BEFORE THE OREGON PUBLIC UTILITIES COMMISSION

DR 10/UE 88/UM 989

In the Matters of

The Application of Portland General Electric Company for an Investigation into Least Cost Plan Plant Retirement. (DR 10)

Revised Tariffs Schedules for Electric Service in Oregon Filed by Portland General Electric Company. (UE 88)

Portland General Electric Company's Application for an Accounting Order and for Order Approving Tariff Sheets Implementing Rate Reduction. (UM 989)

OPENING COMMENTS OF UTILITY REFORM PROJECT, ET AL. ON THE PROFFERED QUESTION REGARDING REMEDIES

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A. ACTION 2: CAN THE OPUC ORDER THE UTILITY TO PAY MONEY BACK TO RATEPAYERS WHO HAVE PAID UNLAWFUL RATES, EITHER IN THE FORM OF CHECKS OR IMMEDIATE REDUCTIONS TO CURRENT UTILITY BILLS? 13

1. Did the Circuit Court err in ordering the OPUC "to immediately revise and reduce the existing rate structure so as to fully and promptly offset and recover all past improperly calculated and unlawfully collected rates, or alternatively, to order PGE to immediately issue refunds for the full amount of all excessive and unlawful charges collected by the utility for a return on its Trojan investment as previously determined to be improper by both this Court and the Court of Appeals”? 14

I. STATUS.

By order dated November 3, 2003, the Marion County Circuit Court remanded OPUC Order No. 93-1117[1] and OPUC Order No. 95-322 to the OPUC (Marion County Circuit Court Nos. 95C 10372, 95C 10417, 95C 11300, and 95C 12542) [hereinafter the "DR 10/UE 88 Remand Order"]. The order of remand required the OPUC to conduct "further proceedings consistent with the opinions and orders of the Court of Appeals." That is the only order under consideration in Phase I of this proceeding, the part of the remand docket underlying the Class Action period at issue in ***Dreyer v. Portland General Electric Company***, 341 Or 262 (2006) [hereinafter ***Dreyer***], and the only order at issue in the question presented for briefing.

QUESTION PRESENTED:

> What, if any, remedy can the Commission determine and provide to PGE ratepayers, through rate reductions or refunds for the amounts that PGE collected in violation of ORS 757.355 between April 1995 and October 2000?

The ruling of June 6, 2007, adopting this question also noted that to answer said question, the parties may address:

1. Fundamental nature of ratemaking;

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1. On August 9, 1993, the Oregon Public Utility Commission issued Order No. 93-1117 [DR-10], 145 PUR4th 113 (1993), an appealable declaratory ruling on PGE's request for a determination of the application of ORS 757.355 to treatment of Trojan Nuclear plant costs. After a long procedural history, Order No. 93-1117 was reversed and remanded in ***Citizens' Utility Bd. of Oregon v. Public Utility Com'n of Oregon***, 154 Or App 702, 962 P2d 744 (1998), *pet rev dis'd*, 355 Or 591, 158 P3d 822 (November 19, 2002) [hereinafter ***CUB/URP v. OPUC***].

2. Scope of the legislature's delegated authority to the Commission;

3. General principles including:

   a. the rule against retroactive ratemaking,

   b. the filed rate doctrine,

   c. prohibition against single issue ratemaking;

4. What constitutes just and reasonable rates; and,

5. Cases relating to recovery issues in nuclear plant cases.

II. SUMMARY OF THE POSITION OF UTILITY REFORM PROJECT, ET AL.

For many years, the Commission has responded to ratepayer requests for refunds of unlawful rates by invoking the "filed rate doctrine." Commission orders have concluded that this doctrine is fully applicable to the Oregon Public Utility Commission (OPUC) and that there is utterly no question or ambiguity about it.[2] The rule, says the OPUC, bans any retroactive adjustment of rates. Portland General Electric Co. (PGE) has been fully supportive of this conclusion and has urged it upon the Commission and upon the courts of Oregon for at least the past decade.

Why, then, does the Commission now suddenly wish to reconsider its long-standing position? And why is it so urgent that the Commission interrupts and abates an ongoing proceeding and invites a plethora of new parties to join the proceeding? One reason is that Portland General Electric Co. (PGE) has sought this

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2. See the extensive discussion of some of these orders in the Opening Comments of the Class Action Plaintiffs, filed today.

reconsideration. Thus, when the rule against retroactive ratemaking can be used to deny relief to ratepayers, there is no ambiguity about it. But when the same rule places a large utility in some difficulty, the long-standing rule must suddenly be reconsidered.

In ***Dreyer v. Portland General Electric Company***, 341 Or 262 (2006) [hereinafter ***Dreyer***], the Oregon Supreme Court on August 31, 2006, held that, regardless of the authority of the OPUC to retroactively change rates or order rate refunds, ratepayers have a direct remedy against a utility that has charged unlawful rates. That remedy is a suit for monetary damages under the causes of actions expressly reserved to ratepayers by ORS 756.200,[3] including suit under ORS

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3. ORS 756.200:

> **Effect of utility laws on common law and other statutory rights of action, duties and liabilities.**
>
> **(1)** The remedies and enforcement procedures provided in chapters 756, 757, 758, 759, 760, 761, 763, 764, 767 and 773 do not release or waive any right of action by the state or any person for any right, penalty or forfeiture which may arise under any law of this state or under an ordinance of any municipality thereof.
>
> (2) All penalties and forfeiture accruing under said statutes and ordinances are cumulative and a suit for and recovery of one, shall not be a bar to the recovery of any other penalty.
>
> (3) Th duties and liabilities of the public utilities or telecommunication utilities shall be the same as are prescribed by the common law, and the remedies against them the same, except where otherwise provided by the Constitution or statutes of this state, and the provisions of ORS chapters 756, 757, 758 and 759 are cumulative thereto.

756.185 for violation of utility laws.[4] This decision has apparently caused PGE to do an about-face in its position about retroactive ratemaking and refunds. Its latest brief on this subject to the Court of Appeals now contends that "retroactive ratemaking" is a "red herring," and offers a case to support its new argument that the OPUC can indeed order refunds, even without express statutory authority to do so. ***Pacific Northwest Bell Telephone Co. v. Katz***, 116 Or App 302, 841 P2d 651 (1992), *rev den* (1993). See Supplemental Brief of PGE (March 16, 2007) in ***Utility Reform***

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4. ORS 756.185:

> **Right of patron to recover for wrongs and omissions; treble damages.**
>
> (1) Any public utility which does, or causes or permits to be done, any matter, act or thing prohibited by ORS chapter 756, 757 or 758 or omits to do any act, matter or thing required to be done by such statutes, is liable to the person injured thereby in the amount of damages sustained in consequence of such violation. If the party seeking damages alleges and proves that the wrong or omission was the result of gross negligence or willful misconduct, the public utility is liable to the person injured thereby in treble the amount of damages sustained in consequence of the violation. Except as provided in subsection (2) of this section, the court may award reasonable attorney fees to the prevailing party in an action under this section.
>
> (2) The court may not award attorney fees to a prevailing defendant under the provisions of subsection (1) of this section if the action under this section is maintained as a class action pursuant to ORCP 32.
>
> (3) Any recovery under this section does not affect recovery by the state of the penalty, forfeiture or fine prescribed for such violation.
>
> (4) This section does not apply with respect to the liability of any public utility for personal injury or property damage.

Project et al. v. OPUC, CA No. A123750, pp. 2-3. We expect PGE to take the same position here.[5]

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5. The Commission itself has not changed its position before the Court of Appeals in that case, which is the appeal of the decision of the Marion County Circuit Court finding unlawful the final order in the UM 989 proceeding, OPUC Order No. 02-227. The Commission's position was expressed in its both its opening brief (September 2004) and reply brief (May 2006). The OPUC Opening Brief stated:

> There is no statutory authority by which the PUC could have awarded a refund of rates already paid by customers. ORS 757.225 specifically provides that the rates established by the PUC are the lawful rates until they are changed by later PUC action. The PUC construes this provision to prohibit retroactive ratemaking.
>
> The Oregon appellate courts have never expressly decided whether Oregon operates under the "filed rate doctrine," or the rule against retroactive ratemaking. ***See Pacific Northwest Bell Telephone Co. v. Katz,*** 116 Or App 302, 841 P2d 651 (1992), ***rev den*** (1993) (recognizing that Oregon courts have not squarely addressed the issue). However, the PUC has long held that Oregon subscribes to the filed rate doctrine, as has the Oregon Attorney General. Op Atty Gen No. 6076 at 1 (March 21, 1987) ("retroactive ratemaking orders are absolutely impermissible unless they are expressly authorized by the legislature and do not violate the Oregon and United States Constitutions"). And the Oregon Supreme Court implicitly recognized the applicability of the filed rate doctrine in ***McPherson v. Pacific Power and Light Co.,*** 207 Or 433, 296 P2d 932 (1956). There, consumers sought to restrain the collection of a surcharge and to recover surcharges already paid at rates approved by the PUC. The court held that the PUC had no authority to award reparations for unreasonable rates or overcharges, except as provided by the applicable statutes. 207 Or at 449.
>
> Retroactive rulemaking occurs when past profits or losses are considered in establishing future rates. ***Los Angeles Gas Co. v. R.R. Comm'n***., 289 US 287, 313, 53 S Ct 637, 77 L Ed 1180 (1933); ***Newton v. Consolidated Gas Co.***, 258 US 165, 177 (1922). The filed rate doctrine serves two basic functions: it protects the public by ensuring that present consumers will not be required to pay in the future for past deficits of the utility; and it prevents the utility from ensuring the investments of its shareholders through the use of future rates. ***New Jersey Power and Light Co. v. State Department of Public Utilities,*** 15 NJ 82, 104 A2d 1, 7 (1954). The doctrine promotes efficiency by encouraging the utility to keep costs down, because it cannot recoup past losses; on the other hand, if the utility

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does successfully contain costs, it retains any profit realized as a result.

Thus, in general terms, the filed rate doctrine is beneficial to the consumer of utility services. However, the filed rate doctrine is reciprocal in the sense that it also promotes certainty for the utility: once rates are charged and collected according to tariffs established by the PUC, they are not subject to refund except as provided by specific statutes. Customers can rest assured that the rates they are paying for electrical services will not be adjusted up or down after the fact.

As noted in the Introduction to Argument, ratemaking involves balancing of the interests of customers with the right of the utility to a reasonable rate of return. ***Southern Cal. Edison Co. v. Public Utility Com'n,*** 576 P2d 945, 949 n 8 (1978). Rates that are too low to allow a reasonable rate of return are confiscatory and therefore deprive the utility of property without just compensation. ***Board of Commrs. v. N. Y. Tel.,*** 271 US 23, 31 (1926). Thus, past profits cannot be used as a justification for confiscatory rates in the future. ***Los Angeles Gas Co. v. R.R. Comm'n,*** 289 US 287, 313 (1933); ***Newton v. Consolidated Gas Co.,*** 258 US 165, 177 (1922).

Public utility commissions generally are empowered to set just and reasonable rates; in Oregon, this authority is expressly conferred by statute, ORS 756.040(1), and most jurisdictions have similar provisions. The filed rate doctrine is so much a common understanding underlying utility regulation that, in those states where the appellate courts have considered the issue, it has been universally adopted. ***See F.P.C. v. Tennessee Gas Co.***, 371 US 145, 153, 83 S Ct 211, 9 L Ed 2d 199 (1962); ***Arizona Grocery v. Atchison Ry.***, 284 US 370, 52 S Ct 183, 76 L Ed 348 (1932); ***Matanuska Electric Association, Inc. v. Chugach Electric Assoc/. Inc.,*** 53 P2d 578 (Alaska 2002); ***Cullum v. Seagull Mid-South,*** 322 Ark 190 (1995); ***City of Los Angeles v. Public Utilities Com'n,*** 7 Cal 3d 331, 356-57, 102 Cal Rptr 313, 332, 497 P2d 785, 803-04 (1972); ***People's Natural Gas v. Public Util. Com'n***, 197 Colo 152, 590 P2d 960 (1979); ***Connecticut Light and Power Co. v. Department of Public Utilities,*** 40 Conn Supp 520 (1986); ***Public Service Comm. V. Diamond State Tel. Co.,*** 468 A2d 1285 (1982); ***People's Counsel of the District of Columbia v. Public Service Com.,*** 472 A2d 860 (1984); ***Westwood Lake, Inc. v. Dade County***, 264 So2d 7, 12 (Fla 1972); ***Georgia Public Service Com'n v. Atlanta Gas Light Co***., 205 Ga 863, 883-84, 55 SE2d 618, 631 (1949); ***Utah Power & Light v. Idaho Public Utilities Comm.,*** 107 Idaho 47, 685 P2d 276 (1984); ***Indiana Gas Co. v. Office of Utility Consumer Counselor,*** 575 NE2d 1044 (1991); ***Archer Daniels Midland v. State Dept. of commerce,*** 485 NW2d 465 (1992); ***Kansas Gas &***
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Electric Co. v. State Corp. Com., 14 Kan App 2d 527 (1990); ***Kentucky Indus. Util. Customers, Inc. v. Kentucky Util Co.,*** 983 SW2d 493 (1998);***Public Service Com. V. Baltimore Gas & Electric,*** 40 Md App 490 (1978); ***Metropolitan Dist. Com'n v. Department of Pub. Util***., 352 Mass 18, 16, 224 NE2d 502, 508 (1967); ***Detroit Edison Co. v. Mich. Pub. Serv. Com'n***, 82 Mich App 59, 67, 266 NW2d 665, 669-70 (1978); ***People's Natural Gas Co. v. Minnesota,*** 369 NW2d 530 (1985); ***State ex rel Union Electric Co. v. Public Service Com.,*** 765 SW2d 618 (1988); ***Mississippi Public Serv. Com'n v. Home Telephone Co.***, 236 Miss 444, 455, 110 So2d 618, 624 (1959); ***Consumers Council, supra***, 585 SW2d at 58-59; ***Montana Horse Products Co. v. Great Northern Ry. Co.***, 91 Mont 194, 202, 7 P2d 919, 925 (1932); ***Montana-Dakota Utils. Co. v. Public Service Comm'n,*** 431 NW2d 276 (1988); ***Southwest Gas Corporation v. Public Serv. Com'n,*** 86 Nev 662, 669, 474 P2d 379, 383 (1970); ***Appeal of Granite State Elec***., 120 NH 536, 538, 421 A2d 121, 122 (1980); ***New Jersey Power & Light Co. v. State Dept. of P.U.,*** 15 NJ 82, 94, 104 A2d 1, 7 (1954); ***US West v. New Mexico State Corp. Comm'n***, ***127 NM 254 (1999)***; Matter of Yonkers Elec. Light & P. Co. v. Maltbie, 245 AD 419, 423, 283 NYS 839, 844 (1935); ***State ex rel Utilities Com'n v. Edmisten***, 291 NC 575, 232 SE2d 177, 194-95 (1977); ***Montanas Dakota Utils. Co. v. Public Serv. Comm'n,*** 431 NW2d 276 (1988); ***Lucas County Comm'rs v. PUC,*** 80 Ohio St 2d 344 (1997); ***Turpen v. Oklahoma Corp. commn., 1988 Ok 126 (1988)***; Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n., 87 Pa Commw 451, 487 A2d 118 (1985); ***Narragansett Elec. Co. v. Burke***, 415 A2d 177, 179 (RI 1980); ***Porter v. South Carolina PSC,*** 328 SC 222 (1997); ***Producers' Refining Co. v. Missouri, K. & T. Ry. Co.,*** 13 SW2d 680, 681 (Tex 1929); ***Stewart v. Utah Pub. Serv. Comm'n.,*** 885 P2d 759 (1994); ***City of Norfolk v. Virginia Elec. & Power Co.***, 197 Va 505, 511, 90 SE2d 140, 145 (1955); ***In re Cent. Vermont Public Service Corp***., 144 Vt 46, 473 A2d 1155, 1159 (1984); ***Chesapeake v. Public Service Com'n***, 300 SE 2d 607, 619 (W Va 1982); ***Friends of the Earth v. Public Service Com'n***, 78 Wis 2d 388, 254 NW2d 299, 309 (1977); ***Montana Dakota Utils. Co. v. Public Serv. Comm'n,*** 874 P2d 236 (1994).

Exceptions to this rule obviously may vary from jurisdiction to jurisdiction, depending on applicable statutes and administrative rules; however, in the absence of a contrary provision, the common understanding is that rates are made prospectively, and do not redress past over- or undercharges.

The Oregon Legislature shares this understanding. In 1987, the legislature adopted ORS 757.259 in response to the opinion of the Attorney

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General referred to above. App-4. Appended to this brief is the testimony of Public Utility Commissioner Charles Davis in support of this bill. 1987 Or Laws, Chapter 563. The legislation specifically authorized the PUC to include some past expenses in future rates, authority which the commission did not otherwise have; express statutory authority was required to authorize this exception to the filed rate doctrine. App-3. The PUC's ratemaking authority was understood to be prospective, not retroactive.

Here, although PGE charged rates that included an unlawful component, as this court later ruled, it charged the only rates that were legally authorized. Because the commission is authorized to set rates only on a prospective basis, the commission has no authority to penalize PGE for charging the rates it ordered PGE to charge, anymore than the commission could order customers to pay increased rates in the future if the utility fails to realize the rate of return the commission authorized in the past. The filed rate doctrine is thus reciprocal, and protects both the utility and consumers.

The OPUC Reply Brief stated:

Without repeating the arguments contained in the PUC's opening briefs, the PUC reiterates that ratemaking is prospective. ***McPherson v. Pacific Power and Light Co.***, 207 Or 433, 439, 296 P2d 932 (1956). This is the essence of the filed rate doctrine. Under that doctrine, neither the consumer nor the utility is punished for past errors; rather, rates are set on a forward-looking basis. Thus, a utility cannot, after a successful suit against the PUC for setting rates too low, demand payment from customers in excess of the established tariff rate.

The filed rate doctrine is a well-recognized background principle of Oregon utility law. In ***Adamson v. WorldCom Communications***, 190 Or App 215, 78 P3d 577 (2003), the plaintiff filed a claim for unlawful trade practices for switching his telephone service without authorization and charging for services he had cancelled. The defendants alleged that the relief sought by the plaintiff was contrary to the established service tariffs and therefore violated the filed rate doctrine. 190 Or App at 221. This court reversed: Thus, the effect of a tariff on a particular claim depends on the nature of the claim and the specific terms of the tariff. If the claim is one that implicates the provisions of a tariff, then the tariff controls according to its terms, which may either limit relief available or bar a claim entirely. But if the claim is unrelated to the tariff, then the claim is not limited or barred. 190 Or App at 222 (emphasis added). The claims made by the plaintiff had nothing to do with whether the defendant telephone companies had charged the proper rates; rather, plaintiff was charged for services he did not request or receive, and the

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Why would PGE reverse its previous convictions about the rule against retroactive ratemaking? Because it would benefit PGE to impair the ability of the class action plaintiffs in ***Dreyer*** to obtain effective relief for the unlawful charges imposed by PGE for Trojan profits during the 5.5-year period from April 1, 1995, through September 30, 2000. PGE apparently now believes that the OPUC can engage in

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companies made changes on his behalf without his authorization.

In this case, the claims made by URP arise directly from the tariff. Unlike the ***Adamson*** claim, they are barred by the filed rate doctrine. In ***Perla Development Co. v. Pacificorp***, 82 Or App 50, 727 P2d 149 (1986), the utility promised free customer hookups, but its filed rates subsequently specified a set fee for hookups. This court held that the contract for free hookups was unenforceable once the PUC's order approving the fee came into effect.

Because of the filed rate doctrine, URP's constituents are not entitled to refunds, and the PUC was neither obliged nor even allowed to enter a retributive order against PGE. The trial court erred, and its judgment should be reversed.

E. There is no statutory authority for a refund.

here are circumstances in which the statutory provisions allow for a refund. For example, if monies are collected under a rate schedule that has been filed with the PUC but not approved, and the PUC after hearing determines that the fee should not be charged, the utility is required to refund excess revenue to the customers from whom it was collected. ORS 757.215(4). Similar provisions exist for telephone service. ORS 759.185, ORS 759.200. Such an order is consistent with the filed rate doctrine, because the new fees have yet to be approved and the refunds are made to the persons who actually paid the excess.

On the other hand, if past excess revenue is simply deducted from current rates, the beneficiaries will be current ratepayers, who may or may not be among those who were injured. There is no statutory authority for refunding monies that were paid under rates approved by the PUC and in effect at the time the charges were made. The PUC could not make such an order, and neither could a court.

retroactive ratemaking for the purpose of nullifying or at least minimizing the amounts that PGE owes back to the ratepayers who paid the unlawful charges.

URP has for years consistently argued that the Commission cannot interfere with the rights of ratepayers to recover the unlawful charges from PGE, pursuant to ORS 756.185 and ORS 756.200. See, e.g., Application for Reconsideration of OPUC Order No. 04-597 by Utility Reform Project and the Class Action Plaintiffs (December 20, 2004), filed in this docket.

It is obvious how PGE would benefit from an opportunity for retroactive rate determination applied to the UE 88 proceeding. Having charged to ratepayers hundreds of millions of dollars in unlawful return on investment in Trojan, PGE has successfully urged the OPUC to conduct a new rate case and accept new evidence and entirely new positions on what costs were included in PGE's rates commencing April 1, 1995 (the UE 88 remand, Phase I). Being able to recharacterize the unlawful charges as having really been something else obviously benefits the utility.

But how would PGE benefit, if the OPUC had authority to order refunds for past unlawful charges? First, such a conclusion would place the OPUC, instead of the courts, in the role of calculating the amounts to be refunded. It appears that PGE would greatly prefer the OPUC to be the decision-maker, as every decision the OPUC has made in these cases over the past 14+ years has been in PGE's favor. It would be reasonable for PGE to believe that an OPUC-ordered refund would be much smaller than a court-awarded judgment.

Second, such a conclusion would also impair the rights of the class action plaintiffs (CAPs) by placing in jeopardy their ability to recover attorney fees. In a class action judgment, plaintiffs are entitled to recover attorney fees, either from defendant or from the common fund created by the litigation. In appeals of OPUC orders, however, there is no provision for attorney fees for the successful litigants.[6] To the extent that money is going to flow from PGE back to the ratepayers who paid the unlawful charges, it would greatly benefit PGE to have that money flow in the form of an OPUC-ordered refund rather than a court-awarded class action judgment. By eliminating the opportunity for attorney fees for litigants who succeed in returning unlawful utility gains to the ratepayers, such an outcome would certainly discourage future similar litigation and serve to de-lawyer intervenors, thus leaving the utility free to engage in the sort of risky ratemaking adventures described in ***Dreyer***.

Third, the rights of future class action plaintiffs would be further impaired, because their opportunity to recover treble damages under ORS 756.185 would be reduced by the dollars refunded to ratepayer pursuant to an OPUC order. The utility would no doubt claim that such refunds would reduce the damages to the ratepayers who paid the unlawful charges, thus also reducing the basis for calculation of treble damages under ORS 756.185. Thus, a dollar of OPUC-ordered refund is worth up to three dollars to utility stockholders--at the expense of the ratepayers subjected to the

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6. Post-decision awards of attorney fees and costs are not available for intervenors and attorneys who prevail before the OPUC. Nor are they available in court for those who successfully appeal OPUC rate orders. ***CUB/URP v. OPUC***, 157 Or App 410, 971 P.2d 459 (1998).

utility's unlawful charges imposed with gross negligence or willful misconduct. This would negate the deterrent purpose of ORS 756.185, which specifically contemplates that ratepayer suits against utilities could be class actions.

So, the expected PGE arguments in favor of retroactive ratemaking and authority for refunds seek to benefit PGE stockholders. And PGE's opportunity to make these arguments comes at a propitious moment. In ***PGE v. Bonneville Power Administration***, ___ F3d ___, 2007 WL 1288786 (9th Cir 2007), the Ninth Circuit recently ruled unlawful the payments by the Bonneville Power Administration (BPA) to the region's large investor-owned utilities under a 2000 settlement agreement involving the Residential Exchange program. For PGE and PacifiCorp, that amount has been roughly $80 million each per year. What if BPA now seeks to require the utilities to return the unlawfully-paid funds back to BPA? With no "filed rate doctrine" and no prohibition on retroactive ratemaking, the OPUC could readily allow the utilities to impose on PGE ratepayers alone a bill for about $400 million.

III. CAN THE COMMISSION ENGAGE IN RETROACTIVE RATE REDETERMINATION?

Utility Reform Project, et al. here join the comments of the Class Action Plaintiffs (CAPs). The Commission cannot lawfully engage in retroactive rate redetermination.

IV. CAN THE COMMISSION ORDER A UTILITY TO REFUND TO RATEPAYERS AMOUNTS THAT WERE COLLECTED UNLAWFULLY PURSUANT TO A PREVIOUS FINAL ORDER OF THE COMMISSION, OVERTURNED BY MEANS OF JUDICIAL REVIEW?

Utility Reform Project, et al. are currently agnostic on this question. This is the same position we have maintained before the Court of Appeals in the appeal of OPUC Order No. 02-227 (UM 989). On March 16, 2007, we advised the Court of Appeals :

> ### A. ACTION 2: CAN THE OPUC ORDER THE UTILITY TO PAY MONEY BACK TO RATEPAYERS WHO HAVE PAID UNLAWFUL RATES, EITHER IN THE FORM OF CHECKS OR IMMEDIATE REDUCTIONS TO CURRENT UTILITY BILLS?
>
> In the instant case, whether or not the OPUC can take Action 2 may be considered "premature" but it is ripe. Yes, if the Court of Appeals upholds the legal conclusion of the Circuit Court that the rates set by OPUC Order No. 02-227 are unlawful, it can remand the matter to the OPUC for resolution and the addressing of Action 2 above. Assuming that the OPUC then decides against Action 2 due to self-asserted lack of authority to take Action 2, then ratepayers would have to appeal that decision, and on and on. Instead, the Court of Appeals could decide whether Action 2 is available to the OPUC, as the issue has been presented and briefed in this case. Both PGE and OPUC have taken the position that Action 2 is not available to the OPUC. As noted in the Reply Brief of Plaintiffs-Respondents-Cross-Appellants (September 5, 2006), p. 9, Plaintiffs-Respondents have no position on this issue.

[URP's] Supplemental Briefing of Plaintiffs-Respondents-Cross-Appellants (March 16, 2007), CA No. A123750, p. 5.

We had previously stated to the Court of Appeals

> **1. Did the Circuit Court err in ordering the OPUC "to immediately revise and reduce the existing rate structure so as to fully and promptly offset and recover all past improperly calculated and unlawfully collected rates, or alternatively, to order PGE to immediately issue refunds for the full amount of all excessive and unlawful charges collected by the utility for a return on**

its Trojan investment as previously determined to be improper by both this Court and the Court of Appeals"?

Here, both OPUC and PGE argue that the OPUC has no authority at all to require PGE to return to ratepayers any of the unlawful charges for Trojan return on investment occurring during any period, no matter when. They argue that the OPUC cannot order PGE to make refunds in this circumstance and cannot order PGE to reduce rates in the future to offset the past unlawful charges. We have no position on these contentions.

OPUC and PGE claim that the OPUC has no authority to revise rates or to issue refunds, even if the courts hearing timely appeals of an OPUC rate order determine that the rates charged were unlawful. They offer various arguments, many of which rely upon ORS 757.225. In ***Dreyer***, the Oregon Supreme Court has now concluded that ORS 757.225 does not preclude ratepayers who paid the unlawful rates from obtaining relief directly from the utility, pursuant to ORS 756.185. That Court has not, however, addressed the question presented here--whether ORS 757.225 or some other statute or doctrine precludes the OPUC from providing an effective remedy to ratepayers who have paid rates later determined by the courts to have been unlawful.

Appellants claim that the OPUC lacks the power to devise a remedy for ratepayers, either by means of refunds[7] or by means of reducing future rates.[8] In light of ***Dreyer***, we believe that the statutory scheme is clearer: OPUC sets rates prospectively in a quasi-legislative manner, and courts on review may declare rates unreasonable or/or unlawful and remand cases

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7. Refunds could take the form of checks in the mail or credits on the bills of those overcharged customers who still remain customers of the utility at the time of the refund. Customers who terminated service will not be found at their last address known to the utility. We note that the OPUC does not have the plenary powers of a court to order a utility to engage locator services, take out newspaper notices in areas such as California, Western Washington, and Nevada (with the highest out-migration rates from Oregon), and other judicial powers necessary to administer a class action-type remedy.

8. Future rate reductions compensate only that portion of ratepayers who were PGE customers during all of the overcharge period and who remain ratepayers during the entire "rate reduction" period of time. Future rate cuts would not compensate customers who have since left the PGE system but would provide a "windfall" to new ratepayers who did not pay the unlawful rates during Period A. Thus, future rate reductions bear only a coincidental relationship to individual damages.

> back to the agency for action within the agency's powers. If, as claimed here, the agency does not have power to return to ratepayers charges which have been found unlawful, then the courts can hear damage claims by ratepayers against the utility under ORS 756.185(1) and ORS 756.200 (preserving common law remedies) for having charged the unlawful rates. Thus, the rule against retroactive ratemaking as understood and implemented by OPUC would not leave ratepayers without any remedy. This Court can acknowledge the longstanding agency interpretation, and the legislature's interpretation of limitations on retroactive fact-finding and ratesetting by OPUC, without depriving ratepayers of a remedy for past unlawful charges.[9]

[URP] Reply Brief of Plaintiffs-Respondents-Cross-Appellants (September 5, 2006), CA No. A123750, pp. 8-10.

We do not see a reason to change our position but await enlightenment from the

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9. URP assigned error to the OPUC's decision in OPUC Order No. 02-227 to allow PGE to retain all of the unlawful Trojan return on investment it had charged to ratepayers during the 5.5 years of Period A, instead of lawfully crediting those payments by ratepayer as return of investment on Trojan. The Marion County Circuit Court agreed. But declaring the rates in OPUC Order No. 02-227 unlawful on that basis does not necessarily mean that the reviewing court can order the OPUC to implement a remedy beyond the agency's statutory authority. Here, the OPUC and PGE contend that the OPUC cannot implement any remedy that returns to ratepayers any of the charges found to be unlawful.

comments to be filed by others in this docket.

Dated: June 20, 2007

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed the original and 5 copies of the foregoing by email to the Filing Center and by mail, postmarked this date, and that I served a true copy of the foregoing OPENING COMMENTS OF UTILITY REFORM PROJECT, ET AL. ON THE PROFFERED QUESTION REGARDING REMEDIES by email to the physical and email addresses shown below, which comprise the service list on the Commission's web site as of this day (email service only to those who have waived physical service).

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Dated: June 20, 2007

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