IN THE SUPREME COURT OF THE STATE OF OREGON

FRANK GEARHART; PATRICIA MORGAN and KAFOURY BROTHERS, INC.

Petitioners on Review,

and

UTILITY REFORM PROJECT

Petitioner,

v.

PUBLIC UTILITY COMMISSION OF OREGON and PORTLAND GENERAL ELECTRIC COMPANY

Respondents, Respondents on Review.

Supreme Court
No. S061517
(Control)

Court of Appeals
No. A140317

Oregon Public Utility
Commission Order
Nos. 08-487, 09-093

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ANSWERING BRIEF OF PORTLAND GENERAL ELECTRIC COMPANY

Supreme Court
No. S061518

Court of Appeals
No. A140317

Oregon Public Utility
Commission Order
Nos. 08-487, 09-093

January 2014

Review of the Decision of the Court of Appeals
on Judicial Review of Order of
the Public Utility Commission
Lee Beyer, John Savage, and Ray Baum, Commissioners

Date of Court of Appeals Opinion: February 6, 2013
Author of Opinion: Nakamoto, J.
Joining in Opinion: Wollheim, J.
Dissenting: Schuman, P.J.

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I. STATEMENT OF THE CASE

A. Introduction – PUC Authority and Its Proper Exercise Here

1. Utility Regulation

The ratemaking authority of the Oregon Public Utility Commission ("PUC") is a developed, well-understood, politically accountable safeguard of the public interest. Oregon's energy future calls on its utilities to raise large amounts of money in a market where predictable risk lowers the cost of capital and gives significant savings to utility customers.[1]

This Court, the PUC, and the Oregon Court of Appeals all have shown their understanding of those paramount realities. So has the Citizens' Utility Board of Oregon ("CUB"), whose *amicus curiae* brief appears in support of PGE and the PUC.[2] By affirming the decision of the Court of Appeals, this Court will affirm its own precedents and signal to the state and beyond that Oregon's system of utility regulation is on sound footing. Equally important,

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[1] By mid-2015 PGE plans to spend about $500 million to build a large renewable energy wind farm. Additional projected capital commitments between 2013 and 2016 total more than another $500 million. *See* Portland General Electric Co. Form 10-Q, filed with Securities and Exchange Commission (Nov. 1, 2013) (App-1).

[2] Because "utility customers need an effective advocate to ensure that public policies affecting the quality and price of utility services reflect their needs and interests," ORS 774.020, CUB was established by the people of Oregon as a statutory nonprofit public corporation. CUB's mission is to "advocate forcefully and vigorously on [utility customers'] behalf concerning all matters of public policy affecting their health, welfare and economic well-being." *Id.*

the Court will confirm a rule and a result that is fair and equitable to consumers and public utilities alike.

2. Background Facts

PGE put the Trojan power plant into service in 1976. *See* the Court of Appeals decision on review here, *Gearhart v. PUC*, 255 Or App 58, 65, 299 P3d 533 (2013). In 1978 Ballot Measure 9, the voters of Oregon enacted by initiative what became ORS 757.355(1), prohibiting inclusion in rate base of a facility "not presently used for providing utility service." Trojan was already up and running. The understood thrust of Measure 9 was that profit should not be earned on facilities *under construction* (construction work in progress, or "CWIP"). *See generally* State of Oregon, Oregon Voters' Pamphlet, Arguments in Favor, pp. 53-55 (Nov. 7, 1978) (AR 331-34). Trojan is not mentioned there.

In 1993, having concluded that it was the "least cost" solution for PGE's customers, and with the PUC in agreement, PGE shut down Trojan. 255 Or App at 65. Earlier, the PUC and PGE had asked the Oregon Attorney General's opinion on whether ORS 757.355 was intended to affect PGE's recovery in rates of the undepreciated Trojan investment balance, together with a fair rate of return on it. The Attorney General said that ORS 757.355 did *not* prohibit such a recovery. Or Att'y Gen Ltr of Adv OP-6454 (June 8, 1992)

(AR 313). The PUC made its own analysis, agreed with the Attorney General, and issued a declaratory order. Order No. 93-1117 (Aug. 9, 1993) (AR 298).

Throughout this entire period, PGE charged customers **exactly what the PUC's rate orders required it by law to charge** – no more and no less – but it turned out that the Attorney General, the PUC, and PGE were mistaken. In a 1998 decision known as *Trojan I* (*Citizens' Utility Board v. PUC*, 154 Or App 702, 962 P2d 744 (1998), *rev allowed*, 328 Or 464 (1999), *rev dismissed*, 335 Or 91 (2002)), the Oregon Court of Appeals gave the controlling legal opinion, that ORS 757.355 did indeed bar the allowance of a return on the unamortized Trojan investment. The court sent the matter back to the PUC.

3. Utility Regulation Sense and Petitioners' Spurious Claims

Petitioner Utility Reform Project ("URP") insisted to the PUC that the holding in *Trojan I* required refunds to PGE customers of more than a billion dollars. AR 6773 (Review ER-20); *see also infra* at 39 n 15). Petitioners Class Action Plaintiffs ("CAPs") sued in Marion County Circuit Court, claiming the same recovery by jury verdict. Tying together *Trojan I* and the other proceedings in the Court of Appeals and this Court that are discussed at length below (*infra* at 31-37), this Court halted the Marion County proceedings and sent everything to the PUC, to use its primary jurisdiction to sort out and resolve all the issues in all the pending matters.

With full analysis and in cogent and sensible detail, the PUC has done in Order No. 08-487 (Sept. 30, 2008) what the law and this Court say it was supposed to do. Performing its own analysis by the correct standards of review, the Court of Appeals has affirmed the PUC's action. Petitioners come to this Court insisting that claims for relief remain, but they do not. Not only have the claims been addressed and determined by the PUC's affirmed order, but Petitioners' claims would also fail on constitutional grounds.

B. Questions Presented on Review.

Petitioners' Questions Presented are a reflection of the "kitchen sink" accretion of issues and argument that marks their approach to this proceeding. But the array of issues distills to the following questions, as the Court of Appeals properly understood (*Gearhart*, 255 Or App at 60):

- Was the PUC authorized on remand to determine whether PGE customers were injured by paying what they did in 1995-2000 and 2000-2001?
- In determining whether customers were harmed, was the PUC *required*, without discretion, to act as the Petitioners assert—by holding all other ratemaking elements constant except for the inclusion of Trojan in rate base, disregarding the effect of the legal error on related ratemaking elements and the legality of the resulting rate structure, and ignoring the statutory mandate to ensure just and reasonable rates?

- If instead the PUC had discretion about the methodology it would use on remand to determine customer harm, did it use a permissible method?
- Did the PUC in Order 08-487 calculate rates that included a "return on" the Trojan investment balance?
- Did the PUC have the authority to order the $33.1 million refund that PGE does not contest and has paid, with interest, to its customers?
- On remand, did the PUC possess and properly exercise discretion to receive evidence that would have been available when the PUC initially made its rate decisions?
- Was Order 08-487 supported by substantial evidence and reasoning?

C. Summary of Argument.

Dreyer v. PGE, 341 Or 262, 142 P3d 1010 (2006), suggests the answers to the principal questions before the Court. Common sense yields these conclusions:

- On remand, the PUC was authorized to determine whether PGE's customers were harmed by paying what they did in 1995-2000 and 2000-2001: "[T]he central issue in these cases [is] whether plaintiffs have been injured," and the PUC's specialized expertise gave it primary jurisdiction to do that. *Id.* at 285.
- This Court on mandamus abated the trial court proceeding for a single purpose: To let the PUC exercise its primary jurisdiction. The PUC

used a ratemaking template to determine whether customers were injured, as the Court authorized in its mandamus order.

- The Court of Appeals panel agrees unanimously that the PUC understood and correctly applied the law that no return *on* the Trojan balance was permitted. The panel is unanimous that return *of* the Trojan balance must include allowance for time value of money over the return period. The panel disagrees only on whether the PUC had any discretion on remand regarding how to determine customer harm. *See Gearhart*, 255 Or App at 113 (Schuman, J., dissenting) ("In all other respects [than the methodology], I agree with the majority.").
- The methodology chosen and applied by the PUC for determining customer harm, supported in the law and by evidence in the record, receives the narrowest judicial review. *See* ORS 756.610(1) (PUC orders are reviewed under ORS 183.480 to 183.497); ORS 183.482(7) ("[T]he court shall not substitute its judgment for that of the agency as to any issue of fact or agency discretion.").
- The $33.1 million (plus interest) refund ordered by the PUC, and paid by PGE, was a proper remedy. *Dreyer*, 341 Or at 285 ("[t]he PUC also has special expertise with respect to * * * [w]hether the PUC can order refunds" as a remedy); *Pacific Northwest Bell Telephone Co. v. Katz*, 116 Or App 302, 309-10, 841 P2d 652 (1992), *rev den*, 316 Or 528

(1993) (implicit in legislative ratemaking powers granted to the PUC is the authority to issue refunds when necessary).

- In Order 08-487, the PUC has responded "to all issues raised by *Trojan I*, *Trojan II*, and *Dreyer*." Order 08-487 at 2. Inasmuch as *Dreyer* confirms the PUC's authority and discretion on remand, and inasmuch as the PUC has determined injury and provided a full remedy within that authority and discretion, the Court of Appeals decision is correct.

On remand, the PUC properly declined to accept Petitioners' position that the PUC could correct its legal error only by removing Trojan from rate base without considering related ratemaking assumptions impacted by the removal, partly because doing so would make the remaining rate unlawful in itself.[3] Petitioners' arguments that the Court of Appeals did not follow its own *Trojan I* decision, or was somehow estopped from revisiting the decision, are

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[3] Another significant problem is that not only the 1995 UE 88 rate order (Order No. 95-322 (Mar. 29, 1995) would be affected by application of Petitioners' theory. As the PUC pointed out (Order 08-487 at 55), the 1995-2000 rates actually involved two *additional* (and unappealed) rate proceedings and orders, UE 93 (Order No. 95-1216 (Nov. 20, 1995)) and UE 100 (Order No. 96-306 (Nov. 26, 1996)). In *Dreyer* this Court ruled that the legal error of Order 95-322 (inclusion of return on the declining Trojan balance) continued into the two succeeding orders. 341 Or at 281. Petitioners' approach would require the PUC to reopen the record to re-examine those rate orders as well (that information is not in this record), to determine the Trojan balance and a "return on" element under each of those orders. Petitioners' notion that the PUC could make a simple ministerial determination is far off target.

mistaken. Moreover, in recalculating the 1995-2000 rates to determine whether PGE customers were injured, the PUC was required to (or, at a minimum, could in its discretion) account for the time value of money.

The PUC's actions on remand were proper. The agency was well within its discretion to consider new evidence regarding the 1995 and 2000 rates. This Court knows what it intended to do when it issued its writ in *Dreyer*. Petitioners (and in part the dissenter in the Court of Appeals) are out of step with this Court about the scope of the remand and the latitude of the PUC's discretion. Finally, Petitioners' arguments about absence of evidence in the record and PUC irrationality, presented here in identical form to what Petitioners argued to no avail below, are without merit.

The decision of the Court of Appeals is thorough and sound, and it should be affirmed.

D. Procedural Background.

Much has been written of the history of the proceedings surrounding the Trojan nuclear plant's retirement. In the interest of brevity, PGE invites the Court to refer to the facts set forth in the opinion of the Court of Appeals (*Gearhart,* 255 Or App at 65-79) detailing the steps that led to the consolidated remand proceedings at the PUC. In addition, PGE offers the Court a brief overview of the decisions that directed the PUC to reconsider the UE 88 and

UM 989 *rates*, and the process by which the PUC undertook such a review in the remand proceedings.

The PUC order at issue here, Order 08-487 (AR 7198), arose from three consolidated remand proceedings from this Court and the Oregon Court of Appeals:

- *Citizens' Utility Board v. PUC*, 154 Or App 702, 962 P2d 744 (1998), *rev allowed*, 328 Or 464 (1999), *rev dismissed*, 335 Or 91 (2002) ("***Trojan I***").
- *Dreyer v. PGE*, 341 Or 262, 142 P3d 1010 (2006) ("***Dreyer***").
- *Utility Reform Project v. PUC*, 215 Or App 360, 170 P3d 1074 (2007) ("***Trojan II***").

Following the instructions in *Trojan I*, *Dreyer*, and *Trojan II* (*see infra* at 31-37), the PUC initiated a three-part proceeding. Phase I carried out the remand of the PUC's orders in UE 88 and DR 10 by considering

> "[w]hat rates would have been approved in UE 88 if the Commission had interpreted the authority delegated to it in ORS 757.355 as the Court of Appeals did in [*Trojan I*]."

Ruling: Scope of Phase I Established, AR 5453 (Aug. 31, 2004).

Phase II investigated the legal question of the PUC's "delegated authority to engage in retroactive ratemaking." Order No. 07-157 (Apr. 19, 2007) at 9, AR 6156.

Phase III addressed the 2000 settlement among PGE, PUC Staff, and CUB that removed the Trojan balance by offsetting a variety of customer credits. In particular, Phase III addressed the following issues: (1) PGE's remaining undepreciated investment in Trojan as of October 1, 2000, (2) whether the UM 989 rates included the "functional equivalent" of a return on PGE's remaining undepreciated investment in Trojan, (3) the proper treatment of the customers' FAS 109 liability, (4) the distribution of proceeds from PGE's NEIL insurance policy, (5) whether the rates adopted in Order No. 02-227 (Mar. 25, 2002) were "unjust and unreasonable," (6) whether Order 02-227 was supported by substantial evidence, and (7) whether the PUC denied URP due process in docket UM 989. Ruling: Scope of Phase III Established, AR 6682-83 (Feb. 22, 2008).

The PUC allowed the parties to present new evidence in Phase III; however, the evidence was limited to evidence that existed on or before October 1, 2000. *Id.*, AR 6685. The PUC allowed the parties to submit testimony and briefs. Order 08-487 at 20, ER-20.

The three-part proceeding culminated in a single 106-page order, Order 08-487, that concluded the following:[4]

- The rates ordered by the PUC and resultant amounts charged by PGE for electric service from April 1, 1995 to September 30, 2000 (the UE 88 rates) were just and reasonable. The PUC arrived at this conclusion using its ratemaking authority to determine what the UE 88 rates would have been had the PUC set rates in 1995 knowing it could not allow a return *on* Trojan investment. The PUC found that the redetermined rates would have been higher than the rates actually in effect from 1995 to 2000, and it concluded that the amounts actually charged were therefore just and reasonable despite the legal error identified in *Trojan I*.
- The rates PGE charged for electric service from October 1, 2000 to September 30, 2001 (the UM 989 rates), implementing a 2000 settlement among PGE, PUC Staff, and CUB, which removed Trojan entirely from PGE's prospective rates, were just and reasonable.
- Although the UM 989 rates were just and reasonable, the PUC found that, had it correctly interpreted the statutes in 1995, the amount of the

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[4] Order No. 09-093 (Mar. 19, 2009) (ER-207) resulted from a petition by PGE to modify the refund mechanism of Order 08-487. In Order 09-093, the PUC denied PGE's petition. The order is not here on review. *See Gearhart*, 255 Or App at 60 n 1.

remaining Trojan balance as of September 30, 2000 would have been $15.4 million lower.

- The PUC ordered PGE to refund the $15.4 million – plus interest to account for the time value of money – to customers (including customers not currently served by PGE) who received service under the UM 989 rates (customers from October 1, 2000 to September 30, 2001).

PGE did not seek to stay Order 08-487. It paid the refund. With additional interest through the date of the actual refund, the ultimate amount was just under $37 million. *See* PUC UM 1402, Initial Utility Filing, Letter from Randall J. Dahlgren of PGE to PUC at 1 (Oct. 22, 2010).

E. The Opinion of the Court of Appeals – *Gearhart*, 255 Or App 58 (2013)

1. The Majority Opinion[5]

The Court of Appeals opinion is analytically sound. The court provides an accurate overview of the utility ratemaking process in Oregon (*Gearhart*, 255 Or App at 60-64), succinctly relates the factual and procedural background (*id.* at 64-79), and then, with clarity, analyzes the PUC order (*id.* at 79-105). The opinion discusses every material argument advanced by Petitioners (the court acknowledges its review of arguments not warranting discussion – *id.* at 96 n 24, 104). It engages the dissenting judge's views and cogently explains why they are mistaken. *Id.* at 91-92 (dissent would improperly limit scope of PUC authority on remand); *id.* at 92-94 (*Dreyer* did not presume customers were injured, as dissent does); *id.* at 94 n 22 (if it mattered in light of PUC's final order, inclusion of a legally mistaken element had not made 1995 rates

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[5] The Utility Reform Project takes some pains to demonstrate that Judge Nakamoto had represented PGE before she joined the Oregon Court of Appeals. (URP Brief p. 77 n 45; Declaration of Daniel Meek.) To the extent that URP intends to suggest bias or other impropriety, PGE notes URP's counsel has been aware of Judge Nakamoto's professional background for a long time. (*See* Meek Decl., ¶ 2 ("In 2005-07, I represented plaintiffs in two class action suits * * *.").) If URP believed Judge Nakamoto's impartiality might reasonably be questioned, it could have suggested her recusal. *See* ORS 14.275 (motion to disqualify, if judge's participation would violate the Code of Judicial Conduct); Oregon Judicial Code Rule 2-106(A) (recusal of judge where his or her impartiality reasonably may be questioned). But URP did not raise any issue regarding Judge Nakamoto's background until after the panel rendered a decision unfavorable to URP.

"structurally unlawful," nor precluded PUC consideration of other affected components on remand).

The majority opinion of the Court of Appeals is a well-reasoned work, and its final word – "Affirmed" – is the right result.

2. The Dissenting Opinion

The dissenting judge states his general agreement with the panel decision (*id.* at 113). His points of disagreement are more properly stated as points of misunderstanding.

A fundamental mistake is the dissent's presumption of an injury. This Court in *Dreyer* specifically gave that determination to the PUC. *See* 341 Or at 285 ("the issue *whether* plaintiffs have been injured" (emphasis added)). The dissent not only ignores that instruction but also presumes a *different* injury than the one the PUC found and, still overlooking this Court's statements of how the PUC might choose to treat the issue on remand, states that on remand the PUC "had no discretion." *Gearhart*, 255 Or App at 108. To reach this surprising conclusion, the dissent extrapolates from what everyone agrees (*Trojan I* decided as a matter of law the PUC made a legal error in 1995) to conclude obscurely that review of the PUC's order on remand here *remains* a matter of law. The dissent reaches this conclusion notwithstanding that *Trojan I* and *Dreyer* did not remand with a "no discretion" instruction to the PUC. Rather, they remanded with no restrictions on the PUC's jurisdiction (as

Dreyer notes, its *primary* jurisdiction) to correct the original mistake. In fact, the PUC did consider but rejected the dissent's approach – to hold all elements but the "return on" element constant as it reconsidered the rates. Order 08-487 at 63.

In presuming a particular injury and then concluding that the PUC had no choice but to find the presumed injury, the dissent boxed itself into a logical loop, a classic begging of the question.

II. MANY ISSUES ARGUED HERE BY THE UTILITY REFORM PROJECT WERE NOT PRESERVED BELOW AND ARE NOT REVIEWABLE.

URP's Petition and Brief on the Merits here repeat the preservation failures of its brief to the Court of Appeals. Many of URP's issues cannot be reviewed by this Court. *See State v. Wyatt*, 331 Or 335, 345, 15 P3d 22 (2000) (ORAP 9.20(2) – Supreme Court "does not have authority" to review error that was not preserved in Court of Appeals and is not apparent on face of the record); *Vokoun v. City of Lake Oswego*, 189 Or App 499, 508 & n 1, 76 P3d 677 (2003), *rev den*, 336 Or 406 (2004) (Court of Appeals declines to consider assignments where brief fails to set out verbatim the portion of the record and specific rulings demonstrating error).

Especially where PGE pointed specifically to those defects already (*see* PGE Answering Brief in Court of Appeals, pp. 29-30), URP's raising the same

issues again is improper. The following are URP's most plainly unpreserved Assignments of Error:

Assignment Nos. and Page of URP Brief	**Substance of Unpreserved Assignment of Error**
No. 6, p. 68	PUC's Addressing of "New Evidence" on Remand
No. 7, p. 69	PUC's Limitation of Evidence to That "Benefitting PGE"
Nos. 8-11, p. 70[6]	PUC's Treatment of Transition Between 1995-2000 and 2000-2001 Periods
Nos. 12-15, p. 73	PUC's Treatment of 2000-2001 Period

III. STANDARD OF REVIEW

The standard of review is set forth in ORS 183.482(8)(b)(A), incorporated for PUC orders by ORS 756.610(1). This Court reviews to determine whether the discretion exercised by the PUC is within the range of discretion granted to it by law. The Court does not "substitute its judgment for that of the agency as to any issue of fact or agency discretion." ORS 183.482(7).

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[6] The Court of Appeals considered these Assignments only "[t]o the degree that those challenges are properly preserved and assigned," charitably giving a plain-on-the-face sort of review and concluding that substantial evidence supported the PUC's exercise of discretion. *Gearhart*, 255 Or App at 103-04.

A. In This Proceeding the PUC Expressly Understood That Return on the Trojan Investment Could Not Be Included in Rates.

A clear distinction separates the standard of review in this proceeding from that in *Trojan I*. In *Trojan I* the issue was whether, as a matter of law, ORS 757.355 and ORS 757.140(2) allow inclusion in rates of a return on PGE's undepreciated Trojan investment. The Court of Appeals decided:

> "ORS 757.355 and ORS 757.140(2) as we have interpreted them disallow the return component that the PUC orders allowed for PGE's investment in Trojan."

Trojan I, 154 Or App at 716.

On remand, the PUC accepted and applied that ruling:

> "In *Trojan I*, the Court of Appeals interpreted ORS 757.140 as allowing PGE to recover its undepreciated investment in Trojan, but interpreted ORS 757.355 as *prohibiting inclusion of this investment in PGE's rate base with the opportunity to earn a return.*"

Order 08-487 at 21 (emphasis added). The legal question was decided, and the PUC understood that.

B. PUC Application of ORS 757.210 and ORS 756.040(1), the Relevant Statutes on This Review, Was Within the Range of the PUC's Lawful Discretion.

The PUC's authority to determine rates under relevant statutory standards, and whether those rates are "just and reasonable," arises under two statutes in which the Legislative Assembly has delegated *policy* choices to the

PUC. Those statutes are ORS 757.210 and ORS 756.040(1). This Court singles them out as "delegative" statutes under which the PUC is "empowered to regulate and, in so doing, to make delegated ***policy*** choices of a ***legislative*** nature within the broadly stated legislative policy." *Springfield Education Assn. v. School Dist.*, 290 Or 217, 230, 621 P2d 547 (1980) (emphases added). The Court of Appeals followed this Court's holdings. *Gearhart*, 255 Or App at 85-86.

ORS 757.210. The legislature itself used to determine just and reasonable utility rates. In 1919 the legislature delegated that authority to the predecessor of the PUC, under what now is ORS 757.210. Determination of what is "just and reasonable," and the methodology by which the determination is made, now are policy choices for the PUC. *See American Can v. Lobdell*, 55 Or App 451, 463, 638 P2d 1152, *rev den*, 293 Or 190 (1982). Moreover, rate determination is holistic. The final rate *order*, not the elements of the rate, is what counts. *Valley & Siletz R.R. Co. v. Flagg*, 195 Or 683, 699, 247 P2d 639 (1952).

ORS 756.040(1). The legislature delegates policymaking authority in this statute too. "In addition to the powers and duties now or hereafter transferred to or vested in the Public Utility Commission," says the legislature,

> "the commission [PUC] shall represent the customers of any public utility * * * and the public generally in all controversies respecting rates * * * and all matters

> of which the commission has jurisdiction. * * * The commission shall balance the interests of the utility investor and the consumer * * *."

ORS 756.040(1).

Where an agency operates under delegative statutes, and especially where (as here) the delegation is of legislative power, the means chosen by the PUC to carry out its responsibilities on remand are reviewed by the appellate court to determine whether the PUC's decisions were within the range of its discretion.[7] Second-guessing of policy, or balancing of interests, is off limits. *Gearhart*, 255 Or App at 86; *see also Springfield Education Assn.*, 290 Or at 229, 239.

Contrary to the suggestion of the URP (URP Brief pp. 7-8), pre-2006 cases addressing the standard of review applicable to PUC orders remain highly relevant here. This is unsurprising, as the *former* ORS 756.598 was itself modeled on the review provisions of the Administrative Procedures Act ("APA"). *Dickinson v. Davis*, 277 Or 665, 669 n 2, 561 P2d 1019 (1977). The chief difference between the current standard of review under ORS 183.482 and review under the former ORS 756.598 and the *former* ORS 756.594 is that

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[7] One exception, noted by URP at pages 6-7 of its Brief, applies to non-delegative ORS 757.355. The question of whether accounting for time value of money constitutes an ORS 757.355-prohibited "return on" rather than a "return of" capital, is a matter of law. PGE addresses the issue *infra*, at 56-61.

an aggrieved party formerly had the burden of showing the unreasonableness or unlawfulness of a PUC order by clear and satisfactory evidence. But this is not a case that turns on the strength of evidence. Rather, the issue here is an exercise of delegated legislative authority. On that point, when the PUC applies a delegative statute, its action has always been and remains entitled to the highest judicial respect. *See Trojan I*, 154 Or App at 714.

C. This Court's Review of PUC Discretion in Ratemaking Is Narrow and Restricted.

Once the Court determines the correct standard of review, which in almost all instances here is *not* the standard Petitioners continue to suggest, very little remains for decision.

1. The Court of Appeals Properly Applied the General Standard of Review of the PUC Order – Agency Discretion, with No Judicial Substitution for the Agency's Judgment.

Though Petitioners still fail to note it, ORS 756.610(1)[8] establishes the general review standard for orders of the PUC. The statute incorporates the contested case standard of ORS 183.482(7):

> "Review of a contested case shall be confined to the record, and the court shall not substitute its judgment for that of the agency as to any issue of fact or agency discretion."

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[8] ORS 756.610(1): "[F]inal orders of the Public Utility Commission are subject to judicial review as orders in contested cases under the provisions of ORS 183.480 to 183.497."

This Court should disbelieve CAPs' assertion (p. 21 of their Brief) that the Court of Appeals opinion "eliminates all judicial review of rate orders." The Court of Appeals knew and correctly applied the standard. *Gearhart*, 255 Or App at 60 (court reviews whether PUC correctly applied applicable law, whether substantial evidence supports its findings, and whether it acted within the scope of its discretion).

Petitioners' Opening Briefs (URP Brief p. 6; CAPs Brief p. 4) look to ORS 183.482(8)(a), arguing that this proceeding still turns on questions of law under ORS 757.355 and 757.140(2). They are wrong. First, no party has asked any court in this proceeding to revisit the settled *Trojan I* conclusion of law under those two statutes (154 Or App at 714), that only the principal amount of the Trojan investment may be recovered through rates. Moreover, this Court made clear in *Dreyer* that the PUC's choice of a methodology, its application of that methodology to determine just and reasonable rates, and its determination of a remedy are all quasi-legislative policymaking, exercised under the PUC's ratemaking authority (and thereby reviewed under ORS 183.482(7)):

> "[It] is beyond serious dispute – that ratemaking is a quasi-legislative function that is vested in the PUC by statute.
>
> "* * * * *

> "[T]he PUC proceeding * * * has the potential for disposing of the central issue in these cases, *viz.*, the issue of whether plaintiffs have been injured (and, if they have been, the extent of the injury). * * * [T]he PUC's specialized expertise in the field of ratemaking gives it primary, if not sole, jurisdiction over one of the remedies contemplated in the remand: revision of rates to provide for recovery of [any] unlawfully collected amounts."

Dreyer, 341 Or at 282, 285.

Throughout Order 08-487, the PUC acknowledges and applies the *Trojan I* interpretation of ORS 757.355 and 757.140(2). *See, e.g.*, Order 08-487 at 69 ("It is clear from the decision [in *Trojan I*] that the Commission cannot include PGE's undepreciated investment in rate base with the opportunity to earn a return (or profit).").

2. By Appellate Court Decision, Order 08-487 and Its Review Are Matters of PUC Ratemaking.

Order 08-487, affirmed by the Court of Appeals decision here on review, is about ratemaking. The Court of Appeals in *Trojan I* directed the PUC to reconsider *orders* that were "contrary to the limitations in ORS 757.355 and ORS 757.140(2)." 154 Or App at 716-17. This Court in *Dreyer* authorized the PUC, in the exercise of its "primary, if not sole, jurisdiction" to decide whether plaintiffs have been injured and to the extent they have, to provide relief through revision of *rates*. 341 Or at 285. The PUC exercised its legislatively delegated *ratemaking* authority to determine the rates that would have been

approved and charged under the Court of Appeals' settled interpretation of ORS 757.355 and ORS 757.140,[9] and to order a refund accordingly. The ratemaking paradigm establishes the Court's standard of review for this proceeding.

As noted above, this Court in *Dreyer* left it to the PUC to decide whether customers had been injured, whether it could order a remedy, and if so, what the remedy would be. That is a quasi-legislative policy function, specifically delegated to the PUC by the Legislative Assembly. *See* ORS 756.040(1); *Katz*, 116 Or App at 309. The PUC understood that the law does not allow any recovery of a *return on* the Trojan investment.

IV. RESPONSE TO CLASS ACTION PLAINTIFFS' FIRST ASSIGNMENT OF ERROR AND UTILITY REFORM PROJECT'S FIRST, SECOND, AND THIRD ASSIGNMENTS OF ERROR: ORDER 08-487 WAS NOT SUBSTANTIVELY UNLAWFUL

A. The PUC Properly Refused to Hold All but One Ratemaking Element Constant, Where the Original Legal Error Also Affected Other Rate Elements.

1. The PUC Is Compelled by Its Statutory Mandate to Ensure That Rates Are Fair, Just, and Reasonable.

After considering the alternatives, the PUC determined it could not focus myopically on a single ingredient (the return on Trojan) that went into the mix

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[9] *See* ORS 756.040(1) (empowering the PUC to exercise its discretion, and in the interests of the public and the regulated utilities, to establish "fair and reasonable rates").

when it was formulating 1995 rates. The PUC could not unmake the cake by drawing out one constituent, in disregard of the unbalanced nature of the rate that would result from that approach.[10] Rather, the PUC was bound to reconsider and take account of the effect of its legal error on other related components, in order to determine what a fair, just, and reasonable rate would have been under a correct understanding of the law.

Analytically, URP's desired approach is no different under the skin. On remand, the PUC *had* to apply a ratemaking template (to determine rate adjustment or a refund, if customers were harmed). URP simply wanted the PUC to choose a different ratemaking assumption, holding constant all elements of the original ratemaking *except* return on Trojan. The PUC correctly saw that such an approach would produce an unlawful rate and that only by changing other related rate elements could it both eliminate the return on Trojan and produce a rate that was fair, just, and reasonable.

Two distinct lines of authority confirm that the PUC acted properly. First, an agency generally must comply with its statutory duty when correcting

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[10] The PUC implicitly found that the outcome would be unjust and unreasonable if it distorted the rate in such a manner. Order 08-487 at 64 ("We reject URP's argument that we can simply quantify and remove from rates the amount that reflects the *return on* the undepreciated Trojan investment while holding all other rate determinations constant. * * * URP asks this Commission to ignore basic ratemaking principles, as well as our statutory mandate to ensure that utility rates are set in a manner that protects both customer and utility interests.").

a legal error identified on judicial review. The Oregon Court of Appeals, for instance, has explained that in identifying an agency's erroneous interpretation of a statute, a reviewing court "could not properly [] hold that the agency was foreclosed from performing its statutory duty of applying the correct interpretation of the statute to the facts of the case." *Kari v. Jefferson County Sch. Dist. No. 509-J*, 120 Or App 99, 102, 852 P2d 235 (1993). Courts elsewhere have long taken the same position. "[T]he Commission's duty was to apply the statutory standard * * * after it fell into legal error as well as before." *Fly v. Heitmeyer*, 309 US 146, 148, 60 S Ct 443, 84 L Ed 664 (1940) (holding that, on remand, agency may reconsider application at issue along with subsequently filed applications, including taking new evidence). Put another way, committing a legal error "does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *Fed. Comm'cns Comm'n. v. Pottsville Broadcasting Co.*, 309 US 134, 145, 60 S Ct 437, 84 L Ed 656 (1940) (holding that, on remand, agency must judge application and other later-filed applications against statutory standard). After all, "[t]he Commission's responsibility at all times is to measure applications by the standard of 'public convenience, interest, or necessity.'" *Id.* The same reasoning applies with full force here. ORS 756.040(1) governs the PUC "in all controversies respecting

rates"—there is no carve-out exempting the PUC from achieving fair, just, and reasonable rates on those occasions when it has previously erred.

Second, the rule derives additional support in the utility context from the fact that courts do not set rates. In *Hammond Lumber, Co. v. Public Service Commission*, 96 Or 595, 601, 189 P 639 (1920), this Court recognized the implications of the commission's exclusive authority to set rates. "'The result of the reversal of the order of the commission'" on judicial review is not to establish what would be a just and reasonable rate, "'but to leave it undisclosed, leaving the former rates to stand or requiring the commissioners to *try over again* to find it.'" *Id.* (quoting *Minneapolis Ry. Co. v. R.R. Comm'n of Wisc.*, 116 NW 905 (Wis 1908) (emphasis added)).[11] Here, the PUC's disability to consider whether related ratemaking elements were still reasonable, after it corrected the legal error, would surely not be "try[ing] over again to find" just and reasonable rates.

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[11] Before the Court of Appeals, CAPs distinguished *Minneapolis Railway* on the ground that the commission order at issue in that case involved the level of service provided, not rates. (CAPs Ct App Brief p. 24.) But the principles applicable to regulating rates and services are closely allied, if not indistinguishable. *See, e.g., GTE Northwest, Inc. v. PUC*, 321 Or 458, 475 n 8, 900 P2d 495 (1995) (telecommunications – PUC has duty to administer "rates and services" statutes in accordance with legislative policy). Indeed, the *Minneapolis Railway* court plainly believed that a discussion of ratemaking authority was germane to its review of the railway service order.

Endorsing this "try over again" admonition, the Wisconsin Supreme Court specifically refused to presume that a railway commission's rate and service order would be reasonable if amended to strip out the portion of the order that the court had determined to be unreasonable. *City of Milwaukee v. R.R. Comm'n of Wisconsin*, 240 NW 165, 172 (Wis 1932):

> "This court cannot, in connection with its decision that the order of May 1, 1930, is unreasonable, substitute therefor its determination that a similar order, *from which there has been eliminated the provision* as to the inclusion of the two extra-fare zones in the single-fare area,[12] is reasonable, and shall be adopted by the commission upon remanding the record."

Id. (emphasis added).

In fact, the PUC is not alone in declining to proceed with a "head in the sand" approach to the need to change related ratemaking elements following judicial review of a rate order containing a legal error. For instance, in 2008, the Bonneville Power Administration ("BPA") chose to employ a more comprehensive analysis – very similar to the PUC's here – on remand from *Portland General Electric Co. v. Bonneville Power Administration*, 501 F3d 1009 (9th Cir 2007). In that litigation, the Ninth Circuit ruled that BPA had

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[12] In *City of Milwaukee*, the provision, which mandated that the former extra-fare zones be incorporated into the single-fare area, lowered the utility's railway revenues. *Id.* at 170. As a result, the order would not have permitted a fair rate of return on the utility's railway rate base and would have required that the railway operations be subsidized by the same utility's electric revenues. *Id.*

violated the Northwest Power Act by allocating the costs of certain settlement agreements to a category of customers. *Id.* at 1036. On remand, the BPA declined to focus solely the improper costs. *See* BPA, Administrator's Final Record of Decision [ROD], WP-07-A-05 at 15 (Sept. 2008), http://www.bpa.gov/news/pubs/PastRecordsofDecision/2008/WP-07-A-05.pdf. Rather, BPA found that "the most lawful, appropriate, and equitable way" to proceed was to disallow the improper costs, and supplement the record as necessary to calculate what would have been decided regarding other items absent the legal error. *Id.* BPA specifically refused to confine the remand proceedings to stripping the improper costs, as Petitioners suggest the PUC should have done. "BPA necessarily and properly reexamined certain issues * * * in order to more closely track what would have actually occurred in the absence of the REP Settlement Agreements." *Id.* at 32.

In sum, the PUC's statutory mandate here required it to ensure fair, just, and reasonable rates, even on remand, rather than merely changing only one rate element assumption (return on Trojan) without regard to the full effects of its legal error on rates.

2. Petitioners' Attempt to Avoid the Effect of Case Law Is Unavailing.

The attempts of the CAPs to avoid the effect of *Kari* and a similar case, *Armstrong v. Employment Division*, 113 Or App 257, 832 P2d 1233 (1992), are unavailing.

The CAPs try to distinguish *Kari* as involving "a delegative term," while here, "the issue [on remand] was applying the non-delegative terms of ORS 757.355." (CAPs Brief p. 63.) That was not the issue on remand – *Trojan I* had made that application, and on remand the PUC operated under delegative authority. But CAPs misread *Kari* in any event. Contrary to their claim, the term at issue in *Kari* – "neglect of duty" (ORS 342.865(1)) – is not a delegative term, but an "inexact" term requiring interpretation. *Bellairs v. Beaverton School District*, 206 Or App 186, 199, 136 P3d 93 (2006); *see also Teacher Standards & Practices Comm'n v. Bergerson*, 342 Or 301, 311, 153 P3d 84 (2007) (holding that "gross neglect of duty" in same statutory scheme is an interpretive term, not delegative). According to *Trojan I*, ORS 757.355 is of exactly the same inexact, interpretative nature. 154 Or App at 714. Furthermore, the CAPs ignore that ORS 756.040(1) is unquestionably a delegative statute that the PUC was bound to heed on remand, even as the PUC implemented a correct interpretation of ORS 757.355. *Springfield Education Assn.*, 290 Or at 230.

The CAPs also complain that *Kari* and *Armstrong* had not been cited by an Oregon court prior to the Court of Appeals opinion here. (CAPs Brief p. 63 n 20.) This is a makeweight. A published opinion of an Oregon court does not have to be cited in another case in order to become good law. Moreover, in May of 2013, the Oregon Court of Appeals issued yet another decision in which, as in *Kari* and *Armstrong*, it approved an agency's implementation of its duty on remand. *Campbell v. Employment Dep't*, 256 Or App 682, 688-91, 303 P3d 957 (2013).

Finally, the CAPs argue that *Kari* and *Armstrong* did not consider new issues or evidence. (CAPs Brief p. 63.) But the authority to re-open a record is a separate question from whether an agency is still bound to implement its statutory mandate on remand. Here, the PUC has express authority to re-open the record, ORS 756.558, and it properly did so. Disposition: Scope of Phase I Established, AR 5454 (Aug. 31, 2004). In any event, in *Campbell,* the agency on remand "focused on a factual question that [the court] did not address" previously, and made new findings. 256 Or App at 686, 689. *Campbell* also specifically rejected a law-of-the-case argument like that made by Petitioners here. *Id.* at 689.

3. The PUC's Approach Did Not Conflict with Any Appellate Decisions Regarding the Scope of the Proceedings to Be Conducted on Remand.

Consistent with the principles discussed above, none of the previous court decisions in this dispute precluded the approach taken by the PUC on remand. The prior opinions did not require the PUC to consider the "return on" element in isolation. Rather, the PUC's actions were consistent with the scope and nature of the remand contemplated by the courts.

a. The PUC's Approach Did Not Conflict with *Trojan I.*

To begin with, although *Trojan I* announced the court's interpretation of ORS chapter 757 and held that the PUC's orders were unlawful, nothing in the case prescribed any particular approach on remand. The Court of Appeals simply ruled that the trial court was to "remand orders to PUC for reconsideration." 154 Or App at 717.

b. The PUC's Approach Did Not Conflict with *Dreyer.*

Nor did *Dreyer* mandate that the PUC remove Trojan from rate base (thereby preventing a return on Trojan) while holding constant all the other related moving parts. Instead, as the Court of Appeals recognized, *Gearhart*, 255 Or App at 92-93, in *Dreyer* this Court anticipated that the remand proceedings could entail more. That understanding is reflected at several points in *Dreyer*.

First, *Dreyer* acknowledged that, analytically, the problem caused by the unlawful rate order could be addressed in alternative ways. A jury might "simply attempt to determine what part of the rates that the PUC had approved as 'fair and reasonable' in fact represented a return on PGE's investment in Trojan." 341 Or at 282. But the Court noted that a jury might also proceed by "determining what a 'fair and reasonable' rate would have been if the objectionable return on Trojan had been excluded and then comparing that rate to the one actually charged during the relevant period." *Id.* The Court allowed that a jury might lack jurisdiction to embark on the second endeavor, *id.*, but that caveat does not negate the Court's recognition that it was a possible approach to resolving the issue. And the Court did not question the PUC's jurisdiction to employ that approach on remand.

Indeed, the Court was aware that the PUC's intention was to do precisely that. The Court quoted the PUC's decision to undertake an "'investigation of what rate determinations would have been made by the PUC under the statutory framework provided by the Court of Appeals.'" *Id.* at 272 n 11 (quoting Order No. 04-597 at 18 (Oct. 18, 2004), which describes the scope of Phase I to include "[w]hat rates would have been approved in UE 88 if ORS 757.355 had been interpreted to prohibit a return on Trojan"; AR 5513). Accordingly, this Court in *Dreyer* knew well that the PUC planned to reexamine "those aspects of the 1995 case that are affected by the Court of

Appeals' statutory interpretation," including the appropriate recovery period and adjustment to the net benefits analysis that Petitioners now challenge. 341 Or at 272 n 11.

Second, *Dreyer* repeatedly suggested that the PUC might determine that the CAPs had not been injured by the legal error in Order 95-322. The Court expressly stated that the remand proceedings could dispose of the issue "*whether* plaintiffs have been injured (and *if* they have been, the extent of the injury)." *Id.* at 285 (emphases added). The Court referred to the CAPs' "*claimed* injuries." *Id.* (emphasis added). And the Court noted that if the PUC did not provide any remedy, "then the court system *may* have a role to play." *Id.* at 286 (emphasis added). Notably, the Court did not state that the judicial system "will" have a role to play under those circumstances, thus implying that the dispute might be over even without a remedy. Yet the premise of Petitioners' contention that the PUC could do nothing but "quantify" the profit component of the 1995 rates (*see* URP Brief pp. 53-54) is that the PUC's legal error *necessarily* injured ratepayers, in the exact amount of that profit. Petitioners' attempt to read *Dreyer* as supporting that premise is incompatible with *Dreyer*'s express and implicit acknowledgments that the PUC would determine on remand "whether" and to what extent ratepayers had been injured.

Redressing an injury through full relief is an outcome this Court envisioned in *Dreyer*. 341 Or at 285 (explaining that if PUC provides a remedy, plaintiffs either "are not injured" or can seek judicial review of the PUC's remedial order). And complete redress is what *occurred* here, where the PUC determined that the 1995 legal error did produce an injury—to the 2000-2001 ratepayers—and it ordered a refund of $33.1 million, plus interest. Order 08-487 at 87-88; *see supra* at 12.

Dreyer's additional references to "claimed injuries," and to the role the judicial system "may" have to play if the PUC does not order a remedy, show that *Dreyer* did not foreclose the possibility that the PUC would on remand determine that there had been *no injury in the first place*. Petitioners cannot point to any statement in *Dreyer* that assumes, much less holds, that there has definitely been injury.

For the rate periods before and after the 2000 settlement, the PUC did exactly what *Dreyer* anticipated – it assessed "'what rate determinations would have been made by the PUC under the statutory framework provided by the Court of Appeals'" (341 Or at 272 n 11) to determine *whether* there had been an injury, the *extent* of any such injury, and an appropriate *remedy* for any injured ratepayers. And, we have seen, the PUC in its statutory authority did find injury, quantified the injury, and ordered a remedy.

c. The PUC's Approach Did Not Conflict with *Trojan II*.

Finally, *Trojan II* conclusively demonstrates that the PUC's actions were within the scope of the remand, despite the CAPs' claim to the contrary (CAPs Brief pp. 63-64). The disposition ordered by *Trojan II* was:

> "Judgment vacated and remanded to circuit court with instructions to remand Order No. 02-227 to PUC for reconsideration of issues raised on appeal and cross-appeal."

215 Or App at 376 ("remanded to the PUC for reconsideration in light of [*Dreyer* and *Trojan I*], and the PUC's own joint remand proceedings").

Those "issues raised on appeal and cross-appeal" included whether the PUC's authority on remand from *Trojan I* was limited to considering *only* the Trojan profit element, or whether it could also adjust related elements of the 1995 rates. In *Trojan II*, the PUC assigned error to the circuit court's reversal of Order 02-227. The PUC raised precisely the issue of PUC discretion that the CAPs now dispute:[13]

> "The circuit court's order assumes that, on remand, the PUC would have been required to hold that the previously established rates were unreasonable and must be refunded. This premise is false. The 1995 rates were based upon allowing PGE to recover a return of 87% of its investment over a period of years to 2011. ***On remand, after elimination of the return on investment as ordered by this court, the PUC***

[13] PGE asks the Court to take judicial notice of this and the succeeding cited portions of the *Trojan II* briefs in the Court of Appeals. OEC 201(d).

> ***might well have concluded that Trojan should recover 100% of its investment, and/or that PGE should be allowed to recover its investment over a shorter period of years—yielding the identical rate established by the 1995 Order.***"

PUC *Trojan II* Opening Brief at 16 (emphasis added). Similarly, PGE argued that the PUC's legal error in Order 95-322 "does not necessarily make the rates unjust or unreasonable" and that the court should be "wary of the notion that the identification of an error in one element invalidates the rates and requires a linear adjustment to them." PGE *Trojan II* Opening Brief at 61-62. "*The alternative paths may lead to the same overall rate level* (and the same price for electricity) when a 'return with compensation over time' is replaced by 'rapid return without compensation.'" PGE *Trojan II* Reply Brief at 7-8 (emphasis added).

Opposing the PUC's and PGE's positions, URP argued in *Trojan II* that "when courts find rates to contain unlawful charges, it is not a 'mandate to set new rates.'" URP *Trojan II* Opening Brief at 77. As *amici curiae*, the CAPs agreed:

> "CAP's position is that OPUC cannot give PGE a mulligan. A proceeding which seeks to determine facts and circumstances that might have existed in 1995 and to give them legal effect through setting rates *nunc pro tunc* under quasi-legislative powers amounts to prohibited retroactive ratemaking. Neither of the remand orders call, either directly or indirectly, for a general reexamination or reopening of PGE costs during any past period, particularly

> those costs which PGE never asserted in the original case or those costs and ratemaking treatments upon which the OPUC ruled and no one appealed."

CAPs *Trojan II* Amicus Brief at 31; *see also id.* at 33-35 (arguing that PUC should not be allowed to make different rulings on elements of the 1995 rate case).

Following this briefing, the remand "for reconsideration of issues raised on appeal and cross-appeal" necessarily encompassed whether the PUC would evaluate how it would have treated other interrelated rate elements in 1995, absent the legal error. And in accordance with the *Trojan II* remand, the PUC decided to continue using the latter approach.[14] The CAPs should not be heard to complain now that the PUC took the court at its word.

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[14] *See* PUC Disposition: Phase II Established (Dec. 21, 2007), AR 6588 ("The Commission therefore has decided to reactivate Phase I, institute a third phase to address the recent Court of Appeals' remand, and issue a single comprehensive order in all three phases at the completion of Phase III."); *see also* PUC Disposition: Scope of Phase III Established (Feb. 22, 2008), AR 6683 ("Whether ratepayers paid too much from 1995 to 2000 is being addressed in Phase I of these proceedings. If the answer to that question is yes, the Commission will order PGE to issue refunds to redress this overpayment as part of the Phase I analysis.").

B. If the Dissent's Faulty Thinking Were Carried Out, the Result Would Violate State and Federal Constitutional Norms.

1. The Dissent Leaves Nothing to Doubt About the Rates the PUC Would Have to Impose.

Adoption of the dissenting judge's analysis and faulty logic would force upon the PUC a rate not only unlawful but also confiscatory, in violation of PGE's rights under the Oregon and United States constitutions.

The dissent would leave no choice. The Court's remand to the PUC would mandate "single-issue ratemaking" (*Gearhart*, 255 Or App at 108), with the rate predetermined by the Court ("The PUC * * * ha[s] no discretion.") (*id.*). By past rate revision or new rate adjustment, the PUC would *have* to order PGE to return the part of the original 1995 rate that represented a return on the Trojan investment. *Id.* at 110, 113 (the dissent's "second criterion," in its view the only one possible).

URP urges that result and tells us how much it thinks PGE must be ordered to pay: $959 million, plus interest, bringing the total well above

$1 billion.[15] To put that amount into context, PGE's total net income for the three-year period 2010 to 2012 was $413 million.[16]

2. The Oregon and United States Constitutions Forbid Confiscatory Utility Rates.

Not just in utility regulation, but in all actions of agencies, courts, and legislative assemblies of the State, the right of persons to be safe from confiscation of property without just compensation is guaranteed. An investor-owned utility gives over its capital assets to public use and in return accepts governmental regulation. The public regulator must then formulate fair, just, and reasonable rates that balance the interests of both consumers and utility investors. ORS 756.040(1). Indeed, ORS 756.040(1) adopts and codifies the rate-making standard set forth in *Federal Power Com'n. v. Hope Natural Gas Co.*, 320 US 591, 603, 64 S Ct 281, 88 L Ed 333 (1944), which requires that

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[15] URP contends that, as of January 1, 2006, PGE owed ratepayers $522,862,000 for the 1995-2000 rates and that, as of October 1, 2008, PGE owed them another $436,491,924 for the Phase III rates. (URP Brief p. 2; *see also* AR 6773 (Review ER-20).) Together, these amounts would total more than $959 million, as of more than five years ago. With interest at PGE's authorized rate of return, the total would be much greater than $1 billion.

[16] *See* Portland General Electric Company, 2012 Annual Report at 44, *available at* http://files.shareholder.com/downloads/POR/2857165537x0x651336/8155e713-343a-4806-bea2-cfde72b49345/PGE_2012_Annual_Report_10K.pdf.

utilities be allowed to maintain fiscal stability and to access the capital markets at reasonable rates.[17]

These requirements, in turn, ensure that state rate regulation does not result in an unconstitutional "taking" of the utility's assets.[18] "The Constitution protects utilities from being limited to a charge for their property serving the public which is so unjust as to be confiscatory." *Duquesne Light Co. v. Barasch*, 488 US 299, 307, 109 S Ct 609, 102 L Ed 2d 646 (1989) (internal quotation marks and citation omitted). "The lowest *reasonable* rate is one which is not confiscatory in the constitutional sense." *Id.* at 308 (internal quotation marks and citation omitted; emphasis added). Rates are not reasonable if they "jeopardize the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital," or if they are "inadequate to compensate current equity

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[17] *See* Testimony, S Comm on Rules and Redistricting, May 3, 2001 (statement of PUC Chair Roy Hemmingway) ("[W]e felt it was perfectly appropriate that the statutes be amended to contain [the *Hope*] standard.").

[18] Or Const, Art I, §18:

> "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation."

The Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q.R. Co. v. Chicago*, 166 US 226, 236, 17 S Ct 581, 41 L Ed 979 (1897), provides:

> "Private property shall not be taken for public use without just compensation."

holders for the risk associated with their investments." *Id.* at 312; *see also Hammond Lumber*, 96 Or at 604 (public use of utility's capital assets is always subject to the condition of just compensation). The Court of Appeals in this case noted one instance where utility rates *can* be held unlawful – when "the rates are confiscatory." *Gearhart*, 255 Or App at 61.

An order that took account only of the legally mistaken part of the 1995-2000 rates, and required a utility to refund amounts that are multiples of its total net income for several years, would plainly be unreasonable and confiscatory. Such a rate order would not leave the utility "sufficient operating capital" or afford adequate compensation to equity holders for the risks associated with their investments.

Indeed, the resulting rates would be unreasonable not only because they would fail to *compensate* investors for the risks of their investments, but because they would also expose investors to an unreasonable risk – *i.e.*, the risk of impermissible retroactive ratemaking. Where, as here, a regulatory body exercises a delegated legislative power to set rates, *see supra* at 17-19, the regulated entity is entitled to rely on that legislative pronouncement. *Arizona Grocery Co. v. Atchison T. & S.F. Ry Co.*, 284 US 370, 387-90, 52 S Ct 183, 76 L Ed 348 (1932). Otherwise, regulated utilities would live in an "Orwellian world" in which they are "in constant jeopardy of being forced to refund enormous sums of money, even though they complied scrupulously with their

filed rates." *American Tel. & Tel. Co. v. F.C.C.*, 836 F2d 1386, 1394 (DC Cir 1988) (*en banc*; concurring opinion) (citing *Arkansas Louisiana Gas Co. v. Hall*, 453 US 571, 576, 101 S Ct 2925, L Ed 856 (1981)). Whether or not retroactive adjustment of rates paid nearly two decades ago would, without more, constitute a taking, *see Eastern Enterprises v. Apfel*, 524 US 498, 528-29, 118 S Ct 2131, 141 L Ed 2d 451 (1998) (plurality) ("severe retroactive liability on a limited class of parties" can cause unconstitutional taking), the combination of such retroactivity with the draconian economic impact of the resulting refunds with years of interest demonstrates that such relief would result in constitutionally confiscatory payments.

3. A Court-Dictated Rate, Even if Permissible Otherwise, Would Be Unconstitutional.

A utility commission may constitutionally set rates in a range that neither gouges utility customers nor confiscates utility property. *Verizon Communications, Inc. v. F.C.C.*, 535 US 467, 481, 122 S Ct 1646, 152 L Ed 2d 701 (2002); *Hope*, 320 US at 603. The effect of an order requiring the PUC to turn a blind eye to possible changes in ratemaking elements related to the court-determined legal error would require PGE to pay amounts beyond the pale of the Oregon and United States constitutions. The dissenting judge in the Court of Appeals would require the PUC to impose a confiscatory rate that by

URP's reckoning would require refunds multiple times PGE's entire net income over multiple years. *See supra* at 39 nn 15-16.

Any remand from this Court would have to allow the PUC the discretion to fashion a constitutional solution, but the PUC has already done it in Order 08-487.

C. The Court of Appeals Understands Its Own Rulings and the Nature of Its Own Remand in *Trojan I.*

In arguing that the Court of Appeals could not say what its own *Trojan I* decision meant (URP Brief pp. 26-38), URP flouts the judicial process. By raising a 2000 statutory ballot measure, URP pulls a red herring before the Court. In challenging the PUC's methodology in Order 08-487, and in claiming error in the PUC's understanding of the *Trojan I* remand, where the same court that decided *Trojan I* has affirmed the PUC, URP's argument is not credible.

1. "Law of the Case" Is Not Applicable, and Even if It Were, the Court of Appeals Majority Here Has Told Us What It Would Be.

Headings II C of the URP Brief (p. 26) and III B of the CAPs Brief (p. 16) allude to "law of the case" established by *this* Court, but the arguments that follow (URP Brief pp. 26-38; CAPs' brief offers no analysis) allude to no decision other than *Trojan I.* Instead, URP tries to claim that this Court's dismissal of review in *Trojan I* carried with it an adoption of URP's positions there, which became "law of the case." (URP Brief pp. 29, 32.) The answer to

this argument is brief: This Court's decision to dismiss or deny review carries no implication of the Court's view of a Court of Appeals opinion, much less does it make any "law" for later proceedings. *See Finear v. Finear*, 351 Or 580, 582, 273 P3d 103 (2012).

As for the arguments that *Trojan I* established "law of the case" for the PUC's remand proceedings and the Court of Appeals in this proceeding (*see* URP Brief pp. 35-36), they reflect a misunderstanding not only of the doctrine, but also of its inapplicability here. "Law of the case" doctrine is invoked to preclude the parties from urging revisitation of issues that have been fully considered by an appellate court in the same proceeding. *State v. Pratt*, 316 Or 561, 569, 853 P2d 827, *cert den*, 510 US 969 (1993). The Court of Appeals made its decision in *Trojan I* and remanded to the PUC. The PUC was called upon to apply *Trojan I*, and it applied the statutory interpretation of the Court of Appeals, not that of URP. Nowhere in Order 08-487 did the PUC question or "revisit" any holding of *Trojan I*; instead it *followed* those rulings, including the *Trojan I* remand giving the PUC discretion to reconsider rates (154 Or App at 716-17),[19] and the same Court of Appeals in this case has confirmed the fact.

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[19] PGE argued below (and the Court of Appeals correctly perceived) that if Petitioners' construct were right, the *Trojan I* remand would have directed simple quantification of a *charge*-related "injury." *See* PGE Answering Brief pp. 37-38; 255 Or App at 109, 92 (dissent's presumption of injury from "excessive charges," rejected by majority). Instead, and in accordance with the

The Court of Appeals has explained and *affirmed* its rulings in *Trojan I*. *See, e.g.*, *Gearhart,* 255 Or App at 87-88, 92 (agreeing with the PUC and PGE, and rejecting URP and CAPs understanding of *Trojan I* remand). "Law of the case" simply does not apply. Even if it did, the Court of Appeals here has clarified its intent in *Trojan I*, and the arguments of URP and the CAPs have been rejected.

2. *Res Judicata* Did Not Bar the PUC on Remand from Evaluating the Reasonableness of the Rates.

Contrary to the assertion by the CAPs (CAPs Brief pp. 15-19, 24), *Trojan I* did not hold that the rates charged during the 1995-2000 period were unlawful; the word does not appear in the opinion. The CAPs' arguments about *res judicata* and law of the case are beside the point.

As the PUC correctly observed (Order 08-487 at 24), and subject only to exceptions not here present (*see Gearhart*, 255 Or App at 61), the task of a court in Oregon is not to review underlying rates, but rather the overall decision – the rate order – establishing those rates. This Court recognized in *Hammond Lumber*, 96 Or at 600, that on judicial review, a court may "inquire whether or not the order of the commission was unreasonable and to vacate the order if so found" (internal quotation marks and citation omitted). Thus, "the

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primary jurisdiction confirmed by this Court in *Dreyer*, the PUC was ordered to reconsider *rates* (154 Or App at 717), which was exactly what it did.

inquiry is not whether the *rate*, regulation, or service fixed by the commission is just and reasonable, but whether the *order* of the commission is unreasonable or unlawful." *Id.* at 601 (emphases added; internal quotation marks and citation omitted).

Consistent with this principle, *Trojan I* respected the distinction in the court's authority as to rates and orders. Nowhere in *Trojan I* did the Court of Appeals hold that the *rates* paid pursuant to the orders were unlawful. Rather, the court properly focused on the legality of the PUC's *orders*. The Court of Appeals held that the applicable statutes "disallow the return component that the PUC orders allowed" and "preclude[] PUC from allowing rates[] of the kind its orders here would allow." 154 Or App at 716. *Trojan I* clearly established that the PUC is prohibited from ordering rates that include profit on the Trojan investment balance and that the PUC order had erred in doing so, but it did not hold that the rates thereby ordered were unlawfully high. Thus, *Trojan I*—and *res judicata*—did not bar the PUC from determining on remand that under a correct statutory interpretation, it would have found the rates to be just and reasonable, and the charges to customers no lower.

3. PGE Was Not Required to Cross-Appeal Every Issue in the Original Rate Case.

Petitioners would have it that claim preclusion, issue preclusion, or law of the case preclude the PUC from reconsidering issues on remand unless each

such issue had been specifically appealed from. (CAPs' Brief pp. 18-19; URP Brief pp. 54-55.) Petitioners' approach would create prodigious inefficiencies: if judicial review were sought on any issue, Petitioners' theory would require that parties always cross-appeal all related issues to protect themselves in the event of a remand. Fortunately, Petitioners are mistaken about the law. The PUC was not barred from reconsidering decisions affected by its original legal error merely because no party appealed from particular rulings such as the reasonableness of rate, the 17-year recovery period, or the amount of the Trojan investment balance disallowed from recovery.

As even Petitioners' own cases teach, only *final* decisions trigger issue preclusion and claim preclusion. *See Drews v. EBI Companies*, 310 Or 134, 139, 795 P2d 531 (1990) (issue preclusion "precludes future litigation on a subject issue only if" issue litigated was essential "to *the final decision* reached" (emphasis added)); *id.* at 140 (noting that "*[f]inality is also required*" for claim preclusion (emphasis added)); *Astoria Fed. Savings & Loan Ass'n v. Solimino*, 501 US 104, 107, 111 S Ct 2166, 115 L Ed 2d 96 (1991) ("We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained *finality*." (emphasis added)). And finality does not attach piecemeal. *See Huszar v. Certified Realty Co.*, 272 Or 517, 523, 538 P2d 57 (1975) (holding that res judicata applies "only to 'an

adjudication of issues which ha[s] culminated in a final decree,' and one 'embracing all issues,' *rather than to a ruling upon 'a segment of the whole case*'" (emphasis added; citation omitted)). Here, there is simply no final decision on any of the subsidiary issues that Petitioners characterize as "not appealed from," because *the litigation on the corresponding orders is still ongoing.* Until judicial review and remand proceedings are concluded, Petitioners cannot invoke claim preclusion or issue preclusion.

Law of the case, too, requires a species of finality, because the doctrine applies only to former decisions "'upon the same state of facts.'" *Id.* at 522 (citation omitted); *accord State v. Langley*, 331 Or 430, 443 n 9, 16 P3d 489 (2000) ("[L]aw of the case is inapplicable in light of new facts or evidence bearing on the legal issue in question."). This Court instructed in *Huszar* that if the parties properly introduced further evidence, "then [the] former decision *was no longer final.*" 272 Or at 523 (emphasis added; internal quotation marks and citation omitted). Here, additional evidence was added to the record after the PUC properly exercised its statutory discretion to re-open the record. ORS 756.558(1); Disposition: Scope of Phase I Established, AR 5454 (Aug. 31, 2004). Thus, under this Court's precedents, the PUC's earlier decisions on issues such as the reasonableness of rates, the recovery period, and the amount of disallowance were "no longer final" and not subject to law of the case.

4. The PUC Correctly Reviewed Its Final Order to Determine Whether Its End Result Had Been Fair, Just, and Reasonable.

A disjointed argument at pages 21-26 of CAPs' brief, headed "The 'Only the End Result Matters' Theory," seems to make three points: (1) On remand, the PUC was forbidden from examining the 1995 rate order for fairness and reasonableness, because (2) under ORS 756.010(7) every element of a rate order involving dollars is its own separate "rate," and (3) courts cannot mean it when they acknowledge that in ratemaking it is the end result that matters. According to CAPs, the forbidden element of "return on" Trojan in the 1995 rate (a charge, as CAPs call it) was an "unlawful rate" in itself. CAPs' leap of faith from that is that by definition the 1995 rate order *had* to be "unjust and unreasonable," and the CAPs *had* to be injured by making payments under it.

However, in *Dreyer* this Court explicitly left open the possibility that Petitioners paid nothing more, under the 1995 rate order, than they would have paid under an order that contained no element of return on Trojan ("the central issue in these cases, *viz.*, the issue whether plaintiffs have been injured" (*Dreyer*, 341 Or at 285)). The Court *required* the PUC to determine *whether* there was injury; the PUC could not have done that under CAPs' construct.

CAPs' convolution of ORS 756.010(7), to make every ratemaking element its own final rate, is senseless. The PUC points out in its brief to this Court that the determinant is not whether any element of a rate is found to be legally deficient; rather it is the overall reasonableness of the rate *order*. CAPs seem to think the *Trojan I* court was reviewing something less than a final rate order, but by law that was all it *could* review. *See former* ORS 756.598 (1979) ("The court may affirm, modify, reverse or remand the order."); *Trojan I*, 154 Or App at 706 ("On appeal, we review PUC's orders directly"). CAPs' attempt to distinguish away *Valley & Siletz*, *supra* at 18, on the ground that the end result matters only "when all that is being challenge[d] is the end result" (CAPs Brief p. 24), is no distinction at all, and CAPs offer no authority for it. The end result is all that *can* be challenged, and *Valley & Siletz* has pronounced the law:

> "[I]t is the end result of an order of a regulatory authority which determines the question of its validity and not the processes by which the authority reached the result."

195 Or at 699, following the holding of *Hope*, 320 US 591, 602, and recognizing "the manifest wisdom" of the rule. CAPs' argument is not well taken.

5. Ballot Measure 90 (2000), Raised Here for the First Time, Does Not Affect the Case.

URP claims to see in a 2000 referendum a legislated preemption of the ability of the Court of Appeals to explain and reaffirm its thinking in *Trojan I*. (URP Brief pp. 37-38 (alluding to Oregon Ballot Measure 90 (Nov. 2000)).) This is a first-time argument for URP—it was not raised in the Court of Appeals. Moreover, nothing in Measure 90 and its defeat, which restored the statutory status quo to what it was in *Trojan I*, has any effect here.

The 1999 Legislative Assembly enacted and the Governor signed 1999 Or Laws chapter 259, amending ORS 757.140 and 757.135 to provide that, notwithstanding ORS 757.355, the PUC could allow in rates a utility's recovery of return on undepreciated investment in property retired from service. The intent was to nullify the result in *Trojan I* and reinstate the remanded 1995-2000 rate orders. *See* State of Oregon, Oregon Voters' Pamphlet, Citizen Committee's Explanatory Statement at 54 (Nov. 7, 2000). A referendum petition placed the statutory amendment before the voters as Ballot Measure 90, and they rejected the new law. The law on which the Court of Appeals had decided *Trojan I* was restored.[20] In these briefs neither PGE nor

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[20] URP (URP Brief pp. 37-38) tries to bootstrap a line from PGE's 2000 Argument in Favor of Measure 90 that "a return on th[e] investment [is] the 'interest' customers pay on the amount remaining on PGE's books." Voters' Pamphlet at 55. The point is not related to the PUC's work here; but furthermore, as PGE explained to the Court of Appeals in briefing and oral

the PUC takes issue with *Trojan I*. It is *URP* that attacks *Trojan I* as the Court of Appeals decided it and as that court now has reaffirmed and explained it.

D. Time Value of Money

The Court's *Dreyer* decision acknowledges the PUC's primary jurisdiction to determine, as part of the *Trojan I* remand to the PUC, "whether plaintiffs have been injured (and, if they have been, the extent of the injury)," calling the PUC "far superior" to a court for those determinations. 341 Or at 285. Declining for good reason the option that would hold constant all elements but return on Trojan (*supra* at 23-28), the PUC made a holistic determination of where PGE's customers would have stood if the 1995 rates had properly excluded the Trojan investment balance from PGE's rate base, and whether Petitioners would have done better by paying those rates. The formula utilized time value of money to achieve return *of* the Trojan principal. The process was not, as Petitioners would have it, unlawful; it was necessary.

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argument in this case, and as the Court of Appeals recognized in its opinion, interest can include two components: "return on" (profit – not allowed here) and "return of" (time value of money – required here). *See Gearhart*, 255 Or App at 95-96 ("We also conclude that the interest that [the PUC] awarded is not a return *on* Trojan that ORS 757.355 forbids. Rather, it is part of the return *of* Trojan that ORS 757.140(2) requires.").

1. It Would Be Unlawful *Not* to Account for the Time Value of Money in Calculating Return over Time of the Unamortized Trojan Investment.

URP claims (Heading II and Argument B, Brief pp. 13-15) that including the time value of money in calculating the return of the Trojan balance over time was a "substantively unlawful" action by the PUC. URP is mistaken.

An initial note: Petitioners do not argue (and did not argue below) that the 7.09 percent "time value of money" rate (the 2004 Treasury bill rate), as determined by Order 08-487 (at 73), is excessive. That record-supported discretionary call, like the monthly compounded 9.6 percent "time value of money" that PGE was ordered to pay and did as part of the refund (255 Or App at 87), would not be subject to revision on review.

Instead, URP argues as a matter of law that *no* interest may be part of a utility's return of capital over time; that *any* interest is always a "return on" the capital investment. Common sense and simple economics show that URP's argument is wrong.

Interest to compensate for the time value of money is part and parcel of the payment of a sum, when full payment will be delayed. For instance, compensatory damages in Oregon "'compensate the injured party for the injury

sustained, and nothing more,'"[21] and prejudgment interest is an integral part of compensatory damages.[22] Here, the PUC decided (contrary to PGE's urging) that crediting the Trojan investment balance to PGE in a single year would not be fair to customers, who would suffer a one-year "spike" in rates. Order 08-487 at 70. By choosing to apply a 10-year amortization period instead, the PUC had to factor in interest to "'compensate [PGE] * * * and nothing more'" for the additional time. *Tadsen*, 324 Or at 470 (citation omitted).

The notion is by no means peculiar to Oregon. A recent Texas Supreme Court case, involving recovery of revenues over time by public utilities, affirms the same thing the Oregon PUC did in this case:

> "Since * * * this true-up award is designed to assure the recovery of revenues * * *, the PUC reasonably concluded that ***a full recovery of this amount must include interest to reflect the time value of money***. * * * 'Awarding the time value [of the principal amount] puts the [] applicants in the same economic position they would have been in had they received this amount in 2002 and 2003.'"

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[21] *Tadsen v. Praegitzer Industries, Inc.*, 324 Or 465, 470, 928 P2d 980 (1996) (quoting Black's Law Dictionary 390 (6th ed 1990)).

[22] *Hamlin v. Hampton Lumber Mills, Inc.*, 349 Or 526, 537, 246 P3d 1121 (2011) (prejudgment interest is considered a part of compensatory damages); *see also Donnell v. Kowell*, 533 F3d 762, 772 (9th Cir 2008) (prejudgment interest is "simply an ingredient of full compensation that corrects judgments for the time value of money").

State v. Public Utility Com'n of Texas, 344 SW3d 349, 377 (Tex 2011) (emphasis added) (quoting Public Utility Commission's order).

By deferring full return of PGE's Trojan investment for 10 years, the recalculated rate would impermissibly have reduced the recovery *of* the investment if it failed to account for the deferral period. "Compensation deferred is compensation reduced by the time value of money." *Anadarko Petroleum Corp. v. F.E.R.C.*, 196 F3d 1264, 1267 (DC Cir 1999) (internal quotation marks and citation omitted). Because money intrinsically has time value, a sum received in the future is worth less than the same amount received today. A payment over time without accounting for time value decreases the *principal* amount. *See Osborne v. Biotti*, 533 NE2d 1341, 1342-43 (Mass 1989). In this case, the Court of Appeals correctly recognized that including interest over time was required for "return of" the investment, authorized by ORS 757.140(2) and *Trojan I. Gearhart*, 255 Or App at 95-96.

Indeed, the URP's own witness recognized the time value of money. He concluded that the $180.5 million Trojan investment balance on PGE's books as of October 1, 2000, if returned over the period 2001-2012 without interest, had a present value[23] of at most $106 million, and perhaps as low as

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[23] To determine the value today of payments expected in the future—such as delayed repayment of the Trojan investment balance—economists use the concept of "present value." "The *present value* is the dollar value today of a stream of future income." Paul A. Samuelson & William D. Nordhaus,

$87 million. Testimony of Jim Lazar, AR 5074. Having offered this testimony, the URP cannot have been surprised that the PUC reached the same conclusion—recovery over time without interest would return only a fraction of the Trojan investment balance's value.

2. Allowance of Time Value of Money on a Delayed Recovery of the Trojan Investment Balance Does Not Conflict with ORS 757.355 or *Trojan I*.

URP wrongly claims that allowing the time value of money in connection with a delayed return of the Trojan investment balance conflicts with ORS 757.355 and *Trojan I*. (URP Brief pp. 14-17, 23-28, 40.) Not so. Whether Order 08-487 removed the profit from the Trojan investment balance as ordered by *Trojan I* is the *only* issue in this appeal that involves non-delegative statutory terms (ORS 757.355 and ORS 757.140(2)) and their construction as a matter of law. An examination of the matter demonstrates that Order 08-487 is entirely consistent with the statutes and the statutory interpretation announced by *Trojan I*.

Microeconomics at 285 (19th ed 2010). The present-value formula is another manifestation of the time value of money, because "future payments are worth less than current payments and they are therefore *discounted* relative to the present." *Id.* at 286. This truly is Econ 101. Discount rate is the same as a time-value interest rate; the present value of future repayment of a debt with time-value interest equals the present value of immediate repayment.

First, *Trojan I* held that ORS 757.355 in harmony with ORS 757.140(2) prohibits profit, not interest. In 1995 and at the time of *Trojan I* (the effect is unchanged by later amendment), *former* ORS 757.355 (1979) read:

> "No public utility shall, directly or indirectly, by any device, charge, demand, collect or receive from any customer rates which are derived from a rate base which includes within it any construction, building, installation or real or personal property not presently used for providing utility service to the customer."

This provision reflects a legislative judgment "expressed in 'inexact terms'" and requiring interpretation by the PUC. *Trojan I*, 154 Or App at 714. In *Trojan I*, the court construed ORS 757.355 and ORS 757.140(2) in context as permitting a "return of," but not a "return on," the Trojan investment balance. 154 Or App at 713. And the court was clear that by "return on," it meant *profit*:

> "The statute * * * does not allow public utilities to obtain a *profit* from ratepayers on their investments in facilities that are not used to serve ratepayers. It makes no difference whether the *profit* is called 'interest' instead of a 'return.'"

154 Or App at 714 (emphases added). So long as rates do not contain *profit*, they do not run afoul of ORS 757.355 and *Trojan I*.

URP wrongly contends that *Trojan I* prohibited all "interest." (URP Brief p. 26.) Even a brief examination of the opinion shows that to be false. The court did not say the statute "forbids public utilities to obtain *interest*."

Rather, *Trojan I* held that *profit* was prohibited, even if that profit was called by another name. Nor did the court hold that profit and return on investment are coextensive with "interest." *Trojan I* merely rejected allowing profit, however it might be called. 154 Or App at 714 ("It makes no difference whether the *profit* is called 'interest' instead of a 'return.'" (emphasis added)). *Trojan I* neither said nor intended that "interest" could only mean "profit," and the same court has expressly confirmed the fact here. *Gearhart*, 255 Or App at 95-96 ("We also conclude that the interest that it awarded is not a return *on* Trojan that ORS 757.355 forbids.").

As Order 08-487 explains, the PUC selected an interest rate designed to reflect the time value of money in 1995. After considering several possible rates, the PUC chose the Treasury rate to "ensure the rate reflects solely the time value of money" and not an "opportunity to earn a profit." Order 08-487 at 73. Petitioners have never challenged the Treasury rate as excessive, and the Court of Appeals has found substantial evidence to support it (255 Or App at 96). Petitioners have disputed only the PUC's threshold decision to allow any time-value interest at all, thereby staking their appeal on the view that even a dime of time-value interest paid over a decade would be "profit." They offer nothing to justify equating all time-value interest with profit, a position that flies in the face of common sense and economics. *See, e.g., S.E.C. v. Mutual Benefits Corp.*, 408 F3d 737, 738 (11th Cir 2005) (noting that purchaser of

insurance policy realizes a *profit* only if the benefits paid are greater than the purchase price "adjusted for time value").

Second, *Trojan I* held that the statutes permit recovery of the principal amount of an undepreciated investment. The Court of Appeals adopted an interpretation of ORS 757.140 "as allowing only the rates *necessary to compensate* utilities for the principal amount of their undepreciated investment," announcing that "[w]e read it in [that] way." *Trojan I*, 154 Or App at 713 (emphasis added). Under *Trojan I*, the PUC could permissibly (actually, had to) order rates that *compensated* PGE for the principal amount of its Trojan investment balance. That is exactly what Order 08-487 did by allowing the time value of money. When recovery of the principal is to occur over time, a utility would not be compensated for the principal amount of its investment unless the rates also include interest comprising the time value of money. *See Rake v. Wade*, 508 US 464, 472 n 8, 113 S Ct 2187, 124 L Ed 2d 424 (1993) ("When a claim is paid off pursuant to a stream of future payments, a creditor receives the 'present value' of its claim only if the total amount of the deferred payments includes the amount of the underlying claim plus an appropriate amount of interest to compensate the creditor for the decreased value of the claim caused by the delayed payments."); *Thomas v. Senior & Disabled Servs. Division*, 319 Or 520, 530, 878 P2d 1081 (1994) (holding that

state is entitled to interest on amount owed by decedent as "compensation from the estate for the loss over time of the value of the money owed").

Ignoring *Trojan I*'s holding regarding compensation, URP focuses exclusively on a later passage in the opinion that changes nothing. URP argues that by saying that the statutes "allow only the principal amount of the undepreciated investment to be recovered through rates" (154 Or App at 714), *Trojan I* limited the manner in which such principal may be recovered. (URP Brief p. 26.) The argument fails for several reasons.

First, URP reads too much into the sentence. In context, it is apparent that the Court of Appeals did not intend the term "only" to exclude time-value interest, but rather to distinguish recovery of the principal from recovery of principal-plus-profit. As Order 08-487 noted (at 70), in stating that only the principal amount may be recovered, *Trojan I* did not purport to address the method of that recovery. Both an immediate repayment of the principal without interest and a delayed repayment with time-value interest accomplish recovery of a sum worth exactly the same as the principal amount. In other words, both options bear the same present value: the principal amount. As economic equivalents, both are consistent with *Trojan I*'s holding that "only the principal amount" is to be recovered.

Second, URP's broad reading of "only the principal amount" as precluding time-value interest is incompatible with the court's statement that

rates could be set at the level "*necessary to compensate* utilities for the principal amount." *Trojan I*, 154 Or App at 713 (emphasis added). Given that a delayed payment of the principal without time-value interest would compensate PGE for only a fraction of the investment balance (*see supra* at 53-55, 59), the URP's argument requires this Court to assume that the Court of Appeals was talking out of both sides of its mouth in *Trojan I.*

Finally, URP notes that PGE did not request time-value interest, as if to impugn the propriety of the PUC's decision. (URP Brief p. 19.) In fact, PGE put forward alternative rate case proposals that simply dealt with the time-value issue in other ways.[24] There are multiple paths to just and reasonable rates. *See Kliks v. Dalles City*, 216 Or 160, 173, 335 P2d 366 (1959) ("Rate making for public utility service is a complex procedure."). The PUC was not forbidden from exercising its discretion to set rates in a manner that accounted for time value in return of principal.

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[24] PGE proposed either immediate recovery, so that there was no need to adjust for the time value of money, or a delayed recovery that compensated PGE for not recovering the value of the Trojan investment balance by increasing its authorized rate of return. Order 08-487 at 68-71. In its discretion, the PUC rejected PGE's proposals.

3. The Utility Reform Project's Misunderstandings of Accounting and Ratemaking Do Not Undermine the Lawfulness of Order 08-487.

URP muddies the water with its references to accounting and ratemaking principles, and its discussion fails to establish that the award of time value is improper in any way. (URP Brief pp. 33-35.)

First, URP complains that the interest comprising the time value cannot be part of recovering the Trojan investment balance because the time-value interest was treated as an "operating expense" in Order 08-487. (URP Brief p. 33.) But there is no inconsistency in this. For ratemaking purposes, recoverable amounts are characterized as belonging to one of two categories: operating expenses or rate base. The point of *Trojan I* was that the Trojan investment balance could *not* be included in rate base. Instead, the Trojan investment balance *had to* be deemed an operating expense. The time-value interest that ensures recovery of the value of that balance would then also be an operating expense—not rate base—and Order 08-487 properly categorized it as such. Order 08-487 at 71 & n 256.

Second, URP contends that "applying interest to an amount is wholly inconsistent with treatment as an operating expense." (URP Brief p. 33 n 22.) But the treatise passage on "interest expense" relied on by URP is inapplicable to this situation. The quoted definition refers *not* to interest *owed* to the utility on money that it has spent and for which ratepayers will reimburse the utility

over time, but rather to the converse—interest "paid by the firm on the money that it borrows." Interest *paid by* the firm and interest *owed to* the firm are not the same thing; the accounting treatment of one does not indicate the proper classification of the other.

Third, URP contends that the time-value interest cannot be considered part of the "return of" the Trojan investment balance because the interest is not an amount on the utility's books of account. (URP Brief pp. 34-35.) Contrary to URP's characterization, *Trojan I* held nothing about books of account: the court declined to reach the argument. 154 Or App at 713 n 7. And as explained above, *see supra* at 52-56, awarding the time value of the Trojan investment balance *is* necessary to return to PGE the principal amount on its books of account, if the "return of" that principal is to be delayed by a decade.

4. Order 08-487 Does Not Indirectly Allow a Return on the Trojan Investment Balance.

URP contends that the PUC "indirectly" permitted PGE a return on the Trojan investment balance when it determined that certain other rate components would have been different in 1995 had the PUC correctly interpreted ORS 757.355. (URP Brief pp. 43-48.)

URP's "indirect return" claims are classic question-begging. URP assumes the conclusion it is trying to prove – that any recalculation of rates that results in rates equal to or greater than the actual UE 88 rates must be

providing an indirect return on Trojan. But that circular thinking misses the real issue, which is whether the recalculated rates include a "return on Trojan." The *comparison* between those recalculated rates and the UE 88 rates tells us nothing about whether, in recalculating the rates, the PUC complied with the *Trojan I* ban on "return on."

The PUC accepted *Trojan I*, removed Trojan from rate base, and eliminated the "return on" element from the recalculated rates. Shortening the recovery period, and providing time value of money for delayed recovery, ensured that PGE recovered only its remaining investment, not a "return on" Trojan.[25] The recalculated rates were the byproduct of the process in which the PUC answered the question, "What rates would have been approved in UE 88 if ORS 757.355 had been interpreted to prohibit a return on Trojan?" *See*

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[25] *See* Order 08-487 at 72. A utility's risk profile affects its cost of capital and thus the rates that must be borne by ratepayers to attract the investment capital needed to provide the public with reliable, economic service. URP complains about "zero evidence" for that (URP Brief p. 45 n 30), but URP is mistaken. *See* Staff Exhibit 100 pp. 5-6 for August 29, 2005 hearing, Direct Testimony of Ed Busch and Judy Johnson ("Depending on the period of recovery and magnitude of the lost return on investment, investors might view such treatment as increasing risk, which could lead to higher costs of capital and increased rates in the future."); PGE Exhibits 6600 and 7000 for August 29, 2005 hearing, Direct and Rebuttal Testimony of Colin C. Blaydon, Ph.D., especially Ex. 6600 p. 7 ("As the risk of an asset increases, the return required by investors rises as well."); Ex. 7000 p. 2 (risk is dependent upon period of recovery); Ex. 7000 p. 6 ("[T]he longer the period of recovery and the greater the magnitude of the lost return on investment, the greater will be the impact on required returns for investors.").

supra at 9; AR 5513. If the PUC had determined those rates in 1995, no one could have credibly suggested they contained a "return on Trojan." That the PUC determined these recalculated rates in 2008 on remand does not alter this conclusion, and URP's "indirect return" arguments offer no reason to conclude otherwise.

Finally, URP objects that proposals made by PGE and PUC staff during the remand proceedings would have also indirectly allowed a return on the Trojan investment balance. But as URP admits, "Order 08-487 rejected these proposals." (URP Brief p. 47.) Accordingly, they are not now under review.

5. *Res Judicata* Did Not Bar the PUC from Allowing the Time Value of Money in PGE's Rates.

PGE invites the Court's attention to its section IV.C.1 and 2 (*supra* at 43-46).

6. The Arguments Made in the *Trojan I* Briefing Do Not Establish That *Trojan I* Forbade Allowing the Time Value of Money.

Contrary to URP's assertions (URP Brief pp. 30-32), certain references to the time value of money contained in the *Trojan I* briefing do not mean that *Trojan I* barred the PUC from allowing the time value of money. The orders at issue in *Trojan I* were not intended to grant PGE the time value of money, and they did not do so. Rather, they had placed the Trojan investment balance in

rate base, thus allowing PGE a *profit* on that amount.[26] *See Trojan I*, 154 Or App at 706 (reviewing "orders that allowed * * * a 'rate of return' (*i.e.*, profit)"). Although PGE argued in its *Trojan I* briefing that the profit could be justified by the need to compensate for the time value of money, this alternative rationale could not alter the nature of the orders under review. Those orders expressly allowed a profit, and *Trojan I* reversed the orders. That holding does not speak to whether an order narrowly permitting the time value of money—without any profit—is prohibited by ORS 757.355. As discussed above, *supra* at 56-61, it is not.

V. RESPONSE TO CLASS ACTION PLAINTIFFS' THIRD AND FOURTH ASSIGNMENTS OF ERROR AND UTILITY REFORM PROJECT'S SECOND ASSIGNMENT OF ERROR: THE PUC'S ACTIONS ON REMAND WERE PROPER

A. PGE Is Not Precluded, by Its Earlier Failure to Predict the Statutory Interpretation Announced by *Trojan I*, from Offering Additional Evidence on Remand.

We must remember that (1) until the 1998 *Trojan I* decision, the PUC's approved rates were based on sound analysis by both the Attorney General and the PUC that a return on the Trojan investment was proper, and (2) PGE had been **required by law** (ORS 757.225) to charge the approved rates.

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[26] "'Rate of return,' * * * refers to the profit that a utility earns from operations, as a percentage of its invested capital." *Northern Natural Gas Co. v. Fed. Energy Regulatory Comm'n*, 827 F2d 779, 786 n 15 (DC Cir 1987).

The Court should decline the CAPs' invitation to hold that the PUC had no discretion to re-open the record on remand. Ignoring the PUC's statutory authority to re-open the evidentiary record, ORS 756.558, CAPs insist that the PUC should "hold PGE to the legal consequences of the choices it made in 1995." (CAPs Brief p. 5; *see also id.* pp. 67-69.) But there are several problems with the claim that PGE should have been somehow estopped from offering additional evidence after the PUC re-opened the record.

First, PGE was not "impruden[t] in failing to make a record in 1995." (CAPs Brief p. 5.) At the time of the UE 88 proceeding, ORS 757.355 had not been interpreted to prohibit allowing a return on the Trojan investment balance. Rather, both the Oregon Attorney General in its Opinion 6454 and the PUC in Order 93-1117 had agreed that doing so was permissible. Or Att'y Gen Ltr of Adv OP-6454 (AR 313 at 323-24); PUC Order 93-1117 (AR 298 at 311). Relying on this authority scarcely constitutes "imprudence."

Second, contrary to CAPs' accusation that PGE failed to make a "full and complete record of all its revenue requirements" in 1995 (CAPs Brief p. 68), PGE in fact made such a record of its revenue requirements under the legal regime (return on Trojan investment allowable) that the PUC had established it would apply (*see* Order 93-1117 (AR 298)). The additional evidence PGE presented on remand was *not* evidence of brand-new costs that PGE had previously chosen to omit, as the CAPs insinuate, but rather

addressed what a just and reasonable rate would have been under the statutory interpretation announced by *Trojan I*. Order 08-487 at 52. The CAPs' argument would require utilities (and other participants in ratemaking proceedings, which often include URP and CUB) not only to present their preferred rate plans under the governing legal standards, but also to present evidence of what would comprise a just and reasonable rate under different legal frameworks and methodologies, just in case interpretation of the governing standards were to be altered later on judicial review.

Requiring participants in ratemaking to present the full evidence necessary to set rates under all possible configurations of law would be inefficient in the extreme, and it would render ORS 756.450, which allows interested persons to obtain a binding declaratory ruling from the PUC, largely pointless. There would be little benefit to obtaining a declaratory ruling on any issue if the affected parties were compelled to proceed as if the PUC had taken no position, or risk later being barred from presenting the relevant evidence.

Nor does the authority relied on by the CAPs (CAPs Brief p. 68) support their argument. In the cited case, *Louisiana Land & Exploration Co. v. Oil & Gas Comm'n*, 809 P2d 775, 780 (Wyo 1991), the court concluded it would order an agency to allow further material evidence if "good reason is provided for [its original] nonproduction." *Id.* The good reason was the unexpected nature of another party's technical information. *Id.* at 781. Here, a new

interpretation of governing law supplies reason at least as good for the PUC to exercise its statutory discretion to reopen the record. *See* ORS 756.558(1); PUC Ruling re scope of Phase I, AR 5454.

Finally, the CAPs complain that PGE was not justified in seeking a revised rate of return on remand, contending that PGE itself created the risks it was facing. (CAPs Brief pp. 68-69.) The CAPs appear to have lost sight of the fact that the PUC *rejected* PGE's proposal to increase its rate of return for the rate periods at issue. Order 08-487 at 77.

Moreover, contrary to the picture that the CAPs attempt to paint, PGE acted reasonably from the start. PGE obtained a declaratory ruling from the PUC to determine whether it could seek a return on the Trojan investment balance. Order 92-1117, AR 298. The PUC agreed with the Oregon Attorney General's earlier conclusion on the question. Or Att'y Gen Ltr of Adv OP-6454, AR 313. PGE then sought approval from PUC for a rate order incorporating a profit component. The PUC issued such an order, whereupon PGE was required by law to charge the approved rates. ORS 757.225. PGE defended the rate order during the *Trojan I* judicial review, as contemplated by the adversarial nature of our judicial system. Finally, PGE settled the dispute with CUB while the *Trojan I* appeal was pending before this Court, pursuant to which PGE brought a new rate case before the PUC. Without a crystal ball, *none of this conduct was irresponsible.* Yet Petitioners would require PGE to

pay out more than a billion dollars because of the original legal error of the PUC, an agency of the State of Oregon.

B. Incorporation of Arguments of PUC.

As to the remainder of the arguments made by CAPs in their third and fourth assignments of error and by URP in its second assignment of error, PGE endorses the arguments made by the PUC in Argument Sections C and D of its Answering Brief.

VI. RESPONSE TO CLASS ACTION PLAINTIFFS' SECOND ASSIGNMENT OF ERROR: THE PUC DID NOT ERR BY EXERCISING ITS PRIMARY JURISDICTION TO DETERMINE THE INJURY TO THE CLASS ACTION PLAINTIFFS

A. Standard of Review.

This Court in *Dreyer* anticipated that in the exercise of its specialized expertise and primary jurisdiction, the PUC would determine (1) *whether* the CAPs (*i.e.*, the customers under PUC rates) stood in a worse position (*i.e.*, were "harmed") by having paid those rates, and (2) if so, to what extent. There are no two ways to read that opinion – the PUC would exercise its *discretion*, under its *primary jurisdiction*, in making those determinations. Simply stated, the Court of Appeals review of those determinations was ordained by ORS 183.482(7): the court could not substitute its judgment for that of the PUC as to any issue within the PUC's discretion.

B. Argument

1. This Court Recognized and Facilitated the Discretionary Authority of the PUC.

CAPs call it a "faulty premise," but it is exactly accurate that *Trojan I* directed the PUC "to reconsider the rates" it had originally approved, in light of its legal error. *Gearhart*, 255 Or App at 60. This is where Petitioners' argument goes off the track, because even *their* desired result would have called for reconsideration of the rates (and under several orders – *see supra* at 7 n 3), holding all variables except the "return on" element constant, to determine whether or to what extent Petitioners had been injured. This is the fundamental point they have missed all along. *Whatever* result the Court of Appeals had reached in *Trojan I*, if it involved a remand to the PUC, it involved rate reconsideration. And where rates are being reconsidered, the PUC can apply only its delegative ratemaking paradigm (ORS 756.040(1), ORS 757.210), using its legislatively delegated discretion and primary jurisdiction (*see supra* at 17-20 and *infra* at 71-73). That is what this Court directed in *Dreyer*, the PUC did it, and the Court of Appeals did not err in its review of the result.

2. This Court Recognized and Facilitated the Primary Jurisdiction of the PUC, Which Determined and Provided a Full Remedy.

CAPs' summary of the *Dreyer* inquiries (CAPS Brief pp. 28-32) is unfounded. It ignores this Court's statement of "the *central issue* in these

cases, *viz.*, the issue whether plaintiffs have been injured." *Dreyer*, 341 Or at 285 (emphasis added). CAPs ignore this Court's resolution of that issue, that "the doctrine of primary jurisdiction requires that the present [court] actions defer to [the PUC] proceeding." *Id.* at 283. It was for *the PUC* to determine whether PGE customers, including the CAPs, had been harmed. And, *if* there were harm from payments under rate orders containing the "return on" component, "the PUC has primary jurisdiction[27] to determine what, if any, remedy it can offer to PGE ratepayers, through rate reductions or refunds." *Id.* at 286. The Court also noted:

> "If [the PUC] can and does provide a full or partial remedy, then plaintiffs either are not injured at all or, if they remain injured, their remedy is to seek judicial review of the PUC's order."

Id. at 285.

"Primary" jurisdiction does not mean "unreviewable" jurisdiction, but neither in a case like this is the PUC a mere placeholder for later judicial review. This is at least as much a case of statutory primary jurisdiction as of the judge-made variety, because where legislatively delegated ratemaking is

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[27] *See* 2 Richard J. Pierce, Jr., *Administrative Law Treatise* at 1212 (2009) ("[R]eferral of a close and difficult issue to an agency for initial resolution (1) increases the chances of a high quality decision, (2) decreases the potential for conflicts among legal institutions, and (3) increases the likelihood that unavoidable conflicts will be resolved in a manner that gives proper respect to the respective responsibilities of the many institutions of federal and state government.").

concerned, a court can no more perform the discretionary parts of that function than it can enact a statute.[28] The *Dreyer*-anticipated "review of the PUC's order," where a ratemaking PUC has determined plaintiffs' injury using its ratemaking procedures, is subject to the narrow APA standards of review that PGE has noted above (*supra* at 20-22). To the extent that Petitioners contend otherwise, they are mistaken, and that is a mistake that fatally damages their case.

The PUC's order determined that plaintiffs were injured in their payment of 2000-2001 rates, and that the amount of injury was $33.1 million (plus additional interest by time of the refund). Order 08-487 at 88. The PUC determined that it could effect a complete remedy in the form of a refund (*id.* at 42), identified the most equitable method for making the refund (*id.* at 103-05), and issued an order accordingly (*id.* at 106). In short, the PUC faithfully carried out this Court's instructions in *Dreyer*.

3. The PUC Did Not Unlawfully Deprive the Class Action Plaintiffs of Any Rights.

The CAPs rely mistakenly on the cumulative-remedies provision of ORS 756.200(2) (CAPs Brief pp. 6, 10-11, 32-35), because the absence of injury means that *no* claim remains in Marion County Circuit Court. The

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[28] *See Boise Cascade Corp. v. Board of Forestry*, 325 Or 185, 191, 935 P2d 411 (1997) (types of primary jurisdiction); *Katz*, 116 Or App at 309 (refund authority is part of utility's ratemaking authority under ORS 756.040(1)).

CAPs did not pay a cent more than they would have without the PUC's legal error.

The CAPs ignore that the prohibited profit element was not a but-for cause of the rates they paid. They simply insist that they must necessarily have been injured because the PUC improperly included a profit component when it set rates in 1995. (CAPs Brief pp. 33, 35.) CAPs' failure to grapple with the injury problem does not make it go away. For instance, the Massachusetts Supreme Court has acknowledged that harm does not always accompany an unlawful rate component. *W. Mass. Elec. Co. v. Dep't of Pub. Utilities*, 366 NE2d 1232, 1234, 1238-39 (Mass 1977) (finding no prejudice to ratepayers where utility unlawfully included nonfuel costs in fuel charge, because it had not been shown that the utility received revenues to which it was not entitled); *see also Alaska Pub. Util. Comm'n v. Municipality of Anchorage*, 902 P2d 783, 789 (Alaska 1995) (refusing to require utility commission to order refunds of entire amount of untariffed illegal rates, because "a commission does not have authority to order refunds beyond what is necessary to reduce rates to reasonable levels").

The CAPs complain about the Order 08-487 discussion of the PUC's exclusive jurisdiction to determine whether customers paid more than they should have paid. (CAPs Brief p. 34 (quoting Order 08-487 at 48).) The Court of Appeals correctly recognized that it need not express any opinion on this

portion of Order 08-487. *Gearhart*, 255 Or App at 103. The PUC's view of whether the Marion County Circuit Court had jurisdiction to assess injury or damages "did not play a significant role" in the PUC's conclusion that the 1995-2000 ratepayers had not been harmed by the legal error underlying Order 08-487.

The CAPs' four claims are described in *Dreyer*, 341 Or at 273-75. The first claim, a statutory cause of action under ORS 756.185, accrues explicitly only to a "person *injured*" by a utility's prohibited action. ORS 756.185(1) (emphasis added). The PUC's identification of the CAPs' full injury, the complete remedy provided for in Order 08-487, and PGE's payment of it under the order obviate that claim. This Court in *Dreyer* declined to order dismissal of the CAPs first claim because it had a basis in law (341 Or at 280), but with the injury element missing from that claim, it now has no basis in *fact*. The Court reached only CAPs' first claim in *Dreyer* (341 Or at 280), but the PUC's determinations in Order 08-487 now eliminate not only the first claim but also all of the CAPs' circuit court claims.

The second claim, for violation of ORS 757.225, alleges that by charging what the PUC's printed rate schedules provided, PGE collected "for service which was not rendered [*sic*]" and "include[ed] charges on bills * * * in excess of lawful charges." CAPs Opening Brief in Court of Appeals, p. 21 n 10. This is a claim within the primary jurisdiction of the PUC, and

Order 08-487 shows why that claim is no longer viable. The necessary element for recovery on this claim, that the PUC rates or PGE's collections entailed overcharges for which CAPs are entitled to redress, is not there. *See* Order 08-487 at 25 (the rates were neither "unlawful" nor an "overcharge"), at 79 (customers were not overcharged in the 1995 rates), at 88 (customers *were* charged too much by the approved 2000 rates), at 106 (the full amount of the excess will be (and now has been) refunded). As ordered by this Court and in the valid exercise of its primary jurisdiction, Order 08-487 has obviated CAPs' second claim.

The CAPs' third and fourth claims are interrelated, and neither of them has any validity in the absence of monetary loss. Loss is absent here. Money had and received is a legal action in *assumpsit*,[29] but its ground is "the equitable principle that one who has been unjustly enriched *at the expense of another* must make restitution." *Comcast of Oregon II, Inc. v. City of Eugene*, 346 Or 238, 254, 209 P3d 800 (2009) (emphasis added). Unjust enrichment is essentially the same – its theory is that a defendant has been unjustly enriched by the amount to which the plaintiff would otherwise have been entitled, and "the measure of the plaintiff's recovery is the amount by which the [defendant]

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[29] *See C.A.M. Concepts, Inc. v. Gwyn*, 206 Or App 122, 128, 136 P3d 60 (2006) (claim is appropriate where a contract has been performed and nothing remains to be done but payment of money).

would otherwise have been enriched." *Hughes v. Bembry*, 256 Or 172, 176, 470 P2d 151 (1970). The PUC has accurately and properly set the basis for those claims' dismissal in Order 08-487, not only in its determination that no customer injury remains, but also at page 25 ("confusion over the correct meaning of 'overcharge' led to the circuit court's [money had and received] decision"), and page 43 (absence of any "overcharge" removes the required element from both claims (citing cases)).

This Court should accordingly determine that the CAPs' claims in the circuit court are fully resolved, to facilitate an orderly process in that court.

VII. RESPONSE TO UTILITY REFORM PROJECT'S FOURTH THROUGH FIFTEENTH ASSIGNMENTS OF ERROR: ORDER 08-487 WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AND SUBSTANTIAL REASONING AND WAS WITHIN THE RANGE OF DISCRETION DELEGATED TO THE PUC BY LAW.

A. URP Misrepresents the Undepreciated Trojan Investment Balance; Its Argument Is Simply Wrong.

The PUC did not mistakenly increase the Trojan balance from $250.7 million to $340.2 million, as URP suggests (URP Brief pp. 48-49). The two figures reflect the Trojan balance at different points in time (April 1, 1995, versus an average amount over the 1995 and 1996 test period), using two different methods (actual balances versus projected balances), and differ in terms of whether they are stated as a gross depreciated balance

($340.2 million) or a net (of deferred taxes and tax credits) depreciated balance ($250.7 million). URP's argument is simply wrong.

URP's argument about the PUC's statement that Order 95-322 authorized PGE to recover $340.2 million (URP Brief pp. 48-49) is without merit. First, URP's claim reflects a fundamental misunderstanding about the difference between the *projected* balance for Trojan used in the rate setting process and the *actual* balance for Trojan at any particular point in time. Order 95-322 established new rates effective April 1, 1995. The PUC establishes rates based upon the cost of providing electricity service. To determine the cost of providing service, the PUC uses *projected* costs for a representative period during which the rates will be effective; this is called the "test period." For the rates approved in Order 95-322, the PUC used *projected* costs for the test period of 1995 and 1996.

In Order 95-322, the required disallowances related to Trojan. The Trojan *actual* undepreciated balance that resulted from these disallowances was $340.2 million as of the effective date of Order 95-322, April 1, 1995. The derivation of this figure was presented in the record before the PUC through PUC Staff and PGE testimony and exhibits. AR at 5110 and 5123, PGE/PUC Staff Exhibit 202. Testimony in the record shows how the *actual* balance depreciated over time, starting with the $340.2 million balance on April 1, 1995, and ending with the $180.5 million balance as of September 30,

2000, the date of the settlement. That remaining actual balance was then removed as a result of the settlement. Because Order 95-322 was a rate order it was concerned with the *projected* Trojan balance—the projected average balance during the test period 1995 and 1996. It was not concerned with the *actual* Trojan balance on the effective date of the PUC order (April 1, 1995).

Second, because the PUC was issuing a rate order, the PUC used the projected *net* undepreciated Trojan balance, which reflects the gross undepreciated balance *minus* deferred taxes and tax credits associated with Trojan that are standard in utility rate making. Thus, the gross undepreciated Trojan balance as of April 1, 1995 was $340.2 million as demonstrated in the record (AR at 5110 and at 5123—PGE/PUC Staff Exhibit 202). As of April 1, 1995, the actual gross undepreciated Trojan balance of $340.2 million *net* of deferred taxes and tax credits associated with Trojan was equal to an actual Trojan balance of $263.9 million. AR 5123. The *projected net* Trojan balance used to set UE 88 rates was $250.7 million, as stated in Order 95-322, which incorporated associated deferred taxes and tax credits and reduced the $263.9 million actual balance to reflect a future projection (1995-1996, test period).[30] Each figure is fully supported in the record. They are all consistent.

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[30] Deferred taxes and investment tax credits benefited customers by substantially reducing the net rate base that is used to establish rates. The deferred tax and investment credits were appropriately reflected at the time of the UE 88 final order (*see* AR 5123, showing deferred tax benefit of $66.5

B. Incorporation of Arguments of PUC.

PGE endorses and incorporates by reference the arguments made in Section D of the PUC's Answering Brief on the Merits.

VIII. RESPONSE TO THE RELIEF REQUESTED BY THE UTILITY REFORM PROJECT.

As the foregoing discussion establishes, Order 08-487 was entirely proper. Nevertheless, in the event that the Court were to determine that the PUC erred or acted outside the range of its discretion in issuing the order, or that the order is not supported by substantial evidence in the record, the Court should remand the order to the PUC. ORS 183.482(8). The Court may modify a PUC order in lieu of remanding it only if the Court determines that the PUC "has erroneously interpreted a provision of law and that a correct interpretation *compels a particular action*." ORS 183.482(8)(a) (emphasis added). In the complex arena of ratemaking, where the legislature has delegated to PUC rather than the courts the authority and duty to ensure that rates are just and reasonable, it would be imprudent of this Court to assume that a correct legal interpretation compels as a consequence any particular rate. Thus, even if the Court were to rule that one of the PUC's orders was based on a legal error, a remand would be the most appropriate disposition.

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million and investment tax credits of $9.7 million) and the settlement (*see* AR 5120 showing deferred taxes and tax credits reflected in the settlement).

Moreover, under no circumstances should the Court grant the URP's improper request—made for the first time before this Court—for the appointment of a special master "pursuant to ORS 183.482(7) to take evidence and make finding of fact regarding the amount of the unlawful charges paid by PGE ratepayers during the Phase I Period." (URP Brief p. 79.) This request is contrary to ORS 183.482(7), which provides a means to elucidate procedural irregularities, not a mechanism to create findings of fact on other matters. The statute provides for the appointment of a special master "[i]n the case of disputed allegations of irregularities in procedure before the agency not shown in the record," whereupon the special master is to "take evidence and make findings of fact upon them." ORS 183.482(7). "The master's findings are meant to expose a procedural error not shown in the record *for one purpose only: to permit judicial review of the claimed procedural error.*" *Or. Health Care Ass'n v. Health Division*, 329 Or 480, 491, 992 P2d 434 (1999) (emphasis added); *see also id.* (holding that provision "is designed to supplement the agency record regarding irregularities in procedure before the agency that do not appear in the record"). Here, the findings of fact that URP seeks – "regarding the amount of the unlawful charges paid by PGE ratepayers" (URP Brief p. 79) – do not concern alleged procedural irregularities. And URP seeks these findings not to permit review of any procedural error, but as an end run around the PUC's authority. The Court should reject this improper proposal.

IX. CONCLUSION

Even though investor-owned PGE obeyed every rate order of the PUC, its state regulator, the utility faced claims of huge potential monetary liability. The PUC and the Court of Appeals rightly judged those claims to be unfounded. For all of the reasons given above, the Court should affirm the decision of the Court of Appeals. If the PUC order is not affirmed, PGE requests the Court to remand to the PUC for reconsideration.

DATED: January 24, 2014.

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CERTIFICATE OF COMPLIANCE WITH ORAP 9.10(3) AND ORAP 5.05(4)(f)

Brief Length

I certify that this brief complies with the word-count limitation in ORAP 9.10(3) (extended to 20,000 words by order of the Court), with a count of 19,639 words.

Font Size

I certify that the font of this brief is 14-point Times New Roman for both the text and footnotes, as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING AND SERVICE

I certify that I filed the foregoing **Answering Brief of Portland General Electric Company** on January 24, 2014, with

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Appellate Court Administrator

using the Appellate Court Electronic Filing System.

I further certify that I served the foregoing **Answering Brief of Portland General Electric Company** on the following named persons on January 24, 2014, using the Appellate Court Electronic Filing System:

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