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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.

FRANK GEARHART; PATRICIA MORGAN and KAFOURY BROTHERS, INC.

Petitioners,

and

UTILITY REFORM PROJECT

Petitioner on Review,

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

BRIEF *AMICUS CURIAE* OF AVISTA CORPORATION D/B/A AVISTA UTILITIES, IDAHO POWER COMPANY, NORTHWEST NATURAL GAS COMPANY, AND PACIFICORP D/B/A PACIFIC POWER IN SUPPORT OF RESPONDENTS

Supreme Court
No. S061518

Court of Appeals
No. A140317

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

January 24, 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

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This Brief *Amicus Curiae* is filed on behalf of four public energy utilities serving customers in Oregon and regulated by the Oregon Public Utilities Commission ("Commission"):

- Avista Corporation d/b/a Avista Utilities ("Avista") provides electric and natural gas services to approximately 481,000 customers in Oregon, Washington, and Idaho and has been in business since 1889;
- Idaho Power Company ("Idaho Power") provides electric service to approximately 490,000 customers in Oregon and Idaho and has been in business since 1916;
- Northwest Natural Gas Company ("NW Natural") provides natural gas service to approximately 650,000 customers in Oregon and Washington and has been in business since 1859; and
- PacifiCorp d/b/a Pacific Power ("PacifiCorp") provides electric services to approximately 727,000 customers in Oregon, Washington, and California, and has been in business since 1910.

Together, these companies ("Joint Utilities") have more than four centuries of experience appearing before the Commission and complying with its regulatory policies. While the Joint Utilities have no direct interest in the outcome of this case, they do have a strong interest in the legal and regulatory

principles presented in this case. To continue to provide safe, reliable and affordable utility service to Oregon customers, the Joint Utilities need a stable system of utility regulation, one free from the threat of civil lawsuits over Commission-approved rates, even when the order approving rates is reversed on appeal. The Joint Utilities' amicus brief focuses on this issue, complementing the answering briefs of the Commission and Portland General Electric ("PGE").

In *Gearhart v. PUC*, 255 Or App 58, 299 P3d 533 (2013), the Court of Appeals correctly affirmed the Commission's Order in *In re Portland Gen. Elec. Co.*, OPUC Dockets DR 10, UE 88, UM 989, Order No. 08-487, 269 PUR4th 1 (Sept. 30, 2008) ("Order"). The Court of Appeals determined that the Commission complied with several court orders on remand and appropriately rectified the error of allowing a "return on" undepreciated investment for the retired Trojan nuclear power plant in PGE's rates. The result is a fair and full remedy for PGE's customers.

The Court of Appeals' decision constitutes sound public policy. First, by clarifying the Commission's remedial authority on remand, the Court of Appeals ensures a fair outcome in future cases when a Commission order is challenged and reversed on appeal, while still upholding the rule against retroactive ratemaking. Second, by affirming the Commission's exercise of its primary jurisdiction over all of the remaining issues in this case, the Court of Appeals effectively foreclosed further proceedings in the circuit court, ending

the specter of collateral class-action litigation when Commission-approved rates are reversed on appeal. *See Dreyer v. PGE,* 341 Or 262, 284, 142 P3d 1010, 1021 (2006) (if agency has primary jurisdiction over entire dispute, court action is dismissed, *citing Boise Cascade Corp. v. Board of Forestry*, 325 Or 185, 193, 935 P2d 411, 417 (1997)).

The result is fully consistent with this Court's opinion in *Dreyer,* which abated the circuit court action to allow the Commission to assert primary jurisdiction to avoid "[c]onflicting or inconsistent resolutions of the remedy issue." *Dreyer*, 341 Or at 286.[1] The Court observed that such an outcome would be "highly problematic for the resolution of this dispute and for utility regulation generally." *Id.*

Petitioners propose major, detrimental changes to Oregon's approach to public utility regulation. To further their own interests at the expense of customers at large, Petitioners seek to limit the Commission's role on remand to a ministerial function or eliminate it entirely. Petitioners also seek to insert trial courts into the ratemaking process, claiming more than $1 billion in damages to

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[1] *See also Boise Cascade*, 325 Or at 192 (primary jurisdiction doctrine recognizes "the need for orderly and sensible coordination of the work of agencies and of courts"); *Texas & P. Ry. Coc. v. Abilene Cotton Oil Co.* 204 US 426, 441, 27 S Ct 350, 355 (1907) (when an agency has the "power . . . to award reparation" there is no reason for courts to have power to also "grant relief" because "a conflict would arise which would render the enforcement of the act impossible").

account for PGE including a "return on" Trojan in rates. Utility Reform Project ("URP") Opening Brief at 2. If adopted, Petitioners' positions would upend Oregon's current system of utility regulation and replace it with an untested model fraught with new risks for customers and utilities.

The Court of Appeals resolved the longstanding controversy over PGE's rates related to the closure of the Trojan nuclear plant in a constructive and sustainable manner. The decision should be affirmed.

II. ARGUMENT

A. The Opinion of the Court of Appeals Ensures a Sound and Stable System of Ratemaking.

The Court of Appeals integrated past court decisions related to the early retirement of Trojan, including *Dreyer*, *Trojan I* (*Citizens' Utility Board v. PUC*, 154 Or App 702, 962 P2d 744 (1998), *rev dismissed*, 335 Or 91 (2002)), and *Trojan II* (*Utility Reform Project v. PUC*, 215 Or App 360, 170 P3d 1074 (2007)), in a way that recognizes their full weight and reinforces the fairness and predictability of Oregon's ratemaking process. The result appropriately balances the interests of customers and utilities, defines meaningful roles for the Commission and the courts, and stabilizes Oregon ratemaking.

1. The Court of Appeals' Decision Affirms a Fair Remedy to Customers, Reinforcing the Important Role of the Courts on Judicial Review.

The Court of Appeals affirmed the Commission's authority on remand to remedy an error through a rate refund or surcharge: (1) as required to produce fair and reasonable rates; and (2) under guidelines dictated by the rule against retroactive ratemaking. In this case, the Commission ordered a refund of $33.1 million, or approximately $37 million after interest. This is a sizable refund; by way of comparison, the rate increase in the underlying rate case (docket UE 88) for all revenue requirement items (including the costs of other resources, fuel, and operations and maintenance) was approximately $50 million. Order at 12. *See In re Portland Gen. Elec.*, OPUC Docket UE 88, Order No. 95-322, Appendix B, 160 PUR4th 201 (Mar. 29, 1995).

This decision followed naturally from this Court's decision in *Dreyer*: (1) authorizing the Commission to determine whether the petitioners were injured, *Dreyer*, 341 Or at 285; (2) recognizing that the Commission had already commenced a process for making this determination that involved a limited recalculation of PGE's rates, *id.* at 272; (3) acknowledging the Commission's special expertise on using rate refunds as a remedy, *id.* at 285; and (4) finding that ORS 757.225 and the filed rate doctrine do not legally preclude a refund when a Commission rate order is reversed on appeal. *Id.* at 277-280.

2. In Affirming the Commission's Order, the Court of Appeals Clarified and Reinforced Important Regulatory Principles.

The consolidated cases on remand presented many issues arising from their complex procedural history. At heart, the remand orders required the Commission to correct the error of law in the rate orders while still complying with other regulatory requirements and principles. The Commission closely examined the historical, constitutional, statutory, and policy underpinnings of Oregon's ratemaking framework and comprehensively explained its key components.

The Court of Appeals affirmed the Commission's central conclusions regarding the respective roles of the judiciary and the Commission in post-appeal proceedings and the applicability of the rule against retroactive ratemaking. Taken together, the Court of Appeals' decision and the Commission's Order support the following regulatory principles:

- ***The Commission has primary jurisdiction to determine and redress harm associated with legal error in its orders, and may invoke its ratemaking authority to make such a determination and ensure fair and reasonable rates. The court then reviews whether the process was proper and the end result meets the broad goals of ORS 756.040.***

Ratemaking is a legislative function delegated to the Commission, subject only to constitutional and statutory limits. *Gearhart,* 255 Or App at 86 *(citing American Can Co. v. Lobdell*, 55 Or App 451, 461, 638 P2d 1152, 1158 (1982)). Appellate courts provide a vital check on the Commission's broad

ratemaking authority by enforcing the Commission's governing statutes. *Id.* If an appellate court identifies an error of law in a Commission-approved order, the Commission has "primary, if not sole, jurisdiction over . . . revision of rates to provide for recovery of unlawfully collected amounts." *Dreyer,* 341 Or at 285. The Commission's exercise of authority on remand is governed by general ratemaking principles and standards, as is the court's review of the Commission's order on remand. G*earhart,* 255 Or App at 94.

- ***Under Oregon's approach to the rule against retroactive ratemaking, ratemaking is prospective only. Post-appeal rate refunds or surcharges do not violate the rule against retroactive ratemaking as long as they do not rely on new information or the utility's actual costs or revenues, and they are not used to offset future rates.***

The rule against retroactive ratemaking is a longstanding ratemaking principle in Oregon, which protects both customers and utilities. Order at 36. The rule rests on the principle that rates are approved prospectively, based on anticipated utility costs and revenues. *Id.* Accordingly, current rates cannot be adjusted to account for unanticipated gains or losses experienced by the utility in the past.

The Court of Appeals recognized a limited exception to the rule against retroactive ratemaking to allow for refunds or surcharges when a Commission order is overturned on appeal. The carefully defined conditions required for this exception ultimately reinforce the general operation of the rule against retroactive making and contribute to regulatory stability. The refund or

surcharge must: (1) be based only on the information in existence at the time of the initial rate order; (2) not be based on an evaluation of the utility's actual expenses or revenues; and (3) not be effectuated by offsetting future rates. *Gearhart,* 255 Or App at 100.

B. The Commission Followed Applicable Regulatory Principles and the Court of Appeals Properly Affirmed the Commission's Decision.

The decisions of the Court of the Appeals and the Commission are thorough and well-reasoned. The Joint Utilities respond to Petitioners by highlighting three points.

First, the Commission appropriately defined the limited scope of its ratemaking review on remand as covering only those elements in PGE's rates affected by the legal error in allowing a return on PGE's Trojan investment. To be clear, the Commission did not comprehensively reevaluate PGE's entire rate structure or "duplicate the full-blown UE 88 general rate case."[2] For example, the Commission expressly rejected PGE's proposal to revise its return on equity authorized in docket UE 88. Order at 77. While the Commission could not disregard rate elements directly related to the remand order under its mandate to ensure fair and reasonable rates, the Commission's rate review on remand was much narrower than in its original orders.

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[2] The Commission defined the scope of its review on remand in *In re Portland Gen. Elec. Co.*, OPUC Dockets DR 10, UE 88, UM 989, Order No. 04-597 (Oct. 18, 2004).

Second, the Commission properly refused to abdicate its role entirely or to limit itself to the ministerial act of calculating a "return on" Trojan investment isolated from any other ratemaking element or consideration. As the Court of Appeals recognized, the Commission has broad authority under ORS 756.040 to set fair and reasonable rates—both in its original rate orders and on remand of a rate order reversed on review. *Gearhart*, 255 Or App 86, 94. In addition, the Commission's authority to allow any cost recovery for the retired Trojan plant (including the "return of" the unamortized investment) is based on ORS 757.140(2), which requires a determination that plant retirement is in the public interest. Order at 9-10. On remand, ORS 757.140(2) required the Commission to make a new public interest finding. *Id.* at 74, 78. This analysis, which is inextricably connected to the Commission's ratemaking determinations on PGE's Trojan investment, necessitated the post-remand proceedings conducted in this case.

Third, URP is demonstrably wrong that the Commission's application of interest on the outstanding "return of" balance is unprecedented and violates ORS 757.355. URP Opening Brief at 42-43. The Commission routinely applies interest on costs or revenues that are amortized over time in rates, including those associated with utility plant. *See In re PacifiCorp*, OPUC Docket UE 116, Order No. 01-787, 49-50, 212 PUR4th 379, 412 (Sep. 7, 2001) (ordering proceeds from utility property sales to be held in an interest-bearing

balancing account for later refund to customers). *See also In re Citizens' Utility Board*, OPUC Docket UM 374, Order No. 91-830 at 1 (July 1, 1991) (ordering a deferred account, with interest, to capture Measure 5 tax savings for customers' benefit). The Commission's application of interest to unamortized Trojan costs was fully consistent with normal Commission practice. It does not constitute an impermissible return under ORS 757.355.

C. Petitioners Seek to Undermine Oregon's Established Regulatory Framework by Inappropriately Inserting Trial Courts into the Ratemaking Process.

By arguing that (1) the Commission exceeded its authority on remand, and (2) the circuit court can award damages, Petitioners seek to undermine Oregon's regulatory regime in a manner harmful to both utilities and customers. Petitioners' proposal removes ratemaking authority from the Commission and assigns it to the trial courts, spurning the Commission's ratemaking expertise and injecting significant new uncertainty into customer rates and the business model for utilities.

Petitioners contend that once an appellate court has identified an error in a Commission rate decision, a trial court has the authority to calculate and award damages associated with that error. CAPs' Opening Brief at 6, 12. Petitioners rely on *Oregon-Washington Railroad Navigation Co. v. McColloch*, 153 Or 32, 55 P2d 1133 (1936), for the proposition that courts may award damages when a rate is reversed on appeal. *Id.* at 55-56. But *McColloch*

expressly contradicts Petitioners' proposition: it clearly distinguishes overcharges, or "charges paid in excess of the published lawful tariffs" from challenges to the published lawful tariff itself. *McColloch*, 153 Or at 44. *McColloch* makes clear that the former are eligible for court-awarded damages, but the latter are not. *Id.* at 46-47. To be clear, in circuit court Petitioners are challenging PGE's Commission-authorized rates, not amounts charged in excess of those rates.

Allowing a civil lawsuit against a utility for charging commission-authorized rates is contrary to many fundamental regulatory principles (notably, the filed rate doctrine, addressed below), even when the commission order is reversed on appeal. Petitioners do not cite any cases sanctioning the regulatory framework they advocate. For compelling reason: there are none.

To calculate a remedy as proposed by Petitioners, a trial court would need to evaluate the rates set by the Commission, calculate the effect of the unlawful element, and order an appropriate refund. Petitioners classify this process as "calculating damages," but this is semantics. To craft a fair and reasonable result, the court would need to consider the multitude of factors involved in any rate review and the interdependence of these factors. For example, the Commission expressly considered five ratemaking principles and policies in reviewing PGE's rates on remand: (1) least cost planning; (2) balancing customer and utility interests; (3) the utility's financial integrity; (4)

inter-generational equity; and (5) rate stability and avoiding rate shock. Order at 66. In determining a refund, the Commission also considered the interdependent relationship of the calculation of net benefits under ORS 757.140(2) and the calculation of the remaining Trojan investment balance in 2000. *Id.* at 87-88. Trial courts are ill-suited to evaluate such considerations:

> A court is not well-suited to determine, if the rate approved by the commission were found to be unlawful, what other rate the commission would find to be reasonable and non-discriminatory to take its place. In other words, in order to assess the damages that were caused by the unlawful rate, a court would need to predict what the commission would determine was a lawful rate and then compare the two. *** [R]atemaking is a legislative function.*** [A] court generally would not have the technical expertise to do so nor the capacity to consider the entire rate structure or to balance all competing interests.

Schermer v. State Farm Fire and Gas Co., 721 NW2d 307, 312 (Minn. 2006)

D. Petitioners' Proposals Would Harm Oregon Customers and Oregon Utilities.

Utility customers in Oregon would be harmed if, as Petitioners request, circuit courts were authorized to issue damage awards against a utility when Commission-approved rates are reversed on appeal. Most basically, such a ruling opens the door for reciprocal lawsuits by utilities seeking a rate surcharge upon reversal of a Commission order. It could allow some customers to collect damages, thereby increasing costs for others.

Adoption of Petitioners' proposals would also increase utility financing costs, a key component of rates.[3] The potential liability associated with class-action lawsuits would unquestionably increase utility risk, leading to higher equity costs.[4] Under ORS 756.040(1), the Commission must reflect added risk in a utility's cost of equity, increasing rates for all customers.

In addition, because Petitioners' proposals would destabilize Oregon's regulatory framework, their adoption could produce credit downgrades. *See In re PacifiCorp*, OPUC Docket UE 170, Order No. 06-379 at 15-17, 250 PUR4th 552, 563-564 (July 10, 2006) (considering whether the Commission's adjustment to PacifiCorp's rates impacted company's credit rating). A credit downgrade increases a utility's cost of debt and discourages investment. *In re Portland Gen. Elec. Co.*, OPUC Docket UF 4192, Order No. 03-024 at 3

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[3] Viewed most simplistically, utility rates are determined by the utility's revenue requirement, which is made up of three basic elements: (1) operating expenses, (2) capital investments or "rate base", and (3) an allowed "rate of return" on capital investments. The revenue requirement formula is often expressed as R = O + (V-d) r, where R = Revenue requirement; O = Operating expenses; (V-d) = Value of property minus accrued depreciation, or total capital investments; and r = rate of return. An individual utility's rate of return is set with reference to the utility's cost of capital, or financing cost, which is calculated as a function of : (a) the utility's cost of debt; (b) the utility's cost of equity; and (c) the utility's capital structure. *In re Portland Gen. Elec. Co.*, OPUC Docket UE 115, Order No. 01-777 at 23, 212 PUR4th 1 (Aug. 31, 2001).

[4] As the United States Supreme Court has noted, uncertain or irregular income will result in "low prices for the securities of the utility and higher rates of interest to be demanded by investors." *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W.Va.*, 262 US 679, 694, 43 S Ct 675, 680 (1923).

(Jan. 13, 2003) ("Lower credit ratings translate into reduced access to capital markets, increased borrowing costs, and ultimately, higher rates for utility service.").

Ultimately, Petitioners' proposals would restrict Oregon utilities' access to low-cost capital, decreasing service quality for utility customers. The Commission has recognized that limitations on access to capital can result in a utility being unable to make infrastructure investments necessary to provide safe and reliable service.[5]

Adoption of Petitioners' positions would be particularly damaging now because Oregon's utilities are facing unusually large capital investment demands. These include new and emerging requirements for investments in green energy resources, environmental compliance, energy efficiency, and the need to update aging infrastructure.[6] For example, PGE's projected capital

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[5] *See Portland Gen. Elec. Co.*, OPUC Docket UF 4192, Order No. 03-024 at 3 (Jan. 13, 2003) ("Issuing [stock] will enable PGE to protect and maintain its ability to access capital markets, and in so doing, secure sufficient generating, transmission, and distribution capacity to serve its customers reliably and at reasonable cost. * * * PGE's ability to keep capital costs low directly affects its ability to acquire utility property and facilities and to improve and maintain service.").

[6] Black & Veatch, *2013 Strategic Directions in the US Electric Industry*, at 8-9 (2013) *at* http://bv.com/reports/2013-electric-utility-report; Edison Electric Institute, *Disruptive Challenges: Financial Implications and Strategic Responses to a Changing Retail Electric Business* at 3 (Jan. 2013) *at* http://www.eei.org/ourissues/finance/Documents/disruptivechallenges.pdf.

commitments through 2016, including a new renewable wind farm, total more than one billion dollars.[7]

The Joint Utilities are all making similarly substantial capital investments to serve customers:

- Avista estimated utility capital expenditures for 2013 of $260 million.[8]
- Idaho Power estimated capital expenditures for 2013 of $245-$255 million.[9]
- NW Natural estimates utility capital expenditures for 2013 of $115-$130 million. For the five-year period ending in 2017, NW Natural estimates utility capital expenditure of $600-$700 million.[10]

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[7] PGE Form 10-Q, filed with Securities and Exchange Commission ("SEC") November 1, 2013.

[8] Avista Form 10-K, filed with SEC for the fiscal year ended December 31, 2012, at 21.

[9] Idaho Power Form 10-K, filed with SEC for the fiscal year ended December 31, 2012, at 39.

[10] NW Natural Form 10-K, filed with SEC for the fiscal year ended Dec. 31, 2012, at 12.

- PacifiCorp expects to spend approximately $3.4 billion on capital projects throughout its system from 2013 to 2015.[11]

These investments are made more challenging by the fact that energy demand has been flat or declining since the recent recession, resulting in a smaller customer base over which to spread and recover costs.[12] Now more than ever, Oregon utilities and their customers require regulatory stability and predictability to ensure continued access to low-cost capital.

E. A Final Word on the Filed Rate Doctrine.

While *Dreyer* rejected the argument that ORS 757.225 embodied the filed rate doctrine in a manner that barred a remedy in this case, the decision did not otherwise reach the question of the existence of the filed rate doctrine. On remand, the Commission set out its view that the filed rate doctrine does indeed exist in Oregon and acts to preserve the Commission's jurisdiction over ratemaking by preventing collateral attacks on Commission-approved rates. Order at 34. The filed rate doctrine also prevents rate discrimination by ensuring that all customers are charged the same approved rates. *Id.* While the Court of Appeals did not expressly address this issue, the effect of its

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[11] PacifiCorp Form 10-K, filed with SEC for the fiscal year ended December 31, 2012, at 39.

[12] Black & Veatch, *supra* note 6; Edison Electric Institute, *supra* note 6.

decision—reserving ratemaking decisions to the Commission, including those on remand—is fully consistent with the Commission's interpretation of the filed rate doctrine.

The *Dreyer* decision raised questions about the scope of the filed rate doctrine and the role a court might play in providing a remedy to customers when a Commission order is reversed on appeal. The Court's rationale seemed designed to allow Petitioners to seek a remedy in the courts if the Commission concluded on remand that it had no authority to provide such a remedy. *See Dreyer*, 341 Or at 285. Now that the Commission has exercised its primary jurisdiction to provide a remedy and the Court of Appeals has affirmed, it is clear that the trial courts have no further role to play.

The Court should provide similar clarity on the filed rate doctrine, recognizing its existence in Oregon and its importance in protecting: (1) the Commission's jurisdiction over ratemaking; (2) the appellate court's role as sole reviewer of Commission orders; and (3) customers against rate discrimination. Without a filed rate doctrine in Oregon, Commission-approved rates may be subject to collateral attack in circuit court actions, undermining years of Oregon precedent to the contrary.[13] Order at 34-35. This will result in

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[13] *Mt. Hood Stages, Inc. v. Haley*, 252 Or 538, 542, 451 P2d 125, 126 (1969) ("An order of the commissioner promulgated under his statutory authority is not subject to collateral attack."); *Morgan v. Portland Traction Co.*, 222 Or 614,

rates that are never certain, at least until a presumed statute of limitations has run.[14] It could also advantage one class of customers to the disadvantage of others.[15]

By affirming the Court of Appeals, explicitly recognizing the filed rate doctrine as reinterpreted in the Order, and rejecting Petitioners' request to allow their damages action to proceed, the Court will ensure a regulatory system in Oregon where: (1) customers pay rates that are just and reasonable; (2) customers are charged the same rates and none is unjustly favored or discriminated against; (3) rates are set in a process that recognizes the complex

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622, 331 P2d 344, 348 (1958) (statutory procedure for judicial review "is intended to be the exclusive method of testing the validity of the Commissioner's order"); *Simpson v. Phone Directories Co.*, 82 Or App 582, 586, 729 P2d 578, 580 (1986) ("all rates and service levels approved by the PUC are prima facie lawful and reasonable and that those rates and service levels are subject to attack only in actions prosecuted against the PUC for that purpose. Those rates and service levels therefore cannot be collaterally attacked in proceedings such as this."); *Garrison v. Pac. Northwest Bell,* 45 Or App 523, 530, 608 P2d 1206, 1210 (1980) ("[T]he rates and service levels set by the Commissioner are prima facie lawful and are not open to collateral attack in this proceeding.").

[14] *Arkansas Louisiana Gas Co. v. Hall*, 453 US 571, 579, 101 S Ct 2925, 2931 (1981) (allowing a court to award a rate as damages "could have an unsettling effect" on other transactions and the natural gas markets).

[15] *Keogh v. Chicago & NW Ry Co.*, 260 US 156, 163, 43 S Ct 47, 50 (1922) ("If a shipper could recover . . . damages . . . the amount recovered might, like a rebate, operate to give him a preference over his trade competitors."); *Schermer*, 721 NW2d at 312 ("by modifying the rates for some ratepayers but not for others. . . . it would inevitably disrupt the balance of interests achieved by the [Commission] when the rates were approved.")

set of principles and policies that the Commission is uniquely qualified to consider; (4) customers and utilities are assured of a level of certainty when they charge or pay tariffed rates; (5) customers and utilities have recourse to the courts if the Commission commits error; and (6) the Commission has authority to determine and provide a remedy if its error resulted in unjust and unreasonable rates.

III. CONCLUSION

The Joint Utilities, like all public utilities, provide services that are essential to the health and well-being of their customers. A stable and sustainable regulatory framework is critical to their ability to provide these services as required by law—safely, reliably, and at fair and reasonable rates.

Taken together, the decisions of the Court of Appeals and the Commission articulate a cogent regulatory framework that is consistent with statutory and constitutional requirements, delineates clear roles for the Commission, the appellate courts, and the circuit courts, and benefits both customers and utilities. At a time when utilities need regulatory certainty to

enable investment for Oregon's energy future, the Court of Appeals' decision charts a clear and steady path forward. The decision should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 4,476 words in 14-point Times New Roman font.

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I certify that I filed the foregoing Brief *Amicus Curiae* of Avista Corporation d/b/a Avista Utilities, Idaho Power Company, Northwest Natural Gas Company, and PacifiCorp d/b/a Pacific Power in Support of Respondent on January 24, 2014, by U.S. First Class Mail with the Appellate Court Administrator.

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