IN THE SUPREME COURT OF THE STATE OF OREGON

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 and 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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CORRECTED *AMICUS CURIAE* BRIEF OF CITIZENS' UTILITY BOARD OF OREGON

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CORRECTED *AMICUS CURIAE* BRIEF OF CITIZENS' UTILITY BOARD OF OREGON

G. Catriona McCracken 933587
Sommer Templet 105260
Ray Myers 803208
Citizens' Utility Board of Oregon
610 SW Broadway, Suite 400
Portland, OR 97205
Telephone: (503) 227-1984
catriona@oregoncub.org
sommer@oregoncub.org
raymye5@msn.com
Attorneys for *Amicus Curiae* Citizens' Utility Board of Oregon

Michael A. Casper 062000
Denise G. Fjordbeck 822578
Oregon Department of Justice
1162 Court St., Suite 400
Salem, OR 97301
Telephone: (503) 986-4402
michael.casper@doj.state.or.us
denise.fiordbeck@doi.state.or.us
Attorneys for Respondent Oregon Public Utility Commission

Linda K. Williams 784253
Linda K. Williams PC
10266 SW Lancaster Rd.
Portland, OR 97219
Telephone: (503) 293-0399
linda@lindawilliams.net
Attorney for Petitioners, Petitioners on Review Class Action Plaintiffs, Gearhart, *et al*.

James N. Westwood 743392
Rachel C. Lee 102944
Stoel Rives LLP
900 SW Fifth Ave., Suite 2600
Portland, OR 97204
Telephone: (503) 224-3380
jnwestwood@stoel.com
rclee@stoel.com
Attorneys for Intervenor, Intervenor Respondent Portland General Electric Company (PGE)

Daniel W. Meek 791242
Attorney at Law
10949 SW Fourth Ave., Suite 1000
Portland, OR 97219
Telephone: (503) 293-9021
dan@meek.net
Attorney for Petitioner, Petitioner on Review Utility Reform Project

Katherine A. McDowell 890876
Lisa Rackner 873844
McDowell Rackner & Gibson PC
419 SW 11th Ave., Ste. 400
Portland, OR 97205
Telephone: 503-595-3924
katherine@mcd-law.com
lisa@mcd-law.com
Attorneys for *Amici Curiae* Avista Corporation, Idaho Power Company, Northwest Natural Gas Company, and PacifiCorp ("Joint Utilities")

Scott Seidman
Tonkon Torp LLP
888 SW 5th Ave., Ste. 1600
Portland, OR 97204
Telephone: 503-802-2021
scott.seidman@tonkon.com
Attorney for *Amicus Curiae* Edison Electric Institute

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CORRECTED *AMICUS CURIAE* BRIEF OF CITIZENS' UTILITY BOARD OF OREGON

I. STATEMENT OF *AMICUS CURIAE*

The Citizens' Utility Board of Oregon ("CUB") is a statutorily created non-profit corporation charged with representing "the interests of utility consumers before legislative, administrative and judicial bodies." ORS 774.030(3)(b). Created through citizen initiative, the statutory scheme grants CUB the power to advocate on behalf of utility consumers to ensure that "public policies affecting the quality and price of utility services reflect their needs and interests." ORS 774.020.

CUB has been involved in the Trojan litigation since the beginning. In 1995, CUB, Utility Reform Project ("URP") and other parties initiated the litigation that gave rise to the Oregon Court of Appeals' decision in *Trojan I*.[1] *Citizens' Utility Board of Oregon v. PUC*, 154 Or App 702, 962 P2d 744 (1998), *rev dismissed*, 355 Or 591, 158 P3d 822 (2002) ("*Trojan I*"). In that case, the Oregon Court of Appeals upheld CUB's argument that ORS 757.355[2] precluded the Public Utility Commission of Oregon ("OPUC" or "Commission") from allowing in rates a rate of return on capital assets that are

[1] URP had several other issues on appeal aside from CUB's primary issue — whether PGE's rates could include a rate of return on PGE's undepreciated investment in Trojan.

[2] In 2003, the Oregon Legislature amended ORS 757.355. CUB's references to ORS 757.355 are to the statute prior to the amendment.

not currently being used to provide utility service. *Id.* at 716-717. The court reversed and remanded the lower court's decisions with instructions to remand the orders to the OPUC for reconsideration. *Id.* at 717.

Since then, URP and Class Action Plaintiffs ("CAPs") have extensively participated in several OPUC remand proceedings and appealed the orders resulting from those proceedings, ultimately seeking to obtain a remedy for alleged *unlawful rates* approved by the OPUC and charged by PGE for the periods between April 1995 and September 2000 ("Phase 1") and from October 2000 and forward ("Phase 3") stemming from *Trojan I*'s holding that PGE's rates could not contain a return on PGE's undepreciated Trojan investment. *See generally* Opening Brief of Class Action Plaintiffs on Review ("CAPs Opening Brief") and Opening Brief of Utility Reform Project on Review ("URP Opening Brief"). The litigation of these issues has resulted in two appellate decisions—*Dreyer v. PGE*, 341 Or 262, 142 P3d 210 (2006) ("*Dreyer*") and *Utility Reform Project v. PUC*, 215 Or App 360, 170 P3d 1074 (2007) ("*Trojan II*")—which are summarized in the Court of Appeals decision that gave rise to this case, along with a detailed history of all of the OPUC decisions and appeals that have culminated in the case before this Court. *Gearhart v. PUC*, 255 Or App 58, 64-79, 299 P3d 533 (2013).

CUB initiated *Trojan I* because it felt that the OPUC's decisions in dockets DR 10 and UE 88 were not in the interest of utility consumers. *Trojan*

I, 154 Or App at 707. CUB, like URP, took part in the subsequent remand of OPUC Order No. 95-322. *In re Portland General Electric Company*, OPUC Docket UE 88, Order No. 95-322, 160 PUR 4th 201 (Mar. 29, 1995). Unlike URP, CUB believes that the Commission's actions on remand in that case were within its agency discretion, in the interest of ratepayers, and provided an adequate remedy for ratepayers. CUB, in considering the interest of ratepayers in accordance with its statutory mandate, has continued to participate in the litigation prosecuted by URP and CAPs to ensure that ratepayers' interests are upheld. Most recently, CUB was *amicus curiae* in the underlying Court of Appeals case because it believes that URP's and CAPs' challenges to OPUC Order No. 08-487, if adopted, have the potential to negatively affect - rather than help - utility ratepayers. Specifically, CUB is concerned that URP's and CAPs' requested remedies, if imposed by this court, will curtail the OPUC's ability to perform its legislatively mandated role of setting just and reasonable rates that balance the interests of utility investors and consumers. ORS 756.040(1).

In the present case, URP and CAPs renew the arguments made before the Court of Appeals, including that the Commission engaged in *ultra vires* ratemaking in OPUC Order No. 08-487 and that an adequate remedy was not provided to ratepayers during either the Phase 1 or Phase 3 period. URP Opening Brief at 9-13; CAPs Opening Brief at 5-6. URP's and CAPs'

characterizations of the Commission's legal authority on remand are incorrect. The OPUC's interpretation of its role in utility ratemaking, as described in OPUC Order No. 08-487, is correct and in the best interests of utility ratepayers.

Because of implications that could arise should this Court adopt the arguments set forth by URP and CAPs, CUB presents the correct rule of law in this case with regard to the OPUC's discretion in setting fair, just and reasonable rates. CUB is the statutorily appointed organization vested with the power and obligation to represent the interests of residential utility consumers before this Court. CUB offers its arguments on behalf of its constituents as prescribed by statute. *See* ORS 774.030. CUB has no private interest in this litigation.[3]

[3] CAPs challenged CUB's *amicus* status in its Reply Brief before the Oregon Court of Appeals, arguing that the court should reject CUB's *Amicus* Brief because CUB failed to disclose a private interest in this matter and that CUB is a "subcontractor" to PGE. CAPs' Reply Brief at 24-5. CUB responded to CAPs allegations in its *Response of Citizens' Utility Board of Oregon to CAPs' Motion to Strike CUB's Amicus Curiae Brief*. Following CUB's response, CAPs moved for leave to file a reply to that response, or, in the alternative, to strike the response. The court granted CAPs' motion to strike because it found that "[CAPs'] argument in their reply brief does not amount to a motion to strike CUB's *amicus* brief." Order Striking Response and Denying Leave to File Reply Testimony in *Gearhart v. Public Utility Com'n of Oregon*, CA No. A140317 (Sept. 28, 2011) (unpublished order).

II. STATEMENT OF THE CASE

For purposes of this *amicus* brief, CUB adopts Respondent OPUC's "Statement of Material Facts" and Intervenor-Respondent PGE's "Statement of the Case," which describe the nature of the proceeding, the relief sought, material facts, pertinent dates and statutory basis for appellate jurisdiction. Answering Brief of Portland General Electric, p. 1-17; Answering Brief of Oregon Public Utility Commission, p. 9-24.

III. INTRODUCTION AND SUMMARY OF ARGUMENT

URP and CAPs essentially argue that the OPUC's chosen method of implementation of the Court of Appeals' holding in *Trojan I* was erroneous at every turn. They contend, among other things, that the OPUC should have isolated the erroneous component of the original rate - related to PGE's return on investment for Trojan - and that the OPUC should then have provided a monetary remedy to ratepayers. URP Opening Brief at 50-59; CAPs Opening Brief at 12-15. In short, according to URP, "[t]he only lawful function of the PUC, upon the remands from the courts, was to calculate the prior unlawful charges and return those funds, with appropriate interest, to those who paid them." URP Opening Brief at 50.

CUB believes that if the position of URP and the CAPs were adopted by this court, it would undermine the ratemaking authority of the OPUC and the complex system of regulation that the legislature has enacted. The result of

adopting this position would be that once a court determines that a rate order contains a legal error, then all rates resulting from that order would be unlawful and the parties who were affected by the unlawful charges would necessarily be entitled to a specific monetary remedy or damages, regardless of whether the resulting rates remained fair and reasonable. This would allow the courts to usurp the ratemaking function of the OPUC and its broad legislative mandate to set rates that are just and reasonable. Such a determination would be contrary to sound policy and against ratepayer interests.

IV. ARGUMENT

The Commission exercised proper discretion in OPUC Order No. 08-487. The Commission has exclusive jurisdiction over ratemaking proceedings, during which it must ensure that rates are "just and reasonable." ORS 756.040(1). In those proceedings, it is not only proper, but is also required, that the Commission consider its general authority when setting rates that protect ratepayers and the public, generally, and then balance both the interests of ratepayers and a utility's shareholders. *Id*. Therefore, the Commission, on remand, was not charged solely with determining what part of rates is not "legal" and then ordering a refund for that specific amount; rather, the Commission, in line with its statutorily mandated directive, was required to consider whether rates, when corrected to remove the unlawful return on Trojan investment, would remain just and reasonable.

1. The Commission acted within its authority during the remand proceedings.

The essence of URP's and CAPs' arguments is that once a court has found that the OPUC made a legal error, the fairness and reasonableness of rates as a whole is completely irrelevant and that ratepayers are necessarily entitled to a refund. URP and CAPs are incorrect. The Commission is statutorily charged with setting just and reasonable rates, even in proceedings in which it is correcting a legal error. The Commission cannot divorce itself from that obligation.[4] *Id.* Moreover, the method chosen by the OPUC to re-determine a fair, just and reasonable rate (a new rate case proceeding) was squarely within its jurisdictional discretion.

ORS 756.040(1) states that the Commission "**shall** make use of the jurisdiction and powers of the office to protect such customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates." *Id.* (emphasis added). The statute also requires the Commission to "balance the interests of the utility

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[4] The OPUC stated in its Order 08-487:

> 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.

In re Portland Gen. Elec. Co., OPUC Docket DR 10, UE 88, and UM 989, Order No. 08-487, 64, 269 PUR4th 1, 48 (Sept. 30, 2008).

investor and the consumer in establishing fair and reasonable rates." *Id.* In correcting a legal error, the Commission is still required to ensure that remaining rates are just and reasonable – rates that balance the interests of the utility investor and the customer.

"Utility regulation, including ratemaking, is a legislative function, and the legislature has granted broad power to the PUC to perform its delegated function." *Pacific N.W. Bell Telephone Co. v. Katz*, 116 Or App 302, 309, 841 P2d 652, 656 (1992) (citing *American Can v. Lobdell*, 55 Or App 451, 638 P2d 1152 (1982); *Pacific N.W. Bell Telephone Co. v. Sabin*, 21 Or App 200, 213, 534 P2d 984 *rev. den*. (1975)). This court has stated that "[t]he legislature may use general delegative terms because it cannot foresee all of the situations to which the legislation is to be applied and deems it operationally preferable to give an agency the authority, responsibility and discretion for refining and executing generally expressed legislative policy." *Springfield Education Ass'n v. Springfield School Dist. No. 19*, 290 Or 217, 228, 621 P2d 547, 555 (1980). The agency's authority is not, however, without limits, including those prescribed by the legislature, and state and federal constitutions. *Katz*, 116 Or App at 310 (citing *Sabin*, 21 Or App at 213). Here, the Oregon Legislature, via ORS 756.040, has delegated to the OPUC the authority and obligation to protect customers, and the public generally, in all matters over which the Commission has jurisdiction.

The Commission must also balance the interests of the utility investor with the interests of the consumer to establish fair and reasonable rates. To do this the Commission must operate within the confines of its legislative grant, including the mandate that it ensure "just and reasonable" rates, or it is at risk for being overturned during judicial review. This is precisely what the OPUC did in Order 08-487. Therefore, the OPUC is operating under its delegative authority, and its choices are subject to the highest deference.[5] *Trojan I*, 154 Or App at 714.

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[5] CUB notes that this court, in the *Dreyer* case, stated:

> [W]e note that the PUC now is engaged in a proceeding * * * That being the case, we believe, for the reasons we describe below, that the doctrine of primary jurisdiction requires that the present actions defer to that proceeding.

Dreyer, 341 Or at 283. The court further stated that:

> [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: revisions of rates to provide for recovery of [any] unlawfully collected amounts.

Id. at 285.

URP and CAPs fail to understand that the Commission, in every iteration of its responsibilities, must ensure that all legal obligations are met—the Commission cannot simply ignore its legislative mandate, though general, to ensure that rates are just and reasonable, even if the thrust of the underlying proceeding is narrow. Though there may be exceptions to the broad delegation—i.e. situations in which the OPUC has no discretion other than what is specifically prescribed by statute—its general discretion does not fall by the wayside.

The *Trojan I* court found that the inclusion of a return on investment in Trojan was contrary to ORS 757.355 and ORS 757.140(2) due to specific statutory limitations. *Id.* at 714-15. Those statutes do nothing, however, to limit the Commission's discretion on how to remedy the inclusion of a rate that is contrary to the statutes. The "general grants of authority in ORS 756.040 and other general statutes" may not empower "PGE to charge or OPUC to approve rates of a kind that are specifically contrary to the limitations in ORS 757.355

Clearly, the *Dreyer* court also contemplated that the OPUC would exercise its full ratemaking authority in its review of the remanded cases.

See also Fly et al. v. Heitmeyer, 309 US 146, 148, 60 S Ct 443, 444, 84 L Ed 664 (1940) (U.S. Supreme Court found that a commission had the same duty before and after it "fell into legal error" to apply the required statutory standards and that it should, therefore, on remand, consider the application at issue, along with subsequently filed applications, including new evidence. "[T]he Commission's duty was to apply the statutory standard * * * after it fell into legal error as well as before" *Id.*).

and ORS 757.140(2)," *Id.*, but they do not purport to limit the Commission's broad remediation discretion, including the directive that it "shall" set rates that are "just and reasonable" and that balance the interests of customers and utility shareholders. *See* ORS 756.040.

In *all* ratemaking proceedings, there is the requirement that rates approved by the Commission are not only compliant with specific legislative limitations on Commission authority, but are also consistent with the Commission's general grant of authority to, among other things, set "just and reasonable" rates. Therefore, it is appropriate for the Commission to consider its general authority when it is correcting rates for a legal error.

The OPUC's error, in this case, was the inclusion of a return on investment for PGE's undepreciated investment in Trojan. In Order No. 08-487, the Commission was correcting that error in accordance with the mandates in *Trojan I*, *Trojan II*, and *Dreyer*. *In re Portland General Electric Company*, OPUC Docket DR 10, UE 88, and UM 989, Order No. 08-487, 2-3, 269 PUR 4th 1, 8-9 (Sept. 30, 2008). In doing so, the Commission used a comprehensive and holistic approach, as it does in all types of rate proceedings, because of the interdependence of ratemaking decisions. *Id.* at 7-8 (citing *Federal Power Com'n. v. Hope Natural Gas Co.,* 320 US 591, 602, 64 S Ct. 281, 288, 88 L Ed 333 (1944) and *Valley & Siletz R.R. Co. v. Flagg*, 195 Or 683, 699, 247 P2d 639, 646 (1952)). Additionally, "[i]t is not theory but the impact of the rate

order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important." *Hope*, 320 US at 602 (U.S. Supreme Court summing up its prior statements on ratemaking, including that a "Commission is not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments'").

With regard to the rates charged between April 1995 and September 2000, the Commission considered both the direct and indirect effects of removing unlawful charges to determine what rates would have been imposed absent the unlawful charges during that period. *See* OPUC Order No. 08-487 at 54-78. The OPUC compared actual rates with its new calculation and determined that the rates originally charged in the Phase 1 period were "just and reasonable" because they were actually lower than the rates that would have been imposed had the Commission not originally included a return on investment for Trojan. *Id.* at 78-9.

For rates charged from October 2000 onward, the Commission concluded that the settlement resulting in those rates was in the public interest and provided "just and reasonable" rates; however, upon re-examining Phase 1 rates, the Commission determined that there would be an impact on subsequent rates for the Phase 3 period, and therefore ordered PGE to refund that amount,

with interest, to its customers. *Id.* at 102-5. Finally, in response to the issues raised in *Dreyer*, the Commission concluded that the *Dreyer* court "specifically did not determine whether the filed rate doctrine limited the Commission's remedial authority, and left the existence and scope of our remedial authority for our final determination" and that "the Commission not only has jurisdiction, but *primary* jurisdiction to remedy harm, if any, to customers in the circumstances of this case." *Id.* at 50.

The OPUC's decision in Order No. 08-487 regarding how to correct the erroneous inclusion of a return on investment for Trojan, while still ensuring that overall rates during the relevant period were just and reasonable, is within its discretion. This court must uphold OPUC Order No. 08-487 if it correctly applied the applicable law, is supported by substantial evidence, and is within the Commission's scope of discretion. ORS 183.482(8). OPUC Order No. 08-487 meets these criteria—the Order applies the law to the substantial evidence, and demonstrates a rational relationship between the facts and legal conclusions in a way that allows the court to determine that the OPUC's reasoning was rational and within its authority.

2. URP's and CAPs' requested remedies, if granted by this Court, would serve to harm ratepayers and disturb sound legal principles and long-standing policy.

URP and CAPs are focused solely on the outcome of this particular case, and have not considered the broader consequences of the remedies they seek.

In contrast, in its statutory role as the consumer advocate, CUB must consider the effect that adopting URP's and CAPs' remedies might have on other cases and the system as a whole.

A. If an unlawful charge were levied to the utility's disadvantage, ratepayers would be hit with surcharges.

If URP's and CAPs' remedies are granted by this Court, ratepayers would be at risk for bearing the financial burden in potential future proceedings in which the OPUC commits a legal error to the disadvantage of the utilities. This is because if URP's and CAPs' approaches were adopted, utilities would likely challenge many more ratemaking decisions in court seeking damages (likely in the form of customer surcharges) from ratepayers whose rates were even slightly lower because of an allegedly erroneous decision of the OPUC. This is of great concern to CUB because customers have less financial and other resources than utilities. If the courts are going to adopt a position that allows for review and revision of decisions, which are otherwise within the OPUC's discretion to decide, then utilities will be able to more easily influence the direction of utility law in this state. This is because utilities will be the only ones able to regularly file appeals – the expense would simply be too great for consumers to bear. Acceptance of the positions pushed by URP and the CAPs will result in a review structure that, in the future, favors the party with the deep pockets - the utilities.

In contrast, if the method used by the OPUC, which focuses on whether overall rates are just and reasonable, as well as lawful, is upheld, then a utility which questioned the legality of some aspect of the overall rate would have no guarantee that a court ruling that finds a legal error in ratemaking would result in the collection of damages. Utilities would thus have less incentive to challenge every slightly unfavorable rate order of the OPUC. Accordingly, under the OPUC interpretation, both utilities and ratepayers have assurance that the ultimate goal in ratemaking is fair and reasonable rates, not retroactive rebalancing with damages to the injured party.

B. Ratemaking is a complex and interdependent process.

In arguing for review of only a single erroneous element of a rate, URP and CAPs ignore the complexity of ratemaking and the interdependency of each component of "overall rates." CAPs argue that the court should focus on one component of the "rate" rather than focusing on whether "overall rates" are just and reasonable once the legal error is corrected. CAPs Opening Brief at 13; *see also* URP's Opening Brief at 50. They argue that the *Trojan I* court invalidated a single "rate," and therefore the Commission should conduct proceedings to remove just that single rate from "overall rates" in order to provide a remedy to ratepayers. *Id.*

Here is a small group of consumers who seek to obtain damages through single-issue ratemaking. CUB too has been accused of requesting single-issue

ratemaking, *In re Portland General Electric Company*, OPUC Docket UE 180/UE 184, Order No. 08-118, 3-4 (Feb. 14, 2008), but generally argues against single-issue ratemaking for utilities. *In re Northwest Natural Gas Company*, OPUC Docket UG 221, Order No. 12-437, 63 (Nov. 16, 2012); *In re PacifiCorp*, OPUC Docket UE 245, Order No. 12-409, 4-5 (Oct. 29, 2012). Utilities do not like regulatory lag and want rate recovery to happen at light speed with the result that they try to file for single investments outside of general rate cases. CUB does not support this kind of single-issue ratemaking because it makes it impossible to review rates holistically to find trade-offs – places where the utility has generated savings and should not therefore need to file for a one-sided increase in rates. Additionally, the Commission itself has found that single-issue ratemaking is prohibited. *City of Portland v. Portland General Electric Company*, OPUC Docket UM 1262, Order No. 06-636,18 (Nov. 17, 2006) ("The Commission does not engage in single issue ratemaking" (internal citation omitted)). CAPs and URP, in arguing for single-issue ratemaking for customers, would preclude the Commission from balancing the interests of the utilities' investors and its ratepayers.

Ratemaking is complex, and the factors that determine rates are interdependent; balance must be found. Ratemaking does not occur in absolute terms, where hundreds or even thousands of "individual rates" comprise an "overall rate" that simply equals the sum of each individual rate. Rather, rates

are set prospectively, which means that participants in ratemaking proceedings use estimates for nearly every aspect of the components that go into rates (i.e. financial risk, employment numbers, pensions, etc.). Parties to a ratemaking proceeding may have very different views on the best estimate for the components that ultimately make up overall rates. *See e.g.* OPUC Order No. 12-437 at 4-16 (discussing parties' differing positions on return on equity, a component of revenue requirement). Therefore, whether a case results in a settlement in which the parties balance out the individual parts to reach an overall revenue requirement they believe to be just and reasonable or whether the parties litigate their positions before the Commission, the Commission is charged with ensuring that overall rates are just and reasonable, and that they provide a balance between the investor and the ratepayer. In all cases, any single "rate" approved will necessarily depend, to some extent, on other approved "rates" because of the Commission's responsibility to ensure that rates are just and reasonable. In ratemaking, the whole is greater than the sum of the parts. *See Sabin*, 21 Or App at 224 (stating that the OPUC "is not obligated to employ any single formula or combination of formulas to determine what are in each case 'just and reasonable rates'").

Both the Oregon and federal courts recognize this concept. As noted by the Court of Appeals in this case, "Oregon's focus on determining whether the end result of ratemaking—the rates themselves—is valid [and] consistent with

federal ratemaking." *Gearhart v. PUC*, 255 Or App at n. 2 (citing *Hope*, 320 US at 602) (stating that if the total effect of the rate order is not unjust or unreasonable, "the fact that the method employed to reach that result may contain infirmities is not then important"). Because of the complex nature of ratemaking, it is a task best left to the regulatory body charged with this expertise rather than a court of general jurisdiction. *Sabin*, 21 Or App at 214 (holding that the legislature provided the OPUC with the broadest grant of authority "commensurate with that of the legislature itself" to carry out its regulatory and ratemaking functions).

Allowing courts to isolate one element of ratemaking, quantify the "damage," and award it to an allegedly harmed party would undermine the OPUC's authority to set and determine rates—exclusive authority granted to it by the legislature. *Dreyer*, 341 Or at 265. As recognized by the Court of Appeals, such a ruling would effectively put courts in the position of ratemaking:

> Specifically as to ratemaking by the PUC, the Supreme Court has noted that it is the legality of the end result of the ratemaking process, and not the legality of each calculation or input used during that process, that controls. In ratemaking, the PUC must exercise its discretion in balancing a multitude of factors and many economic considerations in order to determine the appropriate rates. The judiciary's role is to ensure that the process is proper and that the result meets the broad goals that ORS 756.040 establishes for utility rates. As discussed above, there is no single correct rate, but rather a range of just and

> reasonable rates, and the selection of a rate within that range is within the PUC's discretion.

Gearhart v. PUC, 255 Or App at 94.

C. Intergenerational Equity requires that OPUC Order No. 08-487 be upheld.

If adopted, URP's and CAPs' method of awarding damages would also potentially affect intergenerational equity. Intergenerational inequity occurs when there is an interperiod mismatch of costs and benefits whereby current ratepayers would subsidize future ratepayers. *See In re Portland General Electric Company*, OPUC Docket No. UE 126, Order 02-633, 4, 220 PUR 4th 110, 114 (Sept. 12, 2002). Intergenerational inequities are generally avoided in ratemaking so that the responsibility for cost recovery from past, present and future ratepayers is fair and based upon each generation paying its fair share. OPUC Order No. 08-487 at 66. URP's and CAPs' proposed method of awarding damages, which guarantees damages for an error of law made by the OPUC, would virtually guarantee that a different generation of ratepayers (today's ratepayers) will benefit from the refund of any prior overpayment.

V. CONCLUSION

As discussed above, from both a legal and policy standpoint, the holding of the Court of Appeals should be upheld.

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Respectfully Submitted,

s/ G. Catriona McCracken

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G. Catriona McCracken 933587
Sommer Templet 105260
Ray Myers 803208
Citizens' Utility Board of Oregon
610 SW Broadway, Suite 400
Portland, OR 97205
Telephone: (503) 227-1984
catriona@oregoncub.org
sommer@oregoncub.org
raymye5@msn.com
Attorneys for *Amicus Curiae*
Citizens' Utility Board of Oregon

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s/ G. Catriona McCracken

_____

G. Catriona McCracken 933587
Sommer Templet 105260
Ray Myers 803208
Citizens' Utility Board of Oregon
610 SW Broadway, Suite 400
Portland, OR 97205
Telephone: (503) 227-1984
catriona@oregoncub.org
sommer@oregoncub.org
raymye5@msn.com
Attorneys for *Amicus Curiae* Citizens' Utility Board of Oregon

PROOF OF SERVICE

I hereby certify that I filed the foregoing Corrected *Amicus Curiae* Brief of Citizens' Utility Board of Oregon with the State Court Administrator, Appellate Records Section by using the Oregon Appellate eFiling system on January 28, 2014.

I further certify that on January 28, 2014, I served the foregoing Corrected *Amicus Curiae* Brief of Citizens' Utility Board of Oregon upon the following by Electronic Filing (for registered eFilers) and by US Mail (for those not registered as eFilers):

Linda K. Williams 784253
Linda K. Williams PC
10266 SW Lancaster Rd.
Portland, OR 97219
Telephone: (503) 293-0399
linda@lindawilliams.net
Attorney for Petitioners, Petitioners on Review Class Action Plaintiffs, Gearhart, *et al*.

Daniel W. Meek 791242
Attorney at Law
10949 SW Fourth Ave., Suite 1000
Portland, OR 97219
Telephone: (503) 293-9021
dan@meek.net
Attorney for Petitioner, Petitioner on Review Utility Reform Project

Michael A. Casper 062000
Denise G. Fjordbeck 822578
Oregon Department of Justice
1162 Court St., Suite 400
Salem, OR 97301
Telephone: (503) 986-4402
michael.casper@doj.state.or.us
denise.fiordbeck@doi.state.or.us
Attorneys for Respondent Oregon Public Utility Commission

James N. Westwood 743392
Rachel C. Lee 102944
Stoel Rives LLP
900 SW Fifth Ave., Suite 2600
Portland, OR 97204
Telephone: (503) 224-3380
jnwestwood@stoel.com
rclee@stoel.com
Attorneys for Intervenor, Intervenor Respondent Portland General Electric Company (PGE)

Katherine A. McDowell 890876
Lisa Rackner 873844
McDowell Rackner & Gibson PC
419 SW 11th Ave., Ste. 400
Portland, OR 97205
Telephone: 503-595-3924
katherine@mcd-law.com
lisa@mcd-law.com
Attorneys for *Amici Curiae* Avista Corporation, Idaho Power Company, Northwest Natural Gas Company, and PacifiCorp ("Joint Utilities")

Scott Seidman
Tonkon Torp LLP
888 SW 5th Ave., Ste. 1600
Portland, OR 97204
Telephone: 503-802-2021
scott.seidman@tonkon.com
Attorney for *Amicus Curiae* Edison Electric Institute

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s/ Sommer Templet

G. Catriona McCracken 933587
Sommer Templet 105260
Ray Myers 803208
Citizens' Utility Board of Oregon
610 SW Broadway, Suite 400
Portland, OR 97205
Telephone: (503) 227-1984
catriona@oregoncub.org
sommer@oregoncub.org
raymye5@msn.com
Attorneys for *Amicus Curiae* Citizens' Utility Board of Oregon