IN THE SUPREME COURT OF THE STATE OF OREGON

FRANK GEARHART; PATRICIA MORGAN; and KAFOURY BROTHERS, INC.,
Petitioners,
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,
Petitioners on Review,

and

UTILITY REFORM PROJECT,
Petitioner,

v.

PUBLIC UTILITY COMMISSION OF OREGON and PORTLAND GENERAL ELECTRIC COMPANY,
Respondents,
Respondents on Review.

Public Utility Commission of Oregon
08487, 09093

Court of Appeals
A140317

S061517 (Control)

REPLY BRIEF OF UTILITY REFORM PROJECT ON REVIEW

FRANK GEARHART; PATRICIA MORGAN; and KAFOURY BROTHERS, INC.,
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This brief shows only those outline headings from the URP Opening Brief on Review [hereinafter "URP OB Review"] where respondents have offered argument.

I. STATEMENT OF THE CASE.

A. LEGAL QUESTIONS PRESENTED IN THE URP PETITION FOR REVIEW.

The Brief on the Merits of Respondent on Review PUC [hereinafter "PUC-ABR"] (pp. 2-3) offers incorrect questions for review. PUC had no authority, and ***Dreyer v. Portland General Electric Co***., 341 Or 262 (2006) [hereinafter "***Dreyer***"] did not authorize or direct the PUC, to "determine the extent to which PGE's customers were harmed by its erroneous 1995 rate order." See pages 9-10, *post*.

As for the PUC's second question, the PUC in ***Citizens' Utility Board. v. PUC***, 154 OrApp 702, 962 P2d 744 (1998), *review dismissed*, 335 Or 91, 58 P3d 822 (2002) ("***Trojan I***") told the courts that Order 95-322 itself had allowed "interest" on the Trojan investment balance (TIB).

> Instead of allowing the utility to recover its entire undepreciated investment all at once, the total amount of remaining capital investment is paid over time, in the equivalent of installments plus interest on the balance.

Reply Excerpt of Record and Appendix ("Rep App"-20). PGE has repeatedly agreed that Order 95-322 (reversed in ***Trojan I***) allowed "interest" on the TIB. PGE told this Court:

> Third, the order [Order 95-322] allowed a return, that is, interest at a Commission-determined rate, on the deferred balances of the recovery.

Petition for Review of PGE (in ***Trojan I***), Rep App-4. PGE told the Court of Appeals in ***Trojan I*** that the question on appeal was "(1) * * * may the Commission defer that recovery with interest on deferred balances?" Combined Brief and Abstract of Record of PGE, ***Trojan I*** (Rep App-9). PGE then characterized Order 95-322 numerous times as having allowed "interest" on the TIB. Rep App-9-17. Order 08-487 again allows "interest" on the TIB, in violation of ***Trojan I***.

B. HISTORY OF THE CASES AND PROCEDURAL FACTS.

PUC-ABR (pp. 12, 15) misstates the position of URP in ***Trojan I***. URP argued both that Trojan return <u>on</u> investment was unlawful and that Trojan return <u>of</u> investment was unlawful.

Both PUC-ABR (pp. 6, 15-16, 24, 44) and the Answering Brief of PGE (on review) [hereinafter "PGE-ABR"] (pp. 10, 11, 79) offer incorrect descriptions of the UM 989 "settlement," not agreed to by URP, which did not remove the Trojan return <u>on</u> investment charges to ratepayers. This was demonstrated at URP OB Review (pp. 72-79); URP Opening Brief [hereinafter "URP-OB"] (pp. 41-50). Neither PUC nor PGE have responded to any of the specific reasons showing that the UM 989 "settlement," adopted in Order 02-227, continued to include Trojan return <u>on</u> investment and were thus both (1) unlawful and (2) not "just and reasonable,"[1] contrary to the assertions at PUC-ABR, pp. 17-18. PUC also

1. URP did argue that the UM 989 rates, adopted in Order 02-227 and (continued...)

misstates the Marion County Circuit Court holding, which was that PUC had authority to order a refund, not authority to retroactively redetermine rates.

As for the "legitimate ways" to decide the question of damages (PUC-ABR, pp. 16-17), ***Dreyer*** was referring to the methods available to a jury, not the methods available to the PUC.

PGE-ABR (p. 2) resurrects its argument that ORS 757.355 applies only to "CWIP," not to abandoned plants that had ever been in service, which was made at length and rejected in ***Trojan I***. 54 OrApp at 708-11.

PGE-ABR (p. 3) claims that ***Dreyer*** "sent everything to the PUC, to use its primary jurisdiction to sort out and resolve all the issues in the pending matters." ***Dreyer*** contains no such statement. It abated the class actions to allow the PUC to determine whether it could or would provide a remedy to ratepayers for the "improperly calculated and unlawfully collected rates," 341 Or at 285. ***Dreyer*** did not authorize the PUC to perform other functions, such as determining whether ratepayers were harmed by the unlawful rates, as the PUC-ABR and PGE-ABR and repeatedly claim. See pages 9-10, *post*.

PGE-ABR (p. 13) incorrectly claims that the ***Gearhart*** Majority Opinion "discusses every material argument advanced by Petitioners." It did not address any of the specific arguments regarding the UM 989, Order 02-227 rates, nor any of the arguments discussed by:

1.(...continued)
remanded by ***Utility Reform Project v. OPUC***, 215 OrApp 360, 170 P3d 1074 (2007) ("***Trojan II***").

(1) URP OB Review, pp. 75-79; URP Petition for Review, Exhibit 1; or

(2) the CAPs Opening Brief on Review [hereinafter "CAPs OB Review"], pp. 31-32; CAPs Petition for Review, Exhibit 1.

PGE-ABR (p. 13) notes that URP did not move to disqualify Judge Nakamoto from the ***Gearhart*** panel. Her role representing PGE in the ***Lezak, et al. v. PGE*** litigation in 2005-07 was apparently limited to reviewing documents for PGE. URP counsel never encountered her in person or by phone, and he received one email from her. He did not remember that she had represented PGE until ***Gearhart*** was decided.

C. STANDARDS OF REVIEW.

PGE-ABR (p. 6) claims that the PUC's methodology for "determining customer harm * * * receives the narrowest judicial review." But "determining customer harm" from past unlawful rates is not within the authority of the PUC and was not assigned to the PUC by ***Dreyer***. See pages ?-9, *post*.

PGE-ABR (pp. 16, 20-21) incorrectly implies that ORS 183.482(7) means that the agency is free to define the scope of its own discretion--i.e., define its own powers. To the contrary, the PUC-asserted scope of its statutory powers is reviewed for legal error, as it involves determining whether the agency's exercise of discretion was "outside the range of discretion delegated to the agency by law" or "in violation of a constitutional or statutory provision." ORS 183.482(8)(b).

PGE-ABR (pp. 17-18) states that Order 08-487 implemented the delegative statutes ORS 757.210 and ORS 756.040(1) in, for example, awarding PGE 7.09%

"interest" on the TIB. ***Trojan I*** (154 OrApp at 716-17) concluded that "the general grants of authority in ORS 756.040 and other general statutes do not empower PGE to charge or PUC to approve rates of a kind specifically contrary to the limitations in ORS 757.355 and ORS 757.140(2)." Here, URP and CAPs arguments are again based on PUC violations of specific statutes, as well as legal doctrines (such as law of the case, issue preclusion, and the lawful scope of issues upon remand), from which ORS 757.210 and ORS 756.040(1) do not exempt PUC.

Regarding the standard of review applied in ***Gearhart*** to the UM 989 Phase 3 Remand Period (URP-OB, pp. 41-50; URP OB Review, pp. 72-79), the Majority Opinion refused to address any of the substantive URP arguments that:

1. Those rates violated ORS 757.355, for several separate reasons (including the cancellation of at least $161.9 million of return-bearing accounts PGE owed to ratepayers, the diversion to PGE of $33.6 million in rebates on nuclear insurance policies for which ratepayers had paid the premiums, and the imposition of a new $47.4 million liability on ratepayers to recompense PGE for "income taxes" that it never paid).

2. That portion of Order 08-487 lacked any rational stated bases, was not supported by evidence in the record, and was often contradicted by the evidence in the record.

3. PUC procedural error precluded the presentation of evidence on central issues.

The Majority Opinion disposed of all of those issues, and more (URP OB Review, pp. 75-79), solely on the misconception that "they relate to issues of substantial evidence and of the PUC's discretion in ratemaking." 255 OrApp at 103. The briefs to the Court of Appeals demonstrate that is incorrect. The Majority Opinion

declined to examine any of the specific arguments made by URP that the UM 989 rates were unlawful, lacked rational bases, and lacked evidence in the record. The standard of review applied was this:

> It is apparent from PUC Order No. 08-487 and the record on remand that the PUC considered briefing and materials from all parties and PUC staff and that the PUC fully considered URP's arguments on remand and rejected them.

255 OrApp at 104. Thus, according to the Majority Opinion, it is sufficient that the PUC merely "considered URP's argument." That is not the standard of review applicable to agency decisions in contested cases.

D. IDENTIFICATION AND PRESERVATION OF ERRORS.

1. NEW ISSUES RAISED FOR FIRST TIME BY PGE.

PGE-ABR (pp. 38-43) offers two entirely new issues on appeal:

a. Whether simply removing the unlawful charges from the 1995-2000 rates would result in "confiscatory" rate in violation of the Oregon and U.S. Constitutions; and

b. Whether a "court-dictated rate would be unconstitutional."

These were not raised to the Court of Appeals and are thus waived. ***State v. Burgess***, 352 Or 499, 508, 287 P3d 1093 (2012).

Nor did any party raise either issue in the PUC remand dockets, so the issues are further waived and not preserved. ***Lake County v. Teamsters Local Union #233***, 208 OrApp 271, 277-78, 145 P3d 187 (2006). They are also precluded by the requirement of exhaustion of administrative remedies. ***Trujillo v. Pacific Safety Supply***, 336 Or 349, 367-68, 84 P3d 119 (2004).

Also, confiscation is not an issue for which this Court accepted review in this case. PGE could have suggested in it a response to the Petitions for Review but did not. Also, whether rates are confiscatory requires findings of fact on several issues, such as whether the utility would have "sufficient operating capital," etc. The PUC never made such findings. It would also require examination of PGE's actual profits during the 1995-2000 period (far exceeding its 9.6% authorized rate of return), which URP presented in the agency proceeding with evidence the PUC refused to hear. See URP-OB, pp. 35-36; Additional Appendix of Petitioners ("Add App"-10-15, incorporating AR Item 293). Those tables (column 5) show that PGE actually earned rates of return of 12.34% in 1995, 11.5% in 1996, 11.34% in 1997, 10.34% in 1998, 8.89% in 1999, and 9.66% in 2000 on ratebases that included the TIB. And even those rates of return are understated by the $86.x million per year PGE charged ratepayers for "income taxes" that in fact were never paid to any government.

Curiously, the PGE-ABR (pp. 41-42) argues for imposition of a filed rate doctrine to ban refunds of previously charged rates, a position it and PUC have expressly disavowed.

2. ALL ISSUES RAISED BY URP AND CAPs WERE PRESERVED.

The PUC Answering Brief to the Court of Appeals [hereinafter PUC Answer"] (pp. 17, 29) acknowledged that both URP and CAPs raised and preserved at the agency level all issues in its brief that could have been preserved.

URP-RB, pp. 6-7. The URP and CAP Opening Briefs on Review raise no different issues.

PUC-ABR (p. 53) claims one unpreserved issue by CAPs. That is not an "issue" but additional authority for the continuously-argued issue on whether the PUC had authority to order a refund.

PGE-ABR (p. 16) offers a strange list of allegedly unpresented URP assignments of error. PGE claims to have identified those issues as unpreserved in the PGE Answering Brief to the Court of Appeals (pp. 29-30), but it did not.

URP obviously objected to the PUC's consideration of "new evidence" on remand. Opening Brief of URP and CAPs to PUC (Phase 1) (November 9, 2005) raised the "new evidence" objection many times (pp. 1-11, 43) (Review ER-33-43, 75). They also raised that issue in motions during the contested case proceeding. They further objected to the bias in admitting PGE's evidence of "future facts" while rejecting all of that offered by URP or CAPs. *Id.*, pp. 28-36 (Review ER--60-68.[2]

As for "PUC's Treatment of Transition Between 1995-2000 and 2000-2001 Periods," no such issue could be raised before the agency, because the offending treatment (and accompanying calculation errors and refunding to the wrong cohort of ratepayers) were adopted *sua sponte* by Order 08-487. The discovery issues regarding "implementation of relief" were extensively presented in the agency proceeding.

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2. The issue of "future facts" evidence is addressed at page 40, *post*.

As for "PUC's Treatment of 2000-2001 Period," there is no such period identified in the URP OB Review. If PGE means the UM 989 remand Phase 3 Period, every argument presented in the URP OB Review was presented to the PUC, twice: once in the original UM 989 rate case in 2000-01 and again in Phase 3 of the remand dockets.

E. SUMMARY OF ARGUMENT.

1. *DREYER* DID NOT AUTHORIZE PUC TO DECIDE WHETHER RATEPAYERS WERE HARMED BY THE UNLAWFUL RATES.

PUC and PGE again repeatedly misstate the content of ***Dreyer***, claiming that it directed or authorized PUC to determine whether ratepayers had been harmed or injured by the 1995-2000 unlawful rates for Trojan investment. See PUC-ABR (pp. 2, 4, 5, 8, 19, 20, 23, 25, 32, 37, 40, 41. 50); PGE-ABR (pp. 1, 5, 6, 13, 14, 22, 23, 24, 33, 34, 49, 52, 70, 71-72, 73). The PGE response in particular is an adventure in ellipses. Both of the briefs offer truncated snippets of language out of context; neither present the full actual language in ***Dreyer***, which clearly disproves their assertion.

Here, again, is the full passage from ***Dreyer*** (341 Or at 285):

> Although plaintiffs vigorously deny it, the PUC proceeding that is underway thus has the potential for disposing of the central issue in these [class action] cases, viz., the issue whether plaintiffs [in the class action cases] have been injured (and, if they have been, the extent of the injury). In that regard, we note that the PUC has been instructed either to revise and reduce rates to offset the previous "improperly calculated and unlawfully collected rates" or to order PGE to issue refunds. Depending on how the PUC responds to that remand, some or all plaintiffs' claimed injuries may cease to exist.

As stated in the CAPs Reply Brief [to Court of Appeals] (pp. 10-11):

> ***Dreyer*** certainly does not state that the Commission is to determine whether the ratepayers have been injured. Instead, it states that whether the ratepayers remain harmed is a function of what the OPUC does in the remand proceeding. It states, "Depending on how the PUC responds to that remand, some or all plaintiffs claimed injuries may cease to exist." That is true. If, pursuant to OPUC order, PGE were to refund to those ratepayers all the money "to offset the previous 'improperly calculated and unlawfully collected rates,'" (referring to the 1995-2000 rates found unlawful in ***Trojan I***), then damages for their injuries may cease to exist.[3] But that does not authorize the PUC to determine whether or to what extent ratepayers have been injured or to declare that no injury has occurred to the Phase 1 Period ratepayers. Order 08-487 declares that the Phase 1 Period ratepayers were not harmed (because the original Order 95-322 rates were "just and reasonable") and provides them zero relief.

The $37.5 million in refunds did not go to the Phase 1 Period cohort of ratepayers; it went to the Phase 3 period ratepayers.

PGE-ABR (p. 24) states that "PUC had to apply a ratemaking template (to determine rate adjustment or a refund, if customers were harmed" of (p. 76) "to determine whether or to what extent Petitioners had been injured." Calculating an amount of past unlawful charges may involve mathematics but is not "ratemaking," as ***Dreyer*** recognized. 341 Or at 282. It not a function of PUC to use hypothetical rate cases to declare whether customers have been harmed by any act prohibited by ORS chapter 757. That is the function of the court in an action under ORS 756.185, which is to determine "the amount of damages sustained in consequence of such violation." Order 08-487 seeks to nullify the opportunity for

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3. CAPs do not concede that the measure of damages in the class actions is necessarily "injury" to ratepayers; it may be measured by unjust enrichment of PGE or statutory damages under ORS 756.185.

such judicial determination by declaring that the 1995-2000 ratepayers suffered no damages.

2. OTHER ISSUES.

PUC-ABR (p. 5) claims that, if it had not authorized unlawful Trojan return on investment in Order 95-322, then it would actually have authorized "somewhat *higher* rates during the period from April 1995 to September 2000." In other words, PUC did PGE ratepayers a favor by adding $26 to $34 million per year in Trojan return on investment to their electric bills. ER-72.

PUC claims that the PUC's error in adding those unlawful charges "had simultaneously influenced several different aspects of its 1995 rate analysis." First, there is nothing in Order 95-322 stating that the PUC decided those other aspects because it had allowed Trojan return on investment. Second, those other determinations were not challenged in the ***Trojan I*** appeal and thus were not available for reexamination and redetermination upon remand. See URP-OB, pp. 17-19, 38-44; CAPs OB Review, pp. 47-70. See also the discussion of Plan A and Plan B at pages 38-39, *post*.

For example, contrary to PUC-ABR (pp. 6, 20-21), there is nothing in Order 95-322 stating that PUC chose a 17-year recovery period because PUC allowed Trojan return on investment. That number was the remaining portion of the original expected operating life of Trojan. There is no basis for the statement (PUC-ABR, p. 7) that "the PUC would have issued a rate order permitting PGE to recover its Trojan costs more quickly than it had been."

Regarding the PUC-ABR assertion that "The net effect of all those adjustments on rates between 1995 and 2000 was essentially a wash," that depends on allowing $172.8 million of "interest" on the TIB (at 7.09%), as of 2008, to be charged to ratepayers during that period, as well as retroactively changing numerous other aspects of Order 95-322 that no one appealed.

PGE-ABR (p. 6) mischaracterizes the dissent in ***Gearhart*** (J. Schuman), which disagreed both with the PUC's attempt to measure ratepayer injury "and the nature of any remedy that the PUC could provide." 255 OrApp at 106. He also recited several of other legal issues and arguments of URP and CAPs and expressed his agreement with them. 255 OrApp at 107-09.

PGE-ABR (p. 7) seeks to reintroduce the argument, rejected in ***Dreyer*** "on a number of grounds," 341 Or at 780, that Order 95-322 was superseded by other PUC rate orders in 1995 and 1996. ***Dreyer*** concluded that the superseding rate orders "retained the rate treatment that previously had been approved (and was thereafter was excluded from the decision-making process)." So there was no need, as PGE suddenly now claims (p. 7) "to reopen the record to re-examine those rate orders as well." And Order 08-487 retroactively redetermined rates for the entire 1995-2000 period, including when those other PUC rate orders were in effect.

II. ASSIGNMENT OF ERROR: ORDER 08-487'S DECISIONS REGARDING THE UE 88 REMAND (PHASE I) ARE SUBSTANTIVELY UNLAWFUL.

A. THE PUC'S ORDER ERRED IN ALLOWING CONTINUED POST-CLOSURE TROJAN RETURN ON INVESTMENT IN THE FORM OF "INTEREST."

B. THE MAJORITY OPINION CONTRADICTS THE LAW OF THE CASE, AS ESTABLISHED BY THE OREGON SUPREME COURT, AS WELL AS THE STATUTES INVOLVED.

1. *TROJAN I* CONCLUDED THAT ORS 757.355 BANS "INTEREST" ON CLOSED PLANTS.

PUC-ABR (pp. 44-46) addresses this issue. PUC-ABR misstates our position as reading ***Trojan I*** as "prohibiting PGE from recovering interest on any Trojan-related funds." Our point is the ORS 757.355, combined with ORS 757.140(2), prohibits charging ratepayers for post-closure Trojan investment any more than the "amounts on the utility's books of account which the commission finds represent undepreciated investment in a utility plant." ORS 757.140(2). We assume "Trojan-related funds" means Trojan investment balance (TIB).

PUC-ABR (p. 38, 44) suggests that the Court "affirm the Court of Appeals' interpretation of its own opinion," as expressed in the Majority Opinion. PGE-ABR (p. 43) argues the same. But ***Trojan I*** was not just a Court of Appeals mixed panel opinion, as is ***Gearhart***. ***Trojan I*** survived Supreme Court petitions for review and was reaffirmed as the law of the case in ***Dreyer***, 341 Or at 270. As for ***Finear v. Finear***, 351 Or 480, 273 P3d 103 (2012), PGE cites only a one-justice dissenting opinion as if it were an opinion of this Court. The case cited by

the dissent refers to the denial of a petition for review, not the dismissal of a previously granted petition for review.

PUC-ABR (pp 8-9, 45) repeats its arguments about "time value of money" and "present value," all of which were presented and rejected in ***Trojan I***. See URP OB Review, pp. 28-32.

The key here is to read ***Trojan I*** and the actual applicable statutes. ORS 757.355 stated:

> 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. [1979 c.3 § 2]

ORS 757.140(2) states:

> (2) In the following cases the commission may allow in rates, directly or indirectly, amounts on the utility's books of account which the commission finds represent undepreciated investment in a utility plant, including that which has been retired from service:
>
> (a) When the retirement is due to ordinary wear and tear, casualties, acts of God, acts of governmental authority; or
>
> (b) When the commission finds that the retirement is in the public interest.

These statutes do not allow the utility to charge ratepayers a "time value of money" or the "present value" of investment in abandoned plant. They allow only the amount of "undepreciated investment in a utility plant" "on the utility's books of account." As noted at URP OB Review (pp. 34-35), those books never show a "time value of money" or the "present value" of the investment. They show the

principal balance of the investment, as recognized in ***Trojan I***, 154 OrApp at 713-14:

> It makes no difference whether the profit is called "interest" instead of a "return." We conclude that, read together, ORS 757.140(2) and ORS 757.355 allow only the principal amount of the undepreciated investment to be recovered through rates.

Contrary to PUC-ABR (p. 8), ***Trojan I*** never used the phrase "full value" or even "value" of the principal investment.

Order 08-487 did not conclude "undepreciated investment in a utility plant" "on the utility's books of account" could itself include profit or interest. It expressly added "interest" on top of the "undepreciated investment." Nor did the PUC or PGE briefing to the Court of Appeals in ***Gearhart*** assert that "undepreciated investment" could include profit or interest. Yet, that was the *sua sponte* legal conclusion of the Majority Opinion.

Of course, PUC and PGE now seek to defend this new conclusion of law. But it was necessarily rejected in ***Trojan I***, because it was there extensively argued by the parties, including PUC and PGE, in their ***Trojan I*** briefs in 1997. See Reply Brief of URP in ***Trojan I*** (February 28, 1997), pp. 5-13 [hereinafter "URP ***Trojan I*** Reply Brief"] (Reply Review App-2-10). Since ***Trojan I*** necessarily rejected these PUC and PGE arguments, their invalidity became the law of the case (when ***Trojan I*** survived review by this Court and was endorsed in ***Dreyer***). ***Trojan I*** necessarily rejected the PUC/PGE arguments, because accepting them would have caused ***Trojan I*** to approve Order 95-322 instead of reversing it.

Neither profit nor interest is part of "undepreciated investment in a utility plant" "on the utility's books of account." That was demonstrated in detail by the URP ***Trojan I*** Reply Brief, *supra*, pp. 7-13 (Reply Review App-4-10).[4] PGE-ABR (p. 63) asserts that "***Trojan I*** held nothing about books of account." Yes, it necessarily did, because that phrase prominently appears in ORS 757.140(2). As for the specific arguments about FERC accounts (18 CFR Part 101), ***Trojan I*** declined to "reach that argument," because it found the statutes abundantly clear even without it. 154 OrApp at 714 n7.

The cases cited by PUC-ABR (p. 45) are addressed at Reply Brief of Petitioner Utility Reform Project (to the Court of Appeals) [hereinafter "URP-RB"], p. 11. ***Till v. SCS Credit Corp***, 541 US 465 (2004) is irrelevant, as it involves a federal law that requires a debtor in bankruptcy to provide to creditors a "value, as of the effective date of the plan, * * * not less than the allowed amount of such claim." Its legislative history specified that the property to be distributed is "of a present value equal to the allowed amount of the creditor's secured claim." House Report No. 109-31 (Part I), 2005 US Code Cong and Adm News, p. 88. Neither ORS 757.355 nor ORS 757.140(2) refers to the "value" of "present value" of the investment. ORS 757.140(2) refers to the "amounts [of] undepreciated investment in a utility plant."

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4. URP requests judicial notice of all documents included in the Reply on Review Appendix (paginated as "Reply Review App"). These are documents from the ***Trojan I*** litigation and are readily verifiable.

PUC-ABR (p. 46) refers to "whole value of that principal," which is also contrary to ORS 757.140(2). As for the PUC's "rate shock" scenario, no one appealed from the conclusion of law of the Circuit Court that "The PUC could not legally authorize immediate recovery of all of PGE's remaining undepreciated investment in Trojan." Reply Review App-16. And none of the rationales offered by PUC-ABR (p. 46) were in any way offered or briefed by the parties at the agency proceeding, because no parties advocated allowing "interest" on the TIB (having correctly concluded that such "interest" was forbidden by ***Trojan I***). See Order 08-487, p. 67:

> All of the parties * * * interpret the decision in ***Trojan I*** as * * * also prohibiting the Commission from giving PGE the time value of money if the Commission required PGE to recover the remaining investment over time rather than immediately.

PGE-ABR (pp. 52-63) addresses this issue. PGE-ABR (p. 52) begins by again incorrectly asserting that ***Dreyer*** "acknowledges the PUC's primary jurisdiction to determine * * * "whether plaintiffs have been injured." There is no such statement in ***Dreyer***; see pages 9-10, *post*. The words "far superior" are also taken out of context. They refer to the PUC "determining that remedy" for the "improperly calculated and unlawfully collected rates," 341 Or at 285, not determining the existence of harm or injury to ratepayers.

PGE-ABR (p. 52) then asserts that the PUC's "formula utilized a time value of money to achieve the return *of* the Trojan principal." This assertion does not appear anywhere in Order 08-487 and is certainly not a PUC finding or

conclusion. No party asserted it in the remand dockets or in briefs to the Court of Appeals in ***Gearhart***.

PGE-ABR (pp. 53, 58) claims URP did not argue about the accuracy of 7.09% interest on the TIB. There was no reason to argue about it; any amount of interest on the TIB violates ORS 757.355. Further, it was impossible for URP to contest the 7.09% interest (or any other amount of "interest") at the PUC, because adding "interest" to recovery of the TIB was never raised by any party in the remand dockets prior to issuance final Order 08-487. That ***Gearhart*** found "substantial evidence to support it," says PGE-ABR, illustrates the actual standard of review applied by the Majority Opinion, since there was no evidence in the record at all on the subject of appropriate "interest rate" to apply to the TIB.

As for PGE-ABR's discussion (pp. 52-66) of "time value of money," "same economic position," "full compensation," and other concepts, none of it is relevant. The only issue is whether interest is part of the "amounts on the utility's books of account which the commission finds represent undepreciated investment in a utility plant, including that which has been retired from service." ORS 757.140(2). ***Trojan I*** went into great detail on this subject and specifically stated that the statute did not allow the utility to charge ratepayers anything for investment in the abandoned Trojan plant, other than the amount of the undepreciated investment on the utility's books of account.

> Correspondingly, PUC's and PGE's arguments that turn on the word "interest" instead of the term "rate of return" also lose sight of ORS 757.355. That statute, as we interpret it, 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." We conclude that, read together, **ORS 757.140(2) and ORS 757.355 allow only the principal amount of the undepreciated investment to be recovered through rates**.

Trojan I, 154 Or App at 713-14 (emphasis added).

As pointed out by URP to the Court of Appeals in ***Trojan I***, the amount on the books of account most certainly does not include "interest" of any sort. Reply Brief of URP, et al. (February 28, 1997), pp. 5-13 (Reply Review App-xxx):

> The OPUC CRCR Brief (p. 13) correctly notes that OPUC Order No. 95-322 addressed PGE's "books of account," ordering PGE to book "all the Trojan plant investment" in FERC Account 182.2. **This proves our point.** At the time OPUC Order No. 95-322 was issued, that amount was $288 million, as the order found. The amount in FERC Account 182.2 has never included any rate of return on the Trojan "undepreciated investment."

Nor has the amount in FERC Account 182.2 ever included any "interest" on the Trojan "undepreciated investment."

PGE-ABR (p. 55) cites ***Osborne v. Biotti***, 533 N.E.2d 1341, 1342-43 (Mass 1989) for a proposition it simply does not contain. Nor is a statute requiring interest on judgments relevant to ORS 757.140(2). And, of course an economist, such as Jim Lazar, knows about present value. He was not testifying about what was allowable in rates under ORS 757.355 and ORS 757.140(2).

PGE-ABR (pp. 57-61) attempts to claim that ***Trojan I*** somehow ruled that only "profits" on the abandoned Trojan plant were unlawful. But ***Trojan I*** actually stated, 154 Or App at 713-14:

> We conclude that, read together, ORS 757.140(2) and ORS 757.355 allow only the principal amount of the undepreciated investment to be recovered through rates.

Trojan I used the terms "profit" and "return on investment" and as a shorthand for amounts in excess of the principal amount of the undepreciated investment. That does not mean that the decision was limited to banning only profits. ***Trojan I*** was abundantly clear that ORS 757.355 and ORS 757.140(2) banned charging ratepayers for any amount in excess of the "undepreciated investment in a utility plant" not providing service, no matter it be labeled "rate of return" or "return on investment" or "profit" or "interest." ***Trojan I***, 154 OrApp at 713-14; see URP OB Review, pp. 26-28.

Trojan I did not merely state that "profit" was banned. PGE-ABR (p. 57) offers a selective quotation from ***Trojan I*** that omits the crucial next sentence and also omits ***Trojan I***'s other statements of its holding that do not use the term "profits" at all:

> It is sufficient here to hold that, reading ORS 757.355 and ORS 757.140(2) together, the rates may not include a return component on undepreciated investment in retired or otherwise unused property.

154 OrApp at 713 n7. ***Trojan I*** also stated:

> Similarly, in this case, ORS 757.355 precludes PUC from allowing rates, of the kind its orders here would allow, that include a rate of return on capital assets that are not currently used for the provision of utility services; ORS 757.140(2) authorizes rates that would reimburse the utility for its principal investment in retired capital assets, but it does not authorize the return on the investment that ORS 757.355 proscribes.

154 OrApp at 716. ***Trojan I*** equated the terms "return on," "profit," and "interest," and concluded that all were prohibited, because all were in excess of "the principal amount of the undepreciated investment."

PGE-ABR does not attempt to refute that both PUC and PGE extensively argued in ***Trojan I*** that the statutes allowed the utility to charge "interest" on the TIB, repeatedly telling the Court of Appeals that Order 95-322 had in fact granted "interest" on the TIB and that the statutes allowed such "interest." They argued that point in their briefs to the Court of Appeals and in PGE's Petition for Review to this Court literally dozens of times. See URP OB Review, pp. 28-32. ***Trojan I***, 154 OrApp at 749-50, expressly rejected their argument that "PGE is *ipso facto* entitled to 'interest' on what amounts to a deferred balance, as a matter of basic financial practice." If it had accepted their argument, it would not have reversed Order 95-322.

PGE-ABR (p. 59) then argues that ***Trojan I*** adopted an interpretation of ORS 757.140(2) that allows "rates *necessary to compensate* utilities for the principal amount of their undepreciated investment." PGE seeks to rend that statement into a conclusion that ***Trojan I*** meant that the utility could charge ratepayers <u>more than</u> the principal amount. There is no indication that ***Trojan I*** intended the term "compensate" to mean anything other than charge or recover. Nor does the word "compensate" mean paying back <u>more than</u> the referenced amount or any specific portion of the referenced amount. The first definition of "compensate" in WEBSTERS 1913 DICTIONARY is "To make equal return to."

And ORS 757.140(2) does not use the term "compensate" but instead restricts what "the commission may allow in rates, directly or indirectly, [to] amounts on the utility's books of account * * *." Further, the new PGE-ABR rationale was not adopted in ***Gearhart***. Nor does ORS 757.140(2) in any way provide for the "present value" of the amount "on the utility's books of account."

PGE-ABR (p. 59) cites ***Thomas v. Senior and Disabled Services Div.***, 319 Or 520, 530, 878 P2d 1081 (1994), which held that the state was entitled to interest on its claim against an estate, after the money became due, pursuant to ORS 82.010(1)(a), a statute that does not apply to PGE here.

PGE-ABR (p. 60) offers a wrong interpretation of ***Trojan I***, easily refuted merely by reading ***Trojan I***, which never used the term "present value" and did not state that the utility could recover the "present value" of abandoned plant investment from ratepayers.

And if PGE thought that the statutes allowed "interest," why did PGE never ask for that in the remand proceedings? PGE abandoned that argument throughout the remand proceedings. PGE-ABR (p. 61) admits that "PGE put forward alternative rate case proposals that simply dealt with the time-value issue in other ways." None of those proposals sought "interest" on the TIB from ratepayers. As for PGE's proposals for "immediate recovery" or "increasing its authorized rate of return," Order 08-487 rejected both of those proposals, and PGE filed no appeal of those determinations.

PGE-ABR (p. 62) misconstrues URP's point about interest being deemed an "operating expense" in Order 08-487, which contradicts the ***Gearhart*** *sua sponte* conclusion that interest was "part of the return of Trojan." Our point was that the Majority Opinion's rationale entirely contradicts Order 08-487.

PGE-ABR (p. 64) seeks to discuss a "utility's risk profile" but failed to contest the Order 08-487 decision to reject PGE's proposal for "increasing PGE's ROE to compensate for the increased risk created by the inability to earn a return on a prudently-incurred investment in utility plant." Order 08-487, pp. 58, 77. And the only evidence about the actual profit performance of PGE during the 1995-2000 period was presented by URP, showing that PGE earned far more than its authorized rate of return <u>on</u> investment during that period--even more than the $26-34 million per year it was charging ratepayers for Trojan return <u>on</u> investment. Add App 10-15; ER-72. PUC erred in excluding that evidence as not relevant, as it was obviously relevant to PGE's risk profile and the "view of investors" that PGE expresses concern for.

PGE stockholders actually earned a huge return on investment, when Enron Corp. bought all of PGE stock in 1997 at a premium above its market price of 47%, another fact disregarded by PUC. See Review ER-50. During 1997-2005, PGE had only one "investor," as it was wholly owned by Enron Corporation, making the views of ordinary investors immaterial.

PGE-ABR (p. 65) claims that, if the Order 08-487 rates had been adopted in 1995, "no one could have credibly suggested that they contained a "return on

Trojan." To the contrary, allowing "interest" on the TIB in 1995 would have been no different than allowing it in 2008.

PGE-ABR (p. 65) defines "rate of return" at "the profit that a utility earns from operation, as a percentage of its invested capital." First, ORS 757.355 and ORS 757.140(2) do not use the terms "rate of return" or "profit." Second, PGE's definition applies to the "interest" ordered by Order 08-487, which was calculated "as a percentage of its invested capital" in Trojan.

2. *TROJAN I* EVEN REJECTED THE "TIME VALUE OF MONEY" RATIONALE NOW RELIED UPON BY THE MAJORITY OPINION.

The URP OB Review (pp. 28-32) showed that PUC and PGE in ***Trojan I*** made dozens of arguments about ORS 757.140(2) allowing "interest" due to the "time value of money" and "present value," all of which were and rejected in ***Trojan I***.

We need not "justify equating all time-value interest with profit," as PGE-ABR (p. 58) asserts, because the issue is what is allowed by ORS 757.355 and ORS 757.140(2), neither of which use the terms "interest" or "profit."

PGE-ABR (p. 65) claims, "the orders at issue in ***Trojan I***[5] were not intended to grant PGE the time value of money, and they did not do so." But PGE argued in ***Trojan I*** that in fact those orders did grant PGE "interest" and were justified by

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5. Those orders were the rates Order 95-322 and the declaratory ruling orders: Order 93-1117 and Order 93-1763.

the concepts of "present value" and the time value of money. PGE specifically stated that the first question presented on appeal in ***Trojan I*** was:

> (1) Where the statute allows the Commission to allow recovery in rates of the undepreciated investment in a utility plant retired from service, may the Commission defer that recovery with interest on deferred balances?

Rep App-9. "And, the Commission elected to compensate the utility for the loss of the use of the money resulting from the deferral by allowing interest on the deferred recovery." DDD *Id.* "The only significant issue on this appeal is whether the Commission may allow interest on the deferred recovery of the undepreciated investment." Reply App-12 (emphasis in original).

PGE specifically sought to justify the inclusion of "interest" with its arguments about "present value." See the numerous quotations from PGE's ***Trojan I*** brief at URP OB Review, pp. 28-32; URP's Petition for Reconsideration [of ***Gearhart***], pp. 9-13; URP-RB, pp. 9-12.

> However, if the Commission were to defer balances but not allow interest on those deferred balances, then the utility would not receive the true economic value of the amount it is entitled to recover, simply because future dollars do not have the same value as present dollars.

Rep App-17.

> A dollar to be paid in 2011, without interest, has little value.

Reply App-16.

C. THE MAJORITY OPINION DISREGARDS CONCLUSIVE LEGISLATIVE CONFIRMATION OF THE *TROJAN I* DECISION.

Contrary to the assertions of PGE-ABR (p. 51), reference to Measure 90 of 2000 is not new. URP discussed Measure 90 of 2000 in the URP-RB (pp. 13-14), the URP Reply Appendix (Rep App-22-24), the URP Petition for Reconsideration (pp. 15-16), the URP Petition for Review (pp. 22-24). Further, reference to Measure 90 is not an "issue." It is authority regarding the meaning of ORS 757.355. The meaning of ORS 757.355 was obviously an issue raised at all stages of this litigation. New authority on an existing issue is permitted. ***State v. Hitz***, 307 Or 183, 188, 766 P2d 373 (1988).

D. THE PUC'S ORDER ERRED IN ALLOWING CONTINUED POST-CLOSURE TROJAN RETURN ON INVESTMENT BY SHORTENING THE RECOVERY PERIOD.

1. ORDER 08-487 SIMPLY PUTS DIFFERENT LABELS ON THE SAME POST-CLOSURE TROJAN PROFITS RULED UNLAWFUL IN *TROJAN I*.

The PUC-ABR (p. 22) quotation of Order 08-487 proves our point. Order 08-487 chose to reduce the recovery period for Trojan from 17 years to 10 years, so that "PGE recovered the full present value of its principal."

PUC-ABR (p. 55) claims that Order 95-322's "decision to allow PGE to recover Trojan investment over 17 years was reasonable only because the commission assumed PGE would be earning a profit over time." There is no such statement in Order 95-322. The basis for 17 years was that it was the remainder of the original expected operating life of Trojan.

Trojan I expressly "affirmed on appeals and cross-appeals" the "judgments in case numbers A92935 and A93400." Those case numbers correspond to Marion County Circuit Court Nos. 95C-11300 and 95C-12542 (*Id.*, 154 OrApp at 706). In those cases, Judge Paul Lipscomb specifically found and ruled:

> Accordingly, these statutes appear to operate without conflict if ORS 757.355 is confined to the rate base and 757.140 is confined to operating expenses. So construed, PGE could be permitted to continue to recover its normal depreciation, but could not recover any return on its remaining undepreciated investment. In other words, PGE could be allowed to simply continue to depreciate out Trojan as originally scheduled through 2011 (without any additional "return" on the undepreciated investment). It is also worth noting that this approach is consistent with the legislative history of each statutory provision.

Special Findings of Fact and Conclusions of Law, No. 95C-11300 (Reply Review App-15-16). Thus, the Circuit Court decision that ***Trojan I*** affirmed stated that the law would permit PGE to "continue to depreciate out Trojan as originally scheduled through 2011 (without any additional 'return' on the undepreciated investment." Order 08-487 disregarded this conclusion.

URP is fully aware of the proposals that the PUC rejected. It is in the adopted scenario that Order 08-487 escalated PGE's "costs," year-by-year, by the 13.22% - 13.34% rates of return on investment. URP OB Review, p. 47.

The PUC-ABR (p. 22) analysis of the "net benefit test" lacks logic. First, it does not apply to the $17.1 million disallowance of imprudent costs on steam generator repair, yet Order 08-487 reversed that disallowance on the basis of its faulty thoughts about the "net benefits test" in Order 95-322. Second, the "net benefits test" applied only to the additional $20 million that Order 95-322 cut from

the TIB. But PUC never conducted a "net benefits test" in the remand dockets. If it had, it would have found that reducing the recovery period from 17 years to 10 years would increase the cost of the "closing Trojan" scenario and thus again require the $20 million disallowance to bring the "closing Trojan" and "continuing to operate Trojan" scenarios back into balance.

Thus, PUC cannot explain a fundamental contradiction in Order 08-487--that somehow without Trojan return on investment the overall amounts collected under Order 95-322 would have been the same or even higher, yet somehow $20 million should be restored to the TIB because without Trojan return on investment the aggregate rates of the "closing Trojan" scenario would have been at least that much lower. See URP-OB, pp. 27-29.

2. THE ADOPTED ALTERNATIVE SCENARIO VIOLATES ORS 757.355 BY ALLOWING PGE RATES TO INDIRECTLY INCLUDE POST-CLOSURE TROJAN RETURN ON INVESTMENT.

PUC-ABR (p. 13) notes that one of the changes to Order 95-322 made in Order 08-487 was to eliminate the $17.1 million disallowance for PGE's imprudent incurrence of capital expenses on the Trojan steam generators. PUC-ABR (p. 14) now claims that Order 95-322 disallowed that expense, found to have been imprudent, only because Order 95-322 allowed PGE to charge Trojan profits to ratepayers. There is nothing in Order 95-322 that so states. Nor does Order 95-322 contain any statement that "the PUC's erroneous 1995 assumption that PGE was entitled to a return on the Trojan investment affected several different

components that informed and influenced the 1995 rate calculation," as PUC-ABR (p. 36) asserts.

And, if a utility cost is imprudent, it is not allowable in rates, regardless of concerns for profits. Order 08-487 did not reexamine any evidence about the prudency of the steam generator costs or draw any new conclusion about their prudency.

E. THE PUC'S ORDER ERRED IN INCREASING THE UNDEPRECIATED TROJAN INVESTMENT BALANCE FROM $250.7 MILLION TO $340.2 MILLION.

While both PUC-ABR (pp. 11, 13) and PGE-ABR (pp. 77-79) repeatedly refer to the undepreciated Trojan balance as of the effective date of Order 95-322 in 1995 as $340.2 million, that number does not appear in Order 95-322. The starting figure for TIB in Order 95-322 is $288 million, reduced by disallowances to $250.7 million. Order 08-487 increased the TIB to $340.2 million, because, it claimed, that was the figure adopted in Order 95-322. But it is not there.

The PGE-ABR (pp. 78-79) attempted explanation of the source of the $340.2 million figure also does not show where that number appeared in Order 95-322. It refers to PUC Staff and PGE testimony and exhibits, but those were submitted in the remand dockets, not in the original UE 88 docket, and also do not show that the $340.2 million figure was in Order 95-322.

III. ASSIGNMENT OF ERROR: THE COMMISSION'S ORDER ERRED IN FAILING TO QUANTIFY THE AMOUNT OF UNLAWFUL POST-CLOSURE TROJAN RETURN ON INVESTMENT CHARGED TO RATEPAYERS UNDER UE 88.

A. COURTS HAVE BANNED COMMISSIONS HEARING SIMILAR REMANDS FROM ADDRESSING ISSUES OTHER THAN REFUNDING THE UNLAWFUL CHARGES.

PGE-ABR (p. 44) refers to the ***Trojan I*** remand as "giving the PUC discretion to reconsider rates (154 OrApp at 716-17)." ***Trojan I*** contains no such statement. PGE-ABR (p. 71) makes the same incorrect statement.

B. THE PUC DISREGARDED THE EXPERT TESTIMONY THAT QUANTIFIED THE UNLAWFUL CHARGES.

Having declined to quantify the unlawful charges in the remand dockets, PGE-ABR (pp. 39, 41) attempts only to mock the expert quantification provided by economist Jim Lazar. His simple and accurate approach merely noted the Trojan return on investment added to rates in each of the 5.5-years at issue under Order 95-322 (***Trojan I***) and then escalated those amounts by adding interest. ER-72. He similarly quantified the unlawful charges for Trojan return on investment in the subsequent years under Order 02-227 (***Trojan II***). PGE's level of profit on its $1.805 billion of 2012 net revenues (or its $1.813 billion of 2011 net revenues or its $1.783 billion of 2010 net revenues[6]) is irrelevant.

As the Circuit Court concluded back in 1996, "The dollar amounts involved are very substantial." Reply Review App-13.

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6. All figures are from the same PGE, 2012 Annual Report at 44, cited by PGE-ABR (p. 39).

IV. ASSIGNMENT OF ERROR: ORDER 08-487 ERRED IN CONCLUDING THAT RATEPAYERS ARE ENTITLED TO NO REMEDY FOR UNLAWFUL CHARGES, UNLESS THE OVERALL RATES ARE NOT "JUST AND REASONABLE".

A. THE PUC CANNOT WIPE AWAY THE UNLAWFULNESS OF RATES WHICH VIOLATE ORS 757.355 BY DEEMING THEM "JUST AND REASONABLE."

PUC-ABR (pp. 8, 19, 23, 25, 27, 29-30) again claims that rates are not unlawful, unless the PUC deems them to be not "just and reasonable." But PUC answers none of our argument at URP-OB, pp. 21-25; URP-RB, pp. 23-25; or Opening Brief of the CAPs, pp. 7-24, 35-46. Those discussions fully apply to the Majority Opinion, which adopts the PUC position on this issue, using language largely verbatim from the PUC Answering Brief. 255 OrApp at 63, 72, 104.

Curiously, post ***Gearhart***, ***Wah Chang v. Public Utility Com'n***, 256 Or App 151, 162, 301 P3d 934 (2013), stated:

> That said, the PUC does not have discretion to misinterpret or misapply the law. We will not affirm the PUC's decision that Wah Chang's rates remained "just and reasonable" if we conclude that the formula employed by the PUC was based on an erroneous interpretation of ORS 757.230(1), or was specifically precluded by some source of law. See ORS 183.482(8)(a), (b); ***Citizens' Utility Board. v. PUC***, 154 Or App 702, 716- 17, 962 P2d 744 (1998), *rev. dismissed*, 335 Or 91, 58 P3d 822 (2002) (reversing and remanding PUC decision because "[t]he general grants of authority in ORS 756.040 and other general statutes do not empower PGE to charge or PUC to approve rates of a kind that are specifically contrary to the limitations in ORS 757.355 and ORS 757.140(2)").

This contradicts the PUC/PGE position here--that rates (or rate orders) are not subject to reversal as unlawful, unless the rates ordered, as a whole, are also not "just and reasonable," a determination to be made under the "delegative term"

standard of review. ***Wah Chang*** states that, if the PUC's formula was based on erroneous interpretation of law, then the resulting specific rates are not "just and reasonable," regardless of the level of "overall rates" or the PUC's delegative determination. Under the ***Wah Chang*** view, petitioners need not challenge the "entire order" or all of the rates put together or the overall revenue requirement as "unjust or unreasonable."

"Unlawful rates" are a category separate from "unjust and unreasonable" overall rates or revenue requirement. But ***Wah Chang*** indicates that, if discrete rates in an order are based on an erroneous interpretation of law or include amounts "specifically precluded by some source of law," then the order may not be affirmed as "just and reasonable."

PGE-ABR (p. 45) claims "***Trojan I*** did not hold that the rates charged during the 1995-2000 period were unlawful." ***Trojan I*** (154 OrApp at 716) stated:

> Similarly, in this case, ORS 757.355 precludes PUC from allowing rates, of the kind its orders here would allow, that include a rate of return on capital assets that are not currently used for the provision of utility services * * *.

Rates that are "precluded" by statute are unlawful. ***Dreyer***, 341 Or at 280, stated that "CUB and URP * * * obtained by that challenge a judicial determination that the charges were unlawful." It also referred to:

> "part of the rates * * * in fact represented a return on PGE's investment in Trojan and, therefore, were unlawful under ORS 757.355 (1993), as interpreted in [***Trojan I***]." 341 Or at 282.

It also referred to "determining a remedy for PGE's collection of unlawful rates," 341 Or at 283, and to the "unlawfully collected amounts," 341 Or at 285, and to

"the amounts that PGE unlawfully collected between April 1995 and October 2000," 341 Or at 286. Even the Majority Opinion itself refers to ***Trojan I*** as the "judicial determination that it had unlawfully required inclusion of a return on PGE's undepreciated Trojan investment." 255 OrApp at 84-85.

B. THE RATE (CHARGES) FOR TROJAN RETURN ON INVESTMENT WAS NOT A MERE ERROR IN A FORMULA OR COMPONENT.

PUC-ABR (pp. 28-30) discusses various cases regarding general tenets of ratemaking. We addressed those cases at URP-OB, pp. 23-25; URP-RB, pp. 22-23; CAPs Opening Brief, pp. 22-24; CAPs Petition for Review, pp. 19, 26-27; CAPs Opening Brief on Review, pp. 23-24.

PUC-ABR (p. 30) asserts that ***Hammond Lumber Co. v. Public Service Comm'n***, 96 Or 595, 603, 189 P 639 (1920), allowed the PUC to "start over" on remand. Those words do not appear in ***Hammond***. ***Hammond*** involved no remand. The PUC-ABR (p. 39) discussion of ***Hammond*** is misleading and depends upon literally inserting the terms "[reasonableness of a rate]" and "[rate] regulations" that do not appear in ***Hammond***, which at that point was discussing challenges to orders requiring railroads make certain investments. As for "try over again," that *dicta* referred to what happens if an order is successfully challenged as "unreasonable," not a circumstance here.

PUC-ABR (p. 30) refers to "legal error in the process of its ratemaking." The legal errors in Order 95-322, Order 02-227, and Order 08-487 included both

procedural errors (issues addressed and excluded, evidentiary rulings, etc.) and substantive legal error (including Trojan return on investment in rates).

PUC-ABR (p. 31) states: "If a reviewing court determines that a rate order contains a legal error, the court vacates the order; it remains up to the PUC to ascertain what rates would have been fair and reasonable." PUC itself admits that both ***Trojan I*** and ***Trojan II*** determined that the rate orders at issue contained legal errors. Thus, according to the PUC now, Order 95-322 and Order 02-227 were vacated. If that is the case, then ratepayers were entitled to pay the rates that had been in effect prior to the issuance of those rate orders (as stated in ***Hammond***). There must be lawful rates in effect at all times. If the rate orders since April 1995 are not in effect, having been declared unlawful by the courts, then the previously operative rates must have remained in effect. In the case of Order 95-322, the previous rates in effect were $50 million per year lower than the Order 95-322 rates, so states Order 08-487 (p. 12). The PUC's new theory would thus entitle ratepayers to compensation greater than merely return of the Trojan profits, which amounted to no more than $26.2 to $35.2 million per year. ER-72.

Order 08-487 contains no conclusion that the Order 95-322 rates, minus the charges for Trojan return on investment, were or would have been not "just and reasonable." Both PUC and PGE attempt to graft that absent conclusion into the order. PUC-ABR (p. 31-32, 35) Order 08-487 never concluded that simply removing the Trojan profits charges "would make the remaining rate unlawful in itself" or "would produce an unlawful rate," as PGE-ABR (p. 7, 24) asserts.

The mere fact that such rates would have been lower than the Order 95-322 rates does not make them "unjust" or "unreasonable." As PUC admits, "just and reasonable" rates can encompass a wide range of rates within a "broad zone of reasonableness." ***In re Permian Basin Area Rate Cases***, 390 US 747, 770, 88 SCt 1344 (1968). The new PUC-ABR (p. 35) position is entirely contrary to its earlier assertions about the broad zone of reasonableness:

> If a rate is fair and reasonable, but the PUC were nonetheless to strip any supposedly "illegal" component without attempting to adjust related ratemaking decisions, then the resulting rate would not be fair and not reasonable. If a rate--whatever errors may have gone into it--is nonetheless the "right" rate because it is in fact fair and reasonable, then by definition neither party to the rate order can be said to harmed by the rate.

But PUC-ABR (pp. 28-29) also states that there is no such thing in ratemaking as a "particular or precise result." *Accord*, PGE-ABR, p. 42. And the notion of a "right rate" entirely contradicts Order 08-487 (p. 67), which stated, "we recognize that it is generally accepted that there is no one ‘correct’ revenue requirement."

And, as shown elsewhere in our briefing, ratepayers are entitled to be charged only lawful rates, whether or not the PUC retroactively determines that the approved amounts of lawful rates somehow became "unjust and unreasonable," which in fact did not happen in Order 08-487. It further makes no sense to say that the rates charged by a utility are "just and reasonable" only if they include unlawful charges.

Any such determination that the total amounts collected under the lawfully imposed rates had somehow fell under the "broad zone of reasonableness" would

need to be based on evidence regarding the amounts PGE received and profited from during the 1995-2000 period. Only URP offered such evidence in the remand dockets, showing that PGE enjoyed massive profits above and beyond its authorized rate of return on investment. See pages 7-7, *ante*. Returning the Trojan profits/interest to the 1995-2000 ratepayers would merely have reduced PGE's excess profits. But PUC disregarded the evidence.

Removing the Trojan profits/interest from the total revenue authorized under all 1995-2000 rates would have cut PGE's revenue by between no more than $26.2 to $35.2 million per year at a time when PGE's overall expected revenues for 1995-96 were $1.765 billion (or about $883 million per year). Order 95-322, App. H, p. 1. Whether this maximum 3-4% difference is outside the "broad zone of reasonableness" was not addressed in Order 08-487 or the remand dockets. And in fact PGE earned far more than the expected profits during the 1995-2000 period.

As for the PUC-ABR (p. 32) discussion of the Jim Lazar testimony, he offered a straightforward quantification of the amounts of Trojan profits/interest charged to the 1995-2000 ratepayers. ER-72. But the scoping orders adopted by the PUC required the conduct of a retroactive rate case encompassing numerous other issues. So Lazar also addressed the unlawful charges in that alternative manner. See URP OB Review, pp. 53-54; URP-OB, p. 16; ER-72-73, Reply ER-1-4).

V. ASSIGNMENT OF ERROR: THE PUC'S ORDER LACKS ASCERTAINABLE BASIS IN FACTS IN THE RECORD.

PUC-ABR (p. 57) states that "the spreadsheets and the electronic formulas used to recalculate the rates were contained in the record." That is not true. The PUC did not use "Excel spreadsheets contained in testimony filed by PGE and PUC staff and admitted into the record," because those spreadsheets consisted of numbers printed on paper and did not have formulas. Contrary to PUC assertion, the "equations" were not in the record. PUC did not obtain the formulas, which it applied only to the Phase 1 Period, until 3 years after the close of the evidentiary hearing on the Phase 1 Period.[7]

Further, PUC did not merely apply those formulas. It used the electronic spreadsheets as a base for adding its own additional data and additional formulas, none of which were revealed to URP prior to the issuance of the final order, Order 08-487. Compare the extra-record spreads with the exhibits they were modeled after, AR 295, tab 102; AR 297, tab 6201, 6202. URP could not possibly know until issuance of Order 08-487 that the PUC decision-makers would be creating their own evidence, outside of the record.

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7. It was the Phase 3 Period evidentiary record that closed in 2008, but the Extra-Record Spreadsheets are not relevant to the Phase 3 Period.

VI. ASSIGNMENT OF ERROR: THE PUC'S ORDER ERRED IN ADDRESSING ISSUES OTHER THAN THOSE ADJUDICATED ON APPEAL.

Take the case of a plaintiff who sues a defendant on 10 claims for damages. The trial court finds defendant liable on 7 of the claims and not liable on 3 of the claims and determines an amount on damages on each of the 7 successful claims. Only defendant appeals. The appellate court rules that, as a matter of law, defendant is not liable on 1 of the 7 claims successful below and remands. Upon remand, what should the trial court do?

Plan A: The trial court removes the judgments on that 1 claim. If defendant has already paid that judgment, plaintiff must return those funds to defendant, with interest.

Plan B: The trial court conducts a new trial to determine "what he would have done the first time around," if he had known that defendant could not be held liable on 1 of the 7 successful claims. In doing so, the trial court hears new issues (not raised before) and accepts new evidence, both on the new issues and the previously tried issues. The trial court then restores to plaintiff the full benefit of the original judgment by:

> ruling in favor of plaintiff on an entirely new claim arising from the same original circumstances

> ruling in favor of plaintiff on the 3 claims that had been rejected the first time around

> increasing the assessment of damages on the 6 originally successful claims, even though plaintiff never appealed the original assessments of damages as too low

In these cases, ratepayers are in the position of defendant; PGE is the plaintiff. PGE went to a tribunal (PUC) and sought authority to collect money from ratepayers. The tribunal made some rulings in favor of plaintiff (authorizes

charging ratepayers for Trojan return on investment) and some rulings in favor of defendant (recovery period is 17 years; imprudent Trojan capital costs excluded). The appellate courts found that charging ratepayers for Trojan return on investment was unlawful, and remanded.

The URP/CAPs position is that, upon remand, the tribunal (PUC) should follow Plan A, above. But, at PGE's urging, PUC on remand followed Plan B, conducting a new rate proceeding to determine what it "would have done" in UE 88 and UM 989, if it had known that charging Trojan return on investment was unlawful. PUC heard new issues (not raised before) and accepted new evidence (at least from PGE), both on the new issues and the previously tried issues. PUC then restored to PGE the full benefit of Order 95-322 (1995-September 2000) and nearly the full benefit of Order 02-227 (October 2000 and forward) by:

> ruling in favor of PGE on an entirely new claim arising from the same original circumstances (the claim that PGE can charge "interest" on Trojan)[8]

> changing its prior rulings that had not harmed ratepayers and were never appealed (excluding imprudent capital costs from rates, adopting 17-year Trojan depreciation schedule)

> increasing the Trojan balance by modifying the "net benefits test," although PGE never appealed the original disallowance

One issue raised in this appeal is whether it was legal for PUC to implement Plan B.

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8. The PUC itself created this claim, *sua sponte* in Order 08-487, as PGE never sought "interest" in the remand docket.

VII. ASSIGNMENT OF ERROR: THE PUC'S ORDER ERRED IN ALLOWING ONLY THOSE NEW ISSUES ON REMAND THAT BENEFITTED PGE AND ONLY THAT NEW EVIDENCE ON REMAND THAT BENEFITTED PGE.

PGE-ABR (p. 43) admits the PUC allowed the parties on remand to "present new evidence" but fails to respond to our showing that the "new evidence" was limited only to that benefitting PGE. Nor has the PUC responded to our showing that it also allowed PGE to introduce evidence that could not have been in existence in 1994 (regarding the Order 95-322 rates) or in 2000 (regarding the Order 02-227 rates).

PUC-ABR (p. 59) incorrectly claims that "the only supposed inadmissible 'future fact' that URP has ever identified is the Court of Appeal's decision in ***Trojan I***. To the contrary, URP identified 59 specific passages in PGE testimony consisting of "future facts" (not knowable when the records closed in UE 88 or UM 989), many involving multiple such facts, or "legal opinion." Of those 59 passages, some several pages long, URP identified 43 of them as "future facts" and moved to strike them, a motion the denied by the PUC ALJ on the basis of not understanding the term "future facts," even though the same ALJ at the earlier hearing specifically stated that she fully understood the term. See URP and CAPs Motion to Strike Portions of Testimony, September 6, 2005 (Reply Review ER-1-4). Denial of that motion is discussed in the same Opening Brief of URP (pp. 28-29) that PGE-ABR (p. 60) selectively quotes from. Review ER-60-61.

ASSIGNMENTS OF ERROR APPLICABLE TO THE UM 989 REMAND PHASE 3 PERIOD.

VIII. ORDER 08-487'S DECISIONS REGARDING THE UM 989 REMAND (PHASE 3) ARE BOTH SUBSTANTIVELY UNLAWFUL AND RESULT IN RATES THAT ARE NOT JUST AND REASONABLE.

Neither the PUC-ABR nor the PGE-ABR respond to any of these issues.

IX. RELIEF REQUESTED BY URP.

PGE-ABR (pp. 80-81) contests the relief sought by URP. Consistent with the J. Schuman dissent, URP contends that a correct interpretation of law does compel a particular action--that the PUC, if it has remedial authority, quantify the unlawful charges for Trojan return on investment and return that amount to the correct cohorts of ratepayers, with interest. Law also compels the PUC not to declare the unlawful rates to been lawful all along or that ratepayers have not been injured.

PGE-ABR (p. 81) states that URP's issues "do not concern alleged procedural irregularities." Several of those issues so do concern, including the unlawful scope of the PUC's remand proceeding, its failure to quantify the unlawful charges, its consideration of new issues and new evidence (at least that offered by PGE), its bias in excluding relevant evidence presented by URP. URP OB Review, pp. 50-59, 68-72, 74-75; URP-OB, pp. 14-40. The briefs of the CAPs also address procedural irregularities. And the procedural irregularity of the PUC in relying upon evidence in Phase 1 it itself created 3 years after the close of that evidentiary record was not shown in the agency record. See URP-OB, pp. 4-6.

X. ADDITIONAL COMMENT.

Both PUC-ABR (pp. 21, 25) and the PGE-ABR (pp. 1, 12, 39) offer materials outside of the agency record for the purpose of proving facts. Neither requests judicial notice for those materials or provides copies of them.

Dated: February 12, 2014

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that the Reply Brief on Review in this case was filed on or before the date established by existing or, hopefully, forthcoming order of this Court. I further certify that the size of the type in this Reply Brief on Review is not smaller than 14 point for both the text of the brief and footnotes.

I further certify that this brief is less than the 10,000 words allowed in the Court's order. The word-counting function of WordPerfect 5 shows 9,977 words.

Dated: February 12, 2014

/s/ Daniel W. Meek

Daniel W. Meek

CERTIFICATE OF FILING AND SERVICE

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