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 CLASS ACTION PLAINTIFFS ON REVIEW

FRANK GEARHART; PATRICIA MORGAN; and KAFOURY BROTHERS, INC.,
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I. INTRODUCTION.

PUC and PGE bemoan the length of this "saga" but delays in resolution have not been caused by ratepayers. PGE sought a declaratory ruling (DR 10) on the PUC's interpretation of ORS 757.355, and then filed a rate case (UE 88) in which the PUC applied its erroneous legal conclusion to the facts before it (Order 95-322). About one year after those rates took effect in April 1995, the Marion County Circuit Court in Nos. 95C-11300 and 95C-12542 ruled against the PUC/PGE position on the meaning of ORS 757.355:

> 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).

Special Findings of Fact and Conclusions of Law, No. 95C-11300 (April 1996) (Reply on Review App-11-17), affirmed by ***Citizens' Utility Bd. of Oregon v. Public Utility Com'n of Oregon***, 154 Or App 702, 713 962 P2d 744 (1998), *pet rev dis'd*, 355 Or 591, 158 P3d 822 (2002) ("***Trojan I***").

PGE-ABR (p. 66) argues PGE it was "required" to charge the rates set in Order 95-322 by ORS 757.225 (rates approved over ratepayer opposition). Nothing stopped PGE from seeking to suspend or rescind the rates for Trojan return <u>on</u> investment at any time. Instead, PGE insisted on imposing those rates through September 2000 under Order 95-322 and for additional years under Order 02-227, despite adverse decisions in 1996 and 1998.

PGE-ABR (pp. 67, 69) claims PGE was not imprudent in putting its revenue eggs into the Trojan profits/interest basket, because it was relying upon Attorney General opinion and the PUC's declaratory ruling in DR 10. But PGE then disregarded the Circuit Court decision of April 1996, noted above, and continued to charge for Trojan profits/interest. As noted in ***Dreyer v. Portland General Electric Co.***, 341 Or 262, 279 n15, 142 P3d 1010 (2006) ("***Dreyer***"), "utilities will make a calculated decision to pursue a theory that may or may not withstand judicial review (as in the present case), with the consequences of such a ruling factored into the choice to press their theory in the first place."

As for agency declaratory ruling, these bind only the PUC and the petitioner, are subject to appeal and, as in this case, reversal. PGE refused to wait judicial finality of the DR 10 ruling, and imposed unlawful charges for Trojan profits. PGE did not file for new rates, even after ***Trojan I*** reversed the DR 10 ruling in 1998. PGE-ABR (p. 70) then seeks to blame its fate on a "legal error of the PUC," failing to note that PGE very vigorously proposed that legal error in the first place.

The Brief on the Merits of Respondent on Review PUC [hereinafter "PUC-ABR"] concedes the PUC conducted a retroactive review of Order 95-322 rates (the period of the abated class actions), but that did not violate any rule against retroactive ratemaking because it used this analysis only to determine if CAPs had suffered injury that it could remedy, and in any event, it had the authority to do so.

PUC-ABR (p. 50) states that the PUC was:

> using its rate making authority and expertise to address whether a legal error in previously established rates produced an injury that is capable of being remedied. The PUC did retroactively examine the rates in effect from 1995 to 2000, but the PUC did so only to determine the extent to which PGE's customers were injured by the PUC's past legal error in setting those rates. * * * In fact, the PUC did not set future rates at all.

CAPs never claimed to lack a "remedy." They sued PGE under the authority of ORS 756.185-.200 for recovery of unlawful charges under the 1995-2000 rates. ***Dreyer*** did not dismiss those suits as requested by PGE, because CAPs do have a right to judicial remedies. The amount of damages will be disputed by any arguments PGE might there offer, including its argument to this Court that all damages have been "set-off" by administrative action.

PGE-ABR (p. 74) argues CAPs "did not pay a cent more than they would have without the PUC's legal error." PGE's use of the subjunctive tells the true story: this "lack of injury" to the CAPs is purely hypothetical. PUC was asked to determine its authority (if any) to mitigate the improper charges to CAPs and whether to exercise such authority. PUC instead declared no rates paid by the CAPs had never been "unlawful," so the PUC can "recalculate" them in a hypothetical rate case to declare "no harm" had occurred.

This evaded the ***Dreyer*** instruction. It reversed the commonplace "no harm, no foul" with "no foul, no harm." This conclusion absolutely depends on the PUC's recalculating rates and retroactively imposing those hypothetical "rates" upon CAPs now for the utility service provided them years age.

On the other hand, if as PUC claims it was not really resetting 1995-2000 rates, but doing some damages assessment, there is no presumption that the result

of its "hypothetical rate case" is *prima facie* valid or should have preclusive effect on judicial damages. A proper "hypothetical" could be offered as a form of expert opinion to a jury.

Further, CAPs agree with URP, that the "recalculated" rates still illegally include profit on Trojan, under the guise of "interest."

CAPs consistently contended that the "remedial" authority of the PUC upon remand of a superseded rate order is limited by the state and federal constitutions, statutes, "filed rate doctrine," and the rule against retroactive ratemaking. We discuss the scope of the admittedly "retroactive" examination of 1995-2000 superseded rate order the PUC undertook and argue below that such examination was retroactive ratemaking. The retroactivity discussion applies to the lack of PUC authority to (1) retroactively redetermine rates applicable to a past period and (2) order the (insufficient) refunds to a small number of different ratepayers after the close of the CAPs 1995-2000 rate period.

II. FIRST ASSIGNMENT OF ERROR: THE PUC ERRED IN CONCLUDING THAT CHARGES FOR POST-CLOSURE PROFIT ON TROJAN WERE NOT ILLEGAL AND THUS FAILED TO RESPOND TO THE *DREYER* COURT INQUIRIES.

Respondents do not cite authority for the PUC to use rate making procedures for any purpose other than to actually set prospective rates for utilities and customers. Nor do they offer authority that the PUC can conduct a "hypothetical" rate case, with new issues and new evidence, applied to past periods for present effect. Instead:

1. PUC-ABR (p. 34) claims a "rate" is the "end result" of calculations, a "*total* amount of money" (PUC's emphasis). If this "total amount of money" it calls a "rate" can be found "unlawful" only if it is "discriminatory, confiscatory or outside the range of fair and reasonable." *Id.* The PUC Answering Brief to the Court of Appeals argued:

> (p. 19): "As the PUC's order [Order 08-487] correctly states, the ***Trojan I*** court did not even address the lawfulness of the *rates* adopted in UE 88, much less determine conclusively that these *rates* were unlawful. Order at 25 (emphasis added [by PUC])."

PGE-ABR (p. 24) similarly argues that all of Order 95-322 resulted in but a single unitary "rate" and that single rate would become "unbalanced" by excluding the illegal charge for post-closure Trojan profit.

2. Using this invented definition of "rate," it finds the CAPs and URP (and the dissent of J. Schuman) confused. The "proposition that a rate *itself* may be fair and reasonable but nonetheless unlawful is based on a misconception of what a rate is." PGE AB at p. 34. "[I]t does not follow that the *rate* can be both 'fair and reasonable' and the rate still [be] inherently unlawful." PUC AB, p. 34, n 11 (PUC's emphasis). This argument depends entirely on PUC's unique definition of a "rate" which is contrary to the statute it enforces, ORS 756.010(7).

3. PUC-ABR (p. 33) argues that the CAPs further confuse the concept of unlawful "rates" with unlawful "rate orders." The real confusion seems

to be in PUC's brief. It argues (pp. 30, 33-34) that the conclusion in ***Trojan I*** that PGE was collecting amounts which violated ORS 757.355 did not render the entire "rate order" unlawful, but then it later argues that, when the PUC makes an analytical error in calculating a rate "the underlying *order* is unlawful" (p. 33) and "must" to be re-examined by the agency for fairness and reasonableness anew, regardless of the fact it was not challenged or reversed on those bases.

A rate is "rate" any charge to customers for utility service. ORS 756.010(7). Order 95-322 contains a number of rates.[1] The only issue raised on appeal of Order 95-322 was that Order 95-322 contained substantively unlawful rates in violation of ORS 757.355. ***Trojan I*** ruled that rates in Order 95-322 did include charges for post-closure Trojan return on investment, violating ORS 757.355, upholding the judgment of the Marion County Circuit Court on that legal issue. It did not disturb the Circuit Court's remand order of Order 95-322 (based on the legal conclusion that the order contained illegal rates).

No party argued that the revenue requirement allowed PGE was unreasonable or that the total amount of money authorized by the aggregate of all the rates in Order 95-322 was not "just and reasonable," and no court has ever held that.

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1. A single rate order will set out many different rates for electric service for different classifications of customers (residential, commercial, small farm, industrial), rates for different levels of consumption within classes, rates based on time of day, season of the year, fuel mix purchased by the utility, *etc*.

Absent timely appeal, that issue--were the total amounts authorized within a range of reasonableness--was resolved after the opportunity to raise it on appeal lapsed.

Faced with issue preclusion (1) that the total amount of revenue authorized under Order 95-322 was itself lawful, but (2) charges for profit on Trojan were illegally collected, PUC coins a new definition of a "rate" as the "total amount of money" authorized for collection under a rate order. PUC and PGE then argue that the charges for Trojan are not "rates" at all but mere calculation errors in determining this "end result rate."

Respondents argue that orders can be reversed by a reviewing court only for unreasonableness (and other circumstances not relevant to this case) and since the Order 95-322 order was not reversed on that basis, it was not "unlawful" but contained mere calculation errors (what the courts have deemed substantively illegal charges).

PUC then argues that courts cannot tell it how to calculate anything in arriving at this "end result rate," including ascertaining how much was charged unlawfully when that unlawfulness was the sole basis for reversing the order. It embarks on a collateral issue: were ratepayers "harmed" by being forced to pay the so-called "end result rate" in their 1995-2000 bills? Claiming unfettered authority to determine ratepayer "harm," somehow PUC could retroactively decide the total-amount-of-money "rate" in Order 95-322 would have been "unlawful" for being unfairly low to PGE, if it now had to disgorge the unlawfully collected amounts,

so that it "must" conduct a new (hypothetical) rate case during 2004-8 to come up with a "rate" applicable to 1995-2000.

PUC-ABR (pp. 8, 27, 37-38) and PGE-ABR (pp. 45-46) repeat their confusing arguments that ***Trojan I*** "held that the PUC's rate *order* was unlawful" and that "it does not follow from that holding that the resulting *rates* were unlawful" and "***Trojan I*** did not hold that the rates charged during the 1995-2000 period were unlawful." PUC has cause and effect backwards. ***Trojan I*** held that certain (identifiable and ascertainable) rates adopted in Order 95-322 were unlawful. That was the reason that the rate order, Order 95-322, was reversed and remanded--all other rates, including their underlying calculations and the "end result" were NOT appealed, not disturbed on appeal, and became settled.

In many places, ***Trojan I*** always referred to the unlawfulness (in terms of being precluded or not allowed by statute) of the "rates."

> We have also concluded that ORS 757.355 precludes public utilities from charging and PUC from approving exactly what PUC and PGE urge us to interpret ORS 757.140(2) as allowing--rates that include a return on a utility's investments in assets that are not being used for utility services to the ratepayers.

154 OrApp at 713.

> 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.

154 OrApp at 714.

> Similarly, in this case, ORS 757.355 precludes PUC from allowing rates, of the kind its orders here would allow * * *.

154 OrApp at 716-17.

Dreyer, 341 Or at 282, also expressly referred to unlawful rates:

> [A] jury [in the class action] also could simply attempt to determine what part of the rates that the PUC had approved as "fair and reasonable" in fact represented a return on PGE's investment in Trojan and, therefore, were unlawful under ORS 757.355 (1993), as interpreted in ***Citizens' Utility Board***, 154 OrApp 702, 962 P2d 744.

Dreyer noted "PGE's collection of unlawful rates" (341 Or at 283).

PUC-ABR (pp. 33-34) claims that the (J. Schuman) dissent in ***Gearhart*** "confused two entirely different concepts: An *unlawful rate order* with an *unlawful rate*. First, ***Trojan I*** found that Order 95-322 had impermissibly approved unlawful rates. Second, the distinction PUC offers simply does not exist in utility law. PUC cites no authority for it, but offers an inaccurate discussion of early versions of railroad regulation, discussed at pages 16-19, *post*.

PGE-ABR (pp. 46-47) addresses issue preclusion, noting that preclusion attaches to determinations of agencies that have attained finality. All of the agency determinations in Order 95-322 attained potential finality upon issuance of that order, subject only to those determinations that were appealed. ***Huszar v. Certified Realty Co.***, 272 Or 517, 523, 538 P2d 57 (1975), merely held a judgment of nonsuit or dismissal without prejudice "adjudges nothing" for application of *res judicata*; see also ORCP 54. Here, ***Trojan I*** reached the merits of those issues which were preserved on appeal. Other issues became settled by waiver through failure to appeal. See CAPs Opening Brief on Review [hereinafter "CAPs OB Review"], pp. 40-1. ***Campbell v. Employment Division Dep't.***, 256 OrApp 682 (3013) [PGE-ABR, p. 30], allowed the EAB to consider new evidence on an issue

which had not been addressed by the reviewing court conclusively. 256 OrApp at 699. This result is hardly inconsistent with CAPs' argument that preclusion and/or law of the case applies to issues and facts actually litigated, which become final through waiver on appeal or when decided by a reviewing court.

As for ***State v. Langley***, 331 Or 430, 16 P3d 489 (2000), it deals with what law to applies to the remand of a sentence on a single count where the jury had not been properly instructed as to findings necessary for the sentence of "ordinary life" or death (sentencing options under law at the time of the crime). Later enacted statute, allowed for a "true life" sentence option. During the sentence remand, defendant sought to waive objections to *ex post facto* application the new sentencing option to him. The court held that the law of the case did not preclude this effort upon remand since that issue (potential waiver of objection *ex post facto* of instruction on the newer "true life" option) had not been decided.

More relevant to the present facts, ***Langley*** holds that the law of the case doctrine applied to exhibits which had been admitted in the initial proceeding, summarizing, "under the doctrine of the law of the case, earlier appellate court decision is binding and conclusive in subsequent proceedings involving same issue in same case." 331 Or at 443.

PGE's view of "law of the case" is circular: If the lower tribunal on remand happens to allow new evidence, then the court's prior decisions on points of law are not the law of the case. But here no new fact can alter the illegality of the rates charged for profit on Trojan. There remains a factual dispute about the

magnitude of the unlawful charges, but that did not require redetermination of all other rates in Order 95-322 or new issues and new evidence upon remand. Our position is that the "law of the case" doctrine precludes relitigation of already-decided issues, which means that new evidence on those issues is not allowable.

Evidence not available at the time of the first agency proceeding might be allowed. ***La. Land & Exp. v. Oil & Gas Cons. Com'n***, 809 P2d 775 (Wyo 1991); CAPs OB Review, p. 68. PGE-ABR (p. 68) claims that the Wyoming decision allowed new evidence on remand. There the court had authority to remand with specific instructions for the agency to take new evidence, if there was good reason shown for its nonproduction initially.

But no such instructions accompanied ***Trojan I*** or ***Trojan II***, and no party sought that sort of remand under the similar Oregon statute, ORS 183.482(5). In these remand dockets, the PUC stated that it was allowing only new evidence that was available at the time of the first trials (UE 88 and UM 989) but not offered then.

PGE-ABR (p. 69) argues that the decision in ***Trojan I*** was "a new interpretation of governing law," which in itself gave good reason for PUC to open the record of the superseded rate order (citing ORS 757.568, discussed below). The decision in ***Trojan I*** (1998) was not "new"; it upheld the 1996 decision of the Circuit Court on the basis of arguments offered by ratepayer representatives, including URP, since early 1993 in DR 10. The outcome was hardly unforeseeable.

A. CHARGES FOR POST-CLOSURE TROJAN PROFIT ARE "A RATE."

The Court need not "defer" to the PUC's own interpretation that a "rate" is a "total amount of money" which can be reviewed by courts only for reasonableness (or discriminatory impact on some customers or confiscatory impact on the utility). "'Rate' means any fare, charge, joint rate, schedule or groups of rates or other remuneration or compensation for service." ORS 756.010(7).

ORS 757.355 forbids "rates" based on plant not providing utility service, not entire "rate orders."[2] No rate or charge for profit on Trojan, however calculated, can be found either reasonable or unreasonable; the Commission is not authorized to calculate a "fair" charge for return <u>on</u> Trojan investment. It is not to be considered. ***Trojan I***, 154 OrApp at 713, ruled unlawful PGE's conduct in collecting that charge <u>and</u> PUC's approval of that charge:

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2. The statute was amended, effective January 1, 2004, as shown by strike-out and bolding:

> ~~no~~ **A** public utility ~~shall~~ **may not**, 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~~ **that include the costs of** construction, building, installation or real or personal property not presently used for providing utility service to the customer.

The new version of ORS 757.355 took effect during the pendency of the class actions and the appeals of ***Trojan I*** and ***Utility Reform Project v. Oregon Public Utility Com'n***, 215 OrApp 360, 170 P3d 1074, (2007) [hereinafter "***Trojan II***"] on appeals. Should the Court remand to the agency for still further proceedings, it would be helpful if this Court indicated whether the amended ORS 757.355 should apply.

> We have also concluded that ORS 757.355 precludes public utilities from charging and PUC from approving * * * rates that include a return on a utility's investments in assets that are not being used for utility services to the ratepayers.

Respondents' claim that a "rate" is a "total amount of money" arrived at through complex analysis describes but one step in a possible process for determining a "rate," but that step is not the rate itself. A lawful rate may be based on analysis (or be a flat fee, such as the approved monthly "service fee" on utility bills) but a utility rate order, including 95-322, establishes many discrete rates.

A rate is not a "total amount of money." A "rate" is what is charged to the customer for the utility service to it; not some total amount of money authorized for collection or actually collected by the utility. Nor is a rate some intermediate calculation or prediction about an amount of money. For example, during a rate case the PUC analyzes economic activity to estimate the demand for electricity and how much the utility will sell in future years. There is an unexpected economic upturn the following year, so the amounts collected under rates set for commercial customers exceed expectations. Obviously, neither the underlying calculation errors about customer demand and utility revenue, nor the resulting surplus of actual v. predicted <u>amounts</u> recovered under those rates, changes the authorized <u>rate</u> for those commercial customers.

ORS 756.565, for example, assumes a "rate" can be independently reviewed apart from "any order" embodying a "group of rates":

> All rates, tariffs, [*etc.*] approved or prescribed by the Public Utility Commission and any order made or entered * * * shall be in force and shall be prima facie lawful and reasonable until found otherwise in a proceeding brought for that purpose under ORS 756.580 to 756.610. (emphasis added).

The conclusion that only rate orders in their entirety are reviewable by courts contradicts the references to "rates, tariffs," in ORS 756.565. The remainder of the sentence would suffice to establish the *prima facie* reasonableness of "any order," until reversed on judicial review.

PGE-ABR (p. 50) contends that the former (now repealed) ORS 756.598 allowed only the appeal of an entire "rate order." But the applicable judicial review statute until 2006 was ORS 756.580(1), which stated:

> A party to any proceeding before the Public Utility Commission, when aggrieved by any findings of fact, conclusions of law or order, including the dismissal of any complaint or application by the commission, may prosecute a suit against the commission to modify, vacate or set aside such findings of fact, conclusions of law or order.

The statute did not require a party to challenge the "entire order" or the "end result," whatever that means. Nor does ORS 183.482. And the rates including Trojan return on investment was the "end result" of the Order 95-322 rates found unlawful in ***Trojan I***.

Reviewing courts have consistently referred to the charges for Trojan profit as violating law--not violating "reason" or "fairness." ***Trojan I*** did address the legality of particular charges within Order 95-322 and did so conclusively: "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 * * *." 154 Or App at 717. ***Dreyer*** referred to "the amounts that PGE collected in violation of ORS 757.355 (1993) between April 1995 and October 2000." 341 Or at 286.

ORS 757.355 is a substantive prohibition on certain amounts in rates, not subject to balancing whether the rates are "undue," "unreasonable," or other words suggesting a balance between the interests of the utility and ratepayer. ORS 757.355 has always been framed as a substantive prohibition on certain charges imposed on customers, not reviewable for "unjustness."

B. RATES CAN BE REVIEWED FOR SUBSTANTIVE ILLEGALITY INDEPENDENT ANY REQUEST THAT AN ENTIRE ORDER BE FOUND NOT FAIR OR REASONABLE.

CAPs argue that the substantive lawfulness of a single rate/charge in an order can be independently evaluated by a reviewing court without overturning the entire order as unlawful or unreasonable. PUC-ABR (pp. 30, 33-34) actually agrees with this proposition, arguing that the conclusion in ***Trojan I*** that PGE was collecting amounts which violated ORS 757.355 did not render the entire "rate order" unlawful, unless the aggregate of rates therein were also found to be "outside the range of reasonableness." CAPs agree on that limited point and point out that no party ever challenged Order 95-322 as being not within the broad zone of "just and reasonable."

Instead, URP and others argued to the Marion County Circuit Court that charges for Trojan return <u>on</u> investment (or profit or interest) were unlawful, not that the overall Order 95-322 revenue requirement exceeded the "broad zone of

reasonableness." ***In re Permian Basin Area Rate Cases***, 390 US 747, 770, 88 SCt 1344 (1968). While the Circuit Court remand of Order 95-322 was thus upheld in ***Trojan I***, the PUC's conclusion that the overall rates fell within the "broad zone of reasonableness" was never challenged.

The parties do differ on the legal effect of the undisputed conclusive "reasonableness" of the aggregate amounts authorized in Order 95-322. CAPs contend that with both (1) the reasonableness of the total amounts authorized under Order 95-322 established conclusively (by failure to preserve the claim of "unreasonableness" through timely appeal at the time) and (2) the illegality of charges imposed on ratepayers during 1995-2000 also conclusively established, then (3) the amount of the illegal charges was capable of ascertainment and recoverable as damages under ORS 756.185 - .200, without altering any lawfully charged rates.

The concept of the Commission revisiting its undisturbed conclusion of just and reasonable rates *sua sponte* is contrary to utility law. CAPs rely on their discussion of ***Arizona Grocery Co. v. Atchison, Topeka & Santa Fe R. Co.***, 284 US 370, 389, 52 SCt 183, 76 LEd 348 (1932) in CAPs OB Review, pp. 37-8.

> Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed.
>
> * * *. It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the Legislature itself.

Precluding the illegal charges initially, or returning unlawful charges now from amounts collected under a group of rates, does not in itself make the amount the utility could have lawfully collected (or now keep) unjust or unreasonable. The amount the utility could lawfully keep from its collections under the remainder of that "group of rates" may well be within the "fair or reasonable" range of properly considered "operating expenses," "capital costs," and shareholder return [ORS 756.040(1)(a) and (b)], without the amounts courts have repeatedly referred to as the unlawful "rate" charged for profit on Trojan.

C. THE MEANINGLESS DISTINCTION BETWEEN REVERSING AN ORDER AS OPPOSED TO REVERSING RATES.

PUC-ABR's (p. 38) principle support for the argument that CAPs are confused about "the difference between and *unlawful rate order* and an *unlawful rate*" rests on ***Hammond Lumber Co. v. Public Serv. Comm'n***, 96 Or 595, 609, 189 P 639 (1920), which in turn includes long internal quotes from other jurisdictions--***Minneapolis, etc., Ry. Co. v. Railroad Commission of Wisconsin***, 136 Wis 146, 116 NW 905 (1908), and ***State v. Great Northern Ry. Co.***, 135 Minn 19, 159 NW 1089 (1916).

PGE-ABR (pp. 26-27) relies on ***Hammond*** for totally unremarkable points such as "courts do not set rates" or that the reviewing court, when finding an order "unreasonable" on review, cannot issue its own order or excise provisions it has found "unreasonable." ***City of Milwaukee v. R.R. Comm'n of Wisconsin***, 206 Wis 339, 240 NW 165, 172 (Wis 1931). The argument is misplaced, because no one

contended at the relevant time that Order 95-322 was unlawful for being not "just and reasonable."

The only other authority PGE offers for the PUC's duty, which "bound" it to conduct a "new" rate case on "harm" to the CAPs, is the Bonneville Power Administration decision upon remand of settlements with PGE and others (PGE-ABR, p. 28), after the settlements were set aside as inconsistent with the Northwest Power Act, 16 USC §§ 839c (a, b-d). ***Portland General Elec. Co. v. Bonneville Power Admin.***, 501 F3d 1009 (9th Cir 2007).

PGE claims the BPA's actions in adopting a revised settlement (not a rate order) bolsters the PUC's claim of "duty" to relitigate the closed rate order. Regardless of whatever the BPA Administrator decided after the settlements were found contrary to law, he is a federal officer with a unique mandate to operate in the "best business interests of BPA."[3] This is far different from grants of authority to the PUC.

Turning to PUC's discussion of ***Hammond***, the internally cited out-of-state cases did not deal with "rates" at all. Both ***Minneapolis, etc., Ry. Co.*** and ***Great Northern*** reviewed orders requiring the railway to construct new structures (such

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3. Unlike many regulatory agencies, "Congress endowed the Administrator with broad-based powers to act in accordance with BPA's best business interests," allowing BPA "to function more like a business than a governmental regulatory agency." ***Ass'n of Pub. Agency Customers***, 126 F3d at 1170; see 16 USC § 838i; id. § 839f(b) * * *.

PGE v. Bonneville Power Admin., *supra*, 501 F3d at 1030 n 17.

as a depot). To support its claim that courts overturn "orders," not illegal "rates," Order 08-487 altered the meaning of the internal quotes and inserted the words "rate order" and "reasonableness of a rate" and "rate" in brackets [Order 08-487 pp. 23-24, ER-123-124], seeking to convert decisions overturning orders requiring specific performance of construction tasks into "[rate] regulations," when in fact neither case involved rates. A utility rate order has multiple findings and components, while an order to construct a passenger platform deals with the reasonableness of demanding one prospective expenditure as part of rail service.

PUC-ABR (p. 39) quotes ***Hammond*** (quoting ***Minneapolis, etc., Ry. Co.***), without noting it is a statement of Wisconsin law or that the railway regulations at the time allowed carriers to file individual tariff sheets for carriage or transport (different rates for different products and routes) which could be contested by shippers (or passengers) in proceedings before the Commission. ***Hammond*** describes the carrier's statutory right to set its own rates, subject to complaint by a shipper. *Id.*, at 597-8.

The Oregon judicial review statute set out in ***Hammond***, similar to Wisconsin's, provided two different standards for court review of (1) orders approving a rate after challenge and (2) orders ordering or approving a particular railroad practice or service. Lord's Oregon Laws, § 6910. After hearing a complaint, the "order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates or any order fixing any regulation, practice or service" was appealable to circuit court on the basis that

> the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order is unlawful or that any regulation, practice or service prescribed or fixed in such order is unreasonable.

Hammond, at 597-8; LOL § 6910 (emphasis supplied). Thus, the statutory scheme certainly allowed appeal of either a "rate or rates" within an order as unlawful, although that was not the issue in ***Hammond*** (or the internally cited cases.) Naturally, the decision deals with the issue actually raised.

Hammond is an appeal of an order adopting a "single" rate for shipping logs along a single rail line in Columbia County. *Id.* In its filed rate for that service, the carrier included amounts for accelerated depreciation of its rail stock. The customers did not claim the rate was "illegal" but did argue the rate was "unfair." The Commission found that method of calculation reasonable. *Id.* at 605-6. No rates for other products or other routes or distances were at issue. Thus, it is not surprising that upholding or setting aside the "order" and upholding or setting aside the "rate" was essentially one and the same.

Hammond quotes ***Minneapolis, etc., Ry. Co.*** in noting that its role is to "ascertain if [the commission] violated any principle of law or gone beyond the scope of its duty in making the order." ***Hammond***, 96 Or at 603. PUC-ABR (p. 39) choses to italicize "the *order*" in the foregoing sentence, as if emphasizing one word from *dicta* in a Wisconsin case somehow alters LOL § 6910's express language that an appeal from a commission order could challenge not only an order, but "the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order" as "unlawful."

Thus, the only case in Oregon that PUC could find to cite for its proposition that rates cannot be declared unlawful by a reviewing court does not support its proposition.

D. DREYER POSED INQUIRIES TO THE PUC BUT DID NOT AUTHORIZE THE PUC TO DECIDE "IF" RATEPAYERS WERE HARMED, ONLY WHETHER IT COULD REMEDY THE ALREADY IDENTIFIED VIOLATIONS OF LAW.

CAPs discuss respondents' answering arguments regarding what CAPs labeled in headings as "summary of Dreyer inquiries" and "the erroneous approach of Order 08-487 and the majority opinion." ***Dreyer*** deals directly with the CAPs class certification period of 1995-2000 under Order 95-322, yet the PUC's description of ***Dreyer*** (PUC-ABR p. 17) quotes a portion of the ***Dreyer*** decision which relied on then-current remand instructions (underlined below) from the Marion County Circuit Court in UM 989 pertaining to Order 02-227 (culminating in ***Trojan II***), which applied to a later period.

> [T]he 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 have been injured (and, if they have been, the extent of the injury). <u>In that regard, we note that the PUC has been instructed [by the Circuit Court] either to revise and reduce rates to offset the previous "improperly calculated and unlawfully collected rates" or to order PGE to issue refunds.</u> Depending on how the PUC responds to that remand, some or all plaintiffs claimed injuries may cease to exist. Moreover, the 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: <u>revision of rates to provide for recovery of unlawfully collected amounts.</u> Certainly, if the PUC decides to take that approach to the problem, its special expertise makes it a far superior venue for determining that remedy.

While it is possible that this Court may have thought that the existence of such specific remand instructions from a court ordering revision and reduction of rates might alter the circumstances when, if ever, the PUC had authority to retroactively reduce rates for 1995-2000, those specific remand instructions were then repudiated by the Court of Appeals in ***Trojan II,*** 215 OrApp at 374. PUC's response to that referenced remand instruction from the Marion County Circuit Court, was to appeal it. ***Trojan II*** concluded that ***Dreyer*** itself disallowed such specific judicial instruction.

> It is now evident, after ***Dreyer***, that the circuit court's remand instructions were erroneous. The circuit court presumed that: (1) the PUC had authority to offer a remedy to ratepayers through rate reductions or refunds of previously collected amounts, and (2) was required to exercise that authority. However, as the Supreme Court explained, there are alternative ways in which ratepayers could attempt to obtain a refund of unlawfully collected amounts: They could seek a refund, as they did in this case, through a rate reduction or refund through the PUC, or they could proceed in circuit court against PGE, as the class action plaintiffs did in ***Dreyer***. Whether the former avenue should be utilized, the Supreme Court held, is a matter that should be determined, in the first instance, by the PUC.

215 OrApp at 374. In reversing the Circuit Court's remand instructions, the Court of Appeals repudiated the Circuit Court's language this Court relied upon in part for abating the class actions relating to the earlier 1995-2000 period.

PUC-ABR (p. 41) claims that ***Dreyer*** "expressly assumed that the PUC would exercise its ratemaking authority in the remand proceedings." But the quotation offered there illustrates that ***Dreyer*** did not contemplate the use of "ratemaking" to (1) retroactively declare the 1995-2000 so-called "end results" to be lawful under new calculations, new issues and new evidence or (2) deprive the 1995-2000

ratepayers of their potential remedy in court-awarded damages. This Court's only mention of "ratemaking" was in noting that the PUC potentially could return some or all of the past unlawful charges to ratepayers by adjusting future rates to so do because, as of the time of ***Dreyer***, PUC was under a judicial instruction that included: the "revision of rates to provide for recovery of unlawfully collected." 341 Or at 285.

Nothing in ***Dreyer*** "expressly assumes" or instructed the PUC to "exercise its ratemaking authority" or to "engage in retrospective analysis" in the remand of Order 95-322. PUC-ABR, pp. 41, 41 n17, 43. Instead, depending on the proper exercise of whatever authority the PUC might have, several options remained open, as the above-quote from ***Trojan II*** illustrates--including that the UM 989 ratepayers "could also proceed in circuit court against PGE."

As noted in URP OB Review, the PUC in Order 08-487 allowed the same rates for 1995-2000 as were authorized in Order 95-322, mostly by replacing the Trojan return <u>on</u> investment with "interest" on the post-closure Trojan investment balance (TIB). Both the PUC's declaration that the original 1995-2000 rates were "just and reasonable," and its calculation of the small refund due to later post-September 2000 ratepayers as only $37.5 million, depend entirely upon allowing in PGE rates for the 5.5-year CAPs period 7.09% interest on the unrecovered Trojan investment, the TIB.

In any event, the remand of Order 02-227 to assess the proper calculation of the Trojan balance at the end of the Order 95-322 rate period (the end of the class

action period) did not order or contemplate changing the evidentiary record of the superseded UE 88 rate case in order to determine whether the rates charged in the 1995-2000 period were within the "broad zone of reasonableness," as no one disputed that they were. The only legal conclusion was that the charges for profit on Trojan post-closure were illegal. ***Trojan I***.

III. THIRD AND FOURTH ASSIGNMENTS OF ERROR: THE PUC ERRED IN CONDUCTING RETROACTIVE RATEMAKING (3) WITHOUT SPECIFIC AND EXPRESS STATUTORY AUTHORITY AND (4) IN ORDERING PGE TO ISSUE REFUNDS FOR A ONE-YEAR PAST PERIOD OF TIME IN UM 989 REMAND.

A. THE VARIOUS PROPOSED SOURCES OF PUC AUTHORITY DO NOT AUTHORIZE THE REEXAMINATION OF ORDER 95-322 THE PUC UNDERTOOK.

Respondents proffer a number of rationales for the PUC's claimed authority to hold a hypothetical rate case. PGE-ABR (p. 25) cites ***Kari v. Jefferson County School Dist. No. 509-J***, 120 OrApp 99, 852 P2d 235, *rev den,* 318 Or 25, 862 P2d 1305 (1993). This case, and ***Armstrong v. Employment Div.***, 113 OrApp 257, 832 P2d 1233 (1992) (relied upon by the Majority Opinion) are discussed at CAPs OB Review, pp. 62-64. In both cases, the appeals court ordered the agency reconsider its ultimate conclusion in orders under review in light of the court's instruction of the interpretation of the applicable legal standard to the record facts which might alter the ultimate conclusion of the order (Kari's qualifying for reinstatement to employment; Armstrong's eligibility for unemployment compensation), but neither remand resulted in new issues or evidence at the agency.

Fly v Heitmeyer, 309 US 146 (1940), is not a rate case. PGE-ABR, p. 25. The FCC's rejection of Heitmeyer's application for a broadcasting license was remanded for legal error. Since no license was granted, in the interim of the appeal, other applicants sought the broadcast license for the same geographic area. Since there were now rival applications, the FCC's "duty was to apply the statutory standard in deciding which of the applicants was to receive a permit." 309 US at 148. Obviously, the question on remand was which applicant best satisfied the "public convenience, interest or necessity" a different question than the propriety of the denial of Fly's application.

Fly notes it is controlled by ***FCC v. Pottsville Broadcasting Co.***, 309 US 134 (1940). The situation there was similar (FCC could proceed with its consolidated dockets, including the remanded case), and compare rival applications for permits. 309 US at 145. Congress later countermanded the ***Pottsville*** result by amending 74 USC § 402 in 1956: requiring the FCC on remand "to carry out the judgment of the court" and, "unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record which said appeal was heard and determined." ***Greater Boston TV Corp. v. FCC***, 463 F2d 268, 281 (1971), *cert denied*, ***WHDH, Inc. v. FCC***, 406 US 950 (1972).

PGE-ABR (p. 32) claims that ***Dreyer*** "was aware that the PUC's intention was to do precisely that," meaning undertake "investigation of what rate determinations would have been made by the PUC under the statutory framework provided by the Court of Appeals." ***Dreyer*** was merely reciting the PUC position;

the passages offered by PGE were entirely within a quotation from a PUC scoping order. It was not a statement that this Court agreed with the PUC position. PGE-ABR (p. 34) repeats that same tactic with the same quotation.

PGE-ABR (p. 35) misconstrues ***Trojan II***, which "remanded to circuit court with instructions to remand Order No. 02-227 to PUC for reconsideration of issues raised on appeal and cross-appeal," for the proposition that those issues "included whether the PUC's authority on remand from ***Trojan I*** was limited to considering *only* the Trojan profit element. ***Trojan II*** was referring to issues raised in the ***Trojan II*** appeal and cross-appeal, not to issues raised in the ***Trojan I*** appeals. And PGE's quotations from the briefs in ***Trojan II*** are also referring to the Circuit Court's remand in the ***Trojan II*** case, not in the ***Trojan I*** case. What the PUC would do on remand of ***Trojan I*** was not "an issue raised on appeal or cross-appeal" in ***Trojan II***.

PUC-ABR (p. 43) claims that ORS 756.568 allows it to "amend orders at any time," as does PGE-ABR (p. 67). ORS 756.568 authorizes the PUC to "upon notice * * * rescind, suspend or amend any order made by the commission" which "shall be served and take effect as provided in ORS 756.558 for original orders."[4] It does not state that the PUC has "authority to reopen the evidentiary records," as

4. PUC did not invoke or give notice of ORS 756.568 to amend any order involved in this case.

PUC and PGE assert. Nor is it clear how the Commission can "amend" a superseded order *nunc pro tunc* without retroactive operation.[5]

Argument based on ORS 756.568 is circular. Amended orders are to take effect in the same manner as "original orders." If PUC's original orders must be applied prospectively, as has always been the case (absent specific statutory exceptions (such ORS 757.215(4)-(5), allowing amounts collected under announced "interim" orders subject to refund), amended orders must also similarly apply prospectively.

The cited authority to modify orders is part of the rail and utility regulation acts adopted by most states near the turn of the last century. Generally, this modification power is a vestige of the older forms of appellate process, which were passed before the development of now-familiar administrative contested case procedures, such as motions for rehearing. ***City of Lansing v. Michigan Public Service Com'n.***, 330 Mich 608, 48 NW2d 133 (1951); ***New England Tel. & Tel. Co. v. Public Utilities Commission,*** 15 PUR4th 128, 354 A2d 753 (Me 1976).

See, ***Morgan v. Portland Traction Co.***, 222 Or 614, 634, 331 P2d 344, 353 (1958). In *dicta*, this Court referred to the Commission's power to alter, modify or rescind as having a function akin to what would now be a motion for rehearing.

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5. ORS 756.568 has been superseded by a later-enacted statute, ORS 183.482(6), which allows the agency to "withdraw its order for purposes of reconsideration" only "prior to the date set for hearing" in the reviewing court.

Notwithstanding this statute, certain "amendments" are unauthorized. Case law indicates that PUC lacks any authority to "amend" a final order to suddenly become "interim" *nunc pro tunc* for the purpose of refunding some amounts collected thereunder. ***Pacific Northwest Bell v. Eachus***, 135 Or App 41, 898 P2d 774 *rev den*, 322 Or 193, 903 P2d 886 (1995). The public utility statutes read in *para materia* "show that PUC's authority to declare rates to be interim and subject to refund is circumscribed." ***PNB v. Eachus***, 135 Or App at 49. This repudiates any broad refund powers lurking within ORS 756.040 as well.

If the PUC cannot order refunds for overcharges which occur during the pendency of a proceeding to account for regulatory lag absent the express authority granted in 1981 under ORS 757.215(4)-(5),[6] it strains credulity to argue the Commission can order refunds under superseded orders for events that occurred decades ago. As to rate cases, "*claim preclusion* may apply to rate filings, notwithstanding authority of Public Utilities Commission to review and amend orders * * *." ***Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Com'n***, 721 FSupp 710, 720, (MD Pa 1989), affirmed 899 F2d 1217 (3rd Cir 1990).

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6. (4) If the commission * * * does not order a suspension [of the new rates], any increased revenue collected by the utility as a result of such rate or rate schedule becoming effective shall be received subject to being refunded * * *.

   (5)* * * Upon completion of the hearing and decision, the commission shall order the utility to refund that portion of the increase in the interim rate or schedule that the commission finds is not justified.

PUC-ABR (p. 48) claims that CAPs rely on ***McPherson v. Pacific Power & Light Co., 207 Or 433, 296 P2d 932*** (1956). They do--for the proposition that overcharged utility customers in Oregon may seek a judicial remedy. See CAPs Opening Brief [to Court of Appeals], pp. 24-26 (discussing the long-approved judicial remedy of suit for money had and received for utility overcharges).

But it was PUC that first relied upon ***McPherson*** for support of its claim to have retroactive ratemaking authority, under a profound misreading of the case. It asserted that this Court "envisioned" PUC authority to order refunds for utility overcharges.

> Those parties [CAPs and Utility Reform Project] that argue that the legislature did not delegate refund authority to the Commission also rely extensively on ***McPherson v. Pacific Power & Light***. In ***McPherson***, the Oregon Supreme Court found that the legislature did not delegate to the Commission the authority to order the issuance of refunds to remedy the imposition of overcharges or unjust and unreasonable rates. [n 132 ***McPherson***, 207 Or at 449]. Although the court recognized the Commission's exclusive jurisdiction to determine whether rates are unjust and unreasonable, **the court seemed to envision a process where the Commission would make that determination, and then the court could award damages to remedy the imposition of the unjust and unreasonable rates. [n 133 *Id.* at 453.] It is unclear from the decision whether the courts or the Commission would calculate the appropriate refund amount.**

Order 08-487, p. 31, ER-131 (emphasis supplied). As noted earlier (CAPs Opening Brief, pp. 22-25, 46; CAPs OB Review, pp. 55-58), Order 08-487 displayed a lack of understanding of the prior statutory schemes. ***McPherson*** was not philosophizing about some "unclear" process which might involve the PUC in issuing utility ratepayer refunds. ***McPherson***, 207 Or at 449, is absolutely clear that the PUC had no refund authority over utilities:

> Turning to the statutes dealing with utilities * * *, we find that the Commissioner has no authority to award any reparations, either for unreasonable or unjustly discriminatory rates, or for overcharges * * *.

CAPs continue to rely on ***McPherson*** as repudiation of the PUC's efforts to misread that case into supporting any PUC retroactive refund authority.

Oddly, even at this stage, PUC still misreads this case. It claims (PUC-ABR, p. 49) that it is inapposite for CAPs' points because:

> ***McPherson*** is about the regulation of railroads; the availability of "reparations" in the context of railroad regulation has nothing to do with whether a utility regulator can order a refund.

McPherson is not "about" railroad regulation. Utility ratepayers challenged a utility surcharge. It reaches a conclusion about the power of the PUC in utility cases. ***McPherson*** (207 Or at 453) summarizes the then-existing statutory scheme (since repealed) for reparations for railway shippers set out in detail in ***Oregon-Washington R.R. & Nav. Co. v. McColloch***, 153 Or 32, 55 P2d 1133 (1936), to illustrate its point that commission powers depend on statute and that no refund authority existed for utility overcharges:

> No such provision is found in the public utility statutes. To determine the jurisdiction of the commissioner over a particular business, one must refer to the substantive statutes governing that business.

McPherson, 207 Or at 542. ***McPherson*** held that the PUC may not calculate or award refunds in <u>utility</u> cases.

We refuted the PUC view of ***McPherson*** and offered many other supporting authorities for the widely-held view on the general prohibitions on retroactive ratemaking, none of which are addressed by PUC-ABR except (p. 51) for

reference to cases collected in a law review article, without citation to which cases from other jurisdictions construe statutes that are like Oregon's or which cases might support what PUC here undertook.

The great majority of jurisdictions have reached conclusions that support the CAPs positions. CAP OB Review, 73-76. CAPs there showed Order 08-487 misstated both the heavy weight of cases contrary to its position and that only cases cited were inapposite. PUC declines to discuss the majority rule and offers no additional case authority.

PUC-ABR (p. 49) then asserts that "***Dreyer*** * * * expressly acknowledged that the PUC had jurisdiction to determine whether it can authorize refunds in this case." Not so. ***Dreyer*** ruled that the PUC had primary jurisdiction to address that determination, subject of course to judicial review, not the unfettered discretion to so determine, regardless of applicable law. "In either event, the issue of the PUC's authority to provide a retroactive remedy is one that, at least initially, belongs before that body." 341 Or at 285. PUC and PGE point to no statute delegating refund authority to PUC, except in specific circumstances (such as faulty interim, temporary rates not adopted in a final order).

PUC-ABR (pp. 49-50) claims that retroactive ratemaking occurs only when "the PUC sets *prospective rates*," and does not apply in other situations, citing no authority other than the Majority Opinion under review herein (which itself does not make that statement). This is a tautological argument. "Ratemaking" is itself a function that sets rates prospectively. The PUC seems to argue it can only

impermissibly set rates retroactively when it is otherwise engaged setting rates but can somehow retroactively set rates (as it did here) when it is doing "something else."

PUC-ABR (p. 50) gives an example of what would be retroactive ratemaking that would not be authorized under what it claims is its general authority of ORS 757.040 it relies upon in later argument (PUC-ABR, pp. 52-33). According to PUC, it would be retroactive ratemaking:

> [I]f the utility earned less than the PUC had predicted it would earn in the past rate period, the PUC may not penalize ratepayers by raising rates in a new rate period in order to make up for that mistaken estimate.

PUC-ABR (pp. 4, 9) also states that retroactive ratemaking is when a commission adopts rates "in an attempt to 'make up' for a utility's anticipated profits or losses in previous rate periods." But that *is* what the PUC did here in Order 08-487. Considering only projected loads and revenue, PGE lawfully earned less than the PUC had predicted it would earn under Order 95-322 (the past, superseded rate period), because $27-34 million of the annual authorized revenues of $883 million (Order 95-322, App. H, p. 1) consisted of the Trojan return <u>on</u> investment declared unlawful in ***Trojan I***.

That ruling left PGE with an absence of legal authority to charge the rates it actually imposed during the 5.5-year Phase 1 Period (1995-2000). PGE was thus faced with losing the "return on Trojan" money it had collected from those ratepayers. Order 08-487 retroactively changed the 1995-2000 rates, so that the loss facing PGE would be avoided. Order 08-487 penalized ratepayers by

retroactively redetermining the 1995-2000 rates to "make up" for the "unexpected shortfall" in lawful revenue during that period for PGE. Retroactive ratemaking means redetermining the rates applicable to a past period.

> The Commission does not have the power to redetermine rates for a past period at a different level from those actually charged in accordance with filed schedules because that would be to make retroactive rates.

City of Norfolk v. Virginia Elec. & Power Co., 90 SE2d 140, 148 (Va 1955). Order 08-487 did not merely "retroactively examine the rates in effect from 1995 to 2000" (PUC-ABR. p. 50), it retroactively redetermined the rates and the underlying rate order by issuing an order, retroactive to 1995-2000, after conducting a new rate case with new issues and new evidence. The purpose of the new rate order, Order 08-487, was to "make up" for PGE's absence of legal authority to charge 1995-2000 ratepayers more for Trojan investment than its principal balance. It "made up" for that mainly by adding "interest" on the balance but also by shortening the Trojan recovery period and removing cost disallowances ordered in Order 95-322, including disallowances for imprudent capital expenditures.

PUC-ABR (pp. 49-53) couches its discussion of retroactive ratemaking in the context of ordering the $37.5 million refund. But what the PUC did in Order 08-487 was not provide the appropriate remedy for the unlawful rates but instead to provide a remedy-denying service for PGE. Yes, PUC ordered a $37.5 refund, but it used retroactive ratemaking (declaring "no harm") to deny to ratepayers the full

amount owed to them for the 1995-2000 period, which URP's witness quantified as $522.9 million as of 2006.

PUC-ABR (pp. 52-53) argues that, whatever retroactive "examination" it undertook of the Order 95-322 rates, it did so under its general grant of authority. ORS 757.040. Although it has previously and often abjured any broad, general retroactive powers [CAP OB Review, p. 47; CAP Opening Brief, Court of Appeals, p. 37] and applied that understanding to parties before it at the PUC,[7] it now claims its authority is so uniquely broad in Oregon under ORS 757.040 that there are really no constraints and no articulable standards to apply to determine restrictions on its power to retroactively change its own superseded rate orders. This Court rejected reliance upon the general authority to allow any stratagem declaring rates interim and subject to refund (***PNB v. Eachus***, *supra*) and quoted that same reasoning in ***Trojan I***, 154 OrApp at 716-17: "notwithstanding the general grant of ratemaking authority, the specific statutes for establishing and changing rates" governed.

PUC argues that the Oregon statutory scheme is unique in <u>not</u> requiring that rates be set prospectively. CAP OB Review (pp. 38-52) showed that the (1)

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7. The PUC argued to this Court in ***Dreyer*** that it lacked such power. It has applied the rule against retroactive ratemaking to deny utility rate applications. See, e.g., Docket No. UT 135, Order 97-180 (denying US West authority to use am "Interconnection Cost Adjustment Mechanism"); Order 97-366 (order on reconsideration). In Docket No. UE 195 (In the Matter of Idaho Power), Order 08-491 (issued one week after Order 08-487) holds (p. 4) that retroactive ratesetting "would have to be approved by the Legislature to be valid."

historical context, (2) 110-year old legislative scheme which has always included cumulative judicial and agency remedies and right to sue for violations of utility duties, (3) case law, (4) consistent interpretation and application by the agency and the Attorney General, and (5) valid, persisting consideration of public policy expressed in voter enactments relating to utilities illustrate that Oregon view has always assumed and held since the 1880s in Oregon that utility rates must be set prospectively.

> [A]ll rate orders are prospective in character; that is, they prescribe rates governing future shipments. Hence, the power to prescribe them, like the power to write laws, is legislative in character.

Valley & Siletz Railroad Co. v. Flagg, 195 Or 683, 715, 247 P2d 639 (1952). The general grant of authority (now ORS 756.040) has always been part of the regulatory scheme that has presumed prospective conduct. Nothing in PUC's arguments should persuade this Court that this statute now means something never intended by generations of lawmakers, commissioners, utilities and customers.

PUC's argument means that ORS 757.259(1)(a)(A) & (B) (allows prospective rate treatment for "[a]mounts lawfully imposed retroactively by order of another governmental agency," and for amounts maintained in properly established deferred accounts") are meaningless, since the PUC had the general power to accomplish those acts without the new authority it sought and obtained. CAP OB Review, pp. 46-49.

PUC-ABR (p. 52) argues that ORS 757.040 must be construed as conferring extremely broad authority to order retroactive refunds, because, absent such power,

PUC is powerless to protect ratepayers from its own mistakes. PUC and its predecessor commissions have operated for over 100 years without claiming or resorting to such power.

But just because the PUC can conduct rate cases, it does not follow that rate cases can solve all harms to ratepayers. Other remedies exist, including court review of orders, various complaints for discriminatory rates, and a full panoply of judicial remedies, specifically allowed since the creation of the regulator, precisely because the utility regulators have never had plenary powers. CAP OB Review, pp. 41-49; Review App-1.

Respondents argue that the PUC may order refunds under its general powers [ORS 757.040], and PGE also argues ***Pacific Northwest Bell Telephone Co. v. Katz***, 116 OrApp 302, 841 P2d 652, *rev den*, 316 Or 527, 854 P2d 940 (1993) ("***PNB v. Katz***") (which allowed refunds only of "temporary rates that failed to comply with an ordered revenue reduction," 316 OrApp at 309), shows that the rule against retroactive ratemaking does not apply to Phase I of the remand which redetermined Order 95-322 rates. While the full scope of the limitations on retroactive ratemaking have not had much appellate discussion, Oregon's own rule against retroactive ratemaking includes (at least):

1. a proscription on considering utility profits or losses incurred under final orders when calculating <u>new</u> rates ***PNB v. Katz***"), Majority Opinion (255 OrApp at 101); and

2. no authority for the PUC to retroactively recharacterize a final order as "not final" for purposes of disturbing past earnings. ***PNB v. Eachus***.

B. CAPS PRESERVED ERROR AND ARE ENTITLED TO REQUEST ALTERNATIVE FORMS OF RELIEF DEPENDING ON THIS COURT'S RULINGS OF LAW.

PUC-ABR (53, n18) claims that "argument" IV.E. in the CAPs OB Review (pp. 59-74) was not "preserved." In particular PUC claims that CAPs alternative requested relief that PUC's reversal of its longstanding interpretation of its own rule against retroactive ratemaking, is such a novel and abrupt new rule should be applied in future cases only. The arguments and case authority for the claims that the PUC acted impermissibly retroactively were preserved at the agency level, and raised in the those briefs as follows:

1. The critique of the rationale for the retroactive rate case is discussed at length in CAPs Opening Brief to the Court of Appeal, third and fourth assignments of error, pp. 32-49; and argument based on principles of issue and claim preclusion applicable to agencies is discussed and shown to be preserved. *Id.*, First Assignment of Error therein.[8]

2. Legislative acquiescence and reliance on agency rules is discussed [*Id.*, pp. 37-39, referred to as "the doctrine of contemporaneous interpretation"].

3. Arguments relating to particular retroactive decisions during the conduct of the remand proceeding relies on record facts preserved and raised in the appeals process by the URP.

Nothing in ORAP 5.45 limits the forms of alternative relief a party requests or what this Court may consider an appropriate judicial response should it agree that error has occurred.

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8. CAPs Opening Brief (p. 8) cited CAPs' numerous filings at the PUC to show that they had preserved all issues raised.

IV. RESPONSE TO BRIEF OF CITIZENS UTILITY BOARD.

Generally, the arguments of this *amicus* mirror or rephrase the arguments of respondents about the so-called authority of the PUC to issue refunds

CUB Amicus, pp. 14-5, offers a policy argument based on misunderstanding the long existing statutory regime and cumulative remedies. It argues that, if this Court agrees with CAPs regarding the availability of cumulative judicial remedies, then utilities might sue ratepayers if they believe a PUC error caused a shortfall in revenues. The statute authorizing suit for utility conduct in violation of the statutes pertaining to rates, ORS 756.185, does not authorize utilities to sue ratepayers. The notion of PGE suing nearly 1 million customers under some *quantum meruit* theory--that customers got "more" electric service than they paid for--would be cumbersome to maintain (serving a millions summonses, providing service copies, etc.). This is simply not a realistic policy concern.

The "intergenerational equity" argument (CUB Amicus, p. 19) ignores the reason why ORS 757.355 was adopted by initiative--to preserve intergenerational equity at the time PGE was investing large sums in nuclear plants, all of which failed to meet expectations. All of them, except Trojan, were cancelled after having consumed billions of dollars in construction costs (Pebble Springs 1 & 2, Skagit Hanford 1 & 2, and WPPSS 3). Trojan broke down 17 years before the end of its expected service life (which justified the cost of construction in the first place. Current customers are shielded from paying for investments which will, at

best, serve only later customers. Current and future customers are shielded from paying for profits on abandoned plants which served older cohorts of ratepayers.

The rule against retroactive ratemaking urged by the CAPs comports with the previous position of the agency: the PUC cannot impose surcharges or recoup utility windfalls. *Ad hoc* reversal of the long-held rule against retroactive ratemaking by the PUC creates uncertainty for ratepayers and utilities. It will be impossible to predict when the PUC will act retroactively to benefit either investors or customers. See CAPs OB Review, pp. 43-44.

Dated: February 12, 2014

Respectfully Submitted,

/s/ Linda K. Williams

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

I 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 9959 words.

Dated: February 12, 2014

/s/ Linda K. Williams

Linda K. Williams

CERTIFICATE OF FILING AND SERVICE

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