IN THE COURT OF APPEALS OF THE STATE OF OREGON

FRANK GEARHART, PATRICIA MORGAN, AND KAFOURY BROTHERS, INC. **Petitioners,** **v.** **OREGON PUBLIC UTILITY COMMISSION,** **Respondent.**	**Oregon Public Utility Commission Docket Nos.** **DR 10** **UE 88** **UM 989** **CA ________________** **PETITION FOR JUDICIAL REVIEW**

1. Petitioners, known in the agency proceeding as the "Class Action Plaintiffs," seek judicial review of the final order of the Oregon Public Utility Commission (OPUC) in consolidated Docket Nos. DR 10, UE 88, and UM 989. The final order is OPUC Order No. 08-487, dated September 30, 2008.

2. The parties to this review and their counsel are:

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3. Judicial review of OPUC final orders is pursuant to ORS 756.610.

4. Accompanying this petition is a copy of the order for which judicial review is sought.

5. Petitioners were parties to the administrative proceeding which resulted in the order for which review is sought.

6. Petitioners at this time are not willing to stipulate that the agency record may be shortened.

Dated: October 22, 2008

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on October 22, 2008, I served a true copy of this Petition for Judicial Review, by deposit into the United States Mail, first class postage prepaid, to:

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CERTIFICATE OF FILING

I certify that on October 22, 2008, I filed the original of this Petition for Judicial Review, by deposit into the United States Mail, first class postage prepaid, to:

State Court Administrator
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Dated: October 22, 2008

Daniel W. Meek

ENTERED 09/30/08

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

DR 10, UE 88 & UM 989

In the Matters of	)	
The Application of Portland General Electric Company for an Investigation into Least Cost Plan Plant Retirement (DR 10)	)	
Revised Tariffs Schedules for Electric Service in Oregon Filed by Portland General Electric Company (UE 88)	)	ORDER
Portland General Electric Company's Application for an Accounting Order and for Order Approving Tariff Sheets Implementing Rate Reduction (UM 989)	)	

EXECUTIVE SUMMARY

In this decision, we address various judicial opinions stemming from our decision in 1995 to allow Portland General Electric Company (PGE) to recover in rates a portion of its undepreciated investment in the retired Trojan nuclear generating facility (Trojan). That decision generated a series of overlapping Commission proceedings, appeals, and civil lawsuits. Our orders in dockets DR 10, UE 88, and UM 989 were challenged and remanded to us for further consideration. We respond to all legal issues identified for our review, as well as the remaining challenges to PGE's recovery of its Trojan investment.

We examine various aspects of the Commission's ratemaking authority and the extent of our authority to redress past rates. We conclude that the Commission has the authority to order a utility to issue refunds under certain limited circumstances.

We also examine PGE's rates from April 1995 through September 2000 to determine whether they were unjust and unreasonable or otherwise unlawful. We conclude that, despite inclusion of an error identified by the Court of Appeals, the rates as a whole were not unjust and unreasonable.

Finally, we review the decision removing PGE's remaining Trojan investment from rates, effective October 1, 2000. We conclude that it is appropriate under the unique circumstances of this case to make an adjustment to the settlement that produced those rates and order PGE to refund $33.1 million to its customers. With that adjustment, we conclude that the settlement was reasonable and appropriate, and that the resulting rates were just and reasonable.

ORDER NO. 08-487

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I. INTRODUCTION

These consolidated remand proceedings are the culmination of a series of events resulting from Portland General Electric Company's (PGE) decision to retire its Trojan nuclear generating facility (Trojan) before the full amount of its capital investment in the facility had been recovered in rates. This early retirement resulted in long-standing controversy regarding whether PGE could recover its remaining undepreciated investment in Trojan from customers and, if so, the appropriate method to allow recovery.

Shortly after Trojan's closure, the Public Utility Commission of Oregon (Commission) concluded that PGE was permitted under Oregon law to recover its undepreciated Trojan investment. ORS 757.355 generally prevents a utility from recovering investment in utility plant that is "not presently used for providing utility service to the customer." But ORS 757.140 allows recovery in rates of a utility's undepreciated investment in utility plant when the plant's early retirement is in the public interest. The Commission interpreted ORS 757.140 as creating an exception to the "used and useful" standard in ORS 757.355 and concluded that ORS 757.140 allowed inclusion of PGE's remaining undepreciated Trojan investment in rate base, which also allowed PGE the opportunity to earn a return on the remaining investment.[1] The Commission incorporated this conclusion into its 1995 decision in docket UE 88, which adopted new rates for PGE and allowed PGE to include 87 percent of its undepreciated Trojan investment in rate base.[2]

In *Citizens' Utility Board v. Public Utility Commission of Oregon* (*Trojan I*), the Court of Appeals disagreed with the Commission's interpretation of ORS 757.140 and 757.355.[3] Although the court agreed that ORS 757.140 allowed PGE to recover the principal amount of its remaining Trojan investment, the court found that ORS 757.355 prohibited the Commission from including the remaining investment in PGE's rate base, thereby giving PGE the opportunity to earn a return on the investment. In other words, the court found that PGE was entitled to a *return of* its remaining undepreciated investment, but the method that the Commission used to allow recovery of this investment—inclusion in rate base with the opportunity to earn a *return on* the investment—was inappropriate. The court remanded the UE 88 order to the Commission for reconsideration.

While an appeal of *Trojan I* was pending in the Oregon Supreme Court, PGE, the Commission Staff (Staff), and the Citizens' Utility Board of Oregon (CUB) reached a settlement that removed all of PGE's remaining undepreciated investment in Trojan from prospective rates. The Commission adopted the settlement in docket UM 989 and approved new rates effective October 1, 2000.[4] The Utility Reform Project (URP) filed a complaint under ORS 757.500 challenging the new rates.[5] URP's primary argument was that the Commission should have offset the Trojan balance as of September 30, 2000, with the amounts collected as a *return on* Trojan from April 1995 through September 2000.

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[1] Order No. 93-1117, Docket DR 10 (Aug 9, 1993); Order No. 93-1763, Docket DR 10 (Dec 7, 1993) (denying reconsideration of Order No. 93-1117).
[2] Order No. 95-322, Docket UE 88 (Mar 29, 1995).
[3] *Citizens' Util. Bd. v. Public Util. Comm'n of Or.*, 154 Or App 702, 962 P2d 744 (1998).
[4] Order No. 00-601, Docket UM 989 (Sept 29, 2000).
[5] *See* Order No. 02-227, Docket UM 989 (Mar 25, 2002).

The Commission rejected URP's challenges in a 2002 order.[6] URP's appeal of the Commission's 2002 order ultimately resulted in the Court of Appeals' decision in *Utility Reform Project v. Public Utility Commission of Oregon* (*Trojan II*).[7] The court reversed and remanded the Commission decision, finding that the Commission relied on a faulty interpretation of the filed rate doctrine in rejecting URP's primary argument.[8]

During the appeal of the UM 989 settlement, counsel for URP sought a remedy from the Marion County Circuit Court, in the form of damages, by filing class action lawsuits on behalf of former and current customers of PGE (the Class Action Plaintiffs or CAPs).[9] The CAPs argued that customers are entitled to refunds or damages because the court in *Trojan I* finally and conclusively determined that the rates approved in UE 88 were "unlawful." After considering competing motions for summary judgment, the court ruled in favor of the CAPs, finding PGE liable for the amounts customers paid for a *return on* PGE's undepreciated Trojan investment from April 1, 1995, through September 30, 2000. PGE then sought a writ of mandamus from the Oregon Supreme Court, arguing that the Supreme Court should order the circuit court to dismiss the lawsuits because the filed rate doctrine barred the CAPs' claims. In *Dreyer v. Portland General Electric Company*, the Supreme Court declined to issue the writ of mandamus, holding that the filed rate doctrine did not compel dismissal of the lawsuits.[10] The Supreme Court concluded, however, that the Commission's decision in these remand proceedings could affect the availability of damages at the circuit court and possibly remedy the CAPs' alleged damages.[11] The Supreme Court therefore abated the consolidated class action proceeding until this Commission could "determine what, if any, remedy it can offer to PGE ratepayers, through rate reductions or refunds" for rates paid that included recovery of a *return on* the Trojan investment during the April 1995 through September 2000 period.[12]

In this order, we respond to all issues raised by *Trojan I*, *Trojan II*, and *Dreyer*. To date, the various proceedings involving the rate treatment of PGE's undepreciated Trojan investment have been fragmented. Commission dockets have proceeded simultaneously with cases at the appellate or circuit courts. Now, all proceedings related to PGE's undepreciated Trojan investment are finally presented in one forum—this Commission. For the first time, we have the opportunity to determine an appropriate rate treatment for the remaining Trojan investment during the entire disputed period (1995 to the present). We therefore decide all issues related to the rate treatment of PGE's remaining undepreciated Trojan investment in this one comprehensive order to avoid future fragmented litigation.

[6] *See id.*
[7] 215 Or App 360, 170 P3d 1074 (2007).
[8] *Id.* at 372-374.
[9] *Dreyer, et al. v. Portland Gen. Elect. Co.*, Case No. 03C-10639 (Marion County Circ. Ct.); *Morgan v. Portland Gen. Elect. Co.*, Case No. 03C-10640 (Marion County Circ. Ct.). The circuit court consolidated these cases. The CAPs have also intervened in these remand proceedings.
[10] *Dreyer v. Portland Gen. Elec. Co.*, 341 Or 262, 270-280, 142 P3d 1010 (2006).
[11] *Id.* at 286-287.
[12] *Id.* at 286.

We begin this order with a review of the Commission's delegated ratemaking authority and the ratemaking process. In this discussion, we explain various ratemaking terminology and principles and provide the proper context for our decision. We also summarize the procedural history of all Trojan-related proceedings to better explain the events that have shaped these remand proceedings.

We then address three threshold legal issues that have arisen during these remand proceedings. First, we must clarify the confusion over the status of the rates approved by this Commission in 1995. URP and the CAPs contend that the Court of Appeals' decision in *Trojan I* determined that the rates were "unlawful." The Marion County Circuit Court similarly labeled the rates as "unlawful" in granting the CAPs' motion for summary judgment in the proceeding that led to the decision in *Dreyer*.[13] Other parties, and even this Commission,[14] have also used the term "unlawful," perhaps unaware of the implications of using that label. The clarification and resolution of this issue not only implicates these remand proceedings, but also the consolidated class action proceeding pending in the circuit court.

Second, we address this Commission's authority to remedy the imposition of "unlawful" rates through rate reductions or refunds. This issue was first raised in UM 989 and has been in question throughout these proceedings. Both the Court of Appeals in *Trojan II* and the Supreme Court in *Dreyer* found that the question of the Commission's authority should be decided, at least in the first instance, by this Commission.

Third, we examine the *Dreyer* decision and outline our understanding of the Supreme Court's decision and its effect on these remand proceedings. Some parties have argued that the court in *Dreyer* conclusively decided that customers are entitled to bring an action in circuit court under ORS 756.185 or 756.200 for damages for the payment of "unlawful" rates. We examine *Dreyer* in light of these arguments, and discuss the Supreme Court's assumptions and conclusions.

Following the resolution of these threshold issues, we respond to the Court of Appeals' remands in *Trojan I* and *Trojan II*. We begin by reexamining the decision in UE 88 to determine whether the Commission's decision to include PGE's undepreciated Trojan investment in rate base with the opportunity to earn a return rendered rates in effect from April 1995 through September 2000 unjust and unreasonable. We next reconsider our decision in UM 989 and reevaluate the rates implementing the settlement reached by PGE, Staff, and CUB. We conclude with our ordering paragraphs.

[13] *See Utility Reform Project v. Pub. Util. Comm'n of Or.*, Case No. 02C-14884, Opinion and Order (Marion County Circ. Ct. (Jan 9, 2004) ("Circuit Court Opinion and Order").
[14] *See* Letter from Commission to Parties in DR 10, UE 88, and UM 989 Regarding Timing of Commission Decision at 1 (Oct 2, 2007).

II. UTILITY RATEMAKING

Utility ratemaking is a unique blend of legislative action and economics that is unlike any other action performed by administrative agencies. In this section, we provide an introduction to ratemaking that allows a more comprehensive understanding of the Commission's regulation of PGE and the rate treatment of PGE's undepreciated Trojan investment. We discuss the Commission's authority to regulate, its powers and limits in setting rates, and the ratemaking process itself.

A. Commission Authority

As monopoly providers of essential services, public utilities are subject to government control over entry, service, and rates. As the Oregon Supreme Court first recognized in 1877, when one "devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."[15]

Since 1911, the Oregon legislature has delegated its authority to regulate public utilities exclusively to the Commission. This delegation provides the Commission with "the broadest authority—commensurate with that of the legislature itself—for the exercise of [its] regulatory function."[16] The Commission is expressly charged with representing utility customers and the public generally "in all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction," and to use those powers "to protect such customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates."[17]

While the Commission has broad authority, its powers are not without limits. As a legislatively created body, the Commission's authority is naturally limited by the boundaries of the legislature's delegation.[18] Moreover, like the legislature itself, the Commission is bound to exercise its authority within the confines of both the state and federal constitutions.[19] Although subject to regulation, public utilities remain private enterprises. Governmental regulation has implied limits that preserve the private rights of these for-profit businesses.[20]

[15] *Board of Canal and Locks Comm'rs v. Willamette Transp. and Locks Co.*, 6 Or 219, 229 (1877), quoting *Munn v. Illinois*, 94 US 113, 126, 24 L Ed 77 (1877).
[16] *Pacific Northwest Bell Tel. Co. v. Sabin*, 21 Or App 200, 214, 534 P2d 984, *rev den* (1975).
[17] ORS 756.040.
[18] *See, e.g., Pacific Northwest Bell Tel. Co. v. Katz*, 116 Or App 302, 309-10, 841 P2d 652 (1992) (an agency's authority cannot go beyond the authority expressly conferred upon it by the legislature), citing *Sabin*, 21 Or App at 213.
[19] *See id.* at 310, citing *Sabin*, 21 Or App at 213.
[20] *See, e.g., Hammond Lumber Co. v. Public Serv. Comm'n*, 96 Or 595, 604, 189 P 639 (1920) ("Thus to devote its property means that it gives to the public the right or option to demand its service or the use of its property, but this is always subject to the condition of just compensation.").

The Commission's most recognized—and perhaps least understood—function is ratemaking. The Commission sets rates under a comprehensive and flexible regulatory scheme.[21] The legislature has expressed no specific process or method the Commission must use to determine the level of just and reasonable rates, and the Commission has great freedom to determine which of the many possible methods it will use.[22]

Ratemaking is performed through a quasi-judicial process similar to a civil court proceeding. The ultimate act of setting utility rates, however, is a legislative function. "The power to prescribe [rates], like the power to write laws, is legislative in character."[23] Ratemaking involves an exercise of Commission discretion to balance the interests of the utility investor and the customer.

> [T]he commission shall represent the customers of any public utility or telecommunications utility and the public generally in all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction. In respect thereof the commission shall make use of the jurisdiction and powers of the office to protect such customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates. The commission shall balance the interests of the utility investor and the consumer in establishing fair and reasonable rates.[24]

The Commission sets rates within a reasonable range that protects the competing interests of the utility and its customers. To protect customers, the rates must be set at a level sufficiently low to avoid unjust and unreasonable exactions. To protect the utility investor, the rates must provide sufficient revenue not only for operating expenses, but also for the capital costs of the business. If the rates "do not afford sufficient compensation, the State has taken the use of the utility property without paying just compensation * * *."[25]

[21] *See Multnomah County v. Davis*, 35 Or App 521, 525, 581 P2d 968 (1978).
[22] *See, e.g., Pacific Northwest Bell Tel. Co. v. Eachus*, 135 Or App 41, 56, 898 P2d 774 (1995), citing *Sabin*, 21 Or App at 224 (Commission is "not obligated to use any single formula or combination of formulas to determine what are, in each case, just and reasonable rates.").
[23] *Valley & Siletz R.R. Co. v. Flagg*, 195 Or 683, 715, 247 P2d 639 (1952). *See also American Can v. Lobdell*, 55 Or App 451, 461, 638 P2d 1152 (1982) ("Utility regulation, including ratemaking, is a legislative function subject only to constitutional limits and those of the Commission['s] express, legislatively delegated broad powers."); *Prentis v. Atlantic Coast Line Co.*, 211 US 210, 226, 29 S Ct 67, 69, 53 L Ed 150 (1908) ("The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind* * *.").
[24] ORS 756.040.
[25] *Duquesne Light Co. v. Barasch*, 488 US 299, 308, 109 S Ct 609, 616, 102 L Ed 2d 646 (1989). *See also Hammond Lumber Co.*, 96 Or at 605 (to devote private property for public use is always subject to the condition of just compensation, because "a public service corporation cannot be expected to sacrifice its property for the public good"); *Pacific Tel. & Telegraph v. Wallace*, 158 Or 210, 224, 75 P2d 942 (1938) ("Constitution fixes limits to the rate-making power by prohibiting * * * taking of private property without just compensation."); *Bluefield Water Works Co. v. Public Serv. Comm'n*, 262 US 679, 690, 43 S Ct 675, 678 L Ed 1176 (1923) ("Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is

Thus, rates must include a return to the utility investor that is commensurate with the return on investments in similar enterprises and sufficient to maintain the financial integrity of the utility:[26]

> From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock * * *. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital.[27]

Although the interests of customers and investors are competing, they are also interrelated and reinforcing. A utility cannot provide adequate service to customers without the ability to attract capital. In fact, a utility would not be able to attract needed capital if the rates do not provide sufficient revenue to pay the interest on its outstanding debt. Accordingly, Commission rate decisions generally permit a utility to maintain financial coverage ratios sufficient for investment-grade debt ratings.

B. Ratemaking Process

The Commission's statutes provide three ways to change a utility's rates.[28] The first and most commonly used method is for a utility to file proposed tariffs under ORS 757.210. Second, ORS 756.515 authorizes the Commission to investigate any rate it believes to be unreasonable or discriminatory. Finally, any person may file a complaint challenging an existing rate under ORS 756.500.

Regardless of how a rate case is initiated, the Commission exercises its legislative authority using quasi-judicial proceedings generally characterized by discovery, pre-filed testimony, evidentiary hearings, and briefing on policy and legal matters. A rate case typically focuses on two basic ratemaking tasks: (1) determining the utility's revenue requirement; and (2) allocating that revenue requirement among customer classes and services.[29]

being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment."); *Smyth v. Ames*, 169 US 466, 475, 18 S Ct 418, 434, 42 L Ed 819 (1898) ("What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience.").

[26] *See* ORS 756.040(1)(a) and (b), adopting language from *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 US 591, 602-03, 64 S Ct 281, 288, 88 L Ed 333 (1944).

[27] *Hope*, 320 US at 603. *See also Bluefield*, 262 US at 693 ("The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit * * *.")

[28] *See Multnomah v. Davis*, 35 Or App at 525.

[29] *See Lobdell*, 55 Or App at 454.

The Commission's ultimate goal is to set rates that provide the utility the opportunity to collect enough revenue to recover reasonable operating expenses and to earn a reasonable return on investments it has made to provide service. To determine how much revenue a utility should be allowed to receive, the Commission uses a standard ratemaking formula generally expressed as $R = E + (V-d)r$. "R" represents revenue requirement, "E" represents allowable operating expenses, "V" represents rate base, "d" represents accumulated depreciation, and "r" represents the rate of return allowed on the rate base.[30]

A utility's rate of return is calculated by identifying the costs and components of the utility's capital structure. The cost of each capital component—typically debt, preferred stock, and equity—is estimated using financial models and weighted according to its percentage of total capitalization. These weighted costs of capital are then combined to calculate the utility's overall cost of capital, which becomes the allowed rate of return on rate base.[31] The rate of return established in rates represents the utility's *opportunity* to earn a profit, but utilities are not guaranteed a fair rate of return.[32]

The ratemaking formula allows the Commission to set just and reasonable rates based on a forecast of the utility's revenue needs. It does not, however, render a precise result. There are so many variables in the formula that there are literally an infinite number of possible results: "The economic judgments required in rate proceedings are often hopelessly complex and do not admit to a single correct result."[33] Moreover, like all forecasts, the utility's actual costs will vary. Some estimates of expenses will be too high; others will be too low. The utility absorbs the expenses if they are higher than expected and benefits if the expenses are lower, which gives the utility the incentive to manage its operations efficiently to reduce expenses and attain its authorized return on investment. If actual costs deviate significantly from those estimated in rates, then a utility, the Commission, or a customer may initiate a new rate proceeding under the processes mentioned above.

For these reasons, the validity of the determined rates rests on the reasonableness of the overall rates, not the theories or methodologies used or individual decisions made. As the United States Supreme Court explained in *Hope*, if the total effect of the rate order is not unjust and unreasonable, "[t]he fact that the method employed to reach

[30] Charles F. Phillips, Jr., *The Regulation of Public Utilities* 177 (3d ed 1993).

[31] Rate base is often misconstrued as the entire basis for a utility's rates, meaning rate base is thought to include all expenses, revenues, and capital investments. This is incorrect. Rate base has a narrow meaning. It generally includes those amounts that a utility prudently invests in capital assets that serve customers.

[32] *See, e.g., Public Serv. Comm'n of Mont. v. Great Northern Utils. Co.*, 289 US 130, 135, 53 S Ct 546, 548, 77 L Ed 1080 (1933) (The Fourteenth Amendment does not "assure to public utilities the right under all circumstances to have a return upon the value of its property * * *."); *Market St. Ry. Co. v. Railroad Comm'n*, 324 US 548, 567, 65 S Ct 770, 89 L Ed 1171 (1945) ("The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces.").

[33] *Duquesne*, 488 US at 314. *See also Hammond Lumber Co.*, 96 Or at 609 (the factors involved in ratemaking are "so many and so variable that it is impossible to fix rates that will be mathematically correct or exactly applicable to all the new conditions that may arise even in the immediate future").

that result may contain infirmities is not then important."[34] The Oregon Supreme Court has also recognized the holistic nature of ratemaking, stating that "it is the end result of an order of a regulatory authority which determines the question as to its validity and not the processes by which the authority reached the result."[35]

All rate proceedings culminate with a Commission order establishing new rates. To implement any rate change, the Commission directs the affected utility to file new tariffs under ORS 757.220 and specifies the effective date of the new rates.[36] Any party may request reconsideration or seek judicial review of a Commission rate order.[37] Any such challenge, however, does not stay the rate order. The order is presumptively valid during appeal.[38] To postpone the effect of the decision, a party must seek an order from the Commission or court to prevent the new rates from taking effect until final disposition of the challenge.[39] A Commission rate order is not considered final and conclusively lawful until: (1) the time for appeal has passed and no party filed a request for judicial review; or (2) a party seeks judicial review, and the reviewing court upholds the Commission's order. Once final, a Commission rate order is not subject to collateral attack.[40]

III. PROCEDURAL HISTORY

The early retirement of Trojan resulted in numerous Commission proceedings, multiple appeals of Commission orders, court remands, and a consolidated class action lawsuit. The extensive procedural history of these matters will not be fully reviewed here.[41] Rather, we focus on the key events affecting these remand proceedings: (1) a Commission declaratory ruling (DR 10); (2) two Commission rate orders (UE 88 and UM 989); (3) the appellate review and remands of DR 10, UE 88, and UM 989; and (4) the Supreme Court's opinion in *Dreyer*. We also summarize the procedural history of these consolidated remand proceedings.

[34] *Hope*, 320 US at 602. *See also Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish County*, 554 US ___, 128 S Ct 2733, 2738, 171 L Ed 2d 607 (2008) ("We have repeatedly emphasized that the Commission is not bound to any one ratemaking formula.").
[35] *Flagg.*, 195 Or at 699.
[36] *See, e.g., In re Portland General Electric Company*, Docket UE 180, Order No. 07-273 at 4.
[37] *See* ORS 756.561; ORS 756.610.
[38] *See* ORS 756.565.
[39] *See* ORS 756.561(2); ORS 756.610(2). *See also Eachus*, 135 Or App at 47 (Pacific Northwest Bell requests stay of rate decrease; agrees it will be required to issue refunds from date of Commission order if they lose appeal).
[40] *See, e.g., Morgan v. Portland Traction Co.*, 222 Or 614, 622, 331 P2d 344 (1958) (statutory scheme for judicial review of a Commission rate order is "intended to be the exclusive method of testing the validity of the Commissioner's order."); *Mt. Hood Stages, Inc. v. Haley*, 252 Or 538, 542, 451 P2d 125 (1969) (citing *Morgan* in support of the proposition that "[a]n order of the commissioner promulgated under his statutory authority is not subject to collateral attack. Judicial review is available under ORS 756.505 to 756.610 and not otherwise."); *Garrison v. Pacific Northwest Bell*, 45 Or App 523, 530, 608 P2d 1206 (1980) ("Thus, the rates and service levels set by the Commissioner are * * * not open to collateral attack in this proceeding."); *Simpson v. Phone Directories Co.*, 82 Or App 582, 586, 729 P2d 578 (1986) (rates established by the Commission are "subject to attack only in actions prosecuted against the PUC for that purpose" and "cannot be collaterally attacked in proceedings such as this.").
[41] For an in-depth discussion of the relevant procedural history, see Order No. 04-597, Appendix A. The Court of Appeals' opinion in *Trojan II* also includes a clear and concise description of the procedural history. *Trojan II*, 215 Or App at 363-371.

A. DR 10

Trojan was a 1200 megawatt nuclear generating facility that began commercial operation in 1976. When Trojan went into service, the Commission allowed PGE's investment in the plant to be included in PGE's rate base. The Commission found that PGE's investment was prudent and set rates to allow PGE the opportunity to recover its investment over a 35-year period (until 2011) through an annual depreciation expense and a return on the undepreciated balance.[42] Degradation of the plant's steam generator tubes, however, led PGE to retire the plant in January 1993, before the utility had an opportunity to fully recover its capital investment in the plant. PGE concluded that closing the plant was the least-cost option for its customers, meaning that closing Trojan and replacing its output with purchased power was expected to be less expensive than continuing to operate the plant.

Shortly after the plant's closure, PGE filed a request for a declaratory ruling under ORS 756.450. PGE asked the Commission to decide whether PGE could recover its unrecovered capital investment in Trojan if PGE demonstrated in a rate proceeding that Trojan's retirement "assure[d] an adequate and reliable supply of electricity at the least cost to the utility and its customers consistent with the long-run public interest."[43] In response to PGE's petition, the Commission relied on legal advice it had previously sought from the Oregon Department of Justice (DOJ) relating to the possible closure of Trojan. In a letter of advice, the DOJ determined that the Commission could authorize recovery of capital costs associated with the retirement of a plant upon a finding that the recovery was in the public interest or produced net benefits for customers.[44]

The DOJ identified two types of capital costs: (1) *return of* undepreciated investment; and (2) *return on* the undepreciated investment.[45] Although ORS 757.355 generally prohibits the recovery of costs for property not currently used to provide utility service, the DOJ concluded that the Commission had the authority to allow for recovery of both types of capital costs under ORS 757.140(2), which provides:

> In the following cases the commission may allow the utility to 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*.[46]

[42] *See* Order No. 76-601.
[43] Order No. 93-1117 at 1 (quoting from PGE's request for a declaratory ruling).
[44] *See* Letter of Advice dated June 8, 1992, to Ron Eachus and Joan H. Smith (OP 6454).
[45] *See id.* at 2.
[46] ORS 757.140(2) (emphasis added).

The DOJ acknowledged that ORS 757.140(2) does not expressly address the *return on* undepreciated investment, but concluded that the Commission could include it in rates. Because ORS 757.140(2) allows the Commission to order the immediate *return of* the investment, the DOJ reasoned that "the statute also allows the commission to provide for the economic equivalent of immediate return: return over time, with interest on the unreturned amount."[47] The DOJ also noted that "one might argue that if the commission does not allow interest, then it is not permitting the utility to recover its full investment."[48]

The Commission adopted the DOJ's analysis and concluded that it would favorably consider allowing PGE to recover a *return of* and a *return on* its undepreciated investment in Trojan in rates if PGE established certain facts in a subsequent rate proceeding. Such facts included a showing that permanently closing Trojan in January 1993 was in the public interest.[49]

B. UE 88

In November 1993, PGE filed a general rate case seeking to raise overall customer rates by approximately $90 million per year.[50] One significant issue in the case was the recovery of PGE's net undepreciated Trojan investment, which totaled approximately $288.2 million. PGE's investment in Trojan had been in rate base since 1976. At the time PGE filed its rate case in 1993, PGE's remaining investment was still in rate base. The question presented to the Commission in UE 88 was whether the full amount of this investment was still recoverable and could remain in rate base now that Trojan was retired. PGE sought full recovery of its investment, arguing that closing the plant and replacing its output with purchased power was the least-cost option for serving its customers.

The Commission rejected PGE's request for full recovery of the remaining Trojan balance under a "least-cost" theory. Although the Commission agreed that closing Trojan was PGE's least-cost option, the Commission did not believe that this alone was sufficient to meet the "public interest" standard in ORS 757.140(2)(b). The Commission was concerned that PGE's least-cost analysis failed to examine whether the costs associated with the plant's closure were prudently incurred. The Commission noted that a utility's mismanagement of a plant might affect the costs of continued operation and might therefore overstate the apparent benefits of the plant's closure.[51]

Instead, the Commission applied a "net benefits" test to decide whether the closure of Trojan was in the public interest for purposes of determining recovery of undepreciated investment. The Commission explained that the net benefits test compares the allowable projected costs of continuing to operate the plant with the allowable projected costs of closure. Allowable costs are those costs the Commission would deem reasonable and allow PGE to include in rates. By examining the reasonableness of PGE's actions, the net benefits test ensured that the closure of Trojan was in the public interest by identifying

[47] OP 6454 at 3.
[48] *Id.*
[49] *See* Order No. 93-1117 at 11.
[50] *See* Order No. 95-322.
[51] *See id.* at 32.

the point at which customers were indifferent between the continued operation of Trojan and the shutdown of Trojan, which included the estimated costs of construction or acquisition of replacement resources.[52]

To perform its net benefits test, the Commission compared the estimated allowable long-term costs of continued Trojan operation with the costs associated with closing the plant, plus the estimated long-term costs of replacing its output. In determining costs associated with closing the plant, the Commission included a return on PGE's remaining undepreciated investment in Trojan.

To help determine the amount of present and future allowable costs, the Commission hired an independent consulting firm to review PGE's operation and management of Trojan.[53] Based on the consultant's review, the Commission determined that the estimated allowable long-term costs of closure exceeded the estimated allowable long-term costs of continued operation, and therefore disallowed $20.4 million[54] of PGE's remaining undepreciated investment in Trojan. The Commission also disallowed an additional $17.1 million in Trojan-related capital expenditures made after 1991,[55] resulting in a total Trojan-related disallowance of $37.5 million.[56]

With these adjustments, the Commission determined that the remaining amount of undepreciated investment, $250.7 million, represented the point at which customers were indifferent between the continued operation of Trojan and its shutdown, thus ensuring that Trojan's closure was in the public interest. Applying the legal framework adopted in the DR 10 declaratory ruling, the Commission found that the recovery of this amount was in the public interest under ORS 757.140(2).[57]

The $250.7 million figure was the after-tax figure. The corresponding pre-tax figure, representing the net Trojan plant investment (gross plant less accumulated depreciation), was $340.2 million. Rather than allowing an immediate return of this amount, the Commission authorized PGE to recover the $340.2 million over a 17-year period (until 2011) through an annual depreciation expense; the after-tax investment of $250.7 million was included in PGE's rate base, giving PGE the opportunity to earn a return on that amount.[58]

[52] *Id.*
[53] *Id.* at 36.
[54] Equivalent to $26.8 million after taxes are considered.
[55] These capital expenditures reflected plugging and sleeving expenses.
[56] Order No. 95-322 at 52.
[57] *Id.*
[58] The actual authorized amortization period was 16 years, 9 months (April 1, 1995, through December 31, 2011). For simplicity, throughout this order we refer to 17 years as the amortization period authorized in UE 88, but in any calculations we used the *actual* authorized amortization period.

The Commission created a Trojan Investment Recovery Account (TIRA) to amortize PGE's authorized Trojan recovery.[59] The TIRA was designed to adjust the amortization of the Trojan balance to reflect actual revenue received by PGE. Unlike a regular balancing account that amortizes an expense based on a fixed annual amount, the TIRA reduced the Trojan balance based on PGE's actual annual revenues multiplied by the rate case ratio of the Trojan revenue requirement to PGE's overall revenue requirement. The Commission required PGE to report the balance in the TIRA in its semi-annual adjusted results of operation reports.

The Commission made its decisions regarding the rate treatment of PGE's remaining Trojan investment in conjunction with numerous other decisions on proposed rate elements and methodologies used to set PGE's rates. Among other decisions affecting PGE's estimated revenue requirement, the Commission continued a 27-year period to amortize a customer credit of $111 million resulting from the sale of a portion of the Boardman generating facility, approved PGE's recovery of variable power costs based on test-year estimates of $304.6 for 1995 and $310.1 for 1996, and included a rate of return on equity of 11.6 percent.[60] In addition, the Commission approved recovery of Trojan decommissioning costs and—finding that the accounting classification of Trojan assets used for safety, environmental protection, and decommissioning had no effect on rates—classified these assets as abandoned rather than plant-in-service.[61]

Combining those adjustments with the allowed recovery of PGE's undepreciated investment in Trojan, the Commission ultimately approved new rates to increase PGE's annual revenue requirement by approximately $50 million. This resulted in an overall increase in customer rates of 5.8 percent. The Commission concluded that these rates were just and reasonable.[62]

C. Appeals of DR 10 and UE 88 (*Trojan I*)

CUB and URP (joined by Colleen O'Neill and Lloyd Marbet) separately appealed the Commission's declaratory ruling in DR 10 and its rate determination in UE 88. CUB did not oppose the recovery of the undepreciated principal amount of PGE's Trojan investment, but argued that allowing PGE to earn a *return on* its remaining investment was contrary to law. URP opposed recovery of both the *return of* and the *return on* PGE's remaining Trojan investment. Neither CUB nor URP sought a stay of the DR 10 or UE 88 orders.

[59] Order No. 95-322 at 65.
[60] *Id.*, Appendices B, D, and E. Return on equity (otherwise known as the cost of equity) is one component used in the calculation of a utility's rate of return. *See supra* p 7.
[61] Order 95-322 at 59-60.
[62] *Id.* at 66.

Under laws governing judicial review of Commission orders at that time,[63] the appeals were initially heard by the Marion County Circuit Court, which issued conflicting opinions. One judge upheld the Commission's declaratory ruling (DR 10) allowing both a *return of* and a *return on* PGE's remaining Trojan investment.[64] Another judge then reversed the rate decision (UE 88) that incorporated the orders in DR 10 because the Commission impermissibly allowed a *return on* the remaining investment.[65] The circuit court decisions were then appealed to the Court of Appeals, which consolidated the appeals.

The Court of Appeals rejected URP's arguments opposing the *return of* PGE's undepreciated principal.[66] It concluded, however, that while ORS 757.140(2) authorizes recovery of undepreciated investment in a retired plant in some circumstances, ORS 757.355 precludes any return or "profit" on that amount.[67] The court 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. Like the specific statutes that "circumscribed" PUC's authority in *Eachus*, ORS 757.355 and ORS 757.140(2) as we have interpreted them disallow the return component that the PUC orders allowed for PGE's investment in Trojan.[68]

In short, the court held that the Commission could allow PGE to recover a *return of* its undepreciated investment in Trojan, but could not allow PGE to include the remaining investment in rate base, which also allowed PGE to earn a *return on* the investment. The court remanded the orders in DR 10 and UE 88 to the Commission for reconsideration.[69]

[63] *See former* ORS 756.610. The legislature amended ORS 756.610 in 2005. Appeals of Commission orders are now filed directly in the Court of Appeals. ORS 756.610; ORS 183.480 – 183.484.
[64] Marion County Circ. Ct. Case Nos. 94C-10372 and 94C-10417 (affirming Order Nos. 93-1117 and 93-1763 in DR 10).
[65] Marion County Circ. Ct. Case Nos. 95C-11300 and 95C-12542 (reversing Order No. 95-322 in UE 88).
[66] *Trojan I*, 154 Or App at 711, n 3.
[67] *Id.* at 714. It is arguably illogical to restrict the options for cost recovery under ORS 757.355 for utility facilities that, for the public interest, have been retired prematurely. The Commission believes that the legislature addressed this situation by enacting ORS 757.140(b), which should be viewed as an exception to ORS 757.355.
[68] *Id.* at 716-17.
[69] *Id.* at 717.

D. UM 989

Before the Commission received the remand of the orders in DR 10 and UE 88 in November 2003,[70] PGE, Staff, and CUB entered into a settlement intended to entirely remove PGE's remaining Trojan investment from rates on a prospective basis. URP was not a party to those agreements. The settlement offset the remaining Trojan balance with existing customer credits, which removed both the remaining Trojan balance and the customer credits from PGE's balance sheet. To implement the settlement, PGE filed an application for an accounting order and approval of related tariff sheets. The Commission docketed the application as UM 989 and approved the proposed accounting order. The Commission did not suspend the tariffs, allowing them to take effect on October 1, 2000.[71]

URP, this time joined by Lloyd Marbet and Linda Williams, challenged the settlement under ORS 757.210, arguing that the Commission should have offset the remaining undepreciated Trojan balance by the amount collected in past rates that included a *return on* PGE's investment in Trojan or otherwise refund that amount to customers. The Commission rejected URP's challenges and affirmed the settlement and the new rates.[72] The Commission clarified that the only issues to be addressed in response to URP's challenge were: (1) whether the settlement was in the public interest; and (2) whether the rates implementing the settlement were just and reasonable on a *prospective* basis. In response to URP's arguments regarding a refund or offset for the amounts customers had already paid for the *return on* PGE's Trojan investment, the Commission expressed doubt regarding its legal authority to retroactively address rates, but ultimately concluded that the issue was irrelevant because the Supreme Court's review of *Trojan I* was still pending at that time and it was unlikely that the court would order a refund because that issue was not litigated in the lower courts and therefore was not under review.[73]

E. Appeal of UM 989 (*Trojan II*)

URP challenged the Commission's decision in UM 989 in Marion County Circuit Court. This time, URP did request a stay of the Commission's order. The circuit court rejected URP's request for a stay, but reversed the Commission's order.[74] The circuit court concluded that "[a]s part of the adjustment of offsetting charges and liabilities related to the Trojan write-off, PGE should have been required to account for all refunds due to rate payers for these unlawfully collected rates as a matter of law."[75] The court, in effect, concluded that: (1) due to the Commission's error of law in allowing PGE to recover a *return on* the undepreciated investment, the UE 88 rates were unjust and unreasonable; (2) the Commission had authority to retroactively reset those rates; and (3) the Commission

[70] Although the decision in *Trojan I* was issued in 1998, and the Supreme Court dismissed the petitions for review of *Trojan I* in 2002, the Commission did not receive the remand of the DR 10 and UE 88 orders until late 2003.
[71] *See* Order No. 00-601.
[72] *See* Order No. 02-227.
[73] *Id.* at 10-11.
[74] *See* Circuit Court Opinion and Order, cited *supra* note 13.
[75] *Id.* at 6.

should have used that authority to offset future rates or order refunds.[76] In January 2004, the circuit court remanded the matter to the Commission for further proceedings.[77]

Faced with nearly concurrent remands of the orders in DR 10, UE 88, and UM 989, the Commission undertook joint remand proceedings. The Commission and PGE also appealed the circuit court's decision in UM 989 to the Court of Appeals. In its appeal, the Commission argued that the circuit court erred in prematurely deciding issues that the agency had yet to address—that is, whether the rates in UE 88 were unlawful and, if so, whether the Commission had the authority to redress those rates.

In *Trojan II*, the Court of Appeals agreed that the circuit court's remand instructions were erroneous.[78] Citing the Supreme Court's decision in *Dreyer*, more fully discussed below, the Court of Appeals concluded that the question regarding the Commission's authority to engage in retroactive ratemaking or to order a refund must be decided first by this Commission. Specifically, the Court of Appeals stated:

> [B]efore the circuit court or this court orders the PUC to provide a refund or engage in retroactive ratemaking regarding Order No. 02-227, the PUC must determine—in the agency proceedings that are currently underway—whether it has authority and will exercise its authority to take those actions.[79]

The Court of Appeals also concluded that, given *Dreyer*, the Commission relied on an erroneous interpretation of the filed rate doctrine, as embodied in ORS 757.225, in Order No. 02-227.[80] Accordingly, the Court of Appeals remanded the case to the circuit court with instructions to remand Order No. 02-227 to the Commission for reconsideration of issues raised on appeal and cross-appeal.[81]

F. *Dreyer v. PGE*

During the Trojan remand proceedings, certain current and former customers of PGE filed class action lawsuits in Marion County Circuit Court.[82] The CAPs seek damages against PGE for charging rates that included a return on the utility's undepreciated investment in Trojan. Their cause of action arises solely from the Commission's decision in UE 88 to include PGE's undepreciated Trojan investment in rate base with the opportunity to earn a return. They seek to recover damages under ORS 756.185, a statute that allows customers to sue utilities in circuit court for, among other statutes, violations of

[76] *Id.*
[77] *Utility Reform Project v. Comm'n*, Case No. 02C-14884, Judgment (Marion County Circ. Ct. Jan 9, 2004).
[78] *Trojan II*, 215 Or App at 374.
[79] *Id.* at 375-76.
[80] *Id.* at 372-74.
[81] *Id.* at 376.
[82] Two different sets of plaintiffs filed class action lawsuits asserting the same claims, the only difference being that the plaintiffs in *Dreyer, et al. v. PGE* (Marion County Circ. Ct. Case No. 03C-10639) alleged that they were present customers of PGE, while the plaintiffs in *Morgan v. PGE* (Marion County Circ. Ct. Case No. 03C-10640) alleged that they were former PGE customers. The trial court consolidated both lawsuits. The CAPs are represented by Daniel Meek, counsel for URP, and Linda Williams, a party to the appeal of UM 989.

ORS chapter 757. The CAPs contend that PGE is liable for damages under ORS 756.185 because PGE violated ORS 757.355 by charging rates that included a *return on* PGE's remaining Trojan investment. The CAPs also allege that PGE is liable under the common law theories of money had and received and unjust enrichment. The CAPs contend that ORS 756.200 preserves these common law causes of action.

PGE, in a motion to dismiss filed in the circuit court and in a writ of mandamus filed in the Oregon Supreme Court, responded that ORS 757.225 required it to charge the rates established by the Commission and that the circuit court lacked jurisdiction to order PGE to charge anything other than its filed rates. PGE therefore argued that the court should not read ORS 756.185 and 756.200 to allow claims for damages against a utility that is doing what the law compels it to do—charging rates approved by the Commission. Alternatively, PGE argued that the circuit court should abate the consolidated class action lawsuit because the Commission was considering the remand of UE 88, which concerned the same subject matter as the circuit court action.

In its ruling on the mandamus filing, the Supreme Court disagreed with PGE that ORS 757.225 required dismissal of the circuit court action. While recognizing the possibility that Oregon law incorporates some form of the filed rate doctrine, the court concluded that ORS 757.225 did not manifest a "legislative intent that Commission-approved rates be treated as conclusively lawful for all purposes 'until they are changed as provided in ORS 757.210 to ORS 757.220.'"[83] The Supreme Court concluded such an interpretation was untenable given the multiple ways utility rates may be set. The court explained:

> We find it significant that, although the public utility statutes provide more than one process for changing the filed rates for a utility, ORS 757.225 refers to only one such process—the utility-initiated process "provided by ORS 757.210 to 757.220." If PGE's interpretation of ORS 757.225 were correct, then *only* rate changes adopted pursuant to the utility-initiated ratemaking process at ORS 757.210 to 757.220 would be valid. A necessary corollary of that interpretation would be that rate changes adopted under any alternative process provided in the statutes, including the ratepayer- or PUC-initiated process set out at ORS 756.500 to 756.515, would *not* produce a binding change to the "lawful" rate. Those two propositions do not persuade us.[84]

Nonetheless, the Supreme Court ultimately concluded that the circuit court had a legal duty to abate the consolidated class action proceeding until the Commission has concluded its remand proceedings. Specifically, the *Dreyer* court, after pointing out that the proceedings before the Commission and the circuit court involved the same parties, the same issues, and the same money, held that the Commission should act first and the circuit court

[83] *Dreyer*, 341 Or at 278-279 (emphasis in original).
[84] *Id.* The Supreme Court apparently was unaware that *any* utility rate change—regardless of how initiated—is accomplished through the filing of new tariffs under ORS 757.220. *See supra* p 8.

should abate the consolidated class action proceeding under the doctrine of primary jurisdiction:

> Although plaintiffs vigorously deny it, the PUC proceeding that is underway thus has the potential for disposing of the central issue in this case, *viz.*, the issue whether plaintiffs have been injured (and, if they have been, the extent of the injury) * * *. Depending on how the PUC responds * * * 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: revision of rates to provide for recovery of unlawfully collected amounts. 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.[85]

The court also noted that the Commission has special expertise with respect to a legal issue that underlies these proceedings—whether the Commission has the authority to offset future rates or to order a utility to issue refunds to customers. Accordingly, the court concluded that the Commission has primary jurisdiction to determine what, if any, remedy the Commission can offer to PGE customers, through rate reductions or refunds, for the amounts that PGE collected from April 1, 1995, through September 30, 2000.[86]

G. Consolidated Remand Proceedings

We began these remand proceedings following the nearly concurrent remands of the DR 10 and UE 88 orders by the Court of Appeals in *Trojan I* and the UM 989 rate order by the circuit court. The Supreme Court's *Dreyer* decision and the Court of Appeals' decision in *Trojan II* were issued after these remand proceedings began and necessarily affected the course of these proceedings. To appropriately respond to the court decisions as they were issued, the remand proceedings have been divided into three phases.

1. Phase I

The intended purpose of Phase I of the remand proceedings was to carry out the Court of Appeals' remand of the orders in UE 88 and DR 10, as well as the circuit court's remand of the UM 989 order. In the remand of the UM 989 order, the circuit court specifically ordered the Commission to "immediately revise and reduce the existing rate structure so as to fully and promptly offset and recover all past improperly calculated and unlawfully collected rates, or alternatively, to order PGE to immediately issue refunds for the full amount of all excessive and unlawful charges collected by the utility for a return on its Trojan investment."[87] Although the Commission appealed the circuit court's order and

[85] *Id.* at 285 (emphasis added).
[86] *Id.* at 286.
[87] Circuit Court Opinion and Order at 6.

continued to believe that the court's instructions were improper, the Commission nonetheless began to resolve the ongoing issue by attempting to calculate an appropriate refund amount.

The parties in Phase I were not able to agree regarding the appropriate method to calculate the refund amount. An Administrative Law Judge (ALJ) for the Commission issued a ruling on May 5, 2004, dividing the proceeding into two phases and requesting comment on the scope of those phases.[88] On August 31, 2004, the ALJ issued a ruling that established the scope of the first phase of these proceedings (Phase I Ruling).[89]

The Phase I Ruling provided a thorough discussion of the two remand orders, the Court of Appeals' opinion in *Trojan I*, and pertinent judicial precedent regarding the constitutional and statutory authority of the Commission and general principles of ratemaking. The ALJ concluded that "the most important event bearing on these remand proceedings is the Court of Appeals' determination in [*Trojan I*] that the Commission is not statutorily authorized to allow utilities to earn a *return on* unused or retired property."[90]

As the Phase I Ruling observed, the circuit court's remand of the order in UM 989, in conjunction with the belated remand of the orders in DR 10 and UE 88, provided an additional directive. In remanding the UM 989 order, the circuit court found the approved overall rates to be neither just nor reasonable. Taking fault with the scope of the approved rates, the circuit court stated, "[a]s part of the adjustment of offsetting charges and liabilities related to the Trojan write-off, PGE should have been required to account for all refunds due to rate payers for these unlawfully collected rates * * *."[91]

Following briefing by Staff, PGE, URP, and the CAPs, the ALJ limited Phase I to reconsideration of "only those aspects of the ratemaking process in UE 88 that are affected by the Court of Appeals' statutory interpretation" in *Trojan I*.[92] The ruling identified the general question to be considered as: "What rates would have been approved in UE 88 if the Commission had interpreted the authority delegated to it in ORS 757.355 as the Court of Appeals did in [*Trojan I*]?"[93] Under this framework, the ALJ identified three specific rate determinations made in UE 88 that were affected by the Court of Appeals' statutory interpretation of ORS 757.355, but allowed the parties to identify others.

On September 13, 2004, URP and the CAPs sought Commission review of the Phase I Ruling, arguing that resolution of Phase I required only a ministerial calculation of amounts already paid by customers for the *return on* the remaining Trojan investment. On October 18, 2004, the Commission affirmed and adopted the Phase I Ruling in Order No. 04-597. On December 20, 2004, URP and the CAPs filed an Application for

[88] The ALJ expected the second phase to address the effect, if any, of the reconsideration in Phase I on the decisions in UM 989. We changed the scope of the second phase after the Supreme Court's decision in *Dreyer*.
[89] Ruling: Scope of Phase I Established (Aug 31, 2004).
[90] Phase I Ruling at 14, citing *Trojan I*, 154 Or App at 716-17.
[91] Circuit Court Opinion and Order at 6.
[92] Phase I Ruling at 18.
[93] *Id.* at 15.

Reconsideration of Order No. 04-597 with the Commission. On February 11, 2005, the Commission issued Order No. 05-091 denying the request for reconsideration.[94]

In accordance with the schedule established by the ALJ, PGE submitted an opening brief and opening testimony (PGE/6000, 6100-103, 6200-202, 6300-303, 6400-402, 6500-501, 6600-604, and 6700-701) on February 15, 2005. On May 19, 2005, URP filed joint opening testimony (URP/200-202 and URP/204-205), and Staff submitted opening testimony (Staff/100-102 and Staff/200-202).

On June 27, 2005, PGE filed rebuttal testimony (PGE/6800, 6900, and 7000). On August 1, 2005, Staff submitted surrebuttal testimony (Staff/300 and Staff/400-401). The same day, URP submitted its surrebuttal testimony (URP/300 and URP/400), and the CAPs filed a statement sponsoring and adopting URP's surrebuttal testimony. On August 23, 2005, PGE submitted sursurrebuttal testimony (PGE/7100).

On August 29 and 30, 2005, the ALJ conducted evidentiary hearings. PGE, Staff, and URP and the CAPs filed opening briefs on November 9, 2005. Staff and URP and the CAPs filed reply briefs on November 30, 2005. On December 14, 2005, PGE filed a response brief.

2. *Phase II*

We were nearing the end of Phase I when the Supreme Court issued its decision in *Dreyer* on August 31, 2006. Because of the circuit court's directive in its remand of the UM 989 order to immediately offset rates or issue refunds, we proceeded with Phase I assuming that we must order PGE to issue refunds, even though we questioned whether we had the authority to do so. Because the decision in *Dreyer* revived this legal question, we concluded that it was necessary to abate Phase I and initiate a second phase to address the question of our remedial authority.[95] We adopted that process because resolution of Phase I would be unnecessary if we found that we had no remedial authority. Given the generality and breadth of this legal issue, we allowed other interested persons to intervene and participate in Phase II of the proceedings.

At a May 9, 2007 conference, all parties agreed that Phase II presented a purely legal question that could be resolved with briefing. Accordingly, on June 20, 2007, Staff, PGE, CUB, URP and the CAPs, as well as two new intervenors, PacifiCorp, dba Pacific Power, and Idaho Power Company, filed opening briefs. The same parties, except CUB, filed reply briefs on July 20, 2007. PGE, Pacific Power, URP, the CAPs, and Staff presented oral arguments to the Commission on August 9, 2007.

[94] URP and the CAPs renewed their objections to the scope of Phase I in a late-filed motion on September 12, 2008. We address this motion *infra* pp 51-52.
[95] *See* Order No. 07-157.

3. *Phase III*

Before we were able to issue a decision in Phase II, the Court of Appeals issued its decision in *Trojan II* on October 10, 2007. With the ensuing remand, the Commission was presented with the opportunity to address all Trojan-related issues at one time without ongoing and potentially conflicting proceedings in other forums. The Commission therefore decided to reactivate Phase I, institute a third phase to address the recent Court of Appeals' remand of the UM 989 order, and issue a single comprehensive order in all three phases at the completion of Phase III. This approach is consistent with the Court of Appeals statement in *Trojan II* that "all of the issues relating to Trojan should be resolved in one forum rather than through piecemeal litigation."[96] It is also consistent with the Supreme Court's finding in *Dreyer* that "this clearly is a case in which a uniform resolution of the issue is desirable."[97]

Again, the parties were unable to agree on the proper scope of proceedings. Staff and PGE argued that no further proceedings were necessary for the Commission to respond to the Court of Appeals' remand of the UM 989 order. Staff and PGE also asserted that no new evidence should be allowed and the remand proceedings could proceed based solely on the evidence presented during the original UM 989 proceedings. URP disagreed, arguing that full contested case proceedings were necessary and that the introduction of new evidence should be permitted.

Following briefing from the parties, the ALJ issued a ruling identifying seven broad issues to be considered in Phase III (Phase III Ruling).[98] The ALJ acknowledged that the issues encompassed most of the arguments raised during the prior UM 989 proceedings before the Commission, the circuit court, and the Court of Appeals. The Phase III Ruling clarified, however, that the parties may not raise any issues that were not raised in prior proceedings, and that Phase III would not address whether the rates collected from customers from 1995 through 2000 that reflect a return on the Trojan investment should be used to reduce or eliminate the Trojan balance. The ALJ concluded that this issue would be resolved as part of Phase I of these proceedings. The ALJ also limited the scope of discovery and new evidence to be presented.

The ALJ subsequently adopted a procedural schedule for Phase III. On April 11, 2008, PGE submitted opening testimony (PGE/7500). On May 16, 2008, Staff filed opening testimony (Staff/500). URP and the CAPs filed joint testimony (URP/500-501) on May 19, 2008.[99] On June 13, 2008, PGE (PGE/7600), Staff (Staff/600), and URP (URP/510) each filed rebuttal testimony. PGE filed surrebuttal testimony (PGE/7700) on June 27, 2008.

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[96] *Trojan II*, 215 Or App at 376.
[97] *Dreyer*, 341 Or at 286.
[98] Ruling: Scope of Phase III Established (Feb 22, 2008).
[99] URP filed corrected testimony on May 22, 2008 (URP/500C-501).

An evidentiary hearing was held on July 10, 2008. PGE, Staff, and URP and the CAPs filed opening briefs on July 21, 2008, and reply briefs on August 4, 2008. On August 13, 2008, PGE filed a response brief. PGE, URP, the CAPs, and Staff presented oral arguments to the Commission on September 4, 2008.

IV. THRESHOLD LEGAL ISSUES

As discussed in our introduction, several legal issues have arisen during the course of these remand proceedings that we must address before reconsidering the orders in DR 10, UE 88, and UM 989. First, given the parties' confusion over the status of the rates adopted in UE 88, we must clarify whether the Court of Appeals in *Trojan I* declared those rates to be "unlawful." Second, we must determine whether this Commission has the authority to remedy the imposition of "unlawful" rates through rate reductions or refunds. Finally, we believe it is necessary to examine the *Dreyer* decision and outline our understanding of the Supreme Court's decision and its effect on these remand proceedings.

A. Did the Court of Appeals in *Trojan I* declare the rates adopted in UE 88 unlawful?

In *Trojan I*, the Court of Appeals interpreted ORS 757.140 as allowing PGE to recover its undepreciated investment in Trojan, but interpreted ORS 757.355 as prohibiting inclusion of this investment in PGE's rate base with the opportunity to earn a return. URP and the CAPs interpret *Trojan I* as conclusively and finally deciding that rates including a return on PGE's remaining Trojan investment are unlawful. For reasons not fully explained, URP and the CAPs attempt to make a distinction between "unlawful" rates and unjust and unreasonable rates. This assertion that the UE 88 rates were "unlawful" underlies most of the arguments presented by URP and the CAPs in these remand proceedings and the consolidated class action proceeding pending in circuit court. But URP's and the CAPs' position reflects a fundamental misunderstanding of the circumstances under which rates are considered unlawful and the role of the courts in reviewing a Commission order.

Ratemaking is a legislative act, and the Commission is given broad discretion in setting rates, subject only to statutory and constitutional constraints. Rates are unlawful in three circumstances: (1) rates are unjust and unreasonable; (2) rates are unjustly discriminatory; or (3) rates are confiscatory.[100] In this case, no party asserts that the rates were unjustly discriminatory or confiscatory. In *Trojan I*, the Court of Appeals did *not* find the rates produced by the UE 88 rate order to be unjust and unreasonable, unjustly discriminatory, or confiscatory. Rather, the court held that the Commission's rate order was based on an error of law—the conclusion that PGE's undepreciated Trojan investment could be included in rate base, giving PGE the opportunity to collect a *return on* the investment.[101]

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[100] *See, e.g., Lobdell*, 55 Or App at 462 (Commission's authority to set rates is "subject only to prohibitions against unjust, unreasonable or unjustly discriminatory rates."); *Pacific Tel. v. Wallace*, 158 Or 210 (confiscatory rates). *See also* ORS 756.040 (duty to set just, reasonable, and non-confiscatory rates); ORS 757.310(2) (prohibiting a utility from imposing unjustly discriminatory rates); ORS 757.325 (making imposition of unjustly discriminatory rates unlawful).
[101] *Trojan I*, 154 Or App at 717.

It is critical to recognize the distinction between what the Court of Appeals did and did not conclude: The court did find that a single component used in calculating overall rates was based on an erroneous statutory interpretation; the court did not find that overall rates were unlawful. The court offered no opinion on how that error of law affected the legality of the rates as a whole. Moreover, it provided no specific instructions to the Commission to issue refunds. Rather, it simply remanded the matter to the Commission for reconsideration.

It may *seem* logical to conclude that the inclusion of an improper *rate element* necessarily results in unlawful *rates*. But such a conclusion is contrary to the well-established principle that it is the legality of the end result of the ratemaking process, and not the legality of each calculation or input used during that process, that controls:

> It is not the theory but the impact of the rate order that counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the [Federal Power] Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.[102]

> The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding.[103]

> [I]t is the end result of an order of a regulatory authority which determines the question as to its validity and not the processes by which the authority reached the result.[104]

As these cases establish, the end result of the ratemaking process—which we refer to as the "overall rates" or "rates as a whole"—is legal so long as the rates are just, reasonable, not unjustly discriminatory, and non-confiscatory, even if the rate order is erroneous.

Our conclusion that the Court of Appeals' in *Trojan I* examined the legality of the Commission's *order*, but did not address the legality of the *rates* approved in that order, is consistent with the court's limited authority on review of a Commission order. This limited authority is a product of the separation of powers doctrine, which gives courts the authority to ensure that the legislature complies with applicable law and follows the

[102] *Hope*, 320 US at 602.
[103] *Duquesne*, 488 US at 314.
[104] *Flagg*, 195 Or at 699.

appropriate process in performing its legislative functions, but does not allow courts to second guess the wisdom of legislative action or to establish legislative policy.[105]

During its review of a Commission rate order, the court is limited to reviewing the order to ensure that it is within the Commission's delegated authority, complies with applicable state and federal law (including constitutional law), is supported by substantial evidence, and is not arbitrary or capricious. The court may not substitute its judgment for that of the Commission on any finding supported by substantial evidence.[106] As explained by the Oregon Supreme Court:

> The authority given to the Circuit Court [on review of a commission rate order] is not to search for or disclose or declare this "reasonable and just" rate or service, but merely to determine whether the order of the commission is "unreasonable"—quite a different thing. * * * The result of the reversal of the order of the commission is not to * * * ascertain the [reasonableness of a rate], but to leave it undisclosed, leaving the former rates to stand or requiring the commissioners to try over again to find it. In reviewing the order of the railroad commission the inquiry is not whether the rate, regulation, or service fixed by the commission is just and reasonable, but whether the order of the commission is unreasonable or unlawful.[107]
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> * * * * *
>
> The making of [rate] regulations is a legislative or administrative, and not a judicial, function. The reasonableness of such an order is, however, a judicial question. The court may review the orders of the commission, but only so far as to determine whether they are reasonable. The order may be vacated as unreasonable if it is contrary to some provision of the federal or state Constitution or laws, or if it is beyond the power granted the commission, or if it is based on some mistake of law, or if there is no evidence to support it, or if, having regard to the interest of both the public and the carrier, it is so arbitrary as to be beyond the exercise of a reasonable discretion and judgment * * *. *The court does not consider the wisdom or expediency of the order.* The court ascribes to the findings of the commission "the strength due to

[105] *See, e.g., Federal Power Comm'n v. Pacific Power & Light*, 307 US 156, 160 (1939) (court reviews commission orders for legal errors and "cannot fix rates" or establish commission policies).
[106] *See Katz*, 116 Or App at 305; *Publishers Paper Co. v. Davis*, 28 Or App 189, 196, 559 P2d 891 (1977), quoting *McCann v. Oregon Liquor Control Comm'n*, 27 Or App 487, 503, 556 P2d 973 (1976).
[107] *Hammond Lumber*, 96 Or at 600-601, quoting with approval *Minneapolis etc. Ry. Co. v. Railroad Comm'n of Wisconsin*, 136 Wis 146 (the Wisconsin court was discussing the Wisconsin statutes upon which Oregon's public utility regulation is largely based).

the judgments of a tribunal appointed by law and informed by experience," and its conclusion, when supported by substantial evidence, is accepted as final.[108]

* * * * *

In brief, the function of the court is, in a sense, to review the proceedings of the commission and to ascertain if it has violated any principle of law or gone beyond the scope of its duty in making the order.[109]

Thus, courts do not review the reasonableness of the underlying rates, but rather the reasonableness, or legality, of the decision establishing those rates. If a court concludes that a Commission order was made in error, the court is prohibited from establishing new rates, and generally will remand the decision to the Commission for further proceedings. It is then the Commission's job to determine whether the error identified by the reviewing court rendered overall rates unjust and unreasonable or unjustly discriminatory.[110] Although not at issue in these proceedings, we note that a court does have the authority to determine if rates are confiscatory because such a determination is a constitutional question requiring interpretation of the prohibition against the taking of private property without just compensation.[111] Even if the court finds rates to be confiscatory, however, it remands the case to the Commission to reset the rates.

URP and the CAPs further obfuscate the court's holding in *Trojan I* by referring to rates including a *return on* PGE's remaining Trojan investment as "overcharges." The use of the term "overcharge" is equally as inaccurate as labeling the rates "unlawful." The term "overcharge" has an established meaning in utility regulation. An overcharge occurs when a utility charges a customer a rate that is in excess of the lawfully filed schedule of rates.[112] A schedule of rates (otherwise known as a tariff) is "lawfully filed" when the utility follows the procedures in ORS 757.210 and the schedule is approved by the Commission or otherwise allowed to go into effect. If a utility charges a rate in excess of the rate set forth in the tariff, an overcharge has occurred and the utility has violated ORS 757.310. As a result of this violation, a customer is entitled to pursue an action for

[108] *Id.* at 602, quoting with approval *State v. Great Northern Ry. Co.*, 135 Minn. 19, 159 NW 1089 (1916) (emphasis added).
[109] *Id.* at 603 (discussing Oregon law). *See also Darnell v. Edwards*, 244 US 564, 569, 37 S Ct 701, 61 L Ed 1317 (1917) ("It is well established that in a question of rate-making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing.").
[110] *McPherson v. Pacific Power & Light Co.*, 207 Or 433, 453-454, 296 P2d 932 (1956) (considering "the unreasonableness or unjust discrimination of rates, * * * demands the exercise of a quasi-legislative or administrative function of the Commissioner.").
[111] *See, e.g.., Pacific Gas & Elect. Co. v. San Francisco*, 265 US 403, 425, 44 S Ct 537, 68 L Ed 1075 (1924) ("Rate-making is no function of the courts; their duty is to inquire concerning results and uphold the guaranties which inhibit the taking of private property for public use without just compensation under any guise.").
[112] *See McPherson*, 207 Or at 448-449, quoting *Oregon-Washington R.R. & Nav. Co. v. McColloch*, 153 Or 32, 48-49, 55 P2d 1133 (1936) ("It is obvious from the foregoing excerpt that the court distinguishes between an unreasonable rate and an overcharge * * *. There is no necessity of resorting first to the commission in those instances in which the only question involved is an overcharge, *i.e.*, a charge in excess of that called for by established rates * * *.").

damages in circuit court under ORS 756.185.[113] Generally speaking, the customer is permitted to seek damages directly in circuit court, without first filing a complaint with the Commission, because the issue is not whether the tariff rate is unjust and unreasonable (which is a question that is in the exclusive jurisdiction of the Commission), but rather is a ministerial calculation of the difference between the tariff rate and the rate charged.[114] Contrary to URP's and the CAPs' misuse here, the term "overcharge" does not apply to rates charged in accordance with a lawfully filed tariff, even if the rate order approving the rates included in that tariff is later remanded after judicial review.

We note that in the consolidated class action lawsuit pending in circuit court, the court granted summary judgment to the CAPs for their common law claims of money had and received. We believe that confusion over the correct meaning of "overcharge" led to the circuit court's decision. Although courts have recognized that customers may have an action against utilities for money had and received, those cases have been limited to claims involving overcharges.[115] In other words, in cases allowing claims for money had and received, the utility was charging rates that exceeded the rates set forth in the utility's lawfully filed tariff. None of those cases are analogous to this case, where PGE charged customers the rates set forth in the lawfully filed tariff, but the rate order approving those rates was later remanded after judicial review.

We also believe that the mistaken assumption that the Court of Appeals in *Trojan I* conclusively declared rates including a return on PGE's Trojan investment to be unlawful led the circuit court to grant the CAPs' motion for summary judgment on their claim for damages under ORS 756.185 for PGE's violation of ORS 757.355.

By mistakenly characterizing the rates as "unlawful" or as an "overcharge" following the Court of Appeals' decision in *Trojan I*, URP and the CAPs (as well as other parties and arguably the circuit court) assumes that the Court of Appeals determined that customers suffered a harm that must be remedied. But in *Trojan I* the court did not even address the lawfulness of the rates adopted in UE 88, much less determine conclusively that these rates were unlawful. Rather, the court determined that the Commission's rate order contained an error of law. On remand, it is this Commission's role to determine whether the error identified by the court in *Trojan I*—inclusion of a return on PGE's remaining Trojan investment—resulted in unjust and unreasonable or unjustly discriminatory rates. We address this question below in our reconsideration of the UE 88 order.

[113] *Id.*
[114] *See McCulloch.*, 153 Or at 46-49; *McPherson*, 207 Or at 448-450.
[115] *See, e.g., McPherson*, 207 Or at 453 (a customer may seek redress for overcharges in an action for money had and received). *See also McCulloch*, 153 Or at 46-49.

B. Does this Commission have the authority to remedy, through rate reductions or refunds, the imposition of "unlawful" rates?

As established above, after appeal and remand of a Commission rate order, the Commission must determine whether the error identified by the reviewing court renders the rates adopted in the order unjust and unreasonable or unjustly discriminatory. The next legal question that has arisen during these remand proceedings is whether this Commission has the authority to reduce future rates or to order a utility to issue refunds to remedy an error in a past rate order. The Commission's remedial authority was also an issue in the *Dreyer* decision, with the Supreme Court finding that the Commission had primary jurisdiction to determine what, if any, remedy it could provide.[116]

In response to the Supreme Court's decision in *Dreyer*, we initiated Phase II of these remand proceedings and asked the parties to brief the following legal issue: What, if any, remedy can the Commission offer to PGE customers, through rate reductions or refunds, for the amounts that PGE collected in violation of ORS 757.355 from April 1, 1995, through September 30, 2000.[117] We received extensive briefing from multiple parties in response to our request.[118] We also gave the parties the opportunity to express their views during oral arguments before the Commission on August 9, 2007.

The parties' arguments can be distilled into three questions. First, does the Commission have the statutory authority to order a utility to issue refunds? Second, does the filed rate doctrine prohibit the Commission from ordering a utility to issue refunds? Third, does the rule against retroactive ratemaking prohibit the Commission from ordering a utility to issue refunds? We address each of these in turn, followed by our resolution.

1. Does the Commission have the statutory authority to order a utility to issue refunds?

As discussed above, the Commission is a legislatively created body that has only those powers that have been delegated to it by the legislature.[119] The legislature has explicitly charged this Commission with the duty to protect customers from unjust and unreasonable exactions.[120] The legislature gave the Commission broad authority to do everything "necessary and convenient" to fulfill this duty.[121] ORS 756.040 provides, in pertinent part:

[116] *Dreyer*, 341 Or at 286.
[117] Ruling: Issues List Adopted (Jun 6, 2007).
[118] Because the Phase II proceedings occurred prior to the Court of Appeals' decision in *Trojan II*, the parties' arguments, and consequently our analysis, focus on the Commission's remedial authority in the context of the UE 88 rate order. Despite this limitation, the analysis also applies to our remedial authority in the context of the UM 989 rate order.
[119] *See supra* p 4.
[120] ORS 756.040(1).
[121] ORS 756.040(2).

> (1) In addition to the power and duties now or hereafter transferred to or vested in the Public Utility Commission, the commission shall represent the customers of any public utility or telecommunications utility and the public generally in all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction. In respect thereof the commission shall make use of the jurisdiction and powers of the office to protect such customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates. The commission shall balance the interests of the utility investor and the consumer in establishing fair and reasonable rates. Rates are fair and reasonable for the purposes of this subsection if the rates provide adequate revenue both for operating expenses of the public utility or telecommunications utility and for capital costs of the utility, with a return to the equity holder that is: (a) Commensurate with the return on investments in other enterprises having corresponding risks; and (b) Sufficient to ensure confidence in the financial integrity of the utility, allowing the utility to maintain its credit and attract capital.
>
> (2) The commission is vested with power and jurisdiction to supervise and regulate every public utility and telecommunications utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction.

The first question we must address is whether the Commission's delegated powers include the authority to order PGE to issue refunds in this case. The answer to this question is not straightforward, and applicable precedent can be interpreted in a conflicting manner. In fact, the issue is so uncertain that the two primary parties in these remand proceedings—PGE and URP—have renounced their initial arguments and adopted those previously advocated by the other party.[122]

[122] PGE initially argued that the Commission did not have the authority to order a utility to issue refunds or to offset future rates or the remaining Trojan balance with amounts collected for the *return on* Trojan from 1995 through 2000. *See, e.g.*, Joint Reply Brief of Staff and PGE, Docket UM 989 (Nov 30, 2001) (PGE argued that offsetting the remaining Trojan balance as of September 30, 2000, with amounts collected from 1995 through 2000 would violate the filed rate doctrine and the rule against retroactive ratemaking). After the Supreme Court's decision in *Dreyer*, PGE changed its position and now asserts that the Commission has remedial authority in this case. *See* PGE's Phase II Opening Brief with Respect to the Authority of the PUC to Award Relief (Jun 20, 2007). URP initially argued that the Commission should offset the remaining Trojan balance as of September 30, 2000, with the amounts collected for the *return on* Trojan from 1995 through 2000. *See* URP's Answering Brief, Docket UM 989 (Oct 10, 2001). Like PGE, URP changed its position after the *Dreyer* decision and now argues that the Commission "does not have authority to order PGE to provide rate reductions or refunds for the amounts at issue." Reply Comments of URP on the Proffered Question regarding Remedies at 2 (Jul 20, 2007) ("URP Phase II Reply Brief"); *Trojan II*, 215 Or App at 374, n 10.

Advocates for the proposition that the Commission does not have the delegated authority to order a utility to issue refunds rely primarily on the argument that the statutes granting the Commission refund authority under specific circumstances indicate a legislative intent to limit the Commission's authority to only those specified circumstances, despite the Commission's broad authority to protect customers from unjust and unreasonable exactions.[123] In other words, these parties contend that the specific grant of refund authority in ORS 757.215(4) and 757.215(5) trumps the more general grant of authority in ORS 756.040.

ORS 757.215(4) provides in part:

> If the commission is required to or determines to conduct a hearing on a rate or schedule of rates filed pursuant to ORS 757.210, but does not order a suspension thereof, 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.

ORS 757.215(5) provides in part:

> The commission may in a suspension order authorize an interim rate or rate schedule under which the utility's revenues will be increased by an amount deemed reasonable by the commission, not exceeding the amount requested by the utility * * *. 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.

Generally speaking, these parties are correct that a later-enacted, more specific statute trumps an earlier general statute.[124] But the issue of whether the legislature's specific grant of refund authority indicates an intent to limit the Commission's refund authority to only that specified has already been considered and rejected by the Court of Appeals in *Pacific Northwest Bell v. Katz*:

> P[acific]N[orthwest]B[ell] argues that, because the legislature has authorized refunds under a specific statute, ORS 759.185(4), it has limited PUC's authority to order a refund in any other circumstance. Nothing in ORS 759.185(4)

[123] The parties' arguments regarding the rule against retroactive ratemaking are often intertwined with their arguments about the Commission's statutory authority. This is based on the theory that the legislature has only granted the Commission the statutory authority to set rates prospectively, and thus the Commission cannot order refunds, which arguably would require a retroactive exercise of its ratemaking authority. These arguments require a very broad interpretation of both ratemaking and the rule against retroactive ratemaking. It is unclear whether such broad interpretations have been adopted in Oregon. To avoid confusion, all arguments related to the rule against retroactive ratemaking will be discussed *infra* pages 36 to 42.

[124] *See* ORS 174.020(2). *See also Bobo v. Kulongoski*, 338 Or 111, 119, 107 P3d 18 (2005).

> or (5) limits PUC's power to order a refund in other circumstances, and we do not believe that the statute should be interpreted to impose such a limitation. To hold that PUC does not have the power to order a refund of amounts over collected under temporary rates that failed to comply with an ordered revenue reduction would be inconsistent with its regulatory role and statutory duties * * *. Holding that the PUC *may* order refunds under other circumstances does not render superfluous ORS 759.185(4) or (5), which *require* refunds under those *particular* circumstances.[125]

The court in *Katz* ultimately found that the Commission's duty under ORS 756.040 to do everything necessary and convenient to protect customers from unjust and unreasonable exactions included the authority to order a utility to issue refunds in circumstances other than those set forth in ORS 759.185.[126]

The parties raise two primary arguments to distinguish *Katz*. First, the parties contend that the court's holding is limited solely to the particular facts presented in that case, and that those facts are not presented here. Yet nothing in *Katz* indicates an intent to so limit the court's holding. Consistent with general principles of jurisprudence, *Katz* addressed only whether the general refund authority granted in ORS 756.040 applied in the circumstances of the particular case before the court. While *Katz* does not answer the question whether the general grant of refund authority in ORS 756.040 is appropriate to exercise in this case, the *Katz* decision undermines the parties' arguments that the specific refund authority granted in ORS 757.215 is intended to limit the more general authority granted in ORS 756.040.

Second, the parties contend that the Court of Appeals limited the holding in *Katz* when it decided *Pacific Northwest Bell v. Eachus*. In *Eachus*, the Commission determined that Pacific Northwest Bell had been overearning and initiated an "own motion" rate case to determine an appropriate rate decrease to be effective prospectively. The Commission denied CUB's request to declare existing rates interim and subject to refund while the rate case proceeded, stating that it lacked the authority under the interim rate statute to declare existing rates to be interim. On appeal, the Court of Appeals affirmed, holding that the statute governing interim rates for telecommunications utilities (ORS 759.185) did not give the Commission the authority to retroactively declare previously-approved and implemented rates to be interim.[127] In contrast to the court in *Katz*, the court in *Eachus* found that the specific statute governing the Commission's authority to declare rates to be interim did trump the Commission's more general authority under ORS 756.040. Thus, the parties contend that the court in *Eachus* intended to limit *Katz* to the specific facts of the case.

[125] *Katz*, 116 Or App at 310 (emphasis in original). Although the court in *Katz* was interpreting 759.185(4) and (5), the court's reasoning and holding are equally applicable in this case because 759.185(4) and (5) are virtually identical to 757.215(4) and (5). The primary difference is that ORS 759.185 governs the Commission's ratemaking authority over telecommunications utilities, while ORS 757.215 governs the Commission's ratemaking authority over a utility that "produces, transmits, delivers, or furnishes heat, light or power * * *." ORS 757.215(5).

[126] *Katz*, 116 Or App at 309-310.

[127] *Eachus*, 135 Or App at 49-50.

Contrary to the parties' assertions, there is no indication in the *Eachus* decision that the court intended to limit *Katz*. In fact, the decision in *Eachus* can be easily harmonized with the decision in *Katz*. In *Katz*, the court found that specific statutes governing refunds of interim or temporary rate increases did not limit the Commission's otherwise broad authority under ORS 756.040 to order refunds to protect customers in other circumstances. In *Eachus*, the court found that the specific statute governing interim rates did circumscribe the Commission's ability to retroactively declare rates to be interim and subject to refund. Unlike *Katz*, the statute at issue in *Eachus* dealt directly and specifically to the authority being discussed—the authority to declare rates to be interim.

Furthermore, in *Katz* the rates being charged by the utility included an additional temporary charge that was in excess of the permanent rates set by the Commission. The Commission reduced the utility's revenue requirement, but then delayed approving the utility's tariffs to implement the rate decrease. As a result, the utility continued to collect amounts in excess of the Commission-determined authorized revenue requirement. Thus, the court in *Katz* authorized the refund of rates that were in excess of the company's authorized revenue requirement. In *Eachus*, Pacific Northwest Bell had not charged rates that were in excess of the authorized permanent rates. Rather, Pacific Northwest Bell had been charging approved rates, but CUB wanted to change those rates retroactively based on the Commission's finding that a rate decrease was appropriate for the future.

In summary, there is nothing in the *Eachus* decision to indicate that the court intended to overrule or otherwise limit the holding in *Katz* that the Commission has general refund authority beyond that provided in ORS 757.215. We believe the appropriate interpretation of *Katz* is that ORS 756.040 gives the Commission refund authority beyond that specifically provided in ORS 757.215, although the court did not fully delineate the scope of that authority. We believe the appropriate interpretation of *Eachus* is that the Commission may have refund authority beyond that specifically set forth in ORS 757.215, but when the authority contemplated (for example, the authority to declare rates to be interim) is directly governed by a specific statute, then the specific statute controls.

This interpretation of the holding in *Katz* is consistent with the legislature's broad delegation of authority granted to this Commission.[128] It is important to recognize that the grant of authority in ORS 756.040 to protect customers from unjust and unreasonable exactions is not permissive, it is obligatory. ORS 756.040 creates a *duty* for this Commission: "the commission *shall* make use of the jurisdiction and powers of the office to protect such customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates."[129] To fulfill this duty, the Commission "is vested with the power and jurisdiction to * * * do all things necessary and convenient in the exercise of such power and jurisdiction."[130] Without the power to order a utility to issue refunds for the imposition of unjust and unreasonable rates,

[128] The Alaska Supreme Court interpreted *Katz* consistently with this Commission's interpretation in a 1995 decision. *Alaska Pub. Utils. Comm'n v. Anchorage Tel. Util.*, 902 P2d 783 (1995).
[129] ORS 756.040(1) (emphasis added).
[130] ORS 756.040(2).

the Commission's ability to protect customers would be seriously impaired. To interpret the general grant of authority to mean that the Commission may only protect customers *prospectively* would be inconsistent with the plain language of the statute. This is not to say that the Commission's authority is unbounded. Once a rate order is non-appealable and final, the Commission cannot retroactively reconsider the rates adopted in that order.[131]

Those parties 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.[132] 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.[133] It is unclear from the decision whether the courts or the Commission would calculate the appropriate refund amount.

Although language used in *McPherson* would seem to put an end to the question of whether the legislature delegated refund authority to the Commission, subsequent decisions indicate that the issue remains an open question. *McPherson* was decided in 1956, and several court and Commission decisions have since found that the Commission does have refund authority under some circumstances.[134] In addition, the facts in *McPherson* involved overcharges, not unjust and unreasonable rates, so the court's determination regarding the Commission's authority to remedy the imposition of unjust and unreasonable rates is *dictum* because it was not essential to the court's decision.[135] As discussed further below, it is well settled that the courts have jurisdiction to remedy an overcharge under ORS 756.185. The authority to remedy the imposition of unjust and unreasonable rates, however, has been a much more contentious issue.

Furthermore, although the Supreme Court in *Dreyer* did not specifically address whether *McPherson* resolved the issue of the Commission's refund authority, the court was aware of *McPherson* and had reviewed it before rendering its opinion.[136] Despite the *McPherson* language cited above, the *Dreyer* court abated the consolidated class action proceeding to allow the Commission to address, among other things, its authority to order refunds or to otherwise remedy the imposition of rates that included a *return on* PGE's remaining Trojan investment.[137] This indicates that the court believed the Commission's remedial authority had not yet been conclusively determined.

[131] *See infra* pp 36-42.
[132] *McPherson*, 207 Or at 449.
[133] *Id.* at 453.
[134] *See, e.g., Katz*, 116 Or App at 309-10.
[135] *McPherson*, 207 Or at 453-454.
[136] *Dreyer*, 341 Or at 271, n 10.
[137] *Id.* at 285-287.

2. *Does the filed rate doctrine prohibit the Commission from ordering a utility to issue refunds?*

As with most of the issues in these remand proceedings, the parties do not agree on the meaning of the filed rate doctrine. Some parties, including Staff, argue that the filed rate doctrine prohibits the Commission from ordering a utility to issue refunds. Other parties argue that the doctrine is a directive to utilities and is irrelevant to the question of Commission jurisdiction or authority. Both groups are incorrect. Contrary to the parties' arguments, the filed rate doctrine is directly relevant to the Commission's jurisdiction over rates, but is *irrelevant* to the question of the Commission's authority to order a utility to issue refunds.

At various times during these proceedings, the filed rate doctrine has been used interchangeably with the rule against retroactive ratemaking. The Commission itself has been at fault in this regard.[138] We take this opportunity to clarify that the two regulatory principles are separate and act independently from each other. As further explained below, the rule against retroactive ratemaking limits a Commission's authority in setting rates. The filed rate doctrine precludes a utility from charging—or a court from imposing—rates other than those approved by the Commission.

The filed rate doctrine provides that once new rates are established, the utility is obligated to charge only those rates in providing service to its customers until a change in the rates is approved by the Commission. Oregon courts have recognized that the filed rate doctrine serves two primary purposes. First, the doctrine ensures that the regulator alone is empowered to judge the reasonableness of rates, and once it has done so, no rate other than the one on file may be charged.[139] Second, the doctrine prohibits price discrimination by ensuring that similarly situated customers are subject to the same rates, terms, and conditions of service. The relationship between the utilities and their customers are solely governed by the approved tariffs, and the regulated service must be offered in accordance with those tariffs to ensure the non-discriminatory treatment of customers.[140]

The filed rate doctrine is embodied in ORS 757.225, which provides:

> No public utility shall charge, demand, collect or receive a greater or less compensation for any service performed * * * than is specified in printed rate schedules as may at the time be in force, or demand, collect or receive any rate not specified in such schedule. The rates named therein are the lawful rates until they are changed as provided in ORS 757.210 to 757.220.

[138] *See, e.g.*, Order No. 02-227.

[139] *See, e.g.*, *Eachus*, 135 Or App at 49 ("[R]ates that have been approved and are in force may be adjusted only pursuant to process described in the statutes."); *Simpson*, 82 Or App at 586 ("[A]ll rates and service levels approved by the PUC are prima facie lawful and reasonable" and "those rates and service levels are subject to attack only in actions prosecuted against the PUC for that purpose."). *See also Arkansas Louisiana Gas Corp. v. Hall*, 453 US 571, 581, 101 S Ct 2925, 2932, 69 L Ed 2d 856 (1981).

[140] *See Oregon-Washington RR. & Nav. Co. v. Cascade Contract Co.*, 101 Or 582, 588, 197 P 1085 (1918); *Black v. Southern Pac. Co.*, 88 Or 533, 537, 171 P 878 (1921); *Baldwin Sheep & Land Co. v. Columbia S. Ry. Co.*, 58 Or 285, 289, 114 P 469 (1911); *Zoller Hop Co. v. Southern Pac. Co.*, 72 Or 262, 268-73, 143 P 931 (1914); *Texas & Pac. Ry. Co. v. Mugg*, 202 US 242, 26 S Ct 628, 50 L Ed 1011 (1906).

Unfortunately, we believe that much of the confusion over the meaning of the filed rate doctrine has arisen from the Commission's own erroneous definition of the doctrine. As the Court of Appeals found in *Trojan II*, the Commission relied on an erroneous interpretation of the filed rate doctrine in finding that it would be inappropriate to offset future rates or to order a utility to issue refunds to compensate customers for the payment of rates charged in accordance with a rate order later found to include an erroneous statutory interpretation.[141] We agree that our conclusions regarding the filed rate doctrine in Order No. 02-227 were erroneous, but for reasons other than those identified by the Court of Appeals.

In Order No. 02-227, we interpreted the filed rate doctrine as follows:

> The filed rate doctrine, of which ORS 757.225 is an example, is based on the idea that the rate filed with a commission "is the only lawful charge" and that "[d]eviation from it is not permitted upon any pretext." Rates filed with a commission bind both utilities and customers "with the force of law." The Oregon Supreme Court recognized the doctrine in *Oregon-Washington R. & Nav. Co. v. Cascade Contract Co.*, and applied the doctrine in *McPherson v. Pacific Power & Light Cos.*, when it found the "the Commission has no authority to award any reparations, either for unreasonable or unjustly discriminatory rates, or for overcharges."[142]

As the Commission did in Order No. 02-227, the parties in these remand proceedings, as well as in other Trojan-related court proceedings, have focused on only one aspect of the filed rate doctrine—a utility's obligation to charge only those rates set forth in its lawfully filed tariffs. But the filed rate doctrine is much more than a directive to the utility to charge only those rates set forth in a lawfully filed tariff. The doctrine is also—if not primarily—a jurisdictional doctrine. The doctrine reflects the fundamental premise that a person challenging the reasonableness of rates, including the utility, must do so before the regulatory body that approved the rates in the first instance. In other words, the filed rate doctrine recognizes that the Commission has exclusive jurisdiction to determine just and reasonable rates. Thus, any challenge to rates, whether by the utility or a customer, must be brought before this Commission.

This interpretation of the filed rate doctrine is consistent with our statutory framework. Once the Commission establishes new rates, the utility is obligated to charge only those rates in providing service to its customers until a change in the rates is approved by the Commission.[143] Rates are *prima facie* lawful pending judicial review (if requested).

[141] *Trojan II*, 215 Or App at 373.

[142] Order No. 02-227 at 8 (citations omitted).

[143] ORS 757.225. *See also* ORS 756.990 (establishing penalties for failure to comply with a Commission order).

Once rates are final, any person challenging a filed rate, including the utility, must do so before the Commission. Collateral attacks on final rates in a court proceeding are not permitted, and courts are unable to impose a different rate than the one approved by the Commission.[144]

Any party may seek judicial review of a Commission rate order, but as discussed above, the court's review is limited. The rates adopted in the order will be in effect during the court's review unless a stay is granted.[145] The court does not review the reasonableness of the underlying rates, but rather the reasonableness, or legality, of the Commission's decision establishing those rates.[146] A court may not substitute its judgment for that of the Commission on any finding of fact supported by substantial evidence.[147] A court reviews the Commission's legal interpretations and conclusions to ensure that they are consistent with federal and state law and within the Commission's delegated authority. If a court concludes that a Commission order is erroneous, then the court is prohibited from establishing new rates or from instructing the Commission to establish new rates in a certain manner, and generally will remand the decision to the Commission for further proceedings.

Our interpretation of the filed rate doctrine is not only consistent with Oregon law, but also consistent with federal precedent. The doctrine was first applied in *Keogh v. Chicago & N.W. RY Co., et al.*[148] In considering a shipper's claim that it had been injured by a carrier's anti-competitive actions, the Supreme Court held:

> Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.[149]

The application of the federal filed rate doctrine has been reaffirmed many times, including in a recent decision by the Court of Appeals for the Ninth Circuit. In *Wah Chang v. Duke Energy Trading and Marketing, et al.*, the court dismissed a civil lawsuit against a number of power sellers in the western energy market, holding that the filed rate doctrine "is a form of deference and preemption, which precludes interference with the rate setting authority of an administrative agency like the FERC. It is a far reaching doctrine."[150]

[144] *See Hammond Lumber Co.*, 96 Or at 603. *See also supra* note 40.
[145] *See* ORS 756.561(2); ORS 756.610(2). *See also Eachus*, 135 Or App at 47 (Pacific Northwest Bell requests stay of rate decrease; agrees it will be required to issue refunds from date of Commission order if they lose appeal).
[146] *See supra* pp 21-25.
[147] *See Katz*, 116 Or App at 305; *Publishers Paper Co.*, 28 Or App at 196.
[148] 260 US 156, 43 S Ct 47, 67 L Ed 183 (1922).
[149] *Id.* at 163.
[150] *Wah Chang v. Duke Energy Trading and Marketing, et al.*, 507 F3d 1222, 1225 (9th Cir 2007).

The court further explained the filed rate doctrine:

> The filed rate doctrine's fortification against direct attack is impenetrable. It turns away both federal and state antitrust actions; it turns away Racketeer Influenced and Corrupt Organizations Act actions; it turns away state tort actions; and it even turns away state attempts to assert sovereign power to commandeer power contracts. In short, it turns away [challenges] which necessarily hinge on a claim that the FERC approved rate was too high and would, therefore, undermine FERC's tariff authority through the medium of direct court actions against the Energy Companies.[151]

Although the application of the filed rate doctrine may sometimes seem harsh, the doctrine has a rational legal basis and an important role in law and policy. The doctrine ensures rate stability and promotes administrative efficiency by establishing the appropriate method for challenging utility rates: (1) all challenges to rates must be brought before the regulatory agency that established the rates in the first instance; and (2) the agency's decision resolving the challenge is subject to judicial review, but given the agency's exclusive jurisdiction over setting rates, collateral attacks on rate orders in court are not permitted. The filed rate doctrine recognizes that agencies, such as this Commission, are given exclusive jurisdiction over ratemaking because it is a complex endeavor requiring specialized expertise. The doctrine also reflects the separation of powers doctrine, which dictates that courts should not exercise uniquely legislative functions such as ratemaking.

Furthermore, application of the doctrine is only harsh and unyielding if the regulatory agency with exclusive jurisdiction is unable to remedy the imposition of unjust and unreasonable or unjustly discriminatory rates. If, due to the particular legislative delegation to that agency, the agency is without such authority, the doctrine would arguably leave customers without a remedy because pursuing a remedy in court would be prohibited. As discussed above, however, we have determined that the legislative delegation of authority to *this* Commission is broad and arguably does include the ability to remedy the imposition of unjust and unreasonable or unjustly discriminatory rates.

To be clear, the filed rate doctrine does not address a regulatory agency's remedial authority. The filed rate doctrine is determinative of *where* a customer may pursue a remedy for unjust and unreasonable or unjustly discriminatory rates, but is irrelevant to the question of the scope of the agency's remedial authority. That is determined by looking at the agency's delegated statutory authority.

In summary, the filed rate doctrine is primarily a jurisdictional doctrine reflecting the established principle that challenges to rates must be made before the regulatory body that set the rates in the first instance. The doctrine does not, however, address that regulatory body's remedial authority. When this Commission has relied on the filed rate doctrine in arguing that it does not have remedial authority, the Commission has

[151] *Id.* at 1226.

made the same mistake as many of the parties to these remand proceedings—confusing the filed rate doctrine with the rule against retroactive ratemaking. Therefore, the Commission erroneously relied on the filed rate doctrine in finding that we did not have the authority to offset future rates or to order PGE to issue refunds to compensate customers for the inclusion PGE's remaining Trojan investment in rate base, with the opportunity to earn a return, from April 1, 1995, through September 30, 2000. The filed rate doctrine is irrelevant to the question of the Commission's remedial authority. We believe, however, that the appropriate interpretation of the filed rate doctrine *is* relevant to the jurisdiction of the circuit court over the ongoing consolidated class action proceeding, which we discuss below.

3. Does the rule against retroactive ratemaking prohibit the Commission from ordering a utility to issue refunds?

It is generally accepted that the rule against retroactive ratemaking exists in Oregon.[152] But the meaning of the rule and the scope of its application have not yet been conclusively determined. The rule against retroactive ratemaking is primarily derived from the fact that ratemaking is a legislative act that is generally prospective in nature.[153] Consequently, ratemaking, like legislation, is applied prospectively absent explicit legislative direction to the contrary.

Utility rates are based on a utility's anticipated expenses and revenues.[154] The rule against retroactive ratemaking prohibits the Commission from setting rates to allow a utility to recover past losses or require it to refund past profits. In the context of the rule against retroactive ratemaking, "past losses" and "past profits" have unique meanings. "Past losses" means earnings lower than the utility's authorized revenues; "past profits" means earnings in excess of the utility's authorized revenues.[155]

The prospective nature of ratemaking protects both customer and utility interests. The rule against retroactive ratemaking is intended to ensure that customers are paying rates that reflect the cost of service at the time the service is rendered. Similarly, the rule protects utilities because the use of past profits to reduce future rates may violate constitutional safeguards against confiscatory rates.

In this case, the Commission has previously taken the position that ratemaking is prospective only, and therefore, when a court remands a rate order for the Commission's reconsideration in light of a legal error, the Commission is limited to fixing the error on a prospective basis.[156] We believed that calculating refunds in this case required determining

[152] *See* Letter of Advice dated March 18, 1987, to Charles Davis, n 1 (OP 6076).
[153] *See, e.g., Flagg.*, 195 Or at 715 ("[A]ll rate orders are prospective in character."). *See also Hall v. Northwest Outward Bound School, Inc.*, 280 Or 655, 658, 572 P2d 1007 (1977), citing Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn L Rev 775 (1936).
[154] *See, e.g., Industrial Customers of Northwest Utils. v. Public Util. Comm'n*, 196 Or App 46, 49, 100 P3d 1072 (2004) ("Utility rates are set prospectively based on a utility's anticipated costs and revenues * * *.").
[155] *See* OP 6076.
[156] *See* Order No. 02-227 at 9.

what rates would have been if we had appropriately interpreted ORS 757.140 and 757.355 in 1995, and that such a determination would be impermissible retroactive ratemaking.[157]

The arguments presented by the parties in response to the question of our remedial authority reveal that the rule against retroactive ratemaking is unclear, but that the rule does not necessarily prohibit the calculation and imposition of refunds. We therefore embarked upon a thorough review of all of the relevant precedent in order to determine whether the rule against retroactive ratemaking prohibits this Commission from ordering a utility to issue refunds of rates charged in accordance with a rate order that has been overturned on appeal. Based on this review, we believe our prior interpretation of the rule has been unduly restrictive.

Many of the parties use precedent from other states to argue that the rule against retroactive ratemaking prohibits this Commission from ordering a utility to issue refunds. Non-jurisdictional precedent, however, is of particularly limited use in considering this issue. The rule against retroactive ratemaking is a judicially created doctrine that was initially based on statutes that specifically stated that the regulatory agency's actions had prospective application only.[158] Many of the subsequent federal and state court cases discussing the rule involved similar statutory schemes. Determining whether precedent from other states is persuasive in this state would require a detailed comparison of the various relevant statutes. No party to these proceedings has undertaken such a detailed analysis.

Furthermore, while almost every state has adopted some form of the rule, the definition of the rule against retroactive ratemaking and the scope of its applicability vary widely.[159] The rule against retroactive ratemaking is uniformly accepted to preclude consideration of past losses and past profits in setting future rates.[160] Past profits in this context are generally defined as earnings greater than a utility's authorized earnings; past losses are defined as earnings lower than a utility's authorized earnings.[161] Beyond this one principle, however, application of the rule across the country has not been uniform. Some courts interpret the rule broadly and apply it rigidly to prohibit not only consideration of past losses and profits in setting future rates, but also to prohibit refunds under any circumstances.[162] Other courts interpret the rule more narrowly and apply the rule less staunchly, allowing some exceptions to remedy procedural mistakes, address extraordinary losses or gains, or to allow energy cost adjustment clauses.[163] State courts that have

[157] *See id.* at 10.
[158] *See, e.g., T.R. Miller Co. v. Louisville & Nashville R.R.*, 92 So 797 (Ala 1921).
[159] *See Ghost of Regulation Past: Current Applications of the Rule Against Retroactive Ratemaking in Public Utility Proceedings*, 1991 U. Ill. L. Rev. 983, 986 (1991). *See also* OP 6076 at 2, n 3.
[160] *Id.* at 984-986. *See also* OP 6076 at 2.
[161] *See* OP 6076 at n 1; *Board of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 US 23, 31-32, 46 S Ct 363, 366, 20 L Ed 808 (1926) (defining past profits and losses and discussing how they may not be used to set future rates).
[162] *See Ghost*, 1991 U. Ill. L. Rev. at 1022-24.
[163] *See id.* at 1003-09, 1030-31.

considered the issue of whether the rule against retroactive ratemaking prohibits refunds when a rate order is reversed on appeal are almost evenly split on the issue.[164]

Oregon courts have been relatively silent about the rule against retroactive ratemaking. The courts have not fully considered the rule or conclusively decided whether to interpret the rule narrowly (to prohibit only the consideration of past profits or past losses in setting future rates) or more broadly (to prohibit any action by the Commission that would affect past losses or profits). Only the Court of Appeals in *Katz* has attempted to define the rule in Oregon, and it did so in a manner that indicates that Oregon courts may be inclined to interpret the rule narrowly. In *Katz*, the court defined the rule against retroactive ratemaking as follows: "Retroactive ratemaking occurs when past profits or losses are incorporated in setting future rates."[165] The court went on to find that the rule was not implicated, even though the court was upholding the Commission's decision to order a utility to issue a refund of past lawfully-collected rates, because the case did not involve "comparing *authorized* revenues with *actual* revenues and then adjusting for unexpected profits or shortfalls."[166] The discussion of the rule in *Katz* is of limited assistance, however, because the court specifically declined to determine the scope of the rule's applicability in Oregon.[167] Nonetheless, the court did state that ordering a utility to issue refunds (at least under certain circumstances) did not constitute retroactive ratemaking.[168] No other Oregon court has addressed the rule against retroactive ratemaking. The rule was mentioned by the Supreme Court in *Dreyer*, but only in passing when the court noted that the rule was not applied in *McPherson*.[169]

The Oregon legislature has apparently accepted that the rule against retroactive ratemaking applies in Oregon and has created two exceptions to the rule. First, in ORS 757.259, the legislature authorized the Commission to allow utilities to recover identifiable expenses or revenues in future rates under certain circumstances. This is known as "deferred accounting" and has been used to allow utilities to recover extraordinary

[164] *Compare California Mfrs. Ass'n v. Pub. Util. Comm'n*, 595 P2d 98 (Cal 1979) (rule does not apply because the original order is not final for ratemaking purposes until after full judicial review); *North Carolina ex rel Util. Comm'n v. Conservation Council of N. Carolina*, 320 SE 2d 679 (NC 1984) (same; rate not lawfully established simply because the Commission has ordered it; meaningful judicial review requires the right to retroactive relief); *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 604 P2d 1144 (Ariz Ct App 1979) (retroactive ratemaking does not apply to refunds resulting from statutorily authorized review; equity required a refund because the utility had never shown that the rates collected under the original commission order were ever just and reasonable) *with Mandel Bros v. Chicago Tunnel Terminal Co.*, 117 NE 2d 774 (Ill 1954) (court found that relevant statutory scheme only allowed reparations for excessive rates; because the ICC had approved the rates as just and reasonable, they were not excessive); *Public Serv. Comm'n v. Diamond State Tel. Co.*, 468 A 2d 1285 (Del 1983) (calculation of refunds requires ratemaking; ratemaking is only prospective; therefore only remedy upon remand is prospective relief; stay should be used to prevent harm in first instance); *Mountain States Tel. & Tel. Co. v. Mew Mexico Corp. Comm'n*, 563 P2d 588 (NM 1977) (same); *Utah Power & Light Co. v. Idaho Pub. Util. Comm'n*, 685 P2d 276 (Idaho 1984) (same).
[165] *Katz*, 116 Or App at 311.
[166] *Id.*(emphasis in original).
[167] *Id.*
[168] *Id.*
[169] *Dreyer*, 341 Or at 271, n 10.

expenses such as excess power costs[170] and implementation costs for Senate Bill (SB) 1149 (electric industry restructuring),[171] and to refund extraordinary revenues such as Measure 5 tax savings.[172] ORS 757.259 creates an exception to the universally accepted definition of the rule against retroactive ratemaking, which prohibits past losses or profits from being considered in establishing future rates.

Second, in an effort to ensure that customers are only charged in rates for income taxes that a utility actually pays to taxing authorities, the legislature passed ORS 757.268. This statute requires utilities to "true-up" income taxes collected in rates with taxes paid. Generally speaking, when actual taxes paid exceed the estimate of taxes included in rates, the utility may add a surcharge to customers' bills to recover the difference. When taxes paid are lower than estimated taxes, the utility will be required to refund the difference to customers. ORS 757.268 creates an exception to a slightly broader definition of the rule against retroactive ratemaking, which prohibits comparing *actual* utility results to the estimates used in a rate case test year, then requiring utilities to refund any excess or collect any deficits.

In considering whether to pass ORS 757.259 in 1987, the legislature relied, at least in part, on testimony from Oregon Public Utility Commissioner Charles Davis. Commissioner Davis's testimony relied on a DOJ opinion regarding the rule against retroactive ratemaking. In that opinion, the DOJ stated that the rule against retroactive ratemaking "applies when past profits or losses, including past expenses, are incorporated in future rates * * *. The rule is implicated when the regulator, after determining expected costs and revenues, supplements that determination by employing past profits or losses in setting the future return the utility will be authorized to earn."[173] Thus, the DOJ's opinion expressed a narrow interpretation of the rule against retroactive ratemaking. The DOJ went on to apply the rule to the specific questions raised by Commissioner Davis, including whether the Commission could issue a deferred accounting order or allow recovery of specific past excess power costs.[174] The DOJ concluded that the rule against retroactive ratemaking prohibited the Commission from engaging in those actions in the absence of specific legislative delegation creating an exception to the rule, which ultimately led to the enactment of ORS 757.259.

Several aspects of Oregon's statutes governing utility regulation also support a narrow definition of the rule against retroactive ratemaking. First, nothing in our statutory scheme specifically limits Commission rate decisions to prospective application only. This is unlike the statutes in many of the states that have adopted broader interpretations of the rule.

[170] ORS 757.259(2)(a). *See In the Matter of the Application of Idaho Power Company for Authorization to Defer for Future Rate Recovery Certain Excess Net Power Supply Expenses*, Docket UM 1198, Order No. 07-119 (Apr 2, 2007).
[171] *See In the Matter of the Application of Portland General Electric Company for an Order Approving Deferral of Costs Per Senate Bill 1149*, Docket UM 954, Order No. 00-165 (Mar 17, 2000).
[172] *See In The Matter of the Application of the Staff of the Public Utility Commission of Oregon for Deferral of Tax Savings of Certain Electric and Natural Gas Utilities*, Docket UM 878, Order No. 98-044 (Feb 2, 1998).
[173] OP 6076 at 2.
[174] *Id.* at 8-19.

Second, the statutes governing judicial review of Commission orders arguably indicate that the legislature envisioned that the Commission had some retroactive remedial authority. ORS 756.565 provides that Commission orders are only *prima facie* lawful pending judicial review:

> All rates, tariffs, classifications, regulations, practices and service fixed, approved or prescribed by the Public Utility Commission and any order made or entered upon any matter within the jurisdiction of the commission shall be in force and shall be prima facie lawful and reasonable, until found otherwise in a proceeding brought for that purpose under ORS 756.610.

This statute allows a Commission order to become effective immediately, even if a party seeks judicial review of the order, but the order is not considered final until the period to appeal has passed or an appeal is resolved. While a party may seek a stay of a Commission order pending appeal, the stay is not automatic.[175] The party requesting the stay must show cause and may be required to post a bond or other security.

The Commission previously relied on the availability of a stay to conclude that it had no remedial authority to compensate customers for an error identified on appeal of a rate order. The Commission believed that the only remedy available to customers was to prevent a problem in the first instance by requesting a stay. Some of the parties in these remand proceedings have advocated this position as well. But this position is only sustainable if a stay is automatic. Otherwise, if a stay were not granted, an appealing party would be left without any remedy for the imposition of unjust and unreasonable or unjustly discriminatory rates.[176] If, in fact, there were no remedy, either before this Commission or in the courts, then appealing parties would always be able to show good cause for a stay, and the limits on the stay provision would become meaningless because stays would become *de facto* automatic.

Third, the legislature's broad delegation of authority to do everything necessary and convenient to protect customers from unjust and unreasonable exactions is consistent with a narrow interpretation of the rule against retroactive ratemaking. The broader the interpretation of the rule, the more constrained the authority of the Commission. It is difficult to reconcile a broad interpretation of the rule against retroactive ratemaking with the comprehensive authority delegated to this Commission.

From our review of the relevant case law and Oregon's statutory scheme for utility regulation, we believe a narrow interpretation of the rule against retroactive ratemaking is warranted. Under a narrow interpretation, the rule against retroactive ratemaking prohibits: (1) consideration of past losses or past profits in setting future rates;

[175] ORS 756.610(2).

[176] Some of the parties in these proceedings argue that the statutes give the courts, not this Commission, authority to remedy the imposition of rates that are found "unlawful" upon judicial review. We respond to this argument in our discussion of the Supreme Court's decision in *Dreyer*. *See infra* pp 43-50.

and (2) retroactively adjusting past rates to "true-up" the estimated expenses and revenues used in the rate case test year to a utility's actual expenses and revenues.

Having decided what we believe is the appropriate definition of the rule against retroactive ratemaking in Oregon, we now turn to the question of whether the rule prohibits the Commission from ordering a utility to issue refunds of rates imposed in compliance with a Commission order that was remanded after judicial review. To answer this question, we must look first at the limits on the scope of judicial review. As discussed above, the court does not review the rates set by the Commission; rather, the court reviews the legality of the Commission's order approving those rates. Thus, at the conclusion of judicial review, a court has determined the legality and reasonableness of the Commission's rate order, but the reasonableness of the rates adopted in that order has yet to be determined. The question of whether the error identified by the reviewing court renders overall rates unjust and unreasonable or unjustly discriminatory is exclusively within the jurisdiction of the Commission, and is therefore the first question for the Commission to address after remand.

Once the Commission determines that overall rates are unjust and unreasonable or unjustly discriminatory, we believe that our delegated authority is broad enough to include the authority to protect customers by ordering a utility to issue refunds. The question remains whether the rule against retroactive ratemaking constrains the exercise of this authority. Two things are clear from our definition of the rule against retroactive ratemaking. First, in conducting a remand proceeding, the Commission cannot consider the rates charged in compliance with an unlawful rate order in setting future rates. Thus, any rate refunds cannot be made by using the amount of those refunds to offset future rates.[177] Second, the Commission cannot use *actual* expenses or revenues in calculating appropriate refunds of past rates.

In addition, calculating refunds in a case like this, which involves a rate element that is inextricably linked with other rate elements, requires a retrospective examination of what rates would have been in the absence of the error identified by the reviewing court.[178] It has generally been believed that this retrospective examination would be impermissible retroactive ratemaking. But the rule against retroactive ratemaking, as we have defined it, is not a wholesale prescription against reconsideration of past rates. Rather, it proscribes using actual results in that reconsideration or effectuating refunds by offsetting future rates.

[177] This does not mean that the Commission cannot implement a refund through a specific credit on customers' bills. If current customers were also customers during the time that unjust and unreasonable or unjustly discriminatory rates were in effect, a specific credit on that customer's bill would be an appropriate method of effectuating the refund and would not be considered an "offset" of future rates. The utility would be required to issue a check to those customers that are no longer customers of the utility, but were customers during all or part of the time the rates were in effect. The CAPs' and URP's argument that the Commission does not have the ability to effectuate a refund to past and current customers is not well taken. *See In the Matter of the Application of U S West Communications, Inc., for an Increase in Revenues*, Dockets UT 125 and UT 80, Order No. 00-190 (Apr 14, 2000).

[178] *See infra* pp 63-65.

We find, consistent with the Court of Appeals' decision in *Katz* and the broad scope of our delegated authority over rates, that the rule against retroactive ratemaking is not implicated in calculating and ordering refunds so long as: (1) the Commission considers only the information in existence at the time of the initial rate order; (2) the Commission does not consider actual utility expenses or revenues in calculating refunds; and (3) the refunds are not effectuated by offsetting future rates. Our decision is limited to whether the rule against retroactive ratemaking prohibits the Commission from ordering a utility to issue a refund of rates collected in compliance with a rate order that was later overturned on appeal when the Commission determines upon remand that a refund is required. We do not decide the scope and applicability of the rule against retroactive ratemaking in every case.

4. Resolution

We believe that this Commission has the authority to order a utility to issue refunds in unusual and limited circumstances. We believe that our general grant of authority in ORS 756.040 to do everything necessary to protect customers "from unjust and unreasonable exactions" authorizes us to order a utility to issue refunds when required to remedy an error identified by a reviewing court on appeal.

Our conclusion is consistent with the scope of our jurisdiction over rates. Because ratemaking is legislative and has been delegated to the Commission, the Commission has exclusive jurisdiction to determine whether rates are just and reasonable, a grant of authority that has been repeatedly recognized by the courts. Although courts have the authority to review a Commission order approving rates to ensure that the order is constitutional and within the Commission's statutorily delegated powers, courts do not have the authority to review the rates themselves, to set rates, or to order the Commission to set rates in a certain manner.

Generally, refunds would not be required in the absence of a Commission finding that the error identified by the reviewing court rendered rates unjust and unreasonable or unjustly discriminatory. But it is clear from *Katz* that we may also order a utility to issue refunds in additional unusual and limited circumstances. In *Katz*, the Commission had permitted Pacific Northwest Bell to charge rates in excess of its authorized revenue requirement. Even though the company had the Commission's permission to charge these rates, and the Commission made no determination that the rates were unjust and unreasonable or unjustly discriminatory, the Commission nonetheless found it appropriate to order the company to issue refunds. The Court of Appeals upheld the Commission's determination, finding that ORS 756.040 gave the Commission remedial authority in that unique circumstance.

We emphasize, however, that this remedial authority is limited and must be exercised carefully. The rule against retroactive ratemaking and legal constraints on collateral attacks of final rate orders prohibit the Commission from reconsidering and adjusting past rates that were lawfully established and either were not appealed or were upheld on appeal. Thus, our conclusion is limited to the circumstance where a Commission rate order is determined to be unlawful upon judicial review, and we determine upon remand that a refund is required to remedy the error identified by the reviewing court.

C. *Dreyer v. PGE*

The final legal issue that has arisen during these remand proceedings is the possible effect, if any, of the Supreme Court's decision in *Dreyer* on this Commission's reconsideration of the orders in UE 88 and UM 989 and the remedies available to PGE's customers. As discussed above, the CAPs filed class action lawsuits in circuit court seeking damages against PGE for charging rates that included a *return on* the utility's undepreciated investment in Trojan. PGE filed a motion to dismiss, arguing that the filed rate doctrine barred the CAPs' claims. The CAPs filed a motion for summary judgment, asserting that the Court of Appeals had already determined in *Trojan I* that the rates in effect from 1995 through 2000 were "unlawful," and therefore PGE is liable to customers for the damages incurred for the payment of these "unlawful" rates. The circuit court denied PGE's motion to dismiss and granted the CAPs' motion for summary judgment, finding PGE liable for damages under ORS 756.185, a statute that allows customers to sue utilities in circuit court for, among other statutes, violations of ORS chapter 757. The circuit court agreed with the CAPs that the Court of Appeals had concluded that PGE violated ORS 757.355 by charging rates that included a *return on* PGE's remaining Trojan investment, and thus PGE was liable under ORS 756.185 for that violation. The circuit court also held PGE liable under the common law theories of money had and received and unjust enrichment, finding that ORS 756.200 preserves these common law causes of action.

In response to the circuit court's decision, PGE sought a writ of mandamus from the Supreme Court. PGE argued that the Supreme Court should order the circuit court to dismiss the CAPs' lawsuits because the filed rate doctrine, as embodied in ORS 757.225, bars claims for damages under ORS 756.185 and 756.200. PGE asserted that ORS 757.225 requires utilities to charge only those rates set forth in lawfully filed tariffs. PGE argued that the circuit court impermissibly read ORS 756.185 and 756.200 to allow claims for damages against a utility that is doing what ORS 757.225 compels it to do—charging rates approved by the Commission.

In their Phase II briefs, the parties have differed regarding the correct interpretation of the *Dreyer* decision and the impact of that decision on these remand proceedings. In *Dreyer*, the Supreme Court held that the filed rate doctrine, as set forth in ORS 757.225, does not required dismissal of the CAPs' claims under ORS 756.185 or 756.200. URP and the CAPs argue that the Supreme Court conclusively decided that customers have the right to seek damages under ORS 756.185 and 756.200 to remedy the payment of "unlawful" rates. URP and the CAPs believe that this Commission would be impermissibly interfering with this right and providing a "remedy blocking service" for PGE if we decide (as we did above) that we have remedial authority in this case.[179] Other parties argue that the Supreme Court's interpretation of the filed rate doctrine in *Dreyer* fundamentally changed utility law as we understood it. We believe that all of the parties overstate the significance of the *Dreyer* decision in this case.

[179] URP Phase II Reply Brief at 1.

To properly interpret the Supreme Court decision, we must consider the procedural posture of the case. PGE brought the action requesting a writ of mandamus. PGE asked the Supreme Court to intervene in an ongoing circuit court case and order the circuit court to rule in a certain manner. As the Supreme Court recognized, a writ compelling a lower court decision is an extraordinary remedy that the Supreme Court will issue "only when the law *requires* a particular decision."[180] Thus, in order to obtain the writ, the court required PGE to show "that the law requires dismissal of plaintiffs' actions and that the *ordinary remedy of reversal on appeal is inadequate.*"[181] The court ultimately found that PGE did not meet this burden:

> Thus, we do not accept PGE's argument that the circuit court is without jurisdiction to hear plaintiffs' claims because they necessarily involve ratemaking or pertain to utility regulation. Neither do we accept any of PGE's other arguments urging that the law *requires* [emphasis in original] dismissal of plaintiffs' actions. As such, we conclude that the *particular remedy* [emphasis added] that PGE seeks is not available: We cannot issue a preemptory writ ordering the circuit court to dismiss plaintiffs' actions and vacate its class certification order.[182]

Furthermore, not only is the scope of review restricted when the court considers a writ of mandamus, but the record and arguments presented are also quite limited. PGE did not present all of the possible arguments for reversal of the circuit court's summary judgment, nor did the court have a complete record discussing the ratemaking process. Rather, PGE presented the reasons it believed the law required immediate dismissal of the circuit court action. Nothing in the Supreme Court's decision prohibits PGE from appealing the circuit court's final decision in the consolidated class action proceeding. In fact, in finding that a writ of mandamus was inappropriate, the Supreme Court determined that the ordinary remedy of reversal on appeal is adequate. Accordingly, the precedential value of the Supreme Court's opinion is limited to only those findings essential to the court's ultimate decision.

Against that backdrop, we now turn to the Supreme Court's decision. We address four issues that have arisen in these proceedings as a result of the *Dreyer* decision. First, we discuss whether our interpretation of the filed rate doctrine is inconsistent with the Supreme Court's decision. Second, we address the Supreme Court's conclusion that the filed rate doctrine, as embodied in ORS 757.225, does not require dismissal of the CAPs' circuit court lawsuits. Third, we consider the Supreme Court's apparent belief that a utility may be held liable for damages in circuit court for doing what the law requires it to do—charge only the rates approved by the Commission. Finally, we address the Supreme Court's interpretation of ORS 757.225 as a directive to utilities, rather than a directive to this Commission.

[180] *Dreyer*, 341 Or at 276 (emphasis in original).
[181] *Id.* (emphasis added).
[182] *Id.* at 282-83.

Contrary to the assertions of some parties, the Supreme Court in *Dreyer* did not rule that the filed rate doctrine did not apply in Oregon, nor did the court determine the scope of the filed rate doctrine. Instead, the Supreme Court rejected PGE's assertion that the filed rate doctrine, as embodied in ORS 757.225, shields PGE from liability under ORS 756.185 and 756.200 for charging rates that were approved in a rate order that was later found to include an erroneous statutory interpretation:

> Although we reject PGE's contention here that ORS 757.225 embodies the particular application of the filed rate doctrine that it espouses, we do not reject the possibility that Oregon utility law incorporates some form of the doctrine. We simply do not address that question here.[183]

Thus, the filed rate doctrine's applicability and scope were not addressed, and the Supreme Court's decision in *Dreyer* is not inconsistent with our interpretation of the filed rate doctrine.

The Supreme Court did conclude, however, that ORS 757.225 does not *require* dismissal of the CAPs' claims under ORS 756.185 and 756.200. URP and the CAPs misinterpret this holding and assert that the court conclusively decided that a customer is entitled to pursue a remedy for the imposition of "unlawful" rates by seeking damages in circuit court. But the Supreme Court never determined conclusively whether customers could maintain an action under ORS 756.185 and 756.200 under the circumstances of this case. Rather, the Supreme Court found that dismissal of the action is not *required* by ORS 757.225, and that the ordinary remedy of appeal is adequate to protect PGE. PGE is therefore able to renew its arguments that the CAPs' claims are barred by ORS 757.225 on appeal.

Notwithstanding the inherent limits on the court's holding, we respectfully question the Supreme Court's conclusion that ORS 757.225 does not *require* dismissal of suits brought under ORS 756.185 or 756.200. Although the conclusion does not affect our remand proceedings, it conflicts with extensive precedent and potentially affects the Commission's exclusive authority to establish rates for utility service. The Supreme Court found that the Commission has primary jurisdiction to determine whether and to what extent customers have been harmed by the imposition of rates that included an unlawful component, but then stated that the courts may have a "role to play" if the Commission did not fully remedy any harm.[184] Unfortunately, we believe that the manner in which the case was presented prevented the Supreme Court from fully and accurately considering all of the issues and relevant precedent. Specifically, we believe that the Supreme Court's consideration of the meaning and scope of the filed rate doctrine was necessarily limited because the parties to the *Dreyer* appeal inaccurately described the filed rate doctrine to the court. The filed rate doctrine, as appropriately defined, prohibits the courts from considering the reasonableness of rates. It is well established in Oregon that the reasonableness of rates

[183] *Id.* at 279, n 14.
[184] *Id.* at 286.

is not a question for the courts, but is rather within the exclusive jurisdiction of this Commission.

As discussed above, the filed rate doctrine embodies two principles. Rather than focusing on the part of the doctrine reflecting the principle that the reasonableness of rates is within the exclusive jurisdiction of the Commission, the *Dreyer* parties focused on the aspect of the doctrine that requires a utility to charge only those rates set forth in a lawfully filed tariff. PGE argued that because the doctrine requires PGE to charge the rates set forth in its tariff, PGE cannot be held liable for charging rates set forth in that tariff, even if the rate order approving the rates was overturned on appeal. In other words, PGE argued that the filed rate doctrine shielded it from *any liability* to customers as long as it was charging the rates set forth in lawfully filed tariff.[185] Understandably wary of finding that customers had no remedy if a utility charges rates set forth in a tariff, even if the order approving those rates was overturned on appeal, the Supreme Court rejected PGE's interpretation and found that ORS 757.225 was "most reasonably read as a direction to utilities to charge all their customers the PUC-approved rate and, if a utility is dissatisfied with a rate, to obtain a new PUC-approved rate through the process set out at ORS 757.210 to 757.220."[186]

The Supreme Court is correct that the filed rate doctrine does not shield PGE from the obligation to issue refunds as long as it charges the rates set forth in its lawfully filed tariff. We disagree, however, that customers may seek damages from a utility under ORS 756.185 or 756.200 when that utility has charged the rates set forth in its lawfully filed tariff. Prior Oregon Supreme Court decisions make it clear that the remedy in such circumstances is appropriately found before this Commission, not before the courts. In finding that the filed rate doctrine, as embodied in ORS 757.225, does not bar such an action in circuit court, the Supreme Court seemed to adopt the parties' assumption that the rates charged by PGE from 1995 through 2000 were unlawful.[187] As discussed above, rates are only unlawful if they are unjust and unreasonable, unjustly discriminatory, or confiscatory. In this case, no court has decided, nor does any court have the jurisdiction to decide, what rates should be or whether the rates charged by PGE were unjust and unreasonable or unjustly discriminatory.[188] Thus, by declaring the rates "unlawful" because the Court of Appeals in *Trojan I* found one element of the Commission's *order* unlawful, URP and the CAPs have failed to recognize the fundamental premise that the determination of just and reasonable rates is a legislative function that is in the exclusive jurisdiction of the Commission. The question of whether the rates in effect from April 1995 through September 2000 were just and reasonable has remained unresolved until this order.

[185] PGE's position was consistent with the Commission's interpretation of the filed rate doctrine in Order No. 02-227. Although we focus on the parties' arguments before the Supreme Court, we acknowledge that those arguments were largely based on the Commission's own erroneous interpretation of the filed rate doctrine.
[186] *Dreyer*, 341 Or at 279.
[187] *See, e.g., id.* at 282 (a jury could calculate damages simply by determining what part of the rates PGE charged represented a *return on* PGE's investment in Trojan and were therefore "unlawful").
[188] Whether rates in this case were unjustly discriminatory or confiscatory has never been at issue in any of the Trojan-related court or Commission proceedings.

The Supreme Court apparently agree with URP and the CAPs and stated that the case did not involve ratemaking and damages could be calculated by simply determining that portion of rates that represented a return on PGE's remaining Trojan investment "and, therefore, were unlawful* * *."[189] The Supreme Court's belief was understandable, however, given the arguments presented to it by URP and the CAPs. Both parties have consistently argued (both in the courts and before this Commission) that such an approach is the appropriate way to calculate damages in this case because this case is akin to a case involving "overcharges." But URP's and the CAPs' arguments reflect a basic misunderstanding of the ratemaking process and the definition of overcharge. As discussed above, an overcharge occurs only when a utility charges more than the rate set forth in its lawfully filed tariff.[190] No one disputes that PGE charged the rates set forth in a lawfully filed tariff; therefore this case does not involve overcharges. Furthermore, as discussed in detail below, in a case involving a return on a rate base asset, one cannot simply calculate the portion of rates that reflect the *return on* and refund that amount.[191]

Given the fact that the Supreme Court apparently accepted URP's and the CAPs' erroneous argument that that this case was akin to a case involving "overcharges," it is understandable that the Supreme Court believed that allowing the damages action under ORS 756.185 and 756.200 to go forward did not infringe on the exclusive jurisdiction of the Commission. It has been established that a customer may seek damages in circuit court under ORS 756.185 when a utility has charged more than the rates set forth in a lawfully filed tariff (an "overcharge"). Courts have also determined that a customer may seek damages for *overcharges* under the common law theories of money had and received and unjust enrichment.[192] If this case truly did involve overcharges, the Supreme Court would be correct that the filed rate doctrine does not protect PGE from liability under ORS 756.185 or applicable common law theories preserved by ORS 756.200.

Furthermore, if the lawfulness of the rate had already been determined, as URP and the CAPs argued, then the Supreme Court's conclusion that simply determining damages for the unlawful portion of rates would not necessarily involve ratemaking is also understandable. The fundamental problem with the Supreme Court's conclusions, however, is the fact that the lawfulness of rates had not been determined prior to this order. Consistent with the court's limited authority on review of a Commission decision, the Court of Appeals' decision in *Trojan I* decided the lawfulness of the Commission's rate *order*, but did not decide the reasonableness of the *rates* approved in that order.[193]

When the circuit court granted the CAPs' motion for summary judgment and found PGE liable for the imposition of unlawful rates, the circuit court was assuming that the Court of Appeals had determined that the rates were unlawful. But the circuit court was incorrect, and an essential step in the analysis has been skipped. Unless and until *this Commission* determines that the error identified by the Court of Appeals in *Trojan I* resulted in unjust and unreasonable rates, then rates charged by PGE were not unlawful. By refusing

[189] *Dreyer*, 341 Or at 282.
[190] *See supra* pp 24-25.
[191] *See infra* pp 63-65.
[192] *See supra* p. 24-25.
[193] *See supra* p 21-25.

to overturn the circuit court's decision that PGE was liable for the imposition of rates that had been determined to be unlawful in *Trojan I*, the Supreme Court failed to recognize this fundamental flaw in the circuit court's decision.

Without the erroneous assumption that the Court of Appeals had already ruled on the lawfulness of the rates, the circuit court's determination that PGE is liable for damages under the circumstances of this case clearly infringes on this Commission's exclusive jurisdiction. To conclude that damages were warranted, the court would necessarily be required to conclude that customers paid more than they should have paid for services rendered. A determination that customers paid more than they should have paid for services rendered is inherently a determination that rates were unjust and unreasonable. Courts simply do not have the jurisdiction to make that determination.[194]

We are also concerned with the Supreme Court's interpretation of ORS 757.225 as solely a directive to utilities. The text and context of ORS 757.225 make it clear that the statute is directed to all parties wishing to challenge a rate set by the Commission. To challenge the reasonableness of rates, both customers and the utility must do so before this Commission. Although the first sentence in ORS 757.225 is directed specifically to public utilities, the second sentence is not. It states that "[t]he rates named [in a tariff] are the lawful rates until they are changed as provided in ORS 757.210 to 757.220."

One of the reasons the Supreme Court interpreted ORS 757.225 as a directive to utilities was the fact that the statute referred specifically to the utility-initiated rate change process in ORS 757.210, but did not refer to the Commission-initiated or customer-initiated processes in ORS 757.515 and 757.500, respectively.[195] The court thus found PGE's argument unavailing because it would give conclusively lawful effect to utility-initiated changes, but not to other types of rate changes. The Supreme Court was apparently not aware that *all rate changes*, regardless of how initiated, are ultimately accomplished through the filing of tariffs under ORS 757.210 to 757.220.[196] We believe that it would have been helpful to the Supreme Court if the parties and the *amici*, including the DOJ, had more thoroughly detailed the ratemaking process to the court.

There is another issue raised by the Supreme Court's decision that we think it is important to address. The Supreme Court also interpreted ORS 757.355 as a directive to utilities, relying on the opening clause of the statue: "No public utility shall * * *." Under this reading, the Supreme Court concluded that it was unlawful for utilities to impose rates that include a return on investment in utility property that is not presently used for providing utility service to the customer.[197] PGE and the DOJ argued that ORS 757.355 is more accurately read as a directive to the Commission in setting utility rates, because utilities may only charge rates that have been approved by the Commission. Thus, if a utility charges rates that include a return on property that is no longer used for providing utility service, it is

[194] *See, e.g., Wah Chang*, 507 F3d at 1226 (the filed rate doctrine "turns away" court challenges "that necessarily hinge on a claim that the FERC approved rate was too high and would, therefore, undermine FERC's tariff authority through the medium of direct court actions against Energy Companies.")
[195] *Dreyer*, 341 Or at 278-279.
[196] *See supra* p 8.
[197] *Dreyer*, 341 Or at 279.

because the Commission ordered it to do so. But the Supreme Court rejected PGE's and the DOJ's arguments. Under the *Dreyer* court's formulation of the law, PGE could possibly be held liable for damages in circuit court for doing what the Commission *ordered* it to do. If the *Dreyer* court is correct, then PGE was placed in the unenviable position being forced to violate ORS 757.355 because it had no choice but to comply with the Commission's order.[198]

Even though the Supreme Court rejected these arguments, we think it is important to emphasize the context of ORS 757.355. As discussed above, a utility may only charge rates authorized and approved by this Commission under ORS 757.205 to 757.268. It may not unilaterally set its own rates. With this context, ORS 757.355 is properly read as a directive to this Commission in setting a public utility's rates.

ORS 756.185 makes a utility liable if it "does, or causes or permits to be done, any matter, act or thing prohibited by ORS chapter 756, 757 or 758 or omits to do any act, matter or thing required to be done by such statutes * * *." A utility is required by statute to comply with a Commission order (ORS 756.990) and to charge only the rates approved by the Commission (ORS 757.225). If the utility charges the rates approved by the Commission, the utility simply is not doing, causing, or permitting an act prohibited by the statutes. Rather, a utility is liable under ORS 756.185 if it charges rates *other than* those approved by this Commission.

In addition, the Supreme Court's interpretation of ORS 757.355 and the operation of the filed rate doctrine puts a utility in the impossible position of being liable for doing what the law requires it to do—charge the rates approved by the Commission—when the order approving those rates is later found to contain a legal error. The Supreme Court discounted this argument and justified its conclusion by noting:

> [R]ealistically, utilities will rarely if ever be placed involuntarily into such a position; rather, they 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.[199]

There are at least two problems with the court's justification. First, it is simply not true that utilities are rarely forced to charge rates that are based on a Commission order that has adopted a legal or factual position with which the utility disagrees. The court seems to assume that the adversarial process that the Commission uses to establish rates is ineffectual, resulting in little more than "rubber stamping" a utility's proposal. To the contrary, the Commission regularly adopts legal or factual positions that are advocated by parties other than the utility, or reached solely on the Commission's own initiative. It is possible that the Supreme Court meant that, realistically, the issue of refunds or damages would arise only in those situations where the Commission has adopted a position that results

[198] *See, e.g., Morgan v Portland Traction Co.*, 222 Or at 627-628 (if an exclusive and adequate review procedure of a Commission order is available, then due process "authorizes the courts to compel compliance with the order, *even if invalid*, until its validity is thus challenged.") (emphasis added). *See supra* note 40.
[199] *Dreyer*, 341 Or at 279, n 15.

in a rate increase, and that PGE would most likely be advocating for that position. Even assuming this to be true, PGE's advocacy should be irrelevant to the question of whether it is appropriate to hold PGE liable for doing something that the Commission ordered it to do.

Second, the language used by the Supreme Court makes it seem as though PGE was making a risky argument in arguing that ORS 757.140 should be interpreted to allow a *return on* its remaining Trojan investment.[200] But by 1995, the year PGE's rates were changed in a manner that reflected this interpretation of the statute, PGE's argument had already been supported by an opinion from the DOJ, adopted by the Commission, and upheld by the circuit court on appeal. PGE's position was far from risky.

In summary, we believe the parties in these remand proceedings misinterpret *Dreyer* and overstate its significance in this case. Because the Supreme Court in *Dreyer* did not determine the definition of the filed rate doctrine or the scope of its application in Oregon, we conclude that our definition of the filed rate doctrine is not inconsistent with the Supreme Court's decision. The *Dreyer* court specifically did not determine whether the filed rate doctrine limited the Commission's remedial authority, and left the existence and scope of our remedial authority for our initial determination.[201]

Furthermore, URP's and the CAPs' arguments that the Supreme Court conclusively decided that the courts, and not the Commission, have jurisdiction to remedy harm to customers in the circumstances of this case are inconsistent with the court's decision. The Supreme Court actually held that the Commission not only has jurisdiction, but has *primary* jurisdiction to remedy harm, if any, to customers in the circumstances of this case.[202]

V. RECONSIDERATION OF UE 88 AND UM 989

As a result of the decisions in *Trojan I* and *Trojan II*, three Commission orders were remanded for reconsideration: the orders in DR 10, UE 88, and UM 989. The DR 10 order was a declaratory ruling that set forth the Commission's interpretation of ORS 757.355 and 757.140. This interpretation was then incorporated into the Commission's decision in UE 88. Because the decision in DR 10 was a purely legal interpretation, we believe the Court of Appeals' decision in *Trojan I* effectively renders the decision a nullity, and therefore find that no further reconsideration of the DR 10 decision is necessary.

We now turn to the rate orders in UE 88 and UM 989. As discussed above, the first step for this Commission upon remand is to determine whether the error in the order identified by a reviewing court renders the rates adopted in those orders unjust and unreasonable or unjustly discriminatory. No party in these cases has argued that the rates adopted in UE 88 or UM 989 were unjustly discriminatory. Thus, the remands of the orders in UE 88 and UM 989 present two primary questions for our resolution: (1) Were the rates in effect from April 1, 1995, through September 30, 2000, just and reasonable?; and (2) Were

[200] URP has interpreted the court's language in this manner to conclude that PGE and the Commission engaged in "risky ratemaking adventures" in the UE 88 decision. Opening Comments of URP on the Proffered Question regarding Remedies at 11 (Jun 20, 2007).
[201] *Dreyer*, 341 Or at 286-287.
[202] *Id.* at 285-287.

the rates implementing the settlement in UM 989 just and reasonable? If we conclude that the rates adopted in either order were unjust and unreasonable, then we must determine an appropriate remedy for the customers that paid the unjust and unreasonable rates.

A. Procedural Issues

Before we reconsider the rate orders in UE 88 and UM 989, we address URP's and the CAPs' (collectively URP) numerous procedural challenges in these remand proceedings. In its briefs and a late-filed motion, URP contends the Commission or presiding ALJs made numerous errors in establishing the scope of Phase I and Phase III and made other decisions prejudicing URP in these proceedings.

1. Scope of Proceedings

URP objects to our decision in Phase I to allow parties to present evidence and argument that had not been presented in the original UE 88 proceeding. This objection relates to URP's position that the reconsideration of the UE 88 rate order should be limited to a simple ministerial calculation that isolates and removes from PGE's rates amounts related to the return on Trojan. The ALJ rejected URP's position, instead allowing the parties to present new evidence to allow a broader "retrospective examination of what rates would have been approved in UE 88 if the Commission had interpreted the authority delegated to it by the legislature in ORS 757.355 to not allow a return on investment in retired plant * * *."[203] We affirmed and adopted the ALJ's ruling, first in Order No. 04-597 and again on reconsideration in Order No. 05-091.

URP continues to raises objections to the scope of Phase I, filing a motion on September 12, 2008 (well after the record in these remand proceedings was closed at the July 10, 2008 hearing) arguing that the Commission should exclude issues and evidence that had not been presented in the original docket or preserved on appeal.[204] URP contends that the decision to expand the Phase I proceedings to allow new argument regarding the rate treatment for PGE's remaining Trojan investment was in error and inconsistent with the ALJ's decision in Phase III to limit arguments to those raised in the initial proceeding or on appeal or cross-appeal. URP argues that "applying different standards within the same consolidated proceeding is arbitrary" and denies URP due process of law. URP cites no legal authority in its motion, but incorporates by reference its arguments in its request for reconsideration of Order No. 04-597, which was denied in Order No. 05-091.

It is necessary to first correct URP's mistaken belief that the ALJ unfairly excluded evidence presented by URP because it could not have been presented in the original proceedings, but did not exclude such evidence submitted by PGE or Staff. Contrary to URP's belief, the ALJ's restriction on evidence applied to all parties in this proceeding. In

[203] Order No. 04-597 at 5 (footnote omitted).
[204] URP's arguments are somewhat contradictory. URP argues that new evidence should not be allowed in Phase I, but then uses data from post-1995 events (such as PGE's acquisition by Enron) to argue that customers are entitled to a $744 million refund.

both Phase I and Phase III, the parties were limited to presenting information that was known or could have been reasonably known at the time of the Commission's original decisions.[205]

Regarding the merits of URP's objection, we find the arguments raised are simply a reiteration of those we previously addressed and rejected in Order Nos. 04-597 and 05-091. We decline to consider URP's arguments again. We therefore incorporate by reference the findings and conclusions of Order Nos. 04-597 and 05-091 regarding the scope of admissible evidence. We also agree with the ALJ's ruling limiting new evidence to factual evidence that could have been presented in the original proceeding, and therefore adopt and affirm the ALJ's denial of URP's request to introduce evidence of PGE's earnings from 1995 through 2000, Enron's purchase of PGE in 1997, and the income tax effects of Enron's ownership of PGE.

We emphasize that the scope of Phase I is different from the scope of Phase III because the issues on remand are different. As discussed above, this Commission has been granted broad discretion in the exercise of its ratemaking functions. In this order, we carefully exercise those functions to appropriately respond to the remand instructions in both *Trojan I* and *Trojan II*. As a result of the different instructions we received in those decisions, we adopted different approaches. Moreover, even though the Phase III proceedings were more limited in scope, the ALJ expressly allowed URP to notify the Commission in writing if it believed the scope of Phase III was too narrow.[206] URP made no such filing and identifies no issue that it was barred from presenting. Accordingly, we deny URP's September 12, 2008 motion to exclude issues and evidence from Phase I.

2. *Exclusion of Witness Meek's Testimony*

URP contends that the Commission improperly excluded the testimony of Daniel Meek on behalf of URP in the Phase I proceedings. The ALJ excluded the testimony *sua sponte* on the grounds that Mr. Meek could not act as both counsel and witness for URP under Oregon Rule of Professional Conduct (ORPC) 3.7. URP claims that the ALJ committed legal error and demonstrated bias against URP by failing to allow the testimony under the hardship exception set forth in ORPC 3.7(a)(3).

We affirm and adopt the ALJ's ruling. ALJs have an independent obligation to enforce rules governing the conduct of attorneys, regardless of whether any party in a proceeding complains of an ethical violation. Moreover, it was reasonable for the ALJ to conclude that the substantial hardship exception to ORCP 3.7 did not apply to the circumstances of Mr. Meek's testimony on behalf of URP. Although the testimony was correctly excluded, we will exercise our discretion and consider Mr. Meek's testimony as comments, thereby allaying URP's concerns.

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[205] *See* Phase I Ruling at 3 ("While the Commission must now apply a different legal interpretation of ORS 757.355, the factual evidence to which that statute is applied must encompass the same timeframe, that is, information that could have been presented in UE 88."); Phase III Ruling at 6 ("As discussed above, the Commission must reconsider Order No. 02-227 based on the facts existing at the time the rates went into effect. Any new evidence presented by any party must have existed on or before October 1, 2000, to be properly considered.").
[206] Phase III Ruling at 3.

3. *Commission Appeal of UM 989*

At various times throughout Phase I, URP has claimed that the Commission's concurrent appeal of the circuit court's remand of the order in UM 989 "irretrievably prejudiced this remand proceeding." URP asserts that the Commission's previous belief that we did not have remedial authority under the circumstances of this case rendered our investigation in Phase I meaningless.

It is unclear whether URP continues to support these earlier arguments, given its subsequent decision to join the Commission's arguments on appeal that the circuit court order was in error and given URP's assertions in Phase II that this Commission lacks remedial authority. Regardless, URP has presented no new arguments to support its position and we uphold and incorporate our previous decision on this matter.[207] Furthermore, we believe URP's assertions of prejudice are moot because we have decided in this order that the Commission does have refund authority under certain circumstances.

4. *Phase III Evidentiary Ruling*

URP contends that the ALJ improperly excluded evidence on three key issues in Phase III. For the reasons discussed below, we conclude that the ALJ's evidentiary rulings in Phase III were correct and adopt them as our own.

First, URP contends that the ALJ erred in excluding evidence related to the return on Trojan during the period from April 1995 to September 2000. In doing so, URP claims that the ALJ excluded consideration on remand the one issue the Court of Appeals in *Trojan II* singled out as legal error: the consideration of the return on Trojan previously received by PGE under UE 88 rates in determining the correct Trojan balance as of September 30, 2000. We reject URP's argument because URP ignores the basis for the ALJ's decision. The ALJ specifically recognized that the Commission would address the prior return on Trojan in Phase I of these proceedings:

> Whether ratepayers paid too much from 1995 to 2000 is being addressed in Phase I of these proceedings. If the answer to that question is yes, the Commission will order PGE to issue refunds to redress this overpayment as part of the Phase I analysis.[208]

Second, URP contends the ALJ erred in denying its request to update the "continuing rate effects of any error in Order No. 02-227; update the cost to ratepayers from trading the non-interest-earning Trojan balance with interest-earning ratepayer credits and to bring these sums to present value; update the amounts of NEIL proceeds" and bring those amounts to present value.[209] URP has failed, however, to establish how that ruling limited its ability to address these issues. URP's testimony and briefs propose undoing the UM 989

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[207] Order No. 04-596 at 7.
[208] Phase III Ruling at 4.
[209] *Id.* at 6.

settlement and bringing the value of customer credits, NEIL proceeds, and other items to present values as of October 1, 2008.[210]

Third, URP objects to the ALJ's ruling to exclude consideration in Phase III of evidence pertaining to PGE's subsequent actual results of operation.[211] URP complains that PGE and Staff have been allowed to introduce evidence of the utility's subsequent actual results of operations in another case, docket UM 1224, and therefore such evidence should be admissible in these remand proceedings. URP fails to recognize the distinction between the two proceedings. Docket UM 1224 concerns the amortization of amounts deferred under ORS 757.259. The amortization of deferred amounts is subject by law to an earnings test, which requires using the utility's results of operations.[212] This proceeding does not involve deferred accounting and therefore no earnings test is required. In addition, as discussed above, determining whether rates were just and reasonable by comparing the rates to PGE's actual results of operations would violate the rule against retroactive ratemaking.

5. *Comprehensive Order*

In its Phase III briefs, URP renews its request for the Commission to reinstate the schedule announced in Order No. 07-157, which anticipated that we would issue a preliminary order deciding whether the Commission has remedial authority in this case. URP contends the ALJ's denial of its request was erroneous. We affirmed the ALJ's ruling in Order No. 08-117. In that decision, we noted the unique and complex history of the Trojan cases and concluded that it was extremely important to avoid future piecemeal litigation by resolving all Trojan-related issues in one comprehensive order, including the issue of our remedial authority. We noted that our conclusion was consistent with directives from both the Supreme Court and Court of Appeals, which noted their respective desires for a uniform resolution of all Trojan issues.[213] We adhere to that decision here.

B. Reconsideration of the UE 88 order: Were the rates in effect from April 1995 through September 2000 just and reasonable?

In *Trojan I*, the Court of Appeals determined that the Commission's rate order in UE 88 was based on an error of law and remanded the matter for reconsideration. In response, we initiated Phase I of these remand proceedings and asked the parties to address the following issue: What rates would have been approved in UE 88 had the Commission interpreted ORS 757.355 to not allow a return on investment in retired plant?[214] We received testimony and briefing regarding this issue from PGE, URP, and Staff.

The evidence and arguments presented by the parties reveals the complex and confusing nature of this issue. Based on different interpretations of the Court of Appeals' opinion in *Trojan I*, the parties fundamentally disagree on the process the Commission must

[210] *See* URP/500, Lazar/3-6; URP/501; Opening Brief of URP and CAPs (Phase III) at 5 (Jun 20, 2008) ("URP Phase III Opening Brief").
[211] Phase III Ruling at 6.
[212] ORS 757.259(5); OAR 860-027-0300(9).
[213] *See supra* p 20.
[214] Order No. 04-597 at 5.

use to determine whether the rates were unjust and unreasonable. Using different processes, the parties also reach drastically different conclusions regarding whether the rates in effect from April 1995 through September 2000 were just and reasonable.

Before beginning our discussion, we note that the UE 88 rate order was in effect for approximately eight months. The Commission issued two other rate orders during the 1995 through 2000 period: Order No. 95-1216 in docket UE 93 (effective November 28, 1995) and Order No. 96-306 in docket UE 100 (effective December 1, 1996). The orders in UE 93 and UE 100 were not appealed. This would generally render the rates adopted in those orders final and subject to revision only through the three available processes for initiating a change to utility rates.[215] There is a long-standing principle that collateral attacks on final Commission orders are impermissible.[216] This principle would normally limit the time period under consideration in these remand proceedings to the time that the UE 88 rates were in effect (April 1, 1995, to November 27, 1995). In this case, however, the Supreme Court found in *Dreyer* that the error identified in *Trojan I* (inclusion of the remaining investment in rate base with the opportunity to earn a return) continued unaltered in the decisions in UE 93 and UE 100, and therefore the error should be redressed regardless of whether those decisions were appealed.[217] We therefore examine the rates in effect for the entire period from April 1, 1995, through September 30, 2000.

We divide our review into two sections. First, we set forth the parties' positions regarding what rates would have been during the 1995 through 2000 period if the Commission had interpreted ORS 757.355 as the Court of Appeals did in *Trojan I*. We then analyze the parties' arguments, determine what we believe rates would have been in the absence of the error identified by the Court of Appeals, and decide whether that error rendered rates during the 1995 through 2000 period unjust and unreasonable.

1. *Parties' Positions*

a. Portland General Electric

PGE agrees with the Commission's conclusion in Order No. 04-597 that the remand of UE 88 requires "a retrospective examination of what rates would have been approved in UE 88 if the Commission had interpreted the authority delegated to it by the legislature in ORS 757.355 to not allow a return on investment in retired plant."[218] PGE argues that this retrospective examination requires the Commission to engage in ratemaking, noting that the Commission has broad discretion in exercising its legislative ratemaking function. Given this broad discretion, the Commission is not limited to considering a single rate component or ratemaking issue. Rather, PGE asserts the Commission must consider all relevant aspects of the rate order to ensure the appropriate balance between the interests of the utility and its customers. PGE agrees, however, with the Commission's decision to limit

[215] *See supra* p 8.
[216] *See supra* note 40.
[217] *Dreyer*, 341 Or at 280-282.
[218] Order No. 04-597 at 5.

Phase I to consideration of those aspects of the ratemaking process in UE 88 that are affected by the Court of Appeals' statutory interpretation of ORS 757.355.[219]

PGE argues that the Commission should use three criteria in reexamining the ratemaking decisions made in UE 88. PGE contends that the Commission's decision on remand should: (1) encourage utilities to make resource decisions that provide an adequate and reliable supply of energy at the least cost to the utility and its customers consistent with the long-run public interest; (2) equitably allocate the costs and benefits of utility resource decisions over time; and (3) preserve the utility's financial integrity and maintain the utility's ability to attract debt and equity capital at reasonable cost.

PGE uses these criteria to identify two alternative revenue requirement scenarios for PGE during the 1995 through 2000 period. PGE asserts that each of these alternative scenarios results in a revenue requirement that is higher during this period than PGE's actual authorized revenue requirement during that period. PGE thus concludes that the rates in effect from April 1, 1995, through September 30, 2000, were just and reasonable.

To develop its alternative revenue requirement scenarios, PGE identifies various elements used to calculate PGE's revenue requirement in UE 88 that the Commission should reconsider and modify. PGE proposes that the Commission reconsider five ratemaking decisions, which PGE refers to as "building blocks":[220]

- ☐ *Trojan Recovery Period.* PGE posits that, given the inability to allow PGE to recover a return on its undepreciated Trojan investment, the Commission should allow PGE to recover its investment in as short as period as possible. PGE recommends a one-year recovery period. PGE states that leaving the recovery period at 17 years without a return would be equivalent to disallowing $182 million of PGE's investment without a finding of imprudence. PGE asserts that this would be inconsistent with the Commission's finding that it was entitled to recover $250.7 million of its undepreciated investment, as well as the Commission's objective to give utilities the incentive to make least-cost resource decisions. PGE acknowledges, however, that requiring recovery over time is consistent with the objectives of intergenerational equity and rate stability.

- ☐ *Net Benefits Test.* PGE argues that the Commission should reconsider the net benefits test used in UE 88 to determine the recoverable amount of the Trojan investment. Specifically, PGE asserts the Commission must adjust the net benefits test to exclude a return on the undepreciated investment in the closure scenario. The test must also be adjusted to reflect a modified recovery period and the reclassification of certain Trojan assets, assuming the Commission also modifies those building blocks. PGE also asserts that the projected cost of replacing Trojan's steam generators should be included in the projected

[219] *Id.* at 6-7.

[220] In its testimony and briefs, PGE also argues that the Commission could have allowed recovery of debt costs PGE had incurred prior to UE 88 and was obligated to repay. None of PGE's ratemaking alternatives, however, propose recovery of debt payments. We therefore do not discuss the proposal.

allowable costs of continued operation of Trojan. Depending upon the whether the Commission chooses to make Staff's or PGE's recommended adjustments to the net benefits test, PGE states that either $17.7 million of the $26.8 million disallowance, or the entire disallowance, would be restored to PGE.

- ☐ *Classification of Trojan Assets.* PGE argues that the Commission should reconsider the decision to classify $80.2 million of Trojan assets as abandoned rather than plant-in-service. PGE contends that these assets are used and useful, and therefore should be considered plant-in-service, because they are being used for safety, environmental protection, and decommissioning. If considered plant-in-service, the $80.2 million in assets would remain in PGE's rate base and permitted to earn a return. PGE asserts that the Commission's initial decision to classify the assets as abandoned was not based upon a finding that the assets were no longer used and useful. Rather, because the Commission interpreted ORS 757.140 as allowing a utility to include investment in a retired plant in rate base, the classification as abandoned versus plant-in-service had no effect on the rate treatment of the assets—they would be included in rate base regardless of their classification.

- ☐ *Balance Sheet Options.* At the time of the decision in UE 88, PGE's balance sheet included a customer credit of $111 million from the sale of a portion of its Boardman generating facility (Boardman), which was being amortized over 27 years (until 2013). PGE argues that the Commission would have offset the Trojan balance in 1995 with this credit. PGE states that this would reduce the impact on customers of the rate increase caused by a one-year recovery of the Trojan investment and help rate stability. PGE also argues that the offset would serve the goal of intergenerational equity. Because the Boardman customer credit was offset with certain customer liabilities in UE 93, these customer liabilities would need to be put back into PGE's revenue requirement. The customer liabilities are the unamortized balance of previous power cost deferrals, the deferred AMAX termination payments, and the SAVE incentive.[221] PGE also suggests a second balance sheet option. PGE argues that the Commission may consider deferring a portion of the UE 88 power costs. PGE states that this would help stabilize rates if the Trojan recovery period was reduced to one year.

[221] Both the AMAX termination payments and SAVE incentives arose from Commission decisions in a 1991 PGE rate case. In that case, the Commission approved the deferral of costs, for later recovery in rates, incurred to terminate the AMAX coal contract in favor of a more favorable contract. The Commission also approved the Share All Value Equitably (SAVE) tariff, which provided PGE with incentives to implement successful energy efficiency programs. Among other things, the incentives allowed PGE to recover lost revenues for kilowatt hour (kWh) savings attributable to approved energy efficiency programs in excess of kWh savings included in base rates. *In the Matter of Revised Tariff Schedules filed by Portland Gen. Elec. Co.*, Docket UE 79, Order No. 91-098 (Jan 18, 1991).

- *Return on Equity.* In UE 88, PGE presented evidence to support a rate of return on equity (ROE) in the range of 11.46 percent to 13.37 percent. PGE stipulated with Staff to an ROE toward the bottom of that range—11.6 percent. PGE states that the inability to recover its remaining Trojan investment over time with the opportunity to earn a return would have affected its decision to stipulate to an ROE at the bottom end of its proposed range. PGE argues that the Commission should consider 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. PGE proposes an increase between 25 and 150 basis points, depending upon the recovery period for the Trojan investment.

Using its proposed building blocks, PGE constructs its two alternative revenue requirement scenarios, each representing how the Commission might have rebalanced these rate elements to allow PGE the opportunity to fully recover its prudent investment in Trojan without a return on that investment, while maintaining stable and equitable rates for customers.[222] For each scenario, PGE provides an incremental cost analysis for the 1995 through 2000 period. The analysis compares the revenue requirement from PGE's scenario with PGE's authorized revenue requirement during that period.

PGE's first scenario, which we will call the one-year recovery period alternative, would establish PGE's alternative revenue requirement based on the following adjustments to the building blocks:

- Allow recovery of the undepreciated investment in Trojan in one year;
- Adjust the net benefits test to exclude a *return on* the undepreciated investment from the cost of closure and to include the steam generator replacement in the cost of continued operation;
- Restore $80 million of the Trojan assets as plant-in-service, thereby allowing them to remain in rate base;
- Offset the $111 million Boardman gain against the undepreciated Trojan assets that were not still plant-in-service and amortize the remainder over one year;
- Authorize a ROE of 11.85 percent, a 25 basis point increase over the ROE authorized in UE 88;

[222] PGE's Opening Post Hearing Brief (Phase I) at 8-10 (Nov 9, 2005).

- Defer a portion of PGE's 1995 and 1996 net variable power costs for recovery over the subsequent 10 years; and
- Recover the AMAX termination payment, pre-UE 88 deferred power costs, and SAVE incentive over the same 10 years.[223]

This scenario results in an alternate revenue requirement that is $19 million higher during the 1995 through 2000 period than PGE's authorized revenue requirement during that period.

PGE prefers the one-year recovery period alternative, but also supports a second option that we will call the 17-year recovery period alternative. This second scenario includes the following adjustments to the building blocks:

- Allow recovery of the entire undepreciated investment in Trojan over 17 years;
- Adjust the net benefits test to exclude a return on the undepreciated investment from the cost of closure and to include the steam generator replacement in the cost of continued operation;
- Receive 20 percent of the positive net benefits created through its economic retirement of Trojan, spread evenly over 17 years;
- Restore $80 million of the Trojan assets as plant-in-service, thereby allowing them to remain in rate base;
- Offset the $111 million Boardman gain against the undepreciated Trojan assets that were not still plant-in-service;
- Authorize a ROE of 13.1 percent, a 50 basis point increase over the ROE approved in UE 88; and
- Recover the AMAX termination payment, pre-UE 88 deferred power costs, and SAVE incentive over three years beginning in 1995.[224]

This scenario results in an alternate revenue requirement that is $58.5 million higher than PGE's authorized revenue requirement during the 1995 through 2000 period.

PGE concludes that, because the rates under both of its alternate revenue requirement scenarios would be higher than the authorized rates during the April 1995 through September 2000 period, rates in effect during that period were just and reasonable.

[223] PGE/6000, Lesh/41.
[224] PGE/6000, Lesh/43-44.

b. Commission Staff

Staff agrees with PGE's proposed approach to examining the rates in effect from April 1, 1995, through September 30, 2000. Staff also agrees with the criteria that PGE identifies for the Commission to use in evaluating the factual and policy decisions made in UE 88. But Staff acknowledges that PGE's criteria can suggest conflicting results. For example, to create incentives for a utility to make resource decisions that provide safe and reliable service at the least cost to customers and to ensure the financial integrity of the utility, the Commission should provide PGE full recovery of its remaining Trojan investment. Without the ability to provide a return on that investment, the Commission would need to allow immediate recovery of the investment. But to equitably allocate the benefits and burdens of resource investments over time and to maintain rate stability, the Commission should spread recovery of the investment over time.

Staff addresses each of PGE's building blocks and proposes two alternate revenue requirement scenarios of its own. Staff believes the Commission would have allowed PGE to recover its remaining Trojan investment in one year to ensure full recovery.[225] Staff agrees with PGE's proposed reclassification of the Trojan assets as plant-in-service instead of abandoned, as well as PGE's proposed balance sheet adjustments, including offsetting the Trojan balance with the Boardman customer credits and deferring a portion of the UE 88 power costs. Staff argues that these adjustments would improve intergenerational equity and rate stability. Staff contends that increasing rates substantially for customers in one year while reducing rates significantly for customers in subsequent years is poor regulatory policy.

Staff disagrees, however, with two of PGE's proposed adjustments and therefore does not believe that PGE's two revenue requirement scenarios are reasonable for the Commission's consideration. First, Staff disagrees with PGE's proposal to increase its ROE. Staff believes that allowing recovery of the Trojan investment in one year would be a "single, short-term event, with minor financial impact" and would not affect PGE's long-term cost of capital. Second, Staff disagrees with PGE's proposed adjustments to the net benefits test and the restoration of the entire $26.8 million disallowance. Specifically, Staff objects to PGE's inclusion of the projected cost of replacing the steam generators in the estimated allowable costs of continued operation. Staff argues that this adjustment is inappropriate given the Commission's conclusion in UE 88 that PGE was better situated to pursue a remedy for the defective generators from the manufacturer. But Staff acknowledges that the net benefits test should be adjusted to remove the assumption of a return on the Trojan investment from the closure scenario. This would restore $17.7 million of the disallowance to PGE.

[225] We use the term "full recovery" throughout this discussion. By "full recovery," we mean the principal amount of PGE's undepreciated Trojan investment authorized for recovery by the Commission. Full recovery does not include a *return on* that investment.

Based on these changes to PGE's one-year recovery period alternative, Staff presents its two alternative revenue requirement scenarios. Staff's first scenario restores $17.7 million of the original net benefits disallowance instead of the entire $26.8 million and eliminates PGE's 25 basis point ROE increase. With these two changes, PGE's revenue requirement would have been $8.6 million lower during the 1995 through 2000 time period.

Staff's second scenario includes the same two adjustments but adds a third—remove the deferral and subsequent amortization of net variable power costs. Staff explains that this scenario assumes that the Commission would have allowed a speedier recovery of the net Trojan investment, but with minimal rate adjustments to moderate a significant rate increase. Staff estimates that this approach would have resulted in a revenue requirement that is $17 million higher than that authorized during the review period.

c. Utility Reform Project

URP disregards our earlier determination regarding the scope of these remand proceedings and objects to the alternative ratemaking proposals of both PGE and Staff. URP contends that a retrospective examination of rates is procedurally flawed because it allows parties to revisit issues that were already litigated to conclusion in UE 88. URP characterizes the proposed ratemaking alternatives as illegal attempts to embed Trojan costs in other rate elements, thereby allowing PGE to recover a *return on* the net Trojan investment indirectly.

URP argues that the remand of UE 88 requires nothing more than refunding the amount included in rates during the 1995 through 2000 period that represented a *return on* PGE's remaining Trojan investment, which URP believes is a simple ministerial calculation. URP contends that we have exceeded the scope of the court's remand by engaging in a retrospective examination of the UE 88 rate order. Characterizing rates that included a return on PGE's Trojan investment from 1995 through 2000 as "unlawful rates" or "overcharges," URP contends that the "only lawful function of the Commission, upon the remands from the courts, is to calculate the prior unlawful charges and to return those funds, with appropriate interest, to those who paid them."[226]

Interestingly, URP's recommended refund in Phase I is not based on this calculation, despite URP's assertion that it is the only "lawful" approach. URP estimates that customers paid at least $60.8 million for Trojan investment annually during the 1995 through 2000 period. Applying all of the Trojan charges to the authorized recovery of the undepreciated investment, URP contends that Trojan was fully amortized as of May 15, 1999, and that PGE continued to collect an additional $83.6 million before rates were reset in 2000. URP does not, however, use this assumption to calculate its proposed refund amount. Instead, URP assumes the Commission would have required a complete write-off of PGE's remaining Trojan investment in UE 88 and begins its calculation with an estimate of the *return of* and *return on* included in customer rates from 1995 through 2000.

[226] *See* Opening Brief of URP and CAPs (Phase I) at 1 (Nov 10, 2005).

URP's belief that the Commission would have required a complete write-off of PGE's remaining Trojan investment is based on URP's interpretation of the Court of Appeals' decision in *Trojan I.* URP interprets *Trojan I* as requiring this Commission to continue the rate treatment adopted in UE 88 for PGE's undepreciated Trojan investment, but without allowing a return on that investment. In other words, URP interprets *Trojan I* to require the Commission to allow recovery of PGE's remaining Trojan investment over 17 years with no return. URP then posits that no reasonable Commission would adopt this approach because of the negative impact this would have on PGE's status in the financial markets. Thus, URP concludes that the Commission would have required PGE to write-off its entire remaining Trojan investment in 1995 rather than allow PGE to face this long-term risk.

URP also contends that the write-off of the Trojan balance would require the Commission to refund to customers the accumulated deferred taxes associated with Trojan and amounts calculated based on an adjustment to PGE's capital structure. The proposed capital structure adjustments result in a $106 million increase in URP's refund claim. The accumulated tax proposal results in an additional $83 million in customer refunds. URP then proposes applying interest at PGE's pre-tax rate of return, resulting in a $744 million refund as of December 31, 2005.[227]

Beyond disagreeing with the general approach taken by PGE and Staff in these proceedings, URP also specifically objects to some of their proposed building block adjustments. Specifically, URP offers a limited response to the proposals to reexamine the classification of Trojan assets and the authorized ROE.

URP opposes revisiting the classification of the Trojan assets. URP points out that the assets were used for "safety, environmental protection and decommissioning," not to provide utility service to customers. Consequently, URP contends that these assets were not "used and useful" under ORS 757.355 and cannot be placed in rate base.

URP also opposes PGE's proposed increase to its ROE. URP states that PGE's arguments disregard the fact that PGE's investors received a substantial return when Enron purchased PGE in 1997, and the fact that, after the Enron takeover, PGE no longer need to attract equity investment. URP continues to make this argument in its briefs despite our rulings that post-1995 evidence is inadmissible.

2. Commission Resolution

The retrospective examination of rates is an unusual exercise. As a legislative act, ratemaking is fundamentally a prospective exercise. The Commission is therefore placed in an unfamiliar position when asked to retrospectively review prior rate decisions and make necessary adjustments. Since the beginning of these remand proceedings, the parties have

[227] PGE's pre-tax rate of return was 13.22 percent for 1995 and 13.34 percent from 1996 forward. PGE's authorized rate of return was 9.51 percent in 1995 and 9.6 percent from 1996 forward. Order No. 95-322, Appendix E at 2-3. URP uses PGE's pre-tax rate of return as the applicable interest rate in its refund calculations, although in some cases URP adjusts this rate to 12.71 percent to reflect URP's proposed adjustments to PGE's capital structure.

disagreed about what type of review the Commission must undertake on remand. The parties recommend two very different analytical approaches. URP maintains that calculating an appropriate refund amount in a case involving a return on a rate base asset requires a mere ministerial calculation. PGE and Staff counter that calculating a refund is a complex ratemaking inquiry requiring a reexamination of a multitude of ratemaking variables.

a. What is the appropriate scope of our review?

We agree with Staff and PGE that we must undertake a comprehensive review of the ratemaking decisions in UE 88 to appropriately determine whether the error identified by the Court of Appeals in *Trojan I* rendered rates during the 1995 through 2000 period unjust and unreasonable. As discussed, ratemaking decisions are not made in isolation and individual rate elements are frequently interdependent and mutually supporting. For example, the Commission's decision to require PGE to recover its undepreciated investment in Trojan over a 17-year recovery period was based on the assumption that PGE could earn a return on the net investment over that time. That decision was made in conjunction with other decisions to produce rates the Commission determined to be just and reasonable. In reconsidering the UE 88 decision in light of the Court of Appeals' interpretation of ORS 757.355, we must recognize the fact that rate decisions are interdependent, and we must therefore consider both the direct and indirect effects of eliminating the ***return on*** component and make necessary adjustments to ensure the revised rates are just and reasonable for both PGE and its customers.

This comprehensive and holistic approach to reconsidering the rates in effect from 1995 through 2000 is a natural consequence of our statutory and constitutional mandates. In determining whether rates during this period were just and reasonable, we must balance the interests of the customer and utility under ORS 756.040. Our decision must ultimately serve customers' interests in adequate, safe, and reliable service at just and reasonable rates, and shareholders' interests in earnings that are commensurate with the returns of comparable businesses and preservation of the utility's financial integrity and ability to attract capital.[228]

The Marion County Circuit Court recognized the holistic nature of ratemaking and anticipated that the Commission would engage in broad ratemaking considerations in reexamining the rates in effect from 1995 through 2000:

> [A]t the Commission you [PGE] can argue * * * if you can't give us that [a return on the Trojan investment], you have to give us something else, because otherwise we aren't made whole * * *. And that's probably what you're going to do * * *. And that may or may not result in any net rate relief.
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[228] ORS 756.040(1). *See supra* pp 5-6. *See also* ORS 757.020 and 757.210.

> I'm certainly not prepared to conclude that you can't argue on remand to the PUC that if you can't get a return on your investment, they need to put something else in your [rate] base for some other reason that * * * allows you to have * * * a rate of return that's economically viable for you to continue on as a successful utility company.[229]

We reject URP's argument that we can simply quantify and remove from rates the amount that reflects the *return on* the undepreciated Trojan investment while holding all other rate determinations constant. Although URP's arguments may seem to present a simple and expedient solution, there are at least three fundamental problems with performing a mere ministerial calculation to respond to the Court of Appeals' remand in *Trojan I*. First, URP's arguments are based the mistaken belief that the Court of Appeals held the UE 88 rates to be unlawful and that, as a result, PGE customers were overcharged during the 1995 through 2000 period. As discussed above, the Court of Appeals did *not* find the rates produced by the UE 88 rate order to be unjust and unreasonable, unjustly discriminatory, or confiscatory. Rather, the court held that the Commission's rate order was based on an error of law: the conclusion that rates could be set to allow PGE the opportunity to collect a *return on* the undepreciated Trojan investment. It is this Commission's responsibility on remand to determine whether the error identified by the Court of Appeals renders the rates adopted in UE 88 unjust and unreasonable, and therefore unlawful.

Second, URP's attempt to isolate one rate component (*return on*) from other rate components used to establish rates in UE 88 represents a misunderstanding of ratemaking.[230] As discussed, ratemaking is holistic. The decision to include PGE's remaining Trojan in rate base with the opportunity to earn a return directly affected other decisions that the Commission made in UE 88, including the amount of PGE's remaining investment that was authorized for recovery and the length of the amortization period. By arguing that the Commission could (and should) simply calculate the amount included in rates for a return on Trojan during the 1995 through 2000 period and refund that amount to customers, URP asks this Commission to ignore basic ratemaking principles, as well as our statutory mandate to ensure that utility rates are set in a manner that protects both customer and utility interests.[231]

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[229] *Utility Reform Project v. Commission*, Case No. 02C-14884, July 23, 2003 Hearing, Tr. at 177, 179 (Marion County Circ. Ct.).

[230] URP's misunderstanding may be based in part on its erroneous belief that the Commission's exercise of its ratemaking function is a judicial, not a legislative act. During oral arguments held in Phase II, URP disputed the Commission's authority to reexamine rates on remand and argued that "[t]he notion that the Commission has this plenary or legislative authority over rates does not comport with the case law. You are acting in a quasi-judicial manner." Unofficial Transcript of Oral Arguments at 19 (Aug 9, 2007).

[231] *See* ORS 756.040. *See also FCC v. Pottsville Broadcasting Co.*, 309 US 134, 145, 60 S Ct 437; 84 L Ed 656 (1940) ("On review the court may thus correct errors of law and on remand, the Commission is bound to act upon the correction. But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.") (citations omitted).

Third, URP's argument assumes that there is only one "correct" approach in the wake of the Court of Appeals' remands. But courts do not have the authority on appeal of a Commission order to instruct the Commission how to act upon remand. If the Court of Appeals had instructed the Commission to order PGE to issue refunds in this case, or directed the Commission to calculate refunds in a particular manner, then the court would have been infringing on the Commission's exclusive jurisdiction over utility rates.[232]

We note—as even the parties seeking damages for the alleged harm caused by the inclusion of a return on PGE's remaining Trojan investment in rates acknowledge—that no party appealed the Commission's conclusion that the overall rates approved in UE 88 were just and reasonable. In its Phase II argument, the CAPs state that the Commission's ruling that the rates adopted in UE 88 were just and reasonable as a whole was "not appealed by any party."[233] Similarly, URP argues that the question of whether rates were just and reasonable is irrelevant because the court found rates to be unlawful.[234] In essence, URP and the CAPs argue that rates can be just and reasonable, yet still be unlawful. As discussed above, URP and the CAPs are incorrect. A legal error in a rate order, like the error identified in *Trojan I*, does not automatically result in unlawful rates. Only if that error resulted in unjust and unreasonable rates (or unjustly discriminatory or confiscatory rates, which are not at issue here) would the rates be "unlawful." Other than the claim that rates were "unlawful," URP and the CAPs do not explain why customers are entitled to a refund for paying rates that they admit were just and reasonable.[235]

We conclude that a comprehensive retrospective examination of rates is required to determine whether the error identified by the Court of Appeals in *Trojan I* rendered rates in effect from April 1, 1995, through September 30, 2000, unjust and unreasonable. We believe that this broad retrospective examination allows us to reconsider any aspect of the decision in UE 88, but find that we need not reexamine every aspect of that decision in this case. We agree with our prior conclusion that our retrospective examination of rates can be limited to those "aspects of the ratemaking process in UE 88 that are affected by the Court of Appeals' statutory interpretation of ORS 757.355."[236]

b. What is the appropriate analytical framework for our review?

We agree with Staff and PGE that we must create an analytical framework to determine whether the rates in effect from April 1, 1995, through September 30, 2000, were just and reasonable. This framework should be designed to ensure that our analysis is consistent with our statutory duty to balance the interests of the utility and its customers in exercising our legislative ratemaking function.

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[232] *See, e.g., Federal Power Comm'n v. Pacific Power & Light*, 307 US at 160 (court reviews commission orders for legal errors and "cannot fix rates" or establish commission policies). *See also supra* pp 32 to 36.

[233] *See* Phase II Opening Brief of the CAPs on the Proffered Question Regarding Remedies at 9 (Jun 20, 2007).

[234] *See* URP Phase II Reply Brief at 2.

[235] We suppose we could conclude that the UE 88 rates were just and reasonable based solely on URP and the CAPs admission that the rates in UE 88 were just and reasonable. But we assume that URP and the CAPs would have argued that the rates approved in UE 88 were unjust and unreasonable had they appropriately understood the legal framework. We therefore find it necessary to continue our reexamination of the UE 88 rates.

[236] Order No. 04-597 at 6-7.

We believe that the only way to determine whether the rates in effect from 1995 through 2000 were just and reasonable is to: (1) reexamine those elements of PGE's revenue requirement during that period that should be adjusted in light of the Court of Appeals' determination in *Trojan I* that the Commission cannot allow PGE to earn a return on its remaining undepreciated investment in Trojan; and (2) compare the revenue requirement resulting from that reexamination with PGE's authorized revenue requirement during the April 1995 through September 2000 period.

We also agree with Staff and PGE that established ratemaking principles and policies should guide our decision regarding the appropriate adjustments to make to PGE's revenue requirements. These principles and policies are:

> *(1) Least-cost Planning Principles.* Least-cost planning principles were first adopted by the Commission in 1989 and are designed to encourage utilities to make resource decisions that yield an adequate supply of energy at the least cost and risk to customers.[237]
>
> *(2) Balancing of Interests.* In determining a range of just and reasonable rates, the Commission must balance the customers' interest in safe, reliable, and adequate service at just and reasonable rates with the utility's interest in a return "commensurate with the return on investments in other enterprises having corresponding risks."[238]
>
> *(3) Utility's Financial Integrity.* The Commission must set rates that are "[s]ufficient to ensure confidence in the financial integrity of the utility, allowing the utility to maintain its credit and attract capital."[239]
>
> *(4) Intergenerational Equity.* The Commission must balance customers' interests over time, known as intergenerational equity. When determining the period over which utilities will recover the costs of assets incurred to produce future benefits, as well as the period over which customers will receive the benefit of utility cost savings, the Commission attempts to equitably allocate those costs and benefits to customers over time so no one generation of customers receives an inequitable share.
>
> *(5) Rate Stability and Avoidance of Rate Shock.* The Commission sets rates with the goals of promoting rate stability over time and avoiding sudden substantial rate increases (often referred to as "rate shock").

Although we are not setting future rates, we find that it is appropriate to use these ratemaking principles and policies to guide our decision.

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[237] *See In re Investigation into Least-Cost Planning for Resource Acquisitions by Energy Utilities in Oregon*, Docket UM 180, Order No. 89-507 (Apr 20, 1989). The Commission updated these principles in 2007. *In re Investigation into Integrated Resource Planning*, Docket UM 1056, Order No. 07-002 (Jan 8, 2007).
[238] ORS 756.040(1).
[239] ORS 756.040(1)(b).

In making our determination of the appropriate adjustments to make to PGE's 1995 through 2000 revenue requirement, we recognize that it is generally accepted that there is no one "correct" revenue requirement. As discussed above, in setting utility rates, including determining a reasonable rate of return and other components of utility's revenue requirement, the Commission must balance the interests of the public utility and the interests of customers. "The concept of a fair rate of return, therefore, represents a range or a zone of reasonableness."[240] Given the complexity of the inquiry and the variability in possible results, courts give great deference to agency decisions that rates are just and reasonable: "The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions."[241]

c. What are the appropriate adjustments to PGE's revenue requirement during the period from April 1995 through September 2000?

In light of the Court of Appeals' decision in *Trojan I* that the Commission cannot include PGE's remaining Trojan balance in rate base with the opportunity to earn a return, PGE proposes adjustments to five elements used to determine its revenue requirement during the 1995 through 2000 period: (1) the Trojan investment recovery period; (2) the Commission's net benefits test; (3) balance sheet options; (4) the classification of Trojan assets; and (5) PGE's authorized return on equity (ROE). Staff primarily agrees with PGE's arguments supporting the reexamination of the first four identified issues, but not the fifth. URP again disputes the scope of the proceedings and contends that the Commission is not authorized to reexamine the UE 88 rates, but also objects to the proposed adjustments to the classification of Trojan assets and PGE's authorized ROE.

We believe Staff and PGE have identified the key ratemaking decisions possibly affected by the Court of Appeals' *Trojan I* decision. We therefore address each of PGE's proposed adjustments to its 1995 through 2000 revenue requirement.

(1) Trojan Recovery Period and the Time Value of Money

As PGE and Staff agree, the first adjustment that we must consider is changing the recovery period for PGE's undepreciated investment in Trojan. The decision in UE 88 to allow PGE to recover $340.2 million of its remaining investment in Trojan over a 17-year period was reasonable only because the Commission included the investment in PGE's rate base, which gave PGE the opportunity to earn a return on the investment. Allowing PGE to recover its Trojan investment over a 17-year period with a return appropriately balanced the interests of the utility and its customers by preserving PGE's financial integrity and ability to attract capital, encouraging least-cost planning principles by limiting the financial impact of the early retirement of Trojan, keeping rates stable over time, and avoiding rate shock. Because we are no longer permitted to allow PGE to include its undepreciated Trojan investment in rate base with an opportunity to earn a return, it is

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[240] Phillips, *The Regulation of Public Utilities* at 375.
[241] *Morgan Stanley*, 128 S Ct at 2738 (citations omitted).

reasonable to reexamine the length of the amortization period to maintain an appropriate balance between utility and customer interests.

All of the parties in these remand proceedings interpret the decision in *Trojan I* as not only prohibiting inclusion of the remaining Trojan investment in rate base with the opportunity to earn a return, but 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. Based on that interpretation, the parties propose two extreme scenarios for consideration: (1) allowing a rapid recovery of the remaining investment in an attempt to provide PGE with full recovery; or (2) effectively requiring PGE to recover significantly less than its full remaining investment by requiring an extended recovery with no interest.

We do not read *Trojan I* so restrictively. Rate of return (or *return on* as used in these proceedings) has a specific meaning in the context of utility regulation. For regulatory purposes, a utility's authorized rate of return represents the utility's opportunity to earn a profit, although a utility is not guaranteed a fair rate of return.[242] Moreover, a "return" in the business sense, according to Webster's New Collegiate Dictionary, refers to something designed to produce a profit. Specifically, "return" means:

> [A] quantity of goods, consignment, or cargo coming back in exchange for goods sent out as a mercantile venture * * * the value of or profit from such venture * * * the profit from labor investment or business * * * YIELD * * * RESULTS * * * the rate of profit in a process of production per unit of costs.[243]

The time value of money, on the other hand, recognizes the basic economic truth that a dollar today is worth more than a dollar tomorrow due to its potential earning capacity.[244] Interest is often used to compensate for the time value of money. Although interest can be used in many contexts and for many purposes, in this context, interest is "compensation for the use of forbearance of another's money."[245]

In briefing before the Court of Appeals in UE 88, PGE attempted to equate the two concepts and argued that the Commission, by including PGE's remaining Trojan investment in rate base with the opportunity to earn a return, was in effect giving PGE the time value of money as compensation for requiring recovery over 17 years. CUB and URP,

[242] *See supra* p 7.
[243] *See also* Paul A. Samuelson & William D. Nordhaus, *Economics* at 775 (17th Ed. 2001) (rate of return or return on capital is the "yield on an investment or on a capital good"); Richard G. Lipsey, Peter O. Steiner, Douglas D. Purvis & Paul N. Courant, *Economics* at 969 (9th Ed. 1990) (rate of return is "the ratio of net profits earned by a firm to total invested capital").
[244] This concept is explained by the following example where Tom loans Larry $100. Absent the loan, Tom could put the $100 in a savings account and earn interest. Assuming an annual 5 percent interest rate, Tom's $100 would be worth $105 in one year. If Larry paid back Tom the $100 a year from now, Tom would lose the opportunity put his $100 in savings, and would in effect lose $5. Thus, obtaining $100 today, which can be invested to produce $105 in one year, is of more value than receiving $100 is one year. Interest is designed to compensate for this lost earnings opportunity.
[245] *Portland Gen. Elec. Co. v. Department of Rev.*, 7 OTR 444, 445 (1978).

the appellants in *Trojan I*, identified the error in PGE's reasoning and summarily dismissed the argument:

> The PGE Combined Brief repeatedly refers to "interest" on its investment in Trojan. OPUC Order No. 95-322 does not allow PGE to earn "interest" but instead grants to PGE ratebase treatment for the Trojan investment, thus granting to PGE a "return on investment" equal to a rate of return specified by the OPUC.[246]
>
> * * * * *
>
> PGE claims that the issue here is whether the PUC can allow "interest." The court should be aware that the PUC did not award PGE "interest" on its investment in Trojan. Instead, the PUC put Trojan into rate base and allowed PGE to recover a full return.[247]

The Court of Appeals apparently accepted URP's and CUB's arguments that rate of return was something other than "interest." The Court of Appeals repeatedly referred to the return on PGE's remaining Trojan investment as "profit"[248] and was careful to specify that ORS 757.355 does not allow utilities to "obtain a *profit* from ratepayers on their investments in facilities that are not used to serve ratepayers."[249] The court appropriately looked at rate of return for what it is in utility regulation—the utility's opportunity to earn a profit. In fact, the court specifically rejected PGE's attempt to justify the *return on* by calling it "interest."[250]

We interpret the Court of Appeals' decision in *Trojan I* to mean what it says, and nothing more. It is clear from the decision that the Commission cannot include PGE's undepreciated investment in rate base with the opportunity to earn a return (or profit). But the Court of Appeals' decision is silent on the question of whether the Commission may require recovery of PGE's remaining investment over time with interest to compensate for the time value of money. We believe the parties' view to the contrary is inconsistent with the plain language of the decision.

[246] Combined Reply Brief, Responding Brief, and Cross-Appellants' Brief of Utility Reform Project, Colleen O'Neil, and Lloyd K. Marbet at 13, n 6, Court of Appeals Case Nos. CA A86940, CA A86973, CA A92935, CA A93400 (Oct 31, 1996). This is completely contradictory to URP's position in this case, where URP argues that "PGE incorrectly claims that 'interest' is not 'return.'" Phase I Reply Brief of URP, et al., and the CAPs at 13 (Nov 30, 2005).
[247] CUB's Combined Reply Brief and Respondent's Brief at 19, Court of Appeals Case Nos. CA A86940, CA A86973, CA A92935, CA A93400 (Oct 25, 1996).
[248] *See, e.g., Trojan I*, 154 Or App at 706 (the court stated that it was reviewing Commission orders that allowed PGE to include a "'rate of return' (*i.e.*, profit)" on its undepreciated Trojan investment).
[249] *Id.* at 714 (emphasis added).
[250] *Id.* at 713-714.

We also believe that the parties' interpretation of *Trojan I* would require this Commission to disregard its statutory duty to balance the interests of customers and the utility. Under the parties' interpretation of *Trojan I*, the Commission would be required to choose between burdening customers with a drastic rate increase for one year in order to allow PGE full recovery of its remaining Trojan investment or effectively disallowing a significant amount of a prudently-incurred investment in utility plant by requiring recovery over time without interest. This interpretation would make it exceedingly difficult, if not impossible, for the Commission to appropriately balance the interests of the utility and its customers.

We do not believe that the parties' interpretation of *Trojan I* accurately reflects what the Court of Appeals intended, nor do we think the parties' interpretation is consistent with the court's limited review of Commission orders. It is clear that the court found that one method of allowing recovery of PGE's remaining Trojan investment—inclusion in rate base with the opportunity to earn a return—was inconsistent with ORS 757.355. But the court did not address alternate methods for allowing recovery, nor is it within the court's authority to require the Commission use a certain methodology in establishing rates.[251] We do not believe that the Court of Appeals intended to abrogate any Commission discretion to allow recovery under ORS 757.140 of undepreciated investment in a retired plant over time with interest to compensate for the time value of money.

With this interpretation in mind, we conclude that this Commission is not limited to the extreme scenarios presented by the parties on remand and do not adopt either of them. We first reject the proposal to allow PGE recovery of its remaining undepreciated investment in Trojan in one year. Such recovery, without other adjustments to rates, would have caused an immediate 30.5 percent increase in rates for one year.[252] Rates would then decline substantially in subsequent years. This result would be inconsistent with several of the ratemaking principles outlined above, including the Commission's policies to avoid rate shock and to promote rate stability and intergenerational equity. Requiring one "generation" (year) of PGE's customers to pay the entire $340.2 million remaining undepreciated balance would not fairly allocate the benefits and burdens of Trojan.

We also reject the proposal to require PGE to recover its remaining Trojan balance over 17 years without interest. Amortization over 17 years without interest would result in significantly less than full recovery of the value of the remaining $340.2 million Trojan balance, which would be contrary to the Commission's determination—subsequently affirmed by the Court of Appeals—that recovery of this amount is in the public interest. As noted, such recovery is estimated to result in the loss of $182 million of PGE's prudently-incurred Trojan investment. If the Commission allowed this result, the Commission would not be fulfilling its duty to protect the financial integrity of the utility and the utility's ability

[251] *See supra* p 22.
[252] Staff/100, Busch-Johnson/14. This is based on an alternative revenue requirement scenario presented by PGE that adjusted only the recovery period for the Trojan investment and the net benefits test. PGE did not address this third scenario in its briefs, which is why it is not included in our discussion.

to attract capital.[253] This result would also fail to promote least-cost investments. Not providing full recovery of prudently-incurred investment when a plant is retired early might give utilities the incentive to continue operating plants until investment is fully depreciated, even when continued operation is more expensive for customers.[254]

Accordingly, we find it reasonable to require PGE to recover its remaining Trojan investment over a period of time, with interest to compensate for the time value of money. As noted, the Court of Appeals affirmed the Commission's decision that PGE was entitled to the recovery of $340.2 million of its undepreciated Trojan investment. To allow PGE the ability to fully recover that amount over time, we need to include some form of interest—not profit—to compensate the utility for the delayed recovery of the investment.[255] We believe that conclusion is the only way to harmonize the Court of Appeals' decision in *Trojan I* with the Commission's statutory mandate to balance customer and utility interests and with the long-standing ratemaking policies applicable in this case—namely the promotion of least-cost planning, maintenance of intergenerational equity, avoidance of rate shock, and rate stability.

We must now decide the appropriate recovery period for PGE's undepreciated Trojan investment. Because we have interpreted *Trojan I* to allow PGE to recover its remaining Trojan investment over time with interest, we could theoretically still require recovery over 17 years. In 1976, when PGE's entire Trojan investment was first included in rate base, the Commission required amortization of the investment over 35 years, or until 2011. In 1995, because the Commission allowed the same rate treatment for PGE's remaining Trojan balance (inclusion in rate base with a return), the Commission kept the same amortization period—through 2011 (or 17 years).

Reconsideration of this amortization period is appropriate, however, because the decision in *Trojan I* requires a different rate treatment for the remaining balance. Rather than being permitted to include the balance in rate base, the Commission now has to include the balance as an expense.[256] Although we have concluded that we should allow interest on this expense because it is being recovered over time, the applicable interest rate will be lower

[253] This would also be to the detriment of customers. Because investors would consider PGE to be a "riskier" investment, PGE's costs would go up, including its cost of capital and cost of debt. This would result in higher rates for customers.
[254] *See Town of Norwood v. FERC*, 80 F3d 526, 532 (1996). We acknowledge that there are cases where a commission has required a utility to recover investment in utility plant over time with no return or interest. But to our knowledge, all of these cases involve investments in plants that were canceled or abandoned and were therefore never used to serve customers. Because these plants were never used or useful, the commissions found it appropriate to disallow full recovery of the utilities' investments. That is not the case here; Trojan served customers for over 16 years.
[255] As discussed above, in UE 88 the Commission authorized recovery of $340.2 million of PGE's undepreciated Trojan plant investment, which included the net rate base amount of $250.7 million after adjustments to account for various tax effects. Although the full $340.2 was authorized for amortization, only $250.7 million was included in PGE's rate base. In adjusting this element of PGE's revenue requirement, we apply interest only an amount equivalent to the $250.7 million previously included in PGE's rate base.
[256] To clarify, previously the Commission included Trojan as part of rate base ("V") in the standard formula for revenue requirement: $R = E + (V-d)r$. As noted, this allowed PGE the opportunity to earn a return ("r") on its Trojan investment. In light of the decision in *Trojan I*, we now conclude that the Commission would have instead treated Trojan as an expense ("E") with no opportunity to earn a return.

than the utility's rate of return. Requiring recovery over 17 years with interest at a rate lower than the utility's rate of return would likely increase PGE's risk profile, because PGE would have less than the full value of its Trojan investment returned to it and available to make new investments in rate base assets and earn a return on those investments. This concept is known as opportunity cost, which, concerning the use of money, is the benefit forfeited by using the money in a particular way.[257]

Given this opportunity cost, we find that it is reasonable to allow quicker recovery of PGE's remaining Trojan investment. We do not believe, however, that allowing recovery in a relatively short period of time such as three or five years is reasonable because it would allocate a disproportionate share of the burdens to a relatively small number of PGE's customers and would be inconsistent with the Commission's policies of promoting intergenerational equity and avoiding rate shock. Rather, we find that a 10-year recovery period would equitably allocate the benefits and burdens while allowing quicker recovery to offset any increase in PGE's risk profile.

Our decision to allow PGE to recover its remaining investment over 10 years with interest presents a question that was not addressed by the parties: What interest rate appropriately reflects the time value of money? The Commission often, but not always, uses a utility's authorized rate of return as the applicable interest rate when an amount is amortized over time, even when that amount is not included in rate base.[258] The theory behind using a utility's authorized rate of return as the applicable interest rate is that it best represents a utility's lost earning opportunity because, if the utility recovered the money immediately, it could invest it in a rate base asset that would earn a return. To provide symmetrical treatment of a utility and its customers, the Commission has also used the utility's authorized rate of return as the interest rate applicable to customer credits that are refunded over time.[259] Given the Court of Appeals' specific prohibition on allowing a utility to earn a return on a utility's remaining investment in retired assets, however, we obviously cannot use PGE's rate of return as the applicable interest rate in this case.

[257] "What is *the opportunity cost of holding money*? It is the sacrifice in interest that you must incur by holding money rather than a riskier, less liquid asset or investment." Samuelson & Nordhaus, *Economics* at 520 (emphasis in original). *See also* Lipsey, et al., *Economics* at 967 (Opportunity cost is the "cost of using resources for a certain purpose, measured by the benefit given up by not using them in their best alternative use.").

[258] *See, e.g., In re Portland Gen. Elec. Co.*, Docket UM 1256, Order No. 06-483 (Aug 22, 2006) (recovery of expenses relating to the development of a regional transmission organization; *In re Portland Gen. Elec. Co.*, Docket UM 954, Order No. 00-038 (Jan 24, 2000) (recovery of costs related to implementing SB 1149). The Commission recently modified the traditional use of a utility's authorized rate of return for deferrals once they are approved for recovery in rates. While the utility's authorized rate of return will still be used for amounts during the deferral phase, the Commission will apply a modified blended U.S. Treasury rate to accounts once they are authorized for recovery in rates. *See In re Investigation Related to Deferred Accounting*, Docket UM 1147, Order No. 08-263 (May 22, 2008).

[259] *See., e.g., In re Portland Gen. Elec. Co.*, Docket UM 1290, Order No. 07-452 (Oct 16, 2007) (return of savings associated with the transportation of natural gas); *In re Portland Gen. Elec. Co.*, Docket UM 1252, Order No. 06-183 (Apr 13, 2006) (return of savings associated with the 2005 Oregon Corporate Tax Kicker).

Another option is to use the cost of debt adopted for PGE in UE 88. As discussed above, a utility's rate of return is calculated by identifying the costs and components of the utility's capital structure. The cost of each capital component—typically debt, preferred stock, and equity—is estimated using financial models and weighted according to its percentage of total capitalization. These weighted costs of capital are then combined to calculate the utility's overall cost of capital, which becomes the allowed rate of return on rate base. The cost of debt represents the amount a utility must pay for borrowed funds, which we believe is a reasonable estimate of a utility's time value of money. PGE's cost of debt for 1995 was set at 7.71 percent in UE 88.[260]

A final option would be to use an interest rate that is unrelated to utilities or utility operations. The Commission has previously used U.S. Treasury bond rates to determine a reasonable interest rate. For example, the Commission recently decided to use a blended Treasury bond rate, plus a 100 basis point adjustment, as the interest rate applicable to deferred accounts after amortization is authorized.[261] The interest rate applicable to a Treasury bond depends upon the bond's maturity (for example, there are different interest rates applicable to 3-year bonds and 5-year bonds). In this case, we would use the annual rate for 1994 (the closest full year to the April 1, 1995 effective date of the UE 88 order) applicable to the bond maturity that most closely reflects the length of amortization of PGE's remaining Trojan investment—10 years. The annual Treasury rate for 10-year bonds in 1994 was 7.09 percent.[262]

We believe that, under the circumstances of this case, it is most appropriate to choose an interest rate that is unrelated to utilities. This helps ensure the rate reflects solely the time value of money and is not in any way reflective of PGE's opportunity to earn a profit on its rate base. In addition, the lower Treasury bond rate better balances the interests of the utility and the customer because it allows PGE to recover the full authorized amount of its remaining Trojan investment at the least cost to customers. We therefore conclude that 7.09 percent is the appropriate interest rate to use to reflect PGE's time value of money in this case.

(2) Net Benefits Test

In the UE 88 order, the Commission applied a net benefits test to determine whether the closure of Trojan was in the public interest for purposes of determining the recoverable amount of PGE's undepreciated Trojan investment. To perform its net benefits test, the Commission compared the estimated allowable long-term costs of continued Trojan operation with the estimated allowable long-term costs of closing the plant and replacing its output. Allowable costs are those costs the Commission would deem reasonable and authorize a utility to include in rates. By examining the reasonableness of PGE's actions, the net benefits test identified the point at which customers were indifferent between the continued operation of Trojan and the shutdown of Trojan and construction or acquisition of

[260] Order No. 95-322, Appendix E at 2. PGE's cost of debt increased to 7.82 percent after 1995. *Id.* at 3.

[261] *See* Order No. 08-263 at 15.

[262] We take official notice of the 10-year U.S. Treasury rate for 1994 under OAR 860-014-0050. The 10-year Treasury rate for 1994 is reported by the Federal Reserve at: http://www.federalreserve.gov/releases/h15/data/Annual/H15_TCMNOM_Y10.txt.

replacement resources. In determining estimated costs of the continued operation of the plant, the Commission excluded the projected cost of replacing Trojan's steam generators. In determining costs associated with closing the plant, the Commission included a *return on* PGE's remaining undepreciated investment.[263]

PGE and Staff contend that the Court of Appeals' decision in *Trojan I* affects the Commission's net benefits test. Both parties agree that the Commission must recalculate the projected allowable costs of closure in order to take into account the elimination of any return on PGE's undepreciated Trojan investment, as well as any change in the amortization schedule applied to recovery of the investment. PGE further argues that the Commission would have made a different assumption in its net benefits test regarding the cost of replacing Trojan's steam generators. PGE suggests that the Commission would not have exercised its discretion to eliminate the entire projected cost of replacing the steam generators if it had known that rates could not include a return on PGE's remaining Trojan investment. Staff disagrees with this portion of PGE's argument. Because the Commission excluded recovery of the projected costs of steam generator replacement in determining the estimated costs of Trojan's continued operation, Staff contends that it would be inconsistent now to consider those costs to be savings in determining costs of the plant's closure.

We agree that the net benefits test must be reconsidered. In determining the costs of the plant's closure, the Commission assumed that PGE would be able to recover both a *return of* and a *return on* the undepreciated Trojan investment. With this assumption, the net benefits test showed that the estimated long-term costs of closure were $26.8 million (before taxes)[264] higher than the estimated long-term costs of continued operation. The Commission therefore removed $26.8 million from PGE's remaining undepreciated investment in Trojan to ensure that Trojan's closure was in the public interest. Had it interpreted ORS 757.355 to preclude giving PGE the opportunity to earn a return on its undepreciated investment, the Commission would not have included those amounts in its closure analysis.

We do not agree with PGE's argument, however, that we should include, for purposes of the net benefits test, the entire cost of replacing Trojan's steam generators in the estimated costs of continued operation. The Commission excluded the $183.1 million steam generator replacement costs based on the finding that PGE was better situated than customers to pursue remedies for any manufacturing defects against Westinghouse, the steam generator manufacturer. The Commission adopted the reasoning articulated in a case where the Pennsylvania Public Utility Commission held the utility responsible for costs associated with a plant shutdown caused by a manufacturing defect. The Commission quoted the following language from the Pennsylvania Supreme Court decision upholding the order:

> By disallowing the replacement costs, the Commission held that the utility and not the ratepayers were in a far superior position to seek redress for the defects and negotiate contractual protections to minimize any future problems. [W]e

[263] *See* Order No. 95-322 at 33.
[264] Equivalent to $20.4 million after taxes.

> believe a utility company is in a better position to prevent an occurrence or provide for protection against any such occurrence. After all, it was the utility which chose the contractor, negotiated the contract, and is in a position to seek damages for any losses sustained under the contract. While the utility may have to bear the initial losses incurred as the result of its contractor's negligence, it is in a far better position to aggressively pursue the tort-feasor for reimbursement. If we were to hold otherwise, the utility would have no incentive to pursue the tort-feasor, having already received full compensation for its losses.[265]

We agreed with this logic, and the Court of Appeals' decision in *Trojan I* does not alter our reasoning. As the Commission concluded in UE 88, someone must bear the costs relating to the steam generator defects. We continue to believe that, even with the correct interpretation of ORS 757.355, it more appropriate for PGE to bear the costs of the defective steam generators.

Because we conclude that it is reasonable to adjust PGE's 1995 through 2000 revenue requirement to require recovery of PGE's remaining Trojan investment over 10 years with interest to compensate for the time value of money, we also believe it is reasonable to adjust the net benefits test used in UE 88 to reflect these adjustments. Therefore, to appropriately reexamine the net benefits test we must recalculate the costs of closure to: (1) *exclude* recovery of both the return of and the return on PGE's undepreciated Trojan investment over 17 years; and (2) *include* the return of PGE's undepreciated investment over 10 years with interest at the rate of 7.09 percent.[266] This recalculation reduces the costs of Trojan's closure by $70 million, to a point below the costs of the plant's continued operation.[267] In other words, the cost of Trojan's continued operation would have exceeded the costs of closure. Thus, under this adjusted net benefits test, there is no reason to disallow a portion of PGE's remaining undepreciated investment in Trojan to reach the point at which customers were indifferent between Trojan's continued operation and its

[265] Order No. 95-322 at 61, quoting *Pennsylvania Pub. Util. Comm'n v. Philadelphia Elec. Co.*, 561 A2d 1224, 1228 (1989).
[266] Because we decline to make PGE's proposed adjustment to the estimated costs of continued operation, we did not recalculate these costs in our revised net benefits test.
[267] We used the Excel workbook submitted by PGE on July 28, 2008 (in response to a July 24, 2008 Bench Request) to make this calculation. We modified the "Return Foregone" worksheet in this workbook to: (1) determine the monthly return of investment (on gross plant investment less accumulated depreciation, without any net benefits disallowance) and return on investment (net of deferred taxes and investment tax credits, at the company's authorized rates of return) over 17 years; and (2) calculate the net present value of the monthly streams on March 1, 1995, using the discount rate from the net benefits analysis in UE 88 of 8.81 percent. The total net present value equals $391.8 million (consisting of $195.7 million for *return of* investment and $196.1 million for *return on* investment). We then calculated the corresponding net present value of the monthly streams for return of investment over 10 years and interest on the average outstanding balance at an annual rate of 7.09 percent. The total net present value for recovery over 10 years with 7.09 percent interest is $321.8 million. Recovery over 10 years at 7.09 percent interest instead of recovery over 17 years at the rates of return authorized in UE 88 reduces the cost of the Trojan closure scenario by the difference, $70 million.

shutdown with construction or acquisition of replacement resources. We therefore restore the $26.8 million disallowance to PGE.

(3) Balance Sheet Options

PGE and Staff also contend that the Commission should adjust other rate inputs to keep rates stable and to avoid rate shock that would likely result from a shorter recovery period for the undepreciated Trojan investment. The parties explain that, at the time of the UE 88 rate proceeding, PGE's balance sheet included a customer credit of $111 million from the sale of Boardman assets (referred to as the "Boardman gain"), which was being amortized over a 27-year period until 2013.[268] In the UE 88 rate decision, the Commission left the amortization period for the Boardman gain unchanged, but, in the UE 93 rate proceeding, the Commission accelerated those credits to use as offsets to several amounts owed by customers to PGE.[269] These included the AMAX termination payments, power cost deferrals, and the SAVE incentive.[270] According to PGE and Staff, the Commission should reexamine these decisions in light of the fact that the Commission may not authorize PGE to recover the remaining investment in Trojan over time with a return on its investment. PGE and Staff argue that the Commission should offset the customer credit on PGE's books with an equal amount of undepreciated Trojan investment in 1995. PGE and Staff also suggest that, for the purposes of stabilizing rates in the event of the rapid return of the remaining investment in Trojan, the Commission could defer some power costs for future recovery in order to smooth rates.

We conclude that our decision to require recovery of PGE's remaining investment over time with interest to compensate for the time value of money adequately promotes rate stability and ameliorates any rate shock, which renders it unnecessary to consider offsetting the balance with the Boardman gain.

(4) Classification of Trojan Assets

PGE and Staff contend that the *Trojan I* decision requires the Commission to reconsider its conclusion in UE 88 to classify all Trojan assets as abandoned rather than plant-in-service. The parties explain that the Commission classified all Trojan assets as abandoned based on the assumption that PGE could recover its cost of capital (including a *return on*) regardless of the account PGE used to record the assets.[271] Although the Commission classified these assets as abandoned, the Commission acknowledged that a portion of the Trojan investment remained in use to carry out required activities related to safety, environmental protection, and decommissioning.[272] These assets primarily included the spent fuel pool, related systems, and administrative buildings. Given the Court of

[268] Order No. 95-322 at 17-18.
[269] *See* Order No. 95-1216.
[270] *See id.*
[271] Order No. 95-322 at 53. PGE and Staff are referring to the accounting classification for PGE's remaining Trojan investment. The Commission found that classifying the remaining investment as "abandoned" rather than "plant-in-service" had no effect on rates because the investment would be included in PGE's rate base regardless of the accounting classification.
[272] *Id.*

Appeals' decision that the remaining Trojan investment may not be included in rate base with the opportunity to earn a return, the classification of these assets is now relevant. PGE and Staff therefore argue that we should revisit the classification of these assets and find that $80 million in undepreciated Trojan investment remained in utility service following the plant's closure. URP opposes revisiting the classification of the Trojan assets. URP points out that the assets were used for "safety, environmental protection and decommissioning," not to provide utility service to customers. Consequently, URP contends that these assets were not "used and useful" under ORS 757.355 and cannot be placed in rate base.

We agree with URP. The critical issue is whether the Trojan assets were being "used for providing utility service to the customer," as required by ORS 757.355. Although the Commission acknowledged that the spent fuel pool and other Trojan assets were necessary for continuing activities at the site, it found those activities were "related to decommissioning, not productive operation of the facility."[273] The Commission thus concluded that the Trojan plant was no longer "used and useful" in providing utility service to customers.[274] We therefore find that it is inappropriate to revisit the classification of the Trojan assets. Our conclusion is consistent with the Court of Appeals' more restrictive interpretation of ORS 757.355 in *Trojan I*.

(5) Authorized Return on Equity

PGE contends that the Commission should reexamine the authorized return on equity and capital structure adopted in UE 88 in light of the *Trojan I* decision. Staff and URP oppose any adjustment to PGE's ROE. There is substantial precedent supporting the conclusion that it is appropriate for a commission to increase a utility's return on equity to compensate for increased risk to the utility investor.[275] PGE is likely correct that, in 1995, the Commission may have increased PGE's ROE if PGE were required to recover its remaining Trojan investment over time with no return. Staff is probably correct that the Commission would not have increased PGE's ROE if the Commission allowed immediate recovery of PGE's remaining Trojan investment.

Although we had identified cost of capital effects as an issue for reconsideration in an earlier scoping order,[276] it would be difficult to reevaluate the ROE in this case given the fact that the ROE was reached by stipulation rather than by Commission decision. Because the Commission adopted the stipulation with little comment, we do not know the factors the Commission considered in deeming the stipulated ROE appropriate or whether and to what extent increased risk due to the different rate treatment of Trojan would affect the ROE. It is also inappropriate to make assumptions regarding whether PGE would or would not have stipulated to the same ROE under these different circumstances.[277] We therefore decline to reexamine the ROE approved in the UE 88 rate order.

[273] *Id.* at 53.
[274] *Id.* at 54.
[275] *See, e.g., In re Portland Gen. Elec. Co.*, Docket UE 180, Order No. 07-015 (Jan 12, 2007).
[276] Order No. 04-597 at 7.
[277] We decline to consider URP's arguments about the ROE adjustment because those arguments are based upon post-1995 events. *See supra* pp 51-52.

d. Conclusion

As discussed above, in determining the appropriate adjustments to make to PGE's revenue requirement during the period from April 1, 1995, through September 30, 2000, we must consider the ratemaking principles and policies discussed above: (1) least-cost planning principles; (2) our duty to balance the interests of the utility and its customers in setting just and reasonable rates; (3) our duty to maintain the financial integrity of the utility; (4) intergenerational equity; and (5) rate stability and avoidance of rate shock.

We begin our resolution by making explicit the parties' assumption that the closure of Trojan remained PGE's least-cost option even after the Court of Appeals' decision in *Trojan I*. As highlighted above, the Commission determined in its UE 88 order that PGE's closure of Trojan in 1993 was the least-cost option for the utility and its customers.[278] In other words, the Commission concluded that the costs associated with closing Trojan and replacing its output with purchased power were less than the costs associated with repairing or replacing the steam generators and continuing to operate the plant. Because the costs associated with closing Trojan included PGE's recovery of a return on its undepreciated investment in the facility, the Court of Appeals' decision to exclude recovery of those costs further reduces the plant's closing costs to the benefit of customers. Allowing PGE to recover its remaining Trojan investment, even after the plant was retired, is consistent with encouraging least-cost resource investments. Not only are utilities encouraged to make the investment in the first instance because they are confident that they can recover their prudently-incurred investment even if unexpected considerations result in early retirement, but utilities are also encouraged to make the decision to retire a plant early when it is the least-cost option for customers.

Next, with the five key ratemaking principles and policies in mind, we conclude that it is reasonable to make the following adjustments to PGE's revenue requirement for the period from April 1995 through September 2000:

- Change the recovery period for PGE's remaining investment from 17 years to 10 years, with interest at 7.09 percent to compensate for the time value of money given the delayed recovery.
- Adjust the net benefits test to reflect this change in the recovery of the remaining investment. Because the costs of closure under this scenario would have been lower than the costs of the continued operation of Trojan, we restore the full amount of the $26.8 million disallowance to PGE.

Adjusting the recovery period for PGE's remaining Trojan investment reasonably balances the interests of PGE and its customers by allowing PGE to minimize lost opportunity costs, while ensuring rate stability, intergenerational equity, and just and reasonable rates. By allowing interest on PGE's remaining investment, we ensure PGE's

[278] Order No. 95-322 at 29 ("After reviewing PGE's LCP and Staff's evaluation, we conclude that PGE has proved [that closing Trojan permanently in January 1993 was PGE's least-cost option].").

financial integrity and ability to attract capital by giving PGE full recovery of its investment. Least-cost investments are also encouraged by allowing full recovery of those investments.

When these adjustments are made to the revenue requirement approved in UE 88, PGE's rates during the period from April 1, 1995, through September 30, 2000, would have been $4.03 million *higher* than PGE's authorized rates during that time.[279] Stated differently, these adjustments show that, had the Commission properly excluded PGE's undepreciated Trojan investment in rate base, thereby eliminating any *return on* Trojan, and allowed PGE to recover its remaining Trojan balance over a 10-year period with interest, customers would have been required to pay $4.03 million more during the 1995 through 2000 time period. For this reason, there is no basis to conclude that the error identified in *Trojan I*—inclusion of a *return on* PGE's remaining Trojan investment in rates—resulted in unjust and unreasonable rates during the April 1995 through September 2000 period.

The adjustments made above not only affect the revenue requirement during the 1995 through 2000 period, but also affect the amount of PGE's remaining Trojan balance at the end of that period. In UM 989, PGE, Staff, and CUB determined that PGE's remaining Trojan investment as of September 30, 2000, was $180.5 million. Under the alternative revenue requirement scenario that we developed above, which included a shorter recovery period (10 years instead of 17), the balance of PGE's remaining Trojan investment would have declined more rapidly during the 1995 through 2000 period. This shorter recovery period would have decreased PGE's remaining investment as of September 30, 2000, to $165.1 million, instead of $180.5 million. We resolve this discrepancy in our reconsideration of the UM 989 order.

[279] We used the Excel workbook underlying Staff/102, Busch-Johnson/3, to make this calculation. Staff submitted the workbook on July 29, 2008, in response to a July 24, 2008 Bench Request. Staff's workbook is made up of relevant worksheets from the Excel workbook underlying PGE's calculations and exhibits. The "Page Two Summary" worksheet in Staff's workbook develops the revenue requirement for Staff's second alternative revenue requirement scenario and compares it to the authorized revenue requirement over the time period from April 1, 1995, through September 30, 2000. We modified the calculations for the staff alternative in the workbook by: (1) reversing the treatment of $80.2 million of Trojan investment as plant-in-service (which eliminates or zeros out lines 1 and 2 in Staff/102, Busch-Johnson/3); (2) reversing the effect of using the Boardman gain to offset the Trojan investment and eliminating the associated recovery of regulatory assets (which zeros out line 6 of the exhibit); (3) restoring the full UE 88 net benefit adjustment of $26.8 million, instead of the $17.7 million in Staff's analysis; and (4) replacing the Trojan revenue requirement for Staff's alternative scenario (line 4 of the exhibit) with the revenue requirement, calculated on a monthly basis, for recovery of the Trojan investment over 10 years with 7.09 percent interest on the average outstanding plant balance net of taxes. Furthermore, we reduced the authorized Trojan revenue requirement in the 12 months beginning April 1, 1995, (line 12, columns A and B) by $20 million. PGE included $20 million in the revenue requirement to reflect the decision in UE 93 (Order No. 95-1216) to use that amount of the Boardman gain to reduce the Trojan investment. We do not believe, however, that it is reasonable to include this $20 million in PGE's revenue requirement because the offset in the UE 93 decision did not result in changes to PGE's authorized revenue requirement. As a result, the revenue requirement for our alternative scenario is $4.03 million higher than the authorized revenue requirement over the study period (with this difference obtained by comparing lines 8 and 15 of the exhibit).

C. Reconsideration of the UM 989 Order: Were the rates implementing the settlement just and reasonable?

We began Phase III of these remand proceedings after the Court of Appeals issued its decision in *Trojan II*. In that decision, the court vacated the circuit court decision ordering the Commission to immediately revise or reduce rates to refund the amount customers paid for a return on PGE's undepreciated Trojan investment from April 1, 1995, through September 30, 2000.[280] Although the Commission's UM 989 order made it clear that the decision was intended to address only the *prospective* rate treatment of Trojan,[281] both the circuit court and the Court of Appeals focused on the question of whether the Commission should have *retrospectively* examined the rates in effect from 1995 to 2000 and adjusted the remaining Trojan balance or future rates to compensate customers for any overpayment.

Citing the Supreme Court's decision in *Dreyer*, the Court of Appeals concluded that the Commission erred in concluding that the filed rate doctrine (as embodied in ORS 757.225) precluded the Commission from reducing future rates or offsetting the remaining Trojan balance as of September 30, 2000, to compensate customers for the payment of a *return on* PGE's undepreciated Trojan balance during the 1995 to 2000 period.[282] The Court of Appeals remanded the UM 989 order, directing the Commission to reexamine its remedial authority in light of the *Dreyer* decision.[283] The Court of Appeals offered no opinion on the merits of the other arguments that URP raised on appeal and cross-appeal, which had been rejected by both the Commission and the Marion County Circuit Court, and permitted URP to raise these issues again on remand before the Commission.

We divide our discussion into five sections. First, to provide background for our analysis, we review the UM 989 settlement and the Commission's decision concluding that the rates implementing the settlement were just and reasonable. Second, we specifically address the Court of Appeals' direction to reconsider whether we should adjust PGE's remaining Trojan balance as of September 30, 2000, to reflect any amounts owed to customers for the payment of a *return on* Trojan from April 1, 1995, through September 30, 2000. Third, we examine URP's arguments in support of its contention that the UM 989 rates were unjust and unreasonable. Fourth, we address URP's challenges to the net benefits analyses used to support the Settlement. Finally, we clarify the appropriate scope of our review of the UM 989 order and render our conclusions.

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280 *Trojan II*, 215 Or App at 374-376.
281 Order No. 02-227 at 11.
282 *Trojan II*, 215 Or App at 373.
283 *Id.* at 376.

1. *The UM 989 Settlement*

On August 22, 2000, PGE entered into two settlement agreements, one with Commission Staff and one with CUB, an entity statutorily created to protect the interests of residential customers.[284] The two agreements are materially the same with respect to the issues in this docket and we refer to them collectively as the Settlement. Both agreements were intended to entirely remove Trojan costs (both the *return of* and the *return on* PGE's remaining investment) from PGE's rates on a prospective basis.

To remove these costs, the Settlement offset the remainder of PGE's principal investment in Trojan with existing customer credits that were being amortized over time in PGE's rates. This offset removed both the remaining Trojan balance and the customer credits from PGE's balance sheet. PGE, Staff, and CUB (the Settling Parties) calculated that the remaining Trojan balance at the time of settlement was $180.5 million. The customer credits were slightly larger than the remaining Trojan investment, providing customers a $10.2 million rate decrease for the first 12 months beginning in October 1, 2000. As part of the Settlement, PGE also agreed to provide an additional $2.5 million rate reduction in the future.

Specifically, the Settling Parties agreed to: (1) remove the Trojan investment from PGE's balance sheet and future rates; (2) offset a portion of the Trojan investment by adjusting several regulatory assets and liabilities; (3) write-off the residual investment balance of approximately $5.9 million (grossed up to approximately $9.8 million on a revenue requirement basis); (4) implement a rate reduction of $10.2 million over 12 months beginning October 1, 2000; (5) establish a regulatory asset of approximately $56 million related to existing Financial Accounting Standards Board Statement 109 (FAS 109) tax benefits previously advanced to customers, but now owed to PGE; (6) establish a regulatory liability equal to $2.5 million, which would earn interest at PGE's authorized rate of return until the credit has been fully provided to customers; and (7) share future distributions from the Nuclear Electric Insurance Limited (NEIL) insurance policy between customers (55 percent) and shareholders (45 percent), a division the Settling Parties believed would provide PGE significant incentive to seek the highest possible level of NEIL distributions.[285]

a. Benefits of the Settlement

PGE, Staff, and CUB claimed that the Settlement accomplished four goals, each of which was in the public interest. First and foremost, the Settlement was intended to resolve the long-standing controversy regarding PGE's recovery of its remaining Trojan investment. There is evidence that the Settling Parties believed that the Settlement adequately responded to the Court of Appeals' decision in *Trojan I* with no further action required: PGE filed a motion to dismiss the Oregon Supreme Court's review of *Trojan I* and to vacate the lower court decisions, arguing that the approval of the rates implementing the

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284 CUB was created to be an "effective advocate to assure that public policies affecting the quality and price of utility services reflect [utility customers'] needs and interests" and to "advocate forcefully and vigorously on [utility customers'] behalf concerning all matters of public policy affecting their health, welfare and economic well-being." ORS 774.020.
285 Order No. 00-601 at 5-6.

Settlement rendered the controversy moot.[286] Second, the Settlement produced a financial benefit for customers in the form of immediate and future rate reductions. Third, the Settlement aligned the interests of PGE and its customers by allocating future distributions from the NEIL insurance policy between customers and shareholders. Finally, the Settlement enabled PGE to simplify its balance sheet and smooth potential rate changes. The Settling Parties asserted that these four benefits established that the rates implementing the Settlement were just and reasonable. We discuss each of the four benefits in more detail below.

(1) Resolution of Trojan Recovery Controversy

The Settling Parties emphasized that, at the time of the Settlement, the issue of the proper rate treatment of Trojan was a drain on the parties' resources.[287] Uncertainty surrounding the proper treatment of Trojan had occupied their attention since the early 1990s. By the time of the Settlement, the Commission had conducted numerous long and complex proceedings related to Trojan. It had issued multiple deferred accounting orders[288] and had conducted a declaratory proceeding addressing proper rate treatment of PGE's remaining investment in the plant.[289] Several of these orders had been appealed, and the Oregon Supreme Court had agreed to review the Court of Appeals' decision in *Trojan I* precluding the inclusion of PGE's undepreciated Trojan investment in rate base with the opportunity to earn a return. The Settling Parties did not know how the issues would ultimately be resolved, but it was clear that more litigation was forthcoming.

The Settling Parties were also burdened by a pending statewide ballot measure that would address the same issue.[290] Ballot Measure 90 (Measure 90) asked Oregon voters to affirm or reject House Bill 3220, legislation that would have allowed utilities such as PGE to recover profits on retired investments such as Trojan. Measure 90 was retroactive and, if approved, would have allowed the Commission to do what *Trojan I* prohibited—include PGE's remaining Trojan investment in rate base with the opportunity to earn a return on that investment.

Faced with difficult issues surrounding the proper rate treatment for PGE's remaining Trojan investment, multiple ongoing proceedings, and no clear date for resolution, PGE, Staff, and CUB wanted to resolve all outstanding Trojan issues. The Settlement was designed to accomplish this goal by offsetting the remaining Trojan balance with customer credits that were being amortized over time, which removed both the remaining Trojan balance and the customer credits from PGE's balance sheet. The Settling Parties argued that the Settlement not only eliminated the contentious *return on* element from PGE's rates prospectively, but also mooted the Supreme Court case, spared the parties from conducting a campaign for or against Measure 90, gave customers a rate decrease, and allowed the Settling Parties to put the distraction of the Trojan proceedings behind them.

[286] The Supreme Court denied PGE's motion, but nonetheless dismissed the petitions for review without explanation. 335 Or 91, 58 P3d 822 (2002).
[287] Order No. 02-227 at 2.
[288] *See, e.g.,* Docket No. UM 529, Order No. 93-309; Docket Nos. UM 594 and UM 571, Order No. 93-1493; Docket Nos. UE 88 and UM 692, Order No. 94-1456.
[289] *See* Order No. 93-1117.
[290] Order No. 02-227 at 3.

These benefits were expressly identified in the Settlement. For example, the settlement agreement between CUB and PGE described the pending Oregon Supreme Court appeal and Measure 90 and explained that the agreement was negotiated "in order to achieve a compromise of disputed matters that is in the public interest on terms that are just and reasonable and that create greater certainty for each of the Parties."[291] The agreement further identified other benefits, including customer protection against the risk stemming from the pending appeal and Measure 90, and the elimination of the need to expend time and resources on those matters.[292] CUB and PGE even agreed to mutual limitations on their "time-consuming" campaign related to Measure 90 in the November 2000 election, and agreed to steps designed to end the pending Supreme Court appeal.[293] CUB and PGE further agreed that the implementation of the Settlement "will result in PGE no longer recovering through rates either a return on or a return of its investment in Trojan," and agreed that the settlement resolved all disputes between them concerning PGE's investment in Trojan.[294]

(2) Financial Benefit for Customers

The Settling Parties also claimed that, by offsetting PGE's Trojan balance with existing customer credits, the Settlement accomplished another goal: It allowed PGE to recover the remainder of its principal investment in Trojan—an outcome the Commission had already concluded was in the public interest[295]—with minimal impact on customers. PGE's right to recover the remainder of the principal invested in Trojan (the *return of* PGE's remaining investment) was undisputed. The Commission's conclusion in UE 88 that PGE was authorized to recover $340.2 of its remaining undepreciated Trojan investment was upheld by the Court of Appeals in *Trojan I*.[296] By the time of the Settlement, $180.5 million of this Trojan investment remained unrecovered by PGE. Thus, the key question for the parties contemplating the Settlement was not whether PGE should be allowed to recover the full $180.5 million in customer rates, but rather how PGE should be allowed to recover that amount. The Settlement was designed to accomplish this goal by offsetting the remaining Trojan balance with existing customer credits, removing both the remaining Trojan balance and the customer credits from PGE's balance sheet.[297] At the same time, it included a number of adjustments that resulted in an immediate rate decrease.

PGE, Staff, and CUB claimed that the benefit of a rate decrease was significant. At the time of the Settlement, the potential effect of PGE's recovery of its Trojan investment might have on customer rates was unclear. As CUB noted, the Settlement provided a safety net for customers. CUB explained that if PGE were ultimately permitted by the Supreme Court (or by Measure 90) to recover a *return on* its remaining Trojan investment, customer rates might well be negatively affected. But CUB also noted that, even if PGE were ultimately *prohibited* by either the Oregon Supreme Court or Measure 90 from recovering a *return on* Trojan, the effect on customers' rates might nevertheless be

[291] CUB/PGE Settlement Agreement at 2 (August 22, 2000).
[292] *Id.* at 2-3.
[293] *Id.* at 3.
[294] *Id.* at 3.
[295] *See* Order No. 95-322 at 52.
[296] *Trojan I*, 154 Or App at 716.
[297] Order Nó. 02-227 at 2.

negative.[298] CUB explained that under those circumstances, the Commission might deem it necessary to allow PGE to recover its remaining investment in Trojan immediately, thus resulting in a large rate increase for customers without the protections or concessions made by PGE in the Settlement.[299] According to CUB, the Settlement not only reduced litigation costs, eliminated uncertainty, and resulted in just and reasonable rates, but also protected customers from large rate increases that might follow in the aftermath of the pending appeals and Measure 90. Thus, the Settlement structured the return of PGE's Trojan investment in a manner that placed a minimal burden on PGE customers.

(3) Alignment of Utility and Customer Interests

A less significant benefit of the Settlement claimed by the Settling Parties was that it aligned the interests of PGE and its customers with respect to anticipated NEIL refunds. PGE paid premiums to NEIL from 1976 through 1994 for insurance coverage related to Trojan. PGE recovered estimates of the premiums in customer rates. NEIL invested these premiums and paid occasional refunds to PGE. Prior to the Settlement, the final NEIL distribution had not yet occurred, and the proper regulatory treatment of the final distribution was in dispute. The Settlement divided the final distribution between PGE shareholders (45 percent) and customers (55 percent). The Settlement therefore provided PGE with the incentive to maximize the amount of the final NEIL distribution,[300] while at the same time maintaining customer credits that were used as part of the Settlement to pay down the remaining Trojan balance.

(4) Additional Benefits

The Settlement provided additional claimed benefits that were difficult to measure, yet had tangible value. The Settling Parties noted that the law has long recognized that the value of a Settlement is measured not only by its demonstrable financial impact on parties, but also by its mitigation of future risks, costs, and uncertainty. The Settlement cleaned up and simplified PGE's balance sheet, eliminated rate uncertainty for customers by eliminating the controversial *return on* element from the company's rates, mooted a Supreme Court appeal, and spared the parties from conducting a campaign for or against Measure 90.

b. Net Benefits Analyses

To further support the Settlement, PGE and Staff presented two net benefits analyses to provide a secondary measure that the offset provided customers with financial benefits. Unlike the net benefits test used in UE 88, these analyses were not used to establish any component of the rates implementing the Settlement. Rather, the net benefits analyses were intended to provide further confirmation of the Settlement's benefits by comparing customer burdens and benefits with and without the Settlement.

[298] *See, e.g.*, CUB's Reply Brief at 2-3, Docket UM 989 (November 30, 2001).
[299] *Id.*
[300] The amount of the final distribution was $33.3 million, $10.5 million higher than the parties expected. *See* Order No. 02-227 at 3.

The first net benefits analysis compared the present value of the various regulatory assets and liabilities involved in the Settlement based on the revenue requirement for each. This analysis, which we call the Revenue Requirements Analysis, assumed that the rates then in effect from PGE's last rate case, UE 100, would remain in effect until 2002. After that, the analysis included the projected balance and amortization in each year until the Trojan balance was fully paid off.[301] Under this analysis, the Settlement provided customers with a net financial benefit of $18.5 million.

Revenue Requirements Analysis ($ millions)			
	No Settlement Case	Settlement Case	Net Benefits (Settlement Case Less No Settlement Case)
Net present value of assets and liabilities involved in settlement	$68.1	$36.7	$(31.4)
Customer credit	N/A	$(2.5)	$(2.5)
PGE retains 45% of NEIL	N/A	$15.4	$15.4
Total net present value	$68.1	$49.6	$(18.5)

The second net benefits analysis compared the unamortized balances of the regulatory assets and liabilities involved in the Settlement. This analysis, which we call the Asset-Based Analysis, assumed that, without the Settlement, customers would be required to pay the $180.5 million Trojan balance remaining on PGE's books, as well as the $47.9 million remaining for FAS 109, but customers would be entitled to recover $161.9 in various existing customer credits. Under this "no-settlement" scenario, customers would continue to owe PGE approximately $66 million.

Under the "settlement" scenario, by contrast, the remaining Trojan balance and FAS 109 liability would be paid off by the various customer credits and refunds. PGE would be permitted to collect $36.7 in net present value (NPV) for a regulatory asset to recover the FAS 109 amounts, and would receive 45 percent of the final NEIL distribution. Customers would receive a credit of $2.5 million. Under the Asset-Based Analysis, the Settlement provided customers with a net financial benefit of $16.4 million.

[301] The final version of the Revenue Requirements Analysis is detailed in Staff-PGE/204.

Asset-Based Analysis ($ millions)			
	No Settlement Case	Settlement Case	Net Benefits (Settlement Case Less No Settlement Case)
PGE collects remaining Trojan investment balance	$180.5	N/A	$(180.5)
PGE collects FAS 109 balance	$47.4	N/A	$(47.4)
PGE refunds net credit balances	$(161.9)	N/A	$161.9
PGE collects new regulatory asset	N/A	$36.7	$36.7
PGE retains 45% of NEIL final distribution	N/A	$15.4	$15.4
Customer credit	N/A	$(2.5)	$(2.5)
Total NPV	$66.0	$49.6	$(16.4)

c. Commission Approval of the Rates Implementing the Settlement

On September 1, 2000, PGE filed an application for an accounting order and approval of revised rates implementing the Settlement. The Commission approved the application in Order No. 00-601 on September 29, 2000. The offsets authorized in the Settlement occurred on September 30, 2000, and the rates implementing the Settlement became effective October 1, 2000.

On October 30, 2000, URP filed a complaint pursuant to ORS 756.500 and ORS 757.210 challenging the Settlement. When URP failed to elect whether its complaint should proceed under ORS 756.500 or 757.210, the ALJ dismissed the allegations under ORS 756.500.[302] URP's primary argument was that the Commission should have offset the Trojan balance as of September 30, 2000, with the amounts collected as a *return on* Trojan from 1995 to 2000, but URP also raised other challenges to the rates implementing the Settlement. The Commission rejected URP's challenges in Order No. 02-227, finding no merit to URP's arguments and concluding that the rates implementing the Settlement were just and reasonable. URP appealed Order No. 02-227, which ultimately resulted in the Court of Appeals' decision in *Trojan II*. In this phase of the remand proceedings, we must reconsider URP's challenges and again determine whether the rates implementing the settlement were just and reasonable.

2. *Should we adjust the balance of PGE's undepreciated Trojan investment as of September 30, 2000, to compensate customers for payment of a return on the investment from April 1995 through September 2000?*

As discussed above, the Court of Appeals in *Trojan I* held that ORS 757.355 prevented the Commission from including PGE's undepreciated investment in the retired Trojan plant in PGE's rate base, which gave PGE the opportunity to earn a return on this investment. In our reconsideration of the rates in effect from 1995 to 2000, we concluded that the error identified by the Court of Appeals did not render those rates unjust and

[302] Order No. 02-229 at 2.

unreasonable. We noted, however, that the adjustments we made to the 1995 to 2000 rates to remove the investment from rate base and exclude the *return on* that investment would have resulted in a remaining Trojan balance as of September 30, 2000, that was $15.4 million less than the $180.5 million balance used in the UM 989 Settlement. We closed our discussion of the 1995 to 2000 rates by acknowledging the discrepancy and indicating that we would resolve it in our reconsideration of the UM 989 order.

In *Trojan II*, the Court of Appeals questioned our conclusion that we did not have the authority to redress the error identified in *Trojan I* by offsetting the remaining Trojan balance as of September 30, 2000, with amounts representing the *return on* PGE's investment during the 1995 to 2000 period. The court therefore instructed us to reconsider our conclusion. Based on our conclusion that we have broader remedial authority than we previously believed—a determination derived from our close review of the *Katz* decision—we will reconsider our previous believe that we lacked authority to adjust PGE's remaining Trojan balance on September 30, 2000, to compensate customers for the payment of rates that included the error identified in *Trojan I*.

As discussed above, we believe our statutory duty to protect customers from "unjust and unreasonable exactions" gives us the authority to remedy the imposition of unjust and unreasonable or unjustly discriminatory rates. The decision in *Katz* also makes it clear that the Commission's authority under ORS 756.040 is broad enough to remedy mistakes in Commission orders under unique and limited circumstances, even in the absence of a finding that rates were unjust and unreasonable or unjustly discriminatory.[303] We find that these remand proceedings present just such a unique circumstance.

In *Katz*, the court upheld the Commission's decision to refund amounts collected in excess of the utility's authorized revenue requirement, even though the Commission had authorized the utility to collect those excess amounts and did not find that the utility's rates were unjust and unreasonable or unjustly discriminatory. In these proceedings, PGE charged rates that had been authorized by the Commission. We have reexamined those rates and determined that they were just and reasonable. Notwithstanding that determination, we are presented with the unique circumstance of having determined a specific value for PGE's remaining Trojan balance as of September 30, 2000—$180.5 million. As we determined in our analysis of the rates in effect from 1995 to 2000, that balance would have been $15.4 million less ($165.1 million) based on our alternative revenue requirement scenario. Our alternative revenue requirement scenario adjusted rates to exclude the Trojan investment from rate base, thereby eliminating the opportunity for PGE to earn a *return on* that investment.

We believe that, under *Katz*, our remedial authority is broad enough to allow us to compensate customers for the difference between the balance derived from rates that included a *return on* PGE's remaining Trojan investment and the balance derived from adjusted rates that excluded the return. All else being equal, the rates implementing the UM 989 Settlement would have reflected this difference in customers' favor.

[303] *See supra* p 42.

We therefore order PGE to issue refunds sufficient to resolve that difference. To determine the appropriate refund amount, we must account for the time value of money from October 1, 2000 (the effective date of the rates approved in UM 989) to the present. In Phase I, we determined that 7.09 percent was a reasonable interest rate to use to compensate for the time value of money. We do not, however, choose to apply that interest rate to the customer refund. As discussed above, the Commission traditionally uses a utility's authorized rate of return as the applicable interest rate for customer credits that are amortized over time.[304] To be consistent with this practice, we use PGE's authorized rate of return in 2000 (9.6 percent) as the applicable interest rate. We reject URP's proposal to use PGE's pre-tax rate of return (13.34 percent) as the appropriate interest rate. URP believes that the pre-tax rate of return represents the utility's "actual" rate of return. URP is incorrect. PGE's authorized rate of return (9.6 percent) represents PGE's opportunity to earn a profit on its rate based investments. This rate is then grossed up to account for the utility's tax requirements. In other words, to ensure that PGE has the opportunity to earn a 9.6 percent rate of return, that rate must be adjusted to reflect the taxes that PGE must pay on its revenues. However, non-rate base amounts surcharged or refunded to customers are not subject to the pre-tax rate of return.[305] We have recognized this in the past by applying the utility's authorized rate of return to amounts deferred for later inclusion in rates, whether surcharges or credits.[306]

Consequently, the total amount of the refund, with interest calculated at PGE's authorized rate of return (9.6 percent) from October 1, 2000, through October 1, 2008 (compounded monthly) is $33.1 million. The refund amount will continue to earn interest at 9.6 percent, compounded monthly, from October 1, 2008, until PGE issues the refund. We describe the process by which this refund will be made to customers later in this order.

We clarify that this adjustment to PGE's undepreciated Trojan balance as of September 30, 2000, is meant to account only for the modifications we have made to PGE's revenue requirement in Phase I, and is separate from the arguments raised by URP regarding the method and assumptions the Settling Parties used to calculate the beginning Trojan balance for purposes of the Settlement in UM 989. Any further adjustment to the Trojan balance based on those arguments will be in addition to the adjustment made here. We address URP's challenges below.

3. *URP's Challenges to the Rates Implementing the Settlement*

In the original UM 989 proceeding and in Phase III of these remand proceedings, URP raises numerous challenges to the Settlement. URP contends that the Settlement sought to preserve PGE's right to earn a profit on its Trojan investment and, consequently, was unlawful. URP's arguments can be distilled into three categories: (1) challenges to the appropriate starting balance for PGE's remaining Trojan investment; (2) URP's argument that the Settlement resulted in the functional equivalent of a return on PGE's Trojan investment; and (3) challenges to the Commission's treatment of various ratemaking elements of the Settlement. We address each in turn.

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304 *See supra* note 258 and accompanying text.
305 For non-rate base items, the effect on income taxes is neutral, because the tax gross up on the surcharge or refund is offset by the tax related to the revenue or expense change.
306 *See, e.g.*, Order 05-1070 at 14.

a. Balance of PGE's Remaining Trojan Investment

URP challenges the Settlement's assumption that PGE's remaining undepreciated investment in Trojan was $180.5 million. First, URP contends that the actual Trojan investment as of October 1, 2000, was zero. Next, URP argues that the Settling Parties' method of calculating the Trojan investment balance failed to account for the actual amounts customers paid for the Trojan investment during the 1995 to 2000 period. URP explains that, although PGE reduced the amount of Trojan balance carried on its books during that time period, it failed to reduce charges to customers to reflect this reduction and did not credit customers for increased sales. Finally, URP contends that the scope of Phase III improperly prohibited it from seeking in discovery monthly detailed accounting information from PGE that would allow URP to analyze how the Trojan balance should have been reduced during the 1995 to 2000 period.

Before we address URP's arguments, we again clarify that we have adjusted the Trojan balance used in the UM 989 Settlement to eliminate any adverse effect resulting from the Commission's decision in UE 88 to include PGE's remaining Trojan investment in rate base with the opportunity to earn a return. This adjustment gives customers the difference between the balance used in the UM 989 Settlement and what that balance would have been absent the error in UE 88. This restores the Trojan balance to $180.5 million as of September 30, 2000, the same Trojan balance that existed at the time of the Settlement, and allows us to review the terms of the Settlement using the original $180.5 million baseline.

We also clarify that the relevant date for our inquiry regarding the amount of the Trojan balance is September 30, 2000, not October 1, 2000. The UM 989 Settlement removed Trojan from PGE's books on September 30, 2000. Thus, while URP is correct that the Trojan balance as of October 1, 2000, was zero, we must determine the amount of the balance on September 30, 2000.[307]

We adhere to our prior conclusion that the Trojan balance was properly calculated and find that no further adjustments are necessary. As noted earlier, the Trojan balance was amortized based on the TIRA mechanism adopted in UE 88.[308] Under this mechanism, the Trojan balance was reduced based on actual utility revenues for the year multiplied by the rate case ratio of the Trojan revenue requirement compared with the overall revenue requirement. With the exception of 1995, the Trojan balance declined approximately $22.2 million to $26.5 million annually from 1995 to 2000.[309] Applying this mechanism, as of September 30, 2000, the remaining Trojan balance was $180.5 million.

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307 URP's reliance on the October 1, 2000 date is apparently based an error in the Phase III Ruling. At the beginning of the Phase III proceedings, the ALJ originally characterized the issue as the amount of PGE's remaining undepreciated investment in Trojan as of October 1, 2000. Given the terms of the settlement, the ALJ subsequently revised this issue to refer to September 30, 2000. URP overlooks this change and continues to argue that the Trojan balance on *October 1, 2000*, was zero.
308 *See supra* p 12.
309 *See* Staff-PGE/200, Busch-Hager-Tinker/20, Table 3. In 1995 the annual depreciation included a one-time $20 million offset against a portion of the gain from the sale of Boardman, which increased the annual amortization amount to approximately $39 million.

URP contends that the calculation of the remaining Trojan balance was inappropriate because PGE did not reduce rates during the 1995 to 2000 period to reflect the reductions in the Trojan principal during that period. But URP misunderstands amortization of an asset over time. Although the principal balance declines over time, the amount collected to amortize the asset remains the same. This allows the balance to be paid off completely during the chosen amortization period. If the amount of the payments declined over time as the principal declined, amortization of the asset would take much longer. This is similar to paying a home mortgage, where monthly payments reduce the outstanding balance, but the amount of the monthly payments is not correspondingly reduced.

Moreover, URP's concern that the Trojan balance failed to account for increased sales during the 1995 to 2000 period is misplaced. Again, the TIRA mechanism ensured that customers received the benefit of higher than expected loads during that time period by using actual revenues. When higher loads caused increased revenues, customers benefited through accelerated amortization of the Trojan balance. If straight-line depreciation of the asset were used instead of the TIRA mechanism, then the Trojan balance would have been reduced by $20 million annually. Using the TIRA mechanism, the Trojan balance was reduced by more than $20 million annually in each year during the 1995 to 2000 period.

Finally, URP's procedural challenges lack merit. The only limitation placed on URP was the restriction not to address issues already litigated in Phase I, namely whether the error indentified in *Trojan I* rendered rates in effect from 1995 to 2000 unjust and unreasonable. We have already affirmed the ALJ's Phase III Ruling on this issue and need not address it further.[310]

b. Functional Equivalent of a *Return On*

URP believes that the Settlement was a "forced trade" that was "absurd" from a customer perspective, as well as economically irrational and unjustified.[311] URP asserts that the Settlement included the functional equivalent of a *return on* PGE's Trojan investment by requiring customers to trade interest-earning assets (customer credits) for non-interest bearing debt (PGE's remaining Trojan balance). URP compares this to trading "$300 million in *zero coupon* U.S. Treasury bonds due in 2012" for "$300 million in U.S. Treasury bonds, also due in 2012, which carry a 7% rate of interest."[312] URP contends that trading a non-return bearing amount of debt for the cancellation of return-bearing credits produces the functional equivalent of a return on the remaining undepreciated investment in Trojan, which is prohibited by ORS 757.355.

The Commission previously rejected this argument in Order No. 02-227, and we see no reason to reach a different conclusion here. As noted in that order, the Commission allowed the customer credits to accrue interest at PGE's rate of return because those credits were being returned to customers over time. Allowing interest compensated customers for the time value of the money due to this delayed recovery. Because the

[310] *See supra* pp 53-54.
[311] URP Phase III Opening Brief at 16.
[312] *Id.* at 14.

Settlement gave customers the value of those credits in one day (the day the credits were used to offset PGE's remaining Trojan balance), interest on those credits was no longer required to compensate for the delayed recovery. In other words, the Settlement allowed PGE to recover its remaining Trojan investment in one day (September 30, 2000), and allowed customers to receive credits, which until that time were being amortized over a number of years, on that same day. Thus, the Commission effectively shortened the amortization period for both from a number of years to one day. The Settlement then offset these two amounts, eliminating any need for or right to earn interest on those accounts.[313]

In its argument, URP apparently assumes that the Trojan balance *must* be amortized over 17 years *without interest* and thus has a net present value worth significantly less than $180.5 million.[314] This is, in essence, an assertion that the Commission is required to disallow a significant amount of the remaining Trojan balance. This assumption is reflected in the testimony of URP's witness Lazar, who, in the original UM 989 proceedings, stated that PGE's remaining $180.5 million Trojan investment was worth only $106 million. This is so, Mr. Lazar explained, because the $180.5 million should be reduced to the present value of that sum "recovered ratably over the period 2001-2012 without a return."[315]

URP's assumption that PGE must be forced to recover the remaining Trojan balance without interest is erroneous. The $180.5 million figure at issue in this proceeding represents the portion of the Trojan investment that the Commission, and the Court of Appeals in *Trojan I*, had already deemed recoverable by PGE.[316] Requiring PGE to recover that investment over time without interest, as URP would have us do, would cause PGE to lose a significant portion of the value of that investment over time. URP's assumption is also inconsistent with our determination in Phase I that nothing in *Trojan I* prevented the Commission from allowing PGE to recover its remaining Trojan investment over time with interest to compensate for the time value of money, as distinguished from a return or profit on the investment.

Moreover, the customer credits are not equivalent to certificates of deposits or other investment vehicles with a guaranteed return over a set term. As described above, the customer credits only earned interest because they were being amortized over time, and the interest was included to compensate customers for the time value of money. Thus, the customer credits had a value as of September 30, 2000, and interest was designed to maintain this value over time. This is unlike certificates of deposits, where the interest is designed to increase the value of the deposited asset over time. In this case, offsetting the remaining Trojan balance with customer credits is more analogous to paying off a mortgage in one day with cash.

[313] Order No. 02-227 at 12.
[314] URP's argument also assumes that customers are *entitled* to receive these benefits over time, as opposed to receiving them on one day. URP has offered no support for such an assertion, nor has it explained precisely why any particular amortization period is more appropriate than another.
[315] URP/200, Lazar/11.
[316] In Order No. 95-322, the Commission wrote down the amount of the Trojan investment that PGE was entitled to recover. We held that the rest of the Trojan balance, however, including the $180.5 million at issue here, should be recoverable by PGE. Although PGE is not permitted to collect a *return on* this remaining balance, it is permitted to collect the *return of* that balance under ORS 757.140(2).

To the extent URP contends that the Commission has no authority to shorten the amortization period for Trojan, URP is incorrect. Oregon law gives the Commission authority to determine the appropriate amortization period for utility assets and, in making that determination, to balance the interests of customers and the utility.[317] URP has not explained why the Commission's decision to allow PGE to extinguish the value of Trojan instantly was an inappropriate exercise of that discretion.

Further, we are not persuaded by URP's claims that other commissions "normally" amortize the entire amount of an abandoned plant over time without interest.[318] This Commission is not bound by decisions in other jurisdictions and we note that other states have addressed the abandonment of plants with a wide variety of approaches, based on a wide variety of facts and law. In this case, the Commission did, in fact, discount the amount of the Trojan investment PGE was entitled to recover, but it did so at the outset of the UE 88 proceeding.

Certainly there are times where a longer amortization period may be appropriate. For example, decisions about the appropriate time period for amortization can be affected by the need to avoid sudden, steep increases in customer rates. Lengthy amortization periods can help prevent unnecessary rate shock by allowing customers to pay smaller amounts in rates over time.[319] In this specific instance, however, immediate amortization of the Trojan balance did not raise this concern. The risk of rate shock was eliminated by PGE's ability to exchange customer credits for the Trojan balance, and the net result of the Settlement was to *lower* customer rates. Given these circumstances, the Commission concluded in Order No. 02-227, as we conclude here, that the simultaneous exchange reasonably balanced the interests of PGE and its customers.

We adhere to our prior reasoning in the UM 989 order and believe that allowing the remaining Trojan balance to be amortized immediately was an appropriate exercise of our discretion.

c. FAS 109 Liability

URP contends the Commission should not have used the FAS 109 liability to partially offset credits owed to customers. URP argues that the FAS 109 liability was nothing but a "phantom" liability that allowed PGE to charge customers an extra $47.4 million for taxes it would never pay.

The FAS 109 liability arose from PGE's use of accelerated depreciation for its Trojan investment for tax purposes. Accelerated depreciation, authorized by the Internal Revenue Service and the Oregon Department of Revenue, allows a company to depreciate an asset in such a way that the amount of depreciation taken each year is higher during the earlier years of the asset's useful life.

[317] *See* ORS 757.105 - 757.140.
[318] *See* URP/200, Lazar/13-14. Witness Lazar drew this conclusion based on his personal experience with several proceedings involving the abandonment of nuclear facilities. Mr. Lazar provided no significant details about those proceedings, including whether the facilities at issue had ever been placed in service.
[319] CUB supported the Settlement, in part, because it would allow customers to avoid the risk of rate shock.

The use of accelerated depreciation produced tax benefits in early years that that would reverse over time. During the early years of Trojan's operation, accelerated depreciation initially lowered PGE's stand-alone tax expenses, which reduced the overall rates paid by customers. Having taken accelerated depreciation, however, PGE faced higher overall tax expenses in later years. The FAS 109 liability represented the value of the accelerated tax benefits previously passed through to customers that would have to be recovered in future rates to offset the higher tax expenses. At the date of the UM 989 Settlement, this liability totaled $47.4 million.

URP does not challenge the accounting treatment or calculation of the FAS 109 liability. Rather, it contends that imposing this liability on customers was in error because there is no evidence that PGE would *actually* have faced higher overall tax expense in future years. URP points out that while PGE was owned by Enron during 1997 to early 2006, Enron had offset PGE's tax liability with other losses and paid little or no income taxes on behalf of PGE. URP thus concludes that the UM 989 Settlement "required PGE ratepayers to pay an extra $47.4 million for alleged PGE income taxes [sic] costs, even though there existed no actual payments of those income taxes to the federal or state governments and thus no actual 'costs' to cover."[320]

URP also questions whether PGE customers actually benefited from the early years of accelerated depreciation. URP notes that, prior to Enron ownership, PGE had its own corporate structure and, with consolidated tax filings, may or may not have paid income taxes in the amounts reported to the Commission. For this reason, URP claims there is no proof that PGE's customers in the early years of Trojan's operation benefited from accelerated depreciation or other applicable tax treatment.

Next, URP claims that the Commission is compelled to modify the rate treatment of the FAS 109 liability because of SB 408, enacted by the 2005 legislature.[321] URP points out that SB 408 deems rates unjust and unreasonable if they include amounts for taxes that do not reflect the taxes that are actually paid to units of government.[322] Citing *Quaker State Oil Co. v. Taskinen*,[323] URP claims this new rate standard applies to this remand proceeding because it was pending during the effective date of the new legislation. Thus, according to URP, an order on remand allowing PGE to continue to charge customers for the FAS 109 liability would violate SB 408 by imposing rates that include the cost of income taxes that were not actually paid by the utility.

Finally, URP contends that the Commission's treatment of the FAS 109 liability preserves for PGE the functional equivalent of a return on investment in Trojan. While its argument is a bit unclear, URP apparently reasons that, had the Commission properly disallowed a return on Trojan investment in its initial UE 88 rate decision, PGE would have been required to write-off a large share of its remaining Trojan investment. That

[320] URP Phase III Opening Brief at 20.
[321] For a general discussion of SB 408 and its impact on ratemaking, *see In re Pacific Power & Light Co.*, Docket No. UE 170, Order No. 05-1050 at 13 (September 28, 2005). We also identify SB 408 as a legislatively created exception to the rule against retroactive ratemaking in our discussion of the rule. *See supra* p 39.
[322] ORS 757.267(1)(f).
[323] 147 Or App 245, 935 P2d 1229 (1997).

write-off would have reduced PGE's reported net income and, consequently, its nominal tax liability. Rather than allowing PGE's customers to benefit from such tax benefits, URP claims that the Commission's decision in UM 989 actually forces customers to pay even more in income taxes, thus providing a functional equivalent of a return on Trojan.

We find no error in our prior order on this issue and conclude, as we did in Order No. 02-227, that FAS 109 liability was properly considered part of PGE's return of its Trojan investment. At the outset, we reject URP's contention that we should replace the treatment of PGE's income taxes in Order No. 02-227 with a completely new rate treatment that complies with subsequently enacted SB 408. As the Phase III Ruling makes clear:

> This phase of the remand proceedings involves reconsideration of URP's challenges to the rates implementing the settlement reached in 2000. To determine whether the Commission's decisions approving the settlement and rejecting URP's challenges to the rates implementing the settlement were lawful and supported by substantial evidence, the Commission must look at the facts as they existed *at the time the rates went into effect*. In other words, it must look at the relevant facts as they existed on or before October 1, 2000.[324]

Thus, in this proceeding we must review Order No. 02-227 based on the law and facts that existed at the time the decisions were made, not based on a new regulatory paradigm that became effective more than five years later.

URP's reliance on *Quaker State* is misplaced because that case involved a different statutory scheme with different legislative intent than SB 408. In *Quaker State*, the legislature amended the workers' compensation law while the case was on appeal. Although the appealed decision was based on the prior law, the court concluded the new law applied because the appeal of that decision had not yet been finally resolved.[325] The court based its ruling on a prior case, *Volk v. America West Airlines*, which had analyzed the same new law and, based on a review of the text, context, and legislative history of the amendments, concluded that the legislature intended to make the new provisions applicable to all pending matters that had not been finally resolved by the courts at the time of the effective date of the amendments.[326] In this case, the legislature expressed no such intent that SB 408 be applied retroactively. In fact, the legislature expressly stated that the adjustment mechanism designed to true-up any differences between taxes collected and taxes paid applied only to taxes paid on or after January 1, 2006.[327] Accordingly, the legislature never intended SB 408 to be applied to tariffs submitted and approved years prior to the law's enactment.

[324] Phase III Ruling at 5 (emphasis in original).
[325] *Quaker State*, 147 Or App at 247.
[326] *Volk v. America West Airlines*, 135 Or App 565, 573, 899 P2d 746 (1995).
[327] Oregon Laws 2005, ch. 845, § 4(2).

We thus examine the FAS 109 liability issue using the criteria applicable to PGE's taxes calculated on a stand-alone basis—the methodology we used when the Settlement was approved. At all times relevant to this proceeding, the FAS 109 liability was a standard component in the Commission's cost of service ratemaking. In each rate case that included Trojan, PGE's stand-alone tax liability reflected the accelerated tax deductions to be either passed on to customers or recovered from customers. These accelerated tax deductions, or their reversals, were included in the Commission's calculations of PGE's stand-alone tax expense.

Accordingly, the key question in determining whether the FAS 109 asset was reasonable is not whether PGE's actual tax payments to the government would have been higher, but rather whether PGE's stand-alone tax expenses would have been higher.[328] The answer to that question is yes. Calculated on a stand-alone basis, PGE's tax liabilities reflected the effects of accelerated depreciation taken in the early years of Trojan's operation. As the accelerated tax deductions reversed in later years, the tax deductions associated with the investment were less than they otherwise would have been. Consequently, on a stand-alone basis, PGE's tax expenses in those later years would have been higher.

URP's allegation that customers might not have actually received the benefit from accelerated depreciation in the early years of Trojan's operation is similarly flawed. Again, PGE's tax expense was based on the stand-alone methodology. Because PGE's effective tax rate was lowered through accelerated depreciation, customers benefited from a reduction in PGE's stand-alone tax expense. The balance in the FAS 109 account reflected the amount of these benefits received, as well as the liability customers owed to PGE to cover increased future lax liability.

In sum, the FAS 109 asset accurately reflected the tax treatment of Trojan calculated on a stand-alone basis and was thus handled appropriately. As we noted in Order No. 02-227, this tax liability was not a phantom. Generally Accepted Accounting Principles (GAAP) required PGE to eliminate the Trojan-related FAS 109 asset when PGE removed the Trojan investment from its balance sheet, but this removal did not erase the related tax liability. The Settlement recommended, and Order No. 00-601 created, a new regulatory asset to reflect this outstanding tax liability due from customers. Moreover, as Staff points out, the FAS 109 liability would have been owed by customers with or without the decision in UM 989.

Finally, we reject URP's allegation that the Commission's treatment of the FAS 109 liability provides PGE the functional equivalent of a *return on* investment in Trojan. URP's argument is based on the faulty premise that ORS 757.355 requires the Commission to disallow a significant portion of PGE's remaining Trojan investment. For reasons discussed earlier in this order, URP's premise is incorrect and contrary to our statutory responsibilities.

[328] URP's claims are more properly viewed as an impermissible collateral attack on the Commission's prior use of the stand-alone methodology. We note that URP did not object to the use of that methodology in estimating PGE's income tax expense in UE 88.

d. NEIL Distributions

URP next argues that the Settlement improperly treated the proceeds and premium rebates from PGE's NEIL policy. PGE paid premiums to NEIL for insurance coverage during Trojan's operation. PGE recovered estimates of these premiums in customer rates. NEIL invested the premiums and paid occasional refunds to PGE reflecting both excess premium payments and gains from the invested premiums. At the time of the Settlement, the final NEIL refund distributions had not yet occurred, and the proper regulatory treatment of the final NEIL distributions was in dispute. The Settlement allocated future distributions from the NEIL insurance policy between customers (55 percent) and shareholders (45 percent).[329]

URP argues that the Commission's treatment of the NEIL distributions was improper from a ratemaking perspective. According to URP, the premiums that PGE paid to NEIL were included in the test years upon which PGE rates were based. URP argues that customers were "entitled" to 100 percent of the NEIL distributions because customers paid 100 percent of the NEIL premiums. URP therefore argues that the Settlement improperly took these distributions away from customers and gave them to PGE shareholders.[330]

URP seems to misunderstand how the Settlement treated the NEIL distributions. The Settlement did not disregard the NEIL distributions owed to customers, but in fact assumed, as URP does, that customers were entitled to receive 100 percent of the NEIL distributions.[331] The Settlement then treated 55 percent of those distributions in the same manner as it treated the other customer credits and used the estimated distributions to offset a portion of the remaining Trojan balance.

URP also claims that the Settlement failed to account for an "accumulated balance of the NEIL refunds that PGE had not returned to ratepayers during at least the 1993-1999 period."[332] URP contends that this amount, which it calculates to be approximately $8.7 million without interest, should have been part of the offset of the Trojan investment balance.

URP incorrectly believes that the NEIL premiums and distributions were subject to true-up. They were not. Rather, PGE's rates at the time reflected forecasts of the NEIL premiums and distributions. As with any expense of revenue used to set rates, the actual premiums and distributions could vary from the forecasted amounts used to set rates. Indeed, because of this fact, as well as regulatory lag, PGE customers may not have paid all of the NEIL premiums, and the allocation of 100 percent of the NEIL distributions to

[329] The amount of the final distribution was $33.3 million, $10.5 million higher than the parties expected. *See* Order No. 02-227 at 3.
[330] URP contends that the treatment of NEIL rebates in Order No. 02-227 has cost customers at least $15.4 million in rebates "diverted" to PGE's shareholders.
[331] PGE/7600, Tinker-Schue-Hager/11-12; Staff/500, Johnson/4.
[332] *See* Reply Brief of URP and CAPS (Phase III) at 12 (Aug 4, 2008).

customers was therefore a conservative allocation.[333] URP's argument about an "accumulated balance of NEIL refunds" misunderstands this basic principle of ratemaking.

We agree with the Commission's conclusion in Order No. 02-227 that requiring customers to give up a portion of the NEIL distributions in exchange for a Settlement that provided customers with an overall benefit was fair and reasonable.[334]

e. Treatment of CWIP

URP argues that the Commission improperly included $10.3 million in Construction-Work-In-Progress (CWIP) in the recoverable Trojan balance. URP contends this is inappropriate because CWIP may not be included in a utility's rate base.

We conclude, as the Commission did in Order No. 02-227, that CWIP was properly handled in the Settlement. The allowed Trojan investment balance reflected $4.2 million in Nuclear Fuel-CWIP and $6.1 million in Cancelled CWIP. Had Trojan continued to operate, these accounts would have been transferred to a plant-in-service account, and PGE would have been permitted to include them in its rate base. Because Trojan was retired, however, these accounts remained classified as CWIP.

URP's contention that we should exclude the $10.3 million from the allowed Trojan balance makes no sense. As we have discussed, the Commission used a net benefits test in Order No. 95-322 to determine what portion of the unamortized balance of the Trojan investment PGE would be allowed to recover.[335] The net benefits test compared the projected costs of Trojan's continued operation with the projects costs of the plant's closure plus the long-term costs of replacing the plant's output. The purpose of the test was to "identify the point at which customers are indifferent between the options of continued operation of Trojan and shutdown and construction or acquisition of replacement resources."[336] Using the net benefits test, the Commission concluded that the early closure of Trojan resulted in a negative net benefit of $26.8 million. The Commission therefore ordered a $26.8 million reduction of the Trojan balance. In other words, the net benefits test was used to help the Commission determine what portion of its unamortized balance of the Trojan investment PGE would be allowed to recover. The net benefits test ensured that the amount of recovery properly balanced the interests of both customers and the utility.

It was necessary to include the $10.3 million of CWIP in the Commission's net benefits test in order to obtain an accurate measure of the potential benefits of closure. As we explained in Order No. 02-227, the following calculation expresses the net benefits associated with closure of Trojan:

No Closure Alternative		Closure Alternative
$(X + Y)$	$>$	$(X + Z)$

[333] *See* Order No. 02-227 at 14-15.
[334] Order No. 02-227 at 14.
[335] Order No. 95-322 at 52.
[336] *Id.*

X represents the unamortized investment in Trojan, Y is the estimated allowable long-term costs of continued Trojan operation, and Z is replacement resource costs.[337] The $10.3 million in CWIP would have become plant-in-service in the future under the "no closure" alternative. Excluding the CWIP from the net benefits test would have understated the amount customers would have been required to pay if Trojan had remained in operation, skewing the results of the net benefits test.[338]

In short, the Commission's inclusion of $10.3 million in CWIP in the net benefits test allowed the Commission to accurately determine the amount of Trojan investment that would render closure of the plant neutral from the customers' perspective. The analysis allowed the Commission to appropriately balance the interests of both customers and PGE. Using CWIP in this fashion did not allow PGE to recover specific unauthorized assets, as URP would assert. Rather, the CWIP was a necessary component of a net benefits test that assisted the Commission in determining the total amount of Trojan investment PGE should be permitted to recover. As we explained in Order No 02-227, if CWIP had not been included in the net benefits test in UE 88, Order No. 95-322 would simply have directed PGE to write-off a different amount of its Trojan investment, in either case reaching the same conclusion about the appropriate amount of Trojan investment PGE should be permitted to recover.[339]

f. Due Process

In the list of issues to be addressed in Phase III, the ALJ included the question of whether the Commission denied URP due process in the earlier UM 989 proceeding. Despite the inclusion of this issue, URP now declines to identify for the Commission any instances in which it believes it was denied due process. It refers instead to its briefs filed in the Court of Appeals and asks the Commission to take official notice of those briefs.[340]

URP's broad references to briefs filed in another forum fail to identify with adequate specificity any issues for the Commission's consideration. Nevertheless, we have reviewed URP's appellate briefs and have identified no due process arguments.

Due process requires notice of a contemplated action and, if that action is contested, an opportunity to be heard.[341] In only the proceedings related to UM 989, URP has been given two hearings, three opportunities to present written testimony, two extended periods for discovery, oral argument before the Commission, and multiple briefs in which to raise the issues it deems important. URP has also been given extensive opportunities to present arguments and evidence in the proceedings related to DR 10 and UE 88. We find

[337] Order No. 02-227 at 16, citing Order No. 95-322 at 33.
[338] PGE argues, and the Commission concluded in Order No. 02-227, that ORS 757.355 bars *return on* CWIP, but not *return of* CWIP if the CWIP is for projects associated with a plant in service (as opposed to a new project.). In any case, even if URP were correct that CWIP should have been excluded from the Trojan balance, the CWIP number would have been much lower than $10.3 million in September 2000 due to amortization over time.
[339] Order No. 02-227 at 17.
[340] URP Phase III Opening Brief at 34.
[341] *See, e.g., Tupper v. Fairview Hospital & Training Center*, 276 Or 657, 662, 556 P2d 1340 (1976).

that URP has been given more than adequate opportunity to present its issues and arguments to the Commission for consideration.

4. *URP's Challenges to the Net Benefits Analyses*

URP raises numerous challenges to the two net benefits analyses used by PGE and Staff to further support the Settlement in UM 989. URP contends the analyses were flawed and illegal in various ways and thus do not provide an adequate legal basis to support the Commission's order in UM 989.

Before we address URP's challenges to the net benefits analyses, we offer a preliminary clarification. In light of the multiple goals of the Settlement, the net benefits analyses offered by the parties served a useful purpose—they offered the Commission a measure of the Settlement's financial impact on customers. They did not, however, serve as an independent means to establish the rates approved in UM 989. Thus, whether the UM 989 rates were just and reasonable was not wholly dependent on the net benefits analyses. Nonetheless, because the analyses were offered as evidence of customers' financial benefit, we address URP's challenges to each net benefits analysis.

a. Revenue Requirements Analysis

URP asserts that the Revenue Requirements Analysis was deficient because it measured the benefits of the Settlement against the rates approved for PGE in UE 100, which carried forward the Commission's erroneous conclusion in UE 88 to allow a return on the Trojan investment.[342] According to URP, because the UE 100 rates contained an unlawful element, the test improperly compared the benefits of the Settlement against an "unlawful" baseline.

We agree with URP that the Revenue Requirements Analysis is problematic. Although we disagree with URP that inclusion of a *return on* PGE's Trojan investment rendered the UE 100 rates "unlawful," in light of the decisions we have made in Phase I of these remand proceedings, the Revenue Requirements Analysis offered in support of the Settlement no longer provides a meaningful measure of the Settlement's immediate financial impact on customer rates. That test depended, at its core, on the assumption that UE 100 rates were the appropriate rates with which to compare the Settlement rates. Because we have reexamined and modified a multitude of ratemaking factors impacting PGE's prior rates in Phase I, however, the test no longer reflects the revenue requirement that would have been in place had the Commission properly excluded PGE's Trojan investment from PGE's rate base, thereby eliminating PGE's ability to earn a *return on* that investment.

[342] URP challenges the Revenue Requirements Analysis on numerous grounds, including URP's assertion that the analysis used inappropriate discount rates, treated the NEIL distributions inappropriately, and inflated the asserted benefits of the Settlement by assuming that UE 100 rates would be in place until January 2002. We disagree with these assertions, but find it unnecessary to discuss them further in light of our finding that the Revenue Requirements Analysis is no longer useful.

Moreover, contrary to URP's implied assertion, we cannot rehabilitate this analysis simply by isolating and removing the *return on* component from the UE 100 rates and establishing a new baseline for comparison. Instead, as we have done in Phase I, we would be required to reexamine the totality of the ratemaking elements at issue in UE 100 and strike an appropriate balance between the interests of PGE and its customers. Without developing a new record for UE 100, and perhaps the other intervening rate case (UE 93), we cannot make accurate assumptions about what PGE's revenue requirement from UE 100 might have been.[343] We decline to undertake such an exercise in this remand proceeding. Accordingly, we conclude that the Revenue Requirement Analysis is no longer useful to our analysis and do not consider it in determining whether the rates implementing the UM 989 Settlement were just and reasonable.

b. Asset-Based Analysis

URP argues that the Asset-Based Analysis was faulty because it incorporated the Settlement's rate treatment of the remaining Trojan balance, and thus was unreasonable for all of the same reasons that the Settlement was unreasonable. We have reviewed and rejected each one of URP's challenges to the rates implementing the settlement above.

URP also asserts that the Asset-Based Analysis did not use $180.5 million as its starting balance. To the contrary, the Asset-Based Analysis clearly used $180.5 million as its starting balance, as demonstrated both in PGE's and Staff's testimony and Order No. 02-227.[344]

Having rejected URP's contentions, we find no reason to disturb the Commission's finding in Order No. 02-227 that the Asset-Based Analysis demonstrated a financial net benefit to customers.

5. Proper Scope of Review and Conclusion

Before beginning our analysis, we must clarify the proper scope of our reconsideration of the order in UM 989. The procedural posture of our review on remand of the UM 989 order is unique. As noted above, the Court of Appeals in *Trojan II* did not disturb the Commission's decision that the rates implementing the UM 989 Settlement were just and reasonable, nor did it address any of the Commission's conclusions regarding URP's specific challenges to the Settlement. Rather, the Court of Appeals held that it could not review the particular arguments regarding the lawfulness of the rates given the Commission's reliance on an erroneous interpretation of the filed rate doctrine.

[343] The rates in UE 93 and UE 100 were established in valid, unchallenged Commission orders. As we noted in Phase I, altering final, unappealed agency decisions is contrary to long-standing precedent, and with good reason. URP chose not to participate in either UE 93 or UE 100. This allowed expensive and time-consuming evidentiary proceedings to continue with no assertion by any party that the end results might be unjust or unreasonable for the reasons URP asserts. In addition, we have no evidentiary record on which to recreate the details of the hypothetical alternative rate orders, and thus have an inadequate record on which to revise our findings in those cases. Consequently, we cannot compare the effect of the Settlement by reference to hypothetical alternatives.

[344] Staff-PGE/200, Busch-Tinker-Hager/5; Order No. 02-227 at 4.

We remedied this erroneous interpretation above, and responded to the *Trojan II* remand by adjusting the $180.5 million balance as of September 30, 2000. We then required PGE to issue refunds to compensate customers for the difference between what that Trojan balance would have been absent any error in UE 88 ($165.1 million), and the balance used in the UM 989 Settlement ($180.5 million). Now that we have restored that balance, our reconsideration of the UM 989 rate order is essentially identical to our review of the Settlement in the first instance. In other words, our review is similar to the review we would conduct upon receiving a request for reconsideration.

In reconsidering the UM 989 order, we must rely on facts that were known or could have been reasonably known at the time the order went into effect.[345] We believe any adjustment to the Settlement based on the consideration of subsequent actual events would violate the rule against retroactive ratemaking.[346]

With that clarification, we address whether the Settlement resulted in just and reasonable rates. We first adhere to and adopt our prior conclusion in UM 989 that the amount of the Trojan balance as of September 30, 2000, was $180.5 million. Pursuant to the TIRA mechanism adopted in UE 88, PGE reduced the Trojan unamortized balance to reflect the full amount of customer payments during the April 1995 through September 2000 period. At the end of that period, the Trojan balance had been reduced from PGE's after-tax authorized recovery amount of $340.2 million to $180.5 million. We have rejected all of URP's challenges to this $180.5 million figure. For reasons explained above, this amount accurately reflects PGE's remaining allowed Trojan balance and does not include the functional equivalent of a return on PGE's Trojan investment. Thus, as of September 30, 2000, PGE was entitled to recover from its customers $180.5 million.

We also adhere to and adopt our conclusion in UM 989 that the Settlement treated other regulatory assets and customer credits appropriately. Again, for reasons explained above, the FAS 109 liability and CWIP were properly treated as recoverable costs from customers. Moreover, the NEIL proceeds were properly considered as a customer benefit that could be used to offset a portion of the Trojan balance.

Having concluded that the Settlement properly identified the amount of regulatory assets and customer credits as they existed on PGE's books on September 30, 2000, the only remaining question is whether the decision to offset these assets and credits under the terms of the Settlement was a proper exercise of Commission authority. As we have noted, ratemaking involves an exercise of Commission discretion to "balance the interests of the utility investor and the customer." This requires the Commission to set rates within a reasonable range to protect these interests, keeping in mind established ratemaking principles. The ultimate question is whether the UM 989 settlement furthered the public interest and produced rates that were just and reasonable.

[345] *See supra* pp 53-54.

[346] *See* Phase III Ruling at 6. *See also supra* pp 36-42.

We conclude, as we did Order No. 02-227, that the record amply demonstrates that the Settlement was in the public interest and that the rates approved in UM 989 were just and reasonable. No party disputes the key benefit identified in the Settlement: the resolution of the controversy regarding the proper rate treatment of PGE's undepreciated Trojan investment. Although subsequent events demonstrate that this goal was not completely reached, the agreement to resolve the controversy was of great value to the Settling Parties at the time. By eliminating the controversial *return on* element from PGE's rates, the Settlement eliminated rate uncertainty, mooted a pending Supreme Court case, eliminated the rate shock that would have resulted from allowing PGE to recover its Trojan investment immediately, and spared the Settling Parties from conducting a campaign for or against Measure 90. As CUB aptly concluded, the Settlement "implement[ed] a reasonable settlement of a set of controversial issues concerning the rate treatment of the retired Trojan plant which had been causing significant uncertainty and potential liabilities for the various parties."[347]

In attempting to eliminate these outstanding uncertainties and liabilities, the Settlement did not impose on customers any new costs or liabilities. To the contrary, it allowed PGE to collect in rates only amounts that the Commission had already concluded were in the public interest. The $180.5 million Trojan investment at issue in the Settlement represented the remaining portion of the Trojan balance deemed recoverable by the Commission in UE 88, and affirmed by the Court of Appeals in *Trojan I*. This conclusion was based on numerous ratemaking considerations, including that the closure of Trojan was in the public interest.[348]

Thus, at the time of the Settlement, the question was not *whether* PGE could recover the remaining $180.5 million but *how* PGE should recover that balance. There were a number of ways the Commission could have allowed PGE to recover its remaining Trojan balance. The Commission had wide discretion in choosing the appropriate method for recovery, and no single method was "correct." First, we could have rejected the Settlement and allowed existing rates to remain in place. This option would have continued the error of the UE 88 rate order, however, and would have required the Settling Parties' continued participation in ongoing litigation and Measure 90 campaigns. Moreover, it would have eliminated an immediate rate reduction. Consequently, this option was not in the public interest. Second, the Commission theoretically could have removed the contested *return on* element from PGE's rates by allowing PGE to recover the remaining $180.5 million balance over time without interest, as URP suggests. We have rejected this solution because it would result in a write-down of PGE's allowed Trojan investment and undermine our conclusion that PGE's recovery of its allowed Trojan investment creates an appropriate incentive for utilities to invest in needed generation resources. Third, we could have allowed PGE to recover the $180.5 million over time with interest to compensate PGE for the time value of money. Finally, we could have allowed PGE to recover its Trojan investment immediately, assuming we could also protect customers from rate shock.

[347] CUB's Opening Brief at 1, Docket UM 989 (August 8, 2001).
[348] Order No. 95-322 at 29.

The Settlement allowed PGE to recover its remaining Trojan balance in a way that reasonably balanced the interests of PGE and its customers. By offsetting PGE's remaining $180.5 million Trojan balance with existing customer credits, the Settlement allowed PGE to recover the investment to which it was entitled without the attendant problem of rate shock that often accompanies quick recovery of large investments. In fact, the Settlement produced an immediate rate decrease to customers. We note that customer rates would have decreased even under the alterative rate scenario we developed in Phase I.

In concluding that the Settlement produced just and reasonable rates, we acknowledge that the Revenue Requirements Analysis no longer provides a valid measure of the direct financial benefits of the Settlement to customers because it used rates that included a *return on* PGE's undepreciated Trojan investment as a baseline for comparison. That deficiency invalidates only the net benefits analysis, however, not the reasonableness of UM 989 rates. The net benefits analyses in UM 989 were offered only as a secondary measure of whether the Settlement was in the public interest; they did not serve as an independent means of establishing the justness and reasonableness of the rates. We have described in detail the varied benefits of the Settlement and find that they continue to support the conclusion that the rates established in UM 989 were just and reasonable.

We thus reject URP's broad contention that the Settlement was economically irrational and unjustified. Given the options facing the Commission and the Settling Parties at the time, the Settlement provided a reasonable means for structuring the recovery of PGE's remaining Trojan investment. In conclusion, we find no basis to disturb our prior determination that the Settlement was in the public interest and that the rates approved in UM 989 were just and reasonable.

D. Refund Mechanism

Having concluded above that customers should receive a $33.1 million refund, we must now address the appropriate procedure to provide that refund. Given the length of time that has passed since the rates were in effect, the refund mechanism should maximize the ability of all affected customers to obtain relief.

We must first determine which customers should be eligible for a refund. These customers should be those that received and paid for service during the time period the UM 989 rates were in effect. As explained above, the rates implementing the settlement in UM 989 were effective on October 1, 2000. The end date is less straightforward. The UM 989 rates remained in effect until new rates were effective, coincidentally, on October 1, 2001, following the decision in the UE 115 rate proceeding. Although the UM 989 rates were effectively terminated upon the effective date of the new rates, two items had a rate impact after the October 1, 2001 date. First, the recovery of the FAS 109 liability, which was amortized over a five-year period as part of the UM 989 Settlement, continued in rates for four more years. Second, the UM 989 Settlement created a regulatory liability of $2.5 million that was being returned to customers. That amount was fully refunded to customers over a 15-month period beginning October 1, 2001.

Given this history, we identify two possible groups of customers eligible for a refund: (1) customers from October 1, 2000 to September 30, 2001 (the one-year group); or (2) customers from October 1, 2000 to September 30, 2005 (the five-year group). Selecting the one-year group would limit the refund opportunity to those customers who were most affected by the UM 989 Settlement. Selecting the five-year group would expand the refund opportunity to any customer possibly affected by the UM 989 Settlement.

Of those two choices, we adopt the one-year group. Although the five-year group is more inclusive, we believe that the one-year group better represents the customers most affected by the UM 989 Settlement. While other customers were also affected, the extent of the impact was substantially less and, consequently, not comparable. Therefore, we conclude that the one-year group—any PGE customer who received service at any time during the one-year period from October 1, 2000, and September 30, 2001—is eligible for a refund.

We next turn to the mechanics of distributing the refund. The refund amount for each class of customers shall equal the total refund amount multiplied by the ratio of that class's share of revenues to total PGE retail base revenues as set forth in the UM 989 Settlement. Eligible customers within each class may elect to receive the refund by submitting a claim to PGE. Those percentages, shown in PGE filing Advice No. 00-13 filed on August 31, 2000, are set forth in the table below.

Class of Customers	Percent of Total Revenues
Residential	45.18%
General Service	34.87%
Large General Service	6.23%
Industrial	12.66%
Street Lighting	1.06%
Total	**100.00%**

PGE must take several steps to broadly announce the ability of eligible customers to seek a refund. First, within 60 days from the date of this order, PGE must notify by mail all of its customers of record during the October 1, 2000, to September 30, 2001 period about the refund and provide information about how to file a claim. PGE may request to notify current customers who received service during this period through alternative means, such as a billing insert.

To address the CAPs' concerns about whether PGE's records alone are adequate to identify and locate all eligible customers,[349] PGE will also be required to advertise in newspapers throughout Oregon about the opportunity for customers to submit a claim, the eligibility criteria, and how to file a claim. PGE will run the quarter-page advertisements once per week for four successive weeks in the following newspapers to ensure broad coverage:

[349] CAPs' Motion to Reinstate Schedule of OPUC Order No. 07-157 at 3 (Jan 15, 2008).

Albany: Albany Democrat-Herald
Astoria: The Daily Astorian
Baker City: The Baker City Herald
Bend: The Bulletin
Corvallis: Corvallis Gazette-Times
Eugene: The Register-Guard
Grants Pass: Grants Pass Daily Courier
Klamath Falls: Herald and News
Medford: The Mail Tribune
Pendleton: The East Oregonian
Portland: The Oregonian; Portland Tribune; Portland Business Journal
Roseburg: The News-Review
Salem: Statesman Journal

If any questions arise from PGE's records regarding whether a customer received service during the October 1, 2000, to September 30, 2001 period, a customer may establish eligibility by producing proof of residence in PGE's service territory during that time period. Proof of residence includes, but is not limited to, a rental or lease agreement, mortgage document, checking or savings account statement, vehicle registration card, property tax record, voter registration card, or utility bill.

Customers may submit a refund claim for a period of six months after the date of this order. PGE will verify each claim by determining the customer's eligibility. If such a claim is verified, PGE will retrieve the billing records for that customer for the relevant time period. Once the six-month period has passed and PGE has verified all timely claims, PGE will determine the customer refund as follows: For all verified claims, PGE will sum the kWhs consumed by each class of customer over the October 1, 2000, to September 30, 2001 time period. Each claimant within that class will get a refund equal to the class's total refund amount, multiplied by the claimant's specific kWh usage and divided by the total kWh usage for all claimants. PGE will distribute the refund in one of two ways. If the claimant is a current PGE customer, PGE may apply the refund as a credit to the claimant's bill or may mail the claimant a check. If the claimant is a former customer, PGE must mail the claimant a check.

We direct Staff to convene a workshop with PGE and other parties to develop language for the customer notice, as well as the form to be used to submit a claim. We also urge the parties to consider and recommend any changes to these procedures to minimize the burdens placed on eligible customers seeking a refund.

Through a separate filing, PGE may request a deferral of incremental administrative costs associated with this refund mechanism for future recovery in rates. PGE must make available for Commission review its costs of administering the mechanism and its efforts to keep administrative costs as low as possible.

VI. ORDER

IT IS ORDERED that:

1. The rates for electric service provided by Portland General Electric Company from April 1, 1995, through September 30, 2000, were just and reasonable.

2. The rates for electric service provided by Portland General Electric Company from October 1, 2000, through September 30, 2001, were just and reasonable.

3. Portland General Electric Company must, pursuant to the mechanism described in this order, refund $33.1 million to customers who received service from October 1, 2000, to September 30, 2001. The refund amount must continue to earn interest at 9.6 percent, compounded monthly, from October 1, 2008, until the time that the refunds are issued.

4. Portland General Electric Company may seek recovery of the incremental administrative costs of implementing the refund mechanism by seeking a deferral of costs through an application filed pursuant to ORS 757.259.

5. Utility Reform Project's and the Class Action Plaintiffs' motion to exclude issues filed on September 12, 2008, is denied.

6. To the extent necessary to be consistent with this order, Order Nos. 95-322 and 02-227 are amended.

Made, entered, and effective SEP 3 0 2008.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

PUBLIC UTILITY COMMISSION OF OREGON

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860 013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.