BEFORE THE OREGON PUBLIC UTILITIES COMMISSION

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)

Portland General Electric Company's Application for an Accounting Order and for Order Approving Tariff Sheets Implementing Rate Reduction. (UM 989)

OPENING COMMENTS OF THE CLASS ACTION PLAINTIFFS (GEARHART, KAFOURY, MORGAN) ON THE PROFFERED QUESTION REGARDING REMEDIES

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I. STATUS.

By order dated November 3, 2003, the Marion County Circuit Court remanded OPUC Order No. 93-1117[1] and OPUC Order No. 95-322 to the OPUC (Marion County Circuit Court Nos. 95C 10372, 95C 10417, 95C 11300, and 95C 12542) [hereinafter the "DR 10/UE 88 Remand Order"]. The order of remand required the OPUC to conduct "further proceedings consistent with the opinions and orders of the Court of Appeals." That is the only order under consideration in Phase I of this proceeding, the part of the remand docket underlying the Class Action period at issue in ***Dreyer v. Portland General Electric Company***, 341 Or 262 (2006) [hereinafter ***Dreyer***], and the only order at issue in the question presented for briefing.

QUESTION PRESENTED:

> What, if any, remedy can the Commission determine and provide to PGE ratepayers, through rate reductions or refunds for the amounts that PGE collected in violation of ORS 757.355 between April 1995 and October 2000?

The ruling of June 6, 2007, adopting this question also noted that to answer said question, the parties may address:

1. Fundamental nature of ratemaking;

2. Scope of the legislature's delegated authority to the Commission;

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1. On August 9, 1993, the Oregon Public Utility Commission issued Order No. 93-1117 [DR-10], 145 PUR4th 113 (1993), an appealable declaratory ruling on PGE's request for a determination of the application of ORS 757.355 to treatment of Trojan Nuclear plant costs. After a long procedural history, Order No. 93-1117 was reversed and remanded in ***Citizens' Utility Bd. of Oregon v. Public Utility Com'n of Oregon***, 154 Or App 702, 962 P2d 744 (1998), *pet rev dis'd*, 355 Or 591, 158 P3d 822 (November 19, 2002) [hereinafter ***CUB/URP v. OPUC***].

3. General ratemaking principles, including the:

   a. rule against retroactive ratemaking;

   b. filed rate doctrine;

   c. prohibition against single issue ratemaking;

4. What constitutes just and reasonable rates; and,

5. Cases relating to cost recovery issues in nuclear plant cases.

II. SUMMARY OF CLASS ACTION PLAINTIFFS' POSITION.

The Gearhart, Kafoury and Morgan, collectively, the "Class Action Plaintiffs" (CAPs) believe that the OPUC lacks the power (1) to reopen factual determinations made in prior rate cases or (2) to order reparations[2] for either all or individual ratepayers who were overcharged under the UE 88 order, either by means of refunds[3] or by means of reducing future rates in the remand of UE 88.[4] In light of ***Dreyer***, we believe that the statutory scheme regarding ratepayer remedies is clarified: The OPUC plays no role in remedies for past illegal overcharges and cannot consider past overcollection is setting future rates (rule against retroactive ratemaking), nor redetermine rates for past time periods (filed rate doctrine).

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2. Reparations include "redress of an injury: amends for a wrong inflicted." BLACK'S LAW DICTIONARY (7TH ED).

3. A "refund" could take the form of a check in the mail or credit on the bill of those overcharged customers who still remain customers of the utility at the time of the refund.

4. Future rate reductions compensate only that portion of ratepayers who were PGE customers during all of the overcharge period and who remain ratepayers during the entire "rate reduction" period of time. Future rate cuts would not compensate customers who have since left the PGE system but would provide a "windfall" to new ratepayers who did not pay the unlawful rates during the period UE 88 rates were in effect Thus, future rate reductions bear only a coincidental relationship to individual damages.

OPUC ratemaking is a legislative power, and the Commission is charged with the duty to exercise this power through formal quasi-judicial (contested case) processes, in distinction to the more informal fact-finding attendant to legislative functions.[5] The Legislature has also granted limited jurisdiction to courts to review the OPUC's quasi-judicial decision-making and, upon such review under the statutes then-extant, ORS 756.580 *et seq.*, to "modify, vacate or set aside such findings of fact, conclusions of law or order" adopted by the Commission. ORS 756.580(1). The statutes also authorize the courts to "affirm, modify, reverse or remand the order." ORS 756.598(1). In the current case, the courts remanded the orders pertaining to the 5.5-year period (OPUC Order No. 93-1117 and OPUC Order No. 95-322), without specific instructions.[6]

The extent of the judicial power to order specific modifications or to order the OPUC to undertake action under the review statutes is not presented in Phase I, as the remand ordered only action consistent with the court mandates, which instructed OPUC on the law (reversing Order No. 93-1117 and OPUC Order No. 95-322) but did not order redetermination of the rates set in UE 88. Whatever the validity of the remand instructions in UM 989, or validity of other potential remand instructions, the Commission cannot reopen and redetermine rates in UE 88.[7]

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5. It also adjudicates specific disputes in a quasi-judicial manner.

6. Under the current statute, when a reviewing court determines that an OPUC order has "erroneously interpreted a provision of law," it may either "set aside or modify the order" or "remand to the agency for further action under a correct interpretation of the provision of law." ORS 183.484(5)(a)(A) and (B). This statute is inapplicable to the DR 10, UE 88, and UM 989 remands, because it applies only to OPUC cases after January 1, 2006.

7. Under the same separation of powers mandate discussed in the memorandum, historically, courts
(continued...)

ORS 757.355 prohibits utility profit (return on investment) on a plant not providing service.[8] OPUC cannot take into account those past profits earned on Trojan investment in past rate periods in determining future rates, nor can it indirectly allow those prohibited profits by any device which retroactively recharacterizes the prohibited return on Trojan investment in these proceedings. A regulator cannot do indirectly what it is proscribed from doing directly. ***Towns of Concord, Norwood, & Wellesley, Mass. v. FERC,*** 293 USApp DC 374, 378, 955 F2d 67, 71 (1992); ***Coos County v. State of Oregon***, 303 Or 173, 183, 734 P2d 1348 (1987). The prohibition contained in ORS 757.355 is an instruction to the commission and the utility what is an illegitimate profit. This prohibition is very broad, extending to the use of "any device" that allows such prohibited charges, whether "directly or indirectly." One "device" for allowing a utility to impose the prohibited charges on

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7.(...continued)
cannot redetermine rates, order refunds, or order the Commission to do so:

> Here the court determines that the respondent shall perform for the relator a specific service for three months for a specific sum of money. This in effect was a determination by the court that $3 per month was a reasonable compensation for the service required to be rendered by the respondent, and a fixing of the compensation for such service at that price for the future.
>
> We think the history of the legislation of the entire country shows that the power to determine what compensation public service corporations may demand for their services is a legislative function and not a judicial one.

Nebraska Tel. Co. v. State, 55 Neb 627, 76 NW 171, 173, 45 LRA 113 (1898).

8. The version of ORS 757.355 in effect during the 1995-2000 period read:

> No public utility shall, directly or indirectly, by any device, charge, demand, collect or receive from any customer rates which are derived from a rate base which includes within it any construction, building installation or real or personal property not presently used for providing utility service.

ratepayers is to recharacterize Trojan return on investment identified in OPUC Order No. 95-322 as now being something else.

1. Ratesetting is legislative.

The primary constitutional component of what is called the "rule against retroactive ratemaking" arises from the delegation of legislative power: ratesetting is a legislative function, and commissions are statutory creations and cannot exercise delegated legislative power retroactively, unless specifically authorized.

2. The Commission cannot redetermine past rates.

Distinct due process considerations adhere to the quasi-judicial fact-finding role of the OPUC. These considerations prevent the OPUC from redetermining rates or recreating a factual record for past time periods, particularly when the factual record has closed on issues not appealed. "[W]here an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts will not hesitate to apply *res judicata* principles." ***Philadelphia Electric Co. v. Borough of Lansdale,*** 283 PaSuper 378, 392, 424 A2d 514, 521 (1981). Furthermore, as to ratecases, claim preclusion applies to long-adjudicated facts. ***Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Com'n***, 721 FSupp 710, 716 (MD Pa 1989), *affirmed* 899 F2d 1217 (1990) (deciding Pennsylvania law to apply to federal suit to redetermine rates, which state commission had declined to do).

3. The Commission does not have quasi-judicial power to determine reparations.

Oregon statutes once granted the Commission limited authority to order reparations to ratepayers, but that authority has been repealed. It applied only for a claim for "reparations" by customers of a railroad. ***Oregon-Washington Railroad & Navigation Co. v. McColloch***, 153 Or 32, 49, 55 P2d 1133 (1936). "No such provision is found in the public utility statutes." ***McPherson v. Pacific Power & Light Co***., 207 Or 433, 449, 452, 296 P2d 932, 940, 942 (1956). None exists today.

OPUC Hearings officers have relied upon ***McPherson*** for the proposition that it cannot order refunds. OPUC Order No. 03-401 (July 9, 2003) (UCB 13). The Commission has recently decided that it does not have the power to award reparations or compensation to the competitive local exchange carriers (CLECs) who had paid rates to Qwest Corporation which had been in violation of Commission rules and thus invalid. The Commission had earlier ruled that Qwest had engaged in numerous major violations of OAR 860-016-0020(3).

> Specifically, the law that put into place the unjust discrimination statutes, see Or L 1987, ch 447, §§ 46, 49, also purposely stated the remedies for violations of those statutes, see id. at § 52. For this reason, the Commission does not have the jurisdiction to award the relief that Complainants seek for Qwest's alleged violations of ORS 759.260 and 759.275. Complainants' claims for damages based on violations of ORS 759.260 and 759.275 are dismissed.

OPUC Order No. 06-230 (May 11, 2006), p. 3 (UM 1232: Oregon AT&T Communications v. Qwest Corp.)

It undermines the perception of impartiality of the regulator when the rule against retroactive ratemaking and the filed rate doctrine have been applied consistently in ruling against OPUC-ordered refunds sought by advocacy groups (UCB 13) and other utilities (UM

1232), and have consistently been advocated to the courts as barring Commission action, yet is only being reconsidered only when it become clear that CAPs have another, more complete, remedy available to them.

4. <u>The Commission does not have quasi-judicial power to require effective utility action to accomplish reparations</u>.

There are a million or more PGE ratepayers who paid illegal charges in the 1995-2000 period at issue who are no longer PGE customers. Tens of thousands of PGE customers leave the PGE service area each month. Former customers are members of the class certified by Judge Lipscomb in *Dreyer v. Portland General Electric Company*, Marion County Case No. 03 C10639. (Morgan is class representative of this cohort). The OPUC does not have express authority to require the utility to take all the steps necessary to accomplish due process protection of their rights. Only a court acting under class action rules (ORCP 32) can accomplish justice and equity under the circumstances.

Dreyer confirms that, even though the agency does not have power to redetermine past rates or to order the return of amounts to each individual ratepayer that paid charges which have been found unlawful in UE 88, Oregon courts can hear damage claims by overcharged ratepayers against the utility based on the utility's unlawful conduct (ORS 756.185(1)) and payment of bills which were higher than lawfully allowed. ORS 756.200 (preserving statutory and common law remedies). Conversely, the utility has common law rights of contract and restitutionary remedies, and courts also have original jurisdiction over a claim against the agency that rates are so low as to be confiscatory and therefore unconstitutional. *See,* ***e.g., Portland Ry., Light & Power Co. v. City of Portland***, 200 F 890 (D Or 1912).

These judicial and legislative powers are distinguished in Oregon's separation of powers clause, Oregon Constitution, Article III, § 1:

> The powers of the Government shall be divided into three separate departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

Thus, as a legislative body OPUC does not have the authority to remove or impair settled rights or settled facts retroactively. Acting as a fact-finder under its quasi-judicial duties, OPUC cannot ignore principles of repose or redetermine rates already established and paid under the "regulatory contract" without depriving the utility (or the consumer if the rates were originally too low) of due process.

5. Redetermining past rates contravenes both the rule against retroactive ratemaking and the filed rate doctrine.

The CAPs also contend that the Commission has thus far allowed this proceeding to contemplate an impermissible redetermination of UE 88 rates by (apparently) concluding that it has the authority, upon remand from the courts of successful challenges to prior OPUC orders, to recognize for ratemaking purpose new costs which were not included in the original OPUC orders. This redetermination of past rates contravenes the rule against retroactive ratemaking.

The rule against retroactive ratemaking requires express legislative exceptions, and such a legislative grant to include return of undepreciated assets in future rates is included in ORS 757.140(2). However, the Commission did not follow this narrow and express legislative grant of authority but, instead, also allowed return on undepreciated investment in plant no providing service, leading to reversal of Order No. 93-1117 and OPUC Order No. 95-322.

CUB/URP v. OPUC, 154 OrApp 708, 713 (1998). It is ironic then, that the Commission, having engaged in impermissible retroactive ratemaking concerning past charges related to Trojan, is now engaged in an even more retroactive project in Phase I, seeking to redetermine a panoply of previously conclusive facts established in the UE 88 proceeding.

The OPUC has allowed in the record of the remand hearing thus far (Phase I) entirely new facts and issues, never before raised, and arguments that the Commission should change to its rulings on numerous issues that were litigated to conclusion in OPUC Order No. 95-322 and which were never appealed by any party. Accordingly, under the facts of the instant case, the Commission's role has been concluded, although of course, it must now follow the law as announced in the court proceedings and correctly apply ORS 757.355 prospectively. It is not within the Commission's authority to (1) hear new issues regarding costs that were not included in rates in UE 88 or (2) reopen issues upon which it previously ruled in OPUC Order No. 95-322--the justness or reasonableness of the rates as a whole-- when those rulings were not appealed by any party.

III. OPUC HAS A RULE ON RETROACTIVE RATEMAKING, BASED ON THE LAW.

A "rule" means any agency directive, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency. ***Burke v. Children's Services Division***, 26 OrApp 145, 552 P2d 592 (1976) [hereinafter "***Burke v. CSD I***"]; see ORS 183.310(7)(a).

A. TO THE EXTENT OPUC HAS DISCRETION TO INTERPRET THE LAW, ITS "RULE" CANNOT BE CHANGED WITHOUT CONFORMING TO OREGON ADMINISTRATIVE PROCEDURES ACT.

The basic rule in Oregon against retroactive ratemaking has been known decades:

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

Valley & Siletz Railroad Co. v. Flagg, 195 Or 683, 715, 247 P2d 639 (1952). The formulation of the rule the OPUC has expressly followed for 20 years is set out in an opinion letter from the Attorney General to then-Commissioner, Charles Davis, who defined retroactive ratemaking as:

> "the setting of rates which permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate-of-return with the rate actually established." ***State ex rel Util. Consumers Council v. P.S.C***., 585 SW2d 41, 59 (Mo 1979) (hereafter ***Consumers Council***)* * * .

Another court stated the rule slightly differently:

> "Technically, retroactive rate making occurs when an additional charge is made for past use of utility service, or the utility is required to refund revenues collected, pursuant to then lawfully established rates, for such past use." * * *
>
> "* * * Prospective rate making to recover unexpected past expense, or to refund expected past expense which did not materialize, is as improper as is retroactive rate making.'

State ex rel Utilities Com'n. v. Edmisten, 291 NC 451, 232 SE2d 184, 194-95 (1977).

Or OpAttyGen OP-6076 (*Davis*), 1987 WL 278316 (March 18, 1987). This rule necessarily precludes applying past profits or losses in future rates. The Attorney General also opined that a "change in past obligations may violate the impairment of contracts clause of Article I,

section 10 of the United States Constitution." See also Or OpAttyGen OP-6107 (*Colburn*), 1987 WL 278333 (April 20, 1987). Here, the charges for return on investment in Trojan are past profits. As such, they cannot be taken into consideration or redetermined.

B. THE RULE HAS BEEN APPLIED AND RELIED UPON.

1. OPUC HAS APPLIED THIS RULE CONSISTENTLY.

The OPUC has applied the rule as announced consistently to deny utility applications for rates. See, e.g., Docket No. UT 135, Order No. 97-180 (denying US West authority to use am "Interconnection Cost Adjustment Mechanism")[9] and Order No. 97-366 (order on reconsideration). The Commission, hearings officers, and staff have all referred to the rule repeatedly in a variety of settings.

> The trail is well-worn on our inability to grant refunds or set rates retroactively based on claims that the tariff rates were calculate on an improper basis. There is no ambiguity. ORS 757.255, which embodies the filed rate doctrine in Oregon provides [quoting text of ORS 757.225].
>
> The filed rate doctrine derives from the rule against retroactive ratemaking.

OPUC Order No. 03-401 (July 9, 2003) (UCB 13).

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9. The principal issue addressed by the parties is whether the proposed cost adjustment mechanism violates the rule against retroactive ratemaking. According to the Oregon Attorney General, retroactive ratemaking is:

> (T)he setting of rates which permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate-of-return with the rate actually established. (Citation omitted.)

Letter of Advice, March 18, 1987, (OP-6076).

OPUC Order No. 97-180, p. 1.

When a rule or interpretation has been known for decades, has been applied, and the legislature has not intervened, the doctrine of contemporaneous interpretation requires that the long-established interpretation continue and prevail. See 2 SUTHERLAND, STATUTORY CONSTRUCTION, pp 514-515, § 5104 (3d ed). The doctrine applies where a contemporaneous interpretation has continued for a considerable length of time. *Id*. at 520, 522. The doctrine has long been the rule in Oregon. ***Union Pac. R. R. Co. v. Anderson***, 167 Or 687, 709, 120 P2d 578 (1941):

> Here the construction of the law, or perhaps it might be more accurate to say the application of a provision of the law to a particular state of facts, has been by those who are governed by its provisions in a special and immediate way, and on the part of the defendants there has been acquiescence for this period in the position assumed by the plaintiff.

In ***Butler v. State Indus. Acc. Commission*****,** 212 Or 330, 340, 318 P2d 303, 308 (1957), the Court rejected a novel interpretation of workers compensation coverage, because the prevailing interpretation had been unchallenged for many years without legislative intervention:

> This has been the interpretation for some 40 years, and that it has been put into effect in numerous school districts. At recurring sessions of the legislature the Workmen's Compensation Law has been amended and revised, but this practice has not been disturbed. On a question as close as this, upon the decision of which very grave public consequences may depend, we think that the contemporaneous, administrative interpretation over a long period of time should turn the scale. ***City of Portland v. Duntley***, 185 Or 365, 385, 203 P2d 640; ***Union Pac. R. R. Co. v. Anderson***, 167 Or 687, 709, 120 P2d 578; ***Kelly v. Multnomah County***, 18 Or 356, 359, 22 P 1110; 2 SUTHERLAND, STATUTORY CONSTRUCTION (3d ed.) 525-526.

Accord, ***Standard Ins. Co. v. State Tax Commission***, 230 Or 461, 469, 370 P2d 608, 611-612 (1962) (tax code interpretation went "unchallenged and unquestioned for more than twenty years by defendant").

In the present case, the Legislature has affirmatively acknowledged the rule against retroactive ratemaking, by occasionally granting express authority to the OPUC to act in ways otherwise proscribed by the general rule. See discussion of ORS 757.215(4) and (5), *post*.

2. THE EXISTING RULE HAS BEEN RELIED UPON BY PARTIES TO THIS PROCEEDING IN OTHER PENDING CASES.

The OPUC currently contends to the Court of Appeals in the UM 989 appeal that the rule against retroactive ratemaking precludes any refund of the unlawful charges:

> There is no statutory authority by which the PUC could have awarded a refund of rates already paid by customers. ORS 757.225 specifically provides that the rates established by the PUC are the lawful rates until they are changed by later PUC action. The PUC construes this provision to prohibit retroactive ratemaking.

OPUC Appellant's Brief (September 9, 2004), CA No. A123750, p. 17. Further:

> Thus, the trial and appellate courts can suspend the collection of unlawful charges during the pendency of an appeal. But neither the courts nor the commission can order a refund except where, by statute, a refund or retrospective calculation is specifically authorized by statute. The trial court erred in ordering the commission to engage in retroactive ratemaking by ordering reparations for the collection of lawful rates. Its order should therefore be reversed.

Id. p. 22.

Similarly, PGE is on record arguing to the Court of Appeals in the UM 989 appeal:

> Even if the 1998 decision [***CUB/URP v. OPUC***, 154 OrApp 708 (1998)] was right, the [circuit] court could not order the rates collected pursuant to Order 95-322 [the overturned order] to be refunded.

* * *

> But the PUC cannot change past rates. The legislature did not give it the power to readjust retroactively the sales and purchases of electricity that have already happened. The PUC cannot make customers pay extra for the electricity they have already bought and used. Neither can it order refunds to them. Because the system that the legislature established is not retroactive, the rates in effect for any sale are always known, definite, and simple. The price of electricity is therefore free of the uncertainty and ambiguity that would attend a decision by the PUC or a court to retroactively readjust the price in millions of transactions long afterwards.
>
> According to the Supreme Court, the PUC cannot order a refund without explicit statutory authority to do so, for its implied authority under its general powers is not enough. Although the legislature *has* granted authority to the PUC to calculate refunds in certain narrow and technical circumstances, it has not done so in the circumstances of this case. * * *
>
> * * * A court has no authority to improve on the statutes by creating a new remedy that the legislature did not provide.

PGE Intervenor-Appellant's Brief (September 24, 2004), CA No. A123750, pp. 6-7. PGE continued (p. 9):

> The trial court also ordered the PUC to lower future rates, as an alternative to implementing a refund. The trial court had no authority to order that either. Rate-making is an entirely legislative function, and the court invaded that function by giving the PUC orders on how to make rates. Reducing future rates is also just another way of ordering a refund, and is therefore subject to the same objections as refunds.

C. REQUISITE NOTICE REQUIREMENTS HAVE NOT BEEN MET.

Since a rule on retroactive ratemaking already exists, the OPUC must undertake rulemaking to accomplish a change in the understood and applied rule against retroactive ratemaking. Unless a rule is promulgated according to the rulemaking statute,[10] and filed

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10. The purpose of a notice requirement for rulemaking is twofold: it serves to inform (continued...)

with the Secretary of State, it is not effective, whatever policies the agency may wish to advance. ***Burke v. CSD I***, *supra*. A rule "remains an effective statement of existing practice or policy, binding on the agency, until repealed according to procedures required by the Administrative Procedures Act." ***Burke v. Children's Services Division***, 288 Or 533, 538, 607 P2d 141, 144 (1980) [hereinafter ***Burke v. CSD II***]. A substantive change in the meaning of a rule through "policy" changes is the kind of administrative action which is "rulemaking," regardless of what the agency calls it. ***Fitzgerald v. Oregon Board of Optometry***, 75 OrApp 390, 392, 760 P2d 586 (1985) (examination grading criteria is a "rule").

As noted, a "rule" means any agency pronouncement in any format which implements, interprets or prescribes law or policy for general application. ***National Ass'n of Psychiatric Treatment Centers for Children v. Weinberger***, *supra*; ***Burke I,*** *supra*. For example, in ***McCleery v. State By and Through Oregon Bd. of Chiropractic Examiners***, 132 OrApp 14, 887 P2d 390 (1994), the Board issued what it called a "policy statement" forbidding chiropractors to use certain devices. This "policy statement" was found to be a rule but invalid due to the Board's failure to comply with statutory provisions for rulemaking. The

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10.(...continued)

> the interested public about intended agency action, and it triggers the opportunity for an agency to receive the benefit of the thinking of the public on the matters being considered.

Bassett v. State Fish and Wildlife Commission, 27 OrApp 639, 642, 556 P2d 1382, 1384 (1976).

policy was a rule, because it applied to all chiropractors and involved agency's quasi-legislative power to forbid all chiropractors from using devices for any purpose.[11]

D. CHANGING THE RULE ON RETROACTIVE RATEMAKING WILL ONLY FURTHER DELAY RESOLUTION.

Whatever the OPUC decides regarding its authority under the Oregon Constitution and the statutes in this proceeding, the final decision ultimately will be determined by the courts. The role of the court in reviewing questions of law arising from the OPUC is the same as that of any reviewing court presented with questions of law. ***Rogers Const. Co. v. Hill, Oregon Public Utility Commissioner***, 235 Or 352, 356, 384 P2d 219 (1963); ***Trabosh v. Washington County***, 140 Or App. 159, 164 n6 (1996); ORAP 5.45(5) n2. Review of legal questions is without the deference granted to "factual" matters within the agency's expertise or within the agency's discretion. In ***Citizens' Utility Bd. of Oregon v. Public Utility Com'n of Oregon***, 154 Or App 702, 962 P2d 744 (1998), *pet rev dis'd*, 355 Or 591, 158 P3d 822 (2002) [hereinafter ***CUB/URP v. OPUC***], the court did not defer to the agency's interpretation.

> Ultimately, the meaning of the statutes under that standard of review is a question of law for the court to decide, after giving appropriate consideration and weight to the agency's interpretation. ***See 1000 Friends of Oregon v. LCDC (Lane Co.),*** 305 Or 384, 388-92, 752 P2d 271 (1988); *see also* ***Springfield,*** 290 Or at 224, 621 P2d 547. For the reasons we have given, we interpret ORS 757.355 and ORS

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11. The policy statement is not directed to a named person or persons. ***Portland Inn v. OTC***, 39 OrApp 749, 752, 593 Pd 1233 (1979). Rather, it applies to all chiropractors. Further, it involves a "quasi-legislative act" of general applicability, because it forbids all chiropractors from using a Toftness or Toftness-like device at any time for any purpose. See ***Don't Waste Oregon Com. v. Energy Facility Siting***, 320 Or 132, 149, 881 P2d 119 (1994); ***Amazon Coop. Tenants v. Bd. High Ed***., 15 OrApp 418, 420, 516 P2d 89 (1973), rev den (1974).

McCleery v. State By and Through Oregon Bd. of Chiropractic Examiners, 132 Or App at 16-17, 887 P2d at 391.

> 757.140(2) differently from the way the agency did, and the applicable standard of review does not require us to defer to the agency's interpretation under those circumstances.

CUB/URP v. OPUC, 154 Or App at 714-15. "We have an independent obligation under the law to discern the correct interpretation of an administrative rule, regardless of the arguments of the parties." ***Tye v. McFetridge***, 199 OrApp 529, 532, 112 P3d 435, 437 (2005).

As noted in the course of the proceedings in court, OPUC decided in DR 10 to announce a "rule of law" regarding ORS 757.355 which was ultimately reversed. The prudent course of action at the time of the ruling in DR 10 would have been for PGE to await final determination of the meaning of ORS 757.355 by the courts before relying upon the agency advice in DR 10. Once again, we face the same situation. Whatever this Commission decides on this question is merely advisory to the courts. While awaiting finality on that legal question, all efforts in this proceeding will be wasteful, inefficient and perhaps moot.

Each month, tens of thousands of PGE customers move or go out of business. They become more difficult to locate so that they can be provided relief. These former PGE ratepayers from the 1995-2000 period (now likely in excess of 1 million) have no prospect of relief in the on-going remand proceedings. They do have vested rights in their claims in the circuit court [*Dreyer v. Portland General Electric Company*, Marion County Case No. 03 C10639] and full protection of their rights through the rigorous notice requirements of ORCP 32.[12]

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12. Plaintiff Phil Dreyer died (in 2004) after filing of the suit. His death is sadly typical of the harms caused by the delay in relief for the class. The overcharges extend back 12 years. Many customers have gone out of business, died or moved. Gladstone's comment, "Justice delayed is justice denied" is fully applicable to the ratepayer claims.

IV. THE CURRENT RULE CORRECTLY STATES THE COMMISSION'S AUTHORITY.

A. COMMISSIONS ARE CREATURES OF STATUTE WITH STRICTLY CONSTRUED DELEGATED LEGISLATIVE POWERS.

1. RATESETTING IS LEGISLATIVE.

The constitutional component of what is called the rule against retroactive ratemaking is that ratesetting is a legislative function. Commissions are statutory creations and cannot exercise delegated legislative power retroactively. The rationale was explained in ***Arizona Grocery Co. v. Atchison, Topeka & Santa Fe R. Co.***, *supra*, 284 US at 388-90, 52 SCt 183, 76 LEd 348 (1932) (emphasis added):

> If that body [Interstate Commerce Commission] sets too low a rate, the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future. It cannot have reparation from the shippers for a rate collected under the order upon the ground that it was unreasonably low. This is true because the Commission, in naming the rate, speaks in its quasi-legislative capacity. The prescription of a maximum rate, or maximum and minimum rates, is a legislative quality as is the fixing of a specified rate.
>
> In ***Oklahoma Operating Co. v. Love***, 252 US 331, 335, 40 SCt 338, 339, 64 L Ed 596, it was said: 'The order of the Commission prohibiting the company from charging, without its permission, rates higher than those prevailing in 1913, in effect prescribed maximum rates for the service. It was, therefore, a legislative order. * * *.'
>
> * * *. [C]ongress has delegated to the Commission and its administrative arm its undoubted power to declare, within constitutional limits, what are lawful rates for the service to be performed by the carriers. The action of the Commission in fixing such rates for the future is subject to the same tests as to its validity as would be an act of Congress intended to accomplish the same purpose.
>
> * * *.
>
> As respects its future conduct, the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate; and if the order merely sets limits, it is entitled to protection if it fixes a rate which falls within them. Where, as in this case, the Commission has made an order having a dual aspect, it may

> not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed.
>
> * * *. [I]t was bound to recognize the validity of the rule of conduct prescribed by it, and not to repeal its own enactment with retroactive effect. **It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the Legislature itself.**

Ratemaking is recognized as state legislative activity in every jurisdiction, even though it is carried out by an administrative agency.

In ***Pacific Telephone & Telegraph Co. v. Wallace***, 158 Or 210, 224, 75 P2d 942, 949 (1938), the Oregon Supreme Court explained:

> When the Legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. * * *. But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation

See also, ***Central Power and Light Company/Cities of Alice v. Public Utility Com'n of Texas***, 36 SW3d 547 (Tex 2000), explaining the legislative function:

> See ***City of Alvin v. Public Util. Comm'n***, 876 SW2d 346, 362 (Tex App Austin 1993), judgm't vacated sub nom ***Public Util. Comm'n v. Texas-New Mex. Elec. Co***., 893 SW2d 450 (Tex 1994). Therefore, the constitutional prohibition on ex post facto or retroactive laws applies. See *id*.; Tex Const art I, § 16. Utility rates generally may have only prospective effect, and the Commission may not set rates that allow a utility to recoup past losses or refund excess utility profits to consumers. See ***State v. Public Util. Comm'n***, 883 SW2d 190, 199 (Tex 1994); ***City of Alvin***, 876 SW2d at 362. This principle is reflected in PURA § 36.111, which states that "[t]he rates established in the order shall be observed thereafter until changed as provided by this title." PURA § 36.111(b).

Thus, the rule against retroactive ratemaking would appear to ban the Commission from setting future rates that requires the utility to "refund excess utility profits to consumers." What are the 1995-2000 profits on Trojan, if not excess?

In discussing the prohibition against retroactive ratemaking, the Illinois Supreme Court stated:

> Retroactive ratemaking is prohibited under the Act; that is, the Act prohibits refunds when rates are too high and surcharges when rates are too low. (***Citizens Utilities Co. v. Illinois Commerce Comm'n*** (1988), 124 Ill2d 195, 207, 124 Ill Dec 529, 535, 529 NE2d 510, 516.) The rule against retroactive ratemaking was announced in ***Mandel Brothers, Inc. v. Chicago Tunnel Terminal Co.*** (1954), 2 Ill2d 205, 117 NE2d 774, where the court held that the act of setting rates is "legislative in character and prospective in its operation." (2 Ill2d at 210, 117 NE2d at 776.)

Illinois Bell Telephone Co. v. Illinois Commerce Com'n, 203 IllApp3d 424, 434, 149 Ill Dec 148, 156,561 NE2d 426 (1990).

The Wisconsin Supreme Court held:

> In fixing rates to be charged by public utilities, the commission exercises an essentially legislative power, and lacking statutory authority, it is limited to fixing rates to be applied prospectively.

Friends of the Earth v. Wisconsin Pub. Service Commission, 78 Wis2d 388, 21 PUR4th 201, 254 NW2d 299 (1977).

2. RATES ARE SET PROSPECTIVELY UNDER STATUTES SUCH AS OREGON'S.

Ratemaking is a prospective rather than a retroactive process. ***Providence Gas Co. v. Burke,*** 475 A2d 193, 197 (RI 1984) ("[o]ne of the central principles of ratemaking is that

rates must be prospective"); ***Railroad Commission v. Lone Star Gas Co.,*** 656 SW2d 421, 425 (Tex 1983) (recognizing "fundamental principle that utility rates are set for the future, and not the past"); ***Boston Edison Co. v. Dept. of Public Utilities,*** 375 Mass 1, 6, 375 NE2d 305, *cert denied*, 439 US 921, 99 SCt 301, 58 LEd2d 314 (1978) ("a rate increase may not be awarded retroactively as matter of law"); ***Mississippi Pub. Serv. Comm'n v. Home Tel. Co., Inc***., 236 Miss 444, 454, 110 So2d 618, 623 (1959) ("It is generally held that neither losses sustained nor profits gained by a public utility in the past may be taken into account in fixing rates to be charged in the future."); ***State ex rel. South Dakota Elec. Consumers v. Northwestern Public Service Co***., 265 NW2d 882, 884 (SD 1978) ("ratemaking is prospective").

Alaska prohibits a utility billing its subscribers retroactively, either upon receiving approval to increase its rates or to recoup past losses. ***Re Anchorage Refuse, Inc.*** U-79-62, Order No. 1, August 30, 1979. ***In the Matter of the Special Contract***, Designated as TA186-8, 1999 WL 33944716 (Alaska PUC):

> In Alaska, no statute is retrospective (retroactive) unless expressly stated therein. (AS 01.10.070.) Interpretation of this law has held that "Retrospective laws are generally unjust, and neither accord with sound legislation nor with the fundamental principles of the social compact." ***Watts v. Seward Sch. Board***, 421 P2d 586, 602-603 (Alaska 1966), vacated, 391 US 592, 88 SCt 1753, 20 LEd2d 842 (1968), judgment reinstated, 454 P2d 732 (Alaska 1969).
>
> The Commission's statutes in AS 42.05 contain no language that provides for retroactive actions. In fact, as discussed below, the Commission's rate suspension authority in AS 42.05.421 provides for automatic interim rates only after initial suspension periods have ended.

In ***Utah Power & Light v. Idaho Public Utilities Commission***, 107 Idaho 47, 52, 685 P2d 276, 281 (1984), the Idaho Supreme Court held:

> [The Idaho statute] provides that:

> "Whenever the commission ... shall find that the rates are unjust, unreasonable, discriminatory or preferential, ... or that such rates ... are insufficient, the commission shall determine the just, reasonable, or sufficient rates ... *"to be thereafter observed* * * *" [emphasis by court].
>
> This section provides only prospective relief. It does not give the PUC authority to prescribe surcharges or reductions to otherwise reasonable rates in order to make up past revenue shortfalls * * *.

As a result, the Idaho court refused to allow retroactive ratesetting.

> The Indiana Supreme Court has explained:
>
> Simply put, the rule against retroactive ratemaking requires that in fixing rates a regulatory commission must fix such rates prospectively and may not fix future rates to compensate a utility for that utility's past losses. See ***Public Service Comm'n v. City of Indianapolis***, 235 Ind 70, 131 NE2d 308, 315 (1956); ***Indiana Gas Co. v. Office of Utility Consumer Counselor***, 575 NE2d 1044, 1052 (Ind Ct App 1991); ***Public Service Indiana, Inc. v. Nichols***, 494 NE2d 349, 353 (Ind Ct App. 1986); ***Citizens Energy Coalition, Inc. v. Indiana & Michigan Electric Co.***, 396 NE2d 441, 446 (Ind CtApp 1979); ***City of Muncie v. Pub. Serv. Comm'n***, 396 NE2d 927, 929 (Ind CtApp 1979); see also ***Archer Daniels Midland v. State***, 485 NW2d 465, 468 (Iowa 1992).

Re: Northern Indiana Public Service Company, Cause No. 39723 Indiana Utility Regulatory Commission, 157 PUR4th 206, 1994 WL 728029 (Ind URC 1994).

> The rule in Hawai'i is stated by the Commission:
>
> The term "retroactive ratemaking" in this proceeding means ratemaking which attempts to recover past deficits or losses through higher rates in the future. This Commission has always prohibited retroactive ratemaking. In this jurisdiction rates are fixed prospectively, i.e., for the future. Should there be losses or deficits in a utility's operations the utility has the right to request rate relief. However, the request must be made for anticipated recurring deficits and losses in the future.

Re: Hawaiian Electric Company, Inc., 82 PUR4th 218, 1987 WL 257485 (Hawai'i PUC).

The prohibition against retroactive ratemaking is acknowledged throughout the United States. The Rhode Island Supreme Court held that the rule against retroactive ratemaking serves two basic functions:

> (1) [I]t protects the public by ensuring that present consumers will not be required to pay for past deficits in their future payments and (2) it prevents utilities from employing future rates as a means of ensuring the investments of their stockholders.

Narragansett Electric Co. v. Burke, 37 PUR4th 369, 415 A2d 177 (1980.

California has held that a Commission may set rates prospectively only and is prohibited from retroactive ratemaking. ***Re Continental Telephone Company of California***, Decision No. 84662, Application No. 55376, July 15, 1975. The Iowa Commission has found that a water company's maintenance expense allowance requests could not be granted, as the reason given for seeking a higher maintenance allowance was to recoup unrecovered 1978 costs. The Iowa Commission stated that it was fundamental that rates were not to be set for the future so as to recoup past losses. ***Re Crestview Heights Water System***, Docket No. RPU-79-2, Nov. 7, 1980. The Michigan Commission has held that it has no power to set a future rate so as to recover for losses suffered in the past. ***Detroit Edison Company v. Michigan Public Service Commission***, 82 Mich App 59, 266, NW2d 665 (1978).

3. REFUNDS OR REPARATIONS ARE NOT ALLOWED BASED ON PAST RATE PERIODS.

> The prohibition of retroactive ratemaking is derived from the overall scheme of the Act and the role of the Commission in the ratemaking process. * * * The rule prohibiting retroactive ratemaking is consistent with the prospective nature of legislative activity, such as that performed by the Commission in setting rates. Moreover, because the rule prohibits refunds when rates are too high and

> surcharges when rates are too low, it serves to introduce stability in the ratemaking process.

Citizens Utilities Co. of Illinois v. Illinois Commerce Commission, 124 Ill2d 195, 207, 124 Ill Dec at 534-35, 529 NE2d at 515-16 (1988). In ***City of Los Angeles v. Public Utilities Commission***, 7 Cal3d 331, 357, 497 P2d 785, 804, 102 CalRptr 313, 332 (1972), an order of the Commission granting a rate increase had been vacated, leaving the prior rate order in place. Upon remand of the vacated order, the California PUC could not base its order on remand from the date of the vacated order and order refunds from that time period. "To permit the commission to redetermine whether the preexisting rates were unreasonable as of the date of its order and to establish new rates for the purpose of refunds would mean that the commission is establishing rates retroactively rather than prospectively." *Id.*

The Vermont Supreme Court has held that "a rate that requires consumers to pay for past deficits of a utility or that requires a utility to refund to consumers a portion of its previously earned profits constitutes retroactive ratemaking." ***In re Central Vermont Public Service Corporation***, 144 Vt 46, 56 (1984). The Court stated: "Subsequent cases cannot correct past errors." *Id.* In that case, the Vermont Supreme Court held that a tariff filed by a utility company that called for a yearly surcharge, or credit, representing the difference between projected costs and costs actually incurred, constituted retroactive ratemaking. This is the same result and reasoning applied in OPUC Order No. 97-180, which denied US West authority to use an "Interconnection Cost Adjustment Mechanism" as violating the rule against retroactive ratemaking.

Other states proscribe reparations or "backdating" remanded orders as well. ***South Carolina Elec. and Gas Co. v. Public Serv. Comm'n***, 275 SC at 48, 490, 272 SE2d 793, 795 (1980):

> [N]o general authority to direct refunds was intended to be placed in the Commission. We conclude the Commission exceeded its statutory power in ordering SCE&G to refund more than seven million dollars to its retail customers * * *. * * * The Commission simply does not have any implied power to award refunds in the nature of reparations for past rates or charges; such power must be expressly conferred by statute.

See ***Niagara Mohawk Power Corp. v. Public Serv. Comm'n***, 54 AD2d 250, 257, 388 NYS2d 157, 159 (1976) (public service commission "does not have the general power to order a utility to make reparation or refunds to its customers"); ***Chesapeake and Potomac Tel. Co. v. Public Serv. Comm'n of West Virginia***, 300 SE2d 607, 619 (WVa 1982) (commission could not order utility to refund excess profits because it was empowered to "fix reasonable rates * * * to be followed in the future").

> The Commission clearly may not establish rates which are calculated to retroactively recover surpluses or refund deficits created by inaccuracies in its prior rate authorizations.

Pike County Light & Power Company v. Pennsylvania Public Utility Commission, 87 Pa Commonwealth Ct 451, 456, 487 A2d 118 (1985).

The Public Service Commission in the District of Columbia applies the rule:

> Retroactive ratemaking to recoup past losses has long been prohibited in this jurisdiction. See, e.g., ***People's Counsel of the District of Columbia v. Public Service Commission of the District of Columbia***, 472 A2d 860, 866 (DC 1984)(citations omitted); ***Washington Gas Light Co. v. Baker***, 188 F2d 11, 21 (DC 1950) (citations omitted). Excessive earnings belong to the Company and past losses must be borne by the Company. 188 F2d at 21.

In re Potomac Elec. Power Co. 1995 WL 356428, 6 (DC PSC).

The Florida Supreme Court has held that the Commission has no authority to make retroactive rate orders. ***City of Miami v. Florida Public Service Commission***, (1968), 63 PUR 3d 369, 208, So2d 249. The Florida Public Service Commission has explained:

> This Commission has consistently recognized that ratemaking is prospective and that retroactive ratemaking is prohibited. See ***Gulf Power Co. v. Cresse***, 410 So 2d 492 (Fla 1982); ***Meadowbrook Utility Systems, Inc. v. Florida Public Service Commission***, 518 So 2d 326 (Fla 1987); ***Citizens of the State of Florida v. Florida Public Service Commission***, 448 So 2d 1024 (Fla 1982); and ***GTE Florida Inc. v. Clark*** [668 So2d 971, 973 (Fla 1996)]. See also ***Ortega Utility Company***, 95 Florida Public Service Commission 11:247 (1995). The general principle of retroactive ratemaking is that new rates are not to be applied to past consumption. The Courts have interpreted retroactive ratemaking to occur when an attempt is made to recover either past losses (underearnings) or overearnings in prospective rates. Past losses are interpreted to be prior period costs that a utility did not recover through its rates, causing the utility to earn less than a fair rate of return. An example of this was addressed in the ***Ortega*** case, when the utility requested to reduce accumulated depreciation in a rate case for prior losses where the utility argued that it had not earned a fair rate of return. In ***City of Miami***, the petitioner argued that rates should have been reduced for prior period overearnings and that the excess earnings should be refunded. Both of these attempts were deemed to be retroactive ratemaking and thus were prohibited.

In re Florida Cities Water Co., 1998 WL 973740, 10 (Fla PSC).

4. PUBLIC UTILITY REGULATION INCLUDES EXPLICIT COST-OF-SERVICE PRINCIPLES WHICH PROHIBIT RETROACTIVE DETERMINATION OF RATES.

In addition to the Florida cases, which state the that the rule means that "new rates are not to be applied to past consumption," retroactive rate-making is disfavored in other jurisdictions as well as bad public policy. It is prohibited by the general principles that those customers who use the service provided by the utility should pay for its production rather

than requiring future rate payers to pay for past use. ***Popowsky v. Pa. Pub. Util. Comm'n***, 164 Pa Cmwlth 338, 642 A2d 648 (1994) (***Popowsky I***).

> We applied this principle that expenses incurred in past years would not be reimbursed in ***Philadelphia Electric Company v. Pennsylvania Public Utility Commission***, 93 Pa Commonwealth Ct 410, 502 A2d 722 (1985) (PECO). In that case, the utility requested recovery in rates for maintenance and depreciation expenses of pollution control facilities which were required, in part, by the Environmental Protection Agency. Although the PUC had previously allowed PECO to use a deferred accounting method, it refused to allow the recovery of those expenses because it was retroactive and the expenses were neither extraordinary nor non-recurring. This court agreed and stated: "these pollution control facilities' expenses were not, for whatever reason, anticipated by the utility nor made the subject of evidence before the Commission in this previous rate case, and the question presented by PECO's claim for deferred expenses in the instant proceeding is whether a utility may properly found a claim for increased prospective rates on past expense items which were greater than anticipated by the utility's proofs supporting the customer charges in effect." *Id*. at 420, 502 A2d at 727 (emphasis in original). We held that the excess over the projection of an isolated item of expense could not, without more, be the subject of a recovery in the utility's subsequent rate increase request. *Id*. at 422, 502 A2d at 728.

Popowsky I, 164 Pa Cmwlth at 344-45, 642 A2d at 651.

Re: Northern Indiana Public Service Company, Cause No. 39723 Indiana Utility Regulatory Commission, 157 PUR4th 206, 1994 WL 728029 (Ind URC 1994):

> The rule against retroactive ratemaking serves three basic functions, namely: (1) protection of the public by ensuring that current customers will not be required to pay for the past deficits of utilities through their future rates, (2) preventing utilities from employing future rates to protect the financial investment of their stockholders, and (3) requiring utilities to bear losses and enjoy gains depending on their managerial efficiency. ***Public Service Comm'n. v. City of Indianapolis***, 235 Ind 70, 131 NE2d 308, 315 (1956); ***Indiana Gas Co. v. Office of Utility Consumer Counselor***, 575 NE2d 1044, 1052 (Ind Ct App 1991); ***Town of Kingsford Heights***, 1987 Ind PUC LEXIS 335, Cause No. 37999, at 32-43 (IURC March 18, 1987).

5. NO EXCEPTIONS RECOGNIZED IN OTHER JURISDICTIONS APPLY IN THIS CASE.

Some jurisdictions recognize that extraordinary and non-recurring one-time costs are recoverable and do not constitute retroactive ratemaking. See ***Popowsky I***, *supra*, holding that a rate increase to recover transitional expenses incurred in switching from cash to accrual accounting was not retroactive ratemaking, but an extraordinary, one-time event, and the water company had not had the opportunity to seek recovery of the expenses until the accrued accounting of such obligations was approved.

> The exception to the rule against retroactive ratemaking applies where an extraordinary event such as a severe storm causes damage to a utility resulting in great expense on repair and restoration of service to its customers.

State ex rel. Pittman v. Mississippi Public Service Com'n, 520 So2d 1355, 1361 (Miss 1987).

B. OPUC IS A LEGISLATIVE BODY AND DOES NOT HAVE AUTHORITY TO LEGISLATE RETROACTIVELY.

"Ratemaking is purely legislative in character, derives its authority from the legislature and is regarded as an exercise of the legislative power." Or OpAttyGen OP-6076 (*Davis*). Oregon agencies are "creatures of statutes," and, in the absence of a constitutional provision concerning their function and authority, they derive their authority from:

> "'(1) the enabling legislation that mandates that particular agency's function and grants powers, and (2) from general laws affecting administrative bodies.'"

City of Klamath Falls v. Environ. Quality Comm., 318 Or 532, 545, 870 P2d 825 (1994) (quoting ***1000 Friends of Oregon v. LCDC (Clatsop Co.)***, 301 Or 622, 627, 724 P2d 805 (1986)). An agency has

> "only such power and authority as has been conferred upon it by its organic legislation. This power includes that expressly conferred by statute as well as such implied power as is necessary to carry out the power expressly granted. Stated somewhat differently, a statute which creates an administrative agency and invests it with its power is likewise the measure of its power." ***Ochoco Const. v. DLCD,*** 295 Or 422, 426, 667 P2d 499 (1983).

Danmark Pub., Inc. v. Department of Justice of State of Or., 108 OrApp 382, 386, 816 P2d 629, 631 (1991) (citations omitted).

1. OPUC POWERS.

The Commission is empowered to protect utility customers and the public "from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates." ORS 756.040(1). Under its ratemaking authority, its orders "shall be prima facie lawful and reasonable, until found otherwise * *." ORS 756.565.

> Utility regulation, including ratemaking, is a legislative function subject only to constitutional limits and those of the Commissioner's express, legislatively delegated broad powers.

American Can v. Lobdell, 55 Or App 451, 461, 638 P2d 1152, *rev den* 293 Or 190 (1982); ***Pacific Northwest Bell Tel. Co. v. Sabin***, 21 Or App 200, 213, 534 P2d 984 (1975).

Ratesetting is a legislative function which, prior to delegation to an agency, was performed by the Legislature itself. After first creating a Railroad Commission to set shipping rates [1907 Or Laws Ch 53] in 1911, the Oregon Legislature brought public utilities under the same system of regulation. 1911 Or Laws Ch 279. The legislative power to set public utility rates in Oregon after 1911 was therefore in the hands of the Railroad Commission, which eventually evolved into today's OPUC. 1911 Or Laws Ch 279. After

delegation of the function to a Commission, the legislature did not authorize retrospective rate determinations. ***Valley & Siletz Railroad Co. v. Flagg***, *supra*.

2. EXERCISE OF OPUC AUTHORITY IS SUBJECT TO STRICT CONSTRUCTION.

The Legislature granted the Commission limited authority to make reparations, and that authority was later repealed. In 1923, the Legislature adopted a feature of the federal Interstate Commerce Act that provided for "reparations" to customers of a railroad. ***Oregon-Washington Railroad & Navigation Co. v. McColloch***, 153 Or 32, 49, 55 P2d 1133 (1936). Under this new power, the OPUC could order "reparations" to a customer who complained that the existing "lawful rates" were nevertheless excessive. ***McColloch*** at 45-49; 3 Oregon Code 1930 § § 62-103, 62-111, 62-125, 62-126, 62-127; ORS 756.500(2). "Reparations" were therefore a refund authorized by the Legislature of the lawful rates on file to specific claimants in a quasi-judicial determination. ***McColloch*** involved railroad rates, not utility rates. As for *utility* rates, the OPUC had *no* power to order refunds or reparations.

> Turning to the statutes dealing with utilities * * * we find that the Commissioner has no authority to award any reparations, either for unreasonable or unjustly discriminatory rates, or for overcharges * * *.
>
> * * *
>
> The railroad statutes confer jurisdiction upon the Commissioner to award reparation. No such provision is found in the public utility statutes.

McPherson v. Pacific Power & Light Co., 207 Or 433, 449, 452, 296 P2d 932, 940, 942 (1956). The Supreme Court imposed a strict construction on the PUC's authority:

> The commissioner's jurisdiction is limited. His authority must affirmatively appear from the law creating his office and defining his powers.

207 Or at 449. Any OPUC authority to order retroactive rate redeterminations must "affirmatively appear" in the statutes. Obviously, it does not. The Legislature has never authorized reparations for electric utility customers. The fact that it allowed limited reparation authority and then revoked it speaks powerfully: OPUC does not have the authority to award reparations.

C. LIMITED OPUC "REFUND" AUTHORITY DOES NOT AUTHORIZE REDETERMINING SETTLED FACTS.

The Legislature *has* given express statutory authorization to the OPUC to order refunds in a specific situation. Such refunds are not premised upon redetermining past rates, nor do they give OPUC such authority. The OPUC sought and received limited refunding authority from the Legislature in 1981 to deal with regulatory lag. The Legislature enacted a statute that provided for refunds in the particular situation of interim rates that had been previously authorized by the OPUC. Even here, however, such refund is not a "redetermination" of facts in a *closed* record but is, instead, a provisional grant of authority to the utility to charge new rates before fact-finding and the conclusion of the evidentiary hearing. ORS 757.215 provides:

> (4) If the commission * * * does not order a suspension [of the new rates], any increased revenue collected by the utility as a result of such rate or rate schedule becoming effective shall be received subject to being refunded * * *.
>
> (5) * * * Upon completion of the hearing and decision, the commission shall order the utility to refund that portion of the increase in the interim rate or schedule that the commission finds is not justified * * *. Refunds shall be made as nearly as possible to the customers against whom the interim rates were charged * * *.

While the statute uses the word "refund" to refer to an adjustment to the amount collected provisionally pending fact-finding, the statute does not authorize redetermination of settled legislative or adjudicated facts. Nor does it allow refunds in any other circumstances, as the filed rate doctrine applies. ORS 757.225; ***Pacific Northwest Bell Telephone Co. v. Eachus***, 135 OrApp 41, 898 P2d 774 (1995).

ORS 757.140(2) (which allows prospective inclusion in rates of return of undepreciated investment) is a specific and narrow grant of authority to include certain past investment in future rates, although it does not authorize redetermination of past rates or revisiting facts already determined about undepreciated investment. We now know that it does not allow any deviation from its express terms. ***CUB/URP v. OPUC***, *supra*, 154 OrApp at 713.

ORS 757.259(1)(a)(A) allows prospective rate treatment for "[a]mounts lawfully imposed retroactively by order of another governmental agency" and for amounts maintained in properly established deferred accounts. ORS 757.259(1)(a)(B) and (b). Similar highly specific statutes in other states, for example, allow the state commission to determine the manner in which the local gas distribution company (LDC) under state regulation was to pass through refunds to company customers when the Federal Energy Regulatory Commission (FERC) ordered natural gas pipeline rate refunds. ***ARCO Products Co. v. Washington Utilities and Transp. Com'n***, 125 Wash2d 805, 811, 160 PUR4th 200, 888 P2d 728, 731

(1995);[13] ***Farmland Industries, Inc. v. Kansas Corp. Com'n***, 29 KanApp2d 1031, 1034, 37 P3d 640, 643 (2001).[14]

Thus, it is clear the Legislature from time to time has considered some aspects of treatment of past events. It has allowed return of undepreciated property for prospective treatment. If there were no limit upon the OPUC ratesetting authority which requires prospective ratesetting, then ORS 757.140(2) would be meaningless, as OPUC could allow a return of undepreciated property in rates without needing express statutory authority. Similarly, there would be no need to be concerned about "regulatory lag," if the Commission could order rates revised upwards or downwards retroactively from the date of decision.

In limited circumstances, the Legislature allows prospective consideration of specific past "amounts," when such amounts have been properly sequestered initially (deferred

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13. RCW 80.28.200 gives the Commission a great deal of discretion to determine whether a FERC refund is to be allocated or partially allocated to the LDC's customers, and if so, how it is to be allocated. The statute provides:

> Whenever any gas company whose rates are subject to the jurisdiction of the commission shall receive any refund of amounts charged and collected from it on account of natural gas purchased by it, by reason of any reduction of rates or disallowance of an increase in rates of the seller of such natural gas pursuant to an order of the [FERC] ... the commission shall have power ... to determine whether or not such refund should be passed on, in whole or in part, to the consumers of such company and to order such company to pass such refund on to its consumers, in the manner and to the extent determined just and reasonable by the commission.

14. Under the tariffs on file with the Kansas Corporation Commission (KCC) in 1988, LDCs were not permitted to keep the refunds they were receiving from pipelines. The tariffs required any refunds received to be passed on through PGA or COGR provisions. The tariffs also contained general language allowing the KCC to make case-by-case determinations for the distribution of supplier refunds.

    In May 1998, the KCC opened a generic investigation to establish general policies for the handling of tax refunds the Kansas LDCs were receiving from the pipelines, concluding it had jurisdiction to require LDCs to pass the refunds on to customers, to the extent the customers were not under FERC jurisdiction.

accounting and interim rates) or when specific amounts have been determined by "*another* governmental agency." These grants do not purport to authorize the OPUC *itself* to determine "[a]mounts lawfully imposed retroactively." These specific powers are specific and limited in scope. The existence of the limited legislative grants to consider some past events illustrates that the general rule against retroactive ratemaking was intended to apply to the authority of the OPUC, as otherwise such specific grants would be meaningless. None confers power upon OPUC to *redetermine past rates*.

V. APPLICATION OF THE FILED RATE DOCTRINE TO THIS CASE.

The "filed rate doctrine" is a phrase used variously to describe (1) the strict duty of a regulated utility to charge only rates in effect at the time (the Oregon rule); (2) a statutory limitation upon the power of the regulator to change filed rates retroactively (Oregon rule); and, in some jurisdictions (3) a case law limitation upon court jurisdiction to hear suits which challenge rates as they exist on file. Oregon has adopted the "filed rate doctrine" as it applies to utility duties and as a limit upon the regulator. But by statute and case law, Oregon rejects the "filed rate doctrine" applied to the powers of courts to entertain ratepayer suits for damages.

A. DUTY-ON-THE-UTILITY STRAND OF THE FILED RATE DOCTRINE.

A utility's duty to adhere to the schedules and tariffs in effect is a strict liability duty. ORS 757.225 provides that, "No public utility shall * * * collect or receive a greater or less compensation than is specified in printed rate schedules * * *." This prohibits private contracts, agreements, rebates, surcharges and other mechanisms which alter the rate charged

by a utility to a customer. This rule is sometimes referred to as the "filed rate doctrine" and applies even when the utility mistakenly charges a different rate or the parties in good faith contract for a different rate.

The version of ORS 757.310 in effect during the 1995-2000 period provided:[15]

Unjust discrimination in charges for service.

(1) Except as provided in ORS 757.315, no public utility or any agent or officer thereof shall, directly or indirectly, by any device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by it than:

(a) That prescribed in the public schedules or tariffs then in force or established; or

(b) It charges, demands, collects or receives from any other person for a like and contemporaneous service under substantially similar circumstances. * * *

Also relevant is:

ORS 757.325. Undue preferences or advantage

(1) No public utility shall make or give undue or unreasonable preference or advantage to any particular person or locality, or shall subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.

(2) Any public utility violating this section is guilty of unjust discrimination.

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15. The current version of ORS 757.310 provides:

(1) A public utility may not charge a customer a rate or an amount for a service that is different from the rate or amount prescribed in the schedules or tariffs for the public utility.

(2) A public utility may not charge a customer a rate or an amount for a service that is different from the rate or amount the public utility charges any other customer for a like and contemporaneous service under substantially similar circumstances.

See discussion in ***American Can Co. v. Davis,*** 28 OrApp 207, 227, 559 P2d 898, 910 (1977), construing these statutes in *para materia*.

> ORS 757.225 and ORS 757.310(1) prohibit a utility from charging directly more or less for any service than is prescribed in the rate schedule or than it charges anyone under similar circumstances. * * *. The sections merely require that, if a rate is prescribed in the rate schedule, *all customers must be charged that rate, no more and no less*.

Northwest Climate Conditioning Ass'n v. Lobdell, 79 Or App 560, 565-566, 720 P2d 1281, 1284 (1986) (emphasis supplied).

> The purpose of statutes like ORS 757.225 and 757.310 is not to make it illegal for a public utility to make an inadvertent billing error, but to protect the utility's customers from excessive or discriminatory charges. See, generally, 1 Priest, PRINCIPLES OF PUBLIC UTILITY REGULATION 305 (1969). Nevertheless, because of the prophylactic and deterrent purposes of such statutes, it is not a defense to a complaint under such a statute that the utility acted in good faith and that its error was the result of simple negligence. See ***National Van Lines, Inc. v. United States***, 355 F2d 326, 331 (7th Cir 1966) interpreting in the context of an inadvertent overcharge 49 USC § 317(b), the equivalent provision of the Interstate Commerce Act.

Holman Transfer Co. v. Pacific Northwest Bell Telephone Co. 287 Or 387, 400-401, 599 P2d 1115, 1123 (1979). The rule that a utility must never deviate from printed rates, followed in ***National Van Lines***, and endorsed and adopted in ***Holman Transfer,*** is longstanding. It was announced in ***Louisville & Nashville R. R. v. Maxwell***, 237 US 94, 97, 35 SCt 494, 495, 59 LEd 853, (1915):

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. * * *. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

The rule that the utility must charge in accordance with filed rates and tariffs prohibits private agreements for lower rates. *See, e.g.,* ***Maislin Indus. U.S. v. Primary Steel, Inc.,*** 497 US 116, 110 SCt 2759, 111 LEd2d 94 (1990) (dismissing claim based on allegation that defendant had quoted plaintiff lower rate, which plaintiff sought to enforce, rather than filed rate). It is the rule followed in other states:

> The principles that underlie the Public Utilities Act of this state (Rev St 66-101 *et seq.*) are the same as those which underlie the Interstate Commerce Act of the United States (US Comp St § 8563 *et seq.*) * * *. Under the Public Utilities Law, a public utility cannot legally collect less than the lawful rate for the service rendered. It does not matter whether less than the legal rate is mistakenly or intentionally collected. The lawful rate must be collected.

Kansas Elec. Power Co. v. Thomas, 123 Kan 321, 255 P 33, 35 (1927). The result was required to prevent "favoritism and discrimination" by the utility in dealing with ratepayers. *Id.*

> The "filed-rate" or "filed-tariff" doctrine arose many years ago. * * *. The doctrine was established to prevent regulated, monopolistic interstate transportation and communications companies from discriminating among their respective customers with respect to rates for particular services. These regulated industries are required by law to file a tariff with the appropriate regulatory body * * * that sets forth in detail the rates to be charged and the services to be provided under various sets of circumstances. Once a company files a tariff, the company is forbidden from deviating from the rates contained therein. Under the filed-rate doctrine, a consumer of the regulated service is conclusively presumed to have notice of the contents of the tariff and may not claim that it is entitled to any rate other than the rate contained in the tariff.

Emperor Clock Co., Inc. v. AT&T Corp., 727 So2d 41, 41-42 (Ala 1998). ***Cullum v. Seagull Mid-South, Inc.***, 322 Ark 190, 196, 907 SW2d 741, 744 (1995) ("purpose of the filed rate doctrine is to * * * insure that the regulated entities charge only those rates that the agency has approved or been made aware of as the law may require").

B. LIMIT-ON-THE-POWER-OF-THE-COMMISSION STRAND OF THE FILED RATE DOCTRINE.

The fact that the ***Holman Transfer*** decision adopted the federal filed rate doctrine regarding utility duties strongly suggests that the Oregon Supreme Court would also adopt the federal filed rate doctrine as applied to regulatory agencies. In ***Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.,*** 284 US 370, 52 SCt 183, 76 LEd 348 (1932), the U.S. Supreme Court held that, once a regulatory body has authorized a public utility to charge a particular rate, having found that rate to be reasonable, it may not require the utility to pay refunds to its customers based on its subsequent finding that the rate was excessive--even if it concludes that it made an error when it approved the rate in the first place. The filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate * * *regulatory authority." ***Arkansas Louisiana Gas Co. v. Hall,*** 453 US 571, 577, 101 SCt 2925, 69 LEd2d 856 (1981)) ("***Arkansas***"). "This rule bars the * * * retroactive substitution of an unreasonably high or low rate with a just and reasonable rate." ***Arkansas,*** *supra,* 453 US at 578. In its discussion of the doctrine, ***Arkansas*** explains that it explicitly prohibits an entity from "imposing a rate increase for gas already sold," 453 US at 578, 101 SCt at 2931, and states, in a footnote, that a regulator "may not *impose* a retroactive rate alteration and, in particular, may not order reparations." *Id.*, n 8.

This aspect of the filed rate doctrine constitutes a rule against retroactive ratemaking and retroactive rate alteration. ***Columbia Gas Transmission Corp. v. FERC.,*** 831 F2d 1135, 1140 (DC Cir 1987). Further, the regulator agency is precluded "from doing indirectly what

it cannot do directly." ***Towns of Concord, Norwood, & Wellesley, Mass. v. FERC****,* 293 USApp DC 374, 378, 955 F2d 67, 71 (1992).

While the OPUC may have broad authority to continue to declare proposed rate changes to be "interim" and subject to refund, it cannot declare a final rate to be "interim" retroactively. ***Pacific Northwest Bell Telephone Co. v. Katz****,* 116 OrApp 302, 841 P2d 652, *review denied* 316 Or 527, 854 P2d 940 (1993), held that OPUC had authority to order a refund of amounts over-collected under temporary rates that failed to comply with an ordered revenue reduction. However, the public utility statutes read in *para materia*, "show that PUC's authority to declare rates to be interim and subject to refund is circumscribed." ***Pacific Northwest Bell Telephone Co. v. Eachus***, 135 OrApp 41, 49, 898 P2d 774, *review denied* 322 Or 193, 903 P2d 886 (1995).

In ***Eachus***, the Commission, upon its own motion, considered PNB's rates, and after investigation, ordered a reduction in rates, effective from the date of the final order. The Citizens' Utility Board argued on appeal that the Commission had the authority to declare the rates under review to be "interim" from the date of the commencement of the proceedings and to order refunds for the time period from commencement to conclusion of the proceeding.

The Court of Appeals distinguished the situation from that in ***Katz***, where there had been an initial (though procedurally ambiguous) notice that the rates at issue were "interim." The court held that the OPUC lacked authority to declare existing rates to be "interim" between the date on which the Commission opened a rate case on its own motion and date it issued order in rate case. Although the OPUC concluded after evidence that the company was earning more than its authorized rate of return, until it ordered the new reduced rates,

those charges were still pursuant to the filed rates. Thus, any order declaring those existing rates to be "interim" would be an retroactive adjustment beyond the authority of the Commission.

The court cited ORS 759.205 (the telecommunications utility analog to ORS 757.225) and emphasized the following phrases:

> "No telecommunications utility shall charge, demand, collect *or receive* a greater or lesser compensation for any service performed by it within the state, or for any service in connection therewith, 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 therein are the lawful rates until they are changed as provided in this chapter.*" (emphasis supplied by the court)

> Thus, rates that have been approved and are in force may be adjusted only pursuant to the process described in the statutes.

> Although PNB was earning more than its authorized rate of return until Order 89-1807 reduced PNB's rates, it was doing so pursuant to rates that had been approved by and filed with PUC and that complied with all previous PUC rate orders. * * *. The effect of an order declaring those existing rates to be interim would have been to allow a rate reduction before the reduced rate had been approved; it would, in essence, have been a retroactive adjustment which we conclude would have been inconsistent with the emphasized portion of ORS 759.205.

PNB v. Eachus, 135 OrApp at 49-50.

In this case as well, the Commission may "adjust rates" only as authorized by statute. Its authority to specifically order refunds is limited to refunds under "interim" rate procedures. It cannot circumvent this prohibition by some indirect means, such as "redetermining" rates for past periods. The effect of the filed rate doctrine upon the Commission is that it lacks authority to declare the rates adopted in UE 88 as "interim" and hence no authority to order changes to those rates. The more general principles of the rule against retroactive ratemaking

preclude the Commission from taking any over- or under-charges into consideration prospectively, as discussed below.

One rationale underlying the filed rate doctrine is that retroactive rate changes would lead to discriminatory rates, as former customers would be charged one rate, and later customers a revised rate for the same period. ***Maislin Industries, U.S. v. Primary Steel, Inc***., *supra*. Oregon's anti-discrimination in rates statutes are quoted above. ORS 757.225, 757.310, and 757.325. In ***Maislin***, the US Supreme Court strictly applied the "filed rate" doctrine, stressing the rationale that retroactive relief in the courts would lead to discrimination in rates. See also ***Mincron SBC Corp. v. Worldcom, Inc***., 994 SW2d 785, 789 (Tex App [1 Dist] 1999) (if filed rate doctrine not enforced, discrimination would result among customers).

Here, any "refund" in the form of lower rates prospectively, is not actually a refund but is a windfall benefitting only new PGE customers who opened accounts on or after October 1, 2000. That cohort or generation of "ratepayers" may enjoy somewhat lower rates sometime later in this decade because of the Trojan profit overcharges paid by plaintiffs during the 1995-2000 period. This violates costs of service principles and is retroactive ratemaking. A current-ratepayer windfall does nothing to protect the public from "unjust and unreasonable exactions and practices," nor does it do anything to actually recompense individual ratepayers who paid illegal rates. Only the court and the class action mechanism can achieve intergenerational ratepayer equity without prohibited discrimination in treatment of customers who received service in 1995-2000.

C. THE LACK-OF-COURT-JURISDICTION STRAND OF THE FILED RATE DOCTRINE.

1. COURTS CANNOT DISTURB LAWFUL FILED RATES.

By statute, Oregon has a nuanced approach to the strand of the filed rate doctrine which limits court interference in ratesetting. A court cannot interpose itself into the ratesetting process. "It is not the province of the courts to substitute their judgment for that of the Commission." ***Valley & Siletz R. Co. v. Thomas***, 151 Or 80, 94, 48 P2d 358, 363 (1935). "We cannot substitute our judgment for that of the Commissioner." ***Cascade Natural Gas Corp. v. Davis,*** 28 OrApp 621, 634, 560 P2d 301, 309 (1977). Nonetheless, in Oregon courts can hear suits for damages brought by ratepayers under the common law and ORS 756.185 because damage awards do not implicate ratesetting.

2. COURT ARE SPECIFICALLY AUTHORIZED TO HEAR DAMAGE SUITS FOR CLAIMS BASED ON UNLAWFUL RATES.

ORS 756.200 specifically imposes common law duties upon utilities and assures ratepayers' rights to sue a utility for breaches of statutory and common law duties:

> (1) The remedies and enforcement procedures provided in chapters 756, 757, 758, 759, 760, 761, 763, 764, 767 and 773 do not release or waive any right of action by the state or any person for any right, penalty or forfeiture which may arise under any law of this state or under an ordinance of any municipality thereof.
>
> * * *
>
> (3) The duties and liabilities of the public utilities or telecommunication utilities shall be the same as are prescribed by the common law, and the remedies against them the same, except where otherwise provided by the Constitution or statutes of this state, and the provisions of ORS chapters 756, 757, 758 and 759 are cumulative thereto.

In ***Dreyer***, *supra*, 341 Or at 281-82, 142 P3d at 1020-21, the Oregon Supreme Court reaffirmed longstanding case law allowing utility customers to sue for rate overcharges, noting that ORS 756.200 itself contemplates civil suits. In ***Dreyer****, supra* (Marion County Case Nos. 03C10639, 03C10640), the trial court certified a ratepayer class of all customers of PGE who had been charged rates which included profits on the defunct Trojan plant during a 5.5-year period commencing April 1995 (a class of at least one million customers). The claims certified for the class included a claim under ORS 756.185 for violation of ORS 757.355 in charging ratepayers for profits on a plant not providing service) and common law claims. The trial court granted summary judgment on liability in favor of plaintiffs on the statutory claim and a claim for money had and received, relying in part upon ***McPherson v. Pacific Power & Light Co***., 207 Or 433, 453, 296 P2d 932, 942 (1956); ***Service & Wright Lumber Co. v. Sumpter Valley Ry. Co***., 67 Or 63, 75-76, 135 P 539 (1913). PGE sought a writ of mandamus from the Oregon Supreme Court, arguing that the class action should be dismissed. The Court stated:

> PGE also seems to argue, in a more nebulous way, that plaintiffs' actions in circuit court fly in the face of a "comprehensive statutory scheme" that assigns all matters relating to utility regulation to the PUC and limits courts to reviewing PUC orders. We note, however, that plaintiffs rely on provisions within that supposedly "comprehensive statutory scheme," ORS 756.185(1) and ORS 756.200, that appear to contemplate judicial involvement in matters other than review of PUC orders.
>
> 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* dismissal of plaintiffs' actions. As such, we conclude that the particular remedy that PGE seeks is not available: We cannot issue a peremptory writ ordering the circuit court to dismiss plaintiffs' actions and vacate its class certification order.

Dreyer, 341 Or at 282.

Examples of such suits against utilities for which the circuit court has jurisdiction include:

- Suits by ratepayers for damages from unlawful utility practices brought under ORS 756.185 (the basis for the Fifth Claim for Relief): ***Oregon-Washington R. & Nav. Co. v. McColloch***, 153 Or 32, 55, 55 P2d 1133, 1142 (1936); ***Olson v. Pacific Northwest Bell Telephone Co.***, 65 Or App 422, 425, 671 P2d 1185, 1187 (1983)

- Suits by ratepayers for refunds from utility overcharges: ***Oregon-Washington R. & Nav. Co. v. McColloch***, 153 Or 32, 55, 55 P2d 1133, 1142 (1936)

- Suits by ratepayers against utilities for money had and received (basis for Sixth Claim for Relief): ***Service & Wright Lumber Co. v. Sumpter Valley Ry. Co***., 67 Or 63, 75-76, 135 P 539 (1913); ***McPherson v. Pacific Power & Light Co.***, 207 Or 433, 453, 296 P2d 932, 942 (1956)

- Suits by ratepayers for statutory unfair trade practices involving PUC tariffs on file: ***Adamson v. Worldcom Communications***, 190 Or App 215, 78 P3d 577 (2003)

- Suits by ratepayers for statutory unfair trade practices involving misrepresentations concerning PUC rules: ***Isom v. PGE***, 67 Or App 97, 104, 677 P2d 59 (1983);

- Suits by ratepayers for damages from negligence and breach of contract arising from tariffs filed with the PUC: ***Holman Transfer Co. v. PNB Telephone Co.,*** 287 Or 387, 401, 599 P2d 1115, 1123 (1979); ***Olson v. Pacific Northwest Bell Telephone Co.***, 65 Or App 422, 425, 671 P2d 1185, 1187 (1983)

3. THE AVAILABILITY OF DAMAGES IS DISTINCT FROM ANY RATESETTING FUNCTION.

The availability of monetary damages under statutory authority (or awarded for money had and received or some other form of disgorgement for unjust enrichment) does not involve the court in setting any "rate" or "rates." Thus, the fact that courts may award damages shines a light upon the limits of OPUC authority.

In ***Oregon-Washington R. & Nav. Co. v. McColloch***, *supra*, 153 Or at 48, the Court distinguished between the legislative or administrative function of "determining what rate is just or reasonable" and the judicial function of "finding and awarding reparation of damages," concluding that under Oregon law, overcharge suits are damage suits in court. *Id.* at 49. At the time ***Oregon-Washington R. & Nav. Co. v. McColloch*** was decided in 1936, there was a reparation statute in effect, allowing the Commissioner to determine reparations for unreasonable exactions. Despite this authority (since repealed), the ***McColloch*** court reaffirmed the rule announced in ***Service & Wright Lumber Co. v. Sumpter Valley Ry. Co***, holding that "There is no necessity of resorting first to the commission in those instances in which the only question involved is an overcharge * * *." 153 Or at 49.

As a corollary to the role of the limits on agency power, separation of power principles prohibit a regulatory commission from interfering with proper judicial functions. ***City of New Orleans v. United Gas Pipe Line Co***. 438 So2d 264, 266 (La App 4th Cir 1983), *cert denied*, 442 So2d 463 (La 1983), illustrates the complete separation of judicial and regulatory functions. The City, a gas company, and certified class of citizen ratepayers brought suit against a natural gas supplier for breach of contract. The Public Service Commission moved to intervene, claiming an interest in distributing any damage award to ratepayers. Its intervention was denied. The court reasoned that awarding damages is solely a judicial function, and the Commission was prohibited from playing a role on intervention:

> [The Commission] seeks to substitute its own judgment for that of the trial judge in awarding and allocating damages. Such action, if allowed, would constitute a dangerous precedent--an untenable usurpation and encroachment of the judicial function.

In Oregon, this distinction between judicial and administrative function is required by the Oregon Constitution, Article VII, § 1 (establishing the judiciary) and Article III, § 1 (separation of powers), which forbids encroachment of the executive upon the judiciary.[16]

VI. ORS 756.558 CONFERS NO AUTHORITY TO REDETERMINE PAST RATES.

The OPUC may "at any time * * * rescind, suspend or amend any order * * *" ORS 756.568. This statute is not applicable to the remand proceeding. The remand order does not direct the Commission to "rescind, suspend or amend any order made by the commission." Instead, it directs the Commission to undertake a proceeding consistent with the decisions of the appellate courts (DR 10/UE 88 Remand Order). Nothing the Court has ordered, or within ORS 756.586, authorizes, either directly or indirectly, a reexamination or reopening of PGE costs during any past period, particularly those costs (or rate treatment of costs) which PGE never asserted in the original case or those costs (or rate treatment of costs) upon which the OPUC ruled and no one appealed.

But any authority the OPUC has under ORS 756.568, even if exercised, does not enlarge its ratesetting authority or allow redetermination of past rates. An order issued under

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16. Article III, §1, of the Oregon Constitution, provides:

> The powers of the Government shall be divided into three separate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

In ***State ex rel. Metropolitan Public Defender Services, Inc. v. Courtney***, 335 Or 236, 238, 64 P3d 1138, 1139 (2003) the court explained:

> * * * [T]his court has the inherent power under the Oregon Constitution to ensure that the judicial branch operates as an independent branch of government, free from undue interference by the other branches.

ORS 756.568 is subject to the procedures set out in ORS 756.558 for an original order. Additionally, such an order is subject to a motion for reconsideration or rehearing under ORS 756.561, which in turn "is subject to the same provisions as an original order." *Id*. As to ratesetting orders, original orders must apply prospectively. ***Valley & Siletz Railroad Co. v. Flagg***, *supra*. Since the OPUC's original orders must take effect prospectively, an amended order must also take effect prospectively--it cannot substitute newly redetermined rates for past rates or state in 2007 that the effective date of the "amended" rate order is "April 1, 1995," for example.

If the OPUC had greater authority upon rescinding its own orders than it had in originally making the orders, then ORS 757.259(1)(a)(A) becomes meaningless. OPUC would not need the authority of ORS 757.259(1)(a)(A) if its amendatory powers exceeded its original ratesetting powers. Under that theory, the 1981 interim rates legislation [ORS 757.215(4) and (5)] was a waste of legislative time, and meaningless as well. We know that as to final orders, the OPUC cannot declare such rates "interim" and seek to redetermine such rates retroactively. ***PNB v. Eachus*****,** *supra*. It flies in the face of ORS 757.225 if OPUC could merely "amend" filed rates and accomplish what is otherwise forbidden and unauthorized.

The first level of analysis of a statute includes the text and context of the words. The context of a statute for the purposes of ***PGE v. Bureau of Labor and Industries***, 317 Or 606,

611 (1993), includes other provisions of the same statute and related statutes, prior enactments and prior judicial interpretations of those and related statutes.[17]

> "The subject and purpose of the statute, together with the statutory language that surrounds the word in question, narrow the array of definitional choices that dictionaries alone afford[.]"

CUB/URP v. OPUC, *supra*, 154 OrApp at 708 (quoting ***Steele v. Employment Department,*** 143 OrApp 105, 113, 923 P2d 1252, *review allowed* 324 Or 487, 930 P2d 851 (1996)). The context of utility regulation is that the Commission has only prospective ratesetting power, has been denied any authority to provide reparations, and lacks the power to redetermine past rates.

We are to assume the Legislature meant to accomplish something in enacting ORS 757.215(4) and (5); ORS 757.140(2) and ORS 757.259(1)(a)(A). The court gives meaning to each section of statutes in *para materia*, to achieve a "harmonious whole." ***State ex rel Dept. of Transportation v. Stallcup***, *supra*. It is hardly "harmonious" to give no effect to these later-enacted statutes, if they are mere surplusage to some heretofore covert power to retroactively set rates conferred in 1911 by ORS 756.568.

The Court of Appeals applied the rule of construing utility regulation by giving meaning to *each section* in ***CUB/URP***, *supra*, 154 OrApp at 713 (emphasis in original).

> ORS 757.140(2) contains no *express* language that contemplates a return or profit on undepreciated investment. Even assuming that the statute *could* be read in the

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17. ***Owens v. Maass***, 323 Or 430, 435, 918 P2d 808 (1996); ***State ex rel Dept. of Transportation v. Stallcup***, 341 Or 93, 138 P3d 9 (2006)], and the historical context of the relevant enactments. ***Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto,*** 322 Or 406, 415, 908 P2d 300 (1995), *on recons* 325 Or 46, 932 P2d 1141 (1997); ***Krieger v. Just***, 319 Or 328, 876 P2d 754 (1994); *see generally* Jack L. Landau, *Some Observations About Statutory Construction in Oregon,* 32 WILL L REV 1, 38-40 (1996).

> way PUC and PGE do, it can at least as plausibly be read, by its own terms, as allowing only the rates necessary to compensate utilities for the principal amount of their undepreciated investment in their unused or retired property. To read it in the first way would be to construe it as conflicting with ORS 757.355. To read it in the second way would be to construe the two statutes harmoniously and consistently. We read it in the second way.

ORS 756.568 has been in the public utility law of Oregon for a century. Until this proceeding, no one has ever asserted that this procedural statute authorizes retroactive ratemaking. Quite the contrary, despite this statute, the Oregon Legislature, the Attorney General, the Commission, affected utility applicants, the hearings section and litigants have understood otherwise. As noted, when a legal interpretation has been known for a century, has been applied, and the legislature has not intervened, the doctrine of contemporaneous interpretation suggests it is a settled question of law. ***Union Pac. R. R. Co. v. Anderson***, *supra*; ***Butler v. State Indus. Acc. Commission*****,** *supra*.

After the turn of the 20th century, language similar to ORS 756.568 was found in virtually every utility regulation act. At the time, before the more robust development of administrative law, it was deemed necessary to provide administrative agencies with express authority to reconsider earlier decisions. This avoided confusion between the legislative aspects of their role and the quasi-judicial role of allowing petitions for reconsideration, as explained in ***Arizona Grocery Co. v. Atchison, Topeka & Santa Fe R. Co.***, *supra*, 284 US at 390 (emphasis added):

> Where * * * the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed. * * *. *It could repeal the order as it affected future action, and substitute a new rule*

> *of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the Legislature itself.*

These early statutes (such as Oregon's) are now a vestige of older forms of appellate process which were adopted before the more modern procedures (court-like civil procedure, such as motions for rehearing). ***City of Lansing v. Michigan Public Service Com'n.***, 330 Mich 608, 48 NW2d 133 (1951); ***New England Tel. & Tel. Co. v. Public Utilities Commission,*** 15 PUR4th 128, 354 A2d 753 (Me 1976).

In no state is this vestigial power to amend deemed to be the authority to retroactively redetermine rates. In practice, the statutes are often invoked to modify a number of various orders, but cannot be used to interfere with rate case orders. These "rescind or amend" statutes do not authorize retroactive ratemaking in other jurisdictions. For example, Indiana Code (IC) 8-1-2-72, "Orders; rescission; modification'" provides:

> The commission may, at any time, upon notice to the public utility and after opportunity to be heard as provided in sections 54 through 67 of this chapter, rescind, alter, or amend any order fixing any rate or rates, tolls, charges, or schedules, or any other order made by the commission, and certified copies of the same shall be served and take effect as provided in this chapter for original orders.

Indiana has a longstanding rule against retroactive ratemaking, notwithstanding a statutory power essentially the same as ORS 756.568. ***Re: Northern Indiana Public Service Company***, *supra*, 157 PUR4th 206, 1994 WL 728029.

Illinois Compiled Statues (ILCS) 5/10-113, "Rescission or hearing of order," provides:

> (a) Anything in this Act to the contrary notwithstanding, the Commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any rule, regulation, order or decision made by it. Any order rescinding, altering or amending a prior rule, regulation, order or decision shall, when served upon the

> public utility affected, have the same effect as is herein provided for original rules, regulations, orders or decisions.

Illinois does not allow retroactive ratemaking. As noted, "[r]etroactive ratemaking is prohibited under the Act; that is, the Act prohibits refunds when rates are too high and surcharges when rates are too low." ***Citizens Utilities Co. v. Illinois Commerce Comm'n***, *supra*, 124 Ill2d at 207, 124 Ill Dec at 535, 529 NE2d at 516.

Colorado's statute, CRSA § 40-6-112, provides:

> (1) The commission, at any time upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, may rescind, alter, or amend any decision made by it. Any decision rescinding, altering, or amending a prior decision, when served upon the public utility affected, shall have the same effect as original decisions.

Colorado does not allow retroactive ratemaking, and the law prevents "seeking an increased rate in order to recoup operating expenses incurred prior to any filing for new tariffs * * *." ***Peoples Natural Gas Division of Northern Natural Gas Co. v. Public Utilities Commission***, 197 Colo 152, 156, 590 P2d 960, 962 (1979).

Mississippi Code § 77-3-61, "Rescission or amendment of order," provides:

> The commission may at any time, after notice, and after opportunity to be heard as provided in section 77-3-47, rescind or amend any order or decision made by it. Any order rescinding or amending a prior order or decision shall, when served upon the utility affected and after notice thereof is given to the other parties to the proceedings, have the same effect as original orders or decisions. However, no such order shall affect the legality or validity of any acts done by said utility before service upon it of the notice of such change.

Nevertheless, Mississippi applies the rule against retroactive ratemaking. ***Mississippi Pub. Serv. Comm'n v. Home Tel. Co., Inc.***, *supra*.

As noted, Pennsylvania has a rule against redetermining past rates. "The Commission

clearly may not establish rates which are calculated to retroactively recover surpluses or refund deficits created by inaccuracies in its prior rate authorizations." ***Pike County Light & Power Company v. Pennsylvania Public Utility Commission***, *supra.* It has announced this rule notwithstanding Pennsylvania's statute, 66 PaCSA 703(g), "Rescission and Amendment of Orders" states:

> The commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it. Any order rescinding or amending a prior order shall, when served upon the person, corporation, or municipal corporation affected, and after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders.

The Pennsylvania Supreme Court has explained that the "main effect of the provision of statute providing for rescission and amendment of orders, is that prior orders of the state Public Utility Commission have no preclusive effect on the Commission from taking action, even though they have issued an order governing the same matter and involving same parties. ***Popowsky v. Pennsylvania Public Utility Com'n***, 805 A2d 637, Pa Cmwlth 2002 (2002), reargument denied, appeal denied 820 A2d 163, 573 Pa 660 (2003), appeal denied 847 A2d 60, 577 Pa 704 (2004) (***Popowsky II),*** consistent with the ***Arizona Grocery*** explanation of legislative decision-making.

Thus, even with a "modify or rescind" statute in place, claim preclusion prevents redetermination of adjudicated facts in ratecases under Pennsylvania law:

> In applying claim preclusion here, we recognize that the PUC proceedings at issue involve rate making, traditionally not considered an area of administrative law where claim preclusion should apply. The PUC itself has stressed the flexible nature of the rate making process in that successive section 1307(f) proceedings take into account historical as well as projected costs. But we agree with the

> PUC that, at some point in time, rate making predicated upon certain historical and ascertainable costs can be made subject to claim preclusion principles.

Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Com'n, 721 FSupp 710, 716 (MD Pa 1989), *affirmed* 899 F2d 1217 (1990).[18]

The federal rule of administrative law also gives preclusive effect to agency fact-finding.

> When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose. ***Sunshine Anthracite Coal Co. v. Adkins***, 310 US 381, 60 SCt 907, 84 LEd 1263; ***Hanover Bank v. United States***, 285 F2d 455, 152 CtCl 391; ***Fairmont Aluminum Co. v. Commissioner of Internal Revenue***, 222 F2d 622 (4th Cir); ***Seatrain Lines, Inc. v. Pennsylvania R. Co.***, 207 F2d 255 (3rd Cir).

United States v. Utah Construction and Mining Co., 384 US 394, 422, 86 SCt 1545, 1560, 16 LEd2d 642 (1966).

RESTATEMENT (SECOND) OF JUDGMENTS § 83 (1982), shows that this is the modern rule. It advocates that *res judicata* should apply to an adjudicative determination by an

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18. ***Arizona Grocery Co. v. Atchison, Topeka & Santa Fe R. Co.***, *supra*, explained this same distinction, that administrative agencies are not bound by *res judicata*, but instead, by other constraints:

> The Commission in its report confuses legal concepts in stating that the doctrine of res judicata does not affect its action in a case like this one. * * *. The rule of estoppel by judgment obviously applies only to bodies exercising judicial functions; it is manifestly inapplicable to legislative action. The Commission's error arose from a failure to recognize that, when it prescribed a maximum reasonable rate for the future, it was performing a legislative function, and that, when it was sitting to award reparation, it was sitting for a purpose judicial in its nature. In the second capacity, while not bound by the rule of *res judicata*, it was bound to recognize the validity of the rule of conduct prescribed by it, and not to repeal its own enactment with retroactive effect. It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the Legislature itself.

administrative tribunal when the parties had the opportunity to use procedures similar to court procedures. *Id*., at *Comment b*. Oregon applies this rule. *Res judicata* bars claims which were or could have been litigated in the prior administrative proceeding. See ***Million v. SAIF***, 45 OrApp 1097, 1102, 610 P2d 285, *review denied* 289 Or 337 (1980).[19] The preclusive effect of an administrative proceeding is governed by common law considerations in the absence of specific statute. ***Drews v. EBI Companies,*** 310 Or 134, 142, 795 P2d 531 (1990); ***Nelson v. Emerald People's Utility Dist***., 318 Or 99, 862 P2d 1293 (1993).

Whether an administrative decision has a preclusive effect depends on: (1) whether the administrative forum maintains procedures that are "sufficiently formal and comprehensive"; (2) whether the proceedings are "trustworthy"; and (3) whether the "same quality of proceedings and the opportunity to litigate is present in both proceedings." See, ***State v. Ratliff,*** 304 Or 254, 258, 744 P2d 247 (1987); ***Chavez v. Boise Cascade Corporation,*** 307 Or 632, 635, 772 P2d 409 (1989); 305 Or 48, 52, 750 P2d 485, *modified on other grounds* 305 Or 468, 752 P2d 1210 (1988). Clearly, OPUC proceedings are litigated with trial-like procedures, and PGE had every incentive to litigate all its appropriate costs in the UE 88 proceeding in 1994-95.

VII. OPUC CANNOT REDETERMINE UE 88 RATES IN EITHER A LEGISLATIVE OR QUASI-JUDICIAL MANNER.

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19. Oregon has abandoned the use of the terms "*res judicata* " and "collateral estoppel" in favor of, respectively, "claim preclusion" and "issue preclusion." ***Drews v. EBI Companies,*** 310 Or 134, 139, 795 P2d 531 (1990); ***North Clackamas School Dist. v. White,*** 305 Or 48, 50, 750 P2d 485, *modified on other grounds* 305 Or 468, 752 P2d 1210 (1988).

In its fact-finding role OPUC is without authority to *redetermine rates* in the UE 88 remand. UE 88 was conducted with trial-like procedures for the taking of evidence based on a test year. The record pertaining to that test year closed more than 12 years ago. This is the "test year rule."

> [A] utility's rates are a function of its annual revenues and operating expenses, as well as its rate base. In order to accurately determine the utility's revenue requirement, the Commission established filing requirements under which a utility must present its rate data in accordance with a proposed one- year test year. The purpose of the test-year rule is to prevent a utility from overstating its revenue requirement by mismatching low revenue data from one year with high expense data from a different year.

Business & Professional People for the Public Interest v. Illinois Commerce Comm'n, 146 Ill2d 175, 238, 585 NE2d 1031, 1038, 166 IllDec 10 (1991) (***Business & Professional People II***); ***Business & Professional People for the Public Interest v. Illinois Commerce Comm'n***, 136 Ill2d 192, 219, 144 IllDec 334, 555 NE2d 693 (1989) (***Business & Professional People I***).

> This court has held on a number of occasions that the Public Utilities Commission may not rely upon events occurring after the date certain of the test year in order to make a determination of whether to include property or expenses in the rate base. ***Pike Natural Gas Co. v. Pub. Util. Comm.*** (1981), 68 Ohio St2d 181, 429 NE2d 444 [22 OO3d 410]; ***Consumers' Counsel v. Pub. Util. Comm.*** (1981), 67 Ohio St2d 303, 423 NE2d 1082 [21 OO3d 191]; ***Consumers' Counsel v. Pub. Util. Comm*** (1979), 58 Ohio St2d 449, 391 NE2d 311 [12 OO3d 378].

Columbus & Southern Ohio Elec. Co. v. Public Utilities Com'n of Ohio, 10 Ohio St3d 12, 460 NE2d 1108 (1984).

The Pennsylvania Supreme Court explained that the Commission could not reopen the evidence adduced for an earlier test year in a later proceeding, when the utility sought to include earlier-incurred pollution control expenses in rates:

> Simply put, these pollution control facilities' expenses were not, for whatever reason, anticipated by the utility nor made the subject of evidence before the Commission in this previous rate case and the question presented by PECO's claim for deferred expenses in the instant proceeding is whether a utility may properly found a claim for increased *prospective* rates on past expense items which were greater than anticipated by the utility's proofs supporting the customer charges in effect.

Philadelphia Elec. Co. v. Pennsylvania Public Utility Com'n, 93 PaCmwlth. 410, 420-421, 502 A2d 722, 727 (1985) (emphasis in original). The Court held that the proof in the prior ratecase was conclusive.

Other courts prohibit reopening closed ratecase records. ***Detroit Edison Co. v. Public Service Commission,*** 416 Mich 510, 523, 331 NW2d 159 (1982) ("the rule against retroactive ratemaking is that when the estimates prove inaccurate and costs are higher or lower than predicted, the previously set rates cannot be changed to correct for the error"); ***MGTC, Inc. v. Public Service Commission,*** 735 P2d 103, 107 (Wyo 1987) ("The rule against retroactive ratemaking is a generally accepted principle of public utility law which recognizes the prospective nature of utility ratemaking and prohibits regulatory commissions from rolling back rates which have already been approved and have become final").

Other courts reach the same result by expressly prohibiting commissions from redetermining past rates. In Virginia:

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

City of Norfolk v. Virginia Elec. & Power Co., 197 Va 505, 516, 90 SE2d 140, 148 (1955). A "revised" rate schedule cannot reduce rates charged in an earlier case.

> The question before us is whether, in the present proceeding, the Commission has jurisdiction to declare the rates, which were put into effect in the manner provided by law, and became effective on May 1, 1939, unjust and unreasonable as of July 23, 1941, when the revised schedule was put into effect, and to require the Power Company to refund to its customers in the town of Appalachia the difference between the rates collected under the schedule of May 1, 1939, and those which would have been collected under the new schedule, which, the petitioners say, should, at the same time, have been put into effect in their community? *Or, to state the matter tersely, has the Commission jurisdiction to put into effect, retroactively, reduced rates applicable to petitioners, and require the Power Company to refund to them the overcharges collected of them*?
>
> We are of opinion that the Commission correctly held that it lacked the jurisdiction to grant such relief.

Com. ex rel. Town of Appalachia v. Old Dominion Power Co., 184 Va 6, 12, 34 SE2d 364 (1945) (emphasis supplied).

In Missouri:

> Under Missouri law, however, in determining the rate to be charged, the PSC may only: consider past excess recovery insofar as this is relevant to its determination of what rate is necessary to provide a just and reasonable return in the future, and so avoid further excess recovery, *see* ***State ex rel. General Telephone Co. of the Midwest v. Public Service Comm'n***, 537 SW2d 655 (Mo App 1976). It may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process.

State ex rel. Midwest Gas Users' Ass'n v. Public Service Commission or State, 976 SW2d 470, 480-481 (MoApp WD 1998). See also, ***State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission***, *supra*, 585 SW2d at 59.

In the District of Columbia:

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

People's Counsel of Dist. of Columbia v. Public Service Com'n of Dist. of Columbia, *supra*, 472 A2d at 866.

Even courts are limited in the authority to engage in retroactive factfinding after remand. In ***Bank of Commerce v. Ryan***, 157 Or 231, 234, 69 P2d 964, (1937), the Oregon Supreme Court considered a case where it had earlier reversed a dismissal by the trial court of a mortgage foreclosure action and remanded. Upon remand, the plaintiffs sought to introduce at the trial court new evidence of the dissolution of the bank defendant, which the trial court declined to consider. Plaintiffs appealed again. In the second appeal, The Oregon Supreme Court explained why such different evidence would have been improper in the remand proceeding:

> It is elementary that upon the remand of this cause to the circuit court by us it was the duty of the former to obey the mandate; otherwise litigation would never end. ***Simmons v. Washington F. N. Ins. Co.***, 140 Or 164, 13 P(2d) 366; 3 AMJUR p 732, § 1236. Therefore, it was the duty of the circuit court to determine the amount of taxes which the appellants had paid, direct the plaintiff to pay that amount to them, and enter a decree foreclosing the mortgage against all. That the court did in the decree which is now under attack. The appellants contend, however, that they discovered after our decision that the plaintiff had been dissolved and that, hence, it was their duty after making this discovery to call the court's attention to it so that it would not enter a decree in favor of a mere name. But the record clearly indicates that on May 16, 1935, during the trial which resulted in the decree which became the subject-matter of the first appeal, the defendants were fully aware of the liquidation of the plaintiff's business by the superintendent of banks, and of the proceedings in the circuit court attendant thereon. In fact, they offered in evidence, for another purpose, the final report of the bank superintendent's administration of the affairs of the insolvent bank. Appellants' counsel, referring to the report, said: "I will introduce that to show the liquidation and disposition of the assets." We believe that the appellants were as well aware of the facts during the first trial as when they offered for filing the tendered answer. Therefore, if the liquidation involved dissolution, the issue should have been incorporated in the first trial.

Claim preclusion applies to ratecase appeals. ***Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Com'n***, *supra*. Generally, claim preclusion requires a concurrence of four conditions. There must be an identity of the (1) subject; (2) issues; (3) persons and parties to the action; and (4) quality or capacity of the parties suing or sued. Here, PGE in UE 88 had every opportunity to present evidence pertaining to all of its costs of service, and all such evidence should have been incorporated into the original findings of fact before the Commission. One such fact was the uncertainty that Oregon law would allow PGE to charge Trojan profits to ratepayers, particularly in light of ORS 757.355. In proceeding in the manner it did, filing ratecases and charging and collecting for Trojan return on investment without finality to the DR 10 Order No. 93-1117, PGE took a risky path, as "action taken in reliance upon a lower court decree ordinarily is at the risk that it will be reversed on appeal." ***Harvey Aluminum v. School District No. 9***, 248 Or 167, 172, 433 P2d 247, 250 (1967). PGE could have presented evidence that this uncertainty was somehow causing it to suffer in the financial markets, thereby warranting a higher authorized rate of return. And the Commission could have accepted such evidence and have made findings of fact and conclusions of law consistent with it. But that did not happen.

Similarly, PGE could have identified the costs it seeks to redetermine through testimony in the original factfinding stage of the UE 88 docket or could have asked for the rate treatments for those costs it now seeks. But that also did not happen, and PGE did not assign error to any Commission order on the grounds that such costs were not recognized or such rate treatments adopted.

In ***Washer v. Clatsop Care and Rehabilitation District***, 98 OrApp 232, 235, 778 P2d (1989), the Court endorsed the principles of finality and preclusion implicit in ***Harvey Aluminum***:

> Questions that could have been raised and adjudicated on appeal are deemed adjudicated. ***City of Idanha v. Consumer's Power***, 13 OrApp 431, 509 P2d 1226 (1973). Plaintiff, as appellant, could have contended on appeal that the ruling striking his claim for pre-formation expenses was error. Because he did not do so, the ruling became the law of the case.

In ***City of Idanha v. Consumer's Power***, 8 OrApp 551, 495 P2d 294 (1972), the appellate court had ruled that plaintiff city had legal authority to enact an ordinance imposing license fees on public utilities operating within the City but that the City could not forbid the utility from passing the tax onto its customers. On remand, the utility argued for the first time that it was prohibited by a federal statute from increasing its rates in order to pay the tax imposed. On the second appeal**,** ***City of Idanha v. Consumer's Power***, 13 OrApp 431, 434, 509 P2d 1226 (1973), the Oregon Court of Appeals held:

> Even if we were to assume for purposes of argument (a) that the only way defendant can pay the tax is by increasing its rates to Idanha customers, and (b) that defendant is correct in its interpretation of the cited federal statutes, this is a defense which defendant could have made in the trial court in the original proceeding (and thence on appeal to this court), but did not. All questions which could have been raised and adjudicated on appeal are deemed adjudicated. ***William Hanley Co. v. Combs***, 60 Or 609, 119 P 333 (1912).

The rule is the same in administrative review cases--where an appeal is taken with respect to only a particular issue or issues, there can be no retrial after remand of issues previously tried and determined but not appealed from. The failure of a party to take a cross-appeal as to other elements of the agency decision (not included as an issue on appeal by the appellant) will foreclose appellate consideration of the aspect of the agency decision as

to which no appeal was taken. ORS 756.580 allows review of findings, conclusions and orders. If a finding or conclusion was not before the reviewing court it simply cannot be within the scope of a remand as it was *de hors* the appellate record.

Hitt v. State of Alabama Personnel Board, 873 So2d 1080, 1088 (Ala 2003), offers a relevant example. The case arose as an appeal of an agency order. After the State Personnel Board failed to act on the former employees' request for computation of benefits, the employees sought judicial review of the administrative action. As is the case in review of OPUC decisions, the first level of review of the Board decision required the parties to the agency proceeding to become plaintiffs in circuit court. Upon the trial of the issue to the first level of review, the trial court ordered a benefit calculation and the State appealed the part of the order allowing prejudgment interest. The judgment of the trial court was reversed as to that portion of the judgment. On remand, the employees sought to open other determinations of the trial court which had not been the subject of the appeal. The Alabama Supreme Court reaffirmed that:

> "'In cases where an appeal is taken with respect to only a particular issue or issues, there can be no retrial after remand of issues previously tried and determined but not appealed from. ***Sewell Dairy Supply Co. v. Taylor***, 113 GaApp 729, 149 S.E.2d 540 (1966) * * *.'" ***Eskridge v. Allstate Ins. Co.***, 855 So2d 469, 472 (Ala 2003) (quoting ***Ex parte Army Aviation Ctr. Fed. Credit Union***, 477 So2d 379, 380-81 (Ala 1985)).
>
> Failure of a party to take a cross-appeal as to an adverse aspect of the judgment appealed, but not included as an issue on appeal by the appellant, will, under circumstances such as those presented here, foreclose appellate consideration of the aspect of the judgment as to which no appeal was taken. *See* ***Cavalier Mfg., Inc. v. Clarke***, 862 So2d 634, 643 (Ala 2003).

In Oregon, another rationale for the requirement that a party must raise and preserve error in the original proceeding or be foreclosed from relitigating illustrates URP's litigation harms herein and by extension the harms to the Class Action plaintiffs. The due process element of the requirement of full litigation of all issues on the original appeal exists to afford the opposing party an opportunity to be heard at each adjudicatory level regarding the issue and for the adjudicator to rule, thereby promoting efficient judicial administration so that "parties are not taken by surprise, misled, or denied opportunities to meet an argument." ***Davis v. O'Brien***, 320 Or 729, 737, 891 P2d 1307, 312 (1995). Having participated in all levels of judicial review successfully, URP is entitled to finality on the issues it pursued successfully and finality on all issues PGE could have raised but did not.

VIII. OPUC LACKS EXPRESS AUTHORITY TO ACTUALLY ACCOMPLISH REPARATIONS TO OVERCHARGED INDIVIDUAL RATEPAYERS.

Further, OPUC has no express powers to actually accomplish refunds to all who were overcharged during the 1995-2000 period at issue or even to order lower rates or refunds to those *current* ratepayers who were also ratepayers during some or all of that period (to avoid discriminatory rate "windfalls" to those current ratepayers who were never charged rates with Trojan profits).

Discovery undertaken in *Dreyer v. Portland General Electric Company*, (Marion County Case Nos. 03C10639, 03C10640), strongly suggests that even most of those who were ratepayers in 1995-2000 and who remain current ratepayers cannot be identified and recompensed. For part of the period, accounts were not linked to named individuals. Thus

neither consumption, nor last-known addresses can easily be determined, without full discovery in litigation.

PGE produced the corporate person most knowledgeable about tracking customer accounts, David Schwartz, for deposition on July 24, 2004. There are serious impediments to locating pre-2002 customers. Mr. Schwartz testified that there is no reliable way of determining who was a PGE ratepayer prior to approximately August 2002, even if that customer is currently a customer. Ex. 1, Excerpts from Deposition of David Schwartz, Declaration of Linda Williams. There was some effort during a transitional period to update records from sometime in 1998 to integrate them with the new system installed in 2002.

Prior to approximately 1998, the older forms of record-keeping tracked meter numbers but not the names of customers. In those older records individual customers are not linked to any account numbers. Records were not maintained by address. Account numbers were changed and reassigned for various reasons unrelated to the physical address or the named customer. Records exist only a format which requires manually reviewing microfiche film of hundreds of millions of "snapshots" which miss many billings. Declaration of Linda Williams, Ex. 1, Depo. Schwartz, paginated Ex. p. 2 (internal p. 15, ll. 17-25, p. 16, ll. 4-25, p. 17 ll. 1-4); Ex. p. 3 (internal p. 18, ll. 1-24, p. 19, ll. 9-25, and p. 20, ll. 1-4); Ex. p. 4 (internal p. 30, ll. 17-24); Ex. p. 5 (internal p. 41, ll. 6-25, and p. 42).

Based on the sworn testimony of Mr. Schwartz, it appears that no one who paid illegal charges for profit on Trojan to PGE at any time prior to mid-2002 can reliably be identified and recompensed by PGE. Experience with the PGE settlement class in the recent ***Kafoury v. Portland General Electric Company*, Multnomah County Circuit Court No. 0505-00627** ***and Lezak v.***

***Portland General Electric Company*, Multnomah County Circuit Court No. 0512-127627** cases (which covered the time period of 1998-2005) suggests that on average, approximately 10% of PGE's electric utility customers terminate service each year and do not relocate within PGE's service territory. Declaration of Linda Williams at ¶ 7. The amount that should be paid to these former ratepayers who paid the unlawful Trojan profits during the periods for which PGE does not have records could amount to tens of millions of dollars in aggregate.

As further evidence of the inadequacy of any "refund" order, we attach the recently prepared Affidavit of Douglas I. Leeper, Director, Business Services for PacifiCorp. Declaration of Linda Williams, Ex. 2. This document was filed by PacifiCorp in *Alt/Delk v. PacifiCorp*, Multnomah County Circuit Court Case No. 0510-10786, recently certified as a class action on June 7, 2007. In May 1999, the Utah Public Service Commission ordered PacifiCorp to refund certain amounts it had collected under interim rates, subject to refund, between March 14, 1997, and February 28, 1999.[20] ***In re PacifiCorp***, Docket No. 97-035-01, 192 PUR 4th 289, 1999 WL218118. Affiant Leeper was in charge of the refund process and estimates that using PacifiCorp's own resources, the costs of "identifying, locating and processing refunds" for former ratepayers in Utah was "in the range of $5 to $10 per

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20. In the 1997 General Session of the Utah Legislature, House Bill 313 was enacted and became law. H.B. 313 affected these proceedings through its provisions found in U.C.A. 54-7-12.3(2) and (3). Therein, the Legislature enacted the following:

> (2) ...each investor-owned electrical corporation shall freeze its rates on an interim basis on the effective date of this section for each of the electrical corporation's electric service schedules at January 31, 1997 levels. These interim rate levels shall remain in effect until 60 days following the conclusion of the 1998 General Session and shall not be final until the Public Service Commission completes any rate case pending as of the effective date of this act.

customer." Affidavit of Leeper ¶ 8. Using that estimate suggests that it would cost $5-10 million for PGE to process whatever information it has regarding the million or more former customers.

Mr. Leeper also testifies to the internal cost of assigning IT personnel to run the program to identify former customers as at least "$100,000.00" (¶ 3), and "inestimable" in total. Mr. Leeper states that the company incurred costs for writing checks which were later cancelled, crediting unclaimed amounts back to customer accounts, and for processing escheats to the State of Utah. Such costs are not within the "penalties" [ORS 757.990] which OPUC may impose.

Mr. Leeper further states that "approximately half of the checks sent to former customers were returned to PacifiCorp * * * as undeliverable * * *." Affidavit of Leeper ¶ 4.a. In a second round of mailings, only about 20% of former customers responded. Affidavit of Leeper ¶ 4.b. Obviously, customers who terminated service will not be found at their last address known to the utility. In Utah, PacifiCorp was trying to reach customers who had terminated service within the two preceding years. For UE 88 rates, the customers will have terminated service anytime since 1995--and we do not know when that effort will be undertaken to find them--14 or 15 years from the date of overcharge, perhaps.

In Utah, PacifiCorp's reliance upon postal forwarding (which is in place for only one year) was thus not a reasonable effort to locate former ratepayers. It should have been required to use locator services (approximately 44 cents per name, Declaration of Linda Williams, ¶ 5) and extensive newspaper advertisements. Newspaper notices would cost at least $100,000. Declaration of Linda Williams, ¶ 8. Unless such steps and costs are ordered

by the Commission and borne by the company, approximately one million former customers will not receive the most minimal due process notice of their refunds. Does the OPUC have such powers?

The Commission does not have express authority required by ***McPherson v. Pacific Power & Light Co***., *supra*, 207 Or at 449; **CUB/URP**, *supra*, 154 OrApp at 713, to order and enforce such costs and mandates. True, the Commission has general powers "to do all things necessary and convenient" to protect the public from "unjust and unreasonable exactions and practices," ORS 756.040(1) and (2), but we question whether the OPUC has the plenary powers of a court to order a utility to pay for locator services, take out multiple newspaper notices in California, Western Washington, and Nevada (areas with the highest out-migration rates from Oregon), and the other judicial powers necessary to administer individual refunds. Consider that the Oregon Court of Appeals invalidated, as beyond its authority, the OPUC's "tagline rule," which required no expenditure of funds by the utilities but only required that they disclose in all advertisements whether the advertisement was paid for by customers or stockholders. Such authority could not be inferred from 756.040(1) and (2). ***Pacific Northwest Bell v. Davis***, 43 Or App 999, 608 P2d 547 (1979), *review denied* 289 Or 107 (1980). The necessity for strict construction of OPUC's powers under those sections was required because:

> [T]the people, by adopting the state constitution, conferred upon the Legislative Assembly the power to legislate. Therefore this power is not by implication to be delegated to nonelective officers. The tendency of administrators to expand the scope of their operations is perhaps as natural as nature's well-known abhorrence of a vacuum. But no matter how highly motivated it may be, the tendency to make law without a clear direction to do so must be curbed by the overriding constitutional requirement that substantial changes in the law be made solely by

> the Legislative Assembly, or by the people. Oregon Constitution, Art IV, s 1 * * *.

43 Or App at 1006 (quoting ***Oregon Newspaper Publishers Ass'n v. Peterson***, 244 Or 114, 123-124, 415 P2d 21, 24-5 (1966)).

IX. PROHIBITION ON SINGLE-ISSUE RATEMAKING IS DISTINCT FROM THE RULE AGAINST RETROACTIVE RATEMAKING.

The scoping order in this docket correctly stated the prohibition on single issue ratemaking:

> To determine the total revenue requirement, the Commission is required to consider all aspects pertinent to the utility's operations. [] This is the rule against single-issue rulemaking. Recognizing that the revenue formula used in ratemaking is designed to determine the revenue requirement based on the aggregate costs and demand faced by a utility, the rule appreciates that a change in one item of the revenue formula may be offset by a corresponding change in another component of the formula. Consequently, the rule makes it improper to consider any change to components of the revenue requirement in isolation.

OPUC Order No. 04-597 (October 18, 2004). It applies to making prospective changes in *existing rates* without full consideration of all factors.

> Missouri's prohibition against single-issue ratemaking bars the Commission from allowing a public utility to change an existing rate without consideration of all relevant factors such as operating expenses, revenues, and rates of return.

Consumers Council, *supra*, 585 SW2d at 56-58.

> When a utility files a request for a rate increase in the form of a new tariff schedule * * * [t]he Commission must determine whether the proposed rates are just and reasonable and do so within the regulatory parameters which prohibit retroactive and single issue ratemaking.

Business & Professional People II, *supra*, 146 Ill2d at 244, 585 NE2d at 1038, 166 IllDec 10.

> This prohibition is based on the rate maker's obligation to consider all of a utility's revenues and costs in the balancing process to achieve just and reasonable rates. Moreover, review of expense items in isolation could result in confiscatory rates.

National Fuel Gas Distribution Corp. v. Pennsylvania Public Utility Com'n, 464 A2d 546, 567 (Pa Cmwlth Ct 1983).

The scoping order incorrectly assumed, however, that the Commission could retroactively redetermine rates at all in UE 88. The prohibition against single-issue ratemaking cannot overcome the constitutional objections to retroactive ratemaking nor be a reason to allow new evidence on a test year that has already long gone. If the company had other costs for the test year which was used in UE 88, it should have put evidence on at the time, before the evidentiary record closed in 1995. The prohibition against single issue ratemaking is not an opportunity for a do-over on costs which existed at the test year.

Any such attempt to redetermine rates would violate the "test-year rule," under which utility must present its rate data in accordance with a proposed test year. Its function is to prevent a utility from overstating its revenue requirement by mismatching low revenue data from one year with high expense data from a different year. Recovery now for charges proven at this late date would allow PGE to mismatch expenses from the past period with the revenue data from the test year.

X. ANY LEGISLATIVE EFFORT TO ELIMINATE OR INTERFERE WITH THE ACCRUED AND FILED DAMAGE CLAIMS WOULD RESULT IN UNCONSTITUTIONAL DEPRIVATIONS OF VESTED RIGHTS.

We have previously referred to Oregon Constitution, Article III, § 1, to explain the distinctions between OPUC's legislative and quasi-judicial powers and the courts' role in

reviewing decisions. We also referred to the role of judiciary in determining individual ratepayer damages for overcharges. The separation of powers clause also prevents the OPUC from removing or impairing those individual ratepayers' judicial remedies or rights or contracts retroactively.

"Retroactive application of a change in the law may be invalid for depriving a litigant of due process in the literal sense of an opportunity to adjudicate an existing claim * * * ." ***Hall v. Northwest Outward Bound School, Inc.***, 280 Or 655, 661-663, 572 P2d 1007, 1011 (1977). The OPUC cannot change vested rights. ***State ex rel. Bayer v. Funk***, 105 Or 134, 209 P 113, 25 ALR 625 (1922). The general rule is that substantive legal rights may not be retroactively impaired, once vested, and vesting occurs "when it is actually assertable as a legal cause of action or defense," ***Hall v. A.N.R. Freight System, Inc.***, 717 P2d 434 (Ariz 1986).

A. OPUC CANNOT INTERFERE WITH INDIVIDUAL RATEPAYERS PARTICIPATION IN THE PENDING CLASS ACTION.

Once a cause of action has accrued, the right to pursue that cause of action under then-existing law is a vested right. When a cause of action has accrued, subsequent legislative acts may not be applied to eliminate or curtail the cause of action. See ***Forbes Pioneer Boat Line v. Bd. of Comm'rs***, 258 US 338, 339, 42 SCt 325, 66 LEd 647 (1922) (holding that "legislature [could not] take away from a private party a right to recover money that is due when the [legislative] act is passed"). A cause of action which has accrued, and in fact reached success at summary judgment--such as the claims of the CAPs and the ratepayer class--are such vested rights which cannot be destroyed.

> [T]heir right to such compensation, having accrued while the act was in force, cannot be destroyed by subsequent legislation without a violation of the rights guaranteed by the 14th Amendment.

Ettor v. City of Tacoma, 228 US 148, 150, 33 SCt 428, 428 (1913).

Fisk v. Leith, 137 Or 459, 299 P 1013 (1931), held that an electric utility's cause of action for interference with its **statutory** right to engage in business could not be destroyed by subsequent legislation. The plaintiff was an electric utility claiming that it was entitled to operate without competition under the "pioneer utility" statute. The Legislature repealed the statute while the action was pending. The Oregon Supreme Court held the utility was entitled to seek damages for the unlawful competition which had existed under the state of the law, until the statute was repealed, on the grounds that the utility's rights to sue under then-existing law had vested:

> In the instant case the statute repealed conferred upon the plaintiff a right as distinguished from a remedy. It protected the plaintiff public utility company from competition by other public utilities in the same territory until the Public Service Commission issued to them a certificate of public convenience and necessity. This statutory right thus to engage in business was a property asset--a vested right--and, a cause of action having accrued by reason of interference therewith, such could not be destroyed by subsequent legislation. The cause of action which accrued prior to the repeal of the statute is property in the same sense in which tangible things are property, and its destruction would amount to the taking of property without due process of law. COOLEY'S CONSTITUTIONAL LIMITATIONS (8th Ed) vol II, p 756.

137 Or at 463. As discussed below, the right to pursue common law remedies is additionally protected by the Oregon Constitution's Remedies Clause, Article I, § 10, discussed below, and the right to implied contract damages is additionally protected by the Contracts clauses of the Oregon and U.S. Constitutions. Oregon Constitution, Article 1, § 21; U.S. Constitution, Article 1, § 10, cl 1.

State courts have found that accrued causes of action are protected by state constitutional due process guarantees and cannot be impaired without compensation, including:

Florida: ***Rupp v. Bryant***, 417 So2d 658, 666 (Fl 1982), held that "due process considerations" preclude retroactive application of amendments to tort immunity statute where such application abolished vested right to recover from persons who were not immune from liability when tort claim arose.

Iowa: The legislature may not extinguish a right of action that has already accrued to a claimant. ***Thorp v. Casey's Gen. Stores, Inc.***, 446 NW2d 457, 461 (Iowa 1989). A cause of action accrues when an aggrieved party has a right to institute and maintain a lawsuit. *Id*. at 460. When a cause of action has accrued, the party owning the action has a vested interest in it. *Id*. New legislation that takes away a cause of action, which previously existed either through legislation or the common law or creates new rights, is substantive legislation. *Id.* at 461. "Because substantive legislation cannot extinguish vested rights, such legislation can only operate prospectively." ***Dolezal v. Bockes***, 602 NW2d 348, 351 (Iowa 1999).

Illinois: "[R]ights and obligations of the parties became vested at the time the cause of action accrued which the amendatory act could not impair." ***Application of Rosewell***, 286 Ill App 3d 814, 819, 677 NE2d 443, 446, 222 Ill Dec 240, 243 (1st Dist 1997).

Kansas: "[T]he holder of an accrued tort action for negligence has a vested property right in that cause of action." ***Holt ex rel. Holt v. Wesley Medical Center, LLC*** 277 Kan 536, 539-540, 86 P3d 1012, 1015 (2004).

Maine: "At common law, an individual has a vested right in an accrued cause of action, and a subsequent statutory enactment cannot act to defeat retroactively such a cause of action." ***Heber v. Lucerne-in-Maine Village Corp***., 755 A2d 1064, 1066 (Me 2000).

Maryland: A statute having the effect of abrogating a vested property right and not providing for compensation allows the taking of private property without just compensation and results in unconstitutional deprivation of property in violation of the state due process clause. Statutes that retroactively created a statutory interest rate and validated late fees in cable company consumer contracts deprived those cable subscribers of vested rights and violated the state due process clause and protection against taking of property without just compensation, whether the statutes abrogated the right to particular sums of money, causes of action, or both. Further, the retroactively-enacted interest rate violated the state constitutional remedies clause. ***Dua v. Comcast/Harvey v. Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc***.,

379 Md 604, 805 A2d 1061 (2002). (Copy attached for its pertinent discussion of two unconstitutional retroactive legislative acts under state constitutional provisions analogous to Oregon's.)

Nebraska: "[T]he Legislature may not deprive a plaintiff of an already accrued cause of action without providing the plaintiff a reasonable time in which to file the action." ***Macku v. Drackett Products Co***., 216 Neb 176, 343 NW2d 58 (1984). The "rationale * * * is grounded in the due process clause of Neb Const Art I, § 3, which prevents deprivations of property without due process of law. A statutory bar and an accrued cause of action are vested rights. Like other vested rights, they cannot be impaired by a subsequent legislative act." ***Schendt v. Dewey***, 246 Neb 573, 577, 520 NW2d 541, 545 - 546 (1994) (some citations omitted).

North Dakota: "There is a vested right in an accrued cause of action. SUTH. STAT. CONSTR., § 480. A vested right of action is property in the same sense as tangible things are property, and is equally protected against arbitrary interference. Cooley, CONST. LIM. 445 (5th Ed)." ***Wirtz v. Nestos,*** 200 NW 524, 530 (ND 1924).

Ohio: "[T]he law is clear that a cause of action which has accrued is a vested and substantial property right." ***Nationwide Ins. Co. v. Ohio Dept. of Transp***., 61 Ohio Misc 2d 761, 765, 584 NE2d 1370, 1373 (Ohio CtCl 1990).

Pennsylvania: The Legislature cannot "constitutionally extinguish a vested cause of action or an accrued claim." ***Gibson v. Commonwealth***, 490 Pa 156, 161, 415 A2d 80, 83 (1980). "It is well-settled that the Legislature may not extinguish a right of action which has already accrued to a claimant. This Court has consistently held that the Legislature's repeal of a law which created a right of action does not disturb any actions accrued thereunder." *Id*.

B. INTERFERENCE WITH THE FILED CLAIMS WOULD VIOLATE THE OREGON REMEDIES CLAUSE.

Any retroactive legislation intended to deprive plaintiffs of their accrued cause of action would violate the Oregon Constitution, Article I, § 10:

> No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.

Generally, this clause guarantees those remedies which existed at common law and were established when Oregon adopted its constitution. ***Smallwood v. Fisk***, 146 Or App 695, 934

P2d 557 (1997). The common law remedy of Money Had and Received was well-established in the common law of England (assumpsit) and the new constitutions of the States at the time of the adoption of the Oregon Constitution. See ***Clark v. Pinney***, 6 Cow 297 (NY 1826).

The constitutions of 39 states contain provisions substantially similar to Oregon's Article I, § 10. *See* David Schuman, *The Right to a Remedy,* 65 TEMP L REV 1197, 1201 (1992). This provision, commonly referred to as the "open courts" or "remedies" clause, is derived from MAGNA CARTA and Sir Edward Coke's Seventeenth Century commentary on the Great Charter, which was relied upon by the drafters of early American state constitutions. Jennifer Friesen, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 6-2(a) (3d ed 2000). The contemporary understanding of the Remedies Clause would have been well-understood by the Oregon framers. For example, at the time of the Oregon Constitutional Convention, the Pennsylvania Supreme Court discussed the origin and meaning of that state's Remedies Clause (Penn Const Article 1, Section 11) in ***Menges v. Dentler,*** 33 Pa 495 (1859). The Court considered a challenge to a legislative act which sought to invalidate the property rights of certain heirs. The Pennsylvania Supreme Court agreed that the Remedies Clause was both a command to courts and a limitations upon the legislative branch. In its holding the Court reviewed the Magna Carta and described the remedies clause derived from that charter as:

> [I]mperative limitations on legislative authority, and imperative impositions of judicial duty. To the judiciary they say:--You shall administer justice to all men by due course of law, and without sale denial or delay, and to the legislature they say:-- You shall not intermeddle with such functions.

33 Pa at 498.

XI. NUCLEAR PLANT CASES.

There does not seem to be anything unique about nuclear plant cases which alters the general principles set out above and the particular impact of Oregon law. In general, regulatory commissions have exercised ratemaking discretion and have allowed amortization of some or all of plant investment, subject to local laws and as summarized in the appended cases. ***Attorney General v. Dept. of Public Utilities***, 390 Mass 208, 455 NE2d 414 (1983); ***People's Organization for Washington Energy Resources v. WUTC***, 104 Wash2d 798, 711 P2d 319 (1985). Amortization of Trojan investment is not at issue here, so the cases shed no light on the issues herein, with the exception of ***Business & Professional People I*** and ***II***, *supra,* which sets out the widely-followed framework for disallowing costs sought retroactively in contravention of the "test year rule." No case on nuclear plant costs allows collection of costs and charges prohibited by law.

Dated: June 20, 2007

Respectfully Submitted,

/s/ Linda K. Williams

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Attorney for the
Class Action Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I filed the original and 5 copies of the foregoing by US Mail, and by e-filing to the Filing Center, postmarked this date, and that I served a true copy of the foregoing OPENING COMMENTS OF THE CLASS ACTION PLAINTIFFS ON THE PROFFERED QUESTION REGARDING REMEDIES by email to the physical and email addresses shown below, which comprise the service list on the Commission's web site as of this day (email service only to those who have waived physical service).

STEPHANIE S ANDRUS DEPARTMENT OF JUSTICE 1162 COURT ST NE SALEM OR 97301-4096 stephanie.andrus@state.or.us	PAUL A GRAHAM DEPARTMENT OF JUSTICE 1162 COURT ST NE SALEM OR 97301-4096 paul.graham@state.or.us
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Dated: June 20, 2007

/s/ Linda K. Williams

Linda K. Williams

BEFORE THE OREGON PUBLIC UTILITIES COMMISSION

DR 10, UE 88, UM 989

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

I, Linda K. Williams, under penalty to perjury, declare from my own personal knowledge and for filing in the above-captioned matter:

1. I am the attorney of record for intervenor-parties to the above-captioned proceeding, the Class Action Plaintiffs (Gearhart, Kafoury, Morgan).

2. I am co-class counsel and represent plaintiff class action representatives in the following pending cases: *Dreyer v. Portland General Electric Company*, Marion County Case No. 03 C10639; and *Alt/Delk v. PacifiCorp*, Multnomah County Circuit Court Case No. 0510-10786

3. Filed with this Declaration as Exhibits are true copies of documents obtained by me in the course of the litigation identified in ¶ 2 and maintained by me in my files. Each exhibit has internal indicia of authenticity and the statements therein were sworn under penalties of perjury.

Excerpts from Deposition of David Schwartz, conducted July 24, 2004, in *Dreyer v. PGE* . . . . . Exhibit 1

Affidavit of Douglas Leeper, dated A, 2007, filed in *Alt/Delk v. PacifiCorp* . . . . . Exhibit 2

4. I was appointed co-lead Class Counsel in *Kafoury v. Portland General Electric Company*, Multnomah County Circuit Court No. 0505-00627, consolidated with, *Lezak v. Portland General Electric Company*, Multnomah County Circuit Court No. 0512-12762. These cases involved overcharges for Multnomah County Business Income Tax (MCBIT) charged by Portland General Electric Company. The cases settled, and I was personally involved in negotiating with the claims administrator, Poorman-Douglas Company, regarding cost estimates, which the Court approved. I have recently reviewed documents provided to me by Poorman-Douglas.

5. PGE had some computerized records going back to sometime in 1998 for a total of about 300,000 former customer names with last known address in Multnomah County. The Claims Administrator used several proprietary locator data bases to try to ascertain some more recent addresses for the former customers. At the time, an initial run against the US Postal database of forwarded addresses (one year) cost $750. The cost of running the names through the private databases was about 44 cents per name.

6. First class mail notice was sent to approximately 200,000 persons who were likely to have been former ratepayers.

7. From PGE's records provided to the Claims Administrator for processing, it appears the approximately 10% of its customers terminated service each year and did not resume service with PGE. Using census records, publicly available taxpayer relocation records (zip codes), and information complied by Portland State University and the State of Oregon, I concluded that the majority of relocation from Multnomah County is within the States of Oregon and Washington, and also large out-migration to other parts of the western United States.

8. The Court approved the use of newspaper notices (4 insertions each) in newspapers published throughout Oregon, Washington and in the western edition of *USA Today*. The cost of these notices was approximately $90,000 in the summer of 2006.

9. PGE's Oregon customer base is approximately 3 to 4 times larger than the customer base in Multnomah County alone. The period of time at issue for UE 88 extends back to 1995. Accordingly, the number of former ratepayers who paid rates under the UE 88 rate order is in the range of 1 to 1.5 million.

10. The claims administrator's duties included running a live toll-free telephone information line 12 hours a day, and a website with information and answers for frequent questions. This telephone service tallied thousands of minutes.

June 20, 2007

Linda K. Williams

Signed this date in Portland, (Multnomah County), Oregon.

EXHIBIT 1

BE IT REMEMBERED THAT, pursuant to Oregon Rules of Civil Procedure, the deposition of DAVE SCHWARTZ was taken before Denise C. Johnson, Certified Shorthand Reporter in and for the state of Oregon, on Tuesday, July 27, 2004, commencing at the hour of 1:36 p.m., the proceedings being reported in the law offices of PGE Legal Department, 121 S.W. Salmon, Suite 13, Portland, Oregon.

* * *

APPEARANCES

MS. LINDA K. WILLIAMS
Attorney at Law
Attorney for Plaintiffs

PGE COUNSEL'S OFFICE
By Mr. David A. Aamodt
Attorney for Defendant

* * *

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everybody's meter on the same day. And so what they've done, had done I should say, is to organize the work on what a meter reader could accomplish in a given day. That's known as a meter reading route.

And so – and that context, it was more important for the business at that time to be able to manage the work and the transactions that were processed on a daily basis, as opposed to who was the specific person living in that residence at that time and where did they move to after that.

Q. Okay. And so let me just see if I understand a little bit. So, generally speaking, and I'm not sure -- first I've got to make sure I understand it, and then I've got to make sure I understand if it's true throughout the whole time frame, because I think you're talking about maybe a 40-year time frame?

A. About '64 through 2002.

Q. So some of those considerations that you just described affect the way the data was organized for that period of time?

A. Correct.

Q. Whether it makes sense anymore, you know, in

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2001, but that's the way it was.

When you say "a meter reading route," I guess, was that something that was determined by the – kind of the actual physical route that the meter reader had? You know, if he had a route way out in the Salem area and had a big drive-around routine, might be servicing fewer accounts than the meter reader up in Northeast Portland?

A. Correct. Yeah.

Q. So by meter reader routes, they really were quite literally tied to particular people. And if one guy got to eight people in a day, that's what that --

A. Yeah. It was typically more like anywhere from 200 to 400 meters per day.

Q. Okay. And as a consequence of that, what does that mean for the way the data was compiled?

A. What makes it difficult is it's laborious and perhaps nearly impossible to determine if a given customer moved from one location to another in that period of time that was referenced of April 1995 to September 30, 2000.

Q. Okay. Because the way that the Legacy was organized had not yet been modified enough to

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give you individual rate payer information, as opposed to meter location information?

A. Correct.

Q. Okay. Let me see if I can understand, then. Is there or was there a separate system about customer payment history?

A. They were all contained within the same database.

Q. Okay. But you're saying it would be difficult to cross-reference them?

A. It would be difficult to say that, for example, Linda Williams who lived in Southeast Portland from April 1995 through December 1998, was the same Linda Williams who moved to Southwest Vermont Street in the year 1998 to present, because it wasn't a customer-based system.

Q. Okay. And because it was not a customer-based system your records might include in that particular example, it might say service to the Vermont Street address, and then service again to the Vermont Street address, but it would be kind of indifferent as to who service was provided?

A. Yeah, it wouldn't know, for example, if he had moved. The agent at the time who was looking

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at the information would know that you had lived on that street and that residence for a period of time.

Q. Okay. Now, how would the agent looking at the record know that?

A. Because there are fields in and on that record that tell the agent when that particular customer moved in and when they moved out if the account was closed.

Q. Okay. And is it your testimony, then, or is it your testimony about how the field was operated, that the field would be contained – let's just keep using that example.

You now have an account open on Vermont Street somewhere. The agent looking at that account would know that this account was opened by someone with my name?

A. Correct.

Q. Or a name. Because just the way it showed up, new account.

Would the agent looking at that know that I was at the time or had just been a PGE customer? Is there anything that would indicate that to the agent looking at the –

A. Can you repeat the question?

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Q. Well, I thought I heard you say that the agent looking at the account could tell that I had been a customer previously by looking at the account.
A. **That is true at the time. But I guess the other thing to remember is that these are Dynamic Systems. And that a given situation at one point in time would not be the same at a later date in time.**
Q. Well, let me see if I can ask it in a way that I understand. This Dynamic aspect to the system, is that because fields were not – are not preserved for some reason, or – you know, if I go back now today and I call up a record from 1999 and I look at it, is there anything about that record that I could use to discern from that field about who the customer is and whether or not that customer had been a customer at that address or some period of time, or had been a customer at a different address for some period of time, using the Legacy's CIS system?
A. **The current means by which the data has been stored, that would be impossible in many cases.**
Q. Okay. So when you say "current," we're talking

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about the way the Legacy CIS currently is stored?
A. **What is and will ever been stored.**
Q. Okay. So whatever is –
A. **Let me explain, if I might –**
Q. Yeah.
A. **– the storage and tension.**
Q. Got it.
A. **And with Dynamic Systems it's impossible and it's cost prohibitive to take a snapshot of every day's activities and archive it off so that you could look at any day in time and see what the situation was.**
Nor would there be any way to take an X number of days of activity and combine them in a means that would make sense and could be physically accomplished.
So let me just see if I can give you an example. Let's say that we have a snapshot of six months from January 1, 1998 to June 30, 1998. And you look into the database, and it would be very likely that if Linda Williams, or any customer for that matter, had moved in February 1st, had two or three billings, paid their billings, they would not appear on that

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record June 30th.
Because after a period of time, if you are a customer who paid your bill regularly and no longer were with us, that record dropped off.
Q. Okay. And your example there was just a short interval of bill paying, and then no further bill paying?
A. **Yes.**
Q. And that at some point, and I'm not sure if you're saying it really was a period of two or three months or some other period, that would drop off, and so there would just be no record, then, of the account being serviced, or no record of the person who received the service, or what record would –
A. **Not in that snapshot. There are other means to look at an individual record. There is a microfilm record at every month that would show what your consumption and other information were.**
Q. Okay. Well, let's see if I can begin to understand the different kinds of data that you're keeping. One is the Legacy CIS, which we've described a little bit about both what it was meant to do, and what it, by its nature

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preserved, if at all, you know, because of what it was meant to do.
Now you're saying there is also some sort of microfiche. So I guess there was a hard paper printout of some stuff sometime?
A. **Microfilm is microfilm. And their status, as well as more current technology document management systems that have other data that can be looked at for an individual.**
Q. Okay. Well, let me just try to understand in my own terms. Microfilm is microfilm of something. So what was the original source document that got microfilmed, do you know?
A. **It was specific fields from the Legacy CIS.**
Q. Okay. So specific fields from Legacy CIS got printed out at some interval in a paper form?
A. **No paper.**
Q. No paper. Okay. Printed out to directly to microfilm?
A. **Yes, it was sent directly to microfilmed record.**
Q. Okay. And this period in which some fields from Legacy CIS were – is that a routine practice, routinely printed to microfilm?
A. **Yes.**

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A. Yes.
Q. Okay. And is there a way about how the account numbers were distributed or reassigned, or something, within the meter routes so that with reasonable precision I could tell that this new account number that showed up for the first time on this chunk of readout that has to do with meter route up in Southwest Portland, there is probably the same account number -- is probably the same as that person that had an account number in the previous snapshot?
A. Components of the account number would remain the same.
Q. In a consistent manner? I mean, like, would it be like four digits somewhere in the middle, or something?
A. With exceptions. For example, as your service territory grows you have to reroute. So that if you have a large apartment complex that gets built on Southeast Belmont Street, then you have to move the sequence of the routes that are read to accommodate that 400-unit apartment complex. So the account number would change. That's a common practice.
So I guess the short answer is, there are

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probably not any consistent ways on which we could look at these and have any kind of certainty that we're talking about the same customer.
Q. Okay. Looking at it a different way, and, again, looking at that period of time only before you changed to the CIS system, if I opened up a new account and told you I'd previously been a customer at X, Y, Z, and I don't want to pay a deposit or something. Or for some reason you think I'm somebody that needs to pay a deposit because of some problem, how does that get hooked up?
How does that information get linked up that I am a customer currently or somebody with a bad record?
A. There was another appended application, called it accrued reserve file. And if you were a poor-paying customer and had left owing money, then that record would appear on that file. And there was a link between the CIS to the accrued reserve file.
Q. Perhaps we started to go down this road before and then I got diverted, or whatever. Somewhere there would be a record of bills

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being paid, right?
A. Yes.
Q. Not necessarily in the Legacy CIS system, but somewhere somebody is sending bills all the time, and somebody is either paying them or not.
A. And the charged amounts and the payment amounts were housed in the Legacy CIS.
Q. Okay. And how did they get there, the charged amounts and the paid amounts? It sounds like it would be a separate data entry task by somebody else, based on -- well, why don't you take me through.
Somebody or something keeps track of usage, correct?
A. Yes.
Q. And what would that be?
A. The record of consumption was contained in the database, the CIS database.
Q. And it got in there from information supplied by the meter reader?
A. Correct.
Q. And was that kind of a hand-held device?
A. In the old days it was punch cards. And I think it was probably about 1994, that we

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converted to hand-helds.
So the information came from the field into the CIS via an interface --
Q. Okay.
A. -- to another system.
Q. Got it. So that's data that's accumulated from that kind of an input source?
A. It's separate application that has an interface feed into the CIS.
Q. And that application was not -- was the data from that application stored in other format for any other reason before going to the CIS?
A. It all went into CIS. There were, of course, periodic backups made of the meter reading information. But they typically weren't kept very long, because once you had them in the CIS there was no need to store them elsewhere.
Q. Okay. And then when you've got regular monthly input about the consumption data, how did the consumption data information somehow get merged into the application which creates a customer bill?
A. The application CIS had the routine to calculate the charges. And those charges were then -- I'm trying to think of the right term.

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there are 21 working days per month.
Q. So the bills go out on a rolling basis of some sort?
A. That's correct.
Q. And for each of the 21 working days, or average of 21 working days, there is a microfilm record of the bills that went out that day, at least contemporaneously was microfilm work?
A. Yes.
Q. Okay. The microfilm records, how long are they maintained?
A. I believe that they are probably 20 years or more. I'd have to clarify that.
Q. Subject to whatever limitations there are on microfilm?
A. (Witness nods.)
Q. Okay. Do you know where they're maintained, just out of curiosity?
A. No, I don't. I know that currently we have a document management system which does a similar function as the old microfilm records. But I don't know – I should say I don't recall when those – when that system became the archival tool.
Q. Okay. So let me just see if I just understand

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about microfilm record. It may not look like the customer bill looked, correct?
A. Correct.
Q. But it contains all of the basic information from which the company could re-create a bill if there was some dispute with the customer about what the bill was?
A. Correct.
Q. How would the company -- and the reason the company -- what field could the agent of the company use to hook up the guy that's complaining on the phone with the record?
Would he be using the guy's name? Would he be using an account number? Would he be using a street address? How would he say, You know, sir, I'm going to have somebody check this for you?
A. There were typically two ways to do that: One was a name register. So you could look at the customer name and find an account number; and then you'd go to the billing register, which had the account number, sorted in account number order.
Q. Okay. How was the name register maintained?
A. Again, when an account would go through billing

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then a record of – no, let me stop that.
I don't know how that was maintained. That might have been a monthly, but I don't know how that was maintained.
Q. Okay. Maybe I didn't use quite the right phrase.
Do you know if that was also, in essence, part of the database system, or is there a big Rolodex somewhere with the customer name register?
A. Again, the snapshot provides record of who the customer was at the time that snapshot was taken. That's the CIS, the Legacy CIS database.
Q. Uh-huh.
A. That name, I'm not sure I understand what you're asking about –
Q. You're saying you can go to the name register which would somehow tell you the account number, I guess.
I call up, I say, I'm Linda Williams and I'm living on Southwest Vermont. My bill's missing or it's wrong or something. And you say, Okay -- it's 1997. And you say, All right. We'll check for you and send you a new

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bill or something. And I said, Well, how would the company go about figuring out what information to retrieve to re-create the bill for this person, given that information? So one of them was the name register.
A. And, typically, you would look through the name register and try to isolate your unique name.
Q. Okay.
A. If there was one. There are literally hundreds of John Smiths.
Q. Sure. And I'm just asking in the very common sense when you say look through the name register – this is all new to me – am I looking through a computer screen? Am I scrolling down to try to find a Williams?
A. In the old days it was actually physically taking a piece of microfilm and placing it in a microfilm reader and scrolling through it to try to find the name.
Q. So you're saying a name register was also a microfilm?
A. Yes.
Q. Is the billing register a microfilm?
A. It was.
Q. And the billing register, instead of being a

EXHIBIT 2

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

BETH ALT and DAVID DELK, individuals as representatives of the class of similarly situated electric service customers of PACIFICORP, abn PACIFIC POWER,

Plaintiffs,

vs.

PACIFICORP, a Maine corporation, doing business in Oregon under abn PACIFIC POWER,

Defendant.

No. 0510-10786

AFFIDAVIT OF DOUGLAS L. LEEPER IN SUPPORT OF DEFENDANT'S RESPONSE TO MOTION TO CERTIFY CLASS

STATE OF OREGON)
) ss.
County of Multnomah)

I, Douglas L. Leeper, being first duly sworn on oath, hereby depose and say:

1. I am a Director, Business Services, at PacifiCorp, defendant in the above-captioned litigation. I have been continuously employed with PacifiCorp since August, 1977. I make this affidavit based on my personal knowledge and involvement in this and other PacifiCorp litigation and would testify consistent therewith if called to do so.

2. I have personal knowledge of prior ratepayer refund actions involving PacifiCorp. In particular, I am familiar with a 1999 regulatory action in Utah where the Utah Public Service Commission ordered PacifiCorp to refund $40,258,473.00 to customers receiving service on February 28, 1999. The refund was to include taxes that would have been charged on this amount.

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Telephone 503-222-9981

3. Upon learning of the need to refund the Utah customers, our Information Technology ("IT") department created a batch program to process the refund, and PacifiCorp sought to refund all current as well as former Utah customers. But there are approximately 20,000 customers in Utah that close an account each month. Because PacifiCorp needed to create a reliable method to issue the credit, it took approximately a month and a half to implement the credit, and the first batch of credits were posted to customer accounts around the middle of April, 1999. A second refund was completed in February, 2000.

4. Most customers who were no longer active had a credit on their account.

a. For the initial April 1999 refund, PacifiCorp processed account credits to all Utah customers who had active accounts as of February 28, 1999. Approximately 20,000 customer accounts were closed during the 1 ½ month period from February 28, 1999 to mid-April 1999, when the account credits were posted. These closed accounts also resulted in account credits that required refunding; refund checks were processed and mailed to the former customers' last known addresses. In many cases, the cost to prepare the refund check exceeded the amount of the refund itself. Approximately half of the checks sent to the former customers were returned to PacifiCorp by the U.S. Postal Service as undeliverable, which increased PacifiCorp's clerical and processing costs.

b. The February 2000 refund was also provided to all customers who had active accounts on February 28, 1999. Because no contingencies arose with respect to the April 1999 refund procedure, the February 2000 refund consisted of the $800,000 in reserve funds, which were then dispersed to the same individuals who participated in the April 1999 refund. Therefore, customers with active accounts on February 28, 1999, received an account credit, just as in the April 1999 refund. However, PacifiCorp applied a different procedure to former customers without an active account, based on its experience with the first refund procedure in April 1999. If the refund credit was less than $5.00, the former customer received a postcard advising them that they could: (a) donate the funds; (b) provide information regarding an active

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account to which the refund could be posted; or (c) request a check. Only about 20% of these postcards were returned to PacifiCorp; credits assigned to these former customers escheated to the State of Utah if the former customers did not return a response within 90 days. If the refund credit was greater than $5.00, PacifiCorp issued a check through its normal process and mailed the refund to the last address of record. Returned refund checks were cancelled, credits were returned to the accounts of former rate payers, and unclaimed refunds escheated to the State of Utah. For these reasons, it was not possible to ensure that all eligible former customers received refunds pursuant to the Utah Public Service Commission order.

5. Customer service complaints increased considerably during the refund period from customers who had small refunds and were questioning why PacifiCorp had sent them a letter. This was especially true for commercial and residential landlords with multiple accounts, who were inundated with letters.

6. All told, PacifiCorp spent considerable time and money addressing written complaints and fielding telephone calls, business center handling time, and the labor and costs to cut checks, cancel checks and process any escheats to the State of Utah. PacifiCorp's good faith estimate of the costs to implement the IT batch program alone is over $100,000. The costs of the total 1999 Utah refund program are inestimable.

7. Regarding the alleged overcollection of Multnomah County Business Income Tax, PacifiCorp refunded approximately $1.2 million of overcollections to the 68,074 Multnomah County ratepayers who had active accounts on April 14 and 15, 2005, and who paid any amount of MCBIT between March, 2004 and February, 2005. As to former ratepayers, any overcollected amount due to these former customers has been maintained in a separate account since discovery of the overcollection and remains sequestered.

8. Based on my knowledge as a thirty-year employee of PacifiCorp, my position as Director, Business Services, and my personal experience with the Utah Public Service Commission action in 1999, I believe in good faith that the cost of identifying, locating and

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processing refunds for former Multnomah County ratepayers is in the range of $5 to $10 per customer.

9. In late 2005 and early 2006, I directed my staff to research the refund status of plaintiff David Delk. PacifiCorp records show Mr. Delk was added as an alternate customer to the account of customer Thomas A. Thomas on February 6, 2001. Mr. Thomas was a resident at 1009 NE Meadow Dr., Portland, Oregon and held a PacifiCorp account from August 20, 1993 to July 15, 2002, at which time the account was closed. Attached hereto as Exhibit B is a true and correct copy of the Customer Invoice Inquiry screen for Thomas A. Thomas showing the amount of MCBIT collected on the account.

Douglas L. Leeper
Director, Business Services
PacifiCorp

SUBSCRIBED AND SWORN to before me this 30 day of April, 2007.

Notary Public for Oregon
My Commission Expires: 12/12/2010

OFFICIAL SEAL
GREGORY E CHILBERG
NOTARY PUBLIC-OREGON
COMMISSION NO. 412644
MY COMMISSION EXPIRES DECEMBER 12, 2010

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CERTIFICATE OF SERVICE

I hereby certify that I filed the original and 5 copies of the foregoing by US Mail, and by e-filing to the Filing Center, postmarked this date, and that I served a true copy of the foregoing DECLARATION OF LINDA K. WILLIAMS AND EXHIBITS by email to the physical and email addresses shown below, which comprise the service list on the Commission's web site as of this day (email service only to those who have waived physical service).

STEPHANIE S ANDRUS DEPARTMENT OF JUSTICE 1162 COURT ST NE SALEM OR 97301-4096 stephanie.andrus@state.or.us	PAUL A GRAHAM DEPARTMENT OF JUSTICE 1162 COURT ST NE SALEM OR 97301-4096 paul.graham@state.or.us
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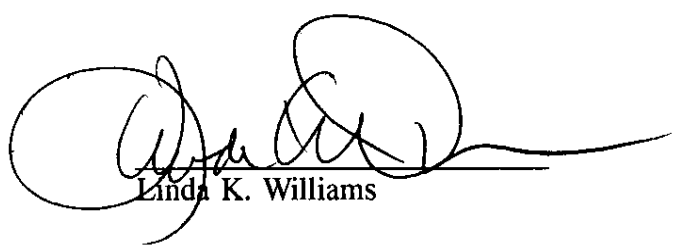
Dated: June 20, 2007



Linda K. Williams