1. SUMMARY OF FACTS.

The Opening Brief of Defendant-Relator Portland General Electric Co. [hereinafter "PGE Opening Brief" or just "PGE" followed by a page reference], pp. 4-19, offers a "summary of facts" that is not objective. We already provided an accurate factual history of these matters in the Plaintiffs-Adverse Parties' Response to Petition for Alternative Writ of Mandamus of Portland General Electric Co., March 23, 2005, pp. 6-18 [hereinafter "*Plaintiffs' Response to (First) Petition for Mandamus*"].

1. THE LITIGATION NOT BEFORE THIS COURT.
1. BALLOT MEASURE 9 OF 1978.

The PGE Opening Brief, pp. 5-6, is not a summary of facts but a preliminary attempt to reargue the outcome 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***]. As noted at pages 7-8 *infra*, such relitigation is precluded.

PGE's (p. 6) lament about taking a loss until the final month of the 35th year is an incorrect description of ratemaking.[1] Conventional ratemaking treatment for plants that work is to include them in ratebase. Then the utility is allowed to charge to ratepayers depreciation on the plant (typically straight-line over its expected life) and a return on investment (profit) on each year's undepreciated balance of ratebase. Thus, the utility earns most of its profits on any plant in its early years of operation, when the ratebase value is highest (least depreciated). Here, the Oregon courts allowed PGE to recover all of the ratebase value placed on the Trojan plant by the

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1. If a utility retires a plant early, it does not "suffer a loss," as PGE contends. Instead, it merely stops earning a profit on the early-retired plant. PGE then does earn a profit on the plant it builds to replace the early retired plant. Under the PGE-preferred system, rejected in ***CUB/URP v. OPUC***, the utility would earn profits both on working plants and abandoned (early-retired) plants, thus making it very profitable for a utility to build plants that quickly cease to function and replace them with additional plants, thereby earning

OPUC, even though Trojan was less than half depreciated at the time it ceased to function. The only issue is whether ORS 757.355 also allowed PGE to charge ratepayers for a return on investment (profit) on Trojan, after it broke down in November 1992 and permanently closed in January 1993.

2. LEAST COST PLANNING.

PGE offers no references to facts here. PGE does cite ***Hammond Lumber Co. v. Public Service Commission***, 96 Or 595, 604-05, 189 P 639 (1920), for the proposition that "the state must allow the railroad to fully recover the cost of its plant, for otherwise the state takes property without paying just compensation." In this case, the issue is not whether PGE is allowed to fully recover the cost of Trojan. It is whether PGE can lawfully charge ratepayers for that cost plus (return of investment) plus return on investment (profit) on Trojan, after it prematurely ceased to function, in light of ORS 757.355, enacted in 1978.

3. ORS 757.140(2).

PGE (p. 7) cites ORS 757.140 as authority for allowing PGE to recover the full cost of Trojan upon retirement. This is the same statute which the Oregon courts considered in great detail and determined in ***CUB/URP v. OPUC*** did not countermand ORS 757.355 and did not authorize the OPUC to allow PGE to charge ratepayers for a return on the Trojan investment. This argument was fully presented to the courts in ***CUB/URP v. OPUC*** and was rejected.[2] PGE is precluded from raising it again; see pp. 7-8, *infra*.

4. LEAST COST PLANNING AND TROJAN.

PGE again offers a selective history of Trojan, then castigates Plaintiffs-Respondents for

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double profits (on the working plants and on the non-working plants).

2. ORS 757.140.140(2) authorizes the Commission to consider certain depreciation treatment for plants not providing service, but the court found that the costs to be charged

having ever responded to its previous incomplete Trojan history (PGE, p. 10), claiming that we "denounced Trojan and PGE's management of Trojan." This is wrong, in many ways. First, it is PGE that insists upon presenting a "history" of Trojan that seeks to portray PGE as the innocent pawn of government decisions. We stated it is not material but responded, in case the Court thinks it material. **Second, all of the statements that denounce Trojan and PGE's management of Trojan are not by Plaintiffs but are direct quotations from the Commission itself**, from OPUC Order No. 95-322. See *Plaintiffs' Response to (First) Petition for Mandamus*, pp. 22-25. PGE (p. 10) claims that we "quarrel with PUC findings of fact that are now beyond challenge," when in fact we are the ones quoting the actual OPUC findings of fact.

PGE (pp. 8-9) incorrectly states the results of the 1992 Least Cost Plan (LCP), claiming that the company closed Trojan voluntarily because of the findings of that plan. In fact, as indicated in OPUC Order No. 95-322, pp. 26-27 (Plaintiffs-Adverse Parties' Appendix, App-13-14), that plan concluded that PGE should continue to operate Trojan until mid-1996--an additional 4 years. The PGE plan concluded that it would **not** be cost-effective to close Trojan **until** 1996. Trojan then broke down in November 1992 and never again functioned. PGE produced no LCP concluding that closing Trojan was desirable until February 1993--3 months after the plant had irreparably broken down.

The OPUC itself concluded that PGE's mismanagement of Trojan had grossly inflated its operating costs and led to its premature termination. OPUC Order No. 95-322 concluded that PGE had severely mismanaged Trojan. Naturally, PGE omitted those portions of OPUC Order No. 95-322 from the "Record" filed with its mandamus petition. PGE never appealed those findings of fact by the Commission.

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to ratepayers cannot lawfully include a <u>return on investment</u> for such plants.

It is true that the OPUC agreed in 1995 that, since Trojan had broken down in 1992 and was not capable of operating after the first week of November 1992, that closing Trojan was the least cost option. In fact, it was the only option. The OPUC's conclusion also depended upon its findings of PGE mismanagement of Trojan which led to the high costs.

5. THE 16-YEAR RECOVERY.

PGE's discussion here is irrelevant to the issues on this mandamus. PGE wishes to argue facts about the amount of charges during the TRIP. PGE did not move or argue below on grounds that the claims would not lie because there were *no damages or charges for Trojan profits*. It argued that, as a matter of law, there can be no damages or recovery of the illegal charges, whatever they are proved to be when quantified.[3] Should the Court allow them to raise this fact issue for the first time, Plaintiffs offer that there are indisputably substantial damages (in the form of the unlawful charges to ratepayers) so as to properly state claims that CAPs were harmed.

6. CHALLENGE TO OPUC ORDER NO. 95-322 IN MARION COUNTY CIRCUIT COURT.

PGE says it is trying reargue the legal holding of ***CUB/URP v. OPUC*** in a case now before the Court of Appeals. PGE is also inviting this Court to relitigate facts and law which they litigated to final binding conclusion in the ***CUB/URP v. OPUC***. PGE is precluded from relitigating the precise factual and legal issues already advanced to and rejected by this Court. ***Chavez v. Boise Cascade Corp.***, 307 Or 632, 772 P2d 409 (1989). All the underlying facts and conclusions are barred from relitigation in this subsequent action by the doctrine of preclusion by prior adjudication, ***North Clackamas School Dist. v. White***, 305 Or 48, 750 P2d 485, *modified*

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3. Simple methods for quantifying the unlawful charges are noted at p. of this brief and discussed in the *Amicus Brief of the Utility Reform Project (URP).*

on other grounds, 305 Or 468, 752 P2d 1210 (1988); ***Drews v. EBI Companies***, 310 Or 134, 139, 795 P2d 531, 535 (1990). ***Drews*** refined the often-confused terminology, but not the law, and explained that:

> "Preclusion by former adjudication" is a doctrine of rules and principles governing the binding effect on a subsequent proceeding of a final judgment previously entered in a claim. The term comprises two doctrines: claim preclusion, also known as *res judicata,* and issue preclusion, also known as collateral estoppel.

Id. Collateral estoppel or "[i]ssue preclusion applies to an issue of either fact or law" which is actually "litigated and determined" in the prior action. ***Drews***, 310 Or at 139; ***North Clackamas School Dist.***, *supra,* 305 Or at 53. As to claim preclusion, the ***Drews*** opinion, 310 Or at 141, relied upon ***Rennie v. Freeway Transport***, 294 Or 319, 323, 656 P2d 919 (1982), for the explicit holding that "Claim preclusion applies equally to a defendant's defense."

Further, the case PGE references is the appeal of a rate order subsequent to OPUC Order No. 95-322 and which covered a different period of time (October 1, 2000 and later) than the 5.5-year period addressed here, as explained in the *Plaintiffs' Response to (First) Petition for Mandamus*, pp. 28-31.

7. OREGON SUPREME COURT GRANTS REVIEW.

PGE fails to note the 6 years of delays it sought and obtained from both the Court of Appeals and from the Oregon Supreme Court, despite opposition by URP. That history is summarized in the *Amicus Brief of URP*, adopted by reference herein.

After the critical order, OPUC Order No. 93-1117 (DR 10), was summarily affirmed by the Marion County Circuit Court (Barber, J.) in 1994, the parties completed briefing the case to the Court of Appeals in the summer of 1995. Then PGE sought to delay consideration there, pending arrival of the OPUC Order No. 95-322 (UE 88) challenges filed in April 1995 (even

though PGE knew that OPUC Order No. 95-322 refused to address any legal arguments pertaining to ORS 757.355). URP opposed PGE's proposed abatement of the OPUC Order No. 93-1117 appeals. The Court of Appeals then did wait, at PGE's urging, for approximately 3 years, before deciding the consolidated appeals on June 24, 1998, reversing both of the OPUC orders under review as unlawful under ORS 757.355. ***CUB/URP v. OPUC***, supra.

After the Court of Appeals decision, PGE then sought and obtained a further 3 years of delay at the Oregon Supreme Court. This Court granted the petitions for review in April 1999. PGE went to the Legislature for enactment of HB 3220 (1999), which in essence sought to retroactively repeal ORS 757.355 and allow PGE to charge ratepayers for Trojan return <u>on</u> investment (profit). This law was enacted on June 16, 1999, but never took effect, because URP and others collected the necessary signatures to cause a statewide referendum, and HB 3220 was defeated by over 88% of the vote in November 2000. It was the enactment of HB 3220 (1999) that caused the Oregon Supreme Court to place the petitions for review on hold for about 1.5 years.

On October 27, 2000, PGE and CUB jointly filed a "Notice of Expected Mootness and Motion for Extended Continuance, asking this Court to hold the cases in abeyance "indefinitely." Sup App-1. This Court then rejected several PGE motions to declare the cases moot and vacate the Court of Appeals decision. Then this Court dismissed the petitions for review in November 2002. Sup App-21-22. PGE (p. 15) states only that "this Court dismissed the petitions [for review of ***CUB/URP v. OPUC***] on its own motion." To the contrary, this Court also specifically denied the PGE Notice of Mootness and Motion to Dismiss and Vacate (July 1, 2002) [hereinafter "PGE Mootness/Dismissal Motion"], with substantive effect on the litigants as discussed at pages 23-24 of this brief.

PGE (pp. 14-15) inaccurately describes PGE-CUB-Staff stipulations in the subsequent rate case, UM 989. These did not address the return on investment PGE collected during the 5.5-year period (April 1, 1995, until the effective date of the preliminary order in UM 989, October 1, 2000). Quantifying the charges for the return on investment (profit) during the 5.5-year period is part of the remaining work in the class actions and is not complex or difficult. See p. 43 of this brief, *infra*.

8. SUBSEQUENT AND PENDING OPUC "REMAND" PROCEEDING.

In their current briefing to the Court of Appeals, both PGE and OPUC deny that the OPUC itself has authority to refund any money to ratepayers and no authority even to decrease future rates to compensate those who paid the past unlawful charges and are still PGE customers. See *Plaintiffs' Response to (First) Petition for Mandamus*, pp. 3-4, 39-45. URP's position is that the OPUC-adopted scope of the remand proceeding very directly contemplates impermissible retroactive ratemaking. See *Amicus Brief of URP*. Thus, **all** parties to ***URP v. OPUC*** (UM 989; CA No. A123750) agree that "remand proceeding" is now *ultra vires*.