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May 14, 2018

VIA ELECTRONIC FILING

Attention: Filing Center
Public Utility Commission of Oregon
201 High Street SE, Suite 100
P.O. Box 1088
Salem, Oregon 97308-1088

Re: Docket UM 1909 – In the Matter of PUBLIC UTILITY COMMISSION OF OREGON, Investigation of the Scope of the Commission's Authority to Defer Capital Costs.

Attention Filing Center:

Attached for filing in the above-captioned docket is an electronic copy of the Joint Utilities' Closing Brief.

Please contact this office with any questions.

Sincerely,

Katherine McDowell

Attachment

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Investigation of the Scope of the Commission's Authority to Defer Capital Costs	**UM 1909**

JOINT UTILITIES' CLOSING BRIEF

May 14, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Public Utility Commission of Oregon Orders

Statutes

Legislative History

Other Authorities

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1909

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Investigation of the Scope of the Commission's Authority to Defer Capital Costs	JOINT UTILITIES' CLOSING BRIEF

I. INTRODUCTION AND SUMMARY

This Closing Brief is submitted on behalf of all Oregon investor-owned energy utilities, Portland General Electric Company ("PGE"), PacifiCorp d/b/a Pacific Power ("PacifiCorp"), Idaho Power Company ("Idaho Power"), Northwest Natural Gas Company ("NW Natural"), Avista Corporation ("Avista"), and Cascade Natural Gas Corporation ("Cascade") (collectively, "Joint Utilities"). This brief responds to Staff's Closing Brief and to the Joint Opening Brief of the Oregon Citizens' Utility Board ("CUB") and the Alliance of Western Energy Consumers ("AWEC")[1] (collectively, "Intervenors").[2] In addition to the Joint Utilities' legal analysis in this brief, Avista, Idaho Power, NW Natural, PacifiCorp, and PGE have each filed concurrent supplemental briefs providing examples of their capital investment deferrals and explaining why the decisions of the Public Utility Commission of Oregon ("Commission") to grant such deferrals were fair and reasonable.

For more than thirty years, the Commission has authorized revenue requirement deferrals for utilities' capital investments under ORS 757.259. Now, Staff and Intervenors claim that

[1] The Industrial Customers of Northwest Utilities ("ICNU") and Northwest Industrial Gas Users ("NWIGU") are now known as AWEC.

[2] Northwest and Intermountain Power Producers Coalition ("NIPPC") did not file an Opening Brief. *See* Notice of Intent Not to File an Opening Brief (Mar. 16, 2018).

ORS 757.259 does not permit the deferral of capital costs. Staff neither acknowledges nor explains its abrupt departure from the Commission's—and Staff's own—historical interpretation of ORS 757.259. Staff relies on narrow slices of legislative history to support its interpretation of the terms "revenues" and "expenses," and to justify its rejection of the overwhelming weight of legislative history. But the correct interpretation of a statute is the one that best effectuates the legislature's intent. In this case, the legislature sought to minimize the frequency of rate cases and to match customers' costs and benefits by confirming the Commission's ability to authorize deferrals consistent with the public interest—including deferral of the full revenue requirement effects of capital investments. Consistent with the legislature's transparent intent and the plain language of the statute, the Commission should continue to exercise its discretion to allow full revenue requirement deferrals on a case-by-case basis.

II. DISCUSSION

Staff's responsive briefing in this docket is most notable for what it does *not* address. Staff ignores the vast majority of the statute's legislative history, aside from a single, mischaracterized exchange[3] and a glossary of terms.[4] Staff fails to address Commission precedent (1) authorizing revenue requirement deferrals for capital investments,[5] and (2) concluding that terms in ORS 757.259 are "generic[]."[6] Staff fails to recognize its own past

[3] Staff's Closing Brief at 9.
[4] Staff's Closing Brief at 5.
[5] *See, e.g., In the Matter of Avista Corp., dba Avista Utils. Application for the Reauthorization of Certain Deferral Accounts Related to Avista's Demand Side Management Programs*, Docket No. UM 1165, Order No. 16-304 (Aug. 16, 2016) (emphasis added) (reauthorizing Avista's deferred account and noting that "Staff recommends the Commission approve Avista's application"); *see also In the Matter of the Application of Nw Natural Gas for an Order Authorizing Deferral of Certain Expenses and Revenue Items*, Docket No. UM 636, Order No. 93-1881 (Nov. 26, 1993) (authorizing Avista's initial deferral).
[6] *In the Matter of Idaho Power Co., Request for General Rate Revision*, Docket No. UE 233 (Phase II), Order No. 13-416 at 5 (Nov. 12, 2013).

support for full capital investment deferrals,[7] or to reconcile the competing legislative directive of ORS 469A.120, which mandates full revenue requirement recovery for renewable resources.[8] And Staff declines to explain why existing Commission policies are inadequate to provide the protections Staff seeks.[9] Staff's ongoing silence on these matters indicates that Staff's current position is irreconcilable with ORS 757.259, past precedent, and the well-established framework for cost recovery of renewable resources.

A. Staff Suggests that ORS 757.259's Legislative History is "Inconsistent" by Citing a Single Example of a Purportedly Countervailing Statement.

Staff claims that authorizing comprehensive revenue requirement deferrals would be "inconsistent" with the statute's legislative history concerning capital costs,[10] and that the statute's legislative history is unreliable in any event because it is internally "inconsistent."[11] For both assertions, Staff cites a single exchange in which Representative Ron Eachus repeatedly questioned Bill Warren, a Commission Staff member,[12] about what might constitute an "unanticipated event" triggering a deferral, which reads in full as follows:[13]

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[7] *See, e.g., In the Matter of Northwest Natural, Application for Authorization to Record and Defer Unrecovered Expenses Associated with the Company's Coos County Distribution System Invest*ment, Docket No. UM 1179, Order No. 04-702 (Dec. 3, 2004) (emphasis added) (attaching Staff's report, recommending that the Commission approve the "request for authorization, under ORS 757.259, to defer the unrecovered revenue requirement associated with the Coos County Distribution System").

[8] ORS 469A.120 (requiring recovery of "all prudently incurred costs associated with compliance with a renewable portfolio standard").

[9] Staff's Closing Brief at 11 (urging the adoption of a new policy without reference to existing policies or any associated inadequacies).

[10] Staff's Closing Brief at 9.

[11] Staff's Closing Brief at 10.

[12] The exchange referenced in Staff's Closing Brief quoted Representative Eachus and Commission Staff members Ray Lambeth and Bill Warren—not Commissioner Davis. *See* Staff's Closing Brief at 9 (stating that "Commissioner Davis" responded to questioning). Mr. Lambeth responded to questions prior to the exchange quoted here.

[13] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 57 Side A at 22:24 ("Would you consider Colstrip 3 or Colstrip 4 an unanticipated event?") (quoting Rep. Eachus); *id.* at 23:02 ("What about Colstrip 4? I'm asking if you considered it an unanticipated event under the scenario that's been outlined here?") (quoting Rep. Eachus); *id.* at 24:01 ("Other than federal decisions or other governmental decisions, what else would you consider an unanticipated event?").

> Rep. Eachus: Do you consider changes in the basis upon which the utility filed its data, such as major reductions in load or reductions in the cost of capital, to be unanticipated events with which you would defer expenses?
>
> Mr. Warren: Mr. Chairman, Representative Eachus, we have never deferred anything of that nature.
>
> Rep. Eachus: Why?
>
> Mr. Warren: Simply because it's part of a general rate review, cost of capital review—
>
> Rep. Eachus: What is the difference between that and deferring—why would you defer some costs for Colstrip 4 on a selective basis, but not—Why wouldn't that be part of a regular rate case as well?
>
> Mr. Warren: It may well be. Colstrip 4—that example is one of a rather substantial investment that the electric utilities make in a plant and could cause a rate increase all of its own. And as I indicated with respect to Pacific Power and Light, what the Commissioner found reasonable was to combine that increase along with others that were to come later in 1986, so that the consumer saw just one increase in 1986 rather than a succession of increases. It is a very discrete large investment too, whereas a load change or a cost of capital change is a rather amorphous item.[14]

Staff describes this exchange as "a clear indication that a utility's rate of return was not intended to be construed as an 'expense' or 'revenue' subject to deferral—despite discussion that deferrals were intended to cover plants such as Colstrip 4."[15] Staff is mistaken in three respects.[16]

First, this exchange is entirely consistent—both internally and with the remaining legislative history—because capital costs are deferrable only as part of an "identifiable" capital investment.[17] The Joint Utilities agree that changes in costs of capital are not *on their own*

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[14] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 57, Side A, at 25:25-26:55 (Mar. 11, 1987).

[15] Staff's Closing Brief at 9.

[16] Staff further suggests that the Joint Utilities' robust legislative history analysis was used to "establish[] ambiguity in the plain and unambiguous text of the statute." Staff's Closing Brief at 10. Staff misconstrues the statutory interpretation process, which *must* consider "pertinent legislative history" before concluding that a statute is ambiguous or unambiguous. *State v. Gaines*, 346 Or 160, 171-72 (2009) (noting that "we no longer will require an ambiguity in the text of a statute as a necessary predicate to the second step – consideration of pertinent legislative history that a party may proffer").

[17] ORS 757.259(2) (authorizing deferral of "*[i]dentifiable* utility expenses or revenues") (emphasis added).

"identifiable" deferrable items under ORS 757.259.[18] This distinction was addressed head-on by Mr. Warren in the above exchange: when legislators asked whether it would be appropriate to file a deferral for changes in capital costs *alone*, Mr. Warren confirmed that such an item had "never" been deferred.[19] Yet Mr. Warren had just described comprehensive capital investments whose revenue requirement impacts *were* fully deferred—including the Colstrip 4 project.[20] Staff assumes that these statements must be "in conflict."[21] But as Mr. Warren went on to explain, "a cost of capital change" on its own is "amorphous," while a capital project is a "discrete large investment" whose revenue requirement impact is identifiable and thus subject to deferral.[22] The Commission's historical approach to ORS 757.259—allowing full revenue requirement deferrals including capital costs, but not deferring changes in stand-alone costs of capital—illustrates the harmony in the legislative history.

Second, declining to defer capital costs as part of a capital investment would run counter to the statute's remaining legislative history, which repeatedly describes full revenue requirement deferrals.[23] Indeed, by asking why a shift in the cost of capital would not be deferrable *on its own*, the legislators' discussion confirms that they were fully aware that the revenue requirement deferrals authorized by the legislation included capital costs.[24]

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[18] ORS 757.259.
[19] *Hearing on HB 2145 Before the H. Environment and Energy Comm.,* Tape 57, Side A at 25:43 (Mar. 11, 1987) (quoting Mr. Warren).
[20] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 57, Side A, at 26:13 (Mar. 11, 1987).
[21] Staff's Closing Brief at 10.
[22] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 57, Side A at 26:13 (Mar. 11, 1987) (quoting Mr. Warren).
[23] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 97, Side A, at 3:09-3:21 (Apr. 8, 1987) (quoting Rep. Ron Eachus stating that, "[b]ecause the process has been opened up and the authority to defer benefits to the ratepayers as well as revenue requirements for the utility, [that] balances it out"); *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 72, Side B, at 30:24-30:28 (Mar. 25, 1987) (quoting Rep. Parkinson stating that a witness "recommended a balancing account where you take into account both debits and credits").
[24] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 57, Side A at 25:55 (Mar. 11,

Third, even if a single statement was inconsistent, Staff inappropriately abandons the bulk of the statute's legislative history,[25] which overwhelmingly supports the legislature's intent to authorize full revenue requirement deferrals.[26] Courts will only discard the body of legislative history when it "does not clearly resolve the matter one way or the other,"[27] and "are reluctant to place too much weight on a single statement of a single witness in a legislative hearing."[28] Specifically, Courts will not rely on "a single phrase from the legislative history" in the face of contrary overwhelming evidence.[29] Here, the drafting Commissioner,[30] Commission Staff,[31] the Assistant Attorney General,[32] the party proposing an amendment (NW Natural),[33] and legislators

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1987) (asking why "some costs" related to capital investments are deferred, but not costs of capital) (quoting Rep. Eachus).

[25] Staff's Closing Brief at 10 (noting that legislative history may help a court interpret a statute, but then noting that, "[i]n this case, legislative history was inconsistent," before arguing that the plain language could not support revenue requirement deferrals in any event).

[26] *See* Joint Utilities' Opening Brief at 10-16 (detailing ORS 757.259's legislative history).

[27] *State v. Cloutier*, 351 Or 68, 102 (2011) (noting that the legislative history at issue "provides a little something for everyone").

[28] *Suchi v. SAID Corp.*, 238 Or App 48, 55 (2010); *see also State v. Stamper*, 197 Or App 413, 424-25, *rev den*, 339 Or 230 (2005) ("[W]e are hesitant to ascribe to the Legislative Assembly as a whole the single remark of a single nonlegislator at a committee hearing.").

[29] *See, e.g., Avco Corp. v. U.S. Dept. of Justice*, 884 F.2d 621, 626 (D.C. Cir. 1989) (rejecting one party's reliance on "a single phrase from the legislative history" in light of "approximately eighteen-and-one-half pages" of bill analysis addressing the issue).

[30] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit B at 4 (Mar. 11, 1987) (testimony of Commissioner Davis stating "the proposed measure allows the Commission to make rates retroactively in cases where the utility asks that a cost be deferred and not reflected in rates until a later date").

[31] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 56, Side B, at 7:28-7:54 (Mar. 11, 1987) (quoting Mr. Warren stating: "I gave the example of Pacific Power & Light where several events were occurring in 1986. And Pacific Power had every right to ask for a rate increase in April for Colstrip 4, in October for the scrubber unit in Jim Bridger 2, and in December for the scrubber unit at Wyodak. We would have had three rate changes. The Commissioner felt that it is better to have one rate signal than to have rates change every four months in a given year.").

[32] *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Tape 100, Side B, at 5:19-5:57 (May 21, 1987) (quoting Assistant Attorney General Socolofsky explaining the scope of the bill as amended).

[33] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 73, Side A, at 24:30-25:16 (Mar. 25, 1987) (quoting John Lobdell, representing NW Natural, stating: "It is our understanding that the amendments as submitted by the Public Utility Commissioner [did] not deal with that kind of balancing account, the kind . . . that is tied to the revenue side of utility regulation, so we are proposing that [the bill] be amended to delete that portion of the first sentence saying 'amounts incurred by a utility' and substituting language that would stipulate 'utility expenses or revenues' to make it clear that legislative authorization went to that type of account.").

before both the House[34] and the Senate[35] confirmed that the statute was intended to authorize comprehensive deferrals of a utility's revenue requirement.

In the end, Staff appears to acknowledge—albeit obliquely—that its current position is inconsistent with the legislature's intent, describing "discussion that deferrals were intended to cover plants such as Colstrip 4"[36] and "statement[s] indicating an intent to defer the revenue requirement effects of capital projects, which includes the utility's rate of return."[37] Where the legislature's intent is clear, it is the responsibility of the courts and this Commission to interpret the statute so as to best effectuate the legislature's purpose.[38]

B. Staff Continues to Claim that the Legislature Adopted Technical Meanings of "Expenses" and "Revenues" Because the Legislature Considered a Glossary of Other Utility Terms.

Despite dismissing the legislative history as inconsistent and unpersuasive, Staff continues to rely on the legislative history's glossary of terms to argue that the legislature "incontrovertibl[y]" intended to adopt technical meanings of both "expenses" and "revenues."[39] By "technical meaning," Staff refers to its current definition of these terms, not the definitions

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[34] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 97, Side A, at 3:09-3:21 (Apr. 8, 1987) (quoting Rep. Ron Eachus stating that, "[b]ecause the process has been opened up and the authority to defer benefits to the ratepayers as well as revenue requirements for the utility, [that] balances it out"); *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 72, Side B, at 30:24-30:28 (Mar. 25, 1987) (quoting Rep. Parkinson stating that a witness "recommended a balancing account where you take into account both debits and credits").

[35] *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Tape 99, Side B, at 12:50-16:05 (May 21, 1987) (quoting Rep. Eachus stating: "There is a practice called, the establishing of deferred accounts. The attorney general determined that there is no specific authority to do that. . . . So this bill provides the specific authority to do that. . . . [Intervenors raised concerns that] while it was allowing costs for utilities to be included on a deferred basis there was no mechanism for allowing benefits to ratepayers to be included. So . . . we've allowed deferred accounts in certain circumstances, and we've established a process that is balanced and allows either the utility, the Commission, or the ratepayers to initiate a deferral, and it is not only cost to the utility but also for benefits to the ratepayer.").

[36] Staff's Closing Brief at 3.

[37] Staff's Closing Brief at 10.

[38] *Long v. Farmers Ins. Co.*, 360 Or 791, 803 (2017) (holding that a statute's terms "should be interpreted in light of their function within the statute's overall purpose"); *Linn-Benton-Lincoln Ed. v. Linn-Benton-Lincoln ESD*, 163 Or App 558, 570 (1999) ("[A] court should attempt to construe the language of a statute in a manner consistent with its purpose.").

[39] Staff's Closing Brief at 5.

used in normal accounting or in past Commission or Oregon court orders.[40] Staff points to the glossary as proof that the legislature understood "how [the statute's terms] would be construed by the Commission once the statute was enacted."[41] But, as explained in the Joint Utilities' Opening Brief, the glossary supports the Commission's historical interpretation of ORS 757.259, not the new interpretation Staff now advocates.[42]

To summarize, the glossary (1) included neither "expenses" nor "revenues";[43] (2) defined "revenue requirement" as including "all operating *and capital costs*"—confirming that the legislature was aware that deferring a capital project's revenue requirement would defer associated capital costs;[44] and (3) was accompanied by a demonstrative list illustrating the sorts of deferrals the statute would authorize—including a variety of comprehensive revenue requirement deferrals.[45] Staff fails to acknowledge any of these facts, instead stating that "[t]here is simply no indication in the legislative history that statutory terms were intended to be construed in any manner other than consistent with how they are used to set rates."[46] Yet the legislature, the Commissioners, and Staff all clearly indicated that the statute would provide precisely the authorization that Staff now finds wanting.[47]

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[40] *See* Joint Utilities' Opening Brief at 19-23 (describing the technical definitions of both "expenses" and "revenues" as well as Commission and court precedent)
[41] Staff's Closing Brief at 5.
[42] Joint Utilities' Opening Brief at 17-19.
[43] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit F (Mar. 30, 1987) (providing a glossary of terms from Deloitte, Haskins & Sells' Public Utilities Manual).
[44] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit F at 7 (Mar. 30, 1987) (emphasis added).
[45] *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Exhibit D, Appendix at 6 (May 21, 1987) (testimony of Commissioner Davis, "Energy Utility Deferred Debit/Credit Accounts").
[46] Staff's Closing Brief at 5.
[47] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 97 Side A, at 3:15-3:20 (Apr. 8, 1987) (quoting Rep. Eachus) (describing the revised legislation as granting authority to defer both "benefits to the ratepayers as well as *revenue requirements* for the utility") (emphasis added); *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Exhibit D, Appendix at 6 (May 21, 1987) (testimony of Commissioner Davis, "Energy Utility Deferred Debit/Credit Accounts"); *see also* Joint Utilities' Opening Brief at 14-16 (describing the

C. Staff Mistakenly Claims that "Expenses" and "Revenues" Must be Terms of Art Because Courts Have Found Other Terms in Other Utility Statutes to be Terms of Art.

Staff now argues that "expenses" and "revenues" are "appropriately considered 'terms of art'" because they are "terms within ratemaking statutes."[48] For this conclusion, Staff relies on three cases—none of which supports Staff's position or its new definition of the terms "expenses" and "revenues" in ORS 757.259.

First, in *Citizens' Util. Bd. v. Pub. Util. Comm'n of Or.*, the court interpreted a different statute—ORS 757.355—and relied on the technical meaning of the term "rate base" to determine that retired plant could not be included in rate base.[49] As the court noted, "rate base" is a highly specialized term widely accepted as such by the courts.[50] In contrast, the terms "expenses" and "revenues" are commonly used outside the utility regulatory context.[51] Staff points to no case—and Joint Utilities have found none—establishing "expenses" as a term of art in utility statutes.

Second, in *Beaver Creek Coop. Tel. Co. v. Pub. Util. Comm'n of Or.*, the court *declined* to find that the term "for hire," as used in the utility statute, was sufficiently "well-established" to be considered "a term of art in the utility field."[52] Noting that "[n]o Oregon case has defined that term in this context," and further noting that "cases from other jurisdictions yield diverse definitions," the court declined to find that the term carried a special meaning outside its

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legislative history that specifically considered how the statute would authorize revenue requirement deferrals for capital investments).

[48] Staff's Closing Brief at 3.

[49] 154 Or App 702, 709 (1998) (noting that "'rate base' is a term of art in the field of public utility regulation").

[50] *Citizen's Util. Bd.*, 154 Or App at 70; *see also Gearhart v. Pub. Util. Comm'n of Or.*, 356 Or 216, 220 (2014) (noting that, while "rate base" was not defined, "it is understood within public utility ratemaking" as a defined term, and further citing to Charles F. Phillips, Jr., *The Regulation of Public Utilities: Theory and Practice* at 169-70 (1993)).

[51] *See, e.g., Reed v. Dept. of Revenue*, 310 Or 260, 266 (1990) (interpreting the meaning of "expenses" in the payroll context); *Dowell v. Or. Mut. Ins. Co.*, 361 Or 62, 70 (2017) (relying on a dictionary definition of 'expense" in a medical insurance context, and noting that the definition is "straight-forward").

[52] 182 Or App 559, 571-72 (2002).

common usage.[53] Here, again, no case has concluded that "expenses" is a "well-established" term of art in the utility regulatory context. In the absence of such precedent, *Beaver Creek* appears to require courts and this Commission to apply a dictionary definition of the term—which is synonymous with "costs."[54]

Third, in *Or. Trail Elec. Consumers Co-op, Inc. v. Co-Gen Co.* ("*OTECC*"), the court interpreted the terms of a negotiated fixed-price power purchase agreement, entered pursuant to the Public Utility Regulatory Policies Act ("PURPA").[55] In that case, the drafting attorney testified that the phrase, "to the extent the Oregon Public Commissioner, or his successor, may modify the agreed payments" was "designed to reflect" the existing federal court doctrine precluding state commissioners from modifying executed PURPA contract prices.[56] The court agreed, finding that "extrinsic evidence" was particularly appropriate to construe "contractual language in such specialized or highly technical areas."[57]

In this case, the Commission should similarly look to extrinsic evidence *to determine the drafters' intent.*[58] The drafting Commissioner intended to provide authority "to use deferred accounting when it is deemed by the Commission to be in the public interest to do so,"[59] and the

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[53] *Beaver Creek*, 182 Or App at 572.
[54] *See Webster's Third New Int'l Dictionary* 515, 800 (1961); *Black's Law Dictionary* 345, 577 (6th ed. 1990) (equating "cost" to expense and "expense" to cost); *Oxford Dictionary of English* 615 (3d ed. 2010) (defining "expense" as "the cost incurred in or required for something"); *Merriam Webster's Collegiate Dictionary* 282, 440 (11th ed. 2004) (defining "costs" as "expenses incurred in litigation," and "expense" as "cost"); see also *Shammas v. Focarino*, 784 F.3d 219, 229 (4th Cir. 2015) ("[I]n its dictionary form the term 'expenses' is generally synonymous with the word 'costs.'").
[55] 168 Or App 466, 476 (2000).
[56] *OTECC*, 168 Or App at 479.
[57] *Id.* at 477.
[58] *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.* (*PGE v. BLI*), 317 Or 606, 610 (1993) ("In interpreting a statute, the court's task is to discern the intent of the legislature.").
[59] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 57, Side A, at 19:17 (Mar. 11, 1987) (quoting Commissioner Davis).

legislature intended to authorize deferrals of "revenue requirements for the utility."[60] Courts will reject a technical definition when doing so "would seem to frustrate what it appears is plainly the purpose of the statute."[61]

In continuing to argue that "expenses" must be a term of art in the utility regulatory context, Staff rejects court precedent that specifically addresses both the statute and terms at issue, and that uses "expenses" interchangeably with "costs."[62] Staff argues that relying on these authorities would be "misplaced" because the courts were "not interpreting the meaning of 'expenses' in either case," nor "offer[ing] any indication about the appropriate definitions."[63] Staff's objections to on-point precedent is inconsistent with its reliance on cases interpreting the terms "rate base," "for hire," and "to the extent."[64] Moreover, both cases cited by the Joint Utilities offer indications about the appropriate definition of "expenses" in ORS 757.259, though they do not address the meanings of these terms at length. In *Indus. Customers of Nw. Utils. v. Pub. Util. Comm'n of Or.*, the court interpreted ORS 757.259 and explained that, "[w]hen a utility seeks to recover *costs*," the statute requires the Commission "to conduct an earnings review to determine whether the utility can afford to absorb the *costs*."[65] And in *Util. Reform Project v. Pub. Util. Comm'n of Or.*, the court noted that, "[u]nder ORS 757.259, in exceptional circumstances, the PUC has authority to permit the retroactive adjustment of rates through 'deferral' of *costs* or revenues for later incorporation in rates."[66] By using "expenses" and

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[60] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 97, Side A, at 3:15-3:21 (Apr. 8, 1987) (quoting Rep. Ron Eachus).
[61] *Godfrey v. Fred Meyer Stores* (*In re Godfrey*), 202 Or App 673, 689 (2005) (rejecting a technical definition of "report or statement" that "would seem to frustrate what it appears is plainly the purpose of the statute").
[62] *See* Joint Utilities' Opening Brief at 23 (describing the relevant precedent).
[63] Staff's Closing Brief at 4.
[64] *Beaver Creek*, 182 Or App at 572; *OTECC*, 168 Or App at 479.
[65] 196 Or App 46, 49 (2004) (emphasis added). Staff cites this case to emphasize that "the ratemaking context in which rates are set" is important, thereby adopting the case for a different purpose. Staff's Closing Brief at 4.
[66] 261 Or App 388, 392 (2014) (affirmed 356 Or 517 (2014)) (emphasis added).

"costs" interchangeably, the courts appeared to acknowledge that the term "expenses," as used in ORS 757.259, is synonymous with "costs" and carries no special technical meaning. Staff's rejection of these cases in favor of precedent interpreting neither the relevant terms nor the relevant statute exchanges the somewhat imperfect for the wholly unhelpful.

Staff also fails to acknowledge that the Commission has never applied specific, technical definitions to the terms in ORS 757.259. As the Joint Utilities previously noted,[67] the Commission uses the word "deferral" in ORS 757.259 "generically," noting that Commissioner Davis had used the term to discuss multiple concepts "interchangeably."[68] In the face of the Commission's own conclusion that terms in ORS 757.259 may be non-technical, and given that Commissioner Davis similarly used "expenses" interchangeably with "costs," it is clear that "expenses" in this statute carries no special technical meaning.[69] As Staff does not address the meaning of ORS 757.259 if "expenses" is defined according to its commonly-understood, dictionary definition, one can infer that Staff would agree that such an interpretation would support the legislature's intent to authorize full revenue requirement deferrals.

D. Staff Continues to Argue that a Technical Meaning of Expenses Would Exclude Capital Costs, Despite Relevant Commission and Industry Precedent to the Contrary.

Having concluded that technical meanings of "expenses" and "revenues" govern ORS 757.259, Staff (1) argues that technical *accounting* definitions do not apply, (2) fails to apply Commission precedent or industry authorities interpreting "expenses," and (3) claims that

[67] Joint Utilities' Opening Brief at 23.
[68] Order No. 13-416 at 5.
[69] *See, e.g., In the Matter of Pub. Util. Comm'n of Or. Staff Request to Open an Investigation Related to Deferred Accounting*, Docket No. UM 1147, Order No. 05-1070 at 9 (Oct. 5, 2005) ("When future customers derive the benefit from current *costs*, Oregon law permits the current expenditures to be deferred and placed in rates at the time the benefits flow to ratepayers.") (emphasis added); *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Exhibit D at 3 (May 21, 1987) (testimony of Commissioner Davis).

capital costs are not expenses in a utility regulatory context because utilities are not "entitled" to recover such costs.[70]

1. An Accounting Definition of "Expenses" is an Appropriate Technical Meaning Because Utilities Must Conform to Standard Accounting Principles.

Staff claims that accounting definitions of "expenses" and "revenues" are inappropriate because regulatory accounting is divorced from normal accounting.[71] This is not true. Utilities are required to adhere to the "uniform system of accounts prescribed for public utilities and licensees subject to the provisions of the federal power act."[72] Utilities also conform to Generally Accepted Accounting Principles ("GAAP"), federal accounting standards, and IRS requirements.[73] While Staff quotes the Public Utilities Manual for the statement that utilities' "accounting practices and entries are largely controlled by the ratemaking treatment," Staff misconstrues the Manual.[74] Standard accounting remains the fundamental starting point for regulatory accounting, and utilities must gain Commission approval for any accounting that deviates from these fundamentals.[75] The Manual merely observes that regulators can allow deviations from standard accounting principles—not that such deviations represent standard practice.

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[70] Staff's Closing Brief at 5-8.
[71] Staff's Closing Brief at 5 (stating that "the definitions provided were *ratemaking* definitions, not accounting definitions").
[72] OAR 860-027-0045(1).
[73] *See, e.g., In the Matter of NW Natural Request for General Rate Revision*, Docket No. UG 221, Order No. 12-437 at 9 (Nov. 16, 2012) (finding that NW Natural's hedging activities comported with GAAP); *In the Matter of the Application of Portland General Electric Company for an Investigation into Least Cost Plan Plant Retirement*, Docket No. DR 10, Order No. 08-487 at 95 (Sept. 30, 2008) ("Generally Accepted Accounting Principles (GAAP) required PGE to eliminate the Trojan-related FAS 109 asset when PGE removed the Trojan investment from its balance sheet, but this removal did not erase the related tax liability.").
[74] Staff's Closing Brief at 5.
[75] OAR 860-027-0045(1).

2. Commission and Industry Authorities Confirm that a Technical Meaning of "Expenses" Includes Capital Costs.

If, as Staff argues, a technical meaning of "expenses" was intended by the legislature, then past Commission interpretations or technical treatises would seem uniquely persuasive. The Commission specifically asked parties to address "past policy or precedent" in this docket.[76] Yet in both its opening and closing briefs, Staff declines to discuss the Commission's—and Staff's own—historical support for comprehensive revenue requirement deferrals.[77] Nor does Staff cite any industry treatise for its definition of "expenses."[78]

Both the Commission and Staff have consistently supported the use of revenue requirement deferrals,[79] as highlighted in the concurrent supplemental briefs filed by Avista, Idaho Power, NW Natural, PacifiCorp, and PGE. Staff's silence as to the long history of revenue requirement deferrals is particularly striking given Staff's claim that authorizing such deferrals would "lead to absurd and unsupportable results."[80] Staff claims that the logical extension of Joint Utilities' position "would allow for customer revenues . . . to be deferred."[81] Intervenors similarly argue that Joint Utilities' interpretation "will result in a deluge of deferrals" that will

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[76] November 21, 2017 public meeting at 54:45 (quoting Chair Lisa Hardie).
[77] Staff's Closing Brief (failing to mention past Commission decisions authorizing revenue requirement deferrals or Staff's own support for such deferrals); Staff's Opening Brief at 13 (stating merely that "the Commission is not bound by its past treatment of deferrals for capital investment").
[78] Note, Staff cites A.J. Gustin Priest, *Principles of Public Utility Regulation: Theory and Application Principles of Public Utility Regulation* (1969), through a Court of Appeals case, for a general description of how the Commission applies the revenue requirement formula. Staff's Closing Brief at 6-7. This does not address a definition of "expenses," and appears to be the sole industry treatise cited in either of Staff's briefs.
[79] *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Exhibit D, Attachment at 2 (May 21, 1987) (testimony of Commissioner Davis listing "the variety of circumstances under which deferred accounts have been created"); *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit B at 7 (Mar. 11, 1987) (testimony of Commissioner Davis describing "the many occasions when a legitimate ratemaking income or expense item is changing and the PUC believes rates should be adjusted as a result, but finds that rate changes should take place at some subsequent time").
[80] Staff's Closing Brief at 1.
[81] Staff's Closing Brief at 8.

"fundamentally alter the ratemaking process."[82] But the Joint Utilities merely interpret ORS 757.259 *as both the Commission and Staff have consistently interpreted the statute in the decades since it was adopted.* Staff's and Intervenors' concern that authorizing revenue requirement deferrals would lead to "absurd results" is contradicted by 30 years of practical application—which has yielded no "deluge of deferrals."[83]

Separately, the Commission and courts have concluded that capital costs are part of the necessary cost of providing utility service, explaining that "'there is no difference between the capital charge and operating expenses, depreciation, and taxes. Each is a part of the current cost of supplying the service.'"[84] The United States Supreme Court, citing two authoritative treatises, defined the "cost of service" as including "the *cost of prudently invested capital* used to provide the service."[85] There is no apparent basis for excluding one component of a utility's cost of providing service, inherent in an identifiable capital investment.

3. The Fact That a Utility is Not Guaranteed to Recover Capital Costs Does Not Make Those Costs Inessential.

Staff argues that capital costs are not part of a technical definition of "expenses" because a utility is "entitled" to recover its return *of* investment but merely has the "opportunity" to recover its return *on* investment.[86] To the extent that Staff appears to characterize capital costs

[82] Intervenors' Opening Brief at 9.
[83] Intervenors' Opening Brief at 9.
[84] Phillips at 388 (quoting *Missouri ex rel. Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n*, 262 U.S. 276, 306 (1923) (Brandeis, J., concurring)).
[85] *Verizon Communc., Inc. v. Fed. Commun. Comm'n*, 535 U.S. 467, 485 (2002) (citing James C. Bonbright et al., *Principles of Public Utility Rates* at 173 (1st ed. 1961) and P. Garfield & W. Lovejoy, *Public Utility Economics* at 56 (1964)) (emphasis added); *see also Permian Basin Area Rate Cases*, 39 U.S. 747, 831 (1968) ("Cost of service includes operating expenses and capital charges.").
[86] Staff's Closing Brief at 7.

as inherently optional, this is incorrect; a rate of return is necessary to avoid confiscatory rates.[87] While the specific rate set "is inherently a judgment call," it is not an optional expense.[88]

Staff further analogizes to ORS 757.355, which authorizes utilities to receive only the return *of*, not a return *on*, retired investments—apparently arguing that the statute's ability to foreclose a return *on* investment for retired assets means that capital costs are optional.[89] But this statute only concerns recovery for plant "not presently used for providing utility service,"[90] and demonstrates that non-recovery of a return on investment deviates from the norm.[91]

E. Staff Declines to Address the Possible Illegality of Refusing to Authorize Full Capital Investment Deferrals for Renewable Resources.

The Joint Utilities' Opening Brief noted that failing to authorize full revenue requirement deferrals would violate ORS 469A.120, to which PGE and PacifiCorp are currently subject.[92] In a footnote, Staff acknowledges but does not address this major problem, merely stating that "[a] decision from the Commission in this proceeding may have the effect of changing the methodologies currently used by PGE and PacifiCorp for cost recovery pursuant to ORS 469A.120, but would not alter the utility's ability to recover 'all prudently incurred costs' associated with RPS compliance."[93] Staff goes on to note that "[f]ixed rate automatic adjustment

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[87] *Gearhart v. Pub. Util. Comm'n of Or.*, 356 Or 216, 220 (2014) (citing Phillips at 170).
[88] *Gearhart v. Pub. Util. Comm'n of Or.*, 255 Or App 58, 62 (2013) *aff'd* 356 Or 216 (2014).
[89] Staff's Closing Brief at 7. Staff also references ORS 757.140(1), but this statutory provision merely directs utilities to maintain depreciation accounts and authorizes the Commission to revise depreciation rates at its discretion. ORS 757.355 is the statute that excludes recovery of a return *on* investment for retired plant, as described in Staff's Closing Brief.
[90] ORS 757.355(1).
[91] *Pacific Power & Light Co. v. Dept. of Revenue*, 308 Or 49, 53 (1989) ("A . . . basic premise of regulation is to allow a utility to earn a return only on property which is reasonably necessary and actually providing utility service.").
[92] Joint Utilities' Opening Brief at 20-21.
[93] Staff's Closing Brief at 11n.50.

clauses provide the Commission with a flexible tool for rate recovery of renewable capital costs outside of general rate cases."[94]

The change in law Staff advocates for in this case would upend the Commission's well-established approach to cost recovery for renewable resources, which relies upon revenue requirement deferrals between the in-service date of the resource and the date the resource is reflected in rates.[95] Instead of clearly and fully explaining this far-reaching consequence to the Commission, the Staff dismisses the concern in a vague and highly problematic footnote.

Staff has previously taken the position that deferrals under ORS 469A.120 *must* proceed under ORS 757.259. Staff has never agreed that cost recovery through an automatic adjustment clause could occur without a deferral or acknowledged that deferrals could be directly authorized by ORS 469A.120. Unless the Commission finds that revenue requirement deferrals for renewable resources are separately authorized under ORS 469A.120, adoption of Staff's position in this case will invalidate the Renewable Adjustment Clauses ("RAC"), which the Commission adopted more than 10 years ago at the direction of the legislature in docket UM 1330. Notably, Staff and Intervenors (except NWIGU) all signed the stipulations supporting adoption of the RAC.

Staff concedes that adoption of its new position on deferrals may invalidate the RAC, but claims that the Commission could flexibly employ a "fixed rate" automatic adjustment clause without a deferral to allow the recovery of RPS-compliance costs. Staff does not define the term "fixed rate" automatic adjustment clause or explain how it will solve the problem created by invalidation of revenue requirement deferrals.

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[94] Staff's Closing Brief at 11n.50.

[95] *See, e.g., In the Matter of Pub. Util. Comm'n of Or. Investigation of Automatic Adjustment Clause Pursuant to SB 838*, Docket No. UM 1330, Order No. 07-572 at 3 (Dec. 19, 2007).

In other recent dockets, Staff has argued that underlying deferrals are required for virtually all automatic adjustment clauses and, without a deferral, the Commission's flexibility is highly constrained.[96] Indeed, concurrent with the filing of Staff's closing brief in this case, Staff argued in another docket that an automatic adjustment clause cannot carry forward balances from previous years based on past under- or over-collection without an underlying deferral, as doing so would purportedly violate the rule against retroactive ratemaking.[97] Staff's footnote suggesting that an automatic adjustment clause could readily substitute for a renewable resource revenue requirement deferral is directly at odds with its current position on the inherent limitations of stand-alone automatic adjustment clauses.

F. Staff Continues to Propose New Blanket Policies Outside the Scope of this Proceeding, Which Was Not Substantially Broadened at the Commission's Public Meeting.

Staff continues to misstate the scope of this docket as encompassing "whether the Commission *should* authorize deferrals as a matter of policy."[98] As the Commission explained, the scope of this proceeding underwent a minor adjustment—from considering the Commission's "legal authority," to considering the Commission's "authority." The Commission made this change to allow "for discussion of past policy or precedent" to more fully illuminate "the scope of the Commission's authority to defer capital costs."[99] Commissioner Decker clarified that Chair Hardie's proposal was "not broadening the scope of the investigation," but was instead allowing for the sort of "policy considerations" that would normally be included in

[96] *See, e.g., In re Pacific Power, Multnomah County Business Income Tax Recovery*, Docket No. UE 338, Staff Report (Apr. 3, 2018).
[97] *Id.* at 3.
[98] Staff's Closing Brief at 1.
[99] November 21, 2017 public meeting at 54:45 (quoting Chair Lisa Hardie).

legal briefing the Commission receives.[100] Staff has done the opposite of what the Commission requested. Rather than discussing the Commission's "*past* policy or precedent," Staff describes its preferred approach for *future* Commission policies.[101] As a result, Staff's and Intervenors' proposal to adopt a new policy approach remains outside the scope of this proceeding.

1. Deferring Capital Costs is Appropriate as a Matter of Policy.

Staff and Intervenors argue that the Commission should uniformly decline to authorize capital costs or depreciation expenses—the return *on* and return *of* investment.[102] Staff opposes deferring capital costs because (1) a deferral "guarantees recovery;"[103] (2) deferrals allow a utility to earn its rate of return "twice;"[104] (3) "a utility's return *on* investment is not an expense;"[105] and (4) a rate of return already accounts for regulatory lag.[106]

First, Staff's repeated claims that authorizing a deferral guarantees recovery are simply mistaken.[107] Recovery of deferrals is discretionary, and is subject to reviews for prudence and earnings.[108] The Commission can—and has—denied recovery of deferred amounts, which includes any associated capital costs.[109]

Second, there is no duplication of a utility's rate of return. Before a deferral is approved and amortized, the investment remains at risk of disallowance and the utility's most recently-

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[100] November 21, 2017 public meeting at 56:25 (quoting Commissioner Meghan Decker).
[101] November 21, 2017 public meeting at 54:45 (quoting Chair Lisa Hardie).
[102] Staff's Closing Brief at 12-13; Intervenors' Opening Brief at 5.
[103] Staff's Closing Brief at 12.
[104] Staff's Closing Brief at 12 (emphasis omitted).
[105] Staff's Closing Brief at 12 (emphasis in original).
[106] Staff's Closing Brief at 12.
[107] Staff's Closing Brief at 8; *see also id.* at 12.
[108] *In the Matter of Pacific Power & Light Co., dba PacifiCorp, Request for a Gen. Rate Increase in the Co.'s Or. Annual Revenues*, Docket No. UE 170, Order No. 05-1050 at 14 (Sept. 28, 2005) ("Before amortization has been authorized, recovery of a deferred account balance may be subject to a prudence review and earnings test.").
[109] *See, e.g., In the Matter of Utility Reform Project and Ken Lewis Application for Deferred Accounting*, Docket No. UM 1224, Order No. 09-316 (Aug. 18, 2009) (denying request for amortization of deferral); *see also* Order No. 12-437 at 67 (denying NW Natural's request for amortization of deferred tax amounts).

authorized rate of return is the appropriate measure of the "time value of money."[110] Once funds are approved for amortization and the risk of recovery is reduced, the Commission applies a lower rate of return to reflect this diminished risk.[111] Interest on the utility's balancing account is necessary to keep a utility "whole" on its investments.[112]

Third, Staff's contention that capital costs should not be deferred because they are not "an expense" goes to the central issue in this proceeding.[113] While utilities are not guaranteed to recover their authorized rate of return, neither are utilities' capital costs discretionary components of providing utility service.[114]

Finally, Staff's claim that a "utility's rate of return is already intended to compensate the utility for the lag in recovery" is both novel and unsubstantiated.[115] Staff cites only to Joint Utilities' Opening Brief, which does not support Staff's contention.[116] The Commission has never considered regulatory lag in setting a utility's rate of return. Instead, a rate of return is set by reference to both long-term interest rates and investment risk in comparable firms and industries.[117]

Staff and Intervenors further argue against deferring depreciation expense—that is, the return *of* a utility's investment—because (1) doing so "inequitabl[y]" counteracts regulatory lag as other utility plant depreciates, where that other plant is not updated outside of a general rate

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[110] Order No. 08-487 at 68 ("The time value of money . . . recognizes the basic economic truth that a dollar today is worth more than a dollar tomorrow due to its potential earning capacity.").
[111] *In the Matter of Public Utility Commission of Oregon Staff Request to Open an Investigation Related to Deferred Accounting*, Docket No. UM 1147, Order No. 06-507 at 4 (Sept. 6, 2006).
[112] Order No. 06-507 at 6.
[113] Staff's Closing Brief at 12.
[114] *Gearhart,* 356 Or at 220 (noting that a reasonable rate of return is necessary to avoid confiscatory rates).
[115] Staff's Closing Brief at 12.
[116] Staff's Closing Brief at 12 n.53.
[117] *Gearhart*, 356 Or at 249 ("[A] reasonable rate of return is 'a weighted average of the long-term interest rate plus the rate of return to the equity shareholders that the agency considers appropriate in light of the risk of the investment and the rate of return enjoyed by shareholders in comparable firms.'") (quoting Richard A. Posner, *Economic Analysis of Law* at 142 (9th ed 2014)).

case;[118] (2) deferrals "reduce[] the utility's incentive to operate efficiently to manage costs between rate cases;"[119] and (3) deferring capital investments that are already included in rates would be "untenable" by allowing the utility to "substantially bolster the return on investment."[120]

First, there is no asymmetrical impact resulting from depreciation lag as opposed to regulatory lag, as articulated by Intervenors.[121] If a deferral of capital is temporary and short-term in nature, then the next general rate case will reset all rate base—meaning that the diagram presented on page 8 of Intervenors' Opening Brief would be fully incorporated into rates. On the other hand, if for some reason the deferral is longer-term in nature, then it will be based on updated figures each year, meaning that it will be updated for the decline in net plant—and, again, the diagram on page 8 would be incorporated into rates. This is consistent with the premise of ORS 757.259, which seeks "to match appropriately the costs borne and the benefits received by ratepayers."[122]

Second, utilities have no diminished incentive to operate efficiently between rate cases, as they retain the pressure to constrain costs in order to meet the authorized rate of return. In the absence of capital investment deferrals, as Commissioner Davis and Commission Staff explained, utilities would be forced to file more frequent rate cases—the very result that ORS 757.259 seeks to avoid.[123]

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[118] Staff's Closing Brief at 13.
[119] Intervenors' Opening Brief at 10.
[120] Intervenors' Opening Brief at 10.
[121] Intervenors' Opening Brief at 7 (arguing that capital investment deferrals shift "all of the risk associated with regulatory lag" to customers, "while all of the benefit is shifted to the utility").
[122] ORS 757.259(2)(e).
[123] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 56, Side B, at 7:28-7:54 (Mar. 11, 1987) (quoting Mr. Warren stating: "I gave the example of Pacific Power & Light where several events were occurring in 1986. And Pacific Power had every right to ask for a rate increase in April for Colstrip 4, in October for the scrubber unit in Jim Bridger 2, and in December for the scrubber unit at Wyodak. We would have had three

Third, Intervenors are mistaken that a utility's revenue requirement "already includes a return on the capital investment" that is subject to a deferral account.[124] Deferred capital investments are not included in rates until they have passed prudence and earnings tests and have been amortized.[125] Revenue requirement deferrals do not "bolster the return on an investment," but instead postpone the review and possible inclusion of the investment's impacts in rates in order to minimize the number of rate cases and to match the costs received and benefits borne by customers.[126]

2. Uniform Policies Against Deferring Capital Investments Are Unnecessary Because the Commission Already Has Discretion to Deny Deferrals that Fail to Serve the Public Interest.

As Staff and Intervenors acknowledge, the Commission already has discretion to deny requests for deferral when the application is not in the public interest.[127] The fact that the Commission has authorized a wide variety of capital investment deferrals over decades suggests that the Commission has repeatedly concluded that such deferrals *are* in the public interest. ORS 757.259 was passed with these very benefits in mind—the ability to "minimize the frequency of rate changes or the fluctuation of rate levels" and to allow rates to better "match the costs and benefits received by ratepayers."[128] A policy that uniformly and without discretion denies deferrals that would either minimize rates or better match costs and benefits would undermine the central purpose of ORS 757.259. Because the only deferrals that a blanket policy

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rate changes. The Commissioner felt that it is better to have one rate signal than to have rates change every four months in a given year.").

[124] Intervenors' Opening Brief at 10.

[125] Order No. 05-1050 at 14 ("Before amortization has been authorized, recovery of a deferred account balance may be subject to a prudence review and earnings test.").

[126] Intervenors' Opening Brief at 10.

[127] Intervenors' Opening Brief at 9 ("[T]he Commission can use its discretionary power to decide whether to grant a deferral application."); Staff's Closing Brief at 11 (noting that "no party has disputed that deferrals . . . are a matter of Commission discretion").

[128] ORS 757.259(2)(e).

would foreclose would be those that the Commission determined would be in the public interest, such a policy must, as a matter of logic, do a disservice to the public interest.

Deferrals can also support settlements—and have received the repeated support of Staff and Intervenors in such contexts.[129] Settlements themselves further the public interest by shortening litigation and reducing administrative costs for all parties.[130]

Because Staff fails to recognize the existence of the Commission's extant deferral policies, Staff also presents no basis for *changing* these policies. Indeed, Intervenors claim that, "where the Commission has approved deferrals for capital investments in the past, it has been on individual occasions to facilitate a desired regulatory outcome, and not part of a broader overall policy."[131] This statement is surprising given the two multi-year, comprehensive review processes the Commission undertook in dockets UM 1071 and UM 1147. The Commission specifically considered when and how to exercise its discretion, the statutory requirements for deferrals, the availability of deferral alternatives, whether to adopt uniform limitations on deferrals, and what interest rates should apply to deferred accounts before and after amortization.[132]

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[129] *See, e.g., In the Matter of Portland Gen. Elec. Co., Application for Deferral of Natural Gas Transp. Costs*, Docket No. UM 1290, Order No. 07-452, Appendix A at 2-3 (Oct. 16, 2007) (approving PGE's deferral of natural gas transportation costs consistent with a settlement reached with Northwest Pipeline Corporation); *In the Matter of Portland Gen. Elec. Co., Application for Deferred Accounting of Savings Associated with the 2005 Oregon Corporate Tax Kicker*, Docket No. UM 1252, Order No. 10-308 at 1-2 (Aug. 10, 2010) (adopting a stipulation whereby PGE's deferral of tax savings was not amortized because "PGE's earnings during the deferral period" were "insufficient to support amortization").

[130] *See, e.g., In the Matter of a Rulemaking to Adopt and Amend Division 011 Rules*, Docket No. AR 511, Order No. 07-153 at 1-2 (Apr. 17, 2007) (adopting PacifiCorp's proposal to treat settlement offers as confidential in light of what PacifiCorp described as the Commission's "strong public policy favoring informal settlement of disputes").

[131] Intervenors' Opening Brief at 9-10.

[132] *See* Order No. 05-1070, discussing each issue; *see also* Joint Utilities' Opening Brief at 25-26 (discussing the Commission's history in these dockets).

III. CONCLUSION

ORS 757.259 clearly authorizes the Commission to defer the full revenue requirement effects of capital investments because (1) both the plain and technical meanings of the word "expenses" include the cost of obtaining capital, (2) the legislature specifically stated that it intended to authorize full revenue requirement deferrals when it passed the statute, and (3) the legislature did not adopt an artificially narrow definition of "expenses" that would defeat the very purpose for which the statute was passed. For more than three decades, the Commission has interpreted ORS 757.259 as authorizing full revenue requirement deferrals for utilities' capital investments when the deferral supports the public interest by, for example, mitigating rate shock, reducing the volume of rate cases, facilitating settlement, and supporting the integration of renewable generation. By carefully exercising its discretion to approve deferrals that are in the public interest on a case-by-case basis, the Commission has fully and successfully implemented the deferral statute.

Staff has supported the Commission's approach in the enactment and implementation of ORS 757.259. Staff and Intervenors have been parties to various settlement agreements that include revenue requirements deferrals, agreeing that the results are in the public interest. Without pointing to any change of law or fact or otherwise explaining its abrupt reversal, Staff now claims that the Commission has acted illegally or unwisely in allowing revenue requirement deferrals. Staff's legal and policy analyses turn a blind eye to the legislative history of ORS 757.259, and to the many Commission and Oregon court precedents that support the status quo. The Intervenors support Staff, similarly ignoring the legislative history and case precedent.

In effect, Staff and Intervenors argue that the legislature intended to defeat the legislature's own stated purpose by adopting an incomplete definition of "expenses"—one that

ignores standard dictionaries, industry treatises, and Commission and court precedent to arrive at a meaning stripped of both context and sense. Staff and Intervenors claim that this interpretation is necessary to avoid various calamitous outcomes—from a deluge of deferrals to fundamental alterations in the ratemaking process. This alarmist claim is debunked by years of actual practice, summarized in the Joint Utilities' individual briefs, showing the Commission's careful exercise of discretion to approve those deferrals that meet the public interest.

Staff and Intervenors thus propose a major change in Commission law—and a major restriction on the Commission's authority—for no apparent or compelling reason. Worse, Staff and Intervenors fail to consider or acknowledge the consequences of the change they propose, such as undoing well-established cost-recovery mechanisms, invalidating approved deferrals, and abrogating existing settlements. They also fail to anticipate the challenges that the Commission could face in the future as it tries to unwind the existing regulatory framework and adjust to a paradigm where revenue requirement deferrals are replaced with multiple general rate cases.

The Commission should reject Staff's and Intervenors' call to change its current deferral practices, which have never been subject to legal challenge and have served the public interest. ORS 757.259 permits the deferral of capital costs, and the Commission should continue to exercise its discretion to allow full revenue requirement deferrals on a case-by-case basis.

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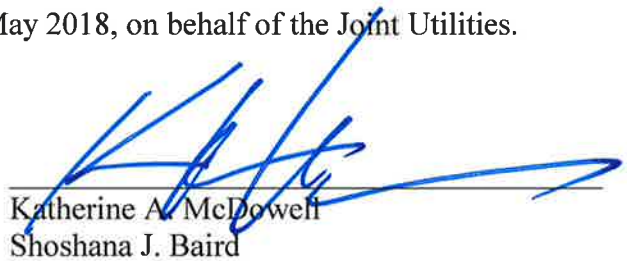
Respectfully submitted this 14th of May 2018, on behalf of the Joint Utilities.



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