



KATHERINE MCDOWELL
Direct (503) 595-3924
katherine@mrg-law.com

December 24, 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’ Motion for Reconsideration, Rehearing, Clarification, and Stay.

Please contact this office with any questions.

Sincerely,



Katherine McDowell

Attachment

**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
Legal Authority to Defer Capital Costs

JOINT UTILITIES'
MOTION FOR RECONSIDERATION,
REHEARING, CLARIFICATION,
AND STAY

December 24, 2018

Table of Contents

I.	Introduction.....	1
II.	Discussion.....	6
	A. Reconsideration is Warranted Because the Legislature Intended to Authorize Full Revenue Requirement Deferrals and this Intent is Consistent with a Reasonable Definition of “Expenses.”	7
	B. Reconsideration or Rehearing is Warranted Because a Technical Accounting Approach to the Deferral of “Expenses” Encompasses Costs Incurred for Use of a Capital Asset.	15
	1. The Commission’s Stated Definition of “Expenses” Supports the Deferral of Capital Costs.	15
	2. FERC’s Regulatory Accounting Principles Support the Deferral of Capital Costs.....	17
	3. FASB’s Regulatory Accounting Principles Support the Deferral of Capital Costs.....	18
	C. In the Alternative, the Commission Should Clarify that it Will Exercise its Discretion to Issue Regulatory Accounting Orders Allowing Utilities to Record Costs Incurred for Use of a Capital Asset as a Regulatory Asset.	21
	D. The Commission Should Stay Application of its Order While Review is Pending.	23
III.	Conclusion	24

I. INTRODUCTION

1 This investigation concerns whether ORS 757.259 authorizes the deferral of costs incurred
2 for use of a capital asset before it is included in rates. These costs include the return *of* investment
3 (depreciation expense), the return *on* investment (including the cost of equity and the cost of debt),
4 property taxes, and operations and maintenance (“O&M”) costs.¹ The return of and return on
5 investment are collectively referred to as “the capital costs of the business,”² while the combined
6 costs incurred for the use of a capital asset, which include non-capital items such as O&M,
7 constitute that asset’s annual “revenue requirement” effect.³ Since ORS 757.259 was enacted in
8 1987, the Public Utility Commission of Oregon (“Commission”) has allowed utilities to track the
9 cost components associated with the use of a capital asset in comprehensive revenue requirement
10 deferrals.⁴ These deferrals have allowed the Commission to reduce the number of rate cases,
11 comply with cost recovery mandates in Oregon’s Renewable Portfolio Standard (“RPS”), facilitate
12 fair and reasonable settlements, and appropriately match the costs and benefits borne by customers,
13 consistent with the statute’s stated purpose.⁵

¹ *In the Matter of Pub. Util. Comm’n of Or. Investigation of the Scope of the Commission’s Legal Authority to Defer Capital Costs*, Docket No. UM 1909, Order No. 18-423 at 1 (Oct. 29, 2018); Joint Utilities’ Opening Brief at 1.

² *In the Matter of the Application of Portland General Elec. Co. for an Investigation into Least Cost Plan Plant Retirement*, Docket No. DR 10, Order No. 08-487 at 5 (Sept. 30, 2008); *see also* Order No. 18-423 at 1 (defining “capital costs”).

³ Order No. 08-487 at 7 (describing the components of utility revenue requirements necessary to support just and reasonable rates).

⁴ *See, e.g., In the Matter of Idaho Power Co.’s Gen. Rate Revision Application for Authority to Include the Langley Power Plant Investment in Rate Base*, Docket No. UE 248, Stipulation at 3 (Sept. 5, 2012) (authorizing full revenue requirement deferral to avoid additional general rate cases); *In the Matter of NW Nat. Gas Co. Application for Authorization to Defer Expenses Related to the Installation of Automated Meter Reading*, Docket No. UM 1413, Order No. 09-105 (Mar. 30, 2009) (authorizing full revenue requirement deferral); *In the Matter of NW Nat. for Authorization to Record and Defer Unrecovered Expenses Associated with the Co.’s Coos Cty. Distribution System Investment*, Docket No. UM 1179, Order No. 04-702 (Dec. 3, 2004) (same); *In the Matters of NW Nat. Gas Co. Applications for Deferred Accounting Order Re. Purchase of Natural Gas Reserves and Proposed Purchase of Natural Gas Reserves*, Docket Nos. UM 1520 & UG 204, Order No. 11-176 (May 25, 2011) (same).

⁵ ORS 757.259(2)(e) permits the Commission to defer “identifiable utility expenses or revenues, the recovery or refund of which the [C]ommission finds should be deferred in order to minimize the frequency of rate changes or the fluctuation of rate levels or to match appropriately the costs borne by and the benefits received by ratepayers.”

1 At the request of Commission Staff, this investigation was opened to reconsider the
2 Commission’s legal authority to authorize full revenue requirement deferrals, and specifically
3 whether capital costs constitute “identifiable utility expenses or revenues” subject to deferral under
4 ORS 757.259(2)(e).⁶ Staff argued that only depreciation expense qualifies for deferral under
5 ORS 757.259,⁷ while Oregon’s investor-owned energy utilities—Portland General Electric
6 Company (“PGE”), PacifiCorp d/b/a Pacific Power (“PacifiCorp”), Idaho Power Company
7 (“Idaho Power”), Northwest Natural Gas Company (“NW Natural”), Avista Corporation
8 (“Avista”), and Cascade Natural Gas Corporation (“Cascade”) (collectively, “Joint Utilities”)—
9 explained that ORS 757.259 permits the Commission to authorize full revenue requirement
10 deferrals, including the return of and return on a capital investment, consistent with the plain
11 language of the statute, the overwhelming evidence of legislative intent, and more than three
12 decades of consistent practice.⁸

13 In Order No. 18-423, the Commission concludes that: (1) the term “expenses” as used in
14 ORS 757.259 is an “inexact statutory term,”⁹ and ambiguous;¹⁰ (2) the legislature intended to
15 adopt a technical regulatory accounting definition of “expenses;”¹¹ (3) a technical accounting
16 definition excludes all capital costs because these items are only “chargeable to a particular period”

⁶ Docket No. UM 1909, Order No. 17-487, Appendix A at 1 (Nov. 27, 2017) (urging the Commission to open a new docket “to investigate the Commission’s legal authority to defer capital costs”).

⁷ Staff’s Opening Brief at 1-2. Staff’s position was joined by the Oregon Citizens’ Utility Board (“CUB”) and the Alliance of Western Energy Consumers (“AWEC”) (collectively, “Intervenors”). Intervenors’ Opening Brief at 1 (agreeing with Staff “that the Commission does not have the authority under ORS 757.259(2)(e) to defer the revenue requirement necessary to recover a return on capital investment”).

⁸ Joint Utilities’ Closing Brief at 1-2.

⁹ Order No. 18-423 at 6.

¹⁰ Order No. 18-423 at 7. The Commission’s interpretation of an inexact statutory term is not entitled to deference by a reviewing court. *Warrenton Fiber Co. v. Dept. of Energy*, 283 Or App 270, 276 (2016).

¹¹ Order No. 18-423 at 7 (“Simply put, ORS 757.259 addresses an exercise of accounting, and should be construed as such.”).

1 after they have been included in rate base;¹² and (4) deferred accounting is unnecessary for capital
2 costs because these costs are not subject to the rule against retroactive ratemaking.¹³

3 Pursuant to ORS 756.561 and OAR 860-001-0720, Joint Utilities ask the Commission to
4 reconsider, rehear, or clarify Order No. 18-423 as follows:

5 (1) The Commission should reconsider its conclusion that the legislature intended to adopt
6 a technical definition of “expenses” in enacting the deferral statute. The Commission
7 is obligated to interpret the meaning of “expenses” to best effectuate the legislature’s
8 “overall purpose” in enacting the deferral statute.¹⁴ Here, the statute was enacted to
9 allow “the Commission to make rates retroactively in cases where the utility asks that
10 a *cost* be deferred and not reflected in rates until a later date,” as explained by the
11 Commissioner responsible for drafting the statute,¹⁵ the Commission’s Staff at the
12 time,¹⁶ the Assistant Attorney General,¹⁷ the party proposing an amendment to the

¹² Order No. 18-423 at 8.

¹³ Order No. 18-423 at 8.

¹⁴ *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”).

¹⁵ *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit B at 4 (Mar. 11, 1987) (testimony of Commissioner Davis) (emphasis added).

¹⁶ *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.”).

¹⁷ *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).

1 statute (NW Natural),¹⁸ and legislators before both the House¹⁹ and the Senate.²⁰ This
2 Commission also acknowledges that a reasonable definition of “expenses” could
3 include capital costs—thereby allowing for full revenue requirement deferrals.²¹ The
4 Commission cannot ignore these clear and compelling indications of legislative intent.
5 Instead, it should effectuate the plain purpose of the statute by adopting a definition of
6 “expenses” that covers costs incurred for use of a capital asset before the asset is
7 included in rates.²²

8 (2) The Commission should also reconsider its decision because, applying the
9 Commission’s own technical approach, regulatory accounting guidance supports the
10 inclusion of costs incurred for use of capital assets in deferred accounts.²³ After a
11 capital asset is placed in service but before the asset enters rate base, costs for use of
12 the asset are chargeable to the period in which they are incurred. Absent a regulatory

¹⁸ *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.”).

¹⁹ *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”).

²⁰ *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.”).

²¹ Order No. 18-423 at 6 (stating that some dictionary definitions “are more inclusive than the Joint Utilities’ proposed broad interpretation” and declining “to decide which of the many definitions to use”).

²² *State v. Gaines*, 346 Or 160, 171 (2009) (describing statutory interpretation’s “paramount goal of discerning the legislature’s intent”).

²³ *See, infra*, Section II(B).

1 accounting mechanism such as a deferral, these costs are not recoverable at a later
2 date.²⁴ These costs are thus properly deemed “expenses” under ORS 757.259(2)(e).

3 (3) Alternatively, the Commission should allow rehearing. Order No. 18-423 constitutes
4 a dramatic departure from Commission precedent and is unsupported by any legal
5 briefing in this docket. No party argued that the legislature intended to adopt a technical
6 regulatory accounting approach in enacting ORS 757.259.²⁵ No party argued that the
7 statute excluded deferral of all costs—including depreciation expense—associated with
8 the use of capital assets not yet in rates.²⁶ And no party cited accounting standards or
9 other definitive guidance showing that a regulatory accounting approach to deferrals
10 would exclude costs incurred in using a capital asset. The Commission should not
11 implement such a major change without a full and complete review of the underlying
12 analysis and relevant accounting guidance.

13 (4) If the Commission declines to reconsider or rehear Order No. 18-423, then the
14 Commission should clarify that the order will be implemented according to its express
15 terms. Order No. 18-423 states that capital costs are not subject to the rule against
16 retroactive ratemaking and can thus be recovered “at any time.”²⁷ To implement this
17 ruling under utility accounting guidelines, however, the Commission must issue a
18 regulatory accounting order authorizing a utility to track and record incurred costs to

²⁴ FERC USOA Account 182.3 (requiring that incurred costs be recorded to the utility’s income statement for the year in which these costs were incurred, unless deferred accounting treatment has been authorized).

²⁵ While the Joint Utilities touched on a technical accounting approach, the Joint Utilities did not argue that a technical regulatory accounting approach—or indeed any technical approach—was appropriate. *See* Joint Utilities’ Opening Brief at 19-20.

²⁶ *See* Staff’s Opening Brief at 1 (supporting the Commission’s “authority to defer the return of capital investment (depreciation expense)”) (emphasis in original).

²⁷ Order No. 18-423 at 8.

1 its balance sheet as a regulatory asset.²⁸ Otherwise, these costs will not be recoverable
2 at the time the asset goes into rate base.²⁹ The Commission should clarify that it will
3 exercise its discretion to issue such regulatory accounting orders, pending inclusion of
4 a capital asset in rates.³⁰

5 (5) As the Commission acknowledges in Order No. 18-423, its decision invokes a
6 “significant” change in regulatory law—one that is not self-implementing, and with
7 potentially far-reaching impacts on Joint Utilities and on customers.³¹ Pending final
8 resolution of this motion, Joint Utilities request that the Commission stay operation of
9 the order to avoid confusion and unnecessary implementation efforts and costs.
10 Because a stay will simply maintain the Commission’s historical approach to deferrals,
11 no party will be prejudiced. If the Commission does not stay operation of the order,
12 Joint Utilities could be financially harmed because the Financial Accounting Standards
13 Board (“FASB”) Accounting Standards Codification 980-340-40-1 requires that, “If at
14 any time an entity’s incurred cost no longer meets the criteria for the capitalization of
15 an incurred cost (see paragraph 980-340-25-1), that cost shall be charged to earnings.”

II. DISCUSSION

16 Reconsideration or rehearing is appropriate where there is either (1) an error of law or fact
17 in the order that was essential to the decision, or (2) good cause for further examination of an issue
18 essential to the decision.³² Order No. 18-423 is predicated on an error of law concerning the
19 dictates of legislative intent in the statutory interpretation process and an incorrect application of

²⁸ FERC USOA Account 182.3 (requiring that incurred costs be recorded to the utility’s income statement for the year in which these costs were incurred, unless deferred accounting treatment has been authorized).

²⁹ FERC USOA Account 182.3.

³⁰ See ORS 757.125 (directing the Commission to establish regulatory accounts for utilities).

³¹ Order No. 18-423 at 9.

³² OAR 860-001-0720.

1 the technical regulatory accounting principles governing regulated utilities. Both justify
2 reconsideration or rehearing.

3 **A. Reconsideration is Warranted Because the Legislature Intended to Authorize Full**
4 **Revenue Requirement Deferrals and this Intent is Consistent with a Reasonable**
5 **Definition of “Expenses.”**

6 The Commission should reconsider its conclusion that the legislature intended to adopt a
7 limited, technical definition of “expenses” in enacting the deferral statute. Oregon’s system of
8 statutory interpretation requires the Commission to adopt a reasonable, non-technical definition of
9 expenses, consistent with the legislature’s stated purpose in enacting the statute.³³ Where the
10 legislature’s intent in enacting a statute is clear, and where that intent is supportable by the statute’s
11 text,³⁴ then the interpreting court *must* adopt that definition that effectuates the clear legislative
12 intent.³⁵

13 Here, the Commission acknowledges that the term “expenses” is “inexact” rather than
14 “delegative.”³⁶ As a result, the Commission’s interpretive role is constrained to ascertaining and
15 giving effect to the legislature’s intent, as opposed to exercising its own judgment in “a general
16 policy decision.”³⁷ The 1987 legislature enacted ORS 757.259 to confirm the Commission’s

³³ ORS 174.020(1)(a) (directing courts to “pursue the intention of the legislature if possible”); *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.”).

³⁴ *Whipple v. Howser*, 291 Or 475, 480 (1981) (holding that courts are not free to “give effect to any supposed intention or meaning in the legislature, unless the words to be imported into the statute are, in substance at least, contained in it.”).

³⁵ *Linn-Benton-Lincoln Ed. v. Linn-Benton-Lincoln ESD*, 163 Or App 558, 570 (1999).

³⁶ In contrast to inexact terms, delegative terms concern questions of judgment. *See, e.g., Bergerson v. Salem-Keizer Sch. Dist.*, 341 Or 401, 413 (2006) (concluding that “unreasonable” is a delegative term because, among other things, it “is among the examples of delegative terms this court has noted previously”); *see also McPherson v. Employment Division*, 285 Or 541, 549-50 (1979) (concluding that “good cause” is a delegative term because it “calls for completing a value judgment that the legislature itself has only indicated”); *but see J.R. Simplot Co. v. Dep’t of Agric.*, 340 Or 188, 197 (2006) (concluding that “reasonably necessary” is not delegative given additional, qualifying statutory wording).

³⁷ *Warrenton*, 283 Or App at 276 (finding that “the phrase at issue—[f]orest or rangeland woody debris from harvesting or thinning’—... is an inexact term” because “it reflects the legislature’s intent to define the organic

1 ability to authorize full revenue requirement deferrals, thereby minimizing the frequency of rate
2 cases and matching customers’ costs and benefits. This clear legislative intent is supported by a
3 variety of common dictionary definitions,³⁸ and by court decisions concluding that “expenses” is
4 synonymous with “costs.”³⁹

5 In contrast, the legislative history of ORS 757.259 includes no reference to authoritative
6 accounting standards such as the Federal Energy Regulatory Commission’s (“FERC”) Uniform
7 System of Accounts (“USOA”), FASB’s generally accepted accounting principles (“GAAP”), or
8 to other non-authoritative accounting guidance.⁴⁰ The Commission acknowledges that the
9 statute’s legislative history “includes statements where the terms ‘costs’ and ‘expenses’ were used
10 interchangeably” and “citations to the practice of allowing full revenue requirement deferrals.”⁴¹
11 But rather than address this compelling, countervailing legislative history, the Commission relies
12 on what it describes as “the statute’s context.”⁴² In particular, the Commission concludes that
13 “other provisions of the statute” and “the statutory framework in which the legislation was
14 enacted” show that “the legislature used ‘expenses’ as a term of art.”⁴³ Ignoring the statute’s
15 legislative history, the Commission relies on two pieces of context as dispositive: (1) the statute

material that is ‘biomass,’” and did not require “a general policy decision regarding biomass,” though “it is susceptible to competing interpretations”).

³⁸ 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”)

³⁹ *In re Domestic P’ship of Baker v. Andrews*, 232 Or App 646, 658 (2009) (concluding that the word “expenses” is “commonly understood to mean ‘something that is expended in order to secure a benefit or bring about a result’ or ‘the financial burden involved typically in a course of action or manner of living: cost’”) (quoting *Webster’s Third New Int’l Dictionary* 800 (unabridged ed. 2002)); 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.’”).

⁴⁰ *Gaines*, 346 Or at 171-72 (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”).

⁴¹ Order No. 18-423 at 8.

⁴² Order No. 18-423 at 7.

⁴³ Order No. 18-423 at 7.

1 uses the words “deferred accounting,” “expenses,” and “revenues”; and (2) utilities “are required
2 to comply with standard accounting practices.”⁴⁴

3 As a general matter, there is no basis in Oregon law for choosing to disregard the vast
4 preponderance of legislative history—a critical piece of statutory context—in favor of select
5 contextual factors. Courts consider a statute’s text and context “as a whole,”⁴⁵ and will only
6 discard the body of legislative history when it “does not clearly resolve the matter one way or the
7 other.”⁴⁶ Here, the legislative history is unambiguous: the Commissioner responsible for drafting
8 the statute,⁴⁷ the Commission’s Staff at the time,⁴⁸ the Assistant Attorney General,⁴⁹ the party
9 proposing an amendment (NW Natural),⁵⁰ and legislators before both the House⁵¹ and the Senate,⁵²

⁴⁴ Order No. 18-423 at 7.

⁴⁵ *Doe v. Medford Sch. Dist.* 549C, 232 Or App 38, 52 (2009).

⁴⁶ *State v. Cloutier*, 351 Or 68, 102 (2011) (noting that the legislative history at issue “provides a little something for everyone”).

⁴⁷ *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”).

⁴⁸ *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.”).

⁴⁹ *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).

⁵⁰ *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.”).

⁵¹ *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”).

⁵² *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

1 all confirmed that the statute was intended to authorize comprehensive deferrals of a utility’s
2 revenue requirement. Many of these parties used the term “expenses” interchangeably with
3 “costs”—in contrast to “revenues,” which was used interchangeably with “benefits.”⁵³ The
4 Commission does not explain why it disregards these clear and compelling statements of
5 legislative intent in favor of two narrow slices of “context.”⁵⁴

6 The fact that the words “deferred accounting,” “expenses,” and “revenues” are used in
7 ORS 757.259 does not mean that the legislature intended to adopt a technical regulatory
8 accounting approach to these terms. The words “expenses” and “revenues” have “commonly
9 understood” meanings that courts have deemed to be non-technical in other contexts.⁵⁵ And the
10 term “deferred accounting” was not introduced into ORS 757.259 by an accounting expert or even
11 by then-Commissioner Davis—but by the Attorney General, in the opinion letter advising the
12 Commission on the need for explicit statutory authority “to issue a deferred accounting order.”⁵⁶
13 As discussed below, this letter expressly references costs associated with the use of a capital asset
14 before it is included in rates.⁵⁷ The Commission then sought legislative approval, citing the
15 Attorney General’s opinion as the basis for the new statute.⁵⁸

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.”)

⁵³ *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Exhibit D at 3-4 (May 21, 1987) (testimony of Commissioner Davis); *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Tape 99, Side B, at 16:00-16:05 (May 21, 1987) (Rep. Eachus explaining that the bill would allow deferral of “not only costs to the utility but also for benefits to the ratepayer”); *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 73, Side A, at 13:40-13:57 (Mar. 25, 1987) (quoting Mr. Warren).

⁵⁴ See Joint Utilities’ Opening Brief at 10-16 (detailing ORS 757.259’s legislative history).

⁵⁵ *Andrews*, 232 Or App at 658; *Shammas*, 784 F.3d at 229 (“[I]n its dictionary form the term ‘expenses’ is generally synonymous with the word ‘costs.’”).

⁵⁶ Attorney General Opinion Letter, Re: Opinion Request OP-6076 at 10 (Mar. 18, 1987).

⁵⁷ The AG Opinion specifically addressed the need for deferrals to cover capital investment projects such as the Jim Bridger Unit 2 and Colstrip Unit 4. Attorney General Opinion Letter, Re: Opinion Request OP-6076 at 13-14 (Mar. 18, 1987).

⁵⁸ FAS 71-4 (distinguishing between “costs” and “allowable costs”).

1 Indeed, neither FERC’s USOA nor FASB’s GAAP defines the term “expenses,” and
2 instead both rely on the more technically precise concept of incurred costs.⁵⁹ As explained below,
3 Order No. 18-423 relies, not on binding accounting guidance, but on a piece of outdated, non-
4 authoritative commentary—which makes plain the fact that “expenses” is not a salient term of art
5 in the regulatory accounting context.⁶⁰ Had the legislature intended to adopt a regulatory
6 accounting approach, it would have used the more technically accurate term, “costs,” which was
7 used by FASB at the time ORS 757.259 was enacted.⁶¹ Instead, the legislature relied on a more
8 colloquial term, “expenses,” while using that term interchangeably with “costs.”⁶²

9 It is also not clear why the need for utilities to comply with standard accounting practices
10 demonstrates that the 1987 legislature “had in mind” specific, technical accounting definitions of
11 “expenses” and “revenues.”⁶³ As noted above, the relevant subject-matter experts (Commissioner
12 Davis and Commission Staff) and the legislators before the House and Senate used the term
13 “expenses” interchangeably with “costs.”⁶⁴ Where the legislature uses terms interchangeably, this

⁵⁹ 18 CFR § 101(39); FAS 71-11 (referring to costs charged to expenses and vice versa, but not defining “expenses”).
⁶⁰ CON6-4; *see also Standards*, Financial Accounting Standards Board, (noting that a Concepts Statement “does not establish generally accepted accounting standards”)
<https://www.fasb.org/cs/ContentServer?c=Page&cid=1176157086176&d=&pagename=FASB%2FPage%2FSectionPage> (most recently accessed on Dec. 4, 2018).

⁶¹ FAS 71-11.
⁶² *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Exhibit D at 3-4 (May 21, 1987) (testimony of Commissioner Davis) (“[T]he proposed measure allows the Commission to make rates retroactively in cases where the utility asks that a *cost* be deferred or the Commission believes *income amounts should be deferred* and not reflected in rates until a later date. A rate-making delay may be preferable either because (a) the full extent of the costs, that is, the *net cost*, will not be known until a future time, or (b) a rate change, otherwise authorized, should be matched with other *costs or benefits* or matched in time with other rate changes.”) (emphasis added); *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 73, Side A, at 13:40-13:57 (Mar. 25, 1987) (quoting Mr. Warren) (describing how the Commission established a comprehensive balancing account by putting “all the other company costs and revenues” including “the reasonable cost of capital for the company . . . into one pot”); *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).

⁶³ Order No. 18-423 at 6 (quoting *State v. Johnson*, 339 Or 69, 81 n.7 (2005)).
⁶⁴ *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Exhibit D at 3-4 (May 21, 1987) (testimony of Commissioner Davis) (“[T]he proposed measure allows the Commission to make rates retroactively in cases where the utility asks that a *cost* be deferred or the Commission believes *income amounts should be deferred* and not reflected in rates until a later date. A rate-making delay may be preferable either because (a) the full extent of the costs, that is, the *net cost*, will not be known until a future time, or (b) a rate change, otherwise authorized, should be matched with

1 “multiplicity of usages . . . convincingly demonstrates” that a phrase is not a term of art and that a
2 “plain and natural” definition is appropriate.⁶⁵

3 Rather than seek to understand and effectuate the clear will of the legislature in enacting
4 ORS 757.259, the Commission appears to have determined how the statute “*should be construed*”
5 because the statute “addresses an exercise of accounting.”⁶⁶ By turning to what the Commission
6 believes the legislature *should* have intended, the Commission abandons the “paramount goal” of
7 statutory interpretation—to ascertain and give effect to the legislature’s *actual* intent.⁶⁷ As the
8 Commission acknowledges, the terms used in ORS 757.259 are “inexact,” not “delegative,”⁶⁸ and
9 thus the Commission’s role is not to engineer an interpretation of the statute that the Commission
10 believes makes sense, but to ascertain and give effect to the legislature’s intent at the time the
11 statute was enacted.⁶⁹ Only when a court is unable to ascertain the legislature’s intent from “what
12 the legislature has written” and “what the legislature has considered” does a court turn, “as a last
13 resort, to what the court determines makes sense.”⁷⁰ Where, as here, the legislature’s intent to
14 authorize full revenue requirement deferrals is amply supported and clearly stated, no justification

other *costs or benefits* or matched in time with other rate changes.”) (emphasis added); *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 73, Side A, at 13:40-13:57 (Mar. 25, 1987) (quoting Mr. Warren) (describing how the Commission established a comprehensive balancing account by putting “all the other company costs and revenues” including “the reasonable cost of capital for the company . . . into one pot”); *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).

⁶⁵ *State ex rel. Engweiler v. Cook*, 340 Or 373, 378-79 (2006) (reversing the Court of Appeals’ conclusion that “context” required a statutory term to be interpreted as “a term of art”).

⁶⁶ Order No. 18-423 at 7 (emphasis added).

⁶⁷ *Gaines*, 346 Or at 171; *see also* ORS 174.020(1)(a) (mandating that statutory interpretation seek to ascertain and give effect to the legislature’s intent).

⁶⁸ Order No. 18-423 at 6.

⁶⁹ *NW Nat. Gas Co. v. City of Gresham*, 359 Or 309, 346 (2016) (holding that the legislature could not have intended to address the impact of local laws not yet in existence).

⁷⁰ *Young v. State*, 161 Or App 32, 37 (1999); *see, e.g., PGE v. BLI*, 317 Or at 162 (“[W]here no legislative history exists, the court will attempt to determine how the legislature would have intended the statute to be applied had it considered the issue[.]”).

1 exists for overriding the clear statutory purpose with what the Commission believes the legislature
2 “should” have intended.⁷¹

3 As the Commission explained in Order No. 18-423, it would be inappropriate to rely on a
4 technical definition that “was never addressed during HB 2145’s legislative history.”⁷² The
5 Commission declined to adopt Staff’s technical definition of “expenses” on that basis, noting that
6 there was no “legislative discussion of the standard ratemaking formula.”⁷³ Yet the Commission
7 proceeded to adopt an alternate technical definition that is similarly unsupported—and is in fact
8 contradicted—by the deferral statute’s legislative history.⁷⁴

9 Finally, the Commission also appears to argue that the legislature could not have intended
10 to authorize the deferral of capital costs because capital costs are not subject to the rule against
11 retroactive ratemaking, and the legislature only intended to create an exception to that rule.⁷⁵ This
12 understanding is inconsistent with the very impetus for the creation of ORS 757.259.⁷⁶ The statute
13 was drafted in response to the advice of Oregon’s Attorney General,⁷⁷ who specifically concluded
14 that costs incurred for use of capital assets (such as Jim Bridger Unit 2 and Colstrip Unit 4) are

⁷¹ *Gaines*, 346 Or at 172-173 n.9 (“In general, an examination of legislative history is most useful when it is able to uncover the manifest general legislative intent behind an enactment.”) (quoting *Errand v. Cascade Steel Rolling Mills*, 320 Or 509, 539 n.4 (1995) (Graber, J., dissenting)). The most reliable legislative history contains themes “consistently reflected in both houses and throughout the legislative process,” making it “more likely to reveal the intentions of the legislature as a whole.” *Denton & Denton*, 145 Or App 381, 400 (1996), *aff’d in part, rev’d in part on other grounds*, 326 Or 236 (1998).

⁷² Order No. 18-423 at 6.

⁷³ Order No. 18-423 at 6.

⁷⁴ Order No. 18-423 at 6 (“We disagree . . . with both of the proposed definitions for ‘expenses’ offered by all of the parties.”).

⁷⁵ Order No. 18-423 at 8.

⁷⁶ *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 57, Side A, at 15:55-16:12 (Mar. 11, 1987) (quoting the following exchange: “[Representative Ron Cease:] You mentioned earlier that this would make explicit what you are currently doing. Does this go beyond that or is this essentially directly authorizing you to do what you’ve been doing to this point? [Commissioner Charles Davis:] Correct, it does not go beyond that.”).

⁷⁷ *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.”).

1 subject to the rule against retroactive ratemaking.⁷⁸ While the Commission now appears to reject
2 this interpretation in Order No. 18-423, the key issue is what the legislature understood and
3 intended in 1987—when the Attorney General issued its opinion and the legislature responsively
4 enacted ORS 757.259.⁷⁹

5 In sum, the legislature enacted ORS 757.259 to authorize the deferral of “revenue
6 requirements for the utility.”⁸⁰ The legislative history includes significant evidence that the statute
7 was designed to cover deferrals for all costs incurred for use of a capital asset, and no evidence
8 that the legislature intended to adopt a technical accounting definition of the term “expenses,”
9 much less one that would exclude costs associated with capital assets. The Commission is
10 obligated to adopt a reasonable definition of “expenses” that best effectuates the legislature’s
11 intent.⁸¹ The Commission is also obligated to reject a technical definition of that term when to do
12 so would, as here, “frustrate what it appears is plainly the purpose of the statute.”⁸²

⁷⁸ The AG Opinion specifically considered whether capital investment projects (such as the Jim Bridger Unit 2 and Colstrip Unit 4) were subject to the rule against retroactive ratemaking, and concluded that they were. Attorney General Opinion Letter, Re: Opinion Request OP-6076 at 13-14 (Mar. 18, 1987).

⁷⁹ *Gresham*, 359 Or at 346 (holding as a matter of logic that evidence available only after a statute was implemented could not have impacted the legislature’s intent at the time of enactment).

⁸⁰ *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).

⁸¹ *Linn-Benton*, 163 Or App at 570; *Long*, 360 Or at 803 (holding that a statute’s terms “should be interpreted in light of their function within the statute’s overall purpose”).

⁸² *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”); *Linn-Benton*, 163 Or App at 570; *cf.* Order No. 18-423 at 9 n.18 (“The Commission is not at liberty to ‘give effect to any supposed intention or meaning in the legislature, unless the words be imported into the statute are, in substance at least, contained in it.’”) (quoting *Whipple v. Howser*, 291 Or at 480 (1981)).

1 **B. Reconsideration or Rehearing is Warranted Because a Technical Accounting**
2 **Approach to the Deferral of “Expenses” Encompasses Costs Incurred for Use of a**
3 **Capital Asset.**

4 **1. The Commission’s Stated Definition of “Expenses” Supports the Deferral of**
5 **Capital Costs.**

6 In Order No. 18-423, the Commission considered whether established regulatory
7 accounting practices would deem capital costs (that is, both the return *of* and the return *on*
8 investment) to be deferrable expenses.⁸³ The Commission concluded that capital costs are not
9 subject to deferral because the term “expenses” only includes items “chargeable to a particular
10 period.”⁸⁴

11 After a capital asset is placed in service but before it enters rate base, costs are incurred for
12 use of the asset—including depreciation expenses, property taxes, and O&M expenses.⁸⁵ Unless
13 a deferral or regulatory accounting order allows these costs to be recorded on the utility’s balance
14 sheet, they are recorded to the utility’s income statement as expenses *for that interim period*.⁸⁶
15 While return on equity (“ROE”) is not technically recorded to the income statement in the same
16 manner as the other costs incurred for use of the capital asset, ROE is not recoverable absent
17 recovery of other incurred costs. Because all of these costs are thus “chargeable to a particular
18 period,” they properly fall within the Commission’s definition of “expenses.”⁸⁷

⁸³ Order No. 18-423 at 8.

⁸⁴ Order No. 18-423 at 8.

⁸⁵ Order No. 08-487 at 7 (describing these cost components).

⁸⁶ FERC USOA Account 182.3 (“The amounts included in this account are to be established by those charges which would have been included in net income, or accumulated other comprehensive income, determinations in the current period under the general requirements of the Uniform System of Accounts but for it being probable that such items will be included in a different period(s) for purposes of developing rates that the utility is authorized to charge for its utility services.”).

⁸⁷ Order No. 18-423 at 8.

1 The Commission’s discussion of capital costs focuses on those costs “associated with
2 constructing an asset”—that is, costs accrued in the period *before* a capital asset goes into service.⁸⁸
3 These costs, commonly known as construction work in progress (“CWIP”), include the financing
4 costs (that is, the costs of both debt and equity) incurred during the construction period—known
5 as the allowance for funds used during construction (“AFUDC”). However, the relevant period
6 for a deferral is “the period between when the resource is placed into service” (at which point
7 AFUDC ceases) “and when the resource enters rates.”⁸⁹ In Order No. 18-423, the Commission
8 overlooks these subsequent costs by assuming that the AFUDC accrued prior to an asset entering
9 service allows a utility to recover the “financing costs associated with a capital investment.”⁹⁰

10 In the order, the Commission implies that a capital asset only depreciates after the utility
11 has sought “rate recovery of its investment,” at which point the utility begins “depreciating the
12 associated capital costs over time.”⁹¹ To clarify, a capital asset begins depreciating *as soon as it*
13 *is placed in service.*⁹² When a capital asset is allowed into rate base, the asset is included at its
14 depreciated value, rather than at its book value.⁹³ Subsequent depreciation then serves as “the
15 means by which capital costs are recovered over the life of facilities.”⁹⁴ Thus, the asset’s

⁸⁸ Order No. 18-423 at 8.

⁸⁹ *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 4 (Dec. 19, 2007).

⁹⁰ Order No. 18-423 at 8.

⁹¹ Order No. 18-423 at 8.

⁹² *See, e.g., In the Matter of Portland Gen. Elec. Co. Detailed depreciation study of the electric properties of the Company*, Docket No. UM 1233, Order No. 06-581 (Oct. 13, 2006) (noting that a capital asset’s “[d]epreciation expense” would “begin accruing on the date the plant goes into service”).

⁹³ FERC USOA Account 182.3.

⁹⁴ 1 FERC ¶63,048 at 63,362 (Dec. 22, 1977). Contrary to CUB’s recent assertion in response to Order No. 18-423, depreciation does not result in customers “overpaying for certain capital investments.” Mike Goetz, *Avoiding a Costly Outcome: CUB Notches Capital Cost Victory* (Nov. 13, 2018) available at <https://oregoncub.org/news/blog/avoiding-a-costly-outcome-cub-notches-capital-cost-victory/1943/>. Capital asset depreciation is simply a means of cost recovery. *See Accounting for Public Utilities*, Rel. 35 § 6.03[2] (Nov. 2018) (“[U]nder most cost-based regulation, depreciation accounting is the recovery of the original cost of assets and not the economic, market, or any other non-original cost measures of value.”). In any event, CUB’s argument addresses a policy argument that Commission could

1 depreciation over the intervening period is “chargeable to a particular period” and, absent
2 recording the amount in a regulatory asset on the utility’s balance sheet by means of an approved
3 regulatory accounting mechanism, the utility will not recover this depreciation expense (i.e., the
4 return of its investment) for that intervening period.⁹⁵ Similarly, absent a deferral or regulatory
5 accounting mechanism, the debt and equity costs incurred for an in-service asset are tied to the
6 intervening period and are unrecoverable in later rates.⁹⁶

7 If it is the Commission’s intent that a utility not begin depreciating an in-service asset until
8 after the utility has sought rate recovery of its investment, the utility would require an order from
9 the Commission specifically directing this accounting treatment. With such an order, there would
10 be no capital costs incurred before rate recovery and no need for the utility to seek a deferral.

11 **2. FERC’s Regulatory Accounting Principles Support the Deferral of Capital Costs.**

12 FERC’s regulatory accounting principles also support a definition of “expenses” that
13 covers costs incurred for use of a capital asset. As explained in Order No. 18-423, the Commission
14 requires regulated utilities to keep uniform accounts and records and has adopted FERC’s USOA
15 for this purpose.⁹⁷ While the Commission cites FERC’s USOA in Order No. 18-423, it relies upon
16 a definition of expenses drawn indirectly from FASB’s GAAP. To be clear, both FERC and this
17 Commission use the USOA for technical utility accounting, not GAAP.⁹⁸ Therefore, if a technical

consider in determining whether to exercise its discretion to allow deferral of costs incurred for use of a capital asset, not a legal argument that supports the Commission’s rationale in Order No. 18-423.

⁹⁵ FERC USOA Account 182.3.

⁹⁶ FERC USOA Account 182.3.

⁹⁷ Order No. 18-423 n.15 (citing OAR 860-027-0065).

⁹⁸ See *In the Matter of Portland Gen. Elec. Request for approval to classify certain gas transportation costs as capital expenditures*, Docket No. UM 1170, Order No. 04-686 (Nov. 26, 2004) (“The Commission has adopted the Federal Energy Regulatory Commission’s (FERC) Uniform System of Accounts for use by all electric utilities in Oregon (OAR 860-027-0045).”)

1 regulatory accounting approach is used to determine the scope of deferrals under ORS 757.259,
2 FERC’s USOA should be the consistent reference.

3 Under FERC’s USOA, deferrals are appropriate for all “revenues, expenses, gains, or
4 losses” that would otherwise have been included in net income.⁹⁹ Rather than relying on a specific
5 definition of “expenses,” FERC’s USOA defines the allowable scope of a deferral according to
6 what items would otherwise have been in the sum of net income.¹⁰⁰ After a capital asset is put
7 into service but before it is included in rate base, costs incurred for use of that asset are later
8 recoverable through a regulatory accounting mechanism such as a deferral.¹⁰¹ Absent such a
9 mechanism, all costs comprising the revenue requirement for the asset’s use during the interim
10 period—including depreciation expense, debt and equity costs, O&M expenses, and property
11 taxes—would be foregone.

12 **3. FASB’s Regulatory Accounting Principles Support the Deferral of Capital Costs.**

13 Even if the Commission chooses to rely on FASB’s GAAP approach, correctly construed
14 GAAP accounting also supports a definition of “expenses” that covers costs incurred for the use
15 of a capital asset. By way of brief background, FASB’s GAAP was first developed in 1973, with
16 specific standards issued as FASB Statements Nos. 1-168 (“Statements”).¹⁰² In 2009, these
17 Statements were superseded by FASB’s Accounting Standards Codification (“Codification”),

⁹⁹ 18 CFR § 101(39).

¹⁰⁰ 18 CFR § 101(39); *see* Roger A. Morin, *New Regulatory Finance* at 3 (Pub. Utils. Reports, Inc. 2006) (“In a nutshell, the determination of rates is implemented by defining a total ‘revenue requirement,’ also referred to as the total ‘cost of service,’ then by adjusting the rates so as to achieve these totals.”).

¹⁰¹ *See* FERC USOA Account 182.3.

¹⁰² FASB’s Statement of Financial Accounting Standards No. 168, *The FASB Accounting Standards Codification™ and the Hierarchy of Generally Accepted Accounting Principles* at 2 (June 30, 2009) (“FAS 168”) (“On the effective date of this Statement, the Codification will supersede all then-existing non-SEC accounting and reporting standards.”).

1 which established the comprehensive GAAP used today.¹⁰³ In addition to both the pre-2009
2 Statements and today’s GAAP, FASB issues “Concepts Statements,” which are non-authoritative,
3 supplemental resources.¹⁰⁴ A Concepts Statement “does not establish generally accepted
4 accounting standards.”¹⁰⁵ All pre-2009 FASB Concepts Statements, including FASB’s Statement
5 of Financial Accounting Concepts No. 6 (“CON6”) cited in Order No. 18-423, appear to have been
6 superseded by the 2009 Codification.¹⁰⁶

7 When ORS 757.259 was enacted in 1987, the FASB’s Statement of Financial Accounting
8 Standards No. 71 (“FAS 71”) provided the relevant FASB accounting guidance to public
9 utilities.¹⁰⁷ Like FERC’s USOA, FAS 71 did not use the term “expenses” to define the scope of a
10 deferral; FAS 71 did not separately define “expenses” at all.¹⁰⁸ Instead, FAS 71 determined what
11 items could be included in a regulatory asset or deferral according to whether the item was an
12 “incurred cost,”¹⁰⁹—that is, “a cost arising from cash paid out or obligation to pay for an acquired
13 asset or service, a loss from any cause that has been sustained and has been or must be paid for.”¹¹⁰

14 Similarly, today’s FASB Codification, ASC 980-340-25-1, continues to use the term
15 “incurred cost” rather than “expense” to define items that may be appropriately deferred through

¹⁰³ *FAF, FASB, and GASB Timeline*, <https://www.fasb.org/timeline/timeline-assets/timeline.html> (most recently accessed on Dec. 4, 2018); see also Barry J. Epstein, Ralph Nach, Steven M. Bragg, *Wiley GAAP 2010: Interpretation and Application of Generally Accepted Accounting Principles* at 6-7 (Oct. 12, 2009) (describing the Codification process and the corresponding withdrawal of “all existing GAAP literature”).

¹⁰⁴ FAS 168-4 (listing Concepts Statements as one source of “nonauthoritative accounting guidance”).

¹⁰⁵ CON6-4; see also *Standards*, Financial Accounting Standards Board, <https://www.fasb.org/cs/ContentServer?c=Page&cid=1176157086176&d=&pagename=FASB%2FPage%2FSectionPage> (most recently accessed on Dec. 4, 2018).

¹⁰⁶ FAS-168-1 (“On the effective date of this Statement, the Codification will supersede all then-existing non-SEC accounting and reporting standards. All other nongrandfathered non-SEC accounting literature not included in the Codification will become nonauthoritative.”).

¹⁰⁷ FAS 71-5, n.2 (describing the procedure by which a regulatory “may order an enterprise to capitalize and amortize a cost that would be charged to income,” also termed “deferring a cost”).

¹⁰⁸ FAS 71-11 (referring to costs charged to expenses and vice versa, but not defining “expenses”).

¹⁰⁹ FAS 71-4.

¹¹⁰ FAS 71-7 n.5 (quoting Eric L. Kohler, *A Dictionary for Accountants*, 5th ed. [Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1975], p. 253).

1 a regulatory accounting mechanism.¹¹¹ Today’s FASB Codification explains that an item may be
2 included in a regulatory asset for future recovery if it “would otherwise be chargeable to expense,”
3 and where the item would otherwise be used to set the “future revenue” requirement. Either FASB
4 definition supports a characterization of “expenses” as encompassing costs associated with use of
5 a capital asset before it is reflected in rates when, absent a deferral or similar accounting
6 mechanism, these costs would be unrecoverable.

7 Rather than looking to preexisting or modern authoritative FASB standards, in Order
8 No. 18-423, the Commission relies on FASB’s CON6 to define the term “expenses.”¹¹² This
9 reliance is inappropriate because, as noted above, CON6 appears to have been superseded by
10 FASB’s comprehensive Codification in 2009.¹¹³ Moreover, none of FASB’s Concepts Statements
11 “establish generally accepted accounting principles or standards.”¹¹⁴ As CON6 explains, Concepts
12 Statements may be “inconsistent” with “current generally accepted accounting principles.”¹¹⁵
13 There is no apparent basis for relying on non-authoritative commentary where authoritative
14 standards on the proper scope of a regulatory accounting deferral mechanism are available—both
15 as would have been accessible to the 1987 legislature (FAS 71) and as currently in force (ASC 980-
16 340-25-1).

17 In any event, CON6 does not support the Commission’s conclusion that, under technical
18 regulatory accounting standards, costs incurred through use of a capital asset are not “expenses.”
19 CON6 defines “expenses” as the “using up of assets or incurrences of liabilities during the time

¹¹¹ ASC 980-340-25-1 (“Recognition of Regulatory Assets”).

¹¹² Order No. 18-423 at 7-8.

¹¹³ FAS-168-1 (“On the effective date of this Statement, the Codification will supersede all then-existing non-SEC accounting and reporting standards. All other nongrandfathered non-SEC accounting literature not included in the Codification will become nonauthoritative.”).

¹¹⁴ CON6-4.

¹¹⁵ CON6-4.

1 period indicated in the income statement.”¹¹⁶ A utility’s annual income statement will reflect the
2 annual costs incurred for use of a capital asset before that asset is reflected in rate base (and ROE
3 on the asset follows the treatment of incurred costs), unless the Commission allows the utility to
4 defer the annual revenue requirement until the asset is reflected in rate base.¹¹⁷ To be clear, but
5 for the deferral, these costs would be recorded to the utility’s annual income statement or otherwise
6 become unrecoverable, and would thus meet the definition of “expenses” in CON6.¹¹⁸ This
7 understanding is reinforced by the fact that CON6 expressly cites “depreciation” as one of the
8 “many forms” of expenses.¹¹⁹ CON6 further refers to “interest expense” as an item subject to
9 “accrual, deferral, and amortization.”¹²⁰ Even if the Commission is inclined to rely on CON6’s
10 non-authoritative guidance—guidance from outside FERC’s USOA approach adopted by this
11 Commission¹²¹—FASB’s CON6 supports treatment of costs incurred for use of a capital asset as
12 expenses subject to deferral.

13 **C. In the Alternative, the Commission Should Clarify that it Will Exercise its Discretion**
14 **to Issue Regulatory Accounting Orders Allowing Utilities to Record Costs Incurred**
15 **for Use of a Capital Asset as a Regulatory Asset.**

16 If the Commission denies Joint Utilities’ request for reconsideration or rehearing, the
17 Commission should effectuate that part of its order allowing utilities to retroactively recover costs
18 incurred for use of a capital asset that is not yet in rate base. In Order No. 18-423, the Commission
19 concludes that the rule against retroactive ratemaking “does not apply to the recovery of capital

¹¹⁶ CON6-1.

¹¹⁷ See, e.g., *In the Matter of NW Nat., Application for Authorization to Record and Defer Unrecovered Expenses Associated with the Company’s Coos County Distribution System Investment*, 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”).

¹¹⁸ See FERC USOA Account 182.3.

¹¹⁹ CON6-23.

¹²⁰ CON6-51.

¹²¹ Order No. 18-423 n.15.

1 costs.”¹²² Capital costs, as the Commission explains, include both the return on and return of
2 investment,¹²³ which can be included in rate base “at any time,” “regardless of when those costs
3 were incurred.”¹²⁴ The Commission reasons that, “[b]ecause the recovery of capital costs is not
4 affected by the rule against retroactive ratemaking, there is no need for a deferral.”¹²⁵

5 As noted above, this conclusion appears to reject the Attorney General’s previous advice
6 that retroactive ratemaking principles bar recovery of costs incurred for use of a capital asset before
7 it is included in rate base.¹²⁶ In order to accommodate the Commission’s new approach while
8 complying with FERC’s USOA (which requires utilities to record costs on their income statement
9 when incurred),¹²⁷ utilities would need to obtain regulatory accounting orders under
10 ORS 757.125.¹²⁸ Regulatory accounting orders allow a utility to record costs incurred to the
11 utility’s balance sheet as a regulatory asset—allowing the costs to be recovered at a later date.¹²⁹
12 While Order No. 18-423 suggests that recovery of capital costs would only be subject to
13 “regulatory lag,”¹³⁰ (implying simply a delay in cost recovery), an accounting order is necessary
14 to allow *any* recovery of costs incurred after an asset’s in-service date but before the asset enters
15 rate base (including depreciation, debt and equity costs, taxes, and O&M expenses).¹³¹ Without

¹²² Order No. 18-423 at 8.

¹²³ Order No. 18-423 at 1.

¹²⁴ Order No. 18-423 at 8.

¹²⁵ Order No. 18-423 at 9.

¹²⁶ Attorney General Opinion Letter, Re: Opinion Request OP-6076, pp. 8-18, (Mar. 18, 1987).

¹²⁷ FERC USOA Account 182.3.

¹²⁸ ORS 757.125 directs the Commission to “prescribe the accounts and records” for public utilities.

¹²⁹ See, e.g., *In the Matter of Idaho Power Co. Application for an Accounting Order Re Treatment of Certain Asset Requirement Obligations*, Docket No. UM 1167, Order No. 04-585 (Oct. 7, 2004); *In the Matter of PacifiCorp Application for an Accounting Order Authorizing Recording of a Regulatory Asset Relating to Pension Liability*, Docket No. UM 1073, Order No. 03-233 (Apr. 18, 2003).

¹³⁰ Order No. 18-423 at 8.

¹³¹ FERC USOA Account 182.3 (requiring that incurred costs be recorded to the utility’s income statement for the year in which these costs were incurred, unless deferred accounting treatment has been authorized).

1 an appropriate accounting order, recovery of costs incurred during this interim period is not merely
2 delayed—it is foregone entirely.

3 Accounting orders are necessary to implement the Commission’s rulings that
4 (1) retroactive ratemaking does not apply to costs incurred for use of capital assets before they are
5 included in rates, and (2) deferred accounting is therefore unnecessary to allow proper cost
6 recovery.¹³² Joint Utilities therefore respectfully request clarification that the Commission will
7 exercise its discretion to authorize regulatory accounting for costs incurred for the use of a capital
8 asset after it has entered service and before it is placed in rates.

9 **D. The Commission Should Stay Application of its Order While Review is Pending.**

10 Joint Utilities request that the Commission stay implementation of Order No. 18-423 while
11 review is pending to avoid confusion and unnecessary implementation efforts and costs. The
12 Commission can stay enforcement of a Commission order under ORS 756.561 where “good
13 cause” exists.¹³³

14 Here, the Commission has already recognized “the departure this decision represents” and
15 has “acknowledge[d] the significance” of its decision.¹³⁴ The Commission has tasked Staff with
16 making “adjustments to our regulatory practices” and with addressing the need for changes to “the
17 methodologies currently used by PGE and PacifiCorp under ORS 469A.120.”¹³⁵ Implementation
18 of the Commission’s new approach will be neither simple nor easily reversed, if the Commission
19 ultimately modifies Order No. 18-423. To effectively “provide[] a more certain foundation” going
20 forward, Joint Utilities respectfully request that the Commission stay application of the order.

¹³² Order No. 18-423 at 9.

¹³³ ORS 756.561(2) requires a “special order of the commission” to “stay or postpone the enforcement” of an order; Order No. 08-487 at 40 (describing the “good cause” standard for staying implementation of a Commission decision).

¹³⁴ Order No. 18-423 at 9.

¹³⁵ Order No. 18-423 at 9.

1 Because a stay will simply maintain the Commission’s historical approach to deferrals, no party
2 will be prejudiced.

3 If the Commission declines to stay application of the order, it should nonetheless apply its
4 decision prospectively only. Retroactivity is unreasonable if, among other facts, a new rule
5 constitutes “an abrupt departure from well-established practice” or where a “party against whom
6 the new rule is applied relied on the former rule.”¹³⁶ Here, Joint Utilities relied on previous
7 deferral authorizations and the Commission’s three decades of consistent practice. The
8 Commission’s decision should not apply to deferrals that have already been approved for deferred
9 accounting treatment.

III. CONCLUSION

10 In Order No. 18-423, the Commission concludes that the legislature intended to adopt a
11 technical regulatory accounting approach definition of “expenses” in ORS 757.259. The
12 Commission should reconsider this conclusion because there is no evidence in the legislative
13 history that the legislature considered or was aware of such technical accounting definitions, nor
14 is there any justification to ignore the overwhelming quantity of evidence indicating that the
15 legislature intended to authorize comprehensive revenue requirement deferrals. Given that the
16 Commission agrees that a reasonable dictionary definition of “expenses” would encompass capital
17 costs, the Commission must adopt this definition to effectuate the statute’s clear purpose.

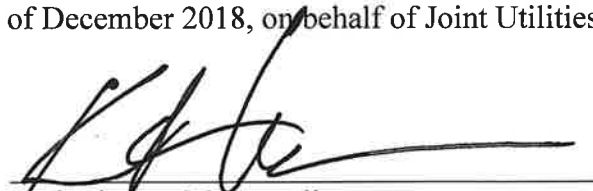
18 In the alternative, under the Commission’s own technical definition of “expenses” as items
19 “chargeable to a particular period,” FERC’s binding USOA guidance, FASB’s authoritative
20 Statements both past and present, and FASB’s non-authoritative CON6 discussion, regulatory

¹³⁶ *Gooderham v. Adult & Family Serv. Div.*, 64 Or App 104, 109 (1983) (quoting *Retail, Wholesale and Department Store U. v. N.L.R.B.*, 466 F2d 380, 390 (DC Cir. 1972)) (finding the retroactive application of a rule to be “unreasonable in its prejudice to petitioners”).

1 deferrals appropriately include costs incurred due to the use of a capital asset *after* it is placed in
2 service but *before* that asset enters rates. The Commission should reconsider or rehear Order
3 No. 18-423 to review additional accounting information, which was not previously cited or briefed
4 by the parties, and which conclusively demonstrates the error in defining “expenses” in ORS
5 757.259 to exclude costs incurred for use of a capital asset.

6 In the alternative, if the Commission declines to either reconsider or rehear its decision, the
7 Commission should clarify how it will implement the order according to its express terms. To
8 ensure that capital costs can be recovered “at any time,” the Commission should clarify that it will
9 exercise its discretion to authorize regulatory accounting orders to track and allow for future
10 recovery of costs incurred for use of a capital asset. If the Commission does not authorize such
11 regulatory accounts, then all costs incurred after an asset is placed in service but before it enters
12 rates would not merely be delayed—but would be wholly unrecoverable.

Respectfully submitted this 24th day of December 2018, on behalf of Joint Utilities.



Katherine A. McDowell
Shoshana J. Baird
McDowell Rackner & Gibson PC
419 SW 11th Ave., Suite 400
Portland, OR 97205
Telephone: (503) 595-3924
Email: katherine@mrg-law.com
shoshana@mrg-law.com

Attorneys for Portland General Electric Company