BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 233

In the Matter of IDAHO POWER COMPANY Request for General Rate Revision PHASE II	)	CITIZENS' UTILITY BOARD OF OREGON'S POST-HEARING BRIEF

I. IN THIS POST-HEARING BRIEF CUB ADDRESSES THE REMAINING CLEAN AIR INVESTMENT ISSUES FROM THE IDAHO POWER COMPANY GENERAL RATE CASE PHASE II

This Post-Hearing Brief is being filed pursuant to the Joint Pre-Hearing Conference Memorandum issued on September 20, 2012—and under the shadow of the PacifiCorp UE 246 General Rate Case. Given CUB's comprehensive Pre-Hearing Brief related to the clean air investments at issue in this UE 233 docket, upon which CUB continues to rely, CUB will not reiterate all of its prior arguments here, nor address Staff's nor Idaho Power Company's ("IPCO" or Company") arguments further if it feels those arguments were adequately addressed in its Pre-Hearing Brief. CUB will instead focus on rebutting the arguments raised by IPCO, and to the extent that IPCO relies on PacifiCorp, also PacifiCorp's Pre-Hearing and Post-Hearing Briefs and the testimony of PacifiCorp witnesses Woollums and Teply, both written and oral, to the extent that their testimony relates to Jim Bridger 3. CUB will also address issues raised by Staff. CUB's failure to address any other testimony or arguments should not be construed as agreement with the information contained in those documents.

II. INTRODUCTION

A. The Questions that Need to Be Answered

Idaho Power, in its Pre-Hearing Brief, states that "[t]he decision to invest in the Jim Bridger Unit 3 Scrubber upgrade project was made in 2008, following consultation between Idaho Power, PacifiCorp, and the relevant regulatory authorities with jurisdiction over the unit's emissions."[1] Other than the pre-filed testimony of Mr. Carstensen, CUB found only scant documentation to support this statement. Indeed, it continues to be CUB's opinion that Idaho Power played little if any role in the purchase and installation of these pollution controls, having ceded its say entirely to PacifiCorp.[2] This Post-Hearing Brief relates to the prudence of the costs associated with pollution control investments at the Jim Bridger Coal Plant.[3] As discussed in CUB's Pre-Hearing Brief, there are two critical issues remaining in this docket:

1) Should a prudence review of environmental controls examine the environmental controls one by one – in a piecemeal fashion – as they are added to rates?

2) Does a minority owner, in this case with a one-third interest in a power plant, have the same due diligence obligation to ensure that decisions affecting that plant are prudent and consistent with the least-cost principle?[4]

In CUB's opinion, the answers to these questions remain as follows:

1. No. A regulator should not conduct the prudence review of environmental controls in a piecemeal fashion. The scrubber upgrade at issue in this case, if considered with all of the other environmental controls required to make the plant compliant with BART, is not a prudent investment. It does not comply with BART, and will not allow the plant to stay open past 2015. To stay open will require additional investment in the plant, including a SCR[5]. A prudence review should consider the entirety of the costs that the Company is committing to invest in order to be BART compliant.

2. Yes, a minority owner should have the same due diligence obligation as the

[1] Idaho Power/1400 Carstensen/2, I 15-3, I. 7.
[2] See UE 233 Idaho Power/1400 Carstensen/2-3 lines 25 to 1.
[3] UE 233 Partial Stipulation/1 lines 13-16.
[4] UE 233/CUB/300/Feighner-Jenks/1 lines 4-12.
[5] Selective Catalytic Reduction ("SCR").

majority owner to ensure that decisions affecting the plant are prudent and consistent with the least-cost principle. One-third of a coal plant is a significant investment and must be managed well. The minority owner has a responsibility to ensure investment decisions that are made are cost-effective and will benefit customers.[6]

B. The Docket's Procedural Background

The Company's filed rate case included $8.2 million of gross plant-in-service, on a total-system basis, associated with investments in pollution control equipment at Jim Bridger 3 ("Bridger 3"). The Company estimated that these investments result in $27,500 of Oregon jurisdictional revenue requirement.[7] A Partial Stipulation was then filed in this docket under which the Parties agreed that even if the issue of the prudence of the Bridger 3 investment was not resolved by March 1, 2012, the rates implemented on March 1, 2012 would include the Company's Bridger 3 investment as filed; however, the Company would request to defer the variance between revenues resulting from rates that include the Bridger 3 investment and revenues resulting from rates without the investments. The Parties agreed to support Idaho Power's request for deferral of this variance with the understanding and agreement that if the Commission ultimately concluded that all or any portion of the incremental Bridger 3 investment was imprudent, Idaho Power would be required to refund to customers any money collected from ratepayers for the imprudent investment. Any such refund would be credited to customers' benefit against the outstanding Power Cost Adjustment True-Up Balancing Account deferral balance as reflected on Idaho Power's books.[8] The Partial Stipulation was filed on February 1, 2012, and was adopted by the Commission on February 23, 2012, in Order No. 12-055.

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[6] UE 233/CUB/300/Feighner-Jenks/2 lines 1-14. In other words, to ensure consistency with the least cost principle, plans for pollution control retrofits should be reviewed during the biannual Integrated Resource Planning mechanism. See also *Re Least Cost Planning for Resource Acquisitions,* Docket UM 180, Order No. 89-507 "Least-cost planning is therefore relevant to the question of ratemaking treatment. Consistency of resource investments with least-cost planning principles will be an additional factor that the Commission will consider in judging prudence."

[7] UE 233 Partial Stipulation, filed Feb 1, 2012, page 6.

[8] UE 233 Partial Stipulation, filed Feb 1, 2012, page 7.

C. The Historical Facts and Circumstances

Bridger 3 is a rate-based asset belonging to both Idaho Power and PacifiCorp. As a co-owner of the unit, Idaho Power is responsible to ensure that the unit is managed in a least-cost/least-risk manner. Idaho Power has the burden of proof in this docket, and Idaho Power alone must demonstrate that the clean air investments made at Bridger 3 were prudent.[9] As a co-owner, Idaho Power has to agree in writing to all significant capital investments in the plant.[10] Idaho Power has failed to produce any such written agreements memorializing agreement to significant capital investments such as the Scrubber Update Project. And, Idaho Power admits that, "[i]n this case, the Company did rely on PacifiCorp to perform the cost-effectiveness studies." But the Company later says: "[h]owever, once completed, the Company carefully reviewed the analyses and ultimately agreed that they correctly concluded that moving forward with the Scrubber Upgrade was the least cost option and therefore the best decision for customers."[11] However, CUB has been able to ascertain both that the Company did not know about the studies commissioned by PacifiCorp and that Idaho Power had not read them. The only study that evaluated the cost-effectiveness of the Bridger investment, before the investment was made, was the PVRR(d) analysis that PacifiCorp is relying on in UE 246 to argue that the investment is prudent. The PVRR(d) study was received by Idaho Power—for the first time—during the litigation of this case. To the degree that Idaho Power "carefully reviewed" that analysis, it did so 4 years after the analysis was conducted and years after it allegedly provided written approval for the investment.[12]

CUB also points out that Idaho Power is happy to rely on studies that it has not read or that

[9] UE 233/CUB/400/Feighner-Jenks/2 line 19 -23.
[10] UE 233/CUB/300/Feighner-Jenks/3 lines 1-2 citing to UE 233/IDAHO POWER/1400/Carstensen/2, lines 10-12.
[11] UE 233/Idaho Power/1700/Carstensen/2 lines 4-8.
[12] UE 233/CUB/300/Feighner-Jenks/5 line 22 to Feighner-Jenks/6 line 5; *See also* CUB Exhibit 301, IDAHO POWER Data Response to CUB DR 48.

were not conducted[13] at the time of the decision that it made, but only so long as these later studies support the Company's position and not that of CUB. Idaho Power does not, therefore, want the Commission to consider the findings of the LC 48 Spring 2012 IRP Update,[14] which showed that in 3 of the 6 studied scenarios, additional clean air investment in Bridger 3 were not cost effective.[15]

Because it is so very important, CUB sets forth verbatim once again the findings from CUB's June 20, 2012 Testimony.

> CUB Exhibit 301 shows the data responses CUB has received in this docket related to due diligence, or the lack thereof, by the Company in regard to compliance with clean air regulations. These data responses reveal that Idaho Power was not engaged in active management of the Bridger Unit 3 plant. Idaho Power, for example, cannot tell us "the exact dates of the planned outage during which the work was completed nor the exact date that the work was completed."[16] Idaho Power never reviewed the contractor's work.[17] Idaho Power does not know when the actual work on the project began[18] or the dates of the competitive bidding process relating to the scrubber upgrade.[19]
>
> Before work on the project began, it seems as if the only study IPCO reviewed was the CH2M Hill study discussed in earlier testimony. That study was not an attempt to determine if the BART projects were cost effective, but instead was an attempt to determine the least-cost option for complying with BART. Based on that study, the current BART investment, which includes an SCR, is not the least cost.[20]
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> It is CUB's position that, regardless of whether Idaho Power in fact engaged in a due diligence review of the clean air compliance regulations and the technological fixes required to come into compliance with the regulations, IPCO is none-the-less responsible for its clean air compliance investments in the plant and the Commission must determine whether those investments were prudent and least cost.[21]

The current standard of objective reasonableness allows the Commission to consider what the

[13] UE 233/Staff/1100/Colville/24 lines 1-9 citing to Idaho Power/1402/Carstensen.
[14] UE 233/Idaho Power/1500/Carstensen/5 lines 4-8.
[15] UE 233/CUB/300/Feighner-Jenks/9.
[16] CUB Exhibit 301, IDAHO POWER Data Response to CUB DR 46.
[17] CUB Exhibit 301, IDAHO POWER Data Response to CUB DR 45.
[18] CUB Exhibit 301, IDAHO POWER Data Response to CUB DR 44.
[19] CUB Exhibit 301, IDAHO POWER Data Response to CUB DRs 42 and 43.
[20] UE 233/CUB/200/Feighner-Jenks/7.
[21] UE 233/CUB/300/Feighner-Jenks/6 lines 6-18.

Company "should have known" in order to fill in gaps in regards to what it actually "knew."[22] For equity's sake, the current standard must also be interpreted to permit other parties the opportunity to shine a light on any historical facts and circumstances that do not favor Idaho Power's position and tend to show that its actions were imprudent.

From the UE 246 docket, it is clear that in 2008 PacifiCorp conducted its PVRR(d) analysis comparing its then-expected cost for clean air investments to immediately (in 2008) closing the plant and relying on market purchases. There are several serious flaws with the analysis in this study[23]— primarily, the alternative closure date had no relationship to the completion date of the project, the deadline for pollution control, or even the date that Wyoming required an upgrade in the future. PacifiCorp is now claiming that the date it should have used for plant closure in its PVRR studies was the expected compliance date of 1/1/14.[24] This means that PacifiCorp's model closed the plant more than 5 years early. A significant amount of the savings identified in this study comes from these years of uneconomic closure of the plant.[25]

Thereafter, PacifiCorp signed a contract for work on the scrubber also in 2008,[26] but construction did not commence until July 6, 2010, and the scrubber update was not installed until a plant outage occurring between April 30, 2011 and June 30, 2011.[27] Meanwhile the price of wholesale electricity decreased significantly from 2008 to 2010, when construction on the upgrade

[22] In a prudence review, the Commission examines the objective reasonableness of a company's actions measured at the time the Company acted: "Prudence is determined by the reasonableness of the actions 'based on information that was available (or could reasonably have been available) at the time.'" *In re PGE.*, UE 102, Order No. 99-033 at 36-37. *See also In re Northwest Natural Gas*, UG 132, Order No. 99-697 at 53: In this review, therefore, it must be determined whether the NW Natural's actions and decisions, based on what it knew or should have known at the time, were prudent in light of existing circumstances.
[23] UE 233/CUB/300/Feighner-Jenks/11 lines 7-19.
[24] UE 246/PAC/1500/Teply/18, lines 1-5.
[25] UE 233/CUB/300/Feighner-Jenks/12 lines 2-12.
[26] UE 246/PAC/500/Teply/84.
[27] UE 246/PAC/500/Teply/84-85.

began.[28] If PacifiCorp had updated its study at the end of 2008, or in 2009, the change in forward prices would have had a significant effect on the 2008 study results. In addition, because the scrubber upgrade was not sufficient to meet the BART requirements, a SCR and other investments would be needed. Clearly PacifiCorp could have updated the study, since construction did not begin until 2010, and clearly because PacifiCorp knew additional investments would be needed, it should have been monitoring and updating its clean air analysis on Bridger 3. By not updating the study before making the scrubber upgrade investment, PacifiCorp was taking a risk that future costs related to meeting the Regional Haze Rules would cause the plant to become uneconomic to operate and the cost of the scrubber update would be stranded.[29] And clearly the timing of the permit requests, the agreed upon limits, and the lack of an approved SIP should also have been taken into consideration.

In addition to the above, PacifiCorp and Idaho Power did not consider any alternatives other than to run the plant indefinitely or shut it down in 2008.[30] For a plant like Bridger 3 that is, in CUB's opinion, now on the very edge of viable economic operation—three scenarios advocate ceasing to burn coal, and three scenarios advocate continuing to burn coal[31]—reconsidering the plant's useful life would likely have led, and would lead, to a better alternative.

Throughout all of this, Idaho Power, co-owner of the Boardman coal plant with the knowledge and education that its ownership provided, did nothing to analyze whether PacifiCorp's plans for Bridger were least-cost/least-risk. It did not conduct studies, it did not read studies, it did not run the costs of the planned pollution control investments through its IRPs, and it did not tell PacifiCorp to cancel the scrubber upgrade contract. As a co-owner of the Boardman plant with

[28] UE 233 CUB Exhibit 303—NPPC's 6th Power Plan
[29] UE 233/CUB/300/Feighner-Jenks/12 lines 14 to Feighner-Jenks/13 line 15.
[30] UE 233 CUB Pre-Hearing Brief at 24 lines 16-17.
[31] UE 246/CUB/100/Feighner-Jenks/36.

Portland General Electric ("PGE"), Idaho Power should have been informed of the December 17, 2008 comments that PGE submitted to DEQ, which contained the following statement:

> As noted above, the Clean Air Act requires consideration of the remaining useful life of the plant.[32]

And, in 2009, Idaho Power, as a co-owner of the plant, would have been informed of the DEQ's decision on BART . That decision invited PGE, on behalf of the owners of the plant, to propose early shut down as a method to reduce the cost of pollution control.[33] And in January 2010 CUB announced that PGE "In essence . . .want[s] to work with stakeholders to change their proposed Integrated Resource Plan (IRP) and close Boardman in 2020 rather than upgrade Boardman and operate it until 2040 or longer."[34] The DEQ adopted the proposal for early phase-out in 2010.[35] Idaho Power may argue that the Boardman information came too late but remember, while PacifiCorp signed a contract for work on the scrubber in 2008,[36] construction did not commence until July 6, 2010, and the scrubber update was not installed until a plant outage occurring between April 30, 2011, and June 30, 2011.[37]

Therefore, when combined with the historical fact that this spring's PacifiCorp IRP Update showed that in 3 of the 6 studied scenarios, additional clean air investment in Bridger 3 is not cost-effective;[38] and that PacifiCorp could have terminated the Scrubber Upgrade project contract at any time and still saved customers millions of dollars,[39] the sum total of the historical facts and circumstances clearly demonstrate that had Idaho Power been doing studies, updating its studies, evaluating contracts, running its projects through its IRP, paying attention to what was happening at

[32] UE 246/CUB/Exhibit 206, page 6.
[33] Summary of decision from DEQ website
[34] UE 246 PAC Exhibit 2304 CUB Blog "When an Announcement on Coal is a Good Thing" dated 1-15-2010.
[35] UE 233 Idaho Power Pre-Hearing Brief at 27 lines 4 – 5.
[36] UE 246/PAC/500/Teply/84.
[37] UE 246/PAC/500/Teply/84-85.
[38] UE 246/CUB/100/Feighner-Jenks/35-36.
[39] UE 246/CUB/200/Jenks-Feighner/40-41.

Boardman where it was also a co-owner, and watching out for the least-cost/least-risk way of doing things for its customers, it could have saved its customers millions of dollars.

D. Idaho Power Has Failed to Prove That Its Decision/Lack of Decision Actions Were Prudent; Furthermore, the Scrubber Upgrade Project Is Not Now Used and Useful

Based upon what the Company knew or should have known, the materials the Company could reasonably have had in its possession at the time of the decision making, and the objective reasonableness standard that will be discussed in the next section of this brief, it is evident that the decisions made by Idaho Power to proceed with the pollution control upgrades at Bridger 3 were not prudent. It is also CUB's position that Idaho Power's Bridger 3 Scrubber Upgrade Project cannot be found to be used and useful because a second yet-to-be-completed upgrade is required to meet the requirements of BART for Jim Bridger 3 and to allow the plant to stay in operation past 2015. CUB therefore respectfully requests that the Commission find that Idaho Power was imprudent when it failed to study alternatives to the Bridger 3 pollution control retrofit costs in its pre-decisional IRPs.[40] That Idaho Power was imprudent when it allowed clean air investments to continue to be made at Bridger 3 without consideration of the least-cost/least-risk strategies known to Idaho Power through its experience with the Boardman plant in which it was a co-owner. That Idaho Power was imprudent when it ceded all analysis and decision making about those retrofits to PacifiCorp. That it was imprudent when it failed to require that PacifiCorp cancel the contract related to Bridger 3 Scrubber Update Project. That Idaho Power Company has therefore failed, and is therefore failing, to properly manage a rate-based asset. And in addition to all of the previously established imprudence on its own behalf, that because PacifiCorp, upon whom Idaho Power is relying to defend it in this matter, was imprudent in its decision-making about the Bridger 3 plant,

[40] CUB notes that the first mention of Bridger 3 upgrades came in the June 30, 2011 filing of LC 53. As noted earlier in this Brief installation of the Scrubber occurred during a planned outage from April 2011 to June 30, 2011. CUB was unable to find any mention of the Bridger 3 Scrubber Upgrade in its LC 50 or LC 41 IRPs.

that Idaho Power was also by implication imprudent in its decision-making. There is no proof that these investments were needed to satisfy environmental regulations, there is no proof that a least/cost-least risk analysis was performed prior to the making of the investments, and there is no proof that the making of these investments was in the economic best interests of customers as opposed to the then-available alternatives. Moreover, the Scrubber Update Project for the Bridger 3 plant is not used and useful because it alone cannot fulfill the BART requirements listed by Idaho Power and PacifiCorp—it alone is insufficient to keep the plant open past 2015. For the Bridger 3 unit to remain open, it will also require the installation of a SCR.

The bottom line is that CUB is requesting that the Commission find that Idaho Power was imprudent in the making of the pollution control investments at Jim Bridger 3.[41] Customers cannot be required to pay costs for imprudent decisions.[42] Idaho Power should be ordered to refund to customers the rate monies already collected in relation to the scrubber upgrade project and Idaho Power should be ordered to cease and desist from further collection of such rates related to the Bridger 3 Scrubber Upgrade Project.

III. THE STANDARD OF REVIEW

CUB wants to reiterate once more that the pollution control costs at issue in this docket are *not* PacifiCorp's Bridger 3 pollution control costs. The fact that Idaho Power has ceded defense of this docket largely to PacifiCorp is of no import. What is important is that the costs at issue in this docket were incurred by Idaho Power because of Idaho Power's decisions or the lack thereof. This docket is about what Idaho Power knew or should have known at the time that Idaho Power agreed to and did invest money in pollution control at the Bridger 3 plant.

[41] UE 233/CUB/400/Feighner-Jenks/3 line 19 to Feighner-Jenks/4 line 2.
[42] UE 233 CUB Pre-Hearing Brief at 11 citing to UE 246 Sierra Club 200/Steinhurst/7 lines 1-9. See also Re Seabrook Involvements by Maine Utilities, 67 P.U.R. 4th, 161 at 168 (imprudence of another utility cannot be passed on to the first utilities customers).

A. Idaho Power Company Bears the Burden to Show That Its Rates Are Fair, Just, and Reasonable

CUB set forth the standard of review in its Pre-Hearing Brief and will touch on it only briefly here. Idaho Power bears the burden of persuasion throughout this docket to show that its requested rate increase is reasonable.[43] While the Commission may take CUB's testimony and weigh it against the testimony presented by Idaho Power, ultimately the Commission must be convinced that Idaho Power has carried its burden of persuasion. Imprudent costs should never be included in rates.

B. The Objectively Reasonable Prudence Standard Must Be Applied Individually to Each Company in Its Own Docket

The Objectively Reasonable Prudence Standard must be applied individually to each utility in its own docket regardless of the fact that Idaho Power has largely ceded its defense to PacifiCorp. While it stands to reason that if PacifiCorp is found to be imprudent then Idaho Power must also have been imprudent, since it ceded control to PacifiCorp, CUB nevertheless thinks that Idaho Power should be found imprudent in its own right regardless of what happens to PacifiCorp.

The objective reasonableness test is as follows:

> [I]f the record demonstrates that a challenged business decision was objectively reasonable, taking into account established historical facts and circumstances, the utility's decision must be upheld as prudent even if the record lacks detail on the utility's actual subjective decision making process.[44]

But just because the Commission must apply an *objective reasonableness standard* clearly does not mean that what the utility actually knew ("everything" or, as in this case, "little") is irrelevant. As Staff stated in its brief, the "*objective reasonableness*" standard "should not be interpreted to mean that evidence regarding the utility's decision-making process, e.g., evidence that the process was deficient,

[43] UE 115 Order No. 01-777 at 6 (Aug. 31, 2001)
[44] Order No. 09 -501 at 5.

is not relevant to the determination of prudence. A utility's decision-making process is generally a primary consideration in a prudence review . . . ."[45] Staff goes on to note that there may be circumstances, such as in Docket UM 995, when a utility is able to overcome the inability to explain its internal activities under the current interpretation of the standard and establish that a particular action was prudent. CUB does not think, given the historical facts and circumstances in this docket, that the UE 233 docket should be found to be one of those cases.[46]

CUB notes that Idaho Power cites to UE 196 for the proposition that "Prudence is determined by the reasonableness of the actions based on information that was available (or could reasonably have been available) at the time."[47] CUB finds Idaho Power's selection of the UE 196 docket interesting. UE 196 was a docket in which the Commission found that certain actions taken by PGE with regard to its Boardman plant were prudent while others were not. For example, it was reasonable for PGE to have hired experts to do the work but unreasonable for PGE to have allowed installation of the larger heavier turbines at that time without ensuring that the footing could support them.[48] In this docket, Idaho Power has argued that PacifiCorp was the expert,[49] (CUB does not agree with this) but if PacifiCorp was the expert, CUB could find an interesting parallel with the UE 196 ruling. If we agreed that PacifiCorp was the only expert, then —similar to the PGE docket—it would be okay to rely on an expert, but not okay to allow the expert to do something without appropriate pre-work checks being done/confirmed by Idaho Power. In UE 196, PGE should have confirmed there was a strong enough footing before letting the experts do the work. In this UE 233 docket, whether or not PacifiCorp provided the expertise, Idaho Power still had the

[45] UE 233 Staff Pre-hearing Brief at 5 lines 1-4.
[46] UE 233 Staff Pre-Hearing Brief at 5 lines 1-4.
[47] UE 196, Order No. 10-051 at 6.
[48] UE 196, Order No. 10-051 at 12. "Because PGE imprudently failed to inspect the LP1 turbine's support structure before installing a new rotor, we deny full recovery of the Deferred Amount. We find, however, that partial recovery is warranted because PGE's imprudence was not the sole cause of the outage. UE 196, Order No. 10-051 at 12.
[49] UE 233 Idaho Power Company's Pre-Hearing Brief at 24 lines 1-5.

obligation to monitor what PacifiCorp was doing. Idaho Power had a due diligence obligation to do its own analysis and to ensure that its customers were being protected. Idaho Power failed in its duty to do due diligence for its customers.[50]

Idaho Power also argues that the Commission applies the "'reasonable person' standard to judge the prudence of a utility's investment decision."[51] This is incorrect. The OPUC did not use the reasonable person standard. The language cited by Idaho Power in its brief was language from the position asserted by Staff in that case only. It was not from the Commissioners themselves.

Idaho Power further cites to Docket UM 424, Order No. 93-695, for the proposition that "[i]n judging prudence the Commission should consider whether the utility's decision was a reasonable response to the possibility that external environmental costs would be internalized."[52] But this was only part of the quote. The entire quote states:

> The DOJ memorandum concluded that we can allow a utility to recover the costs of a resource that is cleaner, but more expensive, than another resource. In judging prudence, we would consider whether the utility's decision was a reasonable response to the possibility that external environmental costs would be internalized. *We also interpret the memorandum to mean that we can disallow the costs of a dirtier resource to the extent that internalization (through new taxes, control standards, or emission allowance trading) raises its total cost above that of an alternative that was available when the utility made its choice.* In both cases, we would make our decision in a rate case, but we believe the values adopted here and applied in utility least-cost plans would have some evidentiary value (consistent with the significance of least-cost planning for rate-making decisions, as expressed in Order No. 89-507 at 7).[53]

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[50] UE 196, Order No. 10-051 at 12; *See also Re Atlantic City Electric Company*, 83 P.U.R. 4th 611, 1987 at 626 "The Company argues that because it is a minority owner in its nuclear plant and since it does not operate these units, it is inappropriate to subject the Company to possible penalties for an operation over which it exerts little, if any, control. The Board rejects petitioner's argument in this regard. Minority ownership in and of itself cannot excuse the Company from the risks associated with its investments. We note that the Company voluntarily entered into the respective ownership agreements; the Company is responsible for providing service if a particular unit is unavailable and the Company has been subject to prudency reviews associated with the operation of these plants, despite their lack of direct control. Moreover, ratepayers have no greater control over the operation of these plants than the Company."

[51] UE 233 Idaho Power Company's Pre-Hearing Brief at 8 lines 11-12.

[52] UM 424 Order No. 93-695 at 6. "At the September 17, 1991, public meeting, staff recommended that the Commission open a docket to develop guidelines for the treatment of external environmental costs in both least-cost plans and resource acquisition decisions (such as the evaluation of bids and the determination of cost-effectiveness levels for demand-side measures). The Commission adopted the staff recommendation and initiated this proceeding." Id. at 2.

[53] UM 424 Order No. 93-695 at 6 *(emphasis added)*.

Thus, were the Commission to find that Idaho Power could have utilized a lower cost, cleaner resource at the time it made its decision, the Commission could disallow the costs of the dirtier resource. In our case, that would mean if there was a cheaper, cleaner (least-cost/least-risk) option for pollution controls, the Commission could disallow the costs of the pollution controls. CUB thinks that just such an option existed in this case at the time that Idaho Power made its decisions or refrained from making its own decisions.

The objective reasonableness standard has been interpreted to mean "what the utility knew, or should have known."[54] Thus CUB is within its rights to point out both what the utility actually knew at the time of its actions (or in this case inaction) and also what it should have known. And, since the Company intends to demonstrate what it should have known by introducing studies that were either available (and not read), or not available (because they were created later), CUB must, for equity's sake, be allowed to respond in kind. In other words, if a Company is to be permitted to supplement the record after the fact in order to try and establish its prudence based on what "could reasonably have been available at the time of the action"[55] when there would otherwise be no record to support such a finding, then Staff and Intervenors should likewise be permitted to supplement the record with regard to what the Company "could reasonably have [had available] at the time of the action" in an attempt to prove the Company's imprudence. CUB notes that while it does not agree with the holding in UM 995, in order for the *objective reasonableness* standard to be equitably applied, the holding in the UM 995 opinion should be read to permit *all* parties to supplement the record after-the-fact with evidence to support a finding of prudence or imprudence. After all, the standard has also been interpreted to be the "information that was available" to the utility at the time

[54] In Re PGE, Docket No. UE 102, Order No. 99-033 at 36-37.
[55] In Re PGE, Docket No. UE 139, Order no. 02-772 at 11 (Oct. 30, 2002).

of the action, "*or could reasonably have been available at the time of the action.*"[56] CUB's presentation of "after-the-fact" evidence is on a par with the Company's; the provision of information that "could reasonably have been available at the time of the action." The difference is that CUB's information clearly demonstrates that the Company was imprudent, whereas the evidence presented by the Company—which has both the burden of proof and the burden of persuasion—fails to demonstrate that the Company's actions were prudent. Imprudent costs should never be included in rates.

Moreover, there is simply no basis upon which Intervenors could know to start collecting evidence of imprudence at the "time of the action." And, in this case, Intervenors were even prohibited from knowing about the projects at the time when an IRP should have been held because the Company failed to bring the project to the Commission for IRP review. For all of these reasons, Idaho Power should not be permitted to successfully argue that CUB's evidence is all *after-the-fact* and discountable. This is especially true since much of the Company's own evidence (the Tipping Point Analysis (TPA)dated June 2011; the 2011 IRP Update dated March 2012; the modified PVRR(d) study described by Mr. Teply in UE 246/PAC 200 and dated September 2012) is also *after-the-fact* and this is the first time these projects have been brought to the Commission for review.

C. The Used and Useful Standard

The Oregon Supreme Court has interpreted the "used and useful" requirement, explaining that "a utility should be permitted to earn a return only on property that is reasonably necessary to and actually providing utility service."[57] Therefore, whenever a utility constructs a new facility, such as a transmission line, this property is excluded from rate base "until it actually is placed in service and, even then, the regulators may not allow it in the rate base until the utility establishes that the

[56] In Re PGE, Docket No. UE 139, Order No. 02-772 at 11 (Oct. 30, 2002)*(emphasis added)*.
[57] *Pacific Power & Light Co. v. Department of Revenue*, 308 Or. 49, 53-54 (1989)(emphasis added).

property is reasonably necessary to provision of electrical service."[58]

In *Citizens' Utility Board v. PUC*, the Oregon Court of Appeals held that the language of ORS 757.355 is clear and does not allow for the recovery of "costs of construction, building, installation or real or personal property not presently used for providing utility service to the customer."[59] The Court also stated that the Commission is not empowered "to approve rates of a kind that are specifically contrary to the limitations in ORS 757.355."[60]

As stated in its Pre-Hearing Brief, CUB is surprised by Idaho Power's insistence that the only investment that should be subject to prudence review in this docket is the scrubber upgrade investment. If Idaho Power insists that remaining investments required under the RHR must be considered on a piecemeal basis, and that the costs associated with the investments are irrelevant, then it leaves the Commission no choice but to find that each discrete investment is not by itself "used and useful." This is the only way to ensure that all relevant costs are considered in a prudence review.

CUB has previously stated that Idaho Power's argument that the scrubber is currently used and useful because it is removing pollution from the plant's emissions is specious.[61] CUB continues to believe that any number of pollution control devices and other add-ons that improve the operation of the plant could be used, but would not necessarily be considered useful under the current regulatory scheme.[62] The scrubber upgrade here is only used and useful in the context of the Regional Haze Rules, and can only be evaluated for prudence in the context of all costs associated

[58] *Id.* at 53-54.
[59] *Citizens' Utility Board v. PUC*, 154 Or App 702, 711 (1998).
[60] *Id.* at 716-717; *Util. Reform Project v. Pub. Util. Comm'n of Or.*, 215 Or. App. 360, 365-66, 376 (2007).
[61] UE 233/CUB/400/Feighner-Jenks 7 lines 17-18.
[62] UE 233/CUB/400/Feighner-Jenks 7 lines 18 - 20.

with meeting the Regional Haze Rules.[63]

D. The Application of the Objective Reasonableness Standard– Potential Outcomes

Table 2: *Potential Outcomes of Prudence Decisions*

Type of Decision	Review Findings	Regulatory Consequences
Prudent	Beneficial	Rate recovery
Prudent	Harmful	Rate recovery
Prudent	Indeterminate	Rate recovery
Imprudent	Harmful	No Rate Recovery
Imprudent	Beneficial	?
Imprudent	Indeterminate	?

As previously stated in UE 246:

> In theory, the regulatory consequences of prudent and imprudent decisions by a utility should be parallel. If a prudent decision allows rate recovery for an investment regardless of whether the investment is beneficial, or harmful, then an imprudent decision should lead to no rate recovery regardless of whether the consequences are beneficial or harmful.
>
> While CUB believes that such a parallel construction of prudence and imprudence makes sense and seems fair, we recognize that a large prudence disallowance,[64] when there is no financial harm to customers, may be a stretch for many regulators. At the same time, CUB feels strongly that imprudent actions by utilities should lead to some consequences. If a utility is generally allowed to recover its prudently incurred costs regardless of whether its actions are beneficial, then the utility should face consequences for imprudent acts regardless of whether those acts are harmful.
>
> In this case, CUB is not arguing that PacifiCorp was imprudent with regards to actions that have created benefits. CUB is arguing that PacifiCorp was imprudent with regards to actions that have harmed customers. The exact level of harm is, however, difficult to quantify.[65]

CUB believes that the Bridger 3 investment is imprudent and that the consequence of imprudence can be demonstrated, but an exact level of harm is difficult to fully quantify. [66]

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[63] UE 233/CUB/400/Feighner-Jenks/8 lines 5-7.
[64] In Idaho Power's case, the disallowance would be small—$27,500 on an annual basis. UE 233 CUB/200 Feighner-Jenks/15. It is the principle/precedent that is important.
[65] UE 246/CUB/100/Jenks-Feighner/14 lines 16 – 17 and Jenks-Feighner/15 lines 1-21 and Jenks-Feighner/16 lines 1-4.
[66] CUB notes that Staff has also provided a "thinking tool"— see UE 246/Staff/1500/Colville/3.

IV. APPLICATION OF THE STANDARD OF REVIEW TO THE UNSETTLED ISSUES IN THIS DOCKET

A. Jim Bridger - the PVRR(d), Scrubber Upgrades, and SCRs

Idaho Power devotes considerable paper to discussing how CUB picked the wrong date for the compliance/closure date for the PVRR(d) study. CUB did not, however, pick the wrong date. CUB used the date assumed by PacifiCorp as the true compliance/closure date when it ran its modified study – 1/1/14.[67] The actual date that Wyoming anticipated to be the compliance date for BART SO_2 emissions was on or after 2015, as evidenced by the discussion in the BART Application Analysis AP-6042 dated May 28, 2009, related to Naughton: "As a practical measure, the Division anticipates the requirement to install the BART-determined controls to occur as early as 2015."[68]

Idaho Power argues that if PacifiCorp had "performed the analysis as described by CUB, its decision to go forward with the Scrubber Upgrade project would not have been different."[69] It is difficult for CUB to understand how this could be true, given that conducting the analysis as CUB requested would have meant changing the closure date to something like a Boardman style phase-out, and the Company never tried that. What CUB has been seeking throughout this docket and the PacifiCorp UE 246 docket is for the companies to be required to update their studies.

While the PVRR(d) study contained the SCR costs, that study was not regularly updated.[70] If the study had been fully updated (and expanded upon in an IRP), PacifiCorp—and Idaho Power, if it had been participating—would have been able to see that the market was changing and could have

[67] UE 233 CUB Pre-Hearing Brief at 24 lines 16-20 and 25 lines 1-4 citing to UE 246 PAC/1500 Teply/18 lines 1-5 and UE 233 CUB/300 Feighner-Jenks/12 lines 14 to Feighner-Jenks 13 line 15.
[68] UE 246 Sierra Club/111 Fisher/54.
[69] UE 233 Idaho Power Company Pre-Hearing Brief at 12 lines 3-5.
[70] Idaho Power's statements at pages 15 and 16 of its Pre-Hearing Brief that CUB claims the PVRR study did not contain the SCR costs is simply incorrect. This is evidenced both by CUB's testimony and by the language in CUB's Motion to Compel, in which CUB argued that the SCR investment was relevant because it was included in the PacifiCorp Study. Idaho Power even cites to the language in the Motion to Compel on page 15 of its Pre-Hearing Brief. Idaho Power cannot have it both ways, and the right way is that the SCR costs were included in the PVRR(d) study. CUB agreed that they were.

considered options other than immediate closure or retrofitting options, such as Boardman style phase-outs.[71] It is true that fixing the price curve did not immediately make the benefits negative, but it did show a significant change[72]—one that should have prompted more study—and more study would have shown that a Boardman style phase-out was a cost effective option. The SCR was not cost effective with the original CH2M HILL study,[73] which, contrary to what Idaho Power implies, was not the same as the PVRR study. Those are different studies that show different things. If the PVRR study was updated today, CUB believes that it too would show that adding a SCR is not the least-cost/least-risk path forward; that path would be converting the plant to gas or phasing out the plant. The Company does not agree.[74]

B. Should Marginally Positive or Marginally Negative PVRR(d) Results Give the Company Pause When Deciding Whether to Make Pollution Control Investments?

As noted above, Idaho Power has stated that it wishes to rely on the testimonies of Mr. Teply and Ms. Woollums. Because of this fact, CUB now responds to Mr. Teply's testimony elicited at the hearing in UE 246. At the hearing, Commissioner Bloom asked Mr. Teply about a statement in Mr. Teply's testimony, also repeated in a footnote in Idaho Power's Pre-Hearing Brief, to the effect that marginally positive or marginally negative PVRR(d) results don't necessarily indicate that shutting down a particular unit is in the best interest of the ratepayers. Commissioner Bloom asked, "And would the opposite of that be true? In other words, that it wouldn't necessarily indicate that it would be prudent to go to that expense?" Mr. Teply replied that "You could make that argument."[75] CUB appreciates Commissioner Bloom's question, because CUB has argued forcefully throughout these dockets that marginally positive or marginally negative PVRR(d) numbers should have given

[71] UE 233 CUB Pre-Hearing Brief at 24 lines 16- 20 and at 25 lines 1-19 and at 26 lines 1-13.
[72] UE 246 CUB Post-Hearing Brief at 46 lines 16-22 and CUB 47 lines 1-6 – specifically page 46 lines 20-21.
[73] UE 233 CUB/300 Feighner-Jenks/6 lines 14-18.
[74] UE 233 CUB/300 Feighner-Jenks/9 lines 15 -26 and at 10 lines 1-3.
[75] Hearing Transcript at 170 lines 10-19.

Idaho Power and PacifiCorp pause. It is CUB's position that neither PacifiCorp nor Idaho Power should have made the investments in Bridger 3 based upon the information then known or knowable to PacifiCorp and Idaho Power as a result of PacifiCorp's PVRR(d) analysis and changing energy sector factors. And now even Mr. Teply is stating that "[t]o rely solely on the PVRR(d) results to determine prudence is overly simplistic."[76] But Idaho Power seems to have been left behind it is still arguing that the PVRR(d) study is in fact all that is needed to determine that undertaking the scrubber upgrade was prudent.[77] Idaho Power is wrong.

To the extent that Idaho Power has ceded control of the Bridger 3 unit to PacifiCorp, and to the extent that Idaho Power is relying on the testimony of PacifiCorp's witnesses Teply and Woollums, CUB was interested to hear Mr. Teply's discussion of the objectively reasonable facts that PacifiCorp applies in making resource decisions, especially given the question about reliance on marginally positive and marginally negative PVRR(d) results. The factors given were: CO_2 prices, price curves, natural gas, environmental compliance, and BART analyses. While CUB wishes that PacifiCorp and Idaho Power had performed a robust least-cost/least-risk analysis around these objectively reasonable factors, it notes that the list is still, after all we have been through in the UE 246, UE 233, LC 52, and LC 53 dockets missing key factors: the effect of alternative closure dates, of alternate resources, and the effect of OPUC IRP analysis and findings.

PacifiCorp and Idaho Power should not have proceeded with investments of this magnitude without additional study of the marginally positive and marginally negative PVRR(d) results. PacifiCorp and Idaho Power should have brought these investments to the OPUC for IRP analysis. CUB respectfully requests that the Commission remind Idaho Power that without IRP acknowledgement of its investment plans, it is at increased risk of being found imprudent in the

[76] UE 233 Idaho Power Company's Pre-Hearing Brief at 13 citing to UE 246 PAC/2000, Teply/4 lines 16-19.
[77] UE 233 Idaho Power Company's Pre-Hearing Brief at 14 lines 9-12.

future—as it should be found imprudent today—for proceeding on the basis of the limited analysis performed by PacifiCorp (to the extent that Idaho Power even reviewed that) which showed only marginally positive PVRR(d) results for the Bridger 3 unit.

C. The Projects and Costs at Issue in This Docket Should Have Been Submitted for Review in Prior IRP Dockets; They Were Not

Oregon's IRP Guideline 8 specifically "requires utilities, when considering long-term resource commitments, to take into account the risks that external costs may be internalized in the future."[78] It also requires utilities to develop and analyze a set of portfolios that cover a range of potential environmental compliance scenarios to address present and future carbon dioxide, nitrogen oxide, sulfur oxide, and mercury emission regulations.[79] Guideline 8 further directs utilities to modify the projected lifetime of a resource as needed in order to be consistent with the compliance scenario being analyzed.[80] Moreover, it requires that IRPs must be performed every two years, with annual updates of the analysis during the in between years, in recognition of the fact that policy, regulatory, and economic changes will affect resource strategies.[81] Idaho Power did not provide analysis of the Bridger 3 pollution control investments which compared those investments to alternatives.

If Idaho Power had submitted these investments in its IRPs, alternatives could have been considered. It was through the IRP process that alternatives to PGE's Boardman pollution control investments were considered and the idea of a phase-out was developed.

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[78] UM 1056, Order No. 07---002 at 17 (Jan. 8, 2007) - *Investigation into Integrated Resource Planning.*
[79] UM 1302, Order No. 08---339 at Appendix C (June 30, 2008) - *Investigation into the Treatment of CO2 Risk in the Integrated Resource Planning Process.*
[80] UM 1302, Order No. 08---339 at Appendix C (June 30, 2008) - *Investigation into the Treatment of CO2 Risk in the Integrated Resource Planning Process.*
[81] OAR 860-027-0400.

D. Should a Lack of Evidence Give the Commission Pause When Considering Idaho Power's Arguments?

Idaho Power argues at page 16 of its Pre-Hearing Brief that it "was aware of the costs associated with alternate resources and 'based upon that knowledge, [Idaho Power] had no reason to believe that it would be cheaper to shut Jim Bridger Unit 3 down and purchase a different resource.'"[82] Idaho Power cites no evidentiary source for this information other than the pre-filed testimony of Mr. Carstensen. Upon what was he basing his testimony? Did Idaho Power conduct some studies on this issue? PacifiCorp did not conduct such studies. Unless Idaho Power conducted studies that were not included in the record, there is not historical support for his current assertion.

Idaho Power also states that updating PacifiCorp's studies—as Idaho Power did not have any relevant studies of its own—would not have changed the ultimate conclusion that the scrubber upgrade project was prudent.[83] It further states that "the process cannot be broken down into a 'series of simple project implementation milestones and reevaluation opportunities without any reference to the underlying regulatory framework, agency requirements and expectations, resulting legal obligations, the realities of cost schedule management of these major projects, or the Company obligation to reliably serve its customers.'"[84] But as CUB has shown, it could have and should have been broken down in all of these ways. There was ample time to review these projects in IRPs—Idaho Power says determination of the pollution controls necessary to comply with the applicable legal requirements began in 2003,[85] so, even with the compliance deadlines to which Idaho Power adheres - there was 10 years for study and reevaluation.

[82] UE 233 Idaho Power Pre-Hearing Brief at 16 lines 20-23.
[83] UE 233 Idaho Power Pre-Hearing Brief at 18 lines 8-9.
[84] UE 233 Idaho Power Pre-Hearing Brief at 18-19.
[85] UE 233 Idaho Power Pre-Hearing Brief at 9 lines 16-17.

E. Idaho Power Argues that Staff's Analysis Supports Its Position, but the Staff Analysis Has Been Abandoned

In its Pre-Hearing Brief, Idaho Power argues that Staff performed a net present value (NPV) analysis using a CCCT as a replacement resource and that the Staff analysis supports Idaho Power's decision making:

> Moreover, Staff's analysis in this case, discussed below, did focus on a non-market alternative. ***Staff compared the price of the pollution control investments to the acquisition of a replacement resource – a CCCT***. Analyzing this alternative, Staff concluded that the cost of the alternative resource was substantially greater than the cost of compliance and therefore 'Idaho Power reasonably invested in the Jim Bridger Unit 3 Scrubber Upgrade Project.' ***(emphasis added)***[86]

This statement from Idaho Power, must be contrasted to what Staff wrote in its August 2012 final testimony:

> Given that the market price of electricity does not generally include all the fixed and variable costs of generating electricity, had the Company considered a replacement resource such as a combined cycle combustion turbine (CCCT) or refueling the plant unit with natural gas, it is likely the PVRR(d) benefit may well have been significantly higher than the Company presented in its testimony. ***While I have <u>not</u> performed an analysis using replacement resources to verify this possibility***…[87]

Part of the confusion here comes from Staff's April testimony, which included Exhibit 1001, a one-page spreadsheet which compared the pollution controls to the cost of a CCCT for the years 2011 to 2017. It is not clear why 2011 was chosen as the year for the CCCT replacement, why the study ended in the year 2017, or why the study did not consider alternatives such as a phase-out of the plant. But what is clear is that since April, this analysis has been abandoned by Staff. Staff did not rely on that analysis as a basis for its recommendations in either its June or August testimony or in its Pre-Hearing Brief. As the above dialogue shows, Idaho Power is giving that exhibit more weight than the author of the analysis ever gave to it.

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[86] UE 233 Idaho Power Pre-Hearing Brief at 17, lines 5-10.
[87] UE 233 Staff/1200/Colville/7 lines 4-11*(empashis added)*.

F. The Company, Contrary to Its Statements, Is Seeking Piecemeal Analysis; Piecemeal Analysis Risks a Finding That the Equipment Is Not Now Used and Useful

Nothing demonstrates better that the Company is seeking piecemeal review of its pollution control investments than the Company's own words in its Pre-Hearing Brief:

> The Company does maintain that the only investments that are at issue in this case are the Jim Bridger Unit 3 Scrubber Upgrade Project. The Company is not seeking pre-approval of any pollution control investments that may be made in the future (like SCR) nor is the Company requesting a prudence review of investments that are already included in rates.[88]

Thus, it seems to CUB that notwithstanding the second part of the quote, which is set forth in the footnote below, a piecemeal analysis is exactly what is occurring whether or not that is what the Company is seeking. To CUB, that seems like a distinction without any merit. The fact is that piecemeal review is what the Commission is presented with and is what the Commission should not acquiesce to. Especially since Idaho Power has stated that it did not conduct an analysis to determine whether the costs at issue in this docket were prudent when compared to alternative generation investments.[89] So, Idaho Power is making investments on an incremental basis—a few million in 2011, a few million in 2012—and has yet to evaluate the investment costs to ensure that they are prudent in comparison to possible investment in alternative resources.

The Commission has an IRP statute and rules for a reason—so that it can see what is coming and whether or not it will provide least-cost/least-risk service to customers. The fact that PacifiCorp's PVRR analysis included the SCR[90] is of little relevance when that study was not presented to the Commission as part of an IRP prior to the construction of the scrubbers or even of

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[88] UE 233 Idaho Power Company's Pre-Hearing Brief at 20 lines 11-14. The Company goes on to say that: "This does not mean, however, that the Company is requesting that the prudence review of the Jim Bridger Unit 3 Scrubber Upgrade Project be made in isolation with no consideration of the related pollution control investments that will be required to ensure continued operation of the unit in full compliance with applicable state and federal regulatory requirements." CUB finds it is really hard to see how the first part of the quote is not contrary to the second.
[89] UE 233 CUB/200 Feighner-Jenks/8; *See also* CUB Exhibit 20.
[90] See UE 233 Idaho Power Company Pre-Hearing Brief at 20 lines 19-21 and 21 at lines 1-7.

the SCR. Allowing utilities to bring incremental/single issue updates into rates without IRP analysis prevents the Commission from being able to review utility resource plans as a whole. CUB respectfully requests that the Commission find that this incremental update is not used and useful because it does not fulfill the BART requirements noted by the utility and will not fulfill those requirements until a SCR is added to the plant.

G. Idaho Power's Reliance on PacifiCorp Was Imprudent

Idaho Power is a sophisticated utility whose attempt to hide behind the skirts of PacifiCorp is unfortunate. Idaho Power has hitched its wagon to the wrong horse.

Idaho Power writes at length about how it relies on PacifiCorp as the operator of the Jim Bridger plant to operate the plant in a prudent manner.[91] It argues that it was reasonable for it to rely on PacifiCorp because of PacifiCorp's extensive experience.[92] It states that arrangements like this are typical for the industry and that this type of arrangement "provides for efficiencies that result in a prudently run plant at the least cost for customers."[93] It cites the operating agreement and what PacifiCorp's duties are and then ignores its obligation as a co-owner to provide oversight and to agree in writing to all significant capital investments in the plant.[94] It relies almost entirely on the written testimony of Mr. Carstensen, with provision of only scant supporting documentary evidence, to demonstrate that it did not in fact take its hands entirely off the reins with regard to pollution control decision-making at Bridger 3. But it appears to CUB that, given the lack of documentary

[91] UE 233 Idaho Power Company's Pre-Hearing Brief at 21 lines 15-18. Idaho Power Pre-Hearing Brief at 22 lines 15-17 and at 23 lines 1-18.
[92] UE 233 Idaho Power Pre-hearing Brief at 24 lines 1-5. And it cites to UE 196 for this proposition, but as we have previously discussed, what UE 196 really stands for is it is fine to hire experts but you still need to provide oversight and make sure that what they are doing makes sense.
[93] UE 233 Idaho Power Pre-hearing Brief at 24 lines 7-9. Surely in the case of two sophisticated utilities running one plant the least we could have expected was double efficiency and protection but in this case Idaho Power's customers received neither of those benefits and are instead being hit up for additional unnecessary incremental costs for unnecessary retrofits.
[94] UE 233/Idaho Power/1700/Carstensen/1 line 23 to Carstensen/2 line 2.

evidence related to Idaho Power's actual approval of the Bridger Scrubber Upgrade, what Idaho Power really wanted was to hitch its wagon to an expert horse and to then go to sleep, leaving the horse without the rider's oversight.

But even when a utility enters into an agreement with another utility to provide services, the first utility cannot give up its obligation to ensure the prudent provision of services to its customers[95]—it cannot close its eyes and allow the other utility to run amok. And that unfortunately is what happened here. Playing the imaginary tape in our heads we hear a conversation that goes something like, "I know, let's have PacifiCorp handle this so we don't have to worry about it. It has to handle its own plants and it won't want to do anything wrong with those so nothing bad can happen to us." But what if PacifiCorp wanted to maintain or increase its coal fleet instead of finding the least-cost/least-risk resources for its customers?[96] What if PacifiCorp's negotiating strategy with the state DEQ was to apply early for permits, agree to most DEQ requests, conduct few studies,[97] and not take the projects to the Commission in its IRPs,[98] all so that its coal plants could move forward with business as usual rather than what was truly in the economic best interests of customers? What if PacifiCorp put maintaining or increasing its coal fleet on the fast track instead of reviewing what currently enforceable environmental laws actually required it to do?[99] CUB thinks that Idaho Power, through its own lack of due diligence, got caught up in PacifiCorp's strategy to

[95] *See* UE 196, Order No. 10-051 at 12 and s*ee also Re Atlantic City Electric Company*, 83 P.U.R. 4th 611, 1987 at 626 discussed earlier in this brief.
[96] UE 246 Sierra Club Pre-Hearing Brief at 1-2: "Rather, these expenses were part of a Company-wide business plan to use pending environmental regulations as a means to increase PacifiCorp's rate base by investing billions of dollars in its old and polluting coal fleet. At every step, the Company's analysis to implement its business plan contained decisions that bolstered and justified its effort to increase rate base at its coal-fired units. Given its single minded focus, the Company missed or ignored numerous warning signs indicating that substantial capital expenditures at coal facilities were either unnecessary or not cost effective."
[97] UE 246 Sierra Club Pre-Hearing Brief at 2: "While the environmental agencies clearly alerted PacifiCorp that its proposals were not cost effective or were unnecessary, it was not the role of those environmental agencies to prevent PacifiCorp from voluntarily over-spending on environmental capital projects."
[98] UE 246 CUB Post-Hearing Brief at 11-12.
[99] UE 246 CUB Post-hearing Brief at 12-18.

ensure a long life for its rate-based coal assets. And even if, as Idaho Power argues, it was actively involved in carrying out the PacifiCorp strategy, then Idaho Power was also imprudent for agreeing to the PacifiCorp strategy and working to carry it out. CUB, however, thinks the evidence in the record shows that Idaho Power participated very little and let PacifiCorp call the shots. Either way, Idaho Power is imprudent for its lack of due diligence or imprudent for following a strategy which was not the least-cost/least-risk for customers; a strategy that did not bring the projects to the OPUC for IRP review.

Idaho Power tries to argue that PacifiCorp had a strategy that addressed the specific criticisms leveled by CUB.[100] Obviously, PacifiCorp did not. CUB has battled long and hard in the UE 246 docket to show that PacifiCorp's strategy was not the correct strategy, and CUB has battled in this UE 233 docket to show that Idaho Power hitched its wagon to the wrong horse. The correct strategy would have been to review the requirements of those regulations, the timelines involved, whether phasing the plants out early or converting them to an alternative fuel resource would be the least-cost/least-risk method of compliance, and then to bring various portfolios to the Commission for IRP review *before* moving forward with retrofits or construction/acquisition of alternate resources. PacifiCorp and Idaho Power, to the extent that any analysis was done, did not perform the appropriate analysis and did not provide their analysis to the Commission for review. Both the actions of PacifiCorp and Idaho Power were imprudent.[101]

We note finally that Idaho Power suggests in its Pre-Hearing Brief that "without demonstrating that PacifiCorp acted imprudently, CUB's criticisms of Idaho Power's reliance on

[100] UE 233 Idaho Power Pre-Hearing Brief at 22 lines 6-8.

[101] CUB also finds Idaho Power's cheerleading for PacifiCorp hard to swallow. Idaho Power failed to conduct any analysis of its own of the projects or of PacifiCorp's proposals to deal with the projects. For Idaho Power to now throw the PacifiCorp analysis in CUB's face and tell CUB what PacifiCorp did is a little hard to take, given that Idaho Power has only recently acquired such knowledge itself and that was because of the discovery being conducted by CUB and Staff as a result of this litigation. Idaho Power needs to stand up and take responsibility for the decisions and actions taken at plants in which it is a part or full owner. Utilities cannot be allowed to shrug off their due diligence obligations.

PacifiCorp have no evidentiary basis."[102] Idaho Power advocates for a a new prudence standard; rather than Idaho Power having the burden to prove that it is prudent, CUB would have the burden to prove (demonstrate) that another utility—PacifiCorp—was imprudent. But notwithstanding Idaho Power's newly proposed standard, CUB is demonstrating that Idaho Power was imprudent in multiple ways: Number one, Idaho Power was imprudent simply for failing to take these costs to the Commission in its IRPs. Number two, Idaho Power was imprudent for failing to provide oversight to PacifiCorp whether or not anything bad occurred. Number three, Idaho Power was imprudent for failing to conduct any studies to confirm PacifiCorp's diagnosis. Number four, Idaho Power was imprudent for failing to update and reevaluate the plans over the course of the years it took for the scrubber to be built and the also the SCR. And the list goes on. While CUB believes that PacifiCorp failed to demonstrate its prudence with regard to Bridger 3 and its others plants, clearly it is not necessary for the Commission to find that PacifiCorp was imprudent in its actions in order for the Commission to find that Idaho Power was imprudent with regard to Idaho Power's actions.

H. The Construction Costs Were Not Prudently Managed

Idaho Power Company argues that CUB has not criticized the management of the construction costs incurred to facilitate the upgrade.[103] This is incorrect. CUB does not think that this project should have been commenced at all without a more comprehensive analysis. To the extent that it was commenced, CUB believes it should have been reevaluated, and that as circumstances related to the cost of energy and the implementation of environmental laws and regulations changed, it should have been cancelled. (See discussion of Contract Termination) Clearly CUB's arguments encompass an argument that the management of the construction costs incurred

[102] UE 233 Pre-Hearing Brief at 24 lines 14-15.
[103] UE 233 Idaho Power Pre-Hearing Brief at 25 lines 8-10.

to facilitate the upgrade was not prudent, that failure to terminate the contract was not prudent.

I. CUB's Phase-Out Evidence is Not Erroneous

PacifiCorp and Idaho Power have shown a marked lack of flexibility to changing circumstances. Right now, it is CUB's impression that the sky could be falling, the price could be exorbitant and PacifiCorp and Idaho Power would carry right on with their "strategy" of adding pollution control devices to coal plants whether they need them or not, and whether or not the project has been acknowledged by the Commission as part of the least-cost/least-risk IRP plan. Based on its "overly simplistic" PVRR(d) analysis,[104] PacifiCorp decided to move forward with the Bridger scrubber update and then never reevaluated its position. Idaho Power argues today that the decrease in forecast market prices was not outside of PacifiCorp's "market price sensitivity range of 80 percent of forecasted values and that updating that study would not have changed its decision." It also argues that the plant could not run until 2020 or 2025 because it would be incompliant—this ignores the fact that Idaho Power and PacifiCorp never proposed an early closure date to the WYDEQ and asked how that would affect its plans. Idaho Power also argues that CUB failed to consider the cost of replacement of the units in its analysis, but so did PacifiCorp. CUB took PacifiCorp's model and plugged in three changes – the compliance deadline, updated the market price forecast, and considered a phase-out of the plant between 2020 and 2025. If CUB's modeling is wrong, then so is the PacifiCorp's and Idaho Power is asking the Commission to rely on PacifiCorp's modeling in making its decisions.

J. CUB Reliance on the Boardman Model is Appropriate

Idaho Power argues that just because early closure was right for Boardman does not mean

[104] UE 233 Idaho Power Pre-Hearing Brief at 13 fn.61.

that it would be prudent for Bridger 3.[105] It also argues that it could not have known about the Boardman option because the timing was wrong.[106] The timing of Boardman is discussed elsewhere in this brief and will be discussed only briefly in this section.

The Boardman process showed the world that there was flexibility in BART and that negotiation could result in alternatives to the installation of costly clean air retrofits and that this alternate process would bring financial benefits to customers – Idaho Power was a minority owner in Boardman. PGE did the right thing in bringing the Boardman pollution control issues to the IRP process—it discovered that phasing out Boardman was the least-cost/least-risk option when scored against other options in its IRP.[107] And while PGE's final decision to request to close the plant in 2020—made one assumes on behalf of all of the owners of Boardman—did not come until January 2010, the IRP process, the laws being considered, and the statutes and rules by which Boardman needed to abide were all available for public review and analysis.

While CUB is proud to celebrate the Boardman decision, CUB acknowledges that each plant is different and that each state DEQ is different. What is the same is the federal law which permits utilities to negotiate with the state DEQs to determine how best to comply with the laws affecting utility plant emissions and that states are required to take into consideration the remaining useful like of the plant. When a plant is marginal a utility should, under its least-cost/least-risk planning procedure, consider early phase-out of the marginal plant rather than the installation of costly retrofits. CUB never intended to portray the costs to close Boardman as the exact costs that other

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[105] UE 233 Idaho Power Pre-Hearing Brief at 26 lines 13-16.
[106] UE 233 Idaho Power Pre-Hearing Brief at 27 lines 4-7.
[107] In this docket, CUB did not focus on the costs of the Boardman phase-out, beyond citing one example, because the cost of the Boardman phase-out has nothing to do with PacifiCorp's units. States use a per-ton cost of pollution removed to determine BART cost effectiveness limits. Basic math shows that the difference between 20 years of pollution and 5 years of pollution will reduce the pollution removed by a particular control by 75%, assuming relatively constant generation. The best way to estimate the cost of pollution controls associated with phasing out a plant is to scale down from the controls required to run the plant for 20 years. UE 246 / CUB / 200 / Jenks-Feighner / 23 at 5-7.

utilities should aim for. CUB's only thought in advocating for the Boardman model was to demonstrate that it can be, and has been, done and that utilities should not be allowed to claim that they did not know they had room to negotiate and not install costly pollution controls, especially when they were a minority owner in the first West Coast plant where this was done. The Boardman model will inherently reduce pollution investments, because what is cost-effective over 20 years of useful life is greater than a 5-year useful life. CUB respectfully requests that the Commission, as part of its ruling in this docket, makes it clear to all utilities that exploration of the flexibility in the clean air regulations is a requirement for compliance with least-cost/least-risk planning. What CUB wants, and believes the Commission wants, is a fully comprehensive review of what is the least-cost/least-risk way to move forward for each plant.

K. All of the Pollution Upgrades at Issue in This Docket Related to Bridger 3 Were Premature at Best and Unnecessary at Worst

Idaho Power has stated that it wishes to rely on the testimony of Mr. Teply and Ms. Woollums and it cites in its Pre-Hearing Brief to their statements related to the Clean Air Act's Regional Haze Rules, National Ambient Air Quality Standards, the Regional SO_2 Milestone and Backstop Trading Program, state issued construction and operating permits, and state implementation plans. Because of this fact, and its argument that "[t]hese investments were required for the Company to continue compliant operation of Jim Bridger Unit 3,"[108] CUB now responds to the Teply and Woollums testimonies elicited at the UE 246 Hearing and to Idaho Power Company's Opening Brief.

The CH2M HILL study commissioned by PacifiCorp, and touted by Idaho Power, was limited to evaluating the least-cost pollution control; it did not consider whether the overall least-

[108] UE 233 Idaho Power Company's Pre-Hearing Brief at 9 lines 14-15.

cost for customer would be an investment in alterative energy resources.[109] The Company also failed to analyze whether a change in the closure date would lead to a lower cost investment.[110] So, the big picture issue here is not whether the $8.2 million requested in this docket is reasonable and prudent—that investment assumes that all other investments necessary to keep the plant running will also be made—but rather whether the entire scheme of proposed investments is reasonable and prudent when taken as a whole.[111]

i. SO_2 Scrubbers

The SO_2 scrubbers were not required by any state or federal statute, regulation, or permit. The Regional SO_2 Milestone and Backstop Trading programs are regional. There are no unit-specific limits for SO_2 under the Regional SO_2 Milestone program, as implemented in Wyoming's proposed SIP. Wyoming does not have an approved state SIP. More importantly, in the event that the SO_2 milestone is exceeded prior to 2018, the first control period is the calendar year that is six years following the calendar year for which SO_2 emissions exceed the milestone.[112] Given that no violation of the Regional SO_2 Milestone has been found to date,[113] the Backstop Trading Program has not been triggered. And, the fact that Naughton 3 is slated to convert to natural gas reduces the need for other units to reduce SO_2 under the Regional SO_2 Milestone program. In any case, PacifiCorp and Idaho Power would have at least six years from today, plus however many years that there is no violation, during which to come into compliance with regard to SO_2. PacifiCorp and Idaho Power had plenty of time to conduct least-cost/least-risk studies to see if scrubbers were the right way to proceed, but the companies failed to avail themselves of those opportunities. In point of fact:

[109] UE 233/CUB/200/Feighner-Jenks/9; CUB prehearing Brief at 16-17.
[110] UE 233/CUB/200/Feighner-Jenks/9; CUB Pre-Hearing Brief at 16-17.
[111] UE 233/CUB/200/Feighner-Jenks/8.
[112] UE 246 Hearing Transcript at 58 lines 5-12.
[113] UE 246 Hearing Transcript at 27 lines 7-9 no violation as of 2009; Hearing Transcript at 38, lines 7-11.

> Regional emissions have continued to decrease, and many of the reductions that were estimated to occur near the end of the program have occurred early. Because emissions are ***significantly below the milestones***, it is unlikely that emission inventory discrepancies would change the determination that the SO_2 milestones have been met, therefore making the audit result less critical.[114]

This is really important. As noted by Commissioner Savage during the UE 246 PacifiCorp Hearing, "Why would this be significantly below limits if everybody is going right to the presumptive target? Are some plants being shut down? What other factors are entering into it?"[115] PacifiCorp and Idaho Power have both failed to put any information in the record that supports its arguments that there were presumptive limits that required it to act immediately. Ms. Woollums' statements that the Company's emissions were ***significantly below the milestones*** because of Utah's lower limits; the fact that Wyoming included sources other than utilities in its state plan and the fact that some facilities were shut down[116] is not supported with any documentation. It is also rebutted in the UE 246 record by Sierra Club's Exhibit 505, the WRAP SO_2 Milestone Tracking Process Audit. PacifiCorp and Idaho Power have failed to show any reason why they should have acted when the region was ***significantly below the milestones***. Had PacifiCorp and Idaho Power brought their proposed investments into the IRP, they could—and should—have been studied, and the requirements of the Backstop Trading Program would have been reviewed along with the Wyoming SIP. PacifiCorp and Idaho Power did not do this, and have failed to carry the burden of persuasion that their actions in proceeding with the pollution control investments at Bridger 3 were prudent. The fact that PacifiCorp, through its improvements to Dave Johnston Unit 3 and Jim Bridger Unit 1, may have had some small part in this SO_2 reduction[117] does not change the fact that PacifiCorp

[114] UE 246 Sierra Club/505 at 2 *(emphasis added)*. We note that on the same page it states that Wyoming has 43 sources that are included in the milestone inventory.
[115] UE 246 Hearing Transcript at 60 lines 4-8.
[116] UE 246 Hearing Transcript at 60 lines 4-25 and at 61 lines 1-8.
[117] UE 246 Sierra Club Exhibit 510 at 16.

and Idaho Power acted prematurely and that they did not bring the project at issue in this docket to their respective IRP processes for review.

This finding of prematurity is further compounded by the fact that the first solid deadline for the Regional SO_2 Milestone program appears to be 2018.[118] So, even if a milestone were to be exceeded prior to 2018, PacifiCorp and Idaho Power would have six years to meet any compliance obligations.[119] PacifiCorp and Idaho Power at that time would also have the option of purchasing allowances for compliance purposes[120] if that were more cost-effective than investing in control technologies. Again, this points to the fact that PacifiCorp and Idaho Power's actions were premature, and as such were imprudent. CUB finds it deeply compelling that if one looks at the completion dates for PacifiCorp's and Idaho Power's pollution control investments at Bridger, that those projects were not scheduled to be completed until between November 2011 and May 2012. Thus those plants were not even included in the audit results which showed that the region was already ***significantly below*** the milestones.[121]

CUB also notes that when questioned by Commissioner Bloom with regard to its SO_2 permits, as to what the date for compliance would have been had PacifiCorp not filed a for a permit, Ms. Woollums stated that that was a "difficult question to answer" because there was a lot of negotiation that "goes on in advance of memorialization of emission limits, etc., in the permits."[122] She went on to say that "from an SO_2 perspective it was clear by the states that we had to achieve those limits and those were actually incorporated into some of the construction permits and operating permits that [the Company] applied for . . ." She finished by stating she could not give him

[118] *See UE 246* Sierra Club/504 at 17.
[119] Wyo. Air Quality Standards and Regs. ch. 14, sec. 2(k)(i)(A)(I).
[120] UE 246 Hearing Transcript at 74 lines 5-10.
[121] *But see* UE 246 Hearing Transcript at 62 lines 9-17 where Ms. Woollums claims that the projects were going online simultaneously with the WRAP SO_2 Milestone Tracking Process Audit issued on March 22, 2012.
[122] UE 246 Hearing Transcript at 76 lines 11-18.

a date because "it was already upon us."[123] In continuing his questioning, Commissioner Bloom elicited the additional statement that "the projects were really tied to the outage schedule and so to the extent there may have been a different technical compliance deadline for some of the NOx projects, [PacifiCorp] fit those projects into that existing outage schedule so as not to take another outage to tie in controls."[124] In other words, having already selected the emissions compliance number, PacifiCorp and Idaho Power (to the extent, if any, that Idaho Power was involved) then picked the date to do the project to fit with its planned outage schedule rather than the actual statutory deadline for compliance with any Regional Haze requirement. Thus, it appears from the record that there were no statutory laws or rules requiring compliance. PacifiCorp applied for permits which then required it to abide by specific emissions limits within specific timelines. The fact remains that PacifiCorp did not have to apply for construction permits when it did.

ii. NO_x—the SCR at Bridger 3

PacifiCorp and Idaho Power were also premature in regard to pollution control investments for NO_x. CUB thinks PacifiCorp was premature in applying for the construction permits that resulted in these emissions limits being set. The *"historical facts and circumstances"* demonstrate that in discussing application of the rules to Naughton the WYDEQ stated that the earliest possible compliance date for NO_x was 2015. "As a practical measure, the Division anticipates the requirement to install the BART-determined controls to occur as early as 2015."[125] WYDEQ based its assessment on the federal rule that requires compliance within five years, "[s]ince the 5-year control installation requirement is stated in the federal rule it applies to all of PacifiCorp's units

[123] UE 246 Hearing Transcript at 76 lines 19-25.
[124] UE 246 Hearing Transcript at 77 lines 20-25 and at 78 lines 1-9.
[125] UE 246/Sierra Club/111 Fisher/54.

requiring additional BART-determined controls."[126] Thus, PacifiCorp and Idaho Power knew, or should have known, given that there was—and is—no approved Wyoming SIP in place, and BART eligible units have five years from the date of the SIP becoming enforceable to make any necessary and appropriate pollution control investments, that PacifiCorp and Idaho Power had at least five years in which to install pollution controls if such installation was appropriate, i.e., it was the least-cost/least-risk thing to do.[127]

PacifiCorp was also premature in its requests for permits for the NO_x Scrubber and the SCR at Bridger 3. In regard to the NO_x Scrubber CUB knows this because on February 26, 2010, PacifiCorp filed an appeal of the ruling on the permits for which it had voluntarily applied.[128] That appeal resulted in a settlement agreement that states:

> (c) NO_x Control For Bridger Units 3 and 4 – With respect to Bridger Unites 3 and 4, PacifiCorp shall: (i) install SCR; (ii) install alternative add-on NO_x control systems; ***or (iii) otherwise reduce NO_x emissions*** to achieve a 0.07lb/MMBTU 30-day rolling average NO_x emissions rate. These installations shall occur, and/or this emission rate will be achieved, on Unit 3 ***prior to December 31, 2015*** . . . .[129]

And in regard to the SCR, even today there is still no approved SIP for Wyoming.

PacifiCorp's actions in prematurely requesting NO_x permits and installing NO_x pollution control investments at Bridger 3 was imprudent.

L. Idaho Power and PacifiCorp Did Not Have to Proceed—the Contracts Could Have Been Terminated and the SIP Was Not Approved

The *historical facts and circumstances* evidence shows that PacifiCorp had an EPC contract related to Bridger 3. This contract contained a termination clause. As previously discussed in CUB's

[126] UE 246/Sierra Club/111 Fisher/54.
[127] The Wyoming regulations implementing BART state: 'Any control equipment under a permit issued in this section shall be installed and operated as expeditiously as practicable but in no event later than five years after the United States Environmental Protection Agency's approval of Wyoming's State Implementation Plan revision for Regional Haze. Sierra Club/111 Fisher/54.
[128] UE 246 PacifiCorp Cross Exhibit 2309 – Appeal and Petition For Review of Bart Permits at 1-2.
[129] UE 246 PacifiCorp Cross Exhibit 2309 – BART APPEAL SETTLEMENT AGREEMENT at 2. *(emphasis added).*

UE 246 Pre-Hearing Brief, PacifiCorp has stated that "[e]mission reduction projects of the number and size described in this testimony take many years to engineer, plan, and build. . . In other words, it is not practical, and is unduly expensive for customers, to expect to build these emission reduction projects all at once or even in a compressed time period."[130] The *historical facts* demonstrate, however, that PacifiCorp did not reconsider any of these projects before signing the contracts.[131] Neither did it reconsider any of these projects after signing the contracts, even though the *historical facts and circumstances* also show that: "[redacted]."[132]

In his testimony[133] Mr. Teply was asked about the Company's decision not to utilize the termination clauses. Mr. Teply testified that overusing such termination clauses would impact the Company's ability to negotiate them. At the UE 246hearing, Mr. Teply was asked whether he could envision a scenario where the economics of a contract could change so much that it would be appropriate for the Company to invoke such a clause. His response was that "hypothetically there could be scenarios like that. That's why we negotiate the provision."[134]

[redacted]

[130] UE 246/PAC/500/Teply/26 lines 13-14 and 22 and Teply/27 lines 1-2; see also PAC/1500 Teply/4 lines 7-10.
[131] "Reevaluation of the economics of projects after the contracts were executed or before beginning construction of a project did not typically occur, because at that time there was no material reason to conduct such reevaluations." UE 246 PacifiCorp Pre-Hearing Brief at 26.
[132] UE 246 CUB/200 Jenks-Feighner/33 lines1-10.
[133] PAC/2000/13 at lines 15-16.
[134] UE 246 Hearing Transcript at 132 lines 22-25 and at 133 lines 1-2.

[redacted][135]

The Wyoming SIP was also rejected after the contracts were signed. This too should have provided PacifiCorp and Idaho Power with additional time to reevaluate their plans. But PacifiCorp and Idaho Power chose not to do any of these things. Idaho Power did not encourage PacifiCorp to terminate the contract, and PacifiCorp did not terminate the contract. Neither did either company reevaluate its plans. [redacted]

M. SCRs Are Needed to Make Some of These Plants Used and Useful

Idaho Power argues that the scrubber upgrade installed at Bridger 3 is used and useful.[136] PacifiCorp stated the same, and further states that it "also anticipates completing installation of five selective catalytic reduction systems ("SCRs") (or otherwise reducing NO_x emissions) at its owned and operated facilities by 2022,"[137] this would include Bridger 3. CUB fears that this plan is resulting in piecemeal construction and review of these projects and also leads to an issue of whether the investments are used and useful.[138] In its Pre-Hearing Brief, Idaho Power spends a lot of time explaining that the prudence review and the used and useful standard are two different things. It does this in an attempt to negate the examples provided by CUB as to why something must be both used and useful to be included in rate base and then prudent to receive reimbursement. CUB stands by its sequestration example. For something to be useful, it must be serving a purpose—for carbon

[135] UE 246/CUB/200/Jenks-Feighner/32 lines 14-21.
[136] UE 233 Idaho Power Company Pre-Hearing Brief at 30.
[137] UE 246/PAC/500/Teply/9 lines 5-8.
[138] UE 233/CUB/300/Jenks-Feighner/3 lines 4 to page 5 line 20.

sequestration to be useful, it must be helping an entity to comply with regulations related to sequestration. For the scrubber at Bridger 3 to be useful, it must be meeting the BART standard. The problem here for Idaho Power is that alone the scrubber will never meet that standard. To meet the standard, the scrubber must be combined with another project – a SCR.

The scrubber upgrade at Bridger 3 was installed by PacifiCorp, on behalf of Idaho Power, and the investment was made in order to comply with the RHR. The Wyoming SIP has not been finalized, but requires the PacifiCorp to invest in additional pollution controls, including adding a SCR;[139] hence the question of whether the scrubber upgrade is used and useful before the SCR is added. The scrubber has been added to the plant, and the plant is operating with it, meaning it is used, but is the scrubber useful without the SCR? CUB continues to believe that the scrubber by itself does not allow the plant to meet the requirements of the RHR.[140] The big problem here is that "[e]lements of the investment were made years before the requirements were finalized and come into rate cases as they occur in test years, but the Regional Haze Rule investments never come before the Commission as a total project."[141] This is a problem because the investments are only used and useful when combined as a project.[142]

According to the PacifiCorp, the "Jim Bridger Unit 3 SCR is a separate and distinct project that when installed will meet the BART requirement established for that equipment as it pertains to NO_x."[143] Since PacifiCorp claims that the NO_x and SO_2 standards must both be met, two separate projects are actually required to meet BART at Bridger 3. Once again, the evidence shows that the scrubber is not used and useful until the SCR is in place. Indeed, CUB proposes that all of the

[139] UE 246/CUB/100/Jenks-Feighner/18 lines 14-17.
[140] UE 233/CUB/300/Jenks-Feighner/3 lines 4 to page 5 line 20.
[141] UE 246/CUB/100/Jenks-Feighner/19 lines 10-12.
[142] UE 246/CUB/100/Jenks-Feighner/19 lines 13-14.
[143] UE 246/PAC/1500/Teply 29 line 22 to Teply/30 line 3.

investments at issue in this docket could in fact be disallowed on a purely used and useful basis.[144]

PacifiCorp and Idaho Power state that all of the investments being made in this docket are being made for purposes of complying with specific environmental laws. CUB believes that until the environmental laws in question go into effect, the investments that have been made are not used and useful. At this time, the NO_x standards exist only in permits and are not actually in law, and the Wyoming SIP has yet to be approved. As for the SO_2 scrubber investments, those are being made pursuant to the Regional SO_2 Milestone and Backstop Trading Program, which has no unit-specific emissions limits, only regional goals. Since the region is below the regional goals, and there are no unit-specific goals, there is no need for the investments at this time; the investments are not useful. And to the extent that some investments require the addition of others in order to meet the RHR standard, the first installation is not useful until the second installation occurs at Bridger 3.

Idaho Power attempts to rebut CUB's used and useful arguments by stating that in order to be "useful," there need only be a "modicum of usefulness" to distinguish property from being "merely used."[145] But that case is distinguishable. The *In Re PGE* case the Company cites is one which pertained to Colstrip 4, which was then a completely new plant. The Commission found that to be useful, "a plant need only provide current benefits and an expectation that the output of the plant will be necessary within a reasonable period of time. Consequently, the Commission will base its determination of the usefulness of Colstrip 4 on: 1. The level of current benefits expected in the test year; and 2. The expected level of increased use as determined by load-resource forecasts."[146] Unlike that case, where the new plant provided some benefits to Oregon ratepayers even though

[144] In its UE 246 Pre-Hearing Brief, Staff observed that CUB had failed to "connect the dots between its discussion of PacifiCorp's investment actions at each plant with its suggested used and useful disallowance remedy . . . ."[144] CUB also responds to that criticism with the arguments in the next paragraph.
[145] UE 233 Idaho Power Company Pre-Hearing Brief at 30 line 15 citing *In the Matter of the revised tariff schedules filed by PGE,* Docket Nos. UE 47 and UE 48, Order No. 87-1017 (Sept. 30, 1987).
[146] UE 233 Idaho Power Company Pre-Hearing Brief citing *In the Matter of the revised tariff schedules filed by PGE,* Docket Nos. UE 47 and UE 48, Order No. 87-1017 at 9 (Sept. 30, 1987).

"limited"[147] a similar review in this UE 233 docket must find that the scrubber is providing no current benefits to customers; there is no enforceable SIP, and thus no law that must be complied with and there is no increase in energy output. In other words, the pollution control investments at issue in UE 233 are not doing anything for customers now other than potentially costing them lots of unnecessary dollars—the pollution control investments are not causing the units to produce more electricity after the installation than they did before. And without the SCR there is no anticipation that they will do anything for customers in the future. As for the second prong of the Order 87-1017 test, the scrubber are not in any way related to load growth so that test is completely irrelevant.

Idaho Power argues back that the State of Wyoming views each pollutant separately and that Bridger 3 is BART compliant now for SO_2 in the eyes of the State of Wyoming,[148] but this belies the fact that without the addition of the SCR or the miraculous disappearance of NO_x from the system (without use of the SCR or other technology) that the unit will not be permitted to operate past 2015. Thus, regardless of how the State of Wyoming views this, the State of Oregon should still not reward the Company for flouting the IRP planning process and bringing these incremental costs to the Commission on a piecemeal basis. In other words, if the Scrubber Upgrade project was part of a larger RHR compliance plan that had been acknowledged in the IRP, then bringing it to a rate case as an incremental investment would not be nearly as troubling. Without that IRP review, Oregon is left with an incremental investment and no context to determine if this will be useful for its expected life, or will be stranded for most of its expected life.

But the fundamental problem is that while PacifiCorp has filed for a CPCN for the SCR it has not made the final decision to invest in the SCR. And, its April IRP Update analysis

[147] *In the Matter of the revised tariff schedules filed by PGE,* Docket Nos. UE 47 and UE 48, Order No. 87-1017 (Sept. 30, 1987) at 9. "Although six years is a considerable period of time, the period is sufficiently short that the Commission finds that the plant will be necessary to meet load within a reasonable period of time."
[148] UE 233 Pre-Hearing Brief at 31 lines 7-13.

demonstrates that depending on gas prices, it may be more economic to convert the plant to gas, in which case it is no longer regulated by BART and the pollution controls at issue in this case are stranded costs because they are then neither used nor useful. Regardless of this fact, CUB also believes that the Commission can decide this case simply by determining that the pollution control investments were imprudently made based upon the fact that the Company failed to do a least-cost/least-risk analysis at any of the units, failed to submit its planned investments for IRP review, and failed to prove that any of the pollution control investments were the least-cost/least-risk solution to an actual problem, as there was, and is, no Wyoming SIP.

N. The Bridger 3 Investments Are Not Prudent

CUB has already discussed the SO_2 and NO_x unit emission limit legal issues above. We now discuss the additional reasons for determining that the Bridger 3 investments were not prudent. The total capital investment for the scrubber project placed in service at Bridger Unit 3 in June 2011 is approximately $17 million.[149] Approximately $1 million of that capital investment is associated with project closeout and is included in the plant additions adjustment also included in this docket.[150] Also, "the operation of the new emissions control equipment results in increased operation and maintenance costs associated with reagent, waste disposal, and equipment maintenance."[151] For Bridger 3, when PacifiCorp modeled the investment as compared to immediate 2008 closure, it found that it had a positive net present value of [redacted][152] CUB changed the PVRR model to remove the assumption that the alternative to the investments was an immediate closure of the

[149] UE 246/PAC/500/Teply/80 lines 8-10; UE 246/CUB/104/Feighner-Jenks/1—CUB Data Request and Response 4. Idaho Power would have a 1/3 share of these costs.
[150] UE 246/PAC/500/Teply/80 lines 10-11.

[151] UE 246/PAC/500/Teply/8 lines 7-9.
[152] UE 246/PAC/500/Teply/85 lines 10-11.

plant. This reduced the NPVRR to [redacted][153] CUB then looked at the forward price curve from the fall of 2009 and found that this reduced the net present value down to [redacted]. By the end of 2009, this project, rather than having a benefit of [redacted], had a benefit of [redacted].

CUB then looked at alternatives to the investment in clean air technology. CUB modeled the effects of *phasing out* the plant by 2020. This reduced the NPVRR again, down to [redacted]. *Phasing out* the plant in 2022 had a net present value of [redacted] and *phasing out* the plant in 2025 had a net present value of [redacted].[154] All of this shows that if the Company had been updating its analysis in the fall of 2009, it would have seen that *phasing the plant out* in 2022 or 2025 would have been preferable to making the pollution control investments.[155]

This means that PacifiCorp could—and should—still have utilized its right to cancel without cause and to pay only the costs the contractor had incurred to date.[156]

Because the *historical fact*s demonstrate that all the tools and information to conduct a simple least-cost/least-risk analysis were available to PacifiCorp and Idaho Power at the time they made their decision to make the environmental control investments at Bridger 3; because Idaho Power and PacifiCorp could also have updated the PacifiCorp initial analysis at any time;[157] and because PacifiCorp could have cancelled the contract at any time,[158] CUB believes that the Bridger 3 investments were not prudent and cannot be included in rates. Idaho Power and PacifiCorp should have reevaluated this project and considered a *phase-out* between 2020 and 2025, since this would likely be the least-cost option for customers.

CUB recommends that the Commission should find this investment imprudent and deny

[153] UE 246/CUB/200/Jenks-Feighner/39 lines 17-19.
[154] UE 246/CUB/200/Jenks-Feighner/40 lines 1-4.
[155] UE 246/CUB/200/Jenks-Feighner/40 lines 6-9.
[156] UE 246/CUB/200/Jenks-Feighner/40 lines 10-22.
[157] UE 246/CUB/200/Jenks-Feighner/40 lines 6-9.
[158] UE 246/CUB/200/Jenks-Feighner/40 lines 10-13.

Idaho Power recovery of it. CUB also recommends that the Commission find that a 2022 *phase-out* would have been the prudent path and that ratemaking treatment in Oregon must follow this assumed prudent path.[159]

V. ADDITIONAL RECOMMENDATIONS

CUB's additional recommendations remain the same as in its Pre-Hearing Brief, but for ease of review CUB will set them forth again here.

Notwithstanding Staff's weak analysis in this docket, CUB joins with Staff in recommending that:

> The Commission should clarify that Guidelines 4 and 8 direct the utilities to evaluate investments that would extend the economic and physical life of existing resources, including evaluation of alternatives that would result in shorter life extensions, no extension of the resource life, or shorten the assumed resource life. The Commission should clarify that the IRP Guidelines also direct the utilities to conduct risk analysis, including analysis of the risk of future environmental regulation, to test whether the investment to extend the life of an existing resource is part of an overall resource strategy with the best combination of expected costs and associated risks for the utility and its customers.[160]

CUB respectfully requests that the Commission require Idaho Power to conduct the detailed, company-wide analytical reviews outlined by CUB in this docket—and to take into consideration all of CUB's concerns—on a going-forward basis so that future dockets dealing with these and other pollution control regulations are not burdened with the same "did they or didn't they know" issues as this docket has been, and, most importantly, so that customers pay only the appropriate share of the Company's prudent costs of doing business. Customers cannot afford a repeat of the Company's planning decision process for the pollution control investments that was shortsightedly based on the assumption that existing units must continue to operate regardless of likely costs, with ratepayers bearing the burden. Customers also do not want any more piecemeal reviews.

[159] UE 246/CUB/200/Jenks-Feighner/41 lines 6-12.
[160] UE 233/Staff/1100/Colville/22 line 15 to Colville/23 line 3.

VI. DISALLOWANCE REQUESTED BY CUB

CUB's disallowance requests remain the same in this Post-Hearing Brief as in CUB's Pre-Hearing Brief. For ease of review we set them forth again here.

Whether investment costs related to pollution controls can be evaluated and determined to be prudent is not a new issue. CUB and the OPUC saw similar issues arise related to the Boardman coal plant owned by PGE and Idaho Power. In the case of Boardman, the projected overall cost of new investments and O&M was more than $500 million. This figure resulted in PGE analyzing and considering alternative paths and led to PGE's determination that the least–cost/ least-risk approach was to phase out Boardman by 2020—a solution that meets BART Regional Haze Standards while reducing costs to customers. Because Idaho Power is a part-owner of Boardman, its customers will also see reduced costs due to the cost-effective decision to close Boardman. Even with this knowledge, Idaho Power has still failed to consider the full range of available options for Bridger Unit 3.[161]

Idaho Power has not conducted the analysis that PGE conducted for Boardman, and as a result Idaho Power has continued to make new investments in Bridger without determining whether the total cost of all the investments was prudent. It has then sought to add the costs of those unanalyzed—and therefore imprudent—investments into rates. Prudence is all about what the Company knew, or should have known, at the time it made its decision to enter into these investments.[162] Idaho Power, as a result of its own lack of studies, clearly did not know enough to

[161] UE 233/CUB/200/Feighner-Jenks/12.

[162] UE 233/CUB/200/Feighner-Jenks/13. Under Oregon law, the utility bears the burden to show that the proposed rate change is just and reasonable. ORS 757.210. When evaluating the prudence of a utility's actions, the OPUC has consistently articulated and applied the following standard:

> In a prudence review, the Commission examines the objective reasonableness of a company's actions measured at the time the company acted: "Prudence is determined by the reasonableness of the actions 'based on information that was available (***or could reasonably have been available***) at the

knowledgably enter into these investments. The Company should not now be rewarded with an increase in rates for imprudent behavior in failing to do its due diligence and conduct detailed appropriate analysis.

Rather than joint ownership providing the Commission with double the due diligence review of plans and options for the plant, CUB has found that, as the minority owner of the plant, Idaho Power simply ignored its responsibility to participate in any decision making for the plant related to clean air compliance investments. This might not have caused customers injury had PacifiCorp acted prudently in its decision-making, but CUB has unfortunately been forced to conclude that PacifiCorp was not operating prudently with regard to this plant and that customers have been, and are continuing to be, injured by both companies' failure to appropriately determine the least-cost method for complying with clean air regulations.[163]

CUB urges the Commission to deny rate recovery for the scrubber upgrade at issue in this docket and to order the Company to return the deferred costs to customers. Idaho Power, having failed to conduct due diligence in regard to decisions made for the Bridger 3 plant, should not be rewarded with favorable ratemaking treatment of the investment costs incurred as a result of its imprudent decision-making.[164]

In the alternative, CUB points out to the Commission that it could find that the scrubber

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time.'" *In re PacifiCorp*, UM 995/UE 121/UC 578, Order No. 02-469 at 4 (emphasis added); *See also In re PGE*, UM 196, Order No. 10-051 at 5-6; *In re PGE*, UE 102, Order No. 99-033 at 36-37; *In re Transition Costs*, UM 834, Order No. 98-353 at 9.

In a prudence review, the Commission is careful to examine not only the actions a utility took, but also the actions that a utility *should have taken*. For example, in *In Re PacifiCorp*, UE 200, Order No. 08-548 at 19-20, the Commission discussed PacifiCorp's Rolling Hills wind project. Specifically, the Commission found that PacifiCorp failed to act within the applicable Major Resource acquisition Guidelines in developing the project, which includes a requirement for utility's to issue an RFP for certain resource acquisitions and review of proposals received. Because PacifiCorp failed to issue an RFP and seek review of the proposals received as required by the Guidelines, and subsequently failed to meet its burden of persuasion with regard to the prudence of its actions taken outside of the guidelines, the Commission declared the project to be imprudent and denied cost recovery for the resource.

[163] UE 233/CUB/300/Feighner-Jenks/14 line 17 to Feighner-Jenks/15 line 9.

[164] UE 233/CUB/300/Feighner-Jenks/15 lines 10 - 13.

upgrade is simply not used and useful at this time and that it will not be used and useful without the addition of the SCR. The Commission could then deny rate recovery for the scrubber upgrade until the time that the investment is found to be used and useful.[165] Either way, the dollars currently in deferral must be returned to customers.

VII. CONCLUSION

Viewed from an objective or subjective point of view, Idaho Power was imprudent in pursuing the scrubber upgrade in the manner, and with the timing, that it did. And, viewed from an objective or subjective point of view, Idaho Power was also imprudent in seeking to also install, in order to meet BART, an SCR at Bridger 3. This is because if PacifiCorp had done its studies correctly and Idaho Power had read them, or if Idaho Power had done the studies itself and read them, and if in those studies Idaho Power had been required to schedule Bridger 3 to close in 2018, 2020, or 2022, for example, it is doubtful that a SCR would have been considered cost-effective pollution control for meeting the RHR. And, viewed either objectively or subjectively, the scrubber upgrade retrofit cannot be used and useful now because it is not BART compliant until the SCR is also installed.

Instead, running a coal plant without as much pollution control for an additional three to five years would have reduced the costs and made closure cost-effective, since the plant would produce power more cheaply than either a coal plant repowered for gas or a coal plant with significantly higher capital investment.[166]

CUB thinks the Company should be held accountable for its complete lack of due diligence in considering the options available regardless of the size of the harm the lack of due diligence

[165] UE 233/CUB/300/Feighner-Jenks/15 lines 14-17.
[166] UE 233/CUB/300/Feighner-Jenks/10 line 4 to Feighner-Jenks/11 line 5.

caused.

CUB thinks that no matter which way you slice it, Idaho Power was imprudent in its decision making—or the lack thereof—in regard to Bridger 3. This imprudence stems from three separate acts.

First, Idaho Power is imprudent because it delegated its management of the plant to another utility without fulfilling its due diligence obligation to continue to provide oversight to that utility.

Second, Idaho Power is further imprudent by failing to include the Bridger 3 pollution control retrofit costs in its IRP and consider alternatives to that investment; when it allowed clean air investments to continue to be made at Bridger 3 without consideration of the least-cost/least-risk strategies known to Idaho Power through its experience with the Boardman plant in which it was a co-owner; when it ceded all analysis and decision-making about those retrofits to PacifiCorp; and when it failed to require that PacifiCorp cancel the contract related to Bridger 3 Scrubber Update Project. That Idaho Power Company has therefore failed, and is therefore failing, to properly manage a rate-based asset. And in addition to all of the previously established imprudence on its own behalf, because PacifiCorp, upon whom Idaho Power is relying to defend it in this matter, was imprudent in its decision-making about the Bridger 3 plant, that Idaho Power was also by implication imprudent in its decision-making. There is no proof that these investments were needed to satisfy environmental regulations, there is no proof that a least-cost/least-risk analysis was performed prior to the making of the investments, and there is no proof that the making of these investments was in the economic best interests of customers as opposed to the then available alternatives.

And, third, the Company is further imprudent because it has delegated defense of this matter to the entity that itself failed to make prudent decisions that now inform the basis of the

disallowance that CUB is seeking in this matter.

Given that Idaho Power accepts its responsibility as owner of the plant to ask customers to only include in rates those costs to provide utility service that are prudently incurred,[167] it is therefore CUB's position that it is appropriate for the Commission to find that Idaho Power was not duly diligent, has not met the burden of proof necessary to demonstrate either that the incremental clean air cost investment made at Bridger 3 is used and useful, or that the investment was prudently made. These costs should not, therefore, be included in rates and currently deferred dollars must be immediately returned to customers.

Given that the test year for this docket is before the compliance deadline for RHR, the plant is not yet compliant with RHR without a SCR, and the Company is arguing that the SCR is not a legitimate subject of this docket, the Commission can simply find that the clean air investments made at Bridger 3 are not used and useful and cannot at this time be included in rates and that the costs in deferral must be returned to customers.

In terms of prudence, the Commission can find that the Company has failed to meet its burden of proof to demonstrate that this investment is prudent because the evidence in this docket and in UE 246 shows that by the fall of 2009, the owners of Bridger 3 should have garnered enough information to make them reverse course and instead pursue a *phase-out* of the plant.[168] Continuing to make clean air investments after that time period was clearly not prudent, and the costs must be removed from rate base in the next tariff update and the deferred costs must be returned to customers.

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[167] **Q. in its role as minority owner, does Idaho Power accept its responsibility to its customers to include in rates only those costs to provide utility service that are prudently incurred?**

Absolutely. The fact that Idaho Power has delegated to PacifiCorp the day-to-day operations of the Bridger plant – or any other plant for that matter – in no way suggests that Idaho Power is not responsible for ensuring that only prudently incurred costs are included in rates.

UE 233/Idaho Power/1500/Carstensen/4 lines 1-7.

[168] UE 246/CUB/200/Jenks-Feighner/40.

CUB further recommends that the Commission clarify what it expects utilities to analyze when making environmental investments.

As CUB has previously stated, the Commission has an opportunity here to send a message to Idaho Power, and to all other electric utilities, that continued investment in coal-fired electric generation plants must be supported by analysis showing that the investments are cost-effective in the context of all the investment needed in the plant and that it would not be more reasonable to invest in alternative resources. The Commission can also demonstrate through the order issued in this docket that companies that fail to provide the required analysis will not be rewarded for their lack of due diligence and imprudent behavior.[169]

Dated this 5th day of December, 2012.

Respectfully submitted,

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[169] UE 233 CUB/200 Feighner-Jenks/16.

UE 233 – CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of December, 2012, I served the foregoing **CITIZENS' UTILITY BOARD OF OREGON'S POST-HEARING BRIEF** in docket UE 233 upon each party listed in the UE 233 OPUC Service List by email and, where paper service is not waived, by U.S. mail, postage prepaid, and upon the Commission by email and by sending one original and five copies by U.S. mail, postage prepaid, to the Commission's Salem offices.

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