

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**

3 **UE 233**

4 In the Matter of the Application of Idaho
5 Power Company for Authority to Increase its
6 Rates and Charges for Electric Services to its
7 Customers in the State of Oregon.

STAFF PRE-HEARING BRIEF

8 **I. Introduction**

9 PacifiCorp and Idaho Power Company co-own a coal-burning power plant, the Jim Bridger
10 Plant, located in Wyoming.¹ The Jim Bridger Plant is comprised of four pulverized coal units
11 and its emissions of sulfur dioxide (SO₂), nitrogen oxide (NO_x), Particulate Matter, and toxins
12 such as mercury, are regulated and limited under various provisions of the Clean Air Act. At
13 issue in this second phase of the proceeding is whether the Oregon-allocated share of Idaho
14 Power's investment in Flue Gas Desulphurization (FGD) to reduce SO₂ emissions at the Jim
15 Bridger Unit 3 (hereinafter referred to as the "Scrubber Upgrade")² should be included in Idaho
16 Power's ratebase and the associated revenue requirement recovered in Idaho Power's retail
17 rates.³

18 The Citizens' Utility Board of Oregon (CUB) argues the Oregon-allocated share of the cost
19 of the Scrubber Upgrade should not be added to Idaho Power's ratebase because (1) Idaho Power
20 was imprudent in not determining whether early shutdown of Jim Bridger Unit 3 was a more cost
21 effective way to comply with Clean Air Act requirements, and (2) the Scrubber Upgrade is not
22 used *and* useful because it does not by itself, bring Unit 3 into compliance with the Clean Air

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24 ¹ Idaho Power/1300, Carstensen/2.

25 ² The Scrubber Upgrade project primarily included the upgrade and replacement of existing pumps, spray
26 headers, trays, induced draft fans, and ancillary equipment to improve the control of SO₂ emissions. *See*
UE 246 PAC/500, Teply/80.

³ The Oregon-allocated share of Idaho Power's investment is \$27,500. *See* CUB/200, Feighner-Jenks/15.

1 Act. CUB argues that it is only when Jim Bridger Unit 3 is in complete compliance with the
2 Clean Air Act that the Scrubber Upgrade will be useful.⁴

3 Staff disagrees with CUB's argument that the Scrubber Upgrade is not used and useful.⁵
4 And, while Staff has also identified infirmities in Idaho Power's pre-investment decision-making
5 process, Staff concludes that the investment is prudent. This is because an objectively
6 reasonable utility operator would have proceeded with the Scrubber Upgrade given that
7 information known or reasonably knowable at the time of Idaho Power proceeded with the
8 investment showed a significant long-term economic benefit from the upgrade.⁶

9 **II. Standard of Review.**

10 **a. Burden of proof.**

11 Under ORS 757.210(1)(a), Idaho Power bears the "burden of proof" to show that its
12 proposed rates are fair, just, and reasonable.⁷ As the Commission stated in a 2001 order, the
13 utility has the burden to show, by a preponderance of the evidence, that its proposed change is
14 just and reasonable.⁸ "If [the utility] fails to meet that burden, either because the opposing party
15 presented compelling evidence in opposition to the proposal, or because [the utility] failed to
16 present compelling information in the first place, the [the utility] does not prevail."⁹

17 The Commission has clarified that the burden of proof includes both the "burden of
18 persuasion" and the "burden of production":

19 The burden of persuasion...is always with the utility. The ultimate burden of
20 producing enough evidence to support its claims is also with the utility. Other parties

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22 ⁴ CUB/300, Feighner-Jenks/3, lines 8-14.

23 ⁵ Staff/1200, Colville/5, line 22 – Colville/6, line 2.

24 ⁶ Staff/1100, Colville/6, lines 8-16; Staff/1200, Colville/3, line 2 – Colville/5, line 18.

25 ⁷ See also ORS 756.040(1).

26 ⁸ *In the Matter of Portland General Electric Co.'s Proposal to Restructure and Reprice its Services in Accordance with Provisions of SB 1149*, Docket No. UE 215, Order No. 01-777 at 6.

⁹ *Id.*

1 in the case, however, have the burden of producing evidence to support their
argument in opposition to the utility's position.¹⁰

2 The Commission most recently opined on the various burdens as follows:

3 To reach a determination on whether proposed rates are just and reasonable, we look
4 at the record as a whole and make a determination based on the preponderance of the
evidence. Once a utility has met the initial burden of presenting evidence to support
5 its request, "the burden of going forward then shifts to the party or parties who
oppose including the costs in the utility's revenue requirement." Although the burden
6 of production shifts, the burden of persuasion is always on the utility.¹¹

7 **b. Prudence standard.**

8 To determine whether a particular investment is prudent, the Commission examines the
9 objective reasonableness of the investment measured at the time the investment was made:

10 "Prudence is determined by the reasonableness of the actions 'based on information that was
11 available (or could reasonably have been available) at the time.'"¹² In applying this standard, the
12 Commission does not focus on the outcome of the utility's decision.¹³

13 Although the Commission determines the prudence of an investment based on the
14 information known or reasonably knowable to the utility at the time of the investment, the
15 prudence standard is an objective standard. Accordingly, a determination of prudence does not
16 necessarily turn on the utility's subjective rationale for the investment at issue or the process the
17 utility used to make the investment decision. These points were made clear in the Commission's
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21 ¹⁰ *In the Matter of Portland General Electric Co. Application to Amortize the Boardman Deferral*, Docket
22 No. UE 196, Order No. 09-046 at 7-8.

23 ¹¹ *In the Matter of Portland General Electric Co. Annual Power Cost Update Tariff*, Docket No. UE 228,
24 Order No. 11-432 at 3.

25 ¹² *In re PGE*, UE 102, Order No. 99-033 at 36-37. See Staff/1100, Colville/2, lines 12 - Colville/3, line 5.

26 ¹³ *In re Transition Costs*, UM 834, Order No. 98-353 at 9 (Commission does not apply "a [prudence]
standard that * * * focuses on the outcome of the utility's decisions.")

1 2002 order in Docket No. UM 995 addressing whether PacifiCorp prudently maintained one of
2 its coal-fired plants and entered into certain wholesale sales agreements.¹⁴

3 In Docket No. UM 995, the Commission addressed whether PacifiCorp should recover
4 costs associated with a forced outage at one of its coal plants and associated with serving
5 wholesale sales contracts. Industrial Customers of Northwest Utilities (ICNU) argued that
6 PacifiCorp had not met its burden of proof that it prudently managed its coal plant or prudently
7 entered into contracts to sell power because PacifiCorp did not present substantive evidence
8 about: (a) what information the company at the time it extended the inspection interval at a coal
9 plant that subsequently had a forced outage; and (b) PacifiCorp's decision making process in
10 entering into the challenged wholesale sales contracts.¹⁵ The Commission disagreed with
11 ICNU.¹⁶

12 The Commission concluded that contemporaneous documentation is useful in a prudence
13 review to show the nature of the information available at the time of the challenged transactions,
14 but that such evidence is not a prerequisite to establishing the prudence of a utility's actions,
15 because prudence determinations are based on an objective standard of reasonableness.¹⁷ The
16 Commission held that if the record demonstrates that a challenged business decision was
17 objectively reasonable, taking into account established historical facts and circumstances, the
18 utility's decision should be upheld as prudent even if the record lacks detail on the utility's actual
19 subjective decision making process.¹⁸

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22 ¹⁴ *In the Matter of Application of PacifiCorp for an Accounting order Regarding Excess net Variable*
23 *Power Costs*, Docket No. UM 995, Order No. 02-249.

24 ¹⁵ *Id.* at 5.

25 ¹⁶ *Id.* at 8.

26 ¹⁷ *Id.*

¹⁸ *Id.*

1 This standard should not be interpreted to mean that evidence regarding the utility's
2 decision-making process, *e.g.*, evidence that the process was deficient, is not relevant to the
3 determination of prudence. A utility's decision-making process is generally a primary
4 consideration in a prudence review, however there may be circumstances, such as in Docket No.
5 UM 995, when a utility is able to overcome the inability to explain its internal activities and
6 establish a particular action is prudent.

7 Both Staff and CUB testified regarding infirmities in how Idaho Power managed its
8 investment in the Jim Bridger Unit 3 Scrubber Upgrade.¹⁹ While evidence regarding these
9 infirmities is not dispositive of whether the investment itself was prudent under the
10 Commission's prudence standard, the evidence can be relevant to determining prudence. And, as
11 Staff notes in its testimony, this docket provides the Commission opportunity to clarify its
12 expectations with respect to analysis underlying future capital investments.

13 **III. The Scrubber Upgrade should be included in Idaho Power's rate base.**

14 **a. The Scrubber Upgrade is used and useful.**

15 CUB asserts that while the Scrubber Upgrade may be "used," it is not yet "useful"
16 because "a separate investment in [selective catalytic reduction (SCR)] technology will be
17 needed to bring the plant into compliance with [Regional Haze Rule] standards."²⁰ Because the
18 Scrubber Upgrade is useful by itself, Staff disagrees with CUB's argument.

19 The "used and useful" standard stems from ORS 757.355. That statute provides, in
20 pertinent part:

21 [A] public utility may not, directly or indirectly, by any device, charge, demand,
22 collect or receive from any customer rates that include the costs of construction,
23 building, installation, or real or personal property not presently used for providing
utility service to the customer.

24 ¹⁹ See *e.g.*, Staff/1100, Colville/10 – Colville/25.

25 ²⁰ CUB/400, Feighner-Jenks/6. See also CUB/300, Feighner-Jenks/3 ("The scrubber upgrade is only
26 useful if, when paired with other controls, the set of controls collectively allow the plant to meet the
Regional Haze Rules.").

1 The Scrubber Upgrade at Jim Bridger Unit 3 was designed and installed to remove SO₂
2 from the unit's emissions, reducing them to 0.15 lb/mmBtu. The engineering, procurement and
3 construction contract that PacifiCorp entered into for the Scrubber Upgrade includes a
4 performance guarantee.²¹ With the Scrubber Upgrade, Jim Bridger Unit 3 will meet the Regional
5 Haze Rule SO₂ emissions reduction imposed on the plant under the operating permits issued by
6 the State of Wyoming.²² The SO₂ emission reduction from the Scrubber Upgrade is also
7 sufficient to comply with the National Air Ambient Air Quality Standards for SO₂.²³ Further, the
8 SO₂ reduction from the Scrubber Upgrade will allow PacifiCorp and Idaho Power to use reduced
9 SO₂ emissions as a surrogate for reduction to Mercury emissions required by the Mercury and
10 Air Toxics Standards ("MATS") that became final on April 16, 2012.²⁴

11 "Because the upgrades are necessary to bring the Unit into compliance, [Staff] concludes
12 the upgrades are used to provide utility service to customers."²⁵ In other words, the Scrubber
13 Upgrade is both used and useful.

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15 **b. The Scrubber Upgrade is prudent.**

16 CUB argues that Idaho Power's Scrubber Upgrade investment was imprudent because
17 Idaho Power did not analyze, prior to deciding to proceed with the Scrubber Upgrade, whether
18 replacing Jim Bridger Unit 3 with another resource would have been more cost effective than

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20 ²¹ UE 246 PAC/500, Teply/83, lines 15-19.

21 ²² See UE 246 PAC/500, Teply/81, lines 1-10 (discussing requirements of Wyoming's MD-1552A permit).

22 ²³ See Idaho Power/1300, Carstensen/2.

23 ²⁴ See UE 246 PAC/500, Teply/82 ("An SO₂ emissions limit of 0.20 pounds SO₂ per MMBtu is the surrogate for MATS acid gases emissions compliance, and a PM emissions limit of 0.030 pounds filterable PM per MMBtu is the surrogate for MATS non-mercury metals emissions compliance. As such, completion of the [Scrubber Upgrade] with performance requirements [described earlier in testimony] and contact guarantees * * * is expected to support compliance with those portions of the MATS."). See also Staff/1000, Colville/5, line 16 to Colville/6, line 2 (Staff agreeing with Idaho Power that Scrubber Upgrade will support compliance with post-2018 RHR requirements and MATS).

26 ²⁵ Staff/1000, Colville/5, line 22 to Colville/6, line 2.

1 investing in the necessary upgrades to meet requirements imposed under the Clean Air Act.
2 Staff agrees that there were infirmities in Idaho Power's decision-making process.²⁶ Ultimately,
3 however, Staff believes that based on the information known or reasonably knowable at the time
4 Idaho Power decided to make the investment and known or knowable during the period over
5 which PacifiCorp implemented the decision, a reasonable utility would have proceeded with the
6 Scrubber Upgrade as Idaho Power did and thus, the Scrubber Upgrade was a prudent investment.

7 The most significant evidence regarding the prudence of the Scrubber Upgrade is found
8 in analysis conducted by PacifiCorp in 2008 and updated in connection with PacifiCorp's
9 pending Oregon rate case (Docket No. UE 246). Prior to the time Idaho Power and PacifiCorp
10 decided to proceed with the Scrubber Upgrade in late 2008, PacifiCorp conducted a present
11 value revenue requirement differential (PVRR(d)) analysis to determine whether the least cost
12 method of complying with certain environmental regulatory requirements was the Scrubber
13 Upgrade or idling Jim Bridger Unit 3 in 2008 and replacing the generation with market power
14 purchases.²⁷ PacifiCorp calculated PVRR(d) between the two options by subtracting fuel, O&M,
15 environmental emissions cost, and on-going and "Comprehensive Air Initiative" capital revenue
16 requirement cost (including the cost of a SCR) through the end of the unit's depreciable life.²⁸
17 PacifiCorp derived the revenue using a September 30, 2008 PacifiCorp official price curve at a
18 corresponding CO₂ price of \$8 per ton beginning in 2013.²⁹

19 The PVRR(d) resulting from the analysis described above was a positive differential of
20 **[begin confidential]** **[end confidential]** between installing the Scrubber
21 Upgrade and idling Jim Bridger Unit 3 in 2008.³⁰ PacifiCorp states, and Staff agrees, that the

22 ²⁶ See e.g., Staff/1100, Colville/18, lines 7-12; Staff/1100, Colville/19, lines 4-11; and Staff/1100,
23 Colville/20, lines 10-16.

24 ²⁷ UE 246 PAC/500, Teply/84, line 17- Teply/23 to 85/line 5; UE 233 Staff/1100, Colville/6, lines 8-13;
25 UE 233 Staff/1200, Colville/

26 ²⁸ UE 246 PAC/500, Teply/85, lines 2-5.

27 ²⁹ UE 246 PAC/500, Teply/85, lines 5-7.

28 ³⁰ UE 246 PAC/500, Teply/85, lines 8-11.

1 results of that evaluation demonstrated that it was beneficial to customers to invest in emissions
2 control equipment for Jim Bridger Unit 3, as opposed to idling the facility and replacing with
3 market power purchases.³¹

4 In response to CUB's criticism in Docket No. UE 246 that the assumed 2008 idling date
5 was inappropriate because no circumstance would have required PacifiCorp to idle the plant as
6 early as 2008, PacifiCorp replicated the 2008 PVRR(d) analysis assuming the plant would be
7 idled in 2014. That revised analysis, which uses the 2008 data but changes the idling date from
8 2008 to 2014, shows the revenue requirement differential (PVRR(d)) benefit to customers from
9 the environmental compliance investments for Jim Bridger Unit 3 is **[begin confidential]**

10 **[end confidential]**.³²

11 CUB argued the results of the 2008 NVPRR(d) analysis are not persuasive because
12 PacifiCorp: (1) used an unrealistic early-closure date (2008); (2) used a gas price forward curve
13 that did not reflect the fact the economy was sliding into a deep recession; (3) did not include
14 anticipated costs for additional Clean Air Act compliance investments other than the Scrubber
15 Upgrade; (4) did not test a variety of generation alternatives to replace Bridger Unit 3 output; and
16 (5) did not include alternate closure dates.³³ As noted above, PacifiCorp addressed CUB's first
17 concern regarding the NVPRR(d) analysis by replicating the analysis assuming PacifiCorp
18 would idle the plant in 2014 rather than 2008. Doing so established that a large differential still
19 exists after changing the closure date of Bridger Unit 3 from 2008 to 2014.

20 PacifiCorp witness Teply replied to some of CUB's other criticisms, testifying that CUB
21 overstated the impact the decreasing gas prices would have had on its analysis and that
22 PacifiCorp did, in fact, include the costs of a SCR in the 2008 analysis and did so again in the
23 Docket No. UE 246 analysis.³⁴

24 ³¹ UE246 Pac/ ; UE 233Staff, Colville/

25 ³² Staff/1200, Colville/4, line 15 to Colville/6, line 4.

26 ³³ CUB/300, Feighner-Jenks/12-14.

³⁴ UE246 PAC/1500, Teply/24-28.

1 The revised PVRR(d) analysis does not correct for all infirmities in Idaho Power's pre-
2 investment process that have been identified by Staff and CUB. However, Staff concludes that
3 the PVRR(d) between idling the plant in 2014 and proceeding with the Scrubber Upgrade (and
4 the subsequent investment in a SCR to reduce NO_x emissions) is so large that correcting for
5 remaining infirmities in the pre-investment decision-making process would not have changed a
6 reasonable utility's decision to proceed with the investment.³⁵

7 One of the underpinnings of CUB's arguments in this case is that Idaho Power was
8 imprudent for failing to follow Portland General Electric's ("PGE") lead in Oregon. CUB argues
9 that Idaho Power (and PacifiCorp) should have employed an analysis like PGE used regarding its
10 Boardman coal plant to determine whether some sort of early closure of Bridger Unit 3 would
11 have been least cost, as opposed to continued operation with the Scrubber Upgrade, the SCR, and
12 any other clean air compliance investments that may prove to be necessary.³⁶ However, Idaho
13 Power and PacifiCorp made the decision to invest in the Scrubber Upgrade in late 2008, when it
14 was not all clear whether PGE's efforts in Oregon would be successful. Staff testified that in this
15 circumstance, neither Idaho Power nor PacifiCorp were imprudent for failing to replicate PGE's
16 BART analysis prior to investing the Scrubber Upgrade.³⁷

17 In any event, absent from the record is factual support for CUB's implicit assumption that
18 that the State of Wyoming would have been willing, in the relevant time period, to issue or revise
19 operating permits for Jim Bridger Unit 3 and revise its SIP to remove the requirements for
20 installation of the Scrubber Upgrade and the installation of a SCR no later than December 31,
21 2015, in exchange for PacifiCorp's and Idaho Power's agreement to close the plant some 11-16
22 years in the future.³⁸

23 ³⁵ Staff/1200, Colville/5, line 19 to Colville/6, line 2.

24 ³⁶ See e.g., UE 246 PAC/2000, Teply/3, lines 8-10 ("[N]egotiations and settlement of the Boardman plant
25 occurred *after* the company's investment decisions at issue in this case.").

26 ³⁷ Staff/1000, Colville/25, line 8- Colville/26, line 6.

³⁸ Cf. UE 246 PAC/2000, Teply/18, line 21 – Teply/19, line 2 ("[I]t is highly unusual to be able
to negotiate [with state and federal regulators] non-compliance with established regulations,

1 Wyoming's 309 SIP is intended to allow Wyoming to meet emission reduction goals by
2 2018. According to Idaho Power witness Carstensen, the Regional SO₂ Milestone and Backstop
3 Trading Program in Wyoming, Utah, and New Mexico includes annual emissions targets for the
4 years 2003 to 2018. Emissions targets under the program represent "reasonable progress" under
5 the RHR and the failure to meet the annual targets would trigger increased emissions regulations,
6 including implementation of an emissions cap and trading program.³⁹

7 It is not clear whether simply replacing the installation of emission controls at the Jim
8 Bridger Unit 3 in the 2011-2015 period with a proposed closure of the unit sometime between
9 2020 and 2025 could impair Wyoming's ability to meet the 2018 emission reduction goals of the
10 backstop plan. Accordingly, it is unclear whether Wyoming would be free to revise its SIP in the
11 manner CUB suggests without concurrence from the other states participating in the SO₂
12 Regional Milestone and Backstop Trading Plan.

13 As discussed in Staff's testimony, Idaho Power was not aware of the 2008 PVRR(d)
14 analysis when it decided to invest in the Scrubber Upgrade or what such an analysis would show
15 assuming a 2014 idling date as opposed to a 2008 idling date. However, whether Idaho Power's
16 investment in the Scrubber Upgrade was prudent turns on whether the investment was
17 objectively reasonable. It was.

18 The information used in the PVRR(d) analysis comparing the option of idling the plant in
19 2014 and replacing with market purchase with the option of proceeding with the Scrubber
20 Upgrade (and other Clean Air Investments) as well as the results of this analysis reasonably
21 knowable at the time Idaho Power decided to proceed with the Scrubber Upgrade. Staff
22 concludes that an objectively reasonable utility, relying on this information, would have
23 proceeded with the Scrubber Upgrade. Accordingly, even though Idaho Power's pre-investment
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25 particularly in states like Utah and Wyoming where coal-fueled generation is an important part
26 of the regional economy.").

³⁹ See Idaho Power/1300, Carstensen/3, lines 4-12.

1 process had significant infirmities, Staff concludes its investment in the Scrubber Upgrade for
2 Jim Bridger Unit 3 is prudent.⁴⁰

3 DATED this 4th day of October 2012.
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5 Respectfully submitted,

6 ELLEN F. ROSENBLUM
7 Attorney General

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9 _____
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11 Senior Assistant Attorney General
12 Of Attorneys for the Staff of the Public Utility
13 Commission of Oregon
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⁴⁰ See Staff/1100, Colville/7, lines 3-20.

CERTIFICATE OF SERVICE

I hearby certify that on October 4, 2012, I served the foregoing STAFF PRE-HEARING BRIEF upon the persons named on the service list below who have waived such service by mail, by serving a full, true and correct copy thereof at their e-mail address as follows:

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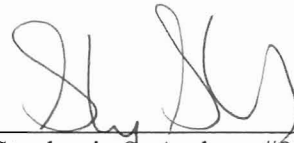
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