Davison Van Cleve PC
Attorneys at Law
TEL (503) 241-7242 ● FAX (503) 241-8160 ● jog@dvclaw.com
Suite 400
333 SW Taylor
Portland, OR 97204

April 28, 2015

***Via Electronic Filing***

Public Utility Commission of Oregon
Attn: Filing Center
3930 Fairview Industrial Drive SE
Salem OR 97302

Re: PACIFICORP dba PACIFIC POWER
Application for Approval of Deer Creek Mine Transaction
**Docket No. UM 1712**

Dear Filing Center:

Enclosed for filing in the above-referenced docket, please find the Reply Brief of the Industrial Customers of Northwest Utilities.

Thank you for your assistance. If you have any questions, please do not hesitate to call.

Sincerely,

*/s/ Jesse O. Gorsuch*
Jesse O. Gorsuch

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

**UM 1712**

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| In the Matter of | ) |
| | ) |
| PACIFICORP d/b/a PACIFIC POWER | ) |
| | ) |
| Application for Approval of Deer Creek Mine Transaction. | ) |
| | ) |
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# REPLY BRIEF OF THE

# INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES

**April 28, 2015**

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## I. INTRODUCTION

In reply to opening briefing,[1/] the Industrial Customers of Northwest Utilities ("ICNU") continues to request that the Oregon Public Utility Commission ("OPUC" or the "Commission") reject the stipulation filed by PacifiCorp (or the "Company") and the Citizens' Utility Board of Oregon ("CUB") (collectively, the "Settling Parties") on March 25, 2015 ("Stipulation").

The Settling Parties concede on brief that the proposed Deer Creek Mine closure tariff, Schedule 198, is a single-issue ratemaking request. Contrary to the contentions of the Settling Parties, ICNU maintains that the Commission's prohibition against single-issue ratemaking is not a loose policy guideline that can be set aside in this proceeding. ICNU further maintains that a finding that the Company's decision to enter into the Transaction was prudent—i.e., considering the Transaction as a non-severable whole, as explicitly requested by the Settling Parties—is presently unnecessary and would be improper. Finally, if ratemaking is approved in this docket, the Settling Parties have failed to demonstrate that a two-year amortization period, including a 3.31% interest rate, accords with Commission precedent.

## II. REPLY

### A. Precedent Establishing the Prohibition on Single-Issue Ratemaking Should Not Be Reversed

#### 1. Rejection of the Settling Parties' Ratemaking Request Will Not Affect the Company's Ability to Close the Transaction

The Company has confirmed that, unlike in Oregon, PacifiCorp has requested "the deferral of Transaction costs for *future recovery*" in Idaho, Utah, and Wyoming.[2/] In other words, Company requests for deferred accounting in other states plainly demonstrates that

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1/ ICNU notes a citation error in Opening Brief of ICNU ("ICNU Brief"). The citation to "2000 WL 1288653" in footnote 66 should have been placed in footnote 70, corresponding to Order No. 00-406.

2/ ICNU/201 (Company response to ICNU Data Request ("DR") 5.82) (emphasis added).



DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

PacifiCorp does not consider immediate rate increase approvals as a necessary prerequisite for the successful closing of the Transaction.

Similarly, the Settling Parties contend that approval of Transaction components are "require[d]," or that a delay in determination could "undermine the Transaction," not in the context of an ultimate ratemaking determination in this docket, but only as to a prudence determination.[3/] Yet, even this claim, as to the necessity of a prudency finding, is without merit. For instance, Commission orders cited by both the Settling Parties and ICNU establish that a finding of prudence is *not* required, either for a deferred accounting approval or even for an accounting order authorizing the Company to track mine closure costs as a regulatory asset.[4/] Thus, the "need" for a prudency determination in this proceeding cannot be supported, because if PacifiCorp had simply requested the accounting treatment in Oregon that it sought in other Transaction states, then the Commission could have approved the Company's request without ever considering the prudence of the Company's decisions in this docket.[5/]

**2. Arguments for Single-Issue Ratemaking Are Not Supported on a Legal or Factual Basis**

**a. The Settling Parties Attempt to Revive an Argument for "Discretionary" Single-Issue Ratemaking Rejected in the Trojan Proceeding**

The legal controversy in this docket regarding single-issue ratemaking concerns only whether the Commission can carve out exceptions to the ratemaking prohibition on a discretionary, case-by case basis. "Consistent with its testimony position" that "[p]roviding PacifiCorp the ratemaking treatment it seeks violates the prohibition on single-issue ratemaking,"

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3/ Compare Joint Opening Brief of PacifiCorp and CUB ("Joint Brief") at 12, with id. at 17-18.

4/ See, e.g., Re PacifiCorp, Docket No. UM 1047, Order No. 02-224 at 1 (Mar. 29, 2002); Re PacifiCorp, Docket No. UM 1298, Order No. 07-375 (Aug. 23, 2007); Re Nw. Natural Gas Co., Docket No. UM 1680, Order No. 14-041 (Feb. 5, 2014).

5/ See also Staff/100, Wittekind/3 (explaining why it is not actually necessary for PacifiCorp to receive regulatory approval by May 31, 2015, in order to close the Transaction).



DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

CUB reaffirms in briefing that "the Transaction constitutes single-issue ratemaking."[6/] Nevertheless, CUB argues that "unique circumstances of the Transaction, coupled with the benefits to customers, weigh in favor of *setting the policy aside for this case*."[7/] Likewise, although recognizing "the importance of [the Commission's single-issue ratemaking] principal [sic]," the Settling Parties contend that "this case presents unique and particular circumstances," allegedly supporting "immediate implementation of the Deer Creek Mine Closure tariff."[8/]

In arguing that the Commission should set "aside" the single-issue ratemaking prohibition in "this case," the Settling Parties are making the same argument raised by the Utility Reform Project ("URP") and rejected by the Commission in the Trojan proceeding.[9/] As noted in the Written Objections of ICNU to the Stipulation ("ICNU Written Objections"), the Commission affirmed a ruling in the Trojan proceeding which expressly rejected the contention of URP that the Commission *could* restrict issues in a ratemaking proceeding, even down to single-issue ratemaking.[10/]

Like the Settling Parties effectively do in this case, URP and another party in the Trojan proceeding "fundamentally challenge[d] whether the Commission is prohibited from limiting issues in a rate case, or even from engaging in single-issue ratemaking. The

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6/ Opening Brief of the Citizens' Utility Board of Oregon ("CUB Brief") at 1-2 (*quoting* CUB/100, Jenks-McGovern/16).

7/ Id. at 2 (emphasis added).

8/ Joint Brief at 17.

9/ PacifiCorp refers to Commission Order No. 08-487 as the "Trojan decision." PAC/400, Dalley/3-4 (*citing* Re Portland Gen. Elec. Co. ("PGE"), Docket Nos. DR 10, UE 88, and UM 989, Order No. 08-487 (Sept. 30, 2008), aff'd Gearhart v. Pub. Util. Comm'n of Oregon, 356 Or 216 (2014)). Using the same convention, the "Trojan proceeding" refers to Docket Nos. DR 10, UE 88, and UM 989.

10/ ICNU Written Objections at 2-3, n.6 (*citing* Re PGE, Docket Nos. DR 10, UE 88, and UM 989, Order No. 04-597 at 8, App. A at 12, 17 (Oct. 18, 2004), aff'd Order No. 08-487 at 52, aff'd Gearhart v. Pub. Util. Comm'n of Oregon, 356 Or 216 (2014)).



DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Commission may restrict issues in a ratemaking proceeding, they assert …."[11/] The Commission affirmed the ruling rejecting URP's discretionary limitation argument, however, including a determination that "the rule against single-issue ratemaking" requires the Commission "to consider *all* aspects pertinent to the utility's operations."[12/] This led to the conclusion—coupled with citation to appellate authority, which would decisively undermine a "discretionary" view of the Commission's ability to set "aside" the prohibition on a case-by-case basis, as if it were a mere "policy"—that the Commission could not simply focus on an "isolated rate component, without considering whether other factors offset this amount. Doing so would constitute single-issue ratemaking, which is prohibited."[13/]

The Settling Parties do not cite to any relevant precedent in briefing that would militate against the Commission's affirmation of the rule prohibiting single-issue ratemaking in this docket. For instance, CUB cites to two orders which allegedly demonstrate that the Commission may simply set "aside the general policy against single-issue ratemaking."[14/] But, in discussing the legislative grant for deferred accounting, these orders only demonstrate the very point ICNU made in its opening brief (including citation to the same page of the same order cited by CUB): "The exception to the prohibition against single-issue ratemaking is deferred accounting. While single-issue ratemaking does not account for offsets and can lead to an overstated revenue requirement, 'Oregon's deferral statute recognizes this issue and mitigates the

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[11/] Docket Nos. DR 10, UE 88, and UM 989, Order No. 04-597, App. A at 12. The other party making that contention was comprised of class action intervenors, Morgan, Gearhart and Kafoury Brothers, LLC, referred to in the ruling as "MGK." Id., App. A at 1.

[12/] Id. at 8, App. A at 17 (emphasis in original).

[13/] Id. at 6 (*citing* American Can v. Lobdell, 55 Or App 451, 454-55 (1982)).

[14/] CUB Brief at 3 & nn.8-12. But see ICNU Brief at 13-14 (discussing the Commission's expectation in Docket Nos. UM 1520 & UG 204 regarding future review of "entire resources portfolios" in similar "Transaction" circumstances, thereby contraverting any notion that the Commission was establishing a single-issue ratemaking standard, not to mention the inapposite context of the original deferred accounting request in those consolidated dockets).



DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

problem by requiring the Commission to conduct an earnings review of deferred amounts prior to amortization. ORS § 757.259(5).'"[15/]

Thus, the prohibition against single-issue ratemaking is not a malleable, "general policy," but a steadfast rule which allows only for a lone exception by statutory authority—an exception which includes an earnings review through which the Commission recognized that the legislature intentially mitigated the offset problem the rule is designed to prevent. Indeed, even CUB recognized the existence of only a single, legislatively authorized exception to the rule in initial testimony, stating that "[d]eferrals are *the* exception to the prohibition on single-issue ratemaking,"[16/] not one of many varieties of "exceptions."[17/]

Other authority cited by the Settling Parties, supposedly demonstrating discretionary exceptions to the rule prohibiting single-issue ratemaking, has already been shown in opening briefing to be inapposite. For instance, the Settling Parties rely heavily on Idaho Power Company's ("Idaho Power") Boardman decision in docket UE 239, which was dependent upon an original Boardman general rate case ("GRC") order, as well as Idaho Power's general rate revision in docket UE 248, which was itself a GRC quite unlike the current proceeding.[18/] Likewise, citation to orders adopting sipulations, which, by their express terms, cannot be used to establish precedent, do nothing to establish the Settling Parties' "discretionary" single-issue

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[15/] ICNU Brief at 5 (*quoting* Re Nw. Natural Gas Co., Docket No. UG 221, Order No. 12-437 at 26 & n. 59 (Nov. 16, 2012)).

[16/] CUB/100, Jenks-McGovern/17 (emphasis added).

[17/] CUB went so far as to testify that the Application's alternative, "catch-all" style "request for a deferral was a smart move by PacifiCorp in light of the prohibition on single-issue ratemaking," effectively conceding that the "discretionary" exception it now promotes does not really exist. Id. at 18.

[18/] Compare CUB Brief at 3-4 & nn.13-14, and Joint Brief at 17-18 & nn.81-82, with ICNU Brief at 11-13 & nn.45-51, 56-57.



DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

ratemaking theory.[19/] As the Commission explains: "any ratemaking actions taken pursuant to approved stipulations do not have any precedential value.[20/]

**b. While Legally Insufficient in Any Event, the Alleged Factual Bases for Single-Issue Ratemeking Do Not Withstand Scrutiny**

CUB contends that "unique circumstances of the Transaction, coupled with the benefits to customers, weigh in favor of" single-issue ratemaking, while the Settling Parties jointly argue that "unique and particular circumstances" justify "immediate implementation of the Deer Creek Mine Closure tariff."[21/] Given the strong legal precedent establishing the rule against single-issue ratemaking, ICNU does not believe any consideration is necessary concerning the claimed factual bases supporting single-issue ratemaking. Nevertheless, looking no further than the initial testimony of CUB, the record in this proceeding demonstrates that neither unique and particular circumstances nor purported customer benefits support a grant of single-issue ratemaking in this proceeding.

For instance, following significant discovery after the filing of the Company's direct case months earlier, and after participating in two workshops and two separate settlement conferences,[22/] CUB testified prior to the Stipulation filing that "there is *no evidence* on the record in this case to support a finding *that rates need to be raised* in order to allow PacifiCorp to recover its costs."[23/] Just twenty days later, however, and despite no new evidence of "unique circumstances" or additional "benefits to customers" following a final settlement conference and

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19/ Compare Joint Brief at 18 & n.83, with ICNU Brief at 12-13 & nn.51-54, 59.
20/ Re PacifiCorp, Docket No. UE 245, Order No. 12-409 at 17 (Oct. 29, 2012).
21/ CUB Brief at 2; Joint Brief at 17.
22/ Joint Brief at 9.
23/ CUB/100, Jenks-McGovern/16 (emphasis added).



DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

the filing of the Company's reply testimony, CUB joined PacifiCorp in asking the Commission to approve a *$31.6 million rate increase*.[24/]

## B. A "Blanket" Transaction Prudency Finding Would Be Inappropriate Based on the Insufficiency of Huntington Coal Supply Agreement ("CSA") Protections and Issues Concerning the Retiree Medical Obligation ("RMO") Loss

ICNU recommends against approval of the request for a determination "that the Company's decision to enter into the Transaction, *as a whole*, is prudent,"[25/] given evidence in the record establishing that prudency determinations should not be made on the following Transaction components: 1) Huntington CSA; and 2) RMO Settlement Loss.

### 1. Ratepayers Are Not Assured of Protection Under the Huntington CSA

In testimony, ICNU witness Bradley G. Mullins recommended "that the Commission find that the Transaction is not in the public interest"—never mind prudent—"unless the Company were to agree that it would exclude any long-term coal contract liabilities or costs related to the Huntington CSA in any future analysis evaluating the retirement of the Huntington facility."[26/] Mr. Mullins added that the Company should also "agree to exclude from rates any actual Huntington CSA contract liabilities actually incurred to the extent Huntington is retired prior to the end of its useful life."[27/]

Staff also supports a condition that eliminates the risk of ratepayer harm from the Huntington CSA, after maintaining its objection to the Stipulation on the basis that "it does not protect customers from the risks of the new long-term CSA."[28/] Sierra Club devotes its entire brief to expound upon the evidence supporting the following position: "It is not prudent to bind

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[24/] Stipulation at ¶¶ 11-13, Exh. A at 3.
[25/] Joint Brief at 11 (emphasis added).
[26/] ICNU/100, Mullins/29-30.
[27/] Id. at 30.
[28/] Staff's Opening Brief at 2.



DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

ratepayers to a 15-year long-term coal contract."[29/] Like Staff and ICNU, Sierra Club also recommends that the Commission withhold a prudency determination for the presently constituted Huntington CSA, and requests that the Commission require PacifiCorp to "hold ratepayers harmless for any and all penalties resulting from an early exit from the CSA."[30/]

The most persuasive evidence against a finding of Transaction prudency, however, may perhaps be found in examining CUB's unjustifiable reversal on the sufficiency of CSA protections. In initial testimony,[31/] CUB expressed relevant concern: a) that, "on its face the [environmental] clause seem [sic] open to interpretation"; b) that "one could interpret the provision in a way that offers … less protection"; and c) in noting the "huge" "risk of environmental regulations affecting coal plant operations."[32/] CUB also testified that PacifiCorp had "refused … to explicitly shoulder responsibility should some 'adverse' regulatory event occur."[33/] This prompted CUB to conclude that the entire "prudency of the coal contract rests on what level of protection does this environmental clause provide to customers."[34/] Thus, CUB initially took the position that the CSA would be prudent only if customers "are … protected" from take-or-pay charges arising from a plant shut down, due to "economic reasons that are caused by environmental regulations."[35/]

According to the Settling Parties, PacifiCorp "addressed the parties' concerns" about the Huntington CSA provision (including CUB's concerns), through "reply testimony."[36/]

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29/ Sierra Club's Initial Brief at 1.
30/ Id. at 10.
31/ CUB alternately refers to the CSA liability provision at issue as the "take or pay provision," the "environmental provision," or the "environmental clause." CUB/100, Jenks-McGovern/10-13.
32/ Id. at 11-12.
33/ Id. at 12.
34/ Id. at 13.
35/ Id.
36/ Confidential Joint Brief in Support of Stipulation ("Stipulation Brief") at 8 & n.33 (*citing* PAC/500, Crane/5-11; PAC/700, Schwartz/3-5).



DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

ICNU finds this to be a less than persuasive explanation. The referenced pages of Mr. Schwartz's reply testimony simply refer to Ms. Crane's discussion of "a broad termination provision" in the CSA.[37/] For her part, Ms. Crane testifies to the Company's staunch opposition to the imposition of any CSA conditions which would "hold customers harmless from any potential risk associated with the take-or-pay provisions."[38/] Thus, in an irrational sequence of reasoning, the Settling Parties effectively allege that CUB's initial position—that CSA prudency rested upon whether customers "are" protected against take-or-pay charges—has now been "addressed" by the Company's definitive stand against *any* conditions that would hold customers harmless from take-or-pay provision risks.

Likewise, CUB has explained that its support for the Stipulation is "premised on its understanding that customers *will* be protected from paying for take or pay charges if the plant is shut down or converted to gas for economic reasons that are caused by environmental regulations."[39/] According to CUB, it "has determined that customers will be adequately protected from paying" such charges, since PacifiCorp reply testimony "makes clear that the provision is *intended* to cover" such circumstances.[40/]

But, concerns over intent and interpretation were precisely the reason CUB refused to find the CSA provision prudent in the first place—thus, nothing has changed, including a crucial fact which CUB observed from the beginning, that the Company has "refused … to explicitly shoulder responsibility should some 'adverse' regulatory event occur," with

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37/ PAC/700, Schwartz/4-5.

38/ PAC/500, Crane/8.

39/ ICNU/301, Mullins/8-10 (CUB response to Sierra Club DR 1-1(d)) (emphasis added).

40/ Id. (CUB response to Sierra Club DR 1-1(c)) (emphasis added). CUB responded in the same way when asked by ICNU whether it still maintained its original testimonial position, "that the Huntington coal supply agreement contains a 'take or pay' provision, or environmental 'clause which could make the contract case more risky that the market case.'" Id. at 4 (CUB response to ICNU DR 007). In the same response, CUB also asserted the inconsistent position that it stood by its original testimony, without correction, in spite of its present support for the Stipulation. Id.



DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

PacifiCorp choosing instead to "merely" depend upon later intent and interpretation determinations by agreeing that the "contract speaks for itself."[41/] Moreover, CUB's determination that customers "will" be protected is flawed and unconvincing for purposes of a prudency determination, given CUB's concession that, if "the Company subsequently requests recovery of take-or-pay charges from customers, CUB will likely oppose ratepayers bearing the burden of such charges."[42/] Obviously, such a scenario will never occur if customers truly "will" be protected from take-or-pay charges, as CUB now contends.

**2. The RMO Settlement Loss Is Unrelated to the Transaction, in Addition to Being Unsupported**

A finding that the Company's decision to enter into the Transaction was prudent, "as a whole," would require the Commission to ignore the plain evidence in the record establishing that the RMO loss is unrelated to the Transaction, in addition to being unsupported on its own merits.[43/] The Settling Parties argue, however, that it is still "appropriate to include the [RMO] settlement as part of the Transaction because without the leverage provided by the Transaction, the Company could not have achieved the favorable settlement."[44/]

But, according to PacifiCorp, in agreeing to the RMO settlement, the United Mine Workers of America were "relying on the Company's intent to sell or *close the mine* in reaching the settlement agreement."[45/] Thus, given that both the Market and Transaction case scenarios involved an intent to "close the mine,"[46/] the "leverage" necessary to purportedly achieve a "favorable settlement" would have been present even if the Company had adopted the Market

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41/ CUB/100, Jenks-McGovern/12 (*quoting* CUB/102, Jenks-McGovern/1).
42/ ICNU/301, Mullins/8-10 (CUB response to Sierra Club DR 1-1(c)).
43/ See. e.g., ICNU Brief at 22 (*citing* ICNU/100, Mullins/28-29).
44/ Joint Brief at 17.
45/ Sierra Club/109, Fisher/1 (Company response to Sierra Club DR 2.6) (emphasis added).
46/ PAC/100, Crane/26.



DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

case approach. In other words, there is no inherent and inextricable link between the RMO settlement loss and the rest of the Transaction.

## C. The Reasonableness of ICNU Rate Proposals Is Not Diminished by the Settling Parties' Arguments in Brieifing

### 1. ICNU's Amortization and Interest Rate Proposals Are Reasonable

#### a. A Nine-Year Dynamic Amortization Period Is Equitable

In support of a two-year amortization period, the Settling Parties quote the same sentence of the Trojan decision relied upon by ICNU in support of a nine-year period, but the Settling Parties continue to overlook the main point of the Commission's finding.

While the Settling Parties' proposed two-year amortization period would undoubtedly provide "quicker recovery" to the Company, the proposal ignores the critically important requirement that an amortization period "equitably allocate" ratepayer "benefits and burdens."[47/] By contrast, ICNU's nine-year dynamic amortization proposal achieves an equitable allocation "while allowing quicker recovery to offset any increase in [PacifiCorp]'s risk profile," as compared to ICNU's original 14-year amoritization recommendation over the full Transaction term. Moreover, the Settling Parties' dogged focus on the "the current depreciable life of the mine," as a basis for a very short amortization period, runs counter to the Settling Parties' equally insistent argument that a net benefits test in this docket must incorporate the "long-term costs" of the Transaction.[48/]

The Settling Parties are also incorrect to assert that "the timing of customer benefits was not a factor the Commission considered in setting the amortization period in

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[47/] Joint Brief at 19 (*quoting* Docket Nos. DR 10, UE 88, and UM 989, Order No. 08-487 at 72).

[48/] Compare id. at 20, with Stipulation Brief at 6.



DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Trojan."[49/] Specifically, just before finding that a 10-year amortization period would "equitably allocate" ratepayer benefits and burdens, the Commission stated: "We do not believe … recovery in a relatively short period of time such as three or five years is reasonable because it would allocate a disproportionate share of burdens to a relatively small number of PGE's customers and would be inconsistent with the Commission's policies of promoting intergenerational equity …."[50/] Plainly, "the timing of customer benefits" was inseparable from the Commission's consideration of "intergenerational equity" in the Trojan decision, just as Mr. Mullins testified that a short amortization period in this proceeding would create "generational inequity."[51/]

**b. ICNU's Amortization Interest Rate Proposals Are Fair and Supported by Precedent**

According to the Settling Parties, "ICNU fails to note" that, in the Trojan decision, "[t]he Commission expressly rejected" an argument that an amortization rate based on cost of debt would allow a utility to earn a profit on undepreciated investment.[52/] Actually, the Settling Parties have failed to carefully read the ultimate finding in the Trojan decision.

Specifically, the Commission held that, in circumstances similar to the Deer Creek Mine closure, "it is most appropriate to choose an interest rate that is unrelated to utilities. This helps ensure that the rate reflects *solely* the time value of money and is not *in any way reflective* of PGE's opportunity to earn a profit on its rate base."[53/] The emphasized terms

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[49/] Joint Brief at 20. The Settling Parties also contend that ICNU conflates matching principle requirements related to deferred accounting and undepreciated investment statutes, but this is irrelevant and not worthy of discussion given the fundamental, intergenerational equity concerns implicated by the 15-year Transaction term.

[50/] Docket Nos. DR 10, UE 88, and UM 989, Order No. 08-487 at 72.

[51/] ICNU/100, Mullins/14. The Settling Parties do not levy any criticism against the "dynamic" component of ICNU's amortization proposal, obviating any need for further discussion as to its reasonableness. See, e.g., ICNU Brief at 19-20.

[52/] Joint Brief at 22-23.

[53/] Docket Nos. DR 10, UE 88, and UM 989, Order No. 08-487 at 73 (emphasis added).



DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

demonstrate that the Commission's decision to base the Trojan interest rate exclusively upon Treasury yields prevented the incursion of a profit element—i.e., the Treasury-only option ensured a rate based "solely" on the time value of money and absolutely excluded any profit opportunity. If the Commission had "expressly rejected" ICNU's argument that blending a cost of debt element into an amoritization rate inserts a profit element, then the Commission's ultimate conclusion in the Trojan proceeding would be nonsense, since there would be no need to distinguish between a Treasury-only option and a cost of debt model.

The Settling Parties also argue that CUB's reasoning and analysis in support of its original recommendation for a 1.51% interest rate, which ICNU supports, "actually demonstrates the unreasonableness of ICNU's proposed interest rate" of 1.92%.[54/] ICNU disagrees. While the Settling Parties explain that applying CUB's analysis to ICNU's recommendation using 10-year Treasury bonds produces a 246 basis point difference between current yields and 1994 levels,[55/] the Settling Parties "fail to note" that the larger spread in comparison to CUB's 5-year analysis is both reasonable and expected. That is, the longer the bond period analyzed, the greater the spread will necessarily be, given the stark contrast between the moderate inflation experienced in 1994 and the present era of *deflation*.

**2. Rate Adjustments Proposed by ICNU Have Not Been Convincingly Rebutted**

The Settling Parties do not offer substantive critique of proposed ICNU rate adjustments, excepting the inclusion of construction work in progress ("CWIP"). On this issue, the Settling Parties contend that ICNU has "failed altogether to address" Commission orders purportedly supporting the inclusion of CWIP associated with the Deer Creek Mine in rates, despite the fact that the mine is no longer used and useful. Rather, ICNU takes the position that

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[54/] Joint Brief at 24.

[55/] Id.



DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

the Settling Parties have altogether failed to discuss the controlling appellate precedent, even though ICNU quoted such precedent in written objections to the Stipulation.[56/]

In CUB v. OPUC, the Court of Appeals determined that, in the context of excluding costs related to property not actually providing utility service: "There is no logical basis for applying that principle only to property that is not *yet* reasonably necessary and actually used, but not to property that has *ceased* to be reasonably necessary and actually used."[57/] The Court also expressly found that ORS § 757.355 "was meant to apply … to CWIP" and "excludes all utility property that is not used for providing utility service, *without regard for whether the property was so used in the past*."[58/]

Thus, it is not ICNU that failed to address relevant and controlling legal authority in recommending that Deer Creek Mine CWIP should not be included in any rate increase approval. To the extent that the Settling Parties interpret Commission orders to contradict and supersede the Court of Appeals, ICNU submits that such an interpretation is misplaced.

## III. CONCLUSION

ICNU respectfully requests that the Commission approve the recommendations submitted in ICNU's Opening Brief, based upon the further support offered in this reply brief.

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56/ ICNU Written Objections at 6 (*quoting* CUB v. OPUC, 154 Or App 702, 710 (1998)).
57/ CUB v. OPUC, 154 Or App 702, 710 (1998) (emphasis in original).
58/ Id. (emphasis added).



DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Dated this 28th Day of April, 2015.

Respectfully Submitted,

DAVISON VAN CLEVE, P.C.

*/s/ Jesse E. Cowell*

Melinda J. Davison
Jesse E. Cowell
333 S.W. Taylor, Suite 400
Portland, OR 97204
(503) 241-7242 phone
(503) 241-8160 facsimile
mjd@dvclaw.com
jec@dvclaw.com
Of Attorneys for the Industrial Customers of Northwest Utilities