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March 16, 2018

VIA ELECTRONIC FILING AND U.S. MAIL

Attention: Filing Center
Public Utility Commission of Oregon
P.O. Box 1088
Salem, Oregon 97308-1088

Re: Docket UM 1909: Joint Utilities' Opening Brief

Attention Filing Center:

Attached for filing in the above-captioned docket is the Joint Utilities' Opening Brief. Attachment A contains eight audio files that will be provided on a CD and sent via U.S. mail to the Filing Center and parties on the service list.

Please contact this office with any questions.

Sincerely,

Katherine McDowell

Attachments

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

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

JOINT UTILITIES' OPENING BRIEF

March 16, 2018

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I. INTRODUCTION AND SUMMARY

This Opening Brief is submitted on behalf of all Oregon investor-owned electric and natural gas utilities, Portland General Electric Company ("PGE"), PacifiCorp d/b/a Pacific Power ("PacifiCorp"), Idaho Power Company ("Idaho Power"), Northwest Natural Gas Company ("NW Natural"), Avista Corporation ("Avista"), and Cascade Natural Gas Corporation ("Cascade") (collectively, "Joint Utilities"). Staff asked the Public Utility Commission of Oregon ("Commission") to open this docket to investigate the Commission's legal authority to defer capital costs, including the return *of* and the return *on* a utility's investment, under ORS 757.259.[1] No party has previously questioned the Commission's legal authority to allow deferred accounting of the revenue requirement associated with utility investments—including capital costs—and the Commission has exercised its discretion to approve many such deferrals since the passage of ORS 757.259 in 1987. Staff now claims that the Commission has acted unlawfully in approving revenue requirement deferrals. Staff's legal theory is that the term "expenses" in ORS 757.259(2)(e) excludes the return *on* utility investment. Staff concedes the legality of deferrals that include a return *of* utility investment, but asks the Commission to adopt a new blanket policy against such deferrals.[2]

Staff's position would represent a major change in long-standing Commission law and policy with no apparent justification. The Joint Utilities oppose this proposed change for the following reasons:

[1] *In the Matter of Pub. Util. Comm'n of Or., Investigation of the Scope of the Commission's Authority to Defer Capital Costs*, Docket No. UM 1909, Initial Application of Or. Pub. Util. Comm'n Staff at 1 (Nov. 11, 2017) ("Staff's Initial Application") ("Staff recommends that the [Commission] open a docket to investigate the Commission's legal authority to defer capital costs.").
[2] Docket No. UM 1909, Staff's Opening Brief at 1 (Feb. 16, 2018).

- ORS 757.259 authorizes the Commission to defer the revenue requirement effects of capital investments because (1) the plain meaning of "expenses" includes the costs associated with obtaining capital, (2) the legislature intended to authorize full requirement deferrals, and (3) the legislature's intent is consistent with the language of the statute.
- Legislative history—including statements by the Commission, Commission Staff, the Assistant Attorney General, and legislators before both the House and Senate—demonstrates that the statute was specifically designed to provide authority to defer the revenue requirement effect of new capital projects.
- The legislature did not adopt a technical meaning of the term "expenses" because (1) both the Commission and the legislators used the term interchangeably with "costs," and (2) the technical glossary provided to the legislature failed to define the term. As a result, it is appropriate to rely on the dictionary definition of "expenses," which encompasses the costs necessary to provide utility service—including the cost of obtaining capital.
- Even if "expenses" is a "term of art," both accounting and utility regulatory definitions of "expenses" encompass all costs necessary to supply utility service.
- Staff's argument that ORS 757.259 does not authorize deferral of a return *on* capital is contradicted by Commission and court precedent explaining that other terms in ORS 757.259 are not terms of art, and that the word "expenses" is synonymous with "costs."
- Staff has historically recommended that the Commission approve full revenue requirement deferrals for renewable energy investments under ORS 757.259, and the Commission has approved these recommendations. Staff's position could thus invalidate the Commission's established framework for renewable energy resource cost recovery.

- Staff's proposal to adopt a new policy against deferral of capital investments is outside the scope of this docket because it does not relate to "the scope of the Commission's *authority* to defer capital costs." While the Commission allowed for relevant "discussion of past policy or precedent,"[3] it did not invite a comprehensive reassessment of the Commission's general policies on deferred accounting.
- Revenue requirement deferrals provide a valuable and flexible tool for the Commission to balance the interests of customers with the need to set fair, just, and reasonable rates. Deferrals help mitigate rate shock, reduce the number of rate cases, and support fair and efficient settlements.
- Staff implies that the Commission should now reject all revenue requirement deferrals with capital costs, including pending deferrals. Retroactive application of a change in longstanding Commission practice is improper, especially when parties have acted in reliance on previous deferral authorizations.

ORS 757.259 clearly permits the Commission to authorize the deferral of the full revenue requirement effect of capital investments, and the Commission should continue to exercise its discretion to allow such deferrals on a case-by-case basis.

II. DISCUSSION

A. ORS 757.259 Authorizes the Commission to Defer the Revenue Requirement Effect of Capital Investments.

1. The Oregon Framework for Statutory Construction Seeks to Discern the Legislature's Intent.

Identifying the scope of ORS 757.259(2)(e) is a matter of statutory interpretation. In Oregon, the guiding principle of statutory interpretation is to "pursue the intention of the

[3] November 21, 2017 public meeting at 54:45 (quoting Chair Lisa Hardie).

legislature if possible."[4] Courts discern legislative intent in three basic steps, "proceed[ing] from what the legislature has written, to what the legislature has considered, and finally, as a last resort, to what the court determines makes sense."[5]

The starting point for the inquiry is the statute's "text and context"[6] because it is the "best evidence of the legislature's intent."[7] Next is a consideration of "pertinent legislative history."[8] If "the legislature's intent remains unclear," then "general maxims of statutory construction to aid in resolving the remaining uncertainty" become applicable.[9] A statute is ambiguous if there is more than one "plausible interpretation" of the disputed text.[10] Where ambiguity exists, the correct interpretation is that which best effectuates the legislature's purpose.[11]

Statutory terms can be either exact, inexact, or delegative.[12] Exact terms are "so precise that no interpretation is necessary,"[13] such as "30 days" or "Marion County."[14] Inexact terms

[4] ORS 174.020(1)(a); *see also Portland Gen. Elec. Co. v. Bureau of Labor & Indus.* (*PGE v. BLI*), 317 Or 606, 610 (1993) ("In interpreting a statute, the court's task is to discern the intent of the legislature.").
[5] *Young v. State*, 161 Or App 32, 37 (1999).
[6] *State v. Gaines*, 346 Or 160, 171 (2009).
[7] *PGE v. BLI*, 317 Or at 610.
[8] *Gaines*, 346 Or at 171-72 (noting that "we no longer will require an ambiguity in the text of a statute as a necessary predicate to the second step – consideration of pertinent legislative history that a party may proffer").
[9] *Id.* at 172.
[10] *Tharp v. Psychiatric Sec. Review Bd.*, 338 Or 413, 425–426 (2005) (court declared text ambiguous when counsel presented two plausible interpretations).
[11] *Long v. Farmers Ins. Co.*, 360 Or 791, 803 (2017) (holding that a statute's terms "should be interpreted in light of their function within the statute's overall purpose"); *Linn-Benton-Lincoln Ed. v. Linn-Benton-Lincoln ESD*, 163 Or App 558, 570 (1999) ("[A] court should attempt to construe the language of a statute in a manner consistent with its purpose."); *see also, e.g., Godfrey v. Fred Meyer Stores* (*In re Godfrey*), 202 Or App 673, 689 (2005) (rejecting a technical definition of "report or statement" that "would seem to frustrate what it appears is plainly the purpose of the statute").
[12] *Springfield Education Assn. v. School Dist.*, 290 Or 217, 224-25 (1980) (distinguishing "terms of precise meaning," "inexact terms," and "terms of delegation," and noting that "inexact terms" do not entitle an agency's interpretation to deference by a reviewing court).
[13] *Dep't of Consumer & Bus. Servs. v. Muliro* (*In re Muliro*), 359 Or 736, 745 (2016).
[14] *Springfield*, 290 Or at 223.

express "a completed legislative policy judgment,"[15] yet are still subject to "competing interpretations"[16]—for instance, "substantial influence" or "person whose business or activities are regulated."[17] Agency interpretations of inexact terms are not entitled to deference, as "the task of the agency, and ultimately of the court, is to determine what the legislature intended by using those words."[18] Delegative terms, by contrast, inherently require the exercise of judgment to ascertain their meaning, such as "unreasonable" or "good cause."[19] Because delegative terms require the interpreting agency "to complete the general legislative policy decision," a court merely reviews such agency interpretations for consistency with the general policy of the statute.[20]

Staff's legal argument is based on its interpretation of the words "expenses" and "revenues" in ORS 757.259(2)(e). The Joint Utilities agree with Staff that "expenses" and

[15] *Citizens' Util. Bd. v. Or. Pub. Util. Comm'n*, 154 Or App 702, 714 (1998) (finding that "ORS 757.355 and ORS 757.140(2) are not 'delegative' statutes – the kind which carry with them the highest level of judicial deference in reviewing agency interpretations," but instead "reflect a 'completed legislative policy judgment,' albeit one expressed in 'inexact terms'").
[16] *Warrenton Fiber Co. v. Dept. of Energy*, 283 Or App 270, 276 (2016).
[17] *Utility Reform Project v. Or. Pub. Util. Comm'n*, 171 Or App 349, 353 (2000) (concluding that the relevant statutory terms, providing that no person may "acquire the power to exercise any substantial influence over the policies and actions of a public utility" without first obtaining Commission approval, were not delegative, but "inexact in nature"); *Roats Water Sys. v. Golfside Invs., LLC*, 225 Or App 618, 623 (2009) (finding that the meaning of the relevant statutory terms, "person whose business or activities are regulated," were "not delegative" but instead "inexact in nature"); *see also Warrenton*, 283 Or App at 276 (finding that "the phrase at issue—'[f]orest or rangeland woody debris from harvesting or thinning'—. . . is an inexact term" because "it reflects the legislature's intent to define the organic material that is 'biomass,'" and did not require "a general policy decision regarding biomass," though "it is susceptible to competing interpretations").
[18] *Coast Sec. Mortg. Corp. v. Real Estate Agency*, 331 Or 348, 354 (2000).
[19] *Bergerson v. Salem-Keizer Sch. Dist.*, 341 Or 401, 413 (2006) (concluding that "unreasonable" is a delegative term because, among other things, it "is among the examples of delegative terms this court has noted previously"); *see also McPherson v. Employment Div.*, 285 Or 541, 549-50 (1979) (concluding that "good cause" is a delegative term because it "calls for completing a value judgment that the legislature itself has only indicated"), *see, e.g., In the Matter of PacifiCorp's Petition for Cert. of Pub. Convenience and Necessity*, Docket No. UM 1495, Order No. 11-366 (Sept. 22, 2011) (concluding that the words "'necessity, safety, practicability and justification in the public interest' . . . are delegative terms, and we have broad discretion to construe and apply them").
[20] *Coast*, 331 Or at 354.

"revenues" are inexact terms,[21] because they express a complete legislative policy decision, but are not so precise that no interpretation is necessary. As a result, the Commission—and any reviewing court—must focus solely on identifying the legislature's intended meaning.

2. Relevant Ratemaking Principles Establish Capital Costs as Expenses Necessary to Provide Utility Service.

In utility regulation, capital costs constitute a component of a utility's cost of service.[22] In setting rates, "'there is no difference between the capital charge and operating expenses, depreciation, and taxes. Each is a part of the current cost of supplying the service.'"[23] Capital costs are part of the expense of providing utility service—expenses for which revenues are required.

Staff's legal argument is entirely premised on a ratemaking formula never cited in the legislative history of ORS 757.259. This formula shows the calculation of a utility's cost of service or "revenue requirement"[24] as $R = E + (V-D)r$.[25] In this formula, "R" represents a utility's revenue requirement, "E" represents allowable operating expenses, "V" represents the gross value of tangible and intangible property, "D" represents accumulated depreciation on

[21] Staff's Opening Brief at 3 (describing the terms as "inexact"). At no point does Staff specify whether it believes the terms to be ambiguous. *Jeld-Wen, Inc. v. Environmental Quality Comm'n*, 162 Or App 100, 105 (1999) ("An inexact term under *Springfield* is not necessarily ambiguous under *PGE* [*v. BLI*].").
[22] James C. Bonbright et al., *Principles of Public Utility Rates* at 123 (2d ed. 1988) ("[T]he cost of service must be interpreted somewhat broadly to include an allowance for a capital-attracting rate of return.").
[23] Charles F. Phillips, Jr., *The Regulation of Public Utilities: Theory and Practice* at 388 (1993) (quoting *Missouri* ex rel. *Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n*, 262 U.S. 276, 306 (1923) (Brandeis, J., dissenting)).
[24] *See* Roger A. Morin, *New Regulatory Finance* at 3 (Pub. Utils. Reports, Inc. 2006) ("In a nutshell, the determination of rates is implemented by defining a total 'revenue requirement,' also referred to as the total 'cost of service,' then by adjusting the rates so as to achieve these totals.").
[25] Staff's Opening Brief at 3.

tangible property,[26] and "r" represents the authorized rate of return, used to cover a utility's costs of capital (including the cost of debt and the cost of equity).[27]

Costs and benefits are generally reflected in a utility's rates prospectively in order to avoid retroactive ratemaking.[28] The rule against retroactive ratemaking "prohibits past losses or profits from being considered in establishing future rates."[29] Although the rule is widely recognized, the Commission has interpreted the prohibition against retroactive ratemaking "narrowly," consistent with "the legislature's broad delegation of authority to do everything necessary and convenient to protect customers."[30] This narrow construal was upheld by the Oregon Supreme Court.[31]

As relevant here, the Oregon legislature has adopted explicit exceptions to the rule against retroactive ratemaking in ORS 757.259. One of these exceptions, ORS 757.259(2)(e), allows utilities, the Commission, or other parties to petition the Commission for deferral of the following:

> *identifiable utility expenses or revenues*, the recovery or refund of which the commission finds should be deferred in order to minimize the frequency of rate changes or the fluctuation of rate

[26] Taken together, the net value of "V" and "D" constitute "rate base." *See* Phillips at 177 ("This net value or investment (*V – D*) is referred to as the 'rate base.'").
[27] *In the Matter of the Application of Portland General Electric Company for an Investigation into Least Cost Plan Plant Retirement*, Docket No. DR 10, Order No. 08-487 (Sept. 30, 2008) (noting that "the Commission uses a standard ratemaking formula generally expressed as R = E + (V-d)r" and explaining the various terms involved).
[28] *See Gearhart v. Pub. Util. Comm'n of Or.*, 356 Or 216, 242 (2014) ("The rule against retroactive ratemaking serves the important function of providing stability in the regulatory process—parties can reasonably rely on the fact that rates will not be changed after they have been set and paid.")
[29] Order No. 08-487 at 36 ("The rule is primarily derived from the fact that ratemaking is a legislative act and is applied prospectively absent explicit legislative direction to the contrary."); *see also Valley & Siletz R.R. Co. v. Flagg*, 195 Or 683, 715 (1952) ("[A]ll rate orders are prospective in character.").
[30] Order No. 08-487 at 39 (noting that "[s]everal aspects of Oregon's statutes governing utility regulation also support a narrow definition of the rule against retroactive ratemaking" and concluding that "a narrow interpretation of the rule against retroactive ratemaking is warranted"); *see also* Order No. 17-482 at 7-8 (discussing Commission and court precedent regarding the rule against retroactive ratemaking and noting "the Oregon Supreme Court's reluctance to conclusively define the meaning of the rule against retroactive ratemaking").
[31] *Gearhart*, 356 Or at 237 (further noting that the court has "never expressly decided whether Oregon accepts some form of the rule against retroactive ratemaking").

> levels or to match appropriately the costs borne by and the benefits received by ratepayers.[32]

A revenue requirement deferral covers the revenue requirement impact of a discrete capital investment, including incremental costs and any offsetting benefits.[33] For example, deferrals for new renewable energy resources include "the return of and on capital costs . . . ; [f]orecasted operation and maintenance costs; [f]orecasted property taxes; [f]orecasted energy tax credits; and [o]ther forecasted costs and cost offsets."[34] A revenue requirement deferral typically covers "the period between when the resource is placed into service and when the resource enters rates."[35] It is authorized by ORS 757.259(2)(e) because it reflects discrete and identifiable utility expenses, including the return on the utility's capital investment.[36] Staff's interpretation to the contrary is contradicted by the plain meaning of the statute, relevant legislative history, Commission precedent, and Staff's historical approach to revenue requirement deferrals.

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[32] ORS 757.259(2)(e) (emphasis added).

[33] *See, e.g., In the Matter of Portland Gen. Elec. Co. Application for Deferral of Revenue Requirement of Incremental Costs Associated with Baldock Solar Project*, Docket No. UM 1574, Order No. 12-359 at 2 (Sept. 20, 2012) (authorizing the deferral of both incremental costs associated with the Baldock Solar Project as well as the estimated gain on the sale transaction); *see also In the Matter of Nw. Natural Gas Co., dba NW Natural, Request for Reauthorization to Defer Revenue requirement Related to the Automated Meter Reading Costs*, Docket No. UM 1413(3), Order No. 12-047 (Feb. 14, 2012) (deferring the revenue requirement associated with the previous year for a capital project, minus avoided capital expenditures).

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

[35] Order No. 07-572 at 4.

[36] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 57, Side A, at 28:47-28:56 (Mar. 11, 1987) (quoting Assistant Commissioner William G. Warren stating that "the items that we've been deferring are very large and discrete in nature or imposed by another governmental body"). Note, all legislative history tapes cited in this docket are included as digital audio files in Attachment A.

3. The Plain Meaning of "Expenses" in ORS 757.259 Includes the Costs Associated with Obtaining Capital.

ORS 757.259 does not define "expenses" nor does the term appear in Oregon's Legal Glossary.[37] When terms of common usage are not defined by the legislature, courts "frequently consult dictionary definitions to determine the meaning of such terms 'on the assumption that, if the legislature did not give the term a specialized definition, the dictionary definition reflects the meaning that the legislature would naturally have intended.'"[38]

In its dictionary form, the word "expenses" is synonymous with "costs."[39] The Oregon Court of Appeals has concluded that the word "expenses" is "commonly understood to mean 'something that is expended in order to secure a benefit or bring about a result' or 'the financial burden involved typically in a course of action or manner of living: cost.'"[40]

Applying this definition here, the combined *costs* necessary for the provision of utility service to customers are reflected in the revenue requirement formula—the "financial burden[s]" required to "bring about" the provision of service to customers.[41] A plain reading of the statute supports deferral of the revenue requirement effect of capital investment, as a reflection of the financial costs inherent in providing utility service.

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[37] *See Oregon Legal Glossary*, OregonLaws.org, available at https://www.oregonlaws.org/glossary. The closest relevant term defines "investment expense" as "[a]ll expenses incurred wholly or partially in connection with the investing of funds and the obtaining of investment income." *Id.* (citing Internal Revenue Service, *Internal Revenue Manual 4.42.6 Glossary*).

[38] *Tri-Cty. Metro. Transp. Dist. of Or. (TriMet) v. Amalgamated Transit Union Local 757*, 2018 Or LEXIS 105, *15-16 (2018) (quoting *Comcast Corp. v. Dept. of Rev.*, 356 Or 282, 296 (2014)).

[39] *See Webster's Third New Int'l Dictionary* 515, 800 (1961); *Black's Law Dictionary* 345, 577 (6th ed. 1990) (equating "cost" to expense and "expense" to cost); *Oxford Dictionary of English* 615 (3d ed. 2010) (defining "expense" as "the cost incurred in or required for something"); *Merriam Webster's Collegiate Dictionary* 282, 440 (11th ed. 2004) (defining "costs" as "expenses incurred in litigation," and "expense" as "cost"); *see also Shammas v. Focarino*, 784 F.3d 219, 229 (4th Cir. 2015) ("[I]n its dictionary form the term 'expenses' is generally synonymous with the word 'costs.'").

[40] *In re Domestic P'ship of Baker v. Andrews*, 232 Or App 646, 658 (2009) (quoting *Webster's Third New Int'l Dictionary* 800 (unabridged ed. 2002)).

[41] *Id.*

Staff rejects the plain meaning of the term "expenses" on the basis that, according to "ORS 757.259's legislative history," the legislature intended to adopt the "technical" meaning of this term.[42] As detailed below, the statute's legislative history does not support this conclusion.

4. The Legislature Intended to Authorize Comprehensive Revenue Requirement Deferrals.

The Commission asked the 1987 Oregon legislature to approve its existing practice of deferring utility costs, including the revenue requirement effect of capital investments.[43] The drafting Commission,[44] Commission Staff,[45] the Assistant Attorney General,[46] the party proposing an amendment (NW Natural),[47] and legislators before both the House[48] and the Senate[49] confirmed that the statute was intended to authorize comprehensive deferral of a

[42] Staff's Opening Brief at 3.

[43] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 57, Side A, at 16:04-16:09 (Mar. 11, 1987) (in which Commissioner Charles Davis confirmed that the legislation would be "essentially directly authorizing [the Commission] to do what [it had] been doing to this point") (quoting Rep. Ron Cease).

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

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

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

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

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

[49] *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Tape 99, Side B, at 12:50-16:05 (May 21, 1987) (quoting Rep. Eachus stating: "There is a practice called, the establishing of deferred accounts. The attorney general determined that there is no specific authority to do that. . . . So this bill provides the specific authority to do that. . . . [Intervenors raised concerns that] while it was allowing costs for utilities to be included on a deferred basis there

utility's revenue requirement. It is difficult to imagine a more robust consensus concerning the intent and purpose motivating a piece of legislation.

a. The Commission Proposed ORS 757.259 to Ratify Existing Commission Practice.

The legislative history of ORS 757.259 begins before the bill was proposed. Before the statute's passage in 1987, the Commission relied on its inherent ratemaking authority to establish a variety of deferred accounts for later ratemaking treatment.[50] Deferral accounts had "been used in a large number of instances relating to a wide variety . . . of both expense increases and . . . deferrals associated with plant coming into service"[51]—a "practice of deferred recognition for some kinds of transactions" that the Commissioner believed was "appropriate" to serve the public interest.[52] After the Oregon Attorney General, Dave Frohnmayer, advised the Commission that existing statutes did "not allow the deferral of ratemaking,"[53] the Commission sought "express statutory authority" to continue the practice.[54] This goal was clarified in legislative discussion:

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was no mechanism for allowing benefits to ratepayers to be included. So . . . we've allowed deferred accounts in certain circumstances, and we've established a process that is balanced and allows either the utility, the Commission, or the ratepayers to initiate a deferral, and it is not only cost to the utility but also for benefits to the ratepayer.").

[50] *See Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Exhibit D, Attachment 2 (May 21, 1987) (testimony of Commissioner Davis listing "the variety of circumstances under which deferred accounts have been created"); *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit B at 7 (Mar. 11, 1987) (testimony of Commissioner Davis describing "the many occasions when a legitimate ratemaking income or expense item is changing and the PUC believes rates should be adjusted as a result, but finds that rate changes should take place at some subsequent time").

[51] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 57, Side A, at 20:27-20:54 (Mar. 11, 1987) (quoting Commission Staff Ray Lambeth)

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

[53] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit B at 4 (Mar. 11, 1987) (testimony of Commissioner Davis). Attorney General Frohnmayer subsequently issued a formal opinion stating that the Commission's ongoing use of deferred accounting (also referred to as "balancing accounts") violated the rule against retroactive ratemaking and required explicit legislative authorization. Attorney General Opinion Letter, Re: Opinion Request OP-6076, pp. 8-18, (Mar. 18, 1987).

[54] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit B at 2 (Mar. 11, 1987) (testimony of Commissioner Davis).

> Representative Ron Cease: You mentioned earlier that this would make explicit what you are currently doing. Does this go beyond that or is this essentially directly authorizing you to do what you've been doing to this point?
>
> Commissioner Charles Davis: Correct, it does not go beyond that.[55]

The Commission thus sponsored the new legislation, HB 2145, in order to confirm its authority to "allow the deferral of ratemaking,"[56] as already employed by the Commission through the use of a "wide variety" of balancing accounts.[57]

b. ORS 757.259 Was Amended to Clarify the Legislature's Intent to Authorize Comprehensive Deferral of a Utility's Revenue Requirement.

During initial discussions with the legislature, legislative representatives questioned certain limiting terms in the Commission's proposed bill—in particular, why the bill only provided for deferral of "amounts *incurred by* a utility,"[58] thereby allowing deferral only "on one side of the equation."[59] Representative Ron Eachus, noting that the Commission's existing deferral accounts "very clearly talk about items where it can either be a reduction of cost or an increase in cost," questioned: "Why don't we have something in here that makes it very clear that you have the authority to [create deferral accounts] with reductions of costs as well as with increases of costs?"[60]

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[55] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 57, Side A, at 15:55-16:12 (Mar. 11, 1987).
[56] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit B at 4 (Mar. 11, 1987) (testimony of Commissioner Davis).
[57] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit B at 4 (Mar. 11, 1987) (testimony of Commissioner Davis).
[58] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit D at 1 (Mar. 25, 1987) (emphasis added).
[59] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 96, Side A, at 19:13-19:37 (Apr. 8, 1987) (quoting Rep. Eachus describing and summarizing the legislature's initial discussions of March 11, 1987).
[60] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 56, Side B, at 8:44-9:15 (Mar. 11, 1987) (quoting Rep. Eachus).

Responding to this concern, NW Natural proposed an amendment removing the phrase "amounts incurred by a utility" and replacing it with "utility expenses or revenues,"[61] thereby allowing for deferral "on the other side."[62] Assistant Attorney General Jack Socolofsky explained that the amendment provided for a more comprehensive deferral procedure:

> When this bill was first introduced, . . . it only dealt with expenses of utilities. But as the bill went through the House, it changed and provisions were added . . . to defer not only expenses of the utility but refunds and revenues that would go back to the customer.[63]

As Representative Eachus explained, "the key word here is balance."[64] Where the initial bill allowed for deferral of "costs" alone,[65] the revised legislation granted authority to defer both "benefits to the ratepayers as well as *revenue requirements* for the utility."[66]

Staff claims that NW Natural's amendment "makes clear that 'revenues' was intended to be defined as revenues as an offset to costs."[67] If by this assertion Staff suggests that the amendment authorized only deferral of revenues when those revenues were offset by corresponding costs, there is no basis for this interpretation in the legislative history of HB 2145. Indeed, the legislative history supports the idea that utility revenues—for instance, in the form of tax refunds—might be deferred independent of any corresponding debit on the utility's deferral

[61] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit D at 1 (Mar. 25, 1987) (presenting the bill as submitted and with an amendment proposed by Northwest Natural Gas Company).
[62] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 96 Side A, at 19:13-19:37 (Apr. 8, 1987) (quoting Rep. Eachus).
[63] *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Tape 100, Side B, at 5:19-5:57 (May 21, 1987) (quoting Assistant Attorney General Socolofsky).
[64] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 97 Side A, at 1:25-1:28 (Apr. 8, 1987) (quoting Rep. Eachus).
[65] *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Tape 99, Side B, at 14:12-14:23 (May 21, 1987) (quoting Rep. Eachus).
[66] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 97 Side A, at 3:15-3:20 (Apr. 8, 1987) (quoting Rep. Eachus) (emphasis added).
[67] Staff's Opening Brief at 6.

account.[68] Instead, this amendment supports the legislature's intent to authorize comprehensive deferral of the "revenue requirements for the utility"[69]—as opposed to deferrals only "on one side of the equation."[70]

c. The Legislature Specifically Considered that ORS 757.259 Would Authorize Comprehensive Deferred Ratemaking Treatment for Capital Investments.

The legislature discussed HB 2145's impact for major capital investments in particular.[71] In response to a legislator's request for examples of deferrals that would be authorized by the new law, Commission Staff highlighted the ongoing deferred accounting treatment of Pacific Power & Light's investments in Colstrip 3 and Colstrip 4—projects involving "a rather substantial investment" that "could cause a rate increase all of its own."[72] Staff explained that the Commission had "delayed rate increases associated with putting those plants into service until a subsequent time."[73]

In order to defer ratemaking treatment for these investments, the Commission established a comprehensive balancing account, putting "all the other company costs and revenues" including "the reasonable cost of capital for the company . . . into one pot."[74] This comprehensive tally of costs and benefits allowed the Commission, in a subsequent rate case, to clearly assess whether the utility's revenues had been "sufficient to cover all those costs"

[68] *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Exhibit D at 8 (May 21, 1987) (testimony of Commissioner Davis describing the deferral of "benefits arising from the tax expense decreases, with interest" resulting from the Tax Reform Act of 1986).
[69] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 97, Side A, at 3:15-3:21 (Apr. 8, 1987) (quoting Rep. Ron Eachus).
[70] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 96, Side A, at 19:26-19:38 (Apr. 8, 1987) (quoting Rep. Eachus).
[71] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 57, Side A, at 19:46-19:56 (Mar. 11, 1987) (in which Rep. Eachus requested examples of deferrals requiring statutory authority, and asked for further clarification regarding what the Commission did in such instances).
[72] *Id.* at 26:16-26:24 (quoting Mr. Warren).
[73] *Id.* at 21:01-21:17 (quoting Mr. Warren).
[74] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 73, Side A, at 13:40-13:57 (Mar. 25, 1987) (quoting Mr. Warren).

contained in the balancing account.[75] In support of Staff's explanation, the NW Natural representative emphasized that its "expenses or revenues" amendment was intended "to make it clear that legislative authorization went to that type of [balancing] account."[76]

Once the bill progressed to the Senate, Commissioner Davis provided a list of the sorts of balancing accounts that would be authorized by the bill.[77] Among these were the following:

- Colstrip Unit 4 Deferred Revenues: "Pursuant to OPUC Order No. 86-605, . . . [Pacific Power & Light] was allowed to place its share of Colstrip Unit 4 in rate base on an interim basis and to accrue revenue and defer billing for the increased costs until the Commissioner issued a final order in the UE 52 proceeding."[78]
- Jim Bridger Unit 2 Pollution Control Equipment Deferred Revenues: The Commission authorized Pacific Power & Light "to defer billing and collection of associated revenues" and subsequently "authorized the amortization of the balance in this account as of January 8, 1987, in rates over a one-year period."[79]
- Institutional Buildings Program – Oregon: The Commission "approved the proposed accounting treatment for program costs for each of the utilities," and approved Idaho Power's "proposal to accumulate [the program's] costs plus interest in a deferred debit account."[80]

As Commissioner Davis explained, these accounts allowed for "deferred recognition" for capital investments.[81] Commissioner Davis testified that this deferred ratemaking treatment was appropriate in certain circumstances, "either because (a) the full extent of the costs . . . will not be known until a future time, or (b) a rate change . . . should be matched with other costs or

[75] *Id.* at 13:57-14:02 (quoting Mr. Warren).
[76] *Id.* at 24:30-25:16 (quoting Mr. Lobdell, representing NW Natural).
[77] *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Exhibit D, Appendix at 6 (May 21, 1987) (testimony of Commissioner Davis, "Energy Utility Deferred Debit/Credit Accounts").
[78] *Id.* at 6.
[79] *Id*.
[80] *Id.* at 8.
[81] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit B at 4 (Mar. 11, 1987) (testimony of Commissioner Davis).

benefits or matched in time with other rate changes."[82] Representative Eachus also testified on the bill's behalf before the Senate, explaining that the bill would allow deferral of "not only cost to the utility but also for benefits to the ratepayer."[83] The Senate approved the bill without modification to the relevant terms.

This combined legislative history unequivocally demonstrates the legislature's intent to authorize comprehensive revenue requirement deferrals for capital investments. Staff concedes that the statute's "legislative history contains statements that suggest that the legislature thought that the legislation would allow the practice of deferring capital investments."[84]

5. The Legislature's Intent to Authorize Full Revenue Requirement Deferrals is Consistent with the Operative Language of ORS 757.259.

The only basis for rejecting clear indications of legislative intent is if the statute's text is unable to support the legislature's intended meaning.[85] One cannot functionally redraft a statutory text by "completely eliminating a word, phrase, or concept that the original text clearly and intentionally includes."[86]

Here, Staff argues that the legislature's intent to authorize deferral of full revenue requirement effects cannot be supported by the text of ORS 757.259 because "expenses" and "revenues" are "terms of art" and—under Staff's analysis—the technical meaning of these terms

[82] *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Exhibit D (May 21, 1987) (testimony of Commissioner Davis)
[83] *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Tape 99, Side B, at 16:00-16:05 (May 21, 1987) (quoting Rep. Eachus).
[84] Staff's Opening Brief at 7.
[85] *Whipple v. Howser*, 291 Or 475, 480 (1981) ("'We ought never to import into a statute words which are not to be found there, unless from a careful consideration of the entire statute it be ascertained that to import such words is necessary to give effect to the obvious and plain intention and meaning of the legislature.'") (quoting *Barrett v. Union Bridge Co.*, 117 Or 566, 570 (1926)).
[86] *City of Salem v. Lawrow*, 233 Or App 32, 39 (2009).

cannot include the return *on* a utility's investment.[87] Staff's position is unsupportable because (1) the legislature did not adopt technical meanings of either term, and (2) even had the legislature adopted technical definitions of these terms, both accounting and utility regulatory definitions of "expenses" encompass all costs necessary to supply utility service—including the cost of obtaining capital.

a. The Legislature Did Not Adopt Technical Definitions of "Expenses" and "Revenues."

As an initial matter, even "when the legislature uses technical terminology," courts "examine word usage in context to determine which among competing definitions *is the one that the legislature more likely intended*."[88] Thus, a technical definition is only relevant insofar as it "reflects the meaning that the legislature would naturally have intended."[89] A statute's terms are to be interpreted in light of "the statute's overall purpose"—not vice versa.[90]

Here, Staff claims that the legislature intended to adopt the technical meaning of these terms because (1) the legislation was filed "at the request of the Public Utility Commissioner Charles Davis,"[91] and (2) the legislature was "provided with a glossary of terms applicable to HB 2145."[92] By these points, Staff appears to suggest that, because the Commissioner was closely involved in developing the legislation, and because the legislature was aware of the technical nature of the words used, the legislature must have intended to adopt the words as they were used

[87] Staff's Opening Brief at 8; *see also id.* at 7 ("[T]he legislature failed to provide the Commission with operative language upon which it could rely to continue the practice of deferring the revenue requirement effects of capital investments, which includes the utility's return on investment.").
[88] *In re Muliro*, 359 Or at 746 (emphasis added).
[89] *Id.*; *see also State v. Fries*, 344 Or 541, 547-48 (2008) (noting that context determines which of multiple definitions is the one the legislature intended).
[90] *Long*, 360 Or at 803 (holding that a statute's terms "should be interpreted in light of their function within the statute's overall purpose").
[91] Staff's Opening Brief at 4.
[92] Staff's Opening Brief at 5.

by the Commissioner and in the glossary of terms provided by Commission Staff. Neither point is persuasive.

First, Commission Davis himself used the word "expenses" and "costs" interchangeably, describing the purpose of the legislation in broad terms:

> [T]he proposed measure allows the Commission to make rates retroactively in cases where the utility asks that a *cost* be deferred or the Commission believes *income amounts should be deferred* and not reflected in rates until a later date. A rate-making delay may be preferable either because (a) the full extent of the costs, that is, the *net cost*, will not be known until a future time, or (b) a rate change, otherwise authorized, should be matched with other *costs or benefits* or matched in time with other rate changes.[93]

Thus, assuming that the legislature implicitly relied on the Commission's technical definitions as used in the Commission's testimony, this supports the interpretation of the term "expenses" as synonymous with the term "costs."[94]

Second, the glossary provided to the legislature did not define either "expenses" or "revenues."[95] As a result, the legislature was presented with no technical meanings of these words to adopt. The glossary's most relevant definition described "revenue requirements" as "[t]he sum total of the revenues required to pay all operating *and capital costs* of providing service."[96] From this entry, one might reasonably infer that the legislature was aware that capital costs constituted a relevant expense for which revenues would be required. Thus, to the extent that the glossary provides evidence of the legislature's understanding of the technical nature of

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[93] *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Exhibit D at 3-4 (May 21, 1987) (testimony of Commissioner Davis) (emphasis added).
[94] *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Tape 99, Side B, at 16:00-16:05 (May 21, 1987) (Rep. Eachus explaining that the bill would allow deferral of "not only costs to the utility but also for benefits to the ratepayer").
[95] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit F (Mar. 30, 1987) (providing a glossary of terms from Deloitte, Haskins & Sells' Public Utilities Manual).
[96] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit F at 7 (Mar. 30, 1987) (emphasis added).

the statute's terms, it suggests that capital costs were deemed part of those expenses necessary to provide utility service.

Notably, Staff's reference to the glossary of terms omits the accompanying exhibit provided by the Commission's Staff, which provides additional context for the legislature's understanding of both "expenses" and "deferrals."[97] This exhibit described in detail the recent Pacific Power & Light 1986 rate case, in which the utility and Staff agreed to amortize the revenue requirement effects for deferred capital investment, including Colstrip 3, Colstrip 4, and scrubbers on Jim Bridger and Wyodak coal plants.[98] This illustration suggests that, according to the understanding of both the Commission and the legislature at the time, deferring "expenses" and "revenues" included deferring the revenue requirement effects of a given capital investment.

b. Even if "Expenses" and "Revenues" are Terms of Art, Both Accounting and Utility Regulatory Definitions of "Expenses" Encompass the Cost of Obtaining Capital.

Even assuming that the Commission were bound to apply specialized meanings, Staff's definitions of "expenses" and "revenues" are technically inaccurate. In an accounting context—a field ignored in Staff's analysis—expenses and revenues are defined as follows:

> Expenses – Outflows or other using up of assets or incurrences of liabilities from delivering goods, rendering services, or carrying out other activities.[99]
>
> Revenues – Inflows or other enhancements of assets or settlements of liabilities from delivering or producing goods, rendering services, or other activities.[100]

[97] *Id.* at 8-25 (setting forth the chronology of events concerning the Pacific Power & Light rate case, Docket No. UE 52).
[98] *Id.* (providing for deferral of the revenue requirement for each capital investment project).
[99] Gary Porter and Curtis Norton, *Financial Accounting: The Impact on Decision Makers*, Harcourt Brace & Company (1995) (Glossary, G-6).
[100] *Id.* (Glossary, G-12).

In this context, it becomes clear that "revenues" and "expenses" represent two sides of a comprehensive financial assessment, with expenses constituting outflows, and revenues constituting inflows. Because the return *on* investment represents one of those outflows necessary to provide service, it necessarily constitutes an "expense."

Staff states that "[a] utility's rate of return . . . is not part of its 'expenses' or 'revenues' used for setting the utility's revenue requirement" because "the utility's rate of return is reflected in the second part of the ratemaking equation ('(v-d)r')."[101] This misrepresents the nature of the ratemaking equation, which seeks to reflect all of the expenses involved in providing utility services and arrive at the "sum total of the revenues required to pay all operating and capital costs."[102] It is inconsistent with the premise of this analysis that certain of these utility expenses would be deemed "technically" expenses, while others would not.

Staff also argues that return on investment is not deferrable as "revenues" under ORS 757.259. The Joint Utilities agree that costs of capital are not "revenues," but disagrees with Staff's related position that all "revenues" are a component of "expenses" found "in the 'E' portion of the ratemaking equation."[103]

6. Staff's Argument that ORS 757.259 Does Not Authorize Deferral of a Return *on* Capital is Inconsistent with its Position Requiring the Filing of Revenue Requirement Deferrals for Renewable Resources under ORS 757.259.

Staff's argument that the Commission is not authorized to defer a return *on* investment is inconsistent with its position that the revenue requirement for renewable energy investments

[101] Staff's Opening Brief at 4.
[102] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit F at 7 (Mar. 30, 1987) (emphasis added).
[103] Staff's Opening Brief at 4. In the revenue requirement formula, revenues are "[t]he sum total . . . required to pay all operating and capital costs of providing service." HB 2145 House Environment and Energy Committee Exhibit F; *see also* Staff's Opening Brief at 8 (quoting provided definition). In other words, "revenues" generally refers to the proceeds from rates paid by customers; only a small subset of revenues—"other revenues"—are used to directly offset costs in ratemaking. *See* Order No. 08-487 at 40-41 (describing the process of setting rates to provide necessary utility revenues, in keeping with anticipated expenses).

must be deferred under ORS 757.259. Recovery of "all prudently incurred costs associated with compliance with a renewable portfolio standard" is mandated by ORS 469A.120. Yet when PGE and PacifiCorp sought deferral and recovery of renewable energy development costs under that statute, Staff objected on the basis that any associated deferral must conform to the requirements of ORS 757.259.[104] Staff's interpretation thus *required* utilities to seek revenue requirement deferrals through ORS 757.259. Since that time, Staff has consistently reviewed renewable energy revenue requirement deferrals for compliance with ORS 757.259, despite the utilities' position that such deferrals are authorized directly by other statutes.[105] If renewable energy revenue requirement deferrals *must be allowed* under ORS 469A.120, and if these deferrals simultaneously *must* conform to ORS 757.259, then, according to the logic of Staff's position, ORS 757.259 *must* allow for full revenue requirement deferrals.

7. Staff's Argument that ORS 757.259 Does Not Authorize Revenue Requirement Deferrals is Inconsistent with Commission and Court Precedent.

Staff largely disregards the long history of Commission precedent interpreting and applying ORS 757.259, appearing to claim that any Commission precedent would be overridden by a new understanding of the statute's dictates.[106] This position is inconsistent with Staff's

[104] *In the Matter of Portland Gen. Elec. Co., Application for Deferral of Expenses Associated with a Photovoltaic Volumetric Incentive Rate Pilot*, Docket No. UM 1482, Order No. 11-059, Appendix A at 3 (Feb. 16, 2011) ("This balancing account would require annual reauthorization, typical of other deferral accounts filed pursuant to ORS 757.259.").

[105] *In the Matter of Portland Gen. Elec. Co. Application for Deferral of Revenue Requirement of Incremental Costs Associated with Baldock Solar Project*, Docket No. UM 1574, Order No. 12-063, Appendix A at 1-3 (Feb. 28, 2012) (adopting Staff's recommendation that PGE's "revenue requirement" for the Baldock Solar Project be approved because it "meets the requirements of . . . ORS 757.259"); Order No. 11-059, Appendix A at 3 (requiring authorization for deferral to comport with ORS 757.259(2)(e)); *In the Matter of Portland Gen. Elec. Co., Application for Authorization of Deferred Accounting of Qualifying Renewable Resource Projects*, Docket No. UM 1471, Order No. 10-116, Appendix A at 2 (Apr. 1, 2010) (approving the deferral of the "revenue requirement of approximately $2.2 million" for renewable facilities).

[106] Staff's Opening Brief at 13 ("Importantly, the Commission is not bound by its past treatment of deferrals for capital investment."); *see also id.* at 2 (noting that "the Commission lacks the authority to allow for later inclusion in rates amounts that are not considered 'expenses' or 'revenues' pursuant to the specific exception in ORS

argument that "expenses" and "revenues" are terms of art in utility regulation. If the words are indeed "terms of art 'drawn from a specialized trade or field,'" then Commission precedent would appear to offer particularly persuasive authority as to their meaning.

Since well before the establishment of ORS 757.259, the Commission has authorized deferral of the full revenue requirement effect of capital investments.[107] After the legislature ratified this use of deferrals in 1987,[108] the Commission has continued—with the support of Staff—to repeatedly authorize deferrals for the full revenue requirement effect of capital investments, including utilities' capital costs. For instance, Avista received annual reauthorization to defer "*the revenue requirements* and estimated revenue margin losses associated with its DSM investment."[109] Similarly, NW Natural received authorization "to record and defer appropriate *revenue requirements* associated with the construction of the Coos County Distribution System."[110] PGE similarly sought and received approval "to defer the

757.259(2)(e)"). Note, this statement discounts other statutory provisions for retroactive ratemaking, including other sections of ORS 757.259.

[107] *Hearing on HB 2145 Before the S. Comm. on Bus., Hous. & Fin.*, Exhibit D, Attachment at 2 (May 21, 1987) (testimony of Commissioner Davis listing "the variety of circumstances under which deferred accounts have been created"); *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit B at 7 (Mar. 11, 1987) (testimony of Commissioner Davis describing "the many occasions when a legitimate ratemaking income or expense item is changing and the PUC believes rates should be adjusted as a result, but finds that rate changes should take place at some subsequent time").

[108] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 57, Side A, at 16:04-16:09 (Mar. 11, 1987) (quoting Rep. Ron Cease confirming that the legislation would be "essentially directly authorizing [the Commission] to do what [it had] been doing to this point").

[109] *In the Matter of Avista Corp., dba Avista Utils. Application for the Reauthorization of Certain Deferral Accounts Related to Avista's Demand Side Management Programs*, Docket No. UM 1165, Order No. 16-304 (Aug. 16, 2016) (emphasis added) (reauthorizing Avista's deferred account and noting that "Staff recommends the Commission approve Avista's application"); *see also In the Matter of the Application of Nw Natural Gas for an Order Authorizing Deferral of Certain Expenses and Revenue Items*, Docket No. UM 636, Order No. 93-1881 (Nov. 26, 1993) (authorizing Avista's initial deferral).

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

revenue requirement associated with Four Capital Projects."[111] And Idaho Power sought and received approval—with the support of Staff—to "defer *revenue requirement* variances associated with the Langley Gulch Power Plant."[112]

In addition, the Commission recently considered both ORS 757.259 and its legislative history and determined that at least some of the statute's terms carry no particularly technical meaning. Asked to interpret the meaning of the word "deferral," the Commission chose "to read the term . . . generically."[113] In reaching this decision, the Commission pointed to the statute's legislative history, in which former Commissioner Davis used the term to discuss multiple concepts "interchangeably."[114] Similarly, the Commission and Commissioner Davis have repeatedly used the terms "expenses" and "costs" interchangeably.[115] The Oregon Court of Appeals has further interpreted ORS 757.259 as allowing for deferral of "costs or revenues"—applying its own understanding of these words as generic and interchangeable.[116]

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[111] *In the Matter of Portland Gen. Elec. Co., Application for Reauthorization of Deferral of Revenue Requirements Associated with Four Capital Projects*, Docket No. UM 1513, Order No. 13-048 (Feb. 12, 2013) (emphasis added) (adopting Staff's recommendation that the Commission approve PGE's application).

[112] *In the Matter of Idaho Power Co., Application for Deferred Accounting of Revenue Requirement Variances Associated with the Langley Gulch Power Plant*, Docket No. UM 1597, Order No. 12-226, Appendix A at 1 (Jun. 19, 2012) (emphasis added).

[113] *In the Matter of Idaho Power Co., Request for General Rate Revision*, Docket No. UE 233 (Phase II), Order No. 13-416 at 5 (Nov. 12, 2013).

[114] Order No. 13-416 at 5 (citing *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit B (Mar. 11, 1987) (testimony of Commissioner Davis)).

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

[116] *Indus. Customers of Nw. Utils. v. Pub. Util. Comm'n of Or.*, 196 Or App 46, 49 (Oct. 27, 2004) (further explaining that, "[w]hen a utility seeks to recover *costs*," the statute requires the Commission "to conduct an earnings review to determine whether the utility can afford to absorb the *costs*") (emphasis added); *see also Util. Reform Project v. Pub. Util. Comm'n of Or.*, 261 Or App 388, 392 (2014) (affirmed 356 Or 517 (2014)) ("Under ORS 757.259, in exceptional circumstances, the PUC has authority to permit the retroactive adjustment of rates through 'deferral' of *costs* or revenues for later incorporation in rates.") (emphasis added).

B. The Commission Should Continue to Exercise Its Discretion to Defer Return *of* Capital Investments on a Case-by-Case Basis.

In addition to claiming that the Commission has no legal authority to defer a return *on* utility investment, Staff urges the Commission to adopt a new uniform policy against deferring the return *of* capital costs.[117] The Joint Utilities oppose Staff's policy proposal. First, Staff's request goes well beyond the scope of this docket, which authorized consideration of Commission policy and precedent as relevant to identify the Commission's *legal authority* to defer capital costs. Second, Staff fails to acknowledge the diverse policy justifications undergirding the Commission's longstanding use of revenue requirement deferrals. Third, Staff unaccountably suggests that any new policy would be applied retroactively, potentially even setting aside pending deferrals that have been approved but not fully amortized.

1. Staff's New Policy Proposal Exceeds the Scope of this Docket, Which Concerns Policy Issues Pertaining to the Commission's *Legal Authority* to Defer Capital Costs.

Rather than offering policy or precedent to illuminate the scope of the Commission's authority, Staff seeks a new policy limiting the Commission's discretion to approve deferrals that Staff concedes are lawful.[118] In so doing, Staff appears to have misapprehended the Commission's directive regarding consideration of Commission policies and precedent in this docket.

Initially, Staff requested that the Commission open this docket to investigate whether the Commission has the "*legal authority* to defer capital costs."[119] Staff noted that "this investigation is rather limited in scope" and therefore "can be resolved in a timely manner."[120]

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[117] Order No. 13-416 at 5.
[118] Staff's Opening Brief at 11 ("The Commission should adopt a policy against deferrals for capital investments.").
[119] Staff's Initial Application at 1 (emphasis added).
[120] Staff's Initial Application at 2.

At the public meeting initiating this proceeding, Chair Hardie requested that the scope of the docket be defined as "the scope of the Commission's authority to defer capital costs," in order allow "for discussion of past policy or precedent."[121] The Commission characterized this as a minor adjustment, not one "broadening the scope of the investigation."[122]

Thus, the Commission's existing policy and precedent is relevant to this proceeding insofar as it pertains to the Commission's *legal authority* to defer capital costs. For instance, as described above, the Commission's consistent precedent interpreting ORS 757.259 as allowing for deferral of utility revenue requirements is relevant to the Commission's authority to defer capital costs.[123] While existing Commission policies and precedent may shed light on the scope of the Commission's authority, this contextual analysis need not and should not entail a comprehensive reassessment of the Commission's deferral policies. As a result, to the extent that Staff urges the Commission to adopt new deferral policies, its discussion exceeds the scope of this docket.

2. The Commission Should Preserve its Discretion to Authorize Deferrals as a Valuable and Flexible Regulatory Tool.

The Commission should preserve its discretion to authorize revenue requirement deferrals because the Commission has already adopted a comprehensive and balanced approach to evaluating deferral applications and because deferrals are a valuable regulatory tool.

a. The Commission Recently Conducted a Comprehensive Assessment of Its Deferral Policies.

The Commission's existing deferral policies represent the results of a multi-year, comprehensive review process over the course of two dockets. In docket UM 1071, the

[121] November 21, 2017 public meeting at 54:45 (quoting Chair Lisa Hardie).
[122] November 21, 2017 public meeting at 55:10 (quoting Commissioner Megan Decker).
[123] *See supra* Section II(A)(7).

Commission first articulated "comprehensive principles" regarding the application of deferred accounting, establishing a two-stage review: first, whether a proposed deferral meets the criteria set forth in subsections (a) through (e) of ORS 757.259(2); and second, whether the proposed deferral warrants the Commission's exercise of discretion.[124] In determining whether to exercise its discretion, the Commission identified "two interrelated considerations"—"the type of event that caused the request for deferral and the magnitude of the event's effect."[125] If the event involved a risk "normally included in modeling," then such an occurrence would generally not justify deferral.[126]

The Commission substantially expanded and revised this general policy statement in docket UM 1147—an "in depth" investigation into deferred accounting that spanned more than six years.[127] In that proceeding, the Commission considered (1) the statutory requirements for deferral, (2) how the Commission should exercise its discretion to authorize deferrals, (3) whether to revise deferred accounting application procedures, (4) the availability of alternatives to deferrals, (5) whether to adopt uniform limitations on deferrals, and (6) what interest rates should apply to deferred accounts before and after amortization.[128]

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[124] *In the Matter of Portland Gen. Elec. Co., Application for an Order Approving the Deferral of Hydro Replacement Power Costs*, Docket No. UM 1071, Order No. 04-108 at 8 (Mar. 02, 2004).
[125] Order No. 04-108 at 8.
[126] Order No. 04-108 at 9.
[127] *In the Matters of Pacific Power & Light Co. (dba PacifiCorp), Portland Gen. Elec. Co., and Idaho Power Co., Applications for Deferred Accounting Treatment of Grid West Loans*, Docket Nos. UM 1256, UM 1257, and UM 1259, Order No. 06-483 (Aug. 22, 2006) ("As was discussed in depth in docket UM 1147, we consider both the nature of the event triggering the need for a deferral and the potential harm caused by denying deferred treatment in making [the] fact-specific determination" of "whether granting the deferral is an appropriate exercise of Commission discretion.").
[128] *See* Order No. 05-1070, discussing each issue.

b. The Commission's Deferral Policies Reflect the Diverse Policy Benefits Deferrals Can Provide.

The Commission's existing deferral policies reflect deferral accounts' role as a versatile and effective policy tool.[129] The benefits of deferrals prompted the development of ORS 757.259, emphasizing deferral accounts' ability to "minimize the frequency of rate changes or the fluctuation of rate levels" and allow rates to better "match the costs and benefits received by ratepayers."[130] As explained by Commissioner Davis in 1987:

> To avoid a rate decrease followed in short order by a rate increase, it may be preferable to accumulate the expense decreases and use them to offset, in whole or in part, the subsequent expense increase.[131]

Deferrals are important to help the Commission achieve a fundamental goal: balancing the interests of customers and utilities in order to provide reliable energy at just and reasonable rates.[132] Deferrals are a tool that can, at the Commission's discretion, be employed to help achieve this central balance. For instance, a deferral can prevent excessive or poorly-timed rate cases, minimize rate fluctuations, and support settlements,[133] thereby furthering the public interest.[134] Deferrals can also forestall the inclusion in rates of amounts that may, given time, be successfully recovered through third parties, either by means of insurance or litigation claims.[135]

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[129] Order No. 05-1070 at 10 (describing deferred accounting's "versatility and expediency").
[130] ORS 757.259(2)(e).
[131] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Exhibit B at 8 (Mar. 11, 1987) (testimony of Commissioner Davis).
[132] ORS 757.040.
[133] *See, e.g., In the Matter of Portland Gen. Elec. Co., Application for Deferral of Natural Gas Transp. Costs*, Docket No. UM 1290, Order No. 07-452, Appendix A at 2-3 (Oct. 16, 2007) (approving PGE's deferral of natural gas transportation costs consistent with a settlement reached with Northwest Pipeline Corporation); *In the Matter of Portland Gen. Elec. Co., Application for Deferred Accounting of Savings Associated with the 2005 Oregon Corporate Tax Kicker*, Docket No. UM 1252, Order No. 10-308 at 1-2 (Aug. 10, 2010) (adopting a stipulation whereby PGE's deferral of tax savings was not amortized because "PGE's earnings during the deferral period" were "insufficient to support amortization").
[134] "The Commission encourages settlement between parties where possible." *In the Matter of Qwest Corp. v. Level 3 Communications, LLC*, Docket No. IC 15, Order No. 13-080 at 1 (Mar. 13, 2013); *see also* Order No. 10-308 at 2 ("The Commission encourages parties to a proceeding to voluntarily resolve issues to the extent that settlement is in

Staff's discussion fails to articulate these clear benefits. Instead, Staff posits three policy reasons for "eliminating the use for deferrals of capital investment."[136] First, Staff states that deferring a return *on* investment is inappropriate because "the utility would be effectively earning a return on its return on investment."[137] This argument overlooks "the time value of money," which "recognizes the basic economic truth that a dollar today is worth more than a dollar tomorrow due to its potential earning capacity."[138] "Interest is often used to compensate for the time value of money."[139] In this context, a utility's return *on* investment reflects the cost of obtaining capital, and is necessary to make the utility whole;[140] the interest accruing on deferred accounts represents the time value associated with the period during which these capital costs remain unrecovered.[141] These costs are discrete. Nor does the fact of deferral guarantee either amortization or recovery, given the requisite prudence and earnings reviews under ORS 757.259.[142] The Commission retains ongoing authority to deny amortization and recovery of deferred amounts.[143]

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

[135] *See, e.g., In the Matters of Nw. Natural Gas Co., dba NW Natural, Mechanism for Recovery of Environmental Remediation Costs and Request for Determination of the Prudence of Environmental Remediation Costs for the Calendar Year 2013 and the First Quarter of 2014*, Docket Nos. UM 1635 and UM 1706, Order No. 15-049 at 2 (Feb. 20, 2015) (applying $50.2 million in insurance proceeds to reduce the deferral balance related to environmental remediation costs).

[136] Staff's Opening Brief at 10.

[137] Staff's Opening Brief at 9.

[138] Order No. 08-487 at 68 (describing the time value of money as a necessary component of utility expenses).

[139] Order No. 08-487 at 68.

[140] *See In the Matter of Public Utility Commission of Oregon Staff Request to Open an Investigation Related to Deferred Accounting* Docket No. UM 1147, Order No. 06-507 at 6 (Sept. 6, 2006) (addressing the return on deferred accounts necessary to keep utilities "whole" on their investments).

[141] Order No. 08-487 at 68.

[142] *In the Matter of Pacific Power & Light Co., dba PacifiCorp, Request for a Gen. Rate Increase in the Co.'s Or. Annual Revenues*, Docket No. UE 170, Order No. 05-1050 at 14 (Sept. 28, 2005) ("Before amortization has been authorized, recovery of a deferred account balance may be subject to a prudence review and earnings test.").

[143] *See, e.g., In the Matter of Utility Reform Project and Ken Lewis Application for Deferred Accounting*, Docket No. UM 1224, Order No. 09-316 (Aug. 18, 2009) (denying request for amortization of deferral); *see also In the*

Second, Staff states that deferring depreciation expense—that is, the return *of* a utility's investment—is inappropriate because "depreciation is recovered pursuant to ORS 757.140, and is based on straight-line and remaining life, meaning that lawful recovery does not depend on precisely matching service with the consumption of the resource."[144] Staff notes that "the whole of the utility investment is not lost without deferral," and that any loss would merely impose "regulatory lag," providing "an incentive for utilities to manage costs between rate cases."[145] Because "utilities control the timing of capital investments and rate cases," deferral is inappropriate as the utility could simply file a new general rate case.[146]

This argument is flawed. First, it fails to explain why utilities should be required to internalize lost depreciation, especially when the benefits of a capital project may flow directly and promptly to customers through, for example, power cost filings. Beyond stating that such treatment would not jeopardize "the whole of the utility investment," Staff fails to explain why a partial loss is preferable to ratemaking treatment that better matches costs and benefits. In addition, if a utility is required to file a general rate case in order to recover every investment, this will inevitably result in more rate cases. Indeed, before deferral accounts were employed, the Commission described rate cases occurring every four months.[147]

Lastly, Staff argues that a uniform policy against deferring capital investments is appropriate because "capital costs are predictable" and "are not lumpy in nature."[148] This assertion is both incorrect and a non-sequitur. Capital costs are necessarily tied to the capital

Matter of NW Natural Request for General Rate Revision, Docket No. UG 221, Order No. 12-437 at 67 (Nov. 16, 2012) (denying NW Natural's request for amortization of deferred tax amounts).

[144] Staff's Opening Brief at 12.

[145] Staff's Opening Brief at 12.

[146] Staff's Opening Brief at 12.

[147] *Hearing on HB 2145 Before the H. Environment and Energy Comm.*, Tape 56, Side B, at 7:46-7:54 (Mar. 11, 1987) (quoting Mr. Warren explaining that "[t]he Commissioner felt that it is better to have one rate signal than to have rates change every four months in a given year").

[148] Staff's Opening Brief at 12-13.

investments they support, which are quintessentially "lumpy."[149] And the fact that depreciation occurs in a predictable fashion is irrelevant to whether the combined revenue requirement effects of capital investment warrant deferral.

Nor is Staff's new policy position logically supportable. To the extent that the Commission has exercised its discretion to approve deferrals of a utility's revenue requirement effect, it has necessarily concluded that doing so was consistent with establishing just and reasonable rates, thereby serving the public interest. Indeed, ORS 757.259 fully safeguards the public interest in this respect by requiring an earnings test before a deferral account can be amortized.[150] Staff's proposal, by constraining the Commission's discretion, unavoidably detracts from the best interest of the public.

In sum, the Commission has emphasized the importance of retaining "flexibility to adapt our procedures as necessary on a case-by-case basis" in reviewing applications for deferral.[151] The Commission has explained that it is in the best interests of customers to allow deferrals on a case-by-case basis. "The use of deferred accounts allows a utility to capture and track costs and revenues without passing them to customers until a later time."[152] Staff has failed to demonstrate that the public interest would be better served by the Commission relinquishing its discretion to approve revenue requirement deferrals on a case-by-case basis.

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[149] *In the Matter of PacifiCorp, dba Pacific Power, Application for Sale of an Interest in Certain Upgraded Wyoming Transmission Facilities to Black Hills Power*, Docket No. UP 265, Order No. 10-449 (Nov. 15, 2010) (noting that investment in large generation "facilities are lumpy investments"); *see also In the Matter of PacifiCorp 2004 Integrated Resource Plan*, Docket No. LC 39, Staff Comments at 18 (June 27, 2005) (describing resource additions as "lumpy").
[150] ORS 757.259(5).
[151] Order No. 05-1050 at 9.
[152] Order No. 05-1070 at 2.

3. Should the Commission Adopt New Deferral Policies, These Policies Should be Prospective Only.

If the Commission were to adopt Staff's new policy approach, such a policy should apply prospectively only. An agency statement that prescribes a generally applicable policy is a rule.[153] Generally, a retroactive rule will be invalid if its retroactivity is unreasonable under the circumstances.[154] Retroactivity is unreasonable if, among other facts, the rule constitutes "an abrupt departure from well-established practice" or where a "party against whom the new rule is applied relied on the former rule."[155] Here, Staff suggests that its proposed new policy would apply to pending deferrals, including those already authorized by this Commission.[156] In light of utilities' reliance on previous deferral authorizations, and the Commission's more than 30 years of consistent treatment of revenue requirement deferrals, retroactive application of Staff's new policy approach would be manifestly unreasonable.

III. CONCLUSION

For more than three decades, the Commission has authorized revenue requirement deferrals for utilities' capital investments, thereby mitigating rate shock, reducing the volume of rate cases, and supporting the integration of renewable generation. Staff offers no reason why the Commission should abruptly declare this approach unlawful and overhaul its deferral policies. According to both the plain language of ORS 757.259 and the clear intent of the

[153] *Burke v. Children's Services Division*, 288 Or 533, 537-38 (1980) (finding that an agency statement or directive prescribing generally applicable policy, "whatever its precise form and whatever informality attended its promulgation," constitutes a rule); *cf. Pen-Nor, Inc. v. Oregon Dep't of Higher Education*, 84 Or App 502, 508 (1987) (distinguishing instances in which an "order applies specifically to one entity"); *see also* ORS 183.310(9) (defining "rule" as "any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy").
[154] *Gooderham v. Adult & Family Serv. Div.*, 64 Or App 104, 108 (1983).
[155] *Id.* at 109 (quoting *Retail, Wholesale and Department Store U. v. N.L.R.B.*, 466 F2d 380, 390 (DC Cir. 1972)) (finding the retroactive application of a rule to be "unreasonable in its prejudice to petitioners").
[156] Staff's Opening Brief at 11 (recognizing "that there are currently approved and pending deferral applications for capital investments . . . which will need to be addressed").

legislature, the Commission has discretion to authorize revenue requirement deferrals, and should continue to exercise this discretion on a case-by-case basis.

Respectfully submitted this 16th of March 2018, on behalf of the Joint Utilities.

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