BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 407

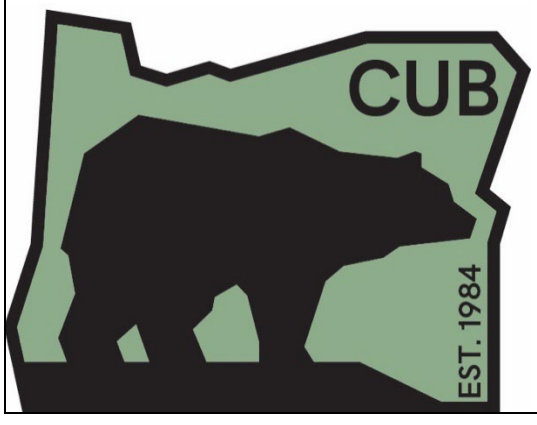
In the Matter of	)
	)
PACIFICORP, dba PACIFIC POWER,	)
	)
Application for Approval of an Automatic Adjustment Clause for Recovery of Costs Associated with the Company's Wildfire Protection Plan.	)
	)

REPLY BRIEF IN OPPOSITION TO STIPULATION

OF THE

OREGON CITIZENS' UTILITY BOARD

March 17, 2023



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I. INTRODUCTION

A. Background and Procedural Posture

Pursuant to Administrative Law Judge (ALJ) Mapes' January 31, 2023 Memorandum, the Oregon Citizens' Utility Board (CUB) submits its Reply Brief in Opposition to Stipulation in the above-captioned proceeding. In this Brief, CUB responds to arguments raised by the Alliance of Western Energy Consumers, Staff of the Public Utility Commission of Oregon, and PacifiCorp (Stipulating Parties), as well as PacifiCorp (PAC or the Company) individually, in their respective testimony and briefing throughout this proceeding. The Stipulating Parties filed a Stipulation detailing the contours of a proposed Wildfire Protection Plan (WPP) Automatic Adjustment Clause (AAC) with the Public Utility Commission of Oregon (Commission) on December 29, 2022. CUB continues to oppose a discrete portion of the Stipulation and

respectfully urges the Commission to modify its terms to include an earnings test on the WPP AAC annual adjustment set at the Company's authorized return on equity (ROE).[1]

Despite the legal requirement borne by the Stipulating Parties to present evidence that the Stipulation is in accord with the public interest and will result in just and reasonable rates,[2] they have failed to do so. The Stipulating Parties reiterate portions of the WPP AAC that are largely irrelevant to CUB's principal argument—that the Commission's core function of establishing just and reasonable rates must be conducted on a holistic basis.[3] Further, while the Stipulating Parties point to previous AACs and deferrals that have been authorized without an earnings test, their review does little to bolster their position.[4] Key to the Commission's decision in this proceeding are bedrock regulatory principles, including that past Commissions cannot bind future Commissions,[5] and that the Commission has an obligation to render a decision based on the arguments, facts, and circumstances on the record before them in the instant case.[6] The Stipulating Parties selective review fails to consider the unique circumstances of this proceeding.

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[1] UE 407 – CUB/100/Jenks/2, lines 10-12.

[2] *In re Northwest Natural Gas Company, dba NW Natural, Request for a General Rate Revision*, Advice 20-19, Schedule 198 Renewable Natural Gas Recovery Mechanism, Docket Nos. UG 435, ADV 1215, and UG 411, OPUC Order No. 22-388 at 6 (Oct. 24, 2022).

[3] UE 407 – CUB/100/Jenks/4-5 citing *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313-315 (1989) ("The economic judgments required in rate proceedings are often hopelessly complex, and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding. The Constitution protects the utility from the net effect of the rate order on its property. Inconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other aspect.") and *Federal Power Comm'n v. Hope Natural Gas Co*., 320 U.S. 591, 603 (1944) (hereinafter *Hope*).

[4] UE 407 – Joint Opening Brief in Support of Stipulation at 12.

[5] *See, e.g., in re Electric Utility Purchases from Qualifying Facilities,* OPUC Docket No. 1129, Order No. 05-584 at 50 (May 13, 2005) ("We are also not convinced that we have the legal authority to bind future commissions . . . .") and *in re Portland General Electric Company,* OPUC Docket No. UE 189, Order No. 08-245 (May 5, 2008) ("CUB observes that this Commission cannot bind future commissions, in any event.").

[6] *In re Internal Operating Guidelines*, OPUC Docket No. UM 1016, Order No. 01-253 (Mar. 26, 2001) ("[Contested case] decisions may be appealed to the courts which determine whether the decision was consistent with the law and based on the evidence in the administrative record. Like a judge, the Commission must support any finding of fact with substantial evidence from that record. There must be a logical nexus between any finding of fact the PUC makes and any conclusion of law it reaches.").

PAC's individual arguments—presumably made so because the other Stipulating Parties disagree with all or part of the Company's assertions—similarly fall flat. As this Brief will detail, the Company's attempt to parse statutory language to serve the interests of its shareholders should be rejected, as they are incorrect. The Commission has both the requisite broad authority and constitutional imperative to implement SB 762 in a manner that grants CUB the relief it seeks.[7] Further, the prior AAC examples that PAC rests nearly its entire case on are readily distinguishable from the issue before the Commission in this proceeding. It is telling that no party to this proceeding has even attempted to rebut CUB's arguments that the Commission's core mandate to establish just and reasonable rates must be undertaken on a holistic basis.[8] The silence is loud. CUB's proposed earnings test set at authorized ROE furthers this fundamental precept and ensures the interests of utility shareholders and consumers are fairly balanced.

This Brief will demonstrate that an earnings test at authorized ROE applied to the annual WPP AAC adjustment true-up achieves this purpose. CUB respectfully requests that the Commission adopt its recommendations articulated herein.

[7] *In re Portland General Electric Company*, OPUC Docket Nos. DR 10, UE 88, and UM 989, Order No. 08-487 at 4 (Sep. 30, 2008) (The legislature has provided the Commission "with 'the broadest authority—commensurate with that of the legislature itself—for the exercise of [its] regulatory function.'") citing *Pacific Northwest Bell Tel. Co. v. Sabin*, 21 Or App 200, 214, 534 P2d 984, rev den (1975) and OPUC Order No. 08-487 at 4 citing *Pacific Northwest Bell Tel. Co. v. Katz*, 116 Or App 302, 310, 841 P2d 652 (1992) ("[T]he Commission is bound to exercise its authority within the confines of both the state and federal constitutions."). Under the constitutional provisions addressed in *Hope*, Commission-approved rates must not overcharge the customer to the extent that rates qualify as an unreasonable exaction. *Hope* at 603. This means rates must pass the *Hope* test to balance the interests of utility customers and shareholders in order to be just and reasonable. Rates must therefore be just and reasonable in order to be constitutional. As filed, the proposed WPP AAC cannot ensure that future rates are just and reasonable. Importantly, "[t]he commission may not authorize a rate or schedule of rates that is not fair, just and reasonable." ORS 757.210(1)(a).

[8] *See* UE 407 – CUB/100/Jenks/4-7.

B. Standard of Review

Under OAR 860-001-0350, the Commission may adopt, reject, or propose to modify a stipulation. In reviewing a stipulation, the Commission determines whether the overall result of the stipulation results in fair, reasonable, and just rates. The Commission reviews settlements on a holistic basis to determine whether they serve the public interest and result in just and reasonable rates. A party may challenge a settlement by presenting evidence that the overall settlement results in something that is not compatible with a just and reasonable outcome.[9]

Where a party opposes a settlement, the Commission reviews the issues pursued by that party and considers whether the information and argument submitted suggests that the settlement is not in the public interest, will not produce rates that are just and reasonable, or otherwise is not in accordance with the law. To support the adoption of a settlement, the stipulating parties must present evidence that the stipulation is in accord with the public interest, and results in just and reasonable rates.[10]

Although the Commission generally supports settlements and encourages "parties to voluntarily resolve issues[,]"[11] the Commission may only approve stipulations upon finding that the stipulation is in accord with the public interest and results in just and reasonable rates.[12]

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[9] *In re Northwest Natural Gas Company, dba NW Natural, Request for a General Rate Revision, Advice 20-19, Schedule 198 Renewable Natural Gas Recovery Mechanism*, OPUC Docket Nos. UG 435, ADV 1215, and UG 411, Order No. 22-388 at 6 (Oct. 24, 2022).

[10] *Id*.

[11] *In re PacifiCorp, dba Pac. Power, 2010 Transition Adjustment Mechanism*, Docket No. UE 207, Order No. 09-432 at 6 (Oct. 30, 2009); *In re PacifiCorp, dba Pac. Power, Transition Adjustment*, Five-Year Cost of Serv. Opt-Out, Docket No. UE 267, Order No. 15-060 at 4 (Feb. 24, 2015) ("Although we encourage parties to resolve disputes informally, we must review the terms of any stipulation for reasonableness and accord with the public interest."); *In re Portland Gen. Elec. Co*., 2005 Resource Valuation Mechanism, Docket No. UE 161, Order No. 04-573 at 4 (Oct. 5, 2004) ("The Commission encourages parties to a proceeding to voluntarily resolve issues to the extent that settlement is in the public interest.").

[12] *Supra,* note 8 *see also* ORS 757.210(1)(a) ("The commission may not authorize a rate or schedule of rates that is not fair, just, and reasonable.").

II. ARGUMENT

CUB has presented adequate evidence to demonstrate that the overall settlement cannot be assured to result in a just and reasonable outcome and is therefore not in the public interest.[13] This is because, absent an earnings test, the Commission cannot be guaranteed that costs flowing through the WPP AAC will result in just and reasonable rates.[14] The magnitude of costs included in future WPP AAC filings are entirely unknown at this time, as are the Company's future earnings.[15] Since these future costs have the potential to be substantial in years when the Company is already over-earning, it is paramount that an earnings test be included in this mechanism to uphold the Commission's constitutional imperative to establish just and reasonable rates.[16] Importantly, the modest modification CUB proposes will only effectuate in years when the Company is already over-earning. The Stipulating Parties' contention that the impact of any earnings test would be limited since PAC has not exceeded its authorized ROE in recent years should be given little weight—CUB's proposal creates a durable solution that will ensure rates are just and reasonable under specific future scenarios.[17]

The Commission should not be persuaded by the parties' attempts to argue that it is somehow estopped from granting CUB the relief it seeks. Contrary to the PAC's assertions, the plain language of SB 762 does not preclude an earnings test, and nothing in the statute's legislative history indicates a clear intent to "reach deep into the Commission's ratemaking function and prevent [it] from achieving balanced outcomes and establishing just and reasonable

[13] *See supra,* note 8.
[14] UE 407 – CUB/100/Jenks/11-12.
[15] *Id*.
[16] *Id*. at 12, lines 1-8.
[17] UE 407 – Joint Opening Brief in Support of Stipulation at 11, lines 17-19.

rates."[18] While CUB has carried its burden to produce sufficient evidence to demonstrate that the Stipulation cannot be guaranteed to serve the public interest and result in just and reasonable rates, the Stipulating Parties have not.

CUB respectfully requests that the Commission modify the Stipulation to include an earnings test set at the Company's authorized ROE in the proposed WPP AAC. Although SB 762 does not require an AAC, CUB is willing to agree to this modest change since there is a need to harden utility systems in light of increased wildfire risk stemming from anthropogenically induced climate change.[19] CUB's proposal will enable the Company to recover all of its WPP-related costs while protecting customers from excessive rates—rates that would be greater than the utility's cost of service plus a reasonable return.[20] Importantly, CUB's proposal will also ensure that the Company retains an important incentive to invest in WPP expenditures. PAC must invest in alignment with its WPP in order to both comply with SB 762 and in furtherance of its duty to furnish adequate and safe service at just reasonable rates.[21] In order for PAC to comply with both of these mandates, CUB's proposed earnings test set at authorized ROE is essential.

A. The Stipulation will not Result in Just and Reasonable Rates

The Stipulating Parties have failed to meet their burden to demonstrate that the proposed WPP AAC will result in just and reasonable rates.[22] The Commission's core responsibility to

[18] OPUC Order No. 22-388 at 80.
[19] UE 407 – CUB/100/Jenks/12-13.
[20] *Id*.
[21] ORS 757.020 ("Every public utility is required to furnish adequate and safe service, equipment and facilities, and the charges made by any public utility for any service rendered or to be rendered in connection therewith **shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited**.") (emphasis added).
[22] *Supra*, note 9.

establish just and reasonable rates is more than a statutory directive. Although it is found throughout the Commission's statutory framework,[23] its origins and requirements are embedded in the Fifth Amendment Takings Clause of the United States Constitution. While the Commission must ensure that the result of its legislatively-delegated ratemaking function is just and reasonable, courts may review any final Commission order to determine whether its authorized rates amount to a confiscatory taking under the Fifth Amendment. According to the Commission:

> a court does have the authority to determine if rates are confiscatory because such a determination is a constitutional question requiring interpretation of the prohibition against the taking of private property without just compensation.[24]

The Commission must establish just and reasonable rates that balance the interests of the utility investor and customer. This core ratemaking function has been exclusively delegated to the Commission by the Oregon legislature since 1911.[25] This delegation provides the Commission with "the broadest authority—commensurate with that of the legislature itself—for the exercise of [its] regulatory function."[26] However, "the Commission is bound to exercise its authority within the confines of both the state and federal constitutions."[27] Therefore, while the Commission has broad authority to balance the interests of utility investors and customers to set just and reasonable rates, it is limited by both state and federal constitutions.

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[23] *See, e.g.* ORS 756.040 ("The commission shall balance the interests of the utility investor and the consumer in establishing fair and reasonable rates.") and ORS 757.210(1)(a) ("The commission may not authorize a rate or schedule or rates that is not fair, just and reasonable.").

[24] OPUC Order No. 08-487 at 24 citing *see, e.g.., Pacific Gas & Elect. Co. v. San Francisco*, 265 US 403, 425, 44 S Ct 537, 68 L Ed 1075 (1924) ("Rate-making is no function of the courts; their duty is to inquire concerning results and uphold the guaranties which inhibit the taking of private property for public use without just compensation under any guise.").

[25] OPUC Order No. 08-487 at 4.

[26] *Id*. citing *Pacific Northwest Bell Tel. Co. v. Sabin*, 21 Or App 200, 214, 534 P2d 984, rev den (1975).

[27] OPUC Order No. 08-487 at 4.

According to the U.S. Supreme Court case *Federal Power Commission v. Hope Natural Gas Co.*, Commission-approved rates must not overcharge the customer to the extent that rates qualify as an unreasonable exaction; but the rates must also provide the utility with sufficient revenue so as not to be considered a taking of shareholder property.[28] The Commission has acknowledged this balance:

> [t]he Commission sets rates within a reasonable range that protects the competing interests of the utility and its customers. To protect customers, the rates must be set at a level sufficiently low to avoid unjust and unreasonable exactions. To protect the utility investor, the rates must provide sufficient revenue not only for operating expenses, but also for the capital costs of the business.[29]

The constitutional provisions underlying the *Hope* test are binding on the Commission. In undertaking the balance to establish just and reasonable rates, the Commission's focus must be on reasonable *overall* rates, not cost recovery of individual rate elements.[30] Therefore, under *Duquesne*, the Constitution does not protect utilities from cost recovery of individual rate elements such as those at issue in the WPP AAC. Rather, the Constitution protects the utility from the net effect of any Commission-approved rate on its property.[31]

The Commission engages in just and reasonable ratemaking, as guided by statutory mandate, controlling case law, clear Commission precedent, and the provisions enumerated in the Constitution. The Commission does not engage in piecemeal recovery of individual costs—nor should it. Such an approach has the potential to lead to unjust and unreasonable ratemaking,

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[28] UE 407 – CUB/100/Jenks/5 citing *Hope* at 603.
[29] OPUC Order No. 08-487 at 5.
[30] *Duquesne*, *supra,* note 3 ("The economic judgments required in rate proceedings are often hopelessly complex, and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding. The Constitution protects the utility from the net effect of the rate order on its property. Inconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other aspect.").
[31] *Id.*

as it would fail to consider the net effect of Commission-approved rates on individual property rights.[32] However, this dangerous proposal is exactly what the Stipulating Parties are asking the Commission to do—allow recovery of potentially substantial WPP costs with absolutely no consideration of the overall impact on customer rates.

The Stipulating Parties assert, without any supporting justification, that the proposed WPP AAC satisfies the Commission's general requirements to establish fair and reasonable rates under ORS 756.040.[33] The Stipulating Parties are wrong. Absent an earnings test, there is no guarantee that costs passed through the WPP AAC will result in just and reasonable rates. An earnings test at authorized ROE would determine what rate increase, if any, would be necessary to ensure the utility is recovering its prudently incurred costs (including the new WPP-related costs) while providing a reasonable return to its shareholders.[34] In other words, CUB's proposed earnings test would ensure rates are just and reasonable under the *Hope* standard.[35] The Commission appears to agree, and has held that "an earnings test is appropriate to be consistent with our general powers expressed in ORS 756.040."[36]

Given that the purpose of an earnings test is to ensure Commission-approved rates are just and reasonable overall, the WPP AAC as proposed by the Stipulating Parties cannot ensure a just and reasonable outcome if an earnings test is not included. Under the constitutional provisions guiding Commission-approved ratemaking, rates must fairly balance the interests of the utility investor and consumer. PAC attempts to argue that the Commission's mandate to

[32] *Id*.
[33] UE 407 – Joint Opening Brief in Support of Stipulation at 10-11.
[34] UE 407 – CUB/100/Jenks/10.
[35] *Id*.
[36] *In re Idaho Power Co., Request for a General Rate Revision*, OPUC Docket No. UE 233 (Phase II), Order No. 13-416 at 6 (Nov. 12, 2013).

establish just and reasonable rates would somehow be superseded by SB 762 because it is more recent and more specific than ORS 756.040 must be rejected.[37] As described, the Commission's mandate to establish just and reasonable rates has its origins in legally required constitutional principles.[38] The Commission's just and reasonable mandate cannot be and is not absolved by the passage of SB 762.

Granting CUB the relief it seeks is especially pressing given the regulatory environment at present. Absent an earnings test, deferrals, trackers, AACs, and other single-issue ratemaking mechanisms fail to consider the total effect of rates, including whether they are just and reasonable on a holistic basis. These mechanisms allow a utility to add new costs to its revenue requirement, but avoid updating for system-wide savings, which can cause customers to overpay.[39] By recovering a significant share of their revenue requirement through trackers, utilities can also avoid their ROE being updated, even during times of decline in a utility's cost of capital.[40]

The Commission should scrutinize any utility request for cost recovery that does not include an examination of the overall earnings, especially since PAC's customers have been hit with significant recent rate increases, the vast majority of which have occurred outside the general rate case setting.[41] Further, the sheer number of deferrals and AACs on the Company's system have exploded over recent decades. In 2007-2008, when the Commission approved an

[37] UE 407 – PacifiCorp's Opening Brief in Support of Stipulation at 18-19.
[38] *Supra,* note 26.
[39] UE 407 – CUB/100/Jenks/9.
[40] *Id*.
[41] *Id*. at 7. While PAC argues that the majority of its recent increase is from its last general rate case and the transition adjustment mechanism (TAM) and that the TAM is not a "tracker," the TAM does adjust rates outside of the general rate case setting. Therefore, TAM costs are added to rates without consideration of their effect on the just and reasonable nature of rates overall. *See* UE 407 – PAC/400/McVee/3.

AAC for costs associated with Renewable Portfolio Standard compliance (RAC), PAC had four deferred accounting applications and sixteen AACs on its Oregon regulatory books.[42] As of February 13, 2023, the Company's books include thirty-three deferrals and fourteen AACs.[43] The number of single-issue trackers on the Company's system has increased from twenty to forty-seven since the inception of the RAC. This imbalanced approach shifts risk from shareholders to customers and increases the likelihood that rates will not be just and reasonable.[44]

In seeking a modest modification to the WPP AAC, CUB is seeking to steer the regulatory ship back to its traditional waters—where constitutional and statutory principles are upheld, where rates are set on a holistic basis, and where the interests of utility customers and investors are fairly balanced. Under this traditional ratemaking framework, the Commission can accurately track the impact of utility rates through the revenue requirement model. To CUB, there must be a threshold at which costs that are not subject to the *Hope* balancing test rise to a level at which they are considered unjust and unreasonable—that is, unconstitutional. With the sheer number of single-issue ratemaking mechanisms before the Commission today, we are closer to that threshold than ever before. The Commission can act on this AAC, and others in the future, by applying an earnings test to protect the interests of utility customers while fairly compensating utility shareholders.

[42] UE 407 – CUB/201, CUB/202, and CUB/203.
[43] UE 407 – CUB/204 and CUB/205.
[44] UE 407 – CUB/200 – Increasing Use of Surcharges on Consumer Utility Bills, Prepared by Larkin & Associates, PLLC for AARP (May 2012), *available at* https://www.aarp.org/content/dam/aarp/aarp_foundation/2012-06/increasing-useof-surcharges-on-consumer-utility-bills-aarp.pdf ("But the increasing imposition of surcharges and other alternative ratemaking mechanisms can also defeat some of the primary principles of the rate-setting and regulatory review process. Besides increased costs to consumers, surcharges can also result in such additional undesirable consequences as reducing utility incentives to control costs and shifting utility business risks away from investors and onto customers.").

B. Statutory Interpretation

On its face, the plain language of SB 762 does not require an earnings test, nor could any statutory language absolve the Commission of its constitutional imperative to establish just and reasonable rates. The Commission's broad authority and discretion to interpret statutory terms to fit within its comprehensive and flexible regulatory scheme is well-documented. Prior examples of the Commission interpreting strikingly similar language to that found in ORS 757.963(8) render PAC's interpretation unworkable.

Statutory interpretation requires discerning the intent of the legislature.[45] The first step in doing so is examining "both the text and context of the statute."[46] If the legislature's intent is not clear from the text and context inquiry, the next step is considering legislative history.[47] If legislative intent is still unclear, the next step is to apply maxims of statutory construction.[48] In *State of Oregon v. Gaines*, the Oregon Supreme Court stated:

> there is no more persuasive evidence of the intent of the legislature than "'the words by which the legislature undertook to give expression to its wishes.'" *State ex rel Cox v. Wilson*, 277 Or 747, 750, 562 P2d 172 (1977) (quoting *U.S. v. American Trucking Ass'ns*., 310 US 534, 542-44, 60 S Ct 1059, 84 L Ed 1345 (1940)). Only the text of a statute receives the consideration and approval of a majority of the members of the legislature, as required to have the effect of law. Or Const, Art IV,§ 25. The formal requirements of lawmaking produce the best source from which to discern the legislature's intent, for it is not the intent of the individual legislators that governs, but the intent of the legislature as formally enacted into law.[49]

[45] *Portland Gen. Elec. Co. v. Bureau of Labor & Indus*., 317 Or 606, 610 (1993) citing ORS § 174.020.
[46] *Id*.
[47] *Id*. at 611.
[48] *Id*. at 612.
[49] *State v. Gaines*, 346 Or 160, 171 (2009).

Under Oregon law, the text and context of the statute in question are given the primary weight in the three step *State v. Gaines* statutory interpretation process.[50] When examining a statute's text and context, the Commission gives words of common usage "their plain, natural, and ordinary meaning."[51]

PAC departs from the arguments raised by the remainder of the Stipulating Parties and asserts that a WPP AAC earnings test is precluded by the plain language of ORS 757.963(8) because it allows recovery of "all . . . costs . . . and prudent investments.[52] ORS 757.963(8) provides that:

> [a]ll reasonable operating costs incurred by, and prudent investments made by, a public utility to develop, implement or operate a wildfire protection plan under this section are recoverable in the rates of the public utility from all customers through a filing under ORS 757.210 to 757.220. The commission shall establish an automatic adjustment clause, as defined in ORS 757.210, or another method to allow timely recovery of the costs.

As seen here, the statute only allows recovery of "all *reasonable* operating costs."[53]

As used in the statute, PAC argues that "timely recovery" of "all" costs is inexact because it expresses a complete policy judgment but requires interpretation.[54] However, PAC also states that "[d]elegative terms, by contrast, inherently require the exercise of judgment to ascertain

[50] *In re Portland General Electric Company, Application for Transportation Electrification Programs*, OPUC Docket No.UM 1811, Order No. 18-054 at 7 (Feb. 16, 2018); *in re PacifiCorp, dba Pacific Power, Petition for Declaratory Ruling Regarding ORS 757.480*, OPUC Docket No. DR 47, Order No. 14-254 at 4 (Jul. 8, 2014).
[51] OPUC Order No. 14-254 at 4 citing *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.,* 317 Or 606, 859 (1993).
[52] UE 407 – PacifiCorp's Opening Brief in Support of Stipulation at 5.
[53] ORS 757.963(8).
[54] *Id*. citing *see Citizens' Util. Bd.,* 154 Or App at 714; *Warrenton Fiber Co*., 283 Or App at 276; see also *Schwan's Sales Enters. v. Dep't of Agriculture*, 129 Or App 131, 135 (1994) ("'all operations'" is an inexact term").

their meaning, such as 'unreasonable' or 'good cause.'"[55] The Oregon Attorney General instructs that "[t]he use of a delegative term reflects a legislative decision to entrust policymaking responsibility to an executive agency subject to the broad policy boundaries established by the statutory scheme."[56] Further, courts have held that terms can be regarded as delegative when "not defined elsewhere" in the statute and are "readily susceptible to multiple interpretations."[57]

Here, since ratemaking is a legislative and policymaking exercise solely entrusted to the Commission by the Oregon legislature, CUB submits that "all" and "reasonable" as used in ORS 757.963(8) are delegative terms. This makes sense, as PAC identified "unreasonable" as a delegative term.[58] Further, neither "all" nor "reasonable" is not defined elsewhere in ORS 757.963(8) and, as can be seen from the advocacy of CUB and the Stipulating Parties, these terms are susceptible to multiple interpretations.

PAC interprets these term to mean "dollar-for-dollar recovery."[59] To CUB, WPP-related cost recovery that occurs after the application of an earnings test is recovery of "all" "reasonable" WPP costs.[60] If established rates allow for the recovery of all costs, including those subject to the WPP AAC, and allow the utility to earn its authorized rate of rate of return,

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[55] *Id*. at 4 citing *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 re PacifiCorp's Petition for Cert. of Pub. Convenience and Necessity*, Docket No. UM 1495, Order No. 11-366 at 3 (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").

[56] Office of the Attorney General, State of Oregon, Opinion No. 8181, 45 Or. App. Atty. Gen 98 (Nov. 4, 1986).

[57] *Or. Occupational Safety & Health Div. v. CBI Servs., Inc*., 356 Or. 577, 590-91 (Or. 2014).

[58] *Supra*, note 55.

[59] UE 407 – PacifiCorp's Opening Brief in Support of Stipulation at 5 ("[T]he legislature intended to provide dollar-for-dollar recovery of WPP costs without an earnings test.").

[60] UE 407 – CUB/100/Jenks/10-11.

PAC cannot argue that is denied recovery of "all" "reasonable" costs. This makes sense, since the Commission engages in the legislative process of holistic ratemaking. The Commission does not engage in piecemeal cost recovery of individual elements,[61] although the Stipulating Parties would prefer that it would. The Commission has great discretion to determine the rates necessary to meet the just and reasonable *Hope* standard.

CUB's interpretation aligns with guidance from the Oregon Attorney General that delegative terms reflect a legislative delegation to an agency to render policy decisions subject to its broad statutory scheme.[62] This also aligns with the Commission's own view of its ratemaking authority:

> [t]he Commission sets rates under a comprehensive and flexible regulatory scheme. The legislature has expressed no specific process or method the Commission must use to determine the level of just and reasonable rates, and the Commission has great freedom to determine which of the many possible methods it will use.[63]

Given the Commission's expansive authority to exercise its just and reasonable ratemaking function,[64] the Commission should find that it has broad discretion and authority to interpret "all" and "reasonable" as used in ORS 757.963(8). As a delegative term, an appellate court would review the Commission's interpretations of "all" and "reasonable" "to ensure that the

[61] *Duquesne*, *supra,* note 3 ("The economic judgments required in rate proceedings are often hopelessly complex, and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding. The Constitution protects the utility from the net effect of the rate order on its property. Inconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other aspect.").
[62] *Supra*, note 47.
[63] OPUC Order No. 08-487 at 5.
[64] *Id*. at 4 (The legislature has provided the Commission "with 'the broadest authority—commensurate with that of the legislature itself—for the exercise of [its] regulatory function.'").

interpretation is within the range of discretion allowed by the more general policy of the statute."[65]

1. *The Plain Language of ORS 757.963(8) Does Not Preclude the Application of an Earnings Test*

The Commission should not be persuaded by PAC's attempt to parse the language of SB 762 in a manner that would benefit its shareholders and impute a legislative finding to limit the Commission's ratemaking authority that does not exist. The Commission has tremendous discretion with which to interpret and implement legislative directives within its comprehensive and flexible regulatory scheme. Absent a clear directive, the legislature cannot "eliminate the Commission's duty to consider the risk balance between utilities and their customers."[66] No such directive exists here.

As Commission precedent implementing similar statutory language dictates, the use of "all" and "reasonable" in ORS 757.963(8) does not mean the Commission must mandate dollar-for-dollar recovery of WPP costs. PAC's simplistic reliance on the Webster's Dictionary definition of "all" fails to consider the Commission's core mandate to set rates at a holistic level that balances competing interests.[67] This is especially true in this context since utilities recover costs in a different manner than most enterprises. Therefore, reliance on a generic Webster's Dictionary definition is not sufficient to capture legislative intent. Further, the statute's use of "all" and "reasonable" indicates no clear intent to depart from just and reasonable ratemaking. Rather, CUB believes these terms fit squarely within the Commission's broad discretion under its statutory scheme. CUB's proposed earnings test would examine the Company's overall rates.

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[65] *Or. Occupational Safety & Health Div. v. CBI Servs., Inc.*, 356 Or. 577, 585 (Or. 2014) citing *Springfield Education Assn. v. Springfield Sch. Dist. No. 19*, 290 Or. 217, 228 (1980).
[66] OPUC Order No. 22-388 at 80.
[67] UE 407 – PacifiCorp's Opening Brief in Support of Stipulation at 5.

If rates are already sufficient to include legitimate recovery of WPP AAC costs, there is no basis for further increases. To CUB, this would allow the utility recovery of "all" "reasonable" WPP-related costs.

CUB's interpretation that ORS 757.963(8), does not mandate dollar-for-dollar recovery aligns with prior Commission interpretations of similar language in other statutes. The language in the ORS 469A.120(1) Renewable Portfolio Standard statute provides that "*all* prudently incurred costs associated with complying with ORS 469A.005 to 469A.210 *are recoverable* in the rates of an electric company."[68] In applying *State v. Gaines* to ORS 469A.120(1) in Order No. 15-408, the Commission held that, "[b]ased on our plain reading of the statute, we agree . . . that ORS 469A.120(1) does not mandate dollar-for-dollar recovery of all RPS costs, but rather allows the utilities the opportunity to recover their variable costs."[69]

Further, ORS 757.936(2), Oregon's Renewable Natural Gas (RNG) procurement standard, provides, in pertinent part, that "[t]he commission shall adopt ratemaking mechanisms that ensure the *recovery of all prudently incurred costs* that contribute to the large natural gas utility's meeting the targets set forth . . . ."[70] In interpreting this language, the Commission rejected NW Natural's assertion that it be granted dollar-for-dollar cost recovery through its RNG AAC.[71] In rejecting this argument, the Commission said:

> [t]hat interpretation, taken to its logical extent, would reach deep into the Commission's ratemaking function and prevent us from achieving balanced outcomes and establishing just and reasonable rates, radically and fundamentally changing the Commission's ratemaking task.[72]

[68] ORS 469A.120(1) (emphasis added).
[69] OPUC Order No. 15-408 at 6-7 (emphasis added).
[70] ORS 757.396(2) (emphasis added).
[71] UE 407 – CUB/100/Jenks/13, lines 16-19.
[72] OPUC Order No. 22-388 at 80.

Similarly, here, the Commission should conclude that ORS 757.963(8) does not mandate dollar-for-dollar recovery of WPP-related costs. The plain language of ORS 757.963(8) does not indicate any clear legislative intent to fundamentally change the Commission's ratemaking task. Further, ORS 757.963(8) includes the term "reasonable" in regards to cost recovery, which provides the Commission greater discretion to decide that dollar-for-dollar cost recovery is not necessary to establish just and reasonable rates. As the next section will demonstrate, an intent to alter the Commission's ratemaking task is also absent from SB 762's legislative history.

2. *The Legislative History of ORS 757.963(8) Indicates No Clear Intent to Alter the Commission's Ratemaking Function*

PAC makes no attempt to argue that SB 762's legislative history demonstrates an intent to alter the Commission's longstanding, delegated ratemaking function. After CUB's review of pertinent legislative history, this is because no such intent exists. As the Commission stated when grappling with the legislative intent of SB 98, the use of "all" did not require dollar-for-dollar cost recovery both on its face and because the legislature did not:

> express a clear intention to deviate from the legislature's traditional deference to the Commission's application of its long-established ratemaking mechanisms, nor to have the legislature tightly control cost recovery mechanisms with an intention to prioritize the companies' interests over customers' interests.[73]

The Commission goes on to state that:

> [a]n intention to make this fundamental change is absent from the legislative history. We see no evidence from the legislative history that, as a fundamental premise of its environmental policy, the legislature expected through SB 98 to eliminate the Commission's duty to consider the risk balance between utilities and their customers.[74]

[73] *Id*.
[74] *Id*.

Similarly, here, the Commission should find that there is no clear intent in either the plain language or legislative history of SB 762 that would somehow absolve the Commission of its core ratemaking function. This function must account for the impact of overall rates on both customers and shareholders, and CUB's earnings test at authorized ROE achieves this purpose. This is especially important given the significant rate increases and proliferation of single-issue ratemaking mechanism that PAC's customers are exposed to.

Contrary to PAC's assertions, CUB is not asking the Commission to ignore statutory language and treat these costs similar to how they would be recovered through a general rate case.[75] Rather, CUB is asking the Commission to take the statutory language, interpret it with the broad discretion that has been delegated to it, and fit it within its legally binding, constitutionally-derived mandate to establish just and reasonable rates. Counter to PAC's assertion, the Commission does indeed have the discretion to grant CUB the relief it seeks.[76]

Indeed, it has done so in very similar circumstances[77] and the utilities have not sought judicial review of those decisions. As PAC concedes, "[r]elated statues that may be considered in the contextual analysis include those with the same underlying policies and/or the same subject matter."[78] The statutes and Commission decisions CUB cites to provide contextual analysis for the Commission to consider. As can be demonstrated from its decisions implementing the RNG AAC and the RAC, the Commission retains broad flexibility to

[75] UE 407 – PacifiCorp's Opening Brief in Support of Stipulation at 7.
[76] *Id*. ("[T]he Commission does not have discretion to adopt the "compromise" approach CUB proposes.").
[77] *Supra,* notes 66 and 69.
[78] UE 407 – PacifiCorp's Opening Brief in Support of Stipulation at 9 citing *see Gen. Elec. Credit Corp. v. Or. State Tax Com*., 231 Or 570, 591 (1962) (determining that usury laws and tax laws were not related because policies underlying usury and tax laws differ); *Chevron U.S.A., Inc. v. Motor Vehicles Div*., 49 Or App 1099, 1103–04 (1980) (determining provisions in two distinct statutes were both related to payments and reports made to state agency).

implement legislation, absent any clear legislative directive to remove that flexibility. No such directive exists here.

C. The Examples Relied Upon are Readily Distinguishable

PAC and the Stipulating Parties lean on a string of Commission decisions implementing legislative directives in an attempt to bolster their position that SB 762 must be implemented without any consideration of overall rates. However, not only are these examples readily distinguishable from the instant case, CUB has demonstrated that the Commission has ruled in ways that run counter to the examples relied upon by PAC in various other circumstances.[79] This demonstrates that the Commission has interpreted similar statutory language in different ways over the years. The examples provided by PAC actually help further CUB's point—the Commission has broad authority and discretion to determine just and reasonable rates and can interpret legislation to fit within this scheme, absent any clear direction otherwise. This makes sense since the Commission is an expert in ratemaking, whereas the legislature is not.

PAC's examples represent one-off circumstances whose decisions do not create any binding precedent thrust upon the Commission today.[80] Further, the Commission's broad authority includes the ability to consider the facts before it today when rendering a decision based on similar statutory language.[81] Here, the Commission should consider the potentially significant impact of these future costs, the sheer number of single-issue ratemaking mechanisms on the Company's books, and the significant rate increases PAC customers have been exposed to when rendering a decision in this instance. Taken together, these facts point to a decision granting CUB the relief it seeks in this proceeding.

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[79] *Supra*, notes 66 and 69.
[80] *Supra*, note 5.
[81] *Supra,* note 6.

PAC leans heavily on references to the SB 838 RAC to justify its position perhaps more than any other prior AAC. However, as indicated above, SB 838 uses nearly identical language to SB 98, and the Commission recently found that SB 98 did not mandate dollar-for-dollar cost recovery in the RNG AAC.[82] Further, in an investigation into SB 838's cost recovery language, the Commission found, "[b]ased on our plain reading of the statute, we agree . . . that ORS 469A.120(1) does not mandate dollar-for-dollar recovery of all RPS costs, but rather allows the utilities the opportunity to recover their variable costs."[83] Similarly, here, CUB's proposed earnings test would allow the Company an opportunity to recover its WPP-related costs as part of its overall rates, consistent with the Commission's mandate.

PAC indicates that CUB supported the RAC without an earnings test when it was adopted.[84] While that is true, entering into a RAC Stipulation without an earnings test remains one of CUB's biggest regrets. Given the evidence before CUB at the time, it seemed as if RAC eligible resources would be small, incremental, ongoing resources that did not fit well into the general rate case process. Since these resources would be small, at the time, CUB believed their impact would be minimal. CUB's SB 373 testimony on cost recovery corroborates this:

> [t]here is a new provision that directs the PUC to identify a mechanism whereby the utility can apply for and get timely recovery of prudently incurred investment in renewable resources without the need for a rate case. This makes policy sense, because the [RPS] will promote a strategy of adding renewable resources on an on-going basis, and this might otherwise require annual rate cases, which are resource intensive proceedings.[85]

[82] OPUC Order No. 22-388 at 80.
[83] OPUC Order No. 15-408 at 6-7 (emphasis added).
[84] UE 407 – PacifiCorp's Opening Brief in Support of Stipulation at 11.
[85] Testimony Before the Senate Environment and Natural Resources Committee, SB 373, Jason Eisdorfer, Citizens' Utility Board (Mar. 15, 2007).

The opposite has been true. The utilities consistently pass large-scale renewable projects through the RAC as Oregon's Renewable Portfolio Standard has continued to accelerate. These projects have been brought on in a large, lumpy, relatively infrequent manner rather than on an ongoing basis.

Further, as PAC notes, in the joint testimony supporting the RAC stipulation, "CUB provided that the 'result of the Stipulation are fair, just and sufficient *in the context of this case* and should be adopted.'"[86] "In the context of this case" is instructive. At the time, given the facts before us, CUB found the RAC stipulation reasonable. However, the number of deferrals and automatic adjustment clauses on PAC's system has more than doubled since that time.[87] Customers are facing severe rate pressure today. Wildfire costs have the potential to be astronomical. Given the facts before CUB today, approving the WPP AAC without an earnings test is not compatible with a just and reasonable outcome. Regardless, the RAC Stipulation does not have any binding impact on the Commission's consideration of the issue before it in this proceeding.

The remainder of selective statutes and attendant mechanisms that PAC relies on are similarly unpersuasive. This Brief has established that SB 762 does not mandate dollar-for-dollar cost recovery, and that the Commission retains broad flexibility, discretion, and authority to implement legislation in a manner that aligns with just and reasonable ratemaking. This has been demonstrated throughout the Commission's history, including in the recent implementation

[86] UE 407 – PAC/400/McVee/5, lines 10-12, fn. 12 citing see *In the Matter of Public Utility Commission of Oregon, Investigation of Automatic Adjustment Clause Pursuant SB 838*, UM 1330, Order No. 07-572 at 4 (Dec. 19, 2007). In the joint testimony supporting the RAC stipulation, CUB provided that the "result of the Stipulation are fair, just and sufficient in the context of this case and should be adopted." (emphasis added).

[87] *Supra*, notes 41 and 42. The number of single-issue trackers on the Company's system has increased from twenty to forty-seven since the inception of the RAC.

of the SB 98 RNG bill. Absent any clear indication of legislative intent to "reach deep into the Commission's ratemaking function[,]"[88] the Commission's core mandate to establish just and reasonable rates must be upheld. No such intent exists in SB 762. CUB's proposal furthers this foundational precept, while the position of the Stipulating Parties would depart from it.

D. CUB's Proposed Earnings Test is a Reasonable Compromise

CUB is proposing that the Commission modify the stipulation to include an earnings test on the WPP AAC at the Company's authorized ROE. However, this modest proposal would only apply to the deferral underlying the AAC that would track actual WPP AAC costs for potential later inclusion in rates. The Stipulating Parties proposed mechanism defers O&M expense annually, and allows the Company to true up the cost to actuals without an earnings test. CUB notes that the deferred accounting standard requires an earnings test.[89] Not only would CUB's proposal treat both the utility and its customers fairly, it would align with Oregon law. CUB requests that the Commission require that the mechanism to examine the Company's earnings on a comprehensive basis prior to recovering additional costs through the WPP AAC.

If PAC was already earning above its authorized ROE by an amount that is equal to, or larger than, the costs subject to amortization in the WMP AAC, rates would already be sufficient under the Commission's just and reasonable standard. Therefore, the utility would already be fairly compensated for costs flowing through the WMP AAC, so additional recovery would not be necessary to satisfy the Commission's standard to establish just and reasonable rates. Conversely, absent an earnings test, the utility would be able to recover costs in excess of what is

[88] OPUC Order No. 22-388 at 80, *supra*, note 17.
[89] ORS 757.259(5).

just and reasonable. If the utility's rates are already sufficient, it is being granted cost recovery for WMP AAC costs. CUB's proposed earnings test at ROE ensures this.

CUB's proposal is both reasonable and durable. It will only apply in specific years, to a limited portion of WPP AAC costs—the potential true up). In most years, it is likely that CUB's proposed earnings test will not trigger at all. However, this important customer protection provision will ensure that rates are just and reasonable overall on years when it does trigger.

III. CONCLUSION

For the foregoing reasons, CUB respectfully recommends that the Commission modify the Stipulation filed in this proceeding to include an earnings test on the retroactive adjustment in the WPP AAC set at PAC's authorized ROE.

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Respectfully submitted,

Michael P. Goetz, OSB #141465
General Counsel
Oregon Citizens' Utility Board
610 SW Broadway, Ste. 400
Portland, OR 97205
T. (503) 227-1984
E. mike@oregoncub.org