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March 2, 2023

VIA ELECTRONIC FILING

Attention: Filing Center
Public Utility Commission of Oregon
201 High Street SE, Suite 100
P.O. Box 1088
Salem, Oregon 97308-1088

Re: Docket 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.

Attention Filing Center:

Attached for filing in the above-referenced docket is PacifiCorp's Opening Brief in Support of the Stipulation.

Please contact this office with any questions.

Sincerely,

Katherine McDowell

Attachment

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 407

In the Matter of PACIFICORP d/b/a PACIFIC POWER'S Application for Approval of an Automatic Adjustment Clause for Recovery of Costs Associated with the Company's Wildfire Protection Plan.

PACIFICORP'S OPENING BRIEF IN SUPPORT OF STIPULATION

March 2, 2023

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I. INTRODUCTION

PacifiCorp d/b/a Pacific Power (PacifiCorp or the Company) requests that the Public Utility Commission of Oregon (Commission) approve the Stipulation between PacifiCorp, Commission Staff (Staff), and the Alliance of Western Energy Consumers (AWEC) (collectively, the Stipulating Parties) in this case. The Stipulation sets forth the agreed-upon structure of PacifiCorp's automatic adjustment clause (AAC) for the recovery of incremental costs associated with the Company's Wildfire Protection Plan (WPP) (WPP Adjustment). The Oregon Citizens' Utility Board (CUB) objects to the Stipulation for one reason—the stipulated WPP Adjustment does not contain an earnings test set at PacifiCorp's authorized return on equity (ROE). As explained in the Stipulating Parties' Joint Brief, the Commission should decline to alter the Stipulation because it contains important customer protections and will result in fair and reasonable rates. This separate brief explains PacifiCorp's position that even if the Commission were to disagree with the Stipulating Parties' consensus that the Stipulation will ensure fair and reasonable rates, the Commission is precluded by law from accepting CUB's recommendation to impose an earnings test on the WPP Adjustment.

In 2021, the legislature passed comprehensive wildfire legislation, Senate Bill (SB) 762, to promote wildfire risk reduction, response, and recovery in several ways. As relevant here, SB 762 Section 3, codified at ORS 757.963, mandates that PacifiCorp establish a WPP, requires that PacifiCorp be permitted to recover "all" costs associated with its WPP, and specifies that the Commission "shall establish" an AAC or another method to allow "timely recovery of the costs." The plain language of the statute shows that the legislature intended to authorize separate and timely, dollar-for-dollar recovery of the costs to comply with this significant new mandate. This legislative intent is confirmed when SB 762's cost recovery language is viewed in the context of more than two decades of Commission precedent interpreting similar language for other legislative mandates, where the Commission has ordered dollar-for-dollar recovery of compliance costs without an earnings test. Most notably, the second sentence of SB 762's cost recovery provision is identical to language in ORS 469A.120(2) that the Commission previously held required dollar-for-dollar recovery without an earnings test, implementing a stipulation that CUB joined. Adoption of an earnings test under SB 762 would contravene the legislature's clear intent because an earnings test could prevent PacifiCorp from timely recovering all costs of implementing the new legislative mandate to develop and implement a WPP.

CUB appears to agree that the statute requires full recovery of WPP costs but reasons that this requirement is met so long as PacifiCorp is earning its authorized ROE.[1] This novel interpretation is not supported by the statutory language or the Commission precedent that provides SB 762's context. CUB also relies on ORS 756.040's general directive that the Commission establish fair and reasonable rates, arguing that the WPP Adjustment *cannot* ensure fair and reasonable rates without an earnings test.[2] However, ORS 756.040's general requirement cannot negate the specific cost-recovery directive in SB 762, even if the two statutes were in conflict—which they are not because the Stipulation will result in fair and reasonable rates. In addition, CUB's position would represent a radical departure from the Commission's long-standing precedent of implementing the cost-recovery provisions accompanying legislative mandates by adopting AACs without earnings tests, with CUB's support or non-opposition.

The Commission should reject CUB's arguments, confirm that SB 762 requires dollar-for-dollar recovery through an AAC without an earnings test, and approve the Stipulation

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[1] CUB/100, Jenks/11:1-3.
[2] CUB's Objections in Opposition to Settlement at 4 (Jan. 20, 2023) (CUB's Objection).

without modification.

II. LEGAL FRAMEWORK

In Oregon, the guiding principle of statutory interpretation is to "pursue the intention of the legislature if possible."[3] The starting point for the inquiry is the statute's "text and context"[4] because it is the "best evidence of the legislature's intent."[5] Next is a consideration of "pertinent legislative history."[6] If "the legislature's intent remains unclear," then "general maxims of statutory construction to aid in resolving the remaining uncertainty" become applicable.[7] A statute is ambiguous if there is more than one "plausible interpretation" of the disputed text.[8] Where ambiguity exists, the correct interpretation is that which best effectuates the legislature's purpose.[9]

When a court reviews an agency's interpretation of a statute, the court must determine whether the language at issue is exact, inexact, or delegative.[10] Exact terms are "so precise that no interpretation is necessary,"[11] such as "30 days" or "Marion County."[12] Inexact terms express

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[3] 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.").
[4] *State v. Gaines*, 346 Or 160, 171 (2009).
[5] *PGE v. BLI*, 317 Or at 610.
[6] *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").
[7] *Id.* at 172.
[8] *Tharp v. Psychiatric Sec. Review Bd*., 338 Or 413, 425–26 (2005) (court declared text ambiguous when counsel presented two plausible interpretations).
[9] *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 Educ. Ass'n 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, 689-90 (2005) (rejecting a technical definition of "report or statement" that "would seem to frustrate what it appears is plainly the purpose of the statute").
[10] *Blanchana, LLC v. Bureau of Labor & Indus.*, 354 Or 676, 687 (2014) ("When a disputed statutory term is part of a regulatory scheme to be administered by an administrative agency, this court first determines whether that term is an 'exact' term, an 'inexact' term, or a 'delegative' term — that is, how much interpretive authority the legislature delegated to the agency when using that term."); *Springfield Educ. Assn. v. Springfield Sch. Dist. No. 19*, 290 Or 217, 223-25 (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).
[11] *Dep't of Consumer & Bus. Servs. v. Muliro* (*In re Muliro*), 359 Or 736, 745 (2016).
[12] *Springfield*, 290 Or at 223.

"a completed legislative policy judgment,"[13] yet are still subject to "competing interpretations"[14]—for instance, "substantial influence" or "person whose business or activities are regulated."[15] 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."[16] Delegative terms, by contrast, inherently require the exercise of judgment to ascertain their meaning, such as "unreasonable" or "good cause."[17] 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.[18]

III. ARGUMENT

ORS 757.963(8) provides that:

> All 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

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[13] *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'").

[14] *Warrenton Fiber Co. v. Dep't of Energy*, 283 Or App 270, 276 (2016).

[15] *Util. 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").

[16] *Coast Sec. Mortg. Corp. v. Real Estate Agency*, 331 Or 348, 354 (2000).

[17] *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").

[18] *Coast*, 331 Or at 354.

automatic adjustment clause, as defined in ORS 757.210, or another method to allow timely recovery of the costs.

The legislature's direction in this provision regarding "timely recovery" of "all" costs is inexact because it expresses a complete policy judgment but requires interpretation.[19] In interpreting this statute, the Commission must apply principles of statutory interpretation to determine whether the legislature intended to provide for dollar-for-dollar recovery of WPP costs without an earnings test, but because the provision is not delegative, the Commission may not exercise its judgment to replace or complete the legislature's policy decision. A review of the plain language of the statute and the context provided by the Commission's interpretation of many other similarly worded statutes demonstrates that CUB's proposed earnings test must be rejected.

A. <u>The Plain Language of ORS 757.963(8) Precludes Application of an Earnings Test.</u>

1. Application of an earnings test would prevent PacifiCorp from recovering "all" WPP costs, as required by the statute.

The meaning of the statutory mandate for timely recovery of "all . . . costs . . .and prudent investments" is plain.[20] "All" means "the whole amount or quantity of" or "every individual component of."[21] Because CUB's proposed earnings test would prevent PacifiCorp from recovering the whole amount or every component of its WPP costs if PacifiCorp were earning more than its authorized ROE, the earnings test would violate the plain language of ORS 757.963(8).[22]

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[19] *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").
[20] OSR 757.963(8).
[21] *Webster's Third New Int'l Dictionary* at 34 (1961); *see also* Merriam-Webster Online Dictionary, *available at* https://www.merriam-webster.com/dictionary/all (last accessed Feb. 27, 2023).
[22] Requiring an earnings test would also violate OAR 860-0300-0080, which is substantively identical to SB 762's cost-recovery language: "All reasonable operating costs incurred by, and prudent investments made by, a Public Utility to develop, implement, or operate a Wildfire Protection Plan are recoverable in the rates of the Public Utility from all customers through a filing under ORS 757.210 to 757.220." For the reasons explained in this section, requiring an earnings test would violate this rule's plain language. The Commission would be entitled to deference

CUB seems to concede that ORS 757.963(8) requires full recovery of WPP costs,[23] but CUB contends that application of an earnings test will not prevent PacifiCorp from fully recovering its WPP costs.[24] Even though some or all WPP costs would not be included in rates under CUB's proposal, CUB argues that the earnings test would not actually disallow recovery of these costs.[25] CUB's theory is that the earnings test "simply looks to see what level of increase is necessary to allow the utility to recover its prudently incurred costs (including the new WPP-related costs) and provide reasonable return to its shareholders,"[26] and CUB believes that "if the utility is fully recovering its revenue requirement, it is being fairly compensated for its operating costs and a return on its rate base."[27]

The problem with CUB's position is that ORS 757.963(8) does not say that all costs and prudent investments are recoverable "only if the utility is earning less than its authorized ROE," or "only if the utility is not being fairly compensated when the costs are incurred," or "only if the utility cannot find savings elsewhere in its business to offset the costs." CUB's effort to insert limiting language into the statute must be rejected, because it infringes upon the legislature's policymaking authority.[28]

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for a plausible interpretation of its own cost recovery rule. *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n,* 346 Or 366, 410 (2009); *Don't Waste Or. Comm. v. Energy Facility Siting Council,* 320 Or 132, 142 (1994). However, a Commission order finding that "all costs" actually means "all costs unless the utility is over-earning" would not represent a plausible interpretation of OAR 860-0300-0080.

[23] *See, e.g.*, CUB/100, Jenks/3:17-19 ("An earnings test at authorized ROE represents a reasonable compromise that will allow PAC to fully recover WPP costs…"); CUB/100, Jenks/11:2-3 ("WPP-related cost recovery that occurs after the application of an earnings test *is* full cost recovery." (emphasis original)).

[24] CUB/100, Jenks/10:19-11:3.

[25] CUB/100, Jenks/10:13-17.

[26] CUB/100, Jenks/10:13-17.

[27] CUB/100, Jenks/6:22-23.

[28] ORS 174.010 (judge interpreting statute must not "insert what has been omitted, or . . . omit what has been inserted."); *State v. Linder,* 177 Or App 715, 717 (2001) ("[A]dding what the legislature omitted requires courts to engage in policy making that is more appropriately left to the legislature.").

2. Applying an earnings test to offset WPP costs against potential, unrelated cost savings would not effectuate the legislative intent to provide full, timely recovery for WPP costs on a single-issue basis.

CUB urges the Commission to focus on PacifiCorp's overall rates, rather than the specific WPP costs,[29] and explains that, "[a]n earnings test at authorized ROE represents a reasonable compromise that will allow [PacifiCorp] to fully recover WPP costs *in a consistent manner to how they would be recovered in a general rate case proceeding*."[30] CUB's statements reveal what CUB is actually asking the Commission to do—ignore the statutory language requiring full, timely cost-recovery for WPP costs and instead treat these costs similar to any other costs the utility would recover through a general rate case. However, the Commission cannot functionally redraft the statute by "completely eliminating a word, phrase, or concept that the original text clearly and intentionally includes,"[31] and therefore the Commission does not have discretion to adopt the "compromise" approach CUB proposes.

If the legislature had intended that WPP costs be recoverable just like any other costs included in a general rate case, *i.e.*, only after offsetting any cost savings in other areas, then there would have been no need for the legislature to include specific language mandating that all WPP costs are recoverable or to mandate specific procedures for timely recovery. Indeed, adopting CUB's interpretation that WPP costs should be recoverable just like any other costs in a general rate case, would render the first sentence of ORS 757.963(8)[32] redundant and unnecessary, contrary to a core principle of statutory construction.[33] The presence of specific cost-recovery language in the first sentence of ORS 757.963(8) must be given meaning, and

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[29] CUB/100, Jenks/4:14-16.
[30] CUB/100, Jenks/3:17-20 (emphasis added).
[31] *City of Salem v. Lawrow*, 233 Or App 32, 39 (2009).
[32] "All reasonable operating costs . . . and prudent investments . . . are recoverable . . .[.]"
[33] *See, e.g.*, *State v. Stamper,* 197 Or App 413, 423, (2005) (noting that proffered construction would "render[] superfluous portions of other statutes").

along with the mandate for timely recovery in the second sentence, the statutory text demonstrates a specific legislative directive that WPP costs be timely and fully recovered on a single-issue basis, separate from a general rate case. The Commission should decline CUB's requests to read the cost-recovery language out of the statute.[34]

The WPP Adjustment appropriately effectuates the legislative intent to provide for timely recovery of WPP costs separate from general rates. As explained in the Joint Brief, the WPP Adjustment segregates all WPP costs and includes only actual in-service capital costs, trues up the expense forecast to actuals through the balancing account, and updates existing rate base in the WPP Adjustment for depreciation each year.[35] This structure ensures that, although the costs are not included in general rates, the WPP Adjustment will not cause PacifiCorp to earn more than its authorized ROE.[36] Notably, CUB does not object to the provision in the Stipulation that depreciation within the WPP Adjustment will be updated each year,[37] and CUB has not suggested that this provision be suspended when PacifiCorp is earning *under* its authorized ROE. Thus, it appears that CUB does not object to the WPP Adjustment differing from general rate recovery when it benefits customers.

B. <u>Commission Precedent Interpreting the Same or Similar Language Provides Crucial Context that Supports PacifiCorp's Interpretation of ORS 757.963(8).</u>

In step one of Oregon statutory construction, the "text and context" analysis of the legislature's intent, related statutes enacted at the same time as or before the statute at issue provide contextual evidence.[38] Courts presume the legislature enacts new law "with full

[34] ORS 174.010 (judge interpreting statute must not "insert what has been omitted, or . . . omit what has been inserted."); *State v. Pine,* 336 Or 194, 201 (2003) ("Reading the statute to the contrary would require omission of words that the legislature chose to insert.").
[35] Joint Brief in Support of Stipulation at 8-9 (Mar. 2, 2023).
[36] *Id.* at 11-12.
[37] Stipulation at 4, ¶ 15 (Dec. 29, 2022).
[38] *Stull v. Hoke,* 326 Or 72 (1997).

knowledge of the existing condition of the law" and intends related statutes to be "part of a general and uniform system of jurisprudence."[39] Decisions interpreting related statutes also provide important context because Oregon courts presume that the legislature is aware of existing law at the time it enacts a statute,[40] and that it enacts statutes in light of existing judicial decisions that directly bear upon the new statute.[41] Related statutes that may be considered in the contextual analysis include those with the same underlying policies and/or the same subject matter.[42] In the absence of evidence to the contrary, courts assume the legislature intended the same words or phrases in related statutes to have the same meaning.[43]

As explained in-depth below, the Commission has for more than 20 years interpreted legislative-mandate, cost-recovery provisions using identical language or similar to ORS 757.963(8) as requiring dollar-for-dollar recovery without an earnings test. In interpreting ORS 757.963(8), the Commission must assume that the legislature understood the Commission's precedent and intended that the same interpretation would apply.

1. SB 1149 (1999), Restructuring Mandate

Oregon's electric power restructuring legislation, SB 1149 (1999), imposed significant new mandates on electric utilities and required that the Commission approve a rate or schedule that provides the utility:

> [T]he *opportunity to recover all costs prudently incurred* in the acquisition, development, operation and maintenance of investments, systems and procedures,

[39] *Coates v. Marion County,* 96 Or 334, 339 (1920) (internal quotation omitted).
[40] *Blanchana, LLC*, 354 Or at 691.
[41] *Weber & Weber,* 337 Or 55, 67 (2004) ("As part of this court's well-established statutory construction methodology, this court presumes that the legislature enacts statutes in light of existing judicial decisions that have a direct bearing upon those statutes.")
[42] S*ee 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).
[43] *State v. Stallcup,* 341 Or 93, 99–103 (2006) (analyzing the definition of "appraisal" by reviewing as context the use of that word and related phrases in related statutes).

> including arrangements with third parties, necessary to comply with sections 1 to 20 and 29 of this 1999 Act, or authorizes the deferral of costs for later recovery in rates…[44]

After considering this language, the Commission endorsed Staff counsel's interpretation that the language provided for recovery outside of the deferred accounting statute, ORS 757.259, and as a result, the Commission need not conduct an earnings review before including the costs in rates, as ORS 757.259 requires.[45] The Commission characterized SB 1149 as including a "dual mandate" to utilities to (1) implement restructuring and (2) "be kept financially whole in the process."[46] The Commission found that the legislature intended to ensure that all prudent costs to comply with the legislation were recoverable and that "SB 1149 clearly allows the recovery of all costs," in contrast to ORS 757.259, which does not contain such a standard.[47]

2. SB 838 (2007), Renewable Portfolio Standard (RPS) Mandate

In 2007, the legislature passed a new RPS in SB 838 (2007), which required utilities to serve a specified percentage of their load with renewable resources and represented a significant change in the regulatory landscape. The new law provided that "*all prudently incurred costs associated with compliance* with a renewable portfolio standard *are recoverable*" and required the Commission to establish an AAC or another method for timely recovery of capital costs.[48]

The Industrial Customers of Northwest Utilities (ICNU) raised concerns in several legislative committee hearings regarding the AAC aspect of SB 838 and the fact that it would allow utilities to pass through "all" costs without the ability to look at costs holistically in a

[44] SB 1149 Section 18(4)(a) (1999) (emphasis added).
[45] *In re Application of Portland Gen. Elec. Co. for Authorization to Defer Costs Related to Implementing SB 1149 and In re Application of PacifiCorp for Authorization to Defer Costs Related to Implementing SB 1149*, Docket Nos. UM 954 and UM 958, Order No. 00-165 at 2-4 (Mar. 17, 2000); reconsideration denied Order No. 00-308 (June 9, 2000).
[46] Order No. 00-165 at 4.
[47] *Id.* at 3.
[48] SB 838 Section 13 (2007) (emphasis added).

general rate case.[49] In contrast, the Commission, CUB, and the utilities supported the AAC. As then-Commission-Chair Lee Beyer explained to the legislature in response to questions regarding the AAC:

> It actually makes some sense, if you're asking the utilities to make an investment, a specific investment, and they're saying ok, if we have to make that to meet law, we want to make sure that we have the opportunity to recover those costs if they are prudently incurred. And I think that makes some sense.[50]

Notably, neither ICNU in expressing its concerns regarding the AAC, nor the stakeholders responding to those concerns (including CUB) appeared to believe that the AAC would involve application of an earnings test. Indeed, there is no mention of an earnings test in the legislative history for SB 838.

Following passage of the bill, the Commission convened docket UM 1330 at CUB's request to investigate the adoption of an AAC under SB 838.[51] Consistent with the parties' apparent understanding of SB 838's requirements, Staff, CUB, ICNU, PacifiCorp, and Portland General Electric Company (PGE) entered a stipulation supporting approval of the utilities' renewable adjustment clause (RAC) filings, which included agreement that the deferrals under the RAC would not be subject to an earnings review.[52] As ICNU's witness explained in testimony, "regardless if the Utilities are exceeding their authorized earnings, they still are allowed recovery of deferred amounts."[53] Over the last 15 years, the Commission has consistently approved recovery under the utilities' RACs without application of an earnings

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[49] *See, e.g.*, House Committee on Energy and Environment, SB 838, Public Hearing - Audio Recording at approximately 00:32:00 - 00:35:00 (Apr. 18, 2007), *available at* https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2007041244.
[50] House Committee on Energy and Environment, SB 838, Public Hearing - Audio Recording at approximately 1:25:25 (Apr. 16, 2007) (oral testimony of Lee Beyer, Chair of the Public Utility Commission of Oregon), *available at* https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2007041234.
[51] *In re Pub. Util. Comm'n of Or. Investigation of Automatic Adjustment Clause Pursuant to SB 838*, Docket No. UM 1330, Order No. 07-572 at 1 (Dec. 19, 2007).
[52] *Id.* at 6.
[53] *Id.* at 7.

test.[54]

3. House Bill (HB) 3039 (2009), Solar Capacity and Volumetric Incentive Rate (VIR) Mandates

In 2009, HB 3039 (2009) added two new mandates related to solar energy and associated cost recovery provisions. First, HB 3039 Section 3 established a 20-megawatt aggregate solar capacity requirement for all electric utilities in the state and provided that "[a]ll costs prudently incurred" to comply "are recoverable" and are eligible for an AAC established under ORS 469A.120 (the codification of SB 838, the RPS cost-recovery statute under which the Commission adopted the RAC).[55] The Commission implemented HB 3039 Section 3 by adopting a rule with similar language to the statute,[56] and subsequently approved AACs under the statute without an earnings test.[57]

Second, HB 3039 Section 2 established a solar VIR pilot program and provided that "[a]ll prudently incurred costs associated with compliance with this section are recoverable in the rates of an electric company," but Section 2 made no mention of an AAC or timely recovery. In the ensuing investigation, the Commission adopted a cost recovery mechanism for PGE and PacifiCorp "that is consistent with their current automatic adjustment clause practices," *i.e.*, with

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[54] *See, e.g.*, *In re PacifiCorp, dba Pac. Power, 2020 Renewable Adjustment Clause*, Docket No. UE 369, Order No. 20-067 (Mar. 9, 2020); *In re Portland Gen. Elec. Co., Schedule 122 Update to Renewable Resources Automatic Adjustment Clause*, Docket No. UE 209, Order No. 09-398 (Oct. 5, 2009); *In re Portland Gen. Elec. Co., Renewable Resource Automatic Adjustment Clause (Schedule 122)*, Docket No. UE 370, Order No. 20-279 (Aug. 26, 2020) & Order No. 20-321 (Sept. 29, 2020).

[55] HB 3690 (2010) amended the cost-recovery language in HB 3039 (2009) Section 2(10), but did not alter the relevant language quoted in this brief.

[56] *In re Rulemaking Regarding Solar Photovoltaic Energy Systems*, Docket No. AR 538, Order No. 10-200, App. A at 4 (May 28, 2010) (adopting 860-084-0060, which stated, "An electric company may request recovery of its prudently incurred costs to comply with the solar photovoltaic capacity standard specified in OAR 860-084-0020 in an automatic adjustment clause proceeding filed at the Commission pursuant to ORS 469A.120.")

[57] *In re PacifiCorp, dba Pac. Power Application for Deferred Accounting for Costs Relating to the Black Cap Solar Project*, Docket No. UM 1627, Order No. 12-450 (Nov. 20, 2012); *In re 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 (Feb. 28, 2012).

their RACs, which have no earnings test.[58] Because Idaho Power Company (Idaho Power) was not subject to the RPS and had not developed a RAC, the Commission approved Idaho Power's request "to recover 100 percent of its costs through a rider mechanism similar to its currently approved Energy Efficiency Rider."[59] Thus, even though the solar VIR provision did not specifically mention an AAC, the Commission adopted AACs for PGE and PacifiCorp without earnings reviews under the more general "all prudently incurred costs . . . are recoverable" language to effectuate the legislative mandate—just as it had under SB 1149 and SB 838. The Commission has consistently reauthorized the solar VIR AACs and Idaho Power's analogous deferral without objection and without an earnings test.[60]

4. Docket UM 1662 (2015), RPS Cost Recovery Investigation

In 2015 in docket UM 1662, the Commission analyzed the RPS cost-recovery provisions (adopted in SB 838 and codified at ORS 469A.120) in response to the utilities' request that the Commission investigate the impact of their power cost adjustment mechanisms on recovery of all prudent variable costs of RPS compliance.[61] The Commission interpreted the two cost-recovery provisions of ORS 469A.120, both of which have language (italicized below) that is echoed in ORS 757.963(8).

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[58] *In re Pub. Util. Comm'n of Or. Investigation into Pilot Programs to Demonstrate the Use and Effectiveness of Volumetric Incentive Rates for Solar Photovoltaic Energy Systems*, Docket No. UM 1452, Order No. 10-198 at 21 (May 28, 2010). *See also* Order No. 10-200 at 15; *In re 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, App. A at 2 (Feb. 16, 2011) and *In re PacifiCorp, dba Pac. Power Application for Deferred Accounting*, Docket No. UM 1483, Order No. 11-021 (Jan. 12, 2011) (approving requests for automatic adjustment clause not subject to earnings review for solar incentive program costs for PGE and Pacific Power).

[59] Order No. 10-198 at 21; *see also In re Idaho Power Co., Application for Deferred Accounting of Solar Photovoltaic Pilot Program Revenues and Expenditures*, Docket No. UM 1975, Order No. 21-449 (Dec. 2, 2021) (approving continued deferral for Idaho Power's solar photovoltaic pilot program revenues and expenses and recommending that an earnings test not be applied).

[60] *See also, generally* prior orders in Docket Nos. UM 1482 and UM 1483.

[61] *In re Portland Gen. Elec. Co. and PacifiCorp dba Pac. Power, Request for Generic Power Cost Adjustment Mechanism Investigation*, Docket No. UM 1662, PGE's Supplement Filing re Request for Generic Power Cost Adjustment Mechanism Investigation at 2 (Mar. 21, 2014).

ORS 469A.120(1) provides:

> (1) Except as provided in ORS 469A.180(5), *all prudently incurred costs associated with compliance with a renewable portfolio standard are recoverable in the rates of an electric company* including interconnection costs, costs associated with using physical or financial assets to integrate, firm or shape renewable energy sources on a firm annual basis to meet retail electricity needs, above-market costs and other costs associated with transmission and delivery of qualifying electricity to retail electricity consumers.[62]

ORS 469A.120(2) provides:

> (2) *The Public Utility Commission shall establish an automatic adjustment clause as defined in ORS 757.210 or another method that allows timely recovery of costs prudently incurred* by an electric company to construct or otherwise acquire facilities that generate electricity from renewable energy sources and for associated electricity transmission.[63]

The Commission found that the plain language of ORS 469A.120(2) "explicitly mandated the use of an automatic adjustment clause to provide dollar-for-dollar recovery,"[64] and that the language of ORS 469A.120(1) standing alone did not mandate dollar-for-dollar recovery of the variable costs specified in that section.[65] In making this determination, the Commission emphasized that the language differed between the two provisions and explained that the legislature "appreciated the difference between various types of cost recovery mechanisms, and only mandated dollar-for-dollar recovery of fixed capital costs" under ORS 469A.120(2).[66] Following the Commission's order, the utilities have continued to recover RPS capital costs under their RACs without an earnings test.

5. SB 762 (2021), WPP Mandate

When it adopted the language at issue in this case in SB 762, codified at ORS 757.963,

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[62] Emphasis added (original text adopted in SB 838, which has since been revised slightly in ways that do not materially affect the cost recovery language).
[63] Emphasis added (original text adopted in SB 838, which has since been revised slightly in ways that do not materially affect the cost recovery language).
[64] Docket No. UM 1662, Order No. 15-408 at 7 (Dec. 18, 2015).
[65] *Id.* at 6.
[66] *Id.* at 7.

the legislature understood how the Commission had interpreted similar language in the past. ORS 757.963(8) addresses cost recovery using language that echoes or mirrors the cost-recovery provisions discussed above:

> *All 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*.[67]

The context provided by the Commission's prior interpretations confirms that the legislature intended SB 762's cost-recovery language to provide dollar-for-dollar recovery without an earnings test. Specifically, the first sentence of ORS 757.963(8) echoes language from SB 1149 ("opportunity to recover all costs prudently incurred") and HB 3039, Section 2 ("all costs prudently incurred . . . are recoverable") that the Commission had applied to permit recovery through a deferral or AAC without an earnings test, even without specific statutory language regarding an AAC or timely recovery. The full text of ORS 757.963(8) is very similar to the full text of HB 3039, Section 3 ("all costs . . . to comply . . . are recoverable . . ." and are eligible for an AAC) under which the Commission had also approved AACs without earnings tests. Perhaps most tellingly, the second sentence of ORS 757.963(8) is *identical to* language from ORS 469A.120(2) that the Commission previously interpreted as "explicitly mandat[ing]" an AAC "to provide dollar-for-dollar recovery,"[68] and under which the Commission had never applied an earnings test.

As explained above, the Commission determined in 2015 that the "all costs . . . are recoverable" language in ORS 469A.120(1) did not mandate dollar-for-dollar recovery when

[67] Emphasis added.
[68] Order No. 15-408 at 7.

read in conjunction with ORS 469A.120(2), which used different language and specifically required full recovery. Here, ORS 757.963(8)'s mandate that "all costs . . . are recoverable" *and* use of the exact AAC language from ORS 469A.120(2) that the Commission determined required dollar-for-dollar recovery provide very clear direction from the legislature. Given the Commission's precedent in effect when SB 762 passed in 2021, the legislature reasonably understood that the language included in ORS 757.963(8) would provide for dollar-for-dollar recovery without an earnings test.

6. The Commission's 2022 interpretation of SB 98 does not provide context regarding SB 762's legislative intent, and SB 98's text and policy are distinguishable.

While CUB appropriately reserved its legal argument for briefing, CUB's Objection and supporting testimony do not reference any of the Commission precedent discussed above and instead note only the Commission's recent decision applying an earnings test to an AAC adopted under SB 98 (2019), which addresses voluntary renewable natural gas (RNG) investments.[69] Because the Commission's interpretation of SB 98 on which CUB relies did not occur until October 2022, the Commission's statements do not provide context relevant to discerning the legislative intent behind SB 762, which was passed in 2021. Therefore, the Commission's interpretation of SB 98 referenced in CUB's Objection does not assist with its statutory interpretation analysis of SB 762.

To the extent CUB argues that the Commission should interpret SB 762 similarly to SB 98, this argument fails because SB 98's underlying policy and statutory language differ significantly from SB 762's. Unlike SB 762 and the other legislative-mandate statutes discussed

[69] CUB/100, Jenks/13:11-15 (citing *In re Nw. Nat. Gas Co., dba NW Nat., Request for a Gen. Rate Revision*, Docket No. UG 435, Order No. 22-388 (Oct. 24, 2022)).

above, SB 98 established *voluntary* targets for natural gas companies to invest in RNG.[70] Further, while SB 98 directed the Commission to adopt "ratemaking mechanisms" to "ensure the recovery of all prudently incurred costs," SB 98 provided that costs "*may* be recovered" by an AAC "or another recovery mechanism authorized by rule."[71] SB 98's use of "may," rather than the mandatory "shall" like the legislature used in SB 762, is another important distinction.[72]

In Order No. 22-388, the Commission found that an AAC was optional under SB 98 and went on to conclude that the legislature did not intend to alter long-established ratemaking mechanisms or to "eliminate the Commission's duty to consider the risk balance between utilities and their customers."[73] The Commission adopted an AAC and allowed for the deferral of the difference between forecasted and actual RNG costs, subject to an earnings test.[74] Because of the important distinctions between the two statutes, the Commission should not rely on its interpretation of SB 98 to apply an earnings test under SB 762.

C. <u>Even if the Commission Finds SB 762's Cost-Recovery Language Ambiguous, the Commission Should Effectuate the Legislation's Purpose by Declining to Impose an Earnings Test.</u>

While PacifiCorp believes that its interpretation of SB 762's cost recovery language is the only plausible one, the Commission should decline to impose an earnings test even if it finds CUB's interpretation to be plausible as well, because ensuring dollar-for-dollar recovery of WPP costs best effectuates the statute's purpose.[75] The legislature adopted SB 762 in 2021, after multiple major fires devastated Oregon during the prior year, to promote wildfire risk reduction,

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[70] ORS 757.396.
[71] *Id.* (emphasis added).
[72] "Shall" is a command "used in laws, regulations, or directives to express what is mandatory." *Preble v. Dep't of Revenue*, 331 Or 320, 324 (2000).
[73] Order No. 22-388 at 80.
[74] *Id.* at 82.
[75] *Tharp*, 338 Or at 425–426 (court declared text ambiguous when counsel presented two plausible interpretations).

response, and recovery.[76] Among its many components, SB 762 imposes significant new requirements on utilities to develop, regularly update, and operate in compliance with WPPs.[77] Along with these requirements, the legislature specifically provided for timely recovery of all costs through an AAC.[78] Declining to apply an earnings test would best effectuate the legislature's purpose of supporting the utilities' swift and ongoing action to help prevent wildfire by providing full recovery for the costs of complying with the significant new mandate.[79]

D. ORS 756.040 Does Not Contradict or Change the Plain Meaning of ORS 757.963(8).

CUB's Objection also relies on ORS 756.040, which delineates the general powers of the Commission, to argue that the Commission must apply an earnings test in order to establish fair and reasonable rates.[80] In CUB's view, rates under the WPP Adjustment cannot be fair and reasonable without imposition of an earnings test.[81] CUB argues that the Commission has "tremendous authority—and discretion—to set just and reasonable rates and is bound by no specific method[,]"[82] but also claims somewhat contradictorily that "the lack of an earnings test renders the automatic adjustment clause incapable of ensuring rates will be just and reasonable."[83] CUB's argument is incorrect as a matter of law because even if ORS 757.963(8) and ORS 756.040 were in conflict as applied to this case, ORS 757.963(8) would control because

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[76] Joint Capital Construction Subcommittee Recommendation re SB 762 at 1 (June 22, 2021), *available at* https://olis.oregonlegislature.gov/liz/2021R1/Downloads/CommitteeMeetingDocument/246194.
[77] ORS 757.963; *see also* OAR 860-0300-0020.
[78] ORS 757.963(8).
[79] *See* PacifiCorp/400, McVee/7:15-16.
[80] ORS 756.040.
[81] CUB/100, Jenks/11:20-22.
[82] CUB/100, Jenks/6:5-7.
[83] CUB/100, Jenks/13:5-7.

it is more recent[84] and more specific.[85] Moreover, the Court of Appeals has explained when interpreting ORS 756.040 that the Commission's general powers to set just and reasonable rates do not extend to adopting a ratemaking formula that is "specifically precluded by some source of law."[86]

However, there is no conflict between ORS 756.040 and ORS 757.963 because, as the Stipulating Parties explain in their testimony and Joint Brief, the structure of the WPP Adjustment will result in fair and reasonable rates without an earnings test.[87] CUB asserts that rates cannot be just and reasonable unless they account for costs that decline.[88] The Stipulation does just that. The WPP Adjustment includes only actual in-service capital costs, trues up the operation and maintenance forecast to actuals through the balancing account, and updates depreciation within the WPP Adjustment every year.[89] As a result, the WPP Adjustment itself will never contribute to PacifiCorp earning more than its authorized ROE.[90] Moreover, the Commission's long history of adopting AACs without earnings tests—with CUB's support or without CUB's objection—confirms that the agreed-upon structure of the WPP Adjustment does not run afoul of ORS 756.040. The Commission should decline to abruptly change its approach and find that lack of an earnings test renders an AAC incapable of being fair and reasonable.

[84] *State v. Langdon*, 330 Or 72, 81 (2000) (explaining that when two statutes irreconcilably conflict, the court may find the newer one impliedly repealed the older one to the extent necessary to resolve the conflict, but that repeal by implication is disfavored).
[85] ORS 174.020(2) ("When a general provision and a particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent."); *Fairbanks v. Bureau of Labor and Indus.*, 323 Or 88, 94 (1996) ("the specific statute is considered an exception to the general statute.").
[86] *Util. Reform Project v. Pub. Util. Comm'n*, 277 Or.App. 325, 341 (2016) (citing *Wah Chang v. Pub. Util. Comm'n*, 256 Or App 151, 162 (2013)).
[87] Joint Brief in Support of Stipulation at 11-13.
[88] CUB/100, Jenks/8:11-13 ("Just and reasonable ratemaking requires us to account for costs that decline . . .").
[89] Joint Brief in Support of Stipulation at 8-9.
[90] *Id.* at 12.

IV. CONCLUSION

The Commission should approve PacifiCorp's WPP Adjustment as agreed upon by the Stipulating Parties and should reject CUB's effort to impose an earnings test because doing so would prevent full and timely recovery of WPP costs, contrary to the legislative intent of SB 762.

Dated this 2nd day of March 2023.

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