McDOWELL RACKNER GIBSON PC
419 SW 11th Ave, Suite 400 | Portland, OR 97205

KATHERINE MCDOWELL
Direct (503) 595-3924
katherine@mrg-law.com

March 29, 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 Closing 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 CLOSING BRIEF IN SUPPORT OF STIPULATION

March 29, 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 and asks the Commission to impose an earnings test set at PacifiCorp's authorized return on equity (ROE).

The Stipulating Parties' Joint Closing Brief explains that an earnings test is not required to ensure just and reasonable rates and that the Stipulation's protections fulfill that function. This separate brief responds to CUB's statutory interpretation arguments, which the Commission need not reach if it finds that the Stipulation will result in just and reasonable rates without an earnings test. PacifiCorp also responds briefly to factual allegations in CUB's brief regarding PacifiCorp's rates and tracker mechanisms.

Senate Bill (SB) 762 Section 3, codified at ORS 757.963 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." PacifiCorp's Opening Brief explained that the statute's text and the context provided by decades of Commission precedent make clear that the legislature intended to require separate and timely, dollar-for-dollar recovery of the costs to comply with the new mandate to develop and implement a WPP. CUB offers a different interpretation of SB 762's cost-recovery language, claiming that the presence of the word "reasonable" in the statute and two prior Commission

interpretations of cost-recovery language support CUB's view that an earnings test is permissible. CUB also argues that the absence of any discussion of cost-recovery language in the legislative history supports CUB's position.

If it reaches the statutory interpretation issues, the Commission should reject CUB's arguments and find that SB 762 precludes the Commission from imposing an earnings test. CUB's interpretation of the statute's cost-recovery language is strained because CUB ignores the second sentence entirely, and the role CUB gives to the word "reasonable" would impermissibly read the word "all" out of the statute. Of the two Commission orders CUB relies on, one provides no context for interpreting SB 762 because it was issued after the statute passed, and the other actually supports PacifiCorp's reading because the Commission interpreted language that is identical to the second sentence of ORS 757.963(8) to require dollar-for-dollar recovery. Finally, CUB's reliance on silence in the legislative history runs counter to well-established case law in Oregon, which confirms that lack of legislative history is not evidence of anything.

With respect to CUB's factual arguments regarding PacifiCorp's rates and mechanisms, the Commission should disregard CUB's claims because they are inaccurate and irrelevant to the question of whether the Stipulation in this case will result in just and reasonable rates. For these reasons, the Commission should reject CUB's statutory interpretation arguments, confirm that SB 762 requires dollar-for-dollar recovery without an earnings test, and approve the Stipulation without modification.

II. ARGUMENT

A. CUB Misinterprets the Plain Language of ORS 757.963(8).

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

PacifiCorp's Opening Brief explained that the statute's direction that PacifiCorp be permitted to recover "all" costs associated with its WPP, and the requirement that the Commission "shall establish" an AAC or another method to allow "timely recovery of the costs" indicates that the legislature intended to authorize separate and timely, dollar-for-dollar recovery of the costs to comply with the new mandate to establish and implement a WPP.[1] Because the relevant language in the statute is inexact, rather than delegative, PacifiCorp noted that the Commission must discern and effectuate the legislature's intent and may not substitute its policy judgment for that of the legislature.[2] CUB responds that the Commission has broad discretion to interpret the statute in the way CUB suggests because the statute is actually delegative. In particular, CUB argues that the phrase "all reasonable operating costs" supports its view that the Commission may apply an earnings test.[3]

CUB places outsized emphasis on the word "reasonable," arguing that it demonstrates dollar-for-dollar recovery is not required and that an earnings test is an appropriate way of ensuring only reasonable costs are recovered. PacifiCorp submits that a more logical reading of the statute is that the descriptors "*reasonable* costs" and "*prudent* investments" confirm that the Commission retains the authority to review WPP costs and investments for which the utility seeks recovery to ensure they are not unreasonable or imprudent. As a hypothetical example, if a utility sought to purchase a new corporate jet and classify it as a WPP cost, the Commission would not be required to automatically permit full recovery under ORS 757.963(8). Instead, the

[1] PacifiCorp's Opening Brief at 4-8 (Mar. 2, 2023).
[2] *See id.* at 5.
[3] CUB's Reply Brief in Opposition to Stipulation at 13-16 (Mar. 17, 2023) (CUB's Brief).

Commission would be authorized to find it to be an unreasonable WPP cost. However, once WPP costs have been reviewed by parties and the Commission and determined to be reasonable and prudent, then the plain language of the statute clearly requires that "all" of such costs are recoverable.

CUB's interpretation—that an earnings test must be applied to limit recovery of costs that have already been reviewed and determined to be reasonable and prudent—reads the word "all" out of the statute and represents a strained interpretation of the role of "reasonable" in the statutory text. If, as CUB believes, "reasonable" gives the Commission discretion to determine whether or not WPP costs can be recovered *at all*, based on the utility's earnings, then there would have been no reason for the legislature to include the word "all." CUB criticizes as "simplistic" PacifiCorp's reliance on the dictionary definition of "all,"[4] but also asserts that "the Commission gives words of common usage 'their plain, natural, and ordinary meaning.'"[5] The plain, natural, and ordinary meaning of "all" is "the whole amount of," and CUB offers no support for its claim that "all" has a different, specialized meaning in the regulatory context.

CUB claims the Commission has authority to read the statute as CUB advocates because the words "all" and "reasonable" are delegative.[6] PacifiCorp disagrees that "all" is a delegative term. As explained in PacifiCorp's Opening Brief, the Oregon Court of Appeals has determined that "all" is an inexact term,[7] which makes sense because it expresses a complete policy judgment and does not require the Commission to complete the legislature's policy decision.[8]

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[4] *Id.* at 16.
[5] *Id.* at 13.
[6] *Id.* at 14.
[7] PacifiCorp's Opening Brief at 5 (citing *Schwan's Sales Enters. v. Dep't of Agriculture*, 129 Or App 131, 135 (1994)).
[8] *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'"); *Coast Sec. Mortg. Corp. v. Real Estate Agency*, 331 Or 348, 354 (2000).

PacifiCorp agrees with CUB that "reasonable" is a delegative term, but disagrees with the conclusion CUB draws as a result. As explained above, "reasonable" gives the Commission authorization to review WPP costs, but "all" requires that reasonable costs and prudent investments be fully recovered. A single delegative term does not give the Commission discretion to ignore other terms or rewrite the statute. And even if the entire provision were delegative, CUB's interpretation still would not hold up under review because it is inconsistent with the general policy of the statute to promote wildfire mitigation efforts.[9]

CUB also argues that the statute's use of "all" and "reasonable" do not indicate an intent to "depart from just and reasonable ratemaking."[10] In reaching this conclusion, CUB entirely ignores the second sentence of the cost-recovery provision and its mandate that the Commission adopt an AAC or another method to ensure timely recovery.[11] PacifiCorp's Opening Brief explained that when read together, the statute's cost-recovery language demonstrates a specific legislative directive that WPP costs be timely and fully recovered on a single-issue basis, separate from a general rate case. PacifiCorp also explained that if the legislature had intended that WPP costs to be recoverable only if the utility is not earning more than its authorized ROE, the legislature could have said that directly or could have declined to require recovery outside of a general rate case. CUB made no effort to rebut these arguments.

CUB rejects PacifiCorp's argument that the Commission's directive to establish fair and reasonable rates in ORS 756.040 cannot negate the specific cost-recovery language in ORS 757.963(8).[12] While CUB is correct that the Commission has broad authority to regulate rates

[9] *Coast*, 331 Or at 354.
[10] CUB's Brief at 16. PacifiCorp agrees that the outcome of the Stipulation must be just and reasonable but disagrees with CUB that just and reasonable ratemaking requires application of an earnings test.
[11] ORS 757.963(8) ("The commission shall establish an automatic adjustment clause, as defined in ORS 757.210, or another method to allow timely recovery of the costs.").
[12] CUB's Brief at 9-10.

under ORS 756.040,[13] the Oregon Court of Appeals has consistently confirmed that when other statutes contain specific provisions related to rates, those statutes control and limit the Commission's authority.[14] Here, ORS 757.963(8) contains specific direction for the Commission regarding recovery of WPP costs, and ORS 756.040 does not permit the Commission to disregard that direction.

Finally, CUB continues to assert that recovery that occurs after application of an earnings test is full recovery and therefore is consistent with the statute.[15] However, the Commission has previously found that applying an earnings test to an AAC that the legislature specifically required the Commission to adopt would be contrary to the legislative intent because the earnings test would prevent the AAC from adjusting rates, "as it was designed to do."[16] That decision confirms the common-sense conclusion that an earnings test *can* limit recovery under an AAC, contrary to CUB's claims. Here, applying an earnings test to the WPP Adjustment would prevent the AAC from adjusting rates and therefore would prevent PacifiCorp from recovering all of its reasonable costs. The Commission should reject CUB's strained interpretation of the cost-recovery language.

B. The Context Provided by Commission Precedent Does Not Support CUB's Proposed Earnings Test.

CUB argues that prior Commission precedent interpreting similar language supports its position.[17] First, CUB points to the Commission's interpretation of ORS 469A.120(1),[18] where

[13] *Id.* at 10.
[14] *Citizens' Util. Bd. v. Or. Pub. Util. Comm'n*, 154 Or App 702, 715-17 (1998) (citing and quoting *Pac. Nw. Bell Tel. Co. v. Eachus*, 135 Or App 41 (1995)).
[15] *See* CUB's Brief at 14.
[16] *In re Adoption of Permanent Rules to Implement SB 408 Relating to Util. Taxes*, Docket No. AR 499, Order No. 06-400 at 9 (July 14, 2006).
[17] CUB's Brief at 17.
[18] ORS 469A.120(1) ("(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

the Commission determined that "all prudently incurred costs . . . are recoverable" language did not mandate dollar-for-dollar recovery.[19] However, CUB fails to mention that the Commission's interpretation relied in part upon the difference between ORS 469A.120(1) and 120(2), in which the legislature provided for timely recovery through an AAC.[20] More importantly, CUB ignores that ORS 757.963(8) incorporates language from *both* sections of ORS 469A.120, including *the exact same* language from ORS 469A.120(2) that the Commission held "explicitly mandated" dollar-for-dollar recovery.[21] The Commission's prior interpretation of ORS 469A.120 supports PacifiCorp's interpretation of ORS 757.963(8).

Second, CUB points to the Commission's interpretation of the voluntary renewable natural gas (RNG) statute, ORS 757.396(2).[22] However, CUB fails to acknowledge a key point from PacifiCorp's Opening Brief—the Commission's interpretation of this statute occurred *after* SB 762 passed and therefore provides no insight into the legislature's intent in developing SB 762's cost-recovery language.[23]

To the extent CUB argues that the Commission should apply the same reasoning to reach a similar decision here, the Commission should decline to do so because both the statutory framework and the AACs at issue differ in significant ways. ORS 757.396 is permissive in that

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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.") (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).

[19] CUB's Brief at 17 (citing *In re Portland Gen. Elec. Co. and PacifiCorp dba Pac. Power, Request for Generic Power Cost Adjustment Mechanism Investigation*, Docket No. UM 1662, Order No. 15-408 at 6-7 (Dec. 18, 2015)).

[20] ORS 469A.120(2) ("(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.") (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).

[21] Order No. 15-408 at 7.

[22] CUB's Brief at 17.

[23] PacifiCorp's Opening Brief at 16.

it neither requires utilities to meet the RNG targets in the statute nor requires the Commission to adopt an AAC, as the Commission acknowledged.[24] Thus, the statute's policy is very different from SB 762. Moreover, the Commission's statement rejecting an interpretation of ORS 757.396 that would "reach deep into the Commission's ratemaking function" referred to the structure of the mechanism as a whole—not just the earnings test element.[25] In that case, the utility sought to defer investments between the in-service date and the rate-effective date, and the Commission rejected the contention that the statute required it to remove "all regulatory lag and shareholder risk."[26] Here, as explained in the Stipulating Parties' Joint Briefs, the WPP Adjustment is a balanced mechanism that contains many customer protections, including agreement by PacifiCorp to absorb the regulatory lag and forego a deferral of capital costs. The Commission decision regarding ORS 757.396 is neither relevant context nor persuasive precedent regarding the issues in this case.

C. The Legislative History is Silent Regarding the Issues Disputed in this Case and Does Not Support CUB's Position.

While legislative history can be considered to discern the legislature's intent, regardless of whether the text of the statute is ambiguous,[27] PacifiCorp's Opening Brief did not address the legislative history of SB 762 because PacifiCorp had determined that the legislative history is silent regarding cost-recovery issues. Based on review of the legislative history and PacifiCorp's involvement in crafting wildfire legislation for Oregon, the Company understood that the legislative history was limited because the WPP portion of the bill was developed in workgroups

[24] *In re Nw. Nat. Gas Co., dba NW Nat., Request for a Gen. Rate Revision*, Docket No. UG 435, Order No. 22-388 at 81 (Oct. 24, 2022).
[25] *Id.* at 80.
[26] *Id.*
[27] *State v. Gaines*, 346 Or 160, 171-72 (2009) ("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").

and added wholesale to the bill, rather than being developed and revised in legislative committees.[28] However, CUB argues that the absence of legislative history discussing the intent of the cost-recovery language in SB 762 somehow demonstrates that the legislature intended WPP costs should be recoverable only after application of an earnings test—notwithstanding the statutory language regarding timely recovery of all reasonable and prudent costs through an AAC.[29]

The Commission should disregard CUB's argument based on the absence of legislative history because it is well-established in Oregon that "silence in the legislative history of a statute, by itself, is not often reliable evidence that the legislature intended anything."[30] As the Oregon Supreme Court has explained, the purpose of legislative history is to persuade legislators to vote in a certain way—not to provide comprehensive direction to an interpreting court—and therefore "a proposed legislative change to the status quo might not prompt comment precisely because everyone understands that the law will have that effect[.]"[31] This is particularly true here, where the legislature used language that the Commission had previously interpreted. The Supreme Court further explained that the press of time in legislative sessions often precludes legislators from commenting on every aspect of a bill.[32] For SB 762, most of the discussion in committee and the public comments centered around the wildland-urban interface definition and defensible space requirements. Because no legislator or commenter objected to the WPP cost-recovery language, the legislature had no cause to discuss it. Thus, the silence in the legislative history is

[28] *See, e.g.*, Idaho Power, PacifiCorp, and PGE's Letter of Support for SB 762, Senate Committee on Natural Resources and Wildfire Recovery, Public Hearing (Apr. 9, 2021) (indicating that the utilities supported similar legislation in 2020, support the -3 amendment to SB 762 addressing wildfire mitigation plans for utilities, and worked collaboratively with the Commission on the -3 amendment) available at: https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/24472.
[29] *See* CUB's Brief at 18.
[30] *Wyers v. Am. Med. Response Nw., Inc.*, 360 Or 211, 226-27 (2016).
[31] *Id.*
[32] *Id.*

not instructive and certainly does not support the inference that CUB draws.

D. PacifiCorp's Interpretation Furthers the Legislative Intent.

The statute's plain language and context clearly point to adopting PacifiCorp's interpretation that an earnings test is precluded. But to the extent the Commission finds ambiguity in the statute it should still adopt PacifiCorp's interpretation over CUB's because PacifiCorp's furthers the legislation's purpose. CUB agrees that "there is a need to harden utility systems in light of increased wildfire risk stemming from anthropogenically induced climate change."[33] But CUB's proposed earnings test would prevent PacifiCorp from recovering all reasonable and prudent costs and could decrease the incentive to engage in wildfire mitigation—contrary to the legislature's intent in adopting SB 762.

E. CUB's Factual Claims Regarding the Number of Trackers and Recent Rate Increases are Inaccurate and Irrelevant.

CUB argues that the Commission should apply an earnings test because the "sheer number of deferrals and AACs" has "exploded" in recent years.[34] CUB supports this statement by comparing the number of deferrals and AACs PacifiCorp had in 2007-08 with the number in February 2023.[35] CUB's arithmetic is misleading, and in any event, CUB's concern about the *number* of trackers ignores the purpose for which these mechanisms exist. CUB adds together the number of deferrals and AACs in 2007-08 and in 2023 to reach the conclusion that the "number of single-issue trackers" has increased from 20 to 47.[36] This statement obscures the fact that the number of AACs has actually decreased since 2007-08.[37] It also ignores that many of the deferrals are associated with AACs, so it is duplicative to count both when determining the

[33] CUB's Brief at 6.
[34] *Id.* at 10-11.
[35] *Id.*
[36] *Id.* at 11.
[37] *Compare* CUB/203 & CUB/205.

"number of single-issue trackers."[38]

Most importantly, however, many of the mechanisms are associated with legislative mandates that have passed since 2007 and that PacifiCorp must implement.[39] For example, PacifiCorp has adjustment schedules related to low-income bill assistance, intervenor funding, the solar incentive program, and the community solar program, to name a few.[40] Similarly, the Company has deferrals related to these same issues as well as transportation electrification, Oregon House Bill 2021, and Washington's Climate Commitment Act.[41]

CUB also references "the significant rate increases" PacifiCorp's customers have experienced recently, "the vast majority of which have occurred outside the general rate case setting," CUB claims.[42] As PacifiCorp explained in its testimony, however, the vast majority of recent increases resulted from PacifiCorp's last general rate case and its transition adjustment mechanism (TAM), which forecasts net power costs for the upcoming year, consistent with the Commission's direct access requirements.[43] PacifiCorp explained that the most recent increase in the TAM was stipulated to by CUB and driven by forward power and natural gas prices.[44] CUB persists in emphasizing that TAM costs are added to rates without consideration of the overall impact.[45] While technically true, rate adjustments through the TAM are the subject of significant process and have consistently understated PacifiCorp's actual net power costs. The TAM attempts to pass through changes in net power costs—not increase the Company's earnings.

[38] *Compare* CUB/203 & CUB/205.
[39] CUB/205 (see "Purpose" column).
[40] CUB/205.
[41] CUB/204.
[42] CUB's Brief at 10, 20.
[43] PAC/400, McVee/3:16-19.
[44] PAC/400, McVee/4:3-6.
[45] CUB's Brief at 10 n.41.

In sum, CUB's assessment of the number of trackers is inflated, CUB's claims about rate increases due to trackers are overstated, and regardless, neither issue has any bearing on the Commission's interpretation of SB 762's requirements or the Commission's decision regarding whether the Stipulation *in this case* regarding recovery of WPP costs is in the public interest and will result in just and reasonable rates.

III. 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. If the Commission reaches the statutory interpretation issue, the Commission should find that CUB's interpretation of ORS 757.963(8) is inconsistent with the plain statutory language, is not supported by Commission precedent or the legislative history, and would not further the legislature's intent.

Dated this 29th day of March 2023.

Katherine A. McDowell
Jordan R. Schoonover
McDowell Rackner Gibson PC
419 SW 11th Ave., Suite 400
Portland, OR 97205

Ajay Kumar
PacifiCorp
825 NE Multnomah Street, Suite 2000
Portland, OR 97232

Attorneys for PacifiCorp