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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 the Stipulating Parties' Joint 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.

JOINT CLOSING BRIEF IN SUPPORT OF STIPULATION

OF

PACIFICORP, STAFF OF THE PUBLIC UTILITY COMMISSION OF OREGON, AND ALLIANCE OF WESTERN ENERGY CONSUMERS

March 29, 2023

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I. INTRODUCTION

PacifiCorp d/b/a Pacific Power (PacifiCorp or the Company), Staff of the Public Utility Commission of Oregon (Staff), and the Alliance of Western Energy Consumers (AWEC) (together, the Stipulating Parties) submit this Joint Closing Brief in Support of the Stipulation resolving all issues related to PacifiCorp's application for an automatic adjustment clause (AAC) for cost recovery associated with the Company's Wildfire Protection Plan (WPP). The Public Utility Commission of Oregon (Commission) should reject CUB's objection, approve the Stipulation, and implement the proposed WPP AAC (WPP Adjustment) without modification because it is fair, just, reasonable, and in the public interest. Furthermore, the Stipulation is the result of a settlement process that brought together key stakeholders and represents a reasonable compromise.

CUB acknowledges that "there is a need to harden utility systems in light of increased wildfire risk stemming from anthropogenically induced climate change,"[1] and CUB agrees to the use of an AAC for recovery of the costs necessary to address this risk.[2] CUB nevertheless opposes the Stipulation because it does not include an earnings test set at PacifiCorp's authorized return on equity (ROE), which in CUB's view, makes the Stipulation unlawful and unconstitutional.[3] However, CUB misunderstands the applicable law and ignores key elements of the WPP Adjustment designed to ensure that the AAC properly balances the interests of PacifiCorp and its customers in accordance with ORS 756.040. The Commission should reject CUB's challenge to the Stipulation and approve the WPP Adjustment.

[1] CUB's Brief in Opposition to Stipulation at 6 (Mar. 17, 2023) (CUB's Brief).
[2] *Id.* at 6.
[3] *Id.* at 8-9.

II. ARGUMENT

A. The Stipulated WPP Adjustment Will Result in Just and Reasonable Rates.

CUB claims that the Stipulating Parties have not met their burden to demonstrate that the WPP Adjustment will result in just and reasonable rates.[4] CUB's concern is based on its belief that the Stipulation allows "recovery of potentially substantial WPP costs with absolutely no consideration of the overall impact on customer rates."[5] CUB explains that the Commission must consider rates holistically.[6] In CUB's view, an earnings test is required to ensure rates as a whole are just and reasonable by limiting PacifiCorp's recovery of WPP costs if the Company is earning more than its authorized ROE.[7]

As explained in detail below, CUB's argument fails for two reasons. First, the Commission has significant discretion in determining just and reasonable rates and is not required to apply an earnings test. Second, the Stipulation's specific provisions and the Commission's general powers will ensure rates remain just and reasonable without the application of an earnings test.

1. The just and reasonable rates requirement gives the Commission significant discretion and does not require application of an earnings test.

CUB grounds its arguments that an earnings test is required to ensure just and reasonable rates in *Hope*, *Duquesne*, and related United States (U.S.) Supreme Court precedent, but CUB's position is not supported—and is actually contradicted—by the cases on which CUB relies. In *Hope*, the Supreme Court famously held that, "[u]nder the statutory standard of 'just and reasonable' it is the result reached not the method employed which is

[4] *Id.* at 6.
[5] *Id.* at 9.
[6] *Id.* at 2-3.
[7] *Id.* at 9.

controlling."[8] The Supreme Court emphasized this point again 80 years later stating that "[i]t was the very point of *Hope Natural Gas* that regulatory bodies required to set rates expressed in these terms have ample discretion to choose methodology."[9] This Commission concurs, explaining that "the standard by which the rates set by the Commission are judged is whether the outcome is just and reasonable, not whether the methods used to obtain the rates are themselves reasonable."[10] The "just and reasonable" requirement does not mandate any specific methodology, nor does it dictate a single correct result; rather, there is a zone of reasonableness.[11]

U.S. Supreme Court and Commission precedent make clear that the Commission has flexibility and significant discretion to determine how to set just and reasonable rates. CUB's claim that the Commission *must* impose an earnings test at PacifiCorp's authorized ROE or rates will be unjust, unreasonable, and unconstitutional is directly contrary to this well-established principle. The Stipulating Parties do not dispute that the end result of the Stipulation must be just and reasonable rates, as evidenced by their Opening Brief.[12] But the Stipulating Parties disagree with CUB that there is only one very specific way to reach a just and reasonable result—by applying an earnings test—and that any other approach would be unlawful and unconstitutional.

CUB's argument that rates cannot be just and reasonable if they are changed outside of a general rate case without consideration of the utility's earnings[13] finds no support in

[8] *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 US 591, 602 (1944).
[9] *Verizon Commc'ns., Inc. v. FCC*, 535 US 467, 500 (2002).
[10] *In re Pac. Power & Light Co., Request for a Gen. Rate Increase in the Co.'s Or. Annual Revenues, et al.,* Docket Nos. UE 170 and UM 1229, Order No. 06-379 at 10 (July 10, 2006).
[11] *See, e.g.*, *Permian Basin Area Rate Cases*, 390 US 747, 767 (1968).
[12] Stipulating Parties' Joint Opening Brief at 1 (Mar. 2, 2023).
[13] CUB's Brief at 10.

Oregon law or Commission precedent and is also contrary to CUB's past advocacy. While CUB is correct that this precedent is not binding upon the Commission,[14] the fact that the Commission has a long history of approving rate changes outside of general rate cases without conducting earnings reviews, combined with CUB's previous advocacy that the Commission should not impose earnings tests, strongly suggests that an earnings test is not statutorily and constitutionally mandated.

For example, in 2005, the Oregon legislature passed Senate Bill (SB) 408, which required that the Commission establish an AAC to align the amounts of taxes collected and taxes paid.[15] In the resulting rulemaking, utilities argued that the Commission should apply an earnings test that would preclude refunds if the utility was under-earning or surcharges if the utility was over-earning to ensure that rates remained fair, just, and reasonable overall.[16] The Commission rejected this argument, finding that it would be contrary to the legislature's intent in requiring the AAC to apply an earnings test that could prevent the AAC from adjusting rates.[17] The Commission observed that "the law provides ample opportunities to adjust rates if there is over- or under-earnings,"[18] and noted that utilities, Staff, or another party may initiate a rate case.[19]

As noted in the Stipulating Parties' Opening Brief and in PacifiCorp's Opening Brief, the Commission has approved many other deferrals and AACs without an earnings test and without any suggestion—by CUB or any other party—that the lack of earnings test makes the

[14] *Id.* at 20 (internal citations omitted).
[15] Or Laws 2005 Ch 845 §3; Senate Bill 408, 73rd Oregon Legislative Assembly (2005).
[16] *In re Adoption of Permanent Rules to Implement SB 408 Relating to Util. Taxes*, Docket No. AR 499, Order No. 06-400 at 8 (July 14, 2006).
[17] *Id.* at 9.
[18] *Id.* at 8.
[19] *Id.* at 8-9.

mechanism unconstitutional or unlawful.[20] CUB acknowledges it took an inconsistent position with respect to the Renewable Adjustment Clause,[21] but otherwise does not discuss the Commission's approval of prior AACs and deferrals without earnings tests.

Instead, CUB quotes a single Commission order finding that "an earnings test is appropriate to be consistent with our general powers expressed in ORS 756.040."[22] In that case, the Commission was not reviewing an AAC but rather was considering whether a deferral was required under ORS 757.259(1)(a)(A).[23] The Commission found that an earnings test should be applied, and specifically distinguished a deferral under ORS 757.259(1)(a)(A) from an AAC, which the legislature expressly exempted from an earnings test.[24] The statement CUB quotes provides the Commission's alternative reasoning that, even if not required by the statute, an earnings test was "appropriate" under ORS 756.040.[25] The Commission certainly was not announcing a broadly applicable policy that earnings reviews are legally required under AACs—as evidenced by the fact that after issuing that order in 2013, the Commission continues to approve AACs and deferrals without earnings tests.

[20] Stipulating Parties' Joint Opening Brief at 12 (discussing lack of earnings review in the HB 2475 deferral and the RAC and citing Joint Stipulating Parties/200, McVee-Stevens-Mullins/5:14-17); PacifiCorp's Opening Brief at 8-13 (Mar. 2, 2023) (discussing lack of earnings review associated with cost recovery for electric restructuring, the RAC, and solar volumetric incentive rate and capacity standard).
[21] CUB notes that while it agreed to the RAC (a similar AAC without an earnings test, in effect since 2008), it regrets the decision because CUB did not anticipate the amount of costs that would flow through the RAC or the increase in the number of deferrals and AACs in general. CUB's Brief at 22. This explanation does not support CUB's position that the Commission impose an earnings test on the WPP Adjustment.
[22] CUB's Brief at 9 (quoting *In re Idaho Power Co., Request for a Gen. Rate Revision*, Docket No. UE 233, Order No. 13-416 at 6 (Nov. 12, 2013)).
[23] Order No. 13-416 at 5.
[24] *Id.*; ORS 757.259(5).
[25] Order No. 13-416 at 5.

2. The Stipulation and the Commission's general powers include ample tools to ensure rates remain just and reasonable without application of an earnings test.

As CUB acknowledges, the Commission reviews a stipulation to determine whether, on an *overall basis*, the stipulation serves the public interest and results in just and reasonable rates.[26] But CUB's argument that the stipulated WPP Adjustment fails this standard incorrectly focuses on a single design element—the lack of a particular earnings test—claiming that other portions of the WPP Adjustment are "largely irrelevant."[27] This is not true.

CUB has previously argued that, in determining whether a rate surcharge is just and reasonable, it is not the size of the increase that matters but rather whether the rates reflect costs that are "prudently incurred and are necessary to provide adequate service to customers."[28] The design of the stipulated WPP Adjustment ensures that all costs included will meet this standard in a manner that is at least as rigorous as under traditional regulation.[29]

First, the WPP Adjustment is limited to costs included in PacifiCorp's approved WPP, subject to a prudence review. This ensures that rates from the WPP Adjustment reflect only costs that are prudently incurred and necessary, meeting CUB's previously articulated just and reasonable standard.

Second, the WPP Adjustment allows PacifiCorp to recover its actual WPP costs while minimizing the risk of over or under recovery. To the extent PacifiCorp's actual WPP

[26] CUB's Brief at 4 (citing *In re Nw. Nat. Gas Co. dba NW Nat., Request for a Gen. Rate Revision*, Docket No. UG 435, Order No. 22-388 at 6 (Oct 24, 2022)) (emphasis added).
[27] CUB's Brief at 2.
[28] *In re PacifiCorp, dba Pac. Power, Application to Implement the Provisions of SB 76*, Docket No. UE 219, Order No. 10-364 at 7 (Sept. 16, 2010).
[29] Joint Stipulating Parties/200, McVee-Stevens-Mullins/2:3-12.

expense varies from what is forecasted in rates, the variance will be carried over to the next year. PacifiCorp has also agreed to forego capital deferrals on WPP investments, accept regulatory lag between in-service and rate effective dates, separate WPP investments from other rate base, and annually update accumulated depreciation on these investments.[30] These provisions effectively eliminate the possibility that PacifiCorp will over recover for WPP expense or capital and allow all cost savings to be passed on to customers.

CUB also argues that mechanisms such as the WPP Adjustment allow a utility to add new costs outside of a general rate case, "but avoid updating for system-wide savings, which can cause customers to overpay."[31] CUB ignores the well-established statutory scheme applicable to AACs, which ensures just and reasonable rates by requiring Commission review of rates under an AAC every two years—a threshold the WPP Adjustment exceeds through its annual review requirement, as well as its limited, initial three-year term.[32]

CUB has not produced any evidence, economic or otherwise, that demonstrates how the WPP Adjustment increases the risk of unjust and unreasonable rates as compared to traditional regulation or the AAC that PacifiCorp originally proposed. Instead, CUB argues for the stipulated WPP Adjustment with an earnings test. But CUB cannot unilaterally insert terms into a stipulation to which it has objected. The effect of CUB's challenge here, if successful, may be the dissolution of the stipulated WPP Adjustment, not the substitution of CUB's proposed AAC, because Paragraph 26 of the Stipulation provides a process for a party to withdraw from the Stipulation in the event the Commission makes material

[30] Joint Stipulating Parties/200, McVee-Stevens-Mullins/2:14-3:9.
[31] CUB's Brief at 10.
[32] ORS 757.210(1)(b).

changes.[33] Simply put, CUB has not demonstrated that rates are more likely to be unjust and unreasonable with the WPP Adjustment than without it.

Additionally, CUB has not established that rates under the WPP Adjustment will be facially unjust and unreasonable. Rather, CUB argues there *might* be a circumstance in the future where the WPP Adjustment could *possibly* result in unjust and unreasonable rates if PacifiCorp is already earning its authorized ROE. CUB's premise that any incremental cost recovery in this scenario would necessarily produce constitutionally infirm rates is incorrect. As noted above, there is a zone of reasonableness above and below a utility's authorized ROE where rates remain just and reasonable. This is demonstrated by the 2012 AARP Report submitted as CUB/200. The report references numerous AACs approved for utilities throughout the U.S., many without earnings tests.[34] Notably, the report does not even include earnings tests as one of its recommended consumer safeguards.[35]

If CUB believes that the WPP Adjustment is actually producing rates that are unjust and unreasonable, then either CUB or the Commission can challenge the rates at that point under ORS 756.500 or 756.515, respectively. The Commission should not reject the WPP Adjustment now based on CUB's theoretical concern about how it might operate at some future point in time.

Lastly, CUB does not explain how its earnings test will address the concern it has raised. For the first time in its brief, CUB explained that its proposed earnings test would apply only to the true-up for under-forecast WPP expenses, not to the return of over-forecasted amounts or to the costs of new investments. Thus, even with CUB's earnings test,

[33] Stipulation at 7, ¶ 26 (Dec. 29, 2022).
[34] CUB/200 at 10 ("sometimes" trackers are subject to an earnings test).
[35] CUB/200 at 15-17.

it remains theoretically possible that PacifiCorp could recover amounts under the WPP Adjustment if it was earning more than its authorized ROE. At the same time, CUB's earnings test does not ensure that the Company retains the incentive to invest, as CUB claims.[36] Instead, CUB's proposed earnings test incentivizes over-forecasting or limiting spending of amounts beyond the WPP forecast, all contrary to the legislative intent of SB 762.

In summary, the WPP Adjustment is not a blank check to include unlimited WPP costs in rates, irrespective of customer impact. The design of the mechanism and existing ratemaking processes are a more effective way of ensuring rates remain just and reasonable than the blunt instrument of CUB's earnings test.

B. The Stipulated WPP Adjustment Will Not Result in an Unconstitutional Taking From Customers.

CUB claims that adopting the WPP Adjustment without an earnings test would be unconstitutional.[37] Specifically, CUB seems to assert that ratepayers would suffer a "confiscatory rate" resulting in a Fifth Amendment "taking" if an earnings test is not applied to the WPP Adjustment.[38] But CUB's takings claim is not supported by the precedent CUB cites nor by any other case or secondary source.

As background, the Fifth Amendment to the U.S. Constitution's Takings Clause prohibits taking private property for public use without just compensation.[39] It applies to federal regulators directly and to state regulators through the Fourteenth Amendment.[40] The

[36] CUB's Brief at 6.
[37] *Id.* at 11.
[38] *Id.* at 7.
[39] U.S. Const. Amend. V.
[40] *See* Hempling, Scott, *Regulating Public Utility Performance* at 221 (American Bar Assoc. 2013) (citing *Chi., Burlington & Quincy R.R. v. Chicago*, 166 US 226 (1897)).

Takings Clause is implicated when setting regulated prices because shareholders' investment in the utility is private property, that property is "taken" when the utility is obligated to invest funds, and the regulator must ensure the revenue produced by the authorized rates justly compensates the utility for the taking—failure to do so would be unconstitutional.[41]

CUB points to *Duquesne Light Co. v. Barasch*[42] and *Federal Power Commission v. Hope Natural Gas*[43] as authorities for its stance that ratepayers would face an unconstitutional taking, but neither case refers to takings in the context CUB maintains. In *Hope*, the Supreme Court considered whether rates were just and reasonable to customers and utility shareholders but did not engage in a Takings analysis under the Fifth Amendment.[44] As CUB notes, the Supreme Court stated that fixing rates requires a "balancing of the investor and consumer interest," but the Court did not hold or suggest that customers would experience a taking if rates were too high.[45]

In *Duquesne*, the Supreme Court considered whether states could limit cost recoveries in rate cases by excluding costs and investments relating to facilities that were not in use.[46] Applying the Takings Clause to the analysis, the Court stated, "[i]f the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments."[47] The Court acknowledged a key factor in such analysis is considering "the total effect of the rate order," but it analyzed the "total effect" on the utility and its investors.[48] Ultimately, the Court

[41] Hempling, Scott, *Regulating Public Utility Performance* at 221 (American Bar Assoc. 2013).
[42] 488 US 299 (1989).
[43] 320 US 591 (1944) (*Hope*).
[44] *Id.* at 602.
[45] *Id.* at 603.
[46] *Duquesne*, 488 US at 303-04.
[47] *Id.* at 308.
[48] *Id.* at 310.

determined the "total effect" is unreasonable and unjust to the point of a government taking of property if "a fair rate of return" is not provided to utilities and its investors.[49] As *Duquesne* clearly states, "[t]he Constitution protects *the utility* from the net effect of the rate order *on its property*."[50]

CUB seeks to apply this concept in reverse, implying that ratepayers experience an unconstitutional taking if rates are not just and reasonable.[51] But CUB fails to identify the ratepayers' property interest that is at risk of being taken for public use without just compensation or otherwise explain how the Fifth Amendment applies to the facts of this case.[52] The Stipulating Parties are aware of no decision by this Commission or any Oregon court applying the Takings Clause to the consumer side of the rate-setting equation, and CUB has failed to provide any such authority. The Stipulating Parties are further unaware of any precedent from another jurisdiction finding customers had experienced an unconstitutional taking. CUB's constitutional argument is both novel and unsupported, and it fails because customers do not risk their private property being relegated to public use without just compensation, the key tenet of an unconstitutional taking.

C. Adopting CUB's Argument Would Require the Commission to Overturn Decades of Precedent and Would Have Broad Implications.

As summarized above, neither U.S. Supreme Court nor Oregon precedent provide *any* support for CUB's premise that the WPP Adjustment would be unconstitutional without an earnings test set at PacifiCorp's authorized ROE. Adoption of CUB's position here would

[49] *Id.*
[50] *Id.* at 314 (emphasis added).
[51] CUB's Brief at 8-9.
[52] *Duquesne*, 488 US at 308 (reiterating an unconstitutional taking occurs when "the State has taken the use of [private] property without paying just compensation).

thus constitute a major change in Oregon ratemaking, one that could render many of the Commission's existing ratemaking mechanisms unlawful or unconstitutional.

CUB signals that it seeks this dramatic change to Commission ratemaking when it asks the Commission to act on this AAC "*and others in the future*" by applying an earnings test.[53] The Commission should decline CUB's effort to force unprecedented constitutional restrictions on the Commission's broad authority to set rates and determine whether they are just and reasonable. There is no reason to reach the constitutional issues CUB raises here, because the Commission can determine that the design of the WPP Adjustment eliminates the risk that it will produce unjust and unreasonable rates.[54]

III. CONCLUSION

Through constructive and thoughtful settlement negotiations, the Stipulating Parties agreed on a design for the WPP Adjustment that fairly balances the interests of PacifiCorp and its customers, and satisfies the legislative directives in SB 762. In seeking to unilaterally modify the Stipulation more to its liking, CUB would undo this balance and upend the Stipulation. CUB's objection to the Stipulation is long on rhetoric, but short on evidence and legal support. CUB ultimately provides no basis for rejecting this Stipulation and calling other well-established ratemaking mechanisms and practices into question. Therefore, the Commission should reject CUB's objection to the Stipulation and approve the WPP Adjustment without CUB's proposed modification.

[53] CUB's Brief at 11 (emphasis added).
[54] *See State v. Campbell*, 306 Or 157 (1988) (court will not reach a constitutional issue when a claim is fully satisfied under other provisions of law).

Dated this 29th day of March 2023.

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