

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

DR 43

In the Matter of)	
)	
NW NATURAL GAS COMPANY, dba)	ANSWER OF THE CITIZENS'
NW NATURAL Petition for a Declaratory)	UTILITY BOARD OF OREGON TO
Ruling.)	NORTHWEST NATURAL GAS
)	COMPANY'S PETITION FOR A
)	DECLARATORY RULING
)	
)	

1 INTRODUCTION:

2 In a Petition for Declaratory Ruling dated March 26, 2009, and pursuant to ORS
3 756.450 and OAR 860-013-0020, NW Natural Gas Company ("NW Natural" or "the
4 Company") petitioned the Public Utility Commission of Oregon ("Commission") for a
5 declaratory ruling establishing that pursuant to OAR 860-022-0070, Order No. 99-272 in
6 Docket No. UM 903¹ and Order No. 08-504 in Docket no. UM 1286 ("PGA Order"), NW
7 Natural may, when conducting its Spring Earnings Review for its Purchased Gas
8 Adjustment mechanism ("PGA"), exclude from earnings amounts attributable to the
9 Company's portion of gas cost variances. The Citizens' Utility Board of Oregon (CUB)
10 opposes imposition of any such ruling, has moved, pursuant to ORS 774.180 and OAR
11 860-012-0001, to intervene in this matter, and herewith pursuant to OAR 860-013-0050;

¹ NW Natural references UM 902 in its Petition for Declaratory Ruling but CUB believes they intended to refer to UM 903.

1 OAR 860-014-0095 and other arguments set forth below, submits its Answer requesting
2 that the Petition for Declaratory Ruling be denied

3 **ARGUMENT:**

4 *A. NW Natural failed to Request Reconsideration of Order No. 08-504 in UM 1286*
5 *within the allotted 60 days and should not be permitted to do an end run around*
6 *the rules by filing a Petition for a Declaratory Ruling now.*

7
8 OAR 860-014-0095 provides that a party may within 60 days from the date of
9 service of an order entered by the Commission file an application for rehearing or
10 reconsideration. NW Natural chose not to file for reconsideration at that time and
11 should be bound by the terms of the order as entered on October 21, 2008, and not
12 permitted to do an end round around the terms of the order.

13
14 *B. NW Natural chose not to file for reconsideration at the time of the entry of the*
15 *order. Why is NW Natural now seeking to change the implementation standards*
16 *of the order?*

17
18 CUB believes that NW Natural is now seeking to “exclude from earnings amounts
19 attributable to the Company’s portion of gas cost variances” because NW Natural
20 wants to benefit its shareholders, rather than the public, with more of the huge cost
21 savings that it is achieving as the purchase price for gas goes down.²

22 NW Natural achieves those savings because gas costs are forecast and payment
23 for the anticipated gas costs is included in the rates that customers pay. If the cost of
24 gas goes down and NW Natural gets to keep more of the savings and not share those
25 savings with customers (as it is requesting in its Petition for Declaratory Ruling) its
26 profits go up and it can then reward its shareholders rather than returning more of the
27 overpayments to the customers who paid them. CUB thinks this is wrong headed

² NWN Advice Filing No OPUC 09-7, Schedule 164 A

1 especially during the worst recession in 30 years and respectfully requests that NW
2 Naturals' Petition for Declaratory Ruling be denied.

3 *C. Recessions are not the time to seek increased profits for shareholders and*
4 *decreased sharing with customers.*

5
6 Now, more than at any time in our State's, and even our country's recent history
7 customers are facing huge economic challenges. Unemployment figures in Oregon
8 rocketed to 12.1% yesterday³ and today or tomorrow, when other states figures are
9 released, we, Oregonians, may find ourselves in the dubious position of first place in
10 the nation in unemployment.⁴ This is not the time for NW Natural to be seeking to
11 increase its profits and increasing rewards to its shareholders. Now is the time for
12 NW Natural to be assisting its customers in any way that it can. One way for NW
13 Natural to provide assistance is to return to customers the amount that customers are
14 entitled to under the current PGA and Earning Sharing mechanisms. Customers have
15 been overpaying as a result of the high gas price forecasts made for 2008 and 2009;
16 forecasts which have, thankfully, been proven to be incorrect.

17 Under the PGA mechanism reviewed and revised in Order No. 08-504 NW
18 Natural gets to keep 20% of the difference between the forecast cost and the actual
19 cost of gas as paid for by customers and customers get 80% of the overpayment for
20 the cost of gas returned to them when gas costs are less than forecast and are charged
21 80% of the underpayment when gas costs are higher than forecast. NW Natural thus
22 gets to keep 20% of any profit or loss under the gas cost sharing mechanism that is
23 part of the PGA. Under the earnings review, if the company is over earning, earnings

³ Oregon Employment Department, April 14, 2009

⁴ Oregon Unemployment Rockets Past 12%, The Oregonian, 4-14-09

1 above the earnings threshold are shared 33% with customers and 67% with the
2 company. When gas prices fall, as they did this year, most of the over-earning above
3 the threshold can be attributed to the gas cost sharing mechanism. Under the
4 modification, proposed by NW Natural, NW Natural would get to exclude from the
5 earnings review calculation the bulk of the money now included in the calculation
6 (the amounts attributable to the Company's portion of gas cost variances) so there
7 would be less left in the earnings review pot for sharing with customers on the 33/67
8 split.

9 To show the effect that such an exclusion might have consider the numbers set
10 forth at UM 1286/CUB/100 Jenks/34 line 10. The numbers set forth in line 10
11 demonstrate that NW Natural's adjusted ROE was 10.15% in 2007 when the
12 Company removed the impact of the shareholders' portion of the savings as a Type 1
13 adjustment. When the impact of the shareholders' portion of the savings was
14 included in the calculation NW Natural's ROE jumped to 12.84%. That is a
15 difference of 270 basis points. And, that difference is caused simply by including or
16 excluding the amounts attributable to the Company's portion of gas cost variances.

17 Recessions are not the time to seek increased earnings sharing for shareholders
18 and reduced earnings sharing with customers. CUB respectfully requests that NW
19 Natural's Petition for Declaratory Ruling be denied.

20 *D. "CUB's proposal, as modified herein, should be adopted."*

21 CUB was very clear about the intents and purposes of its final proposal, the
22 proposal that was ultimately adopted as modified, in the Commission's October 21,
23

1 2008 Order No. 08-504. As CUB stated in CUB's Opening Brief Section III. C.
2 pages 16 – 17:

3 **C. The Earnings Review**

4 The Joint Parties propose a trade-off. Implement a new
5 mechanism, or a new variation on the old mechanism, which shifts risks to
6 core customers, and offset that risk by reducing the earnings threshold,
7 over which earnings are shared with all customers. There are several
8 issues involved in the earnings sharing: what is included in the earnings;
9 what is the sharing percentage above the threshold; and how that should be
10 allocated.

11 ***i. Staff and NW Natural Do Not Agree On What Is Included In The***
12 ***Earnings.***

13 Staff believes that earnings related to gas supply count when it
14 comes to the earnings review. NW Natural believes that earnings related to
15 gas supply should be removed from the earnings review. *CUB agrees*
16 *with Staff. Earnings above the threshold should count. However, this may*
17 *not even be the most important point. The bigger point is that this is an*
18 *issue that should be resolved as part of the mechanism so that we can*
19 *understand it in its entirety.*

20 This is a significant issue. In the July 8, 2008 NW Natural
21 Earnings Review, NW Natural calculated its earnings as 10.15%, while
22 Staff calculated it at 12.84. This is a difference of approximately 270 basis
23 points of ROE. CUB/100/Jenks/34. While the earnings were not enough
24 to trigger sharing of over-earning under the existing mechanism, under
25 either the Joint Parties' PGA or CUB's PGA, the Staff's earnings
26 calculation would have triggered sharing of over-earning.

27 The Joint Parties do not address this disagreement, but NW Natural
28 does on behalf of NW Natural and Staff:

29
30 Staff and NW Natural agree that the Commission need not resolve
31 this issue in this proceeding and instead should allow the parties an
32 opportunity to resolve the disagreement outside of this docket.

33 NW Natural/100/Miller/6
34

35 CUB believes that this needs to be resolved in this docket in order
36 to evaluate the proposed mechanism. Both the Joint Parties and CUB are
37 proposing mechanisms which shift risk to core customers and, in
38 exchange, reduce the threshold for earnings sharing. However, because
39 the difference between including all costs and excluding commodity costs
40 can be as high as 270 basis points, CUB believes that it is impossible to
41 evaluate the trade-off without knowing how commodity related earnings
42 will be treated. The earnings threshold side of this trade-off is much

1 different, depending on whether Staff or NW Natural's position is
2 adopted. *[Emphasis added]*⁵
3

4 The Commission was also very clear in Order No. 08-504 as to what it was, and
5 was not, adopting. The Commission adopted CUB's proposal as modified in Order
6 No. 08-504. The Commission set forth the modifications it was making. Those
7 modifications did not include the modification now sought by NW Natural.

8 In Section VII. B. of the Order the Commission discussed CUB's position and
9 stated as follows:

10 CUB states that Staff and NW Natural do not agree whether earnings
11 related to gas costs are counted in an earnings review. *Staff proposes to*
12 *include the earnings; NW Natural proposes to exclude them. CUB agrees*
13 *with Staff.*
14

15 *CUB cites testimony, from a NW Natural witness, to the effect that NW*
16 *Natural and Staff agree that the Commission need not resolve this issue in*
17 *this proceeding. CUB disagrees. CUB argues that the issue must be*
18 *addressed to evaluate the trade-off between the increased risk for*
19 *customers and the reduced earnings sharing.*
20

21 CUB notes that the Joint Parties propose that 33 percent of earnings
22 above the threshold will be shared by customers of Cascade, but only 20
23 percent will be shared by customers of NW Natural and Avista. SB 408
24 does not apply to Cascade. This treatment is intended to recognize the
25 effect of the statute.
26

27 CUB states that the Joint Parties attempt to address the SB 408 effect
28 on the share of earnings that flows back to customers, but ignore the effect
29 on the earnings retained by the LDCs. Pursuant to SB 408, customers will
30 pay a tax surcharge for the over-earning between the company's
31 authorized rate of return and the earnings threshold, and a tax surcharge of
32 80 percent of the over-earning retained by the LDC. CUB argues that an
33 appropriate adjustment would require an additional sharing to customers
34 to compensate them for the additional amount of taxes they will be
35 charged.
36

⁵ CUB's Opening Brief Section III. C. pages 16 – 17

1 CUB notes that the Joint parties propose that over-earnings be
2 allocated to all customers on an equal percentage of margin basis. CUB
3 argues that core customers would be assigned a greater risk and should
4 receive a corresponding greater reward.
5

6 According to CUB, earnings can be attributed to specific sources of
7 revenue. CUB states that, in this year's earnings review, the amount of
8 over-earning attributed to gas purchases and sales to core customers was
9 270 basis points. CUB argues that over-earnings paid by core customers
10 on gas purchases should not be used to reduce the rates of non-core
11 customers.⁶ [*Emphasis added*]
12

13 Thus the Commission acknowledges CUB's proposal on the earnings band⁷,
14 rejects one small piece of that - the rate spread⁸ - and then accepts CUB's
15 proposal as specifically modified stating in Section IX. Conclusion, Findings of
16 Fact No 4. that "CUB's proposed modifications to the PGA mechanism are
17 consistent with the Commission's instructions to the parties." And in No. 5 that
18 "CUB's proposed modifications to the PGA mechanism provide for a fair
19 allocation of risk between ratepayers and shareholders."^{9, 10}

20 Furthermore, and contrary to what is argued by NW Natural at page 6 of the
21 Petition for Declaratory Ruling, the Commission also acknowledged that the year
22 in which its Order No. 08-504 was being entered was nearly over, and therefore it
23 would conduct the Spring 2009 earnings review of the 2008 numbers under the
24 mechanism in place for most of 2008. Thus clearly indicating that for all periods
25 thereafter the new mechanism as modified would be used and would not sunset.
26 The new mechanism being that proposed by CUB as modified by the Commission

⁶ Order No. 08-504 at pages 14 – 15.

⁷ Order No. 08-504 at page 15.

⁸ *Id.* at 17.

⁹ *Id.* at 17.

¹⁰ *Id.* at 18.

1 which includes in the earnings review calculation “amounts attributable to the
2 Company’s portion of gas cost variances”.

3 The Commission knew what CUB was arguing, accepted what CUB was arguing,
4 and adopted CUB’s proposal, as modified. The proposal to include within calculation
5 of the Spring earning’s review, “amounts attributable to the Company’s portion of gas
6 cost variances.” Clearly the issue was raised by CUB, recognized and ruled upon by
7 the Commission in its PGA Order. NW Natural should be prevented by the doctrine
8 of issue preclusion from raising this issue again.¹¹

9 Based on the forgoing, CUB respectfully requests that NW Naturals’ Petition for
10 Declaratory Ruling be denied.

11
12 *E. NW Natural’s Petition for Declaratory Ruling should be denied based on the*
13 *doctrine of issue preclusion.*

14
15 The issue of whether “amounts attributable to the Company’s portion of gas cost
16 variances” was raised by CUB, recognized and ruled upon by the Commission in its
17 UM 1286 PGA Order No 08-504. As stated by the Supreme Court in the case of
18 *Nelson v. Emerald People’s Utility District,*

19 Because this case involves the preclusive effect of an administrative
20 proceeding, it is governed by the common law. *Drews v. EBI Companies,*
21 *supra*, 310 Or at 142.

22 If one tribunal has decided an issue, the decision on that issue may
23 preclude relitigation of the issue in another proceeding if five requirements
24 are met:

25 1. The issue in the two proceedings is identical. *North Clackamas School*
26 *Dist. v. White, supra*, 305 Or at 53; *State Farm Fire & Cas. v. Reuter,*
27 *supra*, 299 Or at 158.

¹¹ *Nelson v. Emerald People’s Utility District*, 318 OR 99, 104; 862 P.2d 1293 (1993)
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1 2. The issue was actually litigated and was essential to a final decision on
2 the merits in the prior proceeding. *Heller v. Ebb Auto Co.*, 308 Or. 1, 5,
3 774 P2d 1089 (1989).

4 3. The party sought to be precluded has had a full and fair opportunity to
5 be heard on that issue. *Chavez v. Boise Cascade Corporation*, 307 Or.
6 632, 635, 772 P2d 409 (1989); *State v. Ratliff*, *supra*, 304 Or at 258.

7 4. The party sought to be precluded was a party or was in privity with a
8 party to the prior proceeding. *North Clackamas School Dist. v. White*,
9 *supra*, 305 Or at 53; *State Farm Fire & Cas. v. Reuter*, *supra*, 299 Or at
10 159.

11 5. The prior proceeding was the type of proceeding to which this court will
12 give preclusive effect. *North Clackamas School Dist. v. White*, *supra*, 305
13 Or at 52; *State v. Ratliff*, *supra*, 304 Or at 258.(fn4)¹²

14
15 The five requirements cited by the Supreme Court are clearly met in this case and
16 NW Natural's Petition for Declaratory Ruling should be denied.

17
18 *F. CUB's proposal and the new PGA Mechanism were designed and intended to*
19 *work over the long term. The mechanism has been in place less than six months*
20 *and NW Natural is already seeking to change it by shifting even more risk to*
21 *customers and for less compensation – this is not fair just or reasonable.*

22
23 As discussed above, NW Natural now has solid end of year 2008 and early
24 2009 market numbers to crunch and seems to have determined that it is not
25 willing to further repay customers but wishes to benefit shareholders. The
26 Commission has already reviewed, recognized, accounted for, and ruled on the
27 increased gas supply risks for shareholders. The mechanism as set forth in Order
28 No. 08-504 already takes shareholder risks into account. Now the company is
29 seeking to shift even more of the risk burden onto customers and with even less
30 compensation. This is not fair, just or reasonable. ORS 756.040.

31 CUB respectfully requests that NW Naturals' Petition for Declaratory
32 Ruling be denied.

¹² *Id.*

1 **CONCLUSION:**

2 Utilities were, after much process – hearings and rounds of testimony and briefing
3 - provided with a choice under Order No. 08-504 that allowed them to choose whether to
4 participate in gas cost sharing with customers on an 80/20 or 90/10 basis, with
5 corresponding earning thresholds above which customers received 33% of over-earnings.
6 NW Natural chose 80/20. NW Natural now wants the Commission to exclude from
7 earnings sharing “amounts attributable to the Company’s portion of gas cost variances.”
8 Such a change would eliminate a huge portion of the previously included earnings dollars
9 from the Spring earnings review calculation pot. Allowing NW Natural to proceed with
10 this plan would be unfair to customers at the best of times but this is not the best of times,
11 in fact, economically speaking, this is the worst of times for most people alive to day.
12 Allowing NW Natural to proceed with its plan would be grossly unfair to its already
13 economically strapped customers. For a utility to make a proposal of this nature at this
14 time is, frankly, inappropriate.

15 /////
16 /////
17 ///
18 ///
19 //
20 /

1 Notwithstanding the above public policy argument, two major legal reasons also
2 exist to deny NW Naturals' Petition:

3 • The issue of what to include in the Spring Earnings Review calculation
4 was raised before, reviewed before and ruled on before in UM 1286 – NW
5 Natural should be precluded by the doctrine of issue preclusion from
6 raising this issue again.

7 • NW Natural failed to timely request rehearing or reconsideration.

8 CUB respectfully requests that NW Naturals' Petition for Declaratory Ruling be
9 denied.

10 DATED THIS 15TH DAY OF APRIL, 2009

11 Respectfully submitted,



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20

DR 43 – CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of April, 2009, I served the foregoing **ANSWER OF THE CITIZENS' UTILITY BOARD OF OREGON TO NORTHWEST NATURAL GAS COMPANY'S PETITION FOR A DECLARATORY RULING** in docket DR 43 upon each party listed in the DR 43 PUC Service List by email and, where paper service is not waived, by U.S. mail, postage prepaid, and upon the Commission by email and by sending 1 original and 5 copies by U.S. mail, postage prepaid, to the Commission's Salem offices.

(W denotes waiver of paper service)

(C denotes service of Confidential material authorized)

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