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April 29, 2009

## VIA ELECTRONIC FILING

PUC Filing Center  
Public Utility Commission of Oregon  
PO Box 2148  
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**Re: DR 43**

Enclosed for filing are an original and one copy of NW Natural Gas Company's Reply to the Answer of the Citizens' Utility Board of Oregon. The document has been served on all parties to this proceeding as indicated in the attached service list. Please contact me with any questions.

Very truly yours,

A handwritten signature in cursive script that reads "Wendy McIndoo".

Wendy McIndoo

Enclosure

## CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document in Docket DR 43 on the following named person(s) on the date indicated below by email and first-class mail addressed to said person(s) at his or her last-known address(es) indicated below.

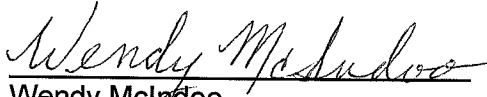
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Dated April 29, 2009

MCDOWELL & RACKNER PC

  
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1  
2 **BEFORE THE PUBLIC UTILITY COMMISSION**

3 **OF OREGON**

4 **DR 43**

5 In the Matter of the Petition of  
6 NW Natural Gas Company for a Declaratory  
7 Ruling Regarding the Application of  
8 OAR 860-22-0070

**REPLY TO THE ANSWER OF THE CITIZENS'  
UTILITY BOARD OF OREGON**

9 Pursuant to OAR 860-013-0050(2), NW Natural Gas Company ("NW Natural" or "the  
10 Company") files this Reply to the Answer of the Citizens' Utility Board of Oregon ("CUB") to NW  
11 Natural's Petition for a Declaratory Ruling ("Answer") filed on April 15, 2009.

12 **I. INTRODUCTION**

13 On March 26, 2009, NW Natural filed its Petition for a Declaratory Ruling ("Petition")  
14 requesting that the Public Utility Commission of Oregon ("Commission") issue an order affirming  
15 its policy of allowing NW Natural to exclude from earnings amounts attributable to the  
16 Company's portion of gas cost variances when conducting the Company's Spring Earnings  
17 Review for its Purchased Gas Adjustment mechanism ("PGA"). In its Answer, CUB argues that  
18 NW Natural's request should be denied because the Petition constitutes an improper attempt to  
19 (1) subvert Oregon's procedural rules by performing an end-run around the rules governing  
20 requests for reconsideration, and (2) alter the Spring Earnings Review policies in order to  
21 increase shareholder profits during an economic recession.

22 CUB is wrong on both counts. First, CUB's procedural argument incorrectly assumes  
23 that the Commission's Order in UM 1286—Order 08-504—intended to exclude gas cost  
24 variances from Company earnings in the Spring Earnings Review. As discussed in NW  
25 Natural's Petition, the better reading of Order No. 08-504 is that the Commission did not reach  
26 the issue, and that NW Natural's Petition requests that the Commission specifically address the

1 question for the first time. Second, CUB's policy arguments are similarly flawed. NW Natural is  
2 not attempting to change the rules governing the Spring Earnings Review, but rather to retain  
3 methodology the Company has used since the Spring Earnings Review was first instituted. NW  
4 Natural's position on this important policy issue is not based on short-term economic conditions;  
5 the Company has asserted this position since Staff first raised the issue during the 2008 Spring  
6 Earnings Review. The Company's current practice of excluding gas cost variances has worked  
7 fairly and appropriately over the long term, and NW Natural urges the Commission not to alter  
8 that practice to address temporary circumstances. For these reasons, NW Natural respectfully  
9 requests that the Commission issue the declaratory ruling requested by NW Natural in its  
10 Petition.

## 11 II. DISCUSSION

### 12 A. The Commission is Free to Issue a Ruling on NW Natural's Treatment of Gas Cost 13 Variances in this Proceeding.

#### 14 1. NW Natural's Petition is Not a Request for Reconsideration.

15 CUB argues that the Commission should deny NW Natural's Petition because the  
16 Company did not file for reconsideration of Order No. 08-504 in Docket UM 1286<sup>1</sup> ("PGA  
17 Order"). CUB's argument is based on a misunderstanding of NW Natural's argument. In the  
18 Petition, NW Natural explains that the most reasonable reading of the PGA Order is that the  
19 Commission did *not* rule on the issue of whether gas cost variances should be included in  
20 earnings for purposes of the Spring Earnings Review. NW Natural is not therefore seeking a  
21 change in the PGA Order. If the Commission never ruled on the issue in the PGA Order, there  
22 is no basis for reconsideration.

23 CUB argues that its filings with the Commission described its position on the treatment  
24 of gas cost variances in the Spring Earnings Review and that the Commission agreed with  
25

26 <sup>1</sup> *Re Investigation into the Purchased Gas Adjustment (PGA) Mechanism Used by Oregon's Three Local  
Distribution Companies*, Docket UM 1286, Order No. 08-504 (Oct. 21, 2008) [hereinafter "PGA Order"].

1 CUB's position. NW Natural does not disagree that CUB's filings outlined its position on  
2 whether gas cost variances should be included in earnings in Docket UM 1286. They clearly  
3 did. However, it is by no means clear that the Commission agreed. On the contrary, the PGA  
4 Order is ambiguous at best on this point, and the more reasonable interpretation is that the  
5 Commission did not reach the issue.

6 NW Natural has been removing gas cost variances from earnings for the past ten years  
7 with the Commission's approval. In the PGA Order, the Commission never discussed the merits  
8 of CUB's position. Nor did it explain why it was departing from ten years of prior practice. As  
9 pointed out in NW Natural's Petition, Oregon law requires the Commission to provide an  
10 explanation whenever it departs from prior practice.<sup>2</sup> The lack of any such explanation,  
11 especially in light of NW Natural's and Staff's recommendation that the parties be allowed to  
12 address the issue *outside of the PGA docket*, suggests that the Commission did not reach the  
13 issue. As a result, CUB's argument that NW Natural is requesting reconsideration is without  
14 basis.

15  
16 **2. Issue Preclusion Is Irrelevant in Commission Proceedings Such as the PGA  
Docket.**

17 CUB also argues that NW Natural's Petition should be denied because the Commission  
18 already ruled on the issue and issue preclusion prohibits the Commission from revisiting the  
19 issue. CUB is incorrect on two counts. First, even if issue preclusion were applicable in general  
20 policy proceedings such as UM 1286, the doctrine would not preclude the Commission from  
21 resolving the issue presented by NW Natural if the Commission never actually resolved the  
22 issue.

23 Second, the Commission has found that issue preclusion does *not* apply to Commission  
24 proceedings unless they are quasi-judicial.<sup>3</sup> Quasi-judicial proceedings are those in which the

25 \_\_\_\_\_  
<sup>2</sup> See ORS 183.482(8)(b)(B).

26 <sup>3</sup> See *Matter of Qwest Corp.*, Docket UA 55, Order No. 04-225, at 2 n. 2 (April 27, 2004) ("issue and  
claim preclusion do not apply to Commission proceedings"); *Public Util. Comm'n. v. Crooked River Ranch*

1 issue is whether a regulated entity violated a statute, rule, or Commission order.<sup>4</sup> In  
2 proceedings where the Commission determines new policy, the Commission—like all  
3 administrative agencies—must be free to choose its policy and must not be bound by previous  
4 decisions.<sup>5</sup> The Oregon Legislature recognized this administrative necessity and codified it as  
5 ORS 756.568, which specifically allows the Commission to rescind, suspend, or amend its own  
6 orders at any time, irrespective of the preclusive effect of those orders. Here, UM 1286 was not  
7 a quasi-judicial proceeding because it was setting policy, not adjudicating the rights of an entity  
8 based on specific facts.<sup>6</sup> Consequently, even if the Commission had ruled in CUB's favor on the  
9 earnings review issue, it would be free to alter its policy in this case.

10 **B. NW Natural is Requesting that the Commission Maintain the Status Quo in NW**  
11 **Natural's Spring Earnings Review, Not Change the Earnings Review as CUB**  
12 **Inaccurately States.**

13 CUB characterizes NW Natural's Petition as an improper attempt to alter the current  
14 mechanism to increase shareholder profits at customers' expense by taking advantage of the  
15 recent unexpected drop in gas prices. This position is simply incorrect. First, as explained  
16 above, the Company is not attempting to change the Spring Earnings Review, but rather to  
17 retain the mechanism that has worked well for a decade.<sup>7</sup> More importantly, CUB's argument is  
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19 *Water Co.*, Docket UM 1381, Order No. 08-409 (Aug. 7, 2008) (Commission applied issue preclusion in  
20 quasi-judicial enforcement proceeding after it had already determined in a prior proceeding that water  
utility had violated Commission order).

21 <sup>4</sup> See Or. Op. Atty. Gen., OP-6454, 1992 WL 526799 (Or. A.G.) (June 8, 1992) (quasi-judicial  
proceedings are those where the Commission determines that someone it regulates violated a statute or  
rule).

22 <sup>5</sup> See Or. Op. Atty. Gen., OP-6454 ("When the purpose is one of regulatory action, as distinguished from  
23 merely applying law or policy to past facts, an agency must at all times be free to take such steps as may  
be proper in the circumstances, irrespective of its past decisions. Even when conditions remain the  
24 same, the administrative understanding of those conditions may change, and the agency must be free to  
act.") (citations omitted).

25 <sup>6</sup> See *PGA Order* at 1 ("Public Utility Commission of Oregon opened this investigation to review and  
modify, as appropriate, the Purchased Gas Adjustment mechanism").

26 <sup>7</sup> Implying that NW Natural is trying to take advantage of its customers during the current recession is  
unfounded and inappropriate, especially given, for example, that the Company has requested that it  
refund its current PGA balance early. NWN Advice No. OPUC 09-7.

1 *itself* an attempt to take advantage of current short-term economic conditions to seek its own  
2 long-term policy change.

3  
4 **III. CONCLUSION**

5 For the reasons explained above, NW Natural respectfully requests that the Commission  
6 rule that NW Natural may remove amounts attributable to gas cost sharing in the results of  
7 operations when conducting its Spring Earnings Review under OAR 860-022-0070.

8 DATED: April 29, 2009

MCDOWELL & RACKNER PC

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