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VIA ELECTRONIC AND U.S. MAIL

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Public Utility Commission of Oregon
PO Box 2148
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**Re: UM 1633 – In the Matter of OREGON PUBLIC UTILITY COMMISSION, Investigation
into Treatment of Pension Costs in Utility Rates**

Attention Filing Center:

Enclosed for filing in docket UM 1633 are an original and five copies of the Joint Utilities' Opening Brief on Bifurcation Proposal. A copy of this filing has been served on all parties to this proceeding as indicated on the attached certificate of service.

Very truly yours,

Wendy McIndoo
Office Manager

Enclosures

cc: Service List

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**

3 **UM 1633**

4 In the Matter of

5 PUBLIC UTILITY COMMISSION OF
6 OREGON,

7 Investigation into Treatment of Pension Costs
in Utility Rates.

**JOINT UTILITIES’
OPENING BRIEF ON
BIFURCATION PROPOSAL**

8 **I. INTRODUCTION**

9
10 Pursuant to Chief Administrative Law Judge (ALJ) Michael Grant’s Prehearing
11 Conference Memorandum dated April 9, 2013, Avista Corporation, Cascade Natural Gas
12 Corporation, Northwest Natural Gas Company (“NW Natural”), PacifiCorp d/b/a Pacific Power,
13 and Portland General Electric Company (collectively, the “Joint Utilities”) file this Opening Brief
14 on the Commission’s proposal to bifurcate this docket.

15 On March 27, 2013, ALJ Grant issued a Notice of Prehearing Conference proposing
16 that this docket be divided into two phases:

17 The first phase would address how the Commission should treat pension costs
18 when setting rates on a going-forward basis. The second would address how
19 the Commission should resolve requests by utilities to recover pension costs
incurred in the past.¹

20 On April 5, 2013, NW Natural filed a letter in response to the bifurcation proposal. NW
21 Natural’s letter recommended that the bifurcation proposal not be adopted because: (1) NW
22 Natural’s proposal for pension cost rate recovery in this case will include prospective
23
24

25 ¹ *Re. Pub. Util. Comm’n of Or. Investigation into Treatment of Pension Costs in Utility Rates*, Docket UM
26 1633, Notice of Prehearing Conference (Mar. 27, 2013).

1 application of future Financial Accounting Standard (FAS) 87² expense and future costs to
2 finance NW Natural's prepaid pension asset, and NW Natural would present its proposal in
3 Phase One; (2) parties are likely to raise issues related to retroactive ratemaking in response
4 to NW Natural's proposals in Phase One; and (3) prohibiting the parties from making these
5 retroactive ratemaking arguments until Phase Two would hinder full development of the record
6 and likely frustrate the Commission's ability to review the case in an efficient matter.³

7 The Commission held a prehearing conference on April 8, 2013, to set a schedule in
8 this docket and address the bifurcation proposal. ALJ Grant set a schedule for the parties to
9 brief whether this docket should be divided into two phases. This brief is filed pursuant to this
10 schedule.

11 II. DISCUSSION

12 A. The Joint Utilities Plan to Propose Changing the Rate Recovery for Pension 13 Costs to Recover Costs on a Prospective Basis Only.

14 1. Current Pension Cost Recovery

15 Under the Commission's current pension cost recovery methodology, utilities recover
16 pension costs through the accounting expense calculated in accordance with FAS 87. This
17 methodology allows for recovery only of current pension expense and does not provide for
18 recovery of another element of pension costs—the financing costs associated with
19 contributions to pension funds before those contributions are recovered through FAS 87
20 expense. Due to a change in federal funding requirements, coupled with the financial
21 recession, these accelerated contributions have resulted in large a "prepaid pension asset" for
22 many utilities.

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24 ² Subsequently codified into Accounting Standards Codification Topic 715-30, *Compensation—Retirement
Benefits—Defined Benefit Plans—Pension*.

25 ³ *Re Pub. Util. Comm'n of Or. Investigation into Treatment of Pension Costs in Utility Rates*, Docket UM
1633, Letter from NW Natural (Apr. 5, 2013).

26

1 The prepaid pension asset represents the cumulative contributions in excess of
2 cumulative FAS 87 expense. Over the life of a pension plan, total company contributions are
3 expected to equal FAS 87 expense. Before passage of Pension Protection Act of 2006 (the
4 PPA), and the impacts of the subsequent market decline, the utilities' prepaid pension assets,
5 if any, remained relatively small. This meant that the utilities incurred limited, or no, financing
6 costs related to prepaid pension assets. After passage of the PPA and the subsequent
7 market decline, however, utilities' prepaid pension assets grew significantly. This condition is
8 expected to reverse in the future, with pension expense overtaking contributions and reducing
9 the prepaid balance eventually to zero. However, until these excess contributions are fully
10 recovered, the Joint Utilities are incurring and will continue to incur significant costs to finance
11 prepaid pension assets, and those financing costs are not currently recovered in rates.

12 **2. Joint Utilities' Proposal to Change Pension Cost Recovery**

13 In this docket, the Joint Utilities will present a modification to the Commission's
14 methodology for pension cost recovery to remedy the fact that the current methodology does
15 not allow for recovery of the significant financing costs now being incurred. Specifically, the
16 Joint Utilities will propose that they continue to recover FAS 87 expense, thereby continuing to
17 draw down the prepaid pension asset over time or until the pension plan is terminated.
18 In addition, the Joint Utilities will propose to begin recovering **on a prospective basis** the
19 costs to finance the prepaid pension assets by adding the assets to rate base.

20 In support of their proposal, the Joint Utilities will demonstrate that the contributions to
21 their pension funds that resulted in the existing prepaid assets benefit customers prospectively
22 by reducing FAS 87 expense, and that it is appropriate to recover the financing costs
23 associated with these assets. Allowing recovery of costs to finance the prepaid asset is
24 consistent with Commission policy allowing utilities to add to rate base cash contributions
25 made on customers' behalf before recognition in expense, such as materials and supplies.
26 Moreover, as Commission Staff discovered when it surveyed the 52 state and local utility

1 commissions on the topic of rate recovery of pension costs, nearly half of states already allow
2 some form of recognition for these financing costs in rates.⁴

3 **B. The Joint Utilities Request that the Commission Decline to Bifurcate this Docket.**

4 The ALJ has proposed to bifurcate this case to address future recovery in Phase One,
5 and to address recovery of past costs in Phase Two. At the prehearing conference on this
6 issue, the ALJ articulated administrative efficiency as the reason for this proposal. Bifurcation,
7 however, will not promote administrative efficiency, but will instead deprive the Joint Utilities of
8 their ability to present and defend their proposal, and could result in related arguments being
9 considered in a piecemeal manner. The Joint Utilities therefore request that the Commission
10 decline to bifurcate this docket.

11 **1. Bifurcation Will Not Promote Administrative Efficiency.**

12 As explained above, the Joint Utilities' proposal to add recovery of financing costs is
13 prospective only. The Joint Utilities have absorbed costs to finance the prepaid assets to date
14 and are not asking to recover past financing costs.⁵ Instead, the Joint Utilities are asking that,
15 in addition to FAS 87 expense recovery, the prepaid pension asset be added to rate base, so
16 that they will be allowed to recover prospective financing costs from contributions in excess of
17 FAS 87 expense made to comply with federal mandates. This request is the core of the Joint
18 Utilities' case, and, as such, the Joint Utilities' proposal must be made in Phase One of this
19 case.

20 The Joint Utilities are aware that the intervening parties and Commission Staff have
21 taken the position that the Joint Utilities' proposal to recover financing costs of prepaid asset
22 in the future, in some way, constitutes a request to recover "past costs." The Joint Utilities do

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24 ⁴ Commission Staff, *Pension Treatment in Ratemaking Survey Summary Report* at Question 2 (Mar. 28, 2013).

25 ⁵ Past financing costs may be eligible for deferral under the deferral applications some utilities have filed
26 during the past year. These applications, however, are not at issue in this case.

1 not yet fully understand the basis for that argument and believe it to be erroneous.
2 Nevertheless, such arguments should be raised and ultimately resolved in Phase One of the
3 docket in response to the Joint Utilities' proposal.⁶ If the Joint Utilities' proposal is forced to
4 Phase Two because it is deemed to constitute "recovery of past costs," or if the Joint Utilities
5 are required to arbitrarily split their proposal into separate elements to accommodate the
6 bifurcation, the Joint Utilities will be deprived of an opportunity to present their cases in a
7 coherent manner.

8 Furthermore, a fair treatment of the prepaid pension asset for ratemaking purposes
9 cannot be determined until the "past cost" argument is resolved. For example, the utilities
10 would be unfairly harmed if the Commission determines in Phase One that the prepaid
11 pension asset should be included in rate base (in addition to FAS 87 expense recovery), but in
12 Phase Two determines that the prepaid pension asset to be included in rate base would be
13 comprised only of the difference between contributions and expense prospectively. Because
14 cumulative contributions will equal FAS 87 expense over the life of the pension plan, any utility
15 with a current prepaid pension asset will have more FAS 87 expense than contributions in
16 future periods. To exclude the existing prepaid asset balance from rate base would ultimately
17 result in a permanent accrued pension liability being included as a rate base reduction, even
18 though the utility would have made more pension contributions than have been recovered
19 through FAS 87 expense.

20 Moreover, it is possible that some parties may propose a change in recovery
21 mechanisms—such as a switch to a cash basis of recovery—that does not include recovery of
22 the prepaid asset or the financing costs of this prepaid asset. As a practical matter, such a
23 proposal could not fairly be considered separately from treatment of the prepaid pension
24

25 ⁶ The Joint Utilities fundamentally disagree with the argument that their proposal implicates past costs or
26 retroactive ratemaking and will respond as such in this docket.

1 asset, because the Commission could not change the methodology for recovering pension
2 costs prospectively without addressing the residual effects of the past methodology.⁷ If the
3 Commission were to force a change in recovery methods without addressing the prepaid
4 assets currently existing on the Joint Utilities' books, the utilities could be forced to "write off"
5 their regulatory assets associated with the prepaid pension assets. Allowing a procedural
6 decision to bifurcate the docket, which could result in write-offs, is unreasonable, especially
7 when such a result is avoidable.

8 In sum, bifurcation will either have no impact on the case (because the Joint Utilities
9 will present their proposal in Phase One, and parties who wish to raise the "past cost"
10 arguments will need to do so at that point, obviating the need for Phase Two) or will deprive
11 the Joint Utilities of their ability to present their entire proposal and respond to arguments
12 against their proposal (because the proposal is deemed to relate to "past costs" and cannot be
13 raised until Phase Two). In either case, bifurcation will not expedite resolution of this docket
14 and could potentially result in significant harm to the Joint Utilities.

15 **2. Bifurcation Over the Joint Utilities' Objections Would Deprive the Joint**
16 **Utilities of Due Process.**

17 In addition to failing to promote administrative efficiency, bifurcating the docket would
18 deprive the Joint Utilities of due process. The Commission considers three factors to
19 determine the appropriate procedural due process requirements in a given case: "the nature
20 of the individual's interest that is at stake, the risk of an erroneous deprivation of that interest
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23 ⁷ It would be similarly inappropriate for a utility to order mid-year that all customers would be transferred
24 to equal pay prospectively without considering whether and how to reconcile the fact that some
25 customers already paid monthly bills for the coldest part of the year. Just as it would be unfair to
26 customers to change the methodology without accounting for the effects of the transition, it would be
unfair to change the pension cost recovery methodology in this case without addressing the existing
prepaid assets.

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1 given the procedures used by the state, and the state's interest."⁸ Application of these three
2 factors indicates that bifurcating the docket would violate the Joint Utilities' due process rights.

3 First, the Joint Utilities have an interest in recovering their pension costs in rates and
4 therefore have an interest in the methodology established by the Commission. Second, there
5 is a risk that the Joint Utilities will be wrongly deprived of this interest if the Commission
6 adopts procedures that limit the Joint Utilities' ability to present and defend their proposals for
7 recovering pension costs. Finally, the ALJ's stated interest in bifurcation is efficient resolution
8 of this docket. As explained above, bifurcating this docket would not more efficiently resolve
9 this docket, so there is no benefit to bifurcation that would outweigh the Joint Utilities' ability to
10 present and defend their proposal.

11 The Commission has noted that due process requires that "all parties . . . have a
12 reasonable opportunity to respond via the submission of testimony, the cross-examination of
13 witnesses of opposing parties in a public forum and the presentation of legal argument."⁹
14 Because the bifurcation proposal may deprive the Joint Utilities of their ability to present
15 testimony and legal argument on their proposal, they request that the Commission not
16 bifurcate the docket. As far as the Joint Utilities are aware, the Commission has never before
17 ordered bifurcation over a party's objection.

18 III. CONCLUSION

19 Because bifurcating this docket will not result in administrative efficiencies and will
20 deprive the Joint Utilities, and potentially other parties, of presenting and defending their
21 proposals for pension cost recovery, the Joint Utilities request that the Commission decline to
22 bifurcate this docket.

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24 ⁸ *Re Portland Gen. Elec. Co. Application to Amortize the Boardman Deferral*, Docket UE 196, Order
No. 09-046 at 5 (Feb. 5, 2009) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

25 ⁹ *Re Portland Gen. Elec. Co. Request for a Rate Increase*, Docket UE 188, Order No. 07-573 at 6
26 (Dec. 21, 2007).

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2 DATED: May 7, 2013.

Respectfully submitted,

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served a true and correct copy of the foregoing document in Docket UM
3 1633 on the following named person(s) on the date indicated below by U.S.First Class and/or email
4 addressed to said person(s) at his or her last-known address(es) indicated below.

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