

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1909

In the Matter of

PUBLIC UTILITY COMMISSION OF
OREGON,

Investigation of the Scope of the
Commission’s Authority to Defer Capital
Costs.

JOINT INTERVENORS’ RESPONSE
IN OPPOSITION TO JOINT
UTILITIES’ MOTION FOR
RECONSIDERATION, REHEARING,
CLARIFICATION, AND STAY

I. INTRODUCTION

The Oregon Citizens’ Utility Board and the Alliance of Western Energy Consumers (collectively “Joint Intervenors”) respond in opposition to the Joint Utilities’ Motion for Reconsideration, Rehearing, Clarification, and Stay of Order No. 18-423 (“Motion”) in the above-captioned matter.

Joint Intervenors respectfully request that the Public Utility Commission of Oregon (“Commission”) deny the Motion and affirm Order No. 18-423 (“Order”) in full. Joint Intervenors oppose reconsideration or rehearing because the Commission made no error of law or fact in adopting a reasonable statutory interpretation of “expenses” and soundly applying applicable regulatory accounting principles in making its determination. Joint Utilities have failed to show sufficient cause to reexamine any of the issues raised in the Motion. Joint Intervenors object to any revision or clarification because the Commission initiated this proceeding precisely to clarify the scope of the Commission’s authority to authorize deferred accounting under ORS 757.259(2)(e) and the Order’s ruling on that issue is clear and unambiguous. Intervenors further request that the Commission deny the Joint Utilities’ request

to stay the Order while the Commission considers the Motion because the Motion does not provide a sufficient basis for such a stay.

II. STANDARD OF REVIEW

After the Commission has made an order in any proceeding, any party thereto may apply for rehearing or reconsideration of the order.¹ The Commission may grant the request only if sufficient reason for rehearing or reconsideration is shown.² The applicant must show one or more of the following specific grounds that warrants reconsideration: (a) new evidence that is essential to the decision and that was unavailable and not reasonably discoverable before issuance of the order; (b) a change in the law or policy since the date the order was issued relating to an issue essential to the decision; (c) an error of law or fact in the order that is essential to the decision; or (d) good cause for further examination of an issue essential to the decision.³

The Motion initially asserts that reconsideration is appropriate based on subsections (c) and (d) of the reconsideration rule. However, the Joint Utilities' arguments relate only to alleged errors of law—specifically the Commission's construction of ORS 757.259. While the Joint Utilities clearly disagree with the outcome of the Commission's decision, the Motion establishes no clear error on which that outcome was based and, therefore, reconsideration is not warranted.

III. BACKGROUND

The Commission initiated this proceeding to investigate the scope of its authority to defer capital costs for later inclusion in rates under ORS 757.259(2)(e). After briefing from Staff of

¹ ORS 756.561(1).

² *Id.*

³ OAR 860-001-0720(3).

the Public Utility Commission of Oregon (“Staff”), the Joint Intervenors, and the Joint Utilities, the Commission analyzed the text and context of ORS 757.259(2)(e) and ultimately disagreed with all parties’ interpretations. The Commission interpreted the statutory language of “‘expenses’ as a term of art from the field of accounting” and concluded that it has no authority to allow deferrals of any costs related to capital investments.⁴ Joint Utilities now seek to have the Commission reconsider that conclusion.

IV. ARGUMENT

A. Reconsideration of the Commission’s Interpretation of ORS 757.259 Is Not Warranted.

As the overarching basis for seeking reconsideration of the Order, the Joint Utilities assert that the Commission should have concluded that “[t]he 1987 legislature enacted ORS 757.259 to confirm the Commission’s ability to authorize full revenue requirement deferrals, thereby minimizing the frequency of rate cases and matching customers’ costs and benefits.”⁵ This assertion is flawed, as it mischaracterizes the legislature’s intent in promulgating the statute.

In the Joint Utilities’ Motion, they make the same arguments they presented to the Commission in their original briefing. A motion for reconsideration is not an appropriate mechanism for a party to reiterate the same arguments it made to the Commission during the prior phase of the proceeding. In their initial brief to the Commission, for example, the Joint Utilities set up their entire argument based on their reading of the legislative history of ORS 757.259:

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⁴ Order at p.8.

⁵ Motion at pp.7-8.

ORS 757.259 authorizes the Commission to defer the revenue requirement effects of capital investments because (1) the plain meaning of “expenses” includes the costs associated with obtaining capital, (2) the legislature intended to authorize full requirement deferrals, and (3) the legislature’s intent is consistent with the language of the statute.⁶

In the arguments of their closing brief to the Commission, the Joint Utilities similarly began their argument with the assertion that, “[i]n this case, the legislature sought to minimize the frequency of rate cases and to match customers' costs and benefits by confirming the Commission's ability to authorize deferrals consistent with the public interest—including deferral of the full revenue requirement effects of capital investments.”⁷

To support those arguments, the Joint Utilities described in detail various discrete facets of the legislative history of ORS 757.259 and then explained why they believed that legislative history supported their interpretation of the statute. This is the exact approach the Joint Utilities have now taken in the Motion. In their Motion, the Joint Utilities do not meaningfully describe the legislative history any differently than they did in their two prior briefs. By simply reiterating those same arguments, the Joint Utilities seek another bite at the apple. Other than again asserting that their interpretation is the best interpretation, the Motion does not adequately explain why the Commission could not arrive at the conclusion it did. Reconsideration is therefore not warranted.

Even where the Joint Utilities have attempted to argue that the Commission could not arrive at the conclusion it did, their specific argument is not appropriate for a motion for reconsideration. In the Motion, the Joint Utilities assert that “Oregon’s system of statutory interpretation requires the Commission to adopt a reasonable, non-technical definition of

⁶ Joint Utilities’ Opening Brief at p.2.

⁷ Joint Utilities’ Closing Brief at p.2.

expenses, consistent with the legislature’s stated purpose in enacting the statute.”⁸ To the contrary, there is no authority stating that the Commission is required to adopt a non-technical definition of a statutory term. As the Joint Utilities later acknowledge, the Commission’s obligation is to discern the intent of the legislature. If the intent of the legislature is to use a technical term, then a statutory interpretation relying on the definition of that technical term is appropriate.

Moreover, this is not an argument that the Joint Utilities presented to the Commission in their earlier briefs and, instead, is the opposite of what they argued. That is, in their Opening Brief, after setting forth the standard for statutory interpretation, the Joint Utilities noted that the Commission Staff supported a technical meaning of the term “expenses.” Rather than argue that the Commission was required to adopt a non-technical definition of that term as they do here, the Joint Utilities instead argued that the term was not technical or, in the alternative, that the technical meaning of “‘expenses’ encompass all costs necessary to supply utility service.”⁹ Without clearer authority supporting their new argument, the Joint Utilities have not demonstrated that the Commission erred when it relied on the technical meaning of “expenses” as that term appears in the statute.

The Motion’s reliance on the legislative history as a basis for reconsideration is further flawed because it misrepresents the role of legislative history in the Commission’s analysis. After addressing some of the legislative history, the Motion makes the following criticism of the Commission’s Order:

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⁸ Motion at p.7.

⁹ Joint Utilities’ Opening Brief at p.17.

But rather than address this compelling, countervailing legislative history, the Commission relies on what it describes as “the statute’s context.” In particular, the Commission concludes that “other provisions of the statute” and “the statutory framework in which the legislation was enacted” show that “the legislature used ‘expenses’ as a term of art.” Ignoring the statute’s legislative history, the Commission relies on two pieces of context as dispositive...¹⁰

The Motion treats the Commission’s reliance on the “context” of the statute as some sort of deviation from the statutory construction standard. The Joint Utilities go as far as to say, “there is no basis in Oregon law for choosing to disregard the vast preponderance of legislative history—a critical piece of statutory context—in favor of select contextual factors.”¹¹ To the contrary, Oregon case law is replete with decisions noting the primacy of statutory context over legislative history. Indeed, the Joint Utilities noted in their Opening Brief that “[t]he starting point for the inquiry is the statute’s ‘text and context’ because it is the ‘best evidence of the legislature’s intent.’”¹² The Joint Utilities erroneously conflate statutory context and legislative history, when they are, in fact, different. In Oregon’s paradigm for statutory interpretation analysis, legislative history is not considered part of the statutory context that a court will consider in its first-level analysis. Rather, the “context” for interpreting a statute’s text is “the preexisting common law and statutory framework within which the law was enacted.”¹³ This is well-settled in Oregon case law.

While it is true that the Oregon Supreme Court has confirmed that there is no longer a requirement to identify an ambiguity in a statute before turning to the legislative history, the

¹⁰ Motion at p.8.

¹¹ *Id.* at 9.

¹² Joint Utilities’ Opening Brief at p. 4 (citing *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.* (“*PGE v. BOLI*”), 317 Or 606, 610 (1993)).

¹³ *State v. Ofodrinwa*, 353 Or 507, 512 (2013); *Klamath Irrigation Dist. v. United States*, 348 Or 15, 23 (2010). *See also Stevens v. Czerniak*, 336 Or 392, 401 (2004) (explaining that the context for interpreting a statute’s text includes “the preexisting common law and the statutory framework within which the law was enacted.”).

“legislature also intended the court to retain the authority to determine, as a discretionary matter, what weight, if any, to give that legislative history. A court need only consider legislative history ‘for what it's worth’—and what it is worth is for the court to determine.”¹⁴ Therefore, it is entirely plausible that a statutory interpretation analysis may rely solely on the text and context of the statute and end before examining pertinent legislative history. This is exactly what the Commission did in the Order.

The Commission’s Order adhered to the exact process for statutory construction set forth in *PGE v. BOLI* and *State v. Gaines*. In stating its resolution of the matter, the Commission expressly stated that it would rely on the text and context of the statute, with the option of looking to the legislative history “to help discern legislative intent.”¹⁵ After reviewing the text and context of the statute, the Commission concluded that it was able to determine the legislature’s intended meaning of the word “expenses.” The Commission had before it the arguments of the parties, which included the legislative history of the statute and the weight the various parties urged should be placed on that history. Here, the Commission undertook a correct statutory interpretation analysis that resolved the ambiguity at the first-level statutory context stage.¹⁶

ORS 757.259 addresses deferred *accounting* applications and identifies when they are permissible as an exception to the prohibition against retroactive ratemaking. The Attorney General opinion that gave rise to the legislation creating the deferral statute pondered whether the Commission—at the time—had the requisite authority to authorize deferred *accounting* orders. The Commission concluded that the context in which ORS 757.259 was enacted is clear

¹⁴ *State v. Gaines*, 346 Or 160, 170–71 (2009).

¹⁵ Order at p.5.

¹⁶ *Id.* at 7.

that the legislature intended to create an accounting mechanism as a narrow exception to the rule against retroactive ratemaking.¹⁷ Coupled with the fact that the statutory framework demonstrates that accounting plays a “critical role” in utility regulation, the Commission was within its authority to conclude that “expenses” is a term of art that the legislature intended to be defined within an accounting paradigm.

Importantly, examining legislative history in the first-level statutory interpretation analysis or as part of a second-level analysis are both permissive rather than compulsory. Examining the legislative history is compulsory only when the text and context of the statute in question fail to indicate the legislature’s intent. Just because the Commission did not find legislative history as compelling as the Joint Utilities found it does not mean the Commission erred when it relied on the text and the context of the language to determine the meaning of that language. Indeed, the fact that the various parties were able to infer different meanings from the same legislative history indicates that this history is insufficiently compelling to override the meaning it found in the actual statutory language through examination of its text and context. Because the Commission applied the correct standard for statutory interpretation and gave the legislative history the weight it thought it deserved, the Commission did not err as a matter of law simply because the Joint Utilities believe the Commission should have given portions of the legislative history more weight. Reconsideration on this basis is therefore not warranted.

B. The Commission Should Reject the Joint Utilities’ Alternative Request to Clarify.

In the event the Joint Utilities’ request for reconsideration or rehearing is denied, the Joint Utilities ask the Commission to “effectuate that part of its order allowing utilities to retroactively recover costs incurred for use of a capital asset that is not in rate base.”¹⁸ The Joint

¹⁷ *Id.* at 7-8.

¹⁸ Motion at 21.

Utilities misconstrue the Order where the Commission concluded that the rule against retroactive ratemaking “does not apply to the recovery of capital costs.”¹⁹ The request for clarification should therefore also be denied.

In the Order, the Commission concluded that the “purpose of seeking the passage of HB 2145 was to create a statutory exception to the rule against retroactive ratemaking—a rule that does not apply to the recovery of capital costs.”²⁰ This stands to reason because, as the Commission explained, capital costs are treated differently than operating expenses. Unlike past operating expenses that are not subject to recovery because of the rule against retroactive ratemaking, the Commission stated that “a utility may—at any time—seek to include capital costs in rate base regardless of when those costs were incurred” subject to regulatory lag.²¹ As the Joint Intervenors read the Commission’s Order, it simply stated as a matter of fact that utilities invest capital up-front and before a capital asset is placed into service, but that does not mean that the rule against retroactive ratemaking then prohibits the utilities from recovering their capital investment later. Rather, that investment is recovered over time through depreciation expense once it is found to be prudent—the same paradigm that has been in place since long before the legislature enacted ORS 757.259. In other words, utilities are not barred from seeking to include undepreciated capital costs (that were incurred in the past) in rate base for the remainder of an asset’s useful life.

The Joint Utilities incorrectly construe the Order to mean that the Commission will allow utilities to seek regulatory accounting to recover costs associated with capital projects from the time between when the assets are placed in service and when the assets are included in rates. If

¹⁹ Order at 8.

²⁰ *Id.*

²¹ *Id.*

the Joint Utilities' interpretation of the Order is correct, regulatory lag associated with capital costs would be eliminated, while utilities would retain the benefit of an authorized return on equity intended to compensate for that lag.

The Commission has defined regulatory lag as “the delay between rate cases and within a rate proceeding where rates remain frozen until a new rate is approved.”²² For capital projects placed in service in between rate cases, the asset begins to depreciate. Then, when the Commission authorizes a utility to include the asset in rate base through a rate proceeding, the investment in capital is recovered as a depreciation expense for the remainder of the project's useful life—without the need to file a deferral. While it is true that utilities may only recover a portion of their “return of” the investment depending on when the asset is placed in service and when the Commission issues a final order in a rate proceeding, utilities can control the timing of capital investments and general rate case filings to minimize these losses. The Commission has noted that “utilities typically bear the risk of increased costs between rate cases”²³ and this includes costs associated with capital investments. The Joint Utilities' request for clarification would eliminate regulatory lag associated with capital projects and guarantee 100 percent of the “return of” capital investments regardless of when the asset is placed in service and when a final order is issued in a rate proceeding. This result is untenable, inconsistent with the Order, and contrary to the Commission's long-standing policy that deferred accounting is a “discrete and

²² *In re PacifiCorp, dba Pacific Power Request for a General Rate Revision*, OPUC Docket No. UE 246, Order No. 12-493 at 15 (Dec. 20, 2012)(citing LEONARD SAUL GOODMAN, *THE PROCESS OF RATEMAKING* (Vol. I), 44 (Pub. Util. Rpts., Inc. 1998)).

²³ *Id.* at 17.

exceptional ratemaking process”²⁴ and “deferrals should be used sparingly[.]”²⁵ The Commission has also referred to the use of deferrals as “extraordinary” on several occasions.²⁶

Further, granting the Joint Utilities’ request for clarification would result in an inequitable outcome in which utilities are able to sidestep regulatory lag and enjoy dollar-for-dollar recovery while customers continue to bear the risk of regulatory lag on the back end of the capital investment’s depreciation curve. As described in the briefing in this proceeding, through regulatory lag, customers continue to pay the price set during a prior rate case for a capital investment that is continuously depreciating.²⁷ It is important to note that customers bear a significantly higher share of regulatory lag risk than do the utilities. Granting the Joint Utilities’ alternative request for clarification is inappropriate for a myriad of reasons, not the least of which is the inequitable effect it would have on the regulatory lag risk profile.

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²⁴ *In re Oregon Public Utility Commission*, OPUC Docket No. UM 1147, Order No. 06-507 at 4 (Sept. 6, 2006) (“Deferred accounting is a discrete and *exceptional* ratemaking process...”).

²⁵ *In re Oregon Public Utility Commission*, OPUC Docket No. UM 1147, Order No. 05-1070 at 10 (Oct. 5, 2005).

²⁶ *See, e.g., In re Northwest Natural Gas Company*, OPUC Docket Nos. UM 1635 and UM 1706, Order No. 15-049 at 14 (Feb. 20, 2015) (“In exercising this discretion, we use a flexible, fact-specific approach that acknowledges the wide range of circumstances underlying a deferral and the decisions made to authorize this extraordinary rate treatment.”); *In re Portland General Electric Company*, OPUC Docket No. UM 1234, Order No. 07-227 at 7 (June 8, 2007) (“We limited the deferral, however, to extraordinary outage costs only—*i.e.*, those costs deemed beyond the level of costs expected to be within the measure of normal risk.”); *In re Portland General Electric Company*, OPUC Docket No. UE 324, Order No. 17-482 (Nov. 28, 2017) (Referencing the “general ratemaking principle that a utility is responsible for operating within a fixed level of rates, and should only be allowed to recover amounts through deferred accounting in extraordinary circumstances.”).

²⁷ Joint Intervenor’s Opening Brief at 5-9.

V. CONCLUSION

For the foregoing reasons, the Joint Intervenors respectfully request that the Commission deny Joint Utilities' Motion for Reconsideration, Rehearing, Clarification, and Stay, and affirm the Order.

Dated this 8th day of January 2019.

Respectfully submitted,

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