

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1633

In the Matter of)	
)	
)	ANSWERING BRIEF OF THE
PUBLIC UTILITY COMMISSION OF)	INDUSTRIAL CUSTOMERS OF
OREGON)	NORTHWEST UTILITIES
)	
Investigation into Treatment of Pension Costs)	
<u>in Utility Rates.</u>)	

I. INTRODUCTION

Pursuant to Administrative Law Judge (“ALJ”) Grant’s April 9, 2013 Prehearing Conference Memorandum, the Industrial Customers of Northwest Utilities (“ICNU”) submits this answering brief supporting the proposal to divide this proceeding into two phases. ICNU supports bifurcation and addressing in Phase I the general question of how the Oregon Public Utility Commission (the “Commission” or “OPUC”) should treat pension costs in rates on a going-forward basis, and deferring to Phase II the issue of how the Commission should resolve requests by the utilities to recover pension costs incurred in the past.

The Commission routinely bifurcates policy proceedings, and bifurcation of the proceeding could promote administrative efficiencies and reduce the workload of both the Commission and the parties. Addressing questions of recovery of past costs will raise complex and data-intensive issues related to how pension costs have been considered in past rate cases, and require the Commission to resolve significant legal issues related to retroactive ratemaking. In addition, the Commission and the parties must thoroughly explore and understand the

different past approaches that the utilities have taken regarding pension cost recovery. The utilities' due process rights will not be deprived, as they will be presented the opportunity to fully address all issues in either Phase II of this proceeding or in their individual utility-specific filings. Therefore, ICNU recommends that the Commission adopt a general policy regarding the ratemaking treatment of future pension costs in Phase I, and resolve the different utility proposals and approaches related to past pension costs in a Phase II.

II. BACKGROUND

The Commission opened this proceeding in November 2012 to address issues related to the utilities' treatment of pension costs in rates. Pension cost recovery issues have been raised in: 1) Northwest Natural Gas Company's ("NW Natural") recent rate case; 2) Portland General Electric Company's ("PGE") and PacifiCorp's pension-related deferral cases; and 3) PGE's and PacifiCorp's current ongoing general rate cases. The Commission has been presented with at least three different proposals to change the ratemaking treatment of pension costs from NW Natural, PGE and PacifiCorp. Instead of adopting potentially inconsistent pension treatments, the Commission opened this proceeding "to review the treatment of pension expense on a general, non-utility-specific, basis." Re NW Natural, Docket No. UG 221, Order No. 12-408 at 4 (Oct. 26, 2012).

The Commission held a general workshop on March 11, 2013, and on April 8, 2013 a prehearing conference to adopt a schedule. At the prehearing conference, Chief ALJ Grant asked the parties to address whether the proceeding should be divided into two phases. In the first phase, the Commission would address how pension costs should be treated on a going-forward basis; and in the second phase it would resolve the specific individual requests by the utilities to

recover pension costs incurred in the past. Re OPUC Investigation into Treatment of Pension Costs in Utility Rates, Docket No. UM 1633, Prehearing Conference Memorandum (April 9, 2013). The parties were unable to agree upon a schedule, and the ALJ set the issue of bifurcation for legal briefing. On May 7, 2013, NW Natural, PacifiCorp, PGE, Avista, and Cascade Natural Gas Corporation (“Joint Utilities”) submitted a brief stating that they would make a new proposal to recover their past pension costs, arguing that bifurcation would not promote administrative efficiencies and would harm their due process rights. Idaho Power Company (“Idaho Power”) submitted a separate brief generally supporting the Joint Utilities, but requested that Idaho Power be excused from the remainder of the proceeding.

III. ARGUMENT

1. **The Joint Utilities’ Novel Proposals Inappropriately Seek to Recover Past Pension Costs**

The Joint Utilities argue that the focus of this proceeding is to review their not yet made proposal to modify the Commission’s current approach to funding pension costs with an approach that allows them to recover the costs to finance their “prepaid pension assets by adding the assets to rate base.” Joint Utilities’ Brief at 3. The Joint Utilities also assert that the current approach of using FAS 87 expense does not allow for full cost recovery. Id. at 3-4.

The Joint Utilities appear to be attempting to use creative nomenclature to claim that their new proposal will focus on recovering “on a prospective basis” costs associated with their past alleged pension under recovery. Essentially, the Joint Utilities claim that they previously failed to recover all their pension costs, and future ratepayers should make up for these past under collections by including some of these past costs in rates on a prospective basis. Specifically, it

appears that the Joint Utilities want to recover their financing costs associated with alleged past under recovery by putting those costs in rate base.

The focus of this proceeding should be on the proper ratemaking treatment for the recovery of pension expenses which may or may not result in changes to the current methodology. If the current methodology is retained, the parties and the Commission may not need to grapple with the more complex aspects of the utilities' proposal.

The Joint Utilities also misconstrue the facts when they claim that nearly half of the states allow for financing of prepaid pension assets in a manner similar to their proposal. The Joint Utilities cite to the Commission Staff's Pension Report, which contradicts their assertions. Joint Utilities' Brief at 3-4. First, the Staff Pension Report shows that the vast majority of state commissions continue to rely upon FAS 87 as the primary method to recover pension costs. Only about a third of the states appear to use some sort of recognition of prepaid pension assets (15 jurisdictions) or include pensions in working capital (3 jurisdictions). Finally, Staff's Pension Report was based on phone conversations and emails with regulatory staff in other jurisdictions, and it is unclear how relevant those state pension cost recovery policies are to Oregon. In sum, this is certainly not a legitimate basis upon which to implement a major change in the treatment of pension expense, which will be harmful to customers.

2. Bifurcation Should Promote Administrative Efficiencies

It only makes sense to treat the past and future expense separately. Each time period involves a different set of legal and factual issues. A full or detailed proposal has not yet been made by the utilities.

As suggested in the Joint Utilities' Brief, consideration of any proposals to recover past pension costs will require the Commission to address legal issues related to the rule against retroactive ratemaking and the filed rate doctrine. The Commission has repeatedly concluded that, absent specific legislative approval, it does not have the authority to engage in retroactive ratemaking, which is setting rates that "permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate-of-return with the rate actually established." Re US West Communications, Docket No. UT 135, Order No. 97-180 (1997) citing Attorney General Letter of Advice, March 18, 1987, (OP-6076). The proposals made to date by the utilities, as well as the Joint Utilities' new proposal, will likely violate these well-established legal principles.

Resolving the utilities' requests to recover past pension costs also could require an extensive and time-consuming factual analysis of each of the utility's past pension policies and rate treatment. First, the Commission may need to analyze what amounts have historically been included in rates and whether shareholders have fully funded the pension amounts. This is likely to be a data-intensive effort. Next, the Commission may need to review the causes of any alleged under recovery of pension costs, including the reasonableness or prudence of the utilities' prior pension related decisions. The Commission also may need to consider whether any alleged under recovery is an extraordinary event or will otherwise be resolved by the passage of time or more favorable economic conditions. The Commission would be better served by deferring these complex legal and factual issues, which could potentially resolve themselves depending on how the Commission addresses the more pressing issue of the proper ratemaking treatment of pension costs on a prospective basis.

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3. There Are No Due Process Concerns

The Joint Utilities allege that their due process rights will be harmed if they are prevented from arguing that their future rates should allow them to recover their past pension costs. Joint Utilities' Brief at 6-7. Bifurcation of the schedule to focus on how the Commission should address pension costs on a going-forward basis in Phase I will not deprive any party of their rights to address any and all pension-related issues. The proposed bifurcation will specifically allow the utilities to raise their proposals to recover past pension costs in a second Phase II of the proceeding. These timing of the consideration of these issues will not result in any due process violations.

4. Idaho Power Should Not Be Required to Participate in this Proceeding

ICNU does not oppose Idaho Power's request to be excused from the remainder of the proceeding, but Idaho Power's brief contains some erroneous assumptions that should be corrected. Idaho Power asserts that it has no pension liability, that the Joint Utilities' proposal will not impact it, and that Idaho Power is not seeking a change in the recovery of its pension costs. Idaho Power Brief at 2-3. Idaho Power asserts: "Now that the docket has been narrowed to seek a solution to a ratemaking issue that does not pertain to it, Idaho Power requests that it be excused from further participation in this docket." Id. at 3.

The issues in this proceeding are much broader than whether the Joint Utilities' proposal to recover a portion or all of their past pension costs through a prepaid asset will be adopted. The scope of this proceeding will focus on how the Commission should set rates and allow for recovery of pension costs, including whether all utilities should be required to use FAS 87 or another method of pension cost recovery. Idaho Power may not need to participate in any phase

or aspect of this proceeding, but it should not be excused on the presumption that the only potential ratemaking treatment that will be considered is the Joint Utilities' recommendations. The Commission's final pension cost recovery policy could be significantly different from the Joint Utilities' proposal, and could require all utilities (including Idaho Power) to comply with the new policy. Likewise, the Commission could decide to continue its current policy related to pension expense.

III. CONCLUSION

The Commission should bifurcate this proceeding, and postpone all issues related to whether the utilities should be allowed to recover past pension costs to Phase II. Phase I of the proceeding should address whether current ratemaking treatment provides the utilities with a reasonable opportunity to recover all of their prudently incurred pension costs, and not address creative efforts to require future ratepayers to pay for past pension costs, including the financing in rate base of any alleged pension under recovery.

Dated this 5th day of June, 2013.

Respectfully submitted,

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June 5, 2013

Via Electronic Mail and FedEx

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Re: In the Matter of PUBLIC UTILITY COMMISSION OF OREGON
Investigation into Treatment of Pension Costs in Utility Rates
Docket No. UM 1633

Dear Filing Center:

Enclosed for filing in the above-referenced docket, please find the original and five (5) copies of the Answering Brief of the Industrial Customers of Northwest Utilities.

Thank you for your assistance, and please don't hesitate to contact our office with any questions.

Sincerely,

/s/ Jesse Gorsuch
Jesse Gorsuch

Enclosures

cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing documents upon all parties on the service list by sending the same via electronic mail only, as all parties have waived paper service.

Dated at Portland, Oregon, this 5th day of June, 2013.

Sincerely,

/s/ Jesse Gorsuch

Jesse Gorsuch

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