

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

3 **UE 219**

4 In the Matter of PacifiCorp's Application to
5 Implement Provisions of Senate Bill 76.

**CUB'S RESPONSE IN OPPOSITION TO
ICNU'S APPLICATION
FOR RECONSIDERATION**

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7 Pursuant to OAR 860-001-0720(4), the Citizens' Utility Board of Oregon (CUB) files
8 its Response to the Application for Reconsideration filed by the Industrial Customers of
9 Northwest Utilities (ICNU) in regard to Commission Order No. 10-364¹ (Surcharge Order), as
10 amended by Order No. 10-390². There is nothing new contained in ICNU's Application for
11 Reconsideration – there are no new facts, and there has been no change in the law or policy.
12 CUB requests that the Commission reject ICNU's Application for Reconsideration.
13

14 **I. BACKGROUND**

15 PacifiCorp, in its Response in Opposition, succinctly states the history of this
16 docket. In the interests of judicial efficiency CUB cites the Commission to PacifiCorp's
17 rendition of events.

18 **II. DISCUSSION**

19 **A. The Legal Standard Of Review.**

20 Under ORS 756.561 and OAR 860-001-0720³, the Commission may grant an
21 application for reconsideration only if the applicant shows that there is (1) new evidence

22 ¹ *Re PacifiCorp's Application to Implement Provisions of Senate Bill 76*, Docket UE 219, Order No. 10-364 (Sept. 16, 2010).

23 ² *Re PacifiCorp's Application to Implement Provisions of Senate Bill 76*, Docket UE 219, Order No. 10-390 (Oct. 11, 2010).

24 ³ **860-001-0720 Rehearing or Reconsideration**

25 (1) Within 60 days from the date of service of an order entered by the Commission, a
26 party may file an application for rehearing or reconsideration of the order as provided by
ORS 756.561. The application must identify all grounds for rehearing or reconsideration.

(2) The application must specify:

(continued...)

1 essential to the decision that was unavailable and not reasonably discoverable before the order
2 was issued; (2) a change in law or policy since the order was issued relating to an essential
3 issue to the decision; (3) an error of law or fact in the order that is essential to the decision; or
4 (4) good cause for further examination of an issue essential to the decision.

5 ICNU's Application for Reconsideration is not based upon new evidence or a change in
6 law or policy. Instead, ICNU argues that reconsideration is necessary to correct errors of law
7 and fact, but ICNU fails to demonstrate that any such error of law or fact indeed occurred in
8 the Surcharge Order. ICNU then argues that the Commission should grant its request for
9 reconsideration "because the decision has significant consequences that create good cause for
10 reconsideration."⁴ ICNU then fails to establish that the Surcharge Order will in fact cause any
11 unanticipated consequences.

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- 15 (a) The portion of the challenged order that the applicant contends is erroneous or
incomplete;
- 16 (b) The portion of the record, laws, rules, or policy relied upon to support the application;
- 17 (c) The change in the order that the Commission is requested to make;
- 18 (d) How the applicant's requested change in the order will alter the outcome; and
- 19 (e) One or more of the grounds for rehearing or reconsideration in section (3) of this rule.
- 20 (3) The Commission may grant an application for rehearing or reconsideration if the
applicant shows that there is:
- 21 (a) New evidence that is essential to the decision and that was unavailable and not
reasonably discoverable before issuance of the order;
- 22 (b) A change in the law or policy since the date the order was issued relating to an issue
essential to the decision;
- 23 (c) An error of law or fact in the order that is essential to the decision; or
- 24 (d) Good cause for further examination of an issue essential to the decision.
- 25 (4) Within 15 days from the date the application is filed, any party may file a response to
the application. Replies to a response are not permitted unless requested by the ALJ.
- 26 (5) Unless ordered by the Commission under OAR 860-001-0700, compliance with the
original order is not stayed or postponed by an order granting an application for rehearing or
reconsideration.
- (6) The application is deemed denied if the Commission has not issued an order granting
the application by the 60th day after filing. If the application is granted, the Commission may
affirm, modify, or rescind its prior order or take other appropriate action.

⁴ Reconsideration Application at 3.

1 CUB generally supports PacifiCorp’s arguments in opposition to ICNU’s Application
2 for Reconsideration. CUB writes separately both to add to the arguments CUB finds most
3 compelling and to highlight additional bases for denial of ICNU’s Application.

4 CUB respectfully requests that the Commission deny ICNU’s Application for
5 Reconsideration.

6 **B. ICNU’s Arguments Are Flawed And Demonstrate No Error Of Law Or Fact.**

7 ICNU asks the Commission to reconsider its approval of the Klamath dam removal
8 surcharges to “correct errors of law and fact that were essential to the decision and because the
9 decision has significant consequences that create good cause for reconsideration.” ICNU
10 argues that the Commission “misinterpreted its authority under SB 76 and issued a decision
11 that inequitably distributes the burden of dam removal, over collects the surcharge amounts
12 through failure to account for load growth, and fails to ensure adequate refunds to customers if
13 the Klamath dams are not removed.”

14 *i. The Commission Has Broad Authority To Make Decisions.*

15 ICNU essentially asks the Commission to ignore all precedent, arguing that this matter
16 is unique and that Commission precedent should not apply because of the “environmental and
17 political forces” driving the matter.⁵ ICNU argues that because the “Commission operates
18 under a ‘flexible regulatory scheme,’ and ‘has great freedom to determine which of many
19 possible methods it will use’ to set rates in a manner that is fair, just and reasonable. . . .”⁶ that
20 the Commission decision “unnecessarily constrained its[own] authority” to do just that. ICNU
21 is arguing in circles. ICNU plainly states that the Commission has the legal authority to craft a
22 decision in this matter and then in the same paragraph criticizes the Commission for doing
23 exactly that, claiming that the Commission has “unfairly burden[ed] industrial customers”.⁷

24 ⁵ ICNU Application at page 4 second full paragraph.

25 ⁶ ICNU Application at page 4 second full paragraph and top of page five.

26 ⁷ ICNU Application at page 5 top of page.

1 ICNU has shown no basis for its argument of an error of law and, as will be demonstrated
2 below, no evidence that industrial customers are being “unfairly burden[ed]”.

3 *ii. The Burden Of Dam Removal Is Not Inequitably Distributed To Industrial*
4 *Customers.*

5 In arguing that the burden of dam removal is inequitably distributed to industrial
6 customers, ICNU makes a series of arguments that have no basis in fact. First, as pointed out
7 by PacifiCorp, ICNU argues that the Commission should have adopted “ICNU’s suggestion to
8 use the equal percentage rate spread that was adopted in the Stipulation in UE 217.”⁸ But the
9 Commission did not adopt an equal percentage rate spread in Docket UE 217. The rate spread
10 agreed to by the Docket UE 217 parties, including ICNU, and adopted by the Commission
11 does not spread the rate increase equally across customer classes.⁹

12 Second, ICNU argues that the industrial customers received more than their share of the
13 increase. This too is incorrect. CUB witness Bob Jenks testified as follows during the hearing
14 on Friday, July 23, 2010:

15 I primarily wanted to respond on the issue of rate spread.

16 The first thing is – I know under their handout the industrial customers say
17 the Company proposes to charge Schedule 48 customers a disproportionate
18 amount of the cost.

19 I would draw people’s attention to the handout that the Company just gave
20 on this section. On the very last page it says: Presentation Attachment 2.

21 From that sheet we can see that the residential class, Class 4, is being
22 charged a surcharge of .101 cents; and Schedule 48, the one that is supposed to be
23 paying a disproportionate amount, is being charged a surcharge of .079 cents. So
24 the surcharge for residential customers is approximately 25 percent higher than
25 the surcharge for the Schedule 48 customers.¹⁰

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⁸ ICNU Application at page 4 first full paragraph.

⁹ PacifiCorp’s Opening Brief at page 20.

¹⁰ Transcript of Proceedings: Workshop/Issues Presentation, Friday July 23, 2010 pages 96 lines 18 to 25 and page 97 lines 1 to 8. See also Order No. 10-364 at 20 “As CUB observed at the Commission workshop, residential customers actually pay a larger amount of the total surcharges. Moreover, the Company observes, the rates per kilowatt-hour for residential customers, \$0.0010 and \$0.00033, are higher than for Schedule 48 Large General Service customers, and \$0.00079 and \$0.00026.”

1 At no time has ICNU sought to refute CUB or the Company's testimony in this regard, with
2 actual "evidence".

3 ICNU must not be allowed to repackage and repeat its failed arguments and to hold
4 them up as "new evidence" meriting reconsideration of a Commission order. ICNU has
5 presented no evidence, let alone "new evidence", disputing the truth of CUB's and the
6 Company's testimony, and CUB respectfully requests that ICNU's Application for
7 Reconsideration be denied.
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9 *iii. There Was No Failure To Account For Load Growth.*

10 ICNU argues that the Commission failed to account for load growth and that this was
11 an error of law. But ICNU, in its Application for Reconsideration at page 5, Section C., begins
12 by stating that the "Commission acknowledges that PacifiCorp's load will not remain static
13 through its adoption of Staff's proposal that requires PacifiCorp to file annual surcharge
14 updates that reflect the 'most recent forecast of future loads . . .'". CUB fails to see how ICNU
15 can argue that the Commission did not account for load growth when the Commission
16 specifically put in place a mechanism to review "the most recent forecasts of future loads" on a
17 going-forward, non-static basis. Simply because the Commission did not adopt ICNU's
18 proposal does not mean that the Commission committed an error of law. As acknowledged by
19 ICNU in the earlier pages of its Application for Reconsideration, the Commission has broad
20 authority to craft a decision that will provide for fair, just and reasonable rates. The
21 Commission used that authority here.

22 ICNU's second argument also defies reason. Here ICNU argues that the Commission's
23 failure to adopt the ICNU method means that the "total annual collections" will not remain
24 "approximately the same during the collection period."¹¹ What ICNU fails to quote, however,

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26 ¹¹ ICNU Application for Reconsideration at page 5 Section C. paragraph 2.

1 is that ORS 757.736(7) also states that “*To the extent practicable*, the commission shall set the
2 surcharges so that the total annual collections of the surcharges remain approximately the same
3” (emphasis added). The Commission did what was practicable here. Contrary to what
4 ICNU argues, there was no “failure to approve the surcharge in accordance with the
5 implementing legislation”¹² and there was, therefore, no error of the law needing
6 reconsideration or correction.

7 *iv. The Refund Provisions Adopted By The Commission Were Within Its Discretion to*
8 *Adopt.*

9 ORS 757.738(4) does not mandate refunds to customers; it provides that, “[i]f any
10 amounts remain in a trust account established under this section after the trustee makes all
11 payments necessary for the costs of removing the Klamath River dams as described in ORS
12 757.736(11), the commission shall direct the trustee of the account to refund those amounts to
13 customers or to otherwise use the excess amounts for the benefit of customers.” Given this
14 broad mandate, the Commission’s decisions were clearly made within its discretion, whether or
15 not the parties agree with those decisions.
16

17 **III. CONCLUSION**

18 ICNU has failed to meet the standard necessary for the granting of an Application for
19 Reconsideration. If ICNU had “new evidence”, it failed to present it. ICNU also failed to
20 demonstrate any error of law, and there have been no relevant changes in law or policy. ICNU
21 also failed to demonstrate “good cause for further examination of an issue essential to the
22 decision”.
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26 ¹² ICNU Application for Reconsideration at page 6.

1 CUB respectfully requests that ICNU's Application for Reconsideration be denied.

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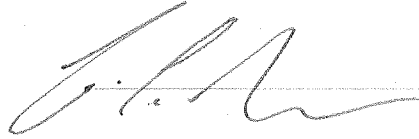
3 DATED: November 30, 2010.

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5 Respectfully submitted,

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UE 219 – CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of November, 2010, I served the foregoing **CUB'S RESPONSE IN OPPOSITION TO ICNU'S APPLICATION FOR RECONSIDERATION** in docket UE 219 upon each party listed in the UE 219 OPUC 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 an original and one copy by U.S. mail, postage prepaid, to the Commission's Salem offices.

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