

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**
3 **UM 1635 PHASE II & UM 1706**

4 In the Matters of

5 NORTHWEST NATURAL GAS
6 COMPANY, dba NW NATURAL,

7 Mechanism for Recovery of Environmental
8 Remediation Costs (UM 1635)

9 and

10 Request for Determination of the Prudence of
11 Environmental Remediation Costs for the
12 Calendar Year 2013 and First Quarter of 2014
13 (UM 1706).

ERRATA

14 Staff of the Public Utility Commission asks the Commission to correct the following in
15 the Response to Motion for Consideration and/or Clarification filed by Staff on April 15, 2015:

16 On page 11, line 9 – Replace “May 2, 2015” with “May 2, 2014”.

17 On page 12, line 12 – Replace “May 2 2015” with “May 2, 2014”.

18 On page 12, n 39 – Replace “Staff/200, Johnson-Bahr/20”, with “Staff/200,
19 Johnson/Bahr/5, lines 16-20, and 20, lines 3-8”.

20 On page 13, line 22 – Replace “May 20, 2015” with “May 2, 2014”.

21 A corrected electronic copy of the Staff Response to Motion for Consideration and/or
22 Clarification is included in this filing.

23 DATED this 17th day of April 2015.

24 Respectfully submitted,

25 ELLEN F. ROSENBLUM
26 Attorney General



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Of Attorneys for Staff of the Public Utility
Commission of Oregon

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RESPONSE TO APPLICATION FOR
RECONSIDERATION AND/OR
CLARIFICATION

I. Introduction and summary.

Northwest Natural Gas Company (“NW Natural”) seeks reconsideration or clarification of Order No. 15-049, the Commission’s most recent order regarding environmental remediation costs incurred by NW Natural. In Order No. 15-049 the Commission resolved issues related to how NW Natural should share with customers responsibility for past and future environmental remediation expense. Among other things, the Commission determined how NW Natural should offset its past (deferred) and future remediation expenses with the \$150.5 million in insurance proceeds that NW Natural testified it had received as of February 2013.¹

More specifically, the Commission ordered NW Natural to apply \$52.2 million of the \$150.5 million of insurance proceeds to “existing” deferrals, which the Commission defined as deferred remediation costs through December 31, 2012. This reduced the balance of “existing” deferred expenses to \$44.2 million.² The Commission also ordered NW Natural to place \$100.3 million of the insurance proceeds in a secure account to offset future remediation expenses.³

¹ *Id.* at 1.

² *Id.* at 2.

³ *Id.* at 11 (ordering NW Natural to apply \$100.3 million of insurance proceeds to future costs); and at 7 (directing NW Natural to hold the insurance proceeds for future environmental remediation costs in a secure account). NW Natural made a series of relatively small adjustments to the \$150.5 million of insurance proceeds that is not at issue in NW Natural’s

1 NW Natural alleges that there is “good cause” to reconsider Order No. 15-049 under
2 OAR 860-001-0720(3)(d) because in ordering NW Natural to place in a secure account \$100.3
3 million of the \$150.5 million of insurance proceeds reported by NW Natural, the “Commission
4 may have inadvertently failed to consider NW Natural’s income tax obligations resulting from
5 the insurance settlements.”⁴ NW Natural asserts that it has a tax obligation of 39.5 percent on
6 the approximately \$100.3 million allocated to future remediation expenses, and thus, has only
7 \$58.3 million of insurance proceeds to place in a secure account.⁵ NW Natural asks the
8 Commission to reconsider or clarify its order that NW Natural must place \$100.3 million in a
9 secure account by replacing \$100.3 million with \$58.3 million.⁶

10 Staff recommends that the Commission deny NW Natural’s Application for
11 Reconsideration and/or Clarification because NW Natural could have submitted information
12 regarding the tax obligation in the underlying proceeding, but did not, and accordingly cannot
13 establish there is good cause to reconsider the Commission’s allocation of all the insurance
14 proceeds.

15 NW Natural argued in the underlying proceeding that it would be inappropriate to require
16 NW Natural to amortize the previously-deferred expenses, and conduct an earnings test on NW
17 Natural’s earnings during the deferral period that might result in ratepayer/company sharing.
18 NW Natural explained that it had more than enough insurance proceeds to offset the end-of-2013
19 deferral balance of over \$100 million.⁷ Staff opposed NW Natural’s proposal to use the

20 application for reconsideration. NW Natural reports that it adjusted the approximately \$150.5
21 million to \$147.1 million to comply with the Commission’s determinations in Order No. 15-049
22 regarding receipt of future insurance proceeds and state allocations. NW Natural states it made
23 another downward adjustment of \$2.5 million to comply with Order No. 14-077 regarding
24 expenditures associated with the Gasco Upland Pumping Station. Staff is reviewing these
25 adjustments in its review of NWN Advice No. 15-03, the tariffs that NW Natural filed in
26 compliance with Order No. 15-049. For convenience, Staff’s response to NW Natural’s Request
27 for Reconsideration and/or Clarification will refer to the unadjusted balance of \$150.5 million in
28 insurance proceeds (and unadjusted allocations of \$52.2 and \$100.3 million) addressed by the
29 Commission in Order No. 14-059.

⁴ Application for Reconsideration and/or Clarification 1.

⁵ Application for Reconsideration and/or Clarification 3.

⁶ Application for Reconsideration and/or Clarification 6.

⁷ Northwest Natural Gas Company Prehearing Brief at 1, 18-19; NWN/800, Miller/7 .

1 insurance proceeds to offset all existing deferrals, instead recommending that the Commission
2 allocate approximately \$50 million of the proceeds to past deferrals and approximately \$100
3 million to future deferrals.⁸ Notwithstanding Staff's express recommendations regarding the
4 disposition of the entire \$150 million in insurance proceeds reportedly received by NW Natural,
5 the Company did not inform the Commission or parties of the tax obligation, or that the
6 Commission could not allocate 39.5 percent of the insurance proceeds for any purpose.

7 OAR 860-001-0720(3)(a) expressly allows reconsideration of an order to review new
8 information only if the information was not available or reasonably discoverable during the
9 underlying proceeding. This express limitation indicates the Commission did not intend to allow
10 reconsideration to consider new information if the information was known, or reasonably could
11 have been known, during the proceeding. NW Natural knew of its tax obligation during the
12 underlying proceeding. Accordingly, reconsideration is not authorized under OAR 860-001-
13 0720.

14 Further, NW Natural's specific reliance on the \$150 million in insurance proceeds and its
15 failure to timely inform the Commission of the tax obligation in the underlying proceeding,
16 precludes the Commission from finding now that there is good cause to reconsider Order No. 15-
17 049 to account for the effect of that tax obligation.

18 Second, even if NW Natural's failure to present information regarding its tax liability in
19 the underlying proceeding could be good cause to reconsider the Commission's order, NW
20 Natural has not "show[n]" that it in fact has this tax liability. The allegations in NW Natural's
21 application are not sufficient to "show" good cause under the Commission's rule.

22 Third, even if the Commission concludes that there is good cause to revisit Order No. 15-
23 049 to take into account NW Natural's alleged tax obligation, reconsideration or clarification of
24 the order is not appropriate. Instead, the Commission should order a rehearing to examine the
25 issues raised by NW Natural's Application for Reconsideration and/or Clarification to allow
26

⁸ Staff/200, Johnson-Bahr/4-5.

1 parties opportunity to conduct discovery and submit evidence regarding the alleged tax liability
2 and its impact on the appropriate treatment of the insurance proceeds.

3 **II. Criteria for reconsideration.**

4 The Commission's authority to reconsider an order within 60 days of its issuance is found
5 in ORS 756.561.⁹ That statute provides that after the Commission has issued an order, "any
6 party thereto may apply for rehearing or reconsideration thereof within 60 days from the date of
7 service of such order" and that the Commission "may grant such a rehearing or reconsideration if
8 sufficient reason therefor is made to appear."

9 In the context of ORS 756.561, "sufficient reason" is a delegative term.¹⁰ The
10 Commission has exercised its rulemaking authority to define the circumstances constituting
11 sufficient reason to grant rehearing or reconsideration. Those circumstances are described in
12 OAR 860-001-0720(3), which provides the Commission may grant an application for rehearing
13 if the applicant "shows" that there is:

- 14 (a) New evidence that is essential to the decision and that was unavailable and not
15 reasonably discoverable before issuance of the order;
- 16 (b) A change in the law or policy since the date the order was issued relating to an issue
17 essential to decision;
- 18 (c) An error of law or fact in the order that is essential to the decision; or
- 19 (d) Good cause for further examination of an issue essential to the decision.

20 By adopting this rule, the Commission has delineated the circumstances in which it has
21 discretion to grant a request for reconsideration. Under OAR 860-001-0720, an applicant must
22 "show" one or more of the four alternate preconditions before the Commission can exercise its
23 discretion to grant reconsideration. While the question of whether to grant a request for

24 ⁹ After 60 days, if no request for rehearing or reconsideration under ORS 756.561 has been filed,
25 an order either becomes final or is no longer subject to the Commission's jurisdiction because a
26 party has petitioned the Court of Appeals to review. In either case, the Commission is no longer
authorized grant reconsideration or rehearing under ORS 756.561.

¹⁰ See e.g., *McPherson v. Employment Division*, 285 Or 541, 550, 591 P.2d 1381 (1979)
("[s]tandards such as 'fair' or 'unfair,' 'undue' or 'unreasonable,' or 'public convenience and
necessity,' * * * call[] for completing a value judgment that the legislature has only
indicated[.]").

1 reconsideration is discretionary, the predicate question of whether one of the four preconditions
2 has been established is not.

3 NW Natural relies on the “good cause” precondition in OAR 860-001-0720(3)(d). The
4 Oregon Supreme Court has clarified that the determination of “good cause” is not a subjective
5 determination but a question of law: “Good cause” is a [l]egally sufficient ground or reason’ that
6 ‘depends upon [the] circumstances of [the] individual case.’”¹¹ The Oregon Supreme Court has
7 explained:

8

9 We acknowledge the temptation to treat indefinite terms like ‘good cause,’
10 [or] ‘sufficient reason,’ * * * as calling for a subjective determination and,
11 thus, as invoking personal judgment. However, it is clear that, when such
12 terms appear in a statutory context, they are focused on real, albeit
sometimes difficult to discern, legal standards: the *legislature's* view of
what is ‘good’ [or] ‘sufficient[.]’ * * * In no case would judicial *discretion*
play any role in the ‘good cause’ determination[.] * * *¹²

13 The Commission has not expressly defined the circumstances that may constitute good
14 cause to grant reconsideration. To determine what the Commission intended when it adopted the
15 good cause precondition in OAR 860-001-0720(3)(d), it is appropriate to examine the context of
16 that subsection, which includes the other preconditions defined by the Commission in OAR 860-
17 001-0720(3).¹³ These other preconditions are instructive on the circumstances the Commission
18 did *not* intend to be “good cause” for reconsideration.

19 In OAR 860-001-0720(3)(a), the Commission specified that reconsideration may be
20 granted to consider new information essential to the decision if the new information was not

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22 ¹¹ *State v. Johnson*, 339 Or 69, 85-87, 116 P.3d 869 (2005)(examining whether the prosecution
23 established “good cause” to deny the defendant’s motion to dismiss the state’s case
notwithstanding state’s violation of the defendant’s right to a speedy trial). *See also, Lombardo*
24 *v. Warner*, 340 Or 264, 132 P.3d 22 (2006)(explaining the meaning of “for good cause shown”
as used in statute allowing variance from restrictions on temporary signs).

25 ¹² *State v. Johnson*, *supra*, at 86 (emphasis in original).

26 ¹³ *See State v. Gaines*, 346 Or 160, 206 P.3d 1042 (2009)(noting that interpretation of a statute
begins with an examination of the text and context of a statute); and *Alanis v. Barrett Business*
Services, 179 Or App 79, 82, 394 P.3d 880 (2000)(holding that in construing an administrative
rule, the appellate court will apply the same analytical framework applicable to the interpretation
of statutes).

1 available and could not reasonably discoverable during the proceeding. In OAR 860-001-
2 0720(3)(b), the Commission specified that reconsideration may be granted to consider a change
3 in law or policy occurring after the Commission issued the order. Extrapolating from these
4 provisions, an applicant cannot establish good cause to reconsider an order when the applicant
5 wants the Commission to consider information or the impact of laws that that were known or
6 reasonably could have been known to the applicant during the proceeding. Otherwise, the good
7 cause precondition in subsection (d) would contravene the express limitations in the first two
8 preconditions.

9 The Oregon Supreme Court's opinion in *Far West Landscaping v. Modern*
10 *Merchandising*, supports the conclusion that the good cause precondition for reconsideration
11 should not contravene the other three preconditions.¹⁴ In *Far West Landscaping*, an attorney
12 failed to timely file a notice of appeal because he relied on the trial court's erroneous statements
13 regarding the date the judgment was entered.¹⁵ In response to the attorney's motion, the trial
14 court set aside the judgment and entered a new but identical judgment so that the attorney would
15 have additional time to appeal.¹⁶ The Oregon Supreme Court reversed the trial court's actions on
16 appeal. The court concluded that the trial court's broad discretion to exercise its inherent
17 authority to modify judgments could not be exercised for "the sole purpose of extending the time
18 for appeal" because doing so would directly contradict the statutorily prescribed time in which an
19 appeal must be taken.¹⁷

20 Furthermore, previous Commission orders addressing requests for reconsideration
21 support the conclusion that good cause to reconsider an order is not established if the applicant
22 could have had the Commission address the alleged flaws in the order prior to its issuance. For
23 example, in 2004 the Commission denied Portland General Electric Company's (PGE's) request
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25 _____
¹⁴ 287 Or 653, 657-58, 601 P.2d 1237 (1979).

26 ¹⁵ *Id.* at 655.

¹⁶ *Id.*

¹⁷ *Id.* at 659.

1 to reconsider a Commission order denying PGE's application to defer certain costs.¹⁸ PGE
2 alleged that procedural flaws in the underlying proceeding, including insufficient notice of issues
3 to be considered by the Commission and a lack of a hearing, were good cause to reconsider the
4 order.¹⁹ The Commission disagreed, noting that PGE participated in establishing the process used
5 to consider PGE's application and knew of its right to ask for a hearing, but did not do so, and
6 also, was not surprised by the Commission's consideration of certain issues.²⁰

7 **III. Analysis.**

8 **A. There is not good cause to reconsider or clarify Order No. 15-049.**

9 NW Natural alleges that there is "good cause" to reconsider Order No. 15-049 under
10 OAR 860-001-0720(3)(d), because in ordering NW Natural to place in a secure account two-
11 thirds of the approximately \$150.5 million of insurance proceeds reported by NW Natural, the
12 "Commission may have inadvertently failed to consider NW Natural's income tax obligations
13 resulting from the insurance settlements."²¹ The Commission's failure to consider NW
14 Natural's income tax obligations resulting from the insurance settlement was not inadvertent,
15 but inevitable in light of the evidence presented and relied on by NW Natural.

16
17 **1. NW Natural relied on its receipt of \$150.5 million in insurance**
18 **proceeds to argue it could offset all of the previously-deferred**
19 **expenses and thus, there was no the need to amortize any deferred**
20 **expenses and consequently, no need for an earnings review.**

21 On February 6, 2014, NW Natural Treasurer and Vice President Regulation Alex Miller
22 wrote to the Commissioners and Administrative Law Judge Pines to report that NWN had
23 received more than enough insurance proceeds to "cover" deferred environmental remediation
24 expenses, "to the extent they will not have to borne by customers."²² NW Natural supported

25 ¹⁸ *In re Portland General Electric Company*, Order No. 04-357.

26 ¹⁹ *Id.* at 9-10.

²⁰ *Id. Cf. Chiquita Min. Co. v. C.I.R.*, 148 F.2d 306 (9th Cir. 1945) (holding petitioner is not
entitled to a rehearing to remedy the mistakes of counsel since the taxpayer has had his day in
court petitioner and new evidence that should have been submitted by the petitioner, was
available, and should have been presented in the original hearing).

²¹ Application for Reconsideration and/or Clarification 1.

²² See February 12, 2014, Notice of ExParte Communication, Attachment.

1 these assertions in its direct testimony filed on March 20, 2014. On page 8 of his direct
2 testimony, the NW Natural witness testified that “[o]n February 3, 2014, the Company settled the
3 last remaining insurance claims and as a result, will receive a total of \$150.5 million in insurance
4 proceeds. This means that the Company will receive more insurance money than the amounts
5 that have been deferred and that customers do not need to pay for the past deferred amounts.”²³

6 At page 12 of his direct testimony, the NW Natural witness testified that the “balance of
7 actual environmental expenditures since 2003, with interest, totaled \$113 million at the end of
8 2013.”²⁴ At page 3, the NW Natural witness testified the “Company’s deferrals to date, before
9 application of insurance, exceed \$100 million.”²⁵ Later in the direct testimony, the witness stated
10 “the Company now has sufficient insurance recoveries to offset all deferrals to date.”²⁶

11 In rebuttal testimony filed on May 29, 2014, the NW Natural witness testified that the
12 insurance proceeds would offset NW Natural’s deferred environmental remediation expenses
13 and “some years” of future expense.²⁷

14 In its prehearing brief, NW Natural relied on its testimony regarding the insurance
15 proceeds to argue the Commission did not need to apply an earnings test to determine how
16 much of the previously-deferred costs should be amortized because there was no need to
17 amortize *any* of the costs that had been deferred. NW Natural argued,

18
19 [t]hrough its settlement of insurance claims, NW Natural has now received more
20 money in insurance recoveries than it has incurred in environmental expense and
21 thus has no net expense today and does not expect to have a net expense for some
22 number of years. This means that the Company is not requesting amortization of
23 the historical deferrals. Therefore, it is improper to apply the earnings test today
because under ORS 20 757.259(5) the earnings test is applied "at the time of
application to amortize the deferral." Moreover, offsetting the historical deferrals
with the insurance is consistent with Commission orders, and represents the most
sensible and fair ratemaking approach.²⁸

24 _____
²³ NWN/800, Miller/7.

25 ²⁴ NWN/800, Miller/12.

26 ²⁵ NWN/800, Miller/3.

27 ²⁶ NWN/800, Miller/3, 23.

28 ²⁷ NWN/900, Miller/2.

²⁸ Northwest Natural Gas Company Prehearing Brief at 18-19.

1 To the extent there is any ambiguity about the amount of insurance proceeds NW Natural
2 represented that it could use to offset environmental remediation costs, NW Natural's prehearing
3 brief also includes the following summary of its proposal regarding recovery of environmental
4 remediation costs:

5 NW Natural will apply the roughly *\$150 million of insurance proceeds* to the
6 *deferral balance of roughly \$100 million*, thus eliminating the need to charge
7 customers for the remediation expenses. The Company will continue to offset
8 future expenses *with the remaining roughly \$50 million of insurance proceeds*
until the deferral account has a positive balance, at which time the balance will be
recovered through the SRRM adopted by the Commission.²⁹

9 The Commission did not adopt NW Natural's proposal to offset all the previously-
10 deferred environmental remediation costs. Instead, the Commission adopted Staff's
11 recommendation to apply \$50.2 million of the insurance proceeds to offset a portion of the
12 amounts deferred between 2003 and December 31, 2012, leaving a deferred account balance of
13 \$42.2 million. The Commission then applied an earnings test to NW Natural's earnings during
14 the deferral period, which resulted in a downward adjustment in the amount NW Natural was
15 allowed to amortize.³⁰

16 The Commission's application of \$50.2 million of the insurance proceeds to previous deferrals
17 left \$100.3 in insurance proceeds to offset future costs. As already noted, the Commission
18 ordered NW Natural to place this amount in a secure account to apply to future remediation
19 costs.

20 **2. The Commission cannot grant reconsideration to consider**
21 **information that could have been presented during the**
underlying proceeding.

22 NW Natural asks the Commission to modify its disposition of the \$100.3 million of
23 insurance proceeds to take into account NW Natural's 39.5 percent tax obligation. NW Natural
24 could have informed the Commission in the underlying proceeding of the alleged tax obligation
25 of approximately \$59 million associated with the \$150.5 million that leaves NW Natural with an

26 ²⁹ Northwest Natural Gas Company Prehearing Brief at 1 (emphasis added).

³⁰ Order No. 15-049 at 17-18.

1 after-tax amount of approximately \$91 million in insurance proceeds, but did not.

2 The text and context of OAR 860-001-0720(3) reflect the Commission intended that there
3 would be good cause to reconsider an order to examine “new” information *only* if the applicant
4 could not reasonably have presented the information during the underlying proceeding. OAR
5 860-001-0720(3)(a) expressly limits the circumstances in which consideration of new
6 information can warrant reconsideration to those in which new information that was unavailable
7 and not reasonably discoverable before issuance of the order. OAR 860-001-0720(3)(b) limits
8 reconsideration to consider changes in law or policy only if those changes occurred after the
9 order was issued. While the Commission has broad authority to define good cause for purposes
10 of OAR 860-001-0720(3), that authority does not necessarily include the ability to create a catch-
11 all precondition that negates the express limitations in the other preconditions.³¹

12 If the Commission found good cause to reconsider Order No. 15-049 to examine
13 information regarding a tax obligation that NW Natural could have been presented during the
14 underlying proceeding, or to examine the application of tax laws and policies in effect during the
15 underlying proceeding, the good cause precondition would negate the express limitations of the
16 precondition in OAR 860-001-0720(3)(a) and(b). Therefore, as a matter of law, the Commission
17 cannot conclude there is good cause to reconsider Order No. 15-049 to take into account
18 information regarding a tax obligation or tax laws that NW Natural could have been presented
19 during the underlying proceeding, but did not.

20
21 **3. Even if the Commission could grant reconsideration to examine**
22 **information that could have been presented in the underlying**
proceeding, but was not, the Commission should not do so here.

23 As already discussed, NW Natural expressly relied on its assertion that it had \$150.5
24 million in insurance proceeds to apply to environmental remediation costs to support its
25 argument that no amortization (and no earnings test and consequential sharing) of previously-
26

³¹ See e.g., *Far West Landscaping v. Modern Merchandising, supra* at 659.

1 existing deferrals was needed.³² NW Natural did not waiver from this assertion even after Staff
2 recommended that the Commission allocate approximately \$50 million of the proceeds to past
3 deferrals and approximately \$100 million to future expenses. In its rebuttal testimony filed on
4 May 2, 2014, Staff testified:

5 Staff proposes to allocate approximately \$50.167 million to historic costs, which
6 leaves approximately \$100 million for expected future environmental remediation
7 costs. Staff recommends that the approximate \$100 million (as well as
8 accumulated interest) be allocated evenly over the next 20 years. This would be
approximately \$5 million of insurance proceeds, plus interest on the balance,
allocated each year for the next 20 years.³³

9 Notwithstanding the risk that the Commission would adopt Staff's recommendation, NW
10 Natural did not contradict Staff's assumption that there was approximately \$150 million in
11 insurance proceeds to allocate to past and future environmental remediation expenses. Given
12 that this is precisely what Staff proposed in testimony, NW Natural cannot now complain that it
13 was unaware that the Commission would allocate \$100 million to future remediation expenses.

14 If NW Natural had informed the Commission during the underlying proceeding that the
15 after-tax insurance proceeds were approximately \$91 million,³⁴ NW Natural presumably could
16 have prevented the Commission from allocating the entire pre-tax amount to remediation costs.
17 However, informing the Commission of the \$59 million tax obligation³⁵ would have undermined
18 NW Natural's ability to argue that an earnings test on its earnings during the deferral period was
19 not needed because it was not necessary to amortize any of the previously-deferred amounts.³⁶

20

21 ³² See e.g., NWN/800, Miller/1, 18-20.

22 ³³ Staff/200, Johnson-Bahr/20.

23 ³⁴ (\$150.5 million - (\$150.5 million x 39.5%) = \$90.6 million.)

24 ³⁵ (\$150.5 million x 39.5% = \$59.4 million.)

25 ³⁶ See e.g., NW Natural Gas Company's Closing Brief at 3:

26 The insurance proceeds recovered by NW Natural now exceed the historical
deferrals, resulting in a net *credit* to customers. As a result, the Company is no
longer seeking amortization of the historical deferrals. Because the Commission
is directed by ORS 757.259(5) to conduct earnings reviews "*at the time of
application to amortize the deferral,*" there is therefore no need for the
Commission to conduct an earnings review for the period over which the deferrals
accumulated.

1 NW Natural's statements on the existing deferred account balance are somewhat varied,
2 but all report a balance of at least \$100 million.³⁷ If NW Natural had told the Commission it had
3 only \$91 million in insurance proceeds to apply to deferred costs, NW Natural presumably could
4 not have argued that the Commission did not need to, and shouldn't, amortize any of the
5 previously-deferred costs.

6 Further, any assertion that the Commission simply intended to allocate 1/3 of the
7 proceeds to existing deferrals and 2/3's to future remediation costs, without regard to the actual
8 amounts allocated, is not supportable. Contrarily, the record reflects the Commission's
9 allocation of \$100 million to future remediation costs was intended to provide NW Natural with
10 annual revenue that exceeds a reasonable estimate of future annual remediation costs.

11 In its testimony filed on May 2, 2014, Staff recommended that the Commission allocate
12 an annual amount of \$5 million from the insurance proceeds and the associated interest, to future
13 environmental remediation costs for a period of twenty years.³⁸ Staff also recommended that the
14 Commission impose a tariff rider to collect \$3 million to \$5 million annually for environmental
15 remediation expenses.³⁹ Staff noted that when the insurance proceeds and revenue from a \$3
16 million tariff rider are added together, NW Natural would have an annual amount of \$8 million
17 dollars, plus interest accrued on the insurance proceeds, to offset environmental remediation
18 costs.⁴⁰

19 Staff noted that NW Natural's remediation costs incurred in recent years ranged from
20 \$8.2 million in 2008 to \$19.4 million in 2012. Staff explained that it made a conservative
21 recommendation for a \$3 million dollar tariff rider to reduce the likelihood that the Commission
22 would recover more revenue than needed.⁴¹

23

24 _____
25 ³⁷ See also Order No. 15-049 at 2 ("the company has incurred remediation costs of over \$100
26 million to date.").

27 ³⁸ Order No. 15-049 at 11.

28 ³⁹ Staff/200, Johnson-Bahr/5, lines 16-20, and 20, lines 3-8".

29 ⁴⁰ Staff/200, Johnson/Bahr/22.

30 ⁴¹ Staff/200, Johnson/Bahr/22.

1 The Commission adopted Staff's proposal, but imposed a tariff rider of \$5 million.⁴² The
2 Commission concluded that the insurance proceeds, accrued interest on the proceeds, and tariff
3 rider revenue would provide NW Natural with at least \$10 million and as much as \$12 million
4 each year to apply to environmental remediation costs.⁴³ The Commission noted that this
5 amount would have covered NW Natural's environmental remediation costs in seven of the last
6 ten years, which indicated that the annual amounts allocated to future environmental remediation
7 costs should generally be sufficient to cover them.⁴⁴

8 Staff's testimony and the Commission's order reflect that both the percentage and the
9 amounts of the Commission's allocation of insurance proceeds were significant to the
10 Commission. Significantly, NW Natural cannot assert that it was unaware the Commission might
11 allocate a specific amount, rather than a percentage, of insurance proceeds to future
12 environmental remediation or that the Commission might require NW Natural to place a specific
13 amount of insurance proceeds in a secure account to accrue interest, or because this is precisely
14 what Staff recommended.⁴⁵ Staff's testimony makes clear that the actual dollar amount of the
15 allocation of insurance proceed, and the placement in a secure account, are significant because of
16 the direct impact on total revenue NW Natural could expect each year.

17 In sum, NW Natural had notice since at least the time Staff filed its May 2, 2014
18 testimony, that the Commission might adopt Staff's recommendation to have NW Natural use
19 \$50 million of the insurance proceeds to offset existing deferred expenses and place \$100 million
20 of the proceeds in a secure account to offset future environmental remediation expense.
21 Notwithstanding, NW Natural did not inform the Commission of the \$59 million tax obligation,
22 or otherwise suggest to the Commission that it should not adopt Staff's recommendation to place
23 \$100 million in a secure account because NW Natural had only \$91 million in insurance
24 proceeds after taxes. Instead, NW Natural continued to rely on its assertion that it had \$150.5

25 ⁴² Order No. 15-049 at 11.

26 ⁴³ Order No. 15-049 at 13.

⁴⁴ Order No. 15-049 at 12.

⁴⁵ Staff/200, Johnson/Bahr/5, 20, 23-24.

1 million in insurance proceeds available to offset deferred costs to argue that the Commission
2 should not amortize the environmental deferred account balance of over \$100 million, and
3 therefore not conduct an earnings test to determine whether NW Natural should absorb some of
4 these deferred expenses.⁴⁶ The Commission should not find that these circumstances are good
5 cause to reconsider its allocation of the full amount of insurance proceeds reported by NW
6 Natural.

7
8 **B. The allegations in the Request for Reconsideration and/or Clarification are
not sufficient to “show” good cause.**

9 OAR 860-001-0720(3) requires that the applicant “show” one of the preconditions for
10 reconsideration before reconsideration can be granted. In *Lombardo v. Warner*, the Oregon
11 Supreme Court held that to the extent there is a requirement of “good cause *shown*,” the “shown”
12 indicates that the determination of good cause is based on what the applicant demonstrates.”⁴⁷
13 And, more specifically, the use of the word “shown” indicates that any determination of good
14 cause must be based on what is in the record.⁴⁸

15 Here, NW Natural has only alleged that it has a tax liability of 39.5 percent.⁴⁹ NW
16 Natural has not submitted an affidavit or other reliable evidence to establish the tax obligation.
17 In contrast, NW Natural’s witness testified that NW Natural had \$150.5 million in tax proceeds
18 to offset deferred costs. This record does not “establish” that NW Natural has a tax obligation.
19 Therefore, the Commission cannot conclude that NW Natural has shown good cause to
20 reconsider Order No. 15-049.

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24 ⁴⁶ NWN/900, Miller/3, Northwest Natural Gas Company Pre-hearing Brief 1-2; Northwest
Natural Gas Company Closing Brief 3.

25 ⁴⁷ *Lombardo v. Warner, supra*, 340 Or at 271 (“The word ‘shown’ [in good cause shown]
26 indicates that the department must make its determination of good cause on the basis of what the
applicant demonstrates.”).

⁴⁸ *Id.*

⁴⁹ See NW Natural Application for Reconsideration and/or Clarification 3.

1 **C. If the Commission concludes that NW Natural has shown good cause to re-**
2 **examine Order No. 14-059, the Commission should order a re-hearing and**
3 **not grant reconsideration or clarification.**

4 Assuming *arguendo* that the Commission concludes NW Natural has shown good cause
5 under OAR 860-001-0720(3), the Commission should not grant NW Natural's request to
6 reconsider the amount of insurance proceeds that NW Natural is required to put in the secure to
7 take into account information that was not presented in the underlying proceeding.⁵⁰ Instead,
8 Staff recommends that if the Commission concludes there is good cause to re-examine the
9 allocation of the insurance proceeds, the Commission order a rehearing to allow additional
10 evidence on the rate treatment of NW Natural's insurance proceeds.

11 The *Attorney General's Administrative Law Manual* states that "reconsideration" occurs
12 when, based on the existing record in the case, an agency reexamines the factual or legal basis
13 for its order or reexamines the adequacy of its findings of fact, conclusions of law or its order.⁵¹
14 The *Manual* states that "rehearing" occurs when an agency either holds an entirely new hearing
15 and re-decides the case based solely on the new hearing record, or the agency holds a
16 supplementary hearing and re-decides the case based on the original record and the record
17 developed at the supplementary hearing.⁵²

18 Here, NW Natural is asking the Commission to modify Order No. 15-049 to take into
19 account information that was not submitted during the underlying proceeding. Accordingly, a
20 rehearing would be the appropriate remedy, not reconsideration.

21 In any event, a rehearing would be necessary because parties should have opportunity to
22 conduct discovery on NW Natural's allegations regarding the tax liability. Staff would like to
23 investigate if NW Natural paid the tax liability, when it did so or will do so, and whether NW
24 Natural's actions with respect to the liability were prudent. Also, Staff would like opportunity to
25 present evidence on modifications to the SRRM that may be warranted due the significant

26 ⁵⁰ NW Application for Reconsideration and/or Clarification 6.

⁵¹ *Oregon Attorney General's Administrative Law Manual* 173.

⁵² *Id.*

1 decrease in insurance proceeds and interest that will be earned in the secure account. Most
2 notably, the risk that environmental remediation costs will exceed the amounts available to offset
3 them in future years will increase with the decrease in interest accruing on the amount in the
4 secure account.

5 **IV. NW Natural's Application for Reconsideration and/or Clarification does not relieve**
6 **NW Natural of its obligation to place \$100.3 million in a secure account.**

7 ORS 756.561(2) provides that an application for reconsideration or rehearing does not
8 "excuse any party against whom an order has been made by the commission from complying
9 therewith, nor operate in any manner to stay or postpone the enforcement thereof without the
10 special order of the commission." Order No. 15-049 directed NW Natural to submit a
11 compliance filing in this docket demonstrating how it will implement both the historic and future
12 decisions reached in this order.⁵³ Among other things, the compliance filing should show the
13 steps NW Natural has taken, or will take, to comply with the Commission's order to place
14 \$100.3 million in a secure account.

15 NW Natural's March 31, 2015 compliance filing does not reflect that NW Natural has, or
16 plans to, place the full amount ordered by the Commission in a secure account.⁵⁴ As noted
17 above, NW Natural must do so unless it receives an order from the Commission telling NW
18 Natural it need not comply with the order. Although the series of small adjustments NW Natural
19 made to the \$100.3 amount ordered by the Commission may be compliant with the
20 Commission's orders, adjusting the \$100.3 million to an "aftertax" amount is not.

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⁵³ Order No. 15-049 at 20.

24 ⁵⁴ NWN Advice No. 15-03 at 5. In its Application for Reconsideration and/or Clarification, NW
25 Natural explained that it made a series of relatively small adjustments to the \$150.5 million of
26 insurance proceeds to comply with other provisions in Order No. 15-049 and Order No. 14-077.
Staff is reviewing these adjustments to determine whether they comply with the orders in its
review of NWN Natural's compliance tariffs. These adjustments are not at issue in NW
Natural's application for reconsideration.

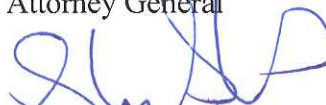
1 **V. Conclusion.**

2 The Commission should deny NW Natural's Request for Reconsideration and/or
3 Clarification.

4 DATED this 17th day of April 2015.

5 Respectfully submitted,

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7 Attorney General

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