

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1635 Phase II & UM 1706

In the Matter of)
)
)
NORTHWEST NATURAL GAS)
COMPANY, dba NW NATURAL)
)
Mechanism for Recovery of Environmental)
Remediation Costs (UM 1635 – Phase II))
)
and)
)
Request for Determination of the Prudence)
of Environmental Remediation Costs for the)
Calendar Year 2013 and the First Quarter of)
2014 (UM 1706))
_____)

**RESPONSE BRIEF OF THE
CITIZENS' UTILITY BOARD OF OREGON**

November 30, 2015



**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1635 Phase II & UM 1706

In the Matter of)	
)	
NORTHWEST NATURAL GAS)	
COMPANY, dba NW NATURAL)	
)	
Mechanism for Recovery of Environmental)	RESPONSE BRIEF OF THE
Remediation Costs (UM 1635 – Phase II))	CITIZENS’ UTILITY BOARD
)	OF OREGON
and)	
)	
Request for Determination of the Prudence)	
of Environmental Remediation Costs for the)	
Calendar Year 2013 and the First Quarter of)	
2014 (UM 1706))	
_____)	

1 Pursuant to Administrative Law Judge Patrick Power’s October 13, 2015
2 Prehearing Conference Memorandum, the Citizens’ Utility Board of Oregon (“CUB”)
3 hereby submits its Response Brief in docket UM 1635.

4 **I. Introduction**

5 Docket UM 1635 stems from Northwest Natural Gas Company’s (“NW Natural”
6 or “Company”) last general rate case, docket UG 221. In UG 221, the Company
7 proposed a Site Remediation Recovery Mechanism (“SRRM”), through which the
8 Company would put into an account for amortization one-fifth of its prudent deferred
9 expenses, net of any offsets, with any over or under collection being used to adjust the

1 amount amortized into rates in the next amortization period.¹ The Commission
2 ultimately approved some aspects of NW Natural’s request, modified others, and directed
3 the parties to address the prudence of the deferred environmental costs and to develop an
4 appropriate earnings test in a new docket—UM 1635.² Docket UM 1635 addressed and
5 resolved the implementation of the SRRM, culminating in Order 15-049 (“Order”). The
6 Commission directed NW Natural to make a compliance filing consistent with the Order.

7 In its initial compliance filing,³ the Company made a number of assumptions and
8 changes with regard to the Commission Order No. 15-049. After discussion among
9 Commission Staff, the Northwest Industrial Gas Users (“NWIGU”), the Company and
10 CUB, NW Natural filed with the Commission its Revised Compliance Filing on
11 September 21, 2015, seven months after the Commission’s final order in this docket.⁴
12 Because this is not a typical compliance filing that clearly implements a Commission
13 order, the Company is seeking a Commission order approving the compliance filing.
14 CUB supports NW Natural’s Revised Compliance Filing with the exception of three
15 issues, but has strong concerns about the Company’s actions with regard to the
16 compliance filing process as discussed more fully below.

¹ *In re Northwest Natural Gas Co.*, OPUC Docket Nos. UM 1635 (Ph. II) & UM 1706, Order No. 15-049 at 3-4 (Feb. 20, 2015).

² *Id.* at 4 (internal citations omitted):

We addressed the request in Order No. 12-437. Regarding amortization, we approved certain elements of NW Natural's requested SRRM, ordering that each year one-fifth of the company's deferred expenses (offset by any proceeds received) be put into an account for amortization during the November 1 through October 31 period, after an opportunity for a prudence review. We declined to adopt a sharing mechanism, but determined that an earnings test would be applied prior to any deferred amounts being placed in rates. We also determined what interest rates should be applied to the deferred amounts. Finally, we opened this docket, UM 1635, to address the prudence of the deferred environmental costs, and directed the parties to develop an appropriate earnings test to be used prior to the placement of any deferred costs into rates, as required by ORS 757.259(5).

³ Filed March 31, 2015.

⁴ NWN OPUC Advice No. 15-03A / ADV 18 Replacement Filing, filed September 21, 2015 (“Revised Compliance Filing”).

1 First, the Company’s state allocation of environmental costs is expressly contrary
2 to the Commission’s Order. Second, the Company’s proposal for the interstate allocation
3 of insurance proceeds is contrary to Order 15-049. Third, the Company inappropriately
4 applies the Commission’s earnings test for past environmental remediation costs (2003-
5 2012). Fourth, the Company’s proposal for a base rate adjustment for 2013 and 2014
6 violates the rule against retroactive ratemaking. For these reasons, CUB urges the
7 Commission to order NW Natural to file compliance tariff sheets that appropriately
8 address interstate allocation and the interest on disallowed amounts and remove the
9 retroactive base rider adjustment.

10 **II. Argument**

11 **A. The Company’s state allocation of environmental costs is expressly contrary to** 12 **Commission Order 15-049.**

13 In Order 15-049, the Commission adopted the parties’ initially agreed-upon
14 interstate allocation as a way to allocate costs between Oregon and Washington.⁵ The
15 “initially agreed-upon interstate allocation” is memorialized in the Prudence and Earnings
16 Test Stipulation, filed with the Commission on July 11, 2013, which states: “[t]he parties
17 agree that 96.68% of the deferred costs amortized through the SRRM will be allocated to
18 Oregon customers.”⁶

19 NW Natural’s argument in this case hinges on the Commission’s dicta that the
20 stipulated interstate allocation “relies on historic operations to determine the allocation of
21 costs between Oregon and Washington.”⁷ The Company argues that the Commission’s

⁵ OPUC Order No. 15-049 at 6.

⁶ UM 1635 – Prudence and Earnings Test Stipulation, filed July 11, 2013.

⁷ NW Natural Opening Brief at 3, citing to Order 15-049 at 6.

1 intention—contrary to the plain language of the “initially agreed-upon” Earnings and
2 Prudence Test Stipulation—was that it intended to draw a distinction between sites that
3 served both Oregon and Washington customers and those that did not.⁸ In support of its
4 argument, the Company relies upon the litigation position of the parties on this issue.⁹

5 NW Natural’s argument is problematic for several reasons. First, NW Natural’s
6 reliance on the fact that “no party has ever explicitly argued – either in Phase I or in
7 Phase II of this case – that it was fair or appropriate for the Commission to apply the
8 historic allocation factor to sites that did not serve Washington customers”¹⁰ is misplaced.
9 The agreement reached among the parties, and ultimately adopted by the Commission,
10 was the result of a compromise. While NW Natural “advocated for a state allocation of
11 environmental remediation costs based on the service customers received from the
12 manufactured gas plants at the time of their operation,”¹¹ CUB argued for using the
13 current interstate allocation factor, a straight allocation of 90.7% to Oregon and 9.3% to
14 Washington, without a distinction between sites that served only Oregon customers.¹²
15 Ultimately, the parties set their litigation positions aside in the spirit of compromise to
16 reach a settlement in this docket, and the language of the settlement is clear and
17 unambiguous. The Prudence and Earnings Test Stipulation, signed by NW Natural, CUB
18 and other parties, states the “parties agree that 96.68% of the deferred costs amortized
19 through the SRRM will be allocated to Oregon customers.”¹³ The Joint Testimony in
20 support of the Prudence and Earnings Test Stipulation explains the parties’ agreement

⁸ NW Natural Opening Brief at 5.

⁹ *Id.* at 3-4.

¹⁰ Revised Compliance Filing at 14.

¹¹ NW Natural Opening Brief at 4.

¹² UM 1635 - CUB/100/Jenks/21; CUB/200/Jenks/20.

¹³ UM 1635 - Prudence and Earnings Test Stipulation at 6.

1 that the 96.68% is appropriate.¹⁴ NW Natural may have regrets about the bargain it
2 struck in the settlement of this issue, but to suggest that the parties' intentions at the time
3 of settlement were anything other than what was expressly written in the Prudence and
4 Earnings Test Stipulation and supporting testimony is wholly disingenuous.

5 Second, the Company's interpretation of the Commission's Order is illogical.
6 How can the Commission both adopt the agreement of the parties, which as NW Natural
7 concedes does not differentiate between sites that served only Oregon and sites that
8 served both Oregon and Washington,¹⁵ and at the same time have intended to allocate
9 some sites wholly to Oregon?

10 It is also notable that NW Natural has an incentive to shift more costs to its
11 Oregon customers. To CUB's knowledge the Washington Utilities and Transportation
12 Commission ("WUTC") has not resolved the issue of interstate allocation for the
13 Company's environmental remediation costs in Washington. By shifting more costs to
14 Oregon, the Company is less exposed to a decision by the WUTC.

15 NW Natural's interpretation of the interstate allocation of environmental
16 remediation costs, as reflected in its Revised Compliance Filing, should be rejected. The
17 Commission should affirm Order 15-049 with regard to this issue, and direct NW Natural
18 to file tariffs that allocate costs between Oregon and Washington at 96.68% and 3.32%,
19 respectively.

¹⁴ UM 1635 - Joint Testimony/100/Joint Parties/12.

¹⁵ NW Natural Opening Brief at 5.

1 **B. The Company’s proposal for allocation of insurance proceeds is unsupported by**
2 **Order 15-049.**

3 NW Natural’s position on the allocation of costs between Oregon and Washington
4 has led the Company to use a different allocation factor for insurance proceeds than for
5 remediation costs, despite its claim that “NW Natural agrees that the allocation of
6 Insurance Proceeds to Oregon should match the allocation of expense.”¹⁶

7 The Company’s Revised Compliance Filing appears to CUB to propose an
8 “initial” allocation of insurance proceeds “using the 96.68% allocation factor,” but to
9 update that over time.¹⁷ For costs, as discussed above, the Company is proposing to
10 allocate 96.68% to Oregon for shared sites and 100% for Oregon sites. This creates a
11 mismatch between the allocation of insurance proceeds and environmental remediation
12 costs, which is contrary to the Commission Order in this docket. The Order makes no
13 distinction between the allocation of remediation costs and insurance proceeds—it clearly
14 contemplates a single state allocation factor to be used for both insurance proceeds and
15 costs.¹⁸ CUB is also perplexed about NW Natural’s proposal to update the allocation
16 factor every five years, when the Commission has determined that it will review the
17 deferral and amortization of future remediation expenses and treatment of remaining
18 insurance proceeds in three years.¹⁹

19 CUB requests that the Commission direct NW Natural to file tariff sheets that
20 allocate environmental remediation costs in the same way that the insurance proceeds are
21 allocated. To be consistent with the Commission’s Order, that allocation factor should be

¹⁶ Revised Compliance Filing at 5.

¹⁷ *Id.* at 4-5.

¹⁸ Order 15-049 at 6.

¹⁹ *Id.* at 2.

1 96.68% to Oregon customers for all sites. If this allocation method is affirmed by the
2 Commission, CUB notes that no update would be necessary.

3 **C. The Company should not earn interest on amounts disallowed by the earnings**
4 **test.**

5 NW Natural describes the second contested issue with its Revised Compliance
6 Filing as “[w]hether, in addition to the \$15 million disallowance, the Commission
7 intended to disallow interest that accrued on that amount of deferred expenses from 2013
8 to the date of the Order, February 20, 2015.”²⁰ CUB takes the view that this is not
9 precisely the issue before the Commission. Rather, the issue before the Commission is
10 whether NW Natural properly applied the results of the Commission’s earnings test for
11 the historic period in its Revised Compliance Filing.

12 The Commission has determined that the appropriate time period for the earnings
13 review is the deferral period.²¹ When the Commission conducts an earnings test for
14 recurring deferrals, it generally does so for each year of the deferral and any amount that
15 might be “disallowed” pursuant to an earnings test is applied to the year in which the
16 Company’s earnings were deemed sufficient to absorb the deferred cost.²² Amortization
17 of deferrals (which include the application of an earnings test) is generally closer in time
18 to the initial application for deferral than in this docket,²³ but the length of time between
19 deferral and amortization does not change how an earnings test is applied. Importantly,
20 the Commission has stated that the purpose of the earnings test is “to ensure that the

²⁰ NW Natural Opening Brief at 5.

²¹ *In re Utility Reform Project, et. al*, OPUC Docket No. UM 1224, Order No. 09-316 at 14-15, aff’d by *In re Idaho Power Company*, OPUC Docket No. UE 233, Order No. 13-416 at 7-8 (Nov. 12, 2013).

²² See *In re Idaho Power Company*, OPUC Docket No. UE 233, Order No. 13-416 at 12 (Nov. 12, 2013).

²³ See Order 15-049 at 18.

1 amortization of deferred amounts is reasonable in relation to the effects in utility earning
2 levels.”²⁴

3 In this case, the deferral period for past remediation costs spans multiple years—
4 2003 to 2012.²⁵ After a review of the Company’s earnings during this time, and
5 consideration of other factors specific to this case, the Commission determined that NW
6 Natural’s shareholders could absorb \$15 million of the historical costs.²⁶ This means that
7 the “\$15 million disallowance” is the result of the Commission’s exercise of discretion in
8 applying the earnings test for past remediation expenses.²⁷

9 The Commission Order in this docket provides the Company with a clear
10 roadmap for how the earnings test was applied in this case. First, the Commission began
11 with \$94.3 million in costs for this historic period.²⁸ Second, the Commission applied
12 \$50.2 million of insurance proceeds, which left \$44.2 million in costs.²⁹ Finally, the
13 Commission applied the earnings test disallowance of \$15 million, stating that that “NW
14 Natural will amortize the remaining \$29.2 million through its SRRM.”³⁰

15 The Company’s Revised Compliance Filing, however, is inconsistent with the
16 Commission Order. NW Natural begins with the full amount, and then adds more than
17 \$15 million in interest before it applies the \$15 million earnings test disallowance.³¹ So
18 NW Natural proposes to account for the \$15 million earnings test disallowance *after* the

²⁴ Order 15-049 at 17.

²⁵ *Id.* at 15.

²⁶ *Id.* at 18.

²⁷ *Id.* at 17-18.

²⁸ *Id.* at 17.

²⁹ *Id.*

³⁰ *Id.* at 18 (CUB notes that the numbers provided in NW Natural’s compliance filing vary slightly from those contained in the Commission’s Order due to the adjustment for capital costs associated with the Gasco Source Control. CUB’s use of the Commission’s numbers rather than the Company’s is for ease of reference to the record established in this proceeding. CUB does not object to the Company’s adjusted costs as reflected in the Revised Compliance Filing.).

³¹ Revised Compliance Filing, Exhibit A at 2.

1 application of interest accrued in 2013, 2014 and 2015,³² meaning that customers are
2 paying interest on amounts that were deemed “disallowed” by the earnings test. This is
3 improper, and creates a mismatch. The \$15 million should be deducted from the period
4 in which it is associated—2003 through 2012—after applying 1/3 of the insurance
5 proceeds. Only after both the insurance proceeds and \$15 million earnings test
6 disallowance are deducted from the \$88.661 million pre-2013 spend and interest should
7 the Company earn interest for years 2013, 2014 and 2015.

8 It is also important to appreciate the impact of the principle applied by NW
9 Natural in this case if carried forward to apply to other deferrals. There is often a time
10 span between when a discrete cost is deferred and when an earnings test is performed.
11 The earnings test, however, still looks back to the deferral period and any costs
12 disallowed because of the earnings test do not earn interest beyond the deferral period.
13 NW Natural’s proposal in this docket would mean that a utility would be permitted to
14 earn interest, at the utility’s rate of return, on amounts that were otherwise disallowed by
15 the earnings test. This is not appropriate. A utility should not be rewarded by earning
16 interest on amounts that were deemed already recovered by the earnings test.

17 Contrary to NW Natural’s assertion, the parties are not “seeking to increase the
18 \$15 million disallowance” by advocating that the Company apply the earnings test
19 consistently with Commission precedent. Rather, CUB is advocating for the Company to
20 apply the earnings test in this case in a manner consistent with how other earnings tests
21 are applied. This is important because otherwise NW Natural is earning a return on
22 expenses that the Commission has ruled have already been recovered through the over-

³² Revised Compliance Filing, Exhibit A at 3. Note: 2015 amounts are for January through February 2015 only.

1 earning associated with the historic earnings test. Applying the earnings test in this way
2 does not compromise the Commission’s decision to protect NW Natural’s long-term
3 financial health—rather, it is consistent with the Commission’s directive in Order 15-
4 049.³³

5 **D. The Base Rate Adjustment for 2013, 2014 and 2015 is contrary to Order 15-049**
6 **and violates the rule against retroactive ratemaking.**

7 In addressing “future” environmental remediation costs (2013 onwards) in Order
8 15-049, the Commission directed NW Natural to file a compliance tariff for a rider to
9 collect \$5 million in base rates in order to “help prevent the accumulation of an
10 excessively large deferral balance.”³⁴ CUB acknowledges that the Commission’s Order
11 is silent regarding how to address the “future” period between 2013 and the effective date
12 of the base rate tariff rider, but objects to NW Natural’s proposal nevertheless because it
13 is inconsistent with Order 15-049’s directive to apply the tariff rider on a going-forward
14 basis and because it violates the rule against retroactive ratemaking.

15 In its Revised Compliance Filing, the Company proposes to “implement the
16 Commission’s directive” for the base rate tariff rider relating to the 2013, 2014 and part
17 of 2015 “future period” by capturing the amounts in Schedule 183.³⁵ The Company
18 states that “the amounts that are collected pursuant to the rider for 2013, 2014 and 2015
19 will be applied against, and reduce environmental deferrals for those years.”³⁶

20 First, the Commission did not direct NW Natural to apply a base rate tariff
21 adjustment to the 2013, 2014 or 2015, and therefore the Company’s Revised Compliance

³³ See Order No. 15-049 at 18.

³⁴ Order 15-049 at 11.

³⁵ Revised Compliance Filing at 7.

³⁶ *Id.*

1 Filing proposal exceeds the Commission’s Order. While the Commission did not use the
2 words “going forward” in Order No. 15-049, it did state that it was adopting Staff’s
3 recommendation for a base rate tariff rider.³⁷ Staff’s testimony explicitly recommended
4 a change “in permanent rates *on a going forward basis* in the form of a tariff rider.”³⁸
5 Although the Commission Order did not explicitly describe how an earnings test should
6 apply to the years of 2013, 2014 and 2015, absent a base rate charge of \$5 million, CUB
7 believes that the earnings test that was described in the order, with the exception of the
8 base rate charge, is appropriate.³⁹

9 Second, the Company’s proposal would violate the rule against retroactive
10 ratemaking. The Oregon Supreme Court recently described the rule against retroactive
11 ratemaking as “prohibiting a public utility commission from setting future rates to allow a
12 utility to recoup past losses or to refund to consumers excess utility profits.”⁴⁰ NW
13 Natural’s proposal would have future customers paying rates related to an expense that
14 was “theoretically” in base rates in 2013, 2014 and 2015, absent a deferral. This is a
15 violation of the rule against retroactive ratemaking.

16 **E. NW Natural’s actions in the compliance portion of this proceeding have been**
17 **inappropriate.**

18 NW Natural’s actions with regard to the compliance filing for the implementation
19 of Order 15-049 have been wholly inappropriate. There are remedies when a party either
20 does not understand or does not agree with a Commission order. In the case of the
21 former, a party can ask the Commission to clarify its order; for the latter, a motion for

³⁷ *Id.*
³⁸ UM 1635 - Staff/200/Johnson-Bahr/22 (emphasis added).
³⁹ See Order 15-049 at 11-14.
⁴⁰ *Gearhart v PUC*, 356 Or 216, 237 (2014) (internal citation omitted).

1 reconsideration is appropriate. NW Natural did neither of these things to address the
2 alleged ambiguities in Order 15-049. Rather, the Company used the compliance filing
3 process as a means to re-litigate issues in the case with which it did not agree. This is
4 procedurally inappropriate, and a misuse of time and resources. If, after Order 15-049,
5 the Company had asked the Commission to clarify or reconsider these issues under the
6 statutory deadlines for such a request, this docket would have been concluded by now.

7 **III. Conclusion**

8 CUB supports NW Natural's Revised Compliance Filing with the exception of the
9 four issues discussed above. Accordingly, CUB requests that the Commission resolve
10 these issues and order NW Natural to make a compliance filing that is wholly consistent
11 with the Commission's Order 15-049.

Dated this 30th day of November, 2015.

Respectfully submitted,



Sommer Templet Moser, OSB #105260
Staff Attorney
Citizens' Utility Board of Oregon
610 SW Broadway, Ste. 400
Portland, OR 97205
(503) 227-1984 phone
(503) 224-2596 fax
sommer@oregoncub.org