ORDER NO. 00-308

ENTERED JUN 09 2000

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 954/UM 958

In the Matter of the Application of PORTLAND GENERAL ELECTRIC COMPANY for Authorization to Defer Costs Related to Implementing Senate Bill 1149. (UM 954)	)	ORDER
In the Matter of the Application of PACIFICORP for Authorization to Defer Costs Related to Implementing Senate Bill 1149. (UM 958)	)	

DISPOSITION: RECONSIDERATION DENIED

On May 15, 2000, pursuant to ORS 756.561, the Industrial Customers of Northwest Utilities (ICNU) filed a request (Request) that we reconsider our decision in Order No. 00-165, entered March 17, 2000 (Order). For the reasons set forth below, ICNU's Request is denied.

Background. On November 12, 1999, the Commission received an application from Portland General Electric Company (PGE) requesting authority for deferred accounting treatment of costs related to implementing Senate Bill 1149 (SB 1149). A similar application was received from PacifiCorp dba Pacific Power & Light (PacifiCorp) on November 24, 1999. In a Report prepared by the Commission Staff, recommending approval of the applications as filed, the Staff included the following:

> Staff's counsel has advised that the provisions of SB 1149 provide the authorization to defer these costs, and that approval under the standard deferred accounting statute, ORS 757.259, is not required. As a result, these deferrals are not subject to the requirements of ORS 757.259, including annual reauthorization and an earnings review prior to including prudently incurred costs in rates.

At a public meeting held on December 14, 1999, we approved those applications. *See* Orders Nos. 00-038 and 00-039. Although no one present at that meeting disputed that the costs should indeed be deferred, a question was raised as to the proper statutory authority upon which to base the Commission's actions, and thus, as to the correctness of the opinion of Staff's counsel, expressed above.

In those companion orders, we invited comments from the public on the appropriate statutory authority for deferring the type of costs which were the subject of the instant applications. PGE and PacifiCorp each filed a brief in its respective docket. Since the issues in the dockets are identical, arguments by PGE and PacifiCorp were considered in both. ICNU, the only other party responding to our invitation, filed a single brief referencing both dockets. In essence, ICNU believed that the opinion rendered by Staff's counsel was incorrect, while PGE and PacifiCorp supported Staff counsel's position.

In our Order, we explained the new statutory language and analyzed the comments of the parties. We noted that

> Section 18 (4) of SB 1149 provides, in part, "…sections…of this 1999 Act shall not become operative until the commission:
>
> (a) Has approved a rate or schedule of rates for an electric company that provides the electric company the opportunity to recover all costs prudently incurred in the acquisition, development, operation and maintenance of investments, systems and procedures, including arrangements with third parties, necessary to comply with section 1-20 and 29 of this 1999 Act, or authorizes the deferral of costs for later recovery in rates…"
>
> Section 45 (3) provides, in part, "If any part of this 1999 Act is found unconstitutional, unlawful or otherwise unenforceable…notwithstanding ORS 757.355, the commission shall allow the electric company to recover in rates all costs and a return on all costs prudently incurred to comply with sections 1 to 20 and 29 of this 1999 Act."

While Staff counsel contended that Section 18 (4) authorizes recovery, ICNU claimed that it does not do so, but merely creates a contingency to the implementation of the act and that the classes of costs eligible for deferral were quite narrow. It claimed, from its reading of the statute, that the deferral of the costs of "analysis and documentation performed by the power operations, customer service, regulatory affairs and legal departments" sought in PGE's application (and similar language in PacifiCorp's submission) should not be permitted without PGE and PacifiCorp bearing the burden of proof that these costs indeed fit ICNU's interpretation of what SB 1149 designated as permissible deferrals. Furthermore, ICNU claimed that, because SB 1149 has not created an independent basis for deferral, all such deferrals must pass the through the ORS 757.259 procedural process with its attendant limitations and scrutiny.

ICNU claimed that ORS 757.259 is broad enough to include deferral of SB 1149 Section 18(4) costs because it provides that utility expenses or revenues should be deferred "to match appropriately the costs borne by and the benefits received by ratepayers."

ICNU sought to use the rules for construction in interpreting statutory language to find that ORS 757.259 applies to SB 1149 Section 18(4): "use of the same term throughout a statute indicates that the term has the same meaning throughout the statute." ICNU stated that the statute in question is all of Chapter 757 and then cited the rule that the specific supercedes the

general whenever there is an inconsistency. By this standard, it claimed ORS 757.259 applies to the subject matter of SB 1149 Section 18(4).

PGE and PacifiCorp, on the other hand, concurred with Staff counsel in viewing the language of Section 18(4) as enabling and inclusive of fulfilling SB 1149's overall intent. What ICNU claimed to be a narrow classification of eligible costs, PGE, in its brief, contended is clearly meant to be expansive; i.e., all costs prudently incurred in implementing all aspects of the legislation.[1] Furthermore, by the use of the word "prudently" in both sections, the legislature, PGE contended, independently declared the standard of review that the Commission was to utilize in determining whether to allow certain costs to be included in the companies' revenue requirements. PacifiCorp's brief also buttressed PGE's inclusive interpretation by noting that SB 1149 Section 31 amended ORS 757.259 to include deferrals under Section 19 (BPA purchases) but did not use similar language for Sections 18 and 45. PGE and PacifiCorp both asserted that, had the legislature intended to apply ORS 757.259 standards upon such recovery, it could easily have done so.

PGE further argued that ICNU's interpretation would put the company at odds with Federal Accounting Standards Board (FASB) Standard No. 71, paragraphs 9 and 10 with respect to cost capitalization. These accounting rules require, essentially, that costs may be deferred only if there is a probable chance of recovering those costs in rates. The limitations contained in ORS 757.259 would greatly reduce the probability of such recovery and raise doubts about the propriety of deferral in the first place.

In our Order, we found ICNU's arguments unpersuasive in their analysis and erroneous in their interpretation of the statutory language. We concurred with Staff counsel's opinion that SB 1149 provides independent authority for the deferral of costs related to the implementation of the Act. In so doing, we stated the following:

> SB 1149 is a legislative act that is sweeping in the changes it imposes on the relationship between the State and the electric utility companies which operate within its borders. Rulemaking proceedings are currently underway to implement these statutory changes as part of an overall restructuring of the industry. In this instance, ICNU has proposed the application of an existing statutory law, which, without specific legislative reference to its applicability, undermines the overall intent of the legislation to insure that all costs, prudently expended by electric companies to comply with the provisions of the Act, are recoverable. Such an application of the law must be viewed skeptically. SB 1149 clearly allows the recovery of all costs. On the other hand, ORS 757.259 does not apply any relevant standard (e.g., "prudently expended") other than that the recovery serves to match the timing of costs borne and

[1] In our Order, at footnote 1, we noted: "Although references are made to Section 45, the primary concern of those submitting briefs is Section 18(4). Section 45 provides for retrospective amelioration as opposed to Section 18's prospective activity, and calls for companies to get back both their costs and a return on those costs, recoverable through rates, upon occurrence of a triggering event. The event which triggers putting the companies back into the position they were before implementation of all or part of the law is a judicial determination that any or all of the law is found to be legally deficient."

> benefits received. Furthermore, SB 1149 pointedly references the applicability of ORS 757.259, via Section 31, only to Section 19. We find the failure of Section 31 to further enumerate Sections 18 and 45, a convincing indication that the omission of a reference in those sections to ORS 757.259 was purposeful.
>
> Finally, interpretation of SB 1149, in the manner suggested by ICNU, would also impose practical impediments to the implementation of the Act, which the legislature surely did not intend. As PGE notes in its brief, the uncertainty of the ORS 757.259 process would expose the deferring company to noncompliance with FASB Standard 71 because it reduces the likelihood of the full recovery of even "prudently incurred" costs. In such circumstances, a company is caught between compliance with the Guidelines of the Federal Accounting Standards Board and compliance with SB 1149's dual mandate to both implement the steps of industry restructuring and to be kept financially whole in the process.

The Request for Reconsideration

As described below, ICNU claims that this analysis, and the resulting conclusions, are in error, and asks that we reconsider the decision contained in our Order. The procedures and standards for such reconsideration are set forth in OAR 860-014-0095, which provides as follows:

> (3) The Commission may grant an application for rehearing or reconsideration if the applicant shows that there is:
> (a) New evidence which is essential to the decision and which was unavailable and not reasonably discoverable before issuance of the order;
> (b) A change in the law or agency policy since the date the order was issued, relating to a matter essential to the decision;
> (c) An error of law or fact in the order which is essential to the decision; or
> (d) Good cause for further examination of a matter essential to the decision.

ICNU appears to rely on subsection (c) of the Rule, claiming that our Order "is legally defective in two respects. First, the Commission's finding that SB 1149 permits deferred recovery of "all costs" of implementing the act violates the plain language of the act. Second, the Commission's finding that costs deferred under SB 1149 are not subject to review under ORS 757.259 is not supported by the language or intent of SB 1149." Request, page 1.

With respect to the first alleged legal defect, ICNU makes no new argument and cites no legal authority or portion of legislative history, but is content to reiterate its contention that "the statutory language applies to a narrower range of costs than that adopted by Order No. 00-165." ICNU has provided us no basis on which to change our analysis of the law set forth above.

ICNU next claims that the Commission erred in finding that SB 1149 created an independent deferral mechanism. Here, too, ICNU merely reiterates its prior argument and its disagreement with our decision and its underlying reasoning, restated above, and provides no new legal or historical basis for review.

Finally, ICNU introduces new matters which are, of necessity, beyond the scope of reconsideration:

> Spending on SB 1149 implementation should be limited until it becomes clearer whether the conditions of Section 18 will be satisfied. In addition, the utilities should be given incentives to be efficient in implementing SB 1149…. ICNU also requests that the Commission require each utility to file an implementation plan that sets out in detail the magnitude and timing of implementation costs. (Request, page 3).

Such a request should take the form of a petition to the Commission, consistent with OAR 860-013-0020, to initiate a rulemaking proceeding or an investigation pursuant to ORS 756.070. It cannot be considered in this docket.

Conclusion

ICNU filed its Request pursuant to ORS 756.561. Paragraph (1) of that statute provides, in part: "The commission may grant such a rehearing or reconsideration if sufficient reason therefor is made to appear." ICNU has caused no such sufficient reason to appear.

ORDER

IT IS ORDERED that the Request for Reconsideration of Industrial Customers of Northwest Utilities is denied.

Made, entered, and effective _____.

_____
Ron Eachus
Chairman

_____
Roger Hamilton
Commissioner

_____
Joan H. Smith
Commissioner

A party may appeal this order to a court pursuant to applicable law.