ORDER NO. 01-072

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# BEFORE THE PUBLIC UTILITY COMMISSION

# OF OREGON

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| In the Matter of a Rulemaking Proceeding to Implement SB 1149 Relating to Electric Restructuring. | ) ) ) | ORDER |

DISPOSITION: RULE ADOPTED

On September 28, 2000, the Commission issued Order No. 00-596 adopting several rules to implement SB 1149, an electric industry restructuring bill signed by the Governor on July 23, 1999. The Commission did not, however, adopt rules relating to the administrative valuation of assets and public purpose funding. It stated that it supported its Staff's proposed rules on those matters. It noted, however, that the parties had raised significant legal issues relating to those two rules which needed analysis by the Commission's legal counsel before the Commission could make a final decision.

The Commission has received advice from counsel on the public purpose rule. At its special public meeting on December 18, 2000, the Commission considered the public purposes rule and adopted it as set out in this order.

**OAR 860-038-0480 – Public Purposes**

This rule sets out the requirement that electric companies, and electric service suppliers (ESSs) that provide electricity services to direct access consumers in the electric company's service territory, collect public purpose charges from their retail electricity consumers equal to 3 percent of the total revenues billed to those consumers for electricity services, distribution, ancillary services, metering and billing, transition charges, and other types of costs that were included in electric rates on July 23, 1999. The collection will continue for 10 years, beginning on the date direct access is first offered. The rules contain special provisions for aluminum plants, requiring them to pay a public purpose charge equal to 1 percent of the total revenue from the sale of electricity service to the plant from any source. The rule also sets out the standard by which certain "self-directing" consumers may receive credits against their public purpose charges for qualified expenditures. We understand that the Office of Energy is establishing rules and procedures consistent with our rules for qualifying a self-directing consumer and for determining the implementation of the credit process.

Sections (11) and (12) of the rule set out the allocation of funds and certain accounting requirements.

**Position of ICNU and Staff**

ICNU raised several issues relating to public purposes. It summarizes its positions as follows:

> (a) Beginning on the effective date of direct access, all public purpose costs should be removed from rates and funded exclusively through the public purpose charge;
>
> (b) Self-directed credits should be capped at 82% of the public purpose charge, rather than the 73.8% level proposed by Staff; and
>
> (c) Regardless of the percentage cap adopted by the Commission, the cap should be imposed on a cumulative basis.

**Public Purpose Costs**

ICNU argues that Staff's proposed rules, which would treat demand side management (DSM) assets existing as of October 1, 2001, as stranded costs to be recovered through transition charges, is inconsistent with SB 1149. According to ICNU, the law intends that after October 1, 2001, public purposes would be funded exclusively through the 3 percent public purpose charge. It argues, moreover, that Staff's proposed rule would violate the provisions of ORS 757.612(3)(f) mandating that large electric consumers not be required to pay a public purpose charge in excess of three percent of their total cost of electricity services because the transition charge related to past DSM investments would be over and above the 3 percent public purpose charge.

Staff disagrees with ICNU. It points out that ORS 757.612(3)(g) requires that the Commission remove from electric company rates "any costs for public purposes described in subsection (1) of this section that are included in rates * * * effective on the date that the electric company begins collecting public purpose charges." Staff notes that subsection (1) of ORS 757.612 requires that "new" public purpose activities be funded. Staff argues that this wording limits funding to activities occurring after the beginning of direct access. Therefore, the rate removal provision of subsection (3) does not include historical capitalized DSM expenditures.

Staff also points out that rates are based on future test periods and that utilities' rates have included DSM amortization expenses related to both historical expenditures and forecasted test period expenditures, as well as non-capitalized DSM expense for such activities as program evaluation. Thus, Staff avers, ICNU is incorrect in claiming that Staff's position renders ORS 757.612(3)(g) a nullity.

Staff claims that ICNU's interpretation would lead to inequitable results. Large consumers, by self-directing the conservation portion of their public purpose charges, would avoid payment for existing DSM cost recovery, thereby "shifting recovery to the remaining consumers that are unable to receive credits for conservation expenditures in their residences and businesses." Recovery of historical DSM expenditures that were incurred to

benefit all utility consumers should be made equitably from all customer classes through the transition charges.

**Amount of Cap/Cumulative Cap/Allocation**

ICNU claims that the proposed rules would lead to a cap on self-directed credits of 73.8 percent, a figure inconsistent with the 82 percent cap established by SB 1149. ICNU thus proposes new allocation figures to alter the cap. ICNU also argues that, whatever the amount of the cap, it should be applied on a cumulative basis. It asserts that the "plain language" of ORS 757.612(5)(a) supports its position. That provision, according to ICNU, was intended to "provide that a self-directing consumer could take a credit for up to 68% of the public purpose charge for conservation, and up to 19% of the public purpose charge for renewable resources, provided that the total credit could not exceed" the total cap (82 percent in ICNU's view, 73.8 percent in Staff's view). ICNU acknowledges that the proposed rules do not take a stance on this issue but asks that they be modified to do so.

Staff argues against the cap proposed by ICNU. It points out that if the allocations proposed by ICNU were adopted, the same factors should apply to all consumers. As a result, self-directing consumers would be eligible to self-direct a maximum of 73.8 percent of their public purpose charges.

**Commission Disposition**

The Commission believes that this rule provides a well-organized and appropriate procedure for dealing with the public purposes issue.

**Public Purpose Costs**

We conclude that Staff's understanding of the recovery mechanism in SB 1149 is correct. It provides equitable treatment of customer classes and is based on a persuasive interpretation of the bill's intentions. ICNU's argument, while thoughtful, would lead to results which, as Staff points out, were not intended.

**Amount of Cap/Cumulative Cap**

The Commission concludes that Staff's position on these issues is correct. Under ORS 757.612, electric companies[1] must bill and collect a 3 percent public purpose charge from all of their retail electricity customers. The first 10 percent of funds collected must be distributed to education districts for energy-related audits and projects. Subject to the provision requiring education district funding, funds collected must be allocated according to set percentages to the following four purposes: conservation and new market transformation; renewable energy; low-income weatherization; and low-income housing. The Commission may change the public purpose charge in the future, but may not charge high-usage ("industrial") consumers more than 3 percent. Industrial consumers may "self-direct" the public purpose funds and receive credits against the public purpose charge for two of the four purposes: on-site conservation and above-market costs of renewable energy

[1] We include in this discussion those ESSs that are covered by the rule.

resources. The credit is equal to the total amount of qualifying expenditures for conservation, not to exceed 68 percent of the annual public purpose charge, and renewable energy, not to exceed 19 percent of the annual public purpose charge. The credit may not exceed, on an annual basis, the lesser of the qualifying expenditures, or the portion of the public purpose charge billed to the consumer that is dedicated to conservation, new market transformation or renewable energy. Qualifying credits not spent in one year may be carried forward to the next year.

The statutory language creates the following interpretive problems. First, the section on self-direction makes no reference to the provision regarding funding for education districts' energy projects. Second, regardless of whether the credits are limited by education district funding, the total amount of credit that appears to be available for industrial customers, 87 percent (68 and 19 percent), does not match the amounts allocated to conservation and market transformation, or renewable energy (63 and 19 percent). And yet, credits cannot exceed, on an annual basis, those amounts dedicated to conservation, market transformation or renewables.

ICNU argues that self-directed credits available to industrial customers should not be reduced by the 10 percent for education districts' funding and that the maximum cap on the credit should therefore equal 82 percent (63 percent and 19 percent). Thus, industrial customers would get a credit for up to 82 percent of their qualifying conservation projects or renewable energy purchases, and would pay 18 percent into the public purpose fund for low-income weatherization and housing. Staff's proposed rule interprets the statute to subject industrial customers to the same 10 percent education district funding requirement that applies to funds collected from all other consumers. After accounting for that limitation, the total cap on self-directed credits would be 73.8 percent (56.7 percent and 17.1 percent). ICNU further argues that, regardless of the total cap, industrial customers should be allowed to allocate up to 68 percent for conservation, or up to 19 percent for renewable energy resources. Staff's proposed rule interprets the statute to limit industrial customers to the same allocation formula as that specified for all consumers, or 56.7 percent and 17.1 percent of the total public purpose charge for conservation and renewables, respectively.

The Commission notes that nothing in the statutory language establishes that the legislature intended to exempt self-directing customers from the provision regarding funding of education districts' energy-related projects. Nor does the statute expressly address allocation of industrial consumers public purpose charges and education district funding. Instead, what it does is set out the overall applicability of the public purpose charge and establish collection processes and allocation standards.

> ORS 757.612(2)(a) provides, in part:
>
> * * * the electric company shall collect a public purpose charge from all of the retail electricity consumers located within its service area for a period of 10 years. * * *

> ORS 757.612(3)(b) provides, in part:
>
> Subject to paragraph (e) of this subsection, funds collected by an electric company through public purpose charges shall be allocated as follows:
>
> [four public purpose areas by percentage]
>
> ORS 757.612(3)(e)(A) provides, in part:
>
> The first 10 percent of the funds collected annually by an electric company under subsection (2) of this section shall be distributed to education service districts, * * *
>
> ORS 757.612(3)(a) provides, in part:
>
> The Public Utility Commission shall establish rules implementing the provisions of this section relating to electric companies.
>
> ORS 757.612(3)(d) provides, in part:
>
> The commission shall direct the manner in which public purpose charges are collected and spent by an electric company * * *

These provisions establish that the public purposes program operates by electric companies billing and collecting the funds. Although the credits accrue to consumers, the responsibility to bill, collect and allocate the funds according to the established percentages resides with the company, subject to regulation by the Commission. The electric company must collect the public purpose charges from all of its consumers. The funds collected must be allocated according to certain set percentages. The first 10 percent of the funds collected under subsection (2) must be distributed to education districts. By their plain language and logical inclusion, these provisions establish that an electric company must collect 3 percent of revenues from industrial consumers and that the funds must be allocated according to the established percentages. ORS 756.612(5)(a) establishes, however, that industrial customers shall receive a credit against public purpose charges billed for a particular site. Because of the credits, electric companies will not actually collect the charges billed to industrial customers when those charges are offset by the allowable credits. If the distinction between funds billed and funds collected is significant, it could mean that funds which are not collected are not subject to the allocation standards or district funding requirements. Subsection (5)(a) is silent with regard to funding of low-income weatherization, low-income housing, and education districts' energy-related projects. However, ICNU does not assert that funds collected from industrial customers will not be used for funding low-income weatherization or housing, even though there is no mention of these categories of subsection (5)(a).

Where there are several provisions in a statute, statutory construction should, if possible, give effect to all of them. Staff's proposed rule gives effect to the provisions at issue by doing the following: Applying the public purpose allocations to industrial consumers as set out in section (3)(b) and (e); allowing a credit for qualifying expenditures; and collecting the remaining amount left after the credits. In general, funds billed are funds that one expects to collect. Any distinction between these terms in this context appears more related to the mechanics of accounting than to any attempt to exempt industrial customers from some or all of the statutory allocation. In contrast, adoption of ICNU's interpretation would require ignoring subsection (3)(e) entirely and explaining why some of the allocation provisions (low-income weatherization and housing) but not all (education districts' projects) apply to industrial consumers.

Therefore, the Commission concludes that 10 percent of the public purpose charges billed to industrial customers should be allocated first to education districts' energy-related projects, thus limiting the total amount of credits available to 73.8 percent. The absolute reach of the public purposes charge to all consumers; the clear legislative directive about how funds must be allocated; the absence of any language exempting industrial consumers from the district funding provision; and the Commission's responsibility to adopt rules implementing the public purposes provision all support this conclusion.

**Allocation**

ICNU also argues that high-usage consumers may apply the credits on an accumulated basis. In other words, regardless of what the total cap on the credit may be, whether 73.8 percent or 82 percent, consumers may direct up to 68 percent of the total amount to conservation and up to 19 percent for renewables, but are not otherwise restricted on how they allocate their credits. Provisions (3)(b) and (5)(a) of ORS 757.612 use different percentages for conservation (63 percent and 68 percent, respectively) and (5)(a)(A) and (B) seem to repeat limitations contained in the first part of (5)(a). As noted above, statutory construction must, if possible, give effect to all of the related provisions.

ICNU has proposed harmonizing the provisions by giving industrial consumers flexibility to allocate their credits within the overall cap in a manner that is different from the percentages applicable to other consumers. However, ICNU's interpretation is not the only plausible means of harmonizing the provisions. Subsection (5)(c) provides that credits earned by a retail electricity consumer as a result of qualifying expenditures that are not used in one year may be carried forward for use in subsequent years. Under this interpretation, a consumer may have qualifying expenditures of up to 68 percent of the public purpose charges but, because the dedicated amounts that go to the consumer limit the total that can be taken in any one year, the excess expenditures can be carried over.

ICNU's interpretation requires abandoning the allocation structure. The alternative interpretation set out in the Staff's proposed rule does not. As discussed above, the Legislature's directive regarding how funds are to be allocated is clear. Assuming there is remaining ambiguity, a review of legislative history is appropriate. Our review of that history indicates that SB 1149 intended to create certainty and consistency in public purpose funding. If industrial consumers may vary the allocation percentages at will, stability and

consistency of funding will be undermined, especially since the essential nature of this category of consumers means the dollars at issue are likely to make up a significant portion of the total dollars available for these public purposes. Under a discretionary allocation interpretation, the percentage allocated to conservation in a given year can vary from 54.8 percent to 68 percent. The percentage allocated to renewables could vary from 5.8 percent to 19 percent. Consequently, funding could increase or decrease by more than 200 percent from year to year. In contrast to the history regarding stability of funding, nothing in the legislative history suggests that the Legislature intended to give large consumers discretion to vary from the percentage allocations applicable to all other public purpose charges.

For these reasons, the Commission concludes that Staff's interpretation is as plausible, if not more plausible, than ICNU's. Therefore, Staff's proposed rule providing that the industrial consumers are not free to disregard the allocation percentages established by the Legislature is appropriate. Under that rule, credits within any given year for conservation may not exceed 56.7 percent. Credits within any given year for above-market costs of renewable energy resources may not exceed 17.1 percent. We conclude that this rule is appropriate and adopt it.

## ORDER

IT IS ORDERED that:

1. The rule set out in Appendix A, attached to and made part of this order, is adopted.

2. The rule shall become effective upon filing with the Secretary of State.

Made, entered, and effective _____.

_____
**Ron Eachus**
Chairman

_____
**Roger Hamilton**
Commissioner

_____
**Joan H. Smith**
Commissioner

A person may petition the Commission for the amendment or repeal of a rule pursuant to ORS 183.390. A person may petition the Court of Appeals to determine the validity of a rule pursuant to ORS 183.400.