

ORDER NO. 03-187

ENTERED MAR 27 2003

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 121/UE 127

In the Matter of PACIFCORP’S Application for)
Partial Amortization of its Deferred Excess Net)
Power Costs and Approval of its Request to)
Implement an Amortization in Rates of Deferred)
Excess Net Power Costs. Advice No. 01-002)
(UE 121).)

ORDER

In the Matter of the Revised Tariff Sheets Filed)
by PACIFIC POWER & LIGHT for Electric)
Service. Advice No. 01-121 (UE 127).)

DISPOSITION: RECONSIDERATION DENIED

On February 7, 2003, the Industrial Customers of Northwest Utilities (ICNU) filed an application for reconsideration of Order No. 02-853, pursuant to ORS 756.561 and OAR 860-014-0095. In that order, the Commission adopted a stipulation (the Stipulation) between the Citizens’ Utility Board (CUB) and PacifiCorp under which: (1) CUB supported PacifiCorp’s increase in its amortization of the deferred excess net power costs from 3 percent to 6 percent, and (2) PacifiCorp requested approval of a Second Revised Schedule 94, a proposed tariff that provided for a refund to customers of any amount PacifiCorp is found to have overcollected if ICNU and CUB prevail in their appeal of the Commission’s prudence order in UM 995. The Commission also found that its tie vote at the August 6, 2002, Public Meeting constituted an order under ORS 183.310(5)(a) and concluded that good cause existed to revisit the order and admit the Stipulation into the record in Dockets UE 121 and UE 127.

In brief, ICNU requests reconsideration of Order No. 02-853 to correct errors of fact and law essential to the decision and because good cause exists for further examination of the decision. ICNU asserts that the Commission erred in finding that its tie vote at the August 6, 2002, Public Meeting was an oral action that constituted an order under ORS 183.310(5)(a). Good cause exists for reconsideration, ICNU argues, in light of the claims PacifiCorp put forth in its motion to dismiss, submitted on January 31, 2003, in UCB 5, a complaint filed by ICNU and CUB challenging the increase in PacifiCorp’s amortization rate of deferred power costs from 3 to 6 percent.

Background. On September 21, 2001, PacifiCorp filed Revised Rate Schedule 94 and Advice No. 01-021. The filing, docketed as UE 127 and joined with UE 121, sought approval to amortize deferred net power costs under ORS 757.259 at a rate equal to 6 percent of PacifiCorp's gross revenues for the year 2000. The Commission suspended Revised Rate Schedule 94 for six months. Order No. 01-881. The Commission extended the suspension period twice, until August 7, 2002. Order No. 02-255; Order No. 02-471.

On August 6, 2002, at its Regular Public Meeting, the Commission discussed PacifiCorp's request that the Commission approve Revised Rate Schedule 94. Two of the three Commissioners were present at the hearing. The Commission voted both on whether Revised Rate Schedule 94 should take effect and on whether that schedule should take effect subject to refund. Each vote resulted in a tie. That day, the Commission issued a press release stating that as a result of the tie votes, Revised Rate Schedule 94 would take effect by operation of law on August 8, 2002, when the suspension period for PacifiCorp's tariff expired.

On August 19, 2002, ICNU and CUB filed a complaint under ORS 756.040 and 757.210, docketed as UCB 5. The complaint alleged that PacifiCorp was unlawfully collecting charges under Revised Rate Schedule 94. Specifically, ICNU and CUB alleged that PacifiCorp lacks proper approval to amortize its deferred costs under the theory that the tie vote on August 6, 2002, was a nullity. CUB and ICNU seek a refund of the amounts they claim were unlawfully collected.

In early Fall 2002, PacifiCorp entered into discussions with ICNU and CUB to try to resolve their claims against and concerns with Revised Rate Schedule 94. PacifiCorp and CUB agreed to the Stipulation allowing PacifiCorp to amortize its deferred costs at a rate of 6 percent under Second Revised Rate Schedule 94 and making the amount collected under that schedule subject to refund. On October 10, 2002, PacifiCorp and CUB requested that the Commission reopen UE 121 and UE 127 under ORS 756.568 to adopt the Stipulation and approve the agreed upon Second Revised Rate Schedule 94.¹ ICNU objected that the Commission lacked authority to reopen those proceedings on the ground that the August 6, 2002, tie vote did not constitute an order under the Administrative Procedures Act (the APA) for the purposes of ORS 756.568. Consequently, ICNU argued that PacifiCorp must separately file and seek approval of the Second Revised Rate Schedule 94 under the same process as any new tariff filing rather than obtaining an amended order.

On December 10, 2002, the Commission approved the Stipulation between CUB and PacifiCorp. Order No. 02-853. In that order, the Commission expressly stated that the August 6, 2002, tie vote was an order under the APA. *Id.* at 9. The order did not immediately approve the Second Revised Rate Schedule 94 but asked PacifiCorp to file the tariff for Commission review under ORS 757.210, so as to give due process to all proper parties. The Commission formally approved Second Revised Rate Schedule 94 at its January 21, 2003, Regular Public Meeting.

¹ ORS 756.568 gives the Commission the authority to rescind, suspend, or amend any order the Commission has made.

On January 31, 2003, PacifiCorp moved to dismiss the claims in UCB 5. PacifiCorp asserted that Revised Rate Schedule 94 was properly filed and that under the filed rate doctrine, ICNU and CUB cannot obtain a refund. In addition, PacifiCorp explained that dismissal is appropriate because the Commission's approval of Second Revised Rate Schedule 94 renders the claims in UCB 5 moot. On March 5, 2003, the Commission denied PacifiCorp's petition and determined that parties may submit briefs on the issues in UCB 5.

Legal Standard for Reconsideration. Under OAR 860-014-0095(3), the Commission may grant reconsideration if the applicant shows that there is: (1) new evidence that was unavailable and not reasonably discoverable before the order issued; (2) a change in the law or agency policy since the date the order was issued; (3) an error of law or fact in the order; or (4) good cause for further examination. Any of these grounds, if essential to the Commission's decision, constitutes sufficient reason to grant reconsideration.

ICNU's Argument. A. The tie vote at the August 6, 2002, Public Meeting was not sufficient action to constitute an order. ICNU argues that under ORS 183.310(5)(a), an order is "any agency action expressed orally or in writing directed to a named person or named persons, other than employees, officers or members of an agency." In Order No. 02-853, the Commission found that the tie vote on August 6, 2002, was oral action sufficient to constitute an order. Based on this reasoning, the Commission concluded that the tie vote constituted an order that can be amended or corrected under ORS 756.568.

According to ICNU, the Commission's conclusion that its oral action at the August 6, 2002, Public Meeting constitutes an order is an error of law that should be corrected. ICNU argues that although the Commission found that its tie vote was oral action for the purposes of ORS 183.310(5)(a), it did not describe how that action fulfilled the other requirements of the statute. The tie vote that the Commission relied upon for its conclusion that it had taken oral action did not direct PacifiCorp to implement the tariffs at issue or take any other action. In fact, one Commissioner voted against implementation of those tariffs, while the other voted in favor. Such a vote, according to ICNU, does not direct any person to take action as required by ORS 183.310(5)(a).² Under these circumstances, ICNU contends that the Commission should reconsider its conclusions in Order No. 02-853 to correct this error of law. In addition, ICNU argues that the Commission did not provide any notice that an order had been issued.

B. In UCB 5, PacifiCorp argues that ICNU's and CUB's claims are moot due to the findings in Order No. 02-853. According to ICNU, that argument gives good cause for reconsideration of Order No. 02-853. Following the tie vote at the August 6, 2002, Public Meeting, ICNU and CUB filed the complaint in UCB 5 alleging that PacifiCorp was unlawfully amortizing its deferred excess net power costs at a rate equal to 6 percent of its gross operating

² ORS 183.310(5)(a) provides in relevant part:

"Order" means any agency action expressed orally or in writing directed to a named person or named persons, other than employees, officers or members of an agency. "Order" includes any agency determination or decision issued in connection with a contested case proceeding. * * *

revenues, because the Commission did not authorize that amortization as required by ORS 757.259. On January 31, 2003, PacifiCorp filed a motion to dismiss the complaint in UCB 5. PacifiCorp requested that the complaint be dismissed in part based on the allegation that ICNU's and CUB's claims in UCB 5 were now moot because the Commission had found that the tie vote constituted an order under ORS 183.310.

PacifiCorp alleges that ICNU and CUB have failed to pursue a number of procedural avenues available to challenge the Commission's action at the August 6, 2002, Public Meeting. According to PacifiCorp, failure to pursue these options warrants dismissal of the complaint. PacifiCorp's argument also constitutes good cause for further examination of Order No. 02-853, according to ICNU.

Finally, ICNU asserts that PacifiCorp attaches legal significance to the findings in Order No. 02-853 that extends beyond the findings of that order. CUB and ICNU could not have pursued any of the avenues for relief that depended on issuance of a final order, ICNU contends, because the Commission itself never indicated that it had issued such an order. ICNU and CUB had no notice that an order had been issued and no basis to seek reconsideration or appeal of such an order. Further, ICNU contends, the Commission did not comply with the substantive or procedural requirements for issuing an order. The advice given the Commission by its legal counsel at the August 6, 2002, Public Meeting; the Commission's actions following that meeting; and the interpretation of the tie vote put forth in Order No. 02-853 are entirely inconsistent, ICNU alleges. Hence, good cause exists for reconsidering the decision in Order No. 02-853 to determine the legal effect of the Commission's findings. If the Commission agrees that ICNU's and CUB's claims in UCB 5 are now moot as a result of the findings of Order No. 02-853, ICNU argues that it is important that this issue be clarified for all parties.

PacifiCorp's Response. PacifiCorp opposes ICNU's application for reconsideration. PacifiCorp argues in brief that the Commission has already directly considered and rejected ICNU's claims in Order No. 02-853 and that the issues raised in UCB 5 will be addressed in the context of that docket. PacifiCorp thus argues that the Commission should deny ICNU's application. PacifiCorp also argues that ICNU has shown neither that the Commission made an error of law or fact in the order that is essential to the decision nor that good cause exists for further examination of a matter essential to the decision.

A. PacifiCorp argues first that ICNU seeks reconsideration of an alleged error of law that is not essential to the decision. PacifiCorp argues that reconsideration of the procedural issues ICNU raises would not result in an outcome different from that reached in Order No. 02-853.

In its objection to the Stipulation between CUB and PacifiCorp, ICNU argued that PacifiCorp should be required to file the Second Revised Rate Schedule 94 in the same manner as any revised tariff. PacifiCorp notes that that is what resulted from Order No. 02-853. In that order, the Commission stated that it would review the Second Revised Rate Schedule 94 under ORS 757.210 to give interested parties an opportunity to comment and participate in the Commission's review. Accordingly, the Commission directed PacifiCorp to file its proposed tariff for Commission review. Order No. 02-853 at 10. The Commission adopted the tariff after

a reasonable period for review and comment. ICNU did not comment. Consequently, Order No. 02-853 resulted in what ICNU sought: PacifiCorp filed Second Revised Rate Schedule 94 independently. Because ICNU ultimately obtained what it sought from Order No. 02-853, and because PacifiCorp filed and subsequently gained approval of the Second Revised Rate Schedule 94 according to the process ICNU advocated, PacifiCorp argues that the Commission should reject ICNU's attempts to seek reconsideration.

B. PacifiCorp next argues that the August 6, 2002, tie vote is an order under the APA and that the Commission considered and properly rejected ICNU's argument to the contrary. PacifiCorp argues that on the merits the Commission properly decided the issue of whether the August 6, 2002, tie vote constitutes an order under the APA. As noted in the Commission's order, ORS 756.568 authorizes the Commission, after notice to the utility and an opportunity to be heard, to "rescind, suspend, or amend any order made by the commission."

According to PacifiCorp, the Commission properly understood that the broad language of ORS 183.310(5)(a) encompasses the action that took place on August 6, 2002. The statutory scheme under which the Commission operates expressly provides that Commission action can be taken via inaction. For instance, ORS 757.215 provides that on expiration of the prescribed suspension period, a rate or schedule of rates becomes final by operation of law without the need for any findings of fact or conclusions of law. Harmonizing ORS 757.215 with the APA definition of order, the three means by which the Commission may take action—in other words, issue an order—include: (1) in writing; (2) orally; and (3) by operation of law. Consequently, the Commission properly evaluated and concluded that the August 6, 2002, tie vote is an order under the APA.

According to PacifiCorp, ICNU raises a single new argument in its application for reconsideration. ICNU contends that the August 6, 2002, tie vote could not be an order because that action did not direct PacifiCorp to implement the tariffs at issue or to take any other action. ICNU here apparently focuses on the part of the definition of order that requires the order to be directed to a named person or named persons. PacifiCorp argues that the Commission should reject ICNU's argument.

PacifiCorp argues that its ability to collect the 6 percent from customers was authorized by operation of law when the Commission allowed the suspension period to pass. ICNU's argument reads a requirement into the law that does not otherwise exist: that PacifiCorp must have express approval from the Commission directing it to implement its tariff before it may lawfully collect rates. ICNU's argument misconstrues the statutory process, according to PacifiCorp.

Under ORS 757.205 and 757.210, PacifiCorp may lawfully collect rates that have been filed with the Commission and that have not been deemed unreasonable. Here, PacifiCorp was the only "person" listed on Revised Rate Schedule 94.³ When the Commission voted on

³ Under the APA, a "person" is defined to include "any individual, partnership, corporation, association, governmental subdivision, or public or private organization." ORS 183.310(7).

Revised Rate Schedule 94, that action was necessarily directed at the “person” listed on that rate schedule, which was PacifiCorp. Consequently, PacifiCorp argues, the Commission’s August 6, 2002, action was directed at one person, PacifiCorp. Therefore, PacifiCorp contends, the Commission should reject ICNU’s assertion that the August 6, 2002, vote did not constitute an order because it was not directed at a named person.

C. PacifiCorp’s final argument is that positions put forth in UCB 5 should not constitute good cause to revisit the Commission’s conclusion in this docket that the August 6, 2002, tie vote constituted an order under the APA. PacifiCorp argues that the Commission should reject ICNU’s contention for three reasons. First, reconsideration is not warranted simply because Order No. 02-853 will have an impact on other proceedings. If that were sufficient cause for reconsideration, the Commission would need to reconsider every order in which it made a legal conclusion. ICNU should not be allowed to reopen decisions with which it disagrees simply because related issues are presented in a collateral proceeding.

Second, PacifiCorp contends that an application to reconsider an order from a separate docket is not an appropriate mechanism by which to evaluate the merits of PacifiCorp’s motion to dismiss in UCB 5 or the authorities on which that motion rests. If the Commission wishes to take up ICNU’s assertion that PacifiCorp has given greater legal significance than is warranted to Order No. 02-853, PacifiCorp argues that the Commission can do so in UCB 5. Because these issues can be addressed and resolved in UCB 5, PacifiCorp’s arguments in UCB 5 do not provide good cause to reconsider Order No. 02-853.

Third, PacifiCorp disputes that its motion to dismiss in UCB 5 provides good cause to revisit the issues in Order No. 02-853. PacifiCorp argues that ICNU’s position is based on two incorrect assumptions. First, ICNU’s argument assumes that the Commission’s reasoning in Order No. 02-853 is faulty and that PacifiCorp has relied on that faulty reasoning in its motion to dismiss in UCB 5. Second, that argument assumes that the Commission will rely on the same allegedly faulty reasoning in Order No. 02-853 to dismiss ICNU’s complaint in UCB 5. PacifiCorp also notes that it has an additional argument in support of its motion to dismiss, the filed rate doctrine. PacifiCorp contends that the Commission might not even grant its motion to dismiss; hence, ICNU should not be able to rely on that motion as a basis to revisit the issues raised in UE 121 and UE 127 and resolved by Order No. 02-853.

Discussion and Resolution. A. ICNU contends that the tie vote at the August 6, 2002, Public Meeting was not an order under the APA. We discussed and rejected this position in Order No. 02-853. The only new argument ICNU brings to this issue is its contention that the order (the tie vote at the August 6, 2002, Public Meeting) was not addressed to a named person or persons. It was, as PacifiCorp points out, clearly directed to PacifiCorp by virtue of being a vote on PacifiCorp’s tariff. This argument does not constitute a ground for reconsideration.

B. ICNU argues that PacifiCorp’s position in UCB 5 gives good cause to revisit Order No. 02-853. We disagree. The Administrative Law Judge denied PacifiCorp’s motion to dismiss that complaint. ICNU’s concerns regarding how Order No. 02-853 will impinge on UCB 5 are therefore not of concern here, but will be heard and weighed in UCB 5.

We conclude that ICNU has not shown grounds for reconsideration of Order No. 02-853. ICNU's application for reconsideration should be denied.

ORDER

IT IS ORDERED that the application for reconsideration filed by the Industrial Customers of Northwest Utilities is denied.

Made, entered, and effective _____.

Roy Hemmingway
Chairman

Lee Beyer
Commissioner

Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.