

ORDER NO. 03-752

ENTERED DEC 18 2003

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UCB 5

INDUSTRIAL CUSTOMERS OF)
NORTHWEST UTILITIES (ICNU) and)
CITIZENS' UTILITY BOARD OF)
OREGON (CUB),)

Complainants,)

vs.)

PACIFICORP, dba PACIFIC POWER &)
LIGHT,)

Defendant.)

ORDER

DISPOSITION: RECONSIDERATION DENIED

On October 27, 2003, the Industrial Customers of Northwest Utilities (ICNU) filed an application for reconsideration of Order No. 03-534, pursuant to ORS 756.561 and OAR 860-014-0095. In that order, the Commission denied a complaint ICNU and the Citizens' Utility Board (CUB) had filed, alleging that PacifiCorp had illegally amortized certain deferred costs in rates from August 7, 2002, to January 21, 2003.

ICNU contends that the Commission should reconsider its decision in Order No. 03-534 to correct errors of law and fact essential to the decision. According to ICNU, the Commission's ruling in that order relies on an unreasonable interpretation of the deferred accounting statute, ORS 757.259, and the conclusions supporting the Commission's decision are inherently contradictory.

PacifiCorp filed a reply to ICNU's application on November 12, 2003. ICNU filed a response on November 26, 2003.

This matter has a long and complex procedural history, which is set out in Order No. 03-534 (*q.v.*). It stems from PacifiCorp's deferred accounting proceeding, UM 995, and the amortization dockets, UE 121 and UE 127 (which were consolidated). Central to ICNU's application is the fact that at its August 6, 2002, public meeting, the Commission considered PacifiCorp's 6 percent amortization tariff in UE 127. Only two Commissioners were in attendance, and the vote on PacifiCorp's tariff was a tie, resulting

in a nullity. PacifiCorp's tariff, Schedule 94, became effective by operation of law on August 8, 2002.

On August 19, 2002, CUB and ICNU filed this complaint, UCB 5, under ORS 756.040 and 757.210. On December 6, 2002, CUB and ICNU amended their complaint to allege that PacifiCorp was collecting amounts in excess of its filed rates because the Commission had not: (1) affirmatively authorized PacifiCorp to increase amortization to 6 percent, as required by ORS 757.259(4) and (7); (2) affirmatively authorized PacifiCorp to amortize any deferred amounts after August 31, 2002; and (3) completed an estimate of PacifiCorp's cost of capital, as required by ORS 757.259(7).

To address complainants' concerns, PacifiCorp and complainants began settlement discussions in the fall of 2002. Those discussions produced a stipulation in which CUB agreed to support PacifiCorp's amortization of the deferred account at the 6 percent rate as long as the rates were subject to refund. On December 10, 2002, the Commission approved the stipulation between CUB and PacifiCorp, rejecting ICNU's procedural attack which was premised on the point that the August 6, 2002, vote did not result in a Commission order.¹ Under the stipulation, CUB and PacifiCorp requested the Commission to approve Second Revised Schedule 94, which increased amortization of deferred amounts to 6 percent and required PacifiCorp to refund amortized amounts in the event the Commission's prudence determination in Order No. 02-469 was reversed by the courts.

The Commission formally approved Second Revised Schedule 94 on January 21, 2003, as a part of the consent agenda for the Commission public meeting held that day. ICNU subsequently requested reconsideration of the Commission's adoption of the stipulation. The Commission denied the request and confirmed that the August 6, 2002, tie vote was an order under the Administrative Procedures Act.² On August 29, 2003, the Commission denied the complaint in UCB 5. Order No. 03-534.

Applicable Law

ORS 756.561(1) provides that a party may request that the Commission reconsider an order within 60 days of service of the order. The Commission may allow reconsideration if the party seeking reconsideration can show that one of several criteria is met. OAR 860-014-0095(3) gives the criteria.³

¹ Order No. 02-853.

² Order No. 03-187.

³(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’s Application for Reconsideration

ICNU alleges that the Commission should reconsider Order No. 03-534 because:

- a. The Commission’s interpretation of the deferred accounting statute places little restriction on the utility’s ability to amortize deferred costs and is inconsistent with the statutory scheme, which imposes several affirmative obligations on the Commission and the utility;
- b. The Commission’s interpretation conflicts with accepted rules of statutory construction because it gives two different meanings to the same word (authorize) used within the same statute;
- c. The Commission’s interpretation conflicts with legislative history; and
- d. The Commission’s conclusion that it has estimated PacifiCorp’s cost of capital is not based on substantial evidence.

DISCUSSION

a. According to ICNU, the Commission unreasonably concluded in Order No. 03-534 that rates for amortizing deferred accounts may go into effect without an affirmative vote. ICNU contends that the Commission’s decision places little restriction on a utility’s ability to amortize deferred costs. ICNU contends that “the Commission’s interpretation departs from the intent of the [deferred accounting] statute because it would allow a rate for recovery of deferred amounts to go into effect without satisfying the other requirements of the statute.” Application for Reconsideration at 9. Additionally, ICNU argues that the Commission’s interpretation leads to absurd results. According to ICNU, if the Commission does not make all the statutorily required findings and fails to vote on the rate, the rates are illegal but under the Commission’s interpretation go into effect nonetheless. This interpretation, ICNU asserts, could not be the Legislature’s intent.

ICNU argues that the deferred accounting statute is restrictive and that the Commission errs in allowing the file and suspend process of ORS 757.210 to “trump the specific requirements of the deferred accounting statute.” ICNU contends that only specific types of costs (ORS 757.259(1)-(2)) are eligible for deferred accounting; that deferrals may last only a limited time (ORS 757.259(3)); and that deferrals may be only for limited amounts (ORS 757.259(5)-(7)). Further, ICNU contends that amortization of deferred amounts is allowed only to the extent authorized by the Commission and is subject to an earnings review, a prudence review, and in some cases, an estimate of the utility’s cost of capital. ORS 757.259(4), (6)-(7). ICNU also cites legislative history to show that the intent of the deferred accounting statute is to include ratepayer protections such as notice to all parties, filing of evidence by the utility, and hearings if requested. Deferred Accounting Statutes Amendment: Hearings on HB 2145 before the House Committee on Environment & Energy, Exhibit B at 5 (1987) (Testimony of Charles Davis, Public Utility

Commissioner). ICNU's argument seems to be that because the deferred accounting statute contains restrictions and protections, it is unreasonable to find that approval of a rate by operation of law under ORS 757.210 should take precedence over the specific requirement that the Commission affirmatively authorize amortization of deferred amounts.

While we agree with ICNU that deferred accounting is an unusual mechanism that the Commission may employ in a limited and restricted manner, we find ICNU's argument unconvincing. ICNU argues that under our reading, ORS 757.210 "takes precedence" over the deferred accounting statute. We do not agree. The file and suspend process is part of the deferred accounting statute, as we explained in Order No. 03-534 at 10.⁴ The procedures invoked in ORS 757.259(4) and set out in ORS 757.210 do not cancel out the specific requirements for deferred accounting. As it did in the underlying case, ICNU argues that the requirement that authorization occur "in a proceeding under ORS 757.210 to change rates" invokes merely the hearing and other procedural requirements of ORS 757.210. That is, ICNU argues that the file and suspend provision does not apply to deferred accounting. We find no inconsistency between the statutes. There is no conflict between the process for establishing a deferred account and amortizing that account under ORS 757.259 and the entire set of procedures for allowing rates to go into effect under ORS 757.210 *et seq.*

ICNU also argues that our interpretation in Order No. 03-534 departs from the intent of the statute because it would allow a rate for recovery of deferred amounts to go into effect without satisfying the other requirements of the statute, such as the specific requirements that the Commission review earnings and estimate cost of capital during the deferral period. ICNU takes issue with the statement in Order No. 03-534, at 9: "If the requirements for amortization specific to ORS 757.259 are not met, even if rates become effective by operation of law they would be subject to successful challenge on review." ICNU seems to argue that this statement means that rates going into effect by operation of law would be *per se* illegal. We agree with PacifiCorp that ICNU is misreading this statement. Its meaning is that any rate, effective by operation of law or otherwise, is subject to a successful challenge if the rate somehow deviates from a statutory requirement. ICNU's reading of the statute to preclude rates going into effect by operation of law would fail to give effect to the reference to ORS 757.210 and its ratemaking process.

b. ICNU argues that the Commission's Order No. 03-534 conflicts with the rules of statutory interpretation because it gives two different meanings to the word "authorize." According to ICNU, there is a presumption that the same term used more than once within a statute will have the same meaning. *See Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 611 (1993). We question whether "authorize" has two meanings under our interpretation. In both subsection (3) and subsection (4) of

⁴ As we stated there:

There are three prepositional phrases that modify "authorized." Subsection (4) refers to including deferred accounts in rates only if the deferred account has been authorized [1] by the commission [2] in a proceeding [3] under ORS 757.210. We cannot ignore the prepositional phrases following "authorized." They modify the word. They tell us that the type of authorization the legislature referred to in subsection (4) is that used in rate proceedings.

ORS 757.259,⁵ the Commission sanctions acts by the utility, deferral in subsection (3) and amortization in subsection (4). The means by which the Commission sanctions these acts differs. If that constitutes a difference in the meaning of “authorize,” we find that the context of subsection (4), with the prepositional phrases directing the reader to ORS 757.210, is sufficiently clear to overcome the presumption that a term has the same meaning throughout a statute.

c. ICNU cites the legislative history of ORS 757.259(4) to support its position that the Commission must act affirmatively to authorize the amortization of deferred amounts. ICNU points out that the reference to ORS 757.210 in subsection (4) was added in 2001. ICNU argues that the reference to ORS 757.210 was added to ensure that parties challenging the amortization of deferrals were entitled to the procedural protection of ORS 757.210. According to ICNU, the other amendments to ORS 757.259(4) also provide additional customer protections. For instance, the Commission is required to find that deferred amounts are prudent before they can be recovered in rates, and the Commission received authority to make amortization of deferred amounts subject to refund.

ICNU supports its position by reference to Representative Witt’s statement that “under the provisions of the amendments the utility would need to make the request and receive PUC approval.” Conference Committee on HB 2630, 71st Oregon Legislative Assembly, 2001 Regular Session, Minutes at 2 (June 11, 2001). ICNU interprets “receive PUC approval” to mean an act affirmatively authorizing amortization. We disagree. As PacifiCorp points out in its reply, Oregon law expressly allows “approval” both in the form of an affirmative vote and in the form of the Commission taking no action.

ICNU’s argument does not change our position. We agree that the amendments to ORS 757.259(4) added consumer protection. We find, however, that the file and suspend process invoked by the addition of the reference to ORS 757.210 entails the option of allowing amortization rates to become effective by operation of law.

⁵ (3) The commission may authorize deferrals under subsection (2) of this section beginning with the date of application, together with interest established by the commission. A deferral may be authorized for a period not to exceed 12 months beginning on or after the date of application. However, amounts deferred under subsection (2)(c) and (d) of this section are not subject to subsection (4), (5), (6) or (7) of this section, but are subject to such limitations and requirements that the commission may prescribe and that are consistent with the provisions of this section.

(4) Unless subject to an automatic adjustment clause under ORS 757.210 (1), amounts described in this section shall be allowed in rates only to the extent authorized by the commission in a proceeding under ORS 757.210 to change rates and upon review of the utility’s earnings at the time of application to amortize the deferral. The commission may require that amortization of deferred amounts be subject to refund. The commission’s final determination on the amount of deferrals allowable in the rates of the utility is subject to a finding by the commission that the amount was prudently incurred by the utility.

d. Finally, ICNU argues that the Commission's conclusion that it estimated PacifiCorp's cost of capital is inconsistent with Commission inaction at the August 6, 2002, public meeting in which the Commission voted one to one on PacifiCorp's application. ICNU challenges the Commission's statement that it had estimated PacifiCorp's cost of capital, as required by ORS 757.259(7), because "there was no indication that the earnings estimate [in the Staff report in Order No. 02-410] included an updated cost of debt." As PacifiCorp notes, the record shows that PacifiCorp performed a rate of return calculation in conjunction with its June 2002 earnings report, which is consistent with the cost of capital analysis required by ORS 757.259(7).

ICNU also argues that the Commission could not have affirmatively adopted PacifiCorp's cost of capital because the Commission did not have two votes adopting the company's rate schedule. That argument is incorrect. As we noted in Order No. 03-534, at 12, we did adopt the Staff report in Order No. 02-410.

We conclude that ICNU has failed to show grounds for reconsideration and that its application should be denied.

ORDER

IT IS ORDERED that the Industrial Customers of Northwest Utilities' application for reconsideration of Order No. 03-534 is denied.

Made, entered, and effective _____.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may appeal this order to a court pursuant to ORS 756.580.