ORDER NO. 07-227

ENTERED 06/08/07

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1234

In the Matter of	)	
	)	
PORTLAND GENERAL ELECTRIC	)	
COMPANY	)	ORDER
	)	
Application for Deferred Accounting of	)	
Excess Power Costs Due to Plant Outage.	)	

DISPOSITION: RECONSIDERATION DENIED

On April 13, 2007, the Industrial Customers of Northwest Utilities (ICNU) filed an Application for Reconsideration and Rehearing of Order No. 07-049 (Application for Reconsideration), pursuant to ORS 756.561 and OAR 860-014-0095. In that Order, the Public Utility Commission of Oregon (Commission) authorized Portland General Electric Company (PGE) to defer ninety percent of the eligible replacement power costs for a specified outage of the Boardman power plant (Boardman), after application of an 80 basis point deadband on PGE's return on equity (ROE). The Application for Reconsideration takes issue with the Commission's adjustment to the applied deferral deadband of 20 basis points to account for effects of Senate Bill (SB) 408. For the reasons set forth below, we deny ICNU's Application for Reconsideration.

Background

On November 18, 2005, PGE filed an application to defer $45 million in replacement power costs (Deferral Application) resulting from an outage of the Boardman generating plant (Boardman) that lasted from November 18, 2005 to February 5, 2006 (the Boardman Outage).

On February 12, 2007, we issued Order No. 07-049. Finding that the Deferral Application satisfied both legal and discretionary criteria, we granted the Deferral Application, in part. The amount deferred was adjusted to $26.8 million.

We classified the Boardman Outage as a scenario risk, deeming the event outside the applicable measure of normal risk. In so doing, we rejected some parties' proposal to use a 250 basis points deadband on return on equity (ROE) range as the measure of normal risk for a scenario plant outage. Instead, we concluded that the appropriate measure of risk should be a reasonable deviation range around the pertinent forced outage rate. To approximate this financial risk, we adopted a 100 basis point deadband on ROE.

We then adjusted this deferral deadband to 80 basis points to account for the effect of SB 408 on costs incurred by PGE on or after January 1, 2006, for the Boardman Outage. ICNU now challenges this 20 basis point adjustment.

Legal Standard for Reconsideration

ORS 756.561(1) authorizes a party to request reconsideration by the Commission of any order within sixty (60) days of service of that order. The Commission may grant reconsideration "if sufficient reason therefor is made to appear." OAR 860-014-0095(3) provides that the Commission may grant an application for rehearing or reconsideration if the applicant establishes one or more of the following grounds:

(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.

OAR 860-014-0095(2) also requires the Applicant to specify what changes in the order the Commission is requested to make and to indicate how such changes will alter the outcome.

ICNU's Application for Reconsideration

ICNU contends that our 20 basis-point adjustment for SB 408 effects constitutes an error of law. ICNU argues that the Commission's decision to adjust the deferral deadband "second guesses the wisdom of Oregon law rather than implementing that law as enacted." Petition for Reconsideration of ICNU at 4.

ICNU observes that the issue of the tax impact of utility earnings variations was raised during the original legislative discussion of SB 408, and that the Commission weighed in at that time. ICNU submits that, while the 2005 Legislative Assembly adopted certain recommendations proposed by the Commission, it did not accept any proposals regarding the tax impact of utility earnings variations, or the so-called "alleged double whammy." *Id*. at 5. Consequently, ICNU argues that the legislature did not intend that implementation of SB 408 would account for the tax impact of utility earnings variations.

ICNU asserts that the utilities, nevertheless, tried to address the double whammy issue in the AR 499 rulemaking to implement SB 408. ICNU indicates that the Commission declined, however, to adopt any of the proposed adjustments. ICNU quotes the Commission as determining that adjustments to offset amounts flowing through the automatic adjustment clause "would strike at the heart of the intent behind SB 408 to adjust

rates for the difference between taxes collected and taxes paid." *Id*. at 6, quoting Order No. 06-400 at 9.

ICNU argues that by reducing the size of the Boardman deferral deadband to account for SB 408, the Commission effectively adjusted the amount that will flow through PGE's automatic adjustment clause. ICNU asserts that the Commission's pledge in AR 499 to be responsive to concerns regarding the double whammy, as implemented in UM 1234 by adjusting the deferral deadband adjustment, inappropriately "reflects its judgment about how the legislature *should* have addressed the mismatch that SB 408 is intended to correct rather than implementing the law that the legislature actually passed." *Id*. at 7. As ICNU argues that the adjustment to the deferral deadband is contrary to Oregon statutory law, ICNU asserts that the Commission should grant reconsideration to eliminate the adjustment and implement SB 408 as intended by the legislature.

Finally, ICNU argues that the Commission should grant reconsideration of Order No. 07-049 in order to allow time for the Legislature to state its intentions regarding the "double whammy" issue. ICNU observes that the 2007 Legislative Assembly is currently considering House Bill (HB) 2479 which would remove the impact of utility earnings variations from the amounts that flow through the automatic adjustment clause. ICNU posits that if the bill fails, any ambiguity about the SB 408 earnings variations issue would be clarified.

PGE's Comments

PGE disputes ICNU's assertion that the Commission committed legal error. PGE points out that the Commission has approved power cost deferrals in the past without applying a deadband. Thus, because application of *any* deadband was not legally required, PGE contends that the Commission acted lawfully in adjusting the deferral deadband to account for SB 408 effects. As PGE explains: "[I]f the Commission could have lawfully authorized the [requested] deferral of $42.8 million, it follows as a simple matter of logic that it cannot be legal error (at least from the customers' perspective) to authorize the deferral of less than that amount." PGE Opposition to Petition for Reconsideration at 2, citing UM 995, Order No. 02-469 at 75 (July 18, 2002) ("Because the record before us supports full recovery of PacifiCorp's excess net power costs * * * a fortiori it supports less than full recovery").

PGE construes ICNU's Petition for Reconsideration as taking the position that the Commission is legally barred from taking any action that would mitigate the "double whammy impact" of SB 408. PGE responds that such a position unduly restricts the Commission's delegated authority. Under such a construct, PGE explains that the Commission would be unable to adjust a utility's authorized revenue (in a general rate case, for example) because of the effect on the amount flowing through the utility's automatic adjustment clause.

Although the Commission is strictly bound to the statutory terms of SB 408 when applying that statute, PGE asserts that when applying other statutes, the Commission need not ignore the effects of SB 408. As the Commission applied deferral law and policy in

Order No. 07-049 to consider the financial impact of the Boardman Outage, PGE argues that the Commission was free to consider the financial impact of SB 408 on PGE's deferral request. PGE observes that the Commission recognized in AR 499 that SB 408 "magnifies the financial impact on utilities of variations in costs between rate cases." *Id*. at 3, citing Order No. 06-400 at 8.

In any case, PGE contends that ICNU should have challenged our pledge in Order No. 06-532 to "consider the tax effects when evaluating issues in other dockets," at the time it was made. PGE observes that ICNU had two rounds of comments after the pledge was made as part of an interim order to raise concerns, but did not.

PGE also rebuts ICNU's contention that the 2005 Legislative Assembly "purposefully declined to mitigate the 'double whammy' impact when structuring the SB 408 automatic adjustment clause." *Id*. at 4. PGE contends that the implementation of the SB 408 automatic clause is not at issue, and there is no evidence that the Legislative Assembly intended to prohibit the Commission from considering SB 408 effects when implementing other law or policy, such as deferral policy. PGE asserts that SB 408 contains no language or terms to that effect, and that legislative history does not suggest such.

Finally, PGE dismisses the need to await pending action by the 2007 Legislative Assembly. PGE asserts that the identified bill is off point, as it directly addresses the "double whammy" impact, rather than the question in this proceeding about whether the Commission may consider SB 408 effects when adopting a deferral application under ORS 757.259. In any case, PGE argues that inferring legislative intent from inaction is speculative, particularly when it may be likely that legislative inaction regarding HB 2479 would be due to a desire to allow SB 408 to operate for some period of time before altering it.

ICNU's Reply

On May 15, 2007, ICNU filed a reply, without asking leave to do so, to PGE's comments. OAR 860-014-0095 does not provide for such a reply, and on May 22, 2007, PGE moved to strike ICNU's reply. PGE argues that ICNU does not have a right to file a reply, and did not seek leave to do so.

PGE is correct that the applicable rules do not provide for ICNU's reply. Such a reply is typically allowed at the discretion of the presiding administrative law judge. Due to the short time frame for reconsideration proceedings under ORS 756.561, replies are often not appropriate. We nevertheless take ICNU's reply into consideration, finding that it better explains ICNU's original position.

ICNU counters PGE's claim that ICNU's complaint about the Commission's pledge in AR 499 is untimely, by asserting that ICNU could not have challenged the pledge until it was implemented. At the time made, a "pledge" lacks finality and ripeness, making it only a possibility that is not yet subject to challenge, ICNU argues.

ICNU also challenges PGE's position "that ICNU must demonstrate that the Commission was legally obligated to adopt a 100 basis point deadband for the Boardman deferral deadband" in order to establish legal error. Reply of ICNU at 3. ICNU clarifies that it does not challenge the deadband itself, only the *adjustment* of the deadband for a reason that ICNU contends is inconsistent with Oregon law, other than the deferral statute. ICNU points out the Commission's statement that the deferral statute "must be read so as to avoid conflict with the other statutory provisions governing ratemaking." *Id*. at 4, citing Order No. 04-108 at 8 (March 2, 2004). ICNU contends that the other statutory provisions applicable here is legislative intent behind SB 408. ICNU argues that:

> . . . by making the adjustment for SB 408 in this case, the Commission is no longer including in rates only those income taxes that are paid to units of government. Instead, the OPUC is impermissibly giving a portion of those income taxes to PGE shareholders. *Id*. at 5.

ICNU finds PGE's reliance on the final decision in UM 995 to argue that the Commission can approve any amount less than the total of eligible deferral costs to be misguided. ICNU asserts that the statement in Order No. 02-469 that if the record in UM 995 supports full recovery, it supports recovery of any lesser number refers only to the sufficiency of an evidentiary record to support a finding that a utility prudently incurred its deferred power costs. ICNU asserts that the issue in UM 995 has nothing to do with the legal error that ICNU claims.

ICNU also argues that PGE is wrong that the Commission is limited to considering SB 408's policies only when applying SB 408. ICNU asserts that the Commission is required to abide by SB 408 when setting all rates.

To PGE's observation that the Commission expressed a distinction between SB 408 implementation and other ratemaking policies such as deferred accounting, ICNU contends that to the extent the Commission discussed deferred accounting in AR 499, it clearly indicated that it cannot approve a deferred account that counteracts SB 408.

Analysis and Resolution

We conclude that ICNU has not demonstrated a sufficient reason to reconsider Order No. 07-049. We find ICNU's claim of error of law to be without merit. Consequently, we deny ICNU's application for reconsideration.

ICNU identifies one alleged error of law. ICNU does not argue that our adoption of a deferral deadband on Boardman related expenses is inappropriate, or that the scope of the deadband is improper. Rather, ICNU argues that our reason for adjusting the deadband to its final size is unacceptable. ICNU asserts that we do not have the discretion to adjust a deferral deadband to account for the effects of ancillary statutory law—*e.g.,* SB 408.

In the case of SB 408, ICNU specifically argues that, because the Legislature chose not to adopt a mechanism in SB 408 to address variations in utility earnings, it foreclosed our ability to consider the effects of SB 408 when establishing rates in proceedings under ORS 756.040, such as this deferral application.

ICNU previously raised this argument in the original proceeding. *See* Order No. 07-049 at 18. We again find it has no merit, for both legal and policy reasons.

The legal question we are presented with by ICNU's petition for reconsideration is whether we have the discretion under the deferred accounting statute to consider ancillary effects caused by SB 408. We conclude that we do. ORS 757.259 vests this Commission with broad authority to address extraordinary deviations in utility expenses or revenues.

We are not persuaded that the Legislative Assembly restricted that authority and prohibited us from considering the effects of SB 408 when setting rates in deferred accounting proceedings. We note that SB 408 contains no language proscribing the Commission from accounting for SB 408 effects on utility costs when setting rates.[1]

When we adopted rules to implement SB 408 in AR 499, we acknowledged an SB 408 effect on utility earnings known as the "double whammy" problem[2], but distinguished between the implementation of a universal offset mechanism to address this issue, and attention to concerns related to the consequences of the "double whammy" problem on a case by case basis. *Id.* at 11. While we declined to adopt the former mechanism, we pledged to be responsive to the latter concerns, as appropriate, "in ORS 756.040 proceedings, general rate cases, and power cost adjustment mechanism dockets." *Id.*

In this proceeding, we concluded that PGE's request for deferral to account for the Boardman Outage warranted an offset to address the "double whammy" problem. As we have discussed in several recent decisions, deferred accounting is an exceptional ratemaking process that is designed to address extraordinary divergences between actual and

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[1] We similarly considered the effects of SB 408 in adopting a power cost adjustment mechanism in PGE's last general rate proceeding. *See* Order No. 07-015 at 27.

[2] In Order No. 06-532, at page 10, we described the problem as follows:

> The so-called "double whammy" situation arises because taxes vary with a utility's earnings. When lower than expected earnings reduce the amount of taxes that will be paid, provision of service is more expensive than was predicted in the rate case, and consumers pay less than the utility's actual costs. At the same time, customers will receive an SB 408 refund because income taxes are less than expected. Utilities argue that this result is unreasonable because it exacerbates their under-recovery and customers do not bear the higher cost of service. Conversely, when a utility's earnings are higher than expected as a result of higher revenues or lower costs, income taxes will also rise, and SB 408 requires a surcharge on ratepayers to compensate for those higher taxes. This would result in further increases in the utility's earnings.

forecast costs. *See, e.g*., Order No. 04-108. Thus, the legislature has specifically authorized us to account for, and address, earning variations pursuant to the deferral statute.

We determined that the Boardman Outage and its financial impact on PGE's earnings qualified for deferred accounting. We limited the deferral, however, to extraordinary outage costs only—*i.e.,* those costs deemed beyond the level of costs expected to be within the measure of normal risk. To estimate these costs, we applied a deadband intended to approximate financial impacts associated with the pertinent measure of normal risk.

In exercising our discretion to grant deferred accounting, we recognized the potential impact of the application of SB 408 on the applied deadband. We did so for the reason expressed by the Citizens' Utility Board of Oregon (CUB), as cited in our prior order:

> [T]he application of Senate Bill 408 may create a reason to reevaluate the appropriate magnitude of a deadband and sharing bands. In the past, a deadband and sharing bands were pre-tax values, and the utility then got a tax deduction, which reduced the impact of these bands. With the implementation of SB 408, these tax deductions will most likely be incorporated in the SB 408 automatic adjustment clause, and so no longer act to mitigate the amounts in a deadband and sharing bands.

Order No. 07-049 at 16-17.

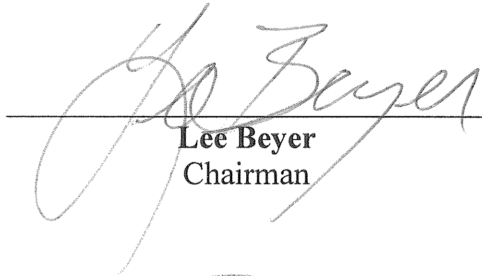
Accordingly, we adopted a 20 basis point deduction so that the deadband would have the same impact on the utility and the customers regardless of SB 408. We deemed this approach consistent with our discretion to account for extraordinary earnings variations under ORS 757.259. Again, we are not persuaded that the Legislative Assembly prohibited such action when passing SB 408.

Finally, we also find it unnecessary to suspend the effectiveness of Order No. 07-049, pending consideration of new legislation. To the extent the Legislative Assembly passes pertinent new legislation, such legislation may be made retroactive as the Legislative Assembly deems appropriate.

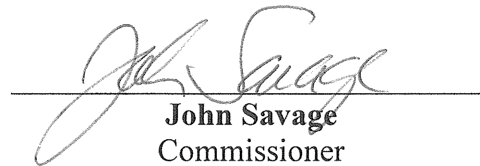
ORDER

IT IS ORDERED that the Industrial Customers of Northwest Utilities' Petition for Reconsideration of Order No. 07-049 is denied.

Made, entered, and effective JUN 0 8 2007.

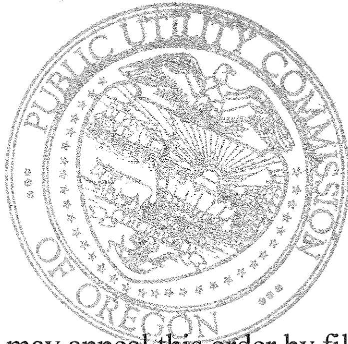


Lee Beyer
Chairman



John Savage
Commissioner

Ray Baum
Commissioner



A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.