ORDER NO. 19-053

ENTERED Feb 19 2019

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1909

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON, Investigation of the Scope of the Commission's Authority to Defer Capital Costs.	ORDER

DISPOSITION: APPLICATION FOR RECONSIDERATION OR REHEARING DENIED; SEPARATE INVESTIGATION OPENED

I. SUMMARY

We deny the request of the Joint Utilities[1] to reconsider or rehear our Order No. 18-423 that clarified our legal authority under ORS 757.259. We affirm and adhere to our conclusion that the deferral statute language deprives this Commission of the ability to authorize deferrals of costs related to capital investments. As we stated in our original order, we acknowledge that this conclusion is contrary to our past limited practice of allowing comprehensive deferrals. We therefore open a new investigation to explore the implications of this decision, and to address options to address recovery of capital costs consistent with our legal authority and the public interest.

II. BACKGROUND

A. Order No. 18-423

ORS 757.259(2)(e) provides that this Commission may authorize the deferral, for later incorporation into rates, of "identifiable utility expenses and revenues." Our Order No. 18-423 focused on the meaning of the legislature's use of the term "expenses."

[1] The Joint Utilities are Portland General Electric Company, PacifiCorp d/b/a Pacific Power, Idaho Power Company, Northwest Natural Gas Company, Avista Corporation, and Cascade Natural Gas Corporation.

In briefing on that issue, the Joint Utilities argued that the term "expenses" should be interpreted broadly to provide the authority to defer all capital costs, including both depreciation costs (return *of* investment) and the costs of capital acquisition (return *on* investment). The Commission Staff, the Oregon Citizens' Utility Board (CUB), and the Alliance of Western Energy Consumers (AWEC) proposed a more narrow interpretation and argued that only the costs associated with the return *of* investment could be deferred.

In Order No. 18-423, we rejected both proposed interpretations. Based on a review of the statutory context, we concluded that the term "expenses" was a term of art that should be given its specialized meaning from the field of accounting. Applying that definition, we concluded that ORS 757.259(2)(e) did not provide the authority to allow deferrals of any costs related to capital investments.

B. Request for Reconsideration or Rehearing

The Joint Utilities ask us to revisit that decision, either through reconsideration of our decision or a rehearing with additional proceedings. CUB and AWEC (collectively Intervenors) oppose the request and ask us to affirm Order No. 18-423 in its entirety.

Under ORS 756.561, a party may seek reconsideration or rehearing of an order within 60 days from the date of service of the order. As relevant here, OAR 860-001-0720(3) provides that reconsideration or rehearing is appropriate where there is either (1) an error of law or fact in the order that was essential to the decision, or (2) good cause for further examination of an issue essential to the decision.

III. DISCUSSION AND RESOLUTION

A. Reconsideration

The Joint Utilities contend that the reconsideration of Order No. 18-423 is required for two reasons. First, they argue that we erred in our interpretation of the term "expenses." According to the Joint Utilities, we are required to adopt a reasonable, non-technical definition of "expenses" consistent with the legislature's stated purpose in enacting the statute. They point out that the deferral statute was intended to confirm the Commission's ability to authorize full revenue requirement deferrals to minimize the frequency of rate cases and match customers' costs and benefits. Because the legislative intent is clear, the Joint Utilities argue that we must interpret "expenses" broadly to effectuate that intent rather than to adopt a technical accounting definition limiting the scope of Commission authority.

The Joint Utilities mischaracterize our obligation in interpreting a statute. There is no obligation to adopt a "reasonable, non-technical" definition of a statutory term. Rather, as we made clear in Order No. 18-423, "our goal is to determine the legislature's intent—that is, what purpose it 'had in mind' when it enacted the statute in question."[2] As the Intervenors point out, if the legislature intended to use a technical term, then we should give that term its technical meaning.

We adhere to our conclusion that the legislature intended to use "expenses" in ORS 757.259 as a term of art, and that the term should be given its meaning from the field of accounting. Although the text of the statute is ambiguous and subject to different interpretations, the statute's context makes clear that ORS 757.259(2)(e) addresses an exercise of accounting, and the statute should be construed accordingly. We find no sufficient reason to revisit our statutory interpretation provided in Order No. 18-423.

We disagree with the Joint Utilities' assertion that the legislative history unambiguously makes clear that the intent of ORS 757.259 was to authorize comprehensive deferrals of a utility's revenue requirement. In Order No. 18-423, we acknowledged the statute's legislative history includes citations to the practice of allowing full revenue requirement deferrals, but clarified that

> the Commission's purpose of seeking the passage of HB 2145 was to create a statutory exception to the rule against retroactive ratemaking—a rule that does not apply to the recovery of capital costs. * * * [A] utility may—at any time—seek to include capital costs in rate base regardless of when those costs were incurred. The only ratemaking principle affecting the recovery of capital costs is regulatory lag.[3]

Thus, we stand by our conclusion that the operative language passed by the legislature reflects the intent not to eliminate regulatory lag, but rather to create an exception for the recovery of costs that would otherwise not be eligible for later rate recovery.

Second, the Joint Utilities contend that we should reconsider Order No. 18-423 because, even under a technical definition of "expenses," regulatory accounting guidance supports inclusion of costs incurred for use of capital assets in deferred accounts. According to the Joint Utilities, once in service but before the assets enter the rate base, costs for use of the asset are chargeable to the period in which they are incurred. Thus, because the costs are chargeable to a particular period, they are eligible for deferral under our definition of expenses. They also contend that we erred in relying on the Financial Accounting

[2] Order No. 18-423 at 5, citing *State v. Gaines*, 346 Or 160, 171 (2009).
[3] *Id*. at 8.

Standards Board's Generally Accepted Accounting Principles (GAAP) to define expenses.

The Joint Utilities' argument applies circular logic. As we explained in Order No. 18-423, capital costs, as they are incurred, are not expensed but rather recorded as Construction Work in Progress (CWIP). Thus, they are not eligible for deferral under required accounting practices. The fact that they are not eligible cannot then form the basis for eligibility when the asset is placed in service. Those amounts remain subject to regulatory lag and not recoverable until placed in rate base.[4] We are also not persuaded by the Joint Utilities' technical arguments related to our use of GAAP definitions, and adhere to our definition of expenses.

B. Rehearing

Alternatively, the Joint Utilities argue that we should allow rehearing. They contend that Order No. 18-423 constitutes a dramatic departure from our precedent, and adopts a result that was not fully briefed by the parties. They argue that we should not implement such a major change without a full and complete review of the underlying analysis and relevant accounting guidance.

That we reached a different legal conclusion than those presented by the parties does not mean that this matter was not fully considered. Indeed, this investigation was opened solely to address the scope of our authority under ORS 757.259(2)(e) to authorize the deferral of capital costs, and included a procedural schedule with four rounds of legal briefing. Moreover, through this reconsideration process the Joint Utilities and the Intervenors have had an additional opportunity to present legal argument on the conclusion we reached in Order No. 18-423.

As we acknowledged in our order, as further discussed below, this decision impacts certain methodologies used for rate recovery of capital costs, and we will open a new investigation to further address those impacts.

C. Implementation of Order No. 18-423

As a second alternative argument, the Joint Utilities contend that, if we decline to revisit Order No. 18-423, we should employ certain regulatory accounting practices to ensure the order is implemented according to its express terms. Specifically, they ask that we

[4] We acknowledge that language contained in the last sentence of the first paragraph on page 8 of Order No. 18-423 does not capture the fact that depreciation expense for an asset may be chargeable for book purposes to a period prior to being placed in rate base. Our reasoning that the cost when incurred is not eligible for deferral remains unchanged.

exercise our discretion to issue regulatory accounting orders to permit utilities to record costs incurred for use of a capital asset as a regulatory asset. The Joint Utilities contend that regulatory accounting orders are necessary to allow any recovery of costs incurred after the in-service date but before the asset is included in the rate base.

Contrary to the Joint Utilities' belief, we did not state or imply that regulatory lag does not exist. To the contrary, we explicitly clarified that capital costs were subject to regulatory lag.[5] As the Intervenors explain, regulatory lag is "the delay between rate cases and within a rate proceeding * * * where rates remain frozen until a new rate is approved."[6] Under traditional ratemaking principles, the utilities bear the risk of increased costs between rate proceedings, including costs associated with capital investments.

D. Conclusion

We find no error of law or fact in the order that was essential to the decision, nor good cause for further examination of an issue essential to Order No. 18-423. Therefore, the request for reconsideration or rehearing should be denied. Having denied the Joint Utilities' request for reconsideration or rehearing in its entirety, we need not consider their request for a stay.

IV. NEW INVESTIGATION

We recognize that our decision in this proceeding precludes our ability to consider the deferral of capital costs. Although the practice was limited (and always subject to Commission discretion), there were certain instances where all parties agreed it was in the public interest to do so.

We therefore open a new investigation to explore the full implications of this decision, and to address options for the recovery of capital costs consistent with our legal authority and the public interest. As we noted in Order No. 18-423, we have broad authority to set rates, and many tools to help incent utility investments that further the interests of ratepayers and the public. These tools include expedited rate proceedings, interim rate relief, and on-going tariffs or mechanisms. We also indicated a willingness to consider adjustments to the rate for Allowance of Funds Used During Construction, if necessary, to ensure that utilities are properly compensated for financing costs associated with

[5] Order No. 18-423 at 8 ("The only ratemaking principle affecting the recovery of capital costs is regulatory lag.")

[6] *In re PacifiCorp, dba Pacific Power Request for a General Rate Revision*, Docket No. UE 246, Order No. 12-493 at 6 (Dec 20, 2012) (citing LEONARD SAUL GOODMAN, THE PROCESS OF RATEMAKING (Vol. I), 44 (Pub. Util. Rpts., Inc. 1998)).

capital investments. We intend this proceeding to help inform our implementation of the operative language used by the legislature in ORS 757.259(2)(e).

V. ORDER

IT IS ORDERED that the request to reconsider or rehear our Order No. 18-423, filed by Portland General Electric Company, PacifiCorp d/b/a Pacific Power, Idaho Power Company, Northwest Natural Gas Company, Avista Corporation, and Cascade Natural Gas Corporation, is denied.

Made, entered, and effective Feb 19 2019.

Megan W. Decker
Chair

Stephen M. Bloom
Commissioner

Letha Tawney
Commissioner

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