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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 115

In the Matter of Portland General Electric)	
Company's Proposal to Restructure and)	ORDER
Reprice Its Services in Accordance with the)	
Provisions of SB 1149.)	

DISPOSITION: PETITION TO STAY DENIED

The Industrial Customers of Northwest Utilities (ICNU), the Citizens' Utility Board (CUB), and the Associated Oregon Industries (AOI) (collectively referred to as Joint Parties) seek reconsideration of Order No. 01-777. In that order, the Commission approved new rate schedules for Portland General Electric (PGE). Because those new rates are scheduled to take effect on October 1, 2001, the Joint Parties also request the Commission to stay the effect of Order No. 01-777 and suspend PGE's compliance tariffs pending disposition of their request for reconsideration.

In this order, we deny the Joint Parties' request to stay Order No. 01-777. For the reasons that follow, we conclude that the Joint Parties have failed to make a showing of irreparable injury and a colorable claim of error in the order. We withhold judgment, however, on the Joint Parties' underlying request for reconsideration. Pursuant to OAR 860-014-0095(4), PGE or any other party may reply to the request by October 9, 2001. Given the nature of the request, the Commission will expedite its review and issue an order resolving the application for reconsideration by October 31, 2001.

Based on our review of the Joint Parties' Application for Reconsideration and Petition to Stay, as well as PGE's Response to the Petition to Stay, the Commission enters the following:

CONCLUSIONS OF LAW

The Commission has not previously considered whether it can stay the effect of new rates approved after a tariff investigation pursuant to ORS 757.215. The Joint Parties contend that a stay of Order No. 01-777 is appropriate under OAR 860-014-0093, which permits a party to seek an "extension of an effective date or of time to comply with a rule or an order of the Commission." PGE contends that rule is inapplicable here, because the Joint Parties are not seeking additional time to comply with the order. Rather, PGE maintains, they are trying to prevent the company from complying with the order.

PGE also contends that the Commission lacks authority to grant the relief requested. As PGE notes, ORS 757.215 gives the Commission authority to suspend PGE's tariffs for a maximum of nine months after the tariffs have been filed. That nine-month period has already expired, and PGE has agreed to extend the suspension period until no later than October 1, 2001. PGE claims that the Joint Parties' request to suspend the tariffs past that date impermissibly seeks to extend the Commission's statutory authority.

Due to the late filing of the Petition to Stay and the expedited review of this matter, we have not had the opportunity to fully examine these threshold legal issues.¹ We preliminarily note that ORS 756.568 authorizes the Commission to "rescind, suspend, or amend any order" after notice and an opportunity to be heard. Moreover, the United States Supreme Court has noted that an agency may delay the effective date of its own determinations "as part of its traditional equipment for the administration of justice."²

We need not resolve these threshold issues, however. Even assuming that the petition to stay is appropriate under OAR 860-014-0093 and consistent with our statutory authority, the Joint Parties have failed to establish that a stay of Order No. 01-777 is appropriate pending our review of their request for reconsideration. ORS 183.482(3)(a), which provides the standard for granting a stay for agencies fully subject to the Administrative Procedures Act (APA), requires a petitioning party to show:

- (A) Irreparable injury to the petitioner; and
- (B) A colorable claim of error in the order.

If the agency finds in petitioners' favor on these two issues, the agency must grant the stay unless it determines that "substantial public harm will result if the order is stayed."³

The Commission is exempt from certain provision of the APA, including those contained in ORS 183.482.⁴ Nonetheless, we previously relied on those APA standards to deny a petition to stay agency action in another docket.⁵ Moreover, the Court of Appeals applied the principles contained in ORS 183.482 to establish standards for deciding whether to stay enforcement of action for another APA-exempt agency.⁶ In the absence of any express legislative direction, we follow the court's example and adopt the standards in ORS 183.482 for deciding whether to stay or postpone compliance of an order.

¹ The Joint Parties filed the petition to stay on September 24, 2001, just seven days before the rates approved in docket UE 115 are scheduled to take effect. PGE filed its response on September 27, 2001.

² *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942).

³ ORS 183.482(3)(b).

⁴ *See* ORS 183.315(6).

⁵ *See, e.g., In the Matter of the Investigation of Universal Service in the State of Oregon*, Order No. 01-140.

⁶ *See Evans v. OSP*, 87 Or App 514 (1987).

In their petition to stay, the Joint Parties contend that PGE's customers and the general public will suffer significant harm if rates are put into effect without resolution of the rate shock issue. They claim the significant rate increases:

could deal the local economy a crushing blow. The rate increase may cause some businesses to close, which is a harm that cannot be remedied if the Commission later grants the Joint Parties' Application for Reconsideration.⁷

The Joint Parties, however, present no evidence to support their allegation that customers would be irreparably harmed if required to pay the increased rates while we expeditiously review the request for reconsideration. We previously recognized the impact these rates will have on residential, business, and industrial customers. As noted above, however, we are committed to complete our review of the Joint Parties' request for reconsideration by October 31, 2001. In the absence of specific evidence that the payment of the increased rates during that one-month period will cause such economic injury, we are reluctant to find that irreparable harm exists.⁸

We need not determine at this point whether the Joint Parties will indeed prevail in their request for reconsideration. They must show, however, that they have a colorable claim and are reasonably likely to prevail. For the Commission to grant reconsideration, OAR 860-014-0095(3) requires the Joint Parties to show that there is:

- (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.

With regard to the first factor, the Joint Parties contend that there is new evidence about the declining state and national economy that was unavailable to the Commission when it made its decision. The Joint Parties present an Oregon Employment Department Press Release, and newspaper articles from *The Wall Street Journal* and the *Oregonian*, which provide

⁷ Petition to Stay at 4.

⁸ *Cf.*, *Merle West Medical Center v. SHPDA*, 94 Or App 148 (1988). (Court interpreted phrase "irreparable harm" in ORS 183.480(3) to exclude financial loss during pendency of an administrative proceeding.)

information about rising unemployment levels, an impending recession, and declining interest rates. As PGE notes, however, the regional and national economy has been declining since the beginning of 2001, or earlier. Moreover, the cited evidence also does not show a material change in the condition of the economy from the time the Commission issued Order No. 01-777, less than one month ago. The Joint Parties also fail to establish how these economic indicators relate to PGE's revenue requirement or otherwise displace traditional rate making principles.

The Joint Parties also allege that the order contains an error of law because the Commission did not discuss their arguments concerning rate shock. Our preliminary review shows otherwise. In Order No. 01-777, we spent considerable effort fully addressing CUB's and ICNU's arguments that PGE's non-power O&M costs should be limited to offset rising power costs.⁹ We also considered the impact of rate increases on PGE's customers. The fact that we did not use the term "rate shock" does not mean that we failed to consider the affect that the new rates would have on PGE's customers.

Moreover, we question the Joint Parties' apparent belief that "rate shock" is a legal doctrine that the Commission can use to reduce a utility's revenue requirement. This belief is reflected in their request for reconsideration, in which the Joint Parties assert "regardless of the prudence of the utility's expenditures, rate increases that cause rate shock are not just and reasonable."¹⁰ As we explained in Order No. 01-777, this Commission discharges its ratemaking function in two steps. First, we determine the utility's revenue requirement. Second, we allocate the revenue requirement among customer classes and services in the rate spread and rate design portion of the case. Rate shock is a factor the Commission may, but is not required to, consider in the rate spread and rate design stage of the case.¹¹ Rate shock plays no role in the first phase of ratemaking—the determination of a utility's revenue requirement.

The Joint Parties' reliance on Order No. 90-920 appears misplaced. That order involved the issue of allocating a telephone company's revenue requirement between non-basic and basic local services. While the Commission expressed concern that an abrupt change toward cost-based pricing for non-basic services could cause rate shock, it did not use rate shock to reduce the telephone company's revenue requirement. Indeed, as PGE points out, the Commission clarified that "having determined the total amount the utility should be allowed to earn from its Oregon intrastate operations, rates must be designed to generate that level of revenues from the various services provided by the company."¹² The cited cases from other jurisdictions similarly confirm that rate shock is one factor to be weighed when the Commission is designing rates and not, as the Joint Parties argue, when the Commission is determining a utility's revenue requirement.

Finally, even if we were to find that the Joint Parties have established irreparable harm and a colorable claim to relief, PGE has submitted evidence that "substantial public harm

⁹ See Order No. 01-777 at 7-16.

¹⁰ Application for Reconsideration at 5.

¹¹ See, e.g., *Publishers Paper Co. v. Davis*, 28 Or App at 189 (1977).

¹² Order No. 90-920 at 2.

will result if the order is stayed.”¹³ Unlike the Joint Parties, PGE provided an affidavit explaining the economic harm to the utility that would result even from a brief stay of the commencement of the new rate period. According to the affidavit, such a stay would cost PGE approximately \$32.4 million per month in lost revenue. A delay of even two weeks, according to PGE, would reduce the company’s return on equity from 10.5 to 9.5 percent and increase its cost of short-term debt.

CONCLUSION

Given the Joint Parties’ late filing of these matters, we have not had the opportunity to fully evaluate the arguments presented in their request for reconsideration. We have committed to review this matter expeditiously, and issue an order granting or denying the request for reconsideration by October 31, 2001. In that review, we will carefully consider the Joint Parties’ request, and any reply thereto, to determine whether any grounds for reconsideration, including good cause, exist under OAR 860-014-0095(3).

We have, however, reviewed the Joint Parties’ petition to stay Order No. 01-777 pending disposition of their request for reconsideration. Without foreclosing final judgment on the underlying request, we conclude that the Joint Parties have failed to make a sufficient showing of irreparable injury and a colorable claim of error in Order No. 01-777. Accordingly, the petition to stay should be denied.

¹³ See ORS 183.483(3)(b).

ORDER

IT IS ORDERED that the petition to stay Order No. 01-777, filed by Industrial Customers of Northwest Utilities, the Citizens' Utility Board, and the Associated Oregon Industries, 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.