BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PACIFICORP D/B/A PACIFIC POWER & LIGHT COMPANY, Respondent.	DOCKET UE-100749

POST-HEARING BRIEF ON BEHALF OF COMMISSION STAFF

(REC PHASE)

ROBERT M. MCKENNA
Attorney General

DONALD T. TROTTER
Assistant Attorney General
Office of the Attorney General
Utilities & Transportation Division

1400 S Evergreen Park Drive SW
P.O. Box 40128
Olympia, WA 98504-0128
(360) 664-1189

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I. INTRODUCTION/SUMMARY

1 In Order 06, the Commission required "the proceeds derived from the sale of RECs to be returned to ratepayers"[1] "in the form of bill credits, identified separately on customers' monthly bills."[2] PacifiCorp did not seek judicial review of these elements of Order 06, and they are now final.

2 In this phase of the docket, the Commission seeks further input on only two issues: 1) whether REC revenues have been properly accounted for; and 2) the proper start date for calculating REC revenues.[3]

3 The record now contains an accurate accounting of REC revenues. Consistent with Staff's presentation, the Commission should select a start date of January 1, 2009, i.e., the beginning of the test period in this case. Using that start date, the appropriate REC revenue amounts are [redacted] for 2009 and [redacted] for 2010.[4] By accepting its Staff's recommendations, the Commission will be able to fully implement its policy decision to return to ratepayers a full and fair share of REC revenues.

II. START DATE ISSUES

4 As we have described, Staff recommends a start date of January 1, 2009. ICNU/ Public Counsel appear to agree.[5] PacifiCorp disagrees, offering a start date of April 3,

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[1] *Utils. and Transp. Comm'n v. PacifiCorp,* Docket UE-100749, Order 06, Final Order Rejecting Tariff Sheets; Authorizing Increased Rates; and Requiring Compliance Filing (March 25, 2011) at 71, ¶ 202.
[2] Id. These basic conclusions are reflected in Conclusions of Law 9 (Order 06 at 123, ¶ 377) and Ordering Paragraph 3 (Order 06 at 124).
[3] Order 06 at 71-73, ¶¶ 203-08.
[4] Breda, Exhibit No. KHB-8C. These amounts reflect REC sales proceeds PacifiCorp realized (i.e., booked) in the respective years, plus imputed REC revenue for RECs PacifiCorp held for compliance in Oregon and California. Year 2009 equals [redacted] realized (this figure agrees with Kusters, Exhibit No. SJK-2C at 1) plus [redacted] imputed REC revenues, for a total of [redacted]. Year 2010 equals [redacted] realized (agrees with Kusters, Exhibit No. SJK-6C at 1) plus [redacted] imputed REC revenues, minus $657,755 per the Docket UE-090205 settlement, for a total of [redacted]. This is the basis for Staff's proposed ongoing calculation as well as the remaining period prior to the rate effective date of April 3, 2011.
[5] Schoenbeck, Exhibit No. DWS-5CT at 2:18 to 3:3.

2011, which is the effective date of the tariffs the Company filed in compliance with Order 06 in this docket.[6]

5 PacifiCorp labels any start date earlier than April 3, 2011, illegal "retroactive ratemaking",[7] and also offers up many other arguments hoping to dissuade the Commission from giving ratepayers all the REC revenues to which they are entitled. For the reasons that follow, the Commission should reject the Company's case and accept Staff's proposed January 1, 2009, start date for calculating REC revenues for return to customers as lawful and consistent with Commission policy.

A. The Commission can deal with the test year REC revenues before it in this case. Therefore, the proper start date for calculating REC revenues is the beginning of the test period: January 1, 2009

6 This is a rate case. The test period is January 1, 2009, to December 31, 2009.[8] The revenues, expenses and rate base amounts for that period are before the Commission for disposition,[9] including the REC revenues attributable to the test period. There is nothing "retroactive" about giving rate recognition to the test year level of REC revenues.

7 For that basic, lawful and commonsense reason, the Commission should use January 1, 2009, as the start date for returning REC revenues to ratepayers.[10] Only in this way will the Commission fully implement its policy decision that ratepayers are entitled to those revenues.

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[6] Kelly, Exhibit No. ALK-1T at 3:21-23.
[7] Kelly, Exhibit No. ALK-1T at 4:12-14.
[8] Dalley, Exhibit No. RBD-1T at 1:12-14.
[9] Breda, Exhibit No. KHB-7TC at 6:15-17.
[10] Breda, Exhibit No. KHB-7TC at 6.

B. Staff's position has been consistent: The Commission should return REC revenues to ratepayers based on actual REC revenues

8 Staff consistently has urged the Commission to return to ratepayers *actual* REC revenues from January 1, 2009 forward. Each change in Staff's numbers has been based on refined calculations using more reliable Company data, and Staff has been transparent in recognizing and explaining these calculations. Nonetheless, PacifiCorp says Staff's REC revenue calculation presents a "moving target".[11] PacifiCorp even thinks Staff now agrees with the Company's proposed use of forecasts to determine REC revenues.[12] The record proves PacifiCorp wrong:

- ***Staff's Rate Case Testimony***: Staff recommends the Commission return to ratepayers the test period actual REC revenues of $4,211,639, and create a regulatory liability account as a vehicle for returning post-test year REC revenues to ratepayers.[13] Source: Company Exhibit No. RBD-3 at 3.5.
- ***Staff's Rate Case Brief***: Staff uses an updated figure obtained from the Company of $4.8 million for test-period actual REC revenues.[14] Source: Company rebuttal Exhibit No. RBD-4T at 10:15-18 and Adjustment 12.5 of Exhibit No. RBD-6.
- ***Staff's May 24, 2011 Filing***. Staff discovers the need to impute REC revenues for Washington RECs PacifiCorp was holding for other states ("held RECs"), and offers a simplified calculation to accomplish that.[15]
- ***Staff's REC Phase Testimony***. Staff's test period actual REC revenues (i.e., before imputation) are [redacted] for 2009 and [redacted] for 2010[16], based on Company

[11] Kelly, Exhibit No. ALK-2CT at 7:19-20.
[12] Kelly, Exhibit No. ALK-2CT at 7:20-23 and at 8:20 to 9:2.
[13] Foisy, Exhibit No. MDF-1TC at 10:20-23.
[14] Staff Brief at 6, ¶ 24.
[15] Staff's May 24, 2011, filing at ¶ 4-5.

Exhibit Nos. SJK-2C, and SJK-3C. Staff further refines its imputation calculation based on discovery,[17] and identifies and resolves the REC revenue realization issue.[18]

C. It is not retroactive ratemaking for the Commission to use a January 1, 2009, start date for returning REC revenues to ratepayers

9 The only legal challenge to Staff's recommended January 1, 2009, start date is PacifiCorp's theory that such a start date is unlawful as retroactive ratemaking.[19] However, Staff's start date does not satisfy the Commission's definition of retroactive ratemaking, or the policy underlying it.

10 The Commission consistently has defined retroactive ratemaking as "surcharges or ordered refunds applied to rates which had previously been paid, constituting an additional charge applied after service was provided or consumed."[20] Under this definition, no retroactive ratemaking exists here because the 2009 REC revenues at issue here are in the same test period as the other costs and revenues at issue in this case. Prior to this docket, the Commission has not set rates using any of the 2009 REC revenues Staff has calculated.

11 In defining retroactive ratemaking, the Commission explains that as a policy matter, "the evil in retroactive ratemaking as thus understood is that the consumer has no opportunity prior to receiving or consuming the service to learn what the rate is or to

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[16] Breda, Exhibit KHB-8C at 3.
[17] Breda, Exhibit KHB-7TC at 7:4 to 10:7. Staff calculates the imputed REC revenue, [redacted] and [redacted] for 2009 and 2010, Respectively, Breda, Exhibit KHB-8C at 4.
[18] Breda, Exhibit No. KHB-9TC at 2:11 to 3:9.
[19] Kelly, Exhibit No. ALK-1T at 4:12-14.
[20] The Commission first enunciated this definition in *Utilities and Transportation Commission v. Puget Sound Power & Light Co.*, Docket U-81-41, Sixth Supplemental Order (December 19, 1988) at 17 (citations omitted). The Commission has restated this definition in several subsequent cases, including, e.g., *Utilities and Transp. Comm'n v. US WEST Communications, Inc.,* Docket UT-970010, Second Supplemental Order (November 7, 1997) at 10, and *Re Puget Sound Energy*, Docket UE-010410, Order Denying Petition to Amend Accounting Petition (November 9, 2001) at 2-3.

participate in a proceeding by which the rate was set."[21] Because no retroactive ratemaking exists in this case, this policy does not apply. But even if it did apply, it would be fully satisfied because all parties have had ample notice that REC revenues and related issues are in dispute in this docket, including the issue of the appropriate start date for giving REC revenues back to ratepayers.[22] There can be no question PacifiCorp knew test-year REC revenues are at issue in this case; the Commission provided the Company a full opportunity to address that issue; and PacifiCorp took that opportunity.

D. Even if Staff's proposed start date had a "retroactive" element, the Commission and the courts generally have approved numerous ratemaking practices with significant retroactive elements

12 Though Staff's proposal to use test year 2009 REC revenues has no retroactive element, even if it did, that would not automatically make it unlawful. In fact, the Commission routinely engages in regulatory practices with significant retroactive elements, almost always to the advantage of the utility, and the courts generally have approved such practices.[23] If these practices are valid, then surely Staff's recommendation in this case is valid, too.

13 One such practice involves power cost adjustment tariffs. The Commission has approved power cost adjustment tariffs with a "true-up" feature that compares actual costs to the costs underlying the tariff rate previously set, and recovers (or credits) the difference through future rate adjustments.[24]

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[21] *Utils. and Transp. Comm'n v. Puget Sound Power & Light Co.*, Docket U-81-41, Sixth Supplemental Order (December 19, 1988) at 17-18.

[22] For example, Staff witness Mr. Foisy testified that the Commission should return the test year level of REC revenues to ratepayers and establish a regulatory asset for REC revenues the Company realized after the test period. Foisy, Exhibit No. MDF-1CT at 10:20-23.

[23] Interestingly, Staff testified to several concrete examples of these practices (Breda, Exhibit No. KHB-7TC at 3:11 to 5:5), but the Company elected not to respond to them.

[24] In 1988, the Commission approved the first power cost mechanism with a true-up feature, called the "Energy Cost Adjustment Clause" or "ECAC". *Utils. and Transp. Comm'n v. Puget Sound Power & Light Co.*, Docket

14 Another practice involves the setting of future rates to recover costs the utility deferred from a prior period.[25] One example is the hydro cost surcharge the Commission approved for PacifiCorp in Docket UE-080220,[26] under which the Company recovered $6.25 million in certain hydro costs, dollar for dollar. Another example is Puget Sound Energy (Puget) Docket UE-090704,[27] in which the Commission approved a tariff surcharge allowing Puget to recover the costs of the Tenaska regulatory asset.

15 Yet another practice involves setting future rates by using an amortization of costs the utility incurred only in the test period (or costs the utility accumulated in prior

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U-81-41, Sixth Supplemental Order (December 19, 1988). In approving the ECAC, the Commission held that the true-up feature did not constitute retroactive ratemaking. Id. at 16-19. By this holding, the Commission overruled, *sub silentio,* the Commission's earlier decision in *Re Puget Sound Power & Light Co.*, Cause U-79-73, Order (December 31, 1979). In that case, the Commission rejected a similar true-up provision as unlawful retroactive ratemaking, reasoning that because the true-up occurred after service was rendered, it affected the price of the electricity previously provided. According to the Commission, this also would violate RCW 80.28.020, which requires a utility's rates be specified in a tariff at the time service is provided. Order in Cause U-79-73 at 2-3.

The Commission's decision in Docket U-81-41 (approving the ECAC with its true-up feature) appears consistent with the weight of judicial authority. See Stephan H. Krieger, *The Ghost of Regulation Past: Current Applications of the Rule Against Retroactive Ratemaking in Public Utility Proceedings*, 1991 U. Ill. L. Rev. 983 (1991) at 1016-18: "by allowing for refunds or surcharges through the reconciliation process, EACs [energy adjustment clauses] allow commissions to engage in what otherwise would be considered retroactive ratemaking. Most courts, however, have found no retroactivity problem with EACs." (Footnotes omitted) Contra, *Re Cent. Vt. Pub. Service Comm'n,* 473 A.2d 1155 (1984); *State ex rel. Util. Consumers Coun. et al. v. Mo. Pub. Service Comm'n*, 585 S.W.2d 41, 57 (Mo. 1979) (though the court did not hold expressly that the operation of the energy cost adjustment clause constituted retroactive ratemaking, the court held the agency required specific statutory authority to adopt such a mechanism, but had no such authority).

Courts have used different rationales in upholding such power cost adjustment tariffs. Some courts uphold such tariffs on the basis they contain a "fixed mathematical formula" that guides the setting of future rates. E.g., *City of Norfolk v. Va. Elec. & Power Co.,* 90 S.E.2d 140, 148 (1955); *United Gas Corp. v. Miss. Pub. Service Comm'n*, 127 S.W.2d 404 (Miss. 1961). The Commission cited the *United Gas Corp.* decision for this reasoning in approving the true-up feature of the ECAC in Docket U-81-41. Sixth Supplemental Order (December 19, 1988) at 18, n.10. Other courts reason that retroactive ratemaking applies only to the setting of general rates, not the rate treatment of specific categories of costs, such as power costs in a power cost adjustment clause. E.g., *So. Calif. Edison Co. v. Pub. Utilities Comm'n,* 576 P.2d 945, 953-55 (Calif. 1978); *MGTC, Inc. v. Wyo. Public Service Comm'n,* 735 P.2d 103, 107 (Wyo. 1987).

[25] The retroactive element involved with recovery of deferred costs is that the utility incurred the cost in a prior period, but is recovering that cost through rates in a much later period. The Commission does not consider this retroactive ratemaking: "When the regulatory authority allows some, or all of the prior deferred expenses in rates, that is not considered a violation of the prohibition against retroactive ratemaking, but instead is recognized as a shift in the timing of the collection of the expense", citing Leonard Saul Goodman, *The Process of Ratemaking*, at 322. *In re Petition of PacifiCorp,* Docket UE-020417, Order Regarding Scope of Proceeding and Threshold Legal Issues (September 27, 2002) at 7.

[26] *Utils. and Transp. Comm'n v. PacifiCorp,* Docket UE-080220, Order 05 (October 8, 2008) at 4, ¶ 11.

[27] *Utils. and Transp. Comm'n v. Puget Sound Energy, Inc.,* Dockets UE-090704 and UG-090705, Order 11, Rejecting Tariff Sheets; Authorizing and Requiring Compliance Filing (April 2, 2010) at 65, ¶¶ 179-80.

periods).[28] A good example comes from a Puget case, Cause U-82-38. During the test period in that case (calendar year 1982), Puget abandoned a nuclear power project, and asked the Commission to amortize to rates the resulting extraordinary property loss. Notably, Puget had accumulated these costs in the test period as well as many years prior.

16 The Commission granted Puget's request after the test period, in mid-1983,[29] allowing Puget to amortize $47.5 million in abandoned plant costs over the ensuing 10 years.[30] In other words, for the decade following the Commission's order in Cause U-82-28, Puget ratepayers paid Puget millions of dollars to Puget for failed generating project costs the utility had incurred not just in the test period, but mostly in periods prior to the test period.

17 If ratepayers can be called upon to pay back millions in costs a utility incurred in the decades leading up to a test period, surely ratepayers can receive the benefits of REC revenues the utility received during the test period.

18 Another amortization example involves "Y2K" preparation costs. As the Commission will recall, there was a concern at the turn of the 21st century that computer systems might not recognize the year "2000", and thereby cause significant business

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[28] The retroactive element of an amortization of a test period cost is because the cost to be amortized will be included in rate setting in subsequent rate cases, thus the utility would be recovering in future periods a cost the utility incurred only in a prior rate case test period. (Note: The amortizations we discuss here are one-time costs the utility incurred in, but not after, the test period, and are recovered by the utility over future periods. In other words, the amortization is designed to allow the utility to recover an historic cost incurred in the test period, not to set a representative future level of that cost. We therefore distinguish these types of amortization from "normalization"; a term that applies to a recurring cost, but where the test period may contain an inappropriate level of that cost, so the cost level is set at a representative ("normalized") level for ratemaking purposes).

We found no case in which a court rejected an amortization of a test period item on retroactivity grounds. For an example of a court expressly approving such an amortization over a retroactive ratemaking challenge, see *Wisconsin's Environmental Decade, Inc. v. Wisconsin Public Service Commission,* 298 N.W.2d 205, 212 (Wisc. App. 1980) (court upheld a commission order that included in operating expenses for ratemaking purposes the amortized portion of storm damage costs the utility incurred in a prior year).

[29] *Utils. and Transp. Comm'n v. Puget Sound Power & Light Co.,* Cause U-82-38, Third Supplemental Order (July 22, 1983).

[30] Id. at 20 and 29 (table shows first year amortization amount).

disruption. Utilities, among most businesses in the economy, expended considerable sums to assure that would not happen. In Dockets UE-991606 and UG-991607, the Commission allowed Avista to recover its one-time test period Y2K costs over the ensuing five years.[31]

19 Similarly, in PacifiCorp Docket UE-090205, the Commission approved the amortization of a one-time, $2.901 million in pension gain the Company recorded in the test period in that case.[32]

20 Other practices include special treatment of extraordinary costs, such as a tariff surcharge designed to collect extraordinary, previously-incurred storm damage costs, and rate consideration of unanticipated "windfall" revenues the utility received prior to the period the commission used to set rates.[33]

21 In conclusion, if there is no impediment to raising current rates using the "true-up" provisions of a power cost adjustment tariff, by including costs deferred from prior periods, by amortizing costs the utility incurred only in a rate case test period, or by any of the other

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[31] *Utils. and Transp. Comm'n v. Avista Corp.,* Dockets UE-991606 and UG-991607, Third Supplemental Order (September 29, 2000) at 63, ¶ 234.

[32] *Utils. and Transp. Comm'n v. PacifiCorp,* Docket UE-090205, Order 09 (December 16, 2009) at 11-12, ¶¶ 29-32. The Company had a pending accounting petition on the subject, but the pension gain was addressed in the rate case (i.e., the Commission did not consolidate the accounting petition docket with the rate case).

[33] An example of a court-approved special tariff surcharge to recover a previously incurred, extraordinary cost is *Narragansett Electric Co. v. Burke,* 415 A.2d 177 (R.I. 1980). In that case, a Rhode Island utility incurred substantial costs to address a severe winter storm. Afterward, the utility filed a tariff surcharge to recover those costs. The Rhode Island commission applied the retroactive ratemaking rule to deny recovery. However, the Rhode Island Supreme Court reversed, rejecting a mechanical application of the retroactivity rule: "No rule should be blindly applied, however, without prior consideration of the underlying policy that originally precipitated its adoption." 415 A.2d at 178 (R.I. 1980). The court referred to a "plethora" of other state commission cases allowing recovery of similar costs. 415 A.2d at 179. *Contra, S. C. Elec. & Gas Co. v. S. C. Pub. Service Comm'n,* 272 S.E.2d 793 (S.C. 1980) (commission lacked authority to order a general refund to ratepayers of utility gains on power exchange transactions outside a general rate case).

In *Turpin v. Oklahoma Corporation Commission,* 769 P.2d 1309 (Okla. 1988), the utility received "windfall" revenues outside the period examined for revenues and expenses. The court specifically approved the Oklahoma commission's consideration of such revenues, rejecting a retroactive ratemaking challenge because commission consideration of those revenues "has nothing to do with mistakes in past ratemaking." 769 P.2d at 1332 (Okla. 1988).

practices identified above, then surely it is appropriate for ratepayers to receive the benefits of REC revenues PacifiCorp booked in the test period in this case.[34]

E. PacifiCorp's many non-legal challenges miss the mark

22 In addition to its legal position, PacifiCorp tries to erect as many other roadblocks as possible to deprive ratepayers from their full and fair share of REC revenues. However, most of the Company's arguments are untimely attacks on the Commission's decision that ratepayers are entitled to REC revenues via a rate credit, and some Company arguments are utterly without substance. There are substantial reasons for the Commission to reject the Company's remaining arguments.

1. It is too late to argue for an earnings test in this docket

23 The Company thinks it would be unfair to give ratepayers the REC revenues that belong to them because PacifiCorp allegedly did not earn its "authorized" return.[35] However, in Order 06, the Commission did not apply an earnings test as a prerequisite for returning REC revenues to the ratepayers who deserve them, and the Commission's order is final on that issue. Notably, PacifiCorp made no claim of illegality or impropriety when it recovered $6.25 million, dollar for dollar, via a deferred hydro cost surcharge.[36] The same "no earnings test" condition should apply here.

2. If "cherry-picking" is a problem, PacifiCorp has a "green thumb"

24 As an offshoot to its untimely "earnings test" argument, PacifiCorp employs the pejorative term "cherry-picking" to attack the Commission's decision to give ratepayers

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[34] Put another way, if Staff's proposal here is unlawful "retroactive ratemaking," that would call into question the legality of power cost adjustment tariffs, deferred cost recovery and amortizations of test period costs as well.

[35] Kelly, Exhibit No. ALK-1T at 4:17-20.

[36] *Utils. and Transp. Comm'n v. PacifiCorp,* Docket UE-080220, Order 05 (October 8, 2008) at 4, ¶ 11.

REC revenues through a tariff credit.[37] PacifiCorp claims that decision is "one-sided" because it does not consider offsetting cost increases.[38]

25 First off, this Company argument is also too late, because the Commission made the rate credit decision in Order 06 in this docket, and that order is final on that issue.

26 In any event, the Company's argument here is entirely self-serving, because PacifiCorp has made millions of dollars "picking cherries". In fact, the Company has several tariff surcharges that isolate specific costs and return them to the Company, dollar for dollar, with no earnings test predicate to collection.

27 One such tariff is Schedule 96, the hydro cost surcharge the Commission approved in Docket UE-080220. The Company has "cherry-picked" about $6.25 million from ratepayers under that tariff.[39] Another example is Schedule 191, the Company's conservation program surcharge (called the "Systems Benefits Charge"), under which the Company "cherry-picks" millions of dollars from ratepayers each year.[40]

28 The list goes on, but the bottom line is the Commission already has made the appropriate policy decision regarding RECs: REC revenues belong to ratepayers and should be returned to them via a rate credit. The Company's "cherry-picking" challenge to that policy decision is not only decidedly one-sided, it is simply too late.

3. PacifiCorp can manage its operations under the Commission's REC policy

29 The Company worries that any start date prior to April 3, 2011, might provide management "improper incentives".[41] Normally, it would be logical to assume PacifiCorp

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[37] Kelly, Exhibit No. ALK-2CT at 2:7.
[38] Id. at 3:14-20.
[39] *Utils. and Transp. Comm'n v. PacifiCorp,* Docket UE-080220, Order 05 (October 8, 2008) at 4, ¶ 11.
[40] E.g., Dalley, Exhibit No. RBD-3 at 3.1.1.
[41] Kelly, Exhibit No. ALK-1T at 5:23 to 6:2.

has managers capable of properly and effectively managing the utility under applicable laws and policies, including the Commission's sound policy decision that REC revenues belong to ratepayers.

30 Unfazed by such logic, PacifiCorp takes aim at the "regulatory environment" in this state. In this startling attack, PacifiCorp condemns the Commission-ordered inter-jurisdictional allocation methodology, the Commission's decision on rate of return in this docket, the Commission's use of historical test periods to evaluate rate filings, and even the lack of legally-enforceable exclusive service territories in this state (!).[42]

31 Needless to say, the Commission should give no credence to PacifiCorp here. Notably, the two other investor-owned electric utilities are able to operate successfully under the same statues and policies. Moreover, some of these statutes and policies are long-standing; one has been in effect for a century,[43] and another has been in effect for almost 80 years.[44] It strains credulity for PacifiCorp to suggest it cannot effectively manage its Washington operations under such requirements.

32 As to rate of return, while Staff believes the Commission's rate of return determination in this case is generous, if the Company truly believed that rate of return is insufficiently supported, the Company could and should have sought judicial review; the Company did not. Neither did the Company seek judicial review of the inter-jurisdictional

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[42] Kelly, Exhibit No. ALK-2CT at 12:3 to 13:14.

[43] Regulation of electric utilities in this state began 100 years ago (chapter 117, laws of 1911). Neither in that 1911 legislation, nor on any subsequent legislation, has the commission been given authority to grant exclusive service territories to an electric utility company.

[44] In Docket UE-050684, PacifiCorp proposed an inter-jurisdictional method called the "Revised Protocol". The Commission rejected that method because it violated RCW 80.04.250. *Utils. and Transp. Comm'n v. PacifiCorp*, Docket UE-050684, Order 06, Order Denying PacifiCorp's Petition For Reconsideration; Clarifying Portions of Order 04 (July 14, 2006) at 5-12, ¶¶ 14-33. The Company was advocating for a different inter-jurisdictional allocation method as a consequence of its acquisition of a higher cost, Utah-based utility. Surely PacifiCorp was aware of RCW 80.04.250 when it made that acquisition, and when it elected to propose the Revised Protocol. In fact, the Legislature enacted that statute enacted nearly 80 years ago (chapter 165, § 4, laws of 1933).

allocation methodology when the Commission approved it in 2006. Notably, the Company has proposed not one substantial change to that allocation method in the ensuing five years. Nor has the Company proposed a change to historical test period ratemaking in recent memory.

33 If there is a problem here, the "regulatory environment" is not the culprit. If it is necessary to assign blame, we suggest it be assigned to PacifiCorp's inaction, inability or ineffectiveness in justifying its positions as lawful and in the public interest.

4. If the Company restates its earnings, that is not the Commission's problem

34 PacifiCorp's next complaint is that it may have to adjust its reported earnings if the Commission uses a start date prior to the beginning of the rate year.[45] However, in Order 06, the Commission placed PacifiCorp on clear notice that the door remained open on the issue of the appropriate start date for returning REC revenues to ratepayers.[46] If PacifiCorp failed to adequately advise investors of the possibility of an earnings restatement, the Commission and the ratepayers bear no responsibility for the Company's oversight.

5. Other Company arguments are completely without substance

35 This section collects several Company arguments that have no support. The Commission should reject these Company arguments summarily.

36 *PacifiCorp's Interpretation of Paragraph 207.* No less than two Company witnesses say Paragraph 207 of Order 06 forecloses Staff's proposed January 1, 2009, start date because the Commission did not list a date before January 1, 2010, in that paragraph.[47]

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[45] Kelly, Exhibit No. ALK-1T at 5:20-23.
[46] Order 06 at 73, ¶ 207.
[47] Kelly, Exhibit No. ALK-2CT at 10:9-32; Dalley, Exhibit No. RBT-28CT at 5:1-19.

37 PacifiCorp interpretation is wrong, pure and simple. First, by its terms, Paragraph 207 merely suggests *some* possible dates, not *all* possible dates. The Commission did not use words of prescription or exclusion in that Paragraph.

38 Second, PacifiCorp's interpretation contradicts the part of Paragraph 203 where the Commission more broadly refers to unanswered questions regarding the amount of REC revenues "for the test, post-test, and rate periods implicated by this case...",[48] and the part of Paragraph 203 where the Commission required PacifiCorp to track REC proceeds received beginning January 1, 2009.[49] If the Commission actually decided to deprive ratepayers from 2009 REC revenues, it would have no reason to require the Company to track revenues starting in January 2009.

39 Last but not least, PacifiCorp's interpretation violates legal rules of interpretation.[50]

40 *"Triple Counting".* Next up is the Company's egregious misstatement that Staff has "triple-counted" REC revenues by calculating 2010 REC revenues in addition to 2009 revenues.[51] Obviously, under a tracking mechanism with a 2009 start date, 2010 REC revenues will be involved. In addressing 2010 REC revenues, Staff simply is responding to the Commission's explicit request for an accurate accounting of REC revenues for the "test year" and "post-test year" periods.[52] Staff cannot be criticized for providing the Commission what it requests.[53]

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[48] Order 06 at 71, ¶ 203.
[49] Id.
[50] Paragraph 207 uses the term "including" when it lists possible dates. As a matter of law, "including" is a term of enlargement, not limitation. *Queets Band of Indians v. State,* 102 Wn.2d 1, 4, 682 P.2d 909 (1984) (citation omitted).
[51] Kelly, Exhibit No. ALK-2CT at 3:5-11.
[52] Order 06 at 71-72, ¶ 203.
[53] In any event, Staff recommends the tariff credit rate be maintained until the ratepayers' full and fair share of REC revenues is returned. That is not "triple counting" in any respect.

41 *2008 REC Revenues.* Another Company argument totally without support is the Company's insistence that Staff is "penalizing" the Company by refusing to credit the Company for $576,254 in 2008 REC revenues, which the Company apparently included in its rate filing in Docket UE-080220.[54] As the Company concedes, the settlement in Docket UE-080220 was a "black box" settlement.[55] As such, there simply is no basis for the Company to suggest that any REC revenues were included in the development of the settled rates in that case.

42 *Settlement in Docket UE-090205.* Without citing even a single word from the actual settlement documents, PacifiCorp makes the vacuous claim that Staff's proposed January 1, 2009, start date violates the Settlement Stipulation the Commission approved in Docket UE-090205.[56] The Company even suggests Staff's January 1, 2009, start date would frustrate the settlement process.[57]

43 The Commission should reject these claims out of hand because that Settlement Stipulation has no impact whatsoever on the Commission's right to select, on its own motion, a January 1, 2009, start date in this docket. In any event, the key language in the Settlement Stipulation in Docket UE-090205 expressly contemplates Staff making its start date proposal here:

> Nothing in this Stipulation limits or expands the ability of any Party to file for deferred accounting or request that the Commission take any other action regarding PacifiCorp's Washington-allocated RECs. For purposes of any such filing, the Parties agree that this case includes $657,755 in Washington-allocated REC revenues for the 2010 rate effective period.[58]

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[54] Kelly, Exhibit No. ALK-2CT at 7:6-12.
[55] Kelly, Exhibit No. ALK-2CT at 7:14-15.
[56] Kelly, Exhibit No. ALK-1T at 3:27-29 and at 6:17-21.
[57] Kelly, Exhibit No. ALK- 2CT at 2:11-12.
[58] Settlement Stipulation at 8, Part I, ¶ 22.

44 As Staff explained,[59] this language could not be more clear: the Settlement Stipulation places "no limit" on any Party requesting the Commission to take "any … action" regarding Washington-allocated RECs, other than to agree that the prior rate case included $657,755 in RECs for 2010.[60] This means PacifiCorp is entitled to a credit or offset for that $657,755, which Staff has accomplished in its calculation of REC proceeds.[61] In other words, Staff is *implementing* that settlement, not violating it.

45 In sum, the Commission should reject categorically the foregoing Company arguments as without a basis; these Company arguments are useless to the Commission.

III. REC PROCEEDS CALCULATION ISSUES

46 Staff's calculates [redacted] in REC revenues for 2009 and [redacted] in REC revenues for 2010. These figures reflect the full measure of Washington-allocated REC revenues owed ratepayers for those years. These figures represent Washington's share of REC revenues PacifiCorp actually sold and booked in those years, plus an amount of imputed revenues for Washington's share of specific RECs PacifiCorp held for compliance in other states.[62]

47 The key calculation issue is the selection of the appropriate start date, which we addressed in Section II above. That issue impacts the other calculation issues as well.[63] The remaining calculation issues are when REC revenues should be recognized, and how imputed REC revenues for "held RECs" should be calculated.

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[59] Breda, Exhibit No. KHB-7TC at 13:20 to 14:15.
[60] Id. and Breda, Exhibit No. KHB-8C at 1:49.
[61] Id.
[62] Breda, Exhibit No. KHB-7TC at 6:19 to 9:10 and Exhibit No. KHB-8C.
[63] For example, PacifiCorp does not impute any REC revenues for RECS held in any period prior to the beginning of the rate year, which is the Company's start date.

A. REC revenues should be recognized in the year the RECs are sold, not the year the RECs were generated

48 Consistent with the basic accounting principle of revenue recognition, Staff calculates REC revenues based on when PacifiCorp earned the revenue, which is the date the RECs were sold.[64] Therefore, Staff's calculation starts with the REC revenue realized and provided by the Company in Exhibit Nos. SJK-2C and SJK-6C.[65]

49 On the other hand, PacifiCorp and ICNU/Public Counsel depart from standard accounting principles and calculate REC revenues based on the date the RECs were generated. Thus, for example, PacifiCorp and ICNU/Public Counsel remove from 2009 REC revenues the RECs PacifiCorp actually sold in that year, which were generated in 2008.[66]

50 Apparently, PacifiCorp uses this odd revenue recognition method because that is the manner in which the Company performs its forecasts, which not only fails to justify its use here, but it also provides one more reason why the Commission should not use the Company's forecasts.

51 For its part, ICNU/Public Counsel offers only that [redacted]."[67] However, if the issue involved a building (i.e., a tangible asset), no one would allocate the proceeds from the sale of that building to the prior periods when that building provided value. Instead, one

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[64] Breda, Exhibit No. KHB-9TC at 3:5-9: "Revenue recognition requires the consideration of when revenue is realized and earned."

[65] Staff's calculation uses PacifiCorp actual realized revenue as a first step. Breda, Exhibit No. KHB-8C line 3, lines 14-16 and 33-35, or [redacted] for 2009, Exhibit No. SJK-2C at 1, and [redacted] for 2010, Exhibit No. SJK-6C at 1. Staff then imputes revenue for those RECs PacifiCorp held in the respective year for compliance in Oregon and California, or [redacted] for 2009, Exhibit No. KHB-8C at 4, and [redacted] for 2010, Exhibit No KHB-8C at 4. After subtracting the REC revenues included in the settlement in Docket UE-090205 ($657,755), Exhibit No. KHB-8C at 5, the Staff's total proposed REC revenue for 2009 and 2010 is [redacted] and [redacted], respectively.

[66] Schoenbeck, Exhibit No. DWS-5CT at 4:1 to 6:2; Dalley, Exhibit No. RBD-28CT at 14:1 to 15:6.

[67] Schoenbeck, Exhibit No. DWS-5CT at 4:22-23.

would recognize the revenues on the date of sale. The Commission has concluded that RECs are "intangible assets",[68] and PacifiCorp and ICNU/Public Counsel offer no reason why a different analysis or result is justified.

52 In sum, the Commission should reject PacifiCorp and ICNU/Public Counsel's revenue recognition proposal. Instead, the Commission should follow standard accounting principles and require REC revenues to be recognized in the year the RECs were sold.

B. The Commission should impute REC revenues assuming only marketable RECs would be sold, and at a rate based on actual experience

53 Staff's imputation calculation is logically based on the assumption that PacifiCorp would have sold Washington's share of RECs the Company held to meet renewable portfolio standards in other states ("held RECs"). The first issue is what number of held RECs would have been marketable had PacifiCorp sold them rather than held them?

54 Staff included all held RECs generated by wind resources and small hydro resources, but excluded held RECs generated by large hydro and biomass projects because [redacted][69] Consequently, it is appropriate to remove these unmarketable RECs from the imputation analysis. [redacted]

55 The second issue is what amount of these marketable held RECs would PacifiCorp have sold had PacifiCorp not held them? Staff assumes PacifiCorp would have sold the marketable held RECs at the same rate the Company sold other marketable RECs in the

[68] "Renewable Energy Credits are *intangible assets* that represent the right to claim the environmental attributes of a renewable generation facility associated with electricity generated from that facility." (Emphasis added). *Re Amended Petition of Puget Sound Energy, Inc.,* Docket UE-070725, Order 03, Final Order Granting, in Part, and Denying, in Part, Amended Petition: Determining Appropriate Accounting and Use of Net Proceeds from the Sales of Renewable Energy Credits and Carbon Financial Instruments (May 20, 2010) at 5, ¶ 13.

[69] Kusters, Exhibit No. SJK-7C.

marketplace.[70] By contrast, ICNU/Public Counsel assume the Company would have sold [redacted] percent of Washington's share of held RECs.[71] As Ms. Breda explained, while ICNU/Public Counsel's approach is not unreasonable, Staff's approach makes more sense because it reflects actual sales for the applicable period.[72] Consequently, the Commission should accept Staff's method as more reasonable and fair to the Company.

IV. TARIFF ISSUES

56 In applying the tariff credit, the Commission should use actual RECs (plus imputed revenues for held RECs), not projections.[73] To implement this proposal, the 2009 Washington actual REC revenue currently included in the balancing account should be increased to Staff's total Washington REC revenues of [redacted] and [redacted] for 2009 and 2010, respectively.

57 The Company's miserable record of forecasting REC revenues is thoroughly documented in the record.[74] Using Company forecasts would undoubtedly result in massive rate swings, and the Commission should reject the use of forecasts to set the tariff rate for that reason. Instead, the Commission should maintain the current tariff rate for the next few years.[75] The balancing account will include REC revenue per Staff's calculation from January 1. 2009 forward.[76] Based on Staff's calculation for 2009 and 2010, the balancing

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[70] The percentages are shown in Breda, Exhibit No. KHB-8C at 21 and 40.
[71] Breda, Exhibit No. KHB-9TC at 3:21-22.
[72] Breda, Exhibit No. KHB-9TC at 4:1-6.
[73] Breda, Exhibit No. KHB-7TC at 10-11.
[74] The Company's REC revenue forecasts have been atrocious. For example, PacifiCorp projected $576,254 in REC revenues for 2009 and $657,755 for 2010; actuals were [redacted] and [redacted], respectively. Breda, Exhibit No. KHB-7TC at 10:19 to 11:5. (All figures are before imputation of REC revenues for Washington RECs PacifiCorp held for compliance in other states). Inadequate forecasts continue with the Company's rate year calculations: the Company's forecast went from $0 (i.e., the Company forecast it would hold all RECs) to [redacted]. Dalley, Exhibit No. RBD-1T at 9:16 to 10:3 ($0 forecast) and PacifiCorp's May 24, 2011, filing, Confidential Attachment 4 at 1 [redacted] rate year forecast including an imputation for RECs generated from wind facilities only).
[75] Breda, Exhibit No. KHB-7TC at 10-11.
[76] Based on Staff's method, Breda, Exhibit No. KHB-7TC at 6:19 to 9:10 and Exhibit No. KHB-8C.

account should be at [redacted],[77] less amounts already returned to customers through the current tariff.

58 This method provides a consistent return of REC revenue to customers without the need to use Company forecasts that have proven completely unreliable, to say the least. Staff proposes that the rate remain at the present level until the balancing account is exhausted or until ongoing REC sales indicate a different level is appropriate".[78]

V. ORDER 06 INTERPRETATION ISSUE

59 There is an issue regarding the proper interpretation of Order 06, with respect to the $4.8 million in REC revenue discussed in Paragraph 204. In that Paragraph, the Commission refers to that $4.8 million as "the amount of REC revenues to which Staff and PacifiCorp agree." This is the amount the Commission ordered be returned to ratepayers in via the tariff credit. The record is crystal clear that as of the date of Order 06, Staff agreed this $4.8 million was the amount of actual RECs for the test period: calendar year 2009.[79]

60 PacifiCorp apparently interprets Paragraph 205 of Order 06 as a Commission decision that the $4.8 million REC revenue amount is merely a projection applicable to 2011.[80] PacifiCorp even suggests Staff agrees to use Company forecasts to establish REC revenues for purposes of the tariff credit,[81] which is false.[82]

61 Commission reconciliation of this language in Paragraph 204 and 205 would be helpful, though ultimately, this issue may be moot given the fact that the scope of this phase

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[77] The Company would credit new REC revenue (calculated based on the Staff method) to the balancing account by month.
[78] Breda, Exhibit No. KHB-7TC at 10:14-15.
[79] Staff Brief at 6, ¶ 24, based on Dalley Exhibit No. RBD-4T at 10:15-18, Exhibit No. RBD-7C, and Exhibit No. RBD-6 at 12.5.
[80] Kelly, Exhibit No. ALK-2C at 8:20 to 9:13
[81] E.g., Kelly, Exhibit No. ALK-2CT at 7:19-23.
[82] See ¶ 8, supra.

of the case is for determining the appropriate start date for returning REC revenues to ratepayers.

VI. CONCLUSION

62 For the reasons stated above, the Commission should calculate REC revenues to be [redacted] for 2009 and [redacted] for 2010, based on a start date of January 1, 2009. The Commission should order PacifiCorp to continue to track Washington share of REC sales proceeds based on Staff's proposed calculation methods, and return them to ratepayers via the tariff credit mechanism as proposed by Staff.

DATED this 4th day of November 2011.

Respectfully submitted,

ROBERT M. MCKENNA
Attorney General

DONALD T. TROTTER
Assistant Attorney General
Counsel for Washington Utilities and
Transportation Commission Staff