BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PACIFICORP D/B/A PACIFIC POWER & LIGHT COMPANY, Respondent.	DOCKET NO. UE-100749

PHASE II REPLY BRIEF ON BEHALF OF

PUBLIC COUNSEL

NOVEMBER 18, 2011

REDACTED VERSION

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I. INTRODUCTION

1. This Reply Brief responds to a number of legal and factual arguments made by PacifiCorp in its Initial Brief filed in this docket on November 4, 2011. Public Counsel continues to advocate for all positions put forth in its Opening Brief and incorporates them herein. As discussed below, the arguments made by PacifiCorp in its Initial Brief are without merit. The only just result in this case is to credit ratepayers the full value of 2009 and 2010 Washington-allocated renewable energy credits (RECs).

II. DISCUSSION

A. PacifiCorp Incorrectly Argues that the Puget Sound Energy REC Order Does Not Apply in this Case.

2. PacifiCorp incorrectly argues that the Commission's Order in the Puget Sound Energy (PSE) REC case, Docket No. UE-070725, does not support parties' proposals to credit ratepayers the full value of 2009 and 2010 REC revenues.[1] PacifiCorp states that the PSE REC case is not applicable here because it arose from an accounting petition. However, the principle relied upon in the PSE REC case is not limited by the fact that there was an accounting petition filed in that case. Moreover, the fact that there was an accounting petition filed in the PSE REC case is not relevant here since, unlike in PSE, this case involves only test period and post-test period revenues.

3. PacifiCorp also argues that the Puget REC Order was one of first impression and thus should only be applied to the Company on a prospective basis. This, too, is incorrect. While the

[1] PacifiCorp's Initial Post-Hearing Brief on Rate Treatment For Renewable Energy Credit Revenues, ¶¶ 45–52 (hereinafter PacifiCorp Brief).

PSE REC Order was the first time that the Commission specifically addressed revenues from the sale of RECs, it is hardly the first time that the Commission has addressed proper treatment of revenues derived from the sale of ratepayer-funded assets. PacifiCorp cannot reasonably argue that it was unaware of previous Commission decisions establishing that ratepayers' entitlement to the value of ratepayer-funded assets. This is a well-established principle not just in Washington, but across the nation.[2] Moreover, the principle has been repeatedly applied by this Commission—including in PacifiCorp cases—regarding revenues from the sale of SO_2 emission credits, which are similar to RECs in most respects.[3] Washington is not alone in holding that ratepayers are entitled to the full benefit of RECs; the Utah,[4] Wyoming,[5] and Idaho[6] Commissions also require utilities to return the full benefit of REC sales to ratepayers. Finally, it

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[2] *Democratic Cent. Comm. Of the Dist. of Columbia v. Washington Metro. Area Transit Comm'n.*, 458 F. 2d 786 (D.C. Cir. 1973), *reh. den., cert. den.*, 415 US 935 (1973) (finding that ratepayers had borne the burdens associated with the assets being sold and therefore allocating all of the gain from the sale to ratepayers). This Commission has adopted the legal principles set out in *Democratic Central*. *See In the Matter of the Application of Avista Corporation for Authority to Sell Its Interest in the Coal-Fired Centralia Power Plant*, Docket Nos. UE-991255 et al., 2nd Suppl. Order (March 6, 2000), ¶ 49.

In Washington, the Supreme Court reiterated this principle in 1997, stating that "a regulated utility cannot fail to return to ratepayers the full value of a lucrative ratepayer-funded asset." *US West., Inc. v. WUTC,* 134 Wn.2d 74, 96, 949 P.2d 1337 (1997) .

[3] *See e.g., Petition of Puget Sound Energy, Inc. for an Order Regarding the Authorization to Sell Sulfur Dioxide Emission Allowances and an Associated Accounting Order,* Docket No. UE-001157, Final Order (Sept. 19, 2011); *In the Matter of the Petition of the Washington Water Power Company Seeking Blanket Authorization to Sell and Lease Sulfur Dioxide Emission Allowances and Seeking an Associated Accounting Order*, Docket No. UE-961156, Commission Decision and Order Granting Authorization (Feb. 12, 1997); *In the Matter of the Petition of PacifiCorp Seeking Blanket Authorization for the Sale of Surplus Sulfur Dioxide Emission Allowances*, Docket No. UE-940466, Commission Decision and Order Granting Authorization (April 13, 1994).

[4] *See In the Matter of the Application of Rocky Mountain Power for Authority to Increase its Retail Electric Utility Service Rates in Utah and for Approval of its Proposed Electric Service Schedules and Electric Service Regulations, Consisting of a General Rate Increase of Approximately $161.2 Million Per Year, and for Approval of a New Large Load Surcharge*, Docket No. 07.035-93, Report and Order on Revenue Requirement, p. 91 (describing one party's dispute regarding REC proceeds: "UIEC argues the amount of revenue included in the test period from the expected sales of renewable energy credits . . . is too low"). Utah uses a future test year, so REC revenues are forecasted in rates. Thus, while parties disputed the method used to forecast revenues, there was no dispute that 100 percent of forecasted revenues were included in rates and credited to ratepayers.

[5] Exh. No. KCH-1T, p. 8:8-11 (Higgins Direct).

[6] *In the Matter of the Application of Idaho Power Company for Authority to Retire its Green Tags*, Case No. IPC-E-08-24, Order No. 30818, p. 2 (May 20, 2009).

could be argued that the Commission is not retroactively applying the PSE REC Order, as it was issued before the conclusion of this case, and the Commission is only applying the Order to revenues at issue in this case.

B. PacifiCorp's Reliance on the ALJ's Order Dismissing the Joint Complaint in Docket No. UE-110070 is Misplaced.

4. PacifiCorp relies on the ALJ Order dismissing ICNU and Public Counsel's Joint Complaint in Docket UE-110070 to support its retroactive ratemaking and impermissible collateral attack arguments, even though, by the Company's own admission, the Commission did not endorse the Order's reasoning or conclusions.[7] In the Notice of Finality, the Commission stated: "In allowing this order to become final, the Commission does not endorse the order's reasoning and conclusions. If cited in the future, the order must be identified as an Administrative Law Judge's order."[8]

Even if the ALJ Order did represent Commission reasoning and conclusions, it would still not support PacifiCorp's arguments here since the ALJ Order did not address the facts of the current case, i.e., a request for a particular ratemaking treatment of test year and post test year revenues. Unlike in this case, the Joint Complaint did request amendment of a filed rate and rate-setting order.[9] Here, no party has sought amendment of any prior Commission order or filed

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[7] PacifiCorp Brief, ¶¶ 29, 59, and 81, citing *Washington State Attorney General's Office and ICNU v. PacifiCorp d/b/a Pacific Power & Light Co.*, Docket No. UE-110070, Initial Order Dismissing Complaint (Order 01) (hereinafter ALJ Order). The Company also cites to the ALJ order in arguing that any amendment of the prior orders could be prospective only and therefore moot since those orders were supplanted by the Commission's final order in this case. *Id.* at ¶ 83. This point is irrelevant as no party is seeking an amendment of a prior order here.

[8] *See Washington State Attorney General's Office and ICNU v. PacifiCorp d/b/a Pacific Power & Light Co.*, Docket No. UE-110070, Notice of Finality, ¶ 4.

[9] *See* Exh. No. DWS-13, ¶ 25.

rate. Notably, the ALJ Order acknowledges that REC issues were being litigated in this case.[10] Thus, the reasoning of the ALJ Order does not apply to the facts at hand.

6. Additionally, the Joint Complaint was brought independently, and therefore no pre-set time period of revenues were at issue. Here, however, the 2009 and 2010 revenues are expressly at issue since they occurred during and after the test period of this case. Thus, any discussion of retroactivity in the ALJ Order pertains to a different set of facts and is not applicable here.

7. Finally, the ALJ Order hinged on the ALJ's determination that the statutory deadline for bringing such a complaint had passed. Accordingly, the ALJ's discussion of retroactive ratemaking and collateral attacks, while informative, is not the critical basis for the dismissal and therefore are not binding here.

C. PacifiCorp Incorrectly Suggests that Non-Company Parties Could Have, or Should Have, Sought Deferred Accounting of Extraordinary REC Revenues.

PacifiCorp states that the record in this case demonstrates that Staff, Public Counsel, and ICNU were all aware of the Company's significant REC sales by January 2010 when ICNU included a CPUC document as an exhibit in the PSE REC case.[11] This is untrue. In fact, there was nothing in the PSE REC record that showed the actual magnitude or price of PacifiCorp REC sales. The CPUC document that PacifiCorp refers to is a publicly-filed advice letter and does not include the actual sales contracts or prices.[12] The first time parties were actually provided information regarding the significant level of revenues the Company began receiving in

[10] ALJ Order, ¶ 8.
[11] PacifiCorp Brief, ¶¶ 21-22 and 66.
[12] Exh. No. DWS-7, pp. 25-65.

the last quarter of 2009 was on July 28, 2010, nearly three months after PacifiCorp filed this case.[13]

9. Even if parties were aware of the extraordinary REC revenues as of January, 2010, as the Company claims, such awareness would not limit the Commission's ability to address those revenues here. As Staff,[14] ICNU,[15] and Public Counsel[16] have all pointed out, these revenues are properly addressed in this case since they were incurred during and after the current test period.

D. PacifiCorp Fails to Recognize Exceptions to the Rule Against Retroactive Ratemaking for Extraordinary Items and for a Company's Failure to Disclose Relevant Information.

10. PacifiCorp correctly points out that one common exception to the rule against retroactive ratemaking—the use of deferred accounting to track costs during one period with the possibility for inclusion in rates an a future period—does not apply in this case.[17] However, PacifiCorp fails to note that there are other potential exceptions to the rule, including first for "extraordinary" items, and second, for situations where a Company has failed to disclose relevant information.[18]

11. These two additional exceptions apply to this case. First, as discussed in Public Counsel's Opening Brief, PacifiCorp's 2009 and 2010 REC revenues fit the criteria of an "extraordinary" item because they were both of unusual magnitude and not recurring.[19] In

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[13] Phase II Opening Brief on Behalf of Public Counsel, ¶ 43 (hereinafter Public Counsel Brief).
[14] Post-Hearing Brief on Behalf of Commission Staff (REC Phase), ¶ 6 (hereinafter Staff Brief).
[15] Phase II Opening Brief on Behalf of ICNU, ¶ 11 (hereinafter ICNU Brief).
[16] Public Counsel Brief, ¶¶ 6-11.
[17] PacifiCorp Brief, ¶¶ 62-65.
[18] PacifiCorp only discusses what it deems the "primary exception" in its argument that "no exception to the rule against retroactive ratemaking" applies in this case. *Id.* at ¶¶ 62-68. The multiple potential exceptions are discussed at length in Stephen Kreiger's frequently-cited *University of Illinois Law Review* article, "The Ghost of Regulation Past." Staff, ICNU, and Public Counsel all cite to Krieger's article in their opening briefs.
[19] Public Counsel Brief, ¶¶ 37-41.

addition, the exception for situations where a company has failed to disclose relevant information applies in this case since, as the record shows, PacifiCorp failed to disclose actual 2009 and 2010 REC revenues either to parties or to the Commission.[20]

E. PacifiCorp's Arguments Related to the Filed Rate Doctrine, Impermissible Collateral Attacks, and Single-Issue Ratemaking Miss the Mark.

12. PacifiCorp raises a number of legal arguments regarding why the Commission should not return to ratepayers the full value of REC revenues starting on January 1, 2009. These arguments are all variations on the Company's central argument—that it should be allowed to retain 2009 and 2010 REC revenues. This central argument, and the variations offered by PacifiCorp, are wrong.

1. Crediting ratepayers the full value of 2009 and 2010 Washington-allocated RECs would not violate the filed rate doctrine or the prohibition on collateral attacks.

13. PacifiCorp presents arguments against crediting ratepayers 2009 and 2010 REC revenues based on the filed rate doctrine and the prohibition against collateral attacks.[21] Both of these arguments are irrelevant to this case. No party has sought to amend any filed rate, or to attack the Commission's orders in either the 2008 or 2009 general rate case. Instead, as Staff noted, crediting ratepayers 2009 and 2010 REC revenues in this case would implement, rather than violate, the 2009 settlement.[22] Moreover, the parties' proposed calculations fully recognize the

[20] *Id.* at ¶¶ 18-36; ICNU Brief, ¶¶ 18-21.
[21] *See* PacifiCorp Brief, ¶¶ 77–82.
[22] Staff Brief, ¶ 15.

outcomes of the 2008 and 2009 rate cases as they reflect a proper level of REC revenues in the rate effective periods for each of those cases.[23]

2. Addressing 2009 and 2010 RECs in this case does not constitute improper single-issue ratemaking.

14. PacifiCorp also argues that crediting REC revenues as proposed by Staff, ICNU, and Public Counsel would constitute improper single-issue ratemaking. This argument too, is incorrect. In its initial filing in this case, PacifiCorp provided a full accounting of 2009 (test period) actual costs and proposed numerous normalizing and pro forma adjustments extending beyond 2009.[24] The Company and other parties also proposed numerous power cost adjustments and related issues.[25] Staff, ICNU, and Public Counsel have made their proposals within the current general rate case. Parties proposed various treatment of 2009 and 2010 REC revenues to which PacifiCorp had the opportunity to respond to in cross-answering.[26] Indeed, this case has involved in-depth consideration of the Company's power costs, including costs associated with REC-generating assets.[27] Thus, while the Commission decided to procedurally bifurcate its consideration of 2009 and 2010 REC revenues in isolation outside of this case, the issue of 2009 and 2010 REC revenue credits *is* being considered along with the associated cost elements and not as a single issue.

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[23] The proposed offsets are zero for 2009 recognizing that the 2008 case was resolved via black box settlement, and over $650,000 in 2010 since the settlement in that case specified such an amount. *See* Staff Brief, ¶¶ 41-45; ICNU Brief, ¶¶ 34-36; Public Counsel Brief, ¶¶ 57-58.
[24] *See generally* Exh. No. RBD-1T (Dalley Direct).
[25] *See* Order 06, ¶¶ 103-193.
[26] *See* Exh. No. MDF-1CT, p. 11:3-6 (Foisy Responsive); Exh. No. RJF-8CT, pp. 61:19-64:16 (Falkenberg Responsive); Exh. No. GND-5T, pp. 2:11-8:11 (Duvall Rebuttal).
[27] *See e.g.,* Order 06, ¶¶ 103-193.

F. PacifiCorp's Arguments Against Crediting Ratepayers REC Revenues Based on Risk and Disincentive are Baseless.

15. PacifiCorp offers a number of policy arguments as to why the Commission should not credit ratepayers the full value of 2009 and 2010 Washington-allocated RECs. As discussed below, these arguments are baseless and should be disregarded.

1. Any risk arising out of crediting ratepayers 2009 and 2010 REC revenues is of PacifiCorp's own making.

16. PacifiCorp argues that the Commission should not credit ratepayers 2009 and 2010 REC revenues because doing so would "introduce significant risk" to the Company by upsetting long-standing Commission policies.[28] The Commission should disregard this argument for a number of reasons. First, crediting the full value of 2009 and 2010 REC revenues to ratepayers eliminates, rather than creates risks regarding Commission policies and principles. It puts into action the long-standing policy that ratepayers are entitled to the proceeds of ratepayer-funded assets. It is also in keeping with the basic principle when a Company files a general rate case, its test period and post-test period revenues are at issue.[29]

17. Second, even if there were any risk created by crediting REC revenues to customers, it would be of the Company's own making. It was the Company's choice not to comply with the Commission's long-standing policy to credit ratepayers all revenues from ratepayer-funded assets. Moreover, the Company could have sought a Commission order regarding proper accounting treatment of REC revenues previously but chose not to do so. Thus, any risk of having these revenues addressed in this case is of the Company's own making.

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[28] PacifiCorp Brief, ¶ 48. The risk the Company claims would arise is that established ratemaking policies would be put into question. *See* Exh. No. ALK-1T, pp. 4:22-5:10 (Kelly Phase II Direct).
[29] *See* Staff Brief, ¶ 6; Exh. No. KHB-7CT, p. 6:15-17 (Breda Phase II Direct).

2. Crediting ratepayers REC revenues should have no bearing on PacifiCorp's efforts to effectively manage its costs and revenues for ratepayers' benefit.

18. PacifiCorp argues that crediting ratepayers 2009 and 2010 REC revenues will "discourage future actions by the Company to take the initiative to improve its earnings."[30] This argument should be disregarded for a number of reasons. PacifiCorp witness, Andrea Kelly, confirmed in discovery that crediting ratepayers 2009 and 2010 REC revenues will not result in the Company failing to take any cost-saving measures. Also, PacifiCorp has a duty to prudently manage costs and revenues, regardless of the regulatory treatment given to its 2009 and 2010 revenues—any failure to do so would result in disallowances going forward. Finally, the Company will always have an incentive to increase its earnings since a portion of those earnings translate into shareholder profits.

G. ICNU and Public Counsel's Calculations of 2009 and 2010 REC Revenues are Proper.

19. Through the testimony of Mr. Don Schoenbeck, ICNU and Public Counsel recommended a level of revenue credit for 2009 and 2010. Public Counsel accepted in its Opening Brief a number of refinements to these calculations offered by the Company, ultimately recommending a REC revenue credit for 2009 and 2010 of **[Begin Confidential]** XXXXXXXXXXXXXXXX **[End Confidential]** respectively. The additional arguments regarding calculation of 2009 and 2010 revenues put forth in PacifiCorp's Initial Brief are without merit—the Commission should reject these additional arguments and should order PacifiCorp to credit ratepayers **[Begin Confidential]** XXXXXXXXXXXXXXXX **[End Confidential]** for 2009 and 2010 respectively.

[30] PacifiCorp Brief, ¶ 48.

1. The Commission should disregard PacifiCorp's request for 2009 and 2010 REC revenues to be offset by lower than predicted hydro net power costs.

20. PacifiCorp requests that, should the Commission credit ratepayers 2009 and 2010 REC revenues, it should offset those revenues by an amount it claims was under-forecast in 2009 and 2010 net power costs due to lower than expected hydro conditions.[31] The Commission should deny this request.

21. PacifiCorp correctly points out that REC revenues are related to power costs. However, this relationship does not support offsetting REC revenues with a newly-asserted NPC shortfall. Furthermore, this is the first time that PacifiCorp has requested to recover the alleged shortfall—the Company could have, but chose not to raise the issue at any earlier phase of this proceeding. Thus, the Company has not shown the prudence of these costs, nor has any other party had the opportunity to examine the validity or the accuracy of the Company's request.

22. A more fundamental reason why the Commission should disregard this request, however, is that it is beyond the scope of this phase of the proceeding; PacifiCorp is improperly seeking to expand the limited scope beyond what the Commission expressly directed. In Order 06, the Commission limited this phase of the case to determining the appropriate start date for the REC revenue tracking account and the calculation of 2009 and 2010 REC revenues.[32] The Company's new request for consideration of NPC shortfalls is irrelevant in determining the appropriate start date for crediting REC revenues and level of those sales revenues.

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[31] PacifiCorp Brief, ¶ 86.
[32] Order 06, ¶¶ 206-07.

2. The REC revenue credits for 2009 and 2010 should reflect an assumption that 100 percent of RECs held for compliance with other states' renewable portfolio standards were "sold."

23. Calculation of the REC revenue credit for 2009 and 2010 should reflect an assumption that 100 percent of RECs held for compliance with other states' renewable portfolio standards (RPS) were "sold." Basing a calculation of 2009 and 2010 revenue credits on any lesser percentage would unjustly enrich PacifiCorp.

24. Both PacifiCorp and Staff suggest that the calculation of the 2009 and 2010 REC revenue credits should assume less than 100 percent of RECs were sold.[33] PacifiCorp and Staff miss the mark here. Absent the ability to use Washington's RECs to meet these RPS standards, PacifiCorp would have had to purchase 100 percent of the RECs needed to meet such standards. Thus, PacifiCorp received 100 percent of the value of these RECs.[34] In addition, as explained in ICNU's Opening Brief, those RECs held for compliance in other states are the most valuable RECs and therefore should be assumed sold.[35] Unlike RECs generated from large hydro which cannot be used to meet any states' RPS requirements, the RECs at issue here *are* highly marketable and valuable.

III. CONCLUSION

25. Allowing PacifiCorp to retain 2009 and 2010 REC revenues would unjustly enrich the Company at ratepayers' expense; ratepayers, not the Company, have borne the full cost of REC-generating assets. It would also reward PacifiCorp's repeated failure to be forthcoming about its REC revenues, and incentivize further gamesmanship in the ratemaking process.

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[33] Staff, however, recognized that ICNU and Public Counsel's calculation was "reasonable." *See* Staff Brief, ¶ 55.
[34] Assuming 100 percent sale of Washington-allocated RECs held for compliance in other states is also in keeping with Mr. Schoenbeck's overall approach to calculating 2009 and 2010 REC revenue credits, which is based on the time RECs are generated and not on when PacifiCorp actually realized revenue from REC sales.

26. Thus, Public Counsel respectfully requests that the Commission disregard the arguments put forth in PacifiCorp's Initial Brief, order the Company to credit Washington ratepayers 100 percent of the value of 2009 and 2010 Washington-allocated RECs, and adopt the calculation of revenues proposed by ICNU and Public Counsel witness, Don Schoenbeck. In addition, Public Counsel requests that the Commission adopt the modifications to the bill credit mechanism so as to base customer credits on actual, rather than forecast revenues.

27. DATED this 18th day of November, 2011.

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[35] ICNU Brief, ¶ 31.