

**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

Complainant,

vs.

PACIFICORP d.b.a. PACIFIC POWER,

Respondent.

**DOCKET UE-100749
PHASE 2**

**PACIFICORP'S
REPLY BRIEF
ON RATE TREATMENT FOR
RENEWABLE ENERGY CREDIT REVENUES**

November 18, 2011

REDACTED

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I. INTRODUCTION

1. In their briefs filed on November 4, 2011, in Phase 2 of this proceeding, Commission Staff (Staff), Public Counsel, and the Industrial Customers of Northwest Utilities (ICNU) (collectively, Responding Parties) provide various justifications for retroactive recovery of PacifiCorp's (the Company) revenues from the sale of renewable energy credits (RECs) in 2009 and 2010.¹ They claim that such recovery does not constitute retroactive ratemaking, and even if it did, the Commission should make an exception to the rule against retroactive ratemaking in this case.
2. The Commission's precedent is clear that retroactive ratemaking is illegal, and the Commission has always applied this rule equally to utility and customer interests. The Responding Parties' REC tracker proposals are irreconcilable with this historic precedent and practice. Adoption of the Responding Parties' approach would result in unjust and unreasonable rates in this case and undermine regulatory certainty to the detriment of both utilities and customers in the future.
3. A running theme in Staff's brief is that it is "too late" for the Company to object to Staff's claim for REC revenues from 2009 and 2010.² But Staff itself has raised a number of new claims and issues in this phase of the docket, notably including the argument that the Commission should now retroactively impute REC revenues. All of PacifiCorp's arguments are

¹ Post Hearing Brief on Behalf of Commission Staff (Staff's Phase II Opening Brief); Phase II Opening Brief of Public Counsel (Public Counsel's Phase II Opening Brief); Phase II Opening Brief of the Industrial Customers of Northwest Utilities (ICNU's Phase II Opening Brief).

² Staff's Phase II Opening Brief ¶¶ 1, 23, 25. Specifically, Staff claims that the Company is foreclosed from arguing against including 2009 and 2010 REC revenues in rates without offsetting costs being included, and in favor of an earnings test before doing so. Staff's position is unreasonable, as the Commission specifically left the issue of whether 2009 and 2010 REC revenues should be included in rates to this phase of the case.

consistent with Order 06³ and with Washington law requiring that the Commission evaluate rates to determine whether they are just and reasonable.

4. Staff also mischaracterizes the Company's legal and policy arguments against retroactive recovery of REC revenues as "erecting as many other roadblocks as possible" to crediting REC revenues to customers.⁴ This argument ignores the fact that customers have received a REC revenue credit in PacifiCorp's rates since late 2008. It also unfairly attacks the Company for meeting its responsibility to the Commission to raise the serious legal and policy infirmities in the Responding Parties' REC tracker proposals, especially when the adoption of their proposals would eliminate the Company's ability to earn its rate of return.

5. The Commission's Order 06 clearly requested a detailed proposal for operation of a REC tracking mechanism going forward.⁵ PacifiCorp's REC tracker proposal comprehensively responds to this request. In contrast, the Responding Parties have submitted tracker proposals designed to recover as much retroactive REC revenue as possible, without fully considering how these proposals will operate on a forward-looking basis. As explained in the Company's response to the Commission's Bench Request 8, Staff only applied its REC tracker calculation to 2009 and 2010 REC revenues and failed to address how its REC tracker proposal could be applied on a forward-looking basis now that the Company is holding RECs for Washington renewable portfolio standard (RPS) compliance.⁶ This Commission should reject Responding Parties' REC tracker proposals not just because they are illegal and unfair, but also because in Staff's case it is unworkable.

³ *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Docket No. UE-100749, Order 06 (Mar. 25, 2011) [hereinafter "Order 06"].

⁴ Staff's Phase II Opening Brief ¶ 22.

⁵ Order 06 ¶ 208.

⁶ *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Docket No. UE-100749, PacifiCorp's Response to Commission Bench Request 8 (Nov. 14, 2011).

6. The Commission's ultimate charge is to "regulate in the public interest."⁷ The Commission has found that "[r]egulating in the public interest means regulating consistently with laws, rules, and pertinent prior decisions. Doing so provides certainty, consistency, and fairness to both utility companies and their customers."⁸ To approve the Responding Parties' proposals for recovery of 2009 and 2010 REC revenues, the Commission must either contort its ratemaking policies to find that the proposals do not constitute retroactive ratemaking, or develop an unprecedented and one-sided exception to the rule against retroactive ratemaking. Such outcomes are inconsistent with the Commission's mandate to regulate in the public interest to ensure "certainty, consistency, and fairness."

II. DISCUSSION

A. Staff, Public Counsel, and ICNU Unpersuasively Attempt to Distort Normal Test Year Conventions to Evade the Rule against Retroactive Ratemaking.

7. The Responding Parties claim that allowing REC revenues from 2009 through 2011 in rates in this case does not constitute retroactive ratemaking because certain REC revenues were included in the 2009 test period in this proceeding.⁹ This "test period" argument is inconsistent with the Commission's ratemaking process and the evidence in this case. As the Company explained in its Initial Post-Hearing Brief, the Commission makes known and measurable changes to test period results to develop rates for the rate effective period.¹⁰ To be known and measurable, adjustments to test year operations must be known to have occurred during the test

⁷ RCW 80.01.040.

⁸ *Wash. Utils. & Transp. Comm'n v. Verizon NW, Inc.*, Docket No. UT-040788 Order 11 ¶ 140 (Oct. 15, 2004).

⁹ Staff's Phase II Opening Brief ¶ 10; Public Counsel's Phase II Opening Brief ¶ 10; ICNU's Phase II Opening Brief ¶ 9.

¹⁰ *Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-090134 *et al.*, Order 10 ¶¶ 41-44 (Dec. 22, 2009).

year *and* “[i]t must also be demonstrated (*i.e., known*) that the effect of the event will be in place during the 12-month period when rates will likely be in effect.”¹¹

8. In this case, the Responding Parties propose including three years of REC revenues in the 12-month rate effective period—actual and imputed 2009 and 2010 REC revenues on top of the 2011 rate effective period REC revenues now included in rates.¹² There is no evidence in the record that demonstrates that REC revenues for the 12-month period beginning on April 3, 2011 will be over \$*****, which is what the Responding Parties have proposed including in rates for the rate year.

9. In addition to the fundamental problem associated with doubling up 2009 historic and 2011 projected REC revenues, the Responding Parties’ test period argument does not even purport to address incorporation of 2010 REC revenues into current rates. Nowhere do the Responding Parties explain why, if 2009 REC revenues can be incorporated in future rates because they were included in the test period, 2010 REC revenues, which are not in the test period or the rate effective period, can be incorporated in future rates.

10. The Responding Parties’ argument is also inconsistent with the evidence in this case because it assumes that the \$4.8 million of REC revenues now in rates reflects 2009 REC revenues and not a forecast of REC revenues for the rate effective period.¹³ Most fundamentally, this interpretation is inconsistent with the Commission’s order in this proceeding. The Commission accepted “for purposes of establishing 2011 credits the amount of REC revenues to which Staff and PacifiCorp agree, approximately \$4.8 million,”¹⁴ and authorized a true up of these initial credits with actual REC revenues received during the 12-month rate effective

¹¹ *Id.* ¶ 45.

¹² Kelly, Exh. No. ALK-2CT 3:2-11.

¹³ See Staff’s Phase II Opening Brief ¶ 6.

¹⁴ Order 06 ¶ 204.

period.¹⁵ The Responding Parties' interpretation would have the Commission ordering a true up of REC revenue credits paid in the 2011-2012 rate year to 2009 REC revenues, which on its face is nonsensical.

11. Second, the Responding Parties' interpretation is inconsistent with testimony of PacifiCorp, Staff, and ICNU in this case. Staff wrongly claims that the "2009 REC revenues at issue here are in the same test period as the other costs and revenues at issue in this case."¹⁶ It is undisputed, however, that the Company's net power costs in this case were based upon a forecast for the 2011 rate effective period.¹⁷ The record is also clear that the REC revenues included in the Company's rebuttal filing were based on a forecast for the 2011 rate effective period, consistent with the test period net power costs.¹⁸

12. In addition, Staff has acknowledged that the Company's 2008 general rate case (GRC) included a forecast of REC revenues for 2009.¹⁹ This testimony is in direct conflict with Staff's current claim that "the Commission has not set rates using any of the 2009 REC revenues Staff calculated."²⁰ Given Staff's concession that the Commission set rates in 2008 covering 2009 REC revenues, it is unreasonable to find that the REC credit in this case was set using 2009 REC revenues.

13. ICNU's testimony provides further support for the fact that the \$4.8 million of REC revenues included in rates in this case reflects forecast REC revenues in the rate effective period, not historic 2009 REC revenues. ICNU's witness, Mr. Falkenberg, testified that his proposed REC adjustment was "a reasonable estimate of REC revenues allocated to Washington during

¹⁵ *Id.* ¶ 205.

¹⁶ Staff's Phase II Opening Brief ¶ 10.

¹⁷ Dalley, TR. 370:5-13; Duvall, Exh. No. GND-5T 2:11-20.

¹⁸ *Id.*

¹⁹ Breda, Exh. No. KHB-7TC 11:3-5.

²⁰ See Staff's Phase II Opening Brief ¶ 10.

the rate effective period,” noting that his calculation “is close to the 2009 actual REC revenues, but less than the most recent 12 months of data available.”²¹

14. Third, the Responding Parties’ position is inconsistent with the matching principle. As Public Counsel has previously argued: “REC revenue issues are directly related to the proper analysis of power costs. . . . [W]hen wind generation costs are included in the power costs sought to be recovered, proper ratemaking principles requires that revenues derived from the related RECs must also be considered. . . . Failure to take these known and measurable revenues into account would be a violation of the matching principle.” It would have been a violation of the matching principle to set rates in 2011-2012 using REC revenues from 2009 and net power costs from 2011-2012.²²

15. The briefs of ICNU and Public Counsel rely on the Commission’s treatment of a contract buy-down in a 1999 Avista rate case as the primary authority in support of their test year argument.²³ The case is readily distinguishable, which may explain why Staff failed to argue the Avista contract buy-down precedent in its brief, despite having cited it in testimony. The Avista case addressed the proper rate treatment of a one-time contract buy-down payment received from an affiliate in the test period.²⁴ It does not address or provide any precedent for the most troubling aspects of the Responding Parties’ proposals: the retroactive restatement of a revenue item previously reflected in rates to capture actual and imputed revenues; the double or triple counting of a single test year revenue item; and the use of a test year theory to capture revenues (but not costs) from the intervening period between the test period and the rate effective period.

²¹ Falkenberg, Exh. No. RJF-1T 63:14-17.

²² See Duvall, Exh. No. GND-5T 6:12-16.

²³ Public Counsel’s Phase II Opening Brief ¶¶ 8-10.

²⁴ *Wash. Utils. & Transp. Comm’n v. Avista Corp.*, Dockets No. UE-991606 and UG-991607 ¶¶68-69, 75 (Sept. 29, 2000).

16. Public Counsel cites other Commission orders that it claims allowed recovery of test period and post-test period revenues and expenses.²⁵ Public Counsel's reference to the Puget Sound Energy, Inc. (Puget) production tax credit (PTC) tariff schedule does not support this claim. That tariff was established to credit PTCs associated with a facility that was not even in service when the Commission's order was issued and therefore operated on a prospective basis.²⁶ Public Counsel also relies on orders allowing the use of deferred accounting after notice by the Company.²⁷ None of these orders stand for the proposition cited by Public Counsel.

17. Finally, in briefing and testimony the Responding Parties claim that the Puget REC case stands for the proposition that all REC revenues should be returned to customers.²⁸ Their citation to the Puget REC case is misleading. The Responding Parties ignore the fact that the Commission found on equitable grounds to return less than all of the REC revenues at issue in that proceeding to customers.

B. There is no Basis for Adoption of the Responding Parties' One-Sided, Ad Hoc Exceptions to the Rule against Retroactive Ratemaking.

18. The Responding Parties argue that even if their proposals constitute retroactive ratemaking, the Commission should make an exception to the rule in this case. The Responding Parties propose various exceptions to the rule, none of which are supported by Washington precedent or the facts of this case.

²⁵ Public Counsel's Phase II Opening Brief ¶ 10.

²⁶ *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy, Inc.*, Docket No. UE-050870, Order 04 ¶ 13 (Oct. 20, 2005).

²⁷ *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Docket No. UE-080220, Order 05 ¶ 11 (Oct. 8, 2008); *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Docket No. UE-090205, Order 09 ¶ 16 (Dec. 16, 2009). Public Counsel's reference to abandoned plant costs in Cause U-82-38 is addressed in paragraph 51 below.

²⁸ Breda, Exh. No. KHB-7TC 1:10-17; ICNU's Phase II Opening Brief ¶ 4, Public Counsel's Phase II Brief ¶ 3.

1. The Responding Parties' Proposed Exceptions Undermine the Important Protections of the Rule Against Retroactive Ratemaking.

19. The rule against retroactive ratemaking contains important protections for both customers and utilities.²⁹ As the Responding Parties note in their briefs, the rule against retroactive ratemaking ensures that customers pay rates that reflect the cost of service at the time the service is rendered.³⁰ The Responding Parties, however, ignore the fact that the rule provides reciprocal protections for utilities. The rule provides constitutional safeguards against confiscatory rates by ensuring that past profits are not used to reduce future rates.³¹ The rule also ensures the regulatory certainty and long-term fairness that the Commission has found to be important in establishing rates.³² The rule also bolsters investor confidence, thereby ensuring that utilities can attract capital.³³ The Responding Parties' characterization of the rule against retroactive ratemaking as a doctrine intended primarily to protect against utilities including past losses in future rates is inaccurate.

²⁹ See *Re Portland Gen. Elec.*, DR 10, UE 88 and UM 989, Order No. 08-487 (OPUC 2008) (“The prospective nature of ratemaking protects both customer and utility interests. The rule against retroactive ratemaking is intended to ensure that customers are paying rates that reflect the cost of service at the time the service is rendered. Similarly, the rule protects utilities because the use of past profits to reduce future rates may violate constitutional safeguards against confiscatory rates.”). See also Stefan H. Krieger, *The Ghost of Regulation Past: Current Application of the Rule Against Retroactive Ratemaking in Public Utility Proceedings*, 1991 U. ILL. L. REV. 983, 1039 (1991) (“Even when a product is unregulated, the consumer is confident once he purchases a product that the merchant will not claim that he is liable for a retroactive price increase on the product. Similarly, a utility, like a merchant in the unregulated context, is confident that the consumer will not be able to obtain a refund of the amount paid.” (quoting *Spintman v. Chesapeake & Potomac Tel. Co.*, 225 A.2d 304, 308 (Md. 1969)).

³⁰ See *Re Portland Gen. Elec.*, DR 10, UE 88 and UM 989, Order No. 08-487 (OPUC 2008).

³¹ See *id.*

³² *Wash. Utils. & Transp. Comm'n v. Olympic Pipe Line Co.*, Docket No. TO-011472, 20th Supp. Order ¶ 119 (Sept. 27, 2002). See also, *Richter v. Fla. Power Corp.*, 366 So.2d 798, 799 (Fla.App. 1979) (the case cited by ICNU, which states “It is, of course, vital to both the regulated utility and the consumers that the PSC's rate orders be final.”).

³³ If investors could not rely on the rates fixed by commissions, “utilities would find it difficult to attract capital.” Stefan H. Krieger, *The Ghost of Regulation Past: Current Application of the Rule Against Retroactive Ratemaking in Public Utility Proceedings*, 1991 U. ILL. L. REV. 983, 1039 (1991). See also *City of Los Angeles v. Cal. Pub. Utils. Comm'n*, 7 Cal.3d 331, 358 (CA 1972) (“The adoption of a comprehensive scheme of public utility rate regulation involves numerous considerations, and it has been recognized that absolute equity must sometimes give way to the greater overall good, including the demands of *certainty and efficiency*.” (referring to the rule against retroactive ratemaking) (emphasis added)).

20. Staff has previously recognized the reciprocal nature of the rule against retroactive ratemaking.³⁴ In a recent Puget rate case, Puget proposed a regulatory liability to reflect past over-collections of operations and maintenance expenses from customers.³⁵ Staff witness Kathryn Breda testified that she removed the liability, which would have substantially reduced rates, “because it is retroactive ratemaking.”³⁶ Ms. Breda’s willingness to expressly address and apply the rule against retroactive ratemaking in the Puget case when it operated to benefit the utility is in stark contrast to this case where Ms. Breda’s testimony refused to even address the issue.³⁷

21. The Responding Parties cite to cases from other jurisdictions to support their arguments in favor of applying an exception to retroactive ratemaking in this case.³⁸ As ICNU concedes, states apply the rule with varying degrees of strictness. Just as there are jurisdictions that allow exceptions to the rule against retroactive ratemaking, there are many states—Washington among them—in which the rule is applied strictly.³⁹

³⁴ Breda, Exh. No. KHB-14 at 37-38.

³⁵ *Id.* at 38.

³⁶ *Id.*

³⁷ Breda, Exh. No. KHB-7TC 12:15-17.

³⁸ See Staff’s Phase II Opening Brief ¶ 12; Public Counsel’s Phase II Opening Brief ¶ 18; ICNU’s Phase II Opening Brief ¶ 10.

³⁹ See, e.g., Stefan H. Krieger, *The Ghost of Regulation Past: Current Application of the Rule Against Retroactive Ratemaking in Public Utility Proceedings*, 1991 U. ILL. L. REV. 983, 1008 (“Not all courts, however, have adopted the ‘extraordinary loss or gain’ exception to the retroactivity rule. A number of courts have held to a strict construction of the rule and have concluded that commissions have the power to set rates prospectively only.”). See, e.g., *S.C. Elec. and Gas Co. v. Pub. Serv. Comm’n*, 272 S.E.2d 793, 795 (S.C., 1980) (“We are not persuaded by the fact the Commission referred to the refund here as an adjustment for extraordinary operating expenses. Semantics aside, the Commission’s action constituted retroactive rate-making . . . The result reached here may initially appear unjust to the retail customer and unduly generous to SCE&G. This is not the case. The crux of this issue is the firm principle that rate-making is prospective rather than retroactive.”); see also, *In re Elizabethtown Water Co v. N.J. Bd. of Pub. Util.*, 527 A.2d 354 (N.J., 1987) (the court overruled the commission’s order postponing the water company’s rate effective date in order to offset the water company’s unusual gains resulting from high water prices during a drought. The court stated that “[t]he orderly processes of ratemaking are necessarily present and prospective if ratemaking is to be effective.” (citations omitted)); *Re. Central Vt. Pub. Serv. Corp.*, 473 A.2d 1155, 1160 (Vt. 1984) (“We hold that, unless authorized by statute, a rate that requires consumers to pay for past deficits of a utility or that requires a utility to refund to consumers a portion of its previously earned profits constitutes illegal retroactive ratemaking.”).

22. The Responding Parties' arguments urging an exception to the rule against retroactive ratemaking in this case ignore the fact that the rule against retroactive ratemaking and its corollary, the filed rate doctrine, are embodied in Washington law. RCW 80.28.080 provides that when the Commission finds rates to be unjust or unreasonable, it shall determine the just and reasonable rates "to be thereafter observed and in force." The Commission has found that this statute requires that "with few exceptions . . . the Commission is charged with setting rates on a *prospective* basis."⁴⁰ RCW 80.28.080 requires that a utility charge the rates specified in its rate schedule filed and in effect at the time and cannot "directly or indirectly refund or remit in any manner or by any device any portion of the rates or charges so specified." These statutes are consistent with the fact that ratemaking is a legislative act and, like legislation, ratemaking is applied prospectively absent explicit legislative direction to the contrary.⁴¹

23. The Responding Parties cannot cite to any Washington case or order supporting an exception to the rule against retroactive ratemaking in this case. ICNU claims that the rule against retroactive ratemaking has been applied on a "contradictory, ad hoc and inconsistent" basis across jurisdictions.⁴² This Commission has been steadfast and consistent in its approach to the rule and should decline the Responding Parties' invitation to move to an inconsistent and ad hoc approach.

⁴⁰ *Re Application of Puget Sound Energy for Authorization Regarding the Deferral of the Net Impact of the Conservation Incentive Credit Program*, Docket No. UE-010410, Order Denying Petition to Amend Accounting Order (Nov. 9, 2001) (emphasis in original).

⁴¹ *Re Portland Gen. Elec.*, DR 10, UE 88 and UM 989, Order No. 08-487 (OPUC 2008) (stating that ratemaking is a legislative act and, like legislation, is prospective in nature absent explicit legislative direction); *People's Org. for Wash. Energy Resources v. Wash. Utils. & Transp. Comm'n*, 104 Wash.2d 798, 807 (Wash.1985) (ratemaking is legislative in character); *Sorensen v. Western Hotels, Inc.* 55 Wash.2d 625, 629 (Wash. 1960) (legislative acts will generally be given prospective, and not retroactive, effect).

⁴² ICNU's Phase II Opening Brief ¶ 10.

2. PacifiCorp Did Not Provide Misleading or Inaccurate REC Information.

24. Public Counsel and ICNU claim that an exception to the rule against retroactive ratemaking is appropriate in this case because PacifiCorp provided misleading REC information.⁴³ Their claim fails on a number of levels. Most basically, there is no evidentiary support in this or any other case that PacifiCorp has misled parties on REC information.
25. In their zeal to retroactively recover PacifiCorp's REC revenues (despite having not filed for deferred accounting), it is Public Counsel and ICNU that have engaged in questionable and misleading tactics. Public Counsel and ICNU have repeatedly denied knowledge of PacifiCorp's California REC revenues until July 2010.⁴⁴ The record in this case now irrefutably demonstrates that Mr. Schoenbeck filed testimony for ICNU in January 2010 addressing PacifiCorp's REC contract with Southern California Edison (SCE), claiming its terms were comparable to Puget's California REC contracts. This testimony was filed in the Puget REC docket to which Staff and Public Counsel were both parties,⁴⁵ but none of the Responding Parties previously disclosed this filing in this case or in the ICNU/Public Counsel complaint case.⁴⁶
26. In addition, while ICNU and Public Counsel cite the order dismissing their complaint as support, the only finding in that order relating to misleading behavior went against ICNU and Public Counsel, not PacifiCorp. The Administrative Law Judge (ALJ) found that ICNU/Public Counsel's argument on the accrual of their claim was "misleading," because they relied upon a case that the Commission had reversed without acknowledging that fact. At the same time, the ALJ examined the allegations related to PacifiCorp's REC discovery responses and found that "PacifiCorp provided full responses to ICNU's data requests, as formulated, during the period

⁴³ Public Counsel's Phase II Opening Brief ¶¶ 18-36; ICNU's Phase II Opening Brief ¶¶ 19-21.

⁴⁴ Exh. No. DWS-13 ¶ 7 n.5.

⁴⁵ *Re. Amended Petition of Puget Sound Energy, Inc. for an Order Authorizing the Use of the Proceeds from the Sale of Renewable Energy Credits and Carbon Financial Instruments*, Docket No. UE-070725.

⁴⁶ See Exh. No. KHB-13; Exh. No. DWS-13; Exh. No. DWS-16.

when discovery continued.”⁴⁷ The only reservation the ALJ expressed with respect to PacifiCorp’s responses was that it was a “matter of some concern that the Company did not disclose any information about the California contracts when the regulatory contingency was removed from them and they became fully effective.”⁴⁸ But, as just noted, the ALJ was not informed that ICNU had actually filed testimony on one of PacifiCorp’s California REC contracts in the Puget REC case in January 2010 (just shortly after the regulatory contingency was removed), showing that Public Counsel and ICNU were well aware of the existence of these contracts.

27. Public Counsel also incorrectly claims that the Company withheld REC information in this case.⁴⁹ Although Public Counsel devotes two pages of its brief to this claim, the claim boils down to the fact that the Company supplemented a response to Public Counsel Data Request 189 to provide additional REC contracts effective beginning in 2011. These contracts are irrelevant to evaluating 2009 and 2010 RECs in this stage of the proceeding and no party has alleged otherwise. Indeed, the fact that the Company supplemented a prior data request response to provide additional REC data to the parties demonstrates the Company’s continuing effort to be forthcoming on this issue, not the opposite.

⁴⁷ *Wash. State Attorney Gen.’s Office and the Indus. Cust. of NW Util. v. PacifiCorp*, Docket No. UE-110070, Order 1, Administrative Law Judge’s Initial Order Dismissing Complaint ¶ 54 (Apr. 27, 2011). On May 26, 2011, the Commission issued a Notice of Finality with respect to the Initial Order Dismissing Complaint. The Notice of Finality stated that no party petitioned for administrative review of the initial order and the Commission did not give notice of its intention to review the order on its own motion, so the order became final on May 25, 2011 by operation of law. The Notice of Finality also stated that the Commission does not endorse the order’s reasoning and conclusions, and if cited in the future, the order must be identified as an ALJ’s order.

⁴⁸ Initial Order ¶ 55 (“Although it appears PacifiCorp adhered to the letter of the Commission’s procedural rules governing discovery, it nevertheless is a matter of some concern that the Company did not disclose any information about the California contracts when the regulatory contingency was removed from them and they became fully effective. It would be no more than pure speculation at this point to consider what impact, if any, such disclosure might have had on the Settlement or the Commission’s consideration of it. PacifiCorp knew, however, that this was an issue of some significance to at least some parties, and should have known it is a matter of significance to the Commission. The Commission must rely to some degree on the good faith effort of the companies it regulates to be forthcoming with information even when not legally compelled to do so. That effort appears to have been lacking in this instance, a shortcoming the Commission would expect to see corrected if similar circumstances arise again.”).

⁴⁹ Public Counsel’s Phase II Opening Brief ¶¶ 26-32.

28. Public Counsel also references proceedings in Utah and Oregon in which parties “raised concerns regarding potential concealment of REC sales information by PacifiCorp.”⁵⁰ These are irresponsible allegations because, as Public Counsel well knows, no commission has ever found that PacifiCorp withheld or concealed REC information. In any event, Public Counsel’s reference to an unsubstantiated claim by a party in Utah and an application for deferred accounting by ICNU in Oregon that did not even allege that the Company withheld REC information cannot serve as a basis for establishing an exception to the rule against retroactive ratemaking.

29. Public Counsel and ICNU cite to *Salt Lake Citizen’s Congress v. Mountain States Telephone & Telegraph Company*⁵¹ for precedent that an exception to the rule against retroactive ratemaking is appropriate in the case of utility misconduct.⁵² But the key facts of that case—a utility violating a commission order, failing to disclose information on questioning by the commission and earning an unusually high rate of return—have no parallels in this case.

30. Finally, if the basis of Public Counsel’s and ICNU’s proposed exception to the rule against retroactive ratemaking is that PacifiCorp provided misleading discovery responses in the 2009 GRC, there is no basis for including REC revenues from the 2008 GRC in rates. Public Counsel and ICNU have not claimed in this or any other proceeding that PacifiCorp withheld information on REC revenues during the 2008 GRC. Therefore, even under Public Counsel’s and ICNU’s proposed exception, there is no foundation to include 2009 REC revenues in rates.

3. PacifiCorp’s REC Forecasts Were Reasonable at the Time They Were Made.

31. ICNU also claims the Commission should establish an exception to the rule against retroactive ratemaking on the basis that PacifiCorp provided inaccurate REC revenue forecasts in

⁵⁰ *Id.* ¶ 33.

⁵¹ 846 P.2d 1245, 49 (Utah 1993).

⁵² Public Counsel’s Phase II Opening Brief ¶¶ 19-22; ICNU’s Phase II Opening Brief ¶¶ 19-20.

the 2009 and 2010 GRCs.⁵³ An exception to the rule against retroactive ratemaking based upon an inaccurate utility forecast of costs or revenues would eviscerate the rule.⁵⁴ ICNU attempts to justify this exception based on the unsubstantiated claim that the Company “knowingly” provided inaccurate forecasts.⁵⁵

32. With respect to 2009 REC revenues included in the 2008 GRC, there is no evidence, and indeed not even any allegation, supporting a finding that the Company knowingly provided an inaccurate REC revenue forecast in that case. The ICNU/Public Counsel complaint related to REC revenues that were included in the 2009 GRC, not the 2008 GRC, so even the unsupported claims in that proceeding cannot be used to establish that the Company knowingly provided an inaccurate forecast in the 2008 GRC. Moreover, no party ever challenged the forecast of REC revenues in that case. Although ICNU and Public Counsel claim that ICNU and Staff previously objected to the Company’s REC revenue forecast, they cite to testimony in this proceeding.⁵⁶ It is uncontested that no party objected to the REC revenue forecast in the 2008 GRC.

33. With respect to 2010 REC revenues included in the 2009 GRC, ICNU provides no support for its claim that the Company was “well aware” that it would experience extraordinary REC revenues in 2009.⁵⁷ In fact, in the complaint proceeding, the ALJ found that the REC contracts that drove the increase in REC revenues in 2010 would not have been considered “known and measurable” until the regulatory contingency was removed—in September and

⁵³ ICNU’s Phase II Opening Brief ¶ 21.

⁵⁴ See *MCI Telecomm. Corp. v. Pub. Serv. Comm’n of Utah*, 840 P.2d 765, 770 (Utah 1992) (stating that “[t]he bar on retroactive ratemaking makes no exception for missteps in the rate-making process, even though the projections of expenses and revenues for the test year will necessarily vary from actual experience.” (quoting *Utah Dep’t of Bus. Reg. v. Pub. Serv. Comm’n*, 720 P.2d 420 (Utah 1986))).

⁵⁵ ICNU’s Phase II Opening Brief ¶ 13.

⁵⁶ Public Counsel’s Phase II Opening Brief ¶ 67; ICNU’s Phase II Opening Brief ¶ 29.

⁵⁷ ICNU’s Phase II Opening Brief ¶ 5.

October, 2009, after the settlement in the 2009 GRC.⁵⁸ As was the case in the 2008 GRC, no party objected to the 2010 REC revenue forecast included in the 2009 GRC.

34. With respect to 2011-2012 REC revenues included in this case, the Company's initial forecast of REC revenues was based on reasonable assumptions, and was updated when those assumptions changed. At the time of the Company's initial filing, its actual practice was to bank all Washington-allocated RECs.⁵⁹ The Company modified its position on rebuttal to reflect the fact that Washington's RPS would not be amended to allow longer-term banking.⁶⁰ ICNU claims that the Company should have reflected REC revenues in its initial case because the legislative session ended three weeks before the Company's initial filing in this case.⁶¹ ICNU's criticism is unwarranted because it is unreasonable to have expected the Company to incorporate this change in the case given the rapidity of changes in the area of RECs and the lead time required to prepare a general rate case.

35. Finally, the Responding Parties all propose basing the bill credit on actual revenues rather than forecasts because of the unpredictable nature of REC revenues.⁶² It is unreasonable for the Responding Parties to rely on the unpredictable and quickly changing nature of the REC market to support their proposed bill credit structure but ignore these factors when assessing the accuracies of the Company's past REC revenue forecasts.

⁵⁸ Initial Order at ¶ 53-54.

⁵⁹ Duvall, TR. 298:15-23.

⁶⁰ Duvall, Exh. No. GND-5T 3:10-19.

⁶¹ ICNU's Phase II Opening Brief.

⁶² Staff's Phase II Opening Brief ¶ 57; Public Counsel's Phase II Opening Brief ¶ 66; ICNU's Phase II Opening Brief ¶ 39.

4. An Exception to the Rule against Retroactive Ratemaking for Extraordinary and Unforeseeable Costs or Revenues is Not Justified in this Case and is Contrary to Commission Precedent.

36. Public Counsel also proposes that the Commission establish an exception to the rule against retroactive ratemaking for “extraordinary and unforeseeable losses or gains.”⁶³ Although Public Counsel claims that the Commission has applied this exception previously, it has not done so absent a deferred accounting petition. Public Counsel cites to a 1988 order in which the Commission noted that “it has on rare occasions authorized the recovery of past expenses in instances where doing so is consistent with the public interest and sound regulatory policy.”⁶⁴ However, in that case the Commission was evaluating an energy cost adjustment clause. The Commission noted that the adjustment clause would not constitute retroactive ratemaking because it would be based on a “fixed mathematical formula” and would be applied only after notice and hearing.⁶⁵ In this case, parties are proposing a retroactive true up of REC revenues, not a forward-looking true up that the Commission has found is not retroactive ratemaking.

37. Commission precedent shows that it has previously rejected the arguments that form the basis of the exception sought by Public Counsel in this case. In 2002, the Company filed a request for deferral of excess power costs related to the energy crisis.⁶⁶ The Commission rejected PacifiCorp’s request.⁶⁷ If the Commission found that the energy crisis was not extraordinary and unforeseen enough to justify an exception to retroactive ratemaking, PacifiCorp’s higher-than-expected REC revenues in 2009 and 2010 certainly cannot justify such an exception.

⁶³ Public Counsel’s Phase II Opening Brief ¶ 37.

⁶⁴ *Wash. Utils. & Transp. Comm’n v. Puget Sound Power & Light Co.*, Docket U-81-41, 6th Supp. Order (Dec. 19, 1988).

⁶⁵ *Id.*

⁶⁶ *Re Petition of PacifiCorp for an Accounting Order Authorizing Deferral of Excess Net Power Costs*, Docket No. UE-020417, 6th Supp. Order ¶ 53 (July 15, 2003).

⁶⁷ *Id.*

38. Moreover, Public Counsel itself claims that for this exception to apply, the item must be “non-recurring.”⁶⁸ There is no question that REC revenues are recurring—this is why the parties are debating REC revenues for 2009, 2010, and 2011. The revenues at issue were not unexpected one-time events, but rather the result of an inaccurate forecast of recurring revenues.⁶⁹ Therefore, even under Public Counsel’s characterization of the exception for unforeseen and exceptional cost items, it would not apply to the REC revenues at issue in this case.

39. Even if the Commission established an exception for extraordinary and unforeseeable cost items and found that such an exception is relevant to this case, the fact that the Company was under earning in 2009 and 2010 should negate application of the exception. Public Counsel cites to *MCI Telecommunications Corporation v. Public Service Commission of Utah* (“MCP”)⁷⁰ for support of its argument that unforeseeable revenues can be retroactively included in rates. In that case, the Utah Supreme Court evaluated whether an exception to the rule against retroactive ratemaking was applicable when a change in the tax law reduced U.S. West’s income tax rate by 26 percent below what was included in rates.⁷¹ The court reviewed cases recognizing an exception to the rule against retroactive ratemaking when an unforeseeable and extraordinary increase in utility expenses resulted from a natural disaster.⁷² The court noted that this exception was justified because, absent such an exception, a utility would not be afforded a reasonable opportunity to earn a reasonable rate of return.⁷³ Based on this justification, it is clear the exception for an unforeseeable and extraordinary event that caused a decrease in earnings would

⁶⁸ Public Counsel’s Phase II Opening Brief ¶ 38.

⁶⁹ See *Turpin v. Okla. Corp. Comm’n*, 769 P.2d 1309, 1332 (Okla. 1988) (distinguishing between errors in ratemaking and unexpected windfalls).

⁷⁰ 840 P.2d 765 (Utah 1992).

⁷¹ *Id.* at 767.

⁷² *Id.* at 771.

⁷³ *Id.*

only be justified if the utility was earning less than its authorized return as a result.

Correspondingly, an exception for an unforeseeable and extraordinary event that caused an increase in earnings would only be justified if the utility was earning more than its authorized return as a result.

40. This rationale is confirmed by the court's holding and direction on remand in *MCI*. After holding that an exception to the rule against retroactive ratemaking for unforeseeable and *extraordinary* increases or decreases in expenses is recognized in Utah,⁷⁴ the court directed the Commission on remand to make factual findings that, "at a minimum, include (1) U.S. West's earnings and rate of return for the years 1986, 1987, 1988, and 1989 . . . ; (2) the extent to which U.S. West's earnings exceeded the authorized rate of return in 1987, 1988, and 1989" ⁷⁵ The court went on to state:

*[I]f a utility earns profits in excess of its authorized rate of return because of an exception to the rule against retroactive ratemaking, the authorized return is the best available measure of a fair return and earnings in excess of that rate are subject to refund. Accordingly, if on remand the Tax Reform Act of 1986 is found to have resulted in an unforeseeable and extraordinary decrease in expenses . . . , we hold that U.S. West's earnings, to the extent they exceeded its authorized rate of return established in the 1985 general rate case, should be refunded to U.S. West ratepayers.*⁷⁶

41. The court clearly and explicitly recognized that application of exceptions to the rule against retroactive ratemaking is contingent on the level of utility earnings. In this case, there is no factual dispute that the Company was under earning in 2009 and 2010. As a result, even under Public Counsel's justification for the exception for unforeseeable and significant revenues, there is no basis to include the past REC revenues in rates.

⁷⁴ *Id.* at 772.

⁷⁵ *Id.* at 774.

⁷⁶ *Id.* at 776 (emphasis added).

5. The Responding Parties Cannot Rely on Deferred Accounting to Justify their Proposals.

42. The Commission has previously recognized that deferred accounting can be used to track costs during one period with the possibility for inclusion in rates in a future period.⁷⁷ Staff and ICNU cite to the Commission's use of deferred accounting as a basis for allowing the 2009 and 2010 REC revenues into rates in this case.⁷⁸ The key difference between the examples of deferred accounting cited by Staff and ICNU and this case is that the Commission has not previously allowed for deferred accounting absent notice of a deferred accounting request, and in fact has emphasized the importance of notice.⁷⁹

43. ICNU claims that notice is not required for deferred accounting requested by non-utility parties.⁸⁰ Although ICNU cites a Commission order purportedly in support of this proposition, the order referenced by ICNU does not stand for that proposition, nor does any other Commission order. The Commission should not adopt ICNU's proposal, as it would effectively eliminate the rule against retroactive ratemaking as applied to revenues, but maintain it as applied to costs. Such a result is at odds with the Commission's mission to regulate with "certainty, consistency, and fairness to both utility companies and their customers."⁸¹ Allowing for unnoticed deferred accounting of revenues but not costs would also be at odds with *Duquesne v. Barach*, because it would require the utility to bear the risk of increased costs, but would result in the utility returning increased revenues to customers.⁸²

⁷⁷ *Re Petition of PacifiCorp for an Accounting Order Authorizing Deferral of Excess Net Power Costs*, Docket No. UE-020417, 3rd Supp. Order ¶ 24 (Sept. 27, 2002).

⁷⁸ Staff's Phase II Opening Brief ¶ 14; ICNU's Phase II Opening Brief ¶ 12.

⁷⁹ *Re Petition of PacifiCorp for an Accounting Order Authorizing Deferral of Excess Net Power Costs*, Docket No. UE-020417, 3rd Supp. Order ¶ 24 (Sept. 27, 2002).

⁸⁰ ICNU's Phase II Opening Brief at ¶ 12.

⁸¹ *Wash. Utils. & Transp. Comm'n v. Verizon NW, Inc.*, Docket No. UT-040788 Order 11 ¶ 140 (Oct. 15, 2004).

⁸² *See Duquesne v. Barasch*, 488 US 299, 314 (1989).

44. ICNU's claim is also at odds with ICNU's representation in the 2009 GRC stipulation that set forth a baseline to be used if a party files an application for deferral. If ICNU understood at the time of the 2009 GRC stipulation that a request for deferred accounting was not necessary for parties to request retroactive recovery of 2010 REC revenues, there would have been no need to call the issue out in the stipulation. Indeed, this is the first time ICNU has made the argument that a non-utility party is not required to provide notice of a request for deferred accounting.

45. Public Counsel also claims that the parties were not privy to information that would form the basis of a deferred accounting request.⁸³ Public Counsel continues to claim that "it was not until July 28, 2010, that the REC reports showed the jump in revenues that occurred in October 2009."⁸⁴ As addressed above, all of the Responding Parties were aware of PacifiCorp's REC sale to SCE by January 2010 when ICNU provided testimony on it in the Puget REC proceeding.

46. In addition, as Public Counsel itself points out, parties (including ICNU) filed for deferred accounting of REC revenues in Oregon and Utah.⁸⁵ If those parties were aware of the need to file for deferred accounting of REC revenues, there is no reason why the parties in this case should not have been aware, especially given their recognition in the 2009 GRC stipulation that such a request could occur in the future.

47. With respect to the 2009 GRC stipulation, Staff claims that Staff is "implementing" the stipulation by proposing retroactive recovery of 2010 RECs.⁸⁶ But Staff still has not explained why the stipulation includes specific reference to deferred accounting and a REC revenue baseline if a request for deferred accounting was not required for retroactive recovery of REC revenues. Although the language stated that parties could "request that the Commission take any

⁸³ Public Counsel's Phase II Opening Brief ¶12.

⁸⁴ *Id.* ¶ 43.

⁸⁵ *Id.* ¶¶ 33, 35.

⁸⁶ Staff's Phase II Opening Brief ¶ 44.

other action regarding PacifiCorp's Washington-allocated RECs," the specific reference to deferred accounting indicates that the parties understood that such a request would be required. Staff's disavowal of the import of the reference to deferred accounting in the stipulation is disingenuous.

48. Finally, the Commission has explicitly held that it cannot "reach back in time to alter the tariffed rate under which [the utility] operated by recognizing a deferral that was neither authorized nor recorded."⁸⁷ The Commission found that doing so would be retroactive ratemaking and illegal. The Responding Parties are asking the Commission to recognize a deferral that was neither authorized nor recorded in this case, and the Commission should similarly reject their proposals as illegal retroactive ratemaking.

6. The Other Orders Cited by Staff Do Not Support the Argument that Retroactive Recovery of REC Revenues is Appropriate.

49. Staff cites to a number of other orders to support the argument that retroactive recovery of RECs is appropriate, none of which stand for the proposition that allowing three years of revenues in a single rate effective period is appropriate absent a request for deferred accounting.

50. Staff first cites to power cost adjustment (PCA) tariffs.⁸⁸ These mechanisms have two crucial elements that are absent from Staff's, Public Counsel's, and ICNU's proposals in this case: they are implemented on a going-forward basis and they are symmetrical.⁸⁹ PCAs operate like the Commission's going-forward REC revenue true up and adjustment ordered by the Commission for REC revenues beginning on the rate effective date in this case. PacifiCorp has

⁸⁷ *Wash. Utils. & Transp. Comm'n v. Olympic Pipe Line Co.*, Docket TO-011472, 20th Supp. Order ¶ 119 (Sept. 27, 2002).

⁸⁸ Staff's Phase II Opening Brief ¶ 13.

⁸⁹ See *Wash. Utils. & Transp. Comm'n v. Puget Sound Power & Light Co.*, Docket U-81-41, 6th Supp. Order (Dec. 19, 1988) (giving notice that the Commission would consider changes to the ECAC and explaining that actual power costs are trued up against a baseline).

not challenged the legality of a going-forward true up of REC revenues—PacifiCorp is objecting to the retroactive recovery of 2009 and 2010 REC revenues.

51. Similarly, Staff claims that the fact that Schedule 96 and Schedule 191 include surcharges for specific costs justifies Staff’s approach on REC revenues.⁹⁰ These surcharges, however, operate on a forward-looking basis and did not provide for an inclusion of three years of costs into rates during one rate effective period.

52. Staff cites to the Commission’s use of deferred accounting as justification for including REC revenues from prior periods in rates.⁹¹ The Company explained in its Initial Filing why the Responding Parties’ proposals cannot be construed as deferred accounting and Staff’s citations to deferred accounting are therefore irrelevant.

53. Staff also cites to using amortization of costs incurred only in the test period.⁹² The example Staff cites is from a Puget case allowing amortization of abandoned plant costs.⁹³ This order addressed how the utility could recover costs associated with an abandoned plant.⁹⁴ The question in that Puget case was whether plant costs could be recovered if the plant was abandoned, not whether an expense from a past period could be included in rates. Amortization of capital items, which is a standard ratemaking element that does not implicate retroactive ratemaking, is not analogous to retroactive recovery of revenues.

⁹⁰ Staff’s Phase II Opening Brief ¶ 27.

⁹¹ *Id.* ¶ 14.

⁹² Staff’s Phase II Opening Brief ¶ 15.

⁹³ *Wash. Utils. & Transp. Comm’n v. Puget Sound Power & Light Co.*, Cause U-82-38, 3rd Supp. Order (July 22, 1983).

⁹⁴ *Id.* at 17-21.

54. Staff also cites to the amortization of Y2K costs in Avista's 1999 rate case.⁹⁵ That case is not analogous to this case because it apparently involved one-time costs for Y2K preparation, not recurring costs or revenues that are forecast in each rate case, as is the case for REC revenues.
55. Staff cites to the amortization of the Company's pension gain.⁹⁶ That pension gain was the subject of an accounting petition, and therefore not comparable to the proposal for retroactive recovery without notice.
56. Finally, Staff cites to "other practices" by other states to include in rates previously-incurred costs and revenues.⁹⁷ There are just as many examples, however, of states rejecting retroactive treatment of costs and revenues.⁹⁸ The decision of other states to allow exceptions to the rule against retroactive ratemaking is irrelevant to the Commission's determination of whether the proposed rate treatment in this case is in accordance with Washington law, policy, and Commission precedent.

C. The Parties' Disregard of the Impact of their Proposals on the Company's Financial Condition is Inconsistent with Washington Law.

57. Staff and Public Counsel recommend that the Commission ignore evidence showing that the Company significantly under earned in 2009 and 2010, and ICNU does not address the evidence on the Company's earnings at all.⁹⁹ The Responding Parties' arguments are inconsistent with the requirement that the Commission evaluate rates to determine whether they

⁹⁵ Staff's Phase II Opening Brief ¶ 18.

⁹⁶ *Id.* ¶ 19.

⁹⁷ *Id.* ¶ 20.

⁹⁸ See, e.g., *Matanuska Elec. Ass'n v. Chugach Elec. Ass'n*, 53 P.3d 578, 587 (Alaska 2002) (finding that a refund of amounts collected in excess of line loss factor would violate the rule against retroactive ratemaking); *re. Elizabethtown Water Co v. New Jersey Bd. of Pub. Util.*, 527 A.2d 354 (N.J., 1987) (overruling the commission's order postponing the water company's rate effective date in order to offset the water company's unusual gains resulting from high water prices during a drought because "[t]he orderly processes of ratemaking are necessarily present and prospective if ratemaking is to be effective." (citations omitted)); *SC Elec. and Gas Co. v. Pub. Serv. Comm'n*, 272 S.E.2d 793, 795 (S.C., 1980) (reversing the Commission's decision to provide a refund for the sale and purchase of energy between the utility and other parties because "the crux of this issue is the firm principle that rate-making is prospective rather than retroactive.").

⁹⁹ See Staff's Phase II Opening Brief ¶¶ 23, 34; Public Counsel's Phase II Opening Brief ¶¶ 48-52.

are just and reasonable, and to set rates that allow the utility an opportunity to earn its authorized rate of return.

58. Staff argues that it is “too late” for the Company to argue for an earnings test.¹⁰⁰ The Commission has a constitutional and a statutory duty to determine whether the rates it orders are just and reasonable.¹⁰¹ Determining whether rates provide the utility to earn a reasonable rate of return is fundamental to determining whether rates are just and reasonable.¹⁰² The Commission should not adopt Staff’s proposal that the Commission violate this constitutional and statutory duty.

59. Additionally, the Commission has previously found that testimony on earnings is relevant even when the scope of the hearing was specifically limited and was not to address ratemaking issues.¹⁰³ In that case, after determining that the scope of the hearing was limited and would not address ratemaking issues, the Commission still found that “earnings testimony may only be used to examine whether access charges are fair, just and reasonable.”¹⁰⁴ This finding indicates that the Commission will evaluate earnings to determine the just and reasonableness of rates in this case.

60. Staff also argues that it is “not the Commission’s problem” if PacifiCorp must restate its earnings if the Commission uses a start date prior to the beginning of the rate year.¹⁰⁵ Staff misses the point of the Company’s concerns related to earnings, which is that adoption of the

¹⁰⁰ Staff’s Phase II Opening Brief ¶¶ 23.

¹⁰¹ *Fed. Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 601-603 (1944); RCW 80.28.020.

¹⁰² *Id.* at 603; *Wash. Utils. & Transp. Comm’n v. Wash. Natural Gas Co.*, Cause No. U-77-47 (Nov. 22, 1977).

¹⁰³ *AT&T Comm. of the Pac. NW, Inc. v. Verizon NW, Inc.*, Docket No. UT-020406, 7th Supp. Order ¶ 62 (Apr. 8, 2003).

¹⁰⁴ *Id.*

¹⁰⁵ Staff’s Phase II Opening Brief ¶ 34.

Responding Parties' proposals will deny the Company the ability to earn its authorized rate of return in the rate effective period of this rate case.¹⁰⁶

61. In any event, Staff's cavalier perspective on the impact of its proposal on Company's earnings is troubling. Staff's proposed retroactive recovery of two years of REC revenues on top of the REC revenues already included in rates in the rate effective period is unprecedented. The Commission has a responsibility to take into account the impact of such a proposal on the financial well-being of the utility. Staff's argument to the contrary demonstrates a disregard for the Commission's need to adhere to Washington and constitutional law and to balance the needs of customers and the utility in making its determination in this case.

62. Public Counsel similarly argues that whether the Company earned its authorized return on equity in 2009 and 2010 is irrelevant to the question of whether the Commission can order a rate credit for REC revenues received during those years.¹⁰⁷ Public Counsel cites to a Utah Public Service Commission (Utah Commission) order rejecting PacifiCorp's motion to dismiss an application for deferred accounting of REC revenues filed by industrial customers.¹⁰⁸ However, the Utah Commission found in that order only that the proponents presented factual and policy issues that warranted further examination, including the factual question of the Company's earnings in 2009 and whether case law foreclosed the retroactive return of revenues for years the utility was under earning.¹⁰⁹ The Utah Commission did not rule on this issue and that case was resolved via settlement.¹¹⁰

¹⁰⁶ Dalley, Exh. No. RBD-28CT 3:14-21.

¹⁰⁷ Public Counsel's Phase II Opening Brief ¶ 49.

¹⁰⁸ *Id.* ¶ 50.

¹⁰⁹ *Re Application of the Utah Indus. Energy Consumers for a Deferred Accounting Order Directing Rocky Mountain Power to Defer Incremental REC Revenue for Later Ratemaking Treatment*, Docket 11-035-46, Order Denying Motion to Dismiss at 8 (June 20, 2011).

¹¹⁰ *Re Application of the Utah Indus. Energy Consumers for a Deferred Accounting Order Directing Rocky Mountain*

63. Public Counsel also claims that the Company's earnings in 2009 and 2010 were "quite robust."¹¹¹ This claim is misleading and demonstrably wrong. The data requests cited by Public Counsel show that the Company under earned on a total-company basis in these years.¹¹² In addition, Public Counsel's claim that the Company issued dividends in these years fails to explain that the Company issued dividends only to preferred stock holders and did not issue dividends to common stock holders.¹¹³ The holdings of preferred stock holders represent only 0.3 percent of the Company's authorized capital structure in Washington.¹¹⁴

D. Staff Mischaracterizes the Company's Testimony on the Regulatory Environment in Washington.

64. Staff's discussion of PacifiCorp's testimony on the regulatory environment in Washington is a mischaracterization. The Company did not "attack" the Commission or its policies as Staff claims. The Company described the "unique set of challenges" related to the Company's opportunity to recover its costs and earn its authorized rate of return in Washington.¹¹⁵ Staff's recommendation that the Commission ignore the overall impact of Washington ratemaking policies on the utility's opportunity to earn its rate of return is contrary to the Commission's charge to regulate in the public interest.

65. Staff claims that the other two investor-owned utilities in Washington are able to operate successfully under the same policies.¹¹⁶ Notably, this statement was not supported by any evidence or citation. The level of rate case activity over the past several years by Washington's investor-owned utilities undermines Staff's unsubstantiated assertion.

Power to Defer Incremental REC Revenue for Later Ratemaking Treatment, Docket 11-035-46, Report and Order at 30-32 (Sept. 13, 2011).

¹¹¹ Public Counsel's Phase II Opening Brief ¶ 51.

¹¹² Exh. No. ALK-5.

¹¹³ Exh. No. ALK-4.

¹¹⁴ *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Docket No. UE-100749, Order 06 at Table 1 (Mar. 25, 2011).

¹¹⁵ Kelly, Exh. No. ALK-2CT 12-13.

¹¹⁶ Staff's Phase II Opening Brief ¶ 31.

E. Calculation of 2009 and 2010 REC Revenues

66. Staff, Public Counsel, and ICNU propose imputing REC revenues that were not allocated to Washington in 2009 and 2010.¹¹⁷ There is no question that the revenues that Staff, Public Counsel, and ICNU are imputing were not allocated to Washington in those years. The question is whether the Commission should retroactively change the allocation of REC revenues, even when the parties had all the information available to them in 2009 and 2010 to propose changing the allocation on a prospective basis. Staff continues to claim that Staff “discovered” the need to impute additional RECs during the course of this proceeding,¹¹⁸ but as the Company has explained, Staff has known this information for almost three years.¹¹⁹ Moreover, the REC revenues included in rates for 2009 and 2010 and the baseline in the 2009 GRC stipulation were based on the allocation method used in the Company’s filing. Imputing additional revenue on a retroactive basis adds to the unfairness of the Responding Parties’ proposals.

67. ICNU claims that the Company agrees with “ICNU, Staff and Public Counsel’s approach, but only on a going forward basis.”¹²⁰ It was the Company, however, who proposed the methodology now adopted by the Responding Parties. The Company appropriately applied the new approach on a prospective basis only.

68. In addition, Staff’s proposed change to the allocation of 2009 and 2010 REC revenues is inconsistent with Staff’s claim that some of the Company’s arguments are “too late” based on the Commission’s order.¹²¹ Staff’s position that the Company cannot at this point argue in favor of an earnings review and to evaluate the one-sided nature of the other parties proposals is

¹¹⁷ Staff’s Phase II Opening Brief ¶ 46; Public Counsel’s Phase II Opening Brief ¶ 55; ICNU’s Phase II Opening Brief ¶ 22.

¹¹⁸ Staff’s Phase II Opening Brief ¶ 8.

¹¹⁹ Dalley, Exh. No. RBD-28CT 11:3-14.

¹²⁰ ICNU’s Phase II Opening Brief ¶ 27.

¹²¹ Staff’s Phase II Opening Brief ¶¶ 23, 25.

inconsistent with Staff's attempt to reallocate and impute additional revenues in 2009 and 2010. The Commission's order is clear that this phase of the proceeding is to assess REC proceeds actually received by the Company, not imputed revenues.¹²²

69. Staff, Public Counsel, and ICNU argue that 2009 REC revenues¹²³ should not be offset by the amount of REC revenues included in the Company's 2008 GRC.¹²⁴ They argue that the 2008 GRC stipulation did not include a baseline for REC revenues, so 2009 REC revenues should not be offset. The Responding Parties' proposal to exclude the \$576,254 of REC revenues that were included in the Company's 2008 GRC filing emphasizes the unreasonableness of their overall proposals. The Responding Parties did not include a baseline for REC revenues in the 2008 GRC stipulation because they had not contemplated the potential for filing a deferred accounting application for 2009 REC revenues as they did in the case of 2010 REC revenues. On one hand, the Responding Parties are arguing that the Company should get no credit for 2008 REC revenues included in rates because they did not contemplate filing a deferred accounting application in the 2008 GRC stipulation, and on the other, they are arguing that even though the parties contemplated filing a deferred accounting application in the 2009 GRC stipulation, they do not need to file one to have those REC revenues be included in rates.

70. Moreover, as the Company explained in its Initial Post-Hearing Brief, under Commission precedent, the remedy for not having a baseline against which to measure the amounts deferred is to reject the deferral, not to assume a baseline of zero.¹²⁵ The fact that the parties are arguing

¹²² Order 06 ¶¶ 203, 205, 207.

¹²³ Staff now refers to the revenues included in the 2008 GRC as "2008 REC revenues," even though Staff's witness repeatedly refers to these revenues as 2009 revenues. *See, e.g.*, Breda, Exh. No. KHB-6:21. This redesignation of 2009 REC revenues as 2008 REC revenues in Staff's brief appears to be Staff's attempt to support Staff's argument that 2009 REC revenues were not previously included in rate, despite all factual evidence to the contrary.

¹²⁴ Staff's Phase II Opening Brief 4; Public Counsel's Phase II Opening Brief ¶ 58; ICNU's Phase II Opening Brief ¶ 34.

¹²⁵ *Re. Petition of PacifiCorp for an Accounting Order Authorizing Deferral of Excess Net Power Costs*, Docket No. UE-020417, 6th Supp. Order ¶ 32 (July 15, 2003).

about the baseline for 2009 REC revenues shows that the Commission's previously expressed concerns on this issue are implicated here. The absence of a 2009 REC baseline means that 2009 REC revenues cannot be measured accurately and including them in rates is inappropriate.

71. The Commission should reject ICNU/PC's calculation of REC revenues that assumes the Company can sell 100 percent of RECs. Public Counsel claims that it would be "the prudent course of action for PacifiCorp to sell 100 percent of RECs."¹²⁶ Public Counsel ignores the fact that the Company has not sold 100 percent of its RECs and cannot do so. Neither Public Counsel nor ICNU allege that the Company has been imprudent with respect to the proportion of its RECs it has been able to market. There is therefore no reasonable basis for imputing REC revenues above the percentage the Company has actually been able to sell. ICNU's suggestion that ICNU's approach is appropriate because it focuses on "when a REC was generated"¹²⁷ is nonsensical. Just because a REC was generated does not mean it is marketable. Staff agrees that basing REC revenues on the actual proportion of RECs sold in the applicable period makes more sense because it reflects actual sales.¹²⁸ Furthermore, to the extent RECs can be sold in a year after the REC was generated, the proceeds of those sales will be reflected in the tracking mechanism during the annual true-up process.¹²⁹

F. Schedule 95 Should Change Based on the Forecast and True Up Each Year.

72. The Commission should reject the parties' proposals to maintain the same level of bill credit regardless of the REC revenues incurred in each year.¹³⁰ Order 06 established a bill credit mechanism that would credit customers for REC revenues forecast in the rate effective period,

¹²⁶ Public Counsel's Phase II Opening Brief ¶ 63.

¹²⁷ ICNU's Phase II Opening Brief ¶ 33.

¹²⁸ Staff's Phase II Opening Brief ¶ 55.

¹²⁹ See *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Docket No. UE-100749, PacifiCorp's Response to Commission Bench Request 6 (Nov. 14, 2011).

¹³⁰ See Staff's Phase II Opening Brief ¶ 57; Public Counsel's Phase II Opening Brief ¶ 66; ICNU's Phase II Opening Brief ¶ 38.

and true up the initial credits based on actual REC revenues received during the 12-month period.¹³¹ Once again, Staff is picking and choosing which aspects of the Commission's Order 06 to which the parties can propose modifications. On one hand, Staff claims that the Company's objections to including 2009 and 2010 revenues in future rates is "too late," even when the Commission specifically left that issue for resolution in this phase of the docket. At the same time, Staff proposes changes to the credit mechanism that the Commission has already established. Responding Parties had the ability to seek reconsideration on the forecast and true-up nature of the REC balancing account in the first phase of this proceeding and failed to do so. In this phase, the Responding Parties have not provided any new evidence that warrants a change to Order 06 on this issue.

73. Aside from this contradiction, the Responding Parties' proposal should be rejected because it is prejudicial to the Company and will provide no benefit to customers. Requiring the Company to return REC revenues over a [REDACTED] period when the Company must record the full amount of the adjustment in 2011 increases the financial burden of the already burdensome proposal.¹³²

74. Public Counsel notes that its proposal is intended to avoid "the accumulation of a cash balance in an interest-bearing account that must ultimately be recovered from customers."¹³³ There is no evidence that the mechanism established in Order 06 and supported by the Company will result in the Company carrying a balance in an interest-bearing account that must be recovered from customers. On the other hand, the evidence shows that parties' proposal will certainly require the Company to accumulate a balance in an interest-bearing account for [REDACTED]

¹³¹ Order 06 ¶ 204-205.

¹³² Kelly, Exh. No. ALK-2CT 11:18-21; Dalley, Exh. No. RBD-28CT 3:3-13.

¹³³ Public Counsel's Phase II Opening Brief ¶ 66.

REDACTED. It is unfair to place this burden on the Company with no evidence that there is a corresponding harm to customers that will be avoided by this treatment.

III. CONCLUSION

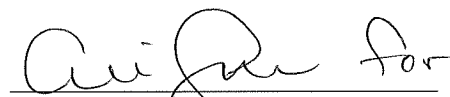
75. No matter how hard the Responding Parties work to justify their retroactive REC tracker proposals, they cannot overcome the numerous legal and policy impediments raised. An order directing retroactive recovery of the Company's 2009 and 2010 REC revenues will upset numerous Commission policies and precedents, disincentivize utilities to pursue strategies beneficial to customers and the utility,¹³⁴ and eliminate any possibility that PacifiCorp will earn its allowed rate of return in the rate effective period.
76. PacifiCorp respectfully requests that the Commission instead decide to commence PacifiCorp's REC tracker on a prospective basis beginning April 2011. This outcome is consistent with the Commission's strong and stabilizing past adherence to the rule against retroactive ratemaking and related legal doctrines. It is also fair because PacifiCorp's actual 2009 and 2010 Washington REC revenues did nothing but slightly lessen PacifiCorp's under earning during the historic period.
77. If the Commission concludes that it may order recovery of historic REC revenues despite the precedents cited, the Company urges the Commission to exercise its discretion to mitigate the adverse financial impact on the Company by relying on PacifiCorp's approach to allocation of historic REC revenues, delaying the REC tracker commencement date until late 2010 (when the Puget REC case was finally resolved) and offsetting the historic REC revenues with historic increased hydro costs for the same period.

¹³⁴ As a part of a rate case filing, the Commission's rules require a utility that has not earned its rate of return to explain why it has not and "what the company is doing to improve its earnings in addition to its request for increased rates." WAC 480-07-510(3)(g). Thus, the Commission rules include an expectation that a company will engage in activity such as the REC sales involved in this case to mitigate under earning and delay or reduce the level of future rate filings.

78. Based upon the record in this proceeding and the legal arguments presented in the Company's initial and reply briefs, the Company respectfully requests that the Commission adopt its forward-looking REC tracking proposal and reject the Responding Parties' retroactive tracking proposals.

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Respectfully Submitted,



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