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BEFORE THE WASHINGTON STATE

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UTILITIES AND TRANSPORTATION COMMISSION

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WASHINGTON UTILITIES AND)
TRANSPORTATION COMMISSION,)

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Complainant,)

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v.) DOCKET UE-100749

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PACIFICORP D/B/A PACIFIC)
POWER & LIGHT COMPANY,)

8

Respondent.)

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ORAL ARGUMENT, VOLUME IX

11

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ADMINISTRATIVE LAW JUDGE PATRICIA CLARK

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Washington Utilities and Transportation Commission

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A P P E A R A N C E S (Continued)

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ALSO PRESENT: CHAIRMAN JEFFREY GOLTZ
 COMMISSIONER PATRICK OSHIE
 COMMISSIONER PHILIP JONES

* * * * *

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1 JUDGE CLARK: Good afternoon. It is
2 approximately 1:30 p.m. on January 31st, 2012, in the
3 Commission's hearing room in Olympia, Washington.
4 This is the time and the place set for oral argument
5 in the matter of Washington Utilities and
6 Transportation Commission versus PacifiCorp, doing
7 business as Pacific Power & Light Company, given
8 Docket No. UE-100749. Patricia Clark, Administrative
9 Law Judge for the Commission presiding. Present for
10 this afternoon's oral argument is Chairman Jeffrey
11 Goltz, Commissioner Patrick Oshie, Commissioner Philip
12 Jones.

13 This matter came before the Commission on
14 May 4th, 2010, when PacifiCorp filed a request for
15 general rate relief by Order No. 6, entered in this
16 matter on March 25th, 2011. The Commission resolved
17 all issues, save for one, and that is the appropriate
18 ratemaking treatment of certain of PacifiCorp's
19 renewable energy credit revenues. The Commission
20 bifurcated that matter to Phase 2 of this proceeding,
21 which is the one we are in. And the parties prefiled
22 testimony regarding this issue, as well as both
23 initial and reply briefs. By notice issued
24 December 21st, 2011, the Commission set this matter
25 for oral argument this afternoon.

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1 At this time, I will take appearances on
2 behalf of the parties.

3 Appearing on behalf of PacifiCorp?

4 MS. McDOWELL: This is Katherine
5 McDowell, here on behalf of PacifiCorp. With me today
6 is Andrea Kelly from PacifiCorp.

7 JUDE CLARK: Thank you, Ms. McDowell.

8 Appearing on behalf of the Industrial
9 Customers of Northwest Utilities?

10 MR. SANGER: My name is Irion Sanger. I
11 am appearing on behalf of ICNU.

12 JUDE CLARK: Thank you.

13 Appearing on behalf of the Public Counsel
14 section of the Office of the Attorney General?

15 MS. SHIFLEY: Sarah Shifley, appearing
16 on behalf of Public Counsel. Thank you, Your Honor.

17 JUDE CLARK: Thank you.

18 And appearing on behalf of the Commission
19 Staff?

20 MR. TROTTER: Donald T. Trotter,
21 Assistant Attorney General.

22 JUDE CLARK: Thank you.

23 The plan this afternoon is to entertain brief
24 oral argument from each of the parties regarding their
25 position in this issue, and then submit this matter to

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1 the Commissioners for inquiry. However, before we
2 proceed to that phase, Chairman Goltz has, I believe,
3 a few remarks to address.

4 CHAIRMAN GOLTZ: Not really remarks.
5 Thank you, Judge Clark.

6 One of the issues that gave rise to this
7 request for oral argument is some issues around
8 retroactive ratemaking that was -- sort of dominated
9 many parts of the briefs. In struggling with that set
10 of issues, it seems to me that it's -- when the term
11 "doctrine of retroactive ratemaking" is used, it can
12 mean different things. I know that sometimes it
13 refers to a statutory provision in RCW 80.28.020, that
14 talks about the Commission setting rates after a
15 complaint or after a hearing. And then it determines
16 the rates, quote, to be thereafter observed and in
17 force. So that's part of the statutory basis for the
18 so-called doctrine of retroactive ratemaking.

19 Sometimes it is discussed in the context of a
20 constitutional issue, whereby it would be a violation,
21 presumably, of due process requirements to go and say,
22 well, the utility charged so-and-so back a couple of
23 years ago, that was -- that was too much, so we're
24 going to make you refund some of that. That might
25 raise some constitutional issues. Sometimes

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1 retroactive ratemaking has a constitutional meaning,
2 and sometimes it's just sort of the doctrine of
3 policy.

4 And so when you talk about a certain action or
5 a proposal as implicating the doctrine of retroactive
6 ratemaking, I would like to know what you mean by
7 that, if you mean is it a statutory issue, is it a
8 constitutional issue or it's a policy issue, because
9 those may have different impacts on how we proceed.

10 That was just a heads-up for the argument if
11 you can -- to the extent that you talk about
12 retroactive ratemaking, I suspect you will, in fact,
13 give some clarification on what exactly you mean by
14 that. Thank you.

15 JUDGE CLARK: Thank you, Chairman Goltz.

16 I will turn to you first, Ms. McDowell, for
17 argument on behalf of PacifiCorp.

18 MS. McDOWELL: Thank you, Judge Clark,
19 and good afternoon, Commissioners.

20 I do plan to address the rule against
21 retroactive ratemaking this afternoon, that is the
22 focus of my remarks this afternoon. As I address that
23 doctrine, in most of my remarks today, I will be
24 talking about primarily the policy, and the policy as
25 reinforced by the statute. That is really how we

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1 briefed the issue primarily. We have talked about the
2 constitutional implications of deviating from it, but
3 primarily, we are talking about a rule that is a
4 combination of policies that is reinforced by the
5 statute. It's in that context that I will refer to
6 the rule in my argument. If there is a need for
7 further clarification as I go, I am happy to provide
8 it.

9 CHAIRMAN GOLTZ: I guess what I mean is,
10 is say it is a policy reinforced by statute. Is your
11 argument that we can't accept a certain proposal, say
12 by Staff or Public Counsel, because the statute
13 prohibits it so it's a prohibition on our action, or
14 are you saying we shouldn't because of policy? That's
15 what I want to get at.

16 MS. McDOWELL: Okay. Well, I will try
17 to clarify that as I go. Again, if I don't clarify it
18 sufficiently, please direct me to do so in your
19 questions of me.

20 So under the Commission's policy and doctrine
21 against retroactive ratemaking, and its corollaries --
22 and by that I mean the filed rate doctrine and the
23 other doctrines we have cited in our brief -- once the
24 Commission sets rates that are representative of the
25 costs and revenues in the rate effective period, all

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1 parties live with the fact that actual costs or
2 revenues could be higher or could be lower.

3 The responding parties in this case seek an
4 asymmetrical change to this policy, allowing them to
5 look back and increase the rate credit for 2009 and
6 2010 for higher than forecast REC revenues, while
7 holding all other costs and revenue elements constant,
8 even though those resulted in PacifiCorp underearning
9 during those periods.

10 The Washington Commission has never applied
11 the rule against retroactive ratemaking
12 asymmetrically, nor previously recognized exceptions
13 to the rule against retroactive ratemaking, aside from
14 deferred accounting. There is no basis on the
15 evidentiary record in this case to deviate from this
16 precedent, especially when that change in precedent
17 would negatively impact issues as fundamental as test
18 period conventions and finality of rate orders.

19 Separate and apart from a determination on the
20 legal issues, considerations of fairness and equity
21 militates in favor of the Commission exercising its
22 discretion to exclude 2009 and 2010 REC revenues from
23 the balancing account.

24 Our argument today will focus on these three
25 points: Why the rule against retroactive ratemaking

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1 applies in this case; why no new exceptions to the
2 rule are warranted; and how a discretionary analysis
3 also supports an April 2011 start date for the
4 balancing account.

5 We welcome the opportunity to address other
6 issues, notably around implementation of the balancing
7 account, in rebuttal or in response to the
8 Commission's questions as appropriate.

9 So turning first to the application of the
10 rule against retroactive ratemaking. Through some
11 undefined combination of test period and amortization
12 conventions, responding parties argue that the
13 Commission can order the company to provide rate
14 credits in this case for three years: 2009, because
15 that is the base year in the case; 2011, because that
16 is the rate year; and 2010, apparently because it
17 falls in between those two years.

18 While responding parties suggest that such an
19 order is just garden variety ratemaking, if one
20 applies this approach symmetrically to net power
21 costs, it becomes clear that this is untrue. It is
22 safe to say that responding parties would never agree
23 to a balancing account in this case that would allow
24 the company to recover its actual test year net power
25 cost, combined with its actual rate year net power

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1 cost, combined with actual net power cost for the year
2 in between.

3 Now, responding parties cite various cases and
4 scenarios in support of their test period theory.
5 Unlike this case, none present the primary
6 characteristic of retroactive ratemaking, which is the
7 restatement of an item previously accounted for in
8 rates, to retroactively capture the difference between
9 that rate and actual costs and revenues.

10 No party in this case disputes that the
11 company's rate filings for 2009 and 2010 included REC
12 revenues each year of approximately half a million
13 dollars. Indeed, all of the company's general rate
14 cases since approximately 2006 have included some
15 level of REC revenue. The fact that all parties now
16 concede the need to offset their 2010 REC revenue
17 proposals with REC revenues already in rates, is
18 conclusive evidence that these proposals retroactively
19 seek to reset a rate to actuals.

20 The parties have contested the offset for 2009
21 REC revenues on the basis that the settlement
22 agreement in the 2008 GRC did not precisely identify
23 the REC revenue baseline. The parties do not assert
24 that there were no REC revenues in final rates, only
25 that there should be no offset, because the exact

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1 amount in rates was not quantified. This position
2 requires the Commission to accept the illogical
3 position that the parties eliminated all REC revenues
4 in terms of the credit in the company's filing, even
5 though the settlement went the other direction,
6 substantially reducing the company's rate request from
7 34 million to 20 million.

8 Now, the Public Counsel and ICNU complaint in
9 Docket UE-110070, seeking additional 2010 REC
10 revenues, recognized the threshold needs to set aside
11 the 2009 rate case in order to avoid this resetting
12 rates issue. That complaint failed on multiple
13 grounds.

14 In this case, the responding parties are
15 attempting to accomplish the same improper result,
16 just more indirectly.

17 Now, another major problem with the test
18 period argument is that it fails to justify more than
19 a single year of REC revenue credit, yet responding
20 parties are using it to support three years of REC
21 revenues in this case. Staff denies that it is
22 double-counting both historical and forecast data, but
23 the Staff fails to acknowledge that whatever the
24 source of that rate credit ordered in the case, that
25 it was, in any event, designed to capture REC revenue

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1 levels in the 2011 rate effective period. By
2 definition, this number cannot be additive to 2011
3 actual REC revenues. At most, it may be trued up
4 against 2011 actual REC revenues.

5 Staff's current position, that the REC credit
6 it proposed and the Commission adopted in Order 06, is
7 a 2009 historic number, not a 2011 forecast, appears
8 contrary to the plain language of Order 06, of
9 Paragraphs 204 and 205, which set a, quote, 2011
10 credit and ordered a true-up against 2011 revenues.

11 As ICNU acknowledges in its opening brief,
12 quote, the Commission directed PacifiCorp to file a
13 tracking mechanism that was based on the rate period
14 year and a credit based on upon an estimate of the
15 company's expected RECs for the next 12 months.

16 Now, turning to the second issue, of whether
17 the Commission should create an exception to the rule
18 against retroactive ratemaking, the Commission has
19 interpreted its statute, RCW 08.28.020, which states
20 that the Commission should fix just, reasonable and
21 compensatory rates, as directing the Commission to set
22 rates on a prospective basis with, quote, few
23 exceptions.

24 While the Commission has recognized deferred
25 accounting as an exception to retroactive ratemaking

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1 required -- or, excuse me, prohibited by this statute,
2 it has expressly required a notice filing and refused
3 to recognize costs of revenues that predate the notice
4 filing, underlining the Commission's adherence to the
5 rule against retroactive ratemaking.

6 CHAIRMAN GOLTZ: Excuse me, it's the --
7 it's a petition for an accounting order you are
8 talking about, generally?

9 MS. McDOWELL: That's correct.

10 CHAIRMAN GOLTZ: So is it the
11 requirement that the petition be filed that triggers
12 the exception, or is it the granting of the petition?

13 MS. McDOWELL: The Commission has, in
14 the past PacifiCorp cases, looked at that precise
15 issue, and concluded that it was really the filing of
16 that petition, that and the notice that was accorded
17 by the filing, that allowed the exception for
18 retroactive ratemaking.

19 CHAIRMAN GOLTZ: So it's basically
20 notice to the company that that revenue stream, that
21 you shouldn't count on that revenue stream -- keeping
22 that revenue stream, that that may be subject to
23 further Commission action?

24 MS. McDOWELL: I think it is notice to
25 all parties.

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1 CHAIRMAN GOLTZ: Right.

2 MS. McDOWELL: Whoever --

3 CHAIRMAN GOLTZ: Because it can go both
4 ways.

5 MS. McDOWELL: Absolutely.

6 CHAIRMAN GOLTZ: Okay.

7 MS. McDOWELL: And I think that's our
8 key point, is that it applies symmetrically. You
9 know, the cases have been pretty clear about that. In
10 the power crises, there was a lot of litigation around
11 this issue, and there was specific litigation around,
12 you know, could you recover revenues or costs, you
13 know, after the petition was filed but before the
14 Commission ruled on it, and there was specific
15 litigation around that. The Commission found that the
16 date of filing was the triggering date.

17 But then there was also litigation about
18 whether you could recover costs that were incurred
19 prior to the date of the filing, and the Commission's
20 response there was that absolutely would constitute
21 retroactive ratemaking.

22 CHAIRMAN GOLTZ: And so -- so do you
23 mean -- I don't recall exactly this from the revenue
24 crisis, but are you saying that during that crisis,
25 PacifiCorp filed a petition to, in effect, defer

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1 costs, and was then able to recover those costs
2 between the time the petition was filed and the
3 petition was approved?

4 MS. McDOWELL: That's correct. So --

5 CHAIRMAN GOLTZ: Do you remember the
6 name of that case? It was PacifiCorp back in --

7 MS. McDOWELL: It's the -- you know, I
8 do. We did cite it in our brief, and I can get that
9 cite to you.

10 CHAIRMAN GOLTZ: Okay.

11 MS. McDOWELL: It is a PacifiCorp case,
12 and I think it's an '02 case.

13 CHAIRMAN GOLTZ: We'll find it. That's
14 fine. Thank you.

15 MS. McDOWELL: Before we end today, I
16 will have that sent to you.

17 CHAIRMAN GOLTZ: Okay.

18 MS. McDOWELL: But it's a series of
19 cases around sort of when exactly the doctrine starts
20 attaching. Interestingly, it's with Staff and Public
21 Counsel and ICNU all arguing that retroactive
22 ratemaking precluded any recovery for net power costs.
23 The Commission ultimately concluded that -- you know,
24 it drew the line at the date of the filing. Not
25 before, but after, it would be allowed, based on the

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1 merits of the petition. But retroactive ratemaking
2 would not preclude it.

3 I have the case cite here, and it's UE-020417.
4 The Sixth Supplemental Order -- actually, we cite both
5 the Third Supplemental Order and the Sixth
6 Supplemental Order for the two different propositions
7 we discussed.

8 COMMISSIONER OSHIE: Ms. McDowell, let
9 me follow up on that question.

10 This is Commissioner Oshie.

11 So under your interpretation of the Commission
12 action in the past -- so let's put that in a
13 contemporary context. So just, you know, over the
14 past couple of weeks, there was a very large storm
15 that hit Western Washington. I think Portland may
16 have escaped the majority of it.

17 Puget Sound Energy has expended perhaps tens
18 of millions of dollars, perhaps exceeding 125 to
19 \$130 million repairing the system, getting people back
20 on line, doing all that they had to do to ensure that
21 safe, reliable service was offered to all and afforded
22 all customers.

23 So under your reading of our interpretation,
24 or of our actions, until Puget files a petition for
25 some kind of accounting treatment for all the storm

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1 damage, all the monies expended to bring the system
2 back up would be disallowed, because everything starts
3 to tick. The monies begin to become accounted for, at
4 the time -- or after -- at the time they file the
5 petition and whatever action is taken, you know,
6 subsequent to that.

7 Is that -- would you address that? I mean, is
8 that fair treatment for a utility?

9 MS. McDOWELL: Commissioner Oshie, just
10 to address your question directly. You know, that is
11 the procedure that is followed. Most -- at least in
12 my experience, in PacifiCorp's experience, when a
13 storm occurs and we -- the company incurs substantial
14 or extraordinary losses associated with it, the
15 company files for deferred accounting as quickly as it
16 can. As soon as it recognizes that extraordinary
17 losses have been incurred, it files for deferred
18 accounting or for an accounting order, whatever the
19 protocol is in a particular state, to put all parties
20 on notice that this isn't just a normal storm, a storm
21 that can be taken kind of -- kind of in account, in
22 the normal -- you know, based on the normal costs, in
23 the revenue requirement associated with repairs and
24 upkeep and so forth. This is one that is
25 unpredictable.

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1 And it really is that notice requirement I
2 think that is so important here symmetrically, all
3 around. The company's filing puts everybody on notice
4 that this is not just business as usual. This one was
5 extraordinary, there extraordinary costs that were
6 incurred.

7 COMMISSIONER OSHIE: And so back to,
8 then -- under any costs that Puget incurred, as an
9 example, any costs that Puget incurred prior to the
10 filing of some petition for deferred accounting, or
11 whatever accounting treatment that they would request,
12 those costs would be disallowed under your
13 interpretation of our action?

14 MS. McDOWELL: Those --

15 COMMISSIONER OSHIE: It will only be
16 costs incurred post filing.

17 MS. McDOWELL: That is the Commission's
18 precedent in terms of the extraordinary costs that the
19 utilities occurred during the energy crisis. That is,
20 as we understand it, current Commission precedent.

21 You know, the issue that this raises is would
22 you later on look at the costs of that storm in
23 adjusting whatever revenue requirement costs were
24 associated with the maintenance of the system and so
25 forth.

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1 You know, you might say, well, in this -- you
2 know, three or four years, here is what -- our average
3 costs. Those costs, you might look at that in terms
4 of forecasting or projecting what future maintenance
5 costs may be. But you might also have those
6 extraordinary costs normalized out in the course of
7 typical ratemaking.

8 So the only way for a utility to recover
9 those, would be to promptly file for deferred
10 accounting and have the matter come before the
11 Commission in the normal course, about whether those
12 amounts were recoverable.

13 So returning to the argument about creating an
14 exception to the doctrine of retroactive ratemaking in
15 this case. As I was indicating, the Commission has
16 been reluctant to recognize exceptions, and in the
17 past, it has only recognized, expressly recognized, an
18 exception for deferred accounting with the limitations
19 we have just discussed. The Commission has never
20 recognized the other exceptions urged by the
21 responding parties from other states. And those are,
22 you know, a series of different scenarios that they
23 put out. But none of them fit the facts of this case,
24 where no one was established or even alleged fraud on
25 behalf of the company, noncompliance with the

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1 Commission order, overearning by the company. Those
2 are the scenarios that each of those cases raised.
3 None of those scenarios have been alleged, none of
4 those scenarios have been established in the evidence
5 that was filed in this case.

6 ICNU and Public Counsel do claim that the
7 company knowingly misled parties with respect to REC
8 revenues, but there is not a single piece of evidence
9 in this record that supports this contention. ICNU
10 and Public Counsel's allegations of deliberate
11 deception are irresponsibly made, given the fact that
12 none are supported by citations to evidence in this
13 record. They had a chance in Phase 2 to put on that
14 case; they didn't do it.

15 So the allegations in their brief, which are
16 full of charges and inflammatory statements, look
17 carefully, because none are -- none have a footnote to
18 an evidentiary citation. Occasionally, they cite each
19 other's briefs, but that's not evidence, that's
20 argument.

21 What the record does indicate here is that the
22 inaccurate REC forecast during the period in time we
23 are talking about, 2009 and 2010, were a function of
24 the overall context, which was a volatile and
25 unpredictable REC market and an associated complex and

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1 uncertain regulatory environment. The citation to the
2 volatile and unpredictable REC market is the
3 Commission's statements in the Puget order, Order 03,
4 at Paragraph 17. The citation on the associated
5 complex and uncertain regulatory environment comes
6 from the Commission's order, Order 06.

7 So the last point I wanted to address -- and
8 this does get at Commissioner Goltz's question about
9 are we talking law, are we talking equitable policy,
10 what are we talking? And, you know, frankly, we have
11 argued both points, because we are not clear. We
12 think there are statutory underpinnings,
13 constitutional underpinnings, but there's no question
14 that there is a discretionary or equitable aspect to
15 this as well.

16 So the reason that we think that is implicated
17 here, is because certainly the Commission is setting
18 rates, and they are actually going back and looking at
19 a past period, potentially changing rate treatment.
20 We think whenever the Commission does that, that
21 implicates 80.28.02 -- 020, which is that the
22 Commission must review rates to determine that they
23 are just, reasonable and compensatory.

24 The company's ongoing underearning and the
25 financial impact of retroactive REC revenue recovery

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1 are necessary considerations in this inquiry,
2 especially because the Commission is considering
3 changing the treatment of an item already accounted
4 for in the rates. For this reason, we think Staff is
5 incorrect, that the rate credit decision in Order 06
6 blocks consideration of these issues.

7 No party has disputed the company's testimony
8 that including 2009 and 2010 REC revenues in the
9 balancing account would reduce the company's ROE in
10 2011 by the substantial amount that is confidential
11 and listed in Mr. Dally's testimony at Page 3, Line 1.

12 I am doing it in this awkward way to avoid us
13 having to go in-camera, but it's a significant amount.
14 It would also preclude, this order -- such an order
15 would preclude the company from earning its allowed
16 ROE in the rate effect period. Nor has any party
17 disputed that the company significantly underearned
18 during the time period in question, 2009 and 2010,
19 even taking into account all of the REC revenues
20 contested in this case.

21 We think these facts support a prospective
22 start date for the REC tracking account.
23 Alternatively, we think these considerations support
24 an offset for the excess hydro costs that the company
25 incurred during 2009 and 2010. It's approximately

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1 \$10.3 million during that period.

2 Now, the parties in their briefs incorrectly
3 allege that PacifiCorp did not raise this issue until
4 its brief, but that's untrue. The evidence in this
5 case clearly demonstrates that the company put forward
6 evidence and exhibits on this matter in Ms. Kelly's
7 rebuttal testimony and her exhibits.

8 Now, there is another statute that we think is
9 involved here, and that's RCW 80.01.040, which is the
10 Commission's mandate to, quote, regulate in the public
11 interest. The Commission has previously interpreted
12 this statute to mean regulating consistently with
13 laws, rules and pertinent prior decisions.

14 A complete evaluation of the consequences of a
15 Commission decision to allow retroactive recovery of
16 REC revenues demonstrates that such a decision will
17 not satisfy this public interest mandate. In the
18 future, parties will look to this precedent to support
19 additional retroactive recovery of both costs and
20 revenues, undermining regulatory consistency and
21 certainty and misaligning the interests of customers
22 and utilities shareholders. This precedent could
23 encourage parties to arbitrarily pick and choose
24 between historic and forecast test periods for a
25 particular cost item, depending on the rate result

1 produced by the different test periods.

2 Conversely, a decision setting the REC
3 balancing account to operate prospectively does not
4 change any Commission precedent or allow overearning.
5 Instead, the decision reinforces the efforts of a
6 utility to mitigate underearning through strategies
7 which ultimately benefit all stakeholders.

8 The company's REC revenues in 2009 and 2010
9 helped balance the company's underrecovery of
10 generation and power costs, including, notably, the
11 costs associated with poor hydro during those periods.

12 Finally, a decision applying prospective
13 tracking account avoids the significant complexities
14 associated with responding parties' proposals to
15 retroactively change allocation methodologies and
16 impute past REC revenues. A prospective application
17 of the tracking account simplifies the operation of
18 the account, removes most of the implementation
19 disputes among the parties, and lessens the potential
20 for future disputes or litigation over the operation
21 of that tracking account.

22 For all of the legal and equitable reasons
23 just discussed, PacifiCorp respectfully requests that
24 the Commission commence the REC tracking account in
25 April 2011, and exclude REC revenues preceding that

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1 date from 2009 and 2010.

2 Thank you very much.

3 JUDGE CLARK: Thank you, Ms. McDowell.

4 Before we turn to anything, I want to let
5 everyone know, I did have an inquiry before we went on
6 the record about whether or not the bridge line was
7 open. It wasn't, but it is now open. I just caution
8 you, if you were to make any comments that you would
9 construe to be confidential, that it will be necessary
10 to conduct an in-camera proceeding. I only advise
11 that because the briefs, as well as the testimony, do
12 contain a significant amount of confidential
13 information.

14 Chairman Goltz.

15 CHAIRMAN GOLTZ: Thank you.

16 Thank you, Ms. McDowell.

17 You mentioned that somehow -- it sounded like
18 you were saying that there is some equitable factors
19 here, that the company was underearning and this helps
20 offset that. Is that accurate?

21 MS. McDOWELL: That's true, yes.

22 CHAIRMAN GOLTZ: So is that really
23 relevant? I mean what would have happened if you had
24 been overearning? Would that be relevant in our
25 determination, then?

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1 MS. McDOWELL: I think it is relevant
2 from looking at this from a discretionary or a policy
3 perspective. So assuming the Commission concludes
4 that, as a legal matter, it can make exceptions to the
5 doctrine against retroactive ratemaking, and it can
6 look at the equitable issues involved in making those
7 kind of exceptions, and that's frankly what other
8 Commissions have done. One of the key issues that
9 Commissions have looked at is the company's
10 earning position.

11 In situations where a company overeans as a
12 result of a particular revenue, you know, boost or
13 cost savings, the Commission in that instance -- a
14 Commission in that instance, it appears, based on case
15 law, are much more likely to say, Well, we'll create
16 an exception here.

17 In a situation where a company is underearning
18 and has not improperly or unfairly benefited from the
19 particular extraordinary revenue item or cost savings,
20 the Commissions have been much less likely to
21 create one of those exceptions. So in that sense, we
22 do think it's relevant.

23 CHAIRMAN GOLTZ: So just one -- sort of
24 a side point here. The filed rate doctrine, is that
25 really relevant here? Doesn't that basically mean

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1 you've got to change what your tariff rates say? You
2 can't charge more; you can't charge less, end of
3 story. Is there something more to that?

4 MS. McDOWELL: Well, we think it is
5 relevant here, in the sense that you have final orders
6 that cover 2009 and 2010. What the Commission is
7 being asked to do here now is undo a part of those
8 orders, the REC revenues embedded in those rate
9 orders. We think, under the filed rate doctrine, the
10 Commission can't go back and undo a part of those rate
11 orders, that the filed rate doctrine stands for the
12 proposition that those are the rates, and the only way
13 that those can be changed, is on a forward-looking
14 basis.

15 CHAIRMAN GOLTZ: So you are saying the
16 filed rate doctrine means more than just the rates
17 that are in the final tariff, that somehow that
18 embodies all of the costs and expenses that went into
19 calculating that rate, and we can't go back and touch
20 those and consider those in a future rate.

21 MS. McDOWELL: You can't go back and
22 undo pieces of those orders retroactively on a one-off
23 basis. You know, you may say, Well, that sounds just
24 like what you are arguing on retroactive ratemaking --

25 CHAIRMAN GOLTZ: Yeah.

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1 MS. McDOWELL: -- or on single-issue
2 ratemaking, and I agree. When I talk about
3 retroactive ratemaking and the corollary doctrines,
4 they are related when it comes to this particular
5 application. And the particular application we are
6 talking about here is when you have a rate that has
7 been set in an order -- you know, there are numerous
8 doctrines that exist that preclude a party from going
9 back and resetting that rate to true-it up to actuals.
10 One of those doctrines is the doctrine against
11 retroactive ratemaking. Another is the filed rate
12 doctrine, because you've got a commission order in
13 place. Another is the rule against collateral attacks
14 on a commission order.

15 The fact that there are so many rules that say
16 you can't do this, you know, should suggest something
17 here; that it's really a pretty significant policy
18 issue. That on various grounds, for various reasons,
19 the Commission has said this is a bad idea, this
20 creates chaos.

21 CHAIRMAN GOLTZ: So I gather if the --
22 if someone, the company, the Public Counsel, the
23 Commission Staff had filed a petition for an
24 accounting order back sometime in 2010, then your
25 argument would be different.

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1 MS. McDOWELL: It would be very
2 different. This case in front of you would be very
3 difficult. The company would have been able to
4 respond to that deferred accounting position with
5 whatever arguments were appropriate at the time --

6 CHAIRMAN GOLTZ: Right. So --

7 MS. McDOWELL: -- including that offsets
8 were -- the Commission should consider offsets. The
9 company could have filed the corresponding deferred
10 accounting order for extraordinary power costs that's
11 occurring at the same time. That is typically what
12 you see.

13 CHAIRMAN GOLTZ: Yeah.

14 MS. McDOWELL: People will look for the
15 matching costs or revenue item and say, Okay, if you
16 are going to defer that, defer this, and do it fairly.

17 CHAIRMAN GOLTZ: So it seems to me that
18 the parties have painted the choice of January 1,
19 2009, or yours is April 3, 2011.

20 MS. McDOWELL: Correct.

21 CHAIRMAN GOLTZ: But isn't there a --
22 when -- in the -- in the rate case, Mr. Foisy -- and I
23 think that was October of 2010 -- on Page 10 of his
24 testimony he said, in response to the question, How
25 should the Commission treat green tag revenues in this

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1 case year and in the future?

2 And he said, The Commission should retain
3 4.2 million revenues from green tag sales in the test
4 year, which ends December 31st, 2009. The Commission
5 should order PacifiCorp to record as a regulatory
6 liability, all green tag revenues from January 1,
7 2010, forward.

8 Isn't that the functional equivalent of an
9 accounting petition filed in October of that year?

10 MS. McDOWELL: Well, I guess I would say
11 the Commission has never recognized a request in a
12 rate case for regulatory accounting treatment as being
13 the equivalent of a deferred accounting request. I
14 mean that's --

15 CHAIRMAN GOLTZ: That's what he asked
16 for, though, isn't it?

17 MS. McDOWELL: I don't dispute what you
18 have read --

19 CHAIRMAN GOLTZ: Yeah.

20 MS. McDOWELL: -- as being an accurate
21 description of his testimony.

22 You know, what we saw is that that was a
23 request for a particular rate treatment in the case,
24 and not a request for deferred accounting, which
25 typically occurs when -- you know, outside of a rate

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1 case and deals -- you've got your -- you know, your
2 embedded rates. And then deferred accounting
3 addresses an item not in rates that's extraordinary.

4 So it's a different scenario, but, you know,
5 your point about the fact that the -- he did reference
6 a regulatory accounting order is correct.

7 CHAIRMAN GOLTZ: If the concern is, and
8 what gets us, you, everyone out of this concern about
9 retroactive ratemaking, is a notice to everybody.
10 Then might that be notice to everybody, at least in
11 October of that time, that there was something about
12 these REC revenues, that maybe we were going to treat
13 them differently, and therefore, with that notice,
14 sort of the -- everyone's -- well, the company is on
15 notice that those REC revenues might be treated
16 differently, at least from that date forward?

17 MS. McDOWELL: Well, I think that's an
18 important point. Mr. Foisy's testimony did request a
19 retroactive accounting order, if you are looking at
20 that as a request for an accounting order. Under
21 Commission precedent, clearly, that would not be
22 permitted, that that portion between January and
23 October --

24 CHAIRMAN GOLTZ: Right.

25 MS. McDOWELL: -- would be considered

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1 retroactive.

2 CHAIRMAN GOLTZ: Yeah.

3 MS. McDOWELL: Your Order 06 did suggest
4 that something in the rate case could have provided
5 the kind of notice that would satisfy the Commission's
6 notice requirements. It is true that in the deferred
7 accounting context, the Commission has focused on
8 notice as the key issue.

9 CHAIRMAN GOLTZ: And then the other
10 instance of sort of -- and this was not an accounting
11 order, but we issued a decision in the PSE REC case,
12 also in 2010, prior to October, where we did say
13 that -- sort of talked about the treatment of REC
14 revenues.

15 Does that give the company any notice of how
16 we are thinking of treating that? We did say the REC
17 revenues did belong -- in effect belonged to the --
18 you know, to the consumer.

19 MS. McDOWELL: I think that is a very
20 different issue. You know, the company had included
21 REC revenues in rates prior to the Puget decision. It
22 wasn't an issue about -- I mean, I don't think the
23 company contested the premise that these were
24 regulatory items that belonged in rates. You know,
25 the -- the Puget decision -- you know, in contrast to

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1 the PacifiCorp case, Puget did not have REC revenues
2 in its base rates. You know, right there, there's a
3 very distinct difference. You were making a decision
4 and encouraging Puget to put them in rates in a
5 different way than PacifiCorp had, that they were
6 already in PacifiCorp's base rates.

7 But even if, you know, there was something
8 about the Puget decision that triggered notice, you
9 know, that would mean that that decision should be
10 applied, again, only prospectively. That case
11 continued to be litigated through October. It was,
12 you know, the first decision that -- I think the
13 Order 03 was decided in May, but your Order 06
14 notes that the parties continued to litigate all of
15 that through -- through the fall. Certainly, the lay
16 of the land wasn't clear until the fall of 2010, as a
17 result of the Puget case.

18 But I think that the -- you know, there's
19 nothing in the Puget case around retroactive
20 ratemaking or the application of the doctrines that
21 are so controversial in this case. Really, the piece
22 that's not so controversial in this case is that REC
23 revenues, as a matter of course, should go to
24 customers. What the Puget case actually said was that
25 the Commission had discretion to award a certain

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1 portion of those to Puget. You know, that's not
2 unlike what we are arguing here; which is, given the
3 circumstances here, it's fair to give 100 percent RECs
4 on a tracking basis from April 2011 forward, but not
5 fair to go back and reset REC revenues in 2009 and
6 2010.

7 CHAIRMAN GOLTZ: I have nothing further.

8 COMMISSIONER OSHIE: Well, I just --
9 this is Commissioner Oshie again.

10 Ms. McDowell, I just want to clarify one
11 thing. I think you said it. Does the company concede
12 that REC revenues, those that we are discussing this
13 afternoon, are really -- should be -- are really --
14 the revenues from REC revenues belong to the
15 ratepayers? That's a general rule, and there may be
16 exceptions to that, which you are arguing now, and you
17 have just pointed out in the Puget case. But do you
18 concede the general principle that REC revenues belong
19 to ratepayers?

20 MS. McDOWELL: Yes, we do, Commissioner
21 Oshie. The company has reflected REC revenues in its
22 rates since approximately 2006.

23 COMMISSIONER OSHIE: Now, I get the
24 impression, based on your argument, that because there
25 were REC revenues included in the 2009 case and the --

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1 you know, the 2009/2010 general rate cases, that given
2 the amount of REC revenue that's in question now,
3 compared to what was in rates, that the Staff, ICNU,
4 the other parties just made a bad deal. Is that what
5 you are saying? They settled for a lot less than what
6 was available, and that was -- so they just -- that
7 was just the luck of the draw, so to speak, in the
8 settlement, and therefore the information represented
9 to the Commission before we approved it was, you know,
10 that's just the way the -- you know, to use the term,
11 kind of -- the cookie crumbles in ratemaking. You
12 know, if there's -- it's just the way it worked out,
13 and we should be satisfied with that.

14 I mean that's how I -- the impression I am
15 getting from your argument, because you keep coming
16 back to the rate cases, because you find significant
17 there that there was some REC revenues included in
18 rates, and that therefore is the significant fact.

19 MS. McDOWELL: Let me just say that
20 my -- our position is more complex than just that's
21 tough. You know, we --

22 COMMISSIONER OSHIE: I understand.

23 CHAIRMAN GOLTZ: That's good, actually.

24 MS. McDOWELL: Let me try to explain it
25 in a little bit more detail.

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1 COMMISSIONER OSHIE: No, you don't --
2 you don't need to go back. I was just trying to boil
3 it down to its essence, because the fact that you are
4 bringing -- because you bring it right back to the
5 ratemaking treatment that was afforded these revenues
6 and the company in their 2009 and 2010 cases. It's
7 not that I don't understand your argument, but that's
8 essentially -- it seems to be what you are arguing
9 here, is what's done is done, and that it may have
10 been a bad deal, but oh, well, that's -- that's how it
11 works sometimes. Because sometimes the company won't
12 earn what's been authorized -- as what's been
13 approved, excuse me, and -- or it may earn more. But
14 that's -- you know, that's what happens after rates
15 have been set, are just -- they are subject to
16 whatever the -- you know, the market that the company
17 is working in, and the economic environment, and the
18 circumstances of the individuals that buy power from
19 the company.

20 MS. McDOWELL: Well, let me just say
21 that, you know, I think the number -- I just want to
22 respond to a couple points.

23 The number one piece that I want to say is
24 that we are not advocating any rule that we are not
25 already living by. We -- the utility lives by this

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1 rule every day. You know, there is costs set on all
2 kinds of items that are way underforecast. And, you
3 know, when -- if we were to come in and say, Our power
4 costs were \$10 million underforecast because of poor
5 hydro, I think what we would hear is, Well, that's
6 tough, do a better job forecasting next time. You
7 know, on a forward-looking basis, maybe we can fix
8 that.

9 You know, nobody is arguing to change anything
10 symmetrically here. People are arguing asymmetrically
11 to change it for this one particular revenue item. We
12 don't think that's fair. We don't think that's fair,
13 especially under the facts of this case, which is
14 really my second point. This wasn't about just
15 setting a rate and not thinking about it. The parties
16 were focused on the REC revenue issue, so they did set
17 a rate, particularly in the 2009 settlements, moving
18 into the 2010 rate year. They set a rate. They asked
19 for a particular reporting regime around it. They
20 reserved their right to seek deferred accounting.
21 There was a process agreed to in that settlement on
22 how to deal with the uncertainty around REC revenues.

23 We filed the reports, we did all of that. The
24 parties did not seek deferred accounting. They -- you
25 know, the company filed its next rate case, and the

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1 next thing we see is that people are, instead of
2 filing for deferred accounting, instead of using the
3 tools that they bargained for in the settlement, they
4 are just seeking, through this sort of odd use of test
5 your conventions, to circumvent that whole process and
6 get from 2009 to 2011 forward. We don't think that's
7 fair, and we don't think that's good ratemaking
8 policy.

9 Our argument, really, is more than just these
10 rates were set, but the foundation of the legal
11 arguments here is the fact that rates were previously
12 set on this item. And the Commission, under all kinds
13 of rules and doctrines, doesn't go back and reset
14 rates to true them up to actuals on a backward-looking
15 basis, and that's what we think is going on here.

16 COMMISSIONER OSHIE: Thank you.

17 MS. McDOWELL: I hope that makes the
18 subtleties of our argument a little more clear.

19 COMMISSIONER OSHIE: I believe I
20 understood them, but, you know, it helps to have a
21 little refresher.

22 MS. McDOWELL: I appreciate the
23 opportunity to explain that a little bit more clearly.

24 JUDGE CLARK: Commissioner Jones.

25 COMMISSIONER JONES: Ms. McDowell, just

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1 a couple of things.

2 One, in your comments, you talked about two
3 factors that could lead to a large difference between
4 the forecasted REC revenues and the actual REC
5 revenues, and you cited the volatility of the REC
6 market, and then the uncertainty of UTC policies. Did
7 I hear you correctly on that?

8 MS. McDOWELL: That's correct.

9 COMMISSIONER JONES: So for the first
10 one, I think I agree with you, and I think most
11 parties in this case would agree that the volatility
12 of the REC revenues in the REC markets, especially in
13 the years that we are talking about, '09, '10, '11 --
14 well, we haven't seen the '11 numbers yet, have we,
15 the official numbers that you are supposed to file on
16 May 1st?

17 MS. McDOWELL: That's correct.

18 COMMISSIONER JONES: Okay.

19 But I think there may be general agreement on
20 that. But I want to probe a little bit on our orders,
21 our policy. I think you cited to Order 06,
22 Paragraphs 204 through 208.

23 MS. McDOWELL: That's correct.

24 COMMISSIONER JONES: Why is this -- why
25 is the Commission's policy so uncertain, recognizing

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1 that we have this parallel case going on with the
2 complaint at the same time?

3 This was a general rate case order, correct?

4 MS. McDOWELL: You know, my point really
5 was just alluding to the fact that the Puget order had
6 just been issued, and, you know, the Commission in
7 Order 06 referenced the fact that the Puget order was
8 the first time that the Commission hadn't --

9 COMMISSIONER JONES: Right.

10 MS. McDOWELL: -- looked at the REC
11 issues. My point was really just that as the market
12 was emerging, so was, too, the Commission's regulatory
13 treatment of REC revenues, in terms of whether, you
14 know, the Commission wanted to see these embedded in
15 base rates, whether they wanted to see them
16 functioning as a tracking mechanism, as in the Puget
17 case. That's really what the reference was to.

18 COMMISSIONER JONES: Isn't it fair to
19 characterize the REC market, and how different
20 Commissions deal with REC revenues is kind of an
21 emerging issue? I mean there is no -- it is kind of
22 policies that are emerging in states that have RPS
23 statutes and REC revenues and REC costs, correct?

24 MS. McDOWELL: I think that's a fair
25 summary.

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1 COMMISSIONER JONES: And then in this
2 order in Paragraph 206, it required the company to
3 issue a detailed accounting of all REC proceeds during
4 the period January 1st, 2009, to the most recent date
5 for which data are available. And you have done that,
6 correct, with your May 24th filing?

7 MS. McDOWELL: That's right.

8 COMMISSIONER JONES: And then in
9 Paragraph 207, the order suggested three possible
10 dates that could be used as the start date. One was
11 January 1st, 2010. Another was the date you made the
12 initial filing in the rate case, which was May of
13 2010, and then another possible date included the
14 start of the rate year. So the Commission set forth
15 three possible dates for starting this tracking
16 mechanism; is that correct?

17 MS. McDOWELL: That's correct.

18 COMMISSIONER JONES: And your best --
19 your preferred choice is the start of the rate year,
20 correct?

21 MS. McDOWELL: That's correct.

22 COMMISSIONER JONES: Now, you mentioned
23 the PSE REC revenue case. In that case, 070705,
24 didn't PSE file an accounting petition?

25 MS. McDOWELL: They did.

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1 COMMISSIONER JONES: So why didn't
2 PacifiCorp file an accounting petition when its actual
3 REC revenue in 2009 and '10 was substantially
4 different than the forecast revenue?

5 MS. McDOWELL: Well, as I indicated, I
6 think the answer is a couple-fold there. First,
7 unlike Puget, PacifiCorp had reflected REC revenues in
8 its base rates.

9 Second, as part of the settlement of the 2009
10 rate case, the company had agreed to file reports, and
11 the parties have reserved their right to seek deferred
12 accounting, so that was the understanding of the
13 protocol going forward.

14 I think the third thing is that the company
15 intended to file a rate case, and did file another
16 rate case in May of 2010. So this wasn't a situation
17 where the company wasn't coming in for a long time.

18 COMMISSIONER JONES: And I am going to
19 ask Staff the questions of these reports as well, when
20 their turn comes.

21 What happened to those reports? Those reports
22 on REC revenues were filed on a quarterly basis,
23 correct?

24 MS. McDOWELL: That's correct.

25 COMMISSIONER JONES: Did anybody get

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1 back to you? Was there any discussion after you filed
2 those reports, from Staff or any other intervening
3 party?

4 MS. McDOWELL: Do you mind if I just
5 check with Ms. Kelly.

6 COMMISSIONER JONES: Sure.

7 MS. McDOWELL: Just to make sure I am
8 giving you the accurate answer.

9 COMMISSIONER JONES: Sure.

10 (Pause in the proceedings.)

11 MS. McDOWELL: So the answer that I just
12 verified is that there was no feedback or follow-up on
13 those reports. I also understand that another -- the
14 next installment of the quarterly reports is being
15 issued today.

16 COMMISSIONER JONES: Okay.

17 And I think in response to Chairman Goltz's
18 question on the filing of Staff testimony in October,
19 in responsive testimony, and that was filed in what,
20 in September or October of 2010?

21 CHAIRMAN GOLTZ: October.

22 COMMISSIONER JONES: October.

23 Thank you.

24 So if -- hypothetically, if we were to adopt
25 that as a starting date for some sort of mechanism,

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1 what would be your fear going forward, or concerns, if
2 you have any, if that becomes, quote, the notice to
3 all parties that this issue is in play, you know,
4 there's a revenue issue in play here?

5 MS. McDOWELL: So are you asking what
6 are the policy implications of that --

7 COMMISSIONER JONES: The policy.

8 MS. McDOWELL: -- kind of --

9 COMMISSIONER JONES: Yes, the policy.

10 MS. McDOWELL: -- decision?

11 COMMISSIONER JONES: Not legal, just in
12 terms of ratemaking.

13 You have been involved in many rate cases over
14 the years, haven't you?

15 MS. McDOWELL: I have.

16 COMMISSIONER JONES: Too many?

17 MS. McDOWELL: I hope it doesn't show.

18 I guess I would just have to say that, you
19 know, that would be a new -- a new application of
20 regulatory accounting or deferred accounting that
21 typically we have not seen. You know, testimony
22 within a case would basically invoke kind of a -- you
23 know, a timing mechanism, so from that day forward,
24 you know, the company is on notice that actual
25 revenues or costs, and whichever was applied, would be

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1 subject to dollar-for-dollar recovery.

2 There's no case previously that has said that.
3 Anytime a commission policy is -- a new commission
4 policy is adopted, you know -- it is difficult when a
5 new commission policy is not adopted prospectively,
6 because it doesn't give us notice that this was -- you
7 know, the Commission is viewing this as tantamount to
8 an independent deferred accounting or regulatory
9 accounting filing.

10 That would be, I think, the concern. It would
11 be new. The company did not understand that that was
12 how the Commission was interpreting its rules, it's
13 policies, et cetera, and so the company did not
14 respond in kind by filing at that time a kind of
15 responsive matching filing, that we would have
16 reported the net -- the corresponding net power costs
17 and so forth.

18 COMMISSIONER JONES: I think
19 Commissioner Oshie wants in.

20 COMMISSIONER OSHIE: Yes. Thank you,
21 Commissioner Jones.

22 Isn't this a little bit different than all the
23 circumstances you just described in very general
24 terms, in that this is money that's not being expended
25 by the company, or not being received by the company

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1 in balancing its general lines of business, but this
2 is, as you conceded, the ratepayers' money? These are
3 revenues that fall to the benefit of ratepayers.
4 Doesn't that put them in a little different category
5 than increasing labor costs, or some other power costs
6 that you might incur, or benefits in the power market
7 that you might receive as a result of sales of
8 capacity in some way? Isn't this a bit different than
9 that because of the nature of what's really at stake
10 here?

11 MS. McDOWELL: Well, I think our
12 fundamental position is no, that all revenues and all
13 costs in a rate case are important, and each ends, you
14 know, results, you know, contributes to that end
15 result of the final rate. Revenues go one direction;
16 costs go the other. But you could have a situation
17 where, you know, revenues are understated or revenues
18 are overstated, costs are understated, costs are
19 overstated. Either way, you know, it's the same
20 thing.

21 The retroactive ratemaking principle and the
22 corollary doctrines have always been applied by this
23 Commission symmetrically. If you are starting to
24 suggest that, well, with this particular revenue item
25 it's different, then you move into a place where that

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1 is being applied asymmetrically, and we don't think
2 that's fair. We think all costs and all revenues are
3 important. They all end up in some way getting passed
4 on to the ratepayer, the customer, and we think they
5 should be treated the same. They all end up --
6 they're contributing to the result in the same way.

7 COMMISSIONER JONES: Judge, I think I am
8 done. I have a few more, but I would like to hear
9 from the other parties as well.

10 CHAIRMAN GOLTZ: Can I ask a couple
11 follow-ups?

12 Basically, the concern was with using the
13 October 2010 Commission Staff filing date as sort of
14 the notice, that's the functional equivalent of an
15 accounting petition. That your concern there is that
16 sort of -- that would be a new application of that.
17 But then you wouldn't have a problem if they had, the
18 same day, filed an accounting petition that said, See
19 Foisy testimony Page 10, then that would have been
20 fine?

21 MS. McDOWELL: Commissioner Goltz, to be
22 honest, the answer is yes. I mean, we expected
23 parties to do that, and when they didn't, we didn't --
24 you know, we didn't respond, because they didn't. I
25 mean that's --

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1 CHAIRMAN GOLTZ: So, then, also going
2 back to, let's say a month after. And I forget the
3 amount of REC revenues that were built into rates.
4 That was 600,000, or something like that?

5 MS. McDOWELL: That's correct.

6 CHAIRMAN GOLTZ: So let's say that a
7 month after the -- that rate -- the month after the
8 start of that rate effective period, where there's
9 \$600,000 of REC revenues built into rates, there had
10 been an accounting petition filed. That would -- that
11 accounting petition would have impacted that rate, so
12 why wouldn't that have been impermissible?

13 You seem to say that all someone needed to do
14 was file an accounting petition, but at the same time,
15 that accounting petition, starting in Month 2, could
16 have an impact on that -- on the rates approved a
17 month earlier.

18 MS. McDOWELL: Well, that's true, but
19 the Commission has previously looked at that and said,
20 because of the notice issues, because we will have
21 separate processes associated with it, we don't see
22 that the same as retroactively going back and setting
23 a rate, you know, two, three years down in the future.

24 So the Commission has recognized that deferred
25 accounting does raise issues of retroactive

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1 ratemaking, but has concluded that it will make an
2 exception for deferred accounting, you know, in --
3 from all of these doctrines.

4 And, you know, if you look at the cases around
5 that, it really is the notice issue, that parties are
6 on notice that this particular item is going to be
7 treated differently, it typically requires an
8 extraordinary cost or revenue item to qualify. It's
9 those issues I think that make it different.

10 But it really is -- I think the notice does go
11 back to the fairness issue, which is really at the
12 heart of our argument.

13 CHAIRMAN GOLTZ: That fairness issue
14 also then triggers the constitutional issue of
15 retroactive ratemaking. Sort of fairness is --

16 MS. McDOWELL: Well, that's -- the due
17 process issue you mentioned at the beginning, really,
18 is all about notice.

19 CHAIRMAN GOLTZ: So -- I forget my
20 question. Anyway, thank you.

21 MS. McDOWELL: Thank you.

22 JUDGE CLARK: So it looks like we have
23 kind of varied from the process that I set out at the
24 beginning. I hope I'm not the only one that noticed
25 that. So I think it would be reasonable for the other

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1 parties to anticipate some Commissioner inquiry,
2 either during or immediately after your argument.

3 CHAIRMAN GOLTZ: Did we mess up?

4 JUDGE CLARK: No, you are grand.

5 It is my intention to turn next to Public
6 Counsel. I understand that Public Counsel and ICNU
7 did file joint testimony in this matter. I will turn
8 to Public Counsel first, unless there is some
9 objection to that.

10 CHAIRMAN GOLTZ: Is this your last
11 appearance before the Commission, Ms. Shifley?

12 MS. SHIFLEY: It might be. There's a
13 possibility that this is --

14 CHAIRMAN GOLTZ: Well, that's too bad.

15 JUDGE CLARK: Thank you.

16 MS. SHIFLEY: I am probably going to
17 keep this a little bit more brief than Ms. McDowell.

18 Like what we have already heard here today,
19 it's well established by both Commission precedent and
20 Washington State law, that ratepayers are entitled to
21 a full return of REC revenues. The revenues that are
22 at issue here are those received by PacifiCorp during
23 2009 and 2010, the test and post-test periods of this
24 case.

25 The company has argued that the Commission is

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1 prohibited from returning these revenues to customers,
2 and as outlined in our briefs, and the briefs of Staff
3 and ICNU, this is simply incorrect and it is not
4 supported by Commission precedent.

5 The company also has argued that it would be
6 bad policy and unfair to return 2009 and 2010 REC
7 revenues to customers. And, in fact, exactly the
8 opposite is true. Not returning 2009 and 2010 REC
9 revenues would be bad policy and unfair.

10 If the Commission allows PacifiCorp to retain
11 these revenues, it will have effectively rewarded the
12 company for not being forthcoming about these
13 revenues, that they have known and have admitted here
14 today are -- ratepayers are legally entitled to. The
15 Commission should not be tolerating this type of
16 gamesmanship.

17 And understanding that this is a public
18 proceeding, I won't go into numbers, but I just would
19 point out that the appropriate amount of 2009 and 2010
20 REC revenues is also a matter of contention, and
21 something that must be decided. I would just point
22 out that Public Counsel, in our confidential reply
23 brief, laid out a number that we still support for the
24 amount that should be passed back.

25 Staff, ICNU and Public Counsel all recommend

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1 changes to the proposed bill credit mechanism. I
2 think that we have laid out in our briefs why these
3 changes are supportable. The company has not offered
4 any credible argument against the types of changes
5 that Staff, ICNU and Public Counsel all agree are
6 appropriate.

7 That's all. Thank you.

8 JUDGE CLARK: Thank you.

9 Just one question, Ms. Shifley. Do you have a
10 reference to a page in your brief that might refer to
11 the confidential number you are addressing?

12 MS. SHIFLEY: It's the confidential
13 reply brief on Page 9, Paragraph 19.

14 JUDGE CLARK: Thank you.

15 Is there any inquiry for Ms. Shifley at this
16 point?

17 CHAIRMAN GOLTZ: Just one question, I
18 think.

19 I asked Ms. McDowell about the filed rate
20 doctrine. I believe you said on -- somewhere in your
21 briefs that -- right, it's Paragraph 13 of your reply
22 brief, about the filed rate doctrine. You basically
23 rejected that argument, saying no party has sought to
24 amend any filed rate, so that doesn't -- that doctrine
25 isn't implicated. And Ms. McDowell seemed to say,

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1 Well, there's more to it than that, it's not just -- I
2 think she was saying that embodied net rate, it's also
3 everything that went into that rate.

4 Is it Public Counsel's position that basically
5 all the filed rate doctrine means is you can't -- when
6 you have a rate on file, you can't charge more; you
7 can't charge less, that's it?

8 MS. SHIFLEY: I think so. I mean all
9 these doctrines are related, and there is some
10 overlapping ideas that support each one of them. My
11 understanding of the filed rate doctrine is that
12 that's the rate that must be charged.

13 CHAIRMAN GOLTZ: So the real focus of
14 the inquiry, then, is on retroactive ratemaking, and
15 the doctrine is statutory, constitutional or policy
16 implications?

17 MS. SHIFLEY: I believe so, yes.

18 CHAIRMAN GOLTZ: Thank you.

19 JUDGE CLARK: Any other inquiry for
20 Ms. Shifley?

21 Commissioner Jones?

22 COMMISSIONER JONES: Just one.

23 Ms. Shifley, you state, I think in your
24 initial brief, that this is comparable to the 1999
25 Avista GRC. In that case, did the revenues

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1 in question involve revenues received during the test
2 period, whereas in this case, aren't we talking about
3 revenues projected for the rate effective periods, and
4 there are two of them: '09 and '10?

5 MS. SHIFLEY: In this case, 2009 is the
6 test period, so we are dealing with actual test period
7 revenues, and the 2010 revenues are beyond the actual
8 test year in that case -- or in this case. But I
9 think that there's definitely a comparison that can be
10 made, because the '99 Avista GRC was dealing with the
11 actual test period revenues.

12 COMMISSIONER JONES: But I am talking
13 about the difference between something that is in the
14 test period versus a projected revenue or cost for the
15 rate effective period.

16 So you don't think there is a distinction
17 between the Avista GRC net and this case?

18 MS. SHIFLEY: So the money that was
19 received, if -- my understanding is that the money
20 that was received by Avista in the 1999 case, was
21 received by the company during the test period. And
22 the money -- at least part of the money that we are
23 dealing with here is money that was received by
24 PacifiCorp during 2009, which is the test period. In
25 that sense, it's an amount received by the company

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1 during the test period.

2 COMMISSIONER JONES: In my dialogue with
3 Ms. McDowell earlier, we were talking about the
4 volatility of forecasting, or the volatility of REC
5 markets and the difficulty of forecasting accurately
6 REC revenue in a forecasted year. Would you agree
7 that for these years we are talking about, REC markets
8 were volatile and forecasting was a difficult
9 exercise?

10 MS. SHIFLEY: I think that it -- from
11 what I know, that the amount that the company received
12 during those years, it was an extraordinary amount,
13 and something that hadn't been seen before. And I
14 think you can -- you can look -- we discuss that a
15 lot, the huge spike that occurred in REC revenues,
16 that parties didn't know about until they saw the
17 report. That wasn't received until mid to late 2010,
18 so there was a very large spike.

19 And I think that that also supports what most
20 people agree here, and there's actually some
21 PacifiCorp testimony in another state that says that
22 these are exceptional, and that the company doesn't
23 anticipate continuing to receive these revenues
24 forever. And I -- although Ms. McDowell doesn't
25 agree, I do believe that this Commission has

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1 recognized an exception for the rule against
2 retroactive ratemaking for extraordinary or
3 unforeseeable revenues, and this was unforeseen.

4 And because of the lag of the information that
5 was provided in the reports, the parties didn't see
6 that until after this case was going on, and chose to
7 address it in this case. And I think that -- I had
8 another point.

9 COMMISSIONER JONES: If it comes back to
10 you, I -- one more question, and it may come up --

11 MS. SHIFLEY: Okay.

12 COMMISSIONER JONES: -- while you are
13 listening to me.

14 MS. SHIFLEY: Okay.

15 Oh, yeah, that's -- okay, there it goes.

16 COMMISSIONER JONES: That was faster
17 than I thought.

18 MS. SHIFLEY: Thank you for that.

19 One other thing to bear in mind is that the
20 company, when it initially filed this rate case, it
21 didn't include any REC revenues, even though it was --
22 it was privy to all this information. It had the
23 contracts, that it wasn't -- that it didn't give to
24 the other parties, and it knew very well what it would
25 be receiving in the rate effective period. And it

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1 still, in its rate filing, asked to keep all the
2 revenue, and told the parties that it would have no
3 REC -- anticipated in their pro forma adjustment was
4 zero.

5 In every rate case that I looked at, they have
6 underestimated. They haven't -- they have
7 underestimated drastically the amount of REC revenues
8 that they are going to include in cases. And so then
9 it is left to the other parties to somehow question
10 what they are telling us, based on the information
11 that they are providing us. At least from our
12 experience, the information has been incomplete, and
13 it has been impossible for us to actually find out
14 what the company is receiving.

15 COMMISSIONER JONES: So that's the basis
16 for you calling this exercise on the part of the
17 company "gamesmanship"?

18 MS. SHIFLEY: Yes.

19 COMMISSIONER OSHIE: When you refer to
20 "the case," are you referring to 100749, the 2010 GRC?

21 MS. SHIFLEY: Yes.

22 COMMISSIONER OSHIE: Okay.

23 COMMISSIONER JONES: But eventually, all
24 parties agree to a figure of 4.8 million in that GRC,
25 correct, as the basis for the true-up mechanism?

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1 MS. SHIFLEY: Yes, we have said that,
2 but with -- but with the caveat that it will be
3 trued-up to actuals. So for purposes of just making
4 calculations, in that case, yes, but with the
5 understanding that 100 percent of what the company
6 receives, that can be allocated and should be
7 allocated to Washington, and the Washington ratepayers
8 are entitled to, will get passed back to them
9 eventually.

10 COMMISSIONER JONES: And just one last
11 question. I am asking everybody this, including
12 Staff.

13 When you received the quarterly REC reports as
14 a part of the settlement agreement in '09, what did
15 you do with them? Did you review them? Did --

16 MS. SHIFLEY: We --

17 COMMISSIONER JONES: Is your position
18 that it was the company's burden to bring that issue
19 to the forefront or was it --

20 MS. SHIFLEY: One thing, the company
21 makes a large deal out of the fact that no other party
22 filed for deferred accounting, but they ignore the
23 fact that parties didn't have the practical ability to
24 file for deferred accounting, because we didn't know
25 what they were receiving. And on Pages 18 and 19 of

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1 our opening brief, I actually show the date spans of
2 those reports. And the jump in REC revenues that made
3 it apparent, that in fact the company was going to
4 be -- that the company had not accurately forecast its
5 REC revenues, didn't occur until -- or wasn't
6 reflected in these rates until the July 28th, 2010
7 report.

8 And I think that the Commission is aware that
9 Public Counsel and ICNU filed a complaint that was
10 within the -- relying on that date as a date for when
11 they knew that something was amiss, and there was
12 also -- at that time this case had been filed, and the
13 2009, so in Staff's view, those revenues were already
14 at issue because there was a case.

15 I mean it was not that we had somehow dropped
16 the ball. We were looking at it, and we did react to
17 it. The timing of the REC reports is very important.

18 And I will also just note that the settlement
19 in the last case doesn't require anybody to file for
20 deferred accounting, it reserves the right. Right
21 after that, it says that parties may take any other
22 action. The actions that have been taken are to
23 address these revenues in a rate case, when the
24 revenues were being received during the test period of
25 that rate case that the company filed, and by filing a

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1 complaint.

2 And I will just also note that the order
3 dismissing the complaint on different grounds than our
4 issue here, noted that, in fact, the company had not
5 been forthcoming about REC revenues. So we have at
6 least the ALJ order stating that the company was not
7 acting -- was not making a good faith effort to be
8 forthcoming about this information.

9 COMMISSIONER JONES: So when did you
10 file your responsive testimony in UE-10074 -- 49?

11 MS. SHIFLEY: I'm going to ask my
12 analyst.

13 JUDGE CLARK: Would you accept, subject
14 to check, that it was October 2010?

15 MS. SHIFLEY: Yes, I will. Thank you.

16 COMMISSIONER JONES: So you received
17 that report, the quarterly report. And I'm not going
18 to refer to it, I think -- I don't have it in front of
19 me, but I think I know what it says, I saw it once.
20 So that brought to light this big discrepancy, and
21 that was on July 28th.

22 But again, the reason for you not raising this
23 in your responsive case in the GRC, was you felt you
24 had an adequate remedy or an adequate -- that these
25 issues were going to be addressed in the complaint

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1 case? Is it --

2 MS. SHIFLEY: I think, Your Honor, that
3 one of the more practical reasons why we didn't
4 address it in our responsive testimony is we didn't
5 have a witness who was testifying to that issue --

6 COMMISSIONER JONES: Okay.

7 MS. SHIFLEY: -- but other parties did
8 address it. And so one thing that we were very well
9 aware of was that the other parties in that case had
10 already raised it, so that it would be an issue, and
11 we would be addressing it in our briefing.

12 As you know, we are sometimes constrained by
13 the number of witnesses that we are able to actually
14 present in cases.

15 COMMISSIONER JONES: Yes, I understand
16 that. Thank you.

17 JUDGE CLARK: Anything further for
18 Ms. Shifley at this time?

19 Thank you, Ms. Shifley.

20 Mr. Sanger.

21 MR. SANGER: Thank you, Your Honor,
22 Commissioners.

23 ICNU's position in this case is that
24 Washington ratepayers should be credited with
25 100 percent of the Washington-allocated REC revenues

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1 that are associated with renewable energy resources
2 included in rates in the WCA. Washington customers
3 have paid their full and fair share of all of the
4 costs associated with these renewable resources,
5 including a return on utilities investment, and they
6 should be returned a full share of all of the
7 REC-related benefits associated with these same
8 resources for 2009 and 2010.

9 It's my understanding that all of the REC
10 revenues at issue in this case are in play from the
11 starting date of the test period that PacifiCorp filed
12 in its general rate case. Therefore, these are an
13 extraordinary rate period type of cost that the
14 Commission can address through a regulatory tracking
15 mechanism or tracking account.

16 I think that Staff did a very good job in
17 their brief of explaining the history of regulatory
18 tracking accounts and how these things are addressed,
19 without having to go into deferred accounting. We
20 addressed it a little bit in our brief, but we would
21 just simply disagree with the company's
22 characterization that you need to file a deferred
23 account to address these types of costs. And I think
24 that the -- the illustration of the factual
25 circumstances of this case demonstrate why that

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1 doesn't necessarily work.

2 The company has an informational advantage.
3 There's a significant disadvantage to customers, in
4 that -- if you follow the company's view, that
5 ratepayers and Staff cannot raise these issues in a
6 rate case, some sort of costs that occurred after the
7 start of the test period, whether it's within the test
8 year or anytime after, if you can't address that in a
9 rate case, then essentially what you are saying is
10 that the utility has the ability to file a deferred
11 account for any extraordinary costs, but extraordinary
12 revenues will almost never be passed back to
13 ratepayers.

14 And the factual circumstances of this case
15 demonstrate that, where the REC reports were not
16 provided to customers, or we didn't have information
17 about how much PacifiCorp's RECs were inaccurately
18 forecast, until the middle of 2010. Well, that's
19 three-quarters of the time period that we are talking
20 about here. So not getting into actual dollars, but
21 that's three-quarters of the -- potentially
22 three-quarters of the REC revenues that we are talking
23 about, that there's no way that ratepayers would ever
24 be able to get back, unless you use the
25 well-established principle of an extraordinary cost

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1 can be addressed in a rate case.

2 Now, PacifiCorp has raised a wide variety of
3 arguments, and we have gotten into some of those,
4 about why -- that shareholders in this case are
5 entitled to the vast majority of these REC revenues
6 and not ratepayers. And -- but even despite these
7 arguments, we do not believe that there is any
8 legitimate legal public policy or factual reason why
9 those customers that have paid the majority of these
10 costs should not be returned their full share of these
11 REC revenues.

12 We believe that PacifiCorp's arguments are
13 primarily intended to distract the Commission from
14 some fundamental facts, which are that these REC
15 revenues were not accurately forecast. That once the
16 information become apparent, that these REC revenues
17 were not accurate, at that point, PacifiCorp did not
18 correct the parties' understandings that the revenue
19 forecasts were inaccurate. And over the course of a
20 number proceedings, PacifiCorp has taken a wide
21 variety of actions to ensure that shareholders and not
22 ratepayers receive the majority of these REC revenues.

23 Now, we think the -- that PacifiCorp -- since
24 PacifiCorp did not provide complete and accurate
25 estimates of this extraordinary cost, that they did

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1 not correct these estimates when it became apparent
2 that they were inaccurate, that the company -- since
3 the company did not take these basic actions, we don't
4 think the company can now hide behind the rule against
5 retroactive ratemaking to ensure that ratepayers are
6 not -- do not gain any of the REC revenue benefits in
7 this case.

8 Now, there was a -- I wanted to respond on a
9 couple of the things, on some of the questions that --
10 from the Commissioners.

11 In the first phase of this case, ICNU took a
12 different position on the regulatory tracking account.
13 We did not propose a regulatory tracking account.
14 ICNU proposed that the Commission adopt a \$10 million
15 credit for an -- our estimate of what REC revenues
16 would be in 2010. I know that there has been
17 questions about what all the other parties' positions
18 were. I just wanted to clarify for the record that
19 ICNU, we did not oppose the regulatory tracking
20 account. We thought a better way to do it was a
21 \$10 million credit for 2010. The Commission did not
22 go with that route. We are not relitigating that, but
23 I just wanted to point that out.

24 And I also wanted to point out that we don't
25 know what the REC revenues of the company will be

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1 earning, or is earning right now, we don't have that
2 information. But we do know that the California
3 market for RECs has significantly changed, and that a
4 possible outcome of this case, if you adopt the
5 company's view, is that not only will the company be
6 able to retain all of the REC revenues up until April,
7 but, you know, we don't know what the actual dollar
8 amount was. And it's possible that the REC credit
9 that has already been provided may be too high, if you
10 just look at what the future market for RECs is going
11 to be.

12 I mean, you could be setting up ratepayers for
13 a double whammy sort of situation, where not only did
14 we not get the REC revenues in the past, but we are
15 going to be harmed by not getting them in the future,
16 as well, and be hurt by that.

17 Looking -- I think that our brief has pretty
18 much addressed most of the arguments that Ms. McDowell
19 raised. I don't think that we need to go over all of
20 them.

21 One thing that I don't think we fully
22 addressed in our brief, that Ms. McDowell raised quite
23 a bit here, is the underearning argument and the issue
24 that parties have not disputed that issue. We did not
25 address that issue in our testimony, because we didn't

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1 believe that it was relevant.

2 It's our view that we are not setting rates
3 based on PacifiCorp's past costs. Basically, this is
4 in a rate case, this is still part of the PacifiCorp
5 general rate case, and we are setting rates in that
6 rate case, and PacifiCorp's earnings are not relevant
7 in that. We also believe that PacifiCorp is not
8 entitled to offset any alleged underearnings by taking
9 money that rightfully belongs to ratepayers.

10 At the time PacifiCorp knew and understood
11 that its REC revenues were different from its
12 forecast, it should have provided that information,
13 and did it the way Puget did, and file a deferred
14 accounting petition for those REC revenues. The fact
15 that Puget may have had zero REC revenues and
16 PacifiCorp had a half a million dollars, I mean, I
17 don't see how that is a distinguishing fact. The REC
18 revenues significantly exceeded whatever was assumed
19 to be in rates, and PacifiCorp should have filed a
20 deferred account at that point.

21 COMMISSIONER OSHIE: Mr. Sanger, just on
22 that point, isn't that -- by including the REC
23 revenues or some -- giving some value to the REC
24 revenues, and then including them in rates for both
25 2009 and 2010, isn't that the risk that the parties

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1 took when they made that deal; that there might be
2 variance in what the REC revenues would really be, and
3 that the cure for that would have been asking the
4 Commission to set up the deferred -- you know, to set
5 up some kind of accounting mechanism by which
6 those dollar for dollar would be accounted for, could
7 be distributed to ratepayers?

8 It seems that there is a couple different
9 approaches here. But that's the risk, I believe, that
10 the parties took when they said, We will include this
11 amount in rates, that that guess or that forecast
12 could be up or down.

13 MR. SANGER: I would agree that that is
14 the ordinary ratemaking process, that under -- for
15 most costs, revenues and benefits, that's what you do.
16 I think that if -- you know, not getting into the
17 confidential numbers, given the difference between the
18 rate case forecast and the actual numbers, this is
19 clearly an extraordinary cost. I think that in
20 extraordinary circumstances, what you see is that --
21 you know, PacifiCorp has filed hydro deferrals in the
22 past, all of the utilities have filed deferrals when
23 there has been extraordinary costs that dramatically
24 exceed what's in rates. You know, Puget did that in
25 the REC circumstance. So when -- I think it's matter

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1 of significance, it's a matter of how extraordinary.

2 If the REC revenues had been \$700,000,
3 \$800,000, I think that you are 100 percent correct. I
4 think under these circumstances, with the numbers that
5 we have, it's a different sort of circumstance. I
6 also believe that -- what Staff has originally
7 proposed in Phase 1 of this proceeding, and now Staff,
8 ICNU and Public Counsel are all supporting, dealing
9 with this in the test period, with a test period type
10 of adjustment, is one appropriate way to allow Staff
11 and Public Counsel and ICNU not have the access to
12 information that the utility does, to be able to
13 review the utility's books, understand what its costs
14 are, and when there is some sort of extraordinary,
15 very unusual cost, that dramatically exceeds
16 forecasts, then you allow the parties to be able to
17 address that, because we don't have the information
18 that the utility does.

19 CHAIRMAN GOLTZ: So if I -- excuse me.
20 So, basically -- so I can just put this in a nutshell,
21 Ms. McDowell was saying, you know, fair is fair. If
22 there's extraordinary costs, the company can file an
23 accounting petition; if there's extraordinary
24 revenues, ICNU or Public Counsel or Staff can file an
25 accounting petition, it's all symmetrical.

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1 And you are saying, Well, that's all well and
2 good, but to make that work, you need symmetry of
3 information, and the information was asymmetrical.

4 MR. SANGER: Exactly. The symmetrical
5 approach proposed by the company is, from practical
6 purposes, completely asymmetrical. There is no
7 circumstance -- you know, as you saw, the REC issues
8 were important to parties in the last general rate
9 case. Not this case, which is Phase 2, but the
10 previous general rate case, parties were interested in
11 what PacifiCorp's RECs were, we investigated those
12 issues, and in this case it was an important issue.

13 The information that we had did not -- that
14 was provided in the rate case did not match up for a
15 variety of reasons, including that the REC markets are
16 volatile. The parties tried to get that information;
17 we did not have that information.

18 If you would adopt the rule that PacifiCorp is
19 proposing, then you are going to have, in theory, a
20 symmetrical rule that always has an asymmetrical
21 application, except in the unusual circumstance where
22 a utility will file a deferred account for an
23 extraordinary revenue.

24 CHAIRMAN GOLTZ: But let's say that in
25 reverse, and placed into rates was an extraordinarily

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1 high number, \$50 million, and what comes in is
2 1 million in REC revenues. Then the remedy for the
3 company, though, is not to file an accounting
4 petition, is it? The remedy for the company is to
5 file for a change in rates. And if they filed for a
6 change in rates, saying, you know, Hey, this is way
7 different, you've got to change this number, I suspect
8 you would say, Wait, time out, once you are
9 ratemaking, you can't do that.

10 MR. SANGER: No, I think the company has
11 filed when there has been significant changes in
12 costs.

13 CHAIRMAN GOLTZ: In their costs, yes.
14 This is change in revenues, this is different. It
15 might be different. I don't know if it's different or
16 not. I'm saying it's not like, oh, we've got -- you
17 know, there's -- a storm just wiped out, you know,
18 Yakima.

19 MR. SANGER: If the company had an
20 element that was a cost or a revenue and it went
21 against them, and it was an extraordinary way, whether
22 it was a cost or a revenue, and it went against them
23 on a significant level, then the company may file a
24 deferred account, and they have filed deferred
25 accounts.

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1 CHAIRMAN GOLTZ: I just don't know if
2 it's been deferred. Maybe they are both -- deferred
3 accounting petition for just a change in revenues.
4 Maybe there has been.

5 MR. SANGER: I don't know if there has,
6 but if you look at a net power cost deferral, a lot of
7 those are both, are costs and revenues. So when they
8 file a net power cost deferral, even though it is
9 termed net power cost, it really looks at the revenues
10 and costs associated with that. Often when you have a
11 hydro cost deferral, often that's because your hydro
12 is lower and you are not getting --

13 CHAIRMAN GOLTZ: Sure.

14 MR. SANGER: -- the revenues associated
15 with it. I think that they are fairly merged in
16 there.

17 CHAIRMAN GOLTZ: Okay.

18 COMMISSIONER OSHIE: I interrupted,
19 Mr. Sanger. I don't know if you have --

20 JUDGE CLARK: I was going to say, you
21 certainly have the opportunity --

22 COMMISSIONER OSHIE: We went down a
23 little different path there for a while, so...

24 MR. SANGER: No, I was pretty much
25 finished. Basically, we don't think this case is as

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1 complex as the company has made it out to be. We
2 believe that you can make this adjustment in a test
3 period, and because of extraordinary costs, everyone
4 agrees the money should go to ratepayers.

5 If you want to go down the road -- if you want
6 to make it really difficult, we think we provided a
7 number of cases, a number of legal theories on why the
8 rule of retroactive ratemaking does not apply in these
9 circumstances. We would request that the Commission
10 issue an order refunding all the monies starting in
11 January of 2009.

12 CHAIRMAN GOLTZ: All the monies except
13 that which was embedded in rates.

14 MR. SANGER: All the money -- correct,
15 all the money except for the 600 and some-odd thousand
16 from 2010 that was embedded in rates, yes.

17 JUDGE CLARK: Thank you, Mr. Sanger.

18 Mr. Trotter.

19 MR. TROTTER: Thank you, Your Honor.

20 First off, I would like to bring the
21 Commission's attention back to its order and what you
22 have already decided. You have ruled that REC
23 proceeds belong to ratepayers and should be returned
24 to them via a rate credit. That's at Paragraphs 199
25 and 202. And you required PacifiCorp to set up a

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1 tracking account for REC revenues from January 1, 2009
2 forward. That's Paragraph 203.

3 That's the law of the case. And any attempts
4 that -- I've heard several attempts by the company to
5 collaterally attack that, in my opinion. That's off
6 base now. Those decisions have been made, these
7 revenues belong to ratepayers, and now we have a legal
8 issue in front of us.

9 Staff's position -- and I believe Commissioner
10 Goltz stated it correctly, because he was reading from
11 Mr. Foisy's testimony -- is to return, in this case,
12 the actual REC revenues for the test period, which is
13 calendar year 2009. That's, I think in the record in
14 a nonconfidential basis, approximately 4.8 million.

15 And, Commissioner Jones, that is not a
16 projection. It is not a forecast, it is not an amount
17 for the rate effective period, it is the test year
18 actual amount.

19 Now, if you look at Ms. Breda's Exhibit
20 KHB10:C, colon C, that 4 -- that's confidential, but
21 the 4.8 million has gone up a little bit, because
22 we've got better information. That's on Line 1. But
23 that's recorded REC revenue. So it's not a
24 projection, it's not a forecast. Also, on the second
25 column -- set of columns, we have 2010 on the same

0918

1 basis: Actuals, recorded, not forecast, not
2 projected. The company has repeatedly characterized
3 our figures as projections; they have been wrong every
4 time.

5 The second half, the bottom of that Page 2, is
6 imputed revenue. That again is also based on the
7 actual RECs available for the period that the company
8 held for compliance in other states. Washington
9 allocated RECs, the company held for compliance in
10 another state. That's unfair, it's inappropriate, and
11 the remedy is imputation, and the second half accounts
12 for that. Those are, again, actuals, and then based
13 on actual sales of RECs that were available for sale.

14 That's all explained in Ms. Breda's testimony,
15 in her brief. Our position is, in this case, return
16 the test year actuals and set up a cumulatory
17 liability account for January 1st, 2010 forward, and
18 deal with that in an appropriate proceeding, which
19 could be even the current rate case the company filed
20 after this one.

21 CHAIRMAN GOLTZ: Actually, the 4.8 is
22 test year, which is calendar 2009.

23 MR. TROTTER: Test period, correct.

24 CHAIRMAN GOLTZ: Okay.

25 MR. TROTTER: Calendar 2009.

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1 CHAIRMAN GOLTZ: Okay.

2 MR. TROTTER: I just want everyone to be
3 crystal clear: Staff's case is not based on a
4 projection, it's based on actuals, and it always has
5 been.

6 I agree with Mr. Sanger, this case is not that
7 simple. That was a Freudian slip. It's not that
8 complicated. After sitting for an hour and 40
9 minutes, it's hard to say it's simple.

10 I do think Staff's case is a very basic
11 proposition; that is, when the company files the test
12 period results of operations, the revenues, expenses,
13 and rate base amounts in that filing are before the
14 Commission for a disposal. The REC revenues for 2009
15 are before you for disposal, and that's our case. I
16 am going to give you several examples of where the
17 Commission has done very similar things to what we are
18 asking you to do here.

19 I want to start with one -- I don't know if
20 this Commission has done it, but because Commissioner
21 Oshie presented the hypothetical, I am going to start
22 with storm damage. The case that we cited in our
23 brief called Narragansett Electric Company v. Burke,
24 which is a Rhode Island State Supreme Court. In that
25 case, there was a terrible storm in Rhode Island. The

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1 company went out, exactly consistent with your
2 hypothetical, spent a lot of money to fix it, and then
3 filed for a rate surcharge. Not a rate case, but
4 surcharge, so it's a little different.

5 The Commission rejected it on retroactive
6 ratemaking grounds, saying, Gotcha ya, you're too
7 late. And the State Supreme Court reversed and said,
8 This has nothing to do with the evils to be addressed
9 by the retroactive ratemaking doctrine, which are to
10 require ratepayers -- prevent ratepayers from paying
11 for past deficits or past losses, or for ensuring
12 investments of shareholders. Those two prohibitions
13 were not at issue, and the Commission had discretion.
14 In fact, they should allow the company to recover
15 those costs.

16 Now, interestingly, we quoted this in our
17 opening brief. The Court cited 12 State Commission
18 cases, cases from 12 different Commissions. Let me
19 just list them: Connecticut, Delaware, Florida,
20 Kansas, Maryland, Massachusetts, Michigan, Missouri,
21 Nebraska, New Jersey, New York and Pennsylvania. So
22 you can see, mainstream regulatory Commissions.

23 Now, a couple of these did have accruals in
24 issue, so we are not going to count those. But for
25 about ten of the other Commissions, the test period

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1 contained a very high level of storm damage costs.
2 The Commission said, We are going to amortize that
3 excess, because it's fair for you to recover those.
4 So there was a test period cost, it was higher than
5 normal, and they allowed the amortization of the
6 excess.

7 Now, this was not a normalization effect,
8 where you are trying to, well, going forward you can
9 have a higher level. No, it was you get the money
10 back.

11 Again, it was in the test period. And if we
12 applied the company's analysis in this case, Oh, wait
13 a minute, there was storm damage in the prior case,
14 you are truing it up, that's retroactive, that
15 violates the filed rate doctrine. It's a mismatch,
16 it's single issue ratemaking, and on, and on, and on,
17 and on. And there's ten Commissions that just did it.
18 Interestingly, no one raised a retroactive ratemaking
19 issue in any of the decisions I read. I submit to you
20 because it's not there. Now, those are very
21 sophisticated Commissions. If there was an issue
22 there, it would have been raised.

23 Now, here's another one that I think is
24 particularly probative, that the company dismissed in
25 their reply brief. I think it is highly probative,

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1 and that is the plant abandonment cases.

2 Now, back in the early '80s, the companies
3 were abandoning their nuclear projects, including one
4 called Pebble Springs. What happened was, during the
5 test year -- the test period, excuse me. I'll start
6 with PSE and Cause U8238, but I will get to
7 PacifiCorp.

8 Puget abandoned that plant during the test
9 period, and they came in for rates saying, Well, wait
10 a minute, we have an extraordinary property loss,
11 which under accounting rules, would have to be written
12 off in that period. Some might have argued that they
13 should do that and receive nothing for it.

14 But the company said, Well, we would like to
15 amortize that balance over a ten-year period. The
16 Commission looked at it and allowed that. Again,
17 applying PacifiCorp's analysis in this case, they
18 would say, Well, wait a minute, let's see, Pebble
19 Springs was in CWIP in a prior case, you are fiddling
20 with that prior order, and besides, ratemaking is
21 prospective, and you can't make -- you can't do it.

22 Well, the Commission did it, and that was
23 consistent with the vast majority of regulatory
24 decisions across the country. Although, I have found
25 a couple that denied it, denied that on the basis that

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1 the company has argued, but those are not mainstream
2 regulatory cases.

3 PacifiCorp had a similar problem. They
4 abandoned Pebble Springs also, they had an
5 extraordinary property loss also, and the docket was
6 Docket U8212 and U8235. They asked for the identical
7 treatment that PSE asked for, which was an
8 amortization. Which, again, I believe directly
9 contradicts what they are telling you here, in
10 terms -- I think I have heard the company say that
11 they live by the rules every day that they are
12 enunciating here. Well, maybe it was from this day
13 forward, but it wasn't back in 1982 and '83.

14 They asked for amortization. The Commission
15 did not grant it on the basis of the company's
16 situation with regards to other states that were
17 allowing a different form of recovery. So instead,
18 the Commission increased their return on equity 250
19 basis points. So they did get money for the
20 additional risk of an uncompensated write-off, which
21 probably does challenge some of the company's theories
22 in the current docket.

23 Another example that we identified in our
24 pleadings was an Avista docket. As you recall, when
25 the year 2000 was coming around, people were concerned

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1 that the computers were going to crash and so on.
2 Companies spent a lot the money for Y2K, they called
3 it, Y2K compliance costs. Avista came in and asked
4 for recovery of those. Staff and Public Counsel
5 objected saying, Nonrecurring, below the line, no
6 recovery. The company said, Well, you know, that's
7 not fair, we need to do this. And the Commission
8 granted them either a three- or a five-year
9 amortization. I forget the exact timing.

10 Again, test period, expense, allowed to be
11 recovered on an amortized basis. Not trying to
12 project what future Y2K compliance costs or
13 extraordinary property losses are going to be, nothing
14 of the sort. It's these dollars, give them back to
15 the company this way.

16 There's also nothing particularly novel about
17 this particular class of revenue. I believe
18 Commissioner Jones or Oshie said, Well, this isn't
19 something that is new, and it is. No one knew about
20 these a few years back. Longstanding precedent of
21 this Commission, if a utility sells a piece of land,
22 ratepayers get the gain. If they sell depreciable
23 property, like a power plant, ratepayers usually get
24 the gain. Sometimes, if it hasn't been fully
25 depreciated, as in Centralia, the Commission has

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1 allocated a share. They haven't done it based on an
2 earnings test, but they do it based on other analysis.
3 And intangible assets, when those are sold, like the
4 Yellow Pages dockets involving US West or its
5 predecessor --

6 CHAIRMAN GOLTZ: Excuse me, aren't those
7 cases, though, a function of the Commission's
8 jurisdiction on transfer of property? So there is
9 a -- they need to -- they don't sell the property and
10 then come in later and worry about disposition of
11 proceeds, they come to the Commission and ask
12 permission to transfer assets. A sale has not yet
13 occurred, and so it is the decision on allocating
14 gain. Some gain or all gain to ratepayers is made
15 before the transfer takes place.

16 MR. TROTTER: Well, there's two things:
17 One, there's nothing in the statute that says what the
18 Commission has to do with the gain. I am relying on
19 the precedent of what the Commission says to do with
20 the gain, which is to give it to the ratepayer.
21 That's my point.

22 You raised an interesting point, and that sort
23 of raises a rhetorical question, why the company
24 didn't come to the Commission and seek under the
25 property transfer statute, but they did not. We think

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1 there's some wiggle room in that statute that may have
2 allowed them to do that. But that's a timing issue,
3 in my judgment, not a who gets the money issue. The
4 Commission -- that's a policy issue that the
5 Commission has consistently resolved in favor of the
6 ratepayer. The statute addresses timing, at least for
7 those transactions that are filed pursuant to that
8 statute.

9 CHAIRMAN GOLTZ: Did you say that -- you
10 questioned that transfer of property would have been a
11 prerequisite to selling RECs? You didn't say that,
12 did you?

13 MR. TROTTER: I did not say that.

14 CHAIRMAN GOLTZ: Okay.

15 MR. TROTTER: I said that one could make
16 the argument, because the statute broadly defines
17 property. I can get into it, if you want. There is
18 some wiggle room in the statute, and we have not
19 insisted on it.

20 CHAIRMAN GOLTZ: Yeah.

21 MR. TROTTER: But I know, you know,
22 people have taken a hard look at that. To me that's
23 just a timing issue, not a who gets it issue.

24 So with respect to this notice issue, first of
25 all, I would like to clear the air on a couple of

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1 topics. Number one, the Commission doesn't require
2 petitions in order to address accounting issues.
3 Accounting issues arise in rate cases all the time,
4 and the Commission addresses them. Take this docket
5 we are in. The company asked for a change in the
6 amortization period of the SO2 allowances, or credits,
7 whatever they were. That was subject to an accounting
8 petition, but we didn't reopen that or consolidate
9 that, we just changed the accounting.

10 In my judgment, the company can choose its
11 procedure. It can come in with a rate case and put
12 its accounting at issue, which I think it does every
13 time it files a rate case, or it can file an
14 accounting petition.

15 Now, what was going on with all of those
16 deferred accounting petitions, is a timing issue.
17 Let's take a look at the company's petition for
18 deferred accounting for excess hydro costs. I have
19 the docket number, but it's discussed in the briefs
20 exhaustively. They filed that outside -- outside the
21 test period of their then-pending rate case. If they
22 wanted to get revenues outside the rate case, outside
23 the revenues, expenses and the rate base that they
24 filed and placed before the Commission, I can see that
25 they would need to file an accounting petition to get

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1 that -- you know, freeze those dollars, whatever you
2 want to call it. But had that occurred during the
3 test period, and it was in the revenues and expenses
4 and rate base of the test period, I think the
5 Commission could have dealt with it.

6 From our perspective, the notice issue is
7 resolved when the company put the 2009 test period on
8 the table.

9 I think it's very interesting to listen to the
10 company's arguments about matching and earnings test
11 and so on. Let's take a look at that excess hydro
12 docket.

13 It was resolved by settlement. As you know,
14 commission settlements must be legal. The parties
15 agreed that PacifiCorp should get a rate surcharge for
16 excess hydro power costs to the tune of \$6.2 million,
17 plus interest. I think it was a three-year
18 amortization, approximately. There was no earnings
19 test for that recovery, they got that dollar for
20 dollar, whether they earned 15 on equity, 5 on equity,
21 or somewhere in between. They got 6.2 million, plus
22 interest, guaranteed. No earnings test whatsoever.

23 That's, I guess, a classic example of the
24 single issue ratemaking that they castigate, and it is
25 also a classic example of a mismatch. Those have

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1 nothing to do with the costs incurred over the period
2 in which those dollars were recovered, the 6.2
3 million, plus interest, dollar for dollar.

4 So that must mean that the matching principle,
5 the single issue ratemaking, I call it a concept, and
6 the earnings test are not legal requirements. If they
7 were, that settlement was illegal, and the company
8 surely would not have signed it. I can assure you, I
9 would not have signed it on behalf of Staff.

10 There has been much made about the \$657,000
11 that was included in that settlement. People always
12 talk about it without quoting the language in that
13 settlement. I'm going to quote it. Nothing in this
14 stipulation limits or expands the ability of any party
15 to file for a deferred accounting or a request that
16 the Commission take any other action regarding
17 PacifiCorp's Washington-allocated RECs for purposes of
18 any such filing. The parties agreed this case
19 includes \$657,755 in Washington-allocated REC revenues
20 for the 2010 rate effective period.

21 We honored that, on Exhibit KHB-10C, Page 2,
22 Column H, Line 31, by crediting those dollars. That
23 was our obligation, we fulfilled it, and we are taking
24 the other action that we are perfectly entitled to do
25 under that settlement by arguing for a return of the

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1 remaining dollars.

2 The company started its argument talking about
3 symmetry and asymmetry and so on. Chairman Goltz
4 asked about, what really is the legal foundation for
5 the retroactive ratemaking rule, concept, principle,
6 whatever it is. And in thinking that through, because
7 we didn't -- frankly, we just quoted this Commission's
8 orders, and we didn't go digging past that. But, of
9 course, we have done that digging in the past, and
10 attempted -- and I attempted to recall.

11 My recollection is the -- this whole concept
12 started with the U.S. Supreme Court, in cases in which
13 companies tried to insist that they were entitled, as
14 a matter of due process, to recover past losses and
15 current rates. And that was a matter of due process
16 under the due process clause in the Federal
17 Constitution. And the U.S. Supreme Court rejected
18 that argument, that that was not the purpose of
19 ratemaking, and they did not have a due process right
20 to recoup past losses and current rates.

21 I don't think the U.S. Supreme Court has
22 expanded on that doctrine much, but it has manifested
23 itself over the years in different -- in different
24 states and different courts. In the extreme case,
25 some courts say you can't do deferred accounting, you

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1 can't do PCAM, you can't do excess hydro deferrals, or
2 all the other things that utilities like, without
3 specific statutory authority permitting you to do so.

4 Until 1988, this Commission ruled that
5 PCAM-type mechanisms with deferrals and so on were
6 illegal, and in 1988 changed that view. As we noted
7 in the brief, that decision is in line with the
8 majority of jurisdictions around the country. As
9 Professor Krieger notes in his article, that both
10 company and Staff recited, you know, is that -- here,
11 if you really look at it closely, that may not hold
12 up.

13 In this state, we don't have any court
14 decisions, that I'm aware of, that really help us in
15 that regard, so we do look to the majority rule. And
16 the majority rule would allow what Staff is proposing
17 here, and would allow PCAMs and deferred accounting
18 and the other things that utilities have enjoyed over
19 the last 25 years.

20 There was some questions about the filed rate
21 doctrine. On its surface, the statute, which purports
22 to invoke it, simply says you file the rate on file.
23 And under that literal reading, there would be no
24 issue, other than matching up the bill with the rate,
25 making sure it's the same number. It all depends on

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1 how that rate is -- or how the Commission acts with
2 regard to that rate. If it tries to refund a prior
3 permanent rate, that's a problem. If it attempts to
4 go back and redo the rates and apply the difference
5 prospectively, that can be a problem.

6 But in this case, the Staff's proposal
7 challenges no prior rate. The dollars that Staff has
8 calculated in Ms. Breda's exhibit, the actuals, the
9 bottom line amount, has never been included in any
10 rate, and it's fully appropriate for the ratepayers to
11 get it. It was in the test year that the company
12 filed.

13 A couple more remarks on the earnings test
14 that the company has attempted to invoke here. First
15 off, we do think that's inconsistent with the order
16 that you issued, saying these are ratepayer dollars,
17 not investor dollars. But just filing some testimony
18 saying they underearned, and saying, Oh, we had some
19 high hydro costs, is really insufficient. This is
20 what a rate case is for, and they filed a rate case.
21 That's the forum for determining that issue. But the
22 point is that they are not entitled to the revenue,
23 and so their earnings are irrelevant in that regard.

24 As I mentioned a moment ago, the earnings test
25 can't be a legal standard, because they didn't insist

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1 on it when they could have in the hydro deferral. In
2 the last settlement, they stipulated that the rates
3 set resulting from that settlement were fair, just,
4 reasonable and sufficient.

5 One other point, the Commission, in its order,
6 did require the company to establish a tracking
7 account. It's my understanding the company did not
8 actually create a reserve on its books or create an
9 account on its books setting forth the revenues that
10 are potentially at issue here. I have no doubt they
11 are tracking them.

12 I am going to finish where I started, and that
13 is that Staff's case is very basic. We don't -- we
14 aren't arguing for an exception to the retroactive
15 ratemaking principle or rule, because the Staff's
16 proposal is not retroactive ratemaking to start with.

17 Again, the company put these revenues into
18 issue when they filed the 2009 test period. We
19 are proposing a disposition of those revenues. We are
20 proposing a regulatory liability account for this
21 class of revenue, which is of course fully appropriate
22 in the context of a rate case, to address the
23 accounting issue. Our fundamental rate proposal is
24 for the Commission to pass back the test year actual
25 level of REC revenues, including the indicated amount

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1 that is of some controversy.

2 So that concludes my remarks, and I look
3 forward to your questions.

4 JUDGE CLARK: Thank you, Mr. Trotter.
5 Chairman Goltz.

6 CHAIRMAN GOLTZ: Thank you.

7 So if the test year revenues had been -- a
8 question asked by Mr. Sanger -- if it had been way
9 lower, would the reverse be true, then, as well?

10 MR. TROTTER: You will need to run by
11 the hypo again.

12 CHAIRMAN GOLTZ: I thought that you are
13 saying all you are doing is, is you just want to
14 put -- capture, return the test year, actual test year
15 revenues?

16 MR. TROTTER: Yes.

17 CHAIRMAN GOLTZ: What if the actuals
18 were much lower so it cut the other way?

19 MR. TROTTER: Well, it wouldn't cut the
20 other way. The ratepayers get them.

21 Maybe I'm not tracking that question.

22 CHAIRMAN GOLTZ: Well, I thought a
23 certain amount was in -- was built in rates.

24 MR. TROTTER: Not in 2009.

25 CHAIRMAN GOLTZ: Okay, I apologize.

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1 So let me ask you a question about the -- what
2 I was suggesting to Ms. McDowell, that if indeed an
3 accounting petition is necessary, that Mr. Foisy's
4 testimony was a functional equivalent of an
5 accounting petition. Without asking you to concede
6 that -- your main argument, what are the merits or
7 nonmerits of that position?

8 MR. TROTTER: It's meritorious.

9 CHAIRMAN GOLTZ: So is the -- so that
10 would -- wouldn't be exactly a middle ground. That
11 would give the pass-back some -- some revenues, more
12 revenues to ratepayers than under the company's
13 petition.

14 MR. TROTTER: As a matter of counting
15 the dollars, that's correct. Again, you know,
16 understand, our theory is different.

17 CHAIRMAN GOLTZ: Right.

18 MR. TROTTER: And the -- you know, the
19 Commission, when PacifiCorp asked for the amortization
20 of the extraordinary property loss, they didn't -- we
21 weren't quibbling about, you know, the day they filed
22 the rate case is the starting point for determining
23 the balance, because the balance at that point would
24 have been zero.

25 CHAIRMAN GOLTZ: Let me ask you, this is

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1 a little bit of an off-the-wall question, and I just
2 don't know. You know, we've talked a lot -- the
3 statute has always been confusing to me, actually.

4 Sort of given retroactive ratemaking, what's
5 the Reparation Statute 80.04.220? How does that fit
6 into that? Does that state an exception, where you
7 actually can go back, where there has been some
8 extraordinary charges, or is that catching you off
9 guard a little bit?

10 MR. TROTTER: No, that's fine. I come
11 across this from time to time.

12 CHAIRMAN GOLTZ: 80.04.220.

13 MR. TROTTER: Yes, that's a -- that's
14 basically that the filed rate was charged, but it
15 was -- but it was excessive. And it gives the
16 customer relief somewhat prior to the date they file
17 that complaint as a matter of equity.

18 CHAIRMAN GOLTZ: So it is kind of a
19 statutory exception to the retroactive ratemaking
20 principle/concept/doctrine?

21 MR. TROTTER: Filed rate doctrine as
22 well, yes.

23 CHAIRMAN GOLTZ: Okay.

24 MR. TROTTER: But I think it's probably
25 recognition of what Mr. Sanger was talking about,

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1 the -- the striking asymmetry and access to
2 information, and so it's fair to go back a ways.

3 CHAIRMAN GOLTZ: I have no further
4 questions.

5 COMMISSIONER OSHIE: I have no
6 questions.

7 JUDGE CLARK: Mr. Jones?

8 COMMISSIONER JONES: Just a couple.

9 Mr. Trotter, so what is Staff advocating for
10 in this proceeding right now? Are you advocating for
11 a regulatory liability account, as you did -- as we
12 have in practice for PSE, or for a continuation of the
13 existing tracking mechanism for PacifiCorp, that's
14 been in place since April of 2011?

15 MR. TROTTER: I have to confess, it's a
16 little unclear to me what you intended by the term
17 "tracking account." I interpreted that to mean a
18 regulatory liability account. I don't believe the
19 company did, but I did. And -- but our recommendation
20 to the Commission stands, and that is the regulatory
21 liability account should be ordered, effective
22 January 1st, 2010, to capture the REC revenues after
23 the test period, calendar 2009.

24 COMMISSIONER JONES: I'm talking about
25 going forward.

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1 MR. TROTTER: And going forward. Yes,
2 starting January 1st, 2010, going forward. And then
3 in a proper proceeding, which could be the current and
4 pending --

5 COMMISSIONER JONES: Okay.

6 MR. TROTTER: -- rate case, you can deal
7 with the money in that account.

8 COMMISSIONER JONES: You responded to me
9 fairly forcefully earlier on, this issue of forecast
10 versus actual REC revenues. Isn't it true that in --
11 if we continue the existing -- what I mean by a
12 regulatory tracking mechanism is what is called, I
13 think, a tracker under FASB 71, which is a deferred
14 accounting petition we would use. I think that always
15 requires you to forecast REC revenues for a certain
16 period of time, either a calendar year or some other
17 period of time. Am I -- am I wrong with that?

18 MR. TROTTER: You may be asking the
19 wrong person that question, because I don't know the
20 answer to that. I do know the -- yes, I don't know
21 the answer.

22 The regulatory liability account that we had
23 in mind was for the company to record the REC revenues
24 from January 1st, 2010 forward, and that would be
25 before the Commission for disposition in a future

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1 proceeding.

2 COMMISSIONER JONES: Okay.

3 In terms of the volatility of this REC revenue
4 forecasting, if that is indeed what we have to do
5 going forward, Ms. Breda -- I'm referring to
6 Ms. Breda's testimony, Page 5.

7 MR. TROTTER: Yes.

8 COMMISSIONER JONES: KHB-7TC. I mean
9 she appears to be saying, Mr. Trotter, that a separate
10 tariff is appropriate to return REC revenues to
11 ratepayers. As you stated, the Commission has already
12 decided, as a general principle, that ratepayers are
13 entitled to these revenues. The reason she states
14 that a separate tariff is appropriate, is because REC
15 revenues are, quote, unpredictable and not expected to
16 be available every year.

17 MR. TROTTER: I think we are talking two
18 different things here. I think you probably
19 understand it better than I.

20 The tracking account of course is not a
21 tariff. And so I think what she was talking about is,
22 you established a tariff in your order, and so the
23 tariff is -- will be ongoing until you change it. But
24 she thought the tariff would be okay. And then you
25 would have the tracking account that would bleed down

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1 those revenues that were being tracked through the
2 tariff.

3 But the idea was, you keep the tariff at a
4 certain level, you don't -- you don't continually
5 adjust it based on the latest projection, because
6 that -- that's going to make a volatile rate that
7 nobody is happy with. So keep that a levelized rate,
8 and then you may need to adjust it from time to time.
9 But don't adjust it on a routine basis, but try to
10 keep it as constant as you can. And if that means
11 that the revenues come back over four years instead of
12 three, or three years instead of four, well, that's
13 okay.

14 COMMISSIONER JONES: Okay.

15 MR. TROTTER: Now, it is true that these
16 are -- these are extraordinary items. The company in
17 this case, in their prefiled direct testimony, listed
18 zero REC revenues for the test period on the basis
19 that they were going to bank these. At the same time,
20 it was reporting massive REC revenues. You know,
21 that -- that's why there has been a lot --

22 COMMISSIONER JONES: Right.

23 MR. TROTTER: -- of confusion about
24 these numbers.

25 COMMISSIONER JONES: But in fairness to

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1 the company, their rebuttal position on the -- as I
2 recall, once we got to rebuttal testimony, was they
3 agreed to a number, 5 million, to establish as the
4 basis for the true-up in 100749; isn't that correct?

5 MR. TROTTER: The Commission
6 characterized that 4.8 million in its order, and I
7 can't speak for what the company thought that number
8 was, although, I can cite you -- I will, just a
9 moment.

10 COMMISSIONER JONES: Okay.

11 (Pause in the proceedings.)

12 MR. TROTTER: It is Page 21 of our reply
13 brief, but we are citing Mr. Dally's Exhibit RBD4T at
14 Page 10, Lines 15 through 18, where he agreed, I
15 think, the 4.8 is okay. I'm going to assume that I am
16 okay in saying this, but the 4.8 million was actual
17 2009 test period revenue.

18 COMMISSIONER JONES: Okay.

19 MR. TROTTER: The company has repeatedly
20 characterized it as a projection.

21 COMMISSIONER JONES: Right.

22 MR. TROTTER: And they are entitled to
23 characterize it any way they want. Staff is
24 characterizing it as the test period actual.

25 In your order, you said the parties were

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1 agreed that 4.8 million was the number. At that
2 time -- it's now a little higher, but at that time, we
3 were in agreement. We knew it was an actual number.
4 The company may have said, Oh, it's a projection, for
5 some purpose, but that's not how we viewed it and
6 that's not what it is, from Staff's perspective.

7 COMMISSIONER JONES: So if Ms. Breda, as
8 the expert witness here, or Mr. Foisy, knew that these
9 revenues were unpredictable -- and these reports were
10 coming in quarterly, correct? Or they were -- at
11 least in 2010 they did. Why didn't Staff take some
12 action, such as filing an accounting petition to
13 address those '08 and '09 revenues? Why didn't you do
14 that?

15 MR. TROTTER: To the best of my
16 knowledge, we understood that the company had just
17 filed a general rate case, the 2009 test period. We
18 knew that these revenues were in that test period, so
19 we didn't see any reason why an accounting petition
20 was necessary. The company placed these revenues at
21 issue.

22 COMMISSIONER JONES: I'm going to --
23 this is my final question. I'm going to ask you the
24 same question I asked the company and the other
25 parties. The settlement agreement in the '09 rate

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1 case required a filing of a quarterly report with REC
2 revenues, did it not?

3 MR. TROTTER: Yes, it did.

4 COMMISSIONER JONES: What did Staff do
5 with those quarterly reports?

6 MR. TROTTER: To the best of my
7 knowledge, they were reviewed. The first one came in,
8 you know, in the spring of 2010. I don't know if it
9 was before or after the company filed its general rate
10 case, but we were aware of the filing and reviewed
11 them.

12 COMMISSIONER JONES: Did any alarm
13 signals --

14 MR. TROTTER: We saw that there was
15 substantial REC revenues, and we knew we were going to
16 be -- we had an issue in the rate case. And we, as
17 you know, filed testimony in October addressing those
18 revenues.

19 COMMISSIONER JONES: Okay.

20 MR. TROTTER: That's how we approached
21 it. That's how the company approached it in U8215 --
22 U821235, and the way Avista approached it in the Y2K
23 docket, and the way other companies have addressed it
24 in the ten or so decisions from those states in the
25 Narragansett Electric case, and countless other

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1 decisions.

2 COMMISSIONER JONES: Thank you,

3 Mr. Trotter.

4 JUDGE CLARK: Any other inquiry?

5 Reply, Ms. McDowell?

6 MS. McDOWELL: Thank you, Judge Clark.

7 Turning first to the last point just made, the
8 last question of Commissioner Jones about these REC
9 reports. I do want to correct the record and note
10 that the first report was filed prior to January 1st,
11 2010, as was required by the settlement agreement. It
12 was actually filed right at the end of 2009. And the
13 first report did track revenues through June of '09,
14 which was consistent with what was required by the
15 settlement agreement. The parties negotiated those
16 time lines, and the company consistently followed
17 those.

18 Now, another point that is relevant to your
19 inquiry of all the parties is that that settlement
20 provision contains the following language: The
21 company also agrees to hold periodic meetings as
22 requested by any party to provide additional details
23 on the reports. So the company was ready, willing and
24 able to do that. No party ever requested that.

25 So I think that right there undermines the

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1 argument around the information deficit, or the
2 asymmetry of information on this issue. There are
3 certainly certain complex issues where there is
4 information asymmetry, but there was an awful lot done
5 here to make sure there was not information asymmetry.
6 The parties were interested in this issue, negotiated
7 for transparency around it.

8 In fact, Public Counsel in the Puget docket
9 actually proposed that Puget be subject to the same
10 reporting requirements that they had negotiated with
11 PacifiCorp, because Public Counsel thought those were
12 such helpful reporting requirements. So these are
13 not -- you know, this was not a meaningless exercise
14 for the company.

15 When Ms. Shifley says that Public Counsel had
16 no idea what the company's REC revenues were for the
17 last part of 2009 until mid to late 2010, that's just
18 inaccurate. That is not what this record shows. It's
19 clear that by the time the rate case, the 2010 rate
20 case was filed, in May 2010, the parties were on
21 notice what the 2009 REC revenues of the company were.
22 They were approximately 5 million. So that's
23 uncontroverted. That was the basis on which the
24 administrative law judge dismissed the complaint, that
25 it was uncontrovertible.

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1 By May of 2010, all parties were on notice
2 about the company's extraordinary REC revenues at the
3 end of 2009. But even before that date, going back to
4 earlier, parts of 2010 and late 2009.

5 And keep in mind, these accounts did not
6 become noncontingent until late 2009. They were
7 pending before the CPUC through the fall of 2009. So
8 the first notable event is that the company, in
9 November of 2009, in Oregon, included them in a power
10 cost update. That was the first filing after these
11 contracts became noncontingent. ICNU was a party to
12 that docket in Oregon, and filed for deferred
13 accounting at the end of 2009 in Oregon, related to
14 REC revenues.

15 So it's -- it rings hollow to suggest that the
16 parties didn't know. At least ICNU didn't know
17 specifics about those California contracts, because
18 they were filed in Oregon, and for accounting petition
19 associated with RECs, was filed by ICNU in Oregon by
20 the end of 2009. A public filing, I might add.

21 Then in the Puget case, in early 2010, as we
22 have noted in our briefing, and in the cross-exhibits
23 we filed, ICNU filed one of the California contracts,
24 one of the two major California contracts that was the
25 subject of their complaint. Now, they argue in their

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1 complaint they didn't know anything about these
2 contracts until July of 2010, but the record in the
3 Puget case shows that all of the regulatory filings
4 around that contract were filed in the Puget case in
5 January 2010, to demonstrate the fact that the Puget
6 contract was not extraordinary, that it was a market
7 price, and the PacifiCorp contract was a market price.

8 So, you know, diving into the record, I think
9 it is pretty clear that shortly after these contracts
10 became noncontingent, the parties were aware of them,
11 and simply chose not to file for deferred accounting
12 for whatever reason. I -- you know, it's not -- I
13 appreciate your asking that question, because it's not
14 clear to us why they didn't -- they negotiated for
15 that approach and then didn't file it and now we are
16 here today arguing around what's fair and what's not.

17 CHAIRMAN GOLTZ: Excuse me. So -- but
18 looking at Ms. Shifley's -- Page 19 of her brief,
19 that -- where she has this little table of the -- when
20 reports are sent to parties and the time span
21 involved, and she has bolded there July 28, 2010, the
22 report. That includes January 2009 to March 2010.
23 Although, the line above that also shows some
24 information coming in in early 2009, at least.

25 But there is at least some asymmetry of

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1 information here, isn't there? I mean, that's just
2 the way -- because the company gets information, and
3 then the other parties get information later, when the
4 company reports it.

5 MS. McDOWELL: You know, there is a lag;
6 there's a six-month lag. That's what the parties
7 negotiated for, and frankly, that's about as quickly
8 as all of this information could be gathered,
9 accounted for and presented, as is the case in any
10 kind of reporting requirement for this Commission.

11 CHAIRMAN GOLTZ: Sure, but the -- but
12 the end result in the report is final and submitted.
13 That's when the parties get notice of information,
14 within the reports. The company has that information
15 well before that time. It's not as if you hit the
16 print button and say, Oh, my gosh, you know, look at
17 this.

18 MS. McDOWELL: I mean I think -- you
19 know, that's -- the company is aware that certain
20 contracts have been entered, the company is aware that
21 certain RECs have been sold. I don't think that
22 the -- you know, there -- it really does take time for
23 the company to be able to assemble the information and
24 understand the financial impact of the various
25 contracts.

1 I think, you know, what's significant is the
2 fact that there are certain contracts in place that
3 involve the sale of certain REC revenues. I think
4 from that, people can make a logical assumption that
5 REC revenues for this particular period are going to
6 be increased. I think the company --

7 CHAIRMAN GOLTZ: You aren't expecting
8 Public Counsel to monitor those REC sales. Really,
9 realistically you are expecting Public Counsel to read
10 the reports that you submit?

11 MS. McDOWELL: Well, I would say in this
12 case, because of the heightened awareness around this,
13 I think it was reasonable for us to expect that
14 parties, particularly a party like ICNU, which is
15 participating in other dockets where REC revenues are
16 involved, to understand that there are new contracts
17 being entered into. And certainly Public Counsel was
18 a part of Puget docket where PacifiCorp's California
19 contract was entered into as an exhibit.

20 You know, whether it -- you know, I think this
21 is a particularly extraordinary period, where a two-
22 or three-month period did matter. I mean, typically a
23 six-month lag in recording of an issue is not going to
24 be, you know, a critical time period. But here, you
25 know, a two- or three-month period did matter. But I

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1 think what -- if you look into the record, in fact the
2 parties did have notice. They showed that by their
3 filings in the Puget case and by the filings that they
4 made in other states.

5 So just turning to a couple of other points
6 that were made in the other parties' arguments. I did
7 want to note, there has been a lot of discussion
8 around what was a forecast, what was actuals. I think
9 there are a few points that are important to note in
10 that regard.

11 First of all, there is no -- no controversy or
12 dispute that the amounts that were in rates for 2009
13 and 2010, the amounts we have talked about, the
14 amounts from those settlements, were forecast REC
15 revenues. They were forecasts for those periods.
16 Staff is arguing about whether the amount that is
17 contained in Order 06 is a historical number or a
18 forecast number. It's a number for the rate effective
19 year, however derived. But there is no dispute that
20 the 2009 rate and 2010 rate were forecast rates.
21 Staff's own testimony cites to those forecasts for
22 those periods.

23 That point is the key point, distinguishing
24 all of the cases that Mr. Trotter cites, and this
25 case. This case involves a forecast rate for a

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1 particular item, that parties are now wanting to go
2 back and change based on actuals. None of
3 Mr. Trotter's cases involve that scenario, and they
4 don't involve that scenario because this is the
5 classic retroactive ratemaking scenario. Commissions
6 don't do this. They don't do this absent some kind of
7 extraordinary exception, none of which apply.

8 CHAIRMAN GOLTZ: What about the storm
9 damage cases he cites out of Rhode Island, and ten or
10 so -- and ten or so other states? I just looked at
11 the brief. He kind of cites that in the opening
12 brief, in a footnote, and you don't respond, but maybe
13 you don't respond to all the footnotes, because
14 there's a lot of them. That seemed like that was an
15 expense, in Rhode Island, for storm damage. That was
16 built into the test period, and they blew right by
17 that, and the Commission said, Sorry, you don't get
18 that, because there's a certain amount in the test
19 period for the storm damage, and you spent more. And
20 they of course said, We aren't going to so strictly
21 apply the retroactive ratemaking
22 doctrine/principle/concept there.

23 MS. McDOWELL: I believe that case was
24 because there is no amount in rates for that
25 particular extraordinary storm damage. We are not --

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1 CHAIRMAN GOLTZ: Of course there's
2 nothing in rates for the extraordinary storm damage,
3 no one would do that, but there was an amount in rates
4 for what was sort of, you know, historical, or what
5 was anticipated. And so the mere fact that something
6 is in a test period, under that case, would imply that
7 that does not prohibit a utility at least from asking
8 for more than that in extraordinary circumstances. So
9 the question, then, is: If that's symmetrical, then
10 why wouldn't that apply here too?

11 MS. McDOWELL: Well, let me just say
12 that that has never been the way the Commission has
13 applied its retroactive ratemaking principles. This
14 Commission has never said, well, it's in the test
15 period, and it doesn't matter that there is already a
16 rate in place. This Commission has not applied it in
17 that way. He has argued that other Commissions have.
18 But this Commission has never allowed a company or the
19 intervening party to go in and reset a rate that was
20 previously forecast, to true-it up to actuals because
21 that -- they've said that's retroactive ratemaking and
22 that's illegal.

23 And, you know, it is -- I think parties have
24 cited a lot of different cases from a lot of different
25 states, and recited law review articles, and I think

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1 all of the parties in citing that have said
2 retroactive ratemaking is a function of particular
3 state statutes and policies, just like it is in
4 Washington. It's a combination of statutes and
5 policies and Commission decisions. And, you know,
6 that was your opening point, and I think it's a fair
7 one.

8 And this particular Commission, if look at
9 your precedence, look at your statutes, it's on the
10 strict side of the continuum. There have not been a
11 lot of exceptions acknowledged or recognized. I think
12 the Commission has done that to -- because of its
13 statutes --

14 CHAIRMAN GOLTZ: Especially pre-1988.

15 MS. McDOWELL: So I don't think -- you
16 know, you might cite a dozen Commissions that do it
17 differently, but this Commission has been quite
18 literal about requiring rates to be set on a
19 prospective basis only, and allowing exceptions only
20 in pretty typical deferred accounting situations.

21 And I do want to mention this hydro deferral,
22 which you are hearing a lot about from Mr. Trotter.
23 You know, that was a deferred accounting petition.
24 There's nothing that's different than -- we are not
25 arguing for a different standard there. The company

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1 filed for deferred accounting. It was settled for
2 some portion, quite a bit less than dollar-for-dollar
3 recovery, and there was no earnings test involved in
4 it, because it was deferred accounting. This was not
5 a situation where somebody is going back and resetting
6 the rate. This was a classic deferred
7 accounting petition.

8 And I think just the -- to clarify one last
9 point, and this is a point that Commissioner Jones
10 asked about, in terms of the regulatory liability
11 account, the technical accounting issues around that.
12 I understand that the company immediately recorded a
13 regulatory liability upon the issuance of Order 06 and
14 has credited amounts to that regulatory liability
15 account every month under the Commission's order,
16 requiring the company to credit REC revenues for the
17 2011 rate effective period.

18 With that, I will thank you again for your
19 attention, for the opportunity to address you today.

20 JUDGE CLARK: Are there any further
21 questions?

22 All right. Hearing nothing, thank you all for
23 your participation in oral argument this afternoon, it
24 was very helpful. We are adjourned.

25 (Oral Argument concluded 3:55 p.m.)

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C E R T I F I C A T E

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COUNTY OF KING

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I, Sherrilyn Smith, a Certified

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Shorthand Reporter and Notary Public in and for the

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State of Washington, do hereby certify that the

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foregoing transcript is true and accurate to the best

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of my knowledge, skill and ability.

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IN WITNESS WHEREOF, I have hereunto

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set my hand and seal this 9th day of February, 2012.

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SHERRILYN SMITH

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MY COMMISSION EXPIRES:

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JUNE 2012