BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION Complainant, vs. PACIFICORP d.b.a. PACIFIC POWER & LIGHT COMPANY, Respondent.	**DOCKET UE-100749**

PETITION FOR RECONSIDERATION AND MOTION TO REOPEN RECORD

September 4, 2012

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I. INTRODUCTION

1 Pursuant to RCW 34.05.470 and WAC 480-07-850, PacifiCorp d.b.a. Pacific Power & Light Company (PacifiCorp or the Company) respectfully requests that the Washington Utilities and Transportation Commission (Commission) reconsider Order 10 entered on August 23, 2012, in this proceeding (Order 10). As further discussed herein, Order 10 is deeply flawed for the following reasons:

- Order 10 spurns years of Commission decisions strictly applying the law against retroactive ratemaking by exempting renewable energy credit (REC) revenues from this law and from general ratemaking, ignoring the fact that PacifiCorp has reflected REC revenues in all of its rate filings in Washington since the Energy Independence Act (EIA) was enacted in 2006.

- Order 10 incorrectly interpreted and applied rationale expressed in other orders to conclude that REC revenues are akin to gains from the sale of utility property. This conclusion ignores the fact that the rationale for returning gains on the sale of utility property to customers—that customers have paid depreciation expense and a return on the property—does not apply to REC revenues.

- Order 10 adopts more punitive rate treatment for PacifiCorp's REC revenues than the Commission has adopted for other Washington utilities. Specifically, the Commission allowed Puget Sound Energy, Inc. (PSE) to retain a portion of its REC revenues and allowed Avista Corporation, d/b/a Avista Utilities (Avista) to include REC revenues as operating revenues in Avista's Energy Recovery Mechanism (ERM). The Commission has never ordered Avista to provide a separate REC revenue rate credit to its customers.

- Order 10 combines different features of the parties' competing proposals to devise the most extreme and punitive approach possible to hypothesize the amount of PacifiCorp's actual and imputed REC revenues, including the assumption—contrary to the evidence in the record—that PacifiCorp can sell 100 percent of its RECs.

- Order 10 ensures that PacifiCorp will have no opportunity to earn its allowed rate of return in the rate effective period and ignores the fact that PacifiCorp significantly under-earned in 2009 and 2010, even taking into consideration all historical REC revenues. Order 10 effectively eviscerates most of the rate increase allowed in this case and further reduces PacifiCorp's earnings by several percentage points. The Commission refused to consider any of these facts, abdicating its responsibility to ensure that PacifiCorp's rates are fair, just and reasonable, and sufficient to maintain PacifiCorp's financial integrity.

2 This Petition is intended to ensure that, to the extent required by RCW 34.05.534 and RCW 34.05.554, PacifiCorp has fully exhausted all administrative remedies and brought new issues arising from Order 10 to this Commission before filing for judicial review. The Company also requests that the Commission reopen the record under WAC 480-07-830 to accept new evidence proffered with this Petition, in the form of a declaration from Company witness Andrea L. Kelly. Good cause exists to grant this motion because Order 10 raises issues that no party raised in this proceeding, including whether REC revenues should be treated like gains on the sale of utility property and whether the Commission has previously accepted the treatment of REC revenues as operating revenues in PacifiCorp's and Avista's Washington rates.

3 PacifiCorp requests reconsideration of the Commission's determinations that it is free to reclassify the Company's RECs, that RECs are comparable to utility property, and that any such comparability makes past and current revenues from the sale of RECs exempt from the Commission's general ratemaking laws, policies, and processes. Under WAC 480-07-850(2), PacifiCorp contends that all aspects of Order 10 are erroneous and incomplete, other than introductory paragraphs 1 through 11. In support of this Petition, PacifiCorp relies upon all portions of the record in Phases 1 and 2 of this case related to REC revenues and the additional evidence PacifiCorp now submits with this Petition. Unless Order 10 is modified on reconsideration to apply only to REC revenues generated after April 2011 and to fairly account for these revenues, as was PacifiCorp proposed in Phase 2 of this proceeding, Order 10 will result in unjust and unreasonable rates, contrary to RCW 80.28.020, and will be based on erroneous and arbitrary findings and legal conclusions.

II. PETITION FOR RECONSIDERATION

A. The Commission's Interpretation and Application of the PSE Order from Docket UE-070725 are Incorrect.

1. Order 10 Misstates the Holding of the Order in Docket UE 070725.

4 In Order 10, the Commission "determined that RECs are comparable to utility property, and the sale of such property results in proceeds that, absent unusual circumstances, must be distributed in total to ratepayers."[1] The Commission expressly based this conclusion on Order 03 in Docket UE-070725 (PSE REC Order): "When first presented with the issue of the proper disposition of REC sale proceeds in Docket UE-070725, we agreed with PSE's analogy of such transactions to the sale of utility property."[2] The Commission concluded in Order 10 that REC revenues are not a "part of the general ratemaking process."[3] The Commission's new interpretation of the PSE REC Order is inconsistent with the plain language of that order. It is also inconsistent with the Commission's prior interpretation of the PSE REC Order in Order 06 in this case and the prior treatment of PacifiCorp's and Avista's REC revenues as operating revenues in Washington rates.

5 In the PSE case, the fundamental question was limited to whether utility customers were entitled to the proceeds from the sale of RECs.[4] Staff argued that customers were entitled to the proceeds under the general ratemaking principle that "benefits should follow burdens and rewards should follow risks."[5] The Commission observed that PSE acknowledged the applicability of this principle when it analogized the sale of RECs to the sale of utility property,

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[1] Order 10 ¶ 23.
[2] *Id.* ¶ 24.
[3] *Id.*
[4] *See Re Amended Petition of Puget Sound Energy, Inc. for an Order Authorizing the Use of the Proceeds from the Sale of Renewable Energy Credits and Carbon Financial Instruments*, Docket UE-070725, Order 03 ¶¶ 39-41 (May 20, 2010) [hereinafter PSE REC Order].
[5] *Id.* ¶ 39.

because this is the same principle that the Commission applies when determining the proper allocation of gain realized from the sale of utility property.[6] The Commission then noted that this principle "offer[ed] useful guidance" to the Commission as it made its determination in the PSE case.[7]

6 Contrary to the Commission's statements in Order 10, the Commission did not conclude in the PSE REC Order that RECs were analogous to utility property, should be treated in a manner equivalent to a rate base item, and credited 100 percent to customers.[8] The Commission simply adopted a "benefits and burdens" test, which is not unique to property transactions, and applied this test to allow PSE to retain a portion of its REC revenues.[9] The Commission has explicitly recognized that the "benefits and burdens" test is a "familiar principle in utility law" and has broadly applied the principle.[10] Indeed, this principle is essentially a restatement of the matching principle, which the Commission routinely applies to require the matching of costs and revenues in general ratemaking, including in Phase 1 of this case.[11] Application of the matching principle here requires PacifiCorp's historical treatment of REC revenues as operating revenues used to offset net power cost operating expense. Treatment of REC revenues as a rate base item

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[6] *Id.* ¶ 40.
[7] *Id.* ¶ 41.
[8] The Commission also stated in Order 10 that "[a]s we decided for PSE in Docket UE-070725, PacifiCorp effectively retained these funds in trust for its customers pending Commission authorization for their disposition." Order 10 ¶ 26. But nowhere in the PSE REC Order did the Commission state or even imply that PSE was holding REC sales proceeds in trust.
[9] In the PSE REC Order, the Commission found instructive a prior commissioner's point that this principle was based on "equitable principles enunciated in *Democratic Central* [*Comm. v. Wash. Metro Area Transit Comm'n*, 485 F.2d 786 (D.C. Cir. 1973)]." PSE REC Order ¶ 41. In that case, the court specifically noted that the equitable principles enunciated were taken from "other aspects of ratemaking" and applied to the allocation of gain from the sale of utility property. *See Democratic Central Comm. v. Wash. Metro Area Transit Comm'n*, 485 F.2d 786, 806 (D.C. Cir. 1973).
[10] *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Dockets UE-050684 and UE-050412, Order 04 ¶ 285 (Apr. 17, 2006) (applying principle to cost of capital analysis).
[11] Order 06 ¶¶ 14-15

violates the matching principle because, in contrast to normal rate base items, customers do not bear the burden of paying depreciation expense or a return on the cost of RECs.[12]

7 In addition, the Commission's current interpretation of the PSE REC Order as holding that RECs are comparable to utility property and therefore outside the general ratemaking process is inconsistent with how the Commission previously interpreted the PSE REC Order.[13] In Order 06 in this case, the Commission cited the PSE REC Order for its application of the benefits and burdens test.[14] The Commission never described the PSE REC Order as finding that RECs were analogous to property or that REC revenues were outside of the general ratemaking process. Instead, in Order 06 the Commission commenced a new phase of the docket to review the disposition of REC revenues in the "test, post-test and rate" periods implicated in this case—even though the Commission now asserts that its resolution of the PSE REC Order made the issue of ratemaking test periods irrelevant to the disposition of REC revenues.

8 The novelty of the Commission's new interpretation of the PSE REC Order is apparent simply from the filings in Phase 2 of this case. As the Commission observed, the "premise underlying virtually all of the parties' arguments is that REC sale proceeds are Company 'revenues' to be factored into the ratemaking process."[15] Indeed, out of the hundreds of pages of testimony and briefs filed by the parties, the Commission could point to only a single paragraph

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[12] Declaration of Andrea L. Kelly ¶ 11.
[13] The Commission inaccurately summarized the Company's position on the disposition of REC proceeds as "the Company does not dispute that [proceeds from REC sales] belong to its ratepayers." Order 10 ¶ 19. The Company's position on this issue is set forth at Kelly, Exh. No. ALK-1T 7:6-17 as follows: "As noted by the Commission, the Puget Sound Energy (PSE) order stands for the proposition that customers are generally entitled to a revenue credit for REC revenues. The Company does not contest this premise, as illustrated by the REC revenue adjustment already in its rates. There is nothing in the PSE order, however, that supports the proposition that normal ratemaking principles should be disregarded when calculating a REC revenue adjustment. The PSE order did not result in a regulatory accounting order that operates incrementally to an adjustment to base rates, nor did parties in that case make any argument to track REC revenues that pre-dated PSE's filing for a regulatory accounting order."
[14] *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Docket UE-100749, Order 06 ¶ 199 (Mar. 25, 2011).
[15] Order 10 ¶ 23.

where a party made an argument even remotely related to the rationale of Order 10.[16] If the PSE REC Order meant what the Commission now claims it means, surely the parties in this case would have understood and argued that interpretation.

2. The Conclusion that REC Revenues are not Part of the Ratemaking Process is Unsupported.

9 As a legal matter, the Commission erred in concluding that REC revenues should be accounted for "outside the general ratemaking process." The Commission's enabling statute grants it jurisdiction to regulate "the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation."[17] Further, the Commission is required by statute to establish rates that are just, reasonable, and sufficient.[18] To this end, the "Commission follows long-established and judicially recognized rate-making principles."[19] These ratemaking principles include, among others, the prohibition against retroactive ratemaking and the filed rate doctrine.[20] The Commission lacks authority to arbitrarily declare a matter properly within its ratemaking jurisdiction as one "outside of the general ratemaking process" and therefore exempt from the Commission's "long-established and judicially recognized rate-making principles."[21]

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[16] Order 10 n.21 (citing one paragraph of Staff's Post-Hearing Brief). Even that insignificant citation is not on point. Staff's argument focused on the timing of the recognition of REC revenues and never argued that because RECs are analogous to utility property they must be accounted for outside of the normal ratemaking process. Post Hearing Brief on Behalf of Commission Staff ¶¶ 48-51 (Nov. 4, 2011). In addition, Staff's brief discussion at oral argument regarding the analogy of REC sales to utility property sales focused exclusively on whether customers are entitled to revenues from REC sales, not on whether REC sales are accounted for outside of the ratemaking process. TR. 924-26. Tellingly, Staff did not cite the PSE REC Order in either reference.

[17] RCW 80.01.040(3).

[18] RCW 80.28.020.

[19] *Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-090134 *et al.*, Order 10 ¶ 17 (Dec. 22, 2009).

[20] *Re Application of Puget Sound Energy for Authorization Regarding the Deferral of the Net Impact of the Conservation Incentive Credit Program*, Docket UE-010410, Order Denying Petition to Amend Accounting Order ¶¶ 7-8 (Nov. 9, 2001).

[21] *See Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-090134 *et al.*, Order 10 ¶ 17 (Dec. 22, 2009).

3. The Commission Should Not Apply its New Interpretation of the PSE REC Order Retroactively to PacifiCorp.

10 The Company argued in Phase 2 that the PSE REC Order should be applied to PacifiCorp on a prospective basis only[22] because the order was one of first impression and the order specifically limited its applicability given its "unique and non-recurring" factual context.[23] As discussed above, the Commission's new interpretation of the PSE REC Order in Order 10 was not reasonably foreseeable by any party. Therefore, based upon similar rationale, the Commission should apply its new interpretation of the PSE REC Order to PacifiCorp on a prospective basis only.

B. The Commission Erred by Concluding that REC Sales are Like Utility Property Sales.

11 The Commission's conclusion that REC revenues are to be accounted for outside of normal ratemaking is based on the conclusion that RECs "are comparable to utility property with respect to the disposition of sale proceeds."[24] In fact, as Order 10 recognizes, RECs are a commodity, like electricity, that is produced by the Company's generating resources.[25] On this

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[22] PacifiCorp's Initial Post-Hearing Brief ¶ 47; *see U.S. West Comm. Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wash.2d 48, 59 (1997) (affirming Commission decision to apply methodology change on a prospective basis only); *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (retroactive application of new agency adjudication permissible, but "must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."); *Champagne v. Thurston Cty.* 163 Wash.2d 69, 79 (2008) ("Generally, we presume prospective application of newly amended administrative regulations, particularly where the amendments change substantive rights."). *See also Letourneau v. Dep't of Licensing,* 131 Wash. App. 657, 665–66 (2006) (considering retroactive application of a rule based on whether: (1) the agency intended the amendment to apply retroactively, (2) the effect of the amendment is remedial or curative, or (3) the amendment serves to clarify the purpose of the existing rule.).

[23] PSE REC Order n. 56; PacifiCorp's Initial Post-Hearing Brief ¶ 47.

[24] Order 10 ¶ 24.

[25] *Id.* ¶¶ 11, 24, 32.

basis, revenues from the sale of RECs should be treated like revenues from the wholesale sale of electricity and used to offset corresponding net power cost expense.[26]

12 Washington's EIA defines RECs with respect to the *electricity* generated. RCW 19.285.030(19) defines RECs as:

> [A] tradable certificate of proof of *at least one megawatt-hour* of an eligible renewable resource where the generation facility is not powered by freshwater. *The certificate includes all of the nonpower attributes associated with that one megawatt-hour of electricity*, and the certificate is verified by a renewable energy credit tracking system selected by the department. (Emphasis added.)

This definition ties a REC to electric production (and not the underlying generation capacity) by bifurcating the electric production into two constituent parts—the physical electricity (*i.e.*, commodity associated with the power attributes) and the REC (*i.e.*, the commodity associated with the nonpower attributes).[27] Order 10 relies on a publication from the United States Environmental Protection Agency that confirms the dual nature of renewable electrical generation.[28] That publication states: "All grid-tied renewable-based electricity generators produce two distinct products: physical electricity [and] RECs."[29]

13 Because by definition RECs are created in tandem with the electricity produced by renewable resources and cannot be created without the generation of electricity, it is more

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[26] Order 06 ¶¶ 165-69 (net power costs reduced by revenue generated from wholesale revenues); *Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-090134 *et al.*, Order 10 ¶ 49 (Dec. 22, 2009) (net power costs determined by offsetting revenues from costs).

[27] *See also* RCW 19.285.030(11)(a) ("eligible renewable resource" defined as *"[e]lectricity* from a generation facility powered by a renewable resource . . .") (emphasis added); RCW 19.285.030(14) defines "nonpower attributes" as "*all environmentally related characteristics*, exclusive of energy, capacity reliability, and other electrical power service attributes, *that are associated with the generation of electricity* from a renewable resource, including but not limited to the facility's fuel type, geographic location, vintage, qualification as an eligible renewable resource, and avoided emissions of pollutants to the air, soil, or water, and avoided emissions of carbon dioxide and other greenhouse gases." (emphasis added).

[28] Order 10 ¶ 9.

[29] *See* Environmental Protection Agency, Green Power Partnership, Renewable Energy Certificates (RECs), http://www.epa.gov/greenpower/gpmarket/rec.htm (EPA Green Power Website, last visited September 4, 2012).

accurate to treat RECs as a commodity like electricity, rather than a unit of property such as a corporate office building. Thus, REC revenues should be treated in the same manner as the revenues related to the sale of electricity, not general utility property.

14 In the PSE rate case that was litigated simultaneously with the PSE REC docket, Public Counsel filed testimony on PSE's REC revenues. In response to PSE's motion to strike this testimony, Public Counsel argued that "REC revenues are directly tied to the proper analysis of power costs," because without accounting for the revenues associated with wind generation the matching principle is violated.[30] The Commission acknowledged the merit of Public Counsel's argument seeking to match rate treatment of REC revenues and net power cost expenses, but granted the motion on other grounds.[31]

15 Comparing RECs to the underlying electricity is a reasonable comparison because, like electricity, RECs are not included in rate base or otherwise treated as utility property for ratemaking purposes. Specifically, customers do not pay depreciation expense or a rate base return related to RECs, in contrast to utility property in rate base.[32]

16 To support its comparison of RECs to other utility property, the Commission appears to equate RECs with the underlying generating facility. For example, the Commission states that the "environmental attributes *of the facilities* PacifiCorp . . . uses to generate electricity are useful or necessary to the performance of its duties to the public to enable the utility to comply with its obligations under the state's EIA."[33] However, as discussed above, RECs are properly associated with the electricity, not the generation facilities.

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[30] *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy Inc.*, Dockets UE-090704 and UG-090705, Order 10 ¶ 7 (Jan. 8, 2010).
[31] *Id.* ¶ 8.
[32] Declaration of Andrea L. Kelly at ¶ 11.
[33] Order 10 n.23 (emphasis added).

17 The facilities-based rationale posited by Order 10 for concluding that RECs are comparable to rate-based investment cannot arbitrarily be limited to RECs; the same rationale would apply to all retail and wholesale sales involving energy from the same facilities. The Order attempts to distinguish REC revenues from "more conventional company revenues from off-system sales of electricity" because RECs "can be stored for future use, held for future sale, or sold upon purchase or generation . . ." and that the "production, acquisition, accumulation and eventual sale of such assets can transcend rate periods."[34] But renewable portfolio standards, including the EIA, typically restrict the banking and storage of RECs, requiring production of the REC to be matched strictly to finite compliance periods. As a result, sales of "vintage" or stored RECs are extremely limited in volume and price.[35] In addition, wholesale sales of electricity can transcend rate periods and are normalized specifically to account for this fact.[36] The simple fact that RECs can be banked under the EIA for brief periods is not a principled distinction between the power and nonpower attributes of the electricity and does not justify making one component subject to normal ratemaking principles and the other exempt from them.

C. Retroactive Ratemaking Prohibits the Retroactive Reclassification of REC Revenues as Property to Avoid Application of Fundamental Commission Laws and Policies.

1. The Commission Previously Accepted the Treatment of REC Revenues as Operating Revenues in Washington Rates.

18 Order 10 is premised on the Commission's finding that PacifiCorp's REC revenues were never properly reflected in Washington rates.[37] This finding is startling because no party ever contested the fact that PacifiCorp has consistently reflected forecast REC revenues in its

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[34] *Id.* ¶ 24.
[35] Declaration of Andrea Kelly at ¶ 12.
[36] *Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-991606 and UG-991607, 3d Supp. Order ¶ 34 (Sept. 29, 2000) (power costs, including revenues, are normalized to represent typical conditions).
[37] Order 10 ¶ 23.

operating revenues in Washington rates. Instead, the dispute in this case and related proceedings was always over the reasonableness of PacifiCorp's REC revenue forecast in rates. For example, Staff witness Kathryn Breda testified in Phase 2 of this case that forecast REC revenues were included in PacifiCorp's 2008 and 2009 general rate cases: in "Docket UE-080220, the Company filed a forecast of REC revenues of $576,254 for 2009" and "in Docket UE-090205, the Company forecast $657,755 of REC revenue for 2010."[38] As noted above, the Commission acknowledged in Order 10 that the "premise underlying virtually all of the parties' arguments is that REC sales proceeds are Company 'revenues' to be factored into the ratemaking" process.[39]

19 The Commission found in Order 10 that it never previously accepted this premise; it also found that REC revenues were never properly included in the Company's rates. Because no party ever argued this position in the case, there is no evidence in the record to support the Commission's determination on this issue. As demonstrated by the Declaration of Andrea L. Kelly accompanying this Petition, the Commission's finding is contrary to the facts.

20 The Company has always accounted for its REC revenues in Washington rates as operating revenue recorded to Account 456, Other Electric Revenues.[40] These revenues offset corresponding operating expenses (*e.g.,* net power costs), and reduce the Company's overall revenue requirement.[41]

21 In the Company's 2006 general rate case, Docket UE-061546, the Company reflected REC revenues in Account 456. This case was fully litigated and decided in Order 08, issued on

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[38] Breda Exh. No. KHB-7TC 10:19-20, 11:3-4.
[39] Order 10 ¶ 23.
[40] In contrast, revenues tracked to a deferred account would be recorded as a liability in Account 253, Other Deferred Credits.
[41] This is similar to Avista's treatment of REC revenues in Washington rates, as discussed in paragraph 25 of this Petition.

June 21, 2007.[42] No party contested the Company's inclusion of REC revenues as operating revenue, and this treatment was accepted as a part of the Commission's determination in that case that the "rates, terms and conditions of service that result from this Order…are fair, just, reasonable and sufficient."[43]

22 Under the Commission's rules, the Company's general rate case filings must include all restating and pro forma adjustments "under the methodology previously accepted by the commission" and explain any proposed changes to accepted methodologies.[44] Accordingly, the Company calculated its restating and pro forma adjustment for REC revenues in the Company's three subsequent general rate cases—Dockets UE-080220, UE-090205, and UE-100749—under the methodology previously accepted in Docket UE-061546. In each case, REC revenues were recorded to Account 456, Other Electric Revenues.[45] The Commission audited the Company's compliance with WAC 480-07-510 in both the 2009 and 2010 general rate case filings and the restating and pro forma adjustment for REC revenues was never challenged as a part of that review.[46] In the 2009 general rate case, the Commission approved a stipulation that expressly called out the amount of REC revenue embedded in rates.[47]

23 The Company files annual results of operations (also referred to as Commission basis reports) with the Commission. In these filings, the Company has reflected its REC revenues as other electric revenue recorded to Account 456.[48]

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[42] *Id.* at ¶ 4.
[43] *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Dockets UE-061546 and UE-060817, Order 08 ¶ 213 (June 21, 2007).
[44] WAC 480-07-510(3)(e).
[45] Declaration of Andrea L. Kelly at ¶ 5.
[46] *Id.* at ¶ 6.
[47] *Id.* at ¶ 7.
[48] *Id.* at ¶ 8.

24 In summary, since the enactment of the EIA, the Company filed four general rate cases and five results of operations with the Commission reflecting REC revenues as other electric revenue in Account 456. Given the history of these filings outlined above, the Commission's current position that it never "accepted" the treatment of REC revenues as operating revenues in the ratemaking process is unsupportable.[49] The theory underlying this argument—that the Company could make nine major regulatory filings over five years and treat a revenue item in a manner unacceptable to the Commission—is inconsistent with the role of the Commission to "conduct[] a careful audit and review [of the Company's test year operations] prior to authorizing any change in rates."[50]

25 The Commission has also accepted similar rate treatment for Avista's REC revenues. In Avista's most recent general rate case, Docket UE-120436/UG-120437, Avista's power supply pro forma adjustment, attached to the testimony of William G. Johnson as WGJ-2 shows Avista's REC revenues recorded to Account 456. These revenues are an offset against Avista's net power costs in Avista's ERM.[51] The Commission has never ordered Avista to provide a separate rate credit for REC revenues.

2. The Commission Cannot Avoid the Rule Against Retroactive Ratemaking or Other Established Ratemaking Principles by Retroactively and Arbitrarily Reclassifying REC Revenues as Proceeds on Property Sales.

26 In Order 06 in this case, the Commission convened Phase 2 of this proceeding, directing further evidence and legal briefing on "the precise rate treatment that should be afforded REC proceeds received by PacifiCorp."[52] The Company's testimony and legal briefs in this case

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[49] *Id.* at ¶ 9.
[50] *Wash. Utils. & Transp. Comm'n v. Avista Corp*, Dockets UE-090134 *et al.*, Order 10 n.38 (Dec. 22, 2009) (citing 1 Leonard S. Goodman, *The Process of Ratemaking* 141 (1998)).
[51] Declaration of Andrea L. Kelly at ¶ 10.
[52] Order 06 ¶ 201.

asserted that ordering a credit in current rates to make up for differences between actual and projected REC revenues in 2009 and 2010 would violate the rule against retroactive ratemaking and other fundamental Commission laws and policies.[53]

27 In Order 10, the Commission declared these laws and principles, which form the bedrock of Commission ratemaking, inapplicable to the sale of RECs. The Commission exempted REC revenues from the operation of basic Commission laws and policies "[b]ecause these undistributed sale proceeds were never included in the Company's rates"[54] and the Commission now interprets REC revenues as "comparable to" proceeds on property sales.[55] This rationale itself violates the law against retroactive ratemaking (as well as other fundamental ratemaking doctrines such as the filed rate doctrine) by declaring a new and arbitrary approach to the treatment of a component of the Company's rates and backdating it to January 1, 2009.[56]

28 Put another way, the Commission cannot avoid application of fundamental ratemaking principles by retroactively reclassifying operating revenue as the equivalent of rate base and then asserting that this rate base equivalent was never in rates. In addition to being arbitrary and capricious, it also constitutes improper, asymmetrical ratemaking, as the United States Supreme Court described in *Duquesne Light Co. v. Barasch*: "[a] State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions."[57] The Commission is required to "regulate in the public

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[53] *See, e.g.*, PacifiCorp's Initial Post-Hearing Brief on Rate Treatment for Renewable Energy Credit Revenues ¶¶ 53-76.
[54] Order 10 ¶ 12.
[55] Order 10 ¶ 23.
[56] *Wash. Utils. & Transp. Comm'n v. Am. Water Resources, Inc.*, Dockets UW-980072 *et al.*, 6th Supp. Order 34 (Jan. 21, 1999).
[57] *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314 (1989).

interest"[58] and, as the Commission has observed: "[r]egulating in the public interest means regulating consistently with laws, rules and pertinent prior decisions. Doing so provides certainty, consistency and fairness to both utility companies and their customers."[59]

29 The Commission has previously found that retroactive reclassification of items in rates violates the rule against retroactive ratemaking. In a 1998 order, the Commission found that a water utility's proposal to add to rate base previously expensed plant was illegal retroactive ratemaking.[60] The Commission found that "[t]o include previously expensed costs in rate base upon which prospective rates are determined would be to allow retroactive ratemaking and that will not be done here."[61] The Commission specifically noted that the "proposed reclassification" to include a previously expensed item in rate base violates the prohibition against retroactive ratemaking.[62]

30 Similarly, the Commission rejected a petition by PSE to retroactively unwind a previously-ordered accounting treatment related to a revenue item.[63] In that case, PSE proposed changing the accounting for a conservation incentive credit to a regulatory asset netted against power cost savings.[64] The Commission found that it was legally barred from amending the accounting order on a backward-looking basis under the doctrine of retroactive ratemaking

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[58] RCW 80.01.040.
[59] *Wash. Utils. & Transp. Comm'n v. Verizon Northwest Inc.,* Docket UT-040788 Order 11 ¶ 140 (Oct.15, 2004).
[60] *Wash. Utils. & Transp. Comm'n v. Am. Water Resources, Inc.*, Dockets UW-980072 *et al.*, 5th Supp. Order Initial Order Rejecting Tariff Filing at 8 (Nov. 24, 1998) (aff'd in the 6th Supp. Order on January 21, 1999).
[61] *Id.* at 21.
[62] *Wash. Utils. & Transp. Comm'n v. Am. Water Resources, Inc.*, Dockets UW-980072 *et al.*, 6th Supp. Order at 34 (Jan. 21, 1999).
[63] *Re. Application of Puget Sound Energy for Authorization Regarding the Deferral of the Net Impact of the Conservation Incentive Credit Program*, Docket UE-010410, Order Denying Petition to Amend Accounting Order ¶ 2 (Nov. 9, 2001).
[64] *Id.*

because PSE's proposal seeks to "change the past effect of a tariffed rate . . . and the corresponding accounting order in effect at the time."[65]

31 The Commission has also found that it would be "improper and illegal" to retroactively create an accounting order. The Commission rejected a request by Olympic Pipe Line Company to recover past earnings that the Commission interpreted as "reach[ing] back in time to alter the tariffed rate under which it operated by recognizing a deferral that was neither authorized nor recorded."[66] The Commission rejected the request because the utility "is prohibited by RCW 81.28.080 from charging a different rate from that shown on its tariff."[67]

32 These orders all demonstrate that the rule against retroactive ratemaking and the filed rate doctrine preclude changes to past ratemaking treatment that impact future rates—whether it be retroactively reclassifying rate elements, retroactively changing an accounting order, or retroactively creating a new accounting order. In this case, the Commission retroactively changed the accounting classification of REC revenues, retroactively ordered new accounting treatment for REC revenues, and retroactively created a new regulatory liability for REC revenues—actions that it has previously and appropriately found to be improper.

33 The Commission recently addressed the equities associated with retroactively changing previously authorized accounting treatment. In evaluating the amount of interest to pass through to customers related to PSE's American Recovery and Reinvestment Act of 2009 grant, the Commission considered whether it would be appropriate to treat certain funds as a regulatory liability in a deferral account when the Commission had authorized the company to treat the

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[65] *Id.* ¶ 8.
[66] *Wash. Utils. & Transp. Comm'n v. Olympic Pipe Line Co.*, Docket TO-011472, 20th Supp. Order ¶ 119 (Sept. 27, 2002).
[67] *Id.*

funds as cash.[68] The Commission did not reach PSE's arguments that the filed rate doctrine and the rule against retroactive ratemaking prohibited such reclassification, because the Commission declined to change the accounting treatment on equitable grounds.[69]

34 The Commission found that unwinding the accounting treatment previously authorized meant that the utility "could be required to reach into its shareholders' pockets. This, to us, simply seems unfair."[70] In the same way, ordering a retroactive change in accounting for REC revenues to avoid the operation of fundamental ratemaking laws and policies is not only improper, but is also unfair to PacifiCorp.

3. The Commission Cannot Create a Retroactive Regulatory Liability Without a Properly Noticed Order Authorizing Deferred Accounting.

35 In the past, the Commission has approved deferred accounting as an exception to retroactive ratemaking principles taking into account "notice, a legal consideration, and fairness, an equitable consideration."[71] These same considerations of notice and fairness demonstrate that the Commission's retroactive creation of a deferred liability for REC revenues violates the rule against retroactive ratemaking.

36 In Order 10, the Commission dismisses the issue of notice, stating that it must determine how to distribute REC revenues based on the nature of the RECs, rather than on whether the Company or another party filed a request for deferred accounting relating to the revenues.[72] The Commission derisively describes a request for deferred accounting as a "simple piece of

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[68] *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy, Inc.*, Docket UE-120277, Order 02 ¶ 28 (June 26, 2012).
[69] *Id.* ¶ 20.
[70] *Id.* ¶ 28.
[71] *Re Petition of PacifiCorp for an Accounting Order Authorizing Deferral of Excess Net Power Costs*, Docket UE-020417, 3rd Supp. Order ¶ 25 (Sept. 27, 2002).
[72] Order 10 ¶ 31.

paper."[73] But the Commission has previously accorded great legal significance to this same piece of paper, finding that the notice embodied in a request for deferral allowed for an exception to retroactive ratemaking. These orders indicate that reaching back to January 1, 2009, to create a deferred liability for REC revenues violates the rule against retroactive ratemaking based on the absence of proper notice.

37 For example, in a 2002 case evaluating whether to allow PacifiCorp to track excess net power costs for later inclusion in rates, the Commission discussed at length the sufficiency of the notice of deferred accounting provided by PacifiCorp.[74] In a later order in that docket, the Commission reiterated its finding that authorizing deferral of excess power costs incurred before notice of the request for deferral was provided to other parties would "undeniably . . . violate the general prohibition against retroactive ratemaking and thus is not a legally sustainable result."[75]

38 In addition, the Commission disallowed more than $12 million in damages resulting from storms because they were out-of-period, non-recurring events and "Avista did not seek timely accounting orders for either event."[76] The Commission explained the need for a request for accounting order if a utility wishes to seek recovery of costs in a future rate case: "This practice gives notice to the Commission and parties who may wish to examine, in a timely manner, the Company's earnings and other circumstances."[77]

39 It is arbitrary and capricious to restrict a utility's ability to recover past expenses without the filing of a request for an accounting order but allow crediting of past revenues without notice

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[73] Order 10 n. 20.
[74] *Re Petition of PacifiCorp for an Accounting Order Authorizing Deferral of Excess Net Power Costs*, Docket UE-020417, 3rd Supp. Order ¶ 24-27 (Sept. 27, 2002).
[75] *Re Petition of PacifiCorp for an Accounting Order Authorizing Deferral of Excess Net Power Costs*, Docket UE-020417, 6th Supp. Order ¶ 36 (July 15, 2003).
[76] *Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-991606 and UG-991607, 3rd Supp. Order ¶¶106-109, 206-207 (Sept. 29, 2000).
[77] *Id.* ¶ 206.

of a change in accounting. As discussed above, PacifiCorp did not have notice of the Commission's current interpretation of the PSE REC Order until the Commission issued Order 10. Regardless of whether reclassification of REC revenues as a rate base item on a forward-looking basis is appropriate, retroactive reclassification clearly violates the rule against retroactive ratemaking and the filed rate doctrine for all of the reasons described above.

D. There is No Evidence Supporting the Imputation of Banked REC Revenues Assuming Sales of 100 Percent of All Such RECs.

40 Order 10 combines different features of the parties' competing proposals to devise the most extreme and punitive approach possible to hypothecate the amount of PacifiCorp's actual and imputed REC revenues. For example, Order 10 accepts Staff's approach to calculating historical, imputed REC revenues for RECs banked for compliance in other states, but accepts the proposal of the Industrial Customers of Northwest Utilities/Public Counsel to assume that the Company sold 100 percent of the imputed RECs allocated to Washington.[78] The record demonstrates that the Company has never achieved a 100 percent sales level in REC sales, a fact that Staff recognized in its recommendation.[79] There is no basis in the record for assuming imputed REC revenues at this unrealistic level.

E. Order 10 Produces Rates that are Unfair, Unreasonable, and Insufficient, a Result the Commission Improperly Failed to Consider.

41 Order 10 effectively eviscerates most of the rate increase allowed in this case. As explained in PacifiCorp's Initial Post-Hearing Brief, Order 06 (as clarified) allowed an effective rate increase of $23.3 million, only slightly larger than the REC revenue rate credit ordered in this case.[80] The rate credit is larger than the entire rate increase allowed in PacifiCorp's 2009

[78] Order 10 at ¶¶ 41, 44.
[79] Dalley. Exh. RBD-28CT 18:16-19:7.
[80] PacifiCorp's Initial Post-Hearing Brief on Rate Treatment for Renewable Energy Credit Revenues ¶ 4.

rate case, Docket UE-090205.[81] PacifiCorp testified that 100 basis points on equity in Washington is approximately $5.7 million. The REC revenue rate credit required by Order 10 will reduce PacifiCorp's earnings by several percentage points[82] and deprive PacifiCorp of the opportunity to earn its allowed rate of return in the rate effective period.[83]

42 The Commission did not address whether Order 10 will produce fair and sufficient rates. It also ignored the undisputed evidence that PacifiCorp significantly under-earned in both 2009 and 2010, even taking into consideration all historical REC revenues. PacifiCorp's earnings in 2009 were 5.28 percent, and its earnings in 2010 were 6.69 percent;[84] its allowed return on equity in both years was 10.20 percent. The Commission refused to consider any of these facts, concluding summarily that REC revenues "may not be used to enhance Company earnings."[85] The Commission also disregarded the fact that its order will reduce PacifiCorp's earnings even further.

43 The Commission was required to consider the fact that Order 10 produces rates that are legally insufficient. Whenever the Commission sets rates, it must ensure that the rates include compensation necessary to provide safe and reliable electric service[86] and "a rate of return sufficient to maintain its financial integrity, attract capital on reasonable terms, receive a return comparable to other enterprises of corresponding risk,"[87] and maintain the utility's

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[81] Kelly, Exh. ALK-2CT 7:2-4.
[82] The Company cannot determine the exact impact of Order 10 at this time given the lack of clarity in the Order and the pending implementation process.
[83] Dalley, Exh. RBD-28CT 2:16-3:2.
[84] Dalley, Exh. RBD-25T 1:15-16.
[85] Order 10 at ¶ 33.
[86] RCW 80.28.010(2).
[87] *Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-991606 and UG-991607, 3rd Supp. Order ¶ 324 (Sept. 29, 2000); *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Docket UE-050684, Order 04 ¶ 235 (Apr. 17, 2006).

creditworthiness.[88] The Washington Supreme Court has also noted that a basic function of the Commission is to "not only assure fair prices and service to customers, but also to assure that regulated utilities earn enough to remain in business—and each of which functions is as important in the eyes of the law as the other."[89]

F. The Company Reserves the Right to Seek Future Reconsideration or Judicial Review of the Order on Implementation.

44 Order 10 sets strict compliance timelines. First, within 30 days the Company is required to file a report calculating the total REC revenues going back to January 1, 2009.[90] Second, within 90 days all the parties to this case must file either an agreed-upon mechanism for crediting historic and future REC revenues to customers or file individual proposals consistent with Order 10.[91] Given the complexity of Order 10, meeting these implementation mandates will be challenging. Because Order 10 contemplates additional proceedings and another Commission order on implementation, the Company reserves the right to seek additional review, whether by a petition for reconsideration or judicial review or both, of any future order arising in this proceeding related to the implementation of Order 10.

III. MOTION TO REOPEN RECORD

45 PacifiCorp has good cause to reopen the record. No party suggested that the Commission disregard and deviate from its historical treatment of PacifiCorp's REC revenues as operating revenue, and accordingly PacifiCorp had no notice that evidence on this issue would be relevant.

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[88] *See Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).
[89] *People's Org. for Wash. Energy Res. v. Wash. Utils. & Transp. Comm'n*, 104 Wash.2d 798, 808 (1985) (en banc).
[90] Order 10 ¶ 74.
[91] Order 10 ¶ 75.

46 The Company proposes to reopen the record to allow into evidence the Declaration of Andrea L. Kelly attached to this Petition, which includes evidence related to the manner in which REC revenues have been reflected in Washington rates for PacifiCorp and Avista. Good and sufficient cause exists to reopen the record to accept this evidence because Order 10 raised new issues: whether REC revenues should be treated like gains on the sale of utility property and whether the Commission previously accepted the historical treatment of PacifiCorp's and Avista's REC revenues as operating revenues in Washington rates.

47 The Company requests that the Commission reopen the record under WAC 480-07-830, which allows any party to file a motion to reopen the record for certain reasons, including "good and sufficient cause." Although it is not clear whether the record in the case is now closed because the implementation phase of the proceeding is forthcoming, the Company makes this request to reopen the record as a cautionary filing. If the Commission concludes that this motion is not timely under WAC 480-07-830, the Company requests that the Commission exercise its authority under WAC 480-07-130 to "modify the time limits stated in a commission rule." No party will be prejudiced by reopening the record because the proffered evidence is information that is generally within the parties' knowledge.

IV. CONCLUSION

48 For the reasons stated above, the Commission should grant PacifiCorp's Petition for Reconsideration and revise Order 10 to commence PacifiCorp's REC tracking mechanism no earlier than April 2011 and to account for these revenues in the manner PacifiCorp proposed in Phase 2 of this case. Unless revised in this manner, Order 10 will not comply with law and policy and will not produce rates that are fair, just, reasonable, and sufficient. The Commission

should also reopen the record to receive the Declaration of Andrea L. Kelly included with this Petition.

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Respectfully Submitted,

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