BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PACIFICORP D/B/A PACIFIC POWER & LIGHT COMPANY, Respondent.	)	DOCKET NO. UE-100749 PHASE II ANSWER OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES IN OPPOSITION TO PACIFICORP'S PETITION FOR RECONSIDERATION, PETITION FOR STAY, AND MOTION TO REOPEN

I. INTRODUCTION

1 Pursuant the Washington Utilities and Transportation Commission's ("WUTC" or the "Commission") notice, the Industrial Customers of Northwest Utilities ("ICNU") submits this answer in opposition to PacifiCorp's (or the "Company") petition for reconsideration ("Petition for Reconsideration"), motion to reopen the record ("Motion to Reopen"), and petition for stay ("Petition for Stay") of the Commission's Order No. 10 ("Final Order"). PacifiCorp's Petition merely reargues issues that the Commission has already ruled against, thus the majority of PacifiCorp's arguments have been addressed and rejected. While ICNU strongly supports the Commission's reasoning and ultimate conclusions in the Final Order, ICNU does not agree with all aspects of the Commission's Final Order; however, disagreement is not grounds to seek reconsideration or to litigate issues that were fully developed, briefed, and decided.

2 Substantively, the Commission should reaffirm its conclusions in the Final Order and reject all aspects of the Petition for Reconsideration. As explained below and in ICNU's,

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

Staff's, and Public Counsel's legal briefing, fully crediting to ratepayers all revenues associated with PacifiCorp's sales of its renewable energy credits ("RECs") does not violate the rule against retroactive ratemaking or the filed rate doctrine, does not result in confiscatory rates, does not harm PacifiCorp's ability to earn its authorized rate of return, nor does it violate any other legal principle. The Commission's conclusion that RECs are comparable to utility property and should be returned to ratepayers is well supported by Commission precedent and is supported by the record. PacifiCorp's argument—that the Commission adopted different REC treatments for Puget Sound Energy ("PSE") and Avista—fails, as these utilities voluntarily returned their REC revenues, while PacifiCorp's own actions prevented the Commission from returning the REC revenues to customers in 2009. Finally, PacifiCorp's arguments regarding the specific amount of RECs that should be returned to ratepayers are simply another attempt to reargue issues that have been fully raised and resolved.

3 The Petition for Stay should also be rejected, as it is inconsistent with the Commission's standards, and the Company has failed to demonstrate substantial harm or patent error that results in a substantial probability that the Final Order will be modified. PacifiCorp fails to note that stays are extremely rare and are simply not appropriate when a party merely disagrees with a Commission's final resolution of the issues in a proceeding. Similarly, a stay is not warranted, since ratepayers will continue to be harmed if PacifiCorp does not promptly return all revenues associated with the sales of its RECs.

4 Finally, the Commission should decline to reopen the record to allow PacifiCorp to present its one-sided new factual "evidence." The record in this proceeding is long since closed, and there is no reason why PacifiCorp should be allowed to keep litigating issues that

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

have already been resolved against it. In addition, ICNU disagrees with PacifiCorp's characterization of the new evidence, and the Commission should provide all parties an opportunity to rebut if it were to reopen the record. However, the record should remain closed as PacifiCorp fails to make a persuasive case for reopening the record.

II. ANSWER

A. The Commission Should Deny the Petition to Stay

1. Legal Standard for Stays

5 The Commission has spoken plainly concerning its criteria in granting stays: "A petition for stay should demonstrate irreparable harm; patent error in a final order such that reconsideration will almost certainly be granted; or substantial hardship combined with substantial possibility that the order to be stayed will be modified."[1/] Further, the Commission regards stays as "useful in those extremely rare circumstances when the risk of damage from interim application of the order is great."[2/] The Commission also weighs the harm to other parties, and a stay may be appropriate if it will not harm any party.[3/] Absent a "substantial reason," the Commission will deny a stay request, as a lesser demonstration by a complainant "would invite a stay in every proceeding."[4/]

6 While PacifiCorp acknowledges that harm to other parties is a relevant consideration, the Company argues for a different legal standard for granting a stay and asserts that the Commission will grant a stay to preserve the status quo when seeking reconsideration or

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1/ WUTC v. Sno-King Garbage Co., Inc., Docket No. TG-900657, Fifth Suppl. Order at 1 (Dec. 19, 1991).
2/ Id. at 2 (emphasis added).
3/ WUTC v. Int'1 Pac., Inc., Docket No. UT-911482, Sixth Suppl. Order at 1 (Nov. 23, 1993).
4/ Sno-King Garbage Co., Inc., Docket No. TG-900657, Fifth Suppl. Order at 2.

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

appeal of a Commission decision.[5/] PacifiCorp cites only one case for the proposition that a stay is appropriate to preserve the status quo, and fails to note that the stay was grounded upon the unique and particular facts of that proceeding.[6/] The proceeding was an enforcement action under a new statutory provision that expanded the Commission's authority over household goods carriers.[7/] Notably, there was no opposition to the stay, no harm to any party, and all parties supported a stay until the Commission issued its final ruling.

7 PacifiCorp cites a different case for the proposition that a stay is appropriate if no party is prejudiced.[8/] This case is completely inapposite to the present case as to render it irrelevant. In the cited order, the respondent had requested "a temporary stay of the interlocutory order" entered by an administrative law judge ("ALJ") when denying the respondent's request to classify certain of its information as confidential, and thus, exempt from public disclosure.[9/] The Commission granted the stay, believing it would "allow the complete production of documents and testimony under confidential protections," thereby providing "for a complete record" and for the case to continue without any "unnecessary delay."[10/] A dispute about discovery and confidentiality involving an interlocutory order from an ALJ can hardly be used as authority to support PacifiCorp's request to stay the effectiveness of the Final Order for an indefinite period. In sum, it cannot be said that no unnecessary delay would ensue, and PacifiCorp cannot

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5/ PacifiCorp Petition for Stay at ¶ 2.
6/ Id.; Re Determining the Proper Carrier Classification of and Complaint for Penalties against Boubacar Zida, Docket No. TV-091498, Order No. 4 ¶¶ 2-3 (July 23, 2010).
7/ Re Determining the Proper Carrier Classification of and Complaint for Penalties against Boubacar Zida, Docket No. TV-091498, Order No. 5 ¶ 11 (Aug. 30, 2010).
8/ PacifiCorp Petition for Stay at ¶ 2.
9/ Int'1 Pac., Inc., Sixth Suppl. Order at 1 (emphasis added).
10/ Id.

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

reasonably contend that ratepayers would not be prejudiced by continued withholding of funds which should be distributed to them.

8 Most importantly, PacifiCorp fails to cite any Commission decisions that support its argument that the Commission will grant a stay to preserve the status quo during the pendency of any appeal. In fact, the Commission has reached a contrary conclusion, explaining that a stay is particularly inappropriate when a party is challenging an order approving new rates, because the Commission cannot simply postpone its statutory obligations to allow a party to challenge its decision.[11/] Absent extremely rare circumstances, the Commission does not stay the effective date of an order, as it would undermine the conclusions in the order.

2. There is Nothing Unique About PacifiCorp's Objections that Warrant the Extreme Remedy of Staying the Final Order

9 PacifiCorp has not demonstrated that this case is one of the few extremely rare circumstances that justifies a stay on the effect of the Final Order; indeed, the Commission's order cannot be taken seriously if PacifiCorp is deemed to meet any of the criteria for a stay. The only harm claimed by PacifiCorp is that it will be required to provide customers the money they are owed during the pendency of any appeal, and that the Company may have difficulty obtaining money if it ultimately prevails on judicial review.[12/] This is not an "irreparable harm" that warrants the Commission granting a stay.

10 PacifiCorp is not alleging any particular or unique harm that is any different from when any party does not obtain the result it wishes and seeks reconsideration or appeal. To adopt PacifiCorp's standard would simply mean that any time an aggrieved party sought

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[11/] WUTC v. PacifiCorp, Docket No. UE-032065, Order No. 07 ¶ 9 (Nov. 10, 2004).
[12/] PacifiCorp Petition for Stay at ¶¶ 4, 9.

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

reconsideration or appeal, then they could seek to stay the effective date of the Commission's order to the detriment of all other parties. The Commission has already rejected this approach in denying a request by Public Counsel to stay a PacifiCorp rate increase because of an appeal.[13/] The Commission explained that it:

> [C]annot simply postpone indefinitely the satisfaction of our statutory responsibilities to establish rates for PacifiCorp that are fair, just, reasonable and sufficient, and to allow the Company to collect the revenues that we have found on the record in this proceeding are appropriate and necessary under that standard.[14/]

11 The Commission also rejected this approach in another proceeding, in which the affected utility sought a stay that was unopposed by the parties.[15/] The Commission denied the stay, saying the utility was not harmed and that granting a stay merely because the utility will change its rates "would invite a stay in every proceeding involving rates, and would increase the likelihood that a stay or supersedeas would prevent application of the rates pending judicial review."[16/] As in Sno-King Garbage, the outcome of this proceeding "does not work surprise" on any party, and PacifiCorp should not be able to keep monies owed to ratepayers merely because it has sought reconsideration and may appeal the Final Order.

12 PacifiCorp agrees that a stay is not appropriate if it harms customers, but the Company asserts that "customers will not be harmed by the requested stay."[17/] PacifiCorp supports its claim by asserting that it will hold the money for customers during the time of its

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13/ Docket No. UE-032065, Order No. 07 ¶ 9.
14/ Id.
15/ Sno-King Garbage Co., Inc., Docket No. TG-900657, Fifth Suppl. Order at 2.
16/ Id.
17/ PacifiCorp Petition for Stay at ¶ 5.

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

reconsideration or an appeal.[18/] This is simply ridiculous, as customers will be harmed if PacifiCorp does not promptly return all monies owed to them. A stay is unwarranted, as customers will pay rates that the Commission has determined are not fair, just, and reasonable rates, which would allow the Company to overcollect simply because PacifiCorp disagrees with the Commission's decision.[19/] PacifiCorp also ignores that the customers currently receiving service and paying rates may not be the same customers who will take service years in the future when any appeal might ultimately be resolved. PacifiCorp should have passed back the revenues from the sales of RECs years ago, and any additional delay exacerbates the harm the Company has already inflicted on customers. The Commission reconfirmed that REC sale proceeds must be distributed to ratepayers, and this fundamental mandate of the Final Order is squarely within the public interest, and it is untenable to "simply postpone indefinitely" the mandate of the Final Order.

13 PacifiCorp also argues that the stay should be granted because "PacifiCorp believes it has a strong likelihood of prevailing on the merits of such an appeal."[20/] PacifiCorp ignores that courts "accord substantial weight to the agency's interpretation of the law it administers—especially when the issue falls within the agency's expertise."[21/] Hence, PacifiCorp's assertion is not founded in governing precedent. Rather, even if an appeal was granted and a court reviewed questions of law regarding REC proceed issues de novo, the

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[18/] Id.
[19/] See WUTC v. PacifiCorp, Docket No. UE-032065, Order No. 07 ¶ 9.
[20/] PacifiCorp Petition for Stay at ¶ 3.
[21/] Re Brown v. Dep't of Health, 94 Wn. App. 7, 12 (1998); accord, Rios v. Wash. Dep't of Labor & Indus., 145 Wn.2d 483 n.12 (2002); Pub. Counsel v. WUTC, 128 Wn. App. 818, 824 (2005).

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

Commission's decisions would still be afforded "substantial" deference given the regulatory nature of the issues involved.

14 PacifiCorp also asserts that granting a stay will result in administrative efficiencies and that it would be a wasted effort to require the parties to negotiate a mechanism to return REC revenues if the Company eventually prevails on an appeal.[22/] Given the amount of time already expended by the parties on this issue, working on the mechanism is hardly a hardship on anyone involved. This process should not be time consuming, and this basis for seeking a stay is without merit.

15 A stay is also unwarranted because the Commission directed the parties to work on a specific mechanism to pass back to ratepayers past REC revenues starting in 2009 and future REC revenues.[23/] Specifically, the Commission ordered the parties to develop a "mechanism for crediting historic and future Renewable Energy Credits sales proceeds to PacifiCorp's customers."[24/] PacifiCorp has always agreed that REC revenues after April 2011 should be returned to customers.[25/] Therefore, the parties will be required to develop a mechanism to return some REC revenues regardless of the outcome of PacifiCorp's challenges, and there is no reason to delay developing this mechanism.

16 PacifiCorp also completely ignores the Commission's very high requirement to obtain a stay of an order pending reconsideration, which is that a movant must show "patent error of law or fact such that reconsideration and modification are virtual certainties . . . ."[26/]

[22/] PacifiCorp Petition for Stay at ¶¶ 6-8.
[23/] Final Order ¶ 75.
[24/] Id. (emphasis added).
[25/] PacifiCorp Phase II Initial Posthearing Brief at ¶¶ 5, 32.
[26/] Sno-King Garbage Co., Inc., Docket No. TG-900657, Fifth Suppl. Order at 2 (emphasis added).

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

PacifiCorp has reargued its previous positions that it lost and raised new arguments that the Commission a misinterpreted its own previous decisions, which is a far cry from alleging a patent error of law or fact.

17 Finally, ICNU notes that PacifiCorp's request for a stay is premature and before the wrong tribunal. Under Washington law, an appeal does not stay the effectiveness of an order, but there is a process for an appellant to obtain a stay. Specifically:

> The pendency of any writ of review shall not of itself stay or suspend the operation of the order of the commission, but the superior court in its discretion may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit.[27/]

The statute further provides that:

> In case the order of the commission under review is superseded by the court, it shall require a bond, with good and sufficient surety, conditioned that such company petitioning for such review shall answer for all damages caused by the delay in the enforcement of the order of the commission, and all compensation for whatever sums for transmission or service any person or corporation shall be compelled to pay pending the review proceedings in excess of the sum such person or corporations would have been compelled to pay if the order of the commission had not been suspended.[28/]

If PacifiCorp wants the Final Order stayed during the pendency of any appeal, then PacifiCorp should make its request to the appropriate court of law and not seek to circumvent the statutory and judicially established standards and requirements, including the posting of a bond. While ICNU does not believe that PacifiCorp will be able to meet the requirements to stay the Final

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[27/] RCW § 80.04.180(1).
[28/] RCW § 80.04.180(3).

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

Order, that issue should be raised to, and resolved by, an appropriate court of law if the Company appeals the Final Order.

B. The Commission Should Deny the Petition for Reconsideration

1. Legal Standard for Reconsideration

18 PacifiCorp fails to cite the standard for seeking reconsideration, just as it did when it filed for reconsideration of the Commission's Final Order in Phase I of this proceeding. PacifiCorp again ignores the legal standard for an appropriate reconsideration request, because the Company is seeking to revisit issues that should not be reviewed or addressed upon reconsideration.

19 A petition for reconsideration must "request that the commission change the outcome with respect to one or more issues determined by the commission's final order" and "must clearly identify each portion of the challenged order that it contends is erroneous or incomplete."[29/] Therefore, a petition for reconsideration is only allowed for the limited purpose of correcting omissions and errors of fact or law.

20 The Commission has explained that petitions for reconsideration are not appropriate to reargue or relitigate issues, and a petition for reconsideration is not warranted merely because a party disagrees with the final order. Specifically, the Commission has repeatedly explained that:

> A petition for reconsideration must demonstrate errors of law, or of facts not reasonably available to the petitioner at the time of entry of an order. A petition that cites no evidence that the Commission has not considered, and merely restates arguments the Commission thoroughly considered in its final order, states no basis for relief. A

29/ WAC § 480-07-850(1)&(2).

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

> petition for reconsideration is not a second opportunity to litigate issues which were fully developed prior to entry of the final order and which were discussed and decided in the final order. The mere fact that a party disagrees with a final order does not state a basis for reconsideration.[30/]

The limited purpose and extent of reconsideration is reflected in the fact that parties only have ten calendar days to seek reconsideration.[31/]

21 PacifiCorp ignores this precedent in both this Petition for Reconsideration and its earlier request to reconsider the Phase I order in this proceeding. In Phase I, the Commission noted that PacifiCorp repeatedly violated the legal standard for reconsideration and that "raising new adjustments on reconsideration denies the other parties due process and does not comply with our rules governing the adjudicative process."[32/] The Commission should further admonish PacifiCorp to prevent the Company from wasting all parties and the Commission's resources by merely re-raising arguments that have been addressed and resolved, and failing to follow the Commission's guidance for a proper petition for reconsideration.

2. The Commission Did Not Misstate the Holding of the Order in the PSE REC Case

22 PacifiCorp argues that the Commission inaccurately characterized both the holding and reasoning of the Commission's recent order in the PSE case regarding revenues

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30/ In re the Matter of the Application of Avista Corp. for Authority to Sell Its Interest in the Coal-Fired Centralia Power Plant, Docket No. UE-991255 et al., Fourth Suppl. Order ¶ 40 (Apr. 21, 2000) (emphasis added and internal citations omitted); see also WUTC v. Olympic Pipe Line Co., Docket No. TO-011472, Eighth Suppl. Order ¶¶ 13, 15 (Mar. 29, 2002) (a petition will be denied where the petitioner points to no error of fact, and instead "continues to support the factual theories that it advanced at the hearing" and the petition "is merely a restatement of its position at hearing;" stating, in part, the matter that petitioner seeks to have reconsidered "was contested; the Commission considered the Company's factual assertions at hearing; and the Commission declined to accept the Company's position as to certain of the facts"); WUTC v. PSE, Docket No. UE-011163, Seventh Suppl. Order ¶¶ 18, 22-23 (Oct. 24, 2001) (finding that PSE failed to meet its burden of demonstrating a basis for reconsideration where it had not shown error in the final order or that the order was incomplete).

31/ WAC § 480-07-850(1).

32/ WUTC v. PacifiCorp, Docket No. UE-100749, Order No. 07 ¶ 52 (May 12, 2011).

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

from the sale of RECs.[33/] PacifiCorp's arguments are both erroneous and presumptuous, as the Commission itself is the best interpreter of the meaning of the PSE REC Order, which it issued less than a year ago. More importantly, the plain language and underlying rationale of the PSE REC Order fully supports the Commission's decision in this proceeding.

23 PacifiCorp argues that the PSE REC Order did not conclude that RECs were analogous to utility property, should be credited 100% to customers, or can be considered outside of the rate case process.[34/] While PacifiCorp is wrong on all fronts, it is important to note that the PSE proceeding represented a remarkably different set of facts. PSE, in contrast to PacifiCorp, identified all of its REC revenues, and proactively sought to return the majority to ratepayers. PSE sought to keep a portion of the revenues, but only because PSE claimed that the total revenues were higher than they ordinarily would be because PSE settled separate litigation.[35/] Thus, while less than 100% of the total proceeds were returned to customers, PSE only obtained a portion of the extra value that the Commission concluded that PSE created due to its decision to settle a separate case.[36/]

24 PacifiCorp has made no such argument to justify the fact that it took extraordinary actions to increase the value of the REC revenues, or is somehow entitled to a portion of the revenues that exist due to its special efforts. Instead, PacifiCorp claims that it is entitled to keep money that should be credited to customers because the revenues are from 2009.

[33/] PacifiCorp Petition for Reconsideration at ¶¶ 4-10 (citing Re Amended Petition of PSE for an Order Authorizing the Use of Proceeds from the Sale of RECs and Carbon Financial Instruments, Docket No. UE-070725, Order No. 03 (May 20, 2010) ("PSE REC Order")).

[34/] Id. at ¶¶ 6-9.

[35/] PSE REC Order ¶¶ 44-47.

[36/] Id.

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

25 Even a cursory reading of the PSE REC Order demonstrates that the Commission's conclusions were based in part upon a view that REC sales are similar to a property sale. The Commission specifically relied upon an argument "analogizing the sale of RECs to the sale of utility property" and the starting value of REC premium was based on a number that was "analogous to gross gain on the sale of an asset . . . ."[37/] The language of the PSE REC Order is entirely consistent with how the Commission described it in the Final Order: "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."[38/]

26 PacifiCorp further argues is that the PSE REC Order did not explicitly find that RECs should be treated outside of the ratemaking context and that any such conclusion should only be applied on a prospective basis.[39/] The Commission fully addressed these issues and explained that it will "continue to find that RECs, at a minimum, are comparable to utility property with respect to the disposition of sale proceeds" and these "property sale proceeds may be credited to customers through rates" or another manner.[40/] The Commission exercised its discretion to ensure that ratepayers are credited 100% of the value of these property sales outside of the ratemaking process.[41/]

27 The Commission also full considered and rejected PacifiCorp's argument that the Commission should only apply the precedent from the PSE REC Order prospectively. The Commission explained that fairness does not support PacifiCorp's position, as the PSE REC

[37/] Id. at ¶¶ 40, 45.
[38/] Final Order ¶ 23.
[39/] PacifiCorp Petition for Reconsideration at ¶¶ 7-10.
[40/] Final Order ¶ 24 (emphasis in original).
[41/] Id. at ¶¶ 24-27

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

Order did not create new law but merely reaffirmed long-standing principles. Any reliance to the contrary by PacifiCorp was of its own creation, as the Company never sought approval of its proposed treatment of REC revenues, and "PacifiCorp did not include or disclose anticipated REC sale proceeds from lucrative contracts with California utilities that were pending approval by the California Public Utility Commission."[42/] The Commission also explained that PacifiCorp would be obligated to return money from sales of other property (a plant or office), and the Company's failure to seek guidance "does not shield [it] from its obligations to its customers or preclude the Commission from determining the proper disposition of those proceeds, even if the sales occurred in the past."[43/] These findings are in complete alignment with principles of equity and fairness.

3. The Commission's Determination that REC Sales Are Comparable to Property Sales Is Supported in the Final Order

28 PacifiCorp argues that the Commission's factual conclusion that REC sales are comparable to the sales of utility property is erroneous because RECs are expenses that must be considered as part of the electricity and not the generation resource, RECs are not included in rate base, and RECs are not treated as utility property for ratemaking purposes.[44/] RECs are not so tied to the electricity generated by renewable resources that they must be considered expense items, and PacifiCorp is simply wrong that RECs are not a separate, tradable commodity that cannot be compared to utility property. All parties recognized that RECs are different from the electricity generated, which is the very reason they provide additional value and why this

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[42/] Id. at ¶¶ 29-32.
[43/] Id. at ¶ 30.
[44/] PacifiCorp Petition for Reconsideration at ¶¶ 11-17.

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

proceeding was extended to determine if ratepayers or shareholders are entitled to the additional revenues associated with their sale.

29 PacifiCorp's position—that RECs can only be considered part of electricity itself and that any comparison of RECs as property would apply to all retail and wholesale energy sales—is simply absurd.[45/] Washington law treats RECs as distinct and different from the electricity produced, as they represent "all of the nonpower attributes associated" with the electricity.[46/] Unlike the electricity that must be used when generated, RECs can be banked, used to meet RPS requirements, or sold to third parties.[47/] Under Washington law, RECs are a separate commodity that are distinct from electricity and have additional value.

30 Although the Commission specifically did not reach the issue, the Commission could have concluded that PacifiCorp is required to obtain approval to sell RECs.[48/] Under Washington law, utilities must obtain Commission approval before making property sales.[49/] The Commission has stated that it applies a "broad, inclusive" reading of this statute.[50/] This statute has been applied to more than simply generation plans and real property, including commodities like RECs and sulfur dioxide allowances.[51/]

31 PacifiCorp's position in its reconsideration request directly contradicts its position before the Oregon Public Utility Commission ("Oregon Commission") on the exact same issue.

45/ Id. at ¶ 17.
46/ RCW § 19.285.030(19).
47/ E.g., RCW § 19.285.040(2)(e).
48/ Final Order ¶ 24 n.23.
49/ RCW § 80.12.020.
50/ Re Application of PacifiCorp and ScottishPower LLC, Docket No. UE-981627, Second Suppl. Order at 9-10 (Mar. 16, 1999).
51/ Petition of PSE for an Order Regarding the Authorization to Sell Sulfur Dioxide Emission Allowances and an Associated Accounting Order, Docket No. UE-001157, Order (Oct. 25, 2000); WUTC v. PacifiCorp, Docket No. UE-100749, Order No. 6 ¶¶ 209-12.

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

In April 2010, PacifiCorp requested approval to sell RECs and to record all net proceeds from the sale of RECs in a property sales balancing account for the return to Oregon customers.[52/] Oregon has a similar statute that requires approval before disposing of property.[53/] There is no reason why PacifiCorp could not have filed a similar request with the WUTC, and PacifiCorp cannot claim surprise that the Washington Commission might treat RECs as property sales when the Company was already treating REC sales as property sales in Oregon.

4. The Commission Did Not Retroactively Reclassify REC Revenues as Property Sales

32 PacifiCorp argues that the Commission reclassified its REC revenues as property sales, and that such a change violates both the rule against retroactive ratemaking and the Commission's basic statutory duties to regulate in the public interest.[54/] The cornerstone of PacifiCorp's argument that the Commission has departed from well-established historic precedent regarding the treatment of RECs without support. The Commission has never affirmatively resolved PacifiCorp REC issues, so there can be no reclassification or arbitrary change that would bar the Commission from ensuring that ratepayers receive the full value of the proceeds of RECs.

33 Contrary to PacifiCorp's arguments, the Commission has never approved PacifiCorp's treatment of REC revenues in the ratemaking process. PacifiCorp points to its REC revenue filings in the last four general rate cases (including this proceeding) and its annual reports of operations filings with the Commission as establishing that the Commission has

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52/ Re PacifiCorp Application Requesting Approval of Sale of RECs, Docket No. UP 260, Order No. 10-210 (June 9, 2010).
53/ Id.; ORS § 757.480.
54/ PacifiCorp Petition for Reconsideration at ¶¶ 18-34.

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

approved its method of calculating REC revenues.[55/] The absurdity of PacifiCorp's position is highlighted by the fact that PacifiCorp includes this proceeding as a case establishing that the Commission has approved its treatment of REC revenues, and the 2006 general rate case (Docket No. UE-061546) in its claim for established precedent, a proceeding that was filed about the time the Washington renewable portfolio standard was enacted. As explained in ICNU's Phase II Opening Brief and recognized by the Commission in its Final Order, the parties in the 2009 rate case "did not even agree on the appropriate treatment of REC sales," and the Commission did not even address the issue of REC sales proceeds "in its orders approving PacifiCorp's rates for 2009 and 2010."[56/] The Commission's acceptance for filing of annual reports or the approval of an uncontested settlement does not constitute binding precedent on the treatment of REC revenues, especially when the Company provided wildly inaccurate information to the parties and the Commission.

34 The Commission also affirmatively addressed and resolved a similar issue when dismissing the Company's arguments. The Commission explained:

> Conspicuously absent from PacifiCorp's argument is any reference to Commission approval of its allocation methodology. As with the disposition of the REC sale proceeds themselves, the Company's reliance on its own interpretation of its obligations, even with the acquiescence of other stakeholders, is not binding on the Commission.[57/]

As the Commission never addressed how PacifiCorp's REC revenues should be resolved, there can be no retroactive reclassification.

[55/] Id. at ¶¶ 22-24.
[56/] Final Order ¶ 28; ICNU Brief at ¶¶ 5-6, 14.
[57/] Final Order ¶ 40.

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

35 PacifiCorp also argues that the Commission cannot retroactively reclassify its REC revenues without the filing of a deferred account.[58/] ICNU agrees that the filing of a deferred account is normally required to avoid retroactive ratemaking and the principles of the filed rate doctrine. The Commission addressed and resolved this issue in its order by concluding that it was not changing any previous treatment of REC revenues, but reaffirming its previous conclusions that REC revenues should be treated in a manner comparable to property sales.[59/]

5. The Final Order Supports the Commission's Adoption of ICNU's and Public Counsel's Recommendation to Impute 100% of Banked RECs

36 The Commission adopted ICNU's and Public Counsel's recommendation that "the market value of each class of all the withheld RECs attributable to Washington must be imputed and included in the amount to be credited to the Company's Washington customers."[60/] Simply because the Commission did not adopt Staff's and PacifiCorp's approach on this issue does not mean that there is no basis or support for this decision or warrant the filing of a reconsideration request. As the Commission explained, "PacifiCorp effectively 'sold' Washington RECs to its operations in other states" and "Washington ratepayers are entitled to the value of such REC usage."[61/]

6. The Final Order Does Not Result in Unfair, Unreasonable, or Insufficient Rates

37 PacifiCorp again abuses the reconsideration process in arguing that the Commission did not address whether the Final Order will produce fair, just, reasonable, and

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[58/] PacifiCorp Petition for Reconsideration at ¶¶ 35-39.
[59/] Final Order ¶ 29.
[60/] Id. at ¶ 45.
[61/] Id. at ¶ 44.

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

sufficient rates.[62/] The Commission rejected this argument in the Final Order, explaining that "REC sales proceeds are not included in rates without express Commission authorization, and those funds may not be used to enhance Company earnings."[63/] The Commission explained that PacifiCorp could have made a filing to account for the REC revenues, but elected not to do so.[64/] PacifiCorp's overall rates were set based on the assumption that the Company would not obtain significant revenues from RECs, and those rates were found to be fair, just, reasonable, and sufficient without PacifiCorp inappropriately retaining REC revenues that belong to ratepayers. PacifiCorp cannot now bolster any alleged under earnings with money that it was never entitled to keep.

C. The Commission Should Not Reopen the Record

38 The Commission should deny PacifiCorp's request to reopen the record. PacifiCorp has failed to establish that its additional evidence would meet any of the Commission's requirements for reopening the record. In addition, ICNU disagrees with PacifiCorp's new evidence and should be provided an opportunity to respond if the record is reopened.

39 PacifiCorp argues that it is not clear whether the record is closed, but that it is seeking to reopen "the record as a cautionary filing." The record is long since closed, as is demonstrated by the Commission's rule on reopening proceedings, which states:

> Any party may file a motion to reopen the record at any time after the close of the record and before entry of the final order. . . . In contested proceedings, the commission may reopen the record to allow receipt of

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62/ Petition for Reconsideration at ¶¶ 41-43.
63/ Final Order ¶ 33.
64/ Id.

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333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

> evidence that is essential to a decision and that was unavailable and not reasonably discoverable with due diligence at the time of the hearing or for any other good and sufficient cause. The commission will give all parties an opportunity to respond to any evidence received after the record is closed.[65/]

The Commission has explained that a request to reopen the record will be denied if a party does not meet these requirements or if reopening the record is unnecessary to resolve disputed issues.[66/] The record is closed at the end of the evidentiary hearing, and the rule allows a party to reopen the record after the close of the record only before entry of the final order. PacifiCorp's request is not timely, because it is seeking to reopen the record after the issuance of a final order.

40 PacifiCorp states that it has demonstrated good cause to reopen the record because the Commission departed from its past practices with a new and novel theory: that REC revenues should be treated as property sales rather than operating revenues.[67/] As explained above, the Commission did not depart from its prior decisions, but merely applied its previous decisions to the new factual circumstances of this case. Parties in both the PSE REC case[68/] and in this proceeding described REC revenues as following from tangible assets,[69/] which is essentially what property rights are. The underlying assumption of ICNU, Staff, and Public Counsel was that ratepayers were entitled to 100% of the revenues from these assets, and this is not a new issue that warrants additional evidence. The Commission's Final Order upheld this fundamental

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65/ WAC § 480-07-830.

66/ WUTC v. Olympic Pipeline Co., Docket No. T0-011472, Eighth Suppl. Order ¶ 34 (March 29, 2002); BNSF Railway Co. v. Snohomish County, Docket No. TR-090121, Order No. 04 ¶¶ 17-19 (Nov. 30, 2009).

67/ PacifiCorp Motion to Reopen at ¶¶ 45-46.

68/ PSE REC Order ¶¶ 44-47; see also Docket No. UE-070725, Testimony of Scott Norwood, Exh. No. SN-1T at 9 (Jan. 28, 2010).

69/ Public Counsel Brief at ¶ 5; Staff Brief at ¶ 51; Phase I Testimony of Michael Foisy, MDF-1CT at 8-9.

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

premise and made it clear that REC revenues will continue to be treated in a manner comparable to property sales.

III. CONCLUSION

41 The Commission should reject PacifiCorp's request to reconsider its Final Order, decline to reopen the record, and not stay the requirement that the Company fully return all REC revenues to ratepayers. PacifiCorp's disagreement with the Commission's Final Order is not a clear error of law or fact that warrants granting any of the Company's post-order filings. Stays, reconsideration, and relitigation of issues are not proper absent unusual circumstances, and are particularly inappropriate to allow the Company to continue to retain REC revenues that it should have provided to customers years ago.

Dated in Portland, Oregon, this 26th day of September, 2012.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Irion A. Sanger

Melinda J. Davison
Irion A. Sanger
333 S.W. Taylor, Suite 400
Portland, Oregon 97204
(503) 241-7242 telephone
(503) 241-8160 facsimile
mjd@dvclaw.com
ias@dvclaw.com
Of Attorneys for Industrial Customers
of Northwest Utilities