

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

**WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,**

Complainant,

v.

**PACIFICORP d/b/a PACIFIC POWER
& LIGHT COMPANY,**

Respondent.

DOCKET UE-100749

**COMMISSION STAFF RESPONSE TO
PACIFICORP'S MOTION TO STAY ORDER 10,
PETITION FOR RECONSIDERATION, and
MOTION TO REOPEN RECORD**

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I. INTRODUCTION

1 PacifiCorp testified that it “does not contest the premise” that “customers are generally entitled to a revenue credit for REC sales.”¹ Yet, one legitimately could read the Company’s Petition for Reconsideration (Petition) as fiercely contesting that uncontested premise.

2 Reconsideration is not the place for PacifiCorp to try out new theories that undermine the very premise the Company testified it does not contest. For this and the other reasons stated below, the Commission should deny PacifiCorp’s Petition for Reconsideration, except as to the single calculation issue PacifiCorp identifies in its Petition regarding Washington’s share of RECs the Company allocated to other states. The Commission should grant the Petition to that limited extent.

3 The Commission should deny PacifiCorp’s Motion to Reopen the Record. The evidence PacifiCorp now offers is irrelevant or cumulative. The Commission should also deny PacifiCorp’s Motion for Stay. The next steps called for by Order 10 are necessary to give ratepayers the amounts of REC revenues to which they are entitled. The Company concedes some amounts are due ratepayers. It does not require appreciably more effort to calculate the total amounts to return to ratepayers and develop the mechanism by which to do so. Customers should not be forced to wait any longer to start receiving their rightful benefits.

¹ Duvall, Exh. No. GND-5T) at 8:3-6. PacifiCorp challenges only the inclusion of 2009 and 2010 revenues in the credit: See, e.g., PacifiCorp Reply Brief (November 18, 2011) at 21-22, ¶ 50.

II. STAFF RESPONSE TO PACIFICORP'S MOTION FOR STAY OF ORDER 10

4 PacifiCorp wants the Commission to stay Order 10.² However, the Commission requires a party seeking as stay to prove a “substantial reason” for granting a stay,³ and the Commission will grant a stay only in “extremely rare circumstances when the risk of damage from interim application of the order is great.”⁴ Based on the analysis in this Staff Response, PacifiCorp does not offer a “substantial reason” nor does it identify any “extremely rare circumstances.”

5 Order 10 gives PacifiCorp 30 days to calculate the REC revenues consistent with the order, and 90 days to file a negotiated mechanism to return REC revenues to ratepayers (or each party may use that same time line to file their own mechanism if agreement cannot be reached).⁵ There is no substantial reason to delay these requirements because, as PacifiCorp concedes, “customers are generally entitled to a revenue credit for REC sales.”⁶ Therefore, while PacifiCorp challenges certain amounts of those revenues, even if the Company prevails on reconsideration, it will still need to calculate the uncontested amount of REC revenues, and it will still need a mechanism for crediting those REC revenues to customers.

6 In other words, there is no substantial “waste”⁷ of resources here because much of the same effort will be needed even if PacifiCorp prevails on reconsideration.⁸

² Motion for Stay of Order 10 (September 4, 2012) (Motion for Stay).

³ *Utilities and Transp. Comm'n v. Sno-King Garbage Co., Inc., G-126, et al.*, Docket TG-900657, Fifth Supplemental Order (December 19, 1991), at 2.

⁴ *Id.*

⁵ Order 10 at 22-23, ¶¶ 74-75, Ordering ¶¶ 1 and 2.

⁶ Duvall, Exh. No. (GND-5T) at 8:3-6.

⁷ Motion for Stay at 3, ¶ 8.

⁸ In any event, PacifiCorp's lament about the burden to comply with Order 10 is undercut by PacifiCorp's offer to place the REC monies at issue in a deferred account. See Motion for Stay at 2, ¶ 4. That is, in order to place the correct amounts of REC revenues in the account, PacifiCorp will need to make the calculation the Company otherwise suggests is too onerous and wasteful.

7 Finally, to the extent PacifiCorp is seeking to stay crediting REC revenues to
ratepayers, that is premature because the Commission has yet to implement that aspect of
Order 10.

8 For these reasons, the Commission should deny PacifiCorp's Motion for Stay.

III. **STAFF RESPONSE TO PACIFICORP'S PETITION FOR RECONSIDERATION**

A. **Commission Standards for Reconsideration**

9 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."⁹

10 The Company's Petition is in large part an attempt to re-litigate issues already fully
litigated, because the bulk of PacifiCorp's Petition is a rehash of the Company's failed
arguments. Most of the "new" issues PacifiCorp raises are not new at all, and the Company
had ample opportunity to address them at hearing.

B. **The Commission Correctly Characterized the Nature of RECs**

11 In Order 10, the Commission correctly characterized the nature of RECs. The
Commission relied on the definition in its earlier PSE REC Order¹⁰ that RECs are
"intangible assets that represent the right to claim the environmental attributes of a
renewable generation facility".¹¹ The Commission noted this definition is consistent with
the definitions in RCW 18.285.030(17) as well as a United States Environmental Protection

⁹ *In re the Matter of the Application of Avista Corp. for Authority to Sell Its Interest in the Coal-Fired Centralia Power Plant*, Docket UE-991255 et al., Fourth Supplemental Order (April. 21, 2000) at 9, ¶ 40.

¹⁰ *In re Amended Petition of Puget Sound Energy, Inc. for an Order Authorizing the Use of Proceeds from the Sale of Renewable Energy Credits and Carbon Financial Instruments*, Docket UE-070725, Order 03 (May 20, 2010) (PSE REC Order).

¹¹ Order 10 at 3-4, ¶ 10.

Agency (EPA) publication that characterized RECs as representing "the property rights to the environmental, social, and other nonpower qualities of renewable electric generation."¹²

12 The Commission's characterization of RECs is consistent with the record in this case. As Staff witness Mr. Foisy testified, REC revenues are created when "PacifiCorp sells to other utilities the attributes associated with the output of PacifiCorp's renewable resources, and receives cash in return."¹³ Because RECs represent the right to claim environmental attributes related to the output of a renewable resource, and RECs lack a physical existence, the Commission was eminently correct to conclude that RECs represent intangible rights and thus should be treated as a property sale when they are sold.

13 PacifiCorp had many opportunities earlier in this docket to address the nature of RECs. Reconsideration is not the time to do so. Nonetheless, we will address the Company's arguments.

1. The Commission Correctly Applied the PSE REC Order

14 PacifiCorp contends the Commission was wrong to use part of its discussion from the PSE REC Order as a basis to conclude that RECs should be treated like sales of property.¹⁴ However, PacifiCorp ignores the Commission's earlier, fundamental determination in Order 10 that RECs are "intangible assets" and that this characterization is "consistent" with RCW 18.285.030(17) and an EPA characterization of RECs as "property rights".¹⁵ Thus, any further reference to the PSE REC Order is cumulative to this fundamental determination.

¹² Id. at 3, ¶ 9.

¹³ Foisy, Exh. No. MDF-1CT at 9:20 – 10:3.

¹⁴ Petition at 3-6, ¶¶ 4-8.

¹⁵ Petition at 3, ¶ 9.

15 In any event, the Commission correctly characterized the PSE REC Order as “analogizing REC sales to property sales”, because that is exactly what the Commission did when it applied language from its property sales orders to the task of analyzing PSE’s claim to a share of REC proceeds.¹⁶

2. RECs do not have to be depreciable to be treated like property

16 PacifiCorp argues that the Commission is wrong in treating RECs like property because customers do not pay depreciation or a return on the cost of RECs.¹⁷ PacifiCorp misses the point. As Mr. Foisy testified:

The Commission should distribute these revenues in an equitable manner to the ratepayers who have supported *the assets that give rise to the REC revenues*. These ratepayers are paying rates based on the costs of these assets, which includes a return on PacifiCorp’s investment, plus all related operating expenses, and taxes. It is entirely proper for those ratepayers to receive the benefits generated by these assets on the same basis that their rates are set. Said another way, PacifiCorp may not keep this revenue.¹⁸

17 In other words, the nature of RECs derives from the facilities that give rise to them. It is therefore irrelevant that RECs themselves are not depreciable.

18 In any event, PacifiCorp’s “non-depreciable” argument makes no sense, because the fact that something is not depreciable does not perforce change its nature. Consider the land under PacifiCorp’s wind towers; that land is not depreciable, yet that does not mean it should not be treated as “property.” Or, if PacifiCorp granted an easement across that land, that would be the transfer of a property right, even though that right is not depreciable.

¹⁶ PSE REC Order at 15-18, ¶¶ 40-43. PacifiCorp erroneously equates the “benefits and burdens test” to the “matching principle”.¹⁶ In fact, these concepts are not the same. The benefits and burdens test is the test enunciated in the case most often cited for the treatment of utility sales of property. See *Democratic Cent. Comm. v. Wash. Metro. Transit Comm’n*, 485 F.2d 786, 806, (D.C. Cir. 1973), cert. denied, 415 U.S. 935 (1973).

¹⁷ Petition at 4-5, ¶ 6.

¹⁸ Foisy, Exh. No. MDF-1CT at 9:20 – 10:3 (emphasis added).

19 In short, many forms of intangible rights are not depreciable. That does not change
their fundamental nature.

3. **RECs are not electricity, they are intangible assets representing rights**

20 Citing Paragraph 24 of Order 10, the Company wrongly states the Commission
“concludes RECs are a commodity, like electricity, that is produced by the Company’s
generating resources.” From this, the Company argues that RECs should be treated like
revenues from the sale of electricity and used to offset power costs.¹⁹

21 In fact, the Commission said “RECs are assets akin to other commodities that can be
stored for future use, held for future sale, or sold upon purchase of generation.”²⁰ These
features do not negate the Commission’s earlier conclusion that RECs are intangible rights.²¹

22 PacifiCorp follows up with a claim that “wholesale sales of electricity can transcend
rate periods,” citing a generic statement on normalizing power costs in an Avista order.²²
Yet, normalizing power costs simply restates the test period’s actual generation conditions to
normal conditions. This marks one of the distinctions between the production and sale of
electricity and RECs, because though RECs can be sold currently, unlike electricity, RECs
also can be banked for later sale or used for later compliance.

23 In the end, however, PacifiCorp simply misses the point when it suggests RECs must
be treated as part of sales of electricity. While it is true that RECs are *quantified* by the
electrical output of a renewable facility, RECs only have value because of the renewable

¹⁹ Petition at 7-10, ¶¶ 11-17.

²⁰ Order 10 at 9, ¶ 24.

²¹ PacifiCorp’s “commodity” argument is additionally unhelpful, because the term “commodity” is overbroad, making the term too ambiguous to apply here. For example, the legal definition of the term “commodity” “embraces only tangible goods, such as products or merchandise, as distinguished from services.” Bryan A. Garner, *Black’s Law Dictionary* (7th edition) at 267 (definition of “commodity”). RECs are not tangible goods.

²² Petition at 10, ¶ 17.

facilities that give rise to them.²³ It is fully proper for the Commission to treat REC sales as sales of property and not as sales of electricity.

4. Prior Commission Property Transfer Orders Involving PacifiCorp Confirm and Support the Commission's Treatment of RECs in this Case

24 Two prior Commission transfer of property orders confirm and support the Commission's treatment of REC sales as sales of property. The first decision relates to the acquisition of PacifiCorp by Scottish Power. In that docket, the Commission interpreted the term "property" under the Commission's transfer or property statute broadly to encompass "transfers of title ... transfers of rights to possess ... and transfers of any designated right or set of rights."²⁴ RECs represent rights, and thus fall squarely within this language.

25 The second decision relates to PacifiCorp's request that the Commission approve as a transfer or property the Company's sale of Sulfur Dioxide Emissions Allowances. According to the Company's petition in that docket, such allowances are "an authorization ... to emit ... one ton of sulfur dioxide."²⁵ The Commission's order resolving that docket agreed with PacifiCorp that such authorizations "are property within the meaning of chapter 80.12 RCW and RCW 80.12.020."²⁶

26 If PacifiCorp considers an "authorization to emit sulfur dioxide" to be property, then it is eminently reasonable, fair and consistent for the Commission to treat as property the right to claim the environmental attributes of a renewable resource, i.e., RECs.

²³ Indeed, the value of RECs can differ depending on the facilities that give rise to them. For example, RECs related to a facility that is eligible for compliance in only one state may be valued in the market differently than RECs related to a facility that is eligible for compliance in several states.

²⁴ *In re Application of PacifiCorp and Scottish Power PLC for an Order (1) Disclaiming Jurisdiction or, in the Alternative, Authorizing the Acquisition of Control of PacifiCorp by Scottish Power and (2) Affirming Compliance with RCW 80.08.040 for PacifiCorp's Issuance of Stock in Connection with the Transaction*, Docket UE-981627, Second Supplemental Order (March 16, 1999) at 12.

²⁵ *In re Petition of PacifiCorp Seeking Blanket Authorization for the Sale of Surplus Sulfur Dioxide Emission Allowances*, Docket UE-940466, Petition for Sales Approval (April 7, 1994) (filing date) at 2, quoting 42 U.S.C. § 7651a(3).

²⁶ *Id.*, Decision and Order Granting Authorization (April 13, 1994) at 3.

5. PacifiCorp Treats its Sales of RECs in Oregon as Sales of Property

27 In 2010, PacifiCorp applied to the Oregon Public Utilities Commission (OPUC) and received approval of REC sales as sales of “property”²⁷ under the same transfer of property language in Oregon’s statute that is found in Washington’s statute.²⁸ PacifiCorp cannot be prejudiced when this Commission similarly treats Washington’s share of the same items.²⁹

C. PacifiCorp’s “Operating Revenue” Argument Misconstrues the Order

28 The Commission noted in Order 10 that it had not previously accepted the premise that proceeds from REC sales should be factored into the ratemaking process.³⁰ This is correct; the Commission has not previously issued an order specifically ruling on the merits of the appropriate regulatory treatment of PacifiCorp’s RECs.

29 PacifiCorp responds in part by seeking to add evidence to the record to show how PacifiCorp booked REC revenues in its operating revenue accounts.³¹ A simple response is

²⁷ *In re Application of PacifiCorp Requesting Approval of Sale of Renewable Energy Credits*, Order 10-201 Oregon Public Utilities Commission (OPUC) (June 9, 2010). The Commission can find this order at: <http://apps.puc.state.or.us/orders/2010ords/10-210.pdf>

²⁸ ORS §757.480(1)(a) states, in pertinent part: “A public utility ... shall not, without first obtaining the [OPUC’s] approval of such transaction: ... sell ... the property of such public utility necessary or useful in the performance of its duties to the public or any part thereof ...”.

RCW 80.12.020 states, in pertinent part: “No public service company shall sell ... the whole or any part of its ... properties ... whatsoever, which are necessary or necessary or useful in the performance of its duties to the public ...”. If anything, RCW 80.12.020 is the more encompassing statute, due to its reference to “any properties whatsoever”.

²⁹ Our legal division considered whether the Commission’s transfer of property statute (RCW 80.12) applied to RECs, thus triggering the property transfer application and approval process. We concluded that the RECs being sold were excess to the utility’s system, and thus met the exception in RCW 80.12.020, i.e., they were not “necessary or useful in the performance of [the utility’s] duties to the public”.

We note that OPUC apparently takes a different view, because it treats sales of surplus RECs as subject to the transfer of property statute, though we could not find an OPUC order in which the OPUC specifically addressed the same “necessary or useful” term that is found in both ORS 757.480(1)(a) and RCW 80.12.020. We also recognize the UTC did not formally decide the applicability of RCW 80.12 in its order. Order 10 at 9, n.23. The Commission may decide to request additional legal briefing on this issue, because if property transfer applications under RCW 80.12 are required for RECs, as they are in Oregon, the utilities in this state will need to comply.

³⁰ Order 10 at 9, ¶ 23.

³¹ Petition at 10-13, ¶¶ 18-25.

that how PacifiCorp booked REC revenues is not relevant. What is relevant is how to treat REC revenues for regulatory purposes.

30 But perhaps the more important point is that PacifiCorp's argument misconstrues the import of this aspect of Order 10. Staff reads this part of the Order to state that it is appropriate to treat RECs as special items of revenue outside the ratemaking formula of $\text{Revenues} = \text{Expenses} + (\text{Rate of Return} \times \text{Rate Base})$.

31 This is not a novel proposition, and PacifiCorp does not contest it: "customers are generally entitled to a revenue credit for REC sales."³² A primary way to implement this uncontested premise is to do what the Commission said: track the REC sales amounts separately, outside the process of setting base rates, and give that revenue back to customers directly.

32 PacifiCorp goes on to offer examples, such as American Water Resources' attempt to include in rate base an item of plant the utility had expensed prior to the test period,³³ or Olympia Pipe Line Company's attempt to recalculate its rate base by adding so-called "deferred earnings" the pipeline attributed to years that pre-dated the test period by as much as eighteen years (!).³⁴ Again, that is not the issue here. The issue here is proper treatment of *undistributed* REC revenues, none of which relate to any period prior to the test period in this case.

³² Duvall, Exh. No. (GND-5T) at 8:3-6. PacifiCorp challenges only the inclusion of 2009 and 2010 revenues in the credit: See e.g., PacifiCorp Reply Brief (November 18, 2011), at 21-22, ¶ 50.

³³ Petition at 15; *Utilities and Transp. Comm'n v. Am. Water Resources, Inc.*, Docket UW-980072 et al., Fifth Supplemental Order (November 24, 1998).

³⁴ Id. at 16, ¶ 31; *Utilities and Transp. Comm'n v. Olympic Pipe Line Co.*, Docket TO-011472, 20th Supplemental Order (September 27, 2002).

D. PacifiCorp's Same Retroactive Ratemaking Arguments are Still Wrong³⁵

33 As we previously noted, PacifiCorp “does not contest the premise” that “customers
are generally entitled to a revenue credit for REC sales.” Rather, PacifiCorp contests
crediting customers with 2009 and 2010 REC sales revenues. In this regard, PacifiCorp’s
Petition brings out the same flawed “retroactivity” arguments the Company offered earlier.³⁶

34 The Company’s retroactive ratemaking arguments are no more valid now than they
were before, because PacifiCorp assiduously avoids two key facts: (1) the Company itself
placed into issue its REC revenues by using a 2009 test year as the basis for its rate case
filing; and (2) the amount of REC revenues at issue has never been reflected in PacifiCorp’s
rates.

1. PacifiCorp placed REC revenues into issue in this case

35 PacifiCorp says that before the Commission can address REC revenues separately
from the general rate-setting exercise in this case, there must be a deferred accounting

³⁵ PacifiCorp takes umbrage at the Commission comment about how a “piece of paper” affects
PacifiCorp’s application of the retroactive ratemaking rule. Petition at 17-18, ¶ 36. However, it would be
challenging to explain to anyone outside the regulatory circle that retroactive ratemaking legally bars a utility
from collecting a past cost in future rates, except if the utility mails in a piece of paper (e.g., a petition) and
gains an agency’s approval to do exactly that.

We also note PacifiCorp persists in saying the Commission strictly applies the retroactive ratemaking
rule, but the Company is only partly correct. Prior to 1988, the Commission did strictly apply the retroactive
ratemaking rule, e.g., *In re Petition of Puget Sound Power & Light Co. for Deferred Accounting Treatment and
Amortization in Regard to Certain Power Costs and Credits*, Cause U-79-73, Order (December 31, 1979). In
that case, the Commission rejected as unlawful retroactive ratemaking a power cost adjustment tariff on the
basis it included a deferral and true-up provision. The Commission reasoned that because the true-up occurred
after service was rendered, it affected the price of the electricity previously provided. According to the
Commission, this also would violate RCW 80.28.020, which requires a utility’s rates be specified in a tariff at
the time service is provided. Order in Cause U-79-73, at 2-3.

However, in 1988, the Commission implicitly reversed that 1979 decision when it approved a similar
power cost adjustment mechanism, and ruled that the deferral and true-up feature did not constitute retroactive
ratemaking. *Utilities and Transp. Comm’n v. Puget Sound Power & Light Co.*, Docket U-81-41, Sixth
Supplemental Order (December 19, 1988) at 16-19.

Of course, a court could strictly apply the retroactive ratemaking rule, i.e., in the manner the
Commission applied the rule before 1988, which would put an end to the deferred accounting PacifiCorp has
enjoyed in the past, as well as the Company’s quest for a power cost adjustment mechanism.

³⁶ Petition at 13-17, ¶¶ 26-34.

petition.³⁷ PacifiCorp quotes a prior Commission order to require “notice, a legal consideration, and fairness, an equitable consideration”.³⁸ However, when PacifiCorp filed this rate case, the Company placed into issue the appropriate treatment of test period REC revenues. PacifiCorp was given a full and fair opportunity to litigate REC issues in this case. Nothing more is necessary.

36 The orders PacifiCorp relies upon in fact support our argument and refute the Company’s. For example, the Company bases its argument on the Commission’s order in Avista Dockets UE-991606 and UG-991607, which PacifiCorp says is an example where the Commission refused to consider extraordinary storm damage expenses absent an accounting petition.³⁹ However, the key point of that order is that Avista incurred those expenses “before the test year”.⁴⁰ Had Avista incurred these expenses during the test year, they would have been fair game.

37 The same situation existed in another case relied on by the Company for its flawed theory; PacifiCorp’s own accounting petition in Docket UE-020417.⁴¹ In that instance, PacifiCorp petitioned to defer certain power costs starting June 1, 2002. Like the Avista case we just distinguished, the key point is that the Company had no rate case pending at the time it filed that accounting petition, let alone a rate case with a 2002 test period.

38 Here, by contrast, PacifiCorp has a pending rate case, and the REC revenues at issue are fairly and appropriately before the Commission.

³⁷ PacifiCorp Petition at 17, ¶ 35.

³⁸ Id., quoting *In re Petition of PacifiCorp for an Accounting Order Authorizing Deferral of Excess Net Power Costs*, Docket UE-020417, Third Supplemental Order (September 27, 2002) at 8, ¶ 25.

³⁹ PacifiCorp Petition at 18, ¶ 38.

⁴⁰ *Utilities and Transp. Comm’n v. Avista Corp.*, Dockets UE-991606 and UG-991607, Third Supplemental Order (September 29, 2000) at 57, ¶ 207.

⁴¹ PacifiCorp Petition at 18, ¶ 37.

39 Another PacifiCorp case relied on by the Company is Docket UE-050412, in which PacifiCorp asked for and received Commission permission to defer excess hydro costs from March 2005 forward.⁴² Once again, the Company had no rate case pending at the time PacifiCorp filed its petition.⁴³

2. The Commission has discretion to treat test period items outside the ratemaking formula when law or policy so dictates

40 In setting rates, the Commission usually uses a “test period” or “test year” to determine the relationship between revenues, expenses and rate base. As the Commission has explained:

The purpose of a test year, and of restating and pro forma adjustments to test year data is to develop a “normal” level of expenses that is expected to match the Company’s expenses in the rate year. Once set, levels of expenses vary, and are expected to vary, from those established. If expenses reach a level where the Company cannot earn a reasonable return, then the Company may file for a rate increase.⁴⁴

41 This means that as a result of the general ratemaking process, there is no expectation that the utility will recover specific expense or revenue items. This removes the underpinnings of PacifiCorp’ retroactive ratemaking theory, and renders irrelevant the new “facts” the Company wants to burden the record with regarding its prior booking of REC revenues.

42 At issue in this case is the Commission’s decision to treat RECs apart from the usual rate-setting process. Again, the Company does not contest the premise that ratepayers are

⁴² *In re Petition of PacifiCorp for an Order Approving Deferral of Costs Related to Hydro Generation*, Docket UE-050412, Petition at 11, ¶ 24 (requesting deferral as of the date of filing the petition (March 18, 2005)).

⁴³ After the Company later filed a rate case including a PCAM (Docket UE-050684), the Commission consolidated the petition with the rate case and resolved the issue there.

⁴⁴ *Utilities and Transp. Comm’n v. Avista Corp.*, Dockets UE-991606 and UG-991607, Third Supplemental Order (September 29, 2000) at 57, ¶ 205.

entitlement to this money, and a return of that money via a credit; rather, PacifiCorp challenges the starting point for calculating the amount.

43 In prior pleadings, we provided the Commission numerous examples where the Commission has departed from the usual test year ratemaking process.⁴⁵ In each example, such departure worked in the utility's favor. We will not repeat each of the examples here, but we will focus on perhaps the simplest one.

44 That example deals with the information technology (IT) expenses Avista incurred to address possible computer problems related to the year 2000 (hence the moniker: "Y2K" expenses). Because of this alleged Y2K problem, Avista incurred an unusually high level of IT expenses in the test year. Despite the fact the Company finished incurring Y2K costs during the test year, the Commission allowed Avista to amortize these Y2K expenses over the ensuing five years.⁴⁶ No accounting petition was involved.

45 Applying PacifiCorp's theory, the Commission's granting of that amortization was illegal retroactive ratemaking in violation of the filed rate doctrine and the Constitution, because the test period was a historical period, and the Commission cannot take those historical amounts and treat them as current amounts over the next five years, absent a Commission-approved accounting petition.⁴⁷

⁴⁵ Post-Hearing Brief on Behalf of Commission Staff (November 4, 2011) at 5-9 ¶¶ 12-21. These and other examples are chronicled by Professor Stephan H. Krieger in the article we have cited previously: *The Ghost of Regulation Past: Current Applications of the Rule Against Retroactive Ratemaking in Public Utility Proceedings*, 1991 U. Ill. L. Rev. 983 (1991). See also Reply Brief on Behalf of Commission Staff (November 18, 2011) at 1-2, ¶¶ 4-6.

⁴⁶ *Utilities and Transp. Comm'n v. Avista Corp.*, Dockets UE-991606 and UG-991607, Third Supplemental Order (September 29, 2000) at 63, ¶ 234.

⁴⁷ The Company would also apply a "corollary" to its central argument, to argue that the Commission violated the law in the Avista case by using the test period actual level of Y2K expenses, because this retroactively changed the prior IT expense level that was "in rates". (It is safe to assume Avista regularly incurred IT expenses before the test period in that case.) If the Commission had applied PacifiCorp's way of thinking, it would have denied the Y2K amortization. We debunked this "corollary" in our Reply Brief on Behalf of Commission Staff (November 18, 2011) at 1-2, ¶¶ 4-6.

46 Staff's theory is that Avista placed at issue its test period expenses, which included its IT-related expenses. The Commission found in the test period an unusual level of IT expense related to Y2K, and for policy reasons, lawfully decided the Company should recover those expenses via an amortization. This is but one of many examples where commissions have similarly allowed actual test year amounts for certain items.⁴⁸

47 In sum, try as it might, PacifiCorp cannot reconcile its theory in this case with common regulatory treatment of test period items. If there is anything uncommon here, it is that this time, the test period item favors the ratepayer, rather than the utility. Certainly, that difference should not dictate a different outcome.

E. PacifiCorp's Rate of Return Argument is Built on a False Premise

48 PacifiCorp once again argues that unless it gets every penny of REC revenues for 2009 and 2010, it will not earn a fair return.⁴⁹ However, this argument presupposes PacifiCorp is entitled to REC revenues in the first place, which is a false premise; these dollars belong to ratepayers.

49 The Company employs this false premise when it calculates that its earned returns would be adversely affected if the Company cannot keep REC revenue.⁵⁰ We note that in no prior rate case did the Commission consider the REC proceeds at issue in this case. Moreover, in the prior phase of this docket and in Docket UE-111190, all REC revenue was removed before determining the revenue requirement.⁵¹

⁴⁸ *E.g., Pa. Pub. Utilities Comm'n v. Pa. Elec. Co.*, 25 PUR 4th 342, 357-58 (Pa. PUC 1978) (allowing amortization of test year actual flooding loss); *In re United Illuminating Co.*, 7 PUR 4th 417, 435 (Conn. PUC 1974) and *In re Southern Bell Tel. & Tel. Co.*, 66 PUR 3d 1, 62-63 (Fla. PSC 1966) (allowing amortization of test year actual storm damage expenses that exceeded normal levels). Many other examples are provided in Professor Krieger's article cited in footnote 45 above.

⁴⁹ Petition at 21, ¶¶ 41-43.

⁵⁰ *Id.*

⁵¹ *Utilities and Transp. Comm'n v. PacifiCorp*, Docket UE-100749, Order 06 (March 25, 2011) at Appendix A; *Utilities and Transp. Comm'n v. PacifiCorp*, Docket UE-111190, Order 07 (March 30, 2012), at 6, ¶ 14.

50 The bottom line is that whenever the Company thinks it cannot earn a satisfactory return under the rates existing at that time, its recourse is to become more efficient or file a rate case, not to keep REC monies that belong to ratepayers.

F. Calculation Issues

51 The specific calculation issue PacifiCorp challenges on reconsideration is the Commission's decision to impute 100 percent of the value of imputed RECs; i.e., the Washington RECs PacifiCorp held for compliance in other states.⁵² In Order 10, the Commission ruled that because PacifiCorp had effectively transferred Washington-allocated value to other states, compensation to Washington is required.⁵³ However, Staff's calculation of the value of imputed RECs is consistent with this ruling. Staff's calculation considered the fact that historically, PacifiCorp was not able to sell all RECs.⁵⁴ In other words, Staff's calculation considered all RECs properly allocated to Washington and properly determined their value. Staff therefore recommends the Commission grant PacifiCorp's Petition to that limited extent.

IV. STAFF RESPONSE TO MOTION TO REOPEN THE RECORD

52 PacifiCorp includes with its Petition a Motion to Reopen Record (Motion to Reopen) and offers a Declaration of Andrea L. Kelly.⁵⁵ For the reasons stated below, the Commission should deny the Company's Motion to Reopen.

53 Kelly Declaration Paragraphs 3-9 address how the Company has booked REC revenues in past years. This information is not relevant or necessary, as we explained earlier.⁵⁶

⁵² Petition at 19, ¶ 40.

⁵³ Order 10 at 15, ¶ 44.

⁵⁴ Id. and Breda, Exh. No. KHB-8C at 1:4.

⁵⁵ Declaration of Andrea L. Kelly in Support of Petition for Reconsideration (September 4, 2012) (Kelly Declaration).

54 Kelly Declaration Paragraph 10 refers to treatment of RECs for Avista, but the Commission has yet to issue an order ruling on the appropriate treatment of Avista's REC sales, so this information is decidedly unhelpful.

55 Kelly Declaration Paragraph 11 refers to RECs not being depreciable. However, as we have explained, that is not relevant,⁵⁷ and to the extent this relates to the nature of RECs, PacifiCorp had the opportunity to offer this earlier.

56 Kelly Declaration Paragraph 12 states that the Company's sales of held RECs are "extremely limited in volume and price." This is not relevant either, because it does not change the character of RECs as rights to claim the environmental attributes of renewable facilities. Moreover, to the extent this relates to the nature of RECs, PacifiCorp had the opportunity to offer this earlier

57 More generally, the Kelly Declaration contains statements that assume that if a utility files a document with the Commission, then the Commission has accepted every figure on that document as a verity, regardless whether the Commission actually considers and rules on each figure on its merits.⁵⁸ There is no legal basis for that assumption, which makes these statements in the Kelly Declaration inappropriate as well as irrelevant.^{59/}

V. CONCLUSION

58 For the reasons stated above, the Commission should deny PacifiCorp's Motion for Stay and PacifiCorp's Motion to Reopen, and Grant PacifiCorp's Petition for

⁵⁶ See ¶¶ 28-32 above.

⁵⁷ See ¶¶ 16-19 above.

⁵⁸ E.g., Kelly Declaration at ¶¶ 8 and 9.

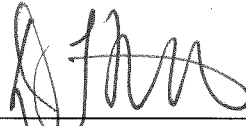
⁵⁹ For example, assume in an annual regulatory filing or a rate case filing, PacifiCorp booked an expense to a plant account, or plant to an expense account, or booked charitable contributions in an above-the-line account, and no party or the Commission "caught" any of it. According to the Declaration, this sort of non-action would imply Commission approval of such bookings, which is nonsensical.

Reconsideration only to the extent of the valuation of Washington-allocated RECs the
Company held for compliance in other states.

DATED this 26th day of September 2012.

Respectfully submitted,

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