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**

REPLY TO ANSWERS TO PETITION FOR RECONSIDERATION, PETITION FOR STAY, AND MOTION TO REOPEN RECORD

REDACTED

October 10, 2012

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I. INTRODUCTION

1 In accordance with Administrative Law Judge Kopta's Notice of Opportunity to File a Reply issued on September 17, 2012, PacifiCorp d.b.a. Pacific Power & Light Company (PacifiCorp or the Company) files this reply to the Answers to PacifiCorp's Petition for Reconsideration (Petition), Petition for Stay of Order 10, and Motion to Reopen Record filed on September 26, 2012, by Commission Staff (Staff), the Public Counsel Section of the Washington Attorney General's Office (Public Counsel), and the Industrial Customers of Northwest Utilities (ICNU) (collectively Answering Parties).

2 PacifiCorp's past renewable energy credit (REC) sales were properly treated as operating revenues because REC sales are not comparable to utility property sales. Even if the Commission has the discretion to change course and treat REC sales proceeds as the equivalent of the sale of utility property prospectively, it cannot rewrite history. For the period before April 2011, PacifiCorp's REC sales proceeds were appropriately categorized as operating revenues, and to change this prior treatment is clearly impermissible retroactive ratemaking. None of the Answering Parties' arguments undermine PacifiCorp's arguments on reconsideration.

II. REPLY TO ANSWERS TO PETITION FOR RECONSIDERATION

A. The Petition for Reconsideration Satisfies the Commission's Standard.

3 The Answering Parties argue that the Company is attempting to re-litigate issues already fully briefed before the Commission in violation of the Commission's standard for reconsideration.[1] A petition for reconsideration is proper if it identifies errors of law and does not attempt to "restate[] arguments that the Commission *thoroughly considered*" in the case.[2]

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[1] Answer of ICNU ¶¶ 1, 21; Commission Staff Response ¶ 10; Public Counsel's (PC's) Answer ¶ 5.

[2] *Re Application of Avista Corp. for Authority to Sell Its Interest in the Coal-Fired Centralia Power Plant*, Docket UE-991255 *et al.*, 4th Suppl. Order ¶ 40 (Apr. 21, 2000) (emphasis added) ("A petition for reconsideration must

4 PacifiCorp petitioned for reconsideration of the Commission's determination to retroactively reclassify RECs as a non-operating revenue item comparable to utility property and exempt REC revenues from the Commission's general ratemaking laws, policies, and processes on this basis. The Commission acknowledged that no party made these arguments in this proceeding, observing that the "premise underlying virtually all of the parties' arguments is that REC sale proceeds are Company 'revenues' to be factored into the ratemaking purposes."[3] The Petition satisfies the Commission's reconsideration standard because it identifies errors of law and raises issues that the Commission did not thoroughly consider in this case.

5 ICNU claims that in Order 07 denying PacifiCorp's Phase 1 Petition for Reconsideration "the Commission noted that PacifiCorp repeatedly violated the legal standard for reconsideration."[4] ICNU provides no citation to support this claim, and a review of Order 07 demonstrates that it is false. ICNU also claims that in Order 07, the Commission noted that "raising new adjustments on reconsideration denies the other parties due process and does not comply with [the Commission's] rules governing the adjudicative process."[5] This quote simply explains the Commission's decision to leave a mathematical error in the calculation of the intra-hour wind integration adjustment because the error, which Staff agreed existed, was *de minimis* and reconsideration was not the proper place to correct errors that could have been corrected in rebuttal testimony.[6] This aspect of Order 07 is inapposite because the Petition does not propose correction of a calculation error in an adjustment.

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demonstrate errors of law . . . A petition that . . . merely restates arguments the Commission thoroughly considered in its final order, states no basis for relief.").

[3] Order 10 ¶ 23. The Commission was able to point to only two instances where a party even raised an argument that was similar to the conclusion reached by the Commission in Order 10, and both of those instances are distinguishable from the Commission's ultimate conclusion in Order 10. Order 10 n. 21; Petition for Reconsideration at n. 16.

[4] Answer of ICNU ¶ 21.

[5] *Id.*

[6] *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Docket UE-100749, Order 07 ¶ 52 (May 12, 2011).

B. PacifiCorp's Past REC Sales Are Not Comparable to Utility Property Sales.

1. RCW 80.12.020 Does Not Apply Because RECs Were Not Included in Rate Base.

6 The Answering Parties rely on the Commission's broad reading of the property transaction statute, RCW 80.12.020, to support their position that the Commission properly treated REC sales as a type of property sale.[7] However, this claim ignores the Commission's own rules defining the scope of the statute. RCW 80.12.020 requires Commission authorization to "sell, lease, assign or otherwise dispose of the whole or any part of [a utility's] franchises, properties or facilities whatsoever, which are necessary or useful in the performance of its duties to the public . . .." WAC 480-143-180(4) states that "[n]ecessary or useful includes all property except items that . . . [a]re excluded from the public service company's rate base by commission order, or otherwise."

7 RECs have not been included in the Company's rate base. Therefore, under the terms of WAC 480-143-180(4), RECs are not "necessary or useful" and not subject to RCW 80.12.020.[8] In a footnote, Staff appears to articulate a similar position, acknowledging that it "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.'"[9] Accordingly, because the 2009 and 2010 REC revenues addressed in Order 10

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[7] Commission Staff Response ¶ 24; PC's Answer ¶ 12; Answer of ICNU ¶ 30.

[8] In one case, the Commission did extend RCW 80.12.020 to a 2.5 percent ownership share of a generation plant not in rate base. *See Re Application of Avista Corp. for a Ruling on the Regulatory Treatment of the Gain on the Proposed Sale of the 2.5% Share of the Centralia Power Plant Acquired by Avista Corp. from Portland General Electric to be Sold to TECWA Power, Inc.*, Docket UE-000080, Order Approving Sale and Distribution of Gain (Mar. 22, 2006). The Commission cited WAC 480-143-180(4) in its order, but did not specifically address the rule. This case is distinguishable because the utility held two shares of the plant, a 15 percent share in rate base and a 2.5 percent share not in rate base, and the Commission treated all aspects of the sale of the plant uniformly as the sale of utility property.

[9] Commission Staff Response at n. 29.

were from RECs ineligible for EIA compliance, they were not property under the Commission's own definition articulated in Order 10.[10]

8 The Answering Parties also point to the Commission's treatment of sulfur dioxide emission allowances to support their claim that RECs are property.[11] However, unlike REC revenues, the proceeds from the sale of sulfur dioxide emission allowances are included in the Company's rate base. When the Commission originally approved accounting treatment for the proceeds from PacifiCorp's sale of sulfur dioxide emission allowances, the Commission ordered that "[g]ains from Pacific's SO2 emission allowance sales will, for ratemaking purposes, be amortized over a fifteen-year period . . . and with consideration in rate base for the unamortized gain."[12]

9 Moreover, even if RCW 80.12.020 did cover REC sales,[13] the rule against retroactive ratemaking and other ratemaking principles would still apply. When PacifiCorp originally sought authority to sell sulfur dioxide emission allowances under RCW 80.12.020, the Company requested retroactive authority for sales made in the year before the filing.[14] The Commission

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[10] *See* Order 10, ¶ 24 n. 23 ("The environmental attributes of the facilities PacifiCorp or any other electric utility uses to generate electricity are useful or necessary in the performance of its duties to the public to enable the utility to comply with its obligations under the state's EIA.").
[11] Commission Staff Response ¶ 35; PC's Answer ¶ 13; Answer of ICNU ¶ 31.
[12] *Re Petition of PacifiCorp Seeking and Accounting Order*, Docket UE-940947, Commission Decision and Order Granting Authorization at 3 (Sept. 14, 1994); *see also, Re Petition of the Washington Water Power Company Seeking Blanket Authorization to Sell and Lease Sulfur Dioxide Emission Allowances and Seeking an Associated Accounting Order*, Docket UE-961156, Commission Decision and Order Granting Authorization (Feb. 12, 1997); *Re Petition of Puget Sound Energy, Inc. for an Order Regarding the Authorization to Sell Sulfur Dioxide Emission Allowances and an Associated Accounting Order*, Docket UE-001157, Order (Oct. 25, 2000).
[13] The Commission did not actually conclude that RCW 80.12.020 applied to RECs. *See* Order 10 ¶ 24 n. 23 (Commission stated "we need not, and do not, decide whether RECs are subject to the statutory transfer of property restrictions. We determine only that the proceeds from the sale of RECs are subject to the same disposition as the proceeds from the sale of utility property.").
[14] *Re Petition of PacifiCorp Seeking Blanket Authorization for the Sale of Surplus Sulfur Dioxide Emission Allowances*, Docket UE-940466, Commission Decision and Order Granting Authorization (Apr. 13, 1994).

denied this request because it "believes that granting that authority would be improper and perhaps beyond the Commission's authority."[15]

2. The Public Utility Commission of Oregon's Precedent Does Not Support the Commission's Decision in Order 10.

10 The Answering Parties also claim that PacifiCorp's position in this proceeding is inconsistent with its filing with the Public Utility Commission of Oregon (OPUC) to authorize REC sales under the Oregon property transfer statute.[16] The Answering Parties omit the key facts that the OPUC *ordered* the Company to file an application for the sale of RECs under the Oregon property transfer statute,[17] and the Company's compliance filing sought OPUC approval for only the *prospective* sale of RECs.[18] Moreover, the OPUC has never concluded that REC revenues are exempt from the general principles of utility ratemaking. For example, the OPUC allows Idaho Power to account for REC revenues through its power cost adjustment mechanism and retain 10 percent of these revenues to offset surcharges under that mechanism.[19]

3. Staff Fails to Persuasively Distinguish the Ratemaking Treatment of RECs from the Ratemaking Treatment of the Underlying Electricity.

11 Staff argues that RECs are not electricity but are intangible assets representing rights.[20] The Petition argued that RECs are a commodity that is similar to electricity and should therefore be afforded the same ratemaking treatment.[21] Because off-system sales of electricity are accounted for as revenue offsetting the Company's net power costs, it is reasonable to treat the

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[15] *Id.* at 2.
[16] Commission Staff Response ¶ 27; Answer of ICNU ¶ 31; PC's Answer ¶ 15.
[17] *Re PacifiCorp*, Docket UE 210, Order No. 10-022 at 15-16 (Jan. 26, 2010).
[18] *Re PacifiCorp Application Requesting Approval of Sale of Renewable Energy Credits*, Docket UP 260, Order No. 10-210 (June 9, 2010).
[19] *Re Idaho Power Company*, UP 269, Order No. 11-086 (March 15, 2011).
[20] Commission Staff Response ¶ 21.
[21] Petition for Reconsideration at 7-10. ICNU mischaracterizes the Company's argument and claims that PacifiCorp argued that RECs "can only be considered part of the electricity itself." Answer of ICNU ¶ 29. This claim is simply wrong. The Company argued clearly that renewable electrical generators produce two commodities—electricity and RECs. The Company never argued that these two commodities are not distinct from one another. The Company argued that they should receive the same ratemaking treatment.

sale of RECs the same way. The fact that RECs are characterized as intangible assets does not render this comparison inapt.[22]

12 Staff also disputes the characterization of RECs as a commodity and claims that PacifiCorp wrongly stated that the Commission referred to RECs as such.[23] However, Order 10 clearly refers to RECs as a commodity.[24] Even ICNU properly characterizes RECs as a commodity.[25] Moreover, as stated in the Environmental Protection Agency materials cited by the Commission in Order 10 and referenced approvingly by Staff,[26] renewable electrical generators simultaneously, and as a result of the same generating process, produce two products—electricity and RECs.[27] It is illogical to conclude that the disposition of one commodity is addressed in the general ratemaking process but the other is not.

13 Staff also argues that the "nature of RECs derives from the facilities that give rise to them."[28] While it is correct that the renewable portfolio standard (RPS) law of any particular state does identify the type (and age) of generation resource that qualifies under the particular law, only the laws in Texas and Iowa base their RPS requirements upon megawatts of generation. All other states, including Washington, base their RPS requirement—and the

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[22] Likewise, the fact that RECs can be sold to a purchaser that is different from the purchaser of the associated energy is irrelevant to the appropriate accounting treatment of RECs. Generation facilities can simultaneously produce multiple separate products for multiple separate customers. For example, energy generated by a plant can be sold to one customer even though the plant's generating capacity or ancillary services are sold to one or more other customers.

[23] Commission Staff Response ¶ 20.

[24] Order 10 ¶ 11 ("Typical of nascent markets, the sale of RECs has been characterized by volatility as affected utilities determine the need, availability, and value of this new *commodity*.") (emphasis added); Order 10 ¶ 32 ("As with any other *commodity,* the utility has control over when it will sell its RECs . . .") (emphasis added).

[25] Answer of ICNU ¶ 29 ("Under Washington law, RECs are a separate commodity that are distinct from the electricity and have additional value.").

[26] Commission Staff Response ¶ 14; Order 10 ¶ 9.

[27] *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 Oct. 10, 2012).

[28] Commission Staff Response ¶ 17.

existence of the REC—upon production.[29] In other words, no REC exists unless there is production; the mere existence of the qualifying generation is not sufficient except in the two states mentioned. Therefore, the Commission's order, which focuses on the generation plant and not on the production, is irreconcilable with the Washington law. Staff claims that RECs are merely quantified by the electrical output of the facility but only have value because of the nature of the facility itself.[30] This ignores the reality that unless a qualifying renewable resource generates energy, it produces no RECs.

4. Staff's Depreciation Argument Misses the Mark.

14 Staff argues that RECs can be treated like property even if they are not depreciable.[31] Staff cites the example of land as a non-depreciable asset that is undisputedly property. However, Staff fails to address the entirety of PacifiCorp's argument, which relied on two undisputed facts: (1) customers pay no depreciation expense related to RECs; and (2) RECs are not included in the Company's rate base.[32] PacifiCorp argued that RECs are akin to electricity because both are excluded from rate base and both lack depreciation expense. These two characteristics of both RECs and electric production support the Company's claim that RECs are more like electric production than utility property under the meaning of RCW 80.12.020. In addition, because RECs are not included in rate base, under WAC 480-143-180(4), the RECs are not "necessary or useful" to PacifiCorp, unlike the land on which the wind facilities are located.

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[29] Database of State Incentives for Renewables & Efficiency, Renewable Portfolio Standards Policies, Sept. 2012 *available at* http://www.dsireusa.org/documents/summarymaps/RPS_map.pdf (last visited Oct. 10, 2012).
[30] Commission Staff Response ¶ 23.
[31] Commission Staff Response ¶ 18.
[32] *See* Petition for Reconsideration at 1, 5, 9.

C. The Commission Does Not Have Authority to Ignore Basic Ratemaking Principles in Its Treatment of Past REC Revenues.

15 The Answering Parties contest the Company's argument that the Commission previously accepted the treatment of REC revenues as operating revenues and cannot retroactively reclassify REC revenues as proceeds on property sales.[33]

1. The Answering Parties' Argument that the Commission Never Classified the Past REC Revenues Ignores Uncontroverted Facts and Fundamental Ratemaking Principles.

16 The Answering Parties argue that the Commission never explicitly addressed PacifiCorp REC issues before this case, so there was no reclassification of REC revenues. Staff claims that "how PacifiCorp booked REC revenues is not relevant. What is relevant is how to treat REC revenues for regulatory purposes."[34] But PacifiCorp has established that for regulatory purposes, before the issuance of Order 10, the Commission set PacifiCorp's rates to include REC revenues classified as operating revenues. None of the Answering Parties specifically contest the fact that the Commission accepted the Company's treatment of REC revenues as other electric revenue in Account 456 in the Company's fully litigated 2006 general rate case. Neither do the Answering Parties respond to the fact that since that case, the Company filed several general rate cases and results of operations reflecting REC revenues as other electric revenue in Account 456 without objection from the Commission or any party.[35]

17 As PacifiCorp explained in the Petition, the Commission has also accepted similar rate treatment for Avista's REC revenues. Staff and Public Counsel argue that this information is not relevant because the Commission has not yet ruled on Avista's REC revenues in Avista's 2012

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[33] Commission Staff Response ¶ 28; Answer of ICNU ¶ 32; PC's Answer ¶ 17.
[34] Commission Staff Response ¶ 29.
[35] PacifiCorp's Petition for Reconsideration and Motion to Reopen Record at 13.

general rate case.[36] However, in past cases, Avista also included REC revenues in rate case filings as Renewable Energy Credit Sales in Account 456, the same as PacifiCorp.[37] As in PacifiCorp's case, no party contested this treatment until very recently.[38]

18 Earlier this year, Staff filed a memorandum in Avista's Energy Recovery Mechanism proceeding questioning whether Avista's treatment of REC revenues was consistent with Commission policy. In response, Avista argued that it was "not appropriate, after the fact, to consider new accounting treatment for certain revenues or expenses for prior periods, and then propose that new accounting treatment to be applied retroactively to prior periods."[39] The fact that Avista independently raised the same arguments against retroactive reclassification of REC revenues after Order 03 in Docket UE-070725[40] (PSE REC Order) and before the issuance of Order 10 undermines the argument that the PSE REC Order adopted a clear and uniform position on the treatment of REC revenues in rates.

19 The Answering Parties claim that because the Commission never explicitly addressed the accounting treatment of REC revenues, the Commission can now retroactively change the treatment of REC revenues. Applying the Answering Parties' theory would mean that unless the Commission explicitly approves rate treatment for each particular expense or revenue item, rates would be subject to backward-looking changes at the Commission's discretion in the future, effectively eviscerating the rule against retroactive ratemaking and the filed rate doctrine. Application of this theory would also make future rate cases much more difficult to litigate, and

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[36] Commission Staff Response ¶ 54; PC's Answer ¶ 18.
[37] *Re Avista Corp. Energy Recovery Mechanism Annual Filing to Review Deferrals for Calendar Year 2011*, Docket No. UE-120432, Comments of Avista Corporation (June 26, 2012). *See also* Exhibit No. WGJ-2 in Dockets UE-110876 (May 16, 2011), UE-100467 (Mar. 23, 2010), UE-090134 (Jan. 23, 2009), and UE-080416 (Mar. 4, 2008). The Company requests official notice of these filings under WAC 480-07-495(2)(a)(i).
[38] *Re Avista Corp. Energy Recovery Mechanism Annual Filing to Review Deferrals for Calendar Year 2011*, Docket No. UE-120432, Comments of Avista Corporation (June 26, 2012).
[39] *Id.* (emphasis in original).
[40] *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy Co.*, Docket UE-070725, Order 03 (May 20, 2010).

settlement much more difficult to reach, because parties would be required to secure the Commission's explicit approval for the accounting of each and every item in rates to avoid retroactive ratemaking.

2. Retroactively Reclassifying REC Revenues Violates Established Ratemaking Principles.

20 The Company explained in the Petition that retroactive reclassification of REC revenues and the creation of a retroactive regulatory liability without notice violates the rule against retroactive ratemaking and other fundamental Commission laws and policies.[41] It appears that ICNU concedes that retroactively reclassifying a rate item would run afoul of retroactive ratemaking. ICNU "agrees that the filing of a deferred account is normally required to avoid retroactive ratemaking and the principles of the filed rate doctrine."[42] ICNU states that the Commission resolved this concern 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."[43]

21 Even if ICNU were correct on that score, which it is not, the Commission did not make this alleged determination until the Commission issued the final order in the PSE REC case on October 26, 2010.[44] As the Commission noted in Order 06 in this docket, implementation of the Commission's finding that customers are entitled to REC revenues was challenging and "it was not until Commission action on petitions for reconsideration [in PSE's proceeding] and on a joint proposal by the parties expressly invited by the Commission, that these questions were fully

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[41] PacifiCorp's Petition for Reconsideration and Motion to Reopen Record at 13-19.
[42] Answer of ICNU ¶ 35.
[43] *Id.*
[44] *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy Co.*, Docket UE-070725, Order 06 (Oct. 26, 2010).

resolved."[45] Even accepting ICNU's argument that the Commission's August 2012 decision in this docket "reaffirmed" the PSE REC Order, it is unreasonable to apply that holding to PacifiCorp's REC revenues generated before the October 26, 2010 final order in the PSE REC case.

22 In responding to the Company's argument that retroactive reclassification of REC revenues is impermissible, both Staff and Public Counsel attempt to differentiate REC revenues from other elements of rates by designating them "*undistributed* REC revenues."[46] Staff argues that because "the amount of REC revenues at issue has never been reflected in PacifiCorp's rates," retroactive ratemaking does not apply. Application of their stance would effectively nullify the rule against retroactive ratemaking. By definition, retroactive ratemaking occurs when current rates are adjusted to make up for expenses or revenues that were not previously included in rates.[47] To say that these REC revenues can be included in future rates because they were never included in rates in the first place is nonsensical: these REC revenues were included in rates just as power sales revenues are included in rates, *i.e.*, based on projections that are intended to estimate actual receipts in the test period.

23 The Answering Parties also attempt to frame the Commission's action as the Commission exercising its discretion to treat REC revenues differently from other elements of rates.[48] Staff argues that the Commission has discretion to treat test period items outside the ratemaking formula when "law or policy so dictates."[49] Similarly, ICNU argues that the Commission

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[45] *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Docket UE-100749, Order 06 ¶ 200 (Mar. 25, 2011) (footnotes omitted).
[46] Commission Staff Response ¶ 32; PC's Answer ¶ 21.
[47] *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 (Nov. 9, 2001).
[48] Commission Staff Response ¶ 30; Answer of ICNU ¶ 26.
[49] Commission Staff Response ¶ 40.

"exercised its discretion" when it chose to retroactively credit REC revenues to customers.[50] The Commission's discretion, however, is limited in that it must be a reasonable exercise of power clearly delegated by the legislature and must not be arbitrary and capricious. Moreover, the Company explained in prior briefing that it is a violation of the matching principle to account for expenses and revenues associated with past RECs differently from the net power costs associated with those RECs because RECs and megawatt hours of energy are generated from the same source at the same time.[51] As Staff notes, the Company accepts the premise that rates should reflect a revenue credit related to REC sales. This does not mean, however, that the Company thinks the Commission may violate ratemaking principles in calculating that revenue credit. The PSE REC Order does not stand for the proposition that normal ratemaking principles may be disregarded when calculating a REC revenue adjustment.[52] The rule against retroactive ratemaking, the filed rate doctrine, and the matching principle apply to all elements of rates.

3. Staff's Continued Claim that the REC Revenues from 2009 Forward Were "Fair Game" Because the Historical Test Year in the Rate Case Was 2009 Ignores How the Commission Sets Rates.

24 Staff claims that the Company's retroactive ratemaking arguments are flawed because the Company placed its REC revenues at issue by using a 2009 historical test year as the basis for its filing.[53] Staff argues that expenses incurred during the test year are "fair game" if the utility files a rate case.[54] Staff's argument is inconsistent with the manner in which rates are established. It is also irreconcilable with the Commission's position in Order 10 that REC revenues are not subject to the general ratemaking process In fact, Staff's answer sets forth the correct standard: "The purpose of a test year, and of restating and pro forma adjustments to test year data is to

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[50] Answer of ICNU ¶ 26.
[51] Duvall, Exh. No. GND-5T 6:12-16.
[52] Kelly, Exh. No. ALK-1T 7:6-17.
[53] Commission Staff Response ¶ 35.
[54] *Id.* ¶ 36.

develop a 'normal' level of expenses that is expected to match the Company's expenses in the rate year."[55] The Commission's treatment of REC revenues in this case includes three years of REC revenues in the 12-month rate effective period—actual and imputed 2009 and 2010 REC revenues on top of the 2011 rate effective period REC revenues now included in rates.[56] In addition, Staff's test period argument has no bearing on incorporation of 2010 REC revenues, which are not in the test period or the rate effective period, into current rates.

25 Staff cites an Avista case addressing Y2K expenses for the proposition that the Commission allows past amounts to be included in future rates and that what the Commission is doing with REC revenues is no different. Staff is incorrect. The Commission specifically noted that Avista sought recovery only of the test year level of expense and that the funds spent "benefit ratepayers beyond the Y2K 'event.'"[57] Here, the Commission is retroactively restating a revenue item and including *three years'* worth of the revenue item in future rates. No Commission case provides precedent for this rate treatment.

D. Order 10 Wrongly Assumes Sales of 100 Percent of Banked RECs.

26 In the Petition, the Company argued that the Commission's adoption of a 100 percent assumed sales calculation for banked RECs was inconsistent with the evidence establishing that PacifiCorp had never achieved a 100 percent sales level for its RECs.[58] The Commission has expressly recognized the emerging and volatile nature of the REC market.[59] Demand for RECs, particularly RECs as defined by the Washington law, is uneven and PacifiCorp's historical sales

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[55] Commission Staff Response at 12 (citing *Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-991606 *et al.*, 3rd Supp. Order ¶ 205 (Sept. 29, 2000)).
[56] Kelly, Exh. No. ALK-2CT 3:2-11.
[57] *Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets No. UE-991606 *et al.*, 3rd Supp. Order ¶ 234 (Sept. 29, 2000).
[58] PacifiCorp's Petition for Reconsideration and Motion to Reopen Record ¶ 40; Dalley, Exh. RBD-28CT 18:16-19:7.
[59] Order 10 ¶ 11 ("Typical of nascent markets, the sale of RECs has been characterized by volatility as affected utilities determine the need, availability, and value of this new commodity."); PSE REC Order at ¶17 ("REC markets are relatively new and in early stages of development.")

levels range from approximately *Begin Confidential* [redacted] *End Confidential* percent in 2009[60] to approximately *Begin Confidential* [redacted] *End Confidential* percent in 2011.[61] Under the Commission's approach, if the Company sold just one REC, the Commission would impute a 100 percent sales level for the pool of all banked RECs for that year. It is inconsistent for the Commission to recognize the challenging nature of the REC market, but then adopt a methodology that assumes a perfect match between PacifiCorp's available RECs and market demand.

27 Staff supports this aspect of PacifiCorp's Petition, noting that Staff's approach (which imputed REC sales based on actual sales percentages) "considered the fact that historically, PacifiCorp was not able to sell all RECs."[62] Because there is no basis in the record for imputing REC sales at a level higher than PacifiCorp was ever able to achieve, the Commission should reconsider its 100 percent assumed sales calculation.

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

28 No party contests the fact that the Commission's Order 10 effectively eviscerates most of the rate increase allowed in Order 06 and deprives PacifiCorp of the opportunity to earn its allowed rate of return in the rate effective period.[63] Staff and ICNU argue that this point is irrelevant because customers are entitled to past REC revenues.[64] Washington law does not support the Answering Parties' argument. Regardless of what revenues and expenses are used to develop rates, the Commission has a statutory obligation to determine whether rates are "just,

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[60] Dalley, Exh. No. RBD-28CT 18:19.
[61] Dalley, Exh. No. RDB-27CT 3 (2011 forecast); PacifiCorp's REC Report for 2011, compliance filing in Docket UE-090205 (April 27, 2012) (2011 actual sales).
[62] Commission Staff Response ¶ 51.
[63] PacifiCorp's Petition for Reconsideration and Motion to Reopen Record ¶ 41; Dalley, Exh. RBD-28CT 2:16-3:2.
[64] Commission Staff Response ¶ 49; Answer of ICNU ¶ 37.

fair, reasonable and sufficient."[65] Specifically, the Commission must review the end result of its decision, not just specific elements of the decision, to determine whether rates are just and reasonable.[66] Staff's and ICNU's argument that the Commission can abandon this statutory duty because it is appropriate to allow retroactive recovery of one rate element is contrary to law.

III. PETITION FOR STAY

A. The Company is Seeking to Stay that Part of Order 10 Requiring a Rate Credit for REC Revenues Generated Prior to April 3, 2011.

29 To be clear, the Company's Petition for Stay seeks to stay implementation of a rate credit for REC revenues that pre-date April 3, 2011, when the Commission issued Order 06. The Company does not contest the forward-looking REC revenue credit established in Order 06. In compliance with Order 06, the Company began crediting $4.8 million in REC revenues on April 3, 2011.[67] Since that time, the Company has credited approximately $7.0 million in REC revenues to customers.[68] The Company has also recorded a regulatory liability for the contested REC revenues from January 1, 2009 to April 2, 2011.

30 Order 10 superseded Order 06 and required the parties to develop a new mechanism for crediting future REC revenues. To limit the scope of PacifiCorp's Petition for Stay and address the revisions to Schedule 95 required by Order 10, the Company plans to make a compliance filing proposing such a mechanism. This filing will include an accounting of amounts credited to date under Schedule 95 and REC revenues accrued since April 3, 2011, along with proposals for necessary revisions to Schedule 95. The Company will make this filing by October 31, 2012.

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[65] RCW 80.28.010(1).
[66] *See Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602-03 (1944); *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Dockets UE-050684 *et al.*, Order 06 (July 14, 2006).
[67] *See* Order 06 ¶ 204.
[68] The approximate per-month credit has been $0.4 million, and has been credited for the past 18 months under Schedule 95.

31 In summary, pending final resolution of this case, the Company requests an order: (1) permitting the Company to continue to record REC revenues accrued from January 1, 2009 to April 3, 2011 as a regulatory liability; and (2) staying the payment of rate credits for REC revenues accrued prior to April 3, 2011, under Schedule 95 or otherwise.

B. The Answering Parties Cite the Incorrect Standard for a Petition for Stay.

32 The Answering Parties argue that the Commission should deny the Petition for Stay because it does not meet the legal standard established by the Commission. The Answering Parties cite to a 1991 order for the proposition that the Commission's standard for granting a stay is that the party "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."[69] The Answering Parties cite to no other order quoting or following this "standard" and none appears to exist. Given that the Commission has not referenced this order in the 21 years since it was issued, it is incorrect to cite the order as the "standard" for a stay.[70]

33 The Commission has granted various petitions for stay since 1991, and in none of these cases did the Commission use the standard cited by the Answering Parties. As referenced in the Company's Petition for Stay, the Commission in 2010 stayed a final order to preserve the status

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[69] *Wash. Utils. & Transp. Comm'n v. Sno-King Garbage Co., Inc.*, Docket No. TG-900657, 5th Supp. Order at 1 (Dec. 19, 1991).

[70] In fact, Staff and Public Counsel have filed requests for stays under WAC 480-07-860 and have not referenced the standard they now cite as the governing standard. For example, Public Counsel stated in support for a request to stay of a proceeding pending reconsideration simply that a petition for reconsideration had been filed and that appeal of the proceeding may be taken as well, and that a "stay of the effect of the Commission's final order would be in the public interest to avoid the risk of over-collection in rates." *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Docket No. UE-032065, Public Counsel's Motion to Stay Order Number Six (Nov. 3, 2004). In a recent Staff petition for stay, Staff requested the stay "until such time as the Commission makes a decision on [the petition for reconsideration]" without reference to the standard now cited by Staff. *Re Determining the Proper Carrier Classification of, and Complaint for Penalties against Boubacar Zida*, Docket No. TV-091498, Petition for Reconsideration and Petition for Stay of Order Imposing Previously Suspended Penalties (July 19, 2010).

quo during Commission reconsideration and judicial review.[71] In a 1993 order, the Commission granted a stay where it did not operate to the prejudice of any party.[72] In 1995, the Commission stated it was granting a stay "where it was necessary to protect the Applicants from acting in reliance upon the Commission's final order . . . pending decision by the joint petitioners to request reopening of these proceedings."[73] In none of these cases did the Commission apply the standard the Answering Parties now claim is applicable.

34 The correct standard to apply is that cited in PacifiCorp's Petition for Stay: Granting a stay is appropriate in this case because it will preserve the status quo, result in administrative efficiencies, and cause no prejudice to any party nor harm to customers.

C. The Company Faces a Risk of Irreparable Harm If the Commission Does Not Grant a Stay.

35 Assuming, *arguendo*, the standard espoused by the Answering Parties applied, the Commission should still grant a stay to avoid irreparable harm to the Company. As the Company explained in its Petition for Stay of Order 10, the Commission and Washington courts have not directly addressed whether the Commission has the authority to order surcharges (*i.e.*, reverse credits previously ordered) when reviewing an order on remand from a successful petition for judicial review. While the existence of the REC revenue balancing account should allow PacifiCorp to recover REC revenues overpaid to customers, there is a risk that such recovery could be barred by retroactive ratemaking principles. The Answering Parties do not address the significant prejudice to the Company that may occur if the Company prevails on appeal but has already credited the amounts to customers.

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[71] *Re Determining the Proper Carrier Classification of and Complaint for Penalties against Zida Labor Services*, Docket TV-091498, Order 04 (July 23, 2010).
[72] *Wash. Utils. & Transp. Comm'n v. Int'l Pac., Inc.*, Docket UT-911482, 6th Supp. Order (Nov. 22, 1993).
[73] *Re Wash. Water Power Co.*, Docket No. UE-941053, 8th Supp. Order (Oct. 17, 1995).

D. Preserving the Status Quo Will Not Harm Customers.

36 ICNU argues that the Commission should reject the Company's request for a stay because "customers will be harmed if PacifiCorp does not promptly return all monies owed to them."[74] As the Company has made clear, the Company is recording the REC revenues subject to Order 10 in a regulatory liability account. There is no prejudice to customers in staying a rate credit for the disputed REC revenues, especially given that PacifiCorp has credited the undisputed REC revenues on a timely basis in rates.

E. ICNU's Claim that the Company's Request for Stay Should Have Been Made Before a Court is Inconsistent with the Administrative Procedure Act.

37 Finally, ICNU claims that the Company's request for a stay is premature and before the wrong tribunal. ICNU misinterprets the law governing stays. Under the Administrative Procedure Act (APA), a party may submit a petition for stay of effectiveness of a final order to the agency within ten days of service of the order.[75] The Commission's rules mirror this statute, also allowing a party to petition to stay the effectiveness of a final order within ten days after service.[76] The APA has a separate statute that allows a party to seek a stay or other temporary remedy from the reviewing court after a petition for judicial review has been filed.[77]

38 ICNU mistakenly relies upon RCW 80.04.180 for the proposition that a stay can only be obtained from the reviewing court.[78] The APA, not the statute cited by ICNU, now "establishes the exclusive means of judicial review of agency action," subject to certain exceptions not

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[74] Answer of ICNU ¶ 12.
[75] RCW 34.05.467.
[76] WAC 480-07-860.
[77] RCW 34.05.550.
[78] Answer of ICNU ¶ 17.

applicable in this case.[79] In any case, RCW 80.04.180 does not address requests for stay before the Commission and certainly does not prohibit them.

IV. MOTION TO REOPEN RECORD

39 PacifiCorp's Motion to Reopen the Record is timely. Under WAC 480-07-820, entry of "an order following the timely filing of a petition for reconsideration" constitutes a "final order."[80] Thus, PacifiCorp's motion to reopen the record was filed before the entry of a final order in this matter, contrary to ICNU's assertion. In any event, the Commission has the authority to deem this motion as timely under WAC 480-07-130, allowing the Commission to modify time limits stated in the rules.

40 The Answering Parties claim that PacifiCorp has not established good cause for reopening the record because Order 10 did not apply new law. The Answering Parties cannot reconcile this argument with the fact that none of their testimony or briefs ever raised the arguments adopted in Order 10. In any event, the Commission's interest in full development of the record supports the motion. This is especially the case when the evidence PacifiCorp has offered predominantly consists of publicly filed documents establishing the Commission's acceptance of PacifiCorp's REC revenues as operating revenues in rates.

V. CONCLUSION

41 For the reasons stated above and in the Company's Petition for Reconsideration, the Commission should 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. If the Commission denies the Company's Petition for Reconsideration, the

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[79] RCW 34.05.510.
[80] WAC 480-07-820(1)(b)(v) ("Final orders may be entered whenever.... The commissioners enter an order following the timely filing of a petition for reconsideration of a final order.")

Company requests a stay of the rate credit for disputed, historical REC revenues pending resolution of the Company's petition for judicial review. Finally, the Company requests that the Commission reopen the record to receive the Declaration of Andrea L. Kelly included with the Petition.

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Respectfully Submitted,

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