

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND)	DOCKET NO. UE-100749
TRANSPORTATION COMMISSION,)	PHASE II
)	
Complainant,)	
)	CONFIDENTIAL RESPONSE OF THE
v.)	INDUSTRIAL CUSTOMERS OF
)	NORTHWEST UTILITIES IN
PACIFICORP D/B/A PACIFIC POWER &)	OPPOSITION TO PACIFICORP’S
LIGHT COMPANY,)	MOTION TO AMEND ORDER 06
)	
Respondent.)	REDACTED VERSION

I. INTRODUCTION

1 The Industrial Customers of Northwest Utilities (“ICNU”) submits this response in opposition to PacifiCorp’s (or the “Company”) motion to amend the Washington Utilities and Transportation Commission’s (the “Commission” or “WUTC”) Order No. 06 (“Motion”). The Commission should deny PacifiCorp’s proposal to terminate the current renewable energy credit (“REC”) revenue credit under Schedule 95 because, contrary to the Company’s allegations, it is not overcrediting customers. Instead, Schedule 95 should be increased, as ratepayers are owed millions of dollars in REC revenues that have been retained by the Company. PacifiCorp’s Motion also is flawed as it goes beyond a simple request to amend Order No. 06 and the Schedule 95 credit under which PacifiCorp is returning REC revenues for the April 2011 to December 2012 time period. Instead, the Company is attempting to withhold all current and historic REC revenues until some unknown, potentially far in the future date after the resolution

of all judicial review of the Commission's Order Nos. 10 and 11.^{1/} Order Nos. 10 and 11 direct PacifiCorp to fully repay ratepayers all REC revenues for the January 1, 2009 to April 2, 2011 time period, and the Commission should direct PacifiCorp to return all these historic REC revenues to customers as soon as possible. At a minimum, any PacifiCorp appeal of Order Nos. 10 and 11 should not delay the payment of either historic or current REC revenues to customers, which should result in an increase (rather than an elimination) of REC credits. Therefore, the Commission should reject PacifiCorp's Motion, maintain the current REC revenue credit required by Order No. 06, and not delay the refund of historic REC revenues mandated by Order Nos. 10 and 11.

II. BACKGROUND

2 The Commission first addressed PacifiCorp's REC revenues in the Company's 2010 general rate case.^{2/} In Order No. 06, the Commission required that PacifiCorp file a \$4.8 million bill credit for its estimate of 2011 REC revenues during the rate effective period, starting in April 2011.^{3/} The credit was adopted after a contested rate proceeding in which the Commission heard evidence from the parties regarding the appropriate amount of REC revenues that should be returned to customers during the rate effective period (starting in April 2011).

^{1/} This Response uses the same descriptive terms as PacifiCorp, and refers to "current" REC revenues as those from April 3, 2011 to the current time period, and refers to "historic" REC revenues as those from January 1, 2009 to April 2, 2011.

^{2/} WUTC v. PacifiCorp, Docket No. UE-100749, Order No. 06 ¶¶ 199-208 (Mar. 25, 2011) ("Order No. 06").

^{3/} Id. at 204-06.

Since April 2011, PacifiCorp estimates that it has returned approximately \$7 million in REC revenues to customers through Schedule 95.^{4/}

3 Order No. 06 only addressed the estimated amount of REC revenues after April 2011, and the Commission did not immediately resolve issues regarding the historic REC revenues from January 2009 to April 2011. In Order No. 10, however, the Commission found that 100% of the historic REC revenues should also be returned to ratepayers through a tracking mechanism.^{5/} PacifiCorp has made a number of filings to stop or change REC revenue credits required by Order Nos. 06 and 10. In Order No. 11, the Commission denied PacifiCorp's efforts to seek reconsideration and a stay of Order No. 10.^{6/}

4 While the Commission affirmed Order No. 10, the Commission has not yet reviewed nor adopted a specific mechanism for returning REC revenues from the January 2009 to April 2011 time period.^{7/} Instead, the Commission has directed the parties to develop an appropriate mechanism, based upon its conclusions in Order Nos. 06, 10 and 11.^{8/} To date, PacifiCorp has not implemented the Commission's directive to work cooperatively with the parties to develop a mechanism to return these credits. PacifiCorp continues to hold significant

^{4/} PacifiCorp has provided different estimates of the REC revenues returned to customers in different filings. It stated that it has returned approximately \$7 million in its Motion, compared with approximately \$7.5 million in its request to eliminate Schedule 95 filed less than two weeks earlier. Motion at ¶ 6; PacifiCorp Letter to David Danner at 1 (Dec. 4, 2012). ICNU has not fully reviewed PacifiCorp's changing REC revenue estimates and does not take a position on their accuracy at this time.

^{5/} WUTC v. PacifiCorp, Docket No. UE-100749, Order No. 10 ¶ 74 (Aug. 23, 2012) ("Order No. 10").

^{6/} WUTC v. PacifiCorp, Docket No. UE-100749, Order No. 11 ¶¶ 39-40 (Nov. 30, 2012) ("Order No. 11").

^{7/} Id. at ¶ 38.

^{8/} Id.; Order No. 06 ¶¶ 207-208.

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amounts of REC revenues that the customers are fully entitled to receive (some of which the Company has held for about four years).^{9/}

5 PacifiCorp filed its Motion on December 13, 2012, making a number of significant requests that are harmful to customers. First, PacifiCorp requests that Order No. 06 be amended and that the Company be allowed to stop crediting any REC revenues to customers.^{10/} PacifiCorp requests that the REC revenue credit be stopped on the grounds that PacifiCorp has overcredited REC revenues since April 3, 2011. PacifiCorp claims that it has credited over \$7.0 million to customers (through November 30, 2012), but that actual REC revenues for the April 2011 to December 2012 time period have been approximately \$4.9 million, resulting in “excess distribution” to customers.^{11/} PacifiCorp proposes to eliminate the REC crediting mechanism on the grounds that it has overpaid customers, and that it will continue to overpay customers in the future.

6 PacifiCorp requests that the Commission allow it not to pay any REC revenues (historical or current) until a court resolves any judicial reviews of Order Nos. 10 and 11.^{12/} The Company also requests that the Commission find that Schedule 95 pertains only to REC revenues received after April 3, 2011, and does not address REC revenues accrued between January 1, 2009 and April 2, 2011.^{13/} Finally, the Company asks the Commission for an accounting order allowing the Company to defer any REC revenues credited to customers under

^{9/} It is important to note that PacifiCorp also accumulated REC revenues prior to January 1, 2009, that will never be returned to customers.

^{10/} Motion at ¶ 3.

^{11/} Id. at ¶ 6; PacifiCorp Letter to David Danner at 1.

^{12/} Motion at ¶ 16-17.

^{13/} Id. at ¶ 4.

Schedule 95 in excess of the REC revenues actually owed to customers from April 3, 2011 to the present.^{14/}

7 Taken in combination, PacifiCorp is asking for even more than it sought in its recently denied motion to stay, and the Company's goal appears to be to hold all REC revenues until the Commission's orders are reviewed on appeal, which could take years. It has been about four years since PacifiCorp began secretly pocketing huge amounts of REC revenues, and the Commission should move expeditiously to ensure that customers receive all the REC revenues to which they are entitled.

III. RESPONSE

A. PacifiCorp Has the Burden of Proof to Meet the High Standard for Amending a Prior Order

8 PacifiCorp has proposed to amend an existing order and change its rates. As a result, the Company bears the burden of proof to demonstrate that its proposed tariffs are just and reasonable.^{15/} This burden includes "the burden of going forward with evidence and the burden of persuasion."^{16/} The Company retains this burden throughout the proceeding and must establish that any rate increase is just and reasonable.^{17/} The Commission has stated that "[w]e do not lightly disturb orders previously entered where no party or person can demonstrate patent error or a prejudicial violation of process"^{18/} Where a request to amend an order has affected the rights of parties, the Commission has applied the same stringent standard of review

^{14/} Id. at ¶ 5.

^{15/} RCW § 80.04.130(4); WAC § 480-07-540; WUTC v. Avista, Docket Nos. UE-100467 and UG-100468 Order No. 1 ¶ 12 (Apr. 5, 2010).

^{16/} WAC § 480-07-540.

^{17/} WUTC v. Pacific Power & Light Co., Cause No. U-84-65, Fourth Suppl. Order at 17 (Aug. 2, 1985).

^{18/} Washington State Dept. of Transp. v. Cent. Puget Sound Reg'l. Transp. Auth., Docket No. TR-081230, et al., Order No. 2 at ¶ 18 (Apr. 15, 2010).

set out for civil courts in Washington Civil Rule 60(b), which allows relief from a judgment only in limited circumstances that include patent error or prejudicial violation of process.^{19/} In its motion, PacifiCorp has not even identified the applicable standard of review, let alone provided evidence of patent error or prejudice.

B. The Commission Should Not Amend Order No. 06 and Should Continue the Schedule 95 REC Revenue Credits

9 PacifiCorp should be required to continue crediting customers REC revenues under Schedule 95 until the Commission modifies the current tracking mechanism to include all REC revenues from the historic January 2009 to April 2011 time period. PacifiCorp is not significantly overcrediting customers. PacifiCorp also fails to acknowledge that the past alleged overpayments and any foreseeable future overpayments are several times less than the historic REC revenues that are owed to customers. Finally, ICNU has not had sufficient opportunity to review the Company's documentation and factual claims, and the credit required by Order No. 06 should only be revised after a full opportunity for ICNU and other parties to review, conduct discovery on, and analyze the Company's changing information.

10 PacifiCorp requests that the Commission eliminate Schedule 95 on the grounds that, from the April 2011 to December 2012, it has paid customers more than it received in REC revenues, and that failure to eliminate the credit will result in the Company continuing to

^{19/} Id. at ¶¶ 11, 18. The Commission may apply a different standard of review when requested amendments are procedural or that amend an order to reflect a change in legal status. See, e.g., Re Petition of Avista, Docket No. UE-100176, Order No. 2 (Feb. 23, 2012) (amending final order to consolidate two related compliance reports); Re Application of Pac. Northwest Bell Tel. Co., Docket No U-89-3524-AT, Order No. 3 (Jul. 16, 2012) (amending an order to reflect the termination of cost of service regulation by the Commission).

overcredit REC revenues to customers.^{20/} Noticeably absent from the Motion is any discussion of how much the Company estimates that it might overpay customers if Schedule 95 is maintained.

11 PacifiCorp's Motion also tells less than half the story, as the credits should be increased, not eliminated. Even assuming that PacifiCorp has paid customers more REC revenues than it estimated that it would obtain over the April 2011 to December 2012 time period, there has not been, nor will there be, an "excess distribution" of REC revenues to Washington customers. The Commission has ordered PacifiCorp to repay to customers 100% of Washington allocated REC revenues obtained from January 1, 2009 to April 2, 2011. As a result, PacifiCorp owes customers \$16-17 million in REC revenue from January 2009 to April 2011, which is significantly greater than any alleged overpayments to date, or any overpayments that would occur in the foreseeable future. Any alleged "overpayments" from April 2011 to now can simply be offset against the larger rate credit that customers are entitled from historic REC revenues.

12 It simply does not make sense as a practical matter to eliminate the current Schedule 95 credit and then to adopt a much larger credit only a few months later when a tracking mechanism for the historic REC revenues is established.^{21/} One aspect of the Commission's guidance was that REC revenues should not be returned to customers over a multi-year period, but over a shorter time period, which will pass back the revenues more

^{20/} Motion at ¶ 3.

^{21/} Order No. 10 at ¶¶ 74-75; Order No. 11 ¶ 38.

quickly through a larger credit.^{22/} This means that the REC crediting mechanism that accounts for all REC revenues should be increased early next year, and there is no need to reduce or eliminate any REC credits at this time. Customers, especially large industrial customers, count on rate stability and rate certainty, and it is inappropriate to suddenly eliminate a rate credit when the rate credit will likely be increased in a few months. In this case, there are no extraordinary circumstances or other good cause to subject customers to a roller coaster ride of successive and unnecessary rate changes.

13 Finally, ICNU has not been provided sufficient opportunity to review the accuracy of the Company's factual claims, which should be reviewed in a proceeding with full discovery rights and the ability to test the accuracy of PacifiCorp's data. PacifiCorp has historically had difficulty providing the Commission and the parties with accurate information regarding its REC revenues, and has even provided different estimates of the alleged amount that the Company has overpaid customers between April 2011 and December 2012.^{23/} In addition, the parties have not had the opportunity to fully review the Company's accounting of REC revenues credited to customers or its estimates of future REC revenues. The Commission should simply maintain the current REC crediting mechanism until Schedule 95 is increased to repay customers for the additional REC revenues owed to customers.

C. REC Credits Should Not Be Stopped Until the Completion of Any Judicial Review

14 PacifiCorp is proposing to stop current REC revenue credits, and to delay crediting historic REC revenues until the final resolution of any judicial review of Order Nos. 10

^{22/} Order No. 10 at ¶ 60.

^{23/} E.g., Order No. 11 at ¶ 38; see supra note 4.

and 11.^{24/} PacifiCorp previously requested that the Commission stay the effect of Order No. 10, and the Commission rejected that request as premature.^{25/} The Commission should reject PacifiCorp's new and expanded efforts to circumvent the normal judicial review process so that that it can keep all REC revenues owed to customers during the long pendency of any appeal.

15 PacifiCorp has proposed to stop crediting customers the current REC revenue based on the fact that it might appeal Order Nos. 10 and 11. In Order No. 06, the Commission ordered that all REC revenues after April 2011 should be returned to customers, and PacifiCorp has never disputed or challenged this conclusion. It makes no sense to delay or stop the crediting of REC revenues for the April 2011 to current time period simply because PacifiCorp plans to challenge the separate decision that historic REC revenues from the January 2009 to April 2011 time period should also be returned to customers.

16 PacifiCorp has also proposed that it should delay crediting customers the historic REC revenues based on the fact that it might appeal Order Nos. 10 and 11. PacifiCorp is essentially again asking for a stay, which the Commission has already denied.^{26/} As ICNU previously argued in response to PacifiCorp's request to stay the effectiveness of Order No. 10, PacifiCorp has not met the extraordinarily high standard for preventing an order to go into effect.^{27/} The Commission regards stays as "useful in those extremely rare circumstances when the risk of damage from interim application of the order is great."^{28/} The Commission also

^{24/} Motion at ¶ 3.

^{25/} Order No. 11 at ¶ 38.

^{26/} Id.

^{27/} ICNU Answer at ¶¶ 9-17.

^{28/} WUTC v. Sno-King Garbage Co., Inc., Docket No. TG-900657, Fifth Suppl. Order at 2 (Dec. 19, 1991).

weighs the harm to other parties, and a stay may be appropriate if it will not harm any party.^{29/}

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.”^{30/}

17 The Commission should not allow PacifiCorp to indefinitely retain REC revenues that the Commission has already determined should be returned to customers merely because the Company disagrees with its conclusions. The Commission has previously explained 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.^{31/} Absent extremely rare circumstances, the Commission does not stay or delay the effective date of an order, as it would undermine its own conclusions and harm customers. PacifiCorp should be required to fully credit all REC revenues to customers without any additional delays.

D. PacifiCorp’s Additional Requests Should Be Denied

18 PacifiCorp also requests that the Commission open an account regarding its current REC revenues to defer any REC revenues credited to customers in excess of the REC revenues actually owed to customers, and that the Commission clarify that the current Schedule 95 does not address the historic REC revenues from January 2009 to April 2011. PacifiCorp’s requests are overbroad, unnecessary, and harmful to customers.

19 Deferred accounting for the REC revenues after April 2011 is unnecessary, as the Commission has already determined that the Company’s current REC tracking mechanism

^{29/} WUTC v. Int’l Pac., Inc., Docket No. UT-911482, Sixth Suppl. Order at 1 (Nov. 23, 1993).

^{30/} Sno-King Garbage Co., Inc., Docket No. TG-900657, Fifth Suppl. Order at 2.

^{31/} WUTC v. PacifiCorp, Docket No. UE-032065, Order No. 07 ¶ 9 (Nov. 10, 2004).

provides PacifiCorp and customers with sufficient protection against under or over payments. In Order No. 06, the Commission established a \$4.8 million credit that would be returned to ratepayers over the next year, which would be reviewed to determine if the credit should be changed. The Commission specifically stated that: “In other words, the Commission will authorize a true-up of the initial credits that can be reconciled as credits are paid during the following 12 months.”^{32/} Thus, there is no need for a separate deferral account as Commission has already established a balancing account for all actual REC revenues received after April 3, 2011, which will be trued up to ensure that ratepayers are paid no more or no less than the actual Washington allocated REC revenues obtained after April 2011.

20 The only potential reason to allow a deferral is to explicitly allow interest to be recorded on positive and negative balances for any deferred amounts. PacifiCorp already proposed that its tracking mechanism should accrue interest on any positive or negative balance based on the Company’s authorized weighted average cost of capital.^{33/} ICNU supported allowing interest to accrue on both positive and negative balances for both historic and current REC revenues.^{34/} As the Commission did not adopt a specific tracking mechanism in Order No. 10, nor specifically address the interest issue, ICNU requests that the Commission clarify that interest will accrue on any REC negative or positive balances. Such a clarification would obviate the need for any deferred accounting.

21 PacifiCorp’s request to clarify that the current Schedule 95 credits only address REC revenues after April 2011 and do not address the historic REC revenues is also

^{32/} Order No. 06 at ¶ 205.

^{33/} Order No. 10 at ¶ 52.

^{34/} See Schoenbeck, Exh. No. DWS-5CT at 8.

unnecessary. The Commission has not yet adopted a specific methodology for crediting REC revenues from the January 2009 to April 2011 time period, and the Commission should retain the discretion to incorporate historic REC revenues into the existing Schedule 95 credit. The Commission specifically directed the parties to attempt to work out a crediting mechanism, and it is inappropriate for the Company to attempt to resolve this issue through a request to amend Order No. 6. The Commission should retain the flexibility to ultimately adopt a mechanism that returns to ratepayers historic, current and future REC revenues through a single REC revenue rate credit.

III. CONCLUSION

22 The Commission should deny the Motion and PacifiCorp's efforts to retain all REC revenues that it has obtained in the past and all REC revenues that it may obtain in the future until the completion of any judicial reviews of the Commission's Order Nos. 10 and 11. PacifiCorp should be required to continue crediting customers under Schedule 95 because the Company has not demonstrated that it is overcrediting customers, and the evidence shows that ratepayers are owed millions in excess REC revenues. The Commission already rejected PacifiCorp's motion to stay the effectiveness of Order No. 10, and the Company has not provided any new justification to grant its new request to delay returning historic REC revenues until following the resolution of judicial review. Delaying the return of monies owed to customers is not appropriate without unusual circumstances, and the Commission should reject the Company's request to continue to retain REC revenues that it should have already provided to customers.

Dated in Portland, Oregon, this 20th day of December, 2012.

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