BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re the Matter of PACIFICORP d/b/a PACIFIC POWER & LIGHT COMPANY Request for an Accounting Order Authorizing Deferral of Excess Net Power Costs	DOCKET NO. UE-020417 BRIEF OF PUBLIC COUNSEL

I. INTRODUCTION

1. The Public Counsel Section of the Washington State Attorney General's Office ("Public Counsel") respectfully requests that the Washington Utilities and Transportation Commission ("Commission") reject the Petition of PacifiCorp, d/b/a as PacifiCorp Power & Light Company, ("PacifiCorp" or "Company"). Public Counsel concurs in the analysis and conclusions reached in the Post Hearing Brief of the Industrial Customers of Northwest Utilities ("ICNU Brief"). The Company has failed to meet its burden of persuasion to demonstrate that it is entitled as a matter of fact and law to an accounting order authorizing deferral of alleged excess net power costs.

II. PACIFICORP HAS FAILED TO MEET ITS BURDEN OF PERSUASION TO DEMONSTRATE IT IS ENTITLED TO DEFERRED ACCOUNTING OF POWER COSTS

A. PacifiCorp has failed to demonstrate that its petition is consistent with the 2000 settlement.

2. The 2000 rate case settlement stipulation provided certain benefits and costs to ratepayers and the company. *WUTC v. PacifiCorp*, Docket No. UE-991832, Third Supp. Order Approving and Adopting Settlement Agreements (Aug 9, 2000) and Settlement Stipulations filed on June 6, 2000 and 20, 2000 admitted in UE-991832 as Exhibits 268 and 269 (collectively referred to hereafter as the "Stipulation" or "Rate Plan"). The Company received three years of rate increases over a five year period that provided solid revenue enhancement and a period of stability for the Company to maximize on the benefits it could achieve as a consequence of the PacifiCorp/Scottish Power merger and it's "Transition Plan." *Id.* and Exhibit 44 at 897. The

ratepayers received as their benefit of the bargain five years of known and predictable rates including two years with no additional rate increases in 2004 and 2005.

3. It should be noted that the Merger and Centralia credits which have been discussed during this case will come off of ratepayer's bills in the next two years. Ratepayers will see the "bottom line" on their bills increase during the remainder of the Rate Plan even though the Rate Plan itself will not increase general rates for the next two years. Exhibit 44 at 863. Now that PacifiCorp is facing the two year period when it is not entitled to general rate increases under the Rate Plan the Company is seeking to enhance revenue through this Petition.

4. The much touted "Transition Plan" which was a significant portion of the Company's justification for the merger and for entering the Rate Plan is now producing "highly optimistic case" or the best case predicted benefits to the company. Exhibits 14 and 27. Tr. at 181-185. The Company's filing in this docket claims to have incorporated those benefits within it. However, if PacifiCorp received over $200 million of transition plan benefits and other savings in 2002 and Washington is between 8 and 11 percent of PacifiCorp's system (depending upon the measure used), then presumably Washington should be allocated between $16 million and $22 million in Transition Plan benefits. This would offset most (or all) of the claimed excess power costs. The Company has never adequately explained why it is that Washington would be entitled to less than its proportional share of Transition Plan benefits in the Company's filings or why those Transition Plan benefits do not entirely off-set the alleged excess net power costs.

B. PacifiCorp is not experiencing a financial emergency.

5. PacifiCorp has failed to demonstrate that it is experiencing a financial emergency that would justify violating the Rate Plan. It is clear that the Company's motivation is to enhance existing earnings. Tr. at 318; Exhibit 62 at 6 and 16. Section 11 of the Rate Plan is clearly and unambiguously designed to address the possibility that the Company could face an unexpected emergency or crisis. Section 11 incorporates by reference the six-part "PNB" standard for relief, which is focused on existential threats to the company and/or severe harm to its ratepayers and

shareholders. The proper framework for analysis of the PNB standard is on a company wide basis and not the narrow, Washington specific focus the Company has urged upon the Commission. It is clear that on a company-wide basis PacifiCorp does not meet the criteria for relief under section 11 of the Rate Plan. Tr. at 155-156. This is not a company in crisis, merely one seeking to enhance its revenues by any means it can.

6. The Commission's own recent analysis of this question is instructive. In its Sixth Supplemental Order Granting Motions and Dismissing Dockets in *WUTC v. Puget Sound Energy, Inc.*, Docket Nos. UE-011163 and UE-011170 ("Puget Order") the Commission compared Puget Sound Energy's situation to the showing made by Avista that led to rate relief, and concluded that "PSE's filing as a whole simply does not show that it is in dire, or emergency, or extraordinary, need of rate or accounting relief." Puget Order at ¶ 21. Public Counsel believes that a similar comparison in the present docket shows that PacifiCorp has failed to prove that it has an urgent need for rate relief. For example, PacifiCorp has failed to show that it has had to take extraordinary steps to preserve its financial integrity, such as reducing management salaries and deferring substantial expenses and investment, or that the company would lose access to capital markets absent this relief. The Commission stated in the Puget Order:

> A request for extraordinary relief must provide a clear showing of the adverse consequences that will reasonably flow from the lack of the relief requested, and must demonstrate why relief in a general rate case or in an interim request associated with a general rate increase, would be inadequate to protect the Company and its ratepayers from severe financial consequences. *Id.*

PacifiCorp has failed to meet its burden of providing "a clear showing of adverse consequences."

7. Similarly, the Wyoming Public Service Commission has concluded that the Company is not facing a financial crisis. At hearing, PacifiCorp witness Mr. Larsen recognized that the Wyoming Public Service Commission recently ruled that PacifiCorp was not facing a disabling financial crisis, and agreed that like its argument before the Wyoming Public Service Commission, in this proceeding before the WUTC the company has characterized recovery as a matter of fairness rather than crisis. Tr. at 157 and Exhibit 17 at ¶ 127 and 129.

C. Amending the Rate Plan raises more questions than it answers.

8. As noted by ICNU in its Post-Hearing Brief, the Commission would have to amend the order adopting the Rate Plan, the order approving the PacifiCorp-Scottish Power merger, and the order approving the Centralia sale in order to grant the relief requested by the Company. While the Commission has the inherent authority to do so, subsequent amendment of an order adopting a consensual settlement between all parties to a proceeding raises an array of factual and legal questions regarding the settlement stipulation entered into by the parties and the rates collected pursuant to it.

9. If the Commission subsequently makes material modifications to the Rate Plan, as the Company requests in this Petition, the Commission will trigger section 17(d) of the stipulation, which allows any settling party to revoke their prior consent to the settlement stipulation per the express reservation of right contained therein. If any party decided to trigger that provision and revoke its consent to the stipulation it is the position of Public Counsel that the settling parties would be bound by section 17(d) to seek a prehearing conference for the resumption of the docket. The Commission would then be required to return the parties to "status quo ante" and resume the procedural docket of the 1999 rate case. This would also raise the legal question of whether rates paid since the Third Supplemental Order in UE-991832 was entered would now be subject to refund, whether rates would have to be reset to pre-stipulation levels pending the resolution of the rate case, and a range of other associated legal and factual issues. The Company's Petition seeks to drag the Commission into a legal and factual quagmire it would likely take several years to resolve. It is in the public interest to simply enforce the existing Rate Plan. As discussed at length during the Commission's evidentiary hearings, sections 9 and 11 of the Rate Plan provide avenues for relief to PacifiCorp for legitimate complaints. In the Petition now before the Commission, the Company has failed to demonstrate that it meets the explicit requirements for the relief requested.

D. PacifiCorp has failed to meet its burden of persuasion that its alleged "excess" power costs are excessive.

10. The Company seeks to recover for alleged excess net power costs without establishing actual net power costs, and simply urges the Commission to rely upon its 1998 test year data pre-filed in the prior rate case, but never adopted by the Commission or subject to challenge (due to the Rate Plan settlement). The Rate Plan did not establish power costs for this company. The Rate Plan did not establish a methodology for determining power costs. In addition, the Rate Plan did not establish or accept the PITA Accord methodology as a means of allocating power costs across the different states served by PacifiCorp. Tr. at 174-175.

11. The Commission should not consider the question of alleged excess net power costs which are predicated upon information never agreed to as part of the Rate Plan or decided by Commission order. At its essence, the Company has filed a Petition that assumes certain baselines or benchmarks and says, in effect, "trust us." The Rate Plan also clearly did not establish a rate of return or a return on equity from which the Company can properly assert a shortfall has occurred. The Company's Petition is materially inconsistent with the Rate Plan and should be denied on this basis.

12. The Commission should reject the Company's argument that it should engage in a Washington-specific analysis when determining whether PacifiCorp is entitled to extraordinary relief. The Commission's prior decisions regarding extraordinary relief and interim rate relief do not contemplate such a narrow analysis.

13. This Company's prior mergers, Pacific-Utah and PacifiCorp-Scottish Power are also relevant to the Commission's consideration of the Petition. In both the Pacific-Utah merger and the PacifiCorp-Scottish Power merger the Company touted the many benefits of a multi-jurisdictional utility to its Washington customers and assured the Commission that Washington ratepayers would not be harmed by the merger. Now the Company is before the Commission urging an unacceptably narrow, state-specific analysis to support its claim of entitlement to extraordinary relief. The Company has filed an overly narrow request which should be denied.

14. Unlike the Commission's recent review of Avista and the experiences of utilities serving ratepayers elsewhere in the Western United States, what is clear is that this company is not experiencing extreme financial hardship and is not entitled to extraordinary relief. As the Company's own documents and public statements affirm, this is not a company on the brink of disaster, but rather one that is financially healthy and appears to have "weathered the storm" of the energy crisis without violating its bargain with its Washington ratepayers as reflected in the Rate Plan. Exhibit 27. At a time when more of its Eastern Washington ratepayers are unemployed, when the small businesses it serves are going out of business at a rate not seen for almost a century, when even large and previously prosperous companies are laying off their employees and shutting their doors, this is a Company that is growing and prospering.

15. This is not a company entitled to the extraordinary relief requested in its Petition, even as the nature of the relief requested has changed during the course of the docket. It is interesting to note that the Company began by requesting to defer power costs or for a power cost adjustment mechanism. Petition at 4 and 7-8. The Company then claimed in pre-filed testimony that it was not seeking interim relief, merely deferral of power costs and recovery through elimination of the existing merger and Centralia credits. Exhibit 1 at 7 and Exhibit 90 at 1-2. During the evidentiary hearings the Company then asked for interim relief via deferral of power costs and recovery through a surcharge. Tr. at 134:4-12. Under any of these theories the Company has failed to present sufficient evidence to support its request for relief.

16. Further, the evidence presented by Commission Staff and ICNU demonstrates the flaws in the Petition as filed. The testimony of Commission Staff witnesses Elgin, Buckley, and Martin as well as ICNU witness Falkenberg cast serious doubts upon the credibility of the Company's witnesses as well as the Company's asserted "need" for the money requested by the Petition. Exhibits 101, 102, 115, 125-127, and 140C-145. As the Wyoming Commission stated quite succinctly:

> The deferred power cost portion of this case shares with the Hunter No. 1 portion the common issue of the impact of PacifiCorp's increasing involvement in the

wholesale market without a corresponding increase in generation capability which resulted in a worsening balance of loads and resources, increasing the risk in a volatile market. The substantial evidence shows that PacifiCorp's management implemented a specific strategy to emphasize and increase wholesale market activities for the company's own gain which resulted in a sharp decline in the percentage of retail sales in comparison to overall sales. This strategy significantly increased the risk to PacifiCorp ratepayers and shareholders. Because it was PacifiCorp's own choice to seek profit in the wholesale market through a strategy that exposed its ratepayers to risk (which was *exacerbated* by the "power crisis" but not *caused* by it), it should not now be allowed to recover for the consequences of its decision. Exhibit 17 at ¶ 196 (emphasis in the original).

E. PacifiCorp is not entitled by law to deferred accounting of claimed "excess" power costs.

17. Public Counsel respectfully disagrees with the conclusion reached by the Commission in the Third Supplemental Order – Order Regarding Scope of Proceeding and Threshold Issues. We hereby incorporate by reference the arguments previously made regarding the Commission's legal authority to allow deferred accounting of costs incurred prior to the date of a final order. Public Counsel requests that the Commission reconsider its analysis of this question in light of the evidence now before it. As the Wyoming Public Service Commission concluded recently:

> We are left with what amounts to a request of PacifiCorp that the ratepayers should underwrite past purchased replacement power costs, a clear request to the Commission, given the situation, that it reach back in time and indulge in simple retroactive ratemaking. Exhibit 17 at ¶ 131 citing to *MGTC, Inc. v. Public Service Commission of Wyoming*, 735 P.2d 103, 107 (1987).

It is the position of Public Counsel that it is neither legally permissible for the Commission to grant deferred accounting of costs incurred prior to the entry of a final order, nor is it factually supportable for the Commission to do so in the matter now before it.

III. CONCLUSION

18. For the foregoing reasons Public Counsel requests that the Commission reject the PacifiCorp's Petition seeking deferred accounting of alleged excess net power costs and re-affirm the validity of the Rate Plan.

RESPECTFULLY SUBMITTED this 11th day of April, 2003.

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