

December 11, 2003, PacifiCorp filed an Application for Mitigation of Penalty (“Application”).

3 The Commission called for comments from Staff regarding the
Application. Staff recommends that the Commission deny the Application.

II. ARGUMENT

A. **The Penalty is for the Timing of the Filing, Not the Substance of the Filing.**

4 The Company claims that it has complied with the essential features of Chapter 480-107 WAC. (Application at 10-11.) The Commission’s penalty order, however, clearly states that the penalty is for the tardiness of the filing and not the substance of what was filed. (Order No. 01 at ¶¶2-3.)

5 The facts surrounding the timing of the filing are not in dispute. The Company filed its LCP on January 24, 2003. The Company acknowledges that it did not file the avoided cost schedule and draft RFP until August 15, 2003. (Application at 2.) WAC 480-107-060(2)(a) requires an RFP filing within 90 days of filing a final LCP. Thus, there is no dispute that PacifiCorp’s draft RFP was late by 113 days.¹

¹ The Company’s August 15th filing also did not include a specific request for exception to the requirements of WAC 480-107-060(2)(a) regarding timing. Even if it did include such a request, that request would also have been untimely since it would have post-dated the date (April 23rd) when the draft RFP was required to be filed in the first instance.

On January 2, 2004, PacifiCorp filed a request in Docket No. UE-031311 for exception of all RFP filing requirements as they relate to PacifiCorp’s LCP in Docket No. UE-030709. That request was also untimely.

6 This is not just a technical violation of the rule. Timely filing of a draft RFP ensures that Qualifying Facilities (QFs) and other developers have an up-to-date avoided cost schedule to determine if they can generate electricity or provide capacity at a lower cost than the Company's avoided cost.

7 The Company argues that delays in Commission's approval of the LCP would not allow enough time to prepare and file an RFP. (Application at 7.) However, the Commission does not approve LCPs. Instead, the Commission "acknowledges" an LCP based on whether or not the LCP satisfies the requirements of the LCP rule, WAC 480-100-238. Commission acknowledgement of the LCP is irrelevant to the draft RFP filing date. Indeed, WAC 480-107-060(2)(a) states that a draft RFP must be filed within 90 days of the *filing* of a final LCP, not Commission action on the LCP. Further, the LCP document is always subject to revision. The Commission's acknowledgement letter takes into account available comments or revisions, may come at a much later time than 90 days after the LCP filing, and may be informed by the draft RFP.

B. Resource Acquisition and RFP Filing Compliance are Different Issues.

8 The Company states, "Chapter 480-107 WAC should not be construed to require an RFP filing unless a utility makes the election to acquire new resources via a Commission-approved RFP." (Application at 4.) The Company relies upon WAC 480-107-001(1), which states that, "These rules do not preclude electric utilities from constructing electric resources, operating conservation programs,

purchasing power through negotiated purchase contracts, or otherwise taking action to satisfy their public service obligations.”

9 The Company’s argument misses the point. WAC 480-107-001(1) does not state that RFPs are required only when a utility intends to acquire resources. It merely states that a utility can acquire resources outside of a Commission-approved RFP process.

10 The Company’s LCP shows a need for about 4,000 MW of resources. (Docket No. UE-030709, PacifiCorp Least Cost Plan, page 4.) The Company has not shared with the Commission its RFPs issued in other states, nor has it updated the estimated administratively determined avoided cost schedule filed in Docket No. UE-031311 based on that information. Since the administratively determined avoided cost fails to incorporate competitive bids, implementation of PURPA in a way that identifies least cost to the utility is compromised. The lack of competitive bidding information would also hamper prudence reviews and determinations of just and reasonable rates in general rate proceedings.

11 The Company states that it has acquired resources without a Commission approved RFP. (Application at 6.) However, the issue is whether the Company made a timely filing that demonstrates compliance with Commission rules and PURPA. RFPs are filed with the Commission not only because they may serve as mechanisms through which resources are acquired, but also because they are price discovery tools that establish avoided cost schedules. The Commission has

chosen to implement PURPA through the development of market based avoided costs as determined by RFPs. Chapter 480-107 WAC. Thus, regardless of whether or not a utility needs to acquire resources, a utility must file a draft RFP within 90 days following the filing of a final LCP. WAC 480-107-060(2)(a). PacifiCorp failed to meet this requirement.

12 Finally, Chapter 480-107 WAC has no blanket exceptions to the RFP filing requirement for utilities that do not need capacity and energy resources. Instead, regulated companies are allowed in individual cases to request exceptions under WAC 480-107-170.² PacifiCorp also failed to request an exception in a timely manner.

C. An Open Rulemaking Does Not Excuse Failure to Comply with Existing Rules.

13 The Company states, “The ongoing rule making proceedings on the RFP rules suggests that the rules are unclear and unworkable in their present form.” (Application at 7-8.) There is, however, nothing unclear about the requirements of WAC 480-107-060(2)(a). That rule unambiguously states that a utility “is required to file its draft request for proposal with the commission within ninety days of the electric utility’s filing of its final least cost plan.”

14 Moreover, the fact that the Commission may be engaged in any rulemaking proceeding is not a justification for lack of compliance with the

² In fact, timely requests for exceptions have been made and granted by the Commission on several occasions. See, e.g., Docket No. UE-031353 regarding Puget Sound Energy, Inc. and Docket No. UE-021052 regarding Avista Utilities.

existing rules that are under review. Rules are revised for a number of reasons. The existence of an open rulemaking implies that a rule may be improvable. But, it does not follow that current rules are unclear or unworkable to a level that nullifies their usefulness, or, as PacifiCorp suggests, their very existence.

D. The Penalty Does Not Unfairly Punish PacifiCorp.

15 PacifiCorp claims that, "...fairness suggests that PacifiCorp not be punished for not filing an RFP, a practice that has been widely followed by utilities and apparently condoned by the Commission in the fourteen years since the regulations were implemented." (Application at 4; See also Application at 8-9.) No evidence, however, is provided to support that assertion.

16 Moreover, rules embody an agency's policies. Staff is aware of no Commission policy to *not* enforce its rules. PacifiCorp has provided no justification why the Commission should now adopt a policy to not enforce its rules.

17 The Company claims that retroactive penalty assessment is not fair. (Application at 9.) A penalty, however, is always a retroactive assessment for lack of compliance. There is nothing unfair about that. Rather, it would be unfair to penalize companies prospectively for actions they have not yet taken.

18 Significant changes have taken place in energy markets over the past three years that have highlighted the importance of resource planning and related rules. The Commission should evaluate PacifiCorp's rule violation and

mitigation request in light of current circumstances. Staff believes that that evaluation supports enforcement of the filing requirements of WAC 480-107-060(2)(a). The penalty assessment against PacifiCorp in this docket is the only tool the Commission possesses to enforce that rule.

III. CONCLUSION

19 The discussion presented above shows that: (i) there is no factual dispute that PacifiCorp violated the timing requirement of WAC 480-107-060(2)(a); (ii) filing a draft RFP is required whether or not the utility needs additional resources; (iii) open rulemakings do not eliminate the need to comply with existing rules; and (iv) enforcement of the timing requirement is consistent with regulatory fairness. Consequently, Staff recommends that the Commission deny PacifiCorp's Application for Mitigation of Penalty.

DATED this 9th day of January, 2004.

Respectfully submitted,

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