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STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

THE WASHINGTON STATE
ATTORNEY GENERAL'S OFFICE,
PUBLIC COUCIL SECTION,

Petitioner,

v.

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Respondent.

NO. 03 2 01614 1
PETITION FOR JUDICIAL REVIEW
OF FINAL AGENCY ORDER

COMES NOW the petitioner, the Public Counsel Section of the Washington State Attorney General's Office ("Public Counsel"), by and through Assistant Attorney General, Robert W. Cromwell, Jr., and petitions pursuant to Chapter 34.05 RCW for judicial review of agency action by the respondent, the Washington Utilities and Transportation Commission ("Commission").

In support of this petition, the petitioner respectfully shows pursuant to RCW 34.05.546 as follows:

- (1) NAME AND MAILING ADDRESS OF PETITIONER:
CHRISTINE O. GREGOIRE, Attorney General
Simon J. ffitich AAG, Section Chief
Public Counsel Section
Washington State Office of the Attorney General
900 4th Avenue, Suite 2000
Seattle, WA 98164-1012

COPY

1 (2) NAME AND MAILING ADDRESS OF PETITIONER'S ATTORNEYS:

2 Robert W. Cromwell, Jr. AAG
3 Public Counsel Section
4 Washington State Attorney General's Office
5 900 4th Avenue, Suite 2000
6 Seattle, WA 98164-1012

7 (3) NAME AND MAILING ADDRESS OF AGENCY WHOSE ACTION IS AT ISSUE:

8 Washington Utilities and Transportation Commission
9 1300 S. Evergreen Park Dr. SW
10 P.O. Box 47250
11 Olympia, WA 98504-7250

12 (4) IDENTIFICATION OF THE AGENCY ACTION AT ISSUE:

13 Issuance of the "Sixth Supplemental Order; Denying Petition for Accounting Order; Rejecting
14 Tariff Filing; Authorizing Subsequent Filing" in Commission Docket No. UE-020417 which is
15 also identified as the "Eighth Supplemental Order; Amending Third Supplemental Order" in
16 Commission Docket No. UE-991832 ("Sixth/Eighth Order"). Service of the Sixth/Eighth
17 Order on Public Counsel was made on July 15, 2003. A copy of this order is attached to this
18 petition.

19 (5) IDENTIFICATION OF PARTIES IN ADJUDICATED PROCEEDINGS THAT LEAD TO AGENCY
20 ACTION:

21 Pacificorp d/b/a Pacific Power & Light Company

22 Washington Utilities and Transportation Commission Staff ("Staff")

23 The Public Counsel Section of the Washington State Attorney General's Office

24 The Industrial Customers of Northwest Utilities ("ICNU")

25 Also party to the 1999 rate case, Docket No. UE-991832 in which the Eighth
26 Supplemental Order referenced above was issued, but not parties to Docket No. UE-020417
were:

The Northwest Energy Coalition ("NVEC")

The Energy Project

1 **(6) JURISDICTION AND VENUE**

2 (a) This is an action seeking judicial review of a final order of the Commission. This
3 court has jurisdiction pursuant to Part V of the Washington Administrative Procedure Act,
4 RCW 34.05.510 *et seq.*

5 (b) Venue is appropriate in Thurston County pursuant to RCW 34.05.514(1)(a).

6 **(7) FACTS THAT DEMONSTRATE THAT THE PETITIONER IS ENTITLED TO OBTAIN JUDICIAL**
7 **REVIEW:**

8 (a) Petitioner Public Counsel is a section of the Washington State Attorney General's
9 Office which represents the interests of the people of the state of Washington (in this case
10 electricity customers of Pacificorp) before the Commission. RCW 80.01.100 and 80.04.510.
11 Public Counsel participated in both Pacificorp's 1999 general rate case (Docket No. UE-
12 991832) and Pacificorp's recent petition for deferred accounting (Docket No. UE-020417)
13 which resulted in the Sixth/Eighth Order.

14 (b) Respondent Commission is an administrative agency of the state of Washington,
15 established under RCW 80.01.010. Among the Commission's duties is the duty to regulate in
16 the public interest, as provided by the public service laws, the rates, services, facilities and
17 practices of all persons engaged within the state of Washington in the business of supplying
18 any utility service or commodity to the public for compensation, including, but not limited to,
19 electric power companies. RCW 80.01.040.

20 (c) Pacificorp is a wholly owned subsidiary of United Kingdom-based Scottish Power,
21 with its principal place of business in the United States in Portland, Oregon. Pacificorp does
22 business in Washington as Pacific Power & Light Company ("PP&L") and is an electric
23 company subject to regulation by the Commission. PP&L provides service to approximately
24 120,000 customers in Washington including the residents of Yakima and Walla Walla.

25 (d) On November 24, 1999, Pacificorp filed tariff revisions with the Commission
26 seeking general rate increases of \$25.8 million per year. Testimony was received by the

1 Commission and evidentiary hearings were held on April 25 and 26, and June 5, 6, and 7,
2 2000. In early June, the parties were successful in reaching a negotiated settlement. On June
3 20, 2000, the parties settled the rate case by presenting the Commission with a final stipulation
4 which resolved all matters in dispute before the Commission. The Settlement established a
5 five year "rate plan" for Pacificorp. Pursuant to the terms of the settlement, Pacificorp would
6 receive a rate increase in each of the first three years of the rate plan, but there would be no
7 increases in the fourth and fifth years (January 1, 2001-3%, 2002-3%, 2003-1%, 2004-0%, &
8 2005-0%). Under the terms of the settlement, Pacificorp agreed that it would not file a general
9 rate case during the five year period of the rate plan.

10 (e) The Settlement made express provision for the eventuality that Pacificorp's
11 circumstances could change in some respects during the term of the rate plan: Section 11
12 ("Rate Plan Reopeners") permitted the company to make a general rate case filing during the
13 rate plan if (1) it could show sufficient financial hardship to warrant interim rate relief under
14 the Commission's standards set forth in *WUTC v. Pacific Northwest Bell Telephone Company*,
15 Cause No. U-72-30, or (2) if industry or corporate restructuring occurred which changed
16 Pacificorp's structure. In addition, Section 9 ("Regulatory Actions During The Rate Plan")
17 expressly exempted from the rate case moratorium company rate changes based on
18 governmental or legislative action, systems benefit charges, low-income assistance programs,
19 changes in transmission costs, revenue neutral filings to implement rate design changes
20 between customer classes to accommodate market conditions, and a variety of ongoing
21 regulatory activities including tax and surcharge pass-throughs. Pacificorp was also permitted
22 to file petitions for accounting orders, as appropriate, for treatment of revenues, investments, or
23 expenditures during the rate plan period.

24 (f) The Commission held an evidentiary hearing to review the settlement and examined
25 witnesses from the settling parties. The Commission then entered its order approving and
26 instituting the settlement. *Third Supplemental Order Approving and Adopting Settlement*

1 *Agreements; Rejecting Tariff Sheets; Authorizing and Requiring Compliance Filing.* (August
2 9, 2000)(“Third Supplemental Order” or “2000 Settlement Order”).

3 (g) On April 5, 2002, Pacificorp filed with the Commission a request for an
4 accounting order that would allow it to establish a deferred cost account to track alleged excess
5 net power costs from June 1, 2002 through May 31, 2003 or "some form of limited rate relief
6 to address extraordinary power costs." As part of its case-in-chief, Pacificorp filed a proposal
7 to recover power costs alleged to be excessive. Pacificorp claimed these costs were in excess
8 of baseline costs and arose from a variety of sources including the energy crisis. Pacificorp
9 claimed its Petition was consistent with Section 9 of the settlement which allowed for
10 accounting orders.

11 (h) On September 27, 2002, the Commission issued its Third Supplemental Order
12 Regarding Scope of the Proceeding and Threshold Legal Issues. The Commission ordered
13 that:

14 (1) The scope of this proceeding is limited to consideration of whether
15 Pacificorp should be authorized to establish and maintain a deferred account for
16 asserted extraordinary power costs so that it will not loose [sic] the opportunity
17 to seek recovery of such costs through a subsequent filing for rate recovery.

18 (2) Any authority granted to Pacificorp in this proceeding will be for
19 accounting purposes only and will not alter or amend Pacificorp's rates.

20 *Third Supplemental Order*, ¶¶ 28, 29. In the order, the Commission reiterated its earlier ruling
21 that it was not appropriate to reopen the previous rate case settlement docket to consider
22 whether the petition for deferral for excess power costs was consistent with the letter and intent
23 of the rate plan or reflected extraordinary circumstances which warranted revisiting the plan.
24 *Id.*, ¶19 n.1. The Commission also ruled that no additional notice was required to ratepayers
25 regarding the petition for deferral, since “[m]erely granting the Company’s Petition for an
26 accounting order has no impact on current rates or current ratepayers.” *Id.* ¶ 26. Subsequent to
the Third Supplemental Order, the Commission did not provide notice to UE-991832 parties

1 (i.e. parties to the 2000 settlement) that it would review the issue of whether to reopen the rate
2 settlement docket to provide for a new general rate case during the term of the rate plan.

3 (i) Prefiled responsive testimony was filed on February 5, 2003, by Staff and ICNU,
4 evidentiary hearings were held by the Commission on March 20, 21, and 24, 2003, and post-
5 hearing briefs were filed on April 11, 2003. The Commission issued its final order
6 (Sixth/Eighth Order) on July 15, 2003, concluding that Pacificorp had failed to adequately
7 support its Petition to recover excess power costs through a deferral account, or to establish a
8 need for interim rate relief. Subsequent to the issuance of the Third Supplemental Order
9 limiting the scope of the proceeding to consideration of deferred accounting, the Commission
10 did not provide notice to ratepayers or parties that it was considering abrogating the settlement
11 to allow a general rate case filing in 2003.

12 (j) Notwithstanding its conclusion that Pacificorp had failed to support its Petition, the
13 Commission nonetheless ordered an amendment of the 2000 Settlement Order, rescinding the
14 bar to a Pacificorp rate case filing to increase rates in 2004 or 2005, and authorizing the
15 company to file a general rate case by year end 2003, two years earlier than the settlement
16 would have permitted. The Commission's amendment of the settlement agreement order has
17 the effect of rescinding the final two years of the agreed rate plan which had provided a two
18 year "rate freeze" to Pacificorp customers. *Sixth/Eighth Order ¶¶ 22,23, 55-57.*

19 **(8) PETITIONER'S REASONS FOR BELIEVING THAT RELIEF SHOULD BE GRANTED:**

20 Public Counsel and the Pacificorp ratepayers it represents are and will continue to be
21 adversely affected by the Commission's Sixth Supplemental Order in UE-020417 / Eighth
22 Supplemental Order in Docket No. UE-991832.

23 The Sixth/Eighth Order violates the procedural and substantive requirements of the
24 Washington Administrative Procedure Act, RCW 34.05.570(3), in the following respects:
25
26

1 **Arguments:**

2 a. The Commission's decision that Pacificorp should be authorized to file a
3 general rate case is arbitrary and capricious and is therefore in violation of RCW
4 34.05.570(3)(i). The challenged order was arbitrary and capricious in the following respects:

5 The Sixth/Eighth Order rescinded the settlement provisions benefiting Pacificorp
6 customers (the 2004-2005 "rate freeze") after the provisions benefiting Pacificorp (the first
7 three years of rate increases) had already taken effect, depriving Pacificorp customers of the
8 benefit of the settlement, to their potential financial detriment.

9 The Sixth/Eighth Order disregarded the provisions of the 2000 Settlement Order,
10 approved by the Commission, which provided the opportunity for relief for Pacificorp from
11 the rate plan in the event the company experienced a serious change in financial circumstances.
12 Having rejected Pacificorp's request for accounting for alleged excess power costs, and finding
13 that it was not entitled to interim rate relief, the Commission substituted a new basis for
14 "reopening" the settlement without adequate justification, substantial evidence, or adequate
15 notice to affected rate case settlement parties.

16 The Sixth/Eighth Order did not provide Pacificorp's ratepayers and parties to the
17 Settlement with notice and an opportunity to be heard when it determined that it would
18 exercise its authority under RCW 80.04.210 to amend and rescind portions of the 2000
19 Settlement Order. This constitutes a violation of Pacificorp's ratepayers' right to due process.

20 The Sixth/Eighth Order failed to adequately articulate and apply a defined standard for
21 the exercise of the Commission's authority under RCW 80.04.210 to revise a prior order,
22 specifically a prior order approving and adopting a settlement agreement.

23 The Sixth/Eighth Order does not take into account that the settlement agreement by its
24 terms allocated the risk of earning a reasonable return during the five year rate plan settlement
25 to Pacificorp, subject to the exceptions noted in Sections 9 and 11 regarding permitted rate
26 changes. *Sixth/Eighth Order ¶ 41.*

1 **b. The Commission's finding that Pacificorp should be authorized to file a general**
2 **rate case was not supported by substantial evidence and is therefore in violation of RCW**
3 **34.05.570(3)(e).**

4 The failure of the Commission to clearly articulate facts constituting substantial
5 evidence in support of its decision renders the abrogation of the settlement agreement a
6 violation of RCW 34.05.570(3)(e). The Commission failed to identify and articulate
7 substantial evidence supporting its decision to amend the Settlement. *Sixth/Eighth Order*
8 ¶¶34-43 and 49.

9 **(9) PETITIONER'S REQUEST FOR RELIEF:**

10 Having stated the basis for its petition for review, Public Counsel respectfully requests
11 relief as follows:

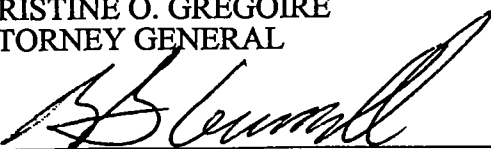
12 1. For an entry of judgment pursuant to RCW 34.05.570 and RCW 34.05.574
13 vacating Section C. of the Sixth/Eighth Order, Finding of Fact Number Five, and Conclusion
14 of Law Number Four and directing that the 2000 Settlement Order be reinstated in full force
15 and effect;

16 2. In the alternative, for an order vacating the above-reference provisions of the
17 Sixth/Eighth Order and remanding the matter to the Commission to provide ratepayers and
18 parties an opportunity to be heard on the issues presented and to develop a standard to apply
19 when considering an exercise of its authority under RCW 80.04.210 to modify and review a
20 prior order of the Commission when that prior order approved a settlement; and

21 3. For such other relief as the Court deems just and appropriate.

22 RESPECTFULLY SUBMITTED this 14th day of August, 2003.

23 CHRISTINE O. GREGOIRE
24 ATTORNEY GENERAL

25 By: 
26 ROBERT W. CROMWELL, JR.
 WSBA #24142
 Assistant Attorney General

PROOF OF SERVICE

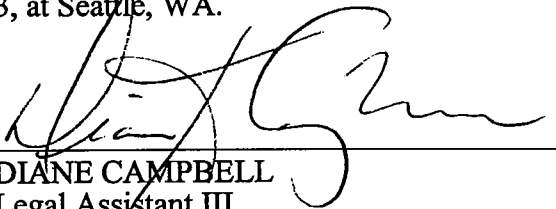
I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid via Consolidated Mail Service
- ABC/Legal Messenger
- State Campus Delivery
- Copies to Washington Utilities and Transportation Commission and Attorney

General's Office personally served by Robert W. Cromwell, Jr.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 14th day of August, 2003, at Seattle, WA.



DIANE CAMPBELL
Legal Assistant III