BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PACIFICORP, d/b/a PACIFIC POWER & LIGHT COMPANY, Respondent.	Docket No. UE-050684
In the Matter of the Petition of PACIFICORP, d/b/a PACIFIC POWER & LIGHT COMPANY For an Order Approving Deferral of Costs Related to Declining Hydro Generation	Docket No. UE-050412

PUBLIC COUNSEL'S ANSWER TO

PACIFICORP'S PETITION FOR RECONSIDERATION

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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) deny PacifiCorp's Petition for Reconsideration of Order No. 4 in this docket. The Commission correctly found that PacifiCorp failed to carry its statutory burden under RCW 80.04.130(2) that the proposed rate increase was fair, just and reasonable. The Commission also correctly found that PacifiCorp's proposed cost allocation method violated RCW 80.04.250 because it included costs for utility plant not "used and useful" for Washington ratepayers.

2. Additionally, the Company's argument that it should be allowed to increase its revenues by various estimated amounts based on those adjustments purportedly approved by the Commission and its new return on equity is without merit. Finally, the Company's assertion that its revenue recovery is inadequate under the *Hope* and *Bluefield* tests is unpersuasive. The Commission appropriately looked at the "end result" of current rates and determined that the Company's existing rates were just and reasonable.

II. ARGUMENT

A. Standard of Review.

3. WAC 480-07-850(2) provides that a petitioner must show as a basis for reconsideration that the challenged order is either "erroneous or incomplete." This means that the petitioner must show that the Commission has made a mistake of fact or law, or that there is some material omission in the order. PacifiCorp has made no such showing here.

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B. The Commission's Interpretation Of The "Used And Useful" Standard Is Not Erroneous As A Matter Of Law.

4. RCW 80.04.250 provides, in pertinent part, that to be considered for ratemaking purposes utility company property must be "used and useful for service in this state." PacifiCorp's Petition argues that the Commission's interpretation of this statutory "used and useful" standard is erroneous. Petition, ¶ 4. Public Counsel disagrees.

5. PacifiCorp notes correctly the requirement in RCW 80.04.010 that the term "service" in Title 80 must be read "in its broadest and most inclusive sense." This does not mean, however, that the term must be read so broadly as to be devoid of any meaning or content. In addition of course, the term must be read in the context of the other language in the statute to give full effect to all the provisions of the law. *Quadrant Homes v. Central Puget Sound Growth Management Hearings Board*, 154 Wn.2d 224, 238-239 (2005**)**. It is significant, therefore, that the term "service" appears as part of the phrase "service in this state." Any interpretation of the statute must include a focus on the location of the use of the property. It must be both used "in this state" and useful "in this state." The plain meaning of this language supports the Commission's focus on benefits in Washington. The Company does not ever demonstrate how the requirement of "tangible and quantifiable benefit" is inconsistent with these statutory requirements.

6. PacifiCorp criticizes the "tangible and quantifiable" formulation as an improperly narrow reading of the law, without acknowledging the Commission's full articulation of the statutory standard. The Commission stated:

> We interpret the phrase "used and useful for service in this state" to mean benefits to ratepayers in Washington either directly or indirectly (e.g. flow of power from a resource to customers) and/or indirectly (e.g. reduction of costs to Washington customers through exchange contracts or other tangible or intangible benefits).

Order No. 04, ¶ 50.

This is a broad and flexible reading of the statutory standard, as is reflected in the further discussion in ¶ 51, which observes that even resources that "do not provide direct service, or only have occasional or potential value to Washington ratepayers….may still be compensable under

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our statutory scheme [.]" The Commission's reading is also consistent with the recognized principle that the " 'useful' aspect of the phrase ["used and useful"] …contains an element of whether ratepayers will benefit from the investment." Goodman, *The Process of Ratemaking*, p. 800. Goodman's treatise also supports the concept applied by the Commission that the value of the property to be included in rate base is tied to the level of benefit provided. *Id.* pp. 800-801.[1]

7. PacifiCorp cites Washington appellate authority on the meaning of the statute, but is not able to explain how the Commission's enunciation and application of the standard is inconsistent with those decisions. Instead, PacifiCorp sets up a "straw man" argument, citing *State ex rel. Pacific Tel. & Tel. Co. v. Department of Public Service*, 19 Wn.2d 200 (1943), for the proposition that the statute does not allow exclusion of property from rate base on the ground that it does not "exclusively" serve Washington. Petition, ¶ 6. The Commission's Order No. 04 never adopts, applies, or even suggests an "exclusivity" requirement. On the contrary, it makes clear that allocation may include allocation of costs of joint facilities or plant located in other states if the "used and useful" standard is met. Order No. 04, ¶¶ 57-58.

C. PacifiCorp Misinterprets Commission Precedent.

8. The Petition misinterprets Commission precedent on the interstate allocation issue. For example, PacifiCorp argues that the holding in *Washington Utilities and Transportation Commission v. Pacific Power & Light Co.*, Cause No. U-83-57, Second Supplemental Order (1984), allowing recovery of costs for Colstrip 3 is inconsistent with the challenged order here. Petition, ¶ 8. The Company, however, points to nothing in that decision that contradicts the analysis in Order No. 04. Indeed, the Second Supplemental Order in that case found that Colstrip 3 was "used to meet the company's power needs" *Id*, p. 9, and held that it was "used and useful to Washington ratepayers." *Id*., Conclusion of Law No. 2, p. 12. The "used and useful"

[1] In applying the used and useful standard to a situation of excess capacity, for example, Goodman observes that there must be proof, not only of the original book investment, but "of the reasonableness of that cost, its propriety or necessity." *Id.* [citations omitted]. *See also*, Goodman, p. 804 ("Original use may have so far declined that value of service to the user may have been impaired at the same time that property is no longer fully used and useful.")

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issue in the case related to excess capacity, not to provision of service to Washington. *Id.*, p. 8. PacifiCorp's Petition states that the Colstrip holding in U-83-57 was made "in the absence of a showing the plant output could actually be delivered to Washington." Petition, ¶ 8. In fact, the record in the case showed the opposite. In ruling on a petition for reconsideration, the Commission was asked to revisit whether the "transmission lines running west from the Colstrip plant" could be included in rate base. *Id.* Fourth Supplemental Order Granting in Part Petition for Reconsideration, p. 2. The Commission held:

> The Commission has concluded in the Second Supplemental Order that the Colstrip 3 plant is used and useful. Treatment for ratemaking purposes, however, took into account the 40-year contract with Black Hills [Power and Light Company of South Dakota] which effectively removed the facility from the position of providing power for Washington ratepayers. Based on this treatment, *the transmission plant at issue will not be used and useful for transmission of power to Washington ratepayers until Colstrip 4 comes on line*[.]

Id., (emphasis added).

Thus there is nothing in the Colstrip 3 orders that supports PacifiCorp's argument. On the contrary, the Commission adjusted ratemaking treatment for the plant, and denied recovery for transmission property held not used and useful until it was in the "position of providing power for Washington ratepayers," just as this Commission did in Order No. 04.

9. PacifiCorp also discusses the Company's 1986 rate order in the last litigated rate case before the current docket. Petition, ¶ 9. *WUTC v. PacifiCorp*, UE-032065, Order No. 06. In doing so, the Company is repeating an argument the Commission already rejected in Order No. 04. As the Commission said:

> The Company's reliance on this citation is misplaced and overlooks the Commission's fundamental premise—facilities must serve and be found to provide quantifiable benefits before costs can be allocated to ratepayers. Recognizing the need for allocation is not the same as determining *how* the allocation should be made. Nothing in our prior orders suggests we have accepted an allocation method that does not meet the statutory used and useful "in this state" standard. As made clear above, the Company has not demonstrated in this proceeding that all of the resources used in its current six-state system are, in fact, "joint" facilities, used and useful for service in this state. Order No. 04, ¶ 58.

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10. A further problem with PacifiCorp's reliance on these orders is that they are factually distinguishable because they pre-date the merger with Utah Power. *In the Matter of the Application of PacifiCorp (Maine) to Merge with PC/UP&L Merging Corp. (PacifiCorp Oregon) and to Issue Such Securities As May Be Necessary to Effect A Merger With Utah Power & Light Company*, Docket U-87-1388-AT, Second Supplemental Order (1988). At the time of the Utah/PacifiCorp merger, as has been extensively discussed on this record, the Washington Commission explicitly addressed the new allocation problems raised by the merger, issues regarding fair allocation of the Eastern and Western divisions and control areas that have continued to be the subject of debate up to the present and lie at the heart of the holding in this case. Public Counsel Initial Brief, ¶¶ 66-74. The Company cannot reasonably suggest that the 1983 and 1986 decisions definitively resolve the new allocation questions resulting from the merger when those issues were not before the Commission in these earlier dockets.[2]

D. The Company Mischaracterizes Order No. 04.

11. PacifiCorp attacks the Commission's reference to the Oregon decision on the merger as an improper form of support for its order. Petition, ¶ 12 *et seq.* The Commission's order, however, cites not only the Oregon order, but its own Washington merger order. Order No. 04, ¶ 56. Furthermore, the Commission observes that in the record in this proceeding "the Company admits in the Revised Protocol that it bears the risk of inconsistent allocation methods adopted by the states." *Id*, (citing Exhibit No. 362 at 15:6-7). This is hardly "fragile" support.[3]

12. Here as in several other areas, the Petition characterizes its situation as one in which no allocation has been approved, implying that PacifiCorp is prevented from any recovery of costs. *See, e.g.*, Petition, ¶ 14. In fact, of course, PacifiCorp has received a recent rate increase, based

[2] PacifiCorp cites the 1983 and 1986 order as indicating that that "remoteness" of a plant location was never an issue. Petition, ¶ 9. This is a red herring. The Commission in this case has not held plant not to be used and useful in Washington merely on the basis of a simplistic "remoteness" theory. While the location of plant outside of Washington is one factor that may trigger a used and useful analysis, the ultimate test is the provision of benefit to customers. Order No. 04, ¶ 51.

[3] It is troubling also that the Company seems to take the position that a public commitment to a governmental body on a matter of general applicability (full system-wide recovery) is inoperative outside the state where it was made and that such a commitment fades with the passage of time.

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on a stipulation that bases recovery on what is effectively an interim allocation methodology. The issue here is whether the Company has proposed a reasonable alternative allocation as a permanent replacement for the stipulated temporary allocation. The Commission found that it has not, but that is not the same as saying the Company may not recovery *any* revenue because it has no allocation methodology. The Company is simply left at status quo. It has a temporary methodology and is recovering its costs and earning a return on rate base under the terms of its last rate order (under which it received a 7.5 percent increase just over eighteen months ago). *WUTC v. PacifiCorp*, UE-032065, Order Nos. 06, 07.

13. PacifiCorp asserts the curious notion that the Commission "radically departs" from its own precedents in denying rate relief here. Petition, ¶ 29 *et seq*. This rewrites the Company's recent regulatory history. In Docket No. UE-032065, the Commission reviewed the history of its growing concern with the need to resolve the inter-jurisdictional allocation issue. Docket No. UE-032065, Order No. 06, ¶¶ 14-18.

14. In the Commission's most recent PacifiCorp rate case order, since resolution of the allocation issue was still not resolved by the Staff/PacifiCorp stipulation, the Commission provided clear and explicit direction to PacifiCorp to engage in discussions with stakeholders and to file by October 2005, "either in a general rate proceeding, or in an independent proceeding, a proposal to resolve inter-jurisdictional cost allocation in Washington." Docket No. UE -032065, Order 06, ¶ 95. The rate increase approved in that order was expressly conditioned on that directive. *Id.* This history reflects the Commission's intention to bring the allocation issue to final resolution.

15. The UE-032065 order made clear that PacifiCorp could not simply file for rate relief in its next case by relying on the stipulated temporary methodology. The Petition for Reconsideration, however, asks the Commission to do exactly that --- allow new rates on the basis of the temporary methodology. PacifiCorp has created the situation in which it finds itself. The Company presented a Revised Protocol methodology with its rate case which it knew had

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not achieved any consensus of approval among Washington parties in the collaborative process. Not surprisingly, this flawed methodology was vigorously opposed by Staff, Public Counsel, and ICNU in the litigated case, and ultimately rejected by the Commission as improperly assigning costs to Washington. Having failed to persuade the Commission to adopt Revised Protocol, PacifiCorp's argument in the petition is that the Commission is now *obligated* to use the existing non-precedential temporary allocation methodology as a basis for new increased rates. The Commission made very clear in rejecting the Staff and ICNU alternative proposals in this case that it sees "no justifiable reason to replace one temporary fix with another" as a basis for new rates. Order No. 04, ¶ 61. PacifiCorp is proposing another "temporary fix."

E. The Commission's Order Does Not Violate Constitutional Limitations.

1. PacifiCorp has no constitutional right to a profit.

16. To prevail on a constitutional challenge to a Commission order establishing rates, PacifiCorp must show deep financial hardship, *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-08 (1989), or inability operate successfully under the rate. *FPC v. Hope Natural Gas*, 320 U.S. 591, 605 (1944). For a rate to held confiscatory, and thus below minimum constitutional levels, it must for all practical purposes "destroy the value of [the utility] property." *Duquesne*, at p. 307. PacifiCorp has not attempted to make any such showing on its Petition for Reconsideration nor could it do so on this record.

17. Moreover, PacifiCorp is not guaranteed any particular level of revenue.

> Unless there are statutory provisions in place that authorize a subsidy to the regulated company, regulation provides the regulated company with an opportunity to earn a fair return but does not guaranty the company will earn it. The agency gives no guaranty that the company will realize the full amount of revenues requested by or allowed in the rate filing. The filing merely represents the regulated company with an opportunity to earn the return implicit in the filed rate.
>
> The foregoing principle is also a principle of constitutional law. "A regulated [company] has no constitutional right to a profit." Regulation does not insure that the regulated business will produce net revenues.

Goodman, *The Process of Ratemaking*, pp. 31-32 (1998).

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2. PacifiCorp's argument that the order violates the principles of *Hope* and *Bluefield* is without merit and shifts the burden of proof to the Commission.

18. First, PacifiCorp argues that the Commission was required at least to consider whether existing rates were just and reasonable on any basis, separate and apart from the interstate allocation issue. Petition, ¶ 16. PacifiCorp's argument appears to be, in essence, that the Commission, having rejected the PacifiCorp case in chief, its evidence and its primary theory of the case, was nonetheless required to craft its own alternative basis or theory for granting rate relief to the Company. This is a startling suggestion, particularly because PacifiCorp did not present an alternative to the Commission.

19. Among its other flaws, if accepted, this rule would render RCW 80.04.130(2), the burden of proof statute, meaningless. It would mean that even if a Company failed to carry its burden on the case it chose to present to the Commission, that the burden would then shift to the Commission to review the record to see if there were some other basis for awarding relief. Not only is this contrary to the burden of proof statute, it raises due process issues. If the Commission were to approve a rate increase on the basis of an alternative theory never presented in testimony and exhibits or briefed by the Company, intervenors would have no opportunity to rebut this alternative case in the evidentiary phase of the case.

20. The Commission, after carefully reviewing all the evidence in the case, concluded that the proposed tariffs were not shown to be fair, just and reasonable, and that existing rates were just and reasonable. Order No. 04, ¶ 65. Existing rates, once set, are presumed to be fair just and reasonable until changed by Commission order or allowed tariff change. RCW 80.04.150. Again, the Company has the burden of proof to establish that existing rates are not just and reasonable and must be changed. There is no contrary presumption that requires a Commission on its own, absent proof by the Company, to reexamine its own earlier rate setting decision as

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suspect.[4] PacifiCorp's argument would have the Commission involuntarily take on that burden whenever it holds against a regulated utility in a case.

21. PacifiCorp also goes on to argue that even if the used and useful test is not met, that the Commission must apply a supposed constitutional "end result" test. This boils down to an argument that the Commission can disregard Washington's statutory ratemaking requirements, and award rate relief, even if those requirements are not met. PacifiCorp has cited no court decision which holds that a state regulator can allow recovery for costs for property that is not "used and useful" in a state so long as an overall constitutional end result test is met.

3. Revenue requirement issues.

22. The Petition presents the Company's restatements of other parties' revenue requirement recommendations in an attempt to show that "some level of rate increase is warranted based on the evidence presented." Petition, ¶¶ 22-23. There are several flaws with this argument.

23. First, the data for Public Counsel is mischaracterized. As Public Counsel made clear in its brief, it did not purport to put on a comprehensive revenue requirement. Public Counsel witnesses addressed *inter alia,* cost of capital, capital structure, rate spread and rate design, decoupling, interjurisdictional cost allocation, and only selected accounting adjustments. Public Counsel, however, did not dispute non-overlapping recommendations by Staff and ICNU. Public Counsel Initial Brief, p. 18. The summary of Public Counsel's position in Table 1 incorrectly compares Public Counsel's recommendations on an apples to apples basis with the full revenue requirement revenue recommendations of Staff and ICNU. This is misleading. For example, even if only Staff's non-overlapping "estimated other O&M adjustment" were added to Public Counsel's total, the result would be a $1 million rate reduction. If other larger adjustments from Staff or ICNU were incorporated in Public Counsel's totals, of course, the

[4] It may of course choose to do so, by bringing an own motion complaint against the existing rates, RCW 80.04.110(1), but that did not occur here.

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indicated rate reduction would be even larger. Public Counsel's revenue requirement testimony does not support the petition for reconsideration.

24. Secondly, PacifiCorp's new revenue analysis is based on a faulty premise. PacifiCorp treats the revenue requirement issues as definitively resolved, except for allocation, and proceeds then to make its calculations. In fact, however, the Commission made clear that "[g]iven our rejection of the Revised Protocol allocation methodology, *we cannot resolve these contested issues* [i.e. contested adjustments to net operating income]." Order No. 04 ¶ 111 (emphasis added). The Commission addressed the issues "in the interest of providing *guidance for future* PacifiCorp rate cases." *Id.* (emphasis added). Similarly, on rate base issues, the Commission held that "where contested adjustments to rate base are supported solely by the Revised Protocol or matters of calculation, *we do not address them in this order. However, in the interests of providing guidance for the future,* we address those contested issues involving matters of policy, accounting rules, or theory." *Id.* ¶ 174 (footnote listing adjustments omitted, emphasis added). Given the Commission's clear and explicit statement that the disputed issues were not being resolved, given the number and significance of the adjustments not addressed and in dispute, and given the Order's statements that the guidance was of a policy nature for future rate cases, it is a misreading of the Order to find in it a basis for awarding rates. Even once allocation is resolved, there remain a number of important disputed issues that would need to be resolved if a new revenue requirement were to be proposed by the Company.

25. In summary, there is evidence in the record that PacifiCorp's rates should be reduced. PacifiCorp's estimates in Table 2 of amounts it is entitled to are merely speculation and based on a misreading of the Order. The Commission's conclusion that existing rates are just and reasonable is supported by the record, which, *inter alia*, includes full revenue requirement evidentiary showings by Staff and ICNU, bolstered by Public Counsel's testimony, that PacifiCorp is actually over-earning.

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F. The Order Is Supported By Evidence In the Record.

26. PacifiCorp argues that the Commission should have given more weight to the Company's evidence on the issue of interjurisdictional allocation, citing a number of the Company's exhibits that support its recommendations. Petition ¶ 35 *et seq*. The Petition does not discuss the extensive countervailing evidence presented to the Commission by Public Counsel, the Commission Staff, and ICNU. Public Counsel's evidence on allocation, for example, is discussed and summarized in its Initial Brief, ¶¶ 71-86, along with other evidence in the case. Public Counsel offered evidence that: "rolled in" forms of allocation such as Revised Protocol create advantages for the Eastern Control area; Revised Protocol does not meet the "least cost planning" requirement of the merger; Revised Protocol contains critical flaws regarding cost causation, hydro endowment, new resources, fixed costs, taxes, fuel costs, non-firm purchases, qualified facilities, and off-system sales; and Revised Protocol does not properly reflect differing regional growth patterns. *Id.*

27. The WUTC is not required to agree with the Company's evidence or to afford it any particular level of weight. It reviews all the evidence presented on the record and makes findings of fact. To withstand appellate review, there must be substantial evidence in the record to support the findings, that is, "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 116 Wn. App 48, 54, (2003)(citations omitted). Where there is conflicting evidence, the Commission has discretion to determine what weight to assign to the competing testimony and exhibits. *Western Ports Transportation, Inc, v. Dept. of Employment Security*, 110 Wn. App. 440, 449 (2002). A court will not disturb an agency's choice between conflicting scientific evidence of "equal dignity." *H.E.A.L. v. Central Puget Sound Growth Management Hearings Board*, 96 Wn. App. 522, 530-531 (1999). In this case, the Commission carefully reviewed and weighed extensive evidence presenting multiple perspectives on the

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allocation issues and made reasonable determinations based on that record. PacifiCorp's challenge to the Commission's findings has not been justified.

III. CONCLUSION

28. PacifiCorp has not established that Order No. 04 contains material errors of fact or law. It has not shown that the order raises constitutional questions about the adequacy of the Company's revenues to sustain its operations. It has not demonstrated that any finding of the Commission is unsupported by evidence in the record. For the foregoing reasons, Public Counsel respectfully requests that the PacifiCorp Petition for Reconsideration be denied.

DATED this 16th day of June, 2006.

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