BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PUBLIC COUNSEL AND THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES, Joint Complainants, v. PACIFICORP, d/b/a PACIFIC POWER & LIGHT CORP. Respondent.	Docket No. UE-110070 PACIFICORP'S MOTION TO DISMISS JOINT COMPLAINT

I. INTRODUCTION

1 Pursuant to WAC 480-07-380(1), Pacific Power & Light d/b/a PacifiCorp (PacifiCorp or the Company) moves the Washington Utilities and Transportation Commission (WUTC or the Commission) for an order dismissing with prejudice the Joint Complaint filed by the Public Counsel Section of the Washington Attorney General's Office (Public Counsel) and the Industrial Customers of Northwest Utilities (ICNU) (collectively, Complainants).

2 The Joint Complaint alleges that PacifiCorp violated certain statutes and Commission rules in connection with forecasting revenues from renewable energy credits (RECs) in PacifiCorp's 2009 general rate case, Docket UE-090205 (2009 GRC). Among these "violations" are complaints about PacifiCorp's calculation of its pro forma adjustment for REC revenues in the case, allegations that PacifiCorp failed to file testimony under oath and meet its burden of proof, and claims that PacifiCorp's discovery responses were deficient. These claims, which are

unsupported even on the face of the Joint Complaint, do not form the basis for independent causes of action against PacifiCorp.

3 ICNU and Public Counsel allege that, but for these violations, they would not have agreed to join in the Settlement Stipulation that resolved the 2009 GRC (Settlement). Under the Settlement, the parties agreed to a rate change to increase PacifiCorp's annual revenues from Washington customers by $13.5 million (or 5.3 percent) effective January 1, 2010. The Commission approved the Settlement without modification in Order 09, Docket UE-090205 (December 16, 2009) (2009 GRC Final Order).

4 Under the reparations and overcharge statutes, RCW 80.04.220 and 80.04.230, respectively, ICNU and Public Counsel seek a refund for REC revenues "covered" by the 2009 GRC Final Order and an ongoing balancing account. Alternatively, under RCW 80.04.210, which authorizes the Commission to "alter or amend any order or rule made, issued or promulgated by it" they seek to amend the 2009 GRC Final Order to reflect the actual level of 2010 REC revenues that PacifiCorp "knew or should have known" it would receive during 2010.

5 ICNU and Public Counsel have it wrong on all elements of their Joint Complaint. Most fundamentally, ICNU and Public Counsel rely on *AT&T Communications et al. v. Qwest Corporation*, Docket UT-051682, Initial Order (Feb. 10, 2006) (hereinafter, *AT&T I*) to establish that their central claims for reparations are timely under the six-month statute of limitations. ICNU and Public Counsel omit the fact that the Commission reversed *AT&T I* and, in so doing, established precedent demonstrating that the reparations claims in the Joint Complaint are time-barred. Similarly, while ICNU and Public Counsel invoke the overcharge statute, they make no

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allegation that PacifiCorp has charged rates in excess of those authorized in the 2009 GRC Final Order.

6 ICNU's and Public Counsel's alternative request for an order amending the 2009 GRC Final Order fails on at least three grounds: as an improper collateral attack on that order, an illegal request for retroactive ratemaking, and a proposal for single-issue ratemaking that contravenes Commission policy.

7 ICNU, Public Counsel, and other parties negotiated specific provisions in the Settlement to address uncertainties around the REC revenue level in the 2009 GRC. ICNU and Public Counsel first failed to avail themselves of these provisions and ignored the issue of REC revenues for months. They then filed this Joint Complaint under inapplicable Commission statutes and wrongly blamed PacifiCorp for their own lack of diligence. Even a threshold review of the Joint Complaint reveals its fundamental deficiencies. PacifiCorp respectfully requests that the Commission dismiss the Joint Complaint with prejudice.

II. BACKGROUND

8 PacifiCorp filed its 2009 GRC on February 9, 2009. The filing was based on an historic test period consisting of the twelve months ended June 30, 2008; the rate effective period was the twelve months ending December, 2010.[1] 2009 GRC, Exhibit No. RBD-1T 8:13-14. Mr. R. Bryce Dalley, the Company's Manager of Revenue Requirement, described the Company's restated and pro forma adjustments for REC revenues in his testimony. *See* 2009 GRC Exhibit No. RBD-1T 14; 2009 GRC Exhibit No. RBD-3 3.7. These adjustments resulted in forecast

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[1] The Joint Complaint incorrectly states that the test period for the 2009 GRC was "the 2008 calendar year." Joint Complaint at ¶ 7.

Washington-allocated REC revenues of $657,755, which reflects a REC sales price of $3.50 MWh. *See* 2009 GRC Exhibit No. RBD-3 3.7.

9 On February 24, 2009, ICNU sent PacifiCorp its second set of data requests, including ICNU Data Requests 2.1 and 2.2, which both related to REC revenues. ICNU Data Request 2.1 (ICNU 2.1) provided as follows: "With regard to Exhibit RBD-3, pages 3.7 and 3.7.1, please provide the actual green tag sales and revenues received by PacifiCorp since 2005. Please update this response as PacifiCorp executes additional sales throughout this proceeding." This request did not ask for executed sales contracts nor did it ask for the most current REC sales price. ICNU Data Request 2.2 (ICNU 2.2) provided: "With regard to Exhibit RBD-3, page 3.7, please provide all documents to support the pro forma sales price." This request sought only documents supporting the pro forma REC sales price included in Exhibit No. RBD-3, which was filed on February 9, 2009.

10 PacifiCorp responded to ICNU 2.1 and 2.2 on March 10, 2009. For ICNU 2.1, PacifiCorp provided ICNU with a spreadsheet listing and describing every contract pursuant to which PacifiCorp was either buying or selling RECs since January 1, 2005, as requested by ICNU 2.1. The spreadsheet was a working document utilized by the Company to track its REC transactions and included a forecast of PacifiCorp's projected REC sales through December 2009, for all non-contingent contracts. For purposes of this document, PacifiCorp treats contracts requiring a regulatory approval as contingent until it has received all necessary regulatory approvals.[2]

11 On March 19, 2009, the Company provided a "1st Revised Response to ICNU Data Request 2.2." In that response, the Company provided ICNU with the data on which the Company relied to

[2] *See* Affidavit of Gregory N. Duvall. This affidavit is attached to provide additional background and context on the issues raised in the Joint Complaint. But the facts necessary for resolution of this motion are either admitted in the

formulate the pro forma REC revenue price presented in its direct case for a rate increase. This data included the REC market broker quotes for the time period of March 2006 through September 2007.

12 Neither ICNU nor Public Counsel sought clarification of the Company's responses to ICNU 2.1 or 2.2, asked for an explanation of the time period analyzed, alleged at that time that the Company's responses were inaccurate or incomplete, or sought follow-up data requests on REC revenues.

13 After PacifiCorp responded to ICNU 2.1 and 2.2, it entered into two new REC sales contracts with San Diego Gas & Electric (SDG&E) and Southern California Edison (SCE) (California Contracts). These contracts were executed in May 2009, subject to approval by the California Public Utilities Commission (CPUC). Prior to becoming effective, the California Contracts required the purchasing utilities (SDG&E and SCE) to obtain CPUC approval. The SDG&E and SCE contracts were filed for approval with the CPUC on July 1, 2009, and June 5, 2009, respectively. These filings were publicly posted on the SCE and SDG&E websites.[3]

14 The Company did not presume that approval of the California Contracts would be granted as a matter of course or in a particular time frame. In some instances, the CPUC has delayed approval of REC-related contracts for more than two years; in at least one case, the CPUC denied approval. Indeed, more than thirty contracts filed for approval around the same time of the California Contracts are currently pending consideration and approval by the CPUC.[4]

Joint Complaint itself or publicly available documents filed with the Commission or other state regulatory agencies.

[3] <http://www.sce.com/AboutSCE/Regulatory/adviceletters/default.htm>; <http://sdge.com/regulatory/advice_index.shtml.>

[4] The following is a link to a spreadsheet maintained on the CPUC's website indicating a list of RPS projects that are online, under development, and pending CPUC approval. Withdrawn and cancelled projects are also included.

15 On July 2, 2009, the Company provided an updated response to ICNU 2.1, as requested by its terms. That response included additional non-contingent contracts that were executed subsequent to the March 10, 2009, response to ICNU 2.1. The updated response did not include the California Contracts because they remained contingent pending CPUC approval.

16 On August 5, 2009, the parties to the 2009 GRC sent a letter to the Administrative Law Judge (ALJ) indicating that they had reached a settlement in principle and requesting a suspension of the schedule, including discovery. On August 7, 2009, the ALJ suspended the schedule.[5] 2009 GRC, Order 07 (Aug. 25, 2009). As of that date, discovery by all parties stopped.

17 The Settlement itself was filed with the Commission on August 25, 2009. The Settlement included provisions relating to REC revenues. Specifically, the Company agreed to provide a report prior to January 1, 2010, that would include: (1) an explanation of how RECs and associated costs and/or revenues are allocated among PacifiCorp's six states; (2) an explanation of how the Company determines proper disposition of RECs on a total-Company and state-by-state basis; and, (3) a detailed accounting of the total-Company RECs that were sold and the total-Company RECs that were retained for each year from calendar year 2005 through June 2009. Settlement at ¶ 20.

18 The Company also agreed to provide quarterly reports, beginning on March 31, 2010, to Staff, Public Counsel, and ICNU that would describe the Company's management of RECs from June 2009 forward. Settlement at ¶ 21. This report would provide on a total-company, west control area, and Washington-allocated basis: the total monthly generation of RECs by resource, the

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<http://www.cpuc.ca.gov/PUC/energy/Renewables/index.htm>

[5] The ALJ maintained the scheduled public comment hearing and the dates scheduled for the evidentiary hearing so that those dates could be used for a hearing on the settlement.

estimated and actual level of REC transactions on a megawatt-hour basis, and the actual level of REC-related revenues. Settlement at ¶ 21. The Company also agreed to hold periodic meetings as requested by any party to provide additional details on the report. Settlement at ¶ 21.

19 The Settlement Stipulation also specifically stated that: "Nothing in this Stipulation limits or expands the ability of any Party to file for deferred accounting or request that the Commission take any other action regarding PacifiCorp's Washington-allocated RECs. For purposes of any such filing, the Parties agree that this case includes $657,755 in Washington-allocated REC revenues for the 2010 rate effective period." Settlement at ¶ 22.

20 On September 22, 2009, the parties filed testimony in support of the Settlement. Public Counsel's witness, Ms. Donna Ramas, testified that "there was a concern in this case with regard to the level of RECs and with the associated projected revenues from the sale of RECs incorporated in the filing." 2009 GRC, Exhibit No. DR-1T 5:22-6:11. According to Ms. Ramas, to address this uncertainty, the Company agreed to provide the REC reports, which in her opinion "will be very helpful to the parties in monitoring the RECs." 2009 GRC, Exhibit No. DR-1T 6:11-12. ICNU's witness, Mr. Robert M. Meek, also testified that the Settlement included "an important reporting provision regarding the Company's [RECs]." 2009 GRC, Exhibit No. RMM-1T 3:10-12. These reporting provisions "provide[] the parties the practical ability to file for deferred accounting or request that the Commission take another action regarding PacifiCorp's Washington-allocated RECs." 2009 GRC, Exhibit No. RMM-1T 3:12-14.[6]

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[6] Pursuant to WAC 480-07-495(2), the Company requests that the Commission take official notice of the testimony filed by the parties in the 2009 GRC.

21 The WUTC reviewed the Settlement in an evidentiary hearing on October 29, 2009, and adopted the Settlement by its Final Order on December 16, 2009. 2009 GRC, Order 09 (Dec. 16, 2009). Rates became effective January 1, 2010.

22 Meanwhile, after the Settlement was completed and filed with the Commission, the CPUC approved the California Contracts in September and October, 2009, respectively.[7] The Resolutions approving the California Contracts are both substantive orders that exceed twenty pages in length, include substantive legal and factual analysis, and evidence the thoroughness with which the CPUC reviewed these contracts. PacifiCorp began receiving REC revenues under these contracts only after the contracts received regulatory approvals from the CPUC and the contracts became non-contingent.

23 On October 8, 2009, Public Counsel witness Ms. Donna Ramas filed testimony in PacifiCorp's Utah general rate case on behalf of the Utah Office of Consumer Services. *See* Utah Public Service Commission, Docket No. 09-035-23, OCS-2D Ramas 16-29.[8] In that testimony, Ms. Ramas argued for an increase in REC revenues of $5.7 million on a Utah basis, adjusting the per-REC sales price from $3.50 per MWh to $6.57 per MWh. *See* Utah Public Service Commission Docket, No. 09-035-23, Rebuttal Testimony of Steven R. McDougal 5:80-6:115.

24 ICNU's witness Mr. Falkenberg was also a witness for the Office of Consumer Services in PacifiCorp's Utah case. On November 30, 2009, Mr. Falkenberg filed testimony in that docket

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[7] The SCE contract was approved on October 15, 2009, by CPUC Resolution E-4264. The SDG&E contract was approved on September 24, 2009, by CPUC Resolution E-4260. These Resolutions are available at the following links and pursuant to WAC 480-07-495(2) the Company requests that the Commission take official notice of these Resolutions: <http://docs.cpuc.ca.gov/word_pdf/FINAL_RESOLUTION/107773.pdf> ; <http://docs.cpuc.ca.gov/WORD_PDF/FINAL_RESOLUTION/108524.PDF>.

[8] Pursuant to WAC 480-07-495(2), the Company requests that the Commission take official notice of the testimony filed by Donna Ramas, Randall J. Falkenberg, and Steven R. McDougal in Utah Public Service Commission Docket 09-035-23. The relevant testimony is available on the Utah Public Service Commission website, at the following link:<http://www.psc.state.ut.us/utilities/electric/elecindx/2006-2009/0903523indx.html>.

expressly referencing the California Contracts, which he claimed lowered net power costs and provided "an unspecified amount of revenue for renewable energy sales." *See* Utah Public Service Commission Docket No. 09-035-23, OCS 4S Falkenberg 4:103-110. Notably, in the 2009 GRC ICNU sent a data request to the Company specifically requesting permission to use discovery provided to Mr. Falkenberg in his capacity as a witness in that Utah docket. *See* Affidavit of Gregory N. Duvall, Exhibit A.

25 Mr. Falkenberg was also an expert witness for ICNU in the Oregon Transition Adjustment Mechanism, where the Company included the California Contracts in its November 2009 update. *See* Oregon Public Utility Commission Docket UE 207, Net Power Cost Update for PacifiCorp's 2011 TAM.[9] On December 31, 2009, Mr. Falkenberg referenced the California Contract in testimony supporting ICNU's request for deferred accounting arising from a REC-related contract with Nevada Power. *See* Oregon Public Utility Commission Docket UM 1465, ICNU/100, Falkenberg/3, ll. 3-11.[10] Again, in the 2009 GRC, ICNU issued a data request, ICNU 1.48, seeking permission to use all data responses related to net power costs that the Company provided to OCS, WIEC, and ICNU in current and recent cases in Wyoming, Utah, and Oregon. *See* Affidavit of Gregory N. Duvall, Exhibit A.

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[9] Pursuant to WAC 480-07-495(2), the Company requests that the Commission take official notice of the Company's November Update in OPUC Docket UE 207. This update is also available on the OPUC's website at the following link: <http://edocs.puc.state.or.us/efdocs/HAD/ue207had103928.pdf>.

[10] Pursuant to WAC 480-07-495(2), the Company requests that the Commission take official notice of this testimony filed in OPUC Docket UM 1465. Mr. Falkenberg's entire testimony in this docket is available at the following link: <http://edocs.puc.state.or.us/efdocs/HAA/um1465haa145155.pdf>.

26 On March 1, 2010, PacifiCorp filed its Form 10-K, a public document filed with the Securities and Exchange Commission, which indicated that the Company received $44 million in REC revenues in 2009.[11]

27 On April 30, 2010, the Company filed its 2009 Commission Basis Report pursuant to WAC 480-100-257, reflecting 2009 Washington-allocated REC sales of $4.8 million.

28 On May 4, 2010, PacifiCorp filed its 2010 rate case in Washington, Docket UE-100749 (2010 GRC). Mr. Dalley's testimony indicated that total Company REC revenues for 2009 were $50,793,765, or in excess of $4 million on a Washington-allocated basis. 2010 GRC, Exhibit RBD-3 3.5.

III. STANDARD OF REVIEW

29 The Commission's rules provide that a motion to dismiss (modeled after one that would be made in Superior Court pursuant to Civil Rule 12(b)(6) or 12(c)) is appropriate when the pleading the moving party seeks to be dismissed (in this case, the Joint Complaint) fails to state a claim upon which the Commission may grant relief. WAC 480-07-380(1)(a). The Commission will dismiss a complaint for failure to state a claim if it appears that the complainant can prove no set of facts in support of its claim that would entitle it to relief. *Wash. Utils. & Transp. Comm'n v. Advanced Telecom et al.*, Docket UT-033011, Order No. 05 at ¶ 99 (Feb. 12, 2004).[12]

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[11] <http://www.sec.gov/Archives/edgar/data/75594/000007559410000008/pacificorp10k12312009.htm>.

[12] Under Commission rules, a party may also seek dismissal of a pending adjudicative proceeding by motion for summary determination (modeled after one that would be made in Superior Court pursuant to CR 56). WAC 480-07-380(2). A motion for summary determination is appropriate when the pleadings filed in the proceeding, along with any properly admissible evidentiary support, reveal that there is no genuine issue of material fact and that the moving party is entitled to the relief requested as a matter of law. WAC 480-07-380(2); CR 56(c). WAC 480-07-380(1)(a) states: "If a party presents an affidavit or other material in support of its motion to dismiss, and the material is not excluded by the commission, the commission will treat the motion as one for summary determination as provided in" WAC 480-07-380(2)-(3). If the Commission deems PacifiCorp's motion to be more appropriately treated as a motion for summary determination, PacifiCorp has no objection to such treatment and requests that the Commission consider the motion in whichever form is most appropriate. In this case, either procedural vehicle is appropriate for resolution of this case.

IV. ARGUMENT

A. ALL CAUSES OF ACTION FAIL TO STATE A CLAIM FOR REPARATIONS UNDER RCW 80.04.220 BECAUSE THEY ARE BARRED BY THE SIX- MONTH STATUTE OF LIMITATIONS.

30 Each of the Joint Complaint's three causes of action are brought under RCW 80.04.220. *See* Joint Complaint at ¶ 6. RCW 80.04.220 is a "reparations" statute which allows the Commission to order a utility to repay excessive charges in certain circumstances.[13]

31 Claims brought under RCW 80.04.220 are subject to the six-month statute of limitations contained in RCW 80.04.240 for "cases involving the collection of unreasonable rates."[14] *See AT&T Commun. et al. v. Qwest Corp.*, Docket UT-051682, Order Affirming Interlocutory Order (Dec. 22, 2006) (hereinafter, *AT&T III*). In the Joint Complaint, ICNU and Public Counsel acknowledge that the RCW 80.04.240 six-month statute of limitations is applicable. Joint Complaint at 6, n 5.

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[13] RCW 80.04.220 provides in full: "When complaint has been made to the commission concerning the reasonableness of any rate, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the commission, and the commission has determined that the public service company has charged an excessive or exorbitant amount for such service, and the commission has determined that any party complainant is entitled to an award of damages, the commission shall order that the public service company pay to the complainant the excess amount found to have been charged, whether such excess amount was charged and collected before or after the filing of said complaint, with interest from the date of the collection of said excess amount."

[14] RCW 80.04.240 states: "If the public service company does not comply with the order of the commission for the payment of the overcharge within the time limited in such order, suit may be instituted in any superior court where service may be had upon the said company to recover the amount of the overcharge with interest. It shall be the duty of the commission to certify its record in the case, including all exhibits, to the court. Such record shall be filed with the clerk of said court within thirty days after such suit shall have been started and said suit shall be heard on the evidence and exhibits introduced before the commission and certified to by it. If the complainant shall prevail in such action, the superior court shall enter judgment for the amount of the overcharge with interest and shall allow complainant a reasonable attorney's fee, and the cost of preparing and certifying said record for the benefit of and to be paid to the commission by complainant, and deposited by the commission in the public service revolving fund, said sums to be fixed and collected as a part of the costs of the suit. If the order of the commission shall be found to be contrary to law or erroneous by reason of the rejection of testimony properly offered, the court shall remand the cause to the commission with instructions to receive the testimony so proffered and rejected and enter a new order based upon the evidence theretofore taken and such as it is directed to receive. The court may in its discretion remand any cause which is reversed by it to the commission for further action. Appeals to the supreme court shall lie as in other civil cases. All complaints concerning overcharges resulting from collecting unreasonable rates and charges or from collecting amounts in excess of lawful rates shall be filed with the commission within six months in cases involving the collection of unreasonable rates and two years in cases involving the collection of more than lawful rates from the time the cause of action accrues, and the suit to recover the overcharge shall be filed in the superior court within one year from the date of the order of the commission."

32 When determining when a claim accrues for purposes of applying the six-month statute of limitations, the Commission applies the "discovery rule" to claims brought under RCW 80.04.220. *AT&T III* at ¶ 37. This rule "does not require a plaintiff to understand all the legal consequences of a claim;" rather, a claim accrues when the "party *should have* discovered salient facts regarding a claim." *Green v. A.P.C.*, 136 Wn.2d 87, 95 (1998) (emphasis in original).

33 When applying the discovery rule, Washington courts apply a "diligent inquiry" standard:

> The general rule in Washington is that when a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm. The plaintiff is charged with what a reasonable inquiry would have discovered. "[O]ne who has notice of facts sufficient to put him upon inquiry is deemed to have notice of all acts which reasonable inquiry would disclose." *Id.* at 96 (citations omitted).[15]

34 To support their argument that the Joint Complaint is timely, ICNU and Public Counsel cite *AT&T I*. Joint Complaint at 6, n 5. ICNU and Public Counsel state that the ALJ held in that case "that the complainant's claim for refund accrued as of the day that the contracts upon which their claim relied were made public and thus available to them." *Id.* Thus, ICNU and Public Counsel argue that their claims accrued on or after July 8, 2010, "*i.e.*, the date on which ICNU and Public Counsel received the actual sales contracts" that are the subject of the Joint Complaint (the California Contracts). *Id.*

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[15] *See also Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 659 (2001) (""The statute of limitations on an action 'does not begin to run until the cause of action accrues—that is, when the plaintiff has a right to seek relief in the courts [citations omitted]'...[when] the client 'discovers, or in the exercise of reasonable diligence should have discovered the facts which give rise to his or her cause of action.' [citations omitted]...This rule does not require that a plaintiff have knowledge of the cause of action itself; rather, only the 'facts' that give rise to that cause of action must be known to start the running of the statute...[Citations omitted] Still the facts supporting each of the essential elements of the cause of action...must be known before the statute begins to run.").

35 In the Joint Complaint, ICNU and Public Counsel omit the critical fact that the Commission subsequently *reversed* the ALJ's decision in the Initial Order in *AT&T I* with respect to the date on which the claim in that case accrued. In *AT&T Commun. et al. v. Qwest Corp.*, Docket UT-051682, Interlocutory Order at ¶ 20 (June 8, 2006) (hereinafter, *AT&T II)* and again in *AT&T III*, the Commission found that the claim accrued much earlier than the date on which the contracts were published.

36 Specifically, in *AT&T II*, the Commission concluded that the ALJ erred in finding that the accrual date occurred upon publication of the contracts because the "test for accrual . . . is not when the aggrieved party actually discovered the injury, but when the aggrieved party *in the exercise of reasonable diligence* should have discovered the injury." *AT&T II* (citing *Enterprise Timber Inc. v. Wash. Title Ins. Co.*, 79 Wn.2d 479 (1969)) (emphasis in original). Moreover, in *AT&T II,* the Commission specifically rejected the claim that the confidentiality of the subject contracts meant that the claims did not accrue until they were in the public domain. *AT&T II* at ¶ 21.

37 After the parties challenged *AT&T II*, the Commission confirmed its accrual date analysis in *AT&T III.* The Commission reiterated the applicability of the discovery rule, noting: "One who has notice of facts sufficient to prompt a person of reasonable prudence to inquire is deemed to have notice of all the facts that a reasonable inquiry would disclose." *AT&T III* at ¶ 37. When discussing the application of the discovery rule to the facts of the case, the Commission noted also that as of the accrual date the complainants had notice of similar contracts filed by Qwest in Minnesota. Coupled with the fact that the Commission, "entered the order declining to explore the issue, a person of reasonable prudence would realize that a six-month limitations period for

possible damages might apply and that steps should be taken immediately to pursue an individual remedy for possible financial harm. However, AT&T failed to act in 2002. That was not reasonable under the circumstances, for purposes of finding the accrual date." *Id.* at ¶ 39.

38 Here, like the complainant in the *AT&T I-III*, ICNU and Public Counsel failed to act upon receiving notice of the alleged harm. ICNU and Public Counsel filed their original complaint on December 9, 2010.[16] Based upon the discovery rule and RCW 80.04.240, the Joint Complaint is time barred if, before June 9, 2010, ICNU and Public Counsel knew or should have known through the exercise of reasonable diligence that (1) the REC revenues PacifiCorp was receiving during 2010 were in excess of the $657,755 reflected in the Settlement; (2) that the REC sales price was higher than the average sales price of $3.50 per MWh assumed in the 2009 GRC; or (3) that PacifiCorp had entered into and was receiving REC revenue under the California Contracts.

39 Under the analysis dictated by *AT&T II* and *AT&T III*, there is no question that ICNU and Public Counsel knew or should have known these facts through the exercise of reasonable diligence before June 2010 based upon public filings at the Washington Commission. First, on April 30, 2010, the Company filed its 2009 Commission Basis Report pursuant to WAC 480-100-257, reflecting 2009 Washington-allocated REC sales of $4.8 million. Second, the Company's 2010 GRC was filed on May 4, 2010; it included references to Washington-allocated REC revenues in excess of $4 million for 2009.

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[16] The operative pleading in this case is a complaint filed on January 6, 2011. Complainants have indicated that they believe that for purposes of the statute of limitations the operative complaint's filing date should relate back to the original December 9th complaint even though that complaint was rejected by the Commission. PacifiCorp does not agree that the January 6th complaint should relate back; however, for purposes of this motion this does not matter as the complaint was untimely using either date.

40 There is also evidence that ICNU and Public Counsel knew or should have known of the facts underlying their claims in the fall of 2009, when their witnesses Donna Ramas and Randall Falkenberg filed testimony in PacifiCorp cases in other states addressing REC revenues, REC prices, and the California Contracts. As agents for Public Counsel and ICNU, the knowledge of Ms. Ramas and Mr. Falkenberg regarding PacifiCorp's REC sales should be imputed to Public Counsel and ICNU.[17] *See Busk v. Hoard*, 65 Wn.2d 126, 134-35, 396 P.2d 171 (1964) (knowledge of (or notice to) an agent is imputed to his principal and "in most instances, the time, place or manner in which the agent obtains the knowledge is immaterial as far as charging the principal with it is concerned."); *see also Feature Realty Inc. v. City of Spokane*, 331 F.3d 769, 782 (9th Cir. 2002) (applying Washington law, the Ninth Circuit concluded that "Feature Realty's former lawyer knew of the assurances when they were made . . . and that knowledge is properly attributable to Feature Realty itself."); *see also Veritas Operating Corp. v. Microsoft Corp.*, 562 F.Supp.2d 1141, 1278 (W.D. Wash. 2008) (reviewing Ninth Circuit cases and attributing knowledge of Microsoft attorneys to Microsoft). As the Commission noted in *AT&T II and AT&T III*, the fact that Public Counsel and ICNU became aware of the contracts through a proceeding in another state is immaterial. This is especially true given ICNU's request in the 2009 GRC to use discovery from the Utah and Oregon cases in which Ms. Ramas and Mr. Falkenberg were active.

41 Relying on the *reversed AT&T I*, Complainants argue that their claims did not accrue until July 8, 2010, when ICNU and Public Counsel "received the actual sales contracts." Joint Complaint

[17] Additionally, the fact that ICNU filed for deferred accounting in Docket UM 1465 in Oregon arising from a REC-related contract demonstrates both that ICNU was closely tracking PacifiCorp's REC-related contracts and that ICNU understood the importance of timely filing for deferred accounting if it sought to capture the benefits of such contracts in rates.

at 6, n. 5. This argument lacks merit because the Commission is clear that the "test for accrual . . . is not when the aggrieved party actually discovered the injury, but when the aggrieved party *in the exercise of reasonable diligence* should have discovered the injury." *AT&T II* at ¶ 20. Here, reasonable diligence on the part of ICNU and Public Counsel would have led them to discover their alleged injuries well before June 9, 2010.

B. ALL CAUSES OF ACTION FAIL TO STATE A CLAIM UNDER RCW 80.04.230 FOR OVERCHARGES.

42 Each of the Joint Complaint's three causes of action is also brought under RCW 80.04.230. *See* Joint Complaint at ¶ 6. RCW 80.04.230 is an "overcharge" statute that authorizes the Commission to order a utility to refund an overcharge if it finds that the utility "charged an amount for any service rendered in excess of the lawful rate in force at the time such charge was made."[18]

43 Complainants do not allege, and cannot allege, that PacifiCorp charged them anything other than the rates that were approved by the Commission in the 2009 GRC Final Order. Because Complainants do not assert that they were billed more than the approved rate, they have not stated a claim under RCW 80.04.230.

C. ALL CAUSES OF ACTION FAIL TO STATE A CLAIM UNDER RCW 80.04.210, SEEKING AMENDMENT OF THE COMMISSION'S 2009 GRC ORDER.

44 As an alternative to their requests for relief under RCW 80.04.220 and 80.04.230, Complainants ask the Commission to construe their Joint Complaint as a motion to amend the Final Order in

[18] RCW 80.04.230 states: "When complaint has been made to the commission that any public service company has charged an amount for any service rendered in excess of the lawful rate in force at the time such charge was made, and the same has been investigated and the commission has determined that the overcharge allegation is true, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, whether such overcharge was made before or after the filing of said complaint, with interest from the date of collection of such overcharge."

the 2009 GRC. Joint Complaint at ¶¶ 3 and 25. This request is improper for at least three reasons.

45 First, as a general proposition, collateral attacks on Commission rate orders are prohibited.[19] The Joint Complaint correctly claims that RCW 80.04.210 authorizes the Commission to "alter or amend any order or rule made, issued or promulgated by it." That statute does not, however, authorize such an amendment to occur as the result of a complaint filed under RCW 80.04.110. Indeed the clear language of RCW 80.04.210 contemplates that proceedings to amend Commission orders are distinct from complaint proceedings. RCW 80.04.210 states that the Commission may amend an order only after providing ". . . notice to the public service company affected, and after opportunity to be heard *as provided in the case of complaints* . . ." (emphasis added). Therefore, complaint proceedings are not the proper forum to request an amendment of a Commission rate order and are an improper collateral attack on that order.

46 Second, Complainants' request to amend the 2009 GRC Final Order to permit recovery of REC revenues from 2010 violates the prohibition on retroactive ratemaking. The Commission has observed that "retroactive ratemaking . . . is extremely poor public policy and is illegal under the statutes of Washington State as a rate applied to a service without prior notice and review." *Re Puget Sound Energy*, Docket UE-010410, Order Denying Petition to Amend Accounting Order

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[19] *See e.g. Re Application of Portland Gen. Elec. Co. for an Investigation into Least Cost Plant Retirement*, Docket DR 10 *et al.*, Order No. 08-487 at 8 (O.P.U.C. Sept. 30, 2008) ("Once final, a Commission rate order is not subject to collateral attack."); *Neb. Pub. Advocate v. Neb. Pub. Serv. Comm'n*, 279 Neb. 543 (2010) (Public Advocate's complaint was impermissible collateral attack on prior rate order because it raised an issue that should have been raised in the rate case); *Anchor Lighting v. So. Calif. Edison*, Case 02-03-060, Decision 03-08-036, 2003 WL 22118931 (C.P.U.C. Aug. 21, 2003) (complaint dismissed as collateral attack, which is an "attempt to impeach the judgment or order in a proceeding other than that in which the judgment was rendered.").

(Nov. 9, 2001); *see also* RCW 80.28.020. This doctrine "prohibits the Commission from authorizing or requiring a utility to adjust current rates to make up for past errors in projections." *Id.*

47 Because retroactive ratemaking is contrary to Washington law, any amendment to the 2009 GRC Final Order can have a prospective application only. The order in the 2010 GRC is expected to be issued prior to the resolution of this case and that order will necessarily supersede the 2009 GRC Final Order, whether amended or not. See 2010 GRC, Order 01 (May 12, 2010) (April 3, 2011 is the end of the suspension period). Thus, the request will be moot as of the issuance of the Commission's final order in the 2010 GRC.

48 Third, the relief requested by Complainants—for a refund and balancing account—constitutes single-issue ratemaking because Complainants seek a rate adjustment based upon an examination of only one component of PacifiCorp's rates. The Commission generally does not engage in single-issue ratemaking because it violates the matching principle. *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy*, Docket UE-090704, Order 11 at ¶ 153 (Apr. 2, 2010); *Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Docket UE-061546, Order 08 at ¶ 152 (June 21, 2007) ("True-up mechanisms, a form of single issue ratemaking, are not generally favored in utility ratemaking."). The matching principle requires "revenues and costs [to be] balanced at a common point in time, *i.e.* a rate case, to determine fair, just, reasonable and sufficient rates." *Wash. Utils. & Transp. Comm'n v.Avista*, Docket UG-060518, Order 04 at ¶ 19 (Feb. 1, 2007). Single issue ratemaking violates this principle because it sets rates based upon an examination of only one component.[20]

[20] *See Re U.S. West Comm., Inc.*, Docket UT-920085, 3rd Suppl. Order. At 5 (Apr. 15, 1993) ("without considering other aspects of the company's rate structure [this] would amount to single issue ratemaking"); *Re US West*

49 Here, Complainants seek a rate adjustment based upon examination of only REC revenues and therefore they are asking the Commission to engage in single-issue ratemaking.[21] The policies against single-issue ratemaking are particularly compelling in this case because the Company has nearly concluded its 2010 GRC. The Commission now has before it the opportunity to establish just, fair, and reasonable rates for PacifiCorp based upon an examination of all revenues and expenses. In this context, Complainants request for single-issue ratemaking should be rejected.

D. THE FIRST CAUSE OF ACTION FAILS TO STATE A CLAIM.

50 The Joint Complaint's First Cause of Action alleges that the Company's direct case in the 2009 GRC included a pro forma REC revenue adjustment that was improper because it was determined in a manner that they dispute. Because ICNU and Public Counsel can point to no statute or Commission rule that PacifiCorp violated when calculating its pro forma adjustment, they pigeonhole their claim into a violation of RCW 34.05.452 (requiring testimony to be filed under oath), RCW 80.04.130 (requiring utility to bear burden of proof) and WAC 480-07-540 (same). For three reasons, this cause of action fails to state a claim.

Communications, Inc., Docket UT-970766, 14th Suppl. Order at 5 (Mar. 24, 1998) ("the proper means to examine [revenues and expenses] is a general rate case"); *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, Docket UT-970653, Second Suppl. Order (Oct. 22, 1997) ("The Commission has consistently held that these questions are resolved by a comprehensive review of the company's rate base and operating expenses, determining a proper rate of return, and allocating rate changes equitably among ratepayers.");

[21] Complainants may point to Docket UT-020406 to argue that the Commission has departed from its prohibition against single issue ratemaking and allowed a general rate adjustment in a complaint proceeding under RCW 80.04.110 when the complaint alleges violations of law. *See e.g. AT&T Comm. of the Pacific Northwest Inc. v. Verizon Northwest Inc.*, Docket UT-020406 Eleventh Supp. Order at 5 (Aug. 12, 2003). In that case, the Commission did authorize a change to Verizon's access charges in a complaint proceeding in part because the complainant "state[d] several statutory bases for its complaint and alleged violations of statute, rule, and federal law." However, in a subsequent case, the Commission limited its holding in Docket UT-020406 to the specific facts of that case. In Docket UT-063013 the Commission acknowledged that its holding in Docket UT-020406 was a departure from the Commission's "usual caution about 'single-issue ratemaking.'" *McLeodUSA Telecom. Services, Inc. v. Qwest Corp.*, Docket UT-063013, Order 04 (Feb. 16, 2007). In Docket UT-063013 the Commission refused to engage in single-issue ratemaking in a docket initiated by a complaint and distinguished Docket UT-020406 because the record in that case was voluminous and even Verizon acknowledged that their rates were too high.

51 First, there is no actionable claim under the statutes cited. As in all rate cases before the Commission, the Company submitted its testimony under oath and assumed the burden of proof in the 2009 GRC. The failure of a utility to meet these basic obligations does not give rise to a claim for damages independent of the rate case filing; instead it creates a potential procedural deficiency in the rate case filing.

52 Second, although all of Complainants' reparations claims are barred by the six-month statute of limitations, the first cause of action is specifically time barred. This claim alleges that the Company's pro forma REC adjustment in its filed 2009 GRC, *i.e.* the adjustment in Exhibit No. RBD-3, "did not reflect data within the Company's possession regarding the known and measurable REC sales prices it expected to receive during the rate effective period." Joint Complaint at ¶ 20.[22] The claim asserts that the "response to ICNU 2.1 indicates that, during 2008, PacifiCorp entered into REC sales for that year and 2009 at materially different prices than the $3.50 relied upon for its pro forma adjustment" in Exhibit No. RBD-3. Joint Complaint at ¶ 10. In other words, Complainants' allege that upon receipt of the Company's response to ICNU 2.1 on March 10, 2009, they became aware that the Company's filed pro forma adjustment was not supported by the data contained in the response to ICNU 2.1. On its face, this claim accrued on March 10, 2009—nearly *twenty-one months* before the Joint Complaint was filed.

53 Third, to the extent that the first cause of action alleges that the Company's pro forma adjustment for RECs should have included the California Contracts, this would not have been a proper "known and measurable" adjustment as defined by WAC 480-07-510(3)(e)(iii). The contracts were subject to approval by the CPUC and were therefore not "known" at the time of the

[22] The Joint Complaint has an unnumbered paragraph between paragraphs 20 and 21. This citation is to the unnumbered paragraph, which will be referenced herein as paragraph 20.

proceeding. *See Wash. Utils. & Transp. Comm'n v. Avista*, Docket UE-090134, Order 10 at ¶¶110-112 (Dec. 22, 2009).

E. THE SECOND AND THIRD CAUSES OF ACTION FAIL TO STATE A CLAIM.

54 The Joint Complaint's second cause of action alleges that the Company violated WAC 480-07-405(7) and RCW 80.28.010. WAC 480-07-405 is the Commission's data request rule. Subsection (7) governs responses to data requests and requires that "a party to whom a data request is directed must provide a full response to the data request." RCW 80.28.010(1) requires utility rates to be "just, fair, reasonable, and sufficient."

55 Complainants allege that the Company "failed to provide accurate and complete responses to" ICNU 2.1 and 2.2 which allowed the Company to collect unjust, unfair, and unreasonable rates. Joint Complaint at ¶¶ 21-22. The second cause of action fails to state a claim because the clear and unambiguous text of ICNU 2.1 and 2.2 did not ask for the information that Complainants now allege was not produced.

56 Complainants allege that ICNU 2.1 "expressly asked for the most current REC sales prices" and asked for PacifiCorp to include "executed sales contracts." Joint Complaint at ¶ 23. Both of these allegations are contradicted by the clear text of the actual data request, which sought only "actual green tag sales and revenue received by PacifiCorp since 2005." Complainants also claim that PacifiCorp breached its duty to provide a complete response because "PacifiCorp understood the data request to require information regarding all executed sales contracts rather than merely revenue received to date," although the request itself did not include this language. PacifiCorp included forecast REC revenues for 2009 for non-contingent contracts because that information was in the Company's REC spreadsheet. Provision of this information does not

constitute an acknowledgement that the Company understood the data request to be asking for more than it stated. *See Wash. Utils. & Transp. Comm'n v. Verizon*, Docket UT-040788, Order 7 (Aug. 24, 2004).

57 With respect to ICNU 2.2, this data request asked the Company to "please provide all documents to support the pro forma [REC] sales price" included in Exhibit RBD-3 of the Company's testimony, which was filed on February 9, 2009. Joint Complaint Exhibit C at 7. In response to this request, the Company provided eight pages of analysis describing REC transactions from 2006 and 2007 that the Company used to support the REC revenue included in its direct case.

58 Complainants allege that "the Company provided no support for its decision to rely on 2007 sales data, nor did it revise or supplement the response with information regarding the actual price it knew it would receive during 2010 firm executed sales contracts." Joint Complaint at ¶ 22. For the Company's response to ICNU 2.2 to be inaccurate or incomplete as alleged, Complainants must allege that the Company in fact relied upon other data to support the pro forma sales price included in its direct case. The Joint Complaint does not include such an allegation.

59 The third cause of action alleges that the Company violated WAC 480-07-405(8) because the Company did not "revise its initial filing to correct for misstatements or provide excluded information," and failed to supplement its data responses upon learning that the response was "no longer correct or complete." Joint Complaint at ¶ 24. WAC 480-07-405(8) requires parties to "immediately supplement any response to a data request . . . upon learning that the prior response was incorrect or incomplete when made or upon learning that a response, correct and complete when made, is no longer correct or complete." Again, the crux of this cause of action

is Complainants' insistence that the Company had a duty to provide information that was not actually requested. As discussed above, the information that Complainants now complain was not provided was also not requested.

60 With respect to ICNU 2.1, the request sought "actual green tag sales and revenue received by PacifiCorp" and requested updates "as PacifiCorp executes additional sales throughout this proceeding." PacifiCorp did not receive any REC revenue under the California Contracts until after discovery was suspended and the Settlement was finalized and filed with the Commission. As of the filing of the Settlement, the California Contracts were still contingent and awaiting CPUC approval.

61 With respect to ICNU 2.2, the Company did not rely on the California Contracts to support its pro forma REC revenue price in its filed case because those contracts did not exist when the case was filed.

62 Moreover, the allegation that this rule requires the Company to "revise its initial filing to correct for misstatements or provide excluded information," is inapplicable. This rule applies to data requests, not pre-filed testimony.

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V. CONCLUSION

63 Based upon all of the foregoing, PacifiCorp respectfully requests that the Commission dismiss the Joint Complaint with prejudice.

DATED: February 7, 2011.

Respectfully Submitted,

Katherine A. McDowell
McDowell Rackner & Gibson PC
419 SW 11th Ave., Suite 400
Portland, OR 97205
Telephone: (503) 595-3924
Facsimile: (503)595-3928
Email: katherine@mcd-law.com

Jordan A. White
Senior Counsel
Pacific Power
1407 W. North Temple, Suite 320
Salt Lake City, Utah 84116
Phone: (801) 220-2279
Facsimile: (801) 220-4615

Attorneys for PacifiCorp