

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of

PACIFICORP d/b/a PACIFIC POWER &
LIGHT COMPANY,

Petition for an Order Approving Deferral
of Costs Related to Wildfire Claims.

Docket No. UE-230495

PacifiCorp’s Reply to Commission Staff

I. INTRODUCTION

1 In accordance with WAC 480-07-370(5)(b), PacifiCorp d/b/a Pacific Power & Light Company (PacifiCorp or the Company) submits this Reply to the Washington Utilities and Transportation Commission (Commission) Staff’s Response to Petition for Deferred Accounting Order (Response).

2 In its Petition for Accounting Order (Petition), PacifiCorp seeks authority to defer costs not covered by insurance from third-party claims relating to wildfires in September 2020. However, because the resolution of claims relating to the September 2020 wildfires remains ongoing, the Petition asks the Commission to refrain from immediately issuing the deferred accounting order and instead consider the Company’s Petition when the costs and the impact on PacifiCorp’s financial stability are more fully known.¹

3 In its Response, Staff does not address PacifiCorp’s request that the Commission delay consideration of the Petition and instead recommends that the Commission deny the Petition because, according to Staff, the costs the Company seeks to defer should not be recoverable in rates.

¹ Petition at ¶¶ 7, 11 (June 21, 2023).

4 As detailed below, the Petition satisfies the standards for a deferred accounting order sufficient to allow the Petition to remain pending until the wildfire claims resolution process is complete. Moreover, Staff’s conclusion that the costs are not eligible for deferred accounting is premature because the total costs from the September 2020 wildfire claims and their effect on the Company’s financial stability have not yet been determined. Additionally, Staff’s arguments regarding prudence are outside the scope of this proceeding and should instead be addressed in a future rate proceeding if the Commission approves the Petition. For these reasons, the Commission should reserve consideration of both the Petition and Staff’s Response until the costs are more fully known.

II. PROCEDURAL BACKGROUND

5 PacifiCorp filed its Petition on June 21, 2023, seeking a deferred accounting order for costs not covered by insurance associated with third-party claims due to wildfires in the Company’s service area in September 2020. As explained in its Petition, much of the litigation and the assessment of liabilities remains unresolved and the Company filed its Petition to enable it to transparently account for and track the associated costs.² The combined amount of these claims from these wildfires, which resulted from unique and unforeseen circumstances outside the Company’s reasonable control, may have a material impact to the financial stability of the Company, resulting in higher costs to customers.³

6 The requested deferred accounting order would enable the Company to seek cost recovery in the future. However, because many of the claims are still pending, the Company requested that the Commission delay consideration of the Petition until the costs and the impact on the financial stability of the Company are more fully known. The

² *Id.* at ¶ 6.

³ *Id.* at ¶ 8.

Company was clear that it was “not seeking recovery of these costs from customers at this time and does not expect to determine if it will seek recovery until the appeals process has concluded.”⁴

7 The Company has requested similar deferred accounting orders in several states within PacifiCorp’s service territory. To date, these petitions either remain pending or the Company has withdrawn them without prejudice based on the understanding that it could refile when more information is known without affecting the Company’s ability to seek recovery of these costs.⁵

8 Although WAC 480-07-370(4)(b) requires that any response to a petition be filed within 20 days, Staff submitted its Response on March 4, 2024—more than seven months after PacifiCorp filed its Petition. Staff’s initial decision to forgo responding to the Petition was reasonable, given the Company’s request that the Commission refrain from immediately ruling. But Staff does not explain why now, months after the deadline for filing a response and without seeking a procedural schedule, Staff changed course and filed a Response seeking denial of the Petition.

⁴ *Id.* at ¶ 6.

⁵ See *In the Matter of the Application of Rocky Mountain Power for a Deferred Accounting Order to Record a Regulatory Asset Associated with Incremental Costs Related to Third-Party Liability for Wildfires in Oregon*, Wyoming Public Service Commission Docket No. 20000-644-EA-23 (Record No. 17339), Application for Deferred Accounting (June 21, 2023); see also *In the Matter of PacifiCorp d/b/a Pacific Power, Application for Authorization Related to Wildfire Claims, Public Utilities Commission of Oregon*, Docket No. UM 2292, Application for Authorization of Deferred Accounting (June 15, 2023); see also *Application of PacifiCorp (U901E) for Authority to Establish the Wildfire Expense Memorandum Account*, California Public Utilities Commission Application 23-06-017, Proposed Decision (Feb. 14, 2024) (discussing PacifiCorp’s proposed Wildfire Expense Memorandum Account for tracking incremental unreimbursed wildfire liability-related costs). The Company also filed applications in Idaho and Utah, but the Company withdrew those applications without prejudice with an opportunity to refile at a later date. *In the Matter of the Application of Rocky Mountain Power for a Deferred Accounting Order Regarding Wildfire Claims*, Idaho Public Utilities Commission Case No. PAC-E-23-16, Notice of Withdrawal without Prejudice (Sept. 29, 2023); *Application of Rocky Mountain Power for a Deferred Accounting Order Regarding Wildfire Claims*, Utah Public Service Commission Docket No. 23-035-30, Notice (Sept. 15, 2023).

III. LEGAL STANDARD

9 Based on the rule against retroactive ratemaking,⁶ a utility must request a deferred accounting order to seek recovery of significant, unanticipated costs between rate cases.⁷ The Commission may grant a request for deferred accounting if the party demonstrates that the costs are “extraordinary.”⁸ To satisfy this standard, the identified cost must have a material impact on company earnings.⁹ If the Commission approves a deferred accounting order, the Commission then separately considers whether the deferred costs can be recovered in rates.¹⁰ The Commission will consider the prudence of any deferred costs when the utility seeks cost-recovery.¹¹

⁶ *Washington Utils. and Trans. Comm’n v. Pac. Power & Light Co.*, Docket Nos. UE-140762 *et al.*, Order 08 at ¶ 245, n.372 (Mar. 25, 2015) (“The Commission’s approval of Pacific Power’s deferral petition establishes an exception to the matching principle and the Company, when seeking recovery, thus avoids the prohibition against retroactive ratemaking for the costs authorized for deferral treatment.”); *Washington Utils. and Trans. Comm’n v. Avista Corp.*, Docket Nos. UE-991606 & UG-991607, Third Supplemental Order at ¶ 207 (Sept 29, 2000).

⁷ Docket Nos. UE-991606 & UG-991607, Third Supplemental Order at ¶ 206 (“Companies also have an opportunity to seek an accounting order from the Commission if they want permission to amortize a cost for the purpose of regulatory accounting, and an opportunity to seek recovery in a future rate case.”); *see also id.* at ¶ 207 (“Avista did not seek timely accounting orders for either event. . . . We will follow the general rule against including out-of-period, non-recurring expenses in rates.”).

⁸ Docket Nos. UE-140762 *et al.*, Order 08 at ¶ 273.

⁹ *Wash. Utils. & Transp. Comm’n v. Nw. Nat. Gas Co.*, Docket Nos. UG-080519 & UG-080530, Order 01/03, ¶ 7 (May 02, 2008); *see also In the Matter of the Petition of Nw. Nat. Gas Co. d/b/a NW Nat.*, Docket UG-240012 at ¶ 7 (Feb. 22, 2024) (“We agree that the material, unusually elevated costs associated with the Meter Modernization Program establish circumstances that substantially impact the Company’s ability to actually earn its previously authorized rate of return.”).

¹⁰ Docket Nos. UE-140762 *et al.*, Order 08 at ¶ 255 (“[T]he Commission must determine whether to grant the petition [for deferred accounting] and, if so, whether to allow recovery of the deferred costs.”).

¹¹ *Wash. Utils. & Transp. Comm’n v. Puget Sound Energy*, Docket Nos. UE-190529 *et al.*, Final Order 08/05/03 at ¶ 443 (July 8, 2020) (“As is the case with all accounting petitions, we reserve our prudence determination for the Company’s next [general rate case]”).

IV. ARGUMENT

A. The Commission should delay consideration of the Petition and Staff's Response because (1) the costs from third-party claims resulting from the September 2020 wildfires will meet the standard for deferred accounting, and (2) denying the Petition now would preclude any recovery of prudently incurred costs.

10 Although the full costs of unreimbursed third-party claims resulting from the September 2020 wildfires are not yet known, it is likely that the costs will be extraordinary and have a material financial impact on the Company, satisfying the requirements for a deferred accounting order. As noted in the Petition, in 2023, a jury ruled that the Company must compensate 17 plaintiffs with damages exceeding \$90 million, including approximately \$4.5 million of economic damages and \$85.5 million of a-typical damages—nineteen times the amount of economic loss.¹² More recently, a jury ordered the Company to pay \$62 million to nine plaintiffs, with economic losses at approximately \$6.3 million, and a-typical damages of to \$56 million—nearly nine times the amount of economic loss.¹³ The potential magnitude of the September 2020 wildfire claims could have a material impact on the Company's earnings and financial health. Indeed, based on the pending claims, both Standard & Poor's and Moody's downgraded the Company's credit rating in 2023.¹⁴

¹² Sloan Millman & Gabe Grosberg, S&P GLOBAL RATINGS, *PacifiCorp Downgraded to BBB+, Outlook Revised to Negative; Berkshire Hathaway Energy Co. Outlook Also Negative*, (June 20, 2023) (available at <https://disclosure.spglobal.com/ratings/en/regulatory/article/-/view/type/HTML/id/3009376>) (last visited Mar. 7, 2024).

¹³ Clark Mindock, REUTERS, *Berkshire's PacifiCorp Ordered to Pay At Least \$62 Million to Homeowners for 2020 Oregon Wildfire Damage*, (Jan. 23, 2024) (available at <https://www.reuters.com/world/us/berkshires-pacificorp-ordered-pay-least-62-million-homeowners-2020-oregon-2024-01-23/>) (last visited Mar. 11, 2023).

¹⁴ See, e.g., Sloan Millman & Gabe Grosberg, S&P GLOBAL RATINGS, *PacifiCorp Downgraded to BBB+, Outlook Revised to Negative; Berkshire Hathaway Energy Co. Outlook Also Negative*, (June 20, 2023) (available at <https://disclosure.spglobal.com/ratings/en/regulatory/article/-/view/type/HTML/id/3009376>) (last visited Mar. 7, 2024); Moody's Rating Action: Moody's downgrades PacifiCorp to Baa1, outlook stable (Nov. 21, 2023).

11 The experience of other utilities is illustrative of the potential adverse financial impact of third-party wildfire claims. Western utilities like Pacific Gas and Electric (PG&E), Southern California Edison,¹⁵ Xcel Energy in both Colorado¹⁶ and Texas,¹⁷ Hawaiian Electric Company,¹⁸ and PacifiCorp have been subjected to significant financial pressures from catastrophic wildfire litigation. After the Camp Fire, PG&E settled third-party claims for approximately \$13.5 billion, and declared bankruptcy to manage its liabilities and facilitate compensation to the plaintiffs.¹⁹ Just last month, Xcel Energy's stock prices decreased eight percent in a single day after the company disclosed a letter asserting potential claims relating to a recent Texas wildfire.²⁰

12 As requested in the Petition, the Commission should defer ruling until the underlying facts and circumstances become clearer. This is consistent with past Commission practice. For example, in docket UE-140094, PacifiCorp requested an accounting order to defer costs that the Company anticipated it would incur during 2014 due to decreased hydropower production.²¹ The Company filed the petition in

¹⁵ Jonathan Stempel, REUTERS, *Southern California Edison to pay \$80 mln to US over 2017 wildfire* (Feb. 26, 2024) (available at <https://www.reuters.com/world/us/southern-california-edison-pay-80-mln-us-over-2017-wildfire-2024-02-26/>) (last visited Mar. 11, 2024).

¹⁶ Tim Drugan, BOULDER REPORTING LAB, *Xcel Energy faces legal firestorm: Understanding the Marshall Fire lawsuits* (Aug. 3, 2023) (available at <https://boulderreportinglab.org/2023/08/03/xcel-energy-faces-legal-firestorm-understanding-the-marshall-fire-lawsuits/>) (last visited Mar. 11, 2024).

¹⁷ Clark Mindock, REUTERS, *Xcel Energy utility equipment started Texas wildfire, homeowner says in lawsuit* (Mar. 1, 2024) (available at <https://www.reuters.com/world/us/xcel-energy-utility-equipment-started-texas-wildfire-homeowner-says-lawsuit-2024-03-02/>) (last visited Mar. 11, 2024).

¹⁸ Bill Chappell and Ravenna Koenig, NAT'L PUB. RADIO, *Maui County sues Hawaiian Electric Co. for damages from disastrous fires* (Aug. 24, 2023) (available at <https://www.npr.org/2023/08/24/1195777967/maui-county-sues-hawaiian-electric-company-for-damages-from-disastrous-fires>) (last visited Mar. 11, 2024).

¹⁹ See e.g., Richard Gonzales, NAT'L PUB. RADIO, *PG&E Announces 13.5 Billion Settlement of Claims Linked to California Wildfires*, (Dec. 7, 2019) (available at <https://www.npr.org/2019/12/07/785775074/pg-e-announces-13-5-billion-settlement-of-claims-linked-to-california-wildfires>) (last visited Mar. 7, 2024).

²⁰ Clark Mindock, REUTERS, *Xcel Energy utility equipment started Texas wildfire, homeowner says in lawsuit* (Mar. 1, 2024) (available at <https://www.reuters.com/world/us/xcel-energy-utility-equipment-started-texas-wildfire-homeowner-says-lawsuit-2024-03-02/>) (last visited Mar. 11, 2024).

²¹ Docket Nos. UE-140762 *et al.*, Order 08 at ¶ 264.

January 2014, but the Commission consolidated the docket with the Company's pending general rate case, and as a result did not issue an order on the request for deferred accounting until March 2015—when costs incurred during 2014 were fully known.

13 If the Commission were to deny the Company's request for deferred accounting now, then the prohibition on retroactive ratemaking could prevent the Company from requesting recovery of these extraordinary costs.²² Because the costs from the September 2020 wildfire claims are likely to be extraordinary, a preemptive denial of the deferral would be highly prejudicial to the Company and could trigger or contribute to further ratings downgrades.

14 For these reasons, consistent with the relief requested in the Petition, PacifiCorp asks that the Commission delay consideration of both the Petition and Staff's Response until a later date when the amount and impact of third-party claims resulting from the September 2020 wildfires are more fully known. At that point, the Commission will have all necessary information to determine whether the costs are eligible for deferral and, if so, the Commission may subsequently consider in a future rate case whether any of the deferred costs should be included in the Company's rates.

²² *In re the Petition of PacifiCorp, dba Pac. Power & Light Co., For an Accounting Order Authorizing Deferral of Excess Net Power Costs*, Docket No. UE-020417, Third Supplemental Order at ¶ 23 (Sept. 27, 2002) ("Put simply, when a regulatory authority approves rates for prospective application that provide for the recovery of costs incurred but not recovered through rates that were effective during the period of cost incurrence, such rates may be susceptible to a challenge that they violate prohibitions against retroactive ratemaking.").

B. The Commission should not yet address Staff’s arguments that costs from third-party wildfire claims are imprudent because the costs of those claims are not fully known and the Commission determines prudence only after issuance of a deferred accounting order.

15 In its Response, Staff does not address the Company’s request that the Commission postpone its consideration of the Petition until the underlying costs are more fully known.²³ Instead, Staff responds as if all the wildfire claim costs have been fully litigated or resolved and the Company’s wildfire actions have been conclusively determined to be imprudent. Both points are incorrect: the third-party claims and the assessment of liabilities relating to the September 2020 wildfires has not been finally resolved, and the Commission addresses prudence when the Company seeks rate recovery, not in considering whether to allow deferred accounting.

16 Staff’s Response focuses exclusively on one case, *James v. PacifiCorp*,²⁴ but the Company requests deferred accounting for all unreimbursed third-party claims resulting from the September 2020 wildfires, not just the damages at issue in *James*.²⁵ Moreover, PacifiCorp has appealed the *James* verdict because the Company continues to believe that its actions were appropriate and consistent with prudent utility practice.²⁶ For these reasons, Staff’s request to deny the Company’s petition based on Staff’s conclusion that the *James* damages alone were imprudently incurred is unsupported.

²³ Response at ¶ 10.

²⁴ Final Verdict, *James v. PacifiCorp*, No. 20-CV-33885; Response at ¶ 3 (“The petition highlights the *James v. PacifiCorp* case, in which the Company was found liable for a total of \$88 million dollars. In that case, the jury found PacifiCorp grossly negligent, and found the Company’s conduct was both reckless and willful.”) (internal footnotes omitted).

²⁵ See Petition at ¶ 7 (“Since this has been initially certified as a class-action lawsuit, additional claims are likely, and there is additional pending litigation for wildfires that occurred in this time period.”).

²⁶ PacifiCorp filed its Notice of Appeal with the Oregon Court of Appeals on January 4, 2024. *James v. PacifiCorp*, Case No. A183140, Notice of Appeal (Jan. 4, 2024). See also PACIFICORP, *Information on Wildfire Litigation* (available at <https://www.pacificorp.com/about/information-wildfire-litigation.html>) (last visited Mar. 7, 2024).

17 In addition, Staff’s opposition to the Petition rests largely on Staff’s assertion that the Company should not be able to recover in rates the costs that the Company seeks to defer.²⁷ This argument is outside the scope of the Company’s request for a deferred accounting order because the Commission considers prudence of deferred expenses when the utility seeks recovery of those expenses.²⁸ If the Company seeks cost recovery, the deferred costs will be included in rates only after a full contested case process, the development of a robust evidentiary record, and a Commission finding that the costs are reasonable for inclusion in Washington rates.²⁹

18 While the Company does not seek a prudence determination in this case, the Company stresses that, contrary to Staff’s claim, the costs at issue are not categorically precluded from recovery. Staff asserts that PacifiCorp cannot ultimately recover the costs from the wildfire claims because those costs include “civil judgments in which [the] Company was found grossly negligent” and that a conclusion in civil proceedings precludes the Commission from determining that costs were prudently incurred.³⁰ However, the Commission has historically distinguished civil negligence verdicts, which are “the province of the courts to determine,” from cost recovery in rates.³¹ Based on that distinction, the Commission has rejected proposed disallowances that were based solely

²⁷ Response at ¶ 10.

²⁸ Docket Nos. UE-140762 *et al.*, Order 08 at ¶ 255; Docket Nos. UE-190529 *et al.*, Final Order 08/05/03 at ¶ 443 (“As is the case with all accounting petitions, we reserve our prudence determination for the Company’s next [general rate case]”).

²⁹ *See, e.g.*, Docket Nos. UE-140762 *et al.*, Order 08 at ¶ 251 (approving recovery of costs associated with the Merwin Fish Collector Project after approving deferred accounting).

³⁰ Response at ¶ 7.

³¹ *Wash. Utils. and Trans. Comm’n v. Wash. Water Power Co.*, Docket No. U-88-2380, Third Supplemental Order at ¶ 11 (Oct. 19, 1989).

“on the theory that the company was negligent.”³² Consistent with these prior orders, if the Commission approves a deferred accounting order in this docket, the Commission may conclude in a future rate proceeding that the Company’s wildfire liability costs were prudently incurred even if a court ultimately awards plaintiffs damages on a theory that certain actions were negligent.

C. Staff’s additional challenges to PacifiCorp’s deferral request do not provide a basis to deny a request for deferred accounting.

19 Staff raises several additional challenges to the Petition. First, Staff argues that the costs resulting from the September 2020 wildfire third-party claims were not incurred to provide service to Washington customers and that PacifiCorp should recover its costs only from customers in states where the fires occurred.³³ Contrary to Staff’s assertion, these costs relate to the provision of utility service to all PacifiCorp customers, including customers in Washington. Although the fires occurred in Oregon, the Company operates a unified system to provide electric service to its customers in all states within PacifiCorp’s service territory. Resources used to provide service to Washington customers, such as long-distance transmission lines, were implicated in and affected by the wildfires in Oregon. In the litigation relating to the wildfires, plaintiffs’ allegations of Company liability result directly from the Company’s provision of interstate electric service to its customers using an interconnected grid.

³² *Id.*; see also *Wash. Utils. and Trans. Comm’n v. Puget Sound Energy, Inc.*, Docket Nos. UG-040640 and UE-040641, Order 06 at ¶ 242 (Feb. 18, 2005) (rejecting proposal to automatically defer costs that may result from actions in which a utility’s negligence is a factor, but suggesting that the utility may seek an accounting order). Equating a jury’s finding of negligence to imprudence, for the purposes of cost recovery, could establish a problematic precedent. Such a precedent may compel regulated utilities to opt for settlement in all claims, regardless of the merits of its defense or the likelihood of success at trial, given that there is always a chance of unfavorable jury verdict. This would not only undermine the judicial process but also grant plaintiffs’ attorneys disproportionate leverage in settlement negotiations.

³³ Response at ¶ 6.

20 Second, Staff analogizes the costs incurred as a result of third-party claims to costs that the Commission typically excludes from a utility’s rates, such as “advertisements, lobbying, and charitable donations.”³⁴ Staff does not explain how these costs are analogous, but suggests that the wildfire claim expenses are akin to other expenses that Staff argues “are not necessary to serve customers.”³⁵ However, the costs from third-party claims that the Company seeks to defer are much more analogous to the insurance premium expenses that utilities incur to mitigate the impacts of third-party claims. As Staff acknowledges,³⁶ those insurance premium expenses are regularly included in utilities’ rates as a necessary component of providing utility service.³⁷ Similar to the insurance premiums incurred as a result of third-party claims, the Commission may include in rates other expenses relating to third-party claims.

21 Finally, Staff asserts that any impact to the Company’s financial stability resulting from third-party wildfire claims “can be addressed through a cost of capital decision in a future rate case.”³⁸ Staff does not cite any case in which the Commission has denied a request for a deferred accounting order on the basis that extraordinary costs could be fully addressed by adjusting the utility’s cost of capital. In any event, absent an accounting order, if a utility proposed increasing its cost of capital to account for costs incurred when prior rates were in effect, parties would likely challenge that proposal on the basis that any

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at ¶ 8.

³⁷ *See, e.g., Wash. Utils. and Trans. Comm’n v. Avista Corp. dba Avista Utils.*, Docket Nos. UE-150204 and UG-150205 (Consolidated), Order 05 at ¶ 244 (Jan. 6, 2016) (incorporating insurance expenses, including general liability insurance expenses, into utility’s rates).

³⁸ Response at ¶ 9.

recovery of these costs, directly or indirectly through a cost of capital adjustment, is barred by retroactive ratemaking.³⁹

V. CONCLUSION

22 The Petition meets the Commission’s standards for deferred accounting. Staff’s recommendation to deny PacifiCorp’s Petition is premature because the Company has asked the Commission to refrain from considering the Petition until more information is known. Moreover, Staff’s argument that the costs the Company seeks to defer cannot be recovered in rates is outside the scope of relief that PacifiCorp seeks in this docket and is inconsistent with prior Commission decisions. Staff’s remaining arguments do not provide a basis for rejecting the Petition. For these reasons, PacifiCorp requests that the Commission reject Staff’s recommendation and instead delay consideration of both the Company’s Request and Staff’s Response until the unreimbursed third-party wildfire claims and their impact on the Company’s financial stability are more fully known.

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³⁹ Docket Nos. UE-991606 & UG-991607, Third Supplemental Order at ¶ 207.