

order that PacifiCorp may only prospectively commence deferrals after the Commission:

1) affirmatively approves the creation of a deferred account; and 2) establishes the methodology or formula by which deferred costs will be recovered in rates.

ARGUMENT

I. Recovery of Deferred Costs Prior to a Commission Order Constitutes Unlawful Retroactive Ratemaking and Violates the Filed Rate Doctrine

PacifiCorp's argument regarding retroactive ratemaking ignores fundamental principles of utility regulation and attempts to eviscerate the customer protections established by the filed rate doctrine and the rule against retroactive ratemaking. PacifiCorp argues that the effective date for a deferred account should be the date the utility files its request to commence deferrals, not the date of Commission authorization. PacifiCorp Brief at 10. While PacifiCorp admits that "advance Commission approval is necessary before costs may be deferred," the Company also claims that "the requirement that Commission approval be obtained in 'advance' does not preclude Commission approval of deferred accounting treatment 'retroactive' to the date of the Commission's order authorizing deferral." PacifiCorp Brief at 13. PacifiCorp's position is contrary to Washington law and would essentially provide the utility with the authority to commence deferrals at any point in time, as long as the Commission eventually authorizes a deferred account.

The Commission should re-affirm past rulings and Washington law by requiring utilities to obtain Commission approval prior to establishing a deferred account. Re Puget Sound Power & Light Co. ("PSP&L"), Docket Nos. UE-920433/ UE-920499/ UE-921262, Twentieth Suppl. Order (Dec. 16, 1994)("without [Commission] approval the company has no authority to defer").

PacifiCorp argues that the Commission’s general powers to regulate in the public interest, to prescribe forms and records, and its “implied power” to authorize deferred accounting provides the Commission with authority to alter past rates that customers have paid. Contrary to PacifiCorp’s assertions, the Commission does not have the “implied power” to retroactively set rates through deferred accounting. The Commission has stated that deferred accounting does not constitute retroactive ratemaking because the Commission is not reaching back to alter past rates, but is instead providing notice that future rates will be adjusted pursuant to a specific methodology. Re PSP&L, Docket No. U-81-41, Sixth Suppl. Order at 17-19 (Dec. 19, 1989). PacifiCorp has no statutory authority to institute a deferred account and the Commission can only change customers’ rates on a prospective basis. ICNU/Public Counsel Brief at 4-7. Therefore, only the Commission’s prospective action can modify rates and put customers on notice that their rates no longer fully compensate the utility for its service. Id.; Re PSP&L, Docket Nos. UE-920433/ UE-920499/ UE-921262, Twentieth Suppl. Order.

PacifiCorp is also incorrect in its assertion that the Commission’s statutory authority to establish a retroactive effective date for deferred accounting can be implied from the Commission’s generic authorization statute (RCW § 80.01.040), and the forms and records statute (RCW § 80.04.090). The plain meaning of RCW § 80.28.020 unambiguously requires the Commission to set rates prospectively. The Commission is required to abide by and enforce the plain meaning of all its statutes, including RCW § 80.28.020. Int’l Ass’n of Fire Fighters Local 46 v. City of Everett, 146 Wash. 2d 29, 34, 42 P.3d 1265, 1267 (2002). The Commission’s generic statutory authority to regulate in the public interest and to prescribe the forms of records do not provide the

Commission with the necessary authority to supersede the filed rate doctrine or rule against retroactive ratemaking encompassed in RCW § 80.28.020.

In addition, PacifiCorp fails to cite to any persuasive case law that supports its argument that the Commission may order deferred accounting prior the date of its order. PacifiCorp Brief at 10. PacifiCorp cites to a 1924 case, Pac. Coast Elevator Co. v. Dept. of Pub. Works, as providing the Commission with authority to retroactively set rates. 130 Wash. 620, 639, 228 P. 1022, 1028 (1924). Pac. Coast Elevator Co. is irrelevant to this proceeding because the Department of Public Works was acting pursuant to a statute that specifically authorized it to act retrospectively by issuing refunds when charges had been collected in excess of the lawful rate. 130 Wash. at 640, 228 P. at 1028. By contrast, the Commission's statutory authority expressly requires it to set rates prospectively. RCW § 80.28.020; Pac. Tel. & Tel. Co. v. Pub. Utils. Comm'n, 62 Cal. 2d 634, 652, 401 P.2d 353, 364 (Cal. 1965) (distinguishing between prospective and retrospective statutory authority).

PacifiCorp also inaccurately claims that the WUTC and other state commissions have expressly found that deferring amounts prior to the date of an order does not constitute retroactive ratemaking. PacifiCorp Brief at 12-13. PacifiCorp's reliance upon the Commission's recent order in the Avista deferral proceedings is misplaced because the issue of retroactive ratemaking was never reviewed by the Commission since the parties entered into a complex and comprehensive multi-party settlement. ICNU/Public Counsel Brief at 10-11; Commission Staff Brief at 9. Similarly, many of the other state commission decisions cited by PacifiCorp are not relevant because of unique factual and legal circumstances. For example, the referenced

deferred accounting order issued by the North Carolina Utilities Commission (“NCUC”) was the subject of an appeal, and subsequently rescinded by the NCUC. Re Carolina Power & Light Co., NCUC Docket No. E-2, Sub. 769, Order Granting Joint Motion and Closing Docket (June 19, 2001). In addition, the deferral request granted by the Minnesota Public Utility Commission (“MPUC”) was pursuant to an existing conservation deferral tracker and is not similar to PacifiCorp’s request in this proceeding. Re Interstate Power Co., MPUC Docket No. G-001/GR-95-406, Order at 4 (Feb. 29, 1996). Similarly, the Texas Public Utility Commission (“TPUC”) order was a prudence review and specifically did not “reach the retroactive ratemaking issue in order to resolve the contested issues in this docket.” Re Southwestern Pub. Serv. Co., TPUC Docket No. 14174, Order on Rehearing at 3 (March 14, 1996).

II. A Deferred Account That Fails to Establish A Specific Rate Recovery Methodology Violates the Rule Against Retroactive Ratemaking

PacifiCorp asserts that the Company’s request is legal in nature because the Commission would be authorizing “a fixed mathematical formula valid against a charge of retroactive ratemaking” which would not be “a rate applied to a service without prior notice and review.” PacifiCorp Brief at 11. This assertion is puzzling because the Company’s request to defer its net power costs expressly defers the question of amortization of deferred amounts, if any, to a later filing. PacifiCorp Petition at 13. The Company’s proposed deferral, unlike a power cost adjustment mechanism or purchased gas adjustment, does not contain a “mathematical formula” by which ratepayers can determine how their future rates will be determined. ICNU/Public Counsel Brief at 6-7.

Not only has PacifiCorp failed to propose a potential recovery mechanism, but the actual power costs that the Company is seeking to defer are unknown. The

Company proposed to defer the difference between actual net power costs incurred each month and the level of power costs currently assumed in retail rates to Washington customers. PacifiCorp Petition at 14. Assuming the Commission approves establishing the deferral account, the Commission has yet to review the power cost baseline that PacifiCorp is assuming is currently in rates. This baseline could be too low, if, for instance, the Commission finds that the two previous rate increases granted under the Rate Plan did not include increased power costs. Until the Commission determines the appropriate baseline, customers cannot know how much they are paying for their current service. Therefore, PacifiCorp should not be allowed to begin deferring excess net power costs until the Commission approves the deferred account, including the appropriate amount of “excess” costs to be deferred.

III. The Narrow Exceptions to the Rule Against Retroactive Ratemaking Do Not Apply in this Case

PacifiCorp argues, in the alternative, that if the Commission determines that establishing a deferred account prior to a Commission order violates retroactive ratemaking, then the Commission should exercise its “discretion to authorize ‘retroactive’ approval of deferred accounting treatment in this case.” PacifiCorp Brief at 13-14. PacifiCorp’s request to commence deferrals on June 1, 2002, does not fit within the small range of exceptions that the Washington courts and the Commission have created to the rule against retroactive ratemaking. ICNU/Public Counsel Brief at 8-9. Since PacifiCorp’s request for establishing the deferred account would constitute retroactive ratemaking and violate the requirements of RCW § 80.28.020, the Commission does not have the legal authority to allow PacifiCorp to commence deferrals on June 1, 2002.

CONCLUSION

PacifiCorp has failed to establish that the Commission is legally authorized to commence deferrals prior to affirmative Commission authorization and approval. As discussed in both the ICNU/Public Counsel and the Commission Staff Briefs, the Commission should issue an order determining, as a matter of law, that regulated utilities are not authorized to book energy costs into a deferral account prior to the date of the order which both authorizes the establishment of the account and provides the method by which the costs will be recovered in rates.

Dated this 5th day of September, 2002.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Reply Brief of the Industrial Customers of Northwest Utilities and Public Counsel upon each party on the official service lists by causing the same to be mailed, postage-prepaid, through the U.S. Mail. Dated at Portland, Oregon, this 5th day of September, 2002.

\s\ Margaret A. Roth _____
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