

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON STATE ATTORNEY
GENERAL'S OFFICE AND THE
INDUSTRIAL CUSTOMERS OF
NORTHWEST UTILITIES,

Joint Complainants,

v.

PACIFICORP, d/b/a PACIFIC POWER &
LIGHT CORP.

Respondents.

Docket No. UE-110070

ICNU AND PUBLIC COUNSEL'S
RESPONSE IN OPPOSITION TO
PACIFICORP'S MOTION TO DISMISS
JOINT COMPLAINT

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| TABLE OF CONTENTS..... | i |
| TABLE OF AUTHORITIES | iv |
| I. INTRODUCTION | 1 |
| II. BACKGROUND | 1 |
| III. STANDARD OF REVIEW..... | 3 |
| IV. ARGUMENT..... | 4 |
| A. The Allegations Raised in the Joint Complaint Are Not Time-Barred | 4 |
| 1. PacifiCorp Has Not Met its Burden to Prove That Any of ICNU and Public Counsel’s Claims are Time-Barred | 6 |
| a. Standard for Asserting a Statute of Limitations Affirmative Defense..... | 6 |
| 2. PacifiCorp Inaccurately Characterizes the Essential Elements of ICNU and Public Counsel’s Claims..... | 6 |
| 3. PacifiCorp has not shown that the claims could have accrued prior to July 28, 2010, for ICNU or September 9, 2010, for Public Counsel | 8 |
| a. The Claims Rely on Multiple Pieces of Information and Therefore Could Not Accrue at a Single Occurrence | 8 |
| b. PacifiCorp Has Not Shown that the Claims Accrued Upon the Filing of PacifiCorp’s 2009 Form 10-K, the Commission Basis Report, or the 2010 GRC | 9 |

| | | |
|----|---|----|
| 4. | Expert Witnesses’ Participation and Filings in Other States Does Not Support PacifiCorp’s Statute of Limitations Argument | 10 |
| | a. Expert Witnesses Are Not Agents | 11 |
| | b. Ms. Ramas’ and Mr. Falkenberg’s Participation in Proceedings in Utah is Outside of the Scope of their Work on Behalf of ICNU and Public Counsel | 12 |
| | c. PacifiCorp Has Not Shown that Mr. Falkenberg Learned of the Essential Elements of the Claims Through Participation in Oregon Proceedings | 13 |
| 5. | The Commission Orders in <i>AT&T v. Quest</i> Support a Finding that ICNU and Public Counsel’s Claims Are <i>Not</i> Time-Barred..... | 14 |
| | a. The Statute of Limitations Applies Only to Requests for Refunds and therefore Does Not Apply to Requests for Any Other Remedies | 17 |
| B. | The Alternative Requests for Amendment of the Final Order in the <i>2009 GRC</i> Under RCW 80.04.210 is Appropriate..... | 18 |
| | 1. The Joint Complaint is Not a Collateral Attack on the <i>2009 GRC</i> Final Order..... | 18 |
| | 2. The Relief Requested in the Joint Complaint Will Not Result in Retroactive Ratemaking..... | 20 |
| | 3. The Relief Requested in a Permissible Exception to the General Rule Disfavoring Single-Issue Ratemaking | 24 |
| C. | PacifiCorp Violated Commission Rules for Failure to Support its Pro Forma Adjustment and Failure to Correct the Record..... | 26 |
| | 1. PacifiCorp’s Failure to Include “Contingent” California Contracts in Pro Forma Adjustment to REC Price Was Unreasonable | 26 |

| | | |
|----|---|----|
| 2. | The Reparations Claim Relating to the Pro Forma Adjustment is Not Time-Barred | 29 |
| 3. | The Failure to Disclose a Material Fact is Not a “Procedural Deficiency” | 30 |
| D. | PacifiCorp’s Justifications for its Failure to Provide Complete and Accurate Responses in Discovery and its Failure to Update its Responses Are Based on an Unreasonable Narrow Interpretation of the Data Requests | 32 |
| V. | CONCLUSION..... | 34 |

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Page</u> |
|---|-------------|
| <u>Activate, Inc., v. State, Dept. of Revenue</u> , 150 Wash.App. 807, 812, 209 (2009)..... | 3 |
| <u>Amended Petition of Puget Sound Energy, Inc. For an Order Authorizing the Use of the Proceeds from the Sale of Renewable Energy Credits and Carbon Financial Instruments</u> , Docket No. UE-070725, Final Order(2010) | 5 |
| <u>AT&T Commun. et al. v. Qwest Corp.</u> , Docket No. UT-051682, Initial Order (Order 03) (2005)..... | 15, 16 |
| <u>AT&T Commun. et al. v. Qwest Corp.</u> , Docket No. UT-051682, Motion for Summary Determination and Dismissal (2005) | 15, 16 |
| <u>AT&T Commun. et al. v. Qwest Corp.</u> , Docket No. UT-051682, Motion for Summary Determination or to Dismiss (2007) | 15, 16 |
| <u>AT&T Comm. of the Pacific Northwest Inc. v. Verizon Northwest Inc.</u> , Docket No. UT-020406 Eleventh Supp. Order (2003) | 9 |
| <u>Brown v. Prowest Transp.</u> , 76 Wn. App. 412, 419, 886 (1994) | 5 |
| <u>Busk v. Hoard</u> , 65 Wn. 2d 126, 129, 396 (1964) | 9 |
| <u>Cross v. Cutter Biological</u> , 676 So.2d (La. Ct. App. 4 th Cir., 1996) | 12 |
| <u>Green v. A.P.C.</u> , 136 Wash.2d 87, 99, 960 (1998) | 6 |
| <u>Hendricks v. Lake</u> , 12 Wash.App. 15, 22 528 (1974) | 9 |
| <u>Hewson Constr., Inc. v. Reintree Corp.</u> , 101 Wn.2d (1989) | 11 |
| <u>Hoffer v. State</u> , 110 Wn.2d 415, 420, 755 (1988) | 4 |

| | |
|--|------|
| <u>In the Matter of the Application of Puget Sound Energy for Authorization Regarding the Deferral of the Net Impact of the Conservation Incentive Program, Docket No. UE-010410, Order Denying Petition to Amend Accounting Order ¶9 (2001)</u> | 23 |
| <u>Janicki Logging & Construction Company, Inc. v. Schwabe Williamson & Wyatt, 109 Wn. App. 655, 660, 37 (2001)</u> | 6, 9 |
| <u>Judd v. AT&T Communications of the Pacific Nw., Inc. and T-Netix, Inc., Docket No. UT-042022, Order No. 23 (Apr. 21, 2010)</u> | 3 |
| <u>Kinney v. Cook, 159 Wash.2d 837, 842, 154 (2007)</u> | 4 |
| <u>Kirk v. Raymark Indus., 61 F.3d 147, 164 (3rd Cir., 1995)</u> | 12 |
| <u>McLeodUSA Telecom. Services, Inc. v. Qwest Corp., Docket UT-063013, Order 04 (2007)</u> | 24 |
| <u>Neb. Pub. Advocate v. Neb. Pub. Serv. Comm’n, 279 Neb. 543 (2010)</u> | 9 |
| <u>Oregon Pub. Utility Comm’n Net Power Cost Update for PacifiCorp’s 2011 TAM, OPUC Docket No. UE 207 (2009)</u> | 14 |
| <u>Petition of Avista Corp. d/b/a Avista Utils., for an Order Authorizing Implementation of a Natural Gas Decoupling Mechanism, Docket No. UG-060618, Order No. 4 (2007)</u> | 25 |
| <u>Pfizer, Inc. v. Ranbaxy Lab., Ltd., 2005 WL 2296613 (D. Del. 2005)</u> | 12 |
| <u>PSE RECs Petition, Docket No. UE-070725, Final Order (2010)</u> | 25 |
| <u>Re PG&E Request for Approval, CPUC Resolution E-4170, PG&E AL 3183-E/SVN (May 15, 2008)</u> | 28 |
| <u>Re Southern California Edison Company Request for Approval, CPUC Resolution E-4168, ALs 2143-E/E-A/E-B/SMK (2008)</u> | 28 |
| <u>Rho Co., Inc. v. Dep’t of Revenue, 113 Wn.2d (1989)</u> | 11 |

| | |
|--|--------|
| <u>Sabel v. Mead Johnson & Co.</u> , 737 f. Supp 135, 138-39 (D. Mass 1990) | 12 |
| <u>State v. Garcia</u> , 146 Wn.App. 821, 827-28, 193 (2008) | 11 |
| <u>Sutherlin v. White</u> , 2006 WL 1737860 (2006) | 12 |
| <u>Taylor v. Kohli</u> , 162 Ill.2d 91, 96, 642 N.E.2d 467, 469 (1994) | 12 |
| <u>U.S. W. Communications, Inc. v. WUTC</u> , 134 Wn.2d 74, 121, 949 (1997) | 18 |
| <u>Vallandigham v. Clover Park Sch. Dist. No. 400</u> , 154 Wash.2d 16, 26, 109 (2005) | 3 |
| <u>Washington State Attorney General’s Office v. WUTC</u> , 128 Wn.App 818, 826, 116 (2005) | 18 |
| <u>WUTC v. Avista Corp., d/b/a Avista Utilities</u> , Docket No. UE-080416/UG-0804167 Order 08 (2008) | 21 |
| <u>WUTC v. Olympic Pipe Line Company</u> , Docket No. TO-011472 (2002) | 32 |
| <u>WUTC v. Northwest Natural Gas Co.</u> , Docket. No. UE-080546, Order No. 5 (2010) | 21 |
| <u>WUTC v. PacifiCorp d/b/a Pacific Power & Light Co.</u> , Docket No. UE-090205 (2009)..... | 1 |
| <u>WUTC v. PacifiCorp d/b/a Pacific Power & Light Co.</u> , Docket No. UE-100749 (Pending Final Order)..... | 2 |
| <u>WUTC v. Puget Sound Power & Light Co.</u> , Docket No. U-81-41, Sixth Supp. Order (1988)..... | 22, 23 |
| <u>WUTC v. U.S. West Commun., Inc.</u> , Docket No. UT-970010, Second Supp. Order (1997) | 22 |

| | |
|---|----|
| <u>WUTC v. Puget Sound Energy, Inc.</u> Docket Nos. UE-072300 and UG-072301, Order No. 13(2009)..... | 25 |
|---|----|

| <u>Statutes and Rules</u> | <u>Page</u> |
|--|-------------|
| RCW 34.05.452(3)..... | 7 |
| RCW 80.04.110..... | 18 |
| RCW 80.04.130..... | 8 |
| RCW 80.04.210..... | 8 |
| RCW 80.04.230..... | 8 |
| RCW 80.04.240..... | 18 |
| WAC 480-07-380..... | 3,4 |
| WAC 480-07-395(4)..... | 20 |
| WAC 480-07-540..... | 8 |
| Washington Superior Court Civil Rule (“CR”) 56(c)..... | 8 |

I. INTRODUCTION

1 Pursuant to WAC 480-07-380(1)(c), WAC 480-07-380(2)(c) and the February 15,
2011 Notice Setting Due Date for Response, the Industrial Customers of Northwest Utilities
("ICNU") and the Public Counsel Section of the Washington State Attorney General's Office
("Public Counsel") provide the following Response in Opposition to PacifiCorp's Motion to
Dismiss Joint Complaint ("Motion to Dismiss") and request oral argument on the Motion.

2 As discussed further in this Response, dismissal of the Joint Complaint is
precluded because there are material facts in dispute. Moreover, the allegations contained in the
Joint Complaint are not time-barred and properly state claims for which the Washington Utilities
and Transportation Commission ("Commission") may grant relief. Finally, allowing ICNU and
Public Counsel to pursue the allegations raised in the Joint Complaint is in the public interest, as
it will result in identification and correction of amounts PacifiCorp has overcharged customers
through inaccurate and incomplete representation of renewable energy credit ("REC") revenue
data in its 2009 general rate case,^{1/} ("2009 GRC"). Accordingly, as matter of law PacifiCorp's
Motion to Dismiss must be denied.

II. BACKGROUND

3 ICNU and Public Counsel provided a thorough summary of the factual
background of this dispute in the Joint Complaint. ICNU and Public Counsel limit this section to
providing a brief summary of the procedural history of this case.

4 On December 9, 2010, ICNU and Public Counsel filed a Joint Complaint alleging
violations of law and requesting, among other relief, damages based on PacifiCorp's

^{1/} *WUTC v. PacifiCorp d/b/a Pacific Power & Light Co.*, Docket No. UE-090205.

misrepresentations during the *2009 GRC* regarding its 2010 (rate-effective period) REC revenue. Specifically, PacifiCorp failed to disclose in discovery, in its testimony, and in the evidentiary hearing the accurate amount of REC revenue that it would receive in 2009 and 2010 that include several contracts with California utilities (“California Contracts”) that were entered into during 2009. During PacifiCorp’s 2010 general rate case (“*2010 GRC*”), ICNU and Public Counsel obtained the California Contracts in discovery that was designated “highly confidential.”^{2/}

5 Prior to filing the Joint Complaint, ICNU and Public Counsel obtained PacifiCorp’s permission to reference highly confidential information received in the *2010 GRC*. The Joint Complaint, as originally filed, contained information that PacifiCorp claims is highly confidential, including the REC prices and REC revenues that PacifiCorp knew it would receive during the effective rate period. Subsequent to the initial filing of the Joint Complaint, PacifiCorp withdrew its authorization for ICNU and Public Counsel to use the highly confidential information and demanded that ICNU and Public Counsel re-file the Joint Complaint without reference to highly confidential information. Despite disagreement as to any actual defects in the initial filing, and without issuing an order formally declaring that the Joint Complaint was defective as filed, the Commission through the Chief Administrative Law Judge did not serve the Joint Complaint on the Company and required that ICNU and Public Counsel re-file the Joint Complaint.

6 ICNU and Public Counsel amended and re-filed the Joint Complaint on January 6, 2011, and the Commission served the Joint Complaint on the Company. PacifiCorp requested and received an extension of time to respond to the Joint Complaint, and filed its Answer and

^{2/} *WUTC v. PacifiCorp d/b/a Pacific Power & Light Co.*, Docket No. UE-100749.

Motion to Dismiss on February 7, 2011.

III. STANDARD OF REVIEW

7 PacifiCorp has filed a motion for summary determination that is styled as a motion to dismiss. The Commission’s rules state that:

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 subsections (2) and (3) of this section.^{3/}

8 PacifiCorp’s Motion to Dismiss was filed with the affidavit of Gregory N. Duvall, which has not been excluded. Accordingly, the Motion to Dismiss must be treated as a motion for summary determination under the Commission’s rules. The rules governing a motion for summary determination are WAC 480-07-380(2) and Washington Superior Court Civil Rule (“CR”) 56(c). Evaluation of a motion for summary determination requires two levels of inquiry.^{4/} First, the Commission must consider whether there are disputed facts in the case, and may not grant summary determination if there are *any* material facts in dispute.^{5/} If the Commission finds that there is no dispute as to any material facts, the Commission must view the facts alleged in the complaint “in the light most favorable to the non-moving party.”^{6/} The Commission may not grant the motion for summary determination unless reasonable persons could not disagree that the moving party, PacifiCorp, is entitled to a judgment as a matter of law.^{7/}

9 If the Commission excludes the affidavit of Mr. Duvall, or otherwise regards PacifiCorp’s Motion as a motion to dismiss rather than a motion for summary determination, the

^{3/} WAC 480-07-380(1)(a).

^{4/} *Judd v. AT&T Communications of the Pacific Nw., Inc. and T-Netix, Inc.*, Docket No. UT-042022, Order No. 23 ¶26 (Apr. 21, 2010).

^{5/} *Activate, Inc., v. State, Dept. of Revenue*, 150 Wn.App. 807, 812, 209 P.3d 524 (2009).

^{6/} *Id.* (citing *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005)).

^{7/} *Id.*

standards applicable to a motion made under CRs 12(b)(6) and 12(c) apply.^{8/} In its evaluation of a motion to dismiss, the Commission must assume all facts in the non-moving party's complaint are true and may even consider hypothetical facts supporting the non-moving party's claims.^{9/} The motion may be granted only if, despite consideration of facts in the light most favorable to the plaintiff, the facts alleged will not support the claims contained in the complaint. A motion to dismiss made under CR 12(b)(6) is “granted ‘sparingly and with care’ and, as a practical matter, ‘only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.’”^{10/}

10 Under either standard, the Commission must deny the Motion if it finds that there are disputed issues of fact and must view the facts alleged in the Complaint in the light most favorable to ICNU and Public Counsel. Specifically, there are numerous material facts in dispute, including whether PacifiCorp withheld key information requested in discovery that resulted in a settlement agreement that failed to properly account for REC revenues. This issue of fact, if viewed as accurate in the Complaint, is sufficient to defeat the Motion for Summary Disposition.

IV. ARGUMENT

11 The allegations presented in the Joint Complaint involve disputed questions of fact, and the Commission should deny PacifiCorp’s Motion to Dismiss to allow full development of an evidentiary record and to provide the relief requested in the Joint Complaint. Even at this time, ICNU and Public Counsel still do not know the full amount of REC revenues that PacifiCorp has earned and wrongfully retained during the 2010 rate-effective period for the 2009

^{8/} WAC 480-07-380(1)(a).

^{9/} *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007).

^{10/} *Id.* (citing *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)).

GRC. PacifiCorp’s underrepresentation of REC revenue data in the *2009 GRC* must be addressed, because PacifiCorp’s customers, not its shareholders, are entitled to the full benefits of REC revenues, as ratepayers have funded those renewable facilities.^{11/} PacifiCorp has acknowledged that: “customers are generally entitled to a revenue credit for REC sales. The Company does not contest this premise.”^{12/} Additionally, PacifiCorp has admitted that it earned significantly more REC revenue during the 2010 rate effective period as compared to its representations in the *2009 GRC*.^{13/} Fairness requires a full investigation of PacifiCorp’s failure to disclose its 2010 REC revenues during the *2009 GRC* and granting appropriate treatment of those revenues.

A. The Allegations Raised in the Joint Complaint Are Not Time-Barred

12 PacifiCorp argues that all of ICNU and Public Counsel’s causes of action under RCW 80.04.230 are barred by the six-month statute of limitations applicable to such claims.^{14/} A statute of limitations is an affirmative defense and, therefore, the party asserting it has the burden to prove the facts establishing it.^{15/} In calculating the time, the Commission should apply the December 9, 2010 date as the filing date for the Complaint. However, as described below, even the later January 6, 2011 filing date is not time-barred.

13 As discussed below, PacifiCorp has not met its burden. Instead, PacifiCorp has offered only unfounded and factually incorrect arguments—based on a misinterpretation of the

^{11/} *Amended Petition of Puget Sound Energy, Inc. For an Order Authorizing the Use of the Proceeds from the Sale of Renewable Energy Credits and Carbon Financial Instruments*, Docket. No. UE-070725, Final Order ¶¶41-47 (May 20, 2010) (“*PSE REC Petition*”) (recognizing that, absent unusual or extraordinary circumstances, REC revenues should be credited to ratepayers).

^{12/} *2010 GRC*, Duvall, Exh. No. GND-5T at 8:3-6.

^{13/} *2010 GRC*, Cross Examination Testimony of R. Bryce Dalley, TR. 369-370 (Jan. 25, 2011).

^{14/} Motion to Dismiss ¶¶30-41.

^{15/} *Brown v. Prowest Transp. Ltd.*, 76 Wn.App. 412, 419, 886 P.2d 223, 228 (1994) (citing *Haslund v. Seattle*, 86 Wash.2d 607, 547 P.2d 1221 (1976)).

AT&T orders and a strained and illogical application of agency law—that do little more than confuse the issues and distract from the central concerns in this case.

1. PacifiCorp Has Not Met its Burden to Prove That Any of ICNU and Public Counsel’s Claims are Time-Barred

a. Standard for Asserting a Statute of Limitations Affirmative Defense

14

To be granted summary determination, a moving party must show that there are no issues of material fact regarding when the non-moving party knew or should have known all elements of its claims.^{16/} Washington precedent requires that “the facts supporting *each* of the essential elements of the cause of action... must be known before the statute begins to run.”^{17/} The moving party’s burden cannot be supported by argument alone.^{18/} Thus, PacifiCorp bears the burden of demonstrating through actual evidence that each of the elements essential to ICNU and Public Counsel’s claims were known, or should have been known, six months prior to the initial filing of the Joint Complaint. In this case, for ICNU and Public Counsel’s claims to be time-barred, PacifiCorp must provide evidence that, prior to June 9, 2010 or July 6, 2010, depending upon which filing date the Commission applies, ICNU and Public Counsel knew or should have known all facts essential to each element of their claims. PacifiCorp has not done so.

2. PacifiCorp Inaccurately Characterizes the Essential Elements of ICNU and Public Counsel’s Claims

15

PacifiCorp argues that the essential elements, i.e., the facts that ICNU and Public Counsel knew or should have known to bring their claims, are as follows: (1) the REC revenues

^{16/} *Green v. A.P.C.*, 136 Wn.2d 87, 100-01, 960 P.2d 912, 918 (1998) (reversing the lower court’s summary judgment because the moving party did not provide sufficient evidence “upon which the trial court could have properly relied in concluding [that the non-moving party] should have known” the facts essential to her claims).

^{17/} *Janicki Logging & Construction Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn.App. 655, 659-60, 37 P.3d 309, 312 (2001) (emphasis original).

^{18/} *See Green*, 136 Wn.2d at 100, 960 P.2d at 918 (holding that summary judgment was improper where the moving party offered only the argument of counsel which “does not constitute evidence”).

PacifiCorp was receiving in 2010 were in excess of the \$657,755 reflected in settlement;^{19/} (2) REC prices were higher than the average sale price of \$3.50 per-MWh;^{20/} or, (3) that PacifiCorp had entered into and was receiving revenue under the California Contracts.^{21/}

16 A plain reading of the Joint Complaint reveals that none of these three facts alone sufficiently supports the claims asserted therein.^{22/} This is because the claims center on when PacifiCorp had knowledge of the California Contracts and their impact on Washington revenues, and, therefore, whether PacifiCorp had a duty to provide this information to the Commission and to the parties. The Joint Complaint shows that ICNU and Public Counsel’s claims actually rely on a different set of facts, none of which could be gleaned from those listed by PacifiCorp. The actual essential facts include: (1) the *dates* on which the California Contracts were signed by PacifiCorp; (2) the specific per-REC price provided for in the California Contracts; and (3) the extent to which the California Contracts themselves would impact 2010 Washington REC revenues.^{23/}

17 The first and second essential facts could only reasonably be ascertained from seeing the complete California Contracts, which the record shows were first provided to ICNU and Public Counsel in Washington on July 8, 2010, and September 9, 2010, respectively. However, the last essential fact could not be known without seeing the complete contracts *and* the 2010 1st Quarter REC Report, provided on July 28, 2010, which provided total revenues associated with the California Contracts and the allocation to Washington. PacifiCorp has failed

^{19/} Notably, PacifiCorp provides *no* evidence of where Public Counsel or ICNU could have learned of its actual 2010 REC revenues before the Company filed its 2010 1st Quarter REC Report on July 28, 2010.
^{20/} PacifiCorp gives no timeframe for this element.
^{21/} Motion to Dismiss ¶38.
^{22/} See Joint Complaint ¶¶20-24.
^{23/} See *id.*

to provide evidence of how the second and third facts could have been drawn from any source other than the 2010 1st Quarter REC Report, and has therefore failed to show how ICNU and Public Counsel could have known, or should have known, all of the essential facts prior to June 9, 2010. To be clear, however, neither ICNU nor Public Counsel concede that the full amount of 2010 REC revenues are known from this 2010 1st Quarter REC Report. Thus, PacifiCorp is not entitled to summary determination on these grounds.^{24/}

3. PacifiCorp has not shown that the claims could have accrued prior to July 28, 2010, for ICNU or September 9, 2010, for Public Counsel

18

As mentioned above, the essential elements of ICNU and Public Counsel's claims rely on multiple pieces of information, and thus, the claims could not accrue at a single occurrence, but rather upon at the very least the provision of the complete Contracts *and* the 2010 1st Quarter REC Report. Conversely, PacifiCorp wrongly argues that earlier-filed documents—specifically, its 2009 Form 10-K, the Commission Basis Report, and the 2010 GRC, each of which was filed prior to June 9, 2010—were sufficient bases for the claims to accrue. Additionally, PacifiCorp also wrongly argues that Donna Ramas's and Randall Falkenberg's participation and filings in other states support its argument that ICNU and Public Counsel's claims accrued prior to June 9, 2010. Further, it is absurd to assume *actual* knowledge based on cases from other jurisdictions. Ironically, PacifiCorp frequently complains if there is an attempt to use data from one jurisdiction to another without its explicit permission.

a. The Claims Rely on Multiple Pieces of Information and Therefore Could Not Accrue at a Single Occurrence

19

Only after all of the following occurrences could both ICNU and Public Counsel,

^{24/} The earliest possible dates upon which the claims could have accrued are therefore July 28, 2010, for ICNU and September 9, 2010, for Public Counsel, both of which are well within the most stringent application of the statute of limitations. *See* Joint Complaint at n. 5.

with reasonable diligence, pursue the claims asserted in the Joint Complaint: (1) ICNU received the California Contracts in Washington on July 8, 2010; (2) PacifiCorp filed the 2010 1st Quarter REC Report on July 28, 2010, demonstrating the potential impact of the California Contracts on 2010 Washington REC revenues; and, (3) Public Counsel received the California Contracts on September 9, 2010. Again, this is not to say that even today ICNU and Public Counsel possess complete and accurate data on the REC revenue amounts.

20 The California Contracts provided ICNU and Public Counsel with knowledge of the date on which the contracts were executed and the per-REC price, but contained no information regarding the amount of revenue PacifiCorp could expect to receive from those contracts on a Washington-basis during the 2010 rate-effective period. Thus, ICNU's possession of the contracts alone could not have triggered accrual of the claims asserted in the Joint Complaint. It was only upon receipt of *both* the contracts *and* the 2010 1st Quarter REC Report that ICNU and Public Counsel could have had any reason to believe that PacifiCorp had significantly understated its expected 2010 REC revenue, thus, causing ratepayers material injury that is actionable under Washington statutes. Indeed, at no point in its Motion to Dismiss does PacifiCorp show where else, besides the 2010 1st Quarter REC Report, ICNU and Public Counsel could have gained knowledge regarding the Company's actual or expected 2010 revenues on a Washington-basis.

b. PacifiCorp Has Not Shown that the Claims Accrued Upon the Filing of PacifiCorp's 2009 Form 10-K, the Commission Basis Report, or the 2010 GRC

21 A party asserting a statute of limitations defense based on the "discovery rule" must provide actual evidence of when knowledge of the claims did or should have accrued.^{25/}

^{25/} See *Janicki Logging*, 109 Wn.App. at 659-60, 37 P.3d at 312-13.

PacifiCorp argues that ICNU and Public Counsel could have, or should have, learned the essential elements of the claims from its 2009 Form 10-K, Basis Report, or *2010 GRC*, but provides no evidence that either party had actual possession of these documents.^{26/} Further, none of these documents show the REC revenue for 2010 on a Washington basis.

22

A party cannot seek to dismiss a case on some vague basis that the information that PacifiCorp claims on the one hand is highly confidential, but, in this context, is in the public domain. As PacifiCorp admits, the Form 10-K only gave a total-Company 2009 REC revenue number^{27/} and provides no information regarding the California Contracts or the revenues PacifiCorp generated from those contracts in 2010. Moreover, the Basis Report and *2010 GRC* show only the amount of REC revenues generated *in 2009*. PacifiCorp fails to address or offer any evidence of how either ICNU or Public Counsel *should* have gleaned from this information any facts regarding the California Contracts or facts regarding the Company's 2010 REC revenue.

4. Expert Witnesses' Participation and Filings in Other States Does Not Meet the Actual Knowledge Requirement

23

PacifiCorp argues that Public Counsel and ICNU should have known about the alleged violations when Donna Ramas and Randall Falkenberg filed testimony on behalf of the Utah Office of Consumer Services in PacifiCorp's 2009 Utah general rate case, or at the time

^{26/} Motion to Dismiss ¶¶26-28, 38.

^{27/} *Id.* at ¶26 (stating that the 10-K "indicated that the Company received \$44 million in REC revenues in 2009").

that Mr. Falkenberg filed testimony in a 2009 Oregon power cost proceeding.^{28/} Once again, PacifiCorp fails to provide any evidence of actual knowledge resulting from the Utah case. PacifiCorp relies on principles of agency law to argue that knowledge gained by Ms. Ramas and Mr. Falkenberg in these other jurisdictions may be imputed to Public Counsel and ICNU. However, as discussed below, these arguments are completely without basis in fact or law.

a. Expert Witnesses Are Not Agents

24

An agency relationship may be implied when “two parties consent that one shall act under the control of the other.”^{29/} In litigation, the party asserting an implied agency relationship bears the burden of proving the existence of such a relationship.^{30/} In order to find implied agency, the party asserting the agency must show: (1) an agreement between the parties to consent to the agency relationship; *and* (2) the right of the principal to control the manner of the agent’s performance.^{31/} The element of control is essential to implied agencies.^{32/} Neither element is met here. In this case, PacifiCorp presents *no evidence* regarding the nature of the relationships between Ms. Ramas and Public Counsel and between Mr. Falkenberg and ICNU. This lack of evidence alone is enough to disregard any argument regarding when either Ms. Ramas or Mr. Falkenberg might have known something material to ICNU and Public Counsel’s claims.

^{28/} *Id.* at ¶¶23-25. In Exhibit A to the Affidavit of Greg N. Duvall, accompanying the Motion to Dismiss, PacifiCorp suggests that ICNU’s Data Request No. 1.48 somehow incorporated information in Utah case (Docket No. 09-035-23) and Oregon proceedings (UE 207 and UM 1465) discussed directly above. This is false and misleading. Data Request 1.48 does not ask to use any information from the Utah or Oregon Cases. Moreover, the data request was issued *before* the Oregon proceedings even began, and therefore could *not possibly* have incorporated any information from those cases. Moreover, ICNU Data Request No. 10.2, included in Mr. Duvall’s affidavit, which *does* request permission to use information from Utah Docket No. 09-035-23 *was never answered as discovery was suspended before the due date.*

^{29/} *Rho Co., Inc. v. Dep’t of Revenue*, 113 Wn.2d 561, 570, 782 P.2d 986, 991 (1989).

^{30/} *Hewson Constr., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 823, 685 P.2d 1062 (1984).

^{31/} *See State v. Garcia*, 146 Wn.App. 821, 827-28, 193 P.3d 181, 184 (2008).

^{32/} *See id.*

Indeed, there is no set of facts could show that either Ms. Ramas or Mr.

Falkenberg were or are agents of Public Counsel or ICNU because expert witnesses are generally not agents of their clients, even during the term of their contract. Numerous courts have explained why this is so. The Supreme Court of Illinois stated: “Excepting for fraud, the employer can influence but cannot control the expert’s thought processes. Thus, the control element, so crucial to agency, is at all times missing.”^{33/} The Third Circuit likewise stated: “Since an expert witness is not subject to the control of the party opponent with respect to consultation and testimony he or she is hired to give, the expert witness cannot be deemed an agent.”^{34/} There is a long line of cases finding that expert witnesses are not agents.^{35/}

b. Ms. Ramas’ and Mr. Falkenberg’s Participation in Proceedings in Utah is Outside of the Scope of their Work on Behalf of ICNU and Public Counsel

Even *if* Ms. Ramas and Mr. Falkenberg could be construed as agents, the agency would necessarily be limited in scope and not extend to their work in other states. Ms. Ramas was contracted by Public Counsel as an expert witness for the finite duration of the *2009 GRC*.^{36/}

^{33/} *Taylor v. Kohli*, 162 Ill.2d 91, 96, 642 N.E.2d 467, 469 (1994) (ruling as a matter of law that an expert witness is not *per se* an agent of the party calling him, and stating that “an expert witness is more accurately described as an independent contractor”).

^{34/} *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 164 (3rd Cir., 1995) (holding that a statement of an expert witness hired by a party cannot be used against that party as an admission by a party opponent). *See also Conduis v. Howard Savings Bank*, 986 F.Supp. 914, 916-17 (D.N.J., 1997) (holding that an outside consultant hired to provide hired by a bank to provide an independent assessment was not an “agent independent contractor” of the bank).

^{35/} *Pfizer, Inc. v. Ranbaxy Lab., Ltd.*, 68 Fed. E. Evid. Serv. 361 (D.Del. Sept. 20, 2005); *Cross v. Cutter Biological*, 676 So.2d 131, 147-48 (La.Ct.App.4th Cir., 1996) (finding no evidence of an agency relationship where an expert witness was paid an hourly rate for his work, the alleged principals did not have the right to control the expert’s conduct, and the expert lacked “the right or authority to represent” the alleged principals); *Sabel v. Mead Johnson & Co.*, 737 F.Supp. 135, 138-39 (D. Mass, 1990) (holding that outside experts/consultants were not agents of the party for whom they had performed research, noting the lack of authority granted to the consultants to speak on the party’s behalf); and *Sutherlin v. White*, 71 Va. Cir. 184 (Va.Cir.Ct., June 29, 2006) (“[N]o party to litigation can exercise the level of control over an expert witness that an employer may exercise over an employee”).

^{36/} *See* Testimony of Donna Ramas in Support of Settlement on Behalf of Public Counsel, Exh. No. DR-1T, Docket No. UE-090205 at 1:17-2:4. (Sept. 22, 2009) (explaining that her testimony was limited in scope to review of the *2009 GRC* filing and settlement stipulation).

Ms. Ramas' work on behalf of Public Counsel was strictly limited in scope to analyzing the revenue filing in that case, and her work ceased after she filed testimony in support of the proposed settlement in September 2009.^{37/} Likewise, Mr. Falkenberg also was retained by ICNU in Washington for the limited purpose of serving as a witness in the 2009 case, and not to act as an agent of knowledge for ICNU regarding PacifiCorp's dealings in other states.^{38/}

27 And assuming *arguendo* that Ms. Ramas and Mr. Falkenberg were agents of Public Counsel and ICNU at the time they were working in Utah, any knowledge they may have gained during their work in Utah for other clients could not be imputed to Public Counsel and ICNU because their work was outside the scope of any possible agency. Ms. Ramas' and Mr. Falkenberg's participation in the Utah case was on behalf of a completely separate party, the Utah Office of Consumer Services.^{39/} Since ICNU and Public Counsel were not parties to the Utah case, even today, they do not know whether any information was actually presented in Utah that has any bearing on the parties' claims in Washington.

c. PacifiCorp Has Not Shown that Mr. Falkenberg Learned of the Essential Elements of the Claims Through Participation in Oregon Proceedings

28 PacifiCorp argues that ICNU and Public Counsel's claims accrued at the time of Mr. Falkenberg's participation as an expert witness for ICNU in two Oregon proceedings—

^{37/} See *id.* PacifiCorp misconstrues the cases that it cites regarding agency law. Specifically, PacifiCorp cites to *Feature Realty, Inc. v. City of Spokane* for the proposition that knowledge can be imputed to a party from its former lawyer, seeming to suggest that knowledge gained by Ms. Ramas or Mr. Falkenberg after they had completed their service as expert witnesses could be imputed to Public Counsel or ICNU. See Motion to Dismiss ¶40. What PacifiCorp fails to explain is that, in *Feature Realty*, the knowledge at issue was obtained by the lawyer during and in the course of his service on behalf of the client. See 331 F.3d 1082, 1093 (9th Cir., 2003). Thus, *Feature Realty* does not stand for the proposition that knowledge obtained by a lawyer *after* his or her service for a client can be imputed to the former client.

^{38/} See Testimony of Robert M. Meek in Support of Settlement Stipulation on Behalf of ICNU, Exh. No. RMM-1T, Docket No. UE-090205 at 2:12 (Sept. 22, 2009) (describing Mr. Falkenberg's role in the 2009 GRC as limited to "review[ing] power cost and resource prudence issues").

^{39/} Motion to Dismiss ¶¶23-24.

Docket Nos. UE 207 and UM 1465.^{40/} Assuming, *arguendo*, that Mr. Falkenberg was an “agent” of ICNU when he served as an expert witness, PacifiCorp has still failed to show that Mr. Falkenberg gained knowledge of the essential elements of the claims at that time. Moreover, PacifiCorp says nothing about how this may have caused Public Counsel’s claims to accrue.

29 The documents that PacifiCorp references to support this assertion do not show that Mr. Falkenberg could have or should have gained knowledge of the essential elements of the claims.^{41/} For instance, the November Update in Docket No. UE 207 shows three “new” sales contracts with California utilities and their impacts on Oregon net power costs. The Update does *not* provide the unredacted California Contracts or show the impact of the sales on Washington. In addition, the November Update explicitly states that the “prices for RECs are irrelevant” and that they are redacted from the filing.^{42/} The piece of testimony from Mr. Falkenberg supporting an Oregon accounting petition in Docket UM 1465 is likewise insufficient to show that he could have or should have gained knowledge of the essential elements of the claims. In that testimony, Mr. Falkenberg does little more than reference one contract generally. This testimony includes nothing regarding the essential elements of ICNU and Public Counsel’s claims.

5. The Commission Orders in *AT&T v. Qwest* Support a Finding that ICNU and Public Counsel’s Claims Are *Not* Time-Barred

30 ICNU and Public Counsel cite to the Initial Order in *AT&T* (hereinafter *AT&T I*) when discussing the proper statute of limitations for refund claims.^{43/} As noted by PacifiCorp, two later orders—Orders 04 and 06—came to a different conclusion than *AT&T I* with regard to

^{40/} Motion to Dismiss ¶¶25, 40.

^{41/} See *Oregon Pub. Utility Comm’n Net Power Cost Update for PacifiCorp’s 2010 TAM*, OPUC Docket No. UE 207 (filed Nov. 9, 2009).

^{42/} *Id.* at Attachment B at 2-3.

^{43/} Joint Complaint at n. 5.

the facts in that case (hereinafter *AT&T II* and *AT&T III*).^{44/} PacifiCorp alleges that ICNU and Public Counsel’s citation to *AT&T I* was improper and that *AT&T II* and *AT&T III* support a finding that ICNU and Public Counsel’s claims accrued at various earlier dates. Both of these allegations are wrong. *AT&T I* is proper precedent for showing that the Commission applies the “discovery rule” when determining whether the statute of limitations on a claim has expired,^{45/} and the Commission’s ultimate determinations in *AT&T II* and *AT&T III* actually support a finding that ICNU and Public Counsel’s claims could not have accrued at the earlier dates alleged by PacifiCorp.

31 In *AT&T I*, Time Warner and AT&T brought a refund claim against Qwest that relied on Qwest’s failure to file interconnection agreements in Washington. AT&T and Time Warner brought their claim in November 2005. Based on the facts in that case, this was years after AT&T and Time Warner had actual knowledge of the essential elements of their claims. The facts in that case included the following. First, AT&T and Time Warner were parties to a similar complaint case in Minnesota initiated in early 2002, in which both submitted comments and argued on the record regarding the unfiled agreements.^{46/} Second, numerous other jurisdictions had begun investigating Qwest for unfiled agreements in 2002. AT&T itself had initiated “a number” of those investigations, and was actively involved in all of them.^{47/} Third, AT&T had also brought a Federal Communications Commission claim regarding Qwest’s interconnection agreements that year.^{48/} Finally, also in 2002, AT&T urged the Washington

^{44/} See Motion to Dismiss ¶¶35-37.

^{45/} *AT&T Commc’n. et al. v. Qwest Corp.*, Docket No. UT-051682, Initial Order (Order No. 03) ¶18 (quoting *Janicki Logging*, 109 Wn.App. at 659-60).

^{46/} Docket No. UT-051682, Qwest Corp.’s Motion for Summary Determination and Dismissal ¶7 (dated Nov. 28, 2005).

^{47/} Docket No. UT-051682, Qwest Motion for Summary Determination or to Dismiss ¶9 (dated Oct. 22, 2007).

^{48/} *Id.* at ¶10.

Commission to pursue the matter of the unfiled agreements in an unrelated docket, and the Commission issued an order declining to do so in that docket.^{49/} At that time, the agreements had been filed in Washington, and it was “common knowledge that possible violations had occurred [and] that the violations could have affected complainants....”^{50/}

32 Based on the facts in that case, the Commission ultimately found that the accrual date for the AT&T and Time Warner claims *did not* hinge on the Minnesota case or what was presented in any other state, but, instead, on when AT&T and Time Warner knew that unfiled agreements existed in Washington and that both parties knew they had claims Washington that were subject to a statute of limitations.^{51/}

33 This case differs from *AT&T* in several critical aspects. Here, unlike *AT&T*, the California Contracts have not been filed in Washington, either publicly or confidentially. Parties have only been able to access the complete California Contracts subject to separately-negotiated highly confidential agreements in the *2010 GRC*. Furthermore, unlike AT&T and Time Warner, neither Public Counsel nor ICNU had brought a complaint in any other state regarding PacifiCorp’s failure to disclose the California Contracts.^{52/} In addition, ICNU and Public Counsel have a vastly different relationship to PacifiCorp than AT&T and Time Warner had with Qwest. AT&T, Time Warner, and Qwest were all business entities that routinely engaged in negotiations essential to the ongoing operation of the CLECs in many states. On the other hand, ICNU and Public Counsel have limited interactions with PacifiCorp as adverse parties in regulatory proceedings in two states for ICNU and one state for Public Counsel. Moreover, this

^{49/} *AT&T II* at ¶11.

^{50/} *Id.* at ¶20.

^{51/} *AT&T III* at ¶¶38-39.

^{52/} Indeed, Public Counsel has never been party to a PacifiCorp case in any other state, much less a case involving REC revenues.

Commission has never before addressed the issue of the California Contracts.^{53/} And, most importantly, unlike the complainants in *AT&T*, the facts here show that ICNU and Public Counsel did *not* have actual knowledge of the elements of the claims asserted prior to the statute of limitations period for the Joint Complaint. In sum, the final determinations in *AT&T II* and *AT&T III* cannot support a finding here that ICNU and Public Counsel's claims are time-barred.

a. The Statute of Limitations Applies Only to Requests for Refunds and therefore Does Not Apply to Requests for Any Other Remedies

34 The six-month statute of limitations applies solely to claims for refunds made under RCW 80.04.220.^{54/} The statute allows a longer period for claims brought under RCW 80.04.230, alleging collection of more than lawful rates, and does not specify any time limit for other types of requested relief as may be requested in a complaint as provided for in RCW 80.04.110.

35 Thus, any discussion of a six-month statute of limitations is solely applicable to ICNU and Public Counsel's request for financial relief, and does not apply to the other requests for relief. Public Counsel and ICNU's claims under RCW 80.04.230 have a two-year statute of limitations, which no party argues has tolled. Moreover, there is no statute of limitations on ICNU and Public Counsel's requests for a Commission investigation, establishment of regulatory mechanism to track REC revenues going forward, or for amendment of the *2009 GRC Final Order*.

^{53/} The issue of the California Contracts was first raised in the *2010 GRC*, in which the Commission has yet to issue a final order. See *2010 GRC*, Exh. Nos. MDF-1CT at 14:10-15:7, MDF-4 and MDF-5.

^{54/} RCW 80.04.240 provides in part: 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. (Emphasis added.)

B. The Alternative Request for Amendment of the Final Order in the 2009 GRC Under RCW 80.04.210 is Appropriate

36

In the Joint Complaint, ICNU and Public Counsel request, as an alternative form of relief, that the Commission amend the 2009 GRC final order.^{55/} This request is proper given the Commission’s broad discretion to amend its prior orders when doing so is necessary to effectuate its purpose of “secur[ing] safe, adequate, and sufficient utility services for the public at just, fair, reasonable, and sufficient rates.”^{56/} PacifiCorp makes three arguments as to why ICNU and Public Counsel’s alternative request for amendment of the final order in the 2009 GRC is improper: (1) the motion to amend, if brought as a complaint, constitutes an impermissible collateral attack on the final order in the 2009 GRC; (2) the motion to amend results in impermissible retroactive ratemaking; and, (3) the motion to amend constitutes single-issue ratemaking.^{57/} For the reasons discussed below, none of these arguments actually bars amendment of the 2009 GRC final order.

1. The Joint Complaint is Not a Collateral Attack on the 2009 GRC Final Order

37

PacifiCorp makes a strained argument that the language of RCW 80.04.210 precludes a motion to amend a Commission order if brought in the form of a complaint.^{58/} RCW 80.04.210 is silent as to the appropriate method to request amendment to a Commission order and contains no language to suggest a limitation on pursuing a request to amend a Commission order in a complaint rather than a different form of pleading. The portion of the rule quoted and emphasized by PacifiCorp^{59/} establishes only that the public service company is entitled to an

^{55/} *Id.* at ¶25.

^{56/} *U.S. W. Communications, Inc. v. WUTC*, 134 Wn.2d 74, 121, 949 P.2d 1337 (1997); *Washington State Attorney General’s Office v. WUTC*, 128 Wn.App 818, 826, 116 P.3d 1064 (2005).

^{57/} Motion to Dismiss ¶¶45-49.

^{58/} *Id.* at ¶45.

^{59/} *Id.* (“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

opportunity to be heard and creates no bar to ICNU and Public Counsel’s request in this case, as PacifiCorp will have a full opportunity to be heard. Thus, PacifiCorp’s interpretation inserts an artificial distinction into the rule. A reasonable interpretation of the language of RCW 80.04.210 includes complaint proceedings, particularly since the rule is silent on this issue.

38 Similarly, RCW 80.04.110(1) presents no limitation on the types of relief requested in a proceeding initiated by a complaint. In fact, RCW 80.04.110(1) explicitly provides that the reasonableness of rates may be challenged by complaint, and a grant of relief under RCW 80.04.110(1) would, in many circumstances, require amending Commission orders. If, as PacifiCorp claims, the Commission is precluded from providing relief for a complaint brought under RCW 80.04.110(1), the central purpose of the complaint statute would be thwarted.

39 Finally, PacifiCorp’s claim that the issues raised in the Joint Complaint constitute a collateral attack on a Commission order suffers from a basic defect of reasoning. As described in the legal authority relied upon by PacifiCorp, a complaint may be viewed as a collateral attack on an order if the issues *could* have and should have been raised and litigated in the underlying rate case. ICNU and Public Counsel *could not possibly* have raised and litigated the issue of 2010 REC revenue in the *2009 GRC*, because PacifiCorp was withholding accurate and complete information about its REC revenues. Thus, granting PacifiCorp’s Motion to Dismiss on the basis that the Joint Complaint is a collateral attack on a Commission order would only create an incentive for the Company to conceal information during its general rate cases with the knowledge that its wrongful actions would be insulated from further review.

heard *as provided in the case of complaints...* (emphasis added).”)

40

Although the Commission rules present no bar to a request to amend a final order through a proceeding initiated by a complaint, if the Commission determines that a complaint is not the most appropriate method to request amendment of a prior order, the Commission may liberally construe pleadings “to effect justice among the parties.”^{60/} In such a case, the Commission may restyle the complaint into a motion to amend the final order in the *2009 GRC*, or in some other form that it deems appropriate.^{61/} Such action would be consistent with the relief requested in the Joint Complaint.

2. The Relief Requested in the Joint Complaint Will Not Result in Retroactive Ratemaking

41

PacifiCorp argues that ICNU and Public Counsel’s request for amendment of the *2009 GRC* Final Order to allow for recovery of 2010 REC revenues is prohibited by the rule against retroactive ratemaking.^{62/} ICNU and Public Counsel’s request for amendment of the *2009 GRC* Final Order does not amount to retroactive ratemaking. In the alternative, if the Commission determines that this is not the case, it may still amend the final order under the well-established exceptions to the rule.

42

The rule against retroactive ratemaking prohibits the current collection of costs that were only properly recoverable fully in a past period or periods.^{63/} Thus, retroactive ratemaking encompasses the recovery of costs or revenues that were known and thus could have, and should have, been included in rates previously. In the 2008 Avista general rate case, the Commission allowed Avista to recover the costs of a settlement with the Coeur d’Alene Tribe for

^{60/} WAC 480-07-395(4).

^{61/} *WUTC v. Northwest Natural Gas Co.*, Docket. No. UE-080546, Order No. 5 ¶¶13-16 (Mar. 19, 2010) (restyling petition for declaratory ruling as a motion to amend final order).

^{62/} Motion to Dismiss ¶46.

^{63/} Leonard S. Goodman, *The Process of Ratemaking*, Public Utility Reports, Inc., 1998, p. 165.

past damage.^{64/} In that case, ICNU and Public Counsel argued that recovery of these costs would amount to retroactive ratemaking since the damages were attributable to past periods.^{65/} The Commission allowed recovery, stating:

Until Avista reached a settlement earlier this year, it had no obligation to the Tribe. This case presents Avista's *first opportunity* to recover the charges associated with that obligation.^{66/}

Applying this precedent here, ICNU and Public Counsel could not have addressed the excess 2010 REC revenues during the 2009 GRC, because PacifiCorp concealed the evidence regarding these revenues. Thus, applying the Commission's reasoning in the Avista case, retroactive ratemaking is not present here.

43

If the Commission determines that amending the 2009 GRC Final Order does technically constitute retroactive ratemaking, it may, nonetheless, still amend the Order under the well-established exceptions to the rule. The Commission has previously explained such exceptions:

Although [the retroactive ratemaking concept is a] well established principle...in the context of economic regulation, [it is] not so rigid as sometimes viewed. There are equally well-established exceptions.^{67/}

Moreover, the Commission has declared that it should "review other relevant factors than the pejorative 'retroactive' label" when determining whether a proposed regulatory action is

^{64/} *WUTC v. Avista Corp, d/b/a Avista Utilities*, Docket No. UE-080416/UG-0804167 (consolidated) Order 08 ¶78 (emphasis added).

^{65/} *Id.* at ¶72.

^{66/} *Id.* at ¶78.

^{67/} *In re the Petition of PacifiCorp d/b/a Pacific Power & Light Co. For an Accounting Order Authorizing Deferral of Excess Net Power Costs*, Docket No. UE-020417, Third Supp. Order ¶¶23-24 (allowing PacifiCorp to file a request to establish and maintain a deferred account for asserted extraordinary power costs for future recovery).

lawful.^{68/} While ICNU and Public Counsel do not believe retroactive ratemaking is implicated by the Complaint, if the Commission disagrees, the exceptions to the rule and the other relevant factors must be taken into consideration here.

44

One well-established exception to the rule against retroactive ratemaking exists for situations where certain costs or revenues could not reasonably be anticipated by the party seeking allegedly retroactive treatment. A central consideration in this exception is whether the party could have accepted the risk of non-recovery. This exception was noted by the Commission in Docket No. UE-010410, which PacifiCorp cites to support its argument here:

In addition, the Commission has carefully reviewed the *substantive and policy issues raised by this filing*. When the Commission initially approved both the CIC and Time-of-Day rates, there was substantial discussion concerning the benefits and risks of the program, and how they might be divided between the Company and its ratepayers. In light of that discussion, it is not credible to claim, as PSE now does, that “no one could have anticipated” the drop in wholesale market prices from extraordinarily high levels to more normal levels (but still high by historical standards). While PSE may not have predicted the market drop, the possibility that it *could* drop was expressly discussed. *It was clear at that time that the Company accepted not only the benefits of the program but also the risk that the program would fail*. Had power prices remained high, under the program, the Company would have kept all benefits flowing from that program. Once prices fell, and the anticipated benefits dwindled, the Company requested that its general body of ratepayers bear all of the losses associated with the program. Significantly, those ratepayers were not put on notice that, under any circumstances, they would be saddled with those risks. It is not in the public interest for the Commission now, after

^{68/} *WUTC v. Puget Sound Power & Light Co.*, Docket No. U-81-41, Sixth Supp. Order at 18-19 (Dec. 19, 1988) (allowing the utility to maintain an energy cost adjustment clause despite arguments by Commission Staff that it involved retroactive ratemaking); *WUTC v. U.S. West Commc’n., Inc.*, Docket No. UT-970010, Second Supp. Order at 10-11 (Nov. 1997) (determining whether the recovery of past expenses was barred by the rule required an evidentiary hearing because the Commission had to consider the “policy and evidentiary reasons for exercising [its] judgment” to allow such recovery).

the fact, to burden PSE's customers with risks the Company assumed at the outset.^{69/}

The Commission applied this exception in a previous case when it allowed a utility to recover unforeseen costs.^{70/}

45 This present case falls squarely into the exception for revenues that could not have been anticipated based on the Company's own representations. ICNU and Public Counsel had no reason to assume and no way of knowing during the 2009 GRC that PacifiCorp would earn REC revenues far in excess of what the Company claimed. The result of the settlement was that PacifiCorp overcharged customers by the amount of REC revenues it knew, but did not disclose, it would receive in the 2010 rate effective period. ICNU, Public Counsel, and the ratepayers they represent in *no way* accepted this risk of overcharge during the 2009 GRC, nor could they have, since PacifiCorp *concealed the relevant information* from the parties.

46 Moreover, there are sound policy reasons why the Commission should reject PacifiCorp's argument that returning 2010 REC revenues to customers would violate the rule against retroactive ratemaking. Accepting such an argument would incent companies to attempt to wrongly retain revenues by not disclosing information about those revenues until it is "too late."^{71/} This result would defeat the purpose of the rule, which is to protect the rights of

^{69/} *In the Matter of the Application of Puget Sound Energy For Authorization Regarding the Deferral of the Net Impact of the Conservation Incentive Program*, Docket No. UE-010410, Order Denying Petition to Amend Accounting Order ¶9 (emphasis added). In that case, Commission Staff discussed PSE's assumption of risks in its Open Meeting Memo dated November 7, 2001 at 2.

^{70/} *WUTC v. Puget Sound Power & Light Co.*, Docket No. U-81-41, Sixth Supp. Order at 19 (noting that the Commission had previously "authorized the recovery of past expenses in the instances where doing so is consistent with the public interest and sound regulatory theory" including "recovery of extraordinary weather-related expenses." The Commission went on to state, "[t]he test for such treatment is not whether it constitutes retroactive ratemaking—it does not—but whether there are sound policy and evidentiary reasons for exercising the Commission's judgment to do so").

^{71/} Docket No. U-81-41 at 17-18, (stating in part, "[t]he evil in retroactive ratemaking as thus understood is that the consumer has no opportunity prior to receiving or consuming the service to learn what the rate is or to participate in a proceeding by which the rate is set. The Commission agrees that retroactive ratemaking, as thus understood, is extremely poor public policy.")

customers in light of the imbalance of knowledge between companies and customers.

3. The Relief Requested is a Permissible Exception to the General Rule Disfavoring Single-Issue Ratemaking

47 PacifiCorp claims that the relief requested in the Joint Complaint, a refund and the establishment of a balancing account, would constitute single-issue ratemaking.^{72/} Single-issue ratemaking is disfavored because it may distort the “matching principle,” whereby costs and revenues are balanced at a single point in time to determine fair, just, reasonable, and sufficient rates.^{73/} The exceptions, however, are largely swallowing the rule, as utilities, including PacifiCorp, frequently file to recover costs as single issues.

48 The Washington precedent cited by PacifiCorp, as applied to the facts of this case, lend no support to its Motion to Dismiss. As PacifiCorp noted in its Motion to Dismiss, the Commission held in *AT&T Comm. v. Verizon* that a general rate adjustment in that complaint proceeding did not constitute single-issue ratemaking.^{74/} PacifiCorp attempts to distinguish that case from the allegations raised in the Joint Complaint, through reference to *McLeodUSA v. Qwest*.^{75/} In *McLeodUSA v. Qwest*, the Commission explained that the departure from the usual caution against single-issue ratemaking in *AT&T Comm. v. Verizon* was predicated on the consideration of a voluminous record, and because Verizon acknowledged that its rates were too high.^{76/}

49 Contrary to PacifiCorp’s assertions, *AT&T Comm. v. Verizon* is analogous to the

^{72/} Motion to Dismiss ¶48.

^{73/} *Petition of Avista Corp. d/b/a Avista Utils., for an Order Authorizing Implementation of a Natural Gas Decoupling Mechanism*, Docket No. UG-060618, Order No. 4 ¶19 (Feb. 1, 2007).

^{74/} Motion to Dismiss at n. 21 (citing *AT&T Comm. of the Pacific Northwest Inc. v. Verizon Northwest Inc.*, Docket No. UT-020406 Eleventh Supp. Order at 5 (Aug. 12, 2003)).

^{75/} *Id.* (citing *McLeodUSA Telecom. Services, Inc. v. Qwest Corp.*, Docket UT-063013, Order 04 (Feb. 16, 2007)).

^{76/} *Id.*

facts alleged in the Joint Complaint. PacifiCorp points out that the result in the *AT&T Comm. v. Verizon* case was achieved upon the consideration of voluminous evidence. Similarly, upon conducting discovery in this case, ICNU and Public Counsel intend to provide the Commission with a full record to support the allegations raised in the Joint Complaint, and thus, the Motion to Dismiss should not be granted because the record does not yet contain “voluminous evidence.” Further, as in *AT&T Comm. v. Verizon*, as Verizon acknowledged that its rates were too high, PacifiCorp has acknowledged that it earned REC revenues in 2010 that were far in excess of the REC revenues accounted for in rates by the settlement of the *2009 GRC*.^{77/} Through this admission, PacifiCorp effectively acknowledges that the rates resulting from the settlement of the *2009 GRC* are excessive because they do not reflect the 2010 REC revenues PacifiCorp knew it would receive.

50

Although disfavored, the Commission routinely makes exceptions to the general rule against single-issue ratemaking, as in the case of the Power Cost Only Rate Case Mechanism (“PCORC”).^{78/} Thus, an exception to the general caution against single-issue ratemaking is appropriate in certain circumstances. The Commission should consider PacifiCorp’s wrongful concealment of material facts through discovery abuses to be such an unusual circumstance. Of particular relevance to the Joint Complaint, the Commission has found that the establishment of a regulatory liability account for RECs was appropriate in the Puget Sound Energy, Inc. (“PSE”) REC case.^{79/} The Commission may, consistent with the policy determination articulated in the PSE REC case, establish an accounting mechanism to accurately

^{77/} *2010 GRC*, Cross Examination Testimony of R. Bryce Dalley, Tr. 369-370 (Jan. 25, 2011).

^{78/} *WUTC v. Puget Sound Energy, Inc.* Docket Nos. UE-072300 and UG-072301, Order No. 13 ¶26 (Jan. 1, 2009).

^{79/} *PSE RECs Petition*, Docket. No. UE-070725, Final Order ¶¶41-47.

credit the customers with the actual REC revenues PacifiCorp wrongfully retained.^{80/}

C. PacifiCorp Violated Commission Rules for Failure to Support its Pro Forma Adjustment and Failure to Correct the Record

51 In the Joint Complaint, ICNU and Public Counsel allege that PacifiCorp is in violation of RCW 34.05.452(3) (testimony under oath), RCW 80.04.130(4) (burden of proof) and WAC 480-07-540 (burden of proof) with regard to the pro forma adjustment for RECs that was ultimately included in the settlement. PacifiCorp maintains that these allegations fail to state a claim because: (1) the California Contracts were “contingent;” (2) the claim is time-barred; and (3) the violations of law alleged constitute a “procedural deficiency.” PacifiCorp is wrong on all accounts.

1. PacifiCorp’s Failure to Include “Contingent” California Contracts in Pro Forma Adjustment to REC Price Was Unreasonable

52 PacifiCorp claims its failure to include the California Contracts in its pro forma adjustment, or to provide the contracts in discovery when requested, was justified because the contracts were “contingent,” *i.e.*, they had not yet been approved by the California Public Utility Commission (“CPUC”) and therefore were not “known.”^{81/} These contracts were not contingent. PacifiCorp grossly overstates the “contingent” nature of these contracts by mischaracterizing REC contract approval data from the CPUC. Indeed, PacifiCorp provides no reason as to why it could have believed that the CPUC would not approve the California Contracts. Finally, PacifiCorp fails to explain why it did not provide the California Contracts in discovery with the explanation that the Company considered them “contingent.” This, of course, is a classic question of fact. ICNU and Public Counsel should be given the opportunity to show how

^{80/}

Id.

^{81/}

Motion to Dismiss ¶53.

PacifiCorp treated these contracts differently than other “contingent” costs.

53

PacifiCorp exaggerates the uncertainty of CPUC approval, claiming that more than “thirty contracts filed for approval around the same time of the California Contracts are currently pending consideration and approval by the CPUC.”^{82/} Review of the spreadsheets which PacifiCorp presumably^{83/} relies upon to make this statement indicates that there were not in fact thirty contracts filed “around the same time” that are still pending CPUC approval. When viewing the data available prior to approval of the California Contracts, the CPUC spreadsheets show that, in fact, there were only four contracts filed “around the same time” as the California Contracts that have not yet been approved by the CPUC.^{84/} Moreover, not a single one of these four contracts is comparable to the California Contracts.^{85/} Thus, it appears from the information presented by PacifiCorp that there were in fact *no* REC contracts still pending CPUC approval

^{82/} *Id.* at ¶14.

^{83/} PacifiCorp cites generally to the CPUC Renewables page and does not include a specific reference for the name and date of the spreadsheet it used. *Id.* at n. 4. Presumably, PacifiCorp is referring to the spreadsheet labeled “RPS_Project_Status_Table_2011_February,” available under the link “Download a List of RPS Projects” at the site referenced by PacifiCorp: <http://www.cpuc.ca.gov/PUC/energy/Renewables/index.htm>.

^{84/} According to the spreadsheet on the CPUC website, there are currently fifty-three contracts pending approval by the CPUC, twenty-one of which were filed in January of 2011 alone. Thirty-two were filed prior to 2011. The remaining pending contracts are presumably the “more than thirty contracts filed for approval at the same time of the California Contracts” (although, this is an assumption, as the Company does not provide a direct citation to which are included). However, of these thirty-two contracts, *twenty-eight were filed after the CPUC approved the California Contracts*. In making representations about its assumptions regarding potential delay of CPUC approval, PacifiCorp cannot rely on contracts that were filed *after* approval of the California Contracts. *Id.*

^{85/} Of the four contracts, three have an online date after January 1, 2012, and the fourth contract related to tradable RECs, which were not allowed for RPS compliance in California until after the CPUC issued a decision and order on the matter, on January 14, 2011. “RPS_Project_Status_Table_2011_February, available under the link “Download a List of RPS Projects” at <http://www.cpuc.ca.gov/PUC/energy/Renewables/index.htm>; *Submission of Contracts For Procurement of Renewable Energy From SCE’s 2008 Renewables Portfolio Standard Solicitation*, CPUC AL 2339-E (Apr. 6, 2009) (generation resource online date 2013); *Submission of Bilateral Agreement for Procurement of Renewable Energy* CPUC AL 2358-E (July 13, 2009) (delivery under contract beginning in 2012); *Submission of Contracts for Procurement of Renewable Energy from SCE’s 2008 Renewables Portfolio Standard Solicitation*, CPUC AL 2374-E, (Aug. 21, 2009) (generation resource online date 2014); *Submission of Bilateral Agreement for Procurement of Renewable Energy*, CPUC Docket No. U-338-E, Ruling (Jan. 24, 2011) (tradable RECs); *Decision Resolving Petitions for Modification of Decision 10-03-021 Authorizing Use of Renewable Energy Credits for Compliance with the California Renewables Portfolio Standard and Lifting Stay and Moratorium Imposed by Decision 10-05-018*, CPUC Docket No. R.06-02-012 (Jan. 14, 2011).

that are comparable to and filed around the same time as the California Contracts.

54 PacifiCorp additionally maintains that “[i]n 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.”^{86/} This statement is, again, completely misleading. At the time that PacifiCorp filed the California Contracts for approval by the CPUC, there were very few examples of delays or denials for REC contracts. The few examples of delays or denials of CPUC approval were limited to contracts involving: (1) failure to include standard terms and conditions required by CPUC rules; (2) new resource acquisitions that would not come online until well into the future; (3) resources that were not yet eligible for RPS compliance; or (4) unviable projects.^{87/} These concerns are not at all relevant to the California Contracts.

55 The two California Contracts at issue were approved within four months of being filed with the CPUC.^{88/} This timeframe is wholly consistent with the average time for CPUC approval of REC contracts at the time PacifiCorp filed the California Contracts.^{89/} Thus, PacifiCorp’s claim that uncertainty of CPUC approval justifies its failure to provide revenue information from the California Contracts during the 2009 GRC is unpersuasive. This appears to

^{86/} Motion to Dismiss at ¶14.

^{87/} See *Re PG&E Request for Approval*, CPUC Resolution E-4170, PG&E AL 3183-E/SVN at 23 (May 15, 2008) (rejected contract for failure to include standard terms and conditions); *Re PG&E Request for Approval*, CPUC Resolution E-4168, AL 3181 at 9-10 (Oct. 16, 2008) (rejected contract because project not viable); *Re Southern California Edison Company Request for Approval*, CPUC Resolution E-4168, ALs 2143-E/E-A/E-B/SMK at 16 (July 10, 2008) (contract approval delayed because generation resources not online).

^{88/} Motion to Dismiss at ¶¶14, 22.

^{89/} To determine the average length of time of CPUC approval of REC contracts, ICNU and Public Counsel researched the filing date of every approved contract listed on the spreadsheet titled, “RPS_Project_Status_Table_2011_February,” available under the link “Download a List of RPS Projects” at <http://www.cpuc.ca.gov/PUC/energy/Renewables/index.htm>. ICNU and Public Counsel then calculated the number of days between the filing and approval of each contract. For purposes of comparison, the California Contracts are similar to those listed under the “Projects Approved and Online” as the resources were operational at the time the contracts were signed. The contracts filed in this category between 2008 and the time PacifiCorp filed the California Contracts were, on average, approved within 117 days.

be nothing more than an after-the-fact justification for failure to provide accurate and complete discovery. Furthermore, the California Contracts were structured so that performance under the contracts would begin in October 2009. PacifiCorp cannot reasonably claim that it expected performance under the contracts to begin in October 2009, prior to the *2009 GRC* evidentiary hearing, while at the same time arguing that approval of the California Contracts was so uncertain that it would be unreasonable to include them in the forecast for 2010 REC revenues.

56 From the facts currently available, it appears that PacifiCorp determines whether to treat a contract pending regulatory approval as contingent or non-contingent for purposes of disclosure to parties and inclusion in rates not based on any objective criteria, but instead based on whether doing so will benefit the Company and its shareholders. In its Motion to Dismiss, PacifiCorp has offered *no* evidence that the California Contracts were new to the CPUC, had unusual terms, or other elements that make approval uncertain. In fact, all evidence shows that it was highly likely, if not certain, that the CPUC would approve the California Contracts before rates from the *2009 GRC* would go into effect. In sum, the evidence presented by PacifiCorp to demonstrate that the regulatory approval of the California Contracts was uncertain is not at all credible, and, on its face, raises questions of fact.

2. The Reparations Claim Relating to the Pro Forma Adjustment is Not Time-Barred

57 PacifiCorp claims that a request for reparations relating to the *2009 GRC* pro forma adjustment is necessarily time-barred, because PacifiCorp disclosed in discovery that 2008 and 2009 REC prices were higher than the price assumed in the pro forma adjustment.^{90/} PacifiCorp's argument fails because the complained-of pro forma adjustment purports to reflect

^{90/} Motion to Dismiss ¶52.

not 2008 or 2009 revenues, but anticipated 2010 revenues.

58 The allegations contained in the Joint Complaint reflect PacifiCorp’s failure to disclose the 2010 REC revenue it knew it would receive at the time the of the 2009 GRC. Thus, the disclosure of 2008 and 2009 data is largely irrelevant to the allegations in the Joint Complaint. PacifiCorp at no time disclosed that it possessed data regarding anticipated 2010 REC prices, and, as discussed above, ICNU and Public Counsel did not know the actual REC prices and their impact on Washington-allocated revenues until the California Contracts became available in Washington and the Company issued the 2010 1st Quarter REC Report.

59 In addition, the damages sought under the reparations statute reflect the difference between the amount of 2010 REC revenues PacifiCorp knew it would receive and the amount claimed by the pro forma adjustment. The data response cited by PacifiCorp reflects 2008 and 2009 data, which does not form the basis for the request for reparations under the Joint Complaint.

3. The Failure to Disclose a Material Fact is Not a “Procedural Deficiency”

60 PacifiCorp minimizes the importance of ICNU and Public Counsel’s allegations by labeling them as a “procedural deficiency.”^{91/} By raising the issue of whether PacifiCorp failed to carry its burden of proof and that the testimony supporting the pro forma adjustment was filed under oath, ICNU and Public Counsel are not alleging that PacifiCorp employees committed a procedural misstep. Rather, ICNU and Public Counsel are alleging that PacifiCorp employees have failed to disclose material facts in their sworn testimony, a serious allegation.

61 PacifiCorp’s witnesses, Andrea Kelly and Cathie Allen, offered testimony in

^{91/} *Id.* at ¶51.

support of the settlement on September 22, 2009. Performance under the California Contracts was scheduled to begin on October 1, 2009, and two of the California Contracts had been approved, and thus, were “non-contingent,” by October 15, 2009.^{92/} At the evidentiary hearing, on October 29, 2009, Ms. Kelly and Ms. Allen swore an oath and adopted their written testimony in support of the settlement.^{93/} The witnesses were afforded an opportunity to correct their testimony; Ms. Kelly made one revision to her testimony to correct a typographical error.^{94/} At no time did Ms. Kelly or Ms. Allen disclose that, since the time of submitting their testimony in support of the settlement, a fundamental change had occurred to the assumptions on which the settlement relied, because two of the California Contracts had been approved and performance had *actually begun* under those contracts. Ms. Kelly and Ms. Allen’s failure to correct the record based on information known at the time of the evidentiary hearing is a failure to disclose a material fact to the Commission.

62

Additionally, ICNU and Public Counsel allege that PacifiCorp failed to carry its burden of proof to support its pro forma adjustment. PacifiCorp provided no support for its decision to rely on 2007 data when it had data at its disposal that would much more accurately reflect expected 2010 REC sales prices. While PacifiCorp again tries to downplay these violations of law as “procedural deficiencies,” they in fact resulted in the Commission approving a settlement of the 2009 GRC that did not reflect 2010 REC revenues, and thus, caused customers to be significantly overcharged. The dollars at stake hardly represent a mere

^{92/} ICNU and Public Counsel maintain that the contracts were non-contingent as of the time of their execution. However, to highlight the unreasonableness of PacifiCorp’s failure to disclose its known 2010 REC revenues, ICNU and Public Counsel note that, even by PacifiCorp’s arbitrary standards, the contracts *were not* contingent at the time of the evidentiary hearing.

^{93/} 2009 GRC, Evidentiary Hearing TR. at 104:5-13 (Oct. 29, 2009).

^{94/} *Id.* at 104:16-25, 105:1-5.

“procedural deficiency.”

D. PacifiCorp’s Justifications for its Failure to Provide Complete and Accurate Responses in Discovery and its Failure to Update its Responses Are Based on an Unreasonably Narrow Interpretation of the Data Requests

63 PacifiCorp argues that ICNU and Public Counsel’s allegations based on discovery violations fail because “the information that Complainants now complain was not provided was also not requested.”^{95/} This is simply not true, and again a question of fact for the Commission to decide. PacifiCorp makes an overly narrow and unreasonable interpretation of ICNU’s data requests in an attempt to hide its then-known amount of 2010 REC revenues pursuant to executed contracts. The Commission has previously articulated the importance of full compliance with discovery rules: “[D]iscovery rules are not simply rules to be followed. They are what enable all parties and the Commission to proceed with a fact-finding hearing in an orderly and well-prepared manner.”^{96/}

64 ICNU’s data request in the *2009 GRC* stated: “Please update this response as PacifiCorp executes additional sales throughout this proceeding.”^{97/} In its response, PacifiCorp included REC sales through the end of December 2009. The data request sought information about all executed sales, including updates executed throughout the proceeding. By the inclusion of revenue forecasts through the end of 2009, PacifiCorp’s response to the request indicates that PacifiCorp had the same understanding of the data request.

65 PacifiCorp claims that it was obligated through this data request to provide only information about revenues that it had actually received and justifies its failure to include the California Contracts, because at the time of filing the settlement, the California Contracts had not

^{95/} Motion to Dismiss ¶59.

^{96/} *WUTC v. Olympic Pipe Line Company*, Docket No. TO-011472 ¶30 (July 23, 2002).

^{97/} Joint Complaint, Exhibit C at 7 (*2009 GRC*, ICNU Data Request 2.1 (“ICNU 2.1”)).

been approved by the CPUC, and PacifiCorp had not received revenue under the contracts. This explanation is simply not credible and in no manner reflects upon the straightforward questions posed in discovery. With regard to revenue received under the contracts, presumably, PacifiCorp had also not yet received actual revenue from the contracts that were included in response to ICNU 2.1, between the time of updating the response (July 2, 2009) and the time through which contract information was provided (December 2009). Thus, the information provided for the period between July and December 2009 was an estimate of revenue it would receive in that time period. If PacifiCorp had in fact interpreted the data request to only seek “actual revenue” received by the Company, its inclusion of revenue estimates was misleading and supports the reasonableness of ICNU’s belief that it was receiving information about *all* executed contracts.

66

PacifiCorp justifies the inconsistency of its inclusion of the July through December 2009 revenue estimates and the exclusion of the California Contracts as follows: “PacifiCorp included forecast REC revenues for 2009 for non-contingent contracts because that information was in the Company’s REC spreadsheet.”^{98/} However, PacifiCorp’s response to ICNU 2.1 contained no explanation that it was including revenue estimates for executed and allegedly “non-contingent” contracts only, or that information from executed and “contingent” contracts was being excluded. The inclusion of revenue forecasts of only “non-contingent” contracts without any explanation as to their inclusion and the exclusion of “contingent” contracts is unreasonable and misleading. Moreover, the instructions accompanying ICNU’s data requests clearly ask that:

If, in answering any of these Data Requests, you feel that any Data Request or definition or instruction applicable thereto is ambiguous, set forth the language you feel is ambiguous and the

^{98/} Motion to Dismiss ¶56.

interpretation you are using in responding to the Data Request.^{99/}

67 Because PacifiCorp failed to comply with the instructions accompanying ICNU's data request and failed to identify what was being included and what was being excluded in the data response, ICNU had no way of knowing that it was not getting fully responsive information. If PacifiCorp was being straightforward and compliant with the data request, it would have included *all* contracts and explained why it believed certain contracts should be excluded. Under this approach, the information would be known, and the Commission could have resolved the matter if the parties were unable to agree. Obviously, this did not occur because presumably PacifiCorp believed it could provide selective information in response to discovery. At best, the reasonableness of PacifiCorp's interpretation of the data request discovery questions is a disputed issue of fact that merits additional investigation.

68 Further, the allegations in the Joint Complaint are not limited to PacifiCorp's failure to include the California Contracts. There may be other contracts that PacifiCorp has failed to include in its discovery responses, that neither ICNU nor Public Counsel have yet discovered. Accordingly, ICNU and Public Counsel should be allowed to investigate whether PacifiCorp failed to fully respond to data requests and failed to supplement its data responses when new information became available, and whether additional discovery abuses occurred.

V. CONCLUSION

69 The Motion to Dismiss is yet another attempt by PacifiCorp to evade the consequences of concealing information from parties to the *2009 GRC* and to avoid crediting ratepayers with the amounts they were overcharged in rates. PacifiCorp has failed to carry its burden to demonstrate that the Joint Complaint should be dismissed as a matter of law. ICNU

^{99/} Joint Complaint, Exhibit C at 4 (*2009 GRC*, ICNU Data Request Instructions).

and Public Counsel should be allowed the opportunity to pursue the allegations raised in the Joint Complaint and to develop a full record. For the foregoing reasons, ICNU and Public Counsel respectfully request that the Commission deny PacifiCorp's Motion to Dismiss or Motion for Summary Disposition.

Respectfully submitted,

DATED this 28th day of February, 2011.

PUBLIC COUNSEL

/s/ Sarah A. Shifley
Sarah A. Shifley
Assistant Attorney General
Public Counsel Section
800 Fifth Avenue, Suite 2000
Washington State Attorney
General's Office
Seattle, WA 98104
(206) 464-6595
sarah.shifley@atg.wa.gov

DAVISON VAN CLEVE, P.C.

/s/ Melinda J. Davison
Melinda J. Davison
Jocelyn C. Pease
333 S.W. Taylor, Suite 400
Portland, Oregon 97204
(503) 241-7242 telephone
(503) 241-8160 facsimile
mjd@dvclaw.com
jcp@dvclaw.com
Of Attorneys for Industrial
Customers of Northwest Utilities