

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

2 Petition of

3 PACIFICORP dba PACIFIC POWER &
4 LIGHT COMPANY

5 For an Accounting Order Authorizing Deferral
6 of Excess Net Power Costs

DOCKET NO. UE-020417
(consolidated with UE-991832)

**PACIFICORP’S REPLY BRIEF
REGARDING COMMISSION
AUTHORITY TO ESTABLISH A
PRIOR EFFECTIVE DATE FOR
DEFERRED ACCOUNTING**

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9 **I. OVERVIEW OF REPLY ARGUMENTS**

10 The sole issue before the Commission at this stage in this proceeding is whether to grant
11 the limited relief of authorizing PacifiCorp to defer its excess net power costs. The sole legal
12 issue about which Administrative Law Judge Dennis J. Moss has requested briefing at this time
13 is whether, in approving the requested deferral, the Commission has authority to establish a
14 deferred account effective as of June 1, 2002.

15 The opposing briefs claim, incorrectly, that deferred accounting is equivalent to
16 retroactive ratemaking and is therefore illegal. As the Commission has recognized, however,
17 deferred accounting is a generally accepted and, according to Goodman, “fundamental”¹
18 ratemaking tool designed to permit rates to reflect actual costs or revenues *without* violating the
19 general rule that rates must be set prospectively and may not retroactively account for past costs
20 or revenues. The opposing briefs fail to acknowledge the critical distinction—also recognized,
21 even emphasized by the Commission—between (1) the limited relief of authorizing an
22 accounting deferral, and (2) a determination of whether and to what extent amounts deferred
23 should be recovered in rates. A decision to approve PacifiCorp’s requested deferral of power
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25 ¹ *Leonard Saul Goodman, The Process of Ratemaking, 322-23 (1998) (hereinafter*
26 *“Goodman”).*

1 costs would not alter or amend rates; the question of recovery and the appropriate recovery
2 methodology will be addressed later in a formal evidentiary proceeding—at which customers and
3 interested parties will have the opportunity to participate. As noted by the Commission, the
4 preliminary question to be addressed—the question of accounting treatment—“can be answered
5 without the necessity for a detailed record.”²

6 The Commission should reject the attempts by Commission Staff, the Industrial
7 Customers of Northwest Utilities (“ICNU”) and Public Counsel to re-hash arguments about
8 “retroactive ratemaking” that the Commission already has rejected. These claims distract from
9 and confuse the legal issue presented, *i.e.*, whether the Commission has the authority to issue an
10 order approving deferred accounting treatment with an effective date earlier than the order but
11 subsequent to the date the Petition requesting deferral was filed. In its Initial Brief, PacifiCorp
12 demonstrated that the prohibition against retroactive ratemaking does not bar the Commission
13 from implementing a prior effective date for the requested accounting deferral and, accordingly,
14 the Commission should find it has the authority to authorize the requested deferred accounting
15 treatment beginning June 1, 2002.

16 **II. ARGUMENT**

17 **A. Deferred Accounting is a Well-established Exception to the Prohibition** 18 **Against Retroactive Ratemaking**

19 As expected, the opposing parties take the position that Commission approval of a
20 deferred account to include entries from June 1, 2002, forward, would run afoul of the principles
21 that generally preclude retroactive ratemaking. After analyzing what they consider to be relevant
22 precedent, both Commission Staff’s Brief (“Staff Brief”) and the Joint Brief filed by ICNU and
23 Public Counsel (“Joint Brief”) reach the conclusion that *any* recovery of past expenses and costs

24 ² *Re Avista Corporation dba Avista Utilities* (“Avista”), Docket No. UE-011597, Order
25 Granting Accounting Petition (Dec. 28, 2001); *Re Puget Sound Energy* (“PSE”), Docket No. UE-
26 011600, Order Granting Accounting Petition (Dec. 28, 2001).

1 in future rates runs afoul of the prohibition against retroactive ratemaking.³ Although both
2 opposing briefs concede that the Commission already has definitively rejected that assertion in
3 the context of deferred accounting,⁴ they nevertheless devote substantial time and effort in an
4 apparent attempt to persuade the Commission that this particular request for deferred accounting
5 should be rejected on that basis. For several reasons, those efforts must fail.

6 PacifiCorp does not dispute that setting rates prospectively is required by Washington
7 law, or that the prohibition against retroactive ratemaking “is a valid principle that has been
8 adopted by the Commission, Washington courts, and other commissions and courts from across
9 the country.”⁵ It is important to remember, however, that deferred accounting is a “widely
10 recognized” exception to the rule against retroactive ratemaking.⁶ For that reason, retroactive
11 ratemaking precedent decided outside the deferred accounting context is inapposite to this
12 discussion about the Commission’s authority to impose a prior effective date for a deferred
13 account.⁷ Deferred accounting by its very nature involves tracking costs for possible recovery in
14 future rates. The Commission (as well as the majority of other commissions) has held that the

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16 ³ Staff Brief at 9-10; Joint Brief at 6, 14-15.

17 ⁴ Staff Brief at 5-7; Joint Brief at 9.

18 ⁵ Staff Brief at 3.

19 ⁶ Goodman at 176, 321.

20 ⁷ Both briefs, for example, rely on statements the Commission made in its Order Denying
21 [PSE’s] Petition to Amend Accounting Order. *Re Puget Sound Energy*, Docket No. UE-010410,
22 Order Denying Petition to Amend Accounting Order (Nov. 9, 2001). In that proceeding, the
23 Commission determined that it was legally barred by the retroactive ratemaking doctrine from
24 granting PSE’s proposal which it determined was nothing more than an attempt to change the
25 past effect of a tariffed rate, *i.e.*, “to adjust current rates to make up for past errors in
26 projections.”” *Id.* (quoting *Town of Norwood Mass. v. FERC*, 53 F.3d 377, 381 (D.C.Cir. 1995)).
By contrast, a “pure” deferred accounting proceeding such as this one does not adjust rates
retrospectively to make up for subsequently discovered mistakes in those rates. Rather, it seeks
to preserve for subsequent review by the Commission costs that are the consequence of
extraordinary circumstances and that, for that very reason, typically are not recoverable in rates.

1 deferral and amortization of past costs does not constitute retroactive ratemaking.⁸ Moreover,
2 the Commission has previously rejected the *exact* same argument the Staff and Joint Briefs make
3 now.⁹

4 In short, deferred accounting (and the subsequent recovery of amounts deferred) can be
5 viewed as either (1) an exception to the rule against retroactive ratemaking or (2) as a ratemaking
6 tool to which the doctrine does not apply (because the ratemaking that ultimately occurs
7 technically is prospective). In any event, it flies in the face of Commission precedent to
8 challenge the legality of deferred accounting and the Commission's discretion to allow recovery
9 of past costs under certain circumstances. The Commission has previously rejected the same
10 challenge to its deferred accounting and ratemaking authority and it should do so again in this
11 case.

12 **B. The Question of Deferred Accounting Treatment and the Question of**
13 **Recovery in Rates are Separate and Distinct Questions.**

14 The opposing briefs also appear to be confused about the limited nature of relief
15 PacifiCorp seeks at this stage in the proceeding, *viz.*, an order authorizing the deferral of the
16 Company's excess power costs. In fact, both the Staff and Joint Brief would condemn
17 PacifiCorp's request for a deferred accounting order on the basis that the Company's Petition did
18 not include a specific methodology for recovery of deferred costs in rates.¹⁰

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21 ⁸ *Re Puget Sound Power & Light Company* ("Puget Power"), Docket No. U-81-41
(Reopened), Sixth Supplemental Order (Dec. 19, 1988).

22 ⁹ *See id.* ("According to Commission Staff, the basic principle underlying the
23 retroactivity prohibition is that past expenses and costs should not be recoverable in future
24 rates.") The Commission agreed that "retroactive ratemaking * * * is extremely poor public
25 policy and is illegal under the statutes of Washing State as a rate applied to service without prior
26 notice and review," but found that recovery of past expenses in a rate to be applied prospectively
and after a hearing is "not retroactive." *Id.*

¹⁰ Staff Brief at 2, 7-8; Joint Brief at 4, 9

1 As recently noted by the Commission, “the question of accounting treatment and the
2 question of recovery in rates are separate and distinct questions.”¹¹ PacifiCorp’s Petition (which
3 contains a proposal for a specific *deferral* methodology) includes information to assist the
4 Commission in answering the first question: Should it allow an accounting treatment that will
5 preserve for later determination whether and to what extent the deferred power costs should be
6 recovered in rates? Only if that question is answered affirmatively does the question of recovery
7 in rates (and, by extension, the establishment of a specific cost recovery methodology) become
8 relevant.¹²

9 Contrary to the Joint Brief’s assertion,¹³ PacifiCorp was unable to find any prior
10 Commission orders approving *deferred accounting* requests (as distinguished from orders
11 approving power cost adjustment mechanisms which by nature are proposed in the form of a
12 tariff) that include consideration or approval of specific recovery methodologies. Likewise,
13 Staff’s suggestion that PacifiCorp’s filing is somehow defective and violates the rule against
14 retroactive ratemaking because it did not include a “tariff or other mechanism indicating that
15 rates will collect the deferred costs”¹⁴ is similarly without precedent or merit. No Commission
16 rule, regulation or order imposes such a requirement on a utility requesting an accounting order.

17 The Commission’s “segregated” approach to deferred accounting requests also is relevant
18 to the issues of notice raised by the opposing parties. Staff contends that approval of a specific
19 rate recovery method in conjunction with an order authorizing deferral better protects the
20 interests of ratepayer notice and opportunity to review.¹⁵ PacifiCorp does not dispute that notice

21 ¹¹ *Avista*, Docket No. UE-011597; *PSE*, Docket No. UE-011600.

22 ¹² *See id.* (one issue to be decided when recovery is sought is how to treat deferred costs
23 for ratemaking purposes).

24 ¹³ Joint Brief at 9.

25 ¹⁴ Staff Brief at 7.

26 ¹⁵ *Id.* at 8.

1 is required when rates change.¹⁶ However, protection of ratepayers’ notice interests already is
2 built in to the deferred accounting process as that process is currently structured. As held by the
3 Commission, the limited question of whether to approve deferred accounting treatment does not
4 involve risk to ratepayers.¹⁷ “That risk is not present precisely because the second question—
5 rate treatment—will be answered only after the development of a detailed record.”¹⁸
6 Accordingly, Staff’s proposal that the Commission in its deferral order also must approve a
7 recovery mechanism would create a notice issue that heretofore has not existed in deferred
8 accounting proceedings.¹⁹

9 Similarly, the deferred accounting process as currently structured also satisfies the due
10 process concerns raised in the Joint Brief. The Joint Brief asserts that “[w]ere the Commission
11 to allow PacifiCorp retroactively *to recover* past excess net power costs prior to an order
12 authorizing deferral, customers’ due process rights would have been violated because they were
13 denied notice and an opportunity to respond to PacifiCorp’s Application.”²⁰ On the contrary,
14 customers will have an opportunity to respond to the issues relevant to *recovery* of costs in rates
15 when the Commission addresses the second question, *i.e.*, whether the deferred costs are prudent,
16 fair, just and reasonable and how deferred costs should be treated for ratemaking purposes.²¹

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¹⁶ See RCW 80.28.060.

18 ¹⁷ *Avista*, Docket No. UE-011597; *PSE*, Docket No. UE-011600.

19 ¹⁸ *Id.*

20 ¹⁹ See also *Re Puget Sound Power and Light Company*, Docket No. U-84-13 (Sept. 28,
21 1984) (case involving request for approval of special accounting procedure with “no immediate
effect on rates” may be considered on basis of legal arguments only without evidentiary hearing).

22 ²⁰ Joint Brief at 14 (emphasis added).

23 ²¹ To the extent the Joint Brief is suggesting that customers’ due process rights will be
24 violated by not allowing them an opportunity to be heard on the issue of the Commission’s
25 authority to authorize deferrals effective June 1, 2002, for two reasons that argument should be
26 rejected. First, because as previously discussed, the law requires only that customers be noticed
of changes in rates, not changes in utility accounting treatment of specific costs. And second, the
interests of ratepayers have in fact been heard on this legal issue through the Joint Brief.

The issue currently before the Commission is the Company’s request for the limited relief of authorizing accounting deferrals, not a request for a change in utility rates. The question of recovery of deferred amounts in rates and, by extension, the establishment of a specific cost recovery methodology become relevant only if the Company’s request for deferred accounting is granted and only when PacifiCorp seeks to recover those costs in rates.

C. Imposing an Effective Date for Deferral Prior to the Commission Order Is Not Equivalent to “Unauthorized” Deferral and Would Not Run Afoul of Principles that Generally Preclude Retroactive Ratemaking.

In support of its position that deferred accounting treatment may not be approved “retroactive” to the date of a Commission order, Staff points to the requirement that a company must obtain authorization to defer before deferrals may lawfully commence.²² As PacifiCorp noted in its Initial Brief however, those issues—unauthorized deferral and authorized deferral “retroactive” to the date of a Commission order—are not the same. Commission approval of deferred accounting treatment that will involve application of the deferral methodology to costs incurred before the Commission’s order approving deferral but after the utility requests permission to defer those costs, is distinguishable from a utility’s attempt to create a deferred account without Commission approval.

As discussed at length in PacifiCorp’s Initial Brief, a Commission order authorizing deferral that takes effect any time on or after the date the Petition is filed would not be “retroactive” but, rather “prospective” from the date the Petition was filed.²³ In its Initial Brief

²² Staff Brief at 7.

²³ The Joint Brief’s assertion that, were the Commission to conclude it has authority to approve deferrals effective prior to a Commission order, “PacifiCorp could [then] choose any past time period when the Company did not meet its authorized rate of return and request a deferred account for those costs that exceeded projections” is absurd and misconstrues both the Company’s argument and the facts in this case. Joint Brief at 8. When PacifiCorp filed its request for deferred accounting treatment, it requested an effective date for deferrals that was almost two months after the date it filed its Petition. In other words, PacifiCorp’s request did not

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1 PacifiCorp also noted that the Commission’s treatment (with Commission Staff’s support) of
2 Avista’s request for deferred accounting—and subsequent for modification of the deferral
3 mechanism previously approved—is consistent with this position.²⁴

4 Staff first attempts to distinguish the Avista precedent from this case on the basis that the
5 “retroactive” deferrals allowed for Avista only were authorized for a one-month period.²⁵ This is
6 a distinction without a difference that should be rejected. Moreover, contrary to Staff’s
7 assertions that this issue never was presented to the Commission in the Avista proceeding,²⁶ the
8 Joint Brief asserts that the Commission issued the order authorizing retroactive deferrals over
9 ICNU and Public Counsel’s objections.²⁷ The Joint Brief also contends that because Avista’s
10 *recovery* of its deferred costs ultimately was resolved by way of settlement, the Commission’s
11 orders regarding *deferred accounting* should not have any precedential value.²⁸ That argument
12 may have merit with respect to the orders authorizing recovery of Avista’s deferred costs, but
13 should not apply to the deferred accounting orders that were not the result of settlement.
14 Consistent with its decision to issue an order authorizing “retroactive” deferral and modification
15 of the deferral mechanism in the Avista case over the objections of Public Counsel and ICNU,
16 the Commission likewise should decide in this case that the opposing parties’ objections to a
17 “retroactive” deferral order are without merit.

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20 (...continued)
21 involve a “past time period,” nor is PacifiCorp contending that the Commission has authority to
22 authorize deferrals to commence *before* the date the Petition was filed.

23 ²⁴ *Re Avista Corporation dba Avista Utilities*, Docket No. UE-000972, Order Granting
24 Deferral of Power Cost Expenses Pending Demonstration of Prudence (Aug. 9, 2000); *Re Avista*
25 *Corporation*, Docket No. UE-000972, Memorandum (Jan. 24, 2001).

26 ²⁵ Staff Brief at 9.

²⁶ *Id.*

²⁷ Joint Brief at 10.

²⁸ *Id.* at 10-11.

1 **III. CONCLUSION**

2 For all the reasons stated in PacifiCorp’s Initial Brief and this Reply Brief, the
3 Commission should find that authorization of deferred accounting treatment effective prior to the
4 date of the order authorizing deferral does not violate the prohibition against retroactive
5 ratemaking. Alternatively, should the Commission decide that such a ruling would constitute
6 retroactive ratemaking, interests of fairness and sound public policy nevertheless warrant
7 Commission exercise of discretion to authorize “retroactive” approval of deferred accounting
8 treatment in this case, for the reasons described in PacifiCorp’s Initial Brief. Thus, regardless of
9 the position the Commission takes on the legal issue presented, the Commission should approve
10 PacifiCorp’s request for deferred accounting treatment effective as of June 1, 2002, as requested
11 in the Company’s Petition filed April 5, 2002.

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13 DATED: September 6, 2002.

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