BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PACIFICORP d/b/a PACIFIC POWER & LIGHT COMPANY Respondent.	)	DOCKET NO. UE-991832
In re the Petition of PACIFICORP d/b/a PACIFIC POWER & LIGHT COMPANY For an Accounting Order Authorizing Deferral of Excess Net Power Costs.	)	DOCKET NO. UE-020417

REPLY BRIEF OF STAFF REGARDING LEGAL AUTHORITY OF COMMISSION TO AUTHORIZE RETROACTIVE DEFERRED ACCOUNTING

I. INTRODUCTION

1 PacifiCorp requests authorization from the Commission to defer excess net power costs commencing June 1, 2002. By Initial Brief filed August 28, 2002, Staff argued that such authorization would result in unlawful retroactive ratemaking since it would allow deferral of costs incurred when no specific provision exists for recovery of those costs from ratepayers. The Commission may authorize deferred accounting for costs incurred

prospectively from the date such authorization is granted as long as it includes a specific method for recovery of the deferred costs.

2 The Company maintains that the rule against retroactive ratemaking does not bar the Commission from authorizing a prior effective date for deferred accounting. Four arguments are advanced by PacifiCorp:

1. Deferred accounting does not violate the rule against retroactive ratemaking;

2. The Commission has implied authority to authorize a prior date for deferred accounting;

3. A prior effective date for deferred accounting is consistent with the filed rate doctrine; and

4. The Commission has discretion to authorize a prior effective date even if such authorization constitutes unlawful retroactive ratemaking.

3 Each of the Company's arguments is addressed below.

II. ARGUMENT

A. Staff Does Not Argue that Deferred Accounting is Unlawful Retroactive Ratemaking as Long as the Order Establishes a Specific Cost Recovery Method

4 PacifiCorp argues that neither deferred accounting nor recovery of deferred costs violates the prohibition against retroactive ratemaking. PacifiCorp Brief at 2-6. This general principle is not in dispute between Staff and the Company. It is Staff's position, however, that authorization for deferred accounting without a specific cost recovery method is vulnerable to a retroactive ratemaking challenge.

5 The Company does not disagree. In fact, the Commission cases quoted extensively by PacifiCorp support Staff's position of the necessity to establish a deferred cost recovery methodology. *Id.* at 3-4. Each of those cases upheld deferred accounting

against a charge of unlawful retroactivity, but only because the Commission established tariffs (ECAC and PRAM) that included a fixed mathematical formula to collect from ratepayers past costs in prospective rates. *In re Puget Sound Power & Light Company,* Cause No. U-81-41, Sixth Supp. Order (December 19, 1988); *In re Puget Sound Power & Light Company,* Docket Nos. UE-901183-T and UE-901184-P, Third Supp. Order (April 1, 1991).

6 None of the cases cited by the Company in this section of its brief address deferred accounting in the same context presented by the Company's Petition;[1] namely, a request for deferred accounting of costs incurred prior to the effective date of a Commission order, and no specific cost recovery mechanism proposed in the request itself or already present in an existing tariff.

B. The Commission Does Not Have Implied Power to Authorize a Prior Effective Date for Deferred Accounting

7 The Company argues that the Commission's power to authorize a prior effective date for deferred accounting may be implied from its express statutory authority to prescribe accounting practices (RCW 80.04.090) and to regulate in the public interest (RCW 80.01.040) to ensure that rates are set that are just, fair, reasonable and sufficient. PacifiCorp Brief at 6-8.

8 Administrative agencies have those powers expressly granted to them and those *necessarily* implied from their statutory delegation of authority. (Emphasis added.) *Tuerk v. Department of Licensing,* 123 Wn.2d 120, 123-25, 864 P.2d 1382 (1994).

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[1] The cases cited by the Company include *In re Puget Sound Energy, Inc.,* Docket No. UE-011600 (December 28, 2001). PacifiCorp Brief at 6, fn. 15. That case, however, was dismissed as part of a settlement adopted by the Commission that granted PSE interim rate relief. *WUTC v. Puget Sound Energy, Inc.* Docket Nos. UE-011570 and UG-011571, Ninth Supp. Order (March 28, 2002). Under the Rate Plan, PacifiCorp has that same option. PacifiCorp can increase rates if it can demonstrate that conditions,

Necessarily implied powers are not easily inferred. *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 869 P.2d 1045 (1994) (power to make local exchange boundaries exclusive cannot be implied from express power under RCW 80.36.230 to "prescribe" such boundaries).

9 None of the express powers cited by PacifiCorp necessarily imply the power to authorize retroactive deferrals. RCW 80.04.090 states only that the Commission has the authority to prescribe "the *forms* of any and all accounts . . . to be kept by public service companies . . .) (Emphasis added.) The authority to approve retroactive deferred accounting cannot be implied from a provision which pertains simply to the form of a company's accounting practices. The provision has no relevance in applying the long-standing and fundamental doctrine that prohibits retroactive ratemaking.

10 RCW 80.01.040(3) does require the Commission to regulate in the public interest. But, such regulation must be "as provided by the public service laws". Those public service laws include RCW 80.28.020 which empowers the Commission to order only the just and reasonable rates ". . . to be *thereafter* observed and in force . . .". (Emphasis added.) This is an express statutory embodiment of the rule against retroactive ratemaking. The statutory requirement that ratemaking must be prospective cannot be the basis to imply necessarily the power to authorize retroactive deferrals.[2]

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including "extraordinary" power costs, warrant emergency relief. No such request has been presented to the Commission.

[2] The Company again cites Cause No. U-81-41 for the proposition that the power to approve deferred accounting is necessarily implied from the absence of legal authority to the contrary. PacifiCorp Brief at 8, fn. 20 and 21. The case, however, did not address authorization of retroactive deferrals. Moreover, as stated earlier, when the proceeding was reopened to consider ECAC, the Commission approved deferred accounting but only under a tariff mechanism that established a fixed mathematical formula for deferred cost recovery.

C. The Filed Rate Doctrine Supports Staff's Position Since PacifiCorp's Petition Did Not Notify Ratepayers that Prior Deferred Costs May be Collected

11 The Company argues that a Commission order authorizing deferred accounting for costs incurred on or after the date the Petition was filed (April 5, 2002) would not be retroactive but, rather, prospective from the date the Petition was filed. PacifiCorp Brief at 8-11. The Company relies upon principles underlying the filed rate doctrine to reach this conclusion. Chief among those principles advanced by PacifiCorp is the rationale of prior and sufficient notice to "the relevant audience" that rates are provisional in nature and subject to revision on a prospective basis. *Id.* at 9: 15-18. Ratepayers are the relevant audience.[3]

12 The Company is correct that it is critical that ratepayers receive advance and sufficient notice that deferred charges will be collected. See *Town of Norwood v. FERC*, 53 F.3d 377, 383 (D.C. Cir. 1995). However, contrary to PacifiCorp's contention, this rationale demonstrates that the time of filing of the Petition is not the trigger for notice to ratepayers that establishes the legality of a Commission order authorizing deferred accounting.[4] This is because a request for deferred accounting is not a tariff nor is it even a request to revise a current tariff. Ratepayers are given *no* notice of the filing of the Petition itself and *no* notice of how the Petition may impact the rate for service

[3] The Company may also have intended to include the financial community in the "relevant audience". Such intention is diffcult to square with the absence in the Petition of a proposal to recover deferred costs. Allowing deferred accounting without a specific recovery method risks sending unclear messages to the financial community, as well as to ratepayers, about cost recovery.

[4] PacifiCorp cites *Pacific Coast Elevator Co. v. Department of Public Works*, 130 Wash. 620 (1924) for the proposition that a Commission decision can be effective prior to the date it is entered as long as it succeeds the date jurisdiction is acquired. PacifiCorp Brief at 10, fn. 29. However, that case involved a complaint by the Commission against the existing rates of a regulated company. The Commission's order in that case, therefore, was in the nature of an order for reparations to the date the complaint was filed which placed the company on notice that existing rates may be excessive. The Commission's authority to order reparations to the date of a complaint is now codified at RCW 80.04.220. No such express statutory authority exists for a deferred accounting order with a retroactive effective date.

consumed.[5] Such notice comes only when a Commission order is issued. Thus, it is the issuance of the Commission's order that triggers the legality of deferred accounting, not the filing of the request for deferred accounting.

13 The circumstances of this case underscore the point that the filing of the Petition does not satisfy the requirement of advance and sufficient notice to ratepayers that deferred costs, whenever they are incurred, will be collected. The Company made no proposal regarding the recovery through rates of any deferred costs. Any such proposal would be the subject of a future filing with the Commission. Petition at 12, ¶ 23. The Company may even propose in that later proceeding less than full recovery of any deferred costs in recognition of the restrictions imposed by the current Rate Plan. Petition at 12-13, ¶ 24.

14 Moreover, the Commission's Third Supplemental Order in Docket No. UE-991832 establishing the Rate Plan placed ratepayers on notice that, absent interim relief, there would be no revisions to rates through 2005 other than those allowed expressly by the Rate Plan. It is extremely difficult under these circumstances to conclude that ratepayers were on notice that the Rate Plan could be abandoned to allow collection of deferred costs incurred prior to any Commission order approving the Petition.

15 The Company implies that the Commission can implement deferred accounting as early as the date specified in the Petition because the Company expected that a Commission order would precede that date. PacifiCorp Brief at 10. As Staff argued previously, however, the key is a Commission order notifying ratepayers of its intent to establish a regulatory asset and a method for later collection in rates. Staff Initial Brief at

[5] Proposals to revise tariffs, on the other hand, are subject to express requirements for publication and notice to the Commission and to ratepayers. RCW 80.28.060. WAC 480-100-193 through -199.

8, ¶14. Company expectations are irrelevant, especially when such expectations provide no notice to ratepayers that rates may be revised to collect deferred costs.

16 Finally, the Company argues that decisions in a recent Avista case are consistent with its argument that the Commission may legally authorize a prior effective date for deferred accounting. PacifiCorp Brief at 11, citing, *Petition of Avista Corporation*, Docket No. UE-000972, Order Approving Establishment of a Deferral Mechanism to Track Power Cost Expenses (August 9, 2000) and Order Granting Request to Modify Power Cost Deferral Mechanism (January 24, 2001). The Company recognizes, however, that the Commission did not in the Avista case undertake a legal analysis of this issue.[6] PacifiCorp Brief at 11. As Staff argued previously, the Avista case simply is not dispositive of the matter. Staff Initial Brief at 9, ¶¶ 16-17.

D. Fairness and Sound Public Policy Warrant Rejection of a Prior Effective Date for Deferred Accounting

17 The Company's final argument is that the interests of fairness and sound public policy warrant a prior effective date for deferred accounting even if such treatment violates the prohibition against retroactive ratemaking. PacifiCorp Brief at 12-13.

18 No judicial precedent is cited by the Company to support the proposition that the Commission can waive the rule against retroactive ratemaking. The only Commission case cited by PacifiCorp authorized recovery of deferred costs but only, as stated above,

[6] The Company also can cite no judicial case law supporting its position. It does list certain commission cases from other states. PacifiCorp Brief at 12, fn. 33. Some of those cases, however, are distinguishable from the present case. *In Re Accounting and Ratemaking Treatment for Pensions and Postretirement Benefits Other Than Pensions*, 1993 WL 499848 (N.Y.P.S.C.) approved retroactive modification of accounting standards. However, the commission in that case had issued previously a notice soliciting comments regarding the new standards and the modification, while approved retroactively, did not predate the issuance of that notice.

Likewise, *Re Southwestern Public Service Company*, 1996 WL 875568 (Tex. P.U.C.) altered retroactively a formula for sharing margins from off-system sales. However, such action was taken under

under a tariff (ECAC) that established expressly a fixed mathematical formula for recovery of deferred costs. *Id.* at 14, fns. 35 and 38, citing, *In re Puget Sound Power & Light Company,* Cause No. U-81-41, Sixth Supp. Order (December 19, 1988). No such circumstances are presented by the Company's Petition.

19 Most important, the current Rate Plan was adopted by the Commission less than two years ago. The Company has already benefited under the Rate Plan with a 3% rate increase in 2001 and a 3% rate increase in 2002. The Company stands to benefit in 2003 with another rate increase of 1%. The Rate Plan also allowed the Company to retain significant savings derived from its acquisition by Scottish Power and the Company's transition plan.

20 In exchange for these Company benefits, ratepayers were to be provided rate stability. This including the promise of no rate increases in either 2004 and 2005.

21 The Company's Petition, if granted, sets up the potential for this bargain to be abandoned precisely at a time when the Company has already enjoyed significant benefits from the Rate Plan, but ratepayers have yet to receive any of the benefits they were promised in the later years of the Rate Plan.

22 Moreover, the Rate Plan provided the Company a safety valve if it ever faced emergency circumstances that warranted rate relief. The Company has the opportunity to receive interim rate relief if it meets the *PNB* standards. No such request has even been filed with the Commission.

23 It is premature to determine whether these circumstances require total rejection of the Company's Petition. However, these circumstances do warrant the Commission

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express statutory authority to that commission to reconcile a utility's fuel expense retroactively to the beginning of the reconciliation period.

rejecting the Company's proposal for a prior effective date for deferred accounting. That is the result that fairness and sound public policy dictate.[7]

III. CONCLUSION

24 For the reasons set forth above, the Commission should reject the arguments included in the Company's Brief. The Commission should issue an order declaring that it does not have authority to allow PacifiCorp to defer excess net power costs incurred prior to issuance of an order approving deferred accounting. Concluding otherwise would allow the deferral of any costs incurred in the past as long as that cost is recovered from customers in future rates. Staff submits that such a result is legally barred as retroactive ratemaking.

DATED This 6th day of September, 2002.

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[7] The courts of this state have recognized that public policy may warrant an exception to the rule against retroactive ratemaking if necessary to protect a vital interest of the people. *Hearde v. City of Seattle*, 26 Wn. App. 219, 611 P.2d 1375 (1980). No such claim is made by PacifiCorp in this proceeding.

Some other courts have recognized a public policy exception to the rule against retroactive ratemaking to allow a utility to recover extraordinary expenses that were incurred in the past. *Narragansett Electric Co. v. Burke*, 415 A.2d 177 (R.I. 1980) (temporary rate adjustment allowed to recoup costs to restore service after record storm). The Company also did not argue that this exception applies.

The Company in its Petition also failed to address whether extraordinary circumstances exist that impact PacifiCorp, and the service it renders, to a degree that requires retroactive deferrals especially during the Rate Plan and with no hint of the need for interim relief. PacifiCorp states only that its adjusted actual (Type 1) return on equity for Washington operations was a negative 1.589% for the year-ended September 30, 2001. Petition at 4, ¶ 6. However, according to the Company's more recent Commission-basis report for the year-ended March 31, 2002, PacifiCorp's unadjusted return on equity is 6.050% and its total normalized return on equity is 6.892%. Its total normalized return on rate base is 6.717% for the same period. Attachment.