

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION
COMMISSION,

Complainant,

v.

PACIFICORP D/B/A PACIFIC
POWER & LIGHT COMPANY,

Respondent.

DOCKET NO. UE-090205

PUBLIC COUNSEL'S MOTION
FOR AN ORDER REGARDING
THE CUSTOMER NOTICE

I. MOTION AND RELIEF REQUESTED

- I.* Pursuant to WAC 480-07-375(1), the Public Counsel Section of the Washington Attorney General's Office (Public Counsel) respectfully requests that the Washington Utilities and Transportation Commission (UTC or the Commission) require Pacific Power and Light Company (PacifiCorp or the Company) to issue its individual customer notice in the form attached as Exhibit A but excluding the chart titled "US Average Residential Monthly Electric Bills for 1,000 kWh" (the chart) that appears on the second page. If the Commission determines that any rate comparison is proper, Public Counsel asks that Commission require the Company to replace the chart with the rate comparison that is publicly available on the UTC website (attached as Exhibit B), and add explanatory language, as provided below. Public Counsel requests that the Commission hold a telephone hearing to consider this matter on July 9, 2009 at 10:00 AM.

II. FACTS

2. Under WAC 480-100-194 and -197, PacifiCorp is required to provide notice to customers of its rate increase request. Shortly after the Prehearing Conference in this case, PacifiCorp, Public Counsel, The Energy Project, and UTC Consumer Affairs Staff (collectively the parties) began discussions on the form and content of the notice. The parties exchanged drafts and feedback on the proposed notice and made every effort to reach compromise. On June 1, 2009, the parties notified the Bench that agreement had been reached on all issues except inclusion of the chart. Administrative Law Judge, Patricia Clark, provided Public Counsel the opportunity to file this motion and request a telephone hearing on this issue.

III. ISSUES

- 3.
1. The extent of the Commission's authority to review the customer notice and issue an order regarding its contents.
 2. Whether inclusion of a state-by-state rate comparison in a rate case notice is confusing, misleading, and likely to discourage customer participation.
 3. Whether inclusion of the chart is protected speech under the First Amendment.

IV. ARGUMENT

A. The Commission may review customer notices and set requirements regarding their content.

4. The Commission's rules require utilities to provide customers notice of proposed rate increases.¹ The Commission has authority to review and approve such notices: "the Commission has the responsibility to govern the course of . . . proceeding[s] to ensure that the rights of the parties are protected, including the rights of the public . . . to a reasonably adequate notice,

¹ WAC 480-90-194 (gas companies) and 480-100-194 (electric companies).

whether or not a rule might require the notice as a matter of course.”² The U.S. Supreme Court has recognized this interest. In *Pacific Gas and Electric Company v. Public Utilities Commission of California*, the Court stated: “The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations,” and differentiated requirements for a utility to distribute certain newsletters from “orders requiring [utilities] to carry various legal notices, such as notices of upcoming Commission proceedings or of changes in the way rates are calculated.”³

5. Specifically, the Commission has a substantial interest in ensuring that the notice provides accurate information regarding a utility’s request, the issues in the case, and the Commission’s authority and process for reviewing the request and setting fair, just, and reasonable rates. To these ends, the Commission’s rules contain specific content requirements.⁴ Moreover, the notice must “reflect[] matters clearly and accurately, given the need to express matters simply and tersely.”⁵ The Commission also has an interest in seeing that the notice encourages customer participation and input to the extent possible.⁶

² *In the Matter of the Joint Application of Verizon Communications Inc. and MCI, Inc. For Approval of Agreement and Plan of Merger*, WUTC Docket No. UT-050814, Order No. 06 (ALJ Wallis), ¶7 (hereinafter *Verizon/MCI Order*). The Commission’s jurisdiction may extend to voluntary notices as well. *See Id.* at ¶6(c).

³ 475 U.S. 1, 16 n. 12, 106 S. Ct. 903 (1986).

⁴ *See* WAC 480-100-194 and -197.

⁵ *Verizon/MCI Order* at ¶12.

⁶ *Id.* at ¶6(c) (stating that “the notice is an important element in seeking comment from affected customers before reaching closure, and therefore . . . should be designed as much as possible to achieve that goal”).

1. Including the chart in the customer notice is misleading and does not clearly and accurately reflect the matters in the rate case.

6. *Black's Law Dictionary* defines misleading as “calculated to be misunderstood.”⁷ In the realm of consumer protection, intent to mislead is not necessary for a communication to be defined as misleading.⁸ A communication need only have the capacity to mislead in order to violate many such laws.⁹ Literally true statements also can be misleading; consumers may be misled by innuendo or implication, not only outright false statements.¹⁰
7. Here, PacifiCorp proposes to include a chart in the customer notice comparing its proposed rates to average rates for residential customers in other western states. Including this chart misleads—or has the capacity to mislead—consumers about the relevance of comparisons to PacifiCorp’s rate increase.¹¹ The chart suggests that rate comparisons are relevant when they are not. The Commission does not set rates for Washington utilities based on comparisons with rate levels in other states; it determines rates for each Washington utility based on the particular facts and circumstances of the individual utility.¹²
8. Moreover, the chart includes no contextual information about various factors that would explain differing rates, such as access to low-cost hydro generation. This lack of context is

⁷ *Black's Law Dictionary* 1021 (8th ed. 2004).

⁸ See *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986).

⁹ *Id.*

¹⁰ See *Feil v. FTC*, 285 F.2d 879, 896 (9th Cir. 1960).

¹¹ PacifiCorp may argue that it should not be precluded from including the chart in its notice because Public Counsel did not raise formal objection to inclusion of a similar chart in the customer notice in the recently-filed Avista general rate case (Docket Nos. UE-090134/UG-090135). This is not the case. While Public Counsel expressed some concern about Avista’s use of a rate comparison chart, it agreed to its inclusion as a matter of compromise in negotiating that specific notice. That agreement does not preclude Public Counsel from raising similar concerns here or in the future.

¹² See *People's Organization for Washington Energy Resources, et al. v. WUTC*, 104 Wn.2d 798, 805-13, 711 P.2d 319 (1985) (describing the Commission’s rate setting process).

misleading because it may suggest that PacifiCorp “deserves” a rate increase because the Company is earning less than utilities in other states when indeed that may not be the case.

9. Additionally, it is not possible to easily verify the completeness or accuracy of the information contained in the chart. The chart was prepared by the Edison Electric Institute (EEI) and presented in its Winter 2009 “Typical Bills and Average Rates Report.” The Report may be purchased from EEI’s website for \$75.00 but is not otherwise publicly available.¹³ It is unclear from the chart or EEI’s website how complete the data presented is, *i.e.* whether the averages are based on information from all investor-owned utilities in the states presented. It is also unclear how EEI collected the data or prepared the averages. It is also of note that EEI is an advocacy and resource group for investor-owned utilities. These companies pay membership dues and purchase materials such as the Report to use in their own advocacy, and thus EEI may not be a neutral source of information.

10. Finally, the chart implies that, because PacifiCorp’s rates appear lower in comparison to utilities in other states, its proposed increase is justified and should be approved. This, too, is misleading or has the capacity to mislead customers. The Commission will determine the fair, just, and reasonable rate for PacifiCorp based on the Company’s individual costs, revenues, and financial circumstances.¹⁴

2. Including the chart is likely to discourage customer participation in this case.

11. The notice is a crucial tool in seeking customer input: “the notice is an important element in seeking comment from affected customers before reaching closure, and therefore . . . the

¹³ See http://www2.eei.org/products_and_services/descriptions_and_access/typ_bill_winter_5.htm (last visited June 22, 2009).

¹⁴ RCW 80.28.020.

notice should be designed as much as possible to achieve that goal.”¹⁵ This is also clear from the Commission’s rules requiring “public involvement” language¹⁶ and its separate requirements for notice in cases where public testimony may be taken.¹⁷ Including the chart undermines this essential purpose of the customer notice because it is likely to discourage customer participation. It implies that PacifiCorp’s proposed increase is justified and therefore customer concern and input would not be warranted. Moreover, it suggests to customers that they have no reason to comment because, “it could be worse.”

B. The First Amendment does not prohibit the Commission from regulating the content of the PacifiCorp notice.

12. PacifiCorp may argue that the First Amendment protects its inclusion of the chart in the customer notice. This is not the case. The Commission can order PacifiCorp to remove the chart either by finding that the notice is misleading or that removing the chart serves a substantial interest.

13. Public Counsel recognizes that communications by regulated utilities enjoy no fewer First Amendment protections than other types of constitutionally-protected speech.¹⁸ Commercial speech, that is, communication “related solely to the economic interests of the speaker and its audience,” is afforded lesser protection.¹⁹ The U.S. Supreme Court has

¹⁵ *Verizon/MCI Order* at ¶6(c).

¹⁶ WAC 480-100-194(4)(j).

¹⁷ WAC 480-100-197.

¹⁸ *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 n. 5, 100 S. Ct. 2343 (1980).

¹⁹ *Id.* at 561-63.

recognized that rate case notices are commercial speech because they are “relevant to commercial transactions between the ratepayer and the utility.”²⁰

1. The notice is misleading commercial speech and thus not entitled to any First Amendment Protection.

14. To be protected at all, commercial speech must not be misleading.²¹ As discussed above, including the chart, regardless of whether the information it contains is accurate, renders the notice misleading. Accordingly, the notice in its current form is not protected commercial speech and its content may be regulated to any extent under the First Amendment.

2. Whether or not the chart renders the notice misleading, the Commission may require PacifiCorp to remove it because doing so furthers the Commission’s substantial interest in providing effective notice.

15. Commercial speech that is not found to be misleading may still be regulated if the regulation: (1) seeks to implement a substantial government interest; (2) directly advances that interest; and, (3) reaches no further than necessary to accomplish the given objective.²² This does not mean that a regulation must be the least restrictive means of furthering the legitimate interest.²³ There need only be a “fit” between the purpose of the restriction and the means chosen to accomplish that purpose.²⁴

16. As to the first requirement, as noted already, the U.S. Supreme Court has recognized states’ substantial interest in regulating communications regarding the ratemaking process for regulated utilities.²⁵ As discussed previously, including the chart in this customer notice

²⁰ *Pacific Gas*, 475 U.S. at 23 n. 2 (Burger, J., concurring).

²¹ *Central Hudson*, 447 U.S. at 566.

²² *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507, 101 S. Ct. 2882 (1981).

²³ *See Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 476-77, 109 S. Ct. 3028 (1989).

²⁴ *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 341, 106 S. Ct. 2968 (1986).

²⁵ *Pacific Gas*, 475 U.S. at 16 n. 12.

undermines the Commission’s interest in providing accurate, clear, and effective notice that encourages customer participation in the rate-setting process. As to the second and third requirements for regulation, removing the chart from the notice is the best means for furthering the Commission’s substantial interest in ensuring that customers obtain effective notice. In other words, ordering PacifiCorp to issue the notice as it appears in Exhibit A but without the chart advances the Commission’s substantial interest without going further than necessary—simply taking the chart out of the customer notice would correct the misleading nature of the current notice, leaving it more accurate, clear, and likely to encourage customer participation.

C. If the Commission determines that a comparison is permissible, it should require a comparison of Washington state electric utilities with an explanatory statement clarifying that no rate comparison is relevant to its determination of whether PacifiCorp’s proposed increase is justified.

17. Rate comparisons are inherently difficult because rates are not set by comparison—rates are set on an individual basis considering the single utility’s costs and revenues. However, if a comparison of some type is permitted, it should be a comparison of Washington utilities with similar resource mixes, specifically the comparison publicly available on the UTC Website (attached as Exhibit B). This would provide customers a more accurate picture of PacifiCorp’s circumstances. The accuracy of this comparison is also more easily verified because all of the information it contains is also publicly available. If any comparison is allowed, it should include an explanatory statement, such as: “The UTC does not consider electric rates charged by other utilities in setting rates for PacifiCorp.”²⁶

²⁶ This alternative is far less preferable than removing the chart because it still has the potential to confuse and mislead. Customers will likely wonder why any comparison has been included in the rate case notice if such comparisons have no bearing on the Commission’s rate-setting process. However, Public Counsel offers this alternative because it is somewhat preferable to the state-by-state chart currently included in the draft notice.

V. CONCLUSION

18. For the foregoing reasons, Public Counsel respectfully requests that the Commission order PacifiCorp to issue the customer notice in its current form, but without the chart. If the Commission determines that any rate comparison is proper, the comparison available on the UTC website (attached as Exhibit B) should be substituted for the company's proposed chart along with the explanatory language provided above.

DATED this 22nd day of June, 2009.

Respectfully submitted,

ROBERT M. MCKENNA
Attorney General

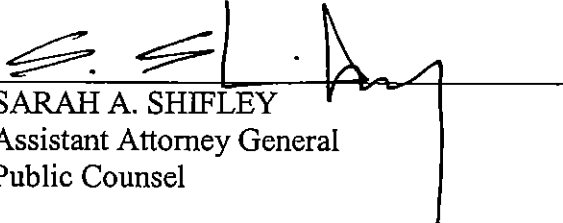

SARAH A. SHIFLEY
Assistant Attorney General
Public Counsel

EXHIBIT A

Notice of proposed rate increase

On February 9, 2009, Pacific Power filed a general rate case request with the Washington Utilities and Transportation Commission (UTC) requesting an electric rate increase of \$38.5 million or 15 percent. The increase would recover additional costs associated with investments in the electrical system we use to reliably serve our customers, as well as investments in new renewables to meet the state's new renewable portfolio standards. Power costs are also rising, due in part to the expiration of some purchase power contracts.

The UTC will be reviewing our request. If approved, changes would go into effect January 2010. You have the opportunity to comment on this filing.

Public comment hearing

Pacific Power customers have the opportunity to comment to the UTC in numerous ways, including in person at a public hearing.

October 12, 2009

5:30 p.m. - 7:30 p.m.

Yakima Valley Community College

Parker Room

1015 S. 16th Avenue

Yakima, WA



Let's turn the answers on.

You are invited to comment to the UTC:

- in person at the October 12, 2009, public hearing in Yakima (see front cover for details) or contact the commission
- via UTC Web form: utc.wa.gov/comment
- by e-mail at: comments@utc.wa.gov
- in writing at:

UTC

P.O. Box 47250

Olympia, WA 98504-7250

- by using the detachable mailer attached to this notice
- by phone: **1-888-333-WUTC (9882)**

Please reference Docket Number UE-090205.

Public Counsel

The public is represented by the Public Counsel Section of the Washington Attorney General's Office.

You may contact the Public Counsel in writing at:

Public Counsel

Assistant Attorney General

800 5th Avenue, Suite 2000

Seattle, WA 98104-3188

e-mail: utility@atg.wa.gov

For more information about Public Counsel, visit:

www.atg.wa.gov/utilities.aspx

For more information or to contact Pacific Power, please call us toll free at **1-800-221-7070** or write to:

Pacific Power

825 NE Multnomah, Suite 2000

Portland, OR 97232

Place
stamp
here

Washington Utilities and Transportation Commission

Post Office Box 47250

Olympia, WA 98504-7250

Re: Docket No: UE-090205

What would the requested rate increase pay for?

If approved, the increase would recover the rising cost of serving customers. This request includes, but is not limited to the following, approximately:

- \$20.0 million for new generation resources
- \$2.3 million for increased operating expenses for new generation resources
- \$9.8 million for increased power costs
- \$5.0 million for increased return on investment

General rate case information

A general rate case is the regulatory proceeding which gives the UTC an opportunity to examine a utility's operations and costs to determine if the proposed rates are fair, just and reasonable. This process lets the UTC conduct a detailed review of a utility's revenues, profits, expenses, and investments in plant and equipment, in order to establish an approved revenue requirement.

The UTC staff, Pacific Power, Public Counsel Section of the Attorney General's Office, and other parties will participate. New rates would go into effect at the completion of the UTC's investigation, which may take up to 11 months. Based on the outcome of its investigation, the UTC has the authority to approve rates that are higher or lower than Pacific Power's request.

Need help managing electric expenses?

Pacific Power offers special services, bill assistance and time payment plans for customers experiencing financial difficulties. For questions about payment plan eligibility or if you are experiencing difficulty making payments, please call **1-888-221-7070**.

Effects on residential customers

Based on the overall increase discussed, the following chart shows the increases for a residential customer using electric service at 1,000 kwh and 1,300 kwh per month:

	Current	Proposed
Basic charge per month	\$6.00	\$7.00
@ 1,000 kwh:		
Average rate per kwh	6.62¢	7.64¢
Total bill	\$66.15	\$76.38
@ 1,300 kwh:		
Average rate per kwh	6.86¢	7.92¢
Total bill	\$89.17	\$102.93

A typical Pacific Power residential customer bills 1,300 kwh per month.

US Average Residential Monthly Electric Bills for 1,000 kWh (As of January 1, 2009)

California	\$164.65
Nevada	\$127.54
US Average	\$116.83
New Mexico	\$107.50
Colorado	\$100.22
Arizona	\$97.61
Montana	\$84.30
Wyoming	\$84.00
Oregon	\$83.48
Utah	\$81.49
Washington	\$77.77
Pacific Power [†]	\$76.38
Idaho	\$75.23
Pacific Power ^{††}	\$66.15

*Pacific Power calculated using current WA rates
 **Pacific Power calculated using proposed WA rates
 Source: Edison Electric Typical Bills and Average Rates Report, Winter 2009

Your input into this process is important, please comment.

Directions for mailing:
 1. Detach comment form from this customer notice

2. Stamp and mail to UTC

Save a stamp

Share your comments with the commission for free by logging on to: utc.wa.gov/comment

Customer name

Phone number

Comments

E-mail

EXHIBIT B

WASHINGTON



UTILITIES AND TRANSPORTATION COMMISSION

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Compare electricity costs for 2009

The table below compares how much residential customers of six Washington electric utilities will spend for 1,000 kilowatt hours (kWh) of electricity in 2009, including basic monthly charges.

Utility	Cost for 1000 kWh
Avista	\$70.60
Pacific Power	\$68.70
Puget Sound Energy	\$ 91.21
Seattle City Light*	\$ 65.78
Snohomish PUD*	\$ 78.57
Tacoma Light*	\$ 67.56

*Seattle Light, Snohomish PUD and Tacoma Light are NOT regulated by the UTC. The rates for these utilities include city business and occupation (B&O) taxes, while Avista, Pacific, and Puget rates do not.

Staff contact: Joanna Huang
 Posted/updated: 02/05/2009

360-664-1160 | PO Box 47250, Olympia, WA 98504-7250



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**Docket No. UE-090205
PACIFICORP GRC 2009**

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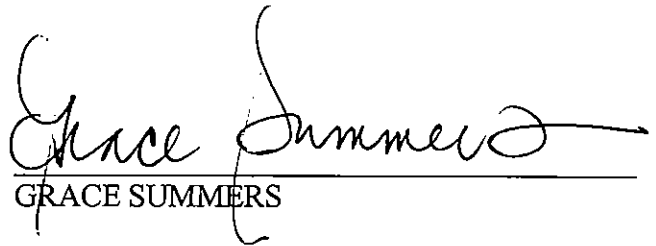
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Brad Purdy
Attorney At Law
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Boise, ID 83702

CERTIFICATE OF SERVICE
Docket No. UE-090205

I hereby certify that a true and correct copy of Public Counsel's Motion For An Order Regarding The Customer Notice was sent to each of the parties of record shown on the attached Service List in sealed envelopes, via:

First Class Mail and Electronic Mail

DATED: June 22, 2009.


GRACE SUMMERS