

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

RESPONSE OF BEHALF OF  
COMMISSION STAFF TO  
PACIFICORP'S MOTION TO  
DISMISS COMPLAINT

**I. THE COMPLAINT**

1 The "Joint Complaint of ICNU and Public Counsel" (Complaint) alleges the rates the Commission set in Docket UE-090205 (2009 GRC) are excessive.<sup>1</sup> ICNU/Public Counsel say the reason those rates are excessive is because in that prior docket, the Company allegedly failed to supplement data responses,<sup>2</sup> provided inaccurate data request responses,<sup>3</sup> and proposed an improper pro forma adjustment.<sup>4</sup>

**II. RESPONSE TO PACIFICORP'S MOTION TO DISMISS**

2 PacifiCorp's Motion to Dismiss raises several arguments, to which Staff responds as follows:

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<sup>1</sup> E.g., The Complaint alleges "excessive" charges (Complaint at 5, ¶ 6) and "unreasonable rates" (id. at 4, ¶ 4), and relies on the reparations statute (id. at 3, ¶ 2 & at 13, ¶ 25).

<sup>2</sup> Joint Complaint at 12-13, ¶ 24.

<sup>3</sup> Joint Complaint at 10-12, ¶¶ 21-23.

<sup>4</sup> Joint Complaint at 9-10, ¶¶ 19-20, plus the un-numbered paragraph after ¶ 20.

**A. The Commission Should Grant PacifiCorp's Motion as to RCW 80.04.230**

3 PacifiCorp correctly argues that ICNU/Public Counsel are not entitled to relief under  
RCW 80.04.230 because that section applies only to charges in excess of the lawful (i.e.,  
published) rate.<sup>5</sup> The Complaint fails to allege PacifiCorp charged a rate other than the filed  
tariff rate, so the Commission should dismiss the claim for relief under RCW 80.04.230.

**B. PacifiCorp is Correct in its Legal Analysis of the Limitations Period in RCW  
80.04.230; Applying the Law to the Facts is Difficult**

4 PacifiCorp argues the Commission should dismiss the Complaint because RCW  
80.04.240 sets a six-month limitation period for filing an unreasonable rates claim, and ICNU  
and Public Counsel were aware of the facts underlying their claim, or should have been aware of  
those facts, more than six months before they filed the Complaint.<sup>6</sup>

5 Staff agrees with PacifiCorp's legal analysis, i.e., a six-month limitation period applies;  
and it runs from the date ICNU and Public Counsel reasonably should have known about the  
REC information in controversy. More difficult is the factual question: when did ICNU or  
Public Counsel know, or when should they reasonably have known about the REC information  
in controversy?

6 PacifiCorp says the REC information in controversy was contained in its April 30, 2010,  
Commission-basis report.<sup>7</sup> However, no one has a duty to audit that report (which runs several  
hundred pages<sup>8</sup>) in an attempt to discern that information.

7 However, PacifiCorp is correct that its direct evidence in the *2009 GRC* (filed May 4,  
2010) showed significantly higher REC revenues for the calendar year 2009 test year than were  
contained in the settlement filed and approved in that case.<sup>9</sup>

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<sup>5</sup> PacifiCorp Motion at 16, ¶ 42-43.

<sup>6</sup> PacifiCorp Motion at 11-16, ¶¶ 30-41.

<sup>7</sup> PacifiCorp Motion at 10, ¶ 27.

<sup>8</sup> PacifiCorp fails to tell us where in that two inch thick document we might find the REC information at issue.

8

PacifiCorp also argues the Commission should impute knowledge to the Public Counsel Section of the Washington Attorney General’s Office based on information allegedly known to the Utah Office of Consumer Services,<sup>10</sup> but that is obviously wrong because those are two entirely different entities. Also wrong is PacifiCorp’s attempt to impute to ICNU the knowledge Mr. Falkenburg may have had available to him when he appeared for someone else in Utah.<sup>11</sup> On the other hand, it may be fair to impute to ICNU knowledge acquired by Mr. Falkenburg during his work for ICNU in Oregon.<sup>12</sup>

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Despite the foregoing comments, Staff does not have the benefit of ICNU/Public Counsel’s view of these matters. We trust the Commission will carefully consider their view in reaching a decision whether the Complaint is untimely.

**C. The Commission Should Deny PacifiCorp’s Motion Regarding the Request to Amend the Commission’s Order in the 2009 GRC**

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PacifiCorp argues the Commission should dismiss the Complaint to the extent it seeks to amend the Commission’s order in the 2009 GRC, and the Company offers three reasons why amending that order would be bad policy.<sup>13</sup> However, PacifiCorp has not sustained its burden to show there is no set of facts under which the Commission could apply a different policy, the same policy differently, or is otherwise powerless to amend that order. Therefore, the Commission should deny the Motion on this issue.<sup>14</sup>

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PacifiCorp goes on to make a formalistic point that a request to amend an order is distinct from a complaint,<sup>15</sup> and then uses that point to argue that ICNU/Public Counsel’s alternative

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<sup>9</sup> PacifiCorp Motion at 14, ¶ 39.

<sup>10</sup> PacifiCorp Motion at 8, ¶ 23.

<sup>11</sup> PacifiCorp Motion at 8-9, ¶ 24.

<sup>12</sup> PacifiCorp Motion at 9, ¶ 25.

<sup>13</sup> PacifiCorp Motion at 16-19, ¶¶ 44-49.

<sup>14</sup> Staff agrees with PacifiCorp that the soon to be issued Commission final order in the current rate case, Docket UE-100749, likely will moot this particular claim for relief. Still, that is an argument for a later day.

<sup>15</sup> PacifiCorp Motion at 17, ¶ 45.

request to amend the Commission's order in the *2009 GRC* must be an improper collateral attack on that order.<sup>16</sup> The Commission should elevate substance over form and reject this argument because the Commission construes pleadings liberally,<sup>17</sup> the issue here is notice, and PacifiCorp has notice.

**D. The Commission Should Grant PacifiCorp's Motion to Dismiss Claims for Violations of Commission Statutes and Rules Because Those Violations Are Irrelevant to an Excessive Rates Claim**

12 PacifiCorp asks the Commission to dismiss on their merits the claims in the Complaint alleging violations of specific rules regarding pro forma adjustments, accuracy of data request responses, and the obligation to supplement data request responses.<sup>18</sup> The Company makes various factual and legal arguments, and we assume ICNU/Public Counsel will contest them. The more direct route is to dismiss these violations claims because they are irrelevant.

13 Evidence is relevant if it makes the existence of a fact "more probable or less probable than it would be without the evidence."<sup>19</sup> This case is an excessive rates complaint, and the issue is what rates are fair, just and reasonable, and by how much (if any) do the filed rates exceed those fair, just and reasonable rates. If PacifiCorp violated a rule, that does not make a particular level of rates more probable or less probable, nor does a rule violation make more or less probable the amount by which existing rates exceed reasonable rates.

14 Therefore, ICNU/Public Counsel's rule and statute violations claims are irrelevant and the Commission should dismiss them for that reason.

15 Staff observes at this juncture that it appears ICNU/Public Counsel intend to prove PacifiCorp's current rates are excessive based on an assumption that the settlement in the *2009*

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<sup>16</sup> Id.

<sup>17</sup> WAC 480-09-395(4).

<sup>18</sup> PacifiCorp Motion at 19-23, ¶¶ 50-62.

<sup>19</sup> ER 401.

GRC would have been different had different facts earlier come to light.<sup>20</sup> If that is indeed the basis for their excessive rates claim,<sup>21</sup> ICNU/Public Counsel will not be able to rely on that assumption; they will need to prove every other party would have exercised their discretion the same way and signed a different settlement, and the Commission would have exercised its discretion to approve it. Obviously, that is a very difficult (if not impossible) task.<sup>22</sup>

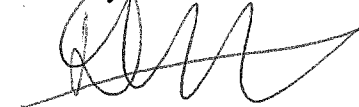
### III. CONCLUSION

16 Should ICNU/Public Counsel's excessive rates claim survive PacifiCorp's Motion to Dismiss, the Commission should set a date for ICNU/Public Counsel to file their direct evidence supporting their claim for excessive rates. At that time, we will be able to discern whether ICNU/Public Counsel can make a *prima facie* showing of excessive rates.

DATED this 28<sup>th</sup> day of February 2011.

Respectfully submitted,

ROBERT M. MCKENNA  
Attorney General



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DONALD T. TROTTER  
Assistant Attorney General  
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Transportation Commission Staff

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<sup>20</sup> ICNU/Public Counsel identify a level of REC revenues and say the difference between that amount and \$657,755 (the amount listed in the 2009 GRC settlement) must be given back to ratepayers. Complaint at 4, ¶ 4, last sentence.

<sup>21</sup> As an alternative, ICNU/Public Counsel could make a rate case-type presentation demonstrating by how much the rates set in the 2009 GRC exceed a fair and reasonable rate. However, the Complaint does not suggest a present intent or willingness to do that.

<sup>22</sup> We seriously doubt ICNU/Public Counsel can prove these discretionary acts would in fact have occurred, and that may be the subject of a future motion. For example, PacifiCorp simply could assert in good faith it would not have signed a settlement in the form ICNU/Public Counsel posit. In any event, we cannot conceive how ICNU/Public Counsel will prove what the Commission would have done had it been presented a different settlement on a different record, neither of which exist.