



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

Utilities and Transportation Division

1400 S Evergreen Park Drive SW • PO Box 40128 • Olympia WA 98504-0128 • (360) 664-1183

June 30, 2009

David W. Danner, Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
P. O. Box 47250
Olympia, Washington 98504-7250

RE: *WUTC v. PacifiCorp (2009 General Rate Case)*
Docket UE-090205

Dear Mr. Danner:

Enclosed for filing in the above-referenced docket are the original and 20 copies of Commission Staff's Response to Public Counsel's Motion for an Order Regarding the Customer Notice, and Certificate of Service.

Sincerely,

DONALD T. TROTTER
Assistant Attorney General

DTT:klg
Enclosures
cc: Parties



BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PACIFICORP d/b/a PACIFIC POWER &
LIGHT COMPANY,

Respondent.

DOCKET UE-090205

COMMISSION STAFF'S
RESPONSE TO PUBLIC
COUNSEL'S MOTION FOR AN
ORDER REGARDING THE
CUSTOMER NOTICE

1 Commission Staff opposes Public Counsel's motion for a Commission order requiring PacifiCorp to exclude a rate comparison table from its customer notice.¹

I. Prologue

2 WAC 480-100-197 covers utility notices to customers regarding a pending rate case and the Commission's customer comment hearing. For example, the rule requires the notice to contain a brief explanation of the reasons for the rate change, a comparison of current and proposed rates, and an example of the impact on a typical customer's bill.² In addition, the rule requires the notice to contain certain public involvement information, such as the Commission's address, the date, time and location of the public meeting, and how a customer can participate. Significantly, the rule does not bar the utility from including information other than the types listed in the rule.

¹ A copy of the proposed notice is attached as Exhibit 1.

² WAC 480-100-197(2) requires that the utility include the information described in WAC 480-100-194(4) (other than (4)(j)).

3 Public Counsel does not claim that the proposed notice violates WAC 480-100-197.
Instead, Public Counsel insists the rate comparison table renders the proposed notice
“misleading” as a matter of law, and the Commission would not violate PacifiCorp’s First
Amendment rights if it orders the table removed.

II. Discussion

4 The Commission should deny Public Counsel’s motion. First, the proposed notice
fully complies with WAC 480-100-197. Second, Public Counsel’s arguments lack
credibility because Public Counsel recently negotiated a customer notice in the pending
Avista rate case that contains a similar table. Public Counsel thinks that was simply a matter
of “negotiation.”³ In fact, it is much more than that, because if Public Counsel’s current
position is correct (*i.e.*, that the table makes the notice unlawfully misleading), then it must
follow that Public Counsel negotiated an unlawful notice in the Avista matter. It is not
reasonable to believe Public Counsel would do that. It is reasonable to conclude that the
table did not render the Avista notice unlawfully misleading, or unlawful in any other way.

5 Third, Public Counsel’s legal analysis is founded on anti-trust/consumer protection
statutes that do not apply.⁴ While, as a matter of policy, the Commission may rightfully be
concerned about utility notices that are misleading, neither the table at issue here nor the
table in the Avista notice are misleading; they simply offer a factual context for
understanding the utilities’ rates.⁵

6 In any event, even if the state anti-trust/consumer protection statute applied, the test

³ Public Counsel Motion at 4 n.11.

⁴ Public Counsel Motion at 4. For example, for the two cases Public Counsel cites in this context, *Hangman Ridge* was decided under RCW 19.86, which does not apply to Commission-regulated activities (RCW 19.86.170), and *Feil* was decided under the Federal Trade Commission Act, which applies only to interstate commerce. *Chas. A. Brewer & Sons v. Fed. Trade Comm’n*, 158 F.2d 74 (1946).

⁵ On page 5 of its Motion, ¶ 9, Public Counsel attempts to challenge the accuracy of the figures in the table, but offers no calculation to contradict those figures. Also without proof, Public Counsel suggests that EEI (the source of the table) is biased, but offers no explanation why EEI has any interest in producing false rate data.

would be whether the table has a capacity to mislead “a substantial segment of the population.”⁶ Public Counsel has not demonstrated that a “substantial segment of the population” would be misled by the table. Instead, Public Counsel speculates that some PacifiCorp customers might think the Commission uses rate comparisons to set rates,⁷ which might then lead some of them to believe that PacifiCorp “deserves” a rate increase, that the rate comparison somehow justifies the rate increase, or even that the requested rate increase is *fait accompli*; Public Counsel posits that this may discourage participation.⁸

7 However, Public Counsel promptly refutes its own speculation by correctly observing that the law is clear: Rate comparisons are not used to set rates.⁹ Public Counsel also fails to point out that the “General rate case information” section of the proposed notice clearly states that the Commission “has authority to approve rates that are higher or lower” than PacifiCorp’s request.¹⁰ That section also describes the general information the Commission considers, and other utilities’ rates are not mentioned. It is far more likely that customers understand this, and they also understand what is also prominently set forth in the proposed notice: PacifiCorp is seeking a 15.2% residential rate increase, with an average residential customer’s bill increasing over \$12 per month.¹¹ The rate comparison table does not change these elemental facts.

8 In any event, though Public Counsel’s concerns lack merit, those concerns would be

⁶ *Hangman Ridge*, 105 Wn.2d at 785.

⁷ Public Counsel Motion at 4, ¶ 7.

⁸ Public Counsel Motion at 5-6, ¶¶ 9-11. Public Counsel’s concern about “participation” raises no due process issue, and does not otherwise challenge the adequacy of the lawful notice the Commission previously provided. That “Notice of Prehearing Conference” (March 2, 2009) was a formal notice issued in full compliance with the Administrative Procedure Act. It offered all interested persons an opportunity to seek intervention and participate in this docket as parties. The Commission took interventions on March 23, 2009.

⁹ Public Counsel Motion at 4, ¶ 7 and n.12.

¹⁰ See Exhibit 1 to this Response, second page.

¹¹ See Exhibit 1 to this Response, second page.

satisfied by a disclaimer that the Commission does not use rate comparisons to set rates.¹²

9 The foregoing analysis renders irrelevant Public Counsel's First Amendment argument. Even so, Public Counsel's uses the wrong analysis. As Public Counsel concedes, the "commercial speech" analysis used in its motion applies only to speech related "solely" to PacifiCorp's economic interests.¹³ However, Public Counsel cannot prove that only economic interests are at issue here. In this case, those interests are inextricably intertwined¹⁴ with such policy issues as rate spread/rate design, service quality, and the structure of low income programs, to name a few.

10 Finally, even assuming Public Counsel used the correct analysis, the Constitution does not require the Commission to exclude the table;¹⁵ a disclaimer would suffice.¹⁶

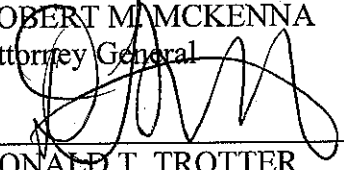
III. Conclusions

11 For the reasons stated above, the Commission should deny Public Counsel's motion.

DATED this 30th day of June, 2009.

Respectfully submitted,

ROBERT M. MCKENNA
Attorney General


DONALD T. TROTTER
Assistant Attorney General
Counsel for Washington Utilities and
Transportation Commission Staff

¹² Staff counsel had suggested this language: "The UTC does not consider electric rates charged by other utilities in setting rates for PacifiCorp." Staff understands the Company is amenable to such a disclaimer.

¹³ Public Counsel Motion at 6, ¶ 13.

¹⁴ Commercial speech loses that character when it is "inextricably intertwined with otherwise fully protected speech." *Riley, v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

¹⁵ States have flexibility in addressing First Amendment problems: A constitutionally acceptable solution is "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Bd. of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 468, 480, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989) (citation omitted).

¹⁶ See footnote 14. In *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 565, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), the Court condoned the use of disclaimer remedies: "For example, in *Bates*, the Court specifically did not 'foreclose the possibility that some limited supplementation, by way of a warning or a disclaimer or the like, might be required.'" (Citations omitted).

EXHIBIT 1

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

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**.

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.

Summary of proposed rate increases

Overall increase in dollars	\$38.5 million	
Overall increase percent	15.1%	
Type of service	Schedule(s)	Average Increase
Residential	16	15.2%
Commercial Industrial		
Small General Service	24	9.9%
Medium General Service	36	15.2%
Large General Service	48	19.9%

Pacific Power also has proposed to increase the customer charge from \$6.00 to \$7.00.

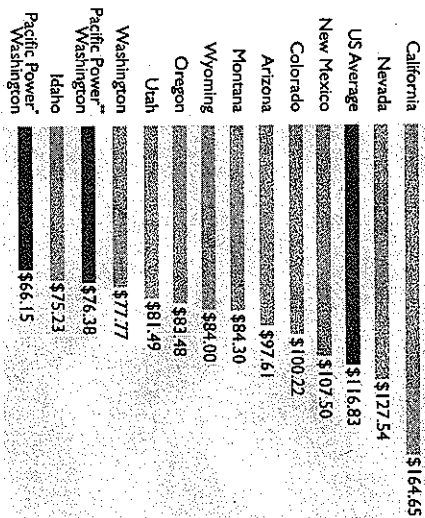
Effects on residential customers

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 uses 1,300 kwh per month.

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



*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

Customer name _____

Phone number _____ E-mail _____

Comments _____

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

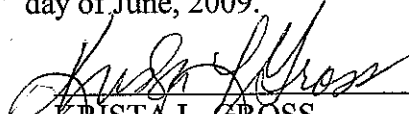
Save a stamp

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

Docket UE-090205
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the attached document upon the persons and entities listed on the Service List below by depositing a copy of said document in the United States mail, addressed as shown on said Service List, with first class postage prepaid.

DATED at Olympia, Washington this 30th day of June, 2009.


KRISTA L. GROSS

HC=Highly Confidential

C=Confidential

NC=Non-Confidential

For PacifiCorp:

Katherine A. McDowell
McDowell & Rackner PC
520 SW 6th Avenue, Suite 830
Portland, OR 97204
Telephone: (503) 595-3924
E-mail: katherine@mcd-law.com

Michelle Mishoe
Legal Counsel
PacifiCorp d/b/a Pacific Power
& Light Company
825 NE Multnomah, Suite 1800
Portland, OR 97232
(503) 813-6840
michelle.mishoe@pacificorp.com

For Public Counsel:

Sarah A. Shifley
Assistant Attorney General
Public Counsel Section
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
Telephone: (206) 464-6595
E-mail: sarah.shifley@atg.wa.gov

For ICNU:

Melinda J. Davison
Iriou Sanger
Davison Van Cleve, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242
Facsimile: (503) 241-8160
E-Mail: ias@dvclaw.com
mail@dvclaw.com

Randall J. Falkenberg
RFI Consulting, Inc.
8343 Roswell Road
PMB 362
Sandy Springs, GA 30350
Telephone: (770) 379-0505
Facsimile: (770) 671-1046
E-Mail: consultrfi@aol.com

Donald W. Schoenbeck
Regulatory & Cogeneration Services, Inc.
900 Washington Street, Suite 780
Vancouver, WA 98660
Telephone: 503-232-6155
Facsimile: 360-737-7628
E-mail: dws@r-c-s-inc.com