

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

In re the Petition of)	
)	DOCKET NO. UE-020417
)	
PACIFICORP d/b/a PACIFIC POWER)	THIRD SUPPLEMENTAL ORDER
& LIGHT COMPANY)	
)	ORDER REGARDING SCOPE OF
For an Accounting Order Authorizing)	PROCEEDING AND THRESHOLD
Deferral of Excess Net Power Costs.)	LEGAL ISSUES
.....)	

SUMMARY

1 **PROCEEDINGS:** This proceeding concerns a Petition filed by PacifiCorp, d/b/a Pacific Power and Light Company (“PacifiCorp” or the “Company”) on April 5, 2002. The Company requests an accounting order that would authorize it to establish a deferred cost account to track asserted excess power costs PacifiCorp expects to incur during periods commencing June 1, 2002. PacifiCorp requests that it be allowed to maintain the deferred account until May 31, 2003, or, if earlier, to “such time as the Commission approves a Power Cost Adjustment Mechanism, or PCAM, for the Company’s Washington customers, or some similar form of limited rate relief to address extraordinary power costs.” *Petition at 1.*

2 **PARTIES:** James M. Van Nostrand, Stoel Rives, Seattle, Washington, represents PacifiCorp. Melinda Davison, Davison VanCleve, Portland, Oregon, represents ICNU. Robert Cromwell, Assistant Attorney General, Seattle, Washington, represents the Washington State Attorney General’s Office of Public Counsel. Robert Cedarbaum, Assistant Attorney General, Olympia, Washington, represents the Commission’s regulatory staff (“Commission Staff” or “Staff”).

3 **SCOPE OF PROCEEDING; EXTENT OF COMMISSION AUTHORITY:** Discussion during the first prehearing conference suggested the need to resolve certain threshold issues. The parties take different views concerning the scope of this proceeding. PacifiCorp takes the view that this proceeding concerns only the question of whether it should be permitted to establish a deferral account. PacifiCorp proposes that the questions of whether and, if so, to what extent it should be permitted to recover through rates any amounts booked to the deferral account be put off for consideration in a separate proceeding. Staff, Public Counsel, and ICNU take the view that the questions of whether the Commission should authorize PacifiCorp to establish a deferral account to track asserted excess power costs and whether and how recovery should be allowed are inseparable.

- 4 The parties also take different views of what the Commission's authority is in the context of the current docket. PacifiCorp argues that the Commission can, and should, authorize the establishment of the requested deferred account with entries to that account authorized to commence on the requested date of June 1, 2002, even though the Commission process leading to any such order already has extended past the requested date. Staff, Public Counsel, and ICNU ("Staff, *et al.*") argue that the Commission cannot legally authorize PacifiCorp to make entries to a deferral account for costs incurred prior to the date of a Commission order granting the Company's accounting petition. Staff, *et al.* argue that this would constitute unlawful retroactive ratemaking.
- 5 **COMMISSION DETERMINATIONS:** In this Order, we address both the scope of this proceeding and the extent of our authority in the context of this docket. In brief, we establish that the scope of this proceeding is limited to the narrow question of whether PacifiCorp has carried its burden to establish that, due to factors beyond the Company's control, it has incurred and is incurring during the relevant period (*i.e.*, after May 31, 2002) such extraordinary levels of power costs that it should be permitted to track those costs in a separate deferral account for possible recovery through rates during some future period.
- 6 We resolve the parties' arguments concerning retroactive ratemaking and conclude that authorizing deferral accounting, in appropriate circumstances, for costs incurred during periods that post-date an application to establish such accounting does not violate the general prohibition against retroactive ratemaking. Accordingly, if the evidence adduced in this proceeding supports allowing PacifiCorp to defer any of its power costs incurred after May 31, 2002, it is within the scope of our authority to authorize the Company to include entries in a deferral account commencing as early as June 1, 2002, as requested by PacifiCorp in its filing on April 5, 2002.

MEMORANDUM

- 7 On April 5, 2002, PacifiCorp filed with the Commission in Docket No. UE-020417 a petition seeking an accounting order to authorize the Company to track prospectively after May 31, 2002, in a separate deferral account, asserted "excess net power costs incurred by the Company in serving its Washington customers." PacifiCorp states that its filing is authorized under the currently effective Rate Plan approved by the Commission in Docket No. UE-991832, citing specifically to Stipulation, Section 9. Section 9 provides that the Company may submit "petitions for accounting orders, as appropriate, for treatment of . . . expenditures during the Rate Plan Period." *Petition at 12*. PacifiCorp states further that by the subject filing:

the Company is making no proposal regarding the amortization in rates of any amounts that would be deferred under this requested accounting

treatment. Any requested amortization in rates, or recovery through a power cost adjustment mechanism, would be the subject of a future filing with the Commission.

Id. PacifiCorp also states in its Petition that it “contemplates that any such filing for amortization would take into account the restrictions imposed on the Company under the Rate Plan.” *Id.* PacifiCorp commits in its Petition to make a filing by September 30, 2002, to address the issue of rate recovery of any power costs the Commission may authorize for deferral accounting. *Id. at 13.*

- 8 On May 13, 2002, Commission Staff, Industrial Customers of Northwest Utilities (ICNU), Public Counsel, Northwest Energy Coalition (NWECC), and the Energy Project filed with the Commission in Docket Nos. UE-991832 and UE-020417 their Joint Motion to Consolidate and Petition to Rehear or Reopen Docket No. UE-991832. PacifiCorp filed an answer to the motion on May 30, 2002.
- 9 On July 12, 2002, the Commission entered its order consolidating Docket Nos. UE-991832 and UE-020417 for the limited purpose of considering the Joint Motion in the context of the PacifiCorp’s request for an accounting order. The Commission’s order included a notice of prehearing conference to be held on August 6, 2002. The Commission conducted the duly noticed prehearing conference, as scheduled, before Administrative Law Judge Dennis J. Moss.
- 10 Discussion with the parties at the prehearing conference demonstrated that they take different views concerning the scope of this proceeding. PacifiCorp takes the view that this proceeding concerns only the question of whether it should be permitted to establish a deferral account. PacifiCorp argues that the related questions of whether and, if so, to what extent it should be permitted to recover through rates any amounts booked to the deferral account should be put off for consideration in a separate proceeding following a filing the Company intends to make no later than September 30, 2002. Staff, Public Counsel, and ICNU, by contrast, take the view that the questions of whether the Commission should authorize a deferral account to track asserted excess power costs, and whether and how any recovery of deferred costs should be allowed, must be considered in a single proceeding.
- 11 The parties also take different views concerning the extent of the Commission’s authority in the context of the current docket. PacifiCorp argues that the Commission can, and should, authorize the establishment of the requested deferred account with entries to that account authorized to commence on the requested date of June 1, 2002, even though the Commission process leading to any such order already has extended past the requested date. Staff, Public Counsel, and ICNU (“Staff, *et al.*”) argue that the Commission cannot legally authorize PacifiCorp to make entries to a deferral account for costs incurred prior to the date of a Commission order granting the

Company's accounting petition. Staff, *et al.* argue that this would constitute unlawful retroactive ratemaking.

- 12 Questions concerning retroactive ratemaking were set for early briefing and resolution. All parties filed simultaneous initial briefs on August 28, 2002, and reply briefs on September 6, 2002. The parties' briefs not only argue the retroactive ratemaking question that was set for briefing, but also present argument concerning the scope of this proceeding. We address both of these issues in this Order. In this fashion, we provide appropriate guidance to the parties as they prepare their respective cases.

I. What is the scope of the current proceeding?

- 13 PacifiCorp presented its Petition with express reference to then-pending matters concerning the two other investor-owned electric companies that do business in Washington State subject to the Commission's jurisdiction. PacifiCorp's Petition states:

As the Commission is aware, the two other electric utilities subject to the Commission's regulation—Puget Sound Energy ("PSE") and Avista Utilities—have made filings with the Commission seeking to implement power cost adjustment mechanisms. The need for such mechanisms is based in part on the unpredictability and volatility of prices in wholesale electric markets throughout the West in recent months. PacifiCorp faces the same unpredictability and volatility and, for the same reasons, has proposed power cost recovery mechanisms in one form or another in each of its five other jurisdictions. PacifiCorp is not making such a filing in Washington at this time; PacifiCorp is currently subject to a Rate Plan in Washington that limits the availability of general rate increases through 2005. At the same time, however, PacifiCorp wishes to retain the ability to seek recovery of extraordinary power costs through some sort of power cost adjustment mechanism (in the event the Commission approves such a mechanism for PSE and Avista Utilities), or a similar limited form of rate relief to address extraordinary power costs. The deferred accounting requested in this Petition is intended to preserve the ability to do so.

Petition at 1-2.

- 14 It appears, then, that the central intent of PacifiCorp's filing is to establish the requested accounting mechanism as a nexus to which the Company can tie a subsequent filing for substantive rate relief. PacifiCorp recognizes in its Petition the broader set of issues, including issues related to the Rate Plan, that will be implicated

by its anticipated filing on September 30, 2002, for recovery of asserted excess power costs. PacifiCorp elected not to make a specific proposal related to recovery of such costs before September 30, 2002, but it did not wish to be foreclosed from even the possibility of recovering costs it would begin to incur on June 1, 2002. Hence, it filed for an accounting order that would allow deferral of the subject costs pending its anticipated filing for recovery and pending the determination of the issues related to recovery.

15 Staff, Public Counsel, and ICNU object to PacifiCorp's approach, apparently viewing the Petition for an accounting order as an effort to make an end-run around the limitations on PacifiCorp's right to seek rate relief prior to 2005 under the Rate Plan. Accordingly, Staff, *et al.* filed their motion to reopen Docket No. UE-991832 and to consolidate the two dockets, and argue at length in the briefs currently before us that we should not consider PacifiCorp's Petition for an accounting order unless we also take up the related question of whether, and if so, how, PacifiCorp might be authorized to recover asserted extraordinary power costs.

16 The Commission noticed the matter for prehearing, in part to explore the issues raised by the parties' respective filings. Following the prehearing conference, the Commission found premature, and denied, the Joint Motion to Reopen or Rehear Docket No. UE-991832, without prejudice to its being renewed at a later time, if appropriate. In light of the parties' subsequent briefing, however, it appears that we need to further define the scope of the current proceeding.

17 We are fully sensitive to the concerns expressed by Staff, *et al.* We do not wish to expend our resources, or put the parties to the task of expending theirs, if, as a legal or practical matter, it would be a hollow exercise to consider the current Petition because the subsequent petition PacifiCorp intends to file would be barred under the Rate Plan. We will return to this point momentarily. First, however, we respond to the central point at hand by observing that the scope of the current proceeding is dictated by the relief requested: an accounting order that would permit the Company to account separately for power costs it asserts are extraordinary. PacifiCorp requests an accounting order so that it will not be foreclosed from having an opportunity to prove in a subsequent proceeding that all or a portion of the asserted extraordinary costs should be allowed for recovery during some future period.

18 PacifiCorp asked that it be given an opportunity to present evidence and argument to show facts and circumstances that might justify allowing special accounting treatment for a portion of the Company's power costs incurred on and after June 1, 2002. PacifiCorp proposed that it be permitted to prefile such evidence on October 18, 2002, and we granted the Company's request in our prehearing order. In the context of this docket, we expect the Company's evidence to address the questions of whether, and to what extent PacifiCorp's power costs during the relevant period are extraordinary relative to the power costs asserted to be embedded in its rates for

recovery, and the impact of such costs on the Company's financial condition. Staff, *et al.* argued at prehearing that the amount of PacifiCorp's power costs that are currently "in rates" may be a significant point of dispute. We expect PacifiCorp's testimony to address its proposed measure of the power costs it asserts are "excess" or "extraordinary" and thus appropriate for deferral accounting.

- 19 Having defined the scope of the matter put at issue by PacifiCorp's Petition, we return to the broader context discussed above. We note that PacifiCorp committed to filing its proposed recovery mechanism for extraordinary power costs by September 30, 2002. PacifiCorp also states in its Petition that it "contemplates that any such filing for amortization would take into account the restrictions imposed on the Company under the Rate Plan." *Petition at 12.* Accordingly, we expect that the issues Staff, *et al.* raise by their arguments at prehearing and on brief, other than the issue of retroactive ratemaking that we resolve in this Order, will be subjects properly before us in the context of PacifiCorp's filing for cost recovery.¹
- 20 We emphasize in this connection that we expect PacifiCorp to follow through on its commitment to file its Purchased Cost Adjustment, or similar rate recovery plan, in the very near future. We note that PacifiCorp's prefiled direct testimony and exhibits in this docket, its request for deferral accounting, are due to be filed by October 18, 2002. As discussed in our prehearing order, we plan to set further procedural dates after that filing. Once PacifiCorp files its cost recovery proposal, which we expect in the very near term, we will be open to hearing an early motion, or may act on our own motion, to consolidate this proceeding with PacifiCorp's filing for recovery of asserted extraordinary power costs.
- 21 If consolidation is appropriate, and ordered, we will consider our procedural options and schedule in the broader context of the consolidated proceedings. We note that the Commission has not yet considered a company's petition for deferral accounting of power costs outside the context of an existing or imminent rate proceeding and we see no apparent reason to do so here. If PacifiCorp does not follow through in a timely fashion on its commitment to file its proposal for recovery, we may then entertain a motion, or act on our own motion, to dismiss the Petition.

¹ Staff, *et al.* argue, for example, that the Commission's consideration of PacifiCorp's Petition should include consideration of whether the Petition is consistent with the letter and intent of the Rate Plan, whether there are currently extraordinary circumstances warranting "revisiting" PacifiCorp's power costs considering the Company's actual power supply situation, and whether PacifiCorp's proposed power cost deferral should be offset by revenue requirement reductions, including any company-wide cost savings resulting from the ScottishPower merger. These issues all relate to cost recovery and rates, and are best considered in the context of a docket in which the Company actually proposes a means by which it would be authorized to recover any extraordinary power costs that are not embedded in current rates.

II. Can the Commission authorize PacifiCorp to establish a deferral account to include entries commencing on a date after the date of PacifiCorp's filing, but prior to the date of a final Commission order in this proceeding?

- 22 At the prehearing conference on August 6, 2002, PacifiCorp expressed its concern that by virtue of the time required to process its application via hearing proceedings it might lose the ability to track its asserted excess power costs in a deferral account and, hence, lose any opportunity to argue for their recovery during some future period. Indeed, Staff, *et al.* argued that if the Commission authorized deferral accounting at all, it could not authorize the deferrals for the period requested. Staff, *et al.* argued that the Commission can only authorize deferrals for periods prospective from the date of a final order allowing PacifiCorp to establish a deferral account. Staff, *et al.* argued that an order authorizing deferrals to commence on a date prior to the date of the order would violate the general prohibition against retroactive ratemaking.
- 23 The retroactive ratemaking concept is a set of principles that are corollaries to the filed rate doctrine. Put simply, when a regulatory authority approves rates for prospective application that provide for the recovery of costs incurred but not recovered through rates that were effective during the period of cost incurrence, such rates may be susceptible to a challenge that they violate prohibitions against retroactive ratemaking. In like fashion, if a utility avoids costs that are embedded in currently effective rates, and the regulatory authority establishes prospective rates that are adjusted to reflect the costs avoided during the prior period, that, too, may be susceptible to a retroactive ratemaking challenge.
- 24 Although these are well-established principles in the context of economic regulation, they are not so rigid as sometimes viewed. There are equally well-established exceptions. The use of deferred accounting to track costs incurred by a regulated utility during one period, with the possibility for inclusion in rates in a future period, while not ratemaking per se, sets up the possibility of such an exception. When the regulatory authority allows some, or all of the prior deferred expenses in rates, this is not considered a violation of the prohibition against retroactive ratemaking, but instead is recognized as a shift in the timing of the collection of the expense.² As Goodman elaborates, “the agency may lawfully allow the utility to make-up for prior deferred costs as an exception to the ‘matching principle,’ that is, the matching of ratepayer costs and benefits.”³
- 25 It stands to reason that if allowing deferred costs for recovery in rates does not itself necessarily violate the general prohibition against retroactive ratemaking, allowing costs to be tracked in a deferral account—what PacifiCorp requests in its Petition—

² See Goodman, S.L., The Process of Ratemaking, at 322.

³ *Id.* (citation omitted).

also does not necessarily run afoul of retroactive ratemaking principles. This, of course, still begs the finer question immediately before us: can the agency lawfully permit the deferral accounting to begin on a date after such authority is requested, but before the date of a Commission order granting such authority? Focusing on the underlying concerns of notice, a legal consideration, and fairness, an equitable consideration, we conclude that the answer is yes.

26 The notice we are concerned with at this juncture is notice that PacifiCorp asserts it is incurring such extraordinary power costs that establishment of a deferral account is warranted. PacifiCorp gave notice of its assertion by its filing, which prompted expressions of interest by not only Staff, Public Counsel, and ICNU, but also by two consumer interest groups, the Northwest Energy Coalition and the Opportunity Counsel [sic]/Energy Project.⁴ We gave general notice of the proceeding by our Order of Consolidation and Prehearing Conference Notice entered and issued on July 12, 2002. We require individual notice to ratepayers only when a jurisdictional company seeks to change its rates, or take other action that may directly impact ratepayers. This is not such a filing. We emphasize again that PacifiCorp, at this juncture, seeks only an accounting order. Merely granting the Company's Petition for an accounting order has no impact on current rates or current ratepayers.⁵ Since our requirements for notice are satisfied in this case, and the general prohibition against retroactive ratemaking is not implicated, there is no legal impediment to our granting authority for PacifiCorp to initiate deferral accounting as of June 1, 2002, if we are persuaded on the record that such accounting should be permitted at all.

27 In terms of fairness, we are cognizant of the timing problems that are peculiar to this docket. As previously noted, PacifiCorp filed on April 5, 2002, for authority to defer costs that it would begin to incur nearly two months later, on June 1, 2002. The Company asked for a finite period for deferral authority; a maximum of 12 months through May 31, 2003. The Commission might have acted on PacifiCorp's Petition prior to the requested effective date in an open public meeting as it did in the cases of Avista's and PSE's requests for similar authority on December 3, 2001, which were granted on December 28, 2001. In both of those cases, the Commission authorized

⁴ Neither the Northwest Energy Coalition nor the Opportunity [Council]/Energy Project have sought to intervene.

⁵ As we said in granting a similar petition by PSE late in 2001:

We emphasize that the question of accounting treatment and the question of recovery in rates are separate and distinct questions. The first question--accounting treatment--can be answered without the necessity for a detailed record because there is no inherent risk to ratepayers in doing so. That risk is not present precisely because the second question--rate treatment--will be answered only after the development of a detailed record. If PSE seeks to recover these costs in future rates, the Company will bear the burden to prove that such recovery is proper. Other parties will have the opportunity to contest whatever proof the Company offers, and to offer their own evidence and argument concerning how we should treat these costs for ratemaking purposes.

deferral to begin on January 1, 2002.⁶ Staff, *et al.* in this case, however, through their joint Motion to reopen or rehear PacifiCorp's most recent general rate proceeding, urged that we broaden our inquiry. The Commission was persuaded to consolidate Staff, *et al.*'s Motion with PacifiCorp's Petition and set the matter for hearing. By the time of our first prehearing conference, August 6, 2002, more than two of the twelve months requested for deferral accounting already had passed. Additional time will be required to permit the parties adequate time to prepare and file their respective cases. Following that, there will be an evidentiary hearing, post-hearing process, and a decision. This could all require several more months. The time needed to adjudicate the issues should not operate to preclude relief. We already have determined that there is no legal impediment to allowing deferral account entries to commence as of a date prior to the date of an order authorizing deferral accounting. Under the circumstances described above, equity requires that PacifiCorp not be foreclosed from offering proof that it should be allowed to initiate deferral entries as of June 1, 2002.

ORDER

THE COMMISSION ORDERS That:

- 28 (1) The scope of this proceeding is limited to consideration of whether PacifiCorp should be authorized to establish and maintain a deferred account for asserted extraordinary power costs so that it will not lose the opportunity to seek recovery of such costs through a subsequent filing for rate recovery.
- 29 (2) Any authority granted to PacifiCorp in this proceeding will be for accounting purposes only and will not alter or amend PacifiCorp's rates.
- 30 (3) Any authority granted to PacifiCorp in this proceeding will not include a determination that any costs allowed for deferral were prudently incurred, or that any portion of the costs should be allowed for future recovery through rates.
- 31 (4) Any authority granted to PacifiCorp to establish a deferral account for asserted extraordinary power costs may allow for entries to such an account to include costs incurred on and after June 1, 2002.

⁶ It is worth noting that the Commission later expanded the period over which Avista could maintain its power cost deferral account, including in its order authority to defer costs incurred prior to the date of the Commission's order. *In re Avista Corporation, Docket No. UE-000972, Order Granting Deferral of Power Costs Expenses Pending Demonstration of Prudence (August 9, 2002)(approving deferrals as of July 1, 2002).*

DATED at Olympia, Washington and effective this ____ day of September, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner