

**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.

Respondent.

Docket No. UE-110070

ICNU AND PUBLIC COUNSEL'S
REPLY TO RESPONSE ON BEHALF
OF STAFF TO PACIFICORP'S
MOTION TO DISMISS

I. INTRODUCTION

1 Pursuant to WAC 480-07-370(1)(d)(ii), the Industrial Customers of Northwest Utilities ("ICNU") and the Public Counsel Section of the Washington State Attorney General's Office ("Public Counsel") submit this Reply to the Response on Behalf of Commission Staff to PacifiCorp's Motion to Dismiss Complaint ("Staff Response").

II. REPLY

A. The Joint Complaint Properly Alleges that PacifiCorp Charged "Unlawful" Rates and Therefore Entitles ICNU and Public Counsel to Seek Relief Under RCW 80.04.230

2 In its Response, Staff argues that the Commission should dismiss the claims for

relief made in the Joint Complaint under RCW 80.04.230.^{1/} Staff states that dismissal of these claims is proper because RCW 80.04.230 only applies to charges in excess of the “lawful (i.e., published) rate,” and that the Joint Complaint fails to allege that PacifiCorp charged a rate other than the filed rate.^{2/} Yet, Staff offers no support for its assertion that the “lawful” rate and the “published” rate are, in all instances, one and the same.

3 There are compelling policy reasons why the Commission should not, categorically, declare that a “published” rate is *per se* “lawful,” or that complainants are never entitled to seek refunds under RCW 80.04.230 so long as they are charged the published rate. This result would make refund claims unavailable to claimants in any case where a previously-charged, published rate was found unlawful and could inadvertently incent companies to act unlawfully during the rate-setting process.

4 Moreover, even if the Commission determines that none of the facts alleged in the Joint Complaint could possibly entitle ICNU and Public Counsel to relief under RCW 80.40.230, it may still consider all other claims, including reparations under RCW 80.04.220, a Commission investigation, and amendment of the 2009 GRC Final Order. In addition, the Commission has discretion to fashion remedies not included in the Joint Complaint’s requested relief, if it finds doing so is in the public interest.^{3/}

^{1/} Staff Response ¶3.

^{2/} *Id.*

^{3/} See RCW 80.01.040(3). Remedies available to the Commission include penalties against PacifiCorp and its individual officers and employees pursuant to RCW 80.04.380, 80.04.385, and/or 80.04.405.

B. Staff Correctly Points out that PacifiCorp Has Not Carried its Burden To Demonstrate Undisputed Facts Sufficient to Support Dismissal on the Basis of the Statute of Limitations

5 The statute of limitations is an affirmative defense.^{4/} Therefore, PacifiCorp has the burden to prove all facts necessary to establish it.^{5/} The Staff Response illustrates that PacifiCorp has failed to carry its burden of proof, and instead only presented information that is confusing and irrelevant to the accrual of ICNU and Public Counsel’s claims.^{6/}

6 The Staff Response points out that resolving the actual date of accrual is “difficult.”^{7/} Indeed, PacifiCorp has not asserted facts that would make it easy – or even possible – to find that ICNU and Public Counsel could have discovered the basis for their claims six months prior to the filing of the Joint Complaint.^{8/} Thus, the Staff Response generally supports the conclusion that PacifiCorp has failed to carry its burden of proof regarding its statute of limitations affirmative defense, and PacifiCorp’s Motion to Dismiss on this basis should be denied.

7 It should also be noted that the Staff Response contains a few errors that confuse the record. First, the heading for Section B of the Staff Response refers to RCW 80.04.230. This appears to be a typographical error and should, instead, refer to RCW 80.04.240 as it applies to a reparations claim brought under RCW 80.04.220. Second, the Staff Response states that PacifiCorp is correct in its claim that 2009 REC data was available in April and May of 2010. However, the Staff Response incorrectly frames the 2009 REC data as “information in

^{4/} *Brown v. Prowest Transp. Ltd.*, 76 Wn.App. 412, 419, 886 P.2d 223, 228 (1994) (citing *Haslund v. Seattle*, 86 Wash.2d 607, 547 P.2d 1221 (1976)).

^{5/} *Id.*

^{6/} Staff Response ¶¶4-9. The Staff Response engages only minimally with the law and facts regarding the statute of limitations, and therefore contributes little to consideration of this issue.

^{7/} *Id.* at ¶5.

^{8/} PacifiCorp, Staff, ICNU, and Public Counsel all agree that the six-month statute of limitations applies to claims brought under RCW 80.04.220. Joint Complaint at n.5, Motion to Dismiss ¶31, Staff Response ¶4, RCW 80.04.240.

controversy.”^{9/} ICNU and Public Counsel do not contest the availability of 2009 REC data, but do dispute its characterization as “information in controversy.” The discovery of the basis for ICNU and Public Counsel’s claims relates *not* to the date of availability of 2009 data, but rather to the date on which they discovered that 2010 REC revenues were significantly higher than the amount disclosed in the *2009 GRC*.

8 Finally, the Staff Response makes the wholly unsupported observation that “it may be fair to impute to ICNU knowledge acquired by Mr. Falkenberg during his work for ICNU in Oregon.”^{10/} Staff offers no factual or legal basis for its conclusion that such a result “may be fair.” Thus, this is nothing more than speculation by Staff, which is inappropriate in this context and should have no bearing on a decision on the Motion to Dismiss.^{11/}

C. The Claims for Violations of Commission Rules Governing Pro Forma Adjustments, Testimony, and Discovery Are Not Irrelevant and Should Not Be Dismissed

9 Staff states that the claims alleging violations of Commission rules regarding pro forma adjustments, filing testimony under oath, accuracy of data request responses, and the obligation to supplement responses to data requests, should be dismissed because they are “irrelevant” to an “excessive rates claim.”^{12/} As discussed below, this argument is wrong for two reasons. First, Staff improperly narrows the scope of the Joint Complaint. The claims related to violations of Commission rules stand on their own, and may be considered independently from the excessive rates claim. Thus, the Commission is not required to find that the claims related to violations of Commission rules are relevant to the excessive rates claim. Second, Staff is wrong,

^{9/} Staff Response ¶6.

^{10/} *Id.* at ¶8.

^{11/} ICNU and Public Counsel’s Response to the Motion to Dismiss discusses at length the legal and factual reasons why PacifiCorp’s line of argument based on agency theory is inappropriate and inapplicable to ICNU and Public Counsel’s claims. *See* ICNU and Public Counsel Response ¶¶23-39.

^{12/} Staff Response ¶¶12-16. Notably, PacifiCorp did not raise the “relevance” of these alleged violations in its Motion to Dismiss. *See* Motion to Dismiss ¶¶50-62.

and the claims regarding violations of the Commission rules are relevant to the excessive rates claim. The alleged violations of Commission rules led to a settlement based on inaccurate information and, thus, *are* relevant to a determination of whether the rates agreed upon in the settlement were excessive and unreasonable.

1. Staff’s Argument that Claims for Violations Are “Irrelevant” to Excessive Rates “Claims” Should Be Disregarded

10 Staff incorrectly argues that the claims for rule violations in the Joint Complaint are “irrelevant” to ICNU and Public Counsel’s excessive rates claim and request for damages.^{13/} Notably, Staff cites no authority to support this contention. This case is not so narrow in scope as to only allege an excessive rates claim.^{14/} RCW 80.04.110(1) provides that complaints may be made “setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission.” The statute goes on to describe the high standard that must be met for dismissal of a complaint:

[N]o motion shall be entertained against a complaint for misjoinder of complaints or grievances.... All grievances to be inquired into shall be plainly set forth in the complaint. No complaint shall be dismissed because of the absence of direct damage to the complainant.^{15/}

The unsupported assertion of Staff regarding the relevance of the statutes and rules falls short of meeting this standard and provides no support for a motion to dismiss.

11 The Joint Complaint properly includes multiple claims for violations of laws, some of which may entitle ICNU and Public Counsel to monetary relief, and some of which might warrant other types of relief. Among these are the claims that PacifiCorp charged

^{13/} Staff’s Response ¶12-16.

^{14/} Staff’s Response ¶13.

^{15/} RCW 80.04.110(2).

customers excessive rates during 2010 under RCW 80.04.220 and .230, *and* that PacifiCorp violated rules regarding pro forma adjustments, filing false or, at best, highly misleading testimony under oath, the accuracy of data request responses, and the obligation to supplement data request responses. These are separate and independent violations, properly joined in a single complaint. The argument that a refund, *i.e.*, a monetary damages remedy, is not directly linked to these claims does not alter the independent nature of the claims or otherwise make them “irrelevant.” In other words, the Commission may separately consider whether PacifiCorp’s 2010 rates were excessive *and* whether PacifiCorp violated rules governing pro forma adjustments, testimony, and discovery. In fact, it is surprising that Staff would argue that information related to PacifiCorp’s deliberately misleading conduct is irrelevant. Given PacifiCorp’s ongoing requests for substantial rate increases, requiring the Company to provide current and accurate information should be important to all parties, including Staff.

2. PacifiCorp’s Violations of Rules Governing Pro Forma Adjustments, Testimony, and Discovery Are Relevant to a Determination of Whether its 2010 Rates Were Excessive

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Staff states that it believes that PacifiCorp’s alleged violations of certain rules are not relevant to the determination of whether the *2009 GRC* resulted in excessive rates, but does not provide an explanation of the foundation for this assertion.^{16/} Instead, Staff appears to base its reasoning about the connection between the rule violations and the improperly obtained settlement on its observation that it “seriously doubt[s] ICNU/Public Counsel can prove” that every other party to the settlement would have exercised its discretion in a similar way and signed a different settlement, or that the Commission would have approved a different

^{16/} Staff simply cites to ER 401 and provides no further support for its arguments regarding relevance. Staff fails to acknowledge that the Commission must consider, but is not obligated to follow, the Washington Rules of Evidence and therefore applies a broader standard for relevance. *See* WAC 480-07-495(1).

settlement.^{17/} Staff is wrong in making this assertion. ICNU and Public Counsel’s claims do not require ICNU and Public Counsel to prove that parties or the Commission would have agreed to a settlement on different terms. Moreover, Staff’s observation is misplaced, because Staff is opining on what it believes ICNU and Public Counsel may be able to prove at a later point. This “observation” has no basis in facts or law, is premature, and provides no support for the Motion to Dismiss.

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Further, a plain reading of the Joint Complaint shows that the claims for rule violations and the claim for excessive rates *are*, in fact, relevant to one another. The Joint Complaint alleges that the 2009 GRC settlement resulted in the approval of unlawful and excessive rates, because the rates agreed upon in settlement did not reflect the proper level of REC revenues.^{18/} This is the case because PacifiCorp, in violation of Commission rules, did not disclose the REC revenue amounts it knew it would receive.^{19/} Thus, the reason why the proper level of REC revenues were not disclosed and reflected in rates *is* relevant to determining whether the rates were, in fact, unlawful and excessive. Finally, Staff’s assertion that the rule violation claims are not relevant is troubling, because it appears to reflect a policy choice by Staff that would insulate PacifiCorp from review despite the Company’s alleged violations of Commission rules.

^{17/} Staff Response at n. 22.

^{18/} Joint Complaint ¶¶4-5.

^{19/} *Id.* The Commission must view the facts alleged in the complaint “in the light most favorable to the non-moving party.” *Activate, Inc., v. State, Dept. of Revenue*, 150 Wn.App. 807, 812, 209 P.3d 524 (2009) (citing *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005)).

III. CONCLUSION

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For the foregoing reasons, ICNU and Public Counsel respectfully request that the Commission consider the arguments in the Staff Response in light of the information presented in this Reply, and renew their request that the Commission deny PacifiCorp's Motion to Dismiss. Respectfully submitted,

DATED this 7th day of March, 2011.

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