BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE AND THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES, Complainants, v. PACIFICORP d/b/a PACIFIC POWER & LIGHT CORPORATION Respondent.	)	DOCKET UE-110070 ORDER 01 INITIAL ORDER DISMISSING COMPLAINT

Synopsis: *This is an Administrative Law Judge's Initial Order that is not effective unless approved by the Washington Utilities and Transportation Commission (Commission) or allowed to become effective as described in the notice at the end of this Order. This Order would dismiss a formal Complaint filed by the Public Counsel Section Washington State Attorney General's Office (Public Counsel) and the Industrial Customers of Northwest Utilities (ICNU) against PacifiCorp. The Complainants fail to state any claim upon which relief can be granted.*

SUMMARY

1 **PROCEEDINGS.** On January 7, 2011, the Industrial Customers of Northwest Utilities (ICNU) and the Public Counsel Section of the Washington State Attorney General's Office (Public Counsel) jointly filed with the Washington Utilities and Transportation Commission (Commission) a formal Complaint against PacifiCorp d/b/a/ Pacific Power & Light Corporation (PacifiCorp). The Complaint alleges that PacifiCorp violated certain statutes and Commission rules in connection with forecasting revenues from renewable energy credits (RECs) in PacifiCorp's 2009 general rate case, Docket UE-090205 (2009 GRC). ICNU and Public Counsel allege

that, but for these violations, they would not have agreed to join in the Settlement Stipulation that resolved the 2009 GRC (Settlement). Under the Settlement, the parties agreed to increase PacifiCorp's annual revenues from Washington customers by $13.5 million (5.3 percent) effective January 1, 2010. The Commission approved and adopted the Settlement without modification.[1]

2 Complainants seek monetary relief under RCW 80.04.220 and 80.04.230. RCW 80.04.220 allows for reparations when a public service company is determined by the Commission to have charged "excessive or exorbitant" amounts for service. RCW 80.04.230 authorizes the Commission to order refunds if the Commission determines a company charged an amount for any service rendered that exceeded the lawful rate in force at the time such charge was made. ICNU and Public Counsel ask the Commission, in the alternative, to amend the 2009 GRC Final Order under RCW 80.04.210 to reflect the actual level of 2010 REC revenues that PacifiCorp "knew or should have known" it would receive during 2010.[2]

3 On February 7, 2011, PacifiCorp filed its Answer and Affirmative Defenses to Joint Complaint and concurrently filed a Motion to Dismiss Joint Complaint. PacifiCorp generally and specifically denied the essential allegations in the Complaint, and argued both factual and legal grounds in support of its affirmative defenses and Motion To Dismiss. ICNU and Public Counsel filed their Response to PacifiCorp's Motion To Dismiss on February 28, 2011, opposing it. The Commission's Regulatory Staff (Commission Staff or Staff)[3] also filed a response, supporting PacifiCorp's Motion To Dismiss in certain regards and opposing it in others.

4 On March 7, 2011, ICNU and Public Counsel filed a Motion for Leave to Reply to Staff's Response and their Reply.

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[1] *Washington Utilities and Transportation Commission v. PacifiCorp d/b/a Pacific Power & Light Company*, Docket UE-090205, Order 09 - Final Order Approving and Adopting Settlement Stipulation (December 16, 2009).

[2] RCW 80.04.210 authorizes the Commission to "alter or amend any order or rule made, issued or promulgated by it."

[3] In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the presiding Administrative Law Judge or the Commissioners make the decisions. To assure fairness, the Commissioners, the presiding Administrative Law Judge, and the Commissioners' policy and accounting advisors do not discuss the merits of the proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See RCW 34.05.455.*

5 **PARTY REPRESENTATIVES:** Sarah A. Shifley, Assistant Attorney General, Public Counsel Section Washington State Attorney General's Office, Seattle, Washington, represents Public Counsel. Melinda J. Davison and Jocelyn C. Pease, Davison Van Cleve, P.C., Portland Oregon, represent ICNU. Katherine A. McDowell, McDowell Rackner & Gibson PC, Portland, Oregon, and Jordan A. White, Senior Counsel, Pacific Power, Salt Lake City, Utah, represent PacifiCorp. Donald T. Trotter, Assistant Attorney General, Olympia, Washington, represents Staff.

6 **COMMISSION DETERMINATIONS**: This Initial Order, if it becomes final by operation of law or is sustained following review, would dismiss ICNU and Public Counsel's Complaint. The Complaint fails as a matter of law to state any claim upon which relief can be granted whether considered under the standards that apply to motions to dismiss or motions for summary determination.

7 Among other factors that drive the Commission's determination that the Complaint should be dismissed is that the rates established in Docket UE-090205, as to which the Complainants seek relief, are no longer effective. The subject rates were supplanted on April 3, 2011, following approval of PacifiCorp's filing in compliance with the Commission's final order in the Company's most recent, fully litigated, general rate case proceeding in Docket UE-100749 (2010 GRC).[4]

8 The Commission's resolution of the REC issues that were raised and adjudicated in the 2010 GRC have already effected part of the relief the Complainants seek by their Complaint. The Commission's final order in Docket UE-100749 requires PacifiCorp to file by May 24, 2011, a detailed accounting of REC revenues received since January 1, 2009, and a detailed proposal for a REC tracking mechanism.[5] This, among other things, will inform the Commission's ultimate determinations in Docket UE-100749 concerning implementation and timing of a crediting mechanism to return REC revenues to customers in the form of bill credits.[6] The question remains open in

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[4] *Washington Utilities and Transportation Commission v. PacifiCorp d/b/a Pacific Power & Light Company*, Docket UE-100749, Order 06 (March 25, 2011). *See also*, Commission Compliance Letter, Docket UE-100749 (April 1, 2011). Complainants acknowledge that their complaint is "is integrally related to both" Docket UE-090205 and Docket UE-100749.

[5] *Id.* ¶¶ 199 – 208.

[6] *Id.*

Docket UE-100749 whether the REC credits ultimately ordered in that proceeding will include all or part of the REC revenues PacifiCorp received during 2010, which are the principle revenues with which the Complaint is concerned.[7] Thus, even though there is no sustainable legal basis upon which the Complaint in this docket can go forward, the Commission has considered in part and continues to consider the substance of these matters in Docket UE-100749.

MEMORANDUM

I. Background and Procedural History

9 On February 9, 2009, PacifiCorp filed in Docket UE-090205 revisions to its tariffs designed to increase revenue by $38.5 million (15.1 percent). The filing was based on a twelve month test year ending June 30, 2008, with adjustments for known and measurable changes through June 30, 2009. As required, PacifiCorp filed its direct testimony and exhibits in support of the Company's as-filed rates.

10 The parties negotiated and filed a Settlement Stipulation on August 25, 2009. This was just three days before the August 28, 2009, date established in the procedural schedule for Staff, Public Counsel, ICNU and other parties to file testimony in response to the Company's initial filing. Two aspects of the Settlement are most relevant to the issues in this proceeding: the agreed revenue requirement and the agreed treatment of renewable energy credits. As discussed in Order 09, approving and adopting the Settlement Stipulation:

> In the Settlement, the parties have agreed to a final outcome, but not the details underlying that outcome. We commonly refer to this type of Settlement as a "black box" Settlement. While we allow parties to file "black box" Settlements, we must have sufficient testimony in support of this type of Settlement to allow us to reach the necessary findings for approval of its terms and conditions. In this case, unlike many others we have considered, each party filed individual testimony in support of the Settlement rather than joint testimony supporting its approval. We found the comprehensive individual testimony submitted here to be of greater value in our deliberative process. We commend the parties for providing the Commission a more detailed and comprehensive analysis

[7] *Id.* ¶ 207.

> supporting the parties' conclusion that the agreement is in the "public interest."[8]

11 The Settlement provided for an overall increase in revenues from Washington customers of $13.5 million (5.3 percent) effective January 1, 2010.[9] This is about 35 percent of the amount PacifiCorp proposed in its initial filing.

12 Although the parties agree that the revenue requirement amount is a negotiated amount, the underpinnings of which depend on each party's litigation and negotiation positions, they do place a few revenue related markers in the Settlement. The parties expressly agreed, for example, to maintain PacifiCorp's overall return at the level approved in the Company's prior general rate proceeding.[10] In addition, the parties agreed that:

> As part of the increase to base rates, the Parties agree that the Commission should authorize the Company to establish a Washington-jurisdictional regulatory asset of $18.0 million for Washington-allocated costs associated with PacifiCorp's acquisition of the Chehalis generating plant. The costs deferred are: operating and maintenance costs, depreciation, taxes, and cost of invested capital. The Company will begin amortization of the regulatory asset on January 1, 2010; coincident with the proposed rate increase effective date. The Company will amortize the Chehalis deferral at $3.0 million per year over a six-year period. The 2010 amount ($3.0 million) is reflected in the annual revenue increase agreed to in [the Settlement].[11]

13 The parties also expressly agreed that the revenue increase under the Settlement includes the 2010 amount of the Washington-allocated portion of a "pension curtailment gain" of $2,901,000.[12] This presumably amounts to one-third of the

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[8] *WUTC v. PacifiCorp*, Docket UE-090205, Order 09 at ¶ 56. *See also Id.*, Order 08: Order Clarifying Content of Testimony in Support of Settlement (September 15, 2009).

[9] *WUTC v. PacifiCorp*, Docket UE-090205, Order 09 at ¶ 11 (citing Settlement, Exh. No. 3, at ¶ 11).

[10] Docket UE-090205, Exhibit 3, Settlement Stipulation ¶ 16.

[11] *Id.* ¶ 13.

[12] *Id.* ¶ 18.

Washington share given that the Settlement provides for a three-year amortization period beginning January 1, 2010.

14 Finally, the parties agreed that "this case includes $657,755 in Washington-allocated REC revenues for the 2010 rate effective period."[13] The purpose of specifying an amount of REC revenue was not to resolve substantively the question of what pro forma adjustment should be made to account for REC revenue.[14] Instead, the express purpose set out in the Settlement was to identify an amount of REC revenue that would be deemed to be accounted for in rates in the event that any party filed "for deferred accounting or request[ed] that the Commission take any other action regarding PacifiCorp's Washington-allocated RECs."[15] Thus, to the extent the amount identified in the Settlement proved later to be understated, this would potentially benefit ratepayers by reserving all amounts PacifiCorp received in excess of $657,755 for inclusion, for example, in a deferred account. No party, however, petitioned the Commission asking it to establish a deferral account or to take other action regarding PacifiCorp's REC revenues.

15 In addition, concerning RECs, the Settlement provided that the Company would file a report by January 1, 2010, providing:

> (1) an explanation of how Renewable Energy Credits ("RECs") and associated costs and/or revenues are allocated among PacifiCorp's six states; (2) an explanation of how the Company determines proper disposition of RECs on a total-company and state-by-state basis; and, (3) a detailed accounting of the total-company RECs that were sold and the total company RECs that were retained for each year from calendar year 2005 through June 2009.[16]

16 The Company agreed to report quarterly to Staff, Public Counsel, and ICNU, beginning March 31, 2010, on its management of RECs from June 2009 forward,

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[13] *Id.* ¶ 22.

[14] Mr. Meeks, testifying for ICNU in support of the Settlement, confirmed its black box nature with respect to the revenue requirement. Both Mr. Meeks and Mr. Ramas, who testified for Public Counsel, stated that on the bases of their respective detailed analyses, the overall amount of revenue was reasonable. *See infra* ¶¶ 37 – 38.

[15] *Id.*

[16] *Id.* ¶ 20.

subject to the Protective Order in Docket UE-090205.[17] The Company agreed to provide the reports through December 2012, at which point the Renewable Portfolio Standard will be in effect and may change the parties' information needs.[18] According to the Company, the REC reports will "provide transparency, help the Parties understand the Company's management of RECs, and are reasonable in light of the upcoming reporting requirements established by the Washington Renewable Portfolio Standard in WAC 480-109-040."[19] The Company also agreed to hold periodic meetings as requested by any party to provide additional details on the reports.[20]

17 Public Counsel supported this aspect of the Settlement on the basis of its belief that the reports the Company agreed to produce would "be very helpful to the parties in monitoring RECs, including both the banking and sale of RECs, and for use in evaluating the appropriate treatment of RECs in future rate cases in Washington."[21] ICNU stated similarly in support that the Settlement provisions addressing REC reporting "provide the Parties the practical ability to file for deferred accounting or request that the Commission take another action regarding PacifiCorp's Washington-allocated RECs."[22]

18 As indicated in the discussion above, the Commission approved and adopted the parties' Settlement Stipulation and authorized and required PacifiCorp to make a compliance filing to implement its terms in the Company's tariff.[23] The new rates authorized by Order 09 became effective on January 1, 2010.

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[17] *Id.* ¶ 21. *Order 03, Protective Order*, entered March 2, 2009.

[18] *Id.*

[19] Docket UE-090205, Exhibit CAA/ALK-1T (Allen/Kelly)at 11.

[20] *Id.*

[21] *Id.* at 6.

[22] Docket UE-090205, Exhibit RMM-1T (Meek) at 3.

[23] *WUTC v. PacifiCorp d/b/a Pacific Power & Light Co*., Docket UE-090205, Order 09 - Final Order Approving and Adopting Settlement Stipulation (December 16, 2009).

II. Complaint

19 ICNU and Public Counsel complained against the rates approved in Order 09 on January 7, 2011. The gravamen of their formal Complaint is found in its fourth paragraph:

> Information received by ICNU and Public Counsel after entry of the Final Order in the *2009 GRC* indicates that, in violation of state law and Commission rules, PacifiCorp failed to disclose complete and accurate information, and failed to meet its burden of providing information through discovery to demonstrate the reasonableness of the proposed REC adjustment as required by RCW 34.05.452, RCW 80.04.130(4), WAC 480-07-540, WAC 480-07-405(7), and WAC 480-07-405(8). These violations resulted in PacifiCorp overstating its revenue requirement and thereby charging and collecting unjust, unfair, and unreasonable rates as required by *[sic]* RCW 80.28.010. Specifically, PacifiCorp knew that its 2009 and 2010 sales of renewable energy credits (REC) would exceed the estimates provided in its pro forma adjustment. PacifiCorp failed to disclose this information, despite numerous obligations to do so. ICNU and Public Counsel would not have entered into the Settlement under the terms it contained if they had been provided accurate and complete information. Moreover, it is doubtful whether the Commission would have approved the Settlement if it had known about the REC revenues the Settlement allowed PacifiCorp to withhold from customers. Thus, the revenue received for RECs in excess of the estimates provided by PacifiCorp in its pro forma adjustment should be refunded to customers.

20 The Complaint states three causes of action:

- First Cause: <u>Violation of RCW 34.05.452 and 80.04.130 and WAC 480-07-540 – PacifiCorp's Proposed Pro Forma Revenue Adjustment was Inconsistent with Known and Measurable Rate-Effective-Period [*i.e.*, 2010] Revenues:</u> "Despite its awareness of materially different REC prices, PacifiCorp still presented the Commission with a pro forma adjustment based on REC prices

far below those in the test period, what it was receiving at the time, or what it could reasonably expect to receive in the rate effective period."[24]

- Second Cause: Violation of WAC 480-07-405(7) and RCW 80.28.010 – Failure to Present Accurate and Complete Evidence Resulted in Settlement Approving Unjust, Unreasonable and Unfair Rates: "PacifiCorp disregarded [its] obligation[s] [under the Commission's discovery rules], and failed to provide accurate and complete responses to the parties' data requests despite the fact that the Company possessed accurate and complete information."[25]

- Third Cause: Violation of WAC 480-07-405(8) – Failure to Supplement Data Responses: "PacifiCorp failed to provide the parties and the Commission with accurate information, resulting in an understatement of actual anticipated 2010 REC revenue and the achievement of a Settlement based on misleading information."[26]

21 Complainants seek monetary relief for ratepayers under RCW 80.04.220 and 80.04.230. The Commission can order "reparations" under RCW 80.04.220 when a public service company is determined by the Commission to have charged "excessive or exorbitant" amounts for service. RCW 80.04.230 authorizes the Commission to order refunds if the Commission determines a company charged an amount for any service rendered that exceeded the lawful rate in force at the time such charge was made. ICNU and Public Counsel ask the Commission, in the alternative, to amend the 2009 GRC Final Order under RCW 80.04.210 to reflect the actual level of 2010 REC revenues that PacifiCorp "knew or should have known" it would receive during 2010.

22 Complainants also ask the Commission to establish "an ongoing balancing account to accurately credit customers with the actual REC revenues."[27] In the context here, this would require an accounting order to establish a balancing account (presumably a

[24] Complaint ¶¶ 19, 20.

[25] *Id.* ¶¶ 21-23.

[26] *Id.* ¶ 24.

[27] *Id.* ¶ 25 (subparagraph 3).

deferral account that would be a regulatory liability on PacifiCorp's books) and a rate order to implement a credit mechanism.[28]

23 Finally, Complainants ask the Commission to "[i]nvestigate whether any PacifiCorp employee committed perjury by failing to disclose accurate data on REC revenues."[29] Although the Complaint does not request the Commission to assess penalties, Complainants later suggest this form of relief in their reply to staff's response to PacifiCorp's Motion to Dismiss.[30]

III. Motion to Dismiss

24 PacifiCorp filed it Motion To Dismiss Joint Complaint on February 7, 2001, along with its Answer and Affirmative Defenses. PacifiCorp' motion essentially elaborates on its affirmative defenses, which argue that the Complaint:

- Is untimely, having been filed beyond the statute of limitations.
- Fails to state a claim upon which relief can be granted.
- Is an improper collateral attack on the Commission's Final Order in Docket UE-090205.
- Requests retroactive ratemaking, which is illegal.
- Constitutes improper, single-issue ratemaking.

25 Staff filed a brief response on February 28, 2011, supporting several of PacifiCorp's arguments and rejecting others. Complainants, also on February 28, 2011, filed their Response opposing PacifiCorp's Motion. Complainants subsequently filed a motion seeking leave to file a reply to Staff's response, along with their reply. The Commission grants Complainants' request and considers their reply along with the parties' other pleadings.

26 Complainants assert in their response that PacifiCorp's motion to dismiss must be treated as a motion for summary determination under the Commission's procedural

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[28] As mentioned elsewhere in this Order (*see, e.g., supra* ¶ 8), the Commission's final order in Docket UE-100749 provides for establishment of a tracking account and crediting mechanism for REC revenues.

[29] Complaint ¶ 25.

[30] ICNU and Public Counsel's Reply to Response on Behalf of Staff to PacifiCorp's Motion to Dismiss ¶4 fn. 3.

rules because PacifiCorp supported it with an affidavit. PacifiCorp argues that it makes no difference whether the matter is considered under the standards for a motion to dismiss or a motion for summary determination. The Company contends the outcome must be the same either way—the final disposition of the Complaint in PacifiCorp's favor without the need for any further process.

27 The Commission's procedural rule governing dispositive motions, WAC 480-07-380, provides:

> (1) **Motion to dismiss.**
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> (a) ***General.*** A party may move to dismiss another party's claim or case on the asserted basis that the opposing party's pleading fails to state a claim on which the commission may grant relief. The commission will consider the standards applicable to a motion made under CR 12 (b)(6) and 12(c) of the Washington superior court's civil rules in ruling on a motion made under this subsection. If a party presents an affidavit or other material in support of its motion to dismiss, and the material is not excluded by the commission, the commission will treat the motion as one for summary determination as provided in subsections (2) and (3) of this section.
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> (2) **Motion for summary determination.**
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> (a) ***General.*** A party may move for summary determination of one or more issues if the pleadings filed in the proceeding, together with any properly admissible evidentiary support (e.g., affidavits, fact stipulations, matters of which official notice may be taken), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In considering a motion made under this subsection, the commission will consider the standards applicable to a motion made under CR 56 of the Washington superior court's civil rules.

It is appropriate in some instances, as here, to consider whether a complaint should go forward under either test. As discussed below, this Initial Order determines that the

Complaint should be dismissed on legal grounds as to which there are no material facts in dispute or which govern, even taking Complainants' fact assertions as true. That is, the Commission determines the Complaint should be dismissed under either standard.

IV. Discussion and Determinations

A. Claims for Refunds Under RCW 80.04.230

28 ICNU and Public Counsel fail to state a claim for which relief can be granted under RCW 80.04.230, which gives the Commission discretion to order a public service company to pay refunds if the Commission determines the company "charged an amount for any service rendered in excess of the lawful rate in force at the time such charge was made."

29 Under the Commission's statutory scheme, the rates it allows to go into effect by operation of law, or approves at the conclusion of a general rate proceeding for publication in the company's tariff, are the company's lawful rates.[31] If rates, once effective, are determined in a subsequent proceeding to not be just, fair, reasonable and sufficient, the Commission will establish the lawful rates for prospective application.[32] That is, all rates published and effective in a company's tariff at a given point in time are lawful rates for purposes of RCW 80.04.230, even if they are later found to be "unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of the law, or that such rates or charges are insufficient."[33]

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[31] RCW 80.28.080.

[32] RCW 80.04.140.

[33] RCW 80.28.020 provides: Whenever the commission shall find, after a hearing had upon its own motion, or upon complaint, that the rates or charges demanded, exacted, charged or collected by any gas company, electrical company or water company, for gas, electricity or water, or in connection therewith, or that the rules, regulations, practices or contracts affecting such rates or charges are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of the law, or that such rates or charges are insufficient to yield a reasonable compensation for the service rendered, the commission shall determine the just, reasonable, or sufficient rates, charges, regulations, practices or contracts to be thereafter observed and in force, and shall fix the same by order.

30 ICNU and Public Counsel do not allege in their Complaint that PacifiCorp charged any customer more than the lawful rates in effect following the Commission's approval of the Settlement rates in Docket UE-090205, as published in the Company's tariff following the Company's compliance filing. Such an allegation is essential in any action seeking refunds under RCW 80.04.230. It follows that the Complaint is deficient as a matter of law and fails to present a claim under RCW 80.04.230 as to which the Commission can grant relief. The Complaint accordingly should be dismissed insofar as this form of relief is concerned.

B. Claims for Reparations under RCW 80.04.220

31 ICNU and Public Counsel are barred by the six month statute of limitations established under RCW 80.04.240 that applies to actions seeking reparations under RCW 80.04.220.[34] The Complainants acknowledge that this is the applicable limitation period, but argue in a footnote to their Complaint that:

> ICNU and Public Counsel's claim for refunds accrued on or after July 8, 2010, *i.e.*, the date on which ICNU and Public Counsel received the actual sales contracts discussed below. (Public Counsel first had access to the actual sales contracts on September 9, 2010). *See AT&T Communications et al. v. Qwest Corporation*, Docket No. UT-051682, Initial Order (Order No. 03), ¶¶ 18-21 (Feb. 10, 2006) (holding that the complainant's claim for refund accrued as of the day that the contracts upon which their claim relied were made public and thus available to them).[35]

32 This argument is misleading. ICNU and Public Counsel ignore that the Commission subsequently *reversed* the ALJ's decision in the Initial Order in *AT&T I* with respect to the date on which the claim in that case accrued.[36] Indeed, in *AT&T II*, the

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[34] RCW 80.04.240 provides: All complaints concerning overcharges resulting from collecting unreasonable rates and charges or from collecting amounts in excess of lawful rates shall be filed with the commission within six months in cases involving the collection of unreasonable rates and two years in cases involving the collection of more than lawful rates from the time the cause of action accrues.

[35] Complaint, ¶ 6, fn 5. In this Order, the Commission refers to the cited Initial Order (*i.e.*, Order No. 03) as *AT&T I*.

[36] The initial order ruled: 1) The complaint accrued on June 8, 2004, with Staff's release of certain contracts to the public. In *AT&T Communications, et al. v. Qwest Corp.*, Docket UT-

Commission expressly rejected the above-quoted holding in the Initial Order. Yet, Complainants rely in their Complaint on the quoted language from *AT&T I* as the principal support for their argument that their claims did not accrue until they actually received certain contracts showing REC revenues higher than those reflected in the Company's filing in Docket UE-090205.

33 The Commission held in *AT&T II* and affirmed in *AT&T III* that the test for claim accrual for purposes of determining the statute of limitations under RCW 80.04.240 runs from the time that "the aggrieved party *in the exercise of reasonable diligence* should have discovered the injury."[37] This date, at the latest, was May 4, 2010, when PacifiCorp filed a general rate case in Docket UE-100749 showing test year REC revenues of over $4.2 million allocated to Washington out of a Company total of nearly $51 million for the 12 months ended December 31, 2009.[38] This amount greatly exceeded the $657,755 that the parties agreed was included in rates in their Settlement in Docket UE-090205. In other words, ICNU and Public Counsel knew beyond peradventure as of May 4, 2010, that the conduct of which they complain here – a significant understatement by PacifiCorp of REC revenue in Docket UE-090205 for the post-test-year period in that proceeding[39] – had occurred. Measuring from this claim accrual date either to December 9, 2010, the date of ICNU and Public Counsel's initial Complaint, or January 7, 2011, the date on which they filed their revised Complaint, their claims for relief under RCW 80.04.220 are barred under the applicable six-month statute of limitations.

051682, Order 04 Interlocutory Order Reversing Initial Order ¶ 20 (June 8, 2006) *(*hereinafter, *AT&T II)* and again in Order 06 Affirming Interlocutory Order (hereinafter, *AT&T III)*, the Commission found that the claim accrued much earlier than the date on which the contracts at issue were published.

37 *ATT&T II* ¶ 20 (citing *Enterprise Timber Inc. v. Washington Title Ins. Co.*, 79 Wn.2d 479, 457 P.2d 600 (1969) for the proposition that "one who has notice of facts sufficient to prompt a person of reasonable prudence to inquire is deemed to have notice of all the facts that a reasonable inquiry would disclose."

[38] ICNU and Public Counsel were served with the Company's filing and participated actively in Docket UE-100749, in which the Commission recently entered its Final Order. Moreover, ICNU and Public Counsel received in discovery, prior to agreeing to settle in Docket UE-090205, information showing REC revenues for 2008 and 2009 that were higher than what PacifiCorp included in its as-filed case based on 2007 REC revenues. Thus

[39] Complaint ¶ 4 and *passim.*

C. Other Claims and Requests for Relief

34 ICNU and Public Counsel request, as an alternative form of relief, that the Commission amend the *2009 GRC* final order under RCW 80.04.210 "to reflect the actual level of 2010 revenue PacifiCorp knew or should have known . . . it would receive during 2010 at the time the Settlement was negotiated."[40] This request implies that the Complainants would have the Commission, following PacifiCorp's "opportunity to be heard as provided in the case of complaints," order the Company to file revised tariff sheets establishing new rates.

35 The Commission is empowered to change currently effective rates upon a proper showing but must establish any revised rates for *prospective* application.[41] The Commission cannot legally establish retroactive rates. Considering that the rates established in Docket UE-090205 are no longer effective, having been supplanted on April 3, 2011, by rates determined following a fully litigated general rate proceeding

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[40] Complaint ¶ 3. The Complainants do not make clear what would be the basis for the revised rates. They do not seem to advocate that the Commission should subtract the *actual* level of 2010 REC revenue received, less the $0.66 million expressly accounted for in the Settlement, from the $13.5 million revenue increase to which the parties agreed in Docket UE-090205. Indeed, such an approach would undermine ratemaking practice in this jurisdiction, which is grounded in the historic test year adjusted for changes that are known and measurable at the time the general rate case is filed. *See Washington Utilities and Transportation Commission v. Puget Sound Energy*, Dockets UE-090704/UG-090705, Order 11 at ¶¶ 22-35 (April 2, 2010). *See also WUTC v. Avista*, Dockets UE-090134 and UG-090135, Order 10 at ¶¶ 40-50 (December 22, 2009). Another possibility is that they would have the Commission rely on the test year level of REC revenue in PacifiCorp's most recently completed general rate proceeding in Docket UE-100749. The end of the test year in that proceeding, December 31, 2009, corresponds closely the effective date of rates in Docket UE-090205 (January 1, 2010), so the test year data arguably might be considered to reflect what PacifiCorp "knew or should have known" at the time of the Settlement. Even this approach, however, strains the principles governing what can be considered "known and measurable," as discussed in the cases cited above.

[41] RCW 80.04.130(ii) provides:

> The commission may prescribe a different rate to be effective on the prospective date stated in its final order after its investigation, if it concludes based on the record that the originally filed and effective rate is unjust, unfair, or unreasonable.

See also RCW 80.28.020.

in Docket UE-100749,[42] it is impossible at this juncture to achieve a meaningful result by amending Order 09 as requested.[43]

36 There are other legal and policy barriers to ICNU and Public Counsel's Complaint insofar as it requests the Commission to modify Order 09 by revising the revenue requirement and, necessarily, the resulting rates. PacifiCorp identifies these in its motion to dismiss as "an improper collateral attack" on Order 09 and as "single issue ratemaking," which PacifiCorp argues is particularly inappropriate considering the general rate proceedings in the then-pending and now-concluded Docket UE-100749.

37 ICNU and Public Counsel appear to acknowledge the authorities cited by PacifiCorp that stand for the proposition that "a complaint may be viewed as a collateral attack on an order if the issues *could* have and should have been raised and litigated in the underlying rate case."[44] ICNU and Public Counsel argue that they "*could not possibly* have raised and litigated the issue of 2010 REC revenue in the *2009 GRC*, because PacifiCorp was withholding accurate and complete information about its REC revenues."[45] It is perfectly clear, however, that the matter of REC revenue was an issue raised in Docket UE-090205. Indeed, the issue is expressly identified and addressed in the parties' Settlement Stipulation and in testimony supporting it, including testimony from ICNU and Public Counsel.[46] It is reasonable to infer, too, that the relative paucity of detailed information available to the parties concerning

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[42] *Washington Utilities and Transportation Commission v. PacifiCorp d/b/a Pacific Power & Light Company*, Docket UE-100749, Order 06 (March 25, 2011).

[43] The Commission notes here, and discusses later, that issues surrounding REC revenues were litigated in Docket UE-100749. The final resolution of some REC issues awaits further process in the docket, as specified in the Commission's Final Order. *Id.* ¶¶ 194-208, 384.

[44] ICNU and Public Counsel Response to PacifiCorp's Motion to Dismiss ¶ 39. The authorities mentioned are those cited in PacifiCorp's motion ¶ 45 at fn 19 (*i.e., See e.g. Re Application of Portland Gen. Elec. Co. for an Investigation into Least Cost Plant Retirement*, Docket DR 10 *et al*., Order No. 08-487 at 8 (O.P.U.C. Sept. 30, 2008) ("Once final, a Commission rate order is not subject to collateral attack."); *Neb. Pub. Advocate v. Neb. Pub. Serv. Comm'n*, 279 Neb. 543 (2010) (Public Advocate's complaint was impermissible collateral attack on prior rate order because it raised an issue that should have been raised in the rate case); *Anchor Lighting v. So. Calif. Edison*, Case 02-03-060, Decision 03-08-036, 2003 WL 22118931 (C.P.U.C. Aug. 21, 2003) (complaint dismissed as collateral attack, which is an "attempt to impeach the judgment or order in a proceeding other than that in which the judgment was rendered.").

[45] ICNU and Public Counsel Response to PacifiCorp's Motion to Dismiss ¶ 39.

[46] *See, e.g.*, Docket UE-090205, Exhibit DR-1T (Ramas) at 5:22 – 6:1 ("[T]here was a concern in this case with regard to the level of RECs and with the associated projected revenues from the sale of RECs incorporated in the filing.").

REC revenues was a matter of specific concern. This is implied by the terms of the Settlement that establish reporting requirements, including a requirement that PacifiCorp provide "a detailed accounting of the total-company RECs that were sold and the total-company RECs that were retained for each year from calendar year 2005 through June 2009."[47]

38 Despite these concerns, ICNU and Public Counsel agreed to a black box Settlement in Docket UE-090205. Mr. Meeks for ICNU testified confirmed the nature of the Settlement as a black box with respect to "all revenue requirement issues and nearly all other issues."[48] He testified in addition that: "ICNU's witnesses conducted extensive analysis and discovery of the Company's filing which demonstrated that an overall increase of $13.5 million on an equal percentage basis is a fair and reasonable resolution of the issues in this proceeding."

39 Mr. Ramas testified similarly for Public Counsel, stating that: "based on the test year ended June 2008 with certain known and measurable changes and the information provided by the Company through discovery in this docket, the Stipulation produces a fair and reasonable outcome for Washington's residential and small business customers."[49]

40 PacifiCorp's responses to discovery prior to Settlement, to which both these witnesses refer, apparently included information concerning 2008 and 2009 REC revenues showing materially higher receipts than those upon which its proposed pro forma adjustment for REC revenues was based.[50] Nevertheless, it was the pro forma amount PacifiCorp included in its initial filing in Docket UE-090205 that the parties agreed to identify as being accounted for in their Settlement.[51] Thus, while ICNU and Public Counsel argue now that PacifiCorp withheld relevant information on 2010 REC revenues that they claim in retrospect would have led it to a different conclusion concerning the reasonableness of the overall increase to which it agreed, ICNU and Public Counsel fail to explain why they elected to settle in the face of information in

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[47] Settlement Stipulation ¶ 20.

[48] Docket UE-090205, Exhibit RMM-1T at 3:1-2.

[49] Docket UE-090205, Exhibit DR-1T at 2:7-10.

[50] *See* Complaint ¶ 10; *See also* Motion to Dismiss ¶ 52.

[51] Settlement Stipulation ¶ 22 states that "the Parties agree that this case includes $657,755 in Washington-allocated REC revenues for the 2010 rate effective period."

their possession at the time showing REC revenues materially higher than those included in the Company's initial filing in Docket UE-090205.

41 ICNU and Public Counsel, in retrospect, apparently regret their decision to settle the REC issue on the terms to which they agreed. This does not provide a basis for reopening the docket to allow them to litigate now the same issues they could have litigated then based on information they already had in their possession.[52] To do so would be to allow an improper collateral attack on Order 09 in Docket UE-090205.

42 Although it generally is a matter of policy, not law, the context of this case also suggests the need for some brief discussion concerning the matter of single issue ratemaking. As ICNU and Public Counsel acknowledge, "single-issue ratemaking is disfavored because it may distort the "matching principle," whereby costs and revenues are balanced at a single point in time to determine fair, just, reasonable, and sufficient rates."[53] Not only do the Complainants wish the Commission to adjust rates considering only a single item on the revenue side of the Company's books, they apparently wish this to be done without otherwise disturbing a black box Settlement in which PacifiCorp agreed to reduce its as-filed revenue requirement by $25 million to a level that is about 35 percent of its initial request.[54] Single issue ratemaking in this context should be rejected not only because it is poor ratemaking practice, but also because it is not legally sustainable. That is, the Commission cannot hold the Company to the bargain it made with all the parties in Docket UE-090205, reopen the

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[52] ICNU and Public Counsel's insistence that they could not have litigated these issues in Docket UE-090205 without the benefit of 2010 REC data is a red herring. It is frankly quite doubtful that the Commission would have considered projections of 2010 REC revenue that PacifiCorp would not even begin to receive until at least 12 months after the end of the test year and which would not be accurately known until 24 or more months after the end of the test year, when considering a pro forma adjustment to test year REC revenues under the "known and measurable" standard. On the other hand, it is almost certain that the Commission would consider actual REC revenue data from 2008 that became available in 2009, considering that the test year ended December 31, 2008. The Commission might also have considered data concerning actual 2009 REC revenue in making a pro forma adjustment. *See Washington Utilities and Transportation Commission v. Puget Sound Energy*, Dockets UE-090704/UG-090705, Order 11 at ¶¶ 22-35 (April 2, 2010). *See also WUTC v. Avista*, Dockets UE-090134 and UG-090135, Order 10 at ¶¶ 40-50 (December 22, 2009).

[53] Public Counsel and ICNU Response to PacifiCorp's Motion to Dismiss ¶ 47 (citing *Petition of Avista Corp. d/b/a Avista Utils., for an Order Authorizing Implementation of a Natural Gas Decoupling Mechanism*, Docket No. UG-060618, Order No. 4 ¶19 (Feb. 1, 2007).

[54] The Settlement lowered PacifiCorp's requested rate increase from $38.5 million to $13.5 million.

matter to litigation and reduce the agreed revenue requirement, and enforce an order producing such a result.[55]

43 The only legally sustainable approach available under RCW 80.04.210 in the context of Docket UE-090205 would be for the Commission to rescind Order 09. This presumably would result in either a contested Settlement proceeding or, more likely; a fully litigated proceeding in which PacifiCorp would have an opportunity to support its original revenue request of $38.5 million and other parties would have an opportunity to contest that amount. Then, the Commission would need to rehear the entire case, starting with PacifiCorp's initial request for an increase to its revenue requirement of $38.5 million. Although this would be a pointless exercise for reasons previously discussed, it is worth observing that it is at least equally likely that the final result would be an overall increase in revenue greater than the $13.5 million to which the parties agreed.

D. Allegations of Perjury and Discovery Abuse

44 The final claim for relief that in this matter is the Complainants' suggestion that the Commission should impose penalties against PacifiCorp, and its individual employees, if Complainants sustain their burden to prove the serious allegations of perjury and discovery abuse that they have made in prosecuting this matter.[56] Penalties, however, are not an available remedy when a private party brings a complaint under the Commission's complaint statutes. As the Commission said in *Glick*, rejecting the private complainants request that penalties be imposed*:*

> *The Commission exercises prosecutorial discretion,* and determines when to file complaints, what consequences to seek, and what level of penalties to impose. Doing so is an essential aspect of the Commission's overall regulatory and enforcement activity. Mr. Glick is entitled to prosecute a complaint for his own benefit, but not to seek penalties on behalf of the state. Allowing him and others to take on

[55] This is no different than what occurs as a matter of law under WAC 480-07-750 in the case of a contested Settlement. The Commission cannot purport to accept a Settlement by some parties, make adjustments to the Settlement based on the advocacy of its opponents, and compel the company to accept such results. In any such case, the company has the right to reject any condition imposed by the Commission, which returns the case to its pre-Settlement posture. WAC 480-07-750(2)(b).

[56] Complainants' Reply to Staff Response to Motion to Dismiss ¶ 4.

> that role could lead to vigilantism in which private parties file multiple actions not on their own behalf, but as agents of the state. That would ultimately destroy the Commission's ability to formulate and execute a coherent and cohesive enforcement policy and to accomplish regulation in the public interest, as the law requires. [57]

Thus, the fact that the Commission can exercise its discretion to investigate allegations of perjury or discovery abuse does not provide an independent basis for proceeding with this private party Complaint to the extent it would have the Commission impose penalties.

45 Even if penalties were an available remedy when a private party brings a complaint under the Commission's complaint statutes, the Complainants would have the burden of going forward. That is, they would be required at the outset establish by more than bare assertions that there is some set of facts that would, if fully developed, convince the Commission to take action against the Company or its employees. They have not done so, at least with respect to their allegations concerning possible perjury.

46 The Complainants argue that the Company's prefiled testimony by Mr. Dalley, which included a proposed pro forma adjustment for REC revenues, can be considered perjury because it was based on a projection of rate-period REC revenue reflecting prices for RECs lower than what was known from more recent data the Company possessed at the time of its initial filing. It may very well be the case that if they had not agreed to settle ICNU and Public Counsel could have presented in their response testimony evidence that the Company's proposed pro forma adjustment for REC revenues was based on stale data and otherwise not well supported.[58] Assuming for purposes of argument that PacifiCorp presented evidence inadequate to support its proposed pro forma adjustment, however, can in no wise be considered tantamount to the commission of perjury.

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[57] *Glick v. Verizon Northwest*, Docket UT-040535, Order 03 (Final Order) ¶¶ 61 – 62 (January 28, 2005).

[58] As the Complaint itself discloses at ¶ 10, ICNU and Public Counsel had in their possession at the time they agreed to settle responses to discovery that showed that "during 2008, PacifiCorp entered into REC sales for that year and 2009 at materially different prices than the $3.50 relied upon for its pro forma adjustment."

47 The Complainants' allegations concerning discovery abuse are more a cause of concern, but even taking the facts in the light most favorable to Complainants, it does not appear that PacifiCorp violated any Commission order or rule governing discovery. ICNU sent its second set of data requests to PacifiCorp on February 24, 2009. ICNU Data Request 2.1 stated: "With regard to Exhibit RBD-3, pages 3.7 and 3.7.1, please provide the actual green tag sales and revenues received by PacifiCorp since 2005. Please update this response as PacifiCorp executes additional sales throughout this proceeding." ICNU Data Request 2.2 provided: "With regard to Exhibit RBD-3, page 3.7, please provide all documents to support the pro forma sales price."

48 PacifiCorp responded to ICNU 2.1 and 2.2 on March 10, 2009. In response to ICNU 2.1, PacifiCorp provided ICNU with a spreadsheet listing and describing every contract under which PacifiCorp was either buying or selling RECs on and after January 1, 2005. PacifiCorp describes the response as being a "spreadsheet [that] was a working document utilized by the Company to track its REC transactions and included a forecast of PacifiCorp's projected REC sales through December 2009, for all non-contingent contracts."[59]

49 On March 19, 2009, the Company provided a "1st Revised Response to ICNU Data Request 2.2." In its response, the Company states that it "provided ICNU with the data on which the Company relied to formulate the pro forma REC revenue price presented in its direct case for a rate increase . . . [including] the REC market broker quotes for the time period of March 2006 through September 2007."[60]

50 It appears that these responses were complete when made. As to ICNU and Public Counsel's argument that PacifiCorp failed in its duty to supplement these data request responses, PacifiCorp acknowledges that it entered into two new REC sales contracts with San Diego Gas & Electric (SDG&E) and Southern California Edison (SCE) (California Contracts) during the pendency of Docket UE-090205. According to PacifiCorp:

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[59] PacifiCorp Motion to Dismiss ¶ 10.

[60] *Id.* ¶ 11.

> These contracts were executed in May 2009, subject to approval by the California Public Utilities Commission (CPUC). Prior to becoming effective, the California Contracts required the purchasing utilities (SDG&E and SCE) to obtain CPUC approval. The SDG&E and SCE contracts were filed for approval with the CPUC on July 1, 2009, and June 5, 2009, respectively.[61]

51 PacifiCorp states that it provided an updated response to ICNU 2.1 on July 2, 2009. While the response included additional non-contingent contracts that were executed subsequent to the March 10, 2009, response to ICNU 2.1, it did not include the California Contracts because they remained contingent pending CPUC approval.

52 On August 5, 2009, the parties to Docket UE-090205 sent a letter to the Administrative Law Judge (ALJ) stating that they had reached a Settlement in principle and requesting suspension of the procedural schedule. On August 7, 2009, the ALJ suspended the schedule.[62] As of that date, discovery by all parties with respect to PacifiCorp's as-filed case stopped. PacifiCorp arguably had no further obligation to supplement its earlier data request responses.

53 It was in September and October, 2009, after the formal Settlement Stipulation was filed with the Commission on August 25, 2009, that the CPUC approved the California Contracts.[63] PacifiCorp began receiving REC revenues under these contracts only after the contracts received regulatory approvals from the CPUC and the contracts became non-contingent.

54 ICNU and Public Counsel offer nothing that disputes these facts, which are set forth in PacifiCorp's Motion to Dismiss. Yet, these facts show that PacifiCorp provided full responses to ICNU's data requests, as formulated, during the period when

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[61] Motion to Dismiss ¶ 13.

[62] WUTC v. PacifiCorp, Docket UE-090205, Order 07 (Aug. 25, 2009). The Commission did not suspend the scheduled public comment hearing and reserved the dates previously scheduled for the evidentiary hearing so that they could be used for a hearing on the Settlement.

[63] The SCE contract was approved on October 15, 2009, by CPUC Resolution E-4264. The SDG&E contract was approved on September 24, 2009, by CPUC Resolution E-4260. It is interesting to note that had ICNU and Public Counsel elected not to settle, discovery would have continued and PacifiCorp would have been obligated to provide the California contracts prior to the evidentiary hearing in Docket UE-090205, which was scheduled to begin on October 27.

discovery continued. It is consistent with Commission practice[64] for PacifiCorp to have not supplemented its response to a request for "*actual* green tag sales and revenues" with information concerning contracts that were contingent on regulatory approval by the CPUC. Such contracts would not be considered "known" sources of revenue for ratemaking purposes until the contingency was removed, assuring that measurable revenues would result under the contracts.

55 Although it appears PacifiCorp adhered to the letter of the Commission's procedural rules governing discovery, it nevertheless is a matter of some concern that the Company did not disclose any information about the California contracts when the regulatory contingency was removed from them and they became fully effective. It would be no more than pure speculation at this point to consider what impact, if any, such disclosure might have had on the Settlement or the Commission's consideration of it. PacifiCorp knew, however, that this was an issue of some significance to at least some parties, and should have known it is a matter of significance to the Commission. The Commission must rely to some degree on the good faith effort of the companies it regulates to be forthcoming with information even when not legally compelled to do so. That effort appears to have been lacking in this instance, a shortcoming the Commission would expect to see corrected if similar circumstances arise again.

CONCLUSION

56 The Complaint in this proceeding is in some respects untimely and in other respects seeks remedies that cannot be ordered lawfully or affected in practice under any set of facts. Thus, the Commission determines that the Complaint should be dismissed as a matter of law for failure to state any claim upon which relief can be granted.

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[64] The Commission, for example, would not be inclined to accept contingent contracts as evidence of known and measurable changes that would support a pro forma adjustment. *See Washington Utilities and Transportation Commission v. Puget Sound Energy,* Dockets UE-090704/UG-090705, Order 11 ¶ 26 (April 2, 2010) ("The known and measurable test requires that an event that causes a change in revenue, expense or rate base must be *known* to have occurred during, or reasonably soon after, the historical 12 months of actual results of operations.").

ORDER

THE COMMISSION ORDERS THAT:

57 (1) Complainant's request for leave to file a reply to Staff's response to PacifiCorp's motion to dismiss is granted.

58 (2) PacifiCorp's Motion to Dismiss Joint Complaint is granted.

Dated at Olympia, Washington, and effective April 27, 2011.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS
Administrative Law Judge

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order, any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such an answer.

RCW 80.01.060(3) provides that an initial order will become final without further Commission action of no party seeks administrative review of the initial order and if the Commission fails to exercise administrative review on its own motion.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An Original and (8) copies of any Petition or Answer must be filed by mail delivery to:

Attn: David Danner, Executive Director and Secretary
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