

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

Complainant,

v.

PACIFICORP d/b/a PACIFIC POWER &
LIGHT COMPANY

Respondent.

DOCKET NO. UE-032065

PUBLIC COUNSEL'S PETITION
FOR RECONSIDERATION OF
CERTAIN PROVISIONS OF
ORDER NUMBER SIX

I. INTRODUCTION

1. The Public Counsel Section of the Washington State Attorney General's Office (Public Counsel) Petitions the Washington Utilities and Transportation Commission (Commission) for an order on reconsideration pursuant to WAC 480-07-850 and within the five business day time limit required by the Commission in its Notice of October 27, 2004.
2. Public Counsel Petitions the Commission for reconsideration on the basis that the Commission failed to properly determine the prudence of resources which it approved for recovery in rates in its final order. Further, that the record now before the Commission is not sufficient to allow it to do so and that any such decision after reconsideration would be irreconcilable with the Commission's concurrent determination regarding deferral of Trail Mountain Mine and Environmental Remediation costs. For these reasons Public Counsel respectfully petitions for reconsideration of the Commission's final order in this docket.

II. ARGUMENT

3. Public Counsel Petitions the Commission for reconsideration of the following issues:

- The proposed settlement approved (as modified) by the Commission in Order No. 6 would allow recovery in rates of resources located in PacifiCorp’s Eastern Control Area for which the Commission has failed to make a prudency determination,
- The Commission lacks sufficient evidence in this docket to support a prudency determination for these resources, and
- It would be arbitrary and capricious for the Commission to accept as prudently acquired resources in the Eastern Control Area which have not been subject to critical review, while at the same time denying deferral accounting treatment of Trail Mountain Mine and Environmental Remediation costs.

A. The Commission Must Determine Prudency Prior to Allowing Cost Recovery in Rates.

4. In order for the Commission to allow recovery in rates through inclusion in rate base of a utility company investment the Commission must first determine that the investment (or acquisition) was “prudent” and that the investment was “used and useful” in providing service to ratepayers.¹ The Commission noted that the proposed settlement agreement would have the Commission defer prudency determination of all resources except the Hermiston and James River generation facilities.² It is not proper for the Commission to include in rate base investments which it has not determined were prudent.

5. The Commission has stated,

The test this Commission applies to measure prudency is what would a reasonable board of directors and company management have decided given what they knew or reasonably should have known to be true at the time they made a decision. This test applies both to the question of need and the appropriateness of the expenditures.³

6. The Commission has also held,

¹ Charles F. Phillips, Jr., *The Regulation of Public Utilities* at 340-342 (3rd Ed. 1993).

² *WUTC v. PacifiCorp*, Docket No. UE-032065, Order No. 6 at ¶ 26 (Final Order) (October 27, 2004).

³ *WUTC v. Puget Sound Power & Light Co.*, Cause No. U-83-54, Fourth Supplemental Order (September 28, 1984) at 32.

The Commission relies upon a reasonableness standard [in evaluating prudence]. The company must establish that it adequately studied the question of whether to purchase these resources and made a reasonable decision, using the data and methods that a reasonable management would have used at the time the decisions were made.⁴

In the Commission's Final Order in this docket the Commission simply accepts the proposed settlement's inclusion in ratebase of the resources located in the company's Eastern Control Area.⁵ This is a sweeping allowance into ratebase of significant costs without any prudence examination or a determination that the resources are used and useful. As Commission Staff conceded during cross-examination by counsel and Judge Moss, they are using the original protocol for purposes of revenue requirement (and thus ratemaking) to support the proposed settlement, but then have to rely upon their hybrid analysis for prudence issues.⁶ Public Counsel respectfully believes that these contradictions in the record are not resolved and that there is not a sufficient evidentiary basis for the Commission's decision.

7. This question was identified in Public Counsel's prior briefing and not addressed in the Commission's final order.⁷ Public Counsel respectfully asserts that such an allowance of unexamined costs is not proper and should be reconsidered by the Commission.

B. The Commission Lacks Sufficient Evidence to Determine that Eastern Control Area Resources Were Prudently Incurred.

As discussed above, the Commission has failed to determine that the resources in the Company's Eastern Control Area were prudently acquired and are used and useful. In reconsidering this question the sufficiency of the evidence now in the record must receive the Commission's attention. Public Counsel respectfully asserts that there is insufficient evidence

⁴ *WUTC v. Puget Sound Power & Light Co.*, Docket No. UE-921262, *et al.*, Nineteenth Supplemental Order (September 27, 1994) at 10 (*citing WUTC v. Puget Sound Power & Light Co.*, Cause No. U-85-53, Second Supplemental Order (May 16, 1986) and *WUTC v. Washington Water Power Co.*, Cause No. U-83-26, Fifth Supplemental Order (January 19, 1984)).

⁵ *Final Order* at ¶ 26, 61-62; *Settlement* at p. 6.

⁶ Tr. 338-42, 373, 383-87, and 548.

⁷ *Initial Brief of Public Counsel* at ¶¶ 14-15 and 31.

now in the record for the Commission to determine that the Eastern Control Area resources were prudently acquired and are used and useful.

8. The only evidence arguably supporting a prudency determination for Eastern Control Area resources is found in the company's direct case. Due to the varying approaches to interstate cost allocation by the different parties to the proceeding, the prudence of Eastern Control Area resources was never critically examined.⁸

9. Given the lack of critical examination by the Commission Staff, Public Counsel, and the intervening parties the Commission can take no assurance from the proposed settlement itself that the costs in question were prudently acquired and are used and useful in Washington. Substantial disallowances may be appropriate.⁹ Indeed, the Commission's choice to again defer an actual determination of the inter-jurisdictional cost allocation question all but precludes a determination that the Eastern Control Area resources are *in fact* "used and useful."¹⁰ Given the lack of sufficient evidence in the record to support a decision after reconsideration that the Eastern Control Area resources were prudently acquired and are used and useful Public Counsel respectfully requests reconsideration by the Commission on this basis.

C. Allowing Recovery of Eastern Control Area Resources in Rates while Denying Deferral Accounting Treatment of Trail Mountain Mine and Environmental Remediation Costs Cannot be Reconciled.

10. The Commission chose to condition its approval of the proposed settlement by rejecting the proposed deferral accounting treatment of Trail Mountain Mine and Environmental Remediation costs.¹¹ It did so because there had not been adequate support offered for allowing such treatment and the existence of other, contemporaneous dockets would allow a full airing of all questions as well as "set the stage for consideration of whether and how any deferred costs

⁸ Transcript (Tr.) at 339-40 and 739; Exhibits 207, 229, 238, 241, 521, 527, and 581 at 98-104.

⁹ See, e.g. *In re Application of NEVADA POWER COMPANY for authority to establish a Deferred Energy Accounting Adjustment*, Nevada Public Utility Commission, Docket No. 01-11029, Order, March 29, 2002.

¹⁰ *Final Order* at ¶¶ 50-51.

¹¹ *Id.* at ¶¶ 63-65.

might be recovered in rates.”¹² The Commission must reconcile its decision to deny deferral accounting for those costs while allowing Eastern Control Area costs that have no greater evidentiary support for their recovery in Washington rate base. Public Counsel respectfully believes that failure to do so would be to act in an arbitrary and capricious fashion. For this reason Public Counsel respectfully requests reconsideration by the Commission.

III. CONCLUSION

11. For the foregoing reasons Public Counsel Petitions the Commission for an order on reconsideration reversing the Commission’s Order No. 06 in this docket and rejecting the proposed settlement.

Dated this 3rd day of November, 2004.

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