

No. 44591-3  
COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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

Petitioner,

v.

WASHINGTON UTILITIES  
AND TRANSPORTATION  
COMMISSION, a Washington  
state agency

Respondent.

**RESPONSE BRIEF OF THE  
INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES**

**January 10, 2014**

PM 1/10/14

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
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## I. INTRODUCTION

In this Petition for Judicial Review (“Petition”), PacifiCorp d/b/a Pacific Power & Light Company (“PacifiCorp” or the “Company”) seeks to keep a \$17.3 million windfall it received from the sale of renewable energy credits (“RECs”), despite the fact that those RECs derive from renewable energy facilities that are paid for by PacifiCorp’s customers. In arguing that it is entitled to this revenue, PacifiCorp asserts that the Washington Utilities and Transportation Commission (“Commission” or “WUTC”) engaged in “illegal retroactive ratemaking” by requiring PacifiCorp to refund this revenue to its customers. (Pet’r’s Br. 29.) PacifiCorp’s retroactive ratemaking argument turns the regulatory compact on its head by subjecting the regulator to the decisions of the regulated. It would bind the Commission to PacifiCorp’s own ratemaking decisions, an outcome that is not in the public interest and prohibited by law.

The Commission’s decision to allocate proceeds from the sale of RECs to PacifiCorp’s customers was reasonable, supported by substantial evidence, and did not violate the rule against retroactive

ratemaking or the filed rate doctrine. Without Commission approval, PacifiCorp made a unilateral determination of how to account for proceeds received from the sale of a newly created commodity (i.e., RECs). The appropriateness of that decision was not litigated or briefed before the Commission until the case on review here. When the Commission had the opportunity, for the first time, to determine the proper allocation of REC sale proceeds, it found that RECs are comparable to utility property, proceeds from the sale of which are traditionally allocated between customers and the utility outside of the general ratemaking process. Thus, the Commission determined that PacifiCorp had not properly accounted for those proceeds and required it to correct its accounting and refund to customers all amounts it received that had not previously been included in its rates. Because the refunded amount was not in PacifiCorp's rates and was distributed outside of the general ratemaking process, the Commission's orders on review here are not retroactive ratemaking.

In issuing the orders on review in this case, the Commission performed its fundamental delegated legislative function of

“regulat[ing] in the public interest.” RCW § 80.01.040(3). It found that PacifiCorp had grossly underestimated the vast amounts of revenue that it derived from renewable generation resources paid for by PacifiCorp’s customers, and its shareholders were not entitled to retain these ratepayer funds. The Commission’s orders are legally sound and properly effectuated its delegated legislative duties. Accordingly, they should be affirmed and PacifiCorp’s Petition should be dismissed.

## II. PACIFICORP’S ASSIGNMENTS OF ERROR

For ease of reference, ICNU restates PacifiCorp’s Assignments of Error below and then references the page numbers of this Brief that demonstrate why PacifiCorp’s allegations of error are without merit.

1. “The Commission erred in retroactively treating PacifiCorp’s historical REC revenues from closed rate periods as “comparable” to gains on utility property, and then relying on that new ratemaking treatment to order PacifiCorp to credit REC revenues dating back to January 1, 2009, to future retail customers. (Order 10, ¶¶ 23-26; Order 11, ¶¶ 19-29.)” (Pet’r’s Br. 4.) **The first time the Commission had the opportunity to consider the proper allocation of PacifiCorp’s REC revenues on a full record was in this case. The Commission was reasonable in comparing RECs to utility property,**

**revenues from which may be allocated outside of the general ratemaking process – ICNU Br. at 32-45.**

2. “The Commission erred in determining that PacifiCorp’s historical REC revenues were not included in PacifiCorp’s approved rates for 2009, 2010, and early 2011 when the Commission approved final rates for PacifiCorp that included an estimate of its REC revenues, and those rates had the force and effect of law. (Order 10, ¶¶ 26-27, 33-35; Order 11, ¶¶ 11, 21-23, 26-27.)” (Pet’r’s Br. 5.) **The only REC revenues included in PacifiCorp’s historical rates were a small percentage of its actual revenues that were deemed to be included only for purposes of facilitating future accounting decisions regarding those revenues, not because they were determined to be properly included in rates – ICNU Br. at 24-25, 35-38.**
3. “The Commission erred in determining that PacifiCorp had notice that the Commission would reconsider the rate treatment of PacifiCorp’s historical REC revenues before March 25, 2011 (the date of Order 06 setting rates in its 2010 general rate case). (Order 10, ¶¶ 28, 30, 33; Order 11, ¶ 10, 12, 28.)” (Pet’r’s Br. 5.) **The facts demonstrate that it was foreseeable that the Commission would allocate REC revenues to customers – ICNU Br. at 24-28.**
4. “The Commission erred in determining that PacifiCorp underestimated or failed to provide sufficient information about its REC revenues when PacifiCorp complied with all disclosure requirements, and all parties were aware of the increase in PacifiCorp’s actual REC revenues, as the record shows and as an Administrative Law Judge (“ALJ”) found in Docket UE-110070. (Order 10, ¶ 31; Order 11, ¶ 24.)” (Pet’r’s Br. 5.) **The facts demonstrate that PacifiCorp was not forthcoming about the revenue it was likely to receive from REC sales. By unilaterally accounting for this revenue, PacifiCorp deprived itself of notice – ICNU Br. at 22-32.**

5. “The Commission erred in determining that it was “fair” to order PacifiCorp to provide a rate credit to its Washington customers based on a retroactive change to a single component of PacifiCorp’s past approved rates, particularly when the rate credit offset nearly two-thirds of the rate increase authorized in PacifiCorp’s 2010 general rate case to cover its costs to serve Washington customers. (Order 10, ¶ 33; Order 11, ¶¶ 28-29.)” (Pet’r’s Br. 5.) **This assignment of error is irrelevant to the disposition of this case, and the Commission was well within its fundamental authority to regulate “in the public interest” when it credited PacifiCorp’s REC revenues to customers – ICNU Br. at 22-32, 43-44.**

### III. STATEMENT OF THE CASE

On May 4, 2010, PacifiCorp filed an application with the Commission for authority to increase the rates it charges to its customers for electric service by \$56.7 million. Administrative Record (“AR”) 0004 *et seq.* All of the issues in this case were resolved by the Commission’s Order 06 on March 25, 2011 with the exception of the proper treatment of proceeds PacifiCorp received from REC sales since January 1, 2009. AR 0843-46, Order 06 ¶¶ 199-208. In Order 06, the Commission noted that it had previously:

[D]etermined fundamentally that the REC benefits should go to all of [a utility’s] ratepayers because they are the ones burdened with the responsibility of paying rates sufficient for the Company to recover all of the costs of the resources that generate the RECs,

including a reasonable return on the Company's investment.

*Id.* at 0843-44 ¶ 199. However, “[b]eyond that fundamental determination, to which we adhere in this proceeding,” the Commission held, “neither the record nor the briefing on legal issues is fully sufficient to make all necessary determinations concerning the amount of RECs that should be returned to customers, various accounting issues, and the precise rate treatment that should be afforded REC proceeds received by PacifiCorp.” *Id.* at 0844 ¶¶ 200-201. The Commission opened a second phase of the proceeding to consider these issues, which included extensive testimony and briefing. AR 1225 *et seq.*, Order 08.

After fully considering the parties' positions, the Commission issued Order 10. AR 1566 *et seq.* This order determined that “PacifiCorp must distribute to its customers the entirety of the actual proceeds from the Company's sale of RECs since January 1, 2009, attributable to its Washington operations, less the \$657,755 included in rates ....” *Id.* at 1575 ¶ 26. This \$657,755 is the amount that a settlement which established PacifiCorp's 2010 rates deemed to be included in rates for purposes of assisting parties in filing a deferred

accounting petition at a later date to capture REC revenues. Clerks' Papers ("CP") at 123, Settlement Stip. At 8, Part I ¶ 22.

In making its determination that PacifiCorp must refund REC revenues not already included in rates to customers, the Commission, in Order 10, considered and rejected each and every argument PacifiCorp makes in its opening brief in this case. Specifically, it found: (1) that its decision to distribute proceeds from PacifiCorp's sale of RECs between January 2009 and March 2011 did not constitute retroactive ratemaking because these proceeds were not included in rates, AR 1575, Order 10 ¶ 26; (2) that it was proper for the Commission to compare RECs to utility property for purposes of allocating the proceeds from their sale, *id.* at 1574 ¶ 24; (3) that it never previously determined the appropriate accounting treatment for PacifiCorp's REC revenues, and that PacifiCorp's unilateral decision to treat RECs under a certain accounting procedure did not foreclose the Commission from making its own determination, *id.* at 1574, 76 ¶¶ 24, 30; and (4) that PacifiCorp reasonably could have foreseen that the Commission would treat proceeds from the sale of its RECs as comparable to gains on the

sale of utility property that should be distributed to ratepayers, *id.* at 1576-78 ¶¶ 29, 31, 33.

After Order 10 was issued, PacifiCorp requested reconsideration of this order. AR 1599 *et seq.* In its request, PacifiCorp re-litigated its positions, arguing that Order 10 constituted retroactive ratemaking and improperly compared RECs to utility property. *Id.* at 1611-23. The Commission considered these arguments, and again the Commission rejected them in Order 11. AR 1782-89, Order 11 ¶¶ 13-29.

PacifiCorp now seeks a third bite at the apple in its Petition. Asserting the same charge of retroactive ratemaking that the Commission already twice rejected, PacifiCorp challenges the Commission's holdings in Orders 10 and 11.

#### **A. Overview of Ratemaking**

The Commission is charged with ensuring that each utility subject to its jurisdiction charges rates that are “just, fair, reasonable and sufficient.” RCW § 80.28.010(1). To determine a “just, fair, reasonable and sufficient” rate, the Commission uses a formula “which has evolved over the past century of public utility regulation

in this country and is the one commonly accepted and used.” *People’s Org. for Wash. Energy Res. v. Wash. Utils. & Transp. Comm’n*, 104 Wn.2d 798, 809, 711 P.2d 319 (1985) (“*POWER*”); *see also*, AR 0783-84, Order 06 ¶ 12. That formula ultimately determines a utility’s “revenue requirement” – that is, the amount of revenue the utility needs to pay its costs and earn a reasonable return. *POWER*, 104 Wn.2d at 809. To arrive at the appropriate revenue requirement, the Commission determines the utility’s operating expenses and the amount it has invested in its “rate base” (i.e., its property and infrastructure, such as power lines, generating stations, office buildings, etc.). *Id.* at 809-10. The amount the utility is allowed to earn as a return for its investors is determined by multiplying a certain percentage (which is known as its “rate of return”) by its rate base. *Id.* This amount, added to its operating expenses, equals the utility’s revenue requirement. *Id.* at 809. The utility then charges its customers the amount necessary for it to collect that revenue requirement. *Id.*

Because a utility’s rates are based on its operating expenses and its rate base, revenues and costs that are not included in these

categories may also not be included in the general ratemaking process. AR 1781-82, Order 11 ¶ 11. WAC § 480-07-505(2), for instance, lists various filings that are not considered general rate proceedings, including “periodic rate adjustments,” “emergency or other short-notice increases caused by disaster or weather-related conditions,” and cost increases related to changes in tax laws. WAC § 480-07-505(2)(a)-(c). Also, as the Commission noted in Order 11, “[d]isposition of the gain from utility property sales is one example of revenue that is not part of the ratemaking formula. Many storm expenses similarly are excluded from base rates.” AR 1781-82, Order 11 ¶ 11. Simply because a utility has expenses or revenues, it does not mean that those expenses or revenues will be considered as part of the general ratemaking process. This is important because, as the California Supreme Court has stated, “[a]t the risk of belaboring the obvious, we observe that before there can be retroactive ratemaking there must at least be *ratemaking*.” *S. Cal. Edison Co. v. Pub. Util. Comm’n*, 20 Cal. 3d 813, 144 Cal. Rptr. 905, 576 P.2d 945, 946 (1978) (emphasis in original).

## **B. Overview of Renewable Energy Credits**

In 2006, Washington voters passed, by ballot initiative, the Energy Independence Act (“Act”). RCW §§ 19.285.010 *et seq.* The Act applies to most utilities in Washington, including PacifiCorp. RCW § 19.285.030(19). The Act establishes a renewable portfolio standard for Washington that requires utilities to produce a certain percentage of their electricity from eligible renewable resources. RCW § 19.285.040(2). Currently, that percentage is three percent; it increases to 15 percent by 2020. *Id.* A number of other states, including Oregon and California, where PacifiCorp also operates, have renewable portfolio standards, though the percentage targets and definitions of eligible resources differ between states. *See Or. Rev. Stat. §§ 469A.005 et seq.; Cal. Pub. Util. Code §§ 399.11 et seq.*

To demonstrate compliance with the renewable portfolio standard, a utility generates RECs from its eligible renewable resources. A REC is “a tradable certificate of proof of at least one megawatt-hour of an eligible renewable resource.” RCW § 19.285.030(20). The REC “includes all of the nonpower attributes

associated with that one megawatt-hour of electricity.” *Id.* Thus, a REC is not energy itself, but is instead a separate commodity that may be used to demonstrate compliance with a renewable portfolio standard, or sold to a third party like other utility property.

Importantly, because RECs are merely evidence of the generation of renewable energy, rather than the energy itself, a utility has some control over when and whether it sells them. *Id.* § 19.285.040(2)(e). As the Commission stated, “RECs are assets akin to other commodities that can be stored for future use, held for future sale, or sold upon purchase or generation.” AR 1574, Order 10 ¶ 24. This means that the “production, acquisition, accumulation and eventual sale of such assets can transcend rate periods.” *Id.* Thus, including in a rate case forecasts of revenue to be received from the sale of RECs in a single year can be problematic because the utility may be able to use its control over the sale of RECs to exceed its revenue projections, thereby reaping additional benefits for itself and its shareholders. *See id.* at 1577-78 ¶ 32.

Moreover, because RECs are a relatively new concept, no common standard has been developed regarding the proper method

of accounting for revenue received from their sale. The first time the Commission made any determination as to how to account for REC proceeds was in a 2010 order that distributed Puget Sound Energy, Inc.'s ("Puget Sound Energy") REC proceeds. *In re Puget Sound Energy, Inc. for an Order Authorizing the Use of the Proceeds from the Sale of Renewable Energy Credits and Carbon Financial Instruments*, WUTC Docket No. UE-070725, 282 Pub. Util. Rep. (PUR) 4th 303, Order 03 ("PSE Order") (May 20, 2010). In the PSE Order, the Commission analogized RECs to utility property, noting that "this principle offers useful guidance" with regard to the appropriate distribution of the proceeds from the sale of RECs between customers and shareholders. *Id.* ¶ 41.

Specifically, the principle the Commission applied was its long-standing doctrine that, in allocating gains from the sale of utility property between customers and shareholders, "reward should follow risk and benefit should follow burden." *Id.* (quoting *In re Application of Avista Corporation for Authority to Sell its Interest in the Coal-Fired Centralia Power Plant*, WUTC Docket Nos. UE-991255, UE-991262, UE-991409, 2000 Wash. UTC LEXIS 252, 2d

Supp. Order ¶ 84 (Mar. 6, 2000)). Through rates, customers pay operating expenses, depreciation, and a return on the capital invested in the renewable resources that generate RECs. PSE Order ¶ 39 n. 40. Customers pay the costs of the resources from which RECs are derived, so the Commission determined that it was reasonable to allocate REC sale proceeds to them, as it would allocate proceeds from the sale of other utility property. *Id.* ¶¶ 40-41.

Such precedent is not unique to the Commission. The Oregon Public Utility Commission (“OPUC”) has treated REC sales as utility property sales since at least 2007. *In re Portland General Electric Application for Approval to Sell Tradable Renewable Energy Credits*, OPUC Docket No. UP 236, 2007 Or. PUC LEXIS 70, Order No. 07-083 at 2 (Mar. 5, 2007). PacifiCorp is itself subject to the OPUC’s jurisdiction and its REC sales are likewise treated as property sales in that state. *In re PacifiCorp d/b/a Pacific Power Application Requesting Approval of Sale of Renewable Energy Credits*, OPUC Docket No. UP 260, 2010 Or. PUC LEXIS 186, Order No. 10-210 at 2 (June 9, 2010).

### C. PacifiCorp's Sale of RECs

The RECs at issue in PacifiCorp's Petition were sold between January 2009 and March 2011. (Pet'r's Br. 3.) The total revenue PacifiCorp received from these sales was approximately \$18 million. AR 1852, line 4, col. D (REDACTED version). PacifiCorp argues that it should be allowed to keep all of this revenue because it included projections of its REC revenues in its 2008 and 2009 rate cases. (Pet'r's Br. 37-38.)

PacifiCorp's filing that initiated its 2008 rate case (for rates effective in 2009) included \$576,254 in projected REC revenue. AR 5346, line 4. (PacifiCorp actually received \$6,779,592 in REC revenue in 2009.) AR 1852, line 4, col. A (REDACTED version). The 2008 rate case was resolved through a multiparty settlement that established a revenue requirement and rate of return, but made no mention of REC revenues. *Wash. Utils. & Transp. Comm'n v. PacifiCorp d/b/a Pacific Power & Light Co.*, WUTC Docket No. UE-080220, 2008 Wash. UTC LEXIS 743, Order 05 ¶¶ 53-54 (Oct. 8, 2008). Thus, although PacifiCorp unilaterally estimated REC revenues in rates when it filed its 2008 rate case, the Commission's

final order approving the 2008 settlement did not approve any specific amount of REC revenue in rates. *See* AR 1578, Order 10 ¶ 35.

PacifiCorp's 2009 rate case (for rates effective in 2010) was also resolved through a multiparty settlement that authorized an overall rate of return, but did not make findings as to the reasonableness of individual rate components. *Wash. Utils. & Transp. Comm'n v. PacifiCorp d/b/a Pacific Power & Light Co.*, WUTC Docket No. UE-090205, 2009 Wash. UTC LEXIS 1185, Order 09 ¶¶ 86, 88 (Dec. 16, 2009). This settlement included a stipulated amount of REC revenue – \$657,755 – in rates, but did so solely for the purpose of allowing other parties to file a deferred accounting petition at a later date. CP at 123, Settlement Stip. At 8, Part I ¶ 22. (PacifiCorp actually received \$10,346,961 in REC revenue in 2010.) AR 1852, line 4, col. B (REDACTED version). The 2009 settlement did not present any agreement that projections of PacifiCorp's REC revenues were properly included in rates, nor did the Commission's order adopting the settlement include such a finding. *See id.*; WUTC Docket No. UE-090205, 2009 Wash. UTC

LEXIS 1185, Order 09. Rather, the 2009 settlement made clear that “[n]othing in this Stipulation limits or expands the ability of any Party to file for deferred accounting or request that the Commission *take any other action regarding PacifiCorp’s Washington-allocated RECs.*” CP at 123, Settlement Stip. at 8, Part I ¶ 22 (emphasis added). Thus, the Commission made no finding that REC revenues were properly included in PacifiCorp’s rates and the 2009 settlement specifically allowed the Commission to “take any other action regarding PacifiCorp’s Washington-allocated RECs.” *Id.*

Moreover, the amount of projected revenues that the 2009 settlement included in rates (\$657,755), did not account for revenue PacifiCorp would receive pursuant to lucrative contracts it had executed with California utilities. Those contracts were executed during the discovery phase of its 2009 rate case, AR 5821-22, Ex. DWS-15 ¶¶ 13, 16, and were approved by the California Public Utilities Commission prior to the Commission’s order approving the 2009 settlement, *id.* at 5824 ¶¶ 21-22. PacifiCorp did not disclose to the Commission the projected revenue it would receive under these contracts until after the Commission’s order approving the 2009

settlement. *Id.* at 5826 ¶ 27. Accordingly, the amount of REC revenue the Commission acknowledged would only be used for purposes of filing a deferred accounting petition did not account for these contracts.

PacifiCorp's 2010 rate case – the case at issue in this Petition – is the first time since RECs were created in Washington by the Energy Independence Act that PacifiCorp has had a fully litigated and briefed rate case.<sup>1/</sup> Accordingly, it is also the first time the Commission has been presented with the issue of how to account for PacifiCorp's REC sale proceeds. In making its determination of how these proceeds should be accounted for, the Commission was deliberate and thorough. It determined, first, that it did not have sufficient evidence to make proper findings, and thus, opened a second phase of the docket for this purpose. AR 0844, Order 06 ¶ 201.

The Commission also has been consistent. It followed its only previous precedent, from its PSE Order, in determining that RECs are comparable to utility property and, thus, proceeds from

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<sup>1/</sup> PacifiCorp did not file a general rate case in 2007 in Washington.

their sale should be allocated in the same way as gains on the sale of utility property. AR 1574, Order 10 ¶¶ 23-24; AR 1784-85, Order 11 ¶ 17. “[I]t is indisputably the case that the ratepayers bear the full burden of cost responsibility for the resources that generate the RECs,” the Commission held in the PSE Order. PSE Order ¶ 39 n. 40. Thus, in applying the same principles to PacifiCorp’s REC sales, the Commission held that PacifiCorp must refund to customers all of its actual REC proceeds from the 2010 test year (beginning January 1, 2009) forward, less all amounts that had already been deemed to be included in rates in the 2009 settlement for deferred accounting purposes. AR 1575, Order 10 ¶ 26.

#### IV. ARGUMENT

The Commission has been delegated the legislative authority to regulate “in the public interest.” RCW § 80.01.040(3). This includes “substantial discretion in selecting the appropriate ratemaking methodology.” *POWER*, 104 Wn. 2d at 812. PacifiCorp’s Petition would deprive the Commission of its authority to regulate in the public interest by forcing the Commission to accept a ratemaking treatment for REC proceeds that PacifiCorp alone has

chosen. The result of this outcome would be to allow the Company to keep over \$17 million that ultimately derived from renewable resources paid for by PacifiCorp's customers, without any Commission order authorizing it to do so. Such an outcome is simply not in the public interest; it is punitive to ratepayers and rewards PacifiCorp for its gross underestimations and lack of disclosures with a staggering windfall.

In allocating PacifiCorp's REC proceeds to customers, the Commission did not "rewrite history". (Pet'r's Br. 39.) In the orders on review, the Commission determined, for the first time, the appropriate principles for allocating proceeds PacifiCorp received from the sale of RECs. PacifiCorp's unilateral accounting treatment for its REC sales should not deprive the Commission of its ability to determine whether such treatment is appropriate – regardless of when it occurred – at the time when these issues are first litigated before it.

In any event, PacifiCorp's invocation of the retroactive ratemaking doctrine to prevent the Commission from determining the proper allocation of REC proceeds is inapplicable to this case.

The Commission's orders on review here only allocated PacifiCorp's REC sale proceeds that had not been included in its rates. Thus, it did not adjust past or future rates. In its decisions, the Commission followed its own precedent when it reasonably compared RECs to utility property with regard to the principles governing how to allocate gains from their sale between customers and shareholders. Such allocation traditionally occurs outside of the general ratemaking process, as revenue received from the sale of utility property generally is not included in the formula used to determine a utility's revenue requirement. Thus, allocating this revenue, even if received in the past, is not retroactive ratemaking.

**A. Standard of Review**

Under RCW § 30.04.570(3), a reviewing court may only overturn an agency decision under specifically delineated circumstances. With regard to the Commission's ratemaking authority, "courts are not at liberty to substitute their judgment for that of the [Commission]. Thus, within a fairly broad range, regulatory agencies exercise substantial discretion in selecting the appropriate ratemaking methodology." *POWER*, 104 Wn. 2d at 812.

“The [Commission] is accorded considerable discretion in determining which items should be included within utility operating expenses ... and which items should be excluded therefrom.” *Id.* at 822. Moreover, “[w]hen [an] agency has expertise in a specialized field of law and has quasi-judicial functions in that field, [Washington courts] accord substantial weight to its construction of statutory words, phrases, and legislative intent.” *Wash. Ind. Tel. Ass’n v. Wash. Util. & Trans. Comm’n*, 110 Wn. App. 498, 508, 41 P.3d 1212 (2002). As to claims of retroactive ratemaking in particular, the D.C. Circuit has reviewed such claims “under the arbitrary and capricious standard ... and will affirm where the [Federal Energy Regulatory] Commission has articulated a rational connection between the facts found and the choice made.” *NSTAR Elec. & Gas Corp. v. Fed. Energy Reg. Comm’n*, 481 F.3d 794, 800 (D.C. Cir. 2007).

**B. PacifiCorp’s claims of retroactive ratemaking would deprive the Commission of its ability to regulate in the public interest.**

The Commission’s duty to “regulate in the public interest” is “paramount,” *PacifiCorp v. Pub. Serv. Comm’n*, 103 P.3d 862, 867

(Wyo. 2004), and the Court should interpret the rule against retroactive ratemaking consistently with this fundamental delegated legislative duty. RCW § 80.01.040(3); WUTC Docket No. UE-981627, 192 Pub. Util. Rep. (PUR) 4th 143, 2d Supp. Order at \*22 (March 16, 1999) (recognizing that Commission’s duty to regulate in the public interest is “the fundamental requirement”); *cf. Pub. Counsel v. Util. & Transp. Comm’n*, 128 Wn. App. 818, 830, 116 P.3d 1064 (2005) (upholding the Commission’s decision to modify PacifiCorp’s rate plan because it “balanced the interests of all parties with its obligation to regulate the utility rates in the public interest”).

PacifiCorp could have foreseen that the Commission would return the Company’s REC revenues to customers. It nevertheless unilaterally accounted for, and significantly underestimated, these revenues such that it maximized the amount of revenue that was returned to its shareholders.<sup>2/</sup> It now invokes the specter of retroactive ratemaking in an attempt to force the Commission to accept its own accounting treatment. PacifiCorp’s argument is nothing more than an effort to secure for its shareholders millions of

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<sup>2/</sup> PacifiCorp is wholly owned by MidAmerican Energy Holdings Company, which is a consolidated subsidiary of Berkshire Hathaway Inc.

dollars in revenue that is ultimately derived from renewable energy facilities its customers pay to support. This position improperly deprives the Commission of its fundamental statutory mandate to regulate “in the public interest.” RCW § 80.01.040(3).

1. The Commission’s decision to allocate proceeds from PacifiCorp’s REC sales to its customers was foreseeable.

PacifiCorp complains that it did not have notice that the Commission would “reconsider the ratemaking treatment of its historical REC revenues” and that such lack of notice violates its due process rights. (Pet’r’s Br. 41-42.) Initially, this argument depends on the assumption that the Commission accepted the accounting treatment PacifiCorp used for its REC revenues despite the lack of any Commission order approving such treatment. In reality, as the Commission stated, PacifiCorp “deprived itself of prior notice” by failing to either seek guidance on the appropriate accounting method, or approval for its chosen method, regarding revenue received from a newly created commodity. AR 1576, Order 10 ¶ 30. Furthermore, three circumstances demonstrate that PacifiCorp

reasonably could have foreseen that the Commission could ultimately determine that REC revenues belonged to its customers.

First, the settlement agreement that resolved PacifiCorp's 2009 rate case deemed \$657,755 to be included in rates solely for deferred accounting purposes and specifically provided that nothing in the settlement "limits or expands the ability of any Party to ... request that the Commission take any other action regarding PacifiCorp's Washington-allocated RECs." CP at 123, Settlement Stip. at 8, Part I ¶ 22. This language belies PacifiCorp's lack of notice claim, as it is clear that the 2009 settlement put all parties on notice, including PacifiCorp, that the Commission could reexamine the Company's REC revenue at a later date. Indeed, as a party to the 2009 settlement, PacifiCorp was involved in the negotiations that led to the inclusion of this provision. WUTC Docket No. UE-090205, "Testimony of Cathie A. Allen and Andrea L. Kelly in Support of Settlement Stipulation," PacifiCorp Ex. No. CAA/ALK-1T at 3:19-23 (Sept. 22, 2009).

Second, when RECs were created in Washington by the Energy Independence Act, PacifiCorp could have sought guidance

from the Commission on the proper accounting treatment for revenues received from the sale of this new commodity. Puget Sound Energy did exactly this in 2007.<sup>3/</sup> WUTC Docket No. UE-070725, “Puget Sound Energy Petition for Accounting Order” (April 13, 2007).<sup>4/</sup> In its request, Puget Sound Energy sought an order allowing it to defer the proceeds from the sale of RECs so that such proceeds could either be reinvested in renewable generation resources or passed back to customers. *Id.* ¶¶ 19-20. In requesting deferred accounting, Puget Sound Energy was proposing a process whereby the *actual* revenue it received from REC sales would be used to benefit its customers. Conversely, PacifiCorp’s accounting method ensured that only the revenue it *estimated* it would receive from future REC sales would benefit its customers. All excess revenue would be passed back to its shareholders. PacifiCorp pursued this accounting procedure without first requesting that the Commission determine its appropriateness despite the knowledge

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<sup>3/</sup> PSE filed an amended petition on October 7, 2009, which is the petition to which the PSE Order relates, although the issues raised in the original and amended petitions were the same. WUTC Docket No. UE-070725, Puget Sound Energy Petitions dated April 13, 2007 and Oct. 7, 2009.

<sup>4/</sup> Filings in WUTC dockets made since 2005 are available at:  
<http://www.utc.wa.gov/docs/Pages/recordsCenter.aspx>

that: (1) RECs were a new commodity with an “evolving” market, (Pet’r’s Br. 14); (2) no procedure had been established to account for the revenue from their sale; and (3) Puget Sound Energy was seeking a markedly different accounting treatment.

Finally, seeking guidance from the Commission regarding PacifiCorp’s accounting decisions would have been particularly appropriate in this case given that: (1) PacifiCorp was well aware that the Oregon Public Utility Commission had treated REC proceeds as utility property since at least 2007, *In re Portland General Electric Application for Approval to Sell Tradable Renewable Energy Credits*, OPUC Docket No. UP 236, 2007 Or. PUC LEXIS 70, Order No. 07-083 at 2 (Mar. 5, 2007); and (2) PacifiCorp sought, and received, similar treatment over its own REC proceeds. *In re PacifiCorp d/b/a Pacific Power Application Requesting Approval of Sale of Renewable Energy Credits*, OPUC Docket No. UP 260, PacifiCorp Initial Application at 1 (April 9, 2010) and Order No. 10-210, 2010 Or. PUC LEXIS 186 at 2 (June 9, 2010). It, thus, could have foreseen that the Washington Commission would make a similar finding. Instead, PacifiCorp took

it upon itself to determine the proper accounting treatment of this new commodity without requesting any ruling from the Commission on the appropriateness of this treatment and with the knowledge that its methodology had the potential to result in a windfall profit for its shareholders.

2. PacifiCorp was aware that it was likely to realize revenue from REC sales far in excess of its estimates.

During its 2009 rate case, PacifiCorp executed lucrative REC sales contracts with certain California utilities. These contracts are a major reason why PacifiCorp's actual REC sale proceeds are so vastly in excess of its projections. AR 1577, Order 10 ¶ 31. The contracts were executed in May 2009 and approved by the California Public Utilities Commission ("CPUC") in September and October 2009. AR 5821, 5824, Ex. DWS-15 ¶¶ 13, 22. PacifiCorp reached a settlement with the other parties in its 2009 Washington rate case in August 2009, at which point discovery closed in the case. *Id.* at 5822 ¶ 16. That settlement was approved by Commission order on December 16, 2009. *Id.* at 5824 ¶ 21. Thus, PacifiCorp executed these contracts before discovery closed in its 2009 Washington rate

case and those contracts were approved by the CPUC before the Washington Commission issued its order approving the 2009 rate case settlement. Nevertheless, PacifiCorp did not disclose the existence of these contracts to the Commission until well after its 2009 rate case closed. *Id.* at 5824-26 ¶¶ 23-28; *see also*, (Pet'r's Br. 47-48 n. 171-172.)

As with other arguments in its brief, PacifiCorp's lengthy discussion of an administrative law judge's ("ALJ") dismissal of a complaint filed by ICNU and Public Counsel related to this potential misconduct is a red herring. (Pet'r's Br. 45-47.) In addition to misconstruing the facts surrounding this complaint, PacifiCorp's discussion of this decision is merely a distraction. The ALJ's decision was not adopted by the Commission, is not a Commission order, and has no precedential value for the Commission or this Court. *See* AR 1577, Order 10 ¶ 31 n. 27. The only evidence relevant to whether PacifiCorp did or did not engage in misconduct related to its REC revenues is the language in the Commission's Orders 10 and 11 on review in this case.

The Commission found that PacifiCorp's "actual REC sales proceeds vastly exceed the amounts PacifiCorp estimated in its 2008 and 2009 rate case filings, in part because PacifiCorp did not include or disclose anticipated REC sale proceeds from lucrative contracts with California utilities that were pending approval by the California Public Utilities Commission." AR 1577, Order 10 ¶ 31. The Commission also determined that:

[T]he evidence at least suggests that one reason PacifiCorp did not follow [Puget Sound Energy's] example in proactively seeking a Commission determination on how to distribute the Company's REC sales proceeds was that it was trying to avoid a Commission decision requiring PacifiCorp to credit to customers the substantial additional proceeds that the actual sales generated.

*Id.* These passages indicate that PacifiCorp may have intentionally misled other parties or concealed evidence in order to reap for itself the benefits of extensive REC revenues.

Furthermore, even if one were to assume the truth of all of PacifiCorp's assertions regarding this matter, PacifiCorp did not disclose its California REC contracts to the *Washington* Commission until after its 2009 rate case closed, even though those contracts were executed and approved before the Commission issued its final

order in that case. (Pet'r's Br. 47-48 n. 171 & 172.) PacifiCorp's suggestion that it acted appropriately because the existence of these contracts may have been known in other jurisdictions is disturbing. (Pet'r's Br. 47-48 n. 171.) The regulatory compact requires the utility to be forthcoming and transparent about its finances so that the Commission can issue fully informed decisions. That clearly did not occur here.

PacifiCorp, nevertheless, seeks to have a court order the Commission to accept this behavior so that it can keep a \$17.3 million windfall. AR 1852, line 7, col. D (REDACTED version). It is the Commission's role as regulator to determine the proper accounting treatment for REC proceeds, not PacifiCorp's. As the Commission held, "PacifiCorp's decision not to proactively seek a Commission determination of the distribution of REC sale proceeds does not shield the Company from its obligations to its customers or preclude the Commission from determining the proper disposition of those proceeds, even if the sales occurred in the past." AR 1576, Order 10 ¶ 30. In refunding these proceeds to PacifiCorp's customers, the Commission properly performed its statutory duty to

regulate “in the public interest.” RCW § 80.01.040(3). Its decision is supported by substantial evidence in the record and is not arbitrary and capricious. RCW § 34.05.570(3).

**C. The Commission’s allocation of proceeds from PacifiCorp’s REC sales was not retroactive ratemaking because it did not modify any ratemaking treatment of these proceeds.**

“The retroactive ratemaking doctrine prohibits the Commission from authorizing or requiring a utility to adjust current rates to make up for past errors in projections. If a utility includes an estimate of certain costs in its rates and subsequently finds out that the estimate was too low, it cannot adjust *future* rates to recoup past losses.” *Town of Norwood, Ma. v. Fed. Energy Reg. Comm’n*, 53 F.3d 377, 381 (D.C. Cir. 1995) (emphasis in original). Although PacifiCorp asserts that the rule against retroactive ratemaking is a “statutory limitation on [the Commission’s] ratemaking authority,” this is incorrect. (Pet’r’s Br. 27.) It is, in fact, “simply a judicially created doctrine” that is by no means as hard-and-fast as PacifiCorp

suggests.<sup>5/</sup> Stefan H. Krieger, *The Ghost of Regulations Past: Current Applications of the Rule Against Retroactive Ratemaking in Public Utility Proceedings*, 1991 U. Ill. L. Rev. 983, 1035 (1991).

In addition to the rule against retroactive ratemaking, PacifiCorp also asserts that the Commission violated the “filed rate doctrine.” (Pet’r’s Br. 34.) The filed rate doctrine “forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate [ ] regulatory authority.” *NSTAR Elec. & Gas Corp.*, 481 F.3d at 800 (citation and internal quotations omitted). Thus, the rule against retroactive ratemaking and the filed rate doctrine are two sides of the same coin and “serv[e] the dual purposes of ‘ensuring rate predictability’ for purchasers of regulated electricity and promoting equity among customers by ‘preventing discriminatory pricing.’” *Id.* (citation omitted).

PacifiCorp’s retroactive ratemaking and filed rate arguments can be summarized as follows: projections of REC proceeds were included in its rates; therefore, it is impermissible retroactive

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<sup>5/</sup> PacifiCorp’s statement that the “Commission has no authority to make retroactive changes to previously approved filed rates,” (Pet’r’s Br. 27), appears disingenuous since the Company has argued that there are several exceptions to the rule against retroactive ratemaking. *PacifiCorp*, 103 P.3d at 874-75.

ratemaking to allocate to ratepayers actual proceeds received that exceeded those projections during the periods that those rates were in effect. (Pet'r's Br. 27-40.)

PacifiCorp's argument is based on the unwarranted assumption that the Commission implicitly approved of its decision to include forecasts of its REC revenues in rates when it approved settlement agreements that set PacifiCorp's 2009 and 2010 rates. (Pet'r's Br. 37-38.) In fact, the Commission made no such determination. AR 1576, Order 10 ¶ 28. Because projections of REC revenue were not included in PacifiCorp's rates for ratemaking purposes, the Commission could not adjust rates to make up for past errors in projections. Rather, when given the opportunity for the first time in this case, the Commission made the reasonable decision to compare proceeds from the sale of RECs to gains on the sale of utility property. AR 0843-44, Order 06 ¶¶ 199-200; AR 1574, Order 10 ¶ 24. Such gains traditionally are not part of the general ratemaking process, and thus, are not subject to an attack of retroactive ratemaking. *See S. Cal. Edison Co.*, 576 P.2d at 946.

1. The Commission did not sanction PacifiCorp's decision to include projections of REC revenue in its rates, and therefore, did not adjust rates to make up for past errors in projections.

PacifiCorp argues that its “REC revenues were included in rates as operating revenues from January 2009 to March 2011” and that “the mere act of retroactively changing the ratemaking treatment of REC revenues from operating revenues to ‘comparable’ to the gains on utility property was impermissible retroactive ratemaking.” (Pet’r’s Br. 39.) PacifiCorp’s argument assumes that, in approving a rate increase, the Commission implicitly approved of PacifiCorp’s accounting decisions when it filed for a rate increase. (*See* Pet’r’s Br. 37.) One, however, does not follow from the other. As the Commission stated, PacifiCorp does “not offer, nor is the Commission aware of, any authority for the proposition that by establishing rates, the Commission is deemed to have approved the accounting treatment of a specific regulatory asset without any knowledge of the existence of that asset or how a company has accounted for it.” AR 1786, Order 11 ¶ 21.

When it filed its rate cases that ultimately led to the 2008 and 2009 settlements, PacifiCorp included projections of REC revenues

in a particular account. (Pet'r's Br. 37.) The settlements that the Commission ultimately approved occurred before any testimony was filed or hearings were held in the cases, so the parties did not litigate before the Commission any of PacifiCorp's accounting decisions or revenue projections. WUTC Docket No. UE-080220, "Notice Suspending Proc. Sched." (Aug. 5, 2008); WUTC Docket No. UE-090205, Order 07 (Aug. 7, 2009). Rather, the parties presented the Commission with "black box" settlements that proposed a particular revenue requirement and return for PacifiCorp, but did not make any determinations with regard to the appropriateness of PacifiCorp's ratemaking methodologies. *Wash. Utils. & Transp. Comm'n v. PacifiCorp d/b/a Pacific Power & Light Co.*, WUTC Docket No. UE-080220, 2008 Wash. UTC LEXIS 743, Order 05 ¶¶ 53-54 (Oct. 8, 2008); *Wash. Utils. & Transp. Comm'n v. PacifiCorp d/b/a Pacific Power & Light Co.*, WUTC Docket No. UE-090205, 2009 Wash. UTC LEXIS 1185, Order 09 ¶¶ 86, 88 (Dec. 16, 2009).

The 2008 settlement made no mention at all of REC revenues. WUTC Docket No. UE-080220, Settlement Stip. (Aug. 1, 2008). The 2009 settlement deemed \$657,755 of REC revenues to be

included in rates solely for the purpose of allowing other parties to file a deferred accounting petition in the future or to “request that the Commission take any other action regarding PacifiCorp’s Washington-allocated RECs.” CP at 123, Settlement Stip. at 8, Part I ¶ 22. This amount of revenue, therefore, was merely a placeholder that was included to simplify potential future proceedings. Indeed, the Commission’s own interpretation of its order approving the 2009 settlement was that it “made no determination on the calculation or amount of the Company’s REC sale proceeds or how those funds should be distributed.” AR 1570, Order 10 ¶ 13.

PacifiCorp’s argument that the Commission’s adoption of the 2008 and 2009 settlements implicitly sanctioned its decision to include REC revenues in rates would preclude the Commission from exercising its right under the 2009 settlement to “take any other action regarding PacifiCorp’s Washington-allocated RECs.” CP at 123, Settlement Stip. at 8, Part I ¶ 22. It would also prevent the Commission from performing its functions as a regulator in making a reasoned, evidence-based decision on the proper allocation of REC sale proceeds. PacifiCorp’s 2010 rate case – the case that ultimately

led to Orders 10 and 11 on review here – was the first time PacifiCorp’s accounting decisions regarding REC revenues were litigated and briefed before the Commission. AR 1570-71, Order 10 ¶ 14. “Because these undistributed sales proceeds were never included in the Company’s rates, PacifiCorp’s arguments based on the filed rate doctrine, retroactive and single-issue ratemaking, and collateral attack on prior rate case decisions are inapplicable.” AR 1575, Order 10 ¶ 26. The Commission could not adjust PacifiCorp’s rates to “make up for past errors in projections” when it never approved projections of REC revenue in PacifiCorp’s rates. *Town of Norwood, Ma.*, 53 F.3d at 381.

2. Like revenue from utility property sales, REC proceeds may be distributed outside of the ratemaking process.

That PacifiCorp’s REC revenues were not, and should not have been, included in its rates is further supported by the Commission’s decision to follow its own precedent, from the PSE Order, in comparing RECs to utility property. PSE Order ¶¶ 40-41. Because “[d]isposition of the gain from utility property sales is one example of revenue that is not part of the ratemaking formula,” it is

not retroactive ratemaking to allocate such gains received in the past. AR 1781-82, Order 11 ¶ 11; *S. Cal. Edison Co.*, 576 P.2d at 946. This is why determinations of the allocation of proceeds from the sale of utility property have often been undertaken in proceedings that are separate from rate cases. *See, e.g., In re Puget Sound Energy, Inc. and Northwest Energy Coalition for an Order Authorizing PSE to Implement Electric and Natural Gas Decoupling Mechanisms*, WUTC Docket Nos. UE-121697/UG-121705 and UE-130137/UG-130138, 2013 Wash. UTC LEXIS 546, Order 07 ¶ 210 (June 25, 2013) (“PSE’s sale of assets in Jefferson County is an issue for another day, in another proceeding that will consider the disposition of PSE’s gain on sale and other matters”) (the issue of allocation of PSE’s gain on the sale of these assets is currently pending in WUTC Docket No. UE-132027); *In re Application of Avista Corporation for Authority to Sell its Interest in the Coal-Fired Centralia Power Plant*, WUTC Docket Nos. UE-991255, UE-991262, UE-991409, 2000 Wash. UTC LEXIS 252, 2d Supp. Order (Mar. 6, 2000); *In re Application of Puget Sound Energy, Inc. for (1) Approval of Proposed Sale of Puget Sound Energy, Inc.’s Share of*

*the Colstrip Facilities, and (2) Authorization to Amortize Gain Over a Five-Year Period*, WUTC Docket No. UE-990267, 99 Wash. UTC LEXIS 699, 3d Supp. Order (Sept. 30, 1999). Even in the current case, while the Commission determined the proper allocation of REC proceeds in a rate case docket, it did so during a separate phase of that docket that dealt only with the allocation of REC proceeds. AR 0844, Order 06 ¶ 201.

PacifiCorp argues that “[n]o support existed for the majority’s position that PacifiCorp’s historical RECs qualified as utility property under Washington law.” (Pet’r’s Br. 31.) The Company states that RECs “are not in PacifiCorp’s rate base or otherwise treated as utility property for ratemaking purposes. Specifically, customers do not pay depreciation expense or a rate base return related to RECs ....” (Pet’r’s Br. 32.)

Fundamentally, PacifiCorp’s argument is significantly undermined by the fact that the Company does not challenge the Commission’s authority to compare RECs to utility property on a prospective basis. (Pet’r’s Br. 30-31.) The reasonableness of this

comparison does not change depending on whether it applies retrospectively or prospectively.

Moreover, PacifiCorp misstates the purpose of the Commission's decisions in Orders 10 and 11. The Commission specifically did not find that RECs are utility property, only that they are *comparable* to utility property in terms of how proceeds from their sale should be allocated. AR 1574, Order 10 ¶ 24 (“We continue to find that RECs, at a minimum, are comparable to utility property *with respect to disposition of sale proceeds*” (emphasis added)). Thus, it was not necessary for the Commission to decide whether RECs were in fact utility property; it only needed to decide (and only did decide) whether the principles governing how to allocate proceeds from the sale of utility property could sensibly be applied to the allocation of proceeds received from the sale of RECs. *Id.* ¶ 24 n. 23.

Washington law defines a REC as “a tradable certificate of proof of at least one megawatt-hour of an eligible renewable resource” that includes “all of the *nonpower* attributes associated with that one megawatt-hour of electricity.” RCW § 19.285.030(20)

(emphasis added); AR 1568-69, Order 10 ¶ 9. Thus, while a REC cannot be generated without the associated generation of electricity, RECs are specifically defined to be everything *but* that electricity. AR 1783-84, Order 11 ¶ 15.

Based in part on this statutory definition, the Commission recognized that RECs are substantively similar to utility property: “RECs are assets akin to other commodities that can be stored for future use, held for future sale, or sold upon purchase or generation.” AR 1574, Order 10 ¶ 24; AR 1783, Order 11 ¶ 14. As with utility property, “the production, acquisition, accumulation and eventual sale of [RECs] can transcend rate periods,” the Commission found. Thus, it was “not barred from examining the terms and conditions of sale just because the asset was sold during a prior rate period ....” AR 1574, Order 10 ¶ 24.

Moreover, practical considerations justify allocating revenue from REC sales outside of the ratemaking process, as with utility property:

[T]he utility has control over when it will sell its RECs, providing both the incentive and the opportunity to generate more sales proceeds than the amounts included in Commission-approved rates if the

Commission were to treat those proceeds as part of the ratemaking process .... Requiring the Company to credit to customers all actual REC sale proceeds ... precludes such gamesmanship.

AR 1577-78, Order 10 ¶ 32. Because a utility's rates are set prospectively, allowing a utility to estimate revenues it will receive from an asset sale when it has control over the timing of the sale permits the utility to underestimate its revenues and then reap for itself all revenues in excess of its estimate. Although the Commission declined to decide whether PacifiCorp engaged in this behavior, AR 1577-78, Order 10 ¶ 32, substantively, that is exactly what happened here. PacifiCorp significantly underestimated that it would receive a certain amount of revenue from the sale of RECs, knew these estimates were likely to be inaccurate, and now seeks to keep the actual revenue from such sales that exceeded its estimates by millions of dollars.

Similarly, PacifiCorp's suggestion that the Commission's order for it to refund REC sale proceeds to customers would exacerbate its under-earning is a red herring. (Pet'r's Br. 49.) A utility's revenue requirement only gives it the *opportunity* to earn its rate of return. AR 0783-84, Order 06 ¶ 12. PacifiCorp was provided

a revenue requirement to give it the opportunity to earn a 10.2 percent return on equity. (Pet'r's Br. 49.) That revenue requirement was determined independently of the excess revenue PacifiCorp earned on the sale of its RECs. AR 1572, Order 10 ¶ 18. Thus, requiring PacifiCorp to refund that excess revenue from REC sales to its customers does not impact its allowed revenue requirement. If PacifiCorp felt that the Commission's decision to allocate REC sale proceeds to its customers resulted in confiscatory rates, it could have made that argument. It did not.

Moreover, allowing PacifiCorp to keep for its shareholders all revenue in excess of its estimates would be contrary to the Commission's determination, in the PSE Order, that "ratepayers bear the full burden of cost responsibility for the resources that generate the RECs," PSE Order ¶ 39 n. 40, and, therefore, "the sale of such property results in proceeds that, absent unusual circumstances, must be distributed in total to ratepayers," AR 1574, Order 10 ¶ 23.

Accordingly, statutory and practical considerations support the Commission's determination that "RECs ... are comparable to utility property with respect to disposition of sale proceeds." AR

1574, Order 10 ¶ 24. Like proceeds from utility property sales, REC proceeds are not “necessarily included in the standard ratemaking framework.” AR 1781-82, Order 11 ¶ 11. While “[u]tility property sale proceeds *may* be credited to customers through rates ... [s]uch a distribution mechanism ... does not make REC sale proceeds part of the general ratemaking process.” AR 1574, Order 10 ¶ 24 (emphasis in original). Accordingly, it is not retroactive ratemaking to allocate these proceeds to customers. *Id.*; AR 1781-82, Order 11 ¶ 11; *S. Cal. Edison Co.*, 576 P.2d at 946. The Commission’s decision is legally sound, is supported by substantial evidence in the record, and, therefore, is not arbitrary and capricious.

## V. CONCLUSION

The crux of this case was succinctly stated by the Commission itself in Order 11: “PacifiCorp has concealed or vastly underestimated the amount of its REC sale proceeds and seeks to profit from that conduct by retaining millions of dollars that rightfully belong, and have always belonged, to its ratepayers.” AR 1787, Order 11 ¶ 24. PacifiCorp took a new commodity (RECs) and, without seeking any advice or obtaining any authority from the

Commission, treated revenues received from its sale in a manner the Company alone determined. It did so despite the knowledge that REC revenues were treated as utility property in Oregon, another jurisdiction it operates in; that another utility (Puget Sound Energy) was proactively seeking a particular accounting treatment from the Commission for its own REC revenues; and that it was likely to receive revenues far in excess of what it projected.

When called upon for the first time in this case to determine the proper allocation of proceeds from the sale of PacifiCorp's RECs, the Commission reasonably compared RECs to utility property and allocated all actual proceeds that had not been included in PacifiCorp's rates under the same principles it uses to allocate gains from the sale of utility property. Because made outside of the ratemaking process, this allocation did not adjust PacifiCorp's rates to make up for past errors in projections, and thus, does not constitute retroactive ratemaking. The Court should defer to the Commission's broad authority to regulate in the public interest and affirm Orders 10 and 11.

DATED this 10th day of January, 2014.

DAVISON VAN CLEVE, PC



Melinda J. Davison, WSBA  
#31182

Davison Van Cleve, P.C.  
333 SW Taylor, Ste. 400  
Portland, Oregon 97204  
Of Attorney for Intervenor  
Industrial Customers of  
Northwest Utilities

**CERTIFICATE OF SERVICE**

I hereby certify that on the 10th day of January, 2014, I caused to be served via e-mail and U.S. Mail the foregoing RESPONSE BRIEF OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES upon the following parties at the following addresses:

*For PacifiCorp:*  
Averil Rothrock  
Schwabe, Williamson & Wyatt P.C.  
1420 5<sup>th</sup> Ave., Ste. 3400  
Seattle, WA 98101  
Email: [arothrock@schwabe.com](mailto:arothrock@schwabe.com)

Jay T. Waldron  
Schwabe, Williamson & Wyatt P.C.  
1211 S.W. 5<sup>th</sup> Avenue, Suite 1900  
Portland, OR 97204  
Email: [jwaldron@schwabe](mailto:jwaldron@schwabe)

Katherine A. McDowell  
McDowell, Rackner & Gibson, P.C.  
419 SW 11<sup>th</sup> Ave., Ste. 400  
Portland, OR 97205  
Email: [Katherine@mcd-law.com](mailto:Katherine@mcd-law.com)

Sarah Wallace  
Ryan Flynn  
PacifiCorp  
825 NE Multnomah St.  
Portland, OR 97232  
Email: [sarah.wallace@pacificorp.com](mailto:sarah.wallace@pacificorp.com); [ryan.flynn@pacificorp.com](mailto:ryan.flynn@pacificorp.com)

*For WUTC Commission Staff:*  
Donald Trotter  
Assistant Attorney General  
WUTC  
PO Box 40128  
1400 S. Evergreen Park Dr. SW  
Olympia, WA 98504-0128

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STATE OF WASHINGTON  
RY FLYNN  
DEPUTY

Email: [DTrotter@utc.wa.gov](mailto:DTrotter@utc.wa.gov)

*For Public Counsel:*  
Simon ffitch  
Public Counsel Section  
800 Fifth Avenue Suite 2000  
Seattle, WA 98104-3188  
Email: [simonf@atg.wa.gov](mailto:simonf@atg.wa.gov)



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Jesse O. Gorsuch