

NO. 44591-3-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

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

Appellant,

v.

WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION, a Washington State Agency,

Respondent.

RESPONSIVE BRIEF OF INTERVENOR PUBLIC COUNSEL

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I. INTRODUCTION

This case involves proceeds from the sale of renewable energy credits (RECs). RECs are a utility asset comparable to utility property. They are created when a utility generates electricity using renewable resources such as wind power. As a general matter, ratepayers are entitled to the proceeds of the sale of REC assets, having paid for the underlying renewable generating facilities through rates. The Commission has authority to determine how the proceeds of a REC sale are disposed of.

In this case, PacifiCorp received more than \$17 million from the sale of RECs during the time period at issue from lucrative California contracts that were not timely disclosed. At the same time the Company was annually seeking double-digit rate increases from its customers. PacifiCorp is a multi-state utility, serving portions of California, Oregon, Idaho, Utah, Wyoming, and Washington, including just over 100,000 residential electric customers in Washington, primarily in Yakima and Walla Walla counties and other areas of south-central Washington. The Company serves some of the most economically disadvantaged parts of the state, with high rates of adult and child poverty, and median incomes

\$13,000 below the state average. AR at 374 (Public Counsel Post-Hearing Brief, ¶ 6).¹

PacifiCorp does not dispute the principle that its customers are entitled to REC sale proceeds. It argues instead that the Commission improperly engaged in retroactive ratemaking when it ordered PacifiCorp to credit customers for the specific REC proceeds for the period January 1, 2009, through April 2, 2011. Each of its arguments regarding retroactivity are inapposite or fatally flawed and was correctly rejected by the Commission.

First, the rule against retroactive ratemaking and the related filed rate doctrine do not come into play where the Commission is addressing the sale of utility assets in this context outside of general ratemaking. Even if these theories were applicable, there are well-established exceptions, as in the case where a utility has not disclosed information crucial to the setting of the rate in question. This exception would apply here.

Second, the settlement of the PacifiCorp 2009 General Rate Case, to which PacifiCorp was a signatory, expressly left open the possibility that the REC proceeds now in dispute could be credited to customers in a future case.

¹ AR refers to the Administrative Record, which is the record on review.

Third, PacifiCorp effectively concedes that the disputed REC proceeds could have been distributed to customers if only another party had filed a “deferred accounting petition,”² but says distribution is barred because no petition was filed. The Commission rejected this argument, finding that the other parties lacked the information to file a deferred accounting petition because PacifiCorp did not disclose the information that would have enabled them to do so, and that PacifiCorp itself could have filed a petition.

The Commission’s decision in this case, to provide the benefits of REC proceeds to PacifiCorp’s customers through rate credits, outside the ordinary ratemaking context, was fully consistent with the law, the evidence, and Commission precedent and practice. Public Counsel respectfully requests that this Court sustain the Commission’s orders in this case.

II. STATEMENT OF THE ISSUES

- 1. Did the Commission err in concluding that PacifiCorp’s customers were entitled to receive the proceeds from the sale of the Company’s REC assets after January 1, 2009?**
- 2. Can PacifiCorp rely on the rule against retroactive ratemaking in this case, when it entered into a 2009**

² “Deferred accounting” allows a utility to track costs or revenues in between rate cases so that they can be considered in setting rates in the next case. AR at 1573 (Order 10, n.19).

Settlement Order which contemplated potential recovery of the REC proceeds at issue in this case?

- 3. Can PacifiCorp rely on the rule against retroactive ratemaking, in light of its failure to disclose relevant information regarding the REC sale proceeds at issue in this case, preventing the Commission and other parties from taking action to recover the proceeds for customers?**
- 4. Were the Commission's findings regarding non-disclosure of REC transactions by PacifiCorp supported by substantial evidence in the record?**

III. THE ROLE OF PUBLIC COUNSEL IN THIS CASE

Public Counsel is the statutory representative of PacifiCorp's electric customers in this case. RCW 80.01.100 and 80.04.510.³ Public Counsel was a party to the underlying proceeding before the Commission and has intervened on appeal because of important customer interests that are at stake, including the following:

- Customers are entitled to receive the financial benefits from the sale of utility assets, in this case PacifiCorp's renewable energy credits (RECs), for which they have paid through rates.

³ AR at 55 (Notice of Prehearing Conference, ¶¶ 8, 10). Public Counsel is a unit of the Washington State Attorney General's Office that by statute represents the interests of the people of the state before the Washington Utilities and Transportation Commission (UTC). *US West Communications, Inc., v. Utils. & Transp. Comm'n*, 134 Wn.2d 48, 60 n.5, 949 P.2d 1321 (1997). Public Counsel is distinct functionally and administratively from the Utilities & Transportation Division of the Attorney General's office, which represents the respondent UTC. Pursuant to this role, Public Counsel acts as a ratepayer advocate in utility company rate cases, with an emphasis on residential and small business customer interests.

PacifiCorp and its shareholders do not have a right to retain these funds.

- The amounts at issue – over \$17 million in REC sale proceeds – are substantial and represent a significant economic benefit to PacifiCorp’s customers in Washington.
- There is a reasonable expectation on the part of customers that the regulated utility which serves them, in this case PacifiCorp, will be forthcoming with the information in its control necessary for the Washington Utilities & Transportation Commission as the regulator to make fully informed decisions to protect customers and regulate in the public interest.

IV. STATEMENT OF THE CASE

A. The Passage of the Energy Independence Act Created a Market for RECs and Triggered Regulatory Activity to Ensure Proper Treatment of REC Sales.

In November 2006, the voters of Washington passed Initiative 937, now codified as the Energy Independence Act, chapter 19.285 RCW. The new law established, *inter alia*, a so-called “renewable portfolio standard,” requiring Washington utilities to provide a certain percentage of their electricity using renewable resources, with increasing percentages required through 2020. RCW 19.285.040(2). AR at 841-842 (Order 06, ¶ 194).

Under the Energy Independence Act, a utility can meet its renewable portfolio target requirement either by generating electricity from a renewable generation resource, such as a wind farm, or by purchasing RECs from another utility or power generator. AR at 1569 (Order 10, ¶ 10). When a utility generates electricity from a renewable resource, it also creates added value in the form of an intangible asset – a REC – that can be sold for cash or held to meet the renewable portfolio requirement. *Id.* Other western states served by PacifiCorp also have renewable portfolio requirements for their utilities.⁴

The passage of the Energy Independence Act contributed to the development of a market for the purchase and sale of RECs. *Id.* The major investor-owned utilities in Washington all began to generate and to sell RECs. This activity in the energy market created a need for utilities and regulators to address the proper treatment of the proceeds received by utilities from REC sales, to ensure that customer interests were protected.

In response to these developments, utility companies in the region began seeking regulatory approval to engage in REC transactions and to establish appropriate accounting for the proceeds of REC sales. For example, in 2007 Portland General Electric requested approval from the

⁴ CP at 376-378 (Amended Petition of Puget Sound Energy, Inc., For An Order Authorizing the use of the Proceeds From the Sale of Renewable Energy Credits and Carbon Financial Instruments, Washington Utilities & Transportation Commission, Docket UE-070725, Final Order 03 (May 20, 2010), ¶¶ 13-17 (PSE REC Order)).

Oregon Public Utility Commission to sell RECs and establish accounting to track the sales. The Oregon Commission approved the request, authorizing treatment of the “sales as property transactions” and established accounting so that the “proceeds would then be amortized back to customers, in the same manner as property sales[.]”⁵ In Idaho in 2008, Idaho Power Company sought authority from the Idaho Public Utilities Commission to retire “Green Tags” (another term for RECs).⁶

In 2007 in Washington, immediately following passage of the Energy Independence Act, Puget Sound Energy (PSE), the state’s largest regulated utility, filed a petition for deferred accounting with the Washington Commission, as a means to track REC proceeds and ultimately seek a Commission decision on the appropriate disposition of the proceeds between customers and shareholders. AR at 1574-1575 (Order 10, ¶ 24 (citing CP at 386-388, *PSE REC Order*, ¶¶ 40-41)).⁷

Like these other energy utilities, PacifiCorp also began engaging in REC sale transactions with the adoption of renewable portfolio standards in the region, conducting REC transactions beginning in 2007 or earlier.

⁵ *In the Matter of Portland General Electric Application for Approval to Sell Tradable Renewable Energy Credits*, UP 236, Order 07-083 at 1, App. A at 4, 2007 WL 914902 (March 5, 2007).

⁶ *In the Matter of the Application of Idaho Power Company for Authority to Retire its Green Tags*, Idaho Public Utilities Commission, Case No. IPC-E-08-24, Order No. 30720, 2009 WL 214811 (January 26, 2009).

⁷ PSE amended its petition for deferred accounting in 2009. The proceedings on the amended petition led to the REC order cited by the Commission and parties in this case. AR at 1574-1575 (Order 10, ¶ 24).

CP at 193 (¶ 37). In April 2010, PacifiCorp filed an application with the Oregon Public Utility Commission for approval of its sale of RECs under that state's property disposition statute. It also proposed to record REC sales revenues in its property sales balancing account for refund to customers with interest. The Oregon Commission approved the PacifiCorp application in June 2010.⁸

In contrast, however, PacifiCorp did not file any petition with the Washington Commission to request approval for its REC sales in Washington, and did not request authority to track its REC sales through the use of deferred accounting. The proper disposition of PacifiCorp's REC revenue remained unresolved.

B. The 2008 and 2009 General Rate Case Settlements and the California REC Sales Contracts.

In 2008, PacifiCorp and other parties, including Public Counsel, reached a settlement regarding the Company's 2008 General Rate Case in Washington.⁹ The settlement was a "black box" settlement which agreed on a final dollar figure for a rate increase but did not list the specific individual cost and revenue components that were included in the rate.

⁸ *In the Matter of PacifiCorp d/b/a Pacific Power Application Requesting Approval Of Sale of Renewable Energy Credits*, Oregon Public Utility Commission., Docket UP 260, Order 10-210 (June 9, 2010). Order available at <http://apps.puc.state.or.us/orders/2010ords/10-210.pdf>.

⁹ In a General Rate Case, as authorized in RCW 80.04.130, the Commission investigates a utility company's books, accounts, practices and activities in order to establish rates for the company that are fair, just, reasonable, and sufficient, as required by RCW 80.28.010(1), RCW 80.28.020. See AR at 0046.

The Commission order approved the settlement and set new rates for 2009, but did not address the issue of REC revenues. AR at 1576, Order 10, ¶ 28.¹⁰

The following year, PacifiCorp filed its 2009 General Rate Case, requesting a rate increase of 15.1 percent. The Commission conducted an adjudicative proceeding to review the filing. In addition to PacifiCorp, the parties in the 2009 General Rate Case were Public Counsel, Industrial Customers of Northwest Utilities (Industrial Customers), the Commission Staff, and The Energy Project. CP at 181-182 (*Utils. & Transp. Comm'n v. PacifiCorp*, Docket 090205, Order 09, 2009 WL 4898823 (December 16, 2009), (2009 Settlement Order)).¹¹

On August 25, 2009, the parties filed with the Commission an all-party settlement stipulation (2009 Settlement Stipulation) in which PacifiCorp agreed to a smaller rate increase. All parties filed supporting evidence, and on October 29, 2009, the Commission held a formal evidentiary hearing to review the Settlement Stipulation and supporting evidence, and to determine if the settlement met “all pertinent legal and policy standards.” WAC 480-07-740. *See generally* WAC 480-07-730 to 750 (Commission settlement rules). Witnesses for PacifiCorp and the

¹⁰ See *Utils. & Transp. Comm'n v. PacifiCorp*, Docket UE-080220, Order 05, 2009 WL 4572320 (October 8, 2008).

¹¹ The full Settlement Stipulation was included as an appendix by the Commission with its 2009 Settlement Order.

other settling parties were sworn and testified regarding the Settlement Stipulation provisions. The Commission issued its final order approving and adopting the Settlement Stipulation 1 on December 16, 2009. CP at 180-210 (2009 Settlement Order).

In addition to setting rates, the 2009 Settlement Order contained two components addressing PacifiCorp's RECs. First, the order provided for reporting of PacifiCorp's REC transactions from 2005 forward, including quarterly reports beginning March 31, 2010, regarding the "actual level of REC-related revenues." CP at 123 (2009 Settlement Order, Stipulation at 8, ¶ 21).¹²

Second, the 2009 Settlement Order expressly contained a reservation of rights, providing 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 (2009 Settlement Order, Stipulation at 8, ¶ 22).

During the 2009 General Rate Case, before the 2009 Settlement Stipulation was filed, PacifiCorp entered into lucrative REC contracts with

¹² In addition to the quarterly reports PacifiCorp was required under the Settlement Stipulation to file an initial overview or summary report by January 1, 2010, of how PacifiCorp had been treating RECs in its multi-state area, including an accounting of RECs sold from 2005 to mid-June 2009. CP at 122 (2009 Settlement Order, Stipulation at 7, ¶ 20).

California utilities. AR at 1577. The contracts were approved by the California Public Utility Commission before the October 2009 evidentiary hearing at which the Washington Commission reviewed the 2009 Settlement Stipulation. PacifiCorp did not disclose to the Commission or the parties during the 2009 General Rate Case that the California contracts had been executed or that they had been approved by the California Commission.

PacifiCorp also did not disclose that the REC sale proceeds anticipated from the California contracts would vastly exceed the \$657,755 in REC revenues included in the 2009 Settlement Stipulation. PacifiCorp began to receive the proceeds of the lucrative California REC contracts in October 2009, the month the settlement hearing was held in Washington, and two months prior to the Commission's final order approving the settlement. The level of REC revenues that PacifiCorp began to receive in October was dramatically higher than the REC revenues it had received in prior months. AR at 1177.¹³ In total, PacifiCorp received \$6,779,592 in REC revenues for 2009. In 2010, PacifiCorp's REC revenues continued their dramatic increase, totaling \$10,346,961. AR at 1852. Because parties were not aware of these lucrative contracts they were not able to request deferred accounting or

¹³ AR at 1167-1215 (REC Compliance Filing Pursuant to ¶¶ 206, 208, and 384 of Order 06 in Docket UE-100749, May 24, 2011).

other Commission action to ensure customers received the benefit of the funds.

C. PacifiCorp's REC Reporting Under the 2009 Settlement Did Not Provide Other Parties a Practical Basis to Request Deferred Accounting.

Only five months elapsed between the end of the 2009 General Rate Case and PacifiCorp's 2010 General Rate Case filing on May 4, 2010. AR at 778 (Final Order 06, ¶ 2). Neither of the two Settlement Order REC reports PacifiCorp provided to parties during this interim period (actually one report and its revision), disclosed the dramatic increase in REC revenues because the reports did not cover the period beginning in October 2009 when the higher revenues began to flow.¹⁴ These increased revenues were not included in a REC report until the first required quarterly report, not provided until July 28, 2010, report, over two months into the current case.¹⁵ The California sales contracts themselves showing the details of the actual sales prices and volumes were not provided to Public Counsel and other parties until this case.¹⁶

¹⁴ The two reports consisted of a December 2009 report required by the Settlement, CP at 122 (2009 Settlement Order, Stipulation at 7, ¶ 20), comprising a general "look back" from 2005 to June 2009; and a revision of that same report filed in February. AR at 5329.

¹⁵ Under the Settlement, quarterly reporting was to begin March 31, 2010. CP at 202 (2009 Settlement Order, ¶ 61). The July 28, 2010, report was the first quarterly report provided. AR at 1315 (Phase II Opening Brief of Public Counsel at 19), citing AR at 5329 (PacifiCorp Exh. No. RBD-35; Duvall, TR. 628:20-629:6).

¹⁶ AR at 5726 (Exh. No. DWS-13, p. 9).

Separate from the newly required REC reporting, PacifiCorp filed the routine annual Commission Basis Report pursuant to WAC 480-100-257, on April 30, 2010, five days before its May 4 2010, General Rate Case filing. The Commission Basis Reports are a broad depiction of company operations and revenues, not used for ratemaking purposes, and not presented to the Commission for approval or consideration in any formal proceeding. Commission Staff reviews the reports to remain informed of company operations, not to analyze accounting practices. AR 1786-1787, Order 11, ¶ 23.

V. ARGUMENT

A. **This Case Involves the Sale of Assets Separate From the Ratemaking Process, So Ratemaking Principles and Methodologies Have Limited Relevance.**

1. **PacifiCorp's description of Washington ratemaking is not accurate.**

The Commission concluded in this case that PacifiCorp's REC sales were equivalent to the sale of utility property, and thus properly dealt with outside and independent of the rate-setting process. AR at 1574-1575 (Order 10, ¶¶ 23, 26). Because PacifiCorp disagrees, it devotes extensive discussion in its brief to describing and arguing Washington ratemaking theory and methodology, seeking to entangle the Court and parties in what ultimately are irrelevant issues. The Commission decided that

PacifiCorp's ratemaking analysis is inapplicable to this case in light of its treatment of the sale of RECs as equivalent to the sale of utility property. If the Court finds that the Commission decision to treat the sale as equivalent to property is adequately supported, there is no need for the Court to reach the ratemaking issues posed by PacifiCorp.

In any event, PacifiCorp's description of Washington ratemaking principles is misleading. PacifiCorp argues that rates are based merely on "estimates" of utility costs and revenues, App. Br. at 8, and that the Company is being unreasonably penalized for "imprecise estimates." App. Br. at 4, 8. PacifiCorp portrays the entire Commission decision as one triggered "simply because the actual amount of that [REC] revenue item exceeded the estimated amount included in PacifiCorp's rates." App. Br. at 2. This seriously mischaracterizes the basis of the Commission decision and misrepresents rates as untethered from actual cost and revenue data in Washington utility ratemaking.

A more accurate and complete description of Washington's ratemaking principles is contained in Final Order 06 in this case, which set the rates to take effect in 2010. AR at 782-785 (Order 06, ¶¶ 11-16), and in case law. The Commission sets rates using the well-established formula that "has evolved over the past century of public utility regulation in this

country and is the one commonly accepted and used.” *POWER v. Utils. & Transp. Comm’n*, 104 Wn.2d 798, 809, 711 P.2d 319 (1985). The formula determines operating expenses based on “actual operating expenses in a recent past period referred to as a ‘test period’ or ‘test year.’” *Id.* at 810. The Commission rules require extensive filing of actual financial data to support a general rate filing. WAC 480-07-510. This actual financial data is used as the baseline for developing the Company’s new rates. The baseline test period data can be modified using known information to make it more representative, as more fully described in Final Order 06. AR at 784 (Order 06, ¶ 13).

2. The Commission considers actual revenues received during the test period in setting rates, not just estimates.

Contrary to PacifiCorp’s arguments, the Commission can and does take into account actual revenues and costs that the Company receives during or after the test period.

In Avista’s 2009 General Rate Case, for example, the Commission approved returning a \$96 million lump sum to customers that had been received by Avista from Portland General Electric during the test period. *Utils. & Transp. Comm’n v. Avista Corp.*, Dockets UE-991606/UG-991607, Third Suppl. Order, ¶¶ 39-76, 204 Pub. Util. Rep. 4th 1, 2000 WL

1532899 (Sept. 29, 2000) (2009 Avista General Rate Case).¹⁷ Like PacifiCorp in this case, Avista sought to retain a portion of the test period revenues for its shareholders. *Id.* ¶ 111. Avista had not fully disclosed the test-period buy down agreement, *id.* ¶ 67, nor did it seek an accounting order regarding the revenues it received during the test year, *id.* at ¶ 72. The Commission denied Avista's request to retain any of the revenues. *Id.* at ¶ 111.

Other examples include cases involving PacifiCorp. In PacifiCorp's 2009 General Rate Case Settlement, the Commission allowed PacifiCorp to recover \$2.9 million in past period pension gains. CP at 189-190 (2009 Settlement Order, ¶¶ 29-32).¹⁸

It is also worth noting that in this 2010 General Rate Case, PacifiCorp used calendar year 2009 as the test period for calculating its new rates. In other words, PacifiCorp used the costs and revenues from

¹⁷ The Commission also allowed recovery of Y2K expenses incurred in the test year. *Id.* ¶ 234. Avista is the regulated utility company serving Spokane and large sections of Eastern Washington.

¹⁸ See also, *WUTC v. Puget Sound Energy, Inc.*, Dockets UE-090704/UG-090705 (consolidated), Order 11, ¶¶ 179-80, 2010 WL 1383928 (Apr. 2, 2010) (approving a new tariff schedule to credit ratepayers the past period benefits of Production Tax Credits (PTCs) from the Company's Hopkins Ridge wind facility); *WUTC v. PacifiCorp d/b/a Pacific Power & Light Co.*, Docket UE-080220, Order 05, ¶ 11, 2008 WL 4572320 (Oct. 8, 2008) (approving a settlement that included a three-year annual surcharge to recover roughly \$6 million in deferred hydro generation costs incurred by the Company during previous periods).

January 1 through December 31, 2009, as the baseline for determining its 2010 rates. AR at 784, Order 06, ¶ 13, AR at 844-845, ¶ 203 (test year begins on January 1, 2009). The test period thus included the same time period during which the earliest REC revenues in dispute in this case were received by PacifiCorp. While the Commission did not base its decision on the fact that the REC revenues were test period revenues, AR at 1573-1574, 1581 (Order 10, ¶¶ 22-23, 46-47), it remains the case that the REC sales proceeds in dispute are contemporaneous with other costs and revenues used to set the Company's 2010 rates in this case.

The rate setting process is tied as closely as possible to actual known financial data. PacifiCorp's argument that it cannot be faulted merely for poor estimates, or that the Commission is legally prohibited from considering actual costs and revenues occurring during and after the test period are at odds with actual ratemaking process and precedent.

In sum, even if the Commission had treated the REC sale proceeds as ratemaking revenues as PacifiCorp argues, there would be ample precedent for the Commission to address PacifiCorp's actual 2009 and 2010 REC revenues in this 2010 General Rate Case as revenues arising during and after the test-year in the case.

B. Revenues From the Sale of Renewable Energy Credits Belong to PacifiCorp's Customers.

The Commission has clearly established that revenues from REC sales “should be returned to the ratepayers who pay rates to cover all the costs of the related resource[s].” CP at 387-390 (PSE REC Order, ¶¶ 41-47). In Order 06 in this case, the Commission again made this clear, stating, “we adhere in this proceeding to the basic principles discussed in [the PSE REC Order] that require the proceeds derived from the sale of RECs to be returned to customers.” AR at 844 (Final Order 06, ¶ 202). These principles are consistent with the Washington Supreme Court’s holding that a utility cannot fail to return to ratepayers the full value of a ratepayer-funded asset. *US West Communications, Inc. v. Wash. Utils. & Transp. Comm’n*, 134 Wn.2d 74, 96, 949 P.2d 1337 (1997).

There is no question that the REC revenues at issue here — those received by PacifiCorp during 2009 and 2010 — were generated entirely from ratepayer-funded assets. As Commission Staff witness Mike Foisy testified, “ratepayers are paying rates based on the costs of [the underlying assets] which includes a return on PacifiCorp’s investment, plus all related operating expenses, and taxes.” AR at 3920-3921 (Foisy Responsive Testimony). Applying the principles discussed above, Mr. Foisy concluded that it is “entirely proper for those ratepayers to receive the

benefits generated by these assets on the same basis that their rates are set. Said another way, PacifiCorp may not keep this revenue.” *Id.*

PacifiCorp has not disputed this fundamental principle, agreeing in its own witness’ testimony that REC proceeds belong to ratepayers. AR at 2399 (Duvall Rebuttal Testimony, p. 8). PacifiCorp did not seek review of the Commission’s “fundamental determination” on this issue in Final Order 06. Reflecting PacifiCorp’s position, the Commission stated in Order 10 that “PacifiCorp has generated proceeds from REC sales since at least 2009. The Company does not dispute that those proceeds belong to its ratepayers.” AR at 1572 (Order 10, ¶ 19). Notably, PacifiCorp does not challenge the Commission’s rationale for concluding that customers are entitled, on a going forward basis, to PacifiCorp REC proceeds in their entirety. App. Br. at 7, 30-31.

Nevertheless, PacifiCorp seeks to distract from this accepted principle by stating in its brief that “this case does not involve a refund of rates paid by PacifiCorp’s Washington customers. Instead, it involves REC revenues received from third parties[.]” App. Br. at 3. This statement appears to be an indirect effort to somehow suggest that the customers have no real claim to REC sale proceeds. The argument ignores the fact that “ratepayers ... pay rates to cover all the costs of the

related resource[s]” that generate the RECs. CP at 387-390 (PSE REC Order, ¶¶ 41-47).

C. The Commission’s Orders Do Not Violate the Retroactive Rulemaking Doctrine.

A primary basis of PacifiCorp’s challenge to the Commission decision is the assertion that the agency has violated the regulatory principles known as the rule against retroactive ratemaking and the filed rate doctrine.¹⁹ In general, retroactive ratemaking occurs when rates are set to allow a utility to recoup past losses or to refund to customers past excess utility revenues. As the Commission observed in this case, “retroactive ratemaking is generally improper because it makes adjustments to rates that have already been charged to customers.” AR at 1573, Order 10, n.17. The rule against retroactive ratemaking serves two basic functions: (1) it protects current customers from being required to pay for past deficits of the utility, and (2) prevents the utility from using future rates to ensure its shareholders’ investments. *Narragansett Elec. Co. v. Burke*, 415 A.2d 177, 178-79 (R.I. 1980).

¹⁹ The filed rate doctrine and the rule against retroactive ratemaking are related. The rule against retroactive ratemaking is sometimes described as a “corollary” of the filed rate doctrine. AR at 1573 (Order 10, n.17). Because PacifiCorp’s brief focuses primarily on the rule against retroactive ratemaking, this brief also focuses on that principle, but the arguments in this brief are also generally responsive to the filed rate issues raised.

PacifiCorp overstates the reach of the rule against retroactive ratemaking and its applicability to this case. The Company may not rely on the rule in this case for at least three reasons:

(1) the rule applies to the ratemaking process, but does not apply in a case like this where the Commission is determining the disposition of proceeds of the sale of a utility asset;

(2) there is an exception to the rule against retroactive ratemaking in cases where, as here, the utility has failed to disclose important information about its revenues during the rate setting process; and

(3) PacifiCorp agreed in the 2009 Settlement Stipulation that REC proceeds from the period at issue in this case could potentially be recovered in a future case, as ultimately occurred here.

These three points are discussed more fully in the following sections of the brief.

D. The Commission Correctly Concluded That Proceeds From the Sale of RECs Are Proceeds From the Sale of a Utility Asset.

1. PacifiCorp has not effectively challenged the Commission's treatment of REC proceeds as equivalent to property.

The Commission's decision to treat the REC proceeds in this case as equivalent to a property sale was based on several factors, including the following:

- Its treatment of REC proceeds in the prior Puget Sound Energy REC docket. CP at 374-375 (PSE REC Order, ¶ 6).
- The plain language of the Energy Independence Act defining RECs. RCW 19.285 030(19).
- The federal Environmental Protection Agency’s definition of RECs as property. AR at 1799-1780 (Order 11, Docket UE-100749.)
- PacifiCorp’s treatment of RECs as utility property under Oregon law. AR at 1781 (Order 11, ¶ 10).

Washington courts “accord substantial weight to an agency’s view of the law that it administers [citations omitted]. When the agency has expertise in a specialized field of law and has quasi-judicial functions in that field, [the courts] accord substantial weight to [the agency] construction of statutory words, phrases, and legislative intent.” *Wash. Ind. Telephone Ass’n v. Utils. & Transp. Comm’n*, 110 Wn. App. 498, 507-508, 41 P.3d 1212 (2002).

PacifiCorp has not effectively responded to the Commission’s analysis. In fact, PacifiCorp does not assign error to the Commission’s determination that RECs are the equivalent of utility property.

Assignment of Error 1 asserts only that “[t]he Commission erred in

retroactively treating PacifiCorp’s historical REC revenues ... as ‘comparable’ to gains on utility property[.]” App. Br. at 4 (emphasis added). Likewise, none of the “Issues Pertaining to Assignments of Error” questions the property comparison, again focusing on retroactivity arguments.

PacifiCorp states in its brief on several occasions that it “does not challenge the Commission’s authority to treat RECs as ‘comparable’ to utility property *prospectively*.” App. Br. at 31 (emphasis in original). *See also* App. Br. at 7, 29. But if REC proceeds are comparable to property, as PacifiCorp concedes, they are comparable to property whether received in 2009, 2010, or 2014. The timing of receipt of the proceeds does not change the character of the asset as the equivalent of property. If the REC proceeds are the equivalent of property then, by definition, the Commission can dispose of the proceeds of the sale without regard to the timing of their receipt by the Company, and can do so outside of the ratemaking process.

2. The Commission’s property analysis is well-supported.

RECs have been broadly recognized as a form of property in academic literature and state rules and decisions. *See, e.g.*, David Berry, *The Market for Tradable Renewable Energy Credits*, 42 *Ecological Econ.* 369, 372 (2002) (“Property rights ... enable the legally recognized transfer

of control of the [REC] credits.”). If such rights were not assigned, “the regulator and the utility ... could not be sure that the portfolio standard was being met” and “owners of renewable generation equipment could not be sure of their ability to capture the revenues from the production of eligible energy.” *Id.* Statutes and commission decisions in other states also describe RECs as a form of property.²⁰

Thus, contrary to PacifiCorp’s assertions, the Commission’s treatment of the RECs as a form of property in Order 10 is not new. The Commission’s previous decision in the PSE REC case adopted this same analysis. PSE itself “analogiz[ed] the sale of RECs to the sale of utility property” and acknowledged that the Commission was tasked with determining the proper disposition of property sales. CP at 386 (PSE REC Order, ¶ 40). The Commission stated in the PSE REC Order that RECs “are intangible assets” that can be “transferred from one owner to another,” CP at 376-377 (PSE REC Order, ¶¶ 13-14). The Commission in

²⁰ See, e.g., Fla. Admin. Code Ann. § 25-17.280 (“renewable energy credits ... shall remain the exclusive property of the ... generating facility”); *In the Matter of Investigation of Net Metering*, Docket No. E-100, 2009 N.C. PUC LEXIS 460 (2009) (“energy and the associated RECs are the private property of the customer-generator” (citing N.C. Gen. Stat. § 62-133.8(i)(7)). *Petition of Southwestern Public Service Company for Declaratory Order Interpreting Commission Subst. R. § 25.173 Implementing Public Utility Regulatory Act § 39.904*, Docket No. 29815, 2005 Tex. PUC LEXIS 6 (March 16, 2005) (agreeing with party’s argument that “payment for RECs is a payment for a new and distinct form of property, a form of property unbundled from and separate from the electricity being purchased”); *In the Matter of the Proposed Rules Implementing Renewable Energy Standards 4 CCR 723-3*, Docket No. 05R-112E, 2006 Colo. PUC LEXIS 67 (January 7, 2006) (describing REC as a “legitimate property interest”).

that case also based its determination of whether a portion of PSE's REC sales revenues should be retained by shareholders on a discussion of the treatment of utility property sales. CP at 385-388 (PSE REC Order, ¶¶ 39-42).

It is not unusual for the Commission to dispose of the proceeds from the sale of utility assets independent of the general rate setting process. The decision to adopt this approach is within the "broad generalized powers" of the agency and its exercise of discretion is entitled to substantial deference. *US West Communications Inc. v. Utils. & Transp. Comm'n*, 134 Wn. 2d 74, 86, 949 P.2d 1337 (1997). One example is the PSE REC docket itself, conducted independently of PSE rate proceedings, resulting in a credit to customers to disburse REC proceeds. Other examples include the Qwest sale of its Yellow Pages directory publishing business in Washington,²¹ and the sale of Washington utilities' interest in the Centralia power plant.²²

²¹ *In the Matter of the Application of Qwest Corporation Regarding the Sale And Transfer of Qwest Dex*, Docket UT-021120, Tenth Supp. Order, 2003 WL 21910702 (August 1, 2003) (approving sale pursuant to a settlement that provided for \$67 million in bill credits to customers).

²² 2009 Avista General Rate Case, ¶ 315 (discussing preference for returning sale proceeds as one-time bill credit not affecting level of rates, citing similar approach for Puget Sound Energy sale proceeds).

E. The Rule Against Retroactive Ratemaking May Not Be Invoked by a Party That Has Failed to Disclose Information Pertinent to the Setting of the Rate.

1. The rule is not an absolute and inflexible prohibition on Commission action.

PacifiCorp describes the rule against retroactive ratemaking as a rigid “prohibition,” and a rule with only one exception in Washington. App. Br. at 11. PacifiCorp is wrong on both counts. As the United States Supreme Court has stated, the rule against retroactive ratemaking is governed by “tests of conscience and fair dealing.” *Atlantic Coast Line Railroad v. Florida*, 295 U.S. 301, 314, 55 S. Ct. 713, 79 L. Ed. 1451 (1935). In a 2004 PacifiCorp case, the Wyoming Supreme Court observed that the “specter of retroactive ratemaking must not be viewed as a talismanic prohibition against the application of principles based upon equity and common sense.” *PacifiCorp v. Public Service Comm’n of Wyoming*, 103 P.3d 862, 875 (Wyo. 2004). *See also, Narragansett Electric Co. v. Burke*, 415 A.2d 177, 178 (R.I. 1980) (the rule against retroactive ratemaking should not be “blindly applied ... without prior consideration of the underlying policy that originally precipitated its adoption.”).

Numerous authorities illustrate that the rule’s application by commissions and courts has been characterized by discretion and

flexibility tied to the specific facts and circumstances before the tribunal. See Stephen H. Krieger, *The Ghost of Regulation Past: Current Applications of the Rule Against Retroactive Ratemaking in Public Utility Proceedings*, 1991 U. Ill. L. Rev. 983, 1003-1007 (1991) (citing cases and describing a variety of exceptions to the rule).

The Washington Commission has followed this flexible approach in its application of the rule, approving recovery of past expenses in certain circumstances:

The Commission notes that it has on rare occasions authorized the recovery of past expenses in instances where doing so is consistent with the public interest and sound regulatory theory. Expensing of investment in abandoned plant, for example; amortization of rate case expense; legal fees; recovery of extraordinary weather-related expenses; and similar matters are approved by this commission and others.

WUTC v. Puget Sound Power & Light Co., Docket U-81-41, Sixth Suppl. Order, p. 315 (internal citations omitted), 99 Pub. Util. Rep. (PUR) 4th 305 (1988).

In a more recent example, the Commission allowed Avista Utilities to recover in rates \$35.4 million owed by the company under a settlement with the Coeur d'Alene Tribe to compensate the Tribe for many decades of past use, trespass, and water storage claims related to Lake Coeur d'Alene. The Commission rejected a challenge by Public Counsel that

charging current customers for an obligation based on decades old company actions in prior rate periods constituted retroactive ratemaking. *Utils. & Transp. Comm'n v. Avista Corp.* Dockets UE-080416, UG-080417 (consolidated), Order 08, 2008 WL 5432197 (December 29, 2008). The Commission order was upheld by the Superior Court.²³

PacifiCorp's focus on the rule against retroactive ratemaking is, in the end misdirected. The rule is part and parcel of traditional rate of return/rate base ratemaking. As a leading commentator on the rule has said, "[T]o comprehend the rule against retroactive ratemaking, it is necessary first to understand the process for the setting of public utility rates....and how the rule fits into this process." Krieger at 993. (Under the rule against retroactive ratemaking, *when a commission engages in ratemaking*, it can look to the future only." *Id.* at 995(emphasis added).) It follows, that as a general matter, if a commission is not engaged in ratemaking, then the rule does not apply. *See, e.g., Southern Cal. Edison v. Public Util. Comm'n*, 20 Cal. 3d 813, 817, 576 P.2d 945 (1978)("At the risk of belaboring the obvious, we observe that before there can be retroactive ratemaking, there must at least be ratemaking."); *Citizens of the State v. Florida Pub. Serv. Comm'n*, 415 So. 2d 1286, 1270 (Fla.

²³ *Washington State Attorney General's Office, Public Counsel Section v. Utils. & Transp. Comm'n*, Thurston County Superior Court No. 09-2-00171-2, Order Affirming Final Order (February 10, 2010).

1982)(reliance on rule was misplaced since commission change in depreciation rate that affected refunds under a prior settlement “was not ratemaking”).²⁴

2. There is an exception to the rule against retroactive ratemaking where a utility fails to disclose important and relevant information.

In a salient exception applicable under the facts of this case, courts and commissions have found that a utility may not rely on the rule where it has failed to disclose information pertinent to the proper resolution of the process by which the rates at issue were set. In *Salt Lake Citizens Congress v. Mountain States Telephone & Telegraph Co.*, 846 P.2d 1245 (Utah 1993), the Utah Supreme Court explained this exception:

The rule against retroactive ratemaking precludes adjustments of approved rates to correct errors or missteps in the ratemaking process. The fundamental policy embodied in that rule, however, *does not permit a utility to subvert the integrity of rate-making proceedings by misconduct that affects rates in a manner favorable to the utility. We recently stated ... “A utility that misleads or fails to disclose information pertinent to whether a rate-making proceeding should be initiated or to the proper resolution of such a proceeding cannot invoke the rule against retroactive rate making to avoid refunding rates improperly collected.”*

Id. at 1254 (emphasis added and internal citations omitted).

²⁴ Krieger at 1018 (“Most courts, however, have held that because the utility commissions have not approved the amounts collected under [cost adjustment clauses] in ‘general ratemaking proceedings’ ” the retroactive ratemaking rule does not apply)(citing multiple cases).

In *Salt Lake*, customers filed a complaint against Mountain States Telephone & Telegraph (Mountain Bell), seeking refunds for rates charged by the Company in previous periods. In multiple previous rate cases, Mountain Bell had included charitable contributions in its test period expenses. In each of these cases, the Utah Commission approved the rate increases without commenting on charitable contributions. *Id.* at 1249.²⁵ Customers thus sought refunds for the amount of charitable contributions that Mountain Bell had included in its previous rate cases.

The Company argued that the rule against retroactive ratemaking prohibited awarding refunds, contending that it had “made clear” in its rate case filings that it was including the contributions for ratemaking purposes since it had included “charitable contributions” in exhibits to its filings. *Id.* at 1249. The Utah Commission found in favor of Mountain Bell and dismissed the complaint, holding that granting refunds would violate the rule against retroactive ratemaking. *Id.* at 1250.

On appeal, the Utah Supreme Court reversed the Utah Commission’s decision. The Court stated that the allegations regarding Mountain Bell’s failure to disclose information “clearly fit within the scope of the exception to the rule against retroactive ratemaking.” *Id.* at

²⁵ The Utah Commission had also required all utilities, including Mountain Bell, to file a report regarding contributions. Mountain Bell complied with the reporting requirement, but did not make clear whether it was charging contributions to shareholders or ratepayers. *See Salt Lake*, 846 P.2d at 1248.

1254. The Court rejected the Utah Commission’s finding that any concealment by the Company was “in plain sight” since the Company had included a page in its exhibits identifying charitable contributions. The Court went on to state that “[r]ate-making proceedings are *not* to be conducted on the basis of gamesmanship,” and that the Utah Commission’s decision to dismiss the complaint and not address the allegations therein was “far worse than an abuse of discretion; it [was] an abdication of its responsibility to the public.” *Id.* at 1254-55 (emphasis in original).

Other decisions are in accord. In *MCI Telecom. Corp. v. Pub. Serv. Comm’n of Utah*, 840 P.2d 765, 775 (Utah 1992), the Utah Supreme Court reversed the Utah Commission’s dismissal of a request for refunds for overearnings of a utility caused by a change in federal income tax rate where the utility did not fully disclose the effect of the change. In *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1015-16 (9th Cir. 2004), the Ninth Circuit held that the Federal Energy Regulatory Commission could issue retroactive refunds to energy purchasers where wholesalers failed to file required reports during the wholesale rate setting process. In *Wise v. Pacific Gas & Elec. Co.*, 77 Cal. App. 4th 287, 299-300 (1999), the court reversed a California Commission dismissal of a consumer complaint seeking retroactive refunds for amounts the utility

had charged for a regulator replacement program the utility had subsequently cancelled; the consumer alleged that the utility had failed to reveal information regarding cancellation of the program.

3. The Commission found that PacifiCorp concealed or failed to disclose the amount of REC revenues it knew it would receive during 2009 and 2010.

PacifiCorp characterizes the record in this proceeding as containing no evidence and no findings by the Commission regarding its failure to disclose information about REC proceeds. PacifiCorp asserts:

- “No evidence exists that PacifiCorp ever intentionally provided inaccurate REC revenue forecasts in its rate cases.” App. Br. at 46.
- There is “no evidence that PacifiCorp withheld information from other parties and effectively prevented them from seeking deferred accounting of its REC revenues.” App. Br. at 47.

These statements are simply incorrect.

The Commission found:

The Company’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 at 1577 (Order 10, ¶ 31, (citing Exh. No. DWS-14, ¶ 23, AR at 5814) (emphasis added)). While the Commission did not make a finding on the propriety of that conduct in Order 10, it did observe that “the evidence at

least suggests that one reason PacifiCorp did not follow PSE's example in proactively seeking a Commission determination on how to distribute the Company's REC sale proceeds was that it was trying to avoid a Commission decision requiring PacifiCorp to credit customers the substantial additional proceeds that the actual sales generated." AR 1577 (Order 10, ¶ 31).

Importantly, the Commission then went on to make a finding regarding the evidence of non-disclosure in the record it had just referenced, stating:

That evidence also supports the other parties' [Public Counsel and Industrial Customer] arguments that they did not file a deferred accounting petition because they lacked sufficient information on the actual sales amounts, such information being entirely within PacifiCorp's control.

Id. (emphasis added). This is a key finding by the Commission, since PacifiCorp concedes that had a deferred accounting petition been filed, the disputed REC proceeds could have been credited to customers. App. Br.at 41 (see discussion below).

The Commission reaffirmed the Order 10 findings on reconsideration. Responding to PacifiCorp's assertion that the Commission did not fulfill its role to conduct a careful audit prior to

authorizing a rate increase, the Commission stated:

The facts here do not support the Company's allegation. To the contrary, *the evidence produced in this docket demonstrates that 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 at 1787 (Order 11, ¶ 24 (emphasis added)).

PacifiCorp cites the Commission's statement that "we make no finding that PacifiCorp engaged in such intentional manipulation" to support its contention that there is no evidence of Company misconduct. App. Br. at 48 (citing AR at 1577, Order 10, ¶ 32). The statement is taken out of context. The Commission made this statement after observing that because PacifiCorp had control over the timing of its REC sales, it had "both the incentive and the opportunity" to generate more proceeds than the amounts included in rates. *Id.*

4. Substantial evidence in the record supports the Commission's statements in the order regarding non-disclosure.

As noted above, the Commission in Order 10 cited specific record evidence in support of its findings. AR at 5814 (Exh. No. DWS-14, ¶ 23 (admission that the California contracts were not disclosed during the 2009 General Rate Case)).

Other evidence in the record also supports the Commission conclusions. AR at 5822 (Exh. No. DWS-15, ¶ 15 (admission that California contracts were not produced prior to the 2009 Settlement Stipulation)); *see also* AR at 5821, ¶ 13 (execution dates of California contracts); AR at 5816, ¶ 22 (approval dates of California contracts, receipt of revenue). The record also contains evidence showing that the REC sales contracts reflecting actual sales prices and volumes were not provided in discovery until the 2010 General Rate Case. AR at 5726 (Exh. No. DWS-13, p. 9, ¶ 18). Company witness Duvall testified that the July 28, 2010, REC report, provided two months after the instant case was filed, was the first to contain REC proceeds from late 2009 when amounts increased dramatically. TR. 626:5-629:6.

5. The substantial evidence standard of review has been met.

The Commission's findings of fact are reviewed under a substantial evidence standard. *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 542, 869 P.2d 1045 (1994). Substantial evidence is "evidence which is substantial when viewed in light of the whole record before the court." RCW 34.05.570(3)(e). Under RCW 80.04.430, the Commission's findings are prima facie correct.

Throughout, PacifiCorp's brief is almost exclusively an effort to re-argue the evidence and derivative points which it unsuccessfully argued to the Commission on multiple occasions. PacifiCorp appears to be asking this Court to conduct a *de novo* review of the facts of the case, to re-examine each item of the Company's evidence already presented below. That is not the function of appellate review. *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 675-676, n.9, 929 P.2d 510, review denied, 132 Wn.2d 1004 (1997). On review of an administrative adjudication decision, the Court does not substitute its judgment for that of the agency with regard to witnesses' credibility or the weight to be given conflicting evidence. *Western Ports Transp. Inc., v. Employment Sec. Dep't*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002).

The question on appeal is simply whether the Commission's findings of fact are supported by substantial evidence. *US West Communication, Inc. v. Utils. & Transp. Comm'n*, 134 Wn. 2d 74, 86, 949 P.2d 1337 (1997). Agencies are permitted to evaluate and interpret evidence in light of their own experience, competency, and specialized knowledge. *Brown v. Dep't of Health*, 94 Wn. App. 7, 972 P.2d 101 (1999). PacifiCorp's brief makes virtually no effort to show that substantial evidence is lacking, other than to say there is "no evidence" or to re-argue its preferred evidentiary interpretations.

6. PacifiCorp's claims of extensive REC reporting and disclosure are misleading.

In part to respond to the non-disclosure issue, PacifiCorp seeks to create the impression that extensive information was reported to the Commission and other parties regarding its disputed REC proceeds prior to this case. It claims, for example, that it disclosed its REC revenues in “numerous prior filings,” detailing the “numerous public filings” in a footnote. App. Br. at 47, n.171. The footnote lists only two filings at the Commission.

One filing cited is the 2010 General Rate Case filing itself, which does not constitute a “prior” filing relative to the instant case. The other filing cited as a “prior filing” is PacifiCorp’s Commission Basis Report filed April 30, 2010, only four days before the instant 2010 General Rate Case.

PacifiCorp asks the Court to second guess the Commission’s own experience and expertise with regard to the evaluation and significance of reports required under the Commission’s own administrative rules. The Commission Basis Report is a routine annual filing by utilities pursuant to WAC 480-07-510. Commission Basis Reports are not presented to the Commission for approval or consideration in any forum, and are not used as part of the ratemaking process. AR at 1786-1787 (Order 11, ¶ 23).

PacifiCorp does not assert that the April 30, 2010, report contained detailed information about the California contracts. Any implication by PacifiCorp that parties should have acted on this report, by filing a deferred accounting petition in the four days before the current 2010 General Rate Case, is illogical and impractical.

In addition, PacifiCorp's characterization of Commission Basis Reports, including the April 2010 report, as REC disclosure documents makes no sense in light of the 2009 Settlement Order. The 2009 Settlement Order created a REC reporting system precisely to provide more "transparency" by providing additional information not presented in any other filing. CP at 202 (2009 Settlement Order, ¶ 61). If PacifiCorp's routine Commission Basis Reports provided full disclosure of REC activity, the REC reporting would be superfluous, simply duplicating information already provided.

In its brief, PacifiCorp claims that PacifiCorp's California REC contracts were "long known" to Public Counsel. App. Br. at 47. The Commission rejected that claim, after considering both the Company's arguments, testimony, and exhibits, and the contrary evidence provided by Public Counsel and other parties. The Commission concluded that PacifiCorp "did not include or disclose anticipated REC sale proceeds from lucrative California contracts," AR at 1577 (Order 10, ¶ 31), that it

“concealed or vastly underestimated the amount of its REC sale proceeds,” AR at 1787 (Order 11, ¶ 24), and that “the evidence also supports the other parties’ [Public Counsel and Industrial Customers] arguments that they did not file a deferred accounting petition because they lacked sufficient information on the actual sales amounts, such information being entirely within PacifiCorp’s control.” AR at 1577 (Order 10, ¶ 31). PacifiCorp here merely seeks to reargue evidence already found unpersuasive by the Commission, disregarding the purpose of appellate review.

7. PacifiCorp’s references to an earlier Administrative Law Judge (ALJ) order are not relevant to this appeal.

PacifiCorp makes references throughout its brief to an ALJ decision in an earlier complaint case brought by Public Counsel and Industrial Customers regarding PacifiCorp’s treatment of REC issues. PacifiCorp’s extensive reliance on this decision is misplaced. In Order 10, the Commission noted the earlier complaint docket, but observed that it was dismissed “on grounds not relevant to the disposition of this case.” AR at 1570 (Order 10, ¶ 13, n.10). In the Notice of Finality issued in the

complaint docket, the Commission stated:

In allowing this order to become final, *the Commission does not endorse the order's reasoning and conclusions*. If cited in the future, the order must be identified as an Administrative Law Judge's order.

App. Br., Appendix E, p. 88 (Notice of Finality, ¶ 4).

PacifiCorp's brief acknowledges this statement in a footnote early on, but then proceeds on numerous occasions to ask this Court to give substantial weight and precedential value to the ALJ's order, as trumping the Commission's own subsequent determinations on the same and related factual and legal determinations. PacifiCorp does not explain how its reliance on the ALJ order can be squared with the Commission statement in the Notice of Finality. When an agency's final order modifies or replaces an ALJ finding, the Court reviews only the agency final decision. *Regan v. Dept. of Licensing*, 130 Wn. App. 39, 49, 121 P.3d 731 (2005).

PacifiCorp's references to the ALJ order also omit key information. Part of the stated rationale for the dismissal of the complaint was that the Commission had in the 2010 General Rate Case already "effected part of the relief" sought by the customer advocates. App. Br., Appendix D (Order 01, ¶ 8). The ALJ noted that the Commission in the instant case (the 2010 General Rate Case) required a detailed accounting for REC revenues since January 1, 2009, and requested proposals to return

those revenues in bill credits. The ALJ order further noted that in the instant case the Commission had considered in part and would further consider the substance of the matters raised in the complaint. *Id.* Thus, even if the ALJ order were considered, it tells a different story than that offered by PacifiCorp. It is apparent from the record and the Commission's final orders in this case that the core issues in the earlier complaint case were in fact ultimately taken up in the 2010 General Rate Case, and decided differently.

F. The 2009 General Rate Case Settlement Contemplated Potential Recovery of The REC Proceeds at Issue Here.

1. The Commission and parties understood that the door was left open to allow REC proceeds to go to customers.

To properly evaluate PacifiCorp's legal and factual arguments on appeal, it is essential to look back at PacifiCorp's immediately preceding rate case, the 2009 General Rate Case. The 2009 General Rate Case was resolved by a settlement that made specific provision both for reporting of PacifiCorp's REC activity and for future treatment of actual REC sale proceeds. That settlement, signed by PacifiCorp and all the parties to this case, set the stage for the REC issues which arose and were addressed in the 2010 PacifiCorp General Rate Case. The settlement was approved and adopted by Commission order.

The 2009 Settlement Order effectively put PacifiCorp on notice and opened the door, by design, to the potential recovery in a later case of PacifiCorp REC proceeds that might come to light under the agreed reporting provisions. While PacifiCorp now seeks to avoid the consequences of the 2009 Settlement Order, that earlier agreement effectively negates the Company's retroactive ratemaking and lack of notice arguments in this appeal.

The 2009 Settlement Order contained two components addressing PacifiCorp's RECs. First, the Settlement provided for reporting of PacifiCorp's REC transactions from 2005 forward, including quarterly reports beginning March 31, 2010, regarding the management of REC proceeds from June 2009 forward. The reports were to include the "actual level of REC-related revenues." CP at 122-123 (2009 Settlement Order, Stipulation at 8, ¶ 21).²⁶

Second, the 2009 Settlement Order expressly provided 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. For purposes of any such filing, the Parties agree that this case includes \$657,755 in

²⁶ In addition to the quarterly reports PacifiCorp was required under the Settlement to file an initial overview or summary report by January 1, 2010, of how PacifiCorp had been treating RECs in its multi-state area, including an accounting of RECs sold from 2005 to mid-June 2009. CP at 122 (2009 Settlement Order, Stipulation at 7, ¶ 20).

Washington-allocated REC revenues for the 2010 rate effective period.”

CP at 123 (2009 Settlement Order, Stipulation at 8, ¶ 22 (emphasis added)).

The intent of these provisions was addressed in the Commission order approving and adopting the 2009 Settlement Order. Reviewing the testimony of the parties supporting the settlement, the Commission noted the parties’ belief that the reports would “be very helpful to the parties in monitoring RECs, including both the banking *and the sale of RECS, and for use in evaluating the appropriate treatment of RECs in future rate cases in Washington.*” CP at 194 (2009 Settlement Order, ¶ 41 (emphasis added) (Public Counsel testimony)), and that it would “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.” CP at 195 (2009 Settlement Order, ¶ 42 (emphasis added) (Industrial Customers testimony)). The Commission found the parties’ agreement “reasonable because *it promotes transparency in the Company’s management of these [REC] credits* and will help ensure that the Company treats this matter fairly across all its jurisdictions.” CP at 202 (2009 Settlement Order, ¶ 61 (emphasis added)).

The Commission later addressed the 2009 Settlement Order in Orders 10 and 11 in this case, confirming the relationship between the 2009 and 2010 cases and reaffirming the meaning of the 2009 Settlement Order :

Our order resolving that [2009] case approved a settlement among all parties that included PacifiCorp's agreement to undertake future reporting and information sharing on REC sales. *The order made no determination on the calculation or amount of the Company's REC proceeds or how those funds should be distributed.*

AR at 1570 (Order 10, ¶ 13, Docket UE-100749 (emphasis added)). The Commission went on to quote in full the settlement provision which reserved parties' rights to request deferred accounting or other Commission action with respect to any PacifiCorp REC proceeds other than the stipulated \$657,000. *Id.* The Commission concluded: "With respect to RECs, therefore, the Commission's order in PacifiCorp's 2009 rate case did nothing more than approve rates that the parties agreed included \$657,755 in REC sale proceeds." *Id.*

Similarly, Order 10 later states:

The settling parties agreed only on the amount of the proceeds that would be considered to be included in rates *should a party seek a Commission determination of how RECs would be treated.*

AR at 1576 (Order 10, ¶ 28 (emphasis added)). *See also* AR at 1786 (Order 11, n.29) ("nothing in that [2009] stipulation or the Commission

order approving it made any reference to the accounting of those proceeds, much less accepted or approved any accounting treatment.”). This language again underlines that, with the exception of the specified REC sale proceeds (\$657,755), the 2009 Settlement Stipulation, signed by PacifiCorp and approved and adopted by the Commission, reserved and did not preclude the possibility of further treatment of any other REC revenues that would come to light from the period in question.

2. PacifiCorp agrees that the 2009 Settlement Order allowed the Commission to order the disputed revenues to be paid to customers.

PacifiCorp does not appear to directly dispute that the terms of the 2009 Settlement Order contemplated possible future recovery of the disputed REC revenues. In fact, in a key concession, PacifiCorp acknowledges that the Commission *could have ordered* the revenues in dispute in this case to be paid to customers, if a petition for deferred accounting had been filed by someone. App. Br. at 41 (“no party petitioned for deferred accounting of PacifiCorp’s historical REC revenues even though the parties expressly reserved the right to make such a filing in the 2009 general rate case stipulation[.]”). *Id.* This is a crucial acknowledgement that the 2009 Settlement Order expressly contemplated potential future recovery of the REC proceeds in dispute in this case for the specific time period in question.

Notwithstanding all PacifiCorp's retroactivity arguments, it asserts that, to allow recovery of the REC proceeds, all that was required was for someone to file a petition for deferred accounting. As the Commission observed, PacifiCorp's entire position in this case, boils down to the argument that other parties did not act on their right to file a petition. AR at 1573 (Order 10, n.20). Ultimately, this argument collapses under the weight of the evidence.

First, the Commission specifically found that Public Counsel and other parties "did not file a deferred accounting petition because they lacked sufficient information on the actual sales amounts, such information being entirely within PacifiCorp's control." AR at 1577 (Order 10, ¶ 31). The Company cannot rely on other parties' alleged failure to pursue their rights when the Company itself prevented that action.

Second, PacifiCorp's focus on other parties' failure to file is a red herring, since PacifiCorp itself could have filed for deferred accounting at any time. AR at 1573 (Order 10, ¶ 21, n.19) (approval to initiate deferred accounting is obtained by filing a "deferred accounting" petition). The information the Company needed to petition for deferred accounting was "entirely within PacifiCorp's control." AR at 1577 (Order 10, ¶ 31). PacifiCorp knew it had entered into the California contracts and knew they

were approved. It knew of the size of the proceeds that could be anticipated and knew when they would begin to flow. PacifiCorp was a signatory to the 2009 Settlement Stipulation, which identified a concern about tracking its REC transactions with “transparency,” and specifically referenced deferred accounting as a possible remedy. If PacifiCorp had timely filed a deferred accounting petition, based on the information it had in its possession, payment of the disputed REC proceeds to customers would have been straightforward. It chose not to make such a filing. PacifiCorp may not now rely on its own inaction as a basis for challenging the Commission’s authority to act.

As the Commission found, “PacifiCorp’s decision not to proactively seek a Commission determination of the distribution of REC proceeds does not shield the company from its obligations to its customers or preclude the Commission from determining the proper distribution of those proceeds, even if those sales occurred in the past.” AR at 1576-1577, Order 10, ¶ 30.²⁷

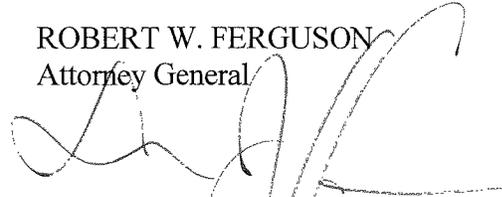
²⁷ The absence of a deferred accounting petition is not a bar to customer recovery of the disputed REC proceeds for an additional reason. The 2009 Settlement Order itself expressly contemplated that REC revenues could be covered by a request for deferred accounting or “any other action” by the Commission. AR at 1570, Order 10, ¶ 13, leaving the door open to other approaches approved by the Commission.

VI. CONCLUSION

For the foregoing reasons, Public Counsel respectfully requests that this Court affirm Orders 10 and 11 of the Utilities and Transportation Commission as consistent with the law and supported by substantial evidence.

RESPECTFULLY SUBMITTED this 10th day of January, 2014.

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PROOF OF SERVICE

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