

September 4, 2009

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1424

RAINBOW YOUTH GOLF EDUCATION
PROGRAM, INC.

Complainant,

vs.

PACIFICORP, dba PACIFIC POWER,

Defendant.

PREHEARING CONFERENCE REPORT;
RULING ON MOTION TO DISMISS

DISPOSITION: COMPLAINT DISMISSED IN PART; HEARING DATE
ESTABLISHED

I. INTRODUCTION

On March 13, 2009, Rainbow Youth Golf Education Program, Inc. (RYGEP), filed a consumer complaint against PacifiCorp, dba Pacific Power (Pacific Power or the Company), raising various issues related to Pacific Power's provision of electric service to RYGEP. On April 2, 2009, Pacific Power timely submitted a motion to dismiss the complaint. On May 20, 2009, a prehearing conference was held via telephone. During that conference, the parties discussed the allegations in the complaint and the scope of the Commission's jurisdiction. On July 15, 2009, Pacific Power responded to a bench request issued by the Administrative Law Judge.

On September 1, 2009, another prehearing conference was held to allow Pacific Power to provide additional detail about its procedures for determining the cost of customers' facilities. During the conference, Counts 1 and 3 of RYGEP's complaint were dismissed. This ruling explains the basis for the rulings on Pacific Power's motion to dismiss and sets Count 2 of the complaint for hearing on **October 8, 2009**.

II. DISCUSSION

RYGEP is a nonprofit organization located in Chiloquin, Oregon, that operates a program for American Indian youth. According to RYGEP, its program "combine[s] ancient traditions and values with lessons inherent in golf to teach and

improve life skills that will benefit Indian youth in their everyday life.”¹ As part of its program, RYGEP operates a summer golf program.

Recently, RYGEP’s Board of Directors decided to develop the DMOLO Golf Facility, a nonprofit business open to the public that would include three golf holes, a driving range, and a practice area. The revenues generated from the facility are intended to support the youth programs and golf facility maintenance. RYGEP worked on the facility through the spring, summer, and fall of 2008, at which point RYGEP was ready to bring electricity to the site to power irrigation and begin establishing grass at the site. In September 2007, RYGEP contacted Pacific Power about establishing electric service.

The parties engaged in a series of discussions from September 2007 until October 2008. The discussions initially involved RYGEP’s inquiries about the potential costs of constructing the facilities necessary to bring electricity to the site. Pacific Power provided ballpark figures, and by July 2008 RYGEP was ready to discuss the details of the project. Pacific Power sent RYGEP draft contracts. RYGEP responded by proposing a number of modifications to the form service contracts and easement agreements. Pacific Power agreed to some of the proposed changes but not others. Initially, the plan was for Pacific Power to remove existing facilities from RYGEP’s site, construct an underground line, and primary meter the site. RYGEP then decided to remove the old powerline itself. It also decided to primary meter the site. These proposals resulted in changes to the parties’ agreements, with the ultimate cost of constructing the necessary facilities estimated by Pacific Power at approximately \$13,616.

Around September 5, 2008, RYGEP signed a service contract with Pacific Power. On September 9, 2008, Pacific Power ordered the equipment necessary for the job. Pacific Power states that it expected the materials to arrive on October 9, 2008, but they did not actually arrive until October 17, 2008. On October 14, 2008, Pacific Power authorized the connection of temporary electric service to the site. The remaining equipment was finally installed on October 21, 2008. Since then, RYGEP has been receiving service from Pacific Power without incident.

On March 13, 2009, RYGEP filed a formal complaint with the Commission. In its complaint, RYGEP complains that Pacific Power caused unnecessary delays in providing the requested electric service, which caused RYGEP to sustain various economic damages. RYGEP seeks reimbursement for economic losses associated with the delays. RYGEP complains that the contract minimum billing formula included in its contract with Pacific Power is unreasonable and should be changed. Finally, RYGEP complains that it was treated inequitably and unfairly by Pacific Power. For this alleged mistreatment, RYGEP seeks a three-year donation of \$10,000 per year to RYGEP from Pacific Power, and asks that Pacific Power be required to treat RYGEP with courtesy and respect.

A. Legal Standard

In ruling on a motion to dismiss, the Commission assumes the truth of all allegations in the complaint, as well as any inferences that may be drawn from them, and views them in the light most favorable to the nonmoving party.²

¹ RYGEP complaint at 1.

B. Issues

1. *Delay in Delivery of Electricity Service (Count 1)*

Parties' Positions

In its complaint, RYGEP alleges that Pacific Power unreasonably delayed providing electric service to the site after RYGEP requested service. According to RYGEP, Pacific Power knew early in the parties' discussions that RYGEP would need service by September 1, 2008. By the time RYGEP signed the contract the first week of September 2008, Pacific Power should have been prepared to provide service. Moreover, RYGEP alleges, when Pacific Power realized that service could not be provided by early September 2008, it should have authorized temporary service immediately rather than waiting until mid-October to do so. RYGEP states that these delays impaired RYGEP's ability to water the greens, fairways, and tee boxes. This, in turn, delayed the opening of the golf facility and may require RYGEP to replant the grass on the facilities at financial cost to RYGEP. RYGEP also states that the delay in opening resulted in lost revenues. RYGEP seeks reimbursement for economic losses associated with the delays.

Pacific Power denies delaying service at the site. The Company states that when it received a signed contract from RYGEP in early September 2008, it had to take additional steps before service could be started, including ordering parts and equipment and scheduling installation. All of these things, Pacific Power argues, took time. Pacific Power explains that it does not ordinarily order materials in advance of receiving a service contract because it is prudent to wait until the Company is certain the materials will be needed. Nevertheless, Pacific Power states, it did order various pieces of equipment related to RYGEP's job before it received a signed contract, even though it is not the Company's practice to do so. Later changes to the agreements, however, made some of the equipment ordered by Pacific Power useless. Pacific Power alleges it was unable to obtain a refund on this equipment and was required to absorb it into local stock at a cost of over \$7,000. Given the ongoing changes to the parties' agreement, Pacific Power states it made sense to delay ordering additional materials until the design was finalized and the services contract was signed. Pacific Power states that it ordered materials within a few days of receiving RYGEP's signed contract and received the materials within a typical time frame. Pacific Power argues that RYGEP's request for relief cannot be granted by the Commission because the Commission has no authority to award monetary damages. In any case, Pacific Power argues, the requested damages are speculative and unsupported.

Resolution

The Commission expects electric utilities to act reasonably in providing service to customers. Nevertheless, the Commission is a legislative agency and has only those powers granted it by the legislature. As the Commission has frequently held, it is not empowered to award actual or consequential damages arising from disputes with regulated utilities.³ This prevents the Commission from awarding damages here for any alleged

² See *Natkin & Co. v. H.D. Fowler Co.*, 128 Or App 311, 313, 876 P2d 319 (1994). RYGEP did not file a response to Pacific Power's motion, but silence is deemed to constitute a general denial of a motion to dismiss. See OAR 860-013-0035.

³ See, e.g., *Advanced TV & Video v. Qwest Corp.*, Order No. 00-572 at 5.

damage to the golf course or lost business opportunities suffered by RYGEP.⁴ In short, the Commission simply lacks statutory authority to award the damages sought by RYGEP related to the alleged delays.

2. *Inequitable and Prejudicial Treatment (Count 3)*

Parties' Positions

RYGEP complains that it was treated inequitably and unfairly by Pacific Power. RYGEP recites numerous occasions on which it believes Pacific Power's District Manager and Estimator treated RYGEP disrespectfully. According to RYGEP, its relationship with Pacific Power was acceptable until RYGEP raised questions about the costs associated with the project and began negotiating ways to make the project more affordable. RYGEP alleges that Pacific Power's personnel then became unhelpful and unreasonable. According to RYGEP, Pacific Power's work crews were told by the District Manager that they were not to help RYGEP with various items. RYGEP also complains that Pacific Power unreasonably refused to accept some of RYGEP's proposed changes to Pacific Power's contracts, including changes to the contract's easement language. RYGEP describes numerous encounters with Pacific Power that it believes amount to the appearance that RYGEP and the Ray family were treated "with blatant inequitable and prejudicial treatment" by Pacific Power. As a result, RYGEP seeks a three-year donation of \$10,000 per year from Pacific Power, and asks that Pacific Power be required to treat the Ray family and RYGEP with courtesy and respect.

Pacific Power responds that the Company and its employees strive to build and maintain strong customer and community relationships, and that the Company does not discriminate against any of its customers. According to Pacific Power, it could not accept RYGEP's proposed changes to the easement language in the contract due to safety issues. With respect to RYGEP's allegations of poor treatment, the Company states that it takes RYGEP's allegations seriously and is sensitive to them. Nevertheless, Pacific Power asserts, the Commission cannot grant the relief RYGEP seeks. ORS 756.900 authorizes the Commission to impose penalties for violations of statutes administered by the Commission, Commission rules, or Commission orders, but nothing gives the Commission authority to force Pacific Power to make a donation to RYGEP.

Resolution

As noted previously, the Commission generally lacks authority to order a utility to pay money damages. I find nothing in the Commission's statutory authority that would allow it to order Pacific Power to make a donation to a nonprofit organization as compensation for prior treatment.

It should be emphasized, however, that the Commission expects utilities to treat all of its customers fairly and equally. While this ruling makes no findings about the specific facts alleged by RYGEP, the Commission expects Pacific Power to be responsive to any questions RYGEP may have about service, rates, charges, or service options, and to do its part to provide quality customer service to RYGEP.

⁴ *John Michael Dolan v. US WEST Communications, Inc.*, Order No. 00-105 at 4. See also *Mattox v. Portland Gen. Elec. Co.*, Order No. 85-196; *Sage v. US WEST Communications, Inc.*, Order No. 98-473.

3. *Contract Minimum Terms (Count 2)*

Parties' Positions

In its complaint, RYGEP seeks to modify the contract minimum billing terms included in its contract with Pacific Power. Under the terms of the agreement, RYGEP must pay a certain "contract minimum" each month. This contract minimum includes charges related to both RYGEP's billed electric service and a "facilities charge" for Pacific Power's cost of owning and maintaining the equipment built to serve RYGEP. The contract minimum billing terms state as follows:

Contract Minimum Billing. Customer agrees to pay a Contract Minimum Billing during the first 60 months beginning from the date the Company is ready to supply service. The billing shall be the greater of: (1) the monthly schedule billing; or, (2) \$210.55 plus eighty percent (80%) of the monthly schedule billings. Billings will be based on Rate Schedule No. 28 and superseding schedules. The Company will adjust the minimum charges if additional customers connect to the Improvements.

In its complaint, RYGEP argues that the contract minimum is unreasonable. RYGEP seeks to lower the facilities charge from \$210.55 to \$105.55 per month, eliminate the 80 percent clause, and reduce the payment period from five years to three years.

Pacific Power argues that the key terms of the contract are governed by Pacific Power's Commission-regulated tariffs and cannot be modified. Specifically, Pacific Power states that the contract minimum billing terms are found in Pacific Power's Oregon Rule 13, Section I.A and I.B. The facilities charges and billing terms were developed in accordance with Pacific Power's Oregon Schedule 300. According to Pacific Power, altering the terms of the contract to include nonstandard pricing terms would violate ORS 757.310(1) and Pacific Power's tariffs. Moreover, Pacific Power maintains ORS 757.310(2) requires Pacific Power to charge all customers the same rates for similar service.⁵ Changing the contract minimum for RYGEP would violate this statute.

Pacific Power also notes that RYGEP is mistaken in assuming it will be required to pay the full \$210.55 facilities charge each month in addition to the cost of electricity at the site, as RYGEP states. The \$210.55 facilities charge will be reduced by a percentage (up to 20 percent) of RYGEP's monthly electricity cost. Thus, Pacific Power explains, the more electricity RYGEP uses, the lower its facilities charge will be.

Resolution

As Pacific Power notes, electric utilities are required to charge customers in accordance with their Commission-filed tariffs.⁶ For this reason, Pacific Power must collect

⁵ ORS 757.310(2) states that "[a] public utility may not charge a customer a rate or an amount for a service that is different from the rate or amount the public utility charges any other customer for a like and contemporaneous service under substantially similar circumstances."

⁶ ORS 757.310(1) states, "Prohibition related to charges for service. (1) A public utility may not charge a customer a rate or an amount for a service that is different from the rate or amount prescribed in the schedules or tariffs for the public utility."

from RYGEP the amounts specific in its rate schedules, no more, and no less. Failure to do so would violate the law.⁷ Any charges required by tariff may not be changed here.

Pacific Power's Oregon Rule 13, which governs RYGEP's minimum contract billing charge, states as follows:

I. Line Extensions – Conditions and Definitions

[* * *] B. Contract Minimum Billing

The Contract Minimum Billing is the greater of: (1) the Consumer's monthly bill; or, (2) 80% of the Consumer's monthly bill plus the Facilities Charges.

[* * *] Contract Minimum Billings begin on the date service is first made available by the Company, unless a later date is mutually agreed upon.

While Pacific Power provided a number of details about cost in its motion to dismiss, and provided a detailed description of its estimating process during the September 1 prehearing conference, it appears that one element of the Contract Minimum Billing calculation is not derived exclusively from Pacific Power's tariffs. Under Pacific Power's Rule 13, a Contract Minimum Billing charge is calculated as 80 percent of the Consumer's monthly bill for electric service plus a "Facilities Charge." Pacific Power's Schedule 300 states that a Facilities Charge is either 0.67 percent of "installed cost" per month for facilities installed at the consumer's expense, or 1.67 percent of "installed cost" per month for facilities installed at the Company's expense.

The "installed cost" of the facilities is not mandated by tariff.⁸ It appears that the installed cost of the facilities in this case is the same as Pacific Power's construction estimate, an estimate established through Pacific Power's own internal procedures, rather than mandated by tariff. As a result, the record does not support a conclusion that the installed cost of the facilities in this case is reasonable as a matter of law. RYGEP is therefore entitled to challenge the reasonableness of Pacific Power's construction estimate. Pacific Power's motion to dismiss RYGEP's challenge to the minimum contract billing count is therefore denied.

III. CONCLUSION

Pacific Power's motion to dismiss RYGEP's complaint is GRANTED with respect to Counts 1 and 3 of RYGEP's complaint. The motion is DENIED with respect to Count 2. A hearing will be scheduled for October 8, 2009, in Klamath Falls, Oregon, on the issue of whether Pacific Power's calculation of the installed cost of RYGEP's facilities is reasonable.

Dated at Salem, Oregon, this 4th day of September, 2009.



Lisa D. Hardie
Administrative Law Judge

⁷ See *In re Portland General Electric Company*, Order No. 02-121 at 8 (utility's failure to charge customers according to terms of its tariffs would violate law).

⁸ The five-year contract term and 80 percent clause included in RYGEP's contract are consistent with Pacific Power's Commission-filed tariffs and cannot be changed.