

April 6, 2018

VIA ELECTRONIC FILING

Public Utility Commission of Oregon
201 High Street SE, Suite 100
Salem, OR 97301-3398

Attn: Filing Center

**RE: Advice No. 18-001—Schedule 103—Multnomah County Business Income Tax
Recovery
PacifiCorp’s Response to Staff’s Report**

PacifiCorp d/b/a Pacific Power respectfully requests that the Public Utility Commission of Oregon (Commission) approve the company’s updated Multnomah County Business Income Tax (MCBIT) Rate of 0.33%, included in the company’s Schedule 103 tariff filing.¹ Staff opposes this request on the basis that PacifiCorp’s MCBIT Rate adjusts for \$6,365 in under-collections from the previous year without requesting and receiving a deferral authorization under ORS 757.259.² PacifiCorp disagrees that a separate ORS 757.259 deferral is required, and asks the Commission to continue to support the company’s use of a balancing account to adjust the MCBIT Rate in Schedule 103, which operates as an automatic adjustment clause (AAC) pursuant to ORS 757.210 and ORS 757.269.

I. BACKGROUND

The MCBIT was enacted in 1976 and imposes a tax on each corporation doing business in Multnomah County. As a local fundraising tax, the MCBIT is charged only to Multnomah County ratepayers and is included as a separate line item on customer bills.³ The Commission’s decision to pass the costs of local taxes directly to local customers has been upheld by the Court of Appeals, which concluded that “the statutory powers of the Commissioner” are “flexible” enough to support the rule-based inclusion of taxes in rates.⁴

Before the passage of Senate Bill 408 (SB 408) in 2005, no particular accounting treatment was required for these taxes after they were collected.⁵ After SB 408 was passed in 2005, utilities were directed “to establish a separate balancing account and automatic adjustment clause tariff” for each local income tax.⁶ Since SB 408 was repealed in 2011 and was replaced by ORS 757.269, Oregon’s utilities have continued to employ balancing accounts to automatically adjust

¹ Docket No. UE 338, Ninth Revision of Sheet No. 103 (Feb. 12, 2018).

² Item 1, Staff Report re Updates to Schedule 103, Multnomah County Business Income Tax Recovery (Staff Report) at 6 (Apr. 3, 2018).

³ OAR 860-022-045(1) (directing utilities to collect taxes imposed by “any county in Oregon” from “customers within the county imposing such taxes”).

⁴ *Multnomah County v. Davis*, 35 Or App 521, 525-27 (1978).

⁵ Order No. 05-1064 at 7.

⁶ See former OAR 860-022-0041(8)(a) (implementing SB 408).

forecasted MCBIT expenses—with the support of both the Commission and Staff.⁷ As implemented, MCBIT balancing accounts accrue any difference between a utility’s actual MCBIT expenses and what is collected from customers.⁸ Customers’ rates are then adjusted to reflect the utility’s projections of future MCBIT tax expenses and the current state of the MCBIT balancing account.

In its Advice No. 18-001, PacifiCorp’s Schedule 103 forecasts \$496,234 in MCBIT expenses to be collected from Multnomah County customers in 2018, which includes a \$6,365 balancing account adjustment. Staff argues that this \$6,365 automatic adjustment constitutes “unlawful retroactive ratemaking.”⁹

II. RESPONSE TO STAFF’S REPORT

As an initial matter, Staff’s position that the MCBIT recovery mechanism is unlawful contradicts its own consistent support in previous MCBIT filings.¹⁰ Less than four months ago, Staff recommended approval of NW Natural’s revised MCBIT tariff, which similarly adjusts its forecasted MCBIT revenues in light of the previous year’s over- or under-collection.¹¹ Critically, Staff’s Report neither acknowledges nor explains this sudden change in its own understanding and, in the absence of any such explanation, Staff’s about-face appears both unfair and unreasonable.

Moreover, Staff’s new policy approach to MCBIT tariff adjustments is more appropriate to a generic proceeding applicable to all utilities. For instance, Staff has recently proposed a new legal understanding of retroactive ratemaking and the Commission’s deferral authority in UM 1909.¹² Unless and until the Commission adopts Staff’s new approach, existing precedent remains in force and should be observed in utility-specific dockets.

Alternatively, if Staff believes that a deferral application under ORS 757.259 is necessary, it could have filed such an application and sought the Commission’s review.¹³ Instead, Staff presents a generally-applicable policy change in response to a single utility’s routine advice filing. Procedurally, Staff’s objections in this docket are misplaced.

⁷ See, e.g., *Revisions to Schedule A: Multnomah County Business Income Tax*, Docket No. ADV 660, Staff Report (Dec. 18, 2017) (finding that the utility’s “filing meets the requirements of ORS 757.205, ORS 757.210, ORS 757.220, and OAR 860-022-0030” and recommending that the Commission approve it without condition).

⁸ See *Portland General Electric MCBIT Rate*, Docket No. ADV 118, Staff Report at 2 (Dec. 14, 2015).

⁹ Staff Report at 5.

¹⁰ See, e.g., *PGE MCBIT Adjustment*, Docket No. ADV 390, Staff Report (Nov. 15, 2016); *PGE MCBIT Adjustment*, Docket No. ADV 649, Staff Report (Nov. 21, 2017); *PacifiCorp Advice No. 16-018 MCBIT Rate*, Docket No. ADV 451, Staff Report (Jan. 12, 2017).

¹¹ *Revisions to Schedule A: Multnomah County Business Income Tax*, Docket No. ADV 660, Staff Report (Dec. 18, 2017).

¹² *In the Matter of Pub. Util. Comm’n of Or., Investigation of the Scope of the Commission’s Authority to Defer Capital Costs*, Docket No. UM 1909, Initial Application of Or. Pub. Util. Comm’n Staff at 1 (Nov. 11, 2017) (“Staff recommends that the [Commission] open a docket to investigate the Commission’s legal authority to defer capital costs.”).

¹³ ORS 757.259(2) (providing for deferral upon application by a utility or ratepayer or upon the Commission’s own motion).

Substantively, Staff's Report fails to demonstrate that any change is necessary. While PacifiCorp agrees that the rule against retroactive ratemaking generally "prohibits past losses or profits from being considered in establishing future rates,"¹⁴ the Commission has interpreted the rule against retroactive ratemaking "narrowly," consistent with "the legislature's broad delegation of authority to do everything necessary and convenient to protect customers."¹⁵

In 1987, Attorney General Opinion 6076 analyzed the possible retroactive rate impact of two types of AACs—"fixed rate" and "cost-of-service"—and concluded that neither requires a separate deferral under appropriate circumstances. Fixed rate AACs, which use costs incurred in previous periods "to estimate current expenses," do not implicate the rule against retroactive ratemaking because they operate prospectively.¹⁶ Here, Schedule 103 is a fixed-rate automatic adjustment clause because it uses the MCBIT balancing account to estimate future revenues. As a result, no separate deferral authorization is required.

If the Commission instead views Schedule 103 as a cost-of-service tariff, PacifiCorp still believes that no deferral is required because recovery occurs through a statutorily authorized AAC and does not violate the rule against retroactive ratemaking. A cost-of-service AAC recovers all actual past costs for a given period through a surcharge in a subsequent period.¹⁷ As the Attorney General explained in Attorney General Opinion 6076, a cost-of-service AAC does not violate the rule against retroactive ratemaking so long as (1) it is statutorily authorized; (2) it does not result in confiscatory rates or otherwise impact the utility's authorized rate of return; and (3) it does not use past losses or excess profits to set future utility rates, but merely "assures that a utility will recover no more or less" than its actual costs.¹⁸

PacifiCorp's Schedule 103 meets each of these three requirements. First, the legislature explicitly declared its intention to allow full recovery of income taxes under ORS 757.269.¹⁹ ORS 757.259(1)(a)(A) similarly demonstrates the legislature's intent to allow for full recovery without a deferral of costs lawfully imposed by other government entities. The Commission further codified this intent to provide pass-through recovery for local taxes in OAR 860-022-0045.²⁰ None of these authorities direct utilities to file separate deferrals under ORS 757.259.

Second, Schedule 103 does not impact the utility's authorized rate of return, as it simply serves as a pass-through for local taxes. As the Commission explained in Order No. 17-482, tax items

¹⁴ Order No. 08-487 at 36.

¹⁵ Order No. 08-487 at 36-39 (further noting that "[s]everal aspects of Oregon's statutes governing utility regulation also support a narrow definition of the rule against retroactive ratemaking" and concluding that "a narrow interpretation of the rule against retroactive ratemaking is warranted"); see also *Gearhart v. Pub. Util. Comm'n of Or.*, 356 Or 216, 237 (2014) (noting that the court has "never expressly decided whether Oregon accepts some form of the rule against retroactive ratemaking").

¹⁶ Attorney General Opinion Letter re Opinion Request OP-6076 (AG OP-6076) at 15 (Mar. 18, 1987).

¹⁷ AG OP-6076 at 15.

¹⁸ AG OP-6076 at 16-17.

¹⁹ ORS 757.269 mandates that "all expected current and deferred tax balances and tax credits" must be included in utility rates. ORS 757.269 (2)(a). This statute does not direct utilities to make a separate deferral filing under ORS 757.259, and such a discrete filing has not previously been required.

²⁰ OAR 860-022-0045(1) (requiring utilities "to collect from its customers" any county taxes or fees).

billed to a single locality “are not part of the calculus used to set general rates.”²¹ Instead, the utility “is required to act essentially as a tax-collector and directly bill customers and remit amounts collected to the city.”²² PacifiCorp merely seeks to act consistently with the Commission’s directives and “to recover amounts it is required to collect.”²³

Third, the pass-through structure means that past losses and excess profits do not dictate PacifiCorp’s future rates. As the Attorney General explained in Opinion 6076, a cost-of-service adjustment “assures that a utility will recover no more or less than its actual . . . costs,”²⁴ and does not otherwise affect the utility’s rates.

Regardless of whether Schedule 103 is a fixed rate or cost-of-service AAC, it is distinguishable from Idaho Power Company’s Power Cost Adjustment Mechanism, which the Commission found required a separate deferral in Order No. 08-491. In that case, the Commission concluded that an annual “true-up” violated the rule against retroactive ratemaking.²⁵ Here, by contrast, Schedule 103 does not involve an annual “true-up,” but merely adjusts the forecasted MCBIT recovery in light of the current balancing account.

III. CONCLUSION

If the Commission determines that it now lacks the authority to continue authorizing the use of MCBIT balancing accounts to adjust prospective MCBIT tariffs, then PacifiCorp respectfully asks the Commission to simply direct PacifiCorp to modify Schedule 103 to exclude the \$6,365 adjustment and otherwise approve this filing. Staff has determined that PacifiCorp’s calculations are correct, and this would not be a material change to the MCBIT Rate filed given the amount at issue.

PacifiCorp believes that Staff’s alternate proposal to stay this proceeding and to adopt a legal briefing schedule would not be an efficient use of Commission or utility resources, or be fair to PacifiCorp and the other utilities this decision may effect. If Staff wishes to continue to advance its legal position concerning retroactive ratemaking and the scope of the Commission’s discretion, such arguments are better suited to generic proceedings such as UM 1909, and should not be raised for the first time in a single utility’s routine update of its MCBIT tariff sheet.

Sincerely,



Matthew McVee
Chief Regulatory Counsel

²¹ Order No. 17-482 at 11.

²² Order No. 17-482 at 11.

²³ Order No. 17-482 at 11.

²⁴ AG OP-6076 at 17.

²⁵ *In the Matter of Idaho Power Co. Application for Authority to Implement a Power Cost Adjustment Mechanism for Electric Service to Customers in the State of Or.*, Docket No. UE 195, Order No. 08-491 at 7 (Oct. 6, 2008).