

ITEM NO. 1

PUBLIC UTILITY COMMISSION OF OREGON
STAFF REPORT
PUBLIC MEETING DATE: April 10, 2018

REGULAR CONSENT EFFECTIVE DATE April 16, 2018

DATE: April 3, 2018

TO: Public Utility Commission

FROM: Mitchell Moore *MAN*
MP for JC

THROUGH: Jason Eisdorfer and John Crider

SUBJECT: PACIFIC POWER: (Docket No. UE 338/Advice No. 18-001) Updates
Schedule 103, Multnomah County Business Income Tax Recovery.

STAFF RECOMMENDATION:

Staff recommends the Commission reject Pacific Power's (PacifiCorp or Company) request to amend its Schedule 103, which recovers the Multnomah County Business Income Tax (MCBIT) payments.

In the alternative, Staff recommends that the Commission suspend PacifiCorp's Advice No. 18-001, for a period not to exceed six months, to allow for an investigation into whether a deferral is required in order to amortize past over- or under-collected MCBIT amounts in current rates.

DISCUSSION

Issue:

Whether the Commission should approve PacifiCorp's proposed update to its Schedule 103 to adjust the rate related to recovery of its MCBIT payments.

Applicable law:

PacifiCorp submitted this filing on February 12, 2018 pursuant to ORS 757.205, ORS OAR 860-022-0025, and OAR 860-022-0030. ORS 757.215 provides the Commission with discretion to suspend a rate or schedule of rates, for a period of up to six months from the proposed effective date, to investigate the proposed new rate.

The rate adjustment schedule applies to all customers receiving service within the boundaries of Multnomah County. The Commission reviews this filing in accordance with OAR 860-022-0045, which states in part:

When a county in Oregon imposes new or increased taxes or license, franchise, or operating permit fees upon an energy utility, the utility shall collect the amount from its customers within the county imposing such taxes or fees.¹

ORS 757.210(1)(b) defines "automatic adjustment clause" as "a provision of a rate schedule that provides for rate increases or decreases or both, without prior hearing, reflecting increases or decreases or both in costs incurred, taxes paid to units of government or revenues earned by a utility and that is subject to review by the commission at least once every two years."

ORS 757.259(2)(e) provides the Commission with discretion to defer, for later ratemaking treatment, "identifiable utility expenses or revenues, the recovery or refund of which the commission finds should be deferred in order to minimize the frequency of rate changes or the fluctuation of rate levels or to match appropriately the costs borne by and the benefits received by ratepayers." ORS 757.259(5) exempts automatic adjustment clauses under ORS 757.210(1) from the earnings review required of deferred amounts not subject to an automatic adjustment clause.

Analysis:

PacifiCorp's Schedule 103 is applicable to all customers whose electric service requirements are supplied by the Company within Multnomah County. Pursuant to this Schedule, the Company maintains a balancing account "to accrue any difference between the Company's actual MCBIT expenses the amount collected from Consumers through the MCBIT Rate. Any over- or under-collection of the MCBIT expense will be considered when the MCBIT Rate is periodically reviewed."² The MCBIT Rate is reviewed and updated as necessary to collect the expected MCBIT expense "and to correct any over- or under-collection in the MCBIT balancing account."³

¹ OAR 860-022-0045(1).

² PacifiCorp Schedule 130 (P.U.C. OR No. 36).

³ *Id.*

The Company determines the MCBIT rate by forecasting its expected MCBIT tax liability for the next calendar year and adding this forecasted amount to the actual over- or under-collection of the prior year MCBIT taxes. The total amount is divided by the forecasted revenues for Multnomah County to determine the final MCBIT rate.

PacifiCorp's current Schedule 130 rate of 0.23 percent was authorized by the Commission at its January 24, 2017, Public Meeting (Advice No. 16-018). PacifiCorp's proposed Schedule 130 rate of 0.33 percent is an increase from the current rate and it has been calculated to recover the projected tax expenses in 2018, as well as crediting customers with the \$6,365.37 over-collection for 2017, with the goal of reducing the balancing account to zero by the end of 2018. PacifiCorp estimates that this rate change will affect approximately 80,000 customers in Multnomah County. A residential customer consuming 900 kWh monthly will see a bill increase of approximately \$0.10 per month.

Staff's Concerns

Staff reviewed the Company's filing, and requested additional information demonstrating the MCBIT tax activity for 2017, the projected activity for 2018, forecasted collections from customers, and the resulting projected balance. Staff has confirmed that the rate adjustment in this filing reflects the Company's projections of the 2018 MCBIT tax expense and the current state (i.e. past over-collection) of the MCBIT balancing account. Although Staff finds that the Company's calculations are correct, Staff is unable to recommend approval of PacifiCorp's Schedule 130 rate, as described more fully below, due to the inclusion of past over-collected amounts absent a deferral. To be clear, if the mechanism were supported by the required deferral, Staff would recommend approval of the Company's rate as filed. For the Company's 2018 tax liability, Staff would support a rate change based on the Company's estimated revenues. If PacifiCorp were to file a deferral to track the over- or under-collection of 2018 amounts, Staff would also support the inclusion of those amounts in 2019 rates.

Staff has discussed this issue with PacifiCorp, and PacifiCorp disagrees that a deferral is necessary to support the current rate recovery mechanism because recovery is achieved pursuant to an automatic adjustment clause (AAC) combined with a balancing account authorized under ORS 757.269.

Application of ORS 757.259

As described above, PacifiCorp's Schedule 103 tracks the prior over- or under-recovery of MCBIT collected in rates in a balancing account, which is then included in setting future rates. PacifiCorp argues that rate recovery occurs pursuant to ORS 757.210(1),

which provides for the creation of AACs, and which it argues are exempt from the deferral requirements of ORS 757.259.

Retroactive ratemaking “prohibits a utility regulator from setting rates that allow a utility to recover past losses or require it to refund past profits.”⁴ Oregon Attorney General Opinion OP-6076 concluded that retroactive ratemaking, without specific statutory authority from the legislature, is unlawful in Oregon⁵--a conclusion which led to the enactment of ORS 757.259 and which has been affirmed by the Commission.⁶ In short, deferrals are the statutory exception to retroactive ratemaking.

The AG Opinion specifically discusses the application of the rule to two types of automatic adjustment clauses (AACs)—cost-of-service AACs and fixed-rate AACs, noting that ORS 757.210 does not specify which type is contemplated in the statute. Cost-of-service AACs are designed to recover all past costs on a dollar-for-dollar basis; fixed-rate tariffs use costs incurred in a past period to *estimate* current expenses (i.e. there is no recovery of actual costs).⁷ Regarding cost-of-service AACs, the Attorney General concluded “the legislature’s grant of authority to the commissioner to include automatic adjustment clauses in utility tariffs does not authorize cost of service adjustment clauses because cost of service clauses have retroactive effect.”⁸ As such, cost-of-service AACs require deferrals in order to adjust rates based on actual over- or under-collected amounts.

⁴ *In re Portland General Electric Co.*, OPUC Docket No. UE 324, Order No. 17-482 at 7 (Nov. 28, 2017). See also *Pacific Northwest Bell Telephone Co. v. Katz*, 116 OrApp 302, 311 (1992) (“Retroactive ratemaking occurs when past profits or losses are incorporated in setting future rates. This case does not concern comparing authorized revenues with actual revenues and then adjusting for unexpected profits or shortfalls. PUC is not ordering PNB to refund past profits. Rather, PUC is ordering PNB to refund amounts that were overcollected under an interim rate schedule that was not in compliance with the authorized revenue level.”) (internal citations omitted). Staff also notes that the Commission’s order discussed its expectation that future cases that turn on the application of the rule against retroactive ratemaking address the policy reasoning and factual circumstances of Oregon court precedent. The facts in this case are distinguishable from the facts underlying the *Trojan* litigation—namely, in this case, the Commission is not engaging in the reexamination of past rates to remedy a legal error in setting those rates. Rather, this case involves the inclusion of past profits in the setting of future rates.

⁵ 1987 WL 278316.

⁶ *In re PacifiCorp*, OPUC Docket No. UE 76, Order No. 92-1128 (Aug. 4, 1992) (“The deferral statute provides specific authorization for retroactive ratemaking in certain circumstances. Retroactive ratemaking is not legal without express legislative authority. We believe any attempt to provide legislative sanction of such ratemaking should be interpreted narrowly. The Commission thus will not grant deferral unless it is clearly within the reach of the statute.”).

⁷ 1987 WL 278316 at 11-12.

⁸ 1987 WL 278316 at 12.

PacifiCorp's MCBIT recovery mechanism tracks dollar-for-dollar recovery of MCBIT used to set future rates. Assuming the mechanism is appropriately considered an AAC, it is a cost-of-service AAC requiring a deferral prior to the inclusion of past amounts in future rates. Because PacifiCorp has not filed for a deferral to track past over- or under-collected MCBIT amounts from customers, the inclusion of actual over or under-recovery in future rates constitutes unlawful retroactive ratemaking. For this reason, the Commission does not have the discretion to approve PacifiCorp's Schedule 130 rate, as filed. As stated above, Staff would support the current recovery mechanism with the addition of a deferral for future years.

Application of ORS 757.269

PacifiCorp also argues that ORS 757.269 directly authorizes the recovery of MCBIT pursuant to a balancing account, which it argues provides an independent basis for recovery outside of ORS 757.259 requirements.

Staff disagrees that ORS 757.269 provides an independent basis for recovery or refund of past MCBIT amounts. ORS 757.269 provides that the Commission is obligated to set fair, just and reasonable rates that include amounts for income taxes. Subsection (1) goes on to state that "[s]ubject to subsections (2) and (3) of this section, amounts for income taxes included in rates are fair, just and reasonable if the rates include current and deferred income taxes and other related tax items *that are based on the estimated revenues derived from the regulated operations of the utility.*" Nothing in subsections (2) or (3) provide direct authorization for a balancing account for local income taxes, such that a deferral under ORS 757.259 is not required. In short, taxes included in rates are just and reasonable if they are recovered based on estimated revenues, rather than actual taxes paid by the utility.⁹

Conclusion:

After a review of PacifiCorp's filing and accompanying work papers, Staff finds that PacifiCorp's proposed rate includes the past over-recovery of MCBIT amounts, absent a deferral, which constitutes unlawful retroactive ratemaking. Because retroactive amounts are included in PacifiCorp's proposed Schedule 103 rates, Staff recommends that the Commission reject PacifiCorp's proposed rates. In the alternative, should the

⁹ ORS 757.269 was "essentially enacted to replace Senate Bill 408." *In re Idaho Power Company*, OPUC Docket No. UE 233, Order No. 13-416 at 6 (Nov. 12, 2013). SB 408, codified as ORS 757.268 and now repealed, required utilities to true-up any differences between the amounts of income taxes authorized to be collected in rates from customers and amounts of taxes actually paid that are properly attributed to the utility's operations. If amounts collected and amounts paid differed by an amount greater than \$100,000, the difference was addressed through an automatic adjustment clause. *See In re PacifiCorp* OPUC Docket No. UE 177, Order No. 09-177 at 1 (May 20, 2009).

Commission find that additional investigation of the legal issues are warranted, Staff recommends that the Commission suspend PacifiCorp's Advice 18-001 for a period not to exceed six months so that the legal issue can be briefed and a determination be made by the Commission.

PROPOSED COMMISSION MOTION:

Reject Pacific Power's (PacifiCorp or Company) request to amend its Schedule 103, which recovers the Multnomah County Business Income Tax (MCBIT) payments.

Alternate Motion

Suspend PacifiCorp's Advice No. 18-001, for a period not to exceed six months, to allow for an investigation into whether a deferral is required in order to amortize past over- or under-collected amounts in current rates.