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Via electronic and US Mail

Filing Center
Administrative Hearings Division
Public Utility Commission of Oregon
PO Box 2148
Salem, OR 97308-2148

Re: In the Matter of PACIFIC POWER & LIGHT Application for a Deferred
Accounting Order Regarding Certain Tax Expenses
Docket No. UM 1229

Dear Filing Center:

Enclosed please find the original and two copies of the Industrial Customers of Northwest Utilities' Response to PacifiCorp's Application for a Deferred Accounting Order Regarding Certain Tax Expenses in the above-referenced proceeding.

Please return one file-stamped copy in the enclosed, postage-prepaid envelope. Please call me if you have any questions. Thank you for your assistance.

Sincerely,

/s/ Christian Griffen
Christian W. Griffen

Enclosures

cc: UE 170 Service List (via electronic mail)

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1229

In the Matter of)	
)	
PACIFIC POWER & LIGHT)	RESPONSE OF THE INDUSTRIAL
(dba PACIFICORP))	CUSTOMERS OF NORTHWEST
)	UTILITIES IN OPPOSITION TO
Application for a Deferred Accounting Order)	PACIFICORP'S APPLICATION FOR A
Regarding Certain Tax Expenses.)	DEFERRED ACCOUNTING ORDER
_____)	

I. INTRODUCTION

The Industrial Customers of Northwest Utilities (“ICNU”) submits this Response in opposition to PacifiCorp’s application for a deferred accounting order regarding certain tax expenses (“Application”). PacifiCorp has requested that the Oregon Public Utility Commission (“OPUC” or the “Commission”) authorize the Company to defer the amounts related to tax expenses that the Commission removed from PacifiCorp’s rates in Order No. 05-1050. The Commission removed these amounts to ensure that the estimated taxes included in PacifiCorp’s rates align with the amount that PacifiCorp will eventually pay to the taxing authorities. PacifiCorp has requested the deferral so that the Company can later charge ratepayers for these tax expenses, if the Commission reconsiders or rehears Order No. 05-1050 and allows PacifiCorp to include in its rates income taxes that are never paid to the taxing authorities.

The Commission should reject PacifiCorp's Application because it is inconsistent with the deferred accounting statute and the Commission's standards regarding deferrals, and it is an impermissible challenge to a lawful Commission order. The applicable law and Commission precedent do not permit a utility to defer costs or expenses that the Commission has already determined should be excluded from rates. Essentially, there is no provision in the deferred accounting statute that would allow a utility to defer illegal costs.

PacifiCorp is also seeking to inappropriately utilize the deferred accounting statute to circumvent the statutorily prescribed method to challenge Commission decisions. PacifiCorp has sought reconsideration of Order No. 05-1050 and has the ability to appeal the Commission's final decision. Reconsideration or appeal of a Commission decision does not stay the effect of the order, unless the party challenging the Commission action makes specific showings and/or posts a bond. PacifiCorp should not be permitted to alter the established method to challenge Commission decisions by deferring costs that the Commission has found should be excluded from rates.

II. BACKGROUND

In PacifiCorp's recently completed general rate case, the Commission found that it was required to ensure that the estimated taxes included in PacifiCorp's rates align with the amount that PacifiCorp will eventually pay. Re PacifiCorp, OPUC Docket No. UE 170, Order No. 05-1050 at 16-18 (Sept. 28, 2005). The Commission specifically directed PacifiCorp to remove from rates \$26.6 million in state and federal income taxes

that will never be paid to the taxing authorities. Id. at Appendix H at 1. PacifiCorp has sought reconsideration and rehearing of Order No. 05-1050.

PacifiCorp filed its Application on October 28, 2005. While PacifiCorp is seeking to defer all the tax expenses that the Commission has disallowed, the Company has not filed any testimony that specifically supports the Application. Instead PacifiCorp relies upon unsupported assertions that its Application complies with the applicable legal standards. PacifiCorp also estimates that the Company will defer approximately \$2.2 million a month until either its reconsideration application is resolved or twelve months have passed, whichever occurs sooner. Application at 3. PacifiCorp intends to later incorporate its deferred tax expenses in rates through an amortization schedule. Id. at 1-2.

III. ARGUMENT

1. The Deferral of Illegal Tax Expenses Violates the Deferred Accounting Statute and Commission Precedent

The Commission should reject PacifiCorp's Application because the Company has failed to demonstrate that the deferred accounting statute, ORS § 757.259, was intended to be used to allow a utility to defer costs that the Commission ordered be removed from rates. Instead of providing substantive justification for its request, PacifiCorp makes only a cursory effort at demonstrating that its Application complies with the deferred accounting statute and the Commission's past deferred accounting orders. Allowing this deferral would result in a radical departure from past deferrals and the statutory grounds upon which deferrals can be granted.

The Commission has established a two-stage review of any deferral application that it will conduct when considering deferred accounting requests. Re Staff Request to Open an Investigation Related to Deferred Accounting, OPUC Docket No. UM 1147, Order No. 05-1070 at 2-3 (Oct. 5, 2005) (“Order No. 05-1070”). First, the Commission must determine whether a proposed deferral meets the criteria established in ORS § 757.259(2) regarding the types of monies that the Commission can defer. Id. Second, if the deferral is legally authorized, the Commission will then determine whether it should exercise its discretion to grant the deferral. Id. at 3.

A. The Deferral of Disallowed Utility Costs Would Violate ORS § 757.259(2)

Deferred accounting is a narrow exception to the rule against retroactive ratemaking, and the Commission is not authorized to permit a utility to defer any amounts unless the request is consistent with the deferred accounting statute. Id. at 2. In other words, the Commission is obligated to reject a deferral request if the applicant fails to establish that the Commission is legally authorized to grant the request. Id. at 5-6. In determining whether a deferral request is legally authorized, the Commission has explained that:

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 will thus not grant deferral unless it is clearly within the reach of the statute.

Re PacifiCorp, OPUC Docket No. UE 76, Order 92-1128 at 8 (Aug. 4, 1992) (emphasis added). PacifiCorp’s Application should be rejected because it is not “clearly within the reach of the statute.”

The deferred accounting statute does not contain a provision that explicitly allows a party to defer costs when seeking reconsideration or rehearing of a Commission order. ORS § 757.259. However, under ORS § 757.259(2)(e), the Commission may authorize a deferral “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.” Id. PacifiCorp has sought to pigeonhole its deferral request into ORS § 757.259(2)(e) by arguing that the deferral of disallowed tax expenses would minimize rate changes or match the costs and benefits to ratepayers. Application at 3-4.

To demonstrate that a deferral will minimize the frequency of rate changes or fluctuations, an applicant for deferred accounting must specifically identify the factual basis upon which rate changes or fluctuations would be reduced. Order No. 05-1070 at 5; see Re PacifiCorp, OPUC Docket No. UM 995, Order No. 01-085 at 12 (Jan. 9, 2001). For example, “a utility might meet this standard by showing that the deferral would prevent an interim rate filing.” Order No. 05-1070 at 5. PacifiCorp has previously recognized that consideration of whether a deferral will minimize rate filings depends upon “the utility’s options for rate filings, including requests for interim rate relief.” Id.

PacifiCorp’s assertion that the deferral of its tax expenses will minimize the frequency of rate changes is unsupported by any evidence. PacifiCorp asserts that,

“in the absence of a deferral, the magnitude of the harm that PacifiCorp faces would require it to seek other regulatory relief, which could increase the frequency or fluctuations in rate levels.” Application at 4. However, PacifiCorp does not identify this vague “other regulatory relief,” nor does it cite any specific regulatory options that the Company would pursue to change rates if its Application is denied. Id. Since PacifiCorp has not specifically identified any actions that it could take to include these illegal costs in rates, the Company has failed to demonstrate that its Application would minimize rate changes.

PacifiCorp’s Application also alleges that it “is necessary to match appropriately the costs borne by and benefits received by ratepayers.” Id. PacifiCorp specifically asserts that costs and benefits are matched because “customers will be charged rates based on the stand-alone tax costs that PacifiCorp will incur in providing its regulated service.” Id. Essentially, PacifiCorp asserts that costs and benefits are matched because its tax costs are allegedly related to providing electric service to ratepayers. However, this is a basic principle that applies to all costs that a utility seeks to charge to ratepayers, and simply asserting that the costs are related to utility services is not an appropriate ground for granting a deferral under ORS § 757.259(2)(e).

PacifiCorp’s argument misconstrues the meaning of matching the costs borne and benefits received by ratepayers. When matching the costs and benefits, the “costs and benefits which are to be matched are related to each other.” OPUC Docket No. UE 76, Order No. 92-1128 at 9. According to the Commission:

[T]he statute means that in the instance where a cost being experienced by a utility today related to a benefit which may be received by a customer in the future, the Commission may defer recovery of such cost until such time as the related benefit can be delivered to the customer.

Id. Under ORS § 757.259(2)(e), the matching of costs and benefits applies to ensure that costs for which a deferral is sought are incurred for the eventual benefit of the customer and that recovery of the deferred amounts will occur at roughly the same time as the benefits occur. See Re Portland General Electric Co., OPUC Docket No. UM 246, Order No. 90-311 at 1 (Mar. 5, 1990); Re Portland General Electric Co., OPUC Docket Nos. UM 594/UM 571, Order No. 93-1493 at 2, Appendix A at 3 (Oct. 15, 1993). For example, the Commission has found that the deferral of expenses associated with contract litigation was appropriate because the costs of the litigation would produce future benefits for the customer, which would offset the rate increase resulting from the deferral. OPUC Docket No. UM 246, Order No. 90-311 at 1.

Thus, when, as here, customers will not derive future benefits from the expenditure of certain costs, the costs are not appropriate for deferral as a matching of costs and benefits. PacifiCorp is seeking to pass on to future customers, through an amortization of deferred tax expenses, amounts that the Company claims that it is incurring for current customers. PacifiCorp has not shown that the tax expenses it seeks to defer would have long-term benefits and, thus, the costs borne by future customers will not be matched with any future benefits. Expansion of the term “matching the costs borne with the benefits received by ratepayers” as proposed by PacifiCorp would

dramatically expand the deferred accounting statute to allow utilities to defer any costs related to utility services.

B. Deferral of Disallowed Expenses Is Inconsistent with the Commission's Established Deferred Accounting Standards

The Commission's order requiring PacifiCorp to remove its tax expenses from rates is not the type of event that warrants deferred accounting because deferred accounting was not intended to be used to challenge Commission orders disallowing costs in rate proceedings. In evaluating whether deferred accounting is appropriate, the Commission will first review the nature of the triggering event, its impact on the utility, and its previous ratemaking treatment. Order No. 05-1070 at 7. The purpose of the Commission's analysis is to determine if the event was modeled in rates, "fell within a foreseen range of risk when rates were last set," or was reasonably foreseeable. Id.; Re Portland General Electric Co., OPUC Docket No. UM 1071, Order No. 04-108 at 9 (Mar. 2, 2004).

The potential disallowance of costs in a general rate case is a reasonably foreseeable event that does not warrant deferred accounting. The issue of whether PacifiCorp could include in rates its tax expenses that were not paid to the taxing authorities was a major issue in PacifiCorp's general rate case, and the Company was well aware of the possibility that the Commission would require it to remove these costs from rates. In addition, PacifiCorp cannot dispute that its tax expenses were modeled, considered, and rejected by the Commission when rates were set in UE 170.

In evaluating a deferred accounting application, the Commission will also review “the magnitude of the underlying event in terms of potential harm.” Order No. 05-1070 at 7. Foreseeable events must have very substantial harms to warrant inclusion in a deferred account. Id. PacifiCorp has not shown that any potential harm to the Company is significant enough to warrant the creation of a deferred account.

The removal of approximately \$26.6 million in tax expenses from rates should not result in substantial harm to PacifiCorp. In the general rate case, PacifiCorp stipulated to reductions of over \$50 million of its original filed revenue requirement increase, approximately twice the amount the Company claims now would result in substantial harm. More importantly, in UE 170, the Commission authorized PacifiCorp an overall general rate increase of approximately \$25.9 million, despite ICNU’s recommendation that the Company only be authorized to increase rates by approximately \$1 million. Order No. 05-1050 at 1; Re PacifiCorp, OPUC Docket No. UE 170, ICNU Reply Brief at 1 (Aug. 11, 2005). Thus, PacifiCorp’s overall rates are higher today than they were immediately before the end of the suspension period in UE 170 and before the Commission disallowed its tax expenses. The Company does not suffer substantial harm merely because it did not obtain as large of a rate increase as it originally requested.

Approval of PacifiCorp’s deferred accounting request would fundamentally alter the manner in which utilities and ratepayers challenge Commission rate orders. If parties are permitted to defer costs associated with rate case issues they lose, then all contested revenue requirement adjustments may become subject to an

automatic deferred accounting request. The Commission should not allow deferral requests to become a pro forma aspect of all challenges to Commission rate case decisions.

2. PacifiCorp's Application Is a Collateral Attack on Order No. 05-1050 That Is Inconsistent with the Statutory Process for Challenging Commission Orders

PacifiCorp is seeking to utilize the deferred accounting statute to challenge Order No. 05-1050 outside of the established statutory process for seeking to stay the full and complete effect of a Commission decision. If PacifiCorp wishes not to comply with Order No. 05-1050 and stay any potential impacts associated with such non-compliance, the Company should make its request consistent with the statutory procedures, instead of utilizing the deferred accounting statute in a manner for which it was never intended.

A request for rehearing or reconsideration does not excuse non-compliance with the order, or stay or postpone the effect of the Commission order, unless the Commission issues a special order. ORS § 756.561(2). Similarly, an appeal of a Commission order does not suspend or stay the order's effect. ORS § 756.590.^{1/} To stay or suspend the effect of a Commission order, an appellant must post a bond or other security, or satisfy other conditions the court may impose. Id. These statutory procedures for challenging a Commission order do not contemplate that a utility can escape the practical effects of compliance by seeking a deferred account.

^{1/} In Senate Bill ("SB") 489, the Legislature repealed ORS § 756.590 and replaced it with ORS § 756.610. SB 489 will not be effective until January 1, 2006. ORS § 171.022. The new ORS § 756.610 also requires that an appellant must comply with a Commission order, unless the appellant seeks a stay and posts a bond. SB 489, 73rd Or. Leg. Assembly, Reg. Sess. (Or. 2005).

The Commission should reject the Application as an illegal attempt to distort the deferred accounting statute and circumvent the statutorily prescribed methods for staying the practical impact of a Commission order. If PacifiCorp wishes to avoid compliance with Order No. 05-1050, then the Company should follow the established statutory standards for challenging a Commission order. For example, under an appeal of Order No. 05-1050 PacifiCorp could seek a stay of the order's effect and would be required to post an appropriate bond in favor of the Commission and ratepayers.

IV. CONCLUSION

The Commission should deny PacifiCorp's request to defer tax expenses that the Commission removed from rates in Order No. 05-1050. Deferral of disallowed costs during the pendency of a reconsideration or rehearing request would violate the specific and narrow grounds upon which the Commission is authorized to grant deferrals under ORS § 757.259(2). Similarly, PacifiCorp's Application should be rejected because it is inconsistent with the Commission's requirement that the triggering event that warrants a deferral must be significant and unforeseen.

Finally, the Commission should deny PacifiCorp's Application because it is an attempt to postpone the practical impact of Order No. 05-1050 without complying with the established statutory procedures. The deferred accounting statute was not intended to be used as a backdoor attempt to stay the effect of a Commission order. Approving PacifiCorp's Application would open a floodgate of requests for

reconsideration and deferral of costs every time the Commission issues an order in a contested rate proceeding.

Dated this 21st day of November, 2005.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Irion Sanger

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Of Attorneys for Industrial Customers
of Northwest Utilities

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the Industrial Customers of Northwest Utilities' Response to PacifiCorp's Application for a Deferred Accounting Order Regarding Certain Tax Expenses upon the parties on the service list by causing the same to be mailed, postage-prepaid, through the U.S. Mail.

Dated at Portland, Oregon, this 21st day of November, 2005.

/s/ Christian Griffen
Christian W. Griffen

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