

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 219

In the Matter of)	
)	
PACIFICORP, dba PACIFIC POWER)	REPLY BRIEF OF
Application to Implement the Provisions of)	THE CITIZENS' UTILITY BOARD
Senate Bill 76.)	OF OREGON
)	

I. INTRODUCTION

In CUB's Opening Brief CUB wrote:

It is not surprising that in the momentum of the moment the Company has, in regard to certain . . . issues in this docket, slightly over-reached. CUB understands PacifiCorp's urgency to wrap up as many of the details in this matter as soon as possible so as not to leave loose ends to be later tripped over.¹

CUB was referring to PacifiCorp's request for the Commission to waive its jurisdiction in regard to the land transfer statute and also PacifiCorp's request that the Commission delete the "subject to refund" language from Schedule 199. Now CUB finds that it also needs to apply this cautionary note to the Standard of Review under which the Commission should address the Surcharge issue. This is disappointing. Notwithstanding this additional overreaching on the part of the Company, CUB still writes in support of the Commission finding that the proposed surcharges result in rates that are fair, just and reasonable for PacifiCorp's residential customers.

¹ CUB's Opening Brief at 18.

In regard to the other issues CUB remains firm in its recommendation that the Commission issue an order as follows:

- Adopting the rate spread proposed by the Company and not that proposed by ICNU.
- Denying PacifiCorp's request that it disclaim jurisdiction under ORS 757.480 or in the alternative make a ruling based on contingencies; and
- Denying its request that the "subject to refund" language be deleted from schedule 199.

As for the issue raised by ICNU in relation to Governor Schwarzenegger's June 29 Press Release, and related to California Prop 18, CUB respectfully requests that if asked the Commission not take Judicial Notice of this document (for the reasons set forth in CUB's Opening Brief) but that if the Commission does take Judicial Notice of that pronouncement that the Commission find that the Governor of California's actions have no bearing on this case or the Commission's ability to rule on the prudence of the surcharges at issue in this matter. CUB respectfully requests that the Commission deny ICNU's request to change the surcharge collection schedule.

II. ORS 757.210 REQUIRES A PRUDENCE REVIEW - APPLYING A PRUDENCE REVIEW PURSUANT TO ORS 757.210 THE SURCHARGES PROPOSED FOR FUNDING COSTS OF REMOVING THE DAMS RESULT IN RATES AND TARIFFS THAT ARE FAIR, JUST AND REASONABLE.

PacifiCorp in its Opening Brief states:

[T]he statutory language of SB 76 implies that: (1) the Commission may review analysis of the relative costs, benefits and risks of removal and relicensing to determine whether the surcharges produce fair, just, and reasonable rates; and (2) the Commission's review of the KHSAs is limited to a determination of whether the surcharges produce fair, just, and reasonable

rates. That is, if the Commission finds that the surcharges meet the standard of SB 76, the Commission may not decline to approve them.²

According to PacifiCorp the Commission cannot apply the standard prudence review, applied under ORS 757.210, to this docket because in PacifiCorp's view SB 76 limits the situations to which it can be applied and the Commission is not allowed to find that something meeting the standards of SB 76 is not prudent. CUB strongly disputes this analysis.

CUB fought hard to ensure that SB 76 included a standard ORS 757.210 prudence review to determine whether the surcharges proposed therein were fair, just and reasonable. And that is what the statute does provide – “the Commission shall conduct a hearing under ORS 757.210 on the surcharges imposed under this section, and shall enter an order setting forth findings and conclusions as to whether the imposition of surcharges . . . results in rates that are fair , just and reasonable.”^{3, 4} Any other reading of the statute renders a prudence review meaningless and CUB did not fight for, or agree to, a

² PacifiCorp's Opening Brief on Surcharge Issues at 14-15.

³ ORS 757.736(4).

⁴ See, for example, UE 196, Order No. 10-051 at 5-6 discussing the prudency review applied under ORS 757.210 when it relates to deferrals; UM 995 , Order No. 02-469 wherein the Commission stated:

As with any rate increase, PacifiCorp here bears the burden to show that the proposed rate change is just and reasonable. ORS 757.210. In a prudence review, the Commission examines the objective reasonableness of a company's actions measured at the time the company acted: “Prudence is determined by the reasonableness of the actions ‘based on information that was available (or could reasonably have been available) at the time.’” *In re PGE.*, UE 102, Order No. 99-033 at 36-37.5 In applying this standard, the Commission does not focus on the outcome of the utility's decision, as the following passage from *In re Transition Costs*, UM 834, Order No. 98-353 at 9 shows:

[When utilities mitigate transition costs,] they must behave prudently, meaning that their decisions were reasonable, based on information that was available (or could reasonably have been available) at the time. The Commission has applied this prudence standard for many years in deciding whether to include in rate base the full amount of a utility's investment in a new resource (as opposed to a standard that, say, focuses on the outcome of the utility's decisions).

meaningless provision. PacifiCorp is over-reaching in its desire to have a successful outcome in this docket.

There can be no dispute that the SB 76 (ORS 757.736(4)) calls for a hearing under ORS 757.210. The standard form of review under ORS 757.210 is a prudence review. Parties to the negotiations (especially PacifiCorp) were aware of that and no additional explanation was called for.

What seems to be confusing PacifiCorp is that SB 76 also calls for a prudence review under ORS 757.734(2) in determining the depreciation schedules. And again calls for a prudence review, under ORS 757.740, of any costs incurred by PacifiCorp from changes in operation of Klamath River dams before removal of the dams or that are incurred for replacement power after the dams are removed, "that are not otherwise recovered under ORS 757.734 and 757.736." The whole point to the cited provisions was to make clear that all of these things were subject to a prudence review by the Commission not just those under ORS 757.210. This was CUB's understanding of the proposed legislation at the time of its drafting and is what CUB fought for and agreed to support. It is CUB's position that this is in fact the standard in place today.

According to the methodology, as outlined in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), legislative history review entails three sequential levels of analysis to determine the legislature's intent:

First, the court examines the text and context of the statute. *Id.* at 610-11. If the legislature's intent is obvious from that first level of analysis, "further inquiry is unnecessary." *Id.* at 611.

Second, "If, but only if," the legislature's intent is not obvious from the text and context inquiry, "the court will then move to the second level, which is to consider legislative history[.]" *Id.* at 611.

Third, if the legislature's intent remains unclear after examining legislative history, "the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id.* at 612.

Thus the statutory analysis provides that on the first level one must look to the text and the context of the statute and if there is no ambiguity one looks no further for its meaning.

CUB would argue that there is in fact no ambiguity in the text and context of this statute and that its intent is clear. The context is provision for statutory review by the OPUC of rate increases being proposed by PacifiCorp for its customers related to a new fangled project.⁵ Clearly prudent use of the funds is for the Commission to determine at all times.

CUB does not feel that it is necessary to delve further into legislative intent and has frankly not had the resources this week to do so but were it to proceed CUB has no doubt as to what the legislative intent would demonstrate – that the Commission is tasked with undertaking a standard no holds barred prudency review.⁶

⁵ See preamble to SB 76 “Whereas the public interest requires that the Public Utility Commission hold a hearing to determine whether the imposition of surcharges under the terms of the final agreement results in rates that are fair, just and reasonable” Then see ORS 757.736 (9) which provides that if later the Commission determines that excess funds have been collected it must order a refund or otherwise use the funds for the benefit of the customer or adjust future surcharges . And see ORS 757.736(10) which provides that if a dam will not be removed the Commission shall direct PacifiCorp to terminate collection of all or part of the surcharge. Apply the excess to relicensing and refund any additional excess to customers.

⁶ CUB notes that *PGE v. BOLI*, *Id.* has been amended by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (Or., 2009) as follows:

The first step remains an examination of text and context. But, contrary to this court's pronouncement in *PGE*, we no longer will require an ambiguity in the text of a statute as a necessary predicate to the second step -- consideration of pertinent legislative history that a party may proffer. Instead, a party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis. However, the extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine.

The third, and final step, of the interpretative methodology is unchanged. If the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty.

The Company argues that the Commission does not need to resolve this issue since CUB has stated its belief that the surcharges result in rates that are fair, just and reasonable. Again CUB begs to differ. The statute is meaningless unless the correct standard of review is applied. CUB respectfully requests the Commission to find that the correct form of review related to the surcharges is a prudence review under ORS 757.210 and then to find that under that standard of review the surcharges result in rates that are fair, just and reasonable.

III. STAFF’S PROPOSED PERIODIC ADJUSTMENT TO THE SURCHARGE RATE

Staff has proposed periodic adjustment to the surcharge rate. That proposal includes periodic adjustments to the surcharge rate,

taking into consideration actual interest earned and changes in load that may affect the rate of surcharge collection and the likelihood of obtaining a total of surcharge collected plus interest earned of approximately \$172 million by December 31, 2019. More specifically, Staff recommends that the Company file updated surcharge rates, using its most recent forecast of future loads, the history of interest earned, and other transactions impacting actual and projected trust account balances, concurrent with its annual Transition Adjustment Mechanism (“TAM”).⁷

CUB supports this proposal.

With regard to this changed methodology, we clarify that a party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it. Legislative history may be used to confirm seemingly plain meaning and even to illuminate it; a party also may use legislative history to attempt to convince a court that superficially clear language actually is not so plain at all -- that is, that there is a kind of latent ambiguity in the statute. For those or similar purposes, whether the court will conclude that the *particular* legislative history on which a party relies is of assistance in determining legislative intent will depend on the substance and probative quality of the legislative history itself.

We emphasize again that ORS 174.020 obligates the court to consider proffered legislative history only for whatever it is worth-- and what it is worth is for the court to decide. When the text of a statute is truly capable of only one meaning, no weight can be given to legislative history that suggests -- or even confirms -- that legislators intended something different. (internal citations omitted)

⁷ Staff’s Opening Brief on Surcharge Issues at 4-5.

IV. CUB DOES NOT AGREE WITH ICNU’S CHALLENGE TO RATE SPREAD.

As pointed out in the Staff’s Opening Brief, “[t]he Company’s proposed rate spread follows the functional approach endorsed by the Commission in UM 827 by basing the surcharges on generation revenues since the associated costs are generation-related; *i.e.*, reflecting the cost of removal of a generation resource, the dams. Contrarily ICNU’s allocation proposal would incorporate distribution and transmission related costs and therefore does not appropriately apportion the generation identified costs of dam removal. The inclusion of distribution costs is of particular concern because they are relatively large (*i.e.*, second in magnitude to generation costs) and are heavily attributed and allocated to the residential class. Under ICNU’s proposal residential customers would be allocated a larger share of the dam removal surcharges due to those customers’ relatively larger share of the distribution costs – even though the cost of dam removal is clearly generation-related and not distribution related.” The Company also points out that, “ICNU’s proposal to use the rate spread from the Company’s direct case in UE 217 ignores the fact that the costs at issue in a general rate case include distribution- and transmission –related costs, whereas in this case only generation costs are at issue. PPL/203, Kelly/8. Even more notable, it ignores the rate spread contained in the stipulation in UE 217 to which ICNU is a party.”

Based upon the above, and also on CUB’s Opening Brief arguments, CUB therefore respectfully requests that the Commission reaffirm the rate spread currently in place for the surcharge. CUB agrees with the Company that spreading the cost on generation revenues subject to the 2 percent cap by customer class is within the spirit of SB 76.

V. DELAYING THE SURCHARGE COLLECTION MAY ADVERSELY AFFECT RATEPAYER INTERESTS.

CUB writes to offer support to the arguments put forth in the Joint Brief of American Rivers *et al.* in regard to this issue. CUB agrees that delaying collection of the surcharge may adversely affect the rate payer interest. “Delay would produce greater customer costs in the long-run. Specifically, deferring the Klamath surcharge collection until months or years later reduces the total time period over which such a rate surcharge must be collected. Reducing the collection period between now and the date for facilities removal (2020) would increase the total monthly amount that must eventually be collected from each PacifiCorp ratepayer.”⁸ And, as noted later in the same section, “[d]elay would also reduce the amount of accrued interest in the Trust Accounts available to offset that increase. Finally, delay would almost certainly push the rate surcharge well above the 2% maximum increase cap contemplated in SB 76 to help prevent rate shock. ORS 757.736(3).”

CUB respectfully requests that the Commission deny ICNU’s request to change the surcharge collection schedule.

VI. CUB DOES NOT SUPPORT PACIFICORP’S REQUEST FOR A DISCLAIMER OF JURISDICTION OR ITS PROPOSED ALTERNATIVE.

PacifiCorp’s request for a disclaimer of jurisdiction is inappropriate and not legally justifiable. As noted in the Opening Brief of ICNU, Oregon law requires utilities to obtain Commission approval before transferring any part of property necessary or useful in the performance of its duties to the public that exceeds \$100,000. ORS 757.480.⁹ SB

⁸ Joint Opening Brief on Surcharge Issues at 7.

⁹ Opening Brief of ICNU at 15

76 does not preempt this requirement. For all of the reasons set forth in CUB’s Opening Brief CUB respectfully requests that the Commission not disclaim its jurisdiction in regard to the land transfer.

And, as set forth in detail in the Opening Brief of ICNU, “PacifiCorps’ alternative request for conditional approval does not meet the requirements of the property transfer statute or the Commission’s rules. The Commission’s rules implementing the property transfer statute require a utility to provide, *inter alia*, descriptions of the facilities to be transferred, the costs of the facilities, copies of all documents (including the sales contracts), and information regarding the person or entity to whom the assets are being transferred to. OAR 860-027-0025. The rules contemplate that a utility will provide all the details regarding a specific and actual transaction.”¹⁰ PacifiCorp cannot meet these standards at this time even if one takes into consideration the “conditions” being proposed by PacifiCorp.

PacifiCorp argues that it is obligated under the KHSA to transfer the dams if the conditions precedent are met and that this should mean that there is no basis to withhold approval now of the transfer of the dams.¹¹ PacifiCorp is wrong. The whole point to conditions precedent is that there is not a current basis for something to happen. Right now there is no current basis for making an early determination that it is in the public interest to approve the land transfer – the time simply is not ripe. PacifiCorp also argues that waiting to approve the land transfer until later would be inconsistent with SB 76. This is not true. SB 76 has nothing to do with land transfers – the land transfer simply is

¹⁰ *Id.*

¹¹ PacifiCorp’s Opening Brief on Surcharge issues at 26.

not mentioned not even in the preamble.¹² The purpose of SB 76 was not to effect, or affect, the land transfer it was to establish surcharges and a means to review those surcharges to see if they were in the public interest. Contrary to what PacifiCorp advocates, there is no “record” upon which to resolve the property transfer issue at this time.¹³

For all the reasons set forth in CUB’s Opening Brief, and for the reasons set forth above, CUB respectfully suggests that the time is not ripe for a decision on PacifiCorp’s alternative proposal and that the Commission should require PacifiCorp to file again, on this issue, at a later date. PacifiCorp’s statement that “[r]esolving the property transfer issue now . . . avoids a number of difficult and contentious issues which could be raised in a future proceeding, *including the proper standard and scope of review, the allowable evidence, federal and state preemption, and the res judicata or collateral estoppel impact of the Commission’s decision in this proceeding*”¹⁴ serves only to underscore that this is not the time or the proceeding in which this determination should be made.

VII. CUB DOES NOT SUPPORT PACIFICORP’S REQUEST TO MODIFY THE LANGUAGE IN SCHEDULE 199.

As noted in the Opening Brief of ICNU, “regardless of whether there is a “high” or a “low” likelihood of refunds, SB 76 requires the Commission to retain the ability to issue refunds, and the best and most clear way to guarantee that refunds can be provided is to ensure that the Klamath surcharges remain subject to refund.” CUB believes the

¹² Though a preamble is rarely used, a drafter may include a preamble in a bill draft following the title and preceding the enacting clause. A preamble does not become part of the law, but is a preliminary statement of the reasons for the enactment of the law. A preamble cannot supply a provision not appearing in the text of the bill and will not be considered in ascertaining the meaning of the bill unless the text of the bill is ambiguous. *Sunshine Dairy v. Peterson*, 183 Or. 305, 193 P.2d 543 (1948). Oregon Legislative Counsel Bill Drafting Manual, <http://www.lc.state.or.us/pdfs/BillDraftingManual/dmchp5.pdf> at section 2.

¹³ PacifiCorp’s Opening Brief on Surcharge Issues at 26 lines 22-23.

¹⁴ PacifiCorp’s Opening Brief on Surcharge Issues at 26 lines 22-26 (emphasis added).

language in the tariff should mirror the statutory language. The language proposed by Staff's counsel in Staff's Opening Brief on Surcharge Issues is acceptable to CUB. "If the rates resulting from these surcharges are determined [to] not be fair, just and reasonable the surcharges shall be refunded."¹⁵

VIII. CONCLUSION.

CUB continues to believe, based upon what was known to PacifiCorp at each step along the way, that the decisions it has made to date have been prudent. Given the prudence of the Company's actions CUB therefore finds, and encourages the Commission to find, that the proposed surcharges result in rates that are fair, just and reasonable for PacifiCorp's residential customers.

In regard to the other issues CUB remains firm in recommending that the Commission issue an order as follows:

- Adopting the rate spread proposed by the Company and not that proposed by ICNU.
- Denying PacifiCorp's request that it disclaim jurisdiction under ORS 757.480 or in the alternative make a ruling based on contingencies; and
- Denying its request that the "subject to refund" language be deleted from schedule 199;
- Finding that the Governor of California's actions have no bearing on this case, or the Commission's ability to rule on the prudence of the surcharges

¹⁵ Staff's Opening Brief on Surcharges issues at 6.

at issue in this matter, and denying ICNU's request to change the surcharge collection schedule.

Dated: August 18, 2010

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'G. C. M.', written in a cursive style.

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UE 219 – CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of August, 2010, I served the foregoing **REPLY BRIEF OF THE CITIZENS' UTILITY BOARD OF OREGON** in docket UE 219 upon each party listed in the UE 219 OPUC Service List by email and, where paper service is not waived, by U.S. mail, postage prepaid, and upon the Commission by email and by sending an original and five copies by U.S. mail, postage prepaid, to the Commission's Salem offices.

(W denotes waiver of paper service)

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