

BEFORE THE
PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of PACIFICORP) UE 307
PacifiCorp 2017 Transition Adjustment)
Mechanism)
_____)

NOBLE AMERICAS ENERGY SOLUTIONS LLC'S CROSS-ANSWERING BRIEF

OCTOBER 5, 2016

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I. INTRODUCTION AND SUMMARY

Noble Americas Energy Solutions LLC (“Noble Solutions”) hereby files with the Public Utility Commission of Oregon (“OPUC” or the “Commission”) its cross-answering legal brief in this proceeding. Noble Solutions’ response brief provided detailed background and argument in support of Noble Solutions’ two recommendations: (1) the OPUC should require PacifiCorp to include a renewable energy certificate (“REC”) credit in the transition adjustment calculation for the one-year, three-year, and five-year programs; and (2) the OPUC and should require PacifiCorp to properly account for the effect of accumulated depreciation in the consumer opt-out charge for the five-year program. Noble Solutions stands by its arguments without repeating them here, and files this cross-answering brief in response to the OPUC Staff’s (“Staff”) legal briefing on the direct access issues raised by Noble Solutions.

Instead of actually addressing the record and Noble Solutions’ arguments, Staff’s response brief argues that the OPUC should simply rely upon the order issued in last year’s transition adjustment mechanism (“TAM”) proceeding as a basis to reject Noble Solutions’ arguments. According to the section of Staff’s response brief addressing direct access, the OPUC need not consider the changed circumstances and arguments in this proceeding on the direct access issues. However, Staff contradicts itself by making the exact opposite argument in support of its own proposed adjustments to PacifiCorp’s net power costs – almost all of which the OPUC has addressed in recent TAM orders setting rates for prior rate periods. As Staff correctly notes in support of its own substantive arguments, the OPUC has a statutory duty to set rates on a prospective basis, must base its decision solely on the record before it, and is not bound by *stare decisis*. It is black letter law in Oregon and throughout the United States that

preclusion doctrines do not apply to rate-setting proceedings, which are quasi-legislative in nature. Moreover, the factual circumstances and regulatory landscape have changed in ways to warrant revisiting the issues raised by Noble Solutions. The OPUC should therefore disregard Staff's incorrect argument that last year's TAM order resolves the direct access issues this year.

II. ARGUMENT

There is no serious dispute that the OPUC should address the record and arguments before it in each case. Yet Staff asserts that with regard to the direct access issues (and no other issues) the OPUC should apply a special rule where it simply defers to the order from last year's TAM. *See Staff's Response Br.* at 3 (arguing the OPUC should reject Noble Solutions' arguments "for the reason they were decided by Commission Order No. 15-394 and the Order is still applicable to the present circumstances"); *id.* 49-50 (same). Noble Solutions respectfully disagrees with Staff on this point. The OPUC should address the record developed in this case on *all* issues because the law requires nothing less, particularly where the circumstances and record are not the same as those existing in last year's TAM.

A. The Commission Has an Ongoing Obligation to Address the Record in Each Proceeding to Set Just and Reasonable Rates.

As Noble Solutions explained in its response brief, the law imposes an ongoing obligation on the Commission to evaluate rates anew based upon the record developed in each rate case. *See Noble Solutions' Response Br.* at 26-27 (citing *American Can Co. v. Davis*, 28 Or App 207, 224, 559 P2d 898 (1977); Or Atty Gen Opin No 6454, 1992 WL 526799 at * 9 (June 8, 1992); Davis, *Administrative Law Text*, § 18.01, at 370-71 (3d ed. 1972)). No party can dispute this basic tenet of ratemaking, which is well established throughout the nation. For example, in *Pac. Nw. Bell Tel. Co. v. Sabin*, 21 Or App 200, 225- 28, 534 P2d 984 (1975), the court affirmed

the OPUC’s disallowance of costs of a utility’s contract with an affiliate even though the OPUC had previously approved the underlying affiliate contract. The court reasoned that “[e]ven when conditions remain the same, the administrative understanding of those conditions may change, and the agency must be free to act” *Id.* (internal quotation omitted).¹

Staff’s response brief correctly sets forth the applicable legal principle that allows a party to raise issues that have been addressed in some fashion in prior OPUC orders. *See Staff’s Response Br.* at 9. In response to PacifiCorp’s argument that the OPUC has already disposed of Staff’s adjustment to the costs of coal in prior TAM proceedings, Staff correctly points out the many flaws with any argument that a prior OPUC order forecloses resolution of any issues in this rate proceeding. As Staff explains: “ratemaking is inherently legislative in nature, meaning that the Commission has broad discretion to carry out ratemaking and other regulatory functions on a prospective basis,” *id.* (citing *Gearhart v. Public Util. Comm’n of Or.*, 255 Or App 58, 61, 299 P3d 533 (2013)); “the Commission must base its decisions solely on the record before it in any given proceeding,” *id.* (citing ORS 756.558); and “the Commission is not bound by *stare decisis*,” *id.* (citing ORS 756.568).

Staff itself raises several proposed adjustments to PacifiCorp’s net power costs that have been addressed by the OPUC in prior orders. *See Staff’s Response Br.* at 9 (proposing rates be based on costs of coal available from the Powder River Basin even though PacifiCorp argues the

¹ *See also Tagg Bros. & Moorhead v. United States*, 280 US 420, 445, 74 L Ed 524, 50 S Ct 220 (1930) (a “rate order is not *res judicata*”); *OXY USA, Inc. v. FERC*, 64 F3d 679, 69 (D.C. Cir. 1995) (“The fact that a rate was once found reasonable does not preclude a finding of unreasonableness in a subsequent proceeding” (internal quotation omitted)); *Tex. E. Transmission Corp. v. FERC*, 893 F2d 767, 774 (5th Cir. 1990) (“the doctrine of *res judicata* is simply not applicable to Commission rate proceedings” due to the “continuing obligation to ensure that . . . rates are just and reasonable”); *Hawaiian Tel. Co. v. Pub. Util. Comm’n*, 827 F2d 1264, 1274 (9th Cir. 1987) (“An issue once decided [in rate proceedings] may create inequities in the continuing administration of the law if applied by estoppel to later years.”).

OPUC approved its coal supply arrangements with its captive Bridger mine in the 2014 TAM); *id.* at 26 (proposing different treatment of PacifiCorp’s “system balancing transactions” from that adopted in the OPUC’s 2016 TAM order that was only “based on the evidence in the record in that proceeding”); *id.* at 54 (challenging PacifiCorp’s reliance on avian curtailment to raise rates related to its wind farms even though “this issue was addressed in PacifiCorp’s 2016 TAM”).

Thus, Staff correctly acknowledges the OPUC must address the record and circumstances in this proceeding even if a similar issue were addressed in a prior OPUC order. Yet Staff asks the OPUC to rely on last year’s TAM order as the sole basis to disregard Noble Solutions’ proposals. However, Noble Solutions has the same right as Staff and other parties to develop the record in an effort to advance the OPUC’s understanding of substantive issues underlying PacifiCorp’s proposed rates, even if those issues were addressed in prior orders based upon the record in past proceedings. Accordingly, Staff’s inconsistent argument should be rejected, and the Commission should address the substance of Noble Solutions’ evidence and arguments just the same as it should address other parties’ evidence and arguments.

B. Staff Is Incorrect to Argue Last Year’s TAM Order Resolves the REC Credit and Consumer Opt-Out Charge Issues this Year.

Implicitly acknowledging that last year’s order cannot preclude consideration of the record in this proceeding, Staff appears to argue that the circumstances have not changed from last year with regard to the direct access issues. *See Staff’s Response Br.* at 50 (arguing that “nothing of substance has changed from last year to the present proceeding”). But Staff’s assertion fails for at least two reasons.

First, as discussed above, the *circumstances do not have to change* in order for the OPUC to address the record developed in this proceeding. Staff implicitly acknowledges this because it

provides no explanation for how circumstances have changed since the OPUC last addressed several of the issues that Staff advocates for in this proceeding.

Second, the *circumstances have in fact changed*. With regard to the REC credit issue, the circumstances are totally different this year because PacifiCorp is now actively procuring RECs from third parties for purposes of complying with the newly enacted renewable portfolio standard in Senate Bill 1547. *See Noble Solutions' Response Br.* at 12-14. That is a material change of fact because PacifiCorp cannot credibly argue that freed-up RECs have no value at a time when PacifiCorp is actively purchasing RECs from third-parties for known values. The reasoning of last year's order simply does not address the arguments or evidence put forth by Noble Solutions in this proceeding in support of a REC credit. *See id.* The circumstances are also somewhat different with regard to the consumer opt-out charge issue. As explained in Noble Solutions' response brief, unlike last year, PacifiCorp acknowledges this year that its consumer opt-out charge fails to close the pool of fixed generation assets allocated to participants in the five-year program for a 10 full years. *See id.* at 24-26. Furthermore, Noble Solutions was provided with an additional round of testimony this year, which allowed it to more fully complete the record with expert testimony responding to PacifiCorp's misplaced arguments on these technically complex rate issues. *See Noble Solutions/200.*

In short, Staff's response brief asks the OPUC to summarily reject Noble Solutions' arguments, but black letter law compels a different approach. Therefore, the OPUC should disregard Staff's assertion that last year's TAM order resolves the issues raised by Noble Solutions in this proceeding.

III. CONCLUSION

For the reasons asserted herein and in Noble Solutions' prior filings, the OPUC should require PacifiCorp to include a REC credit in the transition adjustment calculation for the one-year, three-year, and five-year programs, and the OPUC and should require PacifiCorp to properly account for the effect of accumulated depreciation in the consumer opt-out charge for the five-year program.

DATED this 5th day of October, 2016.

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