

BEFORE THE OREGON PUBLIC UTILITY COMMISSION

Comments Submitted by Public Utility District No. 1 of Snohomish County,  
Washington

Docket No. UM926

Wednesday, April 21, 2004

Public Utility District No. 1 of Snohomish County (“Snohomish”) submits the following comments in the above-referenced matter.

On March 16, 2004, the Oregon Public Utilities Commission (“OPUC”) heard public comment on the staff recommendation to direct PacifiCorp to (a) terminate its deferral of the “Reduction of Risk Discount” and (b) demand that the Bonneville Power Administration (BPA) commence payments to PacifiCorp in October of 2004.

On March 24, 2004, OPUC invited interested parties to submit further comments on the staff recommendation. OPUC further requested that comments include a discussion of the Commission’s statutory obligations to customers of investor-owned utilities (IOU’s), such as PacifiCorp.

Snohomish incorporates its prior comments made on March 16, 2004, and further supports the comments of other interested parties opposing the staff recommendation. Snohomish also offers the following further observations.

OPUC is obligated to protect all utility customers in the State of Oregon. ORS 756.040(1). OPUC’s decision should be made in the public interest and should not advance the rights of some consumers over others.

The staff recommendation is contrary to the public interest. First, ordering PacifiCorp to seek the “Litigation Penalty” will unfairly impact almost 70% of Oregon’s utility customers, including PGE, as the cost of the “Litigation Penalty” is passed through to other Oregon consumers. This result is particularly problematic because PacifiCorp customers already enjoy some of the lowest rates in Oregon and there is no rational basis to provide further rate improvements for those customers at the expense of other customers who are already paying a higher rate. For the same reasons, the proposed action will adversely impact customers in other states and would have a substantial adverse impact on Snohomish and its retail customers.

Viewed from an overall prospective, the proposed action would harm more customers than it would help.

The public interest is also advanced and protected in having good public policy. The “Litigation Penalty” is not good public policy. The Everett Herald, a daily newspaper owned by the Washington Post Group, in an editorial dated November 9, 2003, said about the “Litigation Penalty”:

The PUD calls it a poison pill. Some see it as blackmail. Whatever you call it, it is a coercive tactic to stop the public utilities from exercising their right to challenge BPA’s actions . . . It’s appalling public policy that shouldn’t be allowed to succeed.

Finally, there are substantial Constitutional issues surrounding the disputed “Litigation Penalty.” In a letter of June, 2002, an attorney for PacifiCorp told the OPUC “The intent of this provision was to encourage the publicly-owned utilities and cooperatives to negotiate a settlement that would eliminate all the litigation that threatens PacifiCorp’s current subscription benefits.” In other words, the intent of the “Litigation Penalty” was to chill the rights of those parties who had challenged or who might challenge PacifiCorp’s subscription benefits by creating a \$200 million disincentive for parties to pursue their rights in the 9th Circuit Court of Appeals.

There are already legal challenges to the “Litigation Penalty” and there are likely to be more with good reason. The United States Supreme Court has recognized that the right of access to the courts is basic to our system of government and is one of the fundamental rights protected by the First Amendment of the Constitution. Unconstitutional restrictions may arise from the deterrent or chilling effect of governmental action on a party’s right to seek redress from the courts. See e.g., *Laird v. Tatum*, 408 U.S. 1, 11 (1972).

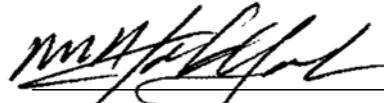
It is beyond serious dispute that the Litigation Penalty placed in the buy down contracts of both PacifiCorp and Puget Sound Energy was intended to chill the rights of parties who legitimately disagreed with the subscription benefits provided to them. Snohomish respectfully submits that OPUC should have no part in attempting to enforce a provision that violates the First Amendment rights of numerous 9th Circuit litigants.

For the foregoing reasons, Snohomish respectfully submits that OPUC decline the staff recommendation. Indeed, OPUC should go further and Order PacificCorp not to take action seeking enforcement of the “Litigation Penalty.”

Dated: April 20, 2004

PUBLIC UTILITY DISTRICT NO. 1  
OF SNOHOMISH COUNTY  
Michael J. Gianunzio  
General Counsel

LAW OFFICES OF MICHAEL A.  
GOLDFARB

A handwritten signature in black ink, appearing to read "Michael A. Goldfarb", written over a horizontal line.

Michael A. Goldfarb  
Attorneys for Public Utility District No. 1  
of Snohomish County