BEFORE THE OREGON PUBLIC UTILITY COMMISSION

Docket No. UM 926

April 21, 2004

Comments of the Canby Utility Board
Canby, Oregon

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I. INTRODUCTION

On March 24, 2004, the Commission invited interested parties to submit comments on the staff's proposal to direct PacifiCorp to terminate the deferral of the "reduction of risk discount" and demand that the Bonneville Power Administration ("BPA") start making cash payments to PacifiCorp on October 1, 2004.

The Commission also asked parties proposing alternatives to include a discussion of the Commission's statutory obligations to the residential and small-farm customers of investor-owned utilities ("IOUs").

The Canby Utility Board ("Canby") hereby submits the following comments in response to the Commission's invitation.[1]

In these comments, we refer to the "reduction of risk discount" as a "Litigation Penalty" because that term more accurately describes the particular arrangement at issue here. The Litigation Penalty is an unlawful attempt by BPA and PacifiCorp to coerce public power utilities from pursuing legal claims in the U.S. Court of Appeals for the Ninth Circuit.[2]

II. SUMMARY

A. The Commission has a legal obligation to protect the public interest and promote the public welfare. This obligation applies to all electric customers in Oregon, not just those in PacifiCorp's service territory. In the absence of a specific need or showing, the Commission should not take action which confers a benefit on one group of customers at the expense of another.

B. The staff recommendation will only exacerbate rate disparities in Oregon. PacifiCorp's rates are already among the lowest in the state. Adopting the staff recommendation would favor PacifiCorp's residential and small-farm

[1] Canby is an independent governmental subdivision of the City of Canby. It is not regulated by the Commission, except for issues relating to territory allocations and safety.

[2] The term "public power" refers to municipal electric utilities, People's Utility Districts (Oregon), Public Utility Districts (Washington), and electric cooperatives that buy power from BPA pursuant to the Bonneville Project Act of 1937 and the Northwest Power Act of 1980.

customers at the expense of everyone else. That means approximately 69% of the ratepayers in Oregon will see higher power bills, while only PacifiCorp's customers (the remaining 31%) will benefit.

C. The Litigation Penalty is unconstitutional. It interferes with and "chills" public power's First Amendment rights to seek redress of grievances in federal court.

The Commission should therefore direct PacifiCorp *not* to seek any enforcement of the Litigation Penalty.

III. PROCEDURAL HISTORY

By instituting the Litigation Penalty, BPA and PacifiCorp have attempted to interfere with the First Amendment rights of public power utilities to pursue access to the courts.[3]

October 2000: BPA signed controversial new contracts with the IOUs that terminated the Residential Exchange Program ("REP") and required BPA to provide a combination of power and financial benefits (cash) to the companies in "settlement" (the "Subscription Contracts"). The Commission approved PacifiCorp's agreement in Order 00-678.

December 2000-January 2001: Public power utilities and associations (whose members include Oregon PUDs, municipalities and cooperatives) filed petitions challenging the BPA-IOU contracts in the Ninth Circuit. Under the Northwest Power Act, those utilities have a statutory right to seek judicial review of BPA actions.

Winter 2000: BPA found itself short 3,300 average megawatts ("aMW") of power, roughly 35% of its load.

April 2001: BPA asked its customers to reduce load. BPA negotiated with the IOUs on a price to "buy back" the power component of the Subscription Contracts.

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[3] BPA signed a similar agreement with Puget. Because Puget is under the jurisdiction of the Washington Utilities and Transportation Commission ("WUTC"), the chronology focuses on the activities of BPA and PacifiCorp.

April-May 2001: BPA paid the IOUs to "buy back" their loads for five years. With PacifiCorp and Puget, however, BPA negotiated a special provision. BPA agreed to pay $45.49 per megawatt hour ("MWH") to the two companies, *unless* public power utilities dismissed their Ninth Circuit appeals by December 1, 2001, *and* agreed not to challenge certain BPA rate case decisions. If that happened, BPA would pay PacifiCorp and Puget only $38 per MWH -- a difference of $7.49 per MWH. To avoid paying this Litigation Penalty, however, public power utilities must forego their Ninth Circuit petitions.

May 4, 2001: PacifiCorp told the Commission staff it had reached agreement with BPA on the buy-back price and described the Litigation Penalty.

May 15, 2001: PacifiCorp, Portland General Electric ("PGE"), the Citizens Utility Board ("CUB") and Commission staff signed a stipulation that, among things, called for the Commission to direct PacifiCorp to execute the "buy back" agreement with BPA. *The stipulation did not mention the Litigation Penalty*.

May 22, 2001: The Commissioners signed Order 01-427, implementing the May 15, 2001 stipulation, without placing the Order on the public meeting agenda and with no public discussion. The BPA-PacifiCorp contract, which contains the Litigation Penalty, was sealed under a protective order.[4]

May 23, 2001: BPA and PacifiCorp signed the buy-back agreement.[5] Over the term of the contract, BPA would pay an extra $81 million to PacifiCorp as a result of the Litigation Penalty, *unless* PacifiCorp has entered in a settlement agreement with public power utilities by December 1, 2001, that waives and dismisses Ninth Circuit legal challenges to BPA decisions. See **Attachment A** for the BPA-PacifiCorp contract language.

[4] The contract remains under protective order with the Commission to this day.

[5] Section 4(b) of the Financial Settlement Agreement entered into between BPA and PacifiCorp on May 23, 2001. BPA-PacifiCorp contract no. 01PB-10854.

The BPA decisions that public power must agree not to challenge are:

1. The 2000 Settlement Agreement ("Subscription Contract");
2. The 2001 buy-back agreement ("this Agreement");
3. BPA's 2000 ROD for the Residential Purchase and Sale Agreement;
4. BPA's 1998 RODs for the Power Subscription Strategy and the Residential Exchange Program Settlement; and
5. The application of the 7(b)(2) surcharge to BPA's WP-02 power rates.

May 23, 2001: BPA issued a Record of Decision ("ROD") on the PacifiCorp contract but did not publish it in the Federal Register, or disseminate it to others outside the agency.

June 7, 2001: BPA signed a buy-back agreement with Puget Sound Energy that also contained a Litigation Penalty.[6] Over the term of the contract, BPA would pay an extra $119 million to Puget. In total, BPA would pay $200 million to PacifiCorp and Puget if public power persisted in seeking judicial review of BPA actions.

June 7, 2001: BPA published a ROD on the Puget agreement but did not disseminate it.

December 1, 2001: The deadline passed for settling the Ninth Circuit challenges to the BPA-IOU contracts and other BPA actions.

June 11, 2002: PacifiCorp lawyer Marcus Wood admitted the intent of the Litigation Penalty in a letter to the Commission: "*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*."

June 2002: BPA signed "deferral" agreements with PacifiCorp and Puget. The agreements allowed the companies to defer collecting the Litigation Penalty pending litigation settlement negotiations with certain public power groups. The Commission approved the "deferral" agreements in Order 02-414.

[6] BPA-Puget contract no. 01PB-10885.

January 7, 2003: PacifiCorp lawyer Marcus Wood wrote the Commission again and repeated his statement about the purpose of the Litigation Penalty: "*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*."

October 2003: BPA published a ROD on a proposed litigation settlement. The proposal called for public power to dismiss its the Ninth Circuit petitions and sign a covenant not to sue BPA over certain rate case decisions. In exchange, PacifiCorp and Puget agreed to waive their rights to collect the Litigation Penalty.

For the settlement to take effect, BPA and the IOUs demanded that *every* public power utility that filed a legal challenge in the Ninth Circuit petition must agree to dismiss it.

BPA's ROD warned: "Absent settlement, the $200 million [Litigation Penalty for PacifiCorp and Puget] would be included in and recovered through BPA's wholesale power rates."

November 2003: Canby went on record opposing the litigation settlement. Although Canby was not one of the "public litigants" (e.g., utilities that had filed Ninth Circuit petitions), Canby opposed the settlement in part because of BPA's "coercive use of the $200-million litigation penalty" to force utilities to agree to settlement terms.

January 22, 2004: BPA announced the proposed litigation settlement is dead. Only 30 of the 72 necessary public litigants signed the documents.

March 12, 2004: The Commission staff recommended that PacifiCorp terminate the "deferral" agreement and demand that BPA pay the entire Litigation Penalty to PacifiCorp, starting on October 1, 2004. The staff report stated: "there is no justification for continuing to defer the contractual monies due to PacifiCorp's residential and small farm customers."

IV. ANALYSIS

A. The Commission has a legal obligation to protect the public interest and promote the public welfare.

1. Title 57: utility regulation

The Commission is required to protect the "public interest" in discharging its responsibilities. The statute conferring general powers on the Commission states:

> "In addition to the powers and duties now or hereafter transferred to or vested in the Public Utility Commission, the commission shall represent the customers of any public utility or telecommunications utility *and the public generally* in all controversies respecting rates, valuations, service *and all matters of which the commission has jurisdiction*. In respect thereof the commission shall make use of the jurisdiction and powers of the office to protect such customers, *and the public generally*, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates." ORS § 756.040(1). (Emphasis added.)

In addition, ORS § 756.062 states that the laws administered by the Commission "shall be liberally construed in a manner consistent with the directives of ORS § 756.040(1) *to promote the public welfare*...".[7] (Emphasis added.)

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[7] Other parts of Title 57 also contain "public interest" mandates. When evaluating the benefits of proposed mergers, for example, the Commission has concluded that it is required to apply a public interest standard. ORS § 757.511(3). That means the applicant must show that the merger produces net benefits and, in addition, that it establishes "*a no harm standard as to the public at large*." See RE: Legal Standard for Approval of Mergers, Docket No. UM 1011, Order 01-778, at page 11. Emphasis added. (September 4, 2001).

See, also:
ORS § 757.140(2)(b) on the treatment of undepreciated utility investments;
ORS § 757.273 on pole attachments; and
ORS § 757.412 on exemptions from securities regulations;
ORS § 757.415(1)(e) on stock issuance; and
ORS § 757.495(3) on contracts between utilities and affiliated interests.

If approved, the staff recommendation would benefit the residential and small farm customers of PacifiCorp at the expense of everyone else in Oregon. That means approximately 69% of the ratepayers in the state will see higher power bills, while PacifiCorp's customers (the remaining 31%) will benefit.[8]

Every other utility customer of BPA in Oregon -- and that means every rural electric cooperative, municipal electric utility and People's Utility District, as well as Portland General Electric -- will pay more for BPA power if the Commission adopts the staff's recommendation.[9] The reason: BPA will pass on the cost of its Litigation Penalty to its other utility customers.

2. The rate disparities

The staff's recommendation occurs at a time when PacifiCorp already has some of the lowest rates in Oregon. In comments submitted to the Commission on March 16, 2004, the Public Power Council presented a chart showing residential rates of various public power and IOU utilities in the state. PacifiCorp's average rates (for 1,000 kWh) are 6.4 cents; PGE's are 7.78 cents; many other publics have residential rates in the range of 7 cents; and one rural utility, West Oregon Electric Cooperative, charges 10.86 cents.

Adopting the staff recommendation will exacerbate those rate disparities. That impact alone should deter the Commission from approving the staff recommendation.

3. Preserving the benefits of low-cost federal power

Under ORS § 757.663, the Commission can require PacifiCorp and other electric companies to enter into contracts with BPA. The purpose of this section is to "preserve the benefits of federal low-cost power for residential and small-farm consumers of electric utilities."

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[8] See, State of Oregon Energy Plan (2003-2005), page 16.

[9] PGE supplies 40% of Oregon's electric load. It continues to buy 258 aMW of power from BPA and did not sign a "buy-back" agreement in 2001. Thus, if BPA pays the Litigation Penalty to PacifiCorp and recovers those costs in wholesale power rates, PGE will pay more for BPA power. PGE's residential and small-farm customers will help underwrite the costs of PacifiCorp's Litigation Penalty.

Utility contracts with BPA "shall be subject to approval by the Commission. ORS § 757.663. Pursuant to that provision, the Commission opened this docket, UM 926. Enforcing the Litigation Penalty is contrary to that statutory requirement. Rather than enhancing and preserving the benefits of BPA power, the Litigation Penalty will actually raise retail rates for customers of Oregon utilities, other than those served by PacifiCorp.

4. The state's broad public power policy

Finally, the Commission is obligated to heed the provisions of ORS § 757.669, which contain a legislative policy regarding consumer-owned utilities (i.e., public power). The policy recognizes the need to "preserve and enhance the ability of consumer-owned utilities and their elected governing bodies to respond to their consumers' needs and desires." This section articulates a general legislative goal that is fundamentally at odds with a Litigation Penalty that punishes Oregon public power utilities if they seek redress of their grievances in federal court.

B. The Litigation Penalty is unconstitutional.

Under the Northwest Power Act, public power utilities have the right to appeal final BPA actions and decisions to the Ninth Circuit and have their day in court. 16 U.S.C. § 839f(e)(5). Furthermore, the Subscription Contracts that public power utilities signed with BPA in 2000 gave them the right to adjudicate certain claims in the Ninth Circuit.

The Litigation Penalty interferes with those rights by penalizing public power utilities for not dismissing the Ninth Circuit petitions and for not agreeing to forego additional appeals on BPA rate case decisions in the future.[10]

1. The Litigation Penalty violates the First Amendment

The Litigation Penalty implicates fundamental rights under the First Amendment to the United States Constitution. The First Amendment grants citizens the right to petition the government for a redress of grievances.

[10] In Canby's service territory (with 6,000 customers), BPA's $200-million Litigation Penalty would raise rates by about $525,000. For large utilities, the impact is measured in millions of dollars.

The right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights." United Mine Workers v. Illinois State Bar Association, 389 U.S. 217, 222 (1967)("United Mine Workers").

That right extends to all departments of the government, including courts. BE&K Construction v. N.L.R.B, 536 U.S. 516, 525 (2002)("BE&K"). California Motor Transport v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

Even unsuccessful lawsuits can advance First Amendment interests and allow the public airing of disputed facts. BE&K at 532, citing Bill Johnson's Restaurants, Inc. v. N.L.R.B., 461 U.S. 731, 743 (1983).

It is not necessary to show that the government has directly interfered with First Amendment rights in order to have a valid Constitutional claim. Laird v. Tatum, 408 U.S. 1, 11 (1972). "The First Amendment would be "a hollow promise if it left [the] government free to destroy or erode its guarantees by indirect restraints...". United Mine Workers at 222.

Unconstitutional restrictions may therefore arise from the deterrent or "chilling" effect of government action. O'Keefe v. Van Boening, 82 F.3d 322, 325 (9th Cir. 1996). Accord: Harrison v. Springdale Water and Sewer Com'n, 780 F. 2d 1422, 1427-28 (8th Cir. 1986).

Nor can the government take retaliatory actions against individuals because they elect to exercise their constitutional rights. Hyland v. Wonder, 117 F.3d 405, 410 (9th Cir. 1997), Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989).

In the case here, BPA and PacifiCorp expressly agreed to a Litigation Penalty that was intended to punish public power for filing litigation in the Ninth Circuit, and designed to create financial obstacles to the pursuit of additional litigation.

2. The Litigation Penalty is unenforceable

Courts have a long history of striking down contract provisions that interfere with the administration of justice or that discourage plaintiffs from pursuing their right to be heard. See, for example, Town of Newton v. Rumery, 480 U.S. 386, 392 (1987), and Davies v. Grossmont Union High School District, 930 F.2d 1390 (9th Cir. 1991), cert. denied, 501 U.S. 1252 (1991).

In Rumery, the issue was the surrender of a statutory right. In Davies, a constitutional right was at issue. In recent years, courts have relied upon the "Rumery/Davies" doctrine to invalidate contract provisions found to be contrary to public policy. See, for example, U.S. v. Northrop Corp., 59 F.3d 953, 969 (9th Cir. 1995).

V. THE COMMISSION'S OBLIGATIONS

The Commission has an obligation under ORS § 756.040(1) to consider the public interest, and it has a duty under ORS § 757.663 to evaluate thoroughly the contracts entered into by BPA and PacifiCorp. The plenary authority under the first statute and the specific authority under the second *require* the Commission to consider the retail rate impacts, the Constitutional infirmities, and the public policy considerations behind the Litigation Penalty.

VI. CONCLUSION

The Commission has an affirmative legal obligation under Oregon law to reject the staff recommendation. The Commission cannot satisfy its public interest mandate if it allows BPA to send more cash to PacifiCorp for its residential and small-farm consumers at the expense of every other customer in the state. PacifiCorp's Litigation Penalty will raise the electric rates of 69% of Oregonians who do not live or work in PacifiCorp's territory.

Furthermore, the Commission is obligated to ensure that PacifiCorp does not use its BPA contract to infringe upon, or chill the exercise of, public power's Constitutional, statutory or contractual rights to seek redress in the courts.

The Commission should therefore direct PacifiCorp not to collect the Litigation Penalty.