

BEFORE THE OREGON PUBLIC UTILITY COMMISSION

Docket No. UM 926

April 28, 2004

REPLY COMMENTS

Canby Utility Board

Canby, Oregon

Submitted By:

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CANBY'S REPLY COMMENTS

A. Comments in response to PacifiCorp

PacifiCorp's comments filed April 20, 2004 contain an "application" for "approval" of a draft long-term BPA contract that PacifiCorp filed in lieu of any substantive comments concerning the staff recommendation.

PacifiCorp's request for "approval" should be deferred until BPA publishes a Record of Decision ("ROD") on the proposed new contracts with the region's investor-owned utilities ("IOUs").¹

Although we have not completed our analysis of PacifiCorp's proposed new BPA contract, it appears to suffer from the same Constitutional and public policy infirmities as the earlier version. The reason is that PacifiCorp would still collect half of the Litigation Penalty (\$40 million, plus interest) starting on October 1, 2006. Furthermore, under the proposal PacifiCorp would be entitled to the full Litigation Penalty if at some later date, public power succeeded in challenging BPA's new contracts with the IOUs.

Finally, we note that PacifiCorp was careful in its comments *not to request* the triggering of the full Litigation Penalty now, as the Commission staff had previously recommended.

¹ BPA invited public comments on its latest contract settlement proposal until May 14, 2004, and said it would decide in early June whether to proceed. PacifiCorp, however, has requested that the Commission approve its proposed contract with BPA at the May 4, 2004 Commission meeting, *ten days before the BPA comment period ends, and a month before BPA publishes the ROD*. At present, the Commission's administrative record is incomplete. Commission decisions must be based on substantial evidence. ORS 756.598(1); Utility Reform Project v. P.U.C, 171 Or.App. 349, 16 P.3d 516 (2000); Market Transport v. Maudlin, 301 Or. 727, 725 P.2d 914 (1986).

Because PacifiCorp, the primary beneficiary of Litigation Penalty, has not requested a Commission Order requiring it to demand the full penalty from BPA at this time, and because BPA has yet to issue a ROD on the new contracts, the Commission should not issue any Order on May 4, 2004.

B. Comments in response to Portland General Electric

Portland General Electric also has been in private negotiations with BPA for a new long-term contract, and PGE has also submitted a new draft contract to the Commission for "approval."

But PGE failed to make any substantive comments on the staff recommendation other than to request that the Commission should trigger the full Litigation Penalty immediately. PGE without analysis or explanation said triggering the full penalty was a "necessary prerequisite" for the BPA contract process to proceed.

PGE's comments are therefore at odds with PacifiCorp, which, as noted above, did not request that the Commission adopt the staff recommendation.

C. Comments in response to the Citizens Utility Board

The Citizens Utility Board ("CUB") endorsed the staff recommendation based on a bare assertion that the Litigation Penalty is "a fair quid pro quo" and is "legal on its face." But CUB cited no legal authority in support of its claims.

In fact, the "quid pro quo" reference by CUB was a patent attempt to place barriers to public power's access to the courts in violation of its First Amendment rights. BPA and PacifiCorp simply cannot strike a bargain that forces public power to pay higher BPA rates if public power pursues litigation in the Ninth Circuit.

CUB's statement that the "Reduction of Risk Discount" (Litigation Penalty) is "legal on its face" hardly

substitutes for rigorous Constitutional analysis. Moreover, CUB's admission that the Litigation Penalty was "negotiated" underscores only that there was a deliberate effort to interfere with public power's access to the courts.

CONCLUSION

Canby agrees with and endorses the comments filed by other parties opposing the staff recommendation. No party submitting comments has provided any reasoned analysis supporting the staff recommendation. PacifiCorp, the presumed beneficiary, carefully skirted the issue and instead submitted a new draft BPA contract for consideration and approval.

PGE similarly used the comment period as a vehicle to seek Commission approval of a new BPA contract. Against this moving target, the Commission should not order PacifiCorp to seek enforcement of the full Litigation Penalty.

The Commission should defer any action on the newly-submitted draft BPA contracts until BPA's own process is complete and it has issued the final ROD.