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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UCB 5

INDUSTRIAL CUSTOMERS OF)
NORTHWEST UTILITIES (ICNU) and)
CITIZENS' UTILITY BOARD OF)
OREGON (CUB),)
Complainants,)
vs.)
PACIFICORP, dba PACIFIC POWER &)
LIGHT,)
Defendant.)

ORDER

DISPOSITION: COMPLAINT DENIED

INTRODUCTION

This matter has a long and complex procedural history. Early in 2001, PacifiCorp filed Schedule 94 to amortize its deferred power costs at the maximum rate then permitted under ORS 757.259, 3 percent of the company's annual gross revenues. The Commission docketed this filing as UE 121, and approved Schedule 94 with two conditions: (1) Schedule 94 was subject to a refund if a prudence determination of PacifiCorp's deferred power costs was not favorable; and (2) the amortization period was limited to one year.¹

The 2001 Legislative Assembly amended ORS 757.259 to increase the maximum amortization level from 3 to 6 percent of annual gross revenues.² Shortly after this statutory change became effective, PacifiCorp filed Revised Schedule 94, seeking to increase its amortization rate to 6 percent. The Commission docketed Revised Schedule 94 as UE 127.

At the Commission's October 22, 2001, public meeting, Staff recommended that Revised Schedule 94 be suspended under ORS 757.215. Staff reasoned that the suspension would allow the Commission an opportunity to evaluate and determine whether

¹ Order No. 01-186.

² OR Laws 2001, ch 733, §3(4) (HB 2630).

PacifiCorp's deferred power costs were prudently incurred in an investigation docketed as UM 995. Staff agreed with PacifiCorp that the results of UE 116, the company's recently completed rate case, could be used to satisfy the earnings review and cost of capital provisions of ORS 757.259. The Commission adopted Staff's recommendation and suspended the tariff.³ To allow additional time for the investigation, the Commission later suspended the tariff for an additional three months, pursuant to ORS 757.215.⁴

Early in 2002, the Commission granted PacifiCorp's request in docket UE 121 to permit it to continue amortizing its deferred power costs at the 3 percent level until the end of June 2002, when PacifiCorp presumed the UM 995 prudence review would be completed.⁵ In June 2002 PacifiCorp sought a second extension of the amortization period in UE 121. In advance of that extension request and in response to Staff, CUB, and ICNU, PacifiCorp filed a special earnings report covering the deferral period. Staff supported PacifiCorp's request for an extension of the amortization period. Staff noted that, based on its review of PacifiCorp's special earnings report, PacifiCorp's adjusted return on equity was slightly less than 4 percent, meaning the company could not absorb the deferred excess net power costs and achieve a reasonable return on equity.

At its June 18, 2002, public meeting, the Commission adopted Staff's recommendation and granted the extension.⁶ To ensure an adequate amount of time to issue a prudence determination in docket UM 995, the Commission extended the amortization period until August 31, 2002.

During this time period, the Commission, at PacifiCorp's request, consolidated UE 121 and UE 127. The Commission accepted PacifiCorp's reasoning that the dockets had similar issues and that consolidating them would save time and effort, for instance by allowing the Commission to take the June 2002 earnings review under consideration in UE 127. Because the UM 995 prudence decision was still pending, PacifiCorp agreed to extend the suspension period for Revised Schedule 94 beyond the statutory limit, until August 7, 2002.

On July 18, 2002, the Commission issued its order in docket UM 995, adopting a stipulation between PacifiCorp and Staff regarding the prudence of PacifiCorp's excess power costs.⁷ The effect of that order and other related decisions allowed PacifiCorp to recover just over 50 percent of its excess net power costs.

The Commission considered PacifiCorp's 6 percent amortization tariff in UE 127 at its August 6, 2002, public meeting. Staff recommended approval of Revised Schedule 94. In support of its recommendation, Staff referred to its earlier review of PacifiCorp's earnings and cost of capital for the deferral period, noting that PacifiCorp's adjusted return on equity for the period was slightly less than 4 percent, far below the 10.75 percent cost of equity authorized in UE 116.

³ Order No. 01-881.

⁴ Order No. 02-255.

⁵ Order No. 02-272.

⁶ Order No. 02-410.

⁷ Order No. 02-469.

Only two Commissioners were in attendance at the August 6, 2002, public meeting. The Commission sought the advice of counsel in the event that they disagreed on the amount of the increase or whether to allow the increase to be subject to refund. Counsel explained that under Oregon law, a filed rate becomes effective at the end of the suspension period unless the Commission acts to prevent the rate from taking effect (i.e., voting to disapprove the rate). Because the suspension period for UE 127 expired the next day, counsel reasoned that a tie vote or the lack of a majority vote to disapprove the rate would result in the rate becoming effective at midnight on August 8, 2002. Similarly, because the statutory default was that rates became effective without a refund provision, a tie vote would result in Revised Schedule 94 not having a refund provision.

The vote on Revised Schedule 94 resulted in a one to one tie on whether to disapprove the rate and whether to make it subject to refund. Because a majority of the Commission did not vote to disallow the rates under the schedule and because the Commission's counsel advised that this meant that the tariff would become effective by operation of law at the expiration of the suspension period, PacifiCorp began collecting charges under Rate Schedule 94 on August 8, 2002.

Complaint

On August 19, 2002, the Industrial Customers of Northwest Utilities (ICNU) and the Citizens' Utility Board of Oregon (CUB) (jointly referred to as complainants) brought this action under ORS 756.040 and 757.210. In an attempt to address complainants' concerns, PacifiCorp and complainants began settlement discussions in the fall of 2002. Those settlement discussions produced a stipulation in which CUB agreed to support PacifiCorp's amortization of the deferred account to 6 percent as long as the rates were subject to a refund.

On December 6, 2002, the complainants subsequently amended their complaint alleging that PacifiCorp was collecting amounts in excess of its filed rates because the Commission had not: (1) affirmatively authorized PacifiCorp to increase amortization to 6 percent, as required by ORS 757.259(4) and (7); (2) affirmatively authorized PacifiCorp to amortize any deferred amounts after August 31, 2002; and (3) completed an estimate of PacifiCorp's cost of capital, as required by ORS 757.259(7).

On December 10, 2002, the Commission approved the stipulation between CUB and PacifiCorp, rejecting ICNU's procedural attack premised on the point that the August 6, 2002, vote did not result in a Commission order.⁸ Under the stipulation, CUB and PacifiCorp requested the Commission to approve Second Revised Schedule 94, which increased amortization of deferred amounts to 6 percent and required PacifiCorp to refund amortized amounts in the event the Commission's prudence determination in Order No. 02-469 was reversed by the courts. The Commission formally approved Second Revised Schedule 94 on January 21, 2003, as a part of the consent agenda for the Commission public meeting held that day. ICNU subsequently requested reconsideration of the Commission's adoption of the stipulation. The Commission denied the request and

⁸ Order No. 02-853.

confirmed that the August 6, 2002, tie vote was an order under the Administrative Procedures Act.⁹

DISCUSSION

The complainants argue that the Commission should issue an order finding that PacifiCorp illegally amortized deferred amounts in rates between August 8, 2002, and January 21, 2003. They contend that PacifiCorp was not legally entitled to include deferred amounts in rates because the Commission did not authorize PacifiCorp to change rates and did not make the necessary factual findings that would accompany such authorization, including estimating PacifiCorp's cost of capital for the deferral period. Therefore, complainants contend, PacifiCorp should refund with interest the amount it has overcharged its customers. PacifiCorp and Staff oppose complainants' position, arguing that the tie vote did authorize the 6 percent deferral.

The parties' arguments focused on four primary issues: (1) whether the complaint had been rendered moot; (2) the effect of the tie vote; (3) the alleged failure of the Commission to make necessary findings; and (4) whether the Commission had authority to order a refund. We address each issue separately.

Mootness

PacifiCorp and Staff raised this issue, claiming that the Commission's approval of Revised Schedule 94 has rendered complainants' claim moot. We discuss this issue first, because a finding that complainants' case is moot would end the discussion of issues in this docket.

PacifiCorp and Staff state that complainants' claims are predicated on the theory that Revised Schedule 94 is invalid because the Commission did not properly approve it as required by ORS 757.259. PacifiCorp and Staff note, however, that Revised Schedule 94 was on file with the Commission and was not subject to suspension during the time PacifiCorp collected charges under that schedule. Moreover, PacifiCorp is no longer collecting rates under Revised Schedule 94. Consequently, PacifiCorp and Staff assert that the question of whether Revised Schedule 94 is a valid tariff is moot, as is complainants' entire action.

In response, complainants contend that their claims are not moot. They argue that modification of a utility's rates does not extinguish customers' right to a refund for amounts previously collected in excess of the filed rate.

Commission Resolution

The issue of mootness turns on whether a remedy is available under the facts presented in this case. If the rate relief complainants seek is possible, then the case is not moot. On the other hand, if such relief is not available, the case is moot. Accordingly, we

⁹ Order No. 03-187.

must examine the underlying claim for relief and choose to do so in the remainder of this order.

Effect of the Tie Vote

Complainants maintain that the Commission's tie vote did not lawfully authorize PacifiCorp to increase its amortization of the deferred power costs. Complainants note that public utilities in Oregon are required to follow established statutory procedures before they may lawfully charge customers for their services.¹⁰ The deferred accounting statute, ORS 757.259, allows a public utility to amortize deferred amounts only after the Commission affirmatively authorizes such amortization and makes explicit factual findings regarding the utility's earnings, cost of capital, and the prudence of deferred amounts. Complainants argue that PacifiCorp illegally increased its rates, because the Commission did not authorize the utility to amortize deferred excess net power costs at the 6 percent level until the Commission approved Second Revised Schedule 94 on January 21, 2003. From August 8, 2002, to January 21, 2003, complainants contend that PacifiCorp illegally amortized deferred costs in rates.¹¹

Complainants argue that Commission's tie vote did not "authorize" PacifiCorp to amortize at the 6 percent rate under the plain meaning of ORS 757.259(4), which states:

[Deferred amounts] shall be allowed in rates only to the extent authorized by the commission in a proceeding under ORS 757.210 to change rates and upon review of the utility's earnings at the time of the application to amortize the deferral.

Similarly, complainants argue, language in ORS 757.259(7), permitting the Commission to approve amortization increases in excess of the 3 percent level, states that the Commission "may authorize amortizations for an electric utility[.]" In support of their argument, complainants cite the definition of "authorize" from Black's Law Dictionary: "To formally approve; to sanction." Therefore, complainants conclude, deferred amounts shall be included in rates only to the extent the Commission formally approves the utility's

¹⁰ See ORS 757.210, 757.212, 757.215, 757.259.

¹¹ According to CUB and ICNU, there are two distinct time periods in which amortization of deferred amounts was illegal. The first period runs from August 8 to August 31, 2002. Prior to August 8, PacifiCorp was authorized to amortize its deferred costs at 3 percent gross revenues. On August 8, following the Commission's tie vote, PacifiCorp began to amortize its deferred costs at 6 percent of gross revenues. However, CUB and ICNU contend that the tie vote did not effectively authorize amortization in any amount above 3 percent. Therefore, starting on August 8, all amounts amortized by PacifiCorp in excess of 3 percent were amortized illegally. The previous authorization granted in Order No. 02-410, which allowed PacifiCorp the ability to amortize deferred amounts at 3 percent, expired on August 31, 2002. From August 8 to August 31, 2002, therefore, complainants argue that all deferred costs amortized by PacifiCorp in excess of the 3 percent level were amortized illegally.

The second period complainants identify is from August 31, 2002, to January 21, 2003. After August 31, complainants contend that PacifiCorp was not authorized to amortize any deferred costs. Therefore, according to complainants, PacifiCorp illegally amortized deferred amounts equal to 6 percent of its gross revenues until January 21, 2003. From September 1, 2002, to January 21, 2003, complainants maintain that all deferred excess net power costs that PacifiCorp amortized and collected in rates were unlawful.

request or gives legal authority to change rates. According to complainants, the plain language of ORS 757.259 is unambiguous and there is thus no need for further inquiry into the meaning of the statute.

Complainants note that ORS 757.259(4) refers to the Commission's duty to authorize amortization in a proceeding under ORS 757.210 to change rates. ORS 757.210 reflects the "file and suspend" process for rate changes. Complainants object to the Commission's interpretation of this reference to allow rate changes to take effect by operation of law. Complainants argue that the possibility that a rate change might take effect by operation of law is irrelevant here, because the Legislature specifically dictated what is required for approval of amortization of deferred amounts. According to complainants, amortization of deferred amounts requires explicit Commission authorization. To interpret the broad provisions of ORS 757.210 to supercede the specific requirements of ORS 757.259 would effectively empower PacifiCorp to charge, or the Commission to approve, rates of a kind that are contrary to the limitations of ORS 757.259.¹² Complainants cite ORS 174.020, which provides that: "When a general and particular provision are inconsistent, the latter is paramount to the former."

Complainants conclude that the Commission did not authorize PacifiCorp to amortize deferred amounts. They reason that the tie vote on whether to approve PacifiCorp's request to amortize deferred amounts at the 6 percent level did not allow Revised Schedule 94 to go into effect. Complainants cite various cases to contend that an evenly split decision by the Commission is considered a nullity or no decision, and that a null vote has the same effect as if the decision-making body had not considered the issue at all.¹³

Finally, complainants argue that the Commission's conclusion that the tie vote was an order under ORS 183.310 does not resolve the issue of whether a tie vote can authorize a rate increase under the deferred accounting statute. Any order that results from a null vote cannot authorize a rate increase, because the order did not state whether PacifiCorp's request to amortize deferred amounts was approved or rejected. In the absence of a specific statutory provision that allows rate increases to take effect without Commission approval, the tie vote cannot constitute Commission authorization to increase rates, complainants maintain.

In response, PacifiCorp and Staff argue that the tie vote authorized PacifiCorp to amortize its excess net power costs at the 6 percent level. They contend that the text and context of 757.259(4) and (7) specifically allow for rate schedules that amortize deferred accounts to become effective by operation of law.

PacifiCorp and Staff note that the Commission may empower or permit a utility to change rates in one of three ways. First, the Commission may simply allow a tariff specifying a rate change to take effect 30 days after filing. Second, the Commission may allow a tariff specifying a rate change to take effect by virtue of a final order approving the tariff. Third, the Commission may allow a tariff specifying a rate change to

¹² See *CUB v. OPUC*, 154 Or App 702, 717 (1998).

¹³ *The Antelope*, 23 US (10 Wheat.) 66 (1825); *Etting v. Bank of the United States*, 24 US (11 Wheat.) 59 (1826); and *Neil v. Biggers*, 409 US 188 (1972).

take effect on expiration of any suspension period imposed by the Commission. In all three cases, these parties argue that the Commission has authorized the rate change either by taking action to approve the tariff or by taking no action to disapprove the tariff in the time set by statute.

According to PacifiCorp and Staff, complainants' interpretation of ORS 757.259 ignores language in the statute specifying that amortization is appropriate to the extent it is authorized "in a proceeding to change rates." PacifiCorp and Staff note that a proceeding to change rates begins with a tariff filing, and may consist entirely of such a filing. However, once a proceeding has begun, the rates may be authorized in any of the three ways described above. The Legislature intended that the Commission allow a rate change to recover deferred costs using the procedure described in ORS 757.210, *et seq.*

PacifiCorp and Staff take issue with complainants' reading of "authorize" in ORS 757.259. Complainants assert that the plain meaning of the term "authorize" requires affirmative approval, basing their interpretation in part on the definition in Black's Law Dictionary. However, PacifiCorp and Staff contend that "authorize" is an ordinary word, not a term of art.¹⁴ Consequently, PacifiCorp and Staff maintain that the Commission should rely on the definition set forth in Webster's Third New International Dictionary, on which Oregon courts rely for words of common usage.¹⁵ PacifiCorp and Staff contend that the ordinary meaning of "authorize" shows that an affirmative act is not always necessary, as Webster's defines "authorize" as "to endorse, empower, justify, or permit by or as if by some recognized or proper authority." Although that definition allows a conferring authority to authorize through an affirmative act, the definition also includes words that do not require an affirmative act, such as permit and sanction. Consequently, Staff and PacifiCorp argue that an affirmative act is not a prerequisite for authorizing the amortization of a deferred account. Indeed, the Commission's ability to "authorize" such rates without an affirmative act becomes clear when the term "authorize" is read in the context of the surrounding provisions.

As PacifiCorp and Staff point out, ORS 757.259(4) provides that deferred amounts shall be allowed in rates only to the extent "authorized by the commission in a proceeding under ORS 757.210 to change rates." When interpreting statutes, terms should be read in context. Here, Staff and PacifiCorp maintain that the phrase "in a proceeding under ORS 757.210 to change rates" modifies the term "authorized."

According to PacifiCorp and Staff, the courts have recognized that a hearing under ORS 757.210 follows the regular file and suspend process set out in ORS 757.215.¹⁶ PacifiCorp and Staff argue that this process specifically allows (or, in this context, "authorizes") utilities to collect rates that the Commission has allowed to become effective by operation of law; that is, where the Commission does not act to prevent the rate from taking effect. According to Staff and PacifiCorp, the analysis for ORS 757.259(7) is the

¹⁴ See *Bollinger v. Board of Parole and Post Prison Supervision*, 329 Or 505, 511 (1999) (treating term "authorized" as an ordinary term).

¹⁵ *Osborn v. PSRB*, 325 Or 135, 146 (1997).

¹⁶ See *Multnomah County v. Davis*, 35 Or App 521, 525 (1978) (explaining the Commission's ratemaking procedures, including "the suspension procedure described in ORS 757.210 to 757.225"); *Fields v. Davis*, 31 Or App 607 (1977) (making a similar reference).

same. ORS 757.259(4) is a statutory predicate to ORS 757.259(7). ORS 757.259(7) provides that the “commission may authorize amortizations for an electric utility under this section with an overall average rate impact not to exceed 6 percent of the electric utility’s gross revenues for the preceding calendar year.” Thus the term “authorize” in ORS 757.259(7) is modified by the same context as is the term “authorized” in ORS 757.259(4). Consequently, PacifiCorp and Staff contend that viewed in context, complainants’ assertion that the Commission must act affirmatively to authorize rates based on deferred accounts is not an accurate interpretation of the statute.

PacifiCorp and Staff also argue that the prior enacted version of ORS 757.259 supports this conclusion.¹⁷ In 2001, the Legislature amended ORS 757.259 to add the reference to ORS 757.210.¹⁸ PacifiCorp and Staff contend that adding that reference can only signal intent to clarify that the ratemaking process for general rates will apply to rates to amortize deferred accounts as well.¹⁹

According to PacifiCorp and Staff, the Commission’s actions in this proceeding demonstrate that the Commission clearly understood that the Legislature intended rates filed under ORS 757.259(4) to be subject to the file and suspend process. If the Commission had believed otherwise it would not have suspended PacifiCorp’s Revised Schedule 94 on several occasions.

Since the August 6, 2002, public meeting, the Commission has consistently articulated the position that Oregon follows the file and suspend ratemaking process and that this process applies to all rate schedules filed with the Commission, including those that amortize deferred accounts.²⁰

PacifiCorp and Staff conclude that on review of the text and context of the statutes at issue, the Legislature clearly intended the normal file and suspend ratemaking provisions to apply to schedules seeking to amortize deferred accounts in rates. These parties contend that a contrary construction would render the reference to ORS 757.210 and its corresponding ratemaking process meaningless. Moreover, it would mean that by taking no action, the Commission would deny the company its ability to collect charges under a previously approved deferred account, without benefit of judicial review. Without benefit of the file and suspend process, the Commission’s lack of action would not produce a final order from which to appeal. This cannot be what the Legislature intended, according to Staff and PacifiCorp. Therefore, these parties argue that the Commission should reject complainants’ arguments to the contrary and conclude that PacifiCorp has lawfully collected charges under Revised Schedule 94.

¹⁷ See *Dockins v. State Farm Ins. Co.*, 329 Or 20 (1999) (context of a statute includes prior enacted versions of the same statute).

¹⁸ OR Laws 2001, ch 733, 3(4) (HB 2630).

¹⁹ See *Carlson v. Myers*, 327 Or 213, 225 (1998) (changes in a statute to be given meaning).

²⁰ See, e.g., UE 121/127, Order No. 02-853 (August 6, 2002, tie vote is an “order”); Notice of Proposed Rulemaking, AR 453, “Quorum for Rate Changes,” filed December 20, 2002 (new rule is designed to “reduce the possibility of major rate changes . . . tak[ing] effect on a tie vote”); Public Hearing on AR 453 (April 15, 2003) (Oregon applies a file and suspend approach to ratemaking, including rates collected on deferred accounts); AR 453, Order No. 03-238.

Commission Resolution

This issue revolves around whether the Commission authorized PacifiCorp's amortization of its deferred amounts at the 6 percent rate. The Commission met on the question of whether to approve PacifiCorp's request to amortize its deferral at the 6 percent rate and did not affirmatively approve the request. The question is whether the Commission's tie vote is a nullity; that is, the result of the vote is Commission inaction. According to complainants, authorization to amortize deferred amounts may not be granted by operation of law. We disagree.

The parties focus their argument on the meaning of "authorize" in the statutory scheme of ORS 757.259. We find that "authorize" is a term of general usage and does, therefore, not require reference to Black's Law Dictionary.²¹ Complainants argue that the court in *Bollinger* did not choose the definition of "authorize" that PacifiCorp and Staff advocate. We find this contention irrelevant here. The context in *Bollinger* is whether an inmate has a choice to accept parole when the Board of Parole authorizes it. The context here is quite different.

To determine the meaning of statutory terms, we look first to text and context.²² The text of ORS 757.259 does not preclude either the more passive or the more active meanings of "authorize." The text of the statute includes the reference in ORS 757.259(4) to ORS 757.210. That statute, along with the other statutes governing the ratemaking process—most notably ORS 757.215—provides the procedural safeguards for ratepayers and utilities that complainants refer to. The statutes governing ratemaking procedures also explicitly set out the file and suspend mechanism that was used in this docket. This mechanism in no way conflicts with the safeguards to which complainants refer. The file and suspend mechanism entails the possibility that rates become effective by operation of law if the Commission does not act within the suspension period.

Complainants contend that PacifiCorp and Staff's reading of the statutory scheme overemphasizes the file and suspend mechanism at the expense of other requirements for amortization of deferred amounts, such as the requirement of an earnings review and a cost of capital estimate. We do not find this to be the case. If the requirements for amortization specific to ORS 757.259 are not met, even if rates become effective by operation of law they would be subject to successful challenge on review. Here, the requirements of ORS 757.259 were met.

In support of this conclusion, we note that ORS 757.259 uses "authorize" in subsection (3) and "authorized," the past participle of the same verb, in subsection (4). Examination of the language in both subsections supports our conclusion that the meaning of the term depends on its context. Subsection (3) states, in relevant part, that:

The commission may authorize deferrals . . . beginning with the date of application, together with interest established by the commission.

²¹ See *Bollinger*, *supra*.

²² *PGE v. BOLI*, 317 Or 606 (1993).

This language refers to setting up deferred accounts. The Commission is doing something affirmative in setting up those accounts, so "authorize," as used in subsection (3), requires a majority vote.

By contrast, subsection (4) states, in relevant part, that

amounts described in this section shall be allowed in rates only to the extent authorized by the commission in a proceeding under ORS 757.210 to change rates and upon review of the utility's earnings at the time of application to amortize the deferral.

There are three prepositional phrases that modify "authorized." Subsection (4) refers to including deferred accounts in rates only if the deferred account has been authorized [1] by the commission [2] in a proceeding [3] under ORS 757.210. We cannot ignore the prepositional phrases following "authorized." They modify the word. They tell us that the type of authorization the legislature referred to in subsection (4) is that used in rate proceedings.

The Commission's rate proceedings involve the "file and suspend" approach common to many regulatory programs. The approach is set out in ORS 757.205, 757.210, 757.215, and 757.220. ORS 757.215 contains two "fish or cut bait" provisions that are part of the file and suspend scheme. First, the Commission must suspend rates, or they go into effect by operation of law. Second, if the Commission does suspend, then it must make a ruling within nine months, or the rates go into effect by operation of law. Because rates can go into effect by operation of law in either way, the Commission needs to do something affirmative to stop them from becoming the lawful rates. The Commission cannot do something affirmative unless it has at least two votes.

The above discussion makes clear that it is wrong to say that the Commission allowed to rates to go into effect on a tie vote. What happened is that the Commission did not have two votes to prevent the rates from taking effect. When the Commission does not have two votes to prevent rates from taking effect, those rates become the rates "authorized by the commission in a proceeding under ORS 757.210."

We conclude that "authorize" in the context of ORS 757.259 includes the possibility that rates become effective by operation of law. Therefore, the effect of the tie vote, or Commission inaction, was to allow the rates in Revised Schedule 94 to become effective by operation of law.

Lack of Necessary Findings

Complainants also contend that PacifiCorp is illegally amortizing deferred amounts because the Commission failed to make the factual findings required for all amortizations under ORS 757.259(4), which requires an earnings review and a final determination that deferred amounts were prudently incurred. For the Commission to authorize amortization of deferred amounts in excess of 3 percent, complainants contend

that the Commission is also required to “estimate the electric utility’s cost of capital for the deferral period . . . for the purpose of reviewing the earnings of the electric utility.”²³

Complainants contend that the Commission did not estimate PacifiCorp’s cost of capital for the deferral period. Complainants acknowledge that, prior to the tie vote, Staff asserted that the 10.75 percent return on equity adopted in UE 116 was a reasonable estimate of PacifiCorp’s cost of capital for the deferral period. However, according to complainants, a Staff report is only a recommendation. It has no legal effect unless adopted by the Commission. Complainants contend that the Commission neither adopted the UE 127 Staff report nor issued an order or findings of fact regarding PacifiCorp’s cost of capital. Complainants conclude that PacifiCorp was therefore illegally amortizing deferred amounts equal to 6 percent of PacifiCorp’s gross revenues because the Commission failed to estimate its cost of capital for the deferral period.

In response, PacifiCorp and Staff contend that the facts of this case defeat complainants’ argument. Staff reported to the Commission that the Commission’s determination of PacifiCorp’s cost of capital for January 1 to December 31, 2001, was a reasonable estimate of PacifiCorp’s cost of capital for the period at issue. The August 2, 2002, Staff report reflects the estimate that the Commission decided previously for an overlapping time period. PacifiCorp and Staff argue that complainants should not be heard to complain that the Commission did not estimate PacifiCorp’s cost of capital for the deferral period.

Furthermore, PacifiCorp and Staff contend that the Commission had previously accepted the 10.75 percent return on equity as PacifiCorp’s cost of capital for the period. In June 2002, PacifiCorp filed an earnings report for the deferral period in connection with its amortization request in UE 121. PacifiCorp filed its earnings review using the 10.75 percent cost of equity authorized in UE 116. At this time, PacifiCorp sought and received consolidation of that docket with UE 127, so the earnings report could be considered in UE 121 as well.

These parties further note that in its June 2002 Staff report regarding PacifiCorp’s amortization request, Staff accepted PacifiCorp’s return on equity estimate and concluded that the earnings report reflected that PacifiCorp could not absorb the deferred costs. The Commission adopted the Staff report in Order No. 02-410.

Thus the Commission’s conclusions in Order No. 02-410 are part of the record for UE 127, according to Staff and PacifiCorp. In light of the record demonstrating the Commission’s previous estimates regarding PacifiCorp’s earnings, Staff and PacifiCorp argue that the assertion that the Commission did not estimate PacifiCorp’s cost of capital for the deferral period is without merit.

²³ ORS 757.259(7).

Commission Resolution

We disagree with Complainants' assertion that the Commission failed to estimate PacifiCorp's cost of capital when considering Revised Schedule 94. Staff's report for the October 22, 2001, public meeting noted that in considering Revised Schedule 94, the results of PacifiCorp's general rate case (UE 116) could be used to satisfy the earnings review and cost of capital provisions of ORS 757.259. Revised Schedule 94 was docketed as UE 127.

In June 2002, PacifiCorp filed an earnings report for the deferral period in connection with its amortization request in UE 121. PacifiCorp filed its earnings review using the 10.75 percent cost of equity authorized in UE 116. The Staff report for the June 18, 2002, public meeting supported continuation of the 3 percent amortization in docket UE 121. That report concluded that the earnings review demonstrated that PacifiCorp could not absorb any portion of the deferred costs and still earn a reasonable rate of return. With respect to the company's cost of capital, Staff estimated PacifiCorp's return on equity for the deferral period at 3.99 percent, well below its authorized rate of return on equity of 10.75 percent. The Commission subsequently adopted that recommendation and the accompanying report.²⁴ This review satisfied the purpose of the cost of capital and earnings review requirements in the statute, which is to preclude amortization if a utility would then earn more than a reasonable rate of return.²⁵

Because the Commission consolidated UE 121 and UE 127, the conclusion in UE 121 would apply in UE 127, and is part of the record in that case. In its August 2, 2002, memo, Staff reiterated its conclusion that PacifiCorp's estimated return on equity for the deferral period was slightly less than 4 percent, below the 10.75 percent return authorized in UE 116.²⁶ This report was in the record presented to the Commission in conjunction with the 6 percent tariff.

Our conclusions in Order No. 02-410 are part of the record for UE 127. We find that Staff's reports for the various public meetings, including the report that was adopted in Order No. 02-410, estimated PacifiCorp's cost of capital and were part of the record on which the Commission based its decisions in UE 121 and UE 127. We conclude that for purposes of ORS 757.259, we estimated PacifiCorp's cost of capital in UE 127.

The Refund Issue

As part of their complaint, complainants contend that PacifiCorp must refund to customers all amounts illegally collected, with interest. PacifiCorp and Staff argue that the filed rate doctrine precludes the relief complainants seek, namely refund of amounts charged under the 6 percent tariff.²⁷

²⁴ Order No. 02-410.

²⁵ See UE 82, Order No. 93-257 (explaining purpose behind the concept of the earnings review).

²⁶ Staff report for August 6, 2002, public meeting, Item No. 3.

²⁷ The filed rate doctrine generally holds "that the rate filed with a commission is the only lawful charge and that deviation from it is not permitted on any pretext. UM 989, Order No. 02-227 at 8 (citation, internal quotation marks and brackets omitted).

Because we find that Revised Schedule 94 took effect as the lawful rate, we need not address the issues involving a refund.

ORDER

IT IS ORDERED that the complaint filed by ICNU and CUB against PacifiCorp is denied.

Made, entered, and effective _____.

Roy Hemmingway
Chairman

Lee Beyer
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.