

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

**IN THE MATTER OF THE APPLICATION** )  
**OF PACIFICORP DBA UTAH POWER &** ) **CASE NO. PAC-E-02-1**  
**LIGHT COMPANY FOR APPROVAL OF** )  
**CHANGES TO ITS ELECTRIC SERVICE** )  
**SCHEDULES.** ) **ORDER NO. 29136**  
)

---

**BACKGROUND**

On January 7, 2002, PacifiCorp dba Utah Power & Light Company (PacifiCorp; Company) filed an Application with the Idaho Public Utilities Commission (Commission) requesting approval of proposed electric service schedules. The Company's Application had four parts: 1) a proposed Schedule 34 – Bonneville Power Administration (BPA) Exchange Credit distribution; 2) a proposed electric service schedule adjusting rates to bring customer classes closer to cost-of-service (COS); 3) a proposed Power Cost Surcharge; and 4) a proposed Rate Mitigation Adjustment (RMA) designed so that no customer classes would have an increase during the two-year period of the surcharge.

The Company's Application was processed in two parts. The first dealt with the BPA credit and was processed using Modified Procedure, i.e., pursuant to written submission rather than hearing. IDAPA 31.01.01.201-204. The second part dealt with the Company's request to recover through a Power Cost Surcharge \$38 million in excess net power supply costs accrued during the period November 2000 through October 2001 and to implement other proposed changes.

The BPA credit was approved in Interlocutory Order No. 28946 and became effective February 1, 2002. The BPA credit is a distribution of exchange benefits negotiated by Northwest utilities and state regulatory Commissions in a May 2001 Settlement Agreement with the BPA. As contemplated by the 1980 Pacific Northwest Electric Power Planning and Conservation Act, the credit passes the benefits of the Federal Columbia River Power System to PacifiCorp's qualifying residential and small farm customers in eastern Idaho.

On April 11, 2002, a Stipulation and Settlement was filed by PacifiCorp, Monsanto Company, the Idaho Irrigation Pumpers Association and the Commission Staff regarding all

other issues. The proposed settlement: 1) limited recovery of excess power costs to \$25 million; 2) accelerated the remaining two years of the PacifiCorp/ScottishPower merger credit to reduce the excess power costs by \$2.3 million; 3) established a Power Cost Surcharge designed to recover excess power supply costs of \$22.7 million over a two-year period; 4) restructured the irrigation tariff schedules to provide firm power; and 5) adjusted revenue responsibility to bring the irrigators closer to cost of service.

On June 7, 2002, the Commission in final Order No. 29034, reaffirmed its previous authorization of the BPA Exchange Credit distribution. The Commission also approved the proposed Stipulation and Settlement; and, for failure to provide the individual customer notice required by Rule 102 of the Commission's Customer Information Rules, the Commission in its Order directed PacifiCorp to provide each customer with a one-time credit of \$20.00 (or a total of \$1,087,720). IDAPA 31.21.02.102.

Petitions for Reconsideration of final Order No. 29034 were filed by Stanley Searle, Tim Shurtz and PacifiCorp. Reference *Idaho Code* § 61-626; IDAPA 31.01.01.331-333. PacifiCorp also filed an Emergency Petition for Stay of the Civil Penalty imposed by Commission Order No. 29034. Reference IDAPA 31.01.01.324, .333; *Idaho Code* § 61-626.

On July 24, 2002, the Commission in interlocutory Order No. 29136 denied the reconsideration petitions filed by Mr. Shurtz and Mr. Searle and granted PacifiCorp's Petitions for Reconsideration and Stay. In this Order on Reconsideration and for reasons set forth below, we rescind that portion of our Order No. 29034 directing the Company to provide a \$20 credit to customers. Instead, we find it reasonable for the Company to pay a \$10,000 civil penalty into the State of Idaho General Fund for failure to comply with Customer Information Rule 102.01. *Idaho Code*, Title 61, Chapter 7; IDAPA 31.21.02.102.01.

#### **Petition for Reconsideration -- PacifiCorp**

PacifiCorp requested reconsideration of that portion of the Commission's Order No. 29034 that required the Company to provide each customer a credit of \$20 (for a total of \$1,087,720) within 90 days of the service date of the Order for failure to comply with the individual notice requirement of Rule 102 of the Commission's Customer Information Rules. Reference IDAPA 31.21.02.102.

The Company contended that reconsideration is warranted because: (1) Rule 102 does not apply to this proceeding which is neither a general nor a tracker rate case; (2) even if

Rule 102 applies and bill stuffer-notice as prescribed therein was required, the Commission's finding that it could impose a remedy pursuant to Idaho Code, Chapter 61, Title 7 for violation of that rule was contrary to the law and, accordingly, any remedy imposed there under unlawful; (3) even if Rule 102 applies, the Commission failed to afford the Company a full and fair opportunity to be heard regarding the circumstances surrounding the alleged violation and determination of the appropriate penalty (if any), violating the Company's constitutional and statutory due process rights; (4) the Commission misinterpreted the penalty provisions of *Idaho Code* § 61-701 *et seq.* when it found the maximum penalty applies on a per customer basis; (5) the Commission exceeded its authority under *Idaho Code* § 61-701 *et seq.* when it required payment of the penalty to customers instead of to the Idaho State Treasury; and (6) the penalty imposed is excessive in comparison to the violation and contrary to Commission precedent.

PacifiCorp requested that the Commission grant reconsideration of Order No. 29034 for the limited purpose of rescinding its findings related to Rule 102 and withdrawing the civil penalty imposed by the Order. PacifiCorp's emergency petition for stay was limited to that portion of Order No. 29034 imposing the \$1,087,720 civil penalty. Reference *Idaho Code* § 61-626(3); IDAPA 31.01.01.333.

**Commission Order No. 29079**

Regarding PacifiCorp's Petition for Reconsideration, the Commission found the Company's due process argument to be persuasive. The Commission granted the Company an opportunity to address the individual notice requirement of Rule 102, our finding that the Company failed to comply with the rule, and the related remedy that was imposed. U.S. Constitution, Amendment XIV; Idaho Constitution, Art. 1 § 13; Idaho Code, Title 61, Chapter 7. The issues presented were both fact and law. Accordingly, reconsideration was granted and an evidentiary hearing was held.

Because the Commission granted PacifiCorp's Petition for Reconsideration, the Commission also granted PacifiCorp's related Motion for Stay of that portion of the Commission's Order No. 29034 which directed the Company to provide a \$20 credit to customers within 90 days from the service date of the Commission's Order. Reference 31.01.01.324 (Stay of Orders); .331 (Petitions for Reconsideration).

## HEARING ON RECONSIDERATION

The evidentiary hearing on PacifiCorp's Reconsideration Petition was held on September 10, 2002, in Boise, Idaho. The following parties appeared by and through their respective counsel or pro se.

PacifiCorp	James F. Fell
Timothy J. Shurtz (telephonically)	pro se
Commission Staff	Scott D. Woodbury

The Commission has reviewed the filings of record in Case No. PAC-E-02-1 including its final Order No. 29034 and the underlying transcript of the earlier proceedings. We have also reviewed and considered the Petition of Reconsideration filed by PacifiCorp, the transcript of proceedings on reconsideration and the Company's post-hearing brief.

Reconsideration provides an opportunity for an aggrieved party to bring to the Commission's attention any question previously determined or omitted in a matter. Likewise, reconsideration provides the Commission with an opportunity to rectify any mistake or omission. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 591 P.2d 122 (1979).

### **Customer Information Rule 102 (IDAPA 31.21.02.102)**

The Commission's Utility Customer Information Rule 102 reads as follows:

#### **102. NOTICES TO CUSTOMERS OF PROPOSED CHANGES IN RATES (RULE 102).**

##### **01. Customer Notice of General Rate Cases and Tracker Rate Cases.**

Each gas, electric, and water utility that applies for a general or tracker rate change shall give to each customer a statement (customer notice) announcing the utility's application. If the utility is requesting a rate increase, the customer notice shall include a brief explanation of the utility's need for additional revenue and the dollar amount requested. The notice shall give the proposed overall percentage change from current rates as well as the proposed percentage increase in revenue for each major customer class. The customer notice shall make it clear that the application is a proposal, subject to public review and a Commission decision. It shall also inform customers that a copy of the utility's application is available for public review at the offices of both the Commission and the utility. (7-1-93)

**02. Timing of Notice for Trackers.** Tracker adjustments occasioned by Federal action may be brought to the attention of customers in compliance with this rule after approval by the Commission. All other tracker cases remain subject to the requirements of advance notice contained in this rule.  
(7-1-93)

**03. Distribution of Customer Notices.** The customer notices referred to in Rule Subsection 102.01 may be mailed to customers as bill stuffers over the course of a billing cycle or may be contained in additional comment pages to the customer's monthly bill. If additional comment pages are used, the information required by this rule is to be clearly identified, easily understood, and pertain only to the proposed rate change.  
(7-1-93)

**04. Press Release.** In instances covered by Rule Subsection 102.01, the utility shall also send a press release containing, at minimum, the same information presented in the customer notices to all newspapers, radio, and television stations listed on the Commission's news organization list for that utility. The press releases shall be mailed or delivered simultaneously with filing of the application. A copy of the press release shall be filed with the application.  
(7-1-93)

**05. Purposes and Effects of this Rule.** The purposes of Rule Subsections 102.01 through 102.04 of this rule are to encourage wide dissemination to customers of information concerning proposed rate changes for utility services. It is not a purpose of these paragraphs to create due process or other procedural rights in customers by expanding, contracting, or otherwise modifying the notice and due process rights of customers under the Public Utilities Law and the Commission's Rules of Procedure, IDAPA 31.01.01.000 et seq. Accordingly, Rule Subsections 102.01 through 102.04 of this rule create no individual procedural rights in any customer for notice that would give rise to a due process or other procedural claim cognizable by the Commission, but failure to comply with Rule Subsections 102.01 through 102.04 of this rule can be grounds for returning an application for incompleteness.  
(7-1-93)

In Order No. 29034, we noted that "some customers indicated they learned of the Commission's hearings only serendipitously and did not get informed until it was too late to study, prepare and testify." Order p. 22. PacifiCorp has 55,000 customers in southeast Idaho. Thirty written comments were filed in this case. (Exh. 28.) There were 20 witnesses at the hearings who signed up to testify. (Exh. 29.) A total of 10 people attended 2 meetings of the Consumer Advisory Group. (Exh. 33.) The Company's focus on meetings with customers was

on canal and irrigation customers (Exh. 33). It is not enough, as the Company contends, “that there were a fair number of folks that were aware of the issues.” Tr. pp. 543. We cannot conclude from the number of comments and the number of participants that even a fair minority, let alone a majority of customers, were aware of the Company’s filing.

Our concern then as now, is with the adequacy and sufficiency of public notice—especially notice to customers of impending changes to rates and charges. The importance of Company notice of rate change applications is underscored by the fact that neither the Commission nor the Company have control over when, how and in what manner press releases are reported by the media. Tr. pp. 582, 583.

In Order No. 29034, we stated

In crafting this credit regarding notice failure [Rule 102], the Commission intends to send a strong signal to the Company that it needs to be more responsible in its communication with customers. Not only must it comply with regulatory requirements, but it should strive to ensure that a consistent message is conveyed in its filings with this Commission, in its media and marketing efforts, and in its efforts to influence public officials.

Order p. 24.

The Company’s Application in this case included a number of significant rate issues at one time. PacifiCorp itself characterizes its filing as “unusual” and an “anomaly.” Tr. pp. 505, 570. The Company reasons that its filing was not a “tracker” because a power cost adjustment tracks costs over a set period of time and is then trued up. Its filing, it states, sought only to recover excess power costs accrued during a defined period of time with a surcharge. Tr. pp. 545, 546. We find that the Company’s filing had elements of both a general rate case (cost of service study and related realignment) and a tracker (requested recovery of \$38 million in deferred excess power costs). The filing also sought to implement a significant increase in the BPA residential exchange credit and contained a rate mitigation adjustment (RMA) to assure that no customer class would receive an increase during the surcharge period.

On reconsideration, PacifiCorp states that prior to filing this case, the Company developed a communication plan. As stated by the Company, a “communication plan is intended to fully and clearly inform customers of the rate filing.” Tr. p. 468. PacifiCorp inquired and sought advice of its legal counsel shortly after filing as to whether Rule 102 notice was required. It was advised that the Company’s filing was neither a general rate case nor a

tracker rate case. Exh. 26, p. 2. The attorney, John Eriksson, qualified his answer by noting that “it has some similarities to a general rate case” and also queried “I don’t know if the Company has plans to send out a bill stuffer explaining to customers what the filing is about. You might check with Dave Eskelsen.” Exhibit No. 26 p. 2. Mr. Eskelsen, in the Corporate Communication Department responds “sounds like we are not ‘required’ to do a [billing insert] . . . I assume a billing insert or bill message would be up to us but seems logical.” Exh. 26, p. 1; Tr. p. 597.

Making a determination that Rule 102 did not apply, Mr. Doug Larson, the Company’s Vice President of Regulation, decided not to do a bill stuffer. Tr. pp. 474; 514. Mr. Larson states that sometimes multiple communications are understood by customers as multiple rate changes, and thus the purpose of the communication is compromised. Tr. pp. 476; 567.

Customers should not be kept uninformed merely because a case is complex and difficult to describe and the notice may be misunderstood. It is the Company’s responsibility to craft a clear description of the filing so that customers can distinguish between what is proposed and what is approved. The stated purpose of Customer Information Rule 102 is “to encourage wide dissemination to customers of information concerning proposed rate changes for utility services. Rule 102.4. The extraordinary magnitude of the BPA credit and the power cost surcharge in this case should have triggered a decision to provide an informational notice to customers, whether or not the Company’s regulatory department believed it was required by the rules. Situations where advance individual notice of a proposed change in rates is not required are rare. The lack of individual notice in this case, we find, was contrary to the public interest.

As a general practice, we find that when a company perceives some definitional ambiguity or a similarity to cases where notice is required, it should err on the side of providing notice. From a customer relations standpoint, we find that it is always wise to liberally construe the requirement for information and notice. It is clear that the Company envisioned a hearing would be held in this case regarding its proposed power cost surcharge, cost of service realignment and rate mitigation plan. Advance notice gives customers ample time to become informed about the proposal and meet the deadline for intervening or filing comments. Notice provided only after a rate change, while informational regarding changes in billing, denies customers the opportunity to participate and express their opinion in any meaningful way. An

after-the-fact notice accomplishes something quite different than an advance notice does. They are not equivalent.

We find that the Company and its legal counsel misinterpreted the requirements of Customer Information Rule 102. We are not persuaded by their argument of ambiguity. In attempting to discern a strict legal requirement, the Company lost sight of the purpose of the notice requirement. In foregoing upfront notice, we find that the Company failed to provide customers with an early opportunity to become informed and participate. The Company's intention in this case is evidenced by its statement "we chose to focus the individual notice on the approved change because that change would not be subject to adjustment, as filed changes are." Tr. p. 476.

We are unpersuaded that other notice provided through press releases and media coverage and one-on-one meetings with customer groups can provide sufficient actual notice or be a substitute for written notice placed in the hands of the customer in his or her monthly billing statement. It is that opportunity provided to a customer, regardless of whether it is acted upon, that is critical to our decision. PacifiCorp serves 55,000 customers in southeast Idaho. PacifiCorp made the communication decision that it would provide its customers with notice only after the Commission issued its Order.

The Company's after-the-fact notice regarding the BPA credit was a bill message:

A new Bonneville Power Administration credit takes effect February 1, 2002 for residential and qualifying commercial and irrigation customers. The BPA credit will continue for five years. Exh. 34, p. 2.

The Company's after-the-fact notice regarding the Settlement was a bill message:

Recent action by the Idaho Public Utilities Commission re-set prices for Idaho customers effective June 8. In some cases, bills now show two additional line items: a temporary surcharge to recover excess power costs; and a rate mitigation adjustment ordered by the IPUC. Typical bills in Idaho are still on average, 17 percent lower than in 2001. Exh. 34, p. 4.

Without commenting on the sufficiency of the after-the-fact notices, we cannot know how many customers failed to act or participate in the Commission's proceedings or hearings in this case because they were not provided upfront Rule 102.01 bill stuffer notice.

In assessing its Application and the requirement of notice, PacifiCorp argues that taken together all of the components of the filing, on a net basis (w/rate mitigation plan) "did not

propose a rate increase for any customer class.” Tr. pp. 474; 545. We do not find the net result of the Company’s filing to be determinative of whether notice is required.

The Company states “we sought and followed the advice of counsel regarding legal notice requirements, we developed and followed a customer communication plan for this filing, we issued press releases and met with customer groups, and there was significant public comment on this filing and participation in the public hearings.” Tr. p. 478. No one has claimed, the Company contends, that because of the lack of individual notice, a material issue did not get raised or considered. Tr. p. 478. This Commission will not countenance an attempt by the Company to establish a principle that it may disregard Commission rules if it can later demonstrate a lack of injury or harm to the public. It is not incumbent on the Commission to find as alleged in PacifiCorp’s Petition page 24 “that customers had been inadequately noticed by other means or that actual injury had occurred as a result of the violation.” It cannot be concluded from the comments and participation in this case that the public understood the Company’s filing. The overall tenor of written comments submitted in this case instead if anything indicates that the public was confused as to what was at issue. (Exh. 28.) That confusion, we find, might have been diffused by use of a well crafted upfront Rule 102 bill stuffer.

**Rule 102 Violation – Civil Penalty**

In Order No. 29034 we required the Company to provide a \$20 credit to each of its customers (a total of \$1,087,720) for failing to comply with the individual notice requirement of Rule 102 of the Commission’s Customer Information Rules. IDAPA 31.21.02.102. We ordered a credit and not a payment to the State General Fund because we strongly believe that in the Company’s failure to give notice, it is the customer that is the aggrieved party. It is the customer who by lack of notice is deprived of the opportunity to participate. On reconsideration, we re-examine the statutory underpinnings for the relief that we fashioned in light of the Company’s actions. Based upon our review, we amend the portion of Order No. 29034 that directed the Company to provide a \$20 credit to each customer. The Public Utilities Law does not permit the Commission to assess a civil penalty but we may initiate a proceeding in district court for the court to impose such a penalty payable to the general fund. Consequently, we find that a civil penalty payable to the general fund of the Idaho State Treasury is reasonable in this instance. *Idaho Code* §§ 61-701; 61-706, 61-712.

The Company contends that if there was a violation of Rule 102, it was the result of a good faith misreading of the rule, not the result of indifference to the Commission's rules or customer communications. Tr. p. 478. The Company should set a higher standard for its customer communications than lack of indifference. Every filing by the Company presents an opportunity to improve its customer relations. On reconsideration the Company has provided evidence to the Commission that has allayed some of our concerns that PacifiCorp was indifferent to customer concerns. That being said, however, we nevertheless believe that the Company under values "notice" and that much can be done by PacifiCorp to establish better communication pathways with its customers.

In our Order granting reconsideration we commented on the Company's communication with customers, and its presence and accessibility to customers, and directed the Company to review its practices and physical facilities and reduce or eliminate obstacles that may inhibit effective communication with customers and report actions taken to us. Although requested in July, the Commission still awaits PacifiCorp's Report.

Having concluded once again that PacifiCorp failed to comply with Customer Information Rule 102.01, we must reconsider what action (if any) is appropriate. PacifiCorp contends that the remedy for violation of Rule 102 is a return of the Application and that any penalty imposed pursuant to Idaho Code, Title 61, Chapter 7 is unlawful. We disagree. The Commission is not restricted to a simple return of the Application. That might have been an appropriate remedy were the failure discovered early on, but in this case the failure was not discovered until during the evidentiary hearing at the conclusion of the case. Idaho Code, Title 61, Chapter 7 Enforcement and Penalty states

61-706 – Any utility which violates or fails, omits or neglects to obey, observe or comply with any . . . **rule**, direction, demand or requirement . . . is subject to a penalty of not more than \$2,000 for each an every offense.

We are asked to consider whether the penalty imposed (\$20 per customer or \$1,087,720) is unduly punitive and excessive. Tr. p. 477. In considering the facts presented on reconsideration, we do find that it is inconsistent with our treatment of other Rule 102 violations. We are persuaded on the facts of this case that the mathematical consequence of assessing the penalty on a per customer basis leads to an excessive fine and unreasonable result. Based on the

record developed on reconsideration, we find that the facts do not warrant seeking a civil penalty as large as initially imposed.

We find it appropriate to seek a civil penalty for violation of Rule 102. We do not dispute the Company's contention that the "level of communication that has gone on in this proceeding is far and away the most extensive effort that we [the Company] has ever done to communicate with customers." Tr. p. 543. We conclude only that in failing to provide individual Rule 102 notice, the Company's efforts fell short of the goal.

While the Company contends that the Commission should regard the Company's failure to provide Rule 102 notice as simply a good faith mistake, it is troubling that the Company appears to discount the value of individual notice, and the value of getting information with the monthly bill. Tr. p. 527. We do not agree with the Company's contention that the lack of individual notice had no effect on the level of customer participation at our hearing. It is also mistaken, we find, to conclude that "those who chose not to participate did so because they were comfortable with what they had seen." Tr. p. 543.

Rule 102.02 requires that notice be provided to each customer. *Idaho Code* § 61-706 provides that the maximum civil penalty for each violation of our rules shall be no greater than \$2,000. In our initial Order we found that each instance of failure to provide notice to a customer was a separate offense. On reconsideration, we find each billing month that passed without individual Rule 102 notice of the Company's Application to be a missed opportunity and a separate and distinct offense. Reference *Idaho Code* § 61-707.

Accordingly, we find it reasonable to seek a civil penalty of \$2,000 for each month the Company violated its Rule 102 notice requirement. There were five months from the month of the Application in January to the month of the hearing in May for a total civil penalty of \$10,000. We further find the amount of fine assessed to be just and reasonable and to be commensurate with the nature of the rule violation and the history of fines assessed on other utilities.

### **CONCLUSIONS OF LAW**

The Idaho Public Utilities Commission has jurisdiction over this matter and PacifiCorp, dba Utah Power & Light Company, an electric utility, pursuant to the authority and power granted under Title 61, Idaho Code and the Commission's Rules of Procedure, IDAPA 31.01.01.000 *et seq.*

## ORDER

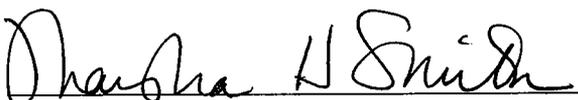
In consideration of the foregoing and as more particularly described above IT IS HEREBY ORDERED and the Commission does hereby affirm its prior dismissal of the Petitions of Reconsideration filed by Mr. Tim Shurtz and Mr. Stanley Searle. Interlocutory Order No. 29079.

IT IS FURTHER ORDERED and the Commission on reconsideration amends its prior direction to PacifiCorp to provide each customer with a one-time credit of \$20. Instead the Commission finds it reasonable to seek a civil penalty for the Company's failure to comply with Customer Information Rule 102.01. The Company may submit a check in the amount of \$10,000 payable to the State of Idaho General Fund to the Commission Secretary within 21 days of the date of this Order. If PacifiCorp does not voluntarily make this payment, the Commission shall commence an action in Idaho District Court to recover this civil penalty as authorized by law. *Idaho Code* § 61-712.

THIS IS A FINAL ORDER ON RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Orders previously issued in this Case No. PAC-E-01-1 may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. See *Idaho Code* § 61-627.

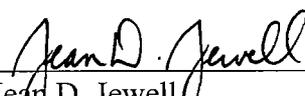
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 25<sup>th</sup>  
day of October 2002.

  
PAUL KJELLANDER, PRESIDENT

  
MARSHA H. SMITH, COMMISSIONER

  
DENNIS S. HANSEN, COMMISSIONER

ATTEST:

  
Jean D. Jewell  
Commission Secretary

vld/O:PACE0201\_sw9