

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND	)	
TRANSPORTATION COMMISSION,	)	DOCKET NO. UE-001734
	)	
Complainant,	)	ANSWER ON BEHALF OF
	)	COMMISSION STAFF TO
v.	)	PACIFICORP'S MOTION TO
	)	STRIKE CREA TESTIMONY
PACIFICORP,	)	
	)	
Respondent.	)	
_____	)	

1 This Answer is filed on behalf of Commission Staff, supporting PacifiCorp's Motion to Strike the testimony of Columbia Rural Electric Association (CREA) witness Mr. Husted.

**Summary**

2 PacifiCorp correctly argues that CREA's proposed testimony is irrelevant. In addition, CREA's testimony is beyond the limited scope of CREA's intervention, and it contains inadmissible argument and speculation. CREA's proposed testimony should be stricken.

**Discussion**

3 The Commission permitted CREA to intervene because the Commission believed CREA could be helpful to the Commission on two issues: 1) "[whether "the proposed tariff charges are an unlawful restraint of trade, restricting competition and customer choice in

contravention of law and policy],”<sup>1</sup> and 2) to “contest the factual contentions about CREA in PacifiCorp’s testimony.” 2<sup>nd</sup> Supp. Order at 7, ¶¶ 25 and 28, and at 8, ¶ 33.

4 CREA’s testimony is not helpful to the Commission on either of these issues.

**ISSUE 1: “Factual contentions about CREA in PacifiCorp’s testimony.”<sup>2</sup>**

5 CREA contests only one factual contention about CREA that is actually contained in PacifiCorp’s testimony. PacifiCorp proposes to testify that CREA has solicited PacifiCorp customers. (Ex. \_\_\_ (WGC-T) at 2:11-12). CREA proposes to testify it has not done so. (CREA presents related testimony that PacifiCorp customers have expressed interest in CREA’s services, and that PacifiCorp has solicited CREA customers. (CREA Testimony (Husted) at 2:18 to 3:22)).<sup>3</sup>

6 PacifiCorp is correct that testimony regarding solicitation of customers is irrelevant. (Ex. \_\_\_ (WGC-T Rebuttal) at 1:9-19) and Motion to Strike at 3). Though there is no pending motion to strike the single sentence of PacifiCorp’s testimony on solicitation, we recommend that if PacifiCorp’s Motion to Strike is granted, the Commission should also strike the sentence on solicitation in Exhibit \_\_\_ (WGC-T) at 2:11-12. (In the alternative, if PacifiCorp agrees to withdraw that sentence, then CREA’s testimony should also be stricken because there will be no facts at all about CREA in PacifiCorp’s testimony to which CREA would be entitled to respond).<sup>4</sup>

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<sup>1</sup> The Commission referred to this issue as “Issue (e)” in ¶¶ 28 and 33 of its 2<sup>nd</sup> Supp. Order. Issue (e) is described in ¶ 25 of that Order.

<sup>2</sup> In its proposed testimony, CREA did not provide specific citations to PacifiCorp’s proposed direct testimony, so interpretation is required to determine contested factual issues.

<sup>3</sup> CREA did not identify its exhibit pursuant to WAC 480-09-736, so we refer to CREA’s filed direct testimony of CREA’s witness Mr. Husted this way. PacifiCorp identified its rebuttal testimony with the same exhibit reference as its direct testimony, so we add the term “Rebuttal” to the exhibit designation to distinguish the direct and rebuttal testimonies of PacifiCorp’s witness Mr. Clemens.

<sup>4</sup> A similar situation exists regarding duplication of facilities testimony. *See* footnote 5, *infra*, and related text.

7           The other factual issues on which CREA attempts to offer testimony are also irrelevant, as PacifiCorp argues. Moreover, this testimony is beyond the scope of CREA’s intervention. It should be stricken.

8           For example, PacifiCorp proposes to testify that duplicating facilities exist in College Place.<sup>5</sup> (Ex. \_\_\_ (WGC-T) at 3:6-9). Though CREA appears to contest this fact, CREA goes on to explain that it has indeed installed facilities in College Place, pursuant to “permits and other approvals first obtained by the city.” (CREA Testimony (Husted) at 2:8-17). Even if these facts were relevant, having city approvals is a fact that is not contested by PacifiCorp. More to the point, CREA’s testimony proves there is duplication of facilities in College Place, so there is no material difference in the testimony. CREA’s testimony on this point is unnecessary.

9           CREA also proposes to testify that 1) there are no duplicating facilities in Dayton and the City of Walla Walla (*id.*); 2) that CREA recovers its own costs to remove facilities costs as part of its overall operating expenses (*id.* at 3:3-17); and 3) that CREA has various service areas and operations. (*Id.* at 1:14 to 2:8). Even if these facts were relevant, none respond to any factual contention about CREA in PacifiCorp’s testimony. Accordingly, this testimony is beyond the scope of CREA’s intervention and should be stricken.<sup>6</sup>

**ISSUE 2: Whether the “proposed tariff charges are an unlawful restraint of trade, restricting competition and customer choice in contravention of law and policy.”**

10          CREA opines that PacifiCorp’s proposed cost of removal charges are “an effort to limit competition.” (CREA Testimony (Husted) at 3:26 to 4:4). CREA justifies this opinion

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<sup>5</sup> This is the other example where, if PacifiCorp’s Motion to Strike is granted, PacifiCorp’s own testimony on duplication (Ex. \_\_\_ (WGC-T) at 3:6-9) should be stricken if it is not withdrawn.

1) by observing that the proposed charge only applies “to customers who want to switch utilities and not to customers who abandon or otherwise discontinue service with PacifiCorp;” and 2) by speculating that the proposed charge “could be a deciding factor in whether a customer changes utilities.” (*Id.* at 4:1-4).

11           There are many reasons for striking this testimony. First, it is argument, not evidence. Second, PacifiCorp no longer has a “switching utilities” limitation in its tariff proposal. (Ex. \_\_\_ (WGC-T Rebuttal) at 2:10 to 4:10). So CREA’s first justification no longer applies.

12           Moreover, CREA’s second justification, relating to PacifiCorp’s customer motives, is simply speculation. It is also irrelevant. A cost of removal charge approved by the Commission contravenes no law or policy.<sup>7</sup> Therefore, CREA’s ideas about PacifiCorp’s customer motives have no bearing on the unlawful restraint of trade issue. This testimony is also beyond the scope of CREA’s intervention because the Commission has ruled it cannot consider CREA’s competitive interests in this case. Rather, it is the impact on PacifiCorp’s customers that is to be protected here. *See* 2<sup>nd</sup> Supp. Order at 8, ¶ 33. CREA does not contest the fact that the proposed cost of removal charge is cost-based. Nothing CREA has offered proves that a cost-based facilities removal charge is anticompetitive.

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<sup>6</sup> Nevertheless, Staff agrees that if any substantive part of Mr. Husted’s proposed testimony is not stricken, he should be permitted to provide the background testimony on page 1, line 3 to page 2, line 8 of his filed direct testimony.

<sup>7</sup> There is no statute or Commission order (of which we are aware) that dictates how a utility’s costs of removing facilities are to be recovered.

There is a state policy that duplication of electric facilities is “contrary to the public interest.” RCW 54.48.020. That policy is not contravened by the proposed charge.

The only other potentially applicable statutes would be state and federal antitrust laws. State antitrust laws are not contravened because Commission-approved actions are exempt. (RCW 19.86.170). Likewise, federal antitrust laws are not contravened because the Commission actively supervises the tariffs filed pursuant to state law. The federal antitrust laws do not apply in that circumstance, pursuant to the “state action doctrine.” (*E.g., Federal Trade Comm’n v. Ticor Insurance Co.*, 504 U.S. 621, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992).

13           There is nothing unfair about the proposed cost-based facilities removal charge. If anything, recovering facilities removal costs through general rates is unfair, since it forces the remaining customers to subsidize the choices of departing customers that impose costs on the utility.

14           The bottom line is that CREA's testimony offers nothing that proves recovery of facilities removal costs through a discrete, cost-based charge is an unlawful restraint of trade. It should therefore be stricken.

### **Conclusions**

15           CREA was permitted to intervene on two narrow issues: 1) to contest factual statements made by PacifiCorp about CREA; and 2) to address whether the charges proposed by PacifiCorp would be an unlawful restraint of trade, in contravention of law and policy. CREA's testimony offers nothing relevant on either issue, and much of what CREA offers is either beyond the scope of these limited issues, or it is inadmissible argument and speculation. Accordingly, Staff supports PacifiCorp's Motion to Strike CREA's testimony.

DATED this 5th day of September, 2002.

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