

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND)	
TRANSPORTATION COMMISSION,)	
)	DOCKET NO. UE-001734
Complainant,)	
)	THE INDUSTRIAL CUSTOMERS OF
v.)	NORTHWEST UTILITIES' ANSWER
)	TO PACIFICORP'S
PACIFICORP, d/b/a PACIFIC POWER &)	MOTION TO STRIKE
LIGHT,)	
)	
Respondent.)	
)	

INTRODUCTION

Pursuant to WAC § 480-09-425 and the August 27, 2002 Notice of Opportunity to Respond to Motion to Strike, the Industrial Customers of Northwest Utilities (“ICNU”) submits this Answer in Opposition to PacifiCorp’s (or the “Company”) Motion to Strike (the “Motion”).

On August 22, 2002, PacifiCorp filed a Motion to Strike the Response Testimony of Mr. Thomas H. Husted, submitted in this proceeding on behalf of the Columbia Rural Electric Association, Inc. (“CREA”) on July 3, 2001. Granting PacifiCorp’s Motion would limit the Washington Utilities and Transportation Commission (“WUTC” or “Commission”) review of relevant issues and impair the Commission’s public interest responsibilities. As a result, PacifiCorp’s Motion is without sound legal support and the Commission should deny the Motion for the reasons set forth below.

ARGUMENT

PacifiCorp has not met its burden of proof justifying granting the Motion. Motions to strike testimony are generally disfavored in administrative proceedings because

ascertaining all relevant facts is the primary objective. As at least one federal court has concluded, “even a properly made motion to strike is a drastic remedy which is disfavored by the courts and infrequently granted.” Int’l Longshoremen’s Ass’n v. Va. Int’l Terminals, Inc., 904 F. Supp. 500, 504 (E.D. Va. 1995). If PacifiCorp insists on objecting to Mr. Husted’s testimony, those objections should be directed at “the weight to be given the evidence,” not its admissibility. WUTC v. US West Communications, Inc., WUTC Docket No. UT-961638, Third Supp. Order at 4 (Dec. 19, 1997); Re Evergreen Trails, Inc.. Order M.V.C. No. 1824, Hearing No. D-2559 (July 10, 1989). In addition, PacifiCorp’s Motion should be denied because it: 1) merely reargues issues already decided by the Commission; 2) is untimely; 3) challenges testimony that responds directly to issues raised by PacifiCorp; and 4) would restrict the Commission’s analysis of the greater impacts of PacifiCorp’s proposal.

A. PacifiCorp’s Motion is an Attempt to Reargue Issues Already Decided by the Commission

PacifiCorp’s Motion is an attempt to reargue issues already decided by the Commission. Re PacifiCorp, WUTC Docket No. UE-001734, Second Supp. Order (July 9, 2001) (“Second Supplemental Order”). PacifiCorp asserts that CREA’s testimony is “not relevant to the merits of PacifiCorp’s proposed tariff changes and/or involve assertions that are beyond the Commission’s jurisdiction.” Motion at 3. These claims are similar to the issues raised by PacifiCorp in its opposition to CREA’s intervention. PacifiCorp’s Response to Petition for Intervention by CREA (June 11, 2001). PacifiCorp claims that the Commission’s analysis should be confined to whether the rates proposed by PacifiCorp “are just, reasonable, necessary and sufficient nature of the proposed net removal charges and whether granting of such proposed charges would be regulation in the public interest.” Motion at 5. The Commission, however,

already determined that PacifiCorp's tariff proposal must be analyzed in the broader context of its effects on competition to determine whether the tariff is in the public interest. Second Supplemental Order at 8. The Commission also concluded that CREA "may help the Commission determine the effects of the Proposed Tariff Revision on customers, which we find to be in the public interest." Id. Furthermore, as one of PacifiCorp's retail customers, the proposed tariff will directly affect CREA. PacifiCorp Motion to Amend Motion to Strike at 1 (Aug. 26, 2002). It is absurd to suggest that any testimony regarding impacts on customers is "not relevant" to this proceeding.

B. PacifiCorp's Motion to Dismiss is Untimely and Striking CREA's Testimony at this Time May Prejudice Parties' Cases

The Commission should deny PacifiCorp's Motion on the basis that it is untimely. CREA filed Mr. Husted's testimony on July 3, 2001. PacifiCorp filed its Motion more than one year after CREA submitted Mr. Husted's testimony. PacifiCorp has not explained the reasons for its delay in filing the Motion, nor has PacifiCorp presented any new arguments against CREA's participation. The Parties should be preparing for the Hearings set for September 20, 2002, not engaging in legal maneuvers over issues already decided by the Commission. Striking CREA's testimony at this stage of the proceeding would prejudice the cases of several parties, leaving little time to address issues properly before the Commission.

C. PacifiCorp Raised the Issues Discussed by Mr. Husted in the Company's Direct Testimony

The Commission should deny PacifiCorp's Motion because PacifiCorp raised the issues discussed in Mr. Husted's testimony in the Company's direct case. PacifiCorp's Direct Testimony stated that the tariff proposal is in response to CREA "soliciting PacifiCorp's current

retail customers” Direct Testimony of William G. Clemens (“WGC-T”) at 2. PacifiCorp also stated that CREA “has been active in seeking franchise rights from local governments.” Id. Mr. Husted’s testimony merely responds to PacifiCorp’s allegations. PacifiCorp should not be allowed to present a rationale for its tariff proposal, and then seek to restrict Parties from presenting evidence contradicting the Company’s allegations.

D. The Commission Must Consider All Impacts on Customers from PacifiCorp’s Proposal to Determine Whether the Proposed Tariff is in the Public Interest

The Commission should deny PacifiCorp’s Motion so that it can consider all of the potential impacts on PacifiCorp’s retail customers associated with the proposed tariff. While PacifiCorp argues that this action is a simple tariff modification, the Company’s request in this Docket has significant consequences for its customers beyond the actual tariff charges. Second Supplemental Order at 8. In effect, PacifiCorp asks the Commission to approve a barrier to competition, contrary to Washington’s fundamental policy against such actions. Wash. Const. art. XII, § 22; Group Health Coop. v. King County Med. Soc’y, 39 Wash. 2d 586, 237 P.2d 737 (1951); Re Elec. Lightwave v. Util. and Transp. Comm’n, 123 Wash. 2d 530, 538, 869 P.2d 1045, 1050 (1994). In addition, the tariff before this Commission is very unusual. ICNU is unaware that PacifiCorp has ever filed for approval of this type of tariff from any of its other regulatory Commissions.

PacifiCorp’s request is contrary to the public interest because it would contradict Washington’s fundamental support for competition. Id. The Commission can only restrict competition under limited circumstances approved by the legislature. Re Elec. Lightwave, 123 Wash. 2d at 538, 869 P.2d at 1050. The Commission can prohibit entry of a competitor only when entrance would be “inimical to the best interests of the . . . public at large.” Kitsap County

Transp. Co. v. Manitou Beach-Agate Pass Ferry Ass'n, 176 Wash. 486, 496, 30 P.2d 233, 237 (1934). Approval of PacifiCorp's proposal would be contrary to that standard.

CREA's testimony is relevant because it indicates the actual impact of the proposed tariff on customers and competition in Washington. Given the unique nature of PacifiCorp's request, the Commission must consider all of the testimony and exhibits presented by the parties in order to reach an informed decision on the true impact on the public interest of the new tariff language. PacifiCorp states that its tariff proposal is in response to competition from other electrical service providers, specifically CREA. WGC-T at 2. Mr. Husted refutes PacifiCorp's claims regarding competitive pressure and the cost of removal. Response Testimony of Thomas H. Husted at 2-3. CREA's testimony also provides relevant evidence as to impacts of PacifiCorp's proposal on competition, which will directly affect PacifiCorp's customers. Id. at 3-4. The tariff's potential impact on competition and customers is squarely within the Commission's jurisdiction. RCW § 80.01.040(2); Second Supplemental Order at 8. Finally, PacifiCorp's opposition to CREA's testimony further belies the fact that this proceeding was put on hold for many months for the sole purpose of entering into a service territory allocation agreement. Therefore, the Commission should deny PacifiCorp's Motion to consider all impacts of the tariff on customers.

CONCLUSION

The Commission should deny PacifiCorp's Motion. The Motion is an eleventh-hour attempt by PacifiCorp to limit the Commission's consideration of issues to protect the public interest and ensure that ratepayers are not charged unjust and unreasonable rates. Since PacifiCorp bases its request for the imposition of an exit fee on the possibility that it could lose

customers to CREA, it is appropriate and essential for other parties, especially CREA, to address the allegations made by PacifiCorp to provide the Commission with all relevant evidence for its decision.

WHEREFORE, ICNU respectfully requests that the Commission to deny PacifiCorp's Motion to Strike.

Dated this 5th day of September, 2002.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

\s\ Melinda J. Davison
Melinda J. Davison
Mathew D. McVee
Davison Van Cleve, P.C.
1000 SW Broadway, Suite 2460
Portland, Oregon 97205
(503) 241-7242 phone
(503) 241-8160 facsimile
mail@dvclaw.com
Of Attorneys for Industrial Customers of Northwest
Utilities

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Industrial Customers of Northwest Utilities' Answer to PacifiCorp's Motion to Strike upon each party on the official service list by causing the same to be mailed, postage-prepaid, through the U.S. Mail.
Dated at Portland, Oregon, this 5th day of September, 2002.

\s\ Margaret A. Roth
Margaret A. Roth