BEFORE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND	)	
TRANSPORTATION COMMISSION,	)	**DOCKET NO. UE-001734**
	)	
Complainant,	)	**OPENING BRIEF OF CREA**
	)	
PacifiCorp, d/b/a/ Pacific Power & Light,	)	
	)	
Respondent.	)	

1. Introduction

Columbia Rural Electric Association, Inc., hereinafter "CREA", respectfully submits this opening Brief in the above captioned matter. This proceeding concerns PacifiCorp's application to include additional language in Rule 4(f) of its existing tariff to allow it to recover the "net removal costs" from its customers who request to permanently disconnect from the company's facilities.

As originally issued by PacifiCorp on November 9, 2000, the proposed tariff charge was directed at and would only affect a customer who requested "the Company to disconnect the Company's Facilities so that customer may switch to another electric utility". *First Revision of Sheet No. F3, Rule 4, Application for Electric Service.* Exhibit 1T, Direct Testimony of William G. Clemens, 1:16-20. Commission Staff, however, recommended in the Direct Testimony of Henry B. McIntosh, Exhibit 301T,

that the proposed tariff be rejected as vague and discriminatory. 2:4-7; 3:20-21; 4:1-12. Mr. McIntosh explained in that testimony that the proposal was vague for not being expressly limited to distribution facilities and for not defining which distribution facilities would be subject to the charge. He reasoned further in Exhibit 301T that the tariff requested was also discriminatory since it only applied to a customer who requested disconnection to receive service from a competing provider. Exhibit 301T, 4:7-12. Those customers who requested disconnection for other reasons would not be subject to the net removal of facilities charge.

This matter went to hearing before the Commission on September 20, 2002. The respective appearances, witness testimony and the conduct of that hearing are contained in the transcript for Docket No. UE-001734, Volume IV, pages 42-303. References herein to hearing testimony will be to that transcript. Copies of the cited statues and WAC provisions are attached. (Public Counsel did not participate in this hearing.)

2. Issue.

The issue now before the Commission is whether PacifiCorp has met its burden of proof by showing that the proposed tariff is factually supported by a preponderance of the evidence and is sustainable as a matter of law.

3. Discussion

3.1 Summary of CREA's Position: Tariff Should be Rejected. As described in the pages that follow, the application for this tariff is procedurally flawed, remains vague, in violation of the filed rate doctrine and is still discriminatory for implicitly targeting customers who wish to

switch utilities, thereby restricting or tending to restrict customer choice in a manner that does not pass the rule of reason test.

3.2 **<u>Procedure:</u>** The first difficulty is with the procedure followed by PacifiCorp in presenting the proposed tariff and arises between its initial submission on November 9, 2000 and what was presented to the Commission on September 20, 2002.

As initially filed, the proposed tariff applied only to customers of PacifiCorp seeking to disconnect from the Company's facilities in order to switch to a different utility. This filing was made under signature of Mathew Wright, Vice President, Regulation; as was the statutory notice of its filing, also dated November 9, 2000. But, after Staff recommended that Commission reject that tariff revision, PacifiCorp essentially abandoned both the filing and the supporting direct testimony of Mr. Clemens, Exhibit 1T (May, 2001).

In its place, then, in August 2002, PacifiCorp filed the rebuttal testimony of Mr. Clemens, Exhibit 2T. At page 2 of that exhibit, Mr. Clemens stated at lines 22 and 23: "PacifiCorp believes Staff's proposals have merit and subject to minor clarification language described below, the Company will amend its proposed tariff language to reflect Staff's proposals."

No such amendment has been filed by PacifiCorp and, importantly, while the Commission, the Administrative Law Judge and the parties are generally aware of the Company's new proposal, what official notice and

publication of those proposed changes has occurred? At this moment there is no tariff filing of record that defines or specifies PacifiCorp's new proposal for a "net removal tariff".

Tariff schedules are to be filed with the Commission in accordance with RCW 80.28.050 and kept open for public inspection. Under RCW 80.28.060 "Thirty days notice to the Commission and publication for thirty days, which notice shall plainly state the changes proposed to be made…" are required before "any change shall be made in any rate or charge". Notice of the November 9, 2000 revised tariff sheets was given as stated in Attachment A to the filing letter – Advice Letter No. 00-010 - from Mr. Wright. But no notice or publication of the tariff as now sought by PaciCorp has been made in the manner required by statute and Commission rules.

The significance of statutory notice is stated in WAC 180-80-020: "When any tariff is issued as to which the Commission and the public are not given statutory notice, the tariff has the same status as if the tariff had not been issued and full statutory notice must be given on any reissuance thereof." The matter of notice of tariff charges is also addressed in WAC 480-100-193, Chapter 480-100- Electric Companies – Part 2 – Consumer Rules. And, under WAC 480-80-300: "A tariff that is received in a form or filed in a method not in accordance with the form or method of tariff publication named in these tariff rules or that reflect retroactive rate treatment will be rejected by the Commission and that tariff will have the same status as if it had not been issued and full statutory notice must be given on any reissue thereof."

It is anticipated that this procedural critique will be termed by PacifiCorp as irrelevant and insignificant because the new tariff changes presented to the Commission on September 20, 2002, are really just a modification and extension of the original filing. Such a tack, however, ignores the due process, equal protection implications of adjudicating an amended filing without notice or publication of its terms to the public. ***USCA, Const Amends. 5, 14***.

The original tariff filing here involved only those customers desiring to disconnect from the Company in order to switch to a different utility provider. But the one now proposed by PacifiCorp, in adopting Staff's recommendations, would apply to all PacifiCorp customers in Washington who request disconnection for any reason. That is a substantial broadening of the affected class of customers. The public is entitled by law to notice of this tariff charge, which would impose on all present PacifiCorp customers the obligation to pay "removal charges" for all permanent disconnects for any reason. This would be a new term and condition of service and, if granted without notice or opportunity to be heard, could arguably result in an unconstitutional taking each time the Company enforced it.

Mr. Clemens' testified there have been twelve disconnects so far for customers switching to another utility. 71:1-19. The (apparently to be) amended tariff application would affect approximately 28,000 customers in Walla Walla and Columbia Counties. Customers in Yakima and Garfield Counties would have to be counted as well.

As disagreeable as it may sound, this proceeding needs to return to square one, to await proper filing, notice and publication. The scope of the proposed amended tariff is, in terms of practical impact, beyond just customers seeking to switch utilities. To proceed on the present record contemplates an arbitrary and capricious result and palpable error.

3.3 <u>The Proposed Tariff Violates the Filed Rate Doctrine:</u> Without waiving the preceding argument and if this case continues in its present configuration, the proposed tariff must be rejected as contrary to the filed rate doctrine. Beyond the means and manner of giving notice described above, the required content of that notice and the reasonableness of the new rates or charges being sought by the utility are to be considered. Those rates or charges are not made known by the instant filing. In practice they would be left to the realm of estimates and the discretion of the utility.

All changes for electricity and services rendered or to be rendered "shall be just, fair, reasonable and sufficient." RCW 80.28.010. The Commission is to determine "just, reasonable or sufficient rates, charges, practices or contracts to be thereafter observed and in force and shall fix the same by order". RCW 80.28.020. The filed rate doctrine is incorporated in Washington's regulatory process through RCW 80.28.050. That statute requires utilities to file with the commission tariffs "showing all rates and charges made, established or enforced or to be enforced…" To like effect is WAC 480-80.040: all rates and charges are to be contained in the filed tariff.

3.4 Hearing Testimony: The instant proposed tariff, and the evidence at hearing, do not rise to the mandates of the filed rate doctrine, RCW 80.28.050 or adequately serve the proponent's burden of proof. Consider the following from the report of proceedings in this case. At hearing, the position of PacifiCorp was offered through the direct and rebuttal testimony of William G. Clemens. Exhibits 1T and 2T. On examination by Ms. Davison, he:

(a) identified himself as a regional community manager, who does public relations, (67:21);

(b) has a general knowledge of utility tariffs but doesn't deal with the in depth detail on a regular basis, (67:9-13);

(c) doesn't deal with the distribution or transmission aspects of PacifiCorp; (69:1-4)

(d) indicates a total of twelve disconnects for customers switching to a different utility, (71;1-3);

(e) approximately 28,000 PacifiCorp customers in Walla Walla and Columbia Counties would be affected by the "net removal" tariff, (72:4-5);

(f) PacifiCorp has previously charged customers for pole removal as an accommodation, (77:1-77);

(g) is not aware of any other electric utility anywhere in the country that has a "net removal tariff", (9.80:6-7);

(h) cost of service is not the primary reason that PacifiCorp sees in its customers switching to CREA, (87:3-6);

(i) it is correct that there is no way a customer can look at this tariff and identify what distribution facilities are subject to it, (89:14-18);

(j) no maximum amount set for residential overhead removals, (100:8-10);

(k) no maximum set for just removal of overhead and meter for commercial customers, (101 12-14);

(l) doesn't know whether tariff would apply if an industrial customer had facilities de-energized and switched to another utility, (106: 17-19);

(m) doesn't know the number of permanent disconnects PacifiCorp has each year in Washington, (108: 21-24);

(n) doesn't know whether PacifiCorp's current rates include the costs associated with discontinuance of service, (109: 1-3);

(o) if an industrial customer wanted to disconnect but purchased the facilities from PacifiCorp rather than pay a net removal charge that would be handled on a case by case basis; and couldn't answer the question on how industrial customers could be assured that PacifiCorp would not discriminate in allowing one

customer to purchase the facilities and another customer not to produce the facilities, (109: 4-21);

(Examination by Mr. Hubbard:)

(p) he is not an officer of PacifiCorp nor aware of any board resolution submitted in connection with this application, (120: 9-14);

(q) the RCMS program has been used by PacifiCorp for some time to reflect charges for disconnection and removal as a customer accommodation, (124: 2-18);

(r) the accommodation tariff applies where it's a customer requested cost, (125: 1-3);

(s) all other PacifiCorp services areas in Washington, except Walla Walla and Columbia Counties are controlled by territorial agreements and those two counties are still a matter of customer choice, (127: 3-14);

(t) the only practical effect of the proposed tariff would be on those counties (and Garfield) and on customer choice, (127: 15-22);

(u) disconnects and connects not his responsibility, (129: 17-18)

(v) disconnect and removal costs would be an estimate and not a hard number in the tariff that a customer could look at ahead of time, (131: 1-11);

(w) imagines that disconnects that have been occurring over the years have been absorbed into PacifiCorp's rate base, (133: 5-13);

(Examination by Chairwoman Showalter:)

(x) the company can give "ballpark" estimates on facilities removal costs to customers but he personally wouldn't rely on it in determining whether to switch or not switch utilities, (157: 24-25; 159: 5-10);

(y) doesn't know why this tariff hinges only on a request by the customer verses an apparent reality that the disconnect is permanent, (168: 19-25; 169:1);

In short, the proposed tariff lacks the specificity required by the filed rate doctrine. It fails to address in any definite way rate classes other than residential and even that is left to an estimate procedure, which the witness above would not personally rely on in deciding whether to switch or not to switch utility service. As to large and small commercial customers, irrigators and industrial customers, they could not know what the "net removal costs" would be by examining this tariff.

The hearing testimony of Mr. McIntosh further revealed the shortcomings of the proposed tariff in terms of the filed rate doctrine:

(Examination by Ms. Davison)

(aa) logically possible under this tariff that Boise Cascade could be assessed a net removal charge which its expert calculates at $5,000 but PacifiCorp claims is $5,000,000, (237:9-18);

(bb) would have been a reasonable thing to have done for PacifiCorp to have undertaken a study and actually suggested a cap or maximum charge for commercial and large industrial customers, (238: 10-19).

(cc) tariff doesn't produce a listing of the distribution facilities that are subject to this tariff, (241: 6-10);

(dd) has seen no evidence in this record that identifies the costs for removal of facilities for commercial or industrial customers, (245: 12-15);

(ee) can assume from Exhibit 61 that PacifiCorp in certain instances believes it has the legal authority to charge for the costs they incurred for moved facilities, (253: 11-16);

(ff) net removal costs can not be passed on to other PacifiCorp customers because it is under a five year rate plan, (258: 14-20);

(gg) the cost of disconnecting a service when the customer moves or small business owner

goes out of business is already in PacifiCorp's rates;

(by Mr. Hubbard)

(hh) no fixed charges in the proposed tariff other than the $200 and $400 and there is still vagueness in it, (365: 13-22);

(by Chairwoman Showalter)

(ii) the reason some tariffs use the technique of nonspecific designation is that you have unusual events, infrequent events, and its hard to capture them in an average cost study, (278: 21-25);

(jj) the tariff is not meant to apply to customers who do not request a permanent disconnection but discontinue service because the facilities remain in place and a new customer can be expected to use them.

If adopted by the Commission, the vagueness in the tariff would leave the eventual charge to the customer to be determined by PacifiCorp's estimate of cost of removal less salvage and subject to a "True-up" when the work is completed and the actual cost is known. (Actual cost is referred to in the proposed tariff but the estimate procedure is not.) As noted in Exhibit 61, the Company using its accommodation tariff, Rule 14, Advice No. 98-004, quoted the customer $1,200 for a disconnect and removal and then $852 for the same result but with a reduced scope of work; i.e. removing the conductor but leaving the secondary pole. Exhibit 61 is likely to become a

telling example of the proposed tariff being put into practice. The estimates and scope of work will be in fluctuation at the Company's discretion.

Unless the tariff defines the facilities and establishes the charges by a fixed amount or methodologically sound formula, the customer is left to deal and negotiate with a party possessed of considerable bargaining power. It is disingenuous to maintain that in the event of a dispute over the net removal charge that a customer could just avail itself of the complaint procedure with the Commission. The typical utility customer is not reasonably equipped to fight that kind of case to a conclusion. Experts and lawyers are not in the household budget. Not only is the Company a significant opponent but also, once the tariff is allowed, the burden of showing the charges to be unreasonable shifts to the customer-complainant. ***NorthCoast Power Co. vs. Kuykendal,*** 117 Wash 563, 201 P.780 (1921). A filed tariff that conformed to law would spare the consumer what should be an unnecessary burden.

3.5 Proposed Tariff is an Unnecessary Charge with Discriminatory Effect and Restraint of Customer Choice.

3.5.1 Tariff Unnecessary: By regulation there can be no charge to the customer for furnishing and installing a meter for billing of electric service. WAC 480-100-313. That cost is one of doing business in general that the company recovers through its rate base. Disconnects and removal of facilities have been absorbed for years by PacifiCorp in the same way. Customer directed discontinuance of service is addressed by WAC 480-100-128. No charge is there assessed to the customer on account of the event of discontinuance. The procedure for reconnection is in WAC 480-

100-133. In subsection (1) of that regulation, a reconnection charge is recognized as an obligation of the customer, who could be a returning or a new customer. The point for PacifiCorp to recoup "net removal costs" is already established through a reconnection charge under that WAC. If facilities have to be built back in to reconnect a former service, those costs would appropriately be handled through the existing line extension tariffs of the Company.

PacifiCorp stated at hearing that the purpose of this filing was for safety and operational issues. (Clemens, 84: 11-25). By that it is understood to mean the Company's desire to recover the net costs it believes it has to incur in removing facilities for safety and operational reasons when a customer permanently disconnects from the system.

It is submitted by CREA that in many instances the removal of facilities by PacifiCorp would be elective on its part and not reasonably required by the circumstances.

Both utilities are subject to the Natural Electric Safety Code and to RCW 19.29.010, which contains the rules for use of electrical apparatus or construction. Both utilities are subject to the terms and conditions of their respective franchises and related right of way ordinances in Walla Walla, College Place and Dayton, Washington as well as in Walla Walla and Columbia Counties. Safety and operational concerns are really addressed by the NESC, existing law and local regulation. It should not be used by PacifiCorp as justification for this tariff. And, in any event, it is improper to

suggest that either utility would proceed unsafely or create or maintain an unsafe condition.

3.5.2 <u>Proposed Tariff Would Restrain Customer Choice and Violate the Rule of Reason:</u>

(a) <u>Public Policy:</u> The ready availability of electric energy at reasonable rates is supported in this state as a matter of public policy. See, e.g. RCW 80.28.010,020. The legislature has declared it a policy of this state to maintain and advance the availability of electric services to the residents of the State of Washington and to ensure that customers pay only reasonable charges for electric service. RCW 80.28.074. To further that end, no electric company or utility can subject its customer "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever". RCW 80.28.090. In RCW 80.28.100, an electric company is prohibited from rate discrimination in what it demands or receives from one person than what it demands or receives from another person for doing a like or contemporaneous service under the same or substantially similar circumstances or condition. Service territories are not mandated in this state, leaving the consumer free to choose the provider of electricity when two or more utilities are present and able to serve the load.

(b) <u>Basis for Filing:</u> The evidence shows that PacifiCorp has historically incurred and absorbed the cost of disconnecting and removing distribution facilities as cost of doing business. That cost was never the basis for this filing. Nor, is it the basis for the referenced but not formally submitted amended tariff. The basis for the filing is contained in Exhibit 1T, the direct

testimony of Mr. Clemens: "CREA is soliciting PacifiCorp's current retail customers…" p. 3: 11-12.

On direct he further testified that PacifiCorp has for years charged customers requesting the relocation of facilities and for new facilities under Rule 14, VI. (The customer accommodation tariff). "The circumstances behind this filing are very similar to a relocation, but involve two utilities…" pages 3-4: 20-3. Even though the solicitation claim has not been substantiated by PacifiCorp and the proposed tariff apparently reconfigured to apply to all customer requesting disconnects and removals, the real purpose and effect of that tariff is to restrain customer choice.

(c) Rule of Reason: Adopted from common law, the rule of reason prohibits restraints of trade that were deemed undue at the time the Sherman Act became law. ***U.S. v. E.I. Du Pont de Nemours & Co.*** 351 U.S. 377(1956); .15 USCA §§ 1-7. Prohibited are those actions and arrangements which prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade. ***U.S. vs. American Tobacco Co.***, 221 U.S. 106 (1911).

The test for the legality of a restraint under the rule-of-reason standard is whether the challenged action is one that promotes or suppresses competition. See, ***FTC vs. Indiana Federation of Dentists***, 476 U.S. 447 (1986). Does the restraint merely regulate to promote competition or does it act to suppress or even eliminate competition? *ibid.*

(d) **<u>State Action Immunity:</u>** It is well recognized that a state may regulate and control public utilities to protect the public interest. The state action immunity doctrine shields public utilities acting under the direction and authority of a state from antitrust liability, but only if:

> **(a)** the conduct in question is the result of a clearly articulated and affirmatively expressed state policy; and
>
> **(b)** state officials have and exercise the authority to review the particular uncompetitive acts of the private party and disapprove those that fail to accord with state policy.

DFW Metro Line Servs v. Southwestern Bell Tel Corp, 988 F. 2d 601(CCA-5, Tex) (1993). Similarly, the filed rate doctrine protects a utility from antitrust liability to its customers when charges or services are provided under a tariff approved by an appropriate regulatory agency. ***County of Stanislaus vs. Pacific Gas and Electric Co.,*** 114 F 3rd 858 (9th Cir., 1997).

(e) **<u>Antitrust Exposure:</u>** In this proceeding, PacifiCorp asks the Commission to approve a barrier to customer choice and competition, contrary to our state's fundamental policy against such action and monopolies. Wash. Const. art. XII §22. ***Group Health Co-Op vs. King County Med. Society,*** 39 Wn. 2d, 237 P2d 737 (1951); ***Re: Elec. Lightwave vs. Util. and Transp. Comm'n,*** 123 Wn. 2d 530, 869 P2d 1045 (1994).

From a case with which the Commission is believed to be closely familiar, ***Cost Management Services, Inc. vs. Washington Natural Gas***

Company, 99 F3d 937 (1996), there is no flat bar to antitrust claims by either the state action immunity doctrine or the filed rate doctrine.

In the first instance, the relevant question is "whether the regulatory structure adopted by the state has specifically authorized the conduct alleged to violate the Sherman Act." ***supra,*** at 942. Likewise, with respect to the filed rate doctrine, it only precludes federal antitrust claims based on rates approved by the regulatory agency but does not apply to rate based damages actions brought by a competitor of a regulated utility. ***supra*** at, 948. Exemptions from antitrust laws are strictly construed. ***Square D Co. vs. Niagara Frontier Tariff,*** 476 U.S. 404 (1986).

(f) **<u>Restraint:</u>** Conduct left to estimates and negotiation between the utility and the customer can not produce a result specifically authorized by the Commission. Nor, in the antitrust context, does the proposed tariff provide a basis for sufficient supervision by the Commission over its anticompetitive application. Moreover, the proposed tariff remains discriminatory, its only real effect being on a targeted class of customers who seek to switch utilities. The historic attrition of customers and facilities is a cost covered already in the Company's rate base. Likewise customer requested removal of facilities is already in the Company's "Customer Accommodation" tariff. The only customer left for this tariff to affect is the one seeking to switch utilities.

The vagueness of this tariff, and the latitude that would be given the Company in applying it, was further established in the following exchanges during the hearing.

Commissioner Oshie posed a hypothetical dealing with orchard plots A and B and each owned by a different farmer. The owner of Block A acquires Block B and wants to put both parcels under one meter, running a hard line from the irrigation pumps on Block A to the irrigation pump on B. When asked if the tariff would apply Mr. Clemens responded both "No" and "It would be an accommodation…" 165; 166 21-17. When asked what the result would be if the owner did not request that the meter on Block B be removed, leaving it up to the Company to remove it or not, the answer by Mr. Clemens was reduced to "it's one of those we'd have to really take a look at…" 167: 1-7. As to safety, "it's not a safety issue in all cases." 167: 22-23. Depending on the situation the Company would "remove safety problems outside the tariff if they exist." 168: 1-11.

When the same hypothetical was put to Mr. McIntosh by Commission Oshie. Blocks A and B are combined under owner A and one meter. There would "probably not be a charge" for removal of meter B. 285: 5-20. If PacifiCorp wanted to remove the meter under the proposed tariff that would be a cost it would absorb. 286: 1-11.

The imposition of the tariff would be a discretionary function of PacifiCorp. Combined with the vagueness in knowing ahead of time what the charge will be, the tariff proposed can not reasonably be termed a valid regulatory constraint. As developed by Commission Hemstad with Mr. Clemens, if there was no request from the customer and the premises were abandoned, without likelihood of ever being served again, the facility would probably just be removed at the Company's cost. 170, 171: 16-1. But, if

the customer requests the disconnection and removal of facilities, then the proposed tariff would apply.

The customer who requests disconnect and removal work will be the one switching to another utility. The discriminatory nature of the "revised" tariff is the same as the one actually filed and objected to by Staff. It would impose burdens on that customer that are not borne by other customers involved in disconnects and removals for other reasons. The only difference is with the one who wants to switch utilities.

The purpose and effect of the instant tariff is to burden the customer and restrict, if not economically prevent, that customer from switching utilities. See, direct testimony of T. Husted, Exhibit 201T, pp 3, 4. The Commission should decline the invitation to embark on that course and PacifiCorp should prudently withdraw its application.

Conclusion

PacifiCorp's rate base and revenue requirements are secure, many times over the restraints and protections it seeks through this application. If the net removal tariff is rejected, as it should be, those costs, to the extent they exist, will not be passed onto the public due to the rate plan now in effect. To grant the tariff would only serve to protect PaciCorp's market share and its shareholders; not the public interest.

Based on the procedural flaws in this filing -- or rather the absence of a formal tariff filing -- its vagueness and the inherent restrictive effect on

customers in the utility marketplace, this tariff should and needs to be, rejected. PacifiCorp has not met its burden of proof that its application would result in a fair, just and reasonable tariff.

Respectfully submitted this 10th day of October, 2002.

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