BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMMISSION, Complainant, v. PACIFICORP, d/b/a/ PACIFIC POWER & LIGHT, Respondent.	DOCKET NO. UE-001734

OPENING BRIEF ON BEHALF
OF COMMISSION STAFF

October 11, 2002

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I. INTRODUCTION AND SUMMARY

1 This case presents the policy issue whether a customer who causes PacifiCorp to incur facilities removal costs should be responsible for paying that cost. The Commission should resolve that issue in the affirmative and approve the proposed tariff changes.

2 PacifiCorp, d/b/a Pacific Power & Light (PacifiCorp or Company), seeks Commission approval to charge a customer the Company's net cost of removing facilities. The charges would apply when a customer requests to permanently disconnect service, and the facilities are not likely to be re-used at that location. PacifiCorp needs to remove facilities in these circumstances for operational and public safety reasons.

3 The proposed net cost of removal charges are prospective, cost-based and non-discriminatory. They exact payment from the customer who imposes the cost on PacifiCorp. The customer pays PacifiCorp's incremental cost of removing facilities, less salvage. No charge is made for any possible stranded plant or lost revenue. Accordingly, the proposed charges are not "stranded cost charges" or "exit fees."

4 The proposed charges are subject to reasonable conditions. If the tariff changes are approved as proposed, they will expire December 31, 2005. If PacifiCorp refiles the tariffs to make the proposed charges effective beyond the sunset date, the Commission would decide whether the charges would continue. Annual reporting of PacifiCorp's actual experience under the tariff is also proposed, to help assure reasonable tariff implementation.

5 In sum, the proposed net cost of removal charges represent a reasonable, measured attempt to require that customers pay to PacifiCorp the net facilities removal costs those customers impose upon PacifiCorp. The proposed charges should be approved, subject to the

proposed sunset date and reporting conditions.

II. BURDEN OF PROOF

6 The burden of proving the proposed tariff revision is "just and reasonable" is on PacifiCorp. (RCW 80.04.130(2)).

III. FACTS

A. Proposed Changes To PacifiCorp's Tariff, Rule 4(f)

7 The proposed net cost of removal charges would add language to existing PacifiCorp Tariff WN U-74, General Rule and Regulation 4(f).[1] The proposed changes to Rule 4(f) are shown below in legislative format.[2] Any terms different from those contained in Staff's filed direct testimony are italicized, and the basis in the record is explained in footnote 2:

> **Rule 4(f).** Availability of Facilities. Company shall not be required to maintain facilities in place or to continue the availability of facilities installed for the Customer's service when: ~~(a)~~ *(1)* facilities are not being utilized to provide service in accordance with an application for service; or ~~(b)~~ *(2)* when such service is not furnished in accordance with contract provisions set forth in this tariff.

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[1] PacifiCorp's current tariff is in the record per official notice. (Tr. 295, lines 10-11).

[2] The proposed tariff language provided in ¶ 7 of this brief reflects the version contained in PacifiCorp's filed rebuttal testimony (*see* Clemens: Ex. 2-T at page 3, line 1 to page 4, line 10), plus the following: 1) The $200 and $400 charges are clarified to apply only to simple "service drop" situations, as explained at hearing (*see, e.g.* Clemens: Tr. 156, line 6 to Tr. 157, line 8 and Tr. 161, lines 20-24); and 2) All of the paragraph designations in Tariff Rule 4(f) are changed from letters to numbers, to avoid confusion. Otherwise, there would be two paragraphs (a) and (b) in Rule 4(f).

Chairwoman Showalter noted that the description of the residential service drop in proposed paragraph (a) (now designated proposed paragraph (3) in the proposed text), was unclear. (Tr. 156, line 6 to Tr. 157, line 8). In response, PacifiCorp testified only the "service drop," not the entire overhead line, would trigger the $200 charge. (*E.g.,* Clemens: Tr. 111, lines 1-13). The term "service drop" has been substituted to address this concern. During the hearing, PacifiCorp agreed to this clarification in concept. (Clemens: Tr. 156, line 13 to Tr. 157, line 8). Staff proposes the proposed tariff changes be clarified accordingly.

Otherwise, the proposed tariff language in PacifiCorp's filed rebuttal testimony is the same as that found in Staff's filed direct testimony (McIntosh: Ex. 301-T at page 7, lines 1-37 and Ex. 302), with the exception that a new last phrase of the proposed tariff was added by PacifiCorp in Ex. 2-T at page 4, lines 9-10 (in italics). This additional phrase is acceptable to Staff. (McIntosh: Tr. 272, line 17 to Tr. 273, line 17).

~~a)~~ *(3)* When Customer requests Company to permanently disconnect Company's facilities, under circumstances where the facilities would likely not be reused at the same site, Customer shall pay to Company the actual cost for removal less salvage of only those distribution facilities that need to be removed for safety or operational reasons, and only if those facilities were necessary to provide service to Customer. However, the actual cost for removal less salvage charged to Customer making a request under this paragraph shall not include any amount for any distribution facilities located on public easement (other than the meter and *service drop*~~overhead or underground service~~). When the facilities removed by Company are the *overhead* service drop ~~residential overhead service~~ & meter only, the charges shall be $200. When the facilities removed by Company are residential underground service *drop* & meter only, the charges shall be $400.

~~b)~~ *(4)* When Customer requests Company to permanently disconnect Company's facilities, under circumstances where the facilities would likely not be reused at the same site and Customer also requests Company to remove specific distribution facilities, Customer shall pay to Company the amounts described in paragraph ~~(a)~~ *(3)* above, as well as the actual cost for removal less salvage of any different distribution facilities Customer requests be removed. Notwithstanding the last sentence of paragraph ~~(a)~~ *(3)*, the actual cost for removal less salvage charged to a Customer making a request under this paragraph may include amounts for distribution facilities located on public easement if Customer specifically requests such facilities be removed.

~~c)~~ *(5)* Company shall remove facilities pursuant to paragraph ~~(a)~~ *(3)* and ~~(b)~~ *(4)* only to the extent it can do so without an adverse impact on the service provided, or to be provided, to other customers.

In billing for removal of distribution facilities under paragraphs ~~(a)~~ *(3)* and ~~(b)~~ *(4)*, Company shall charge Customer for the actual cost for removal, less salvage, unless the specific charge stated in paragraph ~~(a)~~ *(3)* applies. Company shall provide an estimate of such charges to Customer prior to removal of facilities. The Customer shall pay the amount estimated prior to disconnection and removal of facilities. The facilities shall be removed at a date and time convenient to both the Customer and Company. Within 10 business days after removal, Company shall determine the actual cost for removal less salvage, and adjust Customer's estimated bill to that amount, *unless the specific charge stated in paragraph ~~(a)~~ (3) applies.*

B. The Circumstances in Which The Proposed Net Cost Of Removal Charges Would Apply

8 Under the proposed tariff language quoted above, a net cost of removal charge would apply in two situations. First, such a charge would apply when a customer requests permanent

disconnection,[3] and it appears the facilities will not be re-used at the customer's site. (¶ 3 of the proposed tariff language above). In this situation, the customer would be charged the cost (less salvage) that PacifiCorp incurs to remove those distribution facilities not located on public easement that were used to serve that customer. (Exception: if a residential service drop or meter happens to be located on public easement, they would be removed for a charge). If only a residential service drop and meter is involved, a $200 charge (for overhead service drop and meter) or $400 charge (for underground service drop and meter) would be imposed.

9 The second situation for applying the proposed tariff is when the customer makes a request for permanent disconnection under proposed paragraph (3), as described above, and also requests that specific additional distribution facilities be removed. Customer-specified facilities may include power poles or other distribution facilities, even those located on public easement. In this situation, the customer is charged the cost (less salvage) that PacifiCorp incurs to remove these additional distribution facilities the customer requests to be removed. (¶ 4 of the proposed tariff language above).

10 Facilities will not be removed if that would adversely affect the service provided to other PacifiCorp customers. (¶ 5 of the proposed tariff language above).

C. Why PacifiCorp Needs To Remove Customer Facilities In These Circumstances

11 In two of the four counties where PacifiCorp currently serves, customers have a choice of electric service providers. (Clemens: Tr. 154, line 5 to Tr. 155, line 4). Columbia REA is one of

[3] At hearing, the term "request for permanent disconnection" was often used interchangeably with "request to remove facilities." However, a customer request to remove facilities is not a literal pre-condition for application of the charges in paragraph (3) of the proposed language in ¶ 7 of this brief. A customer request to remove facilities is a precondition for the charges in paragraph (4) of the proposed tariff, which is the second situation under which the proposed net cost of removal charges can apply.

those choices. In some parts of the City of College Place (near Walla Walla), there are two sets of poles running down opposite sides of the street, serving customers in the same area. One set of poles is owned by PacifiCorp, and one set is owned by Columbia REA. (Clemens: Tr. 146, lines 7-21)(Husted: Tr. 202, line 12 to Tr. 203, line 1).

12 Duplicate distribution facilities (one energized and one not) located at a single premises presents an unsafe condition for both electric supplier personnel and firefighters in an emergency. (Clemens: Ex. 2-T at page 4, lines 23-26). Firefighters must quickly obtain electricity company cooperation in de-energizing circuits during an emergency. When two service drops are present, a confusing and potentially time-wasting situation is presented. That is not acceptable. (McIntosh: Ex. 301-T at page 10, lines 1-6).

13 Even when a location is permanently abandoned, the existence of a single disconnected, but remaining service drop may cost firefighters precious time in responding to a fire, when they take time to de-energize what appears to be a "live" circuit.

14 Operationally, PacifiCorp needs to remove its meter and service drop in order for a second supplier to use the customer's existing service facilities. As a practical matter, it is not economical for a customer to avoid PacifiCorp's charges by building new service facilities. (*E.g.,* Clemens: Tr. 147, line 23 to Tr. 148, line 25).

15 Accordingly, for both safety and operational reasons, PacifiCorp typically needs to remove electric distribution facilities previously serving a customer who has made the choice of permanently disconnecting service, when the facilities will no longer be used.[4]

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[4] The Commission has been properly responsive in other contexts in which public safety is involved. For example, in Docket No. UE-010686, the Commission allowed PacifiCorp to clarify its tariff to require customers using electric generators to install transfer switches to protect PacifiCorp personnel and the customers themselves. *In the Matter of the Requested Waiver of Statutory Notice in Connection with the Contract Filed by PacifiCorp, d/b/a*

D. Why A Tariff Change is Needed

16 PacifiCorp's existing tariff permits PacifiCorp to charge a customer for facilities removal only when a customer specifically requests a facilities removal. (PacifiCorp Tariff WN U-74, Rule 14, VI.A and B). The existing tariff does not permit PacifiCorp to charge for facilities removal when the customer simply requests permanent disconnection of service.

17 This problem was clearly demonstrated in the customer complaint file included in Exhibit 61, 5th page (labeled "page 4 of 5," 8/20/2002 email of 9:03 AM). When the customer specifically requested PacifiCorp to move facilities, PacifiCorp asserted its tariff and proposed to charge its net cost of $1,167. The customer then changed his request to "just disconnection." No PacifiCorp tariff applied in this circumstance, so the customer was relieved of paying the $1,167 cost PacifiCorp incurred. (The $1,167 figure is shown on the last page of Exhibit 61).

18 The bottom line is that under existing tariffs, customers can avoid paying for the facilities removal costs they impose on PacifiCorp by requesting only permanent disconnection, not removal of facilities. Because PacifiCorp has a need to remove facilities when they will not be re-used at that customer location, and incurs a cost to do so, the proposed tariff changes would close the existing loophole.

E. How The Proposed Net Removal Cost Charges Are Computed

19 If the proposed tariff changes are approved, the Company would charge a departing customer PacifiCorp's actual cost of removing the described distribution facilities, less salvage. After the customer request for permanent disconnection is made, PacifiCorp provides an estimate of its net removal cost. The customer must pay the estimated cost before the facilities are

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Pacific Power & Light, Docket No. UE-010686, Order Granting Less Than Statutory Notice (May 30, 2001).

removed. After the facilities are removed and the actual cost is calculated, a bill is rendered that trues-up the estimated cost to actual cost. (Proposed tariff language, last ¶, as explained by Mr. McIntosh at Tr. 293, line 20 to Tr. 294, line 14).

20 The exception is for removal of residential meters and simple residential underground and overhead service drops, which have specific charges stated. ($200 for meter and overhead service drop; $400 for meter and underground service drop). These are average charges based on the best available cost support. (¶ 3 of the proposed tariff language above, last two sentences)(McIntosh: Ex. 301-T at page 8, lines 15-23 and Tr. 291, lines 18-23)(Clemens: Tr. 111, lines 1-9).

21 Determinations were not made of the average cost of removing distribution facilities in other situations, for two reasons. First, adequate records were not available. Second, rate averaging is not appropriate due to a large variation in the circumstances of customers within the commercial and industrial classes. As Staff testified: "the reason some tariffs use the technique of nonspecific designation is that you have unusual events, infrequent events, and it's hard to capture them in an average cost study." (McIntosh, Tr. 278, lines 21-25). Accordingly, "net removal costs are not amenable for such averaging and will be dealt with on a case-by-case basis." (McIntosh: Ex. 301-T at page 8, lines 15-23. *See also* Tr. 244, lines 17-21, Tr. 278, lines 16-25 and Tr. 291, lines 18-23)(*See also* Clemens: Tr. 101, line 23 to Tr. 104, line 1).

F. Conditions for Approving the Proposed Tariff Changes

22 Staff recommended that the proposed tariff changes bear a "sunset date" of December 31, 2005, which coincides with the end of PacifiCorp's current Rate Plan. (McIntosh: Ex. 301-T at page 8, lines 1-6). This condition was proposed because this is a new service offering.

Experience under the tariff will help determine whether or not it should be continued. (*Id.*). PacifiCorp accepted this condition. (Clemens: Ex. 2-T at page 4, lines 11-15). Columbia REA and ICNU offered no testimony on this issue.

23 Staff also recommended that PacifiCorp be required to report annually the times the tariff was used, date, customer type, nature of the request, estimated removal cost and salvage, actual removal cost and salvage, description of the facilities removed, and the accounts used to book each transaction. (McIntosh: Ex. 301-T at page 8, lines 8-13). These reports will help assure reasonable conduct by all concerned, and will provide data to evaluate the tariff's operation. PacifiCorp accepted this condition. (Clemens: Ex. 2-T at page 4, lines 16-20). Columbia REA and ICNU offered no testimony on this issue.

IV. ARGUMENT

A. The Proposed Net Cost Of Removal Charges Are Reasonable Because They Place Cost Responsibility On The Cost-Causer

24 There is no dispute that PacifiCorp incurs a cost when it removes distribution facilities that are no longer being used at a particular customer site. In these circumstances, "[i]t is reasonable to charge customers based on the cost their action imposes on the Company." (McIntosh: Ex. 301-T at page 10, lines 8-10)(*See also* Clemens: Ex. 2-T at page 5, lines 1-2).[5] The Commission's consistent policy goal has been to have electric utility rates reflect cost. (*See* ¶¶ 54-58*, infra*). Approving the proposed tariff revisions affirms that policy.

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[5] At hearing, Columbia REA offered speculation that PacifiCorp is the "cost-causer" if it is not offering adequate service. (Tr. 142, lines 5-6). There is no factual basis for any claim of inadequate service. On the record, only two specific instances were described where customers switched service to Columbia REA. One instance involved a customer who decided to switch to Columbia REA so their child might be eligible for Columbia REA scholarships. (Ex. 61, first page). This sort of image-building or charitable activity by Columbia REA may be laudable in other contexts, but it is not a consideration the Commission can lawfully consider when determining appropriate tariffs for a public utility. *Jewell v. WUTC*, 90 Wn.2d 775, 777, 585 P.2d 1167 (1978).

The other instance involved a customer who wanted to consolidate all of its loads under Columbia REA.

25 Columbia REA, an electric cooperative offering electric service in the same area as PacifiCorp, has chosen a different policy. Columbia REA chooses to collect its net cost of facilities removal through its general rates, rather than a specific charge upon the individual customer who causes Columbia REA to incur those costs. (Husted: Tr. 193, lines 17-24 and Tr. 198, lines 11-13).[6]

26 It is not for us to criticize Columbia REA's policy choices. Electrical cooperatives like Columbia REA are not regulated by the Commission.[7] So the Commission cannot require that Columbia REA consistently recover its costs from the cost-causer. By the same token, Columbia REA's policy choices do not require the Commission adopt the same policy as Columbia REA.

27 As a practical matter, there are two alternatives to approving the proposed tariff changes: the Commission could either require PacifiCorp to absorb its net facilities removal costs, or require remaining customers to pay those costs through general rates. Each of these alternatives is unjust and unreasonable. (*E.g.,* Clemens: Ex. 2-T at page 5, lines 2-5).

28 In sum, the proposed net cost of removal charges are just and reasonable because they appropriately place cost responsibility on the customer imposing the cost on PacifiCorp. They should be approved for that reason.

(Clemens: Tr. 96, lines 15-22). No further explanation was provided.

[6] Columbia REA also has a policy not to charge its customers when Columbia REA moves a customer's point of service, for example. (Husted: Ex. 201-T at page 3, lines 3-9 and Tr. 197, line 15 to Tr. 198, line 23). By contrast, under its existing tariffs, PacifiCorp would assess a charge in that same circumstance. PacifiCorp Tariff WN U-74, Rule 6(f). On the other hand, both PacifiCorp and Columbia REA charge their customers if they request and receive facilities undergrounding or other substantial service upgrades. (*Id.* and Husted: Tr. 220, line 3 to Tr. 221, line 6).

[7] *Inland Empire Rural Electrification, Inc. v. Dep't of Public Service*, 199 Wash. 527, 92 P.2d 258 (1939).

B. The Proposed Net Cost of Removal Charges Are Reasonable Because They Are Cost-Based

29 The proposed net cost of removal charges are cost-based. The proposed tariff changes require PacifiCorp to charge its customer the actual cost of removing facilities. (*See* proposed tariff language *supra* at ¶ 7: Rule 4(f), ¶¶ (3) and (4)). In the context of simple residential underground and overhead service drops, a charge of $400 and $200 is imposed, respectively. (*Id.* at ¶ 3). These are average charges that were developed based on PacifiCorp's actual cost of removal in residential situations. (McIntosh: Ex. 301-T at page 8, lines 15-23)(Clemens: Tr. 111, lines 1-9).

30 Accordingly, all of the proposed charges reflect cost. They meet the just and reasonable standard for that reason.

C. Reasonable Conditions Are Proposed For Implementation Of The Proposed Net Cost of Removal Charges

31 The tariff changes proposed by Staff are conditioned on a sunset date of December 31, 2005 (the same date the current Rate Plan terminates) and PacifiCorp filing detailed reports on how the tariff is administered. PacifiCorp accepted these conditions. (*See ¶¶* 22-23, *supra*).

32 The sunset date and reporting requirements are reasonable. They will enable efficient and sufficient Commission oversight over how the proposed charges are administered. No party opposed these conditions in their testimony. They should be approved.

D. The Proposed Net Cost of Removal Charges Are Reasonable Because They Will Be Applied Prospectively

33 The proposed net cost of removal charges apply only in the context of customer requests for permanent disconnection that occur after the tariff changes are approved. Thus, any charge for removing facilities under the terms of the proposed tariff changes would apply prospectively

only. Nonetheless, Columbia REA persists in describing the proposed charges as "retroactive" in effect. (Husted: Tr. 216, lines 2-7). Columbia REA is incorrect as a matter of law.[8]

34 In utility regulation, "retroactive ratemaking doctrine prohibits the Commission from authorizing or requiring a utility to adjust current rates to make up for past errors in projections." … "If a utility includes an estimate of certain costs in its rates and subsequently finds out that the estimate was too low, it can not adjust *future* rates to recoup past losses." *Town of Norwood v. FERC*, 53 F.3d 377, 381 (D.C. Cir. 1995)(emphasis in original), citing *City of Piqua v. FERC,* 610 F.2d 950, 954 (D.C. Cir. 1979).[9]

35 The proposed net cost of removal charges are prospective because they would apply only to permanent disconnection requests that occur after the effective date of the tariff. PacifiCorp only recovers the costs it incurs after the tariff changes become effective. Accordingly, the proposed charges are not retroactive as a matter of law.

36 This conclusion is consistent with the broader concept of retroactivity based on due process considerations. For example, a statute is not considered unlawfully retroactive if the "precipitating event" for its application occurs after the enactment of the statute. As the court stated in *In re Estate of Burns,* 131 Wn.2d 104, 110-11, 928 P.2d 1094 (1997) (citation omitted):

> [a] statute operates prospectively when the precipitating event for operation of the

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[8] Columbia REA purports to use the term "retroactivity" in its legal sense, and admits that unlawful retroactivity involves changing conduct that occurred in the past. (Husted: Tr. 191, lines 10-21). The proposed net cost of removal charges do not change any conduct that occurred in the past. The proposed charges would apply only to future conduct. That is, only customers who request permanent disconnection in the future, and after the charges are in effect, will incur a net cost of removal charge. Such tariff application is prospective, not retroactive,.

[9] The Commission recently noted the retroactive ratemaking concept was based on the filed rate doctrine. *In re Petition of PacifiCorp,* Docket No. UE-020417 (3rd Supp. Order at page 7, ¶ 23)(September 27, 2002). The filed rate doctrine in this state is codified in RCW 80.28.080. Some jurisdictions find the source of the retroactive ratemaking concept in statutory language permitting the regulatory agency to establish rates "to be thereafter observed and in force . . . .". *E.g., PSC of New Hampshire v. FERC*, 600 F.2d 944, 957 (D.C. Cir. 1979)(citing 15 USC § 717d(a)). RCW 80.28.020 contains this language. Whatever the source of the concept, there appears to be widespread recognition that retroactive ratemaking is not appropriate.

> statute occurs after enactment, even when the precipitating event originated in a situation existing prior to enactment.
>
> …
>
> A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment … or upsets expectations based in prior law.

37 In the instant case, the precipitating event for applying the proposed charges is a customer's request for permanent disconnection of service from PacifiCorp. The proposed tariff would apply only to customer requests occurring after the effective date of the proposed tariff changes.

38 In sum, the proposed tariff is not retroactive in any sense recognized by the law.

E. The Proposed Net Cost Of Removal Charges Are Similar To Other Charges In Existing Tariffs

39 Another benchmark of reasonableness of the proposed charges is their similarity with several provisions in existing tariffs. It is common for a utility to charge a customer the utility's cost to install, move, change or remove facilities for that customer.

40 For example, PacifiCorp currently charges for the cost to install facilities that a customer imposes on PacifiCorp when becoming a customer. This is reflected in PacifiCorp's line extension tariffs. (*See* PacifiCorp Tariff WN U-74, Rule 14). If those charges are not fully paid by the time a customer permanently disconnects service, that customer must pay PacifiCorp any unpaid charges. (*Id.* at Rule 14, III.A.1, copy contained in Ex. 307). Similarly, Qwest imposes charges when a service is terminated prematurely. (McIntosh: Tr. 293, lines 3-9).

41 Customers must also pay PacifiCorp's cost of removing and then relocating facilities, when the customer requests that be done. (*Id.* at Rule 14, III.A and Rule 6(f), copy contained in Ex. 307). Similarly, if a customer requests overhead facilities to be moved and undergrounded,

PacifiCorp charges the requesting customer for doing that. (*See* PacifiCorp Tariff WN U-74, Rule 14, IV.D, and McIntosh: Tr. 281, lines 21-25).

42 None of the foregoing existing PacifiCorp tariffs state the specific dollar charge for every possible line extension, facilities move or undergrounding. Rather, the tariff sets forth the costs to be incurred, and the procedures for cost estimation and payment. The proposed tariff revisions are no different in that regard.

43 In sum, the proposed net removal cost charges are not unusual. They are similar to existing tariffs that seek to impose cost responsibility on those customers that impose those costs on the utility.

F. The Proposed Net Cost of Removal Charges Do Not Constitute "Exit Fees" or "Stranded Cost Charges"

44 The proposed net cost of removal charges are neither exit fees, nor any other form of stranded cost charges.[10] The terms "exit fees" and "stranded cost charges" describe charges that seek to recover lost revenue, or plant left unproductive, due to a customer's departure. The net cost of removal charges proposed in this case do neither.

45 Nonetheless, Columbia REA labeled the proposed charges "stranded cost charges" or "exit fees." (Husted: Ex. 201-T at page 3, lines 14-17). In discovery, Columbia REA readily conceded that the proposed charges were not stranded cost charges because they do not recover any investment in plant that may be "stranded" by the customer's departure. (Husted: Ex. 216 and 217, and Tr. 188, lines 5-20).

[10] Even if the proposed charges were exit fees or stranded cost charges, that would not make them unlawful. Though these types of charges are not ubiquitous, they have been accepted by both state and federal regulatory commissions. (*See, e.g., Re Niagara Mohawk Power Corp*., Case No. 99-E-0681, Opinion No. 00-11 (New York PSC, September 11, 2000); 18 C.F.R. § 35.26 (FERC rules); *Re Duke Power Co.,* Docket Nos. ER97-2095-000 et al., 79 FERC ¶ 61,161 (FERC, May 14, 1997); and *Re Wisconsin Power & Light Co*., Docket No. ER98-2752-000,

46 The proposed net cost of removal charges are not exit fees, either. The decisions cited in footnote 10, *supra,* all used the term "exit fee" in the context of stranded cost recovery. FERC rules consider exit fees to be a form of stranded cost recovery. For example, in 18 C.F.R. § 35.26(c)(1)(iii), FERC refers to "an exit fee or other explicit stranded cost provision." Staff witness Mr. McIntosh testified he had never heard the term "exit fee" used in any context other than stranded cost recovery. (McIntosh: Tr. 293, lines 10-13). Because the proposed net cost of removal charges do not recover stranded costs, they are not exit fees.[11]

G. Competitive Issues[12]

1. Introduction

47 Columbia REA and ICNU will try to convince the Commission that the proposed net cost of removal charges are unlawfully anticompetitive. They are wrong. As we discuss below, the proposed net cost of removal charges are consistent with state and federal law, as well as Commission policies promoting cost-based rates. Those policies apply even when the Commission has considered the potential impacts of competition in electric markets in this state.

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83 FERC ¶ 61,329 (FERC, June 26, 1998)).

[11] By contrast, Columbia REA has no documents whatsoever to support its proffered definition of "exit fees." (Husted: Ex. 215). Since Columbia REA has not defended its definition with even a single supporting document, its characterization of the proposed charges as "exit fees" is inadequately supported and should be rejected.

[12] In Staff's argument on competition, we will assume the Commission can consider the competitive interests of Columbia REA. But we urge the Commission to rule that outside the context of a service area agreement under RCW 54.48, the competitive interests of Columbia REA are simply not among the interests the Commission is to consider. *Cole v. Utilities and Transp. Comm'n*, 79 Wn.2d 302, 485 P.2d 71 (1971)(Interests of unregulated fuel oil dealers who competed with regulated natural gas distribution companies were not "within the jurisdiction of the commission…." 79 Wn.2d at 306.

The Commission limited Columbia REA's intervention in this case to specific factual issues. (*See* 2nd Supp. Order Denying Motion to Dismiss and Granting Petition for Intervention at ¶¶ 31-33 (July 9, 2001). Now that the record is complete, it is plain that Columbia REA has offered little to assist the Commission on these factual issues. Put another way, Columbia REA has failed to demonstrate that it is in the public interest for the Commission to protect its competitive interests.

2. The Legislature Has Not Adopted A Competitive Model For Regulating Public Utility Companies Such As PacifiCorp

48 The laws of this state do not require the Commission to promote competition between Columbia REA and PacifiCorp:

> State law exempts public utilities from the sphere of free competition, and in fact discourages it. The regulation of public utilities by a state agency replaces competition and ensures that the public interest is protected. … Any contention that this exemption [RCW 19.86.170] lessens free and open competition in our economic system completely ignores the monopoly status of public utilities and their subsequent regulation by the WUTC.

Tanner Electric Coop v. Puget Sound Power & Light, 128 Wn.2d 656, 684, 911 P.2d 1301 (1996).[13]

49 Indeed, many features of the existing public utility regulatory structure are inconsistent with a requirement that the market be used to set rates for electric utilities. For example, PacifiCorp's rates are determined by the Commission, not the market. PacifiCorp is not free to change its tariffs at will, in order to meet perceived competitive market requirements. Instead, the Legislature has required that PacifiCorp's rates and services be subject to regulation by the Commission.[14]

50 This regulatory structure was confirmed when the Legislature considered legislation that

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[13] RCW 19.86.170 exempts from application of state consumer protection laws any "actions or transactions otherwise permitted … or regulated under laws administered" by the Commission. Implementing any tariff changes approved in this case would qualify for this exemption.

The Supreme Court has also observed that regulatory structures like RCW 80.28 evidence a clear policy to displace competition with regulation. In *Southern Motor Carriers Rate Conf. v. United States,* 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1992), the Court characterized a state regulatory structure including the "just and reasonable" rate as reflecting a policy that intrastate rates "would be determined by the regulatory agency, rather than by the market." 471 U.S. at 63-64. This "clearly articulated state policy" to displace competition, coupled with active state supervision, immunized collective rate activity by members of a rate bureau from application of federal antitrust laws. 471 U.S. at 65-66.

[14] PacifiCorp must charge the rates published in its tariffs. (RCW 80.28.080). Tariffs cannot be changed except by following statutory notice procedures. (RCW 80.04.130). PacifiCorp has a statutory obligation to serve all those reasonably entitled to service. PacifiCorp cannot unduly discriminate among customers or provide unreasonable

would have established a competitive model for electric utility regulation in this state. Substitute Senate Bill 5661, 55th Leg. (1997) would have restructured electric utility markets into a competitive model featuring mandated open access and unbundled electric utility services. That legislation failed.

51 There is also a specific state policy against duplication of facilities at the distribution level at issue in this case:

> The legislature hereby declares that the duplication of the electric lines and service of public utilities and cooperatives is uneconomical, may create unnecessary hazards to public safety, discourages investment in permanent underground facilities, and is unattractive, and thus is contrary to the public interest …

RCW 54.48.020.

52 Note that when the legislature wishes to replace public interest regulation with competition, it does so directly. RCW 80.36.300 through .330 provide a good example of the legislature affirmatively adopting competitive concepts for Commission regulation of certain telecommunications companies. No similar statute has been enacted for electric utilities.

53 In sum, there is no legal requirement that the Commission attempt to foster competition between PacifiCorp and Columbia REA in this case.

3. The Proposed Net Cost of Removal Charges Are Consistent With Commission Policies Favoring Cost-Based Rates. The Commission Applies Those Policies When Considering The Potential Impacts of Competition

54 The Commission has consistently endorsed a policy favoring cost-based electric rates, even when considering the potential impacts of competition. The proposed net cost of removal charges are consistent with these policies.

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preferences. (RCW 80.28.090, .100, and .110).

55 In 1978, the Commission formally adopted a policy favoring cost-based electric rates.[15] The Commission has implemented this policy by designing rates with the guidance of cost studies measuring customer cost responsibility.

56 The Commission requires electric rates to recover costs when customer choice is involved. For example, in WAC 480-80-335, the Commission requires that electric special contracts "[d]emonstrate, at a minimum, that the contact charges recover all costs resulting from providing the service … and … provide a contribution to the company's fixed costs." This rule applies, *inter alia*, when a utility customer has a choice of electric service providers.[16]

57 In the context of evaluating the potential impact of competition in electric markets, the Commission declared that the shifting of costs among customers is "inappropriate," does "not constitute fair and efficient competition, [is] contrary to the public interest, and should be avoided." In this connection, the Commission also declared that "service terms and pricing options should reflect customer needs, as well as the reasonable costs and consequences of those options."[17]

58 Commission approval of the proposed net cost of removal charges in this case would affirm each of these Commission policies. The proposed charges are cost-based. They prevent the shifting of costs caused by departing customers to remaining customers. They do not require PacifiCorp to absorb net removal costs. They place cost responsibility on the cost-causer. In

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[15] *See In Re Investigation Into Rate Design and Rate Structure for Electrical Service of Pacific Power & Light Co., et al.,* Cause No. U-78-05, Commission Decision and Order (October 29, 1980) at pages 4-5, and at page 24, Ordering ¶ 1. In this order, the Commission ruled that electric rates should reflect the cost of service "to the maximum extent practicable." Though this standard did not expressly apply to non-recurring charges, the cost-causation principle is the same.

[16] *E.g., In re Application of Avista Corp. for Authority to Implement a Special Contract*, Docket No. UE-990251, Order Approving Contract (March 24, 1999) at 2, Finding No. 2.

[17] *Policy Statement, Guiding Principles for Regulation in an Evolving Electricity Industry* (served December 13, 1995) at page 2, Items 2 and 4.

short, they represent the "reasonable costs and consequences" of a customer's election to permanently disconnect service, as the Commission contemplated when enunciating its policy.

59 There is no possibility that competition between Columbia REA and PacifiCorp can be "fairly brought," as Columbia REA defines that concept.[18] Nonetheless, cost-based net cost of removal charges would send an appropriate price signal. Consumers would have an opportunity to respond in a manner that more reflects the costs their behavior imposes.

60 In sum, the proposed tariff charges are consistent with the Commission's policies favoring cost-based rates. Those policies are consistent with the policies the Commission enunciated when faced with the potential for competition. Approving the proposed tariff changes is in the public interest, as defined by the Commission.

V. CONCLUSIONS

61 The proposed net cost of removal charges described in ¶ 7 of this brief are just and reasonable. They are consistent with Commission policies. They are cost-based, non-discriminatory and prospective in application. They do not shift costs to customers who did not cause those costs to be incurred. They do not require PacifiCorp to absorb costs or provide facilities removal services for free.

62 The proposed net cost of removal charges should be approved, subject to the sunset dates and reporting requirements proposed by Staff and accepted by PacifiCorp.

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[18] While Columbia REA says it wants "competition fairly brought" (Husted: Ex. 201-T at page 3, lines 24-25), the record shows Columbia REA's concept of "competition fairly brought" has no application here. To Columbia REA, "competition fairly brought" means "free enterprise as the term is commonly understood." (Husted: Ex. 218). In turn, Columbia REA agrees that "Free enterprise" means "the freedom of private businesses to operate competitively *for profit* with *little government regulation*." (Husted: Tr. 200, lines 6-16, emphasis added). These terms do not apply here because Columbia does not operate "for profit" (*see* Columbia REA's Petition for Intervention at page 2, lines 23-24 (May 24, 2001) referring to Columbia REA's "non profit cooperative" status), and PacifiCorp's rates, charges, services and practices are subject to full regulation in this state. (*See* RCW 80.04 and 80.28, and Husted: Tr. 201, lines 2-6 and Ex. 218).

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Respectfully submitted,

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