

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND)	
TRANSPORTATION COMMISSION,)	
)	DOCKET NO. UE-001734
Complainant,)	
)	POST-HEARING BRIEF OF THE
v.)	INDUSTRIAL CUSTOMERS OF
)	NORTHWEST UTILITIES
PACIFICORP, d/b/a PACIFIC POWER &)	
LIGHT,)	
)	
Respondent.)	
<hr/>		

INTRODUCTION

Pursuant to WAC §§ 480-09-420 and -770 and the Fourth Supplemental Order Re-Establishing Procedural Schedule, the Industrial Customers of Northwest Utilities (“ICNU”) submits this Post-Hearing Brief (“Brief”) regarding PacifiCorp’s (or the “Company”) request to charge customers who permanently disconnect from PacifiCorp the net costs of removing the Company’s facilities from the former customer’s property (“Net Removal Tariff”). For the reasons described below, the Washington Utilities and Transportation Commission (“WUTC” or “Commission”) should reject PacifiCorp’s Net Removal Tariff because the Company has not met its burden of proof to demonstrate that the proposed tariff is just, reasonable, non-preferential and non-discriminatory. If the Commission does not reject the Net Removal Tariff, the Commission should require PacifiCorp to modify the tariff to make it inapplicable to commercial and industrial customers, or at least establish a reasonable cost-based cap for those customers.

BACKGROUND

On November 9, 2000, PacifiCorp submitted proposed tariff sheets to the WUTC seeking to charge net removal costs to customers who disconnect from the Company (“Original Net Removal Tariff”). PacifiCorp’s proposed tariff would have allowed the Company to charge a customer the total costs of removing PacifiCorp’s utility property from the customer’s locations when that customer switched to a new utility service provider. Exhibit (“Ex.”) 303.

PacifiCorp submitted direct testimony on May 11, 2001, in support of the Original Net Removal Tariff. PacifiCorp’s direct testimony contained 3½ pages of testimony from William Clemens, but no supporting work papers, cost studies, or other analysis. Direct Testimony of William Clemens (“Clemens Direct”). Mr. Clemens stated that the Company submitted the Original Net Removal Tariff to address competition for the Company’s customers in its Washington service territory, and for safety and operational reasons. Clemens Direct at 2:8-21, 3:10-13. Mr. Clemens indicated that the Company was only requesting removal of distribution facilities, but did not describe the types of facilities that would be subject to the tariff. Id.

Commission Staff (“Staff”) submitted rebuttal testimony on July 2, 2001, and Columbia Rural Electric Association (“CREA”) submitted rebuttal testimony on July 3, 2001. Staff’s testimony, *inter alia*, proposed a flat, cost-based net removal charge for residential customers to provide “clarity and predictability to customers” and to reduce “the opportunity for discriminatory treatment.” Rebuttal Testimony of Henry McIntosh (“McIntosh Rebuttal”) at 5:10-12. Staff’s testimony did not propose a cost-based charge or even address the impact of the net removal charge on commercial or industrial customers. Staff also recommended that the Net

Removal Tariff apply to all customers, not just those who switched utility service providers. CREA's testimony addressed the anti-competitive impacts of PacifiCorp's proposed tariff. Rebuttal Testimony of Thomas Husted ("Husted Rebuttal") at 3-4.

On July 26, 2001, PacifiCorp submitted a Motion to Amend the Prehearing Conference Order in order to hold in abeyance further proceedings. On July 30, 2001, PacifiCorp submitted an Application for an interim service territory agreement with CREA. Over ICNU's objection, the Commission suspended the procedural schedule until May 21, 2002, and approved the interim service territory agreement. WUTC v. PacifiCorp, Third Suppl. Order (Aug. 10, 2001); WUTC v. PacifiCorp, Notice of Further Extension of Procedural Schedule (Feb. 15, 2002).

On May 17, 2002, CREA provided notice to PacifiCorp and the Commission that the interim service territory agreement would terminate on June 1, 2002. On May 30, 2002, ALJ Caillé held a scheduling teleconference to establish a new procedural schedule. On June 6, 2002, ICNU filed a motion requesting permission to file intervenor testimony. The Commission denied ICNU's request on July 2, 2002. PacifiCorp v. WUTC, Fifth Suppl Order. As a result, the record does not contain any direct or rebuttal testimony from Public Counsel or customer group representatives, including ICNU. In addition, the record lacks any direct or rebuttal testimony that addresses issues related to commercial or industrial customers.

On August 20, 2002, PacifiCorp submitted less than five pages of rebuttal testimony which, again, was not supported by any work papers, cost studies, or other detailed analysis. Rebuttal Testimony of William Clemens ("Clemens Rebuttal"). The Clemens Rebuttal Testimony contained a revised net removal tariff, which contained language adopting the flat,

cost-based net removal charge proposed by Staff to protect residential customers. Clemens Rebuttal at 2. The revised tariff language also extended the application of the Net Removal Tariff to all customers that permanently disconnect from PacifiCorp's system for any reason. Id. The Clemens Rebuttal did not propose a cost-based cap or flat charges for commercial or industrial customers. In addition, it failed to address the discriminatory impacts on commercial and industrial customers, or respond to CREA's claim that the Net Removal Tariff was designed to limit competition. Id. The Commission held an evidentiary hearing regarding the Net Removal Tariff on September 20, 2002.

ARGUMENT

The Commission should either reject the Net Removal Tariff or place significant conditions on any approval of the tariff. PacifiCorp has not carried its burden of proof to demonstrate that this tariff will produce fair, just, and reasonable rates. Further, PacifiCorp has not produced any evidence of the "rate" for net removal costs for commercial and industrial customers, nor has the Company provided a methodology showing how the "rate" will be calculated. The only evidence that PacifiCorp has provided regarding the tariff is the rate for net removal costs for residential customers in certain instances. The tariff is legally deficient on this basis alone.

Staff identified a variety of problems with the Original Net Removal Tariff and recommended rejection of the tariff unless PacifiCorp adopted Staff's proposed amendment.

McIntosh Rebuttal at 2:5-7. Staff cited the following problems:

1. Ambiguous tariff language made it unclear what facilities are subject to the tariff (Id. at 3:14-18, 4:1-5);

2. Discriminatory application of the tariff to only those customers requesting disconnection to switch service providers (Id. at 4:7-12, 5:10-12);
3. Limited applicability of the tariff to only a handful of customers (Id. at 5:1-12); and
4. The tariff was not cost-based (Id. at 8:18-23).

To address these deficiencies, Staff recommended flat charges for residential customers, stating: “a flat, predetermined rate provides clarity and predictability to customers and rules reduces the opportunity for discriminatory treatment.” Id. at 5:10-12. Staff’s observations of the ambiguous and discriminatory nature of the tariff are accurate. While PacifiCorp has adopted Staff’s language and amended the tariff, these revisions only apply to residential customers. All of the infirmities described by Staff are still present for commercial and industrial customers. The Net Removal Tariff is poorly drafted, vague, ambiguous, without cost support, discriminatory, and fundamentally unnecessary, particularly as applied to commercial and industrial customers.

Approval of this type of tariff would be a major policy change for the Commission. ICNU has been unable to find a similar net removal tariff for electric service anywhere in the United States. The Qwest tariff^{1/} that was referenced at the hearing is distinguishable because it collects costs based on a signed service agreement. Hearing Transcript (“Tr.”) at 292:24-293:14. The Commission should not approve this tariff, even as amended, without a compelling reason to do so.

^{1/} Qwest Corporation Price List, Section 9, effective May 4, 2001.

1. PacifiCorp Has Not Submitted Sufficient Evidence to Meet Its Burden of Proof

As the proponent of the Net Removal Tariff, PacifiCorp has the burden of proof to demonstrate that the proposed tariff is just and reasonable. RCW § 80.04.130(2); WUTC v. Wash. Exchange Carrier Ass'n, Docket No. UT-971140, Fifth Suppl. Order (Oct. 30, 1998) at 17. The Company retains this burden throughout the proceeding and must establish “by a preponderance of the evidence that the rate” change is just and reasonable. WUTC v. Pacific Power & Light Co., (“PP&L”) Cause No. U-84-65, Fourth Suppl. Order (Aug. 2, 1985) at 17. A utility that does not submit sufficient support or evidence for a tariff revision cannot demonstrate that the rate change is just and reasonable. WUTC v. Avista, Docket Nos. UE-991606, UG-991607 Third Suppl. Order (Sept. 29, 2000); Re Puget Sound Power & Light Co., Docket Nos. UE-920433, UE-920499, UE-921262, Eleventh Suppl. Order (Sept. 21, 1993).

PacifiCorp has submitted very little evidence justifying its proposed Net Removal Tariff. PacifiCorp has submitted little more than four pages of actual testimony supporting the Net Removal Tariff, and has not provided any supporting work papers, cost studies, or other information. In addition, PacifiCorp’s only witness in this proceeding works on public and community relations, and he has no expertise in utility tariffs or cost-of-service matters. Furthermore, PacifiCorp’s witness does not work with the distribution or transmission aspects of the Company. Tr. at 68:9-69:4, 120:15-17. In fact, Mr. Clemens “couldn’t answer” questions about PacifiCorp’s Washington service territory because he is only “familiar with what is happening in Walla Walla.” Tr. at 79:5-9. Staff, ICNU, and CREA have introduced into the record the vast majority of the evidence submitted in this proceeding in an attempt to clarify the Company’s vague and ambiguous tariff.

2. The Net Removal Tariff is Unnecessary

PacifiCorp has failed to establish that the Net Removal Tariff is necessary to prevent underrecovery of facility removal costs. The Net Removal Tariff is not necessary to address cost underrecovery because PacifiCorp's current general rates and Accommodation Tariff allow the Company to fully recover all of its net removal costs. Similarly, the Net Removal Tariff is not needed to address any safety or operational issues. PacifiCorp failed to provide any evidence of specific safety or operational problems that would be uniquely addressed by this tariff. PacifiCorp has successfully addressed safety and operational issues through its current tariffs and rules in the past and can continue to do so without the Net Removal Tariff.

A. Approval of the Net Removal Tariff Would Result in Double Recovery of Net Removal Costs

Costs associated with disconnections and net removals of Company facilities from customer property are already included in PacifiCorp's rates. Ex. 107, 26. Although PacifiCorp has not submitted any evidence on this issue, ICNU and CREA have proven that PacifiCorp's current rates include costs associated with discontinued service, removals related to abandoned facilities, customer switches and relocations. Ex. 107, 26, 307.

Washington law prohibits a utility from double recovering of any costs, expenses or other revenues. Re Camelot Square Mobile Home Park, Docket Nos. UT-960832, UT-961341, UT-961342, Fifth Suppl. Order (Aug. 18, 1998); WUTC v. PP&L, Cause Nos. U-82-12, U-82-35, Order (Feb. 1, 1983). The Commission describes a utility's attempt to include in its rates operating costs or investments that are already accounted for as "double

recovery.” Re MFS Communication Co., Inc., Docket Nos. UT-960323, UT-960326, UT-960337, Decision and Final Order (Sept. 11, 1998). The Commission should reject any tariffs that improperly seek to recover the same expenses or investments twice. Id.

i. PacifiCorp Already Recovers Disconnection and Removal Costs in Rates

PacifiCorp did not submit any evidence regarding whether its current rates include costs associated with disconnections and removals. Mr. Clemens stated at hearing that he did not know if disconnection costs were included in the Company’s rates. Tr. at 108-109, 133. As pointed out by Staff, however, PacifiCorp’s rates do include all costs associated with disconnections and de-energizations. Tr. at 260:8-261:5. Similarly, PacifiCorp’s witness also indicated that he did not know whether the Company’s rates included removal costs. Tr. at 108-109, 133, 169. However, PacifiCorp admitted in a data response that net removal “costs are included in general rate case filings before the WUTC based on the level of such costs during the historical test period upon which rates are set.” Ex. 107. PacifiCorp conditioned its response on an unsupported claim that the net removal costs included in rates relate to abandoned facilities, not facilities that switch utility service providers. Ex. 107. This distinction is irrelevant for the purposes of double recovery, because the Net Removal Tariff will recover all net removal costs, including those that PacifiCorp unequivocally admits are included in rates (i.e., those related to abandoned facilities). Clemens Rebuttal at 2-4; Ex. 107. Furthermore, PacifiCorp’s claim that net removal costs in rates are limited to abandoned facilities is inaccurate. The Company acknowledged that it could not determine the reason for past removals because “PacifiCorp’s [net removal] accounting system does not track removal costs by customer, customer type or the

reason for which the facilities were removed . . .” Ex. 26 (emphasis added). Mr. Clemens confirmed this conclusion when he stated that he did not know the reason for disconnections or removals prior to 1999. Tr. at 129, 134:20-135:2.

The Company has not demonstrated that its total removal costs exceed the amounts that PacifiCorp currently recovers in its rates. While PacifiCorp has not provided specific information regarding the total net removal costs assumed in rates, the evidence establishes that the Company’s total net removal costs are very small. PacifiCorp estimates that the total costs associated with removing facilities of customers who have switched from PacifiCorp to CREA have been only about \$20,000 to \$25,000 since 1999. Tr. at 71:8-19. These costs represent twelve net removals, or an average of three per year.^{2/} Tr. at 71. These net removals include seven residential customers and five irrigation customers. Ex. 6; Tr. at 71:1-3. Notably, no commercial or general industrial net removals have taken place during this time.^{3/}

ii. PacifiCorp Already Applies its Accommodation Tariff to Recover Excess Net Removal Costs

Regardless of the total disconnection or removal costs currently included in PacifiCorp’s rates, the Company already has a mechanism to recover excess removal costs. PacifiCorp utilizes its Accommodation Tariff to recover any net removal costs that the Company believes are not covered in current rates. Tr. at 77-78, 253:11-16. The Accommodation Tariff is designed to compensate PacifiCorp for costs associated with customer requests for work that the

^{2/} This is out of a total Washington service territory that includes approximately 118,363 customers.

^{3/} At hearing, PacifiCorp witness Clemens incorrectly stated that there have been five commercial net removals. Mr. Clemens mistakenly categorized irrigation customers as commercial customers. Tr. at 71, 73; Ex. 5, 6.

Company is not required to perform. Tr. at 137:19-25. PacifiCorp has successfully utilized the Accommodation Tariff to recover costs associated with two out of the twelve net removals since 1999, recovering approximately \$6,300 from customers. Tr. at 77:8-24, 253:11-16. In other words, both PacifiCorp's existing rates and its Accommodation Tariff enable the Company to recover all costs from customers disconnecting from the system. An additional Net Removal Tariff is unnecessary under these circumstances.

B. The Net Removal Charge is Not Necessary to Prevent Any Safety or Operational Problems

PacifiCorp claims that the Net Removal Tariff is necessary to address safety and operational concerns in light of increased competition. Clemens Direct at 2:8-21, 3:10-13. However, PacifiCorp has served Washington customers, faced competition, and met its safety and operational requirements for nearly one hundred years without a Net Removal Tariff. *See* Tr. at 133:11-13. PacifiCorp has not presented sufficient evidence to demonstrate that these problems exist or that the Net Removal Tariff is an appropriate tool to address them.

The Company's alleged operational concerns are that a different utility "cannot hook up to the customer until [PacifiCorp removes its] facilities or [its] service drop and meter." Tr. at 165:17-21. The Company's alleged safety concerns include speculation that duplication of facilities can double the opportunity for car-pole accidents, and can place fire and safety personnel in harmful situations. Tr. at 165:5-16.

PacifiCorp, however, has not demonstrated that these safety and operational concerns are legitimate or that the Net Removal Tariff is the appropriate method to address them. PacifiCorp has not presented any evidence regarding any past safety or operational problems that

this Net Removal Tariff would have prevented and the Company has refused to provide such evidence in response to discovery requests. *See, e.g.* Ex. 93. PacifiCorp’s vague and unsupported references to “safety and operational” problems suggest that these are not the real problems the Net Removal Tariff is designed to address.

Finally, PacifiCorp has refused to address whether it would be appropriate to allow a customer the option of purchasing the facilities rather than having the Company automatically removing them. Ex. 18; Tr. at 75:1-76:18. PacifiCorp has not provided the option of allowing customers to purchase the Company’s equipment and leave it in place for any customer who switches to CREA. Tr. at 74:22-75:3. Mr. Clemens stated that if a customer wanted to purchase the facilities, the Company’s decision to sell would be “a policy decision made by the folks in Portland.” Tr. at 75:24-76:11. Neither Mr. Clemens nor the Company could identify the criteria that PacifiCorp would use to decide to sell its facilities rather than remove them. Tr. at 75:24-76:18, 109:4-21; Ex. 18. Mr. Clemens also refused to provide any assurance that PacifiCorp would not discriminate against or penalize customers when it decided whether to sell facilities. Tr. at 109:16-21.

3. PacifiCorp’s Net Removal Tariff Violates Washington Law Because It Does Not Specify the Rate or Charge

The Commission and customers cannot ascertain whether the Net Removal Tariff is just or reasonable, because it does not specify the rate or charge for commercial and industrial customers. Utility tariffs are per se illegal if they do not specifically enumerate either the actual charge or rate in the tariff, or the methodology by which the rate or charge will be calculated. PacifiCorp’s Net Removal Tariff is vague and ambiguous, and it does not provide commercial or

industrial customers an opportunity to determine which facilities will be subject to the tariff or the applicable rate or charge.

A. All Public Utility Tariffs Must Have Plain and Clear Terms and Specify the Rate or Charge for Services

PacifiCorp's Net Removal Tariff violates Washington law because it does not specify the rate or charge for net removal services. Utility tariff schedules must specify all rates or charges applicable for utility service. RCW §§ 80.28.020, .050, .060, .080; *see Public Utility Dist. v. Dept. of Public Serv.*, 21 Wash. 2d 201, 210, 150 P.2d 709, 713-714 (1944). The Commission's rules also require that each rate schedule include the "availability" of service, "rates to be paid for the service," and "[a]ny special terms or conditions associated with the service or the calculation of rates to be paid for the service." WAC § 480-80-102(5) (emphasis added).

Courts and utility commission have found charges in tariffs "must be expressed in clear and plain terms" so that customers can know their rates in advance and make reasonable and informed choices. *U.S. v. Assoc. Air Transp., Inc.*, 275 F.2d 827, 834 (5th Cir. 1960); *Re Taxicab Operations, Drivers, and Garage Employees Local Union No. 935*, 62 P.U.R. NS 188 (D.C. 1945). If the rates or charges are not specified, a public utility commission cannot "determine whether the proposed rate is just and reasonable." *Re Boston Gas Co.*, 142 P.U.R.4th at 241, 259. Therefore, a tariff that does not include a rate or the methodology by which it will be calculated is per se illegal and void under law.

Rates with clear and plain terms also prevent customers from being under or over-charged by the utility. *Re Rates and Charges*, 24 P.U.R. NS 179, 182-183 (Neb. 1938); *Re*

Sawyer & Western Tele. Co., Co. 2-U-2370 (D.C. June 16, 1947). Ensuring that rates are specified in clear and plain terms prevents undue prejudice, preference, discrimination or other abuse of monopoly power that can be concealed in complex or vague tariffs. Re Houston Light and Power Co., 105 P.U.R.4th 89, 100-101 (Texas 1989); Re Rates and Charges, 24 P.U.R. NS at 182-183; Re N.Y. Tele. Co., 45 P.U.R. NS 409, 468 (N.Y. 1942); Re Cleveland, Columbus & Cincinnati Highway, Inc., 24 P.U.R. NS 231, 236-37 (Ohio 1938).

The rate or charge specified in a utility's tariff does not have to detail the exact monetary amount, but must establish a process or mathematical methodology for determining the actual rate or charge. WUTC v. PSP&L, Cause No. U-81-41, Sixth Suppl. Order at 17-18 (Dec. 19, 1988); Norfolk v. Virginia Elec. & Power Co., 90 S.E.2d 140, 148 (Va. 1955). However, a price term that is not expressly defined must still include sufficient detail "to explain the basis for the rate to be charged for the offered services." Re Boston Gas Co., 142 P.U.R.4th at 259; Associated Air Transp., Inc., 275 F.2d at 835. When the rate or cost under a tariff changes or is subject to fluctuation, a commission must ensure that the utility service provider cannot abuse its market power to overcharge or otherwise harm customers. Re Houston Light and Power Co., 105 P.U.R.4th at 100-01. Therefore, charges that are not expressly specified in the tariff are only appropriate when the utility does not exercise market power or have an incentive to discriminate or overcharge customers.

B. PacifiCorp's Net Removal Tariff Does Not Specify the Rate or Charge, and Allows the Company to Unilaterally Determine the Price for Services

PacifiCorp's proposed Net Removal Tariff is vague and ambiguous, and does not specify the rate or charge that commercial or industrial customers must pay. There is no way that a commercial or industrial customer can review the Net Removal Tariff to determine which facilities are subject to the tariff or the total costs of that removal. Tr. at 89:14-18; 239:4-241:18. A customer also cannot receive an accurate estimate from the Company regarding which facilities are subject to the tariff or the total costs of facilities removal. Tr. at 99:16-100:3. In addition, the tariff language provides PacifiCorp with a unilateral right to determine the final charges for service.

Staff opposed PacifiCorp's Original Net Removal Tariff because it gave the Company the power to discriminate against customers. Staff's witness found the Original Net Removal Tariff to be "vague" and proposed a cost-based capped charge for most residential customer net removals to address this vagueness and eliminate the opportunity for discriminatory application of the tariff. Tr. at 242:9-14; McIntosh Rebuttal at 5:1-12. Mr. McIntosh also stated that submitting cost-based capped charges for commercial and industrial customers would have been the "reasonable thing to have done." Tr. at 238:11-19. However, neither Staff nor PacifiCorp proposed a cost-based charge for any commercial or industrial net removals. Ex. 33; McIntosh Rebuttal at 7; Tr. at 90-91, 103-04, 131, 244:14-16.

For commercial and industrial customers, PacifiCorp's Net Removal Tariff continues to be vague and ambiguous as to which facilities will be covered and as to the total

costs.^{4/} The tariff language fails to describe which distribution facilities of commercial and industrial customers would be removed or even a method to determine which facilities the tariff applies to. Tr. at 89, 241:6-10; *e.g.* Ex. 48. In fact, PacifiCorp admits that there is “no way a customer can look at the tariff and identify what distribution facilities are subject to the tariff.” Tr. at 89:14-19. Staff also admits that the average commercial customer cannot review the tariff and determine which facilities will be removed. Tr. at 241:11-18. Similarly, the tariff language does not include any specific charges or rates, and fails to provide any guidance as how the Company will unilaterally calculate the costs of removing facilities. Tr. at 90-91, 245.

The Company’s testimony and discovery responses are not helpful in determining which commercial or industrial facilities will be subject to the Net Removal Tariff or what the total net removal costs would be.^{5/} PacifiCorp’s only witness had limited knowledge, was confused as to when the charge would apply, and admitted that that charge is vague as to which facilities will be removed in some circumstances. *E.g.* Tr. at 106:12-19, 155:5-157:16. PacifiCorp also refused to provide any historic or forecasted information regarding commercial or industrial net removal costs.^{6/} Tr. at 245:12-15; Ex. 7, 8, 10, 11, 12, 13,

^{4/} Tr. at 89:14-18, 239:4-241:18; Ex. 8, 10, 13, 22, 23, 26, 34, 48. These are a series of ICNU data requests and answers in which PacifiCorp refused to calculate the charges under the tariff for a specific industrial customer.

^{5/} Even if the Company’s testimony and discovery response were illuminating, the Commission should not permit PacifiCorp to cure a vague and ambiguous tariff with testimony and discovery responses. The sufficiency of the pricing component “of a tariff must be judged on its face, and testimony is not a sufficient cure to a defect or supply a missing essential term.” Re Boston Gas Co., 142 P.U.R.4th at 259.

^{6/} The Company provided the parties with historic cost data regarding net removal costs for residential customers. *See McIntosh Rebuttal* at 8:15-23.

14, 15, 20, 22, 23, 26, 27, 28, 29, 34, 47, 48. In addition, PacifiCorp has repeatedly refused to answer a variety of specific requests by ICNU, Public Counsel, and Staff to identify the elements of the distribution system that it is seeking compensation for in this filing. Ex. 7, 8, 10, 11, 12, 13, 14, 15, 20, 22, 23, 34, 47, 48; Tr. at 89, 93.

PacifiCorp claims that net removal costs will be unilaterally calculated according to the Company's retail construction management system ("RCMS"). Tr. at 88:15-24. Customers will have no idea that the RCMS will be used to determine their bills because there is no reference to the RCMS in the tariff. Clemens Rebuttal at 3-5. The Company also failed to submit in the record the RCMS or any supporting work papers. Therefore, the Commission cannot determine whether it is appropriate to utilize the RCMS for net removals because the software has not been introduced or reviewed in this proceeding.

PacifiCorp is a large, multi-state electric utility and has experience removing facilities for numerous reasons, including allowing customers to switch utility service providers, updating or extending current service, and removing abandoned facilities. *See* Ex. 107. PacifiCorp could have relied upon this experience to identify the facilities subject to net removal and establish cost-based numbers for commercial and industrial net removals. Tr. at 101:18-22, 237:23-238:2. In fact, submitting a cost-based study for net removal costs for commercial and industrial customers would have been the "reasonable thing to have done." Tr. at 238:11-19. Despite PacifiCorp's failure to review past costs, the Company claims that there is no dollar amount that "would cover the maximum costs of industrial net removal distribution facilities." Tr. at 104:6-10; Ex. 33. The Commission should not approve a tariff that is vague and

ambiguous by design and ultimately allows the Company to charge whatever it believes is appropriate for each individual circumstance.

Pre-determined, cost-based rates specifying applicable facilities “would provide clarity and predictability to customers and . . . reduces the opportunity for discriminatory treatment.” McIntosh Rebuttal at 5:10-12. Both Staff and PacifiCorp have agreed to provide clear, predictable and non-discriminatory cost-based charges for residential customers covering most circumstances. McIntosh Rebuttal at 5:1-12, 7; Clemens Rebuttal at 2-4. Without applying the same approach and principles to commercial and industrial customers, the Net Removal Tariff will allow PacifiCorp to unilaterally determine “customer-specific” charges for each commercial or industrial customer and apply them to a wide variety of distribution facilities. Tr. at 93:9-13; Ex. 22.

C. PacifiCorp Will Not Provide Customers with a Reliable Estimate of Net Removal Costs

PacifiCorp will not provide a reliable estimate of the facilities subject to removal or the Company’s total net removal costs if the tariff is approved. The tariff language provides that PacifiCorp will only provide an estimate of net removal costs after a “[c]ustomer requests [the] Company to permanently disconnect the Company’s facilities” Clemens Rebuttal at 3:2-3. In response to data requests, PacifiCorp stated: “As consistently and repeatedly stated by PacifiCorp, in the absence of an actual request by a customer for removal of facilities, the Company does not prepare estimates of removal costs” Ex. 3 at 2.^{7/}

^{7/} Ex. 3, 7, 11, 14, 15, 16, 17, 19, 20, 21, 24, 25, 26, 47.

At hearing, PacifiCorp made an illusory promise to provide a cost estimate prior to a customer's request to disconnect from the Company. However, in response to a specific question regarding whether PacifiCorp would provide an estimate of net removal costs, Mr.

Clemens stated:

- A. I suppose we could do a ballpark [estimate], but it wouldn't be an accurate cost of what it would take to remove it.
- Q. So you wouldn't provide an estimate to a customer under this tariff unless [the customer] actually made a request to switch service providers; is that correct?
- A. We could do a ballpark estimate, but it wouldn't be accurate. It would be, you know, general information that could probably get them, depending on the size of the customer and the ballpark, but it wouldn't be anything that I would use to make a decision.

Tr. at 99:16-100:3 (emphasis added). Customers should not be expected to make a decision based on a "ballpark estimate" that the Company itself would not rely upon.

The only way that a commercial or industrial customer can obtain an accurate estimate of the net removal charge is to misrepresent its situation to PacifiCorp. A customer that is considering discontinuing service but has not yet decided to do so would have to make a request to permanently disconnect from PacifiCorp's system to have the Company review the facilities and provide an estimate of the expected net removal costs. Clemens Rebuttal at 4:1-6. It is not clear how PacifiCorp would treat a customer that submitted a false request to disconnect in an attempt to receive a more accurate estimate of net removal costs. Customers who require reliable electric service, including most large industrial customers, would never risk having their service disconnected for the purposes of obtaining a quote for net removal costs. Serious safety issues would result if there was any risk that power would be disconnected by PacifiCorp in

response to such a request. In any case, it is not good public policy to require customers to engage in dishonest practices in order to obtain reliable estimates of its rate under a tariff.

Even the estimate that PacifiCorp proposes to provide under the Net Removal Tariff is not guaranteed to be accurate. The Net Removal Tariff provides that, except for residential customers, the estimated charge shall be adjusted to reflect actual net removal costs. Clemens Rebuttal at 4:1-10. In addition, PacifiCorp claims that its actual net removal costs should be presumed to be the “reasonably incurred actual costs.” Ex. 32. Therefore, according to PacifiCorp, customers receive no protection if actual net removal costs exceed the estimated net removal costs, even if the increased costs are the result of PacifiCorp’s malfeasance or negligence.

D. PacifiCorp will Utilize the Vague and Ambiguous Net Removal Tariff to Prevent Competition and Harm Customers

PacifiCorp’s Net Removal Tariff will provide the Company with an opportunity to overcharge, discriminate, and prevent competition. The primary reason PacifiCorp filed the Net Removal Tariff was to prevent or punish customers who choose a different electric service supplier by charging customers for leaving PacifiCorp’s system. Husted Rebuttal at 3-4. Customers will be unable to make informed decisions about whether they should choose PacifiCorp or a competing utility if they cannot obtain a reliable estimate of net removal costs. The tariff allows the Company to potentially inflate costs to punish customers that choose a different electric service provider, since the only protection offered to customers is to file a complaint at the WUTC.

PacifiCorp's Net Removal Tariff is different from any other tariff that the Commission has ever approved, even those with price terms that change or are subject to fluctuation. *See* Ex. 45. The Net Removal Tariff is unlike a special contract because a special contract is a voluntary agreement that must meet specific statutory requirements. The Net Removal Tariff is also unlike a power cost adjustment ("PCA") or a market-based rate because those rates have specific methodologies that calculate rates and charges. In addition, Commission approved PCAs or market indexed-rates approved by the Commission often provide the utilities with incentives to minimize costs and do not provide the utility with the unilateral ability to determine the price charged to customers. WUTC v. Avista, Docket Nos. UE-991606, UG-991607, Third Suppl. Order (Sept. 29, 2000) at 49-52; Air Liquide America Corp. v. PSE, Docket No. UE-981410, Fifth Suppl. Order (Aug. 3, 1999) (WUTC stated that it would not approve a tariff that provides a utility the unilateral right to change the pricing provisions).

The Net Removal Tariff is also different from the Company's current line extension policy. Ex. 307. A customer requesting a line extension has the right to receive an estimate prior to deciding whether to relocate. More importantly, the Company does not have a built-in incentive to discriminate against, over-charge, or penalize a customer that requests a line extension. In contrast, PacifiCorp has an incentive to keep costs down because line extensions result in additional revenues. However, under the Net Removal Tariff, PacifiCorp will have no incentive to minimize costs and may over-charge and penalize departing customers.

4. PacifiCorp's Net Removal Tariff Violates the Statutory Prohibition on Rate Discrimination and Undue Preference

Washington law strictly prohibits PacifiCorp from unjustly discriminating against or granting unreasonable preference to any customer. RCW §§ 80.28.090, .100; Cole v. WUTC, 79 Wash. 2d 302, 485 P.2d 71 (1971). PacifiCorp's Net Removal Tariff will discriminate against small commercial customers who are similarly situated to residential customers because only residential customers have a capped, cost-based charge. PacifiCorp's Net Removal Tariff will also provide the Company with an opportunity to treat similarly situated commercial or industrial customers differently because the charges are vague and ambiguous.

Under RCW § 80.28.090, a public utility is prohibited from making or granting “any undue or unreasonable preference or advantage to any person, corporation or locality” Similarly, under RCW § 80.28.100, a public utility cannot assess a rate to a customer that is not assessed to a similarly situated customer. The Washington courts have generally interpreted RCW § 80.28.100 in connection with RCW § 80.28.090 because both statutes are similar in their intent and prohibitions. *See, e.g. Arco Prod. Co. v. WUTC*, 125 Wash. 2d 805, 816, 888 P.2d 728, 734 (1995). There are two elements to the legal standard outlined in RCW § 80.28.100. The first element is that the customers must be similarly situated. To be considered similarly situated, the party challenging the rate or utility action must show that the conditions or circumstances between the customers are substantially comparable. Model Water & Light Co., v. Dept. of Pub. Serv., 199 Wash. 2d 36, 90 P.2d 243, 244 (1939). The second element is proof of actual disparate treatment.

A. The Net Removal Tariff Will Discriminate Against Small Commercial Customers

For the purposes of the Net Removal Tariff, small commercial customers and residential customers are similarly situated. The Net Removal Tariff requires a customer who permanently disconnects from PacifiCorp to pay the Company to remove unidentified facilities. Clemens Rebuttal at 3:1-13. The facilities that would be removed from some small commercial customers' property can be "almost identical with residential customers." Tr. at 244:24-245:11. Therefore, some small commercial customers and residential customers could receive almost identical service under the tariff, and thus, are similarly situated.

The Net Removal Tariff treats small commercial customers and residential customers differently. Residential customers will pay a fixed \$200 charge for removals of residential overhead service and meter only, and will pay a fixed \$400 charge for underground service and meter removals. Clemens Rebuttal at 3:10-13. No one knows what the small commercial customers would pay since PacifiCorp unilaterally determines those charges. Id. at 2-3. PacifiCorp could have submitted a cost-based charge for these customers, but chose not to. Tr. at 101:18-22; 238:11-19. The Commission should reject PacifiCorp's Net Removal Tariff because similarly situated customers—residential and some small commercial customers—will receive disparate treatment.

B. PacifiCorp May Use the Net Removal Tariff to Discriminate Against Customers

The Net Removal Tariff will also provide the Company with the opportunity to discriminate against or provide unreasonable preference to certain commercial and industrial customers. PacifiCorp has an incentive to use the Net Removal Tariff to discriminate against

commercial and industrial customers. One of PacifiCorp's original goals in filing the Net Removal Tariff was to prevent or discourage customers from taking service from a competing electric service provider. Husted Rebuttal at 3-4; Clemens Direct at 1:17-2:16. Under the circumstances, PacifiCorp has an incentive to make disconnections as burdensome and as expensive as possible, including imposing inflated net removal charges for customers that they would least like to lose to competition. In contrast, customers who have facilities removed due to abandonment, to move locations, or to expand facilities may face more reasonable net removal charges. The Commission may authorize utilities not to compete pursuant to a service territory agreement (RCW § 54.48); however, the Commission may not otherwise prevent competition between utilities. 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. WUTC, 123 Wash. 2d 530, 538, 869 P.2d 1045, 1050 (1994).

Instead of remedying the tariff by proposing clear, plain, and non-discriminatory language, Staff and PacifiCorp instead proposed that customers rely upon the Commission complaint system. Tr. at 249:11-251:1. In fact, Staff and PacifiCorp would prefer to resolve Net Removal Tariff disputes in a complaint proceeding rather than correctly determine the costs and which facilities the tariff will cover. *See Id.*; McIntosh Rebuttal at 6:9-14.

Commission regulatory oversight, including the Commission complaint system, is an important tool to prevent utility abuses, but it is not a substitute for a properly designed tariff. It is inappropriate to rely solely upon the complaint process as a check on the system. Small customers will simply not have the financial resources to pursue a complaint. It is poor public

policy to rely upon customer-initiated complaints to rectify a discriminatory and unduly preferential tariff, and customers would have the burden of proof.

5. PacifiCorp's Net Removal Tariff Illegally Charges Former Customers for Unnecessary and Unwanted Services

PacifiCorp's Net Removal Tariff is a unique tariff that seeks to impose obligations on former customers who have chosen to no longer receive service from the Company. A customer who terminates service from PacifiCorp has no legal obligation to take additional service from the Company and should be allowed to disconnect from the Company's system without additional charges or penalties, including those related to net removals.

RCW § 80.28.010. Post-service costs and obligations must be tied to voluntary agreements or obligations entered into by the customer in the course of receiving past service from the utility.

Charges demanded by electric utilities must be made in connection with rendering or incidental to utility service. RCW § 80.28.010. Net removal services are separate services that are not necessary or incidental to providing basic electric service because a customer can disconnect from PacifiCorp's system without having its facilities removed. The Commission may approve just, reasonable, and non-discriminatory rates for net removal services; however, neither the Commission nor the utility can require a customer to take any service. Once a customer disconnects from the utility, the customer has no legal obligation to continue receiving any electric service, including net removal services.

None of PacifiCorp's tariffs in any jurisdiction require a customer or former customer to take service after they choose to disconnect from the Company. Ex. 45. The Net Removal Tariff is unique in that it only applies to customers who have terminated their service

with PacifiCorp. The Net Removal Tariff is an unprecedented attempt by PacifiCorp to force former customers to take what may be unwanted and unneeded net removal services.

The Net Removal Tariff is distinguishable from obligations that customers may owe for past services. A customer that owes for past service must pay PacifiCorp in full for the services used. The Net Removal Tariff is also different from a stranded cost tariff. Stranded costs “arise when the costs of generation facilities and purchased power contracts exceed market valuation and the company cannot sell or otherwise recover the costs.” Re PSE, Docket No. UE-990267, Third Suppl. Order (Sept. 30, 1999). Both stranded costs and overdue bills are related to obligations that a customer may have incurred while receiving service, not charges for services that will be performed after termination of service.

The Net Removal Tariff is also distinguishable from post-service obligations voluntarily entered into by the customer, like the Company’s line extension policy, special contracts and other utility tariffs. For example, the Qwest tariff referenced at hearing allows a customer to be billed for remaining charges following disconnection only because the customer signed a service contract with the utility. Tr. at 292:24-293:14. PacifiCorp’s Net Removal Tariff should be rejected because it does not provide customers with the option of taking or rejecting the service offered by the Company.

CONCLUSION

PacifiCorp has proposed a discriminatory and ambiguous tariff that will harm customers in its Washington service territory. The Net Removal Tariff violates Washington law because it does not specify the rate or charge, or provide a methodology for calculating the charge for commercial and industrial customers. PacifiCorp could have submitted a non-

discriminatory, cost-based charge for net removal services, but the Company prefers a tariff that prevents certain customers from ascertaining their costs. The Net Removal Tariff provides the Company with the incentive and opportunity to prevent competition and discriminate against commercial and industrial customers who choose to switch electric service providers. For these reasons, the Commission should reject the Net Removal Tariff, or limit its application to only residential customers.

The Net Removal Tariff should also be rejected because it suffers from a host of legal and evidentiary problems. PacifiCorp has submitted very little evidence regarding the tariff and has not met its burden of proof that the Net Removal Tariff is necessary, serves a useful purpose, is cost-based, or will be applied in a uniform and non-discriminatory manner. The tariff language is also facially discriminatory because the Company will charge different rates to similarly situated small commercial and residential customers. In addition, the tariff violates Washington law because it allows the Company to double recover disconnection costs. Finally, the Net Removal Charge should be rejected because it requires a customer who chooses to disconnect from the Company to take unwanted and unnecessary net removal services.

WHEREFORE, ICNU respectfully requests that the Commission reject
PacifiCorp's Net Removal Tariff.

Dated this 11th day of October, 2002.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

\s\Melinda J. Davison
Melinda J. Davison
Irion A. Sanger
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 Post-Hearing Brief of the Industrial Customers of Northwest Utilities 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 11th day of October, 2002.

\s\Margaret A. Roth
Margaret A. Roth