BEFORE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

Introduction

Columbia Rural Electric Association, Inc., hereinafter "CREA", files this reply brief in the above noted matter, which concerns PacifiCorp's request for a tariff revision allowing it to charge customers, who permanently disconnect from it, the net costs of removing the Company's facilities ("Net Removal Tariff").

Summary

CREA continues to maintain that the burden of proof has not been carried in this case by PacifiCorp. The initial briefs of PacifiCorp and Staff fail to persuade otherwise. CREA generally concurs with the positions and arguments presented by ICNU in its opening brief.

As discussed in ***Hardman v.Younkers,*** 15 Wn 2d 483, 131 P. 2d 177 (1942), the burden of proof is a general term referring to two more specific burdens – the burden of producing evidence sufficient to avoid a dismissal as a matter of law and the larger overall burden of persuading the trier of fact

on the factual issues in the proceeding. It is undisputed that here PacifiCorp had the burden of proof to show that its proposed net removal tariff would be "just and reasonable" RCW 80.04.130 (2); ***WUTC vs. PP&L,*** U-76-18 (1976). It failed to meet that burden as a matter of law or, in the alternative, failed to produce substantial evidence sufficient to support factual findings entitling it to the relief sought. RCW 34.05.570 (3) (substantial evidence standard governs).

Discussion

Staff's Brief:

Proposed Changes to Tariff and Application: The initial filing by PacifiCorp for net removal tariff was recommended for rejection by Staff for being vague and discriminatory, McInctosh, Ex 301 T. at 2: 4-7; 3: 20-21; 4: 1-12. From there, Staff proposed different language to be added to PacifiCorp's Tariff, Rule 4. McIntosh, at 302. At hearing, Mr. Clemens clarified its application further, particularly as to what charges applied in simple "service drop" situations for residential overhead and underground removal of service and meter. Clemens: Tr. 156, 157: 6-8; 161: 20-24. And, in Staff's opening brief, it continues to work on the tariff language by substituting "service drop" for overhead and underground service. Staff brief, at p.2-3.

CREA objects to Staff's attempt to supplement the record without a proper motion and moves to strike that portion of its brief dealing with new "tariff" language. Without waiving that objection, however, the continued refining of this proposed tariff by Staff and PacifiCorp demonstrates the very

reasons it needs to be rejected. It remains vague, poorly drafted and amenable to discriminatory application by the utility.

Even if the "service drop" clarification were to be allowed, the tariff, in terms of (some) clarity, stops with overhead and underground residential disconnects. These would be fixed at $200 and $400 respectively for a scope of work limited to removal of the service drop and meter (even though the utility can not charge the customer for furnishing and installing their meter. WAC 480-100-313). If the scope of work expands, the "requesting" customer pays the $200 or $400 plus actual removal costs less salvage. An estimate procedure is included but without parameters or methodology for determining that estimate. Consequently the proposed tariff is ripe for abuse by the utility.

This is especially so in customer classes other than residential, i.e., small and large commercial, irrigation and industrial. The disconnect and removal charge is left entirely to an open or discretionary calculation by the utility. One can reasonably infer that in practice PacifiCorp could cause a customer not to switch utilities by quoting a high-side estimate. The customer, as matter of public policy, should not be left with the dilemma of either not switching utilities, paying an unreasonable charge or fighting the estimate, under the net removal tariff, with PacifiCorp and the Commission. PacifiCorp should not be allowed to place that burden on its customers.

Another example of the vagueness of language problems with this proposed tariff can be found in the last sentence of 4 (f) (b) or rather, in

Staff's brief at pages 2 and 3, Rule 4 (f) (4). That sentence reads:

> *Notwithstanding the last sentence of paragraph (3), the actual cost for removal less salvage charged to a customer making a request under that paragraph may include comments for distribution facilities located on public easement if customer specifically requests such facilities be removed.*

But, the last sentence of (3) (Staff version) reads: "When the facilities removed by Company are residential underground service drop and meter only, the charge shall be $400." It is unexplained why the "Notwithstanding…" clause is inserted to make the charge for removal applicable only to underground distribution facilities in the public right of way and not also to overhead distribution facilities.

A further example of the vagueness in the proposed language, and the resulting discretion in the Company, is that it only becomes applicable "under circumstances where the facilities would likely not be used at the same site…" Staff, brief at p 3, Section (3). Apparently it is left up to PacifiCorp to determine whether facilities are likely not to be used at the site. Perhaps the customer wants to leave in two poles beyond the service drop and not have to pay for their removal, for cost reasons and on a reasonable argument that they could be expected to be utilized in the future. If PacifiCorp insists on charging for their removal, does the tariff apply anyway, over the customer's objection? The customer in that instance is left either to pay PacifiCorp under the tariff or yield on the decision it has made to discontinue service.

Need to Remove Customer Facilities: In its brief, Staff picks up the theme that for operational and safety reasons duplicate distribution facilities "one energized and one not" at single premises are undesirable. However, the hearing testimony on that issue from Messrs. Clemens and McIntosh was without substantive corroboration and amounted to speculation. No firefighter or policeman was called to testify. (It is the utility that does the disconnect in any event). No safety expert was called to address that issue. Obviously, safety is of paramount concern. But, that is a matter that is more appropriately addressed through the National Electric Safety Code, prudent utility practice, RCW 19.29.010 and the respective franchises and right of way agreements of PacifiCorp and CREA that are applicable to the areas in question. Neither Mr. Clemens nor Mr. Husted testified to expecting to ever have two service drops, one from each utility, running to the same residence or business.

Regardless, if adopted, the proposed tariff would leave the Company to make the decision of when and what facilities to remove, without assurance its facilities would not be left in place beside its own, those of CREA or another utility.

Why a New Tariff: Staff asserts that PaciCorp needs this tariff to recover the net costs incurred in removing distribution facilities on a customer request for permanent disconnection. But that cost has historically been recovered in its rate base. Clemens, Tr 133: 5-13; McIntosh, Tr. 260: 18-25; 261: 1-5 Not only would this tariff have the apparent effect of limiting customer choice in switching utilities (and thereby restraining trade) but also if paid by the customer, would amount to a double recovery for PacifiCorp

and, with the reconnection charge authorized by WAC 480-100-133, a potential for a triple recovery by the Company exists.

How Net Removal Charges are "Computed": To say the charges are "computed" is a misnomer by Staff. There is no cost study, data or methodology in the proposed tariff to suggest the charges made under it would be definite and certain enough to be computed ahead of actual application. Rather, the net removal charges would be a function of PacifiCorp's discretion over the scope of work, the methods, means and schedule of construction and its pricing.

Exit Fees and Standard Costs: Staff engages in a semantic inquiry of "exit fees" and "stranded costs", submitting that they do not relate to the proposed net cost of removal charges.

Whatever terminology one prefers, the point remains that this would be a new charge in PacifiCorp's constellation of charges that is designed specifically to affect the customer seeking to permanently disconnect from that system in order to switch utilities or for any other reason. (But if there is no customer request for disconnect and permanent removal, the tariff would be inapplicable; e.g. act of God destruction of the premises served followed by abandonment comes to mind as does an action by eminent domain that places the served premises in a wilderness area where power service is prohibited.)

Competitive Issues: The laws of this state do not require the Commission to promote competition between PacifiCorp and CREA, as noted by the

Staff. But they also do not require the Commission to discourage competition.

The Staff argues that the Commission should not consider the competitive interests of CREA. But in reality, those competitive interests are aligned with those of the general public. If the public is choosing to disconnect from PacifiCorp for reasons other than rates, the approval of this tariff will add economic injury to those customers who have suffered inadequate service. The proposed tariff will inhibit some customers from leaving the PacifiCorp system. It will add a stifling effect to competition with no corresponding benefit to the general public.

Staff also cites RCW 54.48.020. This section deals with a policy that disfavors duplication of facilities. It does not, however, provide a grant from the legislature to prohibit competition.

PacifiCorp:

Tariff Language: The problematic wording of this proposed tariff is again emphasized when PacifiCorp's brief, pages 4 and 5, presents another, new version that is now different than Staff's and still never filed, noticed or published. PacifiCorp brief, at pages 4 and 5.

Again, this tariff without benefit of a cost study or methodology for its application, fails, under the filed rate doctrine, RCW 80-28-050, to make definite and certain the charges to be made to consumers under it other than to impose a flat fee of $200 and $400 (the factual basis for those charges is

unknown) for removal of respectively, overhead or underground service drop and meter. Other classes of customers are not addressed. They are left entirely to an estimate procedure that Mr. Clemens wouldn't rely on in determining whether or not to switch utilities. Clemens, Tr 157: 24-25; 159: 5-10.

Instead, in its brief, PacifiCorp, at page 6, "…contends the proposed tariff language provides direction and specificity to remove discretion from PacifiCorp in implementing the provisions. This ensures non-discriminatory, non-preferential terms and services". It thus appears that the only assurance in that regard is a contention made by PacifiCorp. That can be accepted as an admission by the Company that it doesn't really have any material of substance to support its position. Of course, the Company goes on at page 6, to add new language, like Staff did, but not to the tariff, which it wants approved as submitted, but with conditions limiting the $200 and $400 charges to just a service drop and meter and defining service drop.

CREA objects and moves to strike the indented portion of the Company's brief at the bottom of page 6. Again the Commission, the parties and more significantly the public are held by PacifiCorp to answer a tariff matter that has not been filed, noticed or published and certainly not litigated.

Nondiscriminatory: At page 8 of its opening brief, PacifiCorp merely re-embraces Staff's proposed modification to the original proposed tariff language and then flatly concludes it is nondiscriminatory because it would apply to all customers seeking to permanently disconnect. This begs the

original motivation for this filing: "CREA is soliciting PacifiCorp's current retail customers." Clemens, Ex 1T, p 3: 11-12. The only Company customers this tariff would affect are those wishing to switch to another utility. All others are already covered by the customer accommodation tariff or through a cost recovered out of PacifiCorp's rate base.

During the course of this proceeding, PacifiCorp has expanded the applicability of the proposed tariff from just those customers who desire to switch utilities to all customers proposing to permanently disconnect. The company provides service in five other states (which have certified service areas) but does not have a similar removal tariff in any of them. This is in spite of the Company's assertion that the tariff is meant to address operational and safety concerns. Clemens Tr. 84. Given the lack of similar filings in the other states that PacifiCorp serves, it then becomes even clearer that the true motivation for making this filing is to respond to the competition provided by CREA.

Safety or Operational Reasons for Removal: The safety "arguments" used by PacifiCorp throughout this proceeding raise more questions than they answer. Have the safety considerations of abandoned facilities only now come to light at the Company? Does their opening brief mean to imply that they will only remove potentially hazardous facilities if someone can be charged for the removal? How does the Company weigh the cost of removal of abandoned facilities against the potential of public hazard? And, if the Company is really so concerned about public safety and believes that the proposed tariff is the answer to the problem, why has it not proposed similar tariffs in the other states it serves?

Competition – Restraint of Trade – Federal Anti-Trust Law: PacifiCorp's briefing of the trade issues, competition and federal anti-trust law touches on several points but omits the one the Commission should be concerned about the most: Can a customer switch utilities without an additional charge or is it to be the policy of this state to help a regulated utility hold on to its customers?

The trier of fact in this case is entitled to reasonably infer from its common experience that this tariff is not so much about putting removal costs on the "cost causer" as it is about perpetuating a de facto monopoly. While state action immunity protects non-competition through Commission approved territories (RCW § 54.48), there is otherwise no authority for the Commission to prevent, directly or indirectly, competition between utilities.

Under the two part test for application of state action immunity, see, ***FTC vs. Ticor Title,*** 504 U.S. 621 at 631 (1992) the state must have articulated a clear and affirmative policy to allow the anticompetitive conduct and provide active supervision over the anticompetitive conduct so undertaken by the parties. The subject tariff, if granted, is so vague and discretionary with PacifiCorp, in practical application, that it would violate the filed rate doctrine and provide no immunity from antitrust liability to the Company. The proposed tariff will increase PacifiCorp's power in the relevant market and erect exit barriers for its customers. The day to day administration and supervision of the tariff would be installed in PacifiCorp and its superior bargaining strength in assessing "net removal costs" on its customers.

Conclusion

On this record, one without objective or analytical support offered by PacifiCorp for its proposed tariff, the Commission would be as justified in rejecting the application as a matter of a law as it would be in rejecting it on the merits. PacifiCorp, even with Staff's assistance, has failed here to meet its burden of proof. This tariff should be rejected.

Respectfully submitted this 17th day of October, 2002.

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