BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

REPLY BRIEF ON BEHALF
OF COMMISSION STAFF

October 18, 2002

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I. INTRODUCTION

1 The central question in this case is whether customers who impose cost of removal on PacifiCorp should bear those costs. Staff answers that question Yes. Intervenors disagree, and impose a maze of procedural and other barriers which would avoid having customers actually pay for the costs they impose.

2 Intervenors have strong economic incentives to do this. Without requiring PacifiCorp customers to pay for the costs incurred by PacifiCorp when a customer permanently terminates service, CREA will have freer access to PacifiCorp's customer base. And any ICNU member leaving PacifiCorp would be able to foist its own cost responsibility for removal costs onto other customers.

3 No PacifiCorp customer should be required to subsidize the competitive or other private interests of CREA and ICNU. No law, state or federal, requires otherwise.

4 We urge the Commission to ignore the rhetoric that has seemed to engulf this docket, and focus on the proposed tariff language. That language describes the scope and function of the charges at issue. The proposed tariff is as specific as comparable line extension tariffs and other facilities-related tariffs. These sorts of tariffs cannot, as a practical matter, state a specific price that is applicable in all instances. The proposed net cost of removal charges are fair, non-discriminatory and cost-based. They should be approved.

II. PROCEDURAL ISSUES

5 CREA argues that due process requires the tariff revisions to be re-noticed, since there are PacifiCorp customers other than those electing to switch utilities that are affected by the current proposed tariff, while the tariff as originally filed applied only to

customers switching utilities. (CREA Opening Brief at pages 3-5). ICNU does not raise this argument.

6 There are several reasons why the Commission should reject CREA's claim of procedural error. First, CREA is disingenuous. When it is in CREA's self-interest to advocate procedural error, CREA professes concern for customers not switching utilities, who would now be covered by the proposed tariff revisions. (Id.). But when it is in CREA's self-interest to argue those same tariff revisions are unlawful, CREA says that the only "real effect" of the proposed tariff is on customers switching utilities. (*E.g.* CREA Opening Brief at page 18, 2nd new ¶). These contradictions are not emblematic of a credible presentation.

7 Assuming CREA's procedural argument is sincere, its claim is barred because CREA does not and cannot claim that the notice it received was inadequate.[1] Accordingly, CREA is not aggrieved by any alleged notice deficiencies. Moreover, CREA's argument far exceeds the scope of its limited intervention in this case. For either reason, CREA's procedural claim is barred for lack of standing.

8 Even assuming CREA had standing, its procedural claim is barred by waiver. CREA was aware of the proposed tariff language change 15 months ago. CREA appeared and participated in the hearing. Yet CREA did not bring the issue to the Commission's attention until its post-hearing brief. If there was a notice problem, CREA

[1] CREA had notice of Staff's proposed language well over a year before hearing. Staff's direct testimony and exhibits were filed July 2, 2001. Hearings were held September 20, 2002.

should have timely raised it. There is no reason to reward ICNU's inaction in this context.[2]

III. FACTUAL ISSUES

9 Intervenors have made several incorrect or incomplete citations to the record. We supply some examples here. Others are addressed elsewhere in this brief.

10 First, ICNU incorrectly states that "neither Staff nor PacifiCorp proposed a cost-based charge for any commercial or industrial net removals." (ICNU Opening Brief at page 14, 2nd new ¶). In fact, under the proposed tariff revisions, PacifiCorp may only charge its actual cost of removal, less salvage. So all proposed net cost of removal charges are cost-based.

11 CREA is incorrect that the proposed tariff charges are left to "estimates and negotiation." (CREA Opening Brief at page 18 2nd new ¶). In fact, the proposed tariff requires PacifiCorp to charge its actual net cost of removal, not its *estimated* net cost of removal. And no negotiation is permitted.

12 ICNU provides insufficient record support for its point that "one of PacifiCorp's original goals in filing the net cost of removal tariff was to prevent or discourage customers from taking service from a competing service provider." (ICNU Opening Brief at page 23, 1st ¶). The testimony of PacifiCorp that ICNU cites for this proposition (Clemens, Ex. 1-T at page 1, line 17 to page 2, line 16) does not state anything about discouraging customers from switching providers. That testimony refers to PacifiCorp's need to recover its facilities removal costs.

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[2] If the Commission remains concerned about this issue, it can require any approved tariff to be filed on 30 days notice and require PacifiCorp to give the same notice it gave at the outset. The tariff would then come before the Commission at an open public meeting for appropriate action.

13 Similarly, the testimony of CREA that ICNU cites (Husted, Ex. 201-T at pages 3-4), reflects only CREA's opinion that the tariff was a PacifiCorp "effort to limit competition." CREA's opinions do not constitute factual support for PacifiCorp's actual goals in filing the proposed tariff changes.

14 The record should be considered fairly, and in a balanced way. The opening briefs of the Intervenors fail that standard.

IV. ARGUMENT

15 Both CREA and ICNU criticize the proposed tariff revisions on the basis that the language is "ambiguous." They speculate that the proposed tariff will provide "incentives" for unlawful discrimination and other abuses by PacifiCorp. ICNU goes so far as to claim PacifiCorp "will" abuse the tariff and violate the law. This hyperbole is founded on speculation, not evidence.

16 We urge the Commission not to accept the Intervenors' invitations to exaggerate and speculate, but to closely examine the proposed tariff changes, and consider them in context. The Commission should conclude, as its Staff did, that the proposed tariff language is just and reasonable, and is as precise in scope and effect as other similar PacifiCorp tariffs.

17 The Intervenors raise many factual and legal issues. Some of their points can be rejected out of hand, since they have no support in the record. Others require a more detailed response. We address the major areas of disagreement below.

A. The Proposed Tariff Changes are Necessary for Safety and Operational Reasons

18 Staff described the safety and operational justifications for the proposed net cost of removal charges. (Staff Opening Brief at pages 4-5, ¶¶ 11-15). ICNU claims this

evidence is speculation, and these problems are not "real." (ICNU Opening Brief at pages 10-11).

19 We suggest it is ICNU that is speculating. Note that CREA's witness did not contest any fact on this issue offered by PacifiCorp or Staff. If ICNU wanted to contest this issue, it could have supplied a witness. ICNU elected to supply no witnesses.

20 The record is sufficient to support the need to remove facilities under the circumstances identified in the proposed tariff.

B. Existing PacifiCorp Tariffs Do Not Recover the Costs at Issue In this Case

21 The proposed tariff revisions close an existing "loophole" in PacifiCorp tariffs, through which PacifiCorp customers can avoid the net cost of removal they impose by simply not requesting removal of specific facilities. (Staff Opening Brief at page 6, ¶¶ 16-18). We referred to a specific example in which a customer availed itself of that loophole, and successfully avoided paying $1,167. (*Id.* at ¶ 17).

22 Both ICNU and CREA fail to recognize this loophole. And while the appropriate focus in this docket should be on incomplete cost recovery by PacifiCorp, ICNU argues instead that approving the proposed tariff revisions would amount to "double recovery." (ICNU Opening Brief at pages 7-10 ; CREA Opening Brief at pages 13-15).

23 For the reasons stated below and in our Opening Brief, the Intervenors are plainly wrong in their claims.

1. CREA's Position is Based on Misinterpretations of WAC 480-100-128, -313, –133 and Misapplication of the National Electric Safety Code and Unspecified Local Laws

24 CREA's position on this issue is founded on plain misinterpretations of Commission rules. First, CREA interprets WAC 480-100-313 to mean that disconnects

and facilities removals must be "absorbed." (CREA Opening Brief at page 13, last ¶). In fact, that rule only prohibits utilities from charging for "furnishing and installing" a meter. It says nothing about charging for removal of a meter, or any other facilities, for that matter.

25 Next, CREA interprets WAC 480-100-128 to cover "customer-directed discontinuance of service..." CREA observes that "[n]o charge is there assessed to the customer on account of the event of discontinuance." (CREA Opening Brief at page 13, last ¶). In fact, that rule requires only that if customers give PacifiCorp three days notice, the utility cannot bill for "usage" after that. There is nothing express or implied in WAC 480-100-128 that prohibits recovery of meter removal costs if the meter is not removed after three days. Indeed, "usage" is what meters measure (WAC 480-100-133), so non-usage based customer charges (*i.e.,* meter and meter services) would still accrue after the three days. WAC 480-100-128 does not purport to address all subjects related to discontinuance. It provides no support for CREA's position.

26 CREA also misinterprets WAC 480-100-133. According to CREA, that rule requires PacifiCorp to recover its facilities removal costs through reconnection charges. (CREA Opening Brief at page 14, last ¶ to page 15, 1st ¶). CREA is wrong again. In fact, WAC 480-100-133 only applies when disconnected customers seek to return to service. It does not cover the situation of a customer terminating service under circumstances when the facilities would not be reused, which is the context at bar.

27 Finally, CREA argues that since unspecified provisions of the "National Electric Safety Code [NESC], existing law, and local regulation" address safety and operational concerns, such concerns cannot be used to justify a tariff. (CREA Opening Brief at page

14, last ¶, to page 15). This argument makes no sense, but it also misses the point. No provision of law or rule cited by CREA dictates the appropriate form of utility cost recovery for facilities removal costs. That is a policy question for the Commission to decide. Staff's position is that approval of the proposed net cost of removal charges is good public policy. CREA advances no law or rule to the contrary.

28 In sum, CREA's position is constructed with misinterpretations of Commission rules and misapplications of unspecified other laws and regulations. It should be rejected.

2. Since an Approved Stipulation Established Current PacifiCorp Rates, the Commission Made No Findings that Current Tariffs Recover the Costs at Issue. In any Event, If there is Some Overlap, it is Inconsequential

29 PacifiCorp's current rates were established as a result of a settlement of revenue requirement and rate design. *See* 3rd Supp. Order in Docket No. UE-991832 (August 9, 2000).[3] The parties signing the "Comprehensive Stipulation" in that docket stipulated there was no agreement on the "facts, principles, methods or theories employed in arriving at the terms of this Stipulation…" The Commission approved this stipulation. (3rd Supp. Order, *supra*, at page 27, ¶ 85 (approving Comprehensive Stipulation), and Appendix B thereto, entitled "Comprehensive Stipulation, at page 9, ¶ 17(e)). ICNU signed the Comprehensive Stipulation.

30 While the parties may have ideas about what may have been an appropriate basis for current PacifiCorp rates, there were no Commission findings identifying the costs that support existing rates. Accordingly, it cannot be said that PacifiCorp's current tariffs were designed to recover the sorts of net cost of facilities removal at issue in this case.

31 Staff agrees that "double recovery" should be avoided, when that is a legitimate concern. It is not a legitimate concern in this case. Even if one were to ignore the settlement establishing current rates, "the Company's total net removal costs are very small." (ICNU Opening Brief at page 9, 1st new ¶). Since net removal costs are insignificant, the "double recovery" issue is not a material issue in this case.[4]

32 The cases cited by ICNU do not dictate a different result. In the case of *Re Camelot Square Mobile Home Park*, Docket Nos. UT-960832, UT-961341 and UT-961342 (5th Supp. Order)(November 25, 1997), US WEST was charging for repairs to certain Company facilities located on private property. The tariff obligated US WEST to maintain facilities without charge, and did not distinguish between public and private property. So the Commission barred US WEST from collecting the charges.

33 The instant case is the other side of the *Camelot Square* coin. PacifiCorp is *not* charging for facilities removals for customers who permanently disconnect service, because the existing tariff requires that the customer specify the facilities to be removed. (*See* Staff Opening Brief at page 6, ¶¶ 16-18). A tariff change as proposed in this case is needed to permit PacifiCorp to recover the costs it incurs when customers permanently disconnect service and do not specify all of the facilities that need to be removed.

34 *WUTC v. Pacific Power & Light Co.*, Cause Nos. U-82-12 and U-82-35 (February 1, 1983) is not applicable. The "double counting" issue in that case arose in a different context, and it involved material amounts. There, the Commission approved abandoned

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[3] The previous PacifiCorp rate case used a test year ending June 30, 1985. *UTC v. Pacific Power & Light Co.*, Cause No. U-86-02 (2nd Supp. Order)(September 19, 1986).

[4] Even if the Stipulation did not exist, the evidence is that the first permanent disconnections PacifiCorp experienced from customers switching to CREA was in 1999. (Clemens, Tr. 95, lines 21-23). The test year in the settled rate case was the year ended December 31, 1998. So the rates stipulated to in Docket No. UE-991832 would not have included such costs.

project cost amortizations through rates. At the same time, commissions regulating Pacific in sister states were denying such recovery. The amounts at stake were in the multimillions of dollars.

35 The Commission's concern was that if impact of those other states' actions raised PacifiCorp's cost of capital, Washington ratepayers could be prejudiced. (*Id.* at page 11). The instant case presents no such issue or impact.

36 In *Re MFS Communications Co., Inc.,* Docket Nos. UT-960323, UT-960326, UT-960337 (Decision and Final Order)(September 11, 1998), the Commission found a double recovery problem of significant magnitude, but only after receiving detailed, expert accounting analysis proving this sort of recovery existed. (*Id.* at pages 18-20). No such analysis or impact exists on this record.

C. The Proposed Tariff Language Specifies the Circumstances of its Application

37 Washington statutes require tariffs to reflect the charges for services rendered, but they do not dictate any particular level of specificity. For example, RCW 80.28.050 requires tariff schedules to be on file "in such form as the Commission may prescribe, showing all rates and charges made, … or to be charged…" RCW 80.28.080 requires PacifiCorp to charge only those "rates and charges applicable to such service as specified in its schedule filed and in effect at the time…"

38 These statutes do not prescribe the specific manner in which rates and charges shall be shown or the level of detail in which they need to be specified. Accordingly, the Commission has some discretion to prescribe the form of the PacifiCorp's tariff. The issue is whether the proposed tariff revisions are in an acceptable form, and sufficiently specify the applicable charges. Staff submits they are.

39 According to the proposed tariff language, the net cost of removal charges would apply "when Customer requests Company to permanently disconnect facilities, under circumstances where the facilities would likely not be reused at the same site." (McIntosh, Ex. 301-T at page 7, lines 1-3). A "Customer request for permanent disconnection" is precise terminology. "Under circumstances where the facilities would likely not be reused at the same site" is also precise, though it does not purport to describe all factual situations that might arise.

40 The result is a tariff whose application is not discretionary with PacifiCorp, contrary to CREA's representations. (CREA Opening Brief at page 19, last ¶). Nor does it give PacifiCorp the "unilateral right" to charge whatever it wants, whenever it wants to, as ICNU erroneously claims. (ICNU Opening Brief at page 20, 1st ¶). When the circumstances stated in the proposed tariff apply, the tariff must be applied, and PacifiCorp can only charge its actual net cost of removal.

1. The Cases Cited by ICNU Do Not Justify Its Position Restricting the Lawful Form of Tariffs

41 ICNU provides numerous case citations in an effort to justify its legal position that tariffs "must be clearly expressed in plain terms so that customers can know their rates in advance and make reasonable and informed choices." (ICNU Opening Brief at page 12, 2nd new ¶)(internal quotation omitted).

42 In fact, one of the first cases ICNU cites states just the opposite. In *U.S. v. Associated Air Transport, Inc.,* 275 F.2d 827, 834-35 (5th Cir. 1960) the court stated:

> …it is immaterial whether or not the shipper has accurate knowledge of the charges in advance of shipment. The tariff must furnish the standard upon which the total charges are to be computed on the basis of actual facts then or to be subsequently established. It is not essential to a valid tariff that it, and it, alone or

by incorporation by reference, afford the tools to a shipper to then and there calculate the dollar cost before the shipment is made.

The statute at issue in *Associated Air Transport* is similar to RCW 80.28.050 and .080.[5]

43 A reading of some of the other cases ICNU cites does not reflect the analysis ICNU ascribes to them.[6] Cases like *Re Taxi Cab Operators*, 62 PUR NS 188 (D.C. PSC 1945) and *Re Rates and Charges,* 24 PUR NS 179 (Nebraska Rwy. Comm'n 1938),[7] did not consider or apply specific language from a governing statute. And none of the cases cited by ICNU addressed the sort of tariff at issue here.

44 One case cited by ICNU is instructive: *Re Boston Gas Co.,*142 PUR 4th 241 (Mass. DPU 1993). In that case, the tariff language called for the price for a service to be determined "subject to negotiation," and the tariff did not identify the possible range or basis for the resulting prices. So it was rejected. 142 PUR 4th at 259. By contrast, in the instant case, the proposed tariff language limits the basis of the charges to PacifiCorp's net cost, and prescribes that only distribution facilities not on public easement are eligible for removal charges.

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[5] The statute (49 U.S.C. §§ 483(a) and (b)) respectively required the carrier to file tariffs "showing all rates, fares and charges for air transportation between points served by it," and that no carrier could charge other than "the rates fares or charges specified in its currently effective tariffs." 275 F.2d at 833, n. 14.

[6] For example, ICNU cites *UTC v. Puget Sound Power & Light Co.,* Cause No. U-81-41 (6th Supp. Order) at pages 17-18 (December 19, 1988) for the proposition that a tariff must establish a "process or mathematical methodology for determining the actual rate or charge." In fact, at pages 17-18 of that order, the Commission was addressing retroactive ratemaking. There is nothing retroactive about the proposed net cost of removal tariff. (*See* Staff Opening Brief at pages 10-12, ¶¶ 33-38).

ICNU also relies on *City of Norfolk v. Virginia Electric Power & Light,* 90 S.E. 2d 140, 148 (Va. 1955). But that case simply held that a purchased gas adjustment clause was valid in that it was "an addition of a mathematical formula." The court did not hold that some other form of tariff was *per se* invalid.

[7] Indeed, in the *Re Rates and Charges* case, the Nebraska Railway Commission criticized an existing, rather Byzantine tariff structure. But the Commission did not hold the existing rate structure unlawful under Nebraska law. Instead, it announced that an effort would be undertaken to simplify that rate structure. *Id.* at 282-84. Accordingly, it is inappropriate for ICNU to characterize this case as enunciating the principle of law ICNU is trying to advocate.

45 In another case relied on by ICNU, *Re Houston Light & Power Co.,* 105 PUR 4th 89 (Texas PUC, 1989), the tariff at issue set a price floor only, with the actual rate to vary above that level based on whatever the market could bear. The tariff provided no "process or mathematical methodology" of the type required by ICNU. Yet the tariff was approved.

46 In short, the cases ICNU relies on betray ICNU's legal theory. Legislatures, commissions and courts grant flexibility in the design of tariffs. The tariff changes proposed in this case are reasonable and adequately circumscribe the nature and scope of the charges.

2. The "Block A and Block B" Hypothetical, When Properly Analyzed in Light of the Actual Tariff Language Proposed, Proves the Proposed Net Cost of Removal Tariff is Fair and Applies in Appropriate Circumstances

47 A hypothetical discussed at hearing involved two plots, "Block A" and "Block B." Block A and Block B are owned by different persons. The owner of Block A purchases Block B and converts the service to one meter. The question was whether there would be net cost of removal charges related to disconnection of service to Block B.

48 It is important to note that this hypothetical, as it was stated on the record (Tr. 166) did not indicate whether or not two utilities were involved, or whether a request for permanent disconnection was made. Accordingly, CREA unfairly uses this hypothetical example in an effort to justify an argument that the tariff is improperly vague. (CREA Opening Brief at page 19). In fact, whether the proposed tariff applies in the Block A/Block B example requires additional facts. This may have caused some confusion at the hearing, but the fault does not lie with the proposed tariff language.

49 In any event, CREA's criticisms lack careful analysis, and otherwise fail, when the actual terms of the proposed tariff are considered.[8] When the hypothetical is properly examined, the evenhandedness and fairness of the proposed net cost of removal charges are apparent.

50 In effect, three basic scenarios are possible in the Block A and Block B hypothetical. First, assume the Block B owner asked for permanent disconnection, and the circumstances showed the facilities would not be reused there. The net cost of removal charges would apply.[9]

51 Second, assume the Block B owner did not request permanent disconnection at all. PacifiCorp would not disconnect, but would still provide service there. The owner would be charged for continuing service. The net cost of removal charges would not apply.[10]

52 Third, assume the Block B owner requested permanent disconnection, but the property was to be sold to Block A, and the facilities would be used again. The net cost of removal charges would not apply at that time.[11]

53 Once Block B ownership was transferred, the new Block A/B owner would then ask for consolidation under one meter. Two relevant scenarios could apply in that situation. First, assume PacifiCorp remained the provider of both plots. The new Block A/B owner would request consolidation of loads and facilities from PacifiCorp, which

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[8] For example, at page 19 of its Opening Brief, CREA cites testimony of Staff witness McIntosh at Tr. 285, lines 5-20, but ignores the fact this testimony was clarified at Tr. 288-289. The focus of the tariff language is on whether there is a request for permanent disconnection, and whether the specific facilities would be re-used or not re-used.
[9] *See* proposed tariff language in the testimony of Mr. McIntosh in Ex. 301-T, page 7, lines 1-5, and at Tr. 288, line 24 to Tr. 289, line 8.
[10] *See* proposed tariff language in the testimony of Mr. McIntosh in Ex. 301-T, page 7, lines 1-5, and at Tr. 288, lines 1-16).

would be provided under PacifiCorp's existing tariff.[12] Or, assume Block A was served by CREA and Block B was served by PacifiCorp. The new Block A/B owner would ask PacifiCorp for permanent disconnection of Block B facilities, and would ask CREA to consolidate the loads under one meter. Since PacifiCorp's facilities would no longer be used, the permanent disconnection request to PacifiCorp would trigger the net cost of removal charges.

54 Note that in all scenarios where a customer imposes cost of removal on PacifiCorp, the Company recovers those costs from the customer, whether the customer remains a PacifiCorp customer, or not. This proves the proposed tariff revisions are fair and evenhanded in their application.

3. The Proposed Tariff Language is Not Improper Because it Does Not Cover Sales of PacifiCorp's Facilities to Disconnecting Customers

55 There is nothing in the proposed tariff language that discusses the sale of removed facilities to the disconnecting customer. From this, ICNU argues the tariff will be abused because PacifiCorp will decide when it will sell facilities, and when it won't. (CREA Opening Brief at page 11, 1st new ¶).

56 This issue is extraneous to this case. PacifiCorp is not required to sell its distribution facilities, and ICNU makes no claim that it is. In any event, any transfer of PacifiCorp property cannot be accomplished by PacifiCorp alone. Commission approval is required. (RCW 80.12). If PacifiCorp fails to comply with RCW 82.12, that is a separate question from whether the proposed tariff changes are appropriate.

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[11] *See* proposed tariff language in the testimony of Mr. McIntosh in Ex. 301-T, page 7, lines 1-5, which states that the charges do not apply if the facilities would likely not be reused.

[12] *E.g.,* PacifiCorp Tariff WN U-74, General Rules and Regulations, Rule 6(f), and Rule 14.VI.A, which address service relocations.

D. The Proposed Tariff Language Specifies How the Charges are Calculated

57 The proposed tariff language requires that the net cost of removal charges recover "the actual cost of removal less salvage of only those distribution facilities that need to be removed for safety or operational reasons, and only if those distribution facilities were necessary to provide service to Customer." "Distribution facilities located on public easement" cannot be removed for charge, unless the service drop and meter are located there. (McIntosh, Ex. 301-T at page 7, lines 6-9).

58 This description of applicable charges is sufficiently prescriptive. Only distribution facilities not on public easement may be removed for a charge (unless the service drop and meter are located on public easement, in which case the serve drop and meter may be removed for a charge). And the charges are calculated as PacifiCorp's actual cost of removal, less salvage.

1. The Description of Facilities to be Removed for a Charge is Similar to Other Tariffs

59 ICNU complains that the tariff does not describe the precise distribution facilities that might be removed. (ICNU Opening Brief at page 15, 1st three lines). ICNU offers no correcting language. Indeed, just like other similar tariffs, it is not possible to specify what facilities may be subject to the tariff under each and every possible circumstances.

60 The same level of specificity is included in existing tariffs, to which no party has taken exception. For example, in PacifiCorp Tariff WN U-74, General Rules and Regulations, Rule 6(f), "relocation of service or distribution facilities on or adjacent to Customer's premises" may be charged for, if the move is for the customer's convenience. The charge is calculated as the "installed cost of the relocated facilities, including

operating expenses, plus estimated removal cost, less estimated salvage and less depreciation of the facilities to be removed." (Ex. 307).

61 Another example is PacifiCorp's residential line extension tariff, which requires customers to "advance [PacifiCorp's] costs exceeding the extension allowance."[13] The term "extension" does not specify all possible facilities that could be involved.[14]

62 ICNU does not challenge the legitimacy of these tariffs. But the point here is that these tariffs would not survive ICNU's analysis, because they too fail to describe all of the possible facilities that might be provided, and do not state a specific dollar charge.

63 This demonstrates that the problem is with ICNU's legal theory, not the proposed tariff language. The language proposed in this case is at least as specific as existing tariff provisions.

2. The Distinctions ICNU Makes Between Line Extension Tariffs and the Proposed Net Cost of Removal Tariff are Not Based on Have No Legal Significance

64 ICNU cannot deny the fact that line extensions tariffs are very similar to the proposed net cost of removal tariff. Because no specific prices are set forth in those tariffs, ICNU tries to draw distinctions between the two, in an effort to show why line extension tariffs are valid, but the proposed tariff changes are invalid. But when ICNU's purported distinctions are analyzed, none hold water. The inevitable conclusion is that the proposed net cost of removal charges are valid.

65 First, ICNU says that unlike the proposed net cost of removal charges "a customer requesting a line extension has the right to receive an estimate prior to deciding to relocate." (ICNU Opening Brief at page 20, second ¶). In fact, in both contexts, the

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[13] PacifiCorp Tariff WN U-74, General Rules and Regulations, Rule 14.II.A.
[14] PacifiCorp Tariff WN U-74, General Rules and Regulations, Rule 1, definition of "Extension.".

customer gets an estimate of the charges in advance. In both contexts, the customer can simply not take the extension or the removal service, if it is unwilling to pay the cost that customer choice imposes on PacifiCorp. Cost-causation is the relevant principle, and it applies equally.

66 ICNU's distinction that the proposed net cost of removal charges apply to existing customers, while line extensions apply to prospective customers, is of no legal significance. (Notably, ICNU cites no law to support the significance of this distinction). The Commission has express statutory authority to change rates, rules and regulations, and even the contracts between a utility and its customer. RCW 80.28.020.[15] The power conferred by RCW 80.28.020 applies to current and prospective customers of the utility.

67 Indeed, the Commission may change a customer's terms and conditions of service even if they are contained in a contract between the customer and the utility that predated utility regulation itself. *Raymond Lumber Co. v. Raymond Light & Water Co.,* 92 Wash. 330, 159 P. 133 (1916).[16] Accordingly, ICNU's purported distinction between prospective and current customers has no legal support.

68 ICNU's only other distinction (which ICNU calls the "more important distinction") is that PacifiCorp allegedly does not have an incentive to violate the law when it comes to line extensions. ICNU also says PacifiCorp has an incentive "to keep

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[15] RCW 80.28.020 states in pertinent part:

> Whenever the commission shall find … that the rates and charges … or rules, regulations, practices or contracts, are unjust, unreasonable, unduly discriminatory or unduly preferential, … the commission shall determine the just, reasonable or sufficient rates, charges, regulations, practices or contracts to be thereafter observed and in force, and shall fix the same by order.

[16] In *Raymond Lumber Co.,* a customer entered into a long term contract for water service with a water company that came under state utility regulation several years later. Upon complaint, the state agency ordered the water company to terminate the contract and charge the customer the approved tariff rate, which was higher than the contract rate. On review, the court upheld the agency's action and authority. 92 Wash. at 335.

costs down" only in the line extension context. (ICNU Opening Brief at page 20, second ¶).

69 ICNU is wrong on both counts. (Again, ICNU again cites no legal authority to support its arguments). It is conceivable that if a utility wanted to, it could try to discriminate in the line extension context by favoring those customers with revenue or load characteristics the utility found desirable at the time. Thus, there is no different incentive of "keeping costs down" or "violating the law" in the line extension context than in the context of similar charges such as those proposed in this case. If the utility violates the law in any context, there are well-established procedures and sanctions available to address that if necessary.

70 In the end, the Intervenors have done nothing to establish that the proposed net cost of removal charges are any different, in matters of legal significance, to the line extension tariffs to which they do not and cannot object.

3. The Different Charges Reflected in Exhibit 61 are Cost-Justified

71 The final challenge to the structure of the proposed tariff comes from CREA. CREA notes that the customer in the complaint file in Exhibit 61 received two estimates, one for $1,200,[17] and one for $852. (CREA Opening Brief at page 12, last ¶). According to CREA, this is a "telling example of the proposed tariff being put into practice." (CREA Opening Brief at page 12, last ¶ to page 13).

72 CREA is wrong to conclude that anything untoward is reflected by these two estimates. The Exhibit 61 complaint arose after a customer requested facilities to be removed. The customer apparently was not precise in stating the facilities he wanted

[17] This $1,200 figure represents the $1,167 figure in Exhibit 61, rounded.

removed. Therefore, he was given two estimates, one which included removing a power pole, and one that did not. (Ex. 61, 5th page, numbered "Page 4 of 5," 2nd and 3rd hyphenated ¶¶).

73 This cannot be an example about how the proposed tariff would be administered, because the proposed tariff was not in effect. But it is an excellent example of how the company assesses charges that are rationally related to its costs.

E. The Proposed Tariff Changes are Not Discriminatory

74 ICNU argues that the $200/$400 charges for residential overhead and underground service drop removals are discriminatory since some small commercial customers may be similarly situated, and the same charges do not apply to them. (ICNU Opening Brief at page 22).

75 This argument is beyond the scope of ICNU's intervention in this case. ICNU was permitted to intervene as a representative of the interests largest users of PacifiCorp's services,[18] not the interests of small commercial customers ICNU now finds in its interest to advocate.

76 In any event, ICNU's argument is an unfounded attack on the current residential/commercial class distinction. One can always argue that the cost to serve a specific customer in one class is the same as the average cost to serve a customer in another class, and thus the same rate should apply. If this argument were applied consistently, it would require the Commission to set prices for each electric service provided to each customer based on a cost study specific to each customer. That is not the law, and it has never been the law.

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[18] Petition for Leave to Intervene of the Industrial Customers of Northwest Utilities, at page 2, ¶ 5 (January 24, 2001).

77 The $200/$400 charges were a reasonable attempt to establish an average rate for the residential class. Similar information was not available for other classes. Despite concerns about the wide variation of customer circumstances in the commercial class, an average rate for that class may be possible, but sufficient data is not available. A good tariff should not be rejected because it is not perfect.[19]

78 CREA argues the proposed net cost of removal charges are discriminatory because they do not apply when a customer abandons service. (CREA Opening Brief at pages 19-20).[20] It is true that PacifiCorp would not be able to collect removal charges from a customer that simply abandons the property. But the fact that a tariff cannot, as a practical matter, apply to a customer who abandons its property and its electric service does not render a tariff discriminatory. If it did, then the existing tariff rate for electricity is discriminatory, since a customer who abandons service and leaves behind an uncollectible power bill can equally avoid paying applicable tariff rates. That is an untenable result.

79 CREA cites no law to support its argument. Its argument fails the test of logic. It should be rejected.

F. The Proposed Net Cost of Removal Charges Do Not "Illegally Charge Former Customers"

[19] If the Commission desires all customers to have net cost of removal charges based on actual cost for that customer, it of course has discretion to eliminate the $200/$400 charges from the proposed tariff language.

[20] CREA also uses the term "discriminatory effect" in its argument on pages 13-14 of its Opening Brief. CREA's discrimination argument at this point in its brief is not described in sufficient detail to enable us to respond.

80 ICNU advances the ingenious argument that the proposed tariff changes impose obligations on "former customers" for "unwanted or unneeded" services. ICNU also argues that RCW 80.28.010 forbids any charge associated with a customer's decision to terminate service that was not related to the service it received. (ICNU Opening Brief at page 24).

81 ICNU's argument can be rejected for want of a factual basis. In fact, the proposed charges apply only when the existing PacifiCorp customer has requested permanent disconnection. At that point, the customer is still a customer.

82 RCW 80.28.010 (the only legal authority cited by ICNU) states that "charges for any service rendered or to be rendered in connection therewith, shall be fair, just reasonable and sufficient." The proposed net cost of removal charges satisfy this section because they are "in connection with" both the electrical service provided, and the utility service of disconnection. It is the status of the customer as customer that gives rise to PacifiCorp installing the facilities, and removing them. It is reasonable to require the customer to pay the costs of doing both.

83 Customer's decisions to take service and to terminate service are not cost-free. Individual customers may not "want or need" PacifiCorp to engage in conservation programs, resource acquisitions or other business activities of the utility. The "wants or needs" of individual customers is not the legal standard for relieving them from paying for the utility's prudent costs of providing service.

84 Here, the customer is requesting disconnection, and when that customer decision imposes costs on PacifiCorp, it is sensible and reasonable to assess cost responsibility on that customer.

85 ICNU proves Staff's point by noting that stranded costs are not objectionable because they are "related to obligations that a customer may have incurred while receiving service…" (ICNU Opening Brief at page 25, 1st new ¶). When customers obtain regulated service, they incur obligations. One of those is to pay for the costs they impose by their actions as customers. Paying PacifiCorp's net cost of removal is a reasonable obligation and consequence of being a PacifiCorp customer.

86 Even CREA agreed to net cost of removal charges (so long as they only applied to new customers):

> Q: Do you object to a rate that charges that $125 amount?
>
> A: You know, I don't if its employed at a date certain time going forward to all new customers...

(Husted, Tr. 212, lines 22-25). The law does not require the tariff be applied only to new customers. (*See* discussion *supra*, at ¶¶ 66-67).

87 The point is that a customer's obligation to pay the removal costs it imposes on the utility is *created*, not *eliminated*, by asking for disconnection. The customer's choice to no longer receive service in the context at issue in this case is a cost-causing event, occasioned by its status as a customer. The customer should pay that cost.

G. Competitive Issues

88 Both ICNU and CREA claim the proposed net cost of removal charges would unlawfully restrain customer choice. But each party has yet to explain why a cost-based

charge is not reasonable, and consistent with policies directed at addressing competitive concerns.

89 It is safe to say that all business arrangements restrict customer choice in some manner. The threshold issue is whether the antitrust laws apply at all, and if so, whether a cost-based charge is an unreasonable restraint. The answer to both questions is No.

1. The Proposed Net Cost of Removal Charges Satisfy State Antitrust and Consumer Protection Laws

90 As Staff demonstrated in its Opening Brief, the proposed net cost of removal charges are immune from state antitrust and consumer protection laws because they satisfy the exemption in RCW 19.86.170. (Staff Opening Brief at page 15, ¶ 48, and note 13).

91 Surprisingly, Intervenors do not discuss RCW 19.86.170.[21] In effect, they are attacking the constitutionality of RCW 19.86.170. To support their argument, each Intervenor cites, in identical sequence, const. art. XII, § 22; *Group Health Co-Op v. King County Med. Society,* 39 Wn. 2d 586, 237 P2d 737 (1951); and *Re Electric Lightwave v. UTC,* 123 Wn. 2d 530, 869 P2d 1045 (1994). (CREA Opening Brief at page 17, 3rd new ¶)(ICNU Opening Brief at page 23, 1st ¶).[22]

92 Intervenors' state law arguments fail because RCW 19.86.170 is plainly constitutional. Section 22 of the state constitution is not self-executing. The Consumer

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[21] The Intervenors' failure to discuss RCW 19.86.170 must be intentional, because that statute has been consistently cited by Staff throughout this litigation. (*See* Commission Staff's Response in Opposition to Petition for Intervention by Columbia Rural Electrification Association, at page 3, ¶ 14 (June 6, 2001); Answer on Behalf of Commission Staff to PacifiCorp's Motion to Strike CREA Testimony, at page 4, ¶ 12, n. 7 (September 5, 2002)).

[22] For its part, CREA is inconsistent in its argument. If the proposed net cost of removal charges are constitutionally defective, that defect is not removed if the charges apply only to new PacifiCorp customers. Yet CREA supports the proposed charges if they apply only to new PacifiCorp customers. (Husted, Tr. 212:22-23 to 213:7, and Tr. 216:2-7).

Protection Act, including RCW 19.86.170, lawfully implemented Section 22.[23] Approving the proposed net cost of removal charges complies with RCW 19.86.170, which in turn is consistent with the delegation of legislative authority in Section 22.

93 The state cases cited by Intervenors do not support their arguments, either. *Group Health Co-Op* is instantly distinguishable because it did not involve state activity subject to the exemption in RCW 19.86.170. *Electric Lightwave* arose in the context of Commission-prescribed exclusive territorial boundaries for certain telecommunications companies. The court agreed the Commission could prescribe exclusive territories consistent with Section 22 of the state constitution, so long as there was a statute authorizing that. 123 Wn.2d at 538.[24] The court found the statute relied on by the Commission (RCW 80.36.230) did not authorize that. 123 Wn.2d at 537.

94 *Electric Lightwave* is inapposite because the proposed net cost of removal charges establish no territorial boundaries whatsoever, let alone exclusive ones. The proposed tariff changes would apply wherever PacifiCorp operates in this state, now or in the

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[23] "[I]t cannot be said that the makers of the constitution understood § 22 … to be self-executing, since they expressly provided that the legislature shall make laws for its enforcement." *Northwestern Warehouse Co. v. Oregon Ry. & Nav. Co.,* 32 Wash. 218, 227, 73 P. 388 (1903). Accordingly, the Consumer Protection Act "may be considered as simply compliance by the legislature with the mandate given to it by the Washington Constitution, article XII, § 22, Monopolies and Trusts"… John J. O'Connell, Washington Attorney General, *Washington Consumer Protection Act – Enforcement Provisions and Policies,* 36 Wash. L. Rev. 279, n. 2 (1981).

[24] To support this principle, the *Electric Lightwave* court cited, *inter alia*, *State ex rel. Dep't of Public Works v. Inland Forwarding Corp.,* 164 Wash. 412, 2 P.2d 888 (1931). 123 Wn.2d at 528. In the *Inland Forwarding* case, the court upheld a statute empowering the Commission's predecessor agency to prescribe exclusive territories for auto transportation companies. The court held the statute did not violate const. art. XII, § 22, since the auto transportation companies with the exclusive certificates were at all times subject to state regulation:

> The monopoly interdicted by the constitution is one whose activities are hostile and oppressive to the common welfare, rather than those which at all times are subject to the dominion, judgment and immediate regulation of the state.

164 Wash. at 8. *Electric Lightwave* and *Inland Forwarding* do not require the Commission to reject the tariff changes proposed in the instant case on constitutional grounds. As indicated above, the Commission is not creating a territorial boundary for anyone in this case. Moreover, all of PacifiCorp's rates, services and practices are "at all times subject to the dominion, judgment and immediate regulation of the state."

future. Moreover, the authority to approve a tariff stating net cost of removal charges is wholly consistent with the Commission's statutory authority to regulate the rates, services and practices of PacifiCorp, and approve rates for utility services rendered. (*E.g.* RCW 80.04.130 and RCW 80.01.040(2)).

95 Legal arguments aside, the Intervenors' position here fails a simple test of logic. For example, assume the Commission authorized cost-based rates for PacifiCorp that had the effect of preventing some customers from switching. Intervenors could argue that such a rate action "prevented competition between utilities," and thus violated Section 22. (Quote is from ICNU Opening Brief at page 23, 1st ¶).[25] Indeed, any rate action short of mandating market-based rates for PacifiCorp would appear to violate the Intervenor's novel concept of what the law requires.

96 If accepted, an argument of such expansive scope and effect, clothed in the constitution by self-interested customers and a would-be competitor of PacifiCorp, could undermine almost any Commission order. Indeed, it could be argued that regulation under Title 80 itself "prevents competition between utilities," in violation of the standard ICNU advocates.

97 The problem here is that Intervenors fail to describe any rational and objective means for deciding what sort of Commission action "prevents competition" and what does not. The result is a legal theory without any limit other than Intervenors'

E.g., RCW 80.04 and 80.28. Accordingly, they comply with the policies and purposes underlying Section 22 of the state constitution.

[25]The evidence in this case indicates that no PacifiCorp customers switched to CREA before 1999. (Clemens, Tr. 95, lines 21-23). Consistent with their theory, Intervenors could argue that the entire prior history of regulation of PacifiCorp violates Section 22, since prior to 1999, it apparently had the same practical effect as prescribing an exclusive territory for PacifiCorp. Such an extreme result proves the Intervenors' arguments are overbroad, unreasonable and illogical.

economically-motivated self-interest. Since Intervenors are unable to enunciate any limits to the novel legal theory they are advancing, their arguments should be rejected.

2. The Proposed Net Cost of Removal Charges Satisfy Federal Antitrust Laws, Assuming Interstate Commerce is Involved Here[26]

98 Only CREA suggests that Commission approval of the proposed net cost of removal tariff would violate federal antitrust laws. CREA concedes the state action immunity exists, but argues it does not apply here. (CREA Opening Brief at pages 17-18).

99 Contrary to CREA, the state action immunity applies. As CREA indicates, the state action immunity is for conduct that is the result of a "clearly articulated and affirmatively expressed state policy; and state officials have and exercise the authority to review the particular uncompetitive acts of the private party and disapprove those that fail to accord with state policy." (CREA Opening Brief at page 17, citation omitted).

100 This test would be met by Commission approval of the proposed net cost of removal tariff. Filing the tariff for approval is authorized, *inter alia*, by RCW 80.28.010, .020, and .060. As we indicated in our Opening Brief, state policy affirmatively favors public interest regulation of PacifiCorp's rates and charges. The proposed net cost of removal charges are consistent with the policies the Commission has established

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[26] In Staff's Opening Brief, a tacit assumption was made that the federal antitrust laws could apply to consideration of an intrastate tariff such as the proposed tariff at issue. However, the federal antitrust laws apply only if the alleged acts "occurred within the flow of interstate commerce" or the acts "substantially affected interstate commerce." *Thornhill Publishing Co. v. GTE Corp.,* 594 F.2d 730, 737 (9th Cir. 1979)(citations and internal quotation omitted). CREA has made no affirmative demonstration that the services at issue in this case would qualify under this test.

Thornhill Publishing involved a complaint under the federal antitrust laws related to conduct involving publication of a local telephone directory. The court held that the Defendant's local acts of publishing, distributing, and soliciting advertising for a local telephone directory within the state of Washington were not within the flow of interstate commerce nor did they substantially affect interstate

thereunder, and the Commission should so find. (*See* Staff Opening Brief at pages 15-18, ¶¶ 48-60).

101 CREA suggests Commission oversight is inadequate to justify state action immunity. On the contrary, the Commission will have reviewed the terms and conditions of the proposed tariff, and their consistency with state policy. The Commission is charged with regulating all of PacifiCorp's rates, services and practices. (*E.g.* RCW 80.01.040(2)). The proposed net cost of removal charges are no exception.

102 Without discussing any Commission policies at all, CREA describes the "Rule of Reason," and then says that Rule is violated. (CREA Opening Brief at page 16 and at page 18, 2nd new ¶). Even if we assume the proposed tariff revisions would not be immune from federal antitrust laws, and the Rule of Reason applies, CREA cites no case in which a competitor's cost-based price violated the Rule of Reason.

103 Once case CREA relies upon shows the proposed net cost of removal charges are consistent with the Rule of Reason. In *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)(cited on page 16 of CREA's Opening Brief), the Court indicated that a purpose of the Rule of Reason is to "advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them." The proposed net cost of removal charges are consistent with this purpose because they reflect PacifiCorp's actual net cost of removal. To hold otherwise would require a firm to absorb costs or charge non-cost-based rates in order to satisfy the competitive concerns of other entities. CREA cites no case where that has been required by any court.

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commerce. The court affirmed the trial court's order dismissing the complaint for lack of subject matter jurisdiction.

104 Consider also *Meenan Oil Co. v. Long Island Lighting Co.,* 333 N.Y.S.2d 657 (1972). In that case, oil dealers complained about certain tariffs of Long Island Lighting Company (Lilco), a combination gas and electric utility, as they applied in the Town of Huntington, New York.

105 The Town generally required all electric and natural gas lines to be undergrounded. Lilco tariffs uniformly provided customers overhead electric facilities and underground gas facilities for no charge. Lilco did charge customers to underground electric wires. However, when the customer was installing a new natural gas heater, Lilco did not charge for undergrounding electric lines because using the same trench reduced the cost to below the cost to install overhead facilities.

106 Like the Intervenors here, the oil dealers complained Lilco's tariff prevented them from attracting new customers. Specifically, the oil dealers claimed Lilco's failure to charge for undergrounding when gas service was installed at the same time was a restraint of competition that violated the state's antitrust laws.

107 The court rejected the oil dealers' claim because the undergrounding tariff at issue was based upon Lilco's cost:

> There is no requirement that a supplier of a product impose an artificial charge for a service which does not increase the supplier's cost, simply to ensure that the supplier does not attain an advantage over his competition.

333 N.Y.S.2d at 239.

108 In the instant case, even assuming the antitrust laws applied, the proposed net cost of removal charges would not be lawful for the same reason: they reflect PacifiCorp's cost. Even if they applied, the antitrust laws do not require that a utility absorb, or its

remaining customers pay, the costs imposed on that utility by departing customers, in order to satisfy a competitor's perceptions of what is or is not a competitive advantage.

109 CREA cites *Cost Management Services, Inc. v. Washington Natural Gas Co.,* 99 F.3d 937 (9th Cir. 1996) for the proposition that the filed rate doctrine "only precludes antitrust claims based on rates approved by the regulatory agency but does not apply to rate based damages actions brought by a competitor of a regulated utility." (CREA Opening Brief at page 18, 1st new ¶). Though this is an unsettled legal principle,[27] and it is difficult to apply,[28] the court discussed its holding primarily in the context of claims of unlawful conspiracy in setting a rate, or allegations of specific conduct unlawfully manipulating a rate, which adversely affected not a customer, but a competitor.

110 By contrast, there is no claim by CREA that the instant tariff proposal was the result of an illegal conspiracy. In the future, if PacifiCorp elects to unlawfully manipulate the tariff, that may indeed have adverse consequences for PacifiCorp. But at this stage, the issue is whether a cost-based charge for costs imposed by a customer is anti-competitive in the first place. CREA has cited not a single case that demonstrates that.

H. Reply to PacifiCorp

[27] *See Town of Norwood v. New England Power Co.,* 202 F.3d 408, 420 (1st Cir. 2000)(noting that "no such exception [from the filed rate doctrine] for Plaintiff-competitors has ever explicitly been adopted by [the Supreme Court]."

[28] What is a "rate based damages action" and what is a "rate action" is difficult to determine in some cases. For example, in *Stein v. Pacific Bell Tel. Co.,* 173 F. Supp. 2d 975. 986 (N.D. Cal. 2001) a Plaintiff claimed injury because the telephone company's rates allegedly denied customers "free choice" of alternative suppliers. The court viewed this as a rate matter barred from antitrust scrutiny under the filed rate doctrine.

111 The only issue for which a reply by Staff to PacifiCorp is warranted regards the Company's proposed language clarifying what is covered by the $200/$400 charges for removing simple residential service drops. (PacifiCorp Opening Brief at page 6, last ¶).

112 PacifiCorp's proposed language is not based on anything in the record, so it should not be accepted now. Staff believes the reference in the proposed tariff to "service drop and meter" is adequate. It is based on the record, and it should be accepted. (*See* Staff Opening Brief at 2, ¶ 7, n. 2).

V. CONCLUSIONS

113 Perhaps the clearest reason for approving the proposed tariff changes in this case is supplied by CREA itself. CREA urges the proposed tariff changes be rejected because the costs "will not be passed on to the public due to the rate plan now in effect." (CREA Opening Brief at page 20, 3rd new ¶).

114 In one respect, this proves CREA is searching for an unfair competitive advantage, by trying to force PacifiCorp to absorb legitimate costs. That is contrary to any rational public policy. In another respect, it proves that rejecting the tariff will only delay the issue, which further works to provide CREA an unearned competitive advantage.

115 Customers should recognize they are responsible for the direct costs they impose on utilities such as PacifiCorp. And customers and competitors alike should recognize that cost-based charges are in the public interest. If for some reason neither constituency recognizes this, the Commission should act as if they do, because ultimately, that is in the correct result.

116 The Commission should approve the proposed tariff changes identified by Staff in its Opening Brief at pages 2-3, ¶ 7.

DATED this 18th day of October, 2002.

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