[Service Date November 27, 2002]

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 EIGHTH SUPPLEMENTAL ORDER REJECTING ORIGINAL PROPOSED TARIFF REVISION AND APPROVING MODIFIED TARIFF PROPOSAL

I. SYNOPSIS

1 *The Commission allows PacifiCorp to charge a customer the Company's net cost of removing facilities when a customer requests permanent disconnection of service, the Company's facilities used to provide the service are not likely to be re-used at that location, and their removal is necessary for safety and operational reasons.*

II. MEMORANDUM

A. PARTIES

2 James C. Paine, Stoel Rives LLP, Portland, Oregon, represents PacifiCorp, d/b/a Pacific Power & Light (PacifiCorp or the Company). Don Trotter, Assistant Attorney General, Olympia, Washington, represents the staff of the Washington Utilities and Transportation Commission (Commission Staff or Staff). Robert Cromwell and Simon ffitch, Assistant Attorneys General,

Seattle, Washington, represent Public Counsel. Melinda Davison and Irion Sanger, Davison Van Cleve, P.C., Portland, Oregon, represent Industrial Customers of Northwest Utilities (ICNU). Michael V. Hubbard, Hubbard Law Office, Waitsburg, Washington represents Columbia Rural Electric Association (CREA).

B. PROCEDURAL HISTORY

3 On November 9, 2000, PacifiCorp d/b/a Pacific Power & Light (PacifiCorp) filed a tariff revision (Proposed Tariff Revision) that, as originally proposed, would allow PacifiCorp to charge a customer the costs associated with removing PacifiCorp's utility property from the customer's location when the customer changes utility service providers. On November 29, 2000, the Commission suspended the tariff revision pending hearing(s) on the proposed changes.

4 The Commission convened a prehearing conference on May 1, 2001. Among other things, the Commission granted ICNU's petition to intervene, established a procedural schedule, invoked the discovery rule (WAC 480-09-480), and entered a Protective Order. *First Supplemental Order, May 4, 2001*. In addition, the Commission set a pleading schedule for filing motions to dismiss.

5 On May 24, 2001, Public Counsel and ICNU filed a motion to dismiss PacifiCorp's Proposed Tariff Revision for non-compliance with the Commission's Order and Stipulation in Docket No. UE-991832. PacifiCorp and Commission Staff filed pleadings in opposition to the Motion to Dismiss.

6 On May 29, 2001, Columbia Rural Electric Association (CREA)[1] filed a petition for intervention. PacifiCorp and Commission Staff filed pleadings in opposition to CREA's petition. Public Counsel expressed no objection to the petition.

7 On July 9, 2001, the Commission entered its *Second Supplemental Order* denying the motion to dismiss and granting CREA's intervention on a limited basis. The Commission allowed CREA to intervene to contest the factual contentions about CREA in PacifiCorp's testimony, and to develop CREA's contentions that the filing constitutes an unlawful restraint of trade, restricting competition and customer choice in contravention of law and public policy.

8 On May 11, 2001, PacifiCorp filed the direct testimony of William G. Clemens pursuant to the procedural schedule. On July 2 and 3, 2001, Commission Staff and CREA filed the testimony of Henry B. McIntosh and Thomas Husted, respectively. Public Counsel and ICNU did not submit testimony in this proceeding. Mr. McIntosh sponsored alternative language to the Proposed Tariff Revision. The alternative tariff language will hereinafter be referred to as the Modified Tariff Proposal. Among other things, Staff's proposal would apply to any customer who requests to permanently disconnect service, when the Company's facilities used to provide the service are not likely to be re-used at that location.

9 On July 27, 2001, PacifiCorp filed a motion to amend the prehearing conference order and to hold in abeyance further process in this docket until December 31, 2001. PacifiCorp requested suspension of the procedural schedule because PacifiCorp and CREA had entered into an interim service

[1] Columbia Rural Electric Association, Inc. is a non-profit cooperative that is owned by its members. It provides utility products and services to those members in Columbia and Walla Walla counties in the State of Washington. *Petition for Intervention at p. 2.*

territory area agreement and had executed a Memorandum of Understanding that set forth the framework for negotiating a permanent service territory agreement.

10 On August 10, 2001, the Commission granted PacifiCorp's motion to amend the prehearing conference order. *Third Supplemental Order Amending Prehearing Conference Order. . . (August 10, 2001).* The Commission approved the interim service territory agreement in Docket No. UE-011085, and appointed a mediator to facilitate negotiation of a permanent service territory agreement.

11 PacifiCorp requested further suspension of the procedural schedule to January 31, 2002, and again to May 15, 2002, in order for PacifiCorp and CREA to continue negotiations. The Commission granted the requests, ordered a status report on February 22, 2002, and convened a status conference on May 21, 2002.

12 PacifiCorp and Commission Staff appeared at the May 21, 2002, status conference. PacifiCorp informed the Commission that the parties were unsuccessful in reaching agreement on a permanent service territory agreement. PacifiCorp asked that the Commission re-establish a procedural schedule for this proceeding.

13 On May 30, 2002, the presiding Administrative Law Judge initiated a teleconference to establish a procedural schedule. Representatives of PacifiCorp, CREA, ICNU, Public Counsel, and Commission Staff participated in the teleconference. PacifiCorp and CREA clarified that the interim service territory agreement was no longer in effect. The parties discussed scheduling options, with a final schedule to be determined by the Commission. PacifiCorp agreed to waive the statutory suspension period to accommodate

the hearing schedule. On June 5, 2002, the Commission entered its *Fourth Supplemental Order* re-establishing a procedural schedule.

14 On July 2, 2002, the Commission entered its *Fifth Supplemental Order* in this proceeding denying ICNU's request for leave to file testimony after the established deadline (July 2, 2001) for filing such testimony. On August 20, 2002, PacifiCorp filed the rebuttal testimony of Mr. Clemens. In his rebuttal testimony, Mr. Clemens accepted Staff's Modified Tariff Proposal.

15 On September 20, 2002, the Commission held an evidentiary hearing before Chairwoman Marilyn Showalter, Commissioner Richard Hemstad, Commissioner Patrick Oshie, and Administrative Law Judge Karen Caillé. The Commission received into evidence the testimony and exhibits previously filed in this docket by the parties and previously marked for identification. The Commission heard testimony from William G. Clemens on behalf of PacifiCorp, Henry B. McIntosh on behalf of Commission Staff, and Thomas Husted on behalf of CREA.

C. PROPOSED CHANGES TO PACIFICORP'S TARIFF, RULE 4(f)[2]

16 As originally proposed, PacifiCorp's Proposed Tariff Revision filed on November 9, 2000, would apply to customer requests to disconnect PacifiCorp's facilities so that the customer may switch to another electric utility, and would impose on the requesting customer the actual removal

[2] The Modified Tariff Proposal would add language to existing PacifiCorp Tariff WN U-74, General Rule and Regulation 4(f). The proposed changes to Rule 4(f) are shown in legislative format in Appendix A. The Modified Tariff Proposal in Appendix A reflects the version contained in PacifiCorp's filed rebuttal testimony (Clemens: Ex. 2-T at p. 3) plus the following: The $200 and $400 charges are clarified to apply only to simple "service drop" situations as explained at hearing. *Clemens: Tr. 157-157, 161.* Staff recommends that PacifiCorp's additional proposed language at page 6 of its opening brief not be accepted now because the language is not based on anything in the record.

costs incurred by PacifiCorp to remove the facilities, less salvage value of the assets removed.

17 Commission Staff, through the prefiled testimony of Mr. Henry B. McIntosh, sponsored alternative language to the Proposed Tariff Revision (Modified Tariff Proposal). Mr. McIntosh testified the Staff found the Proposed Tariff Revision unacceptable because it is vague in terms of defining the scope of the proposed charges, and discriminatory in that it would only apply to customers seeking to switch electric suppliers. *McIntosh: Ex. 301-T at 4.*

18 Among other things, Staff's Modified Tariff Proposal would apply to any customer who requests permanent disconnection of service, when the Company's facilities to provide service are not likely to be re-used at that location. In addition, the Modified Tariff Proposal sets a flat charge for normal residential overhead or underground removals, limits and defines the scope of distribution facilities involved, and establishes a sunset date and reporting requirements.

19 Under the Modified Tariff Proposal, a net cost of removal charge would apply in two situations. First, such a charge would apply when a customer requests permanent disconnection, it appears the facilities will not be re-used at the customer's site, and removal is necessary for safety or operational reasons. ¶ *3 of the Modified Tariff Proposal*. In this situation, the customer would be charged the cost (less salvage) that PacifiCorp incurs to remove those distribution facilities not located on public easement that were used to serve that customer. (Exception: if a residential service drop or meter happens to be located on a public easement, it would be removed for a charge). If only a residential service drop and meter is involved, a $200 charge (for overhead service drop and meter) or $400 charge (for underground service drop and meter) would be imposed.

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

21 Facilities will not be removed if that would adversely affect the service provided to other PacifiCorp customers. ¶ *5 of the Modified Tariff Proposal.*

22 The Modified Tariff Proposal also includes two conditions proposed by Commission Staff and accepted by PacifiCorp. First, Staff recommends that the proposed tariff changes bear a "sunset date" of December 31, 2005, which coincides with the end of PacifiCorp's current Rate Plan. *McIntosh: Ex. 301-T at page 8, lines 1-6.* Staff proposes this condition because the new tariff constitutes a new service offering. Staff suggests that experience under the tariff will help determine whether or not it should be continued. *Id.*

23 Staff also recommends that PacifiCorp be required to report annually the number of times the tariff was used, and for each transaction: the date, customer type, nature of the request, estimated removal cost and salvage, actual removal cost and salvage, description of the facilities removed, and the accounts used to book the transaction. *McIntosh: Ex. 301-T at page 8, lines 8-13.* Staff asserts that these reports will help ensure reasonable conduct by all concerned, and will provide data to evaluate the tariff's operation.

24 PacifiCorp accepted Staff's Modified Tariff Proposal in the rebuttal testimony of Mr. Clemens.

D. BURDEN OF PROOF

25 PacifiCorp bears the burden of proving the proposed tariff revision is "just and reasonable." RCW 80.04.130(2) provides:

> At any hearing involving any change in any schedule classification, rule or regulation the effect of which is to increase any rate, charge, rental or toll theretofore charged, the burden of proof to show that such increase is just and reasonable shall be upon the public service company.

E. ISSUE BEFORE THE COMMISSION

26 The fundamental issue the Commission must decide is whether PacifiCorp's proposed tariff revisions, as modified by Staff, are just and reasonable. At the core of this issue is a policy question--whether those customers who impose costs of removal on PacifiCorp should bear those costs.

III. DISCUSSION AND DECISION

27 The ultimate issue the Commission must decide is whether the Modified Tariff Proposal is just and reasonable. ICNU and CREA have raised a number of legal challenges related to the Modified Tariff Proposal, as well as arguments that do not directly address the justness and reasonableness of the Modified Tariff Proposal. Our discussion first addresses the issues raised by the parties and concludes with the question of whether the Modified Tariff Proposal is just and reasonable.

A. PARTIES' POSITIONS

28 PacifiCorp and Staff urge the Commission to approve the Modified Tariff Proposal. They assert that the Modified Tariff Proposal is just and reasonable. They argue that the Modified Tariff Proposal is cost-based, non-discriminatory, and consistent with Commission policies. ICNU and CREA recommend that the Commission reject the Modified Tariff Proposal. ICNU argues that PacifiCorp has not met its burden of proof, and raises legal challenges to the tariff. CREA argues that the charges for net removal cost constitute an unlawful restraint of trade, an unlawful restriction on competition, and an unlawful restriction of customer choice. In addition, CREA contends that the Modified Tariff Proposal is procedurally flawed.

1) Would approval of the Modified Tariff Proposal result in double recovery of net removal costs?

29 **ICNU.** ICNU contends that the costs associated with disconnections and net removals of Company facilities from customer property are already included in PacifiCorp's rates. ICNU argues that Washington law prohibits a utility from double recovery of any costs, expenses, or other revenues. *Re Camelot Square Mobile Home Park, Docket Nos. UT-960832, UT-961341, UT-961342, Fifth Supplemental Order (Aug. 18, 1998), WUTC v. PP&L, Cause Nos. U-82-12, U-82-35, Order (Feb. 1, 1983).* ICNU advises the Commission to reject any tariffs that improperly seek "double recovery" of the same expenses or investments. *Post Hearing Brief of ICNU, pp. 7-8; Reply Br.3-4.*

30 **Responses of PacifiCorp and Commission Staff.** PacifiCorp argues that, contrary to ICNU's double recovery allegations, the proposed tariff revisions reflect incremental costs not covered in or recouped through the Company's current tariffs. *Tr. 70, 282-284.* Commission Staff argues that PacifiCorp's current rates were established as a result of a settlement of revenue

requirement and rate design. *See Third Supplemental Order in Docket UE-991832 (August 9, 2000).* Staff points out that the *Third Supplemental Order* contains 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. *Staff Reply Br. at ¶ 29-30.* Staff agrees that "double recovery" should be avoided, when that is a legitimate concern, but contends that "double recovery" is not a legitimate concern in this case. According to Staff, even if one were to ignore the settlement establishing current rates, "the Company's total net removal costs are very small." *See ICNU Post Hearing Br. at 9.* Since net removal costs are insignificant, the "double recovery" issue is not a material issue in this case. *Staff Reply Br. at ¶ 31-36.*

31 **Commission Decision.** The Commission finds that there is no evidence in the record that the proposed net removal cost charges are recovered in PacifiCorp's rates. Rather, the evidence establishes that an approved stipulation established current PacifiCorp rates. *See Third Supplemental Order in Docket UE-991832 (August 9, 2000).* The parties signing the "Comprehensive Stipulation," including ICNU, stipulated that there was no agreement on the "facts, principles, methods or theories employed in arriving at the terms of this Stipulation. . ." *Id. at p. 27.* The Commission made no findings that current tariffs recover the costs at issue here. Moreover, 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.* 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. Based on the foregoing, 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.

2) Does the Modified Tariff Proposal lack specificity, in violation of Washington law?

32 **ICNU and CREA.** ICNU contends that the Modified Tariff Proposal violates Washington law because it does not specify the rate or charge for commercial or industrial customers. In addition, ICNU contends that the tariff language fails to describe which distribution facilities of commercial and industrial customers would be removed, or even a method to determine to which facilities the tariff applies. *ICNU Post-Hearing, p.11, 14-15.* ICNU argues that utility tariff schedules must specify all rates or charges applicable for utility service. *RCW 80.23.020, .050, .060, .080.* Moreover, the Commission's rules 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 supplied).*

33 ICNU argues that courts and utility commissions 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).* According to ICNU, 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.*

34 CREA also challenges the specificity of the Modified Tariff Proposal and contends that the proposed tariff lacks the specificity required by the filed rate doctrine. *RCW 80.28.050. CREA Opening Br. pp., 5 & 10.*

35 **Responses of PacifiCorp and Commission Staff.** Staff argues that 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. . . ." *Staff Opening Br. at ¶ 37.* Staff points out that these statutes do not prescribe the specific manner in which rates and charges must be shown or the level of detail with which they need to be specified. Staff argues that the cases cited by ICNU do not 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." Rather, the cases ICNU relies on establish that legislatures, commissions, and courts grant flexibility in the design of tariffs. *Id. at ¶ 41-46.*

36 According to Staff, the proposed tariff language specifies how the charges are calculated. The proposed language requires that the charges for net cost of removal 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 the 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, Par. 57.* PacifiCorp explains that it utilizes a software program designated Retail Construction Management System, or "RCMS" to calculate construction activity costs throughout the Company's service territory. PacifiCorp notes that the software program has been examined by Staff in both this proceeding and in the Company's 1998 line extension proceeding. *Tr. 56.*

37 PacifiCorp and Staff maintain that the description of facilities to be removed for a charge is similar to other tariffs. Indeed, just like other similar tariffs (i.e. a relocation tariff or a line extension tariff), it is not possible to specify what

facilities may be subject to the tariff under every possible circumstance. They note that ICNU does not challenge the legitimacy of these tariffs. PacifiCorp adds that the record makes clear that the tariff is applicable only to distribution facilities, defined as facilities that are classified and recorded as distribution assets on the Company's books under the Uniform System of Accounts. *Tr. 87.*

38 **Commission Decision.** We do not agree with ICNU and CREA that Washington law requires the degree of specificity that they advocate. The statutes cited by ICNU and CREA do not prescribe the specific manner in which rates and charges must be shown or the level of detail in which they need to be specified. Rather, the statutes allow the Commission some discretion to prescribe the form of PacifiCorp's tariff.

39 While the Commission encourages specificity in rates and charges when possible, we recognize that there are circumstances where the variation in the circumstances of the customers is not amenable to an average cost and must thus be customer-specific. Commission-approved tariffs exist that describe what charges will be imposed on customers for particular services rendered that do not set forth a specific dollar amount to be assessed. Line extension policies, customer-requested relocations, and undergrounding of overhead facilities are some examples. These types of activities frequently call for the utility to incur costs that will vary due to differing circumstances encountered on a customer-by-customer basis. Like those examples, the Modified Tariff Proposal sets forth the costs to be incurred, and the procedures for cost estimation and payment. The description of facilities to be removed for a charge is also similar to the above examples. As is those tariffs, it is not possible to specify what facility may be subject to the tariff under every possible circumstance. Based on the foregoing analysis, we conclude that the Modified Tariff Proposal provides sufficient information to comply with the statutes.

3) Does the Modified Tariff Proposal violate the statutory prohibition on rate discrimination and undue preference?

40 **ICNU.** ICNU argues that 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 Wn 2d 302 (1971).* According to ICNU, the Modified Tariff Proposal will discriminate against small commercial customers who are similarly situated to residential customers because only residential customers have a capped, cost-based charge.

41 ICNU also contends that the Modified Tariff Proposal will provide the Company with the opportunity to treat similarly situated commercial or industrial customers differently because the charges are vague and ambiguous. *ICNU's Post-Hearing Br. pp.21-23.* ICNU argues that PacifiCorp has an incentive to use the proposed charges for net cost of removal to discriminate against commercial and industrial customers. According to ICNU, one of PacifiCorp's original goals in filing the Proposed Tariff Revision was to prevent or discourage customers from taking service from a competing electric service provider. *Husted: Ex .201-T at 3-4, Clemens: Ex. 1-T at 1-2.* ICNU argues that 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. *ICNU Post-Hearing Br., pp.22-23.*

42 **CREA.** CREA argues that despite the modification of the proposed tariff to include any customer who requests to permanently disconnect service where the facilities are not likely to be re-used at that location, the Modified Tariff Proposal remains discriminatory because its only real effect is on a targeted class of customers who seek to switch utilities. *CREA Opening Br. at. 18.*

43 **Responses of PacifiCorp and Commission Staff.** Staff contends that ICNU's discrimination argument that alleges disparity between the charges for residential overhead and underground service drop removals and some small commercial customers is beyond the scope of ICNU's intervention in this case. Staff points out that ICNU was permitted to intervene as a representative of the interests of the largest users of PacifiCorp's services, not the interests of small commercial customers. In any event, Staff describes ICNU's argument as an unfounded attack on the current residential/commercial class distinction. According to Staff, 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. Staff explains that 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. *Staff Reply Br. at* ¶ 75-77.

44 PacifiCorp contends that there are no grounds for discrimination because the Company uses the same methodology to calculate costs. PacifiCorp uses RCMS to calculate any net removal costs for any customer belonging to any customer class. *PacifiCorp Reply Br. at 4-5.* In instances where a small commercial customer requests removal of property that is "almost identical with residential customers," the net removal costs will approximate $200 if the small commercial customer has a meter and service drop only removed. PacifiCorp explains that this is due to the use of a similar number of personnel and equipment, and similar amount of time to accomplish the removal. *PacifiCorp Initial Br., pp.4-5.*

45 Both PacifiCorp and Staff point out that the premise upon which ICNU relies to support its argument--that PacifiCorp has an incentive to use the Modified Tariff Proposal to discriminate against commercial and industrial customers--is mischaracterized and without evidentiary support. According to PacifiCorp and ICNU, the testimony of PacifiCorp that ICNU cites for this

proposition does not state anything about discouraging customers from switching providers. That testimony refers to PacifiCorp's need to recover its facilities removal costs. Similarly, the testimony of CREA that ICNU cites reflects only CREA's opinion that the tariff was a PacifiCorp "effort to limit competition." *Staff Reply Br., pp. 3-4. PacifiCorp Reply Br., pp.1-2.*

46 Contrary to CREA's contention that the real target of the proposed charges remains the customers who seek to switch utilities, PacifiCorp argues that the proposed charges will be applicable to all customers in the following circumstances: where facilities would likely not be reused at the same site, the facilities need to be removed for safety and operational reasons, and removal will not have an adverse affect on service to other customers.

47 **Commission Decision.** We agree with Staff that ICNU's discrimination argument--comparing the flat rate charges for residential overhead and underground service drop removals with some small, similarly situated commercial customers--is beyond the scope of its intervention. ICNU sought and was granted intervention as a representative of the interests of large industrial electric customers, not the interests of small commercial customers. Nonetheless, we find the argument without merit. As Staff points out, one can always argue that the cost to serve a specific customer in one class is the same as the average cost to service a customer in another class. As PacifiCorp suggests, the net removal costs for a small commercial customer with only a meter and service drop removal will approximate that of the similarly situated residential customer, because it will take the same amount of time and resources to accomplish each removal. Further, our review of the record confirms PacifiCorp's and Staff's representations that ICNU's argument relating to disparate treatment among commercial and industrial customers is without support in the record. Similarly, CREA's contention that the Modified Tariff Proposal remains discriminatory because its real effect is to target customers switching utilities is without evidentiary support.

4) Do the proposed net cost of removal charges constitute an unlawful restraint of trade, an unlawful restriction of competition, and/or an unlawful restriction of customer choice?

48 **CREA.** CREA suggests that Commission approval of the Modified Tariff Proposal would violate federal and state antitrust laws. In support of its position, CREA argues that by proposing the tariff, PacifiCorp asks the Commission to approve a barrier to customer choice and competition, contrary to our state's fundamental policy against such action and monopolies. *Wash. Const. Art. XII, §22, Group Health Coop. V. King County Med. Soc'y, 39 Wn. 2d 586 (1951), RE Elec. Lightwave v. WUTC, 123 Wn. 2d 530,538 (1994). CREA Opening Br. at 17.*

49 CREA acknowledges that state action immunity exists, but argues that it does not apply here. CREA argues that state action immunity shields public utilities acting under the direction and authority of a state from antitrust liability, but only if (a) the conduct in question is the result of a clearly articulated and affirmatively expressed state policy; and (b) state officials have and exercise the authority to review the particular uncompetitive acts of the private party and disapprove those that fail to accord with state policy. *DFW Metro Line Servs v. Southwestern Bell Tel Corp, 988 F. 2d 601 (5th Cir.1993).* According to CREA, conduct left to estimates and negotiation between the utility and the customer cannot produce a result specifically authorized by the Commission. Nor, in the antitrust context, does the Modified Tariff Proposal provide a basis for sufficient supervision by the Commission over its anticompetitive application. *CREA Opening Br. at 18.*

50 **Responses of PacifiCorp and Commission Staff.** PacifiCorp and Staff argue that the proposed net removal charges are exempt from application of Washington's Consumer Protection Act (the CPA) (Chapter 19.86 RCW) and in no way constitute an unlawful restraint of trade, an unlawful restriction of

competition, or an unlawful restriction of customers choice as alleged by CREA. They point out that both the CPA and federal antitrust laws recognize the unique nature of doing business in a regulated industry.

51 Specifically, the CPA does not apply to: "actions or transactions otherwise permitted, prohibited or regulated under laws administered by the …Washington Utilities and Transportation Commission,…" *RCW 19.86.170* . According to PacifiCorp and Staff, implementing any tariff changes approved in this case would qualify for this exemption.

52 Similarly, they argue that PacifiCorp's proposed charges would be exempt from any federal antitrust attack under the state action immunity doctrine for the following reasons. PacifiCorp's proposed tariff revisions are submitted to Washington's regulatory agency for approval. PacifiCorp lacks power to control its retail prices because it cannot assess any charge without Commission permission. *RCW 80.28.050*. Moreover, Washington has articulated a clear and affirmative policy under which the Commission actively supervises activities of Washington electric companies, including the setting of retail rates and charges imposed on retail customers. *See Chapter 80.04 RCW and Chapter 80.28 RCW*.

53 Finally, PacifiCorp and Staff cite our state Supreme Court to refute CREA's assertion that Washington public policy calls for competition amongst retail electric energy providers. *Tanner Elec. v. Puget Sound Power & Light, 128 Wn. 2d 656, 684 (1996).*

54 PacifiCorp notes that the record in this proceeding does not establish that approval of the Modified Tariff Proposal would have *any* affect on the contest for retail electric customers in Eastern Washington. Nor is there evidence of record that shows that establishment of the net removal cost charges would inhibit customers switching suppliers. *PacifiCorp Initial Br. at 15.* Staff

observes that ICNU and CREA have yet to explain why a cost-based charge is not reasonable, and consistent with policies directed at addressing competitive concerns. *Staff Reply Br. at 23.*

55 **Commission Decision.** Based on our review of the evidence, the arguments of the parties, and authorities cited, we conclude that the Modified Tariff Proposal has not been shown to violate federal and state antitrust laws. CREA has failed to describe any rational and objective means for deciding what sort of Commission action "prevents competition" and what does not. More to the point and contrary to CREA's contention, public policy in Washington does not require the Commission to promote competition between CREA and PacifiCorp. As our state Supreme Court said in *Tanner:*

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

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

56 Moreover, the very statute under which the parties attempted to resolve their differences--governing service territory agreements—is an express legislative policy endorsing non-compete agreements between utilities (subject to Commission approval). The inability of the parties to reach agreement does not negate the underlying purpose of the statute. While varying forms of competition may indeed be permissible under Washington's regulatory scheme, it cannot be said that they are, *per se,* required. Many features of the

existing public utility regulatory structure are inconsistent with CREA's view that state policy favors competition among utilities. For example, PacifiCorp's rates are determined by the Commission, not the market. PacifiCorp is not free to change its tariffs at will, in order to meet perceived competitive market requirements. Instead, the Legislature has required that PacifiCorp's rates and services be subject to regulation by the Commission.[3]

57 Likewise, CREA fails to recognize that the Modified Tariff Proposal is immune from state antitrust and consumer protection laws because it satisfies the exemption in RCW 19.86.170. Further, we agree with Staff and PacifiCorp that state action immunity applies in this case to also exempt the Modified Tariff Proposal from federal antitrust attack. Accordingly, we reject CREA's arguments that the proposed charges for net cost of removal are unlawfully anti-competitive.

58 Finally, even if we were promoting competition among utilities, it would be consistent, not inconsistent, to set prices close to costs, so that consumers faced the real costs of their decisions.

5) Is the Proposed Tariff Revision filing procedurally flawed?

59 **CREA.** CREA notes that as initially filed on Nov. 9, 2000, the Proposed Tariff Revision applied only to customers of PacifiCorp seeking to disconnect from the Company's facilities in order to switch to a different utility. CREA further notes that in its rebuttal testimony filed in August 2002, PacifiCorp accepted the Modified Tariff Proposal set forth in Staff's testimony. Staff's Modified

[3] PacifiCorp must charge the rates published in its tariffs. *RCW 80.28.080*. Tariffs cannot be changed except by following statutory notice procedures. *RCW 80.04.130*. PacifiCorp has a statutory obligation to serve all those reasonably entitled to service. PacifiCorp cannot unduly discriminate among customers or provide unreasonable preferences. *RCW 80.28.090,.100, and .110*.

Tariff Proposal would apply to all PacifiCorp customers in Washington who request disconnection for any reason. *CREA Opening Br. at 3.*[4]

60 According to CREA, the changes made by Staff amount to a substantial broadening of the affected class of customers. Consequently the public is entitled by law to notice of this tariff charge, which would impose on all present PacifiCorp customers the obligation to pay "removal charges" for all permanent disconnects for any reason. *Id. at 5.*

61 CREA argues that this would be a new term and condition of service and, if granted without notice or opportunity to be heard, could arguably result in an unconstitutional taking each time the Company enforced it. *Id.* In addition, CREA suggests that the adjudication of an amended filing without notice or publication of its terms to the public would carry due process and equal protection implications. *Id.*

62 In support of its argument CREA cites RCW 80.28.060 and WAC 480-80-020 and argues that the statute requires thirty days' notice to the Commission and publication for thirty days, and the notice must plainly state the changes proposed to be made before any change may be made in any rate or charge.

63 **Responses of PacifiCorp and Commission Staff.** According to Staff there are several reasons why the Commission should reject CREA's claim of procedural error. First, CREA is disingenuous. CREA professes concern for customers not switching utilities, who would now be covered by the Modified Tariff Proposal. However, when it is in CREA's self-interest to argue that those same tariff revisions are unlawful, CREA says that the only "real effect" of the Modified Tariff Proposal is on customers switching utilities. Second, CREA's claim is barred because CREA does not and cannot claim that the notice it received was inadequate. Third, CREA's argument far

exceeds the scope of its limited intervention in this case. Fourth, CREA's 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. *Staff Reply Br. ¶Par. 6-8.*

64 PacifiCorp argues that CREA cannot assert that the notice it received was insufficient; therefore, CREA has not suffered any injury as a result of any perceived notice deficiency. According to PacifiCorp, CREA should not be allowed to attempt to speak for a potential subset of PacifiCorp customers that may consist of a few (perhaps zero) customers.

65 In support of its argument, PacifiCorp cites *Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976),* which provides that the specific dictates of due process generally require consideration of three distinct factors. First, the private interest that will be affected by the official action; second, the risk of an erroneous determination of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

66 Applying the factors set forth in *Mathews v. Eldridge* to the circumstances presented here, PacifiCorp states that the private interest affected by the notice would be any PacifiCorp retail customer in Washington that for reasons other than switching utility suppliers, may seek permanent discontinuance of service at a site where there is little likelihood of reuse of distribution facilities at the site and further requires, for operational or safety reasons, removal of distribution facilities.

67 PacifiCorp suggests that this is an extremely small universe of possible candidates. According to PacifiCorp, customers that may fit this category could possibly include persons that want to self-generate or persons who are planning to abandon a site. It is unlikely that any self-generator would ask PacifiCorp to discontinue service to a site, because these entities want the availability of back-up power should their self-generation fail. It is possible that someone who intends to permanently abandon a site fits this category of persons affected. PacifiCorp believes this to be highly unlikely, primarily because of the few, if any, customers permanently disconnecting for reasons other than switching suppliers.

68 PacifiCorp contends that the administrative and fiscal burdens of re-noticing and rehearing of this matter, the third prong of the due process test, warrant a Commission determination that persons interested in net removal charges received sufficient notice with the initial call for convening a prehearing conference.

69 **Commission Decision.** The Commission agrees with Staff's arguments that CREA is barred from raising the issue that the more inclusive tariff language before the Commission must be re-noticed by the Company and the Commission to satisfy statutory notice requirements and due process implications. Notwithstanding these barriers to CREA's perfection of its claim, the Commission elects to address the issue raised by CREA. Contrary to CREA's assertions, nothing in the statutes or rules regarding notice would require the Company to re-notice customers.[5] The statute and rules require the Company to give 30 days' notice to the Commission and the public of proposed tariff changes. The purpose of the notice is to give the Commission 30 days to review the tariff and to give customers notice of the tariff filing with the Commission. The statute and rules do not create a right in the

[5] *See RCW 80.28.060, WAC 480-80-070, and WAC 480-80-120. (Note that the WACs cited are those in effect at the time of PacifiCorp's filing.)*

customer to additional notice of any tariff modifications that may occur during the adjudication of the suspended tariff. This analysis is consistent with RCW 80.28.020, which gives the Commission the authority to approve, reject, or modify a tariff without additional notice prior to so doing. It is also consistent with RCW 80.28.060 and WAC 480-80-240, which allow the Commission to approve tariff changes on less than 30 days' notice. Moreover, the Company's notice in this proceeding conforms with the statues and rules by informing customers that the Commission may accept, reject, or modify the filed tariff sheets.

70 CREA also suggests that the Commission's notice of prehearing conference raises questions of due process because the notice does not reflect the proposed tariff revisions presently before the Commission. RCW 34.05.434 requires written notice of hearing to all parties and to all persons who have filed written petitions to intervene including in the notice a short and plain statement of the matters asserted. Those who are parties in this proceeding have had notice of the evolution of this tariff as a result of being participants in the proceeding, and they have had an opportunity to be heard on the modifications to the tariff. The notice of hearing can therefore be deemed modified, as parties have had full opportunity to address the issue.

71 Accordingly, based on the foregoing discussion, we conclude that the Modified Tariff Proposal does not need additional notice by the Company or the Commission.

6) Is the Modified Tariff Proposal just and reasonable?

72 **PacifiCorp and Commission Staff.** PacifiCorp and Staff argue that the proposed charges for net cost of removal are just and reasonable because they appropriately place cost responsibility on the customer imposing the cost on PacifiCorp. They assert that there is no dispute that PacifiCorp incurs a cost

when it removes distribution facilities that are no longer being used at a particular site. They maintain that in these circumstances, "[i]t is reasonable to charge customers based on the cost their action imposes on the Company." *McIntosh: Ex. 301-T at page 10, lines 8-10; See also Clemens: Ex. 2-T at page 5, lines 1-2.*

73 PacifiCorp and Staff also argue that the proposed charges for net cost of removal meet the just and reasonable standard because they are cost-based. Under the Modified Tariff Proposal, PacifiCorp would charge a departing customer PacifiCorp's actual cost of removing the described distribution facilities, less salvage. They describe the process as follows. After the customer requests permanent disconnection, PacifiCorp would provide an estimate of its net removal cost. Following removal of the facilities, the actual cost is calculated, and a bill is rendered that trues-up the estimated cost to actual cost. *Modified Tariff Proposal, last ¶, as explained by Mr. McIntosh at Tr. 293, line 20 to Tr. 294, line 14.*

74 They note that in the context of simple residential underground and overhead service drops, a charge of $400 and $200 is imposed, respectively. *Modified Tariff Proposal at ¶ 3.* These are average charges that were developed based on PacifiCorp's actual cost of removal in residential situations. *McIntosh: Ex. 301-T at page 8, lines 15-23; Clemens: Tr. 111, lines 1-9).*

75 PacifiCorp and Staff explain that determinations were not made of the average cost of removing distribution facilities in other situations, for two reasons. First, adequate records were not available. Second, rate-averaging is not appropriate due to a large variation in the circumstances of customers within the commercial and industrial classes. They reference Staff's testimony where Mr. McIntosh explained, "the reason some tariffs use the technique of nonspecific designation is that you have unusual events, infrequent events, and it's hard to capture them in an average cost study."

McIntosh, Tr. 278, lines 21-25. Accordingly, they argue that "net removal costs are not amenable for such averaging and will be dealt with on a case-by-case basis." *McIntosh: Ex. 301-T at page 8, lines 15-23. See also Tr. 244, lines 17-21, Tr. 278, lines 16-25 and Tr. 291, lines 18-23. See also Clemens: Tr. 101, line 23 to Tr. 104, line 1.*

76 According to PacifiCorp and Staff, the Commission has consistently endorsed a policy favoring cost-based electric rates, even when considering the potential effects of competition. *Staff Opening Br., pp. 16-17, PacifiCorp Reply Br. at 6.*

77 PacifiCorp and Commission Staff also argue that another benchmark of reasonableness of the proposed charges is their similarity with several provisions in existing tariffs. They contend that it is common for a utility to charge a customer the utility's cost to install, move, change or remove facilities for that customer. For example, PacifiCorp currently charges for the cost to install facilities that a customer imposes on PacifiCorp when becoming a customer. This is reflected in PacifiCorp's line extension tariffs. *See PacifiCorp Tariff WN U-74, Rule 14.* If those charges are not fully paid by the time a customer permanently disconnects service, that customer must pay PacifiCorp any unpaid charges. *Id. at Rule 14, III.A.1, copy contained in Ex. 307.* Customers must also pay PacifiCorp's cost of removing and then relocating facilities, when the customer requests that be done. This is reflected in PacifiCorp's relocation tariff. *Id. at Rule 14, III.A and Rule 6(f), copy contained in Ex. 307.* Similarly, if a customer requests overhead facilities to be moved and undergrounded, PacifiCorp charges the requesting customer for doing that. *See PacifiCorp Tariff WN U-74, Rule 14, IV.D, and McIntosh: Tr. 281, lines 21-25.*

78 PacifiCorp and Staff point out that none of the foregoing existing PacifiCorp tariffs state the specific dollar charge for every possible line extension, facilities move or undergrounding. Rather, the tariff sets forth the costs to be

incurred, and the procedures for cost estimation and payment. They maintain that the proposed tariff revisions are no different in that regard.

79 In conclusion, PacifiCorp and Staff urge the Commission to find that the proposed net cost of removal charges are just and reasonable, and to approve the Modified Tariff Proposal, including the sunset dates and reporting requirements proposed by Staff and accepted by PacifiCorp.

80 **Response of ICNU.** ICNU contends that PacifiCorp has not submitted sufficient evidence to meet its burden of proof. According to ICNU, PacifiCorp has submitted little more that four pages of actual testimony supporting the proposed charges for net cost of removal, and has not provided any supporting work papers, cost studies, or other information. In addition, ICNU questions the expertise of PacifiCorp's witness in the area of utility tariffs or cost-of-service matters. ICNU asserts that 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. *ICNU Post-Hearing Br. at 6.*

81 **Commission Decision.** The Commission is given broad regulatory authority to regulate in the public interest. *RCW 80.01.040*. One of our basic duties as a Commission is to determine that the rates set by the companies we regulate are just, reasonable, and sufficient. *RCW 80.28.020*. Practically speaking, when a matter concerning rates comes before us for decision, we look for the fairest way to set rates. The Commission engages in a balancing process to determine what costs (or portion of costs) should be borne by all ratepayers and what costs should be borne by individual ratepayers or a subgroup of ratepayers. Where the cost is instigated by the customer for the benefit of the customer--as in customer requests for line extensions, relocation, or undergrounding of overhead lines--it is fair to place more of the cost on the individual requesting that service. The Modified Tariff Proposal in this

proceeding is comparable to the line extension, relocation, and undergrounding tariffs. Here, as in those situations, the customer's request for removal of facilities imposes a direct cost on PacifiCorp. Here, as in those situations, it is fair to require the requesting customer to be largely responsible for the costs. There are no system benefits to be shared by customers who did not cause the costs to be incurred, so they should not have to pay them.

82 We conclude that based on the evidence presented, PacifiCorp has met its burden of proving that the Modified Tariff Proposal is "just and reasonable." *RCW 80.04.130(2).* The proposed charges for net cost of removal place cost responsibility on the customer imposing the cost on PacifiCorp. The proposal is cost-based, non-discriminatory, and similar to several provisions in existing tariffs. Staff's recommended sunset date and reporting requirements will help ensure reasonable conduct by all concerned, and will provide data to evaluate the tariff's operation. Accordingly, the Commission approves the tariff revisions as set forth in Appendix A to this Order.

IV. FINDINGS OF FACT

83 Having discussed in detail both the oral and documentary evidence concerning all material matters inquired into, and having previously stated findings and conclusions based thereon, the following summary of the facts is now made. The portions of the proceeding detailing findings and discussion pertaining to the ultimate facts are incorporated by this reference.

84 (1) The Washington Utilities and Transportation Commission (Commission) is an agency of the State of Washington vested by statute with the authority to regulate rates, rules, regulations, practices, accounts securities and transfers of public service companies.

85 (2) PacifiCorp, d/b/a Pacific Power & Light is engaged in the business of furnishing electric service within the State of Washington, including as a public service company.

86 (3) On November 9, 2000, PacifiCorp filed a tariff revision to PacifiCorp's Rule 4(f) that as originally proposed would allow PacifiCorp to charge a customer the costs associated with removing PacifiCorp's utility property from the customer's location when the customer changes utility service providers.

87 (4) The Modified Tariff Proposal charges amounts reasonably associated with the net costs of removing facilities of customers who request permanent disconnection of service when the Company's facilities to provide service are not likely to be re-used at that location, and their removal is necessary for safety and operational reasons.

V. CONCLUSIONS OF LAW

88 (1) Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the following provides summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Order are incorporated by this reference.

89 (2) The Washington Utilities and Transportation Commission has jurisdiction over the parties to, and subject matter of, this proceeding. *RCW 80.01.040,* Chapter *80.04 RCW, Chapter 80.28 RCW*.

90 (3) The legal deficiencies in the Modified Tariff Proposal alleged by ICNU and CREA designated as 1, 2, 3, 4, and 5 in the issues discussion

section of this Order are not supported by the record or by the legal authority cited.

91 (4) PacifiCorp has met its burden of proving that the Modified Tariff Proposal is just and reasonable.

92 (5) The Modified Tariff Proposal should be approved as set forth in Appendix A of this Order.

93 (6) The Commission should retain jurisdiction over the subject matter and the parties to effectuate the provisions of this Order.

VI. ORDER

94 The Commission has jurisdiction over the subject matter and the Parties to these proceedings.

95 The Modified Tariff Proposal is approved as set forth in Appendix A of this Order.

96 The Commission retains jurisdiction over the subject matter and the parties to effectuate the provisions of this Order.

DATED at Olympia, Washington, and effective this_____day of November, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).

APPENDIX A

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

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

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

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

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

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