

February 11, 2013

***VIA ELECTRONIC FILING  
AND OVERNIGHT DELIVERY***

David W. Danner  
Executive Director and Secretary  
Washington Utilities and Transportation Commission  
1300 S. Evergreen Park Drive S.W.  
P.O. Box 47250  
Olympia, WA 98504-7250

**RE: UE-130043 – PacifiCorp’s Response in Opposition to Columbia Rural Electric Association’s Petition to Intervene**

Dear Mr. Danner:

PacifiCorp d/b/a Pacific Power & Light Company (Company) submits for filing its Response in Opposition to Columbia Rural Electric Association’s Petition to Intervene.

Please direct any informal inquiries regarding this filing to Bryce Dalley, Director, Regulatory Affairs & Revenue Requirement, at (503) 813-6389.

Sincerely,



William R. Griffith  
Vice President, Regulation

Enclosures

cc: Service List UE-130043

## CERTIFICATE OF SERVICE

I certify that I have cause to be served the foregoing document, via e-mail, to the following:

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DATED this 11<sup>th</sup> of February 2013

  
\_\_\_\_\_  
Amy Eissler  
Coordinator, Regulatory Operations

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

PACIFICORP d/b/a PACIFIC POWER  
& LIGHT COMPANY,

Respondent.

Docket No. UE-130043

PACIFICORP'S RESPONSE IN  
OPPOSITION TO COLUMBIA RURAL  
ELECTRIC ASSOCIATION'S PETITION  
TO INTERVENE

**I. INTRODUCTION**

*1* In accordance with RCW 34.05.443 and WAC 480-07-355(2), PacifiCorp d/b/a Pacific Power & Light Company (PacifiCorp or Company) responds and objects to the Petition to Intervene filed by Columbia Rural Electric Association (CREA). CREA has no substantial interest that can or should be addressed by the Commission in this proceeding. Moreover, the public interest will not be served by CREA's intervention in this case. The state's public interest in protecting sensitive commercial information from competitors will be jeopardized if CREA—PacifiCorp's competitor—is permitted to intervene and obtain PacifiCorp's sensitive commercial information to which CREA would not otherwise have access. Finally, given the sensitive commercial information that is filed in this case, there are inadequate safeguards in place to allow the same law firm that represents Intervenor Boise White Paper—who will have access to all sensitive commercial information filed—to also represent CREA, who should not have access to PacifiCorp's sensitive commercial information.

## II. ARGUMENT

2           The Commission may grant a petition to intervene if the petition “discloses a  
substantial interest in the subject matter of the proceeding or if the petitioner’s  
participation is in the public interest . . . .”<sup>1</sup> CREA’s petition to intervene fails to meet  
these standards. CREA has failed to establish a substantial interest in the subject matter  
of this proceeding, and CREA’s intervention is not in the public interest because it  
controverts the state’s public policy of protecting sensitive commercial information from  
competitors. The Commission should deny CREA’s petition to intervene for these  
reasons.

### A. CREA Has Failed to Establish a Substantial Interest in the Subject Matter of the Proceeding

3           This Commission has previously ruled that a nonregulated entity such as CREA  
does not have a substantial interest justifying intervention in a regulated utility’s rate  
proceeding.<sup>2</sup> Despite these prior rulings, CREA claims that it “has an interest in  
PacifiCorp’s proposed rate increase” and further claims that “proposed revisions to the  
PacifiCorp net removal tariff could substantially and directly affect Columbia REA.”<sup>3</sup>

4           In support of its petition to intervene, CREA points to Docket UE-001734,  
involving the original net removal tariff, in which CREA was allowed to intervene.  
CREA, however, fails to recognize that the Commission expressly ruled in that  
proceeding that CREA did *not* have a substantial interest justifying intervention:

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<sup>1</sup> WAC 480-07-355(3).

<sup>2</sup> *WUTC v. PacifiCorp*, Docket UE-001734, Second Supp. Order Denying Motion to Dismiss and Granting  
Petition for Intervention, ¶28 (July 9, 2001).

<sup>3</sup> Petition to Intervene of Columbia Rural Electric Association, ¶4.

We agree with Commission Staff and PacifiCorp that CREA does not show a right to intervention under Washington law. Neither has it demonstrated any substantial interest . . . .<sup>4</sup>

5           This Commission ruling is consistent with the Washington Supreme Court’s decision in *Cole v. Washington Utilities and Transportation Commission*,<sup>5</sup> in which the Court affirmed the Commission’s denial of intervention to a nonregulated competitor because the nonregulated company did not have a substantial interest in the proceeding. In *Cole*, a nonregulated competitive fuel dealer, the Oil Heat Institute, sought to intervene in a Commission proceeding and halt a program of Washington Natural Gas Company that had dramatically expanded the latter’s market at the expense of other competitive fuel dealers.<sup>6</sup> The Washington Supreme Court held that the Commission’s denial of the Oil Heat Institute’s petition to intervene was both proper and reasonable.<sup>7</sup>

6           First, the Washington Supreme Court stated that “it is doubtful whether the institute can prove a ‘substantial interest’ in rates charged to customers of a competitor who is regulated by different laws . . . .”<sup>8</sup> The court then found that the “institute’s objections are beyond the concern of the commission under a reasonable interpretation of the term ‘public interest[,]’ noting with approval that the Commission “concluded that it had jurisdiction only to consider the effects of competitive practices of one regulated

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<sup>4</sup> *WUTC v. PacifiCorp*, Docket UE-001734, Second Supp. Order Denying Motion To Dismiss and Granting Petition For Intervention, ¶28 (July 9, 2001).

<sup>5</sup> 79 Wn.2d 302 (1971).

<sup>6</sup> *Id.* at 303.

<sup>7</sup> *Id.* at 306.

<sup>8</sup> *Id.* at 305.

utility upon another regulated utility and no other business.”<sup>9</sup> The court clarified that “public interest” in the context of the public service laws is “that only of customers of the utilities which are regulated.”<sup>10</sup>

7           Finally, the court found that the Commission’s interpretation “of its regulatory power is amply supported by statute and case law” and that the court’s view that “the commission correctly determined that it had no authority to consider the effect of a regulated utility upon a nonregulated business” was “in accord with the weight of authority elsewhere.”<sup>11</sup>

8           As in *Cole*, there is no substantial interest that justifies intervention by a nonregulated electric service provider in the rate proceeding of a regulated utility. CREA is a competitor of PacifiCorp that seeks to intervene to influence the way PacifiCorp’s tariffs are structured so that it may more ably compete against PacifiCorp in attracting customers. While this may be an interest to CREA, this is not a substantial interest that the Commission can recognize for purposes of intervention in a rate proceeding of a regulated entity, as the Commission has previously recognized.<sup>12</sup>

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<sup>9</sup> *Id.* at 305-06.

<sup>10</sup> *Id.* at 306 (“Although RCW 80.01.040(3) demands regulation in the public interest, that mandate is qualified by the following clause ‘as provided by the public service laws \* \* \*’ Appellants fail to point out any section of Title 80 which suggests that nonregulated fuel oil dealers are within the jurisdictional concern of the commission. An administrative agency must be strictly limited in its operations to those powers granted by the legislature.”) (citation omitted).

<sup>11</sup> *Id.* (citing *Re Promotional Activities by Gas and Elec. Corps.*, 68 P.U.R.3d 162 (1967); *Re Promotional Practices of Elec. & Gas Util.*, 65 P.U.R.3d 405 (1966); *Virginia State Corp. Comm’n v. Appalachian Power Co.*, 65 P.U.R.3d 283 (1966); *Superior Propane Co. v. South Jersey Gas Co.*, 60 P.U.R.3d 217 (1965); *Illinois Coal Operators Ass’n v. Peoples Gas Light & Coke Co.*, 7 P.U.R.(n.s.) 403 (1934).

<sup>12</sup> *See In re Puget Sound Power & Light Co.*, 1996 WL 497460 (Wash.U.T.C.) Docket UE-951270 and UE-960195, Fourth Supp. Order at \*2 (July 10, 1996) (stating that “in rate cases [the Commission] generally does not grant intervention to unregulated potential competitors of a regulated

## **B. CREA's Participation Does Not Serve the Public Interest**

9           Although the Commission allowed CREA to intervene in PacifiCorp's net removal tariff based on a very limited "public interest" determination in Docket UE-001734, the Commission's subsequent ruling in that docket removes the public interest grounds on which CREA now seeks to rely.

10           The Commission allowed CREA to intervene in PacifiCorp's 2000 net removal tariff proceeding for very limited purposes. As discussed above, the Commission found that CREA had not demonstrated a substantial interest, and the Commission also rejected CREA's alleged "public interest" basis for intervention on four of the five bases asserted by CREA. The Commission granted CREA's petition to intervene only to address the following narrow issues:

- Whether the proposed tariff charges are an unlawful restraint of trade, restricting competition and customer choice in contravention of law and public policy; and
- To contest the factual contentions about CREA in PacifiCorp's testimony.<sup>13</sup>

11           In this case, PacifiCorp proposes to revise its net removal tariff, which was first approved in Docket UE-001734. In its decision on the merits in that docket, the Commission rejected arguments that the net removal tariff lacked specificity because it

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company, on the basis that the Commission has no authority to consider the economic effects of practices of a regulated utility upon nonregulated competitors, and that the interest of the public which is to be protected is that only of customers of the regulated utility.”).

<sup>13</sup> *WUTC v. PacifiCorp*, Docket UE-001734, Second Supp. Order Denying Motion to Dismiss and Granting Petition for Intervention, ¶28 (July 9, 2001). Because there are no factual contentions about CREA in PacifiCorp's testimony in its 2013 general rate case, there is no need for CREA to intervene to contest factual contentions, as was the case in the Docket UE-001734.

required that the charges for net cost of removal recover the actual cost of removal less salvage.<sup>14</sup>

12 More to the point, the Commission resolved once and for all CREA's claims that the PacifiCorp net removal tariff stymied competition, in violation of the public interest. The Commission stated that "public policy in Washington does not require the Commission to promote competition between CREA and PacifiCorp."<sup>15</sup> The Commission pointed to Washington Supreme Court precedent stating that the "regulation of public utilities by a state agency replaces competition and ensures that the public interest is protected."<sup>16</sup>

13 The Commission also determined that the net removal tariff was immune from state antitrust and consumer protection laws and that state action immunity applied to exempt the tariff from federal antitrust attacks.<sup>17</sup> By so ruling, the Commission closed the door to future intervention by CREA based on competition, customer choice, and unlawful restraint of trade issues, which were the Commission's bases for allowing CREA's intervention in the 2000 docket.

14 In its petition to intervene in this case, CREA asserts (without support) that "[i]t is

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<sup>14</sup> *WUTC v. PacifiCorp*, Docket UE-001734, Eighth Supp. Order Rejecting Original Proposed Tariff Revision and Approving Modified Tariff Proposal, ¶36, 38-39 (November 27, 2002).

<sup>15</sup> *Id.* ¶55.

<sup>16</sup> *Tanner Elec. Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 911 P.2d 1301 (1996) ("State law exempts public utilities from the sphere of free competition, and in fact discourages it . . . . Any contentions 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.").

<sup>17</sup> *WUTC v. PacifiCorp*, Docket UE-001734, Eighth Supp. Order Rejecting Original Proposed Tariff Revision and Approving Modified Tariff Proposal, ¶57 (November 27, 2002).



in the public interest to allow Columbia REA to intervene in this proceeding.”<sup>18</sup> As demonstrated above, the public interest does not support intervention of a nonregulated utility in the rate proceeding of a regulated utility. To the contrary, the Commission has rejected that public interest argument.

15           Moreover, Washington’s public policy is to provide strong protection to competitively sensitive information, as reflected in Washington statutes. For example, RCW 4.24.601 declares that the protection of confidential commercial information “promotes business activity and prevents unfair competition” and states that it is consistent with public policy that the “confidentiality of such information be protected and its unnecessary disclosure be prevented.” Another example is the Uniform Trade Secrets Act, RCW 19.108 *et seq.* (“the Act”), which provides a civil cause of action for misappropriation of trade secrets. The remedies provided in the Act, including attorneys’ fees and exemplary damages, reflect the strength of the legislature’s commitment to protecting confidential information. *See* RCW 19.108.020-040; *see also* RCW 80.04.095 (confidential marketing, cost, and financial information is not subject to public inspection). Allowing CREA to intervene in this proceeding is contrary to the state’s public policy of protecting competitively sensitive information.

16           In sum, CREA can demonstrate neither a substantial interest nor a public interest justifying intervention in this case. The Commission should deny CREA’s petition to intervene.

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<sup>18</sup> Petition to Intervene of Columbia REA, ¶7.

**C. Sufficient Safeguards Are Not in Place to Allow Davison Van Cleve to Represent Both Boise White Paper, PacifiCorp's Largest Washington Customer, and CREA, PacifiCorp's Competitor**

17 CREA is PacifiCorp's competitor, competing for customers in the same geographical area. As a party to this proceeding, CREA would have access to sensitive commercial and proprietary information to which it would not otherwise have access. CREA's access to this information puts PacifiCorp at a competitive disadvantage.

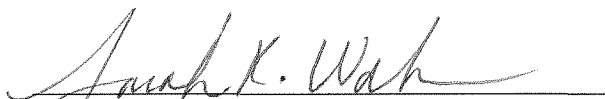
18 Although CREA states that it would limit its involvement to the net removal tariff, CREA is being represented by the same law firm that is representing another intervenor in this case, Boise White Paper. Boise White Paper will have access to all of the confidential information disclosed in this proceeding, and PacifiCorp questions whether a proper barrier can be put in place to limit CREA's access to confidential proprietary information when the law firm that represents CREA has access to this information and is using it to represent another party in the case.

19 Moreover, it is important to recognize the plain, simple fact that the two clients represented by Davison Van Cleve are Boise White Paper, PacifiCorp's largest Washington customer, and CREA, PacifiCorp's competitor. The regulation of utilities by the Commission should not become a forum for nonregulated companies to gain a competitive advantage by using the process to obtain sensitive commercial information from a regulated competitor. The Commission should avoid even the appearance of such impropriety, as would be present in this case if the same law firm represents both PacifiCorp's largest customer and its competitor.

### III. CONCLUSION

20 For the reasons stated above, the Commission should deny CREA's Petition to Intervene.

Respectfully submitted this 11th day of February 2013.



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