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5 **THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

6 WASHINGTON UTILITIES AND  
7 TRANSPORTATION COMMISSION,

8 Complainant,

9 v.

10 PacifiCorp, d/b/a/ Pacific Power &  
11 Light,

12 Respondent.

DOCKET NO. UE-001734

MOTION TO DISMISS  
FOR NON-COMPLIANCE WITH  
COMMISSION ORDER AND  
STIPULATION IN UE-991832

13 **MOTION**

14 Pursuant to WAC § 480-09-426(1), Public Counsel and the Industrial Customers of  
15 Northwest Utilities (“ICNU”) move the Washington Utilities and Transportation Commission  
16 (“Commission” or “WUTC”) to dismiss PacifiCorp’s proposed tariff amendment docketed at  
17 UE-001734 (“Tariff Revision”). Specifically, the Commission’s Third Supplemental Order  
18 approving the Stipulation in UE-991832 prevents PacifiCorp, except in limited, inapplicable  
19 circumstances, from filing rate changes, including this Tariff Revision until December 31,  
20 2005.

21 **BACKGROUND**

22 On November 9, 2000, PacifiCorp filed its Tariff Revision in this Docket. PacifiCorp’s  
23 Tariff Revision, if approved, would allow it to charge a customer who changes utility service  
24 from PacifiCorp to another utility the costs of removing PacifiCorp’s utility property from the  
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1 customer's locations. At the November 29, 2000 Commission Open Meeting, Commission  
2 Staff and ICNU requested that the Commission suspend the Tariff Revision. On November 29,  
3 2000, the Commission suspended the tariff to initiate hearings to investigate whether the Tariff  
4 Revision was just and reasonable. On May 4, 2001, Administrative Law Judge ("ALJ") Karen  
5 Caillé issued a Prehearing Conference Order, establishing, *inter alia*, a May 24, 2001 date for  
6 filing motions to dismiss. On May 10, 2001, PacifiCorp submitted the Direct Testimony of  
7 William G. Clemens and a letter from Company counsel James C. Paine addressed to the  
8 Secretary of the Commission ("Paine Letter"). The Paine Letter articulated the Company's  
9 position that the Tariff Revision does not violate applicable Commission precedent.  
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11  
12 On November 24, 1999, PacifiCorp filed revised tariff schedules which would have  
13 increased its base rates for Washington customers by \$25.8 million. The filings were  
14 suspended by the Commission on December 29, 1999, set for hearing and assigned docket  
15 number UE-991832. After a considerable exchange of discovery and two rounds of cross-  
16 examination hearings, the parties entered into settlement discussions that were ultimately  
17 fruitful. Pursuant to a general settlement, the parties executed a Stipulation, dated June 16,  
18 2000, reciting the terms of the general settlement (hereafter "Stipulation").<sup>1</sup> The Commission  
19 approved the settlement and adopted the provisions of the Stipulation. WUTC v. PacifiCorp,  
20 WUTC Docket No. UE 991832, Third Supp. Order (Aug. 9, 2000) (hereafter "Order"). This  
21 Stipulation provided for a limited number of circumstances under which PacifiCorp could  
22 make additional filings with the Commission prior to the expiration of the settlement on  
23 December 31, 2005.

24  
25 <sup>1</sup> A more narrow settlement of rate spread issues was approved by the Commission on June 6, 2000 and  
was incorporated by reference into the general rate case settlement Stipulation.

1 The Stipulation, as a consensus document which resolved a large number of contested  
2 issues, represented a “give and take” on the part of all parties to the litigation. As with any  
3 settlement, certain benefits inure, and risks are assumed. A significant motivation for Public  
4 Counsel and ICNU was the prospect of five years of predictable rates with established  
5 moderate increases.<sup>2</sup> A benefit accrued by the Company was the certainty of an agreed  
6 increase in rates, a decrease in transactional litigation costs, and the elimination of risk of  
7 uncertainty regarding the decision the Commission might reach after the conclusion of the  
8 case. A concomitant risk the Company assumed in the settlement was the risk of unforeseen  
9 circumstances such as those alleged to be presented in this docket. In signing the Stipulation,  
10 the Company waived its right to make new types of filings that would add new charges for  
11 customers that are not related to new regulatory requirements imposed upon the Company.  
12 Stipulation §§ 1(a) and 9.  
13  
14

15 The Stipulation expressly limits the amount and type of changes to PacifiCorp’s rates  
16 that may be made until December 31, 2005. PacifiCorp may only change its general base rates  
17 by enumerated amounts in 2001, 2002 and 2003, and no changes are allowed in 2004 and  
18 2005. This moratorium on general rate filings does not apply to specific types of filings listed  
19 in the Stipulation, including ongoing regulatory activities and Schedule 300 changes. The  
20 subject matter of this Docket is not within the anticipated scope or the plain language of the  
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23 <sup>2</sup> The Order recognizes the three principal objectives of the settlement, (a) avoidance of "rate shock"  
24 through five years of predictable rates; (b) accommodating the current "period of significant transition" the  
25 company is undergoing pursuant to its “Transition Plan;” and (c) providing for accountability. See *Order* at ¶¶  
33, 37 and 38.

1 Stipulation provisions under which PacifiCorp is authorized to make additional filings and,  
2 therefore, should be dismissed with prejudice.<sup>3</sup>

3 **A. PacifiCorp’s Tariff Revision Should be Dismissed Because It Violates the**  
4 **Stipulation Approved in UE-991832.**

5 **1. Standard for Dismissal.**

6 Under WAC § 480-09-426(1), “[a] party may move to dismiss an opposing party’s  
7 pleading, including the documents initiating the case, if the pleadings fails to state a claim on  
8 which the commission may grant relief.” In considering a motion to dismiss, the Commission  
9 applies the “standards applicable to a motion made under CR 12 (b)(6), 12(c), or 50, as  
10 applicable, of the civil rules for superior court.” Washington Superior Court Civil Rule  
11 (“CR”) 12(b)(6) provides that:

12  
13 Every defense, in law or fact, to a claim for relief in any  
14 pleading, whether a claim, counterclaim, cross claim or third  
15 party claim, shall be asserted in the responsive pleading thereto if  
one is required, except the following defenses may be made by  
motion: . . . (6) failure to state a claim upon which relief can be  
granted.

16 CR 12(b)(6).

17 In support of a motion to dismiss, the moving party bears the burden of demonstrating  
18 that “it appears beyond a reasonable doubt that no facts exist that would justify recovery.”

19 Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 755, 881 P.2d 216, 219 (1994). The

20 Commission should consider the facts in a light most favorable to the nonmoving party. Reid  
21

22 \_\_\_\_\_  
23 <sup>3</sup> There are a number of additional, very significant issues implicated by this filing including, but not  
24 limited to, the potential anti-competitive effect of such charges, the larger issue of stranded distribution costs, and  
25 possible violations of the filed rate doctrine and Washington law requiring all rates be fair, just, reasonable and  
nondiscriminatory. Such issues are beyond the scope of this motion but are worth noting as an indication of the  
potential significance of this document.

1 v. Pierce County, 136 Wn.2d 195, 961 P.2d 333 (1998). No facts can justify recovery if the  
2 moving party is entitled to judgment as a matter of law. Reid, 136 Wn. 2d at 201. A motion to  
3 dismiss is “appropriate only if it appears beyond doubt that [the nonmoving party] can prove  
4 no set of facts, consistent with the complaint, which would entitle it to relief.” MCI  
5 Telecommunications, Corp v. GTE Northwest, Inc., WUTC Docket No. UT-970653, Second  
6 Supp. Order at 4 (Oct. 22, 1997).

7  
8 **2. PacifiCorp’s Tariff Revision Should be Dismissed As a Matter of Law.**

9 PacifiCorp’s Tariff Revision is ripe for dismissal because, as a matter of law, the  
10 factual allegations in the Company’s filing cannot sustain a Commission decision adopting the  
11 proposed tariff. Except for a limited number of circumstances, the Stipulation does not permit  
12 PacifiCorp to make additional filings before December 31, 2005. Even viewing PacifiCorp’s  
13 testimony in support of the Tariff Revision in a light most favorable to the Company, the  
14 Commission should determine as a matter of law that the Tariff Revision: 1) is a general rate  
15 change that violates Sections 1 and 2 of the Stipulation; 2) is not an “ongoing regulatory  
16 activity” tariff change allowed by Section 9(f) of the Stipulation; and 3) is not a Schedule 300  
17 miscellaneous charge allowed by Section 13 of the Stipulation.  
18

19 a. PacifiCorp’s Tariff Revision is a Change to General Base Rates.

20 The Stipulation was designed to establish a five year rate plan period during which the  
21 parties, including PacifiCorp, would “neither propose nor will they recommend that the  
22 Commission approve, any change in the Company’s general base rates in Washington.”  
23 Stipulation § 1(a). PacifiCorp’s base rates during the rate plan would be modified by a 3%  
24 increase in 2001 and 2002 and a 1% increase in 2003. Stipulation § 2. PacifiCorp’s Tariff  
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1 Revision would increase the Company's general rates by a yet undetermined amount. Thus,  
2 the Commission should dismiss PacifiCorp's Tariff Revision because it violates the express  
3 terms of Sections 1 and 2 of the Stipulation.

4           b.       Section 9 - Regulatory Actions During the Rate Plan Period Include This  
5                    Type of Filing.

6           Section 9 of the Stipulation provides six types of exceptions to the "moratorium on  
7 general rate filings" by PacifiCorp during the settlement period. Stipulation § 9. PacifiCorp's  
8 Tariff Revision is not permitted under the terms of Section 9. Sub-sections (a) through (e) are  
9 inapplicable as PacifiCorp appears to agree, if by omission.

10           PacifiCorp identifies Sub-section (f) as permitting this type of filing. Paine Letter at 2.  
11 Sub-section (f) does not allow the Company to request, or the Commission to approve, tariff or  
12 rate changes for "ongoing regulatory activities." Sub-section (f) defines ongoing regulatory  
13 activities as including:  
14

15                   [N]ew service offerings; pursuing special contracts tailored  
16                   to meet individual customer needs; participation in  
17                   Commission notices of inquiry, or NOIs, on electric  
18                   industry issues, including the opportunity to seek related  
19                   rule or tariff changes; and tariff changes associated with  
                    pass-through of credits and surcharges, such as municipal  
                    utility taxes.

20 Stipulation § 9(f).

21           PacifiCorp's Tariff Revision is not of the same nature as the ongoing regulatory matters  
22 identified in Sub-section (f). Washington law requires that the general term "ongoing  
23 regulatory activity" be interpreted in a manner consistent with its enumerated specific terms.  
24  
25 *See City of Seattle v. State Dept. of Labor and Indus., 136 Wn.2d 693, 699, 965 P.2d 619, 622*

1 (1998). Even a cursory review of Section 9 indicates that the parties were contemplating those  
2 tariff filings that might be required in the intervening five years of the rate plan either due to  
3 existing or expected regulatory requirements, or new customer needs. Sub-section 9(f) in  
4 particular addresses new regulatory changes. In no portion of Section 9 or in Sub-section (f),  
5 specifically, are there any examples of additional customer charges, fees, or rates for existing  
6 Company services. Neither Section 9 generally, nor Sub-section (f), specifically, contemplates  
7 any unique or new type of customer charges.  
8

9         The Commission’s previous analysis of Section 9 reflects an understanding that it was  
10 designed to account for foreseen regulatory circumstances. Order at ¶¶ 30 and 60.  
11 Circumstances included routine filings in the ordinary course of business, but not changes that  
12 would result in revenue shifts or re-balancing or the rate increases included in PacifiCorp’s  
13 Tariff Revision.  
14

15         PacifiCorp's proposed customer meter removal charge is neither a routine accounting  
16 order, nor a consequence of “ongoing regulatory activity.” Rather it is a new charge that will  
17 be imposed on customers for services the Company is currently obligated to provide. The rate  
18 plan did not provide for this type of charge and the Commission should not permit it to proceed  
19 further. Mr. Paine states, “This filing is intended to initiate a new charge to meet new  
20 circumstances faced by PacifiCorp . . . .” Paine Letter at 2. The circumstance facing  
21 PacifiCorp is competition. The dilemma posed by this docket is the consequence of not having  
22 a service agreement between these utility service providers. See appended Pacificorp  
23 responses to Public Counsel Data Requests Nos. 18 and 26. The “new circumstance” is not the  
24 consequence of the regulatory activity of this Commission, any other state utility commission,  
25

1 or the Federal Energy Regulatory Commission, and therefore, this is not a charge associated  
2 with any “ongoing regulatory activity.”

3 c. A New Customer Meter Removal Charge is Not a Schedule 300  
4 Miscellaneous Charge.

5 Counsel for PacifiCorp also asserts that this new customer meter removal charge is a  
6 miscellaneous charge similar to other Schedule 300 charges and should be treated as such  
7 under Section 13 of the Stipulation. Paine Letter at 3. This is an inaccurate characterization of  
8 this new charge for which there is no precedent in Washington state. Section 13 of the  
9 Stipulation reads:

11 The proposed changes to the Company’s Schedule 300, included as  
12 part of the Company’s general rate filing in this docket, may be  
13 submitted by the Company in a separate tariff filing. The  
14 Company may make future filings from time to time during the  
Rate Plan Period to update the cost elements included in Schedule  
300 miscellaneous charges.

15 Stipulation § 13.

16 Section 13 of the Stipulation allows the Company to submit rate changes if they: 1) are  
17 proposed rate changes that were “part of the Company’s general rate filing in” UE-991832; or  
18 2) “update the cost elements included in Schedule 300 miscellaneous charges.”  
19 Stipulation § 13. PacifiCorp’s Tariff Revision does not fit within these requirements. First,  
20 Schedule 300 miscellaneous charges submitted by the Company in UE-991832 did not include  
21 “net removal costs.” Second, PacifiCorp’s Tariff Revision does not update the cost elements in  
22 Schedule 300, but instead proposes an entirely new charge.  
23

24 PacifiCorp alleges that Section 13 of the Stipulation allows new charges that are “the  
25 same type of filing” as Schedule 300 charges. Paine Letter at 3. The only new charges Section



1 13 authorizes are those related to the cost support for those Schedule 300 charges proposed in  
2 UE-991832. In addition to being contrary to the plain language of the Stipulation, PacifiCorp's  
3 interpretation of Section 13 would allow the Company, on a piecemeal basis, to eviscerate the  
4 rate change moratorium established in the Stipulation.

5  
6 Public Counsel and ICNU are unaware of any utility regulated by the WUTC which is  
7 authorized to charge customers a fee to transfer their regulated utility service to an alternative  
8 provider. Public Counsel requested, via Data Request, that the Company identify any such  
9 similar filing that it has previously made in Washington or its other state jurisdictions that have  
10 been approved by a commission. In its responses the company was unable to do so. See  
11 appended PacifiCorp response to Public Counsel Data Request No. 2. It is disingenuous to  
12 characterize a tariff revision which this company has never before made in this state or any  
13 other as a routine, miscellaneous charge.  
14

### 15 CONCLUSION

16 The Stipulation the Company entered into last year was intended to provide the  
17 Company's Washington ratepayers with five years of predictable, known rates. It does not  
18 permit this type of new, un-precedented tariff revision that is the subject of this Docket. While  
19 PacifiCorp may incur costs it may not be able to fully recover from its Washington ratepayers  
20 through December 31, 2005; it also can enjoy benefits it need not share with ratepayers. The  
21 Company has a very aggressive "transition plan" which, if successfully implemented, will  
22 provide it substantial cost savings.<sup>4</sup> Pursuant to the Stipulation, PacifiCorp must operate under  
23 its existing rates, but is free to benefit its shareholders through its implementation of the  
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25 <sup>4</sup> The PacifiCorp transition plan was admitted as exhibit 146 in UE-991832.

1 transition plan. Any settlement provides benefits, costs and risks. The settlement of the 1999  
2 rate case should not be disturbed. This type of new charge was not included in the exceptions  
3 to the filing moratorium and the Commission should dismiss the Company's filing with  
4 prejudice.

5  
6 DATED this 24<sup>th</sup> day of May, 2001.

7 Respectfully submitted,

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