



825 NE Multnomah, Suite 2000
Portland, Oregon 97232

February 4, 2016

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

Steven V. King
Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, Washington 98504-7250

RE: Docket UE-143932—Pacific Power & Light Company's Petition for Administrative Review

Pacific Power & Light Company (Pacific Power), a division of PacifiCorp, submits for filing an original and two copies of its petition for administrative review in the above-referenced proceeding.

If you have any informal inquiries regarding this matter, please contact Ariel Son, Manager, Regulatory Projects, at (503) 813-5410.

Sincerely,

R. Bryce Dalley
R. Bryce Dalley
Vice President, Regulation

Enclosures

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this document upon all parties of record in this proceeding by electronic mail.

Walla Walla Country Club

Jesse E. Cowell
Davison Van Cleve, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
jec@dvclaw.com

Walla Walla Country Club

Stanley M. Schwartz
Matthew Daley
Witherspoon-Kelley
422 W. Riverside Ave., Suite 1100
Spokane, WA 99201
sms@witherspoonkelley.com
mwd@witherspoonkelley.com

The Walla Walla Country Club

1390 Country Club Road
Walla Walla, WA 99362
jeff@wvocountryclub.com

PacifiCorp

Troy Greenfield
Claire Rootjes
Schwabe, Williamson & Wyatt
1420 5th Ave., Suite 3400
Seattle, WA 98101
tgreenfield@schwabe.com
crootjes@schwabe.com

Washington Utilities & Transportation Commission

Sally Brown
Assistant Attorney General
1300 S. Evergreen Park Dr. SW
Olympia, WA 98504-7250
sbrown@utc.wa.gov

Walla Walla Country Club

David Grossman
Minnick-Hayner, P.S.
PO Box 1757
Walla Walla, WA 99362
grossman@minnickhayner.com

PacifiCorp

R. Bryce Dalley
Vice President Regulation
825 NE Multnomah, Suite 2000
Portland, OR 97232
bryce.dalley@pacificorp.com

PacifiCorp

Sarah K. Wallace
Vice President and General Counsel
825 NE Multnomah, Suite 2000
Portland, OR 97232
sarah.wallace@pacificorp.com

Public Counsel

Simon ffitich
Office of the Attorney General
800 Fifth Ave., Suite 2000
Seattle, WA 98104-3188
simonf@atg.wa.gov

DATED at Portland, OR this 4th of February, 2016



Amy Eissler
Coordinator, Regulatory Operations

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

THE WALLA WALLA COUNTRY CLUB,

Complainant,

vs.

PACIFIC POWER & LIGHT COMPANY,

Respondent.

Docket No. UE-143932

Oral Argument Requested

PETITION FOR ADMINISTRATIVE REVIEW OF THE INITIAL ORDER

February 4, 2016

Table of Contents

	<u>Page</u>
I. INTRODUCTION	1
II. POINTS AND AUTHORITIES	3
A. In light of the safety and operational reasons that exist when any customer requests permanent disconnection, as well as those specific to the Walla Walla Country Club’s request to permanently disconnect, Pacific Power should be permitted to remove its underground facilities.....	3
1. Empty and duplicate underground conduit and vaults on the grounds of the Walla Walla Country Club present safety risks associated with excavation activities and emergency response services.....	5
i. Currently, there are duplicate or “co-located” facilities on the grounds of the Walla Walla Country Club.....	5
ii. It is entirely unclear what would be done with Pacific Power’s facilities in the event of a taking.....	8
iii. Excavation and emergency response safety risks necessitate removal.	12
2. The NESC imposes a duty upon Pacific Power to either remove or track and maintain the unused, underground facilities it owns.....	15
B. The net result of the Initial Order is an unpermitted taking of Pacific Power’s property by regulatory action, without compensation.	19
1. The Commission is not empowered to take private property for private use.	20
2. In the event of a taking or forced sale of its facilities, Pacific Power is entitled to payment of the fair market value of the facilities.	21
3. The fair market value of Pacific Power’s facilities on the grounds of the Walla Walla Country Club is \$108,262.....	25
4. The fair market value of the facilities is roughly equal to the estimated cost of removal as of January 2013.	26

C. Requiring Pacific Power to keep its facilities in place indefinitely, without compensation and without the ability to remove these facilities, is also outside of the Commission’s authority. 26

III. CONCLUSION..... 28

I. INTRODUCTION

1 Through this petition for administrative review, Pacific Power & Light Company (Pacific Power), a division of PacifiCorp, respectfully requests that the Washington Utilities and Transportation Commission (Commission) review and overturn the Initial Order issued by the administrative law judge (ALJ) in this docket. Specifically, Pacific Power challenges the ALJ's decision to require Pacific Power to "permanently disconnect Walla Walla Country Club's electric service without any requirement to remove the empty vaults and conduit at issue in this proceeding or to charge the Walla Walla Country Club a fee in lieu of removing those facilities." This decision effectively eliminates Pacific Power's ability to protect its customers and the public from the dangers of abandoning facilities without continued oversight and maintenance, and requires Pacific Power to transfer utility property without just compensation, which amounts to a regulatory taking of Pacific Power's property in violation of the U.S. and Washington Constitutions.

2 To fully resolve the claims and controversies presented in this proceeding, the Commission faces two issues. The first is whether safety or operational reasons permit Pacific Power to remove its underground facilities from the grounds of the Walla Walla Country Club. If the Commission ultimately concludes that such a safety or operational reason exists, it will not reach the second issue. As set forth below, the evidence on record and the governing authorities mandate Pacific Power be permitted to remove its underground facilities, leaving the Walla Walla Country Club to receive electric service from Columbia Rural Electric Association (Columbia REA).

3 If the Commission concludes no safety or operational reason to remove exists,

then the Commission must decide the second issue, namely what constitutes just compensation and other necessary and appropriate terms of a forced transfer of Pacific Power's facilities to either the Walla Walla Country Club or Columbia REA. Otherwise, the Commission would be authorizing a regulatory taking of Pacific Power's property without just compensation.

4 As set forth in the record, the estimated cost of removing Pacific Power's facilities is essentially equal to the fair market value of those facilities. If Pacific Power is not permitted to remove its property, the party that assumes legal ownership and liability, presumably either the Walla Walla Country Club or Columbia REA, must pay the fair market value to Pacific Power as just compensation for the taking.¹

5 As addressed in detail below, Pacific Power seeks administrative review of the following findings of fact and components of the decision set forth in the Initial Order:²

- The decision that there are no safety or operational reasons supporting removal of Pacific Power's underground facilities from the grounds of the Walla Walla Country Club;
- The finding that Pacific Power misinterpreted the Net Removal Tariff rather than concluded, by virtue of knowledge and experience accrued after the Net Removal Tariff was approved in 2002, that safety and operational reasons exist in each and every circumstance of a customer requesting permanent disconnection;
- The finding that "there is no co-location of facilities proposed [on the grounds of the Walla Walla Country Club];"
- The finding that empty and duplicate or "co-located" underground conduit and vaults on the grounds of the Walla Walla Country Club do not present safety risks associated with excavation activities and emergency response services;
- The finding that Pacific Power has "consistently abandoned underground conduit in place" and, therefore, cannot reasonably claim that potentially untracked and unmaintained underground facilities do not pose a safety risk;

¹ The Commission's final order in this docket may inform future Net Removal Tariff amendments to address just compensation if there is a regulatory taking of Pacific Power's property upon a customer's request for permanent disconnection.

² Order 03, Initial Order, Docket UE-143932 (January 15, 2016).

- The finding that the National Electric Safety Code (NESC) poses no duty upon Pacific Power to track and maintain the facilities it owns but are buried on the grounds of a former customer;
- The finding that the NESC does not apply to underground facilities owned by an electric utility on the utility's side of the meter or former service point;
- The finding that the Walla Walla Country Club "may simply assume ownership" of Pacific Power's underground facilities, following a regulatory taking of Pacific Power's property;
- The finding that Pacific Power is "relieved of any liability" if its underground facilities are taken by regulatory action;
- The lack of a finding relating to the opinion of Mr. Marne that the Walla Walla Country Club "doesn't have to follow" the NESC if Pacific Power's facilities are taken by regulatory action; and
- The decision that Pacific Power's underground facilities may be taken by regulatory action without just compensation.

II. POINTS AND AUTHORITIES

A. **In light of the safety and operational reasons that exist when any customer requests permanent disconnection, as well as those specific to the Walla Walla Country Club's request to permanently disconnect, Pacific Power should be permitted to remove its underground facilities.**

6 In the Initial Order, the ALJ accurately quoted the terms of Pacific Power's Net Removal Tariff—when a customer requests permanent disconnection, Pacific Power may remove its facilities for either a safety or operational reason.³ Pacific Power has been applying the Net Removal Tariff since its approval in 2002.⁴ The Company's consistent focus is providing safe and reliable electric service to its customers at just and reasonable rates.⁵ As the Company has performed progressively more permanent disconnections, it has gathered knowledge regarding how to appropriately implement the tariff.⁶ Over the

³ Initial Order at 4, ¶16.

⁴ Direct Testimony of Mr. R. Bryce Dalley, Exhibit No. RBD-1T 15:9.

⁵ *Id.* at 9:10-11.

⁶ *Id.* at 9:12-13.

period of almost fourteen years, Pacific Power has identified safety and operational reasons that exist when any customer requests permanent disconnection.⁷

7 During the course of this protracted dispute, prosecuted by Columbia REA in the name of the Walla Walla Country Club,⁸ Pacific Power necessarily analyzed the many complex issues relating to application of its Net Removal Tariff. That analysis revealed an inconsistent but appropriately evolving application of the tariff. For example, in late 2011, Pacific Power recognized the significant trailing liability exposure associated with abandoning underground facilities in place and began to press for removal. When a departing customer refused to allow Pacific Power to remove its property, as an accommodation and in an effort to maintain good will and avoid contentious circumstances such as that presented in this proceeding, the Company offered to sell its facilities with accompanying transfer documents.⁹ In 2011 and 2013, two permanent disconnections were accomplished with accompanying bills of sale.¹⁰

8 Other permanent disconnections involved removal of Pacific Power's underground facilities. For example, on October 31, 2013, Columbia REA submitted a Customer Requested Work Agreement, by which Pacific Power was requested to remove its facilities including underground conduit on Columbia REA's property located at 115 East Rees, Walla Walla County, Washington.¹¹ Columbia REA submitted a check for the entire estimated cost of removal. During that process, Columbia REA never took any of the positions now advocated in this matter through the Walla Walla Country

⁷ *Id.* at 16:11-14 and 22:12-16.

⁸ *Id.* at 9:1-10:2.

⁹ *Id.* at 15:15-20; Exhibit No. RBD-17.

¹⁰ Exhibit No. RBD-17.

¹¹ Exhibit No. RBD-7.

Club.¹² Specifically, Columbia REA never contended that the conduit and vaults should be left in the ground in exchange for a monetary payment.¹³

9 At the conclusion of Pacific Power’s review of its prior application of the tariff and consideration of the ramifications of agreeing to accommodate customers requesting permanent disconnection by selling and transferring its underground facilities, the Company implemented its policy prohibiting the sale and transfer of the Company’s property in lieu of removing those facilities.¹⁴

1. Empty and duplicate underground conduit and vaults on the grounds of the Walla Walla Country Club present safety risks associated with excavation activities and emergency response services.

(a) Currently, there are duplicate or “co-located” facilities on the grounds of the Walla Walla Country Club.

10 The vast majority of Pacific Power’s safety concerns arise from duplicate facilities. The Washington Legislature has declared that the duplication of electric facilities of public utilities and cooperatives is “uneconomical, may create unnecessary hazards to the public safety, discourages investment in permanent underground facilities, and is unattractive, and thus is contrary to the public interest.”¹⁵ Unfortunately, the statute simply *discourages* duplication of facilities. It does not specifically prohibit duplication. Pacific Power has been unable to successfully negotiate a service area agreement with Columbia REA and, therefore, is faced with operating in a service area where duplicate facilities exist.¹⁶ Pacific Power does not face this issue with any other electric service provider in Washington or in any of its other five state jurisdictions.¹⁷

¹² Exhibit No. RBD-1T 17:2-6.

¹³ *Id.* at 17:5-6.

¹⁴ Exhibit No. RBD-18.

¹⁵ RCW 54.48.020 Legislative Declaration of Policy.

¹⁶ Direct Testimony of Mr. William G. Clemens, Exhibit No. WGC-1T 2:6-8.

¹⁷ *Id.* at 2:8-10.

11 With his prefiled testimony, Mr. Clemens submitted a number of photographs that illustrate some of the safety issues encountered by Pacific Power, in Walla Walla, as a result of the actions of Columbia REA.¹⁸ Obviously, a number of the photographs do not depict conditions existing on the grounds of the Walla Walla Country Club but were simply provided for context.

12 Mr. Jeffrey C. Thomas, the Walla Walla Country Club's General Manager, testified by telephone during the September 3, 2015 hearing. In his prefiled rebuttal testimony, Mr. Thomas was questioned regarding Exhibit No. WGC-2:

Q. Do any of the photographs annexed to Mr. Clemens' testimony reflect Club facilities or facilities relevant to electrical service to the Club?

A. No. None of the photographs annexed to Mr. Clemens' testimony reflect actually facilities at, or even near, the Country Club. The exhibits do not reflect a single photograph of facilities relevant to the Club and its property.¹⁹

Mr. Thomas ultimately retracted that statement, in the face of the unequivocal contrary testimony of Mr. Clemens:

Q. Are you aware that photo [No. 6 in the sequence comprising Exhibit No. WGC-2] depicts a condition on Club property?

A. I have no idea of knowing if that's on Club property.

Q. Okay, were you made aware that when Columbia REA was installing conduit on Club property, it actually struck a Pacific Power conduit that had live wire in it?

A. No.²⁰

¹⁸ Exhibit No. WGC-2.

¹⁹ Exhibit No. JCT-4T 2:9-14.

²⁰ Thomas, TR. 140:18-25.

13

On cross-examination by counsel for the Walla Walla Country Club, Mr. Clemens was asked to identify the location of the condition depicted in the sixth photograph contained in Exhibit No. WCG-2. He testified that the photograph was taken on the grounds of the Walla Walla Country Club and further explained that the location is graphically depicted with a star in the upper right corner of Exhibit No. JCT-24CX, an aerial photograph of the Walla Walla Country Club grounds and surrounding area. Mr. Clemens explained that Columbia REA ran six conduit lines vertically between two Pacific Power conduit runs. Even with the knowledge of the location of Pacific Power's conduits, Columbia REA struck one of the Pacific Power lines, causing an outage on a pump servicing the Walla Walla Country Club.²¹

14

During the hearing, Pacific Power first learned that Columbia REA may have already installed all or at least the majority of its facilities on the Walla Walla Country Club grounds. Mr. Thomas testified:

Q. Has Columbia REA since done any trenching, boring, or backhoe work on Club property?

A. Yes

Q. On which dates did it do so?

A. Well, it would have been after that date of November 9th [2012], and by—most of—through December of that year, they had bored and trenched almost the entire Club. They probably finished sometime in January, February of '13.

* * *

A. So all of their service is underground, in vaults, all in place.

²¹ Clemens, TR. 98:25-99:4.

Q. That's news to us, sir. I was just about to ask you, what work was performed? It's your testimony today that Columbia REA has completed its work on Club property and it has vaults and everything it needs to immediately service the Club?

A. Yes.²²

15 Obviously, there are duplicate underground facilities throughout the Walla Walla Country Club grounds, as Columbia REA apparently completed its boring, trenching, and other work to install its facilities, in early 2013. The sixth photograph in the sequence comprising Exhibit No. WGC-2 reveals just one example of the prevailing duplicate facilities condition currently on the Walla Walla Country Club grounds.

16 The ALJ made an erroneous finding concerning duplicate facilities:

Although Pacific Power raised concerns in testimony and at hearing about duplicate facilities, there is no co-location of facilities proposed [on the grounds of the Walla Walla Country Club].²³

(b) It is entirely unclear what would be done with Pacific Power's facilities if Pacific Power is forced to abandon or transfer the facilities.

17 The opinions of the Walla Walla Country Club's witnesses, as set forth in their prefiled direct and rebuttal testimony, are all predicated upon a taking or forced transfer of Pacific Power's facilities and reuse of those facilities by Columbia REA. However, by virtue of the Walla Walla Country Club's second supplemental response to DR 58 and the testimony of its witnesses during the hearing, it is entirely unclear what would be done with Pacific Power's facilities if Pacific Power is forced to abandon or transfer those facilities.

²² Thomas, TR. 138:25-139:21.

²³ Initial Order at 2, ¶5.

18 The following rebuttal testimony of Mr. Marne illustrates the degree to which his opinions and those of Mr. Mullins, as set forth in their prefiled testimony, are predicated upon a forced sale and reuse of the facilities by Columbia REA:

The facilities that are to be abandoned and sold are on the Country Club's property. The maps, drawings and pictures I have reviewed, produced by the Company in discovery, show that the facilities can be reused to supply power to buildings, pumps and other improvements on the Club's property.²⁴

As addressed above, during the hearing, Pacific Power learned that Columbia REA may well have completed all necessary boring, trenching and installation of its facilities on the Country Club property in early 2013.²⁵

19 Shortly before the hearing, the Walla Walla Country Club supplemented its response to DR 58, by which Pacific Power sought a projection of the cost to Columbia REA to replace the subject facilities. The second supplemental response to that DR reads as follows:

[B]ased on his discussion with Columbia Rural Electric Association, Mr. Mullins has come to understand that neither the Club nor Columbia Rural Electrical Association, intends to use any of the electrical components reflected in the net book value calculations discussed in Mr. Mullins' testimony. This is due to Mr. Mullins' understanding that Columbia Rural Electric Association will provide electric service at a different voltage than previously delivered by Pacific Power. **Accordingly, all of the electrical components included in the list of facilities transferred will be of no value to Columbia Rural Electric Association and will be removed and scrapped at the expense of the Club.**²⁶

²⁴ Direct Testimony of David J. Marne, Exhibit No. DJM-1CT 4:14-17.

²⁵ Thomas, TR. 138:25-139:21.

²⁶ Exhibit No. BGM-15CX (emphasis added).

Perhaps Columbia REA, Mr. Mullins, and Mr. Marne began to appreciate the safety concerns necessitating removal of the subject facilities. Regardless of the motivation, the Walla Walla Country Club's response to the DR clearly indicates that all of the subject facilities will be removed. That representation came as a complete surprise to the country club's general manager, Mr. Thomas, during the hearing:

Q. And I'll read it—I'll read the quote to you again, sir, and see—I'm just asking whether you're aware of this.

“All of the electrical components included in the list of facilities transferred will be of no value to Columbia REA and will be removed and scrapped at the expense of the Club.”

Is that an accurate summary of your understanding of the circumstances as they currently exist?

A. I don't remember that at all.

* * *

Q. So I'm talking about the—the current circumstance. Am I fair in understanding your testimony right now that, as general manager of the Club, you have no idea of whether the Club will remove all of—will seek to remove all of Pacific Power's facilities and scrap them?

A. No. It was never in my mind that we were to remove and scrap anything. We couldn't touch a thing. Pacific Power would remove their wires and meters.²⁷

Throughout his prefiled direct and rebuttal testimony, Mr. Mullins referred to removal of the subject facilities as “invasive,” “costly” and “unnecessary.”²⁸ Yet immediately before and during the hearing, he represented that the Walla Walla Country Club will perform the removal nonetheless.

²⁷ Thomas, TR. 145:13-146:9.

²⁸ Direct Testimony of Bradley G. Mullins, Exhibit No. BGM-1CT 8:21; Exhibit No. BGM-6T 2:14; Exhibit No. BGM-6T 11:6.

During the hearing, Mr. Marne sought to leave the door open and allow the Walla Walla Country Club to do whatever it might choose to do with the subject facilities if Pacific Power is forced to abandon or transfer those facilities:

Q. Okay, if I understand correctly, your opinions are also predicated upon the following, which is taken from your pre-filed direct testimony, and I'm referring to page 4, lines 14 through 18, so that's DJM-1CT.

And there you testify, "The maps, drawings and pictures I have reviewed produced by the Company in discovery show that the facilities can be reused to supply power to buildings, pumps, and other improvements on the Club's property. There's no reason or necessity to install additional conduit to serve the property."

So as I read that I took it that you were assuming that Columbia REA would reuse Pacific Power's facilities; correct?

A. Facilities as in conduits.

Q. Okay. And they'd be reusing all of it?

A. The Country Club would take over those facilities, and then they would pass on to Columbia REA whichever ones were beneficial for the Country Club to have used.

Q. And if they didn't pass some on, as Mr. Mullins testified, we would have, under the scenario presented by Columbia REA and the Club in this matter, facilities of Pacific Power's that are sitting on Club property that aren't being used by Columbia REA; correct?

A. They're—if they're sold, they're owned by the Country Club, if I'm following you.

Q. Okay.

A. Yes.

Q. And some may not be used by the REA. What's going to happen to those? Will they be dug up? Will they just sit there fallow in the ground? What's intended?

A. That would be up to the Country Club.²⁹

23 At this time, what Columbia REA and the Walla Walla Country Club might do with Pacific Power’s facilities in the event Pacific Power is forced to sell those facilities is a complete unknown.

24 Based on the collective testimony of Walla Walla Country Club’s witnesses, Mr. Thomas, Mr. Marne, and Mr. Mullins, as well as the sixth photograph in the sequence comprising Exhibit No. WGC-2, there is currently extensive duplication or “co-location” of facilities on the grounds of the Walla Walla Country Club. If Pacific Power is not allowed to remove its underground facilities, namely the vaults and conduit, the condition of duplicate facilities may continue long after conclusion of these proceedings.

(c) Excavation and emergency response safety risks necessitate removal.

25 As noted by the ALJ, in its prefiled and hearing testimony, Pacific Power expressed grave concerns regarding the possibility of serious physical injury to a party performing excavation on the grounds of the Walla Walla Country Club. Pacific Power seeks administrative review of the ALJ’s finding that “the [Walla Walla Country] Club correctly characterizes the scenario as implausible.”³⁰ The ALJ articulated three grounds for the erroneous finding.

26 First, the ALJ states the location of the underground facilities is known to the Walla Walla Country Club. As addressed below, Pacific Power must track and maintain facilities it owns. During the hearing, Mr. Marne was cross-examined regarding the circumstances that might arise in the event of a taking or forced sale of Pacific Power’s property. Without clearly articulating the legal mechanism by which ownership would

²⁹ Marne, TR. 175:11-176:16.

³⁰ Initial Order at 5, ¶ 19.

transfer, Mr. Marne simply concluded that Pacific Power's property would be "owned" by the Walla Walla Country Club. He then proceeded to opine that the Walla Walla Country Club would not have to follow the NESC as it relates to those facilities.³¹ As noted above, Pacific Power seeks administrative review of the lack of a finding reflecting this opinion of Mr. Marne regarding the Walla Walla Country Club purportedly being excused from compliance with the NESC.

27 While one or more current employees of the Walla Walla Country Club may have a general appreciation of the location of Pacific Power's underground facilities, with the passage of time and change in personnel, it is certainly possible that the Walla Walla Country Club will later lack institutional knowledge of the location of the facilities. That possibility, if not probability, is only heightened by the fact that its advisor, Mr. Marne, absolves the Walla Walla Country Club from compliance with the NESC, presumably including any duty to track and maintain the underground facilities.

28 As a second ground for the erroneous finding, the ALJ states the empty conduit would not be locatable because only energized facilities can be located.³² As reflected in the sixth photograph of the compilation comprising Exhibit No. WGC-2, Columbia REA has placed its conduit immediately adjacent to Pacific Power's underground facilities. Even if the wires are pulled from Pacific Power's underground conduit, the condition of an empty conduit very near a conduit containing live wires creates a significant safety risk. As stressed throughout the testimony and exhibits presented by Pacific Power, a locate would reflect the energized lines. A party excavating in the area may well first come across the empty conduit. With the mistaken belief that the empty conduit is the

³¹ Marne, TR. 176:17-177:2.

³² Initial order at 5, ¶19.

subject of the locate and contains the live wires, the party would likely continue excavating and strike live wires, with potentially devastating results.

29 Finally, in support of the finding that the scenario presented by Pacific Power is “implausible,” the ALJ notes that Mr. Clemens is unaware of the scenario presented by Pacific Power occurring to date.³³ The proliferation of duplicate or co-located facilities in Walla Walla is a relatively recent phenomenon. Locates and corresponding excavation present minimal safety risks when an area is served by a single electric utility. Pacific Power is meticulous in tracking and maintaining its facilities. When two or more electric utilities serve a single area, duplicate or co-located facilities present numerous and obvious safety risks.³⁴ The fact that Mr. Clemens is unaware of the very possible, if not probable, scenario presented by Pacific Power occurring to date is virtually irrelevant. The dangerous condition has existed for a short period of time and one can understandably argue that a single occurrence of the scenario presented by Pacific Power is one too many.

30 Duplicate or co-located facilities on the grounds of the Walla Walla Country Club present safety risks beyond those associated with excavation. As addressed in the testimony of Mr. Clemens, valuable time can be lost when emergency service providers cannot readily and accurately identify the electric utility serving a particular customer. Mr. Clemens cited an example in his prefiled testimony. Pacific Power was contacted regarding a substation fire. Company personnel immediately responded and determined it was a Columbia REA substation. Company personnel then contacted Columbia REA

³³ Initial order at 5, ¶19.

³⁴ Exhibit No. RBD-2.

to report the fire and facilitate a response. The associated delay could have caused dire consequences but fortunately did not in that circumstance.³⁵

31 Pacific Power has also responded to a report of a primary line too close to the ground. Upon arrival, Company personnel determined that the line belonged to Columbia REA.³⁶ Again, delays associated with difficulty identifying the electric utility serving a particular customer can have very significant consequences. Emergency responders are increasingly confused by duplicate facilities. It is imperative that the responders know which utility to call for an immediate and appropriate response.³⁷

32 With the potential of duplicate or co-located facilities on the grounds of the Walla Walla Country Club for years after conclusion of this proceeding, it is certainly not difficult to conceive of emergency responders having difficulty identifying the electric utility actually serving the Walla Walla Country Club. Pacific Power simply seeks to remove all of its facilities, to eliminate just that problem. If only Columbia REA facilities are on the grounds of the Walla Walla Country Club, presumably the potential for any confusion is significantly reduced if not entirely eliminated.

2. The NESC imposes a duty upon Pacific Power to either remove or track and maintain the unused, underground facilities it owns.

33 NESC Part 3, Safety Rules for the Installation and Maintenance of Underground Electric Supply and Communication Lines, Section 313.B.3, clearly provides that Pacific Power's unused, underground lines and equipment must either be removed or maintained in a safe condition.³⁸ NESC Section 3 does not provide for the sale of underground facilities to a departing customer or the new utility provider, with resulting termination of

³⁵ Exhibit No. WGC-1T 2:15-20.

³⁶ *Id.* at 2:21-3:1.

³⁷ *Id.* at 3:2-4.

³⁸ Exhibit No. RBD-1T 23:7-10.

the prior owner's duty of perpetual maintenance.³⁹ As set forth in the prefiled testimony of Mr. Dalley, Pacific Power carefully reviewed every potentially relevant provision of the NESC and there is absolutely no limitation upon the duty of the disconnecting utility provider to remove or maintain the underground facilities in a safe condition.⁴⁰

34 Obviously, the duty to perpetually track and maintain unused, underground facilities comes at a cost. For example, labor hours must be dedicated to completing the associated tasks on a periodic basis. Pacific Power's remaining customers should not be burdened with the costs associated with perpetually tracking and maintaining unused, underground facilities after a customer permanently disconnects from the Pacific Power system.

35 There is also the issue of exposure to liability claims of third-parties in the event of injury or damage caused by the unused, underground facilities. As previously explained in detail, a party excavating on the grounds of the Walla Walla Country Club could very easily encounter empty conduit, assume he or she had exposed the conduit containing live wires, and continue digging. If that individual sustained physical injuries, he or she would undoubtedly bring claims against Pacific Power and others. Pacific Power has an obligation to reduce costs for its customers.⁴¹ The Company's remaining customers should not be exposed to costs associated with liability to third-parties arising from unused, underground facilities.

36 After reviewing the prefiled testimony of Mr. Dalley, Mr. Marne could not point to a provision of the NESC that expressly permits Pacific Power to sell unused, underground facilities and, thereby, extinguish the duty to track and maintain those

³⁹ Id. at 23:18-20.

⁴⁰ Id. at 23:22-24:1.

⁴¹ Id. at 23:10-11.

facilities. Rather, Mr. Marne stated: “[M]y opinion is that the NESC does not prohibit the abandonment of underground conduit. NESC Rule 313.B.3 does not provide specific details for individual circumstances.”⁴² The entirety of the combined testimony of Mr. Marne and Mr. Mullins is predicated upon a taking or forced sale of Pacific Power’s facilities. On one point Mr. Marne was very clear—in the event of permanent disconnection, there are only two alternatives, namely removing the facilities or selling them to the departing customer.⁴³ Both Mr. Marne and Mr. Mullins were required to concede that Pacific Power’s Net Removal Tariff does not provide for the sale or transfer of Pacific Power’s facilities upon permanent disconnection.⁴⁴

37 The ALJ correctly notes that “no provision of the NESC directly addresses abandoning facilities in place[.]”⁴⁵ However, the ALJ then follows Mr. Marne’s citation to NESC Rule 012.C, which is a general catch-all regarding accepted good practices for a given local condition. Mr. Marne takes the catch-all and essentially argues that electric utilities such as Pacific Power can abandon unused, underground facilities with impunity, despite the express, unequivocal dictate to the contrary in NESC Rule 313.B.3. Again, Rule 313.B.3 provides that unused or abandoned underground facilities must be either removed or maintained in a safe condition. In the face of Rule 313.B.3, whether leaving unused facilities in the ground is a good practice given the local condition is irrelevant, as the rule then mandates that those unused, underground facilities must be tracked and maintained.

⁴² Exhibit No. DJM-1CT 2:16-18.

⁴³ Marne, TR. 175:1-10.

⁴⁴ Marne, TR. 173:5-22 and Mullins, TR. 152: 9-18.

⁴⁵ Initial Order at 6, ¶23.

38

The ALJ also relies upon another fatally flawed argument of Mr. Marne, namely that relating to the service point. Inherent in every circumstance of unused or abandoned underground facilities is a disconnection or elimination of a former service point. Consequently, Mr. Marne's somewhat circular argument fails in its entirety. NESC Rule 313.B.3 provides, in very plain terms: "[underground] lines and equipment permanently abandoned shall be removed or maintained in a safe condition." A universally recognized rule of code or statutory interpretation and application is that the specific controls over the general.⁴⁶ With disconnection at a former downstream service point, an electric utility such as Pacific Power owns unused or abandoned underground facilities. Even if the Walla Walla Country Club were to argue that the subject underground facilities are only temporarily out of service, Pacific Power would still have the duty to maintain those facilities in a safe condition.⁴⁷

39

The ALJ notes: "Mr. Marne testified that nothing in the NESC prohibits utilities from transferring ownership of their facilities."⁴⁸ We know that unused, underground facilities owned by Pacific Power must be maintained in a safe condition by Pacific Power. The Company simply seeks to remove its facilities and, thereby, extinguish the safety risks and the financial burden upon its remaining customers. Although the Walla Walla Country Club did not maintain a consistent position on this issue, it seems to want to avoid removing Pacific Power's facilities. Accordingly, Mr. Marne offers his opinion that nothing in the NESC prohibits the sale of Pacific Power's facilities to the Walla Walla Country Club or Columbia REA. Conversely, as correctly noted by Mr. Dalley,

⁴⁶ General Tel. Co. of the NW v. Washington Utils. and Transp. Comm'n, 104 Wn. 2d 460, 461, 706 P.2d 625, 627 (1985).

⁴⁷ NESC Rule 313.B.2.

⁴⁸ Initial Order at 6, ¶23.

nothing in the NESC expressly permits Pacific Power to sell its facilities and, thereby, unequivocally extinguish the duties imposed by NESC Rule 313.B.3 and the associated liability exposure.

40 With absolutely no supporting authority, the ALJ states: “To ensure Pacific Power is relieved of any liability, the Club may simply assume ownership of the facilities following permanent disconnection, which it intends to do.”⁴⁹ Pacific Power seeks administrative review of this erroneous finding. The reference to simply assuming ownership presupposes a taking by regulatory action. In such a circumstance, Pacific Power is entitled to just compensation.

B. The net result of the Initial Order is an unpermitted taking of Pacific Power’s property by regulatory action, without compensation.

41 The Commission is empowered to regulate in the public interest the business of supplying utility service.⁵⁰ On occasion, this includes a broad ability to regulate utility facilities for the public welfare, including the regulation of the private property owned by those utilities.⁵¹ The Commission is not, however, empowered to take private property for private use.⁵² It is also not permitted to take private property for public use without compensation.⁵³ Government regulation of private property may be so onerous that its effect is the equivalent to a direct appropriation of that property.⁵⁴ Such regulation is plainly improper, and the Commission is not authorized to regulate to equivalence of a direct appropriation of property.

⁴⁹ Initial Order at 6, ¶23.

⁵⁰ RCW 80.01.040.

⁵¹ *Id.*

⁵² WA CONST. art. I, § 16. (except for limited circumstances not at issue).

⁵³ *Id.*

⁵⁴ *See Lingle v. Chevron U.S.A.*, 544 U.S. 528, 537-38, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

42

The ALJ’s proposed solution—to provide the Walla Walla Country Club ownership of the facilities following permanent disconnection without charge—is an unauthorized taking of private property for private use.⁵⁵ Even if it were a public use, it is done without statutory authority and without compensation. As addressed below, requiring Pacific Power to keep its facilities in place indefinitely, without compensation and without the ability to remove these facilities, is also outside of the Commission’s authority.

1. The Commission is not empowered to take private property for private use.

43

Washington’s constitution provides that: “Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes.”⁵⁶ This prohibition is fundamental to Washington State’s governmental structure. As detailed in *Manufactured Housing Communities*, during the Washington State Constitutional Convention in 1889, delegates publicly voiced concern over the taking of private property for private enterprise.⁵⁷ Certain constitutional delegates specifically opposed even the limited exceptions to the absolute prohibition against taking private property for private use adopted into the provision.⁵⁸

⁵⁵ Initial Order at 6-¶23.

⁵⁶ WA CONST. art. I, § 16; *Manufactured Hous. Cmty. v. State*, 142 Wn.2d 347, 357, 13 P.3d 183, 188 (2000)(“What is key is article I, section 16’s absolute prohibition against taking private property for private use.”)

⁵⁷ *Manufactured Hous. Cmty.*, 142 Wn.2d at 357, 13 P.3d 183, 188 (2000)(citing WASHINGTON STANDARD (Olympia), Aug. 9, 1889, p. 1, col. 4.)

⁵⁸ *Id.* Delegate Turner, for instance, moved to strike “except for private ways of necessity.” “Turner said such private ways should not be made at the expense of other private property, but that such a right of way should be included in the purchase of isolated land.” THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, at 504, (Beverly Paulik Rosenow ed., 1962).

44 As a result of this fierce debate, Washington courts have adopted an approach that views “private use” quite literally and provide Washington citizens with enhanced protections against taking private property for private use.⁵⁹ The absolute language of Article I, § 16 “is further strengthened by the enumeration of specific, but here inapplicable, exceptions ‘for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes.’”⁶⁰

45 In *Manufactured Housing Communities*, the court overturned several state statutes because the legislature had authorized the taking of private property from the owners of mobile homes for their tenants’ “private use in direct violation of the first sentence of article I, section 16.” Here, as in *Manufactured Community Housing*, the public will not own the facilities, the Walla Walla Country Club will.⁶¹ No member of the general public will enjoy use of the facilities.⁶² It is squarely impermissible for the ALJ to give ownership of the facilities to the Walla Walla Country Club.⁶³

2. If Pacific Power is forced to transfer its property, then it is entitled to payment of the fair market value of the facilities.

46 The Washington State Constitution also provides “[n]o private property shall be taken or damaged for public or private use without just compensation having been first made.”⁶⁴ Just compensation means the fair market value of the property.⁶⁵ Fair market value is the amount of money that a well-informed purchaser, willing but not obliged to buy the property would pay, and that a well-informed seller, willing but not obliged to

⁵⁹ *Manufactured Hous. Cmty.*, 142 Wn.2d at 360.

⁶⁰ *Id.* at 362 (“These specific exceptions are incorporated into an otherwise absolute prohibition precluding taking private property for private use.”)

⁶¹ *Id.* at 362.

⁶² *Id.*

⁶³ Initial Order at 6, ¶23.

⁶⁴ Const. art. I, § 16.

⁶⁵ *State v. Wilson*, 6 Wn. App. 443, 447, 493 P.2d 1252, 1255 (1972).

sell, would accept, taking into consideration all uses to which the property is adapted and might in reason be applied.⁶⁶

47 It does not appear that the Commission has any power of eminent domain delegated to it. States may delegate the power of eminent domain but that delegation extends only as far as statutorily authorized.⁶⁷ The Commission is not explicitly given the power of eminent domain. However, even if the Commission had the full authority of the state to condemn, there has been no just compensation.

48 At the conclusion of his prefiled direct testimony, Mr. Mullins made a very succinct statement of what the Walla Walla Country Club and Columbia REA seek by way of this proceeding:

I recommend that the Commission find that it is in the public interest for the Company to transfer the facilities at net book value, plus reasonably negotiated labor charges necessary to effect permanent disconnection, as requested in the Club's June 19, 2015 offer letter.⁶⁸

By way of his prefiled rebuttal testimony, Mr. Mullins exercised greater liberties with Pacific Power's Net Removal Tariff:

In this case, it is in the public interest to *require* the facilities located on the Club property to be transferred at net book value.⁶⁹

Remarkably, Mr. Mullins took it a step further, testifying:

[T]he *objective* of Rule 6 is to effectuate a fair transfer price without regard to the cost of interconnection with the new service provider.⁷⁰

⁶⁶ *Donaldson v. Greenwood*, 40 Wn.2d 238, 242 P.2d 1038 (1952).

⁶⁷ *Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 182 Wn.2d 519, 534, 342 P.3d 308, 315 (2015).

⁶⁸ Exhibit No. BGM-1CT 17:6-9.

⁶⁹ Rebuttal Testimony of Bradley G. Mullins, Exhibit No. BGM-6T 13:5-6 (emphasis added).

⁷⁰ *Id.* at 11:4-5 (emphasis added).

49 On behalf of Columbia REA through the Walla Walla Country Club, Mr. Mullins urged the Commission to exercise the equivalent of inverse condemnation and “require” Pacific Power to transfer its facilities for the benefit of a competitor that is not regulated by the Commission. During the hearing, Mr. Mullins was asked whether he is aware of the measure of damages if private property is taken in Washington. In response, Mr. Mullins stated that he is “not qualified to answer” that question.⁷¹ As set forth above, Pacific Power is entitled to the fair market value of its facilities.

50 Despite the fact that the Net Removal Tariff does not provide for the sale or transfer of Pacific Power’s facilities upon permanent disconnection, Mr. Mullins urged not only that Pacific Power be required to transfer its facilities but that it do so for a fraction of the fair market value of those facilities. Specifically, Mr. Mullins argued that Pacific Power should be required to sell its facilities for use by Columbia REA in exchange for \$24,049.

51 Columbia REA and the Walla Walla Country Club executed an Electric Service Agreement on December 7, 2012, but the Agreement was made effective as of November 30, 2012.⁷² The Agreement includes Columbia REA’s statement of the cost to construct the facilities necessary to service the Walla Walla Country Club—\$318,732.50.⁷³ Without some discount obtained through its prosecution of this action, Columbia REA would shoulder the entire cost of construction.⁷⁴

⁷¹ Mullins, TR. 154:6-9.

⁷² Thomas, TR. 130:20-23, referring to Exhibit No. RBD-6.

⁷³ Exhibit No. RBD-6 3:Section 10.

⁷⁴ Thomas, TR. 131:17-21; Exhibit No. RBD-6 3:Section 10.

52 In his prefiled rebuttal testimony, Mr. Mullins was critical of Pacific Power for not having secured a fair market value appraisal of the subject facilities.⁷⁵ He went on to state:

[T]he Club, in offering to pay the full Net Book Value, would more than compensate the Company for the fair value of the facilities.⁷⁶

53 Troubled by that statement, Pacific Power questioned Mr. Mullins regarding his appreciation of governing appraisal standards and specifically the commonly recognized definition of fair market value:

Q. Are you familiar with the Uniform Standards of Professional Appraisal Practice, USPAP?

A. Not in detail, no.

Q. Do you recognize them as standards that govern appraisals or valuation of property?

A. I—I am not familiar with their—their methods, no.

Q. Have you ever seen a definition of fair market value under USPAP?

A. I have seen a definition—many definitions of market value and fair market value; however, not the one you’re referring to.

Q. Let me ask you whether you agree with the following definition of fair market value. It’s defined as “the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell, and both having reasonable knowledge of the relevant facts.”

Would you agree with that definition?

A. I think it’s a fair—fair definition.⁷⁷

⁷⁵ Exhibit No. BGM-6T 6:5-8.

⁷⁶ *Id.* at 7:16-17.

⁷⁷ Mullins, TR. 155:16-156:10.

During the hearing, Mr. Mullins was asked whether his definition of “fair value” as used in his prefiled rebuttal testimony accounted for the cost of installation. The following exchange ensued:

A. So the—the Net Removal Tariff, the formula that I relied upon, is detailed—it’s detailed in Table 1 on page 4 of BGM-1CT.

Q. Does Table 1 reference cost of installation?

A. Table 1 is the Net Removal Tariff formula which does not reference the cost of installation, correct.

Q. And again, the Net Removal Tariff does not reference sale or transfer; correct?

A. The—the tariff itself does not, but the—well correct. I won’t—I won’t go on.⁷⁸

3. The fair market value of Pacific Power’s facilities on the grounds of the Walla Walla Country Club is \$108,262.

Given the degree to which Mr. Mullins’ prefiled testimony deviated from recognized valuation standards, Pacific Power commissioned a fair market value appraisal of the subject facilities. Professional appraisers, very experienced in valuing electric utility facilities, concluded that the fair market value of Pacific Power’s facilities is \$108,262.⁷⁹ The appraisers took into account the loss of value caused by physical deterioration, functional obsolescence, and economic obsolescence—what is commonly referred to as depreciation.⁸⁰ The appraisers used the Cost Approach, which necessarily incorporates installation of the facilities.⁸¹ The cost of the facilities installed new is

⁷⁸ Mullins, TR. 157:18-158:2.

⁷⁹ Exhibit No. BGM-14CX 9.

⁸⁰ Exhibit No. BGM-14CX 2.

⁸¹ *Id.*

\$142,588.⁸² As set forth above, after taking into account depreciation, the fair market value of the facilities is \$108,262.⁸³

4. The fair market value of the facilities is roughly equal to the estimated cost of removal as of January 2013.

56 Given the fair market value figure necessarily incorporates the cost of installation, it stands to reason that the estimated cost to remove the subject facilities is roughly equal. As of January 25, 2013, the actual cost of removing the facilities, as communicated to the Walla Walla Country Club, was \$104,176.⁸⁴

C. Requiring Pacific Power to keep its facilities in place indefinitely, without compensation and without the ability to remove these facilities, is also outside of the Commission's authority.

57 Even if the Commission were to vacate the portion of the decision regarding transferring the facilities to the Walla Walla Country Club, it cannot require Pacific Power to abandon the facilities indefinitely. The government, through the police power, often regulates and restricts the use of private property in the interest of the public. Police power is inherent in the state by virtue of its granted sovereignty.⁸⁵ As recognized: "It exists without express declaration, and the only limitation upon it is that it must reasonably tend to correct some evil or promote some interest of the state, and not violate any direct or positive mandate of the constitution."⁸⁶

58 As noted in *Conger v. Pierce County*, however, the police power is not unlimited and, when stretched too far, is a power "most likely to be abused."⁸⁷ In *Conger*, an early

⁸² Exhibit No. BGM-14CX Appendix:1.

⁸³ Exhibit No. BGM-14CX.

⁸⁴ Exhibit No. JCT-8.

⁸⁵ *Shea v. Olson*, 185 Wash. 143, 153, 53 P.2d 615 (1936).

⁸⁶ *Id.* at 153.

⁸⁷ 116 Wash. 27, 35-36, 198 P. 377 (1921).

Washington case where a county had exceeded the scope of the police power, the court stated:

[The police power] has been defined as an inherent power in the state which permits it to prevent all things harmful to the comfort, welfare and safety of society. It is based on necessity. It is exercised for the benefit of the public health, peace and welfare. Regulating and restricting the use of private property in the interest of the public is its chief business. It is the basis of the idea that the private individual must suffer without other compensation than the benefit to be received by the general public. **It does not authorize the taking or damaging of private property in the sense used in the constitution with reference to taking such property for a public use. Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public.**⁸⁸

59 There are two threshold questions. The first is whether the regulation destroys or derogates any fundamental attribute of property ownership, including the right to possess, to exclude others, to dispose of property, or to make some economically viable use of the property.⁸⁹ If the property owner claims less than a “physical invasion” or a “total taking” and if a fundamental attribute of ownership is not otherwise implicated, then courts reach the second threshold question—whether the challenged regulation safeguards the *public* interest in health, safety, the environment, or the fiscal integrity of an area or whether the regulation seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit.⁹⁰ If the owner

⁸⁸ Conger, 116 Wash. at 36. (emphasis added).

⁸⁹ *Paradise, Inc. v. Pierce Cty.*, 124 Wn. App. 759, 768, 102 P.3d 173, 178 (2004).

⁹⁰ *Edmonds Shopping Ctr. v. Edmonds*, 117 Wn. App. 344, 362, 71 P.3d 233, 234 (2003).

proves a total taking or a physical invasion, he or she is entitled to compensation without further inquiry into public interest considerations.⁹¹

60 In this proceeding, the Commission must address a fundamental attribute of property ownership, including the right to possess, to exclude others, to dispose of property, or to make some economically viable use of the property. Under the terms of the Initial Order, Pacific Power cannot remove its property. It cannot salvage those facilities. It cannot prevent another from taking control of the facilities. This ends the inquiry and establishes an impermissible taking of private property.

III. CONCLUSION

61 While reconciling Pacific Power's Net Removal Tariff, the governing provisions of the NESC and the law of condemnation is a significant challenge, it is clear the decision that Pacific Power must disconnect the Walla Walla Country Club's service without removing the underground facilities it owns or assessing any charge in connection with those facilities is erroneous. As set forth above, significant safety reasons exist, compelling Pacific Power to remove its unused, underground facilities. Additionally, operational reasons, specifically the cost of tracking and maintaining the unused, underground facilities and the corresponding liability exposure to third parties, similarly mandates removal of the subject facilities.

62 Furthermore, forcing Pacific Power to transfer or abandon its facilities without just compensation and other necessary or appropriate terms is a regulatory taking. Pacific Power must be given the fair market value of the property taken. In this case, the fair market value of all of Pacific Power's facilities on the grounds of the Walla Walla

⁹¹ *Guimont v. Clarke*, 121 Wn.2d 586, 608-09, 603, 854 P.2d 1, 13-14, 16-17 (1993).

Country Club is \$108,262. The fair market value of the subject underground facilities is \$80,264.00. If the Commission precludes Pacific Power from removing its facilities, the Walla Walla Country Club or Columbia REA must pay the fair market value of all facilities that are not removed.

Respectfully submitted this 4th day of February, 2016.

By: Troy Greenfield / AS
Troy Greenfield
Schwabe, Williamson & Wyatt, P.C.
tgreenfield@schwabe.com

Sarah Kamman Wallace
Vice President and General Counsel
Pacific Power & Light Company
Sarah.wallace@pacificcorp.com

Attorneys for Respondent