BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PacifiCorp, d/b/a/ Pacific Power & Light, Respondent.	)))))))))))	DOCKET NO. UE-001734

REPLY TO MOTION TO DISMISS OF PUBLIC COUNSEL
AND THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES

Pursuant to the May 4, 2001 Prehearing Conference Order of ALJ Caillé, PacifiCorp (or the "Company") files this Response to the Motion to Dismiss of Public Counsel and the Industrial Customers of Northwest Utilities ("ICNU") (collectively "Movants").

1. BACKGROUND

PacifiCorp accepts most depictions set forth in the Movants' Background section of its Motion to Dismiss. PacifiCorp sets forth the following abbreviated background summary to address areas in conflict with Movants' descriptions.

PacifiCorp's filing in this docket would, if granted, authorize the Company to assess the estimated net removal costs, i.e., costs incurred to remove the facilities less salvage value, upon PacifiCorp customers that request disconnection of Company facilities in order for the customer to switch electric suppliers.

In PacifiCorp's Docket UE-001832, and pursuant to a general settlement, a Stipulation, dated June 16, 1999 was executed. The Commission subsequently adopted the provisions of the

Stipulation (the "Stipulation"). WUTC v. PacifiCorp., WUTC Docket No. UE 991832, Third Supp. Order (August 9, 2000).

The Company readily acknowledges that the Stipulation limits the type of filings the Company can make through December 31, 2005, however, the Company vigorously disagrees with Movants' assertion that PacifiCorp's UE-001734 application is prohibited by the terms of the Stipulation. This perceived conflict with the terms of the Stipulation is the sole ground relied upon by Movants in their Motion to dismiss the Company's Application. The relevant sections of the Stipulation cited and relied upon by Movants are sections 1, 2, 9 and 13.[1]

2. THE APPLICATION IS NOT IN CONFLICT WITH THE STIPULATION

A. Stipulation Sections 1 and 2.

Movants claim that PacifiCorp's proposed net removal charge filing constitutes a "change to general base rates." Motion, p. 5. PacifiCorp's filing does not constitute a change in "general base rates."

Movants first assert that the Company's proposal is "a general rate change that violates Sections 1 and 2 of the Stipulation." Id. Section 1 discusses the duration (Term) and Purpose of the Stipulation Agreement; it does not define "general base rates." Section 2 establishes restrictions to changes in the Company's "general base rates," but the only rates that the 3.0% (effective September 1, 2000), the 3.0% (effective January 1, 2002), and the 1.0% (effective January 1, 2003) increases are applicable to, are the energy, demand and customer charges provided for in existing retail service tariffs.[2] (the "footnote 2 tariffs"). The Company's

[1] At Motion, p. 5, lines 15-18.

[2] Specifically, PacifiCorp Schedules 16, 17, 18, 24, 33, 36, 40, 47T, 48T, 51, 52, 53, 54 and 57.

proposed net removal charge does not increase or otherwise affect any of the footnote 2 referenced tariffs, nor do any of these tariffs govern Company removal of its facilities from a customer's property. These tariffs govern the provision of the commodity (electricity) and set forth the retail prices for levels of consumption in the form of energy and demand charges and further provide for specified customer charges. None of these charges address removal of Company facilities from a customer's property. The proposed net removal charge is not a "general base rate," and is therefore not prohibited by the filing limitations of Stipulation Section 2.

B. Stipulation Section 9.

The Movants next contend that the net removal charge filing is not permitted under Section 9(f) of the Stipulation as an "ongoing regulatory activity." Motion, p. 5. PacifiCorp disagrees. Section 9 of the Stipulation is entitled "Regulatory Actions During Rate Plan Period" and provides in relevant part:

> "The moratorium on general rate filings during the Rate Plan Period does not preclude the Company from requesting, or the Commission from approving, tariff or rate changes for the following purposes:
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> …. f. Ongoing regulatory activities, such as: New service offerings; pursuing special contracts tailored to meet individual customer needs; participation in Commission notices of inquiry, or NOIs, on electric industry issues, including the opportunity to seek related rule or tariff changes; and tariff changes associated with pass-through of credits and surcharges, such as municipal utility taxes."

Movants citation of subsection 9(f) omits the phrase "such as" thus giving the impression that the "listing" of permitted filings that follow is all-inclusive. Rather, use of the phrase "such as" is meant to introduce a non-exclusive list of examples of permissible filings, each of which constitutes an "ongoing regulatory activity."

In addition, Public Counsel contends that "Washington law requires that the general term 'ongoing regulatory activity' be interpreted in a manner consistent with its enumerated specific

terms," citing City of Seattle v. State Dept. of Labor and Indus., 136 Wash.2d 693, 699, 965 P.2d 619, 622 (1998). Motion, p. 6. What Public Counsel describes is the rule of ejusdem generis, which holds that general terms appearing with precise, specific terms shall be accorded meaning and effect only to the extent that the general terms suggest items or things similar to those designated by precise or specific terms. The problem is that the rule of ejusdem generis is a rule of statutory construction.[3] Movants provide no cites and we find no Washington authority holding that this statutory interpretation rule is properly applicable to interpretation of a contract, an all-party settlement agreement adopted by the Commission.

Moreover, even if the rule of ejusdem generis were applicable to the exercise of contract or agreement interpretation, the rule is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty. United States v. Powell, 96 S.Ct. 316, 423 U.S. 87, 46 L.Ed2d 228 (1975). Stipulation section 9(f) specifically authorizes PacifiCorp to seek Commission consideration of issues that constitute "ongoing regulatory activities." This phrase clearly is not limited to Commission-initiated investigations, or matters pending at the time of Commission adoption of the Stipulation, as is evidenced by the authorization to make "new service offerings." Movants' assertion that Stipulation section 9(f) does not contemplate "any unique or new type of customer charges" (Motion, p. 7) should clearly be rejected. Movants' contention assumes that any PacifiCorp filing constituting a "new service offering" would be offered, but no charge for performance of the service can be authorized. PacifiCorp contends that this is not what the Commission intended when it authorized new service offerings during the duration of the Stipulation. Movants' position violates the standards for considering

[3] See, City of Seattle v. State Dept. of Labor and Indus., Id., State v. Van Woerden, 93 Wash.App. 110, 967 P.2d 14 (1998), Condit v. Lewis Refrigeration Co., 101 Wash.2d 106, 676

summary dismissal requests described on page 4 of the Motion to Dismiss, in that such an interpretation does not consider the facts in a light most favorable to PacifiCorp, the nonmoving party. PacifiCorp contends that "ongoing regulatory activities" includes Commission consideration of new circumstances faced by PacifiCorp in the conduct of its day-to-day regulated business activities over which the Commission has jurisdiction. That is exactly the case with the proposed net removal costs. The Company faces new circumstances, the incurrence of costs associated with departing customers and consideration and resolution of these new circumstances is properly a matter for the Commission. Regardless of whether the Commission finds that the Company's proposed net removal charge is specifically described by any of the "such as" examples describing ongoing regulatory activities in Section 9(f), the net removal cost filing constitutes an ongoing regulatory activity.

Until the Company's recent experiences with customers departing PacifiCorp to acquire retail electric service from Columbia Rural Electric Association, Inc. ("CREA"), PacifiCorp had never fielded a Washington customer request to remove the Company's facilities from the customer's property. It is true that PacifiCorp has fielded Washington customer requests for relocating facilities, but such requests are specifically addressed under currently approved tariff provisions. See, Rule 14, section VI. And Rule 6, paragraph F. The net removal cost proposal is therefore a new service offering under Stipulation section 9(f). While some, including Movants, may feel that a proposal to assess a charge to customers departing PacifiCorp's system is not palatable, the fact remains that the Company has never had to perform this service before. Now that we are fielding requests to perform this service, we wish to address removal of facilities through a new tariff provision and assess a charge to cover our costs to provide the service.

P.2d 466 (1984), State v. Thompson, 38 Wash.2d 774, 232 P.2d 87 (1951), US v. Lacy, 119 F3d

Clearly a policy issue arises from the filing; whether to assess the cost causer, but that determination is to be made when considering the substantive merits of the filing; it does not bear on whether the service is a new offering or is otherwise permitted under the Stipulation.

C. Stipulation Section 13.

Finally, Movants argue that the proposed net removal charge is not a Schedule 300 miscellaneous charge allowed by Section 13 of the Stipulation. PacifiCorp readily acknowledges that the proposed net removal charge is not currently contained in PacifiCorp's Schedule 300, although the proposal could appropriately be located in Schedule 300, as this Schedule contains, as indicated by the Tariff Index designation, "Charges as Defined by the Rules and Special Regulations." The Company could have appropriately proposed that the net removal cost be located within Schedule 300 and such a proposal would have been authorized by Stipulation section 9(f) as an ongoing regulatory activity.

CONCLUSION

Summary dismissal requests must be viewed in a light most favorable to the non-movants, in this case PacifiCorp. The Company asks the Commission to reject Movants' narrow and illogical interpretation of the Stipulation and specifically find that PacifiCorp's proposed net removal cost filing does not entail a change in the Company's "general base rates," but is in response to new circumstances faced by the Company in its Washington retail operations, properly within the Commission's jurisdiction, and specifically constituting an ongoing regulatory activity of the Company permitted by Stipulation section 9.

DATED: June 1, 2001.

Respectfully submitted,

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