Exhibit BGM-5
Docket UE-161204
Witness: Bradley G. Mullins

BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PACIFIC POWER & LIGHT COMPANY Respondent.	)	DOCKET UE-161204

EXHIBIT BGM-5

DATA RESPONSES

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

Docket UE-161204

Wash. Utils. & Transp. Comm'n v. Pacific Power & Light Co

**RESPONSE OF PUBLIC COUNSEL TO COLUMBIA REA
DATA REQUEST NOS. 001 THROUGH 007**

Request No:	002
Directed to:	Public Counsel
Date Received:	April 28, 2017
Date Produced:	May 9, 2017
Prepared by:	Melissa Whitten
Witness:	Kathleen A. Kelly

COLUMBIA REA DATA REQUEST NO. 002 TO PUBLIC COUNSEL:
Reference KAK-1T at 45:16-18.

a. Is Ms. Kelly stating in this sentence that competitive suppliers are offering incentives to Pacific Power customers? If so, please provide all documentation and evidence Ms. Kelly relied on to support this statement. If not, please explain the relevance of the referenced statement.

b. Please explain the connection between the offering of incentives and the use of a revenue multiplier to calculate a stranded cost recovery fee. That is, why does an incentive offering justify a revenue multiplier as opposed to some other calculation of stranded costs?

RESPONSE:

a. Ms. Kelly's statement referenced in Exhibit No. KAK-1T at 45:16-18 was informed by the Company's claim that incentives had been offered. However, Ms. Kelly's statement is meant to address the possibility that any competitive supplier may offer incentives in the future.

b. The use of a revenue multiplier was proposed by the Company in Exhibit No. RBD-1T at 16:3-9. Ms. Kelly merely refers to the use of a revenue multiplier in conjunction with a cap on the stranded cost fee that would otherwise be determined by the Company's stranded cost model to protect residential customers. The multiplier is not tied to the use of an incentive, rather the multiplier is tied to the methodology that will be approved by the Commission.

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

Docket UE-161204

Wash. Utils. & Transp. Comm'n v. Pacific Power & Light Co

**RESPONSE OF PUBLIC COUNSEL TO COLUMBIA REA
DATA REQUEST NOS. 001 THROUGH 007**

Request No:	003
Directed to:	Public Counsel
Date Received:	April 28, 2017
Date Produced:	May 9, 2017
Prepared by:	Melissa Whitten
Witness:	Kathleen A. Kelly

COLUMBIA REA DATA REQUEST NO. 003 TO PUBLIC COUNSEL:
Reference KAK-1T at 53:2-3. Please provide all documentation and evidence to support Ms. Kelly's statement that neighboring non-jurisdictional providers have access to cheaper sources of wholesale electric power than Pacific Power.

RESPONSE:
Ms. Kelly's statement relied on testimony in Exhibit No. RBD-1T at 8:3-6 as follows: "However, non-regulated utilities are able to entice customers with special rates or line extension packages. They are not subject to Commission rate regulation and are also eligible to purchase power from BPA on a preference and priority basis." Ms. Kelly notes that Columbia REA does not post its rate schedule on its public web site, making it difficult to compare CREA's rates to other providers.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION STAFF
RESPONSE TO DATA REQUEST

DATE PREPARED:	May 9, 2017	WITNESS:	David Panco
DOCKET:	UE-161204	RESPONDER:	David Panco
REQUESTER:	Pacific Power	TELEPHONE:	(360) 664-1313

1. Please identity, by docket and order number, each instance in which the Commission has referred to the regulatory compact as a "metaphor".

Response:

Staff used the word "metaphor" as it is ordinarily used, meaning as "a figure of speech in which a term or phrase is applied to something to which it is not literally applicable in order to suggest a resemblance".[1] Staff's point is that state statutes, not the notion of a regulatory compact, provide the authority for Commission regulation of public service companies. The regulatory compact metaphor does not fully or accurately describe Washington law.

Please see the attached article by Scott Hempling, which informed the development of Staff's testimony.

[1] THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE at 1207 (2d. ed. 1987).

http://www.scotthemplinglaw.com/essays/what-regulatory-compact

What "Regulatory Compact"?

March 2015

I recently came across this quote:

> There is ... a long-standing, but unwritten, rule that governs cost recovery and lies at the heart of establishing regulated prices. This rule is known as the regulatory compact. Under the regulatory compact, the regulator grants the company a protected monopoly, essentially a franchise, for the sale and distribution of electricity or natural gas to customers in its defined service territory. In return, the company commits to supply the full quantities demanded by those customers at a price calculated to cover all operating costs plus a "reasonable" return on the capital invested in the enterprise.[1]

This is the formula fed to regulatory newcomers: smooth, sweet and easily digested. But it lacks the essential nutrients. As commonly misused, the phrase "regulatory compact" refers to the regulatory treatment of shareholder investment under the statutory "just and reasonable" standard and the Fifth Amendment's Takings Clause in the U.S. Constitution.[2] There is a legal relationship between utility and regulator, and between utility investment and regulator-set rates. But that legal relationship is not "long-standing," it is not "unwritten," and it is not a "rule." To call a "compact" what the Supreme Court has described as "essentially ... ad hoc and factual" is artificially narrow, incumbent-protective, and legally wrong.

Artificially Narrow

Those who cite the "regulatory compact" talk only of an exchange of service for money. The real relationship is richer. It requires the utility to satisfy the regulator's standards for performance at "lowest feasible cost,"[3] to use "all available cost savings opportunities"[4]; and to pursue its customers' legitimate interests free of conflicting business objectives. In return, the regulator must establish compensation that is commensurate with the utility's performance. But there is more. To set standards for performance and ensure compliance, the regulator must have the resources, expertise and political support that is at least the equal of the utility's. And for this relationship to work to each party's benefit, it must include a mutual commitment not to use the political process to undermine either the utility's or the regulator's ability to do their jobs. Those who talk of a "regulatory compact" leave most of these factors out.

Incumbent-Protective

Utilities often cite the "compact" self-referentially, as if it is their compact, created solely to support their specific revenue needs and their specific business success. (As in, "Utility of the Future" rather than "Customer Needs of the Future.") But the legal relationship just described transcends any particular utility. Its foundation is a franchise, of which the incumbent utility is but a temporary grantee, one whose rights depend on performance. The utility has no lifetime lock on the franchise (see "Regulatory Capture I: Is It Real?"); nor is it like a New York City taxi medallion—bought from government, resold for profit. The franchise is a right to be earned, not demanded.

Legally Wrong

"Regulatory compact" misstates the constitutional relationship between investors and regulators, and between investment and rates. There is no "compact" for a simple legal fact: The constitutional protection of shareholder property is far from airtight. In the landmark case of Duquesne Light Co. v. Barasch, Pennsylvania utilities argued that the Takings Clause (as applied to the states through the Fourteenth Amendment's Due Process Clause) guarantees full rate recovery of all prudent investment. The Supreme Court slapped them down:

> We think that the adoption of any such rule would signal a retreat from 45 years of decisional law in this area which would be as unwarranted as it would be unsettling. Hope clearly held that "the Commission was not bound to the use of any single formula or combination of formulae in determining rates." ... The designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors. The Constitution within broad limits leaves the States free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public.[5]

The case involved a nuclear plant whose construction Duquesne stopped midway. The Pennsylvania Commission had found that Duquesne's decisions both to begin and to stop constructing were prudent. But the Commission disallowed recovery of Duquesne's plant costs based on a statute that limited cost recovery to investment that was "used and useful." The Court rejected the utility's argument that the Constitution required recovery.

This result surprised no non-wishful thinker, because in 1944 the Supreme Court had held that all that matters is the "end result,"[6] and in 1945 declared:

> The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces.[7]

Given this precedent, those who talk of "the regulatory compact" are putting lipstick on the unpredictable pig of Takings jurisprudence—jurisprudence which, unlike a real compact, is "essentially ... ad hoc and factual."[8]

These foundational cases—Duquesne, Hope, Jersey Central, Kaiser Aetna and Market Street Railway—do not create a "compact." They do not create what Lesser and Giacchino call a "long-standing, but unwritten rule that governs cost recovery." What is "longstanding" is not a "rule" but a principle: Government must compensate shareholders consistently with the legitimate shareholder expectations government creates.[9] In creating those expectations, government is not bound by a "compact"; it is bound by the public interest. To promote the public interest, regulators set standards for performance, then compensate based on performance. And regulators can assign risk (including, as in Duquesne, the risk of lousy luck borne by all businesses), then compensate based on the risk thus assigned.

* * *

To define the "regulatory compact" as "Government gives us a franchise, we sell service, you pay for service" misses all these points. The bottom line? Repetition does not create truth. There is no "regulatory compact." As T.S. Eliot wrote:

Words strain,
Crack and sometimes, break, under the burden,
Under the tension, slip, slide, perish,
Decay with imprecision, will not stay in place,
Will not stay still. . . .[10]

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[1] Lesser and Giacchino, Fundamentals of Energy Regulation (2007) at p.43 (footnote omitted).

[2] The Fifth Amendment provides, among other things, that "nor shall private property be taken for public use, without just compensation."

[3] Potomac Electric Power Co. v. Public Service Commission, 661 A.2d 131, 137 (D.C. 1995).

[4] Midwestern Gas Transmission Co. v. East. Tenn. Natural Gas Co., 36 FPC 61, *28 (1966), aff'd sub nom. Midwestern Gas Transmission Co. v. Federal Power Commission, 388 F.2d 444 (7th Cir. 1968).

[5] Duquesne Light Co. v. Barasch, 488 U.S. 299, 315-16 (1989) (citations, footnotes omitted) (referring to Hope Natural Gas v. Fed. Power Comm'n, 320 U.S. 591 (1944)).

[6] FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944).

[7] Market Street Railway Co. v. Railroad Commission of California, 324 U.S. 548, 566 (1945).

[8] Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168 (D.C. Cir. 1987) (Starr, J., concurring) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)). These concepts are discussed in detail in my Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction (American Bar Association 2013) at Chapter 6.

[9] Penn Central Transportation Company v. New York, 438 U.S. 104, 124 (1978) (listing factors involved in the Court's Takings analysis, including the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations").

[10] T.S. Eliot, "Burnt Norton" from Four Quartets (1943).

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RESPONSE TO DATA REQUEST

DATE PREPARED:	May 9, 2017	WITNESS:	David Panco
DOCKET:	UE-161204	RESPONDER:	David Panco
REQUESTER:	Pacific Power	TELEPHONE:	(360) 664-1313

5. Please identify each instance where an electric service provider has sought Commission approval of a "banded rate tariff' in accordance with RCW 80.28.075 and WAC 480-80-112. Please provide the corresponding docket number, order number(s) as well as all exhibit numbers for testimony concerning the proposed banded rates.

Response:

Staff did not research the use of banded rates by electrical companies in Washington when preparing its testimony. Staff simply cited the statute and rule authorizing banded rates to note that Washington law anticipates the potential for competition in electricity services and to rebut Mr. Dalley's contention that Pacific Power has no options to compete with entities like CREA.

With that said, Staff is aware of several dockets where banded rates were discussed. In UE-141505, PSE proposed a banded tariff rate for renewable energy credits, but later withdrew that proposal.[2] The Avista Corporation expressed interest in banded rates during an open meeting for use in its electric vehicle charging pilot program, although nothing has yet come of that interest.[3] Several utilities noted the flexibility afforded by banded rate provisions in comments submitted in UE-160799, although, again, nothing has yet come of those statements.[4]

[2] *See generally Wash. Utils. & Transp. Comm'n v. Puget Sound Energy*, Docket No. 141505, Order 01, at ¶¶1-15 (Oct. 16, 2014); *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy*, Docket No. 141505, Order 02, at ¶¶ 1-12 (Jan. 29, 2015).
[3] *Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Docket No. 160082, Order 01, at ¶ 21 n. 10 (April 28, 2016).
[4] *Rulemaking to consider policy issues related to implementation of RCW 80.28.360, electric vehicle supply equipment*, Docket No. 160799, Comments of Avista Utilities on Draft Policy Interpretive Statement, at 4 (Mar. 29, 2017); *Rulemaking to consider policy issues related to implementation of RCW 80.28.360, electric vehicle supply equipment*, Docket No. 160799, Comments of Puget Sound Energy on electric vehicle supply equipment, at 3 (Nov. 23, 2016).

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6. For each of the banded rate tariffs identified in response to Data Request 5 above, please set forth how the rates were developed. Additionally, please set forth the factors considered by the Commission in determining whether the rates are fair, just and reasonable.

Response:

Banded rates were not implemented in the instances noted above, and Staff does not know how PSE designed the rates proposed in docket UE-141505.

Again, Staff has not researched banded rates, nor what criteria the Commission would use to determine what would make those rates fair, just, and reasonable. Staff does note, however, that WAC 480-80-112 requires that any banded rate filing include a statement explaining the decision to apply a banded rate tariff, a verifiable cost-of-service study showing that the banded rates cover the costs of supplying the service and a contribution to fixed costs, and information about the effect on revenue of the proposed rate band and information about the effect on revenue of the current or proposed rate. Those requirements appear aimed at providing the Commission with information necessary to determine whether banded rates are fair, just, reasonable, and sufficient.

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10. As contemplated by the Staff, would the rates contained in the Company's current tariffs be considered the floor or the ceiling within a banded rate structure? What are the foreseeable ramifications under both scenarios (floor – ceiling)?

Response:

Again, Staff is not suggesting any particular rate design characteristics, and only notes that the provisions allowing the use of banded rates should a Pacific Power desire to use such rates to address competition. It would be incumbent on the Company to design, develop and propose any banded rate model in a way that complies with RCW 80.28.075 and WAC 480-80-112.

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12. As contemplated by the Staff, would it be fair, just and reasonable for the Company to charge banded rates to all commercial and industrial customers? Would the Company have the unilateral discretion to apply a rate within the band to customers in that class?

Response:

Staff has not contemplated any particular banded rate program. Rather than attempting to define the parameters of how and when banded rates can be used, Staff has noted the use of banded rates as an alternative that the company could develop in responding to competition so that the company can retain a portion of that customer's revenue. If the company develops a banded rate proposal, Staff will review it and respond. The Commission will then determine the public interest of any such proposals.