BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WALLA WALLA COUNTRY CLUB,	)	
	)	
Complainant,	)	
	)	DOCKET UE-143932
v.	)	
	)	
PACIFIC POWER & LIGHT COMPANY,	)	
	)	
Respondent.	)	
	)	
	)	

THE WALLA WALLA COUNTRY CLUB'S CONFIDENTIAL ANSWER TO PACIFIC POWER'S PETITION FOR ADMINISTRATIVE REVIEW

March 8, 2016

(REDACTED VERSION)

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. DISCUSSION 2

A. The Record Establishes that No Safety or Operational Reasons Exist to Justify the Removal of Underground Facilities at Issue 2

1. Pacific Power Continues to Misinterpret and Improperly Apply the Net Removal Tariff 3

2. The Record Supports a Finding that "There is No Co-Location of Facilities" 5

a. The Company's Photographic Exhibits Do Not Demonstrate Relevant Facilities Duplication 7

b. Club Testimony Does Not Support the Company's Conclusions 8

3. Empty Facilities on Club Property Pose No Safety Risks . 9

4. The Company's Consistent Practice of Abandoning Conduit Undermines Alleged Safety Concerns 12

5. Initial Order Findings Related to the NESC Are Sound and Supported by the Record 15

a. Neither NESC nor WUTC Rules Require Continued Facilities Maintenance after Disconnection 16

b. The Washington Administrative Code Does Not Confer NESC Obligations to the Club 20

c. Pacific Power Would Have No Continuing Liability under a Facilities Transfer Scenario 21

B. The Company's Emphasis on Regulatory Takings Arguments Is Misplaced and Mischaracterizes Record Evidence 23

1. Mr. Marne Contemplated Simple Abandonment or a Voluntary Transfer 24

2. Mr. Mullins Did Not Offer Legal or Regulatory Takings Testimony 26

3. Emphasis on Regulatory Takings is an Improper Collateral Attack 27

C. Pacific Power's Condemnation Claim Is Without Merit 31

1. Judicial Determinations Cannot Condemn Property 32

2. Pacific Power Does Not Assert Any Interest in Real Property 33

3. Pacific Power Does Not Have Any Post-Termination Rights to the Property (used PVC and Concrete) that is at Issue 34

4. Property Cannot Be Condemned For Private Use 36

5. Business Losses Are Not Compensable in Condemnation36

D. Even if a Condemnation Analysis was Appropriate, Nothing About the Initial Order Constitutes a Taking 38

E. The Company's Appraisal Report Has No Probative Value.... 40

F. Pacific Power Has No Basis to File a Reply 45

G. Oral Argument Is Unnecessary and the Company Failed to Support Its Request 46

V. CONCLUSION 47

TABLE OF AUTHORITIES

Cases Page

Duquesne Light Co. v. Barash, 488 U.S. 299 (1989) 36, 39

Lingle v. Chevron U.S.A., 544 U.S. 528 (2005). 38, 39

Federal Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591 (1944).......... 40

Market Street R. Co. v. Railroad Comm'n, 324 U.S. 548 (1944) 40

Manufactured Hous. Cmtys. v. State, 142 Wash.2d 347 (2000). 33

State v. Wilson, 6 Wash. App. 443 (1972) 37

Ham, Yearsley & Ryrie v. Northern Pac. Ry. Co.,107 Wash. 378 (1919)... 37

Donaldson v. Greenwood, 40 Wash.2d 238 (1952)...........................37

Guimont v. Clark, 121 Wn.2d 586 (1993)..................................32, 33

Matthews v. Eldridge, 424 U.S. 319 (1976) 32

Petition of Puget Sound Power & Light Co., 28 Wn. App. 615 (1981) 32

Hanna v. Allen., 153 Wn. App. 485 (1929)... 33

Healy Lumber Co. v. Morris., 33 Wn. 490 (1903) 33

State ex rel. Washington State Convention and Trade Center v. Evans., 136 Wn.2d 811 (1998) 36

State v. McDonald, 98 Wn.2d 521 (1983)... 37

Fix v. City of Tacoma, 171 Wn. 196 (1933)... 37

City of Des Moines v. Hemenway, 73 Wn.2d 130 (1968). 31

Administrative Orders

Re Review of: Unbundled Loop and Switching Rates; the Deaveraged Zone Rate Structure; and Unbundled Network Elements, Transport, and Termination (Recurring Costs), Docket UT-023003, Twenty-Fourth Suppl. Order (Feb. 9, 2005) 39, 40

WUTC v. PacifiCorp, Docket UE-001734, Eighth Suppl. Order (Nov. 27, 2002) 4, 29

WUTC v. Pacific Power, Dockets UE-140762 *et al.*, Order 07 (Dec. 5, 2014) 6, 18

WUTC v. Pacific Power, Dockets UE-140762 *et al.*, Order 08 (Mar. 25, 2015) 12, 41

WUTC v. PacifiCorp, Docket UE-130043, Order 04 (July 29, 2013) 30

Statutes and Rules

WAC § 480-07-825 .... 1, 6, 13, 45, 46, 47

WAC § 296-45-045 .... 20, 22

RCW § 80.28.080 29

RCW § 80.04.130 .... 4, 29

RCW § 80.04.250 44

Pacific Power Tariff WN-U75, Rule 1 .... 34, 35

Pacific Power Tariff WN-U75, Rule 4 .... 16, 19, 20, 28, 30

Pacific Power Tariff WN-U75, Rule 6 .... 3, 4, 23, 27, 28, 30, 31, 32, 33

I. INTRODUCTION

1 In response to Pacific Power & Light Company's ("Pacific Power" or the "Company") Petition for Administrative Review of the Initial Order ("Petition"), the Walla Walla Country Club ("WWCC" or the "Club") hereby submits its Answer to Pacific Power's Petition ("Answer"). The Club requests that the Washington Utilities and Transportation Commission ("WUTC" or the "Commission"): 1) issue a final order, adopting the initial order of the Administrative Law Judge ("ALJ");[1] and 2) deny the Company's request for oral argument, as unsupported in the Petition.

2 The Company's direct challenges to the initial order are refuted by the pleadings and record in this proceeding, which the Commission will consider before issuing a final order.[2] In this regard, the ALJ's initial order is reasonable and fully supported. Beyond this, WWCC submits that the Petition largely constitutes a collateral attack on the initial order, focusing on takings and condemnation arguments that implicate Constitutional issues receiving little or no treatment over the course of the proceeding. In any event, the Company's takings and condemnation arguments are without merit and should not prevent an adoption of the initial order. Finally, the Company did not even attempt to explain why oral argument is necessary in the Petition, justifying a rejection of its oral argument request.

1/ Although the WWCC does not necessarily agree with all portions of the ALJ's initial order, the Club does not challenge any portions of the initial order in the Answer. Accordingly, Pacific Power has no right to reply to the Answer. WAC §§ 480-07-825(4)(c), (5)(a).

2/ WAC § 480-07-825(9).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

II. DISCUSSION

3 Pacific Power now contends that "the Commission faces two issues" in this proceeding.[3] Accordingly, the Answer addresses the following controversies asserted in the Petition: 1) "whether safety or operational reasons permit Pacific Power to remove its underground facilities from the grounds of the Walla Walla Country Club"; and 2) "[i]f the Commission concludes no safety or operational reason to remove exists," whether "the Commission would be authorizing a regulatory taking of Pacific Power's property without just compensation."[4]

A. The Record Establishes that No Safety or Operational Reasons Exist to Justify the Removal of Underground Facilities at Issue

4 The controversy in this proceeding surrounds the propriety of abandoning "empty conduits and vaults" in connection with the Club's longstanding permanent disconnection request under the terms of the Company's Net Removal Tariff.[5] Specifically, the facilities at issue are "small concrete boxes located in several places on Club property" and "two segments of 4-inch PVC piping."[6] As correctly observed by the ALJ, in response to Pacific Power concerns over facilities duplication, "there is no co-location of facilities proposed here."[7] Indeed, the "isolated, empty conduits and vaults [are] situated on private property in a known location."[8] Based on these facts, and the Company's own acknowledgment of "more than 20 instances when facilities have been abandoned or transferred in connection with a permanent disconnection," the ALJ determined: "The Company's past practice, coupled with its repeated

[3] Petition at ¶ 2.
[4] Id. at ¶¶ 2-3.
[5] Order 03 at ¶ 15.
[6] Id. at ¶ 6.
[7] Id. at ¶ 5.
[8] Id. at ¶ 21.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

offers to leave the conduit and vaults in place upon payment for their transfer, *clearly establishes* there are no safety or operational reasons to remove them."[9]

5 The Club asserts that the initial order properly weighed relevant evidence in concluding that "none of [Pacific Power's] claims demonstrate that safety or operational reasons require the removal of the empty concrete vaults and plastic conduit."[10] Notwithstanding, while the Petition essentially does nothing more than reiterate the same arguments stated in briefing and hearing, and duly rejected by the ALJ, the Company maintains that "evidence on record and the governing authorities mandate" underground facility removal.[11] As explained in the following sections of the Answer, the ALJ's determinations are fully supported by "evidence on record and the governing authorities."

1. Pacific Power Continues to Misinterpret and Improperly Apply the Net Removal Tariff

6 The Company seeks administrative review on the ALJ's finding that Pacific Power misinterpreted the Net Removal Tariff.[12] The initial order notes that Rule 6 of the Net Removal Tariff[13] provides: "When Customer requests Permanent Disconnection of Company's facilities, Customer shall pay to Company the actual cost for removal less salvage of *only* those facilities that need to be removed for safety or operational reasons, and only if those facilities were necessary to provide service to Customer."[14] The ALJ acknowledged that Pacific Power now interprets this rule to positively "require" removal of all facilities upon any permanent

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9/ Id. at ¶ 9 (emphasis added).
10/ Id. at ¶ 18.
11/ Petition at ¶ 2.
12/ Id. at ¶ 5.
13/ Pacific Power Tariff WN-U75, Rule 6 ("Rule 6").
14/ Order 03 at ¶ 16 (emphasis added). The Club has repeatedly agreed to pay for meter, wiring and related hardware removal. See Opening Brief of WWCC at ¶ 38, n. 78.

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

disconnection request, "without exception," due to the Company's new belief that "any permanent disconnection has safety or operational concerns that would necessitate removal of facilities."[15]

7 The Petition's repeated assertion of the Company's new position is irrelevant, however, for the reasons explained by the ALJ when finding that "Rule 6 is not reasonably susceptible to Pacific Power's interpretation."[16] That is, "[t]he phrase 'safety or operational reasons' clearly offers guidance to determine which of the Company's facilities may be removed upon permanent disconnection. The inclusion of the term 'only' necessarily means that those reasons do not always apply."[17] Although the Company now contends that removal is always required, the ALJ correctly states that the Commission-approved terms of the Net Removal Tariff are the governing authority in this dispute, not the Company's contrary interpretation: "Consistent with its duty to regulate in the public interest, the Commission must give effect to all of the language in the Company's tariff."[18]

8 In briefing, the Club pointed out that, when originally approving the Net Removal Tariff, the Commission expressly stated that "[t]ariffs cannot be changed except by following statutory notice procedures. *RCW 80.04.130.*"[19] Hence, barring such a statutorily prescribed change to the terms of the presently constituted Net Removal Tariff, the ALJ properly determined that "Pacific Power must demonstrate that safety or operational reasons require that the Company remove its facilities from the Club's property as part of any service

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[15] Id. (quoting Dalley, TR 34:22-35:3).
[16] Id.
[17] Id. at ¶ 17.
[18] Id.
[19] Opening Brief of WWCC at ¶ 28 & n.58 (quoting WUTC v. PacifiCorp, Docket UE-001734, Eighth Suppl. Order at ¶ 56, n.3 (Nov. 27, 2002)).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

disconnection."[20] Since "Pacific Power failed to demonstrate that safety or operational reasons exist that require the removal of the empty underground conduit and vaults at issue in this proceeding,"[21] the ALJ's initial order should be affirmed.

2. The Record Supports a Finding that "There is No Co-Location of Facilities"

9 Pacific Power seeks review of the ALJ's finding that "there is no co-location of facilities" relevant to this proceeding. [22] The record contains numerous alleged examples in which the Company claims that Columbia Rural Electric Association ("Columbia REA") co-located or duplicated its facilities near Pacific Power's; however, none of these examples is relevant to the Club or the "isolated, empty conduits and vaults situated on private [WWCC] property" at issue in this proceeding.[23] Consequently, the ALJ found Pacific Power's "attempt to correlate these examples to the facilities at issue here … misplaced," affirming that "this docket relates only to the Club's request for permanent disconnection and is not the proper forum to address" the Company's "broader concerns about facility co-location" relative to Columbia REA.[24]

10 Ironically, the Petition provides support for the ALJ's conclusion. The Company states that "[t]he vast majority of Pacific Power's safety concerns arise from duplicate facilities,"[25] and concedes the irrelevance of photographs purportedly depicting such safety concerns in the record: "Obviously, a number of the photographs do not depict conditions

[20] Order 03 at ¶ 18.
[21] Id. at ¶ 32.
[22] Id. at ¶ 5; Petition at ¶ 5.
[23] Order 03 at ¶ 21.
[24] Id.
[25] Petition at ¶ 5.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

existing on the grounds of the Walla Walla Country Club but were simply provided for context."[26/]

11 Nevertheless, on the basis of misleadingly presented portions of testimony and a single photograph, i.e., the sixth photograph contained in Exhibit No. WGC-2 of Mr. William G. Clemens, Pacific Power goes on to make the following conclusory assertion: "Obviously, there are duplicate underground facilities throughout the Walla Walla Country Club grounds …."[27/] On brief, the Club thoroughly addressed the accuracy and reliability of the purported duplicate facility evidence upon which the Company relies[28/]—positions which Pacific Power completely ignores in the Petition.

12 Indeed, in order to emphasize the fact that the Company has been fully apprised of such evidence for over two months, the Club also cites to its briefs when referencing record evidence below. This should demonstrate that the Company has no basis to petition for leave of the Commission to reply to these issues, since this Answer does not raise any new matters not reasonably anticipated by Pacific Power or which necessitate a reply.[29/]

26/ Id. at ¶ 11.
27/ Id. at ¶ 15
28/ E.g., Opening Brief of WWCC at ¶¶ 33-39; Reply Brief of WWCC at ¶¶ 32-37.
29/ WAC § 480-07-825(5)(b). Cf. WUTC v. Pacific Power, Dockets UE-140762 *et al.*, Order 07 at ¶ 3 (Dec. 5, 2014) (rejecting a party filing after finding it "does not satisfactorily respond to the Company's explanation"). The Club submits that any Company request for a reply to the Answer should similarly be considered in light of Pacific Power's tactical election to ignore or disregard Club positions and evidence raised in this proceeding during the briefing stage.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

a. The Company's Photographic Exhibits Do Not Demonstrate Relevant Facilities Duplication

13 The Company claims that Mr. Clemens' sixth photograph "was taken on the grounds of the Walla Walla Country Club" and depicted on a marked up aerial photograph submitted as Cross Exhibit No. JCT-24CX.[30] There are several flaws with this claim.

14 First, the Company does not explain Mr. Clemens' inconsistent testimony related to facilities co-location or duplication on WWCC property. At hearing, Mr. Clemens testified that Columbia REA "only built *around the perimeter* of the Country Club. They haven't actually installed the lines into the actual facilities where the meters and the transformers could be."[31] Then, addressing any potential ambiguity as to what was meant by "around the perimeter," Mr. Clemens testified that "current duplication is *outside* the Country Club property."[32]

15 Next, Mr. Clemens expressly testified that the sole photograph taken "around the perimeter" of Club property, allegedly demonstrating a duplicate or co-located facilities safety concern, related to an incident occurring "early in 2012 ... either January or February."[33] As the record demonstrates, the Club and Columbia REA did not even enter into electric service discussions until "the early summer of 2012."[34] This alleged safety incident clearly occurred several months prior to any of the relevant facts at issue in the Club's complaint.[35] As the ALJ properly concluded, "this docket relates only to the Club's request for permanent disconnection

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[30] Petition at ¶ 13.
[31] Reply Brief of WWCC at ¶ 32 (quoting Clemens, TR 100:3-10 (emphasis added)).
[32] Id. at ¶ 33 (quoting Clemens, TR 101:6-7) (emphasis added).
[33] Id. at ¶ 34 (quoting Clemens, TR 111:23-112:6).
[34] Id. (quoting Exh. No. JCT-1T at 4:18-19).
[35] See also id. at ¶ 36 & n.63 (demonstrating further the chronological inconsistencies in the Company's attempts to connect alleged Columbia REA actions with facts relevant to this proceeding).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

and is not the proper forum to address" the Company's broader concerns related to Columbia REA.[36]

16 Finally, the Company's reliance upon the marked up aerial photograph, Exhibit No. JCT-24CX, should be afforded no evidentiary weight. As the Club has pointed out, the exhibit contains a full and total disclaimer as to its accuracy: "PacifiCorp makes *no representations* or warranties *as to the accuracy*, completeness or fitness for a particular purpose with respect to the information contained in this map."[37] But, even if the exhibit did not already disclaim its own reliability, Club witness Mr. Bradley G. Mullins explicitly testified as to probable inaccuracies of the map in regard to the exhibit markings, thereby confirming the Company's disclaimer.[38]

b. Club Testimony Does Not Support the Company's Conclusions

17 Pacific Power selectively and misleadingly quotes from the testimony of Mr. Jeffrey C. Thomas, Club General Manager, in support of its claim that the ALJ made an erroneous finding in regard to duplicate facilities on WWCC property.[39] Once more, although the Club thoroughly addressed this matter in briefing, the Company has not so much as attempted to address conflicting evidence in its Petition.

18 Mr. Thomas testified about the actual scope of the "completed" work which Columbia REA performed on Club property, i.e., "[t]hey mainly bored on Club property."[40] Moreover, via a cross exhibit sponsored by the Company, the record contains Club statements concerning an August 27, 2015 discussion between Mr. Mullins and a Columbia REA

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[36] Order 03 at ¶ 21.
[37] Opening Brief of WWCC at ¶ 39, n.79 (quoting Exh. No. JCT-24CX (emphasis added)).
[38] Id. at ¶ 39 & n.80 (including numerous testimonial quotes from the hearing).
[39] Petition at ¶ 14.
[40] Reply Brief of WWCC at ¶ 36 (quoting Thomas, TR 146:18-147:2).

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

representative "regarding projected costs, in the event that Columbia [REA] was to use Pacific Power facilities, rather than installing new facilities at the Club."[41/] Such discussion about "installing new facilities at the Club" would make no sense if, as the Company's misleading and incomplete evidentiary presentation would suggest, Columbia REA had truly completed all work on Club property to supply "everything it needs to immediately service the Club."[42/]

3. Empty Facilities on Club Property Pose No Safety Risks

19 The Company misstates the initial order in requesting administrative review of a "finding that empty and duplicative or 'co-located' underground conduit and vaults ... do not present safety risks."[43/] As previously noted, the ALJ explicitly found that, "[a]lthough Pacific Power raised concerns in testimony and at hearing about duplicate facilities, there is *no* co-location of facilities proposed here."[44/] Thus, it is improper for the Company to challenge a finding regarding duplicative facilities on Club property when the initial order contains no such finding.

20 But, even if there were "empty *and* duplicative" conduit or vaults to be found on WWCC property, there would still be no safety risk sufficient to justify facilities removal under the Net Removal Tariff. As with other matters being challenged, the Club directly addressed this issue by citation to record evidence on brief, without any attempt on the Company's part to counter the Club's position in the Petition.

41/ Id. at ¶ 37 (quoting Exh. No. BGM-15CX at 2 (Club Second Suppl. Response to Pacific Power Data Request 58)). Accord id. (citing additional record evidence demonstrating that Columbia REA had not even completed all boring work necessary to service the Club, never mind the installation of facilities).

42/ Petition at ¶ 14.

43/ Id. at ¶ 5.

44/ Order 03 at ¶ 5 (emphasis added).

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

21 In initial briefing, the Company presented a three-part hypothetical scenario in order to suggest that "serious if not fatal injury" may occur in connection with any empty conduit abandoned on Club property.[45/] Relying upon the testimony of Mr. David J. Marne—a nationally recognized expert on the National Electric Safety Code ("NESC"), author of *McGraw-Hill's NESC Handbook*, and a member of several NESC subcommittees, including subcommittees on "Underground Lines" and "Interpretations"[46/]—the Club demonstrated the Company's scenario to be "a flawed syllogism" that "would never occur in the real world."[47/] Mr. Marne not only testified in this proceeding that "it is an accepted good practice to abandon empty, underground conduit,"[48/] but further explained why the Company's safety concerns related to any future "locate" of empty conduit were entirely unfounded: "You *can't* locate an empty plastic conduit. You locate the conduit with wires in it. That's the electronic locating system."[49/]

22 After reviewing the Company's hypothetical safety concerns related to electronic location of empty conduit, the ALJ concluded: "The Club correctly characterizes this scenario as implausible."[50/] In fact, the initial order identifies three separate bases for rejecting the Company's implausible scenario, including that "Mr. Clemens admitted at hearing that the Company's hypothetical scenario has never occurred in his 30 years of experience."[51/]

45/ Reply Brief of WWCC at ¶ 29 (quoting Initial Brief of Pacific Power at ¶ 17).
46/ Opening Brief of WWCC at ¶ 32 (citing Exh. No. DJM-2).
47/ Reply Brief of WWCC at ¶ 30.
48/ Opening Brief of WWCC at ¶ 32 (citing Exh. No. DJM-5T at 2:4-6).
49/ Reply Brief of WWCC at ¶ 30 (quoting Marne, TR 180:18-20) (emphasis added).
50/ Order 03 at ¶ 19.
51/ Id. at ¶ 19 (citing Clemens, TR 95:18-22).

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

23 While Pacific Power now alleges that it "is virtually irrelevant" that Mr. Clemens is unaware of the Company's hypothetical scenario having ever occurred,[52] this statement is unpersuasive on multiple levels. On the one hand, if the Company's safety concerns related to empty conduit were "very possible," as the Petition claims,[53] the Commission could reasonably expect that an electric safety expert would have encountered the Company's scenario on numerous occasions over the course of several decades of service. To this end, there has not been any shortage of opportunity for Pacific Power's hypothetical scenario to have occurred,[54] given the ALJ's observation that the record shows that "Pacific Power has consistently abandoned underground conduit in place, as demonstrated by the list it produced of 21 instances between 2003 and 2013 when it abandoned underground facilities in connection with permanent disconnections."[55]

24 Further, the Company's claim that the testimony of its witness is "virtually irrelevant" highlights a critical issue in regard to the weight that the Commission should attach to any of the Company's alleged safety concerns. As already noted, the Club produced a nationally recognized, actively practicing, and thoroughly credentialed witness on electric safety issues that are vitally germane to this proceeding, in the person of Mr. Marne. In contrast, Company witness Mr. R. Bryce Dalley is "admittedly not an expert on the NESC,"[56] and Mr. Clemens testified to being neither a safety instructor nor an engineer, with the majority of his 30-year tenure performed in a customer service and public relations capacity.[57]

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[52] Petition at ¶ 29.
[53] Id.
[54] Id.
[55] Order 03 at ¶ 20 (citing Dalley, Exh. No. RBD-17 (Pacific Power's Response to Bench Request No. 1)).
[56] Id. at ¶ 22. See also Opening Brief of WWCC at ¶ 44 (quoting Dalley, TR 56:12-13 ("I'm not an expert on the NESC")).
[57] Opening Brief of WWCC at ¶ 33 (citing Clemens, TR 94:7-25).

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

25 Thus, Pacific Power witnesses should not be given equal weighting on safety concerns in comparison to Mr. Marne—a conclusion in full accord with the Commission's reasoning in the Company's recent general rate case, when the balance of probative experience and expertise was reversed.[58] But, to the extent that the Company would have the Commission attach probative weight to Mr. Clemens' testimony on safety issues, Pacific Power cannot have it both ways in alleging Mr. Clemens' testimony "irrelevant" when it actually contradicts the Company's "implausible" empty conduit hypothetical.

26 Finally, the ALJ found the Company's empty conduit hypothetical to be "implausible" because "the location of the empty facilities is known; the Club is well aware of their position on its property."[59] In response, the Company argues that it is a "possibility, if not probability" that WWCC "will later lack institutional knowledge of the location of the facilities."[60] Here again, however, the Company cannot have it both ways; for its own part, the Company boasts that "Pacific Power is meticulous in tracking and maintaining its facilities."[61] Yet, the Company cites to no evidence in the record that would support a conclusion that Pacific Power will meticulously retain its institutional knowledge of facilities location, while noting it may be a "probability" that the Club will not.

4. The Company's Consistent Practice of Abandoning Conduit Undermines Alleged Safety Concerns

27 The record supports the ALJ's determination that "[t]he Company's own practices further undermine its argument" in regard to safety concerns that would purportedly follow upon

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[58] Dockets UE-140762 *et al.*, Order 08 at ¶¶ 102-104 (Mar. 25, 2015) (finding that "[t]he weight of evidence" on a plant operations issue "favors the Company's argument" after noting that the Company's witness had "28 years of experience in plant operations").

[59] Order 03 at ¶ 19.

[60] Petition at ¶ 27.

[61] Id. at ¶ 29.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

leaving the Club's empty underground facilities in place after permanent disconnection.[62] There can be no rational controversy that, as observed by the ALJ, "Pacific Power has consistently abandoned underground conduit in place, as demonstrated by the list it produced of 21 instances between 2003 and 2013 when it abandoned underground facilities in connection with permanent disconnections."[63] Nevertheless, Pacific Power has asked the Commission to review the ALJ's finding that, in recognition of this longstanding abandonment custom, "[t]he Company cannot reasonably claim that this is an unsafe practice."[64]

28 As an initial matter, the Club has found it difficult to determine how Pacific Power even supports this particular challenge to the initial order, due to the Company's election not to "separately state and number every contention" in its Petition,[65] or then to align each numbered contention in an unambiguous fashion to the Petition's "Points and Authorities" section.[66] In any event, the Club firmly agrees with the ALJ that, in light of repeated instances of underground facility abandonment spanning more than a decade, "the Company's argument that the empty conduits and vaults pose a safety risk is unpersuasive."[67] Elsewhere in the initial order, the ALJ states: "The Company's past practice, *coupled with its repeated offers to leave*

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[62] Order 03 at ¶ 20.
[63] Id. (citing Dalley, Exh. No. RBD-17 (Pacific Power's Response to Bench Request No. 1)).
[64] Id.; Petition at ¶ 5 (rephrasing the ALJ's finding as "cannot reasonably claim that potentially untracked and unmaintained underground facilities do not pose a safety risk").
[65] WAC § 480-07-825(3).
[66] Cf. Pacific Power's Response to the Walla Walla Country Club's Motion to Reject Petition at ¶ 12 (Feb. 17, 2016). While the Company has stated that the Club "is in no way prejudiced by the form of Pacific Power's Petition," the Company's disparate bullet point-to-unnumbered "Points and Authorities" format seems to thwart the organizational purpose behind the "separately" numbered contention requirement of the WUTC rule.
[67] Order 03 at ¶ 20.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

the conduit and vaults in place upon payment for their transfer, clearly establishes there are no safety or operational reasons to remove them."[68/]

29 At the hearing, Mr. Dalley acknowledged that abandonment has been an express option for WWCC facilities.[69/] The fact that the Company has repeatedly offered to leave "isolated, empty" underground facilities in place on WWCC property—whether through simple abandonment or formal transfer, in lieu of removal—should more than adequately answer the question of whether such a practice is safe.

30 Pacific Power implemented a new policy, during the pendency of this proceeding, which now prohibits the sale and transfer of conduit and underground vaults in lieu of removal.[70/] The Club submits that both the timing and substance of the Company's policy change are based on litigation strategy, not viable safety considerations.

31 In contrast, the Club provided on-point expert testimony that "it is an accepted good practice to abandon empty, underground conduit, especially when transferred upon permanent disconnection."[71/] Far from posing a safety hazard that "can have dire consequences,"[72/] Mr. Marne testifies that there "is nothing special" about an abandoned conduit scenario because "that is [done] in the industry all the time," including the Company's own practice of installing spare empty conduit for potential future use.[73/] Considering the expert testimony establishing that the practice of leaving empty conduit in place is an accepted and

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68/ Id. at ¶ 9 (emphasis added). See Opening Brief of WWCC at ¶ 4 & n.6 (providing multiple examples of the Company's historic abandonment policy, including evidence that an abandonment option is still legally available under a term agreement which does not expire until 2018).

69/ Opening Brief of WWCC at ¶ 5 (citing Dalley, TR 88:5-8).

70/ Order 03 at ¶ 2, n.1 (noting that both parties agreed "that the Company's policy was implemented on or around March 9, 2015).

71/ Opening Brief of WWCC at ¶ 32 (quoting Exh. No. DJM-5T at 2:4-6).

72/ Exh. No. WGC-1T at 2:15-3:4.

73/ Opening Brief of WWCC at ¶ 35 (quoting Marne, TR 180:10-14).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

common industry custom, along with Company practices that have historically been consistent with this industry custom, the ALJ's finding is fully supported by the record and common sense.

5. Initial Order Findings Related to the NESC Are Sound and Supported by the Record

32 Pacific Power has challenged several ALJ findings that relate to the NESC and the Company's duties under the NESC. While the Club will address each of the Company's specific challenges, the resolution of all NESC matters depends largely, if not entirely, upon the weight afforded to the party witnesses. As already noted, the Company has elected to found its arguments on the NESC, and its application, using the testimony of Mr. Dalley, a witness who admitted at hearing: "I'm not an expert on the NESC."[74]

33 The Petition resorts to a sweeping, misleading assertion in an attempt to denigrate Mr. Marne's testimony—i.e., alleging that Mr. Marne "*absolves* the Walla Walla Country Club from compliance with the NESC."[75] More accurately stated, Mr. Marne has simply offered his informed understanding of what actions are permitted under the NESC, as "a qualified expert on the NESC."[76] In recognizing the credentials of Mr. Marne, therefore, the ALJ's findings on the NESC are supported by the record. The Company offers nothing new, in the way of either perspective or reasoning through the Petition, that would merit modification of the ALJ's finding that the Commission is "not persuaded by the Company's argument that the NESC prohibits the Company from abandoning empty conduit in place, or otherwise requires it to maintain abandoned facilities in perpetuity."[77]

74/ Dalley, TR 56:12-13.
75/ Petition at ¶ 27 (emphasis added).
76/ Order 03 at ¶ 23.
77/ Id. at ¶ 22.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

a. Neither NESC nor WUTC Rules Require Continued Facilities Maintenance after Disconnection

34 The Company asks the Commission to consider an ongoing duty under the NESC that the Company has to track and maintain facilities "buried on the grounds of a former customer."[78] While Pacific Power frames the challenge to encompass "facilities it owns,"[79] ownership is best addressed in the context of the Company's regulatory takings claims. Pacific Power is, or should be, well aware that it has no continuing maintenance duty for underground facilities following a permanent disconnection.

35 Under Rule 4 of Pacific Power's General Rules and Regulations ("Rule 4"), the "Company shall not be required to maintain facilities in place … installed for the customer's service when: …. Customer requests Permanent Disconnection of Company's facilities."[80] Thus, even assuming Pacific Power pays for and installs *all* service facilities on customer property—an assumption that would not be supported by the record in this proceeding[81]—the Commission does not require the Company to continue to maintain any such "facilities in place," once a customer requests permanent disconnection. Although the Club raised this point in its opening brief,[82] Pacific Power has not addressed this issue in reply briefing or the Petition.

36 The lack of continuing maintenance requirements under Rule 4 is not at odds with the NESC. While the Company, for the purposes of this proceeding, now "interprets the NESC to obligate the Company to remove *or perpetually maintain* the underground facilities upon

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78/ Petition at ¶ 5.
79/ Id.
80/ Pacific Power Tariff WN-U75, Rule 4.F.3.
81/ E.g., Exh. No. JCT-6 at ¶ 8 ("The Country Club paid for the excavation, installation and conduit, related parts and equipment and installation of the utility run in this location"); Exh. No. JCT-11 at 2 ("While we have included costs associated with the conduit, installed and paid for by the WWCC, we would prefer not to pay twice for this conduit").
82/ Opening Brief of WWCC at ¶ 46.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

disconnection,"[83] Mr. Marne has testified that "the NESC does not contain such a directive."[84] As the ALJ correctly observed, Mr. Dalley is "admittedly not an expert on the NESC" and he "cites no basis for his opinion" that the Company has a perpetual maintenance duty.[85] In fact, Mr. Dalley's "perpetual maintenance" interpretation of the NESC is refuted by the Company's own legal counsel, who explained in a letter to the Club that a conduit and vault transfer to WWCC, would "absolve Pacific Power of the liability of maintaining the conduit and vaults."[86]

37 In that same letter explaining how the Company could absolve itself of perpetual maintenance liability, Pacific Power counsel explicitly relied on NESC Part 3, Section 313.B.3.[87] Yet, the Company now cites to Section 313.B.3 in the course of alleging a completely contrary proposition—that the NESC does not provide for "termination of the prior owner's duty of perpetual maintenance."[88] Faced with conflicting interpretations on record from the Company, compared to unequivocal testimony from Mr. Marne that the NESC contains no duty to perpetually maintain the subject facilities after disconnection, the ALJ justifiably found that "Pacific Power failed to carry its burden to prove the NESC prohibits abandoning empty facilities in place, and the record evidence supports the opposite conclusion."[89]

38 Moreover, in reaching this conclusion, the initial order expressly notes that "Mr. Marne also explained that the NESC only applies up to the service point; once service is disconnected, the service point ends and the NESC no longer applies to the abandoned

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[83] Exh. No. RBD-1T at 16:11-13 (emphasis added).
[84] Opening Brief of WWCC at ¶ 44 (quoting Exh. No. DJM-5T at 2:17-18).
[85] Order 03 at ¶ 22.
[86] Opening Brief of WWCC at ¶ 41 (quoting Exh. No. JCT-9).
[87] Exh. No. JCT-9.
[88] Petition at ¶ 33.
[89] Order 03 at ¶ 24.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

facilities."[90] Specifically, the "Scope" of the NESC, by its own terms, only "covers utility facilities and functions *up to the service point*."[91]

39 The Company contends that Mr. Marne presents a "fatally flawed argument," alleging that the specific terms of NESC Section 313.B.3—interpreted so as to fit Mr. Dalley's "perpetual maintenance" theory—control the general scope of NESC Rule 011.B.[92] If there is a "fatal flaw," however, then it is to be found in the Company's unsupported attempt to interpret Section 313.B.3 in a manner that conflicts with Rule 011.B, and to introduce controversy and conflict where none exists.

40 Mr. Marne, as a sworn witness in this proceeding,[93] author of an NESC handbook, and a member of NESC subcommittees on "Underground Lines" and "Interpretations,"[94] has testified that "the NESC does not contain" the perpetual maintenance directive for abandoned vaults and conduit, as interpreted by Mr. Dalley.[95] As in the Company's last general rate case, when the sworn statements of a Pacific Power witness were not found susceptible to "[h]yperbole and unproven allegations,"[96] the ALJ's reliance on Mr. Marne's testimony should be affirmed in preference to opinions from Mr. Dalley offered with "no basis."[97]

41 Notwithstanding, any lingering doubts as to rule interpretations are answered by the ALJ's observation that "NESC Rule 012.C requires accepted good practice for the given

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[90] Id. at ¶ 23.
[91] Opening Brief of WWCC at ¶ 45 (quoting Exh. No. DJM-4 at 2) (NESC Rule 011.B)) (emphasis added).
[92] Petition at ¶ 38.
[93] Marne, TR 172:17-23.
[94] Opening Brief of WWCC at ¶ 32 (citing Exh. No. DJM-2).
[95] Id. at ¶ 44 (quoting Exh. No. DJM-5T at 2:17-18).
[96] Dockets UE-140762 *et al.*, Order 07 at ¶ 3.
[97] Order 03 at ¶ 22.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

local conditions. Mr. Marne testified that abandoning underground conduit in place is, in fact, a common and accepted good practice."[98] Indeed, the Company's perpetual maintenance theory cannot be squared with Pacific Power's own common, historical practice, which fully supports Mr. Marne's expert testimony. As the Club noted in briefing, the record contains at least seventeen distinct instances in which the Company "abandoned or transferred facilities in lieu of removal when a customer requested permanent disconnection" on private property.[99] Since only one of those instances actually involved a bill of sale,[100] the Company's common practice has been to simply abandon facilities "in place" on private property, without any formal facilities transfer.

42 Plainly, good practice has *not* been based on a theory that the Company has a perpetual duty to maintain such abandoned facilities,[101] meaning that the NESC would not prohibit the Company from just leaving empty underground facilities on WWCC property "in place" after permanent disconnection. This also effectively answers the Company's separate challenge, to the alleged "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,"[102] in regard to facilities nevertheless "isolated" on WWCC property. Although the Club does not agree with and later responds to the implicit assumption within this quoted challenge—i.e., that all facilities on WWCC property continue to be "owned" by the Company, following disconnection—for

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[98] Id. at ¶ 23.
[99] Reply Brief of WWCC at ¶ 14 (quoting Exh. No. RBD-17 (Pacific Power's Response to Bench Request No. 1)).
[100] Id.
[101] See also Rule 4.F. 1. (stating that the "Company shall not be required to maintain facilities in place" when they "are not utilized to provide service").
[102] Petition at ¶ 5.

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

purposes of the NESC, the common and accepted good practice of leaving abandoned facilities in place on private property is controlling.

43 This entire discussion of NESC requirements leads back to Rule 4. By not imposing any duty upon the Company to maintain facilities after a customer requests permanent disconnection, the Commission-approved rule harmonizes completely with the Company's NESC obligations. Therefore, regardless of any formal ownership transfer to the Club, the initial order appropriately found that "abandoning empty conduit in place ... neither violates the NESC nor places a burden on the Company to maintain it in perpetuity."[103]

b. The Washington Administrative Code Does Not Confer NESC Obligations to the Club

44 The Company seeks administrative review of a supposed "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."[104] While Pacific Power misrepresents the record in that this "challenge" refers to a hearing colloquy in which Mr. Marne was *not* asked about a regulatory taking,[105] Washington law supports Mr. Marne's testimony that the "Club doesn't have to follow the National Electric Safety Code."[106] Accordingly, the ALJ did not err by any alleged "lack of finding" in regard to Mr. Marne's testimony.

45 According to Washington law, the NESC is only applicable to "electric utilities and entities operating transmission and distribution facilities within the state of Washington."[107]

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[103] Order 03 at ¶ 24.

[104] Petition at ¶ 5.

[105] Marne, TR 176:17-177:2 (showing that Mr. Marne was asked about WWCC liability under circumstances that assumed the Club "bought" facilities).

[106] Id. at 177:1-2.

[107] WAC § 296-45-045(1). The Club cited to this very rule section in briefing, which should foreclose any potential argument by the Company that it needs or should be permitted to reply on this matter. See Opening Brief of WWCC at ¶ 40 & n.81.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

The Commission's review concerns "the removal of the empty vaults and conduit at issue in this case."[108] The Club is not within the class of "electric utilities" subject to the NESC, nor could the Club be construed as an entity "operating" transmission and distribution facilities if Pacific Power were to leave "isolated, empty conduits and vaults" in place on WWCC property.

c. Pacific Power Would Have No Continuing Liability under a Facilities Transfer Scenario

46 The Club addresses Pacific Power's regulatory takings arguments later in the Answer. But, this NESC response section may be the most appropriate place to address the Company's request for review of a "finding that Pacific Power is 'relieved of any liability' if its underground facilities are taken by regulatory action."[109]

47 Once more, the Company's statement appears to contain a significant misrepresentation, in phrasing the ALJ's finding as contemplating facilities "taken by regulatory action." Rather, the initial order recounts Mr. Marne's testimony "that nothing in the NESC prohibits utilities from transferring ownership of their facilities," after which the ALJ appropriately concludes that Pacific Power *could* ensure that it is "relieved of any liability" in the event that the Club were to "assume ownership of the facilities."[110]

48 The relevant consideration in the passage, and the reason the Club addresses it now, is that Mr. Marne testified that nothing in the NESC prohibits utilities from transferring ownership of "their" facilities to another party. This is important because under Washington law, the NESC is only applicable to electric utilities like Pacific Power for "their" facilities—i.e., "electric utilities" are only required to "maintain *their* lines and equipment according to the

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[108] Order 03 at ¶ 25.
[109] Petition at ¶ 5.
[110] Order 03 at ¶ 23.

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

requirements of the 2002 National Electrical Safety Code (NESC)."[111] Thus, as common sense would indicate, Pacific Power would retain no continuing liability under Washington law for NESC compliance in regard to the maintenance of transferred facilities. Simply put, facilities that the Company and other utilities transfer away are no longer "their" facilities.

49 This common sense interpretation supports the ALJ's finding that Pacific Power can relieve itself of any liability, were the Club to "simply assume ownership of the facilities." Moreover, the record contains more than ample proof that the Company has already agreed with the ALJ on this very point. For instance, Pacific Power legal counsel explained by letter that the Company's offer to sell conduit and vaults to the Club was made with the express purpose "to absolve Pacific Power of the liability of maintaining the conduit and vaults."[112] Likewise, the Bill of Sale included with that letter explicitly provided that the Club "shall *assume* sole and exclusive responsibility and legal liability for the … maintenance of the Facilities *transferred* to it."[113]

50 Thus, it is unpersuasive for the Company to now argue that its offer to transfer the conduit and vaults to WWCC would not provide for the assumption of "sole and exclusive" liability for those facilities by the Club. In this sense, the Company's request for review of the ALJ's "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,"[114] is also misplaced. That is, the initial order contains no such finding, precisely because it is a

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[111] WAC § 296-45-045(1) (emphasis added).
[112] Opening Brief of WWCC at ¶ 41 (quoting Exh. No. JCT-9).
[113] Id. (emphasis added).
[114] Petition at ¶ 5 (emphasis added).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

misinterpretation of the ALJ's statements to infer that an assumption of ownership by the Club necessarily depends upon a regulatory taking.

B. The Company's Emphasis on Regulatory Takings Arguments Is Misplaced and Mischaracterizes Record Evidence

51 Before moving to the merits of the Company's regulatory takings arguments, and as an important segue, the Club points out that the Petition presents a false dichotomy in relation to the record evidence on underground facilities at issue. As presented by Pacific Power: "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."[115]

52 As a preliminary matter, Pacific Power forced the Commission into a binary choice—the Commission could either endorse Pacific Power's contention that all permanent disconnections implicate safety and/or operational concerns, or the Commission could order abandonment in place. It appears that Pacific Power's strategy was calculated to manufacture the taking argument that it now presents. There was, however, a third option. But for Pacific Power's strategy, it could have removed the empty PVC conduit and the empty concrete vaults, at its own expense, and then repaired any harm to the Club's property that was caused during the removal process.

53 That option is permitted by Rule 6. The Rule does not limit Pacific Power's ability to remove disconnected facilities. It only limits Pacific Power's ability to foist certain removal costs onto its former customer. Pacific Power's position is understandable, it would not have been a sound business decision to incur the hundred or so thousand dollars that would be necessary to excavate, refill, and reseed golf course fairways or to remove, replace, and reline

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[115] Id. at ¶ 36 (emphasis added).

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

parking lot asphalt, just to retrieve some used PVC conduit and concrete vaults. At this point, Pacific Power cannot be heard to complain that the Commission's decision deprived it of a property interest; the situation is of Pacific Power's own making.

54 Moreover, Pacific Power's argument is based upon a misrepresentation of the record, and it ignores the options that are now available to Pacific Power, namely the option to abandon the conduit and vaults or to voluntarily transfer "title" to the Club. Both of those options were testified to, and both avoid the "forced sale" scenario that Pacific Power presents. The Company's sustained misrepresentation of record evidence over the course of this proceeding is especially troubling, given that the Petition does not even attempt to address extensive citation to the record in briefing, *on this very matter*. From the Club's perspective, the Petition's absolute disregard of this evidence in unsurprising, since the record more than establishes that the "entirety" of Club testimony is not predicated upon takings or forced sale arguments. In a reply briefing section straightforwardly entitled "The Commission Does Not Need to Consider 'Forced Sales' Issues," the Club devoted nine paragraphs, spanning six pages, in order to address Pacific Power's mischaracterizations of WWCC witness testimony.[116]

1. Mr. Marne Contemplated Simple Abandonment or a Voluntary Transfer

55 In filed testimony, Mr. Marne offered an expert assessment that "it is an accepted good practice to abandon empty, underground conduit, especially when transferred upon permanent disconnection."[117] By the very terms of this testimony, the accepted good practice of empty conduit abandonment is not *limited* to a transfer scenario. That is, Mr. Marne testified to the acceptance of abandonment practice "especially" in circumstances of facilities transfer, but

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116/ Reply Brief of WWCC at ¶¶ 11-19.
117/ Exh. No. DJM-5T at 2:4-6.

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

not "exclusively" to such a scenario. The Company's historic and routine custom of simply abandoning facilities on private property provides irrefutable support for Mr. Marne's testimony that the accepted practice of facilities abandonment is not limited, exclusively, to a formal transfer.[118]

56 It is a significant mischaracterization for the Company to continue to assert, at this late stage of the proceeding: "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."[119] Indeed, in the hearing colloquy cited by the Company in support of this "two alternatives" dichotomy, Mr. Marne clarified that the Company's line of questioning applied only to the context of one particular paragraph of filed testimony,[120] in which Mr. Marne had explained that "selling and/or transferring facilities to a departing customer is a perfectly viable alternative to requiring facilities removal."[121] Thus, it is inappropriate, to say the least, simply upon the evidence of one paragraph explicitly limited to its own terms, for the Company to argue that Mr. Marne was "very clear" in drawing an all-encompassing dichotomy for purposes of this entire case.

57 Mr. Marne stated what was in the record: "Pacific Power has offered, and I understand the Country Club will accept, through a bill of sale, complete responsibility and liability for the abandoned conduit."[122] If anything, therefore, Mr. Marne's primary assumption was that a voluntary facilities transfer would occur, which demonstrates why he testified that

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[118] See Exh. No. RBD-17 (Pacific Power's Response to Bench Request No. 1).
[119] Petition at ¶ 36 (emphasis added).
[120] Marne, TR 175:3-10.
[121] Exh. No. DJM-1CT at 5:3-5.
[122] Exh. No. DJM-5T at 4:9-11.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

empty conduit abandonment was "especially" indicative of accepted good practice, "when transferred upon permanent disconnection."

58 It is undisputed Pacific Power had offered to sell the facilities at issue on several occasions to the Club,[123] albeit at prices the Club considered unreasonably high, and that the Club continued attempts to negotiate a formal transfer during the pendency of the proceeding.[124] In fact, the Company did not indicate to the Commission that it had adopted a new policy of prohibiting formal transfers until after the hearing in this case, in response to a bench request.[125]

2. Mr. Mullins Did Not Offer Legal or Regulatory Takings Testimony

59 In support of the Company's allegation that the "entirety" of Mr. Mullins' testimony is predicated upon a facilities taking or forced sale, the Petition describes Mr. Mullins as having "urged the Commission to exercise the equivalent of inverse condemnation."[126] More specifically, the Company presents three block quotes from Mr. Mullins' filed testimony discussing transfer value and fairness considerations in the context of the Net Removal Tariff.[127]

60 Crucially missing from the Petition's presentation of evidence, however, is an explicit and materially significant statement from Mr. Mullins' testimony, that even the Company has characterized as "telling qualifier."[128] As Mr. Mullins explained, his testimony in this proceeding merely "addresses issues of fair valuation under the Company's application of the Net Removal Tariff" and "does not contain any legal conclusions … as to the tariff's application to the sale and transfer of facilities absent removal." In short, it is completely

[123] E.g., Opening Brief of WWCC at ¶¶ 9-12, 16 (including record citation); Exh. No. BGM-4C (Pacific Power Responses to Data Requests 13, 18, and 24).
[124] Exh. No. BGM-5C.
[125] Order 03 at ¶ 2, n.1.
[126] Petition at ¶ 49.
[127] Id. at ¶ 48.
[128] Reply Brief of WWCC at ¶ 16 (quoting Initial Brief of Pacific Power at ¶ 3).

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

inappropriate for Pacific Power to misrepresent Mr. Mullins' testimony in a legal context, as if it "urged … inverse condemnation," or to characterize it in any other fashion than the purpose for which it was intended—i.e., expert testimony on applied issues of fair valuation under the Net Removal Tariff from a policy standpoint.[129/]

61 Mr. Mullins appropriately testified at hearing that he was "not qualified to answer" a legal question regarding eminent domain.[130/] Similarly, all of Mr. Mullins' testimony should also construed as being strictly confined to a policy perspective. For instance, when Mr. Mullins testified that it would be "in the public interest to require" a certain valuation,[131/] or opined as to the "objective of Rule 6" from a fair transfer price standpoint[132/]—statements which the Petition represents as having legal significance[133/]—the Commission should consider them in light of Mr. Mullins' "telling qualifier," as "issues of fair valuation under the Company's *application* of the Net Removal Tariff." Properly interpreted in this manner, Mr. Mullins' testimony could provide a helpful reference to the Commission in making policy determinations on the central issue of this proceeding, as in appropriate charges authorized under the Net Removal Tariff.

3. Emphasis on Regulatory Takings is an Improper Collateral Attack

62 Until the filing of the Petition, the Company's strategy in this proceeding had primarily focused upon an interpretive revision of the Net Removal Tariff. Namely, the Company had attempted to interpret the word "only" out of Rule 6, in order to allow Pacific Power to charge for the removal of any and all facilities associated with a permanent

129/ Id. (quoting Exh. No. BGM-6T at 2, n.1).
130/ Id. at ¶ 17 (quoting Mullins, TR 154:6-9).
131/ Exh. No. BGM-6T at 13:5-6.
132/ Id. at 11:4-5.
133/ Petition at ¶ 48.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

disconnection, rather than the longstanding Net Removal Tariff limitation of charging for "*only* those facilities that need to be removed for safety or operational reasons."[134]

63 If sanctioned, the Company's new interpretive approach would give Pacific Power license to "effectively hold customers hostage to unauthorized demands before providing mandatory disconnection service."[135] The ALJ found, however, that "Rule 6 is not reasonably susceptible to Pacific Power's interpretation,"[136] and affirmed the explicit proscription of Rule 6 against charging a customer for removal costs not justified by a demonstration of safety or operational reasons.

64 The complementary directive of Rule 4 provides the Company has no continuing duty to "maintain facilities *in place*" following permanent disconnection.[137] Yet, Pacific Power still maintains that it must be allowed to remove facilities or assess charges in connection with empty conduit and vaults on WWCC property.[138] To support this continuing claim, the Company has changed its strategic approach in the Petition by now emphasizing regulatory taking and Constitutional arguments—e.g., alleging that the initial order "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."[139] through appropriate regulatory procedures—not through a form of collateral attack against the initial order.

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[134] Rule 6.I.1 (emphasis added).
[135] Reply Brief of WWCC at ¶ 8.
[136] Order 03 at ¶ 16.
[137] Rule 4.F.3 (emphasis added).
[138] Petition at ¶ 61 ("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").
[139] Id. at ¶ 1.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

65 Pacific Power's strategic shift attempts to hold the Commission—not customers—responsible to pay its unauthorized demands. That is, the Company's regulatory takings approach is an improper challenge to the entire, integrated suite of Commission-approved rules associated with disconnections and facilities maintenance and removal.

66 By statute, Pacific Power must charge the rates published in its tariffs,[140] and tariffs cannot be changed except by following statutory notice procedures.[141] The Company was reminded of these legal prescriptions when the Net Removal Tariff was originally approved by the Commission.[142] Thus, the ALJ appropriately rejected the Company's attempt to improperly rewrite its tariff duties in this proceeding, and create new charging powers for Pacific Power thereby: "Consistent with its duty to regulate in the public interest, the Commission must give effect to all of the language in the Company's tariff."[143] If the Company believes that faithful application of Commission-approved tariffs will lead to undesired results, then the only legally permissible means to alter tariff terms and charges is through appropriate regulatory procedures—not through a form of collateral attack against the initial order. Indeed, in his prefilled Direct Testimony relating to cost recovery, Mr. Dalley explained, "[t]he Company intends to address these items in a future revision to the net removal tariff, but Pacific Power is not proposing those modifications in this docket."[144]

67 Pacific Power's new regulatory takings approach may be especially suspect, given that the Commission ordered "a thoroughgoing report detailing [the Company's] experience

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140/ RCW § 80.28.080.
141/ RCW § 80.04.130.
142/ Docket UE-001734, Eighth Suppl. Order at ¶ 56, n.3.
143/ Order 03 at ¶ 17.
144/ Exh. No. RBD-1T at 25:18-20.

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

applying Schedule 300 and Rule 6 since inception."[145] That Commission order followed all three of the Company's sale offers in regard to conduit and vaults on WWCC property. The Company responded within months of the order via the filing of "a thoroughgoing report" containing several attachments.[146] Nothing in PacifiCorp's Report indicated that the Commission-approved rules and regulations associated with facilities removal, maintenance requirements, and allowable charges conspired to make the Company susceptible to unconstitutional takings of facilities.

68 In fact, as previously noted by the Club and considered by the ALJ before issuance of the initial order, PacifiCorp's Report contains "several examples of abandoned underground facilities in association with facility removals from 2002 to 2012, in the 'Description of Facilities Removed' column" of Attachment D.[147] If the Company's longstanding practice, following a permanent disconnection, of simply abandoning facilities in place on private property truly implicated Constitutional concerns, then the Company would probably have been expected to raise them within "a thoroughgoing report." But, the Company did not, and the Commission did not see fit to order any supplemental regulatory takings or Constitutional inquiries after reviewing PacifiCorp's Report in Docket UE-132182.

69 Indeed, the Commission explicitly directed Pacific Power to include any information that the Company, along with other parties, would "identify as being pertinent to *future consideration* of the rates, terms, and conditions of service provided under Schedule 300 and Rule 6."[148] Yet, the Company elected not to seek Rule 6 modifications, or to ask for Rule 4

[145] WUTC v. PacifiCorp, Docket UE-130043, Order 04 at ¶ 15 (July 29, 2013).
[146] Re PacifiCorp, Docket UE-132182, PacifiCorp's Report on Permanent Disconnection and Removal of Facilities ("PacifiCorp's Report") (Nov. 27, 2013).
[147] Opening Brief of WWCC at ¶ 5, n.7 (citing PacifiCorp's Report at Att. D).
[148] Docket UE-130043, Order 04 at ¶ 15 (emphasis added).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

or any other tariff changes through its thoroughgoing report—despite the Commission's plain call "for a full record on the issues germane to Schedule 300 and Rule 6."[149] Hence, the Club respectfully submits that Pacific Power's regulatory takings and Constitutional arguments are without basis.

C. Pacific Power's Condemnation Claim is Without Merit

70 Pacific Power's condemnation arguments are without merit, and the deficiencies are major and unavoidable. Condemnation has three necessary elements: (i) that the subject property is to be put to a public use; (ii) that taking the property is necessary for that public use; and (iii) that the property is actually conveyed to the Government for that public use.[150] Pacific Power's argument fails on each front. First, Pacific Power's argument is an improper collateral attack on a judicial (in this case quasi-judicial) government action, but judicial actions cannot implicate the eminent domain power. Second, Pacific Power does not even assert any interest in real property, yet only interests in real property are subject to condemnation. Third, Pacific Power retains no right, title, or interest in the conduit or vaults after its electrical services are terminated; there is, therefore, no property interest that can be condemned. Fourth, condemnation claims only exist in cases where private property is taken for the public's benefit, but there is no public benefit at issue in this case. Finally, business losses are not compensable in condemnation, yet this dispute is about Pacific Power's business losses—not the value of used PVC and concrete.

149/ Id. at ¶ 12.
150/ City of Des Moines v. Hemenway, 73 Wn.2d 130, 138 (1968).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

1. Judicial Determinations Cannot Condemn Property

71 In the most basic terms, condemnation occurs when the government appropriates property for the public's benefit without due process of law.[151] Thus, an executive action that physically invades private property or legislative/regulatory action that prevents all economically viable use of property can constitute an inverse condemnation.[152] Those, however, are not the types of actions that are the focus of Pacific Power's complaint. Instead, Pacific Power asserts that an adverse judicial (or quasi-judicial) decision constitutes an inverse condemnation. As a matter of law and logic, no judicial action can result in an inverse condemnation (of course, no judicial action can result in a *de jure* condemnation) because judicial proceedings are the very manifestation of due process in the United States.[153] Thus, even if a judicial proceeding results in the deprivation of property, it cannot constitute a taking.

72 In every civil proceeding, property rights are implicated; each party believes himself to have vested rights. Regardless of whether those rights are based in realty, contract, or tort some variety of property is implicated (often money). Every civil proceeding, therefore, involves two sides asserting vested property rights, but only one side can prevail. Therefore, every civil proceeding (if litigated to conclusion) ends with one party believing that he was deprived of a vested property right. That party's disappointment, however, does not transmute a judicial determination into an inverse condemnation.

73 Pacific Power's argument is that, by disagreeing with Pacific Power's interpretation of Rule 6, the ALJ inversely condemned (*viz*., deprived without due process of

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[151] U.S. Const., Amend V; Wn. Const., Art. I, §16.
[152] See generally, Guimont v. Clarke, 121 Wn.2d 586 (1993).
[153] See Matthews v. Eldridge, 424 U.S. 319 (1976); Petition of Puget Sound Power & Light Co., 28 Wn. App. 615, 618 (1981) (The Court exercises review over eminent domain actions to assure that the State has not exceeded its lawful authority).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

law) Pacific Power's property, specifically, used PVC conduit and concrete vaults. Pacific Power was afforded every due process protection: it was afforded notice, an opportunity to present evidence, and an opportunity to cross examine contrary evidence. Pacific Power had a fair hearing.

74 An aggrieved litigant, like Pacific Power, may pursue the appellate process. That, however, is the sole avenue of "redress" for aggrieved litigants. Pacific Power's condemnation argument is an improper collateral attack on the Commission's determination.[154/] To the extent that Pacific Power believes that the Commission misconstrued Rule 6, Pacific Power has appellate remedies.[155/]

2. Pacific Power Does Not Assert Any Interest in Real Property

75 Only real property rights are subject to condemnation.[156/] Monetary or personality rights are not subject to condemnation because those types of property are fungible and are insufficient to support a use of the eminent domain authority. Instead, public use of the specific real property taken must be necessary.[157/]

76 There can be no more fungible property than used PVC conduit and used concrete vaults. Pacific Power does not even contend that the Commission (Government) has taken that used conduit and those used vaults for the public's benefit. As such, condemnation is simply the wrong lens through which to view this case.

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154 Hanna v. Allen, 153 Wn. 485, 490-91 (1929).

155/ Id.

156/ Guimont v. Clarke, 121 Wn.2d at 608 (1993).

157/ See Manufactured Hous. Cmtys. v. State, 142 Wn.2d 347, 373 (2000); Healy Lumber Co. v. Morris, 33 Wn. 490, 509 (1903).

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

3. Pacific Power Does Not Have Any Post-Termination Rights to the Property (used PVC and Concrete) that is at Issue

77 In order for the Commission's decision to result in a condemnation, Pacific Power—of necessity—must have some post-termination right in the property at issue.[158] However, the Commission rejected Pacific Power's assertion of such a right. Instead, the Commission held that, once Pacific Power terminates its electrical services to the Club, Pacific Power retains no right, title, or interest in the underground PVC conduit or in the underground concrete vaults.

78 Once Pacific Power's service is cancelled, any "facility" that is left behind—that is, any conduit and concrete vault whose removal is not mandated by safety or operational concerns—becomes Club property. This result is mandated by the applicable tariffs.

79 While Pacific Power provides electrical services, Rule 1 grants Pacific Power ownership of "all Extensions made under these Rules."[159] Pacific Power's counsel repeatedly emphasized this exact regulatory basis for its ownership.[160] However, Pacific Power ignores an undeniable corollary to the *initial* transfer of those facilities to the Company, when service to a customer begins. As a matter of law, those facilities' ownership *reverts* back to the customer upon disconnection. Pacific Power's only claim to post-termination ownership of the facilities is based upon an inequitable (and ultra vires) interpretation of Rule 1—an interpretation that benefits Pacific Power to the exclusion of the public and the ratepayers.

[158] One must have a property right in order to be deprived of that property right without due process of law.
[159] Pacific Power Tariff WN-U75, Rule 1, First Revision of Sheet No. R1.2.
[160] Exh. No. JCT-9.

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333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

80 Pacific Power has never denied that the Club both paid for and installed some of the underground facilities at issue.[161] Therefore, the underground facilities at issue were bought and paid for by the Club; due to Rule 1, those facilities were "given" to Pacific Power during the pendency of Pacific Power's electrical service; and, once service is terminated, those facilities must revert back to Club ownership.

81 It is ironic that Pacific Power fashions its argument in condemnation because it is actually Pacific Power that is attempting to force a purchase of the PVC and concrete that is at issue. The truth is, Pacific Power is attempting to force the Club to buy that PVC and concrete for a second time—and this time at an exorbitant premium.

82 The Commission simply disagreed with Pacific Power. A necessary premise behind the Commission's initial order is that Pacific Power does not retain any property interest in the used PVC and used concrete vaults that are beneath the Club's property. That decision is mandated by the tariffs and by established principles of property law. Pacific Power can certainly argue the contrary to the appellate courts, but there has been no condemnation.

83 The Club has paid to install facilities, and had the ownership of those facilities "automatically" transfer to the Company under the operation of Rule 1. Pacific Power is effectively arguing that the Club must now re-appropriate and pay once more for those same facilities, as if Pacific Power is authorized to act as some sort of "virtual condemnor." To more accurately describe the dynamic at issue, therefore, the Company is seemingly asking for the

[161] E.g., Exh. No. JCT-6 at ¶ 8 ("The Country Club paid for the excavation, installation and conduit, related parts and equipment and installation of the utility run in this location"); Exh. No. JCT-11 at 2 ("While we have included costs associated with the conduit, installed and paid for by the WWCC, we would prefer not to pay twice for this conduit").

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

Commission to sanction a "forced repurchase" by WWCC, rather than a "forced sale" to the Club.

4. Property Cannot Be Condemned For Private Use

84 The Constitution prohibits the taking of private property for a *private* use.[162] Property can only be condemned so that it may be put to the *public's* use.[163] "[A] state scheme of utility regulation does not 'take' property simply because it disallows recovery of capital investments that are not 'used and useful in service to the public.'"[164]

The ALJ rightly noted that the facilities at issue in this case are "isolated, empty conduits and vaults situated on private property."[165] As such, abandoned facilities left in place on WWCC property following disconnection could not possibly be considered "used and useful in service to the public." Setting aside all of the other infirmities in Pacific Power's argument, we cannot ignore the undeniable fact that Pacific Power does not even allege a public use. Instead, Pacific Power argues that it is being deprived of property for the Club's use. Under no circumstances can that constitute an inverse condemnation.

5. Business Losses Are Not Compensable in Condemnation

85 The irony in Pacific Power's argument is that, even were it accepted, it would not give Pacific Power the relief it seeks. As repeatedly noted above, Pacific Power's condemnation claim is premised on the idea that Pacific Power was unjustly deprived of its interest in some used PVC and some used concrete vaults. If the argument were accepted, the fair market value of that used PVC and those used concrete vaults would be the sole and exclusive remedy.

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162 State ex rel. Washington State Convention and Trade Center v. Evans, 136 Wn.2d 811, 817 (1998).
163 Id.
164 Duquesne Light Co. v. Barash, 488 U.S. 299, 301-02 (1989) (citation omitted).
165 Order 03 at ¶ 21.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

Pacific Power, however, seeks far more—Pacific Power seeks the business losses that it will suffer by virtue of the Club's termination of service.

86 Even if a true condemnation claim could be asserted, no business damages would be available. Condemnation damages are limited to the fair market value of the property that was taken. "Just compensation is the fair market value of the property,"[166/] meaning "the amount of money which a well informed purchaser, willing but not obliged to buy the property would pay, and which a well informed seller, willing but not obliged to sell it would accept."[167/] A party is not entitled to recover damages for lost income or revenue in condemnation.[168]

87 Pacific Power argues that the fair market value of the property at issue is approximately $110,000.[169/] However, that figure bears no relation to the actual value of the used PVC and used concrete vaults that are truly at issue; instead, Pacific Power's stated figure includes approximately $109,000 of business losses—none of which are compensable in condemnation. Specifically, the "value" preferred by Pacific Power includes the costs to remove/replace the used PVC and used concrete vaults from the Club's property. The only reason that Pacific Power so vehemently argues for the inclusion of those removal costs is to compensate Pacific Power for the loss of the revenue from the Club's monthly rate payments. That loss of revenue, however, is not compensable in condemnation.

88 In fact, Pacific Power admitted that it has no "actual (e.g., non-proximate) methodology to determine the 'market value' of facilities associated with the Club's permanent

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166/ State v. Wilson, 6 Wash. App. 443, 447 (1972) (citing Ham, Yearsley & Ryrie v. Northern Pac. Ry. Co.,107 Wash. 378 (1919)).

167/ Id. (citing Donaldson v. Greenwood, 40 Wash.2d 238 (1952)).

168/ State v. McDonald, 98 Wn.2d 521 (1983); Fix v. City of Tacoma, 171 Wn. 196 (1933).

169/ Petition at ¶ 55. Specific discussion of the unreliability of this valuation, merely on its own terms, is provided below.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

disconnection request."[170] The actual market value of the used PVC and used concrete vaults, however, is the only damage that could possibly be recovered in condemnation. Thus, in addition to the other serious problems with Pacific Power's argument, there is no evidence upon which to support an award of condemnation damages.

D. Even if a Condemnation Analysis was Appropriate, Nothing about the Initial Order Constitutes a Taking

89 Pacific Power provides no support for its assertion that the initial order is "so onerous that its effect is the equivalent to a direct appropriation of that property."[171] Even assuming, for the sake of argument, that Pacific Power retains all ownership of empty plastic pipe and concrete vaults on WWCC property after disconnection, there is nothing "onerous" about the ALJ's decision, much less "so onerous" as to equal a direct appropriation. The initial order simply finds that Pacific Power's interpretation of the tariffs is wrong. Pacific Power simply could not demonstrate any "operational reasons justify[ing] the removal of the empty conduits and vaults at issue in this case."[172]

90 After more than a decade of abandoning conduit in place (when customers disconnect service), Pacific Power cannot be heard to argue that leaving conduit in this instance is so onerous as to constitute a condemnation.[173] Moreover, the ALJ's requirement, that Pacific Power disconnect the Club's service without removing the underground conduit and vaults,[174] will actually save Pacific Power money—that result is far from "onerous." Pacific Power has estimated facilities removal costs at $66,718, versus a net book value for those same facilities of

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170/ Reply Brief of WWCC at ¶ 18 (quoting Exh. No. BGM-8C at 1 (Company Response to Club Data Request 088)).

171/ Petition at ¶ 41 (citing Lingle v. Chevron U.S.A., 544 U.S. 528, 537-38 (2005)).

172/ Order 03 at ¶ 25.

173/ Id. at ¶ 20 (citing Exh. No. RBD-17 (Pacific Power's Response to Bench Request No. 1)).

174/ Id.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

$19,877 and a salvage value of less than $2,000.[175] Accordingly, removal costs are far in excess of the Company's own accounting of what the facilities are worth, meaning that Pacific Power can save money by just leaving the facilities in the ground.

91 When considering what comprises regulation that is "so onerous" as to equate to a direct appropriation, the U.S. Supreme Court explains: "The rub, of course, has been-and remains-how to discern how far is 'too far.'"[176] Again, it cannot be reasonably argued that the Commission would be going "too far" in requiring Pacific Power to abide by its traditional practice under the Net Removal Tariff of merely leaving in place empty facilities that pose no safety hazard or operational concern, especially where Pacific Power saves money in the process.

92 Moreover, as the Company has estimated the salvage value for WWCC facilities at just $1,792 and net book value at $19,877,[177] those relatively modest amounts must be considered. The Commission has stated that an "order is not constitutionally objectionable unless it is shown to jeopardize the financial integrity of the company or fails to provide equity holders with adequate compensation for their risks."[178] Pacific Power has not alleged, nor could it, that values as modest as the ones at issue here jeopardize the Company's financial integrity. In fact, Deborah Reynolds (WUTC Staff) explained that "(the conduit) is something that has no value to (Pacific Power) ratepayers."[179] Thus, even if Pacific Power had some post-termination right in the used PVC conduit and used concrete vaults, there can be no condemnation.

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[175] Exh. No. JCT-8.
[176] Lingle, 544 U.S. at 538.
[177] Exh. No. JCT-8.
[178] Re Review of: Unbundled Loop and Switching Rates; the Deaveraged Zone Rate Structure; and Unbundled Network Elements, Transport, and Termination (Recurring Costs), Docket UT-023003, Twenty-Fourth Suppl. Order at ¶ 546 (Feb. 9, 2005) (citing Duquesne, 488 U.S. at 312 (1989)).
[179] Opening Brief of WWCC at ¶ 66 (quoting Exh. No. JCT-3 at 2).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

Moreover, WUTC Staff has pointed out that "the takings clause does not guarantee [a utility] a profit, nor is [a utility] constitutionally protected from a loss."[180]

93 The ALJ correctly stated that the Club "intends" to assume ownership of the facilities at issue,[181] and that will happen by virtue of the Club's reversionary interest, which is—in turn—recognized by the tariffs, even if Pacific Power declines to memorialize the transfer of the used PVC and concrete. Thus, regardless of how Pacific Power elects to proceed, it will have no post-termination interest in the property. There is, therefore, no property interest that the initial order could "condemn."

E. The Company's Appraisal Report Has No Probative Value

94 Separate and apart from the flaws in Pacific Power's arguments under the tariffs, and separate and apart from the flaws in Pacific Power's condemnation arguments, Pacific Power's arguments regarding the value of the used PVC and used concrete vaults is baseless.

95 Four business days before the hearing, on the day that cross exhibits were due to be filed, the Company received and filed a third party, 40-page "appraisal report for the electric distribution equipment located at or near the Walla Walla Country Club."[182] As Mr. Mullins pointed out at hearing, there are several critical issues going to the probative weight which should be attached to the appraisal report in relation to both the form and timing of its introduction; e.g., the appraisal report was not sponsored by a witness, the Club had no opportunity to conduct discovery on it, and it appears to contain a value "very much inflated

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[180] Docket UT-023003, Twenty-Fourth Suppl. Order at ¶ 533 (citing Federal Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 603 (1944), and Market Street R. Co. v. Railroad Comm'n, 324 U.S. 548, 565-67 (1944)).

[181] Order 03 at ¶ 23.

[182] Opening Brief of WWCC at ¶ 65 (quoting Exh. No. BGM-14CX).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

relative to the Company's historical costs," based on what analysis Mr. Mullins was able to perform on the eve of hearing.[183]

96 In respect to the Company's eleventh hour filing, the Commission had recently forewarned Pacific Power "that the Commission may not be receptive in a future case to allowing" late-filed evidence which "potentially can disrupt a carefully planned procedural schedule close in time to a planned evidentiary hearing."[184] Given this firm admonition—and in light of the fact that the Company had acknowledged the Club's fair market facilities valuation more than two years prior, in May 2013,[185] and certainly could have prepared a report well in advance—the Club submits that the Commission should afford no probative weight to the appraisal report.[186]

97 Regarding the "very much inflated" values "relative to the Company's historical costs," identified by Mr. Mullins based on an extremely preliminary analysis, even a cursory review of record evidence demonstrates the unreliability of the appraisal report. For instance, the very first item in the appraisal report is a 550-foot length of 15 kilovolt underground cable and conduit, with an 2015 replacement cost $22,688.[187] According to the Company's own accounting records, however, these same facilities had [REDACTED] [188] and [REDACTED]

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[183] Id. at ¶ 67 (citing Mullins, TR 160:20-22, 161:17-18).

[184] Dockets 140762 *et al.*, Order 08 at ¶¶ 79-80.

[185] Exh. No. JCT-12 ("Pacific Power understands the Country Club's position to ... pay the value of such conduit and vaults, estimated by the Country Club to be worth $7.760").

[186] See also Reply Brief of WWCC at ¶ 18 (noting that, while Pacific Power later claimed that the Company commissioned a fair market value appraisal because of the alleged "degree to which Mr. Mullins' prefiled testimony deviated from *recognized* valuation standards," just one month before filing the appraisal report the Company had given no indication of "recognizing" any such standards—indeed, Pacific Power did not "have any actual (e.g., non-proximate) methodology to determine the 'market value' of facilities associated with the Club's permanent disconnection request").

[187] Exh. No. BGM-14CX at 14.

[188] Exh. No. BGM-8C at 3, row 19, column L.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

[REDACTED].[189] Thus, the alleged fair value for these facilities [REDACTED]

98 Further, the Company persists in the presentation of facilities values without distinguishing between the "isolated, empty conduits and vaults" actually at issue in this proceeding and a separate, electric hardware category of facilities comprised of "Wires, Transformers and Metering."[190] The Club pointed out this distinction in some detail in briefing,[191] even citing to evidence establishing that Pacific Power itself had originally bifurcated WWCC facilities in this manner, in 2013.[192] Moreover, the Club has emphasized that the undifferentiated or "lump sum" valuation in the appraisal report fails to distinguish between facilities categories and should, therefore, be afforded no probative weight.[193]

99 A perfect example of the Company's improper, undifferentiated facilities presentation can be found in the comparison just made between facilities costs in the appraisal report and in the Company's prior accounting. The appraisal report lumps underground cable and PVC conduit costs together, making no distinction between the far costlier electric hardware component—i.e., the cable itself, which can be pulled out without invasive and costly digging—and what will ultimately be left after disconnection, in the form of "isolated, empty conduits" that are actually at issue.[194] As the Company's own accounting demonstrates, the difference is staggering: [REDACTED][195]

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[189] Id. at 3, row 10, column L.
[190] Reply Brief of WWCC at ¶ 23.
[191] Id. at ¶¶ 23-28.
[192] Id. at ¶ 23 (quoting Exh. No. JCT-8).
[193] Id. at ¶¶ 27-28. The Company's election to not even address the facilities conflation matter in the Petition provides still another example of why a reply should not be permitted.
[194] Order 03 at ¶ 21.
[195] Compare Exh. No. BGM-8C at 3, row 19, column L, with id. at 3, row 10, column L.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

100 Independent of all other consideration, however, the appraisal report itself contains such an exhaustive litany of disclaimers that it is entirely unsuitable for evidentiary purposes in this proceeding. The Club noted this issue in briefing, quoting from several disclaimer excerpts pulled directly from a 34-item, seven-page "Statement of Assumptions and Limiting Conditions" within the report.[196] Yet, the Company did not attempt to explain why the Commission should afford any probative value to the appraisal report, in light of its express limiting conditions, either in reply briefing or the Petition.[197] To this end, the Commission need look no further than the following explicit disclaimer in rejecting the Company's valuation, based now exclusively on the appraisal report: "Opinions and estimates expressed herein represent our best judgement [sic], *but should not be construed as evidence or recommendation to act*."[198]

101 The initial order provides for disconnection of Pacific Power services without removal of facilities on WWCC property "or assessing any charge in connection with those facilities."[199] The Club continues to support the Commission's adoption of the ALJ order, and this decision in particular, as a reasonable outcome fully supported by the record evidence in this proceeding and the application of Commission, state, and federal precedent.

102 Nonetheless, if just compensation is ordered by the Commission, Mr. Mullins has testified that a facilities transfer at net book value would be in the public interest, from a rate and policy perspective.[200] In fact, upon its own motion, the Commission "has power ... to ascertain

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[196] Opening Brief of WWCC at ¶ 67 (quoting Exh. No. BGM-14CX at 30-36).

[197] This is one further example of an important issue which the Company could have, and did not address earlier in the proceeding, supporting the Club's position that the Company should not be permitted to reply on such matters in response to the Answer.

[198] Exh. No. BGM-14CX at 34 (Statement 26) (emphasis added).

[199] Order 03 at ¶ 25.

[200] Exh. No. BGM-1CT at 17:6-9.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

and determine the fair value for rate making purposes of the property of any public service company used and useful for service in this state and shall exercise such power whenever it deems such valuation or determination necessary or proper."[201] Thus, the Commission would seem able to assess a fair market value for the facilities at issue, based upon the net book value—i.e., "the fair value for rate making purposes of the property."

103 As indicated by the evidence on record, the Company originally calculated the net book value of facilities on WWCC property at $19,877.[202] Later, Pacific Power calculated a net book value for the same facilities of $24,049.[203] But, as explained by Mr. Mullins, the later and higher net book value calculation is problematic, and should not relied upon by the Commission to the extent that net book value is used for just compensation purposes.

104 For example, "[d]espite the fact that no new facilities have been installed on the Club's premises," the Company's valuation has *increased* significantly in the two plus years between calculations.[204] This renders the later calculation highly suspect, given that, "as a result of increased accumulated depreciation, the net book value should have declined materially."[205] Also, Mr. Mullins identified several apparent and unjustified errors and inconsistencies between the two calculations, including that "the handwritten customer contribution amount in the new calculation differs from the originally stated figure, once more without any explanation or support provided."[206]

105 In sum, if the Commission requires net book value compensation, an amount no larger than $19,877 would appear appropriate in relation to the underground facilities at issue

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201/ RCW § 80.04.250(1).
202/ Exh. No. BGM-1CT at 15:7-8 (citing Exh. No. JCT-8 at 3).
203/ Exh. No. BGM-6T at 7:11-13 (citing Exh. No. RBD-1T at 26:9).
204/ Exh. No. BGM-1CT at 16:4-7.
205/ Id. at 16:11-12.
206/ Id. at 16:7-14.

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

(and probably much less, if factoring for the accumulated depreciation since the Company originally provided this net book value in January 2013, more than three years ago). In any event, a just, fair and reasonable net book valuation would be considerably less than the $108,262 valuation alleged by the Company in the Petition.

F. Pacific Power Has No Basis to File a Reply

106 The Club does not raise any new challenges to the initial order that would give the Company the right to file a reply to the Answer.[207] In particular, although not necessarily agreeing with the ALJ's findings, reasoning or decisions in relation to WWCC requests for damage reparations and/or refund overcharges, the Club does not state any challenges to those portions of the initial order herein.

107 Additionally, based on the content of the Answer, the Club submits that the Company should not be granted permissive leave to reply. The Answer does not raise any "new matters" which the Company could not have "reasonably anticipated," according to the stated criteria for permissive replies under Commission rules.[208] Quite the contrary, the Club has often noted that the Company has simply elected not to respond or even to attempt formulation of counterarguments to matters initially stated by the Club earlier in the proceeding, and simply restated here in the Answer.

108 Therefore, while the Club appreciates that the Commission may grant exemptions to its rules for good cause, the Company has had an opportunity to reply to all of the matters discussed in the Answer. Consequently, good cause would seem to weigh against a permissive reply in this case. Even in regard to Constitutional and regulatory takings issues, Pacific Power

[207] WAC § 480-07-825(5)(a).
[208] WAC § 480-07-825(5)(b).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

is the party instigating such discussion in the Petition and the Company manifestly researched these matters in some detail. Accordingly, the Club respectfully submits that nothing raised in the Answer on these matters should be construed as either "new" or not "reasonably anticipated" by the Company, as these matters could and should have been contemplated in fashioning Petition arguments.

G. Oral Argument Is Unnecessary and the Company Failed to Support Its Request

109 Pacific Power requests oral argument in the caption to the Petition; otherwise, the Company offers no explanation or support for this request. In contrast, the applicable WUTC rules states: "A party who desires to present oral argument may request argument, *stating why* oral argument *is necessary* to assist the commission in making its decision and why written presentations will be insufficient."[209]

110 Far from persuasively stating why oral argument "is necessary," Pacific Power did not support or discuss its request. Similarly, the Company offers no rationale as to "why written presentations will be insufficient" to assist the Commission in making its decision. The Club does not believe that oral argument is necessary to assist the Commission in its administrative review. WWCC requests that the Commission deny the Company's oral argument request.

111 Not only is the record robust in this case, such that the Commission has sufficient evidence and a plethora of written argument to consider, but the Club is of the opinion that oral argument will add more in the way of litigation costs than it will in providing issue clarity. Respectfully, the WWCC, as evidenced in this Answer, has expended considerable effort

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[209] WAC § 480-07-825(6) (emphasis added).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

reviewing the evidence and testimony to thoughtfully address issues and claims presented in the Company's Petition.

112 The Company has had the opportunity to respond to Club evidence, positions, and arguments on a number of crucial matters and has elected not to do so in previous briefing or in the Petition. A grant of the Company's oral argument request, despite this tactical choice on the part of Pacific Power, would effectively sanction a strategy to withhold arguments until the last minute. Given the thorough analysis in this Answer, the WWCC submits oral argument is not likely "to assist *the commission* in making its decision."[210/]

113 The Club recognizes that the Commission may allow rule exemptions for good cause. Granting the Company a waiver in these circumstances, in response to or following the Answer, would reward the Company for holding arguments in reserve, despite having the opportunity—and in this instance, the express obligation under Commission rule—to make those arguments up front. If good cause existed, it should have been stated.

III. CONCLUSION

114 The Club has endeavored to answer all of the Company's challenges to the initial order that were made in the Petition. For the reasons stated herein, and based on ample record evidence and arguments provided in prior briefing, the Club respectfully submits that the Commission should adopt the initial order without modification. If the Commission decides that any facilities compensation is required, the Club believes that a fair valuation should not exceed the WWCC's estimation of $7,760, and in no event go beyond the Company's net book value calculation of $19,877, adjusted for recent depreciation. Finally, neither a Company reply nor oral argument should be granted, as explained above.

[210/] Id. (emphasis added).

DAVISON VAN CLEVE, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204
Telephone (503) 241-7242

Dated this 8th day March, 2016.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

Jesse E. Cowell
333 S.W. Taylor, Suite 400
Portland, Oregon 97204
(503) 241-7242 telephone
(503) 241-8160 facsimile
jec@dvclaw.com

/s/ Stanley M. Schwartz
Stanley M. Schwartz, WSBA #15518
Matthew W. Daley, WSBA #36711
Witherspoon Kelley
422 Riverside Avenue, Suite 1100
Spokane, WA 99201-0300
Telephone: 509.624.5265
Email: sms@witherspoonkelley.com
Email: mwd@witherspoonkelley.com

/s/ David S. Grossman.
David S. Grossman, WSBA #18428
Minnick-Hayner
P.O. Box 1757
249 West Alder
Walla Walla, WA 99362
Telephone: 509.527.3500
Email: grossman@minnickhayner.com

Attorneys for the Walla Walla Country Club