

# WILLIAMS MOSES LP

P.O. Box 11024  
Portland, OR 97211  
Voice/text: (971) 404-9081  
email: [jd@williamsmoses.com](mailto:jd@williamsmoses.com)

*Sent Via Electronic and United States Mail*

June 23, 2017

Steven King, Executive Director  
Washington Utilities & Transportation Commission  
1300 S. Evergreen Park Drive S.W.  
P.O. Box 47250  
Olympia, Washington 98504-7250

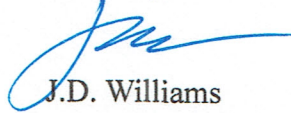
Re: WUTC v. Pacific Power and Light Company  
**Docket UE-161204**

Dear Mr. King:

Please find enclosed an original and five (5) copies of Yakama Power's *Motion for Official Notice – BIA Letter* in the above referenced docket.

Thank you for your assistance. Any questions, please do not hesitate to contact my office by e-mail or calling me at (971) 404-9081.

Sincerely,



J.D. Williams

Enclosures

Cc: Service List

## CERTIFICATE OF SERVICE

I certify that on June 23, 2017, I served the attached *Motion for Official Notice* on the parties listed below by sending them a copy via electronic mail.

  
J.D. Williams

R. Bryce Dalley  
Vice President - Regulation  
PacifiCorp  
825 N.E. Multnomah Blvd., Suite 2000  
Portland, OR 97232  
[Bryce.dalley@pacificorp.com](mailto:Bryce.dalley@pacificorp.com)

Christopher Casey  
Assistant Attorney General  
WUTC  
P.O. Box 40128  
Olympia, WA 98504-0128  
[ccasey@utc.wa.gov](mailto:ccasey@utc.wa.gov)

Patrick Loupin  
Boise White Paper, LLC  
P.O. Box 9900550  
Boise ID 83799-0050  
[PatrickLoupin@packagingcorp.com](mailto:PatrickLoupin@packagingcorp.com)

Lisa Gafken  
Assistant Attorney General  
Washington Office of the Attorney General  
800 5<sup>th</sup> Avenue, Ste. 2000  
Seattle, WA 98104-3188  
[LisaW4@atg.wa.gov](mailto:LisaW4@atg.wa.gov)

Simon J. Ffitch, Attorney  
321 High School Road N.E.  
Suite D3, Box No. 383  
Bainbridge Island, WA 98110  
[simon@ffitchlaw.com](mailto:simon@ffitchlaw.com)

Troy Greenfield  
Schwabe Williamson & Wyatt  
1420 5<sup>th</sup> Avenue, Suite 3400  
Seattle, WA 98101  
[tgreenfield@schwabe.com](mailto:tgreenfield@schwabe.com)

Dustin Till  
PacifiCorp  
825 N.E. Multnomah Blvd., Suite 1800  
Portland, OR 97232  
[Dustin.Till@pacificorp.com](mailto:Dustin.Till@pacificorp.com)

Tyler C. Pepple  
Davison Van Cleve, P.C.  
333 S.W. Taylor, Suite 400  
Portland, OR 97204  
[tcp@dvclaw.com](mailto:tcp@dvclaw.com)

Stanley M. Schwartz  
Witherspoon-Kelley  
422 W. Riverside Avenue  
Spokane, WA 99201  
[sms@witherspoonkelley.com](mailto:sms@witherspoonkelley.com)

Jesse Cowell  
Davison Van Cleve, P.C.  
333 S.W. Taylor, Suite 400  
Portland, OR 97204  
[jec@dvclaw.com](mailto:jec@dvclaw.com)

**BEFORE THE**  
**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

|  |   |                              |
|--|---|------------------------------|
| WASHINGTON UTILITIES AND<br>TRANSPORTATION COMMISSION, | ) | DOCKET UE-161204             |
|  | ) |                              |
| Complainant,   | ) |                              |
|  | ) | YAKAMA POWER'S MOTION FOR    |
| v.   | ) | OFFICIAL NOTICE – BIA LETTER |
|  | ) |                              |
| PACIFIC POWER & LIGHT COMPANY,                         | ) |                              |
|  | ) |                              |
| Respondent.  | ) |                              |
|  | ) |                              |

**I. INTRODUCTION**

1 Pursuant to WAC § 480-07-375(1)(d) and WAC § 480-07-495(2), Yakama Power files this motion for official notice (“Motion”) requesting the Washington Utilities and Transportation Commission (“WUTC” or the “Commission”) take official notice of a letter from the Superintendent of the Yakama Agency for the United States Bureau of Indian Affairs (“BIA”) to Scott Bolton, President, Pacific Power & Light Company (“Pacific”) (hereinafter, “BIA Letter”). Attachment A to this Motion contains the BIA Letter and a Certification Affidavit attesting to its authenticity.

2 This proceeding involves Pacific’s attempt to modify its tariffs and rules affecting customers who opt to permanently disconnect from Pacific’s system and obtain service from another electric service provider. Specifically, Pacific wants to modify its Rule 1 and 6 so as to require departing customers to make an up-front payment of either the actual cost of removal (as determined by Pacific) or the “fair market value” if choosing to purchase facilities. In addition,

Pacific proposes to modify its tariffs to require departing customers to pay a “stranded cost recovery fee” before Pacific will disconnect the customer from its system (collectively, both aspects of Pacific’s proposal will be referred to herein as the “NRT/SCRF Proposal”). Yakama Power has offered testimony in this proceeding recommending the Commission either (i) reject the NRT/SCRF Proposal in its entirety, or (ii) condition approval on Pacific agreeing to modify the NRT/SCRF Proposal so that it does not apply to Pacific customers located on or served by facilities that use Indian Trust Lands.<sup>1</sup> To support its recommendations, Yakama Power’s testimony explains that Tribal law and BIA regulations affecting Indian Trust Lands fatally undermine Pacific’s justifications for its NRT/SCRF Proposal.<sup>2</sup>

3           The Commission should take official notice of the BIA Letter because it evidences a governmental agency’s interpretive policy statement regarding Pacific’s right to operate and maintain facilities on Indian Trust Lands. The BIA Letter and related Certification Affidavit clearly and unequivocally evidence the fact that BIA provided Pacific written notice on or about July 9, 2015 that Pacific’s right to use Indian Trust Land differs significantly from its right to continued use of non-Indian lands. Pursuant to WAC 480-07-495(2)(a)(i)(A), the Commission may take official notice of the fact that the BIA Letter gave Pacific notice of the BIA’s interpretive policy statement contained therein.

## II. MOTION FOR OFFICIAL NOTICE

4           WAC § 480-07-495(2)(a)(i)(A) states that the Commission “*may take official notice of any judicially cognizable fact, examples of which include, but are not limited to . . . interpretive and policy statements . . . of the commission and other governmental agencies*”. Thus, the

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<sup>1</sup> Wiseman, Exh. RW-1T at 3:16-4:15.

<sup>2</sup> *Id.* at 6:11-8:5.

Commission may take official notice of the BIA Letter if it: (1) establishes a “*judicially cognizable fact*”; and, (2) provides an “*interpretive and policy statement*” of a “*governmental agency*”.

A. The BIA Letter Evidences the Fact That in 2015 the BIA Notified Pacific of Unique Federal Regulations Applicable to Pacific’s Right to Maintain Service Lines on Indian Trust Lands.

5 Section 3 of the Certification Affidavit in Attachment A provides a sworn statement from David Shaw, Superintendent of the BIA’s Yakama Agency, of the fact that on or about July 9, 2015, Mr. Shaw mailed a signed copy of the BIA Letter to Pacific’s President, Scott Bolton. The fact that Mr. Shaw mailed the BIA Letter provides credible evidence that Pacific was made aware of the BIA’s position with respect to Pacific’s limited right to place, operate and maintain facilities on Indian Trust Lands more than a year before Pacific submitted the NRT/SCRF Proposal that is the focus of this proceeding. The fact that Pacific was made aware of the BIA’s position and made no attempt to modify the NRT/SCRF Proposal to treat Indian Trust Lands differently is a “judicially cognizable fact” relevant to legitimate issues being asserted by Yakama Power in this proceeding.

B. The BIA Letter Evidences a Governmental Agency’s Interpretive Policy Statement.

6 Established in 1824, the BIA is the oldest bureau of the United States Department of the Interior,<sup>3</sup> a Cabinet-level agency of the federal government. As a result, the BIA is an “other governmental agenc[y]” for purposes of WAC § 480-07-495(2)(a)(i)(A).

7 The content of the BIA Letter clearly provides several policy statements explaining the BIA Yakama Agency’s interpretation of how title 25 of the Code of Federal Regulations, Part

<sup>3</sup> <https://www.bia.gov/WhoWeAre/index.html>

169, affects Pacific's right to provide service to or on Indian Trust Lands. For example, the BIA Letter states, in part:

*[25 CFR] Section 169.22 addresses service lines, including electrical service lines. As a result, wherever PacifiCorp lacks an executed agreement filed with the BIA as required by Section 169.22, PacifiCorp holds, at best, a revocable license for the use of such Indian lands and, at worst, may be in trespass on such lands. If the owners of such Indian lands notify the BIA of their desire to no longer receive electrical or other services from PacifiCorp, the BIA will provide 30 day notice to PacifiCorp to remove such service lines at PacifiCorp's expense*

Each of these statements explains how the BIA Yakama Agency interprets the application of 25 CFR Part 169 to Pacific's right to provide service to customers located on or served by facilities that use Indian Trust Lands. The extent of Pacific's ongoing right to provide service to customers located on or served by facilities located on Indian Trust Lands has a direct bearing on whether the NRT/SCRF Proposal is just and reasonable.

C. The BIA Letter Provides Evidence Directly Relevant to Yakama Power's Position that Assertions Pacific Makes to Justify its NRT/SCRF Proposal are Invalid.

8 One of the central justifications Pacific offers to support its NRT/SCRF Proposal is that it is necessary to maintain the "regulatory compact", i.e., the Commission made a promise to Pacific that it would recover its investment in facilities and supply commitments to its customers because it was under a "duty to serve" them.<sup>4</sup> Yakama Power has disputed Pacific's position by offering credible testimony explaining that the "regulatory compact" is inapplicable to any

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<sup>4</sup> Dalley, Exh. RBD-5Tr at 12:1-14:22.

Pacific customer located on or served by facilities that use Indian Trust Lands unless Pacific has obtained all Federal and Tribal authorizations required to provide service to such customer. Yakama Power's position in this proceeding is that Pacific should not be allowed to recover removal costs for any facility located on property where Pacific does not have a valid BIA use authorization, or located on Trust Land where the BIA has the right to require removal with 60 days or less notice.<sup>5</sup> The fact that the BIA Letter was sent to Pacific on or about July 9, 2015 is directly relevant to the fact that Pacific has known about the unique issues involving its ongoing right to provide service using Indian Trust Lands but has offered no reason as to why customers on or using Indian Trust Lands should not be treated the same as every other Pacific customer

### III. CONCLUSION

9           WAC § 480-07-495(2) authorizes the Commission to take official notice of any judicially cognizable fact, including, but not limited to, interpretive and policy statements of a governmental agency other than the Commission. Yakama Power respectfully requests the Commission issue an order taking official notice of the fact the BIA Letter was sent to Pacific on or about July 9, 2015 and contains interpretive and policy statements from BIA's Yakama Agency concerning Pacific's right to place, operate and maintain facilities on Indian Trust Lands.

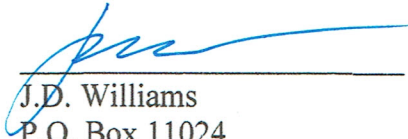
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<sup>5</sup> Wiseman, Exh. RW-1T at 4:6-9.

Dated this 23<sup>rd</sup> day of June, 2017.

Respectfully submitted,

WILLIAMS MOSES LP



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J.D. Williams

P.O. Box 11024

Portland, OR 97211

voice/text [971.404.9081](tel:971.404.9081)

email: [jd@williamsmoses.com](mailto:jd@williamsmoses.com)

Of Attorneys for Yakama Power