

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	DOCKET NO. UE-001734
	)	
Complainant,	)	
	)	
v.	)	
	)	
PACIFICORP, d/b/a PACIFIC POWER & LIGHT,	)	SECOND SUPPLEMENTAL ORDER DENYING MOTION TO DISMISS AND GRANTING PETITION FOR INTERVENTION
	)	
Respondent.	)	
.....	)	

I. SYNOPSIS

1 This proceeding concerns a tariff revision that would allow PacifiCorp to charge a customer who changes utility service from PacifiCorp to another utility the costs of removing PacifiCorp's utility property from the customer's location. This Order addresses two procedural issues. The Commission denies a Motion to Dismiss filed by Public Counsel and Industrial Customers of Northwest Utilities because Movants have not demonstrated that the Proposed Tariff Revision constitutes an increase in general base rates that would be a violation of a prior approved Stipulation. The Commission grants, on a limited basis, a petition for intervention by Columbia Rural Electric Association, Inc.

II. MEMORANDUM

2 **Parties:** James C. Paine, Stoel Rives LLP, attorney, Oregon, represents PacifiCorp, d/b/a Pacific Power & Light (PacifiCorp or Company). Don Trotter, Assistant Attorney General, Olympia, Washington, represents Staff of the Washington Utilities and Transportation Commission (Staff). Robert Cromwell, Assistant Attorney General, Seattle, Washington, represents Public Counsel. Irion Sangern, attorney, Portland, Oregon, represents Industrial Customers of Northwest Utilities (ICNU). Michael V. Hubbard, attorney, Waitsburg, Washington, represents Columbia rural Electric Association, Inc. (CREA).

3 **Procedural History:** On November 9, 2000, PacifiCorp d/b/a Pacific Power & Light (PacifiCorp) filed with the Commission a tariff revision (Proposed Tariff Revision) which would allow PacifiCorp to charge a customer the costs associated with removing PacifiCorp's utility property from the customer's location when the

customer changes utility service providers. The Commission suspended the Proposed Tariff Revision pending hearing(s) on the changes and whether they are just and reasonable.

4 The Commission convened a prehearing conference on May 1, 2001. Among other things, the Commission granted ICNU's petition to intervene, established a procedural schedule, invoked the discovery rule (WAC 480-09-480), and entered a Protective Order (First Supplemental Order, May 4, 2001). In addition, the Commission set a pleading schedule for filing motions to dismiss.

5 On May 24, 2001, Public Counsel and ICNU filed a motion to dismiss PacifiCorp's Proposed Tariff Revision for non-compliance with the Commission's Order and Stipulation in Docket No. UE-991832. PacifiCorp and Commission Staff filed pleadings in opposition to the Motion to Dismiss.

6 On May 29, 2001, Columbia Rural Electric Association (CREA) filed a petition for intervention. PacifiCorp and Commission Staff filed pleadings in opposition to CREA's petition. Public Counsel expressed no objection to the petition.

### III. DISCUSSION AND DECISION

7 This Order addresses two procedural motions: A) a Motion to Dismiss filed by Public Counsel and ICNU, and B) a Petition for Intervention filed by CREA. The Order does not address the merits of the case.

#### A. MOTION TO DISMISS

8 **Standard of Review.** WAC 480-09-426(1) provides that a party may move to dismiss an opposing party's pleading, including the documents initiating the case, if the pleading fails to state a claim on which the Commission may grant relief. In ruling on a motion made under WAC 480-09-426(1), the Commission will consider the standards applicable to a motion made under Civil Rule 12(b)(6), 12(c), or 50, as applicable, of the Civil Rules for Superior Court.

9 In support of a motion to dismiss in civil court, the moving party bears the burden of demonstrating that "it appears beyond a reasonable doubt that no facts exist that would justify recovery." *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755 (1994). The Commission must view the facts in a light most favorable to the nonmoving party. *Reid v. Pierce County*, 136 Wn.2d 195 (1998). No facts can justify recovery if the moving party is entitled to judgment as a matter of law. *Reid*, 136 Wn.2d at 201.

61

10 **Parties' Arguments.** Public Counsel and ICNU (Movants) argue that PacifiCorp's Proposed Tariff Revision should be dismissed as a matter of law because it violates our order approving a stipulation in a recent PacifiCorp rate case, Docket No. UE-991832. Movants contend that the Commission's Third Supplemental Order (Order) approving the Stipulation in Docket No. UE-991832 prevents PacifiCorp, except in limited circumstances inapplicable here, from filing rate changes, including this Proposed Tariff Revision, until December 31, 2005.

11 Specifically, Public Counsel and ICNU urge the Commission to determine as a matter of law that the Proposed Tariff Revision: 1) is a general rate change contrary to Sections 1 and 2 of the Stipulation; 2) is not an "ongoing regulatory activity" tariff change contemplated in subsection 9(f) of the Stipulation; and 3) is not a Schedule 300 miscellaneous charge allowed by Section 13 of the Stipulation. PacifiCorp and Commission Staff oppose the motion. The relevant sections of the Stipulation are provided in Appendix A of this Order.

1) *Is PacifiCorp's Tariff Revision a Change to General Base Rates?*

12 **Movants' Position.** Public Counsel and ICNU note that Section 1 of the Stipulation, did not contemplate change in any "general base rates"<sup>1</sup> other than those expressly stated in the Stipulation. They point out that Section 2 of the Stipulation sets forth the limited increases that the Commission authorized to general base rates. Without discussion, Movants assume that the Proposed Tariff Revision would increase the Company's general rates by a yet undetermined amount. From this assumption, Movants argue that the Proposed Tariff Revision violates the express terms of the Order (Sections 1 and 2 of the Stipulation). According to Movants, the Commission should interpret the Order as barring new rate increases unless explicitly contemplated in the Stipulation.

13 **PacifiCorp's Position.** PacifiCorp argues that the Section 2 restrictions on increases to general base rates refer only to the energy, demand and customer charges provided for in existing retail service tariffs, specifically, Schedules 16, 17, 18, 24, 33, 36, 40, 47T, 51, 52, 53, 54, and 57. PacifiCorp asserts that its Proposed Tariff Revision does not increase or otherwise affect any of the referenced tariffs. Nor do any of these tariffs govern Company removal of its facilities from a customer's property. According to PacifiCorp, the schedules above govern the provision of the commodity (electricity) and set forth the retail prices for levels of consumption in the form of energy and demand charges and further provide for specified customer charges.

14 **Staff's Position.** Staff recommends that Movants' position on this issue be rejected. Staff points out that the Proposed Tariff Revision seeks to change part of PacifiCorp's "General Rules and Regulations." Like PacifiCorp, Staff suggests that a definition

---

<sup>1</sup> The parties agree that the Stipulation does not expressly define "general base rates."

for general base rates can be determined by the types of charges that were actually subject to the rate increases under the Stipulation. Staff provides, as Attachment A to its response, the advice letter implementing certain of the Stipulation rate increases to general base rates, together with the Commission's Fourth Supplemental Order in Docket No. UE-991832 accepting those revisions. Staff notes the absence from those general base rates such charges as line extensions and other charges similar to those included in the Proposed Tariff Revision. Staff asserts that those charges are contained in the "General Rules and Regulations" section of the Company's tariff, which was not subject to the stipulated rate-increase limitations.

2) *Is PacifiCorp's Tariff Revision an "ongoing regulatory activity"?*

15

Subsection 9(f) of the Stipulation states:

**The moratorium on general rate filings during the Rate Plan Period does not preclude the Company from requesting, or the Commission from approving, tariff or rate changes for the following purposes:**

\* \* \*

**f. Ongoing regulatory activities, such as: New service offerings; pursuing special contracts tailored to meet individual customer needs; participation in commission notices of inquiry, or NOIs, on electric industry issues, including the opportunity to seek related rule or tariff changes; and tariff changes associated with pass-through of credits and surcharges, such as municipal utility taxes.**

16

**Movants' Position.** Public Counsel and ICNU contend that PacifiCorp's Proposed Tariff Revision is not of the same nature as the ongoing regulatory matters contemplated in subsection 9(f) of the Stipulation. Movants interpret Section 9 to include those tariff filings that might be required in the intervening five years of the rate plan due either to existing or expected regulatory requirements, or to new customer needs. Movants argue that "ongoing regulatory activity" clearly reflects those actions the Company must take to comply with the ongoing regulatory directives of the state and federal agencies that have jurisdiction over the Company. They cite the Commission's *Third Supplemental Order*<sup>2</sup> at paragraphs 30 and 60 in support of their interpretation. Movants also argue that nothing in Section 9 of the adopted agreement contemplates any unique or new type of customer charge. Finally, Movants maintain that a new circumstance such as competition is not associated with any ongoing regulatory activity.

---

<sup>2</sup> Third Supplemental Order Approving and Adopting Settlement Agreement, Rejecting Tariff Sheets; Authorizing and Requiring Compliance Filing, Docket No. UE-991832.

- 17 **PacifiCorp's Position.** PacifiCorp disagrees with Movants' position that the list of permitted filings in subsection 9(f) is all-inclusive. PacifiCorp points out that the use of the phrase "such as" is meant to introduce a non-exclusive list of examples of permissible filings, each of which constitutes an "ongoing regulatory activity." PacifiCorp argues that the authorization to make a "new service offering" in subsection 9(f) of the Stipulation negates Movants' position that "ongoing regulatory activities" is limited to Commission-initiated investigations, or matters pending at the time of Commission adoption of the Stipulation. PacifiCorp further argues that Movants' position violates the standard for considering summary dismissal requests in that such an interpretation does not consider the facts in a light most favorable to PacifiCorp, the nonmoving party. PacifiCorp contends that "ongoing regulatory activities" includes Commission consideration of new circumstances faced by PacifiCorp in the conduct of its day-to-day regulated business activities over which the Commission has jurisdiction.
- 18 **Staff's Position.** Staff urges the Commission to conclude that PacifiCorp's Proposed Tariff Revision is expressly authorized by the Order in adopting subsection 9(f) either as a "new service offering" or a filing that is part of an "ongoing regulatory activity." Staff points out that, contrary to Movants' position, foreseen regulatory circumstances is not a condition of Section 9 of the Stipulation. Likewise, Staff notes that nothing in paragraphs 30 and 60 of the *Third Supplemental Order* speaks to foreseen regulatory circumstances. Moreover, the term "new service offering" in subsection 9(f) expressly refers to something new, which is expressly contrary to the ban Movants' now propose for any unique or new type of customer charge.
- 19 Staff maintains that PacifiCorp's Proposed Tariff Revision satisfies Movants' definition of "ongoing regulatory activity." Staff argues that competition in the electric industry has been an ongoing regulatory issue for quite some time. Staff notes that in 1995 the Commission issued a Policy Statement on Guiding Principles for Regulation in Electric Industry, Docket No. UE-940932 (December 11, 1995). The Policy Statement recognized the need for ongoing regulatory flexibility in a changing environment. Staff asserts that PacifiCorp's tariff filing is, on its face, a response to a competitive situation that is part of this overall, ongoing regulatory activity.
- 3) *Is PacifiCorp's Tariff Revision a Schedule 300 Miscellaneous Charge?*
- 20 **Movants' Position.** Public Counsel and ICNU assert that the Commission's Order in adopting Section 13 of the Stipulation allows the Company to submit rate changes if they 1) are proposed rate changes that were "part of the Company's general rate filing in" Docket No. UE-991832, or 2) "update the cost elements included in Schedule 300 miscellaneous charges." Movants argue that PacifiCorp's Proposed Tariff Revision does not fit within these requirements because it was not filed under Schedule 300 in

Docket No. UE-991832, and it does not update any cost element in Schedule 300. Therefore, Section 13 does not apply here.

21 **Staff's Position.** Commission Staff agrees with Movants' analysis.

22 **PacifiCorp's Position.** PacifiCorp acknowledges that the proposed net removal charge is not currently contained in PacifiCorp's Schedule 300, but argues that the proposal could appropriately be located in Schedule 300 under the Tariff Index designation "Charges as Defined by the Rules and Special Regulations."

### *Commission Discussion and Decision*

23 Based on the pleadings before us, and viewing the facts in the light most favorable to PacifiCorp, we conclude that Movants have not demonstrated that the Proposed Tariff Revision constitutes an increase in general base rates that would be a violation of the Sections 1 and 2 of the Stipulation. We find persuasive the arguments of Commission Staff and PacifiCorp with respect to the types of charges that were actually subject to the rate increases under the Stipulation. Specifically, the reference to PacifiCorp's November 28, 2000, advice letter implementing certain of the Stipulation rate increases to general base rates, together with our Fourth Supplemental Order Accepting Tariff Revisions Effective January 1, 2001, in Docket No. UE-991832 (December 27, 2000), provide sound support for their arguments that the Proposed Tariff Revision is not subject to the stipulated rate increases, which applied only to general base rates. Rather, the Proposed Tariff Revision was filed as a change in the General Rules and Regulations section of the Company's tariff, which was not subject to the rate-increase limitations by the Order's adoption of Section 2 of the Stipulation.

24 Furthermore, we conclude that the Proposed Tariff Revision is expressly authorized by subsection 9(f) of the Stipulation, either as a new service offering or as a filing that is part of an ongoing regulatory activity. Prior to this filing there were no charges stated in PacifiCorp's tariff for this service, nor had PacifiCorp fielded requests to remove utility equipment from the customer's property. Thus, the Proposed Tariff Revision constitutes a new service offering under subsection 9(f) of the Stipulation. Likewise, we consider the Proposed Tariff Revision to be a response to a competitive situation that is part of the overall, ongoing regulatory activity, namely emerging competition in the electric industry. Accordingly, we deny the Motion to Dismiss.

### **B. PETITION FOR INTERVENTION**

25 Columbia Rural Electrical Association (CREA) seeks intervention in this proceeding. CREA is a non-profit electrical cooperative, providing electric service to its members in areas in Eastern Washington that overlap areas served by PacifiCorp. CREA alleges that it has a general transfer agreement that allows BPA power to be wheeled

over parts of PacifiCorp's lines to serve CREA's members. CREA seeks intervention to address the following issues:

- (a) that the PacifiCorp filing in this case violates the Commission's Order adopting the Stipulation in Docket No. UE-991832;
- (b) that CREA intends to join motions to dismiss to be filed by other parties;
- (c) that PacifiCorp's proposed tariff charges are already covered by existing tariff charges;
- (d) that the proposed tariff charges are discriminatory; and
- (e) that the proposed tariff charges are an unlawful restraint of trade, restricting competition and customer choice in contravention of law and public policy.

26 CREA also asserts a desire to contest factual statements made in this docket about CREA's alleged solicitation activities, and to present evidence of PacifiCorp's customers' requests to CREA for service. CREA does not state the nature of any substantial interest, such as property or contractual rights, in support of its petition.

27 Public Counsel does not object to CREA's petition. PacifiCorp and Commission Staff filed responses in opposition. Both PacifiCorp and Commission Staff argue that the Commission is without jurisdiction to consider the contentions of CREA, citing *Cole v. Utilities and Transp. Comm'n*, 79 Wn.2d 302 (1971). PacifiCorp and Commission Staff argue that the *Cole* case applies here. They argue that CREA is not regulated by the Commission, is not a customer of PacifiCorp in any sense relevant to regulation under Title 80 RCW, and has demonstrated no interest in this proceeding that is within the Commission's jurisdiction to consider or resolve. Therefore, the petition should be denied.

#### ***Commission Discussion and Decision***

28 Based on our analysis of the *Cole* decision and the circumstances of this case, we grant CREA's petition to intervene, with limitations. We agree with Commission Staff and PacifiCorp that CREA does not show a right to intervention under Washington law. Neither has it demonstrated any substantial interest, nor has it demonstrated a public interest that would support intervention with respect to issues (a) through (d) above. However, we find that it is consistent with the public interest to allow CREA to intervene to address issue (e) and to contest the factual contentions about CREA in PacifiCorp's testimony.

29 We disagree with Commission Staff and PacifiCorp that the *Cole* decision controls our decision in this case. The *Cole* case was decided in 1971, and precedes the adoption of the Administrative Procedure Act. *RCW 34.05.443* governs intervention and provides broad discretion in granting a petition for intervention. It states:

**(1) the presiding officer may grant a petition for intervention at any time, upon determining that the petitioner qualifies as an intervenor under any provision of law and that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.**

30 The Commission's rule on intervention has been revised and recodified since the *Cole* decision, but the substance of the rule remains essentially the same. *WAC 480-09-430* provides that the Commission may grant a petition to intervene if the commission finds that the petition discloses a substantial interest in the subject matter of the hearing,<sup>3</sup> or if the participation of the petitioner is in the public interest.<sup>4</sup>

31 In *Cole*, the Commission denied intervention, finding the intervenor had no interest jurisdictional to the Commission. The alternative, "public interest" test was not addressed. This alternative ground for intervention is broader in nature, turning not on the would-be intervenor's *right* to intervene, but rather on the Commission's needs to make a full and fair determination consistent with the public interest. The Commission needs to determine whether the would-be intervenor's participation will contribute to the Commission's ability to make a decision in the public interest.

32 This alternative, discretionary ground for intervention necessarily turns on the facts and context of any given proceeding.

33 In the instant case, PacifiCorp's proposal occurs not in isolation but in the context of potential competition among neighboring utilities. PacifiCorp's customers, whether potential migrants from PacifiCorp or the customers who don't migrate to another utility, are affected by this broader context. In this proceeding, CREA's participation may help us to determine the effects of the Proposed Tariff Revision on the customers, which we find to be in the public interest. Accordingly, we grant CREA's petition to intervene only on the fifth ground (issue (e)) prescribed by CREA, and for the purpose of addressing factual contentions about CREA in the parties' testimony.

#### IV. ORDER

##### THE COMMISSION ORDERS:

34 (1) The Motion to Dismiss filed by Public Counsel and ICNU is denied.

---

<sup>3</sup> By substantial interest, the rule means a legal or property interest that could be adversely affected by a decision. See *In the matter of the Investigation of Depreciation Rates of U S West, Docket No. UT-951425 (March 28, 1997) p.12, fn 3.*

<sup>4</sup> . . . "If the petition discloses a substantial interest in the subject matter of the hearing, or if the participation of the petitioner is in the public interest, the commission may grant the petition orally, at the hearing or prehearing conference, or in writing." *WAC 480-09-430.*



35 (2) The Petition for Intervention filed by Columbia Rural Electric Association is  
granted.

36 DATED at Olympia, Washington, and effective this 9<sup>th</sup> day of July, 2001.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



MARILYN SHOWALTER, Chairwoman



RICHARD HEMSTAD, Commissioner

**NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-09-760.**

**STIPULATION - RELEVANT SECTIONS****1. Rate Plan Period.**

**a. Term.** The rate plan period established in this Stipulation (Rate Plan Period) commences as of the date of the Commission order approving this Stipulation and continues through December 31, 2005. During the Rate Plan Period, the Parties will neither propose, nor will they recommend that the Commission approve, any change in the Company's general base rates<sup>1</sup> in Washington.

**b. Purpose.** The Parties agree that the rate plan offered in this Stipulation is in the public interest and will provide rates for the Company that are just, fair, reasonable and sufficient throughout the Rate Plan Period. The rate plan is designed to achieve several objectives for the Company and its customers over the Rate Plan Period. First, the staging of rate increases over a three-year period lessens the impact on customers of the increases that the Parties have agreed are necessary. The rate plan, after taking into account the other credits<sup>2</sup> that will be flowed through to customers, provides for relative rate stability for a period in excess of five years.

Second, the rate plan covers a period of significant transition for the Company. The rate plan recognizes the difficulty of setting rates during this transitional period, and provides the Company with an opportunity to earn reasonable returns, on balance, over the Rate Plan Period. At the same time, customers are provided predictable and relatively stable rates for the Rate Plan Period.

Third, the rate plan provides that at the end of the Rate Plan Period, the Company will submit either a filing demonstrating the reasonableness of the Company's then-existing rates or a general rate filing. This filing will enable the Commission and the Parties to examine the Company's performance over the Rate Plan Period, and to evaluate the reasonableness of the Company's rates in light of the conditions that exist following the Rate Plan Period.

**2. Rate Changes**

Changes in the Company's general base rates during the Rate Plan Period shall be limited to the following:

---

<sup>1</sup> For example, adoption of a System Benefits Charge or other, similar mechanism for separate recovery of DSM expenditures or low-income energy efficiency would not be included in a "base" rate change. Nor are the carve-outs provided in Section 9 of this Stipulation included as base rate changes that are limited by Section 2.

<sup>2</sup> The merger credit and the gain from the Centralia sale, respectively, are passed through as separate credits on customer bills.

- (a) A 3.0% increase in the Company's general base rates, to be effective as of September 1, 2000. Although effective as of September, 1, 2000, implementation in customer rates shall be delayed to January 1, 2001 (to coincide with the effective date of the merger credit), with the revenue for the intervening period (September 1 through December 31, 2000) deferred for recovery beginning January 1, 2001. Interest shall accrue on such deferral at 8.80% until recovered in rates. Such deferral shall be recovered during 2001.
- (b) A 3.0% increase in the Company's general base rates, to be effective as of January 1, 2002.
- (c) A 1.0% increase in the Company's general base rates, to be effective as of January 1, 2003.

These increases will be spread in accordance with the Stipulation Regarding Rate Spread approved by the Commission in this proceeding on June 6, 2000. Such rate changes are exclusive of the impact of the credit to flow through to customers the gain from the sale of Centralia, as set forth in section 4 below, and the merger credit, which commences January 1, 2001 and continues through December 31, 2004. The amount of the merger credit is \$3.0 million per year, or approximately 1.7%, and will be passed through as a separate credit on the bill.

The Company's present revenues and billing determinants from the 12 months ending December 31, 1998 will be used in setting rate changes during the Rate Plan Period and implementing rate design changes. Consistent with the Stipulation Regarding Rate Spread, the revenue requirement change will be calculated by multiplying the percentage change of the rate changes set forth above by the total present revenues from all standard tariff customers in the test period. For purposes of calculating the percentage change for each subsequent year, present revenues from standard tariff customers for the test period will include test period revenue increases from any prior rate changes.

#### **9. Regulatory Actions During Rate Plan Period**

The moratorium on general rate filings during the Rate Plan Period does not preclude the Company from requesting, or the Commission from approving, tariff or rate changes for the following purposes:

- a. Impact of governmental or legislative actions, such as changes in Federal tax rates or changes in environmental laws or regulations;
- b. Tariff filing pursuant to Section 7 of this Stipulation to implement a System Benefits Charge;

- c. Tariff filing pursuant to Section 14 of this Stipulation to implement low-income assistance programs;
- d. Impact of changes in transmission costs due to implementation of a regional transmission organization, or RTO, (including action on motion of the Commission or any Party in the case of a cost decrease);
- e. Revenue-neutral filings to implement intra-class cost of service changes or redesign of intra-class electric rates as necessary to accommodate market conditions;
- f. Ongoing regulatory activities, such as: New service offerings; pursuing special contracts tailored to meet individual customer needs; participation in Commission notices of inquiry, or NOIs, on electric industry issues, including the opportunity to seek related rule or tariff changes; and tariff changes associated with pass-through of credits and surcharges, such as municipal utility taxes.

This Section 9 does not preclude the Company from submitting petitions for accounting orders, as appropriate, for treatment of revenues, investments or expenditures during the Rate Plan Period. In this regard, the Company shall ensure that items currently treated as regulatory assets under authorizations from other states that are proposed for inclusion in Washington at the end of the Rate Plan Period are supported by necessary accounting authorizations in Washington. Nor does this Section 9 preclude the Company from seeking regulatory approval of proposed transactions pursuant to Chapter 80.12 RCW, under separate filings with the Commission.

### **13. Schedule 300 Charges**

The proposed changes to the Company's Schedule 300, included as part of the Company's general rate filing in this docket, may be submitted by the Company in a separate tariff filing. The Company may make future filings from time to time during the Rate Plan Period to update the cost elements included in Schedule 300 miscellaneous charges.