

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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

**INITIAL POST-HEARING BRIEF OF YAKAMA POWER**

**July 28, 2017**

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Pursuant to Washington Administrative Code (“WAC”) § 480-07-390 and Prehearing Conference Order 03, Yakama Power hereby submits its initial post-hearing brief (“Brief”) in this proceeding.

## **I. INTRODUCTION**

1           This proceeding involves a request by Pacific Power & Light Company (“Pacific” or the “Company”) to modify its tariffs and rules applicable to customers choosing to permanently disconnect from Pacific’s system and obtain service from another electric service provider. Generally speaking, Pacific proposes two types of tariff modifications. First, Pacific wants to change its “net removal tariff” to require departing customers to make an up-front payment of either the total actual cost of removal (as determined by Pacific) or fair market value of the Pacific facilities the customer chooses to purchase. Second, Pacific seeks the right 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”).

2           Yakama Power respectfully requests the Washington Utilities and Transportation Commission (“WUTC” or the “Commission”) prohibit application of Pacific’s NRT/SCRF Proposal to any Pacific customer located within the boundaries of the Yakama Indian Reservation and served in whole or in part by facilities located on Indian Trust Lands.<sup>1</sup>

## **II. DEFINITIONS**

3           For purposes of this Brief, except as otherwise expressly provided, the following terms when used with initial capitalization shall have the meanings assigned to them in this Section.

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

4            BIA means the Bureau of Indian Affairs within the United States Department of the  
Interior.

5            BIA land means any tract, or interest therein, in which the surface estate is owned and  
administered by the BIA, not including Indian land.

6            Indian means any enrolled member of a federally recognized Indian tribe or an owner, as  
of October 27, 2004, of a trust or restricted interest in land within the Reservation.

7            Trust Land means any tract in which the surface estate, or an undivided interest in the  
surface estate, is owned by one or more individual Indians or tribes and held in trust or restricted  
status by the United States.

8            Service Lines means utility lines described in 25 CFR § 169.51{ TA \l "25 CFR §  
169.51" \s "25 CFR § 169.51" \c 2 }.

9            Yakama Reservation or Reservation means the area of land reserved for the Yakama  
Indian Nation as its permanent tribal homelands, consisting of approximately 1.4 million acres  
covering approximately 2,185.94 square miles located primarily in Yakima County but also  
including portions of Lewis and Klickitat counties in Washington.<sup>2</sup>

10           Yakama Nation or Tribe means the Confederated Tribes and Bands of the Yakama  
Nation, an Indian tribe under section 102 of the Federally Recognized Indian Tribe List Act of  
1994 (25 U.S.C. 479a).

11           Yakama Power means the nonprofit tribal electric utility created and wholly-owned by  
the Yakama Nation.

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<sup>2</sup> Wiseman, Exhibit RW-1T 2, fn 1.

### III. BACKGROUND

12 As explained in greater detail below, a fundamental flaw in Pacific's NRT/SCRF Proposal is that it fails to take into consideration the different rights and obligations it has depending on whether it is operating within or without Reservation boundaries. Pacific has no service territory agreement with Yakama Power and, within Reservation boundaries, Pacific has no reasonable expectation of a continuing right to serve customers that require facilities located in whole or in part on Trust Lands. Service to such customers requires authorization from the BIA pursuant to federal regulations, and where lacking makes Pacific facilities subject to eviction upon 30 days' notice. These key distinctions dictate that Pacific's current one-size-fits-all proposal be modified to exclude customers located on the Reservation.

A. Overview of the Yakama Nation's Exercise of its Sovereign Right to Provide Electric Service within the boundaries of the Yakama Indian Reservation.

13 Formed in 2004, Yakama Power is a non-profit utility, incorporated under the authority of the Yakama Nation, a federally recognized Indian tribe<sup>3</sup>, with the goal of providing less costly electrical power, creating economic development and jobs, and asserting the Nation's sovereign authority to provide essential governmental services within the boundaries of the Yakama Reservation, including the resulting consolidation of all electrical services on the Reservation into Yakama Power.<sup>4</sup> As a non-profit, its rates are cost-based and do not differentiate between new and existing customers.<sup>5</sup> As a full requirements customer of the Bonneville Power Administration (BPA), Yakama Power's customers share in the benefits of the public preference

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<sup>3</sup> 81 Fed. Reg. 5019, 5020 (2016){ TA \l "81 Fed. Reg. 5019, 5020 (2016)" \s "81 Fed. Reg. 5019, 5020 (2016)" \c 4 } (List of federally recognized Indian tribes).

<sup>4</sup> Wiseman, Exh. No. RW-1T at 2:5-12, 4:20-23, and 5:1-3; YP Response to UTC DR-1, Exh. No. RW-4X, pp. 1-2.

<sup>5</sup> YP Response to UTC DR-1, Exh. No. RW-4X, pp. 1-2.

access to federal power. The majority of Yakama Power's residential customers, most of whom are Native American, live below the poverty level.<sup>6</sup>

14           Yakama Power first acquired utility assets from Pacific in 2005-06 through a Yakama Nation condemnation process and settlement agreement administered by the Tribal Court. The resulting sale of those assets to Yakama Power was approved by this Commission in 2006.<sup>7</sup> Another condemnation was begun and settled between the two utilities through an additional sale of assets in and near the town of White Swan on the Reservation.<sup>8</sup> An additional condemnation of Pacific utility assets, in or near the town of Wapato on the Reservation, is currently pending settlement negotiations.<sup>9</sup>

15           Yakama Power has not taken Pacific customers without such a condemnation or sale.<sup>10</sup> For example, despite a direct request from a company owned by a Tribal member, Tiin Ma Logging, to provide service to its shops on Trust Land, and Yakama Power having available facilities, Yakama Power has not taken Tiin Ma Logging as a customer. This, despite the fact that Pacific failed to respond to Tiin Ma's disconnect notice for *seven months*, and then asserted a removal cost of \$8,472.00 or more against the company with no explanation of how those costs were determined or what is to be removed.<sup>11</sup>

16           No service territory agreement has ever been discussed or developed between Yakama Power and Pacific.<sup>12</sup> In contrast, Yakama Power recently began a phased purchase over three years of all of Benton Rural Electric Association's (BREA) assets within the boundaries of the

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<sup>6</sup> Wiseman, Exh. No. RW-1T at 5:4-8.

<sup>7</sup> Docket No. UE-151840, Order No. 1 (January 25, 2006); Wiseman, Exh. No. RW-1T at 5:11-16.

<sup>8</sup> Wiseman, Exh. No. RW-1T at 5:17-19.

<sup>9</sup> Wiseman, Exh. No. RW-1T at 5:21-22.

<sup>10</sup> Wiseman, Exh. No. RW-1T at 5:22-23.

<sup>11</sup> Wiseman, Exh. No. RW-1T at 8:10-21 and 9:1-14.

<sup>12</sup> Wiseman, Exh. No. RW-1T at 6:1-2; YP Response to UTC DR-2, Exh. No. RW-4X, pp. 3-4

Yakama Reservation. The sale was approved by vote of the BREA's customers.<sup>13</sup> As a result, Yakama Power now serves over 3000 accounts and has an average load of 22 mega-watts.<sup>14</sup>

17 As a result of a federal allotment act, the eastern third of the reservation is a mix of Trust Lands and lands held in fee title by individuals.<sup>15</sup> Almost all of Yakama Power's customers are located on Trust Lands within the boundaries of the Reservation.<sup>16</sup> Federal courts have consistently noted the lack of any state *civil regulatory* jurisdiction over Trust Lands within reservation boundaries.<sup>17</sup> In addition, the State of Washington has a current policy of supporting Yakama Nation jurisdiction on the Reservation. For example, last year, the State retroceded any *civil adjudicatory* and *criminal* jurisdiction the State obtained, as a delegation of Congress' power over Indian affairs, under Public Law 280. Thus, for example, Washington State courts can no longer adjudicate disputes between Tribal members that occur on the Yakama Reservation or enforce State criminal laws against Indians on Trust Land.<sup>18</sup>

18 Finally, the federal government has developed a regulatory scheme for its administration of Trust Lands, managed by the BIA, that conflicts with or is incompatible with the NRT/SCRF Proposal.<sup>19</sup> Pacific has apparently ignored the requirement for BIA approved access to or across

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<sup>13</sup> Wiseman, Exh. No. RW-1T at 6:5-8.

<sup>14</sup> Wiseman, Exh. No. RW-1T at 1:15-76.

<sup>15</sup> Wiseman, TR 386:8-14; Brendale v. Confederated Tribes, 492 U.S. 408 (1989) (discussing the complexities of jurisdiction on the Yakama Reservation in the context of a zoning dispute).

<sup>16</sup> Wiseman, Exh. No. RW-1T at 5:5-6.

<sup>17</sup> See, e.g., Williams v. Lee, 358 U.S. 217 (1959) (landmark case limiting state infringement of tribal authority on reservation)

<sup>18</sup> Governor's Proclamation 14-01 (January 17, 2014); Pub.L. 83-280 (Aug. 15, 1953) codified as 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321-1326.

<sup>19</sup> 25 C.F.R. Section 169.1 *et seq.*; discussed below

Trust Lands for years. For example, Pacific's service to Tiin Ma Logging's shops on Trust Land lacks the required approval by the BIA.<sup>20</sup>

19 Thus, the sovereign authority of the Yakama Nation over its Reservation and residents, the unique status of Trust Lands, and the conflicting federal regulatory scheme that governs use of such Trust Lands makes Pacific's NRT/SCRF Proposal unjust and unreasonable as it applies to Pacific's customers located within the boundaries of the Yakama Reservation and served in whole, or in part, by assets located on Trust Lands.

#### IV. ARGUMENT

##### A. Federal Rules and Regulations Severely Restrict Pacific's Right to Continuing Use of Indian Trust Lands to Provide Service within the Yakama Indian Reservation.

20 The BIA is responsible for the administration and management of Trust Lands, including the terms upon which electric service providers may construct, operate and maintain facilities on such lands. In late 2015, exercising its authority under 25 U.S.C. 323-329, { TA \l "25 U.S.C. 323-329" \s "25 U.S.C. 323-329" \c 2 } the BIA issued a final rule providing a uniform system for granting rights-of-way over Trust Lands.<sup>21</sup> The final rule consolidated and revised the process for approval of all types of rights-of-way and service line use agreements and includes the following provisions with a direct (and adverse) bearing on Pacific's justification for its NRT/SCRF Proposal:

- 1) Any use of rights-of-way over and across Indian land or BIA land for by electric transmission and distribution systems (including lines, poles, towers, etc.) and

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<sup>20</sup> Wiseman, Exh. No. RW-1T at 6:13-23, 7:1-9 and 9:11-14.

<sup>21</sup> 80 Fed. Reg. 72492; 25 CFR Part 169.

appurtenant facilities requires a BIA-issued authorization.<sup>22</sup> The same is true for placement and use of Service Lines branching off of rights-of-way subject to the rule.<sup>23</sup>

- 2) BIA's rules provide for a specific process and evaluation criteria that must be met before an authorization may issue.<sup>24</sup>
- 3) If an individual or entity takes possession of, or uses, Trust Land or BIA Land without a right-of-way and a right-of-way is required, the unauthorized possession or use is a trespass.<sup>25</sup> Likewise, if a right-of-way grantee remains in possession after the expiration, termination, or cancellation of a right-of-way such continued use is considered a trespass.<sup>26</sup>
- 4) In the event of a trespass, the BIA may take action to recover possession, including eviction, and pursue other remedies available under law.<sup>27</sup> BIA may order a trespasser to vacate the property within 31 days of receipt of a cancellation or eviction notice.<sup>28</sup>

21 In short, BIA regulations require Pacific to apply for and obtain a BIA-authorized grant to use rights-of-way involving BIA or Indian Trust land for the construction, operation and maintenance of facilities providing electric service. Absent such a grant, Pacific may be considered a trespasser and be subject to eviction on 30 days' notice.

B. Pacific's Rationale in Support of its NRT/SCRF Proposal Fails When Indian Trust Lands are used to provide service.

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<sup>22</sup> { TA \l "25 CFR § 169.5(a)(9)" \s "25 CFR § 169.5(a)(9)" \c 4 }25 CFR § 169.5(a)(9){ TA \s "25 CFR § 169.5(a)(9)" }; { TA \l "25 CFR § 169.4" \s "25 CFR § 169.4" \c 4 }25 CFR § 169.4{ TA \s "25 CFR § 169.4" }.

<sup>23</sup> 25 CFR § 169.51{ TA \s "25 CFR § 169.51" }-169.56{ TA \l "25 CFR § 169.51-56" \s "25 CFR § 169.51-56" \c 2 }.

<sup>24</sup> 25 CFR § 169.123-169.124{ TA \l "25 CFR § 169.123-169.124" \s "25 CFR § 169.123-169.124" \c 2 }.

<sup>25</sup> 25 CFR § 169.413{ TA \l "25 CFR § 169.413" \s "25 CFR § 169.413" \c 2 }.

<sup>26</sup> 25 CFR § 169.410{ TA \l "25 CFR § 169.410" \s "25 CFR § 169.410" \c 2 }.

<sup>27</sup> 25 CFR § 169.413{ TA \l "25 CFR § 169.413" \s "25 CFR § 169.413" \c 2 }.

<sup>28</sup> 25 CFR § 169.405(c)(4){ TA \l "25 CFR § 169.405(c)(4)" \s "25 CFR § 169.405(c)(4)" \c 2 }.

22           The testimony and evidence introduced in this proceeding make it clear that the central, if not sole, driving force behind Pacific’s NRT/SCRF Proposal is Pacific’s fear of competition from Columbia Rural Electric Association, Inc. (CREA). That competition is happening well outside Reservation boundaries in the more densely-populated (and customer rich) areas of Pacific’s Walla Walla Service Area.<sup>29</sup> The NRT/SCRF Proposal is premised on the concept that changes are needed to Pacific’s tariffs in order to mitigate cost shifting caused by customers choosing to permanently disconnect and switch providers.<sup>30</sup> Pacific also argues that the NRT/SCRF Proposal 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>31</sup> Pacific has expressly stated that it intends the proposed tariff to apply equally without regard to whether a customer is located on Trust land, or whether Pacific has obtained a BIA authorization to access or use such Trust Lands.<sup>32</sup>

23           When viewed in the context of service within Reservation boundaries Pacific’s arguments are meritless. In the last two full calendar years (2015-2016), Pacific reports that only five (5) of its customers requested permanent disconnection.<sup>33</sup> No customers requested permanent disconnection in the eight (8) years prior to 2015.<sup>34</sup> More importantly, Pacific’s claim of a “regulatory compact” for service within the Reservation is without foundation with respect to any Pacific customer located on or served by facilities that use Indian Trust lands unless Pacific can produce evidence that it has sought and obtained all Federal and Tribal authorizations

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<sup>29</sup> Dalley, Exhibit No. RBD-1T 4:20-34; 5:1-18; Exhibit No. RBD-2.

<sup>30</sup> Dalley, Exhibit No. RBD-1T at 2.

<sup>31</sup> Dalley, Exhibit No. RBD-5Tr at 12:1-14:22.

<sup>32</sup> Wiseman, Exhibit No. RW-2 at 4.

<sup>33</sup> Wiseman, Exhibit No. RW-2 at 5.

<sup>34</sup> *Id.*

required to provide service to such customer. Pacific has failed to offer any such evidence,<sup>35</sup> and in fact admits that it does not have the ability to research its records for Indian Trust land identification references.<sup>36</sup>

24           Wherever Pacific lacks an BIA-authorized right-of-way grant or an executed service line agreement filed with the BIA as required by 25 CFR § 169.56, Pacific holds, at best, a revocable license for the use of such Indian Trust lands and, at worst, may be trespassing on such lands. Either way, under both circumstances, BIA may lawfully require Pacific to disconnect and remove its facilities upon 30 days' notice.<sup>37</sup> Pacific cannot cure its current trespasses by claiming adverse possession or prescriptive easements, since no interest in Indian Trust land may be acquired by adverse possession.<sup>38</sup>

## V. CONCLUSION

25           In sum, Pacific has produced no evidence that it is seeking or has obtained BIA-authorization to use Trust Lands to provide service within the Reservation boundaries.<sup>39</sup> Nonetheless, if approved, Pacific intends to apply the NRT/SCRF Proposal to all of its customers without regard to whether a customer is located on or served by facilities using Indian Trust land.<sup>40</sup> Approving any form of the NRT/SCRF Proposal without exempting Pacific customers located within Reservation boundaries will create legal uncertainty for such customers located on or served by facilities using Indian Trust lands. The Commission should exempt Pacific's

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<sup>35</sup> Dalley, Exhibit No. RBD-25X (listing no BIA authorizations).

<sup>36</sup> Wiseman, Exhibit No. RW-2 at 6.

<sup>37</sup> 25 CFR § 169.405(c)(4){ TA \s "25 CFR § 169.405(c)(4)" }{ TA \l "25 CFR § 169.405(c)(4)" \s "25 CFR § 169.405(c)(4)" \c 2 }.

<sup>38</sup> *Cohen's Handbook on Federal Indian Law*, § 15.09(4), at 1604-5 (2012 ed.){ TA \l "*Cohen's Handbook on Federal Indian Law*, § 15.09(4), at 1604 (2<sup>nd</sup> ed.)" \s "Cohen's Handbook on Federal Indian Law, § 15.09(4), at 1604 (2nd ed.)" \c 5 }.

<sup>39</sup> Dalley, Exhibit No. RBD-25X (listing no BIA authorizations); Wiseman, Exhibit No. RW-2 at 6 (Pacific admission that it cannot search its records for tribal property identification information).

<sup>40</sup> Wiseman, Exhibit No. RW-2 at 4.

Reservation customers from the NRT/SCRF Proposal and address any cost-shifting mitigation concerns related to those customers at such time as they occur (if ever).

Dated this 28<sup>th</sup> day of July, 2017.

Respectfully submitted,

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