BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

REPLY BRIEF ON BEHALF OF COMMISSION STAFF

August 17, 2017

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I. INTRODUCTION

1 Pacific Power & Light Company ("Pacific Power" or the "Company"), along with the Public Counsel Unit of the Attorney General's Office ("Public Counsel") and, possibly, The Energy Project[1] ask the Commission to approve revisions to the Company's currently effective tariff governing the provision of electric service in Washington. Commission Staff ("Staff") urges the Commission to reject those proposed revisions because the regulatory compact does not compel their approval; the proponents fail to show that they are necessary or justified by principles of cost causation; the Federal Energy Regulatory Commission's ("FERC") Order 888 does not support approval of the revisions; and the proposed stranded costs are not sufficiently accurate to make the tariff revisions fair, just, and reasonable. Staff recommends that, if the Commission does approve some version of stranded cost recovery, it require the Company to seek that recovery in a proceeding that allows individualized stranded cost determinations.

2 In addition, Yakama Power asks the Commission to exempt any customers served by facilities located on Tribal Trust Land from the proposed tariff revisions. Staff recommends that, should the Commission approve the tariff revisions, it reject that request.

II. ARGUMENT

3 The Commission must ensure that rates are "fair, just, reasonable, and sufficient."[2] This requires the Commission to balance the interests of the Company and ratepayers.[3] The proposed tariff revisions do not affect the Company's ability to recover its costs—this

[1] Staff is confused as to The Energy Project's position on adopting the tariff revisions given that it ostensibly takes no position yet spends pages of its brief justifying stranded cost recovery.
[2] RCW 80.28.010.
[3] *See People's Org. for Washington Energy Res. v. Wash. Utils. & Transp. Comm'n*, 104 Wn. 2d 798, 808, 711 P.2d 319, 326 (1985).

proceeding is limited to issues of fairness between customers.[4] As Public Counsel recognizes, Pacific Power's departing customers are ratepayers, and this requires the Commission to ensure rates that are just and reasonable to them, not merely to remaining customers.[5]

A. The regulatory compact is irrelevant in this proceeding, and, regardless, does not compel adoption of the proposed tariff revisions.

4 Both Pacific Power and Public Counsel explicitly contend or strongly imply that the regulatory compact compels adoption of the Company's proposed tariff revisions.[6] This is so, they assure the Commission, because the regulatory compact is, essentially, a contract creating positive rights and obligations, specifically Pacific Power's obligation to serve and its right to compensatory rates.[7] Pacific Power and Public Counsel are wrong about both the applicability of the regulatory compact and its nature.

5 The regulatory compact is irrelevant to this proceeding—it does not, and cannot, mandate approval of the tariff revisions because neither the obligation to serve nor the right to compensatory rates is at issue in this docket. Pacific Power's obligation to serve will remain unchanged no matter what the Commission decides in this docket given the issues raised by the parties. Importantly, every witness offered by Pacific Power and Public Counsel testified that the proposed tariff revisions would not affect the Company's compensation because customer disconnections theoretically only shift costs between departing and remaining customers—no cost shift to the Company.[8]

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[4] *See* Bolton, RBD-1T at 9:17-10:1 (tariff prevents cost shifts between customers), 14:3-4 (stranded costs must be borne by departing customers, remaining customers, or shareholders); Pac. Power & Light Co.'s Initial Br. 15.
[5] Post-Hearing Br. of Public Counsel at 4, ¶ 7.
[6] Post-Hearing Br. of Public Counsel at 16; Pac. Power & Light Co.'s Initial Br. at 4.
[7] Post-Hearing Br. of Public Counsel at 15; Pac. Power & Light Co.'s Initial Br. at 4.
[8] *See* Bolton, RBD-1T at 9:17-10:1 (tariff prevents cost shifts between customers), 14:3-4 (stranded costs must

6 Given that testimony, Pacific Power's and Public Counsel's claims that the regulatory compact will unwind if the Commission fails to adopt the proposed revisions are flatly untenable.[9] Again: every witness who testified in this proceeding agreed that the Company will receive adequate compensation no matter the outcome of this docket.

7 Regardless, the regulatory compact is not a source of positive rights, and therefore, cannot compel the course of action that Pacific Power and Public Counsel recommend. The obligation to serve exists by virtue of statute,[10] and the Company's right to compensatory rates arises from statutory and constitutional provisions.[11] Pacific Power and Public Counsel implicitly signal their acceptance of this fact by citing to Washington statute and the federal constitution for legal authority rather than to the regulatory compact.[12] Indeed, Staff cannot find any circumstance where, despite discussing the regulatory compact, either the Commission or any party cite it as legal authority.[13] While the regulatory compact may be a useful metaphor or notion—a shorthand to describe a complicated body of law—it does not create enforceable rights on its own.[14]

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be borne by departing customers, remaining customers, or shareholders); Bolton, TR. at 105:15-20; Meredith, TR. at 243:21-244:1; Kelly, TR. at 296:25-297:6.

[9] E.g., Pac. Power & Light Co.'s Initial Br. at 8, ¶ 18; Post-Hearing Br. of Public Counsel at 15-16, ¶¶ 32, 33.

[10] RCW 80.28.110.

[11] RCW 80.28.020 (forbidding rates "insufficient to yield a reasonable compensation" and ordering the Commission to set "sufficient" rates); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-08, 109 S. Ct. 609, 102 L. Ed. 2d 646 (1989) (Fifth Amendment and Fourteenth Amendments forbid rates insufficient to compensate a utility for the use of its property).

[12] *E.g.*, Bolton, RBD-1T at 12:10-11 (citing RCW 80.28.110 as the source of the obligation to serve rather than the regulatory compact), 12:11-13 (citing RCW 80.28.020 as the source of the right to reasonable and sufficient compensation rather than the regulatory compact).

[13] See *In the Matter of the Petition of GTE Northwest Incorporated For Depreciation Accounting Changes*, Docket No. UT-961632, Fourth Supplemental Order, at 30 (Dec. 12. 1997) ("There is no agreement or compact, stated or unstated, that commits the Commission to ensure that [a utility's] capital will be recovered fully regardless of any changes in the economic, technological, or regulatory environment.").

[14] *See US West Commc'ns, Inc. v. Arizona Corp. Comm'n*, 197 Ariz. 16, 21–22, 3 P.3d 936, 941 (Ariz. Ct. App. 1999) ("US WEST asserts that it provides telephone service within Arizona as the result of a regulatory contract with the State. . . . US WEST's argument is flawed. The nature of US WEST's relationship with the State through the Commission is not contractual. The cases upon which US West relies were speaking ***descriptively or metaphorically***; none holds that there is an actual contract, for breach of which the law of

B. Support for the proposed tariff revisions is not based on evidence, and is inconsistent with cost-causation.

8 Throughout this proceeding, Pacific Power, Public Counsel, and The Energy Project have ignored all evidence demonstrating that the proposed tariff revisions are unnecessary. These parties did not refute, or even respond to, Staff's testimony demonstrating that permanent disconnections are barely occurring, and thus, any potential cost shifts are offset or otherwise lost in the "noise" of Pacific Power's growing customer count. Given the failure of those parties to analyze the threshold question of whether the Company needed to revise its tariffs, which the Commission has already deemed fair, just, reasonable, and sufficient,[15] their support for the proposed revisions should be given little weight.

9 Public Counsel bases its support for the proposed tariff revisions on theory rather than fact. Public Counsel's concern is that "customers bear the ***risk*** of absorbing costs left behind when customers accessing competitive options leave Pacific's system."[16] It justifies its support for the proposed revisions on cost-causation principles,[17] asserting that "[t]he regulator treats ratepayers and companies fairly and equitably when it allocates costs to those who have caused the costs to be incurred."[18] Yet, Public Counsel supports requiring customers to pay fair market value—rather than the cost-based, net-book value—if they wish to purchase their customer-dedicated facilities instead of paying for their removal.[19]

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contracts gives a remedy. US WEST has cited no authority that holds that there is an actual contract or that contract remedies are available under these circumstances." (emphasis added)).

[15] *Wash. Utils. & Transp. Comm'n v. Pacificorp d/b/a Pac. Power & Light*, Docket No. UE-001734, Eighth Supplemental Order, at 27-28, ¶¶ 81-82 (Nov. 27, 2002); *see Wash. Utils. & Transp. Comm'n v. Avista Corp. d/b/a Avista Utils.*, Dockets UE-160228 & UG-160229, Final Order Rejecting Tariff Filing, at 34, ¶ 60 (Dec. 15, 2016) (citing RCW 80.28.020 (noting that a utility proposing tariff revisions must first show that the tariff is unjust, unfair, unreasonable, or insufficient).

[16] Public Counsel Initial Br. at 8 (emphasis added).

[17] *Id.* at 9-11.

[18] *Id*. at 9.

[19] Kelly, TR. at 339:8-12 (noting that customers pay rates based on net book value).

Public Counsel also argues that the inaccuracy of its proposed stranded cost fee is "not reason to reject the filing in this case" implicitly accepting that the proposed revisions would result in charges divorced from actual costs.[20] Ultimately, Public Counsel's recommendation to the Commission fails to live up to the principles it is based upon.

10 The Energy Project likewise relied on theory; so heavily, in fact, that it filed no testimony in this case justifying the revisions in any way. Nevertheless, it supports a stranded cost fee as "a reasonable and necessary response to the ***potential*** for cost-shifting."[21] It accepts as a "general proposition" that a disconnecting customer "causes an unfair cost shift unless there is mitigation."[22] Yet, it never confronted the overwhelming evidence that such mitigation occurs—e.g., since 1999, Pacific Power has lost only 68 customers due to disconnection, but has gained approximately 12,000 customers and its load has grown slightly over the same time.[23] The Energy Project has not demonstrated that its support for the proposed tariff revisions merits much consideration.

C. Pacific Power's stranded cost proposal finds no support in FERC Order 888.

11 Pacific Power cites the FERC Order 888 as support for its stranded cost proposal. Although Staff believes that both it and CREA have already adequately addressed Pacific Power's arguments in this regard, it wishes to emphasize two points.

12 First, the circumstances present in this docket bear ***no*** resemblance to the circumstances prompting FERC to allow stranded cost recovery in its Order 888. FERC allowed for stranded cost recovery in Order 888 because it was demolishing the old

[20] *Id.* at 8.
[21] The Energy Project Initial Br. at 6.
[22] The Energy Project Initial Br. at 6.
[23] Panco, Exh. DJP-1T at 14:4-15-2, 18:3-5.

regulatory regime to eliminate bundled service and create competition in the provision of wholesale electrical power supply.[24] To ease the transition away from that old regime, FERC allowed for the possibility of stranded cost recovery for costs incurred ***before*** it gave notice of its open access rulemaking.[25] In contrast, the regulatory environment relevant to Pacific Power's competition with CREA has not changed in living memory, if ever. Pacific Power faces competition from entities like CREA, as it always has. Pacific Power has no exclusive service territory today, just as it has never had one. Accordingly, stranded costs are unwarranted today, as they have always been.

13 Second, Pacific Power asks the Commission to do what FERC did not do in Order 888: provide for the uniform recovery of stranded costs. Order 888, in fact, did not order the recovery of any stranded costs at all.[26] It simply provided for administrative proceedings wherein a utility could demonstrate that it had a reasonable expectation of continuing to serve a customer leaving to take service under an open access tariff, and therefore, a right to stranded cost recovery from that customer.[27] Customers could appear at these proceedings and contest the utility's reasonable expectation of continued service.[28] Order 888, in other words, required an individualized stranded cost determination. Pacific Power, however, asks the Commission to embed a right to stranded costs in its tariff, and do so in a way that is indifferent to customer-specific context. It asks the Commission to reject the fact-specific

[24] *E.g., Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed. Reg. 21,540, 21,549, 21, 628, 21,629, 21,630 (May 10, 1996); *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 62 Fed. Reg. 12,274, 12,373, 12, 374 (Mar. 14, 1997).
[25] *Transmission Access Policy Study Grp. v. F.E.R.C.*, 225 F.3d 667, 700 (D.C. Cir. 2000), *aff'd sub nom. New York v. F.E.R.C.*, 535 U.S. 1, 122 S. Ct. 1012, 152 L. Ed. 2d 47 (2002).
[26] *Id. at* 701; *see* 18 C.F.R. § 35.26(b)(8), 35.26(c)(1)(v)-(vi).
[27] *Transmission Access Policy Study Grp.*, 225 F.3d at 701.
[28] *Id.*

inquiry that FERC required. Pacific Power's request creates rates that are unjust, unfair, and unreasonable.

D. The proposed stranded cost fee is not "sufficiently accurate."

14 Pacific Power and Public Counsel each acknowledge that accurately identifying the stranded costs caused by a single customer's disconnection poses a "significant challenge."[29] They each also acknowledge that their proposed methodology for calculating a disconnecting customer's stranded cost is imperfect, but they contend that it is "sufficiently accurate" to warrant Commission approval.[30] Pacific Power and Public Counsel, however, each incorrectly assume the reasonableness of their proposed methodology because, as both readily admit, they prioritized simplicity over accuracy.[31] Doing so, however, does not produce fair, just, and reasonable stranded cost fees because determining such charges requires a case-by-case analysis given that factual circumstances can drastically change the costs, if any, created by a departing customer.

15 The unreasonable inaccuracy of the proposed stranded cost fee is exemplified by the six-year timeframe upon which it is calculated. Pacific Power and Public Counsel each contend that the period over which to calculate the stranded cost fee could be longer. Pacific Power asserts that a 20-year timeframe would be "more accurate" because it corresponds with the long-term planning horizon used in its integrated resource planning ("IRP") and the depreciable lives for some of the assets used to serve customers.[32] The Company also emphasizes that Public Counsel's recommendation of a six-year timeframe was at the low

[29] Pac. Power & Light Co.'s Initial Br. at 19; Post-Hearing Br. of Public Counsel at 8.
[30] Pac. Power & Light Co.'s Initial Br. at 19; Post-Hearing Br. of Public Counsel at 8.
[31] *E.g.*, Meredith, Exh. RMM-1T at 2:9-12, 17-20; Meredith, TR. at 257:19-258:23, 282:3-283:18; Kelly, TR. at 311:6-18; *see* Kelly, Exh. KAK-1T at 45:10-12.
[32] Pac. Power & Light Co.'s Initial Br. at 20.

end of what Public Counsel considered a reasonable range.[33] This six-year timeframe, however, ignores the Company's ability to ***completely avoid*** any potential stranded power cost in less than three years due to its heavy reliance on short-term market purchases to meet demand.

16 Of note, Pacific Power contends that it "has no present capacity need."[34] That is simply incorrect. As the Commission has recently acknowledged:

> [Pacific Power] has significantly less capacity from its own resources than it needs to meet system demand. . . . The Company plans to fill this gap between committed capacity and system demand [by] relying on the short-term market purchases . . . it terms front office transactions, or FOTs. . . . Significantly, FOTs are not market purchases of bulk electric power that the Company has under contract. They are short-term purchases the Company will make from time to time to meet future system demand."[35]

17 Solicitations for FOTs can be three or more years in advance, but most transactions are made in close proximity to when they are needed.[36] The Company relies on FOTs to meet 1,575 MW or more of its capacity needs,[37] and the Company's 2017 IRP preferred portfolio "includes" in addition to demand side management, "firm FOTs to address the majority of resource needs within the next three years."[38] Pacific Power can avoid these FOTs purchases because FOTs are future market purchases that the Company anticipates making, but has not yet made.[39]

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[33] Pac. Power & Light Co.'s Initial Br. at 21.
[34] Pac. Power & Light Co.'s Initial Br. at 21.
[35] *Wash. Utils. & Trans. Comm'n v. Pacific Power & Light Corp.*, Docket UE-144160, Order 04, 9-10 (Nov. 12, 2015).
[36] *In the Matter of the Petition of Pacific Power & Light Integrated Resource Plan*, Docket UE-160353, PacifiCorp 2017 IRP, Vol. II, at 176.
[37] *Id.* at 176-77 (emphasis added); *In the Matter of the Petition of Pacific Power & Light Integrated Resource Plan*, Docket UE-160353, PacifiCorp 2017 IRP, Vol. 1, at 11.
[38] *In re Pacificorp d/b/a Pac. Power & Light Co.*, Docket UE-170885, Pacificorp's Petition for Waiver of Certain Requirements Related to Requests for Proposals Contained in WAC 480-107, at 6, ¶ 12 (Aug. 15, 2017).
[39] Id. at 5, ¶ 10 (discussing the process for procuring FOTs).

18 Pacific Power, thus, can completely avoid any potential cost shift caused by a disconnecting customer in less than three years given its heavy reliance on short-term market purchases to meet customer demand. Consequently, a stranded cost fee based on a six-year timeframe would allow the Company to recover for more than double the time it would need to avoid any stranded cost. Ultimately, the proposed stranded cost fee is too inaccurate to be fair, just, or reasonable under current circumstance. Reasonably identifying stranded costs demands case-by-case analysis.

E. Allowing the Company to file an application for stranded cost recovery at the time a large customer elects to disconnection is preferable to the proposed tariff revisions.

19 CREA and Boise each urged the Commission to reject the tariff revisions and to address the unique circumstance of a large customer departure on an appropriate record at the appropriate time.[40] Although Staff continues to recommend that the Commission reject the proposed tariff revisions, if the Commission has concerns about costs potentially stranded by a large departing customer, it should accept CREA's and Boise's recommendations.

20 Staff maintains accepting CREA and Boise's proposal would create a better outcome than accepting the Company's proposal for two reasons. First, CREA and Boise's proposal avoids embedding a generally applicable methodology for determining stranded costs into the Company's tariff. The proposal would thus require the type of individualized stranded cost determinations that the Commission has repeatedly called for, and would ensure that any stranded cost fee is fair, just, reasonable, and sufficient.

[40] Initial Post-Hearing Br. of Columbia REA at 45-47, ¶¶ 76-79; *see* Initial Br. of Boise White Paper, L.L.C. at 8-14, ¶¶ 15-25.

21 Second, although Staff maintains that the public service laws permit Pacific Power to file for stranded cost recovery should a large commercial or industrial customer seek to depart from the Company's system regardless of the outcome in this docket,[41] a Commission order accepting CREA and Boise's proposal would help set appropriate expectations. It would provide notice to such customers that the Commission would authorize stranded cost recovery if a sufficiently large customer elects to depart the Company's system. It would also allow the Commission to set limits on the type of customer Pacific Power could petition the Commission to recover stranded costs from. If the Commission is truly worried about the departure of a customer like Boise, then the Commission, the Company, and ratepayers would be better served by setting the expectations of Boise and the Company through an order and rejecting a generally applicable methodology for calculating a stranded cost fee.

F. The Commission should reject Yakama Power's attempts to carve out a blanket exemption to the net removal tariff.

22 Yakama Power asks the Commission to exempt customers served by equipment on Tribal Trust Lands from the proposed tariff revisions because, it alleges, Pacific Power has no reasonable expectation of continuing to serve those customers due to Bureau of Indian Affairs right-of-way regulations. Irrespective of whether the Company has a reasonable expectation of continuing to serve customers on Tribal Trust Lands, the Commission should reject any calls for a blanket exception to the proposed tariff revisions, should it approve any revisions, because state law forbids the kind of differential rates that exemption would create.

[41] RCW 80.28.020, .060.

23 Washington statutes forbid both discriminatory rates and also unduly or unreasonably preferential or prejudicial rates.[42] Given the intricacies involved in matters where reservation lands are at issue, Washington's Supreme Court has cautioned that the Commission should "primarily apply Washington law" and "keep[] in[-]depth federal Indian law analysis in the federal courts."[43]

24 Yakama Power's proposed exemption violates the proscriptions found in RCW 80.28.090 and RCW 80.28.100. Yakama Power does not contend that the cost of serving or disconnecting customers on Trust Lands differs from the cost of serving or disconnecting any of Pacific Power's other customers, or that those customers served by facilities on Trust Lands receive or would receive different service than those not served by those facilities. Absent that showing, charging disconnection fees to all departing customers save those served by facilities on Trust Land violates both the prohibition on rate discrimination and the prohibition on unduly or unreasonably preferential or prejudicial rates.[44] The Commission should heed the Supreme Court and reject Yakama Power's proposed exception based on Washington law.

25 Yakama Power's argument does, however, highlight the importance of an individualized stranded cost determination if the Commission does approve some version of the proposed tariff revisions. Pacific Power's authority to operate on Trust Lands within the Yakama Reservation would be relevant to its reasonable expectation of continuing to serve customers, and therefore, its ability to recover stranded costs. If the Commission approves

[42] RCW 80.28.090, .100.
[43] *Willman v. Wash. Utils. & Transp. Comm'n*, 154 Wn.2d 801, 808, 117 P.3d 343 (2005).
[44] *See Cole v. Wash. Utils. & Transp. Comm'n*, 79 Wn.2d 302, 308-11, 485 P.2d 71 (1971).

stranded cost recovery, it should require an individualized cost determination to account for these types of contextual, fact-specific questions (among other factual questions).

III. CONCLUSION

26 Staff recommends that the Commission reject Pacific Power's proposed tariff revisions. If the Commission does approve some manner of stranded cost recovery mechanism, it should require Pacific Power to seek those recoveries through customer-specific determinations.

27 DATED this 17th day of August 2017.

Respectfully submitted,

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