**BEFORE THE**

**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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

**REPLY BRIEF**

**OF**

**BOISE WHITE PAPER, L.L.C.**

**August 17, 2017**

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## I. INTRODUCTION

*1* Pursuant to Prehearing Conference Order 03 and WAC § 480-07-390, Boise White Paper, L.L.C. ("Boise") submits this reply brief, respectfully maintaining that the Washington Utilities and Transportation Commission ("WUTC" or the "Commission") should reject Pacific Power & Light Company's ("Pacific Power" or the "Company") proposed revisions to the Net Removal Tariff.[1/] Boise continues to hold that a full rejection of the Company's proposals is appropriate, for reasons supplied in initial briefing, together with evidence contained in Boise's filed testimony and exhibits.[2/] This reply brief does not attempt to restate prior Boise positions, but is submitted in response to initial briefing arguments of other parties.

## II. ARGUMENT

### A. Pacific Power Bears Material Responsibility Not Acknowledged by Proponents of Net Removal Tariff Revisions

*2* A common, portentous theme runs throughout the briefing of each proponent of Net Removal Tariff revisions in this proceeding—i.e., Pacific Power, the Public Counsel Unit of the Attorney General's Office ("Public Counsel"), and The Energy Project. In short, none of these parties accept *any* Company responsibility for alleged stranded costs or cost shifting arising from permanent disconnections. Rather, these parties effectively cast Pacific Power as a helpless regulatory child that can only be supported through novel Commission exactions, which are to come almost exclusively at the expense of large customers. As the Company's largest customer in Washington,

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[1/] As affirmed by the Company at hearing: "the net removal tariff includes Rules 1, 6 and Schedule 300 provisions." Bolton, TR. 134:5-7. These provisions encompass the totality of Pacific Power Tariff WN U-75 changes the Company requests, save making the term "Permanent Disconnection" lowercase on Sheet No. R4.2. See Exh. RMM-3r at 15.

[2/] Boise also commends the initial briefing, filed testimony and supporting exhibits from WUTC Staff ("Staff") and the Columbia Rural Electric Association ("Columbia REA" or "CREA"), which similarly provide compelling grounds for rejection of the Company's proposals.



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Boise urges the Commission to strongly reject attempts to unduly reward Pacific Power for a demonstrated lack of managerial agency, contrary to the Commission's Guiding Principles for Regulation in an Evolving Electricity Industry ("Guiding Principles").[3/]

**1. The Company Fairly Shoulders the Consequences of Business Choices**

*3* Almost immediately, the Company complains that Net Tariff Removal "changes are necessary to protect Pacific Power's remaining customers from the competitive practices of unregulated cooperative electric associations," reasoning that the Company faces a "fairly unique" situation distinct from other "Washington utilities with adjoining service territories [that] have formal or informal territory allocation agreements that define which utility serves which customers."[4/] The record in this proceeding shows that the Company is, indeed, surrounded by five unregulated utilities, with Pacific Power having reached a service area agreement with only a single neighboring utility.[5/] But, to the extent this represents a "fairly unique" situation in Washington, the record also demonstrates that Pacific Power is culpable for these circumstances coming about and persisting—and particularly since the Company's ownership change in 2006.[6/]

*4* First, while Pacific Power has all too eagerly cast Columbia REA as the root of all regulatory evils in Washington, the record in this proceeding tells a decidedly

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[3/] Re Notice of Inquiry: Examining Regulation of Electric Utilities in the Face of Change in the Electric Industry, Docket UE-940932, Policy Statement, Guiding Principles for Regulation in an Evolving Electricity Industry (Dec. 13, 1995) ("Policy Statement"). See also WUTC v. Puget Sound Energy ("PSE"), Docket UE-161123, Order 06 at ¶ 91 (July 13, 2017) (reaffirming the Policy Statement).

[4/] Pacific Power Initial Brief at ¶¶ 1-2.

[5/] Bolton, TR. 148:25-149:11.

[6/] In early 2006, the Commission approved the acquisition of Pacific Power and its parent, PacifiCorp, by MidAmerican Energy Holdings Company ("MEHC") from Scottish Power. Re MEHC and PacifiCorp, Docket UE-051090 Order 07 (Feb. 22, 2006). In 2014, MEHC changed its name to Berkshire Hathaway Energy ("BHE"). See BHE, "MidAmerican Energy Holdings Company Is Now Berkshire Hathaway Energy" (Apr. 30, 2014), available at: https://www.berkshirehathawayenergyco.com/news/midamerican-energy-holdings-company-is-now-berkshire-hathaway-energy. See also WUTC v. Pacific Power, Dockets UE-140762 *et al.*, Order 08 at ¶ 1 n.2 (Mar. 25, 2015) ("PacifiCorp is a wholly-owned subsidiary of Berkshire Hathaway Energy which, in turn, is wholly owned by its affiliate, Berkshire Hathaway").



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different story. For instance, Public Counsel witness Kathleen Kelly testified, without attribution, that Pacific Power "has been *unable* to negotiate a service area agreement with CREA, even with mediation services provided by an Administrative Law Judge, and that the informal agreement was working adequately until a change in management at CREA."[7/] As the record demonstrates, however, these statements regarding Pacific Power efforts relate to a 2001 to 2003 time period,[8/] prior to the Company's own management change from Scottish Power to Berkshire Hathaway affiliates.

*5* Following the Company's acquisition by MEHC in 2006, the record shows no evidence of Pacific Power attempting to negotiate a service area agreement with Columbia REA—which presumably would be expected, to support a claim that the Company has been "unable" to negotiate an agreement over the past decade. Conversely, as even Ms. Kelly acknowledged, Columbia REA has confirmed the sending of "two letters to Pacific Power's CEO seeking to improve relations and coordination between the two companies, *but has yet to receive a response*."[9/] Ms. Kelly affirmed at hearing that these open invitations from Columbia REA were sent as recently as 2013 and 2015.[10/]

*6* Crucially, this factual chronology reveals that Pacific Power has taken a dramatically different approach to cooperative dialogue since its own management change in 2006. Under Scottish Power, both the Company and Columbia REA had attempted, albeit unsuccessfully, to negotiate a service area agreement. Under the

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[7/] Kelly, Exh. KAK-1T at 49:16-20.

[8/] See, e.g., Kelly, KAK-16 at 1-2 (the Company's Response to WUTC Data Request ("DR") 4 (stating that Pacific Power participation in negotiations took place between 2001 to 2003); Kelly, TR. 329:8-25 (testifying to no personal knowledge of "the actual chronology" of events pertaining to negotiation efforts between Pacific Power and Columbia REA, as described in her own written testimony, but conceding to the Company's representations of a 2001 to 2003 time period for active Pacific Power negotiating efforts).

[9/] Kelly, Exh. KAK-1T at 49:14-16 (citing Kelly, KAK-14 (Columbia REA's Response to Public Counsel DR 3(a))) (emphasis added).

[10/] Kelly, TR. 330:11-17 (affirming: "Yes, they were").



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management of Berkshire Hathaway affiliates—i.e., MEHC, and now BHE—Pacific Power has chosen not to so much as respond to repeated requests for dialogue from Columbia REA over the last four years.

*7* This pronounced shift under Berkshire Hathaway leadership, in the direction of adversarial management practices and non-responsive negotiating tactics, is not limited to Pacific Power's relations with Columbia REA. As Yakama Power, another unregulated neighboring utility to the Company, has explained:

> Under Scottish Power's ownership in 2004, PacifiCorp expressed a willingness to sell its On-Reservation facilities to Yakama Power and the parties engaged in negotiations towards that goal. Following its acquisition by Mid-America in mid-2005, *PacifiCorp terminated negotiations* with Yakama Power and informed Yakama Power that it would resist efforts by PacifiCorp's On-Reservation customers to switch service to Yakama Power. Since its acquisition by MidAmerica in 2005, *PacifiCorp has repeatedly refused Yakama Power's requests to engage in negotiations* to effectuate a sale of PacifiCorp's On-Reservation facilities to Yakama Power and, consequentially, eliminate the potential duplication of electric facilities or stranding of PacifiCorp assets no longer needed by customers preferring service from Yakama Power.[11/]

*8* The implications here are troubling, to say the least, of Berkshire Hathaway management practices which include an open declaration of resistance against a "nonprofit tribal electric utility," formed by the Yakama Nation for the express "purpose of providing long-term cost savings, economic development and job creation opportunities, and to generally enhance the tribe's sovereign ability to provide essential government service within the boundaries of the Yakama Indian Reservation."[12/] Although the WUTC may not be the ultimate forum to address the historical pattern of mistreatment of Native Americans in this state, the Commission should also not perpetuate such practices by tacit sanction. Sufficient for present purposes, the apparent

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[11/] Wiseman, Exh. RW-4X at 4 (Yakama Power's Response to UTC Staff DR 2) (emphasis added).

[12/] Id. at 3-4 (Yakama Power's Response to UTC Staff DR 2).



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indignation and scrutiny lately levied upon Columbia REA, which the Company has not been remiss to play up on brief,[13/] should also be applied equally to a utility whose practices are unquestionably the charge of the Commission to monitor and address, if wayward or wanting in some respect—Pacific Power.

*9* To this end, Pacific Power's pattern of behavior under the management of Berkshire Hathaway affiliates has negatively affected not only neighboring utilities, but the Company's own customer base as well, which should have a material effect when considerations over the potential cause of alleged stranded costs are factored. On October 12, 2012, Boise initiated a complaint proceeding regarding "PacifiCorp Reliability Issues" in Docket UE-121680, after having "documented millions of dollars in losses."[14/] While Boise had "been experiencing frequent power outages and voltage dips at the Wallula Mill since at least the 1980s," the reason for the 2012 complaint filing was explained as follows: "PacifiCorp consistently has *refused* to make the modifications necessary to provide reliable service."[15/]

*10* As Boise reminded the Commission in 2012, the Company had agreed in 2006 to a specific MEHC merger condition that required study and evaluation of Wallula Mill reliability issues.[16/] After merely conducting a partial study, however, Pacific Power responded with a "refusal to take the remedial actions suggested by the study," which ultimately "rendered the condition meaningless and left the [Wallula Mill] lines without

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[13/] E.g., Pacific Power Initial Brief at ¶¶ 14, 18, 23, 31.

[14/] Re Investigation into PacifiCorp's Reliability Issues of Electric Service at the Boise White Paper, L.L.C. Wallula Mill, Docket UE-121680, David W. Danner letter to Mr. Pat Reiten, PacifiCorp, Re: Letter from Boise, Inc, detailing outages and other reliability issues with PacifiCorp's service to the Boise White Paper, L.L.C., Wallula Mill location ("Danner Letter"), Att. at 1-2 (Oct. 26, 2012).

[15/] Id., Att. at 1 (emphasis added).

[16/] Id., Att. at 1-2.



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adequate protection."[17/] Unsurprisingly, the Company's refusal to upgrade its service infrastructure has led to continued reliability issues, such that in 2015 Boise "experienced three separate instances of major power disruption at the Wallula Mill, two of which resulted in production disruptions."[18/]

*11* Boise does not raise Docket UE-121680 matters for any improper purpose. Although Boise requested the Commission to maintain that proceeding as an open complaint docket,[19/] the Commission opted for docket closure, albeit with the explicit caveat that closure would "not prohibit future action to be brought before the Commission, *nor does it limit the incorporation of materials from the docket into a possible future proceeding*."[20/] Thus, in the context of the current proceeding, a demonstration that Pacific Power has refused to follow up on Berkshire Hathaway merger conditions is telling. In fact, lest Boise's current identification of BHE management failings be construed as revisionist history, Boise had expressly drawn the same conclusion in 2015:

> Boise continues to maintain that PacifiCorp has failed to meet its service quality improvement obligations, agreed to as part of the Company's acquisition by Berkshire Hathaway Energy. This has resulted in fully avoidable expenditures of incremental capital, on Boise's part, in order to secure internal protection against the risk of further outages at the Wallula Mill.[21/]

*12* In sum, far from the portrait of a helpless or lily-white victim of unregulated competition that the Company presents for itself, since the Berkshire Hathaway merger Pacific Power has shown itself to be entirely unresponsive to the

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[17/] Id., Att. at 2 (emphasis added).
[18/] Docket UE-121680, Boise Letter to D. Nightingale at 1 (Sept. 8, 2015).
[19/] Id. at 2.
[20/] Docket UE-121680, Letter to Jesse E. Cowell and Bryce Dalley from Steve King on behalf of The Utilities and Transportation Commission, Re: Notice of Closure of Docket UE-121680 at 1 (Dec. 30, 2015) (emphasis added).
[21/] Docket UE-121680, Boise Letter to D. Nightingale at 1.



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reasonable requests of both neighboring utilities and its own largest customer. Worse, this same aggressively resistant management strategy toward competitor and customer alike has burdened Boise and the Company's neighboring utilities with still more "fully avoidable expenditures," in having to fight back against onerous Net Removal Tariff proposals in this docket.

*13* As Pacific Power itself has estimated, protecting the lines that serve the Wallula Mill would cost the Company between $2 million to $9 million.[22/] While by no means insubstantial, these figures pale in comparison to the more than $80 million up-front payment the Company would request from Boise through its proposed Stranded Cost Recovery Fee,[23/] in the event that Boise were ever to seek more reliable service from a competing utility.

*14* Considering that Boise provides the Company with $27 million in annual revenue,[24/] a more prudent (if not also more ethical) BHE management approach would have seen Pacific Power finally make good on its 2006 merger commitments, to invest resources to improve reliable service to the Wallula Mill.[25/] The Company is not averse to insinuating untoward behavior on the part of its unregulated neighbors, who are allegedly "able to *entice* customers with special rates."[26/] But, Pacific Power continues to demonstrate no managerial agency, or apparent willingness to "entice" its own customers to stay, through making reasonable investment in its service infrastructure. Rather than

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[22/] Docket UE-121680, Danner Letter, Att. at 2.

[23/] See Meredith, TR. 275:2-24 (confirming "around $80 million that would be required for a dedicated facilities customer"); Bolton, TR. 141:16-20 (agreeing that any customer would need "to pay the stranded cost recovery fee up front in one lump sum").

[24/] Meredith, Exh. RMM-2 at 8 (stating $27.0 million as the average annual revenue of the lone customer on Schedule 48T-Dedicated Facilities).

[25/] To understate the matter considerably, Boise takes issue with the following briefing claim: "Service quality is *clearly* not an issue." Pacific Power Initial Brief at ¶ 19 (emphasis added).

[26/] Dalley, Exh. RBD-1Tr at 8:3-4 (emphasis added). If "entice" is not meant to insinuate something untoward here, then the Company's management failings become even more apparent, in that Pacific Power does not also "entice" customers through lower WUTC-approved rates.



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entice, the Company seems bent upon forcing its largest customers to stay within a "practical exclusive service territory" in Washington,[27/] regardless of service quality.

*15* Boise looks forward to providing additional context for reliability concerns in upcoming comments in Docket UE-151958 (Staff's investigation into reliability benchmarking relevant to both electric and natural gas companies). For present purposes, however, the Company should bear the responsibility for, and any costs of, its own failures to either provide for customer needs or even attempt to work cooperatively with neighboring utilities—*before* asking the Commission to serve as some sort of regulatory lifeguard, saving the Company from drowning in its own mismanagement, while exacting any and all alleged stranded costs from the very customers whose interests the Commission must protect.[28/]

*16* To be blunt, the Company would not need to propose draconian solutions in this docket, in seeking to forcefully hem customers in via threat of massive exit fees, if Pacific Power managed its affairs to provide reliable service at competitive prices. The Company can also obviate any need for future concern about the loss of large customers by numerous proactive means, none of which require the pursuit of improper regulatory bailouts—e.g., improving reliable service as proposed by Boise, exploring eminently available banded rate or special contract alternatives for non-residential customers, as proposed by Staff, or even taking the novel approach (relative to customary BHE management) of actually dialoguing with competitors, in an attempt to reach thoughtful solutions.

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[27/] Bolton, TR. 135:10-14, 136:23-137:1.

[28/] Cost Mgmt. Serv., Inc. v. Cascade Natural Gas Corp., Dockets UG-061256 *et al.*, Order 06 at ¶ 24 (Oct. 12, 2007) (citing Cole v. WUTC, 79 Wn.2d 302, 306 (1971)) ("the public interest the Commission must protect is the interest of customers of regulated utilities," with no distinction made in preference of small customers).



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17 Regrettably, cooperation with competitors and responsive interaction with customers may not be the preferred practice of Berkshire Hathaway managed utilities like Pacific Power. The Commission's ultimate determination in this proceeding will go a long way toward indicating whether such practices will be successful in Washington, going forward.

### 2. Company Briefing Ignores Shareholder Responsibility, as Acknowledged in Prior Testimony and within Commission Guidelines

18 In filing this case, then-Vice President R. Bryce Dalley testified from the outset that "[s]tranded costs must necessarily be borne by the departing customers, remaining customers, shareholders or some combination of the three."[29/] This early acknowledgment of potential shareholder responsibility by Mr. Dalley was consistent with the Commission's recently reaffirmed Guiding Principles, which recognize "*both* shareholder and ratepayer exposure to potentially stranded costs …."[30/] Indeed, the Commission has now affirmed that "regulation cannot and should not be expected to guarantee utilities will, in all circumstances, be made entirely whole" for stranded costs resulting from "actual and fair competition."[31/]

19 The Company's initial brief, however, does not convey any sense that Pacific Power has the slightest bit of responsibility to bear stranded costs. Rather, a sense of unmitigated entitlement to guaranteed recovery, entirely at the expense of ratepayers (whether departing or remaining customers), is evinced by the claim that "Pacific Power's remaining customers … *must* continue to cover the fixed costs of infrastructure,"

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29/ Dalley, Exh. RBD-1Tr at 13:20-21.
30/ Docket UE-940932, Policy Statement at 2 (emphasis added).
31/ Id.



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due to alleged cost shifting.[32/] Likewise, the Company claims that "massive cost shifting [] would be borne by Pacific Power's remaining customers," in lieu of the proposed Net Removal Tariff revisions assigning costs to departing customers.[33/] This "zero-sum" paradigm, with customers left to battle each other over alleged stranded cost responsibility, completely ignores the Company's own measure of responsibility and exposure.

*20* Such abdication of any responsibility is also manifest in the following Company pronouncement: "Doing nothing, preserving the status quo, is simply not an option."[34/] This rhetoric, however, presents an entirely false dichotomy. For instance, Boise and Staff are not asking the Company to "do nothing," as demonstrated by the bevy of proactive Company options identified above; and, neither would the Commission be merely preserving the status quo, if Pacific Power's proposals were rejected and the Company instructed to "do something" other than complain. While the Company adopts a helpless posture—e.g., to complain on brief that "Pacific Power *cannot* tailor its rates, which are regulated by the Commission, to respond to" unregulated competition[35/]—Staff has demonstrated that the Company has rate tailoring options available which are positively encouraged by the Commission and the Washington Legislature, as an express means of responding to unregulated competitors, and particularly in a non-residential customer context.[36/]

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[32/] Pacific Power Initial Brief at ¶ 18 (citing Walla Walla Country Club v. Pacific Power, Docket UE-143932, Order 05 (May 5, 2016) (Separate Statement of Chairman Danner at ¶ 4) ("Walla Walla case") (emphasis added). While the Company cites to Chairman Danner's Separate Statement in the Walla Walla case for this proposition, the Chairman's statement was issued more than a year prior to the Commission's unanimous reaffirmation of the Guiding Principles in July 2017, which plainly acknowledge shareholder exposure to potential stranded costs.

[33/] Pacific Power Initial Brief at ¶ 30.

[34/] Id. at ¶ 33.

[35/] Id. at ¶ 21 (emphasis added).

[36/] See Initial Brief of Boise at ¶¶ 62-66 (explaining such evidence with full citation to the record).



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*21* In a very real sense, Boise agrees that preserving the status quo may not be a viable option for the Company to successfully run a business in Washington. But, the operative sense here is that Pacific Power *itself* has been doing nothing to address customer concerns or cooperate with the majority of neighboring utilities since 2006.

*22* In fact, given the evidence on record noted above—which demonstrates that the Company has either been unresponsive to, or flatly rebuffed and actively resisted offers to negotiate from competitors—Pacific Power goes beyond ignoring responsibility to something that approaches misrepresentation. For example, the Company makes the following claim that is impossible to square with the record of BHE management practices since 2006: "Pacific Power has *consistently engaged* in good faith efforts to reach a service area agreement with Columbia REA."[37/] This claim is only reasonable if *not* responding to repeated entreaties from Columbia REA over the last several years constitutes consistent "good faith efforts" to negotiate; however, the Commission hopefully finds such representations no more persuasive than they are accurate in light of the record. Similarly, the Company pledges that "… Pacific Power will continue to seek out ways to reach a mutually agreeable outcome" on a negotiated service are agreement.[38/] Yet, unless repeated refusals to negotiate, such as Yakama Power has experienced, or simple unresponsiveness, as Columbia REA has been rewarded with, are construed as effective negotiating strategies, this briefing statement by the Company would seemingly have no nexus with the truth.

*23* Delving deeper, the Company's unwillingness to accept any responsibility is also graphically illustrated in the context of alleged encroachment by Columbia REA: "The graphic reports in Exhibit RBD-2 *clearly demonstrate* the aggressive expansion of

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[37/] Pacific Power Initial Brief at ¶ 27 (emphasis added).

[38/] Id. at ¶ 28.



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Columbia REA's customer base and facilities in and around Walla Walla over the past nearly 20 years."[39/] In reality, however, the Company's graphic reports only "clearly demonstrate" that they possess zero evidentiary value. Each and every graphic report included in that exhibit contains a total "No Warranty" disclaimer "[w]ith respect to *any information* … as to the accuracy, completeness or fitness for a particular purpose thereof."[40/] Not coincidentally, this attempt to disclaim all Company responsibility, while simultaneously assigning absolute fault to a competitor, identifies PacifiCorp as "A MidAmerican Energy Holdings Company."[41/]

*24* Pacific Power is free, of course, to accept neither responsibility for particular evidentiary submissions in this proceeding, nor responsibility for broader management decisions that may cause the Company concern over the retention of Washington customers—except by force, through the creation of a "practical exclusive service territory," beyond what Washington statute allows, or the Company has been able to secure through repeated efforts in appropriate legislative channels. But, these freely made decisions should also be attached to fair consequences, such as the rejection of Company evidence that fully disclaims its own fitness, or the bearing of costs attributable to the managerial roadmap followed since 2006, which has led to circumstances culminating in the Company's present complaints.

### 3. Public Counsel and The Energy Project also Ignore Company Responsibility

*25* While rightly noting that "Pacific carries the burden to establish that its proposed tariff is just and reasonable,"[42/] Public Counsel improperly and materially

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[39/] Id. at ¶ 16 (emphasis added).
[40/] Dalley, Exh. RBD-2 (emphasis added). Accord Bolton, TR. 131:14-17.
[41/] Dalley, Exh. RBD-2.
[42/] Post-Hearing Brief of Public Counsel at ¶ 3.



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diminishes that burden, by failing to recognize that the Company bears any potential responsibility for alleged stranded costs. Specifically, Public Counsel presents the Commission with the same false dichotomy which places all exposure to potential stranded costs as a "zero-sum" attribution between remaining and departing customers: "Without the ability to capture the costs of customers leaving its system for competitive reasons, costs shift to Pacific's remaining customers."[43/] Likewise, Public Counsel adopts an overly constrained lens to conclude that "… remaining customers bear the risk of absorbing costs left behind when customers accessing competitive options leave Pacific's system. Those stranded costs would shift to the remaining customers absent a tariff that allows Pacific to collect the stranded costs from the disconnecting customers."[44/]

*26* Public Counsel's binary framing of the stranded cost issue may appear neat and tidy, while presumably functioning to cast residential customers as the hapless victims of a helpless utility, suffering from purportedly uncontrollable large customer attrition. But, this simplistic "either/or" proposition neglects Pacific Power's own responsibility, as with the Company's own briefing, and is contrary to both the record and the Commission's recently affirmed Guiding Principles.[45/]

*27* Moreover, Public Counsel's neglect on the point of Company responsibility is conspicuous, given the concession 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."[46/] Public Counsel implicitly attributes no cost-causation for potential stranded costs to Pacific Power, however, considering the following, absolute

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[43/] Id. at ¶ 4.
[44/] Id. at ¶ 14.
[45/] Dalley, Exh. RBD-1Tr at 13:20-21; Docket UE-940932, Policy Statement at 2.
[46/] Post-Hearing Brief of Public Counsel at ¶ 18 (emphasis added).



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conclusion reached on brief: "… a stranded cost fee also fairly assigns costs to the cost-causers, *who are in this case the disconnecting customers*."[47/]

*28* At the very least, more scrutiny of the Company's stranded cost exposure, and culpability for present circumstances, is warranted by the Commission's recent reaffirmation that "… regulation cannot and should not be expected to guarantee utilities will, in all circumstances, be made entirely whole" for stranded costs resulting from "actual and fair competition."[48/] Indeed, Public Counsel does not seem to attribute unfair competitive practices to the Company's neighboring utilities, claiming only that "Pacific and Columbia REA have long attempted to negotiate a service area agreement, but have been unsuccessful."[49/]

*29* In contrast to Public Counsel, The Energy Project does acknowledge that "the Commission cautioned that regulation should not and cannot be expected to guarantee utilities will, in all circumstances, be made entirely whole for generation and other costs that are determined through actual and fair competition to be stranded."[50/] Yet, this recognition of Company responsibility appears in a footnote, while the body of Energy Project briefing effectively adopts the same false dichotomy of a "zero-sum" customer responsibility, which is common to both Pacific Power and Public Counsel briefing.

*30* For instance, The Energy Project claims, in relation to the Company's "proposal for a stranded cost fee for recovery of low-income and DSM (conservation/energy efficiency) program costs,"[51/] that if "the departure of larger

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[47/] Id. at ¶ 20 (emphasis added).
[48/] Docket UE-940932, Policy Statement at 2.
[49/] Post-Hearing Brief of Public Counsel at ¶ 14.
[50/] Initial Post-Hearing Brief of The Energy Project at ¶ 14 n.22.
[51/] Id. at ¶ 11.



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customers continues or increases, program costs will *inevitably* fall more heavily on remaining customers."[52/] The alleged "inevitability" of this result, however, depends entirely on The Energy Project ignoring the Commission's recent reaffirmation of "both shareholder and ratepayer exposure to potentially stranded costs"—which, ironically, The Energy Project later quotes.[53/] Moreover, an "inevitable" attribution of increased stranded cost exposure to customers depends upon a similarly "inevitable" presumption that shareholders will *never* be exposed to stranded costs. Although this form of reasoning may support the hapless customer/helpless utility paradigm, such logic cannot tenably coexist with the Commission's explicit Guiding Principles.[54/]

### B. Methodological and Ideological Flaws of the Proposed Stranded Cost Recovery Fee Are Further Exposed on Brief

*31* As a threshold matter, Pacific Power attempts to argue that "three interveners oppose the [Net Removal Tariff] revisions out of economic self-interest," i.e., Columbia REA, Boise, and Yakama Power.[55/] If the Commission were to simply factor "economic self-interest," however, then Pacific Power's argument would almost certainly result in a rejection of all Net Removal Tariff revisions, and particularly the exorbitant impacts associated with the Stranded Cost Recovery Fee proposal.

*32* In short, the only party *without* an economic self-interest in this case is Staff, who has definitively recommended against approval of the Company's proposals in testimony and initial briefing. The remaining party calculus would presumably pitch two equal camps in opposition: 1) Pacific Power, Public Counsel, and The Energy Project,

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[52/] Id. at ¶ 12 (emphasis added).
[53/] Id. at ¶ 14 (quoting Policy Statement at 2).
[54/] Cf. Docket UE-161123, Order 06 at ¶ 74 (citing Gottlieb, Paula, "Aristotle on Non-contradiction," The Stanford Encyclopedia of Philosophy (Summer 2015 edition), Edward n. Zalta (ed.)) (noting a philosophical tension that "violates the principle of non-contradiction, which can be reduced to the simple proposition that a thing cannot both be and not be").
[55/] Pacific Power Initial Brief at ¶¶ 35-44.



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collectively in favor of full exaction of costs from departing customers, and primarily large customers, in all circumstances; against 2) Columbia REA, Boise, and Yakama Power, all asserting that the Company has not demonstrated the propriety of such exactions, and with either explicit or implicit allusions to shareholder responsibility. Thus, with Staff's recommendation plainly in alignment with latter camp, the "economic self-interest" argument undermines the Company's ultimate position.

*33* That said, lest there be any argument about the Company's self-interest, Public Counsel declares: "*Undoubtedly*, Pacific has a financial interest in retaining and serving its customers, and there is an opportunity cost in losing customers."[56/] Likewise, if this reply brief accomplishes nothing else, the Company's significant economic self-interest, in avoiding any shareholder responsibility for stranded costs, has hopefully been made manifest.

*34* Also, Boise has previously explained the flaws in Company witness Robert Meredith's contention that wind investment, associated with Pacific Power's 2017 Integrated Resource Plan ("IRP"), should not be factored, as purportedly "not part of the costs that customers currently pay in their rates. It would be inappropriate to include costs and resultant benefits from resources that are not already in rates and are not being driven by a need to serve loads in the Company's stranded cost calculation."[57/] On brief, however, the Company further undermines Mr. Meredith's argument, in conceding that the IRP includes "… some of the Company's assets *used to serve* customers."[58/]

*35* This stark concession, of IRP assets being "used to serve" existing customers, should now refute any notion about the alleged impropriety of factoring the

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[56/] Post-Hearing Brief of Public Counsel at ¶ 17 (emphasis added).
[57/] Initial Brief of Boise at ¶¶ 38-45 (quoting Meredith, Exh. RMM-1Tr at 12:2-5).
[58/] Pacific Power Initial Brief at ¶ 47 (emphasis added).



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2017 IRP in stranded cost calculations—since the Company (probably unwittingly) acknowledges that at least "some" assets in the 2017 IRP are associated with resources presently used to serve customer loads, thereby including "costs that customers currently pay in their rates." While Mr. Meredith was careful at hearing to repeatedly disclaim his expertise on IRP matters,[59/] the Company's most recent 2017 IRP comments are telling, as when expressly discussing the wind repowering facilities that are also in controversy in this stranded cost calculation context: "These facilities serve customers *today* and will continue to serve customers once repowered. It is therefore *appropriate* for these facilities to continue to be treated like every other used and useful utility investment."[60/]

*36* Considering these actual IRP admissions, nothing would support Mr. Meredith's non-expert opinion that factoring 2017 IRP benefits, as Boise witness Bradley Mullins recommended, would still be "inappropriate" because such resources are allegedly "not part of the costs that customers currently pay in their rates." Similarly, while Mr. Meredith claims "[i]t would be inappropriate to include costs and resultant benefits from resources that are … *not being driven by a need to serve loads* in the Company's stranded cost calculation,"[61/] recent IRP comments tell a conflicting story. For example, the Company has recently defended "[t]he key resource actions in the 2017 IRP action plan"—including wind repowering resources as "the cornerstones of the

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[59/] E.g., Meredith, TR. 273:6-7 ("again, I am not the IRP expert of the company"); id. at 273:18 ("But again, I'm not the IRP expert on this"). The Company's practice, under BHE management, of sending witnesses admittedly lacking in subject matter expertise to testify before the WUTC was also evident in the Walla Walla case, when then-Vice President "Mr. Dalley, admittedly not an expert on the NESC, testified that he believes the Company must perpetually maintain the underground facilities upon permanent disconnection … but cites no basis for his opinion." Docket UE-143932, Order 03 at ¶ 22 (Jan. 15, 2016).

[60/] Re Pacific Power's 2017 IRP, Public Utility Commission of Oregon Docket No. LC 67, PacifiCorp's Reply Comments at 23 (July 28, 2017) (emphasis added). To the extent deemed helpful or necessary, Boise requests and the Commission could readily take official notice of these and similar assertions as "[r]ecords contained in government web sites …." WAC § 480-07-495(2)(a)(iv).

[61/] Meredith, Exh. RMM-1Tr at 12:2-5 (emphasis added).



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company's proposed Energy Vision 2020 projects"[62]—precisely because "the Energy Vision 2020 projects are part of the company's least-cost, least-risk plan *to meet system load*."[63]

*37* Once more, the principle of non-contradiction can and should be applied here, in that a thing cannot both be and not be. Pacific Power cannot claim, before the WUTC here, that 2017 IRP wind repowering assets are "not being driven by a need to serve loads"—while simultaneously defending the same investment, in Oregon, by alleging an express purpose "to meet system load." And, lest a relevance question be raised as to the benefits of wind repowering plans, within the context of Washington stranded cost calculations, the Company expressly notes that "the 2017 IRP's action plan includes repowering … the Marengo I and Marengo II facilities in Washington," as well as a very recent update which "expanded the scope of the wind repowering project to include the 94 MW Goodnoe Hills facility located in Washington."[64]

*38* The Company's briefing attempt, to distinguish Oregon direct access and PSE/Microsoft issues, is also indicative of a fundamental lack of understanding. According to Pacific Power, analogs to Oregon direct access are distinguishable because "… the potential for cost shifting is limited to costs associated with generation supply."[65] Likewise, the Company argues that "Microsoft's negotiated resolution with Puget Sound Energy provides *no guidance* in addressing necessary revisions to Pacific Power's tariffs,"[66] despite Public Counsel's claim that the principle expressed by the Commission, "when discussing the context of customers seeking to obtain energy from

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[62] Public Utility Commission of Oregon Docket No. LC 67, PacifiCorp's Reply Comments at 5-6.
[63] Id. at 1-2 (emphasis added).
[64] Id. at 6-7.
[65] Pacific Power Initial Brief at ¶ 48.
[66] Id. at ¶ 55 (emphasis added).



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the market while remaining as distribution customers of the utility, … applies in the current case as well."[67/] According to Pacific Power on brief, though, the stranded costs at issue in this proceeding are irrelevant because "… Microsoft will not be entirely disconnecting from PSE's system; PSE will continue to provide distribution services."[68/]

*39* The first major flaw in this line of argument, from a general perspective, is that costs associated with generation and associated transmission supply are often the primary drivers for electric service costs—meaning that, at a minimum, alleged stranded costs associated with permanent disconnection would have a good deal in common with purported stranded costs arising from retail wheeling scenarios, where generation and associated transmission services are also no longer supplied. As proof, Public Counsel provided a functional breakdown of Pacific Power's non-net power cost revenue requirement, by customer class, which demonstrated that generation was the largest single cost driver for every customer class, while generation and transmission accounted for more than 60% of revenue requirement for every class.[69/]

*40* Further, in the case of Boise service under the unique Schedule 48T-Dedicated Facilities class, generation and transmission account for well over 90% of revenue requirement, according to Ms. Kelly's illustration.[70/] Ironically, the Company contends on brief that, "… as noted by Ms. Kelly, there are unique circumstances of avoided costs and alignment with the closing of a generation resource in the Microsoft-PSE docket."[71/] But, as Ms. Kelly's filed testimony plainly establishes, generation and associated transmission costs for such very large industrial-size loads are probative—e.g.,

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[67/] Post-Hearing Brief of Public Counsel at ¶ 5.
[68/] Pacific Power Initial Brief at ¶ 56 (citing Bolton, TR. 145:7-9).
[69/] Kelly, Exh. KAK-1T at 30, Figure 2 (citing Pacific Power's Response to Boise DR 0052, Att. 1).
[70/] Id.
[71/] Pacific Power Initial Brief at ¶ 56 (citing Kelly, TR. 06:2-15 and 307:5-9).



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if Pacific Power were to "continue to provide distribution services," like PSE in the Microsoft case, the distribution costs at issue for Boise would be so comparatively minor that the graph becomes difficult to even read clearly.[72/]

*41* These points also serve to accentuate the Company's methodological flaws discussed in Boise's initial briefing, regarding the Company's failure to tailor its stranded cost analysis to its largest customer, or to responsibly contextualize such analysis to the virtually identical Microsoft load considered by the Commission in a contemporaneous proceeding.[73/] Most egregiously, the overwhelming impact of generation and transmission cost drivers for a very large customer, like Boise, highlights the relevance of considerations about whether the loss of such load creates a stranded cost *at all* for a multi-jurisdictional utility like PacifiCorp, in which generation resources may readily be redirected to economically service load in other states.[74/] Indeed, Public Council conceded this fact at hearing.[75/]

*42* Finally, Public Counsel's brief is notable for the claim that, "*[i]mportantly*, variation in load caused by permanent disconnection is different than other variations in load that utilities may generally experience and that can shift costs among customers."[76/] The real import of this statement, however, is that Public Counsel attempts to support the adoption of a stranded cost fee on a basis inconsistent with Company testimony at hearing.

*43* Specifically, when cross-examined by Staff counsel, Mr. Meredith alleged that customers switching to natural gas service should not be assessed a stranded cost fee:

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[72/] See Kelly, Exh. KAK-1T at 30, Figure 2 (citing Pacific Power's Response to Boise DR 0052, Att. 1).
[73/] Initial Brief of Boise at ¶¶ 4-25.
[74/] Id. at ¶ 47 (citing Kelly, TR. 317:15-25).
[75/] Kelly, TR. 317:15-25.
[76/] Post-Hearing Brief of Public Counsel at ¶ 6 (emphasis added).



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"…that's fine. That's part of what we experience."[77/] Yet, what the Company experiences through a customer switch to natural gas service—when a stranded cost fee is purportedly *not* appropriate—is exactly the circumstance which Public Counsel describes as appropriate *for* fee imposition. Namely, Public Counsel reasons that "[w]hen a customer seeks to permanently disconnect to become a customer of another utility, that customer remains in place, severing the potential for load growth for Pacific at that location …."[78/] But, whether a customer remains in place by switching to natural gas or electric service, either way (under Public Counsel's paradigm) that customer is still "severing the potential for load growth for Pacific at that location." To apply that metric to justify stranded cost recovery in one circumstance, but not the other, would once more violate the principle of non-contradiction—that a thing cannot both be and not be.

### C. Proponents of Net Tariff Removal Revisions Improperly Argue for an Over-Expansive Concept of the "Regulatory Compact"

*44* On brief, Pacific Power alleges that the concept of a "regulatory compact" actually "governs" these proceedings, citing the legal authority of its own witness, Scott Bolton.[79/] The Company also "provides a non-exhaustive" list of purported applications of the regulatory compact by the Commission[80/]—but, each of the examples is consistent with the notion of the "regulatory compact" as a convenient rhetorical metaphor, as Boise and Staff have explained, and not a "governing" or positive law construct.

*45* For instance, the Commission notes that "basic underpinnings of utility regulation" are "*sometimes* referred to as the 'regulatory compact.'"[81/] However,

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[77/] Meredith, TR. 254:18-25.
[78/] Post-Hearing Brief of Public Counsel at ¶ 6.
[79/] Pacific Power Initial Brief at ¶ 12 (citing Bolton TR. 113:18-20).
[80/] Id.
[81/] Id. (quoting Re PSE, For an Accounting Order Approving the Allocation of Proceeds of the Sale of Certain Assets to Public Utility District #1 of Jefferson County, Docket UE-132027, Order 04 at ¶ 15 (Sept. 11, 2014)) (emphasis added).



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"underpinnings" which are only "sometimes" referred to under the phrase "regulatory compact" is something far less than an example of definitive positive law, such as statute or WUTC rule, which actually "governs" a Commission action. Likewise, the Company quotes a concurring opinion, noting "that a fundamental component of the regulatory compact" is a "belief."[82/] But, as Boise discussed at length in initial briefing, the fundamental problem with Pacific Power's presentation of a regulatory compact has been its similitude to an inarticulable mystery religion, contrary to the "legal terms" or "philosophical terms" categorization recently found efficacious by the Commission.[83/] The fact that the Commission itself has defined the "regulatory compact" as being fundamentally comprised of "belief" only solidifies the point—i.e., that this metaphorical construct should not supersede statute or other forms of positive law.[84/]

*46* The most notable flaw, however, in the Company's portrayal of the "regulatory compact" may well be the near-exclusive focus upon the regulator-utility relationship, without proper recognition of the equally (if not far more) important regulator-customer relationship. For example, the Company states that, under the regulatory compact, "Pacific Power is entitled to" compensation because "the state 'grants the Company a protected monopoly.'"[85/] Yet, as the Commission explained over thirty years ago (and as quoted by the Company), the "concept" of a "compact of utility regulation" begins as follows: "The social and economic compact of utility regulation

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[82/] Id. at ¶ 12 (quoting WUTC v. Rainier View Water Comp., Inc., Docket UW-110054, Order 05 at 27 (Oct. 17, 2012) (Commissioner Oshie, Concurring Opinion)).

[83/] Initial Brief of Boise at ¶¶ 88-94 (citing Docket UE-161123, Order 06 at ¶ 74).

[84/] Boise recognizes that the Company has quoted a concurring opinion here, rather than a full Commission order. To this end, a statement from this concurring opinion would presumably have the same weight as the "Separate Statement" oft cited by Pacific Power from the Walla Walla case.

[85/] Pacific Power Initial Brief at ¶ 12 (quoting Docket UE-143932, Order 05 (Separate Statement of Chairman Danner at ¶ 2).



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*begins* with the premise that a regulated utility has an obligation to serve *the public*."[86] Similarly, as also indicated by another Company briefing citation, the Commission saw fit to block quote Boise's witness, Mr. Mullins, for the proposition that, not merely utilities, but also "*customers* rely on the regulatory compact" metaphor.[87]

*47* Any credible notion of the regulatory compact, therefore, must *begin* with the regulator's duty to the public interest and utility customers. To this point, the Commission recently went to considerable lengths to "provide clarity and guidance … concerning our jurisdiction" over customers when enforcing special contract terms.[88] Indeed, the regulatory bond between the Commission and an individual customer is deemed so close that "jurisdiction over special contracts necessarily includes *personal* jurisdiction."[89]

*48* Thus, a reasonable application of the "regulatory compact," to the extent the notion is used to positively "govern" these proceedings at all, must be fairly applied in a public interest and personal jurisdictive capacity to Boise as well, considering that "the public interest the Commission must protect is the interest of customers of regulated utilities."[90] Conversely, to wield the notion of a "regulatory compact" in support of a stranded cost fee requiring more than an $80 million up-front payment from Boise, rather than place *any* responsibility on shareholders, is to promote alleged utility interest above customer or public interest.

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[86] Id. at ¶ 12 (quoting WUTC v. PSE, Cause No. U-83-84, Fourth Suppl. Order at 57-58 (Sept. 28, 1984)) (emphasis added).

[87] Id. (quoting Dockets UE-140762 *et al.*, Order 08 at ¶ 247 (emphasis added).

[88] Docket UE-161123, Order 06 at ¶ 65.

[89] Id. at ¶ 67. (emphasis added).

[90] Dockets UG-061256 *et al.*, Order 06 at ¶ 24 (citing Cole v. WUTC, 79 Wn.2d 302, 306) ("the public interest the Commission must protect is the interest of customers of regulated utilities," with no distinction made in preference of small customers).



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*49* Lastly, besides unpersuasively citing to the authority of Mr. Bolton for the proposition that "the regulatory compact is a 'governing construct,'"[91/] The Energy Project also focuses unduly upon the regulator-utility aspect of the "regulatory compact." Specifically, although block quoting a Commission order that correctly describes the compact as a metaphorical "understanding," The Energy Project chose to highlight the compact as a relationship "between utilities and those who regulate them," homing in upon the dynamic of "rates that will compensate the utility."[92/]

*50* The Energy Project truly exceeds any legal application of the regulatory compact, however, when proclaiming: "As the *Tanner Electric* decision makes clear, the Commission has the authority to regulate the relationship between an electric cooperative and the regulated monopoly utility …."[93/] This is erroneous because Tanner Electric explicitly stands for an entirely different proposition—that is, within the specific context of Washington's service area agreement statute, and after noting that "cooperatives are not included within the definition of a public utility," the Supreme Court of Washington concluded: "Nor does the Commission have regulatory authority over cooperatives *except* with respect to service area agreements and agreements for the acquisition or disposal of duplicating utility facilities."[94/]

*51* In sum, without a voluntary "agreement" by an electric cooperative, the Commission has no authority over electric cooperatives in this state—which includes Pacific Power's request for the creation of a "practical exclusive service territory,"

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91/ Initial Post-Hearing Brief of The Energy Project at ¶ 22 n.30 (citing Bolton, TR. 112:19-113:5).

92/ Id. at ¶ 21 (quoting Docket UE-132027, Order 04 at ¶ 15).

93/ Id. at ¶ 23. Although citing to precedent here, The Energy Project's discussion is contained within its "Regulatory Compact" briefing section.

94/ Tanner Elec. Coop. v. Puget Sound Power & Light Co., 128 Wash.2d 656, 666 n.2 (1996) (emphasis added). Accord RCW § 54.48.040 ("*Nothing* herein shall be construed … to include cooperatives under the authority of the Washington utilities and transportation commission") (emphasis added).



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through proposed Net Removal Tariff revisions, in the recognized *absence* of a service area agreements with neighboring electric cooperatives. Indeed, as Tanner Electric really does make clear: "Without this statutory validation, service area agreements would be invalid as violative of antitrust laws."[95/]

## III. CONCLUSION

*52* Based upon the evidence on record in this proceeding, and given the reasons stated in briefing along with those contained in testimony and supporting exhibits, Boise continues to request that the Commission reject all the Company's proposed revisions to the Net Removal Tariff.

Dated in Portland, Oregon, this 17th day of August, 2017.

Respectfully submitted,

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