

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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

**REPLY BRIEF OF YAKAMA POWER**

**August 17, 2017**

**TABLE OF CONTENTS**

I. INTRODUCTION..... 4

II. REPLY ..... 5

    A. Pacific Failed to Rebut Yakama Power’s Position that Unique Federal Laws and Tribal Sovereignty Rights Applicable to Service Within the Reservation Fatally Undermine Pacific’s “Regulatory Compact” Theory. ..... 5

    B. Pacific Has No “Obligation to Serve” if it is Unable to Secure All Necessary Rights of Way, Easements, or Governmental Approvals and Permits Needed to Provide Service. 7

    C. Pacific’s Implied-Consent Contract Theory for Its Existing Customers on the Reservation Is Irrelevant To the Issues Raised in This Proceeding...... 8

    D. Red Herring Alert: Without an Approved BIA ROW or Service Line Agreement Authorizing their Placement on Trust Land, Pacific’s Facilities are Trespassing Regardless of Whether they are classified as “Personal Property” or “Fixtures”...... 9

V. CONCLUSION..... 11

**TABLE OF AUTHORITIES**

**Cases**

*Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 415, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989) (plurality opinion)..... 4

*Williams v. Lee*, 358 U.S. 217 (1959) ..... 9

**Statutes**

25 U.S.C. § 2201(7) ..... 9

25 U.S.C. §§ 323-328 ..... 10

RCW 37.12.010 ..... 9

RCW 80.28.020 ..... 5

RCW 80.28.110 ..... 8

**Rules**

25 C.F.R. Pt. 169..... 10

WAC 480-100-108(1)..... 8

WAC 480-10-123(2)(a,d) ..... 8

Pursuant to Washington Administrative Code (“WAC”) § 480-07-390 and Prehearing Conference Order 03, Yakama Power hereby submits to the Washington Utilities and Transportation Commission (“WUTC” or the “Commission”) Yakama Power’s reply brief in response to the Initial Brief of Pacific Power & Light Company’s (“Pacific” or the “Company”).

## I. INTRODUCTION

1 Pacific’s Initial Brief makes it clear that the tariff revisions under consideration in this proceeding are intended to hinder or eliminate the ongoing competitive pressure the Company faces from Columbia Rural Electric Association, Inc. (“Columbia REA”).<sup>1</sup> Rather than tailor its proposal to the issues it faces from Columbia REA, Pacific seeks tariff revisions that will apply to all of its customers regardless of their location. As Yakama Power explained in its Initial Brief, Pacific’s one-size-fits-all proposal fails to take into consideration federal laws and tribal sovereignty rights applicable to Pacific’s operations within the boundaries of the Yakama Indian Reservation.<sup>2</sup> Rather than acknowledge these differences and modify its proposal or exempt its Yakama Reservation customers entirely, Pacific has chosen to pretend the laws are the same throughout its territory and Yakama Power’s concerns are irrelevant to this proceeding.

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<sup>1</sup> See, e.g., Pacific Power & Light Company’s Initial Brief (“Pacific Initial Brief”) at 2, ¶ 5 (“*Pacific Power’s proposal: (1) informs customers who may be contemplating a switch to Columbia REA of the economic impact caused by such a decision; (2) protects remaining customers from the economic consequences of a customer’s voluntary economic decision to switch utilities; and (3) ensures that Columbia REA cannot freely conscript facilities used to serve Pacific Power customers.*”) (emphasis added). See also, Pacific Initial Brief at 6, ¶ 14 (“[t]he lack of a service area agreement between Pacific and Columbia REA, coupled with Columbia REA’s aggressive competitive practices, necessitate the proposed revisions to Pacific’s tariffs.”).

<sup>2</sup> The Yakama Indian Reservation (“Yakama Reservation” or “Reservation”) is the area of land reserved for the Yakama Indian Nation as its permanent tribal homelands. The federal government created the Yakama Indian Reservation by treaty in 1855. The reservation encompasses approximately 1.3 million acres of land, mostly in Yakima County. See *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 415, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989) (plurality opinion).

Unfortunately for Pacific, these differences do exist and without accommodation render Pacific's proposal unjust, unreasonable and inconsistent with WUTC requirements.<sup>3</sup>

2 For the reasons set forth in Yakama Power's testimony, Initial Brief, and further described herein, Yakama Power (again) respectfully requests the Commission prohibit application of Pacific's tariff revisions to any Pacific customer located within the boundaries of the Yakama Reservation and served in whole or in part by facilities located on Indian Trust Lands.<sup>4</sup>

## II. REPLY

### A. Pacific Failed to Rebut Yakama Power's Position that Unique Federal Laws and Tribal Sovereignty Rights Applicable to Service Within the Reservation Fatally Undermine Pacific's "Regulatory Compact" Theory.

3 In this proceeding, the Commission is charged with determining whether the rates, terms and conditions contained in Pacific's tariff proposal are "unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise [sic] in violation of the provisions of the law . . .".<sup>5</sup> Pacific's central argument in support of its proposed tariff revisions is that approval 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>6</sup> Pacific has expressly stated that it does not differentiate between customers located within or without the Yakama Reservation, and intends to apply the tariff revisions (if approved) without regard to whether a customer is located on or

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<sup>3</sup> It bears noting that albeit for different reasons, WUTC Staff reached essentially the same conclusion in its Initial Brief. See Brief on Behalf of Commission Staff, at 32, ¶ 72 (07/28/2017).

<sup>4</sup> As used in this Reply Brief, the term "*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 Yakama Reservation. In addition, the term "*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.

<sup>5</sup> RCW 80.28.020

<sup>6</sup> Pacific Initial Brief, at 3-5.

served by facilities using Trust land (or whether Pacific has obtained BIA authorization to access or use such Trust Lands to serve such customer).<sup>7</sup>

4 Throughout this proceeding Yakama Power has filed testimony<sup>8</sup> and pleadings<sup>9</sup> notifying Pacific of Yakama Power’s position that federal laws and tribal sovereignty rights that apply on the Yakama Reservation, including but not limited to compliance with BIA’s rights-of-way regulations (25 C.F.R. Part 169), make the determination of whether Pacific has a “reasonable expectation of continued service” different from that applicable to service outside the Reservation.

5 Specifically, Yakama Power has repeatedly stated that Pacific has no “reasonable expectation of continued service” 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 required to provide service to such customer. Pacific has failed to offer any evidence as to why this requirement is meritless.<sup>10</sup> Indeed, the extent of the rebuttal provided in Pacific’s Initial Brief is nothing more than a citationless assertion that “Yakama Power’s contention that there is no basis for allowing Pacific Power to recover a stranded cost recovery fee from departing customers located on the Reservation because of the trust status of some of the properties served is beyond the scope of this proceeding, lacks evidentiary support and is contrary to state and federal law.” (emphasis added).<sup>11</sup> Pacific provides no explanation as to why the scope of this proceeding should not involve matters such as whether Pacific has obtained and maintains all required governmental approvals & authorizations necessary to install

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<sup>7</sup> Wiseman, Exhibit No. RW-2 at 4.

<sup>8</sup> Wiseman, Exhibit No. RW-1T at 3.

<sup>9</sup> See Motion for Official Notice – BIA Letter, on behalf of Yakama Power, UE-161204 (June 23, 2017).

<sup>10</sup> Dalley, Exhibit No. RBD-25X (listing no BIA authorizations).

<sup>11</sup> Pacific Initial Brief, at 17, ¶ 40.

and maintain facilities required to provide service. Such matters directly affect Pacific’s ongoing ability to fulfill the “duty to serve” that Pacific claims is the foundation of its rights under the “regulatory compact”.<sup>12</sup> Moreover, Pacific cites no state or federal law that conflicts or contradicts the federal laws and regulations (particularly 25 C.F.R. Pt. 169) and tribal sovereignty principles described in detail in Yakama Power’s testimony and Initial Brief. Simply put, Pacific Initial Brief is devoid of reference to any state or federal law providing Pacific an exemption or any kind of limitation from the application of BIA’s rights-of-way rules (25 C.F.R. Pt. 169).

B. Pacific Has No “Obligation to Serve” if it is Unable to Secure All Necessary Rights of Way, Easements, or Governmental Approvals and Permits Needed to Provide Service.

6 Pacific’s Initial Brief goes to great lengths to assert that state law obligates it to serve anyone within its “traditional service territory” that requests service.<sup>13</sup> Pacific would have the Commission believe that the duty to serve is absolute and without exception. Unfortunately for Pacific, the “duty to serve” is not the unyielding yoke Pacific portrays for purposes of this proceeding.

7 The statute Pacific claims imposes its “duty to serve”, RCW § 80.28.110, expressly states that Pacific does not have to provide service if the applicant is not “reasonably entitled” to receive service.<sup>14</sup> Similarly, WAC 480-100-123(2) provides that Pacific may refuse new or

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<sup>12</sup> Pacific Initial Brief, at 4, Sec. B.

<sup>13</sup> *Id.* at 2, ¶7 and ft. 3 (citing RCW § 80.28.110). It bears noting that because there is no service territory agreement in place between Yakama Power and Pacific (or any other utility) relating to service on the Yakama Reservation, so Pacific is not under any contract-based “duty to serve”.

<sup>14</sup> *Id.*; RCW § 80.28.110 (“Every ... electrical company ... engaged in the sale and distribution of ... electricity ... shall, upon reasonable notice, furnish to all persons and corporations who may apply therefor and be reasonably entitled thereto, suitable facilities for furnishing and furnish all available ... electricity ... as demanded....”) (emphasis added).

additional service if: (1) “[p]roviding service does not comply with government regulations”, or (2) “[a]fter reasonable efforts by the responsible party, all necessary rights of way, easements, approvals, and permits have not been secured”.<sup>15</sup> It stands to reason that if Pacific cannot acquire BIA authorization to use Trust Land to reach a service applicant, or cannot obtain a renewal of a previously-issued BIA authorization authorizing Pacific to use Trust Land to serve an existing customer, such customer is not “reasonably entitled” to be served by Pacific and Pacific has no duty to serve under RCW § 80.28.110.

C. Pacific’s Implied-Consent Contract Theory for Its Existing Customers on the Reservation Is Irrelevant To the Issues Raised in This Proceeding.

8 Having failed to come up with a plausible argument giving it an ongoing right to provide service within the Reservation, Pacific instead claims in its Initial Brief that any customer within the Reservation that asked for and received service from Pacific agreed to be contractually obligated “for conforming to the rules and regulations that are in effect and on file with the Commission when the applicant orders service. Under state law, Pacific Power is required to provide service to these customers.”<sup>16</sup> Pacific cites WAC 480-100-108(1) and RCW 80.28.110 as support for its position.

9 Pacific’s assertion is at best irrelevant, and at worst misleading. First, whether a Pacific customer residing on the Reservation must comply with Commission rules and regulations while being served by Pacific is irrelevant to the central question in this proceeding: does Pacific have an ongoing reasonable expectation of continuing service for customers located on or served by

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<sup>15</sup> WAC 480-10-123(2)(a,d).

<sup>16</sup> Pacific Initial Brief, at 17-18, ¶41; *see also*, Pacific Initial Brief at 18, ¶ 43 (“by applying for service from Pacific Power, customers on trust land agreed to be regulated by Pacific Power’s filed tariffs and the rules of the Commission, and consented to the Commission’s authority to set the Company’s tariffs.”).



facilities using Trust Land? Yakama Power's position is that the answer is "no" unless Pacific can provide demonstrable evidence proving it has all required governmental approvals & authorizations necessary to access a customer located on or needing to be served by facilities requiring the use of Trust Land.

10           Second, Pacific's argument is misleading because it implies that Washington state law is controlling with respect to disputes involving Pacific's service on the Reservation. As Yakama Power noted in its Initial Brief, Federal courts have consistently noted the lack of any state *civil regulatory* jurisdiction over Trust Lands within reservation boundaries,<sup>17</sup> and the State of Washington has a current policy of supporting Yakama Nation jurisdiction on the Reservation.<sup>18</sup> Lastly, it bears noting that without a specific case or controversy, it is impossible to evaluate whether Pacific's "implied contract" claim have any bearing on this proceeding whatsoever.

D.     Red Herring Alert: Without an Approved BIA ROW or Service Line Agreement Authorizing their Placement on Trust Land, Pacific's Facilities are Trespassing Regardless of Whether they are classified as "Personal Property" or "Fixtures".

11           Paragraph 44 of Pacific's Initial Brief asserts that the definition of "land" in 25 U.S.C. § 2201(7) creates an exception to the general common law of property so that "permanent improvements or fixtures on Indian trust land do not take on the characteristics of the underlying trust property and do not automatically become trust assets but, rather, remain as personal property."<sup>19</sup> Based on such analysis, Pacific concludes that its "assets on Indian trust land are not fixtures and, therefore, are not trust assets subject to the Bureau of Indian Affairs'

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<sup>17</sup> Yakama Power Initial Brief at 5, ¶ 17. *See also*, Williams v. Lee, 358 U.S. 217 (1959) (landmark case limiting state infringement of tribal authority on reservation)

<sup>18</sup> *See also*, RCW 37.12.010 which noticeably exempts state jurisdiction over tribal lands or allotted lands within an established Indian reservation and held in trust by the United States.

<sup>19</sup> Pacific Initial Brief, at 18, ¶ 44.

jurisdiction.”<sup>20</sup> (emphasis added). Apart from being a misstatement of the law, Pacific’s claim demonstrates a fundamental misunderstanding of the federal laws granting BIA the authority to control access to Trust Land. Moreover, practically speaking, Pacific’s argument is the proverbial “distinction without a difference” in the sense that whether Pacific’s property is considered personal property or fixtures has no bearing on the fact that Pacific needs to comply with 25 C.F.R. Pt. 169 if it wishes to place them on Trust Lands.

12 To understand the fallacy of Pacific’s reasoning one only has to look at the fact that the definition of “land” that Pacific relies on applies only within the confines of 25 U.S.C. §§ 2201-2221, the Indian Land Consolidation Act (ILCA).<sup>21</sup> The definition does not apply to 25 U.S.C. §§ 323-328, the primary statutory authority underlying BIA’s rights-of-way regulations (25 C.F.R. Pt. 169).<sup>22</sup> So, even if Pacific’s assets on Indian trust land are not subject to BIA jurisdiction for purposes of the ILCA – a position Yakama Power concedes only for the sake of argument – that conclusion has no bearing on whether the placement of such assets on Trust Land remains subject to BIA jurisdiction under 25 U.S.C. §§ 323-328 (and its implementing regulations found at 25 C.F.R. Pt. 169).

13 In sum, the classification of Pacific’s assets on trust land as “personal property” or “fixtures” has no bearing on whether Pacific has the lawful right to place them there in the first place. BIA regulations (25 C.F.R. Pt. 169) require Pacific to apply for and obtain a BIA-

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<sup>20</sup> *Id.*

<sup>21</sup> 25 U.S.C. §2201 states that “For the purpose of this chapter . . . (7) the term "land" means any real property” (emphasis added).

<sup>22</sup> See Rights-of-Way on Indian Land, 80 Fed. Reg. 72,492 & 72,494 (Nov. 19, 2015) (final rule codifying 25 C.F.R. pt. 169) (“*The general approach to the final rule is to provide a uniform system for granting rights-of-way over Indian land by relying primarily on a single statutory authority, 25 U.S.C. 323–328, and to allow Indian landowners as much flexibility and control as possible over rights-of-way on their land. (emphasis added) . . . The rule also lists the Indian Land Consolidation Act (ILCA), as amended by the American Indian Probate Reform Act, 25 U.S.C. 2201 et seq., as statutory authority because the rule relies on this statute as supplemental authority*”) (emphasis added).

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. Whether Pacific's assets are classified as personal property or fixtures has no bearing on whether Pacific is subject to BIA jurisdiction under 25 C.F.R. Pt. 169.

## V. CONCLUSION

14 Pacific has produced no evidence contradicting Yakama Power's position that federal law and tribal sovereignty rights require Pacific to modify its tariff proposal to exempt customers within the Yakama Reservation. Pacific's tariff proposal is unjust and unfair to customers located within the Yakama Reservation, and the Commission should reject the proposal or condition approval on Pacific exempting it Reservation customers from it.

Dated this 17<sup>th</sup> day of August, 2017.

Respectfully submitted,

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