BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PACIFIC POWER & LIGHT COMPANY, Respondent.	)	DOCKET UE-161204 RESPONSE OF BOISE WHITE PAPER, L.L.C. TO PACIFIC POWER'S MOTION TO STRIKE PORTIONS OF BOISE'S REPLY BRIEF

I. INTRODUCTION

1 Pursuant to WAC § 480-07-375(4), Boise White Paper, L.L.C. ("Boise") submits this timely written response in opposition to Pacific Power & Light Company's ("Pacific Power" or the "Company") Motion to Strike Portions of Boise's Reply Brief ("Motion"), filed on August 25, 2017. Boise's Reply Brief contains appropriate argument supported by undisputed evidence in the record, straightforward reasoning, and information publicly available and readily accessible by the Washington Utilities and Transportation Commission ("WUTC" or the "Commission"). Boise's arguments and citations are directly relevant to what has become *the* fundamental issue in this proceeding—responsibility for circumstances leading to disconnections and alleged stranded costs. Accordingly, the Motion should be denied in full.

II. RESPONSE

2 Through both the end sought by the Motion, as well as the tone and tenor that the Company employs to accomplish that end, Pacific Power perfectly illustrates what has become the dominant theme in this proceeding. Namely, the Motion represents a fiery refusal by the

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Company to accept any responsibility for or to brook any equitable criticism of Pacific Power's own actions, while simultaneously lashing out with unflinching recriminations against competitor and customer alike. Quite plainly, Boise has struck a very deep chord to engender the sort of desperate, flailing rhetoric seen in the Motion—which is perhaps most apparent in the mantra-like repetition of "inflammatory" on no fewer than six occasions in a mere five-page motion.[1/] Likewise, the Company charges its largest customer in Washington as being "reprehensible" and "reckless," and guilty of making "wild accusations."[2/]

3 Nevertheless, Boise will show through calm, detailed, and professional elucidation herein that such tempestuous claims are unfounded. Indeed, to frame things colloquially for the benefit of the Commission and public, the controversy here is a classic example of "the pot calling the kettle black."[3/] That is, attributions of reprehensible and reckless behavior, and the allegation of making inflammatory and wild accusations—at the *very* least—must apply equally to Pacific Power in this proceeding, justifying a decision by the Commission not to reward the Company with any relief, in view of such unsavory conduct. Put differently, the Commission should not accept the Company's invitation to serve as arbiter in a tit-for-tat mud-slinging competition. Outright Motion denial would be an efficient means to that end.

1/ E.g., Motion at ¶¶ 1, 3, 7, 8. The Company has also attempted to improperly reify, in similar mantra-like fashion, its belief in the governing authority of the "regulatory compact" in this proceeding, prompting WUTC Staff ("Staff") to file responsive testimony explaining that the regulatory compact is simply a "metaphor" that does not have legal effect in Washington. Panco, Exh. DJP-1Tr at 5:1-20. Staff later provided an article "which informed the development of Staff's testimony" on the regulatory compact, including the following, "bottom line" conclusion relevant to the Company's current attempt to clumsily hammer through a perception of "inflammatory" argument through blunt repetition: "The bottom line? Repetition does not create truth. There is no 'regulatory compact.'" Mullins, Exh. BGM-5 at 3, 6 (Staff's Response to Company Data Request 1 & Att.).

2/ Motion at ¶¶ 7, 13, 3.

3/ See English, Oxford *Living* Dictionaries, available at: https://en.oxforddictionaries.com/definition/us/the_pot_calling_the_kettle_black (defining the phrase as being: "Used to convey that the criticisms a person is aiming at someone else could equally well apply to themselves").

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4 Properly considered, the crux of the matter is as follows. The Company has come to the Commission seeking major tariff revisions that would prospectively affect Boise more than any other customer, to the tune of more than $80 million, via *total* attribution to Boise of alleged stranded cost responsibility (as between shareholder and customer), should Boise ever choose to exercise its perfectly legal right to be served by another electric utility in Washington. The Company bears the burden in this case to demonstrate that such an unprecedented fee would be fair, just, and reasonable, including whether the proposed 100% customer/0% shareholder allocation for stranded cost responsibility meets that standard. In turn, Boise has every right to contest the fair, just, and reasonable quality of Pacific Power's proposed 0% shareholder allocation, which necessitates a careful examination of shareholder responsibility. Thus, evidence on record, as well as publicly available information, concerning Company management practices, are of foundational relevance to the Commission's eventual determination in this proceeding.

5 Ultimately, the Company's bid to strike all Boise argument concerning Pacific Power responsibility—and the hyperbolic affectations of outrage in the Motion, by which the Company seeks to effectuate this purpose—is answered by analogy to a bedrock principle of equity, the substance of which should factor into any proper Commission consideration of what constitutes a fair, just, and reasonable rate outcome of this magnitude. Specifically, following the equitable principle "known as the 'clean hands' doctrine," a party may not base claims "on conduct, omissions, or representations *induced* by his or her own conduct, concealment, or representations."[4/]

[4/] Kramarevcky v. Dept. of Soc. and Health Services, 122 Wash.2d 738, 743 n.1 (1993) (citing Mutual of Enumclaw Ins. Co. v. Cox, 110 Wash.2d 643, 651 (1988)) (emphasis added). To be clear, Boise is not

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6 In this sense, Boise has properly cited to evidence in the record in this proceeding, as well as publicly available information on the Commission's own website, to demonstrate that Pacific Power does not have anything approaching "clean hands," as a matter of what is fair, just, and reasonable regarding proposed Net Removal Tariff Revisions, and particularly excessive stranded cost fees. Thus, all information potentially showing that Pacific Power *itself* may have induced customer disconnections, by the (mis)management of interactions with competitors and customers—and, any resultant consequences flowing therefrom, such as alleged stranded costs—are extremely probative to the question of cost allocation and bottom-line responsibility.

7 Boise does not consider briefing arguments that dare to shine a light on Pacific Power management practices to be either reckless or reprehensible, especially when drawn directly from evidence on record. From Boise's perspective, the charged diction of the Motion is an attempt by the Company to bully both Boise and the Commission into shying away from relevant inquiry, through the implicit threat that Berkshire Hathaway is "too big" to be questioned at all, never mind "fail" in its management of Pacific Power.

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contending that a claim of equitable estoppel has been made in this proceeding, or attempting to conflate WUTC and court proceedings. Rather, the analogy goes to the underlying considerations of equity that *should* be applicable to any credible notion of what is "fair, just, and reasonable" in this docket. To argue the contrary, on some hyper-technical or hopelessly legalistic basis—e.g., that Pacific Power should be made entirely whole for any alleged stranded costs, even if customers have been induced to disconnect by the Company's own mismanagement, despite a fair and legal competitive environment—would not only render words such as "fair, just, and reasonable" as completely devoid of value, but would also explicitly violate the Commission's own recently affirmed Guiding Principles for Regulation in an Evolving Electricity Industry ("Guiding Principles"), which recognize "*both* shareholder and ratepayer exposure to potentially stranded costs …," as well as the fact 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." 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 (Dec. 13, 1995) ("Policy Statement") (emphasis added). See also WUTC v. Puget Sound Energy ("PSE"), Docket UE-161123, Order 06 at ¶ 91 (July 13, 2017) (reaffirming the Policy Statement).

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8 But, Boise has confidence that the Commission will be no more cowed than Boise through these tactics, which a neutral observer may well find to be considerably "reprehensible" on the part of the Company. In fact, the unmistakable Motion vitriol unleashed against Boise should dispel any remaining illusions concerning the veracity of the very Boise representations at issue, and that Pacific Power seeks to strike—i.e., the aggressive, hostile, and obstinate pattern of behavior that Pacific Power has consistently shown to customers and competitors under Berkshire Hathaway management, thereby creating the alleged circumstances of customer attrition prompting a purported need for relief. Boise has carefully cited to the record in this proceeding to appropriately support briefing arguments, as well as different statements by the Company and Boise in various WUTC and Public Utility Commission of Oregon ("OPUC") proceedings. In contrast, all the sound and fury contained within the Motion does not signify anything of rational value that would justify striking cogent, centrally relevant Boise arguments.

9 Finally, before delving into specifics, Boise suggests that Pacific Power's excessive posturing and affectations reveal something that is critically telling, as the Commission considers the verities at issue. This dynamic is aptly captured by the 400^{+} year-old observation that: "The lady doth protest too much, methinks."[5/] That is, the overblown nature of Motion protests should occasion a healthy sense of doubt concerning the ostensible reasons supplied for striking Boise arguments, relative to responsibility the Company might be trying to shirk.

A. The Company Apparently Misapprehends the Purpose of Briefing

10 Basic procedural rules for practice before the Commission, affirmed within the last six months and following years of comment and process in which Pacific Power

[5/] WILLIAM SHAKESPEARE, HAMLET act 3, sc. 2.

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participated,[6/] provide as follows: "The commission may permit or require the parties to a proceeding to *present their arguments and authority in support of their positions* after the conclusion of any evidentiary hearing."[7/] Thus, briefing provides all parties, Boise included, with a fair opportunity to present "arguments and authority in support their positions." Boise has appropriately done just that in reply briefing, regardless of whether Pacific Power or anyone else agrees with that presentation, rendering the entire Motion as misplaced and worthy of full denial.

11 By design, briefing allows parties to argue—e.g., to reason, contend, and advocate for a position—and to do so alongside the appeal to authority. Plainly, neither argument nor authority can be encapsulated within the body of strictly factual evidence on record, else the very concept of allowing for or requiring briefing "*after* the conclusion of any evidentiary hearing" would be an entirely fatuous exercise.[8/] In other words, if material within a brief should be stricken as improper because it contains something other than "evidence," then the filing of a brief "after" a hearing would be utterly gratuitous, as incapable of adding anything more than what the record already contains in the form of preexisting evidence.

12 To this end, the very next Commission rule governing adjudicative proceedings is instructive toward appreciating the relevant distinction between pleadings and motions, on the one hand, and briefs, on the other. The Commission groups all three together for purposes of

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[6/] See, e.g., Re Amending/Adopting/Repealing WAC 480-07, General Order R-588 at ¶¶ 9, 14, 30 (Feb. 28, 2017) (noting comments filed in every year from 2013-2017, with a summary of final comments "made part of" the Order in "Appendix A," and approving rule amendments); id., App. A (containing numerous examples of Pacific Power commentary positions, although no comments were noted regarding WAC § 480-07-390, on briefing rules).

[7/] WAC § 480-07-390 (emphasis added).

[8/] Id. (emphasis added). See also Re PSE, Docket UG-151663, Order 04 at ¶ 12 (Dec. 18, 2015) (denying a motion to strike briefing portions and explaining: "Briefs are required to include argument, citations to authority, and citations to the record. Briefs cite to evidence, *but they are not themselves evidence*") (emphasis added).

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laying out "format requirements";[9/] however, the Commission treats *only* pleadings and motions with respect to matters of substantive legal propriety—i.e., concerning "Verification," "Errors in pleading and motions," and the "Liberal construction of pleadings and motions."[10/] The reason for this distinction should be self-evident, although Boise will spell it out given the Company's misapprehension of the purpose of briefing.

13 Specifically, the Commission formally regulates party verification, the treatment of errors, and the interpretation or construction of pleadings and motions because these documents might be dispositive to the substantive rights of a party. For instance, "[t]he commission will liberally construe *pleadings and motions* with a view to effect justice among the parties,"[11/] which makes sense because the Commission understands that "justice" is dependent upon the construction associated with the substantive rights entwined within pleadings and dispositive motions. Conversely, briefing is simply a rhetorical exercise for framing and contextualizing evidence—surely of potential import, when permitted or required, but valuable only in a *persuasive* sense, rather than in a dispositive, evidentiary sense. The Commission does not regulate or formalize how it will "construe" briefing because that would erroneously presuppose that "justice" in a proceeding attaches to the content of a document valued purely for rhetorical and persuasive content. Accordingly, if the Commission ultimately finds the framing or contextualizing of evidence within a brief to be unpersuasive, irrelevant, or even

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[9/] WAC § 480-07-395(1).

[10/] WAC § 480-07-395(2)–(4). Conversely, regulation of briefing is confined to a ministerial or procedural capacity, to assist the Commission with the efficient operation of process, exemplified by requirements touching upon informational organization, citation methodology, exhibit referencing convention, and the use of attachments. See WAC § 480-07-395(1)(c)(iv)–(vii).

[11/] WAC § 480-07-395(4) (emphasis added).

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"inflammatory," let alone "reckless" or "reprehensible," the Commission need only ignore such briefing, rather than get tangled up in "liberal construction" and "striking" debates.

14 Indeed, the Commission routinely ignores and rejects briefing arguments whenever a contested case is resolved in favor of one party over another, without the need to burden itself and other parties via the time and expense involved with process associated with motions to strike briefing sections. The Motion serves no relevant purpose, therefore, other than to creatively achieve the ends forbidden by the Commission in the context of discovery, including the "… improper purpose … to harass or to cause … needless increase in the cost of litigation."[12/] Thus, if the Commission agrees with the Company about the relative merits of Boise briefing arguments, then the end sought by the Company can be achieved far more efficiently by the weight attached to Boise's presentations in the Commission's final decision.

B. Boise Does Not Attempt to Improperly Introduce New Evidence in Briefing

15 Pacific Power's misapprehension of briefing purpose seemingly prompts the Company to also charge Boise, quite erroneously, with improper use of evidence. For example, the Company claims that Boise attempts to improperly "introduce (for the first time in its Reply Brief)" 2017 Integrated Resource Plan ("IRP") evidence by "claiming that the Commission should take 'official notice.'"[13/] The Company does not offer a citation for this claim, however,

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12/ WAC § 480-07-400(3). Boise counsel will *not* be requesting any recompense for this response, out of an ethically-driven professional desire to prevent the Company from effectively accomplishing that purpose of wearing Boise down, through bullying harassment and increased litigation costs. Conversely, Pacific Power (and its outside counsel authoring the Motion) stand to benefit considerably, in a financial sense, from driving up litigation costs ultimately paid for by Boise and other ratepayers. Thus, even considering that only rhetorical and persuasive impacts may be associated with the potential striking of certain Boise briefing sections now, the repercussions following from how the Commission treats the Motion will be long-lasting—namely that, whether by design or not, the Motion will functionally serve as a practical precedent testing whether the Company can add new litigation costs, through increased adversarial process, at the briefing stage of future proceedings.

13/ Motion at ¶10.

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because the full context of Boise's actual briefing statements confirms that official notice is unnecessary.

16 More specifically, Boise properly contextualizes 2017 IRP issues in support of briefing positions, by citing to recent Company information publicly available on the OPUC's website.[14/] Regarding the treatment of such information, Boise stated: "*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)."[15/] Needless to say, Boise's express statement that the Commission "could" take official notice of OPUC website information, "[t]o the extent deemed helpful or necessary," is considerably distinct from the Company's unattributed claim that Boise stated "the Commission *should* take 'official notice.'"[16/]

17 The distinction here between what the Company represents in its Motion, and what Boise really stated, is crucially important toward a denial of the Motion on multiple accounts. First, consonant with the overarching "pot calling the kettle black" dynamic of the Motion, Pacific Power repeatedly charges Boise with making "false" assertions.[17/] Yet, as with other statements examined below, the Company is seen here to be demonstrably "false" in the representation about Boise.

18 Second, the reason why Boise very deliberately phrased the statement about "official notice" as a contingency—i.e., that the Commission "could" but not "should" take official notice—was that official notice is not necessary, precisely because Boise is not seeking

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[14/] Reply Brief of Boise at ¶¶ 35, 36.
[15/] Id. at ¶ 35 n.60 (emphasis added).
[16/] Motion at ¶10.
[17/] E.g., Motion at ¶¶ 1, 2, 4.

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to improperly introduce new evidence. Certainly, the Commission "could" take official notice and characterize the information cited as official evidence, since it meets the requisite criteria, but the Commission need not do so to allow for consideration of that information. If official notice were necessary for such purposes, then past Commission practice—when later referencing party argument, prior docket positions, and out-of-state material, without converting it first to formal "evidence"—would often be in violation of the law.

19 As a case in point, and as providing a readily apparent analog to the affectations the Company presently adopts in the Motion, Pacific Power professed "surprise" in a 2012 Renewable Energy Credits ("REC") proceeding, after alleging the Commission had reached a determination when, according to the Company, "no party took that position."[18/] The Commission countered that the Company's claim was "disingenuous at best," however, based on information conveyed through rhetorical argument from a party in the same proceeding, reference to a third-party position proposed in a WUTC docket five years prior, and out-of-state material from Oregon:

> Staff not only raised the possibility at oral argument, but PSE proposed that very determination in the REC petition that company filed in 2007 and the Commission accepted in its 2010 PSE REC Order. The Public Utility Commission of Oregon, moreover, has interpreted that state's transfer of property statute, which has language identical to RCW 80.12.020, to apply to RECs and required PacifiCorp to seek approval of its sale of Oregon RECs as utility property. PacifiCorp has no basis on which to claim that the Commission's decision to treat RECs like utility property when determining the proper disposition of sale proceeds is beyond reasonable expectations.[19/]

[18/] WUTC v. PacifiCorp, Docket UE-100749, Order 11 at ¶ 10 (Nov. 30, 2012). See also 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.)) (including no mention of "official notice" process in simply referencing such material as informative to the Commission's decision-making).

[19/] Docket UE-100749, Order 11 at ¶ 10 (citation omitted).

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20 Notably, the Commission found no infirmity with the foregoing position adopted in a later determination, even though another party first "raised the possibility at oral argument." This is material to the Company's Motion argument because, under Commission rules, party argument "presentation may be in the form of written briefs, oral argument at the close of the hearing, or both."[20/] In other words, the Commission equivalently treats argumentative positions in briefing or oral argument, meaning Boise positions raised in briefing here are as potentially valid as the Staff positions raised in oral argument in the foregoing precedent—with no requirement to treat such information as officially noticed "evidence," in either circumstance.

21 Likewise, the Commission had found that a PSE position "proposed" in 2007, and still relevant to REC issues being considered for Pacific Power in 2012 (five years later), was probative to support the validity of the Commission's later REC determination. Much more, then, Boise's references to its *own* positions in Docket UE-121680 (similarly five years prior) are also valid, as providing argumentative support and context for Pacific Power service and managerial responsibility issues directly at issue now.[21/]

22 In this light, Pacific Power is wrong to claim that "Boise improperly attempts to resurrect issues addressed by the Commission in Docket No. UE-121680" because, according to the Company, they "certainly are not part of the record."[22/] For the Company's line of reasoning to be correct, the Commission would henceforth have to formally incorporate all prior docket information, into each and every future proceeding, as officially noticed evidence, prior to any Commission recognition of, or reference to, such material. This would not only render the

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[20/] WAC § 480-07-390.

[21/] E.g., Reply Brief of Boise at ¶¶ 9-11.

[22/] Motion at ¶10. Boise later offers further response to the Company's claims of irrelevance and improper use of UE-121680 material.

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Commission's specific conduct in Docket UE-100749 as patently illegal, but would be manifestly ridiculous—i.e., as an infinite burden, to essentially pretend that the Commission has no knowledge of prior, relevant docket information.

23 Lastly, the Commission had no concern with referencing and discussing OPUC material to demonstrate that Pacific Power was being "disingenuous at best" in the quoted precedent from Docket UE-100749. In fact, in the omitted citation to the block quote above, the Commission had referenced an OPUC Order in the context of being first "cited and discussed in Staff Response ¶ 27" to a Pacific Power motion.[23/] Moreover, in that "¶ 27" noted by the Commission, Staff had *not* formally requested official notice of its discussion of how "PacifiCorp Treats its Sales of RECs in Oregon as Sales of Property."[24/]

24 Rather, much like Boise in reply briefing now, Staff had merely supported its argument on the presentation of Pacific Power conduct in Oregon with a simple citation, along with a link to the OPUC website.[25/] The Commission did not, however, resolve to strike such responsive Staff argument as "procedurally improper," on an alleged basis of Staff's "reliance on evidence that is not in the record," as the Company argues now.[26/] Far from it, the Commission later referenced and adopted Staff's usage as persuasive, in full recognition of the appropriate distinction between "evidence," on the one hand, and argument and authority, on the other.

25 In sum, the fact that Boise has referenced publicly available material to provide argumentative framing and context, does not convert such material into either "evidence" or an

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[23/] Docket UE-100749, Order 11 at ¶ 10 (citation omitted).
[24/] Docket UE-100749, Staff Response at 8 (Sept. 26, 2012).
[25/] Id. at ¶ 27 n.27.
[26/] Motion at ¶¶ 9-10.

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improper attempt to rely on such information as evidence. For this reason, the entire line of "official notice" argument in the Motion misses the mark,[27/] and should be rejected.

C. Evidence Boise Cites Is Relevant, Uncontested, and Not Raised Improperly

26 Ethical practice considerations aside, the Motion is a relatively clever procedural gambit to lure the Commission into a preemptive determination on the merits of this case. More explicitly, behind a façade of affected outrage against any critique of practices under Berkshire Hathaway management, the Company seeks to functionally obviate all meaningful review of shareholder responsibility *before* consideration on the final order.

27 Of course, for this very reason, the Motion should be denied. Moreover, as explained below, the uncontested evidence on record that Boise does cite in reply briefing—in addition to contextual and rhetorical framework material that Boise also references, in a proper and customary fashion, as previously explained—is appropriately used as well. This proper usage includes consideration as to any professions of surprise from Pacific Power now, similar to "disingenuous" tactics that the Company proffered in Docket UE-100749.

1. The Plain Relevance of Evidence and Information on Brief

28 Pacific Power argues that Boise briefing portions should be struck on the grounds of being "irrelevant" on four occasions,[28/] although two instances are within sweeping general recriminations, including "false" allegation charges, untethered to any specific Boise statements.[29/] The common thread, however, is that Pacific Power seeks to strike any briefing

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[27/] Id. at ¶¶ 9-12.
[28/] Id. at ¶¶ 1, 2, 7, 9.
[29/] Id. at ¶¶ 1, 2.

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arguments reflecting upon patterns of management since the Company's acquisition by Berkshire Hathaway affiliates in 2006.[30/]

29 All this information is relevant, however, for precisely the reasons explained, at considerable length, in Boise reply briefing.[31/] In short, Boise cites to both uncontested evidence admitted in the record and contextual material in prior dockets to illustrate post-merger practices that demonstrate a share of material shareholder responsibility for alleged stranded costs. Indeed, as noted in a briefing portion that the Company does not attempt to strike, Pacific Power has conceded that "[s]tranded costs must necessarily be borne by the departing customers, remaining customers, *shareholders* or some combination of the three."[32/] Likewise, the Commission's recently reaffirmed Guiding Principles recognize "*both* shareholder and ratepayer exposure to potentially stranded costs …," while further declaring 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."[33/]

30 Considering the undisputed relevance of potential shareholder responsibility for stranded costs, *on a conceptual level*, there is nothing "irrelevant" or improper about Boise's efforts, in reply briefing, to practically demonstrate that Pacific Power shareholders should reasonably bear at least some portion of the burden of responsibility in any future allocation of stranded costs. Boise attempts to do nothing more than this in the vast majority of briefing

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[30/] E.g., Reply Brief of Boise at ¶¶ 3-12, 14-17, 21-24.
[31/] See, e.g., id. at ¶¶ 18-24.
[32/] Dalley, Exh. RBD-1Tr at 13:20-21 (emphasis added).
[33/] Docket UE-940932, Policy Statement at 2 (emphasis added).

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portions that the Company seeks to strike—i.e., all portions sought to be stricken except 2017 IRP references,[34] which have already been discussed.

31 In this light, far from being reckless or reprehensible, or comprising wild or "spurious" allegations,[35] a demonstration of the pattern of practices under Berkshire Hathaway management is fully in accord with Boise's duty to support its positions on brief, concerning alleged shareholder responsibility, via "arguments and authority."[36] Indeed, Boise would be conducting truly reckless and reprehensible practice, if it were to ask the Commission to allocate a portion of responsibility to Berkshire Hathaway shareholders without *any* discussion of Berkshire Hathaway management practices that would reasonably justify such an allocation. This explains why Boise reply briefing is centrally relevant to this proceeding, and shows why striking Boise's arguments would be improper, as having the practical effect of preemptively settling an issue which rightfully should be determined by the Commission on final order consideration.

32 As to the specific charges of irrelevance, Pacific Power first claims that evidence demonstrating "… that Pacific Power—and by extension Berkshire Hathaway—is mistreating Yakama Power" is irrelevant.[37] Yet, in another potion of reply briefing (that Pacific Power does not attempt to strike), Boise quotes directly to Company briefing to establish why such practices are directly relevant and responsive to Company positions:

> 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

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[34] Reply Brief of Boise at ¶¶ 36-37.
[35] Motion at ¶ 13.
[36] WAC § 480-07-390.
[37] Motion at ¶ 7.

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with adjoining service territories [that] have formal or informal territory allocation agreements that define which utility serves which customers."[38/]

33 Simply put, the Company cannot complain about alleged "competitive practices of unregulated" neighboring utilities, then cry foul at Boise when Pacific Power's own practices under Berkshire Hathaway management, in relation to a neighboring and competing utility like Yakama Power, are similarly called into question. The Company's attempt to do so through the Motion only reinforces the fundamental theme running through this entire proceeding, regarding the Company's absolute refusal to accept any notion of responsibility for its actions.

34 The only other specific charge of "irrelevant" Boise argument pertains to Docket UE-121680 references, "regarding service issues."[39/] For the Company to claim that reply briefing "regarding service issues" is irrelevant, however, is "disingenuous at best." Specifically, the Company had boldly proclaimed that "[s]ervice quality is *clearly* not an issue" in initial briefing.[40/] While Boise respects the Company's right to zealously affirm advocacy positions, Pacific Power cannot reasonably expect that such emphatic declarations will not be susceptible to retort, or that any retort will be subject to striking as "irrelevant" merely because the Company asserts that a matter "is clearly not an issue." Once more, a belief that Pacific Power and Berkshire Hathaway are above reproach seems to undergird the Company's claim of irrelevance here, but Boise should have a fair and equal opportunity to present its positions on brief, independent of whether they are ultimately deemed persuasive or relevant.

35 Finally, as a microcosm of the "pot calling the kettle black" dynamic that pervades the Motion, the Company argues that "service issues" referenced in Docket UE-121680

[38/] Reply Brief of Boise at ¶ 3 (quoting Pacific Power Initial Brief at ¶¶ 1-2) (emphasis added).
[39/] Motion at ¶ 9.
[40/] Pacific Power Initial Brief at ¶ 19 (emphasis added).

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should be stricken as "wholly irrelevant to the present proceeding and certainly are not part of the record."[41/] But, even assuming such a paradigm, the Company is equally culpable for purportedly relying on prior docket material improperly in briefing argument, given the following: "The records in this docket and Docket UE-143932 are *replete with evidence* that Columbia REA has constructed duplicative facilities …."[42/] Worse, beyond even what Boise attempts by mere reference to UE-121680—i.e., not the conversion of prior docket material into "evidence," but contextual framing—the Company flatly purports to use "evidence" in Docket UE-143932 to support its current position.

36 To be perfectly clear, Boise is not calling for tit-for-tat striking of Pacific Power briefing, or claiming that Pacific Power has done anything that should be construed as procedurally improper by citing to alleged "evidence" in Docket UE-143932. Rather, Boise seeks only to draw attention to the farcical and wasteful nature of this Motion process, given the Company's patent guilt in doing precisely what it attributes actionable fault against in Boise. In fact, Boise's conduct, in response to the Company's grandiose (but citation-free) claim of a prior docket "replete with evidence," is offered as a guide. Boise chose simply to ignore the Company's claims as unsubstantiated and, hence, unpersuasive—essentially, so much hot air. As the Commission has previously determined in denying a motion to strike: "Hyperbole and unproven allegations … simply are not persuasive of anything."[43/] Accordingly, the Commission need do nothing more than instruct Pacific Power to ignore Boise reply briefing, if the Company deems it unpersuasive, "inflammatory," or in any other fashion infirm.

41/ Motion at ¶ 9.
42/ Pacific Power Initial Brief at ¶ 25 (emphasis added).
43/ WUTC v. Pacific Power, Dockets UE-140762 *et al.*, Order 07 at ¶ 3 (Dec. 5, 2014).

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2. Boise Does Not Make "False" and "Unfounded" Allegations

37 In the span of five Motion pages, the Company levies charges of "false" or "unfounded" allegations against Boise on nine separate occasions.[44/] The evidence that Boise cites in reply briefing, however, was all admitted to the record or offered at hearing without contest. This includes evidence regarding Columbia Rural Electric Association ("Columbia REA") and Pacific Power interactions and communications, Public Counsel witness Kathleen Kelly's testimony and supporting exhibits concerning Columbia REA and Pacific Power, and Yakama Power's own representations about interactions with the Company since the Berkshire Hathaway acquisition.

38 To demonstrate the actual "false" and "unfounded" nature of the Company's allegations, one particular passage in the Motion is worthy of especially close examination. The Company claims, concerning Pacific Power's 2006 acquisition by Berkshire Hathaway:

> There is *absolutely no evidence* in the record to support Boise's conjecture about changes in Pacific Power's management approach after the acquisition. And there is *zero evidence* in the record supporting Boise's wild accusations about Berkshire Hathaway or Berkshire Hathaway Energy. In fact, there is *zero evidence* in the record related to Berkshire Hathaway or Berkshire Hathaway Energy *in any way*.[45/]

39 Without needing to go further, all these absolute claims are simply refuted by the block quote from Yakama Power, which Boise included in briefing as an uncontested cross-exhibit admitted as evidence to the record, and reproduced here again for comparison to the foregoing Motion claims (albeit with differing emphasis added):

> *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

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[44/] E.g., Motion at ¶¶ 1, 2, 3, 4, 7, 8.
[45/] Id. at ¶ 3 (emphasis added).

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> 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.[46/]

40 Quite apparently, this piece of evidence alone establishes the untruth of Pacific Power's claim that "… there is *zero evidence* in the record related to Berkshire Hathaway or Berkshire Hathaway Energy *in any way*."[47/] As Boise properly cited in reply briefing,[48/] no less an authority than Commission order confirms that "PacifiCorp is a wholly-owned subsidiary of Berkshire Hathaway Energy which, in turn, is wholly owned by its affiliate, Berkshire Hathaway."[49/] If that did not render the connection apparent enough, however, Boise further cited to Commission authority to establish that Pacific Power and its parent, PacifiCorp, had been under Scottish Power ownership but then were acquired by MidAmerican Energy Holdings Company in 2006.[50/] Still further, Boise even provided a link to Berkshire Hathaway Energy's website to pinpoint the exact date in 2014 when MidAmerican Energy Holdings Company took on the name of Berkshire Hathaway Energy.[51/]

41 Moreover, Yakama Power's representations directly relate to "Pacific Power's management approach *after* the acquisition," which disproves the absolute Motion claim that

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46/ Wiseman, Exh. RW-4X at 4 (Yakama Power's Response to UTC Staff DR 2) (emphasis added).
47/ Motion at ¶ 3 (emphasis added).
48/ Reply Brief of Boise at ¶ 3 n.6.
49/ Dockets UE-140762 *et al.*, Order 08 at ¶ 1 n.2 (Mar. 25, 2015).
50/ Reply Brief of Boise at ¶ 3 n.6 (citing Re MEHC and PacifiCorp, Docket UE-051090 Order 07 (Feb. 22, 2006)).
51/ Id. (citing 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).

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"[t]here is *absolutely no evidence* in the record" in this regard.[52/] In sum, all the Company's protestations about there being "zero" or "absolutely no evidence" in the record, that would "in any way" relate to Berkshire Hathaway management practices, is really "too much" to be taken seriously. The absolute claims are refuted by uncontested evidence and supported by Commission authority, leaving the Company's brand of argument thoroughly within the category of "[h]yperbole and unproven allegations," which "simply are not persuasive of anything."[53/]

42 As a final word on whether Boise's briefing statements are false or unfounded: "in this state, truth is a defense to a defamation action."[54/] Like the prior analogy to the "clean hands" doctrine, Boise is not purporting that the Company is raising a formal "defamation action" through the Motion. That said, the Company's claims of "wild accusations" and "reprehensible" statements amount to a practical argument that Boise is somehow improperly defaming the Company.

43 To this, Boise points the Commission to the truth and straightforward presentation of uncontested evidence and arguments in reply briefing. Yakama Power has plainly stated: "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."[55/] Yakama Power further explained that it is 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

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[52/] Motion at ¶ 3 (emphasis added).
[53/] Dockets UE-140762 *et al.*, Order 07 at ¶ 3.
[54/] O'Brien v. Franich, 19 Wash.App. 189, 194 (1978).
[55/] Wiseman, Exh. RW-4X at 4 (Yakama Power's Response to UTC Staff DR 2) (emphasis added).

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opportunities, and to generally enhance the tribe's sovereign ability to provide essential government service within the boundaries of the Yakama Indian Reservation."[56/]

44 On brief, Boise merely juxtaposed those two pieces of evidence and drew an obvious implication,[57/] which almost certainly *should* be found troubling, in the context of historical Native American treatment, at least so far as parties and this Commission can claim any credibility in also seeking to discuss lofty concepts as to what is "fair, just, and reasonable" treatment between interest groups. Further, Boise properly contextualized the Commission's limited role in this regard: "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*."[58/] This observation was an appropriate segue to point out that Pacific Power must bear scrutiny in equal measure to Columbia REA, whose actions the Company has put forward as the genesis for this entire proceeding.[59/]

45 If Pacific Power is troubled by the purportedly "inflammatory" implications of its resistance against a nonprofit tribal utility, which seeks to "enhance the tribe's sovereign ability to provide essential government service within the boundaries of the Yakama Indian Reservation," then the solution is not to lay siege to Boise with a hail of insults. Rather, the Company can begin to take responsibility for its actions, and begin working proactively to rectify past mismanagement under Berkshire Hathaway leadership to secure cooperative relations with both competitors and customers—which is exactly the end Boise seeks by arguing in favor of Company accountability throughout this proceeding.

[56/] Id. at 1 (Yakama Power's Response to UTC Staff DR 1).
[57/] Reply Brief of Boise at ¶¶ 7-8.
[58/] Id. at ¶ 8 (emphasis added).
[59/] Id.

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3. Reply Briefing Arguments Are Not Untimely

46 After claiming that Boise "perverts" the statements of Ms. Kelly concerning Columbia REA and Pacific Power communications,[60/] the Company alleges that Boise argument and evidence on these matters should be stricken because "Pacific Power had no reason to foresee that Boise would use this so-called evidence in such a tortured manner."[61/] Once more, however, a calm examination of the truth reveals an entirely different set of facts.

47 Specifically, the Company claimed in initial briefing that "Pacific Power has *consistently engaged* in good faith efforts to reach a service area agreement with Columbia REA."[62/] Likewise, the Company pledged on initial brief that "… Pacific Power will *continue* to seek out ways to reach a mutually agreeable outcome" on a negotiated service area agreement.[63/] Thus, the fact that Boise might appropriately discuss uncontested evidence on reply brief—to refute the Company's claims that "good faith efforts" in this regard that might "continue"—should come as no surprise to Pacific Power. Indeed, the Company's own crafting of such arguments provided the optimal reason for the Company to "foresee" this very outcome, which again raises the specter of the prior Commission finding that Pacific Power was "disingenuous at best" when professing surprise under like circumstances.[64/]

48 Similarly, concerning service quality issues and UE-121680 references in reply briefing, the Company alleges that Boise "should have properly offered evidence during hearing and given Pacific Power an opportunity to respond," even intimating the propriety of

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60/ Motion at ¶ 4.
61/ Id. at ¶ 6 (emphasis added).
62/ Pacific Power Initial Brief at ¶ 27 (emphasis added).
63/ Id. at ¶ 28 (emphasis added).
64/ Docket UE-100749, Order 11 at ¶ 10.

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supplemental briefing.[65/] Putting aside the proper distinction of "evidence" versus argument, as previously discussed, the Company is incorrect to allege that Boise has improperly raised argument for the first time on reply brief.

49 At hearing, Company witness Scott Bolton had testified that Pacific Power customers "… choose to disconnect *primarily* over incentivization to switch over to an alternative provider, economic incentivization."[66/] After reminding Mr. Bolton of that testimony, and over the denied objections of Pacific Power counsel, Boise counsel then questioned Mr. Bolton about the obvious implications of testifying that disconnection was "primarily" attributable to economics—i.e., "primarily" necessarily implicates the existence of other factors, else the attribution would have been "exclusively" to economics.[67/] Thus, Mr. Bolton was questioned about service quality issues in relation to disconnection factors,[68/] demonstrating that Pacific Power had a fair opportunity to discuss the issue and should not be surprised by its inclusion in briefing arguments.

50 Finally, the Company also complains that Boise attempts to improperly introduce "untimely" 2017 IRP material from Oregon "for the first time in its Reply Brief."[69/] Looking simply at the timing issue, given the prior discussion regarding "official notice" and distinctions between argument and evidence, the relevant fact is that all the OPUC citations referenced in reply briefing date to July 28, 2017[70/]—the same day all parties filed initial briefs in this proceeding. Accordingly, Boise references were as timely as possible under the circumstances.

65/ Motion at ¶ 9 & n.5.
66/ Bolton, TR. 119:4-8 (emphasis added).
67/ Id. at 158:10-159:15.
68/ Id. at 159:3-15.
69/ Motion at ¶ 10.
70/ See Reply Brief of Boise at ¶¶ 35-37 & nn.60, 62-64.

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III. CONCLUSION

51 For the reasons stated above, Boise recommends a denial of the Motion in its totality. Beyond the lack of any credible basis to strike Boise's reply briefing arguments, a grant of the Motion would create a very harmful practical precedent going forward, allowing the Company a ready means to force intervening parties to contend with expensive, time-consuming, and unnecessary process that, regardless of the official outcome, will always increase utility collections for legal fees at the direct expense of ratepayers.

52 Further, to discourage repeated attempts at such practice from Pacific Power or others going forward, Boise asks that the Commission confirm that future concerns about the weight to be placed on briefing arguments and authority will be addressed by the Commission in final order determinations. Boise and Pacific Power have previously seen the Commission ignore briefing arguments not deemed relevant or otherwise persuasive, and there is no reason to assume the Commission will not continue to exercise its duties faithfully in this regard, without the need for potentially harassing and tedious process to strike rhetorical briefing statements and contextual references—especially in light of similar Commission practice to support order arguments with a variety of authoritative and persuasive references, and precedent supporting such practice.

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Dated this 28th day of August, 2017.

Respectfully submitted,

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