

January 13, 2004

**VIA ELECTRONIC MAIL [records@wutc.wa.gov]
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Carole Washburn, Executive Secretary
Washington Utilities and Transportation Commission
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**Re: Docket No. UE-032065
Item No. A1 for January 14, 2004 Open Meeting**

Dear Secretary Washburn:

Item No. A1 on the Commission's open meeting agenda for the January 14, 2004 open meeting involves the proposed suspension of the general rate filing submitted by PacifiCorp dba Pacific Power & Light Company ("PacifiCorp" or "the Company") on December 16, 2003. This general rate filing was expressly authorized by the Commission's Sixth Supplemental Order in Docket No. UE-020417 ("Order"), where the Commission permitted PacifiCorp "to file a general rate case prior to the end of this year [2003]." (Order, ¶ 23) PacifiCorp's rate filing seeks a general rate increase of \$26.7 million, or 13.5%. Rather than recommending that the filing be suspended and set for hearings – the process routinely followed for virtually every other general rate case filing before the Commission – the Staff memorandum recommends rejecting the proposed tariffs. According to Staff, the filing is "based upon an unaccepted interstate cost allocation methodology."

This recommendation (1) is completely consistent with Staff's previous opposition to every effort by PacifiCorp to address the inter-jurisdictional cost allocation issue in Washington, (2) is completely inconsistent with the position taken by Staff in Docket No. UE-020417, where Staff claimed that cost allocation issues could be resolved only in a general rate proceeding, (3) is utterly lacking in any legal basis, and (4) evinces a regulatory policy that features procedural-based opposition to legitimate PacifiCorp filings rather than a constructive processing of a case that is properly before – and in fact was invited by – the Commission.

The Staff Refusal to Address PacifiCorp Inter-jurisdictional Cost Allocation Issues

This proposed recommendation by Staff is the latest in a long line of actions taken by Staff seeking to frustrate PacifiCorp's efforts to implement an inter-jurisdictional cost

allocation methodology in Washington. Virtually every effort undertaken by PacifiCorp in the last three years to attempt to address the inter-jurisdictional cost allocation issue has been met with opposition by Staff. These include the following:

- In Docket No. UE-001878 commenced in December 2000, PacifiCorp submitted its Structural Realignment Proposal (“SRP”), which proposed to address the inter-jurisdictional cost allocation methodology issue by establishing a Washington-only distribution utility (PacifiCorp Washington), as well as a generation company and a services company. In response to this filing, Staff nearly twelve months later filed a motion seeking to have the filing dismissed.¹ The Commission denied the motion.
- In Docket No. UE-020319 commenced on March 11, 2002, PacifiCorp replaced its SRP initiative with a proposed Multi-State Process, or MSP, which sought to convene representatives from the six state commissions regulating PacifiCorp for purposes of developing an acceptable inter-jurisdictional cost allocation methodology. In response to this filing, Staff recommended that Washington not participate in the Multi-State Process.² The Commission rejected this recommendation.
- In Docket No. UE-020417, PacifiCorp sought to defer excess net power costs for later recovery in rates, based on the financial distress arising from the Western energy crisis, as evidenced by financial indicators based on evidence using the then-existing inter-jurisdictional cost allocation methodology. Staff moved to dismiss the filing,³ claiming that until PacifiCorp had in place an agreed upon and accepted inter-jurisdictional cost allocation methodology, PacifiCorp was precluded from making any arguments whatsoever about its financial results in Washington. Staff took the position that the inter-jurisdictional cost allocation issue could be resolved only by the Commission adopting an allocation methodology in a general rate proceeding. The Commission denied the Motion to Dismiss, and went on to issue its Order, which authorized PacifiCorp to make the filing that is the subject of this latest Staff recommendation to dismiss.

At virtually every turn, Staff has thus sought to frustrate PacifiCorp’s efforts regarding the inter-jurisdictional cost allocation issue. Thankfully, the Commission has declined to adopt the recommendations in each of these proceedings, and allowed PacifiCorp’s filings to proceed. Yet the opposition continues, and PacifiCorp is faced with yet another recommendation to dismiss a filing on the basis of the inter-jurisdictional cost allocation issue. The Commission should again reject this recommendation.

The Completely Inconsistent Position Taken by Staff in Docket No. UE-020417

In Docket No. UE-020417, PacifiCorp sought to defer excess net power costs as a means of providing some rate relief in the face of financial distress caused by the impact of the

¹ Docket No. UE-001878, Motion to Dismiss of Commission Staff, filed November 20, 2001.

² Open Meeting Memo of Commission Staff, Item 2A, March 27, 2002 Open Meeting.

³ Tr. 362-65.

2000-2001 Western energy crisis. Staff opposed the requested relief, and claimed that it was unable to perform any analysis of PacifiCorp's financial position given that PacifiCorp did not have in place an approved inter-jurisdictional cost allocation methodology:

“[U]ntil the cost allocation problem is solved, the Company should not make any assertions regarding its financial results in Washington.” (Elgin, Ex. 101 at 23)

“[T]he current state of the inter-jurisdictional cost allocation process does not allow us to properly evaluate any potential effect of these projects on Washington allocated power supply expense.” (Buckley, Ex. 115 at 19)

“Before Washington's costs can be reasonably determined, a more equitable allocation plan must be agreed upon by PacifiCorp states, and approved by the Washington Commission.” (Martin, Ex. 125 at 14)

Staff's consistent position in that case, as expressed throughout its testimony, was that the inter-jurisdictional cost allocation issue could be resolved only through a general rate filing, where the Commission could consider and adopt a cost allocation methodology.

As expressed by Mr. Elgin on cross-examination:

The Company “*may file a general rate case in Washington, with a rate case – with a proposal for interstate cost allocations, and then we can make a determination, because the Commission has in front of it the evidence, the parties have the opportunity to evaluate your proposal, whether it's an agreed-upon methodology or not, and we can move forward.*” (Elgin, Tr. at 475, emphasis added.)

Staff's position is further illustrated in this exchange:

- “Q. . . . I take it the allocation plan that the company would have to include in that filing would be one that had been agreed upon by all PacifiCorp states and approved by the Washington Commission?
- A. No, it would be nice if we had one, and that would potentially eliminate an issue in that rate case, but it didn't have to be. *And the company would have had to make some kind of proposal and the parties would have had to address that in the context of the general rate filing.* But it would have been nice to have an agreement, but it wasn't a requirement.
- Q. So you're saying that Washington costs can be reasonably determined without having an allocation plan agreed upon by PacifiCorp states and approved by the Washington Commission?
- A. *If we're in a general rate case, yes*” (Elgin, Tr. at 474-75, emphasis added.)

While not resolving the cost allocation issue in Docket No. UE-020417, the Commission was able to make findings sufficient to justify modifying the Rate Plan to permit PacifiCorp to make a general rate filing prior to the end of the Rate Plan Period. With respect to the cost allocation issue in particular, the Commission specifically cited that controversy as a matter that could be resolved in the general rate filing:

“The absence of a cost allocation methodology, however, is one reason, as we discuss later, that a general rate case is desirable.” (Order, ¶ 31)

In this filing, PacifiCorp is proposing to implement the MSP Protocol, which represents the outcome of the Multi-State Process. As part of this filing, PacifiCorp seeks Commission approval of that inter-jurisdictional cost allocation methodology and, consistent with that request, PacifiCorp is basing its requested rate relief upon that methodology. Prior to making the MSP filing the states in which PacifiCorp operates, PacifiCorp discussed with Staff the process for considering the MSP cost allocation proposal in Washington. Based on Staff’s preference clearly expressed to PacifiCorp, and in light of Staff’s consistently expressed position that cost allocation issues could be addressed only in the context of a general rate filing, PacifiCorp did not file its MSP proposal as a separate proceeding in Washington – as was done in the other states – but instead agreed to file it as part of this general rate proceeding.

In a complete reversal of the position Staff took both in Docket No. UE-020417 and in discussions with the Company prior to filing the MSP Protocol, Staff now claims that this general rate filing cannot be processed because “it is necessary to first determine a reasonable inter-jurisdictional methodology before any changes to the Company’s rates can be established.” (Memo, p. 1) The inconsistency is inexplicable. Staff made it clear in Docket No. UE-020417 that the cost allocation issue could not be considered outside the context of a general rate filing. Now that a general rate filing is offered, Staff claims that the cost allocation issue must be resolved before the general rate filing can be processed. The only common thread in the Staff position is a complete unwillingness to process any PacifiCorp filing which involves inter-jurisdictional cost allocation issues.

The Lack of Legal Basis for the Recommendation

Notably, the Staff recommendation fails to include any legal authority for the Commission to take the drastic action of rejecting a general rate case filing. Rejection of a general rate case filing would be contrary to law. RCW 80.04.130 permits the Commission either to allow the tariff filing to become effective, or suspend it and conduct an investigation with hearings.⁴ No basis is provided in the law for the

⁴ Under RCW 80.04.130, the Commission has two options when a utility has properly filed a tariff. First, the Commission may choose to do nothing, thereby allowing the tariff to take effect by operation of law. RCW 80.04.130(1); *see also, State ex rel. Puget Sound Nav. Co. v. Department of Transp. of Wash*, 33 Wash 2d 448, 206 P.2d 456 (1949) (so holding). In the alternative, the Commission may on its own, or upon the complaint of a third party, after proper notice, suspend the tariff and conduct a hearing to investigate the “reasonableness and justness”

Ms. Carole Washburn
January 13, 2004
Page 5

Commission simply to reject a tariff filing. The Staff memorandum, for its part, offers no statutory basis that would authorize its recommendation to be followed.

The basis for Staff's argument seems to be that the Company's filing does not comply with the Commission's Order in Docket No. UE-020417. The only authority cited by Staff is note 10 to paragraph 23 of that order, which states as follows:

"The so-called multi-state process is expected to be finalized by the middle of this year [2003]. The outcome of that process should inform PacifiCorp's filing with respect to the important question of inter-jurisdictional cost allocation issues."

Based on this note, Staff urges the Commission "to clarify that it is necessary to first determine a reasonable inter-jurisdictional methodology before any changes to the Company's rates can be established." (Staff Memo at 1)

Staff's claim is without merit. This general rate filing is entirely consistent with the Order in Docket No. UE-020417. In fact, the inclusion of inter-jurisdictional cost allocations as part of this filing was expressly cited by the Commission as an advantage of permitting the Company to submit a general rate filing:

"The absence of a cost allocation methodology . . . is one reason . . . that a general rate case is desirable." (Order, ¶ 31)

Thus, this filing fully implements the Commission's order, and provides an opportunity for the cost allocation issue to be resolved in the context of a general rate case. Moreover, the Company's filing was informed by the Multi-State Process, as contemplated in the referenced footnote in the Commission's order.⁵ Staff seems to claim that the premise for the rate filing was that the Multi-State Process would produce a complete solution of this issue. ("Unfortunately, the MSP process did not resolve this highly contentious issue.") This position, too, is completely at odds with Staff's position

of the rates at issue. RCW 80.04.130(1). No other option exists. Indeed, where the Commission wishes to reject a tariff, it may do so only following a hearing and upon the determination that the tariff at issue is unreasonable or unjust. *See, State v. Public Service Comm'n of Washington*, 76 Wash. 492, 136 P. 850 (1913) (concluding that tariff may only be rendered ineffectual by temporary suspension or final decision upon hearing determining tariff as unreasonable or unjust).

⁵ PacifiCorp's filing is amply "informed" by the MSP process. Andrew MacRitchie testifies that at the final MSP meeting in July 2003, "The Company was encouraged to take the analytical results and all of the parties' views into consideration and come forward with a proposal that was most responsive to the needs of our states. We followed that guidance and developed the Protocol and MSP Solution accordingly." (Exhibit No. ___ (ANM-1T) page 6.) The testimony of Gregory N. Duvall (Exhibit No. ___ (GND-1T), particularly pages 10-20) specifically relates the proposed allocation Protocol to the issues discussed in the MSP process.

during the MSP.⁶ No party expected that the MSP would result in a binding and final allocation method. Washington MSP participants, for their part, clearly stated that the Commission could not delegate its authority regarding allocation issues to an interstate group and would have to approve any proposed allocation method in a general rate filing.

Staff's recommendation thus lacks any legal basis and, in fact, urges an action that is contrary to law.⁷ The recommendation should be rejected.

The Failure to Take Advantage of Opportunities to Begin Processing this Filing

The Staff memo argues that this filing is complicated by two issues in particular: the proposed inter-jurisdictional cost allocation methodology, as discussed above, and the inclusion of the Joint Report on the prudence of PacifiCorp resource acquisitions during the period 1986-1999. These are challenging issues, but this case is not uniquely rigorous compared to other filings the Staff has been able to successfully process in recent years. In the case of both Avista and Puget Sound Energy, for example, power cost adjustment mechanisms were implemented in general rate proceedings during the past two years. In the case of both Avista and NW Natural, inter-jurisdictional cost allocation issues are routinely addressed and resolved as part of general rate case filings.

The issues in this case are made more challenging by Staff's unwillingness to begin processing the case, and instead devoting its efforts to crafting the technical arguments to support a recommendation to reject the filing. In the case of inter-jurisdictional cost allocation, the methodology being filed by PacifiCorp was submitted formally to MSP participants on September 30, 2003. As mentioned previously, the Company did not file the proposed MSP Protocol in Washington on that date in response to the clearly expressed preference of Staff. However, the proposal has been available since that time

⁶ It is also completely at odds with Staff's position in Docket No. UE-020417, where Staff testified that an agreement among all the states "would have been nice . . . but it wasn't a requirement." (Elgin, Tr. 474)

⁷ Commission rejection of a tariff filing without a proper determination that the rates at issue are unjust or unreasonable would be both *ultra vires*, and a violation of the Company's due process rights. The Washington Supreme Court has held that the Commission possesses only those powers granted by statute. *Cole v. Washington Util. & Transp. Comm'n*, 79 Wash.2d 302, 306, 485 P.2d 71 (1971) (concluding that the Commission "must be strictly limited in its operations to those powers granted by the legislature."). Where an agency exceeds its delegated authority, its actions are *ultra vires* and are void. *See, e.g., Woolery v. Department of Social and Health Servs.*, 25 Wn App. 762, 612 P.2d 1 (1980). Here, a review of the relevant statute – RCW 80.04.130 – reveals a lack of any express delegation to the Commission the authority to reject a tariff filing without proper notice and a hearing to determine the justness and reasonableness of the rates at issue. Indeed, to reject, without a hearing to determine the justness and reasonableness of the rates at issue here, would be arbitrary, capricious, and violate the Company's due process rights. *Rivett v. City of Tacoma*, 123 Wn.2d 573, 583, 870 P.2d 299 (1994) (Procedural due process at a minimum requires notice and an opportunity to be heard).

Ms. Carole Washburn
January 13, 2004
Page 7

for Staff to review and analyze.⁸ Staff has not taken advantage of that opportunity. The Joint Report mentioned in the Staff memorandum has been on file with the Commission since December 2001. PacifiCorp offered in November 2003 to put in place arrangements that would allow Staff and other parties to begin conducting discovery and performing their analyses in preparation for this rate filing. Staff has not taken advantage of that opportunity.

This general rate filing is in response to the Commission's express wish that PacifiCorp's Washington operations "be thoroughly reviewed on a full general rate case record," an examination that according to the Commission "is long overdue." (Order, p. 11) Moreover, the Commission directed "a full consideration at an early date." (*Id.*) By its very nature – the Company's Washington operations have not been thoroughly reviewed on a full general rate case record for nearly two decades – the process will be difficult and challenging. It need not be made more difficult and challenging by a recommendation to abort the process at the outset. In fact, accepting Staff's recommendation to reject the filing runs completely counter to the Commission's expressed directive to conduct a "thorough and detailed examination of PacifiCorp's financial condition and Washington rates at an early date." (*Id.*, pp. 2-3)

Conclusion

The Staff recommendation should be rejected, and PacifiCorp's general rate filing should be suspended and set for hearing, and thereby processed in the same manner as other general rate filings submitted to the Commission. The Staff recommendation to dismiss the filing is utterly without foundation, and should be summarily rejected.

Very truly yours,

PacifiCorp

By _____
Christy Omohundro
Vice President, Regulation

cc: Chairwoman Marilyn Showalter
Commissioner Richard Hemstad
Commissioner Patrick Oshie

⁸ In fact, at Staff's request, a copy of the Company's MSP filing in the other states was sent via overnight delivery to Staff on October 1, 2003.