



VIA ELECTRONIC MAIL
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January 16, 2004

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
P.O. Box 47250
Olympia, WA 98504-7250

Re: Docket No. A-021178
PacifiCorp's Comments on Proposed Rules

Dear Ms. Washburn:

In response to the Washington Utilities and Transportation Commission's (the "Commission") notice of November 23, 2003, PacifiCorp hereby submits its written comments on the second discussion draft rules in the above proceeding.

Sincerely,

A handwritten signature in black ink that reads "Christy Omohundro" followed by a stylized flourish.

Christy Omohundro
Vice President, Regulation



36 USC 220505

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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of

Rulemaking for Reporting Financial
Transactions Among Regulated
Companies and Their Subsidiaries

Docket No. A-021178

**PACIFICORP'S COMMENTS ON PROPOSED
RULES**

1 In response to the Washington Utilities and Transportation Commission's (the "Commission") notice of November 23, 2003, PacifiCorp hereby submits its written comments on the second discussion draft rules in the above proceeding. PacifiCorp has been an active participant in this proceeding, previously submitting comments on November 27, 2002, following participation in the Commission's November 5, 2002 workshop, and again on March 11, 2003, following the Commission's notice of February 18, 2003 of its first discussion draft rules. PacifiCorp also participated in the workshop, which followed the closing of the comment period on the first discussion draft rules.

I. INTRODUCTION

2 This second discussion draft contains many more rule deletions, amendments, and additions than did the first. Although the second discussion draft was presumably prepared with the aid of PacifiCorp's, and others', comments from the first draft and the subsequent workshop, the second discussion draft either fails to reflect the concerns PacifiCorp raised or deals with those concerns in an inadequate and unsatisfactory manner.

3 Throughout the course of this proceeding PacifiCorp has voiced caution that the scope of any
rules pertaining to the transactions between a regulated utility and its subsidiaries must be
narrowly tailored so as not to exceed the Commission’s constitutional and statutory authority in
such matters. Nevertheless, the rules proposed here exceed the scope of the Commission’s
authority and impose undue—and in some instances unworkable—requirements that exceed
any corresponding benefit. For those reasons, PacifiCorp respectfully requests the
Commission to reject or modify the following rules.

II. COMMENTS

A. WAC 480-100-008

4 Through this proposed modification, the Commission apparently seeks to simplify its rules for
granting exemptions with the statement that the Commission may do so pursuant to WAC
480-07-110. PacifiCorp urges the Commission to reject this modification and to retain the
existing provision. Under WAC 480-07-110 the Commission may grant exemptions and
exceptions from its *procedural* rules contained in chapter 480-07.¹ Consequently, by
referencing that rule in this provision, the amendment would limit the Commission’s discretion
to grant substantive exemptions. Such exemptions may be warranted in many circumstances,
and it would appear to be in the Commission’s interests to retain its flexibility to grant such
exemptions.

B. WAC 480-100-023

5 The proposed rule adds a definition for the term “subsidiary” to mean “any company in which
the electric utility owns directly or indirectly five percent or more of the voting securities.”

¹ WAC 480-07-110(1) provides that “[t]he commission may modify the application of *these* rules in individual cases if consistent with the public interest, the purposes underlying regulation, and applicable statutes.” (Emphasis added.)

- 6 In PacifiCorp’s view, the 5 percent ownership threshold is too broad and captures ownership structures that do not fit the traditional parent-subsiary model. PacifiCorp urges the Commission to focus its definition on the nature of the parent-subsiary relationship. Five percent ownership is not a critical percentage of ownership to reflect a parent-subsiary relationship, nor is it the sole defining characteristic of a parent-subsiary relationship.
- 7 For example, the Washington Corporations Act defines a subsidiary as “a domestic or foreign corporation that has *a majority of its outstanding voting shares* owned, directly or indirectly, by another domestic or foreign corporation.”² In addition, the Public Utility Holding Company Act (“PUHCA”) does not assume a parent-subsiary structure until there is 10 percent ownership.³ Moreover, even when that critical ownership mass is reached, PUHCA provides that the company issuing the voting securities is not a subsidiary if it is not otherwise controlled, and the management or policies of the company are not susceptible to control, by the holding company.⁴
- 8 PacifiCorp supports a definition that reflects a true parent-subsiary relationship. If percentage of ownership is a factor, the percentage of ownership must be commensurate with the level of control found in a typical parent-subsiary relationship. In that regard, PacifiCorp supports adopting a definition similar to the one in the Washington Corporations Act, which requires majority control. Otherwise, PacifiCorp recommends the Commission amend the rule to presume that, absent a majority of voting securities, a parent-subsiary relationship does not exist absent a showing that the alleged parent company somehow controls, and the management or policies of the company are susceptible to control by, the alleged parent.

² RCW 23B.19.020(17) (emphasis added).

³ 15 U.S.C. § 79b(a)(8).

⁴ *Id.*

C. WAC 480-100-X01

9 Under this proposed rule, “the commission may require information in *addition to* that specified by statute or in this chapter.” (Emphasis added.) Inasmuch as the Commission’s authority is limited to that which is statutorily provided, this proposed rule on its face appears to be *ultra vires* and should be rejected.

D. WAC 480-100-X03

10 This proposal sets out new rules governing the issuance of securities. PacifiCorp’s concerns with this proposed rule include the following:

- a. The proposed rule exceeds the Commission’s statutory authority in the following respects: First, the rule requires electric utilities to provide a specific description of the purposes of the issuance, whereas RCW 80.08.040 requires only a general statement. Second, although that statute allows an electric utility to supply the requisite information “any time” before issuing a security, this rule requires that information be filed no later than five days before issuance.⁵ Third, the rule allows the Commission to request “any additional information” without limitation—a power not delegated to the Commission by RCW 80.08.040. Fourth, the rule’s *general* final reporting/auditing requirements on all issuances, is not authorized or permitted by statute.
- b. The rule’s conditions are impractical. Under the terms imposed by the market, it is often impossible for utilities to provide the information requested on any day other than the day of issuance. Moreover, the final reporting requirements are onerous and such detailed information is not always readily available, nor does it appear to be necessary in order for the Commission to achieve its apparent objectives.

⁵ In addition, the five-day-notice provision raises possible conflicts with federal securities law. *See* Section 5, Rule 502(c) of the Securities Act of 1933 (prohibiting written offers of securities and private offerings, of which notice provisions of rule might offend).

- c. The level of detail required by this rule impermissibly infringes on PacifiCorp’s management prerogatives.⁶ This is particularly true in the case of PacifiCorp, a multijurisdictional utility, as it does not issue securities—which would fall under the purview of this rule—to raise funds simply to finance its Washington operations. Indeed, an attempt to regulate PacifiCorp’s multistate cash management activities and its subsidiaries would offend Title 80 of the RCW⁷ and implicate the Commerce Clause of the U.S. Constitution.⁸

E. WAC 480-100-X04

11 This proposal revises a provision from the first discussion draft, which proposed to govern the transfer of cash and assumption of liabilities, and upon which PacifiCorp raised concerns. PacifiCorp has the same concerns with the revision as it did the first draft. Those concerns include the following:

- a. As noted in PacifiCorp’s comments to the first discussion draft, this proposal far exceeds the Commission’s statutory authority. RCW 80.16.010 does not give the Commission the authority over transactions between public service companies and their subsidiaries. Despite that comment, the second discussion draft captures transactions with subsidiaries.

⁶ See, e.g., *Pub. Serv. Co v. Pub. Util. Comm’n*, 653 P.2d 1117, 1123 (Colo. 1982) (commissions may not interfere with regulated utility’s management prerogatives).

⁷ RCW 80.01.040 (general powers and duties of commission) empowers the Commission to regulate in the public interest, *as provided by the public service laws*, the rates, services, facilities, and practices of all persons engaging *within this state* in the business of supplying utility service. RCW 80.01.040(3).

⁸ The Commerce Clause grants Congress the power to regulate interstate commerce. *FERC v. Mississippi*, 456 U.S. 742, 102 S. Ct. 2126 (1982). The courts have long recognized that the commerce clause correspondingly imposes limits on the powers of the states to regulate interstate commerce. *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 104 S. Ct. 2237 (1984). That principle, commonly referred to as the dormant or negative commerce clause, “grew out of the notion that the Constitution implicitly established a national free market” from which private trade would be free from state interference. *Wyoming v. Oklahoma*, 502 U.S. 437, 469, 112 S. Ct. 789 (1992). Although incidental burdens on interstate commerce are allowable when the state’s interest is of legitimate local concern, the state violates the commerce clause when “the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844 (1970) (setting out “undue burden” test).

- b. PacifiCorp’s initial comments on the first draft also indicated concern with using “between” rather than “from” or “to” when discussing subsidiary transactions because it would seem to apply to transfers in both directions, *i.e.*, from a subsidiary to its parent and from a parent to its subsidiary. Although the word “between” has been replaced, the current wording captures transfers in both directions. Indeed, the current wording would include cross-organizational transactions among a regulated utility’s affiliates, even when the regulated utility is not involved in the transaction. However, PacifiCorp is not aware of any statutory basis that would allow the Commission to govern such cross-organizational transactions. In addition, PacifiCorp reiterates its concern from the first draft rules that the proposed rule is written broadly to address an apparent concern that probably does not exist in the case of most transactions technically falling within its scope. Therefore, further revision is warranted.
- c. The proposal appears also to capture dividend issuance to parent companies, the regulation of which is unprecedented, and is without statutory foundation. Indeed, when commissions are allowed to interfere with a company’s dividend policy, it has been under the express statutory authority and only for limited purposes.⁹
- d. This rule also calls into question the Commerce Clause prohibitions discussed above by impermissibly interfering with PacifiCorp’s multijurisdictional financial management.
- e. Finally, PacifiCorp’s initial comments on the first draft regarding the practical problems associated with this rule remain. For example, the rule lacks a threshold requirement for cash transactions, thereby subjecting electric utilities to preparing multiple reports.

⁹ See *Ohio Cen. Tel. Corp. v. Pub. Util. Comm’n of Ohio*, 189 N.E. 650, (Ohio 1934) (commission has statutory authority to prohibit dividends only when payments will cause deterioration of properties and impairment of services).

F. WAC 480-100-X05

12 PacifiCorp objects to this rule because it would require transactions subject to RCW 80.16.020 to be filed no later than five business days before the effective date of the agreement. However, RCW 80.16.020 does not contain a similar five-day-notice requirement, nor does it give the Commission the authority to impose one. Rather, that statute gives the electric utility the prerogative to file any time before the effective date.

G. WAC 480-100-X06

13 PacifiCorp objects to this rule because it is a dangerous oversimplification and unnecessary repetition of the statutes and rules governing property. Under RCW 80.12.050, utilities must file a petition with the Commission before transferring “necessary and useful property.” This rule, however, provides that a filing is required for all transfers. Consequently, it exceeds the Commission’s authority. In addition, it is unnecessary as it adds no clarity to the existing statutes and rules.¹⁰

H. WAC 480-100-X09

14 This rule largely carries forward existing annual reporting requirements for securities, except that it imposes a greater level of specificity in the reports, *viz.*, the reporting of amounts of proceeds used for each stated purpose. However, PacifiCorp is not aware of any legal basis that would support the increased specificity requirements. Moreover, this requirement does not seem to bear any relation to the Commission’s duties, and as a practical matter, this level of specificity would be nearly impossible to satisfy.

¹⁰ Indeed, WAC 480-143-180(4), one of those rules, clarifies that, for purposes of RCW 80.12.020, property is not “necessary or useful” if it is excluded from the public service company’s rate base, by order or otherwise.

I. WAC 480-100-X10

15 This is a revision of a provision in the first discussion draft relating to affiliate and subsidiary annual reports. As stated in PacifiCorp’s comments on that draft, PacifiCorp generally supports this new requirement as a reasonable response to the Commission’s expressed concerns and the legitimate need for increased information regarding transactions between utilities and subsidiaries. However, in this version of the proposed rule, the reporting requirements for subsidiary transactions are merged with affiliate transactions. Consequently, PacifiCorp urges the Commission to carefully consider whether the types of reporting requirements that apply to affiliate transactions apply equally to subsidiary transactions.

16 For example, PacifiCorp questions whether it is necessary or desirable to include cash transactions in the subsidiary report, particularly when there is no threshold amount. Similarly, PacifiCorp again raises its concerns over the use of the overreaching term “between” when describing those cash transfers. Through those examples, it appears that proposed rule extends beyond the immediate concerns for which it is created, perhaps in an attempt to address other concerns that simply do not exist. Consequently, PacifiCorp urges the Commission carefully examine the rules purpose and the transactions the rule should reach, so that it can draft the rule in a way that allows it to achieve its indented purpose without imposing additional undue or burdensome reporting obligations.

J. WAC 480-100-X11

17 This is a revision of a provision in the first discussion draft relating to “essential utilities services contracts.” PacifiCorp has the same concerns with the redraft as it did with the first draft of this rule. PacifiCorp reiterates those concerns here, which include:

- a. This new category of transactions has nothing to do with subsidiaries or affiliates, but applies to transactions between a utility and *any* party, whether or not affiliated. As

such, this proposal seems to go far beyond any concerns previously identified as the basis for this rulemaking. The affiliated-interest statute refers to “management or service contracts” between a utility and its affiliates, not all manner of contracts between a utility and any party, whether or not affiliated. PacifiCorp understands from page 36 of the “Summary of Comments and Staff Responses” with respect to the March 11, 2003 comments that the Commission purports to request the information pursuant to RCW 80.04.080 and thus the definition of a “management or service contract” under chapter 80.16 of RCW “is not critical.” Regardless of the statutory authority cited in support of the proposed rule, no basis has been shown for imposing such burdensome reporting requirements without any apparent benefit or any articulation of the problem that these requirements are intended to redress.

- b. Although the revision contains a higher threshold, it nonetheless remains broad, and in the aggregate imposes costly and burdensome reporting requirements.
- c. Given these fundamental concerns with respect to this proposed rule, PacifiCorp still believes it is more appropriate to withdraw this particular proposal and replace it with a more narrow, tailored approach.

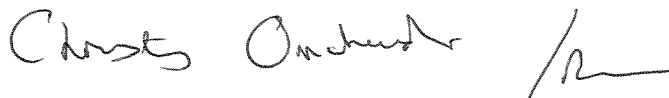
III. CONCLUSION

18 As currently drafted, the second discussion draft of these rules imposes costly and potentially burdensome filing requirements that exceed any associated benefits and that do not appear to have any relationship to the concerns previously identified by the Commission and its Staff in workshops in this and related proceedings. Moreover, as expressed above, these proposed rules raise a number of issues regarding the authority under which the Commission purports to impose various requirements.

19 PacifiCorp appreciates the opportunity to comment on the proposed rules and hopes to play a constructive role as these rules continue to evolve. PacifiCorp recognizes the Commission's interest in monitoring the financial activities of the companies it regulates and its objectives in implementing rules governing a regulated company's transactions with affiliates and subsidiaries. For these efforts to be durable and reach their intended objectives, the rules created must be within the constitutional and statutory limitations on the Commission's authority and within the practical limitations of the regulated utilities' ability to achieve.

RESPECTFULLY SUBMITTED this 16th day of January, 2004.

PACIFICORP

A handwritten signature in cursive script, appearing to read "Christy Omohundro", followed by a large, stylized flourish or mark.

Christy Omohundro
Vice President, Regulation