



VIA ELECTRONIC MAIL
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May 18, 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 April 28, 2004, PacifiCorp hereby submits its written comments on the third discussion draft rules in the above proceeding.

Sincerely,

A handwritten signature in cursive script that reads "Christy Omohundro".

Christy Omohundro
Vice President, Regulation



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 Notice issued April 28, 2004 by the Washington Utilities and Transportation Commission (the "Commission") in this docket, PacifiCorp hereby submits its written comments on the third discussion draft rules. PacifiCorp has been an active participant in this proceeding, previously submitting comments on November 27, 2002, March 11, 2003, and January 16, 2004, and participating in Commission workshops on these draft rules in November 2002 and in May 2003. More recently, we have had follow-up discussions with Staff regarding our January 16 comments.

2 PacifiCorp appreciates the opportunities provided by the Commission and its Staff to help shape these rules. In many situations, the concerns we have expressed have been addressed, and the draft rules incorporate a number of our suggestions. In other instances, our concerns remain, as we discuss in more detail below. We are hopeful that these remaining concerns will be addressed in the CR-102 draft to be made available the week of June 14, 2004 or, absent that, when the final CR-102 draft is presented to the Commission on June 30, 2004. Our comments on these specific remaining issues are set forth below.

I. COMMENTS

WAC 480-100-008

3 Our January 2004 comments on this provision went unaddressed, and thus will be repeated here. 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. Under WAC 480-07-110, the Commission may grant exemptions and exceptions from its *procedural* rules contained in Chapter 480-07 WAC.¹ Consequently, by referencing that rule in this provision and providing no independent authority within Chapter 480-100 WAC to grant exemptions, 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. The specific change proposed by PacifiCorp is to reject the proposed modification and to retain the existing provision.

WAC 480-100-023

4 This section has been substantially improved to eliminate the reliance on the "five percent ownership" standard as a means of defining a "subsidiary" relationship and to focus instead on control, through ownership of a controlling interest of voting shares. However, by including a reference to an "*indirect*" ability to control management, the standard may become so vague as to be unenforceable. The vagueness is compounded by reference to ownership of voting shares, by contract, "*or otherwise.*" To be effective and enforceable, the rule should define clear standards and be relatively easy to administer. These objectives are not served by reference to vague standards such as "indirect" control and undefined "other" means of

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.)

effecting control. Use of the term “indirect” is appropriate only if in reference to indirect ownership of shares, such as the definition of subsidiary under the Washington Corporations Act, which 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

- 5 PacifiCorp supports a definition that reflects a clear and enforceable standard, such as the definition in the Washington Corporations Act, which requires majority control. Specifically, PacifiCorp proposes the following definition of “Control”:

“Control” means the ability to control management or policies of a utility through the ownership, directly or indirectly, of a majority of voting shares.

Moreover, the proposed definition of “subsidiary” need not contain a separate reference to “indirect” control. Use of the defined word “control” in the definition avoids the need to refer to “indirect” control. PacifiCorp therefore proposes the following definition of “Subsidiary”:

“Subsidiary” means any company that the electric utility controls.

WAC 480-100-242

- 6 PacifiCorp continues to object to that aspect of this proposed rule which requires that information be filed “at least five business days” before issuance. The applicable statute, RCW 80.08.040, allows an electric utility to supply the requisite information “any time” before issuing a security, and thus the proposed rule exceeds the Commission’s statutory authority.³ Moreover, this requirement is 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

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

³ 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).

issuance. No explanation has been provided as to why this five-day requirement is necessary in order for the Commission to achieve its apparent objectives in this rulemaking.

WAC 480-100-244

- 7 This proposed rule, which would govern the transfer of cash and assumption of liabilities, is substantially improved from the second discussion draft, and PacifiCorp appreciates the extent to which the concerns raised by PacifiCorp and other utilities have been addressed. In particular, the inclusion of an acceptable threshold (2% of shareholders' equity), and the exclusion of fuel supplies, previously approved transactions, and a "normal" level of dividends, have considerably improved the workability of the proposed rule. At the same time, PacifiCorp continues to object to the inclusion of transactions between a "subsidiary of an electric utility" and other subsidiaries or affiliates. This wording would include cross-organizational transactions among a regulated utility's affiliates, even when the regulated utility is not involved in the transaction. This is neither necessary or appropriate, and seems to go beyond the Commission's expressed concerns when this rulemaking was commenced. PacifiCorp therefore proposes that the words "or the subsidiary of an electric utility" be eliminated from the first sentence of the proposed rule.

WAC 480-100-264

- 8 Subsection 2 defines a threshold level of \$100,000, and imposes additional reporting requirements for those affiliated interests and subsidiaries for which the threshold level of transactions is exceeded. PacifiCorp suggests that this threshold be changed to correspond with the threshold set forth in proposed WAC 480-100-244, *i.e.*, 2% of the utility's common shareholders equity, so that the threshold appropriately captures materiality by reference to the size of the utility.

9 Moreover, in the subsections that follow subsection 2 of proposed WAC 480-100-264, it is not clear from the proposed wording that these additional reporting requirements apply *only* to those affiliates or subsidiaries for which the threshold is exceeded. To clarify the scope, PacifiCorp proposes the language changes set forth below. In addition, subsection (2)(g) generally pertains to common officers and directors. The wording seems overbroad, and potentially captures common officers and directors in a cross-organizational manner, even when the regulated utility is not involved. There does not seem to be any basis for listing common officers or directors where the regulated utility is not involved. PacifiCorp therefore proposes an additional language for subsection (2)(g) to address this issue:

(2) When total transactions with an affiliated interest or a subsidiary are less than one hundred thousand dollars (\$100,000) for the reporting period, the utility must provide the name of the affiliated interest or subsidiary participating in the transactions and the total dollar amounts of the transactions. When total transactions with an affiliated interest or subsidiary equal or exceed one hundred thousand dollars (\$100,000) for the reporting period, the utility must provide:

(a) A balance sheet and income statement for each such affiliated interest or subsidiary;

(b) A description of the products or services provided to or from the utility and each such ~~its~~ affiliated interests or ~~and the utility and its subsidiary~~ies;

(c) A description of the pricing basis or costing method, and procedures for allocating costs for such products or services, and the amount and accounts charged during the year;

(d) A description of the terms of any loans between the utility and each such ~~its~~ affiliated interests or ~~and the utility and its subsidiary~~ies and a listing of the year-end loan amounts and maximum loan amounts outstanding during the year;

(e) A description of the terms and total amount of any obligation or liability assumed by the utility for each such ~~any~~ affiliated interest or subsidiary;

(f) A description of the activities of each such ~~the~~ affiliated interests or ~~and~~ subsidiaryies with which the utility has transactions; and

(g) A list of all common officers and directors between the electric utility and each such affiliated interest or ~~and~~ subsidiary, ~~companies and the electric utility~~ along with their titles in each organization.

WAC 480-100-268

10 PacifiCorp urges that the deadline for filing the essential utilities service contracts report be extended from ninety (90) days to one hundred twenty (120) days. The due date for the FERC Form 1 is 120 days after the end of the calendar year, and extending the filing date for the essential utilities contract report would allow information from the FERC Form 1 to be incorporated by reference. Moreover, the 120-day period would be consistent with the period defined in proposed WAC 480-100-264 for the affiliated interest and subsidiary transactions annual report.

11 In addition, the proposed language creates some ambiguity as to whether the time period begins running as of the end of the fiscal year or calendar year. Arguably, the proposed language allows a utility to file the information using a calendar year reporting period, but wait to do so until ninety days after the end of its fiscal year, which is probably not the intended result.

PacifiCorp suggests the following language be used for WAC 480-100-268(2):

(2) The report of essential services vendors is due one hundred twenty days from the end of each reporting period, whether a fiscal or calendar year.

WAC 480-100-275

12 This proposed rule requires the filing of Washington-only results of operations each quarter. As PacifiCorp indicated in its informal discussions with Staff, PacifiCorp customarily prepares results of operations on an individual state basis twice per year, consistent with requirements in its other jurisdictions. Requiring a quarterly report on a Washington-only basis would impose the burden of the extensive inter-jurisdictional allocation process for purposes of only one report, for Washington. PacifiCorp requests that the following be added as the second sentence in the proposed rule:

For multi-state utilities, such quarterly results may be reported on a total company basis so long as no less often than semi-annually the results are reported on a Washington-only basis.

The revision proposed above would ensure that a Washington-only report would be filed twice per year, but would allow the “off-quarters” to be satisfied with total company results.

PacifiCorp respectfully submits that this is a reasonable accommodation that does not impair the availability of the information reasonably necessary for the Commission and its staff to perform their oversight of utility financial performance.

13 In addition, PacifiCorp requests that the period for filing the report following the end of each quarter be extended from forty-five days to sixty days. The extension of the deadline is appropriate for a number of reasons. First, the Federal Energy Regulatory Commission (“FERC”) is now requiring quarterly reports, to include the current quarter and the calendar Year-to-Date. The deadline for filing these reports at FERC will be sixty days after the end of each quarter, and thus extending the Washington deadline to sixty days would permit the reports to be prepared on the same schedule. Second, the current forty-five day requirement results in the quarterly reports being filed prior to such financial results being filed with the Securities and Exchange Commission (“SEC”). This creates disclosure concerns for PacifiCorp, and presumably as well for other publicly traded companies. For the most recent quarterly period ending March 31, 2004, for example, the due date for filing the financial results with the Commission fell on May 15, while these results will not be filed with the SEC and made public until later in May. To address the SEC non-disclosure requirements, these results were filed with the Commission on a confidential basis, and the confidentiality must continue until the date upon which public disclosure occurs. With an extension to sixty days, however, the quarterly reports could be filed on a non-confidential basis, which would seem to be a preferable and less burdensome process, and would reduce the risk of inadvertent disclosure in violation of SEC regulations. Finally, submitting the quarterly reports to the

Commission prior to filing with the SEC may result in filing data with the Commission that have not yet been finalized. In the most recent filing, for example, PacifiCorp submitted its quarterly report subject to any adjustment that became necessary as the Company completed its final review in connection with the SEC filing. It is potentially confusing – and unnecessarily burdensome – to create and file multiple versions of the quarterly report filings. For these reasons, PacifiCorp urges that the forty-five day period in the proposed rule be extended to sixty days.

II. CONCLUSION

14 PacifiCorp appreciates the opportunity to comment on the third discussion draft, and will continue to play a constructive role as these rules continue to evolve. We acknowledge the extent to which many of our previously stated concerns have been addressed in this draft, and express appreciation to Staff for accommodating our views and suggested revisions. We look forward to continued involvement as the proposed rules move toward adoption and implementation.

RESPECTFULLY SUBMITTED this 18th day of May, 2004.

PACIFICORP



Christy Omohundro
Vice President, Regulation