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February 8, 1999

## HAND DELIVERED

Ms. Carole J. Washburn, Secretary  
Washington Utilities and Transportation Commission  
P.O. Box 47250  
Olympia, Washington 98504-7250

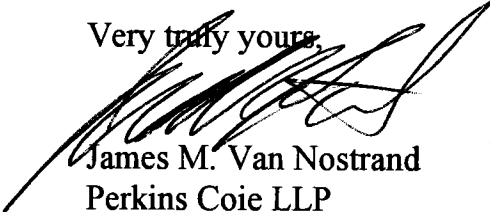
**Re: Docket No. UE-981627  
Joint Applicants' Legal Memorandum on Jurisdictional Issues**

Dear Ms. Washburn:

Enclosed for filing are an original and nineteen (19) copies of Joint Applicants' Legal Memorandum on Jurisdictional Issues in the above matter.

Thank you for your assistance.

Very truly yours,

  
James M. Van Nostrand  
Perkins Coie LLP  
Attorneys for Scottish Power plc

JMV:acs  
Attachment

cc: Robert Cedarbaum, WUTC  
Simon ffitch, Office of Public Counsel  
Robert Green, Scottish Power plc  
Lindsay Johnston, Scottish Power plc  
George Galloway, Stoel Rives  
Anne Eakin, PacifiCorp

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**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION**

In the Matter of the Application of  
**PACIFICORP AND SCOTTISH POWER PLC**

Docket No. UE-981627

For an Order (1) Disclaiming Jurisdiction or, in the Alternative, Authorizing the Acquisition of Control of PacifiCorp by Scottish Power and (2) Affirming Compliance with RCW 80.08.040 for PacifiCorp's Issuance of Stock in Connection with the Transaction

**JOINT APPLICANTS' LEGAL  
MEMORANDUM ON JURISDICTIONAL  
ISSUES**

In response to the Commission's Notice of Prehearing Conference issued January 26, 1999 in this docket, Joint Applicants PacifiCorp and Scottish Power plc ("ScottishPower") hereby submit the following legal memorandum addressing whether the Commission has jurisdiction over the transaction.

**BACKGROUND**

PacifiCorp is a public service company subject to the jurisdiction of the Commission. As of December 6, 1998, PacifiCorp and ScottishPower entered into an Agreement and Plan of Merger ("Agreement"). Prior to the transaction, ScottishPower is not a public service company. Pursuant to the Agreement, an indirect, wholly owned subsidiary of ScottishPower ("Merger Sub") will merge with and into PacifiCorp, with PacifiCorp continuing in existence as the surviving corporation. As of the consummation of the transaction, the outstanding shares of Merger Sub will be cancelled and PacifiCorp will issue to an entity indirectly and wholly owned by ScottishPower an equal number of shares with the same rights, powers and

privileges as the cancelled Merger Sub common stock. As a consequence of this transaction, ScottishPower will acquire indirect ownership and control of all of the voting capital stock of PacifiCorp. In their Application to the Commission filed on December 31, 1998, Joint Applicants requested an order of the Commission disclaiming jurisdiction or, in the alternative, authorizing the proposed acquisition of control of PacifiCorp by ScottishPower.

#### **SUMMARY OF JOINT APPLICANTS' POSITION**

The transaction does not involve a consolidation of two operating utilities and thus is quite different from the 1997 merger of Puget Sound Power & Light Company and Washington Natural Gas Company<sup>1</sup> and the PacifiCorp and Utah Power merger of 1989.<sup>2</sup> This transaction is simply a change in the shareholders of PacifiCorp. After the closing of the transaction, PacifiCorp will continue to exist and provide service to Washington customers and be subject to the jurisdiction of the Commission. PacifiCorp will remain a separate entity and the Commission will continue to exercise its regulatory authority over PacifiCorp. ScottishPower does not own any other domestic operations; thus, the transaction does not present the potential for cost shifting or diminution of energy supplier competition. ScottishPower has no plans to sell, exchange, pledge or otherwise transfer any of PacifiCorp's physical assets that support PacifiCorp's regulated business, except for the already announced sale of the Centralia generating station and the California distribution system. Given the nature of the transaction, there is a basis for the Commission to determine under the applicable statutes and case law that it has no jurisdiction over the proposed transaction.

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<sup>1</sup> Docket Nos. UE-951270 and UE-960195, Fourteenth Supplemental Order issued February 5, 1997.

<sup>2</sup> Docket No. U-87-1338-AT, Second Supplemental Order issued July 15, 1988.

If this proceeding is not dismissed on the basis of the jurisdictional issue, any inquiry should be expeditious and limited in scope to reflect the limited issues raised by the Application. Such a limited proceeding would serve to familiarize the Commission and interested parties with the transaction and the advantages to PacifiCorp's Washington customers flowing from the transaction.

There is no precedent that would support treating the transaction as a merger, and requiring the extended, formal hearings that may be appropriate in the consolidation of two operating utilities. The Commission's merger standards, enunciated in 1997 in the Puget-WNG merger, appear to apply only where a public service company proposes to "merge or consolidate any of its franchises, properties or other facilities with any other *public service company*." Docket Nos. UE-951270 and UE-960195, Fourteenth Supplemental Order at 16 (emphasis added). ScottishPower is not a public service company at the time of the transaction.

## **LEGAL ANALYSIS OF THE JURISDICTION ISSUE**

### **A. The Relevant Statutes**

There are a number of statutory provisions that potentially are relevant to the transaction. RCW 80.12.020 states:

No public service company shall sell, lease, assign or otherwise dispose of the whole or any part of its franchises, properties or facilities whatsoever, which are necessary or useful in the performance of its duties to the public, and no public service company shall, by any means whatsoever, directly or indirectly, merge or consolidate any of its franchises, properties or facilities with any other public service company, without having secured from the commission an order authorizing it so to do . . . .

For purposes of Chapter 80.12 RCW, "public service company" is defined as "every company now or hereafter engaged in business in this state as a public utility and subject to regulation as to rates and service by the utilities and transportation commission under the provisions of this title." RCW 80.12.010. As noted above, PacifiCorp is a public service company under this definition and under Title 80 generally,<sup>3</sup> while ScottishPower is not a public service company at the time of the transaction.

Even if ScottishPower were to become a public service company *after* the transaction, this would not cause it to be a public service company for purposes of the Application. *In re Application of West Florida Natural Gas Company*, No. 870935-GU, 1987 Fla. PUC LEXIS 397 (Sept. 30, 1987) involved a situation where only one public utility (West Florida Natural Gas Company, or "West Florida") was involved in the transaction and the other entity (NG Operating, Ltd.) would *become* a public utility by virtue of the transaction. The Florida Public Utility Commission found that the transaction did not require its approval, stating:

[W]e do not regard the transfer of partnership interests in NG Operating, Ltd. in exchange for [West Florida Natural Gas Company] assets as requiring our authorization. Our approval is required for the issuance and sale of securities by a "public utility." Section 366.04(1), Florida Statutes. The transfer of NG Operating, Ltd. partnership interests described in the application is not an issuance or sale of securities by a public utility within the contemplation of this statute; rather, the interests are the consideration *in a transaction by which NG Operating, Ltd. will first become a "public utility" subject to our jurisdiction.* We expressly reserve our authority to review any

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<sup>3</sup> Under RCW 80.04.010, "public service company" includes every "electrical company" which, in turn, is defined to include any company "owning, operating or managing any electric plant for hire within this state." "Electric plant" includes property used in connection with generation, transmission, distribution, sale or furnishing of electricity.

issuances of securities by NG Operating, Ltd. other than as part of the "transaction" described in the application.

1987 Fla. LEXIS at \*4-5 (emphasis added).

RCW 80.12.020 does not apply to the PacifiCorp/ScottishPower transaction because no properties are being disposed of; only a transfer of stock is involved. There is no "merger or consolidation" with any other public service company given that ScottishPower is not, at the time of the transaction, a public service company.

The Commission has adopted a rule to address the situation where the entity acquiring the franchises, properties or facilities of a public service company is not a public service company itself. WAC 480-143-030 states:

If at the time of the acquisition of franchises, properties or facilities of an existing public service company, the purchaser is not itself a public service company, the commission may nevertheless, as a condition to approving the transaction, require a statement from such purchaser under oath, setting forth any changes in rates, service or equipment, resulting from the transfer which may in any way affect the public interest.

This provision, too, is inapplicable, as there is no acquisition of properties, only the purchase of stock.

RCW 80.12.040 provides that:

No public service company shall, directly or indirectly, purchase, acquire, or become the owner of any of the franchises, properties, facilities, capital stocks or bonds of any other public service company unless authorized so to do by the commission. . . . Any contract by any public service company for the purchase, acquisition, assignment or transfer to it of any of the stocks or other securities of any other public service company, directly or indirectly, without the approval of the commission shall be void and of no effect.

RCW 80.12.040 does not apply to the transaction given that the purchaser of the securities is not, at the time of the transaction, a public service company.

RCW 80.08.040 requires a filing with the Commission prior to a public service company issuing stock or other evidences of interest or ownership, or bonds, notes or other evidence of indebtedness, but does not require Commission approval of such issuance.

**B. Precedent Under the Relevant Statutes**

Joint Applicants are aware of no Commission decision or Washington case holding that a transfer of voting stock or control of a public service company from one set of shareholders to another, or to an individual shareholder, is considered a transfer or a disposition of properties or facilities under RCW 80.12.020. The Commission Staff has previously taken the position that Commission approval is not required under these statutes in the case of a transaction similar to this one. In 1998, when GTE Corporation proposed to merge with Bell Atlantic Corporation, GTE claimed that Commission approval was not required for the merger, given the nature of the transaction.<sup>4</sup> Under the Agreement and Plan of Merger between Bell Atlantic Corporation and GTE Corporation, a merger subsidiary of Bell Atlantic would be created, and GTE Corporation would merge into this subsidiary through a stock transfer. Upon conclusion of the transaction, the merger subsidiary would cease to exist, and GTE would continue as a wholly owned subsidiary of Bell Atlantic.

In that case, Commission Staff indicated in a letter issued October 26, 1998 that it concurred with GTE's position that "under current Washington law, Commission approval is

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<sup>4</sup> Bell Atlantic presumably was not a public service company at the time of the transaction, while GTE Northwest, a subsidiary of GTE Corporation, operated as a public service company in Washington prior to the merger.

not required for the merger" so long as "the merger does not result in a disposition of [GTE Northwest's] assets." A copy of this letter is included as Appendix A to this Memorandum. As in that case, there will be no disposition of PacifiCorp assets in connection with this transaction. Consistent with the analysis used by Commission Staff in the GTE case, there would not seem to be a basis for asserting jurisdiction over this transaction.

Precedent from other states suggests that RCW 80.12.020 cannot be used as the basis for asserting jurisdiction over the transaction. Office of Utility Consumer Counselor v. Public Service Company of Indiana, Inc., 608 N.E.2d 1362 (1993), presents a situation similar to the present case. Public Service Company of Indiana, Inc. ("PSI") filed an application with the Federal Energy Regulatory Commission, or FERC, for approval of corporate reorganization effected by "a statutory exchange of stock whereby PSI will emerge as a subsidiary of a new holding company." 608 N.E.2d 1363 (citation omitted). The result of the transaction was that each issued share of PSI common stock outstanding would be exchanged for one newly issued share of the holding company. The holding company would receive all of the common stock of PSI outstanding before the reorganization, rendering PSI a subsidiary of the holding company. PSI would continue to operate in the same manner after the transaction. Upon learning of PSI's restructuring application before FERC, the Office of Utility Consumer Counselor asserted application of Ind. Code Ann. § 8-1-2-83(a) and filed a motion with the Indiana Commission to set a hearing to determine whether PSI's proposed stock transfer should be approved. The Consumer Counselor claimed that Indiana Law required the Commission to conduct a hearing regarding the formation of a public utility holding company. The question presented to the court was whether a stock exchange between PSI and the



holding company constituted a transfer of control encompassed by the statute.<sup>5</sup> The Supreme Court of Indiana rule that the unambiguous language of the statute did not authorize the Commission

to conduct hearings for the approval of transfers of individual shareholders' stock effecting the formulation of a holding company. *The contemplated exchange for holding company stock does not involve a sale, assignment, transfer, lease, or encumbrance of PSI's franchise, works, or system, all of which PSI will continue to own. Only the shares of PSI stock are being transferred.*

608 N.E.2d at 1364 (emphasis added).

In 1981, the Texas Commission held that its statutes governing the sale of property by public utilities and the mergers of public utilities did not include transfers of stock from a utility to a non-utility, nor did its statute concerning general jurisdiction provide for such jurisdiction. Sandy Mountain Dev. Co., Inc., 7 Texas P.U.C. Bulletin 628 (December 22, 1981).<sup>6</sup> The Commission specifically stated that if it was deemed desirable to require

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<sup>5</sup> The statute at issue was § 83(a), which provides in relevant part:

No public utility, as defined in section 1 [IC 8-1-2-1] of this chapter, shall sell, assign, transfer, lease, or encumber its franchise, works, or system to any other person, partnership, limited liability company, or corporation, or contract for the operation of any part of its works or system by any other person, partnership, limited liability company, or corporation, without the approval of the commission after hearing.

Ind. Code Ann. § 8-1-2-83.

<sup>6</sup> The cited statute, PURA § 63, provided that:

No public utility may sell, acquire, lease, or rent any plant as an operating unit or system in this state for a total consideration in excess of \$100,000 or merge or consolidate with another public utility operating in this state unless the public utility reports such transactions to the commission.

commission approval of a sale of stock constituting the controlling interest in a utility, such a requirement should be implemented by the legislature. *Id.* The applicable statute, Tex. Rev. Civ. Stat. Ann. art. 1446(c), was thereafter amended to specifically provide jurisdiction over stock transfers.<sup>7</sup>

In those states where jurisdiction was asserted over a stock transfer between a public service company and an entity that is not a public service company, the applicable statutes include specific language providing for utility commission jurisdiction over a transfer of a controlling stock interest in a public utility. Appendix B to this Memorandum identifies a number of such statutes.

**C. Precedent Under Section 203 of the Federal Power Act Is Distinguishable**

As noted on page 22 of the Joint Application, a filing will be made with FERC for approval of the transaction pursuant to Section 203 of the Federal Power Act, 16 U.S.C. § 824b(a). Section 203 of the Federal Power Act requires FERC approval whenever a public utility seeks to "sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission . . . or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of *any other person*." (emphasis added) The statute also applies if a public utility seeks to "purchase, acquire, or take any security of any other public utility." The statute requires that FERC find "that the proposed

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<sup>7</sup> PURA § 63 was amended in 1983 to add the following language involving the sale of stock:

All transactions involving the sale of 50% or more of the stock of a public utility shall also be reported to the commission within a reasonable time. On the filing of a report with the commission, the commission shall investigate the same with or without public hearing, to determine whether the action is consistent with the public interest.

disposition, consolidation, acquisition, or *control* will be consistent with the public interest." (emphasis added) FERC precedent suggests that the statute applies whenever there is a *transfer of control* over a utility's facilities, whether achieved through a transfer of stock or sale of assets. Consistent with this precedent, PacifiCorp will file an application with FERC pursuant to Section 203.

The federal and state statutes are different in material respects. Section 203, for example, includes a reference to the purchase or acquisition of a public utility's securities and requires FERC to find that the "control" will be consistent with the public interest. The statute as a whole thus allows FERC to consider the transfer of control over a utility's facilities, regardless of how achieved. In contrast, RCW 80.12.020 makes no mention of another utility's securities and makes no reference to "control" over a utility's facilities. The acquisition of securities is addressed in another statute, RCW 80.12.040, which is inapplicable.

RCW 80.12.020 also refers to a public service company seeking to merge or consolidate, directly or indirectly, with "any other public service company." In contrast to the Federal Power Act, which applies when there is a merger or consolidation with "*any other person*," approval is necessary under RCW 80.12.020 only when the merger or consolidation is with another public service company. ScottishPower is not a public service company.

#### **D. Commission Decisions in Merger Proceedings**

Previous Commission merger proceedings involved the Commission's jurisdiction over a transaction where a public service company was seeking to merge or consolidate with another public service company or operating utility. In the Puget Power - Washington Natural Gas Company merger, for example, the Commission noted that under RCW 80.12.040, "Commission authorization is required in order for a public service company

to merge or consolidate any of its franchises, properties or facilities with any other public service company." Docket Nos. UE-951270 and UE-960195, Fourteenth Supplemental Order at 15. The Commission went on to state that:

In order for a public service company to "merge or consolidate any of its franchises, properties or other facilities with any other public service company," it must receive an order from the Commission permitting it to do so."

Id. at 16. In that order, the Commission identified standards that it would consider in judging the "public interest affected by the proposed *merger*."

Similarly, the 1988 merger proceeding involving PacifiCorp and Utah Power involved the consolidation of two neighboring operating utilities and, more important, the transfer of utility assets to a newly created entity. *In re Application of PacifiCorp (Maine) to Merge with PC/UP&L Merging Corp. (PacifiCorp Oregon)*, 95 PUR 4th 111 (1988). The proposed merger of The Washington Water Power Company and Sierra Pacific Power Company, later abandoned by the utilities, also involved the consolidation of two neighboring operating utilities. *Application of The Washington Water Power Company to Merge into Resources West Energy Company*, Docket Nos. UE-941053 and UE-941054, Seventh Supplemental Order (1995).

The formal hearing process and extensive evidentiary record developed in those proceedings would not be appropriate for this transaction, given the limited issues raised by the Application. This is not a "merger" as that term has been used in previous Commission decisions.

### CONCLUSION

The process to be followed in considering this Application should befit the nature of the transaction. This transaction does not involve a consolidation of two operating utilities

but simply effects a change in the shareholders of PacifiCorp. Following the transaction, PacifiCorp will continue to exist and provide service to Washington customers under its established rates, terms and conditions. PacifiCorp will remain a separate entity, the Commission will continue to exercise its regulatory authority over PacifiCorp, and PacifiCorp will continue to meet all its obligations and commitments under the Commission's rules, regulations and decisions.

There is a basis for the Commission to determine under the applicable statutes and case law that it has no jurisdiction over the proposed transaction. If the Commission chooses to assert jurisdiction, it would be appropriate to limit the scope and duration of any proceeding to correspond with the limited issues raised by the transaction. It would be unwarranted to treat the transaction as a merger and require the extended, formal hearings involved in the consolidation of two operating utilities.

DATED: February 8, 1999.

**PACIFICORP**

**SCOTTISH POWER plc**

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STATE OF WASHINGTON

## WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

1300 S. Evergreen Park Dr. S.W., P.O. Box 47250 • Olympia, Washington 98504-7250  
(360) 753-6423 • TTY (360) 596-8283

October 26, 1998

Timothy J. McCallion  
Regulatory and Governmental Affairs  
Vice President – West  
GTE Service Corporation  
One GTE Place, CA500GA  
Thousand Oaks, CA 91362-3811

Dear Mr. McCallion:

This is to acknowledge receipt of your letter dated October 2, 1998, regarding the proposed merger of GTE and Bell Atlantic. Because your letter was not intended to initiate a formal Commission proceeding, we are treating it as a request for a Commission Staff interpretation.

In your letter you state that, under current Washington law, Commission approval is not required for the merger. Based on the factual representations contained in your letter, the Staff of the Commission concurs, providing the merger does not result in a disposition of GTE Northwest, Incorporated's (GTE Northwest) assets under RCW 80.12.020. Such a transfer would require Commission approval.

It is Staff's understanding that Bell Atlantic, as the parent of GTE, will acquire control of the GTE regulated subsidiaries, including GTE Northwest. This will not affect the Commission's jurisdiction or authority over GTE Northwest. In fact, as you state in your letter at pages 2-3, "GTE Northwest, Incorporated, will continue to meet all its obligations and commitments under the Commission's rules, regulations and decisions," and "will continue to provide service in Washington as [it] did prior to the merger under the established tariff rates, terms, and conditions, and GTE Northwest, Incorporated will remain as one of the certificated providers of telecommunications services in Washington."

Commission Staff trusts that the proposed merger will serve to advance the several important public policy objectives identified in your letter.

Very truly yours,

CAROLE J. WASHBURN  
Secretary

## APPENDIX B

### CALIFORNIA

PU Code Section 854, "Acquisition or control of public utility without approval of Public Utilities Commission," provides:

- (a) No person or corporation, whether or not organized under the laws of this state, shall merge, *acquire, or control* either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from the commission.

### PENNSYLVANIA

66 Pa. C. S. § 1102(A)(3). Section 1102(A)(3) states that, upon application and approval by the Commission, it shall be lawful to "acquire from, or to transfer to, any person or corporation . . . *by any method or device whatsoever, including the sale or transfer of stock* and including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service."

### WEST VIRGINIA

West Virginia Code § 24-2-12(g) provides that "no person or corporation, whether or not organized under the laws of this state, may acquire either directly or indirectly *a majority of the common stock of any public utility* organized and doing business in this state.

### NEW JERSEY

N.J. Stat. Ann. § 48:3-10 prohibits any public utility from selling any shares of its capital stock or permitting a transfer of such shares to any corporation, domestic or foreign, or any person "the result of which sale or transfer in itself or in connection with other previous sales or transfers shall be to vest in such corporation or person *a majority in interest of the outstanding capital stock of such public utility corporation* unless authorized to do so by the board."

### LOUISIANA

A General Order of the Louisiana Public Service Commission provides that no utility subject to its jurisdiction shall "*transfer control or ownership of any assets, common stock or other indicia of control* of the utility to any other person, corporation, partnership, limited liability

company, utility, common carrier, subsidiary, affiliated company or any other entity . . . without prior official action of approval or official action of non-opposition by the Louisiana Public Service Commission."

## NEVADA

Nev. Rev. Stat. Ann. 704.329 (1997) provides that:

1. . . . [N]o person may merge with, acquire through a subsidiary or affiliate, or *otherwise directly or indirectly obtain control of a public utility doing business in this state* or an entity that holds a controlling interest in such a public utility without first submitting to the commission an application for authorization of the proposed transaction and obtaining authorization from the commission pursuant to subsection 2.

## NORTH CAROLINA

North Carolina General Statute 62-111(a) provides that no "merger or combination affecting any public utility [shall] be made *through acquisition or control by stock purchase or otherwise*, except after application to and written approval by the Commission."

## NEW YORK

In *Re New York Citizens Utility Board*, 176 PUR 4th 474 (1997), the New York Public Service Commission reviewed the applicable public service laws:

Public Service Law (PSL) § 99(2) provides that no telephone company in New York State may transfer any part of its works or systems without the approval of the Public Service Commission. PSL § 99(2) provides that no contract or agreement can affect a company's franchise or right to operate in any way, without Commission approval. Finally, pursuant to PSL § 100, no telephone company, domestic or foreign, may acquire the stock of a New York State telephone company without Commission approval.

(footnote omitted) Id. at 476.