



Christine O. Gregoire

# ATTORNEY GENERAL OF WASHINGTON

Utilities and Transportation Division

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February 25, 1999

Carole Washburn  
Executive Secretary  
WASHINGTON UTILITIES  
AND TRANSPORTATION COMMISSION  
P.O. Box 47250  
Olympia, WA 98504

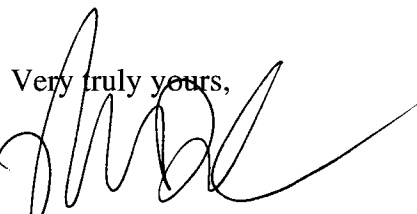
Re: Pacificorp and Scottish Power, PLC  
Docket No. UE-981627

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STATE OF WASH.  
UTIL. AND TRANSP.  
COMMISSION

Dear Ms. Washburn:

Enclosed for filing with the Commission please find the original and fourteen copies of the Staff Memorandum on Jurisdiction and Issues of Concern.

Thank you for your assistance with this matter.

Very truly yours,  


ROBERT D. CEDARBAUM  
Assistant Attorney General

RDC:pah  
Encl.  
cc: All Parties



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	)	STAFF MEMORANDUM ON
(2) Affirming Compliance with RCW 80.08.040	)	JURISDICTION AND ISSUES
for Pacificorp's Issuance of Stock in Connection	)	OF CONCERN
with the Transaction.	)	
.....	)	

I. INTRODUCTION

On December 31, 1998 Pacificorp and Scottish Power PLC filed an application requesting that the Commission disclaim jurisdiction over a stock transaction by which Pacificorp will become a wholly-owned subsidiary of Scottish Power. The Commission required the parties to address this issue of jurisdiction through legal memoranda.<sup>1</sup> The parties were also required to identify any issues of concern they may have regarding the acquisition of Pacificorp.

Staff agrees with the Joint Applicants that the Commission does not have jurisdiction over the Scottish Power/Pacificorp transaction.<sup>2</sup> The Commission will, however, maintain

<sup>1</sup> The application also requested that the Commission affirm compliance with RCW 80.08.040 for Pacificorp's issuance of stock in connection with the transaction. There is no debate that the Commission possesses authority to consider that request.

<sup>2</sup> Staff reached this conclusion based upon the contents and representations made in the application itself. Staff did request from the Joint Applicants a pro forma balance sheet for Pacificorp, giving effect to the acquisition of Pacificorp by Scottish Power. We made this request in order to ensure that the transaction will have no impact on the property and facilities of Pacificorp. We have not received the response to this request and we do not expect a response until March 1999, at the earliest.

Should the response to our request require a change to the position Staff has taken in this memorandum, we

authority to regulate the rates, services, and practices of Pacificorp which will continue to be a public service company subject to full Commission oversight. These powers will allow the Commission to address issues of concern in later proceedings specific to Pacificorp or, where appropriate, in generic proceedings applicable to all regulated electric companies.

## **II. LEGAL ANALYSIS OF JURISDICTION**

### **A. Description of the Transaction**

The acquisition of Pacificorp is accomplished through an “Agreement and Plan of Merger” which is included in Appendix 1 of the application. Use of the term “Merger” may prompt jurisdictional eyebrows to rise. However, at its heart, the transaction involves only the exchange of shares of common stock of Pacificorp for shares of common stock of Scottish Power. This exchange will make Pacificorp a wholly owned subsidiary of Scottish Power. But Pacificorp will continue to exist as a separate entity subject to regulation by the Commission.<sup>3</sup>

### **B. Applicable Statutes**

Resolution of the jurisdiction issue requires the Commission to interpret the provisions of Chapter 80.12 RCW. Three general categories of transactions come under Commission jurisdiction through those laws:<sup>4</sup>

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will request permission from the Commission to file a supplemental memorandum on the jurisdiction issue.

<sup>3</sup> The transaction appears complicated because of the involvement of another wholly-owned subsidiary of Scottish Power called “Merger Sub”. The Commission should not be distracted by this element of the stock exchange or the nomenclature used to describe it. Merger Sub will be an Oregon corporation formed immediately prior to closing of the Agreement and solely for the purpose of allowing the stock exchange to qualify as a “reorganization” under the Internal Revenue Code. (Appendix 1, Preamble.) This will allow Pacificorp shareholders to avoid tax liability, which they otherwise would incur without the creation of a United States corporation. Merger Sub will cease to exist immediately upon closing and the only surviving corporation will be Pacificorp, intact as it was prior to the transaction.

<sup>4</sup> Copies of the statutes are contained in Attachment 1.

1. **Sale, Lease , Assignment or Disposition** by a public service company of its franchises, properties or facilities which are necessary or useful to the performance of the company’s duties to the public. RCW 80.12.020.
2. **Merger or Consolidation** by a public service company of its franchises, properties or facilities with any other *public service company*. RCW 80.12.020.
3. **Purchase or acquisition** by any *public service company* of the franchises, properties, facilities, capital stocks, or bonds of any other public service company. RCW 80.12.040.

A “public service company” means every company engaged in this state as a public utility and subject to regulation as to rates and services by the Commission under the provisions of Title 80 RCW. RCW 80.12.010. Scottish Power is not a public service company. Therefore, the Scottish Power/Pacificorp transaction is neither a merger or consolidation (Category 2) nor a purchase or acquisition (Category 3), since these require a public service company on both sides of the transaction.

The jurisdictional issue in this case boils down to whether the exchange of Pacificorp stock for Scottish Power stock is a “disposition” of the utility assets of Pacificorp (Category 1), since that portion of RCW 80.12.020 does not require the entity to which property is disposed to be a public service company. The next section demonstrates why the stock exchange does not satisfy that standard.

**C. The Scottish Power/Pacificorp Transaction is not a Disposition of the Franchises, Properties or Facilities of Pacificorp**

There are several reasons supporting our position that the Commission lacks jurisdiction over the Scottish Power acquisition of Pacificorp.

1. **The Acquisition Occurs Through Actions by Shareholders and Not Pacificorp**

The relevant provision of RCW 80.12.020 is limited only to transactions by a public service company to “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 ...”. The Scottish Power/Pacificorp transaction does not satisfy that requirement. It involves acts by stockholders to convert their existing interest in a public service company (Pacificorp) to an interest in a corporation which is not a public service company (Scottish Power). Admittedly, the exchange of stock will change the control of Pacificorp, but the transaction will have no impact on the utility assets of Pacificorp.

This interpretation of RCW 80.12.020 is not novel. In fact, at a time fairly contemporaneous to the original enactment of the statute in 1941, the Attorney General’s Office in 1949 rendered a formal opinion adopting the same position with respect to the sale of a majority interest by an existing shareholder to a prospective stockholder. The formal opinion is contained in Attachment 2. The reasoning given by the Attorney General’s Office at that time is even more persuasive today since Scottish Power’s acquisition of Pacificorp will not eliminate current Pacificorp shareholders from the picture. The only change will be the company in which those shareholders have an interest.

## **2. Prior Commission Practice**

The Staff interpretation of RCW 80.12.020 is consistent with prior Commission practice. For example, in 1955 the Commission considered the application of Pacific Power & Light Company for approval of a transaction in which Pacific issued shares of stock in exchange of shares of The Western Public Service Company, which was an electric company operating in Wyoming. The surviving corporation was Pacific. Western ceased to exist as a separate

corporation. The Commission held that the transaction did not fall within RCW 80.12.020 since Western was not a “public service company”. The Commission considered the application only under Chapter 80.08 RCW involving securities. By implication, the transaction also did not involve the disposition of property. A copy of the Commission’s order is included in Attachment 3.

The Staff interpretation is also consistent with more recent history. The 1988 “merger” proceeding between Pacific Power & Light and Utah Power & Light involved the complete combination and transfer of utility assets to a newly created company. (Docket No. U-87-1338-AT.) The proposed merger of The Washington Water Power Company and Sierra Pacific Power Company also concerned the combination of the assets of two utility companies. (Docket No. UE-941053.) Both of these cases, therefore, involved the disposition of property by a public service company which triggered RCW 80.12.020, even though the combination involved a company that was not a public service company.

### **3. Statutory Construction**

Some may argue that the Commission’s broad power to regulate in the public interest the rates, services, and practices of electric companies grants the Commission jurisdiction over the Scottish Power/Pacificorp stock transaction. RCW 80.01.040(3). However, the Legislature has also provided the Commission specific authority over the issuance of securities and the transfers of property in Chapters 80.08 and 80.12 RCW, respectively. These specific grants of authority control over the broad power contained in RCW 80.01.040(3). See Waste Management v. WUTC, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994).

Moreover, RCW 80.01.040(3) allows the Commission to regulate only “as provided by

the public service laws”. The broad power to regulate in the public interest, therefore, can be exercised only so far as allowed under RCW 80.12.020.

Some may also argue that the disposition of property provision of RCW 80.12.020 should itself be construed broadly to include the exchange of Pacificorp stock for Scottish Power stock. These proponents would characterize the stock transaction as the sale of an entire company.

This construction of RCW 80.12.020 should be rejected. We have investigated the legislative history of the statute and found nothing that would assist in this debate. However, the Legislature has elsewhere demonstrated its specific understanding of the different mechanisms by which companies subject to Commission jurisdiction may alter their control and ownership. The Legislature granted the Commission express authority to approve the acquisition of control of common carriers through ownership of stock. RCW 81.80.270. The Legislature also referenced specifically the purchase or acquisition of the capital stock of one public service company by another public service company. RCW 80.12.040. These provisions show that, had the Legislature intended a “disposition of property” under RCW 80.12.020 to include an exchange of stock or the acquisition of control through ownership of stock, it knew what words to use to accomplish that goal. Those words were not, however, used in RCW 80.12.020.

#### **4. Experience from Other States**

Experience in other states supports the position that the Scottish Power/Pacificorp stock transaction is not a disposition of property subject to Commission jurisdiction under RCW 80.12.020. For example, Scottish Power and Pacificorp discuss cases from Indiana and Texas in which transfers of stock were not encompassed by comparable statutes. (Memorandum at 7-8.) Joint Applicants also cite precedent from several other states in which jurisdiction over a

stock transaction is spelled out clearly by specific statutory language governing the transfer of a majority stock interest in a public utility by an entity which is not a public utility.

(Memorandum, Attachment B.)

This list of precedent from other states is instructive and should be supplemented by amendments passed in Illinois in 1997. Those amendments allowed that commission to investigate any “reorganization” of a public utility including “any transaction, regardless of the means by which it is accomplished, that results in a change in the ownership of a majority of the voting capital stock of an Illinois public utility; or the ownership or control of any entity which owns or controls a majority of the voting capital stock of a public utility....” Illinois Public Utility Act, §7-204.

The state of Oregon’s governing statute is also broader in scope than RCW 80.12.020. Under §757.511 of the Oregon Revised Code, “no person, directly or indirectly, shall acquire the power to exercise any substantial influence over the policies and actions of a public utility which provides heat, light or power without first securing from the Public Utility Commission, upon application, an order authorizing such acquisition if such person is, or by such acquisition would become, an affiliated interest with such public utility....”. Accordingly, the acquisition of PacifiCorp by Scottish Power is the subject of an application in Docket UM 918 of the Public Utility Commission of Oregon.

#### **5. Precedent Under the Federal Power Act**

Section 203 of the Federal Power Act requires approval by the Federal Energy Regulatory Commission (FERC) whenever a public utility shall “sell, lease, or otherwise dispose of the



whole of its facilities subject to the jurisdiction of [FERC], or any part thereof....”<sup>5</sup> 18 U.S.C. §824b(a). FERC has construed this provision to include transactions in which the common stock of a regulated utility is transferred from its existing shareholders to a holding company. Central Vermont Public Service Corporation, 1987 WL 117107 (FERC); Central Illinois Public Service Company, 1988 WL 243697 (FERC); Illinois Power Company, 1994 WL 167805 (FERC). Consistent with this precedent, Pacificorp has filed an application with FERC under Section 203. (Joint Application at 22.)

Some may argue that the Commission should follow suit and construe RCW 80.12.020 as FERC has construed Section 203. This action would be inconsistent with the experience from other states, as we discussed earlier. Moreover, although FERC’s interpretation of Section 203 focused on the “disposition of facilities” language of that statute, there is additional language in Section 203 which refers specifically to FERC’s authority to approve a “disposition ... or control”. 18 U.S.C. §824b(a). This may suggest a broader scope of application under Section 203 than should be adopted under RCW 80.12.020 which does contain similar language. In any event, FERC’s interpretation, admittedly like the cases cited from other states, is only instructive. It is not binding on this Commission in construing the provisions of our public service laws.

**III. ISSUES OF CONCERN CAN BE ADDRESSED  
UNDER THE COMMISSION’S CONTINUING AUTHORITY TO REGULATE THE  
RATES, SERVICES AND PRACTICES OF PACIFICORP**

Absence of jurisdiction over the acquisition of Pacificorp by Scottish Power does not render the Commission powerless to address any negative or positive consequences of the

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<sup>5</sup> The full text of Section 203 is contained in Attachment 1.

transaction for Pacificorp or its ratepayers.<sup>6</sup> Pacificorp will continue to be a public service company subject to full public interest regulation by the Commission as to rates, services, and practices. RCW 80.01.040(3). It will also continue to carry the burden of proof to demonstrate that its proposals are just and reasonable. RCW 80.04.130(2).

The following sections discuss general areas of concern for Staff, along with the relevant statutory authority of the Commission for addressing each topic. We do not, however, suggest any resolutions for the listed concerns, nor do we think it advisable for the Commission to attempt to solve these concerns in this proceeding. Many of these concerns will be addressed, by statute, in subsequent filings specific to Pacificorp. Other concerns may be more appropriately addressed generically because they affect all electric companies under Commission jurisdiction. However, all concerns require much more, if not extensive, research, discovery, and consideration.<sup>7</sup> A proceeding in which the Commission does not have jurisdiction over the underlying application is not, we believe, the proceeding where the Commission can achieve results that are beneficial to ratepayers, the company, the Commission, or the parties.

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<sup>6</sup> Each year, the Commission has the opportunity to request legislation. That mechanism can always be pursued should the Commission believe that its existing statutory authority is inadequate with respect to transactions like the Scottish Power acquisition of Pacificorp or any other corporate reorganizations that may be formulated or envisioned. Statutes from other states referenced by Staff and Joint Applicants could serve as useful templates should the Commission wish to follow up these issues before the State Legislature.

<sup>7</sup> As an example, it may be helpful for the Commission to remember the process through which the Service Quality Index (SQI) was created for Puget Sound Energy in its merger in Docket No. UE-960195. There, the Commission jurisdiction over the merger of Puget Sound Power & Light and the Washington Natural Gas Company was not questioned. The SQI, nevertheless, was crafted only after a significant period of discovery and controversy between the parties. Moreover, there were several elements of the SQI which the parties left unresolved initially so that additional information and experience could be acquired before all details were finalized. The SQI has continued to be refined since its initial acceptance. As recently as February 2, 1999, the Commission issued its 22nd Supplemental Order addressing two issues --Overall Customer Satisfaction and Missed Appointments-- which were still outstanding from the original settlement filed over two years ago.

## 1. **Affiliated Interest Transactions**

A consequence of the stock exchange will be to make Scottish Power an “affiliated interest” of Pacificorp. RCW 80.16.010. In a data request by Staff to the Joint Applicants we asked whether there will be any affiliated interest transactions within the meaning of Chapter 80.16 RCW. The companies indicated that they anticipate a Services Agreement and a Management and Administrative Services contract, both of which have not yet been developed.

The Commission’s authority governing transactions between regulated electric companies and their affiliates is contained in Chapter 80.16 RCW. Commission rules governing affiliated interest transactions are contained in Chapter 480-146. Prior to the effective date of the anticipated services contracts, or any other contracts or arrangements with Scottish Power not now envisioned, Pacificorp will be required to file a verified copy with the Commission regardless of the outcome in this application. The same requirement applies to any subsequent modifications to any contracts or arrangements. RCW 80.16.020.

Any time after receiving the filing, the Commission may start an investigation and disapprove the service contracts if Pacificorp fails to prove that the transactions are reasonable and consistent with the public interest. Id. The Commission may also disapprove the filing if satisfactory proof is not submitted of the cost to Scottish Power to provide the property or services covered by the contract or arrangement. Id.

If Pacificorp fails to file its affiliated contracts or arrangements,<sup>8</sup> or makes payments to Scottish Power which the Commission has disapproved previously, the Commission may

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<sup>8</sup> In the same data request response mentioned earlier, the companies committed to filing the Services, and Management and Administrative Services agreements that they intend currently to enter.

prohibit Pacificorp from treating the payments as operating expenses or capital expenditures for rate or valuation purposes. RCW 80.16.060 and .070. In any rate case, the Commission may disallow all or part of the compensation between Pacificorp and Scottish Power unless Pacificorp establishes the reasonableness of the payments. RCW 80.16.030. Satisfactory proof may be required by the Commission of the cost to the affiliate to perform its obligations under the contract or arrangement.<sup>9</sup> Id.

## **2. Securities and Debts**

Subsequent issuances of securities by Pacificorp will be governed by Chapter 80.08 RCW and Commission rules contained in Chapter 480-146 WAC. Before Pacificorp issues stocks, bonds, notes, or other evidence of interest, ownership, or indebtedness it must first file with the Commission a description of the proposed issuance and the purposes for which the issuance is made and a statement as to why the transaction is in the public interest. RCW 80.08.040. Pacificorp can also request the Commission to enter an order that the company has filed the required information. The Commission does not have authority to veto any issuance before it occurs. However, any action by Pacificorp or the Commission to comply with Chapter 80.08 RCW does not impact the Commission's authority over rates, services, accounts, valuations, estimates or determinations of costs, or any other matters that may come before the Commission involving Pacificorp. RCW 80.08.150. Therefore, any negative consequences from an issuance

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<sup>9</sup> The Commission's power to investigate affiliated interests does have its limitations. In, Waste Management v. WUTC, *supra*, the State Supreme Court held that the provisions of Chapter 81.16 RCW (which mirror Chapter 80.16 RCW) apply only to a contract or arrangement entered directly between the regulated company and the affiliate. Any transactions which provide services, compensation, information, or property between the utility and affiliate, but indirectly through another entity, would not be subject to Commission scrutiny under Chapter 80.16 RCW.

may be examined and corrected by the Commission in any later rate filing or other appropriate proceeding.<sup>10</sup>

Moreover, violations of the securities laws have severe consequences. Any person, including officers and employees of Pacificorp, who violates the provisions of Chapter 80.08 RCW is guilty of a gross misdemeanor. RCW 80.08.120.

### **3. Rates, Charges and Terms of Conditions**

Pacificorp's rates, charges, and conditions of service will remain subject to full regulation by the Commission under the terms of Chapter 80.28 RCW. The acquisition by Scottish Power will have no impact upon the Commission's authority with respect to Pacificorp's existing tariffs, tariff revisions, or any complaint that the Commission may find appropriate under RCW 80.04.110. Issues with respect to cost of capital, asset valuation, allocations, cost shifting, cost reductions, or any other rate making concern may be addressed on a full record under these statutes.

### **4. Transfers of Property**

Pacificorp has already announced the sale of the Centralia generating station. This sale, and any other disposition of Pacificorp's utility assets, must receive prior Commission approval in an application filed under RCW 80.12.020 and Chapter 480-143 WAC. Any sale made without prior Commission approval is void. RCW 80.12.030.

Pacificorp indicates that it will file for approval under Chapter 80.12 RCW for the sale of

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<sup>10</sup> The Commission's authority to enter an order stating that a company has complied with the filing requirements of RCW 80.08.040, does allow the Commission to disapprove a filing if the Commission believes, for example, that the company's public interest statement is deficient. The Commission may refuse to enter the requested order, but it can examine the details of the issuance and correct deficiencies only in a subsequent proceeding.

the Centralia generating station and any other sales of Pacificorp's utility assets not now envisioned. (Application at 23.) These applications will provide the Commission a forum to examine the ramifications of the sales.

## **5. Service Quality**

The acquisition of Pacificorp will have no impact on its duty to furnish service and facilities in a manner that is safe, adequate, and efficient and to set conditions of service pertaining to the sale and distribution of electricity that are just and reasonable.

RCW 80.28.010(2) and (3). Moreover, Scottish Power has committed to a target of excellence in service quality and reliability and customer service. (Application at 14-16 and 19-20.)

Any deficiencies in service quality or failure to achieve this commitment after the acquisition of Pacificorp can be remedied by the Commission under the authority granted by RCW 80.28.040. That statute allows the Commission to order improvements for any acts, practices, or services of Pacificorp which the Commission may find are unjust, unreasonable, improper, insufficient, or inadequate. The same statute authorizes the Commission to order Pacificorp to provide service that may be demanded reasonably by any person.

The Commission may also order improvements if there are deficiencies in the quality of electricity, including poor supply or voltage. RCW 80.28.030. The Commission may order repairs, improvements, additions, or changes to any electric plant of Pacificorp's in order to promote the security and convenience of the public or to secure adequate service and facilities for distributing electricity. RCW 80.28.130.

Finally, issues of service quality, service reliability, and customer service are often highlighted in discussions of industry restructuring. The Commission may, therefore, find it

more effective and efficient to address these concerns generically for all electric companies subject to its jurisdiction. The same statutes cited earlier would provide the Commission authority for such a process.

#### **6. Valuation of Property**

The Commission will retain the power, under RCW 80.04.250, to determine the fair value for rate making purposes of the property of Pacificorp that is used and useful for service in the state of Washington. This authority can be exercised in a rate proceeding or at any time the Commission believes is necessary or proper. Any attempt by Scottish Power to earn a return above the current book value of Pacificorp's assets may, therefore, be examined and prevented.

#### **7. Depreciation**

The Commission will continue to control Pacificorp's depreciation and retirement accounts to insure that they are proper and adequate. This same power will continue to apply to all other reserve accounts of Pacificorp's. RCW 80.04.350.

#### **8. Budgets**

Pacificorp's budget will continue to be scrutinized by the Commission annually with respect to maintenance, operations and, construction. RCW 80.04.300. Chapter 480-140 WAC. The company must file its budget and any supplements with the Commission so that the Commission can determine whether the expenditures are fair, reasonable, and not contrary to the public interest. The Commission can reject any item contained in the budget, but neither its examination nor its determination to approve or reject will have any impact subsequently on the Commission's ability to examine any expenditure for rate making purposes. RCW 80.04.310. If Pacificorp were to incur any cost contained in its budget which the Commission has rejected, that

expense must be disallowed whether as an operating expense or an element of rate base.

RCW 80.04.330.

## **9. Penalties**

The Commission will retain extensive authority to penalize Pacificorp for any violation of Title 80 RCW, or any rule, order, demand, or requirement issued by the Commission under Title 80 RCW. The penalty is up to \$1000 for each violation with each day of a continuing violation considered a separate offense. RCW 80.04.380. Violations by officers, employees, or agents of Pacificorp are gross misdemeanors. RCW 80.04.385. RCW 80.04.405 provides the Commission additional authority to penalize Pacificorp, its officers, employees, and agents for violations of any provision of Title 80 RCW, or any Commission rule, order, or directive made under Title 80 RCW.

## **10. Participation in Federal Proceedings**

An element of concern raised by the Pacificorp transaction relates generally to the state of flux experienced by an industry undergoing restructuring. Simply stated, legitimate concerns may arise which we cannot define today with sufficient clarity. Some of these issues, however, will come before FERC. For example, restructuring may impact Pacificorp's rates for transmission service or prompt the divestiture of facilities jurisdictional to FERC.

The Commission has the authority to initiate and participate in FERC proceedings, and any related judicial proceedings, where an issue involves the rates or practices of utility services affecting the interests of the state of Washington.<sup>11</sup> RCW 80.01.075. Therefore, to the extent

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<sup>11</sup> For example, the Commission already is an intervenor in the appeal of FERC Orders 888 and 889, pending before the United States Court of Appeals, District of Columbia Circuit in Case No. 97-1715, *et. al.* The Commission joined the brief of all state commissions challenging FERC's decision to exercise jurisdiction over the



that restructuring of the electric industry results in Pacificorp filings before FERC, the Commission will receive notice and the opportunity to participate at FERC and in the courts as the Commission deems appropriate.

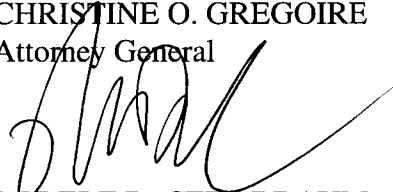
### III. CONCLUSION

The applicable statutes, case law, and Commission precedent warrant a decision that the Commission does not have jurisdiction over the stock transaction by which Scottish Power will acquire control of Pacificorp. The Commission should act upon Pacificorp's request for an order under RCW 80.08.040 and, then, dismiss the application. The Commission's authority to regulate the rates, service, and practices of Pacificorp will be preserved and any issues of concern raised by the parties or the Commission can be addressed through other appropriate and effective means.

DATED this 25th day of February, 1999.

Respectfully submitted,

CHRISTINE O. GREGOIRE  
Attorney General



ROBERT D. CEDARBAUM  
Assistant Attorney General  
Counsel for WUTC Staff

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rates, charges and terms of conditions for retail transmission service.

# ATTACHMENT 1

**80.12.010 Definition.** The term "public service company," as used in this chapter, shall mean 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. [1961 c 14 § 80.12.010. Prior: 1953 c 95 § 6; 1941 c 159 § 1, part; Rem. Supp. 1941 § 10440a.]

**80.12.020 Order required to sell, merge, etc.** 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: PROVIDED, That this section shall not apply to any sale, lease, assignment or other disposal of such franchises, properties or facilities to a special purpose district as defined in RCW 36.96.010, city, county, or town. [1981 c 117 § 1; 1961 c 14 § 80.12.020. Prior: 1945 c 75 § 1; 1941 c 159 § 2; Rem. Supp. 1945 § 10440b.]

**80.12.030 Disposal without authorization void.** Any such sale, lease, assignment, or other disposition, merger or consolidation made without authority of the commission shall be void. [1961 c 14 § 80.12.030. Prior: 1941 c 159 § 3; Rem. Supp. 1941 § 10440c.]

**80.12.040 Authority required to acquire property or securities of utility.** 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. Nothing contained in this chapter shall prevent the holding of stocks or other securities heretofore lawfully acquired or prohibit, upon the surrender or exchange of said stocks or other securities pursuant to a reorganization plan, the purchase, acquisition, taking or holding by the owner of a proportionate amount of the stocks or other securities of any new corporation organized to take over at foreclosure or other sale, the property of the corporation the stocks or securities of which have been thus surrendered or exchanged. 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. [1961 c 14 § 80.12.040. Prior: 1941 c 159 § 4; Rem. Supp. 1941 § 10440d.]

**80.08.040 Prior to issuance—Filing required—Contents—Request for order establishing compliance.** Any public service company that undertakes to issue stocks, stock certificates, other evidence of interest or ownership, bonds, notes, or other evidences of indebtedness shall file with the commission before such issuance:

(1) A description of the purposes for which the issuance is made, including a certification by an officer authorized to do so that the proceeds from any such financing is for one or more of the purposes allowed by this chapter;

(2) A description of the proposed issuance including the terms of financing; and

(3) A statement as to why the transaction is in the public interest.

(4) Any public service company undertaking an issuance and making a filing in conformance with this section may at any time of such filing request the commission to enter a written order that such company has complied with the requirements of this section. The commission shall enter such written order after such company has provided all information and statements required by subsections (1), (2), and (3) of this section. [1994 c 251 § 1; 1987 c 106 § 1; 1961 c 14 § 80.08.040. Prior: 1933 c 151 § 4; RRS § 10439-4.]

**80.08.150 Authority of commission—Not affected by requirements of this chapter.** No action by a public service company in compliance with nor by the commission in conformance with the requirements of this chapter may in any way affect the authority of the commission over rates, service, accounts, valuations, estimates, or determinations of costs, or any matters whatsoever that may come before it. [1994 c 251 § 6.]

§ 824b. Disposition of property; consolidations; purchase of securities

(a) Authorizations. No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$ 50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.

(b) Orders of Commission. The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.

HISTORY: (June 10, 1920, ch 285, Part II, § 203, as added Aug. 26, 1935, ch 687, Title II, § 213, 49 Stat. 849.)

# ATTACHMENT 2



STATE OF WASHINGTON

SMITH TROY  
ATTORNEY GENERAL  
OLYMPIA

November 25, 1949

No. 49-51-167

Utilities / MESSAS

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Wash. Pub. Serv. Comm.

Washington Public Service Commission  
Insurance Building  
Olympia, Washington

Attention: Honorable Raymond W. Clifford, Commissioner

Gentlemen:

You have inquired whether the approval of the Washington Public Service Commission is a prerequisite to a valid sale and transfer by an existing stockholder to a prospective stockholder of common stock constituting the controlling interest of a public service corporation.

Your question is answered in the negative.

A N A L Y S I S

Your written request of November 22, 1949, reads in part as follows:

"The Washington Public Service Commission was notified by the Secretary of the Prescott Telephone and Telegraph Company, Inc., on October 12, 1949, of the transfer of certain stock of the corporation, effective on that date.

"Mr. Martin V. Palmer acquired four (4) shares of stock from Mrs. U. F. Edgecombs, and thirteen (13) shares of stock from Mr. F. M. Benson. The outstanding common stock of the Prescott Telephone and Telegraph Company, Inc., totals eighteen (18) shares, and those shares purchased by Mr. Palmer constitute the majority of the outstanding common stock, and represent effective control of the company.

"The Commission requests your opinion as to whether or not under the provisions of Chapter 159, Laws of 1941, or any other Public Service Law, this transaction must be submitted to the Commission for its approval."

Chapter 159, Laws of 1941, as amended by chapter 75, Laws of 1945, in so far as applicable to your inquiry, reads:

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"The term 'department' when used in this act shall mean the Department of Public Service of Washington or such body as may succeed to the powers and duties now exercised by the Department of Public Service.

"The term 'public service company' shall mean every person, firm, corporation or association, or their lessees, trustees or receivers, now or hereafter engaged in business in this state as a public utility and subject to regulation as to rates and service by the Department of Public Service: \* \* \* " Sec. 10440a, Rem. Supp. 1941.

"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 Department of Public Service an order authorizing it so to do: \* \* \* " Sec. 10440-b, Rem. Supp. 1945.

"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 Department. \* \* \* " Sec. 10440d, Rem. Supp. 1941.

In our opinion the foregoing statutes are the only enactments relative to your point of inquiry.

As an initial consideration, reference is made to that line of cases of our Supreme Court holding that:

" \* \* \* It is well settled in this state, as elsewhere, that a public service commission, such as the department of public service in this state, is an administrative agency created by statute and as such has no inherent powers, but only such as have been expressly granted to it by the legislature or have, by implication, been conferred upon it as necessarily incident to the exercise of those powers expressly granted. Wishkah Boom Co. v. Greenwood Timber Co., 88 Wash. 568, 153 Pac. 367; Puget Sound Nav. Co. v. Department of Public Works, 152 Wash. 417, 278 Pac. 189; Northern Pac. R. Co. v. Denney, 155 Wash. 544, 285 Pac. 452; State ex rel. Northeast Transp. Co. v. Schaaf, 198 Wash. 52, 86 P. (2d) 1112;

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North Bend Stage Lines v. Schaaf, 199 Wash. 621, 92 P. (2d) 702; 43 Am. Jr. 701, Public Utilities and Services, sec. 193; 51 C. J. 36, Public Utilities, sec. 78.

"In Northern Pac. R. Co. v. Denney, supra, it is stated:

"The department of public works (now department of public service), being purely a creature of statute, has only such powers as are expressly conferred upon it, or such powers as are necessarily incident to the powers expressly conferred upon it by statute." State ex rel. Public Utility District No. 1 of Okanogan County v. Department of Public Service et al., 21 Wn. (2d) 201, 208, 150 P. (2d) 709,

and

" \* \* \* In the absence of statutory authority, the department has no power to act \* \* \* " Id. p. 214.

It is noted from your letter and from an examination of your files that the Prescott Telephone Company is a corporation, that the transaction involved relates to the sale by certain stockholders of their shares therein, and that the purchaser was not theretofore engaged in any activity which could be so construed as constituting doing business as a public service company.

It is fundamental that a corporation is, in general, a separate entity distinct from its shareholders. Ownership of corporate assets rests in this artificial entity and not in the natural persons constituting the shareholders. When such corporation is, at the same time, " \* \* \* engaged in business in this state as a public utility \* \* \* " within the contemplation of section 10440a, supra, the corporation, and not the shareholders, becomes a public service company.

With these considerations in mind, we note that section 10440b, supra, refers to certain transactions by a "public service company." In our opinion this section confers no authority on the public service commission to approve or disapprove the transaction in question. The sales involve only acts by stockholders disposing of their interest in the public service corporation, and do not involve any action by the public service company to "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, \* \* \* ."

The jurisdiction of the public service commission under the statute is over the activities of the public service company and not over the activities of its stockholders. By such act of the stockholders the public service company, the artificial entity, distinct from its stockholders, has not disposed of anything; there has been merely a change in the controlling interest of the public service company.



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As we read section 10440d, supra, it applies only to the acquisition by a public service company of such interests as are therein enumerated, and, in our opinion, our courts would not extend it to govern purchase of the stock of a public service company by an individual not then engaged in an activity constituting doing business as a public service company.

Having in mind the previously cited legal principle that the public service commission has only such powers as have been expressly granted to it by the legislature or have, by implication, been conferred upon it as necessarily incident to the exercise of those powers expressly granted, it appears clear that the public service commission has not been granted any express power to assume jurisdiction over the transfer of stock of a public service corporation where a public service company itself is not a party to such transaction. It only remains, therefore, to determine whether the assumption of such jurisdiction has, by implication, been conferred upon it as necessarily incident to the exercise of the express powers granted.

Our Supreme Court has held that implied powers arise only out of necessity for the existence and operation of powers expressly granted. See James v. Seattle, 22 Wash. 654, 62 Pac. 34; State ex rel. Rice v. Sell, 124 Wash. 647, 215 Pac. 326; State ex rel. Port of Seattle v. Superior Court, 93 Wash. 267, 160 Pac. 755. Under such ruling we have no hesitancy in saying that such implied authority is not to be garnered from a full reading of the foregoing statutes.

A case of interest, though not directly in point because of somewhat dissimilar statutes and dissimilar issues, is that of Corporation Commission v. Consolidated Stage Co., 63 Ariz. (2d) 257, 161 P. (2d) 110. The pertinent facts as stated by the Supreme Court of Arizona were:

"A Mr. Hood, owning a share of stock in the appellee corporation, filed an application with the commission for permission to transfer or assign his share of stock and 'his interest' in the corporation to a Mr. Fix. The applicant shareholder proceeded upon the theory that he was one of the joint owners or associates or copartners in the ownership of the assets of the company, and disregarded the legal entity of the corporation. His apparent purpose was to transfer physically what he considered to be his interest in the certificate of convenience, completely disregarding that the corporation and not he owned the certificate of convenience and all other assets of the company."

The appellee (corresponding to a public service company under our statutes) contended that the commission (equivalent to our public service commission) was without jurisdiction in the matter and reviewed the decision of the commission ordering such transfer. In reversing the commission's order, the Supreme Court held:

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"It is elementary that a corporation is for most purposes an entity distinct from its individual members or stockholders. By the very nature of a corporation the corporate property is vested in the corporation itself and not in the stockholders. The natural persons who procured its creation and have pecuniary interest in it are not the corporation \* \* \* "

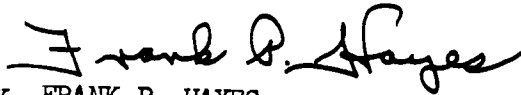
and held that the commission was without jurisdiction in the matter.

It may well be that, under the conclusion which we have been compelled to reach in this instance, public service companies organized as corporations can escape to a measure the jurisdiction of the commission that could properly be exercised if its form of organization were otherwise. If such be true, and if it be also true that such is not felt to be in the public interest, this is a matter to be addressed to the legislature.

Trusting the foregoing fully answers your inquiry, we remain,

Very truly yours,

S M I T H   T R O Y  
Attorney      General



By FRANK P. HAYES  
Assistant Attorney General

# ATTACHMENT 3

In the Matter of the Application of )  
PACIFIC POWER & LIGHT COMPANY )  
for an Order Authorizing the Issuance )  
of 62,800 Shares of Common Stock and )  
the Assumption of Liabilities of The )  
Western Public Service Company )  
Pursuant to Merger Agreement )  
..... )

CAUSE NO. U-8821

ORDER GRANTING APPLICATION

Pacific Power & Light Company (Pacific, or applicant) has entered into an Agreement and Act of Merger, (the merger agreement) dated August 10, 1955, with The Western Public Service Company (Western), a Delaware corporation operating mainly as an electric utility in Laramie, Wyoming. Since Western is not a public service company as defined by RCW 80.12.010, the proposed merger, as such, does not require the approval of this Commission. However, the merger agreement (submitted herein as Exhibit "N") provides, among other things, (1) that the surviving corporation will be Pacific and the separate existence of Western will cease; (2) that Pacific will issue 62,800 shares of its presently authorized, but unissued, \$6.50 par value common stock in exchange for the 15,700 shares of Western's \$10 par value common stock which will be outstanding on the effective date of the merger agreement; (3) that Pacific will be responsible for all the debts and liabilities of Western; (4) that each stockholder of Western will, by operation of the merger agreement, (and subject to the applicable provisions of the Laws of Delaware), become a shareholder of Pacific at the rate of four shares of Pacific's common stock for one share of Western's common stock; and (5) that consummation of the merger is subject to approval by the various regulatory authorities that have jurisdiction.

The application before the Commission in this proceeding, which was filed under the provisions of RCW 80.08 on September 12, 1955, is properly limited to requesting an order authorizing Pacific to do just two things: (a) to issue 62,800 shares of its \$6.50 par value common stock in exchange for 15,700 shares of Western's \$10 par value stock on the basis of four shares of Pacific's stock for each share of Western's outstanding stock; and (b) to assume (pursuant to RCW 80.08.130) the obligations of Western, with respect to its First Mortgage Sinking Fund Bonds, 3-1/2% Series due 1971 in the aggregate principal amount of \$756,000.

Applicant reports that the above-described basis upon which shares of the common stock of Western are to be converted into shares of the common stock of Pacific, was arrived at as the result of arms-length negotiations between the managements of the two companies. "In conducting these negotiations", Pacific states, "the management of each company took into consideration, in the light of its intimate knowledge of the physical properties and the operations of the company which each represented, all pertinent factors having a material bearing in arriving at approximate ratios of exchange. The directors and management of each company consider that the ratio of exchange is fair and equitable to the stockholders of both companies."

According to the information submitted herein, the book value of Western's common stock exceeded that of Pacific's 3.1 times as of June 30,

4.4 times. These figures provide some factual indication as to the relative value of the common stock of the two companies. It does not necessarily follow, however, that they can, or should, be used as the sole criterion of whether or not the proposed 4 to 1 stock exchange is reasonable and proper. On the contrary there might well be a number of other pertinent factors of equal or greater significance that should properly be considered as having a material bearing on the reasonableness of the exchange ratio. Moreover, it is entirely possible that some factors, though important, are not susceptible of exact measurement. Furthermore, the ratio agreed upon (as applicant indicates) represents, at least in part, the results of arms-length negotiations between competent representatives of the two independently owned and operated companies bargaining with one another to obtain the best possible terms for the stockholders of their respective companies. Even though the problem appears to be one which cannot be definitely resolved with mathematical certainty, the Commission is inclined to agree with the directors and management of each company that the proposed ratio of exchange is fair and equitable to the stockholders of both companies.

Pacific is many times larger than Western. Consequently, the end result of the transactions under consideration in this proceeding, which are necessary to effectuate the proposed merger, will alter Pacific's capitalization very little as indicated by the actual and pro forma figures that follow which were abstracted from those submitted in Exhibit F-C of the application herein.

	As of 6-30-55		Pro Forma	
	Amount	%	Amount	%
<b>Debt:</b>				
Bonds	96,000,000	57.2	96,756,000	57.2
Misc. Long-term debt	9,845,660	5.9	9,845,660	5.8
<b>Total debt</b>	<b>\$105,845,660</b>	<b>63.1</b>	<b>\$106,601,660</b>	<b>63.0</b>
<b>Equity:</b>				
Common stock	21,729,091	12.9	22,137,291	13.1
Preferred stock	12,653,300	7.5	12,653,300	7.5
Premium & assessments on stock	4,117,079	2.5	4,117,079	2.4
Installments received on stock	5,672	0.0	5,672	0.0
Earned surplus	23,441,823	14.0	23,738,794	14.0
<b>Total equity</b>	<b>\$61,946,965</b>	<b>36.9</b>	<b>\$62,652,136</b>	<b>37.0</b>
<b>Total capitalization</b>	<b>\$167,792,625</b>	<b>100.0</b>	<b>\$169,253,796</b>	<b>100.0</b>

There is a possibility, although apparently quite remote, that the application herein may be amended for the reasons explained by applicant as follows:

"The applicable statutes of the states of Maine and Delaware, under the laws of which Pacific and Western, respectively, were incorporated, afford to stockholders who oppose a merger the right to receive the value of their shares in cash in lieu of remaining as a stockholder in the merged corporation. It is expected that the number of stockholders of Pacific and Western who take the requisite statutory action to enable them to receive cash for their shares will be small, and that any cash requirements which may arise out of

Surviving Corporation. However, in the event that such cash requirements are too great to be satisfied out of the Surviving Corporation's general corporate funds, it is the intention of Pacific as the Surviving Corporation to provide for such cash requirements through the sale of additional securities, the exact nature and amount of which cannot presently be determined. Should it become necessary to sell any such securities, this Application will be amended for the purpose of seeking authorization from the Commission for the issuance thereof."

The miscellaneous expenses incidental to issuance of the securities under consideration in this proceeding have been estimated by applicant as follows:

<u>Purpose</u>	<u>Amount</u>
Federal stamp tax	450*
Regulatory fees of State Commissions	425*
Fee of transfer agent	100*
Fee of Applicant's Counsel	5,500*
Printing (other than stock certificates)	3,600*
Meetings of stockholders, including expense of solicitation of proxies	14,000*
Officers' and employees' travel, telephone, and other expenses	10,000*
Trustee of Western's Indenture of Mortgage, expenses relative to assumption agreement and other matters related to merger	1,000*
Total	<u>\$35,075*</u>

\*Estimated

### FINDINGS

#### THE COMMISSION FINDS:

1. Pacific Power & Light Company, a Maine corporation, is a public service company subject to the regulatory jurisdiction of this Commission under the provisions of RCW 80.08.
2. The application submitted herein meets the requirements of RCW 80.08 and the rules and regulations of the Commission promulgated thereunder.
3. The common stock Pacific proposes to issue is for a legal and proper purpose.
4. The issuance of said stock will not be contrary to the public interest and should, therefore, be authorized under the terms and conditions of the order which follows.
5. Applicant's proposal to assume all the obligations and liabilities of The Western Public Service Company in respect to the presently outstanding bonds of Western will not be contrary to the public interest and should, therefore, be authorized.

## THE COMMISSION ORDERS:

1. Pacific Power & Light Company is hereby authorized to issue 62,800 shares of its \$6.50 par value common stock having an aggregate par value of \$408,200 and to exchange said stock for 15,700 shares of the \$10.00 par value common stock of The Western Public Service Company as provided in the merger agreement submitted as Exhibit N of the application herein.

2. If the authority granted by Section 1 of this order is exercised, Pacific Power & Light Company is hereby authorized, further, to assume all the obligations and liabilities of The Western Public Service Company in respect to its presently outstanding First Mortgage Sinking Fund Bonds, 3-1/2% Series due 1971 in the aggregate principal amount of \$756,000.

3. Applicant shall promptly advise the Commission as to the effective date of the merger agreement filed as Exhibit N herein, and within 90 days after said effective date it shall file with the Commission a statement, under oath, listing the expenses actually and necessarily incurred in connection with the transaction authorized by this order in direct comparison, in so far as possible, with the estimated expenses as set forth in item 15 of Exhibit G of the application herein. At quarterly periods after the terminal date of the period covered by its first report, applicant shall file a comparable report, with cumulative totals, until such time as all of such expenses have been reported in full.

4. In the event the proposed merger is consummated, applicant shall file with the Commission, for its prior approval, the journal entries by which it proposes to record on its books the accounting and merger adjustments which will be required as indicated in Exhibit F-C of the application herein.

5. Prior to exercising the authority granted by this order, applicant shall file with the Commission, as Exhibit G-19-C thereof, a certified copy of all the resolutions adopted by its stockholders subsequent to the effective date of this order which pertain to the transactions under consideration in this proceeding.

6. The foregoing authorization is without prejudice to the authority of this Commission with respect to rates, service, accounts, valuations, estimates or determination of costs, or any matters whatsoever that may come before this Commission, and nothing in this order shall be construed as an acquiescence by this Commission in any estimate or determination of costs, or any valuation of property claimed or asserted.

DATED at Olympia, Washington, and effective this 4th day of October, 1955.

WASHINGTON PUBLIC SERVICE COMMISSION

  
RALPH DAVIS, Chairman

  
JOSEPH STARIN, Commissioner

  
ROBERT D. VEOMANS, Commissioner

CERTIFICATE OF SERVICE  
UE-981627

I certify this day that I served a copy of the foregoing Staff Memorandum on  
Jurisdiction and Issues of Concern the parties listed below via U.S. mail, postage prepaid:

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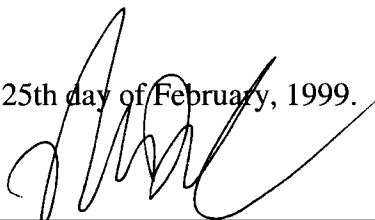
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DATED at Olympia, Washington this 25th day of February, 1999.

  
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ROBERT D. CEDARBAUM