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February 25, 1999

Carole Washburn, Secretary  
WUTC  
1300 S. Evergreen Pk. Dr. S.W.  
PO Box 47250  
Olympia, WA 98504-7250

**RE: *In the Matter of the Application of PacifiCorp and Scottish Power plc***  
***Docket No. UE-981627***

Dear Ms. Washburn:

Enclosed please find an original and fourteen copies of the Public Counsel Responsive Memorandum on Jurisdiction; Identification of Issues for filing in the above matter.

Very truly yours,

SIMON J. FFITCH  
Assistant Attorney General  
Public Counsel

SJF:ljb  
cc: Service List



## CERTIFICATE OF SERVICE

I hereby certify that I have this day served one copy of the Public Counsel Responsive Memorandum on Jurisdiction; Identification of Issues upon all parties of record in this proceeding, as shown on the attached service list by U. S. mail properly addressed and prepaid.

Dated this 25<sup>th</sup> day of February, 1999.



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Linda J. Bofla  
Legal Secretary  
Public Counsel Section

SERVICE LIST  
Application of Pacificorp and Scottish Power PLC  
Docket No. UE-981627

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**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Application of

PACIFICORP AND  
SCOTTISH POWER PLC

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.

NO. UE-981627

PUBLIC COUNSEL RESPONSIVE  
MEMORANDUM ON  
JURISDICTION; IDENTIFICATION  
OF ISSUES

STATE OF WASH.  
UTIL. AND TRANSP.  
COMMISSION

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**I. Introduction**

Scottish Power and PacifiCorp are required by RCW 80.12.020 to obtain Washington Utilities and Transportation Commission (Commission) approval for the merger transaction described in the Joint Application in this docket. The transaction, by which PacifiCorp will become a wholly-owned subsidiary of Scottish Power, constitutes a disposition of facilities or property for purposes of RCW 80.12.020. The proposed transfer of control over PacifiCorp's stock falls under the regulatory jurisdiction of the Commission because it has the effect of transferring control of PacifiCorp's facilities or properties. The implications of this type of transaction for the public interest are as significant as any other disposition of facilities.

Commission review is likewise consistent with the agency's authority to regulate public service companies in the public interest.

**II. Discussion**

**A. Pursuant to the Merger Agreement, Scottish Power Will Acquire Ownership and Control of the Capital Stock of PacifiCorp.**

Under the Agreement and Plan of Merger, an indirect, wholly owned subsidiary of Scottish Power ("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 canceled and PacifiCorp will issue to an entity indirectly and wholly owned by Scottish Power an equal number of shares with the same rights, powers, and privileges as the canceled Merger Sub common stock. As a consequence of this transaction, Scottish Power will acquire indirect ownership and control of all of the voting capital stock of PacifiCorp. Joint Application, p. 1.

B. Washington Statute Requires that A Disposition of Property, Facilities, or Franchises Receive Commission Approval

The Commission has jurisdiction over the proposed transaction under the first clause of RCW 80.12.020. The applicable part of that statute reads as follows:

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 . . . without having secured from the commission an order authorizing it so to do . . .

There is no dispute that PacifiCorp is currently, and will continue to be, a public service company for purposes of RCW 80.12.020, Joint Applicant's Legal Memorandum, p. 2, and as such it may not dispose of any part of its property "necessary or useful in the performance of its duties to the public" without the Commission's approval.

The scope of the statute is broad in its application to transactions. The phrase "otherwise dispose of" gives the Commission the ability to review not just sales, leases, and assignments, but to review any type of disposition, however structured, which results in the transfer of "any part...whatever" of company facilities or property. This language is more than broad enough to encompass this transaction.

C. The Transfer of Control Resulting from the Subject Transaction Effectuates a “Disposition” For Purposes of RCW 80.12.020.

The application itself establishes that a transfer of control over PacifiCorp will occur as a result of the merger. The Joint Application states:

As a consequence of this transaction, Scottish Power will acquire indirect ownership and control of all the voting capital stock of PacifiCorp.

Joint Application, p. 1.

PacifiCorp must seek approval of the merger from the Federal Energy Regulatory Commission because, as applicants concede, the transaction:

will result in the indirect transfer to Scottish Power of control of the ‘jurisdictional facilities’ of PacifiCorp and its power marketing affiliates[.]

Joint Application, p. 22

This transfer of control is reflected in the principal advantages claimed for the transaction, which assertedly are to include Scottish Power’s “significant experience in operating utility businesses,” Scottish Power’s support and enhancement of PacifiCorp’s focus on its core business, a renewed focus on better customer service, reliability, community and employee relations, and environmental stewardship, and efficiencies leading to lower prices. Joint Application, p. 1.<sup>1</sup> The fact that Scottish Power makes these commitments confirms that it will, after the transaction, exert control over the operations of PacifiCorp, including the facilities and properties necessary to provide such things as “better customer service” and “reliability.”

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<sup>1</sup> Scottish Power’s degree of future control of PacifiCorp is reflected elsewhere in the application. For example, Scottish Power states that it “intends to operate PacifiCorp in such a way that will fulfill the varying needs of all of its customers both urban and rural.” Joint Application, p. 19. It is precisely to evaluate this and other similar assertions that Commission review under the statute is appropriate.

Although there is no applicable judicial precedent in Washington interpreting RCW 80.12.020, the Federal Energy Regulatory Commission (FERC) interpretation of Section 203(a) of the Federal Power Act, 16 U.S.C. §824b(a) provides valuable guidance. The language in Section 203(a) is very similar to that of RCW 80.12.020. Section 203(a) states, in pertinent part:

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 . . . without first having secured an order of the Commission authorizing it to do so. . . . 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.

Applicant's memorandum on jurisdiction interprets Section 203(a) incorrectly and in a manner not consistent with the FERC interpretation. The applicants admit that they are subject to the jurisdiction of FERC, but they claim that federal jurisdiction rests on the fact that Section 203(a) mentions "control" in its last sentence. A correct interpretation of this statute recognizes that the first sentence of the section, which closely parallels RCW 80.12.020, is the basis of FERC's review authority. The last sentence of paragraph (a) simply contains descriptive references to the types of transactions already within the review authority of FERC under the first sentence, and regarding which FERC will make its public interest determination. The last sentence does not limit review in the manner suggested by applicants here.

FERC has, in fact, concluded that a transfer of the type proposed here, is, for the purposes of Section 203(a), a "disposition". In *Re Central Vermont Public Service Corporation*, 84 P.U.R. 4<sup>th</sup> 213, 39 FERC P 61295, 1987 WL 257899. FERC determined that it had jurisdiction over a transaction which involved the transfer of ownership and control of a utility's jurisdictional facilities from its existing shareholders to a newly created holding company. Incidental to this conclusion, the commission found that the transfer of control over utility stock

to a holding company constituted a “disposition” for purposes of Section 203(a). According to the Federal Commission:

After the reorganization the jurisdictional facilities of the public utility will be controlled through the parent’s ownership of the utility’s common stock by virtue of the parent’s ability to name [the utility’s] board of directors. Although the current stockholders of the public utility will own stock in the holding company after the reorganization is completed, they will no longer have a proprietary interest in, or direct control over, the jurisdictional facilities. *The substance of the transaction, therefore, is a “disposition” of facilities via the transfer of all direct control.* This analysis is consistent with our prior determinations to focus on the substance rather than the form of corporate transactions and relationships when making jurisdictional determinations. (citations omitted) (emphasis added). *Id.* at 9.

The interpretation of the federal commission in *Vermont* has been followed in a number of FERC cases dealing with transactions involving a transfer of control of utility stock to a holding company. These transactions are closely analogous to the proposed transaction contemplated by the Scottish Power/PacifiCorp application.

Most recently FERC adopted the reasoning in *Vermont* to support jurisdiction under Section 203(a) in *Re Central Hudson Gas & Electric Corp.*, 84 FERC P 62010 (July 2, 1998). In that case, FERC held that, because the transaction involved the transfer of ownership of a public utility’s common stock from its shareholders to a holding company, jurisdiction was proper. Other FERC cases examining similar transactions are in line with the commission’s conclusion, in both *Vermont* and *Central Hudson*, that the transfer of a public utility’s common stock to a holding company is a “disposition” of jurisdictional facilities within the meaning of Section 203(a). *Re Consolidated Edison Co. of New York, Inc.*, 81 FERC P 62,070 (Oct. 21, 1997); *Re Tucson Electric Power Co.*, 80 FERC P 62,275 (Sept. 25, 1997);<sup>2</sup>

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<sup>2</sup> See also, *Re Boston Edison Co. & BEC Energy*, 80 FERC P 61274 (Sept. 11, 1997); *Re NorAm Energy Services, Inc.*, 79 FERC P 61108 (April 30, 1997); *Re MidAmerican Energy Co.*, 76 FERC P 62007 (July 2, 1996); *Re Great Bay Power Corp.*, 75 FERC P 62220 (June 25, 1996); *Re Pacific Gas & Electric Co.*, 75 FERC P 62203



The Washington Attorney General issued an opinion in 1949 interpreting a predecessor version of the RCW 80.12.020. AGO 1949-51 at 167 (letter dated Nov. 25, 1949, from Attorney General Troy to Commissioner Clifford). The opinion concluded that the statute did not require approval by the Commission's predecessor agency of a transaction in which an individual acquired controlling stock in a public service company under the Commission's jurisdiction. Public Counsel believes the situation addressed in the opinion is distinguishable. In that case, the sale involved only acts by individual stockholders who were natural persons disposing of their interests to another individual. In the merger transaction, by contrast, PacifiCorp will become wholly owned by Scottish Power. Ultimately Scottish Power acquires, and PacifiCorp loses by this transfer, the right to control the operations of the surviving public service company.

The similarity between the Washington statute and Section 203(a), as well as the consistency of the federal interpretation of Section 203(a), provides ample support for a finding that, in this case, the transfer of common stock from PacifiCorp shareholders to a newly created Scottish Power holding company, is a "disposition" for purposes of RCW 80.12.020.<sup>3</sup>

Applicants have as much as conceded the applicability of RCW 80.12.020 by filing with FERC.

There are strong policy considerations that support a Commission interpretation of RCW 80.12.020 that is consistent with the FERC interpretation of Section 203(a) of the Federal Power Act. FERC has rightly concluded that, in order to consistently uphold the purpose of the Federal

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(June 18, 1996); *Re Oklahoma Gas & Electric Co.*, 73 FERC P 62173 (Dec. 15, 1995); *Re Southern Indiana Gas & Electric Co.*, 73 FERC P 62090 (Nov. 7, 1995).

<sup>3</sup> Applicants refer to a Commission Staff interpretation regarding the GTE/Bell Atlantic merger in support of their position. Joint Applicant's Legal Memorandum, App. A. The referenced letter is not a Commission decision and was not based upon a formal application or upon a factual record. The Staff interpretation is accordingly not particularly helpful to the Commission guidance in this proceeding.

Power Act to protect the public interest, public utility transactions must be regulated according to their substance rather than their form. Application of this rule of interpretation has led the FERC to hold that the substance of a transaction involving a transfer of stock from the shareholders of a public utility to a holding company is a “disposition” of the jurisdictional facilities of the public utility.

In *Vermont*, FERC reasoned that the public interest could not be properly protected if it were precluded from exercising jurisdiction over these types of stock transfers. The commission found that,

Reorganizations wherein a jurisdictional public utility becomes the wholly-owned subsidiary of a parent holding company may present potential abuses adverse to the public interest. To the extent that utility revenues are used to finance non-utility operations, the cost of utility service may be increased. If the parent makes unwise investment decisions the reliability of service of jurisdictional facilities could be impaired. *Id.* at 10.

For these reasons the federal commission found that jurisdiction over these types of transaction was required to assure that regulation under Section 203(a) is consistent with the public interest.

For purposes of RCW 80.12.020 the transfer of control of PacifiCorp’s common stock constitutes a disposition of property since, in the words of the applicant’s themselves, “it will result in the indirect transfer to Scottish Power of control of the ‘jurisdictional facilities’ of PacifiCorp.” Joint application, p. 22. The Commission should not elevate form over substance in its analysis of RCW 80.12.020 with respect to this transaction. Despite the fact that Scottish Power is acquiring control of PacifiCorp by buying out the company’s stockholders, rather than by directly purchasing its tangible property, the substance of the transaction is the same.

D. The Commission's General Authority to Regulate in the Public Interest Applies to its Specific Power to Review Dispositions of Facilities.

The Commission's authority to regulate certain transactions of public service companies is inextricably linked to the legislative policy articulated in RCW 80.01.040 establishing the general powers and duties of the Commission:

The utilities and transportation commission shall: . . . (3) Regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activities; including, but not limited to, electrical companies . . .

By delegating to the Commission the express authority to "regulate in the public interest" the legislature has given the Commission an important interpretive tool. Any interpretation of the statutes in RCW title 80 must take into account the legislature's express requirement that the Commission consider the actions of public service companies in light of their duties to the public. A rule of strict interpretation in this context is counter-intuitive and would subvert the purposes underlying the Commission's delegated powers. The language of RCW 80.12.020 itself provides a link to and a reminder of the "public interest" component of the Commission's powers by tying the review authority to transfers of facilities and properties which are "necessary or useful in the performance of [the company's] duties to the public."<sup>4</sup>

The legislative policy articulated in RCW 80.01.040 and echoed in RCW 80.12.020 supports a broad interpretation in keeping with the Commission's broad powers to regulate in the public interest. *See generally, U.S. West Communications v. Washington Utilities and Transportation Commission*, 134 Wn.2d 74, 96, 949 P.2d 1337, 1348 (1998) ("The Commission

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<sup>4</sup> WAC 480-143-050 provides that transfer applications which are not consistent with the public interest shall be denied by the Commission.

has broad authority to regulate the practices of public utilities.”); *Tanner Electric Corp. v. Puget Sound Power & Light*, 128 Wn.2d 656, 682, 911 P.2d 1301, 1314 (1996)(“The public utilities industry is one where the legislature has decided that the public interest is best served by direct and uniform regulation of almost every phase of industry activity.”); *see also, In the Matter of the Application of PUGET SOUND POWER & LIGHT COMPANY and WASHINGTON NATURAL GAS COMPANY for an Order Authorizing Merger*, Docket Nos. UE 951270, UE 960195, Fourteenth Supplemental Order, pp. 15-16.

Reading RCW 80.12.020 to allow the Commission jurisdiction over certain transactions while precluding jurisdiction over other transactions with similar or identical effects on the public interest, would be directly contradictory to expressed legislative policy.

### **III. Issues List for Scottish Power/PacifiCorp Merger**

#### **A. General Issues**

To approve this merger, the Commission must find it to be in the public interest. Such a finding requires in Public Counsel’s view, that the applicants provide positive benefits to the public. Without an administrative proceeding to review the merger application, the Commission will be unable to determine whether this merger does indeed provide public benefits that outweigh the risks and costs associated with a merger. Should the Commission fail to exert jurisdiction, it will lose the ability to ensure that the applicants provide benefits to Washington consumers. Other PacifiCorp jurisdictions such as Utah and Oregon, which have exerted jurisdiction, are taking steps to make sure that this occurs.

Furthermore, the Commission will increase the risk that the costs of providing any benefits to consumers in other states served by PacifiCorp will be shifted to Washington by the

company. The applicants are under substantial pressure to provide consumer benefits in other jurisdictions, and must also provide benefits to shareholders. These pressures provide an incentive for the applicants to shift the costs wherever possible. States that are left without the ability to ensure the public interest is protected are likely to suffer as a result.

**B. What is the Public Interest in the Merger?**

1. Most mergers include a stay-out period, rate reductions, or other direct consumer benefits.
2. Scottish Power has significant service quality problems with its UK distribution utilities.
3. The PSE merger included a Service Quality index to prevent deterioration in existing service quality.
4. What corporate commitments will Scottish Power make to Washington communities it serves?
5. Will Scottish Power be able to implement and support low-income programs for Washington consumers which do not rely on prepaid service?
6. How does Scottish Power anticipate increasing reliability and achieving merger synergies through cost cutting?
7. How does Scottish Power anticipate improving customer service and achieving merger synergies by centralizing call and billing centers?

**C. Regulating an Overseas Corporation**

1. Does international law provide a harbor for Scottish Power to disclaim or oppose the imposition of regulation by the State of Washington? Will the existence of international legal requirements impose undue expense or time-consuming delays in the regulatory process?
2. Communication costs will be expensive
3. Discovery and data sharing will be extremely difficult due to the more complex levels of corporate structure and the cultural differences between UK and US style regulation.

4. Interstate and interservice cost allocation is difficult; international allocations will be worse. Scottish Power does not keep its books according to the NARUC system of accounts.
5. How will the creation of a US holding company effect PacifiCorp, Scottish Power, and the Commission's ability to examine the books of all three entities?

D. PacifiCorp Rates

1. Rates are far out of date, as the last rate case in Washington was in 1986 (prior to PP&L merger with UP&L).
2. The Commission ordered alternative methods for rate design which were never implemented.

E. The Merger Contains Unacceptable Assumptions

The proposed capital structure is completely inappropriate, considering the breadth of PP&L investments in non-regulated enterprises. That is the capital structure of PacifiCorp, not PP&L. The most recently approved capital structure is 35.3% common, compared with 41.8% proposed by the applicants.

	Approved	Proposed
LT debt	55.3	52.0
ST debt	2.0	0
Preferred	7.4	6.2
Equity	35.3	41.8

F. Why is the Company proposing such a capital structure, and in particular, how does it anticipate such a high level of equity?

1. Obfuscated corporate structure of the merger deal makes it unclear which entities will be subject to WUTC jurisdiction and at which time (e.g., mergersub, UKSub1, UKSub2). It is not clear why this complex transaction is necessary.
2. A simple acquisition of stock would involve a tender offer for a majority of shares, this transaction does not do that.

3. Why is Scottish Power, the much smaller company at \$7.8 billion (1997 Annual Report, p. 48), the surviving firm of this transaction when PacifiCorp is much larger (\$13.8 billion, 1997 Annual Report, p. 44).

G. Issues to be Addressed should the merger be approved

1. Regulatory treatment of merger costs.
2. Cost allocation method for Scottish Power costs to be borne by Washington jurisdictional customers
3. Regulatory Reprinting requirements for Scottish Power
4. Method to be used by the UTC if it becomes necessary to compel information from Scottish Power, given the Commission's limited ability to reach overseas.
5. Agreements for services between affiliated interests must be approved.
6. Sale of Centralia.
7. Commitments from Utah Power and Light merger. The Commission approval of the PP&L merger with UP&L contained very specific commitments to maintain Pacific Power generating assets for Pacific Power customers. These commitments must be honored.

H. The Commission Should Apply WAC 480-143-030 If It Takes Jurisdiction

WAC 480-143-030 applies to this transaction. The rule provides:  
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.

If the Commission decides that approval is required, the Commission should certainly require such a statement from the joint applicants here.

#### IV. CONCLUSION

For the foregoing reasons, the merger transaction proposed by Scottish Power and PacifiCorp requires the approval of the Washington Utilities and Transportation Commission. RCW 80.12.020 and the other authorities cited make clear that this type of transaction, when viewed in light of its effect, rather than according to the mere form, amounts to a disposition of facilities and properties of PacifiCorp under the statute. This, coupled with the Commission's authority to regulate in the public interest, provide an ample basis for the Commission to review this transaction in order to ensure the protection of Washington consumers.

DATED this 25th day of February, 1999.

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