



VIA ELECTRONIC MAIL
<records@wutc.wa.gov>

September 22, 2004

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

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

Dear Ms. Washburn:

In response to the Washington Utilities and Transportation Commission's (the "Commission") September 3, 2004 Notice of Opportunity to Submit Written Comments, PacifiCorp hereby submits its comments on the proposed financial records and reporting rules in WAC Chapter 480-100 (Electric Companies).

Sincerely,

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

Christy Omohundro
Vice President, Regulation



36 USC 220506

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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of)	Docket No. A-021178
)	
Rulemaking for Reporting Financial)	
Transactions Among Regulated)	PACIFICORP’S COMMENTS ON
Companies and Their Subsidiaries)	PROPOSED RULES
)	
_____)	

1. On September 1, 2004, the Commission filed a formal Notice of Proposed Rulemaking (CR-102) in Docket Nos. A-021178 and TO-030288. In response to the Commission’s September 3, 2004 Notice of Opportunity to Submit Written Comments, PacifiCorp hereby submits its comments on the proposed financial records and reporting rules in WAC Chapter 480-100 (Electric Companies). PacifiCorp has been an active participant in Docket No. A-021178, previously submitting comments on November 27, 2002, March 11, 2003, January 16, 2004, May 18, 2004 and July 16, 2004, and participating in Commission workshops on the draft rules in November 2002 and in May 2003. PacifiCorp’s comments on proposed WAC Chapter 480-100 Rules are set forth below.

COMMENTS

WAC 480-100-008

2. PacifiCorp’s January 2004, May 2004 and July 2004 comments on this provision in Docket No. A-021178 went unanswered. PacifiCorp will therefore repeat its position on this proposed revision. Through this proposed modification, the Commission apparently seeks to simplify its rules for granting exemptions with the statement that the Commission may do so pursuant to WAC 480-07-110. Under WAC 480-07-110, the Commission may grant exemptions

and exceptions from its *procedural* rules contained in Chapter 480-07 WAC.¹ Consequently, by referencing that rule in this provision and providing no independent authority within Chapter 480-100 WAC to grant exemptions, the amendment would significantly limit Commission discretion to grant substantive exemptions. PacifiCorp suggests that it would be in the Commission's and interested parties' best interests for the Commission to retain its flexibility to grant such exemptions. PacifiCorp proposes that the Commission reject the proposed modification and retain the existing provision, which enables the Commission to exercise the discretion to grant substantive exemptions if appropriate.

WAC 480-100-023

3. The proposed rule's definition of "*control*" includes references to an "*indirect*" ability to control management, which makes the reference so vague as to be unenforceable. The proposal's reference to a "*power to direct or cause the direction of the management and policies of a company*" reflects a standard that is incapable of being measured or quantified. Moreover, because the burden is on the utility to demonstrate that it does not have control (under the definition of "subsidiary" in WAC 480-100-023), the consequence of the vagueness falls on the utility. To be enforceable, the rule should define clear standards and be relatively easy to administer. These objectives are not served by reference to vague standards such as "power" and undefined "indirect" means of effecting "power." Use of the term "indirect" is appropriate only if in reference to indirect ownership of shares, such as the definition of subsidiary under the Washington Corporations Act, which defines a subsidiary as "a domestic or foreign corporation that has a *majority of its outstanding voting shares* owned, directly or indirectly, by another

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

domestic or foreign corporation.”² The “majority” standard enunciated in the Washington Corporations Act is also the appropriate ownership threshold to be used for purposes of defining a subsidiary. The five percent ownership threshold is too broad and captures ownership structures that do not fit the traditional parent-subsidary model.

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

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

WAC 480-100-242

5. The proposed rule exceeds the Commission’s statutory authority. The rule requires electric utilities to provide a description of a securities issuance “at least five business days, as defined in WAC 480-07-120 (Office hours), before an electric utility issues [securities]...” The applicable statute, RCW 80.08.040, allows an electric utility to supply the requisite information “any time” before issuing a security, and thus the proposed rule exceeds the Commission’s statutory authority.³ PacifiCorp proposes that the first sentence of WAC 480-100-242(1) be revised to state as follows:

(1) Before an electric utility issues stocks, stock certificates, other evidence of interest or ownership, bonds, notes or other evidences of indebtedness, or assumes any obligation or liability as guarantor, and no later than the business day on which such electric utility publicly announces the proposed issuance, such electric utility must file with the commission:

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

³ In addition, the five-day-notice provision raises possible conflicts with federal securities law. *See* Section 5, rule 502(c) of the Securities Act of 1933 (prohibiting written offers of securities and private offerings, of which notice provisions of rule might offend).

6. Moreover, proposed subsection (2) requires the utility to file with the Commission the terms of financing before issuance of the proposed security. This requirement is impractical. It is often impossible for utilities to provide the information requested until the day of issuance. In addition, the provisions of subsection (7) of the proposed rule require a utility to file the final terms and conditions of the transaction within 60 days after issuance of the securities. This would seem to call for the same information as in proposed subsection (2) requiring submission of the terms of the financing before issuance. There is no apparent need for the subsection (2) requirement when the same information is proposed to be filed within 60 days of the issuance under proposed subsection (7).

7. There has been no explanation provided in Docket No. A-021178 as to why the 5-day-prior-to-issuance requirement, or the proposed requirement to disclose financing terms prior to issuance, are necessary in order for the Commission to achieve its apparent objectives in this proceeding.

WAC 480-100-244

8. PacifiCorp continues to object to the inclusion of transactions between a “subsidiary of an electric utility” and other subsidiaries or affiliates. This wording would include cross-organizational transactions among a regulated utility’s affiliates, even when the regulated utility is not involved in the transaction. This is neither necessary or appropriate, and seems to go beyond the Commission’s expressed concerns when Docket No. A-021178 was commenced.

9. The scope of the proposed rule, as currently defined, impermissibly infringes on PacifiCorp’s management prerogatives.⁴ The attempt to regulate PacifiCorp’s multistate cash

⁴ See, e.g., *Pub. Serv. Co v. Pub. Util. Comm’n*, 653 P.2d 1117, 1123 (Colo. 1982) (commissions may not interfere with regulated utility’s management prerogatives).

management activities and its subsidiaries would offend Title 80 of the RCW⁵ and implicate the Commerce Clause of the U.S. Constitution.⁶

WAC 480-100-264

10. The affiliated interest and subsidiary transactions report requirement of this proposed rule requires detailed reporting of all covered transactions exceeding one hundred thousand dollars. This rule should be modified to establish a materiality threshold for covered transactions. PacifiCorp requests that the rule be modified to only cover total transactions with an affiliated interest or a subsidiary equal to or in excess of 2% of the utility's common shareholders equity, which is the same standard as applied in WAC 480-100-244(1)(a).

WAC 480-100-275

11. This provision requires the filing of Washington-only results of operations each quarter. PacifiCorp appreciates the incorporation of its suggested revision to extend the deadline for filing the operations report from 45 days to 60 days.

⁵ RCW 80.01.040 (general powers and duties of commission) empowers the Commission to regulate in the public interest, *as provided by the public service laws*, the rates, services, facilities, and practices of all persons engaging *within this state* in the business of supplying utility service. RCW 80.01.040(3).

⁶ The Commerce Clause grants Congress the power to regulate interstate commerce. *FERC v. Mississippi*, 456 U.S. 742, 102 S. Ct. 2126 (1982). The courts have long recognized that the commerce clause correspondingly imposes limits on the powers of the states to regulate interstate commerce. *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 104 S. Ct. 2237 (1984). That principle, commonly referred to as the dormant or negative commerce clause, “grew out of the notion that the Constitution implicitly established a national free market” from which private trade would be free from state interference. *Wyoming v. Oklahoma*, 502 U.S. 437, 469, 112 S. Ct. 789 (1992). Although incidental burdens on interstate commerce are allowable when the state’s interest is of legitimate local concern, the state violates the commerce clause when “the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844 (1970) (setting out “undue burden” test).

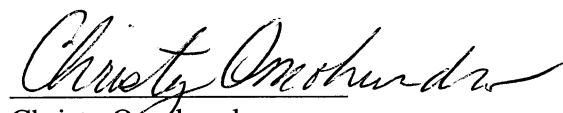
12. PacifiCorp customarily prepares results of operations on an individual state basis twice per year, consistent with requirements in its other jurisdictions. Requiring a quarterly report on a Washington-only basis would impose the burden of the extensive inter-jurisdictional allocation process for purposes of only one report, for Washington. PacifiCorp requests that the rule be amended to allow multi-jurisdictional utilities to report on a Total Company basis so long as no less than semi-annually the results are reported on a Washington-only basis. Such a revision would assure that a Washington-only report would be filed twice per year, but would allow the “off-quarters” to be satisfied with Total Company results. PacifiCorp submits that this proposed modification to the proposed rule would not impair the availability of the information reasonably necessary for the Commission and its Staff to perform their oversight of utility financial performance.

CONCLUSION

13. PacifiCorp appreciates the opportunity to comment on the proposed rules. PacifiCorp acknowledges the efforts taken by the Commission and its Staff to provide several opportunities to participate in the development of these rules, and we further acknowledge the extent to which some of our previous suggestions in Docket No. A-021178 have been included in the proposed rules. PacifiCorp intends to continue to actively participate in this rulemaking proceeding, which may include participation in the October 13, 2004 public hearings at the Commission’s offices in Olympia.

RESPECTFULLY SUBMITTED this 22nd day of September, 2004.

PacifiCorp



Christy Omohundro
Vice President, Regulation