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January 19, 2005

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 dated January 19, 2005

Dear Ms. Washburn:

In response to the Washington Utilities and Transportation Commission's (the "Commission") December 23, 2004 Supplemental Notice of Proposed Rulemaking (supplemental CR-102) in the above docket, PacifiCorp submits the following comments with respect to the revised sections in WAC 480-100 (Electric Companies).

Sincerely,

Christy Omohundro

Christy Omohundro
Vice President, Regulation

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

1. In response to the Commission's December 23, 2004 Supplemental Notice of Proposed Rulemaking (Supplemental CR-102) in the above docket, PacifiCorp submits the following comments with respect to the revised sections in WAC 480-100 (Electric Companies).

COMMENTS

Requirements Based on Corporate Credit/Issuer Rating

2. The significant change in the Commission's Supplemental CR-102 is the introduction of corporate credit/issuer rating as the basis for distinguishing among utilities for purposes of reporting requirements for (1) new securities issuances (480-100-242) and (2) transferring cash or assuming obligations (480-100-244). The stated purpose of this distinction is to "permit the Commission to focus on those companies most likely to experience financial difficulties and at the same time, [to] reduce the requirements for those companies least likely to experience financial difficulties." *Supplemental CR-102 at 1.* The Supplemental CR-102 proposes to distinguish between utilities "rated investment grade" and utilities "not rated investment grade." *Proposed WAC 480-100-242.*

3. In the case of electric and gas utilities, RCW 80.08.047 probably gives the Commission the authority to make the type of distinction it is considering in the rulemaking. The language refers to application to an "electrical or natural gas company," which allows the Commission

to make distinctions on a company by company basis rather than on an issuance by issuance basis. The statute also refers to a "class of electrical or natural gas company," which presumably allows the Commission to group companies by a particular characteristic, such as investment grade versus non-investment grade. (It should be noted that the statute allows this distinction to be made only in the case of electric and gas companies, which would include PacifiCorp. Whether or not, as a matter of law, the Commission has the statutory authority to make that distinction in the case of a telecommunications company, however, is not clear, and is beyond the scope of these comments, and presumably will be addressed by the affected telecommunications providers.)

4. On the issue of distinguishing on the basis of credit rating (investment grade versus non-investment grade), it is worth noting that statutes similar to RCW 80.08.047 are in place in Utah *(Section 54-4-31(4) of the Utah Code)* and Wyoming *(W.S. 37-6-103(b))*. PacifiCorp has used these statutes to obtain exemptions with respect to certain securities approvals. Under the exemptions granted to PacifiCorp in those states, one of the requirements for continuing the exemption is that PacifiCorp maintain an investment grade rating. Thus there is precedent for using credit rating as the basis for distinguishing among utilities, and for granting exemptions under the statute on that basis.

5. Under the revisions proposed in Supplemental CR-102, the distinction between "rated investment grade" and "not rated investment grade" affects the timing with respect to required notification to the Commission of securities issuances. Specifically, utilities that are "rated investment grade" may provide notification up to five (5) days *after* issuance, while utilities "not rated investment grade" must do so five days *before* issuance. *Proposed WAC 480-100-242*. Similarly, utilities "not rated investment grade" are subject to the

reporting requirements under proposed WAC 480-100-244 with respect to transferring cash or assuming obligations. In PacifiCorp's view, an exemption grounded in RCW 80.08.047 should be used to exempt investment grade utilities from *any* notice requirement with respect to securities issuances, rather than merely affect the timing of such notification. That would bring PacifiCorp's requirements in Washington in line with the requirements faced by PacifiCorp in its other jurisdictions, where investment grade status provides more meaningful relief from reporting requirements.

6. As a practical matter, PacifiCorp's securities are comfortably in the investment grade category, and thus PacifiCorp would not be subject to the five day advance notice requirement proposed under the Supplemental CR-102. Similarly, PacifiCorp would be exempted from the requirements imposed under proposed WAC 480-100-244 with respect to transferring cash or assuming obligations. These are provisions which provoked considerable debate in previous comments filed with the Commission with respect to earlier draft proposals. As expressed in PacifiCorp's earlier comments, substantial legal issues are raised by the Commission's proposed imposition of (1) a five-day advance notice requirement with respect to securities issuances, and (2) a five-day advance reporting requirement with respect to cash transfers among utilities, affiliates and subsidiaries. Simply narrowing the scope of the rules to exclude utilities "rated investment grade" does not make the proposals any less subject to legal challenge; it simply reduces the number of utilities with sufficient interest to mount such a challenge.

7. For purposes of the record, and in response to the direction in the Notice that prior comments not be incorporated by reference, PacifiCorp will repeat its previously stated points with respect to the above referenced provisions.

WAC 480-100-242

8. The proposed rule exceeds the authority given to the Commission in the relevant statute, RCW 80.08.040. The statute allows an electric utility to supply the requisite information any time "before such issuance." The proposed rule, on the other hand, 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]." Specifying "five days" is not simply a matter of clarifying what "before" means; it goes beyond the plain meaning of the statute and specifies a deadline well in advance of the time of issuance. As discussed below, doing so has practical consequences, and the adverse impact of these consequences would seem to outweigh any possible benefit (particularly in the absence of any clear articulation of that benefit.) 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:

WAC 480-100-244

9. Even with the scope of the rule limited to a utility "not rated investment grade," it is objectionable to include 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.

10. Moreover, the scope of the proposed rule, as currently defined, impermissibly infringes on a multi-state utility's management prerogatives.[1] The attempt to regulate a multi-state utility's cash management activities and its subsidiaries goes beyond the authority granted the Commission in Title 80 of the RCW[2] and potentially runs afoul of the Commerce Clause of the U.S. Constitution.[3] Limiting the scope of the provision to utilities "not rated investment grade" does nothing to address these legal infirmities.

WAC 480-100-023

11. In addition to PacifiCorp's earlier comments with respect to proposed WAC 480-100-242 and -244, PacifiCorp continues to object to the definition of "*control*" in proposed WAC 480-100-023, which includes references to an "*indirect*" ability to control management. This definition is 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

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[1] *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).

[2] 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).

[3] 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).

to demonstrate that it does not have control (under the definition of "subsidiary" in proposed 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 domestic or foreign corporation."[4] 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-subsidiary model.

12. In supplemental comments by PacifiCorp's counsel filed on October 15, 2004, it was noted that the source of the definition used in proposed WAC 480-100-023 is a rule of the Securities and Exchange Commission, Rule 1-02(g), "Definition of terms used in Regulation S-X," as found at 17 CFR Part 210. (Regulation S-X pertains to the requirements for financial statements filed pursuant to the Securities Act of 1933, the Securities Exchange Act of 1934, and the Public Utility Holding Company Act of 1935.) This is substantially the same definition for "control" as defined in Rule 12b-2(f) under the Securities Exchange Act of 1934.[5] At the Commission's open meeting of October 13, 2004, it was suggested that the

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[4] RCW 23B.19.020(17) (Emphasis added).

[5] "Control" is defined as "the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 CFR Part 240 at Rule 12b-2, Definitions.

precedent of the SEC under its rules could be relied upon as a basis for interpreting the Commission's proposed rule (in the event the current proposed WAC 480-100-023 is adopted in its current form). Upon researching case precedent interpreting these SEC rules, PacifiCorp's concerns regarding the vagueness and unenforceability of this definition remain. According to "*Disclosure and Remedies Under the Securities Laws*," Jacobs, at Volume 5B, § 11.4 (2003), this definition of "control" is "not abundantly helpful." According to this treatise:

> The authorities suggest that either the power to control (whether or not exercised) or actual control (although asserted at the sufferance of those with the unexercised power) is sufficient. In a large corporation, control over a variety of work functions constitutes substantial control over the entire corporation. It follows that under certain facts more than one person could control a corporation. In general, the person who selects the directors controls the corporation, since the directors and the officers they appoint make policy decisions. While a majority stockholder would almost always be in control, holding 51 percent of the voting stock is not a prerequisite. Indeed, a person owning no stock could be in control under the proper circumstances. But a sizable stock of a public company is not necessarily a controlling position. This is so, in part, because actual control sometimes depends on such variables as voting rights, veto rights, or requirements for supermajority votes.
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> . . . .
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> The Ninth Circuit, perhaps with all the foregoing in mind, opined that "control" is an elusive notion for which no clear-cut rule or standard can be devised.[6]

Id. at pages 11-45 – 11-48; 11-54. It is apparent from a review of this treatise that there is a substantial body of cases interpreting the definitions of "control" in the various SEC rules. It is respectfully submitted that incorporating this "elusive notion" of "control" in the Commission's rules may unnecessarily complicate their implementation and enforcement.

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[6] Citing *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433 (9th Cir. 1987); *Kersh V. General Council of Assemblies of God*, 804 F.2d 546 (9th Cir. 1986).

Consequences of Five-Day Advance Notice Requirement

13. The Commission's Notice also invited comment on the "consequences of providing information five days in advance." *Notice at 2.* As noted in the comments of other utilities, the impact of requiring a five-day advance notice requirement may result in less attractive terms given the additional risk imposed on the underwriter associated with the delay. *See, e.g., PSE Comments of September 22, 2004 at 2.* Moreover, a five-day notice requirement would allow market participants additional time to take advantage of market opportunities presented by the issuance. In the case of equity securities, the stock could be shorted, which would place downward pressure on the price, thereby increasing the cost of the issuance and resulting in reduced proceeds for the issuer. In the case of debt issuances, the five-day advance requirement could encourage other issuers to accelerate their sales to tap into the supply of available funds, thereby leading to less advantageous pricing for the Washington utility. *See September 23, 2004 letter from Richard M. Russo at 2; September 21, 2004 letter from David J. Johnson, Jr. at 1-2.* In either case, the result is higher financing costs for the utility, and higher costs of capital to be recovered in utility rates paid by customers.

14. The effect of the revisions proposed in Supplemental CR-102 is to impose this five-day advance notice requirement only on utilities "not rated investment grade." While this may be consistent with the stated objective of the Commission to "focus on those companies most likely to experience financial difficulties" *(Supplemental CR-102)*, it also imposes additional requirements on those utilities that *already have a more difficult time accessing capital markets* than the utilities "rated investment grade." Imposing these additional requirements would likely compound the financial difficulties of those utilities "not rated investment grade." Any benefits derived by imposing these advance notice requirements – which do not

appear to have been articulated – would seem to be exceeded by the adverse consequences imposed on the utilities "not investment rated" that are seeking to access necessary capital on reasonable terms.

15. Designating portions of the filing as "confidential" does not provide an adequate remedy to this concern. Given the proscription on extensive use of the confidential designation under the Commission's rules, only the specific terms of the transaction could be protected from disclosure under the "confidential" designation. (*See* WAC 480-07-160(2), which limits the scope to "valuable commercial information.") The act of the filing of the application itself, and the nature of the authorization requested, presumably would not be exempted from disclosure. It is the request for authorization itself that will lead to the adverse consequences described above, and designating the "commercially sensitive" portions as confidential would not avoid those consequences.

Implications of Disclosure to the Commission

16. The Commission's Notice also raised the issue of whether "disclosure to the Commission require[s] disclosure to others." *Notice at 2*. Under the federal securities laws, disclosure to the Commission probably does not require disclosure to others, pursuant to Regulation F-D ("fair disclosure") of the Securities and Exchange Commission (SEC). *See 17 CFR Part 243*. Under that regulation, so long as the specific information is filed with confidentiality protections, disclosure to the Commission would not trigger a violation of securities laws by failing to disclose at the same time to the SEC or to the financial community.[7]

[7] *See* 17 CFR §243.100(b)(2)(ii).

CONCLUSION

17. PacifiCorp appreciates the opportunity to comment on the proposed rules set forth in Supplemental CR-102. PacifiCorp intends to continue to participate in this rulemaking proceeding, which may include participation in the February 1, 2005 public hearings at the Commission's offices in Olympia.

RESPECTFULLY SUBMITTED this 19th day of January 2005.

PacifiCorp

Christy Omohundro
Vice President, Regulation