Possible Rules to Require Reporting of Transactions Between Regulated Companies and Their Subsidiaries	Docket No. A-021178 Comments of PacifiCorp

In response to the Commission's Notice dated October 9, 2002 and in follow-up to the workshop conducted by the Commission on November 5, 2002, PacifiCorp doing business as Pacific Power & Light Company ("PacifiCorp" or "the Company") submits the following comments regarding possible rules to require reporting of transactions between regulated companies and their subsidiaries.

Scope of Comments

The Commission's October 9, 2002 Notice identifies the following possible rule changes to implement reporting requirements for transactions between regulated companies and their subsidiaries:

(1) Require prefiling of certain transactions with subsidiaries, including:

a. Management or service contracts;
b. Maintenance, operation and construction contracts;
c. Construction, maintenance, or use of telecommunications line or service contracts; and
d. Issuance of evidence of ownership or indebtedness or creation of liens on regulated company property.

(2) Require regulated companies to file periodic reports detailing transactions that have already occurred with subsidiaries.

(3) Require regulated companies to immediately post-file significant transactions/arrangements with subsidiaries.

PacifiCorp's comments will be directed at these particular options, following a background discussion to place these comments in context.

Background

In an earlier, related proceeding regarding possible legislation to amend the affiliated interest statute (Docket No. A-020683), PacifiCorp submitted comments outlining our view of the affiliated interest statute and possible improvements to the regulatory processes under that statute. Those comments, which are incorporated by reference, include the following points:

- Subsidiaries of utilities are not defined as affiliated interests under RCW 80.16.010, unless they are included by virtue of "a management or service contract".[1]
- The longstanding practice in Washington has been *not* to treat utility subsidiaries as affiliated interests.
- The Commission has traditionally relied upon its general ratemaking authority to review transactions between a utility and its subsidiaries, thereby achieving the same level of oversight for these transactions that Chapter 80.16 provides with respect to transactions between a utility and its affiliates.
- PacifiCorp understands that the Commission may consider its general ratemaking authority to be inadequate in that the Commission may not be provided with timely information regarding subsidiary transactions in the absence of some sort of filing by the utility.
- The Commission may be able to gather the same sort of information with respect to transactions between a utility and its subsidiaries as it receives under RCW 80.16.020 with respect to transactions between a utility and its affiliate by adopting a rule requiring each utility to file a "subsidiary transaction report" each year identifying all the transactions between a utility and its subsidiaries. Such a filing would seem to provide the Commission

[1] Moreover, if a utility subsidiary becomes an affiliated interest by virtue of "a management or service contract," the affiliated interest requirements apply only to *subsequent* contracts or arrangements between the utility and that particular subsidiary. The initial management or service contract that creates the affiliated interest relationship does *not* trigger the affiliated interest provisions.

with the necessary information to enable it to monitor transactions between a utility and its subsidiaries, without invoking the formal (and burdensome) requirements of the affiliated interest filings under Chapter 80.16 RCW.

Consistent with these earlier comments, PacifiCorp would support a Commission rule along the lines of item (2) above—requiring regulated companies to file periodic reports detailing transactions that have already occurred with subsidiaries. By proceeding in this manner, the Commission would gather the information necessary to enable it to exercise its general ratemaking authority over utility – subsidiary transactions in general rate proceedings, without unnecessarily "stretching" its statutory authority under Chapter 80.16 RCW to include such transactions. In contrast, the measures proposed in items (1) and (3) above would be far more burdensome, and do not seem to be warranted given the oversight available to the Commission in ratemaking proceedings. Moreover, as discussed further below, it is not clear that the statutory authority exists for the Commission to impose the requirements suggested by (1) and (3) above.

Prefiling of Certain Transactions

In PacifiCorp's view, a basis has not been shown for imposing a prefiling requirement with respect to transactions between a utility and its subsidiary. Moreover, except with respect to transactions that can reasonably be characterized as "a management or service contract," Chapter 80.16 RCW does not provide authority for a prefiling requirement to be imposed with respect to transactions between a utility and its subsidiary.[2]

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[2] Imposing a burdensome pre-filing or post-filing requirement would suggest that the Commission has the same authority with respect to transactions between a utility and its subsidiaries as is authorized for transactions between a utility and an affiliate. But the legislature, in enacting Chapter 80.16 RCW, recognized a distinction between subsidiaries and affiliates, and that distinction must be respected. Neither an administrative agency nor a court is permitted to read into a statute what the legislature failed to provide, however unintentional the omission may have been. *Dept. of Labor & Industries v. Cook*, 44 Wn.2d 671, 677 (1944). Indeed, "[I]t is entirely possible that the

As far as the definition of "a management or service contract," PacifiCorp generally supports the approach proposed by Avista Utilities in its October 30, 2002 comments. Those comments, as we understand them, would very narrowly define a "management or service contract" to exclude most routine transactions between a utility and its subsidiaries. Under the Avista Utilities proposal, "the general corporate support and personnel services that are necessary for the day-to-day operation of the corporation"[3] would be excluded from the prefiling requirement, and would be included as part of the "Subsidiary Transaction Report" to be filed annually.

In the case of a "management or service contract" between a utility and a subsidiary, the Commission should define this category very narrowly, such as through a narrow definition of "management or service" or a very high dollar threshold triggering a filing requirement. In this manner, the Commission could achieve compliance with RCW 80.16.020, without imposing burdensome filing requirements. This approach would recognize and preserve the Commission's longstanding practice of effecting oversight over such transactions primarily through general rate proceedings.

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omission of any provision … was intentional on the part of the legislature, and the presumption, of course, is that it was intentional." *Id.* Nor can the Commission infer such authority over subsidiaries by reference to its general powers conferred under other areas of the Public Service Laws. When construing a statute, specific statutory language prevails over general concepts. *State v. Murphy*, 98 Wn. App. 42, 988 P.2d 1018 (1999). Thus, the specific language of Chapter 80.16 RCW, as it pertains to oversight of between a utility and related entities, must be given priority over the general concepts under Chapters 80.01 and 80.04 RCW. If a statute does not specifically or by necessary implication authorize the actions of the administrative agency, those actions are unlawful. *WITA v. TRACER*, 75 Wn. App. 356 (1994).

[3] Avista Utilities includes in this category agreements for the following types of services: payroll, taxes, shareholder services, insurance, financial reporting, information technology support services, financial planning and analysis, corporate accounting, corporate security, corporate treasury, human resources (compensation, benefits, employment policies), contract and intellectual property support services, employee records, regulatory affairs, lobbying, legal and pension management, marketing and engineering. (October 30, 2002 comments of Avista Utilities, p. 2)

To address the Commission's legitimate concerns that such reliance on general rate proceedings alone may be an inadequate process, utilities should be provided an option to pre-file contracts with the Commission. Once a prefiling occurred, the Commission and its Staff would have an opportunity to conduct a preliminary review of the transaction. In the event that review resulted in identification of an issue or concern, the utility could be notified, and would have an opportunity to respond accordingly—either proceed with the transaction (notwithstanding that an issue had been identified, and in recognition of the possible risks in a rate proceeding), modify the transaction to address the issue, or abandon the transaction. In the event no issue or concern was identified, the utility would also have some comfort that some threshold review had been satisfied. Whether or not any issue or concern had been identified, the Commission and its Staff would not be precluded from conducting its usual full review in a general rate proceeding.

By way of example of a process that could be replicated here, PacifiCorp directs the Commission's attention to the Seventh Supplemental Order in Cause No. U-85-87, a decision involving Puget Sound Power & Light Company's Energy Cost Adjustment Clause, or ECAC, mechanism. In that decision, the Commission adopted a stipulation between Puget and Commission Staff that modified the procedure followed by the Commission for reviewing contracts involving resource acquisitions by Puget. The procedure required by Ordering Paragraph No. 5 is as follows:

> The Company shall file with the Commission all interutility power contracts and contracts related to facilities of one megawatt or more with it enters into pursuant to Chapter 480-107 WAC or PURPA. The Commission through its staff shall conduct a preliminary review with respect to such contracts. If on the basis of such preliminary review, there is any issue with respect to a particular contract, the company shall be notified by letter of the Commission's secretary within thirty (30) days of the date such contract was filed with the Commission. The presence or absence of any such notification to the company as to a particular contract shall not be construed or interpreted as a determination either of the prudence of such contract or of the rate treatment to be accorded such contract in a subsequent adjudicative proceeding.

The Commission could provide a similar process with respect to any contract between a utility and a subsidiary. This process would be optional for all utility-subsidiary transactions not involving a "management or service contract." A utility wanting to avail itself of a preliminary review could take advantage of a prefiling process, based on its evaluation of whatever strategic advantage such a preliminary review provides in a subsequent rate proceeding. Another utility could conclude that such a preliminary review affords little benefit, and elect to proceed without a prefiling. In either case, however, the transaction would be included in the Annual Subsidiary Transaction Report, discussed in the next section. Thus, even where a utility chooses not to prefile, the Commission would periodically be provided information sufficient to enable its oversight of utility-subsidiary transactions.

Filing of Periodic Reports

PacifiCorp supports the proposal set forth in Avista Utilities' October 30, 2002 comments that "all agreements transacted between a regulated company and its subsidiaries in the previous year be itemized in an Annual Subsidiary Transaction Report." (Avista Comments, p. 3) As noted by Avista Utilities, this process would result in *all* agreements being disclosed to the Commission periodically, with an opportunity for Staff to conduct an additional investigation.

Post-Filing of Significant Transactions/Arrangements

For the reasons stated in *Prefiling of Certain Transactions* above, PacifiCorp would oppose any rule imposing a post-filing requirement for significant transactions between a utility and its subsidiary. As discussed in the preceding section, the information that could be obtained from a post-filing requirement should be included in the Annual Subsidiary Transaction Report. Moreover, there does not appear to be the statutory basis for imposing such a requirement.[4]

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[4] As noted in *Prefiling of Certain Transactions* above, a statutory basis arguably exists in the case of a contract that can reasonably be described as a "management or service" contract. In

Conclusion

PacifiCorp appreciates the opportunity to submit these comments, and for the attention directed to these issues, as evidenced by the active interest by the Commission and its Staff during the Commission's November 5 workshop on these issues. We look forward to continued participation in this proceeding, and in the development of specific rules to

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the case of a post-filing requirement, however, no such authority exists, even for a "management or service" contract.

implement these suggested changes. If the Commission or its Staff has any questions with respect to these comments, please direct them to the undersigned at (503) 813-6092 or to Jeff Payne at (503) 813-6032.

Respectfully submitted this 27th day of November, 2002.

PACIFICORP d/b/a PACIFIC POWER & LIGHT COMPANY

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