

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Application of)
PACIFICORP and PACIFICORP,)
WASHINGTON, INC. for an Order)
Approving: (1) the Transfer of Distribution)
Property from PacifiCorp to an Affiliate,)
PacifiCorp Washington, Inc.,)
(2) the Transfer by PacifiCorp of Certain)
Utility Property to an Affiliate, the Service)
Company, and (3) the Proposed Accounting)
Treatment for Regulatory Assets and)
Liabilities, and an Order Granting an)
Exemption under RCW 80.08.047 for the)
Issuance or Assumption of Securities and)
Encumbrance of Assets by PacifiCorp,)
Washington, Inc. and/or PacifiCorp)
.....)

DOCKET NO. UE-001878

**MOTION TO DISMISS OF
COMMISSION STAFF**

Pursuant to WAC 480-09-426(1), the Staff of the Washington Utilities and Transportation Commission moves to dismiss the Joint Application of PacifiCorp and PacifiCorp, Washington, Inc. (Applicants) for approval of a corporate restructuring. The corporate restructuring erodes PacifiCorp’s control, and the Commission’s jurisdiction, over vital utility assets used to ensure essential and reliable service that PacifiCorp provides to retail customers under a statutory obligation to serve. The restructuring will also subordinate the benefits of that service to inconclusive and potentially unwise federal efforts to promote competition in wholesale markets.

Therefore, the Joint Application is not consistent with the public interest and should be dismissed.

I. THE CORPORATE RESTRUCTURING DESCRIBED

Staff’s motion is based upon the Joint Application and all prefiled direct evidence of the Applicants. Those pleadings, taken in the light most favorable to the Applicants, establish the following uncontroverted facts relevant to Staff’s motion.

PacifiCorp is currently a vertically integrated, public service company providing bundled, retail electric service to customers in Washington. It also provides retail electric service in Oregon, Utah, California, Idaho and Wyoming. Joint Application at 6: 5-8.

PacifiCorp's cost to provide retail service in Washington -- including the investment and expenses PacifiCorp incurs in generation, transmission and distribution assets -- is subject to the full jurisdiction of the Commission. The Commission also determines the prices, terms and conditions of service rendered by PacifiCorp in making bundled sales of electricity to retail customers. This oversight ensures that PacifiCorp satisfies its statutory obligations to provide its Washington customers with reliable electric service at rates that are fair, just, reasonable and sufficient. RCW 80.28.110. RCW 80.28.010(1) and (2).

On December 1, 2000, pursuant to chapters 80.12 and 80.08 RCW, Applicants requested Commission approval to implement a radical and complete restructuring of PacifiCorp into six separate electric distribution companies (one for each state in which PacifiCorp now operates), a generation company, and a service company.¹ Applicants submitted with the Joint Application prefiled direct testimony and exhibits. Additional prefiled testimony and exhibits were submitted on February 6, 2001, April 16, 2001, May 17, 2001 and June 29, 2001.

Attachment 1 diagrams the proposed restructuring. PacifiCorp will change its name to "PacifiCorp Generation Company" (PacifiCorp Generation), and will retain ownership and operation of PacifiCorp's mining and generation assets. Joint Application at 2: 3-8. PacifiCorp Generation will also retain ownership of PacifiCorp's transmission system assets, although it

¹ The Joint Application to restructure PacifiCorp was filed shortly after other significant applications concerning the ownership, governance and operation of PacifiCorp. On October 14, 1999, the Commission approved the application of Scottish Power PLC to acquire PacifiCorp. *In the Matter of the Application of PacifiCorp and Scottish Power PLC*, Fifth Suppl. Order Accepting Stipulations, Approving Transaction, and Granting Securities Exemption, Docket No. UE-981627 (1999). On August 9, 2000, the Commission established a five-year rate plan for PacifiCorp through December 31, 2005. *WUTC v. PacifiCorp*, Third Suppl. Order Approving and Adopting

intends to transfer control and operation of these assets to a regional transmission organization, RTO West. *Id.* PacifiCorp Generation will sell electricity and transmission at wholesale. It will not be subject to the jurisdiction of this Commission. It will be subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC).² Exhibit T- ____ (CAM-T) at 11 (Direct Testimony of C. Alex Miller, December 2000).

PacifiCorp proposes to transfer to six separate electric distribution companies only the distribution system assets located in each state and used to serve the PacifiCorp's retail electric customers in each state. Joint Application at 6: 14 through 7: 20. The new company that will provide retail electric service in Washington will be named "PacifiCorp, Washington, Inc." (PacifiCorp Washington). Joint Application, Exhibit 2. The Commission will have jurisdiction over PacifiCorp Washington. Joint Application at 3: 3-5. However, that jurisdiction will no longer include setting prices, terms and conditions of transmission service obtained by PacifiCorp Washington to provide bundled retail service in Washington. Those decisions will be made by FERC.

PacifiCorp proposes to transfer to a service company the assets used to perform centralized functions such as call center operations, billing/customer service activities, meter reading and installation, load and resource planning, and corporate support services. Joint Application at 7: 21 through 8: 17; Exhibit 3. The service company will be renamed "PacifiCorp". It may contract with PacifiCorp Washington and the five other state distribution companies to perform any of these centralized functions. *Id.* The service company will not be under the jurisdiction of the Commission. It will be within the jurisdiction of the Securities and

Settlement Agreements; Rejecting Tariff Sheets; Authorizing and Requiring Compliance Filing, Docket No. UE-991832 (2000).

² 16 U.S.C. § 824(b).

Exchange Commission. Exhibit T- ____ (CAM-T) at 11 (Direct Testimony of C. Alex Miller, December 2000).

Under the proposed restructuring, PacifiCorp Washington will not own transmission. It will purchase transmission service, and all of its power supplies, from PacifiCorp Generation under a five-year power purchase agreement. Joint Application at 3; Exhibit ____ (GND-3), Section 3 (Exhibit to Supplemental Direct Testimony of Gregory N. Duvall, June 2001). PacifiCorp Washington must also assign to PacifiCorp Generation all of its interests in transmission contracts under which the current merchant function of PacifiCorp is entitled to receive transmission services. *Id.* at Section 2.2 This purchased power agreement also requires PacifiCorp Washington to purchase load balancing services from PacifiCorp Generation. *Id.* at Section 9.

After the five-year term, PacifiCorp Washington will meet its power supply requirements through additional purchased power agreements with PacifiCorp Generation or with third-party suppliers. Joint Application at 3; Exhibit ____ (GND-6) (Exhibit to Supplemental Direct Testimony of Gregory N. Duvall, June 2000). It will be assigned from PacifiCorp Generation the latter's interest in transmission contracts under which the merchant function of today's PacifiCorp was entitled to receive transmission service, and any replacement transmission contracts. Exhibit ____ (GND-3), Section 2.2 (Exhibit to Supplemental Direct Testimony of Gregory N. Duvall, June 2000). Ownership of the transmission assets will, however, remain with PacifiCorp Generation. Jurisdiction will remain with FERC to determine the prices, terms and conditions of transmission service obtained by PacifiCorp Washington.

II. ARGUMENT

A. The Commission Should Deny the Joint Application if the Pleadings and Prefiled Evidence Fail to Demonstrate that the Proposed Restructuring is Consistent with the Public Interest

The Staff motion to dismiss is submitted under WAC 480-09-426(1):

A party may move to dismiss an opposing party's pleading, including the documents initiating the case, if the pleadings fail to state a claim on which the commission may grant relief.

In considering a motion to dismiss, the Commission is guided by the standards applicable to a motion made under CR 12(b)(6), 12(c), or 50, as applicable, of the civil rules for superior court.

Id.

The Commission recently applied WAC 480-09-426(1) to dismiss a request by Puget Sound Energy (PSE) for emergency rate relief, where the application and prefiled direct evidence taken in the light most favorable to PSE, failed to satisfy that company's burden to come forward with sufficient evidence to support the relief it requested. *Washington Utilities and Transportation Commission v. Puget Sound Energy, Inc.*, Sixth Suppl. Order Granting Motions; Dismissing Dockets, Docket Nos. UE-011163 and 011170 (October 4, 2001), *reconsideration denied*, Seventh Suppl. Order Denying Reconsideration or Rehearing (October 24, 2001).

A similar approach can be taken in an application for Commission approval under Chapter 80.12 RCW. Commission rules applicable to a transfer of property application state:

If, upon examination of any application and accompanying exhibits, or upon a hearing concerning the same, the commission finds that the proposed transaction is not consistent with the public interest, it *shall deny* the application. (Emphasis added.)

WAC 480-143-170.

Staff's motion applies these principles and procedures to the corporate restructuring proposed by the Applicants. Applicants alone bear the burden to prove that the proposed restructuring is consistent with the public interest. As discussed below, the Joint Application and all prefiled evidence, taken in the light most favorable to the Applicants, fail to satisfy that burden. The Joint Application, therefore, should be dismissed.

B. The Proposed Restructuring Harms the Public Interest and Should be Dismissed

1. Applicants Have the Burden to Demonstrate that the Proposed Restructuring Will Not Harm the Public Interest by Weakening PacifiCorp's Ability to Provide Reliable, Bundled Electric Service Under Its Statutory Obligation to Serve

The Joint Application is submitted under RCW 80.12.020:

No public service company shall sell, lease, assign or otherwise dispose of the whole or any part of its franchise, 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 . . .

In applying this statute and the public interest standard which is fundamental to the Commission's review, an applicant is not required to show that its customers, or the public generally, will be made better off if a transaction is approved. An applicant's initial burden is satisfied if it can at least demonstrate no harm to the public interest. *In the Matter of the Application of PacifiCorp and Scottish Power PLC*, Third Suppl. Order on Prehearing Conference at 2, Docket No. UE-981627 (April 2, 1999) (acquisition of control of PacifiCorp by Scottish Power PLC).

The Commission has considered the following factors in judging whether a transaction meets the "no harm" public interest test:

1. The transaction should not harm customers by causing rates or risks to increase, or by causing service quality and reliability to decline, compared to with what could reasonably be

expected to have occurred in the absence of the transaction.

2. The transaction, with conditions required for its approval, should strike a balance between the interests of customers, shareholders, and the broader public that is fair and that preserves affordable, efficient, reliable and available service.
3. The transaction, with conditions required for its approval, should not distort or impair the development of competitive markets where such markets can effectively deliver affordable, efficient, reliable and available service.
4. The jurisdictional effect of the transaction should be consistent with the Commission's role and responsibility to protect the interests of Washington customers.

In the Matter of the Application of Puget Sound Power & Light Company and Washington Natural Gas Company, Fourteenth Suppl. Order Accepting Stipulation; Approving Merger at 19-20, Docket No. UE-960195 (February 5, 1997) (merger of Puget Sound Power & Light Company and Washington Natural Gas Company).

These factors are grounded not only in the Commission's statutory obligation to regulate in the public interest the rates, services, facilities and practices of all electrical companies subject to its jurisdiction. RCW 80.01.040(3). They also preserve enforcement of the utility's statutory obligation to serve:

Every . . . electrical company . . . engaged in the sale and distribution of electricity . . . shall, upon reasonable notice, furnish to all persons and corporations who may apply therefore and be reasonably entitled thereto, suitable facilities for furnishing all available . . . electricity . . . as demanded . . .

RCW 80.28.110. And, they are echoed in the utility's other statutory duties to: (1) charge rates that are just, fair, reasonable and sufficient; and (2) supply service and facilities that are safe, adequate and efficient, and in all respects just and reasonable. RCW 80.28.010(1) and (2).

Thus, while the Applicants in this case are required to show that the corporate restructuring will result in no harm to the public interest, that burden is substantial. They must demonstrate that the corporate restructuring, which changes radically and fundamentally PacifiCorp's control and Commission jurisdiction over vital utility assets, will ensure that Washington consumers continue to receive essential and reliable retail, bundled electric service from a utility that has a statutory obligation to provide such service. The next section demonstrates that that burden has not been met.

2. The Proposed Restructuring Threatens Service Reliability by Weakening Utility Control and Commission Jurisdiction Over Generation and Transmission

Control over generation and transmission is fundamental to the ability of a utility to provide essential and reliable, bundled electric service to retail customers in Washington. The utility must maintain control over transmission because transmission is essential to move electricity to load centers in Washington State from generation facilities located in other states. The utility must maintain control over generation because it must be able to decide whether to satisfy its statutory obligation to serve with market purchases, generation it builds, or a combination of those power sources. Commission jurisdiction over both generation and transmission also is critical because it allows regular and ongoing review of the acquisition, operation and disposition of those vitally important utility assets.

The Commission recently commented that preservation of utility control, under state jurisdiction, of transmission especially is fundamental to protecting bundled, retail electric service that utilities in Washington provide in accordance with their statutory obligation to serve. In a letter to Senators Patty Murray and Maria Cantwell, dated August 30, 2001, the Commission commented on a "White Paper" that addressed a number of legislative proposals including ones

that would: (1) extend FERC jurisdiction to transmission used for bundled, retail sales; and (2) grant FERC authority to order utilities to join regional transmission organizations. Attachment 2. The Commission opposed strongly both of these proposals because they would shift control over transmission capacity necessary to serve retail customers from utilities and their state regulators to the federal government:

Transmission is a critical component of the utility's retail service. How for example, could Washington utilities provide reliable power to retail customers in Washington from the eastern Montana coal plants (Colstrip) if they did not control the necessary transmission to move that power from eastern Montana to their Washington load centers? Control of transmission necessary to serve retail load is a key issue for both investor-owned and public utilities. Reliable service to retail customers is the reason the transmission system was built, and the reason retail customers have been paying for it in their rates all along. FERC jurisdiction over these critical facilities would allow FERC to require them to be made available for general commercial use, which would, at a minimum, undermine the certainty of their availability to support bundled retail service.

Attachment at 5.

The Commission also expressed concern that shifting authority from state and local agencies to FERC would not provide meaningful protection for consumers against market power abuses, or any other market dysfunction, given FERC's untimely exercise of authority to control power markets in the West over the past eighteen months. *Id.* at 3.

The corporate restructuring proposed by the Applicants in this docket, if implemented, brings to reality the very model about which the Commission expressed grave doubts in its comments to Senators Murray and Cantwell. PacifiCorp Generation retains ownership and control of all of PacifiCorp's generation and transmission assets, and provides generation and transmission services under FERC jurisdiction. As a result, PacifiCorp loses control, and the

Commission loses jurisdiction, over those very assets that are critical to satisfying PacifiCorp's statutory obligation to provide essential and dependable, bundled electric service.³

3. The Proposed Restructuring Makes the Unsubstantiated Assumption that the Electric Industry Is and Should be Effectively Competitive

The proposed restructuring assumes that the wholesale electric industry is effectively competitive, should be effectively competitive, and that the benefits of that competition will flow indefinitely under FERC's guidance to PacifiCorp's retail consumers in Washington. The Commission, however, has expressed its belief that it is a very open question whether the electric industry is, or ever can be, effectively competitive, or whether competition in the electric industry even is an appropriate public policy to pursue. Attachment at 3.

The Commission also has stated that wholesale competition in the electric industry should not be elevated in importance over dependable service to retail consumers. Shifting control over transmission capacity from utilities and their state regulators to the federal government would result in that sacrifice:

Some argue that for FERC to be able to promote a fully competitive wholesale power market, it must have jurisdiction over all transmission, regardless of whether the transmission is necessary for utilities to continue to fulfill their statutory retail service obligations. This argument effectively rejects the public purpose for which this transmission was originally built – dependable service to retail customers – and replaces it with the policy objective of competition in the wholesale power market. This argument rejects the importance of utility control (under state or local regulation) over transmission capacity to serve retail customers, and would place those retail customers in competition with all other commercial uses for transmission necessary to ensure the reliability of their service.

We do not believe this shift subordinating retail transmission to wholesale transmission is good public policy. Electricity is an essential service. That

³ An additional uncertainty exists with respect to the service company, renamed PacifiCorp. It will be regulated by the Securities and Exchange Commission. However, the future ability and authority of the SEC to engage in that oversight is unclear given the continuing debate over whether to repeal the Public Utilities Holding Company Act of 1935.

is why states have imposed service obligations on utilities. . . . Removing the control over transmission capacity necessary to serve retail customers from utilities and their state or local regulators sacrifices the known benefits of reliable service to consumers and replaces those benefits with the uncertain benefits of a competitive wholesale market.

Attachment at 5-6.

The restructuring proposed by the Applicants places in motion priorities the Commission has to date rejected. Approval of the Joint Application, therefore, subordinates to the promises of wholesale competition the Commission's ability to preserve for retail consumers the important benefits derived from PacifiCorp's generation and transmission assets.

4. If Not Dismissed, Consideration of the Joint Application Should be Delayed Until RTO West is Finalized

PacifiCorp Generation will retain ownership of all transmission assets of PacifiCorp, but it will transfer control and operation of those assets to a regional transmission organization, RTO West. PacifiCorp is not yet seeking Commission approval of the transfer to RTO West, as will be required under chapter 80.12 RCW. The details of those arrangements, and of the creation and operation of RTO West itself, are still under development. Joint Application at 2, n2.

Nevertheless, if the Commission approves the proposed restructuring, it will lose to FERC jurisdiction over PacifiCorp Generation. If that approval comes before transfer of control and operation of PacifiCorp's transmission assets to RTO West, the Commission will also lose jurisdiction to FERC to determine whether PacifiCorp should participate in RTO West.

Therefore, even if the Commission does not dismiss the Joint Application as Staff requests, it should delay its consideration of the Joint Application until the arrangements for transferring control and operation of PacifiCorp's transmission assets to RTO West have been finalized and an application for approval of those arrangements has been filed with the Commission. This will allow the Commission to assess whether PacifiCorp's participation in

RTO West is consistent with the public interest, rather than losing to FERC the ability to make that determination.

III. CONCLUSION

The corporate restructuring proposed by the Applicants is a radical and fundamental change which does not preserve company control over assets vital to essential and reliable, bundled electric service that PacifiCorp now provides under a statutorily mandated obligation to serve. The restructuring is also inconsistent with the Commission's jurisdiction to protect the interests of Washington electricity consumers.

The Joint Application, therefore, is not consistent with the public interest and should be dismissed.

DATED This 20th day of November, 2001.

Respectfully submitted,

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