

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION

In the Matter of the Joint Application of	)	
	)	
PACIFICORP and PACIFICORP,	)	DOCKET NO. UE-001878
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	)	FOURTH SUPPLEMENTAL ORDER
Certain Utility Property to an Affiliate,	)	DENYING MOTION TO DISMISS
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.	)	
.....	)	

**I. SYNOPSIS**

1       The Commission denies Staff’s Motion to Dismiss the Joint Application.

**II. MEMORANDUM**

2       **Parties:** James M. Van Nostrand, Stoel Rives LLP, Seattle, Washington represents Applicants. Robert D. Cedarbaum, Senior Counsel, Office of the Attorney General, Olympia, Washington, represents Staff of the Washington Utilities and Transportation Commission (Staff). Robert Cromwell, Assistant Attorney General, Seattle, Washington, represents Public Counsel. Irion Sanger, Davison Van Cleve, P.C., Portland, Oregon, represents Industrial Customers of Northwest Utilities (ICNU). Charles Eberdt, The Energy Project, Bellingham, Washington, represents the Yakima Opportunities and Industrialization Center (OIC).

3       **Procedural History:** On December 1, 2000, PacifiCorp and PacifiCorp, Washington, Inc. (Applicants) filed with the Commission a Joint Application requesting approval to implement restructuring of PacifiCorp into six separate state electric companies, a generation company, and a service company. A prehearing conference originally scheduled for February 8, 2001, was twice continued at the requests of various parties in order to allow the parties to participate in state-specific

workshops and to allow the Applicants to file testimony supplementing the Joint Application. On June 29, 2001, Applicants completed the filing of testimony and exhibits supporting the Joint Application.

- 4 Applicants held technical workshops on February 26, August 7, August 28, September 11, and November 13, 2001.
- 5 The Commission held prehearing conferences on July 26, September 13, and October 30, 2001, before Administrative Law Judge Karen M. Caillé. The initial prehearing conference on July 26, 2001, convened for the limited purpose of receiving petitions to intervene, triggering discovery, and issuance of a protective order. The September 13, 2001, conference addressed the formulation of substantive issues and deferred procedural scheduling, per the parties' request, until the schedules for Utah and Oregon were set. The parties were unable to reach an agreement on a procedural schedule during the October 30, 2001, conference. The Commission set a procedural schedule with hearings in October 2002.
- 6 During the October 30, 2001, prehearing conference Commission Staff informed the parties and the Commission that it intended to file a motion to dismiss the Joint Application. Staff filed the motion on November 20, 2001. Public Counsel filed a statement in support of Staff's motion. Applicants filed a Response to the Motion to Dismiss on December 14, 2001, and Staff filed a Reply on December 28, 2001.
- 7 **Description of the Restructuring Proposal.** According to PacifiCorp, its proposal would establish six separate electric utility companies (one for each state in which PacifiCorp now operates). Each utility company would own the distribution assets used to serve PacifiCorp's retail customers in its state. In Washington, the new company providing electric retail service would be named "PacifiCorp Washington, Inc." The Commission would have jurisdiction over this company.
- 8 The restructuring would create a new generating company (PacifiCorp Generation) that would own and operate PacifiCorp's current mining and generation assets. PacifiCorp Generation would also retain PacifiCorp's transmission assets. In addition, each state utility would assign to PacifiCorp Generation all interest in transmission contracts under which PacifiCorp currently provides bundled utility service. PacifiCorp Generation would transfer control and operation of these assets to a regional transmission organization, RTO West. As a result of these changes, this Commission would no longer have jurisdiction over these transmission assets. Rather, the Federal Energy Regulatory Commission (FERC) would decide the prices, terms and conditions of all transmission services.
- 9 PacifiCorp also proposes to create a new service company from the assets currently used to perform PacifiCorp's centralized functions such as call center operations, billing/customer service activities, meter reading and installation, load and resource

planning, and corporate support services. The service company would be named PacifiCorp. The service company would be within the jurisdiction of the Federal Securities and Exchange Commission.

- 10 Under the proposed restructuring, PacifiCorp Washington would purchase transmission service, and all power supplies, from PacifiCorp Generation under a five-year power purchase agreement. PacifiCorp Washington would also purchase load-balancing services from PacifiCorp Generation. PacifiCorp Washington could contract with the PacifiCorp service company to perform some or all of the centralized utility functions. After the five-year term, PacifiCorp Washington would meet its power supply requirements through additional purchase power agreements with PacifiCorp Generation or third-party suppliers.

### III. DISCUSSION AND DECISION

- 11 On November 20, 2001, Staff filed a motion to dismiss PacifiCorp's Application pursuant to *WAC 480-09-426(1)*. This Order addresses only Staff's motion to dismiss; it does not rule on the merits of the Joint Application. As more fully explained below, Staff argues that the Joint Application is not consistent with the public interest and should be dismissed.
- 12 **Standard of Review.** *WAC 480-09-426(1)* provides that 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.
- 13 *Under CR 12(b)(6)*, dismissal is appropriate only if the complaint alleges no facts that would justify the relief requested. *Reid v. Pierce County*, 136 Wash 2d 195,200-01 (1998). The complaint's allegations and any reasonable inferences must be accepted as true. *Id.* Moreover, under *CR 50*, the evidence offered by the non-moving party must be taken in the light most favorable to the non-moving party.
- 14 **Staff's Motion to Dismiss.** Staff contends that the proposed restructuring is inconsistent with the public interest and the Joint Application should be dismissed. Staff supports its argument for dismissal with the following analysis. First, to be approved, Commission rules require that "transfers of property" be in the public interest. *WAC 480-142-170* provides:

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.

15 Second, the Commission has held that an applicant's initial burden is satisfied if it can at least demonstrate no harm to the public interest.<sup>1</sup> 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 among 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.<sup>2</sup>

16 Finally, Staff argues that the restructuring, as proposed, fails the public interest test because it would threaten 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. . . . Commission jurisdiction over both generation and transmission is also critical because it allows regular and ongoing review

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<sup>1</sup> *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)*

<sup>2</sup> *In re the Matter of the Application of Avista Corporation, PacifiCorp, and Puget Sound Energy, Inc. for approval of the sale of their interest in Centralia Power Plant, Docket Nos. UE-991255, 991262, 991409, p. 11, fn.6.*

*In the Matter of the Application of Puget Sound Power and 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).*

of the acquisition, operation, and disposition of those vitally important utility assets.<sup>3</sup>

- 17 Staff supports this argument by referring to the Commissioners' August 30, 2001, letter to Washington Senators Patty Murray and Maria Cantwell in which the Commission opposed extending FERC jurisdiction to transmission used for bundled retail sales.
- 18 Staff concludes that the corporate restructuring as proposed would erode 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 would subordinate the benefits of that service to inconclusive and potentially unwise federal efforts to promote competition in the wholesale markets. Therefore, according to Staff, the Joint Application is not consistent with the public interest and should be dismissed.<sup>4</sup>
- 19 In the alternative, Staff suggests that if the Commission denies the motion to dismiss, the Joint Application should be delayed until RTO West<sup>5</sup> is finalized. Staff asserts that if the Commission approves the proposed restructuring before the transfer of control and operation of PacifiCorp's transmission assets to RTO West, the Commission will lose jurisdiction to FERC to determine whether PacifiCorp should participate in RTO West.<sup>6</sup>
- 20 **Applicants' Response.** Applicants argue, among other things, that the Joint Application and supporting testimony, which must be accepted as true for purposes of ruling on the motion, establish that the Company's proposal would benefit Washington customers and thus easily satisfies the "public interest" standard for approval of the Joint Application.
- 21 According to the Company the proposed restructuring would produce the following benefits:<sup>7</sup>
- Long-term price increases would be significantly reduced. The testimony of David L. Taylor compares 30-year revenue requirements for the Company's Washington customers under the Company's proposal to revenue requirements under the viable alternative called "Island States." *Taylor Ex. \_\_ DLT-T*. Prices are lower under the Company's proposal by between 4.96% and 15.97%, a savings of between \$161 million and \$562 million over the 30-year period. *Taylor Ex. \_\_ DLT-1*.

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<sup>3</sup> *Staff's Motion to Dismiss at p. 8.*

<sup>4</sup> *Id., at p. 1.*

<sup>5</sup> RTO West refers to a regional transmission organization called for by FERC in its *Order 2000*.

<sup>6</sup> *Staff's Motion to Dismiss at p.11.*

<sup>7</sup> *PacifiCorp's Response to Motion to Dismiss at p. 7.*

- The Company's proposal would preserve system reliability, efficiency and safety. *Wright, Ex. \_\_\_ MRW-T, p. 15.* PacifiCorp Washington would continue to provide safe and reliable service to the Company's customers in Washington. *Craven, Ex. \_\_\_ CAM-T, p. 6.*
- The proposed restructuring would eliminate (or at least substantially reduce) the controversy and dysfunctionality associated with existing interjurisdictional allocation mechanisms. *Joint Application, p. 23.*
- The proposed restructuring would create certainty around the structure and means of PacifiCorp Generation's continuing supply obligation. *Wright, Ex. \_\_\_ MRW-T, p. 12.*
- Each of the jurisdictions within which the Company operates would be able to pursue regulatory policies that it deems proper without affecting customers in other states or causing the Company's shareholders to be unfairly treated. *Joint Application, p. 21.* For example, the proposal would provide a mechanism to ease implementation of direct access in states that choose to pursue this direction. States that prefer to avoid direct access can continue more traditional regulatory approaches indefinitely. *Wright, Ex. \_\_\_ MRW-T, p.12.*
- The proposed restructuring would substantially improve how the Company is regulated as each state commission would, in effect, have a single electric company to regulate. *Joint Application, p. 22.*

22 By this showing, PacifiCorp argues that it has met the burden of demonstrating that the Joint Application is consistent with the public interest.

23 PacifiCorp criticizes Staff's arguments for failure to analyze the Joint Application under the applicable standard for reviewing a motion to dismiss – that the Company's Joint Application and testimony be accepted as true and taken in the light most favorable to the Company.<sup>8</sup> “Rather, Staff reaches conclusions that are directly contradictory to the statements in the Company's testimony, and draws negative inferences from statements in the Company's Joint Application.”<sup>9</sup> According to PacifiCorp, if the correct standard is applied in ruling on the Motion to Dismiss, the Motion must be denied, for the Company has made the necessary showing, under the applicable statutory standard for approval, to sustain the Joint Application.

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<sup>8</sup> *WUTC v. Puget Sound Energy, Inc., Sixth Suppl. Order Granting Motions; Dismissing Dockets, Docket Nos. UE-011163 and 011170 (October 4, 2001) at p.5, reconsideration denied, Seventh Suppl. Order Denying Reconsideration or Rehearing (October 24, 2001)*

<sup>9</sup> *PacifiCorp's Response to Motion to Dismiss at pp. 5-6.*

24 In response to Staff's alternative proposal, that the Commission suspend the procedural schedule until RTO West is finalized, PacifiCorp asserts that the Joint Application and accompanying testimony make clear that any proposal by the Company to transfer control and operation of its transmission assets to an RTO would be subject to a separate filing with the Commission to secure the necessary authorization, once the RTO process evolves sufficiently to provide a basis for making that filing.<sup>10</sup> PacifiCorp reiterates and stipulates in its response "*that the Joint Application is not intended to cause the Commission to lose jurisdiction over the transfer of operating control of the Company's transmission assets to an RTO.*"<sup>11</sup>

### ***Commission Discussion and Decision***

25 We believe that Staff's arguments raise serious issues with respect to the Commission's potential loss of jurisdiction and the Commission's ability to protect PacifiCorp's Washington ratepayers. Those arguments, however, should be considered only after the facts have been fully developed in an adjudication. PacifiCorp has alleged facts which, if true and viewed in the light most favorable to PacifiCorp, may support granting the Joint Application, because these alleged facts would comprise several benefits for customers. Accordingly, we deny Staff's Motion to Dismiss.

26 The pleadings of Staff and PacifiCorp characterize PacifiCorp's facts differently, an indication that those alleged facts would benefit from examination and interpretation in the context of an adjudication. It may well be that these alleged facts will be successfully contested by other parties, or that opposing facts and arguments will outweigh those of PacifiCorp. On the other hand, through the hearing process, parties may present alternative proposals or develop conditions for Commission approval that would address their concerns.

27 We also reject Staff's alternative proposal, that we suspend 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. There is insufficient evidence before us that RTO West will be finalized any time soon or at all. It would be unwise to delay our proceeding pending such a vague contingency. The relationship between the Joint Application and the proposed RTO West may also raise questions of fact that should be further developed in the hearing process.

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<sup>10</sup> *Id.*, at p. 8; *Joint Application*, p. 2, fn. 2.

<sup>11</sup> *Id.*, at p. 9.

#### IV. FINDINGS OF FACT

28 Having considered all materials submitted by the parties to this docket and based on  
the foregoing discussion of our general findings and conclusions, the Commission  
now makes the following summary findings of fact. Those portions of the above  
discussion that include findings pertaining to the ultimate decision of the Commission  
are incorporated by this reference.

- 29 (1) The Washington Utilities and Transportation Commission is an agency of the  
State of Washington vested by statute with the authority to regulate electric  
companies that offer service to the public for compensation.
- 30 (2) PacifiCorp is a public service company providing retail electric service to  
customers in six western states, including the state of Washington.
- 31 (3) The Joint Application and supporting testimony allege facts which, if true,  
may satisfy the “public interest” standard for approval of the Application.

#### V. CONCLUSIONS OF LAW

32 Having discussed above in detail all matters material to our decision, and having  
stated general findings and conclusions, the Commission now makes the following  
summary conclusions of law. Those portions of the preceding detailed discussion  
that state conclusions pertaining to the ultimate decisions of the Commission are  
incorporated by this reference.

- 33 (1) The Washington Utilities and Transportation Commission has jurisdiction  
over the parties and subject matter of this proceeding. *Chapters 80.01, 80.04,  
80.08, 80.12, and 80.28 RCW.*
- 34 (2) Staff’s Motion to Dismiss the Joint Application should be denied for the  
reasons stated herein.
- 35 (3) Staff’s alternative proposal to delay action on the Joint Application pending a  
decision on the transfer of control and operation of PacifiCorp’s transmission  
assets to RTO West should be denied for the reasons stated herein.

#### VI. ORDER

##### THE COMMISSION ORDERS:

- 36 (1) Staff’s Motion to Dismiss the Joint Application is denied.
- 37 (2) Staff’s alternative proposal to delay action of the Joint Application is denied.



DATED at Olympia, Washington, and effective this \_\_\_\_\_ day of January, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

**NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-09-760.**