



State of Utah

DEPARTMENT OF COMMERCE
Committee of Consumer Services

To: Public Service Commission

From: Committee of Consumer Services
Cheryl L. Murray, Utility Analyst
Nancy L. Kelly, Economist

Copies to: PacifiCorp
Andrea Kelly, Director
Division of Public Utilities
Lowell Alt, Director
Judith Johnson, Manager

Date: April 2, 2002

Subject: Comments regarding PacifiCorp's choice of Robert I Hanfling and other matters relating to PacifiCorp's Application to Initiate Investigation of Inter-jurisdictional Issues in Docket 02-035-04.

1 BACKGROUND:

On March 5, 2002 PacifiCorp filed an application to initiate an investigation into interjurisdictional cost-allocation issues through a multi-state process. PacifiCorp requests that the Commission endorse the multi-state approach.

PacifiCorp proposes a two-phase process. The focus of phase one is an attempt to achieve consensus among the state parties on a variety of interjurisdictional cost allocation issues addressed by the multistate forum. The second phase is a formal process that establishes a record to be used by the state commissions in hearing the case.

PacifiCorp proposes that a Special Master that it selects conduct both phases of the multistate process. PacifiCorp announced its choice of Robert I Hanfling March 15.

The choice of Special Master can be vetoed by Oregon or Utah or by Idaho, Washington, and Wyoming acting together. The PacifiCorp application left it to parties within each state to determine how a veto decision for their state would be decided.

On March 11, the Commission issued a notice of PacifiCorp's application and an invitation to participate. The notice set comment dates. Comments regarding PacifiCorp's application were due March 22. Comments regarding the choice of Mr. Hanfling as Special Master were due March 26. However, March 29 was the stated date in the Company's application, and that is the date that stuck in parties' minds.

The Committee takes this opportunity to address the choice of Mr. Hanfling. In so doing we necessarily address the two-phase process proposed by PacifiCorp in its application and more fully flesh out the facilitator vs. special master distinction addressed by the Division in its March 22 comments regarding PacifiCorp's application. In addition, we ask to take this opportunity to clarify issues raised in the March 27 Technical Conference. The Committee concurs in general with the comments that the Division filed March 22 regarding PacifiCorp's application.

2 DISCUSSION

2.1 Choice of Mr. Hanfling

The Committee's acceptance or lack of acceptance of Mr. Hanfling relates directly to the function he is expected to perform. The Committee has no issue with PacifiCorp hiring a facilitator to encourage an open exchange of ideas and to keep participating parties on track. This function is consistent with Phase 1 as described in the Company's application and is consistent with the designation "facilitator." The Committee believes that vetoing the choice of facilitator through "voting with one's feet" is more than adequate process in this case. While not necessary, such a veto signals parties' dissatisfaction with the choice of facilitator to PacifiCorp. Without acceptance of the facilitator it is unlikely that the multi-state process can achieve its intended results.

However, if the consultant hired by PacifiCorp functions as a "special master" to create a record for the commissions in the participating states to use in their individual proceedings, his or her decision and perceptions, while not binding, will likely influence the policy direction taken by the multistate process and thus by the state commissions in their individual proceedings.

In such a case, the vetoing process suggested by PacifiCorp's application is insufficient. The Committee believes that if the consultant is to function as an agent of this Commission, the Commission should participate in the selection process from the outset. Although it is possible that the Commission selection process and criteria might result in the choosing of the same individual as PacifiCorp's selection process and criteria, it is unlikely.

Because PacifiCorp desires an expedited start date that other states have agreed to, the Committee recommends that the Commission accept Mr. Hanfling as PacifiCorp's facilitator and endorse a facilitated multistate process for the purpose of information exchange with the goal of issue resolution. The Commission should not accept Mr. Hanfling as a special master nor should it endorse a two-stage process at this time.

If issues remain unresolved, the Commission should determine, after an appropriate evidentiary process, whether or not it wishes Utah parties to participate in a more formal second phase. If so, the Commission should determine what the appropriate structure and outcome of that phase should be. The Commission generally hears technical disputes itself. If the Commission decides to endorse a second phase it should select its own special master or agent with adequate input from all parties.

Should the Commission endorse a two-phase process at this time, the Committee would oppose the choice of Mr. Hanfling as a special master for two reasons. First, the

selection process is inappropriate. Second, too little is known at this time to endorse his choice as a special master.¹

2.2 Meaning of Consensus

PacifiCorp's application anticipates that its consultant would issue a report describing "the extent of any material consensus that was achieved...as well as the views of any parties not sharing any such consensus view...and provide ...recommendations regarding any issues concerning which a material consensus was not achieved."

Parties attending the past two Technical Conferences engaged in two lengthy and lively discussions regarding the meaning of the word consensus and the implications of its use. As a result of those discussions, the Committee believes the facilitator's report should describe parties' positions only. The facilitator should be directed to avoid the use of the words "consensus" unless there are no dissenters. This should avoid advantaging certain positions and disadvantaging others.

2.3 Utah Process

PacifiCorp proposes a process where a "state" position is sometimes required. Utah parties agreed that in situations requiring a state veto, parties would file positions with the Commission. The Commission would determine the state position. The Committee suggests that any time a unified Utah position is required the Commission should determine the Utah position.

3 RECOMMENDATION

- The Commission should endorse a multistate process to investigate certain interjurisdictional issues. The Commission should not predetermine the appropriate issue list.
- The Commission should establish only the beginning dates of April 10-12. The participants in the multistate process should determine all further scheduling.
- The Commission should endorse a facilitation phase only. If issues remain unresolved, the Commission should determine, after an appropriate evidentiary process, whether or not it wishes Utah parties to participate in a more formal second phase, and, if so, what the appropriate structure and outcome of that phase should be. It should determine the process for selecting its agent at that time.
- A consultant hired by PacifiCorp to facilitate the current process should be referred to as "PacifiCorp's Facilitator." The term "Special Master" should not be used.

¹ While Mr. Hanfling's name was provided at the March 15 Technical Conference, little regarding his qualifications could be found. The Committee received his brief biography with PacifiCorp's cover letter March 25. Additional information was provided late in the afternoon of March 28. The Committee has not had time to effectively evaluate this information.

A special master, acting as an agent of the Commission, should be selected by and serve at the pleasure of the Commission. As part of that selection process, the Commission should fully disclose the background and conflicts of the candidate, including current and former clients, and solicit comment from affected parties on the selection. Mr. Hanfling has not been selected as an agent of the Commission.

- The role of the consultant should be to facilitate dialogue among the parties, to encourage an open exchange of ideas—a free discussion of concerns and options—and to keep parties on track.
- The consultant should issue a report to the Commission at the conclusion of this process. The report should describe rather than recommend. The report should include which issues parties describe as resolved. The Commission should direct the consultant to avoid the use of the term “consensus” unless by consensus it means unanimity. It should direct the consultant to instead describe the positions of the various parties within each state on the spectrum of issues discussed.
- If a unified Utah position is required, parties should file comments with the Commission and the Commission should determine the Utah position.
- Given the above qualifications, the Commission should accept Mr. Hanfling as PacifiCorp’s Facilitator. It should not accept Mr. Hanfling as its “Special Master.”