

Gregory B. Monson (2294)  
STOEL RIVES LLP  
201 South Main Street, Suite 1100  
Salt Lake City, UT 84111  
(801) 328-3131  
gbmonson@stoel.com

George M. Galloway  
Jennifer E. Horan  
STOEL RIVES LLP  
900 SW Fifth Avenue, Suite 2600  
Portland, OR 97204  
(503) 224-3380  
gmgalloway@stoel.com  
jehoran@stoel.com

*Attorneys for PacifiCorp*

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

In the Matter of the Application of  
PACIFICORP for an Investigation of Inter-  
Jurisdictional Issues

Docket No. 02-035-04

**PACIFICORP'S COMMENTS ON  
LEGAL FORM OF PROCEEDING**

Pursuant to the Commission's direction at a scheduling conference held in this matter on October 24, 2003, PacifiCorp (or the "Company"), hereby files these comments describing the type of legal proceeding that may provide a vehicle for the Commission's consideration of PacifiCorp's proposed Protocol and alternatives proposed by other parties and accommodate concerns expressed by certain parties regarding multistate meetings involving the Commission and its staff.

**BACKGROUND**

Since April 2002, PacifiCorp and other interested parties have engaged in a collaborative Multistate Process ("MSP") investigating various issues faced by the

Company as a multistate utility subject to the jurisdiction of six state regulatory commissions. On March 5, 2002, PacifiCorp filed an “Application to Initiate Investigation of Inter-Jurisdictional Issues” (“Application”) pursuant to Utah Code Ann. § 63-46b-3(3) and Utah Admin. Code R746-100-3. In response to the Application, the MSP was endorsed by the Commission when it opened this investigatory docket.<sup>1</sup>

MSP meetings were attended in person by in excess of 50 individuals representing some 18 entities from the states of Idaho, Oregon, Utah, Washington and Wyoming. These included representatives of state commission advisory staffs, advocacy staffs, industrial customers and consumer groups. A number of other people participated by telephone. In addition to the MSP meetings, the Company participated in a number of separate meetings with representatives from individual states or groups of states and conducted various technical workshops. More formal hearings were conducted in some states to review MSP progress. There were weekly telephone conferences and e-mail exchanges. There was a dedicated web site for information sharing. Throughout the process, the Company responded to a large number of formal and informal data requests from the parties.

The last MSP meeting occurred in July 2003. At that meeting, the Company was encouraged to develop and file a specific proposal for resolving MSP issues that was consistent with the results of the analyses that had been conducted and responsive to the views expressed by MSP participants.

PacifiCorp filed its “Motion for Ratification of Inter-Jurisdictional Cost Allocation Protocol” (“Protocol”) on September 30, 2003 in this docket. It supported the

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<sup>1</sup> See Order on PacifiCorp’s Application to Initiate Investigation of Inter-Jurisdictional Issues, Docket No. 02-035-04 (April 3, 2002).

motion with the filed testimony of four witnesses. In the testimony, the Company described its proposed Protocol. PacifiCorp's Motion requested that the Commission ratify the "MSP Solution" embodied in the filed Protocol.

At the scheduling conference in this docket held on October 24, 2003, the parties and the Commission discussed scheduling and procedures in this matter. It was noted that the schedule recently adopted in a companion proceeding in Oregon included proposed multistate meetings at which commissioners would attend and discuss possible consistent resolution of the issues presented. The Commission stated that it wished to participate in such meetings. Some parties questioned whether such meetings would be appropriate in the context of a formal adjudicative proceeding.

In response to the Commission's preference and the concerns expressed by some parties, PacifiCorp agreed to review the type of legal proceeding that should govern the Commission's consideration of PacifiCorp's request in this docket and to make a filing with its recommendation. After undertaking such a review, PacifiCorp has determined that a rulemaking proceeding, which would include the filing of testimony and a hearing, best satisfies legally and practically the desires of the Commission to participate in the multistate commissioner meetings while accommodating the concerns of the parties. These comments therefore are filed in compliance with PacifiCorp's commitment to make such a filing.

## DISCUSSION

### **1. A Rulemaking Proceeding Is a Legally-Appropriate Vehicle for the Commission's Consideration of PacifiCorp's Proposed Protocol Which Meets the Needs and Concerns of the Commission and Parties.**

The Commission has the discretion within its governing statutory framework to determine how to process matters before it.<sup>2</sup> While the Commission could proceed in this docket through an adjudicative process, PacifiCorp believes that the most likely path to resolution of the issues raised in this proceeding that meets the needs of the Commission and concerns of the various parties is through a rulemaking proceeding.<sup>3</sup>

A rulemaking proceeding, while an innovative solution to the issues raised in this docket, is legally proper.<sup>4</sup> Like other rules dealing with accounting issues, an inter-jurisdictional cost allocation rule for large multistate electric utilities<sup>5</sup> is neither dependent on nor subject to material change based on the varying factual situations of future proceedings. Further, a rulemaking is proper in this docket so that the Commission

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<sup>2</sup> See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974) (internal citations omitted) (holding that choice between rulemaking and adjudication “lies primarily in the informed discretion of the administrative agency”).

<sup>3</sup> PacifiCorp believes that it is preferable that the parties conceptually agree on the form of proceeding governing this docket given the unusual circumstances in this proceeding. In their responses to these Comments, other parties will have an opportunity to make known any legal objections they may have to treating this docket as a rulemaking proceeding and the Commission can take those objections, if any, into account in determining the legal structure of this proceeding on a going-forward basis.

<sup>4</sup> As is suggested here, the Commission has previously launched investigatory dockets in advance of rulemaking proceedings. See, e.g., *Re Accounting and Ratemaking Treatment for Postretirement Benefits Other Than Pensions*, Docket No. 92-999-04.

<sup>5</sup> While it is true that PacifiCorp is currently the only utility which might meet the definition in a proposed rule, that is not a fatal flaw to the Commission proceeding under rulemaking procedures in this docket. The Commission has previously issued rules of generally applicability that in fact only effect a single utility. For example, Utah Admin. Code R746-340-8 is a rule stated on a generalized basis applicable to “each incumbent telecommunications corporation with 30,000 or more access lines in Utah.” In fact, the only such telecommunications corporation is Qwest Corporation. The fact that only one such utility meets that definition or the definition contained in a proposed rule does not abrogate the Commission’s authority to conduct rulemaking proceedings interpreting statutes that effect only a single utility.

can interpret its statutory mandate to provide PacifiCorp with just and reasonable rates for electric service provided to Utah customers.<sup>6</sup> Under these circumstances, the statutory definitions related to rulemaking proceedings are satisfied.<sup>7</sup>

Moreover, practically speaking, the unique nature of the allocation issues for multi-jurisdictional utilities lends itself to a process such as that previously undertaken where the staffs and intervenors from various of the Company's jurisdictions are invited to participate in joint discussion and investigation of the issues and their potential resolution. The Commission initially endorsed the MSP process through an investigatory docket. That process enabled that type of multistate joint discussion. Since that time, the Company and representatives of at least 18 different parties from Idaho, Oregon, Utah, Washington and Wyoming have met individually and collectively to develop an MSP solution. Extensive amounts of data and other valuable analytical work have been developed and shared among the parties in the various participating states. Moreover, the process contributed to a mutual understanding of various parties' views and concerns.

Unfortunately, no MSP solution was universally agreed upon. PacifiCorp believes that a proceeding that allows for multistate commissioner and commission staff involvement, as well as the involvement of other interested parties and intervenors, is the next logical step towards seeking consensus among the states on an inter-jurisdictional allocation resolution. Such a process would permit the commissioners to actively engage in understanding the issues, views and concerns, as well as the extensive analytical work already developed, while at the same time permitting them to discuss resolution among the stakeholders in each of the Company's jurisdictions. Until some consensus among

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<sup>6</sup> Utah Code Ann. § 54-3-1 (2003).

<sup>7</sup> Utah Code Ann. § 63-46a-2(16)(a)(i)-(iii) (2003).

the various state commissions can be reached, the substantial and important issues raised in this proceeding cannot be timely and fully resolved. Such resolution is critical given PacifiCorp's need for new resources in the near-term.

The Oregon Commission has already established a schedule in the Oregon MSP proceeding that would enable joint commissioner meetings at which commissioners would discuss possible consistent resolution of the issues presented. At the scheduling conference on October 24, 2003 in this docket, the Commission stated that it wished to participate in such meetings. However, some parties questioned whether such meetings would be appropriate in the context of a formal adjudicative proceeding. Other parties expressed a preference for commission staffs to be actively involved in the process.

Having undertaken a review of the various legal proceedings under which the Commission could proceed in this manner, PacifiCorp believes that a rulemaking proceeding that allows for discovery, testimony, cross-examination and a hearing is the best available alternative to address both the Commission's preference and the concerns expressed by some parties. In the context of a rulemaking proceeding, commissioners and commission staff would not be bound by rules forbidding *ex parte* communications.<sup>8</sup>

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<sup>8</sup> The Commission's rules define an *ex parte* communication as "an oral or written communication with a member of the Commission, administrative law judge, or Commission employee who is, or may be reasonably expected to be, involved in the decision-making process, relative to the merits of a matter *under adjudication* unless notice and an opportunity to be heard are given to each party." *See* Utah Admin. Code R746-100-12(G) (emphasis added); *see also Williams*, 720 P.2d at 777 (holding that letter between commission and utility did not violate *ex parte* communications because *inter alia* it was in a rulemaking proceeding, not an adjudication).

PacifiCorp notes that even in the context of adjudicative proceedings, the Commission's rules permit communications with the Commission if "notice and an opportunity to be heard are given to each party." Utah Admin. Code R746-100-12(G). The Commission could participate in the multistate commissioner meetings if it also provided notice and an opportunity to be heard to all parties in this proceeding and under the definition, such communications would not meet the definition of "*ex parte* communications." Further, in adjudicative proceedings, the Commission may engage in settlement conferences and negotiations with the parties. *See* Utah Code Ann.

Thus, proceeding under the rulemaking procedures would permit the Commission to participate in the multistate meetings, permit Commission staff to remain actively engaged throughout the course of the proceeding and meet the concerns of some of the parties regarding ex parte communications.

Finally, a rulemaking proceeding meets the needs of the Company because it will establish a uniform and consistent rule upon which the Company can rely on a going-forward basis, without the need to relitigate inter-jurisdictional allocation issues in each general rate case proceeding.<sup>9</sup>

## **2. Good Cause Exists to Allow Testimony, Cross-Examination and Hearings in this Proceeding.**

Pursuant to Utah Admin. Code R746-100-15(B), the Commission is permitted for good cause shown to conduct formal hearings, with sworn testimony and the right of cross-examination, in rulemaking proceedings. If the Commission chooses to pursue a rulemaking process, PacifiCorp asserts that good cause exists for the Commission to establish in that same order, a schedule for a formal rulemaking proceeding that would provide parties with these procedural rights in the event that agreement is not reached by April 10, 2004.

Good cause exists to permit discovery, pre-filed testimony and formal hearings because this proceeding involves a myriad of issues that are technically complex and that may be subject to substantial disagreement. While an informal notice and comment

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§ 54-7-1(3)(a) (2003). Thus, if the Commission so preferred, an alternative means to go forward in the docket would be within the context of a contested case proceeding. However, this process is not the preferred alternative for at least some of the parties in the proceeding and therefore, PacifiCorp is not advocating this approach.

<sup>9</sup> This is not to suggest that the rule would be cast in concrete. Even if the Commission adopts the Protocol in a rule, the rule can be amended in the future if evidence or argument presented to the Commission indicates that it should be.

approach would generally establish the positions of the interested parties in this proceeding; discovery, sworn testimony, and hearings with relevant but vigorous cross-examination will more precisely establish a complete and well-supported record on which the Commission can base its decision regarding the final form of the rule.<sup>10</sup>

PacifiCorp is committed to giving the collaborative effort every reasonable opportunity to resolve the issues raised in this docket. However, if the collaborative effort does not result in a generally-agreed upon approach to a rule defining an inter-jurisdictional allocation methodology, the issues raised in a proposed rule are likely to be met with substantial disagreement and could be the subject of prolonged discussion. PacifiCorp believes that the best chance to make the collaborative effort meaningful and productive is to establish a set process and deadlines for ultimate Commission resolution in the event no agreement can be reached. Establishing such a schedule at this point is particularly appropriate given that the parties have been working on these issues for nearly two years. To that end, PacifiCorp has attached a draft proposed schedule to these Comments for Commission consideration. The draft proposed schedule is the same schedule PacifiCorp proposed at the October 24, 2003 scheduling conference in this docket with the changes proposed by the Division and Committee incorporated therein.

## **CONCLUSION**

PacifiCorp recommends that the Commission process the Company's filing under its rulemaking procedures. Such a process is consistent with the Commission's legal authority and relevant statutory and rule definitions. PacifiCorp also requests that the

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<sup>10</sup> The Commission's rules are subject to being declared invalid on appeal if they are "not supported by substantial evidence when viewed in light of the whole administrative record." *See* Utah Code Ann. § 63-46a-12.1(4)(a)(ii).



Commission permit discovery, filed testimony, hearings and cross-examination in the proceeding and adopt the proposed schedule attached hereto. If the Commission issues an order endorsing a rulemaking proceeding in this docket, PacifiCorp will file a form of proposed rule to implement the Protocol as filed<sup>11</sup> pursuant to Utah Code Ann. §§ 63-46a-4 and 63-46a-12 and Utah Admin. Code R15-2-4 and R746-100-15 no later than 15 days after the date of the issuance of the order.

RESPECTFULLY SUBMITTED: November 7, 2003.

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Gregory B. Monson  
George M. Galloway  
Jennifer E. Horan  
STOEL RIVES LLP

*Attorneys for PacifiCorp*

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<sup>11</sup> While the filing of the Company's form of proposed rule will likely be after the first technical conference in this docket scheduled for December 9, 2003, no party will be prejudiced by the delay because the Company's proposed rule will be intended to implement the Protocol as filed and no substantive changes will be suggested.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **PACIFICORP'S  
COMMENTS ON LEGAL FORM OF PROCEEDING** was served upon the parties to  
this docket by electronic mail on November 7, 2003.

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## PROPOSED SCHEDULE<sup>1</sup>

November 7, 2003	PacifiCorp makes a filing describing the type of legal proceeding that may provide a vehicle for the Commission's consideration of PacifiCorp's proposed Protocol and alternatives proposed by other parties.
November 21, 2003	All other parties will file responses to PacifiCorp's November 7, 2003 filing and provide their preliminary issues lists with respect to the proposed Protocol.
Late November/Early December	Commission issues order on legal process for proceeding
Late November/Early December	Company files a form of Proposed Rule
December 9, 2003	Technical Conference
February 25 and 26, 2004	Technical Conference
March 2004	Multistate Technical Conferences and Meetings
April 5, 2004	Technical Conference
May 10, 2004	Staff/Intervenor Direct Testimony Company Supplemental Testimony
May 18, 2004	Technical Conference
June 11, 2004	All Parties' Rebuttal Testimony
July 6, 2004	First day of hearings, schedule additional days as necessary
End of August 2004	Commission Order Target

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<sup>1</sup> While the late November/early December Company filing deadline is dependent on the Commission issuing an order holding that it will proceed under the rulemaking process, the other dates are not. The Company recommends that the Commission adopt this schedule even it decides to proceed using its adjudicatory process.