

Decision 06-02-033 February 16, 2006

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of PacifiCorp (U-901-E) and  
MidAmerican Energy Holdings Company for  
Exemption Under Section 853(b) from the  
Approval Requirements of Section 854(a) of the  
Public Utilities Code with Respect to the  
Acquisition of PacifiCorp by MidAmerican.

Application 05-07-010  
(Filed July 15, 2005)

**DECISION GRANTING CONDITIONAL APPROVAL OF THE ACQUISITION OF  
PACIFICORP BY MIDAMERICAN ENERGY HOLDINGS COMPANY**

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## O P I N I O N

### 1. Summary

This Decision grants authority under Pub. Util. Code § 854(a)<sup>1</sup> to transfer control of PacifiCorp from Scottish Power PLC (ScottishPower) to MidAmerican Energy Holdings Company (MEHC). The authority granted by this Decision is subject to the conditions in Appendix D and any conditions subsequently adopted in other states that provide additional benefits or protections.

### 2. Procedural Background

PacifiCorp and MEHC (referred to jointly hereafter as “Applicants”) filed Application (A.) 05-07-010 on July 15, 2005. In A.05-07-010, the Applicants state that MEHC has agreed to purchase PacifiCorp from ScottishPower, and the Applicants ask the Commission to use its authority under § 853(b) to exempt the transaction from the approval requirements of § 854(a).

Several parties protested the Application.<sup>2</sup> A Prehearing Conference was held on September 9, 2005. In accordance with the Assigned Commissioner’s Ruling and Scoping Memo dated September 26, 2005, an all-party conference was

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<sup>1</sup> All section references are to the Public Utilities Code unless otherwise indicated.

<sup>2</sup> The following parties filed protests: the Office of Ratepayer Advocates (ORA); Karuk Tribe of California; American Rivers, California Trout, and Trout Unlimited (filing jointly); Yurok Tribe; Hoopa Valley Tribe; and Friends of the River, Headwaters Institute For Fisheries Resources, Klamath Forest Alliance, Northcoast Environmental Center, Oregon Natural Resources Council, Pacific Coast Federation of Fishermen's Associations, Sierra Club, and Waterwatch of Oregon (filing jointly).

held to discuss and resolve issues. On October 21, 2005, the Applicants and eight parties filed a joint settlement agreement. ORA did not join the settlement.<sup>3</sup>

Application 05-07-010 includes written testimony from several witnesses. DRA submitted reply testimony on October 19, 2005, and the Applicants submitted rebuttal testimony on October 27, 2005. The testimony was received in evidence pursuant to a ruling issued by the assigned Administrative Law Judge (ALJ) on November 28, 2005.

A public participation hearing was held in Yreka on November 3, 2005. A formal Commissioner hearing was held in San Francisco, on November 22, 2005, at which oral comments, argument, and legislative facts were received in accordance with Rule 8(f)(2). Opening and reply briefs were filed on November 21 and November 30, 2005, respectively. The briefs incorporated comments on the settlement agreement. This proceeding was submitted with the receipt of reply briefs.

### **3. Application 05-07-010**

#### **A. Description of the Applicants**

PacifiCorp is a multi-state electric utility with customers in California, Idaho, Oregon, Utah, Washington, and Wyoming. A map of PacifiCorp's service territory is contained in Appendix A of today's Decision. PacifiCorp has 1.6 million customers and \$12.5 billion of assets. Its revenues for the fiscal year ending March 31, 2005, were \$3.0 billion. PacifiCorp has nearly 44,000 customers in California in a service area that straddles the California-Oregon border.

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<sup>3</sup> Since the inception of this proceeding, ORA's name has been changed to the Division of Ratepayer Advocates (DRA). This Decision will henceforth use DRA.

PacifiCorp's California revenues are approximately \$65 million per year, or about 2.2% of total system sales.

PacifiCorp is owned by PacifiCorp Holdings, Inc. (PHI), a subsidiary of ScottishPower. ScottishPower is a publicly traded company with headquarters in Scotland. ScottishPower acquired PacifiCorp in 1999. At that time, ScottishPower was among the 25 largest investor-owned electric utilities in the world, with 5 million customers in the United Kingdom. The transaction was expected to provide PacifiCorp with better access to capital markets in Europe.<sup>4</sup>

MEHC is a privately-held company that is incorporated in Iowa. Its primary business is the global production and delivery of energy via several subsidiaries.<sup>5</sup> MEHC's major energy subsidiaries are as follows:

- **MidAmerican Energy Company (MEC)** is an electric and gas utility. MEC provides electric service to 693,000 customers in Iowa, Illinois, and South Dakota, and gas service to 672,000 customers in Iowa, Illinois, South Dakota, and Nebraska. A map of MEC's service territory is contained in Appendix A of today's Decision.
- **CalEnergy Generation** owns 14 geothermal power plants in the United States (U.S.) and the Philippines, several natural gas generating stations in the U.S., and a hydroelectric plant and irrigation project in the Philippines.
- **Kern River Gas Transmission Company** owns nearly 1,700 miles of natural gas pipeline stretching from Wyoming to southern California.
- **Northern Natural Gas Company** owns more than 16,500 miles of natural gas pipeline from Texas to the upper Midwest. The combined pipeline capacity of Kern River and Northern is nearly 6.2 billion cubic feet per day, or about 10 percent of all natural gas consumed in the U.S.
- **CE Electric UK Funding plc** owns two electricity distribution businesses that serve 3.7 million customers in northeast England.

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<sup>4</sup> Decision (D.) 99-06-049, 86 CPUC2d 675, 678.

<sup>5</sup> MEHC also has a large real estate brokerage subsidiary.

MEHC's revenues in 2004 were \$6.6 billion, and its assets on December 31, 2004, totaled \$20 billion. MEHC's ownership on January 31, 2005, was as follows: Berkshire Hathaway Inc. (80.48% economic interest); Walter Scott, Jr., and family interests (15.27% economic interest); David Sokol (2.91% economic interest); and Greg Abel (1.34% economic interest).<sup>6</sup>

Berkshire Hathaway currently holds 9.9% of the voting stock of MEHC and 41,263,395 shares of convertible preferred stock. In February 2006, Berkshire Hathaway will convert its preferred stock to common shares, increasing Berkshire Hathaway's 9.9% common stock voting interest in MEHC to approximately 80.5% on a diluted basis. The result will be to match Berkshire Hathaway's voting interest with its ownership interest.<sup>7</sup>

### **B. Summary of the Proposed Transaction**

On May 23, 2005, ScottishPower and MEHC reached an agreement to sell all of PacifiCorp's common stock to MEHC for \$5.1 billion in cash. Approximately \$4.3 billion of outstanding long-term debt and preferred stock will remain at PacifiCorp. The transaction includes PacifiCorp's subsidiaries that support its electric utility operations by providing coal mining, environmental remediation, and management of deforestation carbon credits.

ScottishPower desires to sell PacifiCorp because PacifiCorp needs at least \$1 billion annually for capital investments over the next several years. After reviewing the magnitude of the required investment and the likely profile of the earnings from that investment, ScottishPower concluded that its shareholders' interests would be best served by selling PacifiCorp.

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<sup>6</sup> The economic interests are stated on a diluted basis.

<sup>7</sup> This will create a technical change in control of MEHC.

MEHC's corporate strategy is to invest in the energy industry based on its belief that such investments are stable and provide reasonable returns. The proposed acquisition of PacifiCorp advances MEHC's strategy of owning a portfolio of high-quality energy businesses with sound assets, capable management, and predictable and reasonable earnings.

MEHC has created PPW Holdings LLC (PPW) to be the direct owner of PacifiCorp. PPW will receive an equity infusion of approximately \$5.1 billion raised by MEHC through (1) the sale of \$3.4 billion of equity securities to Berkshire Hathaway, and (2) the issuance of \$1.7 billion of long-term senior notes, preferred stock, or other securities to third parties.<sup>8</sup> If funds are not available from third parties, Berkshire Hathaway will make up the shortfall.

PPW will pay \$5.1 billion in cash to PHI in exchange for 100% of the common stock of PacifiCorp. PPW will have no debt of its own for this transaction. The transaction is subject to customary closing conditions, including receipt of required state and federal regulatory approvals. Upon completion of the transaction, PacifiCorp will be an indirect wholly-owned subsidiary of MEHC through PacifiCorp's new parent company, PPW. The new corporate structure is shown in Appendix B of today's Decision.<sup>9</sup>

The Applicants expect that PacifiCorp will continue to be operated much as it is today. PacifiCorp's headquarters will stay in Oregon. PacifiCorp will remain a separate company with its own management, board of directors,

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<sup>8</sup> The issuance of an additional \$3.4 billion of equity securities by MEHC to Berkshire Hathaway will increase Berkshire Hathaway's proportional ownership of MEHC.

<sup>9</sup> Berkshire Hathaway, which is not depicted in Appendix B, will be the ultimate owner of PacifiCorp.

business plan, and budget. There are no plans to reduce PacifiCorp's workforce. In addition, PacifiCorp will have responsibility and decision-making authority for customer satisfaction, reliable service, employee safety, environmental stewardship, and local regulatory and legislative matters.

PacifiCorp will continue to issue its own debt and maintain its own credit ratings. MEHC will also use "ring fencing" protections to isolate PacifiCorp from MEHC and MEHC's other subsidiaries. The Applicants state that ring-fencing protections are recognized by the major rating agencies as an effective means to separate the credit quality of a company from its affiliates.

PacifiCorp's financial statements will not be affected by the transaction. PacifiCorp will maintain its own accounting system, books, and records. The premium paid by MEHC for PacifiCorp will be recorded in the accounts of PPW, and not at PacifiCorp. However, the Applicants intend to transition PacifiCorp's financial reporting to a calendar year-end from its current March 31 fiscal year-end. The change in year-end will make PacifiCorp's financial reporting consistent with MEHC's other subsidiaries.

MEHC will provide the same services to PacifiCorp as it does to its other subsidiaries. These services include board of directors support, strategic planning, financial planning and analysis, insurance, environmental compliance, financial reporting, human resources, legal, tax, accounting and other services. MEC will provide certain administrative services on behalf of MEHC, including budgeting, human resources, and tax compliance. Shared services costs will be direct billed or allocated to PacifiCorp.

### **C. Requested Authority**

Section 854(a) requires acquisitions of public utilities to be approved by the Commission.<sup>10</sup> Section 853(b) provides the Commission with authority to grant exemptions from § 854 if the Commission finds that the application of § 854(a) is “not necessary in the public interest.”

In A.05-07-010, the Applicants ask the Commission to use its authority under § 853(b) to exempt the proposed transaction from § 854(a). The Applicants assert that an exemption is appropriate because PacifiCorp is a multi-state electric utility with substantial operations in six states, each of which has jurisdiction to review and approve the transaction. PacifiCorp’s operations in California are the smallest of the six states, constituting just 2% of its system sales. The Applicants argue that full-scale review of the transaction by the Commission under § 854 would be redundant to the review that will take place in the other states – states that have a much more significant stake in PacifiCorp’s operations. Further, the Applicants pledge to implement in California all the conditions of general applicability adopted by other state regulatory agencies during their review of the transaction. This will ensure that California receives the same benefits as the other states.

If the Commission does not exempt the proposed transaction from § 854(a) pursuant to § 853(b), the Applicants ask the Commission to approve the transaction pursuant to § 854(a).<sup>11</sup> Despite their request for approval under § 854(a), the Applicants contend that § 854(a) applies only to utilities being

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<sup>10</sup> This transaction does not invoke § 854(b) and (c) because neither PacifiCorp nor MEHC has sufficient California revenues to trigger these subsections.

<sup>11</sup> PHC Transcript, pp. 3 – 5.

acquired that are incorporated in California. The Applicants argue that because PacifiCorp is incorporated in Oregon, not California, § 854(a) does not apply.<sup>12</sup>

#### **D. The Applicants' Commitments**

The Applicants offer more than 60 commitments (“Commitments”) to ensure that the ratepayers and the communities served by PacifiCorp benefit from the transaction and are not harmed by the transaction. The Commitments are listed in Appendix D of today’s Decision. The Commitments are intended to supersede the conditions adopted by the Commission in prior decisions authorizing previous transfers of control of PacifiCorp.

There are two broad categories of Commitments. One category consists of General Commitments that apply to all six states in which PacifiCorp operates. The General Commitments are described here. The second category consists of California-specific Commitments contained in the settlement agreement between the Applicants and some of the parties. The California Commitments are described later in today’s Decision.

The General Commitments address a variety of matters, including:

- **Cost of Capital:** PacifiCorp will not seek a higher cost of capital than that which PacifiCorp would have sought if the proposed transaction had not occurred.
- **Administrative and General (A&G) Costs:** PacifiCorp’s annual A&G costs will be reduced by \$6 million on a company-wide basis through 2010.
- **Acquisition Premium:** The acquisition premium, which is the excess of the purchase price over the net book value of the assets and liabilities that MEHC acquires from PacifiCorp, is \$1.2 billion. The Applicants will not seek to recover the

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<sup>12</sup> The operative language of § 854(a) refers to the acquisition of “any public utility *organized* and doing business in this state.” (Emphasis added.)

acquisition premium in PacifiCorp's rates unless the Commission reduces PacifiCorp's revenue requirement by imputing benefits (other than those benefits promised by the Applicants) accruing to PPW, MEHC, or Berkshire Hathaway. If the Commission fails to recognize in rates the costs associated with such benefits, then the Applicants reserve the right to propose a symmetrical rate adjustment to recognize the acquisition premium.

- **Renewable Energy:** The Applicants affirm PacifiCorp's pre-existing commitment to acquire 1,400 MW of new renewable resources, representing approximately 7% of PacifiCorp's load.
- **Greenhouse Gas Emission Reduction:** MEHC and PacifiCorp will participate in the Environmental Protection Agency's Sulfur hexafluoride (SF<sub>6</sub>) Emission Reduction Partnership.<sup>13</sup>
- **Energy Efficiency and DSM Management:** The Applicants will conduct a company-defined study of DSM and energy efficiency opportunities in PacifiCorp's service area. The study's findings will be used to help direct ongoing DSM and energy efficiency efforts. MEHC shareholders will absorb the first \$1 million of costs for the study.
- **Customer Service Standards:** The Applicants will continue existing customer service guarantees and performance standards as established in each jurisdiction.
- **Books and Records.** PacifiCorp will maintain its own accounting system. All of PacifiCorp's financial books and records will be kept in Portland, Oregon, and will be available to the Commission in accordance with current practice.
- **Affiliate Books and Records.** The Applicants will provide the Commission with access to all books, records, documents, and data regarding PacifiCorp's affiliate transactions.
- **Access to Employees.** MEHC, PacifiCorp, and all affiliates will make their employees, officers, directors, and agents available to

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<sup>13</sup> SF<sub>6</sub> is a greenhouse gas used in electric transmission and distribution equipment.

testify before the Commission on matters within the jurisdiction of the Commission.

- **Corporate Presence:** The Applicants will provide adequate staffing and presence in each state, consistent with the provision of reliable service and cost-effective operations.

The General Commitments also include a promise by MEHC to invest more than \$1.3 billion to (1) upgrade PacifiCorp's transmission and distribution network, and (2) reduce emissions at PacifiCorp's coal-fired plants. The Assigned Commissioner's Ruling and Scoping Memo dated September 26, 2005, determined that issues associated with the Applicants' Commitment to invest in utility infrastructure are outside the scope of this proceeding.

#### **E. The Settlement Agreement**

On October 21, 2005, the Applicants and several parties submitted a Settlement Agreement for Commission approval pursuant to Rule 51.<sup>14</sup> A copy of the Settlement Agreement is contained in Appendix C of today's Decision.<sup>15</sup> The following parties did not join in the Settlement: DRA, Roseburg Forest Products, Klamath Off-Project Water Users, Inc., the Klamath Tribes, and the Utility Workers Union of America.

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<sup>14</sup> The parties to the Settlement Agreement are the Applicants, American Rivers, California Trout, Inc., Hoopa Valley Tribe of California, Trout Unlimited, Yurok Tribe of California, Karuk Tribe of California, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Northcoast Environmental Center, Friends of the River, Oregon Natural Resources Council, Headwaters, Klamath Forest Alliance, Waterwatch of Oregon, and the Sierra Club. These parties are referred to collectively hereafter as the "Settlement Parties."

<sup>15</sup> The Settlement Agreement in Appendix C does not reflect the amendments to the Agreement filed by the Applicants on January 5, 2006. These amendments are reflected, as appropriate, in Appendix D of today's Decision.

In the Settlement Agreement, the Applicants agree to several new California-specific Commitments, which are in addition to the General Commitments described previously. The California Commitments include:

- C-1** The transaction will not diminish PacifiCorp's ability or willingness to perform its legal obligations associated with its Klamath River hydroelectric system or PacifiCorp's ability to recover associated costs.
- C-2** In implementing Commitment 36, PacifiCorp will make cost-effective investments in California as reasonably required to serve load.<sup>16</sup>
- C-3** PacifiCorp will continue to offer cost-effective DSM programs in California, subject to such costs being recoverable on a timely basis.
- C-4** PacifiCorp will take the following actions to extend electric service to unserved Indian communities located in PacifiCorp's service territory. Within 30 days of receiving a request for service by the Tribe(s), PacifiCorp will initiate discussions with the Tribe(s) and other appropriate stakeholders regarding the extension of electric service. Within 1 year PacifiCorp will file an application or other pleading that: (A) seeks permission to extend electric service to specified areas, or (B) states its reasons for not extending electric service.
- C-5** PacifiCorp will provide \$150,000 per year for three years to fund a study by an independent consultant to identify the presence, distribution, and possible causes of toxic algae, and their toxins, in the Klamath River basin. The study will be designed and overseen in cooperation with the appropriate federal and state agencies.
- C-6** PacifiCorp will provide an opportunity for the Settlement Parties to discuss implementation of Commitment 44.<sup>17</sup>
- C-7** PacifiCorp will file an annual report regarding the California Commitments. If any Commitment is not being met, the report will propose corrective measures.

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<sup>16</sup> Commitment 36 requires, among other things, that PacifiCorp spend nearly \$160 million on transmission and distribution infrastructure, operations, and maintenance.

<sup>17</sup> Commitment 44 requires PacifiCorp to invest approximately \$812 million to reduce emissions at its existing coal-fired generation plants.

On January 5, 2006, the Applicants filed a supplement to the Settlement Agreement that amended the Agreement to incorporate, on a most-favored-nation basis, additional Commitments adopted in other states.<sup>18</sup> The most-favored-nation Commitments are addressed below.

In exchange for the Commitments contained in the Settlement Agreement, the Settlement Parties agree to support A.05-07-010 by recommending that the Commission approve the Applicants' request for an exemption under § 853(b). The Settlement Parties intend that the Agreement resolve contested issues within the scope of this proceeding. They do not intend that it resolve issues in other pending or future proceedings.

#### **F. Tangible Benefits of the Proposed Transaction**

According to the Applicants, the chief benefit of the proposed transaction is MEHC's willingness and ability to fund utility infrastructure investments. The Applicants guarantee that MEHC will invest \$1.3 billion for specified projects, including: (1) more than \$490 million for transmission and distribution projects; and (2) more than \$800 million to reduce emissions at coal-fired generation plants. The \$1.3 billion commitment includes \$429 million for new projects, with the remainder for projects previously identified in PacifiCorp's capital plan but which lacked a firm commitment by ScottishPower to fund.

The Applicants state that the proposed transaction will provide several other tangible benefits. These include Commitments to reduce PacifiCorp's costs on a company-wide basis by more than \$30 million cumulatively over five years; to reduce harmful emissions from PacifiCorp's plants and facilities; to continue

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<sup>18</sup> The Applicants filed an errata to the most-favored nation Commitments on January 10, 2006.

customer service standards and performance guarantees; and to fund a study of toxic algae in the Klamath River basin.

### **G. Most-Favored-Nation Treatment**

The Applicants agree to implement in California the commitments adopted in other states that provide additional benefits or protections. The Applicants refer to this as “most-favored nation treatment.”

On January 5, 2006, the Applicants filed and served the following: (1) copies of the settlement agreements submitted by the Applicants in Idaho, Oregon, and Utah; and (2) a revised list of all Commitments applicable to California that reflects, on a most-favored-nation basis, the new or revised Commitments from the settlement agreements in the other states.<sup>19</sup> The revised list is contained in Appendix D.

The Applicants stress that the settlements in the other states have not received final approval. Accordingly, some of the Commitments might change as other states finalize their review of the transaction. The Applicants will advise the Commission of changes to the Commitments and submit a list of the Commitments in their final form.

## **4. Responses to A.05-07-010 and the Settlement Agreement**

### **A. The Conservation Groups**

The Conservation Groups are parties to the Settlement Agreement.<sup>20</sup> They state that the Settlement Agreement resolves all contested issues of law and fact

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<sup>19</sup> The Applicants filed an errata to the most-favored nation Commitments on January 10, 2006.

<sup>20</sup> The Conservation Groups consist of American Rivers, California Trout, Trout Unlimited, Friends of the River, NorthCoast Environmental Center, Oregon Natural Resources Council, Headwaters, Klamath Forest Alliance,

to the satisfaction of the Settlement Parties, and that the Conservation Groups support the Commission's approval of A.05-07-010 under § 853(b) with the conditions (i.e., "Commitments") attached to the Settlement Agreement.

### **B. Karuk Tribe**

As one of the signatories of the Settlement Agreement, the Karuk Tribe asks the Commission to exempt the proposed transaction from § 854(a) pursuant to § 853(b), subject to the conditions in the Settlement Agreement. Despite its support of the Settlement Agreement, the Karuk Tribe believes the Commission should carefully scrutinize the proposed transaction. The Tribe is especially concerned that the transaction might adversely affect PacifiCorp's ability to finance costly environmental conditions that the Federal Energy Regulatory Commission may adopt in a pending re-licensing proceeding regarding PacifiCorp's hydroelectric facilities on the Klamath River.

### **C. DRA**

DRA asserts that it is the Commission's practice to approve a change in ownership of a public utility serving captive ratepayers only if the transaction benefits ratepayers. DRA believes the benefits of the MEHC-PacifiCorp transaction are meager and speculative, and do not justify Commission approval of the transaction.

#### **i. Capital Expenditures**

The Applicants contend that the chief benefit of the transaction is MEHC's willingness and ability to fund utility infrastructure investments. DRA believes the Applicants' promise to invest in utility infrastructure is nothing more than an acknowledgment of PacifiCorp's obligation to serve as set forth in § 451:

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WaterWatch of Oregon, Sierra Club, Institute for Fisheries Resources, and the Pacific Coast Federation of Fishermen's Associations.

**451:** [E]very public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities...as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

DRA posits that there is no evidence that ScottishPower would not maintain the infrastructure necessary to serve customers as required by § 451. PacifiCorp under the ownership of ScottishPower is operating its facilities reliably, making necessary capital expenditures, and otherwise meeting its obligation to serve. Accordingly, DRA sees no benefit to ratepayers from MEHC's commitment to spend money on infrastructure.

## **ii. Reduced Costs**

The Applicants pledge to reduce the cost of PacifiCorp's long-term debt issued over the next five years by 10-basis points.<sup>21</sup> The Applicants estimate the value this benefit at \$6.3 million over five years. DRA states that the value of this benefit is uncertain, as the Applicants admit that PacifiCorp would have the burden in future proceedings to show that the cost of PacifiCorp's incremental long-term debt has been lowered by 10-basis points.

The Applicants also promise to cap costs charged to PacifiCorp by MEHC and MEC at \$9 million per year for five years, which is \$6 million less per year compared to the \$15 million that ScottishPower would have charged PacifiCorp in 2006. DRA argues that the Applicants did not substantiate their claim that ScottishPower's charges would be \$15 million. In fact, pleadings filed by the

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<sup>21</sup> DRA's concerns about PacifiCorp's claimed costs savings as expressed in today's Decision do not reflect the new and revised Commitments that the Applicants filed on January 5, 2006.

staff of the Oregon Public Utilities Commission indicate that a more appropriate estimate of the annual overhead charge is \$11.7 million rather than \$15 million.

DRA states that even accepting the Applicants' claimed savings on long-term debt and corporate charges, the savings to California ratepayers is only \$143,000 per year. DRA believes this amount is inconsequential and does not justify approval of the transaction.

### **iii. Applicants' Commitments**

The Applicants commit to make their employees, officers and directors available to testify before the Commission, to allow access to books and records, and to honor existing labor contracts.<sup>22</sup> DRA contends that these Commitments, and virtually all the others, do nothing more than maintain the status quo and comply with the law.

### **iv. Necessary Conditions**

If the Commission approves the proposed transaction, DRA recommends that such approval be subject to two conditions. First, the Applicants claim they will not seek to recover the acquisition premium in PacifiCorp's rates unless the Commission reduces PacifiCorp's retail revenue requirement by imputing benefits accruing to PPW, MEHC, or Berkshire Hathaway. DRA declares that carving out an exception to the rule that shareholders must finance the acquisition premium is unacceptable.

Second, the Applicants concede that additional cost savings are likely from the acquisition of common services and fuel, and from improved efficiency as a result of information exchange.<sup>23</sup> In light of these benefits, DRA recommends

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<sup>22</sup> Commitments 4, 5, 6, and 29.

<sup>23</sup> Exhibit 6, p. 6, Lines 22 to p. 7, Line 1.

that PacifiCorp's general rate case (GRC) increase be deferred by one year, until 2008, to ensure that ratepayers receive some benefit from the transaction.

## **5. Discussion**

The Applicants and the Settlement Parties request that the Commission use its authority under § 853(b) to exempt the proposed transaction from § 854(a), subject to the Commitments in the Settlement Agreement.<sup>24</sup> For the reasons set forth below, we decline to exempt the proposed transaction from § 854(a). Instead, we authorize the proposed transaction pursuant to § 854(a), subject to the conditions set forth below.

### **A. Denial of § 853(b) Exemption**

The proposed acquisition of PacifiCorp by MEHC is subject to Commission review and approval pursuant to § 854(a). However, § 853(b) provides the Commission with authority to exempt the transaction from § 854(a). Section 853(b) states, in relevant part, as follows:

**§ 853(b):** The commission may...by order or rule, and subject to those terms and conditions as may be prescribed therein, exempt any public utility or class of public utility from this article if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest.

The Applicants request that the Commission determine pursuant to § 853(b) that review and approval of the transaction under § 854(a) "is not necessary in the public interest" because PacifiCorp's California operations are small compared to the rest of its system, because the other states where

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<sup>24</sup> The current list of Commitments was filed by the Applicants on Jan. 5, 2006.

PacifiCorp operates will review the transaction, and because the Commitments offered by the Applicants ensure the transaction is in the public interest.

We decline to exempt the proposed transaction from § 854(a). The purpose of § 854(a) is to enable the Commission to review a proposed transaction, before it takes place, in order to take such actions as the public interest may require.<sup>25</sup> The need for Commission review is especially acute where, as here, the utility is a monopoly provider of electricity and is subject to traditional cost-of-service regulation. The Commission's obligation under § 854(a) to protect PacifiCorp's nearly 44,000 customers in California is not diminished by the fact that these customers represent only a small part of PacifiCorp's operations.

We cannot rely on other states where PacifiCorp operates to fulfill our duty under § 854(a) to protect the public interest in California. There is no assurance that other states have the inclination or the authority to resolve issues of importance to California.<sup>26</sup> Ultimately, other states might resolve issues in a way that is detrimental to California. Thus, even if we chose to rely on other states, the appropriate time for making that decision would be after the other states have completed their review, not beforehand as the Applicants request.

We are not persuaded by the Applicants that their many Commitments make it unnecessary to review the transaction under § 854(a). The purpose of the Commitments is to ensure that the transaction provides public benefits and causes no harm. These issues are relevant to whether the transaction should be

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<sup>25</sup> D.01-06-007, 2001 Cal. PUC LEXIS 390, \*24.

<sup>26</sup> In fact, the record indicates that the Applicants have sought to prevent other states from considering California-related issues. (See the Yurok Tribe protest, p. 5, and the protest filed by the Pacific Coast Federation of Fishermen's Associations, *et al.*, p. 9).

approved under § 854(a). In essence, the Applicants ask us to decide that it is not necessary to review the transaction under § 854(a) because the transaction satisfies § 854(a). It is pointless to exempt the transaction from § 854(a) if we must first determine if the transaction satisfies § 854(a). Put differently, one of the benefits of exempting transactions from § 854(a) pursuant to § 853(b) is that doing so avoids the need for resource-intensive proceedings under § 854(a). There is no such benefit in this proceeding, since the Applicants' request for an exemption under § 853(b) has consumed as much time and effort as reviewing the transaction under § 854(a).

The Applicants cite D.99-06-049 and D.01-12-013 wherein the Commission used its authority under § 853(b) to exempt from § 854(a) ScottishPower's acquisition of PacifiCorp and PacifiCorp's subsequent restructuring. These decisions relied on public-interest factors that are not present here. Specifically, in D.01-12-013 the Commission noted that the requested § 853(b) exemption was not protested.<sup>27</sup> Here, DRA and others oppose the exemption.<sup>28</sup> In D.01-12-013, there was no significant dispute between DRA and PacifiCorp. Here, DRA recommends that the proposed transaction be denied. Further, the Commission found in D.01-12-013 that the transaction had been reviewed and approved by other states.<sup>29</sup> Thus, the Commission had the benefit of hindsight, based on other states' reviews, to support a § 853(b) exemption. Here, we cannot rely on other

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<sup>27</sup> D.01-12-013, FOF 6.

<sup>28</sup> The protests of the other parties were resolved by the Settlement Agreement.

<sup>29</sup> D.01-12-013, FOF 2.

states' review of the transaction because their review has not been completed, let alone analyzed by us.

**B. Applicability of § 854(a)**

We next address the Applicants' contention that § 854(a) does not apply to the proposed transaction. Section 854(a) states, in relevant part, as follows:

No person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or control either directly or indirectly **any public utility organized and doing business in this state** without first securing authorization to do so from the commission. **The commission may establish by order or rule the definitions of what constitute merger, acquisition, or control activities which are subject to this section.** Any merger, acquisition, or control without that prior authorization shall be void and of no effect. (Emphasis added.)

The Applicants argue that § 854(a) does not apply unless the utility being acquired is "organized and doing business in the state." The Applicants maintain that because PacifiCorp is incorporated in Oregon, and not California, § 854(a) does not apply.

We disagree with the Applicants' interpretation of § 854(a). The purpose of § 854(a) is to enable the Commission to review a proposed transaction, before it takes place, in order to take such action as the public interest may require.<sup>30</sup> Where a utility incorporates has no bearing on the extent to which a proposed transaction might affect California. Further, the purpose of § 854(a) could be easily defeated by incorporating (or reincorporating) in another state. Thus, it makes no sense to have separate regulatory schemes depending on where a public utility is incorporated.

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<sup>30</sup> D.01-06-007, 2001 Cal. PUC LEXIS 390, \*24.

Since the enactment of § 854(a) in 1971, the Commission has interpreted the statute as applying to all public utilities operating in California, regardless of a utility's state of incorporation.<sup>31</sup> This is demonstrated by the dozens of Commission decisions that have applied § 854(a) to utilities that operated in California but were incorporated in other states.<sup>32</sup> These decisions are consistent with D.99-06-049 and D.01-12-013, which exempted transactions involving PacifiCorp from § 854(a) pursuant to § 853(b). The exemption from § 854(a) would not have been necessary if § 854(a) did not apply to PacifiCorp.

Unlike the Applicants, we do not read the phrase "any public utility organized and doing business in this state" to mean "incorporated in California." The Public Utilities Code does not define the phrase "organized...in this state." A fundamental tenet of statutory construction is that words are to be given their clear and plain meaning.<sup>33</sup> The Applicants make an unsupported leap that the phrase "organized...in this state" clearly and plainly means "incorporated in." We disagree. A more reasonable interpretation of "organized...in this state" is "authorized to do business in California." At a minimum, § 854(a) is ambiguous,

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<sup>31</sup> The Applicants admit that they "have found no cases in which the Commission has...held that it has no jurisdiction under § 854(a) to review the acquisition of a utility operating in California but incorporated in another state." (Applicants' brief filed on Sept. 2, 2005, at p. 3.)

<sup>32</sup> Attachment B of DRA's Exhibit 100 lists some of those transactions. See, for example, D.05-06-059 (application to transfer control of a Delaware corporation); D.05-04-012 (application to transfer control of a Minnesota corporation); D.05-03-010 (Washington corporation); D.05-02-044 (Delaware corporation); D.04-04-016 (Delaware corporation); D.03-12-033 (Massachusetts corporation), and D.03-06-069 (Delaware corporation).

<sup>33</sup> Witkin, *Summary of California Law*, 2004 Supplement, Volume 7, Constitutional Law §94; *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 CA 4<sup>th</sup> 1233, 1238-39.

leaving the Commission with the duty to interpret the phrase “organized...in this state” in a manner that best complies with its constitutional and statutory obligations under the Public Utilities Code.<sup>34</sup> Further, § 854(a) authorizes the Commission to “establish by order or rule the **definitions** of what constitute merger, acquisition, or control activities which are subject to this section.”

(Emphasis added.) We interpret this provision as providing the Commission with authority to apply § 854(a) to public utilities incorporated in other states, which we have done on many prior occasions.

### **C. Review of the Proposed Transaction Pursuant to § 854(a)**

Having concluded that § 854(a) applies to the proposed transaction, we next consider if the proposed transaction should be approved pursuant to the statute. The Commission has broad discretion to determine if it is in the public interest to authorize a proposed transaction pursuant to § 854(a). Where necessary and appropriate, the Commission may attach conditions to a transaction in order to protect and promote the public interest.<sup>35</sup>

We will use the following criteria to decide if the proposed acquisition of PacifiCorp by MEHC should be approved:

- Whether the proposed transaction will maintain or improve the financial condition of PacifiCorp.
- Whether the proposed transaction will maintain or improve the quality of service for PacifiCorp’s customers.

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<sup>34</sup> Yamaha Corp. of America v. State Bd. of Equalization, 19 Cal. 4<sup>th</sup> 1, 11 (1998) (agency interpretations of statutes within its jurisdiction are given deference due to agency’s special familiarity and presumed expertise with the applicable legal and regulatory issues).

<sup>35</sup> D.01-06-007, 2001 Cal. PUC LEXIS 390, \*24.

- Whether the proposed transaction will maintain or improve the quality of PacifiCorp's management.
- Whether the proposed transaction will be fair and reasonable to the affected utility employees.
- Whether the proposed transaction will harm, on an overall basis, California or the local communities served by PacifiCorp.
- Whether the proposed transaction will preserve the jurisdiction of the Commission and its capacity to effectively regulate and audit public utility operations in California.
- Whether the proposed transaction will harm competition.

Although we are not obligated to use the above criteria to evaluate the proposed transaction, these criteria provide a useful framework for analyzing the transaction. Our use of the above criteria is completely discretionary, and we may choose to use none, some, or all of these criteria in future proceedings.

In the next part of this Decision, we will apply the aforementioned criteria to determine if the proposed transfer of control of PacifiCorp should be authorized and what conditions, if any, should attach to the transaction.

#### **i. Maintain or Improve Financial Condition**

##### **a. Background**

In deciding whether to authorize a proposed transfer of control of a public utility, the Commission may consider if the transaction will maintain or improve the financial condition of the utility. The purpose of this exercise is to ensure that the proposed transfer does not adversely affect the financial ability of the utility to provide safe and reliable service at reasonable rates.<sup>36</sup>

MEHC has agreed to purchase PacifiCorp for approximately \$5.1 billion in cash. MEHC intends to finance the purchase through the sale of \$3.4 billion of

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<sup>36</sup> D.01-06-007, 2001 Cal. PUC LEXIS 390, \*30.

equity securities to Berkshire Hathaway and the issuance of \$1.7 billion of other securities to third parties. PacifiCorp's existing long-term debt and preferred stock, which amounted to approximately \$4.3 billion on March 31, 2005, will remain outstanding.

#### **b. Discussion**

There are several factors relevant to our evaluation of whether the proposed transaction will maintain or improve PacifiCorp's financial condition. First, we must consider how the transaction will affect the financial condition of MEHC, the new owner of PacifiCorp, because such impacts could likely trickle down to PacifiCorp. The Applicants represent that after the announcement of the proposed transaction, the three major credit rating agencies affirmed their ratings for MEHC's debt.<sup>37</sup> Based on this information, we conclude that the proposed transaction will not adversely affect the financial condition of MEHC.

Second, PacifiCorp will remain a stand alone financial entity. It will retain its own capital structure, debt, and credit rating. In addition, the Applicants promise to implement ring-fencing protections to isolate PacifiCorp from any credit issues that might arise at MEHC or other MEHC subsidiaries. The ring-fencing protections that the Applicants will implement include:

- PacifiCorp's immediate parent company, PPW, will have one purpose - to own the common equity of PacifiCorp.
- PPW will have an independent director from whom assent is required to place PPW or PacifiCorp into bankruptcy.

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<sup>37</sup> Fitch affirmed MEHC's senior unsecured debt at BBB, with a stable outlook. Standard & Poor's placed MEHC's corporate rating and senior unsecured debt rating of BBB- on CreditWatch-Positive. Moody's affirmed MEHC's senior unsecured debt rating of Baa3 while noting a positive rating outlook for MEHC.

- PPW will have a non-recourse structure to preclude the liabilities of MEHC, or its other subsidiaries, from being assessed against PPW or PacifiCorp.
- PPW and PacifiCorp will be prohibited from (1) using their credit and assets to guarantee or satisfy the obligations of another company, and (2) acquiring the obligations or securities of MEHC or any of its other subsidiaries, except that PacifiCorp may purchase its own obligations.
- PacifiCorp will maintain separate books, financial records, employees, and assets.
- The ring-fencing protections may not be amended without (1) the consent of PPW's independent director, and (2) rating agency confirmation that the amendment will not result in a credit downgrade.

We find that the promised ring-fencing protections will help ensure that the proposed transaction does not adversely affect PacifiCorp's financial condition. The Applicants shall notify the Director of the Commission's Energy Division of any changes to the ring-fencing protections within 30 days. Such notice shall include (1) the consent provided by PPW's independent director, and (2) the rating agencies' confirmation that there will be no credit downgrade from the amended ring-fencing protections.

Third, we directed the Applicants to explain how the proposed transaction would affect PacifiCorp's ability to fund operations, maintenance, capital expenditures, and cost of capital. The Applicants' response, provided under seal, shows that PacifiCorp will obtain sufficient cash from its operations, regular infusions of equity capital from MEHC, and steady increases in short-term debt to fund: (1) operations and maintenance; (2) capital expenditures<sup>38</sup>; (3) interest

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<sup>38</sup> The Applicants project that PacifiCorp will spend at least \$1 billion annually for capital expenditures over the next five years. The projected capital expenditures are substantially higher than PacifiCorp's capital expenditures

on debt issued by MEHC to acquire PacifiCorp; (4) interest and dividends on debt and preferred stock issued by PacifiCorp; and (5) a modest dividend on MEHC's steadily increasing equity investment and retained earnings in PacifiCorp.<sup>39</sup> Based on the foregoing, we find that PacifiCorp will have sufficient funds after the proposed transaction is complete to provide safe and reliable service.

Fourth, the Applicants represent that PacifiCorp's cost of debt will benefit from the transaction due to MEHC's association with Berkshire Hathaway. We disagree for the reasons stated in the following paragraph.

Finally, there is one factor that indicates the proposed transaction could negatively affect PacifiCorp's financial condition. Specifically, in the immediate aftermath of the transaction announcement, Standard & Poor's (S&P) placed PacifiCorp's credit rating on credit watch with negative implications.<sup>40</sup> This action in itself does not indicate that the transaction will have a negative impact on the financial condition of Pacific Corp, but rather is an indication that there could be a negative impact. The Applicants state that if PacifiCorp suffers a one notch downgrade of its credit rating by all three major credit rating agencies, the impact under current market conditions would be approximately 10 to 15 basis points. That could increase financing costs by approximately \$26.7 million over the next 10 years, assuming market conditions stay the same. If only S&P

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during the years ending March 31, 2003, 2004, and 2005 of \$550 million, \$690 million, and \$852 million, respectively.

<sup>39</sup> The Applicants do not expect PacifiCorp to pay any dividends to its parent company for the next three to four years. (Supplement filed October 14, 2005, response to Question 4.)

<sup>40</sup> PacifiCorp SEC 10Q for the period ending September 30, 2005, p. 30.

downgrades PacifiCorp, the impact of the downgrade would be approximately 5 basis points. The Applicants note, however, that credit markets are constantly changing. For example, during the past 10 years the spread between the yield on BBB+ and A- public utility bonds has ranged from today's relatively tight spread of 10 to 15 basis points to as much as 40 to 60 basis points. Thus, the Applicants admit that the potential cost over the next ten years from a credit downgrade could be much higher than the cost mentioned above.

The Applicants have agreed to take steps to insulate PacifiCorp's ratepayers from the possible adverse effects of a credit downgrade. General Commitment 22 and California Commitments C-15a and 15b provide the following protections to ratepayers:

**Commitment 22:** MEHC and PacifiCorp will not advocate a higher cost of capital as compared to what PacifiCorp's cost of capital would have been, using Commission standards, absent MEHC's ownership.

**Commitment C-15a:** In the event of a ratings downgrade by two or more rating agencies of PacifiCorp's senior long-term debt that occurs within 12 months after the Commission approves the Transaction or issues an order adopting acquisition commitments from other PacifiCorp states, whichever comes later (the "Baseline Date"), and at least one such agency identifies issues related to MEHC's acquisition of PacifiCorp as a cause of the ratings downgrade, the assumed yield for any incremental debt issued by PacifiCorp after the downgrade will be reduced by 10 basis points for each notch that PacifiCorp is downgraded below PacifiCorp's rating on the Baseline Date. Such adjustment will continue until the debt is no longer outstanding. In the case where one rating agency issues a rating downgrade, but not two or more rating agencies, denoted as a split rating, the adjustment shall be 5 basis points for each notch. The adjustment imposed by this commitment will be eliminated for debt issuances following

the ratings upgrade of PacifiCorp equal to the rating on the Baseline Date.

**Commitment C-15b:** In the event that debt issued by PacifiCorp within 12 months after the Baseline Date is recalled and refinanced, PacifiCorp agrees to hold customers harmless, for the term of the debt, as compared to the revenue requirements pursuant to subparagraph a) and its basis point reductions, of the originally financed debt.

The above Commitments ensure that ratepayers will not be harmed by a downgrade of PacifiCorp's credit rating.<sup>41</sup> In addition, MEHC pledged during hearings to operate PacifiCorp as an A-rated company, which should reduce the likelihood of a downgrade and minimize the adverse effects in the event a downgrade materializes.<sup>42</sup> We expect MEHC to keep its pledge.

In conclusion, we are concerned that the proposed transaction might adversely affect PacifiCorp's credit rating. However, there is no evidence that the transaction will hinder PacifiCorp's ability to fund operations, maintenance, infrastructure investments, and cost of capital. Any potential adverse impact is mitigated by Commitments 22, C-15a, and C-15b, which ensure that ratepayers will not be harmed if the transaction results in a higher cost of capital.

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<sup>41</sup> We interpret Commitment 22 as providing for additional ratemaking adjustments to PacifiCorp's cost of debt if the actual cost of a credit downgrade exceeds the parameters set forth in Commitments C-15a and 15b.

<sup>42</sup> RT 1, p. 12, Lines 9 – 21.

## ii. Maintain or Improve Service Quality

### a. Background

In deciding whether to authorize the transfer of control of a public utility, the Commission may consider if the proposed transfer will maintain or improve the quality of service to California ratepayers.<sup>43</sup>

The Applicants argue that the transaction will not adversely affect service quality because MEHC intends to operate PacifiCorp in much the same way as it is currently being operated. The Applicants also assert that MEHC, as a long-time provider of electric utility service through MEC, will be able to maintain or improve PacifiCorp's service quality.<sup>44</sup> They state that MEC has a strong track record of satisfying its customers. For example, a study conducted by J. D. Power and Associates shows that Midwest electric business customers ranked MEC first for overall customer satisfaction in 2004 and 2005, and that Midwest residential electric customers ranked MEC in a tie for first in 2004.

To ensure the proposed transaction will maintain or improve service quality, the Applicants have offered the following Commitments:

**Commitment 2:** Penalties for noncompliance with performance standards and customer guarantees shall be paid as designated by the Commission and shall be excluded from results of operations.

**Commitment 46:** MEHC and PacifiCorp affirm the continuation of existing customer service guarantees and performance standards in each jurisdiction.

### b. Discussion

There is no evidence that the proposed transaction will harm service quality. To the contrary, the record shows that MEHC's utility subsidiary, MEC,

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<sup>43</sup> D.01-06-007, 2001 Cal. PUC LEXIS 390, \*56.

<sup>44</sup> See, generally, Applicants' brief filed Nov. 21, 2005, pp. 7 and 10.

provides good electric service, which bodes well for how PacifiCorp's service quality will fare under the ownership of MEHC. The Applicants have no plans to change PacifiCorp's services, tariffs, operations, and service guarantees and performance standards. Perhaps most important of all, there is no plan to reduce the size of PacifiCorp's experienced and skilled workforce. Based on the foregoing, we conclude that the proposed transaction will maintain or improve PacifiCorp's quality of service.

### **iii. Maintain or Improve the Quality of Management**

#### **a. Background**

In deciding whether to authorize a change in ownership of a public utility, the Commission considers if the new owner has adequate technical and managerial competence to continue the kinds and quality of service that customers have experienced in the past. The Commission also considers if the new owner is experienced, financially responsible, and adequately equipped to continue the business sought to be acquired.<sup>45</sup>

The Applicants state that transaction will not change PacifiCorp's existing management,<sup>46</sup> and that the change of ownership will allow PacifiCorp to tap MEHC's significant reservoir of energy-related expertise.

#### **b. Discussion**

In light of MEHC's extensive experience in managing companies like PacifiCorp, we conclude that the quality of PacifiCorp's management will be maintained or improved after it is acquired by MEHC.<sup>47</sup>

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<sup>45</sup> D.01-06-007, 2001 Cal. PUC LEXIS 390, \*100.

<sup>46</sup> PacifiCorp's CEO & President recently announced her intention to leave PacifiCorp after the transaction closes.

#### **iv. Fair and Reasonable to Affected Utility Employees**

##### **a. Background**

In deciding whether to authorize a transfer of control of a public utility, the Commission may consider if the proposed transfer is fair and reasonable to the affected utility employees. Among the factors the Commission may consider is how the proposed transfer will affect jobs, pay, and benefits.<sup>48</sup>

The Applicants state that they have no plans to reduce PacifiCorp's workforce as a result of the transaction, that PacifiCorp will honor existing labor contracts, and that there will be no adverse changes to employee benefit plans for at least one year.

##### **b. Discussion**

We find that the Applicants have made an adequate showing that MEHC's acquisition of PacifiCorp will be fair and reasonable to PacifiCorp's employees. Although the Utility Workers Union of America, which represents some of PacifiCorp's employees,<sup>49</sup> expressed concern about the proposed transaction at the PHC, the Union has not participated in this proceeding since the PHC. Thus, there is no evidence in the record which indicates that PacifiCorp's employees will be harmed by the transaction.

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<sup>47</sup> Today's Decision does not affect the Applicants' prerogative to change PacifiCorp's management personnel and responsibilities.

<sup>48</sup> D.01-06-007, 2001 Cal. PUC LEXIS 390, \*104.

<sup>49</sup> The Applicants state in their comments on the Draft Decision that the employees represented are not located in California.

**v. Affect on State and Local Communities**

**a. Background**

The Commission may consider if a proposed change in ownership of a public utility will be harmful, on an overall basis, to (1) the State and local economies, and (2) the communities served by the public utility. In considering this matter, the Commission focuses on the economic effects of the proposed transaction, but the Commission may consider other factors as well.<sup>50</sup>

The Applicants assert that the proposed transaction will benefit California and the local communities served by PacifiCorp because PacifiCorp will have better access to capital with which to make needed investments. The Applicants also state that there will be no reduction in corporate philanthropy, community service activities, or other endeavors that benefit local communities.

**b. Discussion**

The Applicants have not shown that the proposed transaction will provide significant economic benefits to either California or the local communities served by PacifiCorp. We agree with DRA that the proposed transaction and the Applicants' associated Commitments do little more than maintain the status quo. At the same time, with the adoption of the Commitments, as modified by today's Decision, we conclude that the proposed transaction will not harm California or the local communities served by PacifiCorp.

**vi. Preserve the Jurisdiction of the Commission**

**a. Background**

In deciding whether to authorize a change in ownership of a public utility, the Commission may consider if the proposed transfer will preserve (1) the

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<sup>50</sup> D.01-06-007, 2001 Cal. PUC LEXIS 390, \*113.

jurisdiction of the Commission, and (2) the capacity of the Commission to effectively regulate and audit public utility operations.<sup>51</sup>

The Applicants assert that the transaction will preserve the jurisdiction of the Commission because PacifiCorp will continue to operate as an electric utility subject to the Commission's regulation.

### **b. Discussion**

We find that the proposed transaction will have no adverse effect on our jurisdiction or our capacity to effectively regulate and audit PacifiCorp. After the transaction is complete, the Commission will continue to exercise the same degree of regulatory oversight over PacifiCorp as it does today. The Public Utilities Code and all Commission decisions, rules, and orders will continue to apply to PacifiCorp. In addition, PacifiCorp must continue to provide such information and maintain such books and records as the Commission may require to effectively regulate and audit PacifiCorp.<sup>52</sup> PacifiCorp has agreed to comply fully with all of its obligations.

### **vii. Competitive Effects**

#### **a. Background**

In deciding whether to authorize a transfer of ownership of a public utility, the Commission must consider how the proposed transfer might affect competition. The Commission is not strictly bound by antitrust laws. The Commission can approve transactions that may violate antitrust laws when other

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<sup>51</sup> D.01-06-007, 2001 Cal. PUC LEXIS 390, \*119.

<sup>52</sup> §§ 581 *et seq.*, 701, and 791 *et seq.*

economic, social, or political factors are found to be of overriding importance.<sup>53</sup> The Commission may also reject transactions that do not affect competition.

MEHC and PacifiCorp both made notification filings pursuant to the federal Hart-Scott-Rodino Antitrust Improvement Act of 1976 (HSR Act). The proposed transaction cannot be consummated until the waiting period prescribed in the HSR Act lapse. The waiting period expired on August 22, 2005.

### **b. Discussion**

Based on our review of the record of this proceeding, we conclude that the proposed transaction does not raise any antitrust or anticompetitive issues that warrant our intervention.

### **D. Approval of the Transaction**

As general principle, we will grant authority under § 854(a) to transfer control of electric utilities that are subject to cost-of-service regulation if we find the transaction is, on balance, in the public interest. Under this balancing test, transactions that have negative effects may be approved if serious harm is mitigated and the benefits of the transaction clearly outweigh the detriments.

For the following reasons, we conclude that it is in the public interest to grant authority under § 854(a) for MEHC to acquire PacifiCorp. First, the transaction will not adversely affect ratepayers or the public because there will be no change to PacifiCorp's assets, operations, rates, services, or tariffs. As our previous analysis shows, the transaction will maintain or improve PacifiCorp's service quality and management, and will be fair and reasonable to employees. The transaction will have no effect on the Commission's ability to effectively regulate and audit PacifiCorp, and there are no antitrust or anticompetitive

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<sup>53</sup> D.01-06-007, 2001 Cal. PUC LEXIS 390, \*122.

issues that warrant our intervention. In addition, today's Decision adopts numerous conditions to protect PacifiCorp's ratepayers and the public from any potential adverse impacts that the transaction might have, such as a downgrade of PacifiCorp's credit rating.

Second, the transaction will benefit PacifiCorp's ratepayers and the communities served by PacifiCorp. For example, ratepayers will receive a \$6 million annual reduction in PacifiCorp's A&G costs on a company-wide basis through 2010, and the Applicants will fund a study of the causes and distribution of toxic algae in the Klamath River system.

Finally, California reaps enormous benefits from the services provided by public utilities. Thus, it is in the public interest to foster a business climate in California that is hospitable to utility investment. Accordingly, transactions that are subject to § 854(a) should be approved absent a compelling reason to the contrary. With the conditions adopted by this Decision, there are no compelling reasons to deny the transaction.

DRA recommends that we deny the transaction because it provides meager benefits to ratepayers. We are not persuaded. The transaction provides modest but concrete benefits to ratepayers and the communities served by PacifiCorp, and there will be no harm to ratepayers or others with the conditions adopted by today's Decision. This is enough for the proposed transaction to garner our approval under § 854(a).

**i. Adopted Conditions**

In A.05-07-010, as amended, the Applicants have offered numerous Commitments to ensure that the transaction both benefits ratepayers and causes no harm. We will adopt the Commitments with three exceptions and several modifications and clarifications.

The adopted Commitments, which are listed in Appendix D of today's Decision, supersede the conditions adopted in D.02-04-061, D.01-12-013, D.99-10-059, and D.99-06-049. Those decisions addressed previous changes in ownership of PacifiCorp. The adopted Commitments do not supersede other Commission decisions. To the extent there is a conflict between today's Decision and another Commission decision (other than the four previously identified decisions), the other decision shall control.

The first exception concerns Commitment 1. This Commitment states that current service guarantees and performance standards will terminate on December 31, 2008. However, Commitment 46 states that current service guarantees and standards will continue until modified or terminated by the Commission. In light of Commitment 46, we find that Commitment 1 is confusing and should be eliminated.

The second exception concerns Commitment 17. We decline to adopt Commitment 17 to the extent it allows PacifiCorp to request rate recovery of the acquisition premium under some circumstances. For reasons described in more detail below, we agree with DRA that the Applicants should not be allowed to recover the acquisition premium under any circumstances.

The third exception concerns General Commitments 16, 22, and 23, and California Commitments C-11 through C-15. Commitment 23 provides that PacifiCorp's customers will be held harmless if the transaction results in a higher revenue requirement than if the transaction had not occurred. Commitment C-14 provides a guaranteed reduction in PacifiCorp's A&G expenses on a company-wide basis of \$6 million annually through December 31, 2010. The Applicants state that they are willing to offer Commitment 23 or C-14, but not both. According to the Applicants, it is unfair for them to bear the costs and risks for

both of these Commitments. They also assert that the general protection from rate increases offered by Commitment 23 is redundant with the protection from rate increases associated with specific types of costs provided by Commitments 16, 22, C-11, C-12, C-13, and C-15.

We will adopt Commitment C-14 because this Commitment provides concrete and quantifiable benefits for PacifiCorp's ratepayers. We decline to adopt Commitment 23, but we caution the Applicants that our rejection of this Commitment does not authorize the recovery of a higher revenue requirement than if the transaction had not occurred. If the transaction does result in a higher revenue requirement that is outside the scope of Commitments 16, 22, C-11, C-12, C-13, and C-15, the Applicants will have the burden of demonstrating why it is reasonable for ratepayers to bear the cost of the higher revenue requirement in the same way they have the burden of demonstrating any costs should be included in the revenue requirement.

We next address modifications and clarifications of the adopted Commitments. Commitment 22 provides that ratepayers will not bear any increase in cost of capital caused the transaction. As noted previously in today's Decision, the transaction might harm PacifiCorp's credit rating, which could lead to a higher cost of capital (including a higher cost than contemplated in Commitments C-15a and C-15b). Any higher costs will be the responsibility of the Applicants, not PacifiCorp's ratepayers.

Commitment 34 provides a process for the Commission to notify the Applicants about violations of the adopted Commitments and to enforce the Commitments. We clarify that the process in Commitment 34 will apply only if the Commission chooses to use it; it will not replace other processes provided by statute, PacifiCorp's tariffs, or elsewhere. There will be no need for the

Commission or its staff to notify the Applicants before deviating from Commitment 34.

Commitments 35, 36, and 45 require the Applicants to spend more than \$1.3 billion for transmission and distribution infrastructure, emissions reductions, and DSM. Other Commitments, including 36, 37, 40, 41, 42, 43, and 52-54, require the Applicants to take certain actions regarding transmission and generation. Although we acknowledge these Commitments, today's Decision does not authorize or require any of the expenditures or actions set forth in the previously identified Commitments.<sup>54</sup> These Commitments will be addressed, as appropriate, in future proceedings.

DRA's comments on the Draft Decision express concern that Commitment 51 prejudices pension issues in PacifiCorp's current GRC proceeding. Commitment 51 states:

PacifiCorp will maintain its current pension funding policy, as described in the 2005 Actuarial Report, for a period of two years following the close of the transaction.

As noted in the Applicants' reply comments on the Draft Decision, none of the Commitments, including Commitment 51, bind the Commission in any respect or mandate any particular result in rate cases. Accordingly, our adoption of Commitment 51 does not prejudice any pension issue in a GRC proceeding.

Finally, today's Decision adopts, on a most-favored-nation basis, the conditions adopted in other states that offer additional benefits or protections. The Commitments adopted by today's Decision (and set forth in Appendix D)

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<sup>54</sup> The Applicants acknowledge that they are obligated to fulfill all Commitments and that the Commission may enforce all Commitments even though today's Decision does not authorize the expenditures and actions in many of the Commitments. (RT 1, pp. 21 - 22.)

reflect the most-favored-nation commitments contained in settlement agreements that have been submitted by the Applicants in Idaho, Oregon, and Utah.

As noted by the Applicants, the settlements in the other states have not yet been approved by those states. Consequently, there might be additions or revisions to the most-favored-nation Commitments adopted by today's Decision. Once the other states have completed their review, the Applicants have agreed to provide a list of all Commitments in their final form. To ensure that the final list of all Commitments is reviewed and approved by the Commission, we will require the Applicants to submit the final list by filing a petition to modify today's Decision.

## **ii. DRA's Conditions**

DRA requests that we (1) prohibit recovery of the acquisition premium from ratepayers, and (2) delay PacifiCorp's next GRC rate increase by one year to January 1, 2008, to ensure measurable benefits for ratepayers.

We will adopt DRA's proposal to prohibit the Applicants' recovery of the acquisition premium, as DRA's proposal is consistent with long-standing Commission precedent.<sup>55</sup> The reasons for the Commission's policy are perhaps best summarized in D.69490, which states as follows:

If a regulated utility purchasing dedicated property were allowed to pass on to its customers a price higher than original cost, the parties to the transaction would be in a position to frustrate the application of the original cost standard by arranging a transfer of ownership at a premium. The seller would receive, at the expense of future ratepayers, more than his original cost and yet the willingness of the purchaser to pay such a premium would have little

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<sup>55</sup> See, for example, D.05-03-010, *mimeo*, FOF 9; D.91-09-068, 41 CPUC 2d 385, FOF 11 and OP 1(a); and D.01-06-007, *mimeo*, p. 24, fn. 57, and FOF 78.

significance since he himself would not bear the burden.  
(D.69490 (1965) 64 CPUC 1st, 558, 564 (quoting D.68841).)

Because today's Decision does not authorize the recovery of the acquisition premium under any circumstances, any benefits associated with the premium shall accrue exclusively to MEHC. Further, any benefits of the transaction that occur solely at the holding company level, such as tax benefits to MEHC, should not be imputed to the results of the utility for ratemaking purposes.

We decline to delay current PacifiCorp's GRC by one year.<sup>56</sup> The Applicants assert that PacifiCorp is not earning its authorized rate of return. If true, delaying PacifiCorp's GRC could prolong PacifiCorp's poor financial performance. Such an outcome could precipitate ratings downgrades and thereby lead to higher financing costs and, ultimately, higher rates. A better approach is to use any synergies and other cost savings from the transaction to offset the proposed rate increase in PacifiCorp's current GRC.<sup>57</sup>

### **iii. Approval of the Settlement Agreement**

In the Settlement Agreement submitted on October 21, 2005, as amended on January 5, 2006, the Applicants agree to perform all the Commitments listed in Appendix D of today's Decision, including several Commitments that apply only to California.<sup>58</sup> The other Settlement Parties agree to support the Applicants' request to exempt the transaction from § 854(a) pursuant to § 853(b).

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<sup>56</sup> PacifiCorp filed a GRC application in November 2005.

<sup>57</sup> PacifiCorp should identify in its current GRC proceeding the economic benefits of the transaction, if any, so that the benefits may be flowed through to ratepayers.

<sup>58</sup> The Applicants filed an errata on January 10, 2006.

In order to adopt a settlement, the Commission must find the settlement is reasonable in light of the whole record, consistent with law, and in the public interest.<sup>59</sup> We conclude that the Settlement Agreement satisfies these criteria to the extent the Settlement is consistent with our decision herein to authorize MEHC's acquisition of PacifiCorp pursuant to § 854(a). In particular, the California-specific Commitments in the Settlement Agreement address significant, California-specific issues that were raised by several parties. For example, Commitment C-4 requires PacifiCorp to address the extension of electric service to unserved portions of Indian communities in PacifiCorp's service area in California, and Commitment C-5 requires PacifiCorp to fund a study of the presence and possible causes of toxic algae in the Klamath River. In addition, the California Commitments, as amended,<sup>60</sup> extend to California on a most-favored-nation basis the benefits and protections that the Applicants have agreed to provide in other states.<sup>61</sup> Therefore, for the preceding reasons, we will adopt the Settlement Agreement to the extent it is consistent with all facets of our

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<sup>59</sup> Rule 51(e) of the Commission's Rules of Practice and Procedures.

<sup>60</sup> On January 5, 2006, the Applicants filed an amendment to the Settlement Agreement that revised the California Commitments to include, on a most-favored-nation basis, 17 additional Commitments adopted in other states. Many of these additional Commitments provide added benefits or protections. The Applicants filed an erratum to the most-favored nation Commitments on January 10, 2006.

<sup>61</sup> The California Commitments do not predetermine the following: (i) Whether PacifiCorp may recover in rates any costs associated with the Klamath River hydroelectric project; (ii) whether electric service will be provided to unserved Indian communities; and (iii) the type, location, costs, benefits, reasonableness, and recoverability of capital investments and DSM. PacifiCorp will have to obtain the Commission's approval before including in rates any costs associated with the California Commitments.

decision herein to authorize MEHC's acquisition of PacifiCorp pursuant to § 854(a), including the revisions and clarifications to the Settlement's Commitments that are adopted herein.

#### **iv. Gain or Loss from the Sale**

In situations involving the sale of an entire utility, as is the case here, we have always allocated to shareholders the gain or loss from the sale.<sup>62</sup> Therefore, consistent with our precedent, we will allocate to ScottishPower's shareholders the gain or loss from the sale of PacifiCorp.<sup>63</sup>

The Commission's practice for allocating gain-on-sale should not be confused with the allocation of other benefits from a transaction. With respect to certain transactions (not including this one), § 854(b)(2) requires that ratepayers receive an equitable allocation of the transaction's benefits. Even in transactions not explicitly covered by § 854(b)(2) the Commission has sometimes allocated a portion of the transaction benefits to ratepayers. Those cases did not involve an allocation of any gain on sale. They involved a quantification of economic benefits of a transaction and an allocation of an equitable share of those benefits to ratepayers. Because PacifiCorp is a cost-of-service utility, the Commission will be able to pass the economic benefits of the transaction, if any, to ratepayers through normal ratemaking processes. Thus, there is no need at this time to identify and allocate the transaction benefits.

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<sup>62</sup> D.01-06-007, 2001 Cal. PUC LEXIS 390, \*154.

<sup>63</sup> There is no record in this proceeding regarding the amount of the shareholders' gain or loss. The public might receive a portion of the gain or loss to the extent the gain or loss affects the taxes paid by the owners of PacifiCorp.

We note that we may impose conditions on the sale of a public utility pursuant to our authority under 854(a) to ensure that the sale is in the public interest. Therefore, when necessary, we may allocate some or all of the gain from the sale of a public utility to fund measures that are intended to mitigate the adverse impacts that a sale might have on the public interest.<sup>64</sup> In the case before us here, it is not necessary to use the gain-on-sale, if any, to fund such measures.

## **6. California Environmental Quality Act**

Pursuant to the California Environmental Quality Act (CEQA)<sup>65</sup> and Rule 17.1 of the Commission's Rules of Practice and Procedure, we must consider the environmental consequences of projects that are subject to our discretionary approval. Thus, in deciding whether to approve A.05-07-010, we must consider if doing so will alter an approved project, result in new projects, change facility operations, etc., in ways that have an environmental impact.

Today's Decision authorizes a change in ownership of PacifiCorp. Today's Decision does not authorize any new construction, changes to the operations of PacifiCorp or other entity, or changes in the use of existing assets and facilities. Therefore, it can be seen with certainty that today's Decision will not have a significant effect on the environment and, for this reason, qualifies for an exemption from CEQA pursuant to Section 15061(b)(3)(1) of the CEQA guidelines.<sup>66</sup> Consequently, there is no need for further environmental review.

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<sup>64</sup> D.89-07-016, 32 CPUC 2d 233, 235.

<sup>65</sup> Pub. Res. Code § 21080.

<sup>66</sup> Section 15061(b)(3)(1) of the CEQA guidelines states: "Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA."

The Applicants have indicated that PacifiCorp intends to spend at least \$1 billion annually on utility infrastructure for the next several years. Today's Decision does not authorize any utility infrastructure investments. Before constructing utility infrastructure, the Applicants will have to comply with any applicable CEQA requirements.

### **7. Category and Need for Hearings**

In Resolution ALJ 176-3156, dated July 21, 2005, the Commission preliminarily determined that the category for this proceeding is ratesetting and that formal evidentiary hearings would not be necessary. These preliminary determinations were affirmed in the assigned Commissioner's Ruling and Scoping Memo dated September 26, 2005. There was no appeal of the assigned Commissioner's ruling, and there is nothing in the record of this proceeding that warrants our disturbing these prior determinations.

### **8. Comments on the Draft Decision**

The draft decision of the ALJ in this matter was mailed to the parties in accordance with § 311(g)(1) and Rule 77.7. Comments regarding the draft decision were filed on February 6, 2006, by the Applicants, DRA, and jointly by American Rivers, California Trout, Friends of the River, Headwaters, Institute for Fisheries Resources, Klamath Forest Alliance, NorthCoast Environmental Center, Oregon Natural Resources Council, Pacific Coast Federation of Fishermen's Associations, Sierra Club, Trout Unlimited, and WaterWatch of Oregon. Reply comments were filed on February 14, 2006, by the Applicants and DRA. The opening and reply comments have been reflected, as appropriate, in the Final Decision adopted by the Commission.

## **9. Assignment of Proceeding**

John Bohn is the Assigned Commissioner and Timothy Kenney is the assigned ALJ for this proceeding.

### **Findings of Fact**

1. A.05-07-010 asks the Commission to use its authority under § 853(b) to exempt from § 854(a) the proposed acquisition of PacifiCorp by MEHC. If the Commission declines to exempt the transaction from § 854(a), the Applicants ask the Commission to approve the transaction pursuant to § 854(a).

2. Despite the Applicants' request described in Finding of Fact (FOF) 1, the Applicants contend that § 854(a) does not apply to the proposed transaction because PacifiCorp is incorporated in Oregon, not California.

3. After the proposed transaction was announced, S&P placed PacifiCorp's credit rating on credit watch with negative implications citing the structure of the proposed transaction as one of several factors that could affect PacifiCorp's future credit rating. If S&P downgrades PacifiCorp by one notch, the impact in today's market would be approximately 5 basis points. If all three major credit rating agencies downgrade PacifiCorp by one notch, the impact in today's market would be 10 to 15 basis points. The adverse effect of a downgrade could be much higher if market conditions change.

4. Downgrading PacifiCorp's credit rating could increase its cost of capital.

5. The conditions adopted by today's Decision ensure that the adverse effect the proposed transaction will have on PacifiCorp's credit rating, if any, will not affect PacifiCorp's ratepayers or the public at large.

6. The proposed transaction will maintain or improve the quality of PacifiCorp's services and management.

7. The transaction will be fair and reasonable to PacifiCorp's employees.

8. The transaction will not cause economic harm to California or the local communities served by PacifiCorp.

9. There is no evidence that the transaction will adversely affect competition.

10. Authorizing MEHC to acquire PacifiCorp will not affect PacifiCorp's ratepayers adversely for the reasons set forth in the body of this Decision.

11. The adopted conditions provide tangible benefits to PacifiCorp's ratepayers and the communities served by PacifiCorp.

12. Public utilities provide enormous benefits to California.

13. It is in the public interest to foster a business climate in California that is hospitable to investment in public utilities.

14. Commitment 23 provides that PacifiCorp's customers will be held harmless if the transaction results in a higher revenue requirement than if the transaction had not occurred. Commitment C-14 provides a guaranteed reduction in PacifiCorp's A&G expenses of \$6 million annually through December 31, 2010. The Applicants state that they are willing to offer Commitment 23 or C-14, but not both. According to the Applicants, it is unfair for them to bear the costs and risks for both of these Commitments. They also assert that the general protection from rate increases offered by Commitment 23 is redundant with the protection from rate increases associated with specific types of costs provided by Commitments 16, 22, C-11, C-12, C-13, and C-15.

15. The Applicants seek to reserve the right to request rate recovery of the acquisition premium under certain circumstances.

16. If a regulated utility purchasing dedicated property were allowed to pass on to its customers a price higher than original cost, the parties to the transaction would be in a position to frustrate the application of the original cost principle by arranging a transfer of ownership at a premium. The seller would receive, at the

expense of future ratepayers, more than the seller's original cost, and there would be little disincentive for the purchaser to pay such a premium because the purchaser would not bear the burden.

17. The Settlement Agreement asks the Commission to approve A.05-07-010, subject to the conditions set forth in Appendix A of the Settlement, as supplemented on January 5, 2006, and as corrected on January 10, 2006.

18. The California Commitments in the Settlement Agreement address significant, California-specific issues raised by several parties.

19. The Applicants promise to apply to California on a most-favored-nation basis the conditions adopted by other states that provide additional benefits or protections. The most-favored-nation conditions are included in the adopted Commitments in Appendix D of today's Decision.

20. After today's Decision is issued, other states may adopt additional or revised most-favored-nation conditions.

21. It can be seen with certainty that today's Decision will not have a significant effect on the environment because today's Decision does not authorize any new construction, changes to the operations of PacifiCorp or other entities, or changes in the use of existing assets and facilities.

### **Conclusions of Law**

1. The purpose of § 854(a) is to enable the Commission to review a proposed transaction, before it takes place, in order to take such actions as the public interest may require. The need for Commission review is especially acute where, as here, the utility is a monopoly provider of electricity and is subject to traditional cost-of-service regulation. The Commission's obligation under § 854(a) is not diminished by the fact that PacifiCorp's nearly 44,000 customers in California represent only a small part of PacifiCorp's operations.

2. For the reasons set forth in the body of today's Decision, the proposed acquisition of PacifiCorp by MEHC should not be exempted from § 854(a) pursuant to § 853(b).

3. For the reasons stated in the body of today's Decision, § 854(a) applies to the acquisition of PacifiCorp by MEHC, even though PacifiCorp is incorporated in Oregon.

4. The Commission has broad authority under § 854(a) to (i) approve or deny transfers of control of public utilities that operate in California, and (ii) impose such conditions as the Commission deems necessary or appropriate.

5. The criteria set forth in the body of today's Decision should be used to decide if MEHC should be authorized to acquire PacifiCorp pursuant to § 854(a).

6. The proposed transaction does not affect the Commission's jurisdiction or capacity to regulate and audit PacifiCorp. After the transaction is complete, the Commission will continue to exercise the same degree of regulatory oversight of PacifiCorp as it does today. The Public Utilities Code and all Commission decisions, rules, and orders will continue to apply to PacifiCorp.

7. The proposed transaction does not raise any antitrust or anticompetitive issues that warrant the Commission's intervention.

8. The acquisition of PacifiCorp by MEHC should be approved pursuant to § 854(a), subject to (i) the Commitments in Appendix D of today's Decision, and (ii) the most-favored-nation conditions adopted in other states.

9. The adopted conditions identified in the previous Conclusion of Law should supersede the conditions adopted in D.02-04-061, D.01-12-013, D.99-10-059, and D.99-06-049. The adopted conditions should not supersede other Commission decisions. To the extent there is a conflict between today's

Decision and another Commission decision (other than the four previously identified decisions), the other decision should control.

10. For the reasons set forth in the body of this Decision, Commitment 1 is unnecessary and should be eliminated.

11. Commitment C-14 should be adopted because it provides concrete and quantifiable benefits for PacifiCorp's ratepayers.

12. Although today's Decision does not adopt Commitment 23, the rejection of this Commitment does not authorize the recovery of a higher revenue requirement than if the transaction had not occurred. If the transaction does result in a higher revenue requirement that is outside the scope of Commitments 16, 22, C-11, C-12, C-13, and C-15, the Applicants will have the burden of demonstrating why it is reasonable for ratepayers to bear the cost of the higher revenue requirement.

13. The acquisition premium should not be included in rates under any circumstances. Commitment 17 should not be adopted to the extent it allows PacifiCorp to request rate recovery of the acquisition premium under some circumstances.

14. Because today's Decision does not authorize the recovery of the acquisition premium, any benefits from the premium should accrue to MEHC.

15. Any benefits of the transaction that occur solely at the holding company level, such as tax benefits to MEHC, should not be imputed for ratemaking purposes.

16. PacifiCorp should not recover in rates any increase in its cost of capital caused by the proposed transaction. Any higher costs should be the responsibility of the Applicants, not PacifiCorp's ratepayers.

17. Commitment 22 provides for additional ratemaking adjustments to PacifiCorp's cost of capital if the actual cost of a credit downgrade exceeds the parameters set forth in Commitments C-15a and 15b.

18. Commitment 34 does not constrain the Commission's ability to enforce today's Decision using whatever procedures the Commission deems appropriate. There is no need for the Commission or its staff to notify the Applicants before deviating from Commitment 34.

19. Commitments 35, 36, and 45 require the Applicants to spend more than \$1.3 billion for utility infrastructure investments. Other Commitments, including 36, 37, 40, 41, 42, and 43, require the Applicants to take certain actions regarding the operation and acquisition of transmission and generation resources. Today's Decision is limited to the review of the proposed acquisition of PacifiCorp by MEHC. Today's Decision does not authorize or require any of the expenditures or actions set forth in the previously identified Commitments. The matters set forth in these Commitments should be addressed, as appropriate, in other proceedings. No costs associated with these Commitments should be included in rates unless and until authorized by the Commission.

20. The Applicants are obligated to fulfill all the Commitments adopted by today's Decision and the Commission may enforce these Commitments.

21. None of the Commitments bind the Commission in any respect, or mandate any particular ratemaking result, in future rate cases.

22. DRA's recommendation to delay PacifiCorp's GRC by one year should not be adopted for the reasons set forth in the body of today's Decision.

23. If other states adopt additional or revised most-favored-nation conditions that are not reflected in today's Decision, the Applicants should file a petition to modify today's Decision to incorporate the additional or revised conditions.

24. The Settlement Agreement is reasonable, consistent with the law, and in the public interest to the extent it is consistent with all facets of the decision herein to conditionally authorize MEHC's acquisition of PacifiCorp pursuant to § 854(a).

25. The Settlement Agreement should be adopted to the extent it is consistent with all facets of the decision herein to conditionally authorize MEHC to acquire PacifiCorp pursuant to § 854(a).

26. The California Commitments in the Settlement Agreement should be adopted because they address substantial, California-specific issues that were raised by several parties.

27. The adopted California Commitments do not predetermine: (i) whether PacifiCorp will provide electric service to unserved Indian communities; (ii) any matters regarding Klamath River hydroelectric facilities; (iii) the type, location, or reasonableness of renewable resources that PacifiCorp may acquire; (iv) the type, location, costs, and benefits associated with utility infrastructure investments; and (v) the recoverability of any costs. PacifiCorp will have to seek and obtain the Commission's approval before including in rates any costs associated with the California Commitments.

28. Consistent with Commission precedent, none of the gain or loss from the sale of PacifiCorp should be allocated to PacifiCorp's ratepayers.

29. Because it can be seen with certainty that today's Decision will not have a significant effect on the environment, the acquisition of PacifiCorp by MEHC as authorized by today's Decision qualifies for an exemption from CEQA pursuant to Section 15061(b)(3)(1) of the CEQA guidelines, and there is no need for further environmental review.

30. The Applicants should notify the Director of the Commission's Energy Division of any changes to the ring-fencing protections within 30 days. Such notice should include (i) the consent provided by PPW's independent director, and (ii) the rating agencies' confirmation that there will be no credit downgrade from the amended ring-fencing protections.

31. The following Order should be effective immediately so that the acquisition of PacifiCorp by MEHC can be consummated expeditiously.

## **O R D E R**

### **IT IS ORDERED** that:

1. MidAmerican Energy Holdings Company (MEHC) is authorized to acquire PacifiCorp (referred to jointly hereafter as the Applicants) pursuant to Pub. Util. Code § 854(a), subject to the following conditions: (i) the Commitments identified in Appendix D of this Decision, and (ii) the conditions adopted in other states that apply to California on a most-favored-nation basis.

2. The adopted conditions identified in Ordering Paragraph 1 supersede the conditions adopted in Decision (D.) 02-04-061, D.01-12-013, D.99-10-059, and D.99-06-049. The adopted conditions do not supersede other Commission decisions. If there is a conflict between the conditions in today's Decision and another Commission decision (other than the four previously identified decisions), the other decision shall control.

3. The adopted Commitments in Appendix D are subject to the clarifications, interpretations, and constraints set forth in the body of this Decision and the preceding Conclusions of Law.

4. If other states adopt most-favored-nation conditions that are not reflected in today's Decision, the Applicants shall file a petition to modify today's Decision to incorporate the additional conditions.

5. None of the gain or loss from the sale of PacifiCorp shall accrue to PacifiCorp's ratepayers.

6. The Applicants shall notify the Director of the Commission's Energy Division in writing of the transfer of control of PacifiCorp as authorized herein. The Applicants shall provide notice within 30 days of the date of the transfer. A true copy of the instruments of transfer shall be attached to the notification.

7. The authority to transfer control of PacifiCorp granted by this Order shall expire if not exercised within one year from the effective date of this Order.

8. The Settlement Agreement in Appendix C is adopted to the extent it is consistent with today's Decision.

9. The Applicants shall notify the Director of the Commission's Energy Division of any changes to the ring-fencing protections within 30 days. Such notice shall contain the information specified in the body of this Decision.

10. Any benefits that MidAmerican Energy Holdings Company (MEHC) receives from the acquisition premium shall accrue exclusively to MEHC. Any benefits of the transaction that occur solely at the holding company level, such as tax benefits to MEHC, shall not be imputed for ratemaking purposes.

11. Application 05-07-010 is granted and denied to the extent set forth in the previous Ordering Paragraphs.

12. Application 05-07-010 is closed.

This Order is effective today.

Dated February 16, 2006, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
GEOFFREY F. BROWN  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
Commissioners