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November 17, 2004

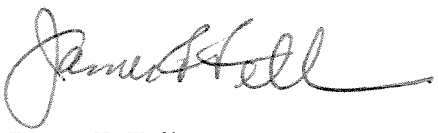
BY FACSIMILE AND MAIL

Administrative Hearings Division
Oregon Public Utility Commission
550 Capitol Street NE, Suite 215
Salem, OR 97301-2551

Re: Docket No. UM 1121

Enclosed for filing are an original and five copies of PacifiCorp's Opening Brief in this matter.

Very truly yours,



James F. Fell

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Enclosures

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1121

In the Matter of OREGON ELECTRIC UTILITY COMPANY, LLC, et al. Application for Authorization to Acquire Portland General Electric Company.	PACIFICORP'S OPENING BRIEF

PacifiCorp submits this Opening Brief addressing the net benefit standard applicable to change of control transactions under ORS 757.511. PacifiCorp does not take a position on the size of any merger credit necessary to provide a net benefit to customers under the facts of this case. PacifiCorp respectfully requests that the Commission examine the full record and carefully apply the guidelines and comments on the net benefit standard expressed in Order No. 01-778.

ARGUMENT

After the ScottishPower/PacifiCorp merger in 1999, the Commission initiated Docket UM 1011 to resolve whether ORS 757.511 requires that an applicant for approval of a merger or acquisition must demonstrate no harm to customers or a net benefit from the transaction. The Commission decided that the law requires a net benefit. Order No. 01-778 (Sept. 4, 2001). In reaching that decision, the Commission stated:

> We do not intend to reduce the net benefit standard to economic considerations as a matter of policy. We will consider the total set of concerns presented by each merger application in determining how to assess a net benefit.... Because potential harm from merger transactions is often difficult to verify, recent orders have required monetary terms as a way to demonstrate that customers will receive a net benefit. This need not always be the case. Order No. 01-778, p. 11.

The Commission also expressed its belief that the public policy for mergers and acquisitions should not require a net benefit, so long as customers are not adversely affected:

> We would like to make clear that the conclusion reached here is compelled by the statutory language and is not the policy preference of the Commission. In fact, we believe that public policy for mergers and acquisitions should not require a "net benefit" for customers, so long as they are not affected adversely by the change of ownership of the utility. . . . The form of business enterprise should be of no consequence to the Commission, as long as the utility obeys regulatory mandates and procedures, does not present conflicts with the interests of Oregon customers, does not expose customers to greater risks of higher costs or lower service quality, and is capable of economically and reliably providing the services offered to customers now and in the future. Order No. 01-778, p. 11.

The Commission stated that it would "assess each merger on a case by case basis." *Id.*

In the process of applying the net benefit standard, the Commission's findings in this case must be supported by substantial evidence in the record. As part of this "substantial evidence" test, Oregon courts require the agency to provide a rational basis for each agency inference. *See, e.g., Pacific Northwest Bell Tele. Co. v. Eachus,* 135 Or App 41, 44, 898 P2d 774 (1995) ("We review PUC's decision pursuant to ORS 756.594 and may reverse only if the order is unreasonable or unlawful or not supported by substantial evidence"); *Tilden v. Board of Chiropractic Examiners,* 134 Or App 276, 281-82, 898 P2d 219 (1995); *City of Roseburg v. Roseburg City Firefighters*, 292 Or 266, 272, 639 P2d 90 (1981) ("[W]e look to the order to state the rational basis of the agency's inference"); *Reynolds School District No. 7 v. Martin,* 30 Or App 39, 43-44, 566 P2d 196 (1977) ("In order that we may fulfill our function of review, we have construed ORS 183.470 to require * * * the rational relationship between the facts and conclusions").

As the Commission recognized in Order No. 01-778, p. 11, the total set of concerns presented by each merger application must be considered in determining how to assess a net benefit. The Commission also recognized that the imposition of monetary terms (merger credits) as a means of providing customers a net benefit will not always be required. That is, an applicant may be able to demonstrate that the merger will bring other benefits, not directly monetized, that in sum provide a net benefit to customers.

In *Matter of PacifiCorp Holdings, Inc. and PacifiCorp*, Docket UM 1021, Order No. 01-573 (Jul. 10, 2001), the applicants filed under ORS 757.511 for approval of an internal corporate restructuring that would place PacifiCorp Holdings, Inc. ("PHI") directly above PacifiCorp in the corporate structure. Thereafter, PacifiCorp would transfer a number of its subsidiaries upstream to PHI. This restructuring would, among other things, facilitate the separation of non-utility activities from utility activities. The Commission found this non-monetary benefit sufficient under either a no harm or net benefit standard and approved the restructuring. Presumably, a program for improved customer service would also qualify as a non-monetary benefit and be sufficient in the absence of evidence of customer harm.

This is the first merger or acquisition transaction after Order No. 01-778 in which the Commission has been asked to apply the net benefit standard under ORS 757.511. Unlike other cases that have been before the Commission,[1] in this case there is no stipulation on the level of merger credits. TPG is offering $43 million in merger credits. Ex. 500, p. 2 (Davis Sur-Surrebuttal). Other parties are arguing for more. In the Commission's evaluation of this transaction, it must determine whether TPG's offer, along with other conditions, is sufficient to provide customers a net benefit. If the Commission finds TPG's merger credits insufficient, it must explain its finding or determine the appropriate level of merger credits consistent with the rulings and guidance adopted in Order No. 01-778. In the end, the net benefit standard does not require any specific magnitude of benefit. As long as the net result is a benefit to customers, it is sufficient.

As noted above, the Commission's findings of both benefits and harms must be based on substantial evidence in the record. To support requiring the payment of additional merger credits, the Commission must have evidence of tangible (that is, not speculative) harms or risks to customers that have not been mitigated by merger conditions, and the additional merger

[1] *See, Sierra Pacific Resources,* UM 967, Order No. 00-702; *Scottish Power plc,* UM 918, Order No. 99-616; *Enron Corp.*, UM 814, Order No. 97-196.

credits must be rationally related to the customer harms identified. Merger credits cannot be based on the return that the purchaser might achieve on the transaction, because customers are not harmed by a purchaser's high return so long as the Commission's regulatory oversight is not compromised. Nor can a merger credit be rationally related to concern about the identity of the purchaser's investors. *See, Surrebuttal Testimony of BOMA, pp. 5-6.* That may be an issue the Commission must consider, but it cannot be mitigated by the payment of money. These are just examples of the type of analysis the Commission must conduct.

PacifiCorp is interested in this case because it will set important precedent on the application of Order No. 01-778 and the substantial evidence test. Disciplined decision-making is required by the law and is also desirable as a matter of regulatory policy. In the absence of a well-reasoned decision supported by substantial evidence, parties contemplating a transaction subject to ORS 757.511 would be forced to guess about the level of merger credit, if any, needed to obtain Commission approval. While the Commission must evaluate each merger and acquisition on a case-by-case basis, introducing an unpredictable or unfounded regulatory price into these transactions would not be good public policy or sound regulation.

CONCLUSION

PacifiCorp does not take a position on the size of merger credit necessary to provide a net benefit to customers under the facts of this case. PacifiCorp respectfully requests that the Commission examine the full record and carefully apply the guidelines and comments expressed in Order No. 01-778. PacifiCorp also requests that the Commission bear in mind that its decision in this case may affect transactions that are not at all like the acquisition of PGE, such as the internal corporate restructuring in *PacifiCorp Holdings.* This decision should address the

requirements of this case without erecting barriers to utility transactions that present little or no risk to customers or are beneficial in their own right, without the payment of merger credits.

DATED: November 17, 2004.

Respectfully submitted,

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Of Attorneys for PacifiCorp

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing document upon the parties of record in this proceeding by electronic mail where available and by first-class mail, addressed to said parties/attorneys' addresses as shown below.

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