BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1209

In the Matter of MIDAMERICAN ENERGY HOLDINGS COMPANY Application for Authorization to Acquire Pacific Power & Light, dba PacifiCorp	STAFF'S RESPONSE TO THE COMMISSION'S BENCH REQUEST

INTRODUCTION

On December 23, 2005, a Stipulation and supporting testimony were filed by the stipulating parties that concluded that MidAmerican Energy Holding Company ("MEHC") had satisfied the approval standard found in ORS 757.511. On January 18, 2006, the Public Utility Commission of Oregon ("Commission") issued a bench request that requested a brief from each stipulating party. Specifically, the Commission requests that the stipulating parties supplement the joint supporting testimony by delineating the mitigating measures in the Stipulation that eliminate or reduce potential harms that were identified in the parties' opening comments and testimony. Furthermore, the Commission requests that the stipulating parties identify those commitments that they view as benefits of the transaction.

In Order No. 01-778, the Commission determined that the approval standard found in ORS 757.511 requires a two step analysis which is that there will be: 1) a net benefit for the utility's customers and 2) that the transaction will not harm Oregon citizens as a whole. *See* Order No. 01-778 at 11. In describing the meaning of the net benefits standard, the Commission also made clear that the determination of net benefits is not rigid and inflexible nor necessarily reducible to economic considerations but, instead, one applied on a case by case basis. *Id.*

Consistent with the Commission's decision on the approval standard, the Public Utility Commission of Oregon ("Staff") believes that the Stipulation provides net benefits to

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PacifiCorp's customers and, furthermore, does not harm the Oregon public as a whole. Staff takes the opportunity presented by the Commission's recent bench request to further, and more specifically, outline its support for approval of the Stipulation.

The bench requests specifically requests that this brief outline its support for the stipulation based upon Staff's opening comments and testimony. Administrative Law Judge Smith's Issues List identified the following subjects of concern:

1. Infrastructure and Resource Investments
    a. Transmission and Resource Investments
        i. Effect on Oregon ratepayers
        ii. Proposed annual four percent rate increase
        iii. Relationship with public power entities
    b. Renewable Resources and Energy Efficiency
        i. Commitment to renewable resources
        ii. Effect on emissions
        iii. Community renewable energy projects
        iv. Proposed Demand Side Management study
2. Financial Stability
    a. Effect of MEHC ownership on credit ratings and cost of debt
    b. Acknowledgment and ability to pay possible liabilities pursuant to FERC relicensing of hydroelectric projects owned by PacifiCorp
    c. Effect of MEHC proposal on corporate overhead charges
3. Customer Service
    a. Service Quality Measures
    b. Other customer guarantees
    c. Assistance to low-income customers
    d. Public purpose funding under SB 1149
4. Holding Company
    a. Access to information in Oregon, especially in light of PUHCA repeal.
    b. Effect of debt or acquisition premium on PacifiCorp finances
    c. Ability of OPUC to regulate Oregon portion of a multi-state utility
5. Other Effects of the Proposed MEHC Transaction
    a. Relocation of headquarters or personnel
    b. Effect of Berkshire Hathaway's influence on PacifiCorp
    c. Effect of MEHC and related companies' business models on PacifiCorp
    d. Management of hydroelectric resources

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To the extent that Staff's opening comments and testimony discuss issues contained on the Issues List, Staff will follow the order outlined by that list.

DISCUSSION

1. Infrastructure and Resource Investments

   a. Transmission and Resource Investments

Staff did not raise a lack of willingness to invest in infrastructure and resource investments as a major concern in this case. Contrarily, Staff argued that both ScottishPower and MEHC would be expected to make prudent decisions in transmission and resources.

According to Commitments 34 and 35, MEHC and PacifiCorp have identified transmission and reliability related projects that they believe will provide a benefit to PacifiCorp's customers. Specifically, these transmission projects involve the potential upgrades to Path C Upgrade, Mona – Oquirrh, and Walla Walla – Yakima or Mid-C.

From Staff's perspective and as noted in its opening testimony, it is important to compare the proposed transaction to continued prudent and well-managed operation of PacifiCorp. *See* Staff/100, Conway/21, lines 8-11. In this context, Staff concluded that Commitments 34 and 35 will not harm PacifiCorp's customers because of the inclusion of Oregon Commitment 34 and paragraph 22 of the Stipulation, which make it clear that the transmission commitments are being made by, and are only binding upon, MEHC and PacifiCorp. Furthermore, through Oregon Commitment 34 and paragraph 22 of the Stipulation, Staff has reserved its ability to argue such things as the prudence, just and reasonable character and appropriate ratemaking treatment of these proposed projects in future proceedings. With these reservations of rights and the fact that the transmission commitments only bind MEHC and PacifiCorp, PacifiCorp's customers are not harmed.

While Staff did not consider it an explicit benefit, the willingness of MEHC to invest in these projects and the stated hesitancy of PacifiCorp to invest could be considered an incremental benefit if the transmission projects are fulfilled and result in cost-effective, prudent management

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of the utility. *See generally* Staff/100, Conway/21, line 18 through Staff/100, Conway/28, line 5. For purposes of analyzing the Stipulation, Staff did not consider the transmission commitments as a benefit because there was no indication that ScottishPower would not also pursue cost-effective transmission projects.

2a. Financial Stability

In Staff's opening testimony, it outlined potential harms of the transaction related to debt or leverage at MEHC, its effect on PacifiCorp's credit ratings and the resulting increase in PacifiCorp's cost of debt. These concerns were increased due to a weaker credit rating at MEHC as compared to ScottishPower. In order to address these concerns, Staff recommended improved ring fencing and credit support for PacifiCorp.

2a(i). Ring fencing

In response, the Stipulation contains numerous commitments that mitigate these potential harms, including commitments 11, 15, 18, 21, and Oregon 14 through Oregon 18.[1] Taken together, these commitments work to mitigate the potential financial harms that Staff identified in its opening testimony related to this transaction.

Commitment 11(b) provides that the ring-fencing provisions found in Appendix 1 will be put in place for PPW Holdings LLC. In addition, Commitment 15 requires MEHC and PacifiCorp to maintain separate debt and preferred stock, if any, while also providing that PacifiCorp will maintain its own corporate credit rating. These ring fencing provisions are expected to result in credit agencies relying on PacifiCorp's stand alone credit metrics. PacifiCorp's stand alone metrics would justify a notch higher debt rating than those of MEHC and, therefore, help to limit a potential downgrade.

[1] For example, Commitment 11(b) was added to specify which ring fencing provisions will be implemented; Commitment 15 was amended and clarified to require PacifiCorp to keep its own debt rating from, at a minimum, both S&P and Moodys; Commitment 18 was added in response to Staff's opening testimony and increases the minimum equity requirement, incorporates short-term debt, and specifies the treatment of existing preferred stock; and Commitment 21, when viewed in combination with O14, provides additional protection against a higher cost of capital.

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A further benefit of the ring fencing provisions included in the stipulation is that they are expected to prevent PacifiCorp from being drawn, involuntarily, into a MEHC bankruptcy. While Staff did not specifically raise the possibility of MEHC filing for bankruptcy, recent history has demonstrated that unexpected events can quickly lead to seemingly healthy companies filing for bankruptcy. This benefit is bolstered by Commitment 17, which requires a non-consolidation opinion. A non-consolidation opinion is a formal legal opinion that states that the ring fencing provisions are sufficient to prevent a bankruptcy court from "pulling" PacifiCorp into an MEHC bankruptcy. While this particular commitment can be viewed as mitigation against a MEHC bankruptcy, Staff notes that it did not identify in its opening testimony a MEHC bankruptcy as a potential of this transaction. In that context, some may view this additional protection as an incremental benefit beyond the identified potential harms. This view is supported by the fact that PacifiCorp does not have a non-consolidated opinion. Staff does not believe that PacifiCorp would be able to obtain a non-consolidation opinion based on its current ring fencing.

Oregon Commitment 18 provides additional protection in that MEHC and PacifiCorp have agreed not to make any dividends to PPW Holdings LLC or MECH if PacifiCorp's unsecured debt rating reaches certain listed ratings, which would keep equity at PacifiCorp under those described situations. No such provision currently exists for PacifiCorp.

2a(ii). Credit Support

MEHC has provided credit support by increasing the minimum level of common equity in PacifiCorp's capital structure that must be maintained if dividends are to be paid; agreeing to include debt issued by the intermediate holding company in the calculation of PacifiCorp's minimum equity requirement, and agreeing to prohibitions on dividends in the event PacifiCorp's ratings fall below listed levels, no matter what the level of common equity. These commitments are considered ring fencing, but also provide credit support. These commitments

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are Commitment 18 and O15 and were negotiated in response to concerns Staff raised in its opening testimony.

2a(iii). Additional protection against potential increases in the cost of debt.

Staff believes the ring fencing and credit support have decreased the probability of a downgrade due to MEHC's ownership, but nonetheless obtained protections in the unlikely event of a downgrade. Oregon Commitment 14 provides mitigation against possible harm by establishing a known and measurable reduction to the cost of debt if two or more rating agencies lower PacifiCorp's senior long-tem debt within 12 months of Commission approval of the transaction. A further protection is provided by Commitment 21 which offers some mitigation of potential harm by providing that MEHC and PacifiCorp will not advocate for a higher cost of capital than would have been absent MEHC's ownership. This commitment would allow the Commission to reduce PacifiCorp's cost of capital in the event it is higher due to MEHC's ownership. These commitments were negotiated in response to concerns Staff raised in its opening testimony.

2b. Effect of MEHC proposal on corporate overhead charges

Staff addressed two major concerns under this general heading. These concerns were an expected increase in costs for PacifiCorp due to changes in its net cross charges and the lack of a comparable insurance captive. In both cases, the commitments related to these areas were negotiated in response to concerns Staff raised in its opening testimony.

2b(i). Net Cross Charges

Staff raised a concern and demonstrated that PacifiCorp should expect increased costs due to changes in net cross charges. Staff calculated that $7.3 million was the current cross-charge cost to PacifiCorp from Scottish Power.

These concerns were mitigated by Commitments O9 and O11. Specifically these commitments required:

a. Customers to be held harmless for increases in management fees, which were calculated by Staff at $1.5 million (total company).

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b. Corporate allocations from MEHC to PacifiCorp included in PacifiCorp's rates will be $7.3 million or less.

c. Customers to be held harmless for increases in costs resulting from PacifiCorp corporate costs previously billed to PPM Energy and other affiliates of PacifiCorp. Staff valued these costs at $7.9 million annually (total company).

d. If the above is not achieved, customers could receive rate credits up to $1.5 million (total company) for the management fee and $7.9 million (total company) annually for the costs previously incurred by affiliates.

2b(ii). Lack of a Captive

Staff raised a concern and demonstrated that PacifiCorp should expect increased insurance costs (or increases in uninsured losses) due to the inability to participate in ScottishPower's captive insurance (Dornoch), should the transaction close.

These concerns were mitigated by Commitment O10. Specifically, this commitment required:

a. MEHC to use an existing captive or form a new captive insurance company to provide certain insurance coverage for PacifiCorp's operations. The cost of forming the captive would not be reflected in regulated accounts.

b. The captive would be comparable in costs for equivalent coverage previously provided by PacifiCorp's existing captive.

c. That premium costs would be capped at the current captive costs of $7.4 million (total company) until December 31, 2010.

d. If this $7.4 million cost is exceeded, MEHC would provide rate credits up to $4.3 million (total company) annually.

3. Customer Service

Staff did not raise customer service as a major concern. Staff noted that the existing service quality measures were already in place for approximately nine more years through a stipulation reached in UE 147. Further Staff observed that PacifiCorp had opted to continue customer guarantees on its own accord presumably because it was beneficial to its shareholders. Nonetheless, MEHC has committed to extend the customer guarantees through 2011. (*See* Commitments 1 and 45.)

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4. Holding Company

4a. Access to information in Oregon, especially in light of PUHCA repeal.

Staff concerns regarding access to information in Oregon, were mitigated by Commitments 4, 5, 6, 17, O1 and O5. These commitments help ensure access to MEHC's and Berkshire Hathaway's books and records and require retention of certain information. Further, O1 outlines a dispute resolution process in the event there is a disagreement regarding discovery.

In addition to concerns over access to information, Staff raised concerns regarding the effects of Berkshire Hathaway's influence on PacifiCorp. *See* Staff/100, Conway/40, line 7 through Staff/100, Conway/43, line 2. These identified concerns were mitigated when MEHC filed an amended application that added Berkshire Hathaway as an applicant and included the sworn statements of Warren Buffet and Walter Scott Jr., which limit their influence over PacifiCorp's activities and operations.

The filed sworn statements provide that neither Warren Buffet nor Walter Scott Jr. will exercise any control, directly or indirectly, on matters that pertain to PacifiCorp, except for matters related to PacifiCorp that are ministerial in nature. The sworn statements also provide that Warren Buffet and Walter Scott Jr. will recuse themselves from voting as MEHC or Berkshire Hathaway directors on MEHC or Berkshire Hathaway Board of Directors matters concerning PacifiCorp activities or operations. Additionally, the sworn statements provide that any future transfer of the shares, if Warren Buffet and Walter Scott Jr. have knowledge that the transferee would own 5% or more of the voting interests of MEHC or Berkshire Hathaway after such transfer, will require an agreement by the transferee to abide by the same limitations as Warren Buffet and Walter Scott Jr. have agreed to in the sworn statements. The addition of Berkshire Hathaway as an applicant along with the sworn statements of Warren Buffet and Walter Scott Jr. mitigated Staff's identified harms related to influence over PacifiCorp's operations and activities.

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4b. Effect of debt or acquisition premium on PacifiCorp finances

Staff concerns regarding the acquisition premium on PacifiCorp's finances is mitigated by Commitment O13 and Staff's belief that the Commission will never recognize goodwill for ratemaking purposes. Commitment O13 identifies the circumstances that must exist before MEHC can request that the Order resulting from UM 1209 be modified. The Commission is not required to grant the request and is not required to allow goodwill in rates. Staff opposes the inclusion of goodwill, now and in the future, in customer rates. Because the exclusion of goodwill from customer rates was essential to Staff's finding of net benefits, it is highly unlikely that there will exist circumstances such that the order should be modified to allow the recovery of goodwill. As discussed in the joint testimony, benefits are expected and therefore cannot be used as a rational to include goodwill in rates. *See* Joint/100, Joint/24, lines 18-23.

5. Other Effects of the Proposed MEHC Transaction

5a. Relocation of headquarters or personnel

Staff did not raise the relocation of headquarters as a major concern in this transaction. However, Staff concerns regarding the relocation of headquarters and key staff to Utah is mitigated by Commitment 47. This commitment requires adequate staffing and presence in each state, including Oregon. This commitment does not currently exist for PacifiCorp while the Utah pressures to relocate staff to Salt Lake, which Staff understands are related to Utah's increasing percentage of PacifiCorp's load, are independent of this transaction.

5b. Other benefits

MEHC provides two commitments that Staff views as a benefit that is not directly tied to any harm. First, Commitment O12 has MEHC committing to A&G reductions. These A&G reductions are guaranteed and not present with any existing PacifiCorp commitment. Further, the A&G savings commence, in full, immediately with the beginning of the first month following closing. Second, through Commitment O8, MEHC commits to reducing the costs associated with West Valley. There are no plans for such a reduction in West Valley contract

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costs absent this MEHC transaction. To capture these savings before the next rate change, the benefits of both of these commitments are deferred for the benefit of customers.

In addition, many of the other commitments and portions of the Stipulation could be viewed as additional benefits. For example: Section 15(d) provides that MEHC and PacifiCorp will work with ICNU to develop service quality standards for high-tech industrial customers; Commitment O22 increases the minimum level of shareholder matching contributions for low income assistance; Commitment O25 provides that MEHC and PacifiCorp will have 400 MW of cost-effective new renewable resources in PacifiCorp's generation portfolio by the end of 2007; and Commitment 40 reaffirms PacifiCorp's commitment to acquire 1400 MW of new cost-effective renewable resources, while also committing to bring at least 100 MW of cost-effective wind resources into service within one year of the close of the transaction. Importantly, Staff does not view these commitments as mitigating harm nor does Staff believe that these commitments harm the Oregon public as a whole. As a result, Staff views these commitments as benefits that are targeted at a subset of customers or designed to guarantee the performance we expect from a well-managed utility. While Staff viewed these additional commitments as targeted benefits, it did not rely on them to conclude that the transaction provided net benefits. Rather, Staff concluded that the other commitments discussed herein resulted in net benefits and that these additional commitments could be viewed as targeted benefits for a subset of customers or to guarantee performance.

CONCLUSION

While it is impossible to identify every potential harm that may exist in the future, Staff is comfortable that the harms that it has identified in its opening testimony related to this particular transaction have been mitigated to the extent that, when considered within the context of the overall Stipulation, the commitments protect PacifiCorp's customers from harm and meet the approval standard of ORS 757.511. Specifically, the Stipulation as a whole substantially mitigates the potential harms that Staff identified while also providing benefits. In combining

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the commitments that mitigate potential harm and those commitments that provide benefits, overall the Stipulation is expected to provide "net" benefits to PacifiCorp's customers. At the same time, the Stipulation does not harm the Oregon public as a whole. As a result, the Stipulation meets the approval standard as outlined in Order No. 01-778 and should be approved.

DATED this 6th day of February 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 6, 2006, I served the foregoing upon the parties hereto by electronic mail, and by sending a true, exact and full copy by regular postage prepaid mail, to the parties accepting paper service, or by hand delivery/shuttle mail to:

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