

**PUBLIC UTILITY COMMISSION OF OREGON  
REDACTED STAFF REPORT  
PUBLIC MEETING DATE: May 19, 2020**

REGULAR  CONSENT  EFFECTIVE DATE May 20, 2020

**DATE:** May 8, 2020

**TO:** Public Utility Commission

**FROM:** Moya Enright

**THROUGH:** Bryan Conway, Michael Dougherty, John Crider, and Matt Muldoon **SIGNED**

**SUBJECT:** PACIFIC POWER:  
(Docket No. UI 435)  
Requests approval of an Affiliated Interest transaction with Bank of New York Mellon Trust Company.

**STAFF RECOMMENDATION:**

Approve Pacific Power's (PacifiCorp or Company) application requesting approval of an Affiliated Interest (AI) transaction with Bank of New York Mellon Trust Company (BNYM), involving entering into up to seven new Trust Agreements and/or Custodian Agreements (Custodian Agreements), subject to the following five conditions (Staff Conditions):

1. Any PacifiCorp financing applications relying on a Commission Order in this Docket No. UI 435 will cite this Order and Docket number and provide the basis for the pricing, charges, or restrictions (where applicable) predicated on approval herein.
2. PacifiCorp shall report to the Commission, as part of its annual AI report, all transactions entered into involving BNYM.
3. PacifiCorp shall provide the Commission access to all books of account, as well as documents, data and records that pertain to any transaction involving BNYM.
4. PacifiCorp shall notify the Commission in advance of any substantive changes to the agreement, including any material change in price. Any such change must be submitted in an application for supplemental order (or other appropriate format) in this docket.
5. The Commission reserves the right to review, for reasonableness, all financial aspects of these transactions in any rate proceedings or alternative form of regulation.

## **DISCUSSION:**

### Issue

Whether the Commission should approve PacifiCorp's affiliated interest transaction with BNYM, which involves entering into up to seven new Custodian Agreements.

### Applicable Rule

ORS 757.495 requires a public utility to seek approval of contracts involving the direct or indirect payment to any person or corporation having an affiliated interest within 90 days after execution of the contract. The required process for submitting an agreement for review by the Commission is set forth in ORS 757.015(2) and OAR 860-027-0040.

The ORS 757.015(3) definition of an "affiliated interest" includes "every corporation five percent or more of whose voting securities are owned by any person or corporation owning five percent or more of the voting securities of such public utility or by any person or corporation in any chain of successive ownership of five percent or more of voting securities of such public utility."

ORS 757.495(3) provides that the Commission may approve an affiliated interest agreement if the agreement is fair and reasonable and not contrary to the public interest.

The Commission need not determine the reasonableness of all financial aspects of the contract for ratemaking purposes, but, rather, may reserve that issue for subsequent proceedings, per Commission Order No. 11-071.

### Analysis

#### *Background*

On February 20, 2020, PacifiCorp filed its Application pursuant to ORS 757.495 and in accordance with OAR 860-027-0040, requesting approval for an affiliate interest transaction with BNYM, which involves entering into up to seven new Custodian Agreements.<sup>1</sup> PacifiCorp will be replacing its current trustee with BNYM, but not amending any retirement or benefit plans, or any other underlying commercial arrangements.

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<sup>1</sup> As noted in PacifiCorp's response to Staff DR 25, one of the seven funds will not transfer to BNYM.

PacifiCorp is a wholly owned indirect subsidiary of Berkshire Hathaway Energy Company (BHE). BHE is a subsidiary of Berkshire Hathaway, Inc. (Berkshire). Berkshire holds a 9.98 percent interest in BNYM,<sup>2</sup> making BNYM an affiliated interest of PacifiCorp.

Pension Trustees are responsible for ensuring that plan assets are managed in the best interests of the plan participants and beneficiaries, while Pension Custodians hold investment assets and handle the buying and selling of investments. A single party may perform the duties of both Trustee and Custodian of a pension plan.

PacifiCorp's existing Custodian Agreements were entered into individually between 1990 and 2015.<sup>3</sup> The change to PacifiCorp's Custodian Agreements addressed in this filing is the result of a company-wide effort to reduce costs and achieve volume discounts by consolidating the Berkshire Hathaway Energy Company Custodian Agreements with single provider.<sup>4</sup> PacifiCorp does not envision any further changes to its Custodian Agreements in the next five years.<sup>5</sup>

Based on the Company's explanation of the share of costs across the BHE companies, Staff calculates that the Company entering into the Custodian Agreements would result in approximately a 50 percent, or approximately \$224,000, savings to PacifiCorp.<sup>6</sup> Fees associated with PacifiCorp's pension and other post retirement plans are included in the Company's net periodic benefit cost, which is a component of the Company's proposed revenue requirement in general rate case proceedings.

In addition to reviewing PacifiCorp's Application, the accompanying exhibits, and responses to Staff's 28 information requests, Staff investigated the following issues in considering whether the agreement is fair, reasonable, and not contrary to the public interest:

- a) Selection Process;
- b) Terms and Conditions of the Agreements;
- c) Transfer Pricing;
- d) Public Interest Compliance; and
- e) Records Availability, Audit Provisions, and Reporting Requirements.

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<sup>2</sup> As on December 31, 2019.

<sup>3</sup> See PacifiCorp's response to Staff Information Request 1, and first supplemental response to Information Request 11.

<sup>4</sup> See PacifiCorp's first supplemental response to Information Request 11.

<sup>5</sup> See PacifiCorp's response to Staff Information Request 3.

<sup>6</sup> Staff calculated value, drawing from PacifiCorp's response to Information Request and 27, and values provided in Appendix B to the Company's filing.

*a) Selection Process*

This change was triggered by BHE carrying out a review of trustee and custodian services for retirement and employee benefits plans. During the course of this review, it was found that BHE companies were using various trustee and custody agreement providers, and the companies were not taking advantage of economies of scale with regard to trustee or custody account fees that would be realized if a single financial entity provided trust and custody services.<sup>7</sup>

A technical working team from PacifiCorp, NV Energy, and MidAmerican Energy Company was formed to choose a new pension custodian. The team worked together with the specialized AON Custodian & Trustee Search Team, which provided expert advice on aspects of the process and review. A Request for Proposals (RFP) was issued to five parties in June 2019, and four responses were received. Two of the respondents were affiliated interests of the Company.

Having thoroughly investigated the selection process, Staff believes that that a comprehensive evaluation of the RFP responses was carried out by the technical team. This included a three-stage evaluation of the responses, the scoring of respondents against a grid of weighted criteria, and the interviewing of shortlisted candidates. All vendors were evaluated against the RFP criteria, without regard to their ownership. Both shortlisted candidates were found to be capable, with excellent services, and ultimately the bidder with the lower price was selected.

*b) Terms and Conditions of the Custodian Agreements*

Staff reviewed the Custodian Agreements and did not observe any unusual terms and conditions. The Agreements appears to have been negotiated between the parties at arm's-length, and contain similar liabilities and indemnities as the prior Custodian Agreements.

Staff notes that as the time of writing, the Trojan Decommissioning Trust Fund Agreement was still under negotiation. Staff has reviewed a draft of the agreement, and did not observe any unusual terms and conditions, or have any objections to the content of the Agreement.

Staff is satisfied that the terms and conditions of the Custodian Agreements are not contrary to the public interest.

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<sup>7</sup> See PacifiCorp's response to Staff Information Request 4.

*c) Transfer Pricing*

Staff reviewed the pricing in order to verify that the agreement meets the requirements set forth in OAR 860-027-0048(4)(e), which requires that when services or supplies (except for generation) are sold to an energy utility by an affiliate, sales shall be recorded in the energy utility's accounts at the approved rate if an applicable rate is on file with the Commission or with FERC, or if services or supplies (except for generation) are not sold pursuant to an approved rate, sales shall be recorded in the energy utility's accounts at the affiliate's cost or the market rate, whichever is lower.

The payment from PacifiCorp to BNYM will be a single annual payment of approximately \$228,000.<sup>8</sup> Staff reviewed the fees of the Company's current Custodian Agreement provider, and of each respondent to the RFP. Based on the Company's explanation of the share of costs across the BHE companies, Staff calculates that the Company entering into the Custodian Agreements would result in approximately a 50 percent, or approximately \$224,000, savings to PacifiCorp.<sup>9</sup>

Staff notes that the overall cost to PacifiCorp of entering into the Custodian Agreements is lower with BNYM than with either the prior custodian, **[BEGIN CONFIDENTIAL]**

**[END CONFIDENTIAL]**

In light of the higher individual account fee for the PacifiCorp Executive Trust, Staff enquired as to whether the Company could have chosen to enter into more than one Custodian Agreement in order to take advantage of the lower fees from each response. Although there appears to have been no impediment to doing so in terms of the agreement with the provider, the Company highlights the fact that the purpose of the RFP was to find a single trustee/custodian services provider, thereby saving fees and enabling account-volume scale discounts.<sup>12</sup>

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<sup>8</sup> See PacifiCorp's initial filing, page 5.

<sup>9</sup> Staff calculated value, drawing from PacifiCorp's response to Information Request and 27, and values provided in Appendix B to the Company's filing.

<sup>10</sup> **[BEGIN CONFIDENTIAL]**

<sup>11</sup> **[END CONFIDENTIAL]** however, the PacifiCorp Foundation did not transfer over to BNYM as trustee. See PacifiCorp's response to Staff Information Request 25.

<sup>12</sup> See PacifiCorp's first supplemental response to Staff DR 14.

Staff notes that this is not a ratemaking proceeding, and will therefore investigate the appropriate ratemaking treatment, including application of the affiliate's costs and the market rate, in such a future case.

*d) Public Interest Compliance*

The Commission customarily applies a "no harm" standard in determining what is, "not contrary to the public interest in matters involving affiliated interest transactions."<sup>13</sup>

Staff analyzed the affiliate transaction to ensure that it is fair, reasonable, and not contrary to the public interest.

Staff found that the overall cost of the new Custodian Agreements is significantly lower than the fees paid to the prior provider. Consequently, Staff finds the new Custodian Agreements will not harm customers.

*e) Records Availability, Audit Provisions, and Reporting Requirements*

The Commission retains the ability to review all of PacifiCorp's affiliate transactions through both its annual affiliated interest report and in general rate case filings.

Furthermore, Staff's Conditions Nos. 1 and 4, listed in Staff's recommendation above, allow for adequate Commission examination of PacifiCorp's records relating to the Custodian Agreements.

Conclusion

Based on the review of this Application, Staff concludes the following:

1. The Application involves an AI transaction that is fair and reasonable and not contrary to the public interest, with the inclusion of proposed ordering conditions.
2. The necessary records are available.

The Company has reviewed and agrees with this memo.

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<sup>13</sup> See, e.g. in the Matter of a Legal Standard for Approval of Mergers, Order No. 01-778 (Docket No. UM 1011).

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**PROPOSED COMMISSION MOTION:**

Approve PacifiCorp's Application requesting approval of an Affiliated Interest Transaction with BNYM, subject to Staff's five conditions.