Gary A. Dodge, Esq. #A0897
PARR WADDOUPS BROWN GEE & LOVELESS
185 South State Street, Suite 1300
Salt Lake City, Utah 84111-1536
Telephone: 801-532-7840
Attorneys for Large Customer Group

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of PacifiCorp and Scottish Power plc for an Order Approving the Issuance of PacifiCorp Common Stock	))))))	Docket No. 98-2035-04 **LARGE CUSTOMER GROUP'S POST-HEARING BRIEF**

The Large Customer Group ("LCG") hereby submits its post-hearing brief in this matter.

INTRODUCTION

With near uniformity, state agencies and intervenors objected to the initial filing of ScottishPower and PacifiCorp ("Applicants") in this matter because it failed to meet the "public interest" standard required by Utah law for the acquisition of Utah's dominant electric utility. Among the more significant risks identified by a host of witnesses are risks of higher rates, deterioration in quality of service, and loss of local accountability and control. The state agencies have elected to support ScottishPower's acquisition in exchange for certain promises or conditions. However, the risks identified by a legion of witnesses have clearly not disappeared; nor have they been adequately mitigated.

The legal question before the Commission is whether the application, as amended by the Applicants' proposed conditions, satisfies the "public interest" standard. The practical question before the Commission is whether additional conditions should be imposed on the acquisition in order to provide Utah electric consumers with added protection. The LCG submits that additional protections are both appropriate and necessary to protect the interests of Utah consumers.

The Large Customer Group--consisting of tariff customers served under Schedules 6 and 9 and special contract customers--along with a number of other customers, has actively participated in these proceedings, at significant expense. The customers chose to participate because higher rates, reduced reliability and lack of accountability are much more than theoretical issues to them. Despite the Applicants' protest that this acquisition represents a simple sale of stock, it is of no small significance to Utah consumers who actually pay bills and whose economic vitality may be at stake when an outside company seeks to seize control of Utah's dominant electric provider. The identity and track record, and particularly the future plans, of any company that desires to control monopoly facilities are of grave concern to captive customers.[1] Unfortunately, the Applicants have not been able or willing to provide their customers with adequate assurances that their interests would be protected following the acquisition. It is both disconcerting and noteworthy that not one of PacifiCorp's actual customers who intervened in this proceeding--or, to the knowledge of the LCG, any customers who intervened in any other state proceedings--has received sufficient comfort and assurances from the Applicants or the state agencies involved to support the merger. This

[1] As a general matter, the members of the LCG support a company's right to merge with or be acquired by another company, domestic or foreign, at the discretion of the company and its shareholders. When the company is the monopoly supplier of critical utility services, however, the interests of the captive customers must receive equal consideration.

unanimous reaction from PacifiCorp customers should give tremendous pause to the Applicants, as well as to this Commission and anyone evaluating the transaction. The conditions proposed to date simply do not go far enough to protect the interests of PacifiCorp's customers.

The risk of higher rates to customers, in particular, has not been adequately mitigated. As was widely acknowledged, the stated commitment that rates will not increase as a result of the acquisition is virtually unenforceable. For that reason, a token "merger credit" of up to $12 million for each of four years does not and cannot protect customers from the risk of higher rates. Reducing rates by $12 million from a starting point that may be higher than it would have been but for the acquisition hardly provides a benefit to customers. The only way to ensure that customers will not pay higher rates as a result of the acquisition is to cap rates for several years. Although a five-year rate cap would not provide assurance that rates will never increase as a result of the acquisition, the long term risks could reasonably be determined to be offset by the guaranteed rate stability period. The Commission must also take affirmative steps now to ensure that a fair and reasonable share of all potential merger benefits, including tax savings that may accrue to upstream affiliates--estimated on the public record in excess of $100 million per year--will be available to Utah electric consumers.

The relatively minor merger credit proposed by the Applicants is not a meaningful assurance of merger benefits nor a reasonable tradeoff for the risks that will be faced by customers. Even if the acquisition credit were accepted as a reasonable tradeoff for the risks, however, the proposed credit mechanism is inequitable and discriminatory in that it fails to provide any form of benefits or risk mitigation for special contract customers. The LCG strongly prefers a five-year rate cap for all customers, including special contract customers. If the merger credit is nevertheless accepted with

respect to tariff customers, alternative risk mitigation measures must be adopted to provide reasonably comparable benefits and protections for special contract customers. The LCG supports automatic extensions of existing special contracts through December 31, 2003.

Several proposed conditions attempt to address the risks of reduced reliability and quality of service. While the LCG supports such conditions, it continues to have grave concerns that dramatic post-closing pressures to reduce costs will lead to a deterioration in service quality, particularly for high voltage customers. PacifiCorp customers will clearly be much worse off as a result of the acquisition if service quality or reliability are permitted to suffer. The LCG respectfully submits that, if the acquisition is to be approved, this Commission must be vigilant and adamant in forcing the utility to commit sufficient attention, resources and investments to ensure adequate and reliable services for all Utah customers.

ANALYSIS

I. The "Pubic Interest" Standard Requires Adequate Protections for Customers, Particularly as to Rate and Reliability Risks.

As the regulated monopoly provider of electrical services for most of the State of Utah, PacifiCorp cannot sell its stock or utility assets, merge, combine or consolidate with another utility without Commission approval. Utah Code Ann. §§ 54-4-28 - 31. The proposed acquisition of PacifiCorp by ScottishPower can be approved only if the Applicants have clearly proved that it is consistent with the "public interest." Id. The "public interest" standard should be interpreted in the context of the Public Utilities Act. *White River Shale Oil v. Public Service Commission*, 700 P.2d 1088, 1091-92 (Utah 1985). Rate and reliability issues should thus be paramount considerations. The Applicants must meet the *heavy burden* of showing by *substantial evidence* that any

demonstrable and measurable benefits of the proposed acquisition will clearly outweigh any potential risks or negatives. *Utah Department of Business Regulation v. Public Service Commission*, 614 P.2d 1242, 1245-46 (Utah 1980). The acquisition as it is currently proposed fails to meet this standard.

II. The Risks of the Acquisition Outweigh the Potential Benefits

The testimony in this case demonstrates that the public interest benefits of the proposed acquisition are uncertain, speculative, and of little value to customers, and the potential risks to customers are significant. As was aptly summarized by DPU witness William A. Powell:

> [T]he degree of unsubstantiated claims is enough to stagger all but the most sanguine supporter. In place of the usual quantitative evidence, ScottishPower encrusts their testimony with pleas to "trust" them. While trust may be a substantial ingredient in British regulatory practice , this trust, if it exists, would be the result of a long history between ScottishPower and British regulators. Given that a similar history has not been developed in Utah, caution may well prove to be the "better part of valor."

Exhibit DPU-4, Direct Testimony of William A. Powell, page 2, lines 6-11. Similarly, as explained by DPU witness Lowell Alt: "The Division realized fairly early on that this merger was quite different than the last Utah Power merger, in 1988, and that this merger had few quantifiable benefits and large uncertainties and risk." Transcript, page 17, lines 10-14. The Commission should condition its approval of this proposed acquisition on additional commitments designed to ensure that customers receive sufficient benefits from the acquisition to compensate them for the risks that they will face.

A. Customers Will Face Significant Rate and Reliability Risks as a Result of the Acquisition

Many witnesses representing the DPU, CCS and large customers convincingly demonstrated in testimony that the proposed acquisition creates significant risks for Utah customers. Among the most significant risks identified by various witnesses are upward pressure on rates[2]; cost-reduction pressures and reliability concerns[3]; regulatory risks[4]; corporate structure and cost allocation risks[5]; and change of control risks[6]. Indeed, these risks were of sufficient magnitude and concern that these witnesses universally recommended that the acquisition not be approved, at least not unless the risks could be adequately mitigated. The significant risks identified by a host of witnesses justify rejection of the application, unless the Applicants will agree to significant additional customer protections.

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[2]E.g., Exhibit DPU-1, Direct Testimony of Lowell E. Alt, Jr., pg 9, ln. 3 - pg. 11, ln. 11; Exhibit DPU-4, Direct Testimony of William A. Powell, pg. 19, ln. 7 - pg. 28, ln. 8; Exhibit CCS-4, Direct Testimony of Neil H. Talbot, pg. 32, ln. 1 - pg. 38, ln. 11; Exhibit LCG-1, Direct Testimony of Dr. Richard M. Anderson, pg. 37, ln. 28 - pg. 47, ln. 24; Exhibit UIEC-1, Direct Testimony of Maurice Brubaker, pg. 24, ln. 1 - pg. 26, ln. 2; Exhibit Nucor-1, Direct Testimony of Dr. Dennis W. Goins, pg. 10, ln. 17 - pg. 11, ln. 23; Trans., pg. 439, lines 10 - 22 (L. Alt).

[3]E.g., Exhibit LCG-1, Direct Testimony of Dr. Richard M. Anderson, pg. 39, ln. 28 - pg. 40, ln. 32; Exhibit Nucor-1, Direct Testimony of Dr. Dennis W. Goins, pg. 12, lines 1 - 8.

[4]E.g., Exhibit DPU-4, Direct Testimony of William A. Powell, pg. 6, ln. 19 - pg. 14, ln. 16.

[5]E.g., Exhibit DPU-2, Direct Testimony of Mary H. Cleveland, pg. 3, ln. 1 - pg. 13, ln. 5; & pg. 21, ln. 12 - pg. 25, ln. 8; Exhibit CCS-4, Direct Testimony of Neil H. Talbot, pg. 38, ln. 12 - pg. 49, ln. 25.

[6]E.g., Exhibit UIEC-1R, Rebuttal Testimony of Maurice Brubaker, pg. 20, ln. 1 - pg.21, ln. 16.

Perhaps the most logical approach to addressing the legitimate concerns of customers would be for the Applicants to present a detailed and comprehensive transition plan, complete with specific cost-saving and rate commitments. Several witnesses commented on the Applicants' backward approach with respect to a transition plan[7], and at least one witness recommended that an approved transition plan be a condition precedent to acquisition approval.[8] The Applicants flatly reject this logical approach and instead insist that the Commission make a public interest finding without knowing the acquiring company's plans or commitments with respect to PacifiCorp. When the transition plan is filed--six months after closing--it will serve primarily an informational purpose; since the Applicants do not contemplate Commission or customer input, evaluation or approval. By then, of course, the details of the transition plan will be largely irrelevant in any event because the acquisition would have long since been consummated. Because the Applicants refuse to reveal their plans or make specific commitments in advance, the parties and the Commission are left to devise alternative means of providing protections against merger risks and assurances that Utah customers will benefit as a result of the acquisition.

The Applicants contend that merger benefits are assured and risks are mitigated because of their alleged track record in the U.K., their "high level benchmarking" that supposedly suggests

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[7]E.g., Exhibit DPU-3, Direct Testimony of Ronald L. Burrup, pg 3, ln. 4 - pg. 4, ln. 6; Exhibit CCS-1, Direct Testimony of Daniel E. Gimble, pg 7, ln. 24 - pg. 10, ln. 7; Exhibit Nucor-1, Direct Testimony of Dr. Dennis W. Goins, pg 12, ln. 10 - pg. 13, ln. 12.

[8]Exhibit UIEC-1, Direct Testimony of Maurice Brubaker, pg. 5, ln. 29 - pg. 6, ln. 8 & pg. 50, ln. 18 - pg. 52, ln. 11.

hundreds of millions of dollars in potential cost reductions (not guaranteed, of course), their proposed network investments and proposals, and the proposed conditions. In fact, the potential benefits are illusory, speculative and insignificant and the conditions are inadequate to mitigate customer risks.

The Applicants' claimed "track record" in the U.K. was meticulously and thoroughly rebuffed and exposed on the record.[9] Customers can take no comfort or assurances from this young and aggressive utility's overseas adventures.

The record also exposes the significant flaws of ScottishPower's "high level benchmarking" and the potential, but non-guaranteed, cost savings used by the Applicants to tantalize ratepayers and regulators.[10] Absent a comprehensive transition plan with adequate guarantees, potential cost savings are wholly uncertain and unreliable.

The record also demonstrates that the Applicants' network reliability standards and proposals are not benefits of the acquisition. Despite the Applicants' smoke and mirrors, it was demonstrated

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[9]E.g., Exhibit CCS-1, Direct Testimony of Daniel E. Gimble, pg 17, ln. 23 - pg. 18, ln. 15; Exhibit CCS-2, Direct Testimony of Bruce E. Biewald, pg 13, ln. 1 - pg. 16, ln. 2; Exhibit LCG-1, Direct Testimony of Dr. Richard M. Anderson, pg. 17, ln. 1 - pg. 29, ln. 12; Exhibit UIEC-1, Direct Testimony of Maurice Brubaker, pg. 26, ln. 3 - pg. 28, ln. 10.

[10]Exhibit CCS-1, Direct Testimony of Daniel E. Gimble, pg 16, ln. 23 - pg. 18, ln. 15; Exhibit CCS-2, Direct Testimony of Bruce E. Biewald, pg 9, ln. 1 - pg. 12, ln. 23; Exhibit LCG-1, Direct Testimony of Dr. Richard M. Anderson, pg. 29, ln. 14 - pg. 34, ln. 26.

that these proposed programs would be bought and paid for solely by customers and that they have not been shown to be desired, necessary or cost-effective.[11]

The Applicants' commitment that rates will not increase as a result of the transaction is illusory. As was widely acknowledged on the record--even by the Applicants--it will be extremely difficult, particularly over time, to determine what rates would have been in the absence of the acquisition.[12] The Applicants do not plan to file a "stand alone" analysis in an effort to demonstrate compliance with such a commitment.[13] The commitment is largely illusory and is wholly inadequate as a means of mitigating risks or ensuring benefits of the acquisition.

The proposed four-year "merger credit" of up to $12 million per year falls far short as an effective means of mitigating customer risks or ensuring customer benefits. In light of the huge uncertainties and risks of the acquisition, a credit of just 69 cents per month for two to four years[14] to a typical residential customer is simply not sufficient to offset the demonstrated risks or to ensure receipt or reasonable benefits for Utah customers. The proposed merger credit, with a net present value of about $37 - 39 million,[15] will be deduced from uncertain and non-guaranteed revenue

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[11]E.g., Exhibit CCS-1, Direct Testimony of Daniel E. Gimble, pg 22, ln. 15 - pg. 25, ln. 11; Exhibit CCS-3, Direct Testimony of Paul Chernick, pg 3, ln. 14 - pg. 45, ln. 13; Exhibit LCG-1, Direct Testimony of Dr. Richard M. Anderson, pg. 13, ln. 7 - pg. 14, ln. 5; Exhibit Nucor-1, Direct Testimony of Dr. Dennis W. Goins, pg. 8, ln. 21 - pg. 9, ln. 7.

[12]Trans., pg. 770, lines 11 - 18 (R. O'Brien).

[13]E.g., Trans., pg. 767, lines 1 - 23 (R. O'Brien).

[14]Trans., pg. 23, ln. 20 (L. Alt).

[15]Trans., pg. 1146, lines 3 - 10 & pg. 1181, ln. 18 - pg. 1182, ln. 6. (R. Anderson).

requirement starting points. The proposal includes no effective means of ensuring that the starting points for rates will not be significantly higher over time as a result of the acquisition. Moreover, $37 - $39 million is hardly significant in the context of the Applicants' multi-billion dollar budget[16]; rounding errors could dwarf the minor rate commitment. A $37 - $39 million credit is also insignificant in comparison to the acquisition premium of up to $1.9 billion to be paid to PacifiCorp shareholders, more than $60 million spent on investment bankers, attorneys and advisers, the $55 million in customer funds to be spent on network programs, or even the $20 million in severance costs to be paid to a handful of PacifiCorp executives to entice them to get out of the way of the acquiring company's ambitions.[17] In fact, the credit is not significantly higher than the $35 million net present value assigned by Applicants to Utah's share of the annual corporate savings initially proposed as a guarantee in the initial filing.[18] That value was rejected by the DPU, CCS and others as inadequate to compensate Utah customers for the risks of the proposed acquisition. The slightly higher net present value of the merger credit hardly adds sufficient value to support approval of the acquisition.

B. A Five-Year Rate Cap Would Provide Customers With Reasonable Compensation for the Risks of the Acquisition

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[16]E.g., Exhibit LCG-1, Direct Testimony of Dr. Richard M. Anderson, pg. 12, lines 14 - 21; Exhibit UIEC-1, Direct Testimony of Maurice Brubaker, pg. 11, lines 9 - 15.

[17]Trans., pg. 693, ln. 13 - pg. 699, l.3 (R. O'Brien).

[18]Trans., pg. 1147, lines 3 - 15 (R. Anderson).

The proposed merger credit and the other proposed conditions simply do not provide adequate compensation or protection for Utah customers to bear the risks of the proposed acquisition. Although risks can never be completely eliminated, Utah customers deserve a fair payment or tradeoff for the risks that they will be expected to bear. A reasonable trade-off for these customer risks would be a five-year cap on rates for all Utah customers, in addition to the other proposed conditions.

The concept of a rate cap to provide protection against risks and assurances of customer benefits from the acquisition is supported by the testimony of a number of witnesses, including the DPU[19], the CCS[20] and customers.[21] Moreover, Wyoming customer of PacifiCorp received a significant cap on rates.[22] A cap on rates would provide a measure of rate stability and certainty to Utah customers, despite the uncertain and unpredictable actions of the new owners. While customer risks would certainly not be eliminated, a five-year period of rate stability would provide sufficient value to Utah customers to reasonably offset the risks. The LCG submits that the use of a rate cap is the most viable option supported by competent evidence in the record for providing Utah customers with adequate compensation for the demonstrated risks stemming from the acquisition.

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[19]Exhibit DPU-1, Direct Testimony of Lowell E. Alt, Jr., pg. 9, ln. 3 - pg. 10, ln. 17.

[20]Exhibit CCS-1, Direct Testimony of Daniel E. Gimble, pg. 29, ln. 18 - pg. 30, ln. 14; Exhibit CCS-1R, Rebuttal Testimony of Daniel E. Gimble, pg. 2, ln. 20 - pg. 3, ln. 9.

[21]Exhibit LCG-1, Direct Testimony of Dr. Richard M. Anderson, pg. 62, lines 24 - 27; Exhibit UIEC-1, Direct Testimony of Maurice Brubaker, pg. 47 ln. 3 - pg. 50, ln. 17; Exhibit Nucor-1, Direct Testimony of Dr. Dennis W. Goins, pg. 5, lines 5 - 15 & pg. 16, ln. 12 - pg. 17, ln. 15.

[22]E.g., Trans., pg. 423, lines 17 - 23 (L. Alt).

Logically, the Applicants should not resist a rate cap. If they can achieve anywhere near the level of cost savings with which they have attempted to tantalize us, a rate cap would not be a problem; if not, the acquisition should not be approved. The Applicants nevertheless resist a rate cap by arguing, among other things, that circumstances independent of the acquisition can affect rates, particularly rates based on an historical test year. The LCG acknowledges a certain degree of validity to this argument with respect to a rate case utilizing a 1998 test year. The argument is not persuasive, however, with respect to a test year using 1999 or any subsequent year; each such year will be fundamentally and dramatically influenced by the ScottishPower acquisition. A 1998 rate case could be determined to be an appropriate means of setting base pre-acquisition rates,[23] but when appropriate pre-acquisition base rates have been established, a five-year rate cap should be required as a condition of approval of the proposed acquisition.j

C. If a "Merger Credit" Mechanism is Utilized to Address Tariff Customer Risks, Alternative Measures must be provided to Special Contract Customers.

As explained above, the proposed "merger credit" is not adequate to mitigate customer risks or ensure customer benefits as a result of the acquisition. Even if the merger credit were accepted as an adequate means of mitigating risks and ensuring benefits to general tariff customers, however,

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[23]Although the LCG recognizes the potential that a pre-acquisition base rate case could be determined by the Commission to be appropriate, the LCG certainly rejects the Applicants' suggestion that Utah revenue requirement should be increased by up to $100 million. [Trans., pg. 430, lines 6 - 11 (D. Larson)]. While a specific analysis must await the Applicants' filing, this docket is replete with evidence that PacifiCorp in 1998 was preoccupied with matters other than retail electric services, provided inadequate services and lacked focus and discipline [E.g., Trans., pg. 703, ln. 14 - pg. 705, l.6 (R. O'Brien)]. Under such circumstances, any requested rate increases must be meticulously scrutinized.

it provides no benefits or protections whatsoever to customers served under special contracts. It would thus be inequitable and discriminatory unless comparable protections and assurances are adopted for special contract customers.

The risks of the proposed ScottishPower acquisition are so significant that the DPU and CCS could not recommend approval absent a merger credit for tariff customers, in addition to all of the other proposed conditions.[24] Special contract customers face similar risks, yet they have not been offered similar protections. Special contract customers face significant rate risks, through annual cost adjustment clauses, potential price adjustments at the discretion of the Commission, contract terminations prior to the end of the transition period, and the Applicants' lack of responsiveness to their customers' timing needs.[25] Moreover, special contract customers also face significant reliability risks. Indeed, the potential financial detriment to such customers from decreased reliability is enormous. The proposed network reliability programs are admittedly aimed almost exclusively at distribution-level customers.[26] Special contract customers also face significant change of control risks because they must renegotiate their contracts during a time of great uncertainty and an apparent leadership vacuum.

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[24]Trans., pg. 361, ln. 25 - pg. 362, ln. 22 (L. Alt; D. Gimble).

[25]E.g., Trans., pg. 439, ln. 10 - pg. 441, ln. 5; pg. 443, lines 13 - 23 & pg. 456, lines 6 - 18 (L. Alt).

[26]E.g., Trans., pg. 813, lines 1 - 13 (B. Moir).

In light of these significant risks, it would be inequitable and discriminatory for the acquisition to be approved without ensuring comparable benefits and protections for special contract customers. No witness has provided an adequate or reasonable basis for denying this one class of customers--which include many of Utah's significant private companies and employers-- comparable protections and benefits.

Two special contract customers are part of the LCG. These customers recognize that the rates they pay under special contracts are established in a different manner than rates for general tariff customers. Therefore, they have not requested a portion the merger credit. They do, however, request an alternative form of comparable rate stability or protection in the form of automatic, short-term extensions of special contracts through the end of the transition period when other customers will receive the merger credit--December 31, 2003. Such extensions would provide special contract customers with a modicum of rate stability and protection for a short period of time. An additional form of protection for some customers that is adequately supported on the record would be to permit customers to obtain power supplies from any available alternative suppliers.[27]

The special contract customers do not ask or expect any other Utah customers to subsidize their electric rates. They acknowledge that the automatic extensions would be subject to

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[27]Exhibit UIEC-1, Direct Testimony of Maurice Brubaker, pg. 50, lines 10 - 17; Exhibit UIEC-1R, Rebuttal Testimony of Maurice Brubaker, pg. 21, lines 1 - 10; Trans., pg. 1231, l. 10 - 1235, l. 23 (L. Brown).

Commission jurisdiction to determine, upon appropriate request, whether the contract rates are sufficient to cover the incremental costs of providing the relevant services. If they are not, the Commission would have the power to order appropriate remedies.

II. Utah Customers are Entitled to a Fair Share of all Merger Benefits, Including Tax Savings.

The most significant benefits of the PacifiCorp/Utah Power merger were in the form of efficiencies and cost savings due to the utilities' proximity and diversities. In that context, merger benefits were largely predictable and measurable from the beginning. The Commission, DPU, CCS and customers have been vigilant and pro-active in ensuring that Utah customers have received a full, fair and reasonable share of all merger-related benefits.

In the instant proceeding, the primary benefits are much less apparent, predictable or measurable. Indeed, anticipated tax benefits that may inure to affiliates upstream of PacifiCorp may provide some of the most significant benefits of this transaction--estimated on the public record as high as $109.2 million per year.[28] Other merger partners would offer far greater and more apparent efficiencies, cost savings and benefits to customers. This transaction thus comes at a significant opportunity cost.[29] Nevertheless, neither this Commission nor PacifiCorp's customers can, as a

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[28]Exhibit CCS-4, Direct Testimony of Neil H. Talbot, pg. 48, lines 15 - 21.

[29]Exhibit LCG-1, Direct Testimony of Dr. Richard M. Anderson, pg. 47 ln. 26 - pg. 48, ln. 11; Exhibit UIEC-1, Direct Testimony of Maurice Brubaker, pg. 44 ln. 3 - pg. 45, ln. 15.

practical matter, choose PacifiCorp's merger partner; we are left to dance with the only merger partner brought to the affair. Even though the Commission cannot practically choose a merger partner that will provide customer benefits in the more traditional form of cost savings and efficiencies, the Commission can and should be vigilant in understanding, identifying and preserving for Utah customers a fair and equitable share of all potential benefits that may result from this transaction--including tax savings that may arise by virtue of the nature and structure of the transaction or the companies involved. Perhaps Utah customers must forego the possibility of a future merger that would produce significant direct cost savings, but they certainly should not be frozen out from receiving a fair and reasonable portion of the merger benefits that may in fact result from this transaction.

The Applicants have gone to great lengths to obfuscate and avoid discussion of the tax issue. They propose that no tax-related issues should be considered in this proceeding and that all parties should be permitted to reserve their rights and arguments. Under pressure, counsel for ScottishPower finally acknowledged that the Applicants intend to argue that this Commission lacks power or jurisdiction to capture projected upstream tax savings for the benefit of Utah customers and that the Applicants' proposed condition as reflected in Cross Examination Exhibit 2 (to the effect that all parties "preserve their positions and have not waived their rights" on the issue of merger-related tax savings):

> ... reserves our right to argue that those — in terms of the Commission capturing those tax savings, it reserves our right to argue that because those are not cost of service related tax issues, that they are outside of what the Commission has authority to reflect in rates in a rate case.

Transcript, page 979, lines 7 - 13 (James Fell).

Both confidential and public testimony and exhibits in this record demonstrate the potential range of projected tax savings and the manner in which those tax savings may be realized.[30] PacifiCorp will not receive these tax benefits directly; they will accrue to upstream affiliates. Such tax savings would thus not be reflected in PacifiCorp's records or expenses. Under traditional notions of ratemaking, it is arguable that upstream tax savings of affiliates should not or even cannot legally be considered for purposes of setting rates. This case, however, is anything but traditional. This is the first case of its type in which a foreign company will own a U.S. utility.

The Applicants have advanced policy arguments that this Commission should not take upstream tax issues into account in setting rates. They have also made it clear, however, that they intend to advance legal arguments that this Commission lacks the power or jurisdiction to credit the Utah revenue requirement with any upstream tax savings.

The LCG does not agree with the Applicants' legal arguments and both the DPU and the CCS apparently believe that the Commission will have jurisdiction to deal with these issues in future rate

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[30] E.g., Exhibit CCS-4, Direct Testimony of Neil H. Talbot, pg. 39, lines 17 - 30 & pg. 43, ln. 11 - pg. 48, ln. 27; Cross Examination Exhibit 3 (Proprietary); Trans., pages 265 - 286 (proprietary).

cases. The Applicants, however, clearly believe to the contrary. There is no sound reason whatsoever for the Commission not to diffuse at least this portion of the debate in its order.

The Commission clearly could require as a condition of its approval that the Applicants agree that all tax savings realized by any ScottishPower affiliates in connection with or as a result of the nature or structure of the transaction and/or the nature or structure of the ScottishPower affiliates are merger-related benefits that belong to PacifiCorp customers. At a minimum, this Commission should require the Applicants to waive any legal argument that the Commission lacks jurisdiction, power or authority to require the Applicants and their affiliates to identify and share all tax savings and other benefits of the transaction with Utah ratepayers in such manner and proportions as the Commission may hereafter determine. The approval order is the only clear and unambiguous means of ensuring jurisdiction and avoiding future legal debates over the Commission's authority. Only by stating its intent and authority in the approval order and requiring the Applicants to consent to the same can the Commission ensure that there will never be an argument that the Commission missed its only opportunity to preserve for Utah customers some of the most significant potential benefits of this transaction.

CONCLUSION

The proposed acquisition of PacifiCorp by ScottishPower leaves Utah customers at significant risk. The right to own and control the means of providing essential utility services to captive customers carries with it significant public interest considerations. The Applicants thus bear a heavy burden of proof to demonstrate that the proposed acquisition is in the best interests of their customers. That burden has not been met. If this Commission elects to approve the ScottishPower acquisition of PacifiCorp, it should require the Applicants to agree to a five-year rate cap for all of its Utah customers to ensure that Utah customers receive adequate benefits and risk mitigation. If the Commission accepts the merger credit, it should also extend special contracts through the transition period. Finally, the Commission should forever and unambiguously resolve the debate over its jurisdiction and legal ability to consider tax benefits to ScottishPower affiliates as merger benefits to be shared with Utah customers.

DATED this 3d day of September, 1999.

PARR WADDOUPS BROWN GEE & LOVELESS

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Gary A. Dodge

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 3d day of September, 1999, to the following:

Edward Hunter
John Eriksson
STOEL RIVES
201 South Main Street, Suite 1100
Salt Lake City, UT 84111

Brian W. Burnett
CALLISTER NEBEKER & MCCULLOUGH
10 East South Temple, #800
Salt Lake City, UT 84133

Michael Ginsberg
ASSISTANT ATTORNEY GENERAL
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111

Douglas C. Tingey
ASSISTANT ATTORNEY GENERAL
Committee of Consumer Services
160 East 300 South, 5th Floor
Salt Lake City, UT 84111

Daniel Moquin
ASSISTANT ATTORNEY GENERAL
1594 West North Temple, Suite 300
Salt Lake City, UT 84116

F. Robert Reeder
William J. Evans
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
P.O. Box 45898
Salt Lake City, UT 84145-0898

Stephen R. Randle
RANDLE DEAMER ZARR ROMRELL & LEE
139 East South Temple, Suite 330
Salt Lake City, UT 84111

Peter J. Mattheis
Matthew J. Jones
BRICKFIELD BURCHETTE & RITTS
1025 Thomas Jefferson Street, N.W.
800 West Tower
Washington, D.C. 20007

Eric Blank
Land and Water Fund of the Rockies
2260 Baseline Rd., Suite 200
Boulder, CO 80302

Matthew F. McNulty, III
VANCOTT BAGLEY CORNWALL & MCARTHY
50 South Main Street, Suite 1600
P.O. Box 45340
Salt Lake City, UT 84145

Lee R. Brown
Magnesium Corporation of America
238 North 2200 West
Salt Lake City, UT 84116

Bill Thomas Peters
David W. Scofield
PARSONS DAVIES KINGHORN & PETERS
185 South State Street, Suite 700
Salt Lake City, UT 84111

Dr. Charles E. Johnson
The Three Parties
1338 Foothill Blvd., Suite 134
Salt Lake City, UT 84108

Roger O. Tew
60 South 600 East, Suite 200
Salt Lake City, UT 84102

Steven W. Allred
Salt Lake City Law Department
451 S. State, Suite 505
Salt Lake City, UT 84111

Paul T. Morris
3600 Constitution Blvd.
West Valley City, UT 84119

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