

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

**In the Matter of the Application of PacifiCorp )**  
**And ScottishPower plc for an Order Approving ) Docket No. 98-2035-04**  
**And Issuance of PacifiCorp Common Stock )**  
**)**

**REPLY BRIEF OF INTERVENOR MAGNESIUM CORPORATION OF  
AMERICA ON THE PROPOSED MERGER OF  
SCOTTISHPOWER PLC AND PACIFICORP**

Pursuant to the briefing schedule established by the Commission in the above-referenced proceeding, Magnesium Corporation of America ("Magcorp")<sup>1</sup> hereby submits its Reply Brief.

**ARGUMENT**

In their Initial Briefs, the Division of Public Utilities (the "DPU"), joined by the Committee of Consumer Services ("CCS"), and the Applicants maintain their painstaking and consistent efforts to exclude industrial customers from any merger benefits. Under their interpretation of the "net benefits test," so long as residential and small commercial customers receive some benefit, it is of no importance in determining whether the Applicants meet the "net benefits" test that the backbone of the Utah manufacturing economy -- the large industrial customers -- have been excluded from the Proposed Settlement Stipulation ("Stipulation") in either its negotiation or terms.

As Magcorp has noted, however, it does not attempt to impose upon the economic benefits parceled out to others in the Stipulation. Magcorp does not seek any

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<sup>1</sup> All references to Magcorp and to Applicants herein include, by incorporation, references to their respective predecessor-in-interest, as appropriate.

modification of its existing contract, either through early termination or regulated extension; Magcorp will abide by its contracts and assumes PacifiCorp will continue to do likewise. Nor does it seek any regulatory requirement that Applicant be required to negotiate with it in "good faith," since any such requirement is meaningless because it is so easily evaded: who is to say whether a party has negotiated in "good faith"?

What Magcorp does seek is simply a condition that would allow it to contract with the most economic power supplier effective upon termination of its current contract with PacifiCorp by decertifying Magcorp from PacifiCorp's exclusive service territory.<sup>2</sup> By this condition, Magcorp does not seek to exclude PacifiCorp from being its power supplier. But this condition, more than anything else the Commission could do, will effectively enforce PacifiCorp's volunteered undertaking to negotiate with Magcorp in good faith. Consequently, this condition is appropriate in any event as to Magcorp -- the only party and only class requesting the condition -- to implement PacifiCorp's volunteered undertaking.<sup>3</sup>

Thus, all of the arguments advanced against the position of the "industrial customers" by the DPU, the CCS and Applicants simply have no applicability to Magcorp. And once the testimony of Lowell Alt is examined, there appears to be no basis for the DPU to oppose Magcorp's requested condition.

As to Applicants, in their Initial Brief they either misrepresent the record or

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<sup>2</sup> By order dated April 19, 1968 in Case No. 5639, *et al.*, PacifiCorp was authorized to expand its service territory to include Magcorp. If in so doing, the Commission did not thereby render PacifiCorp's service rights therein exclusive as to Magcorp, but only permissive to the extent it had a contract with Magcorp, then in such event, Magcorp's requested condition would be rendered moot, since PacifiCorp would not have the exclusive right to serve Magcorp, which is the relief requested by Magcorp in its condition.

<sup>3</sup> Magcorp's request was first made in comments on the Stipulation prior to the hearing on August 6, 1999 to remedy its exclusion from the negotiation of the Stipulation or from any benefits under the Stipulation.

attempt to avoid it. Interestingly, Applicants make no claim that Magcorp was included in the negotiation process for the Stipulation. Further, notwithstanding Applicants repeated claims, the unchallenged testimony of Magcorp was that despite its repeated requests to PacifiCorp over a six-month period, PacifiCorp refused to negotiate with Magcorp on a new contract, most recently as June 1999 when its representatives personally informed Mr. Lee Brown that they had no proposal to make nor would any proposal be forthcoming. It was only after Magcorp's August 6<sup>th</sup> filing and Mr. Brown's August 6<sup>th</sup> testimony that Applicants changed their tune. But although correspondence has now been received setting out Applicants' intent to negotiate with Magcorp, to date -- some 6 weeks after Mr. Brown's testimony -- there has neither been a proposal forwarded nor even a telephone call to set up a meeting. Given this "slow play" state of affairs, effectively jamming Magcorp into a time squeeze where it has no options or alternatives, imposition of the merger condition to assure that Applicants abide by their undertakings is fully appropriate.

"Trust me" may be a comforting assurance if confirmed by positive actions over time. But no such positive actions are reflected on this record. As Magcorp pointed out -- unchallenged, PacifiCorp explicitly refused negotiation with it over a new contract. Given this state of the record, there simply is no predicate in the record for affording Applicants' assertion any credibility. Magcorp's requested condition provides it with the certainty of options and alternatives compared to the hollow ring of Applicants' "trust me."

Magcorp will not repeat here the arguments in its Initial Brief of how its proposed condition is fully warranted; inures to the benefit of Utah, Applicants and other ratepayers; and satisfies the public interest standard. Rather, Magcorp would simply point out that given the marginal and parsimonious nature of the "net benefits" accruing under the

Stipulation, as admitted even by the DPU and the CCS, adopting Magcorp's proposed condition only serves to make the Stipulation more inclusive and representative, in satisfaction of the public interest requirements for approving a merger.

Respectfully submitted,

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