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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

JOINT REPLY MEMORANDUM OF THE DIVISION OF PUBLIC UTILITIES AND THE COMMITTEE OF CONSUMER SERVICES

The following constitutes a reply memorandum of the Division of Public Utilities (DPU) and the Committee of Consumer Services (CCS) to the initial briefs of the parties filed in this proceeding.

I.

INTRODUCTION

After reading the reply briefs of the various parties in this proceeding, the DPU and CCS continue to believe that their stipulation provides net positive benefits to Utah's ratepayers and is in the public interest. Therefore, the DPU and CCS continue to recommend the Commission approve the merger. With very few exceptions, the issues raised by the parties in their initial briefs were addressed adequately by the DPU and CCS in its initial brief. This memorandum, therefore, will address certain issues not addressed initially or issues we believe need further clarification.

II.

THE REQUEST OF MAGNESIUM CORPORATION OF AMERICA TO BE DECERTIFIED SHOULD NOT BE CONSIDERED IN THIS PROCEEDING

MagCorp has requested that the Commission as a condition to the merger decertify it from PacifiCorp's "exclusive retail service territory effective upon the termination of its existing contract with PacifiCorp."[1] MagCorp gives various reasons why decertification should take place including the failure of PacifiCorp to extend the existing contract beyond its current termination date. The DPU and CCS oppose the Commission in this proceeding decertifying a

[1]Initial brief of MagCorp p. 3.

customer from the exclusive service territory of PacifiCorp. The issue of whether a customer should have direct access to other suppliers of electricity is not an issue that should be decided in this merger proceeding. MagCorp, by its request to decertify PacifiCorp, is in essence answering the direct access question. An action to decertify a utility from its exclusive service territory should be in a proceeding where all applicable issues can be fully heard. As a merger case, the proposal to condition such a transaction with an order of decertification appears to go well beyond relevant issues that flow directly from the merger. As a basis of MagCorp's request they state that PacifiCorp has failed to negotiate a new contract. During the proceeding, PacifiCorp indicated they understood the need for customers to consider alternatives and committed to negotiate new contracts promptly in good faith. Therefore MagCorp's claim that PacifiCorp has not negotiated a new contract with it appears premature. Nor is there a right of MagCorp to have a new contract. If one can be negotiated that meets the Commission-established criteria, then PacifiCorp has committed it will do so. If a qualifying contract cannot be negotiated, MagCorp certainly has the option of taking tariffed service or seeking other remedies.

III.

EMERY COUNTY'S REQUEST FOR A SPECIFIC FINDING BY THE COMMISSION ON PROPERTY TAXES SHOULD BE REJECTED

Emery County has requested that the Commission issue a specific finding that the Utah Tax Commission has exclusive jurisdiction over "all questions of property valuation which are a significant component of property tax paid by PacifiCorp."[2] In addition, Emery County requests

[2]Emery County's initial brief, p. 2.

that the Commission adopt a finding that all valuation matters be deferred to the Utah State Tax Commission because it is impossible to accurately isolate and predict specific impacts of the merger on property valuation and taxes of PacifiCorp. They conclude that "any attempt by the Public Service Commission to contain or influence valuation by the Utah State Tax Commission may produce unanticipated results and certainly would transgress the jurisdiction of the Tax Commission to make the assessments required by Utah law."[3] The DPU and CCS oppose such conditions. Clearly, the Utah State Tax Commission has jurisdiction over PacifiCorp's property tax. The Utah Public Service Commission has jurisdiction over the rates charged by PacifiCorp to its customers. During a rate case property taxes paid by PacifiCorp are reviewed by the DPU and CCS. Property taxes became an issue in this proceeding because of the possibility of higher property tax caused by the premium paid by Scottish Power for PacifiCorp's stock. No specific condition was included in the stipulation dealing directly with property taxes. However, the stipulation does provide conditions dealing with the premium paid by Scottish Power. In addition, conditions exist which state that rates will not be higher than they would absent the merger. Obviously, it might be difficult to determine the cause of increased property taxes for PacifiCorp. This proceeding, however, should not eliminate issues relating to future property tax increases from future rate cases. A condition that would automatically force the Commission to rely on the property tax assessment by the Utah State Tax Commission without reference to the merger conditions in the stipulation would reduce protections in the stipulation intended to

[3]Initial brief of Emery County, p. 3.

protect Utah ratepayers from potential property tax increases that result from the revaluation of assets due to the merger.

The conditions in the stipulation provide the DPU and the CCS opportunities to raise issues if they believe that increased property taxes violates one of the conditions in the merger. Those issues should be left for a future day. Emery County's proposed findings appear to be an attempt to eliminate the Commission's ability to address future property tax increase issues in future rate cases. Instead, their findings would require the Commission to accept any property tax increase without reference to the conditions agreed to in the stipulation.

IV.

NOT AUTOMATICALLY GRANTING AN EXTENSION OF EXISTING CONTRACTS FOR SPECIAL CONTRACT CUSTOMERS IS NOT DISCRIMINATORY

A number of the briefs[4] argue that it would be discriminatory for the merger to be approved without "insuring comparable benefits and protections for special contract customers."[5] The DPU and CCS do not agree that an issue of discrimination exists between special contract customers and retail customers particularly with the proposed rate credit in the stipulation. Under the rate credit proposal special contract customers are protected from changes in rates during the contract period. They are promised good faith negotiations for extensions of their

[4]Large customer group, p. 14, NuCor Steel, p. 33.

[5]Large customer group brief, p. 14. Mr. Goins states "I'm recommending the special contract customer be given the same protection as non-special contract customers covered by the stipulation. That's all. I'm not asking for any special treatment, any more favorable treatment than any customers. I'm simply saying, let those customers have the same protections from merger related risk as non-special contracts customers are given under the stipulation. That's all. (Initial brief of NuCorp, p.33.)

contracts in sufficient time for them to pursue alternatives if negotiations fail. They are promised that those negotiations will recognize the contributions that these customers make to the economic well-being of Utah and that those contracts will be negotiated in accordance with Commission standards in effect at the time. No such comparable treatment is guaranteed for retail ratepayers. PacifiCorp has indicated that it plans to file for a significant rate increase in the near future. Any resulting rate increase would not affect the special contract customers. Therefore, there is no comparability between a retail customer and a special contract customer. One should note that the special contract customers are not asking for comparable treatment. They are not asking to have their rates subject to the rate increase filed this year or the future rate credits.

The promises that Scottish Power has made to negotiate extensions to the special contracts did not exist as a public commitment by PacifiCorp. There was no guarantee that PacifiCorp would extend these special contracts beyond the contract period. What appears to be happening in this proceeding is that the special contract customers are using the opportunity of a merger to force new contract terms on PacifiCorp without negotiations. The assurances by PacifiCorp that negotiations will be concluded in ample time for the special contract customers to seek alternatives should be sufficient. The task force on special contracts has held a number of meetings. The DPU and the CCS do not oppose extensions of special contracts assuming they meet the criteria established by the Commission to show that those contracts are in the public interest. Automatic extension of contracts without reference to criteria established by the Commission may have the unwanted affect of causing harm to other ratepayers. That must be

avoided. Using the legal argument of "discrimination" is not a valid basis to force extensions of these contracts.

V.

ADDITIONAL COMMENTS

A. RATE CAP

UIEC's brief (p. 22) implies that the DPU has backed off of a rate cap proposal by agreeing to the rate credit included in the stipulation. Further, UIEC points to the Wyoming agreement as an example of a rate cap that Scottish Power has agreed to that apparently they believe is more beneficial than the $48 million credit. The rate cap in Wyoming was for only two years. There was not a cap on rates but a limitation on rate increases to $12 million in the first year and $8 million in the second, plus any depreciation change. The DPU's original proposal was to consider an alternative similar to Wyoming or other mechanisms like a GDP limitation on rate increases. It was never for an absolute rate cap for a five year period.

The rate credit provides anticipated merger benefits up front and insures that management has a pecuniary stake in merger-related outcomes. It allows general rate cases to proceed without artificial limitations being placed on the results. We believe that the merger credit and protections provided by other provisions in the stipulation[6] adequately protect customers from risk associated with the merger making a rate cap unnecessary.

[6]These other provisions include paragraph 3 eliminating merger transaction cost from rates, paragraph 19 requiring the use of hypothetical capital structures, paragraph 25 stating that increased cost of capital will not be allowed in rates, paragraph 26 prohibiting the inclusion of the premium Scottish Power is paying in rates, paragraph 28 requiring funding of network expenditures required to implement service quality standards from redirected internal funding, paragraph 41 requiring a specific showing of prudency prior to the inclusion of any renewable resources in rate base, and paragraph 44 stating that rates in Utah will not increase as a result of the merger.

B. DIFFICULTIES IN CALCULATING MERGER BENEFITS

UIEC and others claim that an advantage of the rate cap makes it unnecessary to attempt to determine what costs are merger-related and what savings could have been achieved absent the merger. As with any merger of two utilities the difficulties associated with calculating merger savings is present. That problem existed when Utah Power & Light and PacifiCorp merged. It will be present with this merger. What is clear is that the burden of proof to show that there are merger savings rests with the utility and not with regulators. Understanding that this difficulty exists does not appear, in and of itself, to warrant a rate cap or present a basis for denying the merger.

C. THE DPU AND CCS WERE NOT CO-OPTED AND CAPTURED

UIEC, presumably not in a pejorative manner, tells the Commission the DPU and CCS have been "captured and co-opted by those they regulate." (UIEC initial brief, p. 13.) Presumably how the DPU and CCS were captured and co-opted was to enter into a stipulation that provides retail customers with a $48 million merger credit and provides all of the protections the DPU and CCS identified as necessary in their investigations. Even the tax issue received sufficient consideration by the DPU and CCS to determine that such an issue could be heard in a future rate proceeding.[7]

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[7] The UIEC states that the DPU and CCS were operating in a climate of information deficit and did not know of the tax savings when the stipulation was signed.. UIEC brief, pp. 13, 15. It should be noted that the industrials cite CCS witness Talbot's testimony when talking about the tax issue. The confidential exhibits that were used during the hearings on this issue were also in response to a CCS data request. It seems that the DPU and CCS had at least as much information as the industrials.

The industrials also complain about the confidential status of documents as part of their information deficit argument. These are the same industrials that sought, and received, confidential treatment of the only exhibit introduced during the hearings that showed the names of the special contract customers, and the revenue from each.

We do not believe that we have been taken in by Scottish Power. Instead, both the DPU and CCS adequately performed investigations leading to the stipulation and independently determined that, with the terms of the stipulation in place, the merger is in the public interest. Two days of cross-examination of representatives of the DPU and CCS by counsel for the industrials certainly punctuated that point.

D. ADDITIONAL CONDITIONS

The UIEC makes the blanket assertion that "the Division and Committee appear to have no objection to additional conditions." The assertion is made in the context of the tax savings issue, but appears to be a blanket statement. As the DPU and CCS have set out in their original post-hearing brief in this matter, they do object to all conditions having to do with restructuring issues, including RTO's and stranded costs, and the forced extension of special contracts.

VI.

CONCLUSION

The DPU and CCS continue to believe that if the terms and conditions of the stipulation are adopted, the proposed merger is in the public interest. The DPU and CCS continue to recommend the Commission approve the merger.

DATED this 17th day of September, 1999.

By_____
Michael Ginsberg
Assistant Attorney General

The industrials apparently do not have a problem with attempting to keep their information confidential.

By_____

Douglas C. Tingey
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Joint Reply Memorandum of the Division of Public Utilities and the Committee of Consumer Services to be served upon the following persons by mailing a true and correct copy of the same, postage prepaid, to the following on the 17th day of September, 1999:

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