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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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| 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**<br><br>**UIEC'S POST HEARING REPLY BRIEF** |

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The Utah Industrial Energy Consumers ("UIEC") hereby submit this Post-Hearing Reply Brief to respond to the opening Brief of ScottishPower PLC and PacifiCorp, and the Joint Brief of the Division of Public Utilities ("DPU" or "Division") and the Committee of Consumer Services ("CCS" or "Committee").

**INTRODUCTION**

From the outset of these proceedings, the industrial customers have expressed concern that under ScottishPower's merger proposal, the operating utility's capital structure would be weakened, its cost of capital would increase, cash would flow upstream from the regulated utility to holding companies, and rates would be forced upward in an effort to recover inflated acquisition premiums and to shore up certain UK returns. See, e.g., Brubaker Direct, Ex. UIEC 1.1 at 33-39; Anderson Direct, Ex. LCG-1 at 63. Those concern are even greater today than they were three weeks ago during the hearings. On August 12, 1999, (three days after the hearings concluded), the UK office of Gas & Electricity Markets proposed price reductions in ScottishPower's distribution prices of 12 to 17%, and for Manweb, 23 to 28%. See Electric Utility Week, August 16, 1999 at 1 (Steep Distribution Price Reductions in U.K. Stuns Utilities; Moody's Eyes Downgrades). As a result of the announcement of the proposed reduction, Moody's investor service placed many UK regional electric companies on review for possible downgrade. ScottishPower was one of those utilities placed under review. Id. at 4.

The risks that the merged Company will require an ever increasing supply of money, and thus may be forced to increase rates, cannot be overemphasized. It is crucial, therefore, that the Commission require iron-clad assurances that Utah rate payers will not be harmed by this merger. The proposed Stipulation falls far short of providing the necessary protections. The UIEC contend that the only effective method of ensuring that the merger is in the public interest, is to cap rates and impose conditions that have the force of law in future proceedings. A rate cap could be financed by the reductions in income tax and by the savings anticipated from corporate consolidation. It would alleviate the regulatory burden of administering the merger credit and enforcing a vague and ambiguous stipulation.

A rate cap would also serve to bring some semblance of finality to these proceedings. ScottishPower has discouraged the Commission at every turn from reaching any decision in this case other than granting the approval it desires. It has refused to submit a transition plan, hoping to avoid scrutiny about whether cost savings will materialize. It has proposed that the Commission delay the establishment of a benchmark from which to measure those savings. It has sought to defer a decision on the treatment of upstream tax savings in hopes that the Commission will be deprived of authority to address the issue later. It has asked the Commission to wait for task forces, the Utah Legislature, and the FERC before making any decisions on special contracts, stranded costs or participation in a regional transmission organization. At the same time, ScottishPower has fostered these delays by refusing to produce or make reasonably available the information necessary for regulators to perform their duty.

The UIEC submit that under the circumstances, the Commission should not approve this merger without imposing a rate cap, strengthening and clarifying the terms of the Stipulation, and imposing additional conditions that will ensure not only that rates will not increase as a result of the merger, but that the merger will result in a net positive benefit to Utah customers.

## ARGUMENT

### I. Standard For Approval of the Application.

Section 54-4-28 requires that the Utah Public Service Commission ("Commission") find the merger to be in the public interest before approving it. The Division and Committee advocate a "net positive benefit test" that was adopted by the Commission in 1988 as a standard for determining whether the public interest is served. (Docket No. 87-035-27). ScottishPower and PacifiCorp[1] take issue with that standard and advocate instead that the Commission adopt a "no harm" standard. They ask the Commission in effect to lower the bar. The UIEC contend that the standard is "public interest" which may be inferred when there is a net positive benefit to customers. Even if ScottishPower's "no harm" standard were applied, this merger would not be in the public interest unless additional conditions are imposed. As discussed in UIEC's opening brief, Applicants have not shown that the rate payers will suffer no harm as a result of the merger or that the Stipulation adequately mitigates the risk of such harm.

### II. Few If Any Benefits Will Result From the Proposed Merger Unless Additional Conditions are Imposed.

It is not as, ScottishPower contends, "abundantly clear" that the merger carries a net benefit for rate payers. (Applicants' Brief at 3). While ScottishPower has offered certain concessions such as the merger credit, there are also numerous and substantial risks of the merger. The Stipulation among ScottishPower, PacifiCorp, the Division and the Committee ("Stipulation") mitigates some of those risks, but it does not sufficiently mitigate the risks for all rate payers, especially special contract customers. In addition, it does not capture certain benefits

[1] For the sake of simplicity, ScottishPower and PacifiCorp are collectively referred to as ScottishPower or the "Company" unless the context requires that PacifiCorp be separately identified.

unknown at the time the Stipulation was signed and it creates a significant additional administrative burden for the Commission.

In this Post-Hearing Reply Brief, the UIEC respond to the arguments offered in ScottishPower's Brief ("Applicants' Brief") and the Joint Brief of the DPU and CCS ("Joint Brief").

### A. Merger Credit.

ScottishPower argues that the $12 million annual merger credit is guaranteed to the Utah tariff rate payers for the entire four-year period. (Applicants' Brief at 3.) During the third and fourth years, however, the $12 million is subject to offset by achieved cost savings. Under ScottishPower's proposal, the baseline from which cost savings will be measured will be set in ScottishPower's transition plan (not subject to approval by the Commission). Wright, Tr. 203, 209-210. The Company thus is in a position to unduly influence the determination of whether there will be any cost savings in the third or fourth year. The Commission has no reliable, objective baseline from which to measure cost savings.

In addition to the diminution of the merger credit through cost savings, the merger credit may also be overwhelmed by increasing rates. PacifiCorp has already stated that it will seek a $100 million rate increase based on a 1998 test year. If the Company is not able to achieve its projected level of cost savings thereafter and must seek further rate increases, the entire merger credit could be consumed in the increased rates. Without a moratorium on rate cases, it is possible that ScottishPower could continue to claim greater cost increases than the amount of the merger credit for every year the credit is in effect.

Although ScottishPower has promised that rates will not go up "as a result of the merger," determining what is a result of the merger is virtually an impossible task. Alt, Tr. 209.

ScottishPower already has testified that if rates go up due to new management practices, for example, ScottishPower will contend that the increase is not "due to the merger." Wright, Tr. 493-96. If rising costs can somehow be characterized as non-merger related, the risk remains, despite the Stipulation, that the merger will result in a net rate increase to rate payers.

The only way to be sure that rates will not increase as a result of the merger, is to impose a rate cap. The Division and Committee do not seem as certain as ScottishPower that merger credit and Stipulation will provide the necessary protection. Rather, the DPU and CCS warn that the Commission "will need to answer for itself" whether adequate protection is provided under the Stipulation. (Joint Brief at 8). The DPU and CCS agree that a rate cap for a five-year period, even allowing for a 1999 rate case, "would provide protection for retail customers from cost increases caused by the merger." Id.

The Division and Committee see only one possible disadvantage to a rate cap: if there is an "absolute rate cap for a five-year period, the merger will not take place." Id. That may not be the worst outcome of this case considering there are other domestic utilities who may be more suitable candidates for a merger with PacifiCorp. See Cross Exh. 4 at 34; O'Brien, Tr. at 683-84 (acknowledging previous merger offer). In any event, it is unlikely ScottishPower would not consummate the merger if the Commission imposed a rate cap. ScottishPower agreed to a rate cap in Wyoming even though it was earning below its authorized return on equity in that state. Moreover, it appears that in Wyoming, rates were not only capped, but the Company agreed to a 1.7% rate cut just as they have agreed in Utah. (See Electric Utility Week, August 30, 1999 at 10 (ScottishPower, PacifiCorp agree to 1.7% rate cut in Wyoming)). If a rate cap was acceptable to the Company in Wyoming, it should be acceptable in Utah.

ScottishPower has not been forthcoming on how it intends achieve the promised cost savings. Since it has not proffered the transition plan, it must be assumed that it cannot deliver the promised savings. It is evident, nevertheless, that ScottishPower will enjoy savings from reduced tax costs and from corporate consolidation. If it is able to achieve the predicted additional savings estimated to be $200 million, it will not be harmed by a rate cap in Utah. Moreover, if the Commission were to impose a rate cap, it would not have to rely upon the transition plan to tell it whether cost savings have been achieved, and it would not have to determine whether any purported cost savings are "as a result of the merger." Given ScottishPower's persistent affirmations that it will achieve cost savings, and given the uncertainty it has created by failing to produce information showing how it intends to do so, the Commission would be prudent to cap rates and place the risk of savings on ScottishPower.

**B. Promise to Pass Additional Cost Savings Through to Customers.**

ScottishPower has promised that it will pass cost savings on to customers. It claims those intended savings are a direct benefit of the merger because PacifiCorp had no specific plans to achieve cost savings. (Applicant's Brief at 4). This is inaccurate. When talks with ScottishPower were in process, PacifiCorp already had proposed its refocus plan which included $30 million in savings for the year 1999. Larsen, Tr. at 53, 201. Unless PacifiCorp's refocus plan is to be considered a result of the merger, it is clear PacifiCorp did have a specific plan to save costs. In addition, evidence presented at hearing demonstrated that PacifiCorp very likely could have realized some level of savings over the next four years. E.g., Cross Ex. 23.

ScottishPower's plans for savings are virtually unknown. The best it can offer is that cost savings will be identified in the transition plan. (Applicants' Brief at 4). When the transition plan is filed, ScottishPower contends, the Commission will "clearly see what cost savings initiatives will be implemented by ScottishPower." Id. Obviously, at present, the cost savings are *not* there for the Commission to see. Until they are, they cannot be evidence of any net benefit.[2]

### C. Improvements in Network Performance and Customer Service.

ScottishPower, the Division and the Committee count it as a benefit that ScottishPower has promised network performance and customer service guarantees. Certainly, any improvements in performance in customer service would be welcome. But such improvements, if they occur, would not be uniquely due to ScottishPower's takeover of PacifiCorp. ScottishPower argues that "PacifiCorp has no plan for improvements to be undertaken on its own." (Brief at 7). Again, that is not true unless the refocus plan is to be considered a product of the merger.[3] Moreover, PacifiCorp is obligated under current law to achieve adequate levels of performance and customer service. Theoretically, the Commission has the authority to deny approval of the merger and then to require PacifiCorp to achieve the same performance level that has been proposed by ScottishPower. There is very little benefit to rate payers in ScottishPower agreeing to do what the regulators already may compel it to do and what it is obligated by law to do.

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[2] ScottishPower's promise to "pass additional cost savings through to its customers" is disingenuous in light of its resistance to agree to pass tax savings through to rate payers. As discussed below in this Reply Brief, a condition to capture tax savings for the benefit of Utah customers (along with certain other conditions) should be imposed before the merger is found to be in the public interest. The Division and Committee point out the advantage in a merger credit "designed to capture benefits associated with the merger up-front rather than waiting until those benefits are achieved in future rate cases." Joint Brief at 8. If this is a virtue for the merger credit, why is it not a virtue for tax benefits?

[3] ScottishPower has resisted any suggestion that PacifiCorp's refocus plan is in any way related to the discussions between PacifiCorp and ScottishPower that were in progress at the same time the refocus plan was developed. Larsen, Tr. 53, 203.

ScottishPower argues that it will spend "approximately $55 million" over the next five years on improving service standards.[4] It states that these costs will not be passed on to rate payers *unless* the Commission approves them in a rate case. (Brief at 8). As discussed above, if improvements to service quality are needed, then the Commission could order PacifiCorp to invest the same $55 million. Such investments, if prudent, could be recovered in rates whether by ScottishPower after the merger or by PacifiCorp in the absence of the merger. Thus, even if the $55 million investment represents a benefit, it is not a benefit resulting from the merger. Moreover, we can be sure that ScottishPower intends to seek approval to pass on the $55 million to rate payers just as PacifiCorp would.

Improvements in service should not be counted as a benefit of the merger because PacifiCorp could be required to make the same investment and because prudent costs are recoverable by ScottishPower as they would be by PacifiCorp.

## III. The Risks Associated With the Transaction Are Not Adequately Mitigated by the Stipulation.

The Stipulation was developed before the Division and Committee had the benefit of hearing and analyzing certain important evidence that came to light during hearings. It was also fashioned without any accommodation to the industrial customers. For those reasons, the Stipulation is incomplete protection against the risks of the merger. The UIEC have urged the Commission to require additional conditions of Scottish Power.

ScottishPower contends that the Stipulation's conditions "effectively neutralize" all risks associated with the merger. (Applicants' Brief at 14). Despite the assurances of

[4] While ScottishPower would like us to think that $55 million is a substantial investment, compare it to the $250 million that ScottishPower has spent on lawyers and consultants in this merger. Richardson, Tr. 618-19; O'Brien, Tr. 697-99.

ScottishPower, however, it has admitted that the rate payers still bear the risk that ScottishPower's new management will cause costs to increase. Wright, Tr. 493-496. The very existence of new management brings a number of risks that have not been addressed in the Stipulation. The new Company's information management policy places a burden on the regulatory system. While the Stipulation provides that regulators will have access to "necessary" books and records, it was evident in this proceeding that ScottishPower has a different view than the regulators about what is necessary. The Division and the Committee did not have the necessary information to ascertain the level of tax savings to ScottishPower or the confidential cost projections of ScottishPower and PacifiCorp. (See UIEC Opening Brief at 11-12).

The Stipulation also fails to neutralize the risk of prolonged and expensive litigation that likely will occur as a result of ambiguities or omissions in the Stipulation.[5] In addition, the uncertainties remaining as a result of ScottishPower's refusal to file a transition plan leaves a substantial risk that ScottishPower will not be able to achieve any level of cost savings or operate this company more efficiently than PacifiCorp could have. Rate payers are still faced with the risk that rates will increase if the savings do not materialize. In short, the Stipulation does not neutralize the risks of the merger. Additional conditions are necessary to ensure that it is in the public interest.

[5] Condition No. 22, for example, is ambiguous as to the meaning of "inter-company" loans; paragraph 9 is ambiguous about whether notification and approval is required if the Company places transmission distribution or generation into a separate subsidiary; paragraph 10 and 11 addressing access to information may be insufficient to require the Company to cooperate in timely disclosing essential information; paragraph 13 requiring the filing of a transition plan that need not be approved by the Commission invites future litigation over claimed savings as a result of the merger, the Commission's right to adjust the benchmark for those savings, and the Division's right to audit the amount of merger savings claimed. (Tr. 194-202; 209-212).

### A. **Taxes**.

The Commission should determine in the present case that potential income tax savings resulting from the merger must flow through to PacifiCorp's Utah customers. The Division and the Committee agree that the tax savings associated with the transaction should be credited to rate payers "if appropriate," (Joint Brief at 10), but they are unwilling to ask the Commission to decide at present what the amount might be. ScottishPower claims that even though there is potential for upstream tax savings, it is "not clear that tax savings will be available." (Applicants' Brief at 18). The Company, the Division and the Committee thus advocate that specific treatment of those tax savings should be decided in a future proceeding. (Joint Brief at 11; Applicant's Brief at 18). The UIEC do not ask the Commission to determine whether or in what amount tax savings will be achieved, or what a reasonable allocation to the Utah jurisdiction might be. It is essential, however, that the Commission clearly impose the condition in this docket that those tax savings, if any, will accrue to the benefit of Utah rate payers.

Both the Division and the Committee argue that the language contained in Cross Exhibit 2 adequately "preserves the issue" for a future proceeding and "resolves all concerns" regarding the tax question. (Joint Brief at 11; Applicants' Brief at 19). They are mistaken. Cross Exhibit 2 states:

> The parties to this Docket preserve their right to raise the issue of the treatment of upstream tax savings and costs in future rate cases. <u>All parties preserve their positions and have not waived their rights on the issue</u>. ScottishPower commits to retain records regarding upstream tax savings and costs relating to the merger and make those records available to the DPU, CCS and other parties in accordance with the Stipulation. Ex. 1 and the discovery rules of the Commission.

Cross Exhibit 2 (emphasis added). The language of Cross Exhibit 2 does not amount to an acknowledgment that the Commission may address the treatment in a later proceeding and may order that tax savings be credited to Utah rate payers. To the contrary, it preserves the right of ScottishPower to argue in a future case that the Commission has no jurisdiction to address the tax issue at all, or to compel upstream entities to pass along the tax savings to Utah rate payers. Fell, Tr. 979; Larsen, Tr. 93; Wright Tr. 106 (refusing to acknowledge PSC has jurisdiction to decide issue of future case). Neither ScottishPower nor the Joint Brief explicitly address the problem of the Commission's jurisdiction to capture the tax benefits. Either they have overlooked the issue or they have chosen to divert the Commission's attention away from it, contending that cross Exhibit 2 adequately preserves the issue for future determination.

Whether or not ScottishPower could succeed in preventing the Commission from addressing the tax issue in a future case is not known. It is obvious, however, that ScottishPower does not ever intend to submit the merits of the matter to the Commission. Fell, Tr. 979; Larsen, Tr. 93; Wright Tr. 106. Its promise in Cross Exhibit 2 is nothing more than an attempt to momentarily placate regulators now that the tax issue has been uncovered. It simply sets the stage for litigation. The only way the Commission can ensure that the issue will be preserved for a later case is to determine now that as a condition of the merger, ScottishPower must acknowledge the Commission's authority to decide the issue, and must agree that the tax benefits, whatever they may be, will flow through to Utah rate payers. The Commission should impose such a condition now that will carry the force of law in future proceedings.

**B. <u>Utah Presence</u>.**

The UIEC have emphasized the importance of having ScottishPower agents present in Utah capable of binding PacifiCorp and making decisions regarding Utah operations.

The Stipulation does not address the topic. Both ScottishPower and the Division rely on a letter sent to DCED and DBED, in which ScottishPower committed to have an individual in Utah who would report directly to PacifiCorp's CEO. (SP Exh.1R.1; Joint Brief at 13; Applicants' Brief at 20). The commitments that ScottishPower makes in that letter do not include a commitment that a representative located in Utah will have authority to make decisions and bind the company regarding Utah operations. Instead, the letter states:

> The [Utah] executive will report directly to the CEO of PacifiCorp. As a member of the executive team, this person will have broad influence over PacifiCorp's operation in Utah including, but not limited to, authority to approve corporate involvement in economic development and corporate citizenship activities. The executive will be able to assure the best decisions in the interests of Utah.

SP1 R.1. The language of the condition allows ScottishPower to place a CEO in Utah with "authority to approve corporate involvement in economic development issues," but not necessarily with authority to bind the Company in its Utah contracts or operations. The UIEC urge the Commission to require a straightforward, unambiguous commitment from ScottishPower so regulators and customers will have access to someone in Utah with decision-making authority.

**C. <u>Existing Evidence</u>.**

The UIEC have requested that the confidential information currently in the possession of ScottishPower and PacifiCorp be preserved for future cases. ScottishPower contends that "these documents have been entered into the record and are governed by the terms and conditions to the protective order in this docket." (Applicants' Brief at 21). It believes that no additional provisions are required. It is evident, however, that certain data in work papers backing up some of those documents were not produced in response to data requests, yet were referred to by ScottishPower witnesses during the hearings. Tr. 1475-81. The UIEC request that the Commission order that information to be produced and made available for use in future proceedings.

**D. Stranded Costs**.

The UIEC have advocated in this proceeding that ScottishPower should be required to waive any claim for stranded costs as a result of the premium paid for the acquisition of PacifiCorp stock. The Division and Committee evidently understand the Stipulation to mean that ScottishPower shall make no attempt to recover the premium or transaction costs as stranded costs or to include them in any stranded cost calculation. (Joint Brief at 14.) While ScottishPower apparently agreed with that position, (Tr. 136-146), it has not acknowledged such a concession in the Stipulation or in its Brief. (See Applicants' Brief at 21 (omitting any reference to a waiver of premium and transaction costs as stranded costs)). The UIEC propose, therefore, that the commitment of ScottishPower in that regard be incorporated as a formal condition of the merger.

ScottishPower, the Division and the Committee contend that the stranded cost issue is more appropriately addressed in a later proceeding. None of them identify any substantive reason that the Commission should defer the issue, or explain the nature of the "complexities" they claim would preclude a decision in this docket. (Joint Brief at 14; Applicants' Brief at 21). Evidence of the premium is uncontested and there is ample evidence on record on which the Commission could reach a decision that PacifiCorp's shareholders have been compensated for stranded costs. (See UIEC Opening Brief at 26-27).

ScottishPower also claims the Commission should not decide the issue because the Utah Legislature is reviewing restructuring issues in a task force. ScottishPower suggests that the question of stranded costs may be more appropriately handled in that forum.

(Applicants' Brief at 21). If the Commission defers a decision on stranded costs in this case, it should enter findings that will assist the Legislature in its debate. The Commission should find that ScottishPower is a sophisticated buyer, that an independent appraisal company established that ScottishPower is paying 1.4 to 1.8 times the value of PacifiCorp's stock, that such payment reflects the value of the generation assets, and that PacifiCorp shareholders have received a premium over book value in this transaction. (See UIEC Opening Brief at 27).

**E. Regional Transmission Organization.**

The UIEC have requested that the Commission require as a condition of the merger that ScottishPower participate in the organization and operation of a regional transmission organization within a time certain after approval of the merger. (UIEC Brief at 28-29). The Division and Committee believe that the issue should be decided by the FERC and that it does not have any direct relationship with the merger. (Joint Brief at 15). ScottishPower remarks that the only occasions where commissions have required a commitment to join an RTO as a condition to a merger is when market power was affected by the merger. (Applicant's Brief at 22). It also argues that competitive issues were reviewed by the FERC and the FTC for the purposes of the proposed merger, and these entities did not impose the requirement of joining an RTO. Id.

If the Division, Committee, and ScottishPower's suggestions are adopted, the Utah Public Service Commission would be precluded from exercising any control or input over the development of a regional transmission organization in the western United States. The Commission must impose the obligation as part of this merger or be preempted from ever doing so in the future. (See UIEC Opening Brief at 28-29). The fact that the FERC did not require participation in an RTO is not surprising since the FERC will retain jurisdiction to compel an

RTO in the future. But the issue in the present docket is not whether FERC can compel a RTO, whether the FERC imposed similar conditions on this merger, or whether there is a direct relationship between the merger and the proposed condition. It is whether the state of Utah can preserve its right to direct the development of an RTO.

The UIEC believe it is important for the Commission to retain authority to deal with regional transmission issues. This concern was recently underscored when NARUC mounted an opposition to a federal bill that would create a national organization to develop and enforce national reliability standards under FERC oversight. See Electric Utility Week, September 13, 1999, at 4 (State Regulator Group Demands Bigger Role in Reliability Regime"). State regulators, concerned that the bill "might strip them [of] what they consider their police power over local utilities to ensure reliable service to customers," refused to endorse the measure unless it is revised to preserve a meaningful role for the states in ensuring reliability. Id.[6] Likewise, unless the Utah Commission imposes conditions on the merger, it will be stripped of its power to influence the development of a regional transmission system.

The Commission has the opportunity in this docket to remain involved and retain some control over regional transmission issues to ensure reliable service to Utah customers. As discussed in UIEC's Opening Brief, the Commission should take advantage of the opportunity by crafting a merger condition requiring ScottishPower's participation in an RTO.

**F. Special Contracts.**

ScottishPower has offered the following assurances to special contract customers: (a) all existing contracts will be honored; (b) PacifiCorp will allow ScottishPower representatives

[6] NARUC also recently petitioned the 8th Circuit Court of Appeals to uphold a decision that limited the FERC's authority to compel curtailments in native load and network service when transmission

to join the PacifiCorp negotiating team ahead of completion of this transaction, if the customers so wish; (c) ScottishPower/PacifiCorp will negotiate all contracts in good faith; (d) complete such negotiations promptly (understanding the possible needs for customers to pursue alternatives); (e) negotiate contracts recognizing the contributions these customers make to the economic well being of Utah; and (f) negotiate in accordance with the Commission rules in effect at that time. (ScottishPower Brief at 24; DPU Brief at 19).

None of these concessions represents a net benefit to special contract customers or offers them significant protection from future rate increases. The first concession, that all existing contracts will be honored, is nothing more than a statement of ScottishPower's obligation under current law. Special contract customers are not concerned that their current contracts will not be honored, but that they will not be able to extend or renegotiate those contracts under acceptable terms. (See UIEC Opening Brief at 22-23). The second concession, that PacifiCorp will allow ScottishPower representatives to join negotiating teams before the completion of the merger, is not of any significant benefit to special contract customers, especially in view of the fact that ScottishPower has been less willing to negotiate than PacifiCorp.[7] The third concession, that contracts will be negotiated in good faith, again, is no more than the law requires currently. The fourth concession, that negotiations will commence as early as practical and be completed promptly, has little meaning to customers who have already requested discussions with ScottishPower and have been refused. ScottishPower's fifth concession is that it will "recognize the contribution" that special contract customers make to the

constraints forced the local utility to cut point-to-point deals. (Power Markets Week, September 13, 1999 at 9).

[7] When the application for approval of this merger was filed, special contract negotiations with PacifiCorp were halted. ScottishPower refused to negotiate. Brown, Tr. 1233-34. After the hearings,

economic well being of Utah. Without more definite terms, this concession is meaningless. Finally, the concession that contracts will be negotiated in accordance with Commission rules is merely another statement that ScottishPower will comply with the law. In sum, ScottishPower's hollow promises do not offer special contract customers any protection from increasing rates or any guarantee that acceptable terms can be negotiated. Under the Stipulation, special contract customers are the victims of the utility's discrimination, having been selected as the only group of customers to whom no merger benefit or protection is offered.

ScottishPower attempts to justify its exclusion of special contracts customers by citing the work of the Commission's task force on special contracts. (ScottishPower Brief at 23-24). It argues that it will participate in this "procedure to examine the issue of special incentive contracts" but that prior to the completion of the task force's work, "the discussion regarding special contracts is premature and should not be an issue in this docket." (Brief at 24 citing SP Exhibit 1S, page 17-18). ScottishPower's attempt to delay and stall the negotiation of special contracts is a thinly veiled effort to raise special contract rates. In fact, the results of the task force will not be helpful for setting guidelines in the future. As discussed in UIEC's Initial Brief, the task force deals only with firm contracts, while all of the special contracts represented in the merger docket are interruptible contracts. The task force's anticipated guidelines will be inapplicable.

The Division and Committee have stated:

> The Division and Committee do not oppose extension of these contracts if they are in the public interest. In other words, the Division and Committee do oppose the automatic extension of these contracts unless they are submitted for approval to the

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ScottishPower invited some industrial customers to discuss special contracts, but the customers are not optimistic that they can obtain suitable contracts under the circumstances.

> Commission and pass muster showing that they continue to in the public interest under the standards and criteria adopted by the Commission [when the task force's report is submitted].

Division Brief at 17-18. Like ScottishPower, the Division and Committee misconstrue the objective of the task force. Those criteria will not apply to interruptible contracts. At present, all special contracts have been approved and are subject to continuing jurisdiction of the Public Service Commission. The UIEC do not expect to operate under contracts that are inimical to the public interest. (See UIEC Opening Brief at 24-25).

ScottishPower, the Division and Committee have urged the Commission to wait for the results of the task force, evidently hoping to gain some insight as to whether special contract prices will remain above costs, and whether terms and conditions of existing contracts will be reasonable in the future. (Applicants' Brief at 24-25; Joint Brief at 17-18). Because the results of the task force will largely be irrelevant to those questions, however, perhaps the best indicator of whether it would be reasonable to extend special contracts is ScottishPower's non-existent transition plan. Ironically, ScottishPower, claiming that there is insufficient information to determine future costs, is asking Commission to presume that special contracts will become uneconomic if extended. That approach, of course, is backward. Because ScottishPower itself has created the information deficit by its refusal to file the transition plan, the Commission must presume just the opposite: that the information ScottishPower has refused to provide would be adverse to ScottishPower if it were available.[8] Hence, the Commission must conclude that the transition plan would show that special contracts will remain economic through the transition period.

[8] See 2 Wigmore, Evidence § 285 (1991)(the failure of a party to bring before the tribunal a document or witness that might elucidate the facts is evidence that such document or witness if brought, would have exposed facts unfavorable to that party).

Even based solely on the evidence available this proceeding, there is every indication that ScottishPower's projected costs would remain below the rates set in the current special contracts. There is no reason that the Commission cannot decide on the current record that special contracts must be extended. The UIEC have advocated that the Commission impose a rate cap as the most effective way of ensuring the public interest is met in this merger. Capping rates also eliminates all risk that special contracts will become uneconomical or that rate payers would be harmed by extending them.

ScottishPower claims: "We value our relationship with all of our customer classes." (Brief at 23 quoting SP Exhibit 1S). The UIEC's perception is that ScottishPower has alienated every industrial customer in every state in which it has applied for merger approval. The industrial customers are extremely apprehensive that unless there are enforceable conditions in place prior to approval of the merger, ScottishPower will be disinclined to treat special contract customers fairly.

## CONCLUSION

This case has been presented to the Commission without sufficient information for the Commission to determine that the merger is in the public interest. ScottishPower, largely through its refusal to submit a reasonable transition plan, simply has not borne its burden to show quantifiable, actual net benefits of the merger. At the same time, it has been immensely successful in securing the cooperation of the Division and the Committee who were virtually ambushed by the information deficit. Under these circumstances, the Commission should look carefully at evidence, closely evaluate the tangible benefits and risks of this transaction and, as the Division and Committee recommend, "answer for itself" whether the Stipulation alone ensures the public interest.

The UIEC recommend that the Application of PacifiCorp and ScottishPower PLC be denied unless ScottishPower agrees to the amendments necessary to clarify the Stipulation and unless it accepts the following additional conditions: (1) Utah rate payers are entitled to the tax savings resulting from merger and the Utah Public Service Commission has jurisdiction and authority to order that those savings be credited to Utah rate payers; (2) rates will be capped through the transition period (either before or after a rate case using a 1998 test year); (3) special contracts shall be extended through the transition, in accordance with the terms set out in the UIEC's comments to the proposed Stipulation (August 2, 1999); (4) intervenors, customers and regulators must have access to essential information in the possession of ScottishPower or its affiliates; (5) the merged company must waive any future claim for stranded costs; and (6) ScottishPower must present a plan to the Commission for the formation of a regional transmission group with in a time certain, and should acknowledge the Commission's authority to compel it to join such an organization.

DATED this ____ day of September, 1999.

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of September, 1999, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **UIEC'S POST HEARING REPLY BRIEF**, to:

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