

Gary A. Dodge (0897)  
HATCH, JAMES & DODGE  
10 West Broadway, Suite 400  
Salt Lake City, Utah 84101  
Telephone: (801) 363-6363  
Facsimile: (801) 363-6666  
Email: gdodge@hjdllaw.com  
Attorneys for UAE

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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of the Application of PACIFICORP for an Increase in its Rates and Charges.	MEMORANDUM OF THE UAE INTERVENTION GROUP IN RESPONSE AND OPPOSITION TO PACIFICORP'S PETITION FOR REHEARING OR RECONSIDERATION
	Docket No. 01-035-01

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Pursuant to Rule R746-100-11 F, the Utah Association of Energy Users Intervention Group (“UAE”) submits this Memorandum in response and opposition to PacifiCorp’s Petition for Rehearing or Reconsideration (“PacifiCorp’s Petition”) in this matter. The UAE submits that the Commission should reject PacifiCorp’s Petition because it misstates and misapplies applicable standards and ignores the consequences of its own failure to comply with Commission Orders.

**PacifiCorp’s Petition Misstates and Misapplies Applicable Legal Standards**

PacifiCorp claims that Utah law mandates the application of a “prudence” standard of review for all of its expenditures, and that the Commission’s Order improperly applies an “unwarranted risk” standard. PacifiCorp’s argument is factually inaccurate and legally unsound. It is predicated upon a strawman created and hewn down by PacifiCorp.

The standard in Utah for utility rates is set out explicitly by the Utah Code: Rates must be “just and reasonable.” Utah Code Ann. § 54-3-1. The Commission has properly concluded that “just and reasonable” rates must include only costs that are prudently incurred by a utility. However, this “prudence” standard is not co-extensive with the statutory “just and reasonable” standard. Prudence of an expenditure is a *minimum* requirement for inclusion in rate base or expense accounts for purposes of setting “just and reasonable” rates. Numerous other factors must also be considered in setting just and reasonable rates.

Chief among the factors for determining just and reasonable rates is a determination of *on whose behalf* an expenditure was incurred. Given the fact that PacifiCorp serves retail customers in seven states, as well as numerous wholesale customers, the Commission must first identify and segregate those costs incurred by PacifiCorp in order to serve Utah retail ratepayers. The prudence of an expenditure need be examined only after it is determined that it was incurred to serve Utah customers.

The Utah Code specifies that just and reasonable rates should focus, among other things, on “the cost of providing service *to each category of customer.*” [Utah Code Ann. § 54-3-1]. The statute thus focuses the “just and reasonable” inquiry directly on the cost of providing service *to Utah customers.* The record clearly reflects, as the Commission found, that losses suffered by

PacifiCorp in serving several wholesale contracts were not costs incurred to provide serve to Utah. Such losses must thus be excluded from the calculation of just and reasonable rates for Utah retail ratepayers.<sup>1</sup>

Several parties to this case challenged PacifiCorp's attempt to include in Utah retail rates its market losses incurred in providing service to wholesale customers. These challenges did not rely upon the type of "prudence" analyses demanded by PacifiCorp; they did not attempt to analyze whether, under all relevant circumstances, it was "prudent" for PacifiCorp to incur the risk of each long-term wholesale contract. Such an analysis was not necessary because the challenged contracts were not entered into by PacifiCorp for the purpose of serving Utah retail load.<sup>2</sup>

A proper prudence analysis must begin with an analysis of the purposes for which the challenged contracts were entered into and on whose behalf the inherent risks were assumed. It is not the task of the other parties or this Commission to attempt to determine whether it was prudent for PacifiCorp to assume *for itself* the significant wholesale market risks associated with the post-1995 contracts, given the information and projections available to PacifiCorp at that time. Rather,

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<sup>1</sup> The case cited by PacifiCorp in support of its "prudent investment standard," *Utah Power & Light Co. v. Public Service Commission*, 152 P.2d 542 (Utah 1944), does not support PacifiCorp's argument, but rather establishes its fallacy. In that case, the Utah Supreme Court confirmed the Commission's broad discretion to determine the proper elements of a "just and reasonable" rate, and affirmed the Commission's conclusion that the utility's rate base should include only amounts "actually and 'prudently invested' in the property *used and useful in rendering Utah service.*" *Id.* at 546 (emphasis added). The Commission's finding that the challenged wholesale contracts were not pursued for purposes of providing service to Utah ratepayers is equivalent to a determination that the losses stemming from the same were not "used and useful in rendering Utah service."

<sup>2</sup> While the parties did not necessarily challenge (nor concede) the "prudence" of entering into any specific contracts, they did challenge the Company's deliberate decision to rely on short-term purchases to back up long-term contracts, thus subjecting itself and/or its customers to significant market risks. [E.g., DPU Exhibit 8, Prefiled Direct Testimony of Rebecca L. Wilson, page 13, line 1 – page 17, line 8; DPU Exhibit 13SR, Surrebuttal Testimony of George R. Compton, page 3, line 9 – page 8, line 13].

the prudence analysis properly ended with the determination that the challenged contracts, with their associated risks, were not undertaken in order to serve Utah customers.

The evidence clearly showed, and the Commission properly found, that the challenged wholesale contracts were entered into by PacifiCorp in pursuit of corporate goals other than serving Utah retail customers. The Commission found that “during or shortly after 1995 PacifiCorp adopted a business strategy emphasizing participation, *independent of its obligation to serve native retail load*, in wholesale market activity, and sought to position the Company there to capitalize on its view of a future restructured electric industry.” [Report and Order at 33 (emphasis added)]. The Commission also noted that the company’s wholesale activities “became a means to other business ends,” and summarized: “The point is that in entering the contracts to an extent not related simply to the public utility purpose of balancing firm retail load with resources but far beyond such a requirement, the Company exposed ratepayers to substantial risk having little to do with a public utility’s obligation to serve.” [Id.]<sup>3</sup>

Record evidence is overwhelming in support of the Commission’s finding that the Company made a deliberate shift in policy to pursue wholesale market goals not directly related to providing service to Utah retail customers.<sup>4</sup> Having found that the Company’s wholesale activities in and after 1995 were pursued for purposes other than serving Utah retail customers, the Commission properly took steps to insulate Utah retail customers from the consequences of those activities and risks. To

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<sup>3</sup> Implicitly, the Commission’s Order finds that it was (or would have been) imprudent for PacifiCorp to attempt to subject its Utah retail ratepayers to the significant wholesale market risks associated with its pursuit of corporate goals other than the service of Utah retail customers. On reconsideration, the Commission may choose to make that finding explicit.

<sup>4</sup> E.g., UAE/Nucor Exhibit 1, Prefiled Direct Testimony of Dr. Richard M. Anderson on Behalf of the UAE Intervention Group and Nucor Corporation, page 19, line 10 – page 21, line 26.

have done otherwise would have been to sanction rates that were not based on the cost of serving Utah customers. Such rates would have been unjust and unreasonable.

**PacifiCorp's Petition Misstates the Criteria Adopted by the Commission**

PacifiCorp resists the application of the criteria adopted by the Commission in the second phase of the 1990 Docket ("Criteria") by arguing that rejection of revenue credit treatment for the challenged wholesale contracts necessarily requires that those contracts be assigned to a FERC jurisdiction. Nothing in the Criteria requires such a conclusion. PacifiCorp's arguments are neither logical nor supported by the Criteria. The Commission fashioned a remedy for PacifiCorp's failure to follow a prior Commission Order that flows logically from the nature of the transgression.

The applicable part of the Criteria places a burden on the Company only: "Any long term contract proposed to be treated as a revenue credit [must] be filed with the Utah Public Service Commission for subsequent approval of that revenue credit status." If, as here, the Company ignores that obligation, the Criteria do not suggest or dictate the appropriate remedy or consequence. Certainly, a potential remedy would be the use of a FERC jurisdiction for the challenged contracts. However, no party, including PacifiCorp, provided timely data or documentation that would be necessary to fashion such a remedy. That remedy was thus not available on this record. The Commission selected another approach to remedy PacifiCorp's failure to follow the prior Order by imputing revenue in a manner designed to mitigate the negative consequences of the very risk the Criteria were designed to avoid.<sup>5</sup> Nothing contained in the Criteria, and no Utah case law, mandates the remedy now demanded by PacifiCorp.

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<sup>5</sup> The Commission could have elected to insulate ratepayers completely from the consequences of PacifiCorp's

### **Conclusion**

PacifiCorp's Petition should be rejected. The Commission properly applied the "just and reasonable" standard as required by Utah law to exclude costs or losses incurred by PacifiCorp in pursuit of corporate purposes or goals other than providing service to Utah customers. The "prudence" component implicit in the applicable standard supports the Commission's determination that PacifiCorp shareholders should bear the consequences of the company's actions. Nothing explicit or implicit in the Criteria adopted by the Commission in the 1990 docket requires a different result.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2001.

HATCH, JAMES & DODGE

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Gary A. Dodge  
Attorneys for UAE

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failure to comply with the prior Order by imputing revenues based on actual or normalized purchased power costs. Rather, by imputing revenues based on embedded costs, the Commission selected a remedy that forces shareholders and ratepayers to share the burden of PacifiCorp's failure.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this \_\_\_\_ day of \_\_\_\_\_, 2001, 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  
Division of Public Utilities  
500 Heber M. Wells Building  
160 East 300 South  
Salt Lake City, UT 84111

Reed Warnick  
ASSISTANT ATTORNEY GENERAL  
Committee of Consumer Services  
160 East 300 South, 5<sup>th</sup> Floor  
Salt Lake City, UT 84111

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

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

Tony J. Rudman  
MAGCORP  
238 North 2200 West  
Salt Lake City, UT 84116

Jeff Burks  
Office of Energy & Resource Planning  
Utah Department of Natural Resources  
1594 West North Temple, Suite 3610  
Salt Lake City, UT 84114-6480

Steven F. Alder  
ASSISTANT ATTORNEY GENERAL  
P.O. Box 140857  
Salt Lake City, UT 84114

Captain Robert C. Cottrell, Jr.  
Utility Litigation and Negotiation  
AFLS/ULT  
139 Barnes Drive, Suite 1  
Tyndall AFB, Florida 32403-5319

Glen E. Davies  
Bill Thomas Peters  
PARSONS DAVIES KINGHORN PETERS  
185 South State Street, Suite 700  
Salt Lake City, UT 84111

Stephen R. Randle  
RANDLE, DEAMER, MCCONKIE & LEE  
139 East South Temple, Suite 330  
Salt Lake City, UT 84111-1169

Charles E. Johnson  
1338 Foothill Boulevard, Suite 134  
Salt Lake City, UT 84108

Eric C. Guidry  
The Energy Project  
Land and Water Fund of the Rockies  
2260 Baseline Road, Suite 200  
Boulder, CO 80302-7740

Betsy Wolf  
SLCAP/CUC  
746 South 200 West  
Salt Lake City, UT 84101

David Crabtree  
DESERET GENERATION & TRANSMISSION  
10704 South Jordan Gateway  
South Jordan, UT 84095

Bruce Plenk  
Utah Ratepayer Alliance  
1338 Foothill Dr., PMB134  
Salt Lake City, UT 84108

