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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of
PACIFICORP for an Investigation of
Inter-Jurisdictional Issues

DIVISION OF PUBLIC UTILITIES'
RESPONSE CONCERNING
PACIFICORP'S COMMENTS ON
LEGAL FORM OF PROCEEDING

DOCKET NO. 02-035-04

The Division of Public Utilities (DPU) hereby responds to PacifiCorp's November 7, 2003 pleading entitled PacifiCorp's Comments on Legal Form of Proceeding in the above-referenced docket (PacifiCorp's Comments). The DPU has no objections if this Docket ultimately results in the adoption of a rule. The DPU offers the following comments on the nature of this Docket. The DPU will file separately the list of issues it believes are appropriate to discuss in this proceeding.

In its filing, PacifiCorp summarizes the MSP process to date. PacifiCorp points out that the Commission's April 2002 order issued in Docket No. 02-035-04 created an Investigative Docket to address inter-jurisdiction allocations. In response, the

Commission's advisory staff and other interested Utah parties held meetings in Las Vegas with other PacifiCorp states. Additionally, under Docket No. 02-035-04, meetings were held among the Utah Commissioners and those from other PacifiCorp states. Had the parties reached agreement during the Las Vegas meetings, that agreement would have been presented to the Commissions in Utah and the other affected states for approval. However, no agreement was reached, so the Company was advised to present a proposal in each state for further consideration and approval, taking into account the comments and concerns of the participants in Las Vegas. This filing is a direct result of that process.

An essential issue at this time concerns the appropriate process to allow the collaborative process to continue or, in the event that the collaborative process fails, to allow the Commission to make an informed decision in the interest of Utah ratepayers. The Company proposes Rulemaking as the most appropriate process to allow the collaborative process to continue and to allow the Commission to conduct thorough inquiries. The DPU has no objections generally to the Company's proposed process.

The DPU supports a multi-state resolution of the issues presented in Las Vegas, if possible. Continuing this Docket as an investigative docket that may ultimately lead to a published rule will allow the collaborative process to continue, and will allow the Commission and its advisory staff to continue to directly participate in the investigation and discussions.

Under PacifiCorp's proposed schedule, formal testimony by parties is scheduled for May 2004, with hearings scheduled in July. Discovery occurred during the Las Vegas process, and can continue whether this Docket is classified as a rulemaking,

adjudicatory, or an investigative docket. However classifying this Docket as a continuation of the Las Vegas process will allow the collaborative nature of the process to continue at least until it is clear that no agreements are possible. At that point further decisions can be made about the nature of this proceeding if necessary.

PacifiCorp states that it will file a proposed rule in late November or early December. It is unclear whether the Company expects the Commission to adopt its proposed rule in its initial form, or expects the proposed rule to be merely the focus of the investigation, with a published proposed rule the eventual outcome. The DPU suggests that the Commission accept the Company's draft rule as the focus of further investigation and not submit it for publication in the Utah Register at this point. It is likely that continued investigation of the issues will lead to substantial modifications of the draft proposal, and the Commission should submit a rule to the rulemaking process only after it has completed its investigation. In fact, the Commission's rules contemplate such a process, particularly when the proposed rule originates not from the Commission but from an interested party. Utah Admin. Code R746-100-15.

There is nothing in either U.C.A. § 63-46a-1, Utah's general rulemaking statute, or in the Commission's rules that prohibits the Commission from continuing this Docket as an investigation with a rule ultimately as its result. Under U.C.A. § 63-46-3(2), rulemaking can be appropriate when an agency makes rules authorizing an action that provides a material benefit to a class of persons and is authorized by statute. A rule resolving the MSP issues would be appropriate under the standard set forth above. The Rulemaking statute is broad enough to address the unique issues and process in this Docket. Additionally, R746-100-15 is consistent with a collaborative process that has

the best chance culminating in a multi-state agreement. That rule allows the Commission to draw on any resource during its investigation of the proposal. After investigation, if the Commission is satisfied that a rule is appropriate, it can publish the rule as proposed or as amended in conformance with the Utah Rulemaking Act. See R746-100-15 (2).

In conferences, some parties expressed concern about the binding effect of a rule and that a rule may lack sufficient flexibility, given the nature of the PacifiCorp proposed initial protocol. The DPU recommends the Commission build a level of discretion and flexibility into the rule language so that the rule, as applied in future rate cases, applies flexibly to the facts and circumstances of each case. Additionally, the rule can be amended in the future, if necessary both in Rulemaking and adjudication. Indeed, Utah statutes specifically contemplate rule changes.

Some parties may argue that continuing an informal investigation may impede their rights to full access to the information that the Commission may eventually rely upon in a rulemaking proceeding and not provide the same due process safeguards as Adjudication. The DPU recommends that the Commission ensure that discussions and informational exchanges under this Docket remain open to all. For example, if meetings take place between the Utah and Oregon Commission, they should be open and public. If it ultimately becomes necessary to limit ex parte communications or to create a more formal docket, the Commission can establish procedures ensuring that all parties' due process rights are adequately considered, including placing any ex parte comments on the record and providing any needed opportunity to respond.

The DPU agrees with PacifiCorp that adopting a formal procedural schedule will help move the proceeding along, but offers these suggestions. Rather than adopting the schedule set forth by PacifiCorp, the DPU believes that the parties should discuss a schedule at the first technical conference, and then submit the agreed upon dates to the Commission.¹ If no agreement can be reached, the timetable can be turned over to the Commission for resolution and calendaring. In addition to technical conferences, the DPU advocates setting specific dates when parties will make brief position statements to the Commission, and will be available to answer questions.

In conclusion, the DPU has no objection to keeping this proceeding as an Investigative/Rulemaking Docket, recognizing that the process may become more formal if necessary. The DPU sees no reason to publish the PacifiCorp proposal in the Utah register at this time. The DPU's issue will be filed separately.

Dated this _____ day of November, 2003.

MICHAEL L. GINSBERG
Assistant Attorney General

¹ The DPU notes in particular that the proposed hearing date of July 6, 2004 should be changed until later that month to accommodate vacation plans over the July 4th weekend.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing DIVISION OF PUBLIC UTILITIES' RESPONSE CONCERNING PACIFICORP'S COMMENTS ON LEGAL FORM OF PROCEEDING was served upon the following by U.S. Mail, postage prepaid, emailed, or hand delivered to their addresses as indicated below on this ____ day of November, 2003.

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