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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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<b>In the Matter of the Application of PACIFICORP for an Investigation of Inter- Jurisdictional Issues</b>	<b>UAE REPLY TO PACIFICORP'S COMMENTS ON LEGAL FORM OF PROCEEDING AND PRELIMINARY ISSUE LIST</b>
	<b>Docket No. 02-035-04</b>

***Introduction***

The UAE Intervention Group (“UAE”) files this memorandum in response to the Comments on Legal Form of Proceeding filed by PacifiCorp in this docket on November 7, 2003. UAE has been an active participant in the SRP/MSP process for over two years now, and is anxious to see the process lead to a result that is both equitable and sustainable. After carefully considering the motion and the comments filed by PacifiCorp in this docket, UAE has reached the following conclusions and positions:

- Resolution of PacifiCorp’s motion requires an adjudicative proceeding;
- The relative inflexibility of a rule is ill-suited to resolving multi-state allocation disputes;
- The desire to facilitate discussions among state commissioners is not a proper or sufficient reason to cram a square “adjudicative peg” into a round “rulemaking hole;”
- Converting to rulemaking for the express purpose of evading limitations on ex parte communications would be inappropriate and imprudent; and
- The legitimate desire of PacifiCorp and the Commission to facilitate multi-state dialogue can be accommodated in an adjudicative proceeding, with appropriate protections.

***Resolution of PacifiCorp's motion requires an adjudicative proceeding***

UAE recognizes that PacifiCorp's suggestion to convert this docket to rulemaking is, at least in part, in reaction to concerns expressed by UAE and others at the Scheduling Conference. Nevertheless, after reviewing the options and issues in more detail, UAE is convinced that resolution of PacifiCorp's motion requires a formal adjudicative process and that it does not lend itself to rulemaking.

An "adjudicative proceeding" includes a process in which the Commission is asked to issue an "order" to "determine the legal rights, duties, ... or other legal interests of one or more" specific or identifiable persons [Utah Code §§ 63-46b-1(1)(a), (11), 63-46b-2(1)(a), 63-46a-2(11)]. A "rule," in contrast, is a "written statement" of the Commission that is "explicitly or implicitly required by state or federal statute or other applicable law," that "implements or interprets a state or federal legal mandate," and that "applies to a class of persons." [Utah Code § 63-46a-2(16)].

PacifiCorp's motion for "ratification" of an interstate allocation protocol is a request for an order and not a rule. The motion asks the Commission to determine its legal rights and interests by setting a protocol for interstate allocation of costs. Interstate cost allocation is relevant only for purposes of setting rates – clearly an adjudicative process. The motion requests an adjudication of rights, not an interpretation of law. Approving an interstate allocation protocol will require an extremely fact-intensive, technical evaluation and careful balancing of competing interests. These functions, by their nature, lend themselves to an adjudicative process.

The prerequisites for rulemaking are simply not present: (1) no implementation or interpretation of state law has been requested;<sup>1</sup> (2) no such implementation or interpretation is required by law; and (3) the outcome of this docket will apply to a discrete “person,” PacifiCorp, and not to a class of persons. The motion thus squarely falls within the statutory definition of an adjudicative proceeding, not rulemaking.

A rule adopted by the Commission is “enforceable and has the effect of law” [Utah Code § 63-46a-3.5(2)], and can carry penalties for violation [Utah Code § 63-46a-3(5)]. Public hearings are mandated within no less than seven and no more than 30 days after receipt of a proper request for a hearing [Utah Code § 63-46a-5(3)(b)]. Judicial challenges to a rule are filed in Utah District Court rather than with the Utah Supreme Court as in the case of adjudication [Utah Code § 63-46a-12.1(1)(a)], and can be filed anytime within two to four years after the effective date of the rule, depending on the nature of the challenge [Utah Code § 63-46a-14]. A rule is simply not the proper means for resolving complicated and fact-intensive interstate allocation disputes for the purpose of setting rates. Resolution of PacifiCorp’s motion should proceed as an adjudicative process. Alternatively, PacifiCorp could elect to withdraw its motion and leave this docket as an investigation, in which case formal proceedings and rulings would be deferred to a future rate case.

***The relative inflexibility of a rule is ill-suited to resolving multi-state allocation disputes***

PacifiCorp suggests that interstate allocation issues are “neither dependent on nor subject to material change based on the varying factual situations of future proceedings” [PacifiCorp’s

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<sup>1</sup> In an effort to satisfy this requirement for rulemaking, PacifiCorp points to the Utah statutory requirement that rates be “just and reasonable.” This argument, however, proves too much. If “interpretation” of the statutory mandate for just and reasonable rates provided a sufficient basis for rulemaking, it would support rulemaking rather than adjudication in almost every ratemaking context.

Comments, at 4]. This argument is belied by the fact that changing circumstances have caused interstate allocation issues to arise several times within the states served by PacifiCorp since the PacifiCorp/Utah Power merger. Indeed, one of PacifiCorp's express requests in this docket is for an ongoing multi-state standing committee to address changing circumstances [Protocol, § XIII].

Rules are relatively inflexible and do not easily lend themselves to change in response to changing circumstances. Amendment or repeal of a rule can be done only through another rulemaking process [Utah Code § 63-46a-2(16)(b)]. The implications of multi-state allocation issues and rulings can be fully understood and evaluated only in the context of a rate case. If the Commission were to determine in a future rate case that a multi-state protocol no longer produced just and reasonable results for Utah ratepayers due to changed circumstances (as it has in the past), the Commission should not be restrained from ordering just and reasonable rates in that docket due to rigid rulemaking requirements. Moreover, if any other state were to decide not to adopt the multi-state protocol as a rule, Utah would be at a disadvantage.

***The desire to facilitate discussions among state commissioners is neither a proper nor a sufficient reason to cram a square “adjudicative peg” into a round “rulemaking hole”***

At the scheduling conference in this matter PacifiCorp explained that, after analyzing the various procedural options available under Utah law,<sup>2</sup> it concluded that an adjudicative process appeared most appropriate. After analyzing the options, UAE has reached the same conclusion. It was only after UAE and others raised concerns about the legality and propriety of proposed “negotiations” among state commissioners that PacifiCorp agreed to re-consider whether rulemaking might be an appropriate alternative.

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<sup>2</sup> Available procedures include formal adjudication (Utah Code § 63-46b-1, et seq.; Utah Administrative Code § R746-100-1-14), informal adjudication (Utah Code § 63-46b-4, 5; Utah Administrative Code § R746-110-1-3), rulemaking (Utah Code § 63-46a-1, et seq.; Utah Administrative Code § R746-100-1-15-16), declaratory proceedings (Utah Code § 63-46b-21; Utah Administrative Code § R746-101-1-4), or investigations (Utah Code §§ 54-4-1.5, 2].

PacifiCorp's Comments make it clear that its desire to facilitate multi-state discussions is the primary reason for suggesting that this docket be converted to rulemaking. UAE submits that a desire to facilitate multi-state negotiations or discussions is not a proper or sufficient basis for contorting this process into a rulemaking. If such discussions are appropriate in the context of resolving issues raised by PacifiCorp's motion, they should be appropriate in either an adjudication or a rulemaking. If they are not appropriate in resolving those issues, they are inappropriate in either context.

***Converting to rulemaking for the express purpose of evading limitations  
on ex parte communication would be inappropriate and imprudent***

If negotiations or discussions among Commissioners from different states were considered problematic in an adjudicative context, it would hardly seem appropriate to convert to rulemaking for the express purpose of evading these limitations. Prohibitions against ex parte communications or reliance on extra-record information are not mere technicalities to be ignored or evaded when inconvenient. Rather, they are designed to assure due process to all affected persons and to avoid the reality or the appearance of impropriety [See Utah Administrative Code § R746-100-13 A]. PacifiCorp has suggested that its motion be converted to a rulemaking, yet it argues that all aspects of the adjudicative process should be preserved other than the prohibition against ex parte communications. Conversion to rulemaking for that purpose would give rise to a serious appearance of impropriety, and would be imprudent. The outcome of this multi-state allocation process is extremely important to PacifiCorp and to its customers. The process should not be tainted by an improper format selected for an improper purpose.

Moreover, it is not clear that converting this docket to rulemaking alone would necessarily facilitate the desired inter-state discussions. A rule must be supported by a proper administrative record and can be declared invalid if not supported by substantial evidence from

the “whole administrative record” [Utah Code § 63-46a-12.1(4)(a)(ii)]. The relevant issue is thus whether multi-state discussions can be part of a proper administrative record, in either a rulemaking or an adjudication. Given proper protections, UAE submits that such multi-state discussions may be proper under either type of proceeding.

***The legitimate desire of PacifiCorp and the Commission to facilitate multi-state dialogue can be accommodated in an adjudicative proceeding, with appropriate protections***

PacifiCorp’s primary stated reason for suggesting rulemaking is to avoid the prohibition against ex parte communications codified at Utah Code § 54-7-1.5, which provides, in part:

No member of the Public Service Commission ... who is ... involved in the decision making process, shall make ... ***to any party*** any communication relevant to the merits of any matter under adjudication ***unless notice and an opportunity to be heard are afforded to all parties***. Any member of the commission ... who receives an ex parte communication shall place the communication into the public record of the proceedings and afford all parties an opportunity to comment on the information. (emphasis added)

The express requirements of this statute and the Commission’s Rule implementing the same [Utah Code § R746-100-13] apply only to communications with a “party.” Unless the commissioners or participants from other states become parties to this docket, the statute does not expressly apply to communications with them. Moreover, even if the statute did apply, it could be satisfied through notice and an opportunity for all parties to participate.

The most important question is not whether communications with commissioners or participants from other states might constitute prohibited ex parte communications. Nor is the most important question whether any such communications might otherwise be considered improper or imprudent. Rather, the most important question is whether multi-state discussions can properly be part of an administrative record on which the Commission can base findings and conclusions. [See Utah Code §§ 63-46b-16(4)(g), 63-46a-12.1(4)(a)(ii)]. This is the proper question whether the process is adjudication or rulemaking. UAE has concluded that multi-state

discussions can be appropriate and can form part of a proper administrative record, assuming appropriate protections are assured.

Procedures governing formal adjudicative proceedings are quite flexible. For example, the Commission is authorized to give people who are not parties (such as commissioners or participants from other states) “the opportunity to present oral or written statements” [Utah Code § 63-46b-8(1)(e); Utah Administrative Code § R746-100-2(Q)]. Moreover, technical conferences, if properly noticed and open to all, can properly be used to facilitate discovery or explore technical matters [*See* Utah Administrative Code § R746-100-8-9].

Given the multi-state reality in which PacifiCorp operates, the Commission’s desire to understand the views of and impacts on other states is certainly appropriate. Such views and impacts can properly be explored in the context of properly-noticed technical conferences, and can be presented and explained through statements from non-parties. Moreover, PacifiCorp and other parties can make such multi-state views and impacts part of the formal administrative record on which the Commission can rely, subject to proper protections (such as applicable rules of evidence and cross-examination).

UAE does not believe that the Commission can properly “negotiate” a multi-state solution with other states or make findings or rulings based upon private discussions. This is true whether the proceeding is adjudication or rulemaking. It appears, however, that nothing should prevent the Commission from discussing or analyzing the impacts of various multi-state allocation proposals with other states in the context of properly-noticed technical conferences, so long as its ultimate findings and conclusions are predicated upon a proper administrative record developed in public hearings.

### *Schedule*

UAE supports resolution of PacifiCorp's motion in as a formal adjudicative process. Alternatively, the motion could be withdrawn and the docket could continue as an investigation, with decisions delayed for resolution in a future rate case. In either case, the schedule proposed by PacifiCorp is generally acceptable, with a few significant exceptions. Several other PacifiCorp dockets pending in this jurisdiction will be competing for very limited resources during at least the first quarter of 2004. Moreover, it is unlikely that discovery can reasonably be completed or positions determined until after the March 2004 multi-state technical conferences have concluded and PacifiCorp has filed its supplemental testimony in response to those technical conferences. UAE proposes the following changes to the Company's proposed schedule:

- PacifiCorp should file its supplemental testimony as proposed on or about May 10, 2004;
- Other parties should file responsive testimony within about 6 weeks, on or about June 25, 2004;
- Rebuttal testimony should be filed by all parties within about 4-5 weeks, on or about July 30, 2004; and
- Hearings should begin about 1-2 weeks later, on or about August 9, 2004.

UAE submits that this schedule is more reasonable and realistic than the one proposed by PacifiCorp. Moreover, it should result in a timely Commission order, particularly in light of the time when certain other states are expected to issue orders.

### *Preliminary Issue List*

At this point in the proceeding, UAE is unable to provide a comprehensive list of issues raised by PacifiCorp's filing. Nevertheless, UAE submits the following preliminary list of



potential issues that it has identified to date, while reserving the right to raise and address any other issues:

- Implications of and alternatives to cost allocation proposals
- Utah rate impacts
- Verification of modeling assumptions and results
- Impacts of and alternatives to use and expansion of endowments
- Impacts of and alternatives to opt-out provisions
- Alternative multi-state allocation protocols
- Sustainability
- Implications of decisions from other states
- Implications of merger commitments
- Treatment of and implications for single state initiatives (DSM ,QF, special contracts, portfolio standards, open access, etc.)
- Alternatives for and implications of continuing multi-state discussions, including standing committee proposal
- Implications for resource planning and acquisition
- Intra-state cost allocation implications
- Impacts of pending federal energy legislation

### *Conclusion*

UAE appreciates that PacifiCorp's proposal to convert this docket into a rulemaking is, in part, an attempt to respond to concerns expressed by UAE, among others. Nevertheless, UAE cannot support converting an obvious adjudicative process into a rulemaking process for the purpose of evading rules prohibiting ex parte communications or extra-record evidence. Indeed, UAE's concerns would be even greater in a rulemaking process. Rather, UAE submits that the legitimate desire of PacifiCorp and this Commission to facilitate multi-state communications can be accommodated in a formal adjudicative process, so long as proper procedures are followed and due process protections are assured.

DATED this 21<sup>st</sup> day of November, 2003.

HATCH, JAMES & DODGE

/s/ \_\_\_\_\_  
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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the following parties by electronic mail on November 21, 2003.

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