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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 Investigation of Inter-Jurisdictional Issues, | **UIEC'S RESPONSE TO PACIFICORP'S COMMENTS ON LEGAL FORM OF THE PROCEEDING**<br><br>Docket No. 02-035-04 |

The Utah Industrial Energy Consumers ("UIEC"), through its counsel, and pursuant to the Commission's direction at the Scheduling Conference of October 24, 2003, hereby files this Response to PacifiCorp's Comments on Legal Form of the Proceeding.

## INTRODUCTION

On September 30, 2003, PacifiCorp (or the "Company") filed a Motion for Ratification of Inter-Jurisdictional Cost Allocation Protocol ("Motion"). The Motion has a number of serious infirmities. It is not clear exactly what action the Motion is requesting the Commission to take since there is no statutory or regulatory procedure for Commission "ratification." For the same reason, the enforceability and practical effect of "ratification" is unknown. In addition, the Motion contemplates that the Utah Commission will meet with the Oregon Commission to

negotiate a mutually agreeable inter-jurisdictional allocation, evidently an illegal process. During the Scheduling Conference on October 24, 2003, some of the parties, requested that the Company clarify the nature of its request that the Commission ratify its proposed Inter-Jurisdictional Allocation Protocol ("Protocol").[1] Pursuant to the Commission's Scheduling Order, PacifiCorp filed its Comments on Legal Form of Proceeding ("Comments") on November 7, 2003.

In PacifiCorp's Comments, it recommends that the Commission consider its filing under its rulemaking procedures. For reasons discussed below, the UIEC believe that rulemaking is inappropriate in the present context. In fact, the Commission should be wary of PacifiCorp's request to consider the proposed inter-jurisdictional allocation in any context other than in connection with a rate case because, at bottom, the Protocol would result in an increase in Utah's revenue requirement. The Commission should not let the Company's Motion bind it to a certain treatment of PacifiCorp's revenue requirement without the procedural protections afforded by ratemaking procedure and the benefit of test year data with which the Commission could assess the outcome of applying the Protocol.[2]

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[1] The "Protocol" is an alternative to the anticipated product of the multi-state process which failed to produce a consensus among jurisdictions or parties. It is supposedly a descriptive document that explains how PacifiCorp proposes to allocate its system-wide costs to Utah. Direct testimony of Andrew N. MacRitchie ("MacRitchie") at 2; Motion at 2. It also "describes mechanisms for insuring continued dialogue among interested parties regarding PacifiCorp's inter-jurisdictional cost allocation issues and procedures for resolving disputes that may arise among . . . state jurisdictions." MacRitchie at p. 2, l. 9.

[2] The Commission also should be reluctant to commit itself to any inter-jurisdictional allocation process in light of activities of Congress toward passing a new energy bill. The Chairman's Proposed Conference Report Containing the 2003 Energy Bill, which was passed by the House this week, likely will have a significant impact on federal regulation of multi state utilities, with accompanying consequences for state regulation.

Additionally, PacifiCorp's request that the Commission issue a decision or order on the proposed Protocol, regardless of the form of the proceeding, is inappropriate because it requests the Commission to issue an advisory opinion. PacifiCorp acknowledges that any determination the Commission might reach on the Protocol will not be binding in future proceedings or necessarily have any impact on rates. Thus, the request to "ratify" or, as it has been reframed, to consider a "non-binding" rule, is not a request that the Commission can act upon.

Finally, regardless of whether the Motion is treated in adjudicative or rulemaking proceedings, the Commission should be careful not to abridge due process by basing any decision or rule upon discussions with other state commissions or staff. The Commission's regulation of PacifiCorp is a surrogate for competition. It is not the Commission's obligation to manage the Company or negotiate with other state commissions on its behalf. The UIEC believe that such practices can only lead the Commission into error.

## DISCUSSION

### 1. Rulemaking is not Mandatory in the Present Case.

Utah's Administrative Rulemaking Act ("Act") addresses the circumstances when rulemaking is required and when it is not. It provides that the Commission "shall make rules" when agency action would (a) authorize, require, or prohibit an action; (b) provide or prohibit immaterial benefits; (c) apply to a class of persons or another agency; and (d) is explicitly or implicitly authorized by statute. Utah Code Ann. § 63-46a-3 (2003). It does not appear, nor does PacifiCorp argue that the proposed Protocol invokes or implicates any mandate for the Commission to promulgate a rule.

The statute also provides that rulemaking is not required when "an agency issues policy or other statements that are advisory, informative, or descriptive," and that are otherwise not mandatory. Utah Code Ann. § 63-46a-3 (4).[3] Thus, assuming that the Public Service Commission were permitted by its statutes to issue policy statements or advisory or informative opinions like the "ratification" requested by PacifiCorp, the Commission would not be required to use rulemaking procedure to do so.

**2. Rulemaking is not Permissible in the Present Case.**

Rulemaking is inappropriate in the present context. The Act states the definition of "Rule" as follows:

> "Rule" means an agency's written statement that; (i) is explicitly or implicitly required by state or federal statute or other applicable laws; (ii) implements or interprets a state or federal legal mandate; and (iii) applies to a class of persons or another agency.

Utah Code Ann. § 63-46a-2(16)(a) (2003) (emphasis added). Under this definition, a written statement from the Commission responding to PacifiCorp's request for ratification should not be expressed as a rule because it is not explicitly or implicitly required by state or federal statute.[4] Under Utah's Act, a decision of the Commission in this case would fail to meet the first prong of the statutory definition of a "rule."

[3] In addition, the Rulemaking Act provides that a declaratory ruling is not a rule unless it is issued as a written interpretation of a state or federal legal mandate. Utah Code Ann. § 63-46a-2(16)(c)(vi).

[4] In fact, it is doubtful that such a statement would even be lawful under state or federal statue. It is PacifiCorp's view that a Commission decision in this docket "will resolve current differences among PacifiCorp's retail jurisdictions concerning needed new resources and cost allocation methods." PacifiCorp' has not cited any authority that grants power to the Commission to resolve differences among PacifiCorp's other retail jurisdictions. Obviously, it cannot do so through the issuance of a rule that has no legal effect in any other jurisdiction.

Likewise, PacifiCorp does not contend that a decision by the Commission on the Protocol would "implement or interpret any state or federal legal mandate." Utah Code Ann. § 63-46a-2(16)(a). PacifiCorp seeks "ratification" of the Protocol so that it may have assurance of an allocation method that is consistent among jurisdictions, and may thus avoid shortfall in its revenues that may occur as a result of inconsistent decisions by state commissions. There is no state or federal legal mandate at issue here that requires the Commission's interpretation or implementation.

PacifiCorp contends that the Commission can rely on its statutory mandate to set "just and reasonable rates" as an excuse for rulemaking. Comments at 4-5.[5] But, the determination of just and reasonable rates is not dictated by a formula, nor should it be. The legislature wisely has avoided prescribing such a formula or requiring the Commission to make rules to implement one. The action requested by the Company thus fails to meet the second prong to satisfy the definition of a rule because it does not request implementation or interpretation of any state or federal legal mandate.

Finally, a "rule" must be an agency's written statement that "applies to a class of persons or another agency." Id. As proposed, the Protocol would apply only to PacifiCorp. Although PacifiCorp suggests that the Protocol could apply to other "large multi-state electric utilities," there are obviously no other such utilities. PacifiCorp points out that Rule 746-340-8 applies to

[5] While PacifiCorp invokes the duty to set "just and reasonable" rates as a basis for rulemaking, it also suggests that the Protocol does not implicate rates. See MacRitchie at 3 (Protocol does not "compel the inclusion" of any costs in rates, but rather specifies an allocation method). If PacifiCorp's testimony is accurate, a rule adopting the Protocol itself cannot be justified under the Commission's mandate to set "just and reasonable rates."

"each incumbent telecommunications corporation with 30,000 or more access lines in Utah," a class distinction that applies solely to Qwest, the only provider in the class. Comments at 4 n. 5. PacifiCorp fails to mention that the Commission was required by statute to make that distinction. See Utah Code Ann. § 54-8b-1.1 et seq. (different competitive entry, interconnection and price regulations for telecommunications carriers based on the number of access lines served). In the present case, there is no statute to require application of the Protocol to any class, whether or not there is only one person in the class.

A plain, straightforward reading of the Administrative Rulemaking Act indicates that rulemaking is neither required nor permissible in the present case. If the Commission were to issue any written statement in response to PacifiCorp's request for ratification, it could not be considered a rule within the meaning of the Act.

**3. Rulemaking Will Have an Undesirable Binding Effect on the Commission.**

Not only is rulemaking, on its face, an inappropriate procedure for considering PacifiCorp's Protocol, it does not yield the result that PacifiCorp has requested. Instead, it would have the unintended and undesirable result of limiting the Commission's discretion to consider inter-jurisdictional allocations in the proper context of a rate case.

The Company does not wish to bind the Commission. It has stated:

> Ratification will indicate that the Commission believes that the terms of the Protocol are balanced and reasonable and should be followed in the future PacifiCorp's rate proceedings. However, the Company understands that the Commission's ratification of the Protocol *will not be binding on parties to future rate proceedings and that challenges to the terms of the Protocol will have to be dealt with on their merits as they arise*.

Direct Testimony of Andrew N. MacRitchie at 2 (filed September 30, 2003; see also Direct Testimony of Andrea L. Kelly at p. 8, l. 4 ("Mr. MacRitchie acknowledges in his direct testimony that ratification of the Protocol will not bind future Commissions or bar parties from challenging inter-jurisdictional cost allocations in future rate proceedings"). The UIEC do not believe that there is any procedural mechanism that would allow the Commission to "ratify" the Protocol with the non-binding effect that the Company desires. The recommendation that the Protocol should be addressed in a rulemaking proceeding is especially inconsistent with PacifiCorp's stated intention.

It is fundamental that an agency is bound to follow its own rules. See Fort Stewart Schools v. Federal Labor Relations Authority, 495 U.S. 461, 109 L. Ed. 2d 659, 673, 110 S.Ct. 2043 (1990) (agency must abide by its own regulations). Any departure from a rule, any disregard of specific language of a rule, or failure to reasonably interpret and apply a rule, amounts to arbitrary and capricious action. R.O.A. General, Inc. v. Utah Department of Transportation, District Three, 966 P.2d 840, 842 (Utah 1998); see also McBride v. Tax Comm'n., 977 P.2d 467, 470 (Utah 1999) (allowing an agency to ignore its own rules "lies at the very heart of arbitrary and capricious action").

PacifiCorp evidently recognizes the need for the Commission to exercise its discretion in determining the inter-jurisdictional allocation on the basis of the facts presented to it in the context of a rate case. MacRitchie at 2-3. It might even suggest that sufficient flexibility could be built into a rule to allow the Commission to fully consider the inter-jurisdictional allocation in each rate case. While the Rulemaking Act does provide a method to change rules, the procedure

is cumbersome and requires a new rulemaking docket.[6] Utah Code Ann. § 63-46a-6 (setting forth procedure to change rules); 63-46a-2(16)(b) (definition of "rule" includes amendment or repeal of existing rule). A proceeding to amend a rule would not allow the Commission to timely "deal with challenges to the terms of the Protocol as they arise." (MacRitchie at 2). PacifiCorp's stated objective thus would not be served by adopting the Protocol as a rule.

**4. The Commission May Not Issue an Advisory Opinion.**

Utah law provides that administrative agencies may either engage in rulemaking, formal or informal adjudicative proceedings, or they may issue declaratory orders pursuant to rules promulgated by the agency. Utah Code Ann. § 63-46a-1 et. seq.; § 63-46b-1-10; § 63-46b-21. A petition for a declaratory judgment must be clearly designated as such, and such petitions are limited to seeking a determination of the applicability of the statute, rule or order to a particular set of circumstances. § 63-46b-21; R 746-101-1 et. seq. The Commission's jurisdiction is limited to these prescribed functions. It is not authorized to offer an opinion on hypothetical questions.

PacifiCorp's Motion for Ratification, is nothing more than a request for an advisory opinion. It describes the nature of the requested relief as follows:

> Ratification will afford PacifiCorp assurance that it will have a reasonable opportunity to recover prudent investments in new generation and transmission facilities and required improvements to existing facilities.

[6] See PacifiCorp's Comments at 7 n.9 ("the rule would not be cast in concrete . . . the rule can be amended in the future if evidence or argument . . . indicates that it should be").

Motion at 2. PacifiCorp seeks "assurance" that it will have reasonable opportunity to recover its investments. It is not seeking rate base treatment or cost recovery of any for those investments. It has not even identified those investments. At the same time, the Company does not expect that the Commission would be bound by any statement ratifying the Protocol. In essence, it wants the Commission to state that if the Company were to file the Protocol as the basis for inter-jurisdictional cost allocation in the next rate case, the Commission would support the Protocol. e.g., MacRitchie at p. 12, l. 4-6. The Commission is not authorized to issue a statement or opinion on such hypothetical questions. The Commission should thus decline to exercise its authority to consider the Motion for Ratification.

**5. The Procedure Proposed By PacifiCorp Would Offend Due Process.**

PacifiCorp recognizes the need for discovery, testimony, cross-examination and a hearing before the Commission takes any action on the Protocol. Comments at 6. Those procedures are routinely followed in adjudicative proceedings. The Rulemaking Act, on the other hand, spells out a different statutory procedure that does not require the same evidentiary and procedural safeguards that PacifiCorp acknowledges are necessary in the present case. Utah Code Ann. § 63-46a-4. PacifiCorp has thus included in its Comments an argument that good cause exists for the Commission to establish a schedule "that would provide parties with [the] procedural rights," of formal hearings, sworn testimony and cross-examination. Comments at 7-8. Yet, while it admits that procedural due process safeguards are necessary, PacifiCorp touts the advantages of rulemaking because it does not require the Commissioners or staff to be bound by rules forbidding *ex parte* communications. Comments at 6.

PacifiCorp's proposed procedure is an invitation to violate due process. Providing notice of *ex parte* communications or giving adequate rights to file testimony or to cross-examine does not amount to due process if, at the same time, the litigants are deprived of the right to a fair and impartial tribunal. If the Commission participates in this docket as PacifiCorp is urging, the Commissioners may easily become personally invested in the outcome. Regardless of the *ex parte* rules, discussions or negotiations with other state commissions would taint the Commissioners and would likely preclude their participation in a decision. See Williams v. Public Service Commission, 720 P.2d 773 (Utah 1986) (recusal may be necessary for commissioners who participate in *ex parte* communications). Whether undertaken as adjudication or rulemaking, the proposed discussions may provoke a violation of due process and the inevitable appeal of any decision or rule that may be the product of these proceedings.

**6. Rulemaking Would Lead to More Burdensome Appellate Procedure.**

Because the nature of PacifiCorp's request is unusual, because PacifiCorp is urging an advisory opinion, and because the issues involved in MSP have so far evaded agreement by the parties, the Commission should recognize the probability that any decision reached in this case would be appealed. Under the Rulemaking Act, the path of appeal is to the District Court of the State of Utah. Utah Code Ann. § 63-46a-12.1. The District Court may declare the rule invalid if it finds that the agency does not have authority to make the rule, that the rule is not supported by substantial evidence of record, or the agency did not follow proper rulemaking procedure. Id. at 63-46a-12.1(4)(a). The District Court's decision itself may be subject to further appeal. By

considering the Protocol under a rulemaking procedure, the Commission would increase the likelihood of error, and also increase the procedural burden in appealing the error.

While it is PacifiCorp's stated hope that the parties can reach agreement on an interjurisdictional allocation for the State of Utah, it seems that in view of MSP's fate, a stipulated resolution remains unlikely. See MacRitchie at 4-6. The Commission should assume, therefore, that if this docket proceeds as a rulemaking, it will likely be required to adopt or reject a proposed rule, with all of its attendant consequences.

## CONCLUSION

From a broad perspective, the Commission should take a dim view of any proposal by PacifiCorp to require individual states to assure that it recovers its system-wide revenue requirement. In the PacifiCorp/Scottish Power merger application, Scottish Power and PacifiCorp expressly agreed "that they shall assume all risks that may result from less than full system cost recovery if interjurisdictional allocation methods differ among PacifiCorp's various state jurisdictions." Stipulation, Docket No. 98-2035-04 at ¶ 45 (July 28, 1999). The Commission should not allow Scottish Power and PacifiCorp to place that risk back on Utah ratepayers by assuring the Company that Utah will subsidize cost recovery in other jurisdictions which have, through their own state actions, allocated to themselves low cost resources and disallowed cost recovery for less desirable resources.

If PacifiCorp believes that Utah rates are not covering the cost of service to Utah based on rolled-in methodology, it is free to propose some different allocation, as it has done. But, any new allocation methodology should be well understood before the Commission considers

"ratifying" it, much less adopting it as a rule. To that end, it must ultimately be considered in the context of a real case with real data.

Most parties agree that further investigation is necessary to evaluate PacifiCorp's proposal. The UIEC have no objection to discovery or to the technical conferences that the Commission has scheduled as long as *ex parte* rules are observed. But, the proposed Protocol should remain in an informal docket until the parties reach agreement, if possible, or until PacifiCorp files a rates case proposing to use the Protocol.

For the foregoing reasons, the UIEC respectfully request that the Commission (1) deny PacifiCorp's Motion for Ratification; and (2) decline to convert this docket into a rulemaking proceeding.

DATED this _____ day of November, 2003.

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## CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of November, 2003, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **UIEC'S RESPONSE TO PACIFICORP'S COMMENTS ON LEGAL FORM OF THE PROCEEDING** to:

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