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BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Application of PACIFICORP dba UTAH POWER & LIGHT COMPANY for Approval of Its Proposed Power Cost Adjustment Mechanism.	DOCKET NO. 05-035-102 UTAH INDUSTRIAL ENERGY CONSUMERS' MOTION TO DISMISS PACIFICORP'S APPLICATION FOR APPROVAL OF ITS PROPOSED POWER COST ADJUSTMENT MECHANISM

Pursuant to Utah Code Annotated § 63-46b-1(4)(b), Utah Administrative Code R746-100-3(H), and Rule 12(b)(6) of the Utah Rules of Civil Procedure, the members of UIEC, by and through their counsel, hereby move the Public Service Commission ("Commission" or "PSC") to dismiss the application (hereinafter "Application") of PacifiCorp d/b/a Utah Power & Light Company ("PacifiCorp") for approval of its proposed Power Cost Adjustment Mechanism ("PCAM"). This Motion is based on the grounds that the Legislature has not delegated to the Commission the authority to approve PacifiCorp's proposed PCAM.

INTRODUCTION

PacifiCorp's PCAM represents a departure from the Commission's current practice of setting rates prospectively. The PCAM would allow PacifiCorp to compare its actual monthly costs for all fuel purchased and sold, purchased power, wheeling, and sales for resale

(collectively, "fuel and purchased power" or "F&PP"), with its projected F&PP costs as established pursuant to a general rate case, and to place the difference in a separate deferred account. This process would occur each month until the amount in the deferred account reached $20 million, at which time PacifiCorp would credit ratepayers $20 million if the amount is positive, or would surcharge ratepayers to retroactively collect 90 percent of $20 million if the amount is negative. In the latter case, Pacificorp would not seek to recover the other 10 percent of its excess F&PP costs. Because PacifiCorp's shareholders would bear the loss of the un-recovered 10 percent, PacifiCorp claims it would have an incentive to accurately forecast net power costs in the rate case, and to exercise prudence in its purchasing practices so as to avoid ever running a $20 million deficit in F&PP costs. Through this mechanism, PacifiCorp hopes to avoid setting rates strictly prospectively, instead adjusting rates periodically to correct for under-recovery or over-recovery of F&PP costs collected in past rates. In essence, the PCAM would make energy rates set in PacifiCorp's rate cases "interim," subject to a later "true-up."

The Commission has not been given statutory authority to approve the kind of cost recovery mechanism proposed in the PCAM. Title 54 provides that the Commission may approve certain accounting procedures by which a utility may set rates on an interim basis and later adjust them to actual costs. The Utah Supreme Court has affirmed the Commission's authority to approve interim rates in narrow circumstances, but the PCAM does not fit within any of the approved methods. The statutes also provide certain specific ratemaking incentives, none of which correspond to the incentives described in the PCAM. In short, the PCAM does not comply with procedures that the Commission is authorized to approve as "interim" rate measures or as "incentive" ratemaking. Thus, the PCAM is an impermissible way to retroactively adjust rates to match the Company's actual costs. Because any doubt about the Commission's powers

must be resolved against the exercise of those powers, it would be error to construe any Legislative grant of power broadly enough to include the authority to approve the PCAM. Accordingly, the Commission should dismiss the Application.

ARGUMENT

I. STANDARD OF REVIEW

"A rule 12(b)(6) motion to dismiss admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts." St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 196 (Utah 1991).[1] Even if the facts alleged in PacifiCorp's application are deemed true for purposes of this motion,[2] PacifiCorp's application should be dismissed because the Commission cannot grant the relief requested.

II. THE LEGISLATURE HAS NOT DELEGATED TO THE COMMISSION THE AUTHORITY TO AUTHORIZE PACIFICORP TO IMPLEMENT ITS PROPOSED PCAM.

The Commission "has only the rights and powers granted to it by statute." Hi-Country Estates Homeowners v. Bagley & Co., 901 P.2d 1017, 1021 (Utah 1995) (citing Williams v. Pub. Serv. Comm'n, 754 P.2d 41, 50 (Utah 1988)). It has no "'inherent regulatory powers other than those expressly granted or clearly implied by statute.'" Id. (quoting Mountain States Tel. & Tel. Co. v. Pub. Serv. Comm'n, 754 P.2d 928, 930 (Utah 1988)). "When a 'specific power is conferred by statute upon a tribunal, board, or commission with limited powers, *the powers are limited to such as are specifically mentioned.*'" Id. (quoting Union Pac. R.R. v. Pub. Serv. Comm'n, 134 P.2d 269, 474 (1943)) (internal quotations omitted) (emphasis added).

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[1] Because the Administrative Rules of the Commission do not specify standards for a motion to dismiss, the standards associated with the Utah Rules of Civil Procedure apply. See R746-100-21(C) (where there is no provision in Commission's rules, Utah Rules of Civil Procedure shall apply unless the Commission considers them unworkable or inappropriate).

[2] UIEC does not necessarily agree to the veracity of the facts alleged in PacifiCorp's application, but for purposes of this Motion acknowledges that the facts are deemed true under the applicable standard of review.

Accordingly, "'[t]o ensure that the administrative powers of the PSC are not overextended, any reasonable doubt of the existence of any power *must be resolved against the exercise thereof*.'" Id. (quoting Williams, 754 P.2d at 50) (internal quotations omitted) (emphasis added).

A. The Legislature Has Not Delegated the Authority to Approve PacifiCorp's PCAM Because the PCAM Is Not One of the Limited Exceptions to the Prohibition on Retroactive Rate Changes.

PacifiCorp's Application for an order approving the PCAM, was filed pursuant to Utah Code Ann. §§ 54-4-1, *et seq.* See In re Application of PacifiCorp for Approval of its Proposed PCAM, Application at 1. Section 54-4-1 provides in relevant part:

> The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction.

Utah Code Ann. § 54-4-1. PacifiCorp, relying on this general grant of authority, has not identified any other statutory basis that it contends is the source of the PSC's authority to approve the Application. Despite the broad language of Section 54-4-1, the Utah Supreme Court has held that statute "does not confer upon the Commission a limitless right to act as it sees fit, and [the Court] has never interpreted it as doing so." Hi-Country Estates, 901 P.2d at 1021 (citing Mountain States, 754 P.2d at 930)). The Commission's authority must be exercised consistent with the general rules for ratemaking, meaning that "all rate making *must be prospective in effect and rates may be fixed only in general rate proceedings*." Utah Dep't of Bus. Regulation v. Pub. Serv. Comm'n, 720 P.2d 420, 423 (Utah 1986) (emphasis added) (hereinafter referred to as the "EBA Case").

The Commission has limited authority to permit retroactive adjustments to rates due to unexpected increases in certain types of costs. Questar Gas Co. v. Utah Pub. Serv. Comm'n, 34

P.3d 218, 223 (Utah 2001). The Court has ruled that this limited authority can only be used in three situations: (1) pursuant to the fuel cost pass-through legislation of Utah Code Annotated § 54-7-12(3)(d), see EBA Case, 720 P.2d 420 (Utah 1986); (2) in an "abbreviated" rate case, see Utah Dep't of Bus. Regulation v. Pub. Serv. Comm'n, 614 P.2d 1242 (Utah 1980) (hereinafter referred to as the "Wage Case"); and (3) through the 191 balancing account mechanism for gas utilities, see Questar, 34 P.3d at 223. As discussed below, PacifiCorp's PCAM fits none of these situations that would allow for retroactive rate changes. The Legislature has not provided any other basis on which the Commission could approve the PCAM. Hi-Country Estates, 901 P.2d at 1021.

1. The PCAM Cannot Be Authorized under the Pass-Through Statute, Section 54-7-12.

The "pass through" statute provides:

> When a public utility files a proposed rate increase based upon an increased cost to the utility for fuel or energy purchased or obtained from independent contractors, other independent suppliers, or any supplier whose prices are regulated by a governmental agency, the commission shall issue a tentative order with respect to the proposed increase within ten days after the proposal is filed, unless it issues a final order with respect to the rate increase within 20 days after the proposal is filed.

Utah Code Ann. § 54-7-12(3)(d)(i). In the EBA Case, the Utah Supreme Court noted that the circumstances under which the pass-through statute may be used are very limited. EBA Case, 720 P.2d at 424. It is only for very specific costs: "fuel or energy purchased or obtained from independent contractors, other independent suppliers, or any supplier whose prices are regulated by a governmental agency." Utah Code Ann. § 54-7-12-(3)(d)(i). [3]

[3] The pass-through statute also prescribes a very specific procedure by which a utility can recover. Because PacifiCorp's PCAM application does not describe any proposed procedure, it is unknown whether it would be conducted under the specific requirements of the pass-through statute.

The pass-through statute excludes the cost of fuel obtained from any non-independent source such as PacifiCorp's coal affiliates. Those costs have not been excluded such costs from the PCAM, and thus, the PCAM does not qualify under this statute. Also, as the Court noted in the EBA Case, "nothing in the pass-through statute permits retroactive rate adjustments to be made to cover unexpected increases in fuel costs." EBA Case, 720 P.2d at 424. The pass-through statute "simply provides an expedited procedure whereby the PSC may permit utilities to quickly impose *prospective* rate increases to cover increased fuel costs." Id. at 424. It does not allow a utility "to recover revenue shortfall resulting from errors in forecasting or calculating an appropriate general rate." Id. This is precisely what PacifiCorp's proposed PCAM does. See Testimony of Mark T. Widmer, (Docket 05-035-102, Nov. 2005), p. 6, l. 114 to p. 7, l. 149. Because PacifiCorp's PCAM includes cost recovery of fuel costs from its affiliates, and because it acts as a retroactive rate adjustment, it cannot be authorized under the pass-through statute.

2. The PCAM Cannot Be Authorized as an "Abbreviated" Rate Case.

In addition to the pass-through statute, retroactive rate adjustments may be authorized under Section 54-7-12, which deals with the procedure to be followed in rate cases.[4] The scope of the Commission's authority to approve interim rates under this section is specified and thus limited by the section, which also prescribes the procedures that must be followed to arrive at a "just and reasonable" rate. Wage Case, 614 P.2d at 1247-48.

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[4] The statute provides:

> On its own initiative or in response to an application by a public utility or other party, the commission, after a hearing, may allow any proposed rate increase or decrease, or a reasonable part of the rate increase or decrease, to take effect, *subject to the commission's right to order a refund or a surcharge*, upon the filing of the utility's schedules or at any time during the pendancy of the commission's hearing proceedings.

Utah Code Ann. § 54-7-12(3)(a).

The Utah Supreme Court has suggested that not every case adjusting rates under Section 54-7-12 needs to be a "full" rate case. Id. at 1248. The Commission may conduct an "abbreviated proceeding," depending on "how the components involved in determining a just and reasonable rate affect that standard." Id. The precise nature of the issues that may be determined in such an "abbreviated proceeding" is unclear. It is certain, however, that the Commission "may not adjust one side or part of the equation without adjusting the other; unless there is a finding that the particular expense is extraordinary." Id. Thus, there appear to be two kinds of cases that can be "abbreviated." The first requires balancing the "equation" of costs and revenues, and the second could occur in response to "extraordinary" expenses. PacifiCorp's PCAM does not meet the criteria under either standard.

a. The PCAM Cannot Be Authorized as an Abbreviated Proceeding Because All of the Relevant Rate Elements Would Not Have Been Considered.

To update one cost factor alone, without determining whether that factor itself needs evaluation or adjustment, or without concurrently assessing other related costs or revenues, is contrary to the over-arching requirement that rates set by the Commission must be "just and reasonable." Wage Case, 614 P.2d at 1248. Any proposal for rate relief in an abbreviated proceeding "must be supported by substantial evidence concerning every significant element in the rate making components (expense or investment) which is claimed . . . as the basis to justify a rate adjustment." Id. at 1250.

In PacifiCorp's testimony in support of the PCAM, it states that one of the reasons for proposing the PCAM is the large recent increase in F&PP costs. PacifiCorp further contends:

> This [large increase in net power costs] is causing the Company to bear a disproportionate share of net power costs incurred to serve retail customers. As a consequence, *our opportunity to earn our authorized rate of return over the long run will be greatly*

> *diminished if not eliminated*, because net power costs are such a large component of revenue requirement.

Widmer Test., at p. 2, ll. 32-36 (emphasis added). According to PacifiCorp, therefore, the reason that it needs a rate adjustment is that its rate of return has been adversely affected by the change in F&PP costs. However, under the ruling in the Wage Case, PacifiCorp is not entitled to a rate increase without a review of "both sides of the equation" affecting its rate of return. That would entail not only proof that its current earnings are below its authorized rate of return, but also an examination of why, and of all of the other factors bearing upon the Company's rate of return. PacifiCorp's proposal, therefore, must be supported by substantial evidence demonstrating that the expense is matched against revenue and not affected by other factors, such as improved future test year forecasts, or improved management and investment decisions.

Mr. Widmer claims that "weather conditions, retail loads, wholesale market prices for natural gas and electricity and the timing of forced outages" have increased the company's costs "dramatically over the past five years." Id. at p. 3, l. 62.[5] For a rate adjustment based on those factors to be "just and reasonable," the Commission must look at all countervailing events, load changes, the trend in market prices, and PacifiCorp's actions in the market. The PCAM proposes that the Commission set a "base rate" for net power costs in the current general rate case, where those countervailing factors can be examined. Thereafter, the PCAM would allow a proceeding to adjust rates based on the deviation of actual costs from those determined in the full rate case. There would be little, if any, opportunity to re-examine the factors on which the initial rate was determined, even though those factors also may have changed. Because the PCAM does not

[5] Mr. Widmer fails to mention that PacifiCorp has taken advantage of the legislative authorization to use a future test year in which weather conditions, retail loads and market prices for energy are "normalized." Thus it seems disingenuous to complain that weather conditions, etc., create a necessity for PacifiCorp's PCAM.

provide a mechanism for balancing all of the factors that affect the Company's net power costs, it is not the kind of rate adjustment that can be addressed in an abbreviated proceeding.

b. The PCAM Cannot Be Authorized as an Abbreviated Proceeding Because Net Power Costs Are Not Extraordinary.

In the absence of balancing both sides of the equation, an abbreviated proceeding still may be appropriate upon a showing that the utility's increased costs were extraordinary. An abbreviated proceeding may be used to "offset" an item of expense, but only when that item varies "disproportionately to variations in other costs" such as "an unusual change in an expense, such as fuel costs." Wage Case, at 1248-49. The applicant in an "offset" proceeding must show that its increased expenses "*constituted an extraordinary expense*, e.g., disproportionate in relation to anticipated expenses and gross revenues." Id. at 1249 (emphasis added). The purpose of an "offset" proceeding is thus to allow a utility to recoup discreet, ascertainable, extraordinary costs, "not to ensure that its authorized rate of return is actually earned." Id. An "extraordinary" cost is one that usually results from an extreme, single event, for example, as a result of a natural disaster or extreme weather conditions. MCI Telecomms. Corp. v. Pub. Serv. Comm'n, 840 P.2d 765, 771 (Utah 1992).

The costs to be recovered through the proposed PCAM are not extraordinary. PacifiCorp proposes to defer, on a monthly basis, the difference between the actual F&PP costs and the F&PP costs in base rates. Widmer Test. at p. 6, l. 134 to p. 7, l. 143. That difference would accrue regardless of any allegation or finding that F&PP costs are extraordinary. Under PacifiCorp's proposal, a PCAM rate proceeding would be filed as a matter of course when the amount in the deferred account reaches a set trigger point of $20 million, either below or above actual costs. Id. at p. 9, ll. 188-95. The costs that will be the subject of a PCAM proceeding, therefore, are not in any way dependent on F&PP costs ever becoming extraordinarily high or

low, or even particularly volatile. Instead, the proceeding could occur in response to accumulated, small, ordinary differences between the actual costs and the costs embedded in rates. Because PacifiCorp's PCAM does not pertain to extraordinary costs, it cannot be the subject of an abbreviated proceeding.[6] In summary, there is no express or clearly implied grant of authority from the Legislature to the Commission that would enable the Commission to approve the cost recovery mechanism described in PacifiCorp's PCAM. Because other methods of recovering fuel and purchased power have been specified by statute, the Commission's authority is limited to those "specifically mentioned and any ambiguity as to the Commission's power to approve the PCAM must be resolved against the exercise of that power." High Country Estates, 901 P.2d at 1021.

B. The PSC Cannot Rely on PacifiCorp's Prior Energy Balancing Act or Questar's 191 Account as Authorization.

In the past, the Commission has allowed "balancing accounts" for utilities to pass through certain fuel or energy costs over which the utility has no control. For Questar Gas Company, ("Questar") it approved the "191 Account." Report and Order, Docket No. 78-057-13 (Apr. 3, 1979). The 191 Account allows Questar to pass-through its actual cost of purchased natural gas. This account and the underlying tariff are unique to Questar. It is not applicable to PacifiCorp's PCAM. For reasons discussed below, even assuming the cost recovery mechanisms of the 191 Account and the PCAM were the same, which they are not, it appears that such a cost recovery

[6] In recent proceedings in the State of Washington on PacifiCorp's PCAM, the Washington Commission rejected a joint decoupling proposal in part because the Commission could not calculate the mechanism's fixed cost revenue requirement without first having assumed an interjurisdictional allocation methodology. Order Rejecting Tariffs as Filed; Rejecting Stipulation on Net Power Costs; Rejecting in Part and Accepting in Part, Stipulation on Temperature Normalization Adjustment; Determining Cost of Capital, Docket UE 050684, Order 04 and Docket UE 050412, Order 05, at 21-28, 39-42 (Washington State Utilities and Transportation Commission, April 17, 2006). Assuming for the sake of argument, that the PCAM otherwise could be approved as an abbreviated proceeding in Utah, the Commission would not be able to find that the rate was just and reasonable because there is no approved interjurisdictional allocation for determining Utah's share of F&PP costs.

mechanism could not be authorized today under any existing statute, nor would it withstand scrutiny by the Utah Supreme Court.

PacifiCorp's predecessor, Utah Power and Light, had an "Energy Balancing Account" ("EBA") that was approved by the Commission. PacifiCorp's use of this account was never challenged, and the question of whether the Commission ever had authority to approve it was never formally asked or answered in court. Neither of these balancing accounts was authorized under any known provision of Title 54, and neither could be approved today in their present form under the current statutes.

1. The Existence of the 191 Account Does Not Provide Authority for the Commission to Approve PCAM.

Even though there is no statute that explicitly or clearly implies authority to approve the 191 Account, Questar has been permitted to maintain it for the simple reason that the Commission's Order approving it was never challenged. The Commission approved the 191 Account in 1979. Report and Order Docket No. 78-057-13 ("Mountain Fuel Order"); Questar Gas Co. v. Pub. Serv. Comm'n, 34 P.3d 218, 221 (Utah 2001). In doing so, it did not rely on the pass-through statute, but on "'the current pass-through procedure.'"[7] Id. at 222 (quoting Report and Order, Docket No. 78-057-13, at 5 (April 3, 1979)). Although the Commission remarked in its Mountain Fuel Order that rate changes made in a 191 proceeding "will be made pursuant to procedures that comply with statutory and regulatory requirements," It never identified the statutes and regulations that it thought might apply. Id. (quoting Report and Order, Docket No. 78-057-13, at 5). The Commission's Mountain Fuel Order is thus unclear about the source of its authority to allow rate changes by this procedure.

[7] The "current pass-through procedure" evidently was something similar to the procedure used by PacifiCorp in its EBA, which was active at that time. Questar, 34 P.3d at 222.

In the Questar case of 2001, the Utah Supreme Court had occasion to consider the 191 Account on appeal from the Commission's order in the CO2 case. Questar, 34 P.3d 218. The Commission had concluded that Questar's CO2 processing costs were not eligible for treatment under the pass-through statute. Id. at 221. Questar argued to the Court that the 191 Account was not tied to the pass-through statute and the costs were eligible to be recovered through the "separate procedures" that had been established for the 191 Account. Id. The Court after examining the Commission's 1979 Mountain Fuel Order approving the 191 Account, agreed with Questar, ruling that proceedings relating to the 191 Account did not fall under the pass-through statute. The Court, however, still did not identify the source of the Commission's authority to approve the 191 procedure. Instead, it stated:

> We *presumed*, as we did in [the EBA case] . . . that the Commission implemented this rate-changing mechanism under its "ample general power to fix rates and establish accounting procedures."

Id. at 222–23 (quoting EBA Case, 720 P.2d at 424 n.4) (emphasis added). As support for this presumption, the Court cited the EBA procedures, and the longstanding Commission practice of using the 191 Account, even though the procedure is different than is prescribed in the pass-through statute. Questar, 34 P.3d at 222-23.[8] It noted that under Utah's Administrative Procedures Act, an agency's action may not be contrary to its prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency." Id. at 224 (citing Utah Code Ann. § 63-46b-16).

[8] By the time the court decided the Questar case in 2001, the Commission had been allowing Questar to recover specified costs through the 191 Procedure for nearly twenty-two years. "Because it ha[d] been the Commission's prior practice to enable Questar to recover gas costs through this procedure," and because the Commission's refusal to do so was not sufficient to "demonstrate a fair and rational basis for the inconsistency," the Questar court set aside the Commission's report and order. Questar, 34 P.3d at 224.

In addition, the court found that because the Account 191 procedure adequately considers costs and revenues on both sides of the equation, it may serve as a type of abbreviated proceeding "that should result in just and reasonable rates." See id. at 223 ("an application for balancing account approval" that "*contains the appropriate costs and revenues* as described in the company's tariff should result in just and reasonable rates." (emphasis added)).

Because the Commission had used the 191 procedure over a long period of time, because the 191 Account considers matching costs and revenues, and because the Court was not asked to consider whether the 191 procedure was authorized in the first place, the Court simply "presumed" that it was authorized. The legal basis for the Commission's authority to allow the 191 Account has never been challenged and never addressed by the Court. For that reason alone, the 191 Account cannot serve as precedent for authorizing the PCAM.[9]

2. The Former "Energy Balancing Account" Does Not Provide Authority for the Commission to Approve the PCAM.

Just as there is no clear authority for the Commission to have initially approved the 191 Account, there is no authority for its approval of Utah Power & Light's now defunct Energy Balancing Account.

In the EBA Case, 720 P.2d 420 (Utah 1986), the Court considered whether PacifiCorp should be allowed to transfer surplus funds out of the EBA to the benefit of shareholders. In its analysis, the Court reviewed the background of the EBA and the source of the Commission's authority to approve it. It concluded:

> There is nothing in the pass-though legislation that sanctions the establishment of an EBA. … The only relation that we can discern between the pass-through legislation and the EBA is that in between general rate-making proceedings the PSC uses pass-

[9] It bears mentioning again that the PCAM and Questar's 191 Account are not identical in their treatment of purchased fuel and energy. Thus, even assuming for the sake of argument that the 191 Account provided precedent for a similar cost recovery mechanism, the PCAM would not be sufficiently similar to fall under that precedent.

> through proceedings to adjust the fuel cost component of the EBA. We find no authorization for the establishment of EBA's in the pass through legislation; rather, *we assume that the EBA order was promulgated under the Commission's ample general power to fix rates and establish accounting procedures*.

Id. at 423 n.4 (emphasis added). As with Questar's 191 Account, the Court was left to *assume* that the EBA had been established pursuant to the Commission's general authority to set rates. Because issue of the Commission's authority to approve the EBA was not directly raised, either when the EBA was established or on appeal, the Court did not rule on whether the Commission was authorized to implement the EBA under this general authority. It stated:

> We decline to determine the overall validity of the PSC's order establishing the EBA and the propriety of the PSC's determination that certain costs and revenues … should be segregated from a utility's general account and held in the EBA.

Id. at 424. Thus, there is no explicit or implicit statutory authority or judicial confirmation that the Commission ever had the authority to establish the EBA. Like the 191 Account, any validity the EBA might have acquired could only have been derived from the Commission's long-term use of it in light of the requirement in the Utah Administrative Procedures Act that the Commission's orders may not be contrary to its prior practice. Utah Code Ann. § 63-46b-16.

Notwithstanding any momentum the EBA may have acquired due to its habitual use, it clearly lost it when the Commission, upon PacifiCorp's urging, abolished it in 1990. In rate case proceedings, Verl Topham, then president of Utah Power & Light, advocated that the EBA be discontinued. Prefiled Direct Test. of Verl R. Topham, Docket 90-35-06 (May 1990). Mr. Topham testified that (1) the EBA impeded the Company's ability to respond to competition, id. at p. 4, ll. 5-8; (2) it impeded the Company from maintaining stable prices, id. at p. 4, l. 17; (3) it penalized customers when actual retail loads fluctuated, id. at p. 4, ll. 25-26; (4) it "raised questions" about retroactive ratemaking, id. at p. 5, ll. 1-2; and (5) its elimination would provide

the maximum incentive to the Company, id. at p. 4, ll. 21-22. Accordingly, the Commission eliminated the EBA because the Company pleaded for permission to abandon it.[10]

As a result, there is no longstanding practice of the Commission that can support a finding that the Commission has authority to approve the PCAM. The EBA cannot provide that precedent. The authority must be established, if at all, under the current statutory and regulatory regime.

C. The Commission Cannot Authorize the PCAM as an "Incentive Rate."

There has been some suggestion that perhaps the PCAM could be approved as an "incentive" rate. Incentives to the utility are built into the ratemaking process, both through the form of the proceeding, which is specified by statute, and by provisions in the statutes and regulations that directly address incentives to the utility. The incentives provided in the PCAM are not the kind of incentives allowed by statute.

With few exceptions,[11] Utah law requires that rates be set in a general rate case. Utah Code Ann. § 54-7-12(2)(c). Rates are set prospectively only, "to provide utilities with some incentive to operate efficiently." EBA Case, 720 P.2d at 420. The general rate case procedure encourages the utility to accurately estimate costs and revenues and to prudently manage expenses. Id. at 420-21. The process is itself an incentivizing procedure.

Over the years, the Legislature has heard the utilities' requests for incentives for efficiency and for a better opportunity to earn their authorized rate of return. In addition to the

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[10] Based on Mr. Topham's testimony, PacifiCorp should be estopped to contend that the EBA will allow the company to maintain stable prices, that it would be fair to customers when actual retail loads fluctuated, or that its implementation would provide maximum incentive to the company. Moreover, it is inherently unfair to allow PacifiCorp to abolish a balancing account at a time when it perceives market conditions work to its disadvantage, and then reinstate a balancing account whenever market conditions are favorable for doing so. See discussion below at p. 21-23.

[11] The notable exception is the pass-through of fuel costs and purchased energy pursuant to Section 54-7-12(3)(d).

incentives inherent in the ratemaking process itself, the Legislature enacted Section 54-4-4.1(1) which provides:

> The Commission may, by rule or order, adopt any method of rate regulation *consistent with this title*, including a method whereby revenues or earnings of a public utility above a specified level are equitably shared between the public utility and its customers.

Utah Code Ann. § 54-4-4.1(1) (emphasis added.) This revenue-sharing provision allows the Commission to approve an incentive rate by setting a specific level for a utility's revenue or earnings above which, any revenues or earnings would be equally shared between the utility and its ratepayers. The implementation of this ratemaking method must be consistent with Title 54; see also Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 780 (Utah 1994).

The Legislature has also responded to the utilities' pleas for incentives by enacting the pass-through statute, § 54-7-12(3)(d) (discussed above) and, most recently, by allowing general rate cases to be based on future test years, which supposedly enables utilities to overcome regulatory lag.[12] See Utah Code Ann. § 54-4-4(3)(b). All of these measures authorize the Commission to approve ratemaking devices designed to encourage efficiency and prudence.[13] But the incentives available to a utility are confined to those provided by statute. The Legislature has not otherwise delegated authority to implement or approve incentive ratemaking measures. See Hi-Country Estates, 901 P.2d at 1021 ("When a 'specific power is conferred by statute upon a . . . commission with limited powers, the powers are limited to such as are specifically mentioned.'")

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[12] It should be noted that PacifiCorp has filed an application for a PCAM with only having had rates set once under a future test year. Therefore, it is unknown whether accurate forecasting by PacifiCorp would eliminate any claims PacifiCorp makes for needing a PCAM.

[13] As if these incentive measures were not enough, PacifiCorp also has the ability to compensate for volatile market prices for F&PP by its investment decisions. In today's market, it has the ability to financially hedge against volatility. Prudent management of its purchasing practices would require PacifiCorp to avail itself of that opportunity.

PacifiCorp's PCAM would create an incentive not authorized by statute. When PCAM's deferred account accumulates a negative balance of $20 million, PacifiCorp would collect only 90 percent of the $20 million negative balance. Widmer Test., at p. 6-7, ll. 133-45. Mr. Widmer stated:

> This asymmetric risk sharing mechanism will provide the Company a significant incentive to keep total net power costs as low as possible while providing safe, adequate reliable service.

Widmer Test., at p. 7, ll. 145-47; see also Testimony of D. Douglas Larson (Nov. 2005), at p. 3, ll. 48-49; p. 6, ll. 120-26 ("risk of 10 percent under-recovery will provide PacifiCorp with an incentive to keep total net power costs as low as possible"). While PacifiCorp claims the PCAM would create incentives to keep F&PP costs low, the PCAM would also provide an unintended incentive for PacifiCorp to over collect from rate payers. Because overcollected revenue may accrue without consequence up to $20 million, the PCAM encourages Pacificorp to build a positive balance in the account for its own use. The incentives proposed in the PCAM do not in any way resemble the incentives that are permissible by statute. It is doubtful, therefore, that the Commission would have power to authorize the PCAM as an incentive rate. See generally Stewart, 885 P.2d 759 (finding Commission's incentive plan unlawful for, among other reasons, violating the ratemaking principles of Title 54).

III. THE RULE AGAINST RETROACTIVE RATEMAKING PREVENTS THE COMMISSION FROM GRANTING PACIFICORP'S APPLICATION FOR A PCAM.

Utah law prohibits the Commission from permitting a utility to recover past costs or unrealized revenues. In the EBA Case, 720 P.2d at 420, the Court stated:

> [As a] general rule [] … *all ratemaking must be prospective in effect* and rates may be fixed only in general rate proceedings. [citations omitted] It is true that the PSC has limited authority to permit interim rate changes which are necessary because of unexpected increases in certain specific types of costs; such

> authority is specifically given in the fuel cost pass-through legislation. [citations omitted] *However, neither the pass-through legislation nor the Commission's general grant of regulatory authority permits a utility to have retroactive revenue adjustments in order to guarantee shareholders the rate of return initially anticipated*.

Id. at 423 (emphasis added). A "retroactive" rate adjustment is one that allows a utility to recoup from future rates "costs that were greater than projected." MCI, 840 P.2d at 770. The rule against retroactive ratemaking is not constitutionally mandated, but it is a well-settled Utah rule based on "sound ratemaking policies." Stewart, 885 P.2d at 777. The purpose of the rule is "to provide utilities with some incentive to operate efficiently." Id. at 778 (quoting the EBA Case, 720 P.2d at 420).

The rule against retroactive ratemaking makes no exception for "overestimates" or "underestimates" of a utility's costs, or for mistakes in the ratemaking process based on the utility's inability to accurately forecast its revenues and expenses. Id. The sole recognized "exception" to this rule is when "an unforeseeable event results in an extraordinary increase or decrease in expenses or revenues." MCI, 840 P.2d at 771. An "unforeseeable" event is one which is "inherently unpredictable," and which is not a result of "company mismanagement or imperfect forecasts." Id. The Utah Supreme Court stated:

> [t]he extraordinary and unforeseeable nature of the expenses recognized under the exception differentiates them from expenses inaccurately estimated because of a misstep in the ratemaking process, *such as the inability to predict precisely*, or from mismanagement. An increase or decrease in expenses that is unforeseeable at the time of a ratemaking proceeding, cannot, by hypothesis be taken into account in fixing just and reasonable rates."

Id. (emphasis added). Thus, the "exception" is appropriate only when an event is sufficiently unpredictable that it would be impossible to account for its effect in a rate case, and only when the effects of the unforeseen event are so beyond expectation that it would be unjust and

inequitable not to adjust rates accordingly. See also Stewart, 885 P.2d at 778 ("Because earnings or expenses caused by an unforeseeable event cannot be reasonably anticipated in the ratemaking process, justice and equity may require appropriate adjustments in future rates to offset extraordinary financial consequences.").

PacifiCorp requests that the Commission allow it to defer excess F&PP costs so that it can recover those past costs from the ratepayers sometime in the future. Its stated reason for seeking such rate treatment is that, since 1999, market prices have "increased substantially and wholesale prices have fluctuated tremendously." Larson Test., at p. 4, ll. l72-73. Hence, PacifiCorp contends, it cannot "absorb the risk of cost increases resulting in fluctuations" in "hydro and weather conditions, variations in loads, the timing of forced outages, and wholesale market prices for gas and electricity." Id. at ll. 86-90. PacifiCorp's Application, at its core, is nothing more than a complaint that it is unable to predict future costs. In the absence of some unique, unforeseeable and extraordinary event, fluctuating prices have never been grounds for finding an exception to the rule against retroactive ratemaking. See In re Cent. Vt. Pub. Serv. Corp., 473 A.2d 1155 (Vt. 1984).[14] Although volatile prices may lead to imperfect forecasts of power costs, and even to losses for the utility, the inability to predict future prices cannot serve as the basis for a finding that such prices were "unforeseen." See MCI, 840 P.2d at 771.[15]

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[14] In the cited case, the issue was whether a tariff that permitted recovery of past power costs fell under an exception to the prohibition against retroactive ratemaking. The court found that the petitioning utility's fuel costs constituted over 50% of the utility's operating costs, were fluctuating over time and were uncontrollable by the utility. Nonetheless, the court held that "[e]conomic risks are part of the utility business, and even the risk of economic catastrophe may properly be assigned to the owners of a utility company rather than to its consumers." 473 A.2d at 1161. Accordingly, the court denied implementation of the tariff and disallowed recovery of past fuel costs.

[15] A number of courts have held that cost increases alone do not allow the disadvantaged party to avoid obligations under a contract. See, e.g., United States v. SW. Elec. Coop., Inc., 869 F.2d 310, 315 (7th Cir. 1989) (If "the buyer forecasts the market incorrectly and therefore finds himself locked into a disadvantageous contract, he has only himself to blame and so cannot shift the risk back to the seller by invoking impossibility or related doctrines" (citations omitted)); Holmgren v. Utah-Idaho Sugar Co., 582 P.2d 856, 861 (1978) (rise in cost of operating and maintaining canals does not render contract void or voidable); Bernina Distribs. v. Bernina Sewing Mach. Co., Inc.,

PacifiCorp does not allege any unforeseeable and extraordinary event. Even assuming the market price of gas and power may be "volatile," it offers no reason that rates cannot be set in a general rate case so that ratepayers and shareholders alike bear the risk of fluctuations in price. Mr. Widmer explained the Company's concern about wholesale price volatility, and illustrated the historical market price trend in PacifiCorp's Exhibit MTW 2. Widmer Test., at 3-4. As that Exhibit shows, since April 1996, average market prices have increased at a fairly steady rate, with a fairly consistent degree of fluctuation. The obvious exception was a spike in prices beginning in the summer of 2000 that continued for approximately one year. At the end of the year, PacifiCorp applied to the Commission to allow it to retroactively recover those extraordinarily high purchased power costs. Because of the extraordinary degree of fluctuation in price, and because of the overwhelming impact it would have made on the Company's finances to bear those purchased power costs, the Commission allowed a retroactive adjustment in rates. See Docket No. 01-035-23, Order (Nov. 2, 2001). By contrast, the fluctuations that PacifiCorp complains about in its PCAM Application are small and relatively uniform over the nearly ten year period, paling in comparison to the extraordinary spike in market prices during 2000-2001. Those normal fluctuations cannot credibly be characterized as unforeseen and extraordinary, and do not qualify as an exception to the rule against retroactive ratemaking.

To the extent it would be "unjust" to make PacifiCorp's shareholders cover volatile purchased power or fuel prices, the Legislature has provided a method of recovery under the pass-through statute. Utah Code Ann. § 54-7-12(3)(d) (pass through for fuel or energy purchased from independent suppliers or from suppliers whose prices are regulated). PacifiCorp has chosen not to take advantage of the pass-through statute. Had it done so, the Commission

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646 F.2d 434, 439 (10th Cir. 1981) ("cost increases alone, though great in extent, do not render a contract impracticable.").

would have authority to review PCAM as a pass-through. As filed, the PCAM is a text-book example of a request for retroactive recovery of costs.

IV. THE PCAM IS NOT JUSTIFIED UNDER THE PRESENT CIRCUMSTANCES

Even assuming for the sake of argument that at one time the Legislature had delegated to the Commission the power to approve the PCAM (which it did not, nor is there any current support that it has) or that there is otherwise precedent for approving the PCAM (which there is not) it would be manifestly unfair based on the principles of waiver and estoppel, among others, for the Commission to approve the PCAM.

During the eighties when the EBA was in effect, PacifiCorp was virtually guaranteed that it would not be at risk for fuel and purchased power costs since they were all recovered as a pass through. Yet, when the market began to show changes in the 1990s and prices became less volatile, PacifiCorp saw an opportunity to take advantage of wholesale trading in energy. The EBA was no longer the boon to the Company that it had once been. PacifiCorp thus approached the Commission and ultimately got exactly what it asked for—freedom from a pass through of fuel and purchased power. Now that market conditions have further evolved, and now that prices have become more volatile once again, PacifiCorp comes back to the Commission, asking again for a pass-through. While the PCAM takes a little different form than the EBA, the concept is much the same. As discussed above, however, the PCAM cannot be approved under any of the currently existing statutes. While the EBA might have withstood a challenge if brought now and legitimately continued as a longstanding practice, by requesting and obtaining its elimination, PacifiCorp waived whatever right that might have accrued to claim the EBA as precedent for the PCAM. Cf. Lucky Seven Rodeo Corp. v. Clark, 755 P.2d 750, (Utah Ct. App. 1988) ("Abandonment means the intentional relinquishment of one's rights in the contract.").

Similarly, PacifiCorp should be estopped to deny the ratepayers the benefits that it claimed they would enjoy if the EBA were to be eliminated. Cf. Swan Creek Village Homeowners Ass'n v. Warne, --- P.3d ---, 2006 WL 851400, 549 Utah Adv. Rep. 6, 2006 UT 22 (Utah 2006) ("[A] party recovering a judgment or decree [who] accepts the benefits thereof, voluntarily and knowing the facts . . . is estopped to afterwards reverse the judgment or decree on error." (internal citations omitted)); Salt Lake City v. Silver Fork Pipeline Corp., 913 P.2d 731, 734 (Utah 1995) ("[A] person may not, to the prejudice of another person deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject-matter, if such prior position was successfully maintained." (internal citations omitted)); Tanner v. Provo Reservoir Co., 289 P. 151, 154 (Utah 1930) ("[A] person by acceptance of benefits may be estopped from questioning the existence, validity and effect of a contract."). Mr. Topham testified that the EBA impeded the Company's ability to respond to competition and maintain stable prices. It not only penalized customers when retail loads fluctuated, but raised questions about retroactive ratemaking. Its elimination, he stated, would provide the maximum incentive to the Company. Topham Test., Docket 90-035-06, at 4-5. Relying on his testimony and on the Company's representations of fairness to all, the Commission allowed PacifiCorp to withdraw the EBA. Thus, PacifiCorp reaped the benefit of the EBA during a time when it might have been at risk for fuel and purchased power costs, and likewise succeeded in having it eliminated at a time when it perceived it could do better in the market (even though it might have benefited the ratepayers to have the EBA remain in place).

Implicit in the Company's request to eliminate the EBA was the premise that when the pendulum swings the other way, the ratepayers would benefit from its elimination. Now that it appears the shareholders may be at risk for some of the Company's fuel costs, PacifiCorp is back

before the Commission asking again for a pass-through mechanism. PacifiCorp cannot have it both ways. The Commission should not allow PacifiCorp to implement a pass-through whenever it suits the circumstances to PacifiCorp's advantage, and to withdraw it whenever it does not. To allow PacifiCorp to reinstate a fuel and purchased power pass-through at its whim is to deny ratepayers the "upside" of the cost recovery method that PacifiCorp claimed would be fair for all when arguing for elimination of the EBA.

Finally, in light of its history with balancing accounts, and with recent legislation, PacifiCorp's argument that it somehow needs to pass through fuel and purchased power costs does not ring true. Since elimination of the EBA, there has developed a wholesale market in energy that did not exist prior to 1990. PacifiCorp participates in that market and now has the ability to hedge against future power costs both in the financial and physical markets.

In addition, through its lobbying efforts, PacifiCorp now enjoys the ability to project the entire test year to be used in a general rate case. It thus has the opportunity to take into account and to "normalize" the factors that otherwise might cause fluctuations in its costs. Yet, it is the "volatility" of those very cost elements that is the reason Mr. Widmer claims the Company needs the PCAM. PacifiCorp is admitting one or more of the following: (1) that the future test year does not yield any better estimate than a historic test year; (2) that the Company is incompetent at projecting normalized costs; or (3) that the Company simply seeks to entirely eliminate its risks from affiliate fuel purchases as well as the wholesale energy market. In view of the Company's history with the EBA, and the opportunities for fuel and purchased power cost recovery under the present legal framework, the PCAM, which is not in compliance with the pass-through statute, simply cannot be justified.

CONCLUSION

The Legislature has authorized the Commission to approve a variety of ratemaking devices designed to ensure that rates are just and reasonable, and that the utilities have a reasonable opportunity to earn their allowed rate of return. The statutes provide a mechanism for dealing with volatile F&PP costs and providing incentives for the utilities to be efficient and prudent. When unforeseen and extraordinary events occur, the Commission may allow retroactive cost recovery to avoid unjust and inequitable losses for the utility. In short, the Legislature has delegated ample power to the Commission to authorize ratemaking devices in order to remedy the conditions about which PacifiCorp now complains. It has not, however, authorized the Commission to approve the cost recovery method proposed in the PCAM.

The UIEC, therefore, requests that the Commission dismiss PacifiCorp's application.

DATED this _____ day of May, 2006.

_____

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of May, 2006, I caused to be e-mailed and/or mailed, first class, postage prepaid, a true and correct copy of the foregoing **MOTION TO DISMISS PACIFICORP'S APPLICATION FOR APPROVAL OF ITS PROPOSED POWER COST ADJUSTMENT MECHANISM**, to:

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