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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of PACIFICORP dba UTAH POWER & LIGHT COMPANY for Approval of Its Proposed Power Cost Adjustment Mechanism	**Response of the Division of Public Utilities to the Motion to Dismiss of Utah Industrial Energy Consumers** **Docket No. 05-035-102**

The Division of Public Utilities (DPU) hereby files its response to the Motion to Dismiss PacifiCorp's application for approval of a Power Cost Adjustment Mechanism (PCAM) filed by the Utah Industrial Energy Consumers (UIEC) with the Commission on May 10, 2006.

INTRODUCTION

On November 21, 2005, PacifCorp (also referred to as the Company) filed its Application for approval of a PCAM. That Application generated a number of technical conferences and discovery requests concerning the Company's recovery of net power costs. The filing was timed at least partially to allow more investigation into the PCAM prior to the filing of Docket No. 06-035-21, the 2006 general rate case. The general rate case was not filed until March 2006 and parties wanted additional time to address the PCAM issues. The PCAM docket and the general rate case have not been consolidated except for very limited purposes. Testimony on the PCAM was originally scheduled to be filed on August 9, 2006 and hearings were to be held in late

October. The general rate case testimony and hearings are on a different schedule and that case will be heard in December. On June 20, 2006, the Commission issued an Order vacating the schedule for filing testimony and the schedule for hearings and further vacating any consolidation of this docket and the general rate case docket. The Commission's June 20th Order which was issued in the general rate case indicated that the original scheduling order implied a schedule and notice in the PCAM docket even though no corresponding procedural order or notice had been issued in the PCAM docket. Thus currently there is no procedural schedule other than the schedule for this Motion that currently exists in the PCAM docket. The DPU assumes that a scheduling conference will occur where the schedule for this docket can be addressed.

Prior to the filing of this docket, PCAM and net power cost recovery have been discussed at a number of technical conferences among interested parties. The last of these technical conferences was held in December 2004, with at least two other technical conferences held prior to that December 2004 conference. No conclusions on how to recover power costs were reached at any of these technical conferences.

The point of this review of the PCAM process is twofold. First, the Motion to Dismiss is being addressed late in the PCAM process. Often, a Motion to Dismiss is heard prior to discovery and answer. Here the parties have already invested significant time and effort into formulating their positions regarding PCAM. Second, more importantly, the PCAM history is provided to emphasize that the process of setting rates and establishing policy by the Commission is not in any way similar to a complaint filed in a civil action where there is a complainant and a respondent, and where motions to dismiss are more appropriate. Here the Commission is being asked not only to exercise its adjudicative powers alone, but also to

exercise its legislative powers. Setting rates and establishing ratemaking policy is a process dissimilar to resolving a civil complaint.

With this in mind, the PSC should make the movant seeking to dismiss a proceeding such as this bear a heavy burden. If that heavy burden is not met, the Commission should have its opportunity to provide its perspective on how net power costs should be recovered. Past dockets and technical conferences demonstrate that there is a wide variety of opinions on how the recovery of net power costs should be structured. Instead of finding in favor of the motion to dismiss, the Commission should exercise its authority to provide a resolution to these issues in this Docket that will provide guidance to all parties. Although technical conferences provide a mechanism to share information among parties and to share information with the Commission, only a proceeding that is on the record would allow the Commission an opportunity to fully express its opinions.

It is important for the Division to point out that it does not necessarily support the PCAM proposed by the Company. Indeed, the Division may not support any mechanism that is in any way similar to what the Company has proposed. However, the Division does not support the dismissal of this proceeding prior to filing testimony and hearings on the merits of how net power costs should be recovered. Once all of the policy considerations have been presented, the Commission can address the merits of the legal arguments raised by UIEC with the policy evidence presented by all parties. It seems only once that process has occurred can the PSC provide its views on how power costs should be recovered.

THE STANDARD FOR APPROVAL OF A MOTION TO DISMISS SHOULD BE STRINGENT

The Commission rightfully has been reluctant to grant a Motion to Dismiss, particularly in proceedings where ratemaking issues are involved. In fact, in two prior cases the Commission was reversed for not allowing a hearing to take place where the rule on retroactive ratemaking was involved.[1] Proceedings such as this one are not a private cause of action between two parties but instead involve the general public interest considerations the Commission employs in ratemaking. The DPU believes it would have to be extraordinary to dismiss a proceeding like this where how rates are to be set in the future are to be addressed. A hearing after testimony is filed by all parties will allow the PSC to be fully advised on the policy and public interest issues involved and to provide guidance to the utility and the parties including addressing all legal issues.

This Motion was filed as a Rule 12(b)(6) motion, i.e. alleging that the Complaint fails to state a cause of action upon which relief can be granted. R 746-100(C) applies the Utah Rules of Civil Procedures to this Motion. That same Rule states that the Commission is not bound to follow the Utah Rules of Civil Procedure in every case when the Commission finds them to be inappropriate. Moreover, Utah courts have recognized that a motion to dismiss is a severe remedy and should be granted only if the Applicant could present no statement of facts that could support its claim.[2] Arguably, based on the Utah Supreme Court decisions cited by UIEC, particularly the recent Questar Gas decision addressing the Gas 191 Account, a set of facts could potentially be established authorizing some type of PCAM mechanism.

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[1]See MCI v. Public Service Commission 840 P.2d 765, 775-76 (Utah 1992) and Salt Lake Citizens Congress v. Mountain States Telephone and Telegraph Company 846 P.2d 1245 (Utah 1992). Both cases dealt with exceptions to the rule against retroactive ratemaking. In both instances, the cases were remanded back to the Commission to determine if an exception would apply to specific case facts.

[2] Mackey v. Cannon, 996 P.2d 1081, 1084 (Utah 2000).

THE LAW ON THE RULE AGAINST RETROACTIVE RATEMAKING IS NOT CLEAR ENOUGH TO JUSTIFY A MOTION TO DISMISS

UIEC cites three main Utah cases that address the rule against retroactive ratemaking[3] to allow it to reach the conclusion that a motion to dismiss is warranted. UIEC cites the EBA case for the proposition that the PSC can only set rates prospectively and that correcting for missteps in the regulatory process is not permitted.[4] UIEC seems to argue that since the proposed PCAM corrects for over- or under-collection, it violates the rules in the EBA case. The MCI case, it is argued, created two exceptions to the rule against retroactive ratemaking, i.e. misconduct or extraordinary and unforeseen events.[5] UIEC argues that the adjustments proposed in the PCAM are "small and relatively uniform"[6] and therefore do not qualify for retroactive adjustment.[7] UIEC cites the Stewart case as reaffirming the concepts outlined above.

The DPU does not believe that the law is so clear that permitting mechanisms such as a PCAM, EBA or Gas 191 Account constitutes engaging in impermissible retroactive ratemaking. Second, the DPU does not believe that even if PCAMs, EBAs or 191 Accounts are found to be a retroactive adjustment, it is not clear that such an account would clearly warrant a motion to dismiss under the Utah decisions cited by UIEC. Third, the 2001 Questar Gas 191 Account Supreme Court decision[8] does not support UIEC's argument for a Motion to Dismiss.

[3] Utah Department of Business Regulation v. Public Service Commission, 720 P.2d 420 (Utah 1986) ("EBA"), MCI v. Public Service Commission, 840 P.2d 765 (Utah 1992) ("MCI"), and Stewart v. Public Service Commission, 885 P.2d 759 (Utah 1994) ("Stewart").
[4] UIEC memo p.17-21.
[5] UIEC memo p. 18.
[6] UIEC memo p. 20.
[7] This is contrasted to the retroactive adjustments permitted in Docket No. 01-035-21 where the Commission permitted retroactive recovery of excess power costs due to the 2001 energy crisis.
[8] Questar Gas Company v. Public Service Commission, 34 P.3d 218 (Utah 2001).

In 1987, in the Simonelli case the Commission had occasion to indicate whether it thought the EBA decision invalidated the EBA that the Company had in effect.[9] It determined that what was prohibited by the EBA case is not what takes place in an EBA type mechanism. The Commission stated:

> We do not read the Utah Supreme Court's language in the 1986 EBA appeal, supra, to have invalidated the EBA. Rather, we understand the Court to have said that it would not rule on the validity of the EBA mechanism, for the obvious reason that that issue was not before it. The Court did say that the refund of $6 million to shareholders constituted retroactive ratemaking, which is unlawful. We see a sharp distinction between what the Commission did in refunding $6 million to shareholders and what is normally done in making EBA adjustment. In an EBA case, adjustments to rates are made on the basis of two factors: (1) net over or under collection in the past based upon an analysis of reasonable expenditures and revenues and (2) projected expenses and revenues for the next future period. The rate as adjusted operates prospectively not retroactively and similar adjustments have been sustained by courts around the country. E.g. Southern California Edison v. Public Utilities Commission, 576 P.2d 945,[10]

Therefore, as far back at 1987 the Commission definitively ruled that the EBA's correction for over or under collection did not constitute impermissible retroactive ratemaking or violate the "EBA" decision. No Court has yet told the PSC that it is wrong.

The MCI case, which was subsequent to the Simonelli decision, arguably limits EBA-type mechanisms to those costs that reflect costs that represent unforeseen and extraordinary events. Even if one were to accept that premise (that the EBA was engaging in retroactive adjustments) a PCAM-type mechanism could be designed to only address true anomalies in cost that the MCI case seemed to address as permissible under the retroactive ratemaking rules. Therefore, a Motion to Dismiss does not seem appropriate based on the MCI decision.

[9] Order on Motion for Summary Judgment, 84-035-12, March 5, 1987. Ironically, it was the Company who challenged the authority of the PSC to make retroactive adjustments in the EBA citing the "EBA" case as authority.
[10] Order 84-035-12, March 5, 1987, p. 4; see also the concurring opinion by Commissioner Cameron for a discussion of the history of the EBA.

In the Stewart case, the Court determined that the rule against retroactive ratemaking is not constitutionally based but instead is based on sound ratemaking principals. The Court indicated that consistent with the non-constitutional bases for the rule, two exceptions were created by their prior decisions, i.e. misconduct and an event that is extraordinary and unforeseen. Qwest urged the Court to rule that the prohibition against retroactive ratemaking was constitutionally based. The Court concluded after reviewing their prior decisions on the rule that:

> In each case the Court was concerned solely with applying sound rate-making in light of fairness to both ratepayers and shareholder . . . . Thus the rule against retroactive rate-making is not absolute and does not rest on a constitutional right of a utility to earnings in excess of what is just and reasonable any more then the rule gives ratepayers a constitutional right to service at rates that are less then just and reasonable.[11]

Thus the Court is not saying that the rule against retroactive ratemaking is constitutionally based, but instead that the rule is based on sound regulatory principals and fairness to both ratepayers and shareholder. Who better can make an analysis of when exceptions to the rule against retroactive ratemaking should apply than the PSC? That analysis should not occur at the Motion to Dismiss phase of this proceeding.

In a sense, the 2001 Questar Gas Supreme Court decision recognized that, based on the facts outlined by the Commission when it adopted the 191 Account and in the methods and procedures the PSC uses in administering the 191 Account, a Court could find it to be valid. The Court found it to be valid even though the 191 Account allows for retroactive adjustments outside a general rate case. If retroactive ratemaking does apply to a balancing account mechanism, a dismissal of this docket at this time would deprive the PSC of its role in

[11] Stewart v. Public Service Commission, 885 P. 2d 759 (Utah 1994).

determining if it is in the public interest to establish a valid balancing account mechanism under the Questar decision criteria affirmed by the Court.

OTHER COURTS HAVE ALLOWED ADJUSTMENT MECHANISMS

Other jurisdictions have allowed adjustment mechanisms. In addition to the California court, cited above by the Commission in the Simonelli case, other jurisdictions finding that adjustment mechanisms did not constitute retroactive ratemaking include but are not limited to Ohio, Virginia, and the District of Columbia. These cases recognized that administering a rate mechanism that included adjustments was different than making retroactive changes to rates.[12] This has been done by commissions under specific statutory authority or under their "inherent regulatory powers."[13] The Montana Supreme Court said, "A majority of states in which the question has been presented has upheld the validity of similar provisions in utility rate orders variously designated as 'automatic adjustment clauses,' 'escalator clauses,' 'purchased gas adjustment clauses,' and 'pass through procedures.' These decisions have been made under a wide variety of state utility laws, diverse kinds of clauses and procedures, and particular circumstances."[14] For example, in Alabama it was determined that "[t]he Commission could use "any administrative consideration or device" to set rates so long as the constitutional standards embodied in the statute are satisfied."[15]

[12] See River Gas Co. v. Public Utilities Commission, 433 N.E.2d 568 (Ohio 1982); City of Norfolk v. Virginia Electric & Power Co., 90 S.E. 2d 140 (Va. 1955), and East Tennessee Natural Gas Company v. Federal Energy Regulatory Commission, 631 F.2d 794 (D.C. Cir 1980).
[13] See U. Ill. L. Rev. 983, discussing City of Norfolk v. Virginia Electric & Power Co., 90 S.E.2d 140 (1955).
[14] Montana Consumer Council v. Public Service Commission, 541 P.2d 770, 775 (Mont. 1975).
[15] Alabama Metallurgical Corporation v. Alabama Public Service Commission, 441, So.2d 565, at 571 (Ala. 1983).

THE COURTS IN UTAH HAVE NOT MADE A DEFINITIVE RULING THAT THE PSC LACKS AUTHORITY TO ADOPT AN EBA, PCAM, OR 191 ACCOUNT MECHANISM

UIEC cites a number of Utah Supreme Court decisions[16] for the general proposition that the PSC's power are limited and that the PSC has no inherent regulatory power except that granted by statute. The DPU has no objection to these general observations other than to observe that UIEC is reading the PSC's power too narrowly when it comes to ratemaking; the Commission should be able to exercise its powers in a way that best reflects the public interest under changing circumstances. These broad powers that exist can be found in cases cited by UIEC. In Mountain States Telephone and Telegraph v. Public Service Commission,[17] in distinguishing powers that can be implied from the statute versus those that cannot, the Court described the PSC ratemaking authority as:

> Utah Code Annotated 54-4-4 (1986) gives the Commission broad discretion in establishing rates for public utilities. (Citation omitted). Any activities that are related to ratemaking are subject to the Commission's broad powers in this area. The pooling mechanism may be sustained if it is 'closely connected to the supervision of the utilities rates . . . and the manner of the regulation is reasonably related to the legitimate legislative purposes of rate control for protection of the consumer'[18]

The issues seems to be (1) whether the 191 Account, the EBA, the PCAM or the CET tariff[19] could be substituted for pooling and (2) whether a court or the Commission could reach a conclusion that such mechanisms are closely related to the supervision of utility rates and the legitimate legislative purposes of public utility regulation. No court has yet told the Commission

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[16] UIEC memo p. 3.
[17] 754 P.2d 928 (1988).
[18] Id. at 931. Pooling was an attempt by the Commission to have all ILECs pay into a common fund to support telephone lifeline service. Since it involved more then one company, the Court determined that PSC authority could not be reasonably inferred from the PSC ratemaking authority. Eventually a statue was passed that authorized all telecommunication companies to pay into a fund to support lifeline rates.
[19] The application for the Conservation Enabling Tariff was filed in Docket No. 05-057-T01 by Questar, the Division, and Utah Clean Energy as joint applicants.

that it does not have the power to answer those questions. The Division believes that the Commission does have the authority to do so.

Two Utah Supreme Court decisions have reviewed balancing account devices. These cases are the 1986 EBA decision and the 2001 Questar 191 Account decision. In both of those cases, the Court found that the EBA and the 191 Account were not created under the pass through legislation, a fact UIEC notes. Instead, both Courts presumed that these mechanisms were created under the Commission's "ample general power to fix rates and establish accounting procedures."[20] These ample general powers are the same powers as those noted in the Mountain Bell decision noted above. The determination of the public interest of removing certain costs and revenues from general rates is a question to be addressed by the PSC and reviewed by the Court. A ruling supporting the Motion to Dismiss that would not allow the PSC to address the public interest issues would be incorrect.

THE APPLICATION AND USE OF SECTION 54-4-4.1(1) TO A SPECIFIC SET OF FACTS HAS YET TO BE ESTABLISHED

UIEC rather offhandedly rejects the usefulness of Section 54-4-4.1(1)[21] in developing alternatives to traditional rate regulation when the public interest so requires.

Section 54-4-4.1reads as follows:

> Rules to govern rates – Shared earnings.
>
> (1) 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.

[20] See EBA footnote 4. Similar language was also included in the Questar 2001 decision. The Court in the EBA case also noted that UP&L urged the Court to find the EBA invalid. The Court declined to address the overall validity of the EBA noting that the overall validity of the EBA was not raised before the PSC and that the Court could not be fully advised as to the justification for segregating certain costs and revenues from general rates.
[21] UIEC Memo p. 15-17.

> (2) Not later than 60 days from the entry of an order or adoption of a rule adopting a method of rate regulation whereby revenues or earnings of a public utility above specified level are equitably shared between the public utility and its customers, the public utility may elect not to proceed with the method of rate regulation by filing with the commission a notice that it does not intend to proceed with the method of rate regulation.

This section has only been interpreted once by the PSC, in a decision reviewed in the Stewart case. In the Stewart decision the Supreme Court held unconstitutional Section (2) of 54-4-4.1 that allowed the utility to opt out of an order by the Commission that established a method of rate regulation which shared revenues or earnings above a specified level between shareholders and ratepayers. Petitioners urged the Court to hold Section (1) also unconstitutional as being vague. The Court, however, severed Section (1) from Section (2), and provided some guidance on the meaning of Section (1).[22] The Court indicated that Title 54 provided sufficient guidance to the PSC to determine the validity of alternative methods of regulation adopted under Section (1). The Court indicated that Title 54 requires all rates to be "just and reasonable." The utility is required to provide high quality and adequate service. "Just and reasonable" has been defined to mean, "cost based" rates.[23] Cost based rates, the Court indicated, mean rates sufficient to cover all necessary costs of operation and cost of capital. The Court rejected the alternative form of regulation adopted by the PSC for Qwest on the grounds that it essentially rejected cost of

[22] Severance of a section of statute from another when one is held unconstitutional is often determined if the legislative intent to pass one section without the other can be determined. See, generally, Stewart, 885 P.2d 759 (Utah 1994).

[23] Many criteria enter into the determination of "just and reasonable" rates. See Utah Code 54-4a-6(4). Some of those criteria include: financial integrity of the public utility, promote efficient management, protect the long range interest of consumer, promote the stability of rates and protect against the wasteful use of public utility services. See also Section 54-3-1 which states: "The scope of the definition 'just and reasonable' may include, but shall not be limited to, the cost of providing service to each category of customer, and or the well being of the state of Utah, methods of reducing wide periodic variations in demand of such product, commodities or service, and means of encouraging conservation of resources and energy."

service regulation and that it adopted an alternative form of regulation plan without any notice to any party or a hearing on the merits of the plan.[24]

In conclusion, the Commission should not reject the usefulness of Section 54-4-4.1(1) in considering alternatives to a traditional rate case. As long as the rates meet the test of "just and reasonable" and due process is met the Commission should be free to consider alternatives to how rates have been set in the past.

WHETHER THE PCAM IS JUSTIFED UNDER PRESENT CIRCUMSTANCES IS A QUESTION FOR THE COMMISSION AND NOT A MOTION TO DISMISS

UIEC in section IV of its memo argues that the PCAM is not justified under present circumstances. The DPU believes that the discussion of what is justified under present circumstances and what public policy considerations should apply to the adoption or rejection of a PCAM is not appropriate for a Motion to Dismiss. The factors outlined in this Section are policy considerations to be heard by the Commission and argued after the hearing.

CONCLUSION

It is important to remember that the position the DPU has taken in this Motion in no way should be construed as indicating support for the Company's PCAM proposal. However, the DPU also believes that the PSC should be able to hear the merits of the issues surrounding power cost recovery for the Company. For those reasons and the ones stated above the DPU believes the Motion to Dismiss should be either rejected or taken with the case and determined after the hearings have taken place.

[24] Stewart, id. at 781.

Respectfully submitted this _____ day of July, 2006.

_____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Response of the Division of Public Utilities to the Motion to Dismiss of Utah Industrial Energy Consumers** was transmitted electronically (email) on this the _____ day of July, 2006 to the following:

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