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BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Application of	)	DOCKET NO. 05-035-102
PACIFICORP dba UTAH POWER &	)	
LIGHT COMPANY for Approval of	)	UTAH COMMITTEE OF CONSUMER
Its Proposed Power Cost Adjustment	)	SERVICES RESPONSE TO UIEC
Mechanism.	)	MOTION TO DISMISS

Pursuant to Utah Code §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 Utah Committee of Consumer Services responds to the Motion to Dismiss filed by the Utah Industrial Energy Consumers.

**INTRODUCTION**

The Utah Committee of Consumer Services assesses the impact upon, and advocates for the interests of, residential and small commercial business customers of PacifiCorp. *Utah Code § 54-10-4*. As the largest block of PacifiCorp customers, the Committee's constituents are the most burdened by rates to be determined by PacifiCorp's Power Cost Adjustment Mechanism proposed in the Application.

The Committee contends that PacifiCorp's stated reasons for the PCAM are insufficient as a matter of law. The PCAM would be an unwarranted, reactive departure from reliable ratemaking procedures that will result in unjust and unreasonable rates. The Committee's view that Utah law does not permit the cost recovery mechanism PacifiCorp has proposed in the Application is ably corroborated by UIEC's discussion of the Application's legal deficiencies. The Committee believes that Utah law affords protection to residential and small commercial utility customer interests and PacifiCorp's proposed PCAM contravenes that law.

### **ISSUE PRESENTED**

PacifiCorp's Application and testimony describe a singular power cost adjustment mechanism. PacifiCorp allows for only one result; the mechanism described by its witnesses, Doug Larson, Mark Widmer and Dave Taylor. The Application and testimony do not allow for modification or amendment. Accordingly, the PCAM is to be judged as described in the direct testimony. If the Application and testimony do not independently demonstrate by substantial evidence that that the PCAM will result in just and reasonable rates, it must be dismissed.

### **ARGUMENT**

#### **I. STANDARD FOR REVIEW.**

The standard a civil court applies to its consideration of a motion under Utah Rule of Civil Procedure 12(b)(6) does not apply to the Commission's consideration of the

motion to dismiss PacifiCorp's application. Whether the PCAM is workable or provides benefits is not at this point in the proceeding, the issue to be decided. Utility rates must be determined through authorized ratemaking methodologies. Unless Utah's utility regulation statutes and law authorize the proposed PCAM, it must be rejected. "Without clear statutory authority, the Commission cannot pursue even worthy objectives for the public good." *Mountain States Telephone and Telegraph Co. v. Public Service Commission of Utah*, 754 P.2d 928, 933 (Utah 1988).

The Motion to Dismiss must be considered in the context of the statutory scheme for regulating a monopoly public utility. The Commission should not be persuaded to deny the Motion by a party who insists upon the rote application of a civil court standard for considering a motion under civil rule 12(b)(6). The context of the Application and the Motion to Dismiss must be considered using a standard applicable to a public utility that is granted a monopoly over essential services, necessary for the public's health and welfare.

The legal standard against which the Motion to Dismiss the Application is judged is whether the PCAM as proposed in the Application and testimony conforms to the "parameters of rate regulation for natural monopolies: the protection of utility investors from confiscatory rates and, of equal importance, the protection of ratepayers from exploitive rates." *Stewart v. Utah Public Service Commission*, 885 P.2d 759, 767 (Utah 1994). Any ratemaking methodology and the rates derived thereby must in all respects

and as initially described, plainly conform to these “two polar constitutional principles”.

*Id.* The Committee agrees the Application does not plainly conform to the principles of utility regulation in Utah and must be dismissed, though for reasons different than UIEC’s. The proposed PCAM describes a ratemaking mechanism that is not justified and departs from traditional ratemaking in a manner that cannot result in just and reasonable rates.

Furthermore, because of the character of the Commission’s regulatory authority over a monopoly, the Commission and the courts insist that at all times and for all purposes, the utility bears the burden of proof by substantial evidence.

In the regulation of public utilities by governmental authority, a fundamental principle is: the burden rests heavily upon a utility to prove it is entitled to rate relief and not upon the commission, the commission staff, or any interested party or protestant; to prove the contrary. A utility has the burden of proof to demonstrate its proposed increase in rates and charges is just and reasonable. The Company must support its application by way of substantial evidence, and the mere filing of schedules and testimony in support of a rate increase is insufficient to sustain the burden. *Ratemaking is not an adversary proceeding in which the applicant needs only to present a prima facie case to be entitled to relief. Utah Dept. of Business Regulation v. Public Service Commission of Utah*, 614 P.2d 1242, 1245-1246 (Utah 1980). (Emphasis added.)

Under the principle of *Utah Dept. of Business*, a utility proposal, such as the PCAM Application, must on its face present substantial evidence that the proposal is a permitted cost recovery mechanism and that just and reasonable rates will result from its application. If this burden of proof is not met from the onset, the Commission may not further consider the proposal. The *prima facie* case that may survive a motion to dismiss

in a civil court, will not survive a similar motion before the Commission. The utility bears the heavy burden of proof even as to a motion to dismiss the initial pleading. As a matter of law, speculative testimony, testimony unsupported by statistical evidence, or bald assertions are insufficient. The civil standard of construing all factual allegations favorably to PacifiCorp cannot apply if the Commission is to be faithful to the explicit standard for adjudicating a utility's ratemaking proposal. *See Beaver County v. Qwest, Inc.*, 31 P.3d 1147 (Utah 2001).

## **II. PACIFICORP'S ASSERTIONS AND THE EVIDENCE BEFORE THE COMMISSION.**

The allegations upon which PacifiCorp relies to meet its burden of proof, and evidence from Commission proceedings related to this application, may be summarized as follows:

a. Since the Western energy crisis of 2000-2001, there has been a dramatic increase in both the price and volatility of wholesale market power purchases. *Application*, ¶ 3. Volatile net power costs are primarily due to weather, retail loads, forced outages and wholesale electric and natural gas market price variability, all factors outside of PacifiCorp's control. *Application*, ¶ 4; *M. Widmer Direct Testimony*, line 57-63.

b. Drought in the Pacific Northwest requires replacement market or thermal resources and prevails over the MSP Revised Protocol allocation method

justifying a significant increase in net power costs for Utah customers. *D. Larson Direct Testimony, line 102-110.*

c. Except for the impact of the 2000-2001 energy crisis, from 1990 to the present, the variance between actual net power costs and those recovered in rates has been minimal and a risk PacifiCorp has accepted. *D. Larson Direct Testimony, line 76-78; M. Widmer Direct Testimony, line 49-54 and Exhibit MTW-1.* In 2003, the variance was at the same minimal and acceptable level. *Exhibit MTW-1.*

d. Market prices for replacement power, for example, to replace drought caused reduced hydro generation, has remained relatively flat from 1996 to the present, except for an anomalous period from April 2000 to June 2001. *M. Widmer Direct Testimony, line 63-68 and Exhibit MTW-2.*

e. To address its claim that the 2000-2001 energy crisis threatened PacifiCorp with “serious financial harm”, PacifiCorp filed on January 12, 2001 a general rate case to increase rates by \$142 million, and on January 17, 2001, an Emergency Motion to grant this request as an interim rate increase. Approximately \$95 million of the total request was attributed to the “extraordinary cost of power purchases in the wholesale power market.” *Order Granting an Interim Rate Increase, Docket No. 01-035-01, February 2, 2001.*

f. The Commission increased PacifiCorp’s Utah jurisdiction revenues by \$70 million, an interim amount, finding that “wholesale market difficulties are

impairing the Company's financial performance." *Id.* Even though PacifiCorp's Utah jurisdictional earnings for 12 months ended December 31, 1999 were 4.17 percent, against an authorized 11 percent, only after "all evidence has been considered at the end of proceedings can the Commission judge whether claimed under-earning requires a regulatory response." *Id.*

g. By October 2004, PacifiCorp's credit rating was returned to pre-energy crisis levels that were more favorable than any other western U.S. investor owned utility. *M. Widmer Direct Testimony, line 94-97 and Exhibit MTW-4.*

h. Effective May 5, 2003, Utah Code 54-4-4(3) was amended to permit a fully forecasted test period of up to 20 months for purposes of determining just and reasonable rates.

i. In PacifiCorp's general rate case, Docket No. 04-035-42, to determine Utah revenue requirement, including net power costs, for the first time the test year used was normalized, forecasted results for PacifiCorp's 2006 Fiscal Year, April 1, 2005 through March 31, 2006.

j. In PacifiCorp's pending general rate case, Docket No. 06-035-21, PacifiCorp's requested revenue requirement, including net power costs, use normalized, forecasted results for April 1, 2006 to September 30, 2007, a 20 month forecast.

k. "The Company believes net power costs will continue to fluctuate in the future and believes that it is necessary to have a power cost recovery mechanism in

order to allow changes in net power costs to be reflected between general rate cases.” *D. Larson Direct Testimony, line 78-81.*

l. PacifiCorp does not have a reasonable opportunity to recover its actual and prudently incurred net power costs for service in Utah. *Application, ¶ 5.* Without a PCAM, long term opportunity to earn the authorized rate of return will be greatly diminished if not eliminated, due to net power cost exposure, or the variance between actual net power costs and those recovered in rates. *M. Widmer Direct Testimony, line 26-36.*

m. With the completion of MidAmerican Energy Holdings Company’s acquisition of PacifiCorp, Docket No. 05-035-54, PacifiCorp has access to significant financial and managerial resources through a relationship with Berkshire Hathaway. *Gregory E. Abel Direct Testimony, July 15, 2005, page 7.* MEHC has identified the energy industry as a preferred area for investment of a significant amount of its capital resources in the coming years, including capital made available by Berkshire Hathaway. *Gregory E. Abel Direct Testimony, July 15, 2005, page 11.* MEHC believes that PacifiCorp’s incremental cost of long-term debt will be reduced as a result of the acquisition, due to the association with Berkshire Hathaway. Historically, MEHC’s utility subsidiaries have been able to issue long-term debt at levels below their peers with similar credit ratings. *Gregory E. Abel Direct Testimony, July 15, 2005, page 15.*

n. Since March 2000, MEHC has not declared or paid a dividend to its common shareholders or to Berkshire Hathaway. Instead, earnings have been retained at the operating company level to maintain or improve credit quality and support the capital investment programs of MEHC's regulated subsidiaries. *Patrick J. Goodman Direct Testimony, July 15, 2005 page 19.*

### **III. PACIFICORP'S JUSTIFICATIONS FOR THE PROPOSED PCAM ARE INSUFFICIENT AS A MATTER OF LAW.**

In Docket UE-050684 before the Washington State Utilities and Transportation Commission, PacifiCorp proposed a power cost adjustment mechanism that was effectively identical to the one proposed in this docket. In Washington as in Utah, PacifiCorp justified the request by the same general statements. PacifiCorp asserted: 1) It has not recovered from ratepayers \$1.9 billion in net power costs system wide, undermining its ability to earn its authorized rate of return; 2) The PCAM would allow full recovery of net power costs; 3) A PCAM would benefit customers by improving the Company's credit quality and lowering the cost of borrowing money; 4) Major credit agencies impute debt on long-term purchased power agreements, and having a PCAM in place would reduce the risk of a credit downgrade, and; 5) A PCAM would give customers better price signals to respond to higher power costs. *WUTC Order Rejecting Tariffs, Docket UE-050684, April 17, 2006, ¶ 71.*

The Washington Commission on April 17, 2006, rejected PacifiCorp's proposal as lacking foundation and detail. The Washington Commission found that PacifiCorp's

rationale for a PCAM, the same rationale PacifiCorp uses in this case, was incomplete or flawed. In neither application does PacifiCorp show that current power cost volatility is due to extraordinary events or events that cannot be addressed by traditional cost recovery mechanisms. The Washington Commission found that PacifiCorp's proposal was not tailored to address short-run cost changes due to extraordinary or unusual events. The Washington order identifies how narrowly designed power cost adjustment mechanisms addressed the unprecedented 2000-2001 energy markets. In Utah, PacifiCorp was granted interim relief to respond to claims of serious financial harm due to this market.

In both records, PacifiCorp asserts that its un-recovered net power costs in selective years after 2001, prove that substantial market price variability will continue. PacifiCorp's beliefs and expectations are not supported by rigorous analysis or statistical evidence. *D. Larson Direct Testimony, line 78-8; M. Widmer Direct Testimony, line 74-76.* The market variability evidenced in Washington and in this docket is variability that utilities encounter in normal operations, and address with available forecasting and planning systems. In neither record does PacifiCorp establish that its PCAM is necessary to address the market variability that currently exists or that cost recovery mechanisms in place are inadequate. In Utah those techniques include utilizing future test years, weather normalization, IRP processes, and the Energy Resource Procurement Act.

The Washington Commission noted the presence of a very important flaw in the Washington proposal that is shared by the proposed Utah PCAM. The Washington Commission said: “[W]e observe that power cost recovery mechanisms should also apportion risk equitably between ratepayers and shareholders. In striking that balance, we consider risks already allocated through the normalization process, a utility’s financial condition and other circumstances affecting a utility’s ability to recover its prudent expenditures. Deadbands and sharing bands are useful mechanisms, not only to allocate risk, but to motivate management to effectively manage or even reduce power costs.” *WUTC Order Rejecting Tariffs, Docket UE-050684, April 17, 2006, ¶ 96.*

The Washington Commission concluded: “In sum, we reject the proposed PCAM for three reasons: 1) It should focus on short-term costs subject to market volatility or other extraordinary events that are beyond the Company’s control, and should not include costs for new generation; 2) The 90/10 sharing band and the absence of a deadband do not adequately balance risks and benefits between shareholders and ratepayers, and; 3) An acceptable allocation methodology is a prerequisite to establishing a PCAM.” *WUTC Order Rejecting Tariffs, Docket UE-050684, April 17, 2006, ¶ 99.*

This Commission too, rejected unsubstantiated claims for extraordinary relief due to what PacifiCorp believed would happen in energy markets. Following the interim rate increase, after a full hearing of Docket No. 01-035-01, the Commission’s September 10, 2001 Report and Order addressed PacifiCorp’s proposed net power cost determination

and PacifiCorp's expectation that very high prices will continue in coming months. The Commission found:

Our annualization rule requires a change occurring during the test year to be ongoing. Given the extreme volatility of the regional wholesale market, and the record in this Docket, we find no basis for assurance that the high prices experienced in the June through September period will continue. The Company acknowledges as much, citing as reasons for the recorded recent decline in wholesale prices the effect of conservation, cooler weather, the newly introduced FERC price caps, the removal of nitrous oxide costs from price caps, and a general economic slowdown. We are aware that drought in the Pacific Northwest has adversely affected the availability of hydro resources, and this in turn is an important contributing factor to regional wholesale price increases during the test year. Hydro conditions of this sort cannot be assumed to continue; indeed, the variability of hydro resources from year to year is the very reason that net power cost modeling normalizes Northwest hydro conditions based on a 50-year experience. We also know that institutional and structural changes in the regional wholesale market have occurred. A key example is how California's load is served. Formerly, a large portion of California's load was served by California Power Exchange purchases on the day-ahead spot market. This was a source of much of the volatility in the regional wholesale market. Now, however, the Power Exchange has been disbanded, and California's needs are in large part being met with long-term contracts secured by the State. Beyond this, and as a conceptual concern, future prices are unknowable in advance. For all such reasons, we have no confidence that the Company's annualization procedure adequately captures changes of an ongoing nature. Accordingly, the Company's proposed annualization of short-term firm and non-firm prices is not accepted. As in past dockets, actual prices will be employed in net power cost modeling.

Of the \$142.2 million interim rate increase request, PacifiCorp attributed \$95 million to the extraordinary cost of power purchases in the wholesale power market. The Commission's interim award of \$70 million for changes in net power costs only, was reduced to \$40.5 million increase to **all** revenues for expenses incurred in providing

service, requiring a refund of \$30 million. What was a looming financial crisis in February 2001, by September became an ordinary state of affairs.

The Application protests too much about the necessity of the PCAM for the utility's opportunity to earn its authorized rate of return. Mr. Widmer goes so far as to say that the opportunity may be "eliminated." *M. Widmer Direct Testimony, line 26-36.* PacifiCorp's Application and testimony do not substantiate in the slightest, this bold statement. The net power costs and energy market PacifiCorp describes in the Application do not even approach the circumstances that the Commission addressed in ruling upon the Emergency Motion filed in Docket No. 01-035-01. All of the evidence available to the Commission at this time establishes instead that PacifiCorp is financially sound with favorable credit, and has access to capital from the party owning 80% of MidAmerican shares, which party does not require dividends.

### **CONCLUSION**

The lesson to be learned from Docket No. 01-035-01 and from the Washington Commission is that PacifiCorp's alarmist testimony supporting the PCAM proposal, relying upon speculative conditions and non-recurring events, as a matter of law, does not meet the heavy burden of proof that always rests upon PacifiCorp alone. When considered together with the persuasive argument in UIEC's Motion to Dismiss, there should be no doubt that Utah law requires the Commission to dismiss PacifiCorp's Application.

Dated this 7<sup>th</sup> day of July 2006.

/s/ \_\_\_\_\_  
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BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Application of ) DOCKET NO. 05-035-102  
PACIFICORP dba UTAH POWER & )  
LIGHT COMPANY for Approval of ) CERTIFICATE  
Its Proposed Power Cost Adjustment ) OF SERVICE  
Mechanism. )

I hereby certify that a true and correct copy of the Utah Committee of Consumer Services Response to UIEC Motion to Dismiss was served upon the following by e-mail, July 7, 2006:

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