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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of Excess PacifiCorp Income  
Tax Cost Monies Collected in Rates

Docket No. 05-035-98

**RESPONSE MEMORANDUM OF  
DIVISION OF PUBLIC UTILITIES**

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The following is a response by the Division of Public Utilities (DPU) to the Motion to Dismiss filed by PacifiCorp in response to the Request for Agency Action filed by the Committee of Consumer Services (CCS).

**INTRODUCTION**

On October 6, 2005, the CCS filed its Request for Agency Action dealing primarily with the results of an audit by the SEC staff, which found that from 2000 to 2003 certain monies kept at the PacifiCorp Holdings, Incorporated (PHI) level should have been reallocated back to the subsidiary, PacifiCorp. The CCS Request claims that the effect of the audit and the findings of the SEC create a potential remedy against the Company and create a potential exception to the rule against retroactive ratemaking. The CCS claims that this exception is created by the lack of disclosure by the Company of the effect of the SEC audit.

UIEC has essentially joined the CCS in claiming that the Company did not adequately disclose the effect of the SEC audit and therefore an exception to the rule against retroactive ratemaking may very well apply. UIEC claims that PacifiCorp has never properly accounted for the effects of the SEC audit. Both UIEC and the CCS raise numerous other issues which affect the validity of past rate cases, including settlements to which both UIEC and the CCS were parties.

Both parties argue that an exception to the rule against retroactive ratemaking may apply as a result of the SEC audit. In addition, both parties request an investigation into the SEC audit and raise the possibility of other remedies other than refunds or application of the rule against retroactive ratemaking. The issues raised by the audit and the effects of PUHCA are complex.

On November 21, 2005, Questar Gas filed a request to intervene in this docket stating that the outcome of this proceeding may have a direct and substantial impact on the regulatory and ratemaking process of Questar Gas.

On November 18 and 21, 2005, UIEC and the CCS, respectively, filed responsive pleadings to the Motion to Dismiss. On December 1, 2005, PacifiCorp filed a reply memorandum to both of those responses. In its response, the Company addressed the inapplicability of the rule against retroactive ratemaking as being the main justification for dismissal at this time.

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## **THE COMMISSION SHOULD BE CAUTIOUS IN GRANTING A MOTION TO DISMISS, PARTICULARLY WHERE MISCONDUCT IS ALLEGED**

The pleadings filed by the parties set forth case law and argument concerning the standard for granting a Motion to Dismiss, but PacifiCorp's conclusion differed from that of the Committee and UIEC. In addition, the Committee appears to have adopted an "understood" criterion as the basis for application of the misconduct standard. Such a criterion could be a potential expansion of the rule against retroactive ratemaking, and the DPU initially believes that such an expansion could be inappropriate. Although the DPU has nothing else in particular to add to the legal standard outlined in the parties' pleadings discussing Utah cases addressing when a Motion to Dismiss is appropriate, the DPU would like to provide some comments on past Commission actions on Motions to Dismiss.

In two prior cases alleging misconduct, the Utah Supreme Court held that the Commission should hold a hearing to determine if an exception to the rule against retroactive ratemaking should apply.<sup>1</sup>

In a more recent case where a refund was sought and misconduct was an issue, the Commission refused to grant a Motion to Dismiss and allowed discovery to take place. The Commission did, however, ultimately grant a Motion for Summary Judgment.<sup>2</sup>

The DPU recommends that, based on prior precedent, the Commission should be cautious in dismissing complaints where misconduct is alleged. It is

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<sup>1</sup> See *MCI v. Public Service Commission*, 840 P.2d 765, 775-76 (1992) and *Salt Lake Citizens Congress v. Mountain States Telephone and Telegraph*, 846 P.2d 1245,1256 (1992).

<sup>2</sup> See *In the Matter of the Formal Complaint of Beaver County, et al.*, Docket No. 01-049-75 (June 17, 2005).

possible that once sufficient discovery is completed, a Motion for Summary Judgment would be appropriate. The DPU would like to make it clear that its position in this pleading is not meant to imply that it has made a determination as to the ultimate proper disposition of the Request for Agency Action.

### **RECOMMENDATION**

In the limited amount of time since the filing of the Request for Agency Action, the DPU has met with the CCS, the Company, and UIEC to try and understand the requested relief. A number of data requests were sent to both the Company and the CCS. Based on our preliminary review the DPU has neither reached a conclusion nor been able to formulate a recommendation as to whether the CCS Request for Agency Action or UIEC's pleading in response has merit, or as to whether there is a remedy within the Commission's authority. Nevertheless, the DPU believes that the Commission should rarely dismiss serious allegations without discovery and that the Commission should consider allowing the CCS, PacifiCorp, and other parties to conduct discovery and, possibly, to file testimony before any attempted summary disposition of this docket is addressed. We further recommend that the Commission hold a scoping and scheduling conference in this docket.

RESPECTFULLY SUBMITTED, this \_\_\_\_\_ day of December 2005.

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Michael L. Ginsberg  
Patricia E. Schmid  
Attorneys for the Division  
of Public Utilities

## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **RESPONSE MEMORANDUM OF DIVISION OF PUBLIC UTILITIES** was sent by electronic mail and mailed by U.S. Mail, postage prepaid, to the following on December \_\_\_\_\_, 2005:

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