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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Company Pacificorp PC/UP&L Merging Corporation	)))	Docket No. EC88-2-000

MOTION TO INTERVENE
AND COMMENTS OF
POTOMAC ELECTRIC POWER COMPANY

Potomac Electric Power Company (Pepco; Company), pursuant to Rule 214 of the Commission's rules of practice and procedure (18 CFR §385.214), hereby moves the Commission to grant Pepco leave to intervene in the above-captioned proceeding. In support of its Motion, Pepco shows the following:

I.

By Opinion And Order issued October 26, 1988 herein (Opinion No. 318), as modified by Order Clarifying Opinion issued October 28, 1988 herein, the Commission has imposed conditions on the proposed merger of Utah Power & Light Company and Pacificorp which, if accepted by the applicants, would constitute "an absolute obligation on the merged company to provide firm wholesale transmission service at cost-based rates to any utility that requests such service" in order "to provide a long-term remedy to the likely anti-competitive effects of the merger." Opinion 318, supra, mimeo p. 38.

Pepco submits that this "absolute obligation," absent compelling antitrust concerns, amounts to the imposition of common carrier status on the merged company in contravention of the Federal Power Act, and potentially confiscates the facilities and impairs the contractual obligations of the merged company in contravention of the Constitution. Accepting arguendo, however, that this "absolute obligation" is a lawful exercise of the Commission's power under §203 of the Act as applied to the particular facts herein, the broad regulatory policy implicit in the "absolute obligation" is

dangerously flawed.* It presumes (without reference to any evidence) that the merged company could always construct additional transmission facilities within five years sufficient to accomodate all requests by other utilities for firm transmission service. It therefore requires that the merged company provide all requested firm transmission service within five years, even by displacing existing transactions for its own customers if necessary; and it requires that this be done without any recovery of the lost opportunity costs of providing such transmission service. Id. at 44. The high value of the transmission facilities is thus confiscated at embedded cost rates. Moreover, the Commission imposes this "absolute obligation" permanently, which clearly is longer than could possibly be necessary to overcome any "likely anti-competitive effects of the merger." The permanence of the obligation in fact assures that any alleged anticompetitive effect will be perpetuated, because it removes any incentive for others ever to construct alternative facilities.**

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* Pepco takes no position on the merits of the application or the proposed Commission conditions of approval except as they relate to the generic and precedental nature of the transmission obligations which would be imposed. However, Pepco notes that as a matter of logic and policy, whatever the particular facts, a permanent obligation to wheel cannot rationally be supported as the cure for a temporary anticompetitive circumstance.

** In a recent speech to the Energy Daily Annual Utility Conference on November 4, 1988, appended hereto as Appendix A, Commission Chairman Hesse said of Opinion No. 318,

> "The difficult issue for the Commission was to come up with transmission access conditions targeted to remedy the anticompetitive effects shown in the record. The key was to provide incentives for building new transmission capacity and thereby avoid long-term anticompetitive results."

But Opinion No 318 does not provide such incentives. On the contrary, the permanent "absolute obligation" eliminates any incentive that competing utilities might have had to invest in, site, obtain permits for, and construct -- in short, take the risk of building -- the alternative facilities of their own needed to create the state of competition in transmission services the Commission finds presently lacking.

Pepco submits that to impose such a transmission burden on an electric utility for any reason constitutes a radical new departure in the Commission's treatment of transmission services, having profound implications for electric utilities generally if applied in other areas of the nation, most of which operate under completely different circumstances and follow different policies of access.* These implications, especially from the Commission's apparent assumptions (1) that new transmission can be built on demand without regard for limitations neither the utility nor FERC can control, and (2) that lost opportunity costs (from economy energy transactions displaced by firm power commitments) can be disregarded, have not been fully considered and, Pepco submits, could substantially disrupt the nascent value-based market in voluntary transmission services in Pepco's region. Adopting the "absolute obligation" in this case would fly in the face of the Commission's stated intention to proceed cautiously, carefully and by rulemaking to establish generic policy in the sensitive area of transmission services.**

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* Pepco, for example, operates in the mid-Atlantic region which has a well developed bulk power market, facilitated by single-area power pooling and other coordination policies, and which offers a multiplicity of suppliers, purchasers, contract paths, and types of capacity, energy and transmission transactions. The Commission's approval of value-based transactions in the region has been a major encouraging factor. See, e.g., the Pepco capacity purchase accepted for filing in Monongahela Power Co., et al., 39 FERC ¶61,350, rehearing denied, 40 FERC ¶61,256 (1987); the Baltimore Gas & Electric Co. transmission entitlement auction procedure approved in Baltimore Gas & Electric Co., 40 FERC ¶61,170 (1987).

** In Appendix A, supra, Chairman Hesse refers to the recently formed transmission task force, headed by Commissioner Stalon and staffed by OEPR Director Herod, which is intended to "address transmission issues on a more generic basis." Thus it is admittedly premature for the Commission to be issuing precedental transmission policy decisions; yet Opinion No. 318 does not confine its implicit transmission policy to the facts in the record. Chairman Hesse suggests in her speech that generic policy is intended when she states:

> "Not only do we have to price transmission efficiently, but we have to encourage greater wholesale access. It is becoming increasingly clear that transmission pricing alone may not provide

(cont'd)

Accordingly, Pepco urges the Commission to reconsider on its own motion the transmission conditions that would be imposed on the subject merger by Opinion No. 318 (without regard for the acceptability of those conditions to the merging parties, who are in no position to represent the interests of other electric utilities). On reconsideration, Pepco urges the Commission to modify those conditions, at a minimum: so that lost opportunity costs are recovered by any transmitting party as part of its cost of supplying firm tranmission service; so that the obligations pursuant to Opinion 318 are phased out after a sufficient number of years that the merged company's affected competitors might reasonably construct alternative facilities of their own; and so that the Opinion makes clear that the several conditions of merger finally imposed are unique to the facts and anticompetitive concerns of this proceeding and not to be considered generic transmission policy or precedental in nature.

II

Pepco has a significant interest in the outcome of this proceeding, in light of the precedent-setting directives of the Commission with respect to transmission obligations of the merged company, revealed for the first time in Opinion No. 318*. Pepco could not reasonably have foreseen that the

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> sufficient incentives for transmission owners to open up their lines. We must find regulatory incentives for greater wholesale access, without resorting to forms of mandatory access."

With value-based pricing there are ample incentives; the Commission's denial of lost opportunity costs is an enormous disincentive and unfair to the requirements customers for whom transmission is built. Furthermore, the Commission should acknowledge that where even value-based pricing incentives are not sufficient, then there must be other constraints on transmission construction, constraints that cannot be ignored by imposing "absolute" obligations to provide transmission service within five years.

* The intended precedent-setting nature of Opinion No. 318 has been announced; Commission Chairman Hesse's speech on November 4, 1988, Appendix A hereto, contains her clear statement that hereafter the Commission should impose "regulatory incentives for greater wholesale access." See also the preceeding footnote.

Commission's response to the Application herein would be to order the merged company to wheel forever for others as a common carrier. The far-reaching implications of Opinion No. 318 will apply to each electric utility according to its own unique circumstances; accordingly, no other party can adequately represent Pepco's interests in this proceeding.

Pursuant to Rule 214 (d), Pepco submits that the foregoing demonstrates good cause for the filing of this motion to intervene after the date originally fixed by the Commission. Granting Pepco's motion to intervene would not disrupt the proceedings or prejudice the existing parties, as Pepco accepts the evidentiary record as it now exists, and Pepco's interest is only in the potentially precedental nature of Opinion No. 318 and not in any opinion or order rendered herein which is confined to the unique facts of this proceeding.

III

Pepco, a District of Columbia and Virginia corporation, is a public utility subject to Parts II and III of the Federal Power Act. Pepco sells electricity at retail within the District of Columbia and adjacent portions of Maryland, and is the full-requirements wholesale supplier of Southern Maryland Electric Cooperative, Inc.; Pepco is also a member of the Pennsylvania-New Jersey-Maryland Interconnection (PJM), a mid-Atlantic region power pool, and is interconnected with other electric utilities.

All correspondence and communications with respect to this proceeding should be addressed to Pepco's principal place of business as follows:

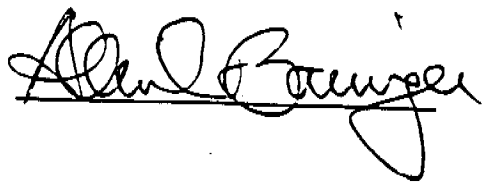
Allen C. Barringer, Associate General Counsel
Potomac Electric Power Company, Room 841
1900,Pennsylvania Avenue, N.W.
Washington, D.C. 20068

202-872-2890

WHEREFORE, Potomac Electric Power Company requests leave to intervene

in this proceeding and submits the foregoing comments and request for reconsideration of Opinion No. 318 by the Commission on its own motion.

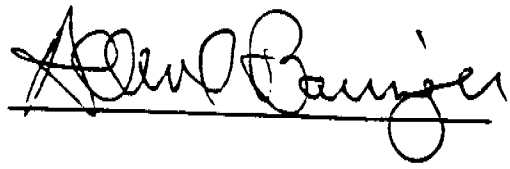
Respectfully submitted,
POTOMAC ELECTRIC POWER COMPANY

by 

Washington, D.C.
November 22, 1988

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion To Intervene And Comments upon each of the persons designated on the official service list compiled by the Secretary in this proceeding, in accordance with Rule 2010, this 22nd of November, 1988.



REMARKS BY MARTHA O. HESSE

CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION

Energy Daily Annual Utility Conference

Washington, DC

November 4, 1988

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

REMARKS BY MARTHA O. HESSE
CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION
Energy Daily Annual Utility Conference
Washington, DC
November 4, 1988

- It's a pleasure to be here this morning, to discuss issues which are of vital importance to all of us involved in the electric utility business. What I hope to do in the next few minutes is to give you a brief overview of where the FERC is headed and offer some insight into the ongoing regulatory movement.

- As all of you know, there has been a great deal of talk in the past year about the future of the electric industry. At one point or another, we all have been part of the debate concerning the Commission's approach in reforming its electric regulations. As this debate continues, we should not lose sight of two critical points.

- First, regulatory reform is being driven by the market. The electric industry is steadily evolving as utilities and customers are confronted with ever-changing energy markets. We are seeing evolution, not revolution.

- And second, a tenet of evolution is that only those who can adapt to change will survive.

- I believe that regulators have the responsibility to provide as much regulatory flexibility as possible to allow utilities and customers to adapt. In other words, to give them the opportunity to respond to economic incentives in the marketplace, so that they can have greater influence on the course of their own futures. This means that regulators, too, must adapt.

- Some have characterized this regulatory philosophy as deregulation. I disagree. Only Congress can deregulate, and it shows no inclination to do so. The commission has a statutory obligation to ensure that consumers get adequate, reliable supplies of electricity at the lowest possible cost. Greater reliance on competitive markets is a tool for meeting that responsibility. It is not deregulation, but a different means of regulating. And, as we've seen on the gas side, the consumer is the ultimate beneficiary.

- With this background in mind, I would now like to turn to specific actions the Commission is taking to move away from traditional, heavy-handed regulation. The Commission is proceeding both on a generic and a case-by-case basis to provide greater flexibility and regulatory certainty to all players in the electric business.

NOPRs

- First, I want to discuss the activity involving generic reform of our regulations. As you know, last March, the Commission issued three rulemaking proposals which are aimed at fostering the development of non-traditional electric power suppliers. This includes qualifying cogenerators and small power producers under PURPA, as well as independent power producers that do not qualify under PURPA but that have no market power in the areas where they sell.

- Two of the rulemakings address how to determine the avoided cost rates that utilities must pay for electricity bought from qualifying facilities, or QFs, under PURPA. The first would provide additional guidance to states and non-regulated utilities that decide to administratively determine avoided cost rates. The second would make it clear that competitive bidding may also be used as an alternative means of pricing QF power.

- The third proposed rulemaking involves the Federal Power Act, and would streamline both rate and non-rate regulation for certain independent power producers that do not qualify as QFs. We call these independents "IPPs" for short.

- There are two fundamental themes running throughout all three of these rulemakings. The first is to provide greater options for more efficient, reliable sources of supply for utilities to serve consumers. The second is to better balance the risk undertaken by investors in power plants with the opportunity for reward.

- The proposals would increase the options available to utilities to get the best deal possible for consumers when they search for new generating capacity. The choice may be power from the utility's own generation, from a QF, or from a non-QF independent power producer. But the point is to give all potential power producers a fair chance to compete and to give the local utility more choices which allow it to serve consumers as efficiently as possible.

- I would emphasize that these proposals deal with wholesale, not retail transactions. The end-consumer would be left indifferent as to the source of power. But the end-consumer would realize the benefits of more efficient wholesale markets, through lower electricity prices in the future.

- The proposed rulemakings do not favor one type of power producer over another. However, there is considerable evidence that our nation is becoming increasingly reliant on non-traditional independent power sources.

- Indeed, just last month the North American Electric Reliability Council released a report which projects that by 1997, some 20,000 megawatts, or 27 percent, of new capacity will come from sources that are not owned exclusively by traditional utilities. Although it's becoming increasingly difficult to predict these numbers, it's clear that non-traditional generators are on the increase.

- There are also individual examples of growing reliance on third-party power. This year, Northeast Utilities announced that by the early 1990s it will be getting 13 percent of its peak power from independents.

- Another example is the enthusiastic response Virginia Power received to its 1988 solicitation for external power supplies through the year 1994. This past June, Virginia Power received bids for 95 projects involving over 14,000 megawatts of capacity -- eight times the capacity needed. Almost half of that capacity was proposed by independent power producers.

- A few weeks ago Virginia Power announced its project selection. It will obtain 35 percent of the capacity from IPPs, 54 percent from cogenerators, and 11 percent from small power producers. Although Virginia Power will build some new capacity of its own, its analysis showed that it could not build all of its needed new capacity more cheaply than these projects could provide it. By the way, it estimates that this new capacity, based on a levelized, life cycle analysis, will cost less than 5 cents per kilowatt hour, excluding transmission costs.

- Yet a further example of non-traditional power supply is the Ocean State Power Project, which is being constructed in Rhode Island. It will consist of two gas-fired generating units, to be owned by a partnership, and unit sales to be made to several New England utilities. Affiliates of TransCanada Pipelines will own 40 percent of the equity interest in the project, with the remaining ownership by several electric utilities. I will talk more about this project later.

- I think these examples show that increasing reliance on non-traditional power suppliers is becoming a fact of life for many utilities, and whether the Commission acts generically or on a case-by-case basis, everyone will have to deal with this evolution in the industry.

- The Commission's proposals would help encourage the broadest possible range of supply sources, including developing IPPs to their full potential. In addition to the increased supply choices that would be encouraged by the use of

competitive bidding mechanisms, the IPPs proposal would add to the range of suppliers who compete either through bidding or through negotiation on the open market.

- This leads me to the second fundamental theme underlying the Commission's proposals -- encouraging new power supplies by providing investors with a more symmetrical risk-reward system.

- Both the IPPs and bidding proposals seek to balance risks and rewards for wholesale sellers of electricity, as well as to give more up-front regulatory certainty. For entities that qualify as IPPs, the proposal would allow FERC to accept rates that are set either through bidding or negotiation, as long as these prices don't exceed a price cap equal to the purchasing utility's avoided cost. And for entities that win a competitive bidding solicitation, the bidding proposal would allow those rates to be accepted by the FERC. In these circumstances, power producers would no longer be constrained by cost-of-service pricing and a limited rate of return.

- So while the technologies used by non-traditional power producers may not change, and in some cases the players may not change, the nature of the regulatory process will change, so as to improve incentives for efficiency.

- In addition to these three proposals, in July of this year the Commission issued a fourth proposed rulemaking, also involving PURPA. This proposal primarily deals with technical QF certification requirements, but also seeks comment on the extent to which utilities of their subsidiaries may own QF facilities.

- The Commission will hold a public hearing on this NOPR on December 1.

- All of the four proposed rulemakings are in the formal comment stage, and the Commission will have a number of major issues to decide as it proceeds down the road to formulate final rules. And although I don't know where we will finally come out on these issues, I can assure you that I do not intend to vote for any final rules that are not supported by, or responsive to, the evidence in the record.

INNOVATIVE CASES

- As we work on the generic rulemaking issues, we are at the same time moving ahead on individual cases in both the generation and transmission areas to respond to the evolution spawned by an increasingly competitive electric market. Indeed, utilities and customers alike are

responding to market forces by reaching significant and sometimes novel agreements which they are bringing to us for approval.

- Let me now describe some of these cases. I think you will see some common threads in these individual decisions that are also in the NOPRs.

- First, in the generation area is the Orange and Rockland case approved this past winter. Orange and Rockland, which operates in New York and New Jersey, asked the Commission to approve standard offer contracts under which it could purchase up to 50 megawatts of peaking capacity from its industrial and commercial customers that have existing excess capacity. These customers fall within the definition of IPPs in our proposed rulemaking, and Orange and Rockland sought to have the rate based not on the seller's cost of service, but on the utility's avoided cost.

- Orange and Rockland explored a number of alternative generating options and concluded that none could alleviate peak capacity shortages as economically or as efficiently --and at the same time use an existing source of capacity that would otherwise remain idle. The commercial and industrial companies will benefit, and Orange and Rockland can postpone construction of costly new generating capacity.

- In approving the proposal, the Commission allowed Orange and Rockland to file on the IPPs' behalf, waived burdensome filing requirements that would otherwise have fallen on the IPPs, and streamlined its rate and non-rate regulation of the IPPs.

- Another case in the generation area is the Ocean State project which I referred to earlier. Last year the Commission gave advance rate approval for 20-year unit power sales contracts for sales from a unit that won't go into operation until 1989. The agreements contain formula rates and provide incentive provisions that are tied to the unit's performance and availability.

- Under these incentive provisions, the company's earned rate of return will depend on whether it constructs the unit in a timely fashion and whether it runs the unit efficiently. An important aspect of the provisions is that they offer at least a partial substitute for potential after-the-fact prudence reviews. Inefficiencies in construction and operation will be reflected immediately in the revenue stream. This should help avoid potential after-the-fact hearings before the Commission.

- Yet another Ocean State proposal, involving the same project, came before the commission this past August. Ocean State has power contracts with four purchasers, three of whom are affiliates of companies that have ownership interests in the project. The formula rates approved last year did not specify a rate of return for the project. Ocean State came in and sought approval to amend the power contracts to specify a return which would equal 115 percent of the Commission's benchmark rate of return.

- The Commission approved the 115 percent rate of return on the basis that the return was negotiated as part of a package, along with the incentive provisions, in a competitive power supply market.

- The market-oriented approach used in both of the Ocean State orders represents an efficient means of establishing a risk premium for innovative projects, and providing incentives for efficient behavior.

- In addition to the innovation in generation pricing, the industry has also brought to us several significant agreements which involve transmission pricing.

- The first of these came before the Commission last year and involved the Baltimore Gas & Electric Company. As a member of the PJM power pool, BG&E has certain entitlements in a valuable pool intertie over which PJM members import coal-generated power from the mid-west. BG&E proposed auctioning to other PJM members the unused portion of its share of the intertie on a monthly basis.

- The Commission approved the BG&E proposal because it was satisfied that any price that resulted from the auction would not reflect any significant degree of market power. Each of the potential buyers -- other PJM members -- has substantial generating resources of its own as well as transmission connections to power sources other than those available through the intertie.

- Market power by BG&E is further mitigated by other potential sellers of intertie capacity. Some of the other eight owners could decide to sell their shares and thus compete with BG&E. In fact, Potomac Electric Power Company recently received approval to do just that.

- While auctioning is not always a panacea for transmission pricing and access, the BG&E case does show that it can be appropriate under certain conditions.

- Another example of industry-proposed innovation is the interconnection agreements between Pacific Gas & Electric Company and two of its captive customers -- the Turlock and Modesto Irrigation Districts. Under these 20-year contracts, the company agreed to provide any amount of long-term generation services and transmission access that the customer initially requests and to do so at average cost-based rates.

- PG&E also agreed to provide additional long-term transmission access that might be requested later. If the additional service requires new transmission facilities or upgrading existing ones, PG&E will do so at incremental cost.

- In return, PG&E's obligation to serve is limited to the amount of initially requested generation service; all other generation services, as well as short-term transmission service, are completely voluntary and flexibly priced, subject to certain price ceilings.

- These agreements address many of the problems associated with expanded transmission access. Importantly, they give the previously captive utilities the long-term access to alternate suppliers which they need to independently plan their own resource futures.

UP&L/PACIFICORP MERGER

- In addition to these recent cases, last week we acted on one of the most important electric items to come before the Commission in some time: the proposed merger between Utah Power & Light and PacifiCorp.

- The Commission issued an order approving the proposed merger, subject to certain conditions, including transmission access, that the Commission decided were necessary to protect the public interest.

- The record in the PacifiCorp proceeding showed that the merged company's enhanced control over transmission would tend to produce anticompetitive effects. The merged corporation would control significant portions of transmission capacity that is used to market relatively cheap electricity from the northwest and Rocky Mountain areas to southwestern markets, mostly in California and southern Nevada. This control could be used to foreclose a significant amount of regional trade by the merged entity refusing to wheel over the strategic transmission facilities.

- The difficult issue for the Commission was to come up with transmission access conditions targeted to remedy the anticompetitive effects shown in the record. The key was to provide incentives for building new transmission capacity and thereby avoid long-term anticompetitive results.

- The Commission found that to remove the anticompetitive effects, the merged company will have to assume a long-term obligation to build or otherwise provide firm wholesale transmission service to any electric utility requesting it, at cost-based rates. A five-year transition period will be established to allocate existing excess capacity in the interim.

- The order conditioning the merger is subject to rehearing. However, Utah Power & Light and PacifiCorp have announced that they will accept the conditions laid out in the order and plan to proceed with the merger.

- I am pleased that we were able to protect the public interest in a fashion that also preserved the efficiencies being sought by the merging utilities. This difficult case certainly exemplifies the complexity of dealing with transmission issues and fashioning access conditions to remedy anticompetitive effects.

- In addition to dealing with transmission issues raised in individual cases such as PacifiCorp, I believe that the Commission should address transmission issues on a more generic basis. It is for this reason that I recently formed a transmission task force comprised of Commission staff members and the Commissioners' electric assistants. I have also asked Commissioner Stalon to head up this task force. And our director of Electric Power Regulation -- Steve Herod -- will coordinate staff's participation in the effort.

CONCLUSION

- In closing, I believe that a three-prong approach is necessary to foster more competitive markets in electricity.

- First is generation. Many utilities are reluctant to undertake major generation construction to fill future capacity needs. We must encourage alternative generation supply options, and we must get generation pricing right.

- Second is transmission. Not only do we have to price transmission efficiently, but we have to encourage greater wholesale access. It is becoming increasingly clear that transmission pricing alone may not provide sufficient

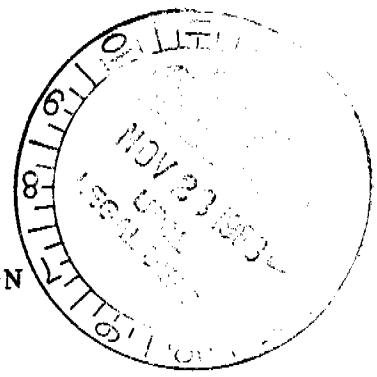
incentives for transmission owners to open up their lines. We must find regulatory incentives for greater wholesale access, without resorting to forms of mandatory access.

- Third is amendment of the Public Utility Holding Company Act. The FERC can go only so far in encouraging more competitive markets. There are several promising possibilities for modifying the Act, which would remove constraints against independent power development, yet not conflict with the intent of the Act. Such a modification would go a long way toward encouraging real opportunity for competition among sellers.

- The Commission, of course, has no authority regarding the Holding Company Act. But we can, and, as I've just described, we <u>are</u>, working on reform in generation and transmission. I have chosen to address generation first at the Commission, and we are well on our way in this area in both the NOPRs and individual cases.

- In the meantime, I can assure you that we are not neglecting transmission issues. As I indicated earlier, our transmission task force is working on putting together a comprehensive and practical approach to transmission.

- In closing, let me repeat that the evolution of the electric industry is well under way, and we regulators -- like all others in the electric business -- must adapt in order to successfully fulfill our responsibilities. Only by moving toward more flexible regulation can we help to ensure consumers efficient and reliable supplies of electricity.



UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Company	)	
	)	
Pacificorp	)	Docket No. EC 88-2-000
	)	
PC/UP&L Merging Corporation	)	

MOTION TO INTERVENE OUT OF TIME
AND REQUEST FOR REHEARING OF
TEXAS UTILITIES ELECTRIC COMPANY

Pursuant to Rules 214 and 713 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, Texas Utilities Electric Company ("TU Electric") hereby moves to intervene out of time and requests rehearing of the Commission's Opinion and Order issued in the above-captioned proceeding on October 26, 1988, approving the merger of Utah Power & Light Company and Pacificorp, subject to certain conditions relating to transmission and other matters. In support thereof, TU Electric states as follows:

I.

TU Electric requests that all communications concerning this proceeding be sent to the following:

*M. D. Sampels
Worsham, Forsythe,
Sampels & Wooldridge
3200 - 2001 Bryan Tower
Dallas, Texas 75201
(214) 979-3000

T. Michael Ozymy
Vice President
Rates and Regulatory
Texas Utilities Electric
Company
19th Floor - 2001 Bryan Tower
Dallas, Texas 75201

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* Pursuant to Rule 203, M. D. Sampels is designated for service and for receipt of communications in this proceeding.

II.

TU Electric is a subsidiary of Texas Utilities Company, a utility holding company, having its principal office and place of business at 2001 Bryan Tower, Dallas, Texas 75201. TU Electric is an electric utility engaged in the generation, purchase, transmission, distribution and sale of electricity within the State of Texas.

There is good cause for the Commission to grant TU Electric's late-filed intervention. The transmission conditions imposed in this proceeding will have far-reaching, adverse effects on electric system planning, operations and reliability, particularly if the Opinion and Order become general Commission policy with respect to transmission access. TU Electric did not intervene earlier in this proceeding because the unprecedented mandatory access and construction of new transmission facility conditions, discussed more fully below, could not have been contemplated before or during the proceeding. They were required by the Commission after the close of the record. Any delay or prejudice to existing parties which might result from allowing the intervention is necessary in order for the Commission to properly reevaluate the significant ramifications of its Order. TU Electric's interests are not adequately represented by any other party to this proceeding.

III.

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, TU Electric hereby also requests rehearing of the Opinion and Order issued in this proceeding.[1/] Opinion 318 contains extraordinary and unprecedented conditions relating to

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1/ The Opinion and Order ("Opinion" or "Opinion 318") affirmed in part, modified in part, and reversed in part the Initial Decision issued by presiding Administrative Law Judge Lewnes on June 13, 1988 (43 FERC ¶ 63,030), and conditionally approved the merger of Utah Power & Light Company and PacifiCorp into a surviving company, PacifiCorp Oregon ("merged company").

transmission access and wheeling which impose on the merged company duties far in excess of those required of a common carrier. The Commission requires that the merged company:

1. reallocate existing transmission capacity to other utilities;

2. comply with an "absolute obligation" to wheel power for other utilities after five years, even if so doing would result in a curtailment of the merged company's own use of its transmission facilities;

3. construct new transmission facilities to meet its wheeling obligations to other utilities; and

4. deprive its own ratepayers of economic benefits otherwise available from transmission of off-system sales.

The Commission has exceeded its limited statutory authority to order wheeling which is confined to orders issued pursuant to Sections 211 and 212 of the Federal Power Act ("Act"). 16 U.S.C. §§ 824j-k (1982). The Commission has also exceeded its conditioning authority under Section 203 of the Act. 16 U.S.C. § 824b(b). The conditions should further be rejected for policy reasons as such broad transmission obligations will result in less reliable and more expensive electric service and, if imposed in future proceedings, will halt utility consolidations thereby depriving the public of the economic benefits derived from consolidated operations.

Therefore, TU Electric respectfully requests that the Commission vacate its Opinion and remand the case for further evidentiary hearing or limit its application to the specific facts and findings of anticompetitive effects in this merger and clarify that the transmission conditions imposed in this case will not apply to future mergers, and are not indicative of Commission policy or the generic approach the Commission intends to follow regarding transmission access and wheeling issues.

IV.

In Opinion 318, the Commission found that the proposed merger of Utah Power & Light Company and PacifiCorp was not consistent with the public interest under

Section 203 of the Act because of its "likely adverse effect on competition and on the effectiveness of regulation." Opinion at 14. However, the Commission rejected the Administrative Law Judge's determination that the Commission lacked authority to condition the merger. The Commission then imposed conditions, to be accepted or rejected by the Applicants, that it perceived would render the merger compatible with the Section 203 standard for approval. The Commission held it had authority under Section 203(a) "to order wheeling for so long as such a condition is necessary to avoid the likely anticompetitive effects of a proposed merger, and the tendency of that merger to create a monopoly." Opinion at 24. In addition, it held that the merger's anticompetitive effects on coordination supported the imposition of wheeling conditions under Section 203(b) which authorizes the Commission to grant applications on conditions "necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission." Opinion at 25.

To remedy these perceived anticompetitive effects, the Commission imposed conditions which include "an absolute obligation on the merged company to provide firm wholesale transmission service at cost-based rates to any utility that requests such service." Opinion at 38 (footnote omitted). The Commission also imposed five year transition period conditions during which period the merged company must set aside a portion of its transmission system for use by third parties.

V.

The imposition of the Opinion 318 transmission conditions was premised on the Commission's interpretation of Section 203 of the Act as providing the authority to remedy a merger's likely anticompetitive effects by requiring wheeling. Opinion at 20-25. However, nothing in the Act or its legislative history supports the conclusion that the

Commission has the broad authority it seeks to exercise in this case. The Commission has imposed common carrier obligations that were considered and rejected by Congress. As the United States Supreme Court has held:

> So far as wheeling is concerned, there is no authority granted the Commission under Part II of the Federal Power Act to order it, for the bills originally introduced contained common carrier provisions which were deleted . . . . The common carrier provision in the original bill and the power to direct wheeling were left to the "voluntary coordination of electric facilities."

Otter Tail Power Co. v. United States, 410 U.S. 366, 375-76 (1973) (footnotes omitted); see also Associated Gas Distributors v. FERC, 824 F.2d 981, 988 (D.C. Cir. 1987), cert. denied, ____ U.S. ____, 108 S.Ct. 1468 (1988).

Furthermore, despite the fact that Congress has chosen not to impose common carrier status on public utilities, the Commission, by requiring the merged company to meet any request for service by foregoing its own use of existing transmission facilities or constructing new facilities, has imposed duties which are far in excess of those required of common carriers. The Commission has, therefore, exercised its Section 203 conditioning power in a manner which is inconsistent with the statutory scheme established by Congress. It clearly seeks to do indirectly that which it is prohibited from doing directly. See, Richmond Power & Light Co. v. FERC, 574 F.2d 610, 619-620 (D.C. Cir. 1978). See also Florida Power & Light Co. v. FERC, 660 F.2d 668, 676 (5th Cir. 1981), cert. denied, 459 U.S. 1156 (1983); New York State Electric & Gas Corp. v. FERC, 638 F.2d 388, 401 (2nd Cir. 1980), cert. denied, 454 U.S. 821 (1981); City of Paris v. Kentucky Utilities Co., 41 FPC 45 (1969).

Moreover, the conditions which the Commission is authorized to impose under Section 203(b) have been expressly limited by Congress to those "necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest" of jurisdictional facilities. 16 U.S.C. § 824b(b). Assuming arguendo that this conditioning

authority includes the power to order wheeling, the Commission's authority to do so is not unlimited. Conditions may only be imposed if they will ensure adequate service and coordination. Conditions which undermine these Congressionally mandated objectives are beyond the scope of the Commission's authority and should, in any event, be rejected on policy grounds.

In this proceeding the Commission has imposed transmission conditions which will impair the provision of adequate service and coordination. The conditions will jeopardize the reliability necessary to adequately serve retail customers and will increase ratepayer costs. If applied to future mergers, the conditions will also preclude other utilities from seeking to enhance their efficiency through consolidation. The result will be to halt utility consolidation and thereby deprive the public of the economic benefits associated with consolidated operations.

Under the transition period conditions, the merged company is required to set aside and make available to requesting utilities its remaining existing transmission capacity. There is no limitation on the use other utilities may make of this capacity which may, therefore, be brokered by a requesting utility rather than used merely to serve its own native load. Such wheeling, which is clearly not necessary to secure the maintenance of adequate service or coordination, should not be required by the Commission.

The long-term conditions require that bona fide requests for transmission service be met by use of the merged company's existing capacity or the construction of new facilities and the company is "obligated to plan and construct its system to accommodate all such requests." Opinion at 44 (emphasis added). The merged company would be forced to limit the use of its own system to wheel for others if, for example, federal or state approval to construct the necessary additional facilities is denied. Faced with the possibility of unlimited requests for service, the merged company would also be

effectively precluded from entering into new reserve sharing and coordination or interconnection support arrangements with other utilities. These arrangements are routinely utilized in the industry to enhance system reliability and reduce the cost of maintaining necessary system reserves. Therefore, even if the Commission has the authority to order wheeling pursuant to its Section 203(b) conditioning powers, the transmission services ordered in this case are not "necessary or appropriate." They will, instead, have an adverse effect on adequate service and coordination — the very objectives the Commission is required to secure under Section 203(b).

Finally, the long-term wheeling conditions require providing transmission service to any utility in any amount. The Commission has not limited the utilities the merged company must accommodate to those adversely affected by the anticompetitive effects of the merger. Any utility, whether adversely affected or not, may demand and must receive wheeling despite the fact that reliability and service to the merged company's own customers may thereby be jeopardized. In concluding that it had the authority to order wheeling in this case, the Commission based its holding on findings of the merger's likely anticompetitive effects and the necessity of requiring wheeling to ameliorate these effects. Opinion at 22. However, by imposing transmission obligations without geographic limitation, the Commission has required that the merged company serve utilities unaffected by the very anticompetitive effects the Commission sought to remedy. Therefore, the conditions imposed in Opinion 318 exceed even the scope of the Commission's asserted authority to order wheeling as a remedy for the anticompetitive nature of the proposed merger.

VI.

For the reasons set forth above, the Commission should delete the transmission conditions imposed in Opinion 318. If the Commission continues to maintain that it has

the authority under Section 203 to impose these conditions to remedy the anticompetitive effects found in this merger proceeding, it should nonetheless modify its Opinion. Assuming, without agreeing, that the record in this case supports the anticompetitive findings, the Opinion is not sufficiently clear that these conditions, which also apply to utilities unaffected by the anticompetitive nature of the merger, were justified solely by reason of these findings. The Opinion should be modified on rehearing to explicitly state that, but for specific anticompetitive findings, the Commission does not have authority to order wheeling in future cases. The Commission should also make it clear on rehearing that its actions in this case were not intended to establish a precedent that is to be liberally followed in future merger proceedings and that this case is not indicative of a generic approach the Commission intends to follow in the future with regard to transmission access issues.

WHEREFORE, TU Electric respectfully requests that the Commission issue an order granting its motion to intervene as a party out of time. TU Electric further requests that the Commission grant rehearing of its October 26, 1988, Opinion and that, on rehearing, the Commission (1) vacate said Opinion and remand the case for further evidentiary hearing, or (2) issue a modified Opinion which satisfies TU Electric's concerns as expressed herein by clarifying that any authority the Commission might have to order wheeling, except under Sections 211 and 212, is strictly limited to and based solely upon specific findings of anticompetitive effects and, further, that the Commission does not intend by its holding to establish a generic approach to transmission access issues.

Respectfully Submitted,

M. D. Sampels
WORSHAM, FORSYTHE, SAMPELS
& WOOLDRIDGE
3200 -2001 Bryan Tower
Dallas, Texas 75201
(214) 979-3000

By: _____
M. D. Sampels

ATTORNEYS FOR
TEXAS UTILITIES ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I hereby certify I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Dallas, Texas this 23 day of November, 1988.

_____
M. D. Sampels
WORSHAM, FORSYTHE, SAMPELS
& WOOLDRIDGE
3200 - 2001 Bryan Tower
Dallas, Texas 75201
(214) 979-3000

Detroit Edison
2000 Second Avenue
Detroit, Michigan 48226
(313) 237-8000

November 23, 1988

The Honorable Lois D. Cashell
Acting Secretary
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, D.C. 20426

Re: Utah Power & Light Company/PacifiCorp
Docket No. EC88-2-000

Dear Ms. Cashell:

Enclosed herewith for filing with the Commission in the above-captioned proceedings are an original and 14 copies of the Motion of The Detroit Edison Company for Leave to Intervene Out of Time and to File Request for Rehearing and the Request of The Detroit Edison Company for Rehearing. A Certificate of Service is also enclosed.

Yours truly,

Raymond O. Sturdy, Jr.

ROS:gg

Enclosure

cc: Dorothy Wideman
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
Lansing, Michigan 48910

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Company PacifiCorp PC/UP&L Merging Corporation	)))	Docket No. EC88-2-000

MOTION OF THE DETROIT EDISON COMPANY
FOR LEAVE TO INTERVENE OUT OF TIME
AND TO FILE REQUEST FOR REHEARING

Pursuant to Rules 212 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.212 and 385.214, The Detroit Edison Company (Detroit Edison) hereby moves, for good cause shown, for leave to intervene in the above-captioned proceedings for the purpose of seeking rehearing of Opinion No. 318, issued October 26, 1988.

1. Service of all pleadings, documents, and communications in this matter should be made upon the following:

Richard C. Viinikainen
Manager, Rates and
Financial Evaluation
The Detroit Edison Company
2000 Second Avenue - 1009 WCB
Detroit, Michigan 48226
(313) 237-8000

Raymond O. Sturdy, Jr.
Senior Staff Attorney
The Detroit Edison Company
2000 Second Avenue - 688 WCB
Detroit, Michigan 48226
(313) 237-8340

2. Detroit Edison is an investor-owned public utility incorporated in the State of Michigan and engaged in the generation, purchase, transmission, distribution and sale of electric energy in a 7,600 square mile area in southeastern Michigan. The Company's service area includes approximately 13% of the state's total land area, and over half of its population (approximately five million people), electric energy consumption and industrial capacity.

3. In order to meet its service obligations to citizens of the State of Michigan pursuant to authority granted by the State, Detroit Edison has built and owns and operates a substantial electrical transmission network

consisting of 904 three-phase circuit miles of lines operating at a nominal voltage of 345 kilovolts and 1,710 three-phase circuit miles of lines operating at nominal voltages below 345 kilovolts.

4. Detroit Edison and Consumers Power Company, another major supplier of electricity to citizens of the State of Michigan, are parties to an Electric Coordination Agreement providing for emergency assistance, coordination of operations and planning for bulk power supply, with energy interchanged between the parties at nine interconnection locations located within the State of Michigan. Under this agreement, Detroit Edison also interchanges electric energy with The Toledo Edison Company, Indiana and Michigan Power Company, Northern Indiana Public Service Company, Ontario Hydro, and other utilities through twelve other interconnections.

5. In conformity with and in furtherance of the public purposes of assuring an abundant supply of electric energy with the greatest possible economy as set forth in Section 202 of the Federal Power Act, Detroit Edison has voluntarily interconnected its transmission properties with those of other public utilities who are themselves interconnected with applicants in the above-captioned docket. Detroit Edison has entered into substantive contractual arrangements as set forth above to coordinate its operation of those facilities in accordance with uniform principles and objectives established to assure the reliability and efficient operation of the integrated electrical service network it has constructed and operates for the benefit of its customers.

6. On October 26, 1988, the Commission issued an Order in the above-captioned docket (Opinion No. 318) which approves a request for merger of two electrical systems only upon the condition that the applicants agree to

dedicate significant portions of their transmission network properties for use by other utilities, undertake transmission facility construction and expansion obligations for the benefit of other utilities, and permit expanded electrical loading of transmission network components.

7. These mandatory transmission service and construction obligations will, if extended to other systems, have serious adverse impact upon the ability of interconnected utilities to continue to effectively carry out contractual obligations and responsibilities with respect to interconnected systems activities and will ultimately result in a reduction in the ability to meet customer requirements for reliable electrical energy supply at reasonable cost. Detroit Edison is concerned that, despite the apparent intent to confine the transmission conditions imposed to the instant proceedings, they will, in practice, become a model rationale frequently used to support unreasonable and improper policy extension. (See, for instance, Clarion 39 FERC P61,317 and Oxbow 43 FERC P61,286).

8. Detroit Edison believes that the imposition of the transmission conditions in the above-captioned docket is unlawful in that the conditions are beyond the power of the Commission to impose and are contrary to policies clearly established by Congress. As more specifically set forth in the accompanying petition for rehearing, Detroit Edison contends that the Commission's powers described in Section 203 of the Federal Power Act are limited by: a) restraints imposed by Section 203 itself as well as other sections of the Federal Power Act, and b) restraints imposed by subsequent amendments of the statute. Further, Detroit Edison believes that the Commission's Order improperly jeopardizes electric service reliability, an interest the Commission is bound by statute to protect. The Commission should

not forsake intersystem reliability in order to foster and promote an interest the Commission believes should probably be developed - so-called workable competition within a regulatory-constrained environment. Finally, Detroit Edison asserts that the transmission conditions imposed appear to represent a set of improper restraints upon the legitimate exercise of rights guaranteed by the Constitution of the United States.

9. Detroit Edison seeks to intervene herein and to file a request for rehearing in the above-captioned docket. Detroit Edison's motion to intervene should be granted. It has good cause for filing out of time. Until the Commission issued its Opinion No. 318, it was not apparent that the Commission would seek to impose conditions upon applicants which would have far-ranging impact extending well beyond the applicant's legally noticed petition. The nature of the conditions are unprecedented and the impact of the conditions upon interconnected electrical systems with applicants was not capable of being foreseen. Late intervention will not prejudice or burden the existing parties or delay the proceeding, because Detroit Edison supports expeditious resolution of the issues in this case. Under these circumstances, the Commission should permit Detroit Edison to intervene and to request the Commission to rehear its order.

WHEREFORE, for the foregoing reasons, Detroit Edison requests that it be permitted to intervene out of time and to file the accompanying petition for rehearing.

Respectfully submitted,

Raymond O. Sturdy, Jr. (P24507)
Senior Staff Attorney
The Detroit Edison Company
2000 Second Avenue, 688 WCB
Detroit, Michigan 48226
(313) 237-8340

Dated: November 23, 1988

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Company PacifiCorp PC/UP&L Merging Corporation	)))	Docket No. EC88-2-000

REQUEST OF THE DETROIT EDISON COMPANY
FOR REHEARING

The Detroit Edison Company (Detroit Edison), pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.713, hereby requests rehearing of the Commission's Order (Opinion 318) issued on October 26, 1988 in the above-captioned proceeding.

SUMMARY

Opinion 318 seeks to exact, as a price for approval of a proposed merger under Section 203 of the Federal Power Act, the forced dedication of private transmission properties and wheeling rights owned by the merging companies to other utilities and seeks to impose an improper obligation to provide transmission service to and to construct transmission facilities for the benefit of other utilities.

The conditions imposed are totally inconsistent with the logic and rational employed by Congress when, in developing the Commission's powers under the Federal Power Act, it carefully limited the Commission's authority with respect to transmission access and wheeling. Further, the conditions fly in the face of FPA amendments which were added when Congress revisited the statute forty-three years after its enactment.

The transmission conditions contained in Opinion 318 will result in reduced electrical system network reliability and an increase in the cost of

electricity to consumers. The Commission, by prescribing the conditions imposed, places in jeopardy one of the fundamental interests it is mandated to protect by subordinating electrical system reliability in order to experiment with competitive economics in a regulated environment.

The reclassification of private ownership rights and entitlements, offered in the guise of "conditions subject to voluntary acceptance", violate constitutional protections against the taking of liberty and property without due process or just compensation. The Commission should vacate its October 26, 1988 Order or, at a minimum, modify its conditional provisions to conform with the requirements of law.

I. THE TRANSMISSION CONDITIONS ARE BEYOND THE COMMISSION'S POWER TO IMPOSE AND ARE CONTRARY TO CONGRESSIONAL INTENT.

Absent the request for merger approval, there can be little doubt that the Commission lacks authority to impose the transmission wheeling and construction conditions it has developed. The Commission lacks this authority because Congress has explicitly withheld it.

Section 203 of the FPA provides that the Commission shall consider proposals by utilities to merge and consolidate their facilities and approve such proposals upon a finding that they are consistent with the public interest. Specifically however, the Commission's conditioning authority provides that:

> "The commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission.

This "maintenance of adequate service" standard means that electrical system network reliability cannot be disregarded in the analysis of Section 203 applications. In the instant proceedings the Commission has not adequately considered the effect of the conditional terms imposed upon the proposed merger.

The Commission's power to "condition" merger approvals under Section 203 is further limited. Section 202(b) establishes the authority of the Commission to order the physical connection of transmission facilities, but only upon the express condition that:

> "...the Commission shall have no authority .... to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers."

Opinion 318 requires that, in certain circumstances, electric service to the merging companies' customers must be reduced or curtailed to meet requests for transmission service by other electric utilities. This requirement represents a direct violation of Congressional directive.

For several decades, courts have pointed out and the Commission has recognized that the Federal Power Act does not authorize the Commission to order a public utility to make its transmission facilities available to facilitate a power supply contract between two other unconnected electric companies. As was said in City of Paris, Kentucky v Kentucky Utilities Co., 41 FPC 45 (1969):

> "It was the intent of Congress to leave such a matter to the voluntary action of the utilities."

In designing the framework for the Federal Power Act, Congress specifically considered and rejected a provision that would have imposed upon public

utilities a duty to wheel on request for other utilities. As was pointed out in Otter Tail Power Co. v United States, 410 US 366, at 374, 93 S Ct 1022, at 1028 (1973):

> "...These provisions were eliminated to preserve the voluntary action of the utilites."

In 1978, Congress amended the transmission wheeling and access provisions of the FPA by setting forth well-defined circumstances in which transmission access and wheeling could be considered. In the newly-created provisions of Sections 211 and 212, 16 U.S.C. 824j-k, Congress determined that a wheeling order may be issued by the Commission if it finds:

1. That the wheeling is in the public interest; and
2. That it would conserve a significant amount of energy; or
3. That it will significantly promote the efficient use of facilities and resources; or
4. Improve the reliability of any of the affected systems; and
5. That the wheeling order will reasonably preserve existing competitive relationships; and
6. That the order does not require the affected utility to transmit electricity which replaces electricity that the utility is already obligated to provide to the applicant; and
7. That the order is not inconsistent with any state law which governs the retail marketing areas of electric utilities; and
8. That the order does not provide for the transmission of electrical energy directly to an ultimate consumer; and
9. That the order is not likely to result in a reasonably ascertainable uncompensated loss for any electric utility, or qualifying cogenerator, or small power producer; and
10. That the order will not place any undue burden on any of the entities enumerated in paragraph (9) above; and
11. That the order will not unreasonably impair the reliability of any electric utility subject to the order; and

12. That the order will not impair the ability of any electric utility affected by the order to service its customers; and

13. That the applicant has demonstrated that it is capable of reimbursing the party subject to the order for reasonably anticipated costs incurred including (a) reasonable costs of transmission services (including expansion costs) and (b) a reasonable rate of return on those costs.

This Congressionally-established criteria represents the minimum requirements under which the Commission may affirmatively impose transmission access and wheeling responsibilities upon public utilities. The Commission has no legal authority to expand that criteria. At page 24 of its Order, the Commission asserts that it has:

> "...broad authority under Section 203(a) to condition approval of a merger that would not, but for such conditions, be consistent with the public interest. We find that this authority includes the power to order wheeling for so long as such a condition is necessary to avoid the likely anticompetitive effects of a proposed merger, and the tendency of that merger to create a monopoly."

While Detroit Edison believes that the Commission does have broad authority to develop and impose conditions upon which a merger can be approved, that authority is not properly exercised when it runs contrary to Congressional mandate and when the conditions imposed are not in the public interest. With all due respect, Detroit Edison suggests that the Commission's economic rationale regarding monopolistic analysis is somewhat specious. Clearly, the merger applicants, merged or otherwise, possess some degree of monopoly control over the transmission facilities they own. The proposed merger consolidates that control under a single management, but does not expand or enlarge the degree of control capable of being exercised. Further, whatever degree of monopoly power is possessed, it has been conferred in exchange for an obligation to extend retail service to all who apply within

the region in which the power exists. In these circumstances, it is not necessary to craft extraordinary remedies to deal with speculation regarding "likely anticompetitive effects." Any abuse of the monopoly power possessed with regard to transmission access or wheeling services for others should be dealt with through standard complaint procedures. The Commission should not simply attempt to bypass existing procedures by instituting extraordinary remedies for imagined improprieties.

II. AN UNCONSTRAINED LONG-TERM WHOLESALE OBLIGATION TO SERVE IS ARBITRARY AND UNREASONABLE

The long-term obligation to provide firm wholesale transmission service is not in the public interest. The Commission has ignored the potential impact of the obigations sought to be imposed on the operation, stability, reliability, and security of, not only the merged companies, but also other interconnected utilities operating in parallel with the merged companies.

It is not apparent that any attempt has been made to identify how much capacity and energy might ultimately be involved in potential transactions between the "resource-rich" Northwest and the "capacity-poor" Southwest. Detroit Edison is aware of no analysis that has been performed as to how these transactions might stress the networks of the merged company and those operating in parallel with it. The long term obligation has the potential to cause significant system control problems, not to mention the necessity for expenditures for additional facilities in adjoining systems not involved with the merger.

Beginning at page 44 of its Order, the Commission describes conditions it seeks to impose on the merged company with regard to the merged company's long

term obligation to provide firm wholesale transmission service. The Order states that:

> "The merged company will be required to provide firm wholesale transmission service to any electric utility requesting it at a cost-based rate. The merged company will be required to meet all bona fide requests for service either by using its existing capacity or by building new facilities. The ultimate decision whether to build would remain with the merged company. In either event, the merged company will be obligated to plan and construct its sytem to accomodate all such requests."

The Commission is mistaken in assuming that transmission facility congestion can simply be relieved by the construction of additional facilities in the merged companies'service areas. It is quite possible that limiting facilities will exist elsewhere in the network in areas where the merged company has no control over construction decisions and has no right to procure rights-of-way or to build transmission. To try to remove such limits by additional construction in the merged company could prove to be grossly inefficient and impractical.

The Commission also mistakenly assumes that five years is a reasonable maximum time limit for planning and engineering facilities, conducting required environmental impact and siting studies, obtaining permits, procuring the necessary rights-of-way, and constructing the transmission facilities, which in this case could be several hundred miles long and involve the participation of several utilities and states with multiple state and federal regulatory agencies, not to mention local planning groups, ordinances, and zoning laws. The Commission assumes that its conditioning of the merger and/or the desire of utilities for transmission service will provide sufficient justification for the merged utility to satisfy environmental authorities and court officials and, thereby, be able to procure the necessary

right-of-way through the process of eminent domain. It is doubtful that economic benefits associated with the desired transactions would be likely to carry sufficient weight to permit the taking of private property through the eminent domain process. This problem is aggrevated by the fact that the Commission's conditions prevent the customers of the merged utility from sharing in any of the benefits of these transactions. These provisions are impractical and unworkable.

Finally, the Commission indicates that it will accept no excuses for the merged company not being able to satisfy a request for firm transmission service that has not been satisfied within the five-year time limit and will somehow force the merged company to curtail service to its own customers to the extent required to satisfy the "unsatisfied" request for transmission service. This provision represents perhaps the most blatent disregard of Congressional mandate.

III. THE TRANSMISSION CONDITIONS UNCONSTITUTIONALLY DEPRIVE APPLICANTS AND THEIR CUSTOMERS OF PROPERTY WITHOUT DUE PROCESS OF LAW OR JUST COMPENSATION

The Fifth Amendment to the federal constitution provides that:

> "No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The transmission systems owned and operated by each of the applicants in this case constitute private property. The Commission's Order requiring capacity to be provided to others, even when presented as conditional in nature, represents a deprivation of property without due process of law and a taking without just compensation.

In Frost & Frost Trucking Co. v Railroad Com. of California, 271 US 583, 46 S Ct 605 (1926), the court rejected a state's imposition of common carrier status "by condition" in the trucking industry, and carefully pointed out that, if a state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. The court's rationale is instructive.

> "That ... a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt, and is not brought into question here .... The naked question which we have to determine, therefore, is whether the state may bring about the same result by imposing the unconstitutional requirements as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it seeks fit to do so. Upon the answer to this question, the constitutionality of the statute now under review will depend.
>
> "There is involved in the inquiry not a single power, but two distinct powers. One of these, the power to prohibit the use of public highways in proper cases, the state possesses; and the other, the power to compel a private carrier to assume against his will the duties and burdens of a common carrier, the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is hereby made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool - an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

In Hanover Fire Ins. Co v Harding, 272 US 494, 47 S Ct 179 (1926) it was similarly held that while it was well settled that foreign corporations could not conduct business within a state without the state's consent, the state could not exact a sacrifice of the corporation's constitutional rights as a condition to its engaging or continuing in business within the state.

In United States v Chicago, M., S. P. & P.R.Co. 282 US 311, 51 S.Ct. 159 (1931), the court upheld an injunction setting aside an order issued by the Interstate Commerce Commission which authorized a railroad to issue securities on the condition that $4 per share received under a reorganization agreement be impounded. The court explained that:

> "The power to regulate commerce is not absolute, but is subject to the limitations and guarantees of the Constitution (Const. Amend. 5), among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without due process of law .... It long has been settled in this court that the rejection of an unconstitutional condition imposed by a state upon the grant of a privilege, even though the state possess the unqualified power to withhold the grant altogether, does not annul the grant. The grantee may ignore or enjoin the enforcement of the condition without thereby losing the grant."

The same principles apply to the Commission's actions in the present case. Not only are the merging companies deprived of their property by the Commission's conditions, but the wholesale service obligation extension unfairly disregards any purchases or sales that the merged companies may be capable of carrying out for the benefit of their native customers. The merged company should be afforded an opportunity to utilize its transmission system to obtain economies for its own customers through strategic purchases and sales with other utilities. The objective should be to minimize the overall cost of electric service not just to minimize the cost of purchased power to

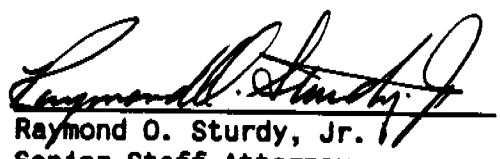
other utilities in the Southwest. The Commission's Order establishes a select group of privileged utilities and, in effect, assigns the cost burden of the privilege to the customers of the merging companies.

CONCLUSION

Detroit Edison believes that transmission conditions contained in Opinion 318 go far beyond the limits of reason and law. Extension or expansion of the principles sought to be established by the conditions imposed will lead to a serious erosion of present electric service network reliability and security. It is of little value to recite the thought that the conditions, if imposed, should be limited to the unusual facts presented by the circumstances of this specific case. The Commission's Clarion/Oxbow transmission decisions and subsequent experiences have rendered such boiler plate language somewhat meaningless.

The Order issued by the Commission on October 26, 1988 in these proceedings contain provisions which are unlawful, unreasonable and contrary to the public interest. Opinion 318 should be vacated and the proceedings should be remanded for consideration of limitations, if needed, which are consistent with Congressional intent and in furtherance of the public interest.

Respectfully submitted,



Raymond O. Sturdy, Jr.
Senior Staff Attorney
The Detroit Edison Company
2000 Second Avenue, 688 WCB
Detroit, Michigan 48226
(313) 237-8340

Dated: November 23, 1988

CERTIFICATE OF SERVICE

I hereby certify that I have this day served by first class mail, the foregoing Motion of The Detroit Edison Company for Leave to Intervene Out of Time and to File Request for Rehearing and Request for Rehearing upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Detroit Michigan this 23rd day of November, 1988

Gerry Green

Gerry Green
The Detroit Edison Company
2000 Second Avenue, 688 WCB
Detroit, Michigan 48226

IOWA PUBLIC SERVICE COMPANY
P. O. BOX 778 SIOUX CITY, IOWA 51102

November 22, 1988

Ms. Lois D. Cashell, Acting Secretary
Federal Energy Regulatory Commission
825 North Capitol Street
Washington, DC 20426

Re: Utah Power & Light Company
Docket No. EC88-2-000

Dear Ms. Cashell:

Enclosed please find original and fifteen (15) copies of the Motion to Intervene Out of Time of Iowa Public Service Company for filing in the above-captioned docket.

Please file stamp one copy and return to me in the stamped, self-addressed envelope enclosed for your convenience.

Respectfully submitted,

John A. Rasmussen
Associate General Counsel

caa

Enclosures

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

IN THE MATTER OF UTAH POWER & LIGHT COMPANY, ET AL.	)	DOCKET NO. EC88-2-000

MOTION TO INTERVENE OUT OF TIME
OF IOWA PUBLIC SERVICE COMPANY

COMES NOW, IOWA PUBLIC SERVICE COMPANY (hereinafter referred to as "IPS") and hereby petitions the Commission, pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. §385.214), for leave to intervene out of time as a party in the above entitled proceeding and in support of its motion states:

I.

Communications

The names, titles and mailing addresses of the persons to whom all communications concerning this motion to intervene should be addressed are as follows:

John A. Rasmussen
Associate General Counsel
Iowa Public Service Company
P.O. Box 778
Sioux City, Iowa 51102

Ira E. Delk
General Counsel
Iowa Public Service Company
P.O. Box 778
Sioux City, Iowa 51102

II.

Movant's Interest In The Proceeding

The IPS utility group provides electric energy to 155,000 customers in 228 Iowa and 5 South Dakota communities and natural gas to 339,000 customers in 206 Iowa, 36

Minnesota, 8 South Dakota, 3 Nebraska and 3 Florida communities. IPS is concerned with the mandatory transmission access, pricing and construction conditions the Commission has attached to its approval of the merger of Utah Power & Light Company and Pacific Power & Light Company into PacifiCorp Oregon.

The wheeling conditions imposed by the Commission in Opinion No. 318 will have a serious adverse impact on the future of the public utility industry in the United States. Neither the scope nor the impact of the conditions could have been anticipated by parties that might have participated in the proceeding. Moreover, the conditions consequences are inconsistent with the public interest and the maintenance of adequate service with the technical and economic requirements for effective coordination of utilities, and with the conditions necessary to assure the reliability of interconnected utilities. They depart from the Federal Power Act's scheme of voluntary coordination and they were largely devised after the record closed.

The requirements for compulsory access (and for compulsory investment in facilities to provide it) will require the merged company to provide facilities for the sole benefit of other utilities. The burden of providing such facilities falls on the ratepayers and shareholders of the merged company without any concomitant benefit. The Commission requires the merged company to reduce its own use of its facilities in order to wheel for other utilities. The result will be to discourage investment, increase costs to

ratepayers, and chill future mergers that would otherwise advance the objectives of the Federal Power Act. IPS seeks to intervene for the purpose of stating its views regarding: 1) the legality of wheeling conditions imposed in this case; 2) the adequacy of the record to support the Commission's choice of remedies for the anticompetitive effects of the merger found likely by the Commission; 3) the likely effects of the Commission's order on IPS; and 4) the effects on the future structure, operation and reliability of the industry. IPS also seeks the opportunity to urge that the decision not be given a generic effect.

It is in the public interests for the Commission to grant intervenor status to IPS and other interested public utilities, holding companies, state commissions and consumers. Such interventions will assure that the Commission is fully informed as to the consequences of adopting the policies embodied in its order. See, e.g., Orange and Rockland Utilities, Inc., 41 FERC 61, 547 (1988).

Late intervention will not prejudice or burden the existing parties or delay the proceeding, because IPS supports expeditious resolution of the issues in this case.

III.

Showing of Good Cause
for Waiver of Time Limitation in Rule 210

IPS could not have anticipated that the Commission would order wheeling conditions of such an unprecedented breadth in

this proceeding. Therefore, its interest in the proceeding was not fully apparent until issuance of Opinion No. 318 on October 26, 1988.

IV.

Conclusion

For the reasons set forth in this motion, IPS requests that it be admitted as an intervenor in this proceeding.

DATED at Sioux City, Iowa, this 22nd day of November, 1988.

Respectfully submitted,

IOWA PUBLIC SERVICE COMPANY

BY _____

John A. Rasmussen
Associate General Counsel
Iowa Public Service Company
P. O. Box 778
Sioux City, Iowa 51102

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Motion to Intervene upon each of the persons designated on the official service list compiled by the Secretary in this proceeding, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure.

DATED at Sioux City, Iowa this 22nd day of November, 1988.

John A. Rasmussen
Associate General Counsel
Iowa Public Service Company
P.O. Box 778
Sioux City, Iowa 51102

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Co., et al.) Docket No. EC88-2

REQUEST OF
SIERRA PACIFIC POWER COMPANY
FOR REHEARING AND CLARIFICATION
OF OPINION 318

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, Sierra Pacific Power Company (Sierra) requests rehearing of Opinion 318 issued in this docket on October 26, 1988. Sierra also requests clarification of Opinion 318 on three limited but important points.

I. SPECIFICATION OF ERRORS AND SUMMARY OF REQUESTS FOR CLARIFICATION

In Opinion 318, the Commission ruled that the merged company could for a limited time develop wholesale rates on a divisional basis. That ruling is unsupported by any demonstrated fact, is contradicted by the Commission's own findings and the overwhelming record evidence, and is clearly and directly inconsistent with established Commission policy strongly favoring rolled-in pricing.

In light of the foregoing, Sierra requests that the Commission modify Opinion 318 to impose on the merger authorization the condition that the merged company develop wholesale rates on a rolled-in basis.

In addition to that request, Sierra also has the fol-

lowing limited but important requests for clarification of Opinion 318:

1. If the Commission does not reverse its ruling that allows Applicants to file its first wholesale rates on a divisional basis, then the Commission should clarify that the just and reasonable rates ultimately determined in all rate proceedings ordered in Opinion 318 could be based on rolled-in pricing.
2. If the Commission does not reverse its ruling on divisional pricing, then it should clarify that fuel and purchased power costs will be calculated on a total system basis even if the fuel adjustment clause for the UP&L division is eliminated.
3. The Commission should clarify that a condition of the merger authorization is that UP&L wholesale sales rates will be reduced by 2% as of the effective date of the merger.

Sierra provides the details and support for the above specification of errors and requests for clarification in the argument portion of this pleading.

II. RESERVATION OF RIGHTS

In Opinion 318 the Commission imposed wheeling conditions that will no doubt be the subject of discussion in numerous rehearing requests or similar pleadings filed by non-parties. Sierra reserves the right to file rehearing requests or to take any other appropriate action should the Commission modify the

wheeling conditions imposed in Opinion 318.

III. ARGUMENT

A. In Opinion 318 the Commission failed to demonstrate why it should depart from its policy of developing rates on a rolled-in basis. Such a departure was unfounded, contradicted ALJ and Commission findings, and should be reversed.

In Opinion 318 the Commission correctly summarized Commission policy that single system (or rolled-in) pricing is presumed to be appropriate "unless the utility can demonstrate a valid basis for departing from that presumption." Opinion 318 at 53. The Commission then stated that the divisional pricing creates regulatory problems that the ALJ identified in the initial decision and that single system pricing would eliminate these problems. Id. The latter statement reflects a Commission ruling at page 14 of Opinion 318 in which the Commission affirmed the ALJ with respect to his finding that the proposed merger could adversely affect the ability of the Commission to regulate rates.

Notwithstanding these rulings, the Commission then held that it would permit divisional pricing for a limited period of time. This Commission holding is wholly unsupported by any demonstrated fact, is contradicted by the Commission's own findings and the overwhelming record evidence and is clearly and directly inconsistent with established Commission policy strongly favoring rolled-in pricing.

As discussed, in Opinion 318, the Commission correctly noted the strong Commission preference for rolled-in pricing. As

its support, the Commission cited Sierra's brief on exceptions in which Sierra cited the rationale for this strong preference as articulated by the Commission in Otter Tail Power Co., Opinion 93, 12 FERC ¶61,169 at 61,420 (1980):

> The principal reason behind adoption of [rolled-in costing] is that an integrated system is designed to achieve maximum efficiency and reliability at a minimum cost of a system wide basis. Implicit in this theory is that all customers. . . . receive the benefits that are inherent in such an integrated system.

As Sierra further explained at pages 12-13 of its brief on exceptions, a basic element of the above-quoted rationale is the extreme reluctance of the Commission to engage in the complicated task of attempting to separate an integrated system into those facilities that benefit jurisdictional customers and those that do not. As the Commission stated in Utah Power & Light Co., Opinion 220, 27 FERC ¶61,258 at 61,487 (1984):

> Where power lines operate in an integrated manner . . . we think it is unnecessary and inappropriate to try to segregate lines and claim they do not benefit the entire network of lines. With an integrated transmission system. . . . it would almost be impossible to trace individual lines and show that some of those lines do not benefit others. . . .

The reluctance of the Commission to engage in the complicated and judgmental task of deciding whether costs of certain facilities should be rolled-in logically applies to condemn divisional pricing. As the ALJ correctly held, a principal problem with divisional pricing is that it requires determining "stand-alone" costs for the UP&L and PP&L divisions -- i.e., what the costs would have been for each company had the companies not

merged. As the ALJ repeatedly found, the determination of these stand-alone costs would be pure speculation dependent on highly judgmental assumptions on what costs UP&L and PP&L would have incurred in a world that did not exist. See ID, 43 FERC at 65,348-349; and 65,352-353.

As noted, in Opinion 318, the Commission affirmed this ALJ finding. Moreover, there is a wealth of testimony that confirms its validity. To begin with, as established by the clear and numerous statements of Applicants' own witnesses, divisional pricing requires that the Commission determine the stand-alone costs of the two divisions. See, e.g., Reed cross, Tr. 1188-1190, 1245-1248, 1281, 1294-1302, and Colby cross, Tr. 1693. See also Staff witness Siems Surrebuttal Testimony, Ex. 299 at 14. There is also uncontradicted testimony that clearly demonstrates the impossibility of arriving at an equitable or objective determination of stand-alone costs. See, e.g., Surrebuttal Testimony of Sierra witness Smith, Ex. 298 at 8; Direct Testimony of Staff witness Siems, Ex. 102 at 16 and Surrebuttal Testimony, Ex. 299 at 9-10; Direct Testimony of Nucor witness Kahal, Ex. 18 at 24-25; Direct Testimony of CREDA witness Helsby, Ex. 134 at 18-20; and Direct Testimony of Public Power witness Drummond, Ex. 27 at 18-21.

The obvious problem is that if stand-alone costs will be arbitrarily determined, the divisional rates that result from that determination will be arbitrary as well. In sum, the record evidence and the ALJ's finding -- which the Commission affirmed in Opinion 318 -- compel the conclusion that divisional rates

cannot be determined equitably or rationally. There is nothing in Opinion 318 that even hints at how any of the rate conditions the Commission imposed would alter the conclusion.

The justification proferred by the Commission for its decision to permit divisional pricing is in any event inadequate. According to the Commission (Opinion 318 at 54):

> [T]he Commission is willing to countenance [divisional pricing] . . . to permit Pacificorp Oregon to gain some experience operating as a merged company, to ameliorate possible rate shock to existing wholesale PP&L ratepayers, and to allow the system time to become more fully integrated.

The first and third reason offered by the Commission were never advocated by any party, including Applicants. The first reason -- to allow Pacificorp Oregon experience operating as a merged company -- has no discernable relevance to whether there should be single system pricing. The third reason -- to allow the system to be more fully integrated -- is obviously insufficient. Applicants have repeatedly and clearly stated that the merged company will be immediately operated as a fully integrated single system. See, e.g., Boucher Direct Testimony, Ex. 8 at 30-31 and Rebuttal Testimony, Ex. 207 at 45; See also Ex. 16 at 3 and Ex. 17 at 41. See also Applicants Initial Br. at 7. Applicants' testimony is equally clear and emphatic that the very reasons for the merger is to achieve cost reductions that can only be accomplished by the planning and use of the facilities and personnel of UP&L and PP&L as a single company. See, e.g., Topham Direct Testimony, Ex. 1 at 20 and Rebuttal Testimony, Ex. 199 at 9; Boucher Direct Testimony, Ex. 8 at 12, 28-19, 35-40 and

Rebuttal Testimony, Ex. 207 at 57; and Reed Direct Testimony, Ex. 3 at 10.

The above testimony substantially exceeds by any measure the standard for roll-in typically imposed by the Commission -- i.e., that costs for facilities of an integrated system will be rolled-in if there is merely the possibility that such facilities may provide a benefit to jurisdictional customers. See, e.g., Potomac Edison Co., Initial Decision, 20 FERC ¶63,060 at 65,257-259 (1982), aff'd in relev. part, Opinion 163, 23 FERC ¶61,106 (1983); Southern California Edison Co., Opinion 145, 20 FERC ¶61,301 at 61,588-589 (1982); and Public Service Co. of Indiana, Opinion 783,56 FPC 3003 at 3035 (1976).

The only other reason cited by the Commission is to ameliorate the possibility of rate shock to PP&L's wholesale customers. However, as the Commission itself acknowledged in Opinion 318, no one, including the Applicants, demonstrated that there would be a rate increase, let alone rate shock, to PP&L wholesale customers from single system pricing. See Opinion 318 at 55, n. 207. The mere possibility of a rate increase surely does not meet the test established by consistent Commission policy and precedent that Applicants demonstrate a reason for departing from single system pricing.

In this regard, in Opinion 318 the Commission discounted Applicants' supposed proof that PP&L's rates would increase as a result of single system pricing. Id. In fact, the Commission should not have even considered the supposed proof. Sierra filed a motion to strike the portion of Applicants' brief

on exceptions that contained the supposed proof of rate shock. In Opinion 318 the Commission made no mention of Sierra's motion and it is apparent that the motion was inadvertently overlooked.*/ As demonstrated in that motion, Applicants' supposed proof had been properly rejected by the ALJ twice and was never subject to cross-examination or responsive testimony. It was entirely inappropriate for the Commission to have given any consideration in Opinion 318 to Applicants' supposed proof as doing so deprived Sierra and others of any opportunity to rebut it.**/

It must also be stressed that no attempt was made by PP&L wholesale customers to demonstrate an adverse rate impact to them that would result if the Commission followed its policy on single system pricing. These customers had every reason to make that case if in fact they viewed single system pricing as a significant concern. The sum of the foregoing is that no one has provided any evidence, much less meet the requisite burden, to demonstrate why the Commission should depart from single system pricing. In fact, the record evidence and the ALJ's finding which the Commission affirmed compel the adoption of single sys-

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*/ A copy of the original of Sierra's motion was retrieved from the Commission and is provided as the attachment to this pleading.

**/ In fact, the Commission would have granted Sierra's motion to strike for the same reasons the Commission stated at pages 15-16 of Opinion 318 in support of striking testimony of the Shareholder Association; namely that "it would be unfair to overrule the judge [because doing so] . . . effectively denies the intervenors any opportunity to cross-examine the witness or to offer rebuttal testimony."

tem pricing.

Important considerations of fairness and practicality also require the immediate adoption of single system pricing. The intervenors, especially Sierra, have devoted considerable time and money in presenting substantial record evidence on this issue. That expenditure was pursuant to the order establishing these proceedings in which the Commission directed that Applicants submit evidence on whether they "intend to file future wholesale rates on a consolidated or divisional basis. The intervenors will then be afforded an opportunity to respond." Utah Power & Light Co., 41 FERC ¶61,283 at 61,754 (1987). The fact that in response to this order, no one has provided any credible reason to depart from single system pricing, and the overwhelming evidence confirms the need for such pricing should compel rejection, not acceptance, of divisional pricing.

Moreover, Sierra stresses the extraordinary expense Sierra, this Commission as well as others would incur in the protracted litigation that would arise under the Commission's ruling that allows Applicants to propose jurisdictional rates on a divisional basis. Applicants concede that such litigation would be protracted, controversial and complex. See, Ex. 3 at 18; Tr. 1276 Ex. 17 at 18; Staff Brief at 19, 23. So, ironically, does the Commission in Opinion 318. See, Opinion 318 at 55.

The validity of this conclusion is confirmed by the complex, multiple cost of services the Commission in Opinion 318 required the merged company to submit as part of each wholesale filing until the merged company proposes single system pricing.

Opinion 318 at 61. As the Commission stated, these multiple cost of services are "necessary for the Commission to intelligently evaluate the inter divisional cost allocation" that is required by divisional pricing. As the Commission also stated, such complex filings will impose a substantial burden on the merged company.

What the Commission fails to recognize is the enormous burden these complex filings will impose on Sierra as well as the other wholesale customers of the merged company. Moreover, additional burdens will arise by virtue of the litigation ordered by the Commission on the issue of the reasonable phase-in period for single system rates.

In Opinion 318 the Commission fails to provide any concrete guideline for how these complex issues will be resolved. For example, the Commission is silent on what it will deem relevant in (1) allocating costs to each division or (2) devising a phase-in period for single system rates. The silence is not unexpected because the litigation ordered in Opinion 318 is unprecedented. The absence of any meaningful guidelines imposes yet more burdens on Sierra as well as other wholesale customers.

The totality of these burdens may well prejudice Sierra and others. Sierra's budget for regulatory matters is not inexhaustible. At some point Sierra may well be forced to forego insistence on positions that it believes are justified only because of the enormous expenditure of time and money that would otherwise be required. Surely such a result is not in this public interest.

Sierra stresses that it does not contest the necessity for the enormously complex litigation ordered by the Commission in Opinion 318 if the Commission accepts divisional pricing. It is the extraordinarily burdensome and complex nature of such litigation that highlights why the Commission should reject divisional pricing, especially when there has been no demonstrated basis to impose such litigation on Sierra and others.

In sum, the practical and obvious question the Commission should address is whether it is in the best interests of anyone to allow divisional pricing even on a limited basis. The obvious answer is an emphatic no, given (1) that divisional pricing cannot be equitably or rationally implemented, (2) the enormous expenditure of time and resources that would be required in the subsequent rate proceedings that allow divisional pricing, (3) the absence of any demonstrated basis to accept divisional pricing or the burdens such pricing would impose, and (4) the overwhelming record evidence in this proceeding and the Commission precedents that compel rolled-in ratemaking for the merged company in the development of wholesale rates.

B. If the Commission does not reverse its ruling that allows Applicants to file its first wholesale rates on a divisional basis, then the Commission should clarify that the just and reasonable rates ultimately determined in all rate proceedings ordered in Opinion 318 could be based on rolled-in pricing.

In Opinion 318, the Commission ruled that Applicants may propose FERC jurisdictional rates on a divisional basis and that an issue to be tried in the first wholesale case will be the

reasonable length of time for a phase-in period to single system pricing. Opinion 318 at 55.

An inference that can be drawn from that ruling is that the Commission could rule in the first wholesale case that no period of time would be appropriate for a phase-in to single system pricing and, hence, that such pricing should be used to determine just and reasonable rates in that proceeding and thereafter.

Such an inference is entirely reasonable and is supported by other Commission statements in Opinion 318. For example, at page 49 of Opinion 318, the Commission warns that if the merged company fails to maintain an adequate audit trail, the Commission may deny recovery of costs. Also, at pages 49-50, the Commission states that it retains the authority to further condition the merger in the future if required to render it consistent with the public interest. Finally, at page 55, the Commission stresses that its limited acceptance of divisional pricing "is expressly contingent upon Pacificorp Oregon submitting detailed cost support for the allocation of costs and revenues between the two divisions in the upcoming rate proceedings as ordered below."

As Sierra has argued at pages 10-12 of its brief opposing exceptions -- and as found by the ALJ in his initial decision 43 FERC at 65,351 -- the uncontradicted evidence is that audit trails would either be fundamentally unfair or unworkable. As Sierra also demonstrated supra at 4-6, the uncontradicted evidence is that divisional pricing cannot be equitably or rational-

ly determined. If, consistent with that evidence, problems arise with respect to the audit trail or divisional pricing, the alternative -- perhaps the only alternative -- would be to devise single system rates. Additionally, the record may develop other reasons why single system pricing should be imposed.

While the above conclusions may be obvious, it is important that the Commission clearly put the merged company as well as its wholesale customers on notice that single system pricing could be the underlying basis for all the wholesale rates that result from the rate proceedings ordered in Opinion 318. Such notice will avoid claims of prejudice on the part of the merged company and will clarify for all concerned that single system pricing may be an alternative to be addressed in the upcoming rate proceedings.

C. If the Commission does not reverse its ruling on divisional pricing, the Commission should clarify that fuel and purchased power costs for the wholesale customers will be calculated on a total system basis even if the fuel adjustment clause for the UP&L division is eliminated.

At pages 56-57 of Opinion 318, the Commission fully adopted the argument of Sierra that the fuel and purchased power costs that are passed through the wholesale fuel clause of the UP&L division must be calculated on a total company basis. The Commission then stated that the merged company could propose in its first full rate proceeding to eliminate the wholesale fuel clause for the UP&L division.

The Commission should clarify that any elimination of

UP&L's wholesale fuel clause will not eliminate the requirement that the fuel and purchased power costs that were subject to that clause be calculated on a total company basis. The Sierra argument adopted in Opinion 318 for calculating such costs on a total company basis was predicated on the Commission policy underlying its fuel clause regulations as well as the policy established in Commission decisions in which the Commission directed newly merged natural gas companies to calculate gas costs on a total company basis. Opinion 318 at 57. These policies would logically apply not only before but after any elimination of the fuel clause for the UP&L wholesale customers.

In this regard Sierra stresses the unchallenged testimony of intervenor witnesses that a separate determination of fuel and purchased power costs for each division would require highly complex and subjective modeling analyses of what these costs would have been for UP&L and PP&L had the merger not occurred. Such an exercise would require pure speculation on how, absent the merger, UP&L and PP&L would have dispatched or used their respective generation or transmission facilities and how each would have engaged in sales or purchases of power and energy. See, e.g., Surrebuttal Testimony of Sierra witness Smith, Ex. 298 at 8 and Direct Testimony of Nucur Steel witness Kahal, Ex. 18 at 24-25. Such a supposed calculation of fuel and purchased power costs for each division would be the regulatory equivalent of unscrambling the egg with results that obviously would be neither objective nor verifiable. For all these reasons, the Commission should clarify that fuel and purchased power costs will be calculated on

a total company basis for wholesale ratemaking, regardless of whether the fuel clause of the UP&L division is eliminated.

D. The Commission should clarify that one condition of the merger authorization is the implementation of Applicants' proposal to reduce UP&L's wholesale sales rates by 2% as of the effective date of the merger.

In Opinion 318, the Commission appears to have accepted Applicants' proposal to reduce by 2% the wholesale sales rates of UP&L as of the effective date of the merger. Specifically at page 56 of Opinion 318, the Commission stated:

> . . . [W]e note that the Applicants have failed to establish that the selective rate reductions and moratoriums offered . . . at this Commission bear any relationship to the ultimate cost the merged company will incur . . . We have no . . . indication that the cost of providing service to UP&L customers will decrease by two percent after the merger. At best, we can accept the (pre-merger) rates that Pacificorp Oregon proposes to charge its wholesale customers on a temporary or interim basis following the merger. This will provide the newly-merged entity time to fully prepare cost of service studies to support just and reasonable wholesale rates.

The clear thrust of the above-quoted passage is that one condition for the merger authorization is that Applicants will implement their proposal to reduce by 2% UP&L wholesale sales rates as of the effective date of the merger. To eliminate any possible ambiguity, Sierra requests the Commission to confirm that interpretation.

The only reason there may be any ambiguity in Opinion 318 is that the 2% reduction is not explicitly stated in the section of Opinion 318 entitled "Rate Conditions". Opinion 318 at 58-62. However, as a reading of that section makes clear, the

Commission devoted its attention only to proposed rate conditions that the Commission believed were inadequate to ensure that the merger benefits would be timely reflected in the just and reasonable rates ultimately determined in post-merger rate proceedings. As the above-quoted paragraph on page 56 makes clear, an immediate 2% reduction is appropriate as a stop gap measure that would be in effect before the effective date of rates to be determined in the post-merger rate proceedings. As an alternative, the Commission could have imposed on Applicants the obligation to have cost-based rates in effect as of the date of the merger. Acceptance of Applicants' proposed 2% reduction was intended as an accommodation to the merged company to allow it "time to fully prepare cost of service studies to support just and reasonable wholesale rates." Opinion 318 at 56.

The sum of the foregoing is that in Opinion 318 the Commission clearly accepted Applicants' proposal to implement a 2% reduction in UP&L's wholesale rates. Moreover, a refusal of this proposed condition would be particularly arbitrary as no participant has criticized it. Such a condition is also required to assure some measure of parity of treatment between UP&L's wholesale sales rates and UP&L's retail sales rates, which Applicants have also agreed to reduce initially by 2%.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, Sierra requests the Commission to modify Opinion 318 to require that the merged company develop single system wholesale rates. Alternatively,

should the Commission not modify Opinion 318 as requested above, then Sierra requests the Commission clarify Opinion 318 to confirm the following:

(a) The just and reasonable rates ultimately determined in all wholesale rate proceedings ordered in Opinion 318 could be based on rolled-in pricing.

(b) Fuel and purchased power costs for the wholesale customers will be calculated on a total system basis even if the fuel adjustment clause for the UP&L division is eliminated.

Finally, regardless of the Commission response to the above-stated requests, the Commission should clarify that one condition of the merger authorization imposed in Opinion 318 is the implementation of Applicants' proposal to reduce UP&L wholesale sales rates by 2% as of the effective date of the merger.

Respectfully submitted,

SIERRA PACIFIC POWER COMPANY

John Madariaga
Vice President - Legal Affairs
John J. Gezelin
Staff Attorney
Post Office Box 10100
Reno, Nevada 89520
Tel.: (702) 689-4011

Joshua L. Menter
Goldberg, Fieldman & Letham, P.C.
1100 Fifteenth Street, N.W.
Washington, D.C. 20005
Tel.: (202) 463-8300

Attorneys for
Sierra Pacific Power Company

November 25, 1988

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon the participants in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure.

Dated at Washington, D.C. this 25th day of November, 1988.

Joshua L. Menter

ATTACHMENT

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of	)	
	)	Docket No. EC88-2-000
Utah Power & Light Company, et al.	)	

JOINT MOTION OF
SIERRA PACIFIC POWER COMPANY,
NEVADA POWER COMPANY AND NUCOR STEEL
TO STRIKE PORTION OF APPLICANTS BRIEF OPPOSING EXCEPTIONS

Pursuant to Rule 212 of the Commission's Rule of Practice and Procedure, Sierra Pacific Power Company (Sierra), Nevada Power Company (Nevada) and Nucor Steel (Nucor) (collectively referred to as Movants) request the Commission to strike the following portions of Applicants' July 11, 1988 brief opposing exceptions:

1. Footnote 12 at page 15, and

2. Appendix A.

In the above-referenced portions, Applicants attempt to provide a quantification of the alleged impact on PP&L ratepayers should the Commission approve rolled-in pricing for the merged company. This attempt has been rejected--not once, but twice--by the ALJ.

Specifically, by order issued on May 24, 1988, the ALJ struck a portion of Applicant's reply brief that provided the very quantification contained in Applicant's brief opposing exceptions. The ruling was in response to a Nucor motion to strike, which is provided as Attachment A to this pleading.

Similarly, at the first day of evidentiary hearings, at Tr. 166-167, the ALJ struck a portion of the rebuttal testimony of Applicants' witness Reed that contained virtually the identical quantification contained in Applicants' brief opposing exceptions. That ruling was in response to a joint motion of Sierra and Nucor, which is provided as Attachment B to this pleading.

The ALJ was clearly correct when he rejected the quantification as suspect and untimely. As he stated, it was entirely improper for Applicants in rebuttal testimony to provide a supposed quantification, especially when they previously had failed to provide any quantification, or to provide support or documentation for any quantification, when specifically requested to do so in data requests.

As Sierra and Nucor stated in their February 29 motion (footnote reference omitted):

> The quantification is in supposed rebuttal to the testimony of Sierra Pacific Power Company witness Smith. The clear and only point of that portion of Mr. Smith's testimony (Ex. 16, pp. 6-7; Ex. 17, pp. 7, 14) is that Applicants failed, when specifically requested in data requests, to provide any quantification for the alleged increase in PP&L rates. In fact, Applicants indicated that no studies or documents exist that would support any quantification.
>
> For Applicants to wait until rebuttal testimony to provide the requested quantification and support is obviously improper and prejudicial. Data requests were asked of Applicants so that Intervenors could sponsor testimony in which witnesses would analyze and challenge justifications preferred by Applicants at a relatively early stage in the proceeding in support of their proposals. The obvious intent and effect of the testimony Movants seek to strike is to circumvent improperly that process.

> Such sandbagging is particularly inappropriate when Intervenors have spent enormous time and resources to develop and present positions consistent with an extremely expedited schedule.

That rationale applies in spades to Applicants' latest attempt, which is to include at that last possible moment the suspect quantification so that there is no opportunity to respond to it.

At the least Applicants could have complied with Rules 509 (b)(3) and 711. In combination, these rules require that Applicants must except to ALJ evidentiary rulings or waive exception to such rulings.

Consistent with Rule 508 (d)(1) Applicants also could have attempted in its brief in exceptions to demonstrate good cause why the Commission should take official notice at this late date of the supposed quantification. The obvious reason is that no good cause exists.

Rather than comply with basic procedural requirements or to two previous ALJ rulings, Applicants cavalierly disregard them.

The repeated improper attempts to provide suspect and late quantification only underscores the fact that Applicants' request for divisional pricing is utterly unsupported and unsupportable.

The sum of the foregoing is that Commission must reject the proferred quantification. To do otherwise would be obviously and severely prejudicial to Movants and would reward tactics that are an affront to the Commission's rules and to basic procedural

fairness.

WHEREFORE, Movants request the Commission strike the following portions of Applicants' brief opposing exceptions:

1. Footnote 12 at page 15, and
2. Appendix A.

A copy of the instant pleading is being hand delivered today to Applicants' D.C. counsel.

Respectfully submitted,

Richard L. Hinckley (JCW)
Richard L. Hinckley
Attorney for
Nevada Power Company

Joshua L. Menter
Attorney for
Sierra Pacific Power Company

Kenneth G. Hurwitz (JCW)
Kenneth G. Hurwitz
Attorney for
Nucor Steel and AMAX Magnesium Corporation

July 18, 1988

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon the participants in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure.

Dated at Washington, D.C., this 18th day of July, 1988.

Joshua L. Menter

ATTACHMENT A

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

UTAH POWER & LIGHT COMPANY PACIFICORP PC/UP&L MERGING CORP.	)	Docket No. EC88-2-000

MOTION ON BEHALF OF NUCOR STEEL TO DISREGARD PORTIONS OF THE REPLY BRIEF OF APPLICANTS

TO: Honorable George P. Lewnes
Presiding Administrative Law Judge

Pursuant to the post-hearing briefing procedures established by the Presiding Officer (Tr. 3703-04 & 3712), Nucor Steel respectfully moves that certain portions of the Applicants' reply brief be disregarded as inappropriate for reply. As will be shown below, the Applicants have sought to address in their reply issues that should have been briefed, if at all, in their opening brief. Indeed, the Applicants went outside the record to circumvent an order striking testimony from their rebuttal case and to contradict their own hearing evidence.

More specifically, Nucor submits that the following portions of the Applicants' reply brief should be disregarded --

- Section C.1. at the bottom of page 14 entitled "Separate Divisions for Ratemaking" (including footnote 10 and referenced Appendix B)
- Footnote 12 on page 15
- Section C.6. on pages 19-20 entitled "Interruptible Rates"

Nucor will address these specific passages *seriatim* in the following argument.

Argument

The Applicants, along with the other participants in this proceeding, were clearly put on notice that their positions should be fully ventilated in their opening brief, not withheld for reply.

> Well, one of the things I require in the briefs, I require everybody in the initial brief to put it all up front, not wait for the rebuttal. You have got a position,you had better tell it to me in your initial brief. That is not only your position to why you are in favor of a position, but why you are against something else. I don't want that in reply. It has to all come up first.
>
> If in your reply brief for the first time you are taking a position on something, I will tell you right now I will entertain motions to disregard. I can't strike it, but I will disregard it. I have done that.
>
> So, the initial briefs are the critical briefs as far as I am concerned, from the standpoint of letting it all hang out in the first go-round.

Tr. 3703. For reasons best known to themselves, the Applicants have closed their ears to that admonition.

Under the guise of responding to Sierra Pacific, the Applicants seek to adduce, through footnote 10 and Appendix B, additional evidence allegedly quantifying the rate impact of uniform wholesale pricing. This effort to buttress their case is manifestly improper. In the first place, the Applicants do not even pretend to satisfy the requirements specified in Rule 716 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.716, to reopen the record. Nor, does it appear that "good cause" could arguably exist to add information relating to their 1987 sales and revenues, matters primarily within their own knowledge for weeks before the record closed. More importantly, Sierra Pacific and Nucor moved, prior to commencement of the hearings, to strike passages from the prepared rebuttal testimony of Applicants' witness Frederic D. Reed wherein Mr. Reed sought to

quantify the impact of rolled-in pricing on PP&L customers, notwithstanding the Applicants' failure to make discovery on the issue. *See Motion to Strike* dated February 29, 1988. The Applicants' rebuttal testimony on the issue was stricken over their contention that "It is a very simple calculation." Tr. 166-67. Now, in reply briefing after the hearing, the Applicants purport to make the calculation and would have the Presiding Officer consider the very matters he had ordered stricken from the evidentiary record.

Nucor accordingly submits that Appendix B and footnote 10 should be disregarded. The remainder of Section C.1. is repetitive of the similarly denominated section of the Applicants initial brief.

In footnote 12, the Applicants seek to contradict the record through unsworn and undocumented recitation of UP&L's action in "advis[ing] the Utah Commission that the 2% retail rate reduction will be effectuated in full though base rates," rather than through the EBA, as testified to in the hearings. No excuse is advanced for the turn-about or for the evidentiary insufficiency of footnote arguments. Once again, the Applicants do not mention, much less attempt to comply with, Rule 716, instead blandly briefing a different factual case than they proffered. The Applicants sought, with varying degrees of success, to force the other participants to aim at a "moving target" before and during the hearings; they ought not be allowed to do so after the record has closed. Footnote 12 should be disregarded.

The Applicants were well aware through discovery, as well as cross-examination of their witness Rodney D. Boucher spread over 30 pages of the transcript (Tr. 2676-706), that Nucor and Amax had raised the issue of merger impact upon service to UP&L's interruptible customers and sought to preserve the reliability of that service post-merger. Applicants were likewise aware that this issue was to be briefed post-hearing. *See* Tr. 3718 (By Mr. Quint "One of the parties

wanted to talk about interruptible rates, and there is some question whether it is a rate issue or whether it belongs under Roman III.C, operation of the Merged Company as a single entity."). The Applicants nonetheless elected to omit treatment of the issue in their opening brief, waiting for reply to include "Interruptible Rates" section C.6.

As their rationale for this omission from the "critical" brief, the Applicants direct attention to the source of the evidence adduced at the hearing on point -- "the only information in the record is that elicited on cross-examination." (*Reply Brief of Applicants* at 19). Nucor submits that Commission proceedings do not follow the rules of volleyball, where only the team serving may score points. An issue is no less in controversy and a fact is no less established simply because it comes out of an opponent's mouth. Indeed, a fundamental purpose of cross-examination is to expose the truth from every source available to the finder of fact. As to the Applicants' footnote 16, the determination of whether a party has carried its burden of proof is manifestly the function of the decisional authority, not a witness.

Nucor expected the Applicants to follow the briefing ground-rules established by the Presiding Officer. The Applicants have not done so, taking their position on interruptible service for the first time in reply and thereby depriving Nucor an opportunity to substantively respond. If those participants who will not follow the procedures applicable to all are permitted to gain an advantage from their non-compliance, the essential fairness of the proceedings is compromised. Section C.6. of their reply brief should, accordingly, be disregarded.

Conclusion

The Applicants have improperly employed their reply brief as a vehicle to argue positions which they were obliged to advance in their initial brief and to augment the record after it has closed. The Presiding Officer is accordingly requested to disregard Section C.1 (Separate Divisions for Ratemaking), footnote 12, and Section C.6 (Interruptible Rates) of the *Reply Brief of Applicants*.

Respectfully Submitted,

RITTS, BRICKFIELD & KAUFMAN

Peter J.P. Brickfield
Daniel C. Kaufman
Kenneth G. Hurwitz

Watergate 600 Building
Suite 915
Washington, D.C. 20037
(202) 342-0800

Counsel for Nucor Steel

Dated: May 17, 1988

ATTACHMENT B

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Co. et. al.) Docket No. EC88-2

MOTION TO STRIKE

TO: Honorable George P. Lewnes
Presiding Administrative Law Judge

Pursuant to Rule 212 of the Commission's Rules of Practice and Procedure, Sierra Pacific Power Company and Nucor Steel and AMAX Magnesium Corporation (hereafter collectively referred to as Movants) request the Presiding Judge to strike the following portions of the rebuttal testimony of Frederick R. Reed submitted by Applicants in this proceeding:

1. The testimony beginning with the phrase "In this regard," shown on line 12 of page 26 and extending through line 8 of page 27.

2. Schedule 6 of Exhibit 202.

As support, Movants state as follows:

The testimony that Movants seek to strike is an alleged quantification of the rate increases to customers of PP&L if prices were developed for Applicants on a single utility basis. The quantification is based on the analysis set forth in Schedule 6 of Exhibit 202.

Applicants' attempt to introduce in rebuttal testimony an alleged quantification of the impact on PP&L's rates as well as support for that quantification is a classic example of sandbagging.

The quantification is in supposed rebuttal to the testimony of Sierra Pacific Power Company witness Smith. The clear and only point of that portion of Mr. Smith's testimony (Ex. 16, pp. 6-7; Ex. 17, pp. 7,14) is that Applicants failed, when specifically requested in data requests, to provide any quantification for the alleged increase in PP&L rates. In fact, Applicants indicated that no studies or documents exist that would support any quantification.*/

For Applicants to wait until rebuttal testimony to provide the requested quantification and support is obviously improper and prejudicial. Data requests were asked of Applicants so that Intervenors could sponsor testimony in which witnesses would analyze and challenge justifications proferred by Applicants at a relatively early stage in the proceeding in support of their proposals. The obvious intent and effect of the testimony Movants seek to strike is to circumvent improperly that process.

Such sandbagging is particularly inappropriate when Intervenors have spent enormous time and resources to develop and present positions consistent with an extremely expedited schedule.

WHEREFORE, for the foregoing reasons, Movants request the Presiding Judge to strike the above-referenced testimony. Movants also request an expedited ruling on this motion in light of the facts that the hearing is to begin in two days and Mr. Reed is proposed to be the second witness to be cross-examined.

---

*/ The data request responses are contained in Mr. Smith's exhibit 17 at pp. 7, 14. Movants also provide for ready reference a copy of these responses as the attachment to the instant pleading.

A copy of the instant pleading is being hand delivered today to Applicants' D.C. counsel.

Respectfully submitted,

Joshua L. Menter
Attorney for
Sierra Pacific Power Company

Kenneth G. Hurwitz (GRM)
Kenneth G. Hurwitz
Attorney for
Nucor Steel and AMAX Magnesium Corporation

February 29, 1988

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon the participants in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure.

Dated at Washington, D.C., this 29th day of February, 1988.

Joshua L. Menter

HINKLE, COX, EATON, COFFIELD & HENSLEY
ATTORNEYS AT LAW
1700 TEXAS AMERICAN BANK BUILDING
POST OFFICE BOX 9238
AMARILLO, TEXAS 79105-9238
(806) 372-5569

2800 CLAYDESTA NATIONAL BANK BUILDING
POST OFFICE BOX 3580
MIDLAND, TEXAS 79702
(915) 683-4691

700 UNITED BANK PLAZA
POST OFFICE BOX 10
ROSWELL, NEW MEXICO 88202
(505) 622-6510

218 MONTEZUMA
POST OFFICE BOX 2068
SANTA FE, NEW MEXICO 87504
(505) 982-4554

500 MARQUETTE N.W., SUITE 740
ALBUQUERQUE, NEW MEXICO 87102-2121
(505) 768-1500

LEWIS C. COX*
PAUL W. EATON
CONRAD E. COFFIELD
[redacted] L. HENSLEY JR.*
[redacted] D. SHANOR*
[redacted] MARTIN
PAUL J. KELLY JR.*
OWEN M. LOPEZ*
DOUGLAS L. LUNSFORD*
JOHN J. KELLY*
T. CALDER EZZELL JR.*
WILLIAM B. BURFORD
RICHARD E. OLSON*
RICHARD R. WILFONG
STEVEN D. ARNOLD
JAMES J. WECHSLER*
NANCY S. CUSACK*
JEFFREY L. FORNACIARI*
JEFFREY D. HEWETT
JAMES BRUCE*
JERRY F. SHACKELFORD
JEFFREY W. HELLBERG
ALBERT L. PITTS*
THOMAS M. HNASKO*

JOHN C. CHAMBERS
THOMAS D. HAINES, JR.*
FRANKLIN H. McCALLUM
GREGORY J. NIBERT*
DAVID T. MARKETTE
MARK C. DOW*
FRED W. SCHWENDIMANN
DAVID MORAN*
JAMES R. McADAMS
JAMES M. HUDSON*
MACDONNELL GORDON*
REBECCA NICHOLS JOHNSON*
PAUL R. NEWTON*
WILLIAM P. JOHNSON
KAREN M. RICHARDSON
ELLEN S. CASEY*
MARGARET C. LUDEWIG*
SUSAN L. NIESER
MARTIN MEYERS*
GREGORY S. WHEELER*
ANDREW J. CLOUTIER
IWANA RADEMAEKERS
S. BARRY PAISNER*

OF COUNSEL
O. M. CALHOUN
MACK EASLEY
JOE W. WOOD
STEPHEN L. ELLIOTT

CLARENCE E. HINKLE (1901-1988)
W. E. BONDURANT, JR. (1913-1973)
ROY C. SNODGRASS, JR. (1914-1987)

*NOT LICENSED IN TEXAS

November 22, 1988

FEDERAL EXPRESS

Federal Energy Regulatory Commission
Mr. Kenneth F. Plumb, Secretary
825 North Capitol Street, N.E.
Washington, D.C. 20426

Re: Proceeding No. EC88-2-000
Dear Commissioners:

Pursuant to Rules 214 and 713 of the Rules of Practice and Procedure, Southwestern Public Service Company ("SPS") submits the enclosed 14 copies of its Motion to Intervene and Application for Rehearing in proceeding number EC88-2-000.

SPS is an electric public utility which operates in New Mexico, Texas, Oklahoma and Kansas. It is subject to the regulatory authority of the Federal Energy Regulatory Commission ("Commission") and the four states. SPS is a member of the Southwestern Power Pool. Its transmission facilities and service territory lie on the western edge of the United States' "eastern grid." SPS is, however, connected to the "western grid" and the Western States Coordinating Council ("WSCC") through two DC converter stations in New Mexico, one station connecting with the system of Public Service Company of New Mexico and the other connecting with the systems of El Paso Electric Company and Texas New Mexico Power Company. SPS is also connected to the Electric Reliability Council of Texas ("ERCOT") through a DC converter station at Oklaunion, Texas.

The decision rendered in proceeding number EC88-2-000, Opinion No. 318, imposes transmission conditions which are beyond the authority of the Commission to independently require and which will impact the system reliability of the merged company and other members of the Western States Coordinating Council.

SPS requests that the Commission reconsider its decision because (1) the Commission has done indirectly that which it could not do directly, that is, it has required the merged company to undertake transmission conditions which are beyond the Commission's statutory authority to order independently, and (2) it has imposed the conditions without appearing to have considered the impact of the conditions upon the operations of other affected utilities or the merged company itself.

Additionally, SPS would point out that the principal anti-competitive effects which concerned the Commission was Utah Power & Light Company's ("Utah") past refusals to wheel low-cost power from the Northwest and the existence of Utah's transmission as an essential facility which could not be duplicated by other utilities. But Utah's conduct and monopoly position, if they exist, existed prior to the proposed merger and, if the merger were disapproved, would continue to exist. The Commission has never imposed on Utah the transmission conditions which it now requires the merged utility to accept. It did not because it was not granted that power by the Federal Power Act. It should not be able to do now what it could not do before - where the conditions and the law have not changed.

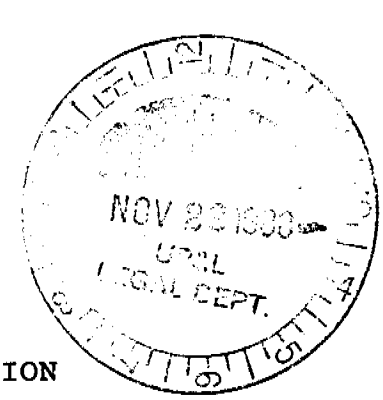
Finally, Opinion No. 318 does not consider and weigh the effect of the transmission conditions on system reliability. Even if the Commission has the authority to impose the conditions to make the merger consistent with the public interest, it must find that the conditions will not adversely impact the reliability of not only the merged company's system, but also the systems of other utilities that would be subject to the effect of the transmission conditions.

SPS requests that the Commission reconsider and conclude that it does not have legal authority to impose all the transmission conditions in question. If it determines it has that authority, SPS requests that the Commission reconsider its Opinion No. 318 and make a finding with respect to the effect of the transmission conditions on the reliability of the systems of the merged company and other affected utilities.

Very truly yours,

Paul W. Eaton
W. Craig Barlow

WCB/PWE/DL20/a1°
8730421
enclosures



UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Company PacifiCorp PC/UP&L Merging Corporation	)))	Docket No. EC88-2-000

MOTION OF SOUTHWESTERN PUBLIC SERVICE COMPANY
TO INTERVENE AND APPLICATION FOR REHEARING

PART I

MOTION TO INTERVENE

Pursuant to Rule 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"), Southwestern Public Service Company ("SPS") files this Motion to Intervene in the above-styled proceeding. In support of the motion SPS would show the following:

1. SPS is an electric public utility which operates an integrated system serving wholesale and retail customers in a 52,000 square mile area in New Mexico, Texas, Oklahoma and Kansas. It is subject to the regulatory authority of the Commission and the four states. SPS is a member of the Southwestern Power Pool. Its transmission facilities and service territory lie on the western edge of the United States' "eastern grid." SPS is, however, connected to the "western grid" and the Western

States Coordinating Council ("WSCC") through two DC converter stations in New Mexico, one station connecting with the system of Public Service Company of New Mexico and the other connecting with the systems of El Paso Electric Company and Texas New Mexico Power Company. SPS is also connected to the Electric Reliability Council of Texas ("ERCOT") tnrough a DC converter station at Oklaunion, Texas.

2. Opinion No. 318 imposes transmission conditions upon the merged company which are beyond the authority of the Commission to independently require and which will impact the system reliability of the merged company and other members of the Western States Coordinating Council.

3. SPS's position is that of a competitor of the merged company for off-system sales and as a regulated utility concerned with the public interest, and with the adverse effect that the transmission conditions would have if they were imposed on SPS in any subsequent proceeding.

4. Granting this motion will not disrupt the proceeding, nor will it place additional burdens on the existing parties. The interest of SPS is not adequately represented by other parties to the proceeding.

5. SPS requests that the Commission grant this motion in order to consider the Application for Rehearing which ensues as Part II of this pleading.

PART II

APPLICATION FOR REHEARING

Pursuant to Rule 713 of the Rules of Practice and Procedures of the Federal Energy Regulatory Commission ("Commission") and Section 313(a) of the Federal Power Act ("FPA"), Southwestern Public Service Company ("SPS") applies for rehearing of the Commission's Opinion No. 318 which issued October 26, 1988.

A. Introduction.

SPS is an electric public utility which operates an integrated system serving wholesale and retail customers in a 52,000 square mile area in New Mexico, Texas, Oklahoma and Kansas. It is subject to the regulatory authority of the Commission and the four states. SPS is a member of the Southwestern Power Pool. Its transmission facilities and service territory lie on the western edge of the United States' "eastern grid." SPS is, however, connected to the "western grid" and the Western States Coordinating Council ("WSCC") through two DC converter stations in New Mexico, one station connecting with the system of Public

Service Company of New Mexico and the other connecting with the systems of El Paso Electric Company and Texas New Mexico Power Company. SPS is also connected to the Electric Reliability Council of Texas ("ERCOT") through a DC converter station at Oklaunion, Texas. Thus, SPS's transmission interconnections particularly justify the company's concern with the provisions of Opinion 318 as they relate to transmission.

In expressing its concerns, SPS has no intention to interfere with, or jeopardize, the merger desires of PacifiCorp and Utah Power & Light. If the proposed merger is consistent with the public interest, the Commission must approve it. FPA, section 203(a). If the proposed merger is not consistent with the public interest, the Commission must reject it. Presiding Administrative Law Judge Lewnes rejected the merger as being, among other things, inconsistent with the objectives of the antitrust statutes. The Commission, although agreeing with Judge Lewnes that the merger would be inconsistent with antitrust policies, established "offsetting" transmission conditions in order that it could approve the merger.

SPS requests that the Commission reconsider its decision because (1) the Commission has done indirectly that which it could not do directly, i.e., it has required the merged company

to undertake transmission conditions which are beyond the Commission's statutory authority to order independently, and (2) it has imposed the conditions without appearing to have considered the impact of the conditions upon the operations of other affected utilities or the merged company itself.

B. The Commission is Without Power to Impose the Transmission Conditions

The Commission, in Opinion No. 318, has required the merged company to provide to other utilities firm transmission service at cost-based or embedded cost rates and, for this purpose, to set aside and make available transmission capacity not needed for its native load and customers under existing firm contracts. The merged company must wheel within intergrated service areas and, subject to certain conditions, must construct additions to its transmission facilities to wheel to the intergrated areas. The merged company must also permit other utilities, subject to certain conditions, to participate in transmission construction projects. If, after the five year transition period provided by the Commission has elapsed, the merged company has not provided transmission capacity to meet the firm transmission requests, it will be required to cut back on its own off-system sales to meet

the requests, thus preventing its own customers from reaping the benefits of off-system sales.

These wheeling and related requirements of the Commission drastically exceed the Commission's limited wheeling authority under sections 211 and 212 of the FPA. They essentially make the merged utility a common carrier, a status which Congress rejected when it enacted the FPA. Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S.Ct. 1022 (1973). No where does the FPA give the Commission authority to impose conditions to its approval of a merger, where the nature and extent of the conditions are such that the Commission is without independent authority to order a utility to impose the same conditions in its operations. Florida Power & Light Co. v. F.E.R.C., 660 F.2d 668, 676 (5th Cir. 1981).

A reading of Opinion No. 318 leads to the conclusion that the principal anti-competitive effects which concerned the Commission was Utah Power & Light's past refusals to wheel low-cost power from the Northwest and the existence of Utah's transmission as an essential facility which could not be duplicated by other utilities. But Utah's conduct and monopoly position, if they exist, existed prior to the proposed merger and, if the merger were disapproved, would continue to exist. The Commission has never imposed on Utah the transmission conditions which it now

requires the merged utility to accept. It did not because it was not granted that power by the FPA. It should not be able to do now what it could not do before - where the conditions and the law have not changed.

C. The Commission Failed to Consider Whether the Transmission Conditions Would Adversely Affect Other Utilities

Transmission engineers would agree that the transmission conditions required by the Commission will have an effect upon the transmission systems of the WSCC utilities as well as the merged utility. Loop flow, loading levels of transmission lines, coordination arrangements and other occurrences and practices will be impacted. System reliability is a primary concern of SPS and every other electric utility.

Opinion No. 318 does not consider and weigh the effect of the transmission conditions on system reliability. Even if the Commission has the authority to impose the conditions to make the merger consistent with the public interest, it must find that the conditions will not adversely impact the reliability of not only the merged company's system, but also the systems of other utilities that would be subject to the effect of the transmission conditions.

D. Conclusion

SPS requests that the Commission reconsider and conclude that it does not have legal authority to impose all the transmission conditions in question. If it determines it has that authority, SPS requests that the Commission reconsider its Opinion No. 318 and make a finding with respect to the effect of the transmission conditions on the reliability of the systems of the merged company and other affected utilities.

Respectfully submitted,

HINKLE, COX, EATON, COFFIELD & HENSLEY

By: Paul W. Eaton

Paul W. Eaton
Paul K. Kelly, Jr.

P.O. Box 9238
Amarillo, Texas 79105
(806) 372-5569

DJ013/u1

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Motion to Intervene and Application for Rehearing of Southwestern Public Service Company were served upon each person designated on the official service list compiled by the Secretary in this proceeding, this 22nd day of November, 1988.

Paul W. Eaton

Paul W. Eaton

dj013/u1

WICKWIRE, GAVIN & GIBBS, P.C.
ATTORNEYS AT LAW
TWO LAFAYETTE CENTRE
1133-21ST STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036-3302
202-887-5200
CABLE ADDRESS
WIREGG
WASHINGTON, D.C.
TELECOPY 202-955-5862

8230 BOONE BOULEVARD
SUITE 400
VIENNA, VIRGINIA 22180-2669
703-790-8750

SUITE 320
414 HUNGERFORD DRIVE
ROCKVILLE, MD 20850
301-251-6308

SUITE 200
152 WEST JOHNSON STREET
P. O. BOX 1683
MADISON, WISCONSIN 53701-1683
608-257-5335

(WICKWIRE, GAVIN & GIBBS)

ONE CENTURY PLAZA, SUITE 3400
2029 CENTURY PARK EAST
LOS ANGELES, CALIFORNIA 90067
213-552-3400

November 23, 1988

Ms. Lois Cashell
Secretary
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, D.C. 20426

Re: Docket No. EC88-2-000

Dear Ms. Cashell:

On behalf of the Cogeneration & Independent Power Coalition of America, Inc. (CIPCA), I hereby submit for filing with the Commission an original and fourteen copies of CIPCA's Motion to Intervene Out of Time and Request for Rehearing in the above-referenced docket.

Copies of the enclosed have been served today on all parties listed on the official service list.

Respectfully submitted,

Maureen Hurley

Maureen Z. Hurley

Enclosures

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Company PacifiCorp PC/UP&L Merging Corporation	)))	Docket No. EC88-2-000

MOTION OF
THE COGENERATION & INDEPENDENT POWER
COALITION OF AMERICA, INC.
TO INTERVENE OUT OF TIME AND
REQUEST FOR REHEARING

On behalf of its members, the Cogeneration & Independent Power Coalition of America, Inc. (CIPCA or the Coalition), pursuant to Rules 214 and 713 of the Federal Energy Regulatory Commission's (Commission or FERC) Rules of Practice and Procedure, 18 C.F.R. §§ 385.214, 385.713, hereby respectfully moves to intervene out of time in the above-captioned proceeding, and requests that the Commission grant rehearing of its Opinion No. 318 (Opinion).[1] Specifically, CIPCA requests that the Commission grant rehearing on the issue of the exclusion of qualifying facilities (QFs) from the class of competitors to which the transmission access and related pricing conditions will extend with respect to the proposed merger between Utah Power & Light (UP&L), PacifiCorp (PacifiCorp Maine), and PC/UP&L Merging Corporation (PacifiCorp Oregon)

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[1] Opinion and Order Affirming In Part, Modifying in Part, and Reversing in Part Initial Decision and Conditionally Approving Merger, 45 FERC ¶61,095 (October 26, 1988 as clarified on October 28, 1988).

(collectively, Applicants).[2] In support of its Motion and Request for Rehearing, CIPCA respectfully states as follows:

I. THE COMMISSION SHOULD GRANT CIPCA'S MOTION TO INTERVENE

Communications concerning this Motion and Request should be addressed to the following persons, and the following should be placed on the Commission's official service list in this proceeding:

Michael J. Zimmer
Gilbert P. Sperling
Maureen Z. Hurley
Counsel, Cogeneration & Independent Power Coalition of America, Inc.
1133 21st Street, N.W.
Washington, D.C. 20036
(202) 887-5200

William A. Gibeaut
Chairman, Policy Committee
Cogeneration & Independent Power Coalition of America, Inc.
200 Civic Center Drive
Suite 500
Columbus, OH 43216
(614)460-6000

CIPCA is a non-profit organization comprised of industrial users, gas utilities, electric utility subsidiaries, independent power producers, equipment manufacturers, project developers, engineering and design firms and organizational entities that include some or all of the above. CIPCA recently affiliated with in 1987 with the American Cogeneration Association, increasing total membership in the combined organization to over 500 corporate and individual members operating in most states nationwide. Since 1980, CIPCA has represented its members in administrative, judicial and legislative matters affecting cogeneration and independent

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[2] Pursuant to an agreement and plan of reorganization and merger, the Applicants propose to merge PacifiCorp Maine and UP&L into PacifiCorp Oregon, with PacifiCorp Oregon to be the surviving corporation.

power development. CIPCA supports the establishment of necessary financial and regulatory incentives to encourage project development nationwide.

CIPCA respectfully requests that the Commission grant its Motion to Intervene Out of Time in this proceeding. As set out below, CIPCA and its various members have good cause for not filing a timely Motion to Intervene. Pursuant to the requirements of Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d), and applicable Commission precedent thereunder, the Commission considers four factors in determining whether "good cause" for late intervention exists: (1) the nature of the interest alleged by the late intervenor and whether that interest is adequately represented by other parties in the proceeding; (2) whether permitting the late intervention will prejudice other parties in the proceeding; (3) whether permitting the late intervention will delay resolution of the proceeding; and (4) the reasons offered by the late intervenor for not having filed on time. Consolidated Gas Supply Corp. and Consolidated Gas Transmission Corp., 20 FERC ¶61,305 at 61,599 (1982).

First, CIPCA submits that it has a strong interest in this proceeding which is not and cannot be adequately represented by any other party. The Commission's decision to exclude QFs from the merger conditions imposed in the instant proceeding has very significant implications for that industry. As outlined in the arguments that follow, the Commission's action effectively permits utilities to unlawfully prejudice and disadvantage QFs in the

provision of critical transmission services necessary to bring power to the wholesale market at issue. As a national trade organization committed to the creation and maintenance of a regulatory environment that encourages qualifying facility development, CIPCA clearly has a strong interest in the instant proceeding. Because no qualifying facilities were parties to the instant proceeding, and because of the Coalition's unique abilities to represent the national QF perspective, it is equally clear that this interest cannot be adequately represented by any party in this proceeding.

CIPCA states with regard to possible prejudice caused by its intervention at this time, that its intention in moving to intervene out of time is to request a rehearing on the issue of the QF exclusion, referenced above. Permitting CIPCA to intervene out of time will not result in any prejudice to existing parties, since the Commission may choose to reject the Request for Rehearing on the merits. In that event, CIPCA's intervention will not operate to delay resolution of this proceeding. However, if the Commission should grant rehearing on this important issue, then any delay in the final resolution must be considered justified.

Finally, with regard to its reasons for filing out of time, CIPCA submits that it had no indication from the record that the QF industry would be the subject of discrimination in the Commission's Opinion conditionally approving the proposed merger. Upon becoming aware of the Commission's Opinion and its implications for the QF industry, CIPCA expeditiously began the

work necessary to file this Motion to Intervene and Request for Rehearing. For the foregoing reasons, CIPCA submits that good cause exists for the Commission to grant its Motion to Intervene Out of Time, and respectfully requests the Commission to do so.

II. THE COMMISSION SHOULD GRANT CIPCA'S REQUEST FOR REHEARING AND REVERSE THE OPINION WITH REGARD TO THE QF EXCLUSION

The Coalition agrees that the Commission possesses the authority to adequately condition the proposed merger to avoid the anticompetitive effects likely to result. Further, the Coalition believes that the substance of the specific conditions imposed on the merged company, incorporating both long- and short-term transmission access obligations, would be effective remedies to potential foreclosure of competitors from the relevant geographic markets after the proposed merger occurs. The striking defect of the Commission's Opinion is the exclusion of qualifying facilities under the Public Utility Regulatory Policies Act of 1978 (PURPA) from the class of competitors to which these critical conditions extend. See Opinion, p. 38, n. 158.

From a policy perspective, this action cannot be supported and is antithetical to the policy direction taken by the Commission in its recent rulemakings on bidding and independent power producers.[3] From a legal perspective, such action clearly violates both the

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[3] Notice of Proposed Rulemaking, Docket No. RM88-4-000, Regulations Governing Independent Power Producers (issued March 16, 1988), 53 Fed. Reg. 9327 (March 22, 1988); Notice of Proposed Rulemaking, Regulations Governing Bidding Programs (issued March 16, 1988), 53 Fed. Reg. 9324 (March 22, 1988).

Federal Power Act and PURPA, and will not withstand judicial scrutiny. To remedy these defects, the Commission must provide for application of the transmission access and related pricing conditions to all competitors of the merged company, including QFs, to preserve the proper competitive balance after the proposed merger occurs. Moreover, analysis must be undertaken to determine the effect of the Commission's action on qualifying facilities to avoid violation of the antidiscrimination provisions of PURPA.

MERGER AS CONDITIONED VIOLATES PUBLIC INTEREST

A. STANDARD OF SECTION 203 OF THE FEDERAL POWER ACT

Section 203(a) of the Federal Power Act confers on the Commission the authority to approve a merger involving a public utility if the merger is "consistent with the public interest." In determining whether a proposed merger satisfies this test, the Commission must consider the policies that underlie the federal antitrust statutes.[4] Thus, as the Commission acknowledges, the potential anticompetitive consequences flowing from a proposed merger are a relevant consideration in evaluating a merger application.

Applying this legal framework, the Commission determined that the proposed merger is likely to result in a substantial lessening of competition in the relevant product and geographic markets.

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[4] In the case of a proposed merger, the applicable statute is the Clayton Act, Section 7, 15 U.S.C. § 18. As the Commission notes in its Opinion, Sections 1 and 2 of the Sherman Antitrust Act also may be applicable.

Mimeo Opinion at 27.[5] In this regard, the Commission found that the merger would give the Applicants strategic dominance over transactions from the Northwest into the Southwest. Id. at 31. In addition, the Commission found that UP&L's transmission system constitutes an essential facility (even without the additional transmission control that would result from the merger) controlled by a monopolist (UP&L). Id. at 32-33. According to the Commission, the merged company would have enhanced ability to foreclose competition for sales of bulk power as a result of the merger. Id. at 34. Thus, the Commission concluded that "the merger as proposed is not consistent with the public interest as a result of its likely adverse effect on competition." Id. at 37.

To redress these anticompetitive effects, the Commission imposed long- and short-term transmission access and pricing conditions, as follows:

> The conditions are designed to provide a long-term remedy to the likely anticompetitive effects of the merger. Thus, we are imposing an absolute obligation on the merged company to provide firm wholesale transmission service at cost-based rates to any utility [footnote omitted] that requests such service. This long-term obligation is necessary to prevent the merged company from exercising its market

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[5] On this point, the Commission affirmed the presiding administrative law judge, who issued an Initial Decision in this proceeding on June 13, 1988. Utah Power & Light Co., 43 FERC ¶63,030 (1988). In that decision, the judge found that the Applicants had failed to show that the proposed merger is consistent with the public interest. The judge also found that the various conditions proposed by the parties would not render the merger consistent with the public interest. Further, he stated that the Commission lacks the authority to impose such conditions, and thus ruled that the application for approval of the merger should be denied.

> power to foreclose access by competitors to bulk power markets in the future.
>
> In addition, we are imposing short-term conditions designed to ameliorate the exercise of monopoly power by the merged company during a five-year transitional period necessary until the long-term conditions can become effective. During the transition period, a portion of the merged company's transmission system will be set aside for use by third parties. This short-term allocation will inhibit the merged company's ability to foreclose competitors who wish to use its transmission system.

Mimeo Opinion at 38.[6]

With respect to the scope of these conditions, the Commission in footnote 158 of its Opinion states that "utility," as used in the above-quoted text, shall not include qualifying facilities under PURPA. Id., p. 38, n. 158. With this footnote, the Commission thus excludes QFs from the class of wholesale power sellers that are entitled, under these conditional obligations, to receive transmission services from the merged company. Since no explanation is provided for this action in the Opinion, the Coalition assumes that the mandatory purchase obligation under Section 210 of PURPA is the basis for treating QFs differently than

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[6] In conditioning its approval of the merger, the Commission relied on its implied authority under Section 203(a) of the Federal Power Act. Section 203(a) confers on the Commission authority to deny approval of a merger if it is not "consistent with the public interest." The Commission reasoned that if it could deny approval of the proposed merger, it must also be able to take the less restrictive step of conditioning its approval. On this point, the Commission reversed the presiding administrative law judge, who found that the Commission lacks the authority to adequately condition the proposed merger. Mimeo Opinion at 20-25.

all other wholesale power sellers in this context.

Contrary to the Commission's apparent conclusion, the exclusion of QFs as beneficiaries of the prescribed transmission access conditions is arbitrary and is clearly inconsistent with the public interest standard imposed under Section 203(a). By excluding QFs, the merger conditions fail to remedy the totality of anticompetitive harms for the relevant product -- wholesale power -- in the appropriate geographic markets. The Commission must extend the benefits of the merger conditions to QFs in order to satisfy the relevant statutory standard.

In identifying the two types of anticompetitive harms that the transmission conditions are intended to remedy, no rational distinction was made by the Commission, or can be made, between the anticompetitive effects of the merger on utility sellers versus QF sellers. First, the extraction of monopoly profits by the merged company through the resale of "captive" QF power remains a distinct and likely possibility. Although the short- and long-term transmission access conditions will likely prevent this scenario with regard to competing utility power sources, no such protection will exist for QF power.

Second, the merged company is likely to continue to give preference to its own generation over QF generation for sales into southwestern markets, even if its own generation is more expensive. The merger conditions may discourage the uneconomic displacement of competing utility sources of supply, but competing QF suppliers would not be protected from the merged company's enhanced ability

to foreclose them from these markets. This omission would exacerbate the hostage seller situation historically faced by QFs due to the native utility's unwillingness to wheel the QF's power to a distant utility that may have a greater capacity need and more attractive avoided cost rates.

It is beyond dispute that QFs are competitors of utilities, such as the merged company, in wholesale power markets. Indeed, the recent trend towards the use of cogeneration deferral rates and related marketing and rate design initiatives by utilities confirms that QFs do exert competitive pressures on utility generators, and are perceived by utilities as such.[7] Likewise, the Commission in its recent rulemaking proposal on bidding recognized that a utility's potential wholesale supply sources include QFs, as well as independent power producers (IPPs) and other franchised utilities. Yet, without explanation or support on the record, the Commission proceeds in the instant case to limit the remedy for the merger's likely anticompetitive results to utility competitors, including IPPs, and to exclude qualifying facility competitors. In order actually to provide "the minimum [conditions] necessary to alleviate [the] ... likely anticompetitive effects so as to make the merger consistent with the public interest," the Commission

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[7] See Petition of the Cogeneration Coalition of America, Inc. for Expedited Investigation Under Section 210 of the Public Utility Regulatory Policies Act and Issuance of Declaratory Order, Docket No. EL87-34-000, pp. 4-12, Attachments A-F (April 28, 1987). See also, "Cogenerators Viewed as Major Utility Competitors by Market Researchers," Cogeneration Report, p. 7 (November 21, 1986).

must expand the scope of the merger conditions to include QFs. Mimeo Opinion at 38.

B. THE COMMISSION'S ACTION VIOLATES THE ANTIDISCRIMINATION PROVISIONS OF SECTION 210(b) OF THE PUBLIC UTILITY REGULATORY POLICIES ACT

By remedying the likely anticompetitive effects of the merger on utilities, and expressly denying to remedy the same for qualifying facilities, the Commission's action clearly violates PURPA. Section 210(b) of PURPA mandates that the Commission insure that the rates for purchases by electric utilities from qualifying facilities:

> (1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and
> (2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

16 U.S.C. § 824a-3(b)(emphasis supplied). The Commission's expansive definition of "rate" makes clear that its continuing oversight responsibilities include consideration of discriminatory effects of the type at issue in this proceeding. The Commission's regulations define "rate" for purposes of PURPA as:

> any price, rate, charge, or classification made, demanded, observed or received with respect to the sale or purchase of electric energy or capacity, or any rule, regulation, or practice respecting any such rate, charge, or classification, and any contract pertaining to the sale or purchase of electric energy or capacity.

18 C.F.R. § 292.101(5).

The merger conditions imposed by the Commission confer a clear competitive advantage to utilities in the relevant wholesale

generation markets by facilitating their power transmission arrangements. Thus, they constitute a rule or practice which will ultimately affect the rate or charge derived for the sale or purchase of electric energy or capacity by such QF. The discriminatory effect of this action is exacerbated by the fact that IPPs, from whom utilities are not obligated to purchase under PURPA as they are obligated with respect to QFs, are among the class of competitors that may obtain the transmission access benefits envisioned in the Commission's Opinion. The Coalition submits that the resulting discrimination towards QFs as nonbeneficiaries of this market advantage constitutes a patent statutory violation.[8] To correct this unlawful discrimination, the Commission must remove the QF exclusion.

C. MERGER AS CONDITIONED VIOLATES PROHIBITIONS OF SECTION 205(b) OF THE FEDERAL POWER ACT

The Commission's conditional approval of the merger clearly violates Section 205(b) of the Federal Power Act, which states that:

> No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any

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[8] Moreover, the Commission's action may further discriminate against QFs in the process of setting full avoided cost rates under PUPRA. No evidence or analysis has been provided by the Commission to verify that its ruling will not have an adverse impact on setting full avoided costs in the relevant geographic market. This potential for discrimination against QFs in avoided cost ratemaking has been totally ignored, and must be addressed by the Commission on rehearing.

> unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

16 U.S.C. § 824d(b)(emphasis supplied). The arbitrary exclusion of QFs from the transmission access and pricing conditions permits the merged company to practice the precise form of discrimination proscribed by the above-quoted provision of the Federal Power Act.

It is beyond question that QFs will be critically disadvantaged by this exclusion with respect to serving the relevant markets. As a matter of policy, the Commission has already recognized this possibility in its discussion of wheeling in and wheeling out proposals in the preamble to its rulemaking proposal in Docket No. RM88-5-000.[9] In the instant proceeding, the Commission itself described the expanded access conditions as "necessary to prevent the merged company from exercising its market power to foreclose access by competitors to bulk power markets in the future." Mimeo Opinion at 38. As a result of the merger conditions, QFs that could be efficient and reliable suppliers of power to these markets will face greater barriers to transmission access than they currently face, since the merged company's obligation to provide such access to other third parties will reduce available transmission capacity.

Equally beyond dispute is the fact that the Commission fails to reconcile with the above-quoted statutory prohibitions its

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[9] Notice of Proposed Rulemaking, Docket No. RM88-5-000, Regulations Governing Bidding Programs (issued March 16, 1988), 53 Fed. Reg. 9324 (March 22, 1988).

exclusion of QFs from the transmission access conditions. The inequity of this action is sharpened by the fact that IPPs are not denied the benefit of these conditions. The Coalition submits that such blatant disregard of the Congressional protections provided under the Federal Power Act for customers of public utilities must not be permitted. Section 205(b) in this instance requires that the Commission extend the merger conditions to all competitors of the merged company, including QFs.

For the foregoing reasons, CIPCA respectfully requests that the Commission grant its Motion to Intervene Out of Time and its Request for Rehearing. CIPCA specifically requests that the Commission reverse its Opinion with respect to the issue of QF exclusion from the conditions imposed on the proposed merger, and extend the transmission access and related pricing obligations of the merged company to qualifying facilities.

Respectfully submitted,

COGENERATION & INDEPENDENT
POWER COALITION OF AMERICA, INC,

Michael J. Zimmer /mzh
Michael J. Zimmer
Gilbert P. Sperling
Maureen Z. Hurley
Counsel

November 23, 1988

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by first class mail, postage prepaid, upon each person designated on the official service list in accordance with the requirements of Rule 2010 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010.

Dated at Washington, D.C. this 23rd day of November, 1988.

Maureen Z. Hurley

WICKWIRE, GAVIN & GIBBS, P.C.
1133 21st Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 887-5200

November 23, 1988

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Company Pacificorp PC/UP&L Merging Corporation)	)	Docket No. EC88-2-000

APPLICATION FOR REHEARING
ON BEHALF OF
ROCHESTER GAS AND ELECTRIC CORPORATION

Pursuant to Rule 713 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, 18 CFR § 385.713, and Section 313 of the Federal Power Act ("FPA"), Rochester Gas and Electric Corporation ("RG&E") seeks rehearing of the Commission's Opinion No. 318 (the "Opinion"), issued October 26, 1988. The Opinion approved the merger of Utah Power & Light Company and Pacificorp, subject to certain wheeling conditions which would be imposed upon the new entity created by the merger. Specifically, the Commission would require the new entity:

(1) to allocate existing capacity to other utilities at cost-based rates during a five-year transition period (Opinion at 40-42);

(2) to provide firm wheeling, subject to engineering limitations, where both the source and point of delivery are within "integrated service areas,"[1/] and to

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[1/] Those areas are identified in Appendix A of Opinion No. 318.

construct necessary additional transmission facilities, subject to certain technical and economic conditions (Opinion at 42);

(3) to provide firm wheeling to any utility, after the five-year transition period, at cost-based rates, even if the new entity must curtail its own use of its own transmission system (Opinion at 44);

(4) to plan and construct its system to accommodate all bona fide requests for wheeling (Opinion at 44-46); and

(5) to permit other utilities to participate in the construction and to share the costs and benefits of new transmission facilities, subject to certain conditions (Opinion at 43-44).

RG&E seeks rehearing of the Commission's imposition of the above conditions on the grounds that such conditions are (1) beyond the Commission's authority, and (2) contrary to sound public policy. Even if the Commission does not so determine, RG&E requests that the Commission clarify that the wheeling conditions are based solely upon the facts in this proceeding and are not precedential for other cases not involving utility mergers.

I. THE COMMISSION IS WITHOUT AUTHORITY TO IMPOSE THE WHEELING CONDITIONS IN OPINION NO. 318.

The wheeling conditions imposed by the Commission in Opinion No. 318 exceed its statutory authority under the FPA. The Commission derives its authority from the FPA, and its powers are limited to those prescribed by the

Act. As discussed below, nowhere does the FPA authorize the Commission to impose the types of conditions it has imposed in the Opinion. They neither are authorized by the specific powers granted the Commission to order wheeling under FPA §§ 211 and 212, nor are they authorized by the Commission's power to approve or disapprove mergers. Further, Congress has specifically refused to grant the Commission the authority to impose such conditions.

In enacting the FPA, Congress originally did not grant the Commission any authority to order wheeling. In 1935, when the FPA was enacted, Congress specifically considered and rejected a provision that would have required utilities to provide wheeling upon request. See Otter Tail Power Co. v. United States, 410 U.S. 366, 374, 93 S. Ct. 1022, 1028 (1973); Associated Gas Distribution v. Federal Energy Regulatory Commission, 824 F.2d 981, 998 (D.C. Cir. 1987), cert. denied, _____ U.S. _____, 108 S. Ct. 1468 (1988). In Otter Tail, the Supreme Court, quoting Senate Report No. 621 of the 74th Congress, 1st Session, 19, stated that the mandatory wheeling provisions "were eliminated to preserve the voluntary action of the utilities."

In 1978, Congress enacted FPA §§ 211 and 212, 16 U.S.C. §§ 824 j-k, for the first time granting the

Commission limited authority to require utilities to provide wheeling, under limited conditions and subject to strict procedural requirements. Before issuing a wheeling order under §§ 211 and 212, the Commission must make very specific determinations which were not made in Order No. 318.[2/] These sections provide the only specific authority for the Commission to order wheeling.

Implicitly recognizing that the wheeling conditions in the Opinion are not authorized by §§ 211 and 212 the Commission determined that the authority to impose these conditions was implied in its § 203 powers to approve utility mergers. Both the language and the legislative history of § 203 demonstrate that § 203 provides the Commission with no such implied powers.

Section 203(b) expressly limits the Commission's power to condition its approvals of mergers. That section states that the Commission "may grant any applications for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities

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[2/] Because the Commission did not utilize its authority under §§ 211 and 212 to impose the wheeling conditions in Opinions No. 318, it is not necessary to demonstrate in detail its failure to comply with these sections.

subject to the jurisdiction of the Commission." 16 U.S.C. § 8246(b). In other words, if the Commission approves a merger, it is authorized to condition that merger for only two purposes: securing adequate service and coordination of facilities. In Order No. 318, however, the Commission imposed conditions for neither of these authorized purposes, but to alleviate the "likely anticompetitive effects" of the merger. Opinion at 38. Not only does Section 203 not specifically authorize the Commission to impose wheeling conditions, but it specifically limits the authority of the Commission to impose any conditions upon merger approvals. This is confirmed by the legislative history of § 203.

In enacting § 203, Congress rejected a provision that would have granted the Commission general conditioning power. The legislation as originally proposed contained a subsection (c) which contained language similar to current § 203(b). However, in addition to the two purposes for conditioning a merger approval under § 203(b), the proposed legislation included a third, more general purpose: "to avoid the creation of relationships detrimental to the public interest or the interests of investors or consumers." H. Rep. No. 1903, 74th Cong., 1st Sess., 75; S. Rep. No. 621, 74th Cong., 1st Sess., 50. In conference, this general language was

deleted; only the two specific conditioning powers were enacted. Id. Thus, conditioning a merger approval in a manner not specifically authorized in § 203 contradicts Congress' intent in enacting that section.

The Commission, therefore, has failed to demonstrate any authority to impose the wheeling conditions in Opinion No. 318. Not only can the Commission not point to any explicit authority for its actions, but, because legislative history demonstrates that Congress has refused to grant the Commission such authority, it cannot rely on any claim to implicit authority.

II. THE WHEELING CONDITIONS IMPOSED BY OPINION NO. 318 ARE CONTRARY TO SOUND PUBLIC POLICY.

Even if the Commission had the authority to impose the conditions in Opinion No. 318, which, we have demonstrated, it does not, those conditions should be rejected on policy grounds. Such conditions are inequitable towards the ratepayers of the merging utilities, and can result in higher costs for those ratepayers as well as reduced reliability and efficiency.

The merging utilities and their ratepayers took the risk of construction of and paid for existing transmission facilities. Those facilities can be used not just for providing service to the merging utilities'

ratepayers, but also for other transactions (e.g. brokering excess capacity) which would directly benefit and earn revenue for utilities and their ratepayers. Under the conditions imposed in the Opinion, however, those ratepayers who paid for the construction of the facilities may not benefit from the new entity's wheeling activities. Therefore, ratepayers will lose the benefits of those facilities built for them and paid for by them.

Other consequences of the Opinion No. 318 conditions can lead to both higher costs to ratepayers and decreased reliability. Faced with potentially unlimited requests for wheeling, the new entity can be precluded from using its capacity to enter interconnection support agreements which enhance reliability and reduce the costs of maintaining necessary reserves. Transmission capacity used for power pooling, reserve sharing, emergency interconnection support, diversity exchanges and economy sales can be preempted by other utilities requesting wheeling. The new entity would then have to use inferior and more expensive resources for assuring adequate reserves. This limiting of the new entity's options both increases costs and decreases reliability.

In addition, transmission flows at times must be reduced below maximum ratings to guard against cascading outages and prevent instability. Utilities requesting

wheeling, motivated by economics and not system reliability, could overload the transmission system leading to outages and unsafe operation.[3/]

These problems cannot necessarily be solved through the construction of additional transmission facilities. Under the conditions in the Opinion, the new entity's wheeling obligations will be absolute; it must supply, after five years, unlimited wheeling upon demand. There is no guarantee that utilities will receive all necessary local, state and federal approvals to build additional transmission facilities. To the extent that the new entity is prevented from constructing new facilities by factors not under its control, it must continue to limit its own use of existing facilities or risk overburdening its system. Thus, the ratepayers of the new entity can be forced to bear successively greater burdens in terms of increased costs and decreased reliability.

[3/] Cost, reliability and safety problems cannot adequately be addressed by the new entity petitioning for relief on a case-by-case basis. Requiring the new entity to petition FERC each time such circumstances arise only serves to create uncertainty, delay and additional expenses.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Company)
Pacificorp)
PC/UP&L Merging Corporation) Docket No. EC88-2-000

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing Application for Rehearing on Behalf of Rochester Gas and Electric Corporation upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated: Rochester, New York
November 23, 1988

Jeffrey C. Parnell, Of Counsel

7904U

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Company) Pacificorp) PC/UP&L Merging Corporation)		Docket No. EC88-2-000

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing Motion to Intervene by Rochester Gas and Electric Corporation upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated: Rochester, New York
November 23, 1988

Jeffrey C. Parnell, Of Counsel

7901U

Commission's Opinion No. 318, issued October 26, 1988, insofar as those determinations may detrimentally affect RG&E's interests.

In Opinion No. 318, the Commission, citing its power pursuant to Section 203 of the Federal Power Act, determined that it has the authority to impose wheeling obligations upon utilities as a condition of approving a merger. In doing so, the Commission has set a precedent that might be applied in other circumstances. Because the Federal Power Act grants the Commission the authority to impose wheeling only under certain conditions, set forth in Sections 211 and 212, which are not present in this case, the Commission has necessarily determined that it has the authority to order wheeling in circumstances where it has not been specifically authorized by Congress to do so. This precedent could be used to require that RG&E and other electric utilities provide wheeling in contexts other than those covered within Sections 211 and 212. Therefore, RG&E has a real and substantial interest in the outcome of this proceeding, even though it would not directly be affected by the proposed merger itself.

Furthermore, RG&E knows of no other party to this proceeding which has addressed, or is planning to address RG&E's concerns insofar as they may be applicable outside the context of mergers. Therefore, RG&E knows of no other

party that is capable of effectively representing its interests in this proceeding.

RG&E at no previous time could have anticipated that the Commission would determine that it had the authority to impose such broad wheeling conditions upon the approval of a merger, especially because such action is not specifically authorized by the FPA, and because Administrative Law Judge Lewnes expressly found that the Commission lacked authority to impose such conditions. RG&E therefore had no interest in this proceeding until Opinion No. 318 was issued. Because it is that Opinion which gave rise to RG&E's interest, RG&E did not seek, and, in fact, could not have sought to intervene prior to the issuance of that Opinion.

For the reasons stated above, RG&E respectfully requests that the Commission grant RG&E's motion to intervene with fully party status.

Dated: Rochester, New York
November 23, 1988

Respectfully submitted,

NIXON, HARGRAVE, DEVANS & DOYLE

By: Jeffrey C. Parnell

Attorneys for Rochester Gas and Electric Corporation
Lincoln First Tower
P. O. Box 1051
Rochester, New York 14603
Telephone: (716) 546-8000

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Company Pacific Corp. P/C/UP&L Merging Corporation	)))	Docket No. EC88-2-000

REQUEST OF DUKE POWER COMPANY
FOR REHEARING

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure (18 C.F.R. §385.713), Duke Power Company ("Duke" or "Company") hereby requests rehearing of Opinion No. 318 in this docket and in support thereof states:

I.

The name, title and mailing address of the person to whom all communications concerning this Request for Rehearing should be addressed are as follows:

Mr. Steve C. Griffith, Jr.
Senior Vice President and General Counsel
Duke Power Company
Post Office Box 33189
Charlotte, North Carolina 28242
704/373-4380

II.

On October 18, 1988, the Commission entered its Opinion No. 318 granting the "Joint Application for Authorization for a Merger" filed October 15, 1988, subject to the terms and conditions set forth in the body of the Order, which terms and conditions require, inter alia, access to existing transmission capacity and participation by other utilities in construction of transmission capacity during a transitional five (5) year period. Thereafter, the Commission imposes as a condition to the merger a long-term obligation to serve which

includes a requirement that the merged company provide firm wholesale transmission service to any electric company requesting it and further requires the merged company to meet all bona fide requests for transmission service by building new capacity or improving/upgrading existing capacity in a period of no less than five years. The merger is also conditioned on the merged company's furnishing nonfirm wheeling access with rates to be based on an equal three-way sharing of benefits. (Slip Opinion, pp. 40-46)

III.

The Company is filing simultaneously with this Request its Motion to Intervene in this Docket pursuant to Rule 214 of the Commission's Rules of Practice and Procedure. (18 CFR §385.214)

IV.

The Commission erred in that it exceeded its authority under Section 203 (16 USC §824b) by conditioning approval of the merger on the Applicants' acceptance of the terms and conditions set forth in Paragraph II above. Section 203 does not authorize the Commission to condition a merger. It must either approve the merger as being consistent with the public interest or disapprove the merger as being inconsistent with the public interest. The Company agrees with Judge Lewnes in the Initial Decision:

> The Commission's general use of its conditioning power has been to fine tune an otherwise acceptable proposal that met all of the statutory public interest tests. It has not used its conditioning powers as a meat axe in order to transmogrify a statutorily unacceptable proposal into one that meets the public interest. (43 FERC Par. 63,030, at p. 65354) (Emphasis added)

Without any reasoned analysis, the Commission summarily dismisses Judge Lewnes' conclusion that the Commission lacks authority to turn a merger proposal which violates the antitrust laws into one which does not by imposing conditions

which in the Commission's view bring the merger proposal into compliance. The Commission should not "bootstrap" its way into asserting jurisdiction over transmission line policy through a Section 203 merger proceeding by conditioning its approval of the merger on acceptance of the conditions set forth in Opinion No. 318 when it has no such jurisdiction in the first instance.

V.

The wheeling conditions imposed may amount to an unconstitutional taking of property, will jeopardize system reliability, and will be detrimental to retail customers because it will require those customers to forego the benefits of economy energy purchases over transmission lines built to serve them and paid for through rates. To the extent that the merged company is forced into limitations on the use of its transmission facilities by the conditions imposed, it will affect the ability of the merged company from performing under any reserve sharing, power pooling, and other coordination contracts entered into after the merger agreement. The long-term obligation to provide transmission service to <u>any</u> other utility without geographical limitation could lead to construction of facilities which are unnecessary to serve the merged company's own load. Thus, the conditions imposed by Order No. 318 would completely usurp the operating responsibility of utilities. A rehearing for further consideration of Opinion No. 318 as it affects transmission policy is absolutely necessary.

WHEREFORE, Duke Power Company respectfully requests that the Commission remove the transmission line conditions contained in Opinion No. 318 or in the alternative grant rehearing and remand the case to Judge Lewnes with directions to reopen the record and take additional testimony in light of this Request.

This 23rd day of November, 1988.

Respectfully submitted,

DUKE POWER COMPANY

By _____

Steve. C. Griffith, Jr.
Senior Vice President & General Counsel
Post Office Box 33189
Charlotte, NC 28242
704/373-4380

Its Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Charlotte, N.C., this 23rd day of November, 1988.

Steve C. Griffith, Jr.
Senior Vice President and General Counsel
P. O. Box 33189
Charlotte, NC 28242
704/373-4380

Attorney for Duke Power Company

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Company Pacific Corp. P/C/UP&L Merging Corporation	)))	Docket No. EC88-2-000

MOTION TO INTERVENE OF
DUKE POWER COMPANY

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. §385.214), Duke Power Company ("Duke" or "Company") hereby petitions the Commission for leave to intervene as a party in the above-entitled proceeding and in support of its motion states:

I.

The Company is a public utility engaged in the generation, transmission, distribution and sale of electric energy in the central portion of North Carolina and the western portion of South Carolina, comprising the area in both states known as the Piedmont Carolinas. Its service area covers about 20,000 square miles with an estimated population of 4 million. The Company supplies electric service directly to approximately 1.4 million retail customers in more than 200 cities, towns and unincorporated communities in the Piedmont Carolinas. Electricity is presently sold at wholesale to eight (8) incorporated municipalities owning their own distribution systems and to a few private utilities. The Company also sells at wholesale to North Carolina Municipal Power Agency No. 1 (NCMPA), Piedmont Municipal Power Agency (PMPA), North Carolina Electric Membership Corporation (NCEMC) and Saluda River Electric Cooperatives, Inc. (Saluda River). The Company renders electric service in a

total of 56 counties and is the principal supplier of electric energy in 44 of these counties.

II.

The name, title and mailing address of the person to whom all communications concerning this Motion to Intervene should be addressed are as follows:

Mr. Steve C. Griffith, Jr.
Senior Vice President and General Counsel
Duke Power Company
Post Office Box 33189
Charlotte, North Carolina 28242
704/373-4380

III.

Duke recognizes that Opinion No. 318 directly applies only to those seeking authority to consummate the proposed merger. However, if the conditions laid down in Opinion No. 318 in this docket were applied to Duke, it could have a potentially adverse impact on Duke's electric customers and could impair Duke's ability to furnish adequate, reliable, and continuous electric service to its wholesale and retail electric customers at just and reasonable rates as it is required by law to do. Duke's interest in this proceeding is not adequately represented by the other parties to this proceeding. Had Duke any cause to believe that the Commission was going to depart from its long-standing policy of restricting its conditioning powers to cases where an acceptable proposal meeting the statutory public interest tests was involved, it would have intervened within the time prescribed by the Commission in its Notice establishing dates for intervention pursuant to Rule 210 (18 C.F.R. §385.210). Conditioning a merger proposal upon acceptance of the transmission policy laid down in Opinion No. 318 could have a tremendous impact on the operating responsibilities of Duke along with other utilities in the entire industry.

Therefore, Duke's participation in this proceeding would be in the public interest. Duke is filing simultaneously with this Motion its Request for Rehearing pursuant to Rule 713 of the Commission's Rules of Practice and Procedure (18 C.F.R. §385.713); and the granting of this Motion is necessary in the public interest. Accordingly, Duke desires to intervene and participate in this proceeding to protect its rights and the interest of the public it serves.

IV.

The Company did not file a Motion to Intervene within the time prescribed by the Commission in its Notice establishing dates for filing interventions and protests as provided under Rule 210. No disruption of the proceeding would result nor would any prejudice or additional burdens be cast upon the existing parties by permitting Duke's intervention at this stage of the proceedings.

WHEREFORE, Duke Power Company requests that it be permitted to intervene and treated as a party in all matters which may arise in this proceeding.

This 23rd day of November, 1988.

Respectfully submitted,

DUKE POWER COMPANY

By _____

Steve C. Griffith, Jr.
Senior Vice President & General Counsel
Post Office Box 33189
Charlotte, NC 28242
704/373-4380

Its Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Charlotte, NC this 23rd day of November, 1988.

Steve C. Griffith, Jr.
Senior Vice President & General Counsel
P. O. Box 33189
Charlotte, NC 28242
704/373-4380

Attorney for Duke Power Company

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Company PacifiCorp PC/UP&L Merging Corporation	)	Docket No. EC88-2-000

MOTION TO INTERVENE OF SCEcorp
AND SOUTHERN CALIFORNIA EDISON COMPANY

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214, SCEcorp and Southern California Edison Company hereby move, for good cause shown, for leave to intervene in the above-captioned proceeding for the purpose of seeking rehearing of Opinion No. 318, issued October 26, 1988.

I.

COMMUNICATIONS

This motion is submitted on behalf of SCEcorp and Southern California Edison Company. The principal place of business of both corporations is 2244 Walnut Grove Avenue, Rosemead, California 91770. Communications in the proceeding should be addressed to:

Charles B. Curtis
Robert R. Nordhaus*
Howard E. Shapiro
Van Ness, Feldman, Sutcliffe & Curtis
A Professional Corporation
Seventh Floor
1050 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
(202) 298-1800

David N. Barry, III*
Thomas E. Taber
2244 Walnut Grove Ave.
Rosemead, CA 91770
(818) 302-1931

*designated for receipt of service

II.

MOVANTS' INTEREST IN THE PROCEEDING

SCEcorp is an exempt public utility holding company that began operations on July 1, 1988.[1/] Its subsidiaries include Southern California Edison Company ("Edison"), a public utility serving nearly four million customers in Southern California. Edison owns and operates an extensive network of high-voltage transmission facilities which is interconnected with numerous other utilities operating in the Western States Coordinating Council ("WSCC") area. SCEcorp and Edison are directly concerned with and affected by the mandatory transmission access, pricing and construction conditions the Commission has attached to its approval of the merger of Utah Power & Light Company and Pacific Power & Light Company into PacifiCorp Oregon. Opinion No. 318, issued October 26, 1988.

The wheeling conditions imposed by the Commission in Opinion No. 318 will have a serious adverse impact on SCEcorp and Edison,

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1/ See Southern California Edison Company, 42 FERC ¶ 62,054 (1988) (order authorizing disposition of facilities). The California Public Utility Commission approved the formation of SCEcorp on January 28, 1988, In the Matter of Southern California Edison Company, CPUC Decision 88-01-063.

on utility operations in the WSCC area, and on the future of the public utility industry in the United States. Those conditions are unprecedented. Neither their scope nor their impact could have been anticipated. Their consequences are inconsistent with the public interest in the maintenance of adequate service, with the technical and economic requirements for effective coordination of utilities in the WSCC area, and with the conditions necessary to assure the reliability of utilities in the West. They radically depart from the Federal Power Act's fundamental scheme of voluntary coordination and transmission access, and they do so on the basis of a truncated record resulting from the expedited schedule in the case. The conditions themselves were devised after the record closed without being subjected to adversary scrutiny on the record to evaluate their economic and operational consequences.

For example, compulsory access and construction requirements will inevitably increase loadings and power flows on the transmission lines of the merged company. These, in turn, will affect power flows and system operations throughout the WSCC area by increasing unintended power flows on parallel systems ("loop flow") and by imposing other loading restraints. Opinion No. 318 has not addressed these consequences.

In addition, the proposed conditions will adversely affect Edison's transmission system, which operates in parallel with the merged company's system and other utilities connected with it.

The conditions go well beyond the limited operational changes Edison anticipated in light of the state of the law prior to this decision.2/

The conditions will also affect the economic development of the utility industry. The requirements for compulsory wheeling and compulsory investment in facilities to provide such wheeling will require the merged company to provide facilities for the sole benefit of other utilities. The burden of providing such facilities falls on the rate payers and shareholders of the merged company without concomitant benefits. On the contrary, the conditions require the merged company to reduce its own use of its own facilities, except to serve native load and pre-merger firm contracts, in order to wheel for other utilities. The result will be to discourage investment, increase costs to rate payers and to chill future efficiency-enhancing mergers that would otherwise advance the objectives of the Federal Power Act.

SCEcorp is immediately affected by these consequences. Since July 1988, SCEcorp has been pursuing a proposal to acquire San Diego Gas & Electric Company ("SDG&E") and to combine the resources of Edison and SDG&E into a single utility serving Southern California with increased efficiency and lower costs to rate payers. The wheeling conditions imposed in this case, if

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2/ Edison intervened in this case (41 FERC ¶ 61,283 at p. 61,751 (1988), but voluntarily withdrew after PacifiCorp, Utah Power & Light, Pacific Gas and Electric, and Edison entered into an agreement for mitigation of major loop flow.

applied to SCEcorp's merger proposal, will directly affect the operations of the merged company.

Movants seek to intervene for the purpose of presenting their views on rehearing regarding: (1) the legality of wheeling conditions of the nature and scope imposed in this case; (2) the adequacy of the record to support the Commission's choice of remedies for the anticompetitive effects of the merger found likely by the Commission; (3) the likely effects of the Commission's order on SCEcorp, Edison and utility systems in the WSCC states; (4) the effects on the future structure, operation and reliability of the industry; and (5) to urge that if the decision is not vacated, that it not be given a generic effect.

It is in the public interest for the Commission to grant intervenor status to Movants and other interested public utilities, holding companies, state commissions, and consumers. Such interventions will assure that the Commission is fully informed as to the consequences of adopting the policies embodied in its order. The Commission has recognized in other cases of similarly broad significance that late interventions may be appropriate so as to assure adequate representation of all interests that may be affected even inadvertently or indirectly by the outcome, particularly when the industry-wide significance of the case is not fully apparent until after issuance of an order. See Orange & Rockland Utilities, Inc., 41 FERC ¶ 61,547 (1988).

No other party adequately represents the interests of SCEcorp and Edison. The merging parties have announced their intent to accept the Commission's conditions despite the consequences for the rest of the industry. Without views like those SCEcorp and Edison seek to present, the Commission's sweeping new conditions will stand on an unstable foundation that is wholly inadequate to satisfy the Commission's obligation to act in the public interest.

Late intervention will not prejudice or burden the existing parties or delay the proceeding, because Movants support expeditious resolution of the issues in this case.

III.

SHOWING OF GOOD CAUSE FOR WAIVER OF TIME LIMITATION IN RULE 210

Movants had good cause not to seek intervention earlier. SCEcorp was not created until July 1, 1988.[3/] Moreover, SCEcorp did not begin pursuing the acquisition of SDG&E until after the conclusion of the hearings in this proceeding. Finally, Movants could not have anticipated that the Commission would order wheeling conditions of such an unprecedented breadth in this proceeding. Therefore, their interest in the proceeding was not fully apparent until issuance of Opinion No. 318 on October 26, 1988.

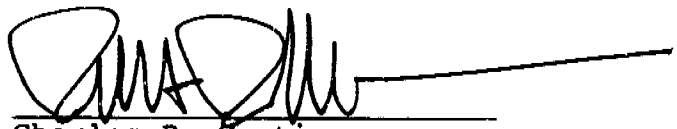
3/ The October 13, 1988 motion to intervene of the Public Utilities Authority for the Town of Plymouth, Utah was granted by the Commission for the same reason, i.e., that the Authority had not been created until August 23, 1988. Opinion 318 at 17.

IV.

CONCLUSION

For the reasons set forth in this Motion, SCEcorp and Edison request that they be admitted as intervenors in this proceeding.

Respectfully submitted,



Charles B. Curtis
Robert R. Nordhaus
Howard E. Shapiro
Van Ness, Feldman, Sutcliffe
& Curtis
A Professional Corporation
Seventh Floor
1050 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
(202) 298-1800

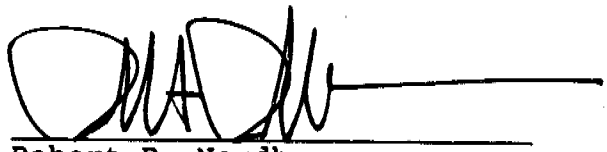
David N. Barry, III
Thomas E. Taber
2244 Walnut Grove Ave.
Rosemead, CA 91770
(818) 302-1931

Attorneys for SCEcorp and Southern
California Edison Company

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion to Intervene of SCEcorp and Southern California Edison Company upon each of the persons designated on the official service list compiled by the Secretary in this proceeding, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Washington, D.C. on this 25th day of November, 1988.



Robert R. Nordhaus
Van Ness, Feldman, Sutcliffe & Curtis
A Professional Corporation
Seventh Floor
1050 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
(202) 298-1800

UNION ELECTRIC

1901 Gratiot Street, St. Louis

(314) 554-2237

November 23, 1988

Ms. Lois D. Cashell, Secretary
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, D.C. 20426

Re: Docket No. EC88-2-000

Dear Ms. Cashell:

Please find enclosed for filing an original and fourteen copies of MOTION TO INTERVENE OF UNION ELECTRIC COMPANY.

Please acknowledge receipt of this filing by date stamping the extra copy of this letter and returning it to me in the enclosed self-addressed, stamped envelope.

Very truly yours,

James J. Cook
Attorney

JJC/cal
Enclosures
cc: Parties on Service List

Mailing Address: P.O. Box 149, St. Louis, MO 63166

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Company PacificCorp PC/UP&L Merging Corporation	)))	Docket No. EC88-2-000

MOTION TO INTERVENE OF UNION ELECTRIC COMPANY

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214, Union Electric Company hereby moves, for good cause shown, for leave to intervene in the above-captioned proceeding for the purpose of seeking rehearing of Opinion No. 318, issued October 26, 1988.

I.
COMMUNICATIONS

This motion is submitted on behalf of Union Electric Company which provides electric service at retail in the States of Missouri, Illinois and Iowa, and at wholesale to customers in Missouri and Iowa. Communications in the proceeding should be addressed to:

James J. Cook
Attorney
Union Electric Company
P.O. Box 149, Code 1310
St. Louis, MO 63166

II.
MOVANT'S INTEREST IN THE PROCEEDING

Union Electric Company (Union) is a public utility serving over 1,000,000 customers in Missouri, Illinois and Iowa. Union

owns high-voltage transmission facilities which are interconnected with other utilities. Union is concerned with the mandatory transmission access, pricing, and construction conditions the Commission has attached to its approval of the merger of Utah Power & Light Company and Pacific Power & Light Company into PacifiCorp Oregon.

The wheeling conditions imposed by the Commission in Opinion No. 318 will have a serious adverse impact on the future of the public utility industry in the United States. Neither the scope nor the impact of the conditions could have been anticipated by parties that might have participated in the proceeding. Moreover, the conditions and consequences are inconsistent with the public interest in the maintenance of adequate service, with the technical and economic requirements for effective coordination of utilities, and with the conditions necessary to assure the reliability of interconnected utilities. They depart from the Federal Power Act's scheme of voluntary coordination and they were largely devised after the record closed.

The requirements for compulsory access (and for compulsory investment in facilities to provide it) will require the merged company to provide facilities for the sole benefit of other utilities. The burden of providing such facilities falls on the ratepayers and shareholders of the merged company without any concomitant benefits. The Commission requires the merged company to reduce its own use of its facilities in order to wheel for other utilities. The result will be to discourage investment,

increase costs to ratepayers, and chill future mergers that would otherwise advance the objectives of the Federal Power Act.

Union seeks to intervene for the purpose of stating its views regarding: (1) the legality of wheeling conditions imposed in this case; (2) the adequacy of the record to support the Commission's choice of remedies for the anticompetitive effects of the merger found likely by the Commission; (3) the possible effects of the Commission's order on Union; and (4) the effects on the future structure, operation, and reliability of the industry. Union also seeks the opportunity to urge that the decision not be given a generic effect.

It is in the public interest for the Commission to grant intervenor status to Union and other interested public utilities, holding companies, state commissions, and consumers. Such interventions will assure that the Commission is fully informed as to the consequences of adopting the policies embodied in its order. See, e.g., Orange & Rockland Utilities, Inc., 41 FERC ¶ 61,547 (1988).

Late intervention will not prejudice or burden the existing parties or delay the proceeding, because Union supports expeditious resolution of the issues in this case.

III.
SHOWING OF GOOD CAUSE FOR WAIVER OF TIME LIMITATION IN RULE 210

Union could not have anticipated that the Commission would order wheeling conditions of such an unprecedented breadth in this proceeding. Therefore, its interest in the proceeding was

not fully apparent until issuance of Opinion No. 318 on October 26, 1988.

IV.
CONCLUSION

For the reasons set forth in this Motion, Union Electric Company requests that it be admitted as an intervenor in this proceeding.

Respectfully submitted,

UNION ELECTRIC COMPANY

By _____
James J. Cook

P.O. Box 149
St. Louis, MO 63166
(314) 554-2237

Dated: November 23, 1988

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion to Intervene upon each of the persons designated on the official service list compiled by the Secretary in this proceeding, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at St Louis MO on this 23rd day of November, 1988.

James J. Cook
Attorney for
Union Electric Company
P.O. Box 149
St. Louis, MO 63166
(314) 554-2237

CP&L
Carolina Power & Light Company
P. O. Box 1551 • Raleigh, N. C. 27602
(919) 836-6382

SHERWOOD H. SMITH, JR.
Chairman/President

November 22, 1988

The Honorable Martha O. Hesse, Chairman
The Honorable Charles A. Trabandt
The Honorable Charles G. Stalon
The Honorable Elizabeth Anne Moler
The Honorable Jerry J. Langdon
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, D. C. 20426

Re: Utah Power & Light Co., et al.
Docket No. EC88-2-000
Opinion No. 318

Dear Commissioners:

Carolina Power & Light is gravely concerned about any possible generic policy implications of the portions of Opinion 318 that address transmission access and transmission services pricing. We respectfully submit that many of the transmission conditions imposed in Opinion 318 exceed the Commission's legal authority. Regardless of the Commission's legal authority to impose these transmission conditions, we believe that Opinion 318, if applied generically, would be grossly contrary to the public interest. Among other things, the application of such policy would subject the consuming public to substantial risks of higher prices, deterioration in reliability of electric service, as well as requiring utilities to make investments and expenditures for the benefit of other electric systems and their customers. A great many utilities and customers which have not had an opportunity to present their positions to the Commission would be seriously prejudiced and adversely affected. Such a result is simply not in the public interest.

There are no doubt great factual differences and differing interests between the parties involved in the proposed Utah Power & Light/Pacificorp merger and other utilities that may be faced with issues of transmission access and transmission services pricing. Such differences in facts and interests can make conditions (that the parties in that case apparently deemed to be acceptable to them) unacceptable and contrary to the public interest in other situations. As the FERC considers changing its general policy on transmission access and pricing, we urge the Commission to act only after having carefully considered its legal authority and the practical effects of any proposed changes in a generic proceeding in which the interests of all affected parties may be considered.

To this end we urge the Commission to reconsider Opinion No. 318 in light of its generic adverse legal and policy implications. For example, the Commission could allow the merger to proceed while it holds the docket open and further reviews the transmission portions of Order No. 318. At a minimum, the Commission should modify Opinion No. 318 to state that the resolution of the transmission issues in that decision are applicable solely to that particular proposed merger.

Sincerely,

Sherwood H. Smith, Jr.

cc: Secretary, FERC
Attached Service List

SERVICE LIST
Docket No. EC88-2-000

Russell D. Mulse
Arizona Public Service Company
Post Office Box 53999
Phoenix, Arizona 85072-3999

David T. Helsby
R. W. Beck & Associates
2121 Fourth Avenue
Seattle, Washington 98121

Scott Hempling, Esq.
Environmental Action Foundation
1525 New Hampshire Avenue
Washington, D.C. 20036

Vickie G. Sandler
Arizona Public Service Company
2100 Valley Bank Center
201 North Central Avenue
Phoenix, Arizona 85037

Jeffrey T. Sprung, Esq.
Hogan & Hartson
Columbia Square
555 13th Street, N.W.
Washington, D.C. 20004-1109

Lynn W. Mitton
Deseret Generation & Trans.
Cooperative
8722 South 300 West
Sandy, Utah 84070

Robert W. Stahman
Secretary
Idaho Power Company
Box 70
Boise, Idaho 83707

Timonthy R. Baker, Esq.
Montana Public Service Commission
1227 11th Avenue
Helena, Montana 59601

John P. Williams
Dunca, Allen & Talmage
1575 Eye Street, N.W.
Washington, D.C. 20005

Michael Lem. Kennedy, Esq.
Citizens Energy Corporation
530 Atlantic Avenue
Boston, Massachusetts 02210

Jan L. Curtis, Esq.
Citizens Energy Corporation
530 Atlantic Avenue
Boston, Massachusetts 02210

Calvin L. Rampton, Esq.
Jones, Waldo, Holbrook & McDonough
1500 First Interstate Plaza
Salt Lake City, Utah 84111

Robert J. Grow, Esq.
Basic Manufacturing & Technologies
of Utah, Inc., DBA Geneva Steel
Post Office Box 2500
Provo, Utah 84603

Janice E. Kerr
California Public Utilities Commission
California State Building
505 Van Ness Avenue
San Francisco, California 94102

J. Calvin Simpson, Esq.
California Public Utilities Commission
California State Building
505 Van Ness Avenue
San Francisco, California 94102

J. Patrick Berry, Esq.
Baker & Botts
555 13th Street, N.W.
Suite 500 East
Washington, D.C. 20004-1109

President
Pacificorp
851 S.W. Sixth Avenue
Portland, Oregon 97204

R. Michael Austin, Esq.
Public Power Council
500 N.E. Multnomah, Suite 729
Portland, Oregon 97230

Daniel O. Flanagan, Esq.
Montana Power Company
40 East Broadway
Post Office Box 1338
Butte, Montana 59701

Richard L. Hinckley, Esq.
Nevada Power Company
6226 West Sahara Avenue
Post Office Box 230
Las Vegas, Nevada 89151

Russell A. Whitfield, Esq.
Whitfield Russell Associates
1301 Pennsylvania Avenue, N.W.
Suite 350
Washington, D.C. 20004

David B. Raskin, Esq.
Newman & Holtzinger, P.C.
1615 L Street, N.W.
Suite 1000
Washington, D.C. 20036

Douglas A. Oglesby
Pacific Gas & Electric Company
77 Beale Street
Post Office Box 7442
San Francisco, California 94120

W. Benny Won, Esq.
Attorney General of Oregon
100 State Office Building
Salem, Oregon 97310

Terry M. Adlhoel, Esq.
Southern California Edison Company
1111 19th Street, N.W.
Washington, D.C. 20036

Daniel C. Kaufman, Esq.
Ritts, Brickfield & Kaufman
Watergate 600 Building, Suite 915
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037

Don P. Garber
San Diego Gas & Electric Company
101 Ash Street
Post Office Box 1831
San Diego, California 92112

Albert R. Malanca, Esq.
Gordon, Thomas, Honeywell, et al.
2200 First Interstate Plaza
Post Office Box 1157
Tacoma, Washington 98401

Robert C. McDiarmid, Esq.
Spiegel & McDiarmid
1350 New York Avenue, N.W.
Suite 1100
Washington, D.C. 20005-4798

Kenneth G. Hurwitz, Esq.
Ritts, Brickfield & Kaufman
Watergate 600 Building, Suite 915
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037

Olof E. Zundel, Esq.
Utility Shareholders Assoc. of Utah
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

Glen West, Jr., Esq.
Pacific Gas & Electric Company
77 Beale Street
Post Office Box 7442
San Francisco, California 94120

George T. Smith, Esq.
Sierra Pacific Power Company
Post Office Box 10100
Reno, Nevada 89510

Norman A. Pedersen, Esq.
Graham & James
2000 M. Street, N.W.
Washington, D.C. 20036

Thomas Taber, Esq.
Southern California Edison Company
2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770

Joseph Duke-Rosati, Esq.
Salt Lake Area Community Action
Program
764 South 200 West
Salt Lake City, Utah 84101

James F. Walsh
San Diego Gas & Electric Company
101 Ash Street
Post Office Box 1831
San Diego, California 92112

Michael Holland, Esq.
United Mine Workers of America
International Union
900 15th Street, N.W.
Washington, D.C. 20005

Michael L. Ginsberg
Utah Division of Public Utilities
Herber M. Wells Building
160 E. 300 South
Salt Lake City, Utah 84145

Joseph L. Menter, Esq.
Goldbert, Fieldman & Letham, P.C.
1100 Fifteenth Street, N.W.
Washington, D.C. 20005

Helen J. Edwards
Utah Power & Light Company
1407 West North Temple
Post Office Box 899
Salt Lake City, Utah 84110

George M. Galloway, Esq.
Stoel, Rives, Boley, Jones & Grey
Standard Insurance Center
900 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268

Arnold H. Quint, Esq.
Hunton & Williams
2000 Penn. Avenue, N.W.
Post Office Box 19230
Washington, D.C. 20036

Gary D. Dahlke
Paine, Hamblen, Coffin & Brooke
1200 Washington Trust Financial
Center
Spokane, Washington 99204

Richard M. Sharp
Shea & Gardner
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Mary L. Vanderpan, Esq.
South Dakota Public Utilities Commission
Capitol Building
500 East Capitol
Pierre, South Dakota 57501

David N. Barry, Esq.
Southern California Edison Company
2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770

Sidney G. Baucom, General Counsel
Utah Power & Light Company
1407 West North Temple
Post Office Box 899
Salt Lake City, Utah 84110

William B. Bohling, Esq.
Jones, Waldo, Holbrook & McDonough
1500 First Interstate Plaza
Salt Lake City, Utah 84111

Kenneth Powell
Utah Division of Public Utilities
Heber M. Wells Building
160 E. 300 South
Salt Lake City, Utah 84145

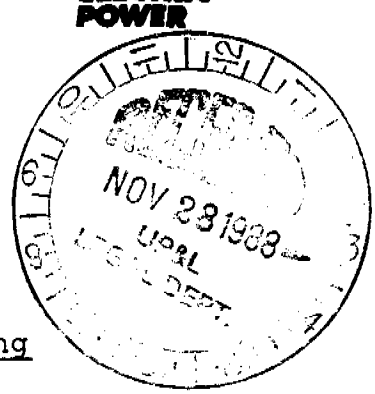
Thomas D. Dukich
Washington Water Power Company
Post Office Box 3727
Spokane, Washington 99202

Roger C. Fransen, Esq.
Wyoming Public Service Commission
Capitol Hill Building
320 West 25th Street
Cheyenne, Wyoming 82002

Stephen N. Ellenbecker, Esq.
Wyoming Public Service Commission
Herschler Building, 1 East
122 West 25th Street
Cheyenne, Wyoming 82002

American Electric Power
Company, Inc.
1 Riverside Plaza
Columbus, OH 43215

AEP
AMERICAN ELECTRIC POWER



Martha O. Hesse, Chairman
Federal Energy Regulatory Commission
825 N. Capitol Street, N.E.
Washington, D.C. 20246

November 23, 1988

Re: Utah P&L - PacifiCorp Merger Proceeding

W. S. White, Jr.
Chairman of the Board and
Chief Executive Officer
614 223 1500

Dear Chairman Hesse:

On behalf of the American Electric Power System, I wish to advise you of our very deep concern regarding the transmission conditions that the FERC imposed in its October 26 opinion and order in the Utah P&L-PacifiCorp merger proceeding. Quite frankly, we are alarmed that these onerous conditions may constitute an indication of the FERC's general thinking with respect to transmission policy.

We trust that this is not the case, because the Utah P&L conditions not only are burdensome in the extreme, they also are arbitrary and, in our view, without legal foundation. They involve an inequitable transfer of economic benefit from the native load customers of the utilities which own the transmission facilities to others. We simply do not believe that the FERC can do indirectly -- even in a merger situation -- that which it clearly lacks the statutory authority to do directly.

We are expressing our concern in the form of a letter (rather than in a formal document) because we do not wish to impede or otherwise delay the realization of the benefits that the parties to the Utah P&L proceeding believe will inure to them and to their customers as a result of the proposed merger. We do, however, urge the FERC to clarify in a public pronouncement that the transmission conditions imposed

in the Utah P&L case have no precedential significance whatsoever beyond the specific facts of that particular proceeding and should in no way be construed as reflecting FERC policy in future merger cases or FERC policy on transmission issues, generally.

Also, we wish to advise you that we subscribe totally to the position expressed by the Edison Electric Institute with respect to this matter.

We appreciate your thoughtful consideration of our request.

Sincerely,

W. S. White, Jr.
Chairman of the Board
and Chief Executive Officer

cc: FERC Commissioners Moler, Langdon, Stalon and Trabandt
All parties of record in FERC Docket No. EC88-2-000

BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C.

Utah Power & Light Company)
PacifiCorp) Docket No. EC88-2-000
PC/UP&L Merging Corporation)

PETITION TO PARTICIPATE AS AMICI CURIAE

Alabama Power Company ("Alabama") and Southern Company Services, Inc. ("SCS"), acting on behalf of Georgia Power Company, Gulf Power Company, Mississippi Power Company and Savannah Electric and Power Company, hereby petition to participate as amici curiae in the above-referenced proceeding. In support of this petition, SCS and Alabama state the following:

1. Alabama is an electric utility operating in the State of Alabama and is a subsidiary of The Southern Company, a registered electric utility holding company under the Public Utility Holding Company Act of 1935. SCS is a subsidiary service company which provides support and technical services to the operating subsidiaries of The Southern Company.

2. On October 26, 1988, the Commission issued its opinion in the above-referenced proceeding. The Commission reversed the decision of the administrative law judge and granted conditional approval of the merger of Utah Power & Light Company and PacifiCorp. As a condition of the merger, the Commission imposed sweeping transmission access and transmission pricing provisions which the merged company

must accept in order to obtain the demonstrable benefits of the proposed merger.

3. Allowing SCS and Alabama to participate as amici curiae in the above-referenced proceeding would be in the public interest. It would afford the above-named utilities an opportunity to express their concerns over the far-reaching and unprecedented transmission conditions incorporated in the Commission's opinion. SCS and Alabama endorse the application for rehearing filed by SCEcorp and other utilities, adopt that request as their initial amici curiae brief and urge the Commission to grant rehearing. In the event the Commission grants rehearing for the purpose of further consideration, SCS and Alabama request permission to file an additional brief as amici curiae within the time limitations established by the Commission.

4. SCS and Alabama submit that the Commission's order deviates from existing law and attempts to expand the Commission's authority to order wheeling and various forms of compulsory transmission access. In enacting and in subsequent attempts to amend the Federal Power Act, Congress specifically rejected provisions that would have allowed the Commission to mandate wheeling or compel transmission access. See Otter Tail Power Co. v. United States, 410 U.S. 366, 375-76, (1973). The courts and the Commission itself have recognized that the Commission lacks the authority to require a utility to provide transmission access. Florida

Power & Light Co. v. Federal Energy Reg. Comm'n, 660 F. 2d 668 (5th Cir. 1981); City of Paris v. Federal Power Comm'n, 41 F.P.C. 45 (1969), on remand from 399 F. 2d 983 (D.C. Cir. 1968). Furthermore, the Commission lacks jurisdiction to order transmission access indirectly. Richmond Power & Light v. Federal Energy Reg. Comm'n, 574 F. 2d 610 (D.C. Cir. 1978). Although the Public Utility Regulatory Policies Act of 1978 added Sections 211 and 212 to the Federal Power Act which give the Commission the authority to order wheeling in very limited circumstances, those narrow provisions are not applicable in the current proceeding. SCS and Alabama, as entities subject to the jurisdiction of the Commission, have an interest in the outcome of this proceeding which attempts to expand the Commission's jurisdiction. SCS and Alabama are extremely concerned that the Commission has required the merged company to dedicate portions of its transmission system to third parties without adequate compensation and without full appreciation of the adverse consequences of such action on the maintenance of reliable service. It is respectfully submitted that the transmission conditions incorporated in the subject order: (a) exceed the Commission's authority under the Federal Power Act; (b) cannot be supported under the Commission's Section 203(b) conditioning power; and (c) will result in a confiscation of property in violation of the Fifth Amendment of the United States Constitution.

5. The Commission's decision could have substantial negative effects on the nation's power supply. With limited exceptions, a utility's transmission facilities are constructed primarily for the purpose of increasing the reliability of service to native load. An attendant benefit of transmission interconnections is the opportunity to take advantage of short-term coordination transactions, such as economy energy transfers and seasonal energy transfers. The Commission endangers these objectives by requiring a utility to dedicate substantial portions of its transmission system to the benefit of third parties. The Commission's order also results in inequities to the native customers because they may not receive the benefits of the transmission systems which have been included in the investment base used to establish the rates which they pay for electric power. The effect of the order is to usurp the interests of the native customers without just compensation or adequate consideration of their needs or of the desires of state and local regulation. It is respectfully submitted that the transmission conditions incorporated in the subject order are inconsistent with the public interest in that (a) the conditions, if imposed in future cases, will make electric service less reliable and more expensive and (b) the conditions will deprive the public of the economic benefits of future utility consolidations.

Respectfully submitted,

Alabama Power Company and
Southern Company Services, Inc.
Acting on Behalf of:
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Savannah Electric and Power Company

November 22, 1988

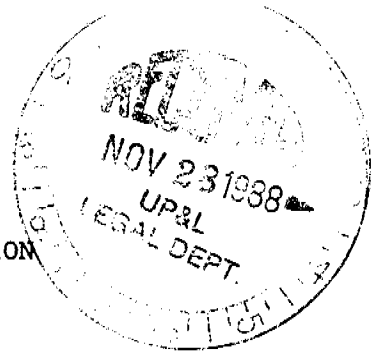
By _____
S. Eason Balch
Rodney O. Mundy
Steven G. McKinney
Mark A. Crosswhite

Balch & Bingham
Attorneys for Alabama Power Company
and Southern Company Services, Inc.
Post Office Box 306
Birmingham, Alabama 35201
(205) 251-8100

CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of November, 1988, served a copy of the foregoing document upon all parties as shown on the official service list as compiled by the Secretary in the proceeding.

Mark A. Crosswhite



UNITED STATE OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Company	)	
PacifiCorp	)	
PC/UP&L Merging Corporation	)	Docket No. EC88-2-000

MOTION TO INTERVENE OF
CENTRAL ILLINOIS LIGHT COMPANY

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.214, CENTRAL ILLINOIS LIGHT COMPANY (hereinafter "CILCO") hereby moves, for good cause shown, for leave to intervene in the above-captioned proceeding for the purpose of seeking rehearing of Opinion No. 318, issued 26 October 1988.

I.
COMMUNICATIONS

This motion is submitted on behalf of CILCO. The principal place of business of CILCO is Peoria, Illinois. Communications in the proceeding should be addressed to:

John G. Sahn, Esq.
General Counsel
300 Liberty Street
Peoria, IL 61602
309-672-5009

II.
MOVANT'S INTEREST IN THE PROCEEDING

CILCO is a public utility serving nearly 182,000 customers in Central Illinois. CILCO owns high voltage transmission facilities which are interconnected with other utilities. CILCO is concerned with the mandatory transmission access, pricing, and construction conditions the Commission has attached to its approval of the merger of Utah Power & Light Company and Pacific Power & Light Company into PacifiCorp Oregon.

The wheeling conditions imposed by the Commission in Opinion No. 318 will have a serious adverse impact on the future of the public utility industry in the United States. Neither the scope nor the impact of the conditions could be anticipated by parties that might have participated in the proceeding. Moreover, the conditions consequences are inconsistent with the public interest in the maintenance of adequate service, with the technical and economic requirements for effective coordination of utilities, and with the conditions necessary to assure the reliability of interconnected utilities. They depart from the Federal Power Act's scheme of voluntary coordination and they were largely devised after the record closed.

The requirements for compulsory access will require the merged company to provide facilities for the sole benefit of other utilities. The burden of providing such facilities falls on the ratepayers and shareholders of the merged company without any concomitant benefits. The Commission requires the merged company to reduce its own use of its facilities in order to wheel for other utilities. The result will be to discourage investment, increase costs to ratepayers, and chill future mergers that would otherwise advance the objectives of the Federal Power Act.

CILCO seeks to intervene for the purpose of stating its views regarding: (1) the legality of wheeling conditions imposed in this case; (2) the adequacy of the record to support the Commission's choice of remedies for the anticompetitive effects of the merger found likely by the Commission; (3) the likely effects of the Commission's order on CILCO; and (4) the effects on the future structure, operation, and reliability of the industry. CILCO also seeks the opportunity to urge that the decision not be given a generic effect.

It is in the public interest for the Commission to grant intervenor status to CILCO and other interested public utilities, holding companies,

state commissions, and consumers. Such interventions will assure that the Commission is fully informed as to the consequences of adopting the policies embodied in its order. See e.g. Orange & Rockland Utilities, Inc., 41 FERC §61,547 (1988).

Late intervention will not prejudice or burden the existing parties or delay the proceeding, because CILCO supports expeditious resolution of the issues in this case.

III.
SHOWING OF GOOD CAUSE FOR WAIVER OF TIME LIMITATION IN RULE 210

CILCO could not have anticipated that the Commission would order wheeling conditions of such an unprecedented breadth in this proceeding. Therefore, its interest in the proceeding was not fully apparent until issuance of Opinion No. 318 on October 26, 1988.

IV.
CONCLUSION

For the reasons set forth in this Motion, CILCO requests that it be admitted as an intervenor in this proceeding.

Respectfully submitted,

John G. Sahn, General
Counsel
Central Illinois Light Co.
300 Liberty Street
Peoria, IL 61602
309-672-5009

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion to Intervene upon each of the person designated on the official service list compiled by the Secretary in this proceeding, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Peoria, Illinois on this 23rd day of November, 1988.

John G. Sahm, General
Counsel
Central Illinois Light Co.
300 Liberty Street
Peoria, IL 61602
309-672-5009

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Company PacifiCorp PC/UP&L Merging Corporation	)))	Docket No. EC88-2-000

MOTION OF EDISON ELECTRIC INSTITUTE TO INTERVENE
AND FOR LEAVE TO FILE OUT OF TIME

Pursuant to Rule 214 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 C.F.R. §385.214, the Edison Electric Institute (EEI) hereby moves to intervene out of time in the above-referenced proceeding in order to seek clarification of the Commission's October 26, 1988 decision. In support of its motion, EEI states the following:

1. The following persons should be included on the official service list in this proceeding, and all communications concerning this motion should be addressed to the following persons:

Robert L. Baum
Senior Vice President and
General Counsel
Edison Electric Institute
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 778-6500

David Owens
Vice President,
Power Supply Policy
Edison Electric Institute
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 778-6527

2. The Edison Electric Institute, with its principal offices located at 1111 19th Street, N.W., Washington, D.C. 20036, is the association of the nation's investor-owned electric utilities. Its member companies provide electric service to 97 percent of all customers of the investor-owned portion of the industry and 73 percent of all ultimate customers in the United States. Most of EEI's member companies are subject to the Commission's jurisdiction pursuant to Parts II and III of the Federal Power Act, 16 U.S.C. §§824-825r, with respect to any wholesale sales of electric energy made by those member companies.

3. On October 26, 1988, the Commission issued a decision in this proceeding which imposed specific transmission access and pricing requirements as conditions of the instant merger.

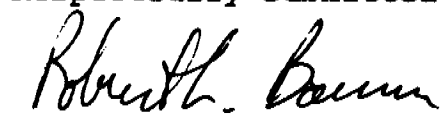
4. EEI takes no position with respect to the specific facts or resolution of the instant merger proceeding. Moreover, EEI does not wish to delay this proceeding. Rather, EEI requests intervention on behalf of its member companies in order to clarify the October 26 decision. Our interest in this proceeding is limited to assuring that the transmission access requirements which the Commission has imposed as conditions of this merger establish no precedent for other mergers or for the development of future Commission policies regarding the imposition of transmission access or the pricing of transmission services. EEI's Motion for Rehearing, which is being filed together with this Motion to Intervene, sets forth in more detail our interest in and concern about this proceeding.

5. EEI requests that this motion to intervene out of time be granted. Interventions in this case were due to be filed on November 2, 1987, pursuant to the notice issued by the Commission. At the time such notice was issued, the case involved the proposed merger between Utah Power & Light Company and PacifiCorp and did not appear to have broad impact upon general industry practices and operations. However, for the reasons set forth in EEI's accompanying motion for rehearing, the Commission's October 26, 1988, decision has raised considerable apprehension within the industry that the transmission access and pricing conditions which the Commission has imposed represent a generic response to crucial policy questions on this issue. Thus, the potential importance of this case to the electric utility industry only became apparent to EEI and its members after the Commission's decision of October 26, 1988.

6. Granting EEI's motion to intervene would not disrupt the proceedings nor would it prejudice any party. EEI specifically takes no position with respect to the specific facts or the outcome of the instant merger proceeding. Further, because EEI represents the investor-owned portion of the industry, EEI can efficiently represent the interests of its members with respect to the broad policy concerns which EEI addresses.

Wherefore, EEI requests that it be permitted to intervene out of time in this proceeding and that it be granted full rights as a party.

Respectfully submitted,



Robert L. Baum
Senior Vice President and
General Counsel
Edison Electric Institute
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 778-6500

Edward H. Comer
Associate General Counsel
for Industry Affairs
Edison Electric Institute
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 778-6615

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Company PacifiCorp PC/UP&L Merging Corporation	)))	Docket No. EC88-2-000

MOTION OF
EDISON ELECTRIC INSTITUTE
ON REHEARING

Pursuant to Rule 713 of the rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission or FERC), 15 C.F.R. §385.713, and Section 213(a) of the Federal Power Act, 16 U.S.C. §8251, the Edison Electric Institute (EEI) seeks rehearing of the Commission's Opinion 318, which was issued on October 26, 1988, approving the merger of PacifiCorp and Utah Power & Light Company, subject to certain conditions relating to transmission and other matters.

Edison Electric Institute submits that the decision contains transmission pricing, construction and access requirements which, if applied as generic transmission policy in other mergers or other regulatory proceedings, will jeopardize reliability, adversely affect consumers, is contrary to the requirements of the Federal Power Act and is bad public policy.

EEI requests that the Commission issue an Order which indicates that the transmission requirements which the decision imposes establish no precedent for the development of future

Commission policies regarding the imposition of transmission access, construction or the pricing of transmission services in mergers or other regulatory proceedings. EEI further requests that when the Commission completes its contemplated review of generic transmission policies or otherwise develops clearer transmission policy guidelines, it permit applicants to obtain modification to the transmission requirements of this decision which are consistent with such new policies. In support of its motion, EEI states the following:

1. BASIS OF EEI'S INTEREST AND CONCERN

EEI takes no position with respect to the specific facts or resolution of the instant merger proceeding and does not wish to delay this proceeding. Our interest in this proceeding is limited to assuring that the transmission access requirements which the Commission has imposed as conditions of this merger establish no precedent for the development of future Commission policies in mergers or other regulatory proceedings regarding the imposition of transmission access, construction or the pricing of transmission services.

Until the publication of the October 26, 1988 decision in this proceeding, the Commission had adopted an extremely cautious, evolutionary approach to the development of policies to encourage the voluntary provision of reliable and efficient transmission services. Many of its initiatives have been characterized as "experimental" so as to emphasize the

Commission's reluctance to establish generic policies without adequate information about the likely impact of such policies. Public Service Company of New Mexico, (Southwest Bulk Power Market Experiment) Opinion No. 203, 25 FERC ¶61,469 (1983), rehearing denied, 27 FERC ¶61,154 (1984): Pacific Gas and Electric Co. (Western Systems Power Pool), 38 FERC ¶61,242 (1987).

In contrast, the instant decision imposes unprecedented mandatory obligations to provide transmission services and unprecedented pricing, construction and allocation principles. While the applicants have determined that the benefits of the proposed merger outweigh the costs of these requirements, they have acknowledged that such requirements impose costs. As more fully set forth below, these requirements cannot be imposed broadly to other utilities in mergers or other regulatory proceedings without increasing electricity costs to most consumers and jeopardizing reliability. Accordingly, whatever the effect on the parties to this case, the policy embodied in the transmission requirements imposed will, if applied generically in mergers or other proceedings, affect utilities and their customers adversely.

2. THIS PROCEEDING PROVIDES AN INSUFFICIENT BASIS FROM WHICH TO DEVELOP GENERIC TRANSMISSION POLICY OR PRECEDENT

Development of a generic transmission policy must occur in a context which affords the widest possible public input. The Commission must consider, among other things, the goals and

requirements of the Federal Power Act, the interrelationship of transmission policy with broader bulk power policy goals, reliability and adequacy of service, and impacts on utilities and their customers throughout the country.

Transmission cannot generally be treated as a product market completely separate from the provision of bulk power, as the instant order infers. From an operational perspective, transmission and generation are inextricably linked. For example, the direct provision of bulk power near a load center, which can be provided by self-generation, a qualifying facility or other power producer, can substitute for and obviate the need for long-distance transmission in many instances.

This case clearly has not provided the proper context for the consideration of these factors because it focused narrowly on a specific merger proposal. The record developed was of necessity composed of evidence concerning the unique circumstances of the merger under consideration. Furthermore, this case was decided on an expedited basis. Thus, the record was not and could not be sufficient to identify the range and scope of relevant circumstances that should influence the development of a broad transmission policy. Moreover, broad transmission policy should not be set in an individual case in which only three of the five commissioners participated.

The Commission's decision in this case also provides no basis for the development of future transmission policy because crucial aspects of the decision lack reasoned explanation as to the facts and circumstances which contributed to the choice of

the specific transmission requirements which the Commission has imposed. The decision does not adequately explain the reasons for the Commission's choice of the specific transmission conditions it imposes. It is unclear whether specific conditions were imposed in response to specific facts and circumstances unique to this case or whether those conditions were chosen because they represent a generic Commission response to crucial policy questions. Whatever the reasons for the imposition of these conditions in this case, the decision does not contain any explanation which would support broader application of this approach. And of course, the Commission has not addressed the extent to which it has considered the practical impact of such conditions if applied in other circumstances. Accordingly, the decision cannot be used to support a general policy for future applications whether in the context of a merger or not. The Commission should publicly acknowledge this fact and also indicate that the case does not reflect any policy decisions on the issues of transmission pricing, construction and access.

3. THE TRANSMISSION CONDITIONS IMPOSED IN THIS CASE WOULD HARM MOST UTILITY CUSTOMERS WITH UNACCEPTABLE COST AND RELIABILITY CONSEQUENCES, IF APPLIED GENERICALLY

The transmission conditions imposed in this case would have unacceptable cost and reliability impacts for utility customers, should they be broadly applied. Reliability would be jeopardized if a utility is required to provide transmission

services for any other requesting utility without regard to (1) the source, destination and timing of power to be transmitted; (2) loop flow effects on other utilities interconnected with the wheeling utility; and (3) the ability of a utility to control generation to deal with emergency conditions and unscheduled outages. These problems would be exacerbated to the extent that the conditions allow the recipient of transmission services to re-sell or reassign its rights to such services without restraint.

A. System Planning, Operation and Reliability

The transmission conditions assume that a utility either has adequate transmission capacity or is able to expand transmission capacity to handle any requested transaction, for the time period of that transaction. That is not and can not be the way in which utilities plan and operate their transmission systems. A utility must plan its transmission system based on a reasonable knowledge of expected sources of generation and loads. Even if a utility were able to infinitely expand its transmission system, not all transactions could be accommodated reliably by the interconnected network. Transactions may be constrained by technical, economic or physical limitations of the system or reliability impacts on the interconnected network outside a utility's own transmission system. Utilities must not be required to engage in transactions which will jeopardize their own reliability, or the reliability of other utilities.

The maintenance of reliability is complicated by the physical properties of electric power systems. Electricity must be produced at the instant in which it is demanded by the customer. Further, electricity cannot be directed over specific paths, as is the case with almost all other modes of energy transportation. Transmission lines cannot by themselves be switched or controlled. The only manner in which power systems can be controlled to prevent widespread outages is through control and scheduling of generation, and effective coordination among utilities operating in the interconnected grid. Each utility operating within a grid must be aware of transactions scheduled by all of its neighbors, its own loads, and the loads of other utilities. Furthermore, a utility must be able to call on its neighbors if it appears that another utility is causing a problem on its own transmission system.

The instant order in this merger case may be used to provide no such protections. Transactions are mandated for which both the transmitting utility and its interconnected neighbors will not necessarily know the source, destination, and schedule very far in advance. Nor is there any suggestion that any of these utilities can request a change in the transaction if reliability would be jeopardized. Furthermore, when transmission of off-system purchases is being provided to a requirements customer, there can be no way of adequately scheduling such transactions. The load of a requirements customer changes from minute-to-minute and day-to-day. The local control area utility is the only entity that can

adequately follow the load of its requirements customers. There is no discussion of how compensation will be provided for such load following and other required residual services.

Finally, the conditions of the instant merger case allow for reassignment or resale of transmission rights. Yet, every single transmission transaction imposes different costs and impacts reliability differently. The only way a utility can estimate the cost and reliability impacts of a particular transaction is to know the source, destination, and schedule of the particular transaction. But if transmission rights can be reassigned, it is not clear that the purchaser of such rights will be using transmission for the same exact transactions. Just because capacity is available for one particular transaction, any change in the terms, conditions, and schedule of that transaction may lead to totally different power flows on the network which were not contemplated in the original service arrangement. The capability of the transmission network to handle specific transactions can only be determined on a case-by-case basis.

B. Customer Impacts and Bypass

EEI firmly believes that retail customers should not be harmed by any transmission services provided for third parties. The merger conditions, if broadly applied, would harm most consumers. The requirement that a utility reduce its own economy transactions if it has insufficient transmission

capacity or is unable to expand its transmission capacity imposes inappropriate costs and burdens on a utility's retail electric customers without any commensurate benefit. If a utility foregoes economy transactions in order to provide transmission service to others, that utility's customers would lose substantial benefits of economy transactions over transmission lines built for them. For example, customers would lose the benefits of purchasing less expensive economy power, which would lower their rates if the purchase were consummated. In comparison, other utilities may use these same transmission lines, not only to serve their native load, but to engage in economy transactions or in transactions to resell that transmission capacity to others.

These requirements are particularly troubling because FERC appears to have rejected the notion of permitting a utility to recover, in its transmission rates, the costs of transactions which it foregoes in order to provide transmission capacity to others. Although the decision indicates that the long-term obligation to provide transmission service will "be at a cost-based rate" (Slip Op. at 39), it specifically states that "we do not contemplate including opportunity costs in such rates" (id. at n. 163). If the Commission denies the recovery of such costs, it raises serious questions under the Fifth Amendment of the Constitution regarding confiscation of utility property.

EEI opposes any FERC condition requiring utilities to "wheel" to requirements customers ("transmission dependent

utilities" in the parlance of the decision) without addressing whether or not "wheeling" actually occurs and without mentioning the issue of bypass. The Commission has apparently ignored the record developed in its 1985 Notice of Inquiry on Regulation of Electricity Sales for Resale and Transmission Service (Docket No. RM85-17, Phase I) and the more recent record developed in the context of the Commission's NOPRs on Competitive Bidding and Independent Power Producers (Docket Nos. RM88-4-000 and RM88-5-000). In all three of these Dockets, EEI demonstrated that the provision of "wheeling" service to requirements customers is not really the wheeling of power at all, but rather the wheeling of money. Such a requirement results in the same negative consequences to a utility as would bypass by a large retail customer. The Commission itself admitted to such negative consequences in the Competitive Bidding NOPR, where it stated (at p. 87, n. 125):

> "Customer access" involves the ability or right for retail or wholesale requirements customers to gain transmission access to reach suppliers other than their native utility, or for such suppliers to reach the retail or wholesale customers of another utility. "Customer access" raises serious concerns as to its potential effects on both the financial viability of franchised utilities and the protection of their customers. See Statement of Commissioner Charles Stalon before the Senate Committee on Energy and Natural Resources, February 1, 1988, pages 36-41.

Bypass by a utility's wholesale requirements customers raises a panoply of issues and concerns which have not been addressed in this decision. Policies must be established to assure that a utility's remaining customers do not face

increased costs to pay for the fixed costs of capacity abandoned by requirements customers. Moreover, a utility still has a residual, practical obligation, based on how electric systems are operated, to provide backup, emergency and other services to a wholesale customer located within its control area even if the customer attempts to rely upon alternative suppliers. As the Commission recently stated, "it is difficult to imagine that the Commission would allow a utility to terminate service to a full or partial requirements customer that has no alternative source of power simply because that customer has not adequately arranged for its own needs, when it is technically feasible to provide service of some sort." Pacific Gas and Electric Co. (Modesto), 44 FERC ¶61,010 at p. 61,051 (1988). The implications of the instant merger case order on a utility's future obligation to serve and questions as to how the costs of these services will be paid must be addressed.

C. Loop Flow

Nor has the Commission explained how loop flow impacts created by any wheeling requirement should be addressed. In the real world, electricity does not necessarily follow contract paths and transmission additions may not actually serve their intended purpose. A particular mandated transaction will likely utilize the transmission facilities of other utilities not subject to the transmission service requirements. This could impair the ability of such other utilities to use their own

facilities and impair reliability. Such results would harm customers of utilities not subject to such transmission conditions and raises important compensation and coordination issues. However, the Commission has not addressed the issues resulting from the impacts of loop flow on other utilities.

Clearly, FERC has not yet addressed many of the complex issues involved in the provision of transmission services. Economic models and theory simply do not reflect the realities of electric system planning and operation, yet these realities cannot be ignored if this industry is to be expected to maintain its traditions of reliable and efficient electric power service.

4. THE FEDERAL POWER ACT PROMOTES VOLUNTARY INTERCONNECTION AND COORDINATION, NOT MANDATORY TRANSMISSION

Section 202(a) of the Federal Power Act directs the Commission to promote and encourage voluntary interconnection and coordination among utilities. This section provides, in pertinent part:

> For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy .... It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts.

16 U.S.C. §824(a) (1982) (emphasis added).

The Supreme Court has concluded that "[t]he essential thrust of §202 is to encourage voluntary interconnections of power..." Otter Tail Power Co. v. United States, 410 U.S. 366, 373 (1073).

EEI believes that the goals of Section 202(a) can best be achieved through the Commission's adoption of policies which promote voluntary transmission transactions, such as through the use of appropriate pricing mechanisms which provide economic incentives (rather than regulatory mandates) for reliable and efficient transactions which provide potential transmission users with appropriate price signals, and which provide incentives for expansion of the transmission system where needed.

While we have not specifically addressed the Commissioners' authority under §203, and there is no need to address the issue of the legality of the decision itself for purposes of granting our request, we have presented our position on the Commission's lack of authority to mandate wheeling in Appendix A of our July 18, 1988 comment responding to the Commission's Notice of Proposed Rulemaking regarding Competitive Bidding Programs. Docket No. RM 88-5-000.

Historically, the Commission has never had general authority to compel a utility to transmit power for third parties. When Part II of the Federal Power Act was originally drafted, the first draft contained provisions which would have required electric utilities to "transmit energy for any person upon reasonable request" and would have allowed the Commission

to require such wheeling. See H.R. 5423, 74th Congress, 1st Sess. Congress deleted such provisions, and specifically wanted to ensure that transmission would remain a "voluntary action of the utilities." S. Rep. No. 621, 74th Congress, 1st Sess., at 19.

For more than 40 years following the passage of the Federal Power Act, the law was clear that the Commission had no power to order a utility to offer transmission services. Richmond Power and Light Co. v. FERC, 574 F.2d 610 (D.C, Cir. 1978). Even where the utility's refusal to offer such services has been found to be a violation of the antitrust laws, the Supreme Court held that the Commission still did not have the authority to order that utility to "wheel." In Otter Tail Power Co. v. United States, 410 U.S. 366, reh. denied 411 U.S. 910 (1973), the Supreme Court stated that, although a court may order transmission services to remedy antitrust violations, the Commission itself may not. "So far as wheeling is concerned, there is no authority granted the Commission under Part II of the Federal Power Act to order it, for the bills originally introduced contained common carrier provisions which were deleted." 410 U.S. at 375 (footnote omitted).

The Commission itself has agreed, stating:

> If wheeling means the obligation of one public utility to make its transmission facilities available to 'facilitate' a power supply contract between two other unconnected companies, ...we think the Commission lacks the power to order it, because Congress considered and affirmatively rejected a provision which would have made it the 'duty of every public utility to ... transmit energy for any person upon reasonable request therefor.. (emphasis in original). City of Paris v. Kentucky Utilities Co., 41 F.P.C. 45, 49 (1969) (footnote omitted).

The circuit courts also agree that "[a]s originally enacted, the Federal Power Act did not permit the Commission to compel wheeling." New York State Electric & Gas Corp. v. FERC, 638 F.2d 388, 401 (2nd Cir. 1980); Florida Power & Light Co. v. FERC, 660 F.2d 668 (5th Cir. 1981) (same holding verbatim). The law on this point is well settled: the original Federal Power Act did not allow the Commission to force a utility to offer transmission services.

Sections 211 and 212 of the Federal Power Act, 16 U.S.C. §824j, §824k, enacted as part of PURPA, granted the Commission specific authority to order transmission services under very detailed, specific criteria to promote reliability, conservation and efficiency, so as to reduce reliance on imported oil. These sections demonstrate that when Congress choose to modify the prior absolute restriction on the Commission's authority to order transmission services, it did so expressly, it narrowly defined the circumstances for which and under which transmission services could be required, it expressly required that an order mandating such services "reasonably preserve existing competitive relationships," and it continued its preference for voluntary transactions. Under these provisions, the Commission must find that the transmitting utility is not likely to suffer an uncompensated economic loss or other undue burden; the order will not unreasonably impair reliability or adequacy of service; and that the wheeling order would reasonably preserve existing competitive relationships.

Finally, the analysis of Sections 211 and 212 in New York State Electric & Gas v. FERC, 638 F.2d at 402, emphasizes Congress' continued reluctance to disturb voluntary relationships. It concludes:

> [E]ven when all the prerequisites for the issuance of an order compelling wheeling have been met, the Commission is instructed to issue a proposed order, so as to allow the parties themselves an opportunity to agree on terms and conditions....
>
> These requirements reflect an intent to safeguard the voluntariness of wheeling arrangements to the greatest extent possible while providing 'assurance to all persons that they will be treated fairly and compensated fully' if they are compelled to provide involuntary services. (emphasis in original)

These requirements demonstrate that Congress was well aware of the prior restrictions on the Commission's authority to mandate wheeling and that, even when Congress did allow the Commission to order wheeling, it did so in narrow circumstances which would preserve existing competitive relationships and continued to prefer voluntary transactions.

The statutory preferences for encouragement of voluntary, rather than mandatory, transmission services establish the legal framework within which the Commission must establish and implement its transmission policy.

5. ARTICULATION OF THE LIMITED EFFECT AND NATURE OF THIS DECISION IS ESSENTIAL

The lack of reasoned explanation about crucial aspects of the decision, ambiguities in the decision itself, the apparent preference for regulatory mandates over the creation of incentives for voluntary initiatives and the obvious absence of

the Commission's previous caution about developing new transmission requirements significantly reinforce our apprehension that the Commission is announcing broadly applicable policy initiatives.

EEI has actively supported Commission efforts to develop generic policies to guide the pricing of transmission services in order to promote voluntary efficient transactions. Many EEI members have participated in Commission experiments (WSPP and Southwest Bulk Power Market Experiment) and initiated innovative services (Baltimore Gas & ELectric Company, Turlock, Modesto) to promote the development of such policies. It is clear, however, that the Commission decision in this proceeding, if it establishes policies that could be applied in some of these other circumstances, would preclude industry innovation. Concern about the Commission applying such transmission conditions to innovative industry proposals may by itself hinder transactions which might otherwise be beneficial.

Our mutual efforts to develop appropriate policies to promote efficient voluntary transmission services will be seriously undermined if the Commission's decision with respect to the transmission elements of this case is perceived to represent definitive Commission policy regarding future transmission-related questions. Clarification of the intent and scope of this decision is thus needed on rehearing.

CONCLUSION

For the foregoing reasons, EEI respectfully requests that the Commission issue an Order on Rehearing which clarifies that the transmission access requirements which the Commission has imposed as conditions of this merger do not establish a precedent to be applied in other cases or for the development of generic Commission policies regarding the imposition of transmission access or the pricing of transmission services; and which provides that when the Commission completes its contemplated review of generic transmission policy or otherwise develops clearer transmission policy guidelines, applicants may obtain modifications to the transmission requirements of this decision which are consistent with such new policies.

Respectfully submitted,

Robert L. Baum
Senior Vice President and
General Counsel
Edison Electric Institute
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 778-6500

Edward H. Comer
Associate General Counsel
for Industry Affairs
Edison Electric Institute
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 778-6615

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of November, 1988, I served one copy of the foregoing "Motion of the Edison Electric Institute to Intervene and For Leave to File Out of Time," and "Motion for Rehearing" on counsel for each of the parties as set forth in the official Service List, by first-class United States mail, postage prepaid.

Dated at Washington, D.C., this 23rd day of November, 1988.

Edward H. Comer

Edward H. Comer, Esquire

UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

UTAH POWER & LIGHT COMPANY PACIFICORP PC/UP&L MERGING CORP.	)))	Docket No. EC88-2-000

APPLICATION ON BEHALF OF NUCOR STEEL REQUESTING REHEARING OR CLARIFICATION OF ORDER CONDITIONALLY APPROVING MERGER

TO: The Honorable Commissioners
Federal Energy Regulatory Commission

Pursuant to Section 313(a) of the Federal Power Act, *as amended*, 16 U.S.C. § 825*l*(a) (1982), and Rule 713 of the Federal Energy Regulatory Commission's Rules of Practice & Procedure, 18 C.F.R. § 385.713, the Nucor Steel division of Nucor Corporation ("Nucor") respectfully requests that the Commission rehear and reconsider or clarify Opinion No. 318, its *Opinion and Order Affirming in Part, Modifying in Part, and Reversing in Part Initial Decision and Conditionally Approving Merger*, issued October 26, 1988 (reported at 45 FERC ¶ 61,095) (the *"Order"*). As Nucor will show more fully hereinafter, although this Commission correctly determined that an unconditioned merger of Applicants Utah Power & Light Company ("UP&L") and PacifiCorp ("PP&L") would not be consistent with the public interest, it failed to condition its approval by unequivocally blunting the force of the merged company's transmission dominance as a vehicle to

foreclose competiton and gain a competitive advantage in bulk power markets. Even under the conditions embodied in the *Order*, the merged company retains signifcant ability to exploit its control over essential transmission facilities to the detriment of actual and potential buyers and sellers of bulk power. End-users, as well as purchasers for resale, will be affected by the merger's adverse impact on competition. Accordingly, those conditions should be strengthened and clarified to effectively ameliorate the anti-competitive effects of the merger at all levels of the market.

I.
The Commission did not sufficiently delineate the "Transmission Dependent Utilities" requiring special protection and otherwise unduly restricted entities to whom the merged company must provide meaningful transmission access.

The *Order* recognizes that transmission access is the key to effective and meaningful competition in bulk power markets. Accordingly the Commission sought to open the merged company's essential transmission facilities up to other market participants through a transition period (5-year) allocation of the excess capacity currently available on the merged company's transmission grid, coupled with a long term obligation to provide transmission service to all requesters thereafter, the transition period allowing them

merged company to plan and complete any construction needed to meet all requests.

As Nucor witness Matthew I. Kahal pointed out, transmission access conditions may have unintended side effects as allocations of existing capacity reduce the opportunity for potential market entrants:

> . . . . [N]ew low cost power suppliers, independent power producers, cogenerators, municipals, or other entities seeking to purchase or sell power may emerge and find that transmission opportunities are foreclosed by the very conditions that are designed to provide a remedy to the transmission access problems on the Applicants' system.

Ex. 192 at p. 4.

The *Order* implicitly recognizes that certain entities are uniquely vulnerable to restraints on transmission service, establishing a category of "Transmission Dependent Utilities" grouped in a separate transition period priority allocation tier (mimeo at p. 40, note 165 and accompanying text) and given an opportunity to participate in backbone transmission facility construction projects (mimeo at pp. 43-44). The definition of that term, however, explicitly includes a named generation and transmission cooperative, two named municipal power associations, and the "present members" of those associations, suggesting an interpretation *limiting* the defined term to such entities.

No rationale for such a narrow view has been or can be advanced.

The Commission prescribed comprehensive conditions requiring the merged company to provide transmission service ""to any utility that requests such service" (mimeo at p. 38, footnote omitted), but nowhere defines the term "utility." The formulation specified in the *Order* explicitly excludes PURPA-qualified small power producers and cogenerators ("QFs") and implicitly forecloses independent power producers (and other entities commonly viewed as "non-utility generators") and end-users from competitive bulk power markets. No rationale for such a narrow view has been or can be advanced.

A.
Transmission access should not be preferentially available to specific entities or to limited to those enjoying a particular regulatory status.

As set forth in footnote 165 of the *Order*:

> Transmission Dependent Utilities are those utilities that are dependent on the merged company for transmission access to their load or resources, and includes Deseret Generation and Transmission Cooperative, Utah Associated Municipal Power Systems, Inc. and its present members, and the present members of the Utah Municipal Power Association.

The use of the term "includes" to introduce the entities named in the note and described by current affinity to the named entities suggests that the Commission has used them to

merely illustrate the "Transmission Dependent Utilities" concept by example. If that be the case, Nucor asks that the *Order* be clarified to so state. If, however, footnote 165 reflects the Commission's intention to restrict "Transmission Dependent Utilities" to those entities named in the note and described by current affinity to the named entities, such a restriction is arbitrary and capricious.

The named cooperative and municipal associations should not be afforded a Commission-bestowed advantage in retaining and attracting members. *Any* utility dependent in fact on the merged company's transmission facilities to move bulk power from its resources to its loads should be have equal access to those facilities. No warrant in the record has been shown to single out specifically named groups and their members as deserving of special protection. Other groups and unaffiliated utilities should not be discriminated against, and named groups and their members should not be preferred, in transmission access conditions.[1]

The *Order* conditions merger approval by requiring the merged company to provide transmission service to requesting utilities, but specifically notes that

> "Utilities shall not include Qualifying Facilities as defined in section

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1 Nucor does not here suggest the any parties to the proceeding to have urged membership as a criteria for qualification. The argument in the text has been included in this *Application* out of an abundance of caution.

292.101(b)(1) of the Commission's regulations. 18 C.F.R. § 292.101(b)(1) (1988)."

Mimeo at p. 38, note 158. No explanation for that exclusion is stated, nor can such an exclusion be supported by substantial record evidence or sound policy.

The *Order* justifies open transmission access conditions as "the minimum necessary to alleviate the [merger's] likely anticompetitive effects so as to make the merger consistent with the public interest." Mimeo at p. 38.[2] By arbitrarily excluding an entire category of bulk power resources, the Commission has thwarted its own stated goal. Congress enacted PURPA a decade ago to encourage and promote small power production and cogeneration as alternatives to the large central generating stations traditionally utilized for bulk power production and, as the Commission is well aware, such alternative resources have grown dramatically in significance since that time. Accordingly, these non-traditional power sources can provide an increasingly important competitive alternative to utility systems fitting the more historically accepted mold.

As the Commission is also well aware, traditional electric utilities are looking beyond the generating

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2 No rationale has been advanced in the *Order* for the Commission choice of *minimum* protections for free and open competition. Nucor suggests that more than minimal prophylaxis is called for on the record.

resources they own or can build themselves to independent power producers ("IPPs").[3] Thus, as industry changes bring about increasing reliance on IPPs as alternative bulk power resources, those alternatives must not be throttled by artificial restrictions on their ability to move power from the point of generation to the point of sale. One can also predict the emergence of other forms of technology and organization as competitive alternatives to traditional industry patterns. These newly emerging competitive forces should not confronted at the outset with the disadvantage of less advantageous access to the transmission facilities of the merged company.[4]

Neither the antitrust laws nor the Federal Power Act can be read to force competition into any particular form. All sources of bulk power must be afforded an equal opportunity to compete in the market, an opportunity for which transmission service is essential.

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3 The *Order* makes no mention of IPPs, leaving open the possibility that the Commission intended, by not excluding them (as it had QFs), to include them as "utilities," in which case clarification is appropriate. If silence was designed to exclude, however, rehearing should be granted to correct the error.

4 Indeed, although arguments can readily be advanced to support conditions affirmatively preferring new forms of competition, none have been or can be made to treat additional market forces less favorably.

B.
Transmission Access should not be limited to those entities currently participating in bulk power markets.

The record amply demonstrates that UP&L has historically opposed formation of competing municipal utility systems in Utah. And, as found by the ALJ and adopted by the Commission, the record is devoid of evidence that the merged company will behave any differently. *Order* at p. 37 and note 157. Section 7 of the Clayton Act, *as amended* (15 U.S.C. § 21 (1982)),[5] moreover, condemns equally mergers raising barriers to entry by new competitors as it does those transactions which foreclose competition by existing market participants. Likewise, the "essential facilities" doctrine cited at pages 32-33 of the *Order* emerged under the antitrust laws to protect potential market entrants, as well as existing competitive forces. *See, e.g., Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977).

The transmission conditions embodied in the *Order* fail of their essential purpose if construed to freeze the *status quo*. Newly established bulk power buyers and sellers should not be discriminated against, and existing bulk power buyers

5 Clayton Act standards unquestionably apply to the Commission's evaluation of the merger under Section 203. *See Order* at pp. 26-27.

and sellers should not be preferred, in transmission access conditions.

C.
Transmission access should not be limited to bulk power sales for resale.

As discussed above, the Commission must treat new market entrants and non-traditional bulk power suppliers even-handedly. The *Order*, however, limits mandatory access to "utilities," necessarily excluding power intensive end-users, such as Nucor, taking service from the applicants' transmission facilities. Such an exclusion is unwarranted from the standpoint of technical considerations and regulatory policy.

Nucor does not quarrel with the Commission's efforts to impose conditions to protect competition in the bulk power market against the merged company's exploitation of its essential transmission facilities as a lever to exclude or disadvantage competitors in that market. Those conditions, however, did not go far enough. The *Order* discusses the bulk power market largely, if not exclusively, in the context of sales for resale -- *wholesale* bulk power transactions. This is understandable, given the historical backdrop and the Commission's jurisdictional grant over "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1) (1982). *See also* 16 U.S.C. § 824(a) (1982). This Commission's regulation of

transmission services and facilities, however, is not so circumscribed, for the Federal Power Act applies "to the transmission of electric energy in interstate commerce" and jurisdiction extends to cover "all facilities for such transmission . . . [but not over those] used . . . only for the transmission of electric energy in *intra*state commerce . . . ." 16 U.S.C. § 824(b)(1) (1982) (emphasis added). This Commission has declared its jurisdiction over the terms and conditions of transmission service ostensibly rendered wholly within the borders of a single state where the facilities used therefor formed part of an integrated interstate grid. *See Florida Power & Light Co.*, 40 FERC ¶ 61,045 at pp. 61,119-20 (1987), citing *FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972) and *Florida Power & Light Co.*, 29 FERC ¶ 61,140 (1984). Perforce, an unquestionably interstate transaction -- whereby Nucor purchases power from a utility outside of Utah, takes title to such power at an interconnection point outside of Utah, and transmits such power for delivery at Nucor's existing substation tapping UP&L's transmission lines in Utah -- is subject to regulation by this Commission exclusively.

No distinction, electrically, can be drawn between the illustrative transaction described above and one in which an intermediate reseller is interposed between the end-user and the out-of-state source of power. The latter transaction falls squarely within those for which the *Order*'s conditions

require the merged company to provide transmission service to preserve the seller's ability to effectively compete with the merged company. The illustrative transaction should be treated no differently.[6]

The record is devoid of probative evidence justifying discrimination between transmission access afforded buyers of bulk power for resale and the access afforded buyers seeking power for their own consumption. Having set forth mechanisms for allocating the merged company's existing available transmission capacity in the transition period and for expanding that capacity to accommodate requests for transmission service in the long-term, the Commission should assure that competitive forces are given free rein, not hemmed in by artificial barriers to reaching ultimate users.

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6 The merging companies have suggested that state statutes establishing exclusive retail service territory constitute the distinction that makes the difference. However, the applicability of such laws to a purchase consummated outside the state, as a matter of statutory construction, is hardly free from doubt. And, even if so construed as a matter of state law, such statutes face pre-emption by the Federal Power Act. The Commission need not prejudge those issues at this juncture, but can instead simply make any retail wheeling conditions "subject to applicable state regulatory approval," if any as the *Order* did with respect to participation by Transmission Dependent Utilities in the merged company's future backbone transmission construction projects. *See* Mimeo at p. 43.

II.
The Commission did not provide adequate protection to entities interconnected solely to the merged company.

The *Order* reserved priority Tier 1 for allocation of the merged company's remaining excess transmission capacity among requesting Transmission Dependent Utilities. Likewise, the *Order* provides separate treatment for such utilities in terms of their participation in the merged company's future transmission construction projects. By these provisions, the Commission manifestly sought to afford maximum protection to those entities faced with no alternative to reliance on the merged company's transmission grid top deliver power to their loads. However, unless the *Order* is clarified to assure that these protections are in addition to, not in lieu of, the merged company's obligations to non-dependent utilities, those in need of maximum protection may be relegated to inferior status.

Taking a municipal power system within the merged company's Eastern control area and without native generation capacity as an example, such a system meets the qualifying criteria for an allocation of 20% of capacity reserved to Tier 1 (transmission dependence), for an allocation of 30% of capacity reserved to Tier 2 (unaffiliated utility connected to the merged company's eastern division, and for an allocation of the remaining 50% of capacity reserved to Tier 3 (any utility). Yet, if such an entity must elect a

single allocation tier, it risks that the tier selected will be oversubscribed. Manifestly, that was not the Commission's intent. Nor would such an intent be consistent with the overall bases and thrust of the *Order*.

The *Order* should be clarified or revised to insure that where Tier 1 allocations are over-subscribed, requests by Transmission Dependent Utilities situated in the merged company's eastern division shall be treated as Tier 2 requests to the extent not satisfied by proration of Tier 1 capacity and, if Tier 1 allocations are likewise over-subscribed, such requests shall be treated as Tier 3 requests to the extent proration of Tier 2 capacity leaves the request unsatisfied. This will afford those most in need of capacity with the maximum opportunity to obtain it.

Even as so clarified, the transition period allocation process is inadequate to the needs of requesting utilities, a flaw falling with particular impact on Transmission Dependent Utilities. The *Order* provides that requesting utilities tender fully executed power contracts no later than 90 days after the merging companies' announcement of available capacity or risk missing an allocation. Mimeo at p. 41. The record is devoid of evidentiary support for this short period -- within which requesting utilities may assess the capacity available over particular paths, contact suppliers, negotiate firm power arrangements lasting as long as five years, and reduce those arrangements to writing.

Even if the merging companies faultlessly evaluate the available capacity and demonstrate to everyone's satisfaction that they have done so, more time is required to conclude the necessary arrangements. The more likely course of events, resolution of disputes arising out of the merging company's compliance filing, will detract further from any opportunity to secure firm power resources. A minimum of 180 days after final resolution of any compliance filing proceeding involving remaining excess capacity should be allowed.

The merged company is required by the *Order* to allow Transmission Dependent Utilities to participate in improvement of backbone transmission[7] facilities serving them when the merged company initiates transmission capacity expansions. Mimeo at p. 43. Again, the Commission manifestly intended to afford special protections to utilities so situated, protections amply justified by their dependency on the merged company's transmission system. Yet, unless the *Order* is clarified or revised to state that the merged company's special obligations to Transmission Dependent Utilities regarding construction participation is in addition to the obligation running to unaffiliated

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7 The record does not support the *Order*'s parenthetical restriction of backbone transmission facilities to 138 kV or higher. So restricted, the *Order* allows evasion by the merged company of the Commission's intent.

utilities generally, Transmission Dependent Utilities may be worse off.

III.
The Commission did not sufficiently constrain the merged company's ability to withhold non-firm transmission service.

The *Order*'s provisions concerning the merged company's obligations with respect to non-firm wheeling are remarkably short -- a single paragraph outlining the rates applicable "to the extent that the merged company negotiates non-firm wheeling transactions." Mimeo at p. 46. Yet, the record makes clear that UP&L's historical exploitation of transmission market power included leverage in economy energy sales. *See*, *e.g.*, mimeo at p. 35, note 145 and accompanying text). Moreover, economy sales and other non-firm transactions are important components of the bulk power market. Bulk power means more than firm power. Accordingly, the Commission should revise the *Order* to impose on the merged company an absolute obligation to provide non-firm transmission service to all who request such service. Otherwise, the merged company retains the ability to foreclose competition in non-firm sales by withholding transmission service.

Quite apart from its failure to explicitly require non-firm transmission service, the *Order*'s split-savings pricing is unworkable for utilities without their own generating

resources. Thus, for example, a municipal distribution system or a rural electric distribution cooperative seeking non-firm transmission service for economy purchases has no decremental cost of power against which the benefits of the transaction are to be measured and split. Embedded cost transmission service should be provided under such circumstances. Indeed, one-third of the savings may well exceed embedded costs for generation-sufficient utilities, allowing the merged company to charge more for an inferior service (non-firm) than it does for firm service at embedded cost rates pursuant to the firm service obligations outlined in the *Order*. Split-savings rates should be a ceiling for non-firm service, not imposed on an unwilling requester.

IV.
The Commission did not provide sufficient opportunity for meaningful participation in the merged company's construction of transmission facilities.

The merged company is required to allow others to participate in construction of new transmission facilities on terms providing for equitable sharing of costs and benefits. Mimeo at p. 43. However, the *Order* is silent on the question of ownership of such jointly constructed facilities. Clarification or revision is needed to make explicit or prescribe the merged company's obligation to allow joint participants to acquire ownership interests commensurate with their respective participations.

Even if clarified as indicated above, the *Order* unduly limits the merged company's obligation to allow participation by unaffiliated utilities in transmission construction projects to those facilities operated at 345 kV or higher. Mimeo at 43. The record does not support the restriction and, as so restricted, the *Order* allows the merged company to readily evade the Commission's intent. The merged company's choice of transmission voltage level should not dictate the outcome, so long as the level is sufficiently high to represent true bulk power transfer capability. A 46 kV floor is more in keeping with industry standards and the levels currently utilized on the merging companies' respective transmission systems. The *Order* also limits the joint participation obligation to the transition period. While the merged company unquestionably is required to build capacity thereafter, the long-term access provisions of the *Order* include no parallel obligation. That deficiency should be corrected.

V.
The Commission allowed the applicants to perpetuate their arbitrarily defined "Integrated Service Areas".

The *Order* properly requires the merged company to provide firm transmission service on request within its so-called "integrated service areas" and to revise those areas as it expands its transmission system. Mimeo at p. 42, note 168 and accompanying text. However, the Commission erred by

accepting the Applicants' "integrated service area" concept without additional obligation on their part.

The quoted terms are creatures of the Applicants' own creation, ones which even their witness conceded are not generally recognized by the industry. Tr. 2717. An Integrated Service Area is circularly defined as portions of the merged company's system where transmission "is generally unconstrained . . . to transmit power in the quantities that can reasonably be expected" and, in certain instances, has been disregarded in favor of arbitrary political boundaries under the rubric of "administrative convenie[ce]." Tr. 3316. *See also* Tr. 2716. The *Order* perpetuates that "Balkanization" of the merged company's eastern control area without adequate record support.

The possibility of future revisions contemplated by footnote 168 is not a sufficient remedy. The Applicants should be required in their compliance filing to validate the integrated service area boundaries currently claimed and to include a transmission construction plan to ameliorate the engineering constraints said to justify such boundaries as soon as feasible.

WHEREFORE, Nucor requests that the Commission clarify and rehear Opinion No. 318 as aforesaid.

Respectfully submitted,

Ritts, Brickfield & Kaufman

Peter J.P. Brickfield
Daniel C. Kaufman
Kenneth G. Hurwitz

Watergate 600 Building
Suite 915
Washington, D.C. 20037
(202) 342-0800

Counsel for Nucor Steel

Dated: November 25, 1988

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, first class postage prepaid, the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 25th day of November, 1988.

Daniel C. Kaufman

UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

UTAH POWER & LIGHT COMPANY PACIFICORP PC/UP&L MERGING CORP.	)))	Docket No. EC88-2-000

APPLICATION ON BEHALF OF THE PUBLIC UTILITIES AUTHORITY FOR THE TOWN OF PLYMOUTH, UTAH REQUESTING REHEARING OR CLARIFICATION OF ORDER CONDITIONALLY APPROVING MERGER

TO: The Honorable Commissioners
Federal Energy Regulatory Commission

Pursuant to Section 313(a) of the Federal Power Act, *as amended*, 16 U.S.C. § 825*l*(a) (1982), and Rule 713 of the Federal Energy Regulatory Commission's Rules of Practice & Procedure, 18 C.F.R. § 385.713, the Public Utilities Authority for the Town of Plymouth, Utah (the "Authority") respectfully requests that the Commission rehear and reconsider or clarify Opinion No. 318, its *Opinion and Order Affirming in Part, Modifying in Part, and Reversing in Part Initial Decision and Conditionally Approving Merger*, issued October 26, 1988 (reported at 45 FERC ¶ 61,095) (the "*Order*"). As the Authority will show more fully hereinafter, although this Commission correctly determined that an unconditioned merger of Applicants Utah Power & Light Company ("UP&L") and PacifiCorp ("PP&L") would not be consistent with the public interest, it failed to condition

its approval by unequivocally blunting the force of the merged company's transmission dominance as a vehicle to foreclose competition and gain a competitive advantage in bulk power markets. Even under conditions embodied in the *Order*, the merged company retains significant ability to exploit its control over essential transmission facilities to the detriment of actual and potential buyers and sellers of bulk power. Accordingly, those conditions should be strengthened and clarified to effectively ameliorate the anti-competitive effects of the merger.

I.
The Commission did not sufficiently delineate the "Transmission Dependent Utilities" requiring special protection and otherwise unduly restricted entities to whom the merged company must provide meaningful transmission access.

The *Order* recognizes that transmission access is the key to effective and meaningful competition in bulk power markets. Accordingly the Commission sought to open the merged company's essential transmission facilities up to other market participants through a transition period (5-year) allocation of the excess capacity currently available on the merged company's transmission grid, coupled with a long term obligation to provide transmission service to all requesters thereafter, the transition period allowing them merged company to plan and complete any construction needed to meet all requests.

As Nucor witness Matthew I. Kahal pointed out, transmission access conditions may have unintended side effects as allocations of existing capacity reduce the opportunity for potential market entrants:

> . . . . [N]ew low cost power suppliers, independent power producers, cogenerators, municipals, or other entities seeking to purchase or sell power may emerge and find that transmission opportunities are foreclosed by the very conditions that are designed to provide a remedy to the transmission access problems on the Applicants' system.

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The *Order* implicitly recognizes that certain entities are uniquely vulnerable to restraints on transmission service, establishing a category of "Transmission Dependent Utilities" grouped in a separate transition period priority allocation tier (mimeo at p. 40, note 165 and accompanying text) and given an opportunity to participate in backbone transmission facility construction projects (mimeo at pp. 43-44). The definition of that term, however, explicitly includes a named generation and transmission cooperative, two named municipal power associations, and the "present members" of those associations, suggesting an interpretation *limiting* the defined term to such entities. No rationale for such a narrow view has been or can be advanced.

The Commission prescribed comprehensive conditions requiring the merged company to provide transmission service ""to any utility that requests such service" (mimeo at p. 38, footnote omitted), but nowhere defines the term "utility." The formulation specified in the *Order* explicitly excludes PURPA-qualified small power producers and cogenerators ("QFs") and implicitly forecloses independent power producers (and other entities commonly viewed as "non-utility generators") from competitive bulk power markets. No rationale for such a narrow view has been or can be advanced.

A.
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The use of the term "includes" to introduce the entities named in the note and described by current affinity to the named entities suggests that the Commission has used them to merely illustrate the "Transmission Dependent Utilities" concept by example. If that be the case, the Authority asks

that the *Order* be clarified to so state. If, however, footnote 165 reflects the Commission's intention to restrict "Transmission Dependent Utilities" to those entities named in the note and described by current affinity to the named entities, such a restriction is arbitrary and capricious.

The named cooperative and municipal associations should not be afforded a Commission-bestowed advantage in retaining and attracting members. *Any* utility dependent in fact on the merged company's transmission facilities to move bulk power from its resources to its loads should be have equal access to those facilities. No warrant in the record has been shown to single out specifically named groups and their members as deserving of special protection. Other groups and unaffiliated utilities should not be discriminated against, and named groups and their members should not be preferred, in transmission access conditions.[1]

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The *Order* justifies open transmission access conditions as "the minimum necessary to alleviate the [merger's] likely anticompetitive effects so as to make the merger consistent with the public interest." Mimeo at p. 38.[2] By arbitrarily excluding an entire category of bulk power resources, the Commission has thwarted its own stated goal. Congress enacted PURPA a decade ago to encourage and promote small power production and cogeneration as alternatives to the large central generating stations traditionally utilized for bulk power production and, as the Commission is well aware, such alternative resources have grown dramatically in significance since that time. Accordingly, these non-traditional power sources can provide an increasingly important competitive alternative to utility systems fitting the more historically accepted mold.

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power producers ("IPPs").[3] Thus, as industry changes bring about increasing reliance on IPPs as alternative bulk power resources, those alternatives must not be throttled by artificial restrictions on their ability to move power from the point of generation to the point of sale. One can also predict the emergence of other forms of technology and organization as competitive alternatives to traditional industry patterns. These newly emerging competitive forces should not confronted at the outset with the disadvantage of less advantageous access to the transmission facilities of the merged company.[4]

Neither the antitrust laws nor the Federal Power Act can be read to force competition into any particular form. All sources of bulk power must be afforded an equal opportunity to compete in the market, an opportunity for which transmission service is essential.

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II.
The Commission did not provide adequate protection to entities interconnected solely to the merged company.

The *Order* reserved priority Tier 1 for allocation of the merged company's remaining excess transmission capacity among requesting Transmission Dependent Utilities. Likewise, the *Order* provides separate treatment for such utilities in terms of their participation in the merged company's future transmission construction projects. By these provisions, the Commission manifestly sought to afford maximum protection to those entities faced with no alternative to reliance on the merged company's transmission grid top deliver power to their loads. However, unless the *Order* is clarified to assure that these protections are in addition to, not in lieu of, the merged company's obligations to non-dependent utilities, those in need of maximum protection may be relegated to inferior status.

Taking a municipal power system within the merged company's Eastern control area and without native generation capacity as an example, such a system meets the qualifying criteria for an allocation of 20% of capacity reserved to Tier 1 (transmission dependence), for an allocation of 30% of capacity reserved to Tier 2 (unaffiliated utility connected to the merged company's eastern division, and for

an allocation of the remaining 50% of capacity reserved to Tier 3 (any utility). Yet, if such an entity must elect a single allocation tier, it risks that the tier selected will be oversubscribed. Manifestly, that was not the Commission's intent. Nor would such an intent be consistent with the overall bases and thrust of the *Order*.

The *Order* should be clarified or revised to insure that where Tier 1 allocations are over-subscribed, requests by Transmission Dependent Utilities situated in the merged company's eastern division shall be treated as Tier 2 requests to the extent not satisfied by proration of Tier 1 capacity and, if Tier 1 allocations are likewise over-subscribed, such requests shall be treated as Tier 3 requests to the extent proration of Tier 2 capacity leaves the request unsatisfied. This will afford those most in need of capacity with the maximum opportunity to obtain it.

Even as so clarified, the transition period allocation process is inadequate to the needs of requesting utilities, a flaw falling with particular impact on Transmission Dependent Utilities. The *Order* provides that requesting utilities tender fully executed power contracts no later than 90 days after the merging companies' announcement of available capacity or risk missing an allocation. Mimeo at p. 41. The record is devoid of evidentiary support for this short period -- within which requesting utilities may assess the capacity available over particular paths, contact

suppliers, negotiate firm power arrangements lasting as long as five years, and reduce those arrangements to writing. Even if the merging companies faultlessly evaluate the available capacity and demonstrate to everyone's satisfaction that they have done so, more time is required to conclude the necessary arrangements. The more likely course of events, resolution of disputes arising out of the merging company's compliance filing, will detract further from any opportunity to secure firm power resources. A minimum of 180 days after final resolution of any compliance filing proceeding involving remaining excess capacity should be allowed.

The merged company is required by the *Order* to allow Transmission Dependent Utilities to participate in improvement of backbone transmission[6] facilities serving them when the merged company initiates transmission capacity expansions. Mimeo at p. 43. Again, the Commission manifestly intended to afford special protections to utilities so situated, protections amply justified by their dependency on the merged company's transmission system. Yet, unless the *Order* is clarified or revised to state that the merged company's special obligations to Transmission

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6 The record does not support the *Order*'s parenthetical restriction of backbone transmission facilities to 138 kV or higher. So restricted, the *Order* allows evasion by the merged company of the Commission's intent.

Dependent Utilities regarding construction participation is in addition to the obligation running to unaffiliated utilities generally, Transmission Dependent Utilities may be worse off.

III.
The Commission did not sufficiently constrain the merged company's ability to withhold non-firm transmission service.

The *Order*'s provisions concerning the merged company's obligations with respect to non-firm wheeling are remarkably short -- a single paragraph outlining the rates applicable "to the extent that the merged company negotiates non-firm wheeling transactions." Mimeo at p. 46. Yet, the record makes clear that UP&L's historical exploitation of transmission market power included leverage in economy energy sales. *See, e.g.*, mimeo at p. 35, note 145 and accompanying text). Moreover, economy sales and other non-firm transactions are important components of the bulk power market. Bulk power means more than firm power. Accordingly, the Commission should revise the *Order* to impose on the merged company an absolute obligation to provide non-firm transmission service to all who request such service. Otherwise, the merged company retains the ability to foreclose competition in non-firm sales by withholding transmission service.

explicit or prescribe the merged company's obligation to allow joint participants to acquire ownership interests commensurate with their respective participations.

Even if clarified as indicated above, the *Order* unduly limits the merged company's obligation to allow participation by unaffiliated utilities in transmission construction projects to those facilities operated at 345 kV or higher. Mimeo at 43. The record does not support the restriction and, as so restricted, the *Order* allows the merged company to readily evade the Commission's intent. The merged company's choice of transmission voltage level should not dictate the outcome, so long as the level is sufficiently high to represent true bulk power transfer capability. A 46 kV floor is more in keeping with industry standards and the levels currently utilized on the merging companies' respective transmission systems. The *Order* also limits the joint participation obligation to the transition period. While the merged company unquestionably is required to build capacity thereafter, the long-term access provisions of the *Order* include no parallel obligation. That deficiency should be corrected.

V.
The Commission allowed the applicants to perpetuate their arbitrarily defined "Integrated Service Areas".

The *Order* properly requires the merged company to provide firm transmission service on request within its so-

called "integrated service areas" and to revise those areas as it expands its transmission system. Mimeo at p. 42, note 168 and accompanying text. However, the Commission erred by accepting the Applicants' "integrated service area" concept without additional obligation on their part.

The quoted terms are creatures of the Applicants' own creation, ones which even their witness conceded are not generally recognized by the industry. Tr. 2717. An Integrated Service Area is circularly defined as portions of the merged company's system where transmission "is generally unconstrained . . . to transmit power in the quantities that can reasonably be expected" and, in certain instances, has been disregarded in favor of arbitrary political boundaries under the rubric of "administrative convenie[ce]." Tr. 3316. *See also* Tr. 2716. The *Order* perpetuates that "Balkanization" of the merged company's eastern control area without adequate record support.

The possibility of future revisions contemplated by footnote 168 is not a sufficient remedy. The Applicants should be required in their compliance filing to validate the integrated service area boundaries currently claimed and to include a transmission construction plan to ameliorate the engineering constraints said to justify such boundaries as soon as feasible.

WHEREFORE, the Authority requests that the Commission clarify and rehear Opinion No. 318 as aforesaid.

Respectfully submitted,

Ritts, Brickfield & Kaufman

Peter J.P. Brickfield
Daniel C. Kaufman

Watergate 600 Building
Suite 915
Washington, D.C. 20037
(202) 342-0800

Counsel for Public Utilities Authority for the Town of Plymouth, Utah

Dated: November 25, 1988

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, first class postage prepaid, the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 25th day of November, 1988.

Daniel C. Kaufman