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BEFORE THE
PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Utah Power & Light Company and PC/UP&L Merging Corp. (to be renamed Pacificorp for an Order Authorizing the Merger of Utah Power & Light Company and Pacific-Corp into PC/UP&L Merging Corporation and Authorizing the Issuance of Securities, Adoption of Tariffs, and Transfer of Certificates of Public Convenience and Necessity and Authorities in Connection Therewith	Case No. 87-035-27

AMAX MAGNESIUM CORPORATION'S APPLICATION FOR REVIEW AND/OR REHEARING OF THE REPORT AND ORDER

Pursuant to R750-100-10 of the Rules of Practice Governing Formal Hearings Before the Public Service Commission, AMAX Magnesium Corporation ("AMAX") hereby seeks review and/or rehearing of the Commission's September 28, 1988 Report and Order in this proceeding. In support of its application, AMAX states as follows:

I.

APPLICANTS FAILED TO CARRY THEIR BURDEN OF PROOF

In its November 30, 1987 Order, this Commission imposed on the Applicants the burden of proving that there would be a "net positive benefit" to the public of Utah resulting from the merger. As a part of that process, the Applicants are required to show whether any class of

customers of Utah Power & Light Company ("UP&L"), as presently structured, will suffer "substantial harm" by reason of the merger. Id. Specific evidence of harm is required as a part of Applicants' burden because "Applicants carry the burden in all areas subject to our jurisdiction to show that on balance the merger will be beneficial ...." November 20 Order at 3. In its Report and Order, the Commission reaffirmed the net positive benefit test. Report and Order at 10.

While projections of total merger benefits are scattered throughout the record in this proceeding and the Report and Order issued by the Commission, it is indisputable that the Applicants failed to quantify the detriments that may occur. For example, Applicants never even attempted to quantify the potential adverse effects on interruptible customers, despite prima facie showings that such effects could occur. Absent a quantification of such adverse effects, however, it is impossible on the record established in this proceeding for the Commission to conclude that the Applicants met the net positive benefit test.

The simple fact is that the Applicants have no idea as to how low the threshold for substantial harm to the interruptible customers really is. Asked to provide copies of all studies or other documents that "relate to the impact" of the merger on the frequency and duration of service interruptions for UP&L's current interruptible

customers, Applicants replied: "No such studies have been conducted and no documents exist." AMAX Exhibit 1.3. Indeed, as demonstrated by AMAX Exhibit 2, even Applicants' claims of benefits for the interruptible customers in the short term is predicated on nothing more than "intuition." Tr. 1298. Such intuition does not operate to discharge the Applicants' burden to quantify the nature and extent of the adverse impacts upon an identifiable class of customers subject to this Commission's jurisdiction. By comparison AMAX presented affirmative evidence that they would suffer harm as a result of the merger.

Applicants' evidentiary failure is exacerbated by their refusal to propose an allocation methodology for this Commission's consideration. Even if all the merger benefits are realized, and even if the overall effect of the merger on all the Applicants' customers is positive, the allocation methodology will determine whether Utah ratepayers ultimately receive a net positive benefit.

II.

THE COMMISSION ERRED IN REJECTING AMAX'S PROPOSED CONDITIONING

Notwithstanding Applicants' failure to carry their burden of proof in this proceeding, the Commission refused to accept AMAX's proposed conditioning of the merger, a conditioning specifically designed to mitigate Applicants' failure to carry their burden. The Commission justified its refusal on two bases: (1) that through options such as self-end co-generation, the large industrial customers will

not be left "holding the bag"; and (2) that AMAX is utilizing the merger process to obtain preference over other customers. Both findings are erroneous and fundamentally at odds with the evidence presented in this proceeding.

As to the Commission's first basis for rejecting AMAX's proposed condition, the Commission stated:

> We know, as a general observation, that in this era of increased competition and low energy prices the industrial customers have other options for power supply such as co- and self-generation which they have been able to use to some advantage in negotiating power contracts with the Company. It is therefore unlikely that these customers will be left "holding the bag" after the merge is consummated. Report and Order at 81.

But that statement has no evidentiary predicate insofar as it purports to relate to AMAX.

First, although AMAX has always had self-generation, that in no manner mitigates its need to purchase from UP&L approximately double the quantity of power it self-generates. Thus, self-generation and cogeneration, already in full utilization at AMAX's facility, give it none of the leverage perceived by this Commission to exist in negotiating with UP&L. 1/ The only

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1/ Further, the Commission's observation rings hollow since it has refused to impose any transportation obligations on Applicants by which an industrial customer might obtain access to power generated by a cogenerator, independent power producer, or other power producer. In these circumstances, where lies the vaunted "leverage"? To the extent the Commission's [Footnote continued]

"leverage" AMAX in fact has is the question of whether it can continue to maintain operations in Utah on an economic basis; the cost of its power is an important factor in this calculation. Thus, the perceived basis for AMAX not being left "holding the bag" just does not exist for AMAX.

Second, AMAX demonstrated on the record the substantial probability, indeed likelihood, that it will suffer economic harm as a result of this merger. That demonstration was not rebutted by Applicants. It is in this context that the Commission's claim that AMAX is simply seeking a preference over other customers must be examined. And that examination emphatically demonstrates that far from seeking a preference, AMAX is only seeking to preserve that position that it would have in the absence of the merger.

The record demonstrates that Applicants are seeking to make significant, new off-system sales. The record further demonstrates that many of these sales are proposed as firm sales. The record demonstrates that Applicants feel no compunction about making firm sales at rates less than the interruptible rate charged AMAX. Finally, the record demonstrates Applicants' own concession

[Footnote continued]
Order sees these alternatives as contracting "leverage," but refuses to adopt transportation/wheeling obligations as a concomitant thereto, the Commission's Order is fundamentally flawed and unlawful.

that they could not make these sales in the absence of the merger.

Thus, AMAX is not seeking a preference at the expense of other customers. It specifically designed a condition that would avoid any such preference. Under its proposed condition, it would never be scheduled ahead of _any_ firm, _on-system_ customer. It would never be scheduled ahead of any _existing_ firm _off-system_ customer. It would only be scheduled ahead of those firm customers that Applicants have admitted that they would not have in the absence of the merger -- _new_ firm, _off-system_ sales. 2/

The result of this condition is to maintain the scheduling priority that AMAX would have been entitled to under its existing contract since UP&L would not be able to make the new, off-system firm sales contracts that would displace AMAX's dispatch priority, by Applicants' own concession, in the absence of the merger. Thus, by rejecting AMAX's condition, this Commission is allowing Applicants to export economic benefits previously accruing to Utah Customers -- and that continue to accrue to Utah customers absent the merger -- to out-of-state, non-system customers. At the same time, these increased revenues accrue to the benefit of Applicants' shareholders, not Utah

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2/ Applicants undertaking not to schedule off-system interruptible sales ahead of existing interruptible customers is required of Applicants by AMAX's historical contract in any event.

customers. This depriving AMAX of benefits currently enjoyed by Utah customers in order to benefit non-Utah customers and Applicants' shareholders is not consonant with this Commission's statutory duty to protest all Utah customers, including the industrial customers of this state.

On this record, conditioning the merger to require a dispatch priority for AMAX ahead of new firm off-system sales of the merged company was an appropriate and valid condition to protect a customer class in Utah from significant adverse impacts resulting from the merger. The Commission's rejection of that condition -- in the face of Applicants' evidentiary failure and AMAX's affirmative evidence -- constituted legal error and cannot be sustained.

III.

ADOPTION OF AMAX'S CONDITION WAS REQUIRED TO SATISFY THE "NET POSITIVE BENEFITS" TEST

Applicants argued -- and this Commission accepted the argument -- that total benefits of the merger equate with the benefits to be realized by the Utah ratepayer. But no predicate for any such equation on exists, in large part because there is no allocation methodology. In short, the Report and Order provides no basis for determining the net positive benefit to Utah ratepayers. In this situation, to allow questionable total benefits to be compared to specific, adverse impacts in Utah that have been fully demonstrated on this record is to depart from the

Utah-specific analysis required under the net positive benefit test to be applied in this proceeding.

The Applicants' failure to propose an allocation methodology before the merger is approved raises serious questions about the ultimate effect of the merger on the public interest of the State of Utah. It was for this reason that AMAX requested the Commission to condition its approval in a manner that would satisfy the legal test it established for approval in the first place: a net positive benefit for Utah ratepayers.

Claims by the Applicants and the Division of Public Utilities ("Division") that AMAX's scheduling priority condition will harm firm ratepayers in Utah are unfounded. This is especially so since AMAX's load represents less than one percent of the total capacity of the merged system. Compare this to one sale alone that the merged company is pursuing that would represent almost five percent of the total capacity of the merged system. Scheduling AMAX's load ahead of new off-system sales many times the magnitude of the AMAX load will not foreclose the merged company's ability to make the substantial off-system sales it is contemplating. Further, although arguing detriment, they presented <u>no</u> record evidence that would indicate <u>any</u> detriment were the Commission to adopt AMAX's proposed condition.

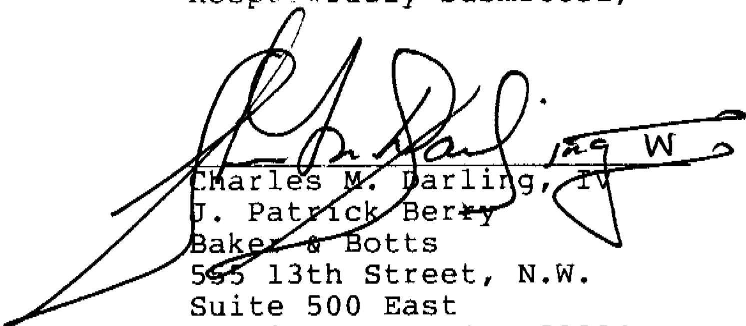
Nevertheless, it is obvious that the Commission accepted the DPU's argument. For example, the Commission apparently rejected the scheduling priority condition proposed by AMAX on the ground that "[o]ne customer should not get preferential treatment over others." Report at 82. In fact, however, AMAX demonstrated conclusively that the scheduling priority condition it sought affording it only limited protection from the effects of the merger, would not result in a detriment to other ratepayers.

II.

CONCLUSION

The Report and Order is based on a record that is devoid of any evidence demonstrating the adverse effects of the proposed merger on interruptible customers currently on the UP&L system. As a result, it is impossible for the Commission to conclude that the merger will result in a net positive benefit to Utah ratepayers, especially in the absence of an allocation methodology. Therefore, AMAX requests that the Commission reconsider its rejection of the conditions proposed by AMAX to protect interruptible customers and impose those conditions as a prerequisite for approval of the merger.

Respectfully submitted,



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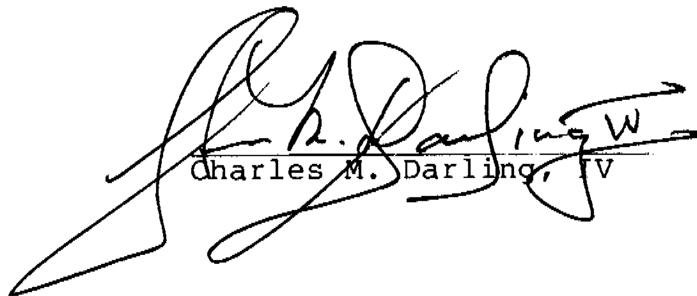
Attorneys for
AMAX MAGNESIUM CORPORATION

Dated: October 17, 1988

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served this date upon all parties listed on the service list in accordance with the requirements of Rules of the Commission.

Dated at Washington, D.C. this 17th day of October 1988.



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UTAH PUBLIC
SERVICE COMMISSION

October 17, 1988

Public Service Commission of Utah
160 East 300 South
Fourth Floor
Salt Lake City, Utah 84111

Attention: Mr. Steve Hewlett

Re: Case No. 87-035-27

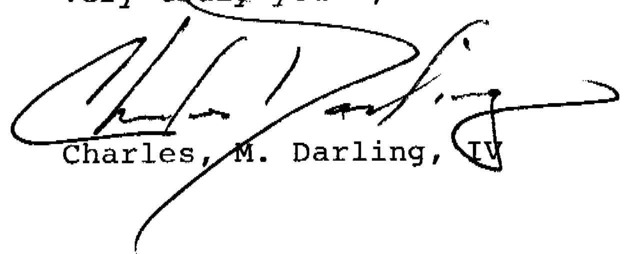
Dear Mr. Hewlett:

Enclosed for filing in the above-captioned matter are the original and 19 copies of "AMAX Magnesium Corporation's Application For Review And/Or Rehearing Of The Report And Order."

I have also enclosed three additional copies to be time-stamped and mailed back to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance in this matter.

Very truly yours,



Charles M. Darling, IV

Enclosures