'87 NOV 19 A10:14

UTAH PUBLIC SERVICE COMMISSION

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- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of Utah Power & Light Company, PC/UP&L Merging Corp. (To be renamed PacifiCorp) for an Order Authorizing the Merger of Utah Power & Light Company and PacifiCorp into PC/UP&L Merging Corp. 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 PETITION FOR REVIEW AND REQUEST FOR EXPEDITED CONSIDERATION

Pursuant to Utah Code Annotated § 63-46b-12 (1987) and R750-100-10 of the Rules of Practice Governing Formal Hearings Before the Public Service Commission, AMAX Magnesium Corporation ("AMAX") hereby petitions the Commission for review of its Order on Intervention issued October 30, 1987

in the above-referenced docket and for expedited consideration hereof.

In support of the instant petition, AMAX submits the following:

I.

STATEMENT OF FACTS

AMAX is one of the largest customers on the Utah Power & Light ("UP&L") system. It generally purchases approximately three percent (3%) of UP&L's system sales, employs hundreds of Utah residents and contributes tens of millions of dollars to the State of Utah economy and tax base. AMAX is currently experiencing economic duress due to competitive conditions created, in part, by the lower electrical costs realized by its competitors.

AMAX is a one hundred percent (100%) interruptible customer on the UP&L system, and has negotiated a special contract rate with UP&L which is directly tied to both fuel and operation and maintenance ("O&M") costs incurred by UP&L. In addition, AMAX has a dispatching priority by virtue of the high load factor on the UP&L system which allows it to operate with fewer than normal incidents of interruption.

In contrast, AMAX understands that the Pacific Power & Light ("PP&L") system is a one hundred percent (100%) firm system which also has a significant number of hydro and other plants with unutilized capacity. Therefore, it remains

a critical question as to how UP&L's dispatch priority will be affected once it has been merged with the PP&L system.

In light of these differences, it is clear that the mechanisms by which the UP&L and PP&L combined system will operate as a result of the merger and the manner in which dispatch priority will be determined will directly impact AMAX.

Inasmuch as AMAX is the only Utah customer on the UP&L system with its dispatch priority and specified rate conditions, it is a customer class in and of itself which has a legally protected interest in these proceedings which cannot be represented adequately by any other party.

Nevertheless, in its Order on Intervention dated October 30, 1987, the Commission stated:

> . . .we fail to see that AMAX has a meaningfully unique position in the context of this case. Furthermore, AMAX did not timely file its Petition for Intervention and has not presented us with a compelling reason for its failure to timely file. . . . In this case, however, to allow AMAX to intervene would impair the integrity of our Order of October 6, 1987 deadlining intervention petitions.

Contrary to the statement of the Commission, AMAX submits that it does, indeed, have a meaningfully unique position in the context of this case. Further, its Petition to Intervene was in fact timely. Accordingly, its Petition to Intervene should be granted.

II.

AMAX Satisfies The Four Requirements For Intervention Set Out By The Utah Supreme Court.

Intervention of right is asserted in this case under Rule 24(a)(2) of the Utah Rules of Civil Procedure, and the corresponding rules of the Public Service Commission. By the terms of Rule 24(a)(2), an applicant must be allowed to intervene in a proceeding if four requirements are met: 1) the application is timely; 2) the applicant has an interest in the subject matter of the dispute; 3) that interest is or may be inadequately represented; and 4) the applicant is or may be bound by a judgment in the action. Lima v. Chambers, 657 P.2d 179 (Utah 1982).

Further, Section 63-46b-9 of the Utah Code Annotated (1987) provides the procedures for intervention in formal adjudicative proceedings. It provides that a petition shall be granted if:

> the petitioner's legal interests may be substantially affected by the . . . proceeding and . . . the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention.

Utah Code Ann. § 63-46b-9 (1987) (emphasis added).

AMAX has satisfied each of the requirements for intervention in this matter as set out by the Code and by Lima v. Chambers.

a. AMAX's Application For Intervention Was Timely

Although AMAX's Petition was filed three days after the scheduled filing deadline set by the Commission, and its supporting Position Statement was filed one day after the Commission's scheduled deadline, the facts and circumstances of this proceeding demonstrate that under the applicable rules for giving notice and providing opportunity for intervention, AMAX's filings were timely.

The Utah Supreme Court has indicated that the use of the word "timely" in subdivision (a) of Rule 24 requires that timeliness of the application for intervention be determined under the facts and circumstances of each individual case and in the sound discretion of the court. Jenner v. Real Estate Services, 659 P.2d 1072 (Utah 1983).

In the instant situation, it is questionable, at best, whether the October 6, 1987 Order adequately apprised interested parties of the filing deadlines. Certainly, the federal and state rules of procedure require a minimum of five days notice of hearings, exclusive of weekends and holidays, so that parties may have a reasonable opportunity

to appear and respond. 1/ The time period is extended three additional days if notice is served by mail. 2/

If these minimum procedural requirements were imposed upon the Commission's Order establishing deadlines for filing interventions, the earliest permissible deadline for filing an intervention would have been Monday, October 19, 1987, three days after AMAX filed both its Petition for Intervention and supporting Position Statement. This calculation is made after excluding weekends and holidays for the initial five-day calculation, and adding three days for service by mail, and carrying that date forward to the next business day.

The Commission's own Rules of Practice Governing Formal Hearings Before the Public Service Commission indicate that the Commission gave inadequate notice of the filing deadlines. Although there is no rule which specifically addresses time requirements for filing petitions for intervention and supporting position statements following an order

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1/ See Utah Rules of Civil Procedure, Rule 6(d); Rule 2(c), Rules of Practice-Third Judicial District; Fed. R. Civ. P. Rule 6(d).

2/ Rule 6(e), Utah Rules of Civil Procedure; Fed. R. Civ. P. Rule 6(e).

requiring such a filing, certain, related rules suggest that the Commission gave inadequate notice.

For example, Rule R750-100-6(A)(3) requires that notices of intervention shall be filed with the Commission at least 10 business days prior to the date set for hearing. As the hearing in this case was set for October 19, 1987, notices for intervention would have to have been filed by October 6, 1987 to comply with this rule. Consequently, notice that October 6, 1987 was the filing deadline for Petitions to Intervene would have to have been given well before October 6, 1987 to adequately apprise interested parties.

Although the Commission may waive certain of its intervention requirements "for good cause shown" under R750-100-6-(A)(1), the Commission failed to provide any cause in its October 6, 1987 Order as to why these time allowances were significantly shortened. Therefore, its October 6, 1987 Order failed to comply with the Commission's own Rules of Procedure. 3/

3/ Further, if the Commission's October 6, 1987 Order is deemed a responsive pleading -- inasmuch as it calls for interested parties to file petitions for intervention and position statements in response to the Commission's four criteria for intervention -- R750-100-3(E) provides that motions (e.g. for

[Footnote continued]

Further, notices of hearings, which require less affirmative action of parties than do filing deadlines, require five days notice, plus three additional days when service is effected by mail. See R750-100-9 and R750-100-4. While not specifically prescribed by the Commission's local rules, Rule 6(a) of the Utah Rules of Civil Procedure requires that "[W]hen the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation."

Applying the Commission's own rules and the Utah Rules of Civil Procedure where the Commission's rules are silent, the five days notice from October 6, 1987 would expire on October 14, 1987 (excluding Saturday, Sunday and Columbus Day), which is then extended to October 17, 1987 for service by mail. Because October 17, 1987 falls on a weekend day, the filing deadline would be October 19, 1987,

[Footnote continued]
intervention) directed towards responsive pleadings (e.g. the Commission's directives regarding filing intervention and supporting position statements) "shall be filed within 10 days of the service of the responsive pleading." Rule R750-100-3(F) enlarges the time by an additional 3 days where notice is served by mail. Accordingly, parties should have been given 13 days to file their petitions for intervention and position statements, or until October 19, 1987. As noted above, AMAX filed its pleadings three days prior to this date.

the next following business day. Although notice of the October 19, 1987 prehearing conference was appropriately noticed on October 6, 1987 under these rules, it is improper to require potentially interested parties to file responsive pleadings prior to October 19, 1987 in light of these minimum notice provisions.

Therefore, by its own Rules, the Commission failed to give adequate notice of intervention deadlines. Even if AMAX had not satisfied each of the legal requirements for timely intervention, which it has satisfied under the standard set forth in Jenner, the Commission ought to recognize that leniency in timeliness is required in equity by its own failure to abide by apparently required procedural standards.

Moreover, the facts of the instant petition reveal that AMAX has acted prudently in addressing the problems of notice and timeliness. In September, 1987, AMAX approached the Commission clerk requesting to be placed on the utility mailing list so that it could stay timely apprised of all Commission matters and filing deadlines. The Commission clerk indicated that AMAX needed to submit a check to cover expenses for these mailings before it could be placed on the list. Ironically, on October 6, 1987, AMAX sent this check to the Commission to have it placed on this service list. That same day, October 6, 1987, the Commission issued its Order requiring that petitions for intervention be filed not

later than October 13, 1987, seven days later, and that position statements be filed October 15, 1987, nine days later. AMAX did not receive notice of the October 6, 1987 Order until it received verbal notice on October 14, 1987. Additionally, AMAX has retained local counsel for the proceedings, as indicated in the signatory section hereto.

Because AMAX's filings were made only days past the scheduled deadlines set by the Commission, and because these filing were made prior to any hearings and well within the procedural standards set by the Utah Rules of Civil Procedure, the Local Rules, the Commission's own Rules, and equitable principles, AMAX's filings were timely. Accordingly, it should be granted intervention in these proceedings.

b. AMAX Has A Direct Interest In These Proceedings

To justify being granted intervention, the party seeking intervention must demonstrate that it has "a direct interest in the subject matter of the proceeding such that the intervenor's rights may be affected for good or for ill." Lima v. Chambers, 657 P.2d 279, 282 (Utah 1982). Not only does AMAX satisfy the standards set forth in Lima, but it also satisfies the Commission's own standards for intervention set forth in R750-100-4(A)(2) and R750-100-4(A)(1). Clearly, the basis of the direct interest between AMAX and UP&L and sequentially, the merged corporation, is AMAX's unique dispatch

priority, and its pricing mechanism under its specially negotiated power purchase contract with UP&L. Because of this scheduling and pricing specificity, it is clear unquestioned that AMAX will be directly affected by this proceeding.

Even though it is presumed that all of UP&L's contracts will be assumed by the merged corporation under the parameters of the merger proposal, AMAX is concerned that its rights and duties under the contract may change because of other aspects of the merger. In addition to the fact that it has negotiated its own rate, AMAX is unique in that it is one of the few customers whose rates have been left out of the Energy Balancing Account.

The merger has been presented as having great prospects for a potential gradual rate reduction of four percent (4%) for Utah ratepayers. However, such rate reductions realized by other ratepayers may not necessarily accrue to AMAX's benefit; rather, such rate reductions may, in fact, increase AMAX's costs. As discussed above, AMAX pays O&M expenses of UP&L's baseload coal plants. If the utilization of those plants is significantly reduced as a result of the merger, the impact upon AMAX may be a significant increase in the cost of power under the contract, even in the face of rate reductions for all other ratepayers.

In addition to its concerns regarding rate structure, AMAX is concerned regarding its scheduled dispatch

priority and the actual administration of its contract. UP&L utilizes a single-system dispatching priority. AMAX has third priority in this system. However, the testimony filed by UP&L and PP&L in this proceeding reveals that the merged corporation will be run as a unitary system, though initially with separate management and accounting divisions. Fundamental questions then arise as to whether its scheduled priority will shift, whether costs will increase, and whether administration of the AMAX contract will change following any merger, regardless of the fact that the contract will be assumed.

The rights and obligations of AMAX under the contract are inseparably tied to the legal rights and obligations of UP&L and the merged corporation under the contract. The initial Commission proceeding in which the contractual rights and obligations of the merged corporation and UP&L are determined is but the first link in an unbroken chain leading to the determination of contractual duties and obligations of AMAX under its contract. As these duties and corresponding liabilities will be directly affected by the proposed merger, it is incumbent upon this Commission to allow AMAX to ensure that any final order issued in these proceedings is based upon properly presented and sufficient evidence, and encompasses all necessary conditions in order to protect AMAX's unique interests in the merger. There is

no other party to these proceedings with the same direct interests cited herein. AMAX stands in a class in and of itself. The complete exclusion by the Commission of a protected class will render these proceedings void ab initio.

c. AMAX's Interest Can Not Be Adequately Represented By The Existing Parties.

Adequacy of representation "generally turns on whether there is an identity or divergence of interest between the potential intervenor and an original party and on whether that interest is diligently represented." Lima v. Chambers, 657 P.2d 279, 283 (Utah 1982). "[W]here the applicant's interest is different from that of an existing party, the applicant's interest is not represented." Id.

A closer look at the other parties to this proceeding reveals that AMAX's interest clearly cannot be adequately represented in these proceedings by any other party approved for intervention. For example, other ratepayers may support a merger where their respective fuel costs will decrease. However, none of these other ratepayers, to the knowledge of AMAX, is so contractually tied to the relationship between fuel costs and O&M costs as is AMAX. Moreover, other industrials may support a phase-out of higher cost baseload coal plant facilities in order to achieve lower overall system rates, although such a phase-out might cause an increase in O&M costs and a direct increase

in contract costs to AMAX. Finally, AMAX has a dispatch priority which other customers do not have. It is then clear that representation by any one of the other intervenors will not protect AMAX's interest. In fact, no other party can be expected to represent these unique interests. Accordingly, AMAX is the only party who may adequately represent these interests in these proceedings, inasmuch as it is in a unique category or class of customers of which it is the only member.

d. AMAX Will Be Bound By The Commission's Final Decision.

Finally, AMAX will be "bound" by a final decision of this Commission either approving or disapproving the proposed merger. The Utah Supreme Court has stated that:

> The federal intervention rule and many states' rules have been amended to clear up this ambiguity [of the meaning of "bound"] by deleting the "bound" requirement and requiring only that the judgment in some way impair the applicant's interest. This construction is now applied in the majority of jurisdictions, either under expressly reworded rules of intervention or through a liberal construction of the term "is or may be bound." We are of the opinion that Rule 24 should be liberally construed to achieve the purpose of eliminating unnecessary duplication of litigation. [Citations omitted]. The language of the rule requiring only that a petitioner show that he "may be bound," clearly contemplates that the rule should be construed broadly enough to further both fairness and economy in judicial administration.

Lima v. Chamber, 657 P.2d 279, 284 (Utah 1982); see also Centurian Corp. v. Cripps, 577 P.2d 955 (Utah 1978); Bartholomew v. Bartholomew, 548 P.2d 238 (Utah 1976).

Certainly, the principles of fairness and avoiding duplication of proceedings impel this Commission to grant intervention to AMAX. To exclude not only a party, but also an entire class in these proceedings may well render any such order issued by this Commission subject to being vacated review. If AMAX's intervention is not granted at this time, AMAX may be forced to seek appropriate relief. It appears more reasonable to grant intervention at the onset of proceedings, which may lengthen the proceedings by a few hours, than to issue a final order which may be found void ab initio because of the exclusion of a protected customer class, requiring weeks of additional time for review and rehearing.

AMAX asserts that it has completely satisfied each of the legal requirements for intervention of right. Accordingly, its petition should be granted.

III.

AMAX Is Being Excluded From Conferences And Proceedings, Potentially Rendering Any Final Decision By The Commission Void Ab Initio.

AMAX has been granted a "monitoring party" status, being on the service list for this proceeding. That status, in fact, does not grant AMAX any meaningful opportunity to

participate. For example, without the status of intervenor, AMAX is being excluded from critical informal conferences and proceedings in this matter. As such, any subsequent order entered by this Commission may be void ab initio due to the exclusion of a protected customer class which may be substantially affected by these proceedings.

Simply being on the service list does not provide AMAX proper notice of proceedings. For instance, counsel for AMAX did not received notice of hearings on the November 10, 1987 law and motion calendar until November 10, 1987 by way of a telephone call by counsel for AMAX to the Commission. Such notice is inadequate even for purposes of monitoring these proceedings.

Technical conferences have been held regarding a protective order in which AMAX was excluded from participation. Hearings on the negotiated protective order have been heard without AMAX's participation. Such exclusion may impede any right AMAX may ever have in these proceedings.

Finally, the entire framework of the proceedings has been established without AMAX's input. The Scheduling Order issued November 10, 1987 indicates that the Commission intends to proceed with this matter at a very accelerated pace. The failure to allow intervention of a protected customer class at any point in this fast-track schedule deprives it of every meaningful opportunity to seek data and to participate in these proceedings. Given the nature of

the schedule, allowing AMAX to proceed as a monitoring party, in effect, cuts off all opportunity to protect its rights under its contract with UP&L. For example, by the time a monitoring party reviews the discovery filed, it will not have a timely opportunity to respond before discovery deadlines pass. This exclusion in toto of a protected single customer class from these proceedings may well render any order issued by this Commission void ab initio, especially in light of the fact that AMAX has attempted to address problems of notice by requesting placement on the service list, retaining local counsel and doing everything else possible to react in a timely manner.

IV.

Granting Intervention Will Not Prejudice Existing Parties Or Unduly Broaden Issues

AMAX does not intend to unduly broaden the issues before the Commission in these proceedings. Rather, it only seeks to protect itself from potential harm from which it could not otherwise be protected if not an intervenor. Like others, AMAX seeks an expeditious resolution of the proposed merger and issues raised herein.

AMAX filed its Petition for Intervention and Position Statement prior to the initial prehearing conference and date upon which arguments on intervention were to be heard. AMAX appeared and presented its arguments at this conference.

Upon specific inquiry by the Commission on October 19, 1987, no one objected to AMAX's late intervention. Accordingly, granting its petition for intervention is legally proper under any circumstances, and would not unduly burden or prejudice any other party. Conversely, AMAX has already experienced harm in being excluded from the protective order negotiations and preliminary discovery requests. Such exclusion from these proceedings must be lifted if the Commission is concerned about each protected customer class.

AMAX does not suggest that its concerns constitute a barrier to approving the merger. What AMAX does suggest is that, by its participation, the potential for adverse impact, some of which presently may not be identified, may be isolated and appropriately provided for in any Order approving the merger. In this manner, unintended, or unrecognized, consequences are not created by any Order approving the merger.

The public interest is served by allowing unintended consequences to be recognized and guarded against during the proceedings instead of after the approved merger. In these circumstances, it serves the Commission's interest to assure that AMAX's rates are not inadvertently increased, that its dispatch priority is not changed, and that its contract administration will not change by a proposal that otherwise lowers overall rates.

It is difficult to quantify at the outset of these proceedings exactly how AMAX will be impacted by the proposed merger. Accordingly, AMAX seeks to intervene in this matter to analyze and assess the extent to which potential impacts will be felt. It impossible for AMAX to assess such impacts and to protect itself from any negative impact if it is not permitted to intervene.

WHEREFORE for the foregoing reasons, this Petition for Review should be granted. Moreover, it should be

considered on an expedited basis in light of the accelerated discovery and hearing schedule set by this Commission.

Respectfully submitted,

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AMAX MAGNESIUM CORPORATION

Dated: November 19, 1987

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 19th day of November 1987.

Sheryl S. Hendrickson

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