

Donald R. Allen, Esq.  
John P. Williams, Esq.  
DUNCAN, ALLEN AND MITCHELL  
1575 Eye Street, N.W.  
Washington, D.C. 20005  
Telephone: (202) 289-8400

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UTAH PUBLIC  
SERVICE COMMISSION

Dale A. Kimball, Esq.  
Gary A. Dodge, Esq.  
Jill A. Niederhauser  
KIMBALL, PARR, CROCKETT & WADDOUPS  
185 South State Street  
Suite 1300  
P.O. Box 11019  
Salt Lake City, Utah 84147  
Telephone: (801) 532-7840

Attorneys for Intervenor Utah  
Municipal Power Agency

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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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IN THE MATTER OF THE APPLICATION )  
OF UTAH POWER & LIGHT COMPANY, )  
AND PC/UP&L MERGING CORP. (TO BE )  
RENAMED PACIFICORP) FOR AN ORDER ) POST-HEARING BRIEF OF  
AUTHORIZING THE MERGER OF UTAH ) UTAH MUNICIPAL POWER AGENCY  
POWER & LIGHT COMPANY AND )  
PACIFICORP INTO PC/UP&L MERGING )  
CORP. AND AUTHORIZING THE ISSUANCE )  
OF SECURITIES, ADOPTION OF TARIFFS, ) Case No. 87-035-27  
AND TRANSFER OF CERTIFICATES OF )  
PUBLIC CONVENIENCE AND NECESSITY )  
AND AUTHORITIES IN CONNECTION )  
THEREWITH. )

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Pursuant to the Commission's Order dated October 30, 1987, the Utah Municipal Power Agency ("UMPA") hereby files this post-hearing brief for the purpose of addressing the appropriate burden to be imposed upon the Applicants in this proceeding.

I. UTAH PRECEDENT SUPPORTS APPLICATION  
OF THE PUBLIC BENEFITS TEST

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The Commission's October 30, 1987 Order asked the parties to address the issue of whether the applicants in this proceeding had the burden of showing only that the proposed merger would have no adverse impact or whether they had the additional burden of identifying positive benefits associated with the merger. In their post-hearing brief, applicants urged this Commission to adopt the "adverse impact" test under which the merger would be approved so long as it does not pose a public detriment or adverse impact to applicants' utility operations or to Utah ratepayers. In support of their arguments, applicants cited a number of cases from various jurisdictions in which the "adverse impact" test had been applied.

While it is true that a number of jurisdictions have applied the "adverse impact" test in cases involving utility mergers, the only Utah authority addressing the issue, Re CP National Corp., 43 PUR 4th 315 (Utah PSC 1981), has applied a different test.<sup>1</sup> In CP National, this Commission was confronted

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<sup>1</sup> As was explained by the Commission in CP National, the case of Collett v. Utah Public Service Commission, 211 P.2d 185 (Utah 1949), did not examine the test to be applied in fixed utility cases. Moreover, while Collett contains language referring to the absence of "adverse impact," it contains no analysis or reasoning supporting application of the "adverse impact" test. The opinion reads as if the court never squarely confronted the issue of the standard to be applied.

with the very question at issue here. In rejecting the "adverse impact" test, this Commission reasoned:

The law in Utah is not entirely clear as to which standards should apply to the "public interest" in utility regulation. The Utah supreme court has had several opportunities to discuss the public interest in the context of common carrier regulation. See specifically, Collett v. Utah Public Service Commission (1949) 116 Utah 413, 211 P.2d 185 where the court appears to adopt a limited ["no adverse impact"] standard. . . . This "no adverse impact" standard as urged by the applicants has been utilized by some states as the standard in fixed utility cases. [citations omitted.] No Utah authority has been found, however, that established such a narrow standard for fixed utilities.

CP National, 43 PUR 4th at 325-26 (emphasis added). This Commission then concluded that it would not restrict its view of the "public interest" to the "no adverse impact" standard and that it would also consider whether any positive benefits would flow from the proposed merger.

Other jurisdictions have similarly rejected application of the "adverse impact" test. For example, in City of York v. Pennsylvania Public Utility Commission, 281 A.2d 261 (Pa. 1972), the Pennsylvania Supreme Court overruled a former decision imposing the "adverse impact" standard. It reasoned that Pennsylvania's statutory scheme, which required a transfer of certificates of public convenience in merger cases, required that those "seeking approval of a utility merger demonstrate more than the mere absence of any adverse effect upon the public." It required the applicants to demonstrate "that the merger will affirmatively promote the 'service, accommodation, convenience,

or safety of the public' in some substantial way." City of York, 281 A.2d at 357. Similarly in Re New Jersey Natural Gas Co. 80 PUR 3d 337 (N.J. PUC 1969), the New Jersey Board of Public Utility Commissioners imposed the requirement that a proposed transaction "meet the test that it is in the best interest of the New Jersey consumers." 80 PUR 3d at 339.

The Utah statutory scheme relating to public utility mergers is broad enough to support the requirement that a proposed merger result in a public benefit. Utah Code Ann. 54-4-28 provides:

No public utility shall combine, merge nor consolidate with another public utility. . . without the consent and approval of the public utilities commission, which shall be granted only after investigation and hearing and finding that such proposed merger, consolidation or combination is in the public interest.

Utah Code Ann. § 54-4-28 (emphasis added).<sup>2</sup> The requirement that the merger be in the public interest provides the basis for distinguishing the Utah statutory scheme from the statutory schemes involved in many of the cases relied on by the applicants. For example, the "landmark" case on which applicants rely, Pacific Power & Light Co. v. Federal Power Commission, 111 F.2d 1014 (9th Cir. 1940), involved interpretation of the phrase "consistent with the public interest." However, the phrase "consistent with" the public interest has been "universally

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<sup>2</sup> Sections 54-4-29 and 54-4-30, involving the acquisition of utility stock and acquisition of utility property, contain an identical standard.

interpreted to require a lesser showing than the phrase "in the public interest." Re Boston Edison Company, 51 PUR 4th 145, 148-49 (Mass. PUC 1983).<sup>3</sup>

II. THIS COMMISSION SHOULD WEIGH THE BENEFITS  
OF THE PROPOSED MERGER AGAINST THE DETRIMENTS

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The standard to be applied by this Commission is of less significance than the issue of the factors to be considered by the Commission in its analysis of the "public interest." A merger of the size and complexity of that proposed by the applicants may produce some benefits, and will certainly cause some adverse impacts. By urging application of the "adverse impact" standard, the applicants presumably are not urging this Commission to deny approval to the merger if there is any identifiable detriment connected with the merger. Therefore, in considering the merger, this Commission will likely weigh the detriments of the proposed merger against any benefits of the

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<sup>3</sup> Similarly, the "public convenience and necessity" standard, which is applicable to applicants' proposed transfer of Utah Power's certificate of public convenience to PacifiCorp, imposes a greater burden on the applicants than the "consistent with the public interest" standard. See Re Boston Edison Company, 51 PUR 4th at 149. Applicants have not provided any authority for their assertion that the transfer of UP&L's certificates of public convenience and necessity should be gauged under the "adverse impact" standard. See Applicant's Post-Hearing Brief at 9.

proposed merger.<sup>4</sup> The important issue is the issue of what factors the Commission may consider in that process.

UMPA believes that this Commission should not restrict its consideration of the merger to the narrow issue of whether the merged utility would be capable of providing "safe and adequate service at reasonable rates." There is no support for such a narrow reading of the "public interest." In CP National, this Commission broadly interpreted the "public interest" test to include consideration of issues such as competition. Other jurisdictions have adopted similar interpretations. For example, in New Jersey Resources Corp. v. NUI Corp., 57 PUR 4th 709 (N.J. PUC 1984), the New Jersey Public Utilities Commission identified a number of factors relevant to the public interest in the context of a merger similar to the one proposed here. These included:

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<sup>4</sup> The practical implications of the "no adverse impact" standard were explained by the Massachusetts Public Utilities Commission in Re Boston Edison Co., 51 PUR 4th at 149:

Few, if any proposals are so benign as to be without any possibility of harm to the public. Other proposals might well combine harm with significant public benefit. . . .

While the standard of "consistency" [with the public interest] has not to date been specifically described in terms of a balancing of benefits and harms, a close reading of department cases in this jurisdiction and a review of cases from other jurisdictions reveal a consistent search for, and reliance upon, benefits to the public. Complicating aspects of a proposal are often downplayed when actual and offsetting benefits are established.

- 1) The advantages of combined control as opposed to local management and the question of absentee ownership by out-of-state of foreign corporations;
- 2) The effect of the merger upon competition;
- 3) The advantages and disadvantages of the integration of corporate structures;
- 4) The impact upon the financial capacity and flexibility of the merged utility;
- 5) The question of the maintenance of the financial integrity of two separate operating companies under the umbrella of one proposed combined utility;
- 6) The impact on service standards and safe, adequate and proper service;
- 7) The effect on rates;
- 8) The impact on customer mix and demand forecasts;
- 9) The impact on regulatory authority and ability to effectively regulate the merged utility; and
- 10) The effect on employees of the utility.

57 PUR 4th at 714-15.<sup>5</sup>

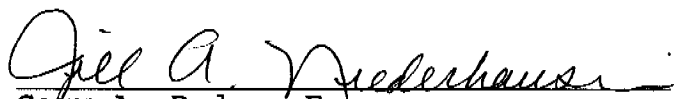
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<sup>5</sup> The closely-related, overlapping, and sometimes confusing areas of FERC and state jurisdiction at times create questions about the proper scope and extent of a particular proceeding. While Part 2 of the Federal Power Act gives the FERC the jurisdiction to regulate wholesale transactions and interstate transmission, such jurisdiction in no way limits or diminishes this Commission's jurisdiction to address the potential impacts of the merger on transmission policies, wholesale sales and similar matters, and how those impacts will affect utilities and ratepayers in Utah. The "public interest" and "public convenience and necessity" standards give the Commission jurisdiction to consider all significant impacts, to deny approval if such impacts are not in the public interest, or to condition approval on such conditions as may be appropriate to alleviate such impacts.


Benefits to be derived from additional opportunities for wholesale power sales and an enhanced interstate transmission system have been identified by the applicants as important benefits allegedly justifying the proposed merger. Thus, the applicants themselves have recognized that the public interest includes consideration of issues other than the ability to provide safe and adequate service to Utah consumers. In addition to the interests of Utah consumers, the public interest should be interpreted to include issues such as the impact on effective regulation of the merged utility, the impact on Utah's economy, jobs, and on competitors such as UMPA.

RESPECTFULLY SUBMITTED this 6th day of November, 1987.

KIMBALL, PARR, CROCKETT & WADDOUPS

  
Gary A. Dodge, Esq.  
Jill A. Niederhauser, Esq.

DUNCAN, ALLEN AND MITCHELL

  
John P. Williams, Esq.

Attorneys for Utah Municipal  
Power Agency



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing "Post-Hearing Brief of Utah Municipal Power Agency," was mailed, postage prepaid, this 6th day of November, 1987, to the following:

Fredric D. Reed  
Senior Vice President  
Pacific Power & Light Company  
920 Southwest 6th Avenue  
Portland, Oregon 97204  
(Federal Express)

James Fell, Esq.  
Stoel, Rives, Boley, Jones & Grey  
Suite 2300  
900 Southwest 5th Avenue  
Portland, Oregon 97204  
(Federal Express)

Charles F. McDevitt, Esq.  
Suite 200, Park Place  
277 North 6th Street  
Boise, Idaho 83702

Sidney G. Baucom  
Thomas W. Forsgren  
Edward A. Hunter, Jr.  
Utah Power & Light Company  
1407 West North Temple  
Salt Lake City, Utah 84140  
(Hand-Delivery)

Wesley F. Merrill  
109 North Arthur  
Spaulding Building  
Pocatello, Idaho 83204

Stephen R. Randle, Esq.  
Ungricht, Randle & Deamer  
520 Boston Building  
Salt Lake City, Utah 84111

Roger Cutler, Esq.  
Salt Lake City Attorney  
324 South State Street  
Salt Lake City, Utah 84111

Robert S. Campbell, Jr., Esq.  
George M. Galloway, Esq.  
Watkiss & Campbell  
310 South Main Street  
12th Floor  
Salt Lake City, Utah 84111

Michael Ginsberg, Esq.  
Attorney General's Office  
236 State Capitol Building  
Salt Lake City, Utah 84114

Sandy Mooy, Esq.  
Attorney General's Office  
236 State Capitol Building  
Salt Lake City, Utah 84114

James A. Holtkamp, Esq.  
Vancott, Bagley, Cornwall & McCarthy  
50 South Main Street  
Suite 1600  
Salt Lake City, Utah 84145

Raymond W. Gee, Esq.  
Kirton, McConkie & Bushnell  
330 South 300 East  
Salt Lake City, Utah 84111

Calvin L. Rampton, Esq.  
L. R. Curtis, Esq.  
Ronald J. Ockey, Esq.  
Jones, Waldo, Holbrook & McDonough  
170 South Main Street  
Suite 1500  
Salt Lake City, Utah 84101

F. Elgin Ward, Esq.  
Lynn W. Mitton, Esq.  
Deseret Generation & Transmission  
Co-operative  
8722 South 300 West  
Sandy, Utah 84070

Paul T. Morris  
Robert Wall  
2470 South Redwood Road  
West Valley City, Utah 84119

F. Robert Reeder, Esq.  
Val R. Antczak, Esq.  
Parsons, Behle & Latimer  
185 South State Street  
P.O. Box 11898  
Salt Lake City, Utah 84147

Alice Ritter Burns, Esq.  
110 North Main Street  
P.O. Box 249  
Cedar City, Utah 84720

John Morris, Esq.  
LeBoeuf, Lamb, Leiby & MacRae  
136 South Main Street  
Suite 1000  
Salt Lake City, Utah 84101

L. Christian Hauck  
Colorado Ute Electric Association  
P.O. Box 1149  
Montrose, Colorado 81402

Salli Brash, Esq.  
Willkie, Farr & Gallagher  
#1 CitiCorp Center  
153 East 53rd Street  
New York, NY 10022

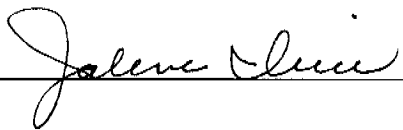
John D. Newman  
West Valley City Manager  
2470 South Redwood Road  
West Valley City, Utah 84119

Chris L. Engstrom, Esq.  
Snow, Nuffer, Engstrom & Drake  
90 East 200 North  
P.O. Box 400  
St. George, Utah 84770

Richard W. Giaouque, Esq.  
Gregory P. Williams, Esq.  
Gary F. Bendinger, Esq.  
Giaouque, Williams, Wilcox & Bendinger  
500 Kearns Building  
Salt Lake City, Utah 84101

A. Wally Sandack, Esq.  
370 East Fifth South  
Salt Lake City, Utah 84111

David T. Helsby  
R.W. Beck and Associates  
2121 Fourth Avenue  
Seattle, Washington 98121  
(Federal Express)

  
\_\_\_\_\_