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November 3, 1987

Public Service Commission
of Utah
Heber Wells Building
Salt Lake City, UT 84110

Re: Utah Power & Light Company and PC/UP&L, et. al.
Case No. 87-035-27

Dear Sir or Madam:

Enclosed please find Petition to Intervene of Local 125, International Brotherhood of Electrical Workers, AFL-CIO for filing in the above-referenced matter.

Very truly yours,

Kathryn T. Whalen

sp
Enclosure
cc: Bill Miller, IBEW, Local 125
Per Certificate of Mailing

RECEIVED

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Attorneys for Intervenors Coastal States Energy Company, Arco Coal Sales Company, Cyprus Coal Company and Andalex Resources, Inc.

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 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

INTERVENORS UTAH INDEPENDENT COAL COMPANIES' RESPONSE TO APPLICANTS' POST-HEARING BRIEF

Intervenors, The Utah Independent Coal Companies, by and through their counsel of record and pursuant to the Order of the Commission, submit this Response to the Post-Hearing Brief submitted by the Applicants in the above-entitled matter.

INTRODUCTION

The proposed merger, if accomplished, would result in a company which is one of the largest suppliers of coal and the single largest consumer of coal, not only in Utah, but in the

western United States. This company would be a dominant force in the coal industry. One possible consequence could be that coal from other states would be used to supply electric energy to Utah. Another possible consequence could be that the cost of coal for rate-making purposes could significantly exceed the cost at which comparable coal could be acquired from non-captive mines.

As discussed below, the Utah Independent Coal Companies maintain that the phrase "in the public interest" appearing in Utah Code Ann. § 54-4-28 is used in the broadest sense and refers to the general welfare of the State of Utah and its citizens. These companies maintain that the so-called "positive benefits test" is the proper test for assessing the merger. However, because the Utah Independent Coal Companies believe that the merger will have substantial and adverse impacts on an industry of vital importance to the economy and welfare of the State, the issues of concern to the companies are appropriate for consideration even under the so-called "no public detriment" test.

ARGUMENT

The question presented here is the appropriate interpretation of the language of Utah Code Ann. § 54-4-28 (1986), which provides:

> No public utility shall combine, merge nor consolidate with another public utility engaged in the same general line of business in this state, 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. (Emphasis added.)

Applicants argue that the phrase "in the public interest" simply means that there must be a finding by the Commission that there is "no public detriment" or "adverse impact" due to the proposed merger. Post-Hearing brief at p. 2. In support of that argument, applicants cite cases under various statutes which, due to their express language, have nothing to do with the scope of the review to be undertaken by this Commission under Utah Code Ann. § 54-4-28. Further, the applicants rely exclusively upon the Utah Supreme Court's decision in Collett v. Public Service Commission, 116 Utah 413, 211 P.2d 185 (1949), which case is entirely inapplicable to the questions presented.

I. APPLICANTS' RELIANCE ON FEDERAL DECISIONS IS MISPLACED.

Applicants rely heavily on the Ninth Circuit's 1940 decision in Pacific Power & Light Co. v. Federal Power Commission. 111 F.2d 1014 (9th Cir. 1940) for the proposition that a finding that the merger is "in the public interest" requires only that it not be a detriment. Applicants' reliance upon Pacific Power & Light is misplaced in two respects. First, the language of Section 203 of the Federal Power Act, 16 U.S.C. § 824b(a), which that case deals with, is different than the language of the statute under consideration herein. Second, the decisions under that section are consistent with the idea, as proposed by the Utah Independent Coal Companies, that the Commission must consider the public interest as a whole and not the narrowly-defined considerations applicants would propose.

Section 203 of the Federal Power Act, 16 U.S.C. § 824b(a) states in pertinent part:

> No public utility shall sell, lease or otherwise dispose of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. . . . After notice and an opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same. (Emphasis added.)

In contrast to that language, Utah Code Ann. § 54-4-28 states as follows:

> No public utility shall combine, merge nor consolidate with another public utility engaged in the same general line of business in this state, 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. (Emphasis added.)

The obvious difference between those two statutes is that the first requires only that the action be "consistent with the public interest" while the second requires that the action be "in the public interest." While the Ninth Circuit in Pacific Power & Light may have found that "consistent with the public interest does not connote a public benefit to be derived," 111 F.2d at 1016, the language "in the public interest" clearly does connote such a benefit.

Moreover, even if it could be found that "consistent with the public interest" means the same thing as "in the public interest," applicants' reliance on Pacific Power & Light is somewhat misleading as to the meaning of the "consistent with the public interest" language found in Section 203. For example, in Citizens for Allegan County, Inc. v. Federal Power Commission, 414 F.2d 1125 (D.C. Cir. 1969), the Court of Appeals for the District of Columbia determined that in considering the "public interest" in the context of one utility's acquisition of another, the Federal Power Commission was required to consider not only the economic interests at stake, but also other interests, such as in that case the impact on the recreational use of a lake. In so deciding, the court stated as follows:

> The FPC is not interested alone in economic cost. It must consider other elements of the public interest, (footnote omitted) including specifically, here, the impact on the recreational use of the lake.
>
> . . .
>
> Thus the Commission must take into account the impact of the proposal on consumers who are not voters--here commercial customers.

Id. at 1130. Thus, it is clearly appropriate under the language "consistent with the public interest" to consider a wide range of impacts including recreational uses of a lake.

A further example of the broad approach taken under Section 203 is the fact that under the language of that statute, it has been found that the Federal Power Commission has an affirmative obligation to consider antitrust policies in

determining whether a merger satisfies the public interest standard therein. Kansas Power & Light Co. v. Federal Power Commission, 554 F.2d 1178 (D.C. Cir. 1977).

It is therefore apparent that Section 203 of the Federal Power Act, and decisions decided under that Act, are not analogous to the statute in question here. Further, even if the language of Section 203 of the Federal Power Act can be found to be analogous to Section 54-4-28, the Kansas Power & Light Co. v. Federal Power Commission and Citizens for Allegan County, Inc. v. Federal Power Commission decisions show that a much broader definition of "public interest" is appropriate than that advocated by the applicants.

II. APPLICANTS' RELIANCE ON CASES FROM OTHER STATES IS MISPLACED.

In an effort to impose their narrow view of the "public interest" on the Commission, applicants resort to decisions from several other states which they contend support that narrow view. In fact, the cases relied upon by applicants are factually so dissimilar as to be meaningless to the question presented here. Moreover, dealing as they do with statutes from other states and which are not the same as the statute at issue here, those cases cited by applicants are of absolutely no precedential value.

The first state case cited by applicants is Electric Public Utilities v. West, 140 A. 840 (Md. 1928). The first point to be made about that case is that it dealt with a statute in which "public interest" was never mentioned. Although the

statute in question did give the public service commission the right to refuse to grant permission for acquisition of the stock of utilities, the standard on which that permission could be refused was not stated. The court created such a standard; however, the standard created by a Maryland court in 1928 has very little to do with the statute at question herein.

Applicants also cite Utilities Commission of New Smyrna Beach v. Florida Public Service Commission, 469 So.2d 731 (Fla. 1985). That case dealt with a proposed territorial agreement between two utilities. A group of customers objected to the transfer from one utility to another. Again, the statute in question granted authority to the Public Service Commission to "approve territorial agreements" but nowhere mentioned the public interest. Id. at 732. Moreover, the question in that case was whether one power company or another should supply electricity to a small group of consumers, not, as in this case, whether one utility should be allowed to entirely take over another. Thus the analogy between that case and the present case is difficult to see.

Applicants' reliance on Fee Fee Trunk Sewer v. Litz, 596 S.W.2d 466 (Ct. App. Mo. 1980); United Fuel Gas Company v. Public Service Commission, 174 S.E.2d 304 (Ct. App. W. Va. 1969); and Brinks, Inc. v. Illinois Commerce Commission, 431 N.E.2d 1242 (Ill. App. 1981) is also misplaced, inasmuch as those cases did not deal with the factual situation existing in this case. In Fee Fee Trunk Sewer, Inc., the question for decision was whether

the public service commission had jurisdiction over a real property ownership suit with regard to the assets of a utility, the sale of which had been approved by the commission. The United Fuel Gas Company case dealt only with the realignment of commonly owned established utilities and did not deal with the sale of a public utility as contemplated in this case. Finally, the Brinks case dealt with the grant of a contract motor carrier permit which, of course, has no application in this case.

The cases from other jurisdictions cited by applicants are simply inapplicable to the issue posed. Considering, as the Commission should, the major impacts likely under the proposed merger, adoption of the applicants' narrow standard based upon cases from other jurisdictions with little application to the statute in issue here would be a grave mistake.

III. THE UTAH PRECEDENTS SHOW THAT THE STANDARD ADVOCATED BY APPLICANTS IS OVERLY NARROW

Based upon Collett v. Public Service Commission, supra, applicants would have this Commission believe that their proposed merger, which will strip this Commission of a great deal of control over the major electric utility in this state, is nothing more than the transfer of a common carrier's operating certificate. Of course, such a position is unsupportable. Rather, the Utah authorities which are on point with regard to the issue herein indicate that the standard to be applied with regard to the public interest is much broader than that advocated by applicants.

The Commission is already familiar, of course, with the CP National Corporation Report and Order in which the Commission has rejected the "no adverse impact" standard as an exclusive focus with regard to the public interest. That decision has already been discussed in this matter and need not be rehashed here. On the other hand, there are Utah precedents which have not heretofore been cited which do have bearing on this issue.

In Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601 (Utah 1983) the Supreme Court of Utah considered whether the Public Service Commission's approval of a settlement agreement which was related to the transfer of a utility's property to an unregulated company was appropriate. As part of that decision, the Supreme Court considered whether that settlement was in the public interest. Id. at 615. In determining that the Commission had correctly concluded that the settlement was in the public interest, the court considered the positive benefits and impact of the settlement on a broad range of areas. Id. at 615-18. Implicit in the court's decision is the fact that the "public interest" as contemplated in Chapter 54 encompasses a very broad range of public endeavor and is not limited to a "no adverse impact" standard.

In Committee of Consumer Services v. Public Service Commission, 595 P.2d 871 (Utah 1979), cert. denied, 444 U.S. 1014 (1980), the Utah Supreme Court stated the following with regard

to the public interest in the context of a purchase and sale agreement between a utility and its wholly-owned subsidiary:

> [B]efore approving the transfer of a utility asset, the commission should determine whether the transaction is detrimental to the ratepayer, and whether it is in the public interest. (Emphasis added.)

Id. at 878. From that language, it is abundantly clear that whether the transaction is in the public interest is a separate and distinct inquiry from the inquiry with regard to whether the transaction is detrimental to a ratepayer. Obviously, unless the Supreme Court intended to be redundant in the foregoing statement, any definition of "public interest" which limits the Commission's inquiry to the "adverse impact" on the ratepayer is far too narrow.

CONCLUSION

The arguments asserted by the applicants in support of a very narrow definition of the phrase "in the public interest" are simply not persuasive in light of the actual language of the Utah statute. Further, to follow that narrow standard would be contrary to this Commission's prior decision in CP National Corporation and contrary to the Utah Supreme Court's decisions in Committee of Consumer Services, supra, and Utah Department of Administrative Services, supra.

The impact of the proposed merger on the State of Utah, the citizens and businesses of the state, and the jurisdiction of the Commission in the future is simply too great for this Commission to limit itself as applicants would propose. A broad

impact can be expected and a broad inquiry with regard to that impact is therefore mandated.

Dated this 6th day of November, 1987.

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By _____
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the persons shown on Exhibit A by mailing a copy thereof, properly addressed and postage prepaid.

DATED at Salt Lake City, Utah, this 6th day of November, 1987.

Jean H. Stott

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