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. 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 MEMORANDUM IN RE STANDARD OF PROOF

This memorandum is submitted pursuant to authority granted by this Commission in its order of October 30, 1987. Counsel for the applicants have already analyzed the cases from other jurisdictions regarding the standard of proof required in a merger case. We will not reiterate that analysis but will refer to some of such cases to sustain the observations hereinafter made.

THE "PUBLIC INTEREST" AND "NO ADVERSE IMPACT TEST" ARE COMPATIBLE.

During the brief discussion of the standard of proof which took place before the Commission on October 19, many of the counsel addressed the public interest standard and the no adverse impact standard as being mutually exclusive. Counsel for the Utility Shareholders Association do not hold this view. We believe the two tests to be compatible.

Certainly, the "public interest" is the final and decisive test of whether or not the transfer of operating

rights to a merged company should be approved. This is so under our statute, Utah Code Ann. §54-4-28 (1953 as amended), and under the near unanimous holding of courts and commissions as cited in the brief of the applicants. The public whose interests must be served, however, is not a monolithic group but is composed of various groups, sometimes with diverse interests although not always so. The groups having the most immediate interests in the merger are (1) the consumers of the company's product and (2) the owners of the company. There may be other groups who may have lesser and indirect interests in the merger. However, they often do not have standing to protest.* It is the duty of the Public Service Commission to weigh all of the impact of the proposed merger on all segments of society which have standing in the case to determine where the public interest lies. It is a balancing process as has been pointed out by this and many other commissions. Committee of Consumer Services v. Public Service Commission, 595 P.2d 871, 878 (Utah 1979); Re CP National Corporation, Nos. 80-023-01 and 80-035-02 [reprinted at 43 PUR 4th 315, 328-29 (Utah June 4, 1981)]; Re Ernest Dinwiddie, Nos. 13,309 and 13,319 [reprinted at 13 PUR 3d 479, 484 (Mo. May 17, 1956)]; Re Bass Lake Rural Telephone Company, M-4926 [reprinted at 54 PUR 3d 262, 267 (Minn. May 11, 1964)]. If there is weight in the scale on the benefits side and no

*Collett v. Public Service Commission, 211 P.2d 185 (Utah 1949) holds that competitors of the merging companies do not have standing to object to the merger. Utah Code Ann. §54-6-13(3) gives standing in merger proceedings to those persons, such as shareholders, who have "ownership interest."

weight on the adverse side, clearly the balance falls on the side of approval. The "no adverse impact test" is a test applied to a particular segment of the public, usually the consumer, to determine whether the impact on that segment has weight to go into the balance. If there is no adverse impact, then the interests of that particular segment do not affect the balance negatively.

THE INTERESTS OF THE SHAREHOLDERS WEIGH IN FAVOR OF THE MERGER.

The fact that one segment of the public, usually the shareholders or the company, as is true in this case, is motivated to seek the merger, clearly indicates that the merger is perceived by that group to be in its interests. This Commission as well as other tribunals have expressly considered benefits to shareholders as part of the public interest analysis. Re CP National Corporation, Nos. 80-023-01 and 80-035-02 [reprinted at 43 PUR 4th 315, 327,29 (June 4, 1981)]; Bryant v. Farmer's Merchant's State Bank, 140 A. 840, 844 (Md.App. 1928); Re Maine Public Service Company, No. 85-92 [reprinted at 75 PUR 4th 295, 304-05 (Maine May 15, 1986)]; See also Re Boston Edison Company, D.P.U. 850 [reprinted at 51 PUR 4th 145, 154 (Mass. February 9, 1983)] (harm to shareholders factor in denial of application for merger). During the course of the hearing, the shareholders will demonstrate by compelling evidence that it is in their interests to have the merger approved. In fact, the evidence will establish, as we have

previously pointed out in our memorandum in support of intervention, that in the absence of this merger or some other remedy, the shareholders face disastrous losses. Therefore, that factor weighs in the balance being sought by the Commission in determining the public interest.* The scales are tipped toward approval of the merger. The Commission then must ask is there an adverse impact on another segment of the public entitled to standing in these proceedings which may tip the scale back to neutral or to the negative side. This is the role of the "no adverse impact rule" which has been adopted as the standard by our federal courts and by the courts of most state jurisdictions as has been pointed out by the applicants in their brief.

THE NO ADVERSE IMPACT RULE IS THE LAW IN THIS STATE.

The only case decided by the Supreme Court of the State of Utah which touches this matter directly is Collett v. Public Service Commission, supra, which has already been much discussed in this proceeding. In this case, a larger company, Lange, was buying a smaller company, Gould, and was seeking to have Gould's rights as a common carrier transferred to Lange. Collett and other competing trucking companies protested on the ground that Lange's greater financial resources would make that

*It is almost axiomatic, although sometimes not susceptible to proof by discrete evidence, that the customers of a utility are in the long run benefited by a financially sound ownership of the utility.

company a more aggressive competitor than Gould and so would have adverse effect on competitors. The Supreme Court held two things. It first held that competitors would not have standing and that the impact on competitors was not a factor in determining "public interest." It further held that as the merger was desired by management and ownership and preceived to be in their interests, it should be approved if it appeared that service to the consumer would not be adversely affected. In other words, the "no adverse impact rule."

In Committee of Consumer Services v. Public Service Commission, 595 P.2d 871 (Utah 1979) commonly known as the Wexpro case, the Utah Supreme Court applied the no adverse impact rule to the transfer of certain oil producing properties of Mountain Fuel Supply Company to its subsidary, Wexpro. The court, after holding in effect that certain assets that were going to be transferred were utility assets, stated:

> Furthermore, before approving the transfer of utility assets, the Commission should determine whether the transaction is detrimental to the ratepayer and whether it is in the public interest.
>
> Id. at 878. (Underlining added.)

It is true that this Commission in CP National Corporation, Case Nos. 80-023-01 and 80-035-02, by dictum, seems to have approved the positive benefit rule. However, the holding was merely dictum and could not have been challenged in a court because the dictum did not go to the nexus of the case and establishes no binding precedent.

The language of the Commission regarding the positive benefit rule was dictum because although they say that rule applies, they then go on to find that there are substantial benefits to the consumer from the merger and so the merger would meet the positive benefit rule. The language regarding the no adverse impart rule would be the law of the case only if the Commission found (a) that the proof met the no adverse impact rule and (b) did not meet the positive benefit rule and then made the decision one way or the other on that state of facts.*

CONCLUSION

Pure logic and equity says that if the shareholders will benefit by the merger and no other segment of the public entitled to standing is hurt, then the merger should be approved. To give one segment the power to be obstructionists nd say "what's in it for me" would be consistent with neither the public interest nor the law.

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*While the shareholders believe that the evidence in this case will show substantial consumer benefits and so would meet the positive impact rule, we would not like to go into the case faced with the responsibility of the production of proof that should not logically be with the proponents and is not placed with the proponents by the great weight of authority in this country.

Respectfully submitted,

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CERTIFICATE OF MAILING

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