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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 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.	Docket No. 87-035-27

POST-HEARING BRIEF

Applicants herewith submit their post-hearing brief relative to the question of whether the underlying and requisite test for the approval of the merger herein is the "public interest" and whether that test is to be evaluated under the "no adverse impact" analysis.

ARGUMENT

POINT I

FEDERAL CASE PRECEDENT IN PUBLIC UTILITY MERGERS IS THE "NO PUBLIC DETRIMENT" OR "ADVERSE IMPACT TEST"

In the Applicants' filed Statement Of The Issues, it is urged that the fundamental issue in this case is whether the merger of PacifiCorp and Utah Power is:

> consistent with the public interest in achieving and maintaining sufficient reliable and adequate electric public utility service at reasonable rates in the State of Utah.

The substantial portion of the argument addressed at the hearing focused on whether merger approval required a showing of "positive benefit" rather than a showing of "no public detriment" or "adverse impact." Little citation of authority was cited other than the Utah decision of Collett v. Pub. Serv. Comm., 116 Utah 413, 211 P.2d 185 (1949) and this Commission's earlier Order in the C.P. National Corp. in Docket Nos. 80-023-01, 80-035-02.

Applicants submit that to the extent that a statute exists in Utah authorizing the Commission to approve this merger, Utah Code Ann. §54-4-28 (1986), it is of primary significance. That statute, in part, 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.)

In determining the definition of the phase "in the public interest", the landmark and seminal case cited in virtually every decision considering the issue is Pacific Power & Light Co. v. Federal Power Comm., 111 F.2d 1014 (Ninth Cir. 1940). In this case, PP&L sought to merge with Inland Power. Section 203 of the Federal Power Act, 16 U.S.C. § 824b(a), required a finding by the Federal Power Commission that the merger would be "consistent with the public interest." Id at 1016. Opponents of the merger argued that Section 203 required "an affirmative showing that benefit to the public will result from the proposed merger." Id. at 1015. After discussion of the congressional intent under the F.P.A., the Ninth Circuit stated in language that has been repeatedly cited:

> The phrase "consistent with the public interest" does not connote a public benefit to be derived or suggest the idea of a promotion of the public interest. The thought conveyed is merely one of compatability. Congress resorted to this language rather than to the use of the stock term "public convenience or necessity", or to such phrases as "in furtherance of", or "will promote the public interest" used in its interstate commerce legislation (later considered); and the language employed ought to be construed to mean no more than it says. It is enough if the applicants show that the proposed merger is compatible with the public interest. The Commission, as a condition of its approval, may not impose a more burdensome requirement in the way of proof than that prescribed by law. (Emphasis added.)

111 F.2d at 1016.

The Ninth Circuit completed its discussion of this issue in Pacific Power by holding that:

> Suffice it to say that the statute does not require a showing that positive benefit to the public will result; and as this court has heretofore said (98 F.2d 835, 837, 838), the section recognizes the existence of a substantive right to have the Commission's approval upon the making of the statutory showing. (Emphasis added.)

111 F.2d at 1017.

Accordingly, under the lead precedent of Pacific Power, the requisite test for a merger satisfying the public interest is one of compatibility and does not require the additional showing that a "positive benefit" to the public will ensue. In a recent case before the Federal Energy Regulatory Commission ("FERC"), In re Central Vermont Pub. Serv. Comm., 39 Fed. Energy Reg. Comm'n. Rep. (June 15, 1987), the FERC cited the Pacific Power holding and affirmed the federal precedent that merger approval does not require a showing of positive public benefit. Stated the FERC:

> Section 203(a) does not require a showing of a "positive benefit" to the public in order for a merger to be found to be in the public interest. Only an absence of a negative detriment is required. The provision was intended to prevent consolidation resulting in detriment to consumers or investors or to other legitimate national interests, but did not disclose a policy hostile to all consolidations as presumptively harmful. (Emphasis added.)

See also FERC decisions citing Pacific Power, In re Utilicorp United Inc., 38 Fed. Energy Reg. Comm'n. Rep. (March 18, 1987);

In re Delmarva Power & Light Co., 5 Fed. Energy Reg. Comm'n. Rep. (December 4, 1978).

The point should not be lost in this case that a showing of a positive benefit, as a condition to merger approval, would necessarily carry with it the implicit presumption that a merger is disfavored in law. Nothing under the Utah statute or Utah case law will support such a presumption.

POINT II

STATE COURT PRECEDENT OVERWHELMINGLY SUPPORTS A "NO PUBLIC DETRIMENT" ANALYSIS OF THE "PUBLIC INTEREST" TEST

In the watershed and still favored case of Electric Public Utilities Co. v. West, 140 A. 840 (Md. 1928), the highest state court in Maryland construed a statute by giving the Maryland Public Service Commission authority to approve the acquisition of stock of one electric utility by another utility if the acquisition was "in the public interest." After rejecting the argument made by several of the intervenors in the case at hand that the "public benefit" was the correct measurement of the public interest, the Maryland court rejected such an analysis and determined that the question of no public detriment was the operative and controlling measure:

> To prevent injury to the public in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be benefited, as a condition to change of ownership, but

> their duty is to see that no such change shall be made as would work to the public detriment. "In the public interest" in such cases, can reasonably mean no more than "not detrimental to the public." (Emphasis added.)

140 A. at 844. The Maryland Court later reaffirmed this holding in Montgomery Co. v. Pub. Serv. Comm., 98 A.2d 15 (Md. 1953).

In State ex rel. Fee Fee Trunk Sewer v. Litz, 596 S.W. 2d 466, 468 (Mo. Ct. App. 1980), the Missouri court of appeals squarely held, in a case involving the transfer of public utility sewerage assets from one utility to another, while relying on an earlier Missouri Supreme Court decision[1/] which in turn cited with approval and as precedent the Maryland decision in Electric Public Utilities Co. v. West, supra, that:

> Before a utility can sell assets that are necessary or useful in the performance of its duties to the public it must obtain approval of the Commission. . . . The Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest.

In the recent case of Utilities Comm. of New Smyrna Beach v. Florida Pub. Serv. Comm., 469 So. 2d 731 (Fla. 1985), the Supreme Court of Florida reversed the Florida Public Service Commission in a case in which the Commission had rejected the

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1/ The earlier decision cited with favor is State ex rel. City of St. Louis v. Pub. Serv. Comm., 73 S.W. 2d 393 (Mo. 1934), in which the Missouri Supreme Court noted that the Maryland and Missouri public utility merger statutes, including the phrase, "in the public interest", were identical.

transfer of territorial services between two Florida electric utilities. The Florida Commission had held that such transfer would not result in any "substantial economic, reliability, or safety benefits to those affected customers." Id. at 732. The Florida Supreme Court, citing substantial authority, including Pacific Power and West, held that the public interest was to be gauged under the litmus test of "no public detriment" analysis. Said the Florida court:

> The PSC has the responsibility to ensure that the territorial agreement works no detriment to the public interest. We find this situation analogous to that in transfer of utility asset cases, where other courts have held that the public need not be benefited by the transfer so long as the public suffers no detriment thereby. E.g., Pacific Power & Light Co. v. Federal Power Commission, 111 F.2d 1014 (9th Cir. 1940); Montgomery County v. Public Service Commission, 203 Md. 79, 98 A.2d 15 (1953); Electric Public Utilities Co. v. West, 154 Md. 445, 140 A. 840 (1928). . . .
>
> Applying the no-detriment test to the facts of this case, we find the PSC erred in refusing to approve the territorial agreement as contrary to the public interest.

469 So. 2d at 732-33.

Further stated precedent is found in United Fuel Gas Co. v. Pub. Serv. Comm. of West Virginia, 174 S.E. 2d 304 (W. Va. 1969), in which the West Virginia Supreme Court stated, in a case involving the transfer of a utility gas plant from one public utility to another, that the public interest issue turns on whether the transfer does not give an "undue advantage over any other

party, and that it does not adversely affect the public in this State." Id. at 317.

Rationale to the same effect is found in Brinks, Inc. v. Ill. Commerce Comm., 431 N.E.2d 1242 (Ill. App. Ct. 1981).

POINT III

UTAH CASE PRECEDENT SUPPORTS THE "NO PUBLIC DETRIMENT OR ADVERSE IMPACT" ANALYSIS IN DETERMINING THE PUBLIC INTEREST

As was noted in oral argument before the Commission, the only Utah precedent on the subject is the Supreme Court decision of Collett v. Pub. Serv. Comm., 116 Utah 413, 211 P.2d 185 (1949), wherein the Utah Court stated under facts involving the transfer of an operating certificate:

> The Commission took the view, that the principal question in such a problem as this is that of the financial status, fitness, willingness and ability of the proposed new certificate holder to carry on the business; that so far as the public is concerned, the public convenience and necessity would not be adversely affected by the change in certificate holders. (Emphasis added.)

211 P.2d at 187.

The test in Collett was whether the transfer of the certificate of public convenience and necessity was "in the public interest." See Utah Code Ann. §76-5-18 (1943). Thus, the Utah Supreme Court has aligned itself with the great weight of authority in this country that in determining whether a transfer of

operating authority is in the public interest, this Commission should conduct the analysis under the "no adverse impact" test.

As has been argued, Collett is a common carrier case involving the transfer of certificate authority. In the instant case, the applicants also seek transfer of Utah Power's certificate of public convenience and necessity to PacifiCorp. Certainly, the transfer of Utah Power's certificate to PacifiCorp should not be gauged under a different standard than whether the merger, an integral part of the certificate transfer, is "in the public interest." The "no adverse impact or public detriment" test should control all of the issues in this case.

C O N C L U S I O N

As stated by Applicants during argument, the Applicants herein will show that the merger before the Commission will yield significant public benefits and advantages. However, factual evidence of positive benefits does not change the central question of law in the case under the substantial case precedent, including that in Utah -- is the merger in the public interest, as viewed in the context of whether, on balance, it poses a public detriment or adverse impact to the utility operations and ratepayers.

Respectfully submitted this 23rd day of October, 1987.

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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 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.	Docket No. 87-035-27

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the MOTION OF APPLICANTS FOR LEAVE TO FILE POST-HEARING BRIEF ON ISSUE OF "PUBLIC INTEREST" and POST-HEARING BRIEF, both dated

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