BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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IN THE MATTER OF RATEMAKING TREATMENT OF DEMAND SIDE RESOURCES AND THE ANALYSIS OF REGULATORY CHANGES TO ENCOURAGE IMPLEMENTATION OF INTEGRATED RESOURCE PLANING	Docket No. 92-2035-04

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UTAH INDUSTRIAL ENERGY CONSUMERS' COMMENTS ON PROPOSED JOINT RECOMMENDATION

On October 19, 1993, PacifiCorp ("Company"), a Division of Public Utilities (the "DPU"), the Committee of Consumer Services, the Department of Natural Resources, and certain environmental intervenors ("EI")[1] filed a proposed Joint Recommendation to the Commission with respect to ratemaking treatment of demand side resources. The Utah Industrial Energy Consumers[2] ("UIEC") sent a representative to the meetings of the technical confer-

[1] The Joint Recommendation does not identify any Utah ratepayers whose interests are represented by EI.

[2] For the purposes of this proceeding, the Utah Industrial Energy Consumers are Abbott Critical Care, Amoco Oil Company, Hercules, Inc., Holnam, Inc./Ideal Division, Kennecott Utah Copper, Kimberly-Clark Corporation, National Semi-Conductor, Praxair, Inc., and Westinghouse/Wester Zirconium.

ence/collaborative from which the proposed Joint Recommendation arose but, for the following reasons, UIEC do not join in the Recommendation.

1. **Demand Side Resource Costs Should Be Treated No Differently From Supply Side Resource Costs.**

The UIEC advocate that DSM programs be approached cautiously. The proposed treatment of DSR requires a fundamental departure from established regulatory methods of evaluating resources and from the established ratemaking process. At present, there is a great deal of uncertainty in many jurisdictions about the usefulness of DSR as a "least cost" alternative. Actual versus estimated savings are often a disappointment, and special regulatory treatment for DSR has met with varying degrees of success. There should be, therefore, a reluctance on the part of Utah regulators to embrace DSR. Indeed, there should be no greater enthusiasm for demand side resource programs than for unbundling of electric utility services, including retailing wheeling, if the goal is indeed to provide service at the least cost. Given the uncertainty that DSM has caused and will cause in the industry, there is some advantage in not being among the first jurisdictions to fully implement DSR. The Utah Commission, the state agencies, the ratepayers and the Company should carefully observe the national experience with demand side resources and make choices that allow Utah regulators to avoid the pitfalls into which other jurisdictions have stumbled.

The merits of DSR should be proven by applying the same longstanding principles of public utility regulation that have become benchmarks for evaluating supply-side resources. DSM programs should be subject to a used-and-useful analysis to inquire whether, in this jurisdiction, the Company is seeking to implement demand side management programs in the face of excess capacity and whether the cost of those programs should be recovered by the Company. DSM costs must also be shown to be prudently incurred. Without any showing that DSR is useful or that any level of investment is prudent, the Technical Conference has assumed that the Company should acquire DSR. Moreover it has assumed that the Company will not acquire DSR unless it has some "incentive" or "assurances" that it will be able to recover not only costs, but "lost revenues" as well.

The UIEC are concerned that regulators are inappropriately encouraging the Company to implement DSM programs by devising a cost recovery mechanism that treats DSR as an exception to the rule that investment must be prudent and facilities must be used and useful. In focusing on cost recovery schemes, the Technical Conference has virtually prejudged the issues of usefulness and prudency and has fostered an implicit presumption that DSR costs are recoverable unless proven otherwise and that the utility must be allowed to recover net lost revenues.

The UIEC are also concerned about the impact that DSR programs might have on rates. Rates should be established using

representative and consistent values for all elements in the revenue requirement and, where possible, costs should be allocated to the class of customers causing the cost. If sound ratemaking principles were applied, DSR would require no special cost recovery treatment.

2. The Joint Recommendation Should Address Cost Allocation.

During the course of the Technical Conference meetings, it was proposed that the Company be allowed to recover its full costs in implementing DSR programs for the calendar year 1994 and that those costs be capitalized with amortization to begin on January 1, 1995, continuing over the life of the program measure. (See Joint Recommendation at ¶ 3.1.) Because the Joint Recommendation provided the means for recovering and amortizing costs, the UIEC proposed that there also be some statement of how those costs would be assigned. The UIEC suggested the following language:

> All DSR program costs and [net lost revenue] incurred through the interim period, whether recovered through amortization or during the Interim Period, shall be assigned to the class of customers who take regular service under the same rate schedule as the customers for whom the cost creating DSR measure was installed. Administrative costs, non-program specific advertising costs, and the cost for a consultant as provided in paragraph 4.1, will be expensed in the year incurred and assigned over all classes.

No party had any objection to adopting this paragraph, but only on the condition that the UIEC endorse the Joint Recommendation's formula for calculating net lost revenues (attached as Exhibit 1 to

the Joint Recommendation) ("Formula"). For reasons discussed below, the UIEC were unable to agree to the Formula. Unfortunately, the Company and the other parties, in response, deleted the cost allocation paragraph from the Joint Recommendation, perhaps because they would like to see the industrials subsidize DSR for all customers.[3] The UIEC oppose any interim cost recovery plan that does not include a statement of how the Company proposes to allocate costs.

3. The Formula for Calculating Net Lost Revenues Is Not Sound.

The UIEC doubt that net lost revenues exist in connection with DSM programs. Nevertheless, the UIEC agreed to participate in the Joint Recommendation if the Formula for calculating "net lost revenues" could be made reasonably precise and understandable to all parties. Although the Technical Conference spent considerable time contemplating the proposed Formula, it was clear that none of the parties understood what it meant or how it might work. The Formula itself is gibberish. It does not appear to measure anything

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[3] The reaction of other jurisdictions to the industrials' concerns about cost allocation should have been instructive to the Technical Conference. Industrials have been willing to participate in DSR experiments when cost allocation can be agreed upon. In a settlement recently reached between Indianapolis Power & Light and its major industrial customers, the utility was allowed to start DSM programs only where costs would be allocated on a cost causation basis. (See, Industrial Energy Bulletin, Sept. 24, 1993, at p. 24). In contrast, as a result of disagreement on how DSR costs should be allocated, the industrials in Niagara-Mohawk's service area opted out of Niagara's DSM programs.

meaningful, and what it does measure, it appears to measure in a meaningless way.

The Formula proposes a two-part analysis of lost revenue consisting of an energy component and a demand component. The energy component of the Formula seems entirely inappropriate. The cost of the energy component of a properly designed rate should not exceed the avoided cost of the energy resource. The utility, therefore, should be indifferent to saving or selling kilowatt hours, and there should never be lost revenues from decreased sales of energy. When a DSM program saves a Kwh, the Company saves the cost of producing that Kwh. If the design of rates creates revenue shortfall when DSM measures are undertaken, the problem should be solved by making adjustments in rate design. Distortions in rate design ought not to be addressed by superimposing the Formula on an already inappropriate rate design.

Assuming for the sake of argument that there would be some "lost" revenues from reduced demand attributable to a DSM program, there is no indication that the Formula will measure those lost revenues. Calculating avoided demand costs on a non-coincident peak, as the Formula prescribes, seems to be meaningless under current concepts. In addition, although the Formula purports to include an adjustment for "sales for resale" there is no way to monitor or ensure that the purported losses due to DSR have not been more than offset by resale of the saved capacity somewhere else on-system or

off-system. The Formula doesn't account for performance of programs, implement accepted regulatory standards, or adequately define terms that are necessary to apply the Formula. The Formula is more like alchemy than economics. If lost revenues due to DSR really existed, they could be measured directly without the Formula.

By agreeing to the Formula, the parties have agreed to be bound by terms that are not presently understood and by results that may not be meaningful. Moreover, under the terms of the Joint Recommendation, the Formula cannot be changed. At the end of the Interim Period, if the Formula has failed to measure what it was intended to measure, or if it has been applied in a way that could not have been foreseen at the time the parties entered into the agreement, the parties will have no method to adjust their results. The UIEC suggested, therefore, that until the end of the Interim Period, the parties reserve the right to contest the Formula. The UIEC suggested the following language:

> The parties understand that the inputs to be used in the Formula may be subject to disagreement and each party, therefore, expressly reserves the right to challenge the Collaborative's recommendation with respect to such data. The parties further understand that the Formula itself may be ambiguous or otherwise impaired in some respects. It may be subject to various interpretations regarding the method by which the components of the Formula are to be determined, the definition of certain terms in the Formula, the proper application of the Formula, or its usefulness in measuring what it was intended to measure. Insofar as the Formula is subject to various interpretations, the

parties reserve the right to challenge the Formula and its usefulness at the end of 1994 before the Commission issues a decision on the Collaborative's recommendation.

PacifiCorp, among others, would not assent to the foregoing paragraph. The UIEC, therefore, withdrew their endorsement of the Joint Recommendation.

4. <u>The Collaborative Process in this Instance Abridges Due Process of Law and Ignores the Interests of the Ratepaying Customers</u>.

This DSR Technical Conference has been largely a caucus of governmental agencies and public interest groups. With the exception of the Company itself, the UIEC were the only active participants in the Technical Conference who had a stake in the outcome. The UIEC's experience with this Technical Conference reinforces their view that, in a setting like this, the collaborative process abridges rights guaranteed by law.[4]

The collaborative process can be a useful device discussing issues that are properly before the Commission. Through a

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[4] The UIEC contend that any Commission decision or order based on the recommendation of the Technical Conference amounts to a violation of their rights to due process of law because procedural safeguards were absent. Off-the record information offered from witnesses not under oath simply lacks a sound evidentiary basis for any Commission decision. In addition, if implemented, the recommendations may give rise to a false presumption that the Formula can account for net lost revenues before there has been any showing that lost revenues exist or that the method of accounting is sound. The result will be to effectively shift the burden of proof in the next rate case from the Company to the opponent to the Company's policies, a violation of due process of law.

collaborative, parties with a real interest in the outcome of an adjudicatory or rulemaking proceeding can inform themselves, discuss the issues, negotiate a mutually acceptable solution as to some or all of those issues, and present the proposed solution to the Commission as a joint recommendation. In the context of a formal proceeding, the Commission may consider such a recommendation in light of the evidence of record and the interests involved, and may reach a decision for which the Commission is accountable to the parties. The process is abused, however, when it ignores the customers' interests and serves primarily as a policymaking vehicle either for the regulators, public interest groups, or for a party who seeks an end-run around lawful procedure. The Commission must have jurisdiction to act and then follow regular procedures for rulemaking or adjudication.

There is no DSR cost recovery case before this Commission, and many of the parties who might intervene in a case did not participate in this Technical Conference. Instead of a useful collaborative effort among interested parties, this Technical Conference has been an exercise for the Company, the regulators, and public interest groups in establishing DSR policy before the Company files a rate case. Instead of a method of resolving competing interests among real stakeholders, the customers and the Company, this Technical Conference has been premised on the supposition that regular discussions by government regulators and public interest

groups will produce better service and lower rates than the market itself.[5]

Regulators with substantial DSR experience are discovering that DSR policymaking should not be left to regulators. California's newly appointed president of the Public Utilities Commission stated that one of the four major goals of the California PUC was to

> "stop ordering demand side management programs which advance on the assumption that the Commission or the utilities simply know best what is in customer interests and then throw money at those assumptions."[6]

California's extensive and often counterproductive experience with DSM has brought regulators to the realization that when ratepayer dollars are involved, customers must be allowed "the dominant say in the steps they will undertake to economize in their consumption of energy." (Id.)

The Utah Public Service Commission has recently stated a similar principle that regulators must not interfere with a utility's market-driven decisions:

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[5] Imagine a court initiating a collaborative of people with driver's licenses to decide whether people claiming to be whiplash victims could recover damages. Those licensed drivers who did not participate would be foreclosed from protesting if they later became whiplash victims themselves. The idea is absurd, but no more so than trying to reach a solution on DSR cost accounting in the absence of a justiciable controversy and, hence, in the absence of real parties in interest.

[6] Remarks of Daniel W. Fessler, President of the California Public Utilities Commission, before the Electric Consumer Resources Council Annual Seminar on Electricity Issues, October 14-15, 1993, Arlington, Va.

> A public utility, as made clear in decisions of the Court, is entitled to manage its own affairs. The Commission is restricted to the setting of appropriate rates and the determination of appropriate levels of service. [Citation omitted.] Ordering a utility to sell or purchase specific property, transgresses the line between utility discretion and regulatory supervision.

(Order on Jurisdiction, Docket No. 87-035-26, Oct. 28, 1993). This Commission should not become involved, nor allow the Utah state agencies to become involved, in dictating to PacifiCorp the kinds of resources it must acquire, including DSR, on the assumption that a task force or the Commission can make better choices than the public.

The agencies and the Company have spent a great deal of time in this Technical Conference studying the problem of cost recovery for DSR to "encourage the Company to implement its IRP" and invest in demand side resources. There has been no agreement among ratepayers as to cost recovery and no adjudication of real customer interests. To the extent the Joint Recommendation involves specific resource planning, it is questionable whether the Commission even has authority to address the activites implicit in the Recommendation. Thus, the cost accounting treatment outlined in the Joint Recommendation is subject to challenge in any subsequent formal proceeding in which the Company seeks to recover DSR costs. While the Joint Recommendation may have influenced the Company to postpone filing a rate case, it has not solved the problem of DSR cost recovery.

Finally, although the Joint Recommendation is before the Commission, the Technical Conference has not yet completed its task with respect to lost revenues. To further study the problem, the Technical Conference has recommended instituting another task force which would hire a consultant and spend yet another year studying the lost revenue Formula so the Company and public agencies can make recommendations to the Commission on how to compensate the Company for its purported losses. Had the same amount of effort been spent in unbundling electric services and letting the customer choose among energy saving alternatives, there might have been a greater likelihood of achieving not only energy savings, but also better service and lower rates.

CONCLUSION

The UIEC make no formal objection to a one-year trial period for cost accounting treatment of DSR. However, if the Commission adopts the Joint Recommendation, the UIEC request that the Commission also order:

(1) that the following provision proposed by the UIEC addressing cost allocation be included in the Order Approving the Joint Recommendation:

> All DSR program costs incurred in the Interim Period, including net lost revenue, administrative costs, non-program specific advertising costs, or consultant costs, whether recovered through amortization or during the Interim Period, shall be assigned to the class of customers who take regular service under the

same rate schedule as the customers for whom the cost-creating DSR measure was installed;

(3) that the UIEC be exempt from any and all charges or surcharges relating to administrative and promotional costs of demand side programs incurred during the Interim Period; and

(4) that the UIEC be exempt from any and all charges or surcharges related in any way to any demand side management programs implemented during the Interim Period among any class of customers other than the class to which the UIEC member belongs.

DATED this 17th day of November, 1993.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 1993, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing UTAH INDUSTRIAL ENERGY CONSUMERS' COMMENTS ON PROPOSED JOINT RECOMMENDATION, to:

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