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- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application) DOCKET NO. 98-2035-04
of PacifiCorp and Scottish Power)
plc for an Order Approving the) **APPLICANTS' ISSUES**
Issuance of PacifiCorp Common) **MEMORANDUM**
Stock)

In its April 2, 1999 Supplemental Scheduling Order, the Commission directed PacifiCorp and Scottish Power plc (the "Applicants") to submit a memorandum identifying the issues which are beyond the scope of this proceeding and the issues for which other parties have the burden of proof. Pursuant to the direction of the Commission, the Applicants submit the following memorandum.

ISSUES BEYOND THE SCOPE OF THESE PROCEEDINGS

The Applicants believe that a number of the issues identified in the parties' issues statements are not relevant to the Commission's analysis of the proposed transaction. The Applicants request that the Commission exclude the following issues: Industry Restructuring, Annexation, Municipalization and Competition. These issues are not only irrelevant to the Commission's analysis, they are also beyond the scope of the Commission's jurisdiction, would substantially expand the scope of this proceeding and reflect, in some instances, an attempt to use this proceeding to achieve the resolution of pre-existing disputes on more favorable terms than those available under current law.

1. Industry Restructuring.

The Large Customer Group, the Utah Industrial Energy Consumers ("UIEC"), the Office of Energy and Resource Planning ("OERP") and the Land and Water Fund of the Rockies seek to include industry restructuring issues in this proceeding.¹ The rate unbundling, transmission reform, regional grid management and other restructuring topics raised by those parties have already been the subject of multi-year analyses by the Commission, in Docket No. 96-999-01, and by the Electrical Deregulation and Customer Choice Task Force ("Task Force") of the Utah legislature.

In its 1998 Report to the legislature, the Task Force declined to adopt a proposed option that would have authorized the Commission to take responsibility for electrical restructuring in the state. Despite the efforts of some of the parties who have raised deregulation issues in this

¹While the Division of Public Utilities and Committee of Consumer Services identified several restructuring topics in their issue statements, they have informed Applicants that they no longer believe that restructuring should be an issue in this proceeding.

case, the legislature also failed to adopt restructuring legislation, instead directing the Commission to assist the Task Force in its analysis of electrical restructuring. See SB 15, enacting Utah Code Ann. Sections 54-7-12.5 and 54-7-12.7. Since it is clear that restructuring issues will be resolved by the Utah legislature, and since the legislature has yet to decide the future of restructuring in Utah, the Applicants submit that restructuring issues have no place in this proceeding.

2. Annexation

The Utah Associated Municipal Power Systems (“UAMPS”) has identified the annexation of PacifiCorp’s facilities, specifically including the “pricing and timing” of those annexations, as an issue in this proceeding. Under the provisions of Utah Code Ann. Section 10-2-421, a municipality cannot begin serving customers in a newly annexed area until it has reimbursed the current utility service provider for the “fair market value” of its facilities. If the parties cannot agree on the fair market value, it is determined by the state courts.

Even assuming that the Commission had the requisite authority to assume the role delegated by statute to the courts, this is certainly not a proceeding in which the Commission could perform the extensive factual analysis required under Utah law to determine “fair market value” . *Logan City v. Utah Power & Light*, 796 P.2d 697 (Utah 1990); *Strawberry Electric Service District v. Spanish Fork City*, 918 P.2d 870 (Utah 1996). The price and timing for annexations has already been resolved by the Utah legislature and those issues are not within the jurisdiction of the Commission, or within the scope of this proceeding.

3. Municipalization

The Utah League of Cities and Towns has identified municipal self-determination as an issue in this proceeding. In recent years, the Utah Supreme Court has emphasized that the Commission has only those powers granted to it by statute. *High-Country Estates Homeowners Ass'n v. Bagley & Co.*, 901 P.2d 1017 (Utah 1995); *see also Williams v. Public Serv. Comm'n*, 754 P.2d 41 (Utah 1988). There is no statute which grants the Commission authority to address municipal self-determination.

The Commission lacks authority to require the involuntary transfer of utility property to a municipality under the rubric of granting an option. The power of eminent domain is a legislative power and the Utah Legislature has not granted that power to the Commission. *See, e.g., Missouri v. Dodge*, 878 S.W. 2d 819 (Miss. 1994).

The Commission also lacks the authority to create or modify municipal rights of self-determination. A municipality's right to acquire utility property is a matter of statute and contract which is not within either the jurisdiction of the Commission, or the scope of this proceeding.

4. Competition

Desert Generation & Transmission and its members ("DG&T") and the UIEC have identified unspecified potential anti-competitive effects of the transaction as an issue in this proceeding. Applicants submit that the recent action of the Federal Trade Commission establishes that competition is not an issue in this proceeding.

Pursuant to the provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Applicants have made a filing regarding the proposed transaction with the Federal Trade Commission ("FTC"). On February 12, 1999, less than 30 days after the filing was submitted to

the agency, the FTC granted the Applicants' request for early termination of the waiting period. This action allows the transaction to proceed without FTC conditions.

Since, unlike the *CP National* case or the *Utah Power/PacifiCorp* merger, this transaction does not involve the acquisition of additional service territory, customers or facilities, that expeditious resolution is not surprising. After the transaction, PacifiCorp will continue to provide service to the same customers, in the same service territory, using the same facilities and subject to the continuing jurisdiction of this Commission. Under the facts of this transaction, there is no legitimate issue regarding any potential anti-competitive effects of this transaction.

ISSUES ON WHICH OTHER PARTIES HAVE THE BURDEN

1. Issues Outside the Commission's Jurisdiction

In its March 31, 1999 Memorandum in this proceeding, the Commission quotes from its Report and Order in Docket No. 87-035-27 (the *Utah Power/PacifiCorp* merger) as follows:

“With respect to considerations outside our normal regulatory jurisdiction and enforcement powers . . . which nonetheless bear on the public interest, Applicants bear no affirmative burden to demonstrate benefits or even an absence of harm. In those areas other parties will carry the burden of demonstrating either some benefit or some substantial harm by reason of the merger. However, Applicants do carry the burden in all areas subject to our jurisdiction to show that on balance the merger will be beneficial and those areas will be our primary focus in the case.”

The following issues are not relevant to this proceeding and, based upon the standard set forth above, the Applicants submit that other parties have the burden of proof on the following issues.

a. Hunter Plant Costs

DG&T and UAMPS have raised issues regarding the impact of the transaction on their costs under the Hunter Plant contracts. The Applicants submit that the Hunter Plant cost

issues are a matter of contract, are irrelevant to this proceeding and outside the jurisdiction of the Commission. However, to the extent the Commission permits parties to address the issues, DG&T and UAMPS should have the burden to demonstrate how the transaction would impact their contract rights and why that is an issue relevant to this proceeding.

b. Fair Market Value of PacifiCorp’s Facilities

Emery County has raised issues regarding the impact of the transaction on the fair market value of PacifiCorp’s facilities. The Applicants submit that the issue is irrelevant and outside the jurisdiction of the Commission. Valuation issues involving PacifiCorp’s property taxes are matters handled by the Utah State Tax Commission. However, to the extent the Commission permits parties to address the issue, Emery County should have the burden to demonstrate how the transaction would impact the fair market value of facilities and why that issue is relevant to this proceeding.

c. Work Force/Local Control/Economic Development/Coal Company

The Department of Community and Economic Development, the Board of Business and Economic Development, UAMPS , the Utah League of Cities and Towns and the Division of Public Utilities (“DPU”) have raised several issues which address the impact of the transaction on the Utah economy, including the impact on economic development, the Utah workforce, local control and the coal industry. Although Applicants’ Direct Testimony addresses some of those issues, they generally involve considerations which fall outside the Commissions’ normal regulatory jurisdiction and enforcement power. As a result, those are not issues on which the Applicants have the burden.

d. Environmental Issues

The Land and Water Fund of the Rockies, the Committee of Consumer Services (“CCS”) and the OERP have raised environmental issues, including regional haze and carbon emission issues. Other agencies have the responsibility to develop and enforce environmental restrictions. Therefore, Applicants submit that those issues are irrelevant and outside the jurisdiction of the Commission. However, to the extent that the Commission allows the parties to address those issues, the Land and Water Fund and OERP should have the burden to show how the transaction could have an impact on those issues and why they are relevant to this proceeding.

e. Undergrounding and Related Issues

The Utah League of Cities and Towns has raised the aesthetics of existing facilities and undergrounding as issues in this case. The Utah Legislature has recently adopted a statute which, in part, establishes the Electrical Facility Review Board to resolve issues regarding the construction and installation of transmission lines and substations. See Utah Code Ann. Section 54-14-101 et. seq. Therefore, Applicants submit that those issues are irrelevant to this proceeding and outside the jurisdiction of the Commission. However, to the extent that the Commission allows the parties to address those issues, the League should have the burden to show why the transaction impacts those issues and why they are relevant to this proceeding.

2. Speculative Issues

The parties have raised, in relatively cursory fashion, some issues which require speculation regarding future events, including potential changes in the existing statutory

framework. Applicants submit that the parties who raised those issues should have the burden to show that the transaction has either a beneficial or harmful impact on those issues.

a. Divestiture

UAMPS has raised the possible future divestiture of assets as an issue in this case. The Applicants have stated that, with the exception of the sale of the California service territory and the potential sale of the Centralia Plant, there is no intention to sell assets. We do not see what else could be said. In addition, Commission rules already establish a separate procedure for any future divestiture activities. See Commission Rule R746-401. However, if UAMPS believes that representation and that process are insufficient, it should have the burden to show why the transaction will have an impact on that issue.

b. Creation of Separate Business Units

The DPU has raised the possible separation of PacifiCorp into separate distribution, transmission and generation entities as an issue in this case. The Applicants have stated that they have no intention to create separate distribution, transmission and generation entities. The DPU should have the burden to show why the transaction will have an impact on that issue.

c. PUHCA

The DPU has raised the possible repeal of PUHCA as an issue in this case. The DPU should have the burden to show why the transaction will have an impact on that issue.

d. Special Contracts

In their filing on March 31, 1999, the Large Customer Group and UIEC identified the impact of the transaction on the offer, renewal, availability and terms of special contracts as additional issues in this proceeding. The Applicants have already stated that they will honor all existing contractual obligations. The potential terms and conditions of future special contracts are not only speculative and subject to Commission approval in a separate process, they are also the subject of a current Commission task force process.

In its March 4, 1999, Order in Docket No. 97-035-01, the Commission created a task force to examine the regulatory criteria for the examination and approval of special contracts. That process and future Commission action based on the task force recommendations, not this proceeding, will determine the offer, renewal, availability and terms for future special contracts in Utah.

e. Certificate Transfer

DG&T has suggested that “adjustments” to “certificated service areas” should be an issue in this proceeding. DG&T and its members have, for a number of years, sought unsuccessfully to acquire portions of PacifiCorp’s service territory. They now seek to use this case as leverage to attain that goal. The Commission should reject that effort. If DG&T believes that it has a legitimate basis for a certificate transfer request, DG&T can, as it has in the past, bring that request to the Commission in a separate case where its merits can be analyzed under the standards adopted by the Utah courts. *See e.g. Empire Elec. Ass’n v. P.S.C.*, 604 P.2d 930 (Utah 1979).

3. Proposed Conditions

A number of parties have identified the imposition of conditions, incentives or penalties on the approval of the transaction as issues in their issue statements. The Applicants submit that the party who proposes a condition, incentive or penalty has the burden to show that it is required, is consistent with the public interest and is within the Commission's regulatory and enforcement authority.

4. Discovery

Some of the parties, including the CCS and Emery County, have structured their issue statements in large part as discovery documents. For example, Emery County's issue statement includes a series of questions regarding how PacifiCorp was "valued by Scottish Power when the merger price was determined?" To the extent those queries are relevant to this proceeding, the Applicants could respond to them in the discovery process. However, the Applicants submit that those discovery questions are not "issues" for which Applicants have the burden of proof in this proceeding.

Respectfully submitted this 12 th day of April, 1999.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Issue Memorandum of PacifiCorp and Scottish Power PLC to be served upon the following persons by mailing a true and correct copy of the same, postage prepaid, to the following on the 12th day of April, 1999.

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