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-BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH-

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In the Matter of the Application	)	DOCKET NO. 98-2035-04
of PacifiCorp and Scottish Power	)	
Plc for an Order Approving the	)	<b>ULCT'S RESPONSE</b>
Issuance of PacifiCorp Common	)	<b>TO APPLICANT'S ISSUES</b>
Stock	)	<b>MEMORANDUM</b>

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**INTRODUCTION**

In its April 2, 1999 Supplemental Scheduling Order, the Commission directed PacifiCorp and Scottish Power plc (the "Applicants") to submit a memorandum identifying those issues which the Applicants assert are beyond the scope of the current proceeding before the Commission and those issues where the Applicants assert that other parties have the burden of proof. On April 12, 1999, the Applicants filed such a memorandum. Pursuant to the April 2, 1999 Supplemental Order, the Utah League of Cities and Towns ("ULCT"), a designated intervenor in this proceeding submits the

following response memorandum.

## RESPONSE

### **Municipal Self-Determination** **(Paragraph 3 of Applicants' Issues Memorandum).**

In asserting that these issues are beyond the scope of these proceedings, PacifiCorp and Scottish Power have either misunderstood or mischaracterized the “municipalization” or “self determination” issues raised by the Utah League of Cities and Towns. Both their memorandum and statements made during hearings would have the PSC believe that an esoteric policy debate over the relative virtues of public versus private electrical power is being raised by ULCT. Such is not the case and ULCT agrees that such a debate is more appropriate in a different forum. Rather, the ULCT, submits that the issues of “municipalization” or “self determination” are issues that are germane, if not essential to the Commission’s consideration on the proposed merger.

Utah’s municipalities are vested with a constitutional authority to provide for delivery of public services to their constituencies. Art XI, Sec. 5(c), Constitution of Utah. *See also* City of Logan v. Utah Power & Light, 796 P.2d 697 (Utah 1990). Indeed, prior to operating within the incorporated boundaries of any Utah municipality, utilities must obtain a franchise from the city or town. Constitution of Utah Art XII, Sec 8. *See also* Utah Code Ann. § 54-4-25 (4)(a).

Concerns over the prior UP&L/PacifiCorp merger and whether that merger did, in fact, provide a net benefit to cities and towns increased the awareness among Utah cities over the need to examine all available alternatives – including authorization of other providers or even providing services themselves. Similarly, the Commission cannot

make a determination that the proposed merger is in the best interest of the residents of the State of Utah without examining both the available alternatives to such a merger and the consequences of such a merger. The League's issues are vital to both such issues.

Municipalities have independent authority regarding the presence of a public utility within their borders and if the proposed merger is approved, cities and towns will, by necessity, carefully examine their current franchise authorizations with PacifiCorp (or in some cases, with Utah Power and Light.). That action may well result in decisions to renegotiate or repeal current franchises. The status of these agreements varies greatly among locations: some are due to expire shortly, others do not provide for successor authorization, some may not actually have an agreement (although the individual cities and towns have never waived their authority to require one), and others were entered into so long ago and under terms, or parties, so different from the present circumstances as to be unenforceable.<sup>1</sup>

For the Commission to undertake a review of a proposed utility merger and not consider the role of franchise-authorizing entities such as Utah's cities and the possibility of alternative methods of providing electrical services would on its face appear to vitiate the net-benefits standard already outlined by the Commission.

Applicants, somewhat disingenuously, argue that the Commission lacks the authority to require the granting of an option to acquire Applicants' distribution system as a condition of the merger. Frankly speaking, Applicants know better. The Commission's attention is invited to Utah Power & Light v. Public Service Commission of Utah, 712

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<sup>1</sup> ULCT and its members do not suggest that the PSC has jurisdiction over franchise-related matters but submit that an orderly forum for the issues related to the viability of the merger are in the interest of all parties. The issues raised by the ULCT are such issues.

P.2d 251 (Utah 1985) in which the Supreme Court held, in the context of a sale of the CP National system to UP&L:

UP&L further concedes that the Commission had the authority to require it to extend options to the municipalities to acquire CPN's distribution system within their corporate limits. . . As a concomitant of its authority to require the option to be granted in the first instance, the PSC had the authority to later require that the option be extended.

It cannot be gainsaid that, given a virtually identical factual scenario, the Commission concluded, and the Supreme Court affirmed, that the Commission does have the jurisdictional authority to require options to acquire Applicant's distribution system.<sup>2</sup> Until discovery is complete, it is not possible to determine if such options are desirable, either for the municipalities or for the State of Utah. However, even if such options are later determined to be contrary to the various interests represented in these proceedings and to the net-benefits standard applicable herein, the Commission may well determine that some of the benefits derived from the granting and/or exercise of the options may be provided by other means.

For instance, even if it determined that an option is not appropriate, the Commission may determine that municipalities should be given a right of first refusal if Applicants make an effort to sell some or all of its distribution system; the Commission may wish to ensure that Utah municipalities derive the benefit that is provided to any other municipalities within the Applicants' service area; and the Commission may want to ensure that the operation of the Applicants' system is consistent with long term

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<sup>2</sup> It is noteworthy that in Paragraph 4 of Applicants' Issues Memorandum, Applicants argue that competition is not among the issues that should be considered by the Commission. ULCT disagrees. Based upon the lack of net-benefits from the last merger, the Commission is duty bound to examine the likelihood of municipal competition and its overall effect on the future viability of the proposed merger. See CP National, *supra*.

economic development and planned growth within Utah's municipalities rather than act as a barrier to that growth and development.

**Work Force/Local Control/Economic Development**  
**(Paragraph 1.c. of Applicants' Issues Memorandum)**

The ULCT along with other parties has raised issues regarding the impact the potential for the continued loss of local management and control over Utah utility operations. The very fact that Applicants fail to acknowledge the importance of this issue is the reason why it is so important. ULCT proffers that the testimony will demonstrate that prior to the Utah Power & Light merger with PacifiCorp, municipal/electrical utility issues were resolved locally between individuals and entities that had a well-defined commonality of interests. That same testimony will equally demonstrate that, subsequent to the merger, there was a material and substantial depreciation in those common interests and the ability to resolve them informally, efficiently and expeditiously. That pattern, through the Commission's inaction, should not be encouraged. The fear of even greater loss of local control is all the more given that the power structure, once removed from Utah, is not simply in a neighboring state but in another country. Similar to the self-determination issues raised *supra*, if municipalization were to take place, local control would be assured. There is no apparent reason why, even if the claim for municipalization is later discarded, the benefits associated with such option, i.e. local control, should not be realized through the Commission's application of the net-benefits standard.

Similarly, municipalities are at the forefront of the economic development efforts of the State of Utah. ULCT's interest in assuring that the operation of the electric utility

within its members' borders provide not only efficient, reliable and affordable utility service but that such utility act as component part of increased and improved development and planning efforts. It is in the interest of ULCT members, the State of Utah and the Applicants to foster efforts of sound economic development and planned community growth. Applicant should be required to demonstrate their willingness to do so and, by such efforts, Applicants facilitate a finding of net-benefit. Similar to the issue of local control, *supra*, these efforts could be managed under a concept of municipalization and if such a concept is not furthered, ULCT members should not be in a position of having a utility less willing to provide such efforts than would be provided by a municipally-run utility. Such loss of effort would constitute a net-loss rather than a net-benefit.

**Undergrounding and Related Issues**  
**(Paragraph 1.e. of Applicants' Issues Memorandum)**

Applicants further demonstrate an apparent lack of understanding and/or interest in the issues related to sound community development when they seek to place the burden upon the ULCT to evidence the relevance of undergrounding as part of these proceedings. As set forth in the immediately preceding section, the developmental interests of ULCT members and the State of Utah dictate that growth and development be directed by sound economic and planning goals not by the self-interests of Applicants. To the extent that overhead lines militate against that orderly development, the larger interests of the public must subsume the interests of the Applicants. The Commission is respectfully advised that neither this Commission nor the Legislature of the State of Utah may preempt the governance of municipal street vis-à-vis Applicants use thereof. The Constitution is

clear:

No law shall be passed granting the right to construct and operate a street railroad, telegraph, telephone or electric light plant within any city or incorporated town, without the consent of the local authorities who have control of the street or highway proposed to be occupied for such purposes.

Constitution of Utah Art. XII, Sec 8.

Given this broad grant of local control, most municipalities have granted franchises to Utah Power & Light or PacifiCorp. Those franchises dictate that the Company will, upon the request of the municipality, relocate or reinstall any property of the Company at the Company's expense. The municipalities presently have the constitutional and contractual ability to mandate removal of the Company's property from municipal property. However, the language is even greater than the issue of relocation of lines and poles.

The Constitutional provision dictates that a utility may not operate "within any city or town" without the consent of the city or town. That consent may be granted or withheld within the discretion of municipality. The granting or withholding of this right may have a profound effect upon the Applicants' system wide service efficiency and economy and accordingly, cannot be ignored by the Commission in determining if there is a net benefit resulting from the merger. Currently, PacifiCorp has refused to consider undergrounding its facilities except at the expense of the municipality. If Scottish Power takes the same position, the proposed merger offers no change in that position *ipso facto* offers no net benefit. If, on the other hand, Scottish Power demonstrates an acknowledgment of municipal authority and a willingness to be integral to sound municipal planning rather than an impediment, it has, in the view of the municipalities,

demonstrated a material net benefit – one which helps sustain the standard for this merger.

### **CONCLUSION**

Applicants appear to presenting the position that the only matters which may be reasonably considered by this Commission are those related to the economics of the merger. ULCT respectfully submits that such was the primary basis of review for the UP&L/PacifiCorp merger and such a minimalist approach has been adequately shown, through time and experience, to be folly. Indeed, the primary reason that Utah's municipalities have chosen to intervene in this proceeding is due to the failure to assess these issues in that prior merger. The decision regarding the corporate identity and characteristics of the primary provider of electrical service to the residents of the State of Utah and to the ULCT members should be one of not only economics, but of corporate citizenship and an affirmative approach to problems facing its customers, including ULCT members.

It is disconcerting that Applicants argue that these matters of substantial import to its municipal customers and their residents are not issues that Applicants view as appropriate for Commission consideration. That fact, in and of itself, suggests that great scrutiny needs to be given to the nature and quality of the service to be delivered by PacifiCorp's successor. In the event that the successor's corporate approach to the concerns, issues and constitutional authority of ULCT members does not differ from those of PacifiCorp, it would be difficult for ULCT to find the net benefit required for merger approval.

DATED this 27<sup>th</sup> day of April, 1999.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing by depositing the same in the U.S. mail, postage prepaid, this 27<sup>th</sup> day of April, 1999, to the following:

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