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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of PacifiCorp and Scottish Power plc for an Order Approving the Issuance of PacificCorp Common Stock	DOCKET NO. 98-2035-04 **UTAH ASSOCIATED MUNICIPAL POWER SYSTEMS' MEMORANDUM IN RESPONSE TO APPLICANTS' ISSUES MEMORANDUM**

Utah Associated Municipal Power Systems ("UAMPS"), by and through its attorneys of record, and on behalf of its members, submits this Memorandum in Response to Applicants' Issues Memorandum to the Public Service Commission of Utah (the "Commission"), pursuant to the Commission's Supplemental Scheduling Order issued April 2, 1999.

INTRODUCTION

In their Issues Memorandum, the Applicants asserted that at least four of the issues raised by the intervening parties lie outside the Commission's jurisdiction. The Applicants also asserted that all issues raised by the intervening parties are irrelevant and claimed that the intervening parties have a certain burden of proof on those issues based on the Commission's March 31, 1999 Memorandum. In sum, the Applicants have responded to all issues raised by the intervening parties simply by asserting either that those issues lie outside the Commission's jurisdiction or that the intervening parties have not met their burden of demonstrating the issues' relevance to this proceeding. It would appear that the Applicants believe that if they can limit

this docket to only those issues with which they feel comfortable, their chances of securing Commission approval will be improved.

I. GENERAL JURISDICTION DISCUSSION

The Commission Has Both Express and Implied Jurisdiction to Examine Proposed Mergers

The Commission possesses both express and implied statutory authority to approve or disapprove mergers of public utilities. *See* Utah Code Ann. § 54-4-28 (1994). Specifically, the Utah Code provides that "[n]o 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 [Commission], which shall be granted only after investigation and hearing and finding that such proposed merger, consolidation or combination is in the public interest." Id. (emphasis added). In conjunction with this express authority to approve mergers, the Commission has a broad, implied grant of jurisdiction over public utilities. Id.. § 54-4-1. Under this section, the Commission is "vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power." Id. Construing these sections of the Utah Code together, the Utah legislature has given the Commission the express power to approve mergers when in the public interest. It follows that the Commission has the implied authority to do what is necessary to effectively exercise that power.

The Utah Supreme Court has interpreted the scope of the implied authority set forth in section 54-4-1 of the Utah Code. *See Mountain States Tel. v. Public Serv. Comm'n*, 754 P.2d 928, 930 (Utah 1988); *Williams v. Public Serv. Comm'n*, 754 P.2d 41, 50 (Utah 1988).

Under section 54-4-1, "[i]t is well established that the Commission has no inherent regulatory powers other than those expressly granted or clearly implied by statute. *Mountain States*, 754 P.2d at 930. However, the Utah Supreme Court has also noted that it will grant deference to the Commission's determination of its own jurisdiction "if that determination is within the tolerable limits of reason." *Williams*, 754 P.2d at 50. Accordingly, based upon both Utah statutory and case law authority, the Commission has the express and implied authority to approve a merger when it is in the "public interest."

When considering the "public interest" in the context of a merger, the Commission has considered a wide variety of issues. *See Re Utah Power & Light*, 97 P.U.R.4th 79 (Utah P.S.C. 1988). In *Re Utah Power & Light*, the Commission identified numerous categories of information that it determined were relevant to an analysis of a merger between UP&L and PacifiCorp. This evidence included: (1) the qualification and organization of the companies proposing the merger; (2) non-power supply savings resulting from the merger; (3) long-run resource acquisition savings resulting from the merger; (4) net power cost savings from the merger; (5) allocations; (6) regulatory burdens associated with the merger; (7) local control issues; (8) the effect of the merger on retail prices, including both general rates and the energy balancing account; (9) the effect of the merger on major industrial customers; (10) coal issues related to the merger; (11) merger costs; and (12) other miscellaneous conditions. *Id.*

In sum, the Commission has the ability to condition approval of the merger in any number of ways. The Commission can condition approval to require premerger sales, acquisitions and other transactions that will protect the citizens of Utah. The Commission can condition approval of the merger so as to require the applicants to be responsible for fines in the event promises and representations made during the "courting process" of the application period

are not fulfilled. The Commission need not be shy when it is imposing conditions; after all, the applicants are seeking the right and privilege to serve Utah's citizens, the right to serve is not the Applicant's in perpetuity. The right to serve is not an easily assigned interest; the right to serve requires thorough oversight, scrutiny and investigation. The Commission's ability to investigate and place conditions upon a merger is required.

There is no Utah case law, that directly holds that the Commission can, when considering a merger request, consider an issue that is not specifically identified as within the Commission's jurisdiction. However, by analogy, federal courts have recognized the authority of the Federal Energy Regulatory Commission ("FERC") to consider the effect of issues that are beyond the scope of FERC's jurisdiction when resolving other matters "within" FERC's regulatory authority. *See Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 276 (1976); *Panhandle East Pipe Line Co. v. Federal Power Comm'n*, 324 U.S. 635, 646-47 (1945); *Corning Glass Works v. Federal Energy Reg. Comm'n*, 675 F.2d 392, 394-96 (D.C. Cir. 1982); *Public Utilities Comm'n v. Federal Energy Reg. Comm'n*, 660 F.2d 821, 826 (D.C. Cir. 1981).

This line of cases has followed the reasoning articulated by the Supreme Court in the *Panhandle East* case. In *Panhandle East*, the Federal Power Commission ("FPC") was faced with the jurisdictional bar from fixing gas rates for "direct industrial sales." *Panhandle East*, 426 U.S. at 646. By contrast, the FPC was statutorily empowered to set rates for the sale of gas in "interstate wholesale sales." *Id.* The Court found that the language of Section 5(a) of the Natural Gas Act[1] indirectly permitted FPC to consider "direct industrial sale" rates when setting "wholesale" rates within its jurisdiction. *Id.* The Court held that the FPC, "while [lacking] authority to fix rates for direct industrial sales, may take those rates into consideration when it

[1] Section 5(a) of the Natural Gas Act set forth the FPC's jurisdiction to set rates for interstate wholesale sales. *Id.*

fixes the rates for interstate wholesale sales which are subject to its jurisdiction." *Id.* Although the FPC was not free to "disregard the jurisdictional lines which Congress [had] drawn," it could include other (non-jurisdictional) "relevant considerations" when exercising its authority to set rates. *Id.* at 647. Other federal courts have followed the *Panhandle East* decision. *See, e.g.*, *Corning Glass Works*, 675 F.2d at 394-96 (noting that "[i]t is well settled that [FERC] may consider nonjurisdictional activities and transactions . . .when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction"); *Public Utilities Comm'n*, 660 F.2d at 826 (reasoning that "FERC, and its predecessor FPC, may take into consideration nonjurisdictional items when setting jurisdictional rates").

Based upon the *Panhandle Eastern* line of authority, the Commission, like FERC, has the authority to consider nonjurisdictional issues when necessary to the effective exercise of the Commission's authority within its jurisdiction. Moreover, the Utah Code grants the Commission both an express authority to approve mergers and an implied authority to carry out its proper functions. Because the approval of a merger requires a "public interest" analysis by the Commission, like FERC under the Natural Gas Act, the Commission should consider all relevant issues that impact the public interest (e.g. the price paid by the municipality for annexed property), even when such issues are "nonjurisdictional." Thus, the Utah Code's grant of statutory authority to the Commission appears to be congruent with the holdings and reasoning in the *Panhandle Eastern* line of cases.

II. ISSUE ALLEGEDLY BEYOND THE COMMISSION'S JURISDICTION: ANNEXATION

In its Amended Petition for Intervention in this proceeding, UAMPS identified the condemnation and/or purchase of certain PacifiCorp facilities as a potential issue in this proceeding. The Applicants responded that condemnation and annexation issues lie outside the Commission's jurisdiction. In their Issues Memorandum, the Applicants stated the following:

> 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.

Applicants' Issues Memorandum, p. 3. (emphasis added). PacifiCorp misapplies both Utah Code Ann. § 10-2-421, as well as the *Logan City* and *Strawberry Electric* decisions. First, Utah Code Ann. § 10-2-421 simply entitles an electric utility company in an unincorporated area to be compensated for the fair market value of its facilities before the municipality may provide electrical service. *Id.* § 10-2-421(1). If the annexing municipality and electric company cannot agree on the fair market value, a state district court shall make the determination. *Id.* § 10-2-421(2). The statute says nothing about the role of the Commission in the process, or establishing non-binding guidelines for the parties to follow in making a fair market value determination. Likewise, neither *Logan City* nor *Strawberry Electric* address the jurisdiction of the Commission over a municipality that is annexing electrical utilities in unincorporated areas. *Logan City* and *Strawberry Electric* simply define the requirements of Utah Code Ann. § 10-2-421.

UAMPS, nevertheless, welcomes the Applicants' position regarding the Utah court jurisdiction in annexation matters.[2] UAMPS notes, however, that PacifiCorp historically has assumed a contrary position in annexation litigation. Recently, as an affirmative defense to Kaysville City's complaint for condemnation of certain property and facilities as part of Kaysville's annexation of a portion of Davis County, PacifiCorp asserted that the Utah State Second District Court lacked primary jurisdiction over determination of fair market value. PacifiCorp's Seventh Affirmative Defense stated: "In the event condemnation is awarded, this Court should abstain and defer primary jurisdiction of the issue of fair market value of the facilities to the Federal Energy Regulatory Commission ("FERC")." PacifiCorp's Answer to Kaysville City's Complaint, dated Dec. 1, 1997, p. 5, attached as Exhibit "A". PacifiCorp now recognizes that fair market value is determined by state courts not by FERC or by the Commission. *See* Utah Code Ann. § 10-2-421(2) (Supp. 1998).

UAMPS is pleased that the Applicants now agree that Utah courts have jurisdiction over determinations of fair market value of annexed facilities. With that admission, UAMPS will not ask the Commission to resolve pricing and fair market value issues vis-a-vis PacifiCorp facilities that are subject to annexation/condemnation proceedings.

[2] The Utah Code expressly sets forth a municipality's right to use the power of eminent domain over electrical power generation and transmission facilities. *See* Utah Code Ann. § 78-34-1(8) (1994) (power to use eminent domain to acquire electrical lines and plants). In addition, the Utah Code empowers municipalities to conduct a variety of other actions related to acquisition and regulation of electrical utilities. *See, e.g.,* Utah Code Ann. § 55-3-1 (1994) (authority to purchase electric systems); Utah Code Ann. § 10-8-21 (1994) (authority to regulate electrical power within the city). Based upon the comprehensive statutory scheme, there is little doubt that a court would find the annexation and regulation of electrical utilities to be a "municipal function."

III. ISSUES ON WHICH APPLICANTS CLAIM UAMPS SHOULD HAVE BURDEN OF SHOWING EITHER BENEFIT OR SUBSTANTIAL HARM

In its Amended Petition for Intervention and Statement Regarding Issues Raised by the Application of PacifiCorp and Scottish Power, UAMPS articulated how the following issues surrounding the proposed merger potentially create substantial harm to the public interest: (1) acquisition of the Hunter II Generation Facility; and (2) impacts on the Utah economy and workforce.

UAMPS has raised the question whether any "acquisition premium" paid for PacifiCorp's generation, transmission, and distribution assets, especially the Hunter II Generation Facility, could be passed on Utah rate payers which would be contrary to the public interest. The applicants should respond and provide evidence which addresses this issue. If Scottish Power's shareholders believe PacifiCorp's assets are worth more than book value, those shareholders must bear the risk of being wrong. Moreover, UAMPS and its citizens should not be expected to cover any increased operation and ownership costs of the Hunter II facility that may result from ownership being transferred to a non-U.S. company. The sale of PacifiCorp's generation, transmission, and distribution assets and any payment of an "acquisition premium" for those assets will impact rates for Utah customers and thus the public interest. The Commission must address questions regarding the potential for increased costs stemming from the sale of PacifiCorp's generation, transmission, and distribution assets to Scottish Power. The Commission should be particularly concerned with the potential for passing on such costs to any Utah rate payers. Increased costs passed on to any Utah rate payers as a result of the proposed merger present substantial harm and must be addressed by the Commission.

Additionally, UAMPS has raised questions about how the proposed merger will impact Utah's economy and its workforce. Utah's experience with the result of the previous

merger requires this type of inquiry. Since the merger of Utah Power & Light ("UP&L") with PacifiCorp, UAMPS and its members have grown concerned about the quality of transmission and distribution service within PacifiCorp's service area. UAMPS has experienced significant reliability problems with PacifiCorp's transmission system and believes the transmission system is less reliable than it was before the UP&L merger.

Since the UP&L merger, PacifiCorp has conducted aggressive cost-cutting measures reducing its Utah workforce. Out-of-state utility executives control much of the operations of Utah Power. The cost-cutting measures and loss of local control have undoubtedly contributed to declining reliability for electric transmission and distribution for Utah consumers of electricity. Moreover, the cost-cutting and lack of local control has impacted Utah workers and the Utah economy.

The currently proposed merger promises additional cost-cutting and further loss of control. The impact on Utah's economy and on Utah's workforce of moving the headquarters of Utah's so-called electric utility to another country rather than simply to another state should not be underestimated. Utah Power's earlier merger with PacifiCorp affected not only the Utah workforce and economy but also the reliability and quality of electric transmission and distribution within Utah. Any further cuts in Utah's workforce or reductions in reliability and quality of transmission will create substantial harm to the public interest; accordingly, such issues must be carefully scrutinized by the Commission.

IV. FACTUAL FINDINGS AND STANDARD OF PROOF REQUIRED FOR APPROVAL OF APPLICANTS' PROPOSED MERGER

The Commission may approve a merger only after issuing factual findings and an opinion that the merger is "in the public interest." *See* Utah Code Ann. § 54-4-28 (1994). However, there is no Utah case law or statute addressing the "public interest" requirement. In its 1988 Order approving the PacifiCorp-UP&L merger, the Commission applied the "net positive benefits" standard to the proposed merger. In that opinion, the Commission analyzed the benefits and drawbacks to the proposed merger and, after a lengthy factual analysis, concluded that the "net positive benefits" of the merger outweighed any possible drawbacks to ratepayers, shareholders, and the State of Utah. *Id.* Consequently, the Commission should apply the "net positive benefits" standard, rather than the "no harm to ratepayers" standard.

Utah courts have consistently required the Commission to provide detailed factual analyses and conclusions to support its orders and opinions. *See, e.g., In re Worthen*, 926 P.2d 853, 872 (Utah 1996) (noting that "[t]here must be an explanation of the linkage between the raw facts and the [Commission's] ultimate conclusions, including an explanation of why the [Commission] drew the inferences from the facts that it did"); *U.S. West Communications, Inc. v. Public Serv. Comm'n*, 882 P.2d 141, 144-45 (Utah 1994) (stating that "it is essential that the [Commission] make subsidiary findings in sufficient detail that the critical subordinate factual issues are focused on and resolved in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions").

As is noted above, there are no statutory requirements to guide the Commission in analyzing a proposed merger. Nonetheless, the Commission's 1988 *In Re Utah Power & Light Co*. decision (the "1988 UP&L Order") is instructive on this issue. *See In Re Utah Power & Light*, 97 P.U.R.4th 79 (Utah P.S.C. 1988). In the 1988 UP&L Order, the Commission identified

numerous categories of information that it determined were relevant to an analysis of a merger between UP&L and PacifiCorp. This evidence included: (1) the qualification and organization of the companies proposing the merger; (2) non-power supply savings resulting from the merger; (3) long-run resource acquisition savings resulting from the merger; (4) net power cost savings from the merger; (5) allocations; (6) regulatory burdens associated with the merger; (7) local control issues; (8) the effect of the merger on retail prices, including both general rates and the energy balancing account; (9) the effect of the merger on major industrial customers; (10) coal issues related to the merger; (11) merger costs; and (12) other miscellaneous conditions. *Id.* The Commission made detailed and comprehensive factual findings on each of these issues. *Id.* The Commission then made a legal determination that the proposed merger provided a "net positive benefit" to ratepayers, shareholders and the State of Utah and approved the merger. *Id.* The Commission did so based on the fact that they had extensive and comprehensive evidence as to these issues. The Commission should require nothing less than the same evidentiary support for this proposed merger.

In the present case, the Commission must make detailed findings of fact, not only on basic factual issues, but on ultimate factual conclusions regarding the "benefits" and "harms" caused by the proposed merger. In analyzing the evidence from the parties, the Commission must provide detailed factual findings to support its opinion and order. The Commission should analyze the factual evidence to determine whether the proposed merger provides "net positive benefits" to ratepayers, shareholders and the State of Utah. In order to provide the types of findings as to the "benefits" and the "harms" of the merger, the Commission should require the Applicants to provide meaningful evidence as to acquisition premiums, local control and local workforce issues.

CONCLUSION

UAMPS accepts PacifiCorp's admission that state courts alone have jurisdiction over issues surrounding annexation related condemnation of PacifiCorp's facilities, particularly the issue of fair market value of those facilities. UAMPS believes the proposed merger potentially impacts operation of the Hunter II Generation Facility and potentially impacts Utah's economy and workforce. The Applicants should be required to affirmatively show that those potential impacts will not harm the public interest. UAMPS urges the Commission to address those specific issues and condition approval of the merger so as to guarantee the merger provides a positive benefit to the citizens of the State of Utah.

RESPECTFULLY SUBMITTED this _____ day of April, 1999.

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_____

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MAILING CERTIFICATE

I hereby certify that I caused a copy of the foregoing **UTAH ASSOCIATED MUNICIPAL POWER SYSTEMS' MEMORANDUM IN RESPONSE TO APPLICANTS' ISSUES MEMORANDUM** regarding Docket No. 98-2035-04, to be mailed by first class mail, postage prepaid, this _____ day of April, 1999 to the following:

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