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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of)	
PacifiCorp and Scottish Power plc)	Docket No. 98-2035-04
for an Order Approving the Issuance)	
of PacifiCorp Common Stock)	LARGE CUSTOMER GROUP'S
)	RESPONSE TO APPLICANTS'
)	ISSUES MEMORANDUM

Pursuant to the Commission's Scheduling Orders in this matter, the Large Customer Group ("LCG") hereby responds to the Applicants' Issues Memorandum dated April 12, 1999 ("Applicants' Memorandum").

INTRODUCTION

The LCG submits that the Applicants fundamentally misconstrue their burden of proof in this matter. As the regulated monopoly provider of electrical services for most of the State of Utah, PacifiCorp cannot sell its stock or utility assets, merge, combine or consolidate with another utility without Commission approval. Utah Code Ann. §§ 54-4-28 - 31. The merger or acquisition contemplated by the Applicants (the "Proposed Transaction") can only be approved if the Applicants

provide an adequate demonstration to the Commission that the Proposed Transaction is consistent with the “public interest.” *Id.* The “public interest” standard, while admittedly imprecise, is a standard properly delegated to the Commission and is within its area of expertise, particularly when read in conjunction with the entire Public Utilities Act. *White River Shale Oil v. Public Service Commission*, 700 P.2d 1088, 1091-92 (Utah 1985). Before the Proposed Transaction can be found to satisfy the “public interest” standard, the interests of ratepayers and shareholders must be protected and, in addition, the “overall public interest” must be accommodated. As explained by the Utah Supreme Court in the context of a rate case:

In the instant case, the role of the Commission is to protect the interests of both the ratepayers and the shareholders *and to accommodate both those interests to the overall public interest.*

Stewart v. Utah Public Service Commission, 885 P.2d 759, 776 (Utah 1994) (emphasis added). Similarly, in the context of the Proposed Transaction, the Commission’s statutory charge is to consider all relevant facets of the “overall public interest”--including areas both within and outside the Commission’s primary areas of regulatory jurisdiction.

A. The Applicants Have the Burden to Prove that the Proposed Transaction is Consistent with the Overall Public Interest.

The Applicants bear a heavy burden of proof to demonstrate by substantial evidence that, all things considered, the proposed transaction is in the overall public interest. Stated another way, the Applicants must convince the Commission by substantial evidence that any demonstrable “positives” flowing from the merger will outweigh any potential “negatives.” PacifiCorp carries the burden of proof as to all potential “positives” and “negatives”--whether or not they fall within the

Commission's normal regulatory jurisdiction or enforcement powers. As explained in an analogous context by the Utah Supreme Court:

In the regulation of public utilities by governmental authority, a fundamental principle is: *the burden rests heavily upon a utility to prove it is entitled to rate relief and not upon the commission, the commission staff, or any interested party or protestant; to prove the contrary. A utility has the burden of proof to demonstrate its proposed increase in rates and charges is just and reasonable. The company must support its application by way of substantial evidence, and the mere filing of schedules and testimony in support of a rate increase is insufficient to sustain the burden. Rate making is not an adversary proceeding in which the applicant needs only to present a prima facie case to be entitled to relief. A state regulatory commission, whose powers have been invoked to fix a reasonable rate, is entitled to know and before it can act advisedly must be informed of all relevant facts. Otherwise, the hands of the regulatory body could be tied in such fashion it could not effectively determine whether a proposed rate was justified.* In accordance with the mandate of Section 54-7-12(2) ("... On such hearing the commission shall establish the rates ... which it shall find to be just and reasonable.") *there must be substantial evidence to support the essential findings* in a rate order.

Utah Department of Business Regulation v. Public Service Commission, 614 P.2d 1242, 1245-46 (Utah 1980) (footnotes omitted; emphasis added). As with rate relief, proponents of a utility merger or acquisition with the potential for significant impacts on customers and other stakeholders have a heavy burden to establish by substantial evidence that the Proposed Transaction is in the interests of shareholders and ratepayers and otherwise is consistent with the overall public interest. It is not enough for the Applicants to make a *prima facie* showing as if this were an adversary court proceedings. As noted by the Utah Supreme Court, the Commission is "entitled to know and before it can act advisedly must be informed of *all relevant facts*" by the utility. *Id.* (emphasis added). The utility must thus present "substantial evidence" to support all "essential findings" that the proposed transaction is consistent with, and not adverse to, the overall public interest. *Id.* This heavy burden

of proof remains with the Applicants at all times.¹ This burden of proof does not mean that PacifiCorp must anticipate and respond in its initial testimony to every potential or claimed negative consequence of the Proposed Transaction. It does, however, require the Applicants' to present substantial evidence as to all reasonably anticipated consequences of the merger, both positive and negative. Absent such a showing, the Application should properly be dismissed or denied.

B. The Applicants Cannot Properly Shift Their Burden to Others.

The Applicants ultimately bear both the burden of proof and the burden of persuasion that the Proposed Transaction satisfies the "overall public interest" standard. The Applicants' Memorandum attempts to shift the Applicants' burden of proof with respect to (i) issues that Applicants consider to be outside the Commission's traditional jurisdiction; (ii) issues that the Applicants label as "speculative;" and (iii) proposed conditions. The Applicants cannot properly evade or shift to others their burden of proof. They must demonstrate by substantial evidence that the proposed transaction is in the overall public interest after consideration of *all* reasonably anticipated potential benefits and detriments of the transaction.

A party that advocates specific potential impacts or detriments of the Proposed Transaction obviously carries the burden to persuade the Commission that the perceived impacts or detriments may indeed result from the Proposed Transaction. The ultimate burden of proof, however, remains

¹A portion of the Commission's order in the PacifiCorp/Utah Power merger case draws a distinction with respect to the merging companies' "burden" as between matters within and without the Commission's "normal regulatory jurisdiction and enforcement powers". Report and Order, Docket No. 87-035-27. While that distinction can be of value in analyzing the burden of persuasion as to certain aspects of certain issues, it cannot properly diminish the Applicants' overall heavy burden of proof to establish through substantial evidence that the proposed transaction is consistent with the overall public interest.

always with the Applicants to demonstrate by substantial evidence either that any potential detriments do not exist or that the Proposed Transaction is in the public interest notwithstanding the same.

C. Issues Relating to Industry Restructuring Should Properly Be Considered in Connection with the Proposed Transaction.

The LCG identified “industry restructuring” as an issue to be considered in these proceedings. The LCG explained the relevance of this issue as follows:

Industry Restructuring. The merger may impact Utah’s readiness for and response to industry restructuring. The merged company has not clearly articulated its position on or its intended response to federal and state restructuring efforts, unbundling of rates, transmission reform, existing and prospective competition, development of and participation in a Regional Grid Management Organization, and customer choice. Steps should be taken to ensure that the merged company is adequately prepared for and will not adversely impact ongoing discussions and decisions regarding, or preparations for, industry restructuring.

Large Customer Group’s Statement of Issues, February 17, 1999, at 2.

The Applicants’ Memorandum suggests that these issues are completely beyond the pale of these proceedings. To the contrary, PacifiCorp customers are clearly entitled to ask of a company seeking to acquire and control their exclusive electric service provider its views on industry restructuring and whether and in what manner the merger may have an impact on attitudes, discussions or processes relating to the same. The LCG is not asking this Commission to enter orders or rulings on industry restructuring or to supplant other legislative or administrative processes. Rather, the LCG seeks information on issues of critical and timely importance to all customers that may be impacted by the Proposed Transaction.

The nature of the Applicants' responses to these kinds of questions--including ambiguous or evasive responses or an outright refusal to respond--will (and should) inform both the customers' and the Commissions' evaluation of the "overall public interest" standard. To claim that "industry restructuring" is an issue wholly beyond the scope of these proceedings as suggested by the Applicants is to say that customers of PacifiCorp have no right to ask or know in advance about existing attitudes and experiences of their potential exclusive electric service provider on issues of critical importance to them. Customers clearly have such a right and both they and this Commission should carefully consider the Applicants' responses in determining whether this Proposed Transaction meets the public interest standard. To muzzle the customers' inquiry into critical and relevant areas would be wholly inappropriate.

D. Mandatory and Voluntary Conditions to the Proposed Transaction Should be Carefully Considered by the Commission.

The LCG listed "transmission organizations" as an issue to be considered in this case and framed the questions explaining its relevance as follows:

Transmission Organizations. Is it in the public interest for the Commission to take advantage of this unique opportunity to require the merged company to participate meaningfully in an effective regional transmission organization, regional grid management organization or similar transmission organization? What merger conditions are necessary or appropriate and in the public interest with respect to transmission control?

LCG and UIEC Statement of Additional Issues, March 30, 1999, at 2.

Based upon a review of the Applicants' testimony and information obtained to date, the apparent public interest benefits of this transaction, if any, appear thin and the potential risks appear significant. There is a definite possibility that the Commission could ultimately conclude that the

Applicants have not meet their burden of proof to demonstrate that the Proposed Transaction as currently contemplated is in the public interest. In such a case, it would clearly be within the Commission's ability and discretion to condition potential approval of the merger on conditions that would make the transaction consistent with the public interest, including conditions within the scope of the Commission's typical regulatory jurisdiction (such as adequate and effective reliability and performance standards) and those outside its normal regulatory functions (such as joining an RTO) that could be voluntarily accepted by the Applicants. FERC and many other states have utilized such approaches in approving mergers (including the FERC's approval of the PacifiCorp/Utah Power merger). Moreover, it appears that certain conditions--including a voluntary separation of generation facilities by Scottish Power--will be required for approval of this merger in the U.K.

Customers of PacifiCorp must not be foreclosed at this stage of the proceeding from discussing or presenting to the Commission various types of voluntary or mandatory conditions or remedies that they believe the Commission should consider offering or imposing before it finds that the Proposed Transaction is consistent with the public interest. The proponents of any such conditions obviously bear the burden of persuading the Commission that the same are appropriate and meaningful. Discussion of such conditions cannot properly be ruled "off limits" from the start of the process as requested by the Applicants.

CONCLUSION

The transaction proposed by the Applicants in this proceeding holds the potential for significant ramifications, both positive and negative, to all stakeholders. The right to own and control the means of providing essential utility services to captive customers carries with it

significant public interest considerations delegated to this Commission's sound discretion. The Applicants properly bear the heavy burden of proof to demonstrate that the Proposed Transaction is in the best interests of their shareholders and ratepayers, and is otherwise consistent with the overall public interest. That burden cannot properly be avoided or shifted to others. The Applicants must present substantial evidence on all reasonably foreseeable impacts of the Proposed Transaction. Other parties must be permitted to seek discovery and present evidence on any issues that might help inform the Commission's deliberations as to overall public interest.

DATED this 29th day of April, 1999.

PARR WADDOUPS BROWN GEE & LOVELESS

Gary A. Dodge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this ____ day of April, 1999, to the following:

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