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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of the Application of PacifiCorp  
and Scottish Power plc for an Order  
Approving the Issuance of PacifiCorp  
Common Stock.

**DOCKET NO. 98-2035-04**

**APPLICANTS' MOTION TO  
STRIKE PORTIONS OF THE  
PREFILED DIRECT  
TESTIMONY OF MAURICE  
BRUBAKER**

PacifiCorp and Scottish Power plc (“Applicants”), by and through their attorneys of record, hereby move the Public Service Commission of Utah (“Commission”) to strike the following portions of the prefiled direct testimony of Maurice Brubaker dated June 1999 filed on behalf of the Utah Industrial Energy Consumers (“UIEC”) in the above-referenced docket: page 4, lines 25 through 26; page 5, lines 13 through 19; page 5, lines 20 through 21; page 5, beginning with the word “or” on lines 25 through 28; page 40, line 1 through page 45, line 15;

page 45, line 16 through page 47, line 2; and page 50 line 10 through line 17 (Confidential Version).

## **BACKGROUND**

The portions of Mr. Brubaker's testimony noted above address two issues which should not be considered by the Commission in this docket. The first issue is Mr. Brubaker's recommendation that the Commission condition the merger upon PacifiCorp separating its transmission assets from its generation assets and subjecting the transmission assets to independent operation through a Regional Transmission Organization ("RTO").

The second issue is Mr. Brubaker's recommendation that ScottishPower/PacifiCorp agree not to make any claim for "stranded cost" in connection with the movement to retail competition.

## **STANDARD**

The Commission issued an Interim Order in this proceeding, dated May 10, 1999, requiring that the parties demonstrate why issues presented in their testimony should be considered in this docket.

## **ARGUMENT**

1. **Relevancy.** Mr. Brubaker has failed to meet the burden the Commission has established in its Order relating to the RTO and stranded cost issues. The establishment of a RTO and the review of stranded cost issues are matters which are irrelevant to this proceeding and should not be considered by the Commission in this docket. The

identified testimony should be stricken because Mr. Brubaker has attempted to interject into this proceeding issues which are reserved for other forums and other dockets. The focus of this proceeding should be on the ScottishPower/PacifiCorp transaction and matters which are centrally related to the merger which is simply the transfer of the stock of PacifiCorp.

2. **Industry Restructuring.** Issues involving the creation of a RTO and issues relating to stranded costs involve matters relating to deregulation which are being addressed by the Utah Legislature. The 1999 Utah Legislature passed SB 15 which amended certain sections of Title 54 of the Utah Code and provided for reauthorization of the legislature's Electric Deregulation and Customer Choice Task Force. This legislation instructs the Commission to work with the Task Force and study electrical restructuring issues. The Commission has already expended significant resources in a multi-year analysis regarding electric restructuring in Docket No. 96-999-01. The ScottishPower/PacifiCorp proceeding is clearly not where the issue of electric restructuring should occur. ScottishPower is purchasing the stock of PacifiCorp and the focus of the Commission proceeding should be on this transaction.

UIEC, in its Petition to Intervene before the FERC in the ScottishPower/PacifiCorp proceeding, implied that the Utah Commission did not have a legislative directive to review competitive issues. UIEC's Petition to Intervene at FERC stated as follows:

Because of an absence of a clear state legislative directive, the PSCU, in meeting its statutory obligations, may not evaluate the impact of the Transaction on competition within the State of Utah. Most assuredly, it will not evaluate the impact of this Transaction on competition

within the region, or use this opportunity to further the goals of competition.

UIEC Petition at page 2.

Mr. Brubaker even states in his Direct Testimony that “ It is my understanding that this Commission may not have authority to directly order a utility to create or join an ISO or RTO.” (Page 43). The establishment of a RTO or a discussion of stranded costs should not be reviewed in this docket.

3. **Competitive Concerns.** When Commissions have imposed transmission conditions in connection with a merger, they have been concerned that there is a risk to the competitive market because of the merger. This situation does not exist with this transaction where ScottishPower is buying the stock of PacifiCorp. The Federal Trade Commission granted the Hart/Scott/Rodino approval and FERC also issued its approval, both of which address competitive issues. This transaction does not impose a risk to the competitive market place.

4. **FERC Rulemaking-RTO.** As Mr. Brubaker points out in his testimony, the Federal Energy Regulatory Commission (“FERC”) has established a Notice of Proposed Rulemaking, Docket RM99-2 regarding “Regional Transmission Organizations” and proposes to establish fundamental characteristics and functions for appropriate retail transmission organizations (See Brubaker Testimony, page 40). FERC has established a proceeding to address issues relating to RTOs. FERC is the appropriate forum for this

issue to be addressed. The Commission should not spend time allocated for this proceeding to discuss RTO issues which are being handled by FERC.

5. **Commission Authority to Exclude Evidence.** The Commission has the authority to exclude issues which are irrelevant to this proceeding. The Administrative Procedures Act (“APA”), Utah Code Ann. §63-46b-8(1)(b), provides as follows:

On his own motion or upon objection by a party, the presiding officer: (i) may exclude evidence that is irrelevant, immaterial, or unduly repetitious

The Commission has previously granted a Motion to Strike testimony that was irrelevant to the proceeding citing to the APA, Utah Code Ann. §63-46b-8(1)(b)(I), See U.S. West Communication, Inc., 1994 WL 400918, PUR Slip Copy. In that docket, the Commission considered whether the proposed sale of a telephone exchange was in the public interest. The Commission excluded testimony regarding the history of the exchange, the attempts to serve the area, circumstances of the sale of other telephone exchanges, and the cost estimates for construction of a new system in the telephone exchange. Also, in Mountain Fuel Supply v. PSC, 861 P.2d 414 (Utah, 1993), the Utah Supreme Court upheld the Commission’s decision to exclude evidence regarding a future test year stating that:

Under the APA, the Commission has the discretion to exclude “irrelevant, immaterial, or unduly repetitious” evidence. Utah Code Ann. §63-46b-8(1)(b)(i); see also Utah R. Evid. 403.

The Commission has the statutory authority to exclude irrelevant evidence, which it has exercised previously and the Utah Supreme Court has upheld the Commission’s use of this authority. The establishment of a RTO and the discussion of stranded costs are irrelevant to this

proceeding. The Commission should therefore use its authority under Utah Code Ann. §63-46b-8(1)(b)(i) to strike the testimony related to those issues.

NOW THEREFORE, the Applicants respectfully request that the Commission strike the portions of the testimony of Mr. Brubaker set forth above for the following reasons:

1. The establishment of a RTO and stranded costs are irrelevant to the ScottishPower/PacifiCorp transaction and should not be considered in this proceeding.
2. The Utah Legislature through the Electric Deregulation and Customer Choice Task Force is handling issues relating to deregulation, competition and the related issues of the establishment of RTO and stranded costs. The law requires the Commission to work with this Task Force. The Utah Legislature is the appropriate forum to address these issues.
3. The transaction does not create a risk for the competitive market place.
4. FERC has established a proceeding to establish fundamental characteristics and functions for RTOs. FERC is the appropriate forum for review of RTO issues.
5. The Commission has the statutory authority to exclude irrelevant issues in this proceeding and should strike the portions of the testimony of Mr. Brubaker identified above.

DATED this \_\_\_ day of July, 1999.

STOEL RIVES LLP  
CALLISTER NEBEKER & MCCULLOUGH

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Edward A. Hunter  
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Attorneys for Applicant

## CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing ***APPLICANTS' MOTION TO STRIKE PORTIONS OF THE PREFILED DIRECT TESTIMONY OF MAURICE BRUBAKER*** to be served upon the following persons by Federal Express or mailing a true and correct copy of the same, postage prepaid, to the following on March 20, 2012:

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