

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

**In the Matter of the Application of PacifiCorp)
And ScottishPower plc for an Order Approving) Docket No. 98-2035-04
And Issuance of PacifiCorp Common Stock)
)**

**INITIAL BRIEF OF INTERVENOR MAGNESIUM CORPORATION OF
AMERICA ON THE PROPOSED MERGER OF
SCOTTISHPOWER PLC AND PACIFICORP**

**Lee R. Brown
Magnesium Corporation of America
238 North 2200 West
Salt Lake City, Utah 84116
801-532-2043 (Phone)
801-534-1407 (Fax)**

Dated: September 3, 1999

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Pursuant to the briefing schedule established by the Commission in this proceeding, Magnesium Corporation of America ("Magcorp"), an intervenor in this proceeding, hereby submits its Initial Brief.

STATEMENT OF POSITION

Magcorp does not oppose the merger. However, the unchallenged testimony, under oath, of Mr. Lee R. Brown, Vice President of Magcorp, is that PacifiCorp has refused to extend Magcorp's existing contract beyond its termination. Moreover, the Proposed Settlement Stipulation (the "Stipulation") excludes Magcorp from any benefit of the proposed merger.

Magcorp submits that the Commission remedy its exclusion from any merger benefits by conditioning the merger to remove Magcorp from PacifiCorp's exclusive service area. Such a condition serves the public interest because it eliminates the discrimination against Magcorp resulting from denying its class any benefits on the merger without any adverse impact arising out of the condition on any other class of customer.

The proposed condition further serves the public interest because such a

condition would also help Magcorp in its efforts to continue its contribution to the Utah economy. At the same time, because the proposed condition only removes PacifiCorp's exclusivity as to Magcorp, the requested declaration allows PacifiCorp the opportunity to serve Magcorp on competitive terms and conditions, should it choose to do so.

STATEMENT OF INTEREST

Magcorp is a large industrial customer served by PacifiCorp under a special contract expiring December 31, 2001. PacifiCorp was authorized to serve Magcorp as a retail customer pursuant to a 1968 Order of this Commission in Case Nos. 5639 and 5640. Service to Magcorp constitutes a class of service for PacifiCorp; Magcorp is the only member of that customer class.

Magcorp's power agreement with PacifiCorp was entered into and approved by the Commission to ensure that more than 500 jobs and related economic benefits would accrue to the State of Utah rather than the State of Washington.¹ The economic benefits to the State of Utah have recently been calculated to be over \$123,000,000 per year.

As has been repeatedly stated to this Commission over the years, PacifiCorp has built no generation to serve Magcorp. Further, Magcorp fully funded the facilities, including a transmission line and substation, built to serve it. Thus, there is no cost or potential stranded investment associated with Magcorp's load.

¹ All References to Magcorp and Pacificorp include by reference their predecessors in interest.

Magcorp is currently in the middle of upgrading its facilities--at a cost of more than \$50 million -- that will render it one of the most efficient magnesium producers

in the world. However, because electric power is one of the largest costs incurred by Magcorp in pricing magnesium, economically priced power is fundamentally important to its continued viability. Without access to economically priced power that allows it, even with the new investment in efficiency, to remain competitive in the world marketplace, the investment will be for naught, and the jobs and industry will be lost to Utah.

ARGUMENT

I. The Commission Should Condition the Merger To Remove Magcorp from PacifiCorp's Exclusive Service Territory.

Magcorp does not oppose the proposed merger or the Stipulation *per se*. However, as pointed out by Magcorp in its comments on the Stipulation, there is nothing in either the proposed merger or the Stipulation that is intended to benefit Magcorp. Thus, Magcorp's customer class is excluded from any merger benefit. To remedy this exclusion, the Commission should condition the merger to ensure that Magcorp as a class receives a benefit at least on a par with the benefits identified to other Utah customers.

However, Magcorp seeks no financial recoupment or rate reduction as a merger benefit. Rather, all that Magcorp seeks is a imposition of a condition that would benefit Magcorp without, under the testimony presented by the Division of Public Utilities, any adverse impact on other Utah ratepayers: that condition would decertify Magcorp from PacifiCorp's exclusive retail service territory effective upon the termination of its existing contract with PacifiCorp. By attaching such condition, PacifiCorp's retail service to Magcorp would be permissive, not exclusive.

Attaching such a condition to the merger approval would be fully consistent with the Commission's 1968 Order authorizing PacifiCorp to serve Magcorp. That Order

authorized PacifiCorp to serve Magcorp in order to capture the benefit of Magcorp's facility for Utah by affording Magcorp access to the most affordable power. By adopting the proposed condition, the Commission will again allow Magcorp to seek out the most economic source of power to maintain its continued viability and contribution to Utah's economy. At the same time, the condition fully affords PacifiCorp the opportunity to contract with Magcorp to provide it economically priced power.

Thus, PacifiCorp would not, by the requested condition, be rendered unable to enter into a new contract with Magcorp upon termination of the existing contract. All that it would mean is that PacifiCorp would not be able to assert any claim that it was the only possible power provider to serve Magcorp's load.

The importance of removing the basis for any such claim by PacifiCorp is demonstrated by evidence in the record. As set out in the sworn testimony of Mr. Lee R. Brown, Vice President of Magcorp, PacifiCorp has, up until the time of his testimony, consistently refused to enter into *any* negotiations on any power contract for the period after the termination of Magcorp's contract. At the same time, PacifiCorp has made it clear to Magcorp that the current contract will be terminated upon expiration.²

Under the terms of the Stipulation, there are no benefits allocated to Magcorp as a result of the merger. By signing the Stipulation with that exclusion, the DPU has made it clear that Magcorp must look after its own interest rather than enjoy any protections under

² After Magcorp's comments and testimony before this Commission, PacifiCorp has offered to commence negotiations. However, that fact does not detract from Magcorp's requested relief since until confronted by Magcorp's testimony, PacifiCorp consistently refused to negotiate with PacifiCorp. Moreover, Magcorp has never rejected PacifiCorp as a power supplier and has always approached it first. Thus, the effect of granting Magcorp's requested condition is to help assure that any negotiations with PacifiCorp will be bilateral and, in Magcorp's view, enhances the possibility that such negotiations will be mutually productive.

the statutory regime.

This exclusion was not inadvertent. Lowell Alt, in testimony on behalf of the DPU, has claimed that all special contract customers -- the large industrial infrastructure of Utah and a massive generator of employment and benefits to the whole of the Utah economy -- are subsidized by the remaining ratepayers of Utah. Although he also admitted that these customers generate system benefits, the DPU's outlook creates significant uncertainty for special contract customers as they look to contract expiration, an uncertainty only heightened by the views being exposed in the current Task Force on Special Contracts.

Magcorp is prepared to protect its own interests. But leaving PacifiCorp with a claim that only it can provide third-party power to Magcorp leaves Magcorp with no meaningful ability to negotiate with any power supplier other than PacifiCorp. The existence of such a claim renders it far more difficult for Magcorp to engage in meaningful negotiations with other potential suppliers or to commit to the financial undertakings, including purchase obligations, that may be required. The existence of such a claim thus constitutes a significant impairment of Magcorp's ability to protect its own interest and secure a reliable power supply at an economic price, even if that supplier, after bilateral negotiations in good faith, turns out to be PacifiCorp.

Moreover, because the lead time required to line up a power supply the size of Magcorp's involves years, not days or months, it is important that Magcorp be able to commence unencumbered negotiations now, not at some indeterminate time in the future.

By adopting the proposed condition herein, the Commission acts in a manner consistent with the Stipulation and extends the benefit of the merger to Magcorp and its class.

II. The Proposed Condition Serves the Public Interest.

Granting the proposed condition serves the public interest. It expands the classes of customers benefited by the merger without adversely impacting any other customer class.

First, there is no prejudice to any other customer class resulting from granting Magcorp's condition. Other customer classes will not be left with costs of generation built to serve Magcorp, since PacifiCorp has repeatedly stated, and the Commission has found, that none have been built to serve Magcorp.

The DPU has claimed other customers subsidize the special contract customers, so obviously, no harm can be visited on the retail customers by allowing Magcorp's requested condition. There is no harm to any customers in Magcorp's class, since Magcorp constitutes a one-customer class; therefore, only benefit results to this class.

As well, the DPU, the Committee for Consumer Services and PacifiCorp have all jointly agreed together on a Stipulation that excludes Magcorp from any merger benefits, effectively excluding them from any perceived public service protection under the statute. By granting the proposed condition, the Commission remedies this exclusion and reinstates Magcorp within the scope of the statutory protections. At the same time, because PacifiCorp's facilities will continue to be used -- and paid for -- by Magcorp for power transmission, PacifiCorp's customers will still receive the benefits of revenue contribution and load stabilization from Magcorp's presence on PacifiCorp's system.

Finally, no other customer is similarly situated to Magcorp's customer class. As a single customer class, the Commission has already found that service to it, and the contract under which it is served, is unique to Magcorp. Magcorp's contract is unique.

Magcorp's contract has always been separately approved by the Commission.

Thus, the condition allows a merger benefit to Magcorp with neither any detriment to either PacifiCorp or the other Utah customers nor any unlawful discrimination against other Utah customers.

CONCLUSION

In sum, Magcorp is not attempting to block the proposed merger or approval of the Stipulation. But any such approval must be conditioned so that Magcorp, which constitutes a single customer class of service, receives a benefit consistent with the benefits afforded other classes of users.

This is not to exclude ScottishPower/PacifiCorp from a future ability to serve Magcorp on a mutually agreeable basis after contract termination, should it choose to do so. But Magcorp will be able to choose among potential suppliers, including ScottishPower/PacifiCorp if it so chooses, in order to access economically priced power.

Magcorp has identified the condition that it believes will accomplish that result without prejudice to any other user or PacifiCorp: deletion of Magcorp as within PacifiCorp's exclusive retail service area upon termination of the existing contract.

WHEREFORE, Magnesium Corporation of America respectfully requests that as a condition of the approval of the Settlement Agreement it be decertified from ScottishPower/PacifiCorp's exclusive retail service area effective upon the termination of its contract with PacifiCorp.

Respectfully submitted,

Lee R. Brown
Magnesium Corporation of America
238 North 2200 West
Salt Lake City, Utah 84116
801-532-2043 (Phone)
801-534-1407 (Fax)

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