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ATTORNEYS FOR NUCOR STEEL, A DIVISION OF NUCOR CORPORATION

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 PACIFICORP Common Stock	) Docket No. 98-2035-04)) REPLY BRIEF OF) NUCOR STEEL, A DIVISION) OF NUCOR CORPORATION

PacifiCorp, ScottishPower (collectively the "Applicants"), the Division of Public Utilities (the "DPU" or the "Division"), and the Committee of Consumer Services (the "CCS" or the "Committee") urge a view that this is a risk-free merger with substantial benefits for Utah. It is not. The Applicants, Division and Committee find merger benefits where there are none, and ignore merger-related risk. The principal points raised in the *Post-Hearing Brief of Applicants Scottish Power PLC and PacifiCorp* ("Applicants' Initial Brief") and the *Joint Brief of the Division of Public*

Utilities and the Committee of Consumer Services ("DPU/CCS Initial Brief") were discredited in the *Initial Brief of Nucor Steel, a Division of Nucor Corporation* ("Nucor Initial Brief"), as well as the initial briefs of the other industrial customers in this docket, the Utah Industrial Energy Consumers ("UIEC") and the Large Customer Group ("LCG"). This Reply Brief is thus not intended to address all matters raised in the initial briefs of the Applicants and the Division and Committee, but only those Nucor believes warrant additional comment. Simply because Nucor chose not to reply to certain comments should not be interpreted as agreement with or acquiescence in the substance of those comments. Nucor encourages the Commission to look carefully at claimed benefits and mitigation measures, and to focus on whether the merger creates real benefits that outweigh the real risks imposed by the merger. Upon review of the initial briefs of the parties, Nucor believes more strongly than ever that additional conditions are necessary to ensure that the merger is in the public interest.

I. THE REAL MERGER-RELATED BENEFITS IDENTIFIED BY THE APPLICANTS, DIVISION AND COMMITTEE REMAIN MINIMAL

As the Commission has formulated the public interest standard, a merger is in the public interest if "the expected benefits of the merger to the Utah jurisdiction outweigh the costs and potential detriments associated with it." *Re Utah Power and Light Company*, 97 PUR 4th 79, 125 (Utah P.S.C. 1988) ("*UP&L II*"). The burden is on the applicants to show that the merger will result in benefits that could not be achieved without the merger. *Id*. Moreover, the Commission has made it clear that the applicants must *quantify* the savings resulting from the merger. *UP&L II*, 97 PUR

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[1] This Reply Brief is filed pursuant to the Commission's order from the bench in this proceeding. Tr. 1536 at 3-9.

4th at 101.

In their initial briefs, both the Applicants and the Division and Committee assert that a variety of non-quantified and not necessarily merger-related benefits should be attributed to the proposed merger. Nucor urges the Commission to resist the entreaties to encompass every positive thing PacifiCorp might do in the future from being included in the determination of whether or not to approve this merger.

The Applicants broadly assert six merger benefits: (1) the merger credit, (2) the "ability to pass additional cost savings through to customers," (3) network performance and customer service improvements, (4) community-related commitments, (5) environmental commitments and (6) wholesale customer commitments. Applicants' Initial Brief at 3-13. Of these, the only truly quantified benefit that could not be achieved without the merger is the $12 million per year merger credit. The other claimed benefits do not warrant being included in the public interest assessment for a variety of reasons. *See* Nucor Initial Brief at 10-18. The Applicants' attempt to categorize their "ability" to pass through cost savings and "intention" to achieve cost savings as being "benefits" barely deserves comment. *See* Applicants' Initial Brief at 4. It is of course not the ability to pass-through benefits or the intent to achieve savings that matter – it is the quantifiable benefits created by the proposed merger that matter. As to the network performance and service quality improvements, the Division and Committee claim that the promised network improvements and service quality standards "will produce measurable benefits to Utah customers," and that "nobody can seriously dispute that those benefits are not significant." DPU/CCS Initial Brief at 9, 10. The Committee's own witness testified as to the "significance" of these claimed benefits:

> My most important recommendation with regard to the application in this proceeding is that nothing that ScottishPower has offered with respect to the performance standards and customer guarantees demonstrates any significant benefit from the merger.[2]

Various witnesses concurred with Mr. Chernick's conclusion. Division witness Alt testified that the Division "didn't really count on [the $60 million benefit] because, to me, we saw a probability that it could go the other way."[3] As Dr. Richard Anderson testified "[n]o weight should be given to this weak attempt to quantify claimed benefits."[4]

Numerous other cited benefits are no more than commitments to live by existing obligations, to continue to support various programs, or to continue to follow current practice. For the community-related, environmental and wholesale commitments identified by the Applicants, no attempt has been made to make the required showing that the benefits could not be achieved without the merger. Virtually none of the "benefits" have been meaningfully quantified.[5]

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[2] Direct Testimony of Paul Chernick, Ex. CCS-3 ("Chernick Direct"), p. 42 at 17-20.

[3] Tr. 472 at 16-18 (Alt).

[4] Direct Testimony of Richard M. Anderson, Ex. LCG-1 ("Anderson Direct"), p. 13 at 36-37; *see also* Direct Testimony of Dennis W. Goins, Ex. Nucor-1 ("Goins Direct"), p. 8 at 21 to p. 9 at 3; Direct Testimony of Maurice Brubaker, Ex. UIEC-1 ("Brubaker Direct"), p. 14 at 5-14. Moreover, Dr. Anderson notes that customers will largely be expected to pay for all of the system reliability enhancements. ScottishPower can hardly claim merger benefits stemming from system improvements funded by the customers. Anderson Direct, pp. 13-14.

The Applicants' confirm Dr. Anderson's concerns. The Applicants state that "these costs [$55 million] will not be passed on to ratepayers unless the Commission determines in a rate proceeding that they have been prudently incurred." Applicants' Initial Brief at 8. This statement, coming in the same paragraph as the statement that "there will be no new incremental cost to ratepayers for the program," should vividly highlight for the Commission the coming debates over the costs and benefits of this merger.

[5] As to the "benefit" of adding another manager in Utah, Nucor notes that the insertion of an additional manager without authority is not necessarily in the special contract customers' best interests. *See* DPU/CCS Initial Brief at 13; Applicants Initial Brief at 20 (both suggesting that the addition of a Utah manager will, in some unspecified way, satisfy industrial customers' "concerns"). The potential for the insertion of another level of management is

Despite the recognized lack of substantial benefits (*see* Nucor Initial Brief at 10-11), the Division and Committee are discouraging the Commission from capturing all potential benefits for ratepayers. The Division and Committee suggest that the Commission "need not capture all possible future benefits that may arise out of the transaction in order to satisfy the 'public interest' test." DPU/CCS Initial Brief at 6. This misses several principal points raised by various intervenors. First, the identified benefits are extremely slight when compared to the benefits being achieved by shareholders and management. The minimal level of benefits makes it imperative that, if the merger produces benefits, the ratepayers share in those benefits. Second, as to the potential tax benefits identified, the issue is whether the Commission will have any authority whatsoever to take action in the future to capture this benefit. If the Commission does not act to ensure its jurisdiction, it may never be able to capture the benefit.

Nucor addressed at length the alleged benefits of the merger in its Initial Brief, and will not belabor the issue here. For all the benefits claimed, Division and Committee witnesses recognized that the benefits are so minimal that without the merger credit even they could not claim a net benefit for this merger. *See* Tr. 361 at 25 to 362 at 6 (Alt); Tr. 362 at 16-22 (Gimble). The Division and Committee seem more concerned with ensuring the consummation of the merger than with the impact of the merger on ratepayers. *See* DPU/CCS Initial Brief at 8 (while a rate cap is desirable from a customer's standpoint, it would likely mean the merger wouldn't occur – therefore such a cap is bad). Nucor urges the Commission to take the necessary steps to assure that ratepayers receive

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the precise concern expressed by contract customers. While it may solve problems perceived by the Department of Community and Economic Development and the Division of Business and Economic Development, it may be counterproductive with respect to contract customers.

real, significant benefits from the merger, commensurate with the risks they are asked to bear.

II. THE APPLICANTS, DIVISION AND COMMITTEE INCORRECTLY ASSERT THAT MERGER-RELATED RISK IS SUFFICIENTLY MITIGATED

The Applicants, the Division and the Committee continue to claim in their initial briefs that the risks posed by the merger are mitigated by the Stipulation. *See* Applicants' Initial Brief at 13-26; DPU/CCS Initial Brief at 2. The Division and Committee go to great pains to justify rejecting additional conditions. Yet, as Nucor and others discussed in initial briefs in this docket, the claim that all risks have been perfectly mitigated by the Stipulation was defused at hearing:

> Q: Okay. And as I understand the rationale, it's because the risks couldn't be perfectly mitigated, you want to have some guarantee of benefits that essentially put this over the top in terms of meeting the net benefit standard?
>
> A: That's right.[6]

See Nucor Initial Brief at 19. In addition, certain risks imposed on special contract customers are not addressed in any way by the Stipulation (*see* Nucor Initial Brief at 23-26) – this despite the pains taken to assure the provision of data and information and protect the potential risks facing other groups and interests, such as environmental, low-income, wholesale, and community and economic development.

The Division and Committee cite enforcement problems as one reason not to add additional conditions to the merger approval. In their initial brief, the Division and Committee urge the Commission to focus on, among other things, the Commission's ability to enforce proposed

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[6] Tr. 361 at 25 to 362 at 6 (Alt). *See also* Tr. 362 at 16-22 (Gimble); Tr. 175 at 20-22 (Wright).

conditions as a prerequisite to imposing conditions on the merger. *See* DPU/CCS Initial Brief at 6.[7] If the Commission approves the merger on the basis of conditions concerning future behavior, the new PacifiCorp will be bound by those conditions. The Commission's powers under section 54-725 are available to enforce the conditions suggested by the intervenors. The Commission's enforcement abilities are thus identical for virtually every paragraph in the Stipulation. *See* Tr. 75 at 8-13.[8] The Division and Committee's vague concerns in this regard are not well placed and should be disregarded.

One of the Division's "tests" of suggested conditions, whether the condition is "outside of the Commission's traditional jurisdiction or the Commission's role," is not a test for the appropriateness of a condition. Rather, the answer to the question determines the placement of the burden of proof necessary to establish the need for a condition. In language quoted by the Division and Committee, the Commission in the UP&L/PP&L merger stated that in areas "outside our normal regulatory jurisdiction and enforcement powers" parties other than the merger applicants bear the burden of demonstrating a benefit or harm that necessitates a condition. *Re Utah Power & Light Company*, 90 PUR 4th 555, 556 (Utah P.S.C. 1987) (*UP&L I*"). The Commission did not there

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[7] It is interesting that enforcement risk related to additional conditions is such a grave concern of the Division and Committee. The Division and the Committee are more than willing to ignore the risk that the Commission may lack jurisdiction to enforce a claim as to tax-related merger benefits.

[8] The exchange between Commission White and ScottishPower witness Wright was instructive on this point:

> COMMISSIONER WHITE: Okay. So if the Commission believed that PacifiCorp or ScottishPower had not lived up to any of the terms and conditions, I take it we would be expected to proceed under section 54-725.
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> MR. WRIGHT: Right.

Tr. 75 at 8-13.

establish a jurisdictional or enforcement "test," and should not accept the Division and Committee's apparent suggestion to do so here.

The Division and Committee also note that conditions must address items directly related to the merger. DPU/CCS Initial Brief at 3. While the Division and Committee do not clearly specify which particular conditions they believe run afoul of this "test," Nucor surmises that they are attempting to attack intervenor positions related to stranded costs, in that the Division and Committee state their opinion, without elaboration, that the merger case is not "the proper forum to resolve the complexities attendant to the stranded cost issue." DPU/CCS Initial Brief at 14. To the contrary, the merger creates and implicates stranded cost issues, and this case is the most appropriate forum to address those issues. Not only does the merger create potential stranded cost claims related to the premium being paid and the transaction costs (*see* Nucor Initial Brief at 38), but the very fact of the high premium creates greater incentive within the new PacifiCorp to vigorously seek all potential avenues of income to satisfy investors. The new PacifiCorp will be in a materially different position as a result of the merger, and the risk this creates is appropriately dealt with now.

The Stipulation goes to great pains to protect rights to information and data, and in some instances provides what amounts to a belt and suspenders to ensure that the merged company will continue to do what it is already obligated to do. *See* Nucor Initial Brief at 22. As to ensuring that actual benefits go to ratepayers, few protections are in place. When it comes to protecting vital ratepayer interests, we are told to rely on vague promises and assumptions about the law and the future. This is not only unnecessary it is unacceptable. The Stipulation does not mitigate all risks to all customers. Additional conditions are necessary to protect all customers (including special contract customers) from merger-related risks, and to preserve merger-related benefits.

III. THE DIVISION AND COMMITTEE'S POSITION AS TO POTENTIAL TAX BENEFITS IS INSTRUCTIVE OF THEIR APPROACH TO REVIEWING THIS MERGER

While at one point the Division and Committee confidently claim that any tax benefits "will be subject to future proceedings and decisions of the Commission," (DPU/CCS Initial Brief at 7), they later express their belief that the tax savings "*should* be available to flow through to ratepayers if appropriate." DPU/CCS Initial Brief at 10 (emphasis added). Yet the Division and Committee do not recommend any additional conditions to protect ratepayer interests. This stands in stark contrast to the approach in the Stipulation of providing assurances that the Applicants would do what they are already obligated to do. *See* Nucor Initial Brief at 22. Indeed, the Division and Committee's less than firm commitment provides little solace to ratepayers who are receiving scant benefit from the merger.

Nucor agrees that the amount of tax savings and the manner in which any savings will be passed through to ratepayers can be left for another day. What cannot be left for another day is a determination by this Commission that any tax benefits created as a result of this transaction are by definition "merger-related," and an agreement by the Applicants (through a condition) that this Commission has the jurisdiction to determine that merger-related tax benefits should be used for the benefit of ratepayers. *See* Nucor Initial Brief at 34-37.

IV. THE APPLICANTS, DIVISION AND COMMITTEE CONTINUE TO INAPPROPRIATELY IGNORE SPECIAL CONTRACT CUSTOMERS IN THE EVALUATION OF THE PUBLIC INTEREST STANDARD

The Division and Committee base their decision to ignore the impact of the merger on special contract customers on the Commission's order in the UP&L/PP&L merger and the "striking" similarities between the cases. DPU/CCS Initial Brief at 15-17. There are unquestionably similarities. Both cases involve mergers; they both involve requests by special contract customers, and at the time of both cases there were task forces assessing various special contract issues. The similarities are irrelevant to whether the relief requested in this case by special contract customers has merit.

The difference between these two cases that has escaped the Division and Committee is that the UP&L/PP&L merger promised tremendous benefits to ratepayers, and came at a time when utility costs were declining. In that case, the industrial customers sought to share in these benefits through an improvement in their priority of service. The Commission declined to provide the requested enhancements to the contracts, on the grounds that doing so would provide those customers with preferential treatment. *See UP&L II* at 114. Here, however, special contract customers do not seek preferential treatment, or enhancements in the pricing provisions at the heart of each contract. Rather, special contract customers seek protection from the risks imposed by the merger – protection that should be provided to all customers.

The Division, Committee and the Applicants cite the existence of the special contract task force as an additional reason for ignoring special contract customers, on the notion that the task force is "looking at the appropriate criteria for extensions of these contracts" and that a report to the

Commission will be submitted by the end of the year. *See* DPU/CCS Initial Brief at 17; Applicants' Initial Brief at 23-24. Given the expiration dates of the contracts (Tr. 1385 at 2-4 (K. Powell)) and the timing required by special contract customers for the consideration of alternatives, those customers need to make decisions now. Tr. 1212 at 20-23 (Anderson). A task force report will not be filed until the end of the year – no guidance will be provided until the Commission acts on the report. With contracts expiring in the near future, this sort of a "wait and see" attitude espoused by the Applicants, Division and Committee will force the hand of special contract customers.

As to Nucor's request that if contracts are not extended customers be given the option of taking service from other suppliers (*see* Nucor Initial Brief at 34), the Division and Committee suggest that "[i]t seems unreasonable for the Commission to require PacifiCorp to waive any legal rights it may have." DPU/CCS Initial Brief at 18. This is an unusual comment, given that that seems to be the very purpose of merger conditions – to require the merging companies to do things they otherwise would not be obligated to do. Arguing that the Commission should not adopt a condition because the Applicants would otherwise be free of that condition is absurd.

The promises made by ScottishPower with respect to the conduct of negotiations with special contract customers was fully addressed in Nucor's Initial Brief, at 27-28. As was explained there, these promises represent nothing more than a commitment by ScottishPower to do (1) what they are otherwise required to do,[9] and (2) what common business sense would tell them to do,[10] and are largely, if not wholly, unenforceable. The promises are nothing less than what Nucor would expect

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[9] *E.g.*, honor existing contracts and abide by Commission rules.

[10] *E.g.*, allow ScottishPower to be involved in negotiations, negotiate in good faith and in a timely manner, and recognize the contributions made by special contract customers.

of all of its suppliers. In fact, Nucor is troubled by the implicit notion that without such a "commitment," ScottishPower intended to (1) refuse to honor the existing contracts, (2) prevent its representatives from joining in negotiations prior to the merger, (3) negotiate in bad faith, (4) attempt to drag out negotiations, (5) refuse to recognize the contribution the customer makes to the economy of Utah, and (6) ignore Commission rules. These commitments typify the "benefits" espoused by the Applicants, the Division and the Committee in this case, and are insufficient to mitigate the merger-related risks facing special contract customers.

V. ADDITIONAL CONDITIONS REMAIN NECESSARY TO ENSURE THAT THE MERGER IS IN THE PUBLIC INTEREST

As Nucor stated in its Initial Brief, at least four additional conditions are required to ensure that the proposed merger is in the public interest:

(1) Rates of all Utah tariff customers should be capped and all provisions of the Stipulation should be adopted as conditions of merger approval;

(2) Current Utah special contract customers should have the option of having their contracts extended through the transition period on current terms and conditions, subject to Commission approval (or, in the alternative, to buy power from alternate suppliers);

(3) The Applicants should be required to acknowledge that if the Commission determines that tax savings result from the merger, then those tax savings will go to benefit customers, through rate reductions. Whether tax savings are created and the amount of any savings should be left for a future proceeding; and

(4) The Applicants should be required to waive any and all future claims to stranded costs relating to existing generation- and transmission-related assets, as well as claims relating to the merger premium and/or merger transaction

costs, in any proceeding.[11]

After reviewing the initial briefs of the Division and Committee and the Applicants, Nucor recommends that the Commission take steps now to ensure that merger-related risk is placed appropriately on the Applicants and that identified merger-related benefits are preserved. Moreover, the Commission should recognize that Applicants, the Division and the Committee propose no protection for special contract customers comparable to the merger credit, in spite of the significant merger-related risk facing those customers. Given that these customers represent a significant portion the Utah customer base, the impact of the merger on these customers cannot be ignored for purposes of assessing the public interest.

WHEREFORE, for the reasons set forth herein, as well as in Nucor's Initial Brief, the Commission should adopt the conditions suggested by Nucor Steel, impose such additional conditions as it deems appropriate, and make such modifications to the Stipulation as it believes are necessary to clarify the protections meant to be provided therein.

DATED this 17th day of September 1999.

Respectfully submitted,

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[11] Nucor concurs with the UIEC that, at a minimum, the Commission should include in its order a finding that will permit the Legislature (or a future Commission) to conclude that any claim for stranded cost has been satisfied as a result of this transaction. *See* UIEC Initial Brief at 27.

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