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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
)	REPLY BRIEF
)	

INTRODUCTION

In its Opening Brief, the Large Customer Group (“LCG”) cited extensive testimony in the record showing that the claimed benefits of the proposed acquisition of PacifiCorp by ScottishPower are uncertain, speculative and relatively insignificant, while the risks are significant and inadequately mitigated. The Applicants’ Brief repeats the well-worn, largely discredited, argument that Utah customers will receive significant benefits at no risk. Ignoring self-serving, unverifiable claims, the Applicants’ Brief fails to adduce substantial credible evidence that the public interest of the State of Utah will be best served by approval of the acquisition as currently proposed. The applicants have simply not carried their heavy burden of proof.

A. The Commission Need Not Approve the Acquisition as Proposed.

The Opening Briefs of the Applicants and the DPU/CCS seem to assume that this Commission is essentially obligated to approve the proposed acquisition because the Stipulation, with its relatively meager “merger credit,” supposedly pushes the proposed acquisition over some illusory “net positive benefits” line. [Applicants’ Brief at 26; DPU/CCS Brief at 6-7]. Such an assumption is devoid of logic or merit. ScottishPower does not have a **right** to acquire control over Utah’s monopoly electric service facilities, and it certainly cannot buy such a right with vague, short-term promises. ScottishPower can acquire PacifiCorp only if it first satisfies its heavy burden of making a substantial, verifiable showing that the proposed acquisition will be in the long-term best interests of the State of Utah. The proper question before this Commission is not whether the Applicants have managed to put just enough on the table to push the proposal over a nebulous “net positive benefits” line, but rather whether there are other reasonable conditions that should be required to better assure Utah electric consumers of long-term, verifiable benefits and protections against risk. The LCG submits that additional protections are both appropriate and necessary to protect the interests of Utah consumers.

B. Absent a Rate Cap, Claimed Benefits of the Acquisition are Uncertain, Speculative and of Limited Value.

As explained by a number of diverse witnesses, the benefits of the acquisition as proposed are largely uncertain and speculative and produce few significant, verifiable or long-term benefits, while the risks are significant and inadequately mitigated. In tacit acknowledgment of the limited value of assured benefits, the Applicants continue to offer tantalizing assurances--although not

guarantees--of significant cost savings: “ScottishPower *will achieve* cost savings in the operations of PacifiCorp beyond that which PacifiCorp could achieve on a standalone basis.” [Applicants’ Brief at 4 (emphasis added)]. While this language may sound a lot like a guarantee to the untrained ear, the Applicants have carefully structured the transaction in an effort to avoid any possibility of guaranteed cost-reduction commitments to back up their tantalizing projections. A rate cap--a remedy supported by substantial testimony on the record--affords the Applicants the clear opportunity either to back up their bravado with guarantees or to cease causing misleading expectations.

The DPU/CCS Brief dismisses the \$10 million per year in guaranteed cost savings committed to by the Applicants in their initial filing (with a net present value to Utah estimated by Applicants at \$35 million) as “minimal” [DPU/CCS Brief at 3], yet embraces a “merger credit” with a net present value of under \$40 million, drawing the unsupported conclusion that the “merger credit” will provide adequate protections against the risks associated with the transaction. [DPU/CCS Brief at 8]. The merger credit is insufficient to ensure that Utah customers are adequately protected against the significant risks of the transaction. Only a rate cap will adequately mitigate those risks.

C. The Commission Must Take Affirmative Steps Now to Ensure that Merger Benefits in the form of Upstream Tax Savings Can be Shared with Utah Consumers.

The Applicants have proposed a condition that all parties preserve their rights and arguments on the issue of tax savings. The Applicants’ Brief makes the astonishing claim that this proposed condition “would resolve all concerns regarding this issue.” [Applicants’ Brief at 19]. To the contrary, and as explained in detail in the briefs of the LCG, the UIEC and Nucor Steel, the

Applicants' proposed condition falls far short of resolving the significant concerns on this issue.

The Applicants clearly hope to escape this approval process with no specific order addressing the issue of taxes. They hope to be able to argue in the future that, having failed to establish its jurisdiction as a condition of the acquisition, the Commission has no legal basis to capture upstream tax savings as merger benefits to be shared with Utah electric consumers.

According to the DPU/CCS Brief, the state agencies "do not disagree with the industrial customers that the tax savings associated with the transaction ... should be available to flow through to ratepayers if appropriate." [DPU/CCS Brief at 10], but they take a giant unsupported leap in logic in concluding that the condition proposed by the Applicants "adequately preserves the upstream tax savings associated with the acquisition ... and that the Commission need not decide the issue on its merits in this proceeding." [DPU/CCS Brief at 11]. The state agencies either wholly miss the point or are remarkably confident in their legal opinions (reached without any research or analysis shared on the record). Unless the Commission acts affirmatively in its Order to ensure its jurisdiction to even *consider* the merits of this issue, it may never get the chance to address the merits. The Applicants have made it abundantly clear that they intend to stand on their legal argument that the Commission lacks jurisdiction to capture the benefits of upstream tax savings for Utah consumers in rate proceedings. The Commission will reach the merits of the argument only if it first wins the legal battles, including probable appeals.

All legal disputes over this issue can be easily avoided by a requirement that the Applicants agree as a condition of approval that the Commission has full and adequate power and jurisdiction to decide, on the merits, whether and what amounts of tax savings realized by ScottishPower

affiliates as a result of the acquisition should be considered merger benefits that should flow to Utah electric consumers. No one has offered a logical reason why the Commission should not diffuse this debate once and for all in this proceeding.

D. Absent a Rate Cap, Special Contract Extensions are Necessary to Produce Equitable, Non-Discriminatory Results.

The Applicants and state agencies suggest that a promise by PacifiCorp to negotiate in good faith with special contract customers is adequate to mitigate risks faced by these customers. To the contrary, such a promise is illusory and inadequate. No one has offered any adequately explanation why this one class of customers should be denied any meaningful protections against risks of the proposed acquisition. Discriminatory and inequitable results can be avoided only by providing all customers with comparable protections—preferably through a rate cap for all customers; alternatively through short-term contract extensions.

Special contract customers have not asked for preferential treatment or contract modifications.¹ Rather, they seek a modicum of protection against the significant identified risks of the proposed acquisition. A rate cap applied to all customers, or alternatively, a short-term contract extension, would provide special contract customers with reasonable time to explore other alternatives.

The DPU and CCS state that they will not oppose extensions of contracts that are in the

¹ Issues raised by special contract customers in this case are nothing like the issues raised in the PacifiCorp/Utah Power merger by certain interruptible customers who requested modifications of contractual interruption priorities. The special contract customers here have not requested contractual amendments or preferential treatment, but rather reasonable protections against identified risks commensurate with the protections offered to other customers.

public interest. [DPU/CCS Brief at 17]. The special contract customers ask for nothing more. Either all rates should be capped or special contracts should be extended, subject to the Commission's jurisdiction to determine, upon appropriate request, whether each contract is in the public interest. The requested extensions are not intended to evade Commission review or public interest considerations, but rather to mitigate against delays, vagaries and uncertainties caused by the takeover of PacifiCorp.

PacifiCorp's promise to negotiate in good faith does nothing to ease the risks or concerns faced by special contract customers. Absent aggressive requirements imposed on the utility,² the remaining time before contracts expire is simply not adequate to accommodate typical negotiations and reasonable pursuit of alternative supply options.

CONCLUSION

The Applicants have not met their heavy burden of demonstrating by substantial evidence that the proposed transfer of control to ScottishPower over essential electric facilities and exclusive service rights would be in the public interest of the State of Utah. The risks are too great and the benefits too speculative. Despite efforts by the Division and Committee, the Stipulation simply does not go nearly far enough to provide meaningful protections to Utah electric consumers. The Commission should require the Applicants to accept further conditions. At a minimum, the commission should require a rate cap for all Utah customers to provide meaningful protections

²For example, under an approach utilized by some regulatory agencies, the Commission could reserve ruling on the special contract issues or the request for contract extensions for a period of 90 days with directions to the parties to attempt to negotiate satisfactory extensions during that period. If the parties reach agreement, the contracts would be submitted for Commission approval. Failing agreement, the Commission would enter rulings on the reserved issues.

against rate risks and a waiver of any claims or arguments that the Commission lacks power or jurisdiction to require that tax savings realized by ScottishPower affiliates stemming from the acquisition be shared with Utah electric consumers as benefits of the transaction.

DATED this 3d day of September, 1999.

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CERTIFICATE OF SERVICE

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