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**Attorneys for Intervenor Monsanto Company**

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

**In the Matter of the Application of PacifiCorp )  
dba Utah Power & Light Company for ) Case No. PAC-E-01-16  
Approval of Interim Provisions for the Supply )  
of Electric Service to Monsanto Company. )  
\_\_\_\_\_ )**

**SUPPORTING BRIEF OF MONSANTO**

**COMES NOW Monsanto Company (“Monsanto”), through counsel, and hereby submits this Brief in support of its Motion to Dismiss or Stay the Application of PacifiCorp to establish an interim tariff rate for Monsanto’s electric service.**

**INTRODUCTION**

**Monsanto operates an elemental phosphorus plant near the City of Soda Springs in Caribou County, Idaho. The electric power requirements of the plant have been supplied by PacifiCorp and its predecessor Utah Power continuously since 1952. Monsanto is PacifiCorp’s single largest customer, contributing over 28 percent of all Idaho retail revenues.**

**Monsanto’s electric service has always been provided pursuant to a special contract.**

**By Order No. 26282 dated December 21, 1995, this Commission approved the current Power Supply Agreement (“Agreement”) dated November 1, 1995, between Monsanto and PacifiCorp. Pursuant to the Agreement, Monsanto receives 9 MW of firm power and energy**

and 206 MW of interruptible power and energy. Since May 18, 1990, when Utah Power eliminated Schedule 13 which provided a tariff rate for customers over 15 MW, no tariff rates have existed for large industrial service.

### **CONTRACT INTERPRETATION DISPUTE**

For some time a dispute has existed between PacifiCorp and Monsanto regarding the termination date of the Agreement. The specific provision in the Agreement dealing with termination, renewal, and notice, is paragraph 2.1, which provides:

**“2.1 Term. Subject to the approval of the Idaho Public Utilities Commission, this Agreement shall become effective on November 1, 1995, shall continue in full force in effect through December 31, 2001, and thereafter shall be renewed annually until either party gives at least one year’s written notice of termination.” (Italics added.)**

The explanatory “Technical Assessment Package” prepared and supplied by PacifiCorp to the Commission with the proposed Agreement when it was submitted for approval also states that the one year termination notice cannot be given until after December 31, 2001, to wit:

#### **“Section 5: Description of New Agreement**

**The New Agreement - signed by Monsanto and PacifiCorp on November 1, 1995, and subject to approval by the IPUC - is designed to replace the current Power Supply Agreement while extending the period of retail service to the Customer through December 31, 2001. After December 31, 2001, the New Agreement would be renewed annually until either party gives a termination notice of one year in advance. The New Agreement would become effective November 1, 1995.” (Italics added.)**

The plain language of the Agreement requires that notice of termination cannot be given until after December 31, 2001. This language, coupled with the “automatic” annual

**extension language, prevents the Agreement from being terminated until January 1, 2003, at the earliest.**

**In December 2000, PacifiCorp wrongfully gave notice attempting to prematurely terminate the Agreement, effective December 31, 2001. This termination notice was premature and ineffective to terminate the parties' Agreement by year-end 2001.**

**Because PacifiCorp continues to wrongfully attempt to deny Monsanto the benefit of its bargain, Monsanto filed a Complaint for declaratory relief which is pending in Federal Court. Monsanto was forced to file suit only after the negotiations reached an impasse.<sup>1</sup>**

#### **MONSANTO'S PENDING DECLARATORY JUDGMENT COMPLAINT**

On November 16, 2001, some three weeks prior to the filing of PacifiCorp's Application with the Commission, Monsanto filed a Complaint for Declaratory Judgment in State District Court in Caribou County for the purpose of interpreting the Agreement and obtaining a Court declaration of the termination date. Attached as Exhibit 1 is a copy of the Complaint with attached Exhibits A through F. On December 5, 2001, PacifiCorp filed a Notice Of Removal causing the case to be removed from State District Court to Federal District Court, Exhibit 2. The case is now pending in the U.S. District Court for the District of Idaho before Federal District Judge B. Lynn Winmill as Case No. CIV-01-0607-E-BLW as reflected by Exhibit 3.

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<sup>1</sup>This resulted after PacifiCorp refused to follow the existing contract format, which had served the parties well for many years. Instead, PacifiCorp has insisted on an entirely new generic contract format, which effectively treats Monsanto as a firm tariff customer without reasonable and adequate consideration for the unique nature of Monsanto's interruptible load which has been historically recognized by this Commission as providing significant operating reserves and load balancing benefits to the PacifiCorp System.

Monsanto intends to vigorously prosecute this case to a prompt conclusion. Since no factual disputes exists and the Agreement can be interpreted as a matter of law, Monsanto expects an early resolution by the Court.

Monsanto's filing and prosecution of this lawsuit deprives the Commission of jurisdiction and renders PacifiCorp's Application to establish an interim rate entirely premature and unnecessary. In the unlikely event the Court determines the termination date is year-end 2001 as claimed by PacifiCorp, Monsanto has agreed to apply retroactive to the termination date whatever new rate is applied to Monsanto's ongoing electric service, whether established by new agreement between the parties or by this Commission, and pay interest at a reasonable rate on any deficiency. Monsanto's proposal to PacifiCorp to this effect was set forth by letter dated December 6, 2001, Exhibit 4 attached, but rejected by PacifiCorp.

### **DISTRICT COURT JURISDICTION**

**It is well established under Idaho law that the Court, not the Public Utilities Commission, has jurisdiction to determine contract disputes.**

The jurisdiction issue was resolved in *Afton Energy, Inc. v. Idaho Power Company*, 111 Idaho 925, 928, 729 P.2d 400, 403 (1986), where the Idaho Supreme Court declared the district court's primary jurisdiction to determine contract disputes of this nature, stating:

“The Commission generally has jurisdiction to hear matters presented to it regarding the regulation and supervision of public utilities. I.C. § 61-501. *Grever v. Idaho Telephone Company*, 94 Idaho 900, 499 P.2d 1256 (1972). But the Commission's jurisdiction is limited and has to be found entirely in the enabling statutes. *Arrow Transportation Company v. Idaho Public Utilities Commission*, 85 Idaho 307, 379 P.2d 422 (1963). Specifically, the Commission has no jurisdiction to take away a utility's freedom of contract (so long as the contract is not inimical to the public interest) and must consider private contracts when involved in the rate-making process.

*Agricultural Products v. Utah Power & Light*, 98 Idaho 23, 557 P.2d 617 (1976). As such, the interpretation of contracts, as a general rule, does not fall within the Commission's jurisdiction. *Lemhi Telephone Company v. Mountain States Telephone & Telegraph Co.*, 98 Idaho 692, 571 P.2d 753 (1977); *Bunker Hill Co. v. Washington Water Power Co.*, 101 Idaho 493, 616 P.2d 272 (1980). As this Court stated in *Lemhi*:

‘Generally, construction and enforcement of contract rights is a matter which lies in the jurisdiction of the courts and not in the Public Utilities Commission. This is true notwithstanding that the parties are public utilities or that the subject matter of the contract coincides generally with the expertise of the commission. If the matter is a contractual dispute, it should be heard by the courts.’ Id. at 696, 571 P.2d at 757.’ ”

*Accord: Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 749, 748, 9 P.3d 1204 (2000), *rehearing denied*.

The Uniform Declaratory Judgment Act, I.C. § 10-1201 *et seq.*, enables a party to a written contract to seek a declaration as to its meaning and effect. I.C. § 10-1202 provides:

“Any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.”

Clearly, the *Afton Energy* case, and I.C. § 10-1202, establish Monsanto’s right and obligation to obtain a Court’s declaration as to the proper operation and effect of the subject Agreement. Monsanto’s existing Agreement and the rate established therein have been approved by this Commission. This Commission lacks statutory authority and has no jurisdiction to interpret or alter the terms of this Contract. PacifiCorp’s Application is, therefore, clearly premature.

## APPLICATION OF PACIFICORP

PacifiCorp's Application to establish an interim tariff rate for Monsanto is entirely premature. It cannot and should not be acted upon until the Court has ruled. The Commission's power to fix rates under I.C. §61-503 is limited and cannot interfere with Monsanto's private contract rights. *Afton Energy, Inc. v. Idaho Power Co., supra, Idaho Power Co. v. Cogeneration, Inc., supra.*

PacifiCorp has an unequivocal legal obligation to provide electric service to Monsanto. I.C. §61-302. In return therefor, Monsanto must pay just and reasonable charges. I.C. §61-301. The Commission has the right and obligation to establish the amount of these charges once the existing agreement terminates, but not before. This includes any appropriate true-up from the termination date with a reasonable rate of interest.

PacifiCorp's Application is effectively an attempted end-run around the Court action already in progress to determine the termination date. While it would seem unimaginable, if PacifiCorp attempted to curtail electric service to Monsanto after year-end, Monsanto would incur literally millions of dollars in damages, the recovery of which would be sought from PacifiCorp. If any indication is given PacifiCorp would undertake such action, Monsanto is prepared to immediately seek injunctive relief from the District Court.

At this time Monsanto has not had an opportunity to evaluate PacifiCorp's filing to permit a detailed substantive response. Monsanto fully intends to do so if the Commission denies its Motion to Dismiss or Stay. Notwithstanding, Monsanto desires to make brief initial comment on some aspects of the Application.

Monsanto anticipates it may take substantially longer for the Commission to establish a new industrial tariff through PacifiCorp's proposed procedure than the time necessary to resolve the Contract dispute in Court. This is because establishing an entirely new tariff rate should necessarily involve a thorough analysis and examination of PacifiCorp's proposed cost-of-service study for Monsanto, cost-of-service studies for other customers, inter-jurisdictional allocation issues and PacifiCorp's overall revenue requirement. It is noteworthy that PacifiCorp has not had a general rate case in Idaho for more than a dozen years.

PacifiCorp's proposed new Tariff Schedule 9 for Monsanto proposes firm rather than interruptible service from Monsanto. The proposed new rate of 31.4 mills per kWh for firm service represents a 70 percent increase over Monsanto's existing Special Contract Rate which would threaten the viability of continued operation of the Soda Springs plant, the loss of which would be an economic disaster to the regional economy.

PacifiCorp's proposed rate for Monsanto ignores the unique interruptible nature of Monsanto's load which has historically been recognized by this Commission as providing substantial operating reserve and load balancing benefits to the PacifiCorp System. Further, Monsanto has not historically been included in class cost-of-service studies or Idaho Jurisdictional Revenue Requirements. This is because Monsanto has always been treated as a system customer, not an Idaho Jurisdictional Load. As stated by this Commission in Order No. 26282 in Case No. UPL-E-95-4 approving the current Agreement:

“The Monsanto interruptible load is not treated as an Idaho jurisdictional load for jurisdictional allocation purposes. It is treated as a system load. PacifiCorp has four other smaller loads in Utah that are also treated as system loads. Costs and revenues associated with system loads are spread to all jurisdictions instead of just the jurisdiction in which the customer is physically located. Four percent of Monsanto revenues are spread to Idaho based on a jurisdictional energy allocator.”

Furthermore, as a jurisdictional customer and by reason of its unique interruptible characteristics, Monsanto's rates have not been established based upon traditional cost-of-service methodology. Instead, Monsanto's rates have been established based upon paying variable energy costs plus a reasonable contribution to fixed costs. PacifiCorp's current proposal is a dramatic departure from ratemaking principles that have been applied to Monsanto by past Commissions as each special contract was presented and approved. The impact of PacifiCorp's new and untested studies and methodologies for pricing the Monsanto Contract will have substantial yet unknown impacts on the Idaho jurisdiction and the rates paid by other customers, which will require a thorough investigation. It is incredulous for PacifiCorp to expect such a proceeding to be handled on modified procedure which Monsanto strenuously objects to.

### **CONCLUSION**

Monsanto's Motion to Dismiss should be granted. The Commission has no jurisdiction to establish the termination date of Monsanto's Agreement nor establish an interim or any other rate until the Court has determined that Monsanto's Agreement is no longer in effect. A Declaratory Judgment Action is pending in Federal District Court to make this determination. Alternatively, PacifiCorp's Application is clearly premature and should be stayed until the District Court has ruled.

Monsanto's willingness and ability to true-up any deficiency relating to power supplied after the Contract termination date with a reasonable rate of interest adequately protects and safeguards PacifiCorp and other ratepayers.

**RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of December, 2001.**

**RACINE, OLSON, NYE, BUDGE &  
BAILEY, CHARTERED**



By \_\_\_\_\_  
RANDALL C. BUDGE

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 14<sup>th</sup> day of December, 2001, I served a true, correct and complete copy of the foregoing document, to each of the following, in the manner indicated:

<b>Jean D. Jewell, Secretary</b>	<input type="checkbox"/>	<b>Hand Delivery</b>
<b>Idaho Public Utilities Commission</b>	<input type="checkbox"/>	<b>U.S. Mail/Postage Prepaid</b>
<b>P.O. Box 83720</b>	<input checked="" type="checkbox"/>	<b>Overnight Mail</b>
<b>472 W. Washington Street</b>	<input checked="" type="checkbox"/>	<b>Facsimile</b>
<b>Boise, Idaho 83720-0074</b>		
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<b>John M. Eriksson</b>	<input type="checkbox"/>	<b>Hand Delivery</b>
<b>Stoel Rives LLP</b>	<input checked="" type="checkbox"/>	<b>U.S. Mail/Postage Prepaid</b>
<b>201 S. Main St., Ste 1100</b>	<input type="checkbox"/>	<b>Overnight Mail</b>
<b>Salt Lake City, Utah 84111</b>	<input type="checkbox"/>	<b>Facsimile</b>
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<b>201 South Main, Suite 2300</b>	<input type="checkbox"/>	<b>Overnight Mail</b>
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**RANDALL C. BUDGE**