

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Division's Annual
Review and Evaluation of the Electric
Lifeline Program, HELP

DOCKET NO. 03-035-01

In the Matter of: HELP, Electric Lifeline
Program Evaluation

DOCKET NO. 04-035-21

ORDER ON VARIOUS PROCEDURAL
MOTIONS AND PETITIONS

ISSUED: August 1, 2005

By The Commission:

Through this order we address and resolve a number of disputes raised in pleadings through which parties have attempted to set parameters on the issues and evidence which should be considered by the Commission in these proceedings. In our May 3, 2005, Scheduling Order, we directed parties to file their preliminary issues list, identifying matters which they believed should be addressed or reviewed by the Commission in these dockets, by which we will make our evaluation of the HELP program, a lifeline electric rate plan. We also directed parties to file motions to dismiss (effectively eliminating consideration) of any of these preliminarily identified issues submitted in the parties' issues lists and the reasoning supporting dismissal of an issue so identified. By this means, we sought to delineate the issues which would be considered in these proceedings; hoping to assist the parties and the Commission in efficiently and effectively preparing and receiving evidence or information to be used in our evaluation.

In its Issues List (filed May 13, 2005), Light and Truth (L&T) made a number of claims or raised issues questioning the HELP program generally, Commission authority relating to implementing the HELP program and alleged statutory violations associated with the HELP program (the relevant details of L&T claims will be noted later in this order when we specifically address them). On June 24, 2005, L&T filed what it denominated a Petition to Revisit Specific Past Issues which indicates a similar desire to address these claims. On June 28, 2005, L&T filed various Motions to Dismiss consideration of specific modifications of the HELP program's structure, which other parties identify should be considered in the Commission's evaluation. L&T also filed what it denominated a Conditional Retraction of Motions to Dismiss (to retract its other Motions to Dismiss dealing with HELP program modifications) if other parties did not seek dismissal or removal from consideration of L&T's issues dealing with Commission jurisdiction and authority to implement the HELP program and the claim that the HELP program violates Utah Code §54-4-37.

Numerous parties have filed Motions to Dismiss addressed to exclude issues identified in L&T's Issues List and these parties' opposition to L&T's Motions to Dismiss. As discussed hereafter, we conclude that these parties' arguments are well founded and it is appropriate to dismiss and preclude consideration of many of the issues identified in L&T's May 13 Issues List and to deny L&T's Motions to Dismiss intended to preclude issues directed at proposed changes to the HELP program's structure or detail.

L&T'S CHALLENGED POSITIONS

L&T's Issues List contains a number of cryptic and rhetorically worded claims. These include claims that: 1. "the Commission is not specifically authorized to take citizen's money (property)....doing so through HELP violates the Constitutional principle of citizens' due process rights

and property rights [and]...also violates other Constitutional principles." (emphasis in original) ; 2. "the Commission violates the 'taxation without representation' principle;" 3. "HELP violates the Third Party Billing law;" 4. "Utah Code in general (and 54-4-37 in specific) supercedes Commission orders;" 5. "HELP is hidden from taxpayers;" 6. "HELP is not an integral part of utility operations;" 7. "HELP is pure charity;" 8. "HELP is outside regulatory processes;" and 9. "PacifiCorp falsely advertised that it was the source of HELP funds." (see, L&T's Issues List, pages 2 and 3).

The Division of Pubic Utilities (DPU), the Committee of Consumer Services (CCS), the Salt Lake Community Action Program and Crossroads Urban Center (collectively Utah Ratepayers Alliance or URA) Pacificorp, and the American Association of Retired Persons (AARP) (Opposing Parties) oppose consideration of these claims and make common argument that the issues identified by L&T are barred from Commission consideration under principles of stare decisis, res judicata or collateral estoppel. These arguments are based on prior Commission proceedings, including those in which similar challenges to the HELP program and the Commission's authority and jurisdiction were made by Paul F. Mecham. In these proceedings, the opposing parties note that L&T is an assumed business name for Paul F. Mecham, registered in July of 2001 and that Mr. Mecham occupies every organization position for L&T; essentially, L&T is the alter ego of Mr. Mecham. This characterization of L&T is not contested by L&T.

PRIOR COMMISSION DECISIONS

In Pacificorp's general rate case proceedings conducted in PSC Docket No. 97-035-01, the Commission issued its March 4, 1999, order wherein we concluded that the Commission possessed authority to adopt a lifeline electric rate. However, we did not implement a lifeline electric rate plan in that docket, as we sought further information upon which an effective program could be designed. In the next general rate case proceedings, in PSC Docket No. 99-035-10, we again reiterated, in our May 24, 2000, order, our conclusion that the Commission has jurisdiction and authority to implement an electric lifeline program. Our decision in Docket No. 99-035-10 was a rejection of the position of Paul F. Mecham, an employee of the DPU. Through our May 24, 2000, order, we directed the formation of a taskforce to gather information that could be used to develop or design an electric lifeline rate program that would be adopted by the Commission. No appeal was taken from our orders made in these two general rate proceedings to challenge our conclusions regarding our ability to implement an electric lifeline program.

With the information obtained from the work of the taskforce, an electric lifeline rate plan (with the acronym of HELP) was presented to the Commission in PSC Docket No. 00-035-T07. In that proceeding, the terms and conditions of the proposed HELP program were found to be consistent with the parameters we had established in the prior general rate case proceedings for an electric lifeline rate plan. The Commission approved and implemented the HELP program by its August 30, 2000, order. Since that time, the HELP program has been included and reauthorized in subsequent Pacificorp rate case proceedings, including our most recent case, PSC Docket No. 04-035-42, which concluded with our Report and Order issued February 25, 2005. No appeal has ever been taken from our final orders in these proceedings to challenge our jurisdiction or authority to create the HELP program, nor the specific terms and conditions of the HELP program and the associated schedules and tariff filed by Pacificorp to conduct or operate the HELP program.

Mr. Mecham, as a private individual, continued to oppose the HELP program. On May 7, 2003, Mr. Mecham filed a formal complaint making

the same claims L&T makes in this docket; the same challenges to the Commission's authority to create and implement the HELP program, the claim that the HELP program violates Utah's third party billing law (Utah Code §54-4-37) and asking for refunds of amounts paid in support of the HELP program. In our September 2, 2003, order for that complaint docket, PSC Docket No.03-035-09, we concluded that "the Electric Lifeline Program [HELP] was properly established and funded by this Commission. The charge is not a third-party charge subject to the provisions of Utah Code Ann. §54-4-37. Accordingly, the charges imposed on Complainant [Mecham] are lawful, and Respondent [Pacifcorp] is entitled to collect the same. The complaint must be dismissed." *Id.* Mr. Mecham took no appeal to challenge our conclusions and dismissal of his complaint.

RES JUDICATA

Referencing the Commission's conclusions and orders from the prior rate proceedings and Mr. Mecham's complaint case dealing with the HELP program, the Opposing Parties argue that the issues identified by L&T in its Issues List must be dismissed on principals of res judicata/collateral estoppel and stare decisis . We agree. Res judicata consists of two prongs: claim preclusion and issue preclusion. Claim preclusion "precludes the relitigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action." *Schaer v. State*, 657 P.2d 1337, 1340 (Utah 1983)(quotations omitted). Issue preclusion (often referred to as collateral estoppel) "arises from a different cause of action and prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit." *Id.* The principles of res judicata (both claim and issue preclusion) are applicable to administrative agencies and their decisions, *Salt Lake Citizens Congress v. Mountain States Telephone and Telegraph Co.*, 846 P.2d 1245 (Utah 1992), and "bars a second adjudication of the same facts under the same rule of law." *Id.*, at 1252. Because Mr. Mecham and L&T are the same, our previous decisions bar L&T's efforts to relitigate the same issues. The bar is not only for the specific claims previously raised by Mr. Mecham, but any additional claims Mr. Mecham now tries to raise through L&T. *See, Schaer, supra* ("issues that could have been litigated"). "To hold otherwise would give a petitioner a way to revive claims he had originally lost due to his own lack of diligence in failing to exhaust his administrative remedies." *Nebeker v. Utah State Tax Commission*, 34 P3d 180, XXX (Utah 2001). Hence, we will not consider claims relating to the Commission's jurisdiction or authority to create or implement an electric lifeline rate plan (and the HELP program in particular), claims that the HELP program is unconstitutional or violates constitutional "principles" or statutory provisions (specifically Utah Code §54-4-37, the third party billing provision) or claims concerning past payments and refunds.

STARE DECISIS

In addition to the preclusive affect of res judicata to L&T's issues, stare decisis also requires us to dismiss the issues going to the Commission's authority to implement the HELP program, third party billing and refunds . To paraphrase the Utah Supreme Court, "the Commission's [prior decisions concerning HELP, third party billing and refunds have] a binding legal effect under the doctrine of stare decisis. The adjudication of every case requires the application of one or more rules of law. . . . [which] necessarily governs all subsequent cases properly falling within the scope of the rule. This is so even when the particular facts in subsequent cases are different and res judicata does not apply." *Salt Lake Citizens Congress, supra*, at 1252. *See, also Steiner Corp. v. Utah State Tax Commission*, 979 P. 2d 357 (Utah 1999). As we have previously considered claims relating to our authority and ability to implement a lifeline electric rate program, the HELP program's relationship to Section 54-4-

37 and refunds of past charges, we will not consider these same claims sought to be revived by L&T Issues List or through the other document denominated "Submission of Consumer Petition" filed by Mr. Mecham on July 19, 2005.

REJECTION OF L&T'S SUBSTANTIVE CLAIMS

Beyond the application of res judicata/collateral estoppel and stare decisis, a number of the Opposing Parties make substantive argument on the Commission's authority and ability to craft the HELP program under Utah law, e.g., Utah Code §§54-4-1, 54-4-4 and 54-3-1. They also distinguish the HELP program from the third-party billing provisions of Utah Code §54-4-37 and show that that statute is not implicated. They also show that no refunds of HELP charges are warranted or available. *E.g.*, AARP's Memorandum in Opposition to Light and Truth's Motions, L&T's Petition to Revisit Specific Issues, and in Response to L&T's Brief. We agree with these positions. The Commission does have authority to implement an electric lifeline rate, specifically the HELP program; the HELP program does not violate Utah Code §54-4-37; and refunds of past HELP charges are not appropriate. We must again reject the substantive merits of L&T's arguments upon our previous bases and those made by the Opposing Parties in this docket.

FUTURE MODIFICATION OF THE HELP PROGRAM

We agree with the Opposing Parties' arguments that L&T's Motion to Dismiss consideration of the \$8 credit, Motion to Dismiss consideration of the \$1.85 million HELP program collection cap, and Motions to Dismiss consideration of changing the HELP program's design, monitoring and reporting parameters should be denied. The electric lifeline rate program was not intended to be static. The regulatory process expects that rates and the terms and conditions upon which electric service is provided by a utility are subject to review and scrutiny to ensure that rates and services continue to be just and reasonable. *E.g.*, Utah Code §§54-3-2, 54-4-2, 54-4-4 and 54-7-13. The HELP program anticipated that it would be reviewed and evaluated. Our prior orders (and parties' stipulation relative to HELP) required annual evaluations of the program. While we continue to apply our prior decisions concerning our authority to implement the HELP program, its interaction with the third-party billing statute and claims for refunds of past HELP program charges, the continuing merits of the HELP program (the specific terms and conditions) are subject to review, evaluation and possible modification. We will not address the matters that go to the past aspects of the HELP program or disagreements on how the HELP program should have been conducted. Review of the past, however, has value if it informs us of what the future may be. The intended evaluation of the HELP program is to reach a forward looking decision, what should apply in the future. On a going forward basis, the terms of the HELP program are subject to regulatory analysis and alteration to ensure that the program continues to be just and reasonable under Utah law. If modification of its terms and conditions is needed to reach that result, we must deny L&T's Motions that would preclude such alteration.

Wherefore, based on the arguments made and our consideration of them, we enter the following ORDER:

1. Light and Truth's Motion to Dismiss Consideration of Changing HELP's \$8 Credit is denied.
2. Light and Truth's Motion to Dismiss Consideration of Changing HELP's \$1.85 Million Cap is denied.
3. Light and Truth's Motion to Dismiss Consideration of Changing the Reporting Requirements of HELP is denied.
4. Light and Truth's Motion to Dismiss Consideration of Changing HELP's Program Design is denied.

5. Opposing Parties' Motions to Dismiss Light and Truth's Issue of Consideration of the Commission's jurisdiction and authority to implement the HELP program are granted.

6. Opposing Parties' Motions to Dismiss Light and Truth's Issue of Consideration of the HELP program's violation of Utah Code §54-4-37 are granted.

7. Opposing Parties' Motions to Dismiss Light and Truth's Issue of Consideration of the refund of past HELP program charges are granted.

DATED at Salt Lake City, Utah, this 1st day of August, 2005.

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
GW#45234