David R. Irvine (1621)
350 South 400 East, Suite 201
Salt Lake City, UT 84111
Telephone: (801) 363-4011

Alan L. Smith (2988)
1492 East Kensington Avenue
Salt Lake City, UT 84105
Telephone: (801) 521-3321

Attorneys for Petitioners

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE COMPLAINT OF GEORGIA B. PETERSON, JANET B. WARD, WILLIAM VAN CLEAF, and DAVID HILLER ON BEHALF OF THEMSELVES and ALL ALL OTHER MEMBERS OF THE CLASS DESCRIBED BELOW AGAINST SCOTTISHPOWER PLC and PACIFICORP, dba UTAH POWER & LIGHT CO., REQUESTING AN INVESTIGATION, and ENFORCEMENT OF THE COMMISSION'S ORDERS IN DOCKET NOS. 87-035-27 and 98-2035-04, and COMPENSATION FOR LOSSES.	Docket No. 04-035-01 MOTION FOR HEARING TO CLARIFY THE DOCKET'S PURPOSE

Petitioners hereby move that a procedural hearing be scheduled to clarify and resolve the purpose and intended consequence of this docket. To date, a series of technical conferences have been held and various reports have been submitted to the parties. No hearings have been held, no sworn testimony has been received into evidence, no discovery has been taken, and no express purpose of the docket can be discerned from the record.

If the purpose of the docket is to serve as an investigative docket, to determine what factors may have affected the 2003 Christmas power outage and what can be done

or what should be done to preclude similar outages in the future, then the creation of a formal record may not be necessary for those limited purposes. If, however, the intended purpose is to serve as an adjudicative docket, virtually nothing has been done to frame the docket in a manner which lawfully allows the Commission to adjudicate any facts or any question of law which bears upon the rights of the Petitioners to obtain redress. This docket was opened without a defined purpose or any clarifying direction ever formally approved by the Commission, beyond asking the Division to investigate what happened.

The Division and PacifiCorp then evidently agreed upon certain "terms of reference" under which they proceeded to assess the causes of the outage, but these "terms of reference" were never the subject of a hearing or formally approved by the Commission. The Petitioners intervened on April 24, 2004. By a letter dated May 14, 2004 (which was never provided to Petitioners),[1] PacifiCorp requested that the storm and its consequences be designated a "major event for exclusion from network performance reporting." The letter states that such a designation would also absolve PacifiCorp from any obligation to make "customer guarantee failure payments." [2]

When Petitioners sought to depose Richard Walje, Utah Power's CEO, in September, 2004, PacifiCorp objected that any deposition would have to be "within the

---

[1] The letter was not submitted by PacifiCorp's counsel of record; it was signed by Heidi Caswell for Bill Cunningham, an officer of the company. Moreover, it was not filed as a request for agency action, nor was a hearing ever held to determine whether the "terms of reference" should be expanded to include making such a determination, nor has the Commission ever formally directed that such a request be made an official object of the docket.

[2] The letter refers to Merger Condition 31 of the 1999 ScottishPower order. It should be noted that by its terms, the Condition states that "any dispute regarding the merits of the claim [the company's determination of major event status] will be resolved by the Commission." It is not clear that anyone has disputed PacifiCorp's "major event" determination – which is now moot, as shown below – but to the extent there may be a dispute in this docket, the Commission cannot decide the "merits of the claim" without a hearing and the taking of evidence.

terms of reference," and insisted that Petitioners clear their proposed questions of Mr. Walje with PacifiCorp in advance of any deposition. The "terms of reference" are stated at pages 35-45 of the company's Outage Report, but nowhere in them is a request that the Commission should make a "major event" determination as to the Christmas outage. The only "major event" issues stated in the "terms of reference" are: (1) Is the number and frequency of "major events" increasing? (2) Should the "major event" definition be revisited? (3) Should customers receive compensation/guarantee payments given the extent of inconvenience during long outages? [3]

Without any hearings, with no meaningful opportunity for public comment or comment by the Petitioners, the Commission has allowed this docket, informally and without a formal proceeding of any nature, to morph into whether the outage should be classified as a "major event." This is the entire thrust of the Division's recommendation to the Commission on September 21, 2004, with which the Committee agreed in its May 6, 2005 Memorandum to the Commission. Nevertheless, substantial questions still remain as to whether the outage was due to storm severity, which may (or may not) have exceeded not just design capacity, but operational capacity as a consequence of the utility's failure to adequately maintain its distribution system. Still unanswered, in any report, is a credible explanation of why the neighboring municipal systems, which experienced the very same storms, did not fail at anywhere near the level of PacifiCorp's massive system failure, and the Committee has recommended that further hearings be held on that issue. Nor has the Commission addressed whether

---

[3] The question does not specify the 2003 Christmas outage; it is asked of "long outages" generally, making no reference to the Christmas outage. Nor does the Williams Consulting Report make any such specific reference.

PacifiCorp's violation of its own tariffs regarding maintenance should preclude "major event" status.

Respectfully, Petitioners submit that certain significant legal questions attend any such determination, and until the Commission clarifies the purpose of the docket and frames it in such a way that adjudicative findings and conclusions can lawfully be made – allowing discovery, holding hearings, taking testimony and evidence under oath – any rush to declare the outage a "major event" on the basis of this docket as it is presently framed, violates the rights of the Petitioners and all injured customers. In the docket's present status, an adjudicative order cannot be sustained under the Commission's obligation to assure due process. *See, MCI Telecommunications v. PSC*, 840 P.2d 765, 772-73 (Utah 1992).

A glaring inconsistency in the Commission's proceedings to date in this docket, which raises problematic legal concerns, is that Electric Service Regulation No. 25 provides an individual customer-by-customer process for invoking the company's obligation to make customer guarantee payments. Under ¶ 1, The customer must apply within 30 days of an outage, and if he/she does, "the credit will be automatically applied to the customer's account." In ¶ 3, certain exceptions are stated, which the company then applies to the requests on a case-by-case basis. If the customer and the company disagree, then under ¶ 5, the company's Customer Guarantee Claim Center is to attempt a resolution. That failing, the dispute may be informally reviewed by a designated employee of the Division of Public Utilities under Electric Service Regulation No. 1, ¶ 9. In the past, PacifiCorp itself has made these "major event" determinations in accordance with Regulation No. 25. "Since 2000, PacifiCorp has declared only nine events out of 302 events that met the definition." [Outage Report, p. 267.] "Prior to 2000,

the company was not separately accounting for or reporting major events to state commissions. Since 2000, however, major events have been tracked, and selected events have been filed with the commission as 'declared major events.'" [Outage Report, p. 272.]

The first problematic legal question is a an unfair and unjust inconsistency in the Commission's treatment of the Petitioner's request to be certified as a class – which the Commission has previously indicated it frowns upon – versus the treatment PacifiCorp is seeking as to "major event" status. PacifiCorp has reported that 14,330 customers have received "goodwill payments of $1.9 million [Outage Report, p. 282]. In its May 14, 2004 letter, PacifiCorp asks that the Commission certify "major event" status for the Christmas outage, thereby relieving the Company of any obligation to pay customer guarantee compensation. This determination is, however, PacifiCorp's obligation under the tariff, not the Commission's. The unjust inconsistency is this: even though Regulation No. 25 creates an individual claim presentation and adjustment process, PacifiCorp is asking the Commission to provide a blanket class exemption from the obligation to make payments under Regulation No. 25. Therefore, because PacifiCorp is seeking to have this docket operate in a way to adversely affect a huge segment of its customers as a class, it is manifestly unjust for the Commission to deny those same customers the opportunity to proceed with their claims against PacifiCorp as a class for the losses PacifiCorp's negligence, violation of its tariffs and of Commission orders caused those customers. On that basis alone, it is incumbent upon the Commission to allow Petitioners to proceed as representatives of the class they seek to represent. If the Commission intends to allow PacifiCorp to invoke "major event" status as to all customers as a class, without affording the equivalent opportunity to all customers as a

class to show and recover their actual economic loss, then Petitioners respectfully request an opportunity to present evidence by affidavit that the conditions assumed by the Division in recommending "major event" status did not exist in the Petitioners' neighborhoods.

The second problematic legal question is this: PacifiCorp's request that the Commission declare the outage to have been a "major event" has already been mooted by the Commission's own prior decision in this docket. In the process, PacifiCorp has deftly tried to mask the precise nature of it's "goodwill payments," and a Commission rush to declare the outage a "major event" will do further violence to the company's disregard of its own tariffs.

After the initial public outcry over the Christmas outage and the Commission's statements that the outage was unacceptable service, the Committee of Consumer Services filed a petition on January 23, 2004 to extend the 30-day customer claim period pursuant to Regulation No. 25. That petition focused squarely on the customer guarantee payments allowed under Regulation No. 25, and noted that PacifiCorp had already declared the outage to be a "major event."

On February 27, 2004, without a hearing, the Commission issued an order denying the Committee's petition. The Commission's language is telling:

> On February 2, 2004, Utah Power announced that it would voluntarily provide good will compensation (as bill credits) to customers whose service was interrupted from the storm. Payments would be made to customers who filed their requests by February 26, 2004. The voluntary credits offered by Utah Power are similar in amounts to the compensation that would be provided under the Customer Guarantees; they are, however, less for those customers who experienced longer outages.
>
> The company argued [in a response to the Committee filed February 9, 2004] that its voluntary goodwill payments offer made the suspension unnecessary.

This order barred any further claim or payment by any customer under either Regulation No. 25 or PacifiCorp's goodwill offer. Since the 30-day application window for customer guarantee payments and goodwill payments has already come and gone, and because the Commission has already ruled that it will not extend that application period, there is no issue whatsoever under the customer guarantee provisions of Regulation No. 25 remaining for decision. Moreover, because PacifiCorp has already paid all of the amounts due anyone, which the Commission has declared to be "equivalent compensation" to the compensation provided in Regulation No. 25, the company is estopped from claiming that it faces any continuing exposure for customer guarantee payments thereunder.

Since PacifiCorp has already granted billing credits to those customers who applied for the guarantee payments, and because the Commission's ruling bars any further guarantee payment claims, it is not clear what purpose remains to be served by pursuing a declaration of "major event" status. PacifiCorp has already made that determination and acted accordingly. Respectfully, that question ought to be foremost on the agenda of a hearing set to clarify what this docket is all about.

However, if, as PacifiCorp sometimes seems to suggest in its pleadings, a declaration of the outage to be a "major event" is intended to have the general legal effect of absolving the utility from all liability whatsoever to its customers, even outside the limited scope of Regulation No. 25, that is something else entirely. If such a sweeping consequence is PacifiCorp's actual objective, then this docket is not at all postured to permit the Commission to enter a dispositive order which would cut off customers' rights to claim compensation outside the limited scope of Regulation No. 25, nor is it clear that the Commission could legally do so. With respect, unless a clarifying

hearing is scheduled, the Commission is unlikely to know whether this is the utility's objective.

If, in fact, it is the Commission's intent to grant PacifiCorp a blanket waiver from any and all liability to customers by declaring the outage to have been a "major event" which precludes the opportunity of customers to seek compensation from the utility for their economic loss without further hearings, then, respectfully, the Commission should make clear in any such order issued: (1) the nature of the record upon which such an order is based; (2) the nature of the evidence upon which such a finding and conclusion is predicated; and (3) a thorough discussion of the legal theories upon which the Commission assumes it may grant blanket absolution for a utility's misconduct.

This is not a lawyer's abstraction. If the Commission grants "major event" status for the outage, is it ruling that the utility bore no responsibility for what befell its customers – that PacifiCorp had fully discharged its service obligations to provide safe and reliable service, even though all indications are that the company eliminated its tree-trimming positions and vastly reduced what little trimming was done for a decade? Will the Commission excuse the utility from the obligations of its own tariffs to maintain <u>all</u> its lines and equipment, even in the face of sworn testimony that it had done no tree-trimming on secondary lines where the vast majority of the outages occurred?

The Commission's primary regulatory purpose is the welfare of the public. It isn't to shield the utility from liability for the utility's own negligence, willful misconduct, neglect of its business, or violation of the Commission's orders or the utility's duties to the public to provide quality service and reliable service. If any of these kinds of protections are what PacifiCorp intends from an interpretation of the

effects of Regulation No. 25, this Commission would do a grave disservice to the public and to the State if blanket absolution were to be granted on the state of the record as it now exists.

If PacifiCorp's data is accurate, 190,000 customers experienced "sustained" outage over the duration of the storm, and 80,000 were without power at the height of the storm. PacifiCorp has said that 2,700 customers were without power for "several days." The actual magnitude of the storm's customer impact has not been the subject of any hearings. Nevertheless, it is useful to work with some reasonable assumptions from the utility's data. The mere handful of named plaintiffs in Docket No. 04-035-70 can show an economic loss of between $75,000 and $100,000. Assume, for illustrative purposes, that the 2,700 customers who lost power for several days were, on average, families of four, and that they were without power for four days and nights. They would likely have had to pay at least $100 per night for a motel room. Their out-of-pocket cost just for lodging is $400. Add to that the expense of twelve meals for four persons. A useful proxy is $20 per day per person – an amount substantially lower than PacifiCorp's executive per diem. That's $320 for four persons for four days. If food and lodging were the only expenses incurred, that total for 2,700 customers would be $1,944,000. [4]

So far, none of the technical conferences (controlled by the utility and the Division) or reports have given much time, if any, to investigate the magnitude of customer loss caused by the outage. The goodwill billing credits paid so far are relatively small compared to the utility's potential liability. As a practical matter,

[4] PacifiCorp has reported that it paid $1.9 million as "goodwill credits" to 14,330 customers [Outage Report, p. 282]. That is an average of $132.58, even for the most severely affected customers.

however, there are likely tens of thousands more customers who experienced losses far greater than PacifiCorp has been willing to compensate. If that $720 per customer amount were expanded to apply to the 80,000 customers who lost power at the height of the storm (not considering that customers may have incurred other and greater expenses than food and lodging), the amount of loss is $57,600,000. If that proxy loss were halved and applied to the 190,000 customers who experienced "sustained outages," that's $68,400,000. As we have spoken with customers since the outage, we have been given loss estimates which range from a few hundred dollars to $8,000 and more. The above calculations may well prove conservative and low. If 100,000 customers could show losses of just $1,000 each, that would be $100,000,000.

The Petitioners' claims and issues have been on the record for more than a year. In that time, the Division has not exhibited any inclination to pursue them. No municipal utility companies have been requested to testify why their systems did not experience the kinds of failures as did PacifiCorp, even though they were visited with the same storms. No one has investigated whether the utility has violated the previous Commission orders when the decisions were made to eliminate Utah jobs and transfer corporate functions and customer service personnel to Oregon. The Williams Consulting Report states that between 1990 and 2002, PacifiCorp reduced its work force in Utah from 1,831 to 895 personnel – a reduction of 51% [Williams Report, p. 43]. It is doubtful that these reductions were approved by the Commission. No one has pursued whether the utility sought Commission approval or advised the Division that it was eliminating or severely reducing its tree-trimming operations. ScottishPower now claims, through PacifiCorp, that the Commission has no jurisdiction over the company or its operations as they relate to PacifiCorp. Indeed, ScottishPower doesn't even

maintain a registered agent in Utah, which appears to be another violation of the Commission's orders.

There has been no discussion in this docket of whether administrative penalties should be applied to PacifiCorp and ScottishPower if, in fact, the Commission's orders have been violated. There has been no inquiry at all into whether the utility's actions and decisions to reduce tree-trimming and line maintenance were a violation of the Commission's orders, nor whether customer frustration at being unable to communicate with the utility offices in Oregon was a consequence of PacifiCorp's moving customer service functions and personnel without Commission approval, in violation of Commission orders. If a single violation were established which tracked back to 1990 (fifteen years), the maximum fine would be $10,950,000. If five such violations were tracked back five years, the maximum fine would be $36,000,000. In *Beehive Telephone v. Public Service Com'n*, 89 P.3d 131 (Utah 2004), the Commission's brief argued that when a violation of a Commission order is found to have occurred, the imposition of a penalty fine is not a matter of discretion – such a fine is mandated by statute.

If PacifiCorp did eliminate Utah jobs in violation of Commission orders (that is, without specific Commission approval), the State of Utah has been damaged as well. Since no hearings have been held, the record is blank, but if the utility wrongfully eliminated 800 Utah jobs (it eliminated 936 between 1990 and 2002) which paid an annual salary of $30,000, that's an annual loss of $24,000,000. If the standard multiplier of five is applied to that salary loss, as a measure of lost economic impact to Utah, that's $120,000,000 per year for however many years it tracks back.

The Commission's role as the state-appointed guardian of the public welfare in utility regulation is front and center in the matter of the Christmas outage as never

before. Utah has never seen such a massive utility failure, and it is a miracle that no lives were lost. When the utility's service failure is so massive that thousands of customers cannot contact a live person at the utility's offices and must roam the streets in the height of a snowstorm to try to find a repair crew, that's a fair indication that the utility isn't meeting its basic service obligations.

The Committee has noted in its Memorandum dated May 4, 2005 that these storms were not the worst on record; the Christmas 2003 storm was only the fourth worst snowfall in the last ten years along the Wasatch Front. Williams Consulting classified the storm as only a one-in-ten-year storm [Williams Report, p. 3]. The Division has recommended that this was a "major event" because more than 10% of the customers were affected, the utility's depleted staff couldn't adequately cope, and the system design capacity was exceeded. However, there has been no adequate investigation of what constitutes adequate "system design" if the system cannot tolerate even a one-in-ten-year storm. In other words, how low will the standards be set in order to absolve PacifiCorp from liability to its customers? What the Division has failed to adequately explore is the impact on system capacity of years of neglected maintenance. The Division's circular logic suggests that "major event" status should be granted, but without considering the extent to which the utility had full control of the very conditions which overtaxed its system. Under the Division's scheme of things, if maintenance is sufficiently reduced and enough maintenance employees are eliminated, the defining criteria of a major event will necessarily and inevitably be achieved (irrespective of system design or operational standards) – every time -- with no penalty to the utility.

The Commission should clearly understand the ramifications of a Commission determination of "major event" status. The utility would prefer to never get to a hearing on the merits of the Petitioners' issues. It's to the utility's interest to bury them in a drawn-out game of procedural ping-pong. The customers are in a real dilemma. If the average loss is $760 or $1,000, few individuals will deem that amount worth spending $10,000 in costs and fees in a separate action to recover that level of loss. That isn't a judgment on the merit of their claim or the reality of what they suffered because PacifiCorp and ScottishPower unwisely cut jobs and maintenance to save money; it's just economic reality.

If the Commission places high value on the interests of utility customers, they benefit from a one-stop Commission remedy, rather than being tossed from pillar to post and back again. The 190,000 Christmas outage customers benefit from being represented before the Commission as a class in order to receive whatever justice the Commission can administer. Petitioners do not minimize the legal question about whether the Commission can award damages, and the cases say what they say. However, this is a rare and exceptional event. It affected 190,000 customers in the dead of winter, at Christmas. It may be that the Supreme Court will ultimately clarify whether the Commission can offer a one-stop customer compensation remedy in these extraordinary circumstances (and the Court has certainly implied such Commission authority in the *Atkin* cases); [5] but if the Commission is not inclined to extend that kind of time and money-saving benefit to those 190,000 customers affected by the massive outage, it should at the least give extremely careful consideration to whether its decision about "major event" status in this docket will have a preclusive effect on customers'

[5] Specifically, *Atkin Wright & Miles v. Mountain States Tel.*, 709 P.2d 330, 334-35 (Utah 1985).

general compensation claims if they are required to seek justice in another forum, and particularly if the language of a "major event" order gives PacifiCorp grounds to try to bootstrap a result the Commission might not intend. For these reasons, Petitioners request that a hearing be held to clarify the purpose of this docket and establish a schedule for further proceedings.

DATED this 19th day of June, 2005.

_____

David R. Irvine
Attorney for Petitioners

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing Motion to be served this 19th day of June, 2005, by mailing copies of the same, first-class U.S. Mail, postage prepaid, to the following parties in interest:

Gregory B. Monson, Esq.
Ted D. Smith
STOEL RIVES, LLP
201 So. Main St., Suite 1100
Salt Lake City, UT 84111

Natalie Hocken
PacifiCorp
825 NE Multnomah, Suite 1800
Portland, OR 97232

Michael G. Jenkins, Esq.
PacifiCorp
201 South Main St., Suite 2200

Dale F. Gardiner, Esq.
60 East So. Temple, Suite 1200
Salt lake City, UT 84111

Michael Ginsberg, Esq.
Heber Wells Bldg., 5th Floor
160 East 300 South
Salt Lake City, UT 84111

Reed Warnick, Esq.
Heber Wells Bldg., 5th Floor
160 East 300 South
Salt Lake City, UT 84111

Tom Forsgren, Esq.
2868 Jennie Lane
Salt Lake City, UT 84117

Arthur F. Sandack, Esq.
8 East Broadway, Suite 510
Salt Lake City, UT 84111

_____