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BEFORE THE UTAH PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE COMPLAINT OF GEORGIA B. PETERSON, *et al.*, FOR THEMSELVES AND AS REPRESENTATIVES OF A CLASS, AGAINST SCOTTISHPOWER, PLC, *et al.*, REQUESTING ENFORCEMENT OF THE COMMISSION'S ORDERS IN DOCKET NOS. 87-035-27 AND 98-2035-04, AND COMPENSATION FOR LOSSES.	Docket No. 04-035-70

RESPONSE OF PETITIONERS

TO MOTION OF PACIFICORP

TO DISMISS COMPLAINT

Petitioners make this response to the motion of PacifiCorp to dismiss the complaint filed in this docket.

PROCEDURAL BACKGROUND

In December, 2003, following a severe storm, approximately 190,000 customers of PacifiCorp dba Utah Power & Light Co. ("PacifiCorp" or the "Utility") suffered an

interruption of service. Approximately 80,000 subscribers lost power for an extended period. Seeking an explanation for the outage, the Utah Public Service Commission (the "Utah Commission" or the "Commission") opened docket number 04-035-01. The Commission apparently exercised executive powers, including the power of investigation, in opening this docket; the Commission may have directed PacifiCorp to file a report, and the Utah Division of Public Utilities (the "UDPU" or "Division") to respond.[1] Through these efforts, the Commission sought to understand what happened and why the failure of service was protracted, and, most important, looking to the future, which remedial efforts may serve to prevent a recurrence of these problems. The docket, as originally opened, did not purport to address questions of liability to customers, whether there should be an assessment of penalties for service failures, whether PacifiCorp's violations of previous Commission orders were a causative factor in the

[1] As an administrative agency, the Commission is invested with executive power to investigate and prosecute, legislative power to make rates and promulgate rules, and the power of adjudication to decide disputes between contestants. *See, e.g.,* Utah Code Annotated, section 54-4-2.

The genesis of Docket Number 04-035-01 is curiously obscure. There is no opening petition that presents a case for decision. Nor is there an order from the Commission, directing action by any party. Instead, at some point, perhaps by consensus reached among the Commission staff, the UDPU, and PacifiCorp, so-called "terms of reference" were formulated. These first appear (insofar as Petitioners have been able to determine) in the PacifiCorp "Utah Holiday Storm Inquiry -- 2003," at chapter 3, but there is no Commission order in which they have been adopted as controlling for purposes of the investigation. PacifiCorp argues that these terms of reference define the parameters of the Commission's investigation into the causes of the outage, but the Commission has not adopted them in a formal way to frame issues for any proceeding, adjudicative or otherwise. Indeed, this docket probably was opened under Utah Code Annotated, sections 54-4-1.5 or 54-4-2 and Commission Rule R746-100-3 A. 1. b., in which event, it expressly was not an adjudicative proceeding. And it would be backwards for the scope of inquiry to be shaped by PacifiCorp, if the docket, as it appears, is a reflection of the investigatory powers of the Utah Commission.

outage at issue, whether PacifiCorp and ScottishPower should be penalized in that event, whether either PacifiCorp or ScottishPower have been guilty of other violations of the regulatory regime, and, if so, what punishment would be commensurate with those offenses.[2]

Certain of the Petitioners filed a motion to intervene in docket number 04-035-01. They purported to represent a class, those customers injured by the outage, and, moreover, sought to raise questions of retrospective relief on account of PacifiCorp's alleged negligence, inadequate service, and past violations of certain orders of the Utah Commission. The request for intervention by these Petitioners would have expanded docket number 04-035-01 in both function and scope; it would have transformed an investigative proceeding into an adjudication of rights, and it would have required the Commission to evaluate, not only the causes of the outage and prophylactic measures, but also to render judgments whether private customers harmed by PacifiCorp's misfeasance should be awarded damages and whether any public interest offended by the Utility's malfeasance should be punished with penalties for contempt.[3]

PacifiCorp objected to intervention on such broad terms. The Commission agreed with this objection, and issued a ruling which, although allowing these Petitioners (for themselves, but not as representatives of a class of customers) to participate in the

[2] The Commission may have felt that, absent an exploration of causes, recompensing customers, the casting of blame, or other forms of retrospective relief would be premature.

[3] The petitioners' complaint in intervention sought administrative penalties against PacifiCorp and ScottishPower because both companies allegedly have been in violation of this Commission's orders approving the merger and acquisition of Utah Power, first for PacifiCorp in 1987 and again for ScottishPower in 1998.

dialogue of issues already referenced in that docket, nevertheless denied these Petitioners an opportunity to raise and be heard on questions of damages to customers and penalties for PacifiCorp.

Petitioners accordingly filed a petition and request for agency action (the "Complaint"), opening a new docket (this docket number 04-035-70) in which they raise, for themselves and as representatives of a class, those questions of compensation and penalties that others[4] were prevented from raising through intervention in docket number 04-035-01. The presentation of this Complaint is a matter of right under Utah Code Annotated, section 54-7-9(1)(b). PacifiCorp has made a motion to dismiss the Complaint, arguing various grounds. Petitioners will explain the appropriate standard for Commission review of the motion to dismiss, and then will refute each of these grounds, one by one.

STANDARD OF REVIEW ON THE MOTION TO DIMISS

The Complaint was filed pursuant to Utah Code Annotated, sections 54-7-9(1)(b) and 63-46b-6 and Commission Rule R746-100-3, requesting agency action and a formal adjudicatory proceeding. The motion of PacifiCorp to dismiss is governed by Commission Rule R746-100-1 C. and, hence, by Rule 12(b)(6) of the Utah Rules of Civil Procedure. Under that rule, all of the averments of the Complaint must be accepted as true, and the Complaint may not be dismissed unless PacifiCorp can show that Petitioners are not entitled to relief as a matter of law. *See, e.g., St. Benedict's Dev. Co. v. St.*

[4] It bears repeating that petitioners requesting intervention in docket number 04-035-01 are not identical to Petitioners seeking relief under the Complaint in this docket number 04-035-70.

Benedict's Hosp., 811 P.2d 194 (Utah 1991) (under Rule 12(b)(6), motion to dismiss admits alleged facts, but challenges right to relief based upon those facts).

Instead of arguing the motion on the merits under this standard, however, throughout its brief, PacifiCorp implies that the ruling of the Commission which denied intervention for some petitioners and on certain issues in docket number 04-035-01 has precedential, if not preclusive, effect on the Complaint in this docket number 04-035-70, attempting to bootstrap -- from denial of the request to intervene -- to dismissal of the Complaint. This argument is wrong-headed or misguided for the following reasons.

PacifiCorp suggests that the ruling on intervention in docket number 04-035-01 is "the law of the case," and, accordingly, should be applied in furtherance of dismissal of the Complaint in this docket number 04-035-70. In this regard, PacifiCorp cites 18B C. A. Wright, *et al*., FEDERAL PRACTICE AND PROCEDURE, section 4478 (2d ed. 2002) (hereinafter cited as "Wright"). As elaborated in Wright, *courts* are reluctant to reconsider rulings on *identical issues* already made in the *same case*. The law of the case doctrine is a rule of procedure that supports this reluctance, encouraging but not requiring courts, under these circumstances, to refuse to reopen a ruling, once made, absent a convincing or compelling need.

A recitation of the rule, however, shows that it has no relevance to the Complaint in this docket. First, as PacifiCorp's own authority makes plain, the law of the case doctrine has questionable application, if any, to administrative agency proceedings, since those proceedings, as in docket number 04-035-01, often entail a legislative or investigative, rather than any judicial, adjudicatory, function. Wright, section 4478, at 645.

Second, even where an adjudication is involved, the rule applies only when the identical issues already have been decided in the *same case*. Wright, section 4478, at 637-641. This docket number 04-035-70 obviously is not the same case as docket number 04-035-01. Indeed, precisely because some Petitioners were denied an opportunity, through intervention in the investigative docket, to obtain an adjudication of rights, private and public, for damages and penalties, these Petitioners initiated a new proceeding, by Complaint, raising those issues in this docket. *See, e.g., Society of Separationists v. Herman,* 939 F.2d 1207, 1213 (5th Cir. 1991) and *Harbor Ins. Co. v. Essman,* 918 F.2d 734, 738 (8th Cir. 1990), cited in Wright, section 4478, at 639 n. 8. *See also, State v. O'Neil,* 848 P.2d 694, 697-698 (Utah Ct. App. 1993).

Third, as noted above, the rule applies only when a tribunal is asked to revisit the *same issue* previously decided. The request for intervention and this Complaint do not present the same issue. A request for intervention, under Utah Code Annotated, section 63-46b-9, is addressed to the discretion of the agency, and the criteria for reviewing that request, under Utah Code Annotated, section 63-46b-9(2), are whether a petitioner's legal interests will be substantially affected, and whether intervention would be consistent with the interests of justice and the orderly and prompt conduct of the proceeding. These are procedural concerns and matters of administration; they do not look to the merits of a claim. The Complaint, on the other hand, was filed as a matter of right. *See,* Utah Code Annotated, section 54-7-9(1)(b). The Commission may not dismiss the Complaint as a matter of discretion or for the sake of flexibility or convenience in the administration of a docket; the Commission is required to adjudicate claims on their merits, after discovery, pre-trial proceedings, and trial, something the Commission may have been reluctant to do

in an investigative docket, and, in fact, has not done to date in docket number 04-035-01.[5] Wright, section 4478, at 649 ("Law of the case does not reach a matter that was not decided"); Wright, section 4478, at 657 ("A denial of discretionary review, at least in most court systems, does not imply decision of any of the questions unsuccessfully tendered for review"); *Field v. Mans,* 157 F.3d 35, 40-42 (1st Cir. 1998) ("A court that refuses to address an issue on procedural grounds cannot reasonably be said to have decided the merits of that issue"). *Cf. Smith v. Four Corners Mental Health Center,* 70 P.3d 904, 911-912 (Utah 2003) (deciding that governmental immunity is available to one party is not same issue, for law of the case purposes, as determining applicability of governmental immunity for another party).

Fourth, even if the Complaint and the request for intervention were in the same docket, raising identical issues, the law of the case doctrine, as applied in Utah, would not bar reconsideration on the merits. Insofar as docket number 04-035-01 may be an adjudicative as well as an investigative docket, multiple parties raising numerous issues still are present in that proceeding. Accordingly, the limitation on intervention, imposed by the Commission's ruling in docket number 04-035-01, is non-final in character, and may be reconsidered as a matter of course at any time under Utah's version of the law of the case rule. *See, e.g., Macris v. Sculptured Software, Inc.,* 24 P.3d 984, 992-993 (Utah 2001) (law of case does not apply to non-final orders); *Plumb v. State,* 809 P.2d 734, 738-739 (Utah 1990) (same). *Cf. LaMarr v. Utah State Dept. of Transp.,* 828 P.2d 535, 537

[5] Indeed, since the request for intervention called for an adjudication of rights, but was raised in an investigative docket, and since section 63-46b-9, by its terms, treats only adjudicative proceedings, these circumstances alone may explain the limitations placed by the Commission on petitioners' intervention.

n. 2 (Utah Ct. App. 1992) ("'[A] trial court is not inexorably bound by its own precedents,'" quoting from *Bennion v. Hansen,* 699 P.2d 757, 760 (Utah 1985)).

In short, the PacifiCorp argument respecting the "law of the case" is an invitation to error, beguiling the Commission to abdicate responsibility for making a decision on the merits by treating the outcome on the Complaint as a *fait accompli*. The Commission should resist this temptation, however, and review the Complaint on the merits, accepting the allegations of that pleading as true, as the law requires, and determining whether there is any legal reason, notwithstanding the truth of those allegations, to dismiss the Complaint.[6]

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[6] PacifiCorp also invites the Commission to defer consideration of the Complaint on the ground that, once there is a resolution in docket number 04-035-01, this resolution may have *res judicata* effect upon the claims of Petitioners. The Commission should decline this invitation for the following reasons. The question of *res judicata*, at best, is premature; there is no way, given our procedural context, to decide this question, and there is no timeline for when it might be ripe for decision. What is more, the likelihood that any ruling in docket number 04-035-01 will have preclusive effect on the Complaint is minimal or nil. The preclusive effect of agency actions -- under any circumstances -- is far from clear under Utah law -- as Petitioners are prepared to demonstrate, if and when this question actually comes before the Commission. At best, however, the Commission's orders may have preclusive effect only when the Commission acts in a quasi-judicial capacity, and it apparently is acting in an investigative rather than adjudicative role in docket number 04-035-01. Even if the Commission acts as a judicial body in docket number 04-035-01, a ruling in that proceeding, under conventional applications of the principles of preclusion, will not bar Petitioners' Complaint, since *res judicata* only operates as a bar on claims that were or could have been raised by the identical parties in the first case. Petitioners were denied the opportunity to raise their claims respecting damages and penalties in docket number 04-035-01, and, hence, whatever ruling is made there will not impact those claims in this docket. Petitioners also were denied the opportunity to serve as representatives of a class in docket number 04-035-01, and, hence, whatever ruling is made there will not impact our class in this docket -- or even individual parties in this docket who have not been joined in docket number 04-035-01.

PacifiCorp also suggests that the Commission should defer consideration of the Complaint, pending mediation of the issues therein by the UDPU under Commission Rule R746-100-3 F.1. The Commission's Rules, read carefully or with a modicum of

THE COMMISSION HAS JURISDICTION OVER SCOTTISHPOWER

Petitioners made ScottishPower a respondent in this proceeding for obvious reasons. The Complaint avers that in 1988 Utah Power merged with PacifiCorp and that in 1999 PacifiCorp was acquired by ScottishPower. The Complaint further avers that the Commission exercised jurisdiction over these reorganization proceedings in two dockets (87-035-27 and 98-2035-04), approving these reorganizations conditionally, and that PacifiCorp and ScottishPower were ordered to comply with these conditions; the conditions pertained to the manner in which the utility business would be conducted post-reorganization, including, among other things, capital outlay, corporate structure, employee retention, and quality of service. The Complaint finally avers that PacifiCorp and ScottishPower have not complied with these conditions, that they have violated the orders of the Commission, and that they should be fined accordingly and/or that the reorganizations should be rescinded as a form of alternative relief. These averments must be accepted as true for the purpose of resolving the motion to dismiss.

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practicality, however, do not require mediation before the Division in this case. Rule R746-100-3 F.1. requires mediation only for so-called "consumer complaints." But "consumer complaints" are designated as "informal proceedings" under R747-100-1 B., as distinct from the formal request for agency action and an adjudicatory proceeding reflected in the Complaint under R746-100-3 A. Moreover, the Complaint raises issues concerning PacifiCorp's contempt under the merger orders, questions of administrative penalties, rescission of the order permitting merger, and the like, which are not the typical stuff of a consumer complaint as obviously contemplated in the mediation procedure of R746-100-3 F.1. Finally, given the requirement under Utah law that mediators must be disinterested, and in light of the participation of the UDPU in the investigative docket (and its rush to judgment therein before any sworn testimony has been taken) and merger proceedings noted above, the ability of the Division to serve as a mediator in this case seems problematic at best. Under the Governmental Dispute Resolution Act, Utah Code Annotated, section 63-46c-103(6), mediation must be provided by a neutral person. This statute, which applies to agency mediations, is akin to the requirements of mediator neutrality in private disputes. Utah Code Annotated, section 78-31b-2(3).

The Commission has ample power, under the public utilities code, to grant the relief requested against ScottishPower in the Petitioners' Complaint. The Commission's general grant of subject-matter jurisdiction is found in Utah Code Annotated, section 54-4-1, which states in pertinent part: "The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction . . ." Utah Code Annotated, section 54-2-1(14)(a) defines the term "public utility" to include any "electrical corporation" which section 54-2-1(6) in turn defines to include "every corporation, cooperative association, and person, their lessees, trustees, and receivers, owning, controlling, operating, or managing any electric plant, or in any way furnishing electric power for public service or to its consumers or members for domestic, commercial, or industrial use, within this state. . ." In section 54-2-1(14)(c) the statute provides for the regulation of companies that, as part of their business, own or control a public utility by stating that "[a]ny corporation or person not engaged in business exclusively as a public utility as defined in this section is governed by this title in respect only to the public utility owned, controlled, operated, or managed by it or by him, and not in respect to any other business or pursuit."

Moreover, the Utah Code amplifies the general jurisdictional grant of sections 54-4-1 and 54-2-1 in specific sections of the utilities statute. The merger, consolidation, or combination of utilities is subject to Commission approval on a finding that such a reorganization is in the public interest. Utah Code Annotated, section 54-4-28. The acquisition of voting stock or secured obligations in utilities, as well as transfers of utility

properties, likewise are subject to Commission approval. Utah Code Annotated, sections 54-4-29 and 54-4-30. And Commission orders approving reorganizations of this sort may be altered or rescinded at a later time. Utah Code Annotated, section 54-7-13. Indeed, all utility contracts are subject to Commission approval, and "if the commission finds that any such proposed contract, purchase or other expenditure diverts, directly or indirectly, the funds of such public utility to any of its officers or stockholders or to any corporation in which they are interested, or is not proposed in good faith for the economic benefit of such public utility, the commission shall withhold its approval of such contract, purchase or other expenditure, and may order other contracts, purchases or expenditures in lieu thereof for the legitimate purposes and economic welfare of such public utility." Utah Code Annotated, section 54-4-26.

Finally, the Commission is empowered to enforce orders, including orders conditionally approving any merger or reorganization, by administrative fines and other means. Fines may be levied not only against any public utility, Utah Code Annotated, section 54-7-25(1), but even against "[e]very corporation, other than a public utility, which violates any provision of this title, or which fails to obey, observe or comply with any order, decision, rule, direction, demand or requirement, or any part or provision thereof, of the commission[,]" Utah Code Annotated, section 54-7-27.

Notwithstanding the extensive regulatory and enforcement power of the Utah Commission as outlined above, PacifiCorp contends that the Commission does not have subject-matter jurisdiction to assess fines or grant relief against ScottishPower, and that, accordingly, ScottishPower should be dismissed from these proceedings. The argument is as follows: (a) in order to assert jurisdiction over ScottishPower, that entity must be a

utility, (b) ScottishPower is not a utility, and, therefore, (c) the Commission has no jurisdiction over ScottishPower.

The argument, however, like most syllogistic reasoning, is built upon false premises, and therefore fails. The Commission's jurisdiction is not confined merely to utilities. ScottishPower, in any case, may be a utility within the meaning of the statute. And there is ample authority under the statute, in all events, to assess fines and afford relief against ScottishPower.

The Utah Code clearly states that the general jurisdiction of the Utah Commission extends at least to electrical corporations as public utilities and these entities, under our statute, are defined to include those who "control" or "manage" electrical plant in this state or who serve as holding companies for a public utility to the extent of the utility business. ScottishPower "controls" the operations of electrical plant in the State of Utah or is a holding company in relation to a public utility, and therefore is subject to regulation as a public utility within the meaning of our statute.[7]

But the general jurisdiction of the Utah Commission extends further than this; it empowers the Commission, not only to regulate public utilities, but also "to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction . . ." The business of a utility, as distinct from the utility itself, may include merger partners and holding companies and contract

[7] The motion to dismiss does not deny that ScottishPower is a "public utility," but coyly avers that it is not a "Utah public utility," following this averment with a series of unproven factual statements that ScottishPower does not own, control, or operate electric plant and the like. These unproven factual statements, of course, are procedurally inadmissible on a motion to dismiss under Rule 12(b)(6), and, in any event, beg the question whether ScottishPower is controlling electric plant through PacifiCorp.

proposals, and the Commission expressly is given supervisory jurisdiction over these business matters, even where that jurisdictional oversight may involve a review of benefits diverted to non-utility third parties such as officers, shareholders, and corporations in which either has an interest. This supervisory jurisdiction respecting utility business explains the Commission's orders affecting PacifiCorp in docket number 87-035-72 and ScottishPower in docket number 98-2035-04 in the first instance. Indeed, the adjudication of ScottishPower as a "public utility" or an entity engaged in the "public utility business" is implicit in the order conditionally approving the reorganization in docket number 98-2035-04, and this ruling is binding upon and may not be attacked collaterally by any party in that docket, including PacifiCorp by motion in this proceeding. Utah Code Annotated, section 54-7-14.

What is more, the Commission's orders in those dockets, commanding obedience to the merger conditions from PacifiCorp and ScottishPower, on the principle of continuing jurisdiction, may be enforced by fines against either or both of these companies in this proceeding. This follows from the express language of our penalty provisions, whether or not ScottishPower is deemed a public utility or otherwise engaged with PacifiCorp in the utility business within the meaning of our statute. Utah Code Annotated, section 54-7-28 (penalties may be levied against "[e]very corporation, *other than a public utility*, which violates any provision of this title, or which fails to obey, observe or comply with any order, decision, rule, direction, demand or requirement, or any part or provision thereof, of the commission[]") (emphasis supplied).[8]

[8] The continuing jurisdiction of the Utah Commission over ScottishPower is clear not only from the context of the reorganization proceeding in docket number 98-2035-04 but also from the text of the decree in that case. The order of the Commission, for example,

PacifiCorp (speaking as surrogate for ScottishPower) argues that, to the extent Petitioners may be entitled to relief in this proceeding, they have "ample recourse against Utah Power." This argument, however, ignores questions respecting fine allocations in this proceeding. The Commission may find that ScottishPower, rather than Utah Power, is the company against which the conditions of merger were imposed, or that, as the controlling party, ScottishPower has greater responsibility for non-compliance with the merger orders, and, accordingly, should bear a heavier burden in relation to the fines assessed. Indeed, SocttishPower's position on this issue is symptomatic of the conflict of interest and dereliction of duty that is implicit in all averments of the Complaint: ScottishPower attempts to escape responsibility and achieve dismissal, while using control to re-direct recourse against Utah Power in this proceeding, recourse that could reach 160 million dollars in administrative penalties. The Commission retains jurisdiction over ScottishPower and PacifiCorp to determine whether the conditions of reorganization in those earlier dockets have been violated, and to levy penalties and allocate relief, whether against ScottishPower or PacifiCorp, as the facts and circumstances may appear as this proceeding evolves.

Finally, Utah Power avers that there is no "need" to join ScottishPower as a party to this proceeding. The Commission, however, has jurisdiction, expressly granted, to treat the diversion of Utility resources to third party affiliates, even where those affiliates

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at one point, observes that, "Several Stipulation conditions express an acknowledgement of the statutes and Commission requirements pertaining to a regulated electric utility doing business in the state of Utah (among others, conditions 5, 8, 15, 39, 41, 46, and 49). The purpose of these conditions is to reduce ambiguity, to clarify and ensure the Applicants [including ScottishPower] recognize and understand their statutory obligation to abide by the Utah Code, rules, and Commission orders." 1999 Utah PUC LEXIS 44, at page 14.

may not be public companies in their own right, and the Complaint in this docket clearly raises such issues in relation to ScottishPower for review and adjudication. Utah Code Annotated, section 54-4-26. The Commission likewise has jurisdiction, expressly granted, to alter or rescind the reorganization orders, and this relief specifically has been requested as against ScottishPower in the Complaint on file. Utah Code Annotated, section 54-7-13. The Commission may not perform its statutory duty in considering this relief, absent the joinder of ScottishPower as a party to the reorganization that may be revoked.

PETITIONERS' CLAIMS FOR DAMAGES

ARE NOT BARRED BY REGULATION NO. 25

AS AN EXCULPATORY CLAUSE

OR LIMITATION ON LIABILITY

UNDER THE PACIFICORP TARIFF

PacifiCorp argues that Regulation No. 25, part of the Utility's tariff, is an exculpatory clause or limitation on liability for power interruptions, and, therefore, works to bar the claims of Petitioners for damages. This argument fails for no fewer than 5 reasons. Any one of these reasons, standing alone, is sufficient to defeat PacifiCorp's argument against damages based upon Regulation No. 25.

First. Regulation No. 25 Does Not Limit Liability; It Creates Additional Rights for Utility Customers. Please read Regulation No. 25, as quoted in the PacifiCorp Brief, at 10. Do you see any language that expressly limits PacifiCorp's liability in the event of a power outage, or that clearly makes Regulation No. 25 the exclusive remedy for utility customers when the power fails? Try again. Do you see this language now, on a second

reading? You don't, because it isn't there. Any words of limitation or exclusivity are in PacifiCorp's mind (and the argument in its Brief); they are not found in the text of the tariff. Indeed, far from limiting liability or excluding remedies, Regulation No. 25, by its terms, simply grants additional rights to the Utility's customers, the so-called Customer Guarantee Credit, which guarantee is compensated in a particular manner under specified circumstances.[9]

Second. Regulation No. 25 May Not Be Construed to Limit Liability or Exclude Remedies. Since Regulation No. 25 does not limit liability expressly, PacifiCorp perforce must argue that it does so impliedly -- that is, PacifiCorp must contend that, because Regulation No. 25 grants a particular right in the event that power is interrupted, this implicitly means that no other rights will inure to the benefit of customers on account of an outage of power. In other words, even though Regulation No. 25 doesn't say as much, PacifiCorp has interpreted the tariff, by using a negative inference, to mean that Regulation No. 25 is the exclusive remedy for Utility customers in the event of electric shortfalls. This construction of Regulation No. 25, however, does not square with *Josephson v. Mountain Bell,* 576 P.2d 850, 852 (Utah 1978), where the Utah Supreme Court held that utility tariffs should be construed strictly against the utility involved (tariffs are filed by utilities and serve utility interests; tariffs therefore are to be interpreted strictly against the utility involved). PacifiCorp's enlargement of utility

[9] Petitioners confess their inability to fathom this strange metempsychosis, taking a customer right and turning that right, by translation, into a PacifiCorp shield. The Commission may need to call upon expert testimony -- a certified metaphysician to untangle this Pythagorean knot.

protection, by implication or inference via Regulation No. 25, simply will not stand under this rule of construction.[10]

Regulation No. 25 does not excuse PacifiCorp from other violations of its own tariffs. It is clear from Electric Service Regulation No. 5(1)(a) that the Utility owns the lines leading to the customer's point of delivery, *i.e.*, the meter. The customer's only obligation under Regulation No. 5(2)(a) is to maintain in a safe condition all wires and

[10] This construction of Regulation No. 25 is improbable for the additional reason that the PacifiCorp tariff in fact contains another provision that speaks to the Utility's liability in the event of a power outage. Regulation No. 4, paragraph 4, provides that, "Unless otherwise specified in a service agreement, electric service is intended to be continuously available. It is inherent, however, that there will at times be some degree of failure, interruption, suspension, curtailment or fluctuations. The Company does not guarantee constant or uninterrupted delivery of Electric Service and shall have no liability to its Customers or any other persons for any interruption, suspension, curtailment or fluctuation in Electric Service or for any loss or damage caused thereby if such interruption, suspension, curtailment or fluctuation results from the following: (a) Causes beyond the Company's reasonable control including, but not limited to, accident or casualty, fire, flood, drought, wind, action of the elements or other acts of God, court orders, litigation, breakdown of or damage to facilities of the Company or of third parties, strikes or other labor disputes, civil military or governmental authority, electric disturbances originating on or transmitted through electrical systems with which the Company's system is interconnected and acts or omissions of third parties." PacifiCorp does not bring this tariff provision to the attention of the Commission. Why? There are at least 2 explanations. The first reason is because this provision undercuts the negative inference portion of the Regulation No. 25 argument. The second reason is because, contrary to that argument, which attempts to pre-empt liability by paying a *de minimis* "good will fee," the more specific and probably controlling language of Regulation No. 4 limits damages only to the extent that PacifiCorp is able to show that the power outage in our case was due to "[c]auses beyond the Company's reasonable control[.]" This standard, a more problematic, fact-specific standard is one which the information available to date suggests PacifiCorp cannot possibly meet. In other words, because Regulation No. 4, rather than Regulation No. 25, may control the question of limited liability in this proceeding, the reduction in employees, failure to trim trees for several years, and similar factors, as causes of the outage that certainly were within the Utility's "reasonable control," will be put at issue in this litigation. Having made this argument respecting "construction" of the tariff's provisions, Petitioners nevertheless reserve the right to contest the validity, effectiveness, and enforceability of Regulation No. 4 as an exculpatory clause or limitation on liability in any event.

lines on the customer's side of the meter. Regulation No. 6 (1) requires the Utility to install and maintain all lines and equipment on the Utility's side of the meter. Indeed, section (2)(a) specifies that the Utility owns all materials furnished and installed by the Utility on the customer's premises. Notwithstanding these explicit, tariff-required duties to customers, the actual practice of the Utility has been to fob off the responsibility for drop lines to its customers.

The Commission has received sworn testimony from a PacifiCorp customer in docket number 04-035-42 about that customer's personal experience with PacifiCorp in this respect. Mr. Darcie White, a retired vice president of the "old" Utah Power & Light, testified to his personal experience as a customer when his power and that of 10 neighbors went out, twice, on New Year's Eve, 2004. It failed again two days later. According to Mr. White:

> The cause of all this was tree growth which had gotten into and damaged the secondary conductors. This whole incident could have been avoided if the company had heeded the calls of our neighbors who, beginning at least two years ago reported arcing and sparking in the trees behind their houses. The most recent report of this condition was last summer. Until this incident, there had been absolutely no response of any kind from the company. This series of events did not seem to me to qualify as good service. In following up on it, I eventually received a telephone call from a company representative who, among other comments, told me that it's the company's policy to require customers to trim trees, any trees necessary to keep the secondaries in their yards clear of branches. This seemed so outrageous to me that I asked him to repeat it, which he did, and he added that the company would send someone to disconnect the line while the trimming was done if the customer requested it. [TR 48.]

This is a remarkable admission of abdication of PacifiCorp's tariff-required service obligation. Mr. White then identified 7 policy failures associated with that abdication, not the least of which is the hazard to customers [TR 49-50]. As the transcript indicates, this startling testimony evoked no questions whatsoever from the

UDPU or the Committee of Consumer Services [TR 51]. A PacifiCorp officer, Mr. Larson, then stated on the record:

> Number one, you're exactly right. The Company has not been trimming trees around service drops. Those costs, since we haven't been doing it, aren't included in customer prices. The second issue, I guess, really is whether or not that is something that the Company should be doing on a prospective basis, which is, I think, the heart of your issue that you're addressing with the Commission, and your recommendation is that the Company should have the responsibilities to trim those trees on secondary drops. [TR 52.]

The statement of Mr. Larson, an officer of PacifiCorp, is a shocking admission that the Utility has regularly and deliberately violated the service requirements of its own tariff, specifically the provisions of Service Regulations Nos. 5 and 6. If Regulation No. 25 were to be given the blanket exculpatory effect the Utility claims for it, it defies reason to accept that such an absolution from liability would shield PacifiCorp from claims resulting from a customer's electrocution while attempting to trim trees impeding the Utility-owned service drop, where Regulations Nos. 5 and 6 place that responsibility squarely on PacifiCorp and not on the customer.

Third. A Reading of Regulation No. 25 That Limits Liability and Excludes Remedies Is Contrary to the Utah Public Utilities Code. Title 54 of the Utah Code, which authorizes the filing of tariffs such as Regulation No. 25, also provides in section 54-7-33(1) that, "This title shall not have the effect to release or waive any right of action by . . . any person for any right . . . which may have arisen or accrued or may hereafter arise or accrue under any law of this state." Petitioners have a right of action to recover from PacifiCorp for negligence, breach of duty under the service requirements of the utilities code, and other wrongs. These rights may not be released or waived on account of any provision in Title 54, including the provision for tariffs. Hence, even if Regulation

No. 25 could be read, as PacifiCorp claims, to limit or eliminate rights, such a provision would be invalid in light of the mandate in section 54-7-33(1).

Fourth. A Reading of Regulation No. 25 That Limits Liability and Excludes Remedies Is Contrary to Other Laws. PacifiCorp makes much of those cases which hold that tariffs are laws, and apparently infers from these rulings (in still another *non sequitur)* that Regulation No. 25 works to limit liability and pre-empt remedies -- but the Utility doesn't explain whether or how this doctrine has application in our case.[11]

In truth, PacifiCorp must implement Regulation No. 25 in a manner that is not inconsistent with other laws in the State of Utah, including the laws which regulate the duty of a utility to provide quality service, and the laws which hold the utility liable, for negligence or on some other theory, when it acts in dereliction of this duty. This is the express teaching of *McCune & McCune v. Mountain Bell Tel.*, 758 P.2d 914, 917-918 (Utah 1988) which held that a provision in a telephone tariff to the contrary notwithstanding, that tariff could not be implemented in violation of the judicially created "jingle rule" of partnership law.

Indeed, even if we were to give Regulation No. 25 the force of a statutory enactment, the provision could not displace other statutes or common-law rules, such as

[11] By emphasizing the status of tariffs as "laws," PacifiCorp may hope that Regulation No. 25 will acquire a nimbus of sanctity and the infallibility of dogma. But laws, like contracts, are built from words and must be interpreted all the same. PacifiCorp proves as much by re-constructing Regulation No. 25 -- from a customer right to a tortfeasor's haven. Most cases that treat tariffs as a form of law are merely an elaboration of the so-called "filed rate doctrine," a doctrine which is designed (ironically in this case) to prevent utilities from rate discrimination and other violations of utilities law. The *Josephson* holding, noted above, that utility tariffs are filed by utilities "and thus mainly serve their own interests," and accordingly should be construed strictly against those same utilities, is an appropriate palliative for PacifiCorp's emphasis on the tariff as law.

those bearing upon negligence liability, unless a purpose to do so were "clearly expressed" in language "'unambiguous . . . and peremptory.'" *Hoffman v. Wisconsin Elec. Power Co.,* 664 N.W.2d 55, 62-63 (Wis. 2003) (citation omitted). But Regulation No. 25 does not purport to sweep away the well-established right of customer suits against utilities for negligence and damages, a right that has been recognized for over 100 years; the words of the tariff do not even approach this meaning; they surely do not express that purpose "clearly," or in terms that are "unambiguous" or "peremptory."

Fifth. Even If Regulation No. 25 Could Be Construed as a Limitation on Liability, This Would Make the Tariff Void As Against Public Policy. As noted above, the terms of Regulation No. 25 cannot be stretched to create a limitation on liability. But if they could be read as an exculpatory clause, would such a clause be valid and enforceable? The Utah Supreme Court, long ago, in *Wertz v. Western Union Tel. Co.,* 27 P. 172 (Utah 1891), answered, "No," to this query.

In *Wertz,* a telegraph company negligently failed to deliver a message. When sued for damages, the company argued that an "exculpatory clause" in the service contract relieved it from liability. Chief Justice Zane, speaking for the Court, wrote: "This brings us to the question, did the contract exempt the defendant from liability for the negligence of its agents? If the senders of dispatches and telegraph companies were the only parties interested in such transactions, they might make such contracts. The public has an interest in the telegraph service. The property employed belongs to the company, as well as the proceeds of the business; but the property is used and business is conducted for the accommodation and convenience of the public. Public policy forbids contracts by telegraph companies exempting them from the consequences to others of the

negligence of their agents in transmitting messages for their [customers]. Such liability promotes promptness, skill, and care in that branch of business. Such companies may by contract exempt themselves from loss or damage to others not from their own fault. Notwithstanding such conditions, the companies are liable for ordinary negligence in transmitting dispatches."

The views expressed in *Wertz* were upheld in *Brooks v. Western Union Telegraph Co.,* 72 P. 499, 501 (Utah 1903), and, insofar as Petitioners have been able to ascertain, these views never have been overruled by any subsequent decision of our Court. They also reflect the majority view in other jurisdictions. *See, e.g., Southwestern Pub. S. Co. v. Artesia Alfalfa G. Ass'n,* 353 P.2d 62, 68-71 (N. M. 1960) (collecting authorities; holding that a public service commission had no power by rule, regulation, or otherwise to displace the law of negligence, and ruling further that a public utility could not do this by exemption in a tariff: "The rule is well established that a provision in a contract seeking to relieve a party to the contract from liability for his own negligence is void and unenforceable, if the provision is violative of law or contrary to some rule of public policy. Under this limitation the courts are in complete accord in holding that a public service corporation, or a public utility such as an electric company, cannot contract against its negligence in the regular course of its business, or in performing one of its duties of public service, or where a public interest is involved. [Citations omitted.]").

In summary, PacifiCorp's construction of Regulation No. 25 is far-fetched and contrary to precedent and sound public policy. The language of the tariff simply does not mean what PacifiCorp claims. This interpretation, moreover, is improbable in view of the requirement that tariffs must be construed strictly against utilities as articulated in

Josephson. Even if Regulation No. 25 could be distorted to create a limitation on liability or an exclusion of remedies, that meaning would be impermissible in view of a panoply of statutes and cases, section 54-7-33(1), *McCune, Hoffman, and Wertz,* all of which deflect the power of a tariff to displace a common law right of action, such as breach of duty or negligence, or deny that power on the ground of public policy. The rationale of *Wertz* remains compelling, even today; public utilities, which must be managed and operated in the public interest, have a duty to provide efficient, quality service; a reduction in remedies to customers or a limitation on liability to the utility is an incentive to be lax in the performance of that duty, and utilities, especially those under investigation for shoddy performance, should not be allowed such incentives.

PETITIONERS' CLAIMS FOR COMPENSATORY DAMAGES

ARE NOT OTHERWISE BARRED

PacifiCorp argues that, even if Regulation No. 25 does not exclude liability in connection with the power outage, the Commission does not have jurisdiction or power to award damages to Petitioners, either as individuals or as a class. Petitioners, however, believe that the Commission has primary jurisdiction to resolve issues that bear directly upon the question of damages, and that this jurisdiction should be exercised by the Commission at this juncture, whether or not, at a later time, Petitioners and the class of customers they represent are forced to proceed in district court for money damages or other monetary relief. The Commission's power to review issues respecting the Utility's failure and consequent damages, in part, is found at Utah Code Annotated, section 54-4-2, which states:

> Whenever the commission believes that in order to secure a compliance with the provisions of this title *or with the orders of the commission or that it will*

> *otherwise be in the interest of the public*, an investigation should be made of any *act or omission to act, or of anything accomplished or proposed*, . . . or of any service or facility of any public utility, it shall investigate the same upon its own motion . . . and shall makes such *findings and orders as shall be just and reasonable with respect to such matter*. (Emphasis added.)

PacifiCorp attempts to blunt the scope of section 54-4-2 by reference to three Utah cases; these cases are inapposite, however, and do not purport to construe section 54-4-2. *American Salt Co. v. W.S. Hatch Co.*, 748 P.2d 1060 (Utah 1987) construes Utah Code Annotated, section 54-7-20, which only applies where reparations have been sought for overcharges in excess of a tariff. That has no application to the petition filed herein, and it does not speak to compensatory damages.

Similarly, *Basin Flying Service v. Public Service Commission,* 531 P.2d 1303, 1305 (Utah 1975) also does not address compensatory damages; it simply restates the general principle, which is not in dispute, that the Commission "has no inherent regulatory powers, but only those which are expressly granted *or which are clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it*." (Emphasis added.) Nor does *Hi-Country Estates v. Bagley & Co.,* 901 P.2d 1017 (Utah 1995) apply in this argument; it does not construe section 54-4-2 or bar damage claims. It is significant that none of these cases even refer to compensatory damage claims.

The Utah test for primary jurisdiction over complaints such as Petitioners' for compensatory damages against utilities is set out in *Atkin Wright & Miles v. Mountain States Tel.,* 709 P.2d 330 (Utah 1985), which relies on an Arizona case, *Campbell v. Mountain States Tel. & Tel. Co.,* 586 P.2d 987 (Ariz. App. 1978). Normally, claims for damages fall within the jurisdiction of district courts; however, in *Atkin Wright & Miles*, the Utah Supreme Court held:

> Public utilities have no wholesale immunity from the duties imposed by tort law generally. A utility's actions which give rise to tortious or contractual liability *and which do not call in question the validity of orders of the PSC or trench upon its delegated powers are delegated to the district court*. (Emphasis added.)

Citing *Campbell*, the Utah Supreme Court continued:

> The [Arizona] court held that if the complaint raised issues concerned only with the manner and means of providing utility service, the Arizona Corporation Commission (Arizona's public utilities commission) had primary jurisdiction over the matter. However, because the dominant issues raised in the complaint sounded simply in tort and contract, the jurisdiction of the trial court was sustained. The Arizona court stated:
>
> *This case . . does not involve the question of whether [the telephone company] is adequately providing telephone service to the public. Further, [the plaintiff] is not seeking injunctive relief to establish broad public doctrines, or rights to service or levels of service*. (Emphasis added.)
>
> Thus the district court had jurisdiction to decide Atkin's claims that Mountain Bell had negligently listed Atkin's phone number in the yellow-page directory and had interfered with Atkin's prospective business relations by negligently installing, maintaining, or operating a malfunctioning intercept. The district court's adjudication of these claims does not interfere with the PSC's powers of regulation.

The power outage at issue here is an unprecedented failure of the state's major electric utility, involving tens of thousands of customers at a time of year when a sustained power outage can be life-threatening. *Atkin* held that district courts have jurisdiction of a utility's tortious or contractual liability where the claims do *not* call into question the validity of orders of the Commission *or* whether the utility is adequately providing service to the public.

A more problematic case, not cited by PacifiCorp, is *McCune & McCune v. Mountain Bell Tel.*, 758 P.2d 914, 916 (Utah 1988). In that matter, the utility attempted to collect an unpaid partnership telephone bill by disconnecting one of the partners' home telephone lines. The disgruntled partner filed a district court case to enjoin the utility

form disconnecting service and for damages. The parties stipulated to a stay of the court action to allow the partner to file a complaint with the Commission to determine the validity and applicability of the tariff. The Supreme Court wrote: "It is the district court, not the Commission, that has jurisdiction to consider claims for damages for wrongful disconnection or other torts committed by a public utility."

The case, however, did not construe section 54-4-2; it only construed section 54-7-20. Further, Justice Zimmerman, writing the *McCune* opinion, did not address the contrary language of Justice Stewart in *Atkin*. It is significant that no previous Utah case has considered what amounts to a broad, systemic failure of a public utility adequately to provide the service for which it has been certificated – particularly where, as here, a core issue is whether the utility violated previous Commission orders and its own tariffs in a manner which directly caused the service failure. It has already been established, if not admitted, that the Utility virtually ceased to do any significant amount of tree trimming for several years, and that the storm involved was not the most severe to have hit the area within the past years. This is not a matter of simple negligence or mistake, which caused a customer's phone number to be mis-printed in or omitted from a directory. This is not about one customer's wrongful service disconnection.

The Petition herein goes to the Utility's service failure to thousands of customers in three counties for multiple days. This, on its face, is the very "adequate service, level of service" condition discussed by the Supreme Court in *Atkin.* If the Supreme Court did not intend for the Commission to have authority under section 54-4-2 to make damage awards in these kinds of extraordinary instances, there would have been no reason for the

reference to and discussion of *Campbell v. Mountain States Telephone & Telegraph Co.* to have even been made in *Atkin*.

There should be no mistake about the effect of a decision by the Commission that it cannot award damages here. It will mean that all of the thousands of customers who *did* sustain loss and damage are on their own to file actions for recovery in the district courts and re-litigate the very issues which PacifiCorp seeks to have the Commission forever bury under a *res judicata* theory. They will be required to retain counsel, pay filing fees, endure the blizzard of motions designed to wear them down before they can ever get to a hearing on the merits – and then, if they ever get there, they will be confronted with the argument -- that the Utah Commission has primary jurisdiction because the Utility's quality of service is at issue, an argument that will force the customer claim into a ping-pong match between Commission and court -- or with the argument that the decision of this Commission to treat the outage as a major event or act of God precludes any finding of fault by the district court -- in either of which events their cases will be dismissed. Such an outcome is a disservice to the public interest and to the customers whose interests the Commission is charged to protect.

The Commission is not only *expressly* charged under section 54-4-2 to ensure that a utility complies with its orders, but it is also *expressly* authorized to make such findings and orders after an investigation as are "just and reasonable with respect to any such matter." The relief sought by Petitioners for themselves and the class falls squarely under the express authority of section 54-4-2.

The allegations made in the Petition which give rise to the claims for compensatory damages to the class are *not* within the exclusive jurisdiction of the district

courts precisely because the questions of non-compliance with Commission orders and overall inadequacy of service within the terms of PacifiCorp's certificate of public convenience and necessity are solely within the jurisdiction of the Commission. Indeed, the claims for damages cannot be adjudicated without a detailed review and interpretation of the merger and sale orders of the Commission, whether the utility has fully complied with those orders, as well as an evaluation of the adequacy of the Utility's discharge of its service responsibilities to customers. These kinds of issues are matters within the special province of the Commission, and section 54-4-2 grants specific authority to the Commission to make "such findings and orders as shall be just and reasonable with respect to any such matter." Just and reasonable relief necessarily includes compensatory damages if the investigation shows that the power outage was either caused or exacerbated by the Utility's violation of Commission orders or failure adequately to maintain its distribution system.

If the Commission is concerned about the possibility that its resources may be burdened in the process of adjudicating damage claims, it may avail itself of the same procedure to which a court would likely resort in this matter: it may appoint a special master under Rule 53 of the Utah Rules of Civil Procedure. In any event, the proper focus should be on facilitating a process where the claims of the utility customers can be expeditiously heard and resolved at the least expense and burden to the customers. It is only to PacifiCorp's advantage for the customers to be shunted from forum to forum and back again if this matter becomes a jurisdictional football in which a customer whose injury due to the outage may have been $6,000 must expend $10,000 in the process of seeking recompense.

PETITIONERS' CLAIMS FOR THE

IMPOSITION OF PENALTIES UNDER SECTIONS 54-7-25(1) and 54-7-27

ARE NOT BARRED BY THE EXISTENCE OF REGULATION NO. 25

Petitioners' Complaint asks the Commission to assess fines against PacifiCorp and ScottishPower for non-compliance with the reorganization orders in docket numbers 87-035-27 and 98-2035-04. As noted above, the Complaint avers that in 1988 Utah Power merged with PacifiCorp and that in 1999 PacifiCorp was acquired by ScottishPower. The complaint further avers that the Commission exercised jurisdiction over these reorganization proceedings in two dockets (87-035-27 and 98-2035-04), approving these reorganizations conditionally, and that PacifiCorp and ScottishPower were ordered to comply with these conditions; the conditions pertained to the manner in which the utility business would be conducted post-reorganization, treating, among other things, capital outlay, corporate structure, employee retention, and quality of service. The complaint finally avers that PacifiCorp and ScottishPower have not complied with these conditions, that they have violated the orders of the Commission, and that they should be fined accordingly in amounts as high as 160 million dollars. These averments must be accepted as true for the purpose of resolving the motion to dismiss.

PacifiCorp argues that these claims for administrative punishment are barred by Utah Code Annotated, Section 54-7-25(1), when this statute is read in conjunction with Regulation No. 25. Section 54-7-25(1) provides that, "Any public utility that violates or fails to comply with this title or any rule or order issued under this title, in a case in which a penalty is not otherwise provided for that public utility, is subject to a penalty of not less than $500 nor more than $2,000 for each offense." PacifiCorp notes that, under this

provision, no fine may be imposed against a public utility where a "penalty" is "otherwise provided for that public utility," and then contends that Regulation No. 25 does "provide otherwise" for a "penalty" in this case, vitiating application of Section 54-7-25(1).

Regulation No. 25, as quoted in the PacifiCorp brief, on either cursory or careful review, does not provide for recourse of any sort in the event that the Utility violates a merger order of the Utah Commission. And although Regulation No. 25 does address failures of service under certain, narrow circumstances, it does not provide for a "penalty" in those events. Indeed, Regulation No. 25 purports to grant customers an additional right, namely a "Customer Guarantee Credit," allowing them to submit a "claim" for "compensation" if the Utility is unable to restore power within 24 hours of a particular outage. Regulation No. 25 provides for a "credit" of up to 50 dollars to a customer account, as a form of "compensation," for failure of the Utility to honor the "guarantee" to restore power with 24 hours of a particular outage. This grant to customers is not a penalty to PacifiCorp within the meaning of section 54-7-25(1).[12]

PacifiCorp's argument in this regard mischaracterizes the Complaint and misreads Section 54-7-25(1). The Complaint seeks fines for non-compliance with the merger orders and other infractions, not for the power outage. Regulation No. 25 says that the Utility will pay 50 dollars as liquidated damages if it does not keep a promise to restore power within 24 hours of a particular outage; it does not address a violation of merger

[12] PacifiCorp also argues, "[a]s a factual matter," that the imposition of penalties is inappropriate "because Utah Power has not violated Title 54 or any rule or order issued under that title." This unsubstantiated assertion obviously is inappropriate in the context of a motion to dismiss under Rule 12(b)(6) -- where questions of fact are not at issue -- and where all averments in the Complaint must be taken as true. The Complaint, as noted above, does aver that PacifiCorp violated the merger orders (among other infractions) which were issued under the utilities code.

orders or other infractions of the utilities code. For this reason alone, Regulation No. 25 simply does not apply to the question of fines in our case.

Even if Regulation No. 25 were distorted to reach the conditions of merger, it does not "otherwise provide" any "penalty" for violations of the merger orders. The penalties of Section 54-7-25(1), on one hand, are imposed by the Commission, as a governmental agency, when there has been a violation of law and in order to punish that violation or coerce compliance with a regulatory agenda. This occurs regardless of loss to private parties who may suffer injury as the result of a particular offense.[13] Regulation No. 25, on the other hand, was a right voluntarily created by PacifiCorp in favor of customers when the tariff was issued, as a "guarantee" against the interruption of service; it was not imposed upon PacifiCorp by the Commission as punishment for the violation of a law. *See, Josephson v. Mountain Bell*, 576 P.2d 850, 852 (Utah 1978) (tariffs are filed by utilities and serve utility interests; tariffs therefore should be interpreted strictly against the utility involved) The right of guarantee isn't even administered by the Commission, since customers must make a claim for credit to PacifiCorp which decides, in the first instance, whether that credit should be granted to a customer.

Hence, PacifiCorp's construction of the interface between section 54-7-25(1) and Regulation No. 25 could be viewed as a form of masochism, a utility that ties itself to a whipping post and engages in self-flagellation. Or it could be seen as wishful thinking, a utility that, supplanting the regulators, and without regulatory oversight, decides whether

[13] Indeed, the penalties are quasi-criminal in character, a conclusion supported by their juxtaposition to the misdemeanor provisions of the utilities code. *See,* Utah Code Annotated, sections 54-7-26 and 54-7-28.

and to what extent punishment should be inflicted at all. But it is not what the legislature meant by the term "penalty" when enacting section 54-7-25(1).[14]

What is more, the guarantee in Regulation No. 25 is compensatory not punitive in purpose; it is designed to recompense the customer for a loss of service, even though the customer does not have to prove his 50 dollars worth of loss; it is not a punishment for outlawry or coercion for compliance with utility regulations. The law distinguishes between remedies in the nature of compensation for private victims, and punishment in the form of fines for the vindication of a public interest. This distinction is marked by the language used and the purposes to be served. The language of "guarantees," "claims," and "damages" denotes compensatory relief for private parties. The language of "penalties" and "fines" is aimed at the vindication of a public purpose. Regulation No. 25 does not speak of "penalties" or "fines;" it addresses "claims" for "compensation." Section 54-7-25(1) does not redress loss to private parties; it punishes malefactors of the public interest.

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[14] The means for administering the "Customer Guarantee Credit" show clearly that Regulation No. 25 does not impose a "penalty." In order to receive remuneration under Regulation No. 25, a subscriber must file a claim with PacifiCorp, and PacifiCorp then decides whether to allow the claim and, if allowed, proceeds to pay it. In other words, PacifiCorp is the arbiter of entitlement to payment of these claims -- at least in the first instance and absent a suit by the subscriber for breach of tariff. The decision to impose a penalty under a regulatory statute, however, is not a matter for private determination; it is a governmental prerogative. Our statute does not allow utilities to decide, even in the first instance, whether they should be "penalized" for misconduct. To hold otherwise would raise serious questions, questions of constitutional import, under the non-delegation doctrine. *Cf. Stewart v. Utah Public Service Com'n*, 885 P.2d 759, 774-779 (Utah 1994) (giving electric utility veto power respecting incentive rate regulation plan, a plan that should have been administered by Commission in public interest, was unconstitutional delegation of legislative power).

Finally, PacifiCorp's argument under Regulation No. 25 and Section 54-7-25(1) will not exonerate ScottishPower in any event. This is because the tariff provisions of Regulation No. 25, even if they do "otherwise provide" for a "penalty," as argued by the Utility, apply only to the promulgator of the tariff, PacifiCorp. There is no "penalty" "otherwise provided" by Regulation No. 25 within the meaning of Section 54-7-25(1) that will serve as an escape hatch for the benefit of ScottishPower. In the event, ScottishPower would remain liable to the imposition of penalties pursuant to either Section 54-7-25(1), if it is a public utility within the meaning of that statute, or under Section 54-7-27, as a corporation that is subject to the enforcement jurisdiction of this Commission, whether or not a public utility within the meaning of the code.[15]

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[15] Section 54-7-25(1), which applies to public utilities, provides an exception for the imposition of penalties "in a case in which a penalty is not otherwise provided for that public utility[.]" Section 54-7-7, which applies to corporations which are not public utilities, provides an exception to the imposition of penalties "in a case in which a penalty has not hereinbefore been provided for such corporation[.]" The language of these sections, "not otherwise provided" and "not hereinbefore . . . provided," may be read in conjunction with the language of section 54-7-23(2). That statute, which regulates the imposition of penalties generally under the utilities code, provides that, "All penalties accruing under this title shall be cumulative and a suit for the recovery of one penalty shall not be a bar to or affect the recovery of any other penalty or forfeiture, or be a bar to any criminal prosecution against any public utility, or any officer, director, agent or employee thereof, or any other corporation or person, or be a bar to the exercise by the commission of its power to punish for contempt." The mandate in section 54-7-23 that all penalties under the utilities code "shall be cumulative," absent some rationale for reconciliation, undercuts forcibly the PacifiCorp argument that the tariff penalty (if it be a penalty) displaces penalties pursuant to section 54-7-25(1). There are two ways in which these statutes may be read harmoniously together, neither of which assists PacifiCorp in this proceeding. The first uses the "in a case" language of Sections 54-7-25(1) and 54-7-27 to achieve consistency with Section 54-7-23. In other words, if a penalty already has been imposed in a particular case, then another penalty may not be superimposed for the same conduct in that same case. This preserves the cumulative remedies mandate of section 54-7-23 while honoring the double jeopardy protections of sections 54-7-25(1) and 54-7-27. This manner of harmonization fits easily with the "hereinbefore . . . provided" language of section 54-7-27 and is not inconsistent with the "otherwise provided" language of section 54-7-25(1) -- especially when the focus remains on the "in

In short, there is no duplication of remedies if both Section 54-7-25(1) of the utilities code and Regulation No. 25 of the utility tariff are applicable and applied in this case. They are distinct remedies, each serving a different purpose. PacifiCorp's argument otherwise should be overruled.[16]

PETITIONERS MAY PROCEED BY CLASS ACTION

PacifiCorp argues that Petitioners may not proceed in this docket as representatives of a class. The support for this argument is a series of irrelevant, conclusory, and unsupported statements.

PacifiCorp contends that the ruling limiting petitioners' intervention in the investigative docket is a bar to class proceedings in this docket, but, as argued under the standard of review section of this brief, this "law of the case" analysis is simply inapposite.

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a case" language of both sections. The second reads the "otherwise provided" and "hereinbefore . . . provided" language of these sections to mean that, in the event there is another penalty arguably available for application in a given case, the Commission may select one but not both remedies for imposition in that case. On this view, after the facts supporting the violation were determined, the Commission would formulate criteria for penalty selection and would apply the penalty best suited for the particular case. This approach to interpretation and application of sections 54-7-25(1) and 54-7-27 is premature at this time, since there is no factual development on the present record.

[16] Even if Regulation No. 25 is deemed to impose a "penalty" for regulatory purposes under the utilities code, it is not a penalty that may be "otherwise provided" with constitutional validity. Regulation No. 25 provides for a *de minimis* payment in the event of power outages, in most instances 50 dollars for a 24 hour period. Section 54-7-25(1), however, requires a fine for "no less than" $500 for any given daily infraction. This mandatory minimum feature of Section 54-7-25(1) is no accident; it was enacted to deprive the Utah Commission as an administrative agency of discretion in the fixing amounts for administrative fines. The legislature was concerned that administrative discretion in this regard might offend the non-delegation doctrine, a feature of separation of powers jurisprudence under the Utah Constitution, as that doctrine was articulated in *Tite v. State Tax Commission*, 51 P.2d 734 (Utah 1936). The improvisation of penalty amounts in various tariffs, such as Regulation No. 25, would reintroduce a discretion that *Tite* and Section 54-7-25(1) were meant to eclipse for important constitutional reasons.

PacifiCorp maintains that "[t]he Commission lacks the statutory authority to certify this matter as a class action," but does not show, from analysis of the utilities code, why this authority is neither "expressly granted" nor "clearly implied" from that legislation. This conclusion rings hollow in view of the Commission's correspondence, quoted by PacifiCorp, that, "The Commission believes that its traditional proceedings are in the nature of and substantively the same as class action proceedings in a court." And the ordinary business of the Utah Commission, as defined in the statute, regularly treats classes and classification for ratemaking and other purposes. *Cf. Utah State Coal. of Sr. Citizens v. UP&L,* 776 P.2d 632 (Utah 1989) (class of senior citizens as utility customers seek fees in relation to Commission proceeding respecting winter termination of utility service).

PacifiCorp concludes, without factual substantiation or other reasoning, that a class action in this docket would be burdensome, and that Petitioners are not representative of those customers who were damaged when the lights went out in December, 2003. On a motion to dismiss, however, the averments of the Complaint must be taken as true, and, in order to prevail, PacifiCorp must offer more than conclusory statements on these points.

PacifiCorp cites a Commission letter from another proceeding, with different parties, claims, facts, and circumstances, and assumes that this letter will resolve the matter in our case. But PacifiCorp should be required to show, under the appropriate legal standards, by factual proof and clear demonstration, that the class vehicle is an inappropriate means to effect relief in this docket.

Title 54 of the Utah Code provides for the regulation of utilities in the "public interest." It treats "classes" of customers and the "classification" of rates and charges and service. Commission proceedings are frequently collective actions. Indeed, the Commission letter cited by PacifiCorp states, “The Commission believes that its traditional proceedings are in the nature of and substantively the same as class action proceedings in a court.” The Commission Rules adopt by reference the Utah Rules of Civil Procedure, including Rule 23 governing class actions. There is no Commission Rule automatically proscribing the use of a class action in Commission proceedings, but R746-100 C. provides that any given rule of the Utah Rules may be denied applied, on a discretionary, case by case basis, whenever such application may be "unworkable" or "inappropriate." The use of class actions in Commission proceedings, proceedings which, according to the Commission correspondence, by "tradition" and "nature," are "substantively the same as class action proceedings in a court" hardly seems "unworkable" or "inappropriate." Hence, the Commission's refusal to allow a class proceeding in the *Beaver/Qwest* litigation must have been based upon extraordinary circumstances. PacifiCorp's argument does not demonstrate that this docket presents similarly unusual facts. The class issue, therefore, should await resolution, pending a factual presentation to the Utah Commission, a presentation wherein PacifiCorp clearly demonstrates why the class vehicle, a mode of procedure that by "tradition" and "nature" is congenial to Commission hearings, is "unworkable" or "inappropriate" under the specific circumstances of this case.

Until PacifiCorp broaches that evidentiary question, it bears repeating that there is no statutory bar to the Commission’s entertaining a class action, the type of action that,

indeed, is "traditional" and "native" to utility regulation. And if questions of “burden” are the decisive issues, then the public interest surely favors unburdening the tens of thousands of PacifiCorp customers affected by the outage and allowing their claims to go forward before the very body charged to oversee PacifiCorp’s quality and adequacy of service under the express and implied responsibilities of its operating certificate.

CONCLUSION

Petitioners respectfully request that the motion of PacifiCorp to dismiss the Complaint be denied, and that the Petitioners be given their proverbial day in court and a trial on the merits of their claims.

Dated this 30th day of March, 2005.

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CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing Response to be mailed this 31st day of March, 2005, via first-class U.S. Mail, postage prepaid, to the following:

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