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Ms. Patricia E. Schmid
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Re: In the Matter of the Complaint of Georgia B. Peterson, *et al.,*
Docket No. 04-035-70

Dear Trish:

David Irvine and I appreciated your comments concerning professionalism at our hearing on the motions of PacifiCorp and the Division for a protective order. After the hearing, we made a mental note that, in view of these comments, we should let you know that we concur with the sentiments you expressed, namely, that the relationship among counsel in this case has been more than cordial, that all sides have extended courtesies on numerous occasions in an effort peaceably to process this litigation, and that, as the frequent beneficiaries of these courtesies, Dave and I are enormously grateful to Greg and you for your civility and even friendship. As I grow older in the trade, these seemingly small things have become more and more important to me. And where the litigation, as here, must be hard fought, they come as a welcome respite in the zone of war.

Your comments on professionalism at the hearing, together with our trust in the basic decency of opposing counsel, have prompted us to venture the request set forth below in this correspondence.

The Division, in seeking a protective order, has argued that, since the Commission has discretion to impose penalties, the discovery should be deferred. The Division's opening brief, if it made this specific claim, did not support it with citation to any authority. But the Division's reply brief, at page 4, unquestionably made this claim, citing Justice Crockett's dissenting opinion in *Diprizio v. Industrial Commission,* 572 P.2d 679, 682 (Utah 1977), and averring that "[t]he [Public Service] Commission has discretion in

ordering penalties, forgoing [sic] the impositoin [sic] of penalties, or ordering corrective action." At oral argument, I stated that citation to the dissent in *Deprizio* was inappropriate, when the majority opinion held that, under the Industrial Commission's governing statute, the imposition of penalties was mandatory rather than discretionary. Indeed, the appellant in *Deprizio* had argued that the statutory remedy, as applied to him, was a "severe penalty" and thus arbitrary, capricious, and reversible error, but this argument expressly was overruled on the ground that this penalty was imposed unambiguously in the statute and could not be ameliorated through the exercise of discretion, either administratively or judicially. *Diprizio v. Industrial Commission,* 572 P.2d at 680-681. This statement from me led to your rejoinder, noted above, concerning professionalism. Notwithstanding your rejoinder, Dave and I continue to believe that citation to the dissent in *Deprizio* was inappropriate where that dissent was expressly contrary to the holding of the case, and where that holding, speaking analogically, contradicts the Division's argument respecting discretion in this docket.

But citation to the dissent in *Diprizio* seems even more inappropriate in light of *Beehive Telephone Company v. Public Service Commission,* 89 P.3d 131 (Utah 2004). *Beehive,* unlike *Deprizio,* deals with the penalty provisions of the utilities code, those provisions, such as Utah Code Annotated, section 54-7-25, at issue in this docket. And *Beehive,* like the majority in *Deprizio,* holds that these penalties are mandatory and not discretionary: "While Beehive was never explicitly informed that its violations could lead to potentially large fines, *section 54-7-25 of the Utah Code clearly states that a fine is mandatory if such violations occur*[.]" *Beehive Telephone Company v. Public Service Commission,* 89 P.2d at 141 (emphasis added and citation omitted).[1]

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[1] What is more, as you may recall, the Division prosecuted the petition for penalties against Beehive in that case, and the Commission's brief at the Supreme Court took the position that penalties are mandatory and not discretionary when a utility engages in misconduct such as tariff violations and service failures. The brief, at pages 7-8, invoked Utah Code Annotated, section 54-7-21, which *requires* the Commission to "see that the provisions of the Constitution and statutes of this state affecting public utilities . . . are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the state therefor recovered and collected[,]" and maintained that the *only* area where discretion could be exercised concerned the amount of the penalty to be imposed, not less than $500 and no more than $2,000 per violation. Whatever deference may be due the views expressed in the Commission's brief on the non-discretionary nature of administrative fines under the utilities code (*compare, e.g., Utah Department of Administrative Services v. Public Service Commission,* 658 P.2d 601, 608 (Utah 1983) (no deference due UPSC on general questions of law), *with Big K Corp. v. Public Service Com'n,* 689 P.2d 1349, 1353 (Utah 1984) (courts may defer where Commission, "by virtue of expertise and experience with the regulatory scheme is in a superior position to give effect to the regulatory objectives to be achieved or the terms of the statute make clear that the Commission was intended to have broad discretion in construing those terms") and *Skandalis v. Rowe,* 14 F.3d 173, 179 (2d Cir. 1994) (deference due federal agency in construction of regulatory statute, even where the views are expressed in context of litigation, so long as position has been maintained consistently over time and is not tactical in nature)), that question of deference is much mooted by the ruling in

Rule 3.3 of the Code of Professional Responsibility, as adopted in Utah, provides in pertinent part as follows: "(a) A lawyer shall not knowingly: (a)(1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; [or] (a)(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]"

Neither Dave nor I ever would believe that you knowingly would misrepresent a case -- in any dishonest sense -- in argument before the Commission. All of us undoubtedly are guilty of unconscious infractions from time to time, as we all have too much to do and not enough time in any given day to do it all. But once the *Beehive* precedent is brought into view, and becomes "known" to the Division, given the language of Rule 3.3, you cannot fail to correct the false statement of law previously made to the Administrative Law Judge. And given the stakes in the present docket, we feel that an amendment to the Division's brief, correcting the error elaborated above, is required -- especially in view of the *Beehive* opinion and the Commission's brief in arguing for the resulting, "mandatory" application of section 54-7-25 in that opinion.

Rule 3.3 enjoins misrepresentations of the law, whether material or not, requires correction of false statements of the law when material, and forbids a failure to disclose controlling law when adverse to the position of a client in litigation. All of these standards, in some sense, may be at issue in our case, and to some extent speak for themselves. The requirement to "correct" a previously false statement comes into play, however, only on condition of materiality. Even though the Division's misstatements about the discretionary nature of administrative fines seem obviously material from our standpoint, a delineation of the reasons why that is so in connection with the motions for a protective order still may be in order.

First. As a matter of law, the Division's views, like the Commission's interpretation on legal points, should receive no deference in this proceeding. *See, e.g., Utah Department of Administrative Services v. Public Service Commission,* 658 P.2d 601, 608 (Utah 1983). Nevertheless, as an agency charged with special duties and presumed to have a certain expertise under the utilities code, or as erstwhile staff to the Commissioners themselves, as a practical matter, those views may be accorded weight by the Administrative Law Judge. But precisely because the Division plays a role in proceedings before the Commission similar to a public prosecutor in our system of justice, it is all the more urgent that errors in argument from that quarter should be corrected promptly. *See, e.g., State v. Casey,* 44 P.3d 756, 764 (Utah 2002) (" . . . prosecutors also have a duty to convey requests to be heard as officers of the court. Prosecutors must convey such requests because they are obligated to alert the court when they know that the court lacks relevant information. [Citation omitted.] This duty, which is incumbent upon all

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Beehive, a ruling that regards the language of section 54-7-25 as "clearly stat[ing]" that fines are "mandatory" and not discretionary. Indeed, in Utah, this straightjacket respecting the imposition of fines by administrative agencies may be a matter of constitutional imperative. *Cf. Tite v. State Tax Commission,* 51 P.2d 734 (Utah 1936).

attorneys, is magnified for prosecutors because, as our case law has repeatedly noted, prosecutors have unique responsibilities. [Citation omitted.] Specifically, a prosecutor is a minister of justice . . . possessing 'duties that rise above those of privately employed attorneys.' [Citation omitted.] The prosecutor 'is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . in a criminal prosecution is not that it shall win . . . but that justice shall be done.'" [Citation omitted.]).

Second. Moreover, the argument that the Commission has "discretion" to investigate or impose these penalties, a discretion that pre-empts the efforts of private parties such as the petitioners in this docket, is the primary if not the only argument that has any weight in the effort temporarily to block discovery at this juncture. As we noted at the hearing, Utah case law appears to mandate discovery and trial where "utility misconduct" is put at issue by private parties. *E.g., Salt Lake Citizens v. Mountain States,* 846 P.2d 1245, 1255 (Utah 1992) and *MCI Telecommunications Corp. v. Public Service Commission,* 840 P.2d 765, 775 (Utah 1992). Petitioners have standing, independent of the regulators, to seek penalties for utility misconduct -- as a matter of statutory right, Utah Code Annotated, Section 54-7-9(1)(b), as a constitutional right, *Sierra Club v. Utah Solid and Hazardous Waste Control Board,* 964 P.2d 335, 339-340 (Utah Ct. App. 1998), as an implied right under Utah's version of the private attorney general doctrine, *Stewart v. Utah Public Service Commission,* 885 P.2d 759, 781-84 (Utah 1994), and as a matter of administrative practice and judicial precedent under *Salt Lake Citizens* and *MCI* noted above. The Division has attempted to subvert this standing and to deflect these rights in the effort to delay discovery with the argument of "Commission discretion" respecting the imposition of penalties. Hence, it is important, if not imperative, to correct this error and reverse this attempt by amending the Division's argument properly to reflect the state of the law in Utah under *Beehive's,* as well as the Commission's, construction of the utilities code, namely, that the Commission does *not* have such discretion, and, indeed, where utility conduct is demonstrable, the imposition of penalties becomes mandatory.

In short, if the imposition of penalties is mandatory, then the pursuit of this remedy may not be derailed by an argument respecting "discretion." And if derailment by discretion no longer is an option, the pursuit of penalties must go forward, through discovery, whether by petitioners, as a matter of right, or by the agency or agencies charged with enforcement, as a matter of statutory imperative. And this is not a case where utility misconduct, in some measure, is seriously disputed (even if a dispute -- for some strange reason -- could vitiate rather than provoke the right to investigate); the record, as demonstrated in our pleadings, is littered with numerous, substantial, admitted violations. In any case, we are going to have an investigation of alleged misconduct on the part of PacifiCorp and ScottishPower and hence there is no good reason to delay that effort by means of a protective order. When viewed in this light, we trust that you can see the importance of amending or otherwise correcting the Division's pleadings to take the discretion argument off the table and out of consideration for purposes of the motion for a protective order now before the Administrative Law Judge.

Please let us know at your earliest convenience whether you are willing to amend the Division's pleadings in compliance with Rule 3.3 of the Code of Professional Responsibility and this request.

Kind regards,

Alan L. Smith

ALS/als
cc: Utah Public Service Commission, Administrative Law Judge, and all counsel