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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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IN THE MATTER OF THE COMPLAINT OF  
GEORGIA B. PETERSON, JANET B. WARD,  
WILLIAM VAN CLEAF, DAVID HILLER,  
GP STUDIO, INC., TRUCK INSURANCE  
EXCHANGE, AND FARMERS INSURANCE  
EXCHANGE ON BEHALF OF THEMSELVES  
AND 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.

PETITION and  
REQUEST FOR  
AGENCY ACTION

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**JURISDICTION**

1. Count I of this action is brought by Petitioners on behalf of themselves, and Count II is brought as a class action on behalf of all others similarly situated, *vis.* customers of ScottishPower and PacifiCorp numbering in excess of 80,000 <sup>1</sup> under the authority of Utah Code Ann. §§ 54-3-1, 54-3-23, 54-4-1; 54-4-2; 54-4-18; 54-7-25; and the Orders of this Commission in

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<sup>1</sup> The number of UP&L customers who lost power on or immediately after December 26, 2003, according to UP&L, is 190,000. More than 80,000 lost power for extended periods of time.

Docket Nos. 87-035-27, dated September 28, 1988 and 98-2035-04, dated November 23, 1999, respectively. Petitioners are seeking compensation for monetary and economic loss for themselves and all others similarly situated as a result of electrical service being interrupted for an unreasonable period of time due to PacifiCorp's failure to adequately maintain its electrical system, an inadequate communication system, and disregard of its ordered duties as an electrical public utility; and for the right of recovery due its customers for outages caused by inadequate service or violation of Commission orders. Petitioners also request that this Commission order PacifiCorp to restore the conditions required of the Company in the prior merger Orders, and for such other relief as is equitable and just. This petition is filed as a request for agency action under the provisions of Utah Code Annotated § 63-46(b)-3. It also invokes the Commission's jurisdiction to enforce its own orders under Utah Code Annotated §§ 54-3-23, 54-7-9, 54-7-21, and 54-7-25. In that regard, it seeks the impositions of fines and other relief.

### **THE PETITIONERS**

2. Georgia B. Peterson, Janet B. Ward, William Van Cleaf, and David Hiller are residents of Salt Lake County, State of Utah and residential customers of Utah Power & Light (UP&L" hereinafter). Petitioner GP Studio, Inc. is a photographic studio doing business in Salt Lake County, State of Utah, and is a commercial customer of UP&L. Truck Insurance Exchange and Farmers Insurance Exchange are national affiliates of Farmers Insurance Group, and both are registered and doing business in the State of Utah. These insurer Petitioners are the subrogees of certain claimants who are commercial customers of UP&L within Salt Lake County, State of Utah and whose losses as a consequence of the power outage were reimbursed by the subrogees. The Petitioners are either customers of Utah Power & Light ("UP&L" hereinafter), or the holder of subrogated claims made by UP&L customers; and they are among the

approximately 80,000 or more UP&L customers whose electrical power service was interrupted for one or more days beginning on December 26, 2003. Petitioners have a direct interest in the Company's future capability to provide reliable service, as well as a direct interest in the Company's strict compliance with Commission orders.

3. Petitioners, whose power was out of service for varying and extended periods of time, believe that thousands of customers were without electrical service for as many as seven days, beginning December 26, 2003.

4. Petitioners, like thousands of other UP&L customers, experienced severe inconvenience as well as financial loss during the period of the power outage. Petitioners accept as factual the many media accounts during that holiday outage of customers whose homes were without light and heat for several days and nights, the struggles of families to stay warm where temperatures inside homes dropped below freezing, families forced to move into hotels, food supplies spoiled, and lives disrupted.

5. Petitioners further accept as factual the media accounts during the outage of customers who could not contact UP&L to report the outage and customers who could only have their service problems investigated by tracking down UP&L crews on the streets.

6. Petitioners believe that the actual economic losses to the county and state due to the outage have not been calculated but that they are significant and considerable.

7. Petitioners are also aware that UP&L is seeking to have this Commission declare the outage a "Major Event," but deny that any such declaration, even if made by the Commission, would absolve UP&L of responsibility to make customer guarantee credit payments or liability for damages sustained by ratepayers.

8. Petitioners are also aware of the proceedings in Docket No. 04-035-01. Petitioners applaud all that the state regulatory entities are doing, but they believe the public interest requires a particular focus which is not yet evident in the proceedings to date.

**CIRCUMSTANCES REQUIRING COMMISSION INVESTIGATION**  
**COMMON TO COUNTS I AND II**

**Docket No. 87-035-27**

9. In 1988, UP&L was sold to PacifiCorp pursuant to an order of this Commission dated September 28, 1988 in Docket No. 87-035-27.

10. In the proceedings before this Commission prior to issuance of the above Order, PacifiCorp represented that:

The merged entity will continue to have its Utah operations headquartered in Salt Lake City, Utah, and *the officers and employees responsible for customer service for the Utah operations will continue to be located within the State of Utah.* As a consequence, Utah customers will continue to have local access to those responsible for customer service decisions concerning the Utah operations of the merged entity on the same basis as Oregon customers have access to responsible personnel for the existing Pacific Power Division of PacifiCorp. (97 PUR4th 89, emphasis added.)

11. This Commission made findings and conclusions, and recited the standard of proof for evaluation of the merger, which was “proving that the merger will result in a net positive benefit to the public in this state,” and even declaring “The phrase ‘to the public in this state’ was not employed ritualistically, but is a direct recognition of our responsibility to safeguard the public interest of Utah and its citizens.” (97 PUR4th 97.)

Finding No. A 10 of the Order states:

*Each division will be responsible for customer services within its service area.* Certain duplicative, and as yet unidentified, administrative functions will be consolidated between the divisions with an equitable and proportionate balance between those functions principally located in and reporting to the Utah Power Division and those principally located in and reporting to the Pacific Division. The power systems of the two divisions will be operated and planned as a single system, and the headquarters for the power supply operations will be in Salt Lake City, Utah. Major changes in the

operations of the divisions will be reported to the Commission prior to implementation. (97 PUR4th 99, emphasis added.)

Finding No. C 7 of the Order states:

On the basis of the foregoing, we find that the merger will result in approximately \$300 million of savings in resource additions, in present value terms, over the 19-year time period examined, and that these long-run savings are the most important benefit of the merger. (97 PUR4th 103, 104.)

Finding No. G 1 of the Order states:

*Applicants testified that they chose the divisional organization form in part because it would maintain local control and autonomy while permitting coordination and cooperation between the divisions. The record shows that the Utah Power Division will maintain its headquarters in Salt Lake City, Utah. Applicants assert that, while it is clear there will be some loss of local autonomy, it is unlikely that the day-to-day management and operation of Utah Power will be affected in any significant way by the merger. (97 PUR4th 109, emphasis added.)*

Finding No. G 3 of the Order states:

. . . We are cognizant of Applicants' assurances, but there is no denying that the proposed merger heightens the risk of loss of localized emphasis and to this extent at least, undermines the tendency on our part to accept without reservation forecasts of merger benefits for Utahns. This, of course, is one of the primary reasons why our approval of this merger must be conditional. (97 PUR4th 109.)

Finding No. L 8 b 18 of the Order states:

The merged company shall provide notification of all asset transfers to or from PacifiCorp, its affiliates, and the Utah Division in accordance with current PSC rules (see in particular PSC R750-4-1). (97 PUR4th 121.)

Finding No. L 14 of the Order states:

We find that the merger, which is in the public interest and a benefit to Utah, is made possible in part because of its employees. The lifeblood of all business and industry is the work force that dedicates its time and talent to providing the product and service to the public. It is appropriate therefore to add the following conditions relating to employees:

- a) No employee shall lose his or her job as a result of the merger.
- b) Work force reductions shall be a result of attrition.
- c) Efforts shall be made to retain employees in their present positions or equivalent positions at equal level and equal pay.

e) *Reductions in the total number of employees shall not impair quality of service, maintenance, and safety.* (97 PUR4th 123, emphasis added.)

Finding No. L 15 of the Order states:

The Commission further expects the Merged Company to operate in such a way as to *benefit the state of Utah, its citizens and its general economy.* Specifically:

a) We expect the Merged Company to maintain the currently existing, proportionate levels of employment between the Utah Division and the Pacific Division. That is, it is required that as the transition of the merged entities occurs, neither the Utah Division nor the Pacific Division shall be assigned a greater number of utility, management or corporate functions, or employees than currently exists in such Division vis a vis the other Division. It is intended by this expectation that after the anticipated merger of administrative and operational functions takes place, and subject to the expected reduction in work force via attrition, that the respective Divisions will find themselves at approximately the same levels of functional importance in the total corporate structure as currently exists between the two.

b) . . . We expect that if the transfer of a certain function out-of-state is required, that every effort will be made to insure alternate equivalent employment in-state for those employees who do not wish to relocate.

d) Further, the Commission expects proportionate use of local businesses where appropriate and finds that Applicants' commitment to promote economic development in Utah includes the assumption that the Company will support the industries and business of this state.

g) Finally, the Commission expects notification by the Company of any action which is contrary to these expectations prior, and with sufficient time for Commission action if necessary, to their implementation. (97 PUR4th 123, 124, emphasis added.)

Conclusion No. 3 of the Order states:

. . . We conclude that it is in the public interest that the conditions imposed on approval of the merger are also conditions of the Commission's grant of transfer of the certificates of public convenience and necessity to the Merged Company. (97 PUR4th 124.)

Conclusion No. 6 of the Order states:

The Commission concludes that all conditions voluntarily entered into on this record by the Applicants and accepted by the Commission are reasonable conditions of approval of transfer of the certificates. In addition, the contested and/or additional conditions imposed by the Commission are reasonable and in the public interest. (97 PUR4th 124.)

12. In approving the merger, Paragraph 15 of the ordering portion of the Order states:

The Merged Company shall satisfy all requirements set forth in the Discussion and Findings, and the Conclusions of Law. (97 PUR4th 126.)

13. Subsequent to issuance of this Commission's Order on September 28, 1988, an additional hearing was held, during which the Commissioners queried officers of UP&L and PacifiCorp about their understanding of the portion of the Order relating to employees of UP&L and how the Utah work force would be treated as the merger proceeded. In that colloquy, Commissioner Cameron quoted from a letter sent to him by a UP&L employee: "The officers of both companies still testify that money may be saved and that rates will be cut in the State of Utah. I fear the only place available for cost reduction is to eliminate Utah jobs. . . I hope that Utah jobs will not also have to be sacrificed in order for the merger to be cost effective." (TR 34, L20-25, TR 35, L1-5.) Commissioner Cameron then went down the list of job conditions recited in the Order, and to each one, both Mr. Bolender (for PacifiCorp) and Mr. Davis (for UP&L) specifically agreed.

14. In the ensuing discussion regarding the proportionality of promotions as between the Utah and Pacific Divisions - so that employees of both systems would equally have reasonable expectations of upward mobility - Commissioner Byrne stated:

I think this is the key condition. This is the one that the employees express the most concern about in that their fear that *Utah Power & Light will become a shell with enough employees to keep the electrons flowing and everyone else in Portland*, and I think this is the major concern and I think the condition clearly states it and *both of you [speaking to Mr. Bolender and Mr. Davis] have indicated that you don't believe that's going to happen.* (TR 39, L7-15, emphasis added.)

Mr. Bolender replied: "No, I certainly don't believe that's going to happen . . ." (TR 39, L16, 17.)

15. Still later in the Commission's colloquy, Commissioner Cameron referred to the Order's language regarding maintaining then-current proportionate levels of employment between the Utah and Pacific Divisions and the same level of functional importance in the total

corporate structure as between the two divisions (TR 43, L4-21). Mr. Bolender, in response, stated: "I would only add one known exception to that which I do not think violates the intent . . . we do intend to move the power supply division, the public supply group to headquarters in Salt Lake City. *That's probably the most major move of a function from one division to another.* (TR 44, L1-8, emphasis added.) Commissioner Cameron posed an additional question to both Mr. Bolender and Mr. Davis: "The last condition in this paragraph I don't believe anyone has any concern with, but I will state it. 'Reductions in total number of employees shall not impair quality of service, maintenance and safety.' I'm sure you agree with that." (TR 40, L15-20.) To which both officers responded: "Yes." (TR 40, L21, 22.)

16. One of the commitments made to this Commission was the assurance that the two divisions of PacifiCorp would operate and function as sister companies or "sister divisions." Commissioner Byrne stated, "Now, you've indicated that UP&L and PP&L would be sister divisions of PacifiCorp?" Mr. Bolender replied, "That's correct." (TR 2322, L16-19.) In his prefiled rebuttal testimony, Mr. Bolender responded to an assertion that, if UP&L was established as a division of a multi-state conglomerate headquartered in Portland, there would be adverse impact on Utah's economy because of the loss of a strong local presence and local accountability. According to Mr. Bolender:

We chose to structure the business combination as separate divisions because this strikes an appropriate balance between coordinated operations and local autonomy. Furthermore, this is consistent with Pacific's general desire to achieve the degree of *decentralization which will encourage responsiveness to customers and cost control by local managers.* Additionally, Utah Power will have a separate board and will be afforded the same benefits and treatment as other business units in the family of PacifiCorp companies. *As further support for local control and influence, the merger agreement provides that the headquarters of the Utah Power division of the merged corporation will be in Salt Lake City.*" (Bolender Rebuttal Testimony, P4, L17-26; P5, L1-5. Emphasis added.)

Contrary to the above and many other representations, the entire accounting, engineering, and computer departments have been transferred to Portland, losing a few hundred jobs to the Utah



economy. This is completely inconsistent with the representations that the Utah Division would function as a “sister division,” having “the kind of decentralization which encourages responsiveness to Utah customers and cost control by local managers.” It is even possible that some work has been outsourced overseas.

**Docket No. 98-2035-04**

17. The terms and conditions which this Commission imposed on PacifiCorp in the first merger docket have not been rescinded. When ScottishPower merged with PacifiCorp, this Commission’s Order approving the merger did not relieve either company of the obligations to which PacifiCorp had agreed, indeed which it had been ordered, to assume.

18. In its Order approving the merger with ScottishPower, the Commission was assured by ScottishPower that the merged company would “be able to deliver higher quality service to customers at lower cost.” (1999 Utah PUC LEXIS 44, at 8.) ScottishPower voluntarily committed to funding a 5-year, \$55 million investment in “customer service and system performance improvements.” (*Id.*, at 9.) ScottishPower represented that the merger would result in a “decline in the duration and frequency of service interruptions,” which were to benefit Utah customers “by approximately \$20 million per year from network performance improvement.” (*Id.*, at 10.) ScottishPower pledged to “reduce the amount of time required to answer telephone calls from customers, and to resolve customer complaints faster.” (*Id.*, at 10.) The Company guaranteed “a penalty payment of (usually \$50) to individual customers if certain customer service standards are not met,” to include restoration of power supply. (*Id.*, at 10.)

19. In accepting the stipulations proposed by the Company, the Commission stated:

Nevertheless, distant corporate decisions must neither rank nor allocate resources in a manner harmful, in either the short- or the long run, to the public service requirements of this utility in Utah. *As this record shows, PacifiCorp in recent years pursued a global business strategy which resulted in neglect of its utility responsibilities.* The first priority of the executive located in Utah must be maintenance of a high-quality Utah

utility operation. We accept the letter agreement as indication of such a commitment. (1999 Utah PUC LEXIS 44 at 17. Emphasis added.)

20. A winter electric power interruption which leaves 80,000 customers along Utah's Wasatch Front without power for up to five or more days is simply unacceptable public utility service. A company which sustains an outage of that breadth, magnitude, and duration is not meeting the inherent service terms and conditions of its certificate of public convenience and necessity. In *Principles of Public Utility Regulation*, by A.J. G. Priest, Vol. 1, Professor Priest writes:

Service complaints naturally become a commission yardstick for measuring the efficiency of a utility's operations. If patrons are silent (even though sour), the utility is doing an acceptable job, but when a regulatory agency receives complaints in volume, it must act, not only for the customer's sake, but also for the utility's. . . Disrupted railroad and bus schedules, dead telephones, freight undelivered, a plane held on its runway by defective parts, will cause much gnashing of teeth, but they are flea-nips when compared with a wholesale failure of electric service, which turns any community upside down." (p. 263.) "The three basic necessities for urban living are air, water, and electric energy. Air is polluted, water is often in short supply, but the megalopolis must have electric service every minute from one midnight to the next. Subways must function, elevators must move, lights must shine, TV sets must babble, electric motors must operate. There is no viable alternative to perfect service." (p. 271, emphasis added.)

21. The finding by the Commission (§ 19 above -- that PacifiCorp has pursued a global strategy which has resulted in the neglect of its utility responsibilities) is all the more problematic in light of ScottishPower's announced intentions to build a new power plant in the United Kingdom. In the same news report of this development (*Deseret Morning News*, February 5, 2004, p.E3), this statement appears: "The Scottish company plans to cut costs in the United States by \$300 million through 2005." There is no further information about exactly how this cost savings is to be achieved, but it is unlikely that the Company can deliver better service to its Utah customers and meet the conditions of this Commission's two merger Orders by siphoning \$300 million from its U.S. operations over the next two years.

22. Nothing in the Order issued by this Commission in the second merger docket waives or abrogates any condition imposed on PacifiCorp in the language of the Order issued in the first merger docket. Each of the conditions from the first Order is still in full force and effect. The terms proposed by the Company and accepted by the Commission in the second Order, relating to customer service, in effect, simply set forth additional or more specific service standards by which the Company's performance may be measured.

23. The fact is, that the PacifiCorp deficiencies noted by the Commission in the second merger Order have now been compounded, and the Commission is duty-bound to make corrections now so that reasonable service can be assured and so that the economic benefit envisioned for the state when the first Order's conditions were imposed can be achieved, and so that penalties can be assessed to restore lost economic benefits to the state from the outsourcing that has occurred.

24. Petitioners believe that the December 26<sup>th</sup> power outage was not an instance of *force majeure*, an act of God, or a "major event" over which PacifiCorp had no control. Other power systems along the Wasatch Front did not experience the same outage severity or extended duration, even though the winter storm visited itself with equal, if not greater, characteristics of snowfall, wind and cold upon all Wasatch Front power systems. In Bountiful, for example (which operates its own municipal power system), the longest outage experienced by any customer was 24 hours, and the number of Bountiful customers out of power was a significantly smaller percentage of total customer load.

25. Petitioners believe that the December 26<sup>th</sup> PacifiCorp outage was the inevitable consequence of deferred maintenance of the UP&L system, and the neglect by PacifiCorp, over a substantial period of time, to trim trees and maintain poles and lines in a serviceable condition. In the Commission hearings held prior to approving the 1988 sale to PacifiCorp, Mr.

David Bolender, President of Pacific Power & Light, responded to a question about differences in the way his company and UP&L approached in-house versus contract work for maintenance. Mr. Bolender testified that “there [were] significant numbers of people, I believe, on the Utah maintenance force that we probably would not have as large a one of (*sic*).” (TR 2325, L12-14.) Petitioners believe that PacifiCorp has methodically reduced the number of in-house maintenance personnel since the sale, making adequate service an impossibility. Moreover, PacifiCorp’s transfer of customer service functions from Utah to Oregon did not include adequate provision for appropriate response to customers in the event of a major system failure.

26. Petitioners believe that the December 2003 power outages were exacerbated, if not caused, by the Company’s inadequate maintenance of its distribution lines and system in the years since the merger, and that as a consequence of such failures, the Company should be ordered to pay monetary compensation to customers who sustained losses as a consequence of the inordinate length of the outage. As has been previously noted, even though other power systems in Utah were affected by the same winter storms, no other electric power provider in Utah experienced such widespread and prolonged outages. Petitioners request that such monetary compensation be calculated for ratepayers as a class, in addition to the customer credits previously authorized by the Company. Such credits have been allowed only for customers who formally applied to receive them (and many customers have likely not made such application), and the Company has denied other claims citing the outage as a “major event” or the equivalent of an act of God, for which the Company bears no responsibility nor liability. In addition or in the alternative, the Commission should impose fines on PacifiCorp for violation of prior orders and for failure to maintain a reasonable quality of service, consistent with the legislative mandate and Commission protocols.

27. The conditions which created the outage breadth and duration, therefore, were conditions within the direct control of PacifiCorp. The communications system for reporting service problems was centralized and operated from Oregon, not Utah, and consequently, Utah customers were unable to communicate with anyone who knew or appreciated what was happening in the Utah service area. The system simply stopped accepting phone calls. The unacceptable outage duration was exacerbated by the unavailability of a sufficient number of repair crews to deal with the extent of the system failures.

28. Petitioners believe that the root cause of the widespread and lengthy hardship occasioned by the UP&L power outage is the systematic failure, over time, of PacifiCorp to abide by the terms of the Orders approving the sale and merger. Petitioners believe, specifically, that PacifiCorp has transferred significant customer service functions out of Utah to the detriment of Utah customers, that the numbers of service and maintenance personnel in Utah have been reduced below levels which adequate maintenance of the Utah distribution system require, that the number of repair crews in Utah have been reduced below levels appropriate and necessary for the size of the Utah distribution system, that entire departments of the company have been transferred from Salt Lake City to Portland, and that the cumulative effect of these decisions has resulted in unnecessary, unjustifiable and unacceptable service to UP&L's customers; and that the Company's obligations to operate in such a way as to benefit the state of Utah, its citizens and its general economy have been abrogated.<sup>2</sup>

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<sup>2</sup> In his substituted prefiled testimony, Mr. Bolender stated, "PacifiCorp recognizes that its prosperity is absolutely dependent upon the economic vitality of the communities where it does business. Pacific Power's employees are expected to be in the forefront of civic activities wherever they reside. PacifiCorp's long-standing commitment to community service and involvement will apply with equal force to Utah Power's service territory. Like Utah Power, we will be a good corporate citizen." (Bolender Substituted Prefiled Testimony, P20, L18-26.) Petitioners do not dispute that PacifiCorp's employees make significant civic contributions in their communities, nor that the company makes financial contributions to Utah charities and the arts. However, over the period of time since the 1988 sale, the loss of good-paying jobs due to transfer of functions to Portland has likely damaged Utah's economy and the communities where Utah Power once had a larger in-house presence.

29. Petitioners are concerned that UP&L's coal mines in Emery County may have been mined in a manner which has substantially reduced the production life expected of the mines at the time of the merger. As a consequence, the remaining coal in those mines may now be unrecoverable except through gasification or other high-cost methods of recovery which would make the coal uneconomical. If the mine mouth generating plants are to be fueled by coal trucked from mines across the intervening mountain range, the far greater expense of that fuel calls into question the very long-run savings from resource acquisition which this Commission declared in 1988 to be "the most important benefit of the merger." (97PUR4th 104.) Petitioners request that this Commission investigate what would appear to be waste of a significant asset which has been maintained in UP&L's rate base from the time the mines were acquired.

30. Petitioners are concerned that prior to the merger, UP&L owned tracts of real property in Utah and elsewhere, which had value beyond any immediate use in conjunction with the generation, transmission, or distribution of electricity. Specifically, these tracts were held by UP&L in anticipation of their usefulness and value as potential tracts for trade with the

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The State's Division of Business and Economic Development estimates that every existing or new full-time job coming into Utah creates an additional .9 of a full-time job, and that every dollar paid out in payroll creates an additional 80 cents of economic impact. While that estimate of the economic multiplier may not hold precisely where job losses are involved, it may be fairly assumed that the economic benefit to Oregon from any transfer of jobs from Utah has followed that formula. If the sale of UP&L has resulted in the transfer of 500 jobs to Oregon for a period of 5 years, that equates to Oregon's gain of an additional 450 jobs for that same period, using the multiplier. If the average salary for those 500 jobs is assumed to be \$35,000 (probably a low proxy), the annual gain to the Oregon economy is \$17.5 million per year. Over the period of 5 years, that Oregon gain aggregates to \$87.5 million as a direct consequence of the transfer. If the multiplier of additional impact is applied (\$70 million), the total economic gain to Oregon for 5 years is \$157.5 million. The actual economic loss to Utah is more difficult to assess, but it is likely not inconsequential.

There is no denying that PacifiCorp and ScottishPower have been generous to Utah's arts organizations and civic undertakings, but certainly not at a level which compensates for the loss of jobs UP&L has sustained. It has been reported that as of March 11, 2004, UP&L had paid about \$1.8 million in credits to power bills as a goodwill gesture for the December 2003 power outage. It is more likely than not that had the Company invested more in maintenance by retaining the jobs outsourced or eliminated, Petitioners and some 80,000 others would not have been left without power for an extended period of time in the bitter cold of a severe Utah storm system, which although perhaps unusual, managed to affect only UP&L customers in duration and scope. Bountiful, which operates its own system, experienced minimal, brief outages; the next-door cities of Centerville and Woods Cross, served by UP&L, were far more severely affected by the outages. Some Woods Cross customers were without power for up to 4 days. The difference cannot be attributed to a severe storm, for the entire area was hit equally hard.

federal or state governments as UP&L sought to acquire additional coal resources and lands upon which to locate generating plants and power lines to facilitate providing the lowest cost energy possible for the benefit of the ratepayers. Ratepayers serviced the financing of their purchase. Petitioners are concerned that these tracts were methodically sold by PacifiCorp after the merger. Petitioners further believe that certain of these tracts may have been undervalued at sale. Petitioners request that a determination be made whether those assets, the financing of which was serviced by ratepayers, have been transferred in violation of the merger orders, the public utilities code, established regulatory principles, and the Utah Supreme Court's holdings in *Wexpro I* and *Wexpro II*.

#### COUNT I

31. In behalf of themselves, Petitioners hereby incorporate paragraphs 1 through 30 above as though separately pleaded herein. Petitioners request that this Commission specifically investigate the matters set forth in the preceding paragraphs and whether UP&L, PacifiCorp and its successor in interest, ScottishPower, have violated the express and binding terms of the 1988 and 1999 Orders approving the sale and merger; and, if violations of those Orders have occurred, whether they have contributed in whole or in part to the December 26, 2003 power outage. If this Commission finds that the Company has failed to abide by the terms of the sale and merger Orders cited above, or has otherwise deliberately or negligently failed to maintain its distribution system in a manner consistent with the quality of service obligations implicit in its certificate of public convenience and necessity, then Petitioners request that this Commission afford them the relief requested below.

#### COUNT II

32. In behalf of all of PacifiCorp's other customers similarly situated to Petitioners, approximately 80,000 who also lost power for extended periods of time during the same power

outage, Petitioners hereby incorporate paragraphs 1 through 30 above as though separately pleaded herein. Petitioners request that this Commission specifically investigate the matters set forth in the preceding paragraphs and whether UP&L, PacifiCorp and its successor in interest, ScottishPower, have violated the express and binding terms of the 1988 and 1999 Orders approving the sale and merger; and, if violations of those Orders have occurred, whether they have contributed in whole or in part to the December 26, 2003 power outage. If this Commission finds that the Company has failed to abide by the terms of the sale and merger Orders cited above, or has otherwise deliberately or negligently failed to maintain its distribution system in a manner consistent with the quality of service obligations implicit in its certificate of public convenience and necessity and Utah Code Ann. § 54-3-1, then Petitioners request that this Commission afford them the relief requested below.

33. Petitioners request that this Commission treat this petition as a class action for purposes of assessing the monetary loss sustained by all members of the class, including Petitioners.

a. This case is unique in that it is the most serious electric power outage customers of PacifiCorp have sustained in all the years the Company and its predecessor have operated in Utah.

b. Petitioners submit that all of the prerequisites for a class action under Rule 23(a) of the Utah Rules of Civil Procedure exist in this matter: (i) the class is so numerous that joinder of all members is impracticable; (ii) there are questions of law or fact common to the class; (iii) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (iv) the representative parties will fairly and adequately protect the interests of the class.



c. Moreover, the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications, which could establish incompatible standards of conduct for the Company; adjudications with respect to individual members of the class could be dispositive of the interests of other members not parties to the adjudications, or could impede their ability to protect their interests; the Company has refused to pay damages beyond the tariffed penalty to customers who were without power for an extended period of time, even though customers experienced actual damages of a greater amount; and the questions of law and fact common to the class predominate over any questions affecting only individual members.

d. A class action before this Commission is superior to any other avenue by which members of the class might seek relief, in that this Commission is vested by statute (Utah Code Ann. § 54-4-1) 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 . . . and to do all things, whether . . . specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction.”

e. The investigation which the Petitioners ask this Commission to undertake will likely be dispositive as to whether the Company’s maintenance policy or negligence was the cause of the actual economic loss sustained by the 80,000 customers who were left without power for prolonged periods of time. This Commission is the guardian of the public interest in matters of utility service obligations, and it can best serve the interests of the customers and the Company in this matter by dealing with the causes of and consequences from and loss due to the power outage in one proceeding rather than

requiring all customers to deal with the expense and inconvenience of dealing in multiple forums over a protracted period of time.

f. The amount of actual monetary loss sustained by customers as a class is likely to be more than the Company's tariff penalty requires to be paid, but less, on an individual basis, than the economics of litigation would make practical for customers to pursue on an individual basis. The result of that practicality will be that unless this Commission accepts and treats the interests of the 80,000 customers as a class, the burden of the Company's negligence and disregard of the Commission's orders will unfairly fall upon the individual customers who have directly sustained economic loss because of the Company's actions. Unless this Commission treats this Petition as a class action, the Company's customers, whose interests as a matter of "public interest" this Commission is charged to protect, will effectively have no other remedy.

#### **RELIEF REQUESTED**

34. With respect to Counts I and II, Petitioners request that the Commission determine whether PacifiCorp's coal mining practices and management of the former UP&L coal assets may have been calculated to produce short-term company revenue at the expense of long-term resource availability and fuel costs. Petitioners request that this Commission investigate what would appear to be waste of a significant asset which has been maintained in UP&L's rate base from the time the mines were acquired.

35. With respect to Counts I and II, Petitioners request that this Commission require an accounting of the proceeds of the sale of certain land tracts held for trade with federal and state entities, and that a determination be made whether those assets, the financing of which was serviced by ratepayers, have been transferred in violation of the merger orders, the public

utilities code, established regulatory principles, and the Utah Supreme Court's holdings in *Wexpro I* and *Wexpro II*.

36. With respect to Counts I and II, Petitioners request that this Commission issue an Order to Show Cause to the Company, requiring that it produce evidence of compliance with the requirements set forth in all findings, conclusions, and ordering clauses of the merger orders, and especially Findings No. A 10, L 8 b 18, and L15 g of this Commission's Order in Docket No. 87-035-27, dated September 28, 1988. These provisions required the Company to report to the Commission "major changes in the operations of the divisions prior to implementation," provide "notification of all asset transfers to or from PacifiCorp, its affiliates, and the Utah Division in accordance with current PSC rules," and notification to the Commission "by the Company of any action which is contrary to these expectations prior, and with sufficient time for Commission action if necessary, to their implementation," respectively. Petitioners request that such an Order to Show Cause direct the Company to specify by date, time, and method of notice (and the dates of actual event occurrence), the reports to the Commission rendered pursuant to those ordering references which detail: (a) the Company's plans and decisions to transfer all divisions or functions from Salt Lake City to Portland; (b) the Company's plans and decisions to eliminate or transfer its in-house maintenance capability and staff, or outsource, or defer maintenance of the Company's lines and distribution system; (c) the Company's plans and decisions to transfer the customer communications system from Salt Lake City to Portland; (d) the Company's plans and decisions to sell the tracts of real property held for trade with federal or state governments, and the date of each such sale, proceeds, and accounting treatment of each such sale; and (e) the Company's plans and decisions to change the manner in which the forecasted productive lives of the Company's Emery County coal

mines would be shortened by failing to recover all reasonably and economically recoverable coal.

37. With respect to Counts I and II, Petitioners further request that the Commission make a finding that the December 2003 power outages were caused and exacerbated by the Company's inadequate maintenance of its distribution lines and system in the years since the merger.

38. With respect to Counts I and II, Petitioners request that the Commission declare the December 26, 2003 power outage not to be a "major event" or an act of God, and that this Commission not relieve the Company from liability to customers for the economic loss caused by the Company's negligence and disregard for past orders of the Commission.

39. With respect to Counts I and II, if the terms of the 1988 and 1999 sale and merger Orders have been violated, Petitioners request that PacifiCorp, UP&L, and Scottish Power be:

a) penalized in accordance with Utah Code Ann. § 54-7-25, which allows for a financial penalty of not less than \$500 nor more than \$2,000 for each offense. Since the statute provides that each day a violation continues shall be treated as a separate offense, Petitioners suggest that each day the utility was in disregard of the Commission's two Orders, from the beginning date of each violation of those Orders, be treated as a separate offense; and, further, that the consequential effects of those violations - the power outage at issue -- be treated as a separate violation for each customer who was out of power for the number of days each such customer was without power - in other words, if 80,000 customers were without power for an extended number of days, there would be 80,000 violations for each day -- \$40,000,000 per day at \$500 per violation, or \$160,000,000 per day at \$2,000. Petitioners recognize that the strict imposition of the statutory (even minimum) penalties quickly calculates to a staggering financial penalty, the imposition of which would give this Commission pause; however, the

statute says what it says, and at minimum, this Commission could use that mechanism to require whatever expenditures by the Company are necessary to bring its distribution system to acceptable standards of capacity and reliability – because half-measures in addressing the system deficiencies put much of Utah’s population at serious risk of real and devastating harm, and grave risk to life and property, should a repeat outage occur;

b) ordered to restore the benefit to the State of Utah, through the multiples of economic benefit derived from each person employed within the state at the time of the merger, and the economic benefit to the State of dealing with businesses in the State;

c) ordered to strictly comply with the Order, to include whatever transfers to Utah of functions, positions, or Utah hires are necessary to restore the proportionality and balance between the two divisions which this Commission diligently and wisely ordered in 1988;

d) ordered to establish a fully-functional customer service communications system, office and staff in Utah in order to deal with service complaints or questions without requiring Utah customers to telephone Oregon; or

e) in the event the companies are unwilling or unable to provide Utah customers with a corporate infrastructure capable of assuring the same quality and levels of customer service and distribution system maintenance and repair enjoyed by customers prior to the merger, that the companies be directed to divest the Utah system to another operator who can restore the UP&L system to the state it was prior to the sale and merger.

40. With respect to Counts I and II, if the prolonged nature of the power outage was caused in whole or in part by PacifiCorp’s failure to adequately maintain its distribution system and/or its customer service system, Petitioners request that the Commission award customers,

as a class, the value of the actual financial and economic loss sustained as a consequence of the Company's negligence or disregard of this Commission's previous Orders.

41. Finally, with respect to Counts I and II, Petitioners request that they be afforded such other relief as may be reasonable and just.

DATED this 23rd day of December, 2004.

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David R. Irvine or Alan L. Smith

Attorneys for Petitioners