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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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 ALL OTHER MEMBERS OF THE CLASS DESCRIBED BELOW AGAINST SCOTTISHPOWER PLC and PACIFICORP, dba UTAH POWER & LIGHT CO., REQUESTING AN INVESTIGATION, and ENFORCEMENT OF THE COMMISSION'S ORDERS IN DOCKET NOS. 87-035-27 and 98-2035-04, and COMPENSATION FOR LOSSES.	Docket No. 04-035-70 REBUTTAL TO PACIFICORP REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. The Commission's Closing of Docket No. 04-035-01 Was Not An Adjudication of Any Issues Raised in the Instant Docket

PacifiCorp filed its Reply in Support of Motion to Dismiss on May 20, 2005, and at that time no dispositive order had been entered by the Commission in its investigative Docket No. 04-035-01. It is clear from PacifiCorp's Reply memorandum that the company anticipated issuance of an order which would contain findings of fact and conclusions of law absolving the utility of any causative responsibility for the December

2003 Christmas power outage. Indeed, PacifiCorp's Reply was specifically framed to bootstrap such factual findings into an argument that any order from the investigative docket would be *res judicata* in the instant adjudicative docket:

> . . Petitioners fail to rebut the reality that their petitions in the Outage Investigation and in this docket are essentially identical and that the conclusions of the Outage Investigation, including the Commission's orders, may well have instructive or preclusive effect on claims any customer may later seek to bring related to the outage. Petitioners, and other customers, are not entitled to divorce themselves from facts established in the Outage Investigation any more than Utah Power could distance itself from those same facts. [Reply Memorandum at p. 2, emphasis added.]

The dispositive order wished for by PacifiCorp in Docket No. 04-035-01, and upon which a substantial portion of its Reply was grounded, did not materialize. That fact has substantially altered the procedural landscape against which the instant complaint and PacifiCorp's Motion to Dismiss must be viewed. The Commission's letter dated June 24, 2005, which closed Docket No. 04-035-01, was not an order, made no findings, made no conclusions of law, and stated nothing which could be characterized as in any way dispositive of any issue raised by the Petitioners. The letter repeatedly referred to the investigative, as distinct from the adjudicative, purpose to be served by the parties' efforts in that docket. It was simply a letter notifying the parties that the docket was closed and no further proceedings therein would be entertained. Moreover, in view of the closed status of that docket, all of PacifiCorp's arguments with respect to the Commission's 2004 order allowing certain of the petitioners herein to intervene in that docket, on whatever basis that order may have contemplated, are now moot.

II. PacifiCorp's Complaints of Improper Filing Procedure Mis-state The Law and Are Not a Proper Basis for Dismissal

PacifiCorp seeks to characterize the instant Complaint as something on the order of an ordinary and routine customer billing dispute in order to relegate the Complaint to

a questionable exercise in mediation presided over by the utility's customer relations department and the Division of Public Utilities. This is mis-directed for the following reasons: (1) the instant request for agency action is not a routine consumer complaint within the intent or scope of R746-100-3(F); (2) the Division's adverse actions in this docket render it unqualified to mediate the Petitioners' claims; (3) The mediation process specified in R-746-100-3(F) does not comply with and is a violation of Utah Code Ann. § 63-46c-103; (4) even if the Commission were to find that a mediation were a necessary prerequisite to acting on the Petitioners' request for agency action, a stay of further proceedings in the docket pending mediation, is the appropriate remedy, not dismissal.

Moreover, PacifiCorp erroneously (but insistently and repeatedly) asserts that it is the Petitioners' responsibility to take the request for agency action first to PacifiCorp's customer relations department and the Division for mediation. This is not consistent with the Commission's rule (R746-100-3(F)(1), which states that "before a proceeding on a consumer complaint is initiated before the Commission, the Commission shall try to resolve the matter through referral first to the customer relations department, if any, of the public utility complained of and then to the Division for investigation and mediation." [Emphasis added.] Under the rule, it is not the Petitioners' call to seek mediation or informal resolution, but the Commission's. Since the Commission has not made such a referral to date, it is a fair assumption that such a referral is presumed to be either unnecessary or unlikely to resolve the issues.

1. The Petitioners' Request for Agency Action Is Not a Routine Consumer Complaint.

PacifiCorp is so eager to avoid an adjudicatory proceeding which would reach the merits of the instant Complaint that it urges the Commission to interpret R746-100-3(F) in a manner absolutely at odds with Utah Code Ann. § 54-7-9(1)(b), which affords

the Petitioners herein the unqualified right to file their request for agency action as a matter of law. The Commission's informal alternate dispute resolution process (which is established in R746-100-3(F)) does not and cannot override the statute. The administrative rule is undoubtedly useful and efficient for dealing with billing disputes and service cut-off complaints, but that is not what the statute contemplates, nor can the nature of utility misconduct alleged in the request for agency action be credibly treated as "routine."

Utah Code Ann. § 54-7-9(1)(b) authorizes any person to file a request for agency action for violations by utilities of "any provision of law, or any order or rule of the commission." That is exactly the substance of the instant Complaint. The Petitioners have alleged that the 2003 Christmas power outage was caused as a direct consequence of ScottishPower's and PacifiCorp's deliberate violation of the conditions and requirements established in the Commission's merger and sale orders in 1988 and 1999, the companies' violation of tariffs, and the companies' violations of Commission rules. The investigation conducted in Docket No. 04-035-01 yielded facts which clearly establish the utility's negligence and misconduct. Contrary to the Commission's orders, the utility severely cut back or substantially eliminated its maintenance of the distribution system, transferred or eliminated more than half of its Utah work force [1] (including its forestry operation), and transferred its engineering, accounting, customer service, and maintenance operations to such an extent that, when a severe but by no means unforeseeable winter storm hit its operating area, the system failed massively. That massive failure was not an act of God – it was the foreseeable consequence of

[1] Between 1990 and 2002, PacifiCorp decreased its customer-facing Utah employees from 1,831 to 895. Williams Consulting Report, p. 7.

neglect and the utility's misguided re-ordering of budgetary priorities. Even though the utility's own tariffs require it to maintain all of its facilities to assure safety and reliability, PacifiCorp and ScottishPower – for the entirety of their ownership of the Utah system – completely ignored the tariff responsibility to trim trees around customer drop lines. [2] At page 112 of its Outage Report, PacifiCorp admits that 90% of the Christmas outages were caused by tree contact with power lines, and the "vast majority of these tree incidents occurred on secondary feeders and low-voltage service lines running from distribution transformers to customers' homes."

Consider also:

- 1,100 tree contacts with primary distribution wires were preventable. [3]

- Of 7,900 separate tree incidents, 29% involved 2-29 customers each, and 13% involved 30 or more customers each. These counts do not include the thousands of individual customers whose service drop lines failed because of PacifiCorp's failure to adequately maintain them. [4]

- The preventable outages could have been avoided if the company were on a 3-year tree-trimming cycle. [5]

- PacifiCorp's Utah tree-trimming cycle was 6.4 years. [6]

- PacifiCorp's November-December 2003 Utah tree survey found that 22% to 39% (more than one-third) of trees which potentially could affect PacifiCorp's facilities *were already in contact with conductors.* [Emphasis added.] [7]

- "In our opinion, primary outages [high voltage distribution lines] are likely to have caused the rapid and large counts of customers out during the first 12 hours of the

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[2] Electric Service Regulation No 6., ¶ 1 and ¶ 2(c). See also, the testimony of Darcie White and Douglas Larson in Docket No. 04-035-42 as cited in Petitioners' Motion to Incorporate Previous Testimony, filed June 19, 2005.
[3] PacifiCorp Outage Report, p. 29.
[4] PacifiCorp Outage Report p. 59.
[5] PacifiCorp Outage Report, p. 112.
[6] Williams Consulting Report, p. 4.
[7] Williams Consulting Report, p. 4.

storm." [8] It is important to note that the utility has admitted that 1,100 of those high voltage tree contacts were "preventable." [9]

Moreover, the storms which overwhelmed the PacifiCorp system, which every neighboring municipal electric system weathered without serious failure rates or outage times, were not the wettest nor the heaviest snowfall of recent record. The Williams Consulting report, at page 10, states that four other storms were more severe – in ascending severity – in 1996, on November 5, 1998, March 22, 1944, and December 12, 1993. This was not a "One Hundred Year" storm; it was not even a "One-in-Ten Year" storm. This was not a storm-caused failure; it was a failure driven by years of deferred maintenance in violation of Commission orders, the company's tariffs, and the Commission's own rules. This is not a "routine" consumer complaint.

The Petitioners' request for agency action was filed in behalf of the one-third of PacifiCorp's Wasatch Front customers – 190,000 -- who lost power during the Christmas storm – 80,600 of whom were out of power at the same time. "Routine" consumer complaints do not reach a magnitude of system-wide failure on that order, nor do they "routinely" see the utility notifying the Red Cross, the LDS Church, and Salt Lake City and Salt Lake County governments of the need to provide humanitarian support and shelter – as happened here. [10]

2. The Division's Adverse Actions In This Docket Disqualify It As a Disinterested, Objective Mediator.

With respect, PacifiCorp is in no position to seriously argue that its customer relations department could effectively or objectively respond to the instant Complaint. Moreover, in view of the Division's hostile reaction to the Complaint (as evidenced by

[8] Williams Consulting Report, p. 20.
[9] PacifiCorp Outage Report, p. 29.
[10] PacifiCorp Outage Report, p. 72.

its June 14, 2005 recommendation that the docket be closed without further action), the Division has spoken as an adverse party. It is difficult to read the Division's various memoranda in Docket No. 04-035-01, in juxtaposition with the reports submitted by PacifiCorp and Williams Consulting, and not conclude that the Division has positioned itself as an apologist for the utility's misconduct. It is unrealistic to expect that an informal mediation presided over by the Division, as an adverse party, would produce any useful result. Indeed, given the serious allegations of utility misconduct and violation of Commission orders, the only appropriate forum for dealing with the Complaint and its allegations of massive quality of service failures, as the statute contemplates, is the Commission itself.

3. The Mediation Process Specified In R-746-100-3(F) Does Not Comply With Utah Law.

Even if R746-100-3(F) were deemed applicable, the process contemplated therein does not satisfy the statutory ADR requirements of Utah Code Ann. § 63-46c-103, the Governmental Dispute Resolution Act. The Commission has never adopted an administrative rule establishing a process for alternate dispute resolution in conformity with the statute. R-746-100-3(F)(1) is no more than a suggestion, at best, and does not begin to meet the criteria specified in § 63-46c-103(1) [which provides that ADR may be used only with the consent of all the interested parties]; nor § 63-46c-103(2)(a) [requiring an ADR procedure governed by rules]; nor § 63-46c-103(2)(b) [requiring open access to and the neutrality of an ADR provider or neutral, requiring a broad selection of ADR providers or neutrals, and requiring objective criteria for an ADR provider or neutral to become qualified to conduct an agency ADR procedure]; nor § 63-46c-103(4) [specifying that ADR procedures are voluntary]; nor § 63-46c-103(5) [requiring development of an

agreement providing for an ADR or neutral whose appointment and division of costs is agreed upon by all parties]; nor § 63-46c-103(6) [requiring that an ADR provider or neutral upon whom the parties agree shall have no official, financial, or personal conflict of interest with any issue or party in controversy].

Since R746-100-3(F)(1) does not comply with any of the foregoing statutory requirements, PacifiCorp's argument that the Petitioners have failed to follow the required procedure is misplaced. The Commission does not have an ADR procedure in place which meets the statutory requirements of the Governmental Dispute Resolution Act, and until the Commission adopts administrative rules which conform to the Act, the Commission may not lawfully direct such a referral.

4. Even if PacifiCorp's Filing Procedure Arguments Were Well-Taken, Dismissal Is The Wrong Remedy.

Even if the Commission were to find that mediation is a necessary prerequisite to acting on the Petitioners' request for agency action, a stay of further proceedings in the docket, for the purposes of mediation, is the appropriate remedy, not dismissal.

Notwithstanding all of the foregoing, and if PacifiCorp is not pulling everyone's leg by making the argument, assume hypothetically that the Commission is empowered to order mediation. What is to be gained by such a referral? Mediation can only succeed if all of the parties are willing to come to the table. Petitioners have already proposed, in writing, to PacifiCorp, ScottishPower, and MidAmerican that it would be useful for all of the parties to try to settle the case prior to hearings on MidAmerican's purchase agreement with ScottishPower. Petitioners have formally asked those companies to designate someone authorized to speak for each company for purposes of discussing settlement. Significantly, no response has been received to date by

Petitioners, which may suggest that PacifiCorp's insistence on mediation is disingenuous. Nevertheless, Petitioners believe the case could be settled on a reasonable basis, and Petitioners have specific proposals for settlement which are reasonable and fair. If PacifiCorp is seriously interested in resolving the issues raised in the request for agency action without further litigation, it may be useful for the Commission (as sometimes happens with courts) to suggest to the parties that they meet and attempt to settle the case; and the Commission can surely do so irrespective of R746-100-3.

III. The Commission Has Subject-Matter Jurisdiction To Grant All Of The Relief Requested By The Petitioners.

The Commission should be clear about the stakes inherent in PacifiCorp's subject-matter jurisdiction arguments, for if it concedes the field to PacifiCorp, it gives up control of critical regulatory power; and once gone, the power is unlikely to return. Again, PacifiCorp argues that the Commission's intervention order in Docket No. 04-035-01 controls the instant docket, as to these issues, which is not correct, as elaborated in Petitioners' initial Response.

1. PacifiCorp Lacks Authority To Make Any Argument For ScottishPower.

PacifiCorp improperly continues to argue that the Commission lacks jurisdiction over ScottishPower and that ScottishPower should be dismissed from the docket. PacifiCorp's counsel has made it clear that Stoel Rives and PacifiCorp do not represent ScottishPower in this proceeding, and none of the documents filed by PacifiCorp in this docket purport to be filed in a dual-client capacity. Moreover, because this proceeding raises a question respecting the allocation of penalty punishments as between PacifiCorp and ScottishPower, both PacifiCorp and Stoel Rives have a conflict of interest in representing ScottishPower in this proceeding; and this conflict further disqualifies Stoel

Rives and PacifiCorp from even speaking for ScottishPower in this proceeding. ScottishPower has been formally served with notice of the proceeding (which was accomplished on June 13, 2005), and has not yet entered an appearance. If ScottishPower wishes to contest the Commission's jurisdiction – which is specifically conferred over ScottishPower by Utah Code Ann. §§ 54-2-1(7), 54-7-27, and 54-7-28 – that company must enter its appearance to do so. PacifiCorp's motion to dismiss ScottishPower is a gratuitous motion, made without authority, and should not even be entertained as legitimate argument.

2. Whether Compensation Is Classified As "Compensatory Damages" Or "Reparation," The Commission May Order PacifiCorp To Compensate Customers Who Lost Power In December 2003.

PacifiCorp's argument that the Commission lacks subject-matter jurisdiction to compensate customers as requested by Petitioners does not have nearly the weight of authority which the utility might wish. Petitioners have been clear and candid about the case law, which PacifiCorp, understandably, seeks to obfuscate. The authorities, as Petitioners have disclosed, are a handful of cases which, because of their specific facts and language, have contested application in this docket. It is undisputed that these Utah cases, to which the Public Service Commission has been a party in one capacity or another, all involve what might be called "routine" service complaints of one or a very few customers. It should, therefore, be no surprise that the Utah Supreme Court has issued its opinions in the context of these fairly isolated events and limited numbers of customers.

What distinguishes the instant Complaint from all of these others is the massive quality-of-service failure experienced over the course of six to eight days, at Christmas, by 190,000 PacifiCorp customers at a time of year when a sustained power outage could

have been fatal as homes dropped below habitable temperatures for days at a time. This was a massive, system-wide failure so unprecedented in proportion in Utah that thousands of customers were scouring neighborhoods trying to spot line crews because they could not make a connection with the utility's customer service department to report their outages and get a repair crew on the scene. The entire outage reporting system collapsed. Thousands of customers could not make telephone contact with a live person through the utility's outage reporting system. This case, therefore is vastly different from all the others considered to date by the Utah Supreme Court. This is not about a small St. George law firm that had its phone lines crossed for a few weeks, nor is it about a lawyer whose company debt was used as a basis for terminating his residential phone service.

The Petitioners have multiple remedies for compensation, whether pursued before the Commission or a different forum. The argument that the Commission cannot award compensatory "damages," however, rests squarely on a distinction without a difference. PacifiCorp concedes that Utah Code Ann. § 54-7-20 authorizes the Commission to order a utility to make "due reparation" where the Commission finds that a utility has "charged an amount for such product, commodity or service in excess of the schedules, rates, and tariffs on file with the commission, or has charged an unjust, unreasonable or discriminatory amount against the complainant." [Emphasis added.] The Oxford Dictionary defines "reparation" to be "making amends" or "compensation for war damage." The same dictionary defines "damages" to be "financial compensation for loss or injury," or "reparation," or "indemnity." Black's Law Dictionary defines "reparation" to be "the redress of an injury; amends for a wrong inflicted." The same law dictionary defines many forms of "damages," but

fundamentally, they are "a pecuniary compensation or indemnification which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another." In short, whether a remedy is classified as "reparation" or "damage," the restorative medium for each is money paid to the injured party.

PacifiCorp argues that "rate reparations" are the only monetary relief permitted by the statute cited above. Petitioners have previously cited the Utah Supreme Court's reasoning in *Atkin Wright & Miles,* 709 P.2d 330, 334 (Utah 1985) as grounds for Commission authority to award "compensatory damages" in a case where a utility breaches its quality-of-service obligation on the colossal scale of the Christmas outage. PacifiCorp persists in mischaracterizing Petitioners' use of this case, [11] but the Commission should read for itself the reference therein, at p. 344 to *Campbell v. Mountain States Telephone & Telegraph Co,* 586 P.2d 987 (Ariz.App. 1978), in which the Utah Supreme Court explains why it relied so heavily on the Arizona precedent in ruling against the St. George lawyers:

> 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.

The Utah Supreme Court used the Arizona case to make a critical distinction between customer injuries which fit traditional theories of tort law (animals hit and killed by utility vehicles) – which are matters for district courts to consider – as opposed to adequacy-of-service or quality-of-service-to-the-public issues which result in injury to

[11] Also of little help is the Reply's penchant for mis-stating the Petitioners' argument in order to create a straw man the utility can then argue against. For example, at Page 5, the Reply suggests that Petitioners have relied on a non-current version of R746-100-3. This is incorrect. The current version of the Rule, as cited by Petitioners, is a correct citation.

customers system-wide and which are within the jurisdiction of the Commission to remedy. Otherwise, this statement by the Court (same page) is nonsensical:

> 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 subject to the jurisdiction of the district court. [Emphasis added.]

The above citations were central to the decision reached by the Court. They explain the analysis followed by the Court in reaching its decision, and if not, strictly, the holding of the Court, they were made with consideration and purpose, and are, at the very least, judicial dicta (not obiter dicta) and entitled to much weight. [12] They express the Court's opinion about the way the law would be applied to facts such as in the instant case. PacifiCorp's massive quality-of-service failure, which was a consequence of deliberate misconduct in the face of Commission orders, rules, and company tariffs, place this case within the exception carved out by the Utah Supreme Court in *Atkin*.

It is also significant that Utah Code Ann. § 54-7-9(4) presupposes the Commission's authority to award damages, because that word, "damage" is the Legislature's word of choice when allowing that a complaining party need not allege or show actual "damage" in order to maintain an action. It logically follows that where "damage" is shown, the Commission may provide appropriate compensation. Otherwise, the statutory language is surplusage.

However, if PacifiCorp prefers that compensation be classified as "reparation" under Utah Code Ann. § 54-7-20, the law, again, is on the side of Petitioners. The

[12] "An opinion of an appellate court, to be valuable to a trial court must deal with the questions involved and discussed at the bar, even though some of them are only indirectly involved in the determination of the question upon which the case turns, so that an expression of the court, while dealing with the case in this way, cannot be regarded as mere obiter dicta." *Buchner v. Chicago, M. & N. Ry. Co.*, 19 N.W. 56, 57-58.

narrow interpretation urged by PacifiCorp looks only at rate schedules and an erroneous charge made as a result of mis-applying the schedule. The statute certainly applies in that situation, but not that situation alone.

The statute also applies where a utility charges an "unjust, unreasonable, or discriminatory amount against the complainant," which is exactly the situation in the instant case. Here, PacifiCorp has committed itself by its tariff and its operating certificate to provide continuous, high-quality electric service, to adequately maintain its equipment and facilities, and to strictly follow the Commission's rules governing provision of electric service. The rates that customers are required to pay under the utility's tariff, and as approved by the Commission, are, as a matter of law, sufficient to allow the utility to meet its costs of service and deliver a reliable product. *See, Utah Department of Business Regulation v. P.S.C.,* 614 P.2d 1242, 1248 (Utah 1980); *American Salt Co. v. W.S. Hatch Co.,* 748 P.2d 1060, 1063 (Utah 1987). As a matter of law, the rates ordered into effect by the Commission are deemed just and reasonable, and they contemplate that PacifiCorp will have sufficient revenues to adequately trim trees, hire sufficient staff to deal with emergencies, and otherwise avoid exactly the calamity 190,000 PacifiCorp customers experienced as a result of the utility's over-aggressive effort to cut the costs of service by eliminating the personnel who could, for example, keep its vegetation management program on a three-year cycle rather than a 6-year cycle.

It is clear from PacifiCorp's own data and testimony that the company made no effort whatsoever to trim customer service drop lines during the entire period of its ownership of the Utah system, even though such maintenance of facilities was always required by the tariff and the Commission's rules. Even as to the vegetation for which

the company claims management responsibility, it had reduced its trimming program to such an extent that in December 2003, 29% to 39% of the lines which could potentially interrupt the company's facilities were already in contact with conductors. Eighty percent of the tree contacts with high voltage primary lines were preventable, and those incidents caused the greatest customer impact.

The financial compensation sought by Petitioners can also be deemed a "reparation" under § 54-7-20, because PacifiCorp evidently diverted the money, recovered for many years in rates, which should otherwise have gone to maintenance; and as a consequence of that diversion of revenue, the rates charged to customers over the years of PacifiCorp's and ScottishPower's ownership of the Utah system were, we now see, unjust and unreasonable. PacifiCorp's customers paid the tariff rates for service and adequate maintenance, but the company did not deliver the quality of service or adequate maintenance the tariff, the Commission's orders, and the Commission's rules required PacifiCorp to deliver, and therefore the rates were rendered unjust and unreasonable by the company's misconduct.

This unfortunate situation has several parallels in *MCI Telecommunications v. PSC,* 840 P.2d 765 (Utah 1992). At issue there was the windfall to U.S. West from changes to the federal income tax code, and the Court held that the misconduct of the utility in failing to offset its revenues by the amount of a tax windfall, for the benefit of customers, had resulted in the rates for those affected years not being "just and reasonable." The utility was ordered to disgorge itself of the windfall through any "refund of excess earnings that might be appropriate, whether by way of reparations, refund, or credit against future rates . ." PacifiCorp has been consistently awarded rate relief sufficient to meet all of its costs of service and a reasonable rate of return; however, the utility used

the money which should have been paid out to trim trees, for other purposes, to the detriment of its customers. Customers paid for services which were not performed, and the savings, presumably, went to shareholders.

If customer compensation must be classified as "reparation" under the statute, Petitioners have no objection to that exercise in semantics. Clearly, everyone for 15 years, including the Commission and the Division, have assumed that PacifiCorp was adequately managing vegetation which could interfere with its facilities. PacifiCorp received rate revenues for that specific purpose. Unlike the U.S. West tax windfall, PacifiCorp's windfall seems to have resulted from budgetary manipulation, but in both instances, the companies' rates were rendered unreasonable and unjust.

As argued above, Petitioners believe that the Commission has power to rule on the questions of PacifiCorp liability pursuant to the tariff, orders, and regulations of the Commission, and to award compensation, whether treated as compensatory damages or reparation, accordingly, to Petitioners. But Petitioners also believe that PacifiCorp's admitted misconduct also gives rise to conventional theories of tort liability, such as negligence, gross negligence, reckless disregard for the life and property of others, as well as related doctrines respecting various breaches of legal duties. The remedies for these wrongs may involve different yardsticks for measuring compensation -- yardsticks that are distinct from the reparation theory addressed in the text of this memorandum. The Commission surely has power to adjudicate the factual questions that are germane to any of these theories of liability, since these questions of fact will implicate the expertise of the Commission in matters of tariff interpretation, duties to serve, quality of service, and the like. And the Commission also, as shown above, has power to implement the remedial measures associated with these theories of liability. In any

event, by arguing the reparation remedy outlined above in the text of this memorandum, Petitioners are not implying that this is the only theory of recovery or the exclusive measure of recompense that is available to Petitioners. In the event that Petitioners are denied -- on jurisdictional grounds -- the opportunity before the Commission to assert and recover on any theory of liability or measure of recompense, Petitioners naturally reserve the right to seek redress on that theory and for that recompense in a judicial forum before a trier of fact.

3. The Commission Has Subject-Matter Jurisdiction To Grant Customer Remedies Through Class Action Proceedings.

PacifiCorp's only argument on the matter of class action authority comes down to the suggestion that the Commission lacks such authority because it has never adjudicated a matter as a Rule 23 class action. In other words, PacifiCorp believes the Commission is intellectually or structurally unable to deal with Rule 23 of the Utah Rules of Civil Procedure, which, as PacifiCorp admits, the Commission has adopted and incorporated into its own rules without exception or qualification. This argument also seems to suggest that where a utility creates such a disaster that its size and scope go beyond the Commission's customary experience, dealing with the losses experienced by customers should be someone else's job, preferably an entity that may not have the years of utility regulatory oversight and quality-of-service experience the Commission has with the company.

There is nothing in Rule 23 that is beyond the capabilities or statutory authority of the Commission to properly manage and assure due process. Indeed, the Commission has concluded that much of what it does already is in the nature of class actions. The most effective vehicle for giving notice is the company's regular monthly

billings. The Commission regularly requires that notice of rate proceedings be given along with the billings. The issue of whether the company has violated its tariff, its certificate obligations, the Commission's orders, or the Commission rules is a matter of primary jurisdiction with the Commission, yet PacifiCorp would have the Commission forfeit that jurisdiction to a jury in a civil court, even though a public utility has no right to a jury trial as to those issues before the Commission. This case isn't whether a PacifiCorp truck negligently hit someone's pet dog: it's about the core regulatory functions and powers of the Public Service Commission and a regulated utility's unprecedented and massive failure to adequately serve the public.

The only administrative burden for the Commission, beyond its usual business, is the matter of determining amounts of individual customer compensation. However, the Commission is empowered to do exactly what a court would likely do with that same burden, which is to appoint a qualified special master or masters to make those determinations. Even that is likely to involve minimal burden, because most class action suits are settled without individual trials for each claimant.

The Commission cannot grant PacifiCorp's Motion to Dismiss without deciding just how much jurisdictional authority it's willing to give away. Who, other than the Commission, should determine whether a utility has followed or breached the Commission's orders? Who should determine whether a utility has breached the Commission's rules for the provision of electric service? Who should interpret the meaning of tariffs? Who should decide what a utility's quality-of-service obligations entail and whether they have been breached? Who should determine what responsibilities a utility has under its certificate of convenience and necessity? Who should determine whether a utility has properly allocated revenues to cover necessary

expenses? Who should decide whether customers are receiving full quality-of-service value for the rates they pay? Who should decide how utility charges, if unfair, unjust, and unreasonable, should be made up to customers?

If the Commission, under PacifiCorp's theories of limited jurisdiction, cannot deal with the issues raised in this Complaint, it may fairly be asked whether the regulatory scheme established by the Legislature adequately serves the public interest. If the Commission, as PacifiCorp would have it rule, cannot order this utility and its parent to make its customers whole for losses caused by the utility's misconduct and system-wide failure, then the customers have been twice victimized: first by the company's failure to adequately maintain the system even though customers were fully charged for maintenance not performed; and second, by paying for a regulatory structure which cannot regulate, compensate, or sanction in the face of PacifiCorp's unprecedented, system-wide failure, which put lives and property at risk in the dead of winter, for 190,000 customers. If Utah's regulatory structure cannot require financial accountability of the utility and its parent for the unprecedented 2003 Christmas outage, the next logical questions are very simple: what are customers paying for through the utility regulation fee added to their bills, and why do they need it?

DATED this 29th day of July, 2005.

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David R. Irvine
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CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing Rebuttal Memorandum to be served this 29th day of July, 2005, by mailing copies of the same, first-class U.S. Mail, postage prepaid, to the following parties in interest:

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