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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

<p>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 &amp; 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</p>	<p>Docket No. 04-035-70</p> <p><b>REPLY OF THE UTAH DIVISION OF PUBLIC UTILITIES TO COMPLAINANT'S RESPONSE FOR AN ORDER STAYING DISCOVERY</b></p>
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Pursuant to the September 26, 2005 "Notice of Oral Argument on Motions to Stay Discovery," the Utah Division of Public Utilities ("Division") respectfully submits its reply to the response of Georgia B. Peterson, Janet B. Ward, William Van Cleaf, David Hiller, GP Studio, Inc., Truck Insurance Exchange, and Farmers Insurance Exchange ("Complainants" or "Petitioners") to the Division's Motion for an Order Staying Discovery in this docket.

Petitioners' arguments that discovery must be allowed to commence without delay are unpersuasive. Petitioners' request ignores the goals of administrative economy and efficiency which would not be achieved even if the Petition is only partially dismissed. Petitioners ignore the distinction between a denial of discovery and delay of discovery. Finally, Petitioners are not foreclosed from seeking discovery in other forums if they pursue their actions there.

Attached to this Response is a memorandum from the Division outlining the effort required by the Division to respond to both the interrogatories and the request for production of documents. The effort required to answer the questions and produce the documents is not insignificant. Even if the Petition is not entirely dismissed allowing for more definition on the scope of the Complaint will allow for more focused discovery.

Prior to addressing the discovery the Division will address the claimed ex parte communications alleged in the Petitioner's response. On page 13 Petitioners' claim they have already shown that the Division has engaged in ex parte communications. It is the Division's understanding that Petitioners claim that the January filing of the Division seeking an extension of time constituted ex parte contact, and that no other ex parte contact is alleged. Apparently the Division's memorandum to the Commission requesting an opportunity to review PacifiCorp's answer prior to sending its memorandum was not sent to Petitioners. Even though it was unfortunate that the response was not sent to Petitioners, the nature of the Division's memorandum appears procedural in

nature and therefore would not be considered an ex parte communication under R 746-100-13(C)(2).

1. Administrative Economy and Efficiency Require a Decision on Dismissal Prior to Commencement of Discovery.

Complainants' inaccurately state that "[t]he motions to dismiss cannot and will not dispose of the request for agency action." Some portion, if not all of the claims in the request for agency action must and will be held by the Utah Public Service Commission ("Commission").<sup>1</sup> Petitioners later explain that the penalties they seek against PacifiCorp preclude deferral of discovery.<sup>2</sup>

Petitioners' argument may fail because pursuing an investigation can be at the discretion of the Commission. In Williams v. Public Service Commission, 645 P.2d 611 (Utah 1982) the Utah Supreme Court was asked to address whether the Public Service Commission "should be compelled to conduct an investigation" under Section 54-4-2 which states in part:

Whenever the commission believes that in order to secure a compliance with the provision of this title or with the orders of the commission, or that it will be otherwise in the interest of the public, an investigation should be made of any act or omission to act, . . . it shall investigate the same upon its own motion,

The Utah Supreme Court then concluded, "This statute gives no right of investigation to a complainant; rather it gives broad discretion to the PSC in the employment of the investigatory process."<sup>3</sup> The Commission has already

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<sup>1</sup> Petitioners' response at p 2.

<sup>2</sup> Id. at pp. 2-5

<sup>3</sup> Williams v. Public Service Commission, 645 P.2d 600 (Utah 1982) at p. 601

conducted an investigation into the issues relating to the winter storm.<sup>4</sup> The Commission has discretion in ordering penalties, forgoing the imposition of penalties, or ordering corrective action. Justice Crockett's dissent sets forth the relationship between administrative agencies and imposition of penalties:

It is an elemental concept of law that some exercise of discretion, when imposing statutory penalties is necessary to achieve individualized justice. This is especially true when sanctions and penalties are imposed by administrative agencies, when the power is conferred upon such agencies to investigate facts, weigh evidence and draw conclusions as a basis for legal actions. Due to the nature of the responsibilities imposed upon the [Industrial] Commission in administering and carrying out the purposes of the act, it is required to perform some functions of a judicial nature. Being thus invested with judicial powers, there should be necessarily implied therein the authority to exercise the judicial prerogative of acting in a reasonable and judicious manner in order to properly administer the act and accomplish its purpose.<sup>5</sup>

Because the Commission is vested with the discretion to determine what if any investigation it pursues, and penalties it imposes, Petitioners' claims that discovery should not be stayed because the Commission must now investigate the imposition of penalties issue is misplaced. More importantly since the Commission has some discretion it and not the Petitioners will decide the scope and nature of any further proceedings at the PSC level dealing with the winter storm. The PSC will decide to what extent the numerous issues and arguably unrelated issues to the winter storm will be addressed. Once that happens, discovery can be better defined.

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<sup>5</sup> *Diprizio v. Industrial Commission*, 572 P.2d 679 (Utah 1977) at p. 682.

2. Delay of Discovery is not a Denial of Discovery.

Once the Commission has more definitively defined the scope of the proceeding, the need for the vast amount of documents and other information requested by Petitioner can be better evaluated. The Division's Motion seeks to allow an orderly progression of issues in the case. After the Commission has defined what, if any, issues will be addressed, responses to the questions can be addressed both on relevancy to the issues in the Docket and the overbroad or unduly burdensome nature of the discovery requests. With the amount of time required to answer the questions in a proceeding that may or may not go forward and if it does proceed may or may not go forward with all of the issues outlined by Petitioner it is a reasonable exercise of the administrative functions of the Commission to wait until after it acts on the Motion to Dismiss to permit the amount of discovery requested by the Petitioners.

3. Petitioners' Should Not Be Foreclosed from Pursuing Discovery in District Court.

Petitioners have indicated that they may file an action in District Court and fear that they will be forced back to the Commission to develop the factual record they hope to develop through this discovery.<sup>6</sup> Obviously, discovery is permitted in District Court but more importantly the Commission has already ruled that the District Court and not the Commission has primary jurisdiction to determine damages. With that ruling and PacifiCorp's Motion to Dismiss it is unlikely PacifiCorp could force this proceeding back to the Commission.

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<sup>6</sup> Response at pp. 10-11.

Therefore, for the reasons stated above, the Division respectfully requests that the Commission grant the Division's Motion for a Stay of Discovery pending resolution of the Motion to Dismiss and recommendation to close the docket.

RESPECTFULLY SUBMITTED, this \_\_\_\_\_ day of October 2005.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **REPLY OF THE UTAH DIVISION OF PUBLIC UTILITIES TO COMPLAINANT'S RESPONSE FOR AN ORDER STAYING DISCOVERY** was sent by electronic mail and mailed by U.S. Mail, postage prepaid, to the following on October \_\_\_\_, 2005:

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