

David R. Irvine (Utah Bar No. 1621)
350 South 400 East, Suite 201
Salt Lake City, Utah 84111
Telephone: (801) 363-4011
Telecopier: (801) 746-0174
E-Mail: Drirvine@aol.com

Alan L. Smith (Utah Bar No. 2988)
1492 East Kensington Avenue
Salt Lake City, Utah 84105
Telephone: (801) 521-3321
Telecopier: (801) 521-5321
E-Mail: Alanakaed@aol.com

Attorneys for Petitioners

BEFORE THE UTAH PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE COMPLAINT OF)
GEORGIA B. PETERSON, *et al.*, FOR)
THEMSELVES AND AS REPRESENTATIVES)
OF A CLASS, AGAINST SCOTTISHPOWER,)
PLC, *et al.*, REQUESTING ENFORCEMENT)
OF THE COMMISSION'S ORDERS IN)
DOCKET NOS. 87-035-27 AND 98-2035-04,)
AND COMPENSATION FOR LOSSES.)

Docket No.
04-035-70

REPLY OF PETITIONERS

**TO PACIFICORP'S RESPONSE TO
MOTION TO INCORPORATE TESTIMONY
AND COMMENTS REGARDING LETTERS**

On July 7, 2005, PacifiCorp filed certain procedural concerns with the Commission in response to: (a) Petitioners' Motion to Incorporate Previous Testimony Into This Docket; (b) Petitioners' June 8, 2005 letter to the Commission's legal counsel

seeking information about ScottishPower's Utah representative; and (c) Petitioner's June 17, 2005 letter to the Commission requesting an opportunity to file a rebuttal to PacifiCorp's Reply in support of the company's Motion to Dismiss. The Commission issued a notice on July 12, 2005 which mooted PacifiCorp's concerns regarding Item (c) above (Petitioners' June 17, 2005 letter), and no further comment with respect to the letter is necessary. Petitioners respond as follows to the remainder of PacifiCorp's Response:

I. PacifiCorp Lacks Standing to Speak for ScottishPower

PacifiCorp, by its own admission, does not represent ScottishPower in this proceeding, and is therefore not empowered to make arguments on ScottishPower's behalf.¹ The argument on this subject, set forth at pages 6-8 of PacifiCorp's Response should be stricken.

Even if PacifiCorp were authorized to make arguments in ScottishPower's behalf, the claim that "the focus on service of process at this time is misplaced" is without merit.² The Petitioners' request for agency action names ScottishPower as a respondent for the reason that PacifiCorp is owned by ScottishPower, and the 1999 Order imposes certain duties, including improvement of quality of service, on both PacifiCorp and its parent as a condition of approving the sale. Moreover, the Commission has asserted valid jurisdiction over ScottishPower, and, pursuant to it has

¹ "ScottishPower is not a Utah public utility, is not appearing at this time, and therefore does not participate in this filing." [PacifiCorp Motion to Dismiss, p. 5.] PacifiCorp's counsel reaffirmed verbally his office's lack of authority and PacifiCorp's lack of authority to accept service of process for ScottishPower in this proceeding, which resulted in Petitioners' July 8, 2005 letter to Sandy Mooy, Esq., legal counsel to the Commission.

² Response, p. 6.

imposed various conditions on ScottishPower's ownership and management of PacifiCorp. That jurisdiction continues, with or without ScottishPower's consent.³

PacifiCorp's gratuitous arguments about jurisdiction confusingly mix the concepts of subject-matter jurisdiction and personal jurisdiction. It is not disputed that both types are necessary, but personal jurisdiction is not dependent upon subject-matter jurisdiction. Since PacifiCorp is not ScottishPower, PacifiCorp's views as to whether personal jurisdiction over ScottishPower exists in this matter are immaterial -- even more so, because Petitioners personally served ScottishPower. The question of personal service, therefore, appears to be moot. In any event, PacifiCorp has no standing to contest that service.

³ In addition to the Commission's continuing jurisdiction over ScottishPower, conferred as a necessary condition of the Commission's approval of the sale of PacifiCorp to ScottishPower in its November 23, 1999 Order in Docket No. 98-2035-04, statutory jurisdiction over ScottishPower is provided by Utah Code Ann. § 54-7-9(1). The definition of an "electric corporation" under § 54-2-1(7) includes the definition of a "corporation" under § 54-2-1(5)(a) - which unarguably includes entities such as ScottishPower - and further qualifies the definitions of such corporations to include: "[every entity] owning, controlling, operating, or managing any electric plant . . . within this state . . ."

Statutory jurisdiction over ScottishPower is also conferred under § 54-7-25, which provides: "Any public utility that violates or fails to comply with any rule or order issued under this title, in a case in which a penalty is not otherwise provided for that public utility, is subject to a penalty of not less than \$500 nor more than \$2,000 for each offense . . . Any violation of this title or any rule or order of the commission by any corporation or person is a separate and distinct offense. In the case of a continuing violation, each day's continuance of the violation shall be a separate and distinct offense . . . the act, omission, or failure of any officer, agent, or employee of any public utility acting within the scope of his official duties or employment shall in each case be deemed to be the act, omission, or failure of that public utility."

Even if ScottishPower were not a public utility as defined by statute, subject-matter jurisdiction is conferred, pursuant to § 54-7-27, over "every corporation, other than a public utility, which violates any provision of this title, or which fails to obey, observe or comply with any order, decision, rule, direction, demand, or requirement, or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such corporation, is subject to a penalty of not less than \$500 nor more than \$2,000 for each and every offense."

PacifiCorp's Response does, however, raise an issue which may merit closer examination in view of the company's Motion to Dismiss. Since that Motion is premised on an alleged lack of subject-matter jurisdiction over ScottishPower – which is an argument PacifiCorp lacks standing to assert – there would have to be facts on the record which clearly show that ScottishPower exercises no oversight or control over PacifiCorp's operations, and that none of PacifiCorp's management structure, budgets or operating policies are reviewed or approved by ScottishPower. Since the record in this docket, presently, is devoid of any such facts, it is inadequate, as a matter of law, to support PacifiCorp's Motion to Dismiss without further factual development by both PacifiCorp and ScottishPower.

II. ScottishPower's Failure To Designate a "Senior Executive" in Utah And Petitioners' July 8, 2005 Letter

As previously noted, subject-matter jurisdiction has nothing to do with personal jurisdiction, and Petitioners' June 8, 2005 letter to Mr. Mooy was simply an effort to establish the facts necessary to perfect *in personam* jurisdiction. The letter was necessary because of yet another violation by ScottishPower of the Commission's order approving the sale of PacifiCorp to ScottishPower. One of the duties, to which ScottishPower stipulated and the Commission ordered, in Appendix 5 to the Order, was:

ScottishPower's commitment to locate a senior executive in Utah. According to the letter agreement, this senior executive will report directly to the CEO of PacifiCorp, and will have broad influence over PacifiCorp's operations in Utah, including authority to approve corporate involvement in economic development and corporate citizenship activities."

A fair assumption, based on that language, is that ScottishPower would at least notify the Commission of such a senior executive's designation, if not register as a foreign corporation pursuant to Utah Code Ann. § 16-10a-1508. PacifiCorp's gratuitous

subject-matter jurisdiction argument claims that Petitioners “misunderstand” the language of the merger order cited above, but the language seems plain enough on its face. ScottishPower has never notified the Division of Corporations of the name of a registered agent, and Petitioners were unable to locate the name and address of a ScottishPower representative (upon whom to effect personal service of process) through that usual source of information. The next logical source of information about such a representative – since naming and maintaining that “senior executive” was part of the Commission’s Order regarding ScottishPower’s purchase of PacifiCorp – was an inquiry of the Commission’s staff. Mr. Mooy, in responding to Petitioners’ July 8, 2005 letter, stated that he was unaware of the existence of such a representative, but stated that he had “heard” that Mr. Richard Walje, PacifiCorp’s was ScottishPower’s designated representative.

Petitioners then sent a copy of the request for agency action, by mail on June 13, 2005, to Mr. Walje and via Fedex to Mr. Ian Russell (ScottishPower’s CEO) at ScottishPower’s Glasgow office, as required by Utah Code Ann. § 63-46b-3(3)(b), which is the Commission’s procedure for effecting service of process, as specified in R-746-100-4(B). Petitioners submit that service on ScottishPower, as required by the Commission’s rule, has been properly effected, and the cases cited by PacifiCorp in its gratuitous and unauthorized argument are not on point, since jurisdiction over ScottishPower continues under the terms of Docket No. 98-2035-04 and is otherwise conferred by statute – unless ScottishPower can make a credible argument that it does not own, control, operate, or manage its subsidiary – PacifiCorp – which controls and operates Utah Power & Light. If ScottishPower maintains that PacifiCorp operates completely without oversight or control by the foreign parent, then it should appear and make the best argument it can

for that proposition. Indeed, as the Commission contemplates yet another sale of PacifiCorp, these lines of argument by PacifiCorp may suggest the necessity for even tighter regulatory control over a new buyer if the service improvements pledged by PacifiCorp and ScottishPower following the Christmas outage fail to materialize.

Petitioners still have no way of knowing whether Mr. Walje is, in fact, ScottishPower's designated representative, and we presume the Commission also lacks information about that. Petitioners will stipulate that Mr. Walje is an executive of exceptional ability and long experience with the Utah Power system; however, if he, in fact, is ScottishPower's designated "senior executive in Utah," that relationship is not readily ascertainable, and it would seem to contradict the logical inference of the stipulation. Prior to ScottishPower's purchase of PacifiCorp, Mr. Walje was never a ScottishPower executive, and it isn't clear, even now, that ScottishPower holds him out as a ScottishPower senior executive. It is only in recent weeks that Mr. Walje's CEO position in Utah has been at least nominally upgraded to place the Utah position on an equal hierarchical plane with his counterpart in Oregon.

Petitioners really have no objection to Mr. Walje's possible dual-hat status, as such, but the manner in which the arrangement may have been made, if in fact it has, is but another example of the two companies' casual regard for the Order approving the sale. If Mr. Walje, in fact, is also ScottishPower's representative under Appendix 5 to the Order, why has no notice of that fact been transmitted in any formal way to the Commission during the past several years? This disregard of the sale order will be one more violation for which Petitioners will ask, in a subsequent motion, that penalty sanctions be imposed on ScottishPower as well as PacifiCorp.

III. The Sworn Testimony of Darcie White and Douglas Larson Should Be Incorporated Into This Docket.

PacifiCorp, in its Response, questions the need to incorporate the sworn testimony of Darcie White and Douglas Larson from a public witness hearing in Docket No. 04-035-42 into this Docket. PacifiCorp argues that no reason for such incorporation has been offered, but the Motion to Incorporate filed by Petitioners explains in detail and at length why the incorporation is necessary.

Mr. White is a former senior officer of Utah Power & Light, who appeared on behalf of himself and his neighborhood, to protest PacifiCorp's continued inattention to complaints, over a period of two years, about power outages and unsafe line conditions. Mr. White specifically testified that he had been told by the company that "it's the company's policy to require customers to trim trees, any trees necessary to keep the secondaries in their yards clear of branches." He then explained why, based on his experience as a UP&L executive, such a policy was dangerous. [Exhibit 1 to Petitioners' Motion, TR, p. 47-48.]

Mr. Douglas Larson responded for PacifiCorp, and testified:

You're exactly right. The company has not been trimming around service drops. Those costs, since we haven't been doing it, aren't included in customer prices. The second issue, I guess, really is whether or not that is something that the company should be doing on a prospective basis which is, I think, the heart of the issue you're addressing with the commission, and your recommendation is that in fact the company should have the responsibilities to trim those trees on secondary drops. [Exhibit 1 to Petitioners' Motion, TR, p. 52.]

Mr. Larson's sworn testimony is an admission that PacifiCorp has been, for years, in violation of its own tariff and Electric Service Regulation No. 6, ¶ 1⁴ and R746-310-4(D)(2) and (4), of the Commission's Rules, which reads:

General Requirements - Unless otherwise ordered by the Commission, the requirements contained in the National Electrical Safety Code, as defined at R746-310-1(B)(13), constitute the *minimum* requirements relative to the following [emphasis added]:

(2). the installation and maintenance of overhead and underground electrical supply and communication lines;

(4). rules to be observed in the operation of electrical equipment and lines;

and

R746-310-5, which reads:

Facilities owned or operated by utilities and used in furnishing electricity shall be designed, constructed, maintained and operated so as to render adequate and continuous service. Utilities shall, at all times, use every reasonable effort to protect the public from danger and shall exercise due care to reduce the hazards to which employees, customers and others may be subjected from the utility's equipment and facilities.

The import of Mr. Larson's admissions cannot be understated. He testified that company policy is not to trim trees around service drops to customer homes, even though PacifiCorp owns those facilities - and that it has not done so.⁵ These admissions go directly to Petitioners' claims that the Christmas 2003 power outage was primarily caused by the company's misconduct and neglect to adequately maintain its facilities.

⁴ ". . .the Company will install and maintain its lines and equipment on its side of the Point of Delivery . . ."

⁵ Mr. Larson's testimony also suggests that tree-trimming around secondary lines, as well as service drops, may not be the company's responsibility: ". . . the heart of the issue that you're addressing with the commission, and your recommendation is that in fact the company should have the responsibilities to trim those trees on secondary drops." Chairman Campbell then asked: "When you say the company hasn't been doing it, did the company do it at one time?" Mr. Larson then testified, "Not that I'm aware. I think it has been the customers' responsibility to trim the tree related to the service drops, as far as I know." [TR, p. 52.]

Mr. White's testimony simply corroborates this fact. This, therefore is not a question of what trimming clearance is reasonable or appropriate – it's an admission that PacifiCorp doesn't trim around these facilities at all. Yet, PacifiCorp has reported that of 7,900 tree contacts, ⁶ which it claims caused more than 90% of the Christmas outages, ⁷ more than 3,300 were on secondary and service lines. ⁸

Even as to vegetation the company purports to manage, its own tree survey in November and December 2003 concluded that, of trees likely to affect PacifiCorp facilities, 22% to 39% were already in contact with conductors. It should be noted that PacifiCorp claims its trimming crews (which have operated on a 6.4 year cycle ⁹) trim to clearances deemed by the company to be consistent with industry standards; ¹⁰ however, R746-310-5 does not set the bar that low. The Commission's maintenance standard is much higher: "Facilities owned or operated . . . shall be maintained and operated so as to render adequate and continuous service." PacifiCorp failed to maintain its facilities to the Commission's own standard. The result of this neglect shows in PacifiCorp's own comparison of how neighboring municipal systems fared. The 2003 Christmas storm saw only 8.2% of Bountiful's system affected, versus 69% of PacifiCorp's next-door Centerville customers. PacifiCorp's own data then provides the explanation: Bountiful's tree-trimming standards are as much as 10 time more rigorous than PacifiCorp's. ¹¹

PacifiCorp argues that the Motion to Incorporate is premature because
Petitioners have not properly filed a "customer complaint" under the terms of R746-100-

⁶ PacifiCorp Outage Report, p. 59.

⁷ PacifiCorp Outage Report, p. 28.

⁸ PacifiCorp Outage Report, p. 29.

⁹ Williams Consulting Report, p. 4.

¹⁰ Note that Bountiful City's municipal power company trims on a 3-year cycle to clearances that are triple to ten times those of PacifiCorp on secondary lines and double to ten times on customer service drops. [PacifiCorp Storm Report, 4/4/05, at p. 5.]

¹¹ PacifiCorp Storm Update dated April 4, 2005, p. 4.

3(F)(1). Petitioners have dealt with this argument at length in their Rebuttal to PacifiCorp's Reply in Support of Motion to Dismiss, filed July 29, 2005. Briefly summarized: (a) Petitioners are allowed to file the request for agency action as a matter of right. R746-100-3(F)(1) does not supersede Utah Code Ann. § 54-7-9(1)(b); (b) Petitioners' request for agency action is not a "routine" consumer complaint and therefore is outside the scope of the rule; (c) the rule relied upon by PacifiCorp does not comply with the Governmental Dispute Resolution Act, Utah Code Ann. § 63-46c-100, *et seq.*, and therefore is unlawful; (d) even if the Commission could lawfully make the referral, the responsibility for which the rule places on the Commission, not the Petitioners, neither PacifiCorp nor the Division is an appropriate mediator since both are hostile and adverse parties to the proceeding; and (e) the Commission has not chosen to make a mediation referral, therefore, PacifiCorp's objections are without merit.

Finally, and without putting too fine a point on the inadequacies of the Division's purported "investigations" either in this docket or No. 04-035-01, there is nothing in any filing from the Division to suggest that the agency ever considered the White and Larson testimony at all. Indeed, at the time it was offered, the Division failed to even cross-examine either witness. Whatever PacifiCorp's view of its tree-trimming "policy" may be at any point in time, the now-admitted key fact, stubbornly, remains: PacifiCorp is obligated by its tariff and the Commission's rules to trim around all of its facilities, primary, secondary, and service drops, and to do so in a manner that renders "adequate and continuous service." The testimony of Mr. Larson flatly admits that PacifiCorp disregarded both its tariff and the Commission's rules, and that sworn testimony bears directly against PacifiCorp's Motion to Dismiss and establishes

significant facts in favor of Petitioner's Request for Agency Action, and must be included in the record of this docket.

DATED this 8th day of August, 2005.

David R. Irvine
Alan L. Smith
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing Response to be served this 8th day of August, 2005, by mailing copies of the same, first-class U.S. Mail, postage prepaid, to the following parties in interest:

Gregory B. Monson, Esq.
Ted D. Smith
STOEL RIVES, LLP
201 So. Main St., Suite 1100
Salt Lake City, UT 84111

Natalie Hocken
PacifiCorp
825 NE Multnomah, Suite 1800
Portland, OR 97232

Michael Ginsberg, Esq.
Heber Wells Bldg., 5th Floor
160 East 300 South
Salt Lake City, UT 84111

Reed Warnick, Esq.
Heber Wells Bldg, 5th Floor
160 East 300 South
Salt Lake City, UT 84111

Michael Jenkins, Esq.
PacifiCorp
201 South Main St., Ste. 2200
Salt Lake City, UT 84111