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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

RESPONSE OF PETITIONERS

TO MOTIONS FOR PROTECTIVE ORDERS

STAYING DISCOVERY FROM PACIFICORP AND

THE UTAH DIVISION OF PUBLIC UTILITIES

Petitioners submit this response to the motions of PacifiCorp dba Utah Power & Light ("PacifiCorp") and the Utah Division of Public Utilities (the "Division") for a protective order, staying discovery, pending the outcome of earlier motions from PacifiCorp and the Division for dismissal of the request for agency action.

I. Preliminary Statement

Boiled to essentials, the arguments of PacifiCorp and the Division for a stay of discovery are based upon the premise that the motions to dismiss may be dispositive of the request for agency action. PacifiCorp and the Division contend that, in light of this potential for disposition, discovery at this juncture is premature, if not wasteful, and, accordingly, should be deferred until the outcome of the motions to dismiss is known.

As with many arguments of PacifiCorp and the Division, however, the premise is the problem. As shown below, this premise is false. The 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 heard by the Utah Public Service Commission ("Commission"). The requested discovery is addressed to these claims and, therefore, should be answered now in anticipation of an adjudication on the merits of these matters -- an adjudication that is inevitable and not merely possible. Moreover, the requests for discovery, in part, are designed to elicit evidence that will be germane to the motion of PacifiCorp for dismissal of ScottishPower on the ground that ScottishPower is not a "public utility" within the meaning of the Utah public utilities code. Insofar as PacifiCorp may raise this question at all,[1] the issue has a factual component and, as explained below, discovery is needed to ascertain the necessary facts in connection with argument on the motion.

[1] Please see footnote 2 below.

II. The Request for Agency Action Seeks Penalties from PacifiCorp and ScottishPower for Violations of Merger Orders, the Utilities Code, Commission Regulations, and Company Tariffs; These Claims Will Not Be Removed by the Motions to Dismiss, and, Accordingly, There Is No Reason to Defer Discovery on These Claims.

The motions of PacifiCorp and the Division for a protective order pretend that the Petitioners' request for agency action only seeks damages for Petitioners as a result of utility negligence leading up to the Christmas 2003 storm outage. The motions argue that, since the negligence and damages claims might possibly be dismissed on jurisdictional and procedural grounds, discovery on those claims is premature and should await the outcome of the motions to dismiss. But the request for agency action, in major part, also seeks penalties from PacifiCorp and ScottishPower for violations of merger orders, the utilities code, agency regulations, and company tariffs. The jurisdictional and procedural arguments at issue on the motions to dismiss cannot and will not defeat these claims.

Petitioners unquestionably have standing to raise these claims -- as a matter of statutory right under Utah Code Annotated § 54-7-9(1)(b), pursuant to case law (even absent this statutory grant), *e.g., Sierra Club v. Utah Solid and Hazardous Waste Control Board,* 964 P.2d 335, 339-340 (Utah Ct. App. 1998), and, additionally, pursuant to Utah's version of the private attorney general doctrine, *e.g., Stewart v. Utah Public Service Commission,* 885 P.2d 759, 781-84 (Utah 1994), especially where, as here, the Division defaults in its statutory responsibility for regulatory oversight.

Petitioners have stated and will bring these claims as individuals, even if the Commission agrees with PacifiCorp and elects to disregard its authority to treat portions of the request for agency action as a class action.

Nor will PacifiCorp's concerns about a mediation process derail these claims. First, as demonstrated in Petitioners' other pleadings, a mediation process does not and, indeed, cannot apply in this docket. Second, Petitioners already long since have asked for a settlement conference with PacifiCorp and ScottishPower, which request has been met with a deafening silence. (In this regard, please see copies of Petitioners' correspondence which are attached as Exhibit 1.) And finally, in any event, mediation effectively cannot occur absent information, obtained through discovery, on the merits of these claims and, speaking realistically, mediation, even if mandated, only will serve as prelude to a formal adjudication of these claims.

Petitioners will proceed on these claims against PacifiCorp because it is indisputably a public utility, subject to penalties, under Utah Code Annotated § 54-7-25. These claims will be adjudicated on the merits, whatever disposition is made respecting subject matter jurisdiction and ScottishPower. What is more, Petitioners will proceed on these claims against ScottishPower as well because, even if the Commission does not have jurisdiction over ScottishPower as a "public utility," as argued in the pleadings of PacifiCorp,[2] ScottishPower nevertheless is subject to penalties as a non-utility under the clear provisions of Utah Code Annotated § 54-7-27.

In short, regardless of the outcome of the motion to dismiss the negligence/damages claim of Petitioners against PacifiCorp and ScottishPower, the

[2] Petitioners contend that PacifiCorp has no standing to speak for ScottishPower, and, indeed, has a conflict of interest in this regard, as explained in earlier pleadings from these Petitioners. Accordingly, the Commission should strike those portions of the PacifiCorp pleadings in this docket which purport to raise any issue on behalf of ScottishPower, including the argument that ScottishPower is not a public utility subject to the jurisdiction of the Commission. Petitioners so move the Commission, and request that such arguments be stricken from those pleadings and not considered in connection with arguments respecting the motions to dismiss, the motions for a protective order, and any other matter in this docket.

claim for penalties, a claim that is ignored in the motion for a protective order, will survive in this docket. The discovery requests, in the main, seek information respecting the penalties claims. Indeed, PacifiCorp's contention that the discovery requests go mainly, if not exclusively, to the claims of Petitioners respecting negligence and damages is a gross distortion of the discovery pleadings. Even a cursory review of those pleadings shows that they are aimed mainly at the penalty claims in the request for agency action. Since these penalty claims will continue and ultimately must be treated on the merits, the motion to dismiss the negligence and damages claims is no reason to defer discovery, and discovery should move forward sooner rather than later.[3] Indeed, these penalty claims are serious and substantial, as shown in the next section of this response, and should move forward in the public interest.

[3] PacifiCorp argues that, since Petitioners have not sought discovery heretofore, notwithstanding a substantial lapse in litigation time, there is no need to conduct discovery at this juncture. This argument, of course, is a *non sequitur,* since any past delay is no excuse for future deferment. Indeed, just the opposite is true, since the parties desire to make up for lost time. There are sound reasons for Petitioners' withholding of discovery requests to this point in time, including the pendency of another docket respecting the storm outage, and (what proved to be) an abortive hope that regulatory bodies would discharge their duties to seek penalties against these utilities for admitted misconduct. It was not clear that the Division would take a passive, pro-utility role in Docket No. 04-035-01 until the Division sent its June 14, 2005 memorandum to the Commission recommending that the docket be closed with no further action. The Division likewise did not reveal that it had joined with PacifiCorp in this docket (04-035-70) until June 14, 2005, when it sent its memorandum to the Commission recommending that this docket also be closed without further action. But these reasons, like PacifiCorp's argument, are moot under present circumstances. The real question is whether the motions to dismiss supply an excuse for delaying the requested discovery and not pressing forward with this litigation. As already noted above and elaborated further below, this is not the case, and, indeed, there is no reason to delay, and every reason to proceed with, pretrial discovery in this docket.

III. While PacifiCorp Has Already Admitted Violations of Orders, Rules, and Tariffs, the Discovery Sought by Petitioners Is Necessary to Calculate the Penalties Owed to the State of Utah.

The magnitude of PacifiCorp's potential liability to the State of Utah for order, rule, and tariff violations to which it has already admitted is enormous. It must be noted that PacifiCorp's admissions of order, rule, and tariff violations have arguably made the Petitioners' negligence/damage claims the more minor part of the request for agency action, and it is Petitioners' intention to litigate the violation/penalty issues first.

Utah Code Ann. § 54-7-25(1) provides:

> Any public utility that violates or fails to comply with this title or 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.

Subsection (2) provides:

> 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.

Commission rule R746-310-4(D) provides:

> Unless otherwise ordered by the Commission, the requirements contained in the National Electric Safety Code, as defined at R746-310-1(B)(13), constitute the minimum requirements relative to the following:
>
> 1. the installation and maintenance of electrical supply stations;
> 2. the installation and maintenance of overhead and underground electrical supply and communication lines;
> 3. the installation and maintenance of electric utilization equipment;
> 4. rules to be observed in the operation of electrical equipment and lines;
> 5. the grounding of electrical circuits. [Emphasis added.]

Commission rule R746-310-5 provides:

> 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.

Adherence to these rules is not discretionary on the part of PacifiCorp, nor is enforcement of these rules discretionary with the Division and the Commission. PacifiCorp filed its Outage Report in April 2004. In it, at page 41, the utility admits that, just in the years FY 2003 and FY 2004, it was guilty of 21,800 separate violations of the National Electric Safety Code. Each of those NESC violations is a separate violation of R746-310-4(D). PacifiCorp further admits that in FY 2003, it corrected 6,500 of the 8,800 violations; in FY 2004, it corrected 10,000 of the 13,000 violations. Each of those violations was for at least one day, and we do not yet know how many days each violation continued, nor do we know whether all such violations were ever corrected. For each of those 21,800 violations, the Commission is required by law to impose a penalty. If the maximum penalty were applied for those 21,800 rule violations (treating each violation as just one day), PacifiCorp owes the State of Utah $43.6 million.

However, we know from the Outage Report that 5,300 of those NESC violations were not corrected in the years they occurred and still may not have been corrected. If you assume, hypothetically, that those 5,300 uncorrected violations each continued for a period of 90 days (each such day a separate violation), that equates to 447,000 days of continuing violations. If only the minimum statutory penalty is applied to those 447,000 days, the amount of money owed by PacifiCorp to the State of Utah is $223.5 million – in addition to the amount stated above.

Looking only at this example – and there are a great many more – the Division of Public Utilities has completely ignored utility-admitted rule violations which entail potential revenue to the State of between $10.9 million and $937.6 million. The

discovery sought by Petitioners in Document Request Nos. 12, 14, and 28 is necessary to determine with precision the number of NESC violations admitted by the utility and the exact number of days each violation was allowed to continue before being corrected.

Another example of overlooked penalties is the admitted failure of PacifiCorp to do adequate tree trimming. Commission rule R746-310-5 requires a very high standard of line maintenance: "to render adequate and continuous service." PacifiCorp slipped its Utah trimming to a 6.4 year trim cycle (Williams Consulting Report, page 4), and the "industry standard" is three years. It should be noted, however, that the Commission rule is stricter than any "industry standard" – the rule obligation is maintenance that will assure "continuous service." In PacifiCorp's Outage Update Report, dated September 9, 2004, the utility admitted that "approximately 1,100 of the tree contacts on primary wires were preventable." [4] The utility further admitted that its own annual vegetation survey in November 2003 showed that "between 22% and 39% of Utah trees which could potentially affect PacifiCorp facilities were currently in contact with the conductors" (Williams Consulting Report, page 4). It is unarguable that the 1,100 "preventable" tree contacts are violations of Commission rules R746-310-4(D)(2) and R746-310-5, and each day those trees were in line contact is a separate rule violation. If this "failure to trim violation" is reduced to a single day for each of the "preventable" 1,100 contacts between trees and lines, this would be 1,100 violations – or 1,100 violation days. If these "preventable contacts" lasted only one day, the minimum penalty for 1,100 violation days is $550,000. If 500 of those tree contacts had persisted for 3 years, the minimum penalty for just those 500 trees is an additional $547,500.

[4] The NESC also provides that tree contacts with conductors is a Code violation; thus, the utility's failure to trim adequately also violates Commission rule R746-310-4(D)(2).

The truly staggering penalty amounts, however, flow from PacifiCorp's admitted failure to trim customer drop lines, which, according to the utility, caused most of the outage incidents. PacifiCorp admits at page 59 of its Outage Report that 4,582 outage incidents involved tree contacts on customer drop lines. PacifiCorp has also admitted, in the testimony of Douglas Larson (which Petitioners have moved to have incorporated in this docket), that the utility does not trim customer drop lines, even though Commission rules R746-310-4(D)(2) and R746-310-5 (and the company's tariffs)[5] make no exception for ignoring that maintenance obligation. It is reasonable to conclude, therefore, that those 4,582 drop lines had not been trimmed in the 6 years prior to the 2003 Christmas outage. Each untrimmed day is a separate rule violation, and that trimming failure for just 6 years equates to 10,034,580 separate violation days. At $500 per day per violation, the minimum penalty for those violations is $5,017,290,000 -- $5 billion plus change. The maximum penalty is four times that.

Document Requests Nos. 4, 5, 6, 7, 10, 15, 17, 27, are necessary to establish with precision the number of tree trimming violations and the duration of each violation in order to calculate the penalties owed by PacifiCorp to the State for its inadequate maintenance program. In addition, Document Requests Nos. 1, 2, 3, 8, 9, 11, 16, 18, 19, 20, 21, 24, 25, 26, 29, 30, and 31 are necessary to establish the nature, frequency, number, and duration of other Commission order and rule violations for the purpose of calculating additional penalties owed by the utility to the State of Utah.

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[5] In other pleadings, PacifiCorp has informed the Commission that a tariff is not merely a contract but also an "order" of the Commission. This is why tariff violations are violations of an order of the Commission, leading to the imposition of fines and penalties under the statutes referenced above. *See, e.g., Beehive Telephone Company v. Public Service Commission of Utah,* 89 P.3d 131 (Utah 2004).

Again, just as to these matters, the discovery is necessary, not necessarily to establish liability – which has already been admitted (as to some, but not all, violations) – but to determine the amounts of the penalties to be paid, which are non-discretionary. [6] Moreover, the discovery sought from the Division has a direct bearing on the issue of order and rule violations. Much of the discovery requested of the Division seeks to determine whether PacifiCorp ever notified the Division or the Commission of its intention to transfer jobs and corporate functions out of Utah, which, if done without Commission approval, violated the merger and sale orders of 1988 and 1999. This discovery seeks to determine whether the Division knew of and approved the utility's decisions to reduce maintenance of its distribution system, and it seeks to determine what remedial action the Division took, if any, in the face of the utility's admitted 21,800 NESC violations in 2003 and 2004. This discovery is necessary, not just to assist in the calculation of appropriate penalties, but also to determine whether, in the years since the first merger with PacifiCorp, the Division has ever adequately discharged its statutory oversight and regulatory functions as to this utility.

IV. Discovery Will Be Necessary Even if the Motions to Dismiss Are Granted in Full.

Even if the motions to dismiss are granted and the request for agency action is dismissed, penalty portion and all (a decision which could not withstand appeal), the discovery at issue still will be necessary, and, therefore, in the interest of expeditious, economic resolution of this dispute, should be ordered by the Commission.

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[6] The discovery sought as to sale and merger order violations is expected to disclose that the utility's failure to notify the Commission of personnel reassignments and transfer of corporate functions from Utah to Oregon will yield additional penalty obligations for order violations which have continued for more than 10 years. A single violation which continues for 3,650 days carries a minimum penalty of $1,825,000.

In the hypothetical event that the motions to dismiss are granted, on the ground that there is no subject matter jurisdiction in the Commission to award damages in favor of the Petitioners or the class of customers they represent, Petitioners will file a class action in district court. This action will raise questions (among others) respecting tariff violations as a breach of contract and regulatory violations as evidence of negligence, all with a view to establishing liability and proving damages in the wake of the storm and outage. PacifiCorp, at that juncture, by motion to the district court, undoubtedly will invoke the doctrine of primary jurisdiction in administrative law, seeking to stay the action in district court until the Commission can apply its expertise by ruling on the questions raised concerning tariff interpretation, regulatory violations, and the overall quality of utility service.

This litigation game of ping-pong will bring the parties back to the Commission, raising the same factual problems that Petitioners now seek to address through these discovery requests. Obviously, the company's object is to burden the customers to the point that they will drop the suit. Of course, if PacifiCorp will stipulate that the Commission does not and never will have this primary jurisdiction in connection with the claim for damages, or if PacifiCorp will stipulate that no such motion will be made in the district court, once an action is filed in that forum, then, of course, the argument articulated above may be ignored – assuming the Commission is content to delegate its jurisdictional responsibilities with respect to these issues to a district court. But PacifiCorp, like most defendants, probably will not stipulate to any procedure that will take away an opportunity for delay in reaching the merits of this controversy. In view of this improbability, and the resulting certainty that questions respecting tariff infractions, regulatory violations, and quality of service issues will be presented for

adjudication to the Commission, either in this docket or on a referral from district court pursuant to the doctrine of primary jurisdiction, efficiency dictates that it makes great sense to avoid delay and move forward with discovery. Petitioners' discovery requests seeking information respecting these issues should be answered forthwith.

V. The Discovery Is Necessary for Adjudication of the Motion to Dismiss.

Discovery is necessary in connection with the motions to dismiss for three, independent reasons.

First, assuming hypothetically that the argument of PacifiCorp that the Commission lacks subject matter jurisdiction over ScottishPower because ScottishPower is not a "public utility" properly is before the Commission on the motion to dismiss,[7] that argument, as framed in the pleadings, has a critical and necessary factual component. The public utilities code defines "public utility" in part by reference to "control" over management, operations, plant, and facilities in Utah. The question of control, in part, therefore is a critical question of fact. Request Nos. 8, 9, 17, 24, and 25 of the request for documents that Petitioners have submitted to PacifiCorp are designed to elicit evidence on this question of control. What is more, Petitioners have requested information respecting motions to amend and amendments of the merger orders from both PacifiCorp and the Division, and this information has a bearing on whether the Commission has altered those findings and conclusions respecting subject matter jurisdiction over ScottishPower in the merger orders -- rulings that, absent any such modification, may be *res judicata* on questions now under consideration. Indeed, it is not impossible or even improbable that the pleadings and correspondence and other documents that are responsive to these data requests will show that, independent of

[7] Please see footnote 2 above.

evidence on the prospect of issue preclusion, the utility and Division may be judicially estopped on these points.

Second, Petitioners already have shown that the Division, as a putative party in interest, has engaged in *ex parte* contacts with the Commission, as the adjudicative body, in connection with this docket. Petitioners have made data requests to determine the nature and extent of these contacts in order to ascertain whether such contacts may have been prejudicial to the Commission's neutrality in this docket. That neutrality is important in connection with any ruling on the motions to dismiss. Petitioners are entitled to have at least these specific requests answered by the utility and the Division prior to any hearing on the motion to dismiss and the request to have this docket closed.

Third, the discovery sought from the Division is necessary prior to any argument on the motions to dismiss because the Division bases its dismissal recommendation to the Commission on a theory that the Division is a gatekeeper for complaints to the Commission. To the extent that this self-appointed role in some way affects Petitioners' standing to proceed, the discovery is necessary to demonstrate that the Division has limited its oversight role, as to this utility, to rate cases only, and that as to matters of compliance with the merger and sale orders, monitoring of compliance with Commission rules R746-310-4 and R746-310-5, the adequacy of system maintenance, appropriate management of coal resources, and appropriate disposition of properties acquired for generation and transmission advantages, the Division has essentially allowed PacifiCorp to be self-regulating. The Division's gatekeeper theory of standing is not supported in statute, but in any event, it implodes when a regulated utility admits that, under the Division's "watchful" eye, 21,800 NESC violations occurred over two years, and that 5,300 went uncorrected – or that the tree-trimming cycle slipped from 3

years to 6.4 years and that all trimming crew positions were eliminated – or that the tariff and rule obligations to trim customer drop lines (a cost allowed in rates) was only rarely practiced throughout all the years of PacifiCorp's operation of the UP&L system.

VI. Conclusion

The discovery requested by Petitioners is essential to aspects of the request for agency action which are not affected by the subject-matter arguments made by PacifiCorp in its motion to dismiss, and, as has been more fully argued in other of Petitioners' pleadings, the Division's recommendation that the docket be closed lacks any authoritative basis upon which that suggestion could conceivably be granted.

The requested discovery is critical to establishing appropriate penalty amounts to be assessed against PacifiCorp and ScottishPower for admitted violations of orders, rules, and tariffs. Moreover, the discovery is essential in order to allow a fair and reasonable adjudication of the jurisdictional claims PacifiCorp has made in its motion to dismiss. The stay of discovery sought by PacifiCorp and the Division would deprive the Commission of critical factual evidence – without which a fair and just determination of the arguments regarding subject-matter jurisdiction cannot possibly be made. Such a stay would deprive Petitioners of an adequate opportunity to contest the jurisdictional arguments of PacifiCorp which turn on whether ScottishPower exercises management control PacifiCorp's utility operations.

DATED this 13th day of October, 2005.

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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 13th day of October, 2005, by mailing copies of the same, first-class U.S. Mail, postage prepaid, to the following parties in interest:

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EXHIBIT 1

July 10, 2005

Mr. Ian Russell
CEO, ScottishPower
1 Atlantic Quay
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United Kingdom

Re: In Re the Complaint of Peterson, et al. Against PacifiCorp and ScottishPower, Utah Public Service Commission Docket No. 04-035-70

Dear Mr. Russell:

Alan L. Smith and I are counsel for the several petitioners in the above-referenced request for agency action which we filed with the UPSC last December concerning the losses experienced by PacifiCorp customers during what is referred to in Utah as the Christmas 2003 power outage. That outage left innumerable customers without power for multiple days. We are aware, of course, of your company's purchase and sale agreement with MidAmerican Energy Holdings Company, which in the near future will be the subject of approval proceedings before the UPSC and other state utility commissions. Our review of PacifiCorp's Form 10-K, 8K, and 10-Q reports to the Securities and Exchange Commission (which was by no means exhaustive) did not indicate that PacifiCorp has specifically referenced this litigation; nevertheless, we assume that the matter will be treated in the course of a normal due diligence review, and that assumption is the reason for this letter.

The question of whether a holdback provision should be required as a condition of the proposed sale, in the event our clients prevail on their claims, is an issue which may well be before the Utah Commission when hearings on the sale are held later this year. We do not wish to impede the sale – we feel that Utah customers will benefit from it – and so we are proposing to PacifiCorp and ScottishPower that it may be advantageous to determine whether the matter can be settled, and on what terms and conditions, prior to the time that sale approval hearings begin. It may be that MidAmerican would also be interested in participating in a settlement discussion, and I have sent a similar letter to Mr. Douglas Anderson, MidAmerican's General Counsel.

Our complaint to the Commission (a copy of which I have previously sent you) names ScottishPower as a co-respondent. We have been advised by PacifiCorp's

counsel (Stoel Rives) that the firm does not represent ScottishPower in the matter, [8] and PacifiCorp has stated in pleadings on file that, if there is any financial liability to our clients or others in the class we seek to represent, there is "ample recourse against Utah Power." Based on that comment, it would seem to us that Stoel Rives may have created a conflict of interest as between ScottishPower and PacifiCorp, and whether Stoel Rives will actually represent both companies remains to be seen. PacifiCorp has stated that ScottishPower is not a "public utility" and, therefore, is not subject to the Commission's jurisdiction and, accordingly, has asked for dismissal. The governing statute defining the term "public utility" (Utah Code Ann. § 54-2-1(7)), however, is quite clear: an electric corporation (over which the Commission has jurisdiction) includes every "corporation . . and person . . owning, controlling, operating, or managing any electric plant . ." What is more, our complaint seeks administrative fines against ScottishPower, and jurisdiction over ScottishPower in this regard, even if it is not a public utility within the meaning of the statute quoted above, undeniably is available under Utah Code Ann. § 54-7-27. Based on these statutory considerations, we have recently taken the necessary steps, under the Commission's rules for service of process, to require ScottishPower to answer for itself in some appropriate manner. I have previously mailed those documents to you and to Mr. Richard Walje.

Recognizing that ScottishPower's status before the Commission is a matter of dispute, however, we invite your company to designate someone in Utah to represent the company in a settlement negotiation – even if just for that very limited purpose. The following information is provided for the purpose of illustrating why, we believe, it is in the interests of PacifiCorp, ScottishPower, and possibly, MidAmerican to resolve the dispute before the sale proposal is presented for Commission approval.

We believe that it is likely that the information regarding the number of customers affected by the power outage is not yet complete, nor has there been any systematic assessment of the degree to which various customers were affected. We have not pleaded a specific loss amount in our complaint, but just the handful of named plaintiffs we have put forward can show an economic loss of between $75,000 and $100,000. PacifiCorp has admitted that 190,000 customers experienced "sustained" outage or outages during the duration of the storm. The company has indicated that 80,000 customers were without power at the height of the storm, and it has said that 2,700 were without power for "several days." For purposes of this letter, I will initially just refer to 2,700 customers who, as the company describes them, were without power for several days. If we assume that "several days" is four days and nights, it is likely

[8] Because Stoel Rives is not, as we understand, representing ScottishPower and because ScottishPower does not maintain a registered agent in Utah, it is our practice to send correspondence regarding this matter directly to you and to Mr. Richard Walje, who, we are advised, is ScottishPower's "representative" in Utah, although not its official registered agent.

that such customers incurred food and lodging bills as a consequence of their homes not being habitable due to cold. Others of the 190,000 likely incurred such expenses as well, but this first calculation is only for the 2,700. If we assume that the average customer of those 2,700 was a family of four, it is probable that they would have had to pay at least $100 per night for a hotel room, probably more, but $100 is a useful proxy. That would be a $400 out-of-pocket cost. If you add the expense of twelve meals to that, for four persons, a proxy number of $20 per person per day is a useful proxy. For a family of four, that amount for four days would be $320. Even if this very minimal "loss" estimate were applied to 2,700 customers, the total is $1,944,000.

As a practical matter, however, there are likely tens of thousands more customers who experienced losses of that magnitude or more. If we expand the affected customer universe to the 80,000 who lost power at the height of the storm – using just the minimal proxy calculation I described for the 2,700 customers – at 80,000 customers, that loss totals $57,600,000. For the sake of a hypothetical calculation, if that minimal loss proxy is halved, to $360 and that level of loss is applied to 190,000 customers, the total is $68,400,000. As we have spoken with customers during the course of the past year, we have received loss estimates which typically range from a few hundred dollars to $8,000 and more. My use of these minimum averages may well be very conservative and low. If 100,000 customers could show losses of just $1,000 each, that would be $100,000,000.

There is another component to the complaint as well, and that is our request that the Commission sanction PacifiCorp and ScottishPower for noncompliance with the two previous merger and sale orders. We believe (and we are confident we can prove) that PacifiCorp's decisions to move corporate functions out of Utah and to eliminate tree-trimming operations and other employee and management positions in Utah were done without notice to the Commission (so a hearing could be scheduled), without Commission approval, and in direct violation of the merger and sale orders. Under Utah Code Ann. § 54-7-25, a utility may be fined up to $2,000 per day for each day of a continuing violation of a Commission order. If these violations are established as a result of continued proceedings under our complaint, there is an additional corporate liability exposure. Without even going back to the date of the first order in 1988, if a violation of the 1999 sale order is established (hypothetically beginning on January 1, 2000), there is the potential for an administrative penalty being levied of $2,000 per day for a period of five years. For just a single violation over that five-year time period, the fine could be $3,650,000. If that single violation were tracked back to 1990 (15 years), such a fine could be $10,950,000. We believe that there are at least five clear-cut such violations, and each constitutes a separate offense for every day since it occurred. If those five were tracked for ten years, that potential administrative penalty could be $36,500,000.

The companies will assess that penalty risk as they may, and while it may seem an unlikely stretch with respect to the dollar totals I've described, there is some

interesting precedent with respect to Qwest and to Beehive Telephone on quality of service issues. In its brief to the Utah Supreme Court in a recent Beehive case, the Commission's counsel argued that, when a violation of a Commission order is found to have occurred, the imposition of a penalty fine is not a matter of discretion – such a fine is mandated by statute.

We understand that these calculations are not yet matters of evidentiary fact, but we believe they suggest a potential level of liability which is sufficiently significant that serious attention is warranted. That PacifiCorp has failed to adequately maintain its distribution system in Utah is virtually undisputed. That it has operated in violation of its own tariffs is also an irrefutable fact, as the company's own documents and sworn testimony demonstrate. Aside from questions of jurisdiction, the only real dispute is the amount of compensatory loss and administrative penalties to which PacifiCorp and ScottishPower may be subject. We believe that it would possible to fashion a settlement which could have enough win-win all the way around to allow ScottishPower a graceful exit and MidAmerican an unencumbered entrance.

We have some thoughts respecting a settlement, both substantive and procedural, and look forward to an opportunity to discuss these with you, in the event that you would care to participate in this process, as noted above. I have sent similar letters to MidAmerican and PacifiCorp. Please let us know your disposition in this regard.

Very truly yours,

David R. Irvine

DRI:sp

cc: Mr. Richard Walje, representing ScottishPower in Utah

July 10, 2005

Andrew Haller, Esq.
General Counsel, PacifiCorp
825 NE Multnomah, Suite 1800
Portland, OR 97232

Re: In Re the Complaint of Peterson, et al. Against PacifiCorp and ScottishPower, Utah Public Service Commission Docket No. 04-035-70

Dear Mr. Haller:

Alan L. Smith and I are counsel for the several petitioners in the above-referenced request for agency action which we filed with the UPSC last December concerning the losses experienced by PacifiCorp customers during what is referred to in Utah as the Christmas 2003 power outage. That outage left innumerable customers without power for multiple days. We are aware, of course, of ScottishPower's purchase and sale agreement with MidAmerican Energy Holdings Company, which in the near future will be the subject of approval proceedings before the UPSC and other state utility commissions. Our review of PacifiCorp's Form 10-K, 8K, and 10-Q reports to the Securities and Exchange Commission (which was by no means exhaustive) did not indicate that PacifiCorp has specifically referenced this litigation; nevertheless, we assume that the matter will be treated in the course of a normal due diligence review, and that assumption is the reason for this letter.

The question of whether a holdback provision should be required as a condition of the proposed sale, in the event our clients prevail on their claims, is an issue which may well be before the Utah Commission when hearings on the sale are held later this year. We do not wish to impede the sale – we feel that Utah customers will benefit from it – and so we are proposing to PacifiCorp and ScottishPower that it may be advantageous to determine whether the matter can be settled, and on what terms and conditions, prior to the time that sale approval hearings begin. It may be that MidAmerican would also be interested in participating in a settlement discussion, and I have sent a similar letter to Mr. Douglas Anderson, MidAmerican's General Counsel.

Our complaint to the Commission (a copy of which has been previously sent to Ms. Hocken and Mr. Jenkins) names ScottishPower as a co-respondent. We have been advised by PacifiCorp's counsel (Stoel Rives) that the firm does not represent ScottishPower in the matter, and PacifiCorp has stated in pleadings on file that, if there is any financial liability to our clients or others in the class we seek to represent, there is

"ample recourse against Utah Power." Based on that comment, it would seem to us that Stoel Rives may have created a conflict of interest as between ScottishPower and PacifiCorp, and whether Stoel Rives will actually represent both companies remains to be seen. PacifiCorp has stated that ScottishPower is not a "public utility" and, therefore, is not subject to the Commission's jurisdiction and, accordingly, has asked for dismissal. The governing statute defining the term "public utility" (Utah Code Ann. § 54-2-1(7)), however, is quite clear: an electric corporation (over which the Commission has jurisdiction) includes every "corporation . . and person . . owning, controlling, operating, or managing any electric plant . ." What is more, our complaint seeks administrative fines against ScottishPower, and jurisdiction over ScottishPower in this regard, even if it is not a public utility within the meaning of the statute quoted above, undeniably is available under Utah Code Ann. § 54-7-27. Based on these statutory considerations, we have recently taken the necessary steps, under the Commission's rules for service of process, to require ScottishPower to answer for itself in some appropriate manner. I have previously mailed those documents to Mr. Ian Russell and to Mr. Richard Walje.

Recognizing that ScottishPower's status before the Commission is a matter of dispute, however, we have invited that company to designate someone in Utah to represent the company in a settlement negotiation – even if just for that very limited purpose. The following information is provided for the purpose of illustrating why, we believe, it is in the interests of PacifiCorp, ScottishPower, and possibly, MidAmerican to resolve the dispute before the sale proposal is presented for Commission approval.

We believe that it is likely that the information regarding the number of customers affected by the power outage is not yet complete, nor has there been any systematic assessment of the degree to which various customers were affected. We have not pleaded a specific loss amount in our complaint, but just the handful of named plaintiffs we have put forward can show an economic loss of between $75,000 and $100,000. PacifiCorp has admitted that 190,000 customers experienced "sustained" outage or outages during the duration of the storm. The company has indicated that 80,000 customers were without power at the height of the storm, and it has said that 2,700 were without power for "several days." For purposes of this letter, I will initially just refer to 2,700 customers who, as the company describes them, were without power for several days. If we assume that "several days" is four days and nights, it is likely
that such customers incurred food and lodging bills as a consequence of their homes not being habitable due to cold. Others of the 190,000 likely incurred such expenses as well, but this first calculation is only for the 2,700. If we assume that the average customer of those 2,700 was a family of four, it is probable that they would have had to pay at least $100 per night for a hotel room, probably more, but $100 is a useful proxy. That would be a $400 out-of-pocket cost. If you add the expense of twelve meals to that, for four persons, a proxy number of $20 per person per day is a useful proxy. For a family of Mr.

four, that amount for four days would be $320. Even if this very minimal "loss" estimate were applied to 2,700 customers, the total is $1,944,000.

As a practical matter, however, there are likely tens of thousands more customers who experienced losses of that magnitude or more. If we expand the affected customer universe to the 80,000 who lost power at the height of the storm – using just the minimal proxy calculation I described for the 2,700 customers – at 80,000 customers, that loss totals $57,600,000. For the sake of a hypothetical calculation, if that minimal loss proxy is halved, to $360 and that level of loss is applied to 190,000 customers, the total is $68,400,000. As we have spoken with customers during the course of the past year, we have received loss estimates which typically range from a few hundred dollars to $8,000 and more. My use of these minimum averages may well be very conservative and low. If 100,000 customers could show losses of just $1,000 each, that would be $100,000,000.

There is another component to the complaint as well, and that is our request that the Commission sanction PacifiCorp and ScottishPower for noncompliance with the two previous merger and sale orders. We believe (and we are confident we can prove) that PacifiCorp's decisions to move corporate functions out of Utah and to eliminate tree-trimming operations and other employee and management positions in Utah were done without notice to the Commission (so a hearing could be scheduled), without Commission approval, and in direct violation of the merger and sale orders. Under Utah Code Ann. § 54-7-25, a utility may be fined up to $2,000 per day for each day of a continuing violation of a Commission order. If these violations are established as a result of continued proceedings under our complaint, there is an additional corporate liability exposure. Without even going back to the date of the first order in 1988, if a violation of the 1999 sale order is established (hypothetically beginning on January 1, 2000), there is the potential for an administrative penalty being levied of $2,000 per day for a period of five years. For just a single violation over that five-year time period, the fine could be $3,650,000. If that single violation were tracked back to 1990 (15 years), such a fine could be $10,950,000. We believe that there are at least five clear-cut such violations, and each constitutes a separate offense for every day since it occurred. If those five were tracked for ten years, that potential administrative penalty could be $36,500,000.

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David R. Irvine

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cc: Greg Monson, Esq.
Michael Jenkins, Esq.
Ms. Natalie Hocken