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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 RECOMMENDATION OF
UTAH DIVISION OF PUBLIC UTILITIES
RESPECTING DISMISSAL OF COMPLAINT

Petitioners Georgia B. Peterson, *et al.* ("Petitioners") make this response to the recommendation of the Utah Division of Public Utilities ("Division" or "UDPU") respecting dismissal of the "Petition and Request for Agency Action" (the "Complaint") filed by Petitioners and opening this docket December 23, 2004. The Division's

recommendation is formulated in a Memorandum filed on June 14, 2005 (the "Memorandum"). Petitioners first will place the Division's recommendation in procedural context. Petitioners next will summarize the concerns expressed by the Division in the Memorandum. Petitioners finally will respond to these concerns, one by one, showing that they lack merit and should be disregarded.

PROCEDURAL BACKGROUND

In December, 2003, following a severe storm, approximately 190,000 customers of PacifiCorp dba Utah Power & Light Co. ("PacifiCorp" or the "Utility") suffered an interruption of service. Approximately 190,000 subscribers lost power for an extended period. Seeking an explanation for the outage, the Utah Public Service Commission (the "Utah Commission" or the "Commission") opened docket number 04-035-01. The Commission apparently exercised executive powers, including the power of investigation, in opening this docket; the Commission may have directed PacifiCorp to file a report, and the UDPU to respond.¹ Through these efforts, the Commission sought

¹ As an administrative agency, the Commission is invested with executive power to investigate and prosecute, legislative power to make rates and promulgate rules, and the power of adjudication to decide disputes between contestants. *See, e.g.*, Utah Code Annotated, Section 54-4-2.

The genesis of docket number 04-035-01 is curiously obscure. There is no opening petition that presents a case for decision. Nor is there an order from the Commission, directing action by any party. Instead, at some point, perhaps by consensus reached among the Commission staff, the UDPU, and PacifiCorp, so-called "terms of reference" were formulated. These first appear (insofar as Petitioners have been able to determine) in the PacifiCorp "Utah Holiday Storm Inquiry -- 2003," at chapter 3, but there is no Commission order in which they have been adopted as controlling for purposes of the investigation. PacifiCorp has argued that these terms of reference define the parameters of the Commission's investigation into the causes of the outage, but the Commission has not adopted them in a formal way to frame issues for any proceeding, adjudicative or otherwise. Indeed, this docket probably was opened under Utah Code Annotated, Sections 54-4-1.5 or 54-4-2 and Commission Rule R746-100-3 A. 1. b., in which event, it

to understand what happened and why the failure of service was protracted, and, most important, looking to the future, which remedial efforts may serve to prevent a recurrence of these problems. The docket, as originally opened, did not purport to address questions of liability to customers, whether there should be an assessment of penalties for service failures, whether PacifiCorp's violations of previous Commission orders were a causative factor in the outage at issue, whether PacifiCorp and ScottishPower should be penalized in that event, whether either PacifiCorp or ScottishPower have been guilty of other violations of the regulatory regime, and, if so, what punishment would be commensurate with those offenses.²

Certain of the Petitioners filed a motion to intervene in docket number 04-035-01. They purported to represent a class, those customers injured by the outage, and, moreover, sought to raise questions of retrospective relief on account of PacifiCorp's alleged negligence, inadequate service, breach of tariff, and past violations of certain orders of the Utah Commission. The request for intervention by these Petitioners would have expanded docket number 04-035-01 in both function and scope; it would have transformed an investigative proceeding into an adjudication of rights, and it would have

expressly was not intended as an adjudicative proceeding. And it would be backwards for the scope of inquiry to be shaped by PacifiCorp, if the docket, as it appears, is a reflection of the investigatory powers of the Utah Commission.

All of these questions, however, now appear to be moot. The Commission closed docket number 04-035-01 by a letter dated June 24, 2005. And as argued more fully below, the Division's Memorandum, which recommends a referral of issues from the Complaint in this docket to the outage investigation in docket number 04-035-01 -- in light of the June 24th Commission letter, closing docket number 04-035-01 -- also has become moot.

² The Commission may have felt that, absent an exploration of causes, recompensing customers, the casting of blame, or other forms of retrospective relief would be premature.

required the Commission to evaluate, not only the causes of the outage and prophylactic measures, but also to render judgments whether private customers harmed by PacifiCorp's misfeasance should be awarded compensation and whether any public interest offended by the Utility's malfeasance should be punished with penalties for contempt.³

PacifiCorp objected to intervention on such broad terms. The Commission agreed with this objection, and on July 6, 2004, issued a ruling which, although allowing these Petitioners (for themselves, but not as representatives of a class of customers) to participate in the dialogue of issues already referenced in that docket, nevertheless denied these Petitioners an opportunity to raise and be heard on questions of compensation to customers and penalties for PacifiCorp and ScottishPower.

The order respecting intervention was made without prejudice. Moreover, Petitioners were invited to submit information respecting certain claims to the Division so that the Division, if it desired, independently could study, investigate, and prosecute such claims. In this regard, the order states: "*Relative to the non-power outage issues the [Petitioners] seek to raise, we deny their Petition without prejudice. The [Petitioners] may present what detailed information they may have concerning their claims to the [Division]. The Division has statutory power to conduct its own investigations or studies upon complaint [citation omitted], and we believe that the Division will objectively consider the claims. Should the Division conclude that future Commission action is*

³ The Petitioners' complaint in intervention sought administrative penalties against PacifiCorp and ScottishPower because both companies allegedly have been in violation of this Commission's orders approving the merger and acquisition of Utah Power, first for PacifiCorp in 1987 and again for ScottishPower in 1998.

warranted, we trust that the Division will bring *its* recommendations to the Commission." Order Granting in Part and Denying in Part Petition and Request to Intervene, docket no. 04-035-01, at 3-4 (July 6, 2004) (emphasis and brackets supplied) (hereinafter called the "Order Denying Intervention").

On December 23, 2004, Petitioners filed the Complaint, opening a new docket (this docket number 04-035-70) in which they raise, for themselves and as representatives of a class, those questions of compensation and penalties that others⁴ were prevented from raising through intervention in docket number 04-035-01. The presentation of this Complaint is a matter of right under Utah Code Annotated, Section 54-7-9(1)(b).

On December 23, 2004, the same date as the Complaint filing, the Commission, by action request, directed the Division to investigate the issues raised in the Complaint. The Commission gave January 24, 2005, as a deadline by which the Division should respond to the mandate to investigate. On January 21, 2005, the Division filed a "Memorandum" with the Commission, seeking an enlargement of this deadline. As grounds, the Division indicated that it was "currently in the middle of the investigation and is awaiting PacifiCorp's response to the complaint. In order for the Division to thoroughly investigate the matter, the Division is respectfully requesting the Commission to postpone the dead line [sic] for the Division's response until the Division gets a chance to see and study PacifiCorp's response to the complaint."

Petitioners were not served with any of these pleadings, neither the Commission's action request nor the Division's memorandum seeking an extension of time to respond to

⁴ It may bear repeating that the petitioners requesting intervention in docket number 04-035-01 are not identical to Petitioners seeking relief under the Complaint in this docket number 04-035-70.

that request. Hence, Petitioners were unaware that the Commission had directed the Division to investigate the issues raised in the Complaint. As explained more fully below, Petitioners remained unaware of this order to investigate until the end of May or early June of 2005.

On February 7, 2005, PacifiCorp responded to the Complaint, answering and moving to dismiss the same. As the Commission is aware, Petitioners have responded to the motion to dismiss, PacifiCorp has replied to this response, and an additional cycle of pleadings in this regard is going forward.

On May 23, 2005, the Commission entered an order canceling a scheduling conference that previously had been set in this docket. The order indicated that cancellation was necessary because, "[t]he Public Service Commission is awaiting additional information from the Division of Public Utilities regarding this matter." Prior to entry of this order, Petitioners were unaware that the Division was involved in any capacity in this docket.

Accordingly, on May 25, 2005, by electronic mail, Petitioners requested that they be given notice of pretrial conferences in future, and that they be informed respecting the role of the Division in this docket, including, without limitation, what information the Division may have supplied the Commission prior to the May 23rd notice, and what additional information the Commission may have been expecting to receive from the Division after the May 23rd notice.

At the end of May or in early June, 2005, the Division's staff, by electronic mail, forwarded to Petitioners a copy of the Division's January 21, 2005, memorandum, which memorandum, as noted above, referenced the Commission's December 23, 2004, order to

the Division to investigate the issues raised in Petitioners' Complaint. This was the first time that Petitioners were alerted to the Commission's directive respecting a Division investigation. As the directive itself cannot be accessed through the Commission's on-line docket sheet, Petitioners obtained a hard copy from the case file at the Commission's offices.

On June 14, 2005, two weeks after Petitioners became aware that the Commission had ordered the Division to investigate the issues in this docket, the Division filed the Memorandum. Contrary to the Commission's directive, the Memorandum does not present an investigation of the issues raised in Petitioners' complaint. Instead of an investigative analysis, the Memorandum undertakes to advise the Commission respecting the time, place, procedures, and context to which the issues under investigation might be diverted or deferred. This "procedural advice" is a thin cover for the Division's noncompliance with the Commission's directive -- to investigate the issues raised in Petitioners' Complaint. The Division's alibi for the failure to investigate -- Petitioners have not come forward with substantial facts in justification of the Complaint -- is a *de facto* admission that the Division has disobeyed the Commission's order.⁵ The Memorandum, with no investigative analysis of the merits of Petitioners' Complaint, nevertheless recommends dismissal of the Complaint. The grounds for this recommendation are stated and rebutted below.

⁵ As noted below, Petitioners have no obligation to "prove" the allegations of the complaint, with "substantial" facts or otherwise, at this stage of the proceeding. But even if Petitioners had some duty to assist the Division in conducting an "investigation," as implied in the Memorandum, Petitioners cannot be charged with non-observance of this duty under the circumstances of this case, when they received notice, for the first time, at the first of June, that an "investigation" was being conducted.

THE DIVISION'S ARGUMENTS

The Division's arguments are organized and summarized below.

(1) **The Gatekeeper Argument.** The Division, without citation to any authority, apparently assumes that it has a "gatekeeper" function in this docket, that no claims or issues may be raised, except in a context and at a time as determined by the Division alone or as adjunct to the Commission. This unarticulated premise, that the Division, as Regulator, has power to pre-empt private complaints against electric utilities, and as Overseer, may dictate what and when and how issues may be brought to the Commission for resolution, is evident throughout the Memorandum. Hence, for example, the Division maintains that all storm related matters should be treated in docket number 04-035-01. Likewise, for example, the Division contends that the issues raised concerning land sales and mining operations should be "filed" with the Division, and that, "[t]hereafter, the Division will evaluate the complaint and determine whether an investigation is warranted."⁶ Still further, as another example, concerning violations of merger conditions, the Division argues that Petitioners should stand aside, since the Division has asked PacifiCorp for a report in this regard, and because any resulting dispute will be addressed in docket number 98-2035-04 or through "the ongoing Service Quality Taskforce and the upcoming acquisition proceedings." In other words, the Division, exercising this assumed power to function as a "gatekeeper," through the Memorandum, is recommending dismissal of the Complaint and diversion of the Complaint's issues to other dockets and deferral of those issues for consideration at another time.

⁶ The Commission's December 23, 2004, order, directing the Division to investigate the issues raised in Petitioners' Complaint, including the issues respecting land sales and mining operations, appears already to have answered this question.

(2) **The Order Denying Intervention.** The Division fails to justify this gatekeeper role with any statute or case, relying instead upon the Order Denying Intervention, misquoting that Order to read that the Commission denied Petitioners' claims related to non-storm matters and "*directed* Petitioners to present detailed information on these claims to the Division for investigation[.]" and misconstruing that Order to authorize, "[t]he Division [to invite] Petitioners to file their complaint [respecting land sales and mining operations] with the Division, as *directed* by the Commission." (Emphasis and brackets supplied.) In a similar vein, the Division observes that, "[i]n the [Order Denying Intervention] the Commission *directed* Petitioners to contact the Division with facts to support its claim so the Division could conduct an investigation, if warranted by the specific facts presented. Petitioners have not approached the Division. Neither does the [Complaint] contain sufficient detailed factual allegations upon which the Division can act. Absent presentation of substantial, detailed specific facts, the claims pertaining to [PacifiCorp's] mining operations and land sales are more suitable for examination in the course of a general rate case close in time to the actual transactions and/or actions complained of than in the instant Petition." (Emphasis and brackets supplied.)

(3) **Lack of Harm or Damages to Petitioners.** The Division fails to see any harm to Petitioners, and, therefore, seeks dismissal of the Complaint. The Memorandum, for example, notes that the Complaint "is vague with regard to the nature of the damages suffered by Petitioners. Furthermore, Petitioners draw a tenuous connection between violations of historical merger conditions and Commission orders to any storm-related damage." The Memorandum elsewhere notes that "with regard to Petitioners' claims

concerning [PacifiCorp's] mining operations and land sales, Petitioners have failed to draw any connection between those operations, the storm outage and any damages that Petitioners have suffered." The Memorandum does not address the question of statutory penalties that should be imposed by the Commission on ScottishPower and PacifiCorp in view of the companies' violation of statutes, rules, orders, and tariffs -- independent of any personal losses suffered by Petitioners as a result of the outage.

(4) Lack of Substantial, Detailed, Specific Facts to Support the Complaint.

The Division argues that, since it cannot understand the allegations of the Complaint, and since those allegations, in its view, are vague or not well-grounded in "substantial, detailed, specific facts," the Complaint should be dismissed and this docket closed.

THE DIVISION'S ARGUMENTS REBUTTED

Petitioners respond to the arguments of the Division in order below.

(1) The Gatekeeper Argument. The gatekeeper argument is based upon a false premise, and, therefore, must be overruled. The Division is not a gatekeeper in relation to Petitioners' Complaint. The Division, in this docket, may not interdict or regulate the appearance of parties, the issues to be raised, the timing of presentation, or the procedural context or docket number to be applied.

These matters, instead, are governed by Utah Code Annotated, Section 54-7-9. That statute provides, in pertinent part, as follows: "(1) When any public utility violates any provision of law or any order or rule of the commission: (a) the commission may file a notice of agency action; or (b) *any person, corporation, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing organization or association, or any body politic or municipal corporation may file a*

request for agency action. (2) The notice or request shall specify the act committed or omitted by the public utility that is claimed to be in violation of the law or a rule or order of the commission. . . . (4) *The commission need not dismiss any complaint because of the absence of direct damage to the complainant.*" (Emphasis supplied.)

Thus, Petitioners have an absolute right, granted by statute, to raise and be heard on the issues presented in their Complaint. This right may not be abridged under the guise of the "procedural recommendations" found in the Division's Memorandum. If the Division desires to file a similar petition for agency action, it is empowered to do so pursuant to Utah Code Annotated, Section 54-4a-1. If the Commission desires to file a similar petition for agency action, it is empowered to do so pursuant to Utah Code Annotated, Section 54-7-9(1)(a). But Petitioners likewise are empowered to file a petition, independent of any regulatory agency, pursuant to Utah Code Annotated, Section 54-7-9(1)(b). Petitioners, moreover, are empowered to file the petition, even in the "absence of direct damage," in light of Utah Code Annotated, Section 54-7-9(4). These powers to petition, vouchsafed to the Division, the Commission, and Petitioners, according to the express language of the respective statutes, are not mutually exclusive.

The plain language of the governing statute, Section 54-7-9, is enough, without more, to rebut the gatekeeper argument, but the policies underpinning that statute add force to the position of Petitioners.

Agencies like the Division do yeoman service in the public interest, but they often are underfunded, inadequately staffed, and spread far too thin on numerous regulatory fronts. In view of these circumstances, private attorneys general are needed to insure that all issues may be raised and presented before the Commission. Section 54-7-9(1)(b)

answers this need, by allowing parties like Petitioners to appear and be heard in matters affecting electric utilities.⁷

⁷ The Division's Memorandum is strongly redolent of these concerns. Read altogether, it is a tract for deferral. Although the Division has had since January of 2003 to explore the various "terms of reference" or outage-related issues, and even though the Commission charged the Division, in December, 2004, to investigate the issues raised in Petitioners' Complaint, the burden of the Division's argument is a request for more time and a recommendation to allocate issues to alternative dockets. In other words, the Division does not deny that the claims of Petitioners have merit; the Division, instead, merely says that it has not had enough time, sufficient information, or the appropriate context in which to assess the merit of those claims.

The Division attempts to palliate its failure to investigate and to justify its recommendation for delayed consideration and deferral to other dockets by saying that Petitioners have not approached the Division with substantial details in support of the allegations of the Complaint, as "directed" by the Commission in the Order Denying Intervention. As argued above and below, however, this is nonsense, not only because the Order Denying Intervention did not *direct* Petitioners to do anything of the sort, but also because the Commission's December 23, 2004, directive in this docket charged the Division with a duty to investigate, a duty that stands independent of any obligation of Petitioners, and a duty which the Division clearly has not fulfilled.

And it should be noted that the Division's effort to deflect blame onto Petitioners lacks merit for additional reasons. First, as noted above, on December 23, 2004, by order of the Commission, the Division was charged with a duty of investigation. Petitioners were not informed respecting the Division's duty to investigate in this docket until June, 2005, just two weeks before the Division's Memorandum was submitted. In the first instance, the Division had a duty to investigate that was independent of Petitioners' role in the case. In the second instance, even if Petitioners' had some responsibility to assist in this investigation, how they were to fulfill this responsibility, absent notice from the Division or the Commission, nowhere is explained in the Memorandum of the Division.

Second, it does not appear that the Division has done anything to investigate the allegations of the Complaint as ordered by the Commission. The Division's January 21, 2004, memorandum, seeking an extension of deadline, represents that the Division was in the "middle" of the investigation, but if this representation was true when made, it does not appear from the Memorandum, which contains no report of results from even one--half of an investigative effort. In truth, there have been no data requests, discovery requests, depositions, or the gathering of information, formally or informally, by the Division, so far as Petitioners are aware. Indeed, the Division did not make a single phone call to Petitioners or their counsel.

Third, if the Division truly had been interested in discharging the duty to investigate, one wonders how far the Division really had to look in order to find evidence of tariff infractions and merger violations as alleged in the Complaint. By simply culling the materials filed in docket number 04-035-01, Petitioners have compiled a substantial number of PacifiCorp admissions respecting noncompliance with the conditions of merger. During a recent rate case, in which the Division participated, PacifiCorp representatives likewise admitted violations to maintenance requirements in the company tariff. Even the minutes of the June 2, 2005, Utah Service Quality Review Group, the so-called Task Force to which the Division wishes to divert some of the issues in the Complaint for consideration, suggest underperformance by PacifiCorp if not failure to comply with the conditions of merger. This evidence of PacifiCorp's deliberate misconduct is so substantial and so far beyond contradiction that Petitioners are nonplussed by the failure of the Division to delineate the same in an investigative analysis that would have been responsive to the Commission's December 23, 2004, directive in this docket. The Division's failure in this respect is inexplicable.

In any event, the Division's failure to investigate, as charged by the Commission, underscores the need for Section 54-7-9(1)(b), granting independent standing to private parties to raise issues, conduct discovery, and present argument to the Commission.

Speaking of the Task Force, noted above, Petitioners did not receive notice of the first meeting, held June 2, 2005, but they were invited to the next meeting, scheduled for July 21, 2005. When Petitioners called the Division, prior to July 21st, in order to get the time and location of that meeting, however, they were informed that there was no meeting scheduled for July 21st (contrary to the terms of the minutes of the June 2nd meeting). Of course, between the June 2nd meeting and the meeting scheduled for July 21st, the Commission distributed a letter, dated June 24, 2005, closing the power outage investigative docket, number 04-035-01. Petitioners speculate that, without the impetus of this docket, and absent either Commission pressure or public outcry, the Division will continue to defer consideration of the important issues that have been raised in the Petitioners' Complaint.

Finally, the Division's Memorandum, in major part, is mooted in view of the Commission letter, dated June 24, 2005, closing the investigative docket in number 04-035-01. The Memorandum, in the main, recommends that the outage issues raised in Petitioners' Complaint should be treated in the investigative docket. Perhaps the Division, siding with PacifiCorp, hoped that a ruling by the Commission, declaring the outage to be a so-called "Major Event," might preclude Petitioners from continuing to press their claims for reparation. Petitioners naturally believed that any such hope was misguided because, among other reasons, in their view, they were denied the opportunity to raise issues in full, as they related to Petitioners, in that docket, and, in any case, that docket was designed for an investigation of issues rather than an adjudication of rights. In any event, the letter of the Commission on June 24, 2005, closing the docket, makes impossible a referral of issues, for investigation or otherwise, to number 04-035-01. The Division's Memorandum, accordingly, is moot on these points.

Moreover, the Division, by statute, is charged with representing the "public interest," a charge that, at times, may narrow the field of issues that properly may be raised and presented by the Division before the Commission. The Utah legislature has recognized the limited or conflicted scope of Division advocacy, in part, by creating the Committee of Consumer Services which is tasked with representing the interests of consumers, small businesses, and agricultural interests. And the need to supplement, if not supplant, Division efforts in utility regulation, in light of institutional constraints or bureaucratic incompetence, are reflected in case law. *See, e.g., Stewart v. Utah Public Service Com'n*, 885 P.2d 749, 781-783 (Utah 1994); *MCI Telecommunications v. PSC*, 840 P.2d 765, 772 (Utah 1992). *Cf. Utah State Coal. of Sr. Citizens v. UP&L*, 776 P.2d 632 (Utah 1989).⁸ Likewise, a conflict of functions may disqualify the Division or restrict participation in certain matters.⁹ Private parties, therefore, must take up the slack.

⁸ Some Complaint allegations may fall through this particular regulatory crack. For example, Petitioners seek reparations for noncompliance with the Utility tariff, as well as administrative fines for contumacious behavior. The Division might determine that tariff reparations, of private benefit to these Petitioners, are not in the "public interest" when viewed against the overall backdrop of utility regulation. Private parties, such as Petitioners, therefore, must be allowed to raise and present these issues, where the Division, in the name of the "public interest," may not feel comfortable in doing so. It is also noted that the Utah Supreme Court, in these cases, was sharply critical of regulatory mis-fires very similar to those of the Division in the present docket.

⁹ This potential for conflicting functions also is illustrated by the circumstances of our case. As noted above, the Order Denying Intervention invites but does not direct the Petitioners to present their concerns to the Division, allowing the Division to determine whether those concerns should be the subject of a Division request for agency action. Both PacifiCorp and the Division, however, have interpreted the Order's language as preemptive in nature, giving the Division alone the power to prosecute whatever claims are to be brought in this regard. The Commission's December 23, 2004, charge to the

Finally, the broad history of utility regulation has a dark side, where the regulators, through inattention, infiltration or corruption, have been co-opted by the regulated. These historical antecedents explain provisions such as Section 54-7-9(1)(b), statutes which empower private citizens to initiate actions respecting utility misconduct, even when regulators, by dint of inability, inattention, exhaustion, or concupiscence, fail to do so.¹⁰

Division in this docket requires the Division to investigate the issues in the Complaint, presumably with the understanding that, if such issues have merit, they may be prosecuted by the Division in a request for agency action. The Division apparently shares this understanding, since the Memorandum contemplates the possibility of agency action in one or more dockets, albeit not in this docket under Petitioners' direction. The Commission's directive suggests the possibility that the Division, in conducting this investigation, is serving as staff to the Commission, at the same time that the Commission must act in a judicial capacity in resolving the issues that are raised in the Complaint of Petitioners. If this be true, then the Division's roles as policeman and prosecutor may collide with its position as adjunct to an adjudicative tribunal. The Division's Memorandum, moreover, takes a position adverse to Petitioners' Complaint in this docket, recommending that it be dismissed, deferring consideration of the issues raised for other proceedings at different times, all at the discretion of the Division. PacifiCorp seeks dismissal of the Complaint on the ground, among others, that Petitioners have not complied with the Commission rule that requires the Division, as a threshold matter, to "investigate and mediate" questions raised in so-called "customer complaints." Petitioners argue elsewhere that this Commission rule runs afoul of the Governmental Dispute Resolution Act, Utah Code Annotated, Sections 63-46c-101, *et seq.*, since, pursuant to the terms of that statute, agency mediations must be consensual and mediators presiding at such mediations must be neutral or have their conflicts waived by all concerned after full disclosure. Petitioners have a not unfounded concern that the Division may experience conflicts in fulfilling all of these duties, assuming that, as PacifiCorp contends, they all apply to the Division. At a minimum, the Division surely is disqualified to serve as mediator under the circumstances described above. In any event, to the extent that these conflicting functions may impair or prevent the Division's effective participation in this docket, Petitioners applaud the legislative judgment embodied in Section 54-7-9(1)(b) which allows Petitioners to proceed, free from these regulatory entanglements.

¹⁰ Petitioners, of course, are not accusing the Division of corruption; they only advert to the lessons of history as an explanation for the statutory standing that is vouchsafed to private parties such as Petitioners in section 54-7-9(1)(b). Petitioners are concerned, however, that the Division may have disincentives adequately to investigate the

In short, while Petitioners appreciate the expertise, effort, and input of the Division, in the final analysis, this is Petitioners' and not the Division's proceeding. Petitioners will conduct their own proceeding, and will not be directed, inhibited, or derailed by the Division, an agency that, under the circumstances of this case, may have conflicts of interest in relation to the matters raised in Petitioners' Complaint. Petitioners have a statutory right to do so, a right given under Section 54-7-9(1)(b); they intend to exercise that right.

(2) **The Order Denying Intervention.** The Order Denying Intervention, in pertinent part, provides as follows: "*Relative to the non-power outage issues the [Petitioners] seek to raise, we deny their Petition without prejudice. The [Petitioners] may present what detailed information they may have concerning their claims to the [Division]. The Division has statutory power to conduct its own investigations or studies upon complaint [citation omitted], and we believe that the Division will objectively consider the claims. Should the Division conclude that future Commission action is*

Complaint's allegations respecting merger violations. For example, Petitioners are in possession of correspondence from the Division to PacifiCorp, dated April 23, 1998, which purports to exonerate PacifiCorp from the merger conditions respecting job retention in the State of Utah. This correspondence expresses the view that, although the merger conditions do not contain any provision for expiration, the parties to that transaction had a tacit understanding that these conditions, even though ordered by the Commission, would cease to apply at some point in time. The correspondence, moreover, appears to assume that the Division may act as official timekeeper for this imagined timetable. Petitioners are of the view that an order is an order unless and until qualified, modified, or vacated by the body that made the order, and that parties who disregard orders may be held in contempt, fined, or otherwise punished. Petitioners likewise are of the view that parties should not undertake unilaterally to abrogate an order or to counsel disobedience to the same. If the Division, as suggested in this correspondence, has been complicit with PacifiCorp in violating the orders of this Commission, then naturally the Division would be disinclined to investigate thoroughly the merger conditions and other issues that have been raised in the Petitioners' Complaint. In view of this additional conflict facing the Division, Petitioners are grateful for their independent right to proceed under Section 54-7-9(1)(b).

warranted, we trust that the Division will bring *its* recommendations to the Commission." (Emphasis and brackets supplied.) The Division argues, in effect, that this language directed Petitioners to submit their claims to the Division, for investigation, evaluation, and prosecution at the discretion of the Division. The Division further argues that Petitioners did not follow this directive. The Division concludes that the Complaint should be dismissed.

But this is not what the Order Denying Intervention provides. The language of the Order, contrary to the argument of the Division, does not dispose conclusively of the claims of Petitioners; it denies a portion of those claims, the non-outage related claims, for purposes of intervention in one docket, and this denial, furthermore, is without prejudice – allowing those claims to be raised in a different proceeding. This language, contrary to the argument of the Division, does not order Petitioners to submit their claims to the Division so that the Division may determine whether those claims have merit and should be pursued before the Commission; it merely invites but does not require this submission. What is more, contrary to the argument of the Division, this language does not suggest that the Division's discretionary review of these claims, in some fashion, would pre-empt Petitioners themselves from renewing the claims in a different docket.

Indeed, the Order's language, as highlighted above, is most fairly read in harmony with the governing statutes, Utah Code Annotated, Sections 54-7-9 and 54-4a-1(1)(a), statutes that permit independent, cumulative petitions by both public agencies, such as the Division, and private citizens, such as Petitioners, in raising issues and pursuing claims before the Commission. A reading that denies this right to Petitioners would be in derogation of Section 54-7-9, and, hence, would place the Order Denying Intervention at

odds with the utilities code, an intention that Petitioners are unwilling to attribute to the Commission.

(3) **Lack of Harm or Damages to Petitioners.** The Division argues that the Complaint should be dismissed because it does not appear, in the Division's eyes, that Petitioners have been harmed or can prove damages. This argument, of course, is answered by Utah Code Annotated, Section 54-7-9(4), which provides that "[t]he commission need not dismiss any complaint because of the absence of direct damage to the complainant."¹¹ What is more, Petitioners can and will prove harm and entitlement to reparations at any trial of this matter; they are not required to show proof at the pleading stage of any proceeding. Finally, this aspect of the Division's Memorandum completely ignores the contempt shown by PacifiCorp and ScottishPower in relation to Commission orders, rules, regulations, and tariffs, contempt that should be punished with administrative fines as provided in the utilities code.

(4) **Lack of Substantial, Detailed, Specific Facts to Support the Complaint.**

The Division argues that, since it cannot understand the allegations of the Complaint, and

¹¹ The Division, unlike PacifiCorp, does not contend that the Complaint should be dismissed for lack of subject matter jurisdiction because the Commission lacks power to award damages. Indeed, the Division appears to assume the opposite, that the Commission has this power, but that Petitioners' Complaint does not show harm or a direct nexus to actual damages, and, therefore, should be dismissed. The wording of Section 54-7-9(4), by negative inference, appears to support the Division's assumption, namely, that the Commission has power to award damages, but does not support the Division's conclusion, namely, that the absence of harm to a complainant is a legitimate ground for dismissal of any complaint. Indeed, as indicated above, Section 54-7-9(4) states the opposite, namely, that the absence of direct damage to the complainant is not a sufficient basis for dismissal of a complaint.

Although Section 54-7-9(4) supports maintenance of Petitioners' Complaint, even in the absence of allegations respecting damages, that Complaint, contrary to the reading of the Division, in fact, alleges harm and seeks reparations. And as noted above, Petitioners will prove their entitlement to such reparations at the appropriate time in this proceeding.

since those allegations, in its view, are vague or not well-grounded in "substantial, detailed, specific facts," the Complaint should be dismissed and this docket closed.

Petitioners agree that the Division does not understand the allegations of the Complaint; this much is apparent from the Division's description of those allegations in the Memorandum.¹² And, of course, Petitioners would have been pleased to clarify any portion of the Complaint for the benefit of the Division -- had the Division made even a single telephone inquiry of Petitioners, seeking such clarification. Petitioners are confident that, given this opportunity, they could have spared the Division from most if not all of the shadow boxing reflected in the Memorandum. But the Division's lack of understanding (and apparent lack of interest in our Complaint), at bottom, is beside the point. Section 54-7-9(1)(b) gives Petitioners a right, independent of Division approval, to prosecute this Complaint. As noted above, Petitioners are unwilling to put their right at

¹² The Division's Memorandum, for example, describes the Complaint as "vague with regard to the nature of the damages suffered by Petitioners. Furthermore, Petitioners draw a tenuous connection between violations of historical merger conditions and Commission orders to any storm-related damage." In similar vein, the Memorandum elsewhere states that, "Petitioners demand an investigation into the causal relationship between alleged violation of merger conditions and their damages arising from the storm outage." Likewise, the Memorandum states that "with regard to Petitioners' claims concerning [PacifiCorp's] mining operations and land sales, Petitioners have failed to draw any connection between those operations, the storm outage and any damages that Petitioners may have suffered." The Complaint, however, sets forth two distinct classes of grievance, one private and the other public. The Complaint, in the first instance, avers that PacifiCorp violated its tariffs, did not discharge its duty to provide quality service, and was negligent, among other ways, in system maintenance, and that these failures resulted in harm and the need for reparations to Petitioners privately. The Complaint, in the second instance, avers that PacifiCorp violated the merger conditions, along with other statutes, orders, and rules; some of these violations involve land sales and mining operations; these violations should be punished with fines as provided in the utilities code; these punishments will vindicate the public interest, and will not inure to the benefit of Petitioners personally. The arguments of the Memorandum, quoted above, show that the Division mistakenly has conflated these two, distinct categories of grievance in Petitioners' Complaint.

risk -- either to the prospect of that approval or to the "hit or miss" understanding of the Division staff.

The Division also argues that, absent the presentation of substantial, detailed, concrete evidence, supporting the allegations of the Complaint, the same should be dismissed. Petitioners, however, are not required to plead their case, at the Complaint stage, with this degree of specificity. Nor are they required to prove their case at this juncture of the proceeding. The Commission rules adopt by reference the Utah Rules of Civil Procedure. Rule 8 of those Rules provides that a complaint shall give a short, plain statement of the several bases for the relief requested. Section 54-7-9(2) requires no more than this. If the Division has standing to move to dismiss the Complaint in this docket, then a motion for failure to state a claim must take the allegations of the Complaint as though they are true for the purpose of that motion, a standard that the Division does not purport to argue in the Memorandum. Evidence may be developed, after a complaint is filed, through pre-trial discovery, fleshing out the bones of a complaint. And this evidence then is submitted at a trial on the merits. In other words, the argument that Petitioners have not presented evidence in the Complaint, detailed or otherwise, is legally insufficient to support a dismissal of that pleading.¹³

¹³ Of course, it may not be unfair to conclude that any knowledge respecting substantial, detailed, concrete facts which might support the Complaint, at this stage of the proceeding (if such facts be required), is the fault of the Division for failing to obey the Commission's directive, dated December 23, 2004, namely, to investigate. If the Division had followed this directive, by holding conference with Petitioners, sending data requests to PacifiCorp, reviewing the reports in the investigative docket as those materials have bearing upon the issues raised in Petitioners' Complaint, interviewing witnesses such as Darcie White and others, in short, by conducting an actual and substantive investigation, Petitioners are confident that the Division could have ascertained many facts in support of the allegations of the Complaint, and that these facts, as part of an investigative analysis, responsive to the December 23, 2004, directive, could

CONCLUSION

In the main, the Division recommends a referral of issues now raised in this Complaint back to an investigative docket, number 04-035-01, a docket that has been closed as of June 24, 2005, making the Memorandum moot in large measure.

The standing of the Division to seek dismissal of Petitioners' Complaint seems questionable under the circumstances of this case. And insofar as the Division may be serving as adjunct to the Commission, which in turn will act as the adjudicator of rights in this proceeding, the impropriety of this position, from an ethical as well as a constitutional standpoint, also concerns Petitioners. This impropriety is underscored by PacifiCorp's insistence, in its response to the Complaint, that Petitioners must use the Division as a mediator as a condition precedent to litigation of the claims in the Complaint before the Commission.

On the whole and at bottom, the Division's recommendation contravenes the letter as well as the spirit of Section 54-7-9 of the utilities code. That statute gives Petitioners, as private attorneys general, an absolute right to present claims for adjudication by the

have been presented to the Commission in lieu of the Memorandum. Instead, the Division attempts to cover its failure to obey the Commission's directive to conduct an investigation by placing on Petitioners' shoulders a heretofore unknown and unnoticed duty to supply information. Even the Order Denying Intervention, PacifiCorp's and the Division's distortion of last resort, will not serve this end, since that Order merely invites, but does not direct, the Petitioners to participate in any investigation of these claims. Indeed, please note the language of that order; it allows Petitioners to "present *what* detailed information they *may* have concerning their claims to the [Division]," leaving the Division thereafter to use its own "statutory power" to "conduct *its own* investigations or studies," if it will. Even this language contemplates that the Division will have a duty, independent of Petitioners, to conduct an investigation into the charges against PacifiCorp. And even if this language could be stretched to enjoin the Petitioners to spoon feed the Division with facts, it is not elastic enough to absolve the Division of the duty to conduct an investigation in this docket, as directed by the Commission on December 23, 2004.

Commission. The utilities code, of course, gives equal place to the Division. But the Division prerogative does not displace the right of Petitioners. Put differently, the Division is at liberty to forgive these claims or to pursue them on a different timetable or in a separate docket; but that decision, in light of Section 54-7-9, does not bind Petitioners.¹⁴

In short, given the mandate of Section 54-7-9, Petitioners are entitled to their "day in court," in a complaint of their own making, at a time of their own choosing, and after a thorough, complete, pretrial investigation -- an investigation not blunted by a regulatory agenda that may be fraught with conflicts of interest.

Accordingly, Petitioners ask the Commission to disregard or overrule the Division's position as reflected in the Memorandum.

Dated this 29th day of July, 2005.

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¹⁴ Naturally, if the Division wants to seek a consolidation of the Petitioners' Complaint with whatever matters have been or will be raised by the Division in another docket, then the Division may make a motion to that effect and Petitioners will reply -- either with agreement or opposition -- as their best interests may require.

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing Response 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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