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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Complaint of Georgia B. Peterson, Janet B. Ward, William Van Cleaf, David Hiller, GP Studio, Inc., Truck Insurance Exchange, and Farmers Insurance Exchange on Behalf of Themselves and All Other Members of the Class Described Below Against Scottishpower Plc and PacifiCorp, dba Utah Power & Light Co, Requesting an Investigation, and Enforcement of the Commission's Orders in Docket Nos. 87-035-27 and 98-2035-04, and Compensation for Losses	Docket No. 04-035-70 **UTAH POWER'S REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER STAYING DISCOVERY**

Pursuant to the schedule established by the Commission's Notice of Oral Argument on Motion to Stay Discovery, PacifiCorp dba Utah Power & Light Company ("Utah Power" or "Company") hereby replies to the Response of Petitioners to Motions for Protective Orders

Staying Discovery ("Petitioners' Response") filed by Georgia B. Peterson, Janet B. Ward, William Van Cleaf, David Hiller, GP Studio, Inc., Truck Insurance Exchange, and Farmers Insurance Exchange ("Petitioners"). For the reasons set forth below, the Company's motion for a protective order staying discovery ("Motion") should be granted.

I. INTRODUCTION

Like much of the argument submitted by Petitioners to date in this matter, Petitioners' Response seeks to cloud issues that should be straightforward, mischaracterizing facts and misstating issues in the process. Petitioners' Response sets up a false premise from the outset by arguing that Utah Power "pretend[s] that the Petitioners' request for agency action only seeks damages . . ." and that since Utah Power's motion to dismiss only goes toward negligence and damages claims, whereas Petitioners are also seeking statutory penalties, some portion of Petitioners' claims must invariably survive (and therefore, allegedly warrant discovery now rather than later).[1] In fact, the Company's motion to dismiss goes to the entirety of Petitioners' Petition and Request for Agency Action ("Petition"), not merely those portions such as the damages claim that are beyond the Commission's jurisdiction. The motion expressly argues that Petitioners have no right to demand an investigation into whether statutory penalties should be imposed for various alleged wrongs that go beyond Petitioners' individual claims related to the December 2003 storm and outage, and expressly argues that the entire Petition should be dismissed for failure to adhere to Commission procedure. If the motion to dismiss is granted in its entirety, the Petition will be dismissed in its entirety (albeit some aspects may be without prejudice). And even if the motion to dismiss is only granted in part, it would be much more

[1] *See* Petitioners' Response at 3.

efficient and much less burdensome to await the Commission's determination on dismissal before addressing what, if any, type of discovery is necessary or appropriate.

As Petitioners' Response makes clear through its near total silence on the issue, Petitioners will not be harmed by a stay of discovery. Utah Power, however, would be unduly burdened if it were required to respond to the vast amount of discovery sought in Petitioners' data requests, only to thereafter have its efforts wasted when the Commission dismisses all or some portion of the Petition. In such circumstances, the Motion should be granted and discovery should be stayed.

II. ARGUMENT

As has become their standard practice, in Petitioners' Response Petitioners spend much more time hyping Utah Power's alleged wrongs than they do making arguments relevant to the issues at hand. As Petitioners would have the Commission believe, Utah Power has already admitted its wrongdoing and it is now merely a question of how big the penalties should be. Petitioners' ongoing attempt to prematurely argue the merits of their case conflicts with their alleged concern about the Commission's "neutrality" in the docket,[2] but, in any event, it is telling that Petitioners' Response does not argue issues that are relevant to the Motion until the end of the filing, and even then only gives the issues passing treatment.

There are two issues that Petitioners raise at the end of their filing that could be relevant to the Commission's determination on the Motion. First, Petitioners argue that discovery is necessary even if the Company's motion to dismiss is granted. And second, Petitioners argue that discovery is necessary in order for the Commission to reach a determination on the motion to dismiss. Neither of Petitioners' arguments has merit.

[2] *See id*. at 13.

A. IT IS NOT EFFICIENT TO ORDER BURDENSOME DISCOVERY BASED ON THE POSSIBILITY THAT IT MIGHT SOMEDAY BE NECESSARY IF MULTIPLE CONTINGENCIES OCCUR.

Petitioners argue that if the motion to dismiss is granted: (1) they will file a class-action suit in district court; (2) Utah Power will argue (and presumably win) Commission "primary jurisdiction"; and (3) as a result, the issues will end-up back in front of the Commission anyway. Based on this triple contingency, Petitioners argue that it would be more efficient to merely order the discovery now.[3] That is, because a series of events could happen, the Commission might as well make Utah Power go through the inordinate burden now of answering Petitioners' data requests that go back nearly twenty years and cover an extensive amount of subject-matter. This is turning the concept of efficiency completely on its head, and to state Petitioners' argument is to essentially refute it.

There are numerous possibilities that could affect whether some or all of Petitioners' data requests ever become probative before the Commission. If the Commission dismisses the Petition in its entirety, Petitioners' could conceivably choose to appeal (depending on the grounds for dismissal), they could choose to file a new petition with the Commission (this time conforming to Commission jurisdiction and procedure), they might decide not to further pursue their claims, or, as they argue, they could conceivably file a case in district court. But even if they file a court complaint, and even if Utah Power makes a primary jurisdiction argument, it is unknown whether Utah Power would win that argument, and if so what issues would actually come back to the Commission for resolution. There are simply too many unknowns in this series of hypothetical events for Petitioners to make a plausible argument that it would be more efficient to require the discovery at this time. Additionally, the "litigation ping pong" foretold by Petitioners never need occur if Petitioners finally get around to crafting a complaint that

[3] *See id*. at 10-12.

comports with the Commission's jurisdiction and procedures. As Utah Power has previously stated, it has no objection to Petitioners receiving an adjudication by the Commission of their individual outage-related claims. It is the failure to follow Commission procedure, the inappropriate inclusion of damages claims, the unwarranted attempt to bring ScottishPower into a customer complaint proceeding, and the impermissible attempt to sue on behalf of a class, among other things, to which Utah Power objects. Notably absent from Petitioners' argument is the claim that they would be prejudiced if they do not receive discovery now, rather than waiting to see what transpires in the event of dismissal. In contrast, Utah Power would be seriously prejudiced if it were required to submit to burdensome discovery that could ultimately be unnecessary. Petitioners' efficiency argument simply has no merit.

B. DISCOVERY IS NOT NECESSARY FOR THE COMMISSION TO DECIDE THE MOTION TO DISMISS.

Petitioners' Response also claims that the requested discovery is necessary in order to decide the Company's (and Division of Public Utilities') motion to dismiss, for three reasons: (1) it is necessary in order to determine whether ScottishPower "controls" utility plant such that it may be a Utah public utility;[4] (2) it is necessary in order to determine whether the Division and Commission have engaged in improper *ex parte* communication that may have prejudiced the Commission's neutrality;[5] and (3) it is necessary in order to determine whether the Division is fulfilling its oversight role.[6] None of these reasons warrants the discovery sought in Petitioners' data requests, and certainly not all of the requested discovery.[7]

[4] *See id*. at 12.

[5] *See id*. at 13.

[6] *See id*.

[7] It is important to note that even if the Commission determines to allow discovery on the three issues Petitioners identify as being necessary for the Commission to render a decision on dismissal, the Commission should not grant Petitioners' other burdensome requests for discovery on unrelated issues.

Taking the issues in reverse order—as to Petitioners' third purported reason for needing discovery, Utah Power notes that the issue has no bearing on the Company's motion to dismiss, since the Company's motion has nothing to due with the Division's oversight role and Petitioners have made no argument in briefing the motion about proceeding as private attorneys general.

As to Petitioners' second purported reason for the requested discovery, Petitioners have no basis to suspect that the Division and Commission have engaged in inappropriate *ex parte* communications. Rather, Petitioners' argument on this issue amounts to nothing more than a bald assertion that Petitioners ought to be allowed to probe for possible inappropriate communications in order to determine whether the Commission is sufficiently neutral. This assertion—which could with equal justification (or lack thereof) be made against any court or administrative tribunal—is offensive and runs counter to the legal presumption of administrative neutrality.[8] The Commission is already required by statute and its own rule to make parties aware of improper *ex parte* communications,[9] and Petitioners should be required to make a significant showing of possible bias before the Commission considers deferring a decision on dismissal in order to allow what is otherwise impertinent discovery.

Finally, as to the first issue, Petitioners claim that data requests 8, 9, 17, 24, and 25 are intended to produce evidence on whether ScottishPower has control of utility assets sufficient to be considered a Utah public utility.[10] Petitioners have never articulated, in their briefing on Utah Power's motion to dismiss, what level of "control" is necessary in order for the Commission to declare ScottishPower to be a public utility subject to consumer complaint proceedings. Utah

[8] *See, e.g., Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (noting the "presumption of honesty and integrity" in those serving as administrative adjudicators).

[9] *See* Utah Code Ann. § 54-7-1.5; Utah Admin. Code R746-100-13.

[10] *See* Petitioners' Response at 12.

Power has argued that a showing akin to alter-ego status would be required before a complainant could properly pierce the corporate veil and haul a public utility's upstream affiliate before the Commission for a consumer complaint proceeding.[11] However, Petitioners have never responded to Utah Power's argument on this issue. Instead, they merely assert that the discovery they seek somehow goes toward control.[12] The question of what level of "control" turns a corporate affiliate into a Utah public utility is a question of statutory interpretation. It is a question of law. The Commission must, therefore, determine whether it agrees with Utah Power that something like an alter-ego showing must be made or whether some lesser level of control will suffice. Then it can determine whether the elicited discovery would be probative on the issue of whether in fact ScottishPower has sufficient control of Utah Power's public utility assets to be itself considered a Utah public utility. Put differently, if under the proper standard for determining control ScottishPower would not be considered a public utility even if Petitioners establish the facts elicited in their data requests, then answers to those data requests are not necessary before the Commission makes a determination on dismissing ScottishPower from this proceeding.

A review of the data requests reveals that, if the Commission accepts anything close to Utah Power's view of the law, the requested discovery could not establish sufficient control to require ScottishPower to face consumer complaints as a Utah public utility. Request 8 seeks documents showing whether ScottishPower reviewed and approved Utah Power's maintenance budgets. Request 9 seeks to identify ScottishPower officers, if any, who approve Utah Power's maintenance budgets. Request 17 seeks information on purported cost-cutting efforts by

[11] As the Commission is well aware, ScottishPower is not the parent of Utah Power. It is rather the parent of PacifiCorp Holdings, Inc., which is in turn the parent of Utah Power.

[12] *See* Petitioners' Response at 12.

ScottishPower in the United States. Request 24 has nothing to do with ScottishPower. And request 25 seeks information on whether ScottishPower has sought to modify any terms of the merger order.

Even if it is assumed that ScottishPower has done all the things these data requests seek to establish, it could hardly warrant corporate veil piercing. If the Commission disagrees and determines that there is some question of fact elicited by these data requests that could be probative on the issue of whether ScottishPower is a Utah public utility, then the Commission will not grant dismissal of ScottishPower at this time (at least, not as an independent issue) and if necessary will allow Petitioners the opportunity to conduct discovery on such issue(s) after the Commission makes its determination on the motion to dismiss. In the mean time, Petitioners will not be prejudiced by waiting for the Commission to address the legal issues involved in Utah Power's motion to dismiss.

III. CONCLUSION

The scope of Petitioners' data requests (in most cases seeking information dating back to 1987, 1988, or 1989) is onerous and unduly burdensome. Petitioners seek information on every tree-trimming contract,[13] every report by Company arborists or foresters,[14] every document regarding customer complaints for power outages, unsafe line conditions or tree problems,[15] every document showing how frequently Utah Power inspected lines and facilities in Weber, Davis, Salt Lake or Utah county (indicating specific areas and specific times for each area),[16]

[13] *See* data request 5.

[14] *See* data request 7.

[15] *See* data request 27.

[16] *See* data request 30.

every document regarding any sale of any parcel of land,[17] and other equally burdensome information.

As Utah Power argued in its Motion, where a motion to dismiss is pending and the exceptionally burdensome discovery requested could be unnecessary if the motion is granted, it is appropriate to stay the discovery pending a determination on dismissal. If the motion to dismiss is denied, Petitioners will obviously be allowed to pursue reasonable discovery and will suffer no prejudice. Petitioners' Response offers no legitimate reason to deny the Motion. For these reasons, Utah Power respectfully requests that the Commission enter a protective order staying discovery pending the resolution of the Company's motion to dismiss.

RESPECTFULLY SUBMITTED: October 25, 2005.

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[17] *See* data request 26.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **UTAH POWER'S REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER STAYING DISCOVERY** was sent by electronic mail and mailed by U.S. Mail, postage prepaid, to the following on October 25, 2005:

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