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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 RESPONSE TO  
MOTION AND LETTERS FILED BY  
PETITIONERS AND REQUEST FOR  
MODIFICATION OF PROCEDURAL  
NOTICE**

PacifiCorp dba Utah Power & Light Company ("Utah Power" or "Company") hereby respectfully responds to the Motion to Incorporate Previous Testimony into this Docket dated June 19, 2005 ("Motion"), the Letter from David R. Irvine to Sandy Mooy dated June 8, 2005

("June 8 Letter"), and the Letter from David R. Irvine to Chairman Campbell dated June 17, 2005 ("June 17 Letter") filed by Georgia B. Peterson, et al. ("Petitioners") in this matter. Utah Power provides this response generally to object to and to state its position on relief requested in these filings. In addition, Utah Power respectfully requests modification of the Procedural Notice issued by the Commission on July 1, 2005, to make clear that Petitioners are not allowed to respond to Utah Power's reply in support of its motion to dismiss without providing a compelling rationale for doing so.

## I. INTRODUCTION

Petitioners filed their Petition and Request for Agency Action ("Petition") initiating this docket on December 23, 2004. The Petition is essentially identical to an earlier petition filed by four of the seven Petitioners in Docket No. 04-035-01. The Petition seeks, among other things, (a) damages for alleged monetary losses sustained by putative class members as a result of the outage resulting from a severe winter storm in late December 2003 ("Outage"), (b) penalties for alleged violation of conditions to approval of the mergers of Utah Power & Light Company with PacifiCorp in 1988 and of PacifiCorp with ScottishPower in 1999, (c) an order requiring compliance with merger conditions (including additional hiring), (d) potential divestment of the Company, (e) the restoration of undefined benefits to the State of Utah, and (f) Commission investigations of allegations relating to the foregoing and allegations (i) that unspecified coal mining practices of the Company may have harmed ratepayers, and (ii) that tracts of land held for trade with federal and state entities have been improperly transferred.

Utah Power filed its Motion to Dismiss and Answer on February 7, 2005.<sup>1</sup> Utah Power moved to dismiss the Petition for several reasons, including that it ignored and was inconsistent

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<sup>1</sup> The Petition was not served on Utah Power until January 4, 2005.

with the Commission's Order Granting in Part and Denying in Part Petition and Request to Intervene issued July 6, 2004 in Docket No. 04-035-01 ("Intervention Order"), that it sought relief either beyond the Commission's jurisdiction to provide or Petitioners' right to request, and that it inappropriately sought to bring ScottishPower into a utility customer complaint proceeding. Pursuant to agreement of the parties, Petitioners responded to Utah Power's motion on March 30, 2005, Utah Power replied to the response on May 20, and the Division of Public Utilities ("Division") filed comments on the motion on June 14. The Division essentially supported Utah Power's motion to dismiss on the ground that Petitioners have failed to provide any factual basis justifying further investigation of their claims.

Petitioners' Motion seeks to incorporate selected testimony from Docket No. 04-035-42, the Company's most recent general rate case, in this docket without explaining why it is necessary to do so, particularly at this stage of these proceedings. The June 8 Letter seeks information from the Commission regarding service of process on ScottishPower. The June 17 Letter requests the opportunity to respond to certain filings made in this docket.

On July 1, 2005, the Commission issued a Procedural Notice in connection with the June 17 Letter based on the Commission's understanding from the Letter that Utah Power did not object to the request. As noted below, although Utah Power does not object to Petitioners responding to the Division's June 14 comments and having until July 29, 2005 to do so, Utah Power does object to Petitioners providing a further response to Utah Power's reply in support of its motion to dismiss without offering some compelling reason to depart from normal practice. Therefore, Utah Power requests modification of the Procedural Notice.

## II. ARGUMENT

### A. THE MOTION IS PREMATURE AND UNNECESSARY.

Petitioners' Motion requests that the testimony of a public witness, Darcie White, and brief responsive testimony of Douglas Larson in Utah Power's last general rate case (Docket No. 04-035-42) be incorporated into the record in this docket. The Motion characterizes Mr. Larson's testimony as an admission of a tariff violation that bears directly on issues raised in this docket, Motion at 2, but fails to state why incorporating the testimony is necessary.

The fact that the Motion fails to state why incorporating the testimony is necessary is itself sufficient basis to deny the Motion. Absent some need or rationale, there is no reason to include excerpts from other dockets piecemeal in this matter. No rationale has been offered. In addition, the Motion suggests a failure by the Petitioners to accept the nature of this docket. Despite their repeated attempts to turn this into a grandiose class-action challenging Company conduct since the Utah Power - PacifiCorp merger in 1989, the fact is that this is simply a customer complaint filed without compliance with the required procedures for such complaints in Rule R746-100-3.F.1.<sup>2</sup> Pursuant to that rule,

Before a proceeding on a consumer complaint is initiated before the Commission, the Commission shall try to resolve the matter through referral first to the customer relations department, if any, of the public utility complained of and then to the Division for investigation and mediation. **Only after these resolution efforts have failed will the Commission entertain a proceeding on the matter.**<sup>3</sup>

The Intervention Order made clear that the Commission intended Petitioners to follow this course with respect to the claims they have asserted in the Petition. For non-Outage-related claims, Petitioners were directed that they "may present what detailed information they may have

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<sup>2</sup> Utah Admin. Code R746-100-3.F.1; Utah Admin. Code R746-100-2.E.

<sup>3</sup> See Utah Admin. Code R746-100-3.F.1 (emphasis added).

concerning their claims to the Division of Public Utilities” and that after the Division considered the claims, “[s]hould the Division conclude that future Commission action is warranted, we trust that the Division will bring its recommendations to the Commission.”<sup>4</sup> While not specifically directed at Outage-related claims because Petitioners were granted intervention in the docket investigating the Outage, Docket No. 04-035-01, the logic of the Intervention Order applies equally to them. In any event, the Motion is premature until Petitioners have complied with the requirements for customer complaints.

Apparently, the rationale for the Motion is that Petitioners believe the testimony supports their claims related to the Outage. In a gross oversimplification, Petitioners argue in the Motion that since a majority of outages were caused by downed trees, Utah Power “abdicated its tariff responsibility to maintain the very lines which caused ‘the vast majority’ of the tree outages (90% of the total outages) experienced by 190,000 customers. The testimony therefore goes directly to whether the outage was caused by [Utah Power’s] own negligence and tariff violations . . . .” Motion at 6-7.<sup>5</sup> Ignoring the immense logical gaps in this rationale, Petitioners do not need the Commission to incorporate the testimony into the record of this case to present it to the Division in support of their claims. Equally important, the Division is already well aware of the testimony and has already considered it in connection with its investigation of the Outage in Docket No. 04-035-01.

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<sup>4</sup> See Intervention Order at 3

<sup>5</sup> Although not necessary to the Commission’s consideration at this point, Utah Power notes that Mr. Larson’s testimony does not in any way admit tariff violations by Utah Power. Overhead service drop lines, which traverse the property of individual customers living in areas with overhead service, unlike secondary distribution circuits, are insulated and potentially affect the service of only individual customers whose own trees and shrubs may come in contact with them. Therefore, the safety and reliability issues associated with tree trimming around secondary distribution circuits are not present for service drop lines. As stated by Messrs. White and Larson, the Company has never had a policy of trimming trees around service drop lines except in circumstances where observation indicates a safety hazard or serious line deflection is present.

If at some point in the future Petitioners appropriately present claims for a customer complaint proceeding and if the issue of tree-trimming around drop lines is then at issue, Petitioners will be free to present testimony in support of their position on the issue and Utah Power and other parties will be free to provide responsive testimony. Presumably, the testimony presented will be offered by competent witnesses who will appear at the hearing and be subject to cross examination. At that point in time, Petitioners can argue that the testimony of Messrs. White and Larson should be incorporated in the record, Utah Power and other parties can respond, and the Commission can determine whether the testimony should be incorporated. It is unnecessary for the Commission to determine the issue at this time, without the required context to identify whether incorporating the testimony is necessary or appropriate. The Motion should be denied without prejudice.

**B. THE JUNE 8 LETTER FOCUSES ON THE WRONG ISSUE AND MAKES AN INAPPROPRIATE REQUEST.**

The June 8 Letter states that ScottishPower has not entered an appearance in this docket, notes that Utah Power is not authorized to accept service of process for ScottishPower and questions whether ScottishPower has been served with process. Based on a misunderstanding of language in the Merger Order regarding ScottishPower commitments, the Letter requests that the Commission provide Petitioners with the name of a ScottishPower officer in Utah who can be served with the Petition, in the apparent belief that effective service is the key to obtaining jurisdiction over ScottishPower.

The focus on service of process at this time is misplaced. As Petitioners note, ScottishPower has not made an appearance. If the Commission directs that such an appearance is required ScottishPower can determine how to respond and, if appropriate, can raise a defense of insufficient service of process as contemplated by Rule 12(b)(5) of the Utah Rules of Civil

Procedure. As it currently stands, however, Utah Power has noted that jurisdiction over ScottishPower in a customer complaint concerning utility actions is improper. While the June 17 Letter suggests that ScottishPower should be required to make such arguments itself, that suggestion is wrong. The Commission is responsible for ensuring that it acts within the confines of its jurisdiction.<sup>6</sup> If it finds jurisdiction lacking it should act sua sponte if necessary.<sup>7</sup> It doesn't matter who brings a jurisdictional question to the Commission's attention—once the question has been raised the Commission should make a determination. Utah Power's motion is pending. Only if the Commission were to resolve that motion by finding jurisdiction over ScottishPower would Petitioners' concern regarding service of process become potentially relevant.

Moreover, even if service of process were currently at issue, it is not the Commission's responsibility to direct Petitioners on how to properly effectuate service. Petitioners have the responsibility to provide notice of a pending matter to the proper parties. If they fail, the Commission bears no responsibility to correct that failure. The Commission should disregard the June 8 Letter.

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<sup>6</sup> See, e.g., *Hi-Country Estates Homeowners Assoc. v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995) (“The P.S.C. has only the rights and powers granted to it by statute.”) (citation omitted); *Mountain States Tel. & Tel. Co. v. Public Serv. Comm’n*, 754 P.2d 928, 930 (Utah 1988) (“Explicit or clearly implied statutory authority for any regulatory action must exist.”) (citations omitted); *James v. Galetka*, 965 P.2d 567, 570 (Utah Ct.App.1998) (“Jurisdiction of the subject matter is derived from the law. It can neither be waived nor conferred by consent . . .”) (citation omitted).

<sup>7</sup> See, e.g., *Petersen v. Utah Bd. of Pardons*, 907 P.2d 1148, 1151 (Utah 1995) (“[S]ubject matter jurisdiction is an issue that can and should be addressed sua sponte when jurisdiction is questionable.”) (citations omitted); Order Granting Motion for Summary Judgment, *In re Beaver County v. Qwest*, Docket No. 01-049-75 (Utah P.S.C. June 17, 2005) at 23 (rejecting a claim that the utility had waived a jurisdictional argument, and finding: “[J]urisdiction is not conferred or obtained from a private party, it is delegated or granted by action of the legislative body having authority over the conferral of such jurisdiction.”).

**C. THE JUNE 17 LETTER IS OBJECTIONABLE IN PART.**

The June 17 Letter requests the opportunity to respond to the Division's June 14 filing on Utah Power's motion and to file a further response to Utah Power's reply in support of its motion. It also states Petitioners' view, addressed above, that arguments regarding the Commission's jurisdiction over ScottishPower should be made by ScottishPower and not Utah Power. The Letter requests until July 29 to file the proposed responses and states that Petitioners understand that Utah Power does not object to the proposed schedule.<sup>8</sup>

Utah Power has no objection to Petitioners being given an opportunity to respond to the Division's June 14 filing or to the proposed date of July 29 to respond to the filing. However, Utah Power notes that the Division's filing was consistent with the Company's motion and contained little if any new material to which Petitioners have not already had the opportunity to respond.

Utah Power objects to the Petitioners' request to file a further response in connection with Utah Power's motion to dismiss. Utah Power is the moving party on the motion. Traditional legal practice with respect to motions is that the moving party files the motion and a memorandum in support of the motion. Any party opposing the motion then responds. Finally, the moving party replies to the responses.<sup>9</sup> Petitioners seek to add a further layer of pleadings on this typical practice without explaining why it is necessary to do so. Petitioners should not be

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<sup>8</sup> The June 17 Letter refers to a conversation between counsel for Petitioners and Utah Power regarding the responses and states that counsel for Petitioners does not believe counsel for Utah Power objects to the proposed schedule. To clarify, all that counsel for Utah Power intended by comments made in the conversation was a suggestion that Petitioners' request for an opportunity to respond to the Company's reply on its motion to dismiss be deferred until after the Division filed its comments, that counsel doubted Utah Power would be concerned with the timing of the response and that if Petitioners were given the opportunity to respond, Utah Power, as moving party, ought to have an opportunity to further reply.

<sup>9</sup> See, e.g., Utah R. Civ. P. 7(c)(1); Utah Admin. Code R746-100-4.D.



given leave to add this layer without providing an explanation demonstrating why departure from normal procedure is necessary or should be allowed.

Utah Power acknowledges that the Commission's Procedural Notice of July 1, 2005, may be viewed as authorizing Petitioners to respond to Utah Power's reply in support of its motion to dismiss. Utah Power also acknowledges that the Commission is typically liberal in allowing parties to provide information. Nonetheless, Utah Power believes that some reason should be given for departures from accepted practice and, therefore, to that limited extent requests that the Commission reconsider the notice to the extent that it grants Petitioners leave to respond to Utah Power's reply without Petitioners having provided any compelling reason for doing so.

In any event, to the extent Petitioners have been or are granted leave to file an additional response, Utah Power, as the moving party on the motion, requests an opportunity to reply.

### III. CONCLUSION

For the foregoing reasons, the relief sought by the Petitioners' Motion, June 8 Letter and June 17 Letter should be rejected except that Utah Power has no objection to the Commission allowing Petitioners to respond to the Division's June 14 filing so long as Utah Power is given an opportunity to reply to any such response. Utah Power requests a modification of the Procedural Notice issued July 1, 2005 to the extent necessary to make it clear that Petitioners must provide a compelling reason to file a further response to Utah Power's reply in support of its motion to dismiss.

RESPECTFULLY SUBMITTED: July 7, 2005.

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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing **UTAH POWER’S RESPONSE TO MOTION AND LETTERS FILED BY PETITIONERS AND REQUEST FOR MODIFICATION OF PROCEDURAL NOTICE** was sent by electronic mail and mailed by U.S. Mail, postage prepaid, to the foregoing on July 7, 2005:

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