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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 TO  
PETITIONERS' REBUTTAL**

PacifiCorp dba Utah Power & Light Company ("Utah Power" or "Company") hereby respectfully replies to the Rebuttal to PacifiCorp Reply Memorandum in Support of Motion to Dismiss ("Petitioners' Rebuttal") filed by Georgia B. Peterson, Janet B. Ward, William

Van Cleaf, David Hiller, GP Studio, Inc., Truck Insurance Exchange, and Farmers Insurance Exchange (“Petitioners”) on July 29, 2005.<sup>1</sup>

## I. INTRODUCTION

Petitioners’ Rebuttal, which was permitted by the Commission’s Second Procedural Notice, stemmed from a request by counsel for Petitioners to file “a brief response” that Petitioners believed would “assist in clarifying the issues for decision”<sup>2</sup> on Utah Power’s Motion. Petitioners’ Rebuttal is neither brief nor limited to issues relevant to the Motion. Instead, it goes on at length arguing the merits of Petitioners’ claims regarding the Company’s alleged fault in the December 2003 storm outage (“Outage”), when the facts surrounding the Outage are not before the Commission on Utah Power’s Motion.<sup>3</sup> Then, rather than clarifying issues for the Motion, Petitioners’ Rebuttal seeks to redefine the previously well-understood reparations statute as a legislative grant of authority for the Commission to award damages,<sup>4</sup> makes untimely arguments about the Commission’s authority to require mediation and investigation,<sup>5</sup> essentially asserts that if the Commission cannot award all the Relief Petitioners

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<sup>1</sup> Utah Power will also briefly address certain arguments made in the Reply of Petitioners to PacifiCorp’s Response to Motion to Incorporate Testimony and Comments Regarding Letters (Aug. 8, 2005) (“Petitioners’ Reply”), to the extent those arguments overlap with the arguments made in Petitioners’ Rebuttal, but will not generally respond to Petitioners’ Reply in an effort to put an end to the cumulative argument on Utah Power’s Motion to Dismiss (“Motion”) Petitioners’ Petition and Request for Agency Action (December 23, 2004) (“Second Petition”).

<sup>2</sup> See Letter from David Irvine to Chairman Campbell (June 17, 2005) at 1.

<sup>3</sup> While arguing facts, Petitioners’ Rebuttal presents selected matters from the Division’s and Utah Power’s Outage reports out of context and claims to find admissions in testimony where none exist. In so doing, the argument misleads rather than enlightens. At an appropriate time, if necessary, Utah Power will demonstrate the appropriate conclusions to be drawn from the Outage reports (including the fact that 80% of tree-damage-related outages would have occurred even if the optimum three-year pruning cycle had been perfectly observed) and other facts, such as the appropriate comparison of the performance of Utah Power’s system with various municipal systems. Now is not the appropriate time, however, and the Commission should disregard Petitioners’ inaccurate preview.

<sup>4</sup> See Petitioners’ Rebuttal at 10-17.

<sup>5</sup> See *id.* at 6-8.

desire it will be victimizing customers,<sup>6</sup> falsely states that Utah Power wants the Commission to forfeit its jurisdiction to a jury in civil court,<sup>7</sup> and falsely implies that Utah Power considers the Commission intellectually incapable of using Rule 23 of the Utah Rules of Civil Procedure.<sup>8</sup>

Utah Power will attempt to limit this reply to issues relevant to a decision on the Motion. However, Utah Power briefly does take exception to Petitioners' implication regarding Utah Power's Rule 23 argument. No appropriate inference could be drawn from that argument that Utah Power was impugning the Commission in any way.<sup>9</sup> Rather, Utah Power was arguing that the Commission has no legislative grant of authority to undertake a Rule 23 class action suit and that it would be burdensome to do so, in no small part due to the fact that it has never been done.<sup>10</sup> The Commission made similar points in its Intervention Order.<sup>11</sup> Utah Power has great

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<sup>6</sup> See *id.* at 19.

<sup>7</sup> See *id.* at 18.

<sup>8</sup> See *id.* at 17.

<sup>9</sup> See Utah Power's Reply in Support of Motion to Dismiss at 14-15.

<sup>10</sup> Regarding burdensomeness, Petitioners' Rebuttal argues that notice of the purported class action could simply be sent through Utah Power's bills and that the action would not be burdensome. See Petitioners' Rebuttal at 17-18. Notice through bills very likely would not satisfy Rule 23 requirements, given the anticipated turn-over in customers since December 2003. Moreover, Rule 23 notice consists of much more than a simple alert of a pending action (*see* Utah R. Civ. P. 23(c)). Petitioners also ignore other burdensome matters such as addressing the adequacy of Petitioners and their counsel to act as class representatives (including Petitioners' standing, to the extent they have already received any remuneration to which they could theoretically be entitled before the Commission, and whether the fee arrangement with Petitioners' counsel presents any conflicts with the interests of class members), whether there is typicality among claims, and numerous other issues. Petitioners also understate the difficulties associated with adjudicating individual damage claims, given Petitioners' assertion that there are over 80,000 class members.

<sup>11</sup> See Order, Docket No. 04-035-01 (July 6, 2004) ("Intervention Order") at 3 ("The Individual Customers have not presented a sufficient basis for us to conclude that the interests of their purported class are not adequately pursued by other parties who are already participating in these proceedings. Nor have they convinced us that the class action designation and class action process is warranted or permitted in our review of the power outage."); *see also* Letter from Public Service Commission of Utah to Parties of Record, *Beaver County v. Qwest Corporation*, Docket No. 01-049-75 (Utah P.S.C. Sept. 30, 2002) ("The Commission sees little benefit and significant burdens to impose additional requirements, applicable to court class actions, on these proceedings and the procedures to be followed herein.").

respect for the Commission, the individual Commissioners, and the Commission Staff.  
Petitioners' implied assertion to the contrary is false.

## **II. ARGUMENT**

### **A. PETITIONERS SHOULD STILL BE REQUIRED TO FOLLOW APPROPRIATE PROCEDURE.**

Utah Power's initial purpose in raising the procedural deficiency (under Utah Admin. Code R746-100-3.F) of the Second Petition was two-fold. First, as to Petitioners' Outage-related claims, dismissal of the complaint in this docket would have required Petitioners to pursue their Outage claims in Docket No. 04-035-01 (the "Outage Investigation") or allowed any new complaint to be filed consistent with any Commission directives or findings arising from the Outage Investigation. Second, as to the non-Outage-related claims, requiring Petitioners to follow the appropriate process (with directions on the appropriate limits of a new complaint) would help Petitioners focus on allegations of utility violations of statute, Commission order or rule, or Company tariff—rather than pursuing a kitchen-sink, class-action complaint asserting vague possibilities of problems regarding land sales and coal mining practices against an entity (ScottishPower) that clearly is not a Utah public utility.

Contrary to Petitioners' exclusive focus on the mediation aspect of Rule R746-100-3.F,<sup>12</sup> Utah Power's consistent focus has been on the investigative aspect of the rule, and on the opportunity to better define the appropriate confines of any consumer complaint proceeding Petitioners seek to adjudicate. The relief Petitioners seek with respect to several of their claims is investigation. Thus, Rule R746-100-3.F is not only the prescribed manner for dealing with customer complaints, it is consistent with Petitioners' own complaint in this matter.

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<sup>12</sup> See, e.g., Petitioners' Rebuttal at 6-8.

Because the Commission did not issue a final order concluding the Outage Investigation, Utah Power’s first purpose may no longer apply. However, Utah Power’s second purpose in arguing for dismissal on procedural grounds is still relevant. Requiring Petitioners to proceed before the Division in the first instance, with Commission directions on the appropriate scope of a consumer complaint proceeding, the scope of available relief, and an identification of the appropriate petitioners and respondent, would allow a more orderly proceeding. In this sense, Utah Admin. Code R746-100-3.F is an additional procedural basis to accompany the more substantive bases for dismissal, and would allow Petitioners to attempt to support an appropriately limited complaint about the Outage without the inappropriate additional baggage of class action claims, along with requests for an order to show cause, divestiture, an accounting, and compensatory damages.

The arguments raised in Petitioners’ Rebuttal do not undermine the applicability of Rule R746-100-3.F. The time for contesting the Commission’s requirement that consumer complainants proceed before the Division for investigation and mediation in the first instance has long since passed. That requirement has substantively been in place under prior iterations of the rule that go back much further than two years.<sup>13</sup> And alleging that the responsibility lies with the Commission to make a “referral” of the matter to the Division does not excuse Petitioners—the Commission could not have been more clear in its Intervention Order that at least the non-outage investigation claims should be “referred” to the Division.<sup>14</sup>

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<sup>13</sup> See Utah Code Ann. § 63-46a-14.

<sup>14</sup> See Intervention Order at 3 (“Relative to the non-power outage issues the Individual Customers seek to raise, we deny their Petition without prejudice. The Individual Customers may present what detailed information they may have concerning their claims to the Division of Public Utilities. The Division has statutory power to conduct its own investigations or studies upon complaint, Utah Code § 54-4a-1, and we believe that the Division will objectively consider the claims. Should the Division conclude that future Commission action is warranted, we trust that the Division will bring its recommendations to the Commission.”).

**B. THE COMMISSION SHOULD FOCUS ON THE SUBSTANCE OF THE ARGUMENTS ABOUT THE EXTENT OF ITS JURISDICTION, NOT THE IDENTITY OF THE PARTY MAKING THOSE ARGUMENTS—THERE IS NO JURISDICTION OVER SCOTTISHPOWER.**

Petitioners' Rebuttal continues to focus on the identity of the party making the argument, rather than on the substantive issue of the extent of Commission jurisdiction. This focus is misplaced, as it makes no difference whether Utah Power has authority to make arguments on ScottishPower's behalf. "[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."<sup>15</sup> The Commission has the responsibility to monitor its jurisdiction and act *sua sponte* if necessary.<sup>16</sup>

Substantively, Petitioners' Rebuttal continues to cite Utah Code Ann. §§ 54-2-1(7), 54-7-27, and 54-7-28 as bases for proceeding against ScottishPower. But the only section among these three that is relevant to Utah Power's Motion is section 54-2-1, defining an electrical corporation. An electrical corporation is one "owning, controlling, operating, or managing any electric plant, or in any way furnishing electric power for public service or to its consumers or members for domestic, commercial, or industrial use, within this state . . . ."<sup>17</sup> ScottishPower does not do any of these things. Utah Power does. Since ScottishPower is not an electrical corporation, it is not a public utility.<sup>18</sup> Since it is not a public utility, it is not subject to a complaint under section 54-7-9. Section 54-7-9 defines the scope of Petitioners' recourse in a

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<sup>15</sup> Order Granting Motion for Summary Judgment, *Beaver County v. Qwest Corporation*, Docket No. 01-049-75 (Utah P.S.C. June 17, 2005) ("Counties Order") at 23.

<sup>16</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).

<sup>17</sup> See Utah Code Ann. § 54-2-1(7).

<sup>18</sup> See *id.* at § 54-2-1(15).

Commission proceeding for violations of statute, Commission rule or Commission order—they have recourse against the public utility, not that utility’s affiliates.<sup>19</sup>

Petitioners’ argument that ScottishPower should be required to appear and provide evidence “which clearly shows that [it] exercises no oversight or control over PacifiCorp’s operations, and that none of PacifiCorp’s management structure, budgets or operating policies are reviewed or approved by ScottishPower”<sup>20</sup> misplaces the burden on an issue of subject matter

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<sup>19</sup> This issue is dispositive, and Petitioners’ attempts to use other provisions (e.g., the Merger Order) in an attempt to bootstrap jurisdiction over ScottishPower are misplaced. The issue is not the Commission’s authority to monitor and ensure compliance with the Merger Order; the issue is the extent of a customer’s right to haul a non-utility before the Commission in a complaint proceeding.

Moreover, Petitioners’ attempts to use the Merger Order as a jurisdictional hook to bring ScottishPower into a utility customer complaint proceeding are highly misplaced when considered as a matter of interpreting the scope and terms of that order. Petitioners continuously cite the Merger Order regarding ScottishPower’s agreement to “locate a senior executive in Utah” and to provide a “strong ScottishPower presence in Utah.” Letter from David Irvine to Sandy Mooy (June 8, 2005) at 1; Petitioners’ Reply at 4-5. The Merger Order notes the ScottishPower agreement to place a senior executive in residence in Utah in a section of the Order titled “Utah Presence.” The Commission was careful to note in that section of the order that the purpose of the executive located in Utah was principally to deal with economic development and community concerns, that the executive would report directly to the CEO of Utah Power and that these were matters of management prerogative. Merger Order at 30-31. It is apparent that this executive would be an employee of Utah Power. No mention whatsoever is made of the executive acting as an agent for service of process on ScottishPower.

Likewise, contrary to Petitioners’ belief, ScottishPower’s agreement in connection with the merger to make its employees, officers, directors and agents available to testify before the Commission and to provide access to relevant books and records (*see* Stipulation between PacifiCorp, ScottishPower, the Division and the Committee of Consumer Services dated July 28, 1999, ¶¶ 7-8, referred to in Merger Order at 7-9) was clearly not an agreement by ScottishPower to subject itself to utility customer complaint proceedings. Rather, the purpose of these provisions in the Stipulation and Merger Order was made manifest by the fact that the penalty for failure to live-up to the commitments was that costs may be denied rate recovery. In other words, the issues being addressed were issues of costs being charged by ScottishPower to Utah Power for inclusion in Utah Power’s rates. These provisions do not suggest that ScottishPower has waived questions regarding the jurisdiction of the Commission or assumed liability for customer complaints against Utah Power. To the contrary, they make clear that such claims and defenses were carefully preserved. In any event, as noted above, “jurisdiction 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.” Counties Order at 23.

<sup>20</sup> *See* Petitioners’ Reply at 4.

jurisdiction.<sup>21</sup> And regardless of where the burden of demonstrating jurisdiction lies, again, ScottishPower is clearly not a public utility appropriately subject to utility consumer complaints.

**C. THE COMMISSION DOES NOT HAVE AUTHORITY TO AWARD DAMAGES—REPARATIONS AND DAMAGES ARE NOT THE SAME THING.**

Petitioners continue to pursue novel theories to manufacture Commission authority to award damages. The Commission should disregard Petitioners' efforts. Whereas Petitioners previously sought to distance themselves from the clear Supreme Court anti-damages directive of the *McCune* case<sup>22</sup> by arguing that *McCune* was limited to considering the reparations statute (section 54-7-20) while Petitioners seek damages under section 54-4-2,<sup>23</sup> Petitioners now actually seek to invoke section 54-7-20 by claiming that damages and reparations are really the same thing.<sup>24</sup>

If this really were a reparations case under section 54-7-20, then damages would be even more specifically (if that is possible) barred under *McCune*. This is not, however, a reparations case. The meaning of "reparations" under the statute is perfectly clear.<sup>25</sup> Reparations are to be made when a public utility has "charged an amount for [a] product, commodity or service in excess of the schedules, rates and tariffs on file . . . , or has charged an unjust, unreasonable or

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<sup>21</sup> See, e.g., *Thompson v. Jackson*, 743 P.2d 1230, 1232 n.2 (Utah Ct. App. 1987) ("When a jurisdictional question arises, the burden to establish it rests upon the party asserting that jurisdiction exists.") (citations omitted).

<sup>22</sup> 758 P.2d 914, 916 (Utah 1988).

<sup>23</sup> See Response of Petitioners to Motion of PacifiCorp to Dismiss Complaint (Mar. 31, 2005) at 26. As Utah Power noted in its reply memorandum, Petitioners are not entitled to demand investigation under section 54-4-2. See *Williams v. Public Service Comm'n*, 645 P.2d 600, 602 (Utah 1982).

<sup>24</sup> See Petitioners' Rebuttal at 11-12.

<sup>25</sup> When interpreting statutes the primary goal is to identify "the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve." See *State v. Burns*, 2000 UT 56 ¶ 25, 4 P.3d 795, 799-800.



discriminatory amount against the complainant.”<sup>26</sup> When the utility has done so, the Commission “may order that the public utility make due reparation to the complainant **therefor**, . . . .”<sup>27</sup> The statute’s use of the word “therefor” specifically ties the available relief to the utility overcharge,<sup>28</sup> as does the introduction to the section—“When complaint has been made to the commission concerning any rate, fare, toll, rental or charge . . . ,” as does the reference to the “date of collection” of the overcharge.<sup>29</sup> Subsection 2 continues to refer only to charges by the utility (in excess of tariff rates, or that are unjust, unreasonable, or discriminatory), and if there were any doubt that this entire section 54-7-20 is limited to rate reparations, court and Commission precedent establishes the fact with certainty.<sup>30</sup>

Petitioners’ complaint does not seek rate reparations, it seeks compensatory damages.<sup>31</sup> If Petitioners seek in a new complaint to make a claim for rate reparations based on the Outage,

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<sup>26</sup> See Utah Code Ann. § 54-7-20(1).

<sup>27</sup> See *id.* (emphasis added).

<sup>28</sup> See, e.g., Merriam-Webster’s Collegiate Dictionary (10th ed. 1993) at 1223 (defining therefor as “for or in return for that”).

<sup>29</sup> See *id.*

<sup>30</sup> See, e.g., *American Salt Co. v. W.S. Hatch Co.*, 748 P.2d 1060, 1064 (Utah 1987) (“We think it plain from the language of the statute that the power of the commission to order reparations is limited to cases where charges have been made in excess of the schedules, rates, and tariffs on file with the commission, or discriminations made under such schedules.”); *Prows v. Mtn. States Tel. & Tel. Co.*, Docket No. 00-049-07, 2000 WL 1643595, \*1 (Utah P.S.C. Aug. 17, 2000) (“We begin our analysis with the premise that the Commission is a creature of the Utah Legislature and can exercise only the authority specifically delegated by the Commission’s enabling statutes or fairly infer able from the explicit grant. In regard to monetary disputes between a public utility and its customers, the Commission’s only authority to order payment of money or to abate utility charges derives from § 54-7-20, . . . . As the Utah Supreme Court has construed this statute, the Commission’s sole authority in regard to monetary disputes is to determine whether a utility has deviated from its published tariffs and afford refunds if it has.”) (citing *American Salt* and *Denver & RGR v. P.U.C.*, 272 P. 939 (Utah 1928)); *Richcrairie Corp. v. Utah Power & Light Co.*, Docket No. 00-035-02, 2000 WL 1643593, \*1 (Utah P.S.C. Aug. 7, 2000) (“In the instant case, the substance of the complaint relates to fraud or negligence, not deviations from Respondent’s tariff. Unfortunately for Complainants, our jurisdiction simply does not extend to affording relief under such theories, and therefore an evidentiary hearing on them would be an exercise in futility.”).

<sup>31</sup> See Second Petition at ¶ 40.

Utah Power can respond. It adds nothing to Petitioners' argument and is demonstrably incorrect, however, for Petitioners to cite section 54-7-20 as a basis of Commission authority to award compensatory damages.<sup>32</sup>

Likewise, section 54-7-9(4) provides no support for Commission authority to award damages. That section provides that the Commission "need not dismiss any complaint because of the absence of direct damage to the complainant,"<sup>33</sup> which clearly goes to the issue of standing, and gives the Commission permission to hear complaints even in cases where under traditional standing principles there would be no genuine case or controversy.<sup>34</sup> The section says nothing at all about the type of relief available before the Commission. Petitioners' argument that the statutory language regarding the absence of direct damage would be surplusage if the Commission could not award damages<sup>35</sup> makes no sense—it is the very language necessary to allow a broadened definition of standing.

#### **D. THE COMMISSION SHOULD NOT PROCEED UNDER RULE 23.**

Utah Power will not restate here its arguments against proceeding via class action. However, Petitioners' new appeal to the reparations statute does provide an additional reason for the Commission to reject a Rule 23 class action. The Commission has previously interpreted

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<sup>32</sup> Petitioners also continue to cite *Atkin, Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330 (Utah 1985) as the basis for Commission authority to award damages. Utah Power will not reiterate here its arguments for why Petitioners' reliance on *Atkin* is misplaced. Suffice it to say that the fact Petitioners must become so creative in order to support their argument is part of the proof that the argument fails, because "any reasonable doubt of the existence of any [Commission] power must be resolved against the exercise thereof." *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995) (quoting *Williams v. Public Service Comm'n*, 754 P.2d 41, 50 (1988)).

<sup>33</sup> Utah Code Ann. § 54-7-9(4).

<sup>34</sup> See, e.g., *Society of Prof. Journalists v. Bullock*, 743 P.2d 1166, 1170 (Utah 1987) ("To establish standing to maintain a claim before a trial court, a plaintiff must have suffered some distinct and palpable injury that gives him [or her] a personal stake in the outcome of the legal dispute." (quotation omitted, bracketing in original)).

<sup>35</sup> See Petitioners' Rebuttal at 13.

section 54-7-20 in the *Nichols* case, finding that “the Commission is empowered to grant reparation to the complainant only and **not to persons in addition to the complainant.**”<sup>36</sup> In broader context, the *Nichols* order (which, like the current complaint, addressed claims under a Utah Power merger order) interpreted section 54-7-20 as being instructive regarding class actions more generally, stating:

We may refer to other statutory provisions to determine whether there is legislative intent to authorize the Commission to entertain what would be equivalent to a class action. In UCA §54-7-20, where the Commission is empowered to directly remedy a flawed transfer of money between the utility and a utility customer, the Commission is empowered to grant reparation to the complainant only and not to persons in addition to the complainant. Hence, where the closest, existing statutory provision to *Nichols*’ request for back wage relief, rate reparations found in UCA §54-7-20, limits the Commission’s ability to grant relief to the Complainant only, we will follow that example and limit *Nichols*’ standing to her claims only.<sup>37</sup>

The Commission’s determination in *Nichols* was correct, and should continue to guide the Commission here. There is no statutory authority for Petitioners to serve as class representatives for “persons in addition to the complainant[s].”

### III. CONCLUSION

Petitioners’ Rebuttal neither clarifies the issues nor provides any appropriate basis to deny the Motion. The Commission either lacks jurisdiction to award, or Petitioners have no right to demand, much of the relief sought in the Second Petition. Utah Power does not seek to have the Commission punt its statutory responsibilities to a court. The Commission is the appropriate body to adjudicate whether Utah Power’s preparation for and response to the massive December 2003 storm were consistent with its public utility obligations to Petitioners. Petitioners,

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<sup>36</sup> See *Nichols v. Utah Power and Light Co.*, Docket No. 97-035-09, 1998 WL 828338 (Utah P.S.C. Aug. 18, 1998) (emphasis added).

<sup>37</sup> *Id.* (footnote omitted).

however, have no authority to pursue claims on behalf of other customers; and the Commission has no authority to determine whether Utah Power has committed tortious conduct or to award compensatory damages. Further, ScottishPower is not an appropriate party to a consumer complaint proceeding. For all these reasons, Utah Power respectfully requests that its Motion be granted.

RESPECTFULLY SUBMITTED: August 15, 2005.

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## **CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing **UTAH POWER'S  
REPLY TO PETITIONERS' REBUTTAL** was sent by electronic mail and mailed by U.S.  
Mail, postage prepaid, to the foregoing on August 15, 2005:

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