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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 MOTION
FOR PROTECTIVE ORDER
STAYING DISCOVERY**

Pursuant to Utah Administrative Code R746-100-8.C and Rule 26(c) of the Utah Rules of Civil Procedure, PacifiCorp dba Utah Power & Light Company ("Utah Power" or "Company") hereby respectfully requests the entry of a protective order directing that discovery requested in

this matter by Georgia B. Peterson, Janet B. Ward, William Van Cleaf, David Hiller, GP Studio, Inc., Truck Insurance Exchange, and Farmers Insurance Exchange (“Petitioners”) be stayed pending the resolution of Utah Power’s February 7, 2005 motion to dismiss (“Motion”) Petitioner’s Petition and Request for Agency Action (“Petition”).¹

I. INTRODUCTION

Petitioners served Utah Power with a Request for Production of Documents (“Data Requests”), by mail, on August 15, 2005.² The Data Requests contain 31 separate document production requests, many of which seek documents going back as far as 1987, and nearly all of which solely address the merits of Petitioners’ claims against Utah Power. The merits of Petitioners’ claims are not at issue in the Motion. Nor is there any need for discovery in order for the Commission to decide the Motion. Rather, the Motion addresses Commission jurisdiction and procedure, neither of which is dependent on factual matters about which discovery would be appropriate or necessary. If the Motion is granted the Data Requests will be moot, at least until a new petition is filed that more closely conforms to the limits of the Commission’s jurisdiction. If the Motion is denied, the stay can be lifted and Utah Power can respond or object to the individual requests as appropriate. Thus, Petitioners will not be prejudiced by the entry of a protective order postponing discovery. Utah Power, however, would be unduly burdened if it were required to spend the time and resources to respond to a far-reaching set of Data Requests that will become moot if its Motion is granted. In such circumstances, Utah Power respectfully requests that the Commission exercise its discretion to order that discovery be stayed pending the resolution of the Motion.

¹ Pursuant to Utah R. Civ. P. 26(c), undersigned counsel hereby certify that they have in good faith conferred with counsel for Petitioners, in an effort to resolve the dispute addressed herein without Commission involvement.

² A true and correct copy of the Data Requests is attached hereto as Exhibit A.

II. ARGUMENT

Under Utah law, courts (and therefore the Commission, by virtue of its adoption of the discovery provisions of the Utah Rules of Civil Procedure) are “entrusted with broad discretion in dealing with discovery matters, namely, protective orders.”³ Rule 26 of the Utah Rules of Civil Procedure allows the Commission, on good cause being shown, to “make any order which justice requires to protect a party or person [from whom discovery is sought] from annoyance, . . . oppression, or undue burden or expense.”⁴ Specifically included among the orders the Commission may enter are those instructing that discovery “not be had.”⁵ Good cause exists in this case to enter a protective order that discovery be stayed until Utah Power’s Motion is resolved.

A. **NO DISCOVERY IS NECESSARY TO RESOLVE UTAH POWER’S MOTION AND PETITIONERS WOULD NOT BE PREJUDICED BY A STAY.**

Utah Power’s Motion addressed matters such as the Commission’s jurisdiction over ScottishPower, the Commission’s jurisdiction to award damages and certify a class action, and the procedural adequacy of the Petition. None of these matters would be illuminated by the discovery sought in the Data Requests (or any other discovery). Until the Motion is decided, discovery is unnecessary. Indeed, the fact that Petitioners waited over six months and until all briefing on the Motion was complete before serving discovery belies the importance of the Data Requests in deciding the Motion. Almost all of the Data Requests only address the underlying merits of Petitioners’ claims. For example, the Data Requests seek information on the number of officers, employees, “customer-facing” employees, tree trimmers, customers (by classification),

³ See *In re Pendleton*, 11 P.3d 284, 294 (Utah 2000) (citing *R & R Energies v. Mother Earth Indus., Inc.*, 936 P.2d 1068, 1079 (Utah 1997)).

⁴ Utah R. Civ. P. 26(c).

⁵ See *id.* at 26(c)(1).

and customer complaints for extended periods, information on Utah Power’s earnings, maintenance costs, NESC violations, the elimination of jobs in Utah, mining practices and coal production, land sales, requests to modify merger terms, expert and internal reports regarding the December 2003 outage, etc., etc.⁶ None of this has any relevance to the Motion, nor are there any other Data Requests that seek facts that would be probative in addressing any issue raised by the Motion. The Motion seeks relief on legal grounds, where factual issues are not determinative.

While two or three of the Data Requests seek information regarding ScottishPower’s involvement with Utah Power, any data elicited from these requests would not be probative on the question of jurisdiction over ScottishPower.⁷ Utah Power’s argument rests on the statutory definition of an electrical corporation.⁸ At this point, either the Commission will accept Utah Power’s argument, in which case no reasonably conceivable set of facts (and certainly not those elicited in the Data Requests on this subject, which address mere approvals of annual budgets)⁹ would undermine the conclusion that ScottishPower is not a Utah public utility and not subject to a consumer complaint proceeding, or the Commission will determine that there are questions of fact that could reasonably be probative regarding jurisdiction over ScottishPower and deny (at least temporarily) the portion of Utah Power’s Motion seeking dismissal of ScottishPower.

⁶ See, e.g., Data Requests 1-7, 10-16, 18-21.

⁷ See Data Requests 8, 9, and possibly 17.

⁸ Admittedly there is a factual component to the definition of an electrical corporation under Utah Code Ann. § 54-2-1(7). 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” *Id.* However, there could not be any plausible factual dispute that ScottishPower directly does any of these things—it clearly does not. Petitioners’ claim is that ScottishPower is an electrical corporation by virtue of owning Utah Power, which in turn owns, controls, operates, and manages electric plant, etc. This is essentially a legal rather than factual issue.

⁹ See Data Requests 8-9.

Either way, discovery is not necessary at this time and Petitioners will not be prejudiced by a stay.

B. RESPONDING TO THE DATA REQUESTS WOULD BE UNDULY BURDENSOME FOR UTAH POWER.

Of Petitioners' thirty-one Data Requests, twenty-one seek information going back more than twelve years. Among these twenty-one requests, nineteen seek information dating back to 1987, 1988, or 1989. Among this nineteen are requests, for example, that Utah Power go back up to eighteen years in search of every tree-trimming contract;¹⁰ every report by Company arborists or foresters;¹¹ every report on the number of NESC violations and corrections;¹² every document regarding customer complaints for power outages, unsafe line conditions or tree problems;¹³ every document addressing any need for system upgrades or tree trimming in Weber, Davis, Salt Lake or Utah county;¹⁴ 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);¹⁵ every report addressing changes in coal recovery parameters;¹⁶ every report to shareholders, officers or regulators quantifying the amounts of recoverable coal in Utah Power mines or inventorying tracts of real property owned by Utah Power in Utah, Colorado, or Wyoming;¹⁷ and every document regarding any sale of any parcel

¹⁰ See Data Request 5.

¹¹ See Data Request 7.

¹² See Data Request 14.

¹³ See Data Request 27.

¹⁴ See Data Request 29.

¹⁵ See Data Request 30.

¹⁶ See Data Request 18.

¹⁷ See Data Requests 19 and 21.

of land—including documentation of the purpose the land was originally acquired, whether it was used for that purpose (or why not), why it was sold, and for how much.¹⁸

The potential amount of data covered by such requests is staggering. Given issues such as the turn-over in Company personnel over the eighteen-year period covered by many of the requests and the fact that some of the information could conceivably not only be spread among Utah Power’s major offices but among small local offices or even subsidiaries, an enormous effort would be required to conduct a reasonable search for the potentially vast amount of information. That effort is simply not called for at this time in this case. Requiring Utah Power to undergo any discovery effort is not justified when the discovery could be mooted by a resolution of Utah Power’s Motion.¹⁹ Requiring Utah Power to undergo the undue burden entailed in a search for the information elicited by the Data Requests would be all the more objectionable.

III. CONCLUSION

In the present case, where a motion to dismiss is pending and the discovery requested could be unnecessary if the motion is granted, it is appropriate to issue a protective order staying the discovery. A stay is all the more appropriate where, as in this case, the discovery sought is unduly burdensome in both its extensive subject matter and lengthy time frame. The parties’ time would be better spent preparing for oral argument on Utah Power’s Motion. If the Motion is denied, Petitioners will obviously be allowed to pursue discovery and will suffer no prejudice. For these reasons, Utah Power respectfully requests that the Commission enter a protective order staying discovery pending the resolution of the Motion.

¹⁸ See Data Request 26.

¹⁹ See, e.g., *LaFleur v. Teen Help*, 342 F.3d 1145, 1152-53 (10th Cir. 2003) (upholding stay of discovery where, “if the motion to dismiss were granted, the depositions would be unnecessary.”).

RESPECTFULLY SUBMITTED: September 19, 2005.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **UTAH POWER'S MOTION FOR PROTECTIVE ORDER STAYING DISCOVERY** was sent by electronic mail and mailed by U.S. Mail, postage prepaid, to the following on September 19, 2005:

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