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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 TO
DISMISS AND ANSWER**

I. INTRODUCTION

PacifiCorp dba Utah Power & Light Company ("Utah Power" or "Company"), pursuant to Utah Code Ann. § 63-46b-6(1) and Utah Admin. Code R746-100-3.H and R746-100-4.D,

hereby responds to the Petition and Request for Agency Action (“Second Petition”) 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 December 23, 2004.¹

This Response is organized into the following sections:

1. A background section recounting general factual information regarding the previous involvement of some of the Petitioners’ in Docket No. 04-035-01, the docket investigating the December 2003 storm and the service outage, and a description of relief sought in the Second Petition (Section II).
2. A motion to dismiss, including a brief discussion of why ScottishPower plc (“ScottishPower”) should not be a party to this matter, as well as a discussion of Petitioners’ specific claims, including the legal and policy reasons why these claims are unlawful or inappropriate and should be dismissed (Section III).
3. The Company’s Answer to the specific factual allegations of the Second Petition (Section IV).
4. The Company’s defenses to the claims asserted by Petitioners (Section V).
5. The relief requested by the Company (Section VI).

II. GENERAL BACKBROUND.

The Second Petition is nearly identical to the Petition and Request to Intervene (“First Petition”) submitted by four of the Petitioners in Docket No. 04-035-01 on April 29, 2004. The principal differences between the First Petition and the Second Petition are the inclusion of three new Petitioners (GP Studio, Inc., as a non-residential customer of Utah Power, and Truck Insurance Exchange and Farmers Insurance Exchange, as purported subrogees of “certain

¹ The Second Petition was served on counsel for Utah Power by mail on January 4, 2005.

claimants who are commercial customers of UP&L within Salt Lake County”)² and Petitioners’ shift to an attempt to adjudicate their claims in a separate docket rather than (or in addition to) through intervention in Docket No. 04-035-01. The factual allegations, alleged causes of action, and relief requested in the Second Petition remain essentially unchanged from the First Petition.

The Second Petition continues to seek—as did the First Petition—among other things, (a) damages for alleged monetary losses sustained by putative class members, (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. Some of these claims are more or less related to the December 2003 storm outage. Others are unrelated to the storm outage.

The Commission granted the First Petition in part, allowing the individual Petitioners to intervene in Docket No. 04-035-01 by order dated July 6, 2004 (“Intervention Order”). The Commission, however, denied the remaining aspects of the First Petition and in doing so set forth prudent directives that apply equally to the Second Petition. The Intervention Order stated:

We will grant the Individual Customers’ intervention in this docket, but for their individual interests only; not as representatives of any purported class. As Interveners, they may participate in what remaining proceedings the Commission may conduct concerning the Commission’s review of the December, 2003, power outage and the Commission’s review of the major event

² See Second Petition at ¶ 2.

exclusion claimed by PacifiCorp. 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.

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.

As to the Individual Customers' request that we order PacifiCorp to pay monetary awards as compensation for damages suffered or award the State of Utah restoration of lost economic benefits, we conclude that the Individual Customers have failed to provide an adequate legal basis upon which such relief is available from the Commission.³

These Commission directives apply with equal force to the Second Petition. Although the Intervention Order may not strictly be res judicata, since it was not a final order, it was certainly the law of the case as applied to the first four Petitioners (i.e., all of the Petitioners with the exception of GP Studio, Inc. and the two insurers) and, regardless of its strict legal effect, it contained prudent decision-making that remains correct as applied to all Petitioners in the Second Petition.

³ Intervention Order at 3 (citations omitted).

III. MOTION TO DISMISS

A. SCOTTISHPOWER IS NOT A PROPER PARTY TO THIS PROCEEDING.

The Second Petition names ScottishPower as a respondent and seeks to have the requested relief applied against ScottishPower, in addition to Utah Power. ScottishPower is not a Utah public utility, is not appearing at this time, and therefore does not participate in this filing. Unless the Commission deems a limited appearance by ScottishPower necessary to resolve the question of Commission jurisdiction over ScottishPower, in which case Utah Power will ensure that ScottishPower is made aware of the Commission's position, Utah Power will address the issue of Commission jurisdiction over ScottishPower. Given the clear limits on the Commission's jurisdiction, and the principle that the Commission should dismiss on the basis of subject-matter jurisdiction sua sponte where appropriate, Utah Power believes it appropriate to call this jurisdictional issue to the Commission's attention without the need for formal involvement by ScottishPower.⁴

As the courts and Commission have consistently recognized (and as argued more extensively in other contexts below), "[t]he P.S.C. has only the rights and powers granted to it by statute."⁵ The Commission is specifically "vested with power and jurisdiction to supervise and regulate every public utility in this state"⁶ Public utilities include electrical corporations, which are "every corporation . . . 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

⁴ 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 Service Comm'n*, 754 P.2d 928, 930 (Utah 1988) ("Explicit or clearly implied statutory authority for any regulatory action must exist.") (citations omitted); *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).

⁵ *Hi-Country Estates*, 901 P.2d at 1021.

⁶ Utah Code Ann. § 54-4-1.

domestic, commercial, or industrial use, within this state”⁷ ScottishPower is not a Utah public utility. It does not own, control, operate, or manage electric plant. It does not furnish electric service to customers. It holds no certificate of public convenience and necessity. Utah Power is the regulated Utah public utility subject to Commission jurisdiction. To the extent Petitioners or any other customers of the Company are entitled to any relief from the Commission on the basis of the electric service provided by Utah Power, they have ample recourse against Utah Power. There is no need for, and no statutory authorization for, ScottishPower’s participation in this matter. ScottishPower should be dismissed as a respondent from this matter on the basis that the Commission’s jurisdiction only extends to the regulation of Utah public utilities.

B. NO NEW DOCKET IS NECESSARY FOR OUTAGE-RELATED CLAIMS AND PROPER PROCEDURE HAS NOT BEEN FOLLOWED FOR NON-OUTAGE-RELATED CLAIMS.

The Petitioners who filed the First Petition have already been directed by the Commission on the appropriate course for pursuing their claims. For outage-related claims they were granted intervention in Docket No. 04-035-01. Thus, there is no reason to open a new proceeding to investigate such claims—they already have a forum in which they have the right to make their arguments. If upon the conclusion of that docket there are unresolved issues that are appropriately addressed in a new complaint proceeding, Petitioners can pursue such issues at that time. However, once Docket No. 04-035-01 is completed any final findings the Commission makes will be both res judicata as to Petitioners and conclusive in any collateral proceeding.⁸

The remaining Petitioners who did not participate in filing the First Petition likewise have no basis to pursue a separate docket for outage-related claims. Although their intervention is

⁷ See *id.* at §§ 54-2-1(7), 54-2-1(15)(a).

⁸ See *id.* § 54-7-14.

undoubtedly tardy and Docket No. 04-035-01 may be nearing completion, Utah Power would stipulate that the new Petitioners may participate as parties in any remaining process in Docket No. 04-035-01 or any appropriate appeal therefrom. It would be a waste of Commission and party resources to open a new docket when Docket No. 04-035-01 already covers such a wide-ranging investigation of the outage and when Petitioners have not identified any unique issues of fact or law that would render it inappropriate for their outage-related arguments to be considered as part of the broader investigation. Indeed, given that the Second Petition is substantially identical to the First Petition, those Petitioners who did not participate in the filing of the First Petition have nonetheless tied themselves to the identical claims that the Commission addressed in the Intervention Order. The outage-related claims in the Second Petition simply do not warrant the opening of a new docket.

For non-outage-related claims, Petitioners were previously directed that they “may present what detailed information they may have 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.”⁹ Such a directive is law of the case as to the Petitioners who filed the First Petition.¹⁰ There is also no reason for this directive not to apply to the claims of those Petitioners who did not participate in filing the First Petition. Indeed, as retail customers

⁹ See Intervention Order at 3

¹⁰ Pursuant to law-of-the-case doctrine, while an action is proceeding parties should not seek to revisit matters previously resolved by the tribunal in the absence of some compelling ground for reconsideration, such as a change in the law, new evidence, or a clear error resulting in manifest injustice. See generally Charles Alan Wright et al., 18B *Federal Practice and Procedure* § 4478 (2d ed. 2002).

of Utah Power (or purported subrogees of such customers), all of the Petitioners were required to follow the procedure identified in Commission Rule R746-100-3.F.1.¹¹ 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.**¹²

Thus, the Commission's direction in the Intervention Order that non-outage-related claims be first submitted to the Division for investigation was in furtherance of what consumer complainants such as Petitioners are already required to do by rule. To the best of Utah Power's knowledge, Petitioners have made no attempt to approach the Division to pursue a potential investigation of their non-outage-related claims as directed in the Intervention Order and as mandated by Rule R746-100-3.F.1.

In such circumstances, there is no basis for the Commission to open a new docket at this time to formally consider Petitioners' non-outage-related claims and no basis to open a new docket apart from Docket No. 04-035-01 to consider Petitioners' outage-related claims.¹³ Thus, notwithstanding the fact that Utah Power answers the Petitioners' factual allegations below and otherwise addresses additional issues concerning the Second Petition, the Second Petition should be dismissed in its entirety on the bases argued in this Section III.B.

¹¹ Utah Admin. Code R746-100-3.F.1; Utah Admin. Code R746-100-2.E. This would also apply to outage-related claims were it not also appropriate to dismiss the Second Petition as to outage-related claims on the basis that a forum already exists, in Docket No. 04-035-01, to pursue such claims.

¹² See Utah Admin. Code R746-100-3.F.1 (emphasis added).

¹³ Utah Power would further note that insofar as the Second Petition merely seeks an investigation of unsupported, speculative assertions regarding the Company's coal mining, property disposition, etc.—as opposed to making solid factual allegations—the “statute gives no right of investigation to a complainant; rather, it gives broad discretion to the PSC in the employment of the investigatory process.” See *Williams v. Public Service Comm'n*, 645 P.2d 600, 602 (Utah 1982).

1. Petitioners' Claims For Compensatory Damages Are Barred.

Petitioners' claims for damages for themselves individually, for the putative class they purport to represent, and for the State of Utah are barred because the Commission lacks the statutory authority to award compensatory damages of the type requested by Petitioners. The Commission appropriately recognized this in its Intervention Order and cited controlling authority therefor.¹⁴

It is well-understood that the authority of the Commission is limited to that which is expressly granted or clearly implied by statute,¹⁵ and "any reasonable doubt of the existence of any power must be resolved against the exercise thereof."¹⁶ Petitioners cite no Utah statute that authorizes the Commission to provide compensatory relief to customers or to the State of Utah for losses allegedly sustained in connection with the December 2003 storm or in connection with alleged breaches of merger conditions. The only statutory provision allowing for compensation is section 54-7-20, providing for rate reparations when charges have been in excess of tariff schedules or have been unjust, unreasonable, or discriminatory. Petitioners, like all other customers who experienced the outage, were not billed for electric service during the outage. Thus, the reparations statute does not provide a basis for compensation.

Petitioners' compensatory claims are otherwise governed by Utah Power's Commission-approved tariff. All claims of Petitioners for damages or other compensation in excess of or inconsistent with the tariff are barred.¹⁷

¹⁴ See Intervention Order at 3 (citing *American Salt Co. v. W.S. Hatch Co.*, 748 P.2d 1060 (Utah 1987), *Basin Flying Service v. Public Service Comm'n*, 531 P.2d 1303 (Utah 1975), *Beaver County v. Public Service Comm'n*, 31 P.3d 1147 (Utah 2001)).

¹⁵ See, e.g., *Basin Flying Service*, 531 P.2d at 1305.

¹⁶ See *Hi-Country Estates*, 901 P.2d at 1021.

¹⁷ See *infra* note 21.

Electric Service Regulation No. 25 (“Regulation No. 25”) of the Company’s approved tariff sets forth the general terms and conditions and the manner by which customers may receive compensation if the Company is unable to fulfill specified “Customer Guarantees,” including restoration of power supply after an outage. In relevant part, Regulation No. 25 provides:

Customer Guarantee Credit: For failure to meet a Customer Guarantee for Customer Guarantees 1 and 7, Customers must make a claim for compensation. Valid compensation claims for Customer Guarantees 1 and 7 submitted within 30 days of the date of an outage will be credited to the Customer’s account. . . . See Schedule 300 for a description of the Customer Guarantee credits.¹⁸

Customer Guarantee 1: Restoring Supply After an Outage

In the event of an outage, the Company will restore a Customer’s electric supply within 24 hours of being notified except where:

- (1) The Customer agreed to remain without supply;
- (2) The Company offered the Customer a generator as an alternative means of supply;
- (3) There were problems or safety-related issues with the Customer’s internal equipment; or
- (4) Specialized equipment was required to restore the supply.*

* Also see General Exceptions.

To receive a credit, a Customer must make a claim for compensation within 30 calendar days of the date of the outage.¹⁹

The general terms and conditions for compensation provided under Regulation No. 25 “are applicable to all metered customers or applicants utilizing the services of the Company.”²⁰

¹⁸ Utah Power & Light Company, Electric Service Schedule 300 sets forth the following credit “charges” with respect to Customer Guarantee 1: For residential customers, \$50; for non-residential customers, \$100; and for each additional 12 hours, \$25.

¹⁹ Utah Power & Light Company, Electric Service Regulation No. 25, issued by authority of Report and Order of the Commission in Docket No. 03-2035-02.

This compensation mechanism serves to provide uniform remedial relief to customers who may have been inconvenienced by a Company failure to restore power supply on a timely basis, without requiring customers to prove the amount or extent of any such damages. Additionally, Regulation No. 25 acts as a deterrent by penalizing the Company for such customer service deficiencies.

The Commission has approved this tariff provision and accepted the terms, conditions, and limitations of Regulation No. 25 as appropriate for determining Utah Power's remedial obligations in connection with a failure to restore power supply after an outage. The Utah Supreme Court has held that tariffs have the binding force of law and, therefore, should be enforced accordingly.²¹ Petitioners' request for remedial relief beyond the remedies of the tariff is unlawful and barred by the applicable relief provisions set forth as Regulation No. 25 in the Company's approved tariff provisions.

2. Petitioners Had The Opportunity To Participate In Goodwill Compensation Credits Which Have Been Found Equitable And Reasonable. Petitioners Either Received The Credit Or Failed To Apply.

On January 23, 2004 in Docket No. 04-035-01, the Committee of Consumer Services filed a Petition for the Commission to Extend the 30-Day Customer Claim Period and Other Relief seeking an open-ended extension the 30-day limitation period in which customers must file claims for outage compensation under Regulation No. 25. AARP petitioned to intervene and joined in the Committee's petition. On February 2, 2004, Utah Power announced that it would voluntarily provide goodwill compensation in the form of bill credits to customers whose service

²⁰ *Id.*

²¹ *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles*, 681 P.2d 1258, 1263 (Utah 1984). See also *Questar Gas Co. v. Utah Public Service Comm'n*, 34 P.3d 218, 224 (Utah 2001); *Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 334 (Utah 1985); *Shehi v. Southwestern Bell Tel. Co.*, 382 F.2d 627, 629 (10th Cir. 1967) ("A tariff . . . is more than a mere contract—it is the Law." (citations omitted)).

was interrupted by the storm for more than 48 hours and that customers could make claims for this goodwill compensation until February 26, 2004.²² The Company also provided extensive advertising of this goodwill compensation, as did AARP, and it received widespread media coverage. On February 18, 2004, AARP withdrew its support for the Committee petition, characterizing Utah Power's goodwill compensation offer as equitable and reasonable. On February 27, 2004, the Commission issued its Order Denying Petition to Extend Claim Period based on a finding that the Company's goodwill payment alternative was equitable and reasonable.

Utah Power has provided voluntary goodwill compensation totaling approximately \$2 million to more than 14,000 customers.²³ Although further information about Petitioners (specifically, their addresses) would be necessary in order to confirm payments, from the Company's records it appears that each of the Petitioners that applied for a goodwill credit from the Company received one, and that the credits ranged from \$100 to \$200.²⁴ The remaining Petitioners do not appear to have applied for the credit. To the extent Petitioners received the credit, they have received all the relief they to which they may be entitled. To the extent Petitioners failed to apply for the credit, the filed tariff doctrine and the Commission's February 27, 2004 Order Denying Petition to Extend Claim Period preclude further relief, as discussed in this section and above in Section III.B.1.

²² The Company actually voluntarily paid claims received through the end of March 2004.

²³ Utah Power paid goodwill compensation of \$1,934,000 to 14,396 claimants.

²⁴ This does not include the insurers, who appear as purported subrogees of unknown Utah Power customers. Utah Power would need further information about the subrogors in order to determine whether they did or did not apply for or receive the credit.

3. Petitioners' Claims for the Imposition of Penalties Are Barred.

Petitioners' claims for penalties under Utah Code Ann. § 54-7-25 are barred by Regulation No. 25, which provides penalties in lieu of those provided for in section 54-7-25:

Any public utility that violates or fails to comply with this title or any rule or order issued under this title, in a case in which a penalty is not otherwise provided for that public utility, is subject to a penalty of not less than \$500 nor more than \$2,000 for each offense.²⁵

The Commission has the authority to impose penalties in accordance with section 54-7-25 upon a finding that a statute, rule or order has been violated, if such violation has been established by clear and convincing evidence.²⁶ However, the statute expressly provides that such penalties may be imposed only “in a case in which **a penalty is not otherwise provided for that public utility.**”²⁷ Because the Company's Customer Guarantee No. 1, as set forth in Regulation No. 25, discussed in Section III.B.1 above, already provides a penalty for the Company's failure to restore power after an outage, the Commission may not impose an additional penalty under section 54-7-25 in connection with this failure (if deemed to be a violation of a statute, rule, or Commission order).

The imposition of additional penalties by the Commission for inadequate service in connection with the extended outage would be contrary to the express language of section 54-7-25 and would result in duplicate penalties for the same purported violation. As a factual matter, the imposition of penalties would also be inappropriate because Utah Power has not violated Title 54 or any rule or order issued under that title.

²⁵ Utah Code Ann. § 54-7-25(1).

²⁶ *Wycoff Co. v. Public Service Comm'n*, 369 P.2d 283, 286 (Utah 1962). See also *Beehive Telephone Co. v. Public Service Comm'n*, 2004 UT 18, ¶ 43; *Thomas J. Peck & Sons v. Public Service Comm'n*, 700 P.2d 1119, 1122 (Utah 1985)..

²⁷ Utah Code Ann. § 54-7-25(1) (emphasis added).

4. Petitioners' Class Action Claims Are Barred.

The Commission lacks the statutory authority to certify this matter as a class action.

Petitioners' request to certify this matter as a class action is therefore barred. As the Commission stated in the Intervention Order:

The [Petitioners] 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.**²⁸

Petitioners have done nothing in the Second Petition to bolster their previous, deficient attempt to pursue a class action. It is well-understood that the authority of the Commission is limited to that which is expressly granted or clearly implied by statute,²⁹ and “any reasonable doubt of the existence of any power must be resolved against the exercise thereof.”³⁰

In addition to this lack of authority, the Commission has concluded in the past, just as it implied in the Intervention Order, that it is inappropriate and burdensome to utilize class action procedures in dockets before it. In a letter to parties in a matter involving another request for certification of a class, the Commission said:

The Commission also informs the parties it currently believes that it is inappropriate and burdensome to conduct these proceedings as a class action, following the procedures contemplated and required by the Utah Rules of Civil Procedure and case law for class actions undertaken in the courts. The Commission believes that its traditional proceedings are in the nature of and substantively the same as class action proceedings in a court. But for individual customer complaints brought before the Commission, typical Commission proceedings affect all of a utility's service groups and customers. The Commission sees little benefit and significant burdens to impose additional requirements,

²⁸ Intervention Order at 3 (emphasis added).

²⁹ See, e.g., *Basin Flying Service*, 531 P.2d at 1305.

³⁰ See *Hi-Country Estate*, 901 P.2d at 1021.

applicable to court class actions, on these proceedings and the procedures to be followed herein.³¹

Finally, even if the Commission had the authority to certify this matter as a class action, Petitioners' are not appropriate class representatives.

IV. ANSWER

With respect to the specific allegations of the Petition, Utah Power admits, denies and alleges as follows:

1. Although some of the statutory provisions cited in the Second Petition's jurisdictional allegation are not relevant to this matter, Utah Power acknowledges that the Commission has jurisdiction to investigate the 2003 storm and outage, as well as to hear consumer complaints against Utah Power (though not ScottishPower) and to enforce its own orders. However, for the reasons described above and hereafter, Utah Power denies that the Commission has jurisdiction to impose fines or certain other elements of relief sought in the Second Petition and states that it is not appropriate for the Commission to exercise jurisdiction in this case. Utah Power therefore denies Petitioners' jurisdictional allegation. The remaining allegations of paragraph 1 set forth legal conclusions to which no response is required. To the extent any of these allegations can be construed as stating factual allegations, Utah Power denies those allegations.

2. Based on a review of its billing records, Utah Power admits that there are account holders located in Salt Lake County named Georgia Peterson, William Van Cleaf, David Hiller and GP Studio, Inc. Utah Power lacks sufficient information to know whether these account holders are the same persons as the Petitioners bearing the same or similar names. Based on a

³¹ Letter from Public Service Commission of Utah to Parties of Record, *In the Matter of the Complaint of Beaver County, et. al. v. Qwest Corporation*, Docket No. 01-049-75 (Utah PSC, Sept. 30, 2002).

review of its billing records, Utah Power does not have record of an account in the name of Janet B. Ward in Salt Lake County and, therefore, denies that she is a customer in Salt Lake County. Utah Power lacks sufficient knowledge and information to admit that the insurer Petitioners are subrogees of Utah Power customers and therefore denies the allegation. Utah Power admits that approximately 80,000 customers were without electrical power simultaneously on December 26, 2003, but denies that approximately 80,000 customers were without power for a continuous period of at least one day beginning on December 26, 2003. The remaining allegations of paragraph 2 set forth legal conclusions to which no response is required. To the extent any of these allegations can be construed as stating factual allegations, Utah Power denies those allegations.

3. Utah Power lacks sufficient knowledge and information to admit the allegations in paragraph 3 with respect to the impact of the outage on Petitioners or Petitioners' belief; however, to the extent paragraph 3 implies that thousands of the Company's customers were without electrical service for approximately seven days, Utah Power denies the allegation. To the extent any of the other allegations of paragraph 3 can be construed as stating factual allegations, Utah Power denies those allegations.

4. Based on information and belief, Utah Power admits that certain customers were inconvenienced during the period of power outage caused by the December 2003 storm. With respect to the specific allegations of paragraph 4, Utah Power lacks sufficient knowledge and information to admit such allegations and therefore denies the same.

5. Utah Power admits that, due to the severity of the storm, the extent of the damage, the high number of calls, and problems with its systems, its ability to communicate information regarding the outage to customers was impaired. On information and belief, Utah Power admits

that this impairment resulted in frustration to customers. With respect to the specific allegations in paragraph 5 relating to Petitioners' acceptance of media accounts, Utah Power lacks sufficient knowledge and information to admit or deny such allegations.

6. Utah Power lacks sufficient knowledge and information to assess the validity of the vague allegations of paragraph 6 and therefore denies the same. Utah Power denies that Petitioners have standing to assert claims for "losses to the county and state."

7. Utah Power admits that it has requested that the Commission declare the severe December 2003 storm that resulted in the power outage a "major event," in accordance with the Company's tariff. The remaining allegations of paragraph 7 set forth legal conclusions to which no response is required. To the extent any of these allegations can be construed as stating factual allegations, Utah Power denies those allegations.

8. Paragraph 8 sets forth legal conclusions to which no response is required. To the extent that paragraph 8 can be construed as stating factual allegations, Utah Power denies those allegations.

9. Utah Power admits that a Utah corporation known as Utah Power & Light Company merged with a Maine corporation known as PacifiCorp to become the new PacifiCorp and that the referenced order was one of the conditions precedent to the merger. To the extent paragraph 9 implies that the new PacifiCorp resulted from an arrangement other than a merger transaction, Utah Power denies the allegation.

10. Utah Power admits that paragraph 10 correctly quotes a portion of the Commission's Report and Order dated September 28, 1988 in Docket No. 87-035-27 (the "1988 Merger Order"), with emphasis added by Petitioners. The Company otherwise refers to the 1988 Merger Order for its terms and conditions.

11. Utah Power admits that paragraph 11 correctly quotes portions of the 1988 Merger Order, with emphasis added by Petitioners. Utah Power otherwise refers to the 1988 Merger Order for its terms and conditions.

12. Utah Power admits that paragraph 12 correctly quotes portions of the 1988 Merger Order. Utah Power otherwise refers to the 1988 Merger Order for its terms and conditions.

13. Utah Power admits that paragraph 13 correctly quotes portions of the record in the Commission's proceeding in Docket No. 87-035-27. Utah Power otherwise refers to the 1988 Merger Order for terms and conditions in connection with this merger.

14. Utah Power admits that paragraph 14 correctly quotes portions of the record in the Commission's proceeding in Docket No. 87-035-27, with emphasis added by Petitioners. Utah Power otherwise refers to the 1988 Merger Order for terms and conditions in connection with this merger. To the extent Petitioners' characterization of the Company's obligations with respect to the quoted statements differs from the actual terms and conditions set forth by the 1988 Merger Order, Utah Power denies these allegations.

15. Utah Power admits that paragraph 15 correctly quotes portions of the record in the Commission's proceeding in Docket No. 87-035-27, with emphasis added by Petitioners. Utah Power otherwise refers to the 1988 Merger Order for terms and conditions in connection with this merger. To the extent Petitioners' characterization of the Company's obligations with respect to the quoted statements differs from the actual terms and conditions set forth by the 1988 Merger Order, Utah Power denies these allegations.

16. Utah Power admits that paragraph 16 correctly quotes portions of the record in the Commission's proceeding in Docket No. 87-035-27, with emphasis added by Petitioners. Utah

Power otherwise refers to the 1988 Merger Order for terms and conditions in connection with the merger. To the extent Petitioners' characterization of the Company's obligations with respect to the quoted statements differs from the actual terms and conditions set forth by the 1988 Merger Order, Utah Power denies these allegations. To the extent that the remainder of paragraph 16 implies that the Company has acted in a manner "completely inconsistent" with specified representations or has violated the terms and conditions of the Commission's 1988 Merger Order, Utah Power denies those allegations.

17. The allegations of paragraph 17 set forth legal conclusions to which no response is required. To the extent any of these allegations can be construed as stating factual allegations, Utah Power denies those allegations.

18. Utah Power admits that paragraph 18 correctly quotes portions of the Commission's Report and Order dated November 23, 1999 in Docket No. 98-2035-04 (the "ScottishPower Merger Order"). Utah Power otherwise refers to the ScottishPower Merger Order for its terms and conditions. To the extent Petitioners' characterization of the Company's obligations with respect to the quoted statements differs from the actual terms and conditions set forth by the ScottishPower Merger Order, Utah Power denies these allegations.

19. Utah Power admits that paragraph 19 correctly quotes portions of the ScottishPower Merger Order, with emphasis added by Petitioners. Utah Power otherwise refers to the ScottishPower Merger Order for its terms and conditions.

20. With respect to the allegation of the first sentence of paragraph 20 that suggests that as many as 80,000 customers were without power for five days, Utah Power denies the allegation. Utah Power denies the allegation that it is failing to meet the terms and conditions of its certificate of convenience and necessity. With respect to the quoted language of paragraph

20, Utah Power admits that Petitioners correctly quote portions of the referenced publication, with emphasis added by Petitioners. Otherwise, Utah Power denies the allegations, express or implied, of paragraph 20.

21. In response to paragraph 21, Utah Power acknowledges the announced intention of ScottishPower to build a new power plant in the United Kingdom. The Company admits that the second sentence of paragraph 21 correctly quotes a portion of the referenced publication. Otherwise, Utah Power denies the allegations, express or implied, of paragraph 21.

22. The allegations of paragraph 22 set forth legal conclusions to which no response is required. To the extent any of these allegations can be construed as stating factual allegations, Utah Power denies those allegations.

23. Utah Power denies the allegations of paragraph 23.

24. With respect to the first sentence of paragraph 24, Utah Power lacks sufficient knowledge to deny the allegations with respect to Petitioners' belief; however, to the extent paragraph 24 alleges that the December 2003 storm did not constitute an instance of *force majeure*, an act of God, or a "major event" (as defined in Regulation No. 25), Utah Power denies such allegations. Based on information and belief, Utah Power denies the allegations of paragraph 24 with respect to other municipal systems and affirmatively alleges that differences in systems and conditions make simplistic comparisons between Utah Power and municipal systems meaningless. Utah Power lacks sufficient knowledge and information to admit the remaining allegations of paragraph 24 and therefore denies the same.

25. Utah Power denies the allegations set forth in paragraph 25, except that the Company admits that the second sentence of this paragraph correctly quotes a small portion of the record in the Commission's proceeding in Docket No. 87-035-27 to consider the 1988

merger. Utah Power otherwise refers to the 1988 Merger Order for terms and conditions imposed by the Commission in connection with this merger. To the extent Petitioners' characterization of the Company's obligations with respect to the quoted statements differs from the actual terms and conditions set forth by the 1988 Merger Order, Utah Power denies these allegations.

26. With respect to paragraph 26, Utah Power admits that Petitioners seek relief in the form of monetary compensation for losses allegedly suffered because of the December 2003 storm or the imposition of fines. The Company denies that the claims for such losses and fines are legally or factually meritorious and denies the remaining allegations of paragraph 26, except that the Company lacks sufficient knowledge to admit or deny the allegations relating to other electric power providers in Utah.

27. Utah Power denies that communications system for reporting service problems was centralized and operated from Oregon and affirmatively alleges that there are such communications systems in both the eastern region dispatch center in Salt Lake City, Utah and in the western region dispatch center in Portland, Oregon. Utah Power further denies that the location of the communication system for reporting service issues contributed to the problems with the system during the December 2003 storm. As noted in Utah Power's response to paragraph 5, due to the severity of the storm, the extent of the damage, the high number of calls, and problems with its systems, its ability to communicate information regarding the outage to customers was impaired. Utah Power denies all remaining allegations of paragraph 27.

28. Utah Power denies the allegations of paragraph 28. With regard to the footnote related to paragraph 28 (footnote 2), Utah Power admits that it correctly quotes a portion of the transcript of Docket No. 87-035-27. To the extent Petitioners' characterization of the

Company's obligations with respect to the quoted statements differs from the actual terms and conditions set forth by the 1988 Merger Order, Utah Power denies these allegations. With regard to the final sentence of the first paragraph of footnote 2, Utah Power denies that its internal realignment of employees over the past fifteen years has damaged Utah's economy. As to the second paragraph of footnote 2 wherein Petitioners describe a formula allegedly used by the Utah Division of Business and Economic Development, Utah Power lacks sufficient knowledge to assess the truthfulness of the speculative allegations made therein, and therefore denies the same. Utah Power denies that Petitioners have standing to assert claims on behalf of the State of Utah or its general economy.

29. With respect to the first sentence of paragraph 29, Utah Power lacks sufficient knowledge to admit or deny the allegations with respect to Petitioners' concerns. However, with respect to the substantive and speculative allegations set forth in paragraph 29, Utah Power denies such allegations. The last sentence of paragraph 29 sets forth a request for Commission action for which no response is required.

30. Utah Power lacks sufficient knowledge and information to admit the vague allegations of paragraph 30 and therefore denies the same. The last sentence of paragraph 30 sets forth a request for Commission action for which no response is required.

31. Paragraph 31 sets forth requests for relief for which no response is required. To the extent paragraph 31 requires a response, Utah Power incorporates by reference its responses to paragraphs 1 through 30 as if fully set forth herein.

32. Paragraph 32 sets forth requests for relief for which no response is required. To the extent paragraph 32 requires a response, Utah Power incorporates by reference its responses to paragraphs 1 through 30 as if fully set forth herein.

33. With respect to Paragraph 33, Utah Power acknowledges that Petitioners seek Commission treatment of the Second Petition as a class action for purposes of assessing damages. For the reasons set forth in the discussion of class action issues in Section III.E above and as set forth hereafter, it would be unlawful to certify this case as a class action. Subject to Utah Power's position that certification of this matter as a class action would be unlawful, Utah Power hereby responds to the allegations of each particular subparagraph of paragraph 33:

a. Utah Power admits the allegation in paragraph 33.a that in terms of damage to Utah Power's system, the 2003 storm was the most destructive in the Company's recent history. In several other measures as well, the storm was the most severe in Company history.

b. Paragraph 33.b generally sets forth legal conclusions for which no response is required. To the extent any of the allegations of paragraph 33.b can be construed to be factual allegations requiring a response, Utah Power denies those allegations.

c. Paragraph 33.c generally sets forth legal conclusions for which no response is required. To the extent any of the allegations of paragraph 33.c can be construed to be factual allegations requiring a response, Utah Power denies those allegations. Utah Power specifically denies that the interests of customers may be left unprotected outside of a class action. Rather, the proceedings in Docket No. 04-035-01, including the participation of the Division and the Committee, ensure that the interests of individual customers are represented and will be protected, given the statutory authority of these agencies. Utah Power denies the allegation regarding payments to customers and

refers to Section III.B.2 above for a discussion of the payments made by Utah Power to customers.

d. Paragraph 33.d sets forth legal conclusions for which no response is required. To the extent any of the allegations of paragraph 33.d can be construed to be factual allegations requiring a response, Utah Power denies those allegations. Utah Power admits that Petitioners accurately quote portions of Utah Code Ann. § 54-4-1, but denies the legal conclusion the Petitioners draw from its quotation of section 54-4-1.

e. With respect to Paragraph 33.e, Utah Power admits that the best interests of customers and the Company may be served by permitting the Commission, as it has been doing, to investigate the December 2003 storm-related outage through one proceeding; however, the Company denies that Petitioners' attempt to open a new docket in addition to Docket No. 04-035-01 will preserve the goal of efficiency through "one proceeding" and denies that Petitioners' attempt to certify a class-action and serve as class representatives will promote the best interests of the Company or its customers.

f. With respect to the first sentence of Paragraph 33.f, Utah Power lacks sufficient knowledge and information to assess the validity of the allegations therein and therefore denies the allegations; otherwise, the Company denies all remaining allegations of paragraph 33.f.

34. Paragraph 34 sets forth legal conclusions and requests for relief for which no response is required. To the extent paragraph 34 can be construed as stating factual allegations, Utah Power denies those allegations.

35. Paragraph 35 sets forth legal conclusions and requests for relief for which no response is required. To the extent paragraph 35 can be construed as stating factual allegations, Utah Power denies those allegations.

36. Paragraph 36 sets forth legal conclusions and requests for relief for which no response is required. To the extent paragraph 36 can be construed as stating factual allegations, Utah Power denies those allegations. Further, Petitioners' attempt in the first paragraph of paragraph 36 to shift the burden of proof to Utah Power is unlawful.

37. Paragraph 37 sets forth requests for relief for which no response is required. To the extent paragraph 37 can be construed as stating factual allegations, Utah Power denies those allegations.

38. Paragraph 38 sets forth requests for relief for which no response is required. To the extent paragraph 38 can be construed as stating factual allegations, Utah Power denies those allegations.

39. Paragraph 39 sets forth legal conclusions and requests for relief for which no response is required. To the extent paragraph 39 can be construed as stating factual allegations, Utah Power denies those allegations.

40. Paragraph 40 sets forth requests for relief for which no response is required. To the extent paragraph 40 can be construed as stating factual allegations, Utah Power denies those allegations.

41. Paragraph 41 sets forth requests for relief for which no response is required.

42. To the extent Utah Power has not specifically admitted factual allegations contained in paragraphs 1 through 41 of the Petition, Utah Power hereby denies those allegations.

V. DEFENSES

A. FIRST DEFENSE

Petitioners have failed to state a claim upon which relief can be granted.

B. SECOND DEFENSE

For some or all of Petitioners' claims, the Second Petition is not ripe for Commission review.

C. THIRD DEFENSE

To the extent any of the individual Petitioners, members of the putative class, or the State of Utah failed to file claims for compensation under Regulation No. 25 in a timely manner, their claims are barred by Regulation No. 25 and the terms of the Commission's February 27, 2004 Order Denying Petition to Extend Claim Period issued in Docket No. 04-035-01.

D. FOURTH DEFENSE

The claims of Petitioners or members of the putative class may be barred by the doctrines of satisfaction and release and/or accord and satisfaction.

E. FIFTH DEFENSE

Petitioners' requests for (1) compensatory damages,³² (2) penalties,³³ (3) an investigation of Utah Power's compliance with merger conditions,³⁴ (4) an investigation of the coal mining

³² Utah Power's service and its exposure to liability for customer service issues have been subject to review in each Utah Power rate case and effect the level of expenses and rate base upon which rates were approved and established by the Commission in each case. It is inappropriate to now reconsider those issues. Such reconsideration would implicitly amount to a reconsideration of the justness and reasonableness of rates set in prior orders which have become final.

³³ In considering Utah Power's tariff, the Commission has considered the appropriate level of penalties to which Utah Power should be exposed and has approved Regulation No. 25 imposing a specific level of penalties in certain circumstances. It is inappropriate to now reconsider these issues. Such reconsideration would implicitly amount to a reconsideration of the justness and reasonableness of the Company's tariff on a retroactive basis.

³⁴ Utah Power has kept the Commission fully informed of its organizational structure, department and employee locations, budgets and staffing levels. Those matters and the Company's practices, in light

practices of Utah Power,³⁵ and (5) an investigation of the land sales practices of Utah Power³⁶ are barred by the doctrines of res judicata, collateral estoppel, the bar on retroactive ratemaking, and laches.

F. SIXTH DEFENSE

Petitioners' request for class action status may be barred by the doctrines of res judicata and collateral estoppel.

G. SEVENTH DEFENSE

Utah Power reserves the right to assert any additional affirmative or special defense that may become known through discovery or further proceedings in this matter or as may be otherwise appropriate.

VI. RELIEF REQUESTED

Based upon the foregoing answer and defenses, Utah Power requests the following relief:

1. An order denying certification of this matter as a class action.
2. An order finding that Petitioners are not appropriate representatives of the class.

of the merger conditions, have been subject to review in each subsequent Utah Power rate case before the Commission. Moreover, these issues directly relate to, and effect the level of, expenses upon which rates were approved and established by the Commission in each case. It is inappropriate to now reconsider those issues. Such reconsideration would implicitly amount to a reconsideration of the justness and reasonableness of rates set in prior orders which have become final.

³⁵ The expenses Utah Power incurs and the investments it makes in its coal mining operations have been subject to review in each Utah Power rate case and effect the level of expenses and rate base upon which rates were approved and established by the Commission in each case. It is inappropriate to now reconsider those issues. Such reconsideration would implicitly amount to a reconsideration of the justness and reasonableness of rates set in prior orders which have become final. In addition, Utah Power's coal mining practices have been the subject of specific examination in recent Utah Power rate cases.

³⁶ Utah Power's land sales practices have been subject to review in each Utah Power rate case and effect the level of revenues and expenses and rate base upon which rates were approved and established by the Commission in each case. It is inappropriate to now reconsider those issues. Such reconsideration would implicitly amount to a reconsideration of the justness and reasonableness of rates set in prior orders which have become final.

3. An order dismissing the Second Petition with respect to claims asserted against ScottishPower.
4. An order dismissing the Second Petition with prejudice.
5. An award of Utah Power's costs and attorneys fees incurred in defending against the claims made in the Second Petition.

RESPECTFULLY SUBMITTED: February 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 MOTION TO DISMISS AND ANSWER** was sent by electronic mail and mailed by U.S. Mail, postage prepaid, to the foregoing on February 7, 2005:

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