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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of PacifiCorp
and Scottish Power plc for an Order
Approving the Issuance of PacifiCorp
Common Stock.

DOCKET NO. 98-2035-04

**APPLICANTS' MOTION TO
STRIKE PORTIONS OF THE
PREFILED DIRECT
TESTIMONY OF CARL N.
STOVER, JR.**

PacifiCorp and Scottish Power plc (“Applicants”), by and through their attorneys of record, hereby move the Public Service Commission of Utah (“Commission”) to strike the following portions of the prefiled direct testimony of Carl N. Stover, Jr. dated June 17, 1999 filed on behalf of Deseret Generation and Transmission Co-operative, Inc. (“Deseret”) in the above-referenced docket: page 21, line 22 through line 24, page 23, line 17 through page 25, line 5 and page 25, line 6 through page 28, line 11.

BACKGROUND

The portions of Mr. Stover's testimony noted above address two issues which should not be considered by the Commission in this docket. The first issue is Mr. Stover's recommendation that the Commission condition the merger upon requiring PacifiCorp to enter into discussions with Deseret to sell service territory to Deseret.

The second issue is Mr. Stover's recommendation that the Commission amend the Hunter II contract between Deseret and PacifiCorp.

STANDARD

The Commission issued an Interim Order in this proceeding, dated May 10, 1999, requiring that the parties demonstrate why issues presented in their testimony should be considered in this docket.

ARGUMENT

1. **Relevancy.** Mr. Stover has failed to meet the burden the Commission has established in its Order relating to the sale of PacifiCorp's service territory and amending the Hunter II contract. These issues are irrelevant to this proceeding and should not be considered by the Commission in this docket. The identified testimony should be stricken because Mr. Stover has attempted to interject into this proceeding issues which are reserved for other forums and other dockets. The focus of this proceeding should be on the ScottishPower/PacifiCorp transaction and matters which are centrally related to the merger which is simply the transfer of the stock of PacifiCorp.

Referring to the Silver Beehive Telephone Co. v. PSC, 512 P.2d 1327 (Utah 1973) case, the Commission stated that “the Utah Supreme Court also made clear that a certificate cannot be revoked unless the utility is failing in a significant manner to meet its duties as a public utility.” US West Communications, Inc. 1994 WL 400918, PUR Slip Copy.

The Commission should not revoke PacifiCorp’s certificate or force the sale of some of its service territory to Deseret since PacifiCorp has not and is not failing to meet its duties as a public utility and the merger with ScottishPower will not cause such a failure. This transaction is only a transfer of stock. Deseret’s recommendations are irrelevant to this proceeding and completely inappropriate.

2. **Commission Jurisdiction.** Deseret’s recommended condition regarding the amendment of the Hunter II contract between Deseret and PacifiCorp is beyond the Commission’s jurisdiction and is a matter for the courts. The Utah Supreme Court has held that claims predominantly in tort or in contract are beyond the primary jurisdiction of the PSC. In Atkin Wright & Miles v. Mountain State Telephone and Telegraph, 709 P.2d 330 (Utah 1985), the court held that “[a] utility’s actions which give rise to tortious or contractual liability and which do not call in question the validity of orders of the PSC or trench upon its delegated powers are subject to the jurisdiction of the district court.” *Id.* at 334 (citing to Garkane Power Assoc. v. Public Service Comm’n, 681 P.2d 1196, 1207 (Utah 1984)). In any event, ScottishPower has agreed to honor all existing contractual obligations of PacifiCorp.

3. **Commission Authority to Exclude Evidence.** The Commission has the authority to exclude issues which are irrelevant to this proceeding. The Administrative Procedures Act (“APA”), Utah Code Ann. § 63-46b-8(1)(b), provides as follows:

On his own motion or upon objection by a party, the presiding officer: (i) may exclude evidence that is irrelevant, immaterial, or unduly repetitious

The Commission has granted a Motion to Strike testimony that was irrelevant to the proceeding citing to the APA, Utah Code Ann. § 63-46b-8(1)(b)(i), See U.S. West Communication, Inc., 1994 WL 400918, PUR Slip Copy. In that docket, the Commission considered whether the proposed sale of a telephone exchange was in the public interest. The Commission excluded testimony regarding the history of the exchange, the attempts to serve the area, circumstances of the sale of other telephone exchanges, and the cost estimates for construction of a new system in the telephone exchange. Also, in Mountain Fuel Supply v. PSC, 861 P.2d 414 (Utah, 1993), the Utah Supreme Court upheld the Commission’s decision to exclude evidence regarding a future test year stating that:

Under the APA, the Commission has the discretion to exclude “irrelevant, immaterial, or unduly repetitious” evidence. Utah Code Ann. § 63-46b-8(1)(b)(i); see also Utah R. Evid. 403.

The Commission has the statutory authority to exclude irrelevant evidence, which it has exercised previously. The Utah Supreme Court has upheld the Commission’s use of its authority to exclude evidence. The recommendation to require the sale of service territory by PacifiCorp to Deseret and the recommendation that the Hunter II contract between PacifiCorp and Deseret be amended are irrelevant to this proceeding. The Commission should therefore use its authority under Utah Code Ann. § 63-46b-8(1)(b)(i) strike testimony related to those issues.

NOW THEREFORE, the Applicants respectfully request that the Commission strike the portions of the testimony of Mr. Stover set forth above for the following reasons:

1. The issues relating to the forced sale of PacifiCorp service territory and the amendment of the Hunter II contract are irrelevant to the ScottishPower/PacifiCorp transaction and should not be considered in this proceeding.
2. The Commission has no jurisdiction regarding the Hunter II contract between PacifiCorp and Deseret.
3. The Commission has the statutory authority to exclude irrelevant issues in this proceeding and should strike the portions of the testimony of Mr. Stover identified above.

DATED this ____ day of July, 1999.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing ***APPLICANTS' MOTION TO STRIKE PORTIONS OF THE PREFILED DIRECT TESTIMONY OF CARL N. STOVER, JR.*** to be served upon the following persons via Federal Express or by mailing a true and correct copy of the same, postage prepaid, to the following on March 20, 2012:

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