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Attorneys for PacifiCorp

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of Divisions Annual Review
and Evaluation of the Electric Lifeline
Program, HELP

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Docket No. 03-035-01

In the Matter of: HELP, Electric Lifeline
Program Evaluation

Docket No. 04-035-21

**PACIFICORP’S MOTION TO EXCLUDE
OR DISMISS CERTAIN ISSUES**

Pursuant to the Commission’s Scheduling Order issued on May 3, 2005, PacifiCorp, doing business as Utah Power & Light Co., (“PacifiCorp”) hereby moves to exclude or dismiss certain issues identified in the preliminary issues list (“Issues List”) submitted by Light and Truth on May 12, 2005.

PacifiCorp does not herein address in detail every issue identified in the Issues List. However, the absence of specific discussion of an issue does not indicate PacifiCorp’s

acceptance of such issue as worthy of Commission consideration. Rather, PacifiCorp understands that the Division of Public Utilities or other parties may address certain issues from the Issues List and notes that the Committee of Consumer Services has already filed a compelling Motion to Preclude Issues and Evidence (“Committee Motion”). In general terms, PacifiCorp views the Issues List as unhelpful to a reasonable evaluation of HELP and believes the Commission should exercise its authority to manage and control this docket by rejecting Light and Truth’s claims. PacifiCorp comments further on certain aspects of the Issues List below.

Res Judicata

In Light and Truth’s motions to dismiss various issues from this matter, Light and Truth erroneously argued that res judicata bars Commission consideration of certain issues such as the monthly total HELP cap and the monthly credit available per eligible customer. These issues raise policy questions that the Commission can assess in its ongoing evaluation of HELP, and do not implicate the doctrine of res judicata.¹

Some (or all) of the claims on the Issues List, on the other hand, are squarely barred by res judicata. As stated by Utah courts, res judicata contains both a claim preclusion branch and an issue preclusion branch. *See, e.g., Swainston v. Intermountain Health Care*, 766 P.2d 1059, 1061 (Utah 1988). Claim preclusion involves the same parties or their privies relitigating the same cause of action, and “precludes the relitigation of all issues that could have been litigated as

¹ In seeking to bar Light and Truth from re-arguing issues regarding HELP that were addressed in prior rate cases, the Committee Motion refers to the Commission’s prior rate case decisions in terms of the issue preclusion branch of res judicata. Although PacifiCorp would not characterize all such decisions in terms of res judicata, they are certainly stare decisis (*see generally Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245 (Utah 1992)) and need not be addressed again barring some changed circumstance that would affect the Commission’s determination of the public interest. The Commission need not re-address such issues merely because Light and Truth has raised them.

well as those that were, in fact, litigated in the prior action.” *Schaer v. State*, 657 P.2d 1337, 1340 (Utah 1983) (quotation omitted). Issue preclusion (or collateral estoppel) “arises from a different cause of action and prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit.” *Id.*

Light and Truth is at least a “privy” to Paul Mecham if not the same party. Light and Truth is registered at the Division of Corporations (<https://secure.utah.gov/bes/action/index>) as a dba, with Mr. Mecham identified as its sole principal and registered agent. Light and Truth’s address is Mr. Mecham’s address. No other individual is identified at the Division of Corporations as being associated with Light and Truth, and PacifiCorp is unaware of any other person participating in prior Commission proceedings on behalf of Light and Truth.

Mr. Mecham filed a formal complaint against PacifiCorp in Docket No. 03-035-09. That complaint addressed third-party billing under Utah Code Ann. § 54-4-37 and more generally challenged the Commission’s authority to implement HELP. In its Report and Order dismissing the complaint, the Commission found: “The Electric Lifeline Program was properly established and funded by this Commission. The charge is not a third-party charge subject to the provisions of *Utah Code Ann.* § 54-4-37. Accordingly, the charges imposed on Complainant are lawful, and Respondent is entitled to collect the same.” Report and Order, Docket No. 03-035-09 (Utah P.S.C. Sept. 2, 2003) (“Order”) at 2. The Order became final and res judicata when the Commission did not act on Mr. Mecham’s petition for review within the 20-day statutory period (*see* Utah Code Ann. § 54-7-15) and when Mr. Mecham failed to pursue an appeal. Thus, Mr. Mecham cannot now collaterally attack the Commission’s findings made in the Order. *See, e.g.*, Utah Code Ann. § 54-7-14.

Yet a collateral attack is precisely what Mr. Mecham (via Light and Truth) now attempts to pursue in the Issues List. Light and Truth raises third-party billing issues and Commission jurisdiction to approve and implement HELP that were the precise subjects of Docket No. 03-035-09 and were resolved against Mr. Mecham in the Order. These claims are squarely barred by both the claim preclusion and issue preclusion branches of res judicata. Indeed, all of Light and Truth's claims regarding the Commission's authority to approve HELP and PacifiCorp's billing for HELP pursuant to its tariff and Commission order are barred by claim preclusion. As the *Schaer* case cited above notes, claim preclusion "precludes the relitigation of all issues **that could have been litigated** as well as those that were, in fact, litigated in the prior action." 657 P.2d at 1340 (emphasis added). Mr. Mecham's prior complaint was a general attack on the Commission's authority to approve HELP and PacifiCorp's billing him for the program. The constitutional claims Light and Truth now raises, the claims that HELP is "hidden" from ratepayers, that it is outside the regulatory process, that PacifiCorp's billing cannot be justified "merely because the Commission ordered the action," etc., all could have been litigated in Mr. Mecham's formal complaint proceeding where he challenged the program. Mr. Mecham should not now be allowed to relitigate the same question of HELP's legality merely because he has since thought-up some additional theories addressing the same facts.

Prior Commission Directives

The claim that PacifiCorp "cannot justify collecting for HELP (and thereby violating Utah Code 54-4-37) merely because the Commission ordered the action" suffers from an additional defect. It is squarely contrary to law. Light and Truth appears to seek to establish an obligation by PacifiCorp to follow Light and Truth's understanding of the statute despite clear

Commission directives to the contrary. PacifiCorp is required to follow the Commission's directives interpreting the Public Utilities Code, unless a court of competent jurisdiction overturns such directives. PacifiCorp cannot justify a failure to abide by Commission order on the ground that PacifiCorp might read the statute differently than the Commission. As a corollary to this, PacifiCorp "cannot be held liable in a subsequent action for what the PSC ordered it to do." *See Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 334 (Utah 1985). Thus, there is no basis to address PacifiCorp's compliance with the statute in a case such as this where it is acting in clear compliance with prior Commission orders. This issue deserves no further Commission attention in this matter and should be excluded or dismissed.

False Advertising and Refunds

Finally, Light and Truth's Issues List identifies claims that "some refund or restitution may be appropriate if some illegal actions are found" and that PacifiCorp "falsely advertised that it was the source of HELP funds." These issues should be excluded or dismissed for multiple reasons. Among such reasons, this is not a complaint proceeding where the adjudication of alleged claims for refunds would be appropriate. If Mr. Mecham wishes to assert that PacifiCorp has committed "illegal actions" that warrant Commission relief he can file a customer complaint to that effect, subject to the binding effect of prior Commission orders and the limits of Commission jurisdiction. PacifiCorp is confident that no such allegations (if they even exist) would be substantiated, but in any event this is not the proceeding to address such allegations and Light and Truth is not an appropriate party to bring any such claims on behalf of customers other than Mr. Mecham. *See, e.g., Nichols v. Utah Power and Light Co.*, Docket No. 97-035-09 (Utah

P.S.C. Aug. 18, 1998) at 3 (“the Commission is empowered to grant reparation to the complainant only and not to persons in addition to the complainant”).

Further, in the specific context of alleged false advertising, no Commission-administered statute, Commission rule, or tariff provision could be implicated such that the Commission would have jurisdiction over such a claim. *See, e.g.*, Utah Code Ann. § 54-7-9; *McCune & McCune v. Mountain States Tel. & Tel. Co.*, 758 P.2d 914, 916 (Utah 1988). Such a claim is not appropriate in this proceeding nor would it be appropriate in a customer complaint proceeding.

Light and Truth’s claims for a refund and for false advertising should be excluded or dismissed.

RESPECTFULLY SUBMITTED THIS 1st day of July 2005.

By _____
Edward A. Hunter
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July 2005, I caused to be served, via U.S. mail, postage prepaid, a true and correct copy of the foregoing **PACIFICORP'S MOTION TO EXCLUDE OR DISMISS CERTAIN ISSUES** to the following:

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