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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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IN THE MATTER OF THE COMPLAINT OF	)	
GEORGIA B. PETERSON, JANET B. WARD,	)	
WILLIAM VAN CLEAF, and DAVID HILLER	)	
ON BEHALF OF THEMSELVES and ALL	)	Docket No. 04-035-01
ALL OTHER MEMBERS OF A CLASS	)	
AGAINST SCOTTISHPOWER PLC and	)	<b>MOTION FOR</b>
PACIFICORP, dba UTAH POWER & LIGHT	)	<b>RECONSIDERATION</b>
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.	)	
	)	

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Petitioners, by and through their counsel, and pursuant to Utah Code Ann. § 63-46b-12 and Commission Rule 746-100-11(F), hereby move and request that the Commission reconsider and clarify its Order in the above-entitled matter, dated July 6, 2004, in which the Commission granted in part and denied in part the Petition and Request to Intervene. This Motion is based upon the following.

I. The Order Does Not Comply With the Utah Administrative Procedures Act.

Utah Code Ann. § 63-46b-9, to which the Commission is subject, provides that the Commission should allow intervention if the Petitioners' legal interests may be substantially affected by the proceeding and if the interests of justice and orderly and

prompt conduct of the proceedings will not be materially impaired. The Order makes no findings as to any of those considerations under the statute. The Order states as a general conclusion, without analysis, that 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.”

This general conclusion, however, ignores the plain language and clear meaning of the statute regulating intervention. The statute does not require potential intervenors to show that the representation of others on their behalf is inadequate or insufficient. Even if the adequacy of representation by others is a factor to be considered in connection with a petition to intervene, however, the circumstances of this case show that governmental entities, such as the Division or the Committee, are not carrying the torch for Petitioners.

For example, the general conclusion in the Commission's order, cited above, makes no reference to five central claims set out in the Petition that are not addressed or are addressed only obliquely, in the terms of reference that were used in conjunction with the opening of this docket: (1) that the outage is a direct consequence of PacifiCorp's violations of standing orders of the Commission; (2) that PacifiCorp's failure adequately to maintain its distribution system is demonstrated by the fact that no neighboring utilities, subject to the same storm and weather conditions, experienced PacifiCorp's massive system failure; <sup>1</sup> (3) that PacifiCorp has pursued a corporate

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<sup>1</sup> The terms of reference ask, "How does PacifiCorp/Utah Power's performance compare with other utilities?" Petitioners have asked a related but different question in the specific context of last December's storm.

strategy of cutting costs, including maintenance, in order to boost shareholder profitability; <sup>2</sup> (4) that customers injured by the neglect of PacifiCorp should be compensated in a manner that recognizes their actual losses; <sup>3</sup> and (5), as discussed more fully below, that the Commission should assess administrative fines against PacifiCorp for contumacious conduct. As noted above, these critical issues do not appear in the "terms of reference" agreed to by the other parties to the proceeding, and there is no pleading of record to show that these issues, in fact, are under consideration by either the Division or the Committee. There is nothing of record, therefore, to support the Commission's conclusion that the interests of the Petitioners or the class are adequately represented by anyone else. Indeed, only PacifiCorp -- and neither the Division nor the Committee -- opposed the Petition, suggesting that the Division and the Committee saw the need, but did not feel inclined themselves, to prosecute the type of claims that Petitioners raised in their Petition.

Moreover, the Order makes no finding that the Petitioners' participation, either as individuals or as representatives of the class, would impair "the interests of justice[.]" Indeed, the "interests of justice" may not be vindicated in this docket, absent the participation of Petitioners.

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<sup>2</sup> The terms of reference, at various points, inquire respecting PacifiCorp/Utah Power's level of cost commitment and degree of actual investment in the maintenance of lines and the like, but none of these inquiries is keyed to the motive of shareholder preference as a basis for ratepayer disadvantage.

<sup>3</sup> The terms of reference invite comments on the issue whether "customers should receive compensation/guarantee payments given the extent of inconvenience during long outages[.]" This concern, however, appears to be prospective in nature, exploring the need for future changes to the utility's tariff, for example, and does not seem to consider any compensation for harm resulting from poor quality of service in the face of December's storm.

The terms of reference, especially when viewed in tandem with the issues raised by Petitioners, cry out for a determination whether Pacificorp has kept faith with earlier orders of the Commission. The terms of reference have targeted, as one example, whether lines properly were maintained by the utility. Petitioners have alleged that requirements of line maintenance and related matters specifically were imposed upon this utility as conditions in earlier Commission orders. Petitioners further have alleged that Pacificorp has shorted line maintenance in violation of these Commission orders. Only Petitioners have raised the question of administrative penalties as an appropriate remedy for this contumacious behavior.

The terms of reference may or may not be read to contemplate the imposition of penalties. No other party appears to be pressing the argument for penalties. Pacificorp's preferred remedy, of course, is exoneration through a declaration that the storm was a "major event," a preference that begs the question whether the utility, through violation of Commission orders, deserves to be penalized, given the "interests of justice," even if the storm is found to be a matter of force majeure under the tariff involved (and a preference that undoubtedly will hold sway if it is the only remedy under consideration in the entire docket, and absent the allowance for opposing views and alternate or additional relief).

Although the Commission itself recently has taken the position in argument before the Utah Supreme Court that, where a violation of Commission orders is shown, the Commission is *required* to pursue an administrative penalty against the offending utility, the Order limiting intervention is unclear respecting the ongoing viability of penalty arguments in this docket. Does not the Commission's own position, recently

affirmed at the Utah Supreme Court, together with the "interests of justice," mandate that penalties be considered as a remedy in this proceeding?

Put differently, is there going to be a legal consequence for this utility's contempt of Commission orders? Or is this docket merely a public relations gesture where we can vent our feelings and wring our hands, in an effort to find redemption through self-examination? At a minimum, the Commission's order on this motion for reconsideration should state clearly whether penalties may be considered as an appropriate remedy in light of the issues to be considered in the terms of reference.

The Order limiting intervention did not, and probably could not, make any findings that Petitioners' intervention would impair either the prompt or the orderly conduct of this proceeding.

As to the issue of "promptness," there is no schedule of proceedings in place in this Docket; there is no discovery schedule, and the only "discovery" to date has been PacifiCorp's own investigation and an evaluation of that by a consultant retained by the Division.

Concerning "orderly conduct," the full, rather than partial, involvement of Petitioners will not burden the orderliness of this docket. Although Petitioners have raised questions, as noted above, that are not identical with the terms of reference in this docket, in the main, those questions are well within the scope of the referenced terms. The two possible exceptions, cited with frequency in the pleadings of Pacificorp, involve sales of property and extraction methods at coal properties. The sales of property, however, are of a piece with the terms of reference, since, if demonstrated, they show a tendency towards, if not a pattern of, contumacious behavior by the utility in the face of the Commission orders under review. And both the sales of property and coal

extraction issues would show, if proven, that this utility has managed with an eye towards short term profitability in favor of shareholders and at the expense of long term goals that would benefit ratepayers. This circumstance is directly related to the fallout from the storm, namely, that management gave short shrift to maintenance, and that, but for this short-sightedness, and notwithstanding the occurrence of a "major event," customers would not have suffered or would not have suffered to nearly the same extent.

Indeed, truncated rather than full participation by these Petitioners may complicate this docket, leading to greater delays and more disorder than otherwise would occur. It is unclear, as noted above, whether, in view of the Order limiting intervention, the question of administrative penalties can be pursued in this docket. It likewise is unclear (at least to Petitioners), whether the Order limiting intervention was intended as a ruling on the jurisdiction of the Commission to entertain class actions by utility customers or damage claims for utility malfeasance, or merely as a ruling regulating intervention that took the difficulties of class actions and damage claims into account. Absent some clarification on these points (presumably after an opportunity for briefing, hearing, and argument, if necessary), the parties to this docket will continue to joust over the scope of the issues that have been framed by the pleadings. An appeal may become necessary, in order to preserve rights and seek such clarification, a process that is sure to protract the resolution of this controversy. Petitioners may be forced, in any event, to file their petition with the Commission, seeking relief through another docket, a docket that might duplicate much of the effort, time, and costs that will be expended in this docket. Such a course likewise may raise additional issues respecting the effect of rulings in one docket vis a vis the administration of matters in the parallel docket, further complicating

proceedings. Petitioners, therefore, respectfully ask the Commission to consider these consequences and weigh alternatives carefully, giving parties clear directions as to what issues can be considered by the Commission -- and through which docket -- as the Commission rules upon this motion for reconsideration.

## II. No Dispositive Motion Was Pending in the Docket.

The Petition and Request to Intervene herein was filed on April 29, 2004. On May 14, 2004, PacifiCorp filed a Response, which simply stated PacifiCorp's position with respect to the Petition. Petitioners filed their reply to that document on June 8, 2004. On June 1, 2004, PacifiCorp filed another "Response" to the Petition, which answered the Petition, point-by-point. As characterized by the Utah Rules of Civil Procedure, Rules 7 and 8, PacifiCorp's June 1, 2004 "Response" was an answer to the Petition, nothing more.

In its July 6, 2004 Order, the Commission may have implied that it was issuing its Order because no further response had been filed by Petitioners to PacifiCorp's June 1, 2004 "Response." This implication may be drawn from language in the Order that could be interpreted to address issues other than the issues usually associated with a petition to intervene. For example, there is some language in the Order that may be read to suggest that a class action in Commission proceedings is inappropriate under Rule 23, Utah Rules of Civil Procedure. As another example, the Order might be construed to suggest that the Commission does not have jurisdiction respecting an action by consumers for damages. If, indeed, the Commission was making rulings in this regard, as opposed to considering the circumstances of the class and the issue of damages as factors that could influence the question of intervention, this may have been premature

and even improper, given the state of the pleadings before the Commission at the time of the Order.

Pacificorp had "answered" the "complaint" of Petitioners. Under the rules of procedure, Petitioners were not obliged to respond to the "answer" of Pacificorp. After "answering," Pacificorp had not placed any other matter at issue, by motion or additional pleading, which motion or pleading would have been necessary in order to compel a response from Petitioners and to justify an Order from the Commission.

As stated in Commission Rule 746-100-1(C), the Commission is bound by the Utah Rules of Civil Procedure unless its own Rules provide otherwise. There is no Commission rule which required a further responsive pleading by Petitioners, and Rule 7(b)(1) of the Utah Rules of Civil Procedure requires that an application to the court for an order shall be made by a motion which "shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought." The Commission's Order, in certain respects, therefore, may be viewed as a gratuitous order, which was improperly issued outside and beyond the scope of its own rules and the Utah Rules of Civil Procedure.

Moreover, the Order was issued without having afforded the Petitioners a hearing. Commission Rule 746-100-10 states: "When a matter is at issue, the Commission shall set a time and a place for hearing." If the Commission deemed the Petition to be "at issue," its own rules required that a hearing be scheduled. While matters before the Commission are administrative in nature, the circumstances here are most analogous to a judge opening a case file, noting that a complaint and answer had been filed, and then, without holding any hearings, issuing an order deciding the case based solely on the defendant's answer.



With respect, the Commission has placed itself in an identical position to that in Stewart v. Utah Public Service Commission, 885 P.2d 759 (Utah 1994), particularly with the comment that “no further reply would be useful for our disposition of the Petition.” There, the Commission also summarily denied the relief sought by the ratepayer intervenors - without a hearing. If the Commission had specific concerns about the Petitioners’ bona fides or whether they are truly representative of a particular class, or if the Commission has a basis for questioning its subject matter jurisdiction in the area of damages, it could easily have processed these matters in the context of a technical conference or a pre-hearing conference or through written briefs and oral argument -- a process that would have given guidance to Petitioners as to any additional information desired and that would have afforded due process to Petitioners under the circumstances of this case. It is surprising that the Commission would choose to be guided, in ruling as it did, by PacifiCorp’s answer, standing alone, opposite the Petition. The issues of law, from which an informed administrative decision would normally be made, have not been briefed nor argued by anyone.<sup>4</sup>

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<sup>4</sup> For example, in the event that the Commission denied intervention by Petitioners in behalf of the class which they sought to represent as a ruling respecting subject matter jurisdiction as distinct from an exercise of discretion regulating intervention, the Petitioner would argue, as to this legal issue, as follows:

The Order provides no discussion, specific findings or conclusions, nor any analysis of the legal bases for that denial. Since these issues have never been briefed or argued, such a decision is, at least, premature. The Commission disposed of the class action portion of the Petition with one sentence: “Nor have [the Petitioners] convinced us that the class action designation and class action process is warranted or permitted in our review of the power outage.”

As stated in Commission Rule 746-100-1(C), the Commission is bound by the Utah Rules of Civil Procedure unless its own Rules provide otherwise. The Commission has adopted no rule which overrides Rule 23 of the Utah Rules of Civil Procedure permitting and governing class actions. It is axiomatic that a process which is not specifically

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prohibited is permitted. Petitioners concede that class action proceedings are not commonly pleaded before the Commission; but, again, this power outage was not within the usual course of the Commission's regulatory experience. More significantly, there has never been a system failure which affected so many people for so long a period of time - nor which caused such significant, widespread economic loss. This Commission is the public's principal protection against the overreach of monopoly utility power. Where a utility may have breached, in a massive way, the obligations of its certificate of public convenience and necessity, the Commission has a particular duty to vouchsafe the interests of customers who deserve redress.

If the Commission harbors a concern for its authority to award economic compensation for loss caused by a utility's actions, the cases cited at page 4 of the Order do not speak at all to that concern, and Petitioners are unsure why those cases were cited. *American Salt Co. v. W.S. Hatch Co.*, 748 P.2d 1060 (Utah 1987) construes Utah Code Ann. § 54-7-20, which only applies where reparations have been sought for overcharges in excess of a tariff. That section has no application to the Petition. The Petitioners and the class are seeking compensation for economic loss. A more apposite statute is Section 54-4-2, which states:

Whenever the commission believes that in order to a compliance with the provisions of this title or with the orders of the commission or that it will otherwise be in the interest of the public, an investigation should be made of any act or omission to act, or of anything accomplished or proposed, . . . or of any . . . service or facility of any public utility, it shall investigate the same upon its own motion . . . and shall make such findings and orders as shall be just and reasonable with respect to such matter. [Emphasis added.]

In *Basin Flying Service v. Utah Public Service Commission*, 531 P.2d 1303, 1305 (Utah 1975), the court stated:

The general grant of jurisdiction to the Public Service Commission is in Section 54-4-1, U.C.A. 1953: The commission is hereby vested with power and jurisdiction to regulate every public utility in this state, and to supervise all of the business of every such public utility. . . In harmony with this it is well established that a regulatory body such as the Public Service Commission, which is created by and derives its powers and duties from statute, has no inherent regulatory powers, but only those which are expressly granted, or which are clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it. [Emphasis added.]

The Commission is not only expressly charged under § 54-4-2 to ensure that a utility complies with its orders, but it is also expressly authorized to make such findings and orders after an investigation as are "just and reasonable with respect to any such matter." The relief sought by Petitioners for themselves and the class falls squarely under the express authority of § 54-4-2.

### III. The Order is Unclear as to the Degree of Participation Allowed to the Individual Petitioners.

The Order does not specify any limitations upon the Petitioners' opportunity to participate in the proceedings for themselves. Petitioners have asserted that if PacifiCorp is found to have violated any previous orders of the Commission, the company should be subject to the appropriate fines and penalties prescribed in Utah Code Ann. § 54-7-25. Petitioners request that the Order be modified to specifically allow them to pursue the remedy of fines and penalties if the evidence shows violations of Commission orders, as well as the latitude to recommend that any such fines and penalties accrue to the benefit of ratepayers injured by the power outage.

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It is correct that *Beaver v. Qwest*, 31 P.3d 1147 (Utah 2001) makes an oblique reference to the desire of certain counties to pursue a property tax refund from Qwest in behalf of a class of similarly situated ratepayers; however, the decision did not reach the merits of the request for class action relief; the court held that the issues raised in the complaint were exclusively within the Commission's jurisdiction and could not be adjudicated by a district court. If this case has any application to the Petition, it favors the position of the Petitioners.

The Utah test for primary jurisdiction over complaints against utilities is set out in *Atkin Wright & Miles v. Mountain States Tel.*, 709 P.2d 330 (Utah 1985), which relies on an Arizona case, *Campbell v. Mountain States Tel. & Tel. Co.*, 586 P.2d 987 (Ariz. App. 1978). The Utah Supreme Court held that district courts have jurisdiction of a utility's tortious or contractual liability only where the claims do not call into question the validity of orders of the Commission or whether the utility is adequately providing telephone service to the public.

The incidents alleged by Petitioners which give rise to the claims for monetary compensation to the class may be outside the jurisdiction of the district courts in Utah precisely because the issues of compliance with Commission orders and adequacy of utility service within the terms of the certificate of public convenience and necessity are exclusively within the jurisdiction of the Commission. The adequacy of the utility's manner and means of providing its service to the public and the degree to which it has complied with the Commission's previous orders are the heart of the Petitioners' individual and class claims. If the Commission denies the class an opportunity to raise and deal with these claims in this forum, the thousands of customers who were affected and injured by the outage may be left without an adequate remedy.

IV. Conclusion.

Petitioners respectfully suggest that the Commission's time and the parties' time may be better served by allowing intervention as requested and dealing with the specific issues of concern to the Commission as they present themselves in the course of this docket.

DATED this 26<sup>th</sup> day of July, 2004.

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## CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing Motion for Reconsideration to be served this 26th day of July, 2004, by mailing copies of the same, first-class U.S. Mail, postage prepaid, to the following parties in interest:

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