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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Investigation of the Power
Outage: December 2003

Docket No. 04-035-01

**RESPONSE OF UTAH POWER TO
MOTION FOR RECONSIDERATION
OF GEORGIA B. PETERSON, ET AL.**

PacifiCorp dba Utah Power & Light Company (“Utah Power” or “Company”), pursuant to Utah Code Ann. § 63-46b-12(2) and Utah Admin. Code R746-100-3.H and R746-100-4.D, hereby responds to the Motion for Reconsideration (“Motion”) filed by Georgia B. Peterson, Janet B. Ward, William Van Cleef and David Hiller (“Petitioners”) on July 27, 2004 in this

docket. The Motion seeks reconsideration of the Order Granting in Part and Denying in Part Petition and Request to Intervene (“Order”) issued by the Commission July 6, 2004.¹

I. INTRODUCTION

Undeterred by their own lack of any significant prior involvement in the 15 years of regulation of Utah Power between the 1988 merger order² and this December 2003 storm docket, Petitioners allege that the Order should be reversed based on Utah Power’s conduct during this time period. Left to their own devices, Petitioners would expand this docket into a reexamination of every decision made by Utah Power and this Commission over the past 15 years on the theory that each decision may have somehow affected Utah Power’s ability to restore power following the December 2003 storm that was, by any reasonable assessment, a major event.

The Commission, based on its own investigatory powers, created this docket. The Order allows Petitioners to intervene, but limits and conditions their intervention to issues the Commission has deemed appropriate to include in this docket, thus ensuring that the interests of justice and the prompt and orderly conduct of this proceeding will not be impaired by their intervention. The Order is an appropriate response to the Petition. Therefore, the Motion should be denied.

¹ Petitioners filed the Motion pursuant to R746-100-11.F. That provision appears to apply only to final orders and is, therefore, not applicable to the Order. Likewise, Utah Code Ann. § 54-7-15, which is referenced in R746-100-11.F and which applies to final orders as a prerequisite for judicial review, is not applicable to the Motion. Therefore, failure of the Commission to act on the Motion within 20 days may not be a “deemed denial” of the Motion, so Utah Power requests that the Commission issue an order denying the Motion.

² *Re Utah Power & Light Company*, 97 PUR4th 79 (1988).

II. ARGUMENT

The Motion claims the Order is defective in three ways. First, it claims that the Order does not comply with Utah Code Ann. § 63-46b-9 on intervention. Second, it claims that the Order decides issues prematurely because no dispositive motion was pending and because no hearing was held. Third, it claims the Order is unclear as to the degree of participation allowed to Petitioners.

Each of these claims is incorrect. Notwithstanding Petitioners' muddling of the Order, it simply and clearly (1) grants Petitioners' intervention, but limits that intervention to their individual interests only, rejecting Petitioners' request to intervene as representatives of a purported class, and (2) permits Petitioners, as individual intervenors, to participate in remaining portions of the Commission-initiated investigation of the December 2003 storm outage, within the scope of the proceedings previously established. The Commission's decisions were appropriate and consistent with the standards for intervention. The Order appropriately ruled on the Petition with respect to intervention without a hearing and clearly limited Petitioners' intervention to remaining portions of the proceeding. There is no need for further clarification of the Order as Petitioners request.

A. THE ORDER REFLECTS APPROPRIATE CONSIDERATION AND APPLICATION OF THE STATUTORY REQUIREMENTS FOR INTERVENTION

Section 63-46b-9 establishes specific requirements for intervention. Beyond the procedural requirements of filing a petition appropriately identifying the proceeding³ and containing certain elements, the statute expressly requires the person seeking intervention to state "facts demonstrating that the petitioner's legal rights or interests are substantially affected . . . or

³ Petitioners' refusal to use the Commission's caption for this proceeding is arguably a deficiency in their Petition.

that the petitioner qualifies as an intervenor under any provision of law” and “the relief the petitioner seeks from the agency.” Utah Code Ann. § 63-46b-9(1)(c) & (d). In addition, the statute provides that intervention should be granted if the Commission determines that “the petitioner’s legal interests may be substantially affected by the . . . proceeding; and the interests of justice and the orderly and prompt conduct of the . . . proceedings will not be materially impaired by allowing the intervention.” *Id.* § 63-46b-9(2)(a) & (b). In a similar vein, the statute provides that “[a]n order permitting intervention may impose conditions on the intervenor’s participation . . . that are necessary for a just, orderly, and prompt conduct of the adjudicative proceeding.” *Id.* § 63-46b-9(3)(b). Petitioners’ characterization of the Order as containing only “general conclusions” does not make it so. The Order indicates that the Commission appropriately applied each of these factors in determining to grant in part and deny in part the Petition.

1. The Order Protects the Legal Interests of Petitioners.

Petitioners have no basis to claim that the Order substantially harms any legal interest they may have in this case because they were specifically allowed to intervene on their own behalf and to represent their own interests in the context of the issues being addressed in this docket. Thus, as to any issues that will be addressed in this docket, such as whether the 2003 storm was a “major event,” they have been allowed to intervene to articulate their own interests.

As to the non-power outage issues, the Commission spelled out a procedure whereby the Petitioners can present detailed information to the Division of Public Utilities (“Division”) for investigation. Order at 3-4. Nothing in the Order precludes Petitioners from pursuing their interests; the Order merely preserves the scope of the current docket.

On other issues like the effort by Petitioners to seek damages and to do so on behalf of a class, the Commission has simply limited Petitioners’ intervention to themselves individually

and within the pre-existing scope of this docket. Nothing in the Order purports to be a final decision on any of the potential issues raised by Petitioners.

In the end, the Order allows the Petitioners to intervene in this docket and represent their own interests with regard to the issues that the Commission has decided are appropriately before it in this docket.

2. Limitation of Intervention Is Consistent with the Interests of Justice.

The purpose of this docket (which was created by the Commission and then defined more specifically by the “Terms of Reference”) is a specific analysis of a single event (the December 2003 storm outage) and was never intended to be an analysis of compliance with merger conditions established over 15 years ago. Furthermore, in creating the docket and in refining the issues, there is nothing to indicate that the Commission, Division, Committee of Consumer Services (“Committee”) or Company intended that it be a case to consider damages, class action status, land sales, coal extraction practices or matters other than the 2003 storm outage and the Company’s response to it.⁴ The Petitioners, however, appear to believe that they have a right to (1) intervene in a representative capacity on behalf of all customers affected by the outage and (2) change the entire parameters of the inquiry. In other words, they believe the intervention statute gives them the power to remake the docket to fit their desires.⁵ However, Commission precedent clearly indicates that it has authority to limit or deny intervention on the basis that

⁴ Petitioners’ claim that the Division and Committee’s failure to oppose the Petition suggests that they agreed with the need to expand the investigation (Motion at 3) is unfounded and self-serving speculation.

⁵ One need only look at the Petitioners’ effort to rewrite the caption of this docket in their pleadings to see just how much they are attempting to change the focus of this docket.

issues raised in the intervention request are addressed by other participants or may be pursued, if appropriate, in another docket, proceeding or investigation.⁶

The Commission has determined, in the interests of justice, that it should maintain the previously chosen focus in this docket and has allowed Petitioners to operate within those parameters established by the Commission. The Commission has allowed Petitioners to “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 exclusion claimed by PacifiCorp.” Order at 3. Nothing in that conclusion impinges in any manner on the interests of justice. The Petitioners may participate in this docket on remaining aspects of the issues as defined by the Commission. This is entirely consistent with the interests of justice.

3. Granting Petitioners’ Broader Intervention Would Impair the Orderly and Prompt Conduct of this Proceeding.

The Commission initiated this docket within days after the outage caused by the December 2003 storm. Since initiating the docket, thousands of hours have been consumed in a thorough investigation of the storm, the outage and related matters, including the Company’s tree trimming practices, its investment in distribution plant and its expenditures for maintenance of distribution plant. Large quantities of data were provided to the Division, Committee and Commission staff during the course of the investigation, and significant additional data were provided to the Division’s consultant at its request. These parties also conducted field

⁶ See Order Granting EAS Application, *In the Matter of Extended Area Service for Uintah and Duchesne Counties*, Docket No. 02-053-02 (Utah PSC May 13, 2003) (Commission denied intervention on certain issues on the grounds that it found “no uniqueness to [petitioner’s] participation, compared to that of the DPU” and that participation “appears to duplicate the DPU’s efforts.” Commission denied intervention on a “unique” issue because it did “not deem it necessary to pursue in this docket.” Commission concluded: “it is appropriate and a better use of regulatory agencies’ resources for this point to be explored separately, in a separate docket if necessary.”)

inspections to see demonstrations of the Company's systems. The investigation examined many of the issues raised by Petitioners, albeit without the punitive bias manifest in the Petition. Based on the investigation, Utah Power has published a 300-page report, discussing the scope of the investigation, providing mountains of data and making findings and recommendations. The Division and its consultant have published their own report, comprising 85 pages, including additional recommendations. These reports were presented to the Commission and to the public in mid-May of this year, just two weeks after the Petition was filed, and have since been subjected to further review. The parties are scheduled to continue to meet to receive updates on the progress made in implementing recommendations and on the governance and tracking structures that have been implemented.

In addition to the investigation, the Committee and AARP raised questions whether the remedy for delayed restoration of power to customers provided in Utah Power's Commission-approved tariff was sufficient. The Commission issued an order on February 27, 2004, two months before the Petition was filed, finding that the Company's additional goodwill compensation program was equitable and reasonable.

In this context, the Motion contains several statements that demonstrate the wisdom of the Order and the necessity for denying the Motion. For example, the Motion states "[t]here is nothing of record . . . to support the Commission's conclusion that the interests of the Petitioners or the class are adequately represented by anyone else." Motion at 3. This assertion conveniently ignores the comprehensive investigation and the Committee's and AARP's efforts to assure that customers received adequate remedies. With regard to prompt conduct of the proceeding, the Motion states "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.” *Id.* at 5.

Likewise, this assertion conveniently overlooks the comprehensive cooperative investigation, including the provision of volumes of data, field demonstrations and meetings to share key findings. It seems clear that Petitioners want to ignore the substantial amount of work that has taken place within this docket and start over.

With regard to issues unrelated to the storm and outage raised by Petitioners, the Motion states that investigation of the sales of property “show a tendency towards, if not a pattern of, contumacious⁷ behavior by the utility” and that “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.” *Id.* at 5-6. And while acknowledging that the Terms of Reference do “inquire respecting Pacificorp/Utah Power’s level of cost commitment and degree of actual investment in the maintenance of lines and the like,” the Motion laments that “none of these inquiries is keyed to the motive of shareholder preference as a basis for ratepayer disadvantage.” *Id.* at 3, n. 2. It is apparent that Petitioners perceive almost nothing to do with the Company as being outside the scope of this proceeding. If anything would be inconsistent with the interests of justice, it would be expanding the docket in the manner Petitioners propose.

The Petitioners’ view, confirmed in the Motion, demonstrates the need for the Order to impose conditions necessary for just, orderly and prompt conduct of this Commission-initiated investigation. The Commission’s denial of the Petition without prejudice “[r]elative to the non-power outage issues [Petitioners] seek to raise” (Order at 3) is well within the Commission’s authority. Partial denial of intervention was appropriate in this case. A less restrictive approach

⁷ “[C]ontumacious . . . *adj* (ca. 1600): stubbornly disobedient: REBELLIOUS.” “[C]ontumacy . . . *n* . . . : stubborn resistance to authority; *specif*: willful contempt of court.” Merriam Webster’s Collegiate Dictionary, Tenth Edition (1993) at 252-53.

would allow Petitioners to hijack this docket, restart the investigation, and redefine the issues to serve their own unsubstantiated whims. The Commission clearly has authority to condition intervention to the issues properly within the scope of the docket it initiated.

B. THE ORDER WAS APPROPRIATELY ISSUED IN RESPONSE TO PETITIONERS' REQUEST TO INTERVENE. NO HEARING WAS REQUIRED BEFORE ISSUING THE ORDER.

Petitioners speculate that “the Order *may* be viewed as a gratuitous order, which was improperly issued outside and beyond the scope of [the Commission’s] own rules and the Utah Rules of Civil Procedure.” Motion at 8 (emphasis added). Petitioners’ argument has no merit because the intervention statute explicitly permits the Commission to issue an order in response to an intervention request “granting or denying a petition to intervene,” which “shall be in writing and mailed to the petitioner and each party.”⁸ Further the statute provides that:

An order permitting intervention may impose conditions on the intervenor’s participation in the adjudicative proceeding that are necessary for a just, orderly, and prompt conduct of the adjudicative proceeding.⁹

The statute does not obligate the Commission to hold hearings on intervention requests, nor do the Petitioners provide any precedent for this position. Under Petitioners’ view, the Commission would be obligated to hold hearings each time a petition to intervene is received, or at the very least, each time such a petition is challenged by a party. Such a requirement would represent a significant departure from Commission practice and could itself impair “the orderly and prompt conduct of the adjudicative proceeding.” Moreover, Petitioners’ can hardly claim that they were not given the opportunity to be heard on the intervention related issues because, in addition to the Petition, Petitioners filed a letter response (on May 21, 2004) and a reply memorandum (on June 8, 2004) to Utah Power’s May 14 response to Petitioner’s request to

⁸ Utah Code Ann. § 63-46b-9(3)(a).

⁹ *Id.* § 63-46b-9(3)(b).

intervene.¹⁰ Moreover, Petitioners never indicated their intent to file further pleadings or requested the Commission to schedule oral argument.

As mentioned above, consideration of any substantive issues addressed by the Order was precluded only in this docket and did not affect the rights of Petitioners. Regardless, each issue resolved by the Order directly relates to Petitioners' request to intervene and was properly and necessarily addressed in the Order. The Order properly considered these issues in the context of the proposed intervention and, as permitted by statute, imposed conditions on Petitioners' participation based on this consideration.

With respect to the class action issue, Petitioners explicitly and repeatedly requested that the Commission permit their intervention "in behalf of all PacifiCorp's other customers similarly situated to Petitioners." The Commission's ruling on this issue is directly related to Petitioners' request for expanded intervention treatment and does not go so far as to rule upon the legality of class actions with respect to Commission proceedings or the propriety of class action proposals by customers outside of this particular proceeding.

Relative to the Commission's treatment of Petitioners' request for monetary damages, a petition to intervene is expressly required by statute to include "a statement of the relief that the petitioner seeks from the agency."¹¹ Because the requested relief is a required component of the petition, it stands to reason that the Commission may consider the propriety and legality of the specific relief requested in its order determining the extent of and conditions to a petitioner's participation. As part of their Petition, Petitioners included a request that the "Commission award customers, as a class, the value of the actual financial and economic loss sustained as a

¹⁰ Additionally, Petitioners filed letter responses to Utah Power's June 1, 2004 response on June 4, 2004 and June 7, 2004.

¹¹ Utah Code Ann. § 63-46b-9(1)(d)

consequence of the Company's negligence or disregard of this Commission's previous Orders." Given this specific request, as required by the intervention statute and the well-established limitations of the Commission with respect to monetary damage requests,¹² the Commission's consideration and rejection of intervention to pursue this request was proper.

C. THE ORDER EXPRESSLY ALLOWS PETITIONERS TO PARTICIPATE IN REMAINING ASPECTS OF THIS DOCKET.

Petitioners' final assertion is that the Order is unclear as to the degree of participation allowed to Petitioners. Motion at 11. The only specific issue raised by Petitioners in this regard is that Order should be modified to allow them to pursue the remedy of fines and penalties if the evidence shows violations of Commission orders. *Id.*

This assertion, like those previously addressed, has no merit. The Order specifically provides that Petitioners "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 exclusions claimed by PacifiCorp." Order at 3. It also makes clear that violations of prior Commission orders is a matter on which Petitioners "may present what detailed information they may have concerning their claims to the Division" for investigation. Order at 3-4. Petitioners' Motion again reflects their disagreement with the scope of the proceeding and does not reflect any problem with the Order.

III. CONCLUSION

The Order properly limited and conditioned the intervention of Petitioners to issues within the scope of this Commission-initiated investigation. It did not decide substantive issues

¹² See *American Salt Company v. W.S. Hatch Company*, 748 P.2d 1060 (Utah 1987); *Basin Flying Service v. Public Serv. Comm'n*, 531 P.2d 1303, 1305 (Utah 1975); and *Hi-Country Estates v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1975). See also Report and Order, *Richcraigne Corp. v. Utah Power & Light Co.*, Docket No. 00-035-02 (Utah PSC Aug. 7, 2000), and Report and Order, *Prows v. Mountain States Tel. & Tel. Co.*, Docket No. 00-049-07 (Utah PSC Aug. 17, 2000).

raised by the Petition without briefing and a hearing. It clearly states the limits of Petitioners' intervention. Therefore, Petitioners' Motion should be denied.

RESPECTFULLY SUBMITTED: August 13, 2004.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **RESPONSE OF UTAH**

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