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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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In the Matter of the Division's Annual Review and Evaluation of the Electric Lifeline Program, HELP)	Docket No. 03-035-01
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In the Matter of HELP, Electric Lifeline Program Evaluation)	Docket No. 04-035-21

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF

Salt Lake Community Action Program and Crossroads Urban Center (collectively known as the Utah Ratepayers Alliance) hereby move this Commission to dismiss any and all claims brought by Intervenor Light and Truth which challenge the power or jurisdiction of this Commission to implement the HELP program.

BACKGROUND

A lifeline electric rate was considered in Docket 97-035-01 and, in its Order of March 4, 1999, the Commission determined that it had the authority to adopt a lifeline

electric rate. The HELP program was authorized in the May 24, 2000 Report and Order in Docket No. 99-035-10, which repeated the Commission's conclusion that it possessed the authority to adopt lifeline rates. The Commission rejected testimony by Paul Mecham in that case, appearing on behalf of the Division of Public Utilities opposing the adoption of the Lifeline rate. No appeal of the Order in Docket No. 99-035-10 was filed.

HELP was implemented by the Commission's August 30, 2000 Report and Order in Docket No. 00-035-T07, which added Schedules 3 and 91 to PacifiCorp's Utah Tariff No. 43. This Order contained the standard language regarding rehearing rights. No appeal of this Order was filed.

On February 12, 2003, Light and Truth was denied intervention status in Docket No. 03-035-01 but was allowed to participate in the informal proceeding. On May 7, 2003, Complainant Paul F. Mecham, the apparent sole member and officer of Light and Truth, filed a formal complaint in Docket No. 03-035-09 challenging the "legal ability" of Utah Power & Light to bill him \$0.12 per month for the "Electric Lifeline Program. On June 17, 2003, Light and Truth was allowed to intervene in Docket No. 03-2035-02. In its January 30, 2004 Order in that case, the Commission did not accept Light and Truth's testimony opposing the continuation of the HELP program that all other parties had stipulated to, and directed that the testimony be considered in Docket No. 03-035-01.

On September 2, 2003, the Commission issued its Report and Order in Docket No. 03-035-09, specifically holding as follows:

The Commission has party and subject matter jurisdiction....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. The complaint must be dismissed.

This language specifically rejected Mecham's claims that the Commission lacked jurisdiction and authority to implement the HELP program and that the program consisted of illegal third party billing. The standard language about seeking a rehearing was included. No appeal to the Utah Supreme Court was taken.

ARGUMENT

THIS COMMISSION SHOULD DISMISS ALL "CONSTITUTIONAL," "STATUTORY" AND "JURISDICTIONAL" CLAIMS RAISED BY Light and Truth BASED ON STARE DECISIS AND ADMINISTRATIVE RES JUDICATA

In its Preliminary Issues List, filed with this Commission on May 12, 2005, Light and Truth lists a series of "Claims." Most of these are written in vague or rhetorical language so the exact legal issue is not specified, yet those that are clear seem to claim that the Commission is without authority or in violation of Utah law to have authorized and maintained the PacifiCorp tariffs that implement the HELP program. To the extent that these "claims" purport to challenge the HELP program or the Commission's authority or jurisdiction to implement them, they are barred by administrative res judicata and stare decisis and should be dismissed without an evidentiary hearing.

This includes the claims that: 1) “the Commission is not specifically authorized to take citizen’s money (property)...doing so through HELP violates the Constitutional principles of citizens’ due process rights and property rights [and]...also violates other Constitutional principles.” (Emphasis in original) ; 2) “the Commission violates the ‘taxation without representation’ principle;” 3) “HELP violates the Third Party Billing law;” 4) “Utah Code in general (and 54-4-37 in specific) supercedes Commission orders;” 5) “HELP is hidden from taxpayers;” 6) “HELP is not an integral part of utility operations;” 7) “HELP is pure charity;” 8) “HELP is outside regulatory processes;” and 9) “PacifiCorp falsely advertised that it was the source of HELP funds.” (Light and Truth’s Preliminary Issues List, May 12, 2005). Some of these items have been renewed in Light and Truth’s recent “petitions, considerations and motions to dismiss. ” (See filings of June 24, 2005 in Docket No. 04-035-01). Any further discussion of these “issues” should be barred and these claims summarily dismissed.

Light and Truth has also completely misconstrued the concepts of stare decisis, administrative res judicata and collateral estoppel by seeking to “dismiss” any possible administrative changes in the HELP program.

Many of the applicable principles here were set forth in Salt Lake Citizens Congress v Mountain States Tel & Tel, 846 P2d 1245 (Utah 1992). There, long after the Commission had established rules for accounting treatment of charitable contributions, the utility sought to surreptitiously change them. The court held that the earlier decision

was binding until a specific decision, rule or court case changed it, citing stare decisis. And the court explained that administrative res judicata applied to Utah agencies: “when there has been a prior adjudication of a factual issue and an application of the law to those facts....res judicata bars a second adjudication of the same facts under the same rule of law.” Here we have not one but several rate cases which have established and continued the HELP program. And we have several other cases, including Mr. Mecham’s challenge to Commission authority to establish HELP as violative of Utah Code §54-4-37 specifically, which have been rejected by the Commission’s application of the same facts under the same rule of law. None have been appealed. They have established the law and are not now subject to challenge. The opportunity to challenge the Commission on any of these grounds expired when no appeal was filed in the earlier cases.

The Utah Supreme Court reviewed the stare decisis aspect of Salt Lake Citizens Congress in Steiner Corp v Utah State Tax Commission, 979 P2d 357 (Utah 1999) and confirmed its holding. There the court stated that: “The holding of an agency adjudication, or the application of a rule of law to the facts in that case, binds an agency in subsequent decisions.” The Commission, and Mr. Mecham, are bound by its decisions on HELP from the earlier cases.

Finally, Nebeker v Utah State Tax Commission, 34 P3d 180 (Utah 2001) holds that a failure to raise constitutional claims in the initial proceeding before an agency results in a waiver to bring it up later either before the agency or the district court. “To

hold otherwise would give a petitioner a way to revive claims he had originally lost due to his own lack of diligence in failing to exhaust his administrative remedies.” This is very similar to our case, where Mr. Mecham continues to try to add constitutional and statutory aspects to his other claims, even though they were not initially raised.

Depending on which proceeding the Commission deems the initial one, Mr Mecham likely did not raise his constitutional claims then and thus would be unable to raise any of those issues now. His claims should be barred.

CONCLUSION

All of Light and Truth’s claims concerning violations of law or the constitutionality of Commission action on HELP should be denied, as well as its recent spate of motions. Based on one of several doctrines: res judicata, stare decisis, collateral estoppel or failure to exhaust, defendant has not fulfilled the fundamental requirements to allow his case to go forward. This Commission should dismiss these motions.

Respectfully submitted on this _____ day of _____, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss was served July 1, 2005, upon the following by electronic mail:

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