

F. ROBERT REEDER (2710)  
VICKI M. BALDWIN (8532)  
PARSONS BEHLE & LATIMER  
Attorneys for Summit Vineyard, LLC  
One Utah Center  
201 South Main Street, Suite 1800  
Post Office Box 45898  
Salt Lake City, UT 84145-0898  
Telephone: (801) 532-1234  
Facsimile: (801) 536-6111

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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of the Application of PACIFICORP for a Certificate of Convenience and Necessity Authorizing Construction of the Lake Side Power Project.	Docket No. 04-035-30  <b>SUMMIT'S MOTION IN SUPPORT OF PACIFICORP'S OPPOSITION TO CALPINE'S PETITION TO INTERVENE</b>
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On or about June 27, 2004, Calpine filed its Petition to Intervene in the above-captioned matter. Thereafter, on June 29, 2004, PacifiCorp file its Opposition to Calpine's Petition to Intervene. Pursuant to R746-100-4.D of the Utah Administrative Code, motions directed toward responsive pleadings filed with the Public Service Commission of Utah ("Commission") shall be filed within ten days of the service of the responsive pleading. The Commission has acted on this issue without allowing the prescribed period for motions directed toward responsive pleadings to be filed. Accordingly, Summit Vineyard, LLC ("Summit") respectfully submits its Motion in Support of PacifiCorp's Opposition to Calpine's Petition to Intervene and states its additional arguments as follows:

### **Calpine's Intervention Is in Contravention of Public Policy:**

1. As evidenced in the First Set of Consolidated Requests for Production, Requests for Admission and Interrogatories of Calpine Corporation Issued to Applicants, served on PacifiCorp on June 30, 2004, and attached hereto as Exhibit A and referred hereinafter as "Calpine Discovery," Calpine Corporation ("Calpine") is clearly using this forum, as well as others, to gain commercial information of entities, including Summit, that have been bidders in the past and are potential bidders in future Request for Proposal ("RFP") processes. This is in contravention of public policy and should not be allowed.
2. In Calpine's Discovery it has asked, for example, that PacifiCorp "detail all cost assumptions including but not limited to major maintenance and capital addition assumptions over the life of the plant used in the Summit project evaluation"; "provide all documents describing or related to PacifiCorp's evaluation of Summit and Siemens' experience on joint projects"; "provide a complete set of all contracts or agreements between PacifiCorp and either Summit, Siemens, or both regarding the Summit project"; "provide any analyses done by PacifiCorp of the incremental debt impact on the company of the Summit project from an accounting, financial, or economic perspective." See, e.g., Exhibit A, ¶¶ 1.10–1.18, 1.26, 1.28, 1.40–1.44. This clearly includes proprietary commercial information that should not be made available to other entities.
3. In addition, in a collateral proceeding before the United States Bankruptcy Court, District of Utah, Calpine has attempted to end-run the instant proceeding and the Protective Order issued by the Commission to propound discovery requesting

production of Summit and Siemens commercial information as well as that of all bidders in the PacifiCorp bid. See the attached Ex Parte Motions and Proposed Orders attached hereto as Exhibit B for these discovery requests. Through the bankruptcy proceeding, Calpine has requested from PacifiCorp, Siemens, Summit, Navigant, as well as Geneva, voluminous proprietary information regarding the details of the parties' bids in the PacifiCorp Lake Side RFP as well as information related to negotiations and evaluations of the proposals. Calpine's requests include, for example, the following: "All documents and records evidencing, referring, or relating to any communications between PacifiCorp and Navigant"; "All models used to evaluate bids received in response to RFP 2003-A." Exhibit B, Ex Parte Motion for Order to Examine Howard Friedman Pursuant to Federal Bankruptcy Rule 2004, Exhibit A ¶¶ 1, 4; "All bids submitted by Summit Power/Summit Energy in response to RFP 2003-A, including the original bid, as well as all amendments, new provisions, supplements, and/or modifications made during negotiations between Summit Power/Summit Energy and PacifiCorp and/or Geneva." Exhibit B, Ex Parte Motion for Order to Examine Earl Gjeldel Pursuant to Federal Bankruptcy Rule 2004, Exhibit A ¶ 9; "All documents and records evidencing, referring or relating to the procedures used to determine the 'short list entities' referred to in paragraph 3 'Bid Evaluation and Selection' of RFP 2003-A." Exhibit B, Ex Parte Motion for Order to Examine John Stewart Pursuant to Federal Bankruptcy Rule 2004 ¶ 17; "All documents and records evidencing, referring, or relating to the

preparation and/or submission of a bid by Summit Power/Summit Energy in response to RFP 2003-A”; “All documents and records evidencing, referring, or relating to any communications between PacifiCorp and Summit Power/Summit Energy and/or Siemens Westinghouse prior to the deadline for submission of bids in response to RFP 2003-A.” Exhibit B, Ex Parte Motion for Order to Examine Jim Heller Pursuant to Federal bankruptcy Rule 2004, Exhibit A ¶¶ 3, 5.

4. This commercial information is information that can be used in a re-bid in Utah, in future bids, or in litigation. Allowing Calpine unrestricted access to this information would essentially provide any prospective participant in a future RFP process a roadmap to the key commercial terms of the parties’ offers as well as the negotiating strategies of the parties. This information sharing, if allowed, will compromise the RFP process by interfering with competition so that the best price will not be reached. Calpine is well aware of this because Calpine made this same argument against allowing a re-bid in the San Diego Gas & Electric RFP. This information sharing will result in negative impacts on ratepayers and should not be condoned.
5. The Commission should not allow its proceedings and the regulatory process to be used to further this anti-competitive behavior. This is not something the law would tolerate generally and is not something the Commission should tolerate.

**Calpine’s Intervention Would Materially Impair the Proceedings:**

6. The Utah Code provides that a petition for intervention should only be granted “if the presiding officer determines that . . . the interests of justice and the orderly and

prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention.” Utah Code Ann. § 63-46b-9(2)(b). Calpine’s intervention will materially impair the orderly and prompt conduct of these adjudicative proceedings and should not be allowed.

7. In Paragraphs 4 and 6 of the Response of Calpine Corporation to PacifiCorp’s Opposition to Calpine’s Petition to Intervene, or in the Alternative, Motion for Leave to Amend Petition to Intervene (hereinafter referred to as “Calpine’s Response” or “Response”), Calpine admits that it is attempting to expand the scope of this proceeding. This proceeding is an application by PacifiCorp for a Certificate of Convenience and Necessity to begin construction and operation of a Lake Side facility. Section 54-4-25 of the Utah Code sets forth the standard for awarding such a Certificate, that is, “that present or future public convenience and necessity does or will require the construction” of the facility. Id. § 54-4-25(1). Calpine admits in Paragraph 4 of its Response that its interest in this proceeding is to broaden this proceeding to an investigation of PacifiCorp’s bid process. It admits in Paragraph 6 that it wishes to re-open PacifiCorp’s bidding process. Calpine’s attempt to broaden the issues goes beyond the purpose of the instant proceeding and should be prohibited.
8. Calpine has not “stated facts demonstrating that [its] legal rights or interests are substantially affected by the [Certificate of Convenience and Necessity] proceeding.” Id. 63-46b-9(1)(c). Thus, its extrinsic arguments will only serve to burden the process. Calpine’s justifications are merely red-herrings. Calpine

points out that it participated in PacifiCorp's bidding process but was not awarded the bid. This did not result in Calpine obtaining any legal right or interest. Participation in an auction does not give the bidders any legal rights or interests. The person who places the second highest bid on eBay® does not gain some kind of legal interest or right by merely participating in the bidding process and coming in second highest. The same is true here. Calpine did not acquire any legal rights or interests merely by participating in PacifiCorp's bid and Calpine has cited no legal rights or interests it may have that can be addressed in the instant proceeding. Calpine's stated purposes for intervention do not demonstrate that it has legal rights or interests to be protected in this proceeding. Its intervention will unnecessarily burden and materially impair this proceeding.

9. Furthermore, in Paragraph 8 of its Response, Calpine asks the Commission to deny PacifiCorp's application unless Calpine is allowed to up-end PacifiCorp's bidding process. This is not in the public interest, but in Calpine's interest. This is not an appeal of the RFP process. It is a proceeding to determine whether the public interest will be served by the building of this facility. It has already been determined in other proceedings before this Commission (such as the IRP proceedings) that there is a growing need for electricity in Utah. Allowing Calpine to materially impair the orderly procession of this proceeding, delaying the construction of the Lake Side facility, would not be in the public's best interest and should not be allowed.

10. Finally, in Paragraph 9 of the Calpine Response, Calpine argues that if it misbehaves, the Commission can settle disputes on a case-by-case basis. This will not effectuate an “orderly and prompt conduct of the adjudicative proceedings.” Instead, each time “Calpine propounds inappropriate discovery,” (Calpine Response ¶ 9) the subject of the inappropriate discovery must incur the costs of preparing and filing an objection, and then must incur the cost of preparing and filing a response to Calpine’s argument against the objection, and then the Commission must incur the time and resources necessary to consider and rule on the motions. “If Calpine raises inappropriate issues in its testimony,” (Id.) the party harmed by this inappropriateness must incur the cost of preparing and filing a motion to strike, and then must incur the cost of preparing and filing a response to Calpine’s argument against the motion to strike, and then the Commission must incur the time and resources necessary to consider and rule on the motions. In fact, Calpine has already propounded inappropriate discovery, as demonstrated in Exhibits A and B. The Parties to this proceeding have already been forced to incur unnecessary costs. This is a tremendous waste of time and resources. The Commission should take control of its proceedings from the beginning by excluding Calpine or by setting limitations and boundaries on the proceeding.

**Alternatively, Participation Should Be Allowed Only with Limitations:**

11. Alternatively, pursuant to the Commission’s statutory authority, if the Commission allows Calpine’s intervention, the Commission should “impose conditions on [Calpine’s] participation in the adjudicative proceeding that are

necessary for a just, orderly, and prompt conduct of the adjudicative proceeding.” Utah Code Ann. § 63-46b(3)(b). The Commission has the authority to expressly limit an intervenor’s participation to the narrow issues to be considered in the proceeding at hand. In fact, the Commission has recently exercised this authority by granting limited intervention to individual customers in In the Matter of the Power Outage December 2003, Docket No. 04-035-01, July 6, 2004.

12. In the event the Commission determines that Calpine’s intervention is warranted at all, and Summit believes it is not, the Commission should set limitations on Calpine’s testimony and scope of discovery to address load growth forecasts and evidence that public convenience and necessity does require the construction of this facility.

WHEREFORE, Summit requests that the Commission deny Calpine’s Petition for Intervention or alternatively, that if the Commission grants Calpine’s intervention, it only does so by imposing such conditions on Calpine’s participation that will ensure a just, orderly, and prompt conduct of this Certificate of Convenience and Necessity proceeding.

DATED this \_\_\_\_\_ day of July, 2004.

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F. ROBERT REEDER  
VICKI M. BALDWIN  
PARSONS BEHLE & LATIMER  
Attorneys for Summit Vineyard, LLC



**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of July, 2004, I caused to be hand-delivered or mailed, first class, postage prepaid, a true and correct copy of the foregoing **SUMMIT'S MOTION IN SUPPORT OF PACIFICORP'S OPPOSITION TO CALPINE'S PETITION TO INTERVENE**, to:

Edward A. Hunter  
Jennifer Horan  
STOEL RIVES LLP  
One Utah Center  
201 South Main Street, Suite 1100  
Salt Lake City, Utah 84111-4904

Reed Warnick  
Assistant Attorney General  
101 East 300 South, Fifth Floor  
Salt Lake City, Utah 84111

Michael Ginsberg  
Assistant Attorney General  
500 Heber M. Wells Building  
160 East 300 South  
Salt Lake City, Utah 84111

Robert M. Pomeroy  
Thorvald A. Nelson  
Holland & Hart LLP  
8390 East Crescent Pkwy, Suite 400  
Greenwood Village, CO 80111-2811

John P. Harrington  
Aaron G. Murphy  
Holland & Hart LLP  
60 East South Temple, Suite 2000  
Salt Lake City, Utah 84111-1031

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