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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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 **SUMMIT VINEYARD'S MOTION TO STRIKE SPRING CANYON ENERGY'S TESTIMONY**

Summit Vineyard, LLC, and Lake Side Power, LLC ("Summit"), respectfully submits this motion to strike the testimony submitted August 27, 2004, by Spring Canyon Energy, LLC ("Spring Canyon"), in the above-captioned docket. In support thereof Summit states as follows:

INTRODUCTION

On August 27, 2004, Spring Canyon filed a two-page document in which it stated:

> Attached[1] is pre-filed direct testimony of F. David Graeber and Theodore Banasiewicz from Docket No. 03-035-29 which Spring Canyon Energy, LLC is hereby filing as its pre-filed direct testimony in the above captioned proceeding. Since, the Utah Public Service Commission has recently cabined [sic] its authority

[1] It is Summit's understanding that the referenced direct testimony was not in fact attached. If that is the case, it appears that Spring Canyon is actually asking the Commission to take administrative notice of its previously filed testimony.

> to making determinations of need and disclaimed any authority to determine which power project will best serve Utah ratepayers, Spring Canyon Energy, LLC sees no point in incurring the expense associated with preparing and filing new testimony.

Spring Canyon Energy LLC's Pre-Filed Direct Testimony Challenging the Results of PacifiCorp's RFP 2003-A, Docket No. 04-035-30 (Aug. 27, 2004). The testimony referred to in Spring Canyon's filing was the testimony Spring Canyon filed in Docket No. 03-035-29 for the certification of the Currant Creek Power Project. This testimony should be stricken because it is irrelevant and non-probative, it is barred by the doctrine of administrative finality, and it was improperly filed in contravention of the rules of the Public Service Commission of Utah ("Commission").

ARGUMENT

I. SPRING CANYON'S TESTIMONY SHOULD BE STRICKEN BECAUSE IT IS IRRELEVANT AND NON-PROBATIVE.

The testimony submitted by Spring Canyon in this matter is irrelevant and non-probative and should be stricken by the Commission. Generally, where the proffered evidence has no probative value to a fact at issue, it is irrelevant. State v. Jaeger, 973 P.2d 404, 407 (Utah 1999); see also Tolman v. Salt Lake County Airport, 818 P.2d 23, 31 (Utah 1991) ("Whether proffered evidence has probative value is in large part a question of whether the evidence is legally relevant."); Utah R. Evid. 401. Pursuant to the Utah Administrative Procedures Act: "On his own motion or upon objection by a party, the presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious." Utah Code Ann. § 63-46b-8(1)(b)(i); see also Utah Admin. Code R746-100-10.F.1 ("Commission may exclude non-probative, irrelevant, or

unduly repetitious evidence."); Mountain Fuel Supply Co. v. Public Serv. Comm'n of Utah, 861 P.2d 414, 423 (Utah 1993) (affirming Commission's refusal to admit proffered evidence due to its irrelevance).

A. By Spring Canyon's Own Admission, Evidence Concerning the 2005 RFP Cannot Be Used as Evidence Against the 2007 RFP.

In the instant case, Spring Canyon has merely filed by reference the testimony it filed previously in the Currant Creek proceeding, which was a complaint of PacifiCorp's prior RFP process to acquire resources for the summer 2005 load. The Commission has already ruled on this process. In the Matter of the Application of PacifiCorp for a Certificate of Convenience and Necessity Authorizing Construction of the Currant Creek Power Project, Docket No. 03-035-29, Report and Order (March 5, 2004).

On March 25, 2004, twenty days after the Commission issued its Report and Order certificating the Currant Creek project, Spring Canyon filed a Petition for Reconsideration, Review, or Rehearing.[2] In that petition, Spring Canyon criticized the Commission for allegedly relying on the 2007 bid process as part justification of the fairness of the 2005 bid process. Spring Canyon argued: "[I]t is inappropriate to rely on the 2007 category since that is not the subject of this proceeding." Petition for Reconsideration, Review, or Rehearing, Docket No. 03-035-29 at 4 (March 25, 2004). Thus, it is inappropriate here for Spring Canyon to rely on its testimony for the 2005 category as an argument against the 2007 category "since that is not the subject of this proceeding."

[2] The Commission did not issue an order granting or denying the request within twenty-days of March 25, 2004, and therefore, the petition was deemed denied pursuant to Utah Code Ann. § 63-46b-13(3)(b).

Spring Canyon also argued that the "2007 category cannot properly be used to prove the purity of the 2005 process." Id. By its own argument then, the 2005 category cannot properly be used to prove the impurity of the 2007 process.

Spring Canyon argued that the evaluation of one RFP process cannot be used as a basis for another RFP process, yet Spring Canyon has done just that in submitting its Currant Creek testimony, without modification, to challenge the Lake Side project. Spring Canyon has thus provided its own argument that its testimony in this case is totally irrelevant and non-probative.

B. Spring Canyon's Testimony Provides No New Facts or Circumstances and Should Not Be Admitted to Unnecessarily Burden the Instant Proceeding.

The Currant Creek proceeding concerned the issuance of a certificate of convenience and necessity for the Currant Creek power project to address the power needs for the summer of 2005. The instant proceeding concerns the issuance of a certificate of convenience and necessity to meet loads for summer of 2007. Nevertheless, Spring Canyon admits that it has not even bothered to reevaluate its position in light of this separate set of facts and circumstances because it "sees no point in incurring the expense associated with preparing and filing new testimony." Spring Canyon Energy LLC's Pre-Filed Direct Testimony Challenging the Results of PacifiCorp's RFP 2003-A, Docket No. 04-035-30 (Aug. 27, 2004).

Spring Canyon's participation in this matter adds nothing to the discussion at hand for the Lake Side power project and the testimony should be stricken. In the Currant Creek proceeding, the Commission rejected Spring Canyon's argument that PacifiCorp should be ordered to restart negotiations with Spring Canyon. The Commission stated that "restarting negotiations after a

bidder's best and final offer is made and found to be uneconomic would be unfair to other bidders and impair the credibility of the process." Id. at 19. Spring Canyon offers no new facts or circumstances to cause this issue to be reevaluated. Thus, the testimony is not probative for purposes of this proceeding.

Spring Canyon also argued in the Currant Creek matter that its evaluation approach should be used rather than the approach that was used by PacifiCorp and supported by the Division of Public Utilities ("DPU") and Navigant. The Commission also rejected this argument in the Currant Creek matter because Spring Canyon had not offered any convincing evidence that an alternative evaluation approach would be superior to that used by PacifiCorp. Because Spring Canyon has merely repeated itself by re-filing its Currant Creek testimony, it provides no new information or evidence to be considered in the current matter and therefore, once again fails to provide anything of probative value.

Spring Creek has provided no new facts or circumstances from the Currant Creek proceeding. It has provided no evidence of why its arguments are relevant to the 2007 resource bid even though they were rejected with respect to the 2005 resource bid. It has not even bothered to address the 2007 resource bid in its testimony. Therefore, Spring Canyon's testimony is not probative and should be stricken.

C. Spring Canyon's Testimony Should be Stricken Based on the Residuum Rule.

While it is true that the Commission is not strictly bound by the technical rules of evidence, Utah Admin. Code R746-100-10.F.1, if there is not a residuum of legal evidence

competent in a court of law to support an agency's findings and conclusions of law after all hearsay and other legally inadmissible evidence admitted by an agency is set aside, the decision will be reversed. Tolman, 818 P.2d at 32. This is known as the residuum rule.

Based on the foregoing it has been shown that Spring Canyon's testimony is irrelevant to this proceeding. Therefore, it is legally incompetent. Accordingly, based on the residuum rule, the Commission cannot base its findings and conclusions of law on Spring Canyon's testimony and it should be stricken.

D. Conclusion

Based on the foregoing, Spring Canyon's testimony should be stricken. Spring Canyon has not even attempted to tailor its arguments to the case at hand. It is not probative and adds nothing to inform the discussion. The testimony is irrelevant and cannot be used as a basis for the Commission's findings and conclusions of law. Consideration of Spring Canyon's testimony will result in a waste of resources and a burden to the process, and therefore, it should be stricken.

II. SPRING CANYON'S TESTIMONY IS BARRED BY ADMINISTRATIVE FINALITY

Spring Canyon has offered no new facts or circumstances to support reexamination of PacifiCorp's RFP process and therefore, Spring Canyon's testimony is barred by the doctrine of administrative finality. Generally, a change in evidence or change in circumstances is required to support reexamination of a previously of litigated issue. West Texas Util. Co. v. Office of Pub. Util. Counsel, 896 S.W.2d 261 (Tex. Ct. App. 1995) (holding that appellants failed to produce sufficient evidence that circumstances were changed enough to justify reexamination of

depreciation expense figure for plant that was approved by the commission in a previous docket and presented by plaintiff in current docket); Consumers Power Co. v. Public Serv. Comm'n, 493 N.W.2d 902 Mich. Ct. App. 1993) (holding that where precise issues have already been litigated, plaintiff should only be allowed to raise previous issues if new evidence or change of circumstances proved that prior findings were no longer applicable) (citing Coalition of Cities for Affordable Util. Rates v. Public Util. Comm'n of Tex., 798 S.w.2d 560 (Tex. 1990)).

As previously stated, the Commission issued its Report and Order in the Currant Creek certification proceeding on March 5, 2004. As determined by the Commission in the Currant Creek proceeding, "the RFP process and evaluation methods are fair and reasonable for the task of screening for competitive bids." In the Matter of the Application of PacifiCorp for a Certificate of Convenience and Necessity Authorizing Construction of the Currant Creek Power Project, Docket No. 03-035-29, Report and Order at 17 (March 5, 2004).

Spring Canyon timely filed its Petition for Reconsideration, Review, or Rehearing on March 25, 2004. Pursuant to Section 63-46b-13(3)(b), the Commission denied Spring Canyon's petition by not issuing an order on the petition within twenty days. Spring Canyon has refiled the same testimony from the Currant Creek proceeding for this proceeding. Spring Canyon has offered no new evidence or change in circumstances to show that the Commission's prior fiding are no longer applicable. Thus, Spring Canyon's testimony is barred by the doctrine of administrative finality and should be stricken.

III. SPRING CANYON'S TESTIMONY SHOULD BE STRICKEN BECAUSE IT WAS FILED IN VIOLATION OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE.

A. Official Notice of Spring Canyon's Direct Testimony Is Improper Without Official Notice Being Taken of the Entire Record.

On August 27, 2004, Spring Canyon filed a two-page document captioned "Spring Canyon Energy LLC's Pre-Filed Direct Testimony Challenging the Results of PacifiCorp's RFP 2003-A." In this document, Spring Canyon stated that it was filing as its pre-filed direct testimony in the Lake Side proceeding, the pre-filed direct testimony of F. David Graeber and Theodore Banasiewicz from Docket No. 03-035-29, the Currant Creek proceeding. Spring Canyon stated that this testimony was attached, but it is Summit's understanding that the testimony was not in fact attached. Therefore, it appears that Spring Canyon actually asked the Commission to take official notice of the previously filed testimony. However, a party should not be allowed to pick and choose what portions of a record are to be officially noticed. Either the entire record should be officially noticed, which would unduly burden this proceeding, or the Commission should (a) deny Spring Canyon's request to only take official notice of the portions of the prior record it has chosen, and (b) strike Spring Canyon's testimony.

Pursuant to the Commission's rules of practice and procedure, the presiding officer in a proceeding may take administrative or official notice of a matter in conformance with Section 63-46b-8(1)(b)(iv). Utah Admin. Code R746-100-10.F.3. That statute allows official notice to be taken of "any facts that could be judicially noticed under the Utah Rules of Evidence, of the record of other proceedings before the agency, and of technical or scientific facts within the agency's specialized knowledge." Utah Code Ann. § 63-46b-8(1)(b)(iv).

Pursuant to the Utah Rules of Evidence, judicial notice may be taken of adjudicative facts and a judicially noticed fact "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Utah R. Evid. 201. Spring Canyon's testimony does not fit the definition of facts that could be judicially noticed under the Utah Rules of Evidence. Nor does the testimony qualify as technical or scientific facts within the agency's specialized knowledge. However, the testimony is a small portion of the record of another proceeding before the Commission.

Nevertheless, the rule states that the Commission may take official notice of "the record," not just a portion of the record that suits one particular party. Furthermore, the direct testimony of Spring Canyon's witnesses is not the full testimony of those witnesses. The witnesses were subjected to cross-examination and rebuttal and that additional testimony should also be included as a part of their testimony for purposes of taking official notice. It is patently unfair for a party to pick and choose those portions of a prior record that suits its interests for admission by official notice, without requiring all the relevant information to be noticed as well.

Spring Canyon has relied by inference on portions of evidence in a prior proceeding that suits its interests. If by doing so, Spring Canyon is requesting that official notice be taken of this evidence, the Commission should deny that request because the evidence is incomplete. As a result, the Commission should strike Spring Canyon's testimony in this matter.

B. Spring Canyon Failed to Serve Its Testimony on the Parties to this Matter and It Should Be Stricken.

Spring Canyon did not serve its testimony on all parties in this matter, in violation of the Utah Rules of Civil Procedure, and therefore, the testimony should be stricken. Pursuant to the Commission's rules of practice and procedure governing formal proceedings, the Utah Rules of Civil Procedure govern for situations in which there is no provision in the Commission's rules. Utah Admin. Code R746-100-1.C. The Commission's rules do not speak to service of pleadings, and prefiled written testimony is characterized in the rules as a pleading. Id. R746-100-10.G (requiring that prefiled written testimony be filed in conformance with the form of pleadings). Accordingly, Rule 5 of the Utah Rules of Civil Procedure should govern.

Rule 5 states that "every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper *shall* be served upon each of the parties." Utah R. Civ. P. 5(a)(1) (emphasis added). Summit was granted intervention in this proceeding on July 1, 2004. Thus, Summit is a party to this matter and should be served copies of all filings. Yet, Spring Canyon did not serve its testimony on Summit, and based on information and belief, Spring Canyon did not even serve its testimony on PacifiCorp, the applicant in this proceeding.

The only reason Summit discovered that Spring Canyon had filed testimony was because Summit had reason to converse with the Commission's office staff shortly after intervenor testimony was due in this proceeding. The Commission's office staff was also kind enough to

provide Summit with copies of Spring Canyon's testimony after Summit made this discovery. Otherwise, Summit may never have discovered that Spring Canyon had filed any testimony.

It is incumbent upon the parties to a docket to follow the rules of practice and procedure of this forum. Spring Canyon has appeared in proceedings before this Commission on prior occasions and should be familiar with the Commission's rules. It should not be the responsibility of the parties to track down filings by other parties. This would require all the parties to constantly call the Commission's office staff, which is an unnecessary burden to the parties as well as the Commission's staff. Therefore, Summit requests that Spring Canyon's testimony be stricken because it was filed in contravention of the Commission's rules of practice and procedure.

CONCLUSION

Based on the foregoing, Summit respectfully requests that the Commission strike the testimony filed August 27, 2004, by Spring Canyon in this matter.

DATED this _____ day of September, 2004.

_____

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of September, 2004, I caused to be hand-delivered, and/or e-mailed, a true and correct copy of the foregoing **SUMMIT VINEYARD'S MOTION TO STRIKE SPRING CANYON ENERGY'S TESTIMONY**, to:

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