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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of MidAmerican Energy Holdings Company and PacifiCorp dba Utah Power & Light Company for an Order Authorizing Proposed Transaction	Docket No. 05-035-54 RESPONSE OF APPLICANTS IN OPPOSITION TO PETITION FOR RECONSIDERATION OF DIXIE POWER-WATER-LIGHT & TELEPHONE, INC. AND DARRELL G. HAFEN
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MidAmerican Energy Holdings Company (“MEHC”) and PacifiCorp dba Utah Power & Light Company (“Utah Power”) (hereinafter jointly referred to as the “Applicants”) hereby respond in opposition to the petition for reconsideration (“Petition”) filed by Dixie Power-Water-Light & Telephone, Inc. and Darrell G. Hafen (hereinafter sometimes jointly referred to as “Dixie”) in this matter on February 16, 2006.¹ Dixie is not a party to this proceeding and has not alleged that it is a stockholder, bondholder or person pecuniarily interested in either of the Applicants. Accordingly, Dixie has no standing to seek reconsideration. In addition, Dixie’s

¹ Dixie did not serve the Petition on Applicants. Applicants only became aware of the Petition today.

vague reference to attempts to reach an agreement with Utah Power and “serious antitrust issues that have surfaced” provide no basis for the Commission to grant reconsideration. Accordingly, the Petition should be denied.

I. INTRODUCTION

On May 23, 2005, ScottishPower and PacifiCorp Holdings, Inc. reached an agreement for the sale of all Utah Power common stock to MEHC. Applicants filed their application in this matter on July 15, 2005, requesting authorization of this transaction. Several parties sought and were granted intervention. However, Dixie never sought intervention.

Following the filing of testimony and revised testimony by Applicants and extensive discovery of Applicants by other parties, Applicants, the Utah Division of Public Utilities, the Utah Committee of Consumer Services and nearly all active intervenors entered into a Stipulation that was filed on November 18, 2005. The Stipulation recommended authorization of the transaction subject to specified terms and conditions.

Based on the filing of the Stipulation, the Commission issued revised scheduling orders on November 17 and 28, 2005. Pursuant to those scheduling orders, testimony in support of the Stipulation was filed on December 2, 2005, a hearing was held on December 12 and a public witness hearing was held on December 13. Mr. Hafen appeared for himself and in behalf of Dixie at the public witness hearing and provided sworn testimony. Mr. Hafen’s testimony raised issues related to a transaction between him or Dixie and Union Pacific Railroad in or prior to 1960 involving national park concessions and his current efforts to have Dixie’s interests in a project referred to as the “Lake Powell Pipeline” protected. Neither Dixie nor any other party or public witness opposed approval of the Stipulation.

On January 27, 2006, the Commission issued its Report and Order (“Order”) approving

the Stipulation and authorizing the transaction. The Order concluded that “the proposed transaction, as modified by the stipulation and conditions contained therein, meets the net positive benefit standard enunciated by the Commission and is in the public interest.”²

On February 16, 2006, Dixie filed the Petition, which is a one-page, hand-written letter.

The Petition states:

While I have had meetings with Utah Power & Light there is no guarantee we will reach an agreement. Thus because of serious antitrust issues that have surfaced I am hereby requesting a formal motion for reconsideration and reconvening of the hearing dealing with the acquisition of PacifiCorp by Mid American Energy.

The Petition does not identify the nature of the agreement Dixie apparently believes it is negotiating with Utah Power or identify what serious antitrust issues have surfaced. Moreover, applicants are not aware of any negotiations between Dixie and Utah Power on any agreement. Applicants represent that any discussions with Mr. Hafen have been offered in an effort to understand what Dixie’s issues are and explain that they are not related to Utah Power or the transaction in this matter.

II. ARGUMENT

A. DIXIE LACKS STANDING TO SEEK RECONSIDERATION.

Seeking review of an administrative order requires party standing, and a petitioner bears the burden of proof that it has such standing.³ Standing is typically obtained through appropriate

² Order at 15.

³ See, e.g., *KERM, Inc. v. F.C.C.*, 353 F.3d 57, 59 (D.C. Cir. 2004) (“A petitioner [for review of agency action] bears the burden of establishing its standing.”); *Redwood Gym v. Salt Lake County Commission*, 624 P.2d 1138, 1145 (Utah 1981) (“In the instant case, plaintiffs have not shown, by stipulation, affidavit, or otherwise, that any one of the massage parlors seeking declaratory relief below employed 25 or more individuals. Therefore, plaintiffs have failed to demonstrate standing to challenge the application of the Anti-discrimination Act, as it does not appear that any of their number is an ‘employer’ for purposes of the statute.”).

intervention,⁴ which Dixie did not seek in this case. And although section 54-7-15 does contain what might be interpreted as an additional grant of standing to non-parties, if the person seeking reconsideration is a “stockholder, bondholder, or other person pecuniarily interested in the public utility,”⁵ Dixie has not even attempted to demonstrate that it satisfies the requirements of section 54-7-15. Rather, Dixie has failed to do anything to attempt to meet its burden to establish its standing to seek reconsideration.⁶

In the absence of standing to seek reconsideration of the Order, the Petition must be denied. In light of this fact, it is respectfully submitted that the Commission should deny reconsideration on this ground without reaching the vague argument raised by Dixie. Nonetheless, Applicants will demonstrate that the argument raised by Dixie also does not warrant reconsideration of the Order.

B. THE COMMISSION HAS ALREADY APPROPRIATELY CONSIDERED THE ISSUES RAISED BY DIXIE.

In challenges to agency actions, “the party challenging the action carries the burden of demonstrating its impropriety.”⁷ In order to warrant reconsideration once the Commission has issued an order, a petitioner needs to demonstrate that there was some essential legal or factual error by the Commission, or that previously undiscoverable evidence has been located that would

⁴ See Utah Code Ann. § 63-46b-9; Utah Admin. Code R746-100-7.

⁵ Utah Code Ann. § 54-7-15(1).

⁶ See, e.g., *Bord v. Banco de Chile*, 205 F.Supp.2d 521, 523 (E.D. Va. 2002) (“The burden of proving that standing exists rests with the Plaintiff and must be supported by sufficient evidence.”); *Harris v. Zoning Comm’n of Town of New Milford*, 788 A.2d 1239, 1246 (Conn. 2002) (“It is . . . fundamental that, in order to have standing to bring an administrative appeal, a person must be aggrieved. . . . Aggrievement presents a question of fact for the trial court and the party alleging aggrievement bears the burden of proving it.”).

⁷ *Kelly v. Salt Lake City Civil Service Comm’n*, 2000 UT App 235, ¶ 30, 308 P.3d 1048, 1056 (quoting *SEMECO Indus. v. State Tax Comm’n*, 849 P.2d 1167, 1174 (Utah 1993) (Durham, J., dissenting)).

support a different outcome.⁸ Rehearing or reconsideration is not warranted, however, where the petition merely seeks to reargue issues without establishing error.⁹

The Petition does not identify any claimed error in the Order. In addition, the Petition does not identify any new evidence, much less explain why that evidence could not have been presented at the hearings in December. It is apparent that the basis for the Petition is the same issues raised by Mr. Hafen in his public witness testimony. Those issues clearly have no relevance to this proceeding and provide no basis for the Commission to reconsider the Order. The Commission considered Mr. Hafen's public witness testimony before it issued the Order. Nothing in the Petition raises any issue not previously considered by the Commission or undermines the Order in the least.

III. CONCLUSION

Dixie's Petition should be denied because Dixie lacks standing to seek reconsideration and because the Petition fails to identify any error in the Order or provide any basis for reconsideration. Applicants respectfully request that the Commission deny the Petition.

⁸ See, e.g., *Taylor, Taylor v. Public Service Comm'n*, No. 20030694-CA, 2005 WL 615164, *1 (Ut. Ct. App. Mar. 17, 2005) (upholding the Commission's refusal to grant rehearing where "[appellant] provided no explanation as to why the 'new' evidence or similar evidence was not available at the May 29, 2003 hearing, or why he could not have introduced this material during the May hearing."); *Garner v. Thomas*, 78 P.2d 529, 530 (Utah 1938) ("As a general rule courts will not grant rehearings to consider questions which could have been urged in the first hearing but were not") (Wolfe, J., Concurring); Order No. 23,543, *In re LOV Water Co.*, DW 99-119, 2000 WL 1531619 (N.H. P.U.C. Aug. 11, 2000) ("We are not required to grant a rehearing so that a party has a second chance to present evidence that it could have presented earlier.").

⁹ See, e.g., Order No. 23,766, *In re Holiday Acres Water and Wastewater Services*, DW 01-027, 2001 WL 1568405 (N.H. P.U.C. Aug. 24, 2001) ("The fact that the Parties are unhappy with [the order] or disagree with the Commission is not sufficient good reason for reconsideration or rehearing, nor does it follow that we erred in our findings and rulings on the law.") (internal quotation omitted).

RESPECTFULLY SUBMITTED: June 27, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **RESPONSE OF APPLICANTS IN OPPOSITION TO PETITION FOR RECONSIDERATION OF DIXIE POWER-WATER-LIGHT & TELEPHONE, INC. AND DARRELL G. HAFEN AND REQUEST FOR EXPEDITED CONSIDERATION** to be served upon the following via electronic mail or United States mail, postage prepaid, at the addresses below on June 27, 2017:

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