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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE APPLICATION OF UTAH POWER & LIGHT COMPANY, AND PC/UP&L MERGING, CORP. (TO BE RENAMED PACIFICORP) FOR AN ORDER AUTHORIZING THE MERGER OF UTAH POWER & LIGHT COMPANY AND PACIFICORP INTO PC/UP&L MERGING CORP. AND AUTHORIZING THE ISSUANCE OF SECURITIES, ADOPTION OF TARIFFS, AND TRANSFER OF CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND AUTHORITIES IN IN CONNECTION THEREWITH.	Docket No. 87-035-27

RESPONSE OF APPLICANTS TO CREDA'S MOTION FOR RECONSIDERATION

Applicants, Utah Power & Light Company and PC/UP&L Merging Corp. ("PacifiCorp"), pursuant to Rule R750-100-10F of the Rules of Practice and Procedure of the Commission, respond to the motion for reconsideration filed by CREDA to the Order

on Intervention entered by this Commission on the 30th day of October, 1987. The applicable Commission rule does not provide for a motion for reconsideration, it specifically provides for review or rehearing. Applicants therefore regard CREDA's motion as a petition for rehearing. Applicants oppose CREDA's motion for reconsideration.

I.

THE COMMISSION'S ORDER ON INTERVENTION PROPERLY DENIED CREDA'S INTERVENTION IN THIS CASE

A. Intervention in a regulatory proceeding is discretionary.

It is a generally accepted rule that unless a party is entitled to intervene as a matter of statutory right, intervention in an agency proceeding is a matter left to the agency's discretion. The Supreme Court of Hawaii stated in Application of Hawaiian Electric Co., Inc., 535 P.2d 1102, 1104 (Hawaii 1975):

> Intervention as a party in a proceeding before the PUC is not a matter of right but is a matter resting within the sound discretion of the commission. . . . This is generally true in proceedings before administrative agencies. (Citations omitted).

Other jurisdictions have come to a similar conclusion.[1]

B. The Commission's Order.

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[1]Gary Transit, Inc. v. Pub. Serv. Comm'n of Ind., 314 N.E.2d 88 (Ind. Ct. App. 1974); Toohey v. Simmons, 17 N.E.2d 269 (Ohio 1938); Borough of Moosic v. Pa. Pub. Util. Comm'n, 429 A.2d 1237 (Pa. Commw. Ct. 1981).

In the Commission's Order on Intervention of October 30, 1987, the Commission denied CREDA's intervention for the following reasons:

> We are of the view that CREDA as a whole does not belong in this case inasmuch as we do not intend to take up interstate matters which belong to other jurisdictions such as the FERC and the DOJ. Its presence in this case would likely lead to a major expansion of the issues before us. We do not believe that such expansion is consistent with administrative efficiency. Furthermore, CREDA lacks a direct and substantial interest in this case. At the same time it is evident that Utah members of CREDA may have a sufficient interest in this case to participate by themselves.

In this Order, the Commission has ruled consistently with its five prong test set forth in its order in the Simonelli case of December 9, 1986.[2] Similar tests for intervention before regulatory bodies have been utilized and affirmed by reviewing courts in other jurisdictions, in particular, by the Interstate Commerce Commission in American Trucking Ass'ns, Inc. v. United States, 627 F.2d 1313 (D.C. Cir. 1980).

There is no indication that the Commission abused its discretion in applying its five prong test to CREDA's initial

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[2]The test is (1) whether a statutory right of intervention exists, (2) whether a direct vis-a-vis indirect, interest is demonstrated in the outcome of the proceeding, (3) is there a substantial interest in the proceedings' outcome, (4) assuming a direct or substantial interest, is that interest unique or is it already represented and protected by a party, and (5) will the issues in the case be broadened by the intervention.

petition for intervention. The application of the test to CREDA was appropriate and the Commission's rationale for denial of the petition for intervention was set forth in its order.

II.

CREDA'S ARGUMENTS IN ITS MOTION FOR RECONSIDERATION ARE SUBSTANTIALLY SIMILAR TO THOSE IN ITS INITIAL PETITION FOR INTERVENTION

CREDA's motion for reconsideration restates the same facts which it cited earlier in its attempt to intervene. Petitions for rehearing which merely recite arguments made at the original hearing or which do not contend that the court or agency overlooked or misapprehended an original argument are not favored and should be generally denied. Edwards v. Clark, 96 Utah 140, 85 P.2d 768 (1938); Panagopulos v. Manning, 93 Utah 215, 72 P.2d 456 (1937).[3]

CREDA begins its reargument by stating that it has a direct and substantial interest, that its interest is unique and that its presence in the matter will not broaden the

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[3]Other jurisdictions have more recently addressed this issue and reached the same result. See Board of Trustees of Weston Cty. v. Holso, 587 P.2d 203 (Wyo. 1978). See also, McComb v. Stanolind Oil & Gas Co., 191 P.2d 743 (Kan. 1948); In re Peterson's Estate, 306 P.2d 121, (Nev. 1957); Rule 35(a) of the Rules of the Utah Supreme Court also state that a petition for rehearing "shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended and shall contain such arguments in support of such petition as the petitioner so desires."

issues. Each of these arguments were presented in CREDA's initial petition and in its oral argument before the Commission. The new argument of CREDA is not substantially different than its earlier argument.

CREDA's argument that the Commission may still evaluate transmission, wholesale rates, or wheeling in order to determine whether the proposed merger is in the public interest is not a new or different argument. As the Commission has already expressed in its order, interstate issues such as transmission, wholesale rates and wheeling are properly addressed in other jurisdictions. This is in harmony with other decisions. The Illinois Supreme Court has held, in Ellis v. Illinois Commerce Comm'n, 255 N.E.2d 417 (Ill. 1970), that intervention will be denied petitioners when issues they seek to address are properly heard by a federal agency which has exclusive jurisdiction in those matters. In Ellis, the commission regulating utilities in Illinois determined that the Securities Exchange Commission had jurisdiction over a specific stock transaction involving a public utility and, therefore, the complaining shareholders could not intervene for the purpose of introducing issues which were properly under the auspices of the SEC. CREDA's motion for reconsideration asks this Commission to broaden the scope of its hearing to consider the potential effects of the merger in reference to federal issues affecting the "entire Western

United States."[4]

The Commission specifically denied CREDA's intervention because it did not want to address issues that were already being addressed before federal bodies and did not desire to broaden this proceeding to address issues not under its jurisdiction or not apposite to Utah utilities or rate payers. CREDA's argument in its motion for reconsideration adds nothing to what was forwarded earlier.

The granting of a rehearing by a utility commission is "in the discretion of the agency and will be interfered with only for a clear abuse of such discretion." Utah Power & Light Co. v. Pub. Serv. Comm'n. of Wyo., 713 P.2d 240, 244 (Wyo. 1986).[5]

The Wyoming Supreme Court defined an abuse of discretion as follows:

> The court does not abuse its discretion unless it acts in a manner which exceeds the bounds of reason under the circumstances. In determining whether there has been an abuse of discretion, the issue is whether or not the court could reasonably conclude as it did. An abuse of discretion has been said to mean an error of law committed by the court under the circumstances.

Id.

CREDA has presented no argument, fact or statement of

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[4]See CREDA's motion at p. 12.

[5]This proposition is supported by appellate courts in other jurisdictions. See Dyke Water Co. v. Pub. Utilities Comm'n, 363 P.2d 326 (Cal. 1961); Pittsburgh Rys. Co. v. Pa. Pub. Util. Comm'n., 119 A.2d 804 (Pa. Super. Ct. 1956).

law which indicates that the Commission overlooked, misapprehended, or erred in its denial of CREDA's petition for intervention. Therefore, it is within the discretion of the Commission to deny its motion for reconsideration.

III.

CREDA IS NOT CONSTITUTIONALLY ENTITLED TO INTERVENE

CREDA maintains that by denying its petition for intervention its due process rights will be violated. CREDA begins its constitutional argument by stating that due process applies to administrative as well as judicial proceedings. Entre Nous Club v. Toronto, 4 Utah 2d 98, 287 P.2d 670, 672 (1955). Entre Nous did not involve a petition for intervention, it simply stated that in order to satisfy due process, an administrative hearing must be at a reasonable time and place, with notice given to interested parties, and a reasonable opportunity for presenting evidence. It is a general statement of law which governs the procedural aspects of administrative hearings.

The balance of the cases cited by CREDA do not address the due process issue. See Virginia Petroleum Jobbers Ass'n. v. Federal Power Comm'n, 265 F.2d 364 (D.C. Cir. 1959); S.M. Gaddis v. Great Northern Ry Co., 284 F.2d 524 (9th Cir. 1960); McCarthy v. Pub. Serv. Comm'n of Utah, 94 Utah 304, 77 P.2d 331 (1938); Ventura County Water Works v. Pub. Utilities Comm'n, 393 P.2d 168 (Cal. 1964). Rather, all of these are

cases in which regulatory commissions have allowed direct competitors to intervene to protect their certificated rights.

In the instant case, CREDA itself is not a competitor of the Applicants. Several individual members of CREDA do business with the Applicants or may be considered competitors of the Applicants. These members of CREDA who do business in Utah have been admitted as intervenors.

In other jurisdictions, intervention has been denied to associations, even when association members may individually have substantial and specific interests. In In re Mason, 342 A.2d 219 (N.J. Ct. App. 1975), a New Jersey court noted that an association of waste collectors, the Solid Waste Industry Council, had no right to intervene in the application of a party to become a waste collector. The court stated that the New Jersey statute

> limits intervention to persons showing that "they may be substantially and specifically" affected by the proceedings. SWIC is simply an organization of solid waste collectors. As distinguished by its members, it has no direct or specific interest in the proceedings. Any interest it may have appears to be a general one and derived from its individual members.

Id. at 222.

By analogy, CREDA derives its interest through its Utah members who have been admitted to intervene. Any interest that CREDA may have is only general and derivative. CREDA has

no direct and substantial interest in Utah.[6]

In its motion for reconsideration, CREDA reargues that it is uniquely situated to present certain issues to the Commission because of its composition as a regional organization. This argument has been dealt with above in Point II. CREDA goes on to declare that despite the fact all Utah members of CREDA have been admitted individually as intervenors, these local members will not be able to adequately represent the interest and views of CREDA members as a whole, particularly those outside Utah. This argument creates a dilemna for CREDA, either its members have different interests or the same interests. If they have different interests, CREDA cannot properly represent all of its members in this proceeding; if they have the same interest, there is no need to allow CREDA to intervene.

Courts have determined that it is inappropriate to admit entities who have interests identical to parties already admitted in an agency proceeding. In Toledo Coalition for

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[6]See also N.A.A.C.P., Inc. v. Pa. Pub. Util. Comm'n, 290 A.2d 704 (Pa. Commw. 1972) (in which a Pennsylvania court held that its public service commission had not abused its discretion in denying intervention to the NAACP which sought to challenge a Pennsylvania utility's discriminatory pay practices in a rate hearing, because the discriminatory pay practices of the utility were beyond the power of the commission to regulate). This same rationale can be applied to CREDA inasmuch as it is seeking intervention to discuss issues that this commission does not have jurisdiction to determine: wholesale rates, interstate transmission and wheeling.

Safe Energy v. Pub. Util. Comm'n of Ohio, 433 N.E.2d 212 (Ohio 1982), the Ohio Supreme Court held that when no specific showing as to evidence or information is made by a party who appears to have identical interests to parties already admitted in a matter, such a party will not be allowed to intervene. The Ohio court went on to state:

> When the interests of a party and prospective intervenor are virtually identical, we believe that the prospective intervenor, as one prerequisite to intervention, must make a compelling showing that the party already participating in the proceeding can not or will not adequately represent the prospective intervenor's interest. (Emphasis added)

Id. at 215.

In order to be entitled to intervention, CREDA must make a compelling showing that its Utah members will not adequately represent its interests in the State of Utah. No showing is made by CREDA other than a suggestion that because CREDA is a regional organization, it is uniquely qualified to bring matters of a regional "interest" to the Commission's attention. However, the Commission has already determined that it does not want to address these issues inasmuch as they are being properly addressed in other jurisdictions.

IV.

CONCLUSION

The Commission's Order of Intervention was proper. CREDA reargues points that were unsuccessfully forwarded earlier, and its only new issue, due process, is not supported

by authorities cited in its motion for reconsideration. The moiton should be denied.

RESPECTFULLY SUBMITTED this 2nd day of December 1987.

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IN THE MATTER OF THE APPLICATION OF UTAH POWER & LIGHT COMPANY, AND PC/UP&L MERGING CORP. (TO BE RENAMED PACIFICORP) FOR AN ORDER AUTHORIZING THE MERGER OF UTAH POWER & LIGHT COMPANY AND PACIFICORP INTO PC/UP&L MERGING CORP. AND AUTHORIZING THE ISSUANCE OF SECURITIES, ADOPTION OF TARIFFS, AND TRANSFER OF CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND AUTHORITIES IN CONNECTION THEREWITH.	:	Docket No. 87-035-27

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the RESPONSE OF APPLICANT'S TO CREDA'S MOTION FOR RECONSIDERATION, dated December 3, 1987, were hand delivered to the following on this 3rd day of December, 1987:

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