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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of PacifiCorp
and Scottish Power plc for an Order
Approving the Issuance of PacifiCorp
Common Stock.

DOCKET NO. 98-2035-04

**APPLICANTS' MOTION TO
STRIKE PORTIONS OF THE
PREFILED DIRECT
TESTIMONY OF TOM DOLAN**

PacifiCorp and Scottish Power plc (“Applicants”), by and through their attorneys of record, hereby move the Public Service Commission of Utah (“Commission”) to strike the following portions of the prefiled direct testimony of Tom Dolan dated June 17, 1999 filed on behalf of the Utah League of Cities and Towns in the above-referenced docket: page 6, the question and answer relating to reopening current franchise agreements, and No. 4 on page 9.

BACKGROUND

The portion of Mr. Dolan's testimony noted above addresses one issue which should not be considered by the Commission in this docket. This issue is Mr. Dolan's recommendation that the Commission condition the merger upon ScottishPower being required to acquire municipal consents, franchises or permits to operate in the municipal rights-of-way; reopening the franchise agreements with the municipalities where PacifiCorp provides service.

STANDARD

The Commission issued an Interim Order in this proceeding, dated May 10, 1999, requiring that the parties demonstrate why issues presented in their testimony should be considered in this docket.

ARGUMENT

1. **Relevancy.** Mr. Dolan has failed to meet the burden the Commission has established in its Order relating to reopening current franchise agreements. Reopening franchise agreements is a matter which is irrelevant to this proceeding and should not be considered by the Commission in this docket. The identified testimony should be stricken because Mr. Dolan has attempted to interject into this proceeding an issue which is governed by contract and constitutional law should be handled in another forum. The focus of this proceeding should be on the ScottishPower/PacifiCorp transaction and matters which are centrally related to the merger which is simply the transfer of the stock of PacifiCorp.

2. **Commission Jurisdiction.** The Commission does not determine matters relating to franchise agreements or issue orders regarding the terms and conditions of these contracts. These issues are within the jurisdiction of the courts. The Utah Supreme Court has held that claims predominantly in tort or in contract are beyond the primary jurisdiction of the Commission. In *Atkin Wright & Miles v. Mountain State Telephone and Telegraph*, 709 P.2d 330 (Utah 1985), the court held that “[a] utility’s actions which give rise to tortious or contractual liability and which do not call in question the validity of orders of the Commission or trench upon its delegated powers are subject to the jurisdiction of the district court.” *Id.* at 334 (citing to *Garkane Power Assoc. v. Public Service Comm’n*, 681 P.2d 1196, 1207 (Utah 1984)). In any event, ScottishPower has committed to honor its contractual obligations.

The franchise agreements are within the municipalities’ authority and not the Commission. Municipalities have the constitutional power to provide public utility services within their boundaries. See UTAH CONST. art. XII, § 5(b). As an exercise of this power, the cities may grant franchises to public utilities, which are essentially contracts granting the utility permission to provide service within their boundaries. See UTAH CONST. art. XII, § 8, and UTAH CODE ANN. § 54-4-25(4)(a) 1998.

The Utah Supreme Court has held that franchise agreements are within the exclusive control of municipalities and not within the jurisdiction of the Commission. In *Union Pacific R. Co. v. Public Service Comm’n*, 134 P.2d 469 (Utah 1943),¹ the court stated:

¹ The essential facts to the case are as follows: Ogden City granted a franchise to a railroad company to build a spur line up Second Street. Nearly fifty years later, Ogden revoked the franchise. The Commission issued an order, requiring the railroad company to keep

[T]he Commission suggests that even though a franchise might be binding as between the city and grantee, [public utility] that nevertheless the Commission within the scope of its functions might issue a conflicting order that would take precedence over the terms of the franchise. That, as we have noted, is true with respect to rates, and other matters over which the Commission has exclusive jurisdiction. It is not true, however, with respect to the matter of franchises granted by municipalities for the special use of their streets. As we have already pointed out, the power to grant such franchises is not a naked one. There is attached to it, to make it effective, the power of continuing control, and that control is exclusive. It is not, within the scope of the effective legislative enactments, shared concurrently with the Commission, nor is the consent of the Commission necessary to the exercise by the municipalities of its proper rights with the terms of the franchise.

Id. at 476. Thus, the court concluded that the Commission, when it attempted to issue an order regarding a franchise that did not deal with rates, “was acting without and in excess of its jurisdiction” Id. at 477. The court struck down the order. Id. The Commission should not deal with franchise issues.

3. **Commission Authority to Exclude Evidence.** The Commission has the authority to exclude issues which are irrelevant to this proceeding. The Administrative Procedures Act (“APA”), Utah Code Ann. § 63-46b-8(1)(b), provides as follows:

On his own motion or upon objection by a party, the presiding officer: (i) may exclude evidence that is irrelevant, immaterial, or unduly repetitious

The Commission has granted a Motion to Strike testimony that was irrelevant to the proceeding citing to the APA, Utah Code Ann. § 63-46b-8(1)(b)(I), See U.S. West Communication, Inc., 1994 WL 400918, PUR Slip Copy. In that docket, the Commission considered whether the proposed sale of a telephone exchange was in the public interest. The Commission excluded testimony regarding the history of the exchange, the attempts to serve the area, circumstances of

operating the spur line. Thus the Commission’s order was in direct conflict to Ogden’s actions regarding the franchise.

the sale of other telephone exchanges, and the cost estimates for construction of a new system in the telephone exchange. Also, in Mountain Fuel Supply v. PSC, 861 P.2d 414 (Utah, 1993), the Utah Supreme Court upheld the Commission's decision to exclude evidence regarding a future test year stating that:

Under the APA, the Commission has the discretion to exclude "irrelevant, immaterial, or unduly repetitious" evidence. Utah Code Ann. § 63-46b-8(1)(b)(i); see also Utah R. Evid. 403.

The Commission has the statutory authority to exclude irrelevant evidence, which it has exercised previously. The Utah Supreme Court has upheld the Commission's use of its authority to exclude evidence. The reopening of franchise agreements with municipalities is irrelevant to this proceeding. The Commission should strike the testimony related to that issue.

NOW THEREFORE, the Applicants respectfully request that the Commission strike the portions of the testimony of Mr. Dolan set forth above for the following reasons:

1. Issues regarding franchise agreements are irrelevant to the ScottishPower/PacifiCorp transaction and should not be considered in this proceeding.
2. The Commission has no jurisdiction regarding franchise agreements with municipalities.
3. The Commission has the statutory authority to exclude irrelevant issues in this proceeding and should strike the portions of the testimony of Mr. Dolan's identified above.

DATED this ____ day of July, 1999.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing ***APPLICANTS' MOTION TO STRIKE PORTIONS OF THE PREFILED DIRECT TESTIMONY OF TOM DOLAN*** to be served upon the following persons via Federal Express or by mailing a true and correct copy of the same, postage prepaid, to the following on March 20, 2012:

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