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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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| In the Matter of the Application of PACIFICORP for Approval of Its Proposed Electric Rate Schedules & Electric Service Regulations, | Docket No. 01-035-01 |

# REPLY MEMORANDUM IN SUPPORT OF UIEC AND UAE'S MOTION FOR RECONSIDERATION OF PROTECTIVE ORDER

The Utah Industrial Energy Consumers ("UIEC") and the UAE Intervention Group ("UAE") (collectively "Petitioners") hereby submit this Memorandum in Reply to PacifiCorp's Opposition to the UIEC and UAE's Motion for Reconsideration of Protective Order issued in this docket by the Public Service Commission ("Commission") on January 24, 2001 (the "Protective Order").

1. Petitioners filed their Request for Reconsideration of the Protective Order on January 30, 2001, seeking a revision of provisions in the Order that (1) preclude the use of confidential information in any proceeding other than the docket in which the information was

produced; (2) prohibit attorneys and consultants from obtaining copies or making verbatim notes of information designated as "highly sensitive" and (3) require attorney and consultant notes of "highly sensitive" information to be turned over to the producing party.

2. Petitioners also object to the designation of any information as "highly sensitive" because (1) there is no standard for deciding when a "highly sensitive" designation is appropriate; (2) the kind of information produced by PacifiCorp is not the kind that usually warrants enhanced protection; and (3) even if it were, and even if there were a standard, the producing party should be required to bear the initial burden of showing that the standard has been met before receiving enhanced protection for such information.

3. On February 9, 2001, PacifiCorp (or the "Company") filed a Memorandum in Opposition to Petitioners' for Reconsideration of the Protective Order (PacifiCorp's "Opposition"). PacifiCorp's first argument in its Opposition is that Protective Order issued in this case is "identical to" the Protective Order entered by the Commission in the last two PacifiCorp rate cases, Docket Nos. 99-035-10 and 97-035-01, and in the Scottish Power/PacifiCorp merger case (Docket No. 98-2038-04). PacifiCorp contends that because it has handled confidential information in this manner since the Scottish Power merger, it must be acceptable. This argument is factually incorrect and logically flawed.

4. Although the UIEC and UAE have complained about the protective order formally for the first time in the present docket, Petitioners have resisted the Company's treatment of confidential information since they first encountered the pink paper in the merger docket. See Transcript of Hearing, Docket No. 98-2035-04 at 1475-81; UIEC's Post-hearing

Brief, Docket No. 98-2035-04 at 11-12, 25-26 (September 3, 1999); Report and Order, Docket No. 98-2035-04 at ¶ V.6 (November 23, 1999) (requiring the merged company to retain certain records produced as "highly confidential" documents). In the merger docket, the UIEC and the Company agreed to certain modifications of the Protective Order. Letter Agreement, February 26, 1999, Docket No. 98-2035-04. Since that time, whenever necessary, Petitioners have made efforts to avoid unreasonable restrictions in the use of confidential information. In the present case, Petitioners and the Company have agreed that PacifiCorp will produce certain confidential information under a letter agreement instead of the Protective Order. At least with respect to Petitioners, it is simply incorrect to imply the Protective Order has governed the treatment of confidential information since the merger case.

5. Even assuming the Protective Order had controlled the production of confidential information, that does not mean that it is reasonable or that it should not be modified. PacifiCorp points out that the Commission has discretion to fashion a Protective Order with a wide range of alternative means of protecting confidential information. Petitioners agree. For that very reason, past protective orders are neither binding on the Commission in future dockets, nor do they represent the only reasonable method to deal with confidential information. The Protective Order can and should be modified to correct the unreasonable restrictions of which Petitioners complain.

6. Petitioners object to the language in the present Protective Order that prohibits use of confidential information in any docket other then the present docket. They contend it is unreasonable to require them, for example, to request information in the Deferred Accounting

docket, request it again in the present docket and request it a third time in the Restructuring Docket. Not only is it burdensome to require an intervenor to repeatedly request the same information, requiring the return of confidential information at the end of every case increases the likelihood that relevant documents from earlier proceedings will be lost or destroyed, or that PacifiCorp will misplace or send back to Scotland information it knows an intervener is likely to request again.[1] Petitioners, for example, will continue to contest the treatment of upstream tax savings due to the merger and will continue to request documents that were initially produced in the Merger Docket. Counsel for Petitioners' should be allowed to retain and, with adequate notice to the Company, use information obtained in that case.

7. PacifiCorp has been unable to articulate any valid reason that it should require three sets of data requests in three different dockets requesting exactly the same information. PacifiCorp contends, without support, that information would lose its confidential nature if used in another proceeding. The notion is absurd. In proceedings before the Commission, the same information is often used from one docket to the next without compromising its confidentiality. The Protective Order itself provides a mechanism for the DPU and the CCS to retain and use

[1] On January 19, 2001 in the present docket, the UIEC served a data request on PacifiCorp requesting all of the documents claimed to contain "highly sensitive" Confidential Information that PacifiCorp and Scottish Power produced on pink paper in the Merger Case (Docket No. 98-2035-04). UIEC Data Request 3.7-3.8. PacifiCorp's responded that it could not identify those documents, despite the Commission having explicitly ordered the Company to retain those very documents and make them available to parties in subsequent proceedings. Report and Order, Docket 98-2035-04, at ¶V.6 (Nov. 23, 1999). On January 26, 2001, the UIEC had to re-serve on PacifiCorp, PacifiCorp and Scottish Power's own responses to the UIEC's data requests served in the Merger Docket. Evidently, PacifiCorp failed to preserve those documents in a way that they could be produced in a subsequent proceeding. Moreover, despite additional verbal requests, as of February 16, 2001, PacifiCorp still had not produced those documents.

confidential information in subsequent proceedings. Protective Order at 3(e). Merely allowing a party to retain it does not change its confidential nature.

8. PacifiCorp apparently is worried that if counsel for Petitioners are allowed the same privilege as regulators, they may use the information in representing competitors of PacifiCorp. PacifiCorp obviously has misunderstood Petitioners' objection. Petitioners have never proposed that they should be allowed to use confidential information in any way they choose. In addition, Petitioners do not contend that confidential information should be made available to individuals who are in a position to gain a competitive advantage from it, only that counsel and consultants should be allowed to retain it from one docket to the next subject to ongoing prohibition against disclosure. PacifiCorp's suggestion that Petitioners' counsel would make confidential information available to PacifiCorp's competitors either belies a misunderstanding of Petitioners' objection, or constitutes an entirely unfounded accusation against the integrity of counsel.

9. Petitioners propose that their counsel and experts be bound by the same restrictions placed on the Division of Public Utilities and the Committee of Consumer Services, namely, that if Petitioners desire to use retained confidential information for any other purpose or in any other proceeding than that for which is was produced, they must notify the Company of their intention to do so. The information would remain confidential and subject to the non-disclosure provisions of the protective orders in both the first and second dockets. It is difficult to see how PacifiCorp could be harmed if it had notice of Petitioners' intention to reuse the confidential information and an opportunity to obtain an order preventing further use.

10. PacifiCorp has agreed that Petitioners should not be required to turn over to PacifiCorp attorney and consultant notes containing confidential information. Opposition at 5. Instead, PacifiCorp proposes that notes be destroyed at the end of the proceeding. Id. Petitioners object to destroying notes of counsel and experts for the same reason that they object to returning confidential documents that are relevant in parallel or subsequent dockets. The potential for harm to PacifiCorp from retention of notes is even more remote than for the confidential documents themselves. At the same time, the burden on Petitioners is greater because in the next case, attorneys and consultants will have to not only request the confidential documents again, but they also will have to go to the time and expense of regenerating their work product. The restriction requiring destruction of notes therefore is both unnecessary and burdensome.

11. PacifiCorp also has evidently misunderstood Petitioners' position on their second objection to the Protective Order, that is, the designation and use of "highly sensitive" confidential information. Under the current Protective Order, Petitioners object to *any* information being designated "highly sensitive."

12. The designation of "highly sensitive" is usually applied to information such as a secret recipe or formula that "is so proprietary or competitively sensitive, that its disclosure to a competitor would cause irreparable harm or competitive injury." United States of America v. Philip Morris Incorporated, 2000 WL 1876452, at 1 (D.D.C., Nov. 15, 2000)(secret formula for tobacco products deemed highly sensitive). Pricing information, financial projections and marketing strategies do not warrant the same level of protection as formula information. E.g., Sullivan Marketing, Inc. v. Valassis Communications, Inc., 1994 WL 177795 (S.D.N.Y. 1994).

When pricing or marketing information is produced, the critical issue becomes whether a potential recipient is in a position to use the information to gain a competitive advantage. See id. at 2 (pricing and marketing information restricted to outside counsel, consultants and those who would not be in a position of "competitive decision making"). The kind of information that PacifiCorp claims to be "highly sensitive" is financial and marketing information. While Petitioners agree that disclosure to competitors conceivably could cause harm PacifiCorp's standing in financial markets, disclosure to regulators or customers of the utility is unlikely to cause irreparable harm or competitive injury. Disclosure to outside counsel and consultants representing customers is even less likely to cause harm.

13. PacifiCorp has never defined what should be considered "highly sensitive" information; it has never shown how disclosure could cause irreparable harm; it has never demonstrated that restrictions already in the Protective Order pertaining to "confidential information" would be inadequate to address such potential harm; and it has not shown, and very likely never could show, that a restriction on outside counsel and consultants having copies serves to protect any legitimate interest. In the absence of any definition of "highly sensitive" and any explanation of why a prohibition on copying is necessary, the restriction is patently unreasonable.

14. PacifiCorp's Opposition seems to miss the point of Petitioners' objection to the prohibition on obtaining copies. PacifiCorp cites a number of cases to support its contention that a designation of information "for attorneys' eyes only" is "routinely" accepted by the courts. Opposition at 6. PacifiCorp blithely presumes that a restriction "for attorney eyes only" is less

burdensome than altogether withholding copies of the sensitive information from attorneys and experts. It views the copying restriction as "minimal." Opposition at 5. Petitioners disagree for several reasons. First, the cases on which PacifiCorp relied in their Opposition regarding the "attorneys' eyes only" restriction involved protective orders that also allowed a party's outside experts to have access. "Attorneys' eyes only" thus usually means attorneys and their expert witnesses. Second, The refusal to allow copies or verbatim notes is not a minimal restriction. It has been a material impediment to discovering and analyzing essential data in the last two proceedings. See Memorandum in Support at 4-5. It has also impeded interveners in their efforts to present evidence at hearing. In the present case, Petitioners have requested the same kind of data that PacifiCorp designated as "highly sensitive" in prior cases. They will again face the problem of how their out-of-state experts will gain meaningful access to documents that can only be viewed at Stoel Rives' offices in Salt Lake City, and how they will prepare exhibits and present their case. An "attorneys' eyes only" restriction would be much less restrictive than the prohibition on copying.

15. In addition, PacifiCorp's reliance on the "attorneys' eyes only" cases is misplaced. Those cases dealt with preventing one competitor from discovering the trade secrets of its rival. The courts upheld protective orders that prohibited disclosure of trade secrets or commercially sensitive documents from employees of parties (or from in-house counsel for parties), who were in a position to use the information for competitive advantage. In the present case, PacifiCorp seeks to prevent disclosure not of trade secrets, but of financial information, and to keep it secret not from PacifiCorp's competitors, but from regulators, customers and their

attorneys outside experts. Finally, in all of the cases cited, the issue was whether certain persons should be given access, not whether persons with access should be given copies. PacifiCorp has not cited a single case where a prohibition on copying was even proposed, much less imposed, as a reasonable measure to prevent disclosure. Nor has it shown that imposing it in this case is necessary to prevent confidential information from falling into the hands of competitors or otherwise causing harm.

16. PacifiCorp is a public utility and a monopoly provider of retail electric service. As such, the Commission should begin with a presumption that all information relevant to setting retail rates is subject to public scrutiny. The Commission should then balance the burden on the parties with the legitimate interests of the Company to prevent harm. Petitioners do not argue that there should be no confidential information. But, only information that can cause harm should be protected, and the means of protection should be no more restrictive than necessary to prevent the harm.

17. Under the current Protective Order, the Company, at its whim, can keep any document secret from public and virtually hidden from parties simply by claiming it to be "highly sensitive." It can do so without any description of the content of the document, without any showing of potential harm, and without any hearing in which the Commission assess whether any enhanced protection is appropriate. At the same time, the mere act of PacifiCorp's designation makes it extraordinarily difficult for attorneys and consultants to access the information. Combined with the Protective Order's provision placing the burden to regulators

and intervenors to challenge a confidentiality, PacifiCorp is able to hide any piece of data that it does not want to come to light.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Commission:

(a) Vacate the portions of Paragraphs 1(a) and 1(b) of the Protective Order that restrict the parties' use of confidential information to the docket in which it was produced;

(b) Modify the Protective Order at Paragraph 4(e) to allow all parties to retain confidential information as the DPU and CCS may retain it; and

(c) Vacate Paragraph 1(d) of the Protective Order dealing with "highly sensitive" confidential information and with the restrictions on obtaining copies or making notes of such information.

DATED this _____ day of February 2001.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this ____ day of February, 2001, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF UIEC AND UAE'S MOTION FOR RECONSIDERATION OF PROTECTIVE ORDER** to:

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