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- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of PacifiCorp for an increase in its Rates and Charges	)))))))	DOCKET NO. 01-035-01 MEMORANDUM IN OPPOSITION TO UIEC AND UAE'S MOTION FOR RECONSIDERATION OF PROTECTIVE ORDER

PacifiCorp (the "Applicant") hereby files this memorandum in opposition to the Utah Industrial Energy Consumer ("UIEC") and the UAE Intervention group ("UAE") (together "Petitioners") request for reconsideration of the Protective Order entered by the Public Service Commission of Utah (the "Commission") on January 24, 2001 ("the Protective Order"). The grounds for this Memorandum in Opposition are as follows:

1. Petitioners challenge three restrictions in the Order: (1) the restriction that the Confidential Information may only be used in this case; (2) the restriction that notes generated by parties regarding the documents are categorized as Confidential Information; and (3) the restriction than requesting parties not be able to make copies of "highly sensitive Confidential Information."

2. Contrary to Petitioners' assertions, the terms Petitioners challenge are more than reasonable and should not be altered.

3. First, the challenged terms are identical to terms in the protective orders entered by the Commission in the last two rate cases for PacifiCorp (Docket No. 99-035-10 & Docket No. 97-035-01) and the PacifiCorp/Scottish Power merger case (Docket No 98-2035-04).

4. Second, the terms are fully consistent with Protective Orders allowed in civil litigation under Rule 26(c) of the Utah and Federal Rules of Civil Procedure. Under Rule 26(c), courts routinely enter protective orders to guard against disclosure of information that might unnecessarily injure the business interests of the parties. This Rule states that a court may order, among other things:

> (1) that the discovery not be had;
> (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
> . . . .
> (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
> . . . .
> (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

Utah R. Civ. Pro. 26(c); see Fed. R. Civ. Pro. 26(c).

5. The broad discretion granted under Rule 26 "authorizes a district court to establish a protective order within a wide range of alternatives. A protective order may completely bar discovery of trade secret materials or it may merely dictate the time, place and manner in which the discovery is to occur." Anderson v. Department of Health & Human Servs., 907 F.2d 936, 946 (10th Cir. 1990).

6. The Order's restrictions are reasonable limitation on the time, place, and manner of discovery. Within the broad discretion under Rule 26(c), courts routinely approve "blanket" protective orders–the kind of protective order entered in this case. A blanket protective order permits the parties "to protect documents that they in good faith believe contain trade secrets or other confidential commercial information." See Bayer AG & Miles v. Barr Lab., 162 F.R.D. 456, 465 (S.D.N.Y. 1995). These protective orders are "essential to the functioning of civil discovery" in certain cases. Id.

7. Within the broad range of allowable restrictions under Rule 26(c), the first challenged restriction–that Confidential Information be used only in this proceeding–is reasonable. The entire purpose of confidentiality orders is, obviously, to keep the information confidential to the extent possible. Recognizing this purpose, the first challenged restriction is not only reasonable, it is *fundamental*. If Confidential Information could be used in other proceedings, then the information would simply lose its confidential nature. For example, Parsons Behle & Latimer, the law firm representing UIEC and UAE in this matter, have represented other parties, *including PacifiCorp's competitors*, in other actions against PacifiCorp. One such action was Parson Behle's representation of UAMPS' in an antitrust case against PacifiCorp. By not restricting the use of Confidential Information gathered in this proceeding, PacifiCorp's highly sensitive commercial information becomes available in such cases even though they do not involve the same parties or the same issues and in which the information may not even be discoverable. This defeats the entire purpose of confidentiality orders because placing this information in the hands of competitors or other parties may place

PacifiCorp at a commercial disadvantage. Thus, it is more than reasonable to restrict the use of Confidential Information to the case at hand.

8. Not only does Petitioners' argument defeat the purpose of confidentiality orders, Petitioners offer no justification for their position. Petitioners try to justify the argument by assuming that Confidential Information produced in one case is "often relevant" or "likely will be relevant" in another. This assumption is debatable; and the proper place for that debate is in those other actions, not in this one. To the extend that Confidential Information is relevant in another case, Petitioners have an easy course of action to obtain it: they can ask for it. Given this, balanced against PacifiCorp's need to maintain the confidentiality of the information, there is no legitimate purpose in Petitioners' request to alter the terms of the first restriction. Confidentiality orders serve the concrete purpose of protecting the producing party from unnecessary use and disclosure of sensitive information. A mere assumption that the information may be relevant in a subsequent action should not defeat that purpose. Moreover, limiting the use of confidential information to one case properly allows the producing party an opportunity to seek an order of non-disclosure of the information in another case in which that party believe the information is irrelevant.

9. The second restriction (classifying notes taken in reviewing the documents as "Confidential Information") is reasonable and fully consistent with Rule 26(c) and the purpose of confidentiality orders. If the information in a document qualifies as "Confidential," then it logically follows that notes taken regarding that information will also be confidential. A confidentiality order serves little, if any, purpose if the requesting party may simply write

down the contents of the confidential documents and retain and use those notes in a non-confidential manner.

10. Nevertheless, PacifiCorp acknowledges that Petitioners should not have to turn their notes over to PacifiCorp at the termination of this case because those notes will likely contain attorney work-product. Thus, PacifiCorp agrees that the Confidentiality Order may be modified to allow the Petitioners to destroy their notes regarding Confidential Information. This approach has been accepted by other courts as reasonable under Rule 26. See, e.g., Sokolski v. Trans Union Corp., 178 F.R.D. 393, 404 (E.D.N.Y. 1998) ("Upon final termination of this litigation, each party . . . shall . . . return to the producing party all items containing the producing party's confidential information produced in accordance with this Order, including all copies of such matter which may have been made, but not including copies containing notes or other attorney work product that may have been placed thereon by counsel for the receiving party. All copies containing notes or other attorney's work product shall be destroyed promptly after final termination by the receiving party who will so inform the disclosing party.")

11. The third challenged restriction–that no copies of the "highly sensitive Confidential Information" be made–is likewise more than reasonable. Whatever minimal additional burden this restriction imposes upon the Petitioners, it is justified given that it only applies to "highly sensitive Confidential Information." Restrictions on copies of documents has been recognized by courts as a legitimate method of restricting access to confidential information. See State v. Tsapis, 419 S.E.2d 1, 4 (W.V. App. 1992) (complete restrictions on experts making copies is reasonable). If Petitioners wish to challenge this restriction on any

particular document, they may do so under paragraph 2 of the Confidentiality Order, at which time PacifiCorp must defend its designation.

12. Not only have other courts approved such measures, the restriction on copies is less burdensome than designating documents as "Attorneys Eyes Only" ("AEO"), which courts routinely accept. See, e.g., Centurion Industries, Inc. v. Warren Steurer & Assocs., 665 F.2d 323, 326 & n.7 (10th Cir. 1981) (upholding protective order which, in essence, designated certain documents as AEO); Brown Bag Software v. Symantec Corp., 960 F.2d 1465 (9th Cir. 1992) (upholding protective order prohibiting disclosure of trade secret information from in-house counsel); Bayer, AG and Miles, Inc. v. Barr Laboratories, Inc., 162 F.R.D. 456 (S.D.N.Y. 1995) ("commercially-sensitive" nature of information to be exchanged in discovery justified AEO provision in protective order which allowed for only outside counsel and independent experts to view.) As with an AEO restriction, the restriction on copies of "highly sensitive Confidential Information" is an effective and reasonable means to protect the legitimate commercial interests of PacifiCorp.

WHEREFORE, PacifiCorp requests that the Commission reject Petitioners' Request for Reconsideration of the Protective Order.

RESPECTFULLY SUBMITTED this 2nd day of October, 2001.

By _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2001, I caused to be served, via United States mail, postage prepaid, a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO UIEC AND UAE'S MOTION FOR RECONSIDERATION OF PROTECTIVE ORDER to the following:

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