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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of the Application of Rocky Mountain Power for Authority to Increase its Retail Electric Utility Service Rates in Utah and for Approval of its Proposed Electric Service Schedules and Electric Service Regulations

**Docket No. 10-035-124**

**UAE'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS IN RESPONSE TO UAE DATA REQUEST 2.1, REQUEST FOR EXTENDED TESTIMONY FILING DEADLINE REGARDING CONTESTED PROJECTS, AND REQUEST FOR EXPEDITED TREATMENT**

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The UAE Intervention Group ("UAE") hereby moves for a Commission Order (i) requiring Rocky Mountain Power (RMP) to respond fully and accurately to UAE Data Request 2.1, (ii) to extend UAE's deadline for filing direct testimony in this general rate case ("Rate Case") docket as to the Contested Projects on a day-for-day basis until RMP has provided full responses to UAE Data Request 2.1, and (iii) for expedited consideration of this Motion.

In support of this Motion, UAE represents as follows:

1. On January 24, 2010, RMP filed this Rate Case seeking to collect from its Utah ratepayers, including UAE members, an additional \$232.4 million per year. Among the multitude of new capital projects that RMP seeks to add to rate base in this docket are replacements or upgrades of environmental equipment at several of its coal plants, including the Hunter 2 generating unit (“Hunter 2”). These environmental replacements and upgrades include hundreds of millions of dollars for conversions of existing electrostatic precipitators to fabric filter baghouses (“Baghouse Conversions”) and for upgrades to flue gas desulphurization equipment (“Scrubber Upgrades”) at some of its coal plants, including Hunter 2. The Baghouse Conversions and Scrubber Upgrades at Hunter 2 and other coal-fired units are referred to herein as “Contested Projects.”

2. On March 3, 2011, UAE served its Data Request 2.1 on RMP, which is duplicated in Exhibit “1,” attached hereto, asking for information directly relevant to the prudence of RMP’s projected expenditures for Contested Projects in this docket. Specifically, UAE asked for documents related to arbitration proceedings (“Hunter 2 Arbitration”) between PacifiCorp and Deseret Power (“Deseret”), a co-owner of Hunter 2, regarding Contested Projects at Hunter 2.

3. In 2010, Deseret filed a lawsuit against PacifiCorp (“Deseret/PacifiCorp Litigation”), which was removed by PacifiCorp to the Utah Federal District Court, challenging, among other things, PacifiCorp’s commitment to spend significant amounts of money on

Contested Projects at Hunter 2, and disputing Deseret's obligation to pay for any part of the Contested Projects. A copy of Deseret's Complaint is attached hereto as Exhibit "2."

4. PacifiCorp filed a motion to compel arbitration on the limited issue of whether the Contested Projects at Hunter 2 were consistent with "Reasonable Utility Practice" as defined by the parties' contract. Copies of PacifiCorp's motion and memorandum to compel arbitration are attached hereto as Exhibit "3." On September 1, 2010, the Court entered an Order granting PacifiCorp's motion to compel arbitration, a copy of which is attached as Exhibit "4." The arbitration clause in the PacifiCorp/Deseret Power contract required that the arbitration be completed, including discovery, preparation of expert reports, hearings and issuance of the arbitration award, within 120 days. (*See* pg. 6, §§ 4(a)(ii)(6)-(7) to Exhibit 1 (Agreement Regarding the Coal Supply and Pricing Relationship, etc.) to Exhibit B (Settlement Agreement and Release) to Exhibit 2 (Complaint), attached hereto).

5. Documents produced, prepared or generated in connection with the Hunter 2 Arbitration, including any documents or correspondence relating to the need for or prudence of the Contested Projects, any expert reports prepared on those issues, any testimony offered by PacifiCorp or others in that proceeding, and the award issued (collectively, the "Arbitration Documents") are clearly relevant to the issues before the Commission in this general rate case docket. It is beyond dispute that documents dealing with PacifiCorp's significant expenditures for Contested Projects at Hunter 2, and the extent to which those expenditures are consistent with Reasonable Utility Practice, are relevant to issues in this general rate case dealing with the

prudence of *these identical expenditures* for the Hunter 2 Contested Projects. Moreover, the Arbitration Documents are potentially relevant to the prudence of similar Contested Projects at other coal plants also at issue in this Rate Case.

6. More than 120 days have passed since the Court ordered the dispute over the Hunter 2 Contested Projects to arbitration on September 1, 2010. UAE's Data Request 2.1 requested production of all relevant documents associated with that arbitration.

7. RMP waited the full 21 days allowed by Commission order to respond to UAE Data Request 2.1, and then filed a 4-line objection, a copy of which is attached hereto as Exhibit "1". Notably, RMP's objection does not (and could not reasonably) dispute that the Arbitration Documents are relevant. RMP nevertheless refused to produce the admittedly relevant documents to UAE, based on two spurious and irrelevant grounds.

8. RMP's purported grounds for withholding admittedly relevant documents are (i) that the Hunter 2 Arbitration Documents are "subject to the Stipulated Protective Order" in the Deseret/PacifiCorp Litigation and (ii) that the requested documents are "already in the possession of [UAE's] counsel in its capacity as counsel for Deseret." Each of these grounds is disingenuous, without merit and irrelevant to RMP's legal obligation to produce relevant information in this Rate Case.

9. RMP's first stated ground for withholding admittedly relevant documents is through a deliberately vague reference to the fact that they are "subject to" a Stipulated Protective Order in the Deseret/PacifiCorp Litigation. It is important to note that RMP does not argue, and

could not ethically argue, that the Stipulated Protective Order prevents RMP from producing the Arbitration Documents in this docket. It does not. The Stipulated Protective Order, a copy of which is attached hereto as Exhibit “5,” does not purport in any way to prevent PacifiCorp from producing any documents whatsoever in response to data requests in another forum. RMP’s vague objection provides no support whatsoever for its refusal to provide admittedly relevant documents to UAE in this Rate Case.

10. Whether or not any documents were marked as confidential or are subject to a protective order in another docket is entirely irrelevant to the issue of whether admittedly relevant documents in RMP’s possession can be requested by any party to this Rate Case, or whether they must be produced by RMP in this docket. Clearly they can be and must be.

11. The Stipulated Protective Order in the Deseret/PacifiCorp Litigation offers no support whatsoever for RMP’s attempt to conceal admittedly relevant documents from this Commission. In the first place, it would be entirely inappropriate for a Federal Court to attempt to dictate the documents that this Commission can and cannot consider in discharging its statutory obligation to ensure just and reasonable rates for Utah ratepayers. Indeed, federal statutes and case law prohibit interference by federal courts with state utility ratemaking. *E.g.*, 28 U.S.C. 1342; *Qwest Corp. v. Utah Telecommunications Open Infrastructure Agency*, 438 F. Supp. 2d 1321 (D. Utah 2006); *Mountain Fuel Supply Co. v. Shell Oil Co.*, 533 F. Supp. 40 (D. Utah 1981). Jurisdiction over RMP’s request to collect hundreds of millions of additional dollars from its captive Utah ratepayers lies exclusively with the State of Utah, and has been delegated

solely to this Commission. *E.g.*, Utah Code Ann. § 54-4-1; *Beaver County v. Qwest, Inc.*, 31 P.3d 1147 (Utah 2001).

12. In any event, no Federal Court has attempted or purported in any manner to prevent or excuse PacifiCorp from producing relevant documents requested in the Rate Case, whether or not such documents were also produced or marked confidential in the Deseret/PacifiCorp Litigation. The Stipulated Protective Order, by its express terms, “has no effect upon, and shall not apply to, a party’s use or disclosure of its own confidential information for any purpose” (Stipulated Protective Order, Exhibit 5, at 3, paragraph 3). Nothing in the Stipulated Protective Order can be read to excuse RMP from producing relevant documents requested in this Rate Case.

13. Similarly, nothing in the Stipulated Protective Order purports to prevent anyone – including Deseret’s counsel – from *merely asking* RMP to produce relevant documents in another docket. It would be highly inappropriate for a Federal Court to interfere in such manner with this Commission’s exclusive jurisdiction over utility rate cases, and the Judge in the Deseret/PacifiCorp Litigation has clearly not entered any Order purporting to do so.

14. RMP’s second purported objection – that UAE’s counsel is already in possession of the requested documents as counsel for Deseret – is even more spurious. Counsel for Deseret in the Deseret/PacifiCorp Lawsuit is indeed in possession of the Arbitration Documents, but it is prevented from disclosing those documents to anyone, including UAE’s experts or this Commission, by the Stipulated Protective Order cited by RMP. It is because Deseret’s counsel is

bound by and fully intends to honor the requirements of the protective order that it has not improperly disclosed the Arbitration Documents in this Rate Case. UAE issued Data Request 2.1 so that UAE can properly obtain and use admittedly relevant documents in this Rate Case.

15. RMP is engaged in a shameful attempt to conceal from this Commission and the parties to this Rate Case clearly relevant documents that were produced or developed in connection with the Hunter 2 Arbitration, including the ultimate Arbitration Award. PacifiCorp's fervor for concealing these admittedly relevant Arbitration Documents is so extreme that it has asked the Federal Court to force Deseret's counsel *to withdraw the data request submitted by UAE in this docket!*<sup>1</sup> RMP's motion is based on a total misunderstanding of the ability or willingness of a Federal Court to interfere in state utility ratemaking proceedings, and on an unprecedented and unsustainable interpretation of a protective order.<sup>2</sup> In essence, PacifiCorp is arguing that an attorney's *mere knowledge of the existence* of documents marked as confidential in one docket somehow prevents it, as counsel for an unrelated party in an unrelated docket, from *even asking for production of* (as opposed to disclosing) information that is also admittedly relevant in the other docket. Not a court in the Country has so interpreted a protective order.<sup>3</sup>

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<sup>1</sup> Copies of PacifiCorp's motion and memo are attached as Exhibit "6."

<sup>2</sup> Counsel for Deseret is completely confident of its compliance with both the spirit and the express requirements of the Stipulated Protective Order, and is responding appropriately to PacifiCorp's motion in the Deseret/PacifiCorp Litigation. However, the existence of this dispute over compliance with a Protective Order in the federal docket is wholly irrelevant to this Rate Case or to RMP's obligation to respond to data requests seeking admittedly relevant documents.

<sup>3</sup> Despite several requests, PacifiCorp has been unable to cite a single case that has adopted its extreme interpretation

16. In any event, whether or not counsel for Deseret violated the terms of a protective order in another case is entirely irrelevant to the issue of whether UAE can request admittedly relevant documents or whether RMP must produce such documents in this docket. Clearly they can and must be produced.

17. PacifiCorp must not be permitted to conceal admittedly relevant documents from disclosure in this Rate Case through abuse of confidentiality designations in the Hunter 2 Arbitration<sup>4</sup> or through irrelevant or contorted legal arguments. There is no dispute that the Arbitration Documents are relevant, and they should promptly be produced by RMP.

18. Consistent with Rule 37(a)(2)(A) of the Utah Rules of Civil Procedure, counsel for UAE hereby certifies that it has made good faith efforts to obtain production of the requested documents without filing a motion to compel. UAE has had several discussions through email, telephone and in-person meetings with counsel for RMP, but has been unable to secure a commitment to produce the admittedly-relevant documents requested by UAE.

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of a protective order. Moreover, PacifiCorp's argument is invalidated by the fact that every single piece of information necessary for anyone to know of the existence and relevance of the Arbitration Documents is contained in public documents, including those attached to this Motion. It is not necessary to know any specifics of the Arbitration Documents or the specific nature of the Arbitration Award to know that they are relevant to this Rate Case proceeding.

<sup>4</sup>PacifiCorp abused the Stipulated Protective Order in the Deseret/PacifiCorp Litigation through blanket designations of virtually everything associated with the Arbitration as confidential, including documents that are publically available, Deseret's own testimony and reports, and the entirety of the Arbitration Award. PacifiCorp's gross over-designation has been challenged by Deseret in the Deseret/PacifiCorp Litigation and the parties are addressing the same, but the resolution of that issue is irrelevant to this Motion to Compel.

19. Because of RMP's delay and efforts to conceal, UAE requests an extension to file its direct revenue requirement testimony on the Contested Projects on a day-for-day basis for the number of days after March 23, 2011, until RMP has provided all of the requested documents.

20. UAE also respectfully requests expedited consideration of this Motion, given the urgent need for UAE and other parties to timely receive all documents relevant to RMP's revenue requirement in this Rate Case.

21. Finally, in light of RMP's delay and concealment, pursuant to Rule 37(a)(4), Utah Rules of Civil Procedure, UAE requests that RMP be required to pay the reasonable expenses incurred by UAE in obtaining production of the Arbitration Documents, including attorneys' fees.

Respectfully submitted this 31<sup>st</sup> day of March, 2011.

HATCH, JAMES & DODGE

/s/ \_\_\_\_\_

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this 31<sup>st</sup> day of March, 2011, on the following:

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