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UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

DESERET GENERATION & TRANSMISSION CO-OPERATIVE, a Utah non-profit corporation, Plaintiff, vs. PACIFICORP, an Oregon corporation, Defendant.	Case No. 2:10cv00159TC **MOTION TO COMPEL ARBITRATION AND FOR STAY OF ALL PROCEEDINGS PENDING ARBITRATION**

Defendant, PacifiCorp, moves the Court, pursuant to Utah Code Ann. §78-31a-4(1),(2) (1985), for an Order compelling Deseret Generation & Transmission Co-Operative ("Deseret") to arbitrate its claims in the present action relating to the Scrubber Upgrade Project and ESP/Baghouse Project before the American Arbitration Association. PacifiCorp further moves the Court, pursuant to Utah Code Ann. § 78-31a-4(3) (1985), for an Order staying this proceeding pending arbitration. This motion is based upon the following grounds:

1. This dispute is about capital improvements at the No. 2 generating unit at the Hunter Power Plant in Emery County, Utah (hereafter "Hunter II"). PacifiCorp owns a majority interest in Hunter II; Deseret Generation & Transmission Co-Operative ("Deseret") and Utah Associated Municipal Power Systems ("UAMPS") (a non-party to this action) are minority owners.

2. In 1999 PacifiCorp and Deseret entered into an *Agreement Regarding The Coal Supply And Pricing Relationship Between PacifiCorp And Deseret Generation & Transmission Co-Operative*, effective January 1, 1999 (the "1999 Agreement"), that contained an agreement to arbitrate certain disputes.

3. Under the 1999 Agreement, all Capital Improvements proposed by PacifiCorp for "Hunter II" requiring expenditures in excess of One Million Dollars ($1,000,000) (hereafter, "Major Capital Improvements") are to be presented to the Hunter II Management Council (which includes a representative of Deseret), and then voted upon by the Management Council at least thirty (30) days later. If Deseret withholds its consent for a Major Capital Improvement, Deseret and PacifiCorp are required, within sixty (60) days of the Management Council vote, to attempt to agree upon a satisfactory resolution. If they are unable to agree upon a satisfactory resolution, either Deseret or PacifiCorp may, at any time within 120 days from the date the vote was taken, commence binding arbitration before the American Arbitration Association by submitting to the other party a Notice of and Demand for Arbitration ("Arbitration Notice"). Thereafter, within ten (10) days of receipt of the Arbitration Notice, Deseret and PacifiCorp are required to sign and file a written submission to arbitrate before the American Arbitration Association and thereafter

proceed with arbitration according to the American Arbitration Association's Rules for Commercial Arbitration.

4. In arbitration a sole arbitrator is to answer just one question either "yes" or "no": Is the Major Capital Improvement, as proposed by PacifiCorp for Hunter II, consistent with Reasonable Utility Practice?

5. On January 26, 2010, two days prior to Deseret filing its Complaint, the Management Council held a written vote on the Hunter II Scrubber Upgrade Project. Deseret withheld its consent for the project.

6. On March 1, 8 and 9, 2010, the Management Counsel held a written vote on the ESP/Baghouse Project. Deseret withheld its consent for the project.

7. The Scrubber Upgrade Project and the ESP/Baghouse Project are defined by Deseret in its Complaint as the "Disputed Capital Commitments" forming the core facts supporting each of Deseret's various claims for relief.

8. On March 24, 2010, within sixty (60) days of the votes on the Scrubber Upgrade Project and the ESP/Baghouse Project, PacifiCorp and Deseret met and attempted to agree upon a satisfactory resolution. None was reached.

9. On April 8, 2010, within one hundred twenty (120) days of the votes on the Scrubber Upgrade Project and the ESP/Baghouse Project, PacifiCorp submitted a Notice of and Demand for Arbitration to Deseret via certified mail, return receipt requested, and on April 9, 2010, PacifiCorp filed its Notice of and Demand for Arbitration and a signed Submission to Dispute Resolution with the American Arbitration Association.

10. Deseret's claims concerning the Scrubber Upgrade Project and ESP/Baghouse Project must now be arbitrated, pursuant to the parties' written agreement to arbitrate, and this action should be stayed pending the arbitrator's determination, either 'yes' or 'no', whether these projects are consistent with Reasonable Utility Practice.

11. This matter should also be stayed pending arbitration.

The grounds for this motion are more fully set forth in PacifiCorp's supporting memorandum filed concurrently herewith.

DATED this 9th day of April, 2010.

/s/ P. Bruce Badger
P. Bruce Badger
Philip D. Dracht
FABIAN & CLENDENIN
a professional corporation
Attorneys for Defendant PacifiCorp

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of April, 2010, I caused a true and correct copy of the foregoing **MOTION TO COMPEL ARBITRATION AND FOR STAY OF ALL PROCEEDINGS PENDING ARBITRATION** to be electronically filed with the U.S. District Court, for the District of Utah, which thereby provides automatic notice, via email, to the following:

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UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

DESERET GENERATION & TRANSMISSION CO-OPERATIVE, a Utah non-profit corporation, Plaintiff, vs. PACIFICORP, an Oregon corporation, Defendant.	Case No. 2:10-cv-00159 TC **MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND FOR STAY OF ALL PROCEEDINGS PENDING ARBITRATION**

Defendant PacifiCorp submits its Memorandum in Support of Motion to Compel Arbitration and for Stay of All Proceedings Pending Arbitration.

I. BACKGROUND

A. The O&M Agreement and Management Council

This dispute between Deseret Generation & Transmission Co-Operative ("Deseret") and PacifiCorp concerns the No. 2 generating unit at the Hunter Plant, an electric power plant located in Emery County, Utah, (hereafter "Hunter II"). Hunter II is co-owned by PacifiCorp, Deseret and Utah Associated Municipal Power Systems ("UAMPS").

On October 24, 1980, Deseret and Utah Power & Light Company, PacifiCorp's predecessor in interest, entered into the *Ownership and Management Agreement Dated October 24, 1980 between Utah Power & Light Company and Deseret Generation & Transmission Co-Operative* (hereafter "O&M Agreement").[1] The O&M Agreement was subsequently amended several times when Deseret sold part of its interest in Hunter II to UAMPS.[2] PacifiCorp now owns 60.310% of Hunter II; Deseret owns 25.108%; UAMPS owns the remaining 14.582%.

Under the O&M Agreement, the parties have agreed that PacifiCorp is the Operator of Hunter II.[3] As the Operator, PacifiCorp has, subject to certain exceptions, the exclusive responsibility for the management of Hunter II, including, but not limited to, responsibility for decisions with respect to the timing, extent and nature of any actions with respect to capital improvements in the ordinary course of business, and the integration of the operations of Hunter II with the remainder of the PacifiCorp system.[4]

Although PacifiCorp is responsible for the management of Hunter II, its authority is not unfettered. For the benefit of its co-owners, PacifiCorp is contractually obligated to operate

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1 The O&M Agreement is attached hereto to as Exhibit A.

2 The amendments are included in Exhibit A.

3 O&M Agreement § 1.1 at p. 7.

4 *Id.* § 4.2.

Hunter II in accordance with Reasonable Utility Practice[5] as that term is defined in the O&M Agreement.[6]

Under the O&M Agreement, the co-owners also established a Management Council, with each co-owner appointing a single member representative.[7] The Management Council meets at least twice annually to review the management of Hunter II.[8]

Under Section 4.1 of the O&M Agreement, certain management decisions require unanimous consent by the Management Council. These include (i) decisions relating to Capital Improvements that are to be implemented within six months from the date PacifiCorp first reports the project to the Management Council; (ii) decisions the effect of which may be to reduce the long-term capacity of Hunter II by more than 5 MW; (iii) decisions with respect to a determination that an Event of Loss has occurred; or (iv) voluntary decisions to take the plant out of service for more than one year.[9]

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5 According to the O&M Agreement,

> "*Reasonable Utility Practice* shall mean at a particular time any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry at such time, or which, in the exercise of reasonable judgment in light of facts known at such time, could have been expected to accomplish the desired results at the lowest reasonable cost consistent with good business practices, reliability, safety and expedition. Reasonable Utility Practice is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather to be a spectrum of possible practices, methods and acts, having due regard for manufacturers' warranties and the requirements of governmental agencies of competent jurisdiction; *provided, however,* that Reasonable Utility Practice shall not include any practice, method or act that discriminates against Hunter II or the Ownership Interest in relation to those employed by UP&L at its generating units other than Hunter II or that is less favorable to Hunter II or the Ownership Interest than those employed by UP&L at its generating units at Hunter Station other than Hunter II."

Id. § 1.1 at p. 8.

6 *Id.* § 4.2

7 *Id.* § 4.1

8 *Id.*

9 *Id.*

B. Deseret Agreed to Resolve Any Dispute With PacifiCorp Regarding Major Capital Improvements In Arbitration

Prior to 1998, if PacifiCorp wanted to implement a Capital Improvement more than six months from the date it first reported the Capital Improvement to the Management Council, PacifiCorp was permitted to proceed so long as it was acting according to Reasonable Utility Practice. Then, in 1998, during negotiations to resolve a lawsuit that UAMPS had filed against PacifiCorp over coal pricing (to which Deseret was not a party), PacifiCorp and UAMPS agreed on a speedy mechanism to allow UAMPS to challenge a Capital Improvement proposed by PacifiCorp requiring expenditures in excess of One Million Dollars ($1,000,000). As between PacifiCorp and UAMPS, they threw out section 4.1(a) of the O&M Agreement and replaced it with an arbitration provision.[10]

The next year, PacifiCorp and Deseret entered into an agreement that was virtually identical to the agreement that PacifiCorp and UAMPS had signed the year before. That agreement with Deseret, titled *Agreement Regarding The Coal Supply And Pricing Relationship Between PacifiCorp And Deseret Generation & Transmission Co-Operative*, effective January 1, 1999 (the "1999 Agreement"),[11] likewise threw out Section 4.1(a) of the O&M Agreement and in its place inserted new language that allows Deseret to challenge all Capital Improvements proposed by PacifiCorp requiring expenditures in excess of One Million Dollars ($1,000,000),

10 The 1998 agreement between UAMPS and PacifiCorp is attached hereto as Exhibit B.

11 The *Agreement Regarding The Coal Supply And Pricing Relationship Between PacifiCorp And Deseret Generation & Transmission Co-Operative*, effective January 1, 1999 ("1999 Agreement") is attached hereto as Exhibit C.

and receive a determination by binding arbitration within 120 days, whether the Capital Improvement is, or is not, consistent with Reasonable Utility Practice.[12]

Under the 1999 Agreement, and in order to afford Deseret an opportunity to challenge whether a particular Capital Improvement is consistent with Reasonable Utility Practice, all Capital Improvements proposed by PacifiCorp requiring expenditures in excess of One Million Dollars ($1,000,000) (hereafter, "Major Capital Improvements") are to be presented to the Management Council and then voted upon thirty (30) days or more later. If Deseret (or UAMPS under its 1998 Agreement) withholds its consent for a Major Capital Improvement, Deseret and

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12 Section 4 of the 1999 Agreement reads in part:

> 4. Consent of Deseret for Major Capital Improvements. As between PacifiCorp and Deseret, Section 4.1(a) of the O&M Agreement is hereby deleted in its entirety and replaced with the following:
>
> [The following decisions shall be implemented only with the unanimous consent of the Management Council:]
>
> (a) decisions relating to expenditures for:
>
> (i) Capital Improvements which are to be implemented within six months from the date first reported to the Management Council by PacifiCorp; or,
>
> (ii) any Capital Improvement requiring total expenditures in excess of $1,000,000.00 ("Major Capital Improvement"), subject to the following procedures:
>
> (1) PacifiCorp shall present any proposed Major Capital Improvement to all members of the Management Council at least thirty (30) days prior to a vote on the proposed Major Capital Improvement by the Management Council. In the event that Deseret withholds its consent to a proposed Major Capital Improvement, PacifiCorp and Deseret shall attempt to agree upon a satisfactory resolution regarding the Major Capital Improvement within sixty (60) days from the date it was voted on by the Management Council. If PacifiCorp and Deseret are unable to agree upon a satisfactory resolution, the matter may be submitted to binding arbitration pursuant to subsections 4.1(a)(ii) (2) through 4.1(a) (ii)(ll) below.
>
> (2) The arbitration may be commenced by PacifiCorp or Deseret at any time within one hundred twenty (120) days of the date on which the Major Capital Improvement was voted on by the Management Council, by the party seeking arbitration submitting to the other party a Notice of and Demand for Arbitration ("Arbitration Notice"). . . . .

1999 Agreement § 4.

PacifiCorp shall, within sixty (60) days of the vote, attempt to agree upon a satisfactory resolution. If they are unable to agree upon a satisfactory resolution, either Deseret or PacifiCorp may, at any time within 120 days from the date the vote was taken, submit the matter to binding arbitration before the American Arbitration Association by submitting to the other party a Notice and Demand for Arbitration ("Arbitration Notice").[13]

Pursuant to the 1999 Agreement, a single arbitrator is to be selected and "[t]he sole question to be decided either 'yes' or 'no' by the arbitrator is whether the Major Capital Improvement, as proposed by PacifiCorp for Hunter II is consistent with Reasonable Utility Practice, as defined by the O&M Agreement."[14] The Arbitrator is to render the decision within one hundred twenty (120) days from the date on which the Arbitration Notice was submitted.[15]

C. PacifiCorp Properly And Timely Presented The Projects For A Vote.

The fact of the matter is that for the next ten years after the 1999 Agreement was signed, PacifiCorp implemented Major Capital Improvements at Hunter II in accordance with Reasonable Utility Practice and Deseret paid its share of the costs of those projects without complaint. Importantly, Deseret never referenced the 1999 Agreement in regard to those projects and never called for the Management Council voting procedures outlined in that agreement. Then, in July 2009, Deseret brought up the 1999 Agreement for the first time.

1. The Baghouse

As Deseret's General Counsel admitted in a letter to PacifiCorp Energy's General Counsel last July, the Baghouse project has been a matter of discussion between PacifiCorp and

13 O&M Agreement §4.1(a)(ii)(1),(2), as modified by the 1999 Agreement.

14 *Id.* § 4.1(a)(ii)(4).

15 *Id.* § 4.1(a)(ii)(5).

Deseret since April 2003.[16] The project, when implemented in 2011, will dismantle the aging electrostatic precipitator ("ESP") at Hunter II that removes ash from the flue gas, and replace it with a fabric filtering system called a baghouse.[17] The anticipated total expenditures for the Baghouse Project are expected to be approximately $82.0 million.[18] Although Deseret has admittedly been vocal in its opposition to the project since it was first introduced to the Hunter II co-owners, Deseret never called for a vote on the Baghouse, or any other Capital Improvement for that matter.[19] Then, in a letter on July 9, 2009, Deseret insisted that the Baghouse project in particular was subject to the Management Council voting requirements in section 4.1(a)(ii)(1) of the O&M Agreement, as modified by the 1999 Agreement.[20]

PacifiCorp's general counsel responded to Deseret:

> "[F]or the first time since section 4.1(a) of the O&M Agreement was amended over ten years ago, and in spite of the fact that many Capital Improvements since that time have been made with Deseret Power's overt or tacit approval without following amended section 4.1(a), your letter now insists that amended section 4.1(a) be strictly followed as it may pertain to the baghouse project at Unit 2.
>
> Setting aside whether Deseret can overturn its well-established course of conduct and course of performance in approving budgets and implementing capital projects at Unit 2 without strictly following amended section 4.1(a), PacifiCorp proposes that the parties waive any preliminaries otherwise required by amended section 4.1(a)(ii), and move straight to arbitration before the American Arbitration Association in accordance with amended Section 4.1(a)(ii)(2) – (11) to settle the sole question whether the baghouse project for Unit 2 is consistent with Reasonable Utility Practice, as defined in the O&M Agreement.

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16 See letter dated July 9, 2009, from David Crabtree to Dean S. Brockbank, at page 3, attached as Exhibit "A" to Declaration of Dean S. Brockbank, filed concurrently herewith.

17 Declaration of Laren Huntsman ¶¶ 7-8.

18 *Id.*

19 Bruno Decl. ¶¶ 6-7.

20 See fn. 16, supra.

> Until I receive your consent to this approach, however, we will proceed as if no such consent will be given. Accordingly, please be advised that the next meeting of the Hunter 2 Unit Management Council, which is scheduled for September 10, 2009 at the Hunter Plant, will trigger the thirty (30) day period referred to in amended section 4.1(a)(ii)(1). At that meeting, PacifiCorp will present the baghouse project and other capital projects for Unit 2 to all members of the Management Council. In addition, PacifiCorp has notified each of the minority owner representatives (simultaneously with this letter) that PacifiCorp will conduct a vote of the Hunter Unit 2 Management Counsel on October 12, 2009, to approve the baghouse project and other projects for Unit 2.
>
> If Deseret Power votes to withhold its consent for the baghouse project or other projects, PacifiCorp will proceed to resolve these matters in accordance with the arbitration provisions set forth in amended Section 4.1(a)(ii). If this occurs, PacifiCorp will, of course, seek in good faith to satisfactorily resolve the dispute; however, in view of Deseret Power's already unequivocal position regarding the baghouse project, it would seem unlikely that a resolution could take place without arbitration and PacifiCorp will proceed down that path as quickly as possible. [21]

On September 11, 2009, Laren Huntsman, the Hunter plant managing director, formally notified Deseret that the Management Council would meet on October 12, 2009 at 9:30 a.m., to vote on a listing of Capital Improvements, including the Baghouse Project.[22] Following that September notice to the Management Council, and prior to October 12, 2009, the President of PacifiCorp Energy, Rob Lasich, spoke on the telephone several times with Kimball Rasmussen, Deseret's President and designated representative on the Management Council. During these telephone conversations, Mr. Rasmussen asked that PacifiCorp postpone the Management Council meeting that was scheduled for October 12, 2009. The reasons that Mr. Rasmussen gave were that this would allow Deseret and PacifiCorp additional time to further discuss and

21 Exhibit "B" to Brockbank Decl..

22 Huntsman Decl. ¶ 12 and Exhibit "A "thereto.

hopefully negotiate a resolution of Deseret's objection to certain budgeted projects, including the Baghouse, and that there would not be a formal dispute about the Baghouse Project that Deseret would need to address, absent the Management Council's vote on that project.[23]

Mr. Lasich agreed to Mr. Rasmussen's request and the Management Council meeting that was scheduled for October 12, 2009 was postponed.[24]

For the next two and a half months, Mr. Rasmussen and Mr. Lasich, and others from PacifiCorp, discussed Deseret's objections to certain budgeted Capital Improvement projects, including the Baghouse Project. In December 2009, Mr. Lasich finally informed Mr. Rasmussen that PacifiCorp needed to move forward with its Capital Improvements and they agreed that a meeting of the Management Council would be scheduled for sometime in January 2010 for the purpose of voting on the Capital Improvements. Mr. Rasmussen specifically requested that the Baghouse Project not be put to a vote in January 2010, so that PacifiCorp and Deseret could continue to discuss and hopefully resolve Deseret's objection to that project, and, as before, Mr. Rasmussen explained that there would not be a formal dispute about the Baghouse Project if it were not put to a vote.[25]

On January 26, 2010, the Management Council met and voted on a list of Capital Improvements. At Deseret's request, the Baghouse Project was not on the ballot.[26]

2. The Scrubber Upgrade Project

The Scrubber Upgrade Project, with anticipated total expenditures of approximately $52.0 million, will, when implemented in 2011, upgrade the existing scrubber at Hunter II in

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23 Declaration of Anthony R. ("Rob") Lasich ¶ 8.

24 *Id.*

25 *Id.* ¶ 9.

26 *Id.* ¶ 10; see also, Huntsman Decl. ¶ 13.

order to reduce sulfur dioxide emissions.[27] When the Management Council met and voted on Capital Improvements (other than the Baghouse) on January 26th, the Scrubber Upgrade was on the ballot. PacifiCorp and UAMPS voted in favor of all of the Capital Improvements that were on the ballot that day; Deseret voted in favor of all of the Capital Improvements, except the Scrubber Upgrade Project, to which Deseret made the written comment on its ballot that "Deseret has previously objected to this item and continues to withhold its consent."[28] All of the Capital Improvements voted on by the Management Council on January 26th, including the Scrubber Upgrade, had been presented to the Management Council at least thirty (30) days before.[29]

On January 28, 2010, less than 48 hours after the Management Council meeting, and after making sure that there had been no Management Council vote on the Baghouse, Deseret initiated this lawsuit by filing its complaint in the Eighth District Court in Uintah County, Utah.[30] The case was removed, pursuant to 28 U.S.C. § 1441, on the basis of diversity of citizenship, less than thirty (30) days later, on February 22, 2010. In its complaint, Deseret alleges, among other things, that the Scrubber Upgrade Project and the Baghouse Project should not be implemented, that Deseret is not responsible for its share of the costs of these projects, and further, that neither the Scrubber Upgrade Project, nor the Baghouse Project, is arbitrable.

3. The Eventual Vote On The Baghouse Project

After Deseret had twice asked PacifiCorp to postpone the Management Council vote on the Baghouse, and had sued PacifiCorp for, among other things, not holding a vote, PacifiCorp

27 *Id.* ¶¶ 9-10.

28 *Id.* ¶¶ 12-14.

29 *Id.*

30 *Id.* ¶¶ 14-15.

delivered a written ballot for the Baghouse to UAMPS' and Deseret's representatives on the Management Council on February 24, 2010, accompanied by instructions to either return the executed ballot to PacifiCorp by 5:00 p.m. on March 11, 2010, or to inform PacifiCorp that a meeting of the Management Council was requested for the purpose of voting on the Baghouse.[31]

UAMPS returned its ballot to PacifiCorp via-e-mail on March 1, 2010, voting in favor of the Baghouse Project. PacifiCorp voted in favor of the Baghouse on March 8, 2010. Instead of returning its marked ballot via e-mail, Deseret requested a meeting of the Management Council, which was scheduled for March 9, 2010, at the North Temple offices of PacifiCorp in Salt Lake City, Utah. Deseret, PacifiCorp and UAMPS attended that meeting of the Management Council, where Deseret voted and withheld its consent for the Baghouse with the written comment on its ballot that "Deseret has previously objected to this item and continues to withhold its consent."[32]

On March 24, 2010, within sixty (60) days following the votes on the Scrubber Upgrade and the Baghouse, Deseret and PacifiCorp met yet again to see if they could reach a resolution. None was reached. [33]

On April 8, 2010, PacifiCorp submitted a Notice of and Demand for Arbitration on Deseret (hereafter the "Arbitration Notice"), via certified mail, return receipt requested, and the next day filed the Arbitration Notice and signed Submission to Dispute Resolution with the American Arbitration Association, thus commencing arbitration according to the agreed terms of

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31 *Id.* ¶ 16.

32 *Id.* ¶ 17.

33 *Id.* ¶ 18.

section 4.1(a)(ii) of the O&M Agreement, as modified by the 1999 Agreement.[34]

II. ARGUMENT

A. The Utah Arbitration Act Applies.

The Utah Arbitration Act, Utah Code Ann. § 78-31a-1, et. seq. (1985),[35] governs this dispute because that is what the parties agreed. Section 6 of the 1999 Agreement provides that the "Agreement shall be construed as a whole in accordance with its fair meaning and in accordance with the laws of the State of Utah."

The U.S. Supreme Court held in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,[36] that when parties agree that their arbitration agreement will be governed by the laws of a particular state, that selected state's arbitration act, rather than the Federal Arbitration Act,[37] should be applied. The court wrote:

> Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration-rules which are manifestly designed to encourage resort to the arbitral process-simply does not offend the rule of liberal construction set forth in *Moses H. Cone,* nor does it offend any other policy embodied in the FAA.[38]

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34 The Notice of and Demand for Arbitration, with proof of service, but without Exhibits, is attached hereto as Exhibit "D". The Exhibits 1 (the O&M Agreement) and 2 (the 1999 Agreement) to the Notice of and Demand for Arbitration are attached hereto as Exhibit "A" and Exhibit "C", respectively; The signed Submission to Dispute Resolution is attached hereto as Exhibit "E".

35 The current version of the Utah Arbitration Act only applies to arbitration agreements reached on or after May 6, 2002, or unless all of the parties to the agreement agree on the record. Utah Code Ann. §78B-11-104. The 1985 version of the Arbitration Act is attached hereto as Exhibit "F".

36 *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University,* 489 U.S. 468, 109 S.Ct. 1248, 103 L. Ed. 2d 488 (1989).

37 9 U.S.C. §1, *et. seq.*

38 *Volt Information Sciences,* 489 U.S. 468 at 476, referring to *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 22, 103 S.Ct. 927, 74 L.Ed.2d 765 ("The [Federal]Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").

That said, due regard must also be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself should be resolved in favor of arbitration.[39]

B. The Utah Arbitration Act Mandates Enforcement Of Deseret's Contractual Obligation To Arbitrate.

Section 78-31a-3 of the Utah Arbitration Act (1985) provides that "[a] written agreement to submit any existing or future controversy to arbitration is valid, enforceable, and irrevocable, except upon grounds existing at law or equity to set aside the agreement, or when fraud is alleged as provided in the Utah Rules of Civil Procedure."

Utah has a long-standing policy favoring arbitration. As the Utah Supreme Court explained in *Central Florida Investments, Inc. v. Parkwest Associates*, "if there is any question as to whether the parties agreed to resolve their disputes through arbitration or litigation, i.e., through the filing of a complaint and recording of a *lis pendens,* we interpret the agreement keeping in mind our policy of encouraging arbitration."[40] In *Reed v. Davis County Sch. Dist.*, the Utah Court of Appeals reiterated the policy favoring arbitration: "It is the policy of the law in Utah to interpret contracts in favor of arbitration, 'in keeping with our policy of encouraging extrajudicial resolution of disputes when the parties have agreed not to litigate.'"[41]

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39 *Id.*

40 *Central Florida Investments, Inc. v. Parkwest Associates*, 40 P.3d 599; 2002 UT 3 (2002).

41 *Reed v. Davis County Sch. Dist.*, 892 P.2d 1063, 1065 (Utah Ct.App.1995) (quoting *Docutel Olivetti Corp. v. Dick Brady Sys., Inc.*, 731 P.2d 475, 479 (Utah 1986)); *see also McCoy v. Blue Cross Blue Shield,* 2001 UT 31, ¶ 14, 20 P.3d 901 ("It is our policy to interpret arbitration clauses in a manner that favors arbitration." (quoting *Docutel Olivetti,* 731 P.2d at 479)); see also, *Chandler v. Blue Cross Blue Shield,* 833 P.2d 356, 358 (Utah 1992) (stating "this court has also recognized the strong public policy in favor of arbitration 'as an approved, practical, and inexpensive means of settling disputes and easing court congestion.'").

When, as here, an arbitration provision is governed by the Utah Arbitration Act and the matters fall squarely within the scope of that provision, the duty of the district court is clear: It must compel arbitration.

C. Deseret's Agreement To Arbitrate Includes Disputes Over The Scrubber Upgrade and the Baghouse Projects.

As the U.S. Supreme Court held in *AT & T Technologies, Inc. v. Communications Workers* , the question whether parties have submitted a particular dispute to arbitration, *i.e.,* the " *question of arbitrability,*" is "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise."[42] There can be no disagreement, based on section 4.1(a)(ii) of the O&M Agreement, as modified by the 1999 Agreement, that PacifiCorp is entitled to have an arbitrator confirm whether or not the Scrubber Upgrade as well as the Baghouse are consistent with Reasonable Utility Practice. Section 4.1(a)(ii) of the O&M Agreement makes "any Capital Improvement requiring total expenditures in excess of $1,000,000.00 ("Major Capital Improvements") subject to the [arbitration] procedures."[43] The total expenditures for both the Scrubber Upgrade and the Baghouse will exceed $1.0 million. Each Capital Improvement, therefore, meets the agreed upon criteria for arbitrability.

D. PacifiCorp Has Satisfied The Conditions For Arbitration.

Prior to demanding arbitration, PacifiCorp was, according to 4.1(a)(ii) of the O&M Agreement, as modified by the 1999 Agreement, required to do the following:

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42 *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986).

43 O&M Agreement §4.1(a)(ii), as modified by the 1999 Agreement.

- Present the Scrubber Upgrade and Baghouse projects to the Management Council;[44]
- At least thirty (30) days later, conduct a vote of the Management Council;[45]
- Within sixty (60) days of the Management Council vote, attempt to agree upon a satisfactory resolution;[46]
- At any time within one hundred twenty (120) days of the Management Council vote, commence arbitration by submitting to Deseret a Notice of and Demand for Arbitration;[47]
- Within the next ten (10) days, sign and submit to the American Arbitration Association a submission to arbitrate.[48]

Each of these events has been satisfied and arbitration must, therefore, be compelled.

III. THIS ACTION SHOULD BE STAYED PENDING ARBITRATION

Under Utah Code Ann. §78-31-4(3)(1985), "An order to submit an agreement to arbitration stays any action or proceeding involving an issue subject to arbitration under the agreement. However, if the issue is severable from the other issues in the action or proceeding, only the issue subject to arbitration is stayed."

In this case, the Scrubber Upgrade Project and the Baghouse Project form the factual core of Deseret's complaint. These issues are not severable from the other issues in the action. Accordingly, a total stay should be ordered pending the arbitrator's decision. That decision will

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44 *Id.* §4.1(a)(ii)(1)

45 *Id.*

46 *Id.*

47 *Id.* §4.1(a)(ii)(2)

48 *Id.* §4.1(a)(ii)(4)

then shape the issues that will still need to be decided by this district court, such as whether Deseret owes PacifiCorp for its proportionate share of the projects' costs, which in turn will determine the scope of discovery relevant to those issues.

CONCLUSION

For the reasons set forth, PacifiCorp's Motion to Compel should be granted, and this action should be stayed pending arbitration.

DATED this 9th day of April, 2010.

/s/ P. Bruce Badger
P. Bruce Badger
Philip D. Dracht
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Attorneys for Defendant PacifiCorp

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of April 2010, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND FOR STAY** to be electronically filed with the U.S. District Court, for the District of Utah, which thereby provides automatic notice, via email, to the following:

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