IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

DESERET GENERATION & TRANSMISSION CO-OPERATIVE, a Utah non-profit corporation, Plaintiff, v. PACIFICORP, an Oregon corporation, Defendant.	**ORDER** Case No. 2:10-cv-00159-TC Judge Tena Campbell

Deseret Generation and Transmission Co-operative (Deseret) has sued Pacificorp relating to a number of decisions Pacificorp made in managing the Hunter II Power Plant, which the parties own jointly with the Utah Associated Municipal Power Systems. Deseret alleges that Pacificorp failed to comply with the 1999 Amendment to the Operation and Management Agreement that required Pacificorp to, among other things, allow the other two owners to vote on "any Capital Improvement requiring total expenditures in excess of $1,000,000." (1999 Amendment to Operation and Management Agreement § 4.1, attached as Ex. C to Mem. Supp. Mot. to Compel Arbitration (the "1999 Amendment").) Pacificorp seeks to compel arbitration under a limited arbitration provision in the 1999 Amendment and to stay proceedings during arbitration. Deseret contends that discovery and an evidentiary hearing are needed in order to determine whether the disputed decisions must be arbitrated under the 1999 Amendment.

The Utah Arbitration Act governs the enforcement of agreements to arbitrate. The scope and existence of an agreement to arbitrate must be determined by the Court pursuant to contract law. "'Arbitration is a matter of contract and a party cannot be required to submit to

arbitration any dispute which he has not agreed so to submit.'" Cade v. Zions First Nat. Bank, 956 P.2d 1073, 1076-77 (Utah Ct. App. 1998) (quoting AT&T Tech., Inc. v. Comms. Workers, 475 U.S. 643, 648 (1986). A party seeking to compel arbitration must present "direct and specific evidence of an agreement between the parties" to arbitrate that dispute. McCoy v. Blue Cross & Blue Shield of Utah, 20 P.3d 901, 905 (Utah 2001).

The agreement between Deseret and Pacificorp does not contain a universal arbitration provision. Rather, it specifies that when Deseret withholds consent to a Major Capital Improvement,[1] either side may request arbitration within 120 days of the "no" vote to determine whether the proposed improvement "is consistent with Reasonable Utility Practice, as defined in the O&M Agreement." (1999 Amendment § 4(a)(ii)(5).) The arbitrator resolves only this question, and the arbitrator's decision on the matter is binding. If the Major Capital Improvement comports with Reasonable Utility Practice, the other two owners of the Hunter II Power Plant must contribute funds to the Major Capital Improvement in proportion to their ownership interest. The arbitrator has 120 days to make a decision.

Pacificorp seeks to compel arbitration of two decisions for which it claims it timely sought arbitration: the Baghouse project and the Scrubber project. Pacificorp sought arbitration within 120 days of Deseret's "no" vote on these projects as required by the 1999 Amendment. Deseret makes three arguments about why the arbitration provision should not apply.

First Deseret argues that the Baghouse and Scrubber decisions are not subject to arbitration because the 1999 Amendment does not provide for arbitration when a project will

[1]A Major Capital Improvement is a defined term in the 1999 Amendment referring to a capital improvement requiring total expenditures in excess of one million dollars.

reduce long-term plant capacity by more than 5 megawatts. But section 4(a)(ii) of the 1999 Amendment does not exempt any Major Capital Improvement from arbitration, including the decisions listed in section 4(b)-(e). (See 1999 Amendment; Operation and Management Agreement § 4, attached as Ex. A. to Mem. Supp. Mot. to Compel Arbitration.) Deseret's argument that the Baghouse and Scrubber projects will reduce plant capacity provides the basis for their breach of contract claim but not a basis for circumventing the arbitration provision.

Deseret also argues that it voted against the Baghouse and Scrubber projects in 2006 when it sent a letter to Pacificorp expressing concern about the project, but at that time the letter was delivered, the projects had not yet been put to a vote of the Management Council.

Finally, Deseret contends that the Management Council's votes on these two decisions were meaningless because Pacificorp had already begun making expenditures for the Baghouse and Scrubber projects long before the Management Council vote, and these expenditures altered the reasonableness of implementing the projects. This argument goes to the heart of the contract dispute at issue in the pending litigation, but does not alter the terms of the arbitration provision.

Although Deseret has raised several issues surrounding the Baghouse and Scrubber decisions that may render the arbitrator's decision useless, Pacificorp is still entitled under the 1999 Amendment to seek arbitration on the limited question of whether the Baghouse and Scrubber projects constitute Reasonable Utility Practice. But the result of the arbitration will not by itself determine the outcome of the pending litigation.

The court GRANTS Pacificorp's motion to compel arbitration because the parties agreed to limited arbitration in the 1999 Amendment. The court DENIES Pacificorp's motion to stay because the arbitration will not resolve most of the claims in the case.

DATED this 1st day of September, 2010.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
Chief Judge