

# **EXHIBIT D**

# **EXHIBIT D**



**FABIAN**

ATTORNEYS AT LAW

Philip D. Dracht  
Direct Dial: 801.323.2251  
pdracht@fabianlaw.com

March 14, 2011

VIA EMAIL

Gary Dodge  
*Hatch, James & Dodge*  
10 West Broadway, Suite 400  
Salt Lake City, Utah 84101

Re: *Deseret Generation & Transmission Co-Operative v. PacifiCorp*, Case No. 2:10-cv-159-TC; *PacifiCorp v. Deseret Generation & Transmission Co-Operative*, AAA Case No., 77 198 Y 00223 10 NOLG

Dear Gary:

This letter is in response to your two emails sent today, March 14, 2011 at 6:25 and 6:34. p.m. (attached as Exhibits A and B) and your phone call to me this evening minutes after I sent my meet and confer request.

First, on the telephone you explained to me that ‘you know that the documents marked as Confidential are relevant, and that’s why you asked for them in the PSC Proceeding.’ After you told me that, I asked you to confirm that position, which you did. Please let me know if my recitation of your position is in any way incorrect.

Second, as to our legal points and authorities for our position, in *Eagle Comtronics, Inc. v. Arrow Communication Laboratories, Inc.*, the Federal Circuit Court found that the filing of documents in another forum violated express terms of the protective order, which stated that any documents marked as subject to protective order could not “be used for any purpose other than for this action.”<sup>1</sup> There the court found the plaintiff violated the district court’s protective order when it knowingly used defendant’s patent application, which had been sealed by the protective order, for a use unrelated to a lawsuit between the two companies.<sup>2</sup> The court held that the protective order, which

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<sup>1</sup> *Eagle Comtronics, Inc. v. Arrow Communication Laboratories, Inc.*, 305 F.3d 1303, 1314-1315 (Fed. Cir. 2002).

<sup>2</sup> *Eagle*, 305 F.3d at 1313-14.

Gary Dodge

Follow up to Telephonic Meet and Confer regarding Stipulated Protective Order Violation  
3/14/2011

stated that certain documents “shall not be used for any purpose other than for this action,” (quoting the protective order issued by the district court), “was clear and unambiguous on its face.” Because the court found that plaintiff used the materials for purposes outside of the litigation, the Federal Circuit held that plaintiff had violated the protective order.<sup>3</sup>

In *Pacific Gas & Electric Company v. United States*, the Court of Federal Claims found that where documents were produced in one proceeding pursuant to a protective order, that counsel for the plaintiff that used those documents in another proceeding representing a different client in support of a motion to compel violated the terms of the protective order.<sup>4</sup>

As outlined in my first letter today, our Stipulated Protective Order has similar prohibitions against “use” of Confidential Materials in other proceedings. While it is true that you have not filed any of the Confidential Materials in the other proceedings, it is our position that you are attempting to circumvent the protections of the Stipulated Protective Order by simply requesting the documents in the PSC Proceedings. As you admitted on the phone, you know that the Confidential Materials are relevant in the PSC Proceedings, and that’s why you asked for them. It is our position that by doing so, you are knowingly “using” the Confidential Material for purposes in another proceeding, which is prohibited under the Stipulated Protective Order.

Third, I expect that during our meet and confer conference you will treat me with the same respect that I treat you. This means not questioning whether and where I went to law school and then hanging up in the middle of the call, as you did this afternoon. While we are obligated to meet and confer with you under DUCiv 37-1, that obligation comes with an expectation that the meeting and conferring attorneys will treat each other with a modicum of professional courtesy.

To conclude, I will still call you tomorrow at 10:00 a.m. If I don’t speak with you then, however, and if I don’t hear from you or your colleague by 5:30 p.m. tomorrow, I will presume that, following your email attached as Exhibit A, that you don’t believe we have “any shred of legal support for the absurd proposition that asking for production of confidential documents in another docket violates a protective order” and that you do not wish to further meet and confer regarding this issue. If so, we will move accordingly.

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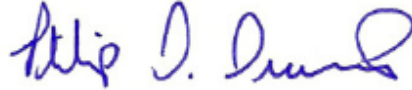
<sup>3</sup> *Eagle*, 305 F.3d at 1314

<sup>4</sup> *Pacific Gas & Electric Company v. United States*, 82 Fed. Cl. 474 (2008).

Gary Dodge

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Sincerely

A handwritten signature in blue ink, appearing to read "Philip D. Dracht". The signature is fluid and cursive, with a large initial "P" and a long, sweeping underline.

Philip D. Dracht

# **EXHIBIT A**

# **EXHIBIT A**

**Philip D. Dracht**

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**From:** Gary A. Dodge [gdodge@hjdllaw.com]  
**Sent:** Monday, March 14, 2011 6:25 PM  
**To:** Philip D. Dracht  
**Cc:** 'Phillip Russell'; 'Dave Crabtree'; P. Bruce Badger; Clint Hansen; Annette Clark; gdodge@hjdllaw.com  
**Subject:** RE: Dracht Letter to Dodge Re Protective Order

Philip – As I told you over the telephone, if you can provide any shred of legal support for the absurd proposition that asking for production of confidential documents in another docket violates a protective order I'll be happy to discuss it further.

Gary A. Dodge  
Hatch, James & Dodge  
(801) 363-6363

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**From:** Philip D. Dracht [mailto:pdracht@fabianlaw.com]  
**Sent:** Monday, March 14, 2011 6:04 PM  
**To:** gdodge@hjdllaw.com  
**Cc:** Phillip Russell; Dave Crabtree; P. Bruce Badger; Clint Hansen; Annette Clark  
**Subject:** Dracht Letter to Dodge Re Protective Order

Gary:

Attached is a letter regarding your violation of the terms of the Stipulated Protective Order entered by the Court in *Deseret Generation & Transmission Co-Operative v. PacifiCorp*, Case No. 2:10-cv-159-TC.

We would like to meet and confer with you regarding this issue to avoid judicial intervention. To that end, please let me know when you are available on this Tuesday, Wednesday, or Thursday to meet and confer. I will make myself available to fit your schedule.

Sincerely,

Philip D. Dracht

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**direct** (801)323-2251  
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Salt Lake City, UT 84111-2323  
[www.fabianlaw.com](http://www.fabianlaw.com)

# **EXHIBIT B**

# **EXHIBIT B**

**Philip D. Dracht**

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**From:** Gary A. Dodge [gdodge@hjdllaw.com]  
**Sent:** Monday, March 14, 2011 6:34 PM  
**To:** Philip D. Dracht  
**Cc:** 'Phillip Russell'; 'Dave Crabtree'; P. Bruce Badger; Clint Hansen; Annette Clark; gdodge@hjdllaw.com  
**Subject:** RE: Dracht Letter to Dodge Re Protective Order

By the way, your letter indicates that I should be “fully prepared to engage in a meaningful discussion of the legal points and authorities” for my data request. I am prepared to discuss legal points and authorities supporting my data requests at any time. I trust that you would not send a threatening letter, demand a meet and confer or take any other actions without being similarly prepared to provide legal points and authorities in support of your argument that by filing a data request asking for confidential documents I have somehow violated the protective order. I once again invite you to share those points and authorities with me. Perhaps then we can have a meaningful meet and confer.

Gary A. Dodge  
Hatch, James & Dodge  
(801) 363-6363

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