- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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 ORDER ON MOTION TO COMPEL DISCOVERY

ISSUED: April 26, 2011

By The Commission:

This matter is before us on the motion of UAE Intervention Group ("UAE'), filed March 31, 2011, to compel production of certain documents, and seeking an extended testimony filing deadline and expedited treatment. PacifiCorp ("Company"), doing business in Utah as Rocky Mountain Power, filed a response to the motion on April 5, 2011, contesting the requested relief, except for expedited disposition of the motion. On April 7, 2011, UAE replied to the Company's response. On April 12, 2011, the Utah Office of Consumer Services ("Office") filed a memorandum in support of UAE's motion. On April 14, 2011, a Commission hearing officer held a duly noticed hearing to receive legal argument on the motion from the parties.

The discovery dispute presented in the motion centers on UAE's Data Request 2.1 served March 3, 2011, and the Company's March 23, 2011, response:

> UAE Data Request 2.1
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> Please provide copies of the arbitration award, hearing transcripts, hearing exhibits, deposition transcripts, deposition exhibits, discovery responses sent and received and other documents filed, admitted or introduced in connection with the recent arbitration proceeding between PacifiCorp and Deseret Generation and Transmission Cooperative relating to pollution control equipment at the Hunter Power Plant Unit II.

> Company Response to UAE Data Request 2.1
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> The Company objects to this request on the basis that the information is subject to the Stipulated Protective Order entered by the federal court in a proceeding between PacifiCorp and Deseret Generation and Transmission and is already in the possession of counsel in its capacity as counsel for Deseret.

In its motion and accompanying exhibits, UAE describes the relationship between the arbitration proceeding referenced in Data Request 2.1 and this case. UAE states Deseret Generation and Transmission Cooperative ("Deseret") is a minority co-owner of the Hunter II generating unit operated by the Company, the majority co-owner. The arbitration is related to litigation in the Utah Federal District Court in which Deseret challenges the Company's decision to spend over two hundred million dollars on two capital improvement projects to replace or upgrade Hunter II generating unit environmental equipment. The projects are referred to as the "Scrubber Upgrade" and "Baghouse Conversion" projects. Deseret denies any obligation to pay for any part of these projects claiming the Company has breached a number of its duties under the Ownership and Management Agreement, dated October 24, 1980, ("O&M Agreement"), as amended. In general, the O&M Agreement governs the joint owners' duties with respect to the Hunter II plant. In particular, it establishes the requirements and process for obtaining minority owners' prior approval of capital improvement project expenditures in excess of one million dollars.

In the federal court litigation, PacifiCorp successfully argued the O&M Agreement required arbitration of one aspect of the dispute with Deseret. Pursuant to the Utah Federal District Court's Order and the terms of the O&M Agreement, the arbitrator analyzed and decided only one question: whether the proposed Scrubber Upgrade and Baghouse Conversion

capital improvements are consistent with "Reasonable Utility Practice."[1] "Reasonable Utility Practice," as defined in the O&M Agreement, means "…any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry…which, in the exercise of reasonable judgment in light of the 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."[2] In Data Request 2.1, UAE seeks the arbitrator's decision on the question of Reasonable Utility Practice together with the arbitration record and all of the underlying discovery.

In its motion, UAE notes the Company seeks through this general rate case to add to its rate base and recover in rates the Company's portion of the expenditures for the Scrubber Upgrade and Baghouse Conversion projects, the identical projects Deseret challenges in the federal litigation. A finding in this general rate case that these project expenditures are prudent is a prerequisite to rate recovery. Accordingly, UAE asserts the arbitration record is directly relevant to our determination of whether the project expenditures are recoverable in rates. Additionally, UAE notes the Company's rate increase application includes similar project costs at other generating units and argues the arbitration record is also potentially relevant to our consideration of the costs associated with those projects. Thus, UAE maintains the information it seeks through the contested data request is a proper subject of discovery in this case.

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[1] See Order, Case No. 2:10-cv-00159-TC, United States District Court for the District of Utah, Central Division, September 1, 2010, p.3.

[2] The definition also provides: "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…." O&M Agreement, p. 8.

UAE also asserts it has been disadvantaged in this case by the Company's "delay and concealment" tactics in not disclosing the arbitration-related documents, and requests a day-for-day extension of the May 26, 2011, deadline to provide its direct testimony and exhibits on the Scrubber Upgrade and Baghouse Conversion projects. Finally, UAE requests we require the Company to pay UAE's reasonable expenses, including attorneys' fees, in obtaining production of the requested arbitration documents, citing Rule 37, Utah Rules of Civil Procedure.

The Office supports and joins UAE's request for the arbitration-related information. Noting the Company's "unequaled access" to its own accounting and financial information, the Office emphasizes the need for the Company to act in good faith in designating certain information "confidential" or "highly confidential." It contends the Company may avail itself of the Commission's rules which provide the means for such information to be disclosed and examined without undue harm to the Company.[3] The Office also draws our attention to prior Commission orders and Utah Supreme Court rulings describing the heavy burden utilities bear in proving their entitlement to rate relief. The Office asserts Data Request 2.1 seeks information the Commission must examine as it evaluates the Company's rate increase application.

The Company's written response to UAE's motion expresses three basic objections to providing the requested information. Each objection relates to the Stipulated Protective Order ("Protective Order") in the federal litigation which, in pertinent part, protects from unauthorized use confidential information produced in response to discovery in the court-ordered arbitration. First, the Company objects to providing the information because UAE's

[3] See Utah Administrative Code § R746-100-16.

counsel, Mr. Gary Dodge, allegedly used his knowledge of protected Company information, gained in his capacity as counsel for Deseret in the federal arbitration, to formulate Data Request 2.1. Second, the Company contends the data request is overbroad and would require the Company to "violate" the Protective Order and risk potential liability. Third, the Company asserts some of the requested information is "privileged or protected or has no probative value or relevance in this proceeding and would only serve to potentially prejudice [the Company]."[4] Disclosure of such information under the Protective Order did not waive any applicable privilege or protection, according to the Company.

During oral argument, the Company amended its position significantly. The Company now acknowledges it was free, under the terms of the Protective Order, to disclose its own information to UAE. In fact, as UAE pointed out in its motion, the Protective Order itself states: "This Order has no effect upon, and shall not apply to, a party's use or disclosure of its own confidential information for any purpose."[5] The Company also concedes Deseret did not designate as "confidential" or "privileged" any of the information it provided in the course of the arbitration. Consequently, Deseret's arbitration disclosures are also not subject to the Protective Order. In sum, the Protective Order has not prevented the Company from disclosing its own

[4] Rocky Mountain Power's Response to UAE's Motion to Compel and Request for Extended Testimony Filing Deadline, dated April 5, 2011, p. 3.
[5] Stipulated Protective Order, ¶ 3.

information or that of Deseret in the Company's possession through the arbitration, despite the Company's initial statement of objection and written response to the contrary.[6]

In effect, the statements by the Company's counsel at the hearing, summarized above, withdraw the Company's objections to providing the vast majority of the information requested in Data Request 2.1. Consistent with this withdrawal, at the hearing's conclusion the hearing officer ordered the Company to comply with Data Request 2.1 and disclose all information and documents reasonably described therein, except for the arbitrator's decision and material subject to the attorney-client communication or attorney work product privileges. The Company has reported it provided the bulk of the responsive documents on April 15, 2011, and the remainder by the close of business Monday, April 18, 2011.

As noted during the hearing, the disclosed material, at least initially, will receive similar protections to those afforded under the federal Protective Order.[7] With regard to these protections, the information UAE has requested falls into three categories. The first of these is information that is not even arguably subject to the Protective Order because it was not designated "Confidential" in the federal arbitration and litigation. This material likewise will not receive confidential treatment in this case, without further justification. The second category is information disclosed in the arbitration bearing a "Confidential" designation. Such material shall

[6] Providing further certainty on this point, Mr. Dodge stated Deseret has authorized him to assure the Commission it waives any protection its information might be afforded by the Protective Order, and consents to disclosure in this proceeding of all of its information, including the arbitration record and decision. Mr. Dodge also made clear, and the Company does not dispute, he could not provide UAE's experts access to the arbitration documents he possesses in his capacity as counsel for Deseret, without potentially violating the Protective Order's coverage of the Company's confidential disclosures. He represents he has not violated the Protective Order and that all information necessary to formulate Data Request 2.1 is available in the public record.

[7] These protections include the opportunity to "claw back" information inadvertently disclosed absent the appropriate confidential or privileged designation, without waiving the confidential or privileged status.

be disclosed in this proceeding subject to Utah Administrative Code § R746-100-16,"Use of Information Claimed to Be Confidential in Commission Proceedings." The third category is material designated "Confidential-Privileged" or "Confidential-CII" which shall be afforded "additional protective measures" as authorized in Utah Administrative Code § R746-100-16.A.1.e.[8] Under this subsection of the rule, the providing party proposes the desired additional protective measures to the requesting party. If they cannot agree on the appropriate measures, the providing party petitions the Commission for an order. Although the additional protective measures to be applied in this case were not specified during the hearing, the parties agreed in principle upon measures analogous to those afforded in the Protective Agreement for "Confidential-Privileged" and "Confidential-CII" material. We leave it to the parties to negotiate the specific additional protective measures in good faith. Failing agreement, the Company as the requesting party may, within ten calendar days of this order, petition the Commission for specific additional protective measures.

The hearing officer's direction at the close of the hearing included instructions for the parties to meet and confer regarding material the Company considers subject to the attorney-client communication or attorney work product privileges. We note on April 18, 2011, the Company provided the Commission, UAE and the Office a privilege log listing ten documents disclosed under the Protective Order in the federal arbitration the Company considers subject to the attorney-client or attorney work product privileges. This log has been docketed in this proceeding. Should UAE, the Office or any other party disagree with the Company's

[8] The Protective Order provides for three classes of confidential designation: "Confidential," "Confidential-Privileged," and "Confidential-CII." See Stipulated Protective Order, p. 6.

classification of these documents and be unable to resolve the matter with the Company informally, that party should promptly bring the matter to the Commission's attention.

As to the arbitration decision (also referred to in the record as the "award"), the Company continues to claim the decision is not discoverable in this proceeding. In its written response to UAE's motion, the Company characterizes the decision as "not relevant," "non-probative," and "the arbitrator's unreviewable, non-precedential, opinion and interpretation of…facts in the context of distinct and unrelated contractual rights of PacifiCorp and Deseret (a non-party to the rate case)."[9] The Company argues the only purpose to be served by disclosure and introduction in evidence of the decision is "to imbue these proceedings with a potential prejudicial bias against Rocky Mountain Power."[10] The Company maintained this theme in oral argument additionally claiming the award is an inadmissible legal opinion whose disclosure could not reasonably lead to the discovery of admissible evidence. The Company reasons essentially all of the information underlying the decision is being produced, so the decision itself is irrelevant.[11] Additionally, the Company maintains the award is not information it controls, and the Protective Order bars its disclosure.

We are not persuaded by the Company's arguments. From the information presented to us in UAE's motion and exhibits, it is clear the arbitrator examined an extensive record of testimony, exhibits, reports, and other documents all bearing on the key factual

[9] Rocky Mountain Power's Response to UAE's Motion to Compel and Request for Extended Testimony Filing Deadline, April 5, 2011, p.8.
[10] Id.
[11] The Company offers no supporting authority for any of these positions beyond the rules of evidence that limit discovery to information which is relevant to the subject matter of the case. See, e.g., Rocky Mountain Power's Response to UAE's Motion to Compel and Request for Extended Testimony Filing Deadline, April 5, 2011, pp.7-8; Transcript of Hearing, April 14, 2011, pp. 55-63.

question of whether the Scrubber Upgrade and Baghouse Conversion capital investments are consistent with Reasonable Utility Practice. In this proceeding, we will examine the prudence of these same investments to determine the extent to which the associated costs may be recovered in rates. When the Commission determines the prudence of a utility's actions or the expenses it incurs, Utah Code § 54-4-4(4)(a) directs the Commission to apply the following standards:

(i) ensure just and reasonable rates for the retail ratepayers of the public utility in this state;
(ii) focus on the reasonableness of the expense resulting from the action of the public utility judged as of the time the action was taken;
(iii) determine whether a reasonable utility, knowing what the utility knew or reasonably should have known at the time of the action, would reasonably have incurred all or some portion of the expense, in taking the same or some other prudent action; and
(iv) apply other factors determined by the commission to be relevant, consistent with the standards specified in this section.

These standards clearly raise issues of reasonable utility practice. While the arbitrator's decision would not be dispositive of the issues we must consider, it is evident the decision addresses factual issues about the Scrubber Upgrade and Baghouse Conversion projects that are closely related, if not identical, to the issues we must judge in acting upon the Company's application. Accordingly, it is reasonable to conclude the decision may lead parties to the discovery of admissible evidence, including the content of the decision itself.

We fail to see why the arbitration decision is not probative of the prudence of the Scrubber Upgrade and Baghouse Conversion capital investments, as the Company argues. Although we will reach questions of the admissibility of evidence later in the case, from the information available to us now, the public interest in just and reasonable electric rates would certainly justify, if not require, that we consider the arbitrator's findings. We are confident doing

so would not unfairly prejudice the Company. The only prejudice the Company mentions would result merely from the information being potentially adverse. That type of prejudice does not disqualify probative evidence from consideration. In any event, the Commission is not bound by the technical rules of evidence and may receive any oral or documentary evidence, provided no finding may be based solely on hearsay or otherwise incompetent evidence.[12] All of the foregoing factors lead us to conclude the Company should produce the arbitration decision.

Furthermore, it seems apparent the arbitration decision is a corporate record within the Company's control and is not subject to the Protective Order, as the Company claims. By its terms, the Protective Order applies to "disclosures" or "responses to discovery" between parties involved in the arbitration and to derivative information like copies, summaries or abstracts of discovery responses.[13] It does not explicitly apply to, or even mention, the arbitration decision. Additionally, even if the Protective Order did apply, it would not bar disclosure of the decision. With very limited exceptions, if any, the information underlying the decision is either Deseret's, none of which is confidential, or the Company's which the Company is free to disclose for any purpose. Moreover, when it does disclose, the Protective Order does not apply. The Company has not explained why the arbitrator's decision discussing information that is not subject to the Protective Order is itself protected. The Company has not established that its duties under the Protective Order bar it from disclosing the decision. Moreover, as previously noted, the Commission's rules afford adequate protection for any confidential Company or third

[12] See Utah Administrative Code § R746-100-10.F.1.
[13] Stipulated Protective Order, p. 2.

party information present in the decision. Accordingly, we direct the Company to disclose the arbitration decision within seven calendar days of the date of this Order.

Under the discovery guidelines agreed upon by the parties and ordered in this proceeding, the Company should have provided the information responsive to Data Request 2.1 on or before March 24, 2011. Instead, the Company produced the bulk of the information on April 15, 2011, the day following the hearing on UAE's motion. UAE requests a day-for-day extension in the deadline for filing its testimony pertaining to the Scrubber Upgrade and Baghouse Conversion projects. That remedy could potentially disrupt the previously adopted case schedule[14] and seems extreme in light of the fact UAE's testimony is not due until May 26, 2011. Nevertheless, some accommodation is warranted for the delay. Rather than adjust the testimony due date, we will shorten the interval for the Company's responses to any further UAE data requests pertaining to the Company's investment in any power plant environmental equipment at issue in this proceeding. The interval shall be five calendar days. If for any reason the Company is unable to meet this schedule with regard to a specific request, it should inform the Commission of the circumstances by letter before the five day interval has expired.

UAE requests we require the Company to pay the reasonable expenses, including attorneys' fees, UAE has incurred in obtaining production of the arbitration documents. UAE makes its request pursuant to Utah Rules of Civil Procedure, Rule 37(a)(4). With certain exceptions not pertinent here, the Commission's procedural rules provide that discovery shall be made in accordance with Rules 26 through 37 of the Utah Rules of Civil Procedure.[15] Rule 37

[14] See Docket No. 10-035-124, Scheduling Order, dated February 23, 2011.
[15] See Utah Administrative Code § R746-100-8.

provides for court-awarded monetary sanctions for withholding discovery. In fact, in the absence of specified justifications, the sanctions are mandatory. Unlike a court of general jurisdiction, however, the Commission may exercise only those powers specifically granted to it by statute.[16] We find we do not have authority to grant UAE's request for costs and attorneys' fees under the facts before us.

ORDER

1. The Company shall disclose the arbitration decision to UAE and any other requesting parties within seven calendar days of the date of this Order.
2. The Company shall respond within five calendar days of receipt to any further UAE data requests pertaining to the Company's investment in any power plant environmental equipment at issue in this proceeding. If for any reason the Company is unable to meet this schedule with regard to a specific request, it shall inform the Commission of the circumstances by letter before the five day interval has expired.
3. The Company and UAE shall resolve any further disagreements concerning the disclosure or use of information provided in response to Data Request 2.1, in accordance with the direction provided in this Order.

[16] See Heber Light & Power Co. v. Pub. Serv. Comm'n, 2010 UT 27, ¶ 17. "It is well established that the Commission has no inherent regulatory powers other than those expressly granted or clearly implied by statute."

DATED at Salt Lake City, Utah, this 26th day of April, 2011.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#72266