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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE APPLICATION OF ROCKY MOUNTAIN POWER FOR APPROVAL OF POWER PURCHASE AGREEMENT BETWEEN PACIFICORP AND LATIGO WIND PARK, LLC	Docket No. 13-035-116 ***REPLY IN SUPPORT OF MOTION TO COMPEL ROCKY MOUNTAIN POWER***

Rocky Mountain Power's ("PacifiCorp") Response to Ellis-Hall's Motion to Compel concedes that PacifiCorp failed to produce highly relevant documents pursuant to Ellis-Hall's discovery requests by the deadline set in the Commission's Scheduling Order. PacifiCorp attempts to excuse this failure by claiming, nearly a month after the Commission's deadline, that it "is compiling the information requested and will provide it to counsel for Ellis Hall, with the exception of the LGIA between PacifiCorp and [Latigo], which is confidential pursuant to the terms until it is executed[.]" Response at 2. PacifiCorp's assertions are incorrect and contrary to Utah law.

I. PACIFICORP'S ADMITTED FAILURE TO PRODUCE RELEVANT DOCUMENTS IS A VIOLATION OF UTAH LAW.

The Utah Supreme Court has held that the purpose of discovery is "to remove elements of surprise or trickery so the parties and the court can determine the facts and resolve the issues as directly, fairly and expeditiously as possible." *Rahofy v. Steadman*, 2010 UT App 350, ¶ 7, 245 P.3d 201, 204 (citations omitted). It is axiomatic that failing to produce documents in a timely manner is contrary to purpose of discovery.

Courts uniformly recognize that "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." *Systemic Formulas, Inc. v. Kim*, 1:07-CV-159 TC, 2009 WL 1444226 (D. Utah 2009). [1] Moreover, failing to respond in the appropriate timeframe subjects the noncomplying party to sanctions under Rule 37. *See Aurora Credit Services, Inc. v. Liberty W. Dev., Inc.*, 129 P.3d 287, 289 (Utah App. 2006); citing *W.W. & W.B. Gardner, Inc. v. Park W. Vill., Inc.*, 568 P.2d 734, 738 (Utah 1977) (affirming default judgment pursuant to rule 37, where defendant failed to respond to discovery within thirty days, because "[a] defendant may not ignore with impunity the requirements of [r]ules 33 and 34, and the necessity to respond within thirty days").

Here, PacifiCorp admittedly failed to produce highly relevant documents by the deadline set in the Commission's Scheduling Order. In fact, PacifiCorp did not produce the requested documents until yesterday, nearly a month after PacifiCorp's responses were due.

Contrary to PacifiCorp's assertions, the fact that Ellis-Hall did not have access to highly relevant documents before it filed its Objection, and did not obtain documents until a little more

1 Because Utah R. Civ. P. 34(1) and Fed. R. Civ. P. 34(a) are "substantially similar, reliance on cases interpreting the [Fed. R. Civil P.] is appropriate." *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54,¶ 7 n.2.

than a week before the Commission's hearing, prejudices Ellis-Hall. PacifiCorp demanded that this matter proceed on an expedited basis. Having done so, PacifiCorp is in no position to delay discovery for nearly a month.

Moreover, after admittedly failing to produce relevant documents to Ellis-Hall, PacifiCorp has the chutzpa to incorrectly assert that Ellis-Hall's Objection should be denied because it lacks material support. *See* PacifiCorp's Reply Comments at 2 (stating "Ellis-Hall has not provided any material evidence to support its objection to the approval of the Latigo PPA or to support its statements and accusations."). PacifiCorp's representation that Ellis-Hall has not provided any material evidence to support its objection is absurd as proven by the numerous citations and supporting exhibits to Ellis-Hall's Objection. Moreover, PacifiCorp's disingenuous argument suggests that PacifiCorp's failure to produce documents is a willful strategy intended to prejudice Ellis-Hall's ability to support its claims.

In addition, even though PacifiCorp eventually did produce some of the requested documents yesterday, under Utah Rule of Civil Procedure 37(d), Ellis-Hall is entitled to the sanction of its attorney's fees and expenses because PacifiCorp's failure to produce its documents is not substantially justified and its production was not made before the Motion to Compel was filed.

PacifiCorp's admitted failure to produce relevant documents without substantial justification is violation of Utah law that prejudices Ellis-Hall's ability to fully support its claims in this matter. The Commission should grant Ellis-Hall's Motion to Compel and impose appropriate sanctions on PacifiCorp under Utah Rules of Civil Procedure 37(d) and 37(e)(2).

II. PACIFICORP MAY NOT WITHHOLD DISCOVERY BASED ON A PURPORTED CONFIDENTIALITY AGREEMENT.

PacifiCorp's claim that it can refuse to produce the LGIA between PacifiCorp and Latigo because it is purportedly "confidential pursuant to the terms until it is executed" is factually incorrect and contrary to law.

As a preliminary matter, contrary to PacifiCorp's representations, the LGIA between PacifiCorp and Latigo **has been executed**. In fact, the LGIA was executed by the parties after Ellis-Hall objected that Latigo's PPA had been approved without an LGIA. As a result, PacifiCorp's stated basis for confidentiality is specious.

Furthermore, it is hornbook law that PacifiCorp cannot refuse discovery simply because it impinges on a confidentiality agreement. *See, e.g., Mancini v. The Ins. Corp. of N.Y.*, 2009 U.S. Dist. LEXIS 51321 *19 (S.D. Ca.) ("Plaintiffs may not use their own confidentiality agreement to hide documents from INSCORP."); *Zoom Imaging, L.P. v. St. Luke's Hosp. and Health Network*, 513 F. Supp. 2d 411, 417 (E.D. Pa. 2007) (confidentiality agreements do not preclude discovery); *Kingsway Financial Svcs, Inc., v. Price-Waterhouse-Coopers LLP*, 2007 U.S. Dist. LEXIS 11349 *11 ("[T]here is no privilege for documents merely because they are subject to a confidentiality agreement."); *Harris v. Federal Reserve*, 938 F.2d 720, 723 (7th Cir. 1991) ("The rights of a party to obtain documents under the judicial process are not enjoyed at the sufferance of third parties who have agreed between themselves to keep documents secret."); *Channelmark Corp. v. Destination Products Intern., Inc.*, 99 C 214, 2000 WL 968818 (N.D. Ill. 2000); citing *Rush Prudential Health Plans*, 1998 WL 156718 at *2 (allowing discovery of terms of a confidential settlement agreement made between defendant and a third party) .

"Simply put, litigants may not shield otherwise discoverable information from disclosure to others merely by agreeing to maintain its confidentiality." *DirecTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 684-85 (D. Kan. 2004).

Here, the LGIA between PacifiCorp and Latigo is relevant to Ellis-Hall's claims of disparate treatment by PacifiCorp. PacifiCorp cannot avoid producing the LGIA by claiming that it is "confidential."

CONCLUSION

PacifiCorp's response to Ellis-Hall's Motion to Compel is devoid of any legal or factual support that PacifiCorp's failure to provide requested discovery was substantially justified. Consequently, under Utah Rule of Civil Procedure 37(d) and 37(e)(2) the Commission should impose appropriate sanctions on PacifiCorp including deeming matters asserted in Ellis-Hall's objection as established and awarding Ellis-Hall its reasonable costs and attorney's fees.

DATED this 11th day of September, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2013, a true and correct copy of the forgoing ***REPLY IN SUPPORT OF MOTION TO COMPEL ROCKY MOUNTAIN POWER*** was served via e-mail to the following:

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