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**VIA HAND DELIVERY**

Utah Public Service Commission  
Heber M. Wells Building  
160 East 300 South, 4<sup>th</sup> Floor  
Salt Lake City, Utah 84111

**Re: Objection to Proposed Confidential Information Certificate  
Docket No. 13-035-184**

Dear Commissioners:

On December 20, 2013, Rocky Mountain Power (“RMP” or “Company”) filed with the Commission a draft Confidential Information Certificate, or non-disclosure agreement (“NDA”) that the Company proposes to use in the general rate case that it intends to file in January under the docket number referenced above.

The rate case has not yet been filed and the Utah Industrial Energy Consumers (“UIEC”) have not yet intervened in this docket. Yet, because the form of the NDA affects the information that will be available to parties when the rate case is filed, and because it also affects discovery in other dockets now pending before the Commission, the UIEC’s undersigned counsels object to the proposed NDA, and in support of the objection, provides the following comments.

The Company proposes to add a new sentence to the usual NDA which states: “Additionally, I verify that I have returned or destroyed all confidential materials from other dockets in which I have participated, pursuant to Rule 746-100-16.3.e.” The additional requirement proposed by the Company is inconsistent with the form of the NDA that is prescribed by the Commission’s rules. The rule states:

The Non-Disclosure Agreement shall require the person to who disclosure is made to read a copy of this rule and any applicable Protective Order and to certify in writing that he or she has reviewed the same and has consented to be bound by the terms.

R746-100-16.(A)(1)(e). The rule also provides the following suggested language for the NDA:

"Nondisclosure Agreement. I have reviewed Public Service Commission of Utah Rule 746-100-16 and/or the Protective Order entered by the Public Service Commission of Utah in Docket No. XX-XXX-XX with respect to the review and use of confidential information and agree to comply with the terms and conditions of the rule and/or Protective Order."

*Id.* The rule does not require recipients of confidential information to certify anything other than that they will comply with the rule and/or protective order.

Under R746-100-16(A)(3)(e), "Counsel who are provided access to Confidential Information pursuant to the terms of this rule or Protective Order may retain the Confidential Information" provided to them, as well as the Confidential Information collected from their consultants. The proposed NDA appears to require counsel to certify that they have returned or destroyed it, even though the rule allows them to retain it.

The Company has petitioned for approval of a new Schedule 31 tariff (Docket No. 13-035-196), has informed the Commission that it will file a general rate case after the first of the year, is scheduled to file an EBA reconciliation case in March, and has recently submitted a stress factor study in the 2011 general rate case (Docket No. 11-035-200), which will become relevant in the upcoming general rate case. It is virtually certain that some of the information sought through discovery in these dockets will pertain to issues in some other docket. Under the circumstances, the requirement to return confidential information, as well as the prohibition against using confidential information obtained in one docket in any other docket, is inefficient, expensive for all parties, and likely to lead to inconsistencies in the information provided by the Company. The Commission should issue a special protective order in this and all related dockets that will ameliorate the difficulties faced by interveners in conducting discovery and in retaining and using confidential information.

Moreover, there is a tendency of RMP to designate as "confidential" virtually all information provided in support of its applications and in response to discovery requests. RMP may designate, for example, a spreadsheet page confidential when only some numbers on the page are confidential, or it may designate the entire document confidential when only some pages appear to contain confidential information. Likewise, there is no distinction made between information that must not be made public and information that, although not public, could be used for other purposes without harming the Company, such as in other dockets or in transactions with the Company.

Under the rule, the confidential nature of information persists indefinitely. Because confidential information, once learned, cannot be forgotten at the end of a proceeding, parties and counsel who have participated in cases before the Commission are vulnerable to claims of violating the protective order simply by conducting business with RMP. In light of the law in this state, which portends harsh consequences for misuse use of RMP's confidential information, (*see USA Power, LLC v. PacifiCorp*, 235 P. 3d 749 (Utah 2010)), recipients must assume all information produced on yellow paper is forever confidential for all purposes.

For the reasons stated above, UIEC counsel opposes (and will not sign) the Company's proposed NDA.

It should also be noted that a person who does not sign an NDA is not in a position to challenge the designation of confidentiality because he or she will not see the information that has been so designated. R746-100-16(2)(c). Given that paradox, (and the fact that the DPU and OCS are, by nature, generally indifferent to challenging confidentiality because of R746-100-16((A)(1)(d))), the utility's practice of broadly designating confidential information is likely to continue unabated despite the chilling effect on participation in cases before the Commission and on counsel's ability to represent clients in other matters involving their electric service.

The Commission should reject the Company's proposed NDA, and should not accept the Company's rate case filing as "complete" for purposes of Section 54-7-12 (or for purposes of commencing the 240 period under subsection 54-7-12(3)(a)) while counsel for intervening parties are effectively denied access to data due to RMP's overreaching NDA.

The Commission might also consider whether a rulemaking proceeding should be initiated to address the use of confidential information in other administrative proceedings and business transactions with the Company, and whether the utility should be required to demonstrate the basis for a claim of confidentiality before designating full pages or entire documents as confidential.

Very truly yours,

PARSONS BEHLE & LATIMER

/s/ William J. Evans

WJE/cvd  
cc: Service List in Docket 13-035-184