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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of) PACIFICORP’S MOTION TO STRIKE,
PACIFICORP for a Certificate of) OR IN THE ALTERNATIVE, MOTION
Convenience and Necessity Authorizing) FOR OFFICIAL NOTICE
Construction of the Lake Side)
Power Project) DOCKET NO. 04-035-30

PacifiCorp (or the “Company”) hereby submits this motion to strike the testimony filed by Spring Canyon Energy on August 27, 2004, in the above-captioned proceeding. In the alternative, PacifiCorp requests that the Commission take official notice of the below-referenced testimony and transcript citations from Docket No. 03-035-29. In support thereof, PacifiCorp states as follows:

Discussion

On August 27, 2004, Spring Canyon Energy LLC (“SCE”) filed a two-page document with the Commission entitled “Spring Canyon Energy LLC’s Pre-Filed Direct Testimony Challenging the Results of PacifiCorp’s RFP-2003-A” (“SCE Filing”). In this filing, SCE seeks to introduce the direct testimony of F. David Graeber and Theodore Banasiewicz previously filed in Docket No. 03-035-29, the Current Creek certificate of public convenience and necessity proceeding, as the prefiled direct testimony in the above-captioned proceeding. SCE claims that the reason it is seeking to reintroduce this previously considered testimony in a new docket is because SCE “sees no point in incurring the expense associated with preparing and filing new

testimony.” Instead, SCE urges the Commission to “reconsider its position” regarding the scope of the Commission’s authority under the certificate statute, Utah Code Ann. § 54-4-25.

Unfortunately for SCE, its own pleading reveals that the proffered testimony is irrelevant to this proceeding and procedurally improper. With this filing, SCE has created the unreasonable burden on this proceeding that PacifiCorp anticipated with SCE’s intervention. For these reasons, discussed in greater detail below, PacifiCorp requests that the Commission strike the SCE Filing and proffered prefiled testimony of Messrs. Graeber and Banasiewicz as irrelevant and improper.

If the Commission chooses to accept the SCE Filing and proffered testimony, PacifiCorp requests that the Commission take official notice, pursuant to Utah Admin. Code R746-100-10(F)(3) and Utah Code Ann. § 63-46b-8(1)(b)(iv), of relevant rebuttal and surrebuttal testimony filed and delivered by PacifiCorp witnesses in Docket No. 03-035-29 and of relevant portions of the transcript of PacifiCorp witnesses, Messrs. Klein, Thurgood, Williams, Tallman and Furman and the cross-examination of Messrs. Graeber and Banasiewicz. In addition, PacifiCorp requests that the Commission take official notice of the portion of the rebuttal testimony of Division of Public Utilities witness, Dr. William Powell related to the SCE testimony.

1. The SCE Filing And Proffered Testimony Is Irrelevant And Therefore Should Be Stricken.

While the Commission is not strictly bound by the rules of evidence in Commission hearings, the Commission nevertheless has the legal authority to exclude “non-probative, irrelevant or unduly repetitious evidence.” Utah Admin. Code R746-100-10(F)(1). Evidence is irrelevant if it has no probative value. Utah. R. Evid. 401. SCE’s proffered testimony relates only to one category, the “peaker” category, of the RFP 2003-A, that the Commission reviewed in Docket No. 03-035-29. That category involved a request for bids for a resource available by

summer of 2005 capable of daily dispatchability. Much of the testimony filed by SCE in Docket No. 03-035-29, to which PacifiCorp responded, involved questions regarding SCE's ability to meet these two requirements. Neither of these two requirements are relevant to the issues in this proceeding, which involves the baseload category of RFP 2003-A. Nor does SCE make any attempt to explain why this testimony is relevant, stating instead that "sees no point in incurring the expense associated with preparing and filing new testimony." SCE Filing at 1.

To the extent Messrs. Graeber and Banasiewicz' previously filed testimony involved more general issues in the RFP process itself, the Commission has already heard this evidence and rejected it in the context of the previous certificate proceeding. As PacifiCorp pointed out in its previously filed opposition to SCE's intervention, to the extent these issues are relevant to any Commission proceeding, it is in the Commission's taskforce on RFP issues in Docket 03-035-03.

For all of these reasons, the SCE Filing and proffered testimony is irrelevant to any issue before the Commission in this proceeding and should be struck pursuant to Utah Admin. Code R746-100-10(F)(1).

2. The Commission Should Strike The SCE Filing And Proffered Testimony Because It Materially Impairs The Orderly And Prompt Conduct Of The Proceeding.

Intervention in Commission proceedings is controlled by the Utah Administrative Procedures Act. *See* Utah Admin. Code R746-100-7; Utah Code Ann. § 63-46b-9. According to the APA, intervention is proper where the "interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention." Utah Code Ann. § 63-46b-9(2)(b). Parties to a Commission proceeding are given the right to participate, including to present evidence and other rights pursuant to the Commission's rules. Utah Admin. Code R746-100-5. However, even after an order permitting intervention is made, the Commission may impose conditions on the intervenor's participation in

order to ensure the “just, orderly, and prompt conduct of the adjudicative proceeding * * * at any time after intervention.” Utah Code. Ann. § 63-46b-9(3)(b), (c).

The SCE Filing further demonstrates why SCE’s participation in this proceeding is inappropriate and why the Commission should now impose conditions on SCE’s participation in this proceeding. SCE has offered the Commission no evidence relevant to any issue before the Commission in this proceeding. Further, SCE’s purported legal interest in this proceeding was that it was denied an opportunity to “further enhance or negotiate” its bid after being short-listed. The testimony of Messrs. Graeber and Banasiewicz from the Carrant Creek proceeding regarding their peaker bids is totally irrelevant to any arguments regarding any baseload SCE bid in this proceeding.

Moreover, requiring PacifiCorp to respond, again, to the exact same issues raised by SCE that it responded to in the Carrant Creek proceeding will unduly burden this proceeding and the record to the extent that the prompt and orderly conduct of the proceeding will be impaired. If the SCE Filing and proffered testimony is not stricken, PacifiCorp must respond through discovery requests, testimony, rebuttal witnesses and cross-examination in this proceeding to the allegations in the SCE testimony. Many of SCE’s responses to PacifiCorp’s data requests on Messrs. Graeber and Banasiewicz’ testimony in the Carrant Creek proceeding were confidential and provided to PacifiCorp subject to the terms of the protective order in that docket. Therefore, that information is not available to PacifiCorp in the course of this proceeding without the need to re-ask the same questions of SCE. Accordingly, the fact that PacifiCorp has seen this testimony before does not reduce the Company’s administrative burden of having to respond to it.

In any event, SCE has decided to take a different route altogether by requesting qualifying facility prices for their proposed facility from PacifiCorp. See Attachment 1 (Letter from SCE to PacifiCorp). Any alleged interest that SCE had in this proceeding has been mooted by this development. SCE has now chosen to seek to offer power to PacifiCorp under an entirely different process both in terms of PacifiCorp's obligation to buy and the means of calculating the price. Rather than the RFP process determining which resource the Company would purchase and at what price, the PURPA statutes and implementing FERC regulations now control whether, to what extent and at what price PacifiCorp would buy SCE power. Accordingly, SCE has no legitimate interest in this proceeding.

For these reasons, PacifiCorp requests that the Commission issue an order striking the SCE Filing and proffered testimony as a condition of SCE's participation in this proceeding because requiring PacifiCorp, and other parties, to respond to this irrelevant testimony will interfere with the prompt and orderly conduct of this proceeding.

3. The Commission Should Strike The SCE Filing Because It Is Procedurally Improper Because It Was Not Served On The Parties.

The Commission's June 30, 2004, Scheduling Order in this proceeding specifically addressed service of filings in this docket:

The parties shall, if possible, serve all filings and discovery by electronic mail. If any party does not have an electronic mail address or is unable to send documents by electronic mail, service shall, if possible, be by facsimile. If a party has neither an electronic mail address nor a facsimile number or a party is unable to serve documents by electronic mail or facsimile, documents shall be served by hand delivery or overnight courier at the discretion of the serving party. It is understood that attachments or exhibits that are not available electronically and which are too bulky to be served by facsimile will be either hand-delivered or sent by overnight courier to parties who would otherwise be entitled to receive service of them by electronic mail or facsimile. (Emphasis added.)

Neither PacifiCorp nor its counsel was served electronically, by fax, by mail or in any other manner with the SCE Filing. If Commission staff had not made the testimony available to parties in this proceeding upon the parties' specific inquiry, PacifiCorp would not have known that SCE was offering any testimony in this proceeding. PacifiCorp, and other parties, are prejudiced by SCE's failure to serve the testimony on the parties as required by the Commission's Scheduling Order. If this testimony is accepted, it also creates an unreasonable burden on parties in this and in future proceedings who are and will be required to contact Commission's administrative staff to inquire whether other testimony or pleadings have been filed but not served. For these reasons, PacifiCorp requests that the Commission strike the SCE Filing and proffered testimony as having been filed but not served in contravention of the Commission's rules and the Scheduling Order in this proceeding.

4. The Commission Should Strike The SCE Filing Because It Is Procedurally Improper Because It Is Effectively A Late Request For Rehearing.

The Commission's rules specify the requirements for filing a request for rehearing. Specifically, petitions for rehearing are due within 20 days after the issuance date of the Commission order for which the party requests further review or rehearing and the party must state the specific grounds upon which relief is sought. Utah Code Ann. § 63-46b-13(1)(a); *see also* Utah Admin. Code R746-100-11(F).

SCE previously filed a Request for Reconsideration, Review, or Rehearing of the Commission's order in Docket No. 03-035-29 on March 25, 2004 ("SCE Request"). In the SCE Request, SCE argued that the Commission was required to make additional findings beyond those made in the order in that proceeding. Because the Commission did not issue an order granting or denying the SCE request within 20 days, it was deemed denied by operation of law

pursuant to Utah Code Ann. § 63-46b-13(3)(b). SCE did not file an appeal of that determination, and thus, its avenues for review of the determination in Docket No. 03-035-29 are closed.

Nevertheless, SCE states in its filing in this proceeding that the Commission has recently “cabined its authority to making determinations of need and disclaimed any authority to determine which power project will best serve Utah ratepayers.” SCE Filing at 1. SCE then “urges the Commission to reconsider its position regarding its authority.” *Id.* at 1-2 (emphasis added).

SCE however has offered no new evidence or analysis that justifies any Commission reconsideration of its previous determinations in Docket No. 03-035-29 regarding the very same evidence proffered by SCE in this proceeding. Without any additional or new evidence or analysis, there is no basis for asserting a claim for reconsideration and SCE has failed in its obligation to provide specific grounds for its requested relief. For these reasons, the SCE Filing and proffered testimony should be stricken as an unsupported and untimely request for reconsideration.

5. If The Commission Does Not Strike The SCE Filing And Proffered Testimony, PacifiCorp Requests That The Commission Take Official Notice Of Portions Of The Currant Creek Record Responding This Testimony.

The Commission’s rules permit the Commission to take official notice pursuant to a section of the Utah APA. Utah Admin. Code R746-100-10(F)(3). That section of the Utah APA in turn permits official notice of, *inter alia*, the “record of other proceedings before the [Commission].” Utah Code Ann. § 63-46b-8(1)(b)(iv). Official notice of other portions of the record responding to the testimony of Messrs. Graeber and Banasiewicz is necessary in order to provide the Commission an accurate and fair record upon which to make decisions regarding the allegations contained in the testimony as offered in this proceeding.

Specifically, PacifiCorp requests that the Commission take official notice of the rebuttal and surrebuttal testimony filed and offered by PacifiCorp witnesses, Messrs. Klein, Thurgood, Williams, Tallman and Furman¹ and of relevant portions of the transcript of these PacifiCorp witnesses, from Docket No. 03-035-29.² In addition, PacifiCorp requests that the Commission take official notice of the PacifiCorp cross-examination of Messrs. Graeber and Banasiewicz.³ Finally, PacifiCorp requests that the Commission take official notice of the portion of the prefiled and live testimony of Division of Public Utilities witness, Dr. William Powell related to the SCE testimony.⁴

Conclusion

WHEREFORE, PacifiCorp respectfully requests that the Commission strike the SCE Filing and proffered testimony. If the Commission does not strike the SCE Filing and proffered testimony, PacifiCorp requests that the Commission take official notice of the portions of the record from Docket No. 03-035-29 referred to herein.

Respectfully submitted this 10th day of September 2004.

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¹ Docket No. 03-035-29, Exhibits UP&L 1, 1.1-1.4, UP&L 14, 1.1R-1.12R, 1.0SR-1.1SR, 1.0SR Supplement-1.4SR Supplement, Exhibit UP&L 2, 2.1, 2R, 2SR; UP&L 4R, 4.1R-4.10R, 4SR.1-4SR.3, 4.1SR, 4.8SR; Exhibit UP&L 5, 5R, 5.1R.

² Docket No. 03-035-29, Transcript (“Tr.”) 9-272; 281-376; 397-533; 542-556, 1567-1575, 1588-1599, 1643-1678; 1680-1707.

³ Docket No. 03-035-29, Transcript (“Tr.”) 826-916, UP&L Cross Exhibits 13-16; Tr. 928-1032, UP&L Cross Exhibits 17-18; Tr. 1707-1722.

⁴ Docket No. 03-035-29, DPU Exhibit 1.0-1.1, 1.0R – 1.4R, 1.2R Revised, 1.3R Revised, 1.4R Revised, 1.0SR – 1.1SR, 1.0SR Supplement - 1.4SR Supplement

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September 2004, I caused to be served by electronic service, a true and correct copy of the foregoing Motion to Strike, Or in the Alternative, Motion for Official Notice to the following:

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