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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of)	PACIFICORP RESPONSE TO UAE
PACIFICORP for a Certificate of)	MOTION TO COMPEL DISCOVERY
Convenience and Necessity Authorizing)	FROM PACIFICORP, REQUEST
Construction of the Currant Creek Power)	FOR ADDITIONAL TIME
Project)	TO FILE TESTIMONY AND REQUEST
)	FOR EXPEDITED RESOLUTION

Docket No. 04-035-42

PacifiCorp doing business as Utah Power & Light (“PacifiCorp” or the “Company”), hereby files this response to the UAE Intervention Group (“UAE”) Motion to Compel Discovery from PacifiCorp (“Motion to Compel”) and Request for Additional Time to File Testimony (“Request”). UAE also filed a Memorandum in Support of the Motion to Compel and Request for Additional Time (“Memorandum”). There is no support in law or fact for either the Motion to Compel or the Request and therefore, PacifiCorp requests that the Commission deny each motion.

1. UAE’s Motion to Compel Relates to Requests That Are Not Proper Discovery.

UAE seeks an order from this Commission compelling the Company to respond to two data requests. UAE’s attempt to portray PacifiCorp as uncooperative in the discovery process is

a misguided effort to persuade the Commission to grant its motion to compel.¹ UAE's portrayal is misleading and easily refuted. While the parties have disagreed about the proper scope of discovery in this case, PacifiCorp has acted in good faith to respond to UAE's requests and has fully complied with its obligations under the Rules.

The two requests that are the basis of the Motion to Compel request voluminous information related to the Lakeside Project. (See Motion to Compel at 2, see Requests 4.1 and 4.2). These are not proper requests for discovery on the Company's case, which does not include costs related to this Project that will not come on-line until 2007.

In the Motion to Compel, UAE asserts that its fourth set of interrogatories asks for information "relating to PacifiCorp's load and resource projections, its projected timing of resource needs, its resource analysis and selection process, and the Lake Side project." As the basis for its assertion that the requested information is relevant, UAE points only to the fact that the Company is including costs associated with new resources ("including the extended West Valley lease and the Currant Creek project") and therefore UAE is entitled to explore PacifiCorp's "load and resource projections, RFP Processes, bid evaluation and resource selection". (Memorandum at 1-2). In light of the specific other discovery requests UAE has propounded and the Company has responded to in this case, it is clear that there is no substance to UAE's motion.

In fact, PacifiCorp has already provided the load and resource information UAE discusses in its Memorandum. UAE asked the very same questions in UAE Set 3 with one exception. UAE Set 3 related to PacifiCorp's load and resource projections, its projected timing

¹ Indeed, parties have served over 1500 discovery requests, many with multiple subparts and requesting multiple years of data, on PacifiCorp. This is the first motion to compel filed in this proceeding.

of resource needs, its resource analysis and selection process, and the Currant Creek plant. (See Attachment 1 for copies of PacifiCorp’s responses to UAE 3.1 and 3.2) Both 3.1 and 4.1 ask for documentation related to resource needs, planning and timing created since 1995 related to the time period in or after 2000. In fact, UAE 3.1 and 4.1 use the exact same words to request copies of “all documents” that led up to the decision to construct the Currant Creek plant and Lake Side plants respectively.

On its face, the request for “all documents” spanning a 10-year period is overly broad and poses an undue burden on the Company and on that basis alone is objectionable irrespective of the subject matter of the requested material. Notwithstanding the overbroad and burdensome nature of the requests, in response to UAE 3.1 and 3.2, PacifiCorp recreated the entire Currant Creek data room from Docket 03-035-29 and permitted UAE access to all of the information in the data room. The data room includes information related to load and resource projections, timing, analysis and selection and the Currant Creek plant. The information fills multiple binders of printed materials and the spreadsheet models on the computer in the data room that relate to analysis of the bids contain extensive additional material. To date, UAE has not yet visited the data room.²

Having been provided information on planning, load and resource projections, analysis and decision processes up through the Currant Creek project in response to UAE 3.1 and 3.2 (and

² It is simply disingenuous to claim, as UAE does, that PacifiCorp has “thwarted all efforts” at meaningful advance investigation into resource planning and selection process. (Memorandum at 3). PacifiCorp has provided thousands of pages of documents in response to discovery both in Docket No. 03-035-29 (Currant Creek) and in Docket No. 04-035-30 (Lakeside). Moreover, PacifiCorp has held numerous public input meetings and provided opportunity for comment in the Company’s IRP processes, of which UAE is an active participant. While UAE has opportunistically chosen to avail itself (or not) of this data based on its own group agenda, it is not for lack of production by the Company that the information has

of course, through the Current Creek case and IRP process), the only additional material called for in UAE 4.1 and 4.2 relates to the Lakeside plant. While relevance may be broadly construed in the discovery context, it should not be so broadly construed as to require the production of documents and other material related to costs outside of and unrelated to the revenue requirement request. Instead, requested information is relevant if the information sought “may be relevant to the subject matter of the action.” (See Motion to Compel at 2, citing 8 Federal Practice and Procedure 2008 (2d ed. 1994)); *see also* Utah R. Civ. P. 26(b)(1) (defining “relevance”). Moreover, the burden of demonstrating that relevance rests squarely with on UAE. In interpreting the parallel federal rule, courts have held that “[o]nce a party opposing discovery raises its objection, the party seeking discovery must demonstrate the relevancy of the requested information.” *Momah v. Albert Einstein Med. Center*, 164 F.R.D. 412, 417 (E.D. Pa. 1996). UAE has not met its burden.

The subject matter of this proceeding is the costs and revenues and rate base properly adjusted for the test period already adopted by the Commission in this proceeding, FY 2006. UAE points to the inclusion of West Valley³ and Currant Creek in this rate case as a basis for asserting the relevance of information related to Lakeside. This argument is however a non-sequitor. Put simply, the Lakeside plant is not relevant to any issue in this proceeding because PacifiCorp is not currently seeking to recover any costs associated with the plant in this docket. UAE asserts that the requested information is relevant to the question of whether a plant “could have been” available during the test period that displaced the need for West Valley and Currant

not come to UAE’s attention in previous proceedings. Indeed, review of the planning and selection process is the intent of the IRP process and certificate filings.

³ Notably, while UAE claims that it needs the requested information to pursue an investigation into the West Valley lease, UAE has not asked a single discovery question regarding that lease.

Creek. As this Commission is well aware, Lakeside emerged the winning bid in the 2003A RFP in the category of bidders for the 2007 timeframe, or outside of the test period in this case. The request for a resources for this timeframe and not earlier was the culmination of a public process that produced a Commission-acknowledged IRP and Action Plan. Accordingly, consideration of these bids for 2007 resources is not relevant to the question of the prudence of the resources acquired or that could have been acquired during the test period. When PacifiCorp files a rate case that includes a request to recover the costs associated with the Lakeside plant and put it into rate base, questions relating to the prudence of the planning, analysis and decisionmaking related to the plant will clearly be relevant, to the extent that these issues have not been already explored and decided in the certificate or IRP proceeding. Until then, PacifiCorp does not understand, and UAE has not provided any rationale, for how the Lakeside plant is relevant “to PacifiCorp’s request to recover the costs of the West Valley lease extension, the Currant Creek simple cycle project and the Currant Creek combined cycle project.” (Memorandum at 3). Lake Side is not related in any way to the “subject matter” of this docket.

2. The Request for Additional Time to File Testimony Should Be Rejected.

Utah law is clear that a situation of a party’s own making does not rise to the level of an undue hardship which justifies a delay in schedule. *See, e.g., Brown v. Glover*, 16 P.3d 540 (Utah 2000) (holding that a motion for continuance was properly denied where plaintiff “waited until the very last day of discovery to act in any way on this case”). That is precisely the case here. Because the requested information does not relate to any issue in this case, the fact that it has not been produced has zero impact on UAE’s ability to prepare and file relevant testimony in this proceeding. In addition, for the reasons described below, the request to extend the schedule

is necessitated by UAE's own dilatory actions. These actions do not provide a sound reason to extend the schedule.

The only reason proffered by UAE for a delay in the schedule is so that UAE can have time to review and analyze the responses to the discovery requests which are the subject of the Motion to Compel. UAE was an active participant in the Currant Creek case and the IRP processes through those processes has had access to the same load and resource, RFP Processes, bid evaluation and resource selection information now requested. That UAE waited over three months after the filing of the case to request this information in this docket (a request that could have been made on the first day of the proceeding) is not a basis for now permitting them to delay the entire proceeding. In other words, over three months passed in which UAE could have been conducting its review of this information but apparently did nothing. Moreover, the fact that UAE wants to review information that it has already had access to for at least several weeks through the reassembled Currant Creek data room before it files testimony cannot provide a reasoned basis for extending the schedule.

The only additional information now sought by UAE relates to the Lakeside project. For the reasons discussed above, that information is not relevant to any issue in this proceeding. Accordingly, UAE does not need additional time to review irrelevant information in order to file testimony not relevant to any issue in this proceeding.

UAE should not be permitted to bootstrap its own delay and any resulting testimony problems into a reasoned basis for the Commission to delay the entire schedule in this proceeding.

3. The Request for Reasonable Expenses Should Be Denied.

UAE's request for an order pursuant to Rule 37 that PacifiCorp reimburse UAE for its reasonable expenses incurred in obtaining an order compelling discovery should be rejected. As an initial matter, for the reasons stated above, the motion to compel should not be granted and therefore, under Rule 37, no sanctions are available.

However, even if the Commission were to grant the motion to compel, no sanctions should be awarded. According to Rule 37, an award of sanctions is not mandatory and is not appropriate if the nondisclosure is "substantially justified or that other circumstances make an award of expenses unjust." See Rule 37(a)(4)(A), see also *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 940 (1998). This is not a situation where PacifiCorp failed to respond in a timely manner. Nor is this a situation where PacifiCorp failed to comply with an order of the Commission. Rather, PacifiCorp made timely and reasonable objections that UAE should not be permitted to conduct discovery of irrelevant information. While UAE objects to the fact that PacifiCorp used the entire time permitted by Commission order to respond to the discovery requests, compliance with a Commission order cannot serve as a basis for imposing discovery sanctions. Moreover, this superficial statement fails to account for the fact that UAE is not the only party propounding discovery requests in this proceeding to which PacifiCorp is preparing discovery responses. Parties have served over 1500 discovery requests, many with multiple subparts and requesting multiple years of data, on PacifiCorp. Under those circumstances, it is hardly surprising that PacifiCorp would need to use the full amount of the time allotted by the Commission to respond to the requests in the order in which they were received. In any event, PacifiCorp provided much of the requested information (that which was relevant) in response to UAE Set 3. Under these circumstances, PacifiCorp's actions were substantially justified and no sanctions are warranted.

For these reasons, PacifiCorp requests that the Commission deny UAE's request for attorneys' fees and costs as PacifiCorp's responses and objections are substantially justified under the circumstances of this case. *See* Utah R. Civ. P. 37(a)(4)(B). Under these circumstances, there is no basis for a finding that would support an award of sanctions in this docket.

Conclusion

Based on the foregoing PacifiCorp requests that the Commission enter an order denying UAE's motion to compel, request for additional time for file testimony in this docket and request for sanctions.

Respectfully submitted this ____ day of November, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 2004, I caused to be served, via electronic mail, a true and correct copy of the foregoing **PACIFICORP RESPONSE TO UAE'S MOTION TO COMPEL DISCOVERY FROM PACIFICORP, REQUEST FOR ADDITIONAL TIME TO FILE TESTIMONY AND REQUEST FOR EXPEDITED RESOLUTION** to the following:

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