BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of PacifiCorp for Approval of a 2009 Request for Proposals for Flexible Resource	)))	DOCKET NO. 05-035-47

RESPONSE OF WESTERN RESOURCE ADVOCATES TO ROCKY MOUNTAIN POWER'S MOTION FOR ADDITIONAL PROTECTIVE MEASURES AND REQUEST FOR EXPEDITED TREATMENT

COMES NOW Western Resource Advocates (WRA), by and through Steven S. Michel, and for its Response to Rocky Mountain Power's (RMP) Motion for Additional Protective Measures and Request for Expedited Treatment, states the following:

1. On September 28, 2007, RMP filed its Motion seeking additional protective measures for certain information related to its 2009 Request for Proposals (RFP). The Commission has requested that responses to RMP's Motion be filed by 12:00 p.m. on October 5, 2007. By this Response, and for the following reasons, Western Resource Advocates OPPOSES Rocky Mountain Power's Motion.

2. In its Motion for Additional Protective Measures, RMP states that certain unspecified events have caused it to seek to amend its RFP. RMP also claims that information in support of its upcoming request is "commercially sensitive" and that "disclosing any of the information surrounding the bid evaluation processand the status of the bids *could* prove detrimental to the integrity of the RFP process and jeopardize the bidders and the Company's

competitive positions." (Emphasis added). RMP nowhere describes nor indicates what the information is that it wants restricted, offers no explanation as to the harm that it or the bidders might incur if the information is disclosed, and has not in any way demonstrated why the information needs to be kept confidential – much less restricted to all parties even under non-disclosure agreements. The extent of RMP's argument is that disclosure of some information "could" prove detrimental to the RFP process.

Nor does RMP offer any explanation as to why a party like WRA, whose interests are clearly distinct from the Committee of Consumer Services (CCS) and the Division – and who has no commercial interest in the outcome of the RFP – should be restricted from access to the information even under a non-discloisure agreement.

Based on its general, vague and unverified claims, RMP asks the Commission to restrict access for any information the Company "believes will ... jeopardize the competitive integrity and fairness of the request for proposals." The restriction would – at the Company's sole discretion – prevent every interested party other than the Division, CCS and the Independent Evaluator (IE) from having any access whatsoever to this unspecified information, even under a non-disclosure agreement. RMP is essentially asking the Commission for a blank check to withhold any information it wants, from all interested parties except the Division and CCS – based only upon vague, general and unverified assertions.

3. RMP's general, unverified statements asserting the need for confidentiality should not suffice to withhold bid-related information from public scrutiny. Moreover, confidentiality determinations, and particularly claims for "additional protection" which would deny all

interested parties access to important information that affects their interests, should never be delegated to the Company' discretion – as RMP requests. An appropriate balancing of the need for confidentiality and/or additional protection versus the public's right and interest in understanding the basis for Commission decisions affecting their utility resource choices is the only proper means for weighing RMP's claims. When that balancing occurs, RMP's vague and unverified assertions fall short. Bid-related information does not rise to the level of "highly confidential" material, and perhaps need not be kept confidential at all.

4. RMP's broad assertions of the confidentiality of bid information are not sufficient to establish that this information must be withheld. RMP's Motion, without accompanying evidence or affidavits, nor even a description of the information much less copies for *in camera* inspection, should not be sufficient to establish the confidentiality of bid-related information. Characterizing this bid information as "highly sensitive," based only upon the unverified representations of RMP's attorneys, undermines the discovery and hearing process, and unnecessarily prevents interested parties from protecting their interests.

RMP's argument that bid information disclosure *might* harm the RFP process, and presumably cause higher prices for resources is not supported by facts, law, or economic theory. RMP simply asserts this claim without any factual support. No evidence supports RMP's tacit claim that bidders would either withhold bids, or bid higher, if disclosure was required. Moreover, common sense dictates that it is equally possible that project developers would submit *lower* bids in response to public disclosure of competing bids and bid information, rather than higher. Economic theory says that in a working competitive market more, rather than less,

information promotes more competitive outcomes. In *Alabama Power Company v. Federal Power Commission*, 511 F.2d 383, 167 U.S. App. D.C. 145 (1974), the United States D.C. Court of Appeals upheld the FPC's order releasing utility fuel purchase information. In its analysis, the Court held:

> Perfect information available to all buyers and sellers is, indeed, one of the conditions of the economic model of 'perfect competition,' and where the remaining conditions are satisfied, dissemination of information tends to facilitate prompt adjustment to the market clearing price by all parties to transactions.

Alabama Power at fn 13. The potential economic benefits of a fully-informed market should be evaluated by the Commission when it considers RMP confidentiality requests.

Moreover, in assessing the need for confidentiality and particularly for requests for additional protections, the Commission should not base its determination, as RMP requests, upon unverified, non-evidentiary pleadings claiming broad, untested, economic principles. In *Re Potomac Electric Power Company*, 86 PUR 4th 75 (1987), the District of Colombia Public Service Commission rejected PEPCO's and District of Columbia Natural Gas' general claim that "the type of information sought to be protected ... has been protected pursuant to Rule 26c(7) as confidential commercial information in any number of cases." In doing so, the D.C. Commission found routine or general assertions of confidentiality were inadequate, and demanded that the utilities provide specific, verified, explanations of their confidentiality claims:

> The utilities had offered mere conclusory assertions by their respective attorneys, which assertions could not give rise to a finding of confidentiality sufficient to warrant the granting of a protective order. Id. at 3-4. Accordingly, we directed the utilities to submit affidavits from relevant personnel justifying the claims of confidentiality regarding the information contained in the Energy Efficiency Studies. Id. at 4. The affidavits were to contain an explanation, in detail, of whether and how disclosure of the allegedly confidential information would harm the respective utility, whether and how disclosure of the information would benefit any other entity, and whether that entity would or would not have access

> to such information except through the utility. Id. The utilities were directed to further explain why the need for a protective order outweighs the public interest in the disclosure of such information. Id.

Re PEPCO. In the *PEPCO* case, after demanding three rounds of affidavits from the Company, the Commission finally granted a protective order to PEPCO and DCNG. Interestingly, however, just one week later the Commission reversed its holding when PEPCO and DCNG moved to release the documents they had fought so hard not to disclose. The reason was to avoid an erosion of public confidence in the Commission process:

> we [grant] PEPCO's motion based upon the Company's concerns as to the public perception of PEPCO's actions in this proceeding.... DCNG has waived its claims of confidentiality with respect to its energy efficiency study in order "to assure public confidence in the proceedings, ... advance the Commission's ability to maximize constructive and informed public participation, and to dispel any doubts concerning DCNG's genuine commitment to principled analysis of important issues.

Re Potomac Electric Power Co. 86 PUR 4th 112.

Similarly, the importance of carefully assessing claims of confidentiality was addressed by the Massachusetts Department of Public Utilities in a decision involving Berkshire Gas Company. In that Case, gas distribution companies argued for stringent, uniform confidentiality provisions - making the similar competitive sensitivity arguments to those RMP makes in the current case. In rejecting that request the Department held:

> [T]he LDC's need for confidentiality to ensure benefits for their ratepayers must be balanced against the Department's responsibility to (1) comply with G.L.c. 25, § 5D; (2) explain the reasoning behind its decisions; and (3) provide useful guidance to LDCs regarding future decision making.... As a regulatory body charged with assessing whether or not an LDC's supply decision contributes to a least-cost, reliable, diverse, and flexible supply portfolio, the Department must allow meaningful public participation when evaluating the company's proposal and must present sufficient analysis to support our findings and to enable judicial review of such orders.

Re Berkshire Gas Co. 1994 WL 71304 (Mass.D.P.U.; DPU 93-187, 93-188, 93-189) at 10-11. The Department concluded that, even in the event materials were determined to be confidential, "[a]ll parties to a contract proceeding may have access to the full range of information filed in the proceeding by filing a nondisclosure agreement with the petitioning LDC." *Berkshire Gas* at 12.

Before it affords "additional protection" to any documents, WRA believes that the Commission should require evidence and affidavits from affected persons that demonstrate that the need for confidentiality, or "additional protection," outweighs the public's need for open processes and the ability to evaluate the basis for agency decisions. Among the determinations that WRA suggests the Commission require before restricting access to documents in proceedings are the following:

> 1) that the information has not otherwise been publicly released;
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> 2) that release of the information would cause substantial, specific, economic harm;
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> 3) the period of time for which the information must remain confidential to avoid exposure to economic harm;
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> 4) if additional protection is sought, why the ordinary confidentiality protections afforded by non-disclosure agreements and commission rules would result in specific, significant, economic harm that outweighs the public's interest in being able to meaningfully participate in Commission proceedings affecting their interests;
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> 5) in the case of bid-related information, why that particular information is of significant commercial value in the current marketplace;
>
> 6) that public disclosure of bid-related information would cause a less efficient market, rather than a more efficient market, and higher prices to customers rather than lower prices;
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> 7) if additional protection with restricted access is sought, why ordinary

confidentiality protections would cause bidders to not bid on significant offerings by RMP;

8) that bidders are not be willing to disclose the details of their bids, even if it would allow them to examine other bids and determine the basis for the final bid award; and

9) if protection from disclosure to all parties other than the Division and CCS is sought, why preventing disclosure to non-bidding parties without a commercial interest in the outcome, best serves the public interest.

5. The decision to afford additional protection to information, and withhold that information from interested parties, should never be at the utility's discretion. The confidentiality standard which RMP advocates – allowing it, *in its discretion*, to withhold bid-related information to all interested parties other than the Division and OCC, would unreasonably compromise the public interest in this and future cases. Confidentiality designations in public processes should never be discretionary – particularly with respect to "additional protection" which precludes interested parties from any access whatsoever.

The Colorado Public Utilities Commission basically agreed that extraordinary protection should be judiciously, and not routinely, afforded in a Public Service Company of Colorado case where the Company sought extraordinary protection for the testimony of one of its witnesses. In that case, the interim order of the ALJ found that determinations of extraordinary protection should be assessed on a case-by-case basis: "In adopting the current rule, the Commission contemplated that appropriate extraordinary protections may be imposed based upon the fact and circumstances *in each case*." (Emphasis added) *Re Public Service Co. Of Colo.* 06S-234EG, R06-1230-I (Colo. PUC 2006). The ALJ went on to hold that "Public Service has not made any demonstration as to why the Commission's protections for confidential information are not

adequate to protect the information." *Ibid.* The ALJ concluded in that case that much of the requested "highly confidential" information was not even confidential, and that the remainder could be adequately protected through the standard commission confidentiality provisions:

> The ALJ concludes that the confidentiality protection of [sic] provided by the Commission's rules is adequate and necessary to protect the commercially sensitive information in a way that balances the public interest and need for the confidential information in this docket. Thus, extraordinary protection is not required.

Ibid.

6. In determining requests for non-disclosure, the Commission should balance the need for confidentiality with the public interest in disclosure of important Commission processes. In assessing whether particular information should be designated as confidential or highly confidential, commissions have typically used a balancing test. This balancing test was recently articulated in *Pennichuck Water Works, Inc.* N.H.P.U.C. 24,701 (2006). In that Case, the Commission held that

> There must be a determination of whether the information is confidential, commercial or financial information "*and* whether disclosure would constitute an invasion of privacy." *Id*. at 552 (emphasis in original, citations omitted). "[T]he asserted private confidential, commercial, or financial interest must be balanced against the public's interest in disclosure, . . . since these categorical exemptions mean not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure." Id. at 553 (citations omitted).See also, e.g. *City of Nashua*, 2006 WL 3371123 (N.H.P.U.C. Nov. 8, 2006, No. 24,699); *In the Matter of Investigation into the Impact on Alaska Consumers and Carriers of Intercarrier Compensation Reform by the Federal Communications Commission*, 2007 WL 293399, Regulatory Commission of Alaska January 12, 2007.

The New Hampshire Commission based its decision on a New Hampshire Supreme Court case, *Union Leader Corporation v. New Hampshire Housing Finance Authority*, 142 H.H. 540,

705 A.2d 725 (1997). In that case, the Court weighed whether the Union Leader should have access to mortgage documents pursuant to New Hampshire's Right-to-Know law. The New Hampshire Court determined that when a statute permits "confidential, commercial or financial information" to be withheld, an overarching policy of public disclosure requires the court to avoid an expansive construction of these terms. *NHHFA* at 553. Only if the contested information fit within these narrow categories would the next step, a balancing of the need for confidentiality versus the public's interest in disclosure, occur. *NHHFA* at 552-3.

Given the parameters of the balancing requirement, it is essential that the party seeking to withhold documents from parties carry the burden of establishing the need for non-disclosure. "The burden is on the party asserting confidentiality to show that the proposed disclosure or change in designation should not be made." *In re Electric Transmission Texas, LLC*, 2007 WL 654281, Feb. 27, 2007 (Texas P.U.C. 33734). See also, *In the Matter of the Petition of Qwest Corporation To be Regulated Under an Alternative Form of Regulation Pursuant to RCW 80.36.135.* 2007 WL 293380 January 19, 2007 (Wash.U.T.C. UT-061625).

7. RMP's has not established that the information it seeks to protect requires extraordinary measures. Even assuming the bid information at issue is confidential, RMP's pleadings have not even come close to establishing that this information rises to a level requiring *extraordinary* protection. Paragraph 1(D) of the Protective Order allows a provider of information to request "additional protective measures" for information which they believe is "highly sensitive" and for which the normal confidential procedures offer insufficient protection. Extraordinary protections such as those requested by RMP should be reserved for extraordinary

situations. Examples might include such things as un-patented inventions and processes, which could cause significant, and long-term, commercial harm if exposed to competitors. Bid information to a public utility does not rise to this level of requirements, especially when weighed against the interest in full public participation in processes which affect utility resource choices, rates and service.

The fact that bid information does not warrant the extraordinary protection RMP seeks is accentuated by the likelihood that, given the dynamics and fluctuations of the electric power market - including prices of copper, steel, fuel, real estate, etc. - bids are typically useful only for the particular resource, and time-frame, being proposed, and are often stale soon after their submission. Allowing examination of bid information by the public, or at least to interested parties, certainly seems to be in the public interest.

Conclusions

It is imperative that WRA and other intervenors have access to bid information – pursuant to an appropriate protective order if need be – in order to meaningfully assess RMP's bid selection process with respect to their interest in the proceedings. Resource procurement issues are of significant public interest. Openness and transparency in these proceedings are important for public acceptance, and to assure that all interests can participate in an informed and effective manner. RMP's Motion should be denied.

WHEREFORE, for the foregoing reasons, Western Resource Advocates prays for a Commission order denying Rocky Mountain Power's Motion for Additional Protective Measures, and for such other and further relief as the Commission deems just and proper.

Respectfully submitted this
____ day of October, 2007.

WESTERN RESOURCE ADVOCATES

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