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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

**UAE’S OBJECTION TO ROCKY
MOUNTAIN POWER’S MOTION FOR
ADDITIONAL PROTECTIVE MEASURES**

The Utah Association of Energy Users (“UAE”) hereby responds and objects to Rocky Mountain Power’s Motion for Additional Protective Measures (“Motion”) in the above-referenced docket.

Introduction

UAE supports the stated goal of Rocky Mountain Power (“RMP”) to preserve the integrity of the resource procurement process. Indeed, UAE has actively participated for many years, at great effort and expense, in all aspects of RMP’s resource procurement activities in an effort to ensure the integrity of that process. RMP’s Motion, however, does not further the stated goal but rather detracts from it. The Motion promotes secrecy, suspicion and skepticism by attempting to exclude every intervenor other than regulatory agencies from access to information critical to meaningful participation in this process. If its Motion is granted, RMP will have

succeeded in excluding virtually every intervenor from meaningful participation in the statutory process created by the Energy Resource Procurement Act, Utah Code § 54-17-1, et seq. Nothing in that Act, the regulations promulgated thereunder, nor the Protective Order entered in this docket, sanctions this effort by RMP to exclude its customers and other interested parties from meaningful participation in this docket.

RMP's motion should be denied. It is unnecessary, grossly over-broad and inadequately supported.

The Motion is Unnecessary. RMP's Motion is not necessary to accomplish the stated objective of protecting sensitive information. The protections that already exist under the Protective Order entered by this Commission in this docket on October 13, 2006 ("Protective Order") are adequate to ensure the protection of even the most highly sensitive information.

RMP's Motion and its proposed amendment to the Protective Order express concerns over potential disclosure of sensitive information "to members of the public." However, the Protective Order already in place allows RMP to avoid "public" disclosure of any confidential or sensitive information. By designating information as confidential under the Protective Order, such information is provided only to attorneys for the intervenors in this docket who have committed to comply with the restrictions on disclosure specified in the Protective Order.

Paragraph 1(B) of the Protective Order permits disclosure of Confidential Information only to an intervenor's attorneys and experts. Moreover, disclosure to experts is permitted only if the experts cannot "use the information in their normal job functions to the competitive disadvantage of the party providing the Confidential Information." The Protective Order thus

provides adequate protections against public disclosure of sensitive information. Indeed, it provides the equivalent of an “attorneys eyes only” restriction -- typically the highest level of confidentiality accorded to any information in virtually any court or regulatory proceedings -- if an expert may be in a position to misuse the information.

If RMP believes that a certain party’s expert should not receive sensitive information, it can raise that concern with the attorney for the affected party. If the parties are unable to agree on restrictions on disclosure to an expert, RMP can submit the dispute to the Commission for prompt resolution under Section 2 of the Protective Order.

Perhaps RMP believes that even disclosure to a particular intervenor’s attorney is inappropriate. Such a concern will rarely be legitimate, given the restrictions on disclosure imposed by the Protective Order. Nevertheless, should such a concern exist, it can be addressed directly with the affected attorney. If there is a legitimate basis for the concern -- for example, disclosure of highly sensitive bidding information to an attorney for a bidder who is also an intervenor -- the attorney may well acknowledge the concern and agree that certain sensitive information should not be provided to him or her. If the concern cannot be resolved in this manner, RMP can submit the dispute to the Commission for prompt resolution under Section 2 of the Protective Order.

RMP’s Motion and proposed amendment to the Protective Order are simply not necessary in light of the ample protections provided by the Protective Order. Moreover, RMP’s broad attempt to exclude active participation by its customers and other concerned intervenors is

inappropriate and inconsistent with the public interest. Accordingly, the Motion should be denied.

The Motion is Overly Broad. The Motion is extremely and unnecessarily broad. It seeks an order giving RMP virtually unlimited discretion to hide material from counsel for UAE and other intervenors, with no meaningful standards and without the necessity of first demonstrating good cause or reasonable grounds for the restrictions. The Motion proposes that RMP need only have an unsupported *belief* that the competitive integrity or fairness of the process may be jeopardized to justify withholding information. The Motion does not suggest that this belief must be reasonable or supported in any manner. Instead the Motion proposes to shift the burden of challenging RMP's unsupported confidentiality designation to the excluded attorneys. No attorney will be able to meet this burden.

By demanding protections beyond those offered by the current Protective Order, RMP proposes to exclude even the attorneys for Intervenors from receiving information that it deems sensitive. Accordingly, the excluded attorneys will have no knowledge whatsoever about the information withheld or the purported need for withholding the same. No attorney can reasonably challenge the exclusion under such circumstances. The theoretical ability of a party to challenge a designation of confidentiality under Section 2 of the Protective Order is necessarily dependent upon access by at least the attorney to the confidential information and the purported basis for additional restrictions on disclosure -- as is clearly contemplated by Section 1(C) of the Protective Order -- so that he or she can formulate a meaningful challenge to the

confidentiality designation. Otherwise, the purported right to challenge the designation is meaningless.

As discussed above, if RMP has legitimate concerns about disclosure under the Protective Order to a specific expert or attorney, its motion should be limited to addressing those specific concerns (assuming it is unable to first resolve its concerns directly with the affected attorney), rather than broadly seeking permission to conceal information from all counsel for all intervenors. Disclosure to counsel for parties who have intervened and signed an Appendix A to the Protective Order should be the general rule, even as to confidential and sensitive information (subject to the extensive protections of the Protective Order). Restrictions on disclosure to attorneys for intervenors are rarely appropriate and should be permitted only under extreme and unusual circumstances. Moreover, even when restrictions on disclosure to an attorney are shown to be reasonable, they should be narrowly tailored to remedy a specific and properly-supported concern.

The Motion is also overly broad in that it seeks to give RMP a blank check to withhold information from all intervenors throughout all stages of this docket. The purported need for additional restrictions is apparently based on RMP's secret reasons for requesting a mulligan on the current RFP, yet the requested amendment to the Protective Order would presumably apply throughout all aspects of this process, including approval of the new RFP, bidding, bid evaluation and resource approval. Even if RMP had demonstrated a legitimate need for withholding sensitive information from counsel for certain intervenors regarding its reasons to scrap the current RFP -- which it clearly has not done -- it would be highly inappropriate to give

RMP carte blanche authority to withhold future information without an appropriate showing of need.

RMP's Motion is grossly overbroad and it fails to target its request narrowly to legitimate concerns. It is the equivalent of using a steamroller to crush a pea and should be denied.

The Motion is Not Adequately Supported. The Motion makes no attempt to demonstrate the need to exclude all intervenors other than the regulatory agencies from meaningful participation in this docket. It offers nothing more than a vague and unsupported belief that such secrecy is needed. Such a (lack of) showing is inadequate to support imposition of additional restrictions on disclosure under the express terms of the Protective Order.

Section 1 (D) of the Protective Order provides as follows with respect to a claim that additional protective measures are needed:

(D) Additional protective measures. A provider of documents and information may claim that additional protective measures, beyond those required under this Protective Order, are warranted for certain confidential material, referred to as highly sensitive documents and information. In such case, the provider shall identify such documents and information and shall inform the requester of such documents and information of their claimed highly sensitive nature as soon as possible. The provider of the requested information shall also petition the Commission for an order granting additional protective measures which the petitioner believes are warranted for the claimed highly sensitive documents and information that is to be produced in response to an information request. **The provider shall set forth the particular basis for: the claim, the need for the specific, additional protective measures, and the reasonableness of the requested, additional protection.** A party who would otherwise receive the documents and information under the terms of this Protective Order, may respond to the petition and oppose or propose alternative protective measures to those requested by the provider of the claimed highly sensitive documents and information. Disputes between the parties shall be resolved promptly pursuant to a Commission Order pursuant to Paragraph 2 of this Protective Order. (emphasis added).

RMP has made no attempt whatsoever to specify the “particular basis” for its claimed need for additional restrictions, for the specific restrictions proposed, or for the reasonableness of the requested restrictions. Rather, the Company claims, without support, that it cannot provide “detailed justification” for its proposed amendment to the RFP, and suggests that the support for its motion should be concealed from every intervenor other than the regulatory agencies. This showing comes nowhere near the showing required by the Protective Order. Before additional protective measures may be imposed, RMP first must describe the particular basis for its claim and need and must demonstrate that the specific proposed restrictions are reasonable.

If, as it appears, RMP claims that its very basis and justification for its request to restart the RFP process is highly sensitive, RMP should be required to provide all non-sensitive aspects of its basis and justification to all parties, to identify precisely which attorneys should be precluded from receiving which sensitive materials and why, and should submit its detailed explanations to the Commission -- for in-camera review, if necessary -- all *before* additional restrictions are imposed.

Paragraph 2 (A) of the Protective Order permits a party claiming “highly sensitive documents and information and the need for additional protective measures” to “submit the said matters to the Commission for its review.” Such review can be requested on an in-camera basis, to the extent necessary. The Commission can review any sensitive information and the justification for withholding the same from attorneys for specified intervenors and determine whether the existing protections of the Protective Order are inadequate. Only if and when a showing has been made and supported that a specific attorney should be excluded from receiving

specific information should the Commission issue an order imposing additional restrictions on disclosure.

Reasonable Alternative Protections. Section 1(D) of the Protective Order allows any party to propose alternative protective measures. As described above, UAE believes that the existing Protective Order provides adequate protections and procedures under virtually any conceivable circumstance. However, to the extent the Commission nevertheless determines that restrictions on disclosure or procedures in addition to those provided for by the existing Protective Order may be appropriate under some limited circumstances, UAE submits that the following language will adequately protect all legitimate concerns and interests, without unfairly prejudicing any participant:

(E) **Highly Sensitive Information:** To the extent a party believes that the restrictions on disclosure of confidential information to attorneys and experts for intervenors under Sections 1(C) and (D) of this Protective Order are inadequate as to certain highly sensitive information, it shall first contact the attorney for the affected intervenor and make a reasonable attempt to negotiate appropriate consensual restrictions on disclosure. If appropriate consensual restrictions cannot be agreed upon, a party may submit a request for specific additional restrictions on disclosure to the Commission. The request shall be submitted under seal and shall include the information claimed to be highly confidential, along with adequate support as to the need for and reasonableness of its specific requested restrictions on disclosure, all marked “Highly Sensitive Information.” A copy of such filing and support, also marked “Highly Sensitive Information,” shall also be sent to the Utah Division of Public Utilities (“Division”), the Utah Committee of Consumer Services (“CCS”), and the designated independent evaluator, each of which shall treat such Highly Sensitive Information as secret and confidential pending a ruling by the Commission. The Commission shall ensure that all affected parties receive sufficient information under the circumstances to permit them to reasonably understand and respond to the request, and shall provide a reasonable opportunity for all interested parties to file comments on the request. The Commission shall then issue a ruling granting, denying or modifying the requested additional restrictions on disclosure as soon as practicable. To the extent the Commission determines that restrictions on disclosure in addition to those provided for in this Protective Order are warranted, it shall impose such additional restrictions on disclosure as are

determined to be adequate, but tailored as narrowly as practicable, to protect the public interest.

UAE submits that such an order would provide RMP and all parties with all procedures and protections necessary to guard legitimately sensitive information from those intervenor attorneys or experts who should legitimately not have access to it, while also protecting the legitimate interests of RMP's customers, the intervenors, and all other interested parties.

Conclusion

UAE shares RMP's stated desire to maintain the integrity of the resource procurement process. However, RMP's Motion is antithetical to its stated desire. The integrity of the process is best preserved by the active and meaningful involvement of all interested parties, to the greatest extent practicable, rather than through systematic exclusion from meaningful participation of virtually all intervenors, as suggested by RMP. Cloaking the resource procurement process in secrecy does not serve the public interest, particularly given the need to rebuild public confidence in a process that in the past has invariably led to the utility selecting itself as the winner. Active and meaningful public involvement is critical to a fair, unbiased and open procurement process and to customer and public confidence.

RMP's request is unnecessary, overly broad and inadequately supported. The existing Protective Order can adequately deal with all of RMP's legitimate concerns. To the extent additional protective measures are deemed necessary, they should be narrowly tailored to address specific demonstrated problems, as suggested above, rather than through a shotgun approach, as suggested by RMP.

UAE has actively participated in all resource procurement issues for a number of years. It respectfully submits that it should be permitted to continue to fully and meaningfully participate in this process on a going-forward basis.

Dated this 5th day of October, 2007.

Hatch, James & Dodge

/s/ _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by email this 5th day of October, 2007, to the following:

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