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**UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION**

<p>DESERET GENERATION &amp; TRANSMISSION CO-OPERATIVE, a Utah non-profit corporation,</p> <p style="text-align: right;">Plaintiff,</p> <p>v.</p> <p>PACIFICORP, an Oregon corporation,</p> <p style="text-align: right;">Defendant.</p>	<p style="text-align: center;">Case No. 2:10-cv-159-TC-DN</p> <p style="text-align: center;"><b>MOTION TO ENFORCE THE TERMS OF THE STIPULATED PROTECTIVE ORDER</b></p>
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In an unrelated proceeding before the Public Service Commission of Utah, Gary Dodge, counsel for Deseret Generation & Transmission Co-Operative (“Deseret”) in the above-entitled action as well as in the Court ordered arbitration, has submitted a discovery request to PacifiCorp, on behalf of a wholly separate client, seeking all of the confidential and protected

transcripts, Final Award, documents, and discovery taken in the Court ordered arbitration. Mr. Dodge is a “Qualified Person” under the terms of the Stipulated Protective Order.<sup>1</sup> In taking this action, Mr. Dodge is improperly using, both directly and indirectly, these Confidential Materials contrary to the Stipulated Protective Order.

PacifiCorp’s counsel has met and conferred with Mr. Dodge in an effort to have him withdraw his request for the protected materials and to comply with the terms of the Stipulated Protective Order. Mr. Dodge does not agree that he is obligated to do that.

Accordingly, pursuant to Rules 16, 37(b) and 71 of the Federal Rules of Civil Procedure, PacifiCorp respectfully moves the Court for its order enforcing the terms of its Stipulated Protective Order by requiring Mr. Dodge, at a minimum, to withdraw the offending discovery request in the proceeding before the Public Service Commission of Utah.

March 23, 2011

FABIAN & CLENDENIN, P.C.

*/s/ Philip D. Dracht*

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P. Bruce Badger

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<sup>1</sup> It does not appear that Deseret directed Mr. Dodge to take the actions complained of in this Motion.

**CERTIFICATE OF SERVICE**

The undersigned further certifies that on March 23, 2011, a true and correct copy of MOTION TO ENFORCE THE TERMS OF THE STIPULATED PROTECTIVE ORDER was served by ECF to all counsel who have appeared in this action.

*/s/ Philip D. Dracht* \_\_\_\_\_

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Counsel for Plaintiff, Gary Dodge, a “Qualified Person” under the terms of the Stipulated Protective Order, is improperly using the documents classified as “Confidential,” Confidential—CII,” and “Confidential—Privileged” under this Court’s Stipulated Protective Order in an unrelated proceeding for a different client. This improper use takes the form of Mr. Dodge asking PacifiCorp, in a discovery request before the Public Service Commission of Utah, to

produce material considered confidential under the Stipulated Protective Order. Pursuant to Rule 16, 37(b) and 71 of the Federal Rules of Civil Procedure, PacifiCorp respectfully requests that the Court enforce the terms of its Stipulated Protective Order to prevent this misuse by, at a minimum, ordering Mr. Dodge to withdraw the offending discovery request.

### **BACKGROUND**

On September 1, 2011, the Court ordered that PacifiCorp and Deseret Generation & Transmission Co-Operative (“Deseret”) arbitrate the issue of whether the Baghouse and Scrubber projects were consistent with Reasonable Utility Practice, as that term is defined in the Ownership and Management Agreement between Utah Power & Light and Deseret Generation & Transmission Co-Operative. On November 12, 2011 the Court entered a Stipulated Protective Order governing the confidentiality of discovery and other documents in both this case, as well as in the Court ordered arbitration, *PacifiCorp vs. Deseret Generation & Transmission Co-Operative*, AAA Case 77 198 00223, regarding the Baghouse and Scrubber projects (the “Arbitration”).<sup>1</sup>

That protective order generally allows the parties in this litigation and the Arbitration the ability to share among themselves protected and/or confidential and/or privileged documents by designating those documents as “Confidential,” “Confidential—Privileged,” and “Confidential—CII,” collectively referred to in the protective order as “Confidential Material.” Once designated, the protective order specified that those documents “shall be used only for the purposes of” (i) the litigation or the Arbitration, (ii) any appeal from the litigation or the Arbitration; (iii) and any

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<sup>1</sup> A copy of the Stipulated Protective Order is attached as Exhibit A.

alternative dispute resolution of the litigation or the Arbitration.<sup>2</sup> The protective order further specified that the Confidential Material “shall not be used, directly or indirectly, for any other purpose whatsoever, and shall not be disclosed to any person, corporation, partnership ... or any other entity (collectively ‘person’) except in accordance with the terms hereof.”<sup>3</sup> The terms of the Stipulated Protective Order apply to persons designated as “Qualified Person.”<sup>4</sup>

Confident that its trade secrets and other confidential, privileged, and protected information would be treated in accordance with the Court’s Stipulated Protective Order, PacifiCorp designated and produced Confidential Material designated as “Confidential,” “Confidential—Privileged,” and “Confidential—CII” to Deseret and its counsel, Mr. Dodge.

The Baghouse and Scrubber project arbitration concluded on February 8, 2011. As the arbitration proceedings transcript and the arbitration Final Award contain information derived from the Confidential Material, PacifiCorp designated those items as “Confidential” and “Confidential—Privileged,” where appropriate. Deseret has never challenged these designations under the terms of the Stipulated Protected Order.

On March 3, 2011, Rocky Mountain Power, a division of PacifiCorp, received a discovery request (referred to as a data request) from Mr. Dodge in a proceeding before the Public Service Commission of Utah entitled *In the Matter of the Application of Rocky Mountain Power for Authority to Increase its Retail Electric Utility Service Rates in Utah and for Approval of Its Proposed Electric Service Schedules and Electric Service Regulations*, Docket No. 10-035-124 (the “PSC Proceeding”). In that proceeding, Mr. Dodge is not representing Deseret, but is

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<sup>2</sup> Exhibit A, Stipulated Protective Order, p. 4, ¶7(b).

<sup>3</sup> Exhibit A, Stipulated Protective Order, p. 4, ¶7(c).

<sup>4</sup> Exhibit A, Stipulated Protective Order, p. 7, ¶15(a).

representing a group entitled the UAE Intervention Group which does not include Deseret among its members. Mr. Dodge's Second Data Request in the PSC Proceeding requested the following documents:

Please provide copies of the arbitration award, hearing transcripts, hearing exhibits, deposition transcripts, deposition exhibits, discovery responses sent and received and other documents filed, admitted or introduced in connection with the recent proceeding between PacifiCorp and Deseret Generation and Transmission Cooperative relating to pollution control equipment at the Hunter Power Plant Unit II.<sup>5</sup>

After it received Mr. Dodge's request, PacifiCorp's counsel sent Mr. Dodge a letter explaining that through his Second Data Request in the PSC Proceeding, he was using the Confidential Material in an unrelated proceeding, which was prohibited under the terms of the Stipulated Protective Order.<sup>6</sup>

Upon receiving the March 14, 2011 letter requesting a meet and confer, Mr. Dodge called PacifiCorp's counsel to briefly discuss the issue. During that telephonic conference, Mr. Dodge reiterated that he knew that the documents marked as Confidential were relevant in the PSC Proceeding, and that is why he asked for them.<sup>7</sup> PacifiCorp's counsel followed up that conversation with a second letter that evening, which addressed Mr. Dodge's question about relevant authority for PacifiCorp's position.<sup>8</sup>

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<sup>5</sup> A copy of The Second Data Request to Rocky Mountain Power From UAE Intervention Group is attached as Exhibit B.

<sup>6</sup> Philip D. Dracht, first letter to Gary Dodge, March 14, 2011. A copy of the first March 14, 2011 letter to Gary Dodge from Philip D. Dracht is attached as Exhibit C.

<sup>7</sup> Philip D. Dracht, second letter to Gary Dodge, March 14, 2011, p. 1. A copy of the second March 14, 2011 letter to Gary Dodge from Philip D. Dracht is attached as Exhibit D.

<sup>8</sup> Exhibit D, second Dracht letter to Gary Dodge, March 11, 2011, pp. 1-2.

On March 17, 2011, Mr. Dodge sent a response letter to counsel for PacifiCorp.<sup>9</sup> That same day, Counsel for PacifiCorp met with Mr. Dodge in an attempt to have him withdraw his data request. During that meet and confer process, the parties discussed their legal positions, but it was apparent that Mr. Dodge would not withdraw his data request, leaving PacifiCorp with no other recourse except to file this motion.

### ANALYSIS

This Court issued a protective order that barred Mr. Dodge from making any” disclosure” or “use,” either “directly or indirectly” of the documents produced in response to the Court’s November 12, 2010 Stipulated Protective Order outside of this particular case and the Baghouse and Scrubber project arbitration. Mr. Dodge has now violated the Protective Order by: (1) asking PacifiCorp to produce in the PSC Proceeding – on behalf of a client other than Deseret -- Confidential Material that is covered by the Stipulated Protective Order; (2) advising his client (UAE Intervener Group) of the existence of the Confidential Material and explaining or implying the relevance of such information to the PSC Proceeding; and (3) alerting other parties in the PSC Proceeding to the existence of the Confidential Material covered by the Protective Order and thereby explaining or implying its relevance to the PSC Proceedings.

Federal Rule of Civil Procedure 26(c) provides that the Court may enter a protective order “forbidding the disclosure of discovery” and that a “trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.”

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<sup>9</sup> Gary Dodge letter to Philip Dracht, March 17, 2011, attached as Exhibit E.



This Court has the inherent jurisdiction and authority to enforce its own order.<sup>10</sup>

Furthermore, the Federal Rules of Civil Procedure provide specifically that a party which fails to obey a pretrial order (which includes protective orders) is subject to “orders, including those authorized by Rule 37(b)(2)(A)(ii)(vii)”<sup>11</sup> and must “pay the reasonable expenses-including attorney’s fees-incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.”<sup>12</sup>

In his capacity as Counsel for the UAE Intervention Group in the PSC Proceeding, Mr. Dodge has violated the terms of the Stipulated Protective Order. His Second Data Request for all the transcripts, the arbitration Final Award, and all discovery documents presumes that all of those documents are relevant in his PSC Proceedings. Mr. Dodge only knows to ask for these Confidential Materials because he is a Qualified Person under the Stipulated Protective Order.

In *Systemic Formulas v. Kim*, this Court recently enforced its own protective order. The Court found that counsel violated a protective order by passing confidential customer information that was designated “Attorney’s Eye’s Only” to his client.<sup>13</sup> The Court entered an order disqualifying that counsel and his firm from further participation in the case.<sup>14</sup>

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<sup>10</sup> See *Public Citizen v. Liggett Group*, 858 F.2d 775, 780-82 (1st Cir. 1988) (issuing court necessarily has power to enforce protective order that it issued at any point that it is in effect, even after final judgment); see also *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (as long as protective order remains in effect, issuing court retains jurisdiction to modify it, even if underlying suit has been dismissed).

<sup>11</sup> Fed.R.Civ.P. 16(f)(1).

<sup>12</sup> Fed.R.Civ.P. 16(f)(2).

<sup>13</sup> *Systemic Formulas v. Kim*, 2009 WL 5205995 \*1 (D. Utah, 2009).

<sup>14</sup> *Systemic Formulas v. Kim*, 2009 WL 5205995 at 3.

In *Eagle Comtronics, Inc. v. Arrow Communication Laboratories, Inc.*, the Federal Circuit Court found that the filing of documents in another forum violated express terms of the protective order, which stated that any documents marked as subject to protective order could not “be used for any purpose other than for this action.”<sup>15</sup> There the court found the plaintiff violated the district court’s protective order when it knowingly used defendant’s patent application, which had been sealed by the protective order, for a use unrelated to a lawsuit between the two companies.<sup>16</sup> The court held that the protective order, which stated that certain documents “shall not be used for any purpose other than for this action,” (quoting the protective order issued by the district court), “was clear and unambiguous on its face.” Because the court found that plaintiff used the materials for purposes outside of the litigation, the Federal Circuit held that plaintiff had violated the protective order.<sup>17</sup>

In *Pacific Gas & Electric Company v. United States*, the Court of Federal Claims found that where documents were produced in one proceeding pursuant to a protective order, that counsel for the plaintiff that used those documents in another proceeding representing a different client in support of a motion to compel violated the terms of the protective order.<sup>18</sup>

Our Stipulated Protective Order provides that “Confidential” and “Confidential – Privileged” documents “shall be used only for the purpose of” the arbitration and litigation,

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<sup>15</sup> *Eagle Comtronics, Inc. v. Arrow Communication Laboratories, Inc.*, 305 F.3d 1303, 1314-1315 (Fed. Cir. 2002).

<sup>16</sup> *Eagle*, 305 F.3d at 1313-14.

<sup>17</sup> *Eagle*, 305 F.3d at 1314

<sup>18</sup> *Pacific Gas & Electric Company v. United States*, 82 Fed. Cl. 474 (2008).

appeals, and settlement discussions.<sup>19</sup> The Stipulated Protective Order provides that Confidential Material “shall not be used, directly or indirectly, for any other purpose whatsoever, and shall not be disclosed to any person ... except in accordance with the terms hereof.”<sup>20</sup> It is clear and unambiguous that the documents should not be used in unrelated proceedings. While Mr. Dodge has not “disclosed” the protected documents by filing them in the PSC Proceeding, he nevertheless is using the documents in formulating the data request and in explaining or implying their relevance in the PSC Proceeding to his other client (UAE Intervention Group) and to other parties to the PSC Proceeding.

Stated another way, Mr. Dodge is attempting to circumvent the prohibition against improper use or disclosure by simply requesting that PacifiCorp produce the documents, thus making them now independently produced in the PSC Proceeding. The Court should not, however, sanction such an attempt by Mr. Dodge to undermine the terms and protections of the Stipulated Protective Order.

In analyzing whether or not Mr. Dodge has violated the Stipulated Protective Order by making this broad request, the issue is whether Mr. Dodge is “using” the documents improperly. The word “use” is defined as follows:

To make use of; to convert to one’s service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of; to put into action or service, especially to attain an end.<sup>21</sup>

Mr. Dodge is utilizing and availing himself of the documents from the arbitration – and his knowledge of those documents -- in a state administrative proceeding that has nothing to do

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<sup>19</sup> Exhibit A, Stipulated Protective Order, ¶7(b).

<sup>20</sup> Exhibit A, Stipulated Protective Order, ¶7(c).

<sup>21</sup> Black’s Law Dictionary 1541 (6th ed. 1990).

with the case before this Court or the related arbitration. If Mr. Dodge was not a Qualified Person under the Stipulated Protective Order, he would not know that the documents even existed, much less what they say or whether they bear some relevance to the matters to be addressed in the PSC Proceeding.

### **CONCLUSION**

Mr. Dodge has a right to represent whomever he chooses. Mr. Dodge, however, does not have an unfettered right to use his knowledge of the Confidential Materials produced pursuant to this Court's Stipulated Protective Order in unrelated proceedings. PacifiCorp respectfully requests this Court order Mr. Dodge, as a Qualified Person under the Stipulated Protective Order, to stop making use of the documents – and his knowledge of the documents – in the manner complained of herein and to withdraw the offending data request in the PSC Proceedings. It is worth noting that the order requested by PacifiCorp likely will not address all of the harm caused by Mr. Dodge's actions. This is because Mr. Dodge sent the offending data request to all of the parties associated with the PSC Proceeding who themselves now know of the existence of the Confidential Materials and of the relevance that Mr. Dodge and the UAE Intervention Group attach to them. If the Court is to grant PacifiCorp's motion, PacifiCorp asks that any resulting order include an admonition that Mr. Dodge withdraw his request in as simple and straightforward a manner as possible and without encouraging other parties in the PSC Proceeding to submit a similar data based on their improperly gained knowledge of the existence of the Confidential Materials.

March 23, 2011

FABIAN & CLENDENIN, P.C.

/s/ Philip D. Dracht

P. Bruce Badger

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*Attorneys for PacifiCorp*

**CERTIFICATE O SERVICE**

The undersigned further certifies that on March 23, 2011, a true and correct copy of MEMORANDUM IN SUPPORT OF MOTION TO ENFORCE THE TERMS OF THE STIPULATED PROTECTIVE ORDER was served by ECF to all counsel who have appeared in this action.

/s/ Philip D. Dracht