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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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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

**ROCKY MOUNTAIN POWER'S  
RESPONSE TO UAE'S MOTION TO  
COMPEL AND REQUEST FOR  
EXTENDED TESTIMONY FILING  
DEADLINE**

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Rocky Mountain Power, a division of PacifiCorp (“Rocky Mountain Power” or “Company”), hereby responds to UAE’s Motion to Compel Production of Documents in Response to UAE Data Request 2.1, Request for Extended Testimony Filing Deadline Regarding Contested Projects, and Request for Expedited Treatment (“Motion”). Rocky Mountain Power opposes the Motion except with regard to the request for expedited treatment, which Rocky Mountain Power supports.

## I. INTRODUCTION

UAE Intervention Group (“UAE”) seeks to compel Rocky Mountain Power to produce all documents responsive to UAE Data Request 2.1. UAE’s Motion to Compel should be denied for at least the following reasons:

First, UAE’s counsel, Gary A. Dodge, admittedly used his knowledge of confidential information gained as counsel for Deseret Generation & Transmission Co-Operative (“Deseret”) in a wholly unrelated proceeding pending in the Utah federal district court (“Federal Action”) for the benefit of another client, UAE.<sup>1</sup> Specifically, Mr. Dodge used his knowledge of confidential information to formulate and propound UAE Data Request 2.1 in direct violation of a Stipulated Protective Order (“Protective Order”) in the Federal Action. PacifiCorp<sup>2</sup> has sought relief and enforcement of the Protective Order in the Federal Action and has requested that the district court order Mr. Dodge to comply with the Protective Order by withdrawing UAE Data Request 2.1. Given the pending enforcement motion in the Federal Action, Rocky Mountain Power should not be required to produce documents responsive UAE Data Request 2.1. For this reason alone, UAE’s Motion to Compel should be denied.

Second, UAE Data Request 2.1 is overbroad and production of responsive documents would require Rocky Mountain Power to involuntarily violate the Protective Order and subject PacifiCorp to potential liability.

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<sup>1</sup> See Exhibit E to Memorandum in Support of Motion to Enforce the Terms of the Stipulated Protective Order, dated March 14, 2011, attached as Exhibit 6 to the Motion.

<sup>2</sup> The Federal Action is between Deseret and PacifiCorp. Rocky Mountain Power is a division of PacifiCorp. The Federal Action involves the PacifiCorp Energy division of PacifiCorp. Rocky Mountain Power will refer to itself in this docket as Rocky Mountain Power and to the PacifiCorp Energy division as PacifiCorp in the Federal Action. Rocky Mountain Power does so only to differentiate the dockets, recognizing that it and PacifiCorp Energy are parts of the same legal entity.

Third, some of the information sought by UAE Data Request 2.1 is privileged or protected or has no probative value or relevance in this proceeding and would only serve to potentially prejudice Rocky Mountain Power.

Accordingly, UAE's Motion to Compel should be denied.

## II. ARGUMENT

### A. WHETHER UAE'S DATA REQUEST 2.1 VIOLATES THE PROTECTIVE ORDER IS BEING LITIGATED IN THE FEDERAL ACTION.

In addition to acting as counsel for UAE in this docket, Mr. Dodge acts as counsel for Deseret in the Federal Action. In compliance with a binding arbitration agreement, the court in the Federal Action ordered the parties to arbitrate certain issues ("Arbitration"). On November 12, 2011, the court in the Federal Action entered the Protective Order governing the confidentiality of discovery and other documents in the Federal Action and the related Arbitration.<sup>3</sup> Pursuant to the terms of the Protective Order, documents marked as "Confidential Material" cannot "be used *directly or indirectly*, for any other purpose whatsoever, and [cannot] be disclosed to any person, corporation, partnership, . . . public service commission, . . . or any other entity" except in accordance with the Protective Order.<sup>4</sup> As counsel for Deseret, Mr. Dodge is subject to and required to comply with the provisions of the Protective Order.

Despite Mr. Dodge's obligation to comply with the provision of the Protective Order, Mr. Dodge directly or indirectly used his knowledge of the Confidential Material in the Federal Action to formulate and propound UAE's Data Request 2.1, thus raising critical concerns regarding whether Mr. Dodge violated the Protective Order. Indeed, Mr. Dodge's improper use of his knowledge of the Confidential Material gained as counsel for Deseret and now used for the

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<sup>3</sup> A copy of the Stipulated Protective Order is attached as Exhibit 5 to the Motion.

<sup>4</sup> Stipulated Protective Order, ¶ 7(c) (emphasis added).

potential benefit of a separate and distinct client in this docket seriously taints the legitimacy of UAE's data request and further opens the door to similar improper data requests from other parties. To resolve these significant concerns, PacifiCorp filed a Motion to Enforce the Terms of the Protective Order ("Motion to Enforce") in the Federal Action on March 14, 2011, specifically asking that the court order Mr. Dodge to comply with the terms of the Protective Order by withdrawing UAE's Data Request 2.1.<sup>5</sup> The Motion to Enforce is currently pending in the Federal Action and should be resolved before Rocky Mountain Power is required to produce documents responsive to UAE's Data Request 2.1 in this case. Indeed, if the Motion to Enforce is successful, no response to UAE's Data Request 2.1 will be required.

UAE acknowledges that the Motion to Enforce is pending in the Federal Action but argues that it is of no consequence to UAE's Motion to Compel because the federal district court lacks authority to prevent Rocky Mountain Power from producing confidential documents in this docket.<sup>6</sup> To the contrary, the federal district court has inherent jurisdiction and authority to enforce its own order.<sup>7</sup> Such authority would certainly include any measure directed at protecting the improper disclosure of materials subject to the Protective Order such as requiring

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<sup>5</sup> See Motion and Memorandum in Support of Motion to Enforce the Terms of the Stipulated Protective Order, dated March 14, 2011, attached as Exhibit 6 to the Motion.

<sup>6</sup> UAE fails to support its broad assertion that the District Court lacks authority to enforce its own order with any relevant statutes or case law. Instead, UAE cites only to the Johnson Act (which is clearly not at issue here) and the following inapplicable cases: *Qwest Corp. v. Utah Telecommunications Open Infrastructure Agency*, 438 F. Supp. 2d 1321 (D. Utah 2006) (holding that federal court lacked jurisdiction where party failed to exhaust its administrative remedies when it failed to first seek relief from the PSC); *Mtn. Fuel Supply Co. v. Shell Oil Co.*, 533 F. Supp. 40 (D. Utah 1981) (applying and interpreting the Johnson Act).

<sup>7</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 is 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).

Mr. Dodge to withdraw UAE's Data Request 2.1. The court could similarly order that PacifiCorp not disclose Confidential Material that is subject to the Protective Order. Regardless of how the court chooses to enforce the Protective Order, the fact remains that it has inherent jurisdiction and authority to do so.

Until the Motion to Enforce in the Federal Action is resolved, Rocky Mountain Power should not be required to provide documents responsive to UAE's Data Request 2.1.

Accordingly, UAE's Motion to Compel should be denied.

**B. UAE'S DATA REQUEST IS OVERBROAD AND RESPONSIVE DOCUMENTS WOULD VIOLATE THE PROTECTIVE ORDER.**

Even assuming the Motion to Enforce were not pending in the Federal Action, the Protective Order in the Federal Action prohibits Rocky Mountain Power from disclosing documents responsive to UAE's Data Request 2.1.

PacifiCorp and Deseret entered into the Protective Order for the very purpose of avoiding the type of scenario that has arisen in this case by—preventing immediate access to and the disclosure of confidential documents to third parties (such as UAE) who may have an interest in the parties' affairs. UAE, however, bluntly asserts that whether documents and information are subject to the Protective Order in the Federal Action is irrelevant to the issue of whether those same documents must be produced in this case. Not so. Production of documents in response to UAE's overly broad Data Request 2.1 would, of necessity, require Rocky Mountain Power to involuntarily violate the Protective Order. Indeed, UAE's Data Request 2.1 seeks not only PacifiCorp's own confidential information related to the Arbitration, but *all* documents, whether relevant or not, related to the Arbitration including “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 [Arbitration].”<sup>8</sup>

UAE’s argument apparently assumes that the only Confidential Materials covered by the Protective Order are PacifiCorp’s own confidential documents. In fact, the Confidential Materials protected by the Protective Order include PacifiCorp’s confidential documents, Deseret’s confidential documents, and other documents and information derived from both. Given that much of the material sought in UAE Data Request 2.1 includes confidential information of third parties, and not just PacifiCorp’s own confidential information, Rocky Mountain Power simply cannot turn over PacifiCorp’s entire Arbitration file, as requested by UAE, without risking potential liability. Thus, it is not surprising that Rocky Mountain Power has been reluctant to do so. Nor should the Commission require that Rocky Mountain Power involuntarily violate the Protective Order.

Interestingly, prior to PacifiCorp’s Motion to Enforce and objection to Data Request 2.1, Deseret had expressed no concerns with the materials designated as Confidential in the Federal Action or Arbitration. But shortly after PacifiCorp filed the Motion to Enforce, Deseret suddenly (but not surprisingly in light of the fact that Mr. Dodge is its counsel) took issue with the designation of Confidential documents and sent PacifiCorp a letter challenging such designations. It seems apparent that Deseret’s letter was related not to any real concern of Deseret, but for the benefit of Mr. Dodge and his other client, UAE. Nonetheless, in light of Deseret’s letter, PacifiCorp has and continues in good faith to work with Deseret to de-designate materials in the Arbitration previously marked as Confidential Material and has proposed to de-

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<sup>8</sup> See UAE Data Request 2.1, attached as Exhibit 1 to the Motion.

designate significant portions of Arbitration documents. Rocky Mountain Power is prepared to produce such documents depending on the court's resolution of the Motion to Enforce.

Finally, Rocky Mountain Power takes issue with UAE's repeated attempts to mischaracterize Rocky Mountain Power's cautionary approach with regard to potential violations of the Protective Order as an attempt to conceal relevant documents from the Commission. To the contrary, Rocky Mountain Power recognizes and respects the weight of the Protective Order and, as set forth above, has done nothing more than attempt to comply with its requirements.

**C. UAE'S DATA REQUEST SEEKS INFORMATION AND DOCUMENTS THAT ARE PRIVILEGED OR PROTECTED OR NOT RELEVANT.**

In addition to its overbreadth, UAE's Data Request 2.1 also seeks the production of documents that are privileged or protected or not relevant to this case, and whose probative value (if any) is outweighed by their potential prejudicial effect. Specifically, in addition to being subject to the Protective Order, there is no relevant basis for UAE's request that Rocky Mountain Power produce privileged or protected documents or the arbitration award. The arbitration award is not only not relevant; its production could be highly prejudicial.

Rule 746-100-8(B) of the Utah Administrative Code requires that "[d]iscovery shall be made in accordance with Rules 26 through 37, Utah Rules of Civil Procedure." Rule 26(b)(1) of the Utah Rules of Civil Procedure mandates that "[p]arties may obtain discovery regarding any matter, not privileged, *which is relevant* to the subject matter involved in the pending action." (Emphasis added). Moreover, although the Commission is not bound by the technical rules of evidence, it should nonetheless exclude evidence that is "non-probative, irrelevant, or unduly repetitious." Utah Admin. Code Rule 746-100-10.

In the course of the Arbitration, the parties agreed to produce certain privileged or protected documents without waiving the privilege or protection. The Protective Order

specifically provides that such production is not a waiver of the privilege or protection. Protective Order, ¶ 5. Regardless of the outcome of the Motion to Enforce in the Federal Action, Rocky Mountain Power should not be required to produce any privileged or protected document in this docket. Rocky Mountain Power does not dispute that many of the underlying facts at issue in the Arbitration are relevant and discoverable in this docket. Such facts exist completely independent of the Arbitration. The arbitration award, however, is not relevant; rather, it is the arbitrator's unreviewable, non-precedential, opinion and interpretation of those facts in the context of distinct and unrelated contractual rights of PacifiCorp and Deseret (a non-party to the rate case). Such analysis and opinion of the contractual rights of PacifiCorp and Deseret has no relevance or place in the Commission's own independent review of the facts and determination of prudence. To the contrary, production and introduction of the non-probative arbitration award in these proceedings serves no purpose except to imbue these proceedings with a potential prejudicial bias against Rocky Mountain Power.

Accordingly, regardless of all else, the Commission should deny UAE's request that Rocky Mountain Power produce the arbitration award on the basis that it is irrelevant to these proceedings and highly prejudicial.

**D. THERE IS NO BASIS FOR UAE'S REQUEST FOR A DAY-FOR-DAY EXTENSION TO FILE ITS DIRECT REVENUE REQUIREMENT OR TO BE AWARDED COSTS.**

As set forth above, there is no basis for UAE's allegations that Rocky Mountain Power has intentionally delayed these proceedings or that it is intentionally concealing relevant documents. To the contrary, Rocky Mountain Power has legitimate concerns regarding the propriety of UAE's Data Request 2.1 and Mr. Dodge's violation of the Protective Order. In light of these facts, Rocky Mountain Power has proceeded with caution so as not to subject itself to potential liability for violation of the Protective Order. Moreover, Rocky Mountain Power has



made a good faith effort to work with UAE to resolve these issues and, in fact, PacifiCorp was in the process of de-designating Arbitration materials when UAE prematurely brought the Motion. Additionally, as set forth above, UAE Data Request 2.1 is overbroad and seeks, in part, privileged, protected and non-relevant and therefore non-discoverable information. Finally, Rocky Mountain Power is making every attempt to expedite resolution of the Motion, including promptly providing this response and supporting UAE's Motion for Expedited Treatment. In that regard, Rocky Mountain Power urges the Commission to set a hearing on UAE's Motion at the earliest date available. UAE's direct testimony on revenue requirement issues is not due until May 26, 2011. If the Motion is resolved promptly, there is ample time for UAE to prepare and file its testimony. Thus, there is no legitimate basis to require RMP to pay UAE's expenses in bringing this Motion to Compel and there is no basis to delay these proceedings by extending UAE's deadline to provide direct testimony.

### **III. CONCLUSION**

For the foregoing reasons, Rocky Mountain Power respectfully requests that the Commission deny UAE's Motions except for the portion of the Motion seeking expedited treatment of the Motion.

DATED: April 5, 2011.

Respectfully submitted,

ROCKY MOUNTAIN POWER

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## CERTIFICATE OF SERVICE

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