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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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

UAE’S REPLY MEMO IN SUPPORT OF MOTION TO COMPEL, REQUEST FOR EXTENDED TESTIMONY FILING DEADLINE AND REQUEST FOR EXPEDITED TREATMENT

The UAE Intervention Group (“UAE”) files this memorandum in reply to the opposition memorandum of Rocky Mountain Power (“RMP”) and in support of UAE’s motion for an order to compel RMP to respond to UAE’s data requests, to extend the filing deadlines and for expedited consideration.

UAE’s Motion to Compel should be granted. RMP’s Opposition Memo continues and escalates its relentless effort to hide behind a protective order in an unrelated proceeding – a

protective order of no relevance to this Commission or this docket – to conceal documents that are obviously and admittedly-relevant.¹

I. RESOLUTION OF UAE’S MOTION SHOULD NOT BE DELAYED PENDING ADJUDICATION OF PACIFICORP’S UNRELATED FEDERAL COURT MOTION

RMP asks this Commission to delay resolving UAE’s Motion to Compel because of an unrelated and irrelevant motion that PacifiCorp has filed in Federal Court. The reason for the requested delay appears obvious – the longer RMP can delay production of admittedly-relevant, but potentially damaging, documents, the less likely it is that any party will have time to adequately review and investigate those documents and prepare testimony regarding the prudence of RMP’s extensive expenditures at issue in this rate case.

This rate case is constrained by a statutory 240-day resolution deadline; no such deadline exists in federal court. PacifiCorp’s motion is currently pending before a Federal Magistrate. No hearing date has been set, and PacifiCorp has not requested expedited consideration. After the Magistrate issues his ruling, RMP can and, in light of its obvious desire to conceal these documents, likely will, appeal that ruling to the Federal Judge assigned to the case. If this Commission accepts RMP’s request for a delay pending resolution of the Federal Court motion, RMP will almost certainly succeed in concealing the requested information from this

¹ As discussed below, RMP admitted that the requested documents are relevant by not raising that objection in its response to UAE’s data request. In any event, it is beyond reasonable dispute that the requested documents are relevant, as demonstrated below.

Commission. RMP should not be permitted to exploit the Commission's statutory deadline in this manner.

II. THE FEDERAL COURT PROTECTIVE ORDER AND MOTION ARE NOT RELEVANT TO RESOLUTION OF UAE'S MOTION TO COMPEL

Whether or not Deseret's Counsel has violated a protective order issued in another docket is not relevant to whether documents requested by UAE in this docket are discoverable. This Commission has exclusive jurisdiction over utility rate cases, and sole authority to govern production of relevant documents in RMP's possession. Moreover, as more fully explained in UAE's Motion, even if the Federal Court were to find that Deseret's counsel violated the protective order,² it would be unprecedented and unlawful for the Federal Court to interfere with the exclusive jurisdiction of this Commission as requested by PacifiCorp. No Federal Court could or would purport to dictate whether data requests filed in this docket should or should not be answered.³ A federal court has ample jurisdiction to impose sanctions or provide other appropriate remedies for violation of a protective order, but it does not have jurisdiction to control discovery in a utility rate case.

² Deseret's counsel is confident that the Magistrate and Federal Court will find no violation of the Protective Order, given that not one court in the Country has ever adopted PacifiCorp's extreme interpretation of a protective order, and given that PacifiCorp is attempting to use and abuse the protective order for an invalid reason -- to hide relevant information from a state regulatory commission.

³ RMP asserts, incorrectly and without support, that the Johnson Act and federal cases cited by UAE are "clearly not at issue here" and are "inapplicable." To the contrary, that Act and those cases stand directly for the point that a federal court lacks jurisdiction to interfere with ratemaking proceedings of state regulatory commissions, which the federal court would clearly be doing if it were to order a party admitted by this Commission to withdraw a data request in this rate case.

III. REQUIRING RMP TO PRODUCE THE REQUESTED DOCUMENTS CAN NOT CAUSE IT TO VIOLATE THE PROTECTIVE ORDER

Advancing an argument as novel and unsupported as those advanced in PacifiCorp's federal motion, RMP argues that it could be forced to violate the Protective Order – potentially subjecting it to liability!! -- if it responds to UAE's Data Request. Nothing could be further from the truth. As explained in more detail in UAE's Motion, and as is evident from reading the Protective Order attached to UAE's Motion, the Protective Order expressly disclaims any restrictions on a party's use or disclosure *of its own confidential information*.

RMP advances its disingenuous argument by suggesting that some of the requested Arbitration Documents are “Deseret's confidential documents.” PacifiCorp knows, and indeed was recently expressly reminded, that Deseret did not designate a single document as confidential in the Arbitration, and that it has consented to production of all Arbitration Documents in any event.⁴ RMP appears to be deliberately misleading the Commission in a vain attempt to hide behind the Federal Court's Protective order. The Protective Order offers it no solace or excuse. RMP is solely in control of compliance or noncompliance with its obligation to produce relevant documents, and is in clear default of that obligation.

The disingenuous nature of RMP's argument is even more obvious given that it has refused to produce not only “Deseret's confidential documents” – if any existed – but also its

⁴ In discharge of its “meet and confer” obligations under the Utah Rules of Civil Procedure, counsel for UAE spoke with counsel for RMP before UAE filed its motion to compel. At that time, counsel informed RMP that Deseret has expressly instructed its counsel to remind RMP that Deseret had not designated any document as confidential in the Arbitration, and that Deseret has consented to disclosure of all of the requested documents in any event.

own documents, for which RMP has offered no excuse. The fact that RMP has not even partially responded to UAE's data request by producing its own Arbitration Documents which the Protective Order admittedly does not cover reveals RMP's true intent – not compliance with a protective order or avoidance of liability, but delay and concealment.

IV. UAE'S COUNSEL HAS NOT USED KNOWLEDGE OF CONFIDENTIAL DOCUMENTS IN VIOLATION OF THE PROTECTIVE ORDER

In an effort to divert this Commission from the simple issue at hand – whether RMP must produce relevant documents – RMP falsely claims that UAE's counsel has “admittedly used his knowledge of confidential information” in violation of the federal court Protective Order. UAE'S Counsel has made no such admission. The claim is false, and demonstrably so.⁵ Indeed, its falsity was demonstrated in Deseret's response to PacifiCorp's federal motion, a copy of which (without exhibits) is attached hereto as Exhibit “A.” Deseret's counsel had no need to use or even know of any confidential information in order to know of the existence and relevance of the requested Arbitration Documents. Indeed, counsel for Deseret requested the same documents in the Arbitration long before any confidential information had been produced or any Protective Order had been entered.

⁵ The only support offered by RMP for this claim is one sentence from a letter prepared by counsel for PacifiCorp purporting to quote counsel for Deseret to the effect that he knew that the requested documents were relevant. That is hardly an admission of improper “use” of confidential information. One need not know any confidential information to know that discovery responses, expert reports, deposition transcripts, hearing transcripts and the arbitration award relevant in the Arbitration are also relevant in this rate because both involve challenges to the prudence of the *identical expenditures*.

V. THE REQUESTED DOCUMENTS ARE RELEVANT, PROBATIVE, NOT OVERBROAD AND NOT PRIVILEGED.

A. RMP has Waived its Belated Objections.

RMP's opposition memo raises for the first time the suggestion, albeit no proof, that some of the requested documents may be irrelevant, not probative, overbroad, privileged or prejudicial. RMP has waived any such objections because it did not raise them in its response to UAE Data Request 2. RMP asserted only two objections, both irrelevant -- that the requested documents are "subject to" a protective order and that counsel for RMP already has them. All other objections were waived because they were not timely asserted. Rule 34(b), *Utah Rules of Civil Procedure*; *State v. Petty*, 412 P.2d 914, 916 (Utah 1966); *Hales v. Oldroyd*, 999 P.2d 588, 593 (Utah App. 2000); *Tuck v. Godfrey*, 981 P.2d 407, 416 (Ut. App. 1999). RMP cannot excuse its failure to provide the requested documents through belated objections. In any event, RMP has provided no proof that any of its belated objections are legitimate, and it can be demonstrated that they are not.

B. All of the Requested Documents are Relevant.

Even had RMP timely objected that some of the requested documents are not relevant, RMP has failed to carry its burden of proof in responding to UAE's motion to compel that any of the requested documents are not relevant to this rate case. UAE has demonstrated through publicly-available documents that the requested documents are relevant. The complaint, motion to compel arbitration and other federal court pleadings attached to UAE's Motion to Compel establish that the *only* issue sent by the Federal Court to binding arbitration was whether

PacifiCorp's decision to spend well over a hundred million dollars on the Baghouse Conversion and Scrubber Upgrade at the Hunter 2 unit was consistent with Reasonable Utility Practice. The prudence of those same projects is at issue in this rate case, as RMP has included in its proposed rate base its share of the *identical expenditures* challenged by Deseret. All discovery, reports, testimony and documents relevant to the limited Arbitration issue are also clearly relevant in this rate case. It does not take advance knowledge of the contents of any of the requested documents to know that they are relevant.

Rule 401, Utah Rules of Evidence, defines "relevant evidence" as any evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Given that the sole issue in the arbitration has a near-100% overlap with critical issues in this rate case, the requested Arbitration Documents are undeniably relevant.

In any event, it is RMP's burden to demonstrate that any of the requested documents are not relevant, and it has offered no such proof. Its burden for withholding documents from discovery is explained in Rule 26(b)(1):

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

RMP has made no effort whatsoever – other than bald, unsupported statements – to demonstrate that any of the requested documents are not relevant to issues in the rate case. Having failed to meet that burden, the documents must be produced.

Finally, the disingenuous nature of RMP’s belated attempt to challenge relevance is betrayed by the fact that RMP has not produced even the *admittedly relevant* documents requested by UAE, but instead has withheld all requested documents.

C. All of the Requested Documents are Probative, Relevant and Not Unduly Repetitious.

RMP also quotes from Commission Rule 746-100-10 to the effect that evidence can be excluded if it is non-probative, irrelevant or unduly repetitious. RMP fails to note, of course, that this Rule applies to *admission* of evidence at hearing, not *production* of documents in discovery. Moreover, how could the Commission possibly determine that evidence is non-probative, irrelevant or unduly repetitious if RMP succeeds in hiding it from the Commission and the parties in the first place? In any event, RMP has again failed to carry its burden to demonstrate that any of the requested documents would fall into any of the referenced categories. The Rule provides no support whatsoever to RMP’s refusal to produce documents.

D. The Requested Documents are Not Privileged from Production in Discovery.

RMP floats the belated suggestion – again without offering any proof – that some of the requested documents may be “privileged.” Privileges that protect documents from discovery are few and narrow, such as privileges based on attorney-client communications or attorney work product. In the Arbitration Deseret did not request, and PacifiCorp certainly would not have

produced, any documents subject to a proper discovery privilege. Similarly, UAE has not requested documents subject to a legitimate discovery privilege. Rather, UAE asked only for documents *that were produced or utilized* in the Arbitration, not those properly withheld from production based on privilege.

RMP's reference to "privileged or protected" documents is a misleading reference to categories of documents *subject to production* in the Arbitration, but as to which PacifiCorp requested enhanced protections. Advanced protections are also available here by Commission Rule. All requested documents can and should be produced here as they were in the Arbitration, subject to the Commission's Rules for protection of confidential information, as appropriate.

In any event, even had UAE requested production of documents subject to a discovery privilege and even had RMP not waived such objection by not timely asserting it, RMP would have the burden of demonstrating that any specific documents were properly withheld based on a claim of privilege. It has made no effort to carry that burden. In addition, as with its other belated and unsupported objections, it failed to produce even the admittedly non-privileged documents, revealing the truth about its desperate attempt to conceal.

E. UAE'S Data Request is Not Overbroad or Burdensome.

RMP also raises a belated and unsupported suggestion that UAE Data Request 2.1 may be overly broad or burdensome. RMP waived any such objections by not timely asserting them, and has failed to meet its burden of demonstrating the same. In any event, any such suggestion is clearly false. The UAE request is narrowly tailored to specific documents from the Arbitration.

All of the requested documents are in digital form and on DVDs in RMP's possession. They can easily be produced without any significant effort, cost or burden.

F. Claims of Prejudice are Premature and Irrelevant.

RMP suggests that production of the Arbitration Award would be prejudicial to it. That may be so, but it is no reason for concealing it. Even if "prejudice" were a legitimate objection to discovery, which it is not, any such objection was waived because it was not timely asserted. Also, no such claim has been proved. As with all of RMP's other "objections," RMP has wholly failed to substantiate its claims, assuming, apparently, that it is sufficient for it to merely raise objections without proving them. It is not. RMP has the burden of proving the legitimacy of any of its objections in response to a motion to compel.

In any event, the potentially prejudicial nature of evidence becomes relevant only when the Commission is asked to balance interests specified by Rule 403, Utah Rules of Evidence, when the evidence is offered *at hearing*: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." This rule provides no basis whatsoever for an objection to discovery or a refusal to produce documents. The Rule would come into play only if a document were offered into evidence and the Commission were to conclude that its probative value was "substantially outweighed" by other factors specified in the Rule.

G. RMP is Improperly Relying Upon a “Bad Document” Privilege.

Ultimately, it becomes clear that RMP’s extreme efforts to conceal relevant documents is based upon the proverbial “bad document” privilege, about which most attorneys will only joke. The fact that RMP does not like the outcome of the Arbitration Award or the documents relied upon in reaching that award hardly justifies RMP’s concerted efforts to conceal relevant documents from this Commission and the parties to this rate case.

VI. UAE’S DEADLINE TO FILE DIRECT TESTIMONY SHOULD BE EXTENDED.

RMP argues against UAE’s request for an extension of the deadline to file testimony challenging the prudence of the Contested Projects based on its unsupported and inaccurate claim that it has not delayed or concealed documents and that it has legitimate concerns relating to the Protective Order. Those claims and concerns are invalid, as demonstrated above. In any event, even if those claims were valid, they do not excuse RMP’s refusal to produce even one document in response to UAE’s data request. RMP has refused to produce even the vast majority of requested documents that even RMP cannot claim to be irrelevant, privileged or precluded from disclosure by the Protective Order.

The parties to this rate case must be given sufficient time to do a thorough analysis of the prudence of RMP’s significant environmental expenditures, and the requested documents are critical to that analysis. By withholding production of even admittedly relevant, not-privileged documents, RMP has severely prejudiced the ability of UAE and other parties to investigate and evaluate the prudence of RMP’s substantial expenditures on Contested Projects in this rate case.

RMP has the benefit of the Deseret Arbitration, including hundreds of exhibits, numerous depositions, several expert reports and seven full days of arbitration hearings, in preparing to defend against claims that any of the Contested Projects are imprudent. UAE's experts do not all share that luxury and, at least to date, have been denied access to documents relevant to that issue. If the Commission is interested in a meaningful evaluation of RMP's unprecedented request for rate increases from its Utah customers, all parties must be given sufficient time to evaluate the evidence and prepare testimony after they receive all relevant documents. UAE promptly requested production of these documents, and promptly moved to compel production when RMP refused to provide anything in response. RMP should not be rewarded for its delay and obfuscation by burdening other parties with inadequate time to analyze information once it has been provided.

In urging the Commission to adopt a test period in this docket that extends more than 17 months into the future, RMP Witness Steven McDougal acknowledged that "availability and accuracy of data to parties" is a factor to be considered in selecting a test period, and promised that RMP "remains open and willing to share information with the parties involved in the case." (Direct Testimony of Steven R. McDougal, Revenue Requirement & Test Period, January 2011, at 11, lines 254-255). Moreover, in accepting RMP's proposed test period, the Division and the Commission both placed significant emphasis on RMP's proposed capital expenditures for environmental equipment, and on RMP's claim that it had little or no discretion in the timing of these investments. (*E.g.*, pages 4, 5, 6 and 7, Order on Test Period, Docket No. 10-035-124,

March 30, 2011). The documents requested by UAE are directly relevant to this issue -- whether the timing and improvements were mandatory or discretionary. The parties need access to relevant documents in order to evaluate it. RMP is violating its promise to share relevant information with the parties to this docket, and is making unprecedented efforts to prevent UAE, the other parties, and this Commission from learning about documents and information that bear directly on critical issues before the Commission.

VII. THE COMMISSION SHOULD PROMPTLY ORDER RMP TO PRODUCE ALL OF THE REQUESTED DOCUMENTS

UAE respectfully requests expedited resolution of its Motion to Compel. UAE submits that the issues raised in its Motion are significant, substantive and critical to a proper determination of the public interest in this rate case. RMP's delays in producing the requested documents have already prejudiced the parties' ability to evaluate and prepare testimony on these issues.

UAE submits that the Commission does not need to hold a hearing to determine that RMP should be ordered to promptly produce the requested documents, subject to the confidentiality protections of the Commission's Rule, as appropriate, and respectfully requests that such an order be entered forthwith. If the Commission nevertheless desires to hold a hearing, UAE requests that the hearing be set for the week of April 11. Counsel for UAE will be out of the country and thus unavailable for a hearing from April 18 – April 25.

Respectfully submitted this 7th of April, 2011.

HATCH, JAMES & DODGE

/s/ _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this 7th day of April, 2011, on the following:

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