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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

DESERET GENERATION &
TRANSMISSION CO-OPERATIVE,

Plaintiff,

v.

PACIFICORP,

Defendants.

**MEMORANDUM IN OPPOSITION TO
PACIFICORP'S MOTION TO ENFORCE
THE TERMS OF THE STIPULATED
PROTECTIVE ORDER**

Case No. 2:10-cv-159

Judge Tena Campbell

Plaintiff Deseret Generation & Transmission Co-Operative (“Deseret”) hereby submits this memorandum in opposition to PacifiCorp’s Motion to Enforce the Terms of the Stipulated Protective Order.

I. INTRODUCTION

With its Motion, PacifiCorp requests that this Court interpret the Protective Order in this matter to preclude Deseret’s counsel from submitting a generalized discovery request in a separate proceeding before the Utah Public Service Commission (“PSC”), even though the terms of the Protective Order have clearly not been violated, the existence of the documents sought is public knowledge, and PacifiCorp has grossly over-designated materials that are not properly subject to the Protective Order. PacifiCorp asks this Court to find that Gary Dodge, counsel for Deseret, has violated the Protective Order by submitting a discovery request on behalf of his client, UAE, that seeks documents produced by PacifiCorp in this case and in an arbitration, some of which are subject to the Protective Order in this case.

PacifiCorp’s Motion is based on an unprecedented and unreasonable interpretation of the Protective Order stemming from an over-wrought interpretation of what constitutes “use.” Moreover, it is based on unfounded and unsupported assumptions about the basis for Mr. Dodge’s discovery request. PacifiCorp’s Motion does not explicitly ask for sanctions, but hints that sanctions—including attorneys’ fees and the disqualification of Mr. Dodge—could be awarded for a violation of the Protective Order. Ultimately, PacifiCorp’s Motion seeks to have this Court order Mr. Dodge to withdraw his discovery request in the PSC proceeding, a remedy this Court is without jurisdiction to provide. Whether or not the documents sought are discoverable in the PSC proceeding—and PacifiCorp has never disputed their relevance to the rate case—is an issue to be decided solely by the Utah Public Service Commission.

II. ARGUMENT

PacifiCorp's Motion asserts an allegation that it makes no effort to support, either with fact or with citation to relevant supporting authority. PacifiCorp claims that Mr. Dodge's discovery request in a PSC proceeding somehow violates the Protective order in this case simply because he happens to know the contents of the documents sought. The discovery request states:

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.¹

PacifiCorp does not claim that the discovery request is, itself, Confidential Material. Indeed, PacifiCorp reprinted the discovery request in its memorandum and then attached the request as an exhibit and publicly filed both the memorandum and the exhibit with this Court. Rather, PacifiCorp claims that Mr. Dodge's formulation of the request is an improper "use" of Confidential Material in violation of the Protective Order. PacifiCorp's assertion states:

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.²

PacifiCorp's Motion should be denied for multiple reasons. First, PacifiCorp utterly fails to support its novel interpretation of the reach of the Protective Order with citation to any authority or with any evidence that Mr. Dodge "used" Confidential Material in any way. Indeed, the existence of and relevance of the documents sought is public knowledge and not subject to the Protective Order. Second, many of the requested documents are not properly subject to the

¹ Second Data Request to Rocky Mountain Power From UAE Intervention Group, attached as Exhibit 1 hereto. *See also* Ex. B to PacifiCorp's Memorandum in Support of its Motion to Enforce. [Doc. No. 47].

² PacifiCorp Memo at 8 (emphasis added).

Protective Order in any event. Third, this Court lacks jurisdiction to grant the remedy that PacifiCorp seeks. Because PacifiCorp's Motion is brought for the improper purpose of delaying and concealing discovery of admittedly-relevant information from the Utah Public Service Commission, Deseret requests its fees and costs incurred in responding to it.³

1. PACIFICORP PROVIDES NO FACTUAL OR LEGAL SUPPORT FOR ITS CLAIM THAT MR. DODGE "USED" CONFIDENTIAL MATERIAL WHEN FORMULATING A DISCOVERY REQUEST IN THE PSC PROCEEDING.

PacifiCorp's Motion utterly fails to prove its allegation that Mr. Dodge's discovery request in the PSC proceeding was an improper "use" of Confidential Material in violation of the Protective Order. A brief discussion of the structure of the Protective Order is helpful. The Protective Order applies only to "Confidential Material"—"Discovery Material" and information derived therefrom that has been properly designated by the producing party as "Confidential" or a similar designation.⁴ "Discovery Material" is defined as "information . . . produced or generated in disclosures or responses to discovery in this litigation" and in the two arbitration proceedings between the parties.⁵ Anything that is not "Confidential Material" is not protected from disclosure under the Protective Order. The Protective Order limits disclosure of Confidential Material to certain "Qualified Persons," who may use the information only within the context of this litigation and the arbitrations between the parties in this case and bars the disclosure of Confidential Material except in accordance with the terms of the Protective Order.⁶

³ PacifiCorp objected to the data request in the PSC docket, not by claiming that the documents sought were irrelevant, but through an inappropriate claim that they are "subject to" the Protective Order in this docket. A copy of the objection is attached hereto as Exhibit 2. Obviously, the Protective Order does not bar the production of documents in the PSC proceeding. PSC Rules protect confidential documents and PacifiCorp's efforts to use the Protective Order to conceal and forestall admittedly relevant discovery in the PSC rate case is highly inappropriate and should not be countenanced by this Court.

⁴ Protective Order, ¶¶ 1, 4, 15-16.

⁵ *Id.*; see also Order Granting Motion to Amend/Correct Protective Order [Doc. No. 45].

⁶ *Id.*, ¶ 7.

PacifiCorp frames the issue in its Motion as follows: “In analyzing whether or not Mr. Dodge has violated the Stipulated Protective order by making [his] broad request, the issue is whether Mr. Dodge is ‘using’ the documents improperly.”⁷ PacifiCorp asks this Court to conclude that Mr. Dodge “is using the documents in formulating the data request and in explaining or implying their relevance in the PSC Proceeding.”⁸ PacifiCorp’s claim that a discovery request constitutes “use” of the documents sought is made without citation to supporting authority other than the Black’s Law Dictionary definition of “use,” which serves only to demonstrate the circularity of PacifiCorp’s argument. PacifiCorp makes the unsupported assertion that Mr. Dodge has “used” Confidential Material, then quotes a definition of “use,” and then concludes that the discovery request meets the definition, stating that “Mr. Dodge is utilizing and availing himself of the documents from the arbitration – and his knowledge of those documents”⁹ PacifiCorp has provided no support whatsoever for its assertion that Mr. Dodge’s mere formulation of a generalized request seeking general categories of documents such as the one at issue here constitutes unauthorized “use” of the documents sought.

PacifiCorp has not identified a single case in any jurisdiction of this country—or the world for that matter—finding that a discovery request for documents protected by a protective order constitutes a prohibited “use” of those materials. Deseret has requested any such authority from PacifiCorp, but none has been provided. Counsel for Deseret has also looked for any such authority and has found none. All of the cases PacifiCorp cites in support of its Motion relate to the *disclosure* of documents in a collateral proceeding, which is clearly a violation of a

⁷ PacifiCorp Memo at 8 (emphasis added).

⁸ *Id.* (emphasis added).

⁹ *Id.*

protective order. PacifiCorp admits that Mr. Dodge has not disclosed any Confidential Material here and so PacifiCorp's authority is entirely inapposite.

One of the cases cited by PacifiCorp, *Pacific Gas & Electric Co. v. United States*,¹⁰ directly contradicts PacifiCorp's novel theory. In that case, Plaintiff's counsel requested, for another client in a separate proceeding, documents he received subject to a protective order limiting the "use" of those documents to the *PG&E* case—just as Mr. Dodge has done here. In the separate proceeding, the Defendant opposed the request for production and the motion to compel production, but did not assert a violation of the protective order stemming merely from the attorney's *request* for those documents or from his motion to compel. It was only when the attorney attached 35 protected documents to his reply brief in support of his motion to compel that the Defendant sought to enforce the protective order. It was only the *disclosure* of the documents—*not the request* that they be produced—that the *PG&E* court concluded was a violation of the protective order.¹¹

Even if one were to accept PacifiCorp's unprecedented theory—that an attorney's request for documents in a separate proceeding is could constitute "use" of the documents sought in violation of a protective order limiting "use" of documents to the instant proceeding—the motion must still be denied because PacifiCorp has not even attempted to offer any proof of such a "use" here. PacifiCorp has made no effort to demonstrate that Mr. Dodge, in formulating the discovery request in the PSC docket, did or must have "used" any such knowledge of Confidential Material in violation of the Protective Order.

¹⁰ *Pacific Gas & Electric Co. v. United States*, 82 Fed Cl. 474 (2008).
1315 (Fed. Cir. 2002).

¹¹ *Id.* at 477.

PacifiCorp's Motion erroneously suggests that the existence of the requested documents is not public knowledge and fails even to attempt to demonstrate that Mr. Dodge **must** be relying on Confidential Material to know of the existence and relevance of the documents sought. PacifiCorp baldly states that "[i]f 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."¹² PacifiCorp offers no proof for this statement. It is false, and demonstrably so.

The fact that the parties are in litigation and arbitration, and the subject matter and timing of the arbitration, are all matters of public record. Indeed, Mr. Dodge knew of the existence and subject matter of the arbitration through public documents long before the Protective Order was entered or he had received a single confidential document from PacifiCorp. For example, it is public information that Deseret filed this lawsuit seeking relief related to PacifiCorp's election to spend significant amounts of money on capital improvement projects for environmental equipment at the Hunter 2 generating station in Emery County, Utah.¹³ Moreover, PacifiCorp publicly filed a Motion to Compel Arbitration in this case, attaching a non-confidential Notice of and Demand for Arbitration it had previously filed with the AAA asserting that the Baghouse and Scrubber Projects planned for Hunter 2 are consistent with "Reasonable Utility Practice."¹⁴ This Court's Order granting that Motion set forth the requirements and timing of the arbitration.¹⁵ For example, it noted that the arbitration would address the "limited question of

¹² PacifiCorp Memo at 9.

¹³ See Complaint, attached as Exhibits 4 and 5 to PacifiCorp's Notice of Removal [Doc. No. 1].

¹⁴ See Motion to Compel Arbitration [Doc. Nos. 4, 10] and Memorandum in Support [Doc. No. 5] & Exhibit D thereto.

¹⁵ See September 1, 2010 Order [Doc. No. 27].

whether the Baghouse and Scrubber projects constitute Reasonable Utility Practice,”¹⁶ and that “the arbitrator has 120 days to make a decision.”¹⁷ The fact and subject matter, as well as the timing, of the arbitration have always been public.

In addition to the public filings in this Court’s docket, Mr. Dodge was independently aware that Deseret was engaged in arbitration with PacifiCorp and knew—without the benefit of first receiving any Confidential Material—to seek particular documents relating to the positions of the parties. Deseret’s First Set of Discovery Requests in the arbitration, attached hereto as Exhibit 4, were served well in advance of PacifiCorp’s production of any Confidential Material and serve as an example of the information Mr. Dodge knew existed before such production. PacifiCorp’s responses to those discovery requests, attached hereto as Exhibit 5, are not subject to the Protective Order and provide further information upon which Mr. Dodge—or anyone else—could have relied in formulating his discovery request.

In addition to the filings in this Court and written discovery materials in the arbitration, the public filings in the PSC proceeding inform Mr. Dodge of the relevance of the documents he seeks in that forum. In the PSC proceeding, Rocky Mountain Power seeks to recover an additional \$232.4 million from its Utah ratepayers for, among other things, capital investments for the installation of environmental equipment at the Hunter 2 generating unit in Emery County.¹⁸ These are the *exact same capital investments* that are the subject of this litigation, and it is a matter of public record that the reasonableness of those capital investments at Hunter 2 was the primary subject of the arbitration between Deseret and PacifiCorp.

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 2.

¹⁸ See Rocky Mountain Power’s Application in Docket No. 10-035-124 [attached hereto as Exhibit 6]; see also Jan. 2011 Direct Testimony of Chad A. Teply at 5, 24-26 & Ex. A thereto [attached hereto as Exhibit 3].

PacifiCorp provides no support whatsoever for its invalid assertion that Mr. Dodge “used” Confidential Material in formulating his discovery request and, as set forth above, he did not need to rely on any Confidential Material to know of the existence of or relevance of the documents sought. Indeed, anyone with knowledge of the public dockets of this Court and of the PSC proceeding could immediately understand the existence and relevance of the documents sought in Mr. Dodge’s discovery request. PacifiCorp’s allegation of a violation of the Protective Order is not only unsupported, it is demonstrably false.

2. MANY OF THE DOCUMENTS MR. DODGE HAS REQUESTED ARE NOT CONFIDENTIAL MATERIAL AND ARE NOT SUBJECT TO THE PROTECTIVE ORDER.

Many of the documents responsive to Mr. Dodge’s request are not subject to the Protective Order and, as such, PacifiCorp’s assertion that Mr. Dodge necessarily relied on Confidential Material when formulating his request is further unsubstantiated. While PacifiCorp’s Motion seems to suggest that all of the documents sought in Mr. Dodge’s discovery request are Confidential Material subject to the Protective Order, that is simply not the case. Many of the materials responsive to Mr. Dodge’s request are public documents or are Deseret’s own discovery materials, including deposition transcripts of Deseret witnesses, that have not been designated as Confidential. PacifiCorp makes no effort to demonstrate that Mr. Dodge somehow relied on Confidential Materials to formulate his discovery request, as opposed to reliance on un-protected documents that are responsive to his request.

Moreover, PacifiCorp has grossly over-designated materials as “Confidential” or like designations that are not “Discovery Materials” and, therefore, are not properly designated under the Protective Order. As set forth above, only “Confidential Materials” are protected under the Protective Order and Confidential Materials are limited to properly-designated “Discovery

Material” and information derived therefrom.¹⁹ Discovery Material is defined as “information . . . produced or generated in disclosures or responses to discovery in this litigation” and in the two arbitrations between the parties.²⁰ Despite the Protective Order’s focus on Discovery Material, PacifiCorp has designated arbitration hearing transcripts, arbitration exhibits, and even the arbitrator’s Final Award as “Confidential.” The Final Award does not consist of and is not “derived from” any Discovery Material. Rather, it is a decision based on the testimony and evidence submitted by the parties at the hearing. The testimony and evidence presented at an arbitration hearing, much like a trial before this Court, is not “information . . . produced or generated in disclosures or responses to discovery.” Documents received in evidence at the hearing are evidence, not “Discovery Material.” The arbitration hearing materials are not subject to the Protective Order and PacifiCorp’s attempts to designate those materials is improper.

PacifiCorp’s reliance on its improper designation of arbitration evidence in support of its Motion seeking an order declaring Mr. Dodge in violation of the Protective Order should not be countenanced. Mr. Dodge’s discovery request needn’t have, and did not, “use” any Confidential Material in any event, because of the abundance of other public information upon which his request was based. PacifiCorp has failed to demonstrate that Mr. Dodge improperly “used” any Confidential Material in formulating his discovery request and its Motion should be denied.

3. THIS COURT DOES NOT HAVE JURISDICTION TO INTERFERE WITH DISCOVERY IN THE UTAH PUBLIC SERVICE COMMISSION DOCKET AND CANNOT GRANT THE REMEDY THAT PACIFICORP SEEKS.

This Court lacks jurisdiction to intervene or interfere in discovery matters before the PSC, and thus lacks jurisdiction to grant the remedy that PacifiCorp seeks, which is an order

¹⁹ Protective Order, ¶¶ 1, 4, 15-16.

²⁰ *Id.*; see also Order Granting Motion to Amend/Correct Protective Order [Doc. No. 45].

requiring Mr. Dodge to withdraw the discovery request filed by an unrelated client in the PSC proceeding. In *United Nuclear Corp. v. Cranford Ins. Co.*,²¹ the Tenth Circuit recognized significant restrictions on a district court’s power to “issu[e] discovery orders applicable only to collateral litigation.”²² “Questions of the discoverability in the [collateral] litigation are, of course, for the [collateral] litigants.”²³ This court is, therefore, barred from granting the remedy PacifiCorp seeks here, which is an order requiring Mr. Dodge to withdraw his client’s discovery request in the PSC proceeding. The discoverability of the documents responsive to the request must be dealt with solely by the PSC.

This Court has also recognized the limitations of its own jurisdiction to interfere with proceedings before the Utah Public Service Commission.²⁴ In *Mtn. Fuel Supply Co. v. Shell Oil Co.*, this Court ruled that both the Johnson Act and the doctrine of comity precluded its exercise of jurisdiction over claims alleging a violation of public policy and seeking declaratory relief and monetary damages relating to disputes concerning contracts approved by the PSC.²⁵ Noting that the Johnson Act²⁶ reflects a “Congressional hands-off policy relating to rate-making,” the *Mtn. Fuel Supply Co.* court acknowledged that the Act “was designed to remove [a] troublesome source[] of dissatisfaction with the federal judiciary: encroachment upon state prerogatives in the area of . . . utility rate-making.”²⁷ The Johnson Act states that “district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State

²¹ *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424 (10th Cir. 1990).

²² *Id.* at 1428.

²³ *Id.* (internal quotation marks omitted).

²⁴ *Mtn. Fuel Supply Co. v. Shell Oil Co.*, 533 F.Supp.40 (D. Utah 1981).

²⁵ *Id.* at 42-43.

²⁶ 28 U.S.C. § 1342

²⁷ *Mtn. Fuel Supply Co.*, 533 F.Supp. at 42.

political subdivision.”²⁸ There is no question that the remedy sought by PacifiCorp here would restrain the operation of the PSC’s orders regarding discovery in rate cases and it would certainly “affect[] rates chargeable by a public utility” if this Court granted an order that limited discovery in the PSC proceeding of admittedly-relevant documents that pertain to hundreds of millions of dollars in expenditures that PacifiCorp now seeks to collect from its Utah ratepayers.

In addition, the *Mtn. States Fuel Supply* court also remanded those portions of the case that were not clearly subject to the Johnson Act, stating that “[a]s to those issues of which it might take jurisdiction, principles of comity require that the court decline to sit.”²⁹ This Court should similarly decline to exercise jurisdiction over discovery requests made before the PSC.

III. CONCLUSION

Based on the foregoing, Deseret respectfully requests that this Court deny PacifiCorp’s Motion with prejudice. Deseret also respectfully requests that this Court grant any other remedies to Deseret that the Court deems appropriate, including attorneys fees and costs for responding to PacifiCorp’s Motion, which was brought for the unseemly purpose of concealing and forestalling production of admittedly relevant discovery material in the PSC proceeding.³⁰

DATED this 1st day of April, 2011.

HATCH, JAMES & DODGE, PC

By: /s/ Phillip J. Russell
Gary A. Dodge
Phillip J. Russell

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²⁸ See *id.*; see also *Mtn. Fuel Supply Co.*, 533 F.Supp. at 42 n.1.

²⁹ *Id.* at 49.

³⁰ See 28 U.S.C. § 1927.