

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of: The Application) Docket No:
of Rocky Mountain Power for) 10-035-124
Authority to Increase its Retail)
Electric Utility Service Rates)
in Utah and for Approval of its)
Proposed Electric Service)
Schedules and Electric Service)
Regulations.)

TRANSCRIPT OF HEARING PROCEEDINGS

TAKEN AT: Public Service Commission
160 East 300 South
Salt Lake City, Utah

DATE: April 14, 2011

TIME: 10:41 a.m.

REPORTED BY: Kelly L. Wilburn, CSR, RPR

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Hearing Officer:

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1 APRIL 14, 2011 10:41 A.M.

2 P R O C E E D I N G S

3 HEARING OFFICER: Good morning ladies and
4 gentlemen. We're convened in Docket No. 10-035-124,
5 captioned: In the Matter of: The Application of
6 Rocky Mountain Power For Authority to Increase Its
7 Retail Electric Utility Service Rates in Utah, and For
8 Approval of Its Proposed Electric Service Schedules
9 and Electric Service Regulations.

10 This is the time and place duly noticed for
11 legal arguments relative to the motion of UAE
12 intervention group to compel production of documents
13 in response to UAE Data Request 2.1, request for
14 extended testimony filing deadline regarding contested
15 projects, and request for expedited treatment.

16 My name is David Clark. I'm the designated
17 Hearing Officer today. And we'll begin by taking
18 appearances of counsel. Mr. Dodge, you're
19 representing the moving party?

20 MR. DODGE: I am.

21 HEARING OFFICER: We'll begin with you.

22 MR. DODGE: Gary Dodge, on behalf of the UAE
23 intervention group.

24 HEARING OFFICER: Mr. Proctor?

25 MR. PROCTOR: Paul Proctor, Assistant

1 Attorney General, on behalf of the Office of Consumer
2 Services.

3 HEARING OFFICER: Thank you. Mr. Moscon?

4 MR. MOSCON: Yeah. Matt Moscon, on behalf of
5 Rocky Mountain Power. And also with me is Yvonne
6 Hogle, in-house counsel with Rocky Mountain Power.

7 HEARING OFFICER: Thank you. I propose to
8 hear first from the moving party, Mr. Dodge,
9 representing UAE intervention group, followed by
10 Mr. Proctor, and then the Company. And then I'll
11 allow some brief final comments from UAE.

12 MR. DODGE: Thank you.

13 HEARING OFFICER: Mr. Dodge?

14 MR. DODGE: Thank you, Mr. Clark. And I
15 assume you prefer we sit, as opposed to stand at the
16 lectern?

17 HEARING OFFICER: That's quite all right.
18 Yes, please do.

19 MR. DODGE: Thank you. I'd like to start,
20 Mr. Clark, by explaining that everything that I say
21 today here will be public. I will not reveal or
22 discuss any confidential information.

23 By way of brief background -- and I know
24 you've read the briefs and I won't dwell on it -- but
25 by way of brief background, Deseret Generation is a

1 25-percent co-owner of the Hunter II Power Plant.

2 Under the agreement between Deseret and
3 PacifiCorp, PacifiCorp manages and operates the plant,
4 makes most of the decisions about improvements, but
5 it's subject to a requirement that it obtain Deseret's
6 consent if it's going to spend more than a certain
7 amount of money on capital improvements.

8 Absent that consent there's a limited
9 arbitration clause that allows PacifiCorp to send to
10 an arbitrator the question of whether the proposed
11 expenditure is consistent with reasonable utility
12 practice as defined in that agreement.

13 Deseret, back in about 2004, 2005, or even
14 before, learned of and objected to plans by PacifiCorp
15 to spend money at that plant on certain projects.
16 PacifiCorp did not, and -- did not obtain their
17 consent. Went ahead with the projects in any event.

18 And then, within the last year or two,
19 demanded arbitration after Deseret filed a lawsuit in
20 federal court seeking a declaratory judgment that it
21 didn't owe any part of those improvements because it
22 had not consented to them and they were not consistent
23 with reasonable utility practice.

24 PacifiCorp requested arbitration. Demanded
25 arbitration. The federal judge agreed. Sent it to a

1 120-day arbitration process before a single
2 arbitrator, whose task was to answer yes or no to two
3 questions posed to him about whether or not the two
4 specific group of improvements at issue were or were
5 not consistent with reasonable utility practice.

6 That process was sent to arbitration last
7 fall. It concluded this year. Early this year. And
8 the parties are still in the process before the
9 federal court of dealing with the consequences of that
10 decision and what it means in the context of the
11 larger lawsuit.

12 The two projects at issue at Hunter II are
13 also included in the rate base in this Docket. The
14 exact same expenditures. PacifiCorp's 60 percent
15 share of the exact same expenditures that Deseret had
16 challenged.

17 And again, this is all available from public
18 documents. Not from anything that one would have to
19 have confidential information about.

20 UAE, through me as their counsel, filed a
21 data request asking for the arbitration documents on
22 the very same issue that is before this Commission in
23 the general rate case. *I.e.*, the prudence or
24 reasonableness of the expenditures by Rocky Mountain
25 Power or by PacifiCorp on these particular upgrades.

1 Moreover, virtually-identical upgrades are
2 also in this rate case from several other power plants
3 where PacifiCorp is following a very similar course of
4 improvements.

5 Deseret -- excuse me. PacifiCorp objected,
6 Rocky Mountain Power objected to my data request,
7 after waiting 21 full days. The data request went out
8 quickly. They objected, after waiting 21 full days,
9 with one sentence, saying -- with two objections:
10 That the documents were allegedly subject to a
11 protective order in the federal docket. And secondly,
12 that I already had them. Those are the only two
13 objections that they raised.

14 I immediately filed this motion to compel,
15 because with a May 26th deadline to file direct
16 testimony, frankly, time's running out. In the
17 arbitration we had 120 days. And there was
18 significant discovery, and significant work, and a
19 hearing that lasted 7 days.

20 To get up to speed on these very complicated
21 issues my experts in this docket need access to the
22 same information we had access to in the arbitration.

23 Now, initially PacifiCorp -- well. In
24 filings in this docket PacifiCorp would have you
25 believe that they are somehow precluded by the

1 protective order from producing those documents. In
2 the federal court they don't make that claim.

3 In fact, I'm gonna read to you from a reply
4 brief filed by PacifiCorp in the federal docket that
5 is proceeding simultaneously on a similar issue.
6 *I.e.*, their request to hold me in contempt,
7 essentially, for having the audacity to ask a data
8 request in this docket for documents that I knew were
9 relevant in the rate case. I'm gonna read to you what
10 they said:

11 "As counsel for the UAE intervention
12 group in his PSC proceedings Mr. Dodge
13 is free to make discovery requests of
14 PacifiCorp. He can properly formulate
15 discovery requests that relate to the
16 subject matter of his PSC proceedings,
17 just as he does in countless other PSC
18 proceedings in which he is counsel.

19 "Responsive documents to those
20 proper requests may include documents
21 marked as 'Confidential' under the
22 stipulated protective order. In that
23 case, PacifiCorp would be obligated to
24 respond appropriately to that type of
25 request under the rules governing the

1 PSC proceedings.

2 "But that's not what Mr. Dodge did
3 here. He took a shortcut. As counsel
4 to Deseret in the arbitration, Mr. Dodge
5 is privy to the confidential material
6 produced in the arbitration. He knows
7 the contents of the documents and
8 believes that those documents are
9 relevant to his PSC proceedings.

10 "So, rather than making a request
11 that is tied to his case in his PSC
12 proceedings, Mr. Dodge just asked for
13 every document produced and created in
14 the arbitration."

15 What they're making in federal court is a
16 form-over-substance argument. Mr. Dodge could have
17 asked for the exact same things, and we would have
18 been obligated to respond. But because he took a
19 shortcut and asked for them in the context of the
20 documents produced in the arbitration, their view is
21 somehow that violates the protective order.

22 The admission in that statement that's
23 relevant to you, Mr. Clark, as the Hearing Officer
24 here, is that they're acknowledging they have the
25 obligation to produce these or to respond to these

1 discovery requests if they're properly formulated.

2 In other words, they're acknowledging the
3 documents themselves are not privileged from discovery
4 here. It's the way they claim I asked for it. And
5 they say that somehow violates the federal court
6 protective order.

7 You don't need to worry about that protective
8 order. The judge in that case is fully competent to
9 deal with any alleged violation of a protective order.
10 And eventually there will undoubtedly be a hearing or
11 a ruling before the magistrate judge, and then
12 probably an appeal to the federal judge that's
13 overseeing the case to deal with their argument that
14 by merely asking for documents I've somehow violated a
15 protective order.

16 That is not relevant to this Commission's
17 jurisdiction or this Commission's job in this case to
18 order PacifiCorp to produce documents relevant to
19 issues before it.

20 What they want in their form-over-substance
21 argument is apparently for me to re-ask the questions
22 the way I did in the Deseret litigation that produced
23 those documents. In other words, without having
24 access to any confidential information we asked data
25 requests that produced the exhibits and the documents

1 that were then used in the arbitration.

2 They apparently want me to ask it
3 differently. Of course, that gives them another
4 21 days. And then of course they could object that
5 some of those are privileged, or confidential, or
6 burdensome, like they've tried to in the reply memo
7 here.

8 And if they keep doing that, they can delay
9 this until it cannot be used by any party in this rate
10 case in an effective way.

11 The delay they ask you to do, they ask you to
12 delay and let the federal court resolve it. The only
13 purpose of that delay will be to deny discovery in
14 this docket. Because that ruling, that resolution
15 will not likely be had until well beyond the deadline
16 for filing testimony in this case.

17 I'd like to, I'd like to turn back to the two
18 objections that PacifiCorp filed timely in response to
19 the data requests. They're the only two before you.
20 They waived the others. It's Hornbook Law. If you
21 don't raise it as an objection, timely objection to
22 discovery, you waive those objections.

23 The two they submitted were that it was
24 "subject to a protective order." Let's address that.
25 A, that's not relevant. Whether there's a protective

1 order in another matter is a hundred percent
2 irrelevant to whether this Commission can require the
3 Utility to produce admittedly-relevant documents in
4 this proceeding. Subject to whatever confidentiality
5 restrictions they choose to put on them or try to put
6 on them under the Commission's protective order rule.

7 Second, even if they -- even if the
8 protective order were relevant to your deliberation,
9 your decision here today, these documents are clearly
10 not covered by the protective order.

11 In other words, the protective order does not
12 preclude PacifiCorp from producing, as I pointed out
13 in my reply brief, there is a clear exception that if
14 it's -- that a Company is not precluded from using its
15 own confidential any way that it sees -- confidential
16 information any way that it sees fit.

17 They want you to believe, Well, it's not all
18 ours. That's just plain false. Deseret did not claim
19 confidentiality as to one document or one piece of
20 information. And has expressly waived any, even if
21 there were some. And we've informed PacifiCorp,
22 Deseret has no objection to their production.

23 So you should not be fooled by an argument
24 that somehow there's some Deseret stuff here, or some
25 other stuff that isn't PacifiCorp's.

1 Under the protective order -- and you have a
2 copy of it and you can read it -- it says a party that
3 designates discovery material, that will become that
4 party's confidential information. It's the only thing
5 subject to the protective order.

6 Even if the protective order applied and
7 precluded them from providing documents that were
8 marked "Privileged" under the protective order --
9 which it clearly does not -- there's no excuse for
10 them not to have produced those documents that are not
11 privileged. No excuse.

12 The rules contemplate tailored objections.
13 And as to those as to which there is no objection,
14 that it be produced. They've refused to produce even
15 one document. They acknowledge some of them are not
16 protected by the protective order, but they refuse to
17 produce them.

18 The second objection that PacifiCorp made
19 timely was that Mr. Dodge already has them in his
20 possession. True. Of course, to the extent they
21 claim they're protected they would accuse me of
22 violating the protective order if I even showed them
23 to my expert witness in this docket. Which I have
24 not, because I'm honoring the protective order. So
25 the fact that I have them is irrelevant.

1 Second, if their argument is, as to those
2 documents that are not privileged, Mr. Dodge has them
3 and we shouldn't have to produce them, that's simply a
4 way to try and avoid any other party in this case from
5 getting them. Because others have asked for copies of
6 all documents responsive to all other data requests.

7 At a very minimum, if Rocky Mountain Power
8 were proceeding in good faith in this proceeding they
9 would have produced every document that they
10 acknowledge is not subject to the protective order to
11 all the parties, including UAE.

12 And they would have specified, as required by
13 Utah Rules of Civil Procedure, why they think other
14 things are protected from discovery. And narrowed
15 their objection so that this Commission and your
16 Honor, as Hearing Officer, could properly deal with
17 those objections.

18 As is, they gave you no basis for it. They
19 just stated two things. Gave you no basis to rule on
20 it. And in their filing, after a motion to compel,
21 they've given you no basis for finding or holding that
22 any one document there is privileged from discovery,
23 is irrelevant. They assert these things. Oh, some of
24 it's not relevant.

25 I don't believe that. It's on the exact same

1 issues before the Commission. I think it's all
2 relevant. But even if not, they have failed in their
3 burden to show you that even one of the requested
4 documents is not relevant.

5 They've failed in their burden to show you
6 that any one of the documents is privileged from
7 disclosure in discovery, as opposed to "privileged
8 under the protective order." Which is very different
9 from privileged from discovery when asked by a party
10 in another docket.

11 They haven't given you any basis for finding
12 that even one of the documents is privileged from
13 disclosure. They have not given you even one basis,
14 one factual basis for finding that any of the
15 requested documents is otherwise not properly
16 produceable in this litigation.

17 The documents we requested are relevant.
18 That relevance can be demonstrated by publicly-
19 available documents, and has been. It's not
20 overbroad. It's very targeted. They have every one
21 of these documents on CDs, as do I.

22 They could deliver them to the parties today
23 without any, without any problem. Claiming privileges
24 to the extent they choose to under the Commission's
25 protective order.

1 And the argument that it's somehow
2 prejudicial is completely irrelevant. Prejudice comes
3 to play at hearing, when a hearing officer weighs the
4 probative value versus the prejudicial value. That
5 weighing can't be done until you see the document and
6 know whether it's prejudicial.

7 I submit that Rocky Mountain Power has
8 submitted not one basis for not complying with a data
9 request for admittedly and obviously relevant
10 documents in this proceeding, other than a desire to
11 keep parties to this case from discovering them.

12 This Commission -- and Mr. Proctor's filing
13 addresses this and I won't spend much time on it --
14 has repeatedly recognized the handicap that parties to
15 rate cases are under. Under a 240-day gun on a very,
16 very com -- in a \$242 million rate increase, with very
17 complicated matters, when the Utility holds all the
18 cards in terms of documents.

19 And it has repeatedly said, We will hold this
20 Utility to its promise to produce documents timely and
21 completely to allow complete vetting of the issues
22 before the Commission.

23 Rocky Mountain's conduct in this matter is
24 directly contrary to that Commission requirement and
25 expectation. And, in my view, is designed for no

1 purpose other than preventing the parties from knowing
2 about the relevance of documents that have been
3 requested.

4 As a result of that conduct we respectfully
5 request an order requiring Rocky Mountain to produce
6 them immediately. So that we can get our experts
7 reviewing them, understanding them, and dealing with
8 them as soon as possible.

9 We also ask for a delay on this issue, as to
10 the contested projects that UAE intends to challenge,
11 day for day until they do produce it from the time it
12 was due, because these are complicated issues. And I
13 think their response time ought to be more limited
14 because their people, unlike mine, have access to
15 these documents.

16 So I respectfully request that the Commission
17 give us an extension of time on this issue alone, the
18 contested projects at Hunter II and other plants, and
19 shorten the Company's responsive time.

20 And then lastly we request, under
21 Rule 37(a)(4), that the Commission award our costs and
22 fees for having to bring this motion. That rule
23 requires that the Officer shall, or the Court in that
24 case, shall award fees unless it finds that the
25 objections were meritorious, or some other bases.

1 But I submit that other this context UAE
2 should be entitled to recover its fees for having to
3 bring this motion in the first place. Thank you very
4 much.

5 HEARING OFFICER: Thank you, Mr. Dodge. I
6 have a couple questions.

7 MR. DODGE: Please.

8 HEARING OFFICER: First, can you be a little
9 more precise for me on the status of the motion to
10 enforce at the Federal District Court?

11 MR. DODGE: Yes. The magistrate, the
12 Magistrate Judge Dave Nuffer, before this -- to whom
13 this has been referred, after the motion was filed
14 gave us a schedule for briefing that was accelerated
15 from the normal schedule.

16 Those briefs have been filed now for -- I
17 forget exactly when they were filed. Several days.
18 The magistrate judge has not -- it was last week, I
19 believe.

20 I don't know if you have --

21 MR. DRACHT: Last week Wednesday.

22 MR. DODGE: Yeah, last week that it was --
23 that the last of those -- the reply memo was filed.
24 Oh, yeah, I have it right here. I could look.

25 And the judge -- the magistrate judge has not

1 scheduled it for hearing, nor indicated if he intends
2 to. Yeah, it was April 5th when the last ruling, the
3 reply memo went in. He has not scheduled it for a
4 hearing, nor indicated if he intends to hold a
5 hearing.

6 We're anxious and we would like him to hold
7 that hearing very quickly, because we're confident
8 that he will agree that asking a data request doesn't
9 violate a protective order. But having said that,
10 there's no assurance when he will rule, or when he
11 does rule that it will not be then taken up to the
12 federal judge, Campbell, who presides over that case.

13 And that's why we believe it does not work to
14 wait for that resolution. That could be months.

15 HEARING OFFICER: In your initial papers you
16 referenced the Johnson Act, and a case or two that
17 construe it. Particularly the Mountain Fuel versus, I
18 think, Shell Oil case.

19 In your review of the Act and associated
20 precedent have you encountered any situation or case
21 where a court examined the Johnson Act in relation to
22 a discovery order in a rate-setting docket?

23 MR. DODGE: No. The cases that we've cited
24 go to the principle that a federal court cannot do
25 anything that directly impacts ratemaking -- rates of

1 or ratemaking in a federal utility context.

2 We believe that's directly relevant. There
3 are hundreds, literally, hundreds of millions of
4 dollars in this rate case, in rate base in
5 PacifiCorp's requested rate increase, for the very
6 same kind of improvements that were involved in the
7 arbitration.

8 And we believe that a federal judge would
9 never, would never even consider demanding that a
10 party not before it in the federal docket, meaning
11 UAE, must withdraw its data request because of an
12 alleged violation of the protective order.

13 UAE could ask it through another counsel. In
14 fact, indeed other parties have asked for the same
15 documents. Anyone can ask -- the arbitration is not a
16 secret. And the fact that it was addressing these
17 same issues is not a secret. It's not confidential.
18 Anyone could ask that.

19 If they refuse to produce it, that will
20 directly impact -- it could directly impact rates in
21 this proceeding because the Commission may not have
22 before it relevant information on those very dollars
23 that they're seeking to recover.

24 But no, I will not represent to you we found
25 an exactly-analogous situation in a discovery context.

1 HEARING OFFICER: And --

2 MR. DODGE: And I will also say neither have
3 they cited any such case. Nor any case in the country
4 that's ever agreed with their narrow -- their broad
5 interpretation of a protective order.

6 That not disclosing it, but somehow, because
7 you happen to know that it exists, asking for it in
8 another docket somehow constitutes a violation of a
9 protective order. Haven't cited one case that's ever
10 found that.

11 HEARING OFFICER: Thank you. Related to your
12 request for costs and attorney's fees, you've
13 mentioned Rule 37. And that is one of the, one of the
14 rules incorporated by reference in the Commission's
15 own rules.

16 MR. DODGE: Right.

17 HEARING OFFICER: You've practiced a long
18 time before the Commission. Are you aware of prior
19 cases in which the Commission has awarded attorney's
20 fees and costs in this kind of a matter?

21 MR. DODGE: I, I am not aware of any. Nor
22 have I ever requested it. I mean, honestly, I think
23 this is probably my third or fourth motion to compel,
24 ever, in 20-plus years of practicing before this
25 Commission. Because typically we get the documents

1 that we request when they're clearly relevant.

2 Having said that, I've never asked for fees
3 before. I believe this one is so obvious and so
4 inappropriate, the way they've responded and refused
5 to produce even one document or present facts to the
6 Commission that would allow you to decide if there's
7 some proper objection to withholding them, that under
8 37(a)(4), I believe, it says shall award them unless
9 certain things happen. I believe this is an
10 appropriate context.

11 But no, I'm not aware of any.

12 HEARING OFFICER: Thank you, Mr. Dodge.

13 Mr. Proctor?

14 MR. PROCTOR: Thank you, Mr. Clark. The
15 Office obviously was not a party to the federal -- or
16 the arbitration proceeding, and nor a party to the
17 pending federal proceedings.

18 The Office also, other than the standard
19 provide to the Office what you provide to others, has
20 not directly asked questions pertaining to the
21 information/documents that were authored for or
22 produced in the arbitration. Although certainly we
23 will.

24 HEARING OFFICER: May I ask you a question
25 about that?

1 MR. PROCTOR: Certainly.

2 HEARING OFFICER: The final sentence in your
3 paper says: "Accordingly, the Office joins in UAE's
4 requests and motion."

5 MR. PROCTOR: Yes.

6 HEARING OFFICER: I wondered about the word
7 "requests," and if you intended that to be a request.

8 MR. PROCTOR: It was intended to, yes,
9 absolutely. But obviously to follow the procedure to
10 submit a data request it must be specifically stated,
11 the information outlined that you're requesting, and
12 so forth. But -- I'll just get to this right now.

13 The Office is certainly concerned about the
14 timing, cost, and other matter -- and necessity,
15 prudence of the controls that were -- that are at
16 issue, environmental controls that are at issue in
17 this particular general rate case.

18 The Sierra Club, as I've noted, is
19 interested. Concerned about that. I believe that, if
20 you look at testimony filed in connection with the
21 test period hearing before this Commission of a couple
22 of weeks ago, you'll find reference there also to a
23 test period that would take into account some of these
24 environmental control projects and the possibility of
25 changes to federal law that may affect them.

1 So I don't believe that there's any
2 suggestion anywhere -- I didn't find it either in
3 Rocky Mountain Power's pleadings -- that suggests that
4 such information is not discoverable. And that, of
5 course, the standard for discovery is quite broad.
6 And in an administrative context, particularly before
7 this Commission, in practice is extraordinarily broad.

8 One of the reasons it is is because the
9 Commission has very specific rules, now administrative
10 rules -- used to be application to case-by-case
11 protective orders -- but in this case administrative
12 rules that apply to every case, and every party in
13 that case, to protect information that may be
14 confidential but requiring its disclosure because it's
15 necessary to the Commission's work, and also highly
16 sensitive information.

17 The problem that caused us to become
18 extraordinarily concerned about Rocky Mountain Power's
19 position, first taken in their response to the data
20 requests and then taken in this particular case in
21 response to the motion to compel, lies in a couple of
22 statements which they made in their pleading.

23 The first is on page 3, the latter part of
24 the paragraph after (a.) And it refers to the
25 protective order in the arbitration:

1 "Pursuant to the terms, documents
2 marked as confidential material cannot
3 be used directly or indirectly for any
4 purpose whatsoever. And cannot be
5 disclosed to any person, corporation,
6 partnership, Public Service Commission,
7 or any other entity, except in
8 accordance with this protective order."

9 Which the Company is describing as saying,
10 You, Public Service Commission, don't get it. And
11 then on the top of page 4, following the sentence that
12 begins the last of page 3:

13 "Indeed, Mr. Dodge's improper use of
14 his knowledge of the confidential
15 material, gained as counsel for Deseret
16 and now used for the potential benefit
17 of a separate and distinct client in
18 this docket, seriously taints the
19 legitimacy of UAE's data request" -- and
20 here's the important part, the troubling
21 part -- "and further opens the door to
22 similar improper data requests from
23 other parties."

24 That's the Office. That's the Division.
25 That's the Sierra Club. That, for that matter, is the

1 Commission, which has the authority also to request
2 information.

3 So they're not simply saying that a
4 protective order exposes them to some risk of
5 violation in the event that they were to turn this
6 information over. They're saying no one, no one in
7 this case is entitled, may receive that information,
8 because the protective order issued in the course of
9 an arbitration prohibits it.

10 And it's information that is directly
11 relevant, by admission, to the proceedings in this
12 general rate case.

13 Their objection -- or their response to Data
14 Request 2.1 also is quite troubling. Should be
15 troubling to the Commission. The Company objects to
16 this request on the basis that the information is
17 subject to the stipulated protective order entered by
18 the federal court in a proceeding between PacifiCorp
19 and Deseret G&T.

20 And then, in combination with the manner in
21 which they have dealt with that data request and the
22 motion to compel, they are stating plainly that that
23 order is binding on this Commission, on agencies of
24 the State of Utah, and prohibits us from getting the
25 information, period.

1 Now, later on they back away from that
2 strident position. And suggest that what they really
3 don't want is, in particular, the arbitration award to
4 be disclosed. Because that would contain the
5 opinions/discussion of the matter by the arbitrator
6 and would not be relevant to any conclusion, certainly
7 would not be evidence that would be supportive of any
8 conclusion reached by the Commission.

9 I don't want to address that. I just want to
10 note that, to Rocky Mountain Power's credit, they back
11 away a little bit from the approach that you don't get
12 anything. Not now, not ever.

13 But from the Office's perspective today, it's
14 this forum that we're concerned about. It's the
15 duties of the Company, and the responsibilities of the
16 party receiving the information, to respect the rules
17 that this Commission has created to govern the
18 process. And that was the main focus of our
19 responsive pleading.

20 They don't dis -- they state this information
21 is confidential. Well, confidential information is to
22 be given certainly to the Division, certainly to the
23 Office, and other parties, because we're presumed to
24 be signatories to the protective order. And we have
25 other state statutory obligations that mean we have to

1 protect that information. Both in our use of it, our
2 disclosure of it, and use in hearing.

3 They don't suggest that any of this
4 information is highly sensitive and, therefore,
5 subject to additional protection. Although the
6 Office's reaction to -- their reply to the motion to
7 compel was essentially, We're disclosing -- we're
8 claiming that this information is so sensitive that
9 we're not gonna give it to you, ever.

10 But they didn't try to discuss that matter.
11 They didn't try to then, upon failure to reach an
12 agreement, come to the Commission and explain, This is
13 our problem, Commission. Whether they feel that they
14 are at risk of violating the protective order issued
15 by the federal judge, or for whatever reason. Or
16 competitive issues. Or will it affect the ability of
17 either Deseret or Pacifi -- Rocky Mountain Power in
18 particular to enforce the arbitration award.

19 They say nothing about that. They just say,
20 Well, you can't have it. And that's troubling. To
21 the point where the Office gets involved. Because,
22 like Mr. Dodge, like every intervener or state agency
23 that's involved in this case, we have testimony due.
24 And it's testimony that must be responsive to their
25 general rate request and all of its components,

1 including the contested projects.

2 And I've adopted that description from
3 Mr. Dodge, but we know what they are. And you can
4 look at their general rate case and you can identify
5 them. And if we don't have the information, how can
6 we possibly respond?

7 And now, if they're not provided at all and
8 so we don't get them through the standard provide us
9 with what you provide others, we ask our own detailed
10 requests. Maybe we get them. Maybe we're confronted
11 with a motion to compel. Maybe we have to fight this
12 over again here. And in the meantime, the date for
13 filing of the testimony is long past.

14 And it's all information that is relevant,
15 and therefore discoverable. There are protections
16 built into the procedural rules, and for that matter
17 the civil rules to the extent they apply, that can be
18 readily managed, and protect everyone's interest, and
19 yet provide the Commission with the information it is
20 entitled to. That is necessary for the Commission to
21 do its work.

22 And also that is necessary, and to which the
23 state agency -- and I speak only for the Office -- is
24 entitled in order to present its case and properly
25 represent its statutorily-stated constituents.

1 As a representative for the State of Utah I'm
2 not gonna ask for attorney's fees. I don't think that
3 the State of Utah rarely, if ever, asks for attorney's
4 fees. And, in fact, only in one case that I have
5 appeared before this Commission has a motion to compel
6 been important.

7 If I were private counsel I would absolutely
8 ask for them. Because their response is not genuine,
9 doesn't comply with the rules, and is for the purpose
10 truly of just preventing information from being
11 disclosed. Not for the manner in which it's
12 protected, or the manner in which it is used later on.

13 The order that has been requested should be
14 granted. Thank you.

15 HEARING OFFICER: Thank you, Mr. Proctor.
16 Mr. Moscon?

17 MR. MOSCON: Thank you, Judge Clark. And
18 good morning. When I was --

19 HEARING OFFICER: Good morning.

20 MR. MOSCON: -- coming over this morning I
21 thought I'd be apologizing to the parties and to the
22 Hearing Officer, because I believe everyone knows I'm
23 actually filling in for Mr. Monson today, who's out of
24 town. And I thought my lack of information may cause
25 problems, and I didn't want to have a lack of

1 familiarity to cause delay or problems.

2 But hearing this today I almost think it's
3 given me an advantage. Because, although I'm
4 certainly not an outsider -- coming to it as an
5 outsider, I see -- and maybe this is the case in many
6 discovery disputes -- how the parties are really two
7 ships passing each other without really confronting
8 what's going on.

9 If, indeed, Rocky Mountain Power's position
10 was as it was just articulated, I think that would be
11 troubling. Maybe it's because of the expedited nature
12 with which this matter has been briefed. Maybe the
13 position of the parties could have been made clearer
14 in those briefs.

15 But I am here to tell you that the parade of
16 horribles that has been presented this morning and the
17 draw-a-line-in-the-sand position that's been portrayed
18 is not the position of the Power Company. And it was
19 not the position of the Power Company even prior to
20 the filing of the motion to compel.

21 I believe some of this is because there's
22 information that was exchanged in the meet-and-confer
23 period that didn't make it into the papers that were
24 filed. And perhaps, for instance, Mr. Proctor's
25 office didn't have privy to that information.

1 But I'm here to tell you that it's not as it
2 seems, at least based on what we've heard this
3 morning. I want to address a couple of things. And I
4 think I can really clarify what the Company is asking,
5 or what the Company is saying it feels that it cannot
6 do.

7 The first is, there's been talk about this
8 protective order and does it apply. And as I read the
9 briefs of the parties this morning I thought, You
10 know, the way that it's being framed puts the
11 Commission in such a difficult order because there's
12 all this, you know, the parties are citing case law
13 about this act, and the Commission has ratemaking
14 authority, and comity, and don't let them exercise
15 jurisdiction over you.

16 And I thought, You know, that misses the
17 point. Rocky Mountain Power is not here to tell you
18 that the federal court has superior jurisdiction to
19 the Commission over this matter. And absolutely we
20 agree that the Commission has the exclusive
21 jurisdiction over ratemaking. That has nothing to do
22 with what we're saying.

23 What is undisputable is that the federal
24 court has jurisdiction and power over the Company.
25 Over Rocky Mountain Power.

1 As to whether the protective order applies in
2 this instance, I think that the Moving Parties are
3 being slightly less than genuine with the Commission.
4 They argue at length in their papers and again here
5 today, Hey, this protective order has nothing to do
6 with this. Don't let them stand in the way.

7 And yet in response to the point that the
8 Company made that, Hey, you yourself, Mr. Dodge, have
9 all these documents, the response back to the
10 Commission is, and I quote:

11 "Counsel for Deseret in the
12 Deseret-Pacific lawsuit is, indeed, in
13 possession of the arbitration documents,
14 but it is prevented from disclosing
15 those documents to anyone, including
16 UAE's experts or this Commission, by the
17 stipulated protective order cited by
18 RMP."

19 So we just heard all of this argument about,
20 Can you believe the outrage that Rocky Mountain Power
21 would take the position that you, the Commission,
22 can't get some information because of this protective
23 order?

24 And yet in their motion to compel they tell
25 you, Hey, we're bound by this protective order too.

1 I.e., we're asking the Commission to order the Company
2 to do something we're telling you we, ourselves, can't
3 do.

4 But all is not lost because, as was correctly
5 pointed out by counsel for UAE, the protective order
6 does allow the Company to disclose its own data. Its
7 own confidential data.

8 When the data request was submitted the
9 Company obviously felt that it was overbroad and threw
10 in everything and the kitchen sink. And it objected.
11 And it made two objections. Could those objections
12 have been more specific? Absolutely. I'm here to
13 tell you they could.

14 I'll get to a minute about whether that
15 constitutes a waiver. But prior to filing the motion
16 to compel my client made clear to UAE that it does not
17 intend to withhold all of the information that the UAE
18 or its experts would need.

19 In fact, as the Commission I'm sure can
20 assume, for the Company to make its case that these
21 costs were prudent and should be included in rate it's
22 going to need to put on evidence about what it
23 purchased for Hunter, and why it purchased it for
24 Hunter, and what led to the purchases, and all of that
25 analysis.

1 So obviously the Company is not going to take
2 the position, That can't come in, the Commission can't
3 see it, you can't see it.

4 It needs to come in. We don't dispute that.
5 The dispute is only over what we call, perhaps
6 inartfully, the "arbitration documents." Meaning the
7 award of the arbitrator, the hearing transcript, the
8 legal motions that the lawyers filed, the -- you know,
9 it would be like a motion for summary judgment, those
10 kinds of legal arguments.

11 Those are irrelevant, are non-discoverable,
12 as I'll address shortly. But the first thing I want
13 to make clear is that the Company has not taken the
14 position it will give nothing. And I would like to
15 quote from an email by Mr. Monson to Mr. Dodge.

16 This was on Wednesday, March 30th. It was in
17 the evening. And he says that -- they're going on
18 about this -- it's the meet-and-confer exchange. And
19 what Mr. Monson says on behalf of the Company is, and
20 I quote:

21 "In addition to documents that the
22 parties have agreed may be removed from
23 coverage of the federal court protective
24 order, we" -- the Company -- "also
25 intend to include documents that are

1 PacifiCorp's documents providing factual
2 information related to the evaluation of
3 whether the improvements to Hunter II
4 Plant were needed consistent with
5 reasonable utility practice.

6 "We do not intend" -- this is the
7 only exception -- "documents that are
8 privileged or relate to the other -- to
9 other unrelated issues in the
10 arbitration. We propose" -- and I
11 skipped it. I go down.

12 "We propose" --

13 HEARING OFFICER: Could I just interrupt --
14 pardon me for interrupting you --

15 MR. MOSCON: Yeah.

16 HEARING OFFICER: -- but I think this will be
17 more efficient. Can you help me understand what those
18 unrelated issues --

19 MR. MOSCON: Sure. Well --

20 HEARING OFFICER: -- would be? Because my
21 understanding of the arbitrator's objective was simply
22 to answer the question about reasonable utility
23 practice.

24 MR. MOSCON: Right. Actually, the part that
25 I cut out here is what, what Mr. Monson goes on to say

1 is, to Mr. Dodge -- this is a Wednesday -- we propose
2 to meet with you on Friday and go over the scope of
3 things because we -- Stoel Rives, Greg Monson -- we
4 weren't involved in that federal case.

5 We need to get the other lawyers involved
6 that were involved so we can figure out what, if any,
7 duplication there was, because we weren't familiar
8 with that. But let's do it. Let's meet and confer on
9 Friday and review the list of documents or portions of
10 documents that we don't object to that can be used in
11 the rate case.

12 The response back on Wednesday -- I guess
13 it's on Thursday, I apologize, because that's on
14 Wednesday -- is:

15 "I will be available until 3 p.m.
16 today for further discussions, but I am
17 not willing to wait beyond that time to
18 file my motion to compel unless I
19 receive good faith assurances RMP will
20 promptly produce all of the documents
21 requested."

22 So with the two ships passing in the night,
23 the Power Company has always said, Look, we're not
24 trying to keep all of the data from you. We intend to
25 give you all of the underlying data. Everything that

1 has to do with what we bought, why we bought it, how
2 much we paid for it, what went into our analysis, we
3 will absolutely give that to you.

4 In addition, we will give to you all those
5 documents and the portions of the transcripts, et
6 cetera, that both parties have agreed can come out of
7 the federal court protective order in this -- the
8 thing that's been briefed, you know, that they were
9 talking about. We're going to give all of that to
10 you.

11 When the hearing began Mr. Dodge said -- and
12 because I thought, Well, that answers our question, I
13 actually wrote it down: "My experts need access to
14 the same information we had at arbitration." And I
15 actually wrote it. When I say "quote," I tried to
16 write it word for word.

17 We don't dispute that. We agree that the
18 Commission should expect the Power Company to give
19 their experts in this case all of that underlying
20 data. We don't object to that.

21 What their experts don't need is the legal
22 conclusion of the arbiter. That document is
23 undiscoverable, for two reasons. As the judge will
24 know, basic discovery law says to discover something
25 you have to look at, number one, whether it's

1 relevant. And you may challenge discovery on
2 relevancy.

3 And we'll go so far as to say that you can
4 even discover material that is itself inadmissible, so
5 long as you can prove that it's likely to lead to the
6 discovery of other information you would not otherwise
7 have that is admissible.

8 The arbitration award is only the arbiter's
9 recitation of all the underlying data, that we're
10 saying we're willing to hand over, and then the
11 arbitrator's legal conclusions.

12 Therefore, that document is not only
13 inadmissible on its face as a legal conclusion, but
14 it's not likely to lead to the discovery of any other
15 evidence that would be admissible. Because the only
16 thing it can do, it can't generate its own
17 information, it can only parrot back the facts in the
18 case.

19 And we're saying, We will give you all of the
20 same underlying facts and data. So while I started my
21 argument saying the protective order applies -- and
22 don't let them fool you, because they themselves say,
23 We can't use it because we're afraid of the protective
24 order. The protective order does say, Rocky Mountain
25 Power, you can turn over your confidential documents.

1 There is a solution to what's been thrown in
2 your lap. I -- when I saw the papers and was reading
3 this I thought, How would any Hearing Officer figure
4 out the comity issues, and the jurisdictional issues,
5 and which court or commission has jurisdiction or
6 supersedes who? And with no briefing and not a single
7 case cited by either party over this, you know, who
8 has comity or who's superior in which jurisdiction.

9 I would say that what this Commission can and
10 should do, the solution is simply to order -- and
11 without time delay, within seven days. Within seven
12 days that Rocky Mountain Power provide, in response to
13 UAE, all of its own underlying financial
14 data/documents about the improvements at issue at
15 Hunter II.

16 And by that I mean what they paid, what their
17 witnesses said, what their experts said. I mean, I'm
18 not trying to hide the ball behind that. I'm saying
19 our underlying data that we used at the arbitration,
20 we turn over.

21 HEARING OFFICER: Pardon me just a moment.
22 When you say what their experts said, what their
23 witnesses said, you're including the transcripts of
24 the arbitration?

25 MR. MOSCON: Well, portions of it. The parts

1 of the tran -- and we -- there's already been, again
2 in the federal thing, an exchange about here's page
3 numbers we'll de-designate or designate.

4 Of course if you just said, Here's the entire
5 transcript, it will have here's the legal argument,
6 here's opening statement, here's closing statement,
7 here's, you know, all kinds of things.

8 But I mean that if there were, you know, on
9 the points involving, you know, the Hunter II
10 improvements and why they were purchased or how much
11 they cost, then yes, that would come in.

12 Now, one thing that I don't have the
13 knowledge of, and why I think Mr. Monson wanted this
14 meet and confer before all this motion was filed, is I
15 believe -- and I'm not involved in the federal case --
16 that the federal case did have a slightly overlapping
17 thing that had to do with highly-confidential
18 information like coal costs and where you're sourcing
19 coal.

20 Just all -- attorney/client privileged
21 documents, things like this that when I say it all
22 comes in? I'm sure there is some very minor subset
23 that would not come in. That no one would ordinarily
24 expect to come in.

25 And again, that is why we thought it was a

1 good idea to meet and confer and say, Hey, let's go
2 down the whole list of everything and let's carve out
3 those small exceptions. But UAE felt compelled to not
4 wait until Friday, and filed its motion to compel.
5 And here we are, off to the races.

6 And in fairness to them, and in fairness to
7 those that filed papers on behalf of Rocky Mountain
8 Power, it was all done on an expedited basis. And I
9 really don't think this was made clear to the Hearing
10 Officer in papers anybody filed, but that has been the
11 position of the Power Company.

12 Now, that --

13 HEARING OFFICER: Just before we leave that
14 issue, pardon me, but I just want to seek some
15 clarifications.

16 MR. MOSCON: Sure.

17 HEARING OFFICER: So relative to the
18 transcripts, am I correct in understanding you to
19 refer to attorney/client privileged information as the
20 minor subset of information that wouldn't be subject
21 to disclosure in relation to the data request?

22 MR. MOSCON: I think that there is one
23 very -- and when I say "I think," I believe there is
24 one very small subset of data that has nothing to do
25 with what Rocky Mountain Power/PacifiCorp bought at

1 Hunter II, and kind of the, what the SO2 readings or
2 why.

3 But has to do with this kind of coal supply
4 customer list, and paying, and all that kind of stuff
5 that we're -- I think believe really have nothing to
6 do with the rate case or the prudence of the rate in
7 this case. But again, I'm speaking somewhat out of
8 school, which is why we had hoped to have this little
9 meet-and-confer kind of thing.

10 But what I would propose the Commission order
11 is order the Power Company to disclose and put, I
12 guess, the initial burden on the Company and order the
13 Company to disclose, number one, its own data that it,
14 you know, that is its data.

15 Now, remember I said we both agree to you the
16 protective order is binding. And don't let them fool
17 you, because they've also said it's binding. The
18 things that I kind of hesitate -- and I'm not trying
19 to, you know, be less than clear.

20 But if something is not the Company's data,
21 what their person said or what their expert said, I
22 guess if they don't object, then we can do it. I, as
23 I sit here, can't tell you those. If there are parts
24 of a hearing that, you know, is the hearing transcript
25 our data? You know, I don't know that I can say that.

1 But I'm guessing the parties could
2 together -- and part of the order may say the parties
3 should meet within -- during this same seven-day
4 period and designate portions of the transcript that
5 they both agree can be produced. Because I think we
6 all agree under the order if both sides agree, it can
7 come in.

8 HEARING OFFICER: Does the Company disagree
9 with Counsel's statement that Deseret Generation did
10 not designate any of its documents or information as
11 confidential?

12 MR. MOSCON: I think that is correct. That
13 we do not dispute that. One --

14 HEARING OFFICER: With that -- pardon me.

15 MR. MOSCON: Uh-huh.

16 HEARING OFFICER: But am I correct in
17 concluding that then that material would not be
18 subject to the protective order?

19 MR. MOSCON: Their own material, I believe
20 they -- if -- well, they haven't produced -- they
21 haven't -- I mean, I guess -- I hesitate to say this,
22 because I don't know. If it's not part of the
23 protective order, it's not been designated. I guess.

24 I -- without being as completely familiar
25 with the federal -- or excuse me, the -- yeah, the

1 federal case and the arbitration, if it doesn't fall
2 under the protective order because it wasn't deemed
3 confidential, then I guess it's not under the
4 protective order to begin with. If I'm understanding
5 your question.

6 HEARING OFFICER: That's my question.

7 MR. DRACHT: Can I take a minute?

8 HEARING OFFICER: Yes, absolutely, confer.
9 Go ahead.

10 (Pause.)

11 HEARING OFFICER: Do you need a recess,
12 Mr. Moscon?

13 MR. MOSCON: No.

14 (A discussion was held off the record.)

15 MR. MOSCON: I think what I'm informed is
16 that there are some categories of documents that
17 Deseret did produce in the arbitration that included
18 co-owner communications.

19 So, for instance, you heard the presentation
20 that PacifiCorp owns a portion, Deseret owns a
21 portion, another party owns a portion. That there's
22 not gonna be a dispute as to having them be produced
23 in this, but just making sure they are deemed
24 confidential and under the protective order of this
25 Commission.

1 That there's also this issue of the coal
2 pricing. There's the issue of attorney/client
3 privileged information, and does that fall -- that's
4 obviously not their document. But these are some of
5 the subset of documents under the underlying data that
6 we would simply, I think --

7 What I believe the easiest thing to do is to
8 have an order that says, number one, Let's go through
9 the categories that we know you're gonna produce: All
10 of your own underlying financial data, your own
11 analysis as to why you had to make these expenditures.
12 All of that.

13 And number two, if there are things that both
14 sides have already agreed, whether it's transcripts or
15 otherwise, should, you know, not be designated, then
16 that comes in. Number three, that the parties meet
17 within five days, seven days, whatever, and go over
18 the remaining portions of, you know, documents, if
19 there is a dispute.

20 Again, this is the underlying data. However,
21 exclude that no party owns the arbiter's decision. No
22 party is free from the terms of the protective order
23 to disclose that. And that's, that's got two issues.
24 Number one, there is the issue of the protective
25 order.

1 Number two, aside from the protective order,
2 general discovery law would indicate that that is not
3 discoverable because, again, it itself is not
4 admissible. And it, itself, is not likely to lead to
5 the discovery of other evidence that they would not
6 otherwise have that would be admissible.

7 So the arbitration award would only be
8 potentially prejudicial. And I hope that as you're
9 drafting this order you would stand back and think,
10 What would happen if that were actually produced?

11 Let's just say the arbitration award's
12 produced. And an expert gets it and reads it and puts
13 something. Then all of a sudden we have motions to
14 strike. And how -- were your ideas based on this or
15 not based on this? And what lines come in and don't
16 come in?

17 And then at the hearing, objections, and this
18 can't come in, and this can't come in. All for this
19 thing that really adds no underlying data or fact that
20 the Commission needs to determine rates, because
21 that's all in the underlying data that the parties
22 will have.

23 So by throwing this award in it's just gonna
24 spin off any number of how do we pull out what
25 potential prejudicial effect there was from that

1 document that we didn't need anyway?

2 So the reason I point that out is I would
3 say, Don't just say, Well, let's save that for
4 admissibility. Because once the experts get it and
5 start reading it, how do you then back out did it have
6 sway, did it not have sway, what has to come out of
7 the report that's already filed, that type of thing.
8 And it's not needed. Under just general principles of
9 discovery it would not be discoverable or admissible.

10 Two things. I don't think that the Hearing
11 Officer is overly concerned, but because they're
12 raised I'll respond to them. One is waiver, and one
13 is fees. Under the discovery rules, which I know the
14 Commission has adopted by rule -- there are actually a
15 couple of rules. There's Rule 33 and 34. One is
16 interrogatories, one is document production.

17 Interrogatories has -- that rule, 33, does
18 have a phrase in that rule that says that if you don't
19 make an objection, unless excused by the Court, it's
20 waived. And there are strings of cases that will kind
21 of say, If you don't do that, it's waived.

22 That same sentence is not in Rule 34 that
23 applies to document requests. I think that there's
24 kind of some fast-and-loose setting of "discovery
25 cases" that are not applicable. And so I would like

1 to refer the Court to one that is.

2 And this is on document requests. It's the
3 case of *Hales vs. Oldroyd*, 999 P.2d 588, Utah Court of
4 Appeals 2000. Of which cert was denied that same
5 year. And it says:

6 "Plaintiff's failure to object to
7 discovery requests when made, and in
8 response to consequent motions to compel
9 discovery, waive the issue on appeal."

10 In other words, the implication of the
11 analysis of that case is, We want the issue brought
12 before the Court. If the parties have a chance to
13 brief it, address it, argue it, and the Court can hear
14 it, we don't care so much about exactly when it came
15 up.

16 You can't appeal it and bring it up on appeal
17 for the first time. But so long as in a response to a
18 motion to compel it's brought up, then we're not going
19 to say that it's been waived. So I didn't know if
20 that was really troubling, but I wanted to point that
21 out.

22 As to the point of the fees. Again, what's
23 missing from the analysis is Rocky Mountain Power's
24 good faith attempts to say, We will give you all of
25 this stuff, we've just got -- it's complicated over

1 here. Look, we need to meet and go down the list. We
2 think we're most of the way there.

3 And, No, I can't wait. I'm filing today.

4 Under the rule it says if a party is acting
5 in good faith, then the fees shall not be awarded.

6 And I've been telling you, you should order the
7 Company to provide this, this, and this. The Company
8 is not trying to prevent disclosure of data.

9 The Company is not trying to obstruct the
10 disclosure of relevant information. The Company is
11 not acting in bad faith, as portrayed. Therefore
12 certainly we think it would be, not only
13 unprecedented, but unwarranted in any setting -- in
14 private litigation, in court, in any setting -- for an
15 award of fees.

16 I feel that I -- I hope I haven't been less
17 than clear in giving a recommendation for how I think
18 this order should issue. But I do believe that there
19 is a way to protect the interests of all the parties,
20 get all of the data out there that the Commission
21 would want, and yet prevent the disclosure of
22 documents and rulings that are neither party's to
23 disclose, that are subject to a protective order, and
24 that would not be discoverable in any instance. *I.e.*,
25 the arbitration award, the arguments of the parties,

1 the motions of the parties, you know, the briefings,
2 the papers, the pleadings of the parties in the
3 underlying arbitration.

4 Oh, actually I do realize I didn't address
5 one thing. One thing brought up was this time thing.
6 We need an extension of time. This has been going on
7 forever. We need a huge extension.

8 I'd like to point out a couple of things.
9 Number one, their direct testimony is not due until
10 May 26th, *i.e.*, more than a month from now.

11 I have indicated I believe this
12 information -- which by the way, they already have.
13 But we could, with an order, have a clear
14 determination within a week's time of what can or
15 can't be used. Which gives their experts a full
16 month.

17 We heard all kinds of war stories a minute
18 ago about how we did this entire arbitration in
19 120 days. Well, what was missing from that analysis
20 then is, if you could start/stop discovery, do
21 hearings, and wrap everything up in 120 days, how come
22 you need more than a month's time to just add this one
23 little issue to your expert report in this underlying
24 case?

25 There's no need to delay. The Commission is

1 well aware of the need to have the rate proceed in a
2 timely fashion. And with an entire month with this
3 data, which only goes to one issue. There has been no
4 showing, there's no letter or affidavit of an expert
5 that says, I need more than a month to look at this
6 data.

7 That the Company has been willing, prior to
8 filing the motion to compel, to produce if the other
9 side would simply sit down and meet and go through and
10 sort it all out. Thank you.

11 HEARING OFFICER: Thank you, Mr. Moscon.

12 We'll be in recess for five minutes.

13 (A recess was taken from 11:43 to 11:49 a.m.)

14 HEARING OFFICER: Mr. Moscon, I've got some
15 follow-up questions for you. I first want to address
16 what I think are the other objections that are raised
17 in your response. That the request is overbroad, that
18 it seeks privileged, or protected, or irrelevant -- or
19 material that's not relevant.

20 First I need to -- I'd like to understand,
21 did the arbitration process then involve the
22 disclosure of attorney/client privileged information
23 to the arbitrator and to Deseret Generation? Is that
24 the correct understanding?

25 MR. MOSCON: I believe -- and this might be

1 from the protective order itself -- pursuant to
2 Rule -- Federal Rule of Evidence 502(d) that there
3 were, there were -- there was disclosure of
4 privileged, immune, or otherwise protected or exempted
5 discovery material.

6 That everybody says is going to be kind of
7 produced, but it's going to be -- and the quote is:
8 Shall not be deemed a waiver or impairment of the, you
9 know, the privilege. So I guess the answer is yes,
10 there was some.

11 The answer is yes, I'm told.

12 HEARING OFFICER: Thank you. And using the
13 word "protected" in that context, does that have a
14 meaning other than a reference to attorney/client
15 privilege and attorney work product information?

16 MR. MOSCON: I suppose I can read or also
17 refer the Hearing Officer to the protective order
18 where it includes these defined terms. And it says
19 that -- so in response to that it's talking about --
20 yeah.

21 The rule that we're quoting, the privileged,
22 immune, or protected material is actually under
23 Federal Rule of Evidence 502(d.)

24 HEARING OFFICER: Uh-huh.

25 MR. MOSCON: So that's not to say that there

1 were different categories, here's the category that's
2 privileged, here's the category that's protected,
3 here's the category that's immune.

4 What I'm telling you my understanding is that
5 in addition to attorney-client privileged information
6 there is highly-sensitive confidential information
7 that still could be admissible in this proceeding
8 under the Commission's protective order that the
9 Company does not dispute.

10 I believe, again -- and this is the thing
11 where I believe the parties need to meet and see if
12 they can pull apart this one very narrow -- and I mean
13 it is, as I understand it, extremely narrow -- issue
14 that has to do with this kind of who gets coal from
15 who, where, at what rate, SO -- you know, I mean,
16 different kinds of coal and who the customers are.

17 Because what the case -- my answer is, the
18 underlying arbitration really was on kind of a
19 different point, even though it's been presented as
20 the same issue. That was a commercial dispute between
21 co-owners, and who has to pay what share of something.

22 And so some of the things that it looks at is
23 who gave what -- what co-owner gave another co-owner
24 how long to object and what -- who said what to who,
25 when. And so part of the issue is this back-and-forth

1 communication between co-owners.

2 That really doesn't have anything to do with
3 the underlying facts for this proceeding, which is,
4 did you need to buy this, what's the prudence, how
5 much should it have cost, et cetera. If there's a
6 dispute between co-owners as to how they communicate
7 and on what terms they communicate.

8 So there are these little very small,
9 discrete subparts of documents that really are --
10 again, have nothing to do with the underlying
11 financial determination that's relevant here, but were
12 produced under privilege or under protection in the
13 federal arbitration. As I understand it.

14 HEARING OFFICER: Thank you. And the
15 reference to relevance, what documents produced and
16 what aspects of the arbitration transcript and award
17 or decision would be irrelevant to the Commission's
18 consideration of the prudence of the bag house project
19 and the scrubber project in this proceeding?

20 MR. MOSCON: Okay. Well, starting I guess at
21 the top and working down, I would say the arbitrator's
22 award would be irrelevant and inadmissible. What it
23 is, is it is a determination, in the context of a
24 commercial dispute between co-owners, as to whether
25 certain investments can be -- the costs can be

1 recouped by one co-owner from another.

2 And --

3 HEARING OFFICER: Pardon me, but is that
4 really the issue the arbitrator was examining? Or
5 wasn't he, or she, examining the question of whether
6 those projects and investment in those projects
7 constituted reasonable utility practice as that term
8 is defined in the protective order?

9 MR. MOSCON: My understanding is there is,
10 yes. That this reasonable utility practice certainly
11 was part of the arbitrator's decision.

12 My response, though, is let's just say it
13 was -- let's hypothetically say there was an
14 arbitration on prudence. I mean, that was the issue,
15 okay?

16 I would say that a paid arbitrator, an
17 attorney or retired attorney who's acting as an
18 arbitrator who renders a legal conclusion on the
19 ultimate issue that is set aside for the -- whether if
20 you're talking about a jury case, the trier of fact,
21 or in this case the judge, that general rules do not
22 allow legal conclusions to come in because, number
23 one, they are potentially very prejudicial.

24 They can give experts or others hearing this
25 to say, Hey, this is law. This -- some arbitrator

1 concluded this. And what courts will say is, Look,
2 that's, you know, the parties may have agreed
3 contractually to let this party make a decision for
4 them, but that person is not a judge.

5 If a court makes a decision, if a commission
6 makes a decision, that has precedential value. Might
7 be binding precedent, may not be binding precedent.
8 But for courts, people that have gone through that
9 process and are on commissions, courts, those kinds of
10 rulings are not deemed legal conclusions. They -- we
11 talked about them.

12 But when other parties -- not judges, not
13 commissioners -- make legal conclusions, those are not
14 admissible because they tend to be prejudicial. And
15 the jury, or the judge, or the commission, the entity
16 making the ultimate conclusion should be left free to
17 use their own independent analysis, without that.

18 So the legal conclusions, I mean, it's a
19 common objection to a legal conclusion that it's
20 irrelevant. One of the rules of evidence is that
21 legal conclusions are not admissible.

22 HEARING OFFICER: So will the federal judge
23 receive the arbitrator's decision, or has the judge
24 received it?

25 MR. MOSCON: Well, I should clarify what I'm

1 saying. I am not saying that in no setting or in no
2 context can an arbitration decision ever be admitted
3 or relevant. Frequently it can be. So I'll give you
4 a for instance.

5 I could have a contract with Mr. Dodge that
6 said, As a condition precedent to having a lawsuit
7 here you have to first arbitrate this minor issue, and
8 then we'll go on to have a lawsuit. In that case I
9 would say, Here's a copy of the arbitration award
10 showing I met my condition precedent.

11 So -- and it comes up a lot in employment
12 cases, Title 7, if you have to arbitrate in front of
13 the EEOC. So I am not taking the position that an
14 arbitration award can never, ever be admitted in any
15 tribunal. I -- that -- if I made that impression, I
16 apologize. That's not the case.

17 Here, in this setting, the only issue that it
18 would be used for -- as kind of conceded in
19 argument -- is, We want our experts to see this stuff.
20 *I.e.*, if an arbitrator made a legal conclusion, we
21 want that to sway our experts.

22 And in that setting, where it's offered for
23 the ultimate fact -- and the example I used where
24 I'm -- it doesn't matter whether the arbitration says
25 I won or I lost, I'm just telling you I can prove I

1 met my condition precedent. It's not being offered
2 for what it says, it's just being offered to show it
3 happened.

4 Here it would have -- the only way it could
5 have any meaning is if people say, We want to pay
6 attention to what the arbitrator said. That is
7 something where it goes to the ultimate issue. That
8 is what the Rules of Evidence say is inadmissible.

9 Now, I have to concede, the analysis doesn't
10 stop there, because just because something is
11 inadmissible doesn't mean it's not discoverable. So
12 then the Commission would stop and say, Okay, fine, it
13 may not be admissible. But would it, itself, lead to
14 or likely be lead -- be likely to lead to the
15 discovery of other evidence that you wouldn't find
16 somewhere else?

17 In this case it's clear it would not, because
18 it's not an original document that has original facts.
19 All it is is someone saying, Here's the facts of this
20 case, and based on those facts I make this legal
21 conclusion.

22 And where the Company is saying, We'll
23 provide all of the same underlying facts, it's not
24 likely to lead to the discovery of other evidence that
25 they wouldn't otherwise have because all of those

1 underlying facts would already be turned over.

2 So it's not likely to lead to the discovery
3 of other admissible evidence, because the other
4 admissible evidence will already be discovered. They
5 don't need it to find something that they wouldn't
6 otherwise have.

7 So in this setting I would say that the
8 arbitration award, based on general standards of
9 discovery, is certainly not admissible, but it's also
10 beyond discovery for that reason.

11 The third thing that I brought up is -- that
12 I think should be considered in this context is one of
13 the reasons why it would be inappropriate to admit or
14 use it, and if you look at the cases that examine
15 this, is they weigh the prejudicial impact. If it's
16 in front of a jury or some other thing, you know, what
17 are they gonna do with it?

18 In this case, again, what I pointed out is
19 saying, in undertaking that analysis, query if an
20 arbitration award is put in the hands of an expert, or
21 a witness, or whoever else, and they've read that, and
22 now they file their prefiled written testimony, how do
23 you undo that?

24 How do you say, This is the expert's opinion
25 or they're -- they've been swayed, or they're

1 parroted back what someone else said. And then do
2 you have to have a motion to strike if they make
3 reference to it?

4 So if you say the underlying arbitration
5 decision is inadmissible but then an expert relies on
6 it, or parrots it, or quotes it, again, you start
7 getting in this slippery slope.

8 If there was no other way to get the
9 underlying facts, then I suppose you could balance
10 that and say, Hey, there's no other way to get the
11 underlying facts; therefore, you know, here's what
12 we're gonna do.

13 But in this case, where the Company is
14 conceding it is willing to divulge all of the
15 underlying facts or make them available to the
16 Commission and the parties, again, there is no need
17 for it, and it will not lead to the discovery of any
18 other admissible evidence.

19 HEARING OFFICER: Would it be improper for a
20 party to seek the award simply to inform the
21 Commission of it? And I guess inherent in that
22 question is, would it be improper for the Commission
23 to consider the award, in the Company's view? And
24 I --

25 MR. MOSCON: And my answer is yes, that would

1 be an inadmissible admission of evidence.

2 HEARING OFFICER: Setting aside the
3 Commission's --

4 MR. MOSCON: And --

5 HEARING OFFICER: -- own rules related to --

6 MR. MOSCON: Right.

7 HEARING OFFICER: -- evidence. Can you help
8 me with some authority for the premise that in the
9 setting of an administrative hearing that an
10 arbitration -- the result of an arbitration that the
11 Utility instituted would be impermissible for the
12 regulator to consider?

13 I am not seeing that in your papers, but if
14 there's some authority.

15 MR. MOSCON: Right. And I have to concede
16 probably for both parties, certainly for my client as
17 well as the other parties here, I don't think any
18 party has really fully briefed the admissibility
19 issue.

20 Are there cases out there that I can -- that
21 I have here that say arbitration decisions are
22 inadmissible? Yes. I have to concede, they're not in
23 a commission setting, they're in a courtroom setting.
24 And no, they were not included in our papers.

25 So can I provide you with some of those

1 cases? Yes. However, I have to, in fairness, concede
2 I don't think my client, and I don't think Mr. Dodge
3 or Proctor on behalf of their clients briefed that
4 issue because it kind of, again, goes to
5 admissibility.

6 But yes, there is case law on that point --
7 well, there's case law in regular courts. You asked
8 the question about a commission, and frankly I
9 don't -- I haven't looked. I don't know the answer to
10 that.

11 But for case law -- and I assume, since what
12 the Commission has done is it has adopted the
13 discovery rules, you know, in general, that would
14 apply. And I believe the Commission also has before
15 it the rule that it will only consider relevant
16 evidence.

17 And it also looks at prejudice, et cetera. I
18 recognize its evidentiary rules are somewhat different
19 from court rules. But it's, I think, clear that the
20 prejudicial impacts or what that could hap -- you
21 know, come from that are clear.

22 The other point, though, that belies this is
23 we still then in that case have the backdrop of the
24 protective order. Which, again, we've said Rocky
25 Mountain Power, consistent with the protective order,

1 can disclose its own information.

2 The arbitrator's decision is certainly not
3 its own information. And so it then gets back to we
4 have the parties going, again, to the federal court.
5 Did you have to first get leave from the federal
6 court? And how long do you wait for that before the
7 federal court acts?

8 And, you know, that, again, is just reason,
9 upon reason, upon reason why there shouldn't be an
10 order today requiring disclosure of the arbitration
11 award.

12 HEARING OFFICER: So it's the Company's
13 position that the arbitration transcripts, the
14 decision, are not Company documents in its control?

15 MR. MOSCON: Well, they're not their
16 documents. Like Mr. Dodge says in his response, he
17 says, I have them, but they're not mine -- I can't
18 divulge them.

19 So yes, the Company has them, but they're not
20 theirs. The protective order says, If it's your data,
21 you can disclose it. The arbitrator's decision is
22 certainly not my client's data.

23 HEARING OFFICER: Is there other information
24 in the decision or the transcripts, beyond Deseret
25 Generation & Transmission's information, that would be

1 of concern to the Company? I mean, and --

2 MR. MOSCON: Beyond the legal conclusions? I
3 mean, are you talking about third parties? I'm not
4 sure I understand your question.

5 HEARING OFFICER: Right. Yeah, third
6 parties.

7 MR. MOSCON: I am told there are -- there is
8 a discussion of confidential contracts with other
9 parties.

10 I don't want to overstate. I apologize,
11 again, for my lack of familiarity with --

12 HEARING OFFICER: Uh-huh.

13 MR. MOSCON: -- that underlying proceeding.
14 I suppose, and --

15 HEARING OFFICER: Set --

16 MR. MOSCON: Go ahead.

17 HEARING OFFICER: Pardon me. But setting
18 that issue aside of third-party information and
19 attorney/client privileged information or work
20 product, the remaining portions of the transcript and
21 the decision of the arbitrator -- and I don't know how
22 extensive that is -- but whatever it is, is there a
23 concern about disclosing, beyond what you've already
24 articulated for me, that information?

25 Is there an objection to it --

1 MR. MOSCON: Yeah, I mean --

2 HEARING OFFICER: -- as subject to the
3 protective order in some way?

4 MR. MOSCON: Yes. So the Company does object
5 to the disclosure of the arbitrator's award.

6 HEARING OFFICER: Uh-huh.

7 MR. MOSCON: It, I think under the purview of
8 this Commission's protective order, would not object
9 to the disclosure of the vast amount of the
10 transcript. But yes, there would be some portions.

11 And I wish I could tell you exactly which
12 page or not at this time. But again, yes, most of
13 that I think the parties could agree this would come
14 in. Because what the Company is not trying to do is
15 to prevent the disclosure of the underlying data.

16 Here's what we paid. Here's why we bought
17 them. Here's the analysis that went into buying them.
18 All of that, that you would use in a rate case, the
19 Company is not trying to prevent the dissemination of
20 that information.

21 HEARING OFFICER: Uh-huh. I'm getting to the
22 end of this. I apologize for -- but I just want to be
23 as clear as I can be about the Company's position
24 here. I hope I'm not being redundant. But I think I
25 understand the Company's issue with respect to the

1 award, at least as you've articulated it. A concern
2 about irrelevance because of -- well, for the reasons
3 you've expressed.

4 Would, in the Company's view, disclosure of
5 the award or the transcripts violate the protective
6 order, or is that somehow prohibited by the protective
7 order?

8 MR. MOSCON: I do believe that my reading of
9 the protective order is that disclosure of the award,
10 for instance, would violate the protective order. In
11 fact, it's my understanding -- I was just told -- that
12 DG&T, I believe yesterday, filed a motion to
13 de-designate that award.

14 Now, I -- to me what that means is you don't
15 file a motion saying de-designate the award unless you
16 of course assume, yes, there's -- at least I believe
17 it's protected, or there's a good argument that it is
18 protected.

19 Yes, I believe if -- well, if I can't speak
20 for both parties certainly my client believes that the
21 award, and the transcripts, and the pleadings, those
22 documents are protected by the protective order.

23 HEARING OFFICER: Would the de-designation
24 motion be, in effect, a challenge to the Company's
25 designation of that information as confidential?

1 MR. MOSCON: Well, it would do -- it would
2 answer one but not both of the questions that I've
3 kind of articulated. So what I've said is, with the
4 arbitration award or, you know, the pleadings,
5 whatever, one problem is that they're not ours to
6 disclose, and they're subject to a protective order.

7 If the federal court somehow issued an order
8 that said, These are not subject to the protective
9 order, then I concede that issue would go away. What
10 wouldn't go away then are these other things we've
11 talked about, about admissibility, legal conclusions,
12 prejudice, it's not likely to lead to the discovery of
13 admissible evidence. That's a separate thing.

14 So yes, if that was answered by the federal
15 court, that would remove one of those two issues. And
16 again, the flip side of that is you can imagine the
17 quandary of the Company if this Commission or hearing
18 were to order the Company today to produce that, and
19 then the federal court were to say, No, it is
20 protected. And we deny that motion, it is protected.

21 HEARING OFFICER: Is there any language in
22 the protective order that you can point me to -- and
23 I'm pretty familiar with the definition of
24 "confidential information" -- that could help me with
25 the Company's position on the award itself?

1 I'm familiar with its reference to the
2 disclosure of information by a party, or responses to
3 discovery by a party. Or summaries --

4 MR. MOSCON: Yes. I --

5 HEARING OFFICER: -- of such.

6 MR. MOSCON: I believe that -- and I'm
7 reading from paragraph 36 -- it was intended to be as
8 broad as it could be. And what it says, and I quote,
9 is:

10 "Unless otherwise agreed to in
11 writing by the parties or ordered by the
12 Court, all proceedings involved or
13 relating to documents or any other
14 information shall be subject to the
15 provisions of this protective order."

16 That's in paragraph 36. It then goes on, in
17 paragraph 7(b), to say that:

18 "This information shall not be used
19 directly or indirectly for any other
20 purpose whatsoever, and shall not be
21 disclosed to any person, corporation" --

22 On, and on, and on. And then it goes on to
23 say:

24 "Includes Public Service Commission,
25 government body, agency, or other

1 entity, except in accordance with the
2 terms hereof."

3 And there's another provision -- that I wish
4 I had here in front of me -- that says that if any
5 other court and/or commission or agency -- I don't
6 know if it says commission -- but any other court or
7 agency orders, or subpoenas, or otherwise tries to get
8 one of the parties to disclose any of this you have to
9 first, before you turn it over, notify the other party
10 so that they can then go and try and intervene and get
11 it protected.

12 And so in that paragraph I think it also
13 makes clear it's talking about the decision, the
14 award. So I think there's actually three places
15 where, again, could it be more clear and say, comma,
16 and by this I mean the award, comma? It doesn't. But
17 it says "anything," so.

18 HEARING OFFICER: Thank you.

19 Mr. Dodge?

20 Oh, Mr. Proctor, I'm sorry.

21 MR. PROCTOR: Mr. Clark, may I?

22 HEARING OFFICER: Please.

23 MR. PROCTOR: I go back a ways with this
24 Commission and with the Hunter Power Plants, the
25 Huntington Power Plants, and so forth. And I think if

1 you look back in the history of this Commission you'll
2 find that, indeed, there have been commercial disputes
3 between the owners of Hunter, in particular, that had
4 a definitive rate impact and that were addressed quite
5 plainly by this Commission.

6 From issues pertaining to the coal, costs
7 coming out of Utah Power & Light-owned coal mines, to
8 an instance covered by insurance, fortunately, where
9 one of the generators at Huntington spun itself out of
10 the building.

11 The point is that such decisions on
12 reasonable utility practices that make a financial
13 determination -- which is what this arbitration
14 proceeding did -- have a direct impact upon rates.

15 When there are co-owners, and in particular
16 in this case, if the arbitration award found that some
17 of the expenses which PacifiCorp was seeking to
18 require its co-owners to pay were found to be
19 unreasonable utility practices, then the price -- or
20 the costs that DG&T was to have paid and need no
21 longer pay get paid by the Office's constituents. You
22 and me.

23 That arbitration award is directly relevant
24 to the general rate case, where the rates going
25 forward on those particular capital investments have

1 been placed at issue by the Company. No question
2 about it.

3 In fact, you need look no further than page 3
4 to the Office's response to find the brief necessary
5 to establish the precedent for doing so. And that was
6 the case involving Grid West employee severance
7 payments and the Powerdale removal costs.

8 Powerdale removal costs are really not the
9 issue. But what is was a commercial agreement between
10 PacifiCorp and several other Western utilities to form
11 a regional transmission organization, Grid West, the
12 voluntary bankruptcy of that, the contribution each
13 was to have made to the costs then incurred by Grid
14 West, and the fact that the Power Company sought more
15 from Utah ratepayers than it had an obligation to pay
16 elsewhere.

17 And the only way we got that was through
18 investigating very, very carefully all of the
19 information related to Grid West. And at the same
20 time dealing with severance payments that were not in
21 an old -- in the prior general rate case, and then
22 they sought to recover them on a deferred accounting
23 basis. And that's what prompted this Commission to
24 say:

25 "With the Utility as the information

1 gatekeeper, the Commission and all
2 others participating in any regulatory
3 activities and proceedings involved with
4 utility regulation know only what the
5 Utility tells us concerning its plans,
6 activities, and operational
7 information."

8 You've gotta give us the information. And
9 that's exactly what you can do in this case with
10 respect to the arbitration award. Deseret Generation
11 & Transmission has obviously said to the Court, We
12 don't mind -- we want it disclosed. Order -- so you
13 don't have to tell them. They already know.

14 Order PacifiCorp to also agree and get that
15 arbitration award to the parties and to the Commission
16 so that the financial determination made, which has a
17 direct impact upon Utah ratepayers, can be determined.

18 I don't know which way it went. Maybe they
19 found all their activities to be prudent, timely,
20 appropriately cost, and the expenses should be paid by
21 co-owners. I don't know. But we also don't know
22 whether or not it was found to be imprudent.

23 So -- which leads me to my last point. And
24 by the way, all this took place -- I didn't know, I
25 was out of town. So I'm in somewhat of the same

1 position as Rocky Mountain Power's counsel. I guess
2 I'll never go out of town again.

3 But the data request is the second or third
4 of March. The answer comes on the 20th or 21st day,
5 when it's due. The answer is no. On April 5th
6 there's a response to the motion to compel. The
7 answer is, No, can't have it. And then between
8 April 5th and April 14th, today, the answer has been
9 no.

10 And citing Rule 34 governing the production
11 of documents, which says plainly, If you don't have an
12 objection to a document, give it, and then we fight
13 over what you do have. But in fact we have nothing
14 now.

15 And the request from the Company is the same
16 pattern and practice as I cited my response: We'll
17 give you what we believe is relevant. We believe.
18 That phrase has appeared here. It has appeared
19 before, in the Office's experience, when designating
20 documents as highly sensitive.

21 Not, Let's talk about it. Not, We can't
22 agree, so let's go to the Commission. It's, This is
23 the way it is.

24 So issuing an order that they give us what
25 they believe is relevant from the arbitration is not

1 enough. It has to be a complete information. As
2 requested in Data Request 2.1, order the Company to
3 allow the arbitration award to come forward, covered
4 by privileges. Information covered by privileges.

5 Attorney/client, no one questions that.
6 Physician/patient, no one questions that. Clergy,
7 maybe that's in there. But everything else, just
8 because it's protected in a federal court proceeding
9 doesn't mean that you can't have it.

10 Despite the application of that protective
11 order that the Company has, until now, and I would say
12 continues, to apply to that protective order to
13 prevent the Commission from having the information it
14 is entitled to. Thank you.

15 HEARING OFFICER: Just before you begin,
16 Mr. Dodge.

17 Mr. Moscon, is there anything else you would
18 like to offer? I meant to offer you that opportunity
19 after my questions.

20 MR. MOSCON: I was actually -- I mean, I, I
21 don't know if you're inviting me to respond to the
22 points we just made, or, or to -- or not. Because I
23 would do that. I don't know if you want me to wait
24 until Mr. Dodge has had a chance to speak. The
25 question I was just --

1 HEARING OFFICER: I intend to give Mr. Dodge
2 the last word, so.

3 MR. MOSCON: Right. Sure. I was just --

4 HEARING OFFICER: But if you --

5 MR. MOSCON: I was conferring with my client
6 to say, I wonder if, again, as the outsider -- I know
7 I'm not an outsider -- but coming into this, if a way
8 that can't be, you know, brought to bear that makes
9 this somewhat workable for all the parties is for the
10 Commission to require a disclosure by my client of all
11 of the underlying data.

12 And that would be all exhibits, all
13 testimony, all, all of the underlying data used at the
14 arbitration. With some kind of proviso that
15 attorney/client privileged information or this other,
16 you know, back and forth between co-owners and all
17 this other kind of stuff can later, once it's all been
18 sent over, be pulled back, you know. Or subject to
19 further order and it's under some kind of thing.

20 And again, then simply exclude the final
21 legal conclusion of the arbitrator. And really I
22 think then you are getting at what everybody is
23 asking. Because the argument I'm just hearing from
24 Mr. Proctor is, We can't trust them if, if it's up to
25 what they believe.

1 And I go, If that was the sense I gave, I
2 misspoke. Because I'm trying to say, Give all the
3 underlying data. And if the concern is, Well, we want
4 to hold back these little bits and pieces? Maybe the
5 answer is some kind of a, you know, very, you know,
6 disclosure of all the underlying data.

7 Not a disclosure of the ultimate award or the
8 party legal briefs, the arguments of the lawyers. But
9 then no party can say that they've had data hidden
10 from them. And, you know, again the point was made, I
11 don't know what the arbitration said. Maybe they said
12 this, maybe they said that.

13 Well, certainly -- let's say the arbitrator
14 had said, Rocky Mountain Power, everything you did was
15 absolutely prudent and reasonable. There's no way
16 that anyone would say this Commission would be bound
17 by that. That that would have any kind of binding
18 impact.

19 And conversely, if hypothetically the
20 arbitrator said, Rocky Mountain Power, everything you
21 did was the last thing a utility should do. There's
22 no way that that should have any kind of binding
23 impact.

24 The thing that should be important to the
25 Commission is, let's get the facts, let's get the

1 data, and then let's make our own decision.

2 So I guess in response to your question, and
3 partially in response to what I just heard, it is not
4 the intent to say, We only want to give you what we
5 believe is relevant.

6 We believe the underlying data should be
7 disclosed, but there is -- it opens up an entire can
8 of worms. It violates the protective order. It
9 creates huge discovery and admissibility issues if the
10 final award or the arguments of the parties are
11 produced to experts and witnesses. Thank you.

12 HEARING OFFICER: By arguments of the
13 parties --

14 MR. MOSCON: I just mean like their motion
15 for summary judgment, or here's my closing argument,
16 that kind of thing. The lawyers', not the testimony
17 of the witnesses.

18 HEARING OFFICER: Okay. Thank you for that
19 clarification.

20 Mr. Dodge?

21 MR. DODGE: Thank you, Mr. Clark. I had
22 several points I was going to respond to with respect
23 to your questions. I may not need to. But I think we
24 just heard, Okay, we give up on everything but the
25 arbitration award. And some briefs that -- some

1 motions that don't exist.

2 There were some prehearing briefs filed. To
3 my knowledge they've never been designated as
4 confidential. So those are available if someone wants
5 them today, I believe. So it comes down to this:
6 They're doing everything in their power to hide the
7 arbitration award.

8 Two things I'd like to respond to -- or a few
9 things specifically. First of all, he referenced a
10 motion by Deseret to de-designate that arbitration
11 award.

12 Deseret has no stake in the issue before this
13 Commission and has not taken a position. It did not
14 move to de-designate the award, even though it knew
15 UAE was fighting to get all these documents.

16 Why it did is because it went to PacifiCorp
17 and said, We don't think you can designate an
18 arbitrator's award as confidential. The protective
19 order says discovery material. This is not discovery
20 material. It's an award. We need to disclose it to
21 our auditor, who has asked us for it. Our independent
22 auditor.

23 And PacifiCorp said, No, unless the auditor
24 promises never to disclose it to anyone.

25 And Deseret said, Auditors are in the

1 business of public disclosure. That's their job.
2 Sarbanes-Oxley, have you ever heard of liability?
3 They can't be constrained.

4 They said, Tough. You can't give it to your
5 auditor.

6 We said -- Deseret said, As a result of this
7 order there may be a need for Deseret to borrow some
8 money to pay some expenses that are due. We need to
9 disclose it to the Public Service Commission of Utah,
10 which has jurisdiction over the issuance of securities
11 we will need to issue in order to pay what we have to
12 pay.

13 PacifiCorp said, No. No way it goes to the
14 Public Service Commission.

15 It's refusing to even allow Deseret to use
16 the award in contexts it absolutely has to -- to its
17 auditor and to this Commission -- in support of an
18 issuance of securities award. And so it had to go and
19 say, These guys are being crazy. We need to use it
20 for these purposes. Please de-designate it so that we
21 can.

22 It has nothing to do with an admission that I
23 think was suggested that Deseret acknowledges the
24 parties can't disclose it. Deseret believes it can
25 properly disclose it. Rather than risk the same fate

1 I now face of being hauled before a federal court
2 claiming that I'm violating my protective order by
3 asking a data request, they're trying to get the judge
4 to say, Enough is enough for this nonsense.

5 Now, I will give to Mr. Moscon -- I mean, I
6 will give him the credit of not having been around, so
7 I suppose a lot of this isn't of his making. But he
8 and his co-counsel sitting by him now have, in my
9 book, the award for creativity and obfuscation in
10 making up legal arguments out of whole cloth with no
11 support.

12 They have not cited you one bit of evidence
13 in support of the arguments they've sat here and made.
14 And I'd like to address them briefly, without
15 repeating myself. First of all they say, We can't
16 turn it over because it's subject to the protective
17 order. And it's not our data.

18 So whose data is it? The judge's, the
19 arbitrator? He didn't designate anything
20 confidential. The judge's? She didn't designate
21 anything confidential. Nobody designated anything as
22 confidential but PacifiCorp.

23 I'm gonna point you to four specific
24 places -- we shouldn't even be having to argue about
25 this protective order. But because of their absurd

1 argument that the federal court protective order
2 somehow binds this Commission not to order them to
3 produce these documents, we have to.

4 The first place I'd refer you to is on
5 page 6, section 10. In defining "confidential" it
6 refers to discovery material that the producing party
7 believes in good faith must be held confidential to
8 protect business or commercial interests.

9 In the first place, they can't even designate
10 it unless they have a good faith argument that it
11 protects their business or commercial interest. Is
12 their business and commercial interest to hide from
13 this Commission an arbitrator's award on the exact
14 same issue the Commission's facing?

15 Maybe. Because the Commission might say,
16 Gees, we find that relevant. We find that
17 informative.

18 And so what they're trying to turn into
19 business and commercial interest is hiding it from
20 legitimate regulatory bodies with jurisdiction to
21 investigate the same issue. I don't believe that's an
22 appropriate designation.

23 The second thing I'd point you to is page 3,
24 paragraph 4, which says:

25 "The term 'confidential material' as

1 used in this order shall refer to
2 discovery material" -- again, discovery
3 material, not an arbitration award --
4 "designated by the producing party as
5 confidential."

6 Designated by the producing party as
7 confidential. It becomes confidential material only
8 when the producing party so designates it. So if
9 they're not claiming the arbitration award as their
10 stuff, there is no designation.

11 It's only confidential if they have
12 designated it as such. And if they have designated
13 it, they can un-designate it at will. So the
14 fourth -- the third thing I would point you to is that
15 provision, page 19, paragraph 37, which says:

16 "The parties may, by stipulation,
17 provide for exceptions to this
18 protective order. And any party may
19 seek an order of this court modifying
20 the protective order."

21 Now, we have -- I have represented to you --
22 and I'm counsel for Deseret and I'm expressly
23 authorized to represent this to you, and I have
24 represented it to PacifiCorp -- they consent to the
25 disclosure of any of the arbitration award.

1 They have not designated anything as
2 confidential. They stipulate to the admission -- to
3 the release of all these documents we've requested
4 from the protective order.

5 So the only thing holding us back is
6 PacifiCorp's refusal to do so. So don't let them tell
7 you they'd be in violation of a court order if they
8 don't. It's their choice not to.

9 And the last thing, which I think is most
10 important in the order itself, is paragraph 27 on
11 page 15:

12 "If a third party, another court,
13 arbitrator, or an administrative agency
14 subpoenas or orders production of
15 documents or information designated for
16 production under this protective order
17 which a party to the arbitration or this
18 litigation has obtained under the terms
19 of this order, such party shall, within
20 five business days, notify the producing
21 party of the pendency of such subpoena
22 or order."

23 End of paragraph. There was no attempt by
24 this federal judge to say, You can't turn it over when
25 the administrative agency tells you to turn it over.

1 No federal court would do that. It would be
2 outrageous. It would be in violation of every concept
3 of federal law and comity.

4 What they're telling you is, You can't even
5 order us to because we'll violate the protective
6 order.

7 Well, this says all we have to do is notify
8 people if you're being asked. So if they feel like
9 they're being ordered by this Court they've got five
10 days to notify whoever it is they think would object
11 so they can presumably seek protections if they need
12 it.

13 It is never intended, this order was never
14 intended to prevent this Commission from ordering the
15 production, or parties to this case from requesting
16 the production of any document whatsoever. And to
17 hide behind that protective order is nothing short of
18 outrageous, in my personal view.

19 Secondly, listen -- they carefully hedged on
20 their offer to provide documents. "Our data." You
21 know, "some of the transcripts." Now, at the end
22 maybe he made an offer -- I'm not quite sure what his
23 offer was -- to produce everything but the award.

24 If they're offering to produce everything but
25 the award, we can narrow it down to just that issue.

1 But if they're still hedging on some of the stuff then
2 I think it's important -- I will join Mr. Proctor in
3 saying that is just a recipe for further delay and
4 coming back here for more motions.

5 They claim that they were proceeding in good
6 faith, through the meet and confer, to release
7 documents. And I jumped the gun, I wouldn't wait.
8 I'll trust that Mr. Moscon doesn't know better than
9 that, but that's an absolute falsity.

10 What they were doing was proceeding under the
11 Deseret meet-and-confer notions. Where Deseret said,
12 You've over -- you've designated everything here. I
13 mean, it can't be -- let's get reasonable.

14 They were meeting to discuss whether some of
15 the documents that were produced in the arbitration
16 that were legitimately subject to the protective order
17 should stay in and others should come out. There was
18 no effort by Deseret to say all of it comes out.
19 Deseret doesn't care.

20 If PacifiCorp claims that it's subject to, in
21 good faith, to a protective -- to protection, from
22 Deseret's perspective it has no interest in changing
23 that. What they were talking about is what is clearly
24 not subject to protection.

25 There was never an offer by PacifiCorp to

1 produce to me all the documents we've requested. In
2 fact they expressly said, We will never produce the
3 arbitration award. Won't do it. And they wouldn't
4 agree at that time to produce the transcripts, or the
5 deposition transcripts.

6 How can those not be relevant? Their
7 witnesses were on the stand, responding to questions.
8 How can sworn testimony of their own witnesses on the
9 very issue before this Commission not be relevant to
10 parties who might want to cross examine them on the
11 same issues here and see if they give the same
12 answers? How can it not be relevant?

13 The transcripts are clearly relevant, even if
14 they are properly protected. Which I don't think they
15 were. The deposition transcripts are relevant, even
16 if they're subject to proper designation.

17 And to the extent they're hedging in any way
18 on producing all of that stuff, it's just a recipe for
19 further delay in the vain hope that some -- they can
20 somehow hide this until it's too late for anyone to do
21 anything with it.

22 Now let's turn to the award itself.
23 Mr. Moscon waves his hand and says, Established legal
24 rules and principles say this is not admissible, it's
25 not relevant.

1 Hasn't cited one case. You asked him.
2 Hasn't cited one case. Hasn't even cited a rule. He
3 said there are rules that control that. Absolute
4 false.

5 He also dismisses it as a legal opinion. And
6 therefore he tries to get into rules and notions that
7 say -- that identify under what circumstances a
8 witness is allowed to offer a legal opinion as
9 evidence in a hearing.

10 We're not in a hearing. This isn't evidence.
11 This is discovery. Those rules have absolutely
12 nothing to do with that.

13 Secondly, it is not a legal opinion. He says
14 it is. Bologna. And I'm prepared to submit the award
15 under seal to your Honor to review it, if they'll
16 consent -- they probably won't because they're so
17 desperate to keep it out -- so you can see that it's
18 not a legal opinion.

19 You can tell it wouldn't just be a legal
20 opinion by reading the public documents that we
21 submitted with our motion. His charge was a factual
22 one: Determine whether Rocky Mountain's expenditures
23 on these contested items was or was not consistent
24 with reasonable utility practice under a definition
25 that you can look at.

1 That definition is similar to the definition
2 in most contracts I'm familiar with that deal with
3 reasonable utility practice. Is it something that a
4 reasonable utility would do, knowing the facts? It
5 doesn't have to be the optimal choice.

6 It's is it the right choice among the
7 available ones, or a reasonable choice among the
8 available ones? Does a majority of the industry do
9 it? It's a long definition very common in utility
10 documents.

11 His answer was yes or no, and then an
12 explanation as to why yes it was or no it was not by,
13 by contract. That's what his job was. Look at all
14 the evidence. He took seven days of evidence. Many,
15 many experts. Many, many witnesses.

16 And after listening to that for seven days
17 went away, wrote a reasoned opinion as to why in his
18 view either the answer was yes, it was consistent with
19 reasonable utility practice, or no, it was not.

20 That's not a legal opinion. He can't just
21 wave his hand and dismiss the admissibility of that --
22 he didn't even try to dismiss the discoverability of
23 it on that basis -- by saying it's a legal opinion.
24 It is not.

25 It's a reasoned thought process about how one

1 man, charged by contract, was looking at the exact
2 same issue this Commission will look at. Looked at
3 the facts, looked at the expert opinions, weighed
4 them, and came to his conclusion yes or no. How that
5 can not be relevant is totally beyond me.

6 If they claim that there is a line in there
7 that has confidential commercially-sensitive
8 information that not only should be subject to a
9 protective order by the Commission but literally
10 should be subject to a privilege from discovery, they
11 have not produced that.

12 They have not explained that. They've failed
13 in the burden of proof. They have the obligation to
14 come and say, Okay, here's this document. Here's why
15 you can't see it. All they want you to do is take on
16 faith that it's a legal opinion and somehow it's not
17 relevant.

18 It is relevant. It's relevant under any
19 definition. And again I invite you, if you have any
20 question about that, to request that it be submitted
21 under seal so you can look at it and see that it's
22 relevant and see that it's not, that it's not a "legal
23 opinion" that would be inadmissible in any event.

24 And to say that someone who sat and listened
25 to all the experts and all the evidence, how he chose

1 to analyze the facts and data, and how he chose to
2 listen to the experts, including the same experts that
3 will be on the stand, can't possibly lead to the
4 discovery of admissible evidence is beyond me.

5 Again, that's Moscon on the law. You know,
6 Just trust me, without any citation to authority for
7 that effect. It's a very broad standard for
8 discoverability. That's the fight we're having.

9 What I request this Commission to do is to
10 order them, not in seven days, not in five, but today,
11 or when you issue the order, to produce those CDs.
12 They're sitting on their desk. They could produce
13 them in a half hour. I could produce them in a half
14 hour, if I'm free to do so.

15 Produce those documents, not only to me but
16 to the other parties that have requested them. And
17 subject any of them that they need to, that they feel
18 is appropriate, to confidentiality protections under
19 the Commission's protective order.

20 They did the same thing in the arbitration.
21 If they thought it was confidential, they marked it as
22 such. They can do the exact same thing here.

23 Turning briefly to timing and fees. He
24 says -- and I, I don't know if Mr. Moscon has ever
25 handled a rate case. You can't wave your hand and in

1 30 days resolve these. He said "one simple issue."
2 There are numerous power plants, with the identical
3 types of upgrades, that our experts need to get in and
4 understand and look at.

5 It took our experts four months to be able to
6 testify about it. He wants my guys to be up to speed
7 within less than a month of the time they first get
8 the first round of documents on them.

9 Other rounds of discovery have asked for
10 documents on the other power plants. They've refused
11 to answer them. Haven't produced one document in
12 response to other parties' requests for documents at
13 all the power plants that justify the expenditure and
14 that ask for analyses of cost/benefit. They said, No,
15 overbroad.

16 They haven't produced one document. They're
17 trying to delay as long as they can. Because I am
18 telling you, this is a complicated issue. And it will
19 take people time to get their heads into it and to
20 understand it.

21 Lastly on fees, I completely reject the
22 argument they've been proceeding in good faith.
23 They've been proceeding with one main objective, and
24 that is hide at all costs the arbitration award from
25 this Commission.

1 It's inappropriate. The Commission should
2 have the ability to look at it and decide if it's
3 relevant. Decide if it's admissible if anyone moves
4 to admit it. No one has so far. All we've done is
5 ask for it.

6 I submit that it's totally inappropriate for
7 this Utility to stand up and claim to be responding to
8 data requests in good faith, and yet having not
9 produced one document in response to a data request
10 issued more than a month ago. And now to seek further
11 delay before they have to produce them. Thank you.

12 HEARING OFFICER: Thank you. I'd like to
13 address some of this today. The issue in controversy
14 related to the arbitrator's award I'll address -- or
15 the Commission will address in a written order.

16 But I think we can accomplish a lot in the
17 next few minutes. And let's start with the scope of
18 what can be presented to the -- or disclosed to the
19 parties today.

20 Mr. Moscon, did I understand you correctly
21 that it would be all of the underlying data, the
22 transcripts, the depositions? I don't know how to
23 characterize all the documents because I'm not
24 familiar with the process.

25 But everything short of the award, subject to

1 the Company's right later to address matters of
2 privilege or -- and subject to the Company's right to
3 place some of that material under the Commission's
4 confidential disclosure rule?

5 MR. MOSCON: Permission for a 30-second side
6 bar?

7 HEARING OFFICER: In fact if you need to
8 confer a bit about this, we can --

9 MR. MOSCON: I don't think -- I don't need a
10 ten-minute recess or anything.

11 HEARING OFFICER: Okay, fine.

12 MR. MOSCON: But permission just to do this,
13 because I think -- I agree we can address most of
14 this.

15 MR. PROCTOR: Mr. Clark, can we take five
16 minutes?

17 MR. MOSCON: We can take five minutes if you
18 want.

19 HEARING OFFICER: Without objection we'll
20 take a recess for five minutes.

21 MR. PROCTOR: Thank you.

22 (A recess was taken from 12:42 to 12:50 p.m.)

23 MR. MOSCON: I think the ball is in my court.
24 It is a complicated matter. And again, hence our
25 initial desire was to have the parties go through and

1 meet and do that.

2 If that is something that cannot happen as
3 far as an order goes, certainly you are aware of the
4 Company's concerns with the arbitration award, so that
5 gets set aside. The Company will, I guess, then
6 otherwise concede to the disclosure of all of the
7 other underlying data.

8 Meaning the depositions, the exhibits to the
9 depositions, the testimony of the parties at the
10 hearing, the exhibits used at the hearing. The, you
11 know, answers given in discovery in that proceeding.
12 Which I think is pretty much everything.

13 So long as -- or with the proviso that the
14 Company does not waive -- well, number one, that it's
15 submitted under an equally-restrictive confidentiality
16 order in this proceeding that has the same thing about
17 disclosure to other parties, et cetera.

18 Number two, that the Company does not waive
19 any privilege. And if, in those communications
20 between co-owners there -- I'm -- for instance -- I'll
21 give you a hypothetical, a for instance.

22 If, working in a friendly capacity, co-owners
23 share legal information because they were friends on
24 an issue, there may be confidential attorney/client
25 privileged information in this volume of documents

1 that has nothing to do with this case that would be
2 privileged.

3 So if there is a proviso that, once
4 disclosed, the Company can -- number one, doesn't
5 waive a privilege. Or can go back and say, Hey, we
6 want you to return, you know, Documents 7, 12, 15,
7 whatever. And, you know, put forth a reason why.
8 Then I think that, you know, the Commission could
9 order that all of the underlying data, testimony,
10 reports be disclosed --

11 (A private discussion was held off the
12 record.)

13 MR. MOSCON: That they be disclosed.

14 (A private discussion was held off the
15 record.)

16 MR. MOSCON: Okay. There's a question about
17 reserving -- there's another super-step, apparently,
18 in the federal case called "confidential privileged,"
19 which would have settlement negotiations,
20 attorney/client privileged, et cetera. And there's a
21 request that that category be then otherwise excluded.

22 HEARING OFFICER: Mechanically, can that be
23 accomplished today?

24 MR. DODGE: Mr. Clark, at the appropriate
25 time I'd like to discuss that last issue. I mean, and

1 first, I mean, Mr. Dracht is the one who knows what's
2 going on there. But I think we need to discuss those.
3 They're not privileged from disclosure in discovery.

4 They claim a different kind of privilege,
5 because it was settlement. But it was among the whole
6 variety of parties. It's not attorney/client
7 privilege.

8 MR. MOSCON: And this goes to my point of I
9 really think there can be this -- the best thing to
10 say, let's agree on this. Let's disclose all this,
11 you know, as soon as we can. Step one.

12 Step two, let's have a meet and confer with
13 the firms that are at issue, that know the underlying
14 proceedings, to see if that remaining subcategory,
15 what can or can't be disclosed. So that would be step
16 two. And then step three is this arbitration award.

17 So I would say for step one let's have a
18 disclosure of the testimony, the exhibits, the
19 reports, the depositions. All of that underlying
20 fact, minus the confidential privileged category of
21 documents, would be my suggestion. And that can
22 happen within, let's say 24 hours or 48 hours,
23 whatever that is.

24 Step two, within the same period of time
25 representatives meet to discuss that other remaining

1 confidential privileged category of documents to see
2 if there can be an agreement on that category.

3 If there cannot be an agreement made within,
4 again, whatever the Commission feels is appropriate --
5 24, 48 hours, whatever the time frame is -- then maybe
6 give each party like a 1 or 2 page -- you know, no
7 oral argument. Submit in two pages your rationale as
8 to what or why it's here. And then the Commission can
9 issue, within another short period of time, that.

10 But meanwhile their experts could have
11 99 percent of whatever they need off and running at
12 the races. And our wrestling over these last few
13 issues don't have to hold up the issue. Would be my
14 recommendation.

15 HEARING OFFICER: And a clarification. The
16 bulk of the documents that you've described would be
17 disclosed in entirety, subject to the Commission's
18 Rule 7-46-116, the confidentiality rule; is that
19 right?

20 MR. MOSCON: I think at this point --

21 MS. HOGLE: Yes.

22 MR. MOSCON: -- yes.

23 HEARING OFFICER: So --

24 MR. DODGE: Wait, wait. Could I address
25 that? I mean, are they saying non-confidential

1 information from the other now becomes confidential?

2 MR. MOSCON: I guess what I'm saying is if
3 we're gonna do this in 24 hours --

4 MR. DODGE: Uh-huh.

5 MR. MOSCON: -- and we can't take the time to
6 figure out what's confidential or not, let's give them
7 everything now and say it's confidential and we can
8 still maybe pull something out of that.

9 But it's gonna take us more than one hour to
10 say, of all of these documents --

11 HEARING OFFICER: So they'll need to be --
12 that will need to be a step in the meet-and-confer
13 process as well?

14 MR. MOSCON: Sure. That makes sense.

15 HEARING OFFICER: To determine what --

16 MR. MOSCON: Sure.

17 HEARING OFFICER: -- is de-designated as
18 confidential, so to speak?

19 MR. MOSCON: Which is what, again, we had
20 anticipated doing, yes.

21 HEARING OFFICER: Okay. Mr. Dodge?

22 MR. DODGE: Well, you know, I, I guess I'll
23 take whatever your Honor thinks is appropriate. In
24 the federal case, anything they thought was
25 confidential was marked as confidential. If they

1 produced it and didn't mark it confidential, it can't
2 be confidential. It's public.

3 So there's no need to blanket everything as
4 confidential, including stuff they didn't even
5 designate there. Secondly --

6 HEARING OFFICER: Just before you go on,
7 Mr. Dodge.

8 MR. DODGE: Please.

9 HEARING OFFICER: So would that designation
10 be obvious in the documents that are electronically
11 maintained?

12 MR. MOSCON: It is. The one proviso I would
13 add is that protective order also has a clawback
14 provision, which is this: If there's something
15 accidentally not designated. Which is why I just
16 wanted to make clear.

17 So yes, if you want to say anything not
18 designated as confidential there isn't designated
19 confidential here, so long as there is the same
20 clawback provision, that will work.

21 MR. DODGE: And I certainly don't object to
22 that. My other point was, on these other documents,
23 they were obviously not privileged from disclosure in
24 discovery because they were produced.

25 Again, they were subject to some claim of

1 heightened protection under some kind of confident --
2 some kind of settlement negotiation thing. Which we
3 didn't ever choose to fight about because it doesn't
4 matter to us.

5 But I don't know what we're gonna meet and
6 discuss. Are they going to say now, even though they
7 produced it in that case, they're not gonna produce it
8 here? Because it has this other -- not a privilege
9 against discovery, but a privilege -- some other
10 privilege they thought required some heightened
11 protection.

12 I mean, the Commission rule here allows a
13 request for heightened protection. And I'd be more
14 than happy to have the Commission say, Those that were
15 marked confidential privileged in the other doc --
16 those that were marked confidential in the other
17 documents are confidential under the rule.

18 Those marked confidential privileged have a
19 heightened degree of protection. Similar to what this
20 protective order did. That would be fine. But I
21 don't see any point in meeting and talking about them.
22 They're already documents that were produced to us.
23 To Deseret, at least. And I don't know why they
24 wouldn't be produced here.

25 MR. PROCTOR: Mr. Clark, if I may? The

1 provision with respect to highly sensitive, or claimed
2 highly-sensitive highly-confidential materials allows
3 the Commission a certain amount of discretion to
4 designate additional protections to guard against
5 public disclosure.

6 And I don't know what those would be, unless
7 it's segregating them. Or whatever copies you may
8 get, you can't produce them electronically or convey
9 them electronically to experts, for example. So that
10 you don't run the risk of insecure emails, that type
11 of thing.

12 And I don't think there's any problem with
13 that, since apparently it's a very small portion of
14 the materials. Like one percent or less. But I agree
15 with Mr. Dodge, there's no reason to meet and confer
16 and argue about that.

17 If they were disclosed in the other case,
18 just attach some additional protections that are in
19 keeping with the nature of the materials. And do
20 that. And it all is based upon a commercial business
21 risk if they're publicly disclosed, so.

22 And again, as to the Office -- and I can only
23 speak to the Office -- we have additional
24 responsibilities under state statute to protect such
25 materials. And we would do so.

1 I think one of the provisions in highly
2 sensitive in other matters that has been used is where
3 it goes to the attorney, and the attorney really is
4 responsible for the copies and so forth and recovering
5 them and such. Which makes a great deal of sense, so.

6 HEARING OFFICER: Mr. Moscon, I'm not sure if
7 you're familiar with the subsection (e) -- (1)(e)
8 under the rule that we've been talking about that
9 relates to additional protective measures for
10 highly-proprietary, or highly-sensitive, or
11 highly-confidential material.

12 MR. MOSCON: That may --

13 HEARING OFFICER: But does that --

14 MR. MOSCON: It may resolve some of the
15 issues as to this coal, et cetera. But there are
16 still documents that would just be core
17 attorney/client privilege or settlement negotiation
18 material that co-owners may share amongst themselves
19 that would, in no setting or under any protection of
20 the Commission normally be produced in a rate case or
21 a rate hearing.

22 HEARING OFFICER: Okay.

23 MR. MOSCON: So the Company still thinks that
24 the way to proceed is to, again, we're getting to the
25 experts the stuff that they need.

1 I don't know why they don't want to have a
2 meet and confer, which is kind of I think your
3 obligation before you bring this motion to begin with.
4 But --

5 MR. DODGE: I object to that.

6 MR. MOSCON: Yeah.

7 MR. DODGE: We did meet and confer, and they
8 blew me off. So I object to that statement.

9 MR. MOSCON: Okay. The point is, you just
10 heard for yourself, We don't know why to meet to go
11 through that remaining thing to say this is purely
12 attorney/client privilege. This, you know, this is
13 settlement negotiation.

14 And if a party then says, No, that still
15 should come in, and the other party disagrees, just
16 tell the parties, You've got two pages or less, no
17 oral argument, fax over your request of why it is or
18 why it isn't.

19 But what I'm loathe to do is, on behalf of my
20 client, with these huge volumes of documents, is just
21 make a blanket statement, Yes, absolutely everything,
22 you know, kind of comes in.

23 When all we've said all along is, You know
24 what? We think we're three-fourths of the way there
25 together. There's a few things we just need to get

1 together and carve out to make sure we're on the same
2 pages on these things.

3 And that is what we think can really satisfy
4 the needs for the Commission. So again, we would say
5 the confidential, if it wasn't designated, there's
6 Category 1. If it was designated confidential, it
7 goes over to Category 2.

8 If it's designated confidential privileged,
9 it gets set aside pending a meet and confer that must
10 happen within -- whatever you think is appropriate.
11 Forty-eight hours, 72 hours, whatever you think is
12 appropriate.

13 Category 3 would be the arbitration award or
14 pleadings of the parties. And I understand you're
15 saying there will be a written ruling on that group of
16 documents. I would suggest that the Commission
17 proceed in that type of a format.

18 MR. DODGE: If I may. To the extent you're
19 willing, I mean, I'm leaving town for eight days. And
20 tomorrow is my last day in town.

21 HEARING OFFICER: Uh-huh.

22 MR. DODGE: Let's have a meet and confer
23 right now. I mean, Mr. Moscon's problem is he doesn't
24 know what's there. Mr. Dracht does.

25 Every document they produced in the Deseret

1 arbitration that they marked privileged --
2 confidential privileged was a document that was
3 disclosed to the EPA, to the Utah DAQ, DEQ, and to the
4 Idaho, or one of those or more.

5 It was disclosed. It wasn't attorney/client
6 privilege from discovery production, which would just
7 be attorneys within PacifiCorp to their client. In
8 fact, a couple of those were inadvertently produced
9 and were immediately pulled back.

10 These are all documents that they claim some
11 other kind of privilege that isn't any discovery
12 privilege. So if he can name one document that would
13 be subject to a discovery privilege -- and again,
14 Mr. Dracht is here. He knows the case. I'll concede
15 to it. But what I don't want is a solely meet and
16 confer, where we already know what the issue is.

17 They think there's some kind of, some kind
18 of, you know, special treatment that goes with the
19 communications they had with the EPA. Maybe so, but
20 not in a discovery context. I mean, it may be
21 privileged in some context before the EPA, but that's
22 why they produced them in the Deseret case.

23 It is subject to discovery. We allowed the
24 higher designation. We don't intend to do anything
25 with them. But to tell us to go meet and confer on it

1 when I already know what they are. And I don't know
2 what the possible argument for not disclosing them
3 here is when they've already been disclosed in the
4 other one. I just don't see the purpose of it.

5 MR. PROCTOR: And traditionally information
6 filed with enforcement-based agencies -- EPA being
7 one -- are granted highly-sensitive treatment. And so
8 special precautions are taken to make certain that
9 they do not end up in the wrong hands. Because those
10 indeed are, are highly -- well, in any event.

11 And that's under the Commission's order. And
12 again, they have the burden. If they seek some
13 additional privilege -- or excuse me, protection, they
14 have the burden to establish it in the event that we
15 can't agree.

16 And it sounds to me like we can agree those
17 information -- that type of information really is
18 highly sensitive, and you need to protect it. But
19 that doesn't say you don't get it. There is no need
20 to meet and confer. That's it.

21 MR. MOSCON: I think I have a better
22 understanding of the concern. There is a federal rule
23 of evidence that states that if attorney/client
24 privileged information is produced under this federal
25 rule of evidence it's not waived and everything else.

1 And there is a concern on the part of those
2 in the federal proceeding that that federal rule is
3 inapplicable in the Commission proceeding. And
4 therefore if the Company voluntarily goes on the
5 record and says, We're gonna give the attorney/client
6 privileged stuff, that it's waived that voluntarily
7 because that -- there is no counterpart to that
8 federal rule in these proceedings.

9 So again what I would say -- trying to make
10 this more simple rather than more complicated -- is,
11 as I indicated with the categories, if no one
12 designated it as confidential, it goes across. If
13 it's designated as confidential it goes across subject
14 to a protective order in this proceeding.

15 We'd request the order be that if it is
16 attorney/client privileged, it not be designated. Or
17 unless there can be some ruling of non-waiver in other
18 outside proceedings. And I just don't know how the
19 Commission can do that. But for now at least, pending
20 written order, that that not be produced. Which,
21 again, is such a small subset I don't know why we're
22 even arguing about it.

23 And the last thing is the settlement
24 information. Again, we would prefer not to produce
25 it. If it gets produced it has to get produced also

1 under this most-highly-top-secret, no-waiver kind of
2 category of production.

3 But again I think, as I've been saying, the
4 lion's share of what's at issue could be produced
5 without delay. And without, you know, needing to make
6 it overly complicated for the parties.

7 And then I take it if either of the other
8 parties have a concern with the attorney/client
9 privileged withheld documents, then that's what the
10 meet and confer would be over. I guess that we could
11 then say, Here's what we've withheld as
12 attorney/client privileged. If you feel like you need
13 it, let's talk.

14 MR. PROCTOR: Well, and Mr. Clark, the rules
15 of -- the Utah Rules of Civil Procedure also have a
16 similar non-waiver provision if it's provided by
17 mistake. And by the way, so does the -- so do the
18 Rules of Professional Conduct Before the Bar.

19 So there's no problem with that type of
20 provision applicable to this Commission's protective
21 order.

22 HEARING OFFICER: I think I'm ready to give
23 you some direction. My order as of today's session
24 will be that the Company disclose all material that is
25 reasonably called for under Data Request 2.1 to UAE

1 and the other participants who have requested it,
2 except for the arbitrator's decision.

3 And that that material will come under the
4 coverage of Commission Rule 7 -- R746-100-16 as
5 confidential information to the extent that it was
6 designated confidential at the time of disclosure or
7 at some time previous to today.

8 Except for information that was designated
9 confidential privileged. To the extent that that
10 information is not attorney/client privileged
11 information or attorney work product that information
12 will be disclosed, subject to the additional
13 protective measures described in subparagraph (1)(e)
14 of Rule 746-100-16.

15 And as to the material that is -- or is
16 represented to be, or felt to be by the Company
17 attorney/client privileged material or attorney work
18 product, I'm directing the parties to discuss that
19 before the close of business tomorrow.

20 And if there is not an agreement as to the
21 designation then I will direct the parties, the
22 Company in particular, to submit that information to
23 me with an explanation of the Company's position -- or
24 an explication of it as to why the Company feels that
25 that information is subject to the attorney/client

1 privilege, the attorney work product privilege.

2 And then I'll address the award itself, or
3 the decision of the arbitrator itself in a subsequent
4 written order. And I'm gonna stop here and say, now
5 what are the gaps that you perceive in what I've just
6 expressed?

7 MR. PROCTOR: My only question, the last
8 reference to the submission of the documents --
9 confidential privileged documents to you, would that
10 be an *in camera* review?

11 HEARING OFFICER: Yes, that would be -- I
12 should have --

13 MR. PROCTOR: Great.

14 HEARING OFFICER: -- been clearer, but that
15 would be for my *in camera* review. And I don't fully
16 understand the logistics of accomplishing this, but I
17 am directing you to accomplish as much as you can of
18 it by the close of business today, and the rest of it
19 by noon tomorrow.

20 MR. MOSCON: By "accomplish" I assume you
21 mean make the production -- stuff --

22 HEARING OFFICER: Yeah. Make the disclosure.
23 That's what I mean.

24 MR. MOSCON: -- that's being produced by noon
25 tomorrow, today if we can?

1 HEARING OFFICER: Uh-huh. What are the
2 logistical issues that the separation presents for
3 you?

4 MR. MOSCON: The concern that I'm hearing is
5 for the non-designated or for just the confidential,
6 easy, that can go across quickly.

7 Now the process is only culling from -- from
8 the category of confidential/privileged we have been
9 ordered to produce a subset of that. And so that
10 we're just kind of disclosing will be the last
11 produced, because we're gonna have to physically go
12 through and cull that out.

13 HEARING OFFICER: Uh-huh.

14 MR. MOSCON: And so I guess we can just say
15 every effort will be made to do that by tomorrow. If
16 that takes longer, we'll do our best. But because
17 we're talking about -- I mean, because the bulk of
18 information experts are gonna need is gonna be
19 disclosed, you know, nearly immediately, I'm hopeful
20 that's not a problem.

21 HEARING OFFICER: I'd like you to report to
22 me by 1:00 tomorrow on the status of that.

23 MR. MOSCON: Okay.

24 HEARING OFFICER: If you're not able to
25 accomplish it.

1 MR. MOSCON: And would we do that by a phone
2 call, a faxed letter, or what? And I'm not saying
3 we're not gonna be able to.

4 HEARING OFFICER: Sure.

5 MR. MOSCON: I'm just saying if we get there,
6 what would you like to have us do?

7 HEARING OFFICER: Yeah, I -- report to me
8 with a written form of some kind.

9 MR. MOSCON: Just a fax or something? Okay.

10 HEARING OFFICER: Faxed letter would be fine.
11 Other vagaries in what we've accomplished
12 today?

13 So what I reserved to address is the award
14 itself, the timing implications of this for the
15 schedule in the rate case, and the costs and
16 attorney's fees issues. Those will be the things that
17 I perceive that I haven't disposed of.

18 And I'm gonna trust that, as to the issues
19 related to confidential designation or highly-
20 confidential designation, and as disclosure of that
21 kind of information becomes an issue later in the
22 proceedings, that the parties will, in good faith,
23 meet and confer about that. About the use of the
24 information in the proceeding.

25 MR. MOSCON: One thing I'll ask, and -- for

1 the information that there's no dispute, you know, the
2 non-confidential, just the confidential, to the extent
3 that it's already in Mr. Dodge's possession do you
4 want the Company to physically redeliver it?

5 Or just kind of say -- I mean, because the
6 bulk of it you could just say as of now he could use
7 it.

8 MR. DODGE: And A, he's got -- they've got to
9 produce it to all the other parties too. And so, B,
10 yes, I'd like to get that. In part because I think
11 I'm aware of one document that legitimately could be
12 claimed as an attorney work product that they
13 disclosed subject to the protection.

14 The other thing they marked is very different
15 stuff. I don't know for sure what they're gonna claim
16 falls in each category, so I need to know that or I
17 might inadvertently violate the intent of the order.

18 MR. MOSCON: I agree. That makes sense to
19 me.

20 HEARING OFFICER: I'm gonna allow you to
21 reflect for a moment as to whether or not we need to
22 address anything else today before we adjourn.

23 MR. DODGE: I can't think of anything, thank
24 you.

25 MR. PROCTOR: Thank you very much.

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MR. MOSCON: Thank you.

HEARING OFFICER: Thank you. We're
adjourned.

(The hearing was concluded at 1:16 p.m.)

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C E R T I F I C A T E

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

This is to certify that the foregoing proceedings were taken before me, KELLY L. WILBURN, a Certified Shorthand Reporter and Registered Professional Reporter in and for the State of Utah.

That the proceedings were reported by me in stenotype and thereafter caused by me to be transcribed into typewriting. And that a full, true, and correct transcription of said proceedings so taken and transcribed is set forth in the foregoing pages, numbered 1 through 115, inclusive.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action, and that I am not interested in the event thereof.

SIGNED ON THIS **18th** DAY OF **April**, **2011**.

Kelly L. Wilburn, CSR, RPR
Utah CSR No. 109582-7801

\$	<p>30 [1] - 92:1 30-second [1] - 94:5 30th [1] - 35:16 33 [2] - 48:15, 48:17 34 [3] - 48:15, 48:22, 74:10 36 [2] - 69:7, 69:16 37 [2] - 21:13, 83:15 37(a)(4) [2] - 17:21, 22:8</p>	<p>30:7, 32:19, 38:3, 45:8, 77:15, 80:16, 88:11, 104:21 absurd [1] - 81:25 accelerated [1] - 18:14 access [5] - 7:21, 7:22, 10:24, 17:14, 38:13 accidentally [1] - 100:15 accomplish [4] - 93:16, 111:17, 111:20, 112:25 accomplished [2] - 96:23, 113:11 accomplishing [1] - 111:16 accordance [2] - 25:8, 70:1 Accordingly [1] - 23:3 account [1] - 23:23 accounting [1] - 72:22 accuse [1] - 13:21 acknowledge [2] - 13:15, 14:10 acknowledges [1] - 80:23 acknowledging [2] - 9:24, 10:2 Act [3] - 19:16, 19:19, 19:21 act [1] - 32:13 acting [3] - 50:4, 50:11, 56:17 activities [3] - 73:3, 73:6, 73:19 acts [1] - 64:7 add [2] - 51:22, 100:13 addition [3] - 35:21, 38:4, 54:5 additional [7] - 28:5, 102:4, 102:18, 102:23, 103:9, 107:13, 110:12 address [17] - 11:24, 27:9, 32:3, 35:12, 49:13, 51:4, 52:15, 81:14, 93:13, 93:14, 93:15, 94:1, 94:13, 98:24, 111:2, 113:13, 114:22 addressed [1] - 71:4 addresses [1] - 16:13 addressing [1] - 20:16 adds [1] - 47:19</p>	<p>adjoin [1] - 114:22 adjourned [1] - 115:3 administrative [6] - 24:6, 24:9, 24:11, 62:9, 84:13, 84:25 admissibility [6] - 48:4, 62:18, 63:5, 68:11, 78:9, 89:21 admissible [17] - 39:7, 39:15, 47:4, 47:6, 48:9, 54:7, 57:14, 57:21, 59:13, 60:3, 60:4, 60:9, 61:18, 68:13, 87:24, 91:4, 93:3 admission [5] - 9:22, 26:11, 62:1, 80:22, 84:2 admit [2] - 60:13, 93:4 admitted [2] - 58:2, 58:14 admittedly [2] - 12:3, 16:9 admittedly-relevant [1] - 12:3 adopted [3] - 29:2, 48:14, 63:12 advantage [1] - 31:3 affect [2] - 23:25, 28:16 affidavit [1] - 52:4 afraid [1] - 39:23 agencies [2] - 26:23, 107:6 agency [7] - 28:22, 29:23, 69:25, 70:5, 70:7, 84:13, 84:25 ago [3] - 23:22, 51:18, 93:10 agree [17] - 19:8, 32:20, 38:17, 43:15, 44:5, 44:6, 66:13, 73:14, 74:22, 87:4, 94:13, 97:10, 102:14, 107:15, 107:16, 114:18 agreed [7] - 5:25, 21:4, 35:22, 38:6, 46:14, 57:2, 69:10 agreement [7] - 5:2, 5:12, 28:12, 72:9, 98:2, 98:3, 110:20 ahead [3] - 5:17, 45:9, 65:16 alleged [2] - 10:9, 20:12 allegedly [1] - 7:10 allow [8] - 4:11, 16:21, 22:6, 34:6,</p>	<p>56:22, 75:3, 80:15, 114:20 allowed [2] - 88:8, 106:23 allows [3] - 5:9, 101:12, 102:2 almost [1] - 31:2 alone [1] - 17:17 amount [3] - 5:7, 66:9, 102:3 analogous [1] - 20:25 analyses [1] - 92:14 analysis [10] - 34:25, 38:2, 46:11, 49:11, 49:23, 51:19, 57:17, 59:9, 60:19, 66:17 analyze [1] - 91:1 answer [16] - 6:2, 36:22, 53:9, 53:11, 54:17, 61:25, 63:9, 68:2, 74:4, 74:5, 74:7, 74:8, 77:5, 89:11, 89:18, 92:11 answered [1] - 68:14 answers [3] - 38:12, 87:12, 95:11 anticipated [1] - 99:20 anxious [1] - 19:6 anyway [1] - 48:1 apart [1] - 54:12 apologize [4] - 37:13, 58:16, 65:10, 66:22 apologizing [1] - 30:21 appeal [4] - 10:12, 49:9, 49:16 Appeals [1] - 49:4 appearances [1] - 3:18 appeared [3] - 30:5, 74:18 applicable [2] - 48:25, 109:20 application [2] - 24:10, 75:10 Application [1] - 3:5 applied [1] - 13:6 applies [3] - 33:1, 39:21, 48:23 apply [5] - 24:12, 29:17, 32:8, 63:14, 75:12 approach [1] - 27:11 appropriate [8] - 22:10, 82:22, 91:18, 96:24, 98:4, 99:23, 105:10, 105:12 appropriately [2] -</p>
\$242 [1] - 16:16				
,				
'confidential' [1] - 82:25 'Confidential' [1] - 8:21				
1	4			
<p>1 [2] - 98:6, 105:6 1(e) [2] - 103:7, 110:13 10 [1] - 82:5 10-035-124 [1] - 3:4 10:41 [1] - 3:1 11:43 [1] - 52:13 11:49 [1] - 52:13 12 [1] - 96:6 120 [3] - 7:17, 51:19, 51:21 120-day [1] - 6:1 12:42 [1] - 94:22 12:50 [1] - 94:22 14 [1] - 3:1 14th [1] - 74:8 15 [2] - 84:11, 96:6 19 [1] - 83:15 1:00 [1] - 112:22 1:16 [1] - 115:4</p>	<p>4 [1] - 82:24 48 [2] - 97:22, 98:5</p>			
	5			
	<p>502(d) [2] - 53:2, 53:23 588 [1] - 49:3 5th [3] - 19:2, 74:5, 74:8</p>			
	6			
	<p>60 [1] - 6:14</p>			
	7			
	<p>7 [4] - 7:19, 58:12, 96:6, 110:4 7(b) [1] - 69:17 7-46-116 [1] - 98:18 72 [1] - 105:11 746-100-16 [1] - 110:14</p>			
2	9			
<p>2 [2] - 98:6, 105:7 2.1 [4] - 3:13, 26:14, 75:2, 109:25 20-plus [1] - 21:24 2000 [1] - 49:4 2004 [1] - 5:13 2005 [1] - 5:13 2011 [1] - 3:1 20th [1] - 74:4 21 [3] - 7:7, 7:8, 11:4 21st [1] - 74:4 24 [3] - 97:22, 98:5, 99:3 240-day [1] - 16:15 25-percent [1] - 5:1 26th [2] - 7:15, 51:10 27 [1] - 84:10</p>	<p>99 [1] - 98:11 999 [1] - 49:3</p>			
	A			
	<p>A.M [1] - 3:1 a.m [1] - 52:13 ability [2] - 28:16, 93:2 able [3] - 92:5, 112:24, 113:3 Absent [1] - 5:8 Absolute [1] - 88:3 absolute [1] - 86:9 Absolutely [1] - 34:12 absolutely [9] - 23:9,</p>			
3				
<p>3 [2] - 37:15, 105:13</p>				

<p>8:24, 73:20 Approval [1] - 3:8 April [4] - 19:2, 74:5, 74:8 APRIL [1] - 3:1 arbiter [1] - 38:22 arbiter's [2] - 39:8, 46:21 arbitrate [2] - 58:7, 58:12 arbitration [78] - 5:9, 5:19, 5:24, 5:25, 6:1, 6:6, 6:21, 7:17, 7:22, 9:4, 9:6, 9:14, 9:20, 11:1, 20:7, 20:15, 22:16, 22:22, 24:25, 26:9, 27:3, 28:18, 33:13, 35:6, 36:10, 38:14, 39:8, 40:19, 40:24, 45:1, 45:17, 47:7, 47:11, 50:25, 51:3, 51:18, 52:21, 54:18, 55:13, 55:16, 56:14, 58:2, 58:9, 58:14, 58:24, 60:8, 60:20, 61:4, 62:10, 62:21, 64:10, 64:13, 68:4, 71:13, 71:16, 71:23, 73:10, 73:15, 74:25, 75:3, 76:14, 77:11, 78:25, 79:7, 79:10, 83:3, 83:9, 83:25, 84:17, 86:15, 87:3, 91:20, 92:24, 95:4, 97:16, 105:13, 106:1 arbitrator [18] - 5:10, 6:2, 27:5, 35:7, 52:23, 56:4, 56:16, 56:18, 56:25, 58:20, 59:6, 65:21, 76:21, 77:13, 77:20, 81:19, 84:13, 111:3 arbitrator's [12] - 36:21, 39:11, 55:21, 56:11, 57:23, 64:2, 64:21, 66:5, 79:18, 82:13, 93:14, 110:2 argue [4] - 33:4, 49:13, 81:24, 102:16 arguing [1] - 108:22 argument [18] - 9:16, 10:13, 10:21, 12:23, 14:1, 16:1, 33:19, 39:21, 41:5, 58:19, 67:17, 76:23, 82:1, 82:10, 92:22, 98:7, 104:17, 107:2 arguments [8] - 3:11, 35:10, 50:25, 77:8, 78:10, 78:12, 81:10, 81:13</p>	<p>articulated [4] - 31:10, 65:24, 67:1, 68:3 aside [3] - 47:1, 62:2, 65:18 aspects [1] - 55:16 assert [1] - 14:23 Assistant [1] - 3:25 associated [1] - 19:19 assume [5] - 4:15, 34:20, 63:11, 67:16, 111:20 assurance [1] - 19:10 assurances [1] - 37:19 attach [1] - 102:18 attempt [1] - 84:23 attempts [1] - 49:24 attention [1] - 59:6 attorney [10] - 53:15, 54:5, 56:17, 103:3, 110:11, 110:17, 111:1, 114:12 Attorney General [1] - 4:1 attorney's [5] - 21:12, 21:19, 30:2, 30:3, 113:16 attorney-client [1] - 54:5 Attorney/client [1] - 75:5 attorney/client [21] - 41:20, 42:19, 46:2, 52:22, 53:14, 65:19, 76:15, 95:24, 96:20, 97:6, 103:17, 104:12, 106:5, 107:23, 108:5, 108:16, 109:8, 109:12, 110:10, 110:17, 110:25 attorneys [1] - 106:7 audacity [1] - 8:7 auditor [5] - 79:21, 79:22, 79:23, 80:5, 80:17 Auditors [1] - 79:25 authored [1] - 22:21 Authority [1] - 3:6 authority [5] - 26:1, 32:14, 62:8, 62:14, 91:6 authorized [1] - 83:23 available [7] - 6:17, 15:19, 37:15, 61:15, 79:4, 89:7, 89:8 avoid [1] - 14:4 award [64] - 17:21,</p>	<p>17:24, 22:8, 27:3, 28:18, 35:7, 39:8, 47:7, 47:23, 50:15, 50:25, 55:16, 55:22, 58:9, 58:14, 60:8, 60:20, 61:20, 61:23, 64:11, 66:5, 67:1, 67:5, 67:9, 67:13, 67:15, 67:21, 68:4, 68:25, 70:14, 70:16, 71:16, 71:23, 73:10, 73:15, 75:3, 77:7, 78:10, 78:25, 79:7, 79:11, 79:14, 79:18, 79:20, 80:16, 80:18, 81:9, 82:13, 83:3, 83:9, 83:25, 85:23, 85:25, 87:3, 87:22, 88:14, 92:24, 93:14, 93:25, 95:4, 97:16, 105:13, 111:2, 113:13 award's [1] - 47:11 awarded [2] - 21:19, 50:5 aware [6] - 21:18, 21:21, 22:11, 52:1, 95:3, 114:11</p>	<p>104:3 begins [1] - 25:12 behalf [7] - 3:22, 4:1, 4:4, 35:19, 42:7, 63:3, 104:19 behind [2] - 40:18, 85:17 believes [1] - 63:22 believes [4] - 9:8, 67:20, 80:24, 82:7 benefit [1] - 25:16 best [2] - 97:9, 112:16 better [2] - 86:8, 107:21 between [11] - 5:2, 26:18, 54:20, 55:1, 55:6, 55:24, 71:3, 72:9, 74:7, 76:16, 95:20 beyond [7] - 11:15, 37:17, 60:10, 64:24, 65:23, 90:5, 91:4 Beyond [1] - 65:2 binding [7] - 26:23, 43:16, 43:17, 57:7, 77:17, 77:22 binds [1] - 82:2 bit [3] - 27:11, 81:12, 94:8 bits [1] - 77:4 blanket [2] - 100:3, 104:21 blew [1] - 104:8 bodies [1] - 82:20 body [1] - 69:25 Bologna [1] - 88:14 book [1] - 81:9 borrow [1] - 80:7 bought [4] - 38:1, 42:25, 66:16 bound [2] - 33:25, 77:16 brief [7] - 4:11, 4:23, 4:25, 8:4, 12:13, 49:13, 72:4 briefed [4] - 31:12, 38:8, 62:18, 63:3 briefing [2] - 18:14, 40:6 briefings [1] - 51:1 briefly [2] - 81:14, 91:23 briefs [7] - 4:24, 18:16, 31:14, 32:9, 77:8, 78:25, 79:2 bring [4] - 17:22, 18:3, 49:16, 104:3 broad [5] - 21:4, 24:5, 24:7, 69:8, 91:7 brought [5] - 49:11,</p>	<p>49:18, 51:5, 60:11, 76:8 building [1] - 71:10 built [1] - 29:16 bulk [3] - 98:16, 112:17, 114:6 burden [6] - 15:3, 15:5, 43:12, 90:13, 107:12, 107:14 burdensome [1] - 11:6 business [9] - 80:1, 82:8, 82:11, 82:12, 82:19, 84:20, 102:20, 110:19, 111:18 buy [1] - 55:4 buying [1] - 66:17</p>
C				
<p>camera [2] - 111:10, 111:15 Campbell [1] - 19:12 cannot [7] - 11:9, 19:24, 25:2, 25:4, 32:5, 95:2, 98:3 capacity [1] - 95:22 capital [1] - 71:25 capital improvements [1] - 5:7 captioned [1] - 3:5 cards [1] - 16:18 care [2] - 49:14, 86:19 carefully [2] - 72:18, 85:19 carve [2] - 42:2, 105:1 case [66] - 8:23, 9:11, 10:8, 10:13, 10:17, 11:16, 14:4, 16:11, 17:24, 19:12, 19:16, 19:18, 19:20, 21:3, 21:9, 24:10, 24:11, 24:12, 24:13, 24:20, 26:7, 28:23, 29:24, 30:4, 31:5, 32:12, 34:20, 37:4, 38:19, 39:18, 40:7, 41:15, 41:16, 43:7, 45:1, 49:3, 49:11, 51:24, 54:17, 56:20, 56:21, 58:8, 58:16, 59:17, 59:20, 60:18, 61:13, 63:6, 63:7, 63:11, 63:23, 71:16, 72:6, 73:9, 85:15, 88:1, 88:2, 96:1, 96:18, 99:24, 101:7, 102:17, 106:14,</p>				

<p>106:22 case-by-case [1] - 24:10 cases [9] - 16:15, 19:23, 21:19, 48:20, 48:25, 58:12, 60:14, 62:20, 63:1 categories [4] - 45:16, 46:9, 54:1, 108:11 category [10] - 54:1, 54:2, 54:3, 96:21, 97:20, 98:1, 98:2, 109:2, 112:8, 114:16 Category [3] - 105:6, 105:7, 105:13 caused [1] - 24:17 CDs [2] - 15:21, 91:11 cert [1] - 49:4 certain [6] - 5:6, 5:15, 22:9, 55:25, 102:3, 107:8 certainly [16] - 22:22, 23:13, 27:6, 27:22, 31:4, 50:12, 56:10, 60:9, 62:16, 64:2, 64:22, 67:20, 77:13, 95:3, 100:21 Certainly [1] - 23:1 challenge [3] - 17:10, 39:1, 67:24 challenged [1] - 6:16 chance [2] - 49:12, 75:24 changes [1] - 23:25 changing [1] - 86:22 characterize [1] - 93:23 charge [1] - 88:21 charged [1] - 90:1 choice [4] - 84:8, 89:5, 89:6, 89:7 choose [3] - 12:5, 15:24, 101:3 chose [2] - 90:25, 91:1 circumstances [1] - 88:7 citation [1] - 91:6 cited [10] - 19:23, 21:3, 21:9, 33:17, 40:7, 74:16, 81:12, 88:1, 88:2 citing [2] - 32:12, 74:10 civil [1] - 29:17 Civil [2] - 14:13, 109:15 claim [11] - 8:2, 10:4, 12:18, 13:21, 86:5,</p>	<p>90:6, 93:7, 97:4, 100:25, 106:10, 114:15 claimed [2] - 102:1, 114:12 Claiming [1] - 15:23 claiming [3] - 28:8, 81:2, 83:9 claims [1] - 86:20 clarification [2] - 78:19, 98:15 clarifications [1] - 42:15 clarify [2] - 32:4, 57:25 Clark [11] - 4:14, 4:20, 9:23, 22:14, 30:17, 70:21, 78:21, 94:15, 96:24, 101:25, 109:14 clause [1] - 5:9 clawback provision [2] - 100:13, 100:20 clear [14] - 12:13, 34:16, 35:13, 42:9, 43:19, 50:17, 51:13, 59:17, 63:19, 63:21, 66:23, 70:13, 70:15, 100:16 clearer [2] - 31:13, 111:14 clearly [5] - 12:9, 13:9, 22:1, 86:23, 87:13 Clergy [1] - 75:6 client [10] - 25:17, 34:16, 54:5, 62:16, 63:2, 67:20, 76:5, 76:10, 104:20, 106:7 client's [1] - 64:22 clients [1] - 63:3 close [2] - 110:19, 111:18 closing [1] - 41:6 closing argument [1] - 78:15 cloth [1] - 81:10 Club [2] - 23:18, 25:25 co [17] - 5:1, 45:18, 54:21, 54:23, 55:1, 55:6, 55:24, 56:1, 71:15, 71:18, 73:21, 76:16, 81:8, 95:20, 95:22, 103:18 co-counsel [1] - 81:8 co-owner [5] - 5:1, 45:18, 54:23, 56:1 co-owners [11] - 54:21, 55:1, 55:6, 55:24, 71:15, 71:18,</p>	<p>73:21, 76:16, 95:20, 95:22, 103:18 coal [9] - 41:18, 41:19, 43:3, 46:1, 54:14, 54:16, 71:6, 71:7, 103:15 com [1] - 16:16 combination [1] - 26:20 coming [5] - 30:20, 31:4, 71:7, 76:7, 86:4 comity [4] - 32:14, 40:4, 40:8, 85:3 comma [2] - 70:15, 70:16 comments [1] - 4:11 commercial [9] - 54:20, 55:24, 71:2, 72:9, 82:8, 82:11, 82:12, 82:19, 102:20 commercially [1] - 90:7 commercially-sensitive [1] - 90:7 Commission [89] - 6:22, 12:2, 14:15, 15:1, 16:12, 16:22, 16:24, 17:16, 17:21, 20:21, 21:18, 21:19, 21:25, 22:6, 23:21, 24:7, 24:9, 26:1, 26:15, 26:23, 27:8, 27:17, 28:12, 28:13, 29:19, 29:20, 30:5, 32:11, 32:13, 32:19, 32:20, 33:3, 33:10, 33:16, 33:21, 34:1, 34:19, 35:2, 38:18, 40:9, 43:10, 45:25, 47:20, 48:14, 50:20, 51:25, 59:12, 61:16, 61:21, 61:22, 63:12, 63:14, 68:17, 70:24, 71:1, 71:5, 72:23, 73:1, 73:15, 74:22, 75:13, 76:10, 77:16, 77:25, 79:13, 80:17, 82:2, 82:13, 82:15, 85:14, 87:9, 90:2, 90:9, 91:9, 92:25, 93:1, 93:15, 96:8, 98:4, 98:8, 101:12, 101:14, 102:3, 103:20, 105:4, 105:16, 108:3, 108:19, 110:4 commission [7] - 40:5, 57:5, 57:15, 62:23, 63:8, 70:5, 70:6 Commission's [16] - 10:16, 10:17, 12:6,</p>	<p>15:24, 21:14, 24:15, 54:8, 55:17, 62:3, 66:8, 82:14, 91:19, 94:3, 98:17, 107:11, 109:20 commissioners [1] - 57:13 commissions [1] - 57:9 common [2] - 57:19, 89:9 communicate [2] - 55:6, 55:7 communication [1] - 55:1 communications [3] - 45:18, 95:19, 106:19 Company [51] - 4:10, 12:14, 25:9, 26:15, 27:15, 32:4, 32:5, 32:24, 33:8, 34:1, 34:6, 34:9, 34:20, 35:1, 35:13, 35:19, 35:24, 43:12, 43:13, 44:8, 50:7, 50:9, 50:10, 52:7, 54:9, 59:22, 61:13, 64:14, 64:19, 65:1, 66:4, 66:14, 66:19, 68:17, 68:18, 72:1, 74:15, 75:2, 75:11, 95:5, 95:14, 95:18, 96:4, 103:23, 108:4, 109:24, 110:16, 110:22, 110:24, 114:4 Company's [13] - 17:19, 43:20, 61:23, 64:12, 66:23, 66:25, 67:4, 67:24, 68:25, 94:1, 94:2, 95:4, 110:23 compel [2] - 3:12, 49:8 compelled [1] - 42:3 competent [1] - 10:8 competitive [1] - 28:16 complete [2] - 16:21, 75:1 completely [4] - 16:2, 16:21, 44:24, 92:21 complicated [8] - 7:20, 16:17, 17:12, 49:25, 92:18, 94:24, 108:10, 109:6 comply [1] - 30:9 complying [1] - 16:8 components [1] - 28:25 concede [7] - 59:9, 62:15, 62:22, 63:1,</p>	<p>68:9, 95:6, 106:14 conceded [1] - 58:18 conceding [1] - 61:14 concept [1] - 85:2 concern [8] - 65:1, 65:23, 67:1, 77:3, 107:22, 108:1, 109:8, 112:4 concerned [4] - 23:13, 24:18, 27:14, 48:11 Concerned [1] - 23:19 concerning [1] - 73:5 concerns [1] - 95:4 concluded [3] - 6:7, 57:1, 115:4 concluding [1] - 44:17 conclusion [11] - 27:6, 27:8, 38:22, 39:13, 56:18, 57:16, 57:19, 58:20, 59:21, 76:21, 90:4 conclusions [8] - 39:11, 56:22, 57:10, 57:13, 57:18, 57:21, 65:2, 68:11 condition [3] - 58:6, 58:10, 59:1 Conduct [1] - 109:18 conduct [2] - 16:23, 17:4 confer [22] - 31:22, 35:18, 37:8, 41:14, 42:1, 43:9, 45:8, 86:6, 86:11, 94:8, 97:12, 99:12, 102:15, 104:2, 104:7, 105:9, 105:22, 106:16, 106:25, 107:20, 109:10, 113:23 conferring [1] - 76:5 confident [2] - 19:7, 101:1 confidential [75] - 4:22, 6:19, 9:5, 10:24, 11:5, 12:15, 13:4, 20:17, 24:14, 25:2, 25:14, 27:21, 34:7, 39:25, 41:17, 44:11, 45:3, 45:24, 54:6, 65:8, 67:25, 68:24, 79:4, 79:18, 81:20, 81:21, 81:22, 82:5, 82:7, 83:5, 83:7, 83:11, 84:2, 90:7, 91:21, 94:4, 95:24, 96:18, 97:20, 98:1, 98:25, 99:1, 99:6,</p>
---	---	--	---	---

<p>99:7, 99:18, 99:25, 100:1, 100:2, 100:4, 100:18, 100:19, 101:15, 101:16, 101:17, 101:18, 102:2, 103:11, 105:5, 105:6, 105:8, 106:2, 108:12, 108:13, 110:5, 110:6, 110:9, 111:9, 112:5, 113:19, 114:2</p> <p>confidential/privileged [1] - 112:8</p> <p>confidentiality [5] - 12:4, 12:19, 91:18, 95:15, 98:18</p> <p>confronted [1] - 29:10</p> <p>confronting [1] - 31:7</p> <p>connection [1] - 23:20</p> <p>consent [5] - 5:6, 5:8, 5:17, 83:24, 88:16</p> <p>consented [1] - 5:22</p> <p>consequences [1] - 6:9</p> <p>consequent [1] - 49:8</p> <p>consider [4] - 20:9, 61:23, 62:12, 63:15</p> <p>consideration [1] - 55:18</p> <p>considered [1] - 60:12</p> <p>consistent [7] - 5:11, 5:22, 6:5, 36:4, 63:25, 88:23, 89:18</p> <p>constituents [2] - 29:25, 71:21</p> <p>constituted [1] - 56:7</p> <p>constitutes [2] - 21:8, 34:15</p> <p>constrained [1] - 80:3</p> <p>construe [1] - 19:17</p> <p>contain [1] - 27:4</p> <p>contemplate [1] - 13:12</p> <p>contempt [1] - 8:6</p> <p>contents [1] - 9:7</p> <p>contested [5] - 3:14, 17:10, 17:18, 29:1, 88:23</p> <p>context [13] - 6:10, 9:19, 18:1, 20:1, 20:25, 22:10, 24:6, 53:13, 55:23, 58:2, 60:12, 106:20, 106:21</p>	<p>contexts [1] - 80:16</p> <p>continues [1] - 75:12</p> <p>contract [3] - 58:5, 89:13, 90:1</p> <p>contracts [2] - 65:8, 89:2</p> <p>contractually [1] - 57:3</p> <p>contrary [1] - 16:24</p> <p>contribution [1] - 72:12</p> <p>control [3] - 23:24, 64:14, 88:3</p> <p>controls [2] - 23:15, 23:16</p> <p>controversy [1] - 93:13</p> <p>convened [1] - 3:4</p> <p>conversely [1] - 77:19</p> <p>convey [1] - 102:8</p> <p>copies [3] - 14:5, 102:7, 103:4</p> <p>copy [2] - 13:2, 58:9</p> <p>core [1] - 103:16</p> <p>corporation [2] - 25:5, 69:21</p> <p>correct [4] - 42:18, 44:12, 44:16, 52:24</p> <p>correctly [2] - 34:4, 93:20</p> <p>cost [4] - 23:14, 41:11, 55:5, 73:20</p> <p>cost/benefit [1] - 92:14</p> <p>costs [13] - 17:21, 21:12, 21:20, 34:21, 41:18, 55:25, 71:6, 71:20, 72:7, 72:8, 72:13, 92:24, 113:15</p> <p>counsel [13] - 3:18, 4:6, 6:20, 8:11, 8:18, 9:3, 20:13, 25:15, 30:7, 34:5, 74:1, 81:8, 83:22</p> <p>Counsel [1] - 33:11</p> <p>Counsel's [1] - 44:9</p> <p>counterpart [1] - 108:7</p> <p>countless [1] - 8:17</p> <p>country [1] - 21:3</p> <p>couple [7] - 18:6, 23:21, 24:21, 32:3, 48:15, 51:8, 106:8</p> <p>course [8] - 7:3, 11:3, 11:4, 13:20, 24:5, 26:8, 41:4, 67:16</p> <p>Court [2] - 49:3, 85:9</p> <p>court [11] - 19:21, 40:5, 50:14, 57:5,</p>	<p>63:19, 70:5, 70:6, 83:19, 84:7, 84:12, 94:23</p> <p>courtroom [1] - 62:23</p> <p>courts [4] - 57:1, 57:8, 57:9, 63:7</p> <p>coverage [2] - 35:23, 110:4</p> <p>covered [4] - 12:10, 71:8, 75:3, 75:4</p> <p>crazy [1] - 80:19</p> <p>created [2] - 9:13, 27:17</p> <p>creates [1] - 78:9</p> <p>creativity [1] - 81:9</p> <p>credit [2] - 27:10, 81:6</p> <p>cross [1] - 87:10</p> <p>cull [1] - 112:12</p> <p>culling [1] - 112:7</p> <p>customer [1] - 43:4</p> <p>customers [1] - 54:16</p> <p>cut [1] - 36:25</p>	<p>18:17, 40:11, 40:12, 46:17, 51:19, 51:21, 84:20, 85:10, 89:14, 89:16, 91:10, 92:1, 105:19</p> <p>de [8] - 41:3, 67:13, 67:15, 67:23, 79:10, 79:14, 80:20, 99:17</p> <p>de-designate [6] - 41:3, 67:13, 67:15, 79:10, 79:14, 80:20</p> <p>de-designated [1] - 99:17</p> <p>de-designation [1] - 67:23</p> <p>deadline [3] - 3:14, 7:15, 11:15</p> <p>deal [5] - 10:9, 10:13, 14:16, 89:2, 103:5</p> <p>dealing [3] - 6:9, 17:7, 72:20</p> <p>dealt [1] - 26:21</p> <p>Decide [1] - 93:3</p> <p>decide [2] - 22:6, 93:2</p> <p>decision [20] - 6:10, 12:9, 46:21, 55:17, 56:11, 57:3, 57:5, 57:6, 57:23, 58:2, 61:5, 64:2, 64:14, 64:21, 64:24, 65:21, 70:13, 78:1, 110:2, 111:3</p> <p>decisions [3] - 5:4, 62:21, 71:11</p> <p>declaratory judgment [1] - 5:20</p> <p>deemed [4] - 45:2, 45:23, 53:8, 57:10</p> <p>deferred [1] - 72:22</p> <p>defined [3] - 5:12, 53:18, 56:8</p> <p>defining [1] - 82:5</p> <p>definition [6] - 68:23, 88:24, 89:1, 89:9, 90:19</p> <p>definitive [1] - 71:4</p> <p>degree [1] - 101:19</p> <p>delay [13] - 11:8, 11:11, 11:12, 11:13, 17:9, 31:1, 40:11, 51:25, 86:3, 87:19, 92:17, 93:11, 109:5</p> <p>deliberation [1] - 12:8</p> <p>deliver [1] - 15:22</p> <p>demand [1] - 5:19</p> <p>Demand [1] - 5:24</p> <p>demanding [1] - 20:9</p> <p>demonstrated [1] - 15:18</p>	<p>denied [1] - 49:4</p> <p>deny [2] - 11:13, 68:20</p> <p>deposition [2] - 87:5, 87:15</p> <p>depositions [4] - 93:22, 95:8, 95:9, 97:19</p> <p>DEQ [1] - 106:3</p> <p>described [2] - 98:16, 110:13</p> <p>describing [1] - 25:9</p> <p>description [1] - 29:2</p> <p>Deseret [33] - 5:2, 5:13, 5:19, 6:15, 7:5, 9:4, 10:22, 12:18, 12:22, 12:24, 25:15, 26:19, 28:17, 33:11, 33:12, 45:17, 45:20, 79:10, 79:12, 79:25, 80:6, 80:7, 80:15, 80:23, 80:24, 83:22, 86:11, 86:18, 86:19, 101:23, 105:25, 106:22</p> <p>Deseret Generation [4] - 4:25, 44:9, 52:23, 64:24</p> <p>Deseret Generation Transmission [1] - 73:10</p> <p>Deseret's [2] - 5:5, 86:22</p> <p>Deseret-Pacific [1] - 33:12</p> <p>designate [16] - 41:3, 44:4, 44:10, 67:13, 67:15, 79:10, 79:14, 79:17, 80:20, 81:19, 81:20, 82:9, 83:13, 100:5, 102:4</p> <p>Designated [1] - 83:6</p> <p>designated [24] - 3:16, 44:23, 46:15, 79:3, 81:21, 83:4, 83:12, 84:1, 84:15, 86:12, 99:17, 100:15, 100:18, 105:5, 105:6, 105:8, 108:12, 108:13, 108:16, 110:6, 110:8, 112:5</p> <p>designates [2] - 13:3, 83:8</p> <p>designating [1] - 74:19</p> <p>designation [10] - 67:23, 67:25, 82:22, 83:10, 87:16, 100:9, 106:24, 110:21,</p>
		<p style="text-align: center;">D</p>		
		<p>DAQ [1] - 106:3</p> <p>data [39] - 34:6, 34:7, 37:24, 37:25, 38:20, 39:9, 39:20, 40:19, 42:24, 43:13, 43:14, 43:20, 43:25, 46:5, 46:10, 46:20, 47:19, 47:21, 50:8, 50:20, 52:3, 52:6, 64:20, 64:22, 66:15, 76:11, 76:13, 77:3, 77:6, 77:9, 78:1, 78:6, 81:17, 81:18, 85:20, 91:1, 93:21, 95:7, 96:9</p> <p>Data request [19] - 3:13, 6:21, 7:6, 7:7, 8:7, 16:8, 19:8, 20:11, 23:10, 25:19, 26:13, 26:21, 34:8, 42:21, 74:3, 75:2, 81:3, 93:9, 109:25</p> <p>data requests [6] - 10:24, 11:19, 14:6, 24:19, 25:22, 93:8</p> <p>data/documents [1] - 40:14</p> <p>date [1] - 29:12</p> <p>Dave [1] - 18:12</p> <p>David Clark [1] - 3:16</p> <p>days [19] - 7:7, 7:8, 7:17, 7:19, 11:4,</p>		

<p>113:19, 113:20 designed [1] - 16:25 desire [2] - 16:10, 94:25 desk [1] - 91:12 desperate [1] - 88:17 Despite [1] - 75:10 detailed [1] - 29:9 determination [5] - 51:14, 55:11, 55:23, 71:13, 73:16 determine [2] - 47:20, 99:15 Determine [1] - 88:22 determined [1] - 73:17 DG&T [2] - 67:12, 71:20 different [7] - 15:8, 54:1, 54:16, 54:19, 63:18, 97:4, 114:14 differently [1] - 11:3 difficult [1] - 32:11 direct [5] - 7:15, 51:9, 71:14, 73:17, 110:21 directing [2] - 110:18, 111:17 direction [1] - 109:23 directly [10] - 16:24, 19:25, 20:2, 20:20, 22:20, 25:3, 26:10, 69:19, 71:23 dis [1] - 27:20 disagree [1] - 44:8 disagrees [1] - 104:15 disclose [16] - 34:6, 43:11, 43:13, 46:23, 50:23, 64:1, 64:21, 68:6, 70:8, 79:20, 79:24, 80:9, 80:24, 80:25, 97:10, 109:24 disclosed [20] - 25:5, 27:4, 30:11, 69:21, 73:12, 78:7, 93:18, 96:4, 96:10, 96:13, 97:15, 98:17, 102:17, 102:21, 106:3, 106:5, 107:3, 110:12, 112:19, 114:13 disclosing [6] - 21:6, 28:7, 33:14, 65:23, 107:2, 112:10 disclosure [32] - 15:7, 15:13, 24:14, 28:2, 42:21, 50:8, 50:10, 50:21, 52:22, 53:3, 64:10, 66:5, 66:9, 66:15, 67:4,</p>	<p>67:9, 69:2, 76:10, 77:6, 77:7, 80:1, 83:25, 94:4, 95:6, 95:17, 97:3, 97:18, 100:23, 102:5, 110:6, 111:22, 113:20 discover [2] - 38:24, 39:4 discoverability [2] - 89:22, 91:8 discoverable [7] - 24:4, 29:15, 35:11, 47:3, 48:9, 50:24, 59:11 discovered [1] - 60:4 discovering [1] - 16:11 discovery [57] - 7:18, 8:13, 8:15, 10:1, 10:3, 11:13, 11:22, 13:3, 14:14, 14:22, 15:7, 15:9, 19:22, 20:25, 24:5, 31:6, 38:24, 39:1, 39:6, 39:14, 47:2, 47:5, 48:9, 48:13, 48:24, 49:7, 49:9, 51:20, 53:5, 59:15, 59:24, 60:2, 60:9, 60:10, 61:17, 63:13, 68:12, 69:3, 78:9, 79:19, 82:6, 83:2, 88:11, 90:10, 91:4, 92:9, 95:11, 97:3, 100:24, 101:9, 106:6, 106:11, 106:13, 106:20, 106:23 discrete [1] - 55:9 discretion [1] - 102:3 discuss [8] - 4:22, 28:10, 86:14, 96:25, 97:2, 97:25, 101:6, 110:18 discussion [4] - 45:14, 65:8, 96:11, 96:14 discussions [1] - 37:16 dismiss [2] - 89:21, 89:22 dismisses [1] - 88:5 disposed [1] - 113:17 dispute [11] - 35:4, 35:5, 38:17, 44:13, 45:22, 46:19, 54:9, 54:20, 55:6, 55:24, 114:1 disputes [2] - 31:6, 71:2 dissemination [1] - 66:19</p>	<p>distinct [1] - 25:17 District Court [1] - 18:10 Division [2] - 25:24, 27:22 divulge [2] - 61:14, 64:18 doc [1] - 101:15 Docket [2] - 3:4, 6:13 docket [9] - 7:21, 7:24, 8:8, 11:14, 13:23, 15:10, 19:22, 21:8, 25:18 document [23] - 9:13, 12:19, 13:15, 14:9, 14:22, 16:5, 22:5, 38:22, 39:12, 46:4, 48:1, 48:16, 59:18, 74:12, 85:16, 90:14, 92:11, 92:16, 93:9, 105:25, 106:2, 106:12, 114:11 document requests [2] - 48:23, 49:2 Documents [1] - 96:6 documents [95] - 3:12, 6:18, 6:21, 7:10, 8:1, 8:8, 8:19, 8:20, 9:7, 9:8, 9:20, 10:3, 10:14, 10:18, 10:23, 10:25, 12:3, 12:9, 13:7, 13:10, 14:2, 14:6, 15:4, 15:6, 15:12, 15:15, 15:17, 15:19, 15:21, 16:10, 16:18, 16:20, 17:2, 17:15, 20:15, 21:25, 25:1, 33:9, 33:13, 33:15, 35:6, 35:21, 35:25, 36:1, 36:7, 37:9, 37:10, 37:20, 38:5, 39:25, 41:21, 44:10, 45:16, 46:5, 46:18, 50:22, 55:9, 55:15, 64:14, 64:16, 67:22, 69:13, 74:11, 74:20, 79:15, 82:3, 84:3, 84:15, 85:20, 86:7, 86:15, 87:1, 88:20, 89:10, 91:15, 92:8, 92:10, 92:12, 93:23, 95:25, 97:21, 98:1, 98:16, 99:10, 100:10, 100:22, 101:17, 101:22, 103:16, 104:20, 105:16, 106:10, 109:9, 111:8, 111:9 DODGE [25] - 3:20, 3:22, 4:12, 4:14, 4:19, 18:7, 18:11, 18:22,</p>	<p>19:23, 21:2, 21:16, 21:21, 78:21, 96:24, 98:24, 99:4, 99:22, 100:8, 100:21, 104:5, 104:7, 105:18, 105:22, 114:8, 114:23 Dodge [29] - 3:18, 4:8, 4:13, 8:12, 9:2, 9:4, 9:12, 9:16, 13:19, 14:2, 18:5, 22:12, 28:22, 29:3, 33:8, 35:15, 37:1, 38:11, 58:5, 63:2, 64:16, 70:19, 75:16, 75:24, 76:1, 78:20, 99:21, 100:7, 102:15 Dodge's [2] - 25:13, 114:3 dollars [2] - 20:4, 20:22 done [4] - 16:5, 42:8, 63:12, 93:4 door [1] - 25:21 down [8] - 36:11, 38:13, 42:2, 50:1, 52:9, 55:21, 79:5, 85:25 DRACHT [2] - 18:21, 45:7 Dracht [3] - 97:1, 105:24, 106:14 drafting [1] - 47:9 draw [1] - 31:17 draw-a-line-in-the-sand [1] - 31:17 due [5] - 17:12, 28:23, 51:9, 74:5, 80:8 duly [1] - 3:10 duplication [1] - 37:7 during [1] - 44:3 duties [1] - 27:15 dwel [1] - 4:24</p>	<p>Electric [3] - 3:7, 3:8, 3:9 electronically [3] - 100:10, 102:8, 102:9 elsewhere [1] - 72:16 email [1] - 35:15 emails [1] - 102:10 employee [1] - 72:6 employment [1] - 58:11 encountered [1] - 19:20 end [3] - 66:22, 85:21, 107:9 End [1] - 84:23 enforce [2] - 18:10, 28:18 enforcement [1] - 107:6 enforcement-based [1] - 107:6 entered [1] - 26:17 entire [4] - 41:4, 51:18, 52:2, 78:7 entirety [1] - 98:17 entitled [5] - 18:2, 26:7, 29:20, 29:24, 75:14 entity [3] - 25:7, 57:15, 70:1 environmental [2] - 23:16, 23:24 EPA [4] - 106:3, 106:19, 106:21, 107:6 equally [1] - 95:15 equally-restrictive [1] - 95:15 essentially [2] - 8:7, 28:7 establish [2] - 72:5, 107:14 Established [1] - 87:23 et cetera [6] - 38:5, 55:5, 63:17, 95:17, 96:20, 103:15 evaluation [1] - 36:2 evening [1] - 35:17 event [5] - 5:17, 26:5, 90:23, 107:10, 107:14 eventually [1] - 10:10 evidence [23] - 27:7, 34:22, 39:15, 47:5, 57:20, 59:15, 59:24, 60:3, 60:4, 61:18, 62:1, 62:7, 63:16, 68:13, 81:12, 88:9, 88:10, 89:14, 90:25,</p>
---	---	---	--	--

<p>91:4, 107:23, 107:25 Evidence [3] - 53:2, 53:23, 59:8 evidentiary [1] - 63:18 exact [7] - 6:14, 6:15, 9:17, 14:25, 82:13, 90:1, 91:22 exactly [5] - 18:17, 20:25, 49:14, 66:11, 73:9 exactly-analogous [1] - 20:25 examine [2] - 60:14, 87:10 examined [1] - 19:21 examining [2] - 56:4, 56:5 example [2] - 58:23, 102:9 except [3] - 25:7, 70:1, 110:2 Except [1] - 110:8 exception [2] - 12:13, 36:7 exceptions [2] - 42:3, 83:17 exchange [2] - 35:18, 41:2 exchanged [1] - 31:22 exclude [2] - 46:21, 76:20 excluded [1] - 96:21 exclusive [1] - 32:20 excuse [5] - 7:5, 13:9, 13:11, 44:25, 107:13 excused [1] - 48:19 exempted [1] - 53:4 exercise [1] - 32:14 exhibits [5] - 10:25, 76:12, 95:8, 95:10, 97:18 exist [1] - 79:1 exists [1] - 21:7 expect [2] - 38:18, 41:24 expectation [1] - 16:25 expedited [3] - 3:15, 31:11, 42:8 expenditure [2] - 5:11, 92:13 expenditures [5] - 6:14, 6:15, 6:24, 46:11, 88:22 expenses [3] - 71:17, 73:20, 80:8 experience [1] - 74:19</p>	<p>expert [8] - 13:23, 43:21, 47:12, 51:23, 52:4, 60:20, 61:5, 90:3 expert's [1] - 60:24 experts [25] - 7:21, 17:6, 33:16, 34:18, 38:13, 38:19, 38:21, 40:17, 40:22, 48:4, 51:15, 56:24, 58:19, 58:21, 78:11, 89:15, 90:25, 91:2, 92:3, 92:5, 98:10, 102:9, 103:25, 112:18 explain [1] - 28:12 explained [1] - 90:12 explaining [1] - 4:20 explanation [2] - 89:12, 110:23 explication [1] - 110:24 exposes [1] - 26:4 expressed [2] - 67:3, 111:6 expressly [3] - 12:20, 83:22, 87:2 extended [1] - 3:14 extension [3] - 17:17, 51:6, 51:7 extensive [1] - 65:22 extent [8] - 13:20, 15:24, 29:17, 87:17, 105:18, 110:5, 110:9, 114:2 extraordinarily [2] - 24:7, 24:18 extremely [1] - 54:13</p> <p style="text-align: center;">F</p> <p>face [2] - 39:13, 81:1 facing [1] - 82:14 fact [17] - 8:3, 13:25, 20:14, 20:16, 30:4, 34:19, 47:19, 56:20, 58:23, 67:11, 72:3, 72:14, 74:13, 87:2, 94:7, 97:20, 106:8 facts [16] - 22:5, 39:17, 39:20, 55:3, 59:18, 59:19, 59:20, 59:23, 60:1, 61:9, 61:11, 61:15, 77:25, 89:4, 90:3, 91:1 factual [3] - 15:14, 36:1, 88:21 failed [3] - 15:2, 15:5, 90:12 failure [2] - 28:11, 49:6 fairness [3] - 42:6,</p>	<p>63:1 faith [1] - 90:16 fall [3] - 6:7, 45:1, 46:3 falls [1] - 114:16 false [2] - 12:18, 88:4 falsity [1] - 86:9 familiar [7] - 37:7, 44:24, 68:23, 69:1, 89:2, 93:24, 103:7 familiarity [2] - 31:1, 65:11 far [3] - 39:3, 93:4, 95:3 fashion [1] - 52:2 fast [1] - 48:24 fast-and-loose [1] - 48:24 fate [1] - 80:25 fax [2] - 104:17, 113:9 faxed [1] - 113:2 Faxed [1] - 113:10 Federal [1] - 18:10 federal [22] - 5:25, 10:12, 19:12, 20:1, 20:8, 22:15, 22:17, 23:25, 28:15, 37:4, 41:2, 41:15, 41:16, 44:25, 45:1, 55:13, 57:22, 84:24, 85:3, 96:18, 99:24, 108:2 federal court [22] - 5:20, 6:9, 8:2, 9:15, 10:5, 11:12, 19:24, 26:18, 32:18, 32:23, 35:23, 38:7, 64:4, 64:5, 64:7, 68:7, 68:14, 68:19, 75:8, 81:1, 82:1, 85:1 federal docket [3] - 7:11, 8:4, 20:10 Federal rule [6] - 53:2, 53:23, 107:22, 107:24, 108:2, 108:8 fees [15] - 17:22, 17:24, 18:2, 21:12, 21:20, 22:2, 30:2, 30:4, 48:13, 49:22, 50:5, 50:15, 91:23, 92:21, 113:16 felt [3] - 34:9, 42:3, 110:16 few [4] - 79:8, 93:17, 98:12, 104:25 fight [4] - 29:11, 74:12, 91:8, 101:3 fighting [1] - 79:15 figure [3] - 37:6, 40:3, 99:6 file [4] - 7:15, 37:18,</p>	<p>60:22, 67:15 filed [20] - 5:19, 6:20, 7:14, 8:4, 11:18, 18:13, 18:16, 18:17, 18:23, 23:20, 31:24, 35:8, 41:14, 42:4, 42:7, 42:10, 48:7, 67:12, 79:2, 107:6 filing [9] - 3:14, 11:16, 14:20, 16:12, 29:13, 31:20, 34:15, 50:3, 52:8 filings [1] - 7:24 filling [1] - 30:23 final [4] - 4:11, 23:2, 76:20, 78:10 financial [5] - 40:13, 46:10, 55:11, 71:12, 73:16 fine [4] - 59:12, 94:11, 101:20, 113:10 firms [1] - 97:13 First [4] - 18:8, 52:20, 79:9, 81:15 first [16] - 4:8, 18:3, 24:19, 24:23, 32:7, 35:12, 49:17, 52:15, 58:7, 64:5, 70:9, 82:4, 82:9, 92:7, 92:8, 97:1 fit [1] - 12:16 five [8] - 46:17, 52:12, 84:20, 85:9, 91:10, 94:15, 94:17, 94:20 flip [1] - 68:16 focus [1] - 27:18 follow [2] - 23:9, 52:15 follow-up [1] - 52:15 followed [1] - 4:9 following [2] - 7:3, 25:11 fool [2] - 39:22, 43:16 fooled [1] - 12:23 forever [1] - 51:7 forget [1] - 18:17 form [4] - 9:16, 10:20, 72:10, 113:8 form-over-substance [2] - 9:16, 10:20 format [1] - 105:17 formulate [1] - 8:14 formulated [1] - 10:1 forth [6] - 23:12, 54:25, 70:25, 76:16, 96:7, 103:4 fortunately [1] - 71:8 Forty [1] - 105:11 Forty-eight [1] -</p>	<p>105:11 forum [1] - 27:14 forward [2] - 71:25, 75:3 four [2] - 81:23, 92:5 fourth [2] - 21:23, 83:14 fourths [1] - 104:24 frame [1] - 98:5 framed [1] - 32:10 frankly [2] - 7:16, 63:8 free [4] - 8:13, 46:22, 57:16, 91:14 Frequently [1] - 58:3 Friday [3] - 37:2, 37:9, 42:4 friendly [1] - 95:22 friends [1] - 95:23 front [3] - 58:12, 60:16, 70:4 Fuel [1] - 19:17 full [3] - 7:7, 7:8, 51:15 fully [3] - 10:8, 62:18, 111:15</p> <p style="text-align: center;">G</p> <p>G&T [1] - 26:19 gained [1] - 25:15 gaps [1] - 111:5 Gary Dodge [1] - 3:22 gatekeeper [1] - 73:1 Gees [1] - 82:16 general [6] - 28:25, 47:2, 48:8, 56:21, 60:8, 63:13 general rate case [6] - 6:23, 23:17, 26:12, 29:4, 71:24, 72:21 generate [1] - 39:16 generators [1] - 71:9 gentlemen [1] - 3:4 genuine [2] - 30:8, 33:3 given [6] - 14:21, 15:11, 15:13, 27:22, 31:3, 95:11 gonna [23] - 8:3, 8:9, 28:9, 30:2, 45:22, 46:9, 47:23, 60:17, 61:12, 81:23, 99:3, 99:9, 101:5, 101:7, 108:5, 111:4, 112:11, 112:18, 113:3, 113:18, 114:15, 114:20 good faith [11] -</p>
---	--	---	---	--

<p>14:8, 37:19, 49:24, 50:5, 82:7, 82:10, 86:5, 86:21, 92:22, 93:8, 113:22 gotta [1] - 73:8 govern [1] - 27:17 governing [2] - 8:25, 74:10 government [1] - 69:25 granted [2] - 30:14, 107:7 great [1] - 103:5 Great [1] - 111:13 Greg Monson [1] - 37:3 Grid West [4] - 72:6, 72:11, 72:13, 72:19 group [6] - 3:12, 3:23, 4:9, 6:4, 8:12, 105:15 guard [1] - 102:4 guess [16] - 37:12, 43:12, 43:22, 44:21, 44:23, 45:3, 53:9, 55:20, 61:21, 74:1, 78:2, 95:5, 99:2, 99:22, 109:10, 112:14 guessing [1] - 44:1 gun [2] - 16:15, 86:7 guys [2] - 80:19, 92:6</p>	<p>Hearing officer [100] - 3:3, 3:17, 3:21, 3:24, 4:3, 4:7, 4:13, 4:17, 9:23, 14:16, 16:3, 18:5, 18:8, 19:15, 21:1, 21:11, 21:17, 22:12, 22:24, 23:2, 23:6, 30:15, 30:19, 30:22, 36:13, 36:16, 36:20, 40:3, 40:21, 42:9, 42:13, 42:17, 44:8, 44:14, 44:16, 45:6, 45:8, 45:11, 48:10, 52:11, 52:14, 53:12, 53:17, 53:24, 55:14, 56:3, 57:22, 61:19, 62:2, 62:5, 62:7, 64:12, 64:23, 65:5, 65:12, 65:15, 65:17, 66:2, 66:6, 66:21, 67:23, 68:21, 69:5, 70:18, 70:22, 75:15, 76:1, 76:4, 78:12, 78:18, 93:12, 94:7, 94:11, 94:19, 96:22, 98:15, 98:23, 99:11, 99:15, 99:17, 99:21, 100:6, 100:9, 103:6, 103:13, 103:22, 105:21, 109:22, 111:11, 111:14, 111:22, 112:1, 112:13, 112:21, 112:24, 113:4, 113:7, 113:10, 114:20, 115:2 hearings [1] - 51:21 hedged [1] - 85:19 hedging [2] - 86:1, 87:17 heightened [4] - 101:1, 101:10, 101:13, 101:19 held [4] - 45:14, 82:7, 96:11, 96:14 help [3] - 36:17, 62:7, 68:24 hence [1] - 94:24 hereof [1] - 70:2 hesitate [2] - 43:18, 44:21 hidden [1] - 77:9 hide [6] - 40:18, 79:6, 82:12, 85:17, 87:20, 92:24 hiding [1] - 82:19 higher [1] - 106:24 highly [16] - 24:15, 28:4, 41:17, 54:6, 74:20, 102:1, 102:2, 103:1, 103:10, 103:11, 107:7,</p>	<p>107:10, 107:18, 109:1 highly confidential [1] - 113:19 highly-confidential [3] - 41:17, 102:2, 103:11 highly-proprietary [1] - 103:10 highly-sensitive [4] - 54:6, 102:2, 103:10, 107:7 history [1] - 71:1 HOGLE [1] - 98:21 hold [6] - 8:6, 16:19, 19:4, 19:6, 77:4, 98:13 holding [2] - 14:21, 84:5 holds [1] - 16:17 honestly [1] - 21:22 honoring [1] - 13:24 hope [4] - 47:8, 50:16, 66:24, 87:19 hoped [1] - 43:8 hopeful [1] - 112:19 Hornbook Law [1] - 11:20 horribles [1] - 31:16 horror [3] - 91:13, 91:14, 99:9 hours [6] - 97:22, 98:5, 99:3, 105:11 house [2] - 4:6, 55:18 huge [3] - 51:7, 78:9, 104:20 hundred [1] - 12:1 hundreds [2] - 20:3 Hunter [4] - 34:23, 34:24, 70:24, 71:3 Hunter II [7] - 5:1, 6:12, 17:18, 36:3, 40:15, 41:9, 43:1 Huntington [2] - 70:25, 71:9 hypothetical [1] - 95:21 hypothetically [2] - 56:13, 77:19</p>	<p>identify [2] - 29:4, 88:7 imagine [1] - 68:16 immediately [4] - 7:14, 17:6, 106:9, 112:19 immune [3] - 53:4, 53:22, 54:3 impact [8] - 20:20, 60:15, 71:4, 71:14, 73:17, 77:18, 77:23 impacts [2] - 19:25, 63:20 impairment [1] - 53:8 impermissible [1] - 62:11 implication [1] - 49:10 implications [1] - 113:14 important [5] - 25:20, 30:6, 77:24, 84:10, 86:2 impression [1] - 58:15 improper [4] - 25:13, 25:22, 61:19, 61:22 improvements [8] - 5:4, 5:21, 6:4, 7:4, 20:6, 36:3, 40:14, 41:10 imprudent [1] - 73:22 in-house [1] - 4:6 inadmissible [9] - 39:4, 39:13, 55:22, 59:8, 59:11, 61:5, 62:1, 62:22, 90:23 inadvertently [2] - 106:8, 114:17 inapplicable [1] - 108:3 inappropriate [4] - 22:4, 60:13, 93:1, 93:6 inartfully [1] - 35:6 include [2] - 8:20, 35:25 included [4] - 6:13, 34:21, 45:17, 62:24 includes [1] - 53:18 Includes [1] - 69:24 including [6] - 14:11, 29:1, 33:15, 40:23, 91:2, 100:4 incorporated [1] - 21:14 Increase [1] - 3:6 incurred [1] - 72:13 indeed [5] - 20:14,</p>	<p>31:9, 33:12, 71:2, 107:10 Indeed [1] - 25:13 independent [2] - 57:17, 79:21 indicate [1] - 47:2 indicated [4] - 19:1, 19:4, 51:11, 108:11 indirectly [2] - 25:3, 69:19 industry [1] - 89:8 inform [1] - 61:20 information [89] - 4:22, 6:19, 7:22, 10:24, 12:16, 12:20, 13:4, 20:22, 23:11, 24:4, 24:13, 24:16, 26:2, 26:6, 26:7, 26:10, 26:16, 26:25, 27:16, 27:20, 27:21, 28:1, 28:4, 28:8, 29:5, 29:14, 29:19, 30:10, 30:24, 31:22, 31:25, 33:22, 34:17, 36:2, 38:14, 39:6, 39:17, 41:18, 42:19, 42:20, 44:10, 46:3, 50:10, 51:12, 52:22, 53:15, 54:5, 54:6, 64:1, 64:3, 64:23, 64:25, 65:18, 65:19, 65:24, 66:20, 67:25, 68:24, 69:2, 69:14, 69:18, 72:19, 72:25, 73:7, 73:8, 75:1, 75:13, 76:15, 84:15, 90:8, 95:23, 95:25, 99:1, 107:5, 107:17, 107:24, 108:24, 110:5, 110:8, 110:10, 110:11, 110:22, 110:25, 112:18, 113:21, 113:24, 114:1 Information [1] - 75:4 information/ documents [1] - 22:21 informative [1] - 82:17 informed [2] - 12:21, 45:15 inherent [1] - 61:21 initial [3] - 19:15, 43:12, 94:25 insecure [1] - 102:10 instance [9] - 31:24, 33:2, 45:19, 50:24, 58:4, 67:10, 71:8, 95:20, 95:21 instituted [1] - 62:11 insurance [1] - 71:8</p>
H		I		
<p>Hales [1] - 49:3 half [2] - 91:13 hand [4] - 39:10, 87:23, 89:21, 91:25 handicap [1] - 16:14 handled [1] - 91:25 hands [2] - 60:20, 107:9 hap [1] - 63:20 happy [1] - 101:14 hailed [1] - 81:1 heads [1] - 92:19 hear [2] - 4:8, 49:13 heard [8] - 32:2, 33:19, 45:19, 51:17, 78:3, 78:24, 80:2, 104:10 hearing [26] - 7:19, 10:10, 16:3, 19:1, 19:4, 19:5, 19:7, 23:21, 28:2, 31:2, 35:7, 38:11, 43:24, 47:17, 56:24, 62:9, 68:17, 76:23, 88:9, 88:10, 95:10, 103:21, 112:4, 115:4</p>	<p>hearings [1] - 51:21 hedged [1] - 85:19 hedging [2] - 86:1, 87:17 heightened [4] - 101:1, 101:10, 101:13, 101:19 held [4] - 45:14, 82:7, 96:11, 96:14 help [3] - 36:17, 62:7, 68:24 hence [1] - 94:24 hereof [1] - 70:2 hesitate [2] - 43:18, 44:21 hidden [1] - 77:9 hide [6] - 40:18, 79:6, 82:12, 85:17, 87:20, 92:24 hiding [1] - 82:19 higher [1] - 106:24 highly [16] - 24:15, 28:4, 41:17, 54:6, 74:20, 102:1, 102:2, 103:1, 103:10, 103:11, 107:7,</p>	<p>i.e [1] - 51:10 ie [5] - 6:23, 8:6, 34:1, 50:24, 58:20 Idaho [1] - 106:4 idea [1] - 42:1 ideas [1] - 47:14 identical [2] - 7:1, 92:2</p>	<p>included [4] - 6:13, 34:21, 45:17, 62:24 includes [1] - 53:18 Includes [1] - 69:24 including [6] - 14:11, 29:1, 33:15, 40:23, 91:2, 100:4 incorporated [1] - 21:14 Increase [1] - 3:6 incurred [1] - 72:13 indeed [5] - 20:14,</p>	<p>31:9, 33:12, 71:2, 107:10 Indeed [1] - 25:13 independent [2] - 57:17, 79:21 indicate [1] - 47:2 indicated [4] - 19:1, 19:4, 51:11, 108:11 indirectly [2] - 25:3, 69:19 industry [1] - 89:8 inform [1] - 61:20 information [89] - 4:22, 6:19, 7:22, 10:24, 12:16, 12:20, 13:4, 20:22, 23:11, 24:4, 24:13, 24:16, 26:2, 26:6, 26:7, 26:10, 26:16, 26:25, 27:16, 27:20, 27:21, 28:1, 28:4, 28:8, 29:5, 29:14, 29:19, 30:10, 30:24, 31:22, 31:25, 33:22, 34:17, 36:2, 38:14, 39:6, 39:17, 41:18, 42:19, 42:20, 44:10, 46:3, 50:10, 51:12, 52:22, 53:15, 54:5, 54:6, 64:1, 64:3, 64:23, 64:25, 65:18, 65:19, 65:24, 66:20, 67:25, 68:24, 69:2, 69:14, 69:18, 72:19, 72:25, 73:7, 73:8, 75:1, 75:13, 76:15, 84:15, 90:8, 95:23, 95:25, 99:1, 107:5, 107:17, 107:24, 108:24, 110:5, 110:8, 110:10, 110:11, 110:22, 110:25, 112:18, 113:21, 113:24, 114:1 Information [1] - 75:4 information/ documents [1] - 22:21 informative [1] - 82:17 informed [2] - 12:21, 45:15 inherent [1] - 61:21 initial [3] - 19:15, 43:12, 94:25 insecure [1] - 102:10 instance [9] - 31:24, 33:2, 45:19, 50:24, 58:4, 67:10, 71:8, 95:20, 95:21 instituted [1] - 62:11 insurance [1] - 71:8</p>

<p>intend [6] - 34:17, 35:25, 36:6, 37:24, 76:1, 106:24</p> <p>intended [5] - 23:7, 23:8, 69:7, 85:13, 85:14</p> <p>intends [3] - 17:10, 19:1, 19:4</p> <p>intent [2] - 78:4, 114:17</p> <p>interest [5] - 29:18, 82:11, 82:12, 82:19, 86:22</p> <p>interested [1] - 23:19</p> <p>interests [2] - 50:19, 82:8</p> <p>interpretation [1] - 21:5</p> <p>interrogatories [1] - 48:16</p> <p>Interrogatories [1] - 48:17</p> <p>interrupt [1] - 36:13</p> <p>interrupting [1] - 36:14</p> <p>intervene [1] - 70:10</p> <p>intervener [1] - 28:22</p> <p>intervention [4] - 3:12, 3:23, 4:9, 8:11</p> <p>investigate [1] - 82:21</p> <p>investigating [1] - 72:18</p> <p>investment [1] - 56:6</p> <p>investments [2] - 55:25, 71:25</p> <p>invite [1] - 90:19</p> <p>inviting [1] - 75:21</p> <p>involve [1] - 52:21</p> <p>involved [9] - 20:6, 28:21, 28:23, 37:4, 37:5, 37:6, 41:15, 69:12, 73:3</p> <p>involving [2] - 41:9, 72:6</p> <p>irrelevance [1] - 67:2</p> <p>irrelevant [9] - 12:2, 13:25, 14:23, 16:2, 35:11, 52:18, 55:17, 55:22, 57:20</p> <p>issuance [2] - 80:10, 80:18</p> <p>issue [53] - 6:4, 6:12, 6:22, 8:5, 17:9, 17:17, 23:16, 40:14, 42:14, 46:1, 46:2, 46:24, 49:9, 49:11, 50:18, 51:23, 52:3, 54:13, 54:20, 54:25, 56:4, 56:14, 56:19, 58:7, 58:17, 59:7, 62:19,</p>	<p>63:4, 65:18, 66:25, 68:9, 72:1, 72:9, 79:12, 80:11, 82:14, 82:21, 85:25, 87:9, 90:2, 91:11, 92:1, 92:18, 93:13, 95:24, 96:25, 97:13, 98:9, 98:13, 106:16, 109:4, 113:21</p> <p>issued [4] - 26:8, 28:14, 68:7, 93:10</p> <p>issues [21] - 7:21, 10:19, 15:1, 16:21, 17:12, 20:17, 28:16, 36:9, 36:18, 40:4, 46:23, 68:15, 71:6, 78:9, 87:11, 98:13, 103:15, 112:2, 113:16, 113:18</p> <p>issuing [1] - 74:24</p> <p>items [1] - 88:23</p> <p>itself [12] - 39:4, 47:3, 47:4, 53:1, 59:13, 68:25, 71:9, 84:10, 87:22, 111:2, 111:3, 113:14</p>	<p>K</p>	<p>39:14, 47:4, 59:13, 59:14, 59:24, 60:2, 61:17, 68:12, 91:3</p> <p>leads [1] - 73:23</p> <p>learned [1] - 5:14</p> <p>least [5] - 32:2, 67:1, 67:16, 101:23, 108:19</p> <p>leave [2] - 42:13, 64:5</p> <p>leaving [1] - 105:19</p> <p>lectern [1] - 4:16</p> <p>led [1] - 34:24</p> <p>left [1] - 57:16</p> <p>legal [32] - 3:11, 35:8, 35:10, 38:21, 39:11, 39:13, 41:5, 56:18, 56:22, 57:10, 57:13, 57:18, 57:19, 57:21, 58:20, 59:20, 65:2, 68:11, 76:21, 77:8, 81:10, 87:23, 88:5, 88:8, 88:13, 88:18, 88:19, 89:20, 89:23, 90:16, 90:22, 95:23</p> <p>legitimacy [1] - 25:19</p> <p>legitimate [1] - 82:20</p> <p>legitimately [2] - 86:16, 114:11</p> <p>length [1] - 33:4</p> <p>less [6] - 33:3, 43:19, 50:16, 92:7, 102:14, 104:16</p> <p>letter [3] - 52:4, 113:2, 113:10</p> <p>liability [1] - 80:2</p> <p>lies [1] - 24:21</p> <p>Light [1] - 71:7</p> <p>Light-owned [1] - 71:7</p> <p>likely [9] - 11:15, 39:5, 39:14, 47:4, 59:14, 59:24, 60:2, 68:12</p> <p>limited [2] - 5:8, 17:13</p> <p>line [2] - 31:17, 90:6</p> <p>lines [1] - 47:15</p> <p>lion's [1] - 109:4</p> <p>list [4] - 37:9, 42:2, 43:4, 50:1</p> <p>listen [2] - 85:19, 91:2</p> <p>listened [1] - 90:24</p> <p>listening [1] - 89:16</p> <p>literally [2] - 20:3, 90:9</p> <p>litigation [4] - 10:22, 15:16, 50:14, 84:18</p> <p>loathe [1] - 104:19</p>	<p>logistical [1] - 112:2</p> <p>logistics [1] - 111:16</p> <p>look [13] - 18:24, 23:20, 29:4, 38:25, 52:5, 60:14, 71:1, 72:3, 88:25, 90:2, 90:21, 92:4, 93:2</p> <p>Look [4] - 37:23, 50:1, 57:1, 89:13</p> <p>Looked [1] - 90:2</p> <p>looked [2] - 63:9, 90:3</p> <p>looking [1] - 90:1</p> <p>looks [2] - 54:22, 63:17</p> <p>loose [1] - 48:24</p> <p>lost [2] - 34:4, 58:25</p>
<p>J</p>	<p>J</p>	<p>L</p>	<p>knowing [2] - 17:1, 89:4</p> <p>knowledge [3] - 25:14, 41:13, 79:3</p> <p>knows [4] - 9:6, 30:22, 97:1, 106:14</p> <p>lack [3] - 30:24, 30:25, 65:11</p> <p>ladies [1] - 3:3</p> <p>language [1] - 68:21</p> <p>lap [1] - 40:2</p> <p>larger [1] - 6:11</p> <p>Last [1] - 18:21</p> <p>last [17] - 5:18, 6:6, 18:18, 18:22, 18:23, 19:2, 25:12, 73:23, 76:2, 77:21, 84:9, 96:25, 98:12, 105:20, 108:23, 111:7, 112:10</p> <p>lasted [1] - 7:19</p> <p>Lastly [1] - 92:21</p> <p>lastly [1] - 17:20</p> <p>late [1] - 87:20</p> <p>latter [1] - 24:23</p> <p>law [10] - 23:25, 32:12, 38:24, 47:2, 56:25, 63:6, 63:7, 63:11, 85:3, 91:5</p> <p>lawsuit [5] - 5:19, 6:11, 33:12, 58:6, 58:8</p> <p>lawyers [3] - 35:8, 37:5, 77:8</p> <p>lawyers' [1] - 78:16</p> <p>lead [11] - 39:5,</p>	<p>M</p>
<p>job [3] - 10:17, 80:1, 89:13</p> <p>Johnson [2] - 19:16, 19:21</p> <p>join [1] - 86:2</p> <p>joins [1] - 23:3</p> <p>judge [18] - 5:25, 10:8, 10:11, 10:12, 18:18, 18:25, 19:12, 20:8, 28:15, 38:23, 56:21, 57:4, 57:15, 57:22, 57:23, 81:3, 84:24</p> <p>Judge [2] - 18:12, 30:17</p> <p>judge's [2] - 81:18, 81:20</p> <p>judges [1] - 57:12</p> <p>jumped [1] - 86:7</p> <p>jurisdiction [9] - 10:17, 32:15, 32:18, 32:21, 32:24, 40:5, 40:8, 80:10, 82:20</p> <p>jurisdictional [1] - 40:4</p> <p>jury [3] - 56:20, 57:15, 60:16</p> <p>justify [1] - 92:13</p>	<p>job [3] - 10:17, 80:1, 89:13</p> <p>Johnson [2] - 19:16, 19:21</p> <p>join [1] - 86:2</p> <p>joins [1] - 23:3</p> <p>judge [18] - 5:25, 10:8, 10:11, 10:12, 18:18, 18:25, 19:12, 20:8, 28:15, 38:23, 56:21, 57:4, 57:15, 57:22, 57:23, 81:3, 84:24</p> <p>Judge [2] - 18:12, 30:17</p> <p>judge's [2] - 81:18, 81:20</p> <p>judges [1] - 57:12</p> <p>jumped [1] - 86:7</p> <p>jurisdiction [9] - 10:17, 32:15, 32:18, 32:21, 32:24, 40:5, 40:8, 80:10, 82:20</p> <p>jurisdictional [1] - 40:4</p> <p>jury [3] - 56:20, 57:15, 60:16</p> <p>justify [1] - 92:13</p>	<p>lack [3] - 30:24, 30:25, 65:11</p> <p>ladies [1] - 3:3</p> <p>language [1] - 68:21</p> <p>lap [1] - 40:2</p> <p>larger [1] - 6:11</p> <p>Last [1] - 18:21</p> <p>last [17] - 5:18, 6:6, 18:18, 18:22, 18:23, 19:2, 25:12, 73:23, 76:2, 77:21, 84:9, 96:25, 98:12, 105:20, 108:23, 111:7, 112:10</p> <p>lasted [1] - 7:19</p> <p>Lastly [1] - 92:21</p> <p>lastly [1] - 17:20</p> <p>late [1] - 87:20</p> <p>latter [1] - 24:23</p> <p>law [10] - 23:25, 32:12, 38:24, 47:2, 56:25, 63:6, 63:7, 63:11, 85:3, 91:5</p> <p>lawsuit [5] - 5:19, 6:11, 33:12, 58:6, 58:8</p> <p>lawyers [3] - 35:8, 37:5, 77:8</p> <p>lawyers' [1] - 78:16</p> <p>lead [11] - 39:5,</p>	<p>magistrate [4] - 10:11, 18:11, 18:18, 18:25</p> <p>Magistrate [1] - 18:12</p> <p>main [2] - 27:18, 92:23</p> <p>maintained [1] - 100:11</p> <p>majority [1] - 89:8</p> <p>man [1] - 90:1</p> <p>managed [1] - 29:18</p> <p>manages [1] - 5:3</p> <p>manner [3] - 26:20, 30:11, 30:12</p> <p>March [2] - 35:16, 74:4</p> <p>mark [1] - 100:1</p> <p>marked [10] - 8:21, 13:8, 25:2, 91:21, 99:25, 101:15, 101:16, 101:18, 106:1, 114:14</p> <p>material [23] - 9:5, 13:3, 25:2, 25:15, 39:4, 44:17, 44:19, 52:19, 53:5, 53:22, 79:19, 79:20, 82:6, 83:2, 83:3, 83:7, 94:3, 103:11, 103:18, 109:24, 110:3, 110:15, 110:17</p> <p>material' [1] - 82:25</p> <p>materials [4] - 102:2, 102:14, 102:19, 102:25</p> <p>Matt Moscon [1] - 4:4</p> <p>Matter [1] - 3:5</p> <p>matter [14] - 8:16, 12:1, 16:23, 21:20,</p>	

<p>23:14, 25:25, 27:5, 28:10, 29:16, 31:12, 32:19, 58:24, 94:24, 101:4</p> <p>matters [3] - 16:17, 94:1, 103:2</p> <p>mean [31] - 21:22, 27:25, 40:16, 40:17, 41:8, 44:21, 54:12, 54:15, 56:14, 57:18, 59:11, 65:1, 65:3, 66:1, 70:16, 75:9, 75:20, 78:14, 81:5, 86:13, 96:25, 97:1, 98:25, 101:12, 105:19, 105:23, 106:20, 111:21, 111:23, 112:17, 114:5</p> <p>Meaning [2] - 35:6, 95:8</p> <p>meaning [3] - 20:10, 53:14, 59:5</p> <p>means [2] - 6:10, 67:14</p> <p>meant [1] - 75:18</p> <p>meantime [1] - 29:12</p> <p>meanwhile [1] - 98:10</p> <p>measures [2] - 103:9, 110:13</p> <p>Mechanically [1] - 96:22</p> <p>meet [30] - 31:22, 35:18, 37:2, 37:8, 41:14, 42:1, 43:9, 44:3, 46:16, 50:1, 52:9, 54:11, 86:6, 86:11, 95:1, 97:12, 97:25, 99:12, 101:5, 102:15, 104:2, 104:7, 104:10, 105:9, 105:22, 106:15, 106:25, 107:20, 109:10, 113:23</p> <p>meet-and-confer [5] - 31:22, 35:18, 43:9, 86:11, 99:12</p> <p>meeting [2] - 86:14, 101:21</p> <p>memo [3] - 11:6, 18:23, 19:3</p> <p>mentioned [1] - 21:13</p> <p>merely [1] - 10:14</p> <p>meritorious [1] - 17:25</p> <p>met [2] - 58:10, 59:1</p> <p>might [4] - 52:25, 82:15, 87:10, 114:17</p> <p>Might [1] - 57:6</p> <p>million [1] - 16:16</p>	<p>millions [1] - 20:3</p> <p>mind [1] - 73:12</p> <p>mine [2] - 17:14, 64:17</p> <p>mines [1] - 71:7</p> <p>minimum [1] - 14:7</p> <p>minor [3] - 41:22, 42:20, 58:7</p> <p>minus [1] - 97:20</p> <p>minute [4] - 34:14, 45:7, 51:17, 94:10</p> <p>minutes [5] - 52:12, 93:17, 94:16, 94:17, 94:20</p> <p>misses [1] - 32:16</p> <p>missing [2] - 49:23, 51:19</p> <p>misspoke [1] - 77:2</p> <p>mistake [1] - 109:17</p> <p>modifying [1] - 83:19</p> <p>moment [2] - 40:21, 114:21</p> <p>money [3] - 5:7, 5:15, 80:8</p> <p>Monson [5] - 30:23, 35:15, 35:19, 36:25, 41:13</p> <p>month [6] - 51:10, 51:16, 52:2, 52:5, 92:7, 93:10</p> <p>month's [1] - 51:22</p> <p>months [2] - 19:14, 92:5</p> <p>Moreover [1] - 7:1</p> <p>morning [7] - 3:3, 30:18, 30:19, 30:20, 31:16, 32:3, 32:9</p> <p>Moscon [13] - 4:3, 30:16, 45:12, 52:11, 52:14, 75:17, 81:5, 86:8, 87:23, 91:5, 91:24, 93:20, 103:6</p> <p>MOSCON [73] - 4:4, 30:17, 30:20, 36:15, 36:19, 36:24, 40:25, 42:16, 42:22, 44:12, 44:15, 44:19, 45:13, 45:15, 52:25, 53:16, 53:25, 55:20, 56:9, 57:25, 61:25, 62:4, 62:6, 62:15, 64:15, 65:2, 65:7, 65:13, 65:16, 66:1, 66:4, 66:7, 67:8, 68:1, 69:4, 69:6, 75:20, 76:3, 76:5, 78:14, 94:5, 94:9, 94:12, 94:17, 94:23, 96:13, 96:16, 97:8, 98:20, 98:22, 99:2, 99:5, 99:14, 99:16, 99:19, 100:12,</p>	<p>103:12, 103:14, 103:23, 104:6, 104:9, 107:21, 111:20, 111:24, 112:4, 112:14, 112:23, 113:1, 113:5, 113:9, 113:25, 114:18, 115:1</p> <p>Moscon's [1] - 105:23</p> <p>most [7] - 5:4, 50:2, 66:12, 84:9, 89:2, 94:13, 109:1</p> <p>most-highly-top-secret [1] - 109:1</p> <p>motion [15] - 3:11, 17:22, 18:3, 18:9, 18:13, 23:4, 41:14, 61:2, 67:12, 67:15, 67:24, 68:20, 79:10, 88:21, 104:3</p> <p>motion for summary judgment [2] - 35:9, 78:14</p> <p>motion to compel [16] - 7:14, 14:20, 21:23, 24:21, 26:22, 28:6, 29:11, 30:5, 31:20, 33:24, 34:15, 37:18, 42:4, 49:18, 52:8, 74:6</p> <p>motions [6] - 35:8, 47:13, 49:8, 51:1, 79:1, 86:4</p> <p>Mountain [1] - 19:17</p> <p>Mountain's [2] - 16:23, 88:22</p> <p>move [1] - 79:14</p> <p>moves [1] - 93:3</p> <p>moving [2] - 3:19, 4:8</p> <p>Moving [1] - 33:2</p> <p>must [5] - 20:11, 23:10, 28:24, 82:7, 105:9</p>	<p>37:5, 38:13, 38:21, 45:11, 48:1, 50:1, 51:6, 51:7, 51:22, 51:25, 52:1, 52:5, 52:20, 54:11, 55:4, 60:5, 61:16, 71:20, 72:3, 78:23, 79:20, 80:7, 80:8, 80:11, 80:19, 85:11, 91:17, 92:3, 94:7, 94:9, 97:2, 98:11, 99:11, 99:12, 100:3, 103:25, 104:25, 107:18, 107:19, 109:12, 112:18, 114:16, 114:21</p> <p>needed [2] - 36:4, 48:8</p> <p>needing [1] - 109:5</p> <p>needs [3] - 35:4, 47:20, 105:4</p> <p>negotiation [3] - 101:2, 103:17, 104:13</p> <p>negotiations [1] - 96:19</p> <p>never [11] - 20:9, 22:2, 58:14, 74:2, 79:3, 79:24, 85:13, 86:25, 87:2</p> <p>next [1] - 93:17</p> <p>night [1] - 37:22</p> <p>no-waiver [1] - 109:1</p> <p>Nobody [1] - 81:21</p> <p>non [6] - 35:11, 98:25, 108:17, 109:16, 112:5, 114:2</p> <p>non-confidential [2] - 98:25, 114:2</p> <p>non-designated [1] - 112:5</p> <p>non-discoverable [1] - 35:11</p> <p>non-waiver [2] - 108:17, 109:16</p> <p>nonsense [1] - 81:4</p> <p>noon [2] - 111:19, 111:24</p> <p>normal [1] - 18:15</p> <p>normally [1] - 103:20</p> <p>note [1] - 27:10</p> <p>noted [1] - 23:18</p> <p>nothing [12] - 28:19, 32:21, 33:5, 35:14, 42:24, 43:5, 55:10, 74:13, 80:22, 85:17, 88:12, 96:1</p> <p>noticed [1] - 3:10</p> <p>notify [4] - 70:9, 84:20, 85:7, 85:10</p> <p>notions [2] - 86:11, 88:6</p>	<p>Nuffer [1] - 18:12</p> <p>Number [5] - 46:16, 46:24, 47:1, 51:9, 95:18</p> <p>number [8] - 38:25, 43:13, 46:8, 46:13, 47:24, 56:22, 95:14, 96:4</p> <p>numbers [1] - 41:3</p> <p>numerous [1] - 92:2</p>
O				
<p>obfuscation [1] - 81:9</p> <p>object [12] - 11:4, 37:10, 38:20, 43:22, 49:6, 54:24, 66:4, 66:8, 85:10, 100:21, 104:5, 104:8</p> <p>objected [5] - 5:14, 7:5, 7:6, 7:8, 34:10</p> <p>objection [13] - 11:21, 12:22, 13:13, 13:18, 14:15, 22:7, 26:13, 48:19, 57:19, 65:25, 74:12, 94:19</p> <p>objections [11] - 7:9, 7:13, 11:18, 11:22, 13:12, 14:17, 17:25, 34:11, 47:17, 52:16</p> <p>objective [2] - 36:21, 92:23</p> <p>objects [1] - 26:15</p> <p>obligated [2] - 8:23, 9:18</p> <p>obligation [4] - 9:25, 72:15, 90:13, 104:3</p> <p>obligations [1] - 27:25</p> <p>obstruct [1] - 50:9</p> <p>obtain [2] - 5:5, 5:16</p> <p>obtained [1] - 84:18</p> <p>obvious [2] - 22:3, 100:10</p> <p>obviously [8] - 16:9, 22:15, 23:9, 34:9, 35:1, 46:4, 73:11, 100:23</p> <p>offer [7] - 75:18, 85:20, 85:22, 85:23, 86:25, 88:8</p> <p>offered [3] - 58:22, 59:1, 59:2</p> <p>offering [1] - 85:24</p> <p>Office [11] - 22:15, 22:18, 22:19, 23:3, 23:13, 25:24, 27:23, 28:21, 29:23, 102:22, 102:23</p> <p>office [1] - 31:25</p>				

<p>Office of Consumer Services [1] - 4:1</p> <p>Office's [5] - 27:13, 28:6, 71:21, 72:4, 74:19</p> <p>Officer [1] - 17:23</p> <p>Oil [1] - 19:18</p> <p>old [1] - 72:21</p> <p>Oldroyd [1] - 49:3</p> <p>once [3] - 48:4, 76:17, 96:3</p> <p>one [73] - 6:18, 7:9, 12:19, 13:15, 14:22, 15:3, 15:6, 15:12, 15:13, 15:14, 15:20, 16:8, 21:9, 21:13, 22:3, 22:5, 26:6, 30:4, 38:25, 41:12, 41:23, 42:22, 42:24, 43:13, 46:8, 46:24, 48:12, 48:16, 49:1, 51:5, 51:9, 51:22, 52:3, 54:12, 56:1, 56:23, 60:12, 68:2, 68:5, 68:15, 70:8, 71:9, 75:5, 75:6, 81:12, 88:1, 88:2, 88:22, 89:25, 92:1, 92:11, 92:16, 92:23, 93:4, 93:9, 95:14, 96:4, 97:1, 97:11, 97:17, 99:9, 100:12, 102:14, 103:1, 106:4, 106:12, 107:4, 107:7, 108:11, 114:11</p> <p>One [7] - 24:8, 44:13, 48:12, 48:15, 51:5, 57:20, 113:25</p> <p>ones [2] - 89:7, 89:8</p> <p>opening statement [1] - 41:6</p> <p>opens [2] - 25:21, 78:7</p> <p>operates [1] - 5:3</p> <p>operational [1] - 73:6</p> <p>opinion [11] - 60:24, 88:5, 88:8, 88:13, 88:18, 88:20, 89:17, 89:20, 89:23, 90:16, 90:23</p> <p>opinions [1] - 90:3</p> <p>opinions/discussion [1] - 27:5</p> <p>opportunity [1] - 75:18</p> <p>opposed [2] - 4:15, 15:7</p> <p>optimal [1] - 89:5</p> <p>oral [2] - 98:7,</p>	<p>104:17</p> <p>Order [2] - 73:12, 73:14</p> <p>order [48] - 10:18, 17:5, 19:22, 26:23, 29:24, 30:13, 32:11, 34:1, 40:10, 43:10, 43:11, 43:12, 44:2, 44:6, 46:8, 47:9, 50:6, 50:18, 51:13, 64:10, 68:7, 68:18, 74:24, 75:2, 76:19, 80:7, 80:11, 82:2, 83:1, 83:19, 84:7, 84:10, 84:19, 84:22, 85:5, 85:13, 91:10, 91:11, 93:15, 95:3, 95:16, 96:9, 107:11, 108:15, 108:20, 109:23, 111:4, 114:17</p> <p>ordered [3] - 69:11, 85:9, 112:9</p> <p>ordering [1] - 85:14</p> <p>orders [3] - 24:11, 70:7, 84:14</p> <p>ordinarily [1] - 41:23</p> <p>organization [1] - 72:11</p> <p>original [2] - 59:18</p> <p>otherwise [11] - 15:15, 39:6, 46:15, 47:6, 53:4, 59:25, 60:6, 69:10, 70:7, 95:6, 96:21</p> <p>ought [1] - 17:13</p> <p>ourselves [1] - 34:2</p> <p>outlined [1] - 23:11</p> <p>outrage [1] - 33:20</p> <p>outrageous [2] - 85:2, 85:18</p> <p>outside [1] - 108:18</p> <p>outsider [4] - 31:4, 31:5, 76:6, 76:7</p> <p>overbroad [4] - 15:20, 34:9, 52:17, 92:15</p> <p>overlapping [1] - 41:16</p> <p>overly [2] - 48:11, 109:6</p> <p>overseeing [1] - 10:13</p> <p>overstate [1] - 65:10</p> <p>owe [1] - 5:21</p> <p>own [17] - 12:15, 21:15, 29:9, 34:6, 34:7, 39:16, 40:13, 43:13, 44:19, 46:10, 57:17, 62:5, 64:1, 64:3, 78:1, 87:8</p> <p>owned [1] - 71:7</p>	<p>owner [5] - 5:1, 45:18, 54:23, 56:1</p> <p>owners [12] - 54:21, 55:1, 55:6, 55:24, 71:3, 71:15, 71:18, 73:21, 76:16, 95:20, 95:22, 103:18</p> <p>owns [4] - 45:20, 45:21, 46:21</p> <p>Oxley [1] - 80:2</p>	<p>Paul Proctor [1] - 3:25</p> <p>Pause [1] - 45:10</p> <p>pay [8] - 54:21, 59:5, 71:18, 71:21, 72:15, 80:8, 80:11, 80:12</p> <p>paying [1] - 43:4</p> <p>payments [2] - 72:7, 72:20</p> <p>pendency [1] - 84:21</p> <p>pending [3] - 22:17, 105:9, 108:19</p> <p>people [5] - 17:14, 57:8, 59:5, 85:8, 92:19</p> <p>perceive [2] - 111:5, 113:17</p> <p>percent [4] - 6:14, 12:1, 98:11, 102:14</p> <p>perhaps [2] - 31:24, 35:5</p> <p>period [5] - 26:25, 31:23, 44:4, 97:24, 98:9</p> <p>Permission [1] - 94:5</p> <p>permission [1] - 94:12</p> <p>person [4] - 25:5, 43:21, 57:4, 69:21</p> <p>personal [1] - 85:18</p> <p>perspective [2] - 27:13, 86:22</p> <p>pertaining [2] - 22:20, 71:6</p> <p>phone [1] - 113:1</p> <p>phrase [2] - 48:18, 74:18</p> <p>physically [2] - 112:11, 114:4</p> <p>Physician/patient [1] - 75:6</p> <p>piece [1] - 12:19</p> <p>pieces [1] - 77:4</p> <p>place [6] - 3:10, 18:3, 73:24, 82:4, 82:9, 94:3</p> <p>placed [1] - 72:1</p> <p>places [2] - 70:14, 81:24</p> <p>plain [1] - 12:18</p> <p>plainly [3] - 26:22, 71:5, 74:11</p> <p>Plaintiff's [1] - 49:6</p> <p>plans [2] - 5:14, 73:5</p> <p>Plant [2] - 5:1, 36:4</p> <p>plant [2] - 5:3, 5:15</p> <p>Plants [2] - 70:24, 70:25</p> <p>plants [5] - 7:2, 17:18, 92:2, 92:10,</p>	
		<p>P</p>		
		<p>P.2d [1] - 49:3</p> <p>p.m [3] - 37:15, 94:22, 115:4</p> <p>Pacifi [1] - 28:17</p> <p>Pacific [1] - 33:12</p> <p>PacifiCorp [32] - 5:3, 5:9, 5:14, 5:16, 5:24, 6:25, 7:3, 7:5, 7:23, 7:24, 8:4, 8:14, 8:23, 10:18, 11:18, 12:12, 12:21, 13:18, 26:18, 45:20, 71:17, 72:10, 73:14, 79:16, 79:23, 80:13, 81:22, 83:24, 86:20, 86:25, 106:7</p> <p>PacifiCorp's [5] - 6:14, 12:25, 20:5, 36:1, 84:6</p> <p>page [5] - 41:2, 66:12, 83:15, 84:11, 98:6</p> <p>page 3 [4] - 24:23, 25:12, 72:3, 82:23</p> <p>page 4 [1] - 25:11</p> <p>page 6 [1] - 82:5</p> <p>pages [3] - 98:7, 104:16, 105:2</p> <p>paid [7] - 38:2, 40:16, 56:16, 66:16, 71:20, 71:21, 73:20</p> <p>paper [1] - 23:3</p> <p>papers [9] - 19:15, 31:23, 33:4, 40:2, 42:7, 42:10, 51:2, 62:13, 62:24</p> <p>parade [1] - 31:15</p> <p>paragraph [9] - 24:24, 69:7, 69:16, 69:17, 70:12, 82:24, 83:15, 84:10, 84:23</p> <p>Pardon [3] - 40:21, 56:3, 65:17</p> <p>pardon [3] - 36:14, 42:14, 44:14</p> <p>parrot [1] - 39:17</p> <p>parroting [1] - 61:1</p> <p>parrots [1] - 61:6</p> <p>part [11] - 5:21,</p>	<p>24:23, 25:20, 25:21, 36:24, 44:2, 44:22, 54:25, 56:11, 108:1, 114:10</p> <p>partially [1] - 78:3</p> <p>participants [1] - 110:1</p> <p>participating [1] - 73:2</p> <p>particular [9] - 6:25, 23:17, 24:20, 27:3, 28:18, 71:3, 71:15, 71:25, 110:22</p> <p>Particularly [1] - 19:17</p> <p>particularly [1] - 24:6</p> <p>Parties [1] - 33:2</p> <p>parties [61] - 6:8, 14:11, 15:22, 16:11, 16:14, 17:1, 20:14, 25:23, 27:23, 30:21, 31:6, 31:13, 32:9, 32:12, 35:22, 38:6, 44:1, 44:2, 46:16, 47:21, 49:12, 50:19, 50:25, 51:1, 51:2, 54:11, 57:2, 57:12, 61:16, 62:16, 62:17, 64:4, 65:3, 65:6, 65:9, 66:13, 67:20, 69:11, 70:8, 73:15, 76:9, 78:10, 78:13, 80:24, 83:16, 85:15, 87:10, 91:16, 93:19, 94:25, 95:9, 95:17, 97:6, 104:16, 105:14, 109:6, 109:8, 110:18, 110:21, 113:22, 114:9</p> <p>parties' [1] - 92:12</p> <p>partnership [1] - 25:6</p> <p>parts [2] - 40:25, 43:23</p> <p>party [37] - 3:19, 4:8, 11:9, 13:2, 14:4, 15:9, 20:10, 22:15, 22:16, 24:12, 27:16, 40:7, 45:21, 46:21, 46:22, 50:4, 57:3, 61:20, 62:18, 65:18, 69:2, 69:3, 70:9, 77:8, 77:9, 82:6, 83:4, 83:6, 83:8, 83:18, 84:12, 84:17, 84:19, 84:21, 98:6, 104:14, 104:15</p> <p>party's [2] - 13:4, 50:22</p> <p>passing [2] - 31:7, 37:22</p> <p>past [1] - 29:13</p> <p>pattern [1] - 74:16</p>	

<p>92:13 play [1] - 16:3 pleading [2] - 24:22, 27:19 pleadings [5] - 24:3, 51:2, 67:21, 68:4, 105:14 point [22] - 28:21, 32:17, 33:7, 48:2, 49:20, 49:22, 51:8, 54:19, 63:6, 63:22, 68:22, 71:11, 73:23, 77:10, 81:23, 82:23, 83:14, 97:8, 98:20, 100:22, 101:21, 104:9 pointed [3] - 12:12, 34:5, 60:18 points [3] - 41:9, 75:22, 78:22 portion [4] - 45:20, 45:21, 102:13 portions [7] - 37:9, 38:5, 40:25, 44:4, 46:18, 65:20, 66:10 portrayed [2] - 31:17, 50:11 posed [1] - 6:3 position [18] - 24:19, 27:2, 31:9, 31:13, 31:17, 31:18, 31:19, 33:21, 35:2, 35:14, 42:11, 58:13, 64:13, 66:23, 68:25, 74:1, 79:13, 110:23 possession [3] - 13:20, 33:13, 114:3 possibility [1] - 23:24 possible [2] - 17:8, 107:2 possibly [2] - 29:6, 91:3 potential [2] - 25:16, 47:25 potentially [2] - 47:8, 56:23 Power [4] - 5:1, 70:24, 70:25, 71:7 power [6] - 7:2, 32:24, 79:6, 92:2, 92:10, 92:13 Power Company [7] - 31:18, 31:19, 37:23, 38:18, 42:11, 43:11, 72:14 Power's [6] - 24:3, 24:18, 27:10, 31:9, 49:23, 74:1 Power/PacifiCorp [1] - 42:25 Powerdale [2] - 72:7,</p>	<p>72:8 practice [12] - 5:12, 5:23, 6:5, 24:7, 36:5, 36:23, 56:7, 56:10, 74:16, 88:24, 89:3, 89:19 practiced [1] - 21:17 practices [2] - 71:12, 71:19 practicing [1] - 21:24 precautions [1] - 107:8 precedent [7] - 19:20, 57:7, 58:6, 58:10, 59:1, 72:5 precedential [1] - 57:6 precise [1] - 18:9 preclude [1] - 12:12 precluded [3] - 7:25, 12:14, 13:7 prefer [2] - 4:15, 108:24 prefiled [1] - 60:22 prehearing [1] - 79:2 Prejudice [1] - 16:2 prejudice [2] - 63:17, 68:12 prejudicial [9] - 16:2, 16:4, 16:6, 47:8, 47:25, 56:23, 57:14, 60:15, 63:20 premise [1] - 62:8 prepared [1] - 88:14 present [2] - 22:5, 29:24 presentation [1] - 45:19 presented [3] - 31:16, 54:19, 93:18 presents [1] - 112:2 presides [1] - 19:12 presumably [1] - 85:11 presumed [1] - 27:23 pretty [2] - 68:23, 95:12 prevent [6] - 50:8, 50:21, 66:15, 66:19, 75:13, 85:14 prevented [1] - 33:14 preventing [2] - 17:1, 30:10 previous [1] - 110:7 price [1] - 71:19 pricing [1] - 46:2 principle [1] - 19:24 principles [2] - 48:8, 87:24 private [4] - 30:7, 50:14, 96:11, 96:14</p>	<p>privilege [21] - 53:9, 53:15, 55:12, 90:10, 94:2, 95:19, 96:5, 97:4, 97:7, 101:8, 101:9, 101:10, 103:17, 104:12, 106:6, 106:11, 106:12, 106:13, 107:13, 111:1 Privileged [1] - 13:8 privileged [44] - 10:3, 11:5, 13:11, 14:2, 14:22, 15:6, 15:7, 15:9, 15:12, 36:8, 41:20, 42:19, 46:3, 52:18, 52:22, 53:4, 53:21, 54:2, 54:5, 65:19, 76:15, 95:25, 96:2, 96:18, 96:20, 97:3, 97:20, 98:1, 100:23, 101:15, 101:18, 105:8, 106:1, 106:2, 106:21, 107:24, 108:6, 108:16, 109:9, 109:12, 110:9, 110:10, 110:17, 111:9 privileges [3] - 15:23, 75:4 privy [2] - 9:5, 31:25 probative [1] - 16:4 problem [8] - 15:23, 24:17, 28:13, 68:5, 102:12, 105:23, 109:19, 112:20 problems [2] - 30:25, 31:1 procedural [1] - 29:16 procedure [1] - 23:9 Procedure [2] - 14:13, 109:15 proceed [3] - 52:1, 103:24, 105:17 proceeding [24] - 8:5, 12:4, 14:8, 16:10, 20:21, 22:16, 26:18, 54:7, 55:3, 55:19, 65:13, 71:14, 75:8, 86:5, 86:10, 92:22, 92:23, 95:11, 95:16, 108:2, 108:3, 108:14, 113:24 proceedings [14] - 8:12, 8:16, 8:18, 9:1, 9:9, 9:12, 22:17, 26:11, 69:12, 73:3, 97:14, 108:8, 108:18, 113:22 process [10] - 6:1, 6:6, 6:8, 27:18, 52:21, 57:9, 89:25, 93:24,</p>	<p>99:13, 112:7 Proctor [8] - 3:24, 4:10, 22:13, 30:15, 63:3, 70:20, 76:24, 86:2 PROCTOR [15] - 3:25, 22:14, 23:1, 23:5, 23:8, 70:21, 70:23, 94:15, 94:21, 101:25, 107:5, 109:14, 111:7, 111:13, 114:25 Proctor's [2] - 16:12, 31:24 Produce [1] - 91:15 produce [31] - 9:25, 10:18, 12:3, 13:14, 13:17, 14:3, 16:20, 17:5, 17:11, 20:19, 22:5, 37:20, 45:17, 46:9, 52:8, 68:18, 82:3, 85:23, 85:24, 87:1, 87:2, 87:4, 91:11, 91:12, 91:13, 93:11, 101:7, 102:8, 108:24, 112:9, 114:9 produceable [1] - 15:16 produced [39] - 9:6, 9:13, 9:20, 10:22, 10:25, 13:10, 13:14, 14:9, 22:22, 44:5, 44:20, 45:22, 47:10, 47:12, 53:7, 55:12, 55:15, 78:11, 86:15, 90:11, 92:11, 92:16, 93:9, 100:1, 100:24, 101:7, 101:22, 101:24, 103:20, 105:25, 106:8, 106:22, 107:24, 108:20, 108:25, 109:4, 111:24, 112:11 producing [8] - 8:1, 12:12, 82:6, 83:4, 83:6, 83:8, 84:20, 87:18 product [6] - 53:15, 65:20, 110:11, 110:18, 111:1, 114:12 production [11] - 3:12, 12:22, 48:16, 74:10, 84:14, 84:16, 85:15, 85:16, 106:6, 109:2, 111:21 Professional [1] - 109:18 prohibited [1] - 67:6 prohibits [2] - 26:9, 26:24 project [2] - 55:18, 55:19</p>	<p>projects [10] - 3:15, 5:15, 5:17, 6:12, 17:10, 17:18, 23:24, 29:1, 56:6 promise [1] - 16:20 promises [1] - 79:24 prompted [1] - 72:23 promptly [1] - 37:20 proof [1] - 90:13 proper [3] - 8:20, 22:7, 87:16 properly [7] - 8:14, 10:1, 14:16, 15:15, 29:24, 80:25, 87:14 propose [5] - 4:7, 36:10, 36:12, 37:1, 43:10 proposed [1] - 5:10 Proposed [1] - 3:8 proprietary [1] - 103:10 protect [7] - 24:13, 28:1, 29:18, 50:19, 82:8, 102:24, 107:18 protected [17] - 13:16, 13:21, 14:14, 30:12, 52:18, 53:4, 53:13, 53:22, 54:2, 67:17, 67:18, 67:22, 68:20, 70:11, 75:8, 87:14 protection [11] - 28:5, 55:12, 86:21, 86:24, 101:1, 101:11, 101:13, 101:19, 103:19, 107:13, 114:13 protections [5] - 29:15, 85:11, 91:18, 102:4, 102:18 protective [4] - 24:11, 86:21, 103:9, 110:13 protective order [96] - 7:11, 8:1, 8:22, 9:21, 10:6, 10:7, 10:9, 10:15, 11:24, 11:25, 12:6, 12:8, 12:10, 12:11, 13:1, 13:5, 13:6, 13:8, 13:16, 13:22, 13:24, 14:10, 15:8, 15:25, 19:9, 20:12, 21:5, 21:9, 24:25, 25:8, 26:4, 26:8, 26:17, 27:24, 28:14, 32:8, 33:1, 33:5, 33:17, 33:22, 33:25, 34:5, 35:23, 38:7, 39:21, 39:23, 39:24, 43:16, 44:18, 44:23, 45:2, 45:4, 45:24, 46:22, 46:24,</p>
--	--	---	---	---

<p>47:1, 50:23, 53:1, 53:17, 54:8, 56:8, 63:24, 63:25, 64:20, 66:3, 66:8, 67:5, 67:6, 67:9, 67:10, 67:22, 68:6, 68:8, 68:22, 69:15, 75:10, 75:12, 78:8, 79:18, 81:2, 81:16, 81:25, 82:1, 83:18, 83:20, 84:4, 84:16, 85:5, 85:17, 86:16, 90:9, 91:19, 100:13, 101:20, 108:14, 109:20</p> <p>protects [1] - 82:11</p> <p>prove [2] - 39:5, 58:25</p> <p>provide [11] - 22:19, 29:8, 29:9, 29:19, 40:12, 50:7, 59:23, 62:25, 83:17, 85:20</p> <p>provided [2] - 29:7, 109:16</p> <p>providing [2] - 13:7, 36:1</p> <p>provision [5] - 70:3, 83:15, 102:1, 109:16, 109:20</p> <p>provisions [2] - 69:15, 103:1</p> <p>proviso [4] - 76:14, 95:13, 96:3, 100:12</p> <p>prudence [4] - 6:23, 23:15, 55:18, 56:14</p> <p>prudency [2] - 43:6, 55:4</p> <p>prudent [3] - 34:21, 73:19, 77:15</p> <p>PSC [6] - 8:12, 8:16, 8:17, 9:1, 9:9, 9:11</p> <p>public [6] - 4:21, 6:17, 80:1, 88:20, 100:2, 102:5</p> <p>Public Service Commission [5] - 25:6, 25:10, 69:24, 80:9, 80:14</p> <p>publicly [2] - 15:18, 102:21</p> <p>pull [3] - 47:24, 54:12, 99:8</p> <p>pulled [2] - 76:18, 106:9</p> <p>purchased [3] - 34:23, 41:10</p> <p>purchases [1] - 34:24</p> <p>purely [1] - 104:11</p> <p>purpose [6] - 11:13, 17:1, 25:4, 30:9, 69:20, 107:4</p>	<p>purposes [1] - 80:20</p> <p>pursuant [1] - 53:1</p> <p>Pursuant [1] - 25:1</p> <p>purview [1] - 66:7</p> <p>put [6] - 12:5, 34:22, 43:11, 60:20, 96:7</p> <p>puts [2] - 32:10, 47:12</p>	<p>71:24</p> <p>rather [2] - 9:10, 108:10</p> <p>Rather [1] - 80:25</p> <p>rationale [1] - 98:7</p> <p>re [1] - 10:21</p> <p>re-ask [1] - 10:21</p> <p>reach [1] - 28:11</p> <p>reached [1] - 27:8</p> <p>reaction [1] - 28:6</p> <p>read [7] - 4:24, 8:3, 8:9, 13:2, 32:8, 53:16, 60:21</p> <p>readily [1] - 29:18</p> <p>reading [5] - 40:2, 48:5, 67:8, 69:7, 88:20</p> <p>readings [1] - 43:1</p> <p>reads [1] - 47:12</p> <p>ready [1] - 109:22</p> <p>realize [1] - 51:4</p> <p>really [19] - 27:2, 31:6, 31:7, 32:4, 42:9, 43:5, 47:19, 49:20, 54:18, 55:2, 55:9, 56:4, 62:18, 72:8, 76:21, 97:9, 103:3, 105:3, 107:17</p> <p>reason [8] - 28:15, 48:2, 60:10, 64:8, 64:9, 96:7, 102:15</p> <p>reasonable [15] - 5:11, 5:23, 6:5, 36:5, 36:22, 56:7, 56:10, 71:12, 77:15, 86:13, 88:24, 89:3, 89:4, 89:7, 89:19</p> <p>reasonableness [1] - 6:24</p> <p>reasonably [1] - 109:25</p> <p>reasoned [2] - 89:17, 89:25</p> <p>reasons [4] - 24:8, 38:23, 60:13, 67:2</p> <p>receive [3] - 26:7, 37:19, 57:23</p> <p>received [1] - 57:24</p> <p>receiving [1] - 27:16</p> <p>recess [6] - 45:11, 52:12, 52:13, 94:10, 94:20, 94:22</p> <p>recipe [2] - 86:3, 87:18</p> <p>recitation [1] - 39:9</p> <p>recognize [1] - 63:18</p> <p>recognized [1] - 16:14</p> <p>recommendation [2] - 50:17, 98:14</p> <p>record [4] - 45:14,</p>	<p>96:12, 96:15, 108:5</p> <p>recouped [1] - 56:1</p> <p>recover [3] - 18:2, 20:23, 72:22</p> <p>recovering [1] - 103:4</p> <p>redeliver [1] - 114:4</p> <p>redundant [1] - 66:24</p> <p>refer [5] - 42:19, 49:1, 53:17, 82:4, 83:1</p> <p>reference [7] - 21:14, 23:22, 53:14, 55:15, 61:3, 69:1, 111:8</p> <p>referenced [2] - 19:16, 79:9</p> <p>referred [1] - 18:13</p> <p>refers [2] - 24:24, 82:6</p> <p>reflect [1] - 114:21</p> <p>refusal [1] - 84:6</p> <p>refuse [2] - 13:16, 20:19</p> <p>refused [3] - 13:14, 22:4, 92:10</p> <p>refusing [1] - 80:15</p> <p>regarding [1] - 3:14</p> <p>regional [1] - 72:11</p> <p>regular [1] - 63:7</p> <p>regulation [1] - 73:4</p> <p>Regulations [1] - 3:9</p> <p>regulator [1] - 62:12</p> <p>regulatory [2] - 73:2, 82:20</p> <p>reject [1] - 92:21</p> <p>relate [2] - 8:15, 36:8</p> <p>related [5] - 36:2, 62:5, 72:19, 93:14, 113:19</p> <p>Related [1] - 21:11</p> <p>relates [1] - 103:9</p> <p>relating [1] - 69:13</p> <p>relation [2] - 19:21, 42:21</p> <p>relative [2] - 3:11, 42:17</p> <p>release [2] - 84:3, 86:6</p> <p>relevance [3] - 15:18, 17:2, 55:15</p> <p>relevancy [1] - 39:2</p> <p>relevant [4] - 8:9, 9:9, 9:23, 10:16, 10:18, 11:25, 12:3, 12:8, 14:24, 15:2, 15:4, 15:17, 16:9, 20:2, 20:22, 22:1, 26:11, 27:6, 29:14, 39:1, 50:10, 52:19, 55:11, 58:3, 63:15,</p>	<p>71:23, 74:17, 74:25, 78:5, 82:16, 87:6, 87:9, 87:12, 87:13, 87:15, 87:25, 90:5, 90:17, 90:18, 90:22, 93:3</p> <p>relies [1] - 61:5</p> <p>remaining [5] - 46:18, 65:20, 97:14, 97:25, 104:11</p> <p>remember [1] - 43:15</p> <p>removal [2] - 72:7, 72:8</p> <p>remove [1] - 68:15</p> <p>removed [1] - 35:22</p> <p>renders [1] - 56:18</p> <p>repeatedly [2] - 16:14, 16:19</p> <p>repeating [1] - 81:15</p> <p>reply [6] - 8:3, 11:6, 12:13, 18:23, 19:3, 28:6</p> <p>report [4] - 48:7, 51:23, 112:21, 113:7</p> <p>reports [2] - 96:10, 97:19</p> <p>represent [3] - 20:24, 29:25, 83:23</p> <p>representative [1] - 30:1</p> <p>representatives [1] - 97:25</p> <p>represented [3] - 83:21, 83:24, 110:16</p> <p>representing [2] - 3:19, 4:9</p> <p>request [22] - 3:13, 3:15, 8:6, 8:25, 9:10, 17:5, 17:16, 17:20, 21:12, 22:1, 23:7, 26:1, 26:16, 28:25, 52:17, 74:15, 90:20, 91:9, 96:21, 101:13, 104:17, 108:15</p> <p>requested [14] - 5:24, 15:3, 15:15, 15:17, 17:3, 20:5, 21:22, 30:13, 37:21, 75:2, 84:3, 87:1, 91:16, 110:1</p> <p>requesting [2] - 23:11, 85:15</p> <p>requests [9] - 8:13, 8:15, 8:20, 10:1, 23:4, 23:7, 29:10, 49:7, 92:12</p> <p>require [3] - 12:2, 71:18, 76:10</p> <p>required [2] - 14:12, 101:10</p> <p>requirement [2] -</p>
	<p style="text-align: center;">Q</p>			
	<p>quandary [1] - 68:17</p> <p>query [1] - 60:19</p> <p>questions [11] - 6:3, 10:21, 18:6, 22:20, 52:15, 68:2, 75:5, 75:6, 75:19, 78:23, 87:7</p> <p>quickly [3] - 7:8, 19:7, 112:6</p> <p>quite [5] - 4:17, 24:5, 26:14, 71:4, 85:22</p> <p>quote [6] - 33:10, 35:15, 35:20, 38:15, 53:7, 69:8</p> <p>quotes [1] - 61:6</p> <p>quoting [1] - 53:21</p>			
	<p style="text-align: center;">R</p>			
	<p>R746-100-16 [1] - 110:4</p> <p>races [2] - 42:5, 98:12</p> <p>raise [1] - 11:21</p> <p>raised [3] - 7:13, 48:12, 52:16</p> <p>rarely [1] - 30:3</p> <p>rate [9] - 16:15, 19:22, 28:25, 34:21, 43:6, 52:1, 54:15, 71:4, 103:21</p> <p>rate base [2] - 6:13, 20:4</p> <p>rate case [10] - 7:2, 8:9, 11:9, 20:4, 37:11, 43:6, 66:18, 91:25, 103:20, 113:15</p> <p>rate increase [2] - 16:16, 20:5</p> <p>rate-setting [1] - 19:22</p> <p>ratemaking [4] - 19:25, 20:1, 32:13, 32:21</p> <p>ratepayers [2] - 72:15, 73:17</p> <p>Rates [1] - 3:7</p> <p>rates [5] - 19:25, 20:20, 47:20, 71:14,</p>			

<p>5:5, 16:24 requires [1] - 17:23 requiring [3] - 17:5, 24:14, 64:10 reserved [1] - 113:13 reserving [1] - 96:17 resolution [2] - 11:14, 19:14 resolve [3] - 11:12, 92:1, 103:14 respect [5] - 27:16, 66:25, 73:10, 78:22, 102:1 respectfully [2] - 17:4, 17:16 respond [8] - 8:24, 9:18, 9:25, 29:6, 48:12, 75:21, 78:22, 79:8 responded [1] - 22:4 responding [2] - 87:7, 93:7 response [24] - 3:13, 11:18, 17:13, 24:19, 24:21, 26:13, 30:8, 33:7, 33:9, 37:12, 40:12, 49:8, 49:17, 52:17, 53:19, 56:12, 64:16, 72:4, 74:6, 74:16, 78:2, 78:3, 92:12, 93:9 responses [1] - 69:2 responsibilities [2] - 27:15, 102:24 responsible [1] - 103:4 responsive [4] - 14:6, 17:19, 27:19, 28:24 Responsive [1] - 8:19 rest [1] - 111:18 restrictions [1] - 12:5 restrictive [1] - 95:15 result [3] - 17:4, 62:10, 80:6 Retail [1] - 3:7 retired [1] - 56:17 return [1] - 96:6 reveal [1] - 4:21 review [5] - 19:19, 37:9, 88:15, 111:10, 111:15 reviewing [1] - 17:7 risk [5] - 26:4, 28:14, 80:25, 102:10, 102:21 Rives [1] - 37:3 RMP [2] - 33:18, 37:19 Rocky [2] - 16:23,</p>	<p>88:22 Rocky Mountain [8] - 17:5, 24:3, 24:18, 27:10, 31:9, 42:25, 49:23, 74:1 Rocky Mountain Power [17] - 3:6, 4:5, 4:6, 6:24, 7:6, 14:7, 16:7, 28:17, 32:17, 32:25, 33:20, 39:24, 40:12, 42:7, 63:24, 77:14, 77:20 round [1] - 92:8 rounds [1] - 92:9 Rule [9] - 17:21, 21:13, 48:15, 48:22, 53:2, 74:10, 98:18, 110:4, 110:14 rule [17] - 12:6, 14:19, 17:22, 19:10, 19:11, 48:14, 48:17, 48:18, 50:4, 53:21, 63:15, 88:2, 94:4, 98:18, 101:12, 101:17, 103:8 rules [24] - 8:25, 13:12, 21:14, 21:15, 24:9, 24:10, 24:12, 27:16, 29:16, 29:17, 30:9, 48:13, 48:15, 56:21, 57:20, 62:5, 63:13, 63:18, 63:19, 87:24, 88:3, 88:6, 88:11, 109:14 Rules [4] - 14:13, 59:8, 109:15, 109:18 ruling [5] - 10:11, 11:14, 19:2, 105:15, 108:17 rulings [2] - 50:22, 57:10 run [1] - 102:10 running [2] - 7:16, 98:11</p> <p style="text-align: center;">S</p> <p>sand [1] - 31:17 Sarbanes [1] - 80:2 Sarbanes-Oxley [1] - 80:2 sat [2] - 81:13, 90:24 satisfy [1] - 105:3 save [1] - 48:3 saw [1] - 40:2 schedule [3] - 18:14, 18:15, 113:15 scheduled [2] - 19:1, 19:3 Schedules [1] - 3:8 school [1] - 43:8</p>	<p>scope [2] - 37:2, 93:17 scrubber [1] - 55:19 seal [2] - 88:15, 90:21 Second [2] - 12:7, 14:1 second [3] - 13:18, 74:3, 82:23 secondly [1] - 7:11 Secondly [3] - 85:19, 88:13, 100:5 secret [3] - 20:16, 20:17, 109:1 section [1] - 82:5 securities [2] - 80:10, 80:18 see [15] - 16:5, 31:5, 35:3, 54:11, 58:19, 87:11, 88:17, 90:15, 90:21, 90:22, 97:14, 98:1, 101:21, 107:4 seeing [1] - 62:13 seek [6] - 42:14, 61:20, 83:19, 85:11, 93:10, 107:12 seeking [3] - 5:20, 20:23, 71:17 seeks [1] - 52:18 sees [2] - 12:15, 12:16 segregating [1] - 102:7 send [1] - 5:9 sense [4] - 77:1, 99:14, 103:5, 114:18 sensitive [12] - 24:16, 28:4, 28:8, 54:6, 74:20, 90:7, 102:1, 102:2, 103:2, 103:10, 107:7, 107:18 Sent [1] - 5:25 sent [2] - 6:6, 76:18 sentence [4] - 7:9, 23:2, 25:11, 48:22 separate [2] - 25:17, 68:13 separation [1] - 112:2 seriously [1] - 25:18 Service [3] - 3:7, 3:8, 3:9 session [1] - 109:23 Set [1] - 65:15 set aside [3] - 56:19, 95:5, 105:9 setting [13] - 19:22, 48:24, 50:13, 50:14, 58:1, 58:17, 58:22, 60:7, 62:9, 62:23, 65:17, 103:19</p>	<p>Setting [1] - 62:2 settlement [6] - 96:19, 97:5, 101:2, 103:17, 104:13, 108:23 seven [7] - 40:11, 44:3, 46:17, 89:14, 89:16, 91:10 seven-day [1] - 44:3 several [3] - 7:2, 72:10, 78:22 Several [1] - 18:17 severance [2] - 72:6, 72:20 Shall [1] - 53:8 shall [9] - 17:23, 17:24, 22:8, 50:5, 69:14, 69:18, 69:20, 83:1, 84:19 share [5] - 6:15, 54:21, 95:23, 103:18, 109:4 Shell [1] - 19:18 ships [2] - 31:7, 37:22 short [3] - 85:17, 93:25, 98:9 shortcut [2] - 9:3, 9:19 shorten [1] - 17:19 shortly [1] - 35:12 show [3] - 15:3, 15:5, 59:2 showed [1] - 13:22 showing [2] - 52:4, 58:10 side [3] - 52:9, 68:16, 94:5 sides [2] - 44:6, 46:14 Sierra [2] - 23:18, 25:25 signatories [1] - 27:24 significant [2] - 7:18 Similar [1] - 101:19 similar [5] - 7:3, 8:5, 25:22, 89:1, 109:16 simple [2] - 92:1, 108:10 simply [8] - 14:3, 26:3, 36:21, 40:10, 46:6, 52:9, 61:20, 76:20 simultaneously [1] - 8:5 single [2] - 6:1, 40:6 sink [1] - 34:10 sit [3] - 4:15, 43:23, 52:9 sitting [2] - 81:8,</p>	<p>91:12 situation [2] - 19:20, 20:25 skipped [1] - 36:11 slightly [2] - 33:3, 41:16 slippery [1] - 61:7 slope [1] - 61:7 small [5] - 42:3, 42:24, 55:8, 102:13, 108:21 SO [1] - 54:15 SO2 [1] - 43:1 solely [1] - 106:15 solution [2] - 40:1, 40:10 someone [4] - 59:19, 61:1, 79:4, 90:24 somewhat [4] - 43:7, 63:18, 73:25, 76:9 somewhere [1] - 59:16 soon [2] - 17:8, 97:11 sorry [1] - 70:20 sort [1] - 52:10 sought [2] - 72:14, 72:22 sounds [1] - 107:16 sourcing [1] - 41:18 speaking [1] - 43:7 special [2] - 106:18, 107:8 specific [4] - 6:4, 24:9, 34:12, 81:23 specifically [2] - 23:10, 79:9 specified [1] - 14:12 speed [2] - 7:20, 92:6 spend [3] - 5:6, 5:15, 16:13 spin [1] - 47:24 spun [1] - 71:9 stake [1] - 79:12 stand [6] - 4:15, 33:6, 47:9, 87:7, 91:3, 93:7 standard [4] - 22:18, 24:5, 29:8, 91:7 standards [1] - 60:8 start [4] - 4:19, 48:5, 61:6, 93:17 start/stop [1] - 51:20 started [1] - 39:20 starting [1] - 55:20 state [5] - 27:20, 27:25, 28:22, 29:23, 102:24 State of Utah [3] - 26:24, 30:1, 30:3</p>
--	---	---	--	---

<p>statement [5] - 9:22, 41:6, 44:9, 104:8, 104:21</p> <p>statements [1] - 24:22</p> <p>states [1] - 107:23</p> <p>stating [1] - 26:22</p> <p>status [2] - 18:9, 112:22</p> <p>statute [1] - 102:24</p> <p>statutorily [1] - 29:25</p> <p>statutorily-stated [1] - 29:25</p> <p>statutory [1] - 27:25</p> <p>stay [1] - 86:17</p> <p>step [5] - 96:17, 97:15, 97:16, 97:17, 99:12</p> <p>Step [3] - 97:11, 97:12, 97:24</p> <p>still [8] - 6:8, 54:7, 63:23, 86:1, 99:8, 103:16, 103:23, 104:14</p> <p>stipulate [1] - 84:2</p> <p>stipulated [3] - 8:22, 26:17, 33:17</p> <p>stipulation [1] - 83:16</p> <p>Stoel [1] - 37:3</p> <p>stop [3] - 59:10, 59:12, 111:4</p> <p>stories [1] - 51:17</p> <p>strident [1] - 27:2</p> <p>strike [2] - 47:14, 61:2</p> <p>strings [1] - 48:20</p> <p>stuff [14] - 12:24, 12:25, 43:4, 49:25, 58:19, 76:17, 83:10, 86:1, 87:18, 100:4, 103:25, 108:6, 111:21, 114:15</p> <p>subcategory [1] - 97:14</p> <p>subject [34] - 5:5, 7:10, 8:16, 11:24, 13:5, 14:10, 26:17, 28:5, 42:20, 44:18, 50:23, 66:2, 68:6, 68:8, 69:14, 76:18, 81:16, 86:16, 86:20, 86:24, 87:16, 90:8, 90:10, 91:17, 93:25, 94:2, 98:17, 100:25, 106:13, 106:23, 108:13, 110:12, 110:25, 114:13</p> <p>Subject [1] - 12:4</p> <p>submission [1] -</p>	<p>111:8</p> <p>Submit [1] - 98:7</p> <p>submit [6] - 16:7, 18:1, 23:10, 88:14, 93:6, 110:22</p> <p>submitted [6] - 11:23, 16:8, 34:8, 88:21, 90:20, 95:15</p> <p>subparagraph [1] - 110:13</p> <p>subparts [1] - 55:9</p> <p>subpoena [1] - 84:21</p> <p>subpoenas [2] - 70:7, 84:14</p> <p>subsection [1] - 103:7</p> <p>subsequent [1] - 111:3</p> <p>subset [6] - 41:22, 42:20, 42:24, 46:5, 108:21, 112:9</p> <p>substance [2] - 9:16, 10:20</p> <p>sudden [1] - 47:13</p> <p>suggest [3] - 27:2, 28:3, 105:16</p> <p>suggested [1] - 80:23</p> <p>suggestion [2] - 24:2, 97:21</p> <p>suggests [1] - 24:3</p> <p>summaries [1] - 69:3</p> <p>super [1] - 96:17</p> <p>super-step [1] - 96:17</p> <p>superior [2] - 32:18, 40:8</p> <p>supersedes [1] - 40:6</p> <p>supply [1] - 43:3</p> <p>support [3] - 80:17, 81:11, 81:13</p> <p>supportive [1] - 27:7</p> <p>suppose [4] - 53:16, 61:9, 65:14, 81:7</p> <p>sway [3] - 48:6, 58:21</p> <p>swayed [1] - 60:25</p> <p>sworn [1] - 87:8</p>	<p>term [2] - 56:7, 82:25</p> <p>terms [7] - 16:18, 25:1, 46:22, 53:18, 55:7, 70:2, 84:18</p> <p>test period [2] - 23:21, 23:23</p> <p>testify [1] - 92:6</p> <p>testimony [15] - 3:14, 7:16, 11:16, 23:20, 28:23, 28:24, 29:13, 51:9, 60:22, 76:13, 78:16, 87:8, 95:9, 96:9, 97:18</p> <p>the Court [7] - 17:23, 48:19, 49:1, 49:12, 49:13, 69:11, 73:11</p> <p>theirs [1] - 64:20</p> <p>themselves [3] - 10:3, 39:22, 103:18</p> <p>Therefore [2] - 39:12, 50:11</p> <p>therefore [5] - 28:4, 29:15, 61:11, 88:6, 108:4</p> <p>they've [13] - 11:6, 14:21, 22:4, 43:17, 60:21, 60:25, 77:9, 79:3, 81:13, 85:9, 92:22, 107:3, 114:8</p> <p>They've [5] - 13:14, 15:5, 90:12, 92:10, 92:23</p> <p>thinks [2] - 99:23, 103:23</p> <p>third [8] - 21:23, 60:11, 65:3, 65:5, 65:18, 74:3, 83:14, 84:12</p> <p>third-party [1] - 65:18</p> <p>three [4] - 46:16, 70:14, 97:16, 104:24</p> <p>three-fourths [1] - 104:24</p> <p>threw [1] - 34:9</p> <p>throwing [1] - 47:23</p> <p>thrown [1] - 40:1</p> <p>Thursday [1] - 37:13</p> <p>tied [1] - 9:11</p> <p>time's [1] - 7:16</p> <p>timely [6] - 11:18, 11:21, 13:19, 16:20, 52:2, 73:19</p> <p>timing [3] - 23:14, 91:23, 113:14</p> <p>Title [1] - 58:12</p> <p>today [23] - 3:17, 4:21, 12:9, 15:22, 27:13, 30:23, 31:2, 33:5, 37:16, 50:3, 64:10, 68:18, 74:8,</p>	<p>79:5, 91:10, 93:13, 93:19, 96:23, 110:7, 111:18, 111:25, 113:12, 114:22</p> <p>today's [1] - 109:23</p> <p>together [3] - 44:2, 104:25, 105:1</p> <p>tomorrow [6] - 105:20, 110:19, 111:19, 111:25, 112:15, 112:22</p> <p>took [5] - 9:3, 9:18, 73:24, 89:14, 92:5</p> <p>top [3] - 25:11, 55:21, 109:1</p> <p>totally [2] - 90:5, 93:6</p> <p>Tough [1] - 80:4</p> <p>town [5] - 30:24, 73:25, 74:2, 105:19, 105:20</p> <p>traditionally [1] - 107:5</p> <p>tran [1] - 41:1</p> <p>transcript [7] - 35:7, 41:5, 43:24, 44:4, 55:16, 65:20, 66:10</p> <p>transcripts [14] - 38:5, 40:23, 42:18, 46:14, 64:13, 64:24, 67:5, 67:21, 85:21, 87:4, 87:5, 87:13, 87:15, 93:22</p> <p>transmission [1] - 72:11</p> <p>Transmission's [1] - 64:25</p> <p>treatment [3] - 3:15, 106:18, 107:7</p> <p>tribunal [1] - 58:15</p> <p>tried [2] - 11:6, 38:15</p> <p>trier [1] - 56:20</p> <p>tries [2] - 70:7, 88:6</p> <p>troubling [6] - 25:20, 26:14, 26:15, 28:20, 31:11, 49:20</p> <p>True [1] - 13:20</p> <p>truly [1] - 30:10</p> <p>trust [4] - 76:24, 86:8, 91:6, 113:18</p> <p>try [6] - 12:5, 14:4, 28:10, 28:11, 70:10, 89:22</p> <p>trying [12] - 37:24, 40:18, 43:18, 50:8, 50:9, 66:14, 66:19, 77:2, 81:3, 82:18, 92:17, 108:9</p> <p>turn [10] - 11:17, 26:5, 39:25, 40:20, 70:9, 81:16, 82:18,</p>	<p>84:24, 84:25, 87:22</p> <p>turned [1] - 60:1</p> <p>Turning [1] - 91:23</p> <p>Two [2] - 48:10, 79:8</p> <p>two [25] - 5:18, 6:2, 6:3, 6:12, 7:9, 7:12, 11:17, 11:19, 11:23, 14:19, 19:16, 31:6, 34:11, 37:22, 38:23, 46:13, 46:23, 47:1, 68:15, 95:18, 97:12, 97:16, 97:24, 98:7, 104:16</p> <p>type [6] - 8:24, 48:7, 102:10, 105:17, 107:17, 109:19</p> <p>types [1] - 92:3</p> <p>typically [1] - 21:25</p>
				U
				<p>UAE [19] - 3:11, 3:13, 3:22, 4:9, 4:11, 6:20, 8:11, 14:11, 17:10, 18:1, 20:11, 20:13, 34:5, 34:16, 34:17, 40:13, 42:3, 79:15, 109:25</p> <p>UAE's [3] - 23:3, 25:19, 33:16</p> <p>ultimate [5] - 56:19, 57:16, 58:23, 59:7, 77:7</p> <p>un-designate [1] - 83:13</p> <p>under [41] - 8:21, 8:25, 12:6, 13:8, 15:8, 15:24, 16:15, 17:20, 22:7, 44:6, 45:2, 45:3, 45:24, 46:5, 53:22, 54:8, 55:12, 66:7, 76:19, 84:16, 84:18, 86:10, 88:7, 88:15, 88:24, 90:18, 90:21, 91:18, 94:3, 95:15, 101:1, 101:17, 102:24, 103:8, 103:19, 107:11, 107:24, 109:1, 109:25, 110:3</p> <p>Under [6] - 5:2, 13:1, 16:15, 48:8, 48:13, 50:4</p> <p>underlying [34] - 37:25, 38:19, 39:9, 39:20, 40:13, 40:19, 46:5, 46:10, 46:20, 47:19, 47:21, 51:3, 51:23, 54:18, 55:3, 55:10, 59:23, 60:1, 61:4, 61:9, 61:11,</p>

<p>61:15, 65:13, 66:15, 76:11, 76:13, 77:3, 77:6, 78:6, 93:21, 95:7, 96:9, 97:13, 97:19 undertaking [1] - 60:19 undiscoverable [1] - 38:23 undisputable [1] - 32:23 undo [1] - 60:23 undoubtedly [1] - 10:10 Unless [1] - 69:10 unless [9] - 17:24, 22:8, 37:18, 48:19, 67:15, 79:23, 82:10, 102:6, 108:17 unlike [1] - 17:14 unprecedented [1] - 50:13 unreasonable [1] - 71:19 unrelated [2] - 36:9, 36:18 unwarranted [1] - 50:13 up [18] - 7:20, 19:11, 49:15, 49:16, 49:18, 51:5, 51:21, 52:15, 58:11, 60:11, 76:24, 78:7, 78:24, 81:10, 92:6, 93:7, 98:13, 107:9 upgrades [3] - 6:25, 7:1, 92:3 Utah [9] - 3:7, 14:13, 49:3, 71:7, 72:15, 73:17, 80:9, 106:3, 109:15 utilities [1] - 72:10 Utility [8] - 3:7, 12:3, 16:17, 16:20, 62:11, 72:25, 73:5, 93:7 utility [17] - 5:11, 5:23, 6:5, 20:1, 36:5, 36:22, 56:7, 56:10, 71:12, 71:19, 73:4, 77:21, 88:24, 89:3, 89:4, 89:9, 89:19</p>	<p>vetting [1] - 16:21 view [6] - 9:20, 16:25, 61:23, 67:4, 85:18, 89:18 violate [5] - 19:9, 67:5, 67:10, 85:5, 114:17 violated [1] - 10:14 violates [3] - 9:21, 10:5, 78:8 violating [3] - 13:22, 28:14, 81:2 violation [6] - 10:9, 20:12, 21:8, 26:5, 84:7, 85:2 virtually [1] - 7:1 virtually-identical [1] - 7:1 volume [1] - 95:25 volumes [1] - 104:20 voluntarily [2] - 108:4, 108:6 voluntary [1] - 72:12 vs [1] - 49:3</p>	<p>whatsoever [3] - 25:4, 69:20, 85:16 whole [3] - 42:2, 81:10, 97:5 willing [5] - 37:17, 39:10, 52:7, 61:14, 105:19 wish [2] - 66:11, 70:3 withdraw [1] - 20:11 withheld [2] - 109:9, 109:11 withhold [1] - 34:17 withholding [1] - 22:7 witness [3] - 13:23, 60:21, 88:8 witnesses [7] - 40:17, 40:23, 78:11, 78:17, 87:7, 87:8, 89:15 won [1] - 58:25 wonder [1] - 76:6 wondered [1] - 23:6 word [5] - 23:6, 38:16, 53:13, 76:2 words [4] - 10:2, 10:23, 12:11, 49:10 workable [1] - 76:9 worms [1] - 78:8 worry [1] - 10:7 wrap [1] - 51:21 wrestling [1] - 98:12 write [1] - 38:16 writing [1] - 69:11 written [6] - 60:22, 93:15, 105:15, 108:20, 111:4, 113:8 wrote [3] - 38:13, 38:15, 89:17</p>
V	W	Y
<p>vagaries [1] - 113:11 vain [1] - 87:19 value [3] - 16:4, 57:6 variety [1] - 97:6 vast [1] - 66:9 versus [2] - 16:4, 19:17</p>	<p>wait [8] - 19:14, 37:17, 42:4, 50:3, 64:6, 75:23, 86:7, 98:24 Wait [1] - 98:24 waiting [2] - 7:7, 7:8 waive [5] - 11:22, 49:9, 95:14, 95:18, 96:5 waived [7] - 11:20, 12:20, 48:20, 48:21, 49:19, 107:25, 108:6 waiver [6] - 34:15, 48:12, 53:8, 108:17, 109:1, 109:16 wants [2] - 79:4, 92:6 war [1] - 51:17 wave [2] - 89:21, 91:25 waves [1] - 87:23 ways [1] - 70:23 Wednesday [5] - 18:21, 35:16, 37:1, 37:12, 37:14 week [3] - 18:18, 18:21, 18:22 week's [1] - 51:14 weeks [1] - 23:22 weigh [1] - 60:15 weighed [1] - 90:3 weighing [1] - 16:5 weighs [1] - 16:3 Western [1] - 72:10</p>	<p>year [4] - 5:18, 6:7, 49:5 years [1] - 21:24 yesterday [1] - 67:12 your Honor [3] - 14:15, 88:15, 99:23 yourself [2] - 33:8, 104:10 Yvonne Hogle [1] - 4:5</p>