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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE APPLICATION OF ROCKY MOUNTAIN POWER FOR APPROVAL OF POWER PURCHASE AGREEMENT BETWEEN PACIFICORP AND LATIGO WIND PARK, LLC	Docket No. 13-035-116 ***REPLY IN SUPPORT OF MOTION TO COMPEL LATIGO WIND PARK, LLC***

Rather than addressing Latigo Wind Park, LLC's ("Latigo") unquestionable failure to produce documents to Ellis-Hall pursuant to Ellis-Hall's discovery requests, Latigo's Response to Ellis-Hall's Motion to Compel attempts to excuse its discovery misconduct by arguing the merits of Ellis-Hall's intervention and impugning Ellis-Hall's motivations. For example, Latigo alleges that "Ellis-Hall has no cognizable interest in the matter before the Commission in this case and is using it in a naked effort to obtain information that is designed to enhance or further its abilities to compete in the wind-project marketplace at the expense of potential competitors such as Latigo." Response at 2-3. Latigo's unsupported accusations are factually incorrect and are contrary to the Commission's Orders in this matter.

The Commission has already determined that Ellis-Hall has a cognizable interest in this matter when it granted Ellis-Hall's Request to Intervene. Ellis-Hall's Objection makes

legitimate claims of disparate and discriminatory treatment regarding PacifiCorp's approval of Latigo's PPA. Ellis-Hall's objection also alleges that PacifiCorp violated Schedule 38 and Utah law. Ellis-Hall's claims are supported by Utah law, the language of Schedule 38, and PacifiCorp's documents and prior representations before the Commission.

Ellis-Hall's claims are serious claims that necessitate discovery from Latigo. Latigo is entitled to disagree with Ellis-Hall's claims and argue in favor of approval of its PPA in Latigo's Reply Comments, but, Latigo cannot avoid discovery by ignoring the Commission's Intervention Order, arguing the merits of Ellis-Hall's claims, or making unsupported allegations impugning Ellis-Hall's motivations.[1]

The Utah Supreme Court has held that the purpose of discovery is "to remove elements of surprise or trickery so the parties and the court can determine the facts and resolve the issues as directly, fairly and expeditiously as possible." *Rahofy v. Steadman*, 2010 UT App 350, ¶ 7, 245 P.3d 201, 204 (citations omitted).

All parties are entitled to reasonable access to "all evidence bearing on the controversy between them, including that in control of adverse parties. This, of course, requires the absolute honesty of each party in answering discovery requests and complying with discovery orders."[2] "Complete and accurate responses to discovery are required for the proper functioning of our system of justice."[3] "The parties have a duty to provide true, explicit, responsive, complete and

1 Latigo's repeated attempts to impugn Ellis-Hall's and it counsel's motivations without any factual support is a violation of the Utah Standards of Professionalism and Civility. *Id.* (stating "Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct.").
2 *Wagner v. Dryvit Sys., Inc.*, 208 F.R.D. 606, 609 (D. Neb. 2001) citing *Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 91 F.R.D. 574, 576 (S.D.N.Y. 1981).
3 *Id*. citing *Averbach v. Rival Mfg. Co.*, 879 F.2d 1196, 1201 (3d Cir. 1989).

candid answers to discovery, and their attorneys have a continuing duty to advise their clients of their duty to make honest, complete, non-evasive discovery disclosures, as well as the spectrum of sanctions they face for violating that duty."[4] "Providing false or incomplete discovery responses . . . subjects the offending party and its counsel to sanctions."[5]

Courts uniformly recognize that "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." *Systemic Formulas, Inc. v. Kim*, 1:07-CV-159 TC, 2009 WL 1444226 (D. Utah 2009). [6] Moreover, failing to respond in the appropriate timeframe subjects the noncomplying party to sanctions under Rule 37. *See Aurora Credit Services, Inc. v. Liberty W. Dev., Inc.*, 129 P.3d 287, 289 (Utah App. 2006); citing *W.W. & W.B. Gardner, Inc. v. Park W. Vill., Inc.*, 568 P.2d 734, 738 (Utah 1977) (affirming default judgment pursuant to rule 37, where defendant failed to respond to discovery within thirty days, because "[a] defendant may not ignore with impunity the requirements of [r]ules 33 and 34, and the necessity to respond within thirty days").

Latigo's boilerplate, unsubstantiated objections are textbook examples of what courts have routinely deemed to be improper objections and evasive and incomplete disclosures.[7] If a

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[4] *Id*. at 610 citing *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 616 (5th Cir. 1977); Fed. R. Civ. P. 26(g).
[5] Id. citing *Hogue v. Fruehauf Corp.*, 151 F.R.D. 635, 637 (C.D. Ill. 1993).
[6] Because Utah R. Civ. P. 34(1) and Fed. R. Civ. P. 34(a) are "substantially similar, reliance on cases interpreting the [Fed. R. Civil P.] is appropriate." *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54,¶ 7 n.2.
[7] *U.S. ex rel. O'Connell v. Chapman Univ.*, 245 F.R.D. 646, 649-50 (C.D. Cal. 2007) (finding that objections stating overbroad, unduly burdensome, unduly redundant, oppressive, calls for narrative "***are general or boilerplate objections, which are not proper objections***."); *Paulsen v. Case Corp.*, 168 F.R.D. 285, 289 (C.D. Cal. 1996); *Burns v. Imagine Films Entm't, Inc.*, 164 F.R.D. 589, 592-93 (W.D.N.Y. 1996)(general objections that discovery request was overbroad, vague and unduly burdensome were not sufficiently specific to allow court to ascertain objectionable character of discovery request and were improper); *McLeod, Alexander, Powel &*

party withholds discovery based on an objection, the objection must be specific, non-boilerplate, and supported by particularized facts where necessary to demonstrate the basis for the objection.[8] Contrary to Latigo's suggestion, the "mere statement by a party that the interrogatory [or request for production] was 'overly broad, burdensome, oppressive and irrelevant' is not adequate to voice a successful objection."[9]

Furthermore, arguing the merits of a party's claim is not a proper way to state an objection and does not satisfy Latigo's burden. *See Incorp Services, Inc. v. Nevada Corp. Services, Inc.*, 209-CV-01300GMNGWF, 2010 WL 2540607 (D. Nev. 2010) (holding that Defendant improperly "chose to argue the merits of Plaintiff's claims, rather than address the specific discovery requests to which Plaintiff seeks to compel further responses . . . therefore, Defendant has failed to carry its burden to show that the discovery requests are overly broad or irrelevant.").

Here, Latigo failed to produce highly relevant documents by the deadline set in the Commission's Scheduling Order. Latigo's Response fails to substantiate its objections or cite a single case that supports the manner in which Latigo made its objections or refused to provide

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Apffel, P.C. v. Quarles, 894 F.2d 1482, 1485 (5th Cir. 1990)(objections that requests were overly broad, burdensome, oppressive, and irrelevant were insufficient to meet party's burden to explain why discovery requests were objectionable); *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1559 (11th Cir.1985) (conclusory recitations of expense and burdensomeness are not sufficiently specific to demonstrate why discovery is objectionable); *Burns*, 164 F.R.D., 592-93; *Chubb Integrated Sys. Ltd. v. Nat'l Bank of Washington*, 103 F.R.D. 52, 58 (D.D.C. 1984)("General objections are not useful to the court ruling on a discovery motion.").

[8] *Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 573 (D. Md. 2010) citing *Hall v. Sullivan*, 231 F.R.D. 468, 470 (D. Md. 2005); *Thompson v. Dep't of Hous. & Urban Dev.*, 199 F.R.D. 168, 173 (D. Md. 2001); *Marens v. Carrabba's Italian Grill, Inc.*, 196 F.R.D. 35, 38-39 (D. Md. 2000).

[9] *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982) (quoting *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 296-97 (E.D. Pa. 1980)); *see also Oleson*, 175 F.R.D. 560, 565 ("The litany of overly burdensome, oppressive, and irrelevant does not alone constitute a successful objection to a discovery request.") (citation omitted).

discovery. The fact that Ellis-Hall did not have access to highly relevant documents before it filed its Objection, and still does not have documents with a little more than a week before the Commission's hearing, prejudices Ellis-Hall. Latigo demanded that this matter proceed on an expedited basis. Having done so, Latigo is in no position to delay discovery for nearly a month.

Latigo's failure to produce relevant documents without substantial justification is a violation of Utah law that prejudices Ellis-Hall's ability to support its claims in this matter. The Commission should grant Ellis-Hall's Motion to Compel and impose appropriate sanctions on Latigo under Utah Rule of Civil Procedure 37(d) and 37(e)(2).

CONCLUSION

Latigo's response to Ellis-Hall's Motion to Compel is devoid of any legal or factual support that Latigo's failure to provide requested discovery was substantially justified. Consequently, under Utah Rule of Civil Procedure 37(d) and 37(e)(2) the Commission should impose appropriate sanctions on Latigo including deeming matters asserted in Ellis-Hall's objection as established and awarding Ellis-Hall its reasonable costs and attorney's fees.

DATED this 11th day of September, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2013, a true and correct copy of the forgoing ***REPLY IN SUPPORT OF MOTION TO COMPEL LATIGO WIND PARK, LLC*** was served via e-mail to the following:

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