

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Formal Complaint of
Blue Mountain Power Partners, LLC against
PacifiCorp d/b/a Rocky Mountain Power

DOCKET NO. 16-035-47
ORDER ON MOTION TO STRIKE

ISSUED: January 30, 2017

I. Procedural History and Parties' Positions.

1. On November 23, 2016, Blue Mountain Power Partners, LLC (Blue Mountain) filed with the Public Service Commission of Utah (PSC) a formal complaint against PacifiCorp d/b/a Rocky Mountain Power (Rocky Mountain Power).
2. The complaint included certain information about a mediation undertaken by the parties.
3. On December 23, 2016, Rocky Mountain Power filed a motion to strike from the complaint all references to the mediation, arguing that such references are protected as follows:

- a. The contract between the parties states:

All verbal and written communications between the Parties and issued or prepared in connection with this Section 24.2 shall be deemed prepared and communicated in furtherance, and in the context, of dispute settlement, and shall be exempt from discovery and production, and shall not be admissible in evidence (whether as admission or otherwise) in any litigation or other proceedings for the resolution of the dispute.

- b. The Utah Uniform Mediation Act, Utah Code § 78B-10-104, provides that mediation communications are privileged, that they are not subject to discovery or admissible in evidence, and that a party may prevent another person from disclosing mediation communications.

- c. Rule 408 of the Utah Rules of Evidence states that any "conduct or statement made in compromise negotiations" is not admissible to "prove or disprove liability for or the validity or amount of a disputed claim."
4. On January 11, 2017, Mr. Ciachurski filed a response to the motion to strike, arguing as follows:
 - a. Although the parties' contract would preclude disclosure of negotiations made pursuant to a dispute resolution process, the complaint did not disclose such negotiations because it made no reference to claims, assertions, or positions taken by Rocky Mountain Power.
 - b. Section 78B-10-103(3) states that the Utah Uniform Mediation Act does not apply "if the parties agree in advance in a signed record ... that all or part of a mediation is not privileged." Mr. Ciachurski argued that, under the parties' contract, confidentiality extends only to "verbal and written communications between the Parties and issued or prepared in connection with [the dispute resolution process.]" Mr. Ciachurski considers that this language of the contract precludes application of the Utah Uniform Mediation Act.
 - c. Mr. Ciachurski argues that Rule 408 does not apply because the complaint does not reveal any conduct or statement that Rocky Mountain Power made in relation to the parties' mediation.
5. On January 23, 2017, Rocky Mountain Power filed its reply, making the following assertions:

- a. The parties' contract protects all communications made pursuant to mediation, not just Rocky Mountain Power's claims, assertions, and positions.
- b. The parties' contract does not state that "all or part of a mediation [would not be] privileged." In fact, it protects "all communications." Therefore, the contract does not supersede the Utah Uniform Mediation Act.

Rocky Mountain Power did not pursue its argument regarding Rule 408.

II. Discussion.

We are able to resolve this dispute under the language of the parties' contract. Therefore, we do not address the Utah Uniform Mediation Act.

Rocky Mountain Power does not argue that the parties' contract would preclude Blue Mountain from asserting in its complaint the same facts and arguments that it asserted in mediation.¹ Paragraph 89 of the complaint sets forth such facts and arguments, specifically stating that they were also raised in mediation. We find that the reference to the mediation is unnecessary and improper, but that the remaining substance of the paragraph is permissible.

Paragraph 90 of the complaint states that the parties participated in a mediation conference. Although nothing in the paragraph discloses specific "verbal [or] written communications between the Parties," the language does disclose that the parties undertook negotiations and communications toward resolution of their dispute. We therefore conclude that

¹ To read the confidentiality provision in such a manner would preclude Rocky Mountain Power and Blue Mountain from further pursuing their positions in court. We decline to hold that a non-binding mediation strips parties of their right to litigate by rendering all facts, positions, and arguments confidential.

it falls within the confidentiality provision of the parties' contract and is improperly included in the complaint.

Paragraph 91 of the complaint summarizes the proposed resolution issued by the mediator. It therefore constitutes a communication issued in connection with the mediation and, as such, is confidential under the parties' contract.

Paragraph 92 discloses further details of the mediator's proposed resolution, which is confidential.

Paragraph 93 describes Rocky Mountain Power's response to the mediator's proposed resolution in a way that provides insight into the content of that proposed resolution. Therefore, it falls within the confidentiality provision of the parties' contract.

ORDER

Rocky Mountain Power's motion to strike is GRANTED in part and DENIED in part.

The introductory phrase of the first sentence of paragraph 89 is stricken. The verb "asserted" in the remaining sentence is changed to the present tense "asserts."

Paragraphs 90, 91, 92, and 93 are stricken.

DATED at Salt Lake City, Utah, January 30, 2017.

/s/ Jennie T. Jonsson
Administrative Law Judge

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Approved and confirmed January 30, 2017 as the Order of the Public Service
Commission of Utah.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
DW#291414

CERTIFICATE OF SERVICE

I CERTIFY that on January 30, 2017, a true and correct copy of the foregoing was served upon the following as indicated below:

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