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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of the Application of Rocky Mountain Power to Establish Export Credits for Customer Generated Electricity

**Docket No. 17-035-61 Phase 2**

***MOTION FOR FORMAL DISCOVERY  
AND STATEMENT OF DISCOVERY  
ISSUES***

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Pursuant to Utah Administrative Code R746-1-501, Vote Solar hereby moves the Public Service Commission of Utah (the “Commission”) for formal discovery from Rocky Mountain Power (“RMP”), a division of PacifiCorp, submits this Statement of Discovery Issues pursuant to Rule 37 of the Utah Rules of Civil Procedure, and requests expedited review for the reasons described herein (“Motion”).

## **RELIEF REQUESTED**

Vote Solar respectfully requests an order compelling RMP to produce anonymous customer identifiers and street addresses for all Schedule 135 and Schedule 136 customers in response to Vote Solar Data Request 4.1 subpart (1) (“Request”), attached hereto as Exhibit 1.

## **BASIS FOR RELIEF REQUESTED**

### **I. Vote Solar Requires The Requested Data To Sustain Its Burden**

In September of 2017, the Commission approved the August 28, 2017 Settlement (“Settlement”) in Docket No. 14-035-114 and established this proceeding to determine a “just and reasonable rate for export credits for customer generated electricity.” Settlement at ¶ 30. To determine this rate, the Settlement acknowledged that the “Parties may present evidence addressing reasonably quantifiable costs or benefits or other considerations they deem relevant, but *the Party asserting any position will bear the burden of proving its assertions*[.]” *Id.* (emphasis added).

RMP is conducting a Load Research Study (“LRS”) to use in this proceeding, but the study design includes serious unaddressed flaws that Vote Solar has previously brought to the Commission’s attention.<sup>1</sup> These flaws render the data unreliable and inadequate for use in this proceeding. Because RMP’s plainly deficient data will not allow Vote Solar to meet its own burden, Vote Solar intends to conduct its own statistically sound study of import, export, and generation data. To do this study, Vote Solar requires anonymous customer identifiers and street addresses for RMP’s Schedule 135 and Schedule 136 customers. RMP refuses to produce this information, asserting that the information is both confidential and commercially sensitive. Both rationales are meritless, and especially so in light of the confidentiality protections already in place here.

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<sup>1</sup> For example, among other issues, the LRS samples customers not drawn from the full population affected by the results, stratifies the sample of customers being studied based on a flawed correlation between nameplate capacity and generation, and contains no contingency plans if problems arise with the existing sample set.

## II. The Data Sought Is Neither Confidential Nor Commercially Sensitive

Discovery is “liberally permitted” under the Utah Rules of Civil Procedure, which apply to this Motion pursuant to R746-1-501(2) of the Utah Administrative Code. *See State By & Through Rd. Comm’n v. Petty*, 412 P.2d 914, 917 (Utah 1966). As described below, Vote Solar has met its burden of demonstrating that the discovery is proportional and relevant. *See* Utah R. Civ. P. 26(b)(1) (“Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality . . .”). Moreover, RMP has not—and cannot—provide a justifiable basis for withholding the requested discovery.

*First*, Utah courts have held that customer lists are not confidential “where the customers are readily ascertainable outside the employer’s business as prospective users or consumers of the employer’s services or products[.]” *Microbiological Research Corp. v. Muna*, 625 P.2d 690, 700 (Utah 1981) (quoting *Leo Silfen, Inc. v. Cream*, 29 N.Y.2d 387, 392 (1972)) (holding employer failed to demonstrate that lists of current customers were trade secrets). RMP services virtually the entire state of Utah,<sup>2</sup> making street addresses of RMP’s customers “readily ascertainable” and certainly far from confidential. All Vote Solar is asking for is a subset of those addresses and anonymous customer identifiers. Notably, Vote Solar is not requesting customer names. While RMP asserts that it has a policy against the production of such information, RMP’s self-imposed policy does not trump its legal obligation to respond to reasonable discovery requests in this proceeding and is, therefore, unavailing. Likewise, RMP’s policy cannot be used as a shield to prevent Vote Solar from meeting its burden in this proceeding.

*Second*, although RMP asserts that this information is commercially sensitive, it cannot demonstrate—as is its burden—that the data reflects “important proprietary information.” *See Zoobuh, Inc. v. Rainbow Int’l Corp.*, 2015 WL 2093292, at \*3 (D. Utah May 5, 2015) (denying motion to quash subpoena brought on the grounds it called for confidential and commercially

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<sup>2</sup> *See* Service Area Map, Rocky Mountain Power, *available at* <https://www.rockymountainpower.net/about/cf/sam.html>.

sensitive information where moving party “failed to describe the confidential or privileged nature of the documents with sufficient particularity”). Vote Solar seeks neither customer projections, business plans, marketing efforts, nor any other information that could be useful to an RMP competitor—which Vote Solar most certainly is not. Vote Solar only seeks anonymous customer identifiers and addresses for current Schedule 135 and Schedule 136 customers. This information is plainly not commercially sensitive, and RMP’s unsubstantiated claim of commercial sensitivity is insufficient to avoid production.

### **III. RMP Should Produce The Requested Information Subject To Appropriate Protections**

Even if this information were confidential or commercially sensitive—which it is not—any concerns regarding disclosure are fully addressed by Vote Solar and its experts having signed non-disclosure agreements in which each certified that they have read and will comply with R746-1-603 of the Utah Administrative Code. By executing such agreements, Vote Solar and its experts have agreed that they will not “use or disclose information [designated as ‘confidential’ or ‘highly confidential’] except . . . for the purpose of the Commission proceeding in which it was obtained.” R746-1-603. If RMP believes that the information Vote Solar seeks is confidential, or even highly confidential, it is free to designate it as such, but RMP must still produce the requested data.<sup>3</sup>

Although Vote Solar believes the existing confidentiality protections are sufficient, it is amenable to additional reasonable protections to assuage RMP’s concerns—a suggestion RMP rejected during the parties’ April 10, 2019 meet-and-confer. In fact, the Commission has a protocol to create additional protections for certain information as long as the party seeking the additional protections can demonstrate “the particular basis for the claim; . . . the specific, additional protective measures requested[; and] . . . the reasonableness of the requested, additional

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<sup>3</sup> R746-1-602(2)(a) permits RMP to withhold confidential information if Vote Solar “could use the information to [RMP’s] competitive disadvantage.” Vote Solar is not even a commercial entity so any claim that the information can be withheld on these grounds must be summarily dismissed.

protection.” R746-1-601. Rather than taking this step, RMP has outright refused to produce the requested information, a wholly unacceptable response.

#### **STATEMENT REGARDING PROPORTIONALITY**

Under Rule 26(b)(2) of the Utah Rules of Civil Procedure, the relief Vote Solar seeks is reasonable and proportional. *First*, the data is necessary for Vote Solar to conduct its own analysis and sustain its burden of proof in support of its proposed export rate. *Second*, RMP does not contest that the information is already in RMP’s possession; nor has RMP argued that there would be any burden in producing such data. *Third*, the information cannot readily be obtained by Vote Solar from another source that is more convenient, less burdensome, or less expensive. *Finally*, the production of any such information is subject to the existing confidentiality agreement, and Vote Solar will comply with an additional protective order if the Commission deems it necessary.

#### **CERTIFICATION OF GOOD FAITH ATTEMPT TO CONFER**

The parties met and conferred by telephone on April 10, 2019. Although they were able to resolve certain disputes, the parties remain at impasse on the production of anonymous customer identifiers and street addresses. RMP stated that it will only produce the information in dispute if it is ordered to do so by the Commission.

#### **REQUEST FOR EXPEDITED CONSIDERATION**

Vote Solar’s ability to conduct the sample described above in time for use in this proceeding reduces with each passing day. Accordingly, Vote Solar respectfully requests an expedited decision from the Commission as soon as is practicable following the submission of RMP’s opposition to this Motion, which is due April 29, 2019.

Respectfully submitted this 22nd day of April, 2019

/s/ Joshua S. Margolin

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of April, 2019 a true and correct copy of the forgoing was served upon the following as indicated below:

Via electronic mail:

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