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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Request of Rocky Mountain Power for a Technical Conference	Docket No. 23-035-34
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UAE’S OBJECTION TO CLOSED TECHNICAL CONFERENCE

The Utah Association of Energy Users (“UAE”) hereby submits the following Objection to the Commission’s Notice of Closed Technical Conference issued in this docket on July 26, 2023 (“Notice”). For the reasons set forth herein, UAE objects to the blanket closure of the technical conference to any interested person other than Rocky Mountain Power, the Commission, the Division of Public Utilities (“Division”), and the Office of Consumer Services (“Office”).

BACKGROUND

The Notice was issued in response to a July 24, 2023 email from Rocky Mountain Power (“RMP” or “Company”) to the Commission requesting such a conference. That email reads, in its entirety, as follows:

Rocky Mountain Power requests from the UPSC a technical conference to discuss PacifiCorp’s recent credit rating change and related finance matters. RMP requests that the technical conference is closed to the public. The non-public technical conference is requested due to PacifiCorp’s ongoing federal and state securities law compliance and disclosure obligations, including but not limited to federal Regulation FD.

The company requests the non-public technical conference for August 11, 2023, at 1:30 pm, if possible.

Thank you. Please feel free to contact me if you have any questions.

In response to this email, the Commission issued the Notice, which states in relevant part as follows:

The PSC has found presentation of this information to the PSC and state regulatory agencies is in the public interest and expects the presentation to include discussion of confidential information pertaining to PacifiCorp's finances and other sensitive data. Therefore, the PSC determines it is in the public interest to close the technical conference to the public under Utah Code Ann. § 54-3-21(4) for the purpose of allowing RMP's regulators to obtain the information.

[Notice at 1].

The Notice went on to set a closed technical conference for 1:30pm on August 11, 2023, and stated that “[a]ttendance at the technical conference will be limited to designated representatives of the PSC, RMP, the Division of Public Utilities, and the Office of Consumer Services. Any person desiring to attend this event must show government issued photo identification to be admitted past the building security station.” Notice at 1-2.

OBJECTION

UAE objects to the Notice on the grounds that it imposes a blanket closure of the technical conference requested by RMP, closing the conference to any interested person other than RMP, the Commission, the Division, and the Office. The Notice creates this blanket closure without first providing interested persons the opportunity to object, without any record evidence to suggest that the information to be presented at the conference is confidential, and without any provision that would allow interested parties to satisfy conditions that would ensure that any confidential or

highly confidential information discussed at the conference is not disclosed outside of the conference.

The Commission regularly handles confidential and highly confidential information provided by utilities in executing its regulatory obligations. It has promulgated rules to ensure that such information can be provided to the Commission and to interested parties in such a manner that ensures that the information is not disclosed. The Commission, the Division, and the Office are permitted to receive and review confidential and highly confidential information pursuant to Commission Rule R746-1-602(1)(a). Subpart (1)(b) identifies persons that “are entitled to receive and review confidential and highly confidential information after signing a non-disclosure agreement,” including “(A) counsel or other designated representative of each party.” UAE frequently intervenes in regulatory proceedings before this Commission and is permitted access to confidential and highly confidential information pursuant to Subpart (1)(b).

Subpart (1)(b) identifies one exception that would prevent disclosure of confidential and highly confidential to parties otherwise permitted access to such information after signing an NDA. That exception is set forth in Subpart (2) of the Rule, which states as follows:

(2)(a) A person, including an expert who is employed or retained by a party, may not receive confidential or highly confidential information if, in performing the person’s normal job functions, the person could use the information to the competitive disadvantage of the person providing the information.

(b) The party that wishes to restrict or deny access to confidential or highly confidential information under Subsection R746-1-602(2)(a) has the burden to demonstrate the competitive disadvantage claimed.

A party identified in Subsection (1)(b), such as UAE, that signs a non-disclosure agreement agreeing to be subject to the Commission’s rules regarding nondisclosure is permitted access to confidential and highly confidential information *unless* the disclosing party carries its burden of

demonstrating that disclosure of the information would provide the receiving party with a competitive advantage. RMP has not claimed that either UAE or any other party described in Subsection (1)(b) would receive a competitive advantage from receiving the information to be provided at the conference and the Commission has made no such finding.

The only proposed justification for closing the hearing was offered by RMP in its initial email in this docket to the Commission on July 24, 2023. In that email, RMP requests the conference “to discuss PacifiCorp’s recent credit rating change and related finance matters.” RMP does not even claim in the email that the information it seeks to disclose at the conference is confidential or highly confidential. Rather, RMP asserts that “[t]he non-public technical conference is requested due to PacifiCorp’s ongoing federal and state securities law compliance and disclosure obligations, including but not limited to federal Regulation FD.”

UAE cannot respond to RMP’s claim that the conference must be closed due to certain unidentified “ongoing federal state securities law compliance and disclosure obligations.” The only such obligation RMP cites is Federal Regulation FD. Federal Regulation FD, which is set forth at 17 C.F.R. § 243.100, applies to entities that issue securities and requires that whenever such an entity “discloses any material nonpublic information regarding that issuer or its securities” to certain enumerated persons, then “the issuer shall make public disclosure of that information as provided in § 243.101(e).” 17 C.F.R. § 243.100(a). In other words—and assuming both that A) RMP is subject to Federal Regulation FD and B) the information RMP proposes to disclose at the conference constitutes “material nonpublic information regarding that issuer or its securities,” Federal Regulation FD would prevent RMP from disclosing information at the conference that it does not also make in public settings, unless some exception to Federal Regulation FD exists.

UAE presumes that RMP's citation to Federal Regulation FD in its request to close the conference is intended to suggest that closure of the conference is necessary so that it can make the disclosure to the Commission and regulators without triggering an obligation to disclose the information to the general public as for securities purposes.

But closing the conference to everyone other than the Commission and the regulators is not necessary to satisfy the requirements of Federal Regulation FD. Federal Regulation FD makes clear that the public disclosure requirement is only triggered if the non-public disclosure is issued to certain enumerated people identified in subpart (b) of the rule. Subpart (b)(1) of Federal Regulation FD states that the public disclosure requirement is triggered if the issuer discloses information to certain listed persons, including securities brokers, investment advisers, investment companies, and securities holders. *See* 17 C.F.R. § 243.100(b)(1). UAE and the vast majority of the general public do not trigger the public disclosure requirement of Federal Regulation FD. Moreover, subpart (2) of Federal Regulation FD makes clear that the public disclosure requirement "shall not apply to a disclosure made: (ii) To a person who expressly agrees to maintain the disclosed information in confidence." *Id.* § 243.100(2)(ii). That is, if at the conference RMP were to disclose information to any person who agrees to receive that information and not disclose it, RMP's public disclosure obligations under Federal Regulation FD would not be triggered.

Nothing in Federal Regulation FD suggests that the public disclosure requirement is not triggered by disclosure to the issuer's government regulators. As such, disclosure to the Commission, the Division, and the Office does not trigger the public disclosure requirements of the rule both because they are not listed in Subsection (b)(1) and because (presumably, at least) RMP intends to designate the information disclosed at the conference as confidential or highly

confidential and subject to the Commission's nondisclosure rules regarding such information. UAE has signed the Commission's nondisclosure agreement and agreed to be bound by those same nondisclosure obligations. As such, there is no reason why disclosure to UAE would trigger a public disclosure requirement under Federal Regulation FD and disclosure to the Commission, the Division, and the Office would not.

This Commission's existing rules regarding the disclosure and handling of confidential and highly confidential information satisfy the obligation in Federal Regulation FD that information be held in confidence so as not to trigger any public disclosure obligation. As noted above, R746-1-602 states that the Commission, the Division, and the Office are entitled to receive confidential and highly confidential information, and that members of the public are entitled to receive such information if they agree to sign a nondisclosure agreement. Parties that receive such information—whether they are listed in subpart (1)(a) or in subpart (1)(b) of R746-1-602—are subject to the same duties not to disclose the information. Those nondisclosure obligations are set forth in R746-1-603 and provide protections against disclosure that should satisfy any concerns related to Federal Regulation FD.

UAE has submitted the Commission's standard nondisclosure agreement in this docket. UAE is, therefore, subject to the same nondisclosure requirements that the Commission, the Division, and the Office. Prior to filing this objection UAE reached out to RMP to determine if some other form of nondisclosure agreement would be appropriate in this matter to satisfy RMP's concerns but was informed that RMP would not discuss any such arrangements with UAE.

For the reasons set forth herein, UAE objects to the blanket closure of the August 11, 2023 conference to all persons other than the Commission, the Division and the Office. A UAE

representative has signed the Commission's non-disclosure agreement and should be permitted to attend the conference. The Commission is sometimes required to close hearings to the general public to allow the discussion of confidential and highly confidential information among the parties to that proceeding. In such circumstances, parties that have not signed the Commission's nondisclosure agreement are required to leave. By contrast, parties that *have* signed the Commission's nondisclosure agreement and have agreed to be bound by the Commission's nondisclosure rules are permitted to remain in the hearing and to receive disclosure of the confidential and highly confidential information. No information has been provided in this docket that justifies different treatment of the information RMP proposes to present at the conference.

For the foregoing reasons, UAE objects to the Notice and asserts that—having signed the Commission's nondisclosure agreement and agreed to be bound by the Commission's nondisclosure rules—UAE's representative should be permitted to attend the conference. UAE respectfully requests that the Commission issue a new notice of the technical conference that permits entry to all parties that have signed the Commission's nondisclosure agreement.

DATED this 11th day of August 2023.

Respectfully submitted,



By: _____

Phillip J. Russell
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Attorneys for UAE

Certificate of Service
Docket No. 23-035-34

I hereby certify that a true and correct copy of the foregoing was served by email this 4th day of August 2023 on the following:

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/s/ Phillip J. Russell