SIERRA CLUB
FOUNDED 1892

September 5, 2014

Via Electronic Filing and FedEx

Public Utility Commission
Attn: Filing Center
3930 Fairview Industrial Drive SE
Salem, OR 97308

Re: Docket No. UM 1707 Reply Brief Denying Alleged Violations of Protective Order of Sierra Club

Please find enclosed the original and five (5) copies of Sierra Club's Reply Brief Denying Alleged Violations of Protective Order in the above-referenced docket. The confidential version of this document is being filed with the Commission and served on parties via FedEx.

Please let me know if you have any questions. Thank you.

Respectfully submitted,

/s/ Derek Nelson

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1707

In the Matter of SIERRA CLUB, Regarding violation of Protective Order No. 13-095.	SIERRA CLUB'S **REPLY** BRIEF DENYING ALLEGED VIOLATIONS OF PROTECTIVE ORDER ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Sierra Club understands that any violation of a protective order is an extremely serious matter. It also recognizes that the Commission's obligation to maintain the integrity of the regulatory process includes acting, where necessary, to enforce protective order obligations. Sierra Club acknowledges that it should have sought in the Wyoming proceeding a copy of any confidential document produced in LC 57 before serving data requests that referred in any fashion to that document—*i.e.,* that it should not have conflated a two-step process into one.[1] Sierra Club regrets any inconvenience it has caused both to this Commission and the parties, recognizes the basis for concern, commits not to engage in such conduct again, and sets forth below the commitments we will undertake to minimize to the greatest extent possible the likelihood that this situation will recur.

Our inartful process notwithstanding, we were extremely careful not to reveal any protected information in the Wyoming data requests and our actions were taken in good faith with the very best intentions to keep utility commissions well-informed. Moreover, Sierra Club maintains that the filing of the Wyoming data requests has not jeopardized this Commission's regulatory process nor has it prejudiced the company.

[1] As PacifiCorp acknowledges, Sierra Club could have requested the document in a first set of data requests. PacifiCorp's Response to Sierra Club's Initial Brief Regarding Violation of Protective Order No. 13-095, at 18-19, hereinafter ("Response"). Then, PacifiCorp could have provided a public document with any sensitive parts redacted, or it could have designated the entire presentation as confidential under the Wyoming protective order.

The company's allegations raise a unique issue about the treatment of confidential information that would be helpful for the Commission to clarify. Specifically, a central question raised is whether a utility can deem everything associated with a confidential workshop—including both written and oral information— as "confidential" even where attendees at the meeting had already obtained that information prior to the meeting and through non-confidential means.

The company seeks to portray Sierra Club as a bad actor, and asks this Commission to levy unprecedented sanctions. No basis has been provided to support the overly punitive sanctions that the company has asked be imposed. In fact, the picture painted by the company stands in stark contrast to Sierra Club's longstanding solutions-oriented work before this Commission, where we have made positive and productive contributions to advance goals and measures that optimize PacifiCorp's energy generation mix in ways that are fully protective of Oregon ratepayers and the environment.

Sierra Club has a longstanding record of productive participation in Oregon energy dockets starting with PGE's 2009 IRP.[2] Specific to PacifiCorp, in LC 52, the 2011 IRP docket, Sierra Club submitted several rounds of detailed, technical comments, and attended confidential technical workshops and public hearings, all with the goal of helping the Commission evaluate PacifiCorp's 2011 coal replacement study and energy efficiency programs.[3] Many of Sierra Club's recommendations are reflected in the final order's revised action plan.[4] In 2012 and 2013, Sierra Club participated in PacifiCorp's rate cases and CPCN dockets in Wyoming, Utah and Oregon. In particular, Sierra Club made a substantial contribution to UE 246 in 2012. Sierra Club engaged in discovery, submitted voluminous expert testimony, cross-examined company witnesses, submitted legal briefing and made oral legal arguments. Sierra Club played a critical role in the outcome of PacifiCorp's 2012 Oregon general rate case; indeed, the Commission cited to

[2] See Sierra Club's comments on Portland General Electric, Co.'s Draft 2009 Integrated Resource Plan, Docket No. LC 48 (Oct. 5, 2009).
[3] See Sierra Club's Reply Comments on PacifiCorp's 2011 Integrated Resource Plan, Docket No. LC 52 (Nov. 3, 2011).
[4] Order No. 12-082, at pp. 7-8, Docket No. LC 52 (March 9, 2012).

Sierra Club's work more than thirty five times throughout the final decision and order covering revenue requirement and thermal generation plants.[5] Most recently, Sierra Club has been an active participant in the Commission's Fleetwide Assessment where Sierra Club has provided oral and written comments on an inter-temporal and fleet-wide tradeoffs analysis for regional haze compliance in Wyoming.[6] That effort tiered off of the 2013 IRP, in which Sierra Club played an important role as reflected in the final order for that docket.[7]

Sierra Club asks that this Commission take into account our longstanding record of positive and productive participation. At no point in any of these proceedings was Sierra Club, its attorneys, or its experts ever accused of any wrongdoing with respect to protected information or otherwise.

II. ARGUMENT

A. Sierra Club Did Not Use Confidential Data to Formulate the Wyoming Data Requests

PacifiCorp first argues that the Sierra Club used confidential business information to formulate the Wyoming data requests. In focusing on the page references, PacifiCorp effectively concedes that the alleged violation amounts to a relatively minor infraction.[8] Sierra Club's references to page numbers, bullet points and requests for the company to provide information in another tribunal, which is also considering the Craig and Hayden plants, is not similar to the Commission's *Verizon* case. [9] There the party used and manipulated **highly** confidential data to support its legal position against that company.

In the *Verizon* case, the Commission found that the International Brotherhood of Electrical Workers (IBEW) violated the operative superseding highly confidential protective order by using highly confidential data to support its arguments in a motion before the Pennsylvania Commission. IBEW brazenly asked the Pennsylvania tribunal to consider "newly provided information" obtained through discovery in Oregon as a basis

[5] Order No. 12-493, Docket UE 246 (Dec. 20, 2012).
[6] Sierra Club Recommendations on PacifiCorp Fleetwide Assessment (June 20, 2014).
[7] Order No. 14-252, Docket No. LC 57 (July 8, 2014).
[8] Response, at p. 7.
[9] In the Matter of Verizon Communications Inc. et al, Docket No. UM 1431, Order No. 09-409, (Oct. 14, 2009), hereinafter ("Verizon Order").

for granting IBEW's request for interlocutory review, thereby *using* the highly confidential data it indisputably learned in Oregon to advocate in Pennsylvania.[10]

IBEW's manipulation of highly confidential data, using facts and figures and turning them into other material to advocate a legal position, is not what happened here. Sierra Club did not manipulate data found in the August 6, 2014 workshop or make calculations or formulate ideas to generate data requests. Sierra Club's mere reference to page numbers and bullet points along with generic questions that we routinely ask utilities around the country bears no resemblance to the matters at issue in *Verizon*.

B. The Company Has Not Shown that Sierra Club Disclosed Confidential Information

The company's claim that Sierra Club's data requests cited "to portions of the confidential written presentation provided by PacifiCorp"[11] is false. Sierra Club has reviewed the company's Confidential Exhibit A, which purported to show that all of the Wyoming data requests contained confidential information. Rather than refute the company's Confidential Exhibit A point by point in this brief, Sierra Club has prepared a virtually identical document to the company's exhibit that addresses each one of the company's concerns. Specifically, Sierra Club Confidential Attachment 1 provides references and cites to publicly available independent information showing that Sierra Club had previous knowledge of these two coal plants well before attending the August 6 workshop.[12]

The company also argues that the data requests "*contain* confidential information from the written presentation and from the oral discussion at the workshop."[13] PacifiCorp attempts to draw a straight line between the confidential workshop and each of the data requests but that straight line does not exist. As we demonstrate in Confidential Attachment 1, we had access to and were well familiar with most of the facts and circumstances surrounding the Craig and Hayden coal plants before attending the confidential workshop and sending the Wyoming data requests. Sierra Club has access to numerous subscription-based and publicly available specialty databases. We review, and

[10] Verizon Order, at 4-5.
[11] Response, at p. 3.
[12] *See* CONFIDENTIAL Attachment 1, Sierra Club Response to PAC Exhibit A.
[13] Response, at p.9 (emphasis added).

frequently propound, discovery in all of PacifiCorp's various proceedings and we conduct additional specialized research. As shown throughout this brief, Sierra Club has a long history with issues surrounding the economics of PacifiCorp's coal plants including resource alternatives, EPA regulatory compliance obligations and renewable resources. PacifiCorp's argument that Sierra Club disclosed confidential information in instances where we already held the subject information is not plausible.

Confidential Attachment 1 shows, in painstaking detail, that Sierra Club did not disclose confidential information. Nevertheless, after reviewing the company's Confidential Exhibit A and our past documents, in the following three instances, Sierra Club admits that our data requests contain several words that the company claims were designated as confidential:

[redacted]

We could not provide this explanation any sooner because, despite our repeated requests and Judge Grant's instructions that the company provide us with particulars, [15] the company would not specify what we supposedly disclosed until its responsive filing

[14] [redacted]

[15] *See* Attachment 6 to Sierra Club's Initial Brief, hereinafter ("Initial Brief"), Email from Sarah Wallace, PacifiCorp, to Gloria D. Smith, Sierra Club (Aug. 19, 2014): "Judge Grant instructed us to 'work informally to help clarify' any confusion that Sierra Club may have over 'what information in its data requests is a concern to PacifiCorp.' PacifiCorp is concerned about every one of the sixteen data requests included in the original third set of data requests in the Wyoming general rate case because every one of those requests either uses or discloses (or both) confidential information provided during the confidential August 6, 2014 workshop at the Oregon Public Utility Commission."

on August 21. In any case, these few words, isolated and unconnected to any broader meaning, cannot possibly be properly included in the confidential designation or constitute confidential trade secrets. However, we fully accept responsibility for using these 4 words and date, but deny that the Wyoming data requests disclosed any other information from the meeting as shown in Confidential Attachment 1.

Finally, the company is incorrect that environmental expenditures at the Craig and Hayden 2 coal plants are not included in Wyoming rate case.[16] In fact, in the company's direct testimony in Wyoming, it describes the SCR retrofits at both Craig and Hayden Units 1 and 2.[17] Just because Dr. Fisher did not testify on all aspects of these expenditures in his pre-filed direct testimony in Wyoming does not mean these plants are not included in the rate case and that Sierra Club will not submit rebuttal testimony on these units after discovery concludes.

C. The Company Cannot Designate Sierra Club's Prior Knowledge As Confidential

The company argues that Sierra Club used or disclosed information that the company had *designated* as confidential.[18] The company claims that Sierra Club is attempting to retrospectively justify its use by now claiming the information was not confidential, and that we should have challenged the designation before issuing the data requests.[19] In fact, it is the company that is taking retrospective action here, not Sierra Club. The company is retrospectively arguing that the whole of the August 6 workshop falls within the protective order despite the fact that some of what was discussed is information that Sierra Club had obtained through public channels prior to the workshop. Sierra Club knows there is a mechanism under the protective order that allows for challenges to designations, and, out of an abundance of caution, we have invoked that provision, but Sierra Club had no basis for challenging PacifiCorp's allegations that our

[16] Response, at p. 12.
[17] Direct Testimony of Chad. A Teply, WY PSC, Docket No. 20000-446-ER-14 (March 3, 2014).
[18] Response, at p. 8 (emphasis added).
[19] *Id.*

own prior knowledge had become designated until after it received PacifiCorp's August 8 letter.[20]

PacifiCorp attempts to repackage public information as confidential by sharing it in a confidential technical workshop. The company should not be able to retrospectively deem public information exchanged in the course of the workshop as confidential. The question is significant because if the company is able to transform public information into confidential data, then any knowledge that a stakeholder may have gained previously could be transformed into a trade secret.

This question arises because the company has not complied with Oregon law, which requires **limited** designations. As we show in our motion challenging designation, PacifiCorp's designation of *all* information related to the workshop is untenable because the company has not in "good faith" "**limited** [designations] to the portions of the document that qualify as a protected trade secret or other confidential research, development, or commercial information."[21]

Sierra Club assumed, reasonably and in good faith, that only the *confidential* aspects of the technical workshop were covered under Protective Order 13-095,[22] which defines "Confidential Information" as data that falls within the scope of ORCP 36(C)(7) ("a trade secret or other confidential research, development or commercial information"). And based on that reasonable assumption, Sierra Club attended the August 6 workshop wherein we asked questions and voiced opinions based on our prior understanding of these coal plants and PacifiCorp's business operations more generally.

In its responsive filing, the company did not dispute that Sierra Club and other parties, including the commissioners attending the meeting, had *some* prior understanding of the economics of these two coal plants. Yet, the company claims that "PacifiCorp designated all information in the written presentation and the oral discussion at that

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[20] Actually, PacifiCorp still did not make clear its belief that *all* information related to the meeting is now designated confidential until after the August 18 telephonic hearing with Judge Grant and subsequent emails.
[21] OAR 860-001-0080 (emphasis added).
[22] Memorandum In the Matter of PacifiCorp, 2013 Integrated Resource Plan, Docket No. LC 57 (July 30, 2014) "Protective Order No. 13-095 will govern *the confidential information* to be addressed at the workshop." (emphasis added)

workshop as confidential under protective order no. 13-095."[23] Sierra Club understandably did not assume that all of its prior understanding with respect to these two coal plants had transformed into confidential information as a result of our having attended a confidential meeting.[24] Now Sierra Club finds itself having to prove through its prior work in several rate cases, CPCNs, pre-approvals, and acquisition and planning dockets in four states that it was aware of publicly known items like coal contracts, participation agreements, Clean Air Act settlements, expressions of interest and the like that appear in its data requests.[25] Even a cursory review of the body of our prior work shows it is just these types of items we frequently focus on.

Sierra Club requests that the Commission consider Sierra Club's reasonable interpretation of the operative rules, along with the company's overly broad designation practice, as well as the FERC Model Protective Order, to help resolve this question for the benefit of all parties that practice in front of the Commission.[26]

D. PacifiCorp's Penchant for Overreaching on Protective Orders is Not New

This is not the first time the company has pushed for an overly expansive reading of a protective order to prevent transparency to regulatory commissions. Both the Utah Commission and a Utah federal district court rejected PacifiCorp's overbroad interpretation of "use" in a federal protective order. There the dispute concerned withholding documents from the Commission related to a recent arbitration proceeding.

In Pacificorp's 2011 general rate case in Utah, UAE Intervention Group asked PacifiCorp to provide the record from a federal arbitration between PacifiCorp and

[23] *See* Attachment 6 to Initial Brief, Email from Sarah Wallace, PacifiCorp, to Gloria D. Smith, Sierra Club (Aug. 19, 2014)

[24] *See e.g.*, Attachment 2, FERC Model Protective Order: "Section (3) Protected Materials shall **not** include (A) any information or document that has been filed with and accepted into the public files of the Commission, or contained in the public files of any other federal or state agency, or any federal or state court, unless the information or document has been determined to be protected by such agency or court, or (B**) information that is public knowledge, or which becomes public knowledge**, other than through disclosure in violation of this Protective Order. Protected Materials do include any information or document contained in the files of the Commission that has been designated as Critical Energy Infrastructure Information." (Emphasis added.)

[25] *See* CONFIDENTIAL Attachment 1, Sierra Club Response to PAC Exhibit A, where Sierra Club provides substantive and detailed examples of our knowledge and use of these types of materials.

[26] *See* Attachment 2, FERC Model Protective Order.

Deseret Generation relating to the costs of pollution control retrofits at the Hunter Power Plant, including hearing transcripts and other discovery documents. PacifiCorp refused to provide the documents, stating:

> The Company objects to this request on the basis that the information is subject to the Stipulated Protective Order entered by the federal court in a proceeding between PacifiCorp and Deseret Generation and Transmission and is already in the possession of counsel in its capacity as counsel for Deseret.[27]

Like here, the company argued that UAE counsel improperly "used" his knowledge of protected company information that was gained in the federal arbitration to formulate this data request. PacifiCorp refused to provide the information because "UAE's counsel… allegedly *used his knowledge* of protected Company information, gained in his capacity as counsel for Deseret in the federal arbitration, to formulate Data Request 2.1."[28] The company also moved to enforce the protective order in federal court to protect disclosure of the arbitration materials, arguing again, just like in this case, that UAE's counsel "is improperly using, both directly and indirectly" confidential materials in violation of the protective order.[29]

The Utah Commission declined to accept the company's position. In its final order, the Commission noted that the attorney "represents he has not violated the Protective Order and that all information necessary to formulate Data Request 2.1 is available in the public record." [30] The Commission accepted the attorney's representation that he did not inappropriately use confidential information. The federal court summarily denied the company's motion to enforce the protective order in a minute order.[31]

Like Sierra Club's Wyoming data requests here, UAE's counsel used publicly available information to draft a data request on behalf of UAE asking for the PacifiCorp/Deseret information. Accordingly, the Utah Commission reminded the

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[27] *See* Attachment 3, Utah Docket No. 10-035-124, Order on Motion to Compel Discovery, at p. 2 (April 26, 2011).
[28] *Id*. at p. 5 (emphasis added).
[29] *See* Attachment 4, Motion to Enforce Terms of the Protective Order, Deseret Generation v. PacifiCorp, Case No. 2:10-cv-159-TC-DN, Doc. 46 (Filed March 23, 2011), at p. 2.
[30] *See* Attachment 3, at p. 6, fn 6.
[31] *See* Attachment 5, Minute Order, Deseret Generation v. PacifiCorp, Case No. 2:10-cv-159-TC-DN, Doc. 68 (Filed May 24, 2011).

company that "the Commission's rules afford adequate protection for any confidential Company or third party information present in the decision."[32]

E. The Company Failed to Show that Sierra Club Routinely Violates Protective Orders and Commission Rules

The company dedicates nearly six pages of its responsive pleading to a list of alleged instances in which the Sierra Club has violated protective agreements and Commission rules, both here and in proceedings in other jurisdictions.[33] As shown below, no such showings have been made. Sierra Club in fact takes its duties and obligations under protective orders and all other rules that come with participating in utility commission proceedings very seriously.

1. Sierra Club Was Not Required to Return Confidential Information

PacifiCorp complained that Sierra Club is remiss for not returning confidential information to the company.[34] PacifiCorp demanded Sierra Club return confidential information in its August 8 letter, and the company also claimed the information must be returned because the final order in LC 57 was issued on July 8; however, the docket remains open for further investigation ahead of the 2015 IRP docket. Sierra Club was not required to return documents. Paragraph 11 of Order No. 13-095 allows PacifiCorp to refuse to provide new confidential information to Sierra Club, however, it does not require that Sierra Club immediately return all documents in its possession. Paragraph 14 of the Protective Order requires that persons other than counsel of record to destroy or return confidential information within 90 days after resolution of the case, however, 90 days from the July 8 final order is October 6. Sierra Club will work with its expert to destroy or return the confidential information within 90 days of the final resolution of LC 57, or as otherwise ordered by this Commission.

[32] *See* Attachment 3, at p. 10-11.
[33] Response, at pp. 12-17.
[34] *Id.* at 4.

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2. Sierra Club Properly Invoked Procedures under the Utah Protective Order

According to the company, Sierra Club *declared a clear intent* to violate a Utah protective order when it sought to provide the Oregon commissioners with Sierra Club testimony filed in a then-pending general rate case in Utah.[35] Sierra Club's May 13, 2014 letter to the commissioners makes clear that, "Sierra Club intended to transmit an unredacted copy of Dr. Fisher's testimony to you, but PacifiCorp intensely denied our request that the company waive Utah confidentiality rules so you could view the company's own evidence."[36] Sierra Club had several telephone calls with company counsel seeking permission to send a copy of Dr. Fisher's unredacted Utah testimony to the Oregon commissioners, but the request was refused.[37]

3. The Sierra Club Did Not Violate the Protective Order when it Transmitted Its Initial Brief to This Commission; Nor Does It Routinely Violate Confidentiality Agreements

PacifiCorp's complaints about legal assistant Kadie McShirley's filing of Sierra Club's initial brief are resolved by Attachment 6, Sierra Club Signatory Page, listing additional Sierra Club "Qualified Persons" under paragraph 3(e) of the Protective Order, in accordance with Judge Grant's instructions, and PacifiCorp counsel's email.[38] The company also suggested that Sierra Club finds it "nearly impossible to abide by confidentiality agreements."[39] While it is correct that Sierra Club has recommended to the Commission that it undertake efforts to facilitate information disclosures in multistate proceedings, that position in no way demonstrates that Sierra Club violated the protective order at issue in this case. Instead of showing a disregard for the Commission's rules,

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[35] *Id.* at p. 12.

[36] Letter to Oregon Commissioners from Gloria D. Smith (May 13, 2014) (*specifically not sent per any Oregon PUC Docket*).

[37] Note that the company's protests were not pursuant to any operative protective order; both the Utah and Oregon utility commissions' rules provide open access to commissioners and commission staff to review confidential material in their respective dockets. See Utah R746-100-16(d); Oregon Protective Order 13-095.

[38] See Attachment 7, Email from Sarah Wallace to Gloria D. Smith, "RE: Timely request: please reply," dated Fri, Aug 29, 2014 at 2:43 PM.

[39] Response, at p. 15.

Sierra Club's full comments demonstrate that Sierra Club is well aware of the obligations and limitations imposed on it under confidentiality agreements.[40]

4. Sierra Club Complies With Commission Rules and Requirements

PacifiCorp claims that Sierra Club's filing of a motion challenging the "confidential" designation concurrently with its initial brief on the protective order is "[t]he most egregious example of Sierra Club's disregard of Commission rulings."[41] In fact, Judge Grant did not prohibit a concurrent filing and, in any event, Sierra Club did so only out of an abundance of caution. Our position is that we did not disclose confidential information in the Wyoming data requests, obviating the need for a motion. However, as that premise has been called into question, we submitted the motion at the same time as our initial brief. Judge Grant's statement that the issues were separate did not mean that PacifiCorp's overly broad designation could not factor into the Commission's consideration of penalties.

The company next accuses Sierra Club counsel of failing to file *pro hac vice* papers to participate in LC 57. As noted, Sierra Club's counsel filed for *pro hac vice* status in UE 246, a contested general rate case where Sierra Club was represented by counsel who cross examined witnesses and filed legal briefing.[42] In contrast, we specifically did not seek *pro hac* status in planning docket LC 57 because, as the Commission's May 2013 memo noted, *pro hac vice* is filed in accordance with OAR 860-001-0320. Pursuant to that regulation, out of state attorneys wishing "to make legal arguments or sign legal documents in Commission proceedings" must appear *pro hac vice*. Sierra Club attorneys have not appeared before this Commission in this manner in LC 57.[43] As appropriate to a planning proceeding, our involvement has been limited to technical issues.

For example, on August 22, 2013, and January 10, 2014, Synapse Energy Economics submitted technical comments on Sierra Club's behalf. On January 17, 2014,

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[40] Sierra Club Final Comments, Docket No. LC 57 (Jan. 10, 2014).
[41] Response, at p. 15.
[42] *Id.*
[43] *See* OAR 860-001-0320.

Sierra Club submitted technical comments outlining the company's additional coal plant technology retrofits under EPA's final rule on regional haze for the state of Wyoming. Similarly, Sierra Club with its experts has appeared at various technical public and confidential workshops and meetings, never for the purpose of presenting legal arguments. Sierra Club properly determined that *pro hac vice* status was not appropriate in LC 57 under Oregon rules.[44]

D. Any Sanctions Must be Just and Fit the Alleged Violation

If the Commission finds that Sierra Club's action was in violation of the protective order, we ask that any sanction imposed take into account (1) the degree of the violation; (2) the lack of any prior finding of wrongdoing by the Sierra Club; and (3) that any violation was unintentional, because Sierra Club was careful to craft the data requests in Wyoming so as not disclose information that it obtained through confidential channels. We assure the Commission that Sierra Club's action was in good faith and consistent with the public interest it seeks to serve.

Sierra Club's actions were neither willful or in bad faith; indeed, the company has not made such claims. Sierra Club's motive was to ensure that the Wyoming Commission had all pertinent information in front of it while considering PacifiCorp's 2014 rate case. The data requests were consistent with the type of discovery we have propounded in PacifiCorp dockets over the last five years, and reflected our goal of ensuring that Commissions are afforded the most timely, relevant information available to assess the actual customer costs of continued reliance on fossil-fuel power. There was no bad faith or self-serving motive behind Sierra Club's discovery.[45]

We note as well that—in advance of any formal finding by the Commission -- Sierra Club, its expert, its allies, and its expert's other clients have already been made to pay a heavy price for the Wyoming data requests. By broadcasting allegations and the

[44] Sierra Club has concluded that it is required to seek pro hac vice status in this proceeding and is actively engaged in securing local counsel.

[45] See, e.g., *Pamplin v. Victoria*, 319 Or. 429, 431 (1994) ("We hold that a trial court that imposes the sanction of dismissal under ORCP 46 B(2)(c) must make findings of fact and must explain why that sanction is 'just'; that a finding of willfulness, bad faith, or fault of a similar degree on the part of the disobedient party is required"); *Johnson v. Eugene Emergency Physicians*, 159 Or. App. 167, 171-74 (1999) (finding plaintiff's actions using protected personnel documents to file complaint against physician were "egregrious and willful in the extreme").

initial statements by Judge Grant to the Commissions and parties in Oregon, Wyoming, and Utah, PacifiCorp has hindered the ability of the Sierra Club, its staff, and its outside expert, Dr. Jeremy Fisher to conduct normal business. PacifiCorp has unilaterally banned Dr. Fisher from confidential workshops and conference calls in entirely unrelated matters, resulting in harm to Dr. Fisher's outside clients.

The company's retribution against Dr. Fisher is especially unwarranted.[46] PacifiCorp has not lodged any specific allegation against Dr. Fisher except that he signed the protective order and attended the confidential workshop. Because Dr. Fisher did not sign or send the Wyoming data requests at issue, PacifiCorp cannot allege that he violated the protective order. Dr. Fisher and his company Synapse Energy Economics have impeccable credentials; Dr. Fisher is a consultant to many state and federal agencies around the country, all of which have required confidentiality. These allegations and related actions have already caused reputational injury to Dr. Fisher and Synapse, and harmed their other clients.[47]

PacifiCorp's exclusion of Dr. Jeremy Fisher from an August 28 training on the company's System Optimizer model harmed a broad coalition of PacifiCorp stakeholders in multiple states.[48] Dr. Fisher is an expert for a large coalition that includes Sierra Club and many other parties from multiple states. Banning Dr. Fisher from the modeling training at the Oregon Commission deprived him and the coalition of a significant opportunity to understand PacifiCorp's use of the model, which will prejudice their participation in upcoming IRP dockets.[49] The public exclusion of Dr. Fisher was particularly unwarranted because Dr. Fisher and Synapse Energy Economics hold a separate and longstanding nondisclosure agreement with Ventyx, the company that licenses numerous models and tools, including System Optimizer. Then, in a wholly separate matter in Utah where Dr. Fisher represents the U.S. Environmental Protection Agency in a Clean Air Act matter, PacifiCorp prohibited Dr. Fisher from participating in

[46] PacifiCorp's attempt to impose sanctions on Sierra Club staff member Amy Hojnowski (spelled incorrectly in PacifiCorp's papers as Hognowski) is also completely unsupported. Like Dr. Fisher, Ms. Hojnowski signed the protective order and attended the confidential workshop, but did not sign or send the Wyoming data requests at issue, and PacifiCorp makes no allegations of wrongdoing.
[47] *See* Attachment 8, Fisher Declaration.
[48] *See* Attachment 9, Email from Gloria D. Smith to Sarah Wallace, "RE: Access to System Optimizer in docket LC 57" (Aug. 22, 2014 at 4:40 PM); *see also* Attachment 8, Fisher Declaration.
[49] *Id.*

a conference call with the state of Utah, which harmed EPA's ability to provide comments to Utah on the modeling process discussed on that call, and worked to cast doubt on Synapse.[50]

In response to the data requests, Rocky Mountain Power's counsel emailed a list of undisclosed recipients stating that Sierra Club had violated the protective order and demanded that the recipients immediately destroy the email containing the data requests.[51] Worse, in response to Sierra Club's revised data request asking only for "any" presentations prepared for the August 6 workshop, PacifiCorp needlessly broadcasted to all parties and the Commission in Wyoming that Judge Grant had found "prima facie evidence that Sierra Club violated the protective order" and "ordered Sierra Club to show cause why the OPUC should not issue an order finding a violation and imposing sanctions."[52] Sierra Club recognizes that PacifiCorp may object to particular parties' access to trade secrets and there is a process for that under the protective order,[53] but PacifiCorp's actions—in advance of any Commission finding of misconduct—were unwarranted.

In cases involving violations of protective orders, Oregon courts admonish that even where plaintiff's actions are "egregious and willful in the extreme," "drastic" sanctions should be reserved "for the most severe violations of rules and court orders."[54] In the *Verizon* case, where the Commission made findings that counsel showed willful misconduct, lacked candor and abused the regulatory process for ulterior purposes, the Commission dismissed the party from the proceeding and sent a copy of the order to the bar association.[55] Here, no intentional misconduct or wrongful motive exists, and Sierra Club has already suffered considerable harm.

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[50] *See* Attachment 8, Fisher Declaration.

[51] *See* Attachment 10, Email from Daniel Solander to undisclosed-recipients, "RE: 20000-446-ER-14 Sierra Club 3rd Set of Data Requests to RMP 8-7-14," (Aug. 8, 2014 at 3:45 PM).

[52] *See* Attachment 11, WY 20000-446-ER-14, Rocky Mountain Power's Response to Sierra Club's Data Request 3.1 (Aug. 22, 2014).

[53] Order No. 13-095, "Protective Order" at ¶ 11, Docket No. LC 57 (March 22, 2013).

[54] *Johnson v. Eugene Emergency Physicians*, 159 Or. App. 167 (1999).

[55] In *Verizon*, not only had IBEW blatantly disregarded the Commission's earlier warning, IBEW's counsel's assertions that the subject data requests were "unintentionally" submitted in Oregon were directly contradicted by counsel's emails seeking further clarification to objections to those requests. Verizon Order, at 6. The Commission also found "resonance in the WUTC's comments" that questioned counsel's credibility and representations. Verizon Order, at 6, fn. 14.

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PacifiCorp has requested the maximum sanctions allowed under Oregon law. In support, the company cites to a case where a party stepped outside the Commission's decision making process and aired confidential information to the Oregon press.[56] A violation of the protective order clearly occurred in that high profile acquisition case. However, the order the company cites to does not provide any instructive value here because it omits any discussion on formulating potential sanctions. Instead, the company should have directed the Commission's attention to the *Verizon* matter, an opinion which does balance the proportionality of the willfulness of an actor's conduct with the level of sanctions warranted.

In the *Verizon* case, an extensive record showed a pattern of bad faith and willful misconduct on the part of the offending party and its counsel.[57] Before the party had even sought intervention in Oregon, it had already been dismissed from a Washington UTC proceeding for "improperly extract[ing] labor concessions from the applicants via a side agreement,"[58] and the Commission issued a strong warning about the party's "serious abuse" of the regulatory process before granting party status in Oregon.[59] Then within a couple of weeks of its intervention, the party immediately engaged in the same improper actions it was warned not to do, propounding improper discovery requests aimed for use in labor negotiations.[60] Under these circumstances, the Commission terminated the party's participation in the case and sent a copy of the order to the attorney's bar association. Given Sierra Club's long-standing commitment to the regulatory process, and its expertise in and its indisputable contribution to the substance of LC 57, our conduct can in no way be compared to that of the Verizon intervenors. For this reason, and those described below, the Commission should not impose sanctions in this case.

[56] In the Matter of Oregon Electric Utility Company, LLC, Docket No. UM 1121, Order No. 05-114 at 9-10 (March 10, 2005).
[57] Verizon Order.
[58] Verizon Order, at fn. 1.
[59] Verizon Order, at p. 2 & 6 ("The use of the regulatory process by one party against another to extract concessions regarding matters exogenous to a case would constitute a serious abuse that must be guarded against. I grant IBEW's petition under OAR 860-012-0001, but throughout the course of this proceeding will entertain a motion by the Applicants to terminate IBEW's participation upon a showing that IBEW has attempted to use the regulatory process to influence the Applicants in areas beyond the scope of the proceeding.")
[60] Verizon Order, at p. 6.

REDACTED

E. Sierra Club Commits to Take Actions to Ensure Future Compliance With Protective Orders

Our arguments notwithstanding, Sierra Club accepts that the Commission may conclude that the events of this proceeding warrant the issuance of a warning to Sierra Club of the importance of abiding by limitations imposed under a protective order. We are committed to preventing any future recurrence of the events at issue here, and—regardless of the outcome—intend to implement the following measures and to report back to the Commission within six months on our progress:

(1) All of the lawyers and legal assistants involved in this matter will receive training on the treatment of confidential information and the operation of protective orders.

(2) The San Francisco office of the Sierra Club will designate a "responsible person" for protective order compliance matters. That person will also receive the training mentioned above.

(3) We will commit to report the events of this proceeding to all other Sierra Club lawyers and legal assistants and will emphasize the need to pay close attention to the treatment and use of confidential materials, and will urge that any staff involved in the handling of confidential materials consider taking specific training.

III. CONCLUSION

The violation alleged is that Sierra Club requested information that the company provided in Oregon be provided in Wyoming. Sierra Club now recognizes the data requests should have been sent in two steps rather than one. Sierra Club respectfully requests that the Commission consider the minor degree of this alleged violation along with Sierra Club's unblemished record, its motive to serve the public interest, and the non-existence of any willful misconduct in assessing sanctions. Sierra Club, Sierra Club senior managing attorney Gloria D. Smith, Sierra Club staff Amy Hojnowksi, Dr. Jeremey Fisher, his company, and their other clients have already suffered as a result of these allegations. A Commission finding that the protective order was violated would have longstanding and severe consequences. Even without a finding, this experience has already served as a stern warning of the consequences of any alleged infraction of a protective order.

REDACTED

Sierra Club requests oral argument on this matter and PacifiCorp does not object to this request.

Sierra Club requests that, should the Commission choose to impose sanctions beyond the issuance of a warning, that such sanctions be stayed so that Sierra Club has an opportunity to pursue options for appeal.[61]

Dated: September 5, 2014

Respectfully submitted,

/s/ Gloria D. Smith

Gloria D. Smith
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[61] Particularly anything sent to the bar association would cause irreparable harm that could not be undone while Sierra Club pursues appeal.

Attachment 1

OMITTED

Due to confidential material

Attachment 2

MODEL PROTECTIVE ORDER

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Name of Proceeding   Docket No.

PROTECTIVE ORDER

(Issued   )

1. This Protective Order shall govern the use of all Protected Materials produced by, or on behalf of, any Participant. Notwithstanding any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Presiding Administrative Law Judge (Presiding Judge) (which includes the Chief Administrative Law Judge) or the Federal Energy Regulatory Commission (Commission).

2. This Protective Order applies to the following two categories of materials: (A) A Participant may designate as protected those materials which customarily are treated by that Participant as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject that Participant or its customers to risk of competitive disadvantage or other business injury; and (B) A Participant shall designate as protected those materials which contain critical energy infrastructure information, as defined in 18 CFR§ 388.113(c)(1) ("Critical Energy Infrastructure Information").

3. Definitions -- For purposes of this Order:

(a) The term "Participant" shall mean a Participant as defined in 18 CFR § 385.102(b).

(b) (1) The term "Protected Materials" means (A) materials (including depositions) provided by a Participant in response to discovery requests and designated by such Participant as protected; (B) any information contained in or obtained from such designated materials; (C) any other materials which are made subject to this Protective Order by the Presiding Judge, by the Commission, by any court or other body having appropriate authority, or by agreement of the Participants; (D) notes of Protected Materials; and (E) copies of Protected Materials. The Participant producing the Protected Materials shall physically mark them on each page as "PROTECTED MATERIALS" or with words of similar import as long as the term "Protected Materials" is included in that designation to indicate that they are Protected Materials. If the

Protected Materials contain Critical Energy Infrastructure Information, the Participant producing such information shall additionally mark on each page containing such information the words "Contains Critical Energy Infrastructure Information B Do Not Release".

(2) The term "Notes of Protected Materials" means memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses materials described in Paragraph 3(b)(1). Notes of Protected Materials are subject to the same restrictions provided in this order for Protected Materials except as specifically provided in this order.

(3) Protected Materials shall not include (A) any information or document that has been filed with and accepted into the public files of the Commission, or contained in the public files of any other federal or state agency, or any federal or state court, unless the information or document has been determined to be protected by such agency or court, or (B) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order. Protected Materials do include any information or document contained in the files of the Commission that has been designated as Critical Energy Infrastructure Information.

(c) The term "Non-Disclosure Certificate" shall mean the certificate annexed hereto by which Participants who have been granted access to Protected Materials shall certify their understanding that such access to Protected Materials is provided pursuant to the terms and restrictions of this Protective Order, and that such Participants have read the Protective Order and agree to be bound by it. All Non-Disclosure Certificates shall be served on all parties on the official service list maintained by the Secretary in this proceeding.

(d) The term "Reviewing Representative" shall mean a person who has signed a Non-Disclosure Certificate and who is:

(1) Commission Trial Staff designated as such in this proceeding;

(2) an attorney who has made an appearance in this proceeding for a Participant;

(3) attorneys, paralegals, and other employees associated for purposes of this case with an attorney described in Subparagraph (2);

(4) an expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for or testifying in this proceeding;

(5) a person designated as a Reviewing Representative by order of the Presiding Judge or the Commission; or

(6) employees or other representatives of Participants appearing in this proceeding with significant responsibility for this docket.

4. Protected Materials shall be made available under the terms of this Protective Order only to Participants and only through their Reviewing Representatives as provided in Paragraphs 7-9.

5. Protected Materials shall remain available to Participants until the later of the date that an order terminating this proceeding becomes no longer subject to judicial review, or the date that any other Commission proceeding relating to the Protected Material is concluded and no longer subject to judicial review. If requested to do so in writing after that date, the Participants shall, within fifteen days of such request, return the Protected Materials (excluding Notes of Protected Materials) to the Participant that produced them, or shall destroy the materials, except that copies of filings, official transcripts and exhibits in this proceeding that contain Protected Materials, and Notes of Protected Material may be retained, if they are maintained in accordance with Paragraph 6, below. Within such time period each Participant, if requested to do so, shall also submit to the producing Participant an affidavit stating that, to the best of its knowledge, all Protected Materials and all Notes of Protected Materials have been returned or have been destroyed or will be maintained in accordance with Paragraph 6. To the extent Protected Materials are not returned or destroyed, they shall remain subject to the Protective Order.

6. All Protected Materials shall be maintained by the Participant in a secure place. Access to those materials shall be limited to those Reviewing Representatives specifically authorized pursuant to Paragraphs 8-9. The Secretary shall place any Protected Materials filed with the Commission in a non-public file. By placing such documents in a non-public file, the Commission is not making a determination of any claim of privilege. The Commission retains the right to make determinations regarding any claim of privilege and the discretion to release information necessary to carry out its jurisdictional responsibilities. For documents submitted to Commission Trial Staff ("Staff"), Staff shall follow the notification procedures of 18 CFR § 388.112 before making public any Protected Materials.

7. Protected Materials shall be treated as confidential by each Participant and by the Reviewing Representative in accordance with the certificate executed pursuant to Paragraph 9. Protected Materials shall not be used except as necessary for the conduct of this proceeding, nor shall they be disclosed in any manner to any person except a Reviewing Representative who is engaged in the conduct of this proceeding and who

needs to know the information in order to carry out that person's responsibilities in this proceeding. Reviewing Representatives may make copies of Protected Materials, but such copies become Protected Materials. Reviewing Representatives may make notes of Protected Materials, which shall be treated as Notes of Protected Materials if they disclose the contents of Protected Materials.

8. (a) If a Reviewing Representative's scope of employment includes the marketing of energy, the direct supervision of any employee or employees whose duties include the marketing of energy, the provision of consulting services to any person whose duties include the marketing of energy, or the direct supervision of any employee or employees whose duties include the marketing of energy, such Reviewing Representative may not use information contained in any Protected Materials obtained through this proceeding to give any Participant or any competitor of any Participant a commercial advantage.

(b) In the event that a Participant wishes to designate as a Reviewing Representative a person not described in Paragraph 3 (d) above, the Participant shall seek agreement from the Participant providing the Protected Materials. If an agreement is reached that person shall be a Reviewing Representative pursuant to Paragraphs 3(d) above with respect to those materials. If no agreement is reached, the Participant shall submit the disputed designation to the Presiding Judge for resolution.

9. (a) A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Protected Materials pursuant to this Protective Order unless that Reviewing Representative has first executed a Non-Disclosure Certificate; provided, that if an attorney qualified as a Reviewing Representative has executed such a certificate, the paralegals, secretarial and clerical personnel under the attorney=s instruction, supervision or control need not do so. A copy of each Non-Disclosure Certificate shall be provided to counsel for the Participant asserting confidentiality prior to disclosure of any Protected Material to that Reviewing Representative.

(b) Attorneys qualified as Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this order.

10. Any Reviewing Representative may disclose Protected Materials to any other Reviewing Representative as long as the disclosing Reviewing Representative and the receiving Reviewing Representative both have executed a Non-Disclosure Certificate. In the event that any Reviewing Representative to whom the Protected Materials are disclosed ceases to be engaged in these proceedings, or is employed or retained for a position whose occupant is not qualified to be a Reviewing Representative under Paragraph 3(d), access to Protected Materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Protective Order and the certification.

11. Subject to Paragraph 18, the Presiding Administrative Law Judge shall resolve any disputes arising under this Protective Order. Prior to presenting any dispute under this Protective Order to the Presiding Administrative Law Judge, the parties to the dispute shall use their best efforts to resolve it. Any participant that contests the designation of materials as protected shall notify the party that provided the protected materials by specifying in writing the materials the designation of which is contested. This Protective Order shall automatically cease to apply to such materials five (5) business days after the notification is made unless the designator, within said 5-day period, files a motion with the Presiding Administrative Law Judge, with supporting affidavits, demonstrating that the materials should continue to be protected. In any challenge to the designation of materials as protected, the burden of proof shall be on the participant seeking protection. If the Presiding Administrative Law Judge finds that the materials at issue are not entitled to protection, the procedures of Paragraph 18 shall apply. The procedures described above shall not apply to protected materials designated by a Participant as Critical Energy Infrastructure Information. Materials so designated shall remain protected and subject to the provisions of this Protective Order, unless a Participant requests and obtains a determination from the Commission's Critical Energy Infrastructure Information Coordinator that such materials need not remain protected.

12. All copies of all documents reflecting Protected Materials, including the portion of the hearing testimony, exhibits, transcripts, briefs and other documents which refer to Protected Materials, shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked "PROTECTED MATERIALS" and shall be filed under seal and served under seal upon the Presiding Judge and all Reviewing Representatives who are on the service list. Such documents containing Critical Energy Infrastructure Information shall be additionally marked "Contains Critical Energy Infrastructure Information B Do Not Release". For anything filed under seal, redacted versions or, where an entire

document is protected, a letter indicating such, will also be filed with the Commission and served on all parties on the service list and the Presiding Judge. Counsel for the producing Participant shall provide to all Participants who request the same, a list of Reviewing Representatives who are entitled to receive such material. Counsel shall take all reasonable precautions necessary to assure that Protected Materials are not distributed to unauthorized persons.

13. If any Participant desires to include, utilize or refer to any Protected Materials or information derived therefrom in testimony or exhibits during the hearing in these proceedings in such a manner that might require disclosure of such material to persons other than reviewing representatives, such participant shall first notify both counsel for the disclosing participant and the Presiding Judge of such desire, identifying with particularity each of the Protected Materials. Thereafter, use of such Protected Material will be governed by procedures determined by the Presiding Judge.

14. Nothing in this Protective Order shall be construed as precluding any Participant from objecting to the use of Protected Materials on any legal grounds.

15. Nothing in this Protective Order shall preclude any Participant from requesting the Presiding Judge, the Commission, or any other body having appropriate authority, to find that this Protective Order should not apply to all or any materials previously designated as Protected Materials pursuant to this Protective Order. The Presiding Judge may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

16. Each party governed by this Protective Order has the right to seek changes in it as appropriate from the Presiding Judge or the Commission.

17. All Protected Materials filed with the Commission, the Presiding Judge, or any other judicial or administrative body, in support of, or as a part of, a motion, other pleading, brief, or other document, shall be filed and served in sealed envelopes or other appropriate containers bearing prominent markings indicating that the contents include Protected Materials subject to this Protective Order. Such documents containing Critical Energy Infrastructure Information shall be additionally marked “Contains Critical Energy Infrastructure Information – Do Not Release.”

18. If the Presiding Judge finds at any time in the course of this proceeding that all or part of the Protected Materials need not be protected, those materials shall, nevertheless, be subject to the protection afforded by this Protective Order for three (3) business days from the date of issuance of the Presiding Judge's determination, and if the Participant seeking protection files an interlocutory

appeal or requests that the issue be certified to the Commission, for an additional seven (7) business days. None of the Participants waives its rights to seek additional administrative or judicial remedies after the Presiding Judge's decision respecting Protected Materials or Reviewing Representatives, or the Commission's denial of any appeal thereof. The provisions of 18 CFR §§ 388.112 and 388.113 shall apply to any requests under the Freedom of Information Act. (5 U.S.C. § 552) for Protected Materials in the files of the Commission.

19. Nothing in this Protective Order shall be deemed to preclude any Participant from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this Protective Order.

20. None of the Participants waives the right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Protected Materials.

21. The contents of Protected Materials or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this (these) proceeding(s). Any violation of this Protective Order and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

Presiding Administrative Law Judge

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Name of Proceeding Docket No.

NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Protected Materials is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of the Protected Materials, any notes or other memoranda, or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with that Protective Order. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: ______________________________
Printed Name: _____________________
Title: ____________________________
Representing: _____________________
Date: ____________________________

Attachment 3

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of Rocky Mountain Power for Authority to Increase its Retail Electric Utility Service Rates in Utah and for Approval of its Proposed Electric Service Schedules and Electric Service Regulations	))))))))	DOCKET NO. 10-035-124 ORDER ON MOTION TO COMPEL DISCOVERY

ISSUED: April 26, 2011

By The Commission:

This matter is before us on the motion of UAE Intervention Group ("UAE'), filed March 31, 2011, to compel production of certain documents, and seeking an extended testimony filing deadline and expedited treatment. PacifiCorp ("Company"), doing business in Utah as Rocky Mountain Power, filed a response to the motion on April 5, 2011, contesting the requested relief, except for expedited disposition of the motion. On April 7, 2011, UAE replied to the Company's response. On April 12, 2011, the Utah Office of Consumer Services ("Office") filed a memorandum in support of UAE's motion. On April 14, 2011, a Commission hearing officer held a duly noticed hearing to receive legal argument on the motion from the parties.

The discovery dispute presented in the motion centers on UAE's Data Request 2.1 served March 3, 2011, and the Company's March 23, 2011, response:

> UAE Data Request 2.1
> Please provide copies of the arbitration award, hearing transcripts, hearing exhibits, deposition transcripts, deposition exhibits, discovery responses sent and received and other documents filed, admitted or introduced in connection with the recent arbitration proceeding between PacifiCorp and Deseret Generation and Transmission Cooperative relating to pollution control equipment at the Hunter Power Plant Unit II.

Company Response to UAE Data Request 2.1

The Company objects to this request on the basis that the information is subject to the Stipulated Protective Order entered by the federal court in a proceeding between PacifiCorp and Deseret Generation and Transmission and is already in the possession of counsel in its capacity as counsel for Deseret.

In its motion and accompanying exhibits, UAE describes the relationship between the arbitration proceeding referenced in Data Request 2.1 and this case. UAE states Deseret Generation and Transmission Cooperative ("Deseret") is a minority co-owner of the Hunter II generating unit operated by the Company, the majority co-owner. The arbitration is related to litigation in the Utah Federal District Court in which Deseret challenges the Company's decision to spend over two hundred million dollars on two capital improvement projects to replace or upgrade Hunter II generating unit environmental equipment. The projects are referred to as the "Scrubber Upgrade" and "Baghouse Conversion" projects. Deseret denies any obligation to pay for any part of these projects claiming the Company has breached a number of its duties under the Ownership and Management Agreement, dated October 24, 1980, ("O&M Agreement"), as amended. In general, the O&M Agreement governs the joint owners' duties with respect to the Hunter II plant. In particular, it establishes the requirements and process for obtaining minority owners' prior approval of capital improvement project expenditures in excess of one million dollars.

In the federal court litigation, PacifiCorp successfully argued the O&M Agreement required arbitration of one aspect of the dispute with Deseret. Pursuant to the Utah Federal District Court's Order and the terms of the O&M Agreement, the arbitrator analyzed and decided only one question: whether the proposed Scrubber Upgrade and Baghouse Conversion capital improvements are consistent with "Reasonable Utility Practice."[1] "Reasonable Utility Practice," as defined in the O&M Agreement, means "…any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry…which, in the exercise of reasonable judgment in light of the facts known at such time, could have been expected to accomplish the desired results at the lowest reasonable cost consistent with good business practices, reliability, safety and expedition."[2] In Data Request 2.1, UAE seeks the arbitrator's decision on the question of Reasonable Utility Practice together with the arbitration record and all of the underlying discovery.

In its motion, UAE notes the Company seeks through this general rate case to add to its rate base and recover in rates the Company's portion of the expenditures for the Scrubber Upgrade and Baghouse Conversion projects, the identical projects Deseret challenges in the federal litigation. A finding in this general rate case that these project expenditures are prudent is a prerequisite to rate recovery. Accordingly, UAE asserts the arbitration record is directly relevant to our determination of whether the project expenditures are recoverable in rates. Additionally, UAE notes the Company's rate increase application includes similar project costs at other generating units and argues the arbitration record is also potentially relevant to our consideration of the costs associated with those projects. Thus, UAE maintains the information it seeks through the contested data request is a proper subject of discovery in this case.

[1] See Order, Case No. 2:10-cv-00159-TC, United States District Court for the District of Utah, Central Division, September 1, 2010, p.3.
[2] The definition also provides: "Reasonable Utility Practice is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather to be a spectrum of possible practices, methods and acts, having due regard for manufacturers' warranties and the requirements of governmental agencies of competent jurisdiction…." O&M Agreement, p. 8.

UAE also asserts it has been disadvantaged in this case by the Company's "delay and concealment" tactics in not disclosing the arbitration-related documents, and requests a day-for-day extension of the May 26, 2011, deadline to provide its direct testimony and exhibits on the Scrubber Upgrade and Baghouse Conversion projects. Finally, UAE requests we require the Company to pay UAE's reasonable expenses, including attorneys' fees, in obtaining production of the requested arbitration documents, citing Rule 37, Utah Rules of Civil Procedure.

The Office supports and joins UAE's request for the arbitration-related information. Noting the Company's "unequaled access" to its own accounting and financial information, the Office emphasizes the need for the Company to act in good faith in designating certain information "confidential" or "highly confidential." It contends the Company may avail itself of the Commission's rules which provide the means for such information to be disclosed and examined without undue harm to the Company.[3] The Office also draws our attention to prior Commission orders and Utah Supreme Court rulings describing the heavy burden utilities bear in proving their entitlement to rate relief. The Office asserts Data Request 2.1 seeks information the Commission must examine as it evaluates the Company's rate increase application.

The Company's written response to UAE's motion expresses three basic objections to providing the requested information. Each objection relates to the Stipulated Protective Order ("Protective Order") in the federal litigation which, in pertinent part, protects from unauthorized use confidential information produced in response to discovery in the court-ordered arbitration. First, the Company objects to providing the information because UAE's

[3] See Utah Administrative Code § R746-100-16.

counsel, Mr. Gary Dodge, allegedly used his knowledge of protected Company information, gained in his capacity as counsel for Deseret in the federal arbitration, to formulate Data Request 2.1. Second, the Company contends the data request is overbroad and would require the Company to "violate" the Protective Order and risk potential liability. Third, the Company asserts some of the requested information is "privileged or protected or has no probative value or relevance in this proceeding and would only serve to potentially prejudice [the Company]."[4] Disclosure of such information under the Protective Order did not waive any applicable privilege or protection, according to the Company.

During oral argument, the Company amended its position significantly. The Company now acknowledges it was free, under the terms of the Protective Order, to disclose its own information to UAE. In fact, as UAE pointed out in its motion, the Protective Order itself states: "This Order has no effect upon, and shall not apply to, a party's use or disclosure of its own confidential information for any purpose."[5] The Company also concedes Deseret did not designate as "confidential" or "privileged" any of the information it provided in the course of the arbitration. Consequently, Deseret's arbitration disclosures are also not subject to the Protective Order. In sum, the Protective Order has not prevented the Company from disclosing its own

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[4] Rocky Mountain Power's Response to UAE's Motion to Compel and Request for Extended Testimony Filing Deadline, dated April 5, 2011, p. 3.

[5] Stipulated Protective Order, ¶ 3.

information or that of Deseret in the Company's possession through the arbitration, despite the Company's initial statement of objection and written response to the contrary.[6]

In effect, the statements by the Company's counsel at the hearing, summarized above, withdraw the Company's objections to providing the vast majority of the information requested in Data Request 2.1. Consistent with this withdrawal, at the hearing's conclusion the hearing officer ordered the Company to comply with Data Request 2.1 and disclose all information and documents reasonably described therein, except for the arbitrator's decision and material subject to the attorney-client communication or attorney work product privileges. The Company has reported it provided the bulk of the responsive documents on April 15, 2011, and the remainder by the close of business Monday, April 18, 2011.

As noted during the hearing, the disclosed material, at least initially, will receive similar protections to those afforded under the federal Protective Order.[7] With regard to these protections, the information UAE has requested falls into three categories. The first of these is information that is not even arguably subject to the Protective Order because it was not designated "Confidential" in the federal arbitration and litigation. This material likewise will not receive confidential treatment in this case, without further justification. The second category is information disclosed in the arbitration bearing a "Confidential" designation. Such material shall

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[6] Providing further certainty on this point, Mr. Dodge stated Deseret has authorized him to assure the Commission it waives any protection its information might be afforded by the Protective Order, and consents to disclosure in this proceeding of all of its information, including the arbitration record and decision. Mr. Dodge also made clear, and the Company does not dispute, he could not provide UAE's experts access to the arbitration documents he possesses in his capacity as counsel for Deseret, without potentially violating the Protective Order's coverage of the Company's confidential disclosures. He represents he has not violated the Protective Order and that all information necessary to formulate Data Request 2.1 is available in the public record.

[7] These protections include the opportunity to "claw back" information inadvertently disclosed absent the appropriate confidential or privileged designation, without waiving the confidential or privileged status.

be disclosed in this proceeding subject to Utah Administrative Code § R746-100-16,"Use of Information Claimed to Be Confidential in Commission Proceedings." The third category is material designated "Confidential-Privileged" or "Confidential-CII" which shall be afforded "additional protective measures" as authorized in Utah Administrative Code § R746-100-16.A.1.e.[8] Under this subsection of the rule, the providing party proposes the desired additional protective measures to the requesting party. If they cannot agree on the appropriate measures, the providing party petitions the Commission for an order. Although the additional protective measures to be applied in this case were not specified during the hearing, the parties agreed in principle upon measures analogous to those afforded in the Protective Agreement for "Confidential-Privileged" and "Confidential-CII" material. We leave it to the parties to negotiate the specific additional protective measures in good faith. Failing agreement, the Company as the requesting party may, within ten calendar days of this order, petition the Commission for specific additional protective measures.

The hearing officer's direction at the close of the hearing included instructions for the parties to meet and confer regarding material the Company considers subject to the attorney-client communication or attorney work product privileges. We note on April 18, 2011, the Company provided the Commission, UAE and the Office a privilege log listing ten documents disclosed under the Protective Order in the federal arbitration the Company considers subject to the attorney-client or attorney work product privileges. This log has been docketed in this proceeding. Should UAE, the Office or any other party disagree with the Company's

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[8] The Protective Order provides for three classes of confidential designation: "Confidential," "Confidential-Privileged," and "Confidential-CII." See Stipulated Protective Order, p. 6.

classification of these documents and be unable to resolve the matter with the Company informally, that party should promptly bring the matter to the Commission's attention.

As to the arbitration decision (also referred to in the record as the "award"), the Company continues to claim the decision is not discoverable in this proceeding. In its written response to UAE's motion, the Company characterizes the decision as "not relevant," "non-probative," and "the arbitrator's unreviewable, non-precedential, opinion and interpretation of…facts in the context of distinct and unrelated contractual rights of PacifiCorp and Deseret (a non-party to the rate case)."[9] The Company argues the only purpose to be served by disclosure and introduction in evidence of the decision is "to imbue these proceedings with a potential prejudicial bias against Rocky Mountain Power."[10] The Company maintained this theme in oral argument additionally claiming the award is an inadmissible legal opinion whose disclosure could not reasonably lead to the discovery of admissible evidence. The Company reasons essentially all of the information underlying the decision is being produced, so the decision itself is irrelevant.[11] Additionally, the Company maintains the award is not information it controls, and the Protective Order bars its disclosure.

We are not persuaded by the Company's arguments. From the information presented to us in UAE's motion and exhibits, it is clear the arbitrator examined an extensive record of testimony, exhibits, reports, and other documents all bearing on the key factual

[9] Rocky Mountain Power's Response to UAE's Motion to Compel and Request for Extended Testimony Filing Deadline, April 5, 2011, p.8.

[10] Id.

[11] The Company offers no supporting authority for any of these positions beyond the rules of evidence that limit discovery to information which is relevant to the subject matter of the case. See, e.g., Rocky Mountain Power's Response to UAE's Motion to Compel and Request for Extended Testimony Filing Deadline, April 5, 2011, pp.7-8; Transcript of Hearing, April 14, 2011, pp. 55-63.

question of whether the Scrubber Upgrade and Baghouse Conversion capital investments are consistent with Reasonable Utility Practice. In this proceeding, we will examine the prudence of these same investments to determine the extent to which the associated costs may be recovered in rates. When the Commission determines the prudence of a utility's actions or the expenses it incurs, Utah Code § 54-4-4(4)(a) directs the Commission to apply the following standards:

(i) ensure just and reasonable rates for the retail ratepayers of the public utility in this state;
(ii) focus on the reasonableness of the expense resulting from the action of the public utility judged as of the time the action was taken;
(iii) determine whether a reasonable utility, knowing what the utility knew or reasonably should have known at the time of the action, would reasonably have incurred all or some portion of the expense, in taking the same or some other prudent action; and
(iv) apply other factors determined by the commission to be relevant, consistent with the standards specified in this section.

These standards clearly raise issues of reasonable utility practice. While the arbitrator's decision would not be dispositive of the issues we must consider, it is evident the decision addresses factual issues about the Scrubber Upgrade and Baghouse Conversion projects that are closely related, if not identical, to the issues we must judge in acting upon the Company's application. Accordingly, it is reasonable to conclude the decision may lead parties to the discovery of admissible evidence, including the content of the decision itself.

We fail to see why the arbitration decision is not probative of the prudence of the Scrubber Upgrade and Baghouse Conversion capital investments, as the Company argues. Although we will reach questions of the admissibility of evidence later in the case, from the information available to us now, the public interest in just and reasonable electric rates would certainly justify, if not require, that we consider the arbitrator's findings. We are confident doing so would not unfairly prejudice the Company. The only prejudice the Company mentions would result merely from the information being potentially adverse. That type of prejudice does not disqualify probative evidence from consideration. In any event, the Commission is not bound by the technical rules of evidence and may receive any oral or documentary evidence, provided no finding may be based solely on hearsay or otherwise incompetent evidence.[12] All of the foregoing factors lead us to conclude the Company should produce the arbitration decision.

Furthermore, it seems apparent the arbitration decision is a corporate record within the Company's control and is not subject to the Protective Order, as the Company claims. By its terms, the Protective Order applies to "disclosures" or "responses to discovery" between parties involved in the arbitration and to derivative information like copies, summaries or abstracts of discovery responses.[13] It does not explicitly apply to, or even mention, the arbitration decision. Additionally, even if the Protective Order did apply, it would not bar disclosure of the decision. With very limited exceptions, if any, the information underlying the decision is either Deseret's, none of which is confidential, or the Company's which the Company is free to disclose for any purpose. Moreover, when it does disclose, the Protective Order does not apply. The Company has not explained why the arbitrator's decision discussing information that is not subject to the Protective Order is itself protected. The Company has not established that its duties under the Protective Order bar it from disclosing the decision. Moreover, as previously noted, the Commission's rules afford adequate protection for any confidential Company or third

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[12] See Utah Administrative Code § R746-100-10.F.1.
[13] Stipulated Protective Order, p. 2.

party information present in the decision. Accordingly, we direct the Company to disclose the arbitration decision within seven calendar days of the date of this Order.

Under the discovery guidelines agreed upon by the parties and ordered in this proceeding, the Company should have provided the information responsive to Data Request 2.1 on or before March 24, 2011. Instead, the Company produced the bulk of the information on April 15, 2011, the day following the hearing on UAE's motion. UAE requests a day-for-day extension in the deadline for filing its testimony pertaining to the Scrubber Upgrade and Baghouse Conversion projects. That remedy could potentially disrupt the previously adopted case schedule[14] and seems extreme in light of the fact UAE's testimony is not due until May 26, 2011. Nevertheless, some accommodation is warranted for the delay. Rather than adjust the testimony due date, we will shorten the interval for the Company's responses to any further UAE data requests pertaining to the Company's investment in any power plant environmental equipment at issue in this proceeding. The interval shall be five calendar days. If for any reason the Company is unable to meet this schedule with regard to a specific request, it should inform the Commission of the circumstances by letter before the five day interval has expired.

UAE requests we require the Company to pay the reasonable expenses, including attorneys' fees, UAE has incurred in obtaining production of the arbitration documents. UAE makes its request pursuant to Utah Rules of Civil Procedure, Rule 37(a)(4). With certain exceptions not pertinent here, the Commission's procedural rules provide that discovery shall be made in accordance with Rules 26 through 37 of the Utah Rules of Civil Procedure.[15] Rule 37

[14] See Docket No. 10-035-124, Scheduling Order, dated February 23, 2011.
[15] See Utah Administrative Code § R746-100-8.

provides for court-awarded monetary sanctions for withholding discovery. In fact, in the absence of specified justifications, the sanctions are mandatory. Unlike a court of general jurisdiction, however, the Commission may exercise only those powers specifically granted to it by statute.[16] We find we do not have authority to grant UAE's request for costs and attorneys' fees under the facts before us.

ORDER

1. The Company shall disclose the arbitration decision to UAE and any other requesting parties within seven calendar days of the date of this Order.
2. The Company shall respond within five calendar days of receipt to any further UAE data requests pertaining to the Company's investment in any power plant environmental equipment at issue in this proceeding. If for any reason the Company is unable to meet this schedule with regard to a specific request, it shall inform the Commission of the circumstances by letter before the five day interval has expired.
3. The Company and UAE shall resolve any further disagreements concerning the disclosure or use of information provided in response to Data Request 2.1, in accordance with the direction provided in this Order.

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[16] See Heber Light & Power Co. v. Pub. Serv. Comm'n, 2010 UT 27, ¶ 17. "It is well established that the Commission has no inherent regulatory powers other than those expressly granted or clearly implied by statute."

DATED at Salt Lake City, Utah, this 26th day of April, 2011.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#72266

Attachment 4

P. Bruce Badger (4791)
Philip D. Dracht (11561)
Clint R. Hansen (12108)
FABIAN & CLENDENIN, P.C.
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chansen@fabianlaw.com

Attorneys for Defendant PacifiCorp

UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

DESERET GENERATION & TRANSMISSION CO-OPERATIVE, a Utah non-profit corporation, Plaintiff, v. PACIFICORP, an Oregon corporation, Defendant.	Case No. 2:10-cv-159-TC-DN **MOTION TO ENFORCE THE TERMS OF THE STIPULATED PROTECTIVE ORDER**

In an unrelated proceeding before the Public Service Commission of Utah, Gary Dodge, counsel for Deseret Generation & Transmission Co-Operative ("Deseret") in the above-entitled action as well as in the Court ordered arbitration, has submitted a discovery request to PacifiCorp, on behalf of a wholly separate client, seeking all of the confidential and protected transcripts, Final Award, documents, and discovery taken in the Court ordered arbitration. Mr. Dodge is a "Qualified Person" under the terms of the Stipulated Protective Order.[1] In taking this action, Mr. Dodge is improperly using, both directly and indirectly, these Confidential Materials contrary to the Stipulated Protective Order.

PacifiCorp's counsel has met and conferred with Mr. Dodge in an effort to have him withdraw his request for the protected materials and to comply with the terms of the Stipulated Protective Order. Mr. Dodge does not agree that he is obligated to do that.

Accordingly, pursuant to Rules 16, 37(b) and 71 of the Federal Rules of Civil Procedure, PacifiCorp respectfully moves the Court for its order enforcing the terms of its Stipulated Protective Order by requiring Mr. Dodge, at a minimum, to withdraw the offending discovery request in the proceeding before the Public Service Commission of Utah.

March 23, 2011

FABIAN & CLENDENIN, P.C.

/s/ Philip D. Dracht
P. Bruce Badger
Philip D. Dracht
Clint R. Hansen
FABIAN & CLENDENIN
Attorneys for PacifiCorp

[1] It does not appear that Deseret directed Mr. Dodge to take the actions complained of in this Motion.

CERTIFICATE OF SERVICE

The undersigned further certifies that on March 23, 2011, a true and correct copy of MOTION TO ENFORCE THE TERMS OF THE STIPULATED PROTECTIVE ORDER was served by ECF to all counsel who have appeared in this action.

/s/ Philip D. Dracht

Attachment 5

From: Utd_Enotice@utd.uscourts.gov
Subject: Activity in Case 2:10-cv-00159-TC -DN Deseret Generation & Transmission Co-Operative v. PacifiCorp Order on Motion to Enforce
Date: June 6, 2011 at 8:20 AM
To: ecf_notice@utd.uscourts.gov

Electronic Case Filing System

District of Utah

Notice of Electronic Filing

The following transaction was entered on 6/6/2011 at 8:19 AM MDT and filed on 5/24/2011

Case Name:	Deseret Generation & Transmission Co-Operative v. PacifiCorp
Case Number:	2:10-cv-00159-TC -DN
Filer:	
Document Number:	68(No document attached)

Docket Text:
Minute Order. Proceedings held before Magistrate Judge David Nuffer: denying [46] Motion to Enforce; Motion Hearing held on 5/24/2011 re [46] MOTION to Enforce the Terms of the Stipulated Protective Order filed by PacifiCorp. Written Order to follow oral order: No. (asb)

2:10-cv-00159-TC -DN Notice has been electronically mailed to:

P. Bruce Badger bbadger@fabianlaw.com, aclark@fabianlaw.com

Gary A Dodge gdodge@hjdlaw.com, gadslc@netscape.net

David F. Crabtree crabtree@deseretgt.com

Phillip J. Russell prussell@hjdlaw.com, phillipjrussell@gmail.com

Philip D. Dracht pdracht@fabianlaw.com, aclark@fabianlaw.com

Clint R. Hansen chansen@fabianlaw.com, djames@fabianlaw.com

2:10-cv-00159-TC -DN Notice has been delivered by other means to:

Attachment 6

ORDER NO. 13 095

SIGNATORY PAGE
DOCKET NO. LC 57

III. Persons Qualified under Paragraph 3(e):

I have read the general protective order, agree to be bound by the terms of the order, and will provide the information identified in paragraph 10.

By: Signature: [signature] Date: 9/4/14
Printed Name: ANDREA ISSOD
Address: 85 SECOND St, 2nd FLOOR SAN FRANCISCO CA 94105
Employer: SIERRA CLUB
Job Title: Staff attorney
☐ Paragraph 10(e) information also provided.

By: Signature: [signature] Date: 9/4/14
Printed Name: DAVID ABELL
Address: 85 SECOND St, 2ND Fl
Employer: SIERRA Club
Job Title: SENIOR ParalegAl
☐ Paragraph 10(e) information also provided.

By: Signature: Kadie McShirley Date: 9/4/14
Printed Name: Kadie McShirley
Address: 85 Second Street, 2nd Fl.
Employer: Sierra Club
Job Title: Legal Assistant
☐ Paragraph 10(e) information also provided.

By: Signature: ______ Date: ______
Printed Name: ______
Address: ______
Employer: ______
Job Title: ______
☐ Paragraph 10(e) information also provided.

Attachment 7

Derek Nelson <derek.nelson@sierraclub.org>

EXHIBIT

Derek Nelson <derek.nelson@sierraclub.org> Thu, Sep 4, 2014 at 11:26 AM
To: Derek Nelson <derek.nelson@sierraclub.org>

---------- Forwarded message ----------
From: **Wallace, Sarah** <Sarah.Wallace@pacificorp.com>
Date: Fri, Aug 29, 2014 at 2:43 PM
Subject: RE: Timely request: please reply
To: Gloria Smith <gloria.smith@sierraclub.org>

Gloria—

PacifiCorp will waive the seven-day waiting period.

Sarah

From: Gloria Smith [mailto:gloria.smith@sierraclub.org]
Sent: Friday, August 29, 2014 1:37 PM
To: Wallace, Sarah
Subject: Re: Timely request: please reply

Sarah,

Sierra Club management has now asked that I speak with a lawyer colleague of ours about this matter. He would not be involved in drafting the pleadings and would not represent the Sierra Club before the Commission. He is willing to sign the protective order, but for him to offer the Sierra Club any advice, PacifiCorp must waive the 7-day waiting period. I am hoping to speak with him this weekend. Your timely attention to this (hopefully) final request is much appreciated.

-Gloria

On Fri, Aug 29, 2014 at 12:53 PM, Wallace, Sarah <Sarah.Wallace@pacificorp.com> wrote:

Gloria –

Correct. Those employed directly by counsel of record need not wait 7 days.

Thank you,

Sarah

From: Gloria Smith [mailto:gloria.smith@sierraclub.org]
Sent: Friday, August 29, 2014 12:25 PM
To: Wallace, Sarah
Subject: Timely request: please reply

Sarah,

In an abundance of caution, I am confirming that persons employed directly by Sierra Club's counsel of record need not wait 7 days in order to help with the briefing of this matter. This is how I understood Judge Grant's advice form yesterday, but I wanted to make sure. Anyone who has a hand in the briefing will file the required "qualified person" statement under paragraph 10.

(audio at 6:38 – 7:11) "Ms. Smith to clarify you say you can't share this with your paralegal. A qualified person under our protective order is the counsel of record for the party which is you and the person employed directly by counsel of record. Your paralegal does not need to sign the protective order. Sierra Club is the party that signed the protective order. He might need to be listed as a qualified person on the – suited for those pages."

Thank you.

--

Gloria D. Smith

Senior Managing Attorney
Sierra Club Environmental Law Program
85 Second Street
San Francisco, CA 94105
Phone: (415) 977-5532

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--
Andrea Issod
Staff Attorney
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105-3441
415.977.5544 phone
415.977.5793 fax
andrea.issod@sierraclub.org

--
Derek Nelson
Legal Assistant
Sierra Club Environmental Law Program

85 Second Street, Second Floor
San Francisco, CA 94105
Phone: 415-977-5595
Fax: 415-977-5793

Attachment 8

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1707

In the Matter of SIERRA CLUB, Regarding violation of Protective Order No. 13-095.	DECLARATION OF JEREMY FISHER, PhD

I. INTRODUCTION

1. My name is Jeremy Fisher, PhD. I am a Principal Associate at Synapse Energy Economics ("Synapse"), based in Cambridge, Massachusetts since July of 2007. I have worked with Sierra Club in various Public Utility Commission ("PUC") dockets since early 2011. Prior to Synapse, I worked as a postdoctoral researcher at Tulane University and the University of New Hampshire in an ecosystem modeling group. I attended graduate school at Brown University, earning a Masters in Geology in 2002, and my doctorate in 2006. During my academic training, I published extensively in peer-reviewed literature, including in leading journals such as *Science*. Over 850 published peer-reviewed articles have cited to my academic work.

2. I have provided consulting services for various clients, including the U.S. EPA, the National Association of Regulatory Utility Commissioners ("NARUC"), the California Energy Commission ("CEC"), the California Division of Ratepayer Advocates ("CA DRA"), the National Association of State Utility Consumer Advocates ("NASUCA"), National Rural Electric Cooperative Association ("NRECA"), the State of Utah Energy Office, the State of Alaska, the State of Arkansas, the Regulatory Assistance Project ("RAP"), the Western Grid Group, the Union of Concerned Scientists ("UCS"), Sierra Club, Earthjustice, Natural Resources Defense Council ("NRDC"), Environmental Defense Fund ("EDF"), Stockholm Environment Institute ("SEI"), Civil Society Institute, and Clean Wisconsin. I developed a regulatory tool for

EPA and state air quality agencies, released by EPA in 2014 as the Avoided Emissions and Generation Tool ("AVERT"), and have provided detailed technical support to EPA regarding electric utility planning practices.

3. At the request of Sierra Club, I have prepared this declaration and understand that it will be submitted as part of Sierra Club's reply in the above captioned proceeding. The purpose of this declaration is to set forth background facts regarding Synapse, its protocols for handling confidential material, the allegations in this case and the impact of PacifiCorp's actions relating to this matter on Synapse and its ability to continue to effectively represent its clients.

II. BACKGROUND OF SYNAPSE

4. Synapse is a research and consulting firm specializing in energy, economic, and environmental topics. Since its inception in 1996, Synapse has grown to become a leader in providing rigorous analysis of the electric power sector for public interest and governmental clients.

5. Synapse's staff of thirty includes experts in energy and environmental economics, resource planning, electricity dispatch and economic modeling, energy efficiency, renewable energy, transmission and distribution, rate design and cost allocation, risk management, cost-benefit analysis, environmental compliance, climate science, and both regulated and competitive electricity and natural gas markets. Several of our senior-level staff members have more than thirty years of experience in the economics, regulation, and deregulation of the electricity and natural gas sectors, and have held positions as regulators, economists, and utility commission and ISO staff.

6. Services provided by Synapse include economic and technical analyses, regulatory support, research and report writing, policy analysis and development, representation in stakeholder committees, facilitation, trainings, development of analytical tools, and expert witness services. Synapse is committed to the idea that robust, transparent analyses can help to inform better policy and planning decisions. Many of our clients seek out our experience and expertise to help them participate effectively in planning, regulatory, and litigated cases, and other forums for public involvement and decision-making.

7. Synapse's clients include public utility commissions in U.S. states and Canada, offices of consumer advocates, attorneys general, environmental organizations, foundations, governmental

associations, public interest groups, and federal clients such as the U.S. Environmental Protection Agency ("EPA") and the Department of Justice ("DOJ"), among others, as well as associations and regional and quasi-governmental entities including the National Association of Regulatory Utility Commissioners ("NARUC"), the National Association of State Utility Consumer Advocates ("NASUCA"), the New England Conference of Public Utility Commissioners ("NECPUC"), the New England Governors' Conference ("NEGC"), the Northeast States for Coordinated Air Use Management ("NESCAUM"), the Ozone Transport Commission ("OTC"), and the National Association of Clean Air Agencies ("NACAA"). Our work for international clients has included projects for the United Nations Framework Convention on Climate Change, the Global Environment Facility, and the International Joint Commission, among others. Since 1996, Synapse has successfully completed more than 1,000 projects, primarily for government, public interest, and non-profit clients.

8. Much of Synapse's work has been subject to review not just by clients and peers, but also by consultants and legal teams hired by adversaries in hundreds of litigated proceedings. Our project managers are frequently called upon to defend the work of their project teams in depositions and contested hearings with discovery, rebuttal testimony, sur-rebuttal testimony, and cross-examination.

9. The technical support that Synapse has provided to the U.S. DOJ since 2000 on the Clean Air Act enforcement cases speaks to Synapse's ability to conduct detailed and rigorous work, such as the analysis of electric power system dispatch and planning, in a challenging and adversarial environment, such as New Source Review lawsuits in Federal Court – and under the strictest of confidentiality requirements.

III. CAPACITY OF ENGAGEMENT WITH SIERRA CLUB IN LC-57

10. Since 2011, on behalf of Synapse, I have been engaged in eight separate PacifiCorp dockets (including the Nevada Energy/MidAmerican merger) in Oregon, Wyoming, and Utah. My participation in seven of these dockets were (or are) on behalf of Sierra Club. In addition, I have helped Sierra Club draft comments and participated on behalf of Sierra Club in stakeholder meetings during the 2011, 2013, and start of the 2015 Integrated Resource Plan ("IRP") process. I have helped Sierra Club draft hundreds of discovery questions, and reviewed thousands of PacifiCorp discovery responses from multiple parties in multiple states.

11. Through a series of separate projects, I have been retained by Sierra Club to comment on and review the 2013 IRP process, docketed as LC-57 in Oregon. In that capacity, I engaged in stakeholder meetings, reviewed PacifiCorp materials, helped craft discovery, and provided extensive comment on the PacifiCorp's IRP.

12. Through June and July of 2014, I actively participated in OPUC staff workshops seeking "fleetwide analysis," and provided written comment and feedback on behalf of Sierra Club in that process.

13. I participated in both the non-confidential and confidential sessions of the August 6, 2014 OPUC meeting in Salem, Oregon, following Order 14-284 calling for a technical session. During that meeting I provided feedback on behalf of the Sierra Club during both of the sessions.

14. Currently, Sierra Club and other parties to the 2015 IRP stakeholder process have retained me as a consultant and to assist in their participation in proceedings in multiple states.

IV. SYNAPSE'S CONFIDENTIALITY PROCEDURES

15. Synapse takes confidentiality very seriously. Our credibility and the viability of our business practice depend on our ability to protect trade secrets, proprietary data, and client communications. Synapse staff has signed over 100 non-disclosure or protective agreements since 2011 as a party to regulatory dockets and other proceedings. Hard copies of confidential materials received by mail are kept under the direct supervision of case managers, while digital materials are kept on an internal server with access granted only to signatories of the confidentiality agreements. We regularly make staff aware of when blanket confidentiality agreements apply to all Synapse staff, and work carefully with our clients to ensure that no project creates a conflict of interest with regard to confidentiality agreements.

16. Multiple forms of published media leave Synapse, including materials that we share directly with our clients, materials that we share with prospective clients and public entities, and materials that we post to our website or to email newsletters. We are rigorous in ensuring that any materials shared with prospective clients or public entities, or posted in a public forum are clear of confidential information. Even amongst our clients, we strictly limit our communications regarding confidential information to our clients' attorneys that are charged with the case and their legal staff. For example, when we work with Sierra Club, we do not, and may not, share confidential information obtained in a legal docket with the group's campaign staff unless they

are explicitly signed on to or otherwise included in the protective order. In all dockets, we only release confidential information back to our clients' attorneys; never to a third party.

17. In the course of examining PacifiCorp's 2013 IRP in Oregon (LC-57), as well as PacifiCorp's 2014 General Rate Case in Utah (13-035-184) and Wyoming (20000-446-ER-14), I have been provided digital and hard-copy confidential information through Sierra Club's legal staff and directly from PacifiCorp. Throughout the course of these dockets, I have maintained direct supervision of those materials. Hard copies are kept in my direct possession, and digital materials are kept in a marked, limited-access folder. I have occasionally consulted with colleagues on general matters, or asked for the direct assistance of Synapse staff in specific matters, providing confidential materials only to those individuals who have signed the respective protective orders.

A. <u>Synapse Protection of PacifiCorp Materials</u>

18. Any PacifiCorp confidential material provided to Synapse or its representatives has been handled pursuant to Synapse's protocols described above. Specifically with respect to the materials that are the subject of this proceeding, I first learned about the Hayden analyses conducted by PacifiCorp in Utah Docket 13-035-184, the 2014 Rocky Mountain Power General Rate Case. In Sierra Club Data Request 2.11(e), the Club asked "has PacifiCorp, PSCo, or Salt River Project performed a market valuation of the Hayden plant from 2004 to present day?" In the PacifiCorp's initial response on March 19, 2014, it stated that "The Company has conducted an estimate of the fair market value of the Hayden plant. The document is protected under attorney client privilege." In a supplemental response on April 11, 2014, PacifiCorp stated that "the Company has conducted an analysis of the SCR installation on Hayden Unit 1under attorney-client privilege, which privilege is hereby waived by the Company," and asked that I "make arrangements for review at the Company's offices."

19. On April 16, 2014 I reviewed PacifiCorp's Hayden analysis at the offices of Morgan, Lewis & Bockius LLP (225 Franklin Street 16th Floor, Boston, MA 02110) under the supervision of Marney Smyth Fischer, a paralegal. I took notes on the analysis, and testified on the issue of Hayden completely under seal in the Utah Docket on May 1, 2014. As in all of the docketed cases in which I've worked, counsel reviewed and filed my testimony. On June 4, 2014, PacifiCorp witnesses Mr. Chad Teply and Mr. Rick Link submitted testimony

substantively responding to my concerns and critiques, and Mr. Teply provided additional evidence regarding the PacifiCorp's decision making-process in Hayden.

20. On July 25, 2014 I submitted testimony in Wyoming Docket 20000-446-ER-14, the 2014 General Rate Case. Again, counsel submitted my testimony in the docket with the Hayden components under seal.

B. The Subject Alleged Violation

21. On August 6, 2014 I attended the OPUC's confidential workshop on the Hayden and Craig analyses in Salem, Oregon. I asked numerous questions at the workshop based on my understanding of the issues gleaned from the analysis document I had reviewed in April, rebuttal testimony filed by Mr. Teply and Mr. Link, and information presented by Ms. Cindy Crane in both the Utah rate case as well as the Jim Bridger CPCN (Wyoming 20000-418-EA-12).

22. On August 7, 2014 I discussed potential discovery concepts with Sierra Club counsel and prepared draft questions for Sierra Club counsel review. Sierra Club counsel is a qualified person as defined under the OPUC General Protective Order 13-095, dated March 22, 2013 ("OPUC Protective Order"). It is my understanding that PacifiCorp alleges that the discovery subsequently issued by Sierra Club in the Wyoming rate case Docket (20000-446-ER-14) violated the OPUC Protective Order because it "used or disclosed" confidential material in a proceeding other than OPUC LC-57 (the proceeding in which the confidential material was provided). At no time did I or Synapse "use or disclose" confidential information provided to me pursuant to the OPUC Protective Order in my testimony in either Utah or Wyoming, or have I disclosed my experiences or understandings of the Oregon proceedings to any person except counsel and qualified individuals under the OPUC Protective Order.

V. REPERCUSSIONS TO SYNAPSE FROM PACIFICORP'S ALLEGATIONS

23. On the evening of August 8, 2014 I received notice from Sierra Club counsel that PacifiCorp had issued a Violation of Protective Order letter. Neither Synapse nor I were copied on the letter from PacifiCorp counsel. Nevertheless, Synapse immediately began to experience the impact of the violation allegation with respect to my work and that of my colleagues in various matters as discussed below.

A. US EPA Excluded From Participation in Utah DEQ NAAQS Compliance Project

24. On August 12, 2014 on behalf of the U.S. EPA, I was scheduled to participate in a teleconference with Energy Strategies, a consultancy based out of Utah, with PacifiCorp, and an advisor from RAP. Energy Strategies is currently working for the State of Utah and the Utah Department of Environmental Quality ("DEQ") on developing alternative compliance mechanisms for meeting National Ambient Air Quality Standards through energy efficiency, and has asked for the participation of the EPA in this project.

25. As a contractor for the EPA, developer of the EPA's AVERT, and an expert in the field of displaced emissions, I was asked to represent the EPA in assisting Energy Strategies and the State of Utah. This project has no relation or bearing on Sierra Club, and is independent of my work in the PUCs. PacifiCorp's participation in the project is a function of Energy Strategy's desire to use the PacifiCorp's GRID model as a regulatory test bed.

26. On August 11, 2014 I was contacted by the project lead at Energy Strategies and informed that PacifiCorp had called to "express concern" about having "outside modeling advisors" on the call the next day. Upon further clarification, I learned that PacifiCorp had expressly requested that I personally not be allowed to participate on the call. As a result of PacifiCorp's actions, I was unable to ask direct questions of import to the EPA in the process noted above and prevented from effective representation.

B. Multiple Environmental Interveners in Utah, Wyoming and Idaho Excluded From System Optimizer Use

27. Similarly, I am currently under contract from multiple environmental stakeholders in Utah, Wyoming, and Idaho to learn about PacifiCorp's use of System Optimizer in the IRP process, and to help develop alternative IRP strategies through the direct use of the System Optimizer model. While Sierra Club holds similar interests, this work is conducted pursuant to an entirely separate contract and scope with these stakeholders, none of whom are party to LC-57. I have not disclosed any confidential information to these groups, nor will we discuss any form of confidential modeling information until all of the parties have signed a protective order.

28. During the OPUC August 6th confidential technical session, OPUC staff expressed an interest in PacifiCorp hosting a session to help OPUC staff understand how the System Optimizer is used in planning. PacifiCorp agreed to schedule such a meeting. I asked if parties to

LC-57 could be present at this meeting, and staff affirmed that qualified parties would be welcome. On August 14, 2014 OPUC staff extended the formal invitation to LC-57 parties to join the meeting to be held on August 28, 2014. I was forwarded the invitation.

29. On August 21, 2014 I let OPUC staff know that I was interested in joining the session, and could sign a separate non-disclosure agreement for the meeting. That same evening, I was contacted directly by Bryce Dalley, PacifiCorp's Vice President of Regulation, asking me to call his cell phone. The next morning, he informed me by phone that I would be unwelcome at the meeting, and that I should cancel any plans to attend. I requested that Mr. Dalley send such notice in writing as well, and a few hours later I received a direct email from PacifiCorp counsel stating that I would not be allowed to participate in the August 28 meeting, and naming me as a person that "PacifiCorp asserts violated the protective order."

30. By being excluded from the meeting, Synapse was denied the opportunity to productively work with PacifiCorp modelers, understand how PacifiCorp uses the model, and to make direct inquiries of PacifiCorp technical staff. As a result, Synapse's clients interested in understanding PacifiCorp's modeling for purposes of this IRP and 111(d) (the New Source Performance Standard for carbon dioxide) are disadvantaged and delayed in conducting their analyses.

31. While PacifiCorp's allegations are being resolved here in Oregon, the filing requirement for the 2015 IRP is unchanged, and PacifiCorp's modeling schedule is similarly unchanged. Interveners in Utah, Wyoming, and Idaho will have a very narrow window of opportunity to productively engage with PacifiCorp in modeling matters before PacifiCorp's modeling process and inputs are finalized. As a result of PacifiCorp's actions, I am unable to provide timely, appropriate, information to clients unrelated to the current dispute or case and to discharge my contractual responsibilities to those clients. Indeed, based on PacifiCorp's actions to date, I am very concerned that I, and any other party that I might work for, would be denied confidential materials in any PacifiCorp proceeding.

C. <u>Denied Opportunity to Assess PacifiCorp Rebuttal and Case in Wyoming</u>

32. Lastly, I am working for Sierra Club as a testifying witness in the current General Rate Case in Wyoming (20000-446-ER-14), where the topic of my direct testimony includes the installation of SCR at Hayden. As part of that testimony, materials that may have been presented at OPUC during the announced August 6, 2014 meeting would have been directly relevant.

33. Most recently, on August 22, 2014 PacifiCorp responded to a set of discovery in the Wyoming Docket 20000-446-ER-14 that sought confidential materials from Rocky Mountain Power, a subsidiary of PacifiCorp. PacifiCorp responded that Rocky Mountain Power would not provide any additional confidential information to Sierra Club due to the allegation of a violation of the OPUC Protective Order. In short, PacifiCorp announced to all of the Wyoming parties that they would not serve confidential information to Sierra Club.

34. Rocky Mountain Power is scheduled to file answering testimony on September 5, 2014, and I am required to file rebuttal testimony by September 19, 2014. Absent an expedited ruling from the OPUC clearing Synapse's and my name no later than the beginning of next week, PacifiCorp's actions interfere with my ability to fulfill my responsibilities to the Wyoming PSC and to file timely or complete testimony. I will not be able to review confidential components of PacifiCorp's rebuttal testimony, nor ask discovery regarding PacifiCorp's rebuttal testimony.

VI. CONCLUSION

35. PacifiCorp's unresolved (and factually unsupported) allegation against Synapse and me has effectively made it impossible for Synapse to participate meaningfully in any PacifiCorp case in any state on behalf of our clients. On behalf of Synapse and myself, I respectfully request the OPUC expeditiously decide this matter, deny PacifiCorp's request for the imposition of sanctions against Synapse or myself and for any OPUC order issued to expressly state that there was no evidence indicating any violation of the Protective Order on the part of Synapse or its Principal Associate Jeremy Fisher.

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1707

In the Matter of SIERRA CLUB, Regarding violation of Protective Order No. 13-095.	AFFIDAVIT OF JEREMY FISHER, PhD

I, Jeremy Fisher, being duly sworn on oath, depose and say:

1. My name is Jeremy Fisher. I am a principal consultant at Synapse Energy Economics. In my capacity as principal consultant, I have provided consulting services to Sierra Club. My business address is 485 Massachusetts Avenue, Suite 2, Cambridge, MA, 02139.
2. As part of Sierra Club's Reply Brief, dated September 5, 2014, filed in the above captioned matter is a Declaration prepared by me and provided to Sierra Club for use in connection with Sierra Club's reply in the above captioned proceeding.
3. I affirm that, to the best of my knowledge and belief, the information in the Declaration is true and accurate.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF OREGON THAT THE FOREGOING IS TRUE AND CORRECT BASED ON MY INFORMATION AND BELIEF.

Signed this 5th day of September, 2014

____
Jeremy Fisher

Subscribed and sworn to before me this ___ day of September, 2014

Signed: ________________
Printed: JANICE CONYERS
My Commission Expires: 7/27/18

JANICE CONYERS
Notary Public
Commonwealth of Massachusetts
My Commission Expires
July 27, 2018

Attachment 9

Derek Nelson <derek.nelson@sierraclub.org>

Fwd: Access to System Optimizer in docket LC 57

Derek Nelson <derek.nelson@sierraclub.org> Fri, Sep 5, 2014 at 2:34 PM
To: Derek Nelson <derek.nelson@sierraclub.org>

---------- Forwarded message ----------
From: **Gloria Smith** <gloria.smith@sierraclub.org>
Date: Fri, Aug 22, 2014 at 4:40 PM
Subject: Re: Access to System Optimizer in docket LC 57
To: "Wallace, Sarah" <Sarah.Wallace@pacificorp.com>
Cc: "jfisher@synapse-energy.com" <jfisher@synapse-energy.com>, "Flynn, Ryan" <Ryan.Flynn@pacificorp.com>, "Dalley, Bryce" <Bryce.Dalley@pacificorp.com>

Sarah,

In response to your email below excluding Dr. Jeremy Fisher from the August 28 training, as you noted, Dr. Fisher has a standing NDA with Ventyx, and has entered into numerous protective orders with PacifiCorp over the years. In addition, he is a consultant to many state and federal agencies around the country, all of which have required confidentiality. Dr. Fisher and his company Synapse Energy Economics have impeccable credentials. OPUC staff have voiced their preference that Dr. Fisher attend this training.

In addition, Synapse is contracted to operate PacifiCorp's System Optimizer model in review of the 2015 IRP process on behalf of a coalition of PacifiCorp intervenors in multiple states. Dr. Fisher is project manager and lead on this effort which includes four other Synapse staff. Synapse will loose a critical opportunity to engage in a productive engagement with PacifiCorp's modeling team to understand key components of the Company's use of the model. Multiple intervenors in Oregon, Wyoming, Utah, and Idaho will be restricted from accessing the Company's model. To date, this effort would have been the first to have any intervenor in any state actively assess the Company's planning model through direct use. Excluding Dr. Fisher from the August 28 training will cause harm to numerous parties. We ask that you reconsider this action.
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On Fri, Aug 22, 2014 at 11:09 AM, Wallace, Sarah <Sarah.Wallace@pacificorp.com> wrote:

> Gloria –
>
> It has come to my attention that Dr. Jeremy Fisher would like to participate in a confidential meeting with PacifiCorp to review the System Optimizer model being held on August 28, 2014, at the request of Commission Staff. The meeting is confidential for two reasons: (1) access to proprietary information protected by non-disclosure agreements with Ventyx; and (2) access to confidential information from Confidential Volume III in PacifiCorp's 2013 IRP. Access to this information will only be given to those who sign both an NDA with Ventyx and the LC 57 protective order, Order No. 13-095.
>
> PacifiCorp acknowledges that Dr. Fisher has a standing NDA with Ventyx and has signed the consent to be bound to Order No. 13-095. Dr. Fisher is, however, one of the parties that PacifiCorp asserts violated the protective order by using or disclosing confidential information. As you are well aware, the Commission is currently investigating Sierra

Club's breach of Order No. 13-095. Under paragraph 11 of that order, PacifiCorp is providing notice that we are restricting Dr. Fisher's access to PacifiCorp's confidential information in LC 57. We therefore will not allow Dr. Fisher to participate in the meeting on August 28 due to the ongoing investigation.

Sarah K. Wallace

Pacific Power | Assistant General Counsel

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Phone: (415) 977-5532

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Attachment 10

Derek Nelson <derek.nelson@sierraclub.org>

20000-446-ER-14 Sierra Club 3rd Set of Data Requests to RMP 8-7-14

Solander, Daniel <Daniel.Solander@pacificorp.com> Fri, Aug 8, 2014 at 3:45 PM
To: undisclosed-recipients

The information contained in Sierra Club's third data request to Rocky Mountain Power contains information that is protected under an Oregon Public Utility Commission protective order in its 2013 IRP proceeding, LC 57, and which was disclosed in violation of that Order.

Please immediately destroy all information and/or emails associated with this data request and confirm to me that you have done so.

Please contact me if you have any questions.

Daniel E. Solander

Senior Counsel

Rocky Mountain Power

One Utah Center

201 South Main Street, Suite 2300

Salt Lake City, Utah 84111

(801) 220-4014 Direct Dial

(801) 803-1240 Cell

From: Derek Nelson [mailto:derek.nelson@sierraclub.org]

Sent: Thursday, August 07, 2014 3:32 PM
To: Data Request Response Center; John Burbridge; Steve Mink; Michelle Bohanan; thomas.wilson@wyo.gov; brittney.brinkmeier@wyo.gov; dave.walker@wyo.gov; marci.norby@wyo.gov; don.biedermann@wyo.gov; luy.luong@wyo.gov; art.schmidt@wyo.gov; kara.seveland1@wyo.gov; Perry McCollom; angela.elliott@wyo.gov; rpomeroy@hollandhart.com; Thor Nelson; Abby Briggerman; Patti Penn; Inbuchanan@hollandhart.com; msmyczynski@hollandhart.com; mbking@hollandhart.com; ivan.williams@wyo.gov; Solander, Daniel; Mosier, David; christopher.leger@wyo.gov; bknight@natronacounty-wy.gov; phickey@hickeyevans.com; kpearson@hickeyevans.com; bluben@cityofcasperwy.com; lisahickey@coloradolawyers.net; Shannon Anderson; Crystal McDonough; Julia Karlin; Splittstoesser, Stacy
Cc: Gloria Smith; Jeremy Fisher
Subject: 20000-446-ER-14 Sierra Club 3rd Set of Data Requests to RMP 8-7-14

[Quoted text hidden]

Attachment 11