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IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF UTAH, CENTRAL DIVISION

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff,</p> <p>vs.</p> <p>RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN,</p> <p>Defendants.</p>	<p>Civil No. 2:15-cv-00828 DN</p> <p><b>UNITED STATES' BRIEF IN RESPONSE TO DEFENDANTS' MEMORANDUM TO EXCLUDE DEPOSITION TESTIONY</b></p> <p>Judge David Nuffer Magistrate Judge Evelyn J. Furse</p>
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Pursuant to this Court's Order dated March 26, 2018,<sup>1</sup> the United States submits its brief in opposition to Defendants' memorandum to exclude the use of deposition testimony in lieu of live witnesses at trial<sup>2</sup>. Specifically, the Court ordered the United States to respond to "detail the basis under the rules for permitting the deposition designation of PacifiCorp in lieu of live testimony."<sup>3</sup> The designations from the [Fed. R. Civ. P. 30\(b\)\(6\)](#) deposition are admissible in this trial because the witnesses who testified on behalf of PacifiCorp testified as to their personal knowledge and they are unavailable for trial.

### **I. Brief Factual Background**

PacifiCorp is a utility company that operates in the Western United States.<sup>4</sup> One of their business units is Rocky Mountain Power, which delivers and transmits power to PacifiCorp's retail customers in Utah, Wyoming, and Idaho.<sup>5</sup> Defendants have claimed to be ready to, or nearly ready to, "connect" to a Rocky Mountain Power facility in or near their purported solar energy technology site.<sup>6</sup> They made these statements to string customers along into thinking that Defendants' purported solar energy technology actually worked to generate electricity. To gather

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<sup>1</sup> ECF No. 354.

<sup>2</sup> [ECF No. 347](#).

<sup>3</sup> ECF No. 354.

<sup>4</sup> Pl. Ex. 713A, Deposition of PacifiCorp ("PacifiCorp Dep.") 15:19-16:15. Pl. Ex. 713 is the United States' designations from the Deposition of PacifiCorp. See [ECF No. 304-1](#). But because some information relevant to this brief is *not* included in those designations, the United States attaches the entire deposition to this brief with the exhibit number Pl. Ex. 713A.

<sup>5</sup> PacifiCorp Dep. 15:19-16:15.

<sup>6</sup> *E.g.*, Pl. Ex. 579, [ECF No. 302-1](#), Designations from the Deposition of Neldon Johnson, vol. 1, 104:22-107:5, 116:22-118:6; Pl. Ex. 72, [ECF No. 254-19](#), at 1 (In August 2013, Shepard told customers that 18 or 19 towers would be producing 1.5 megawatts of power which would "soon be put on power poles going to Rocky Mountain Power which is Utah's largest utility company."); Pl. Ex. 267, ECF No.255-6, at 1 ("The first project will consist of 15 towers that will produce about 1.5 Megawatts for Rocky Mountain Power. We are almost done.").

information about these claims, the United States noticed the [Fed. R. Civ. P. 30\(b\)\(6\)](#) deposition of PacifiCorp.<sup>7</sup>

The deposition of PacifiCorp is actually the combined depositions of three PacifiCorp employees, all of whom live in the Portland, Oregon, area: Bruce Griswold, Kristopher Bremer, and Veronica Whitesmith.<sup>8</sup> Each witness testified to having extensive personal experience working for PacifiCorp in the area for which the witness was designated to testify.<sup>9</sup> Each witness testified that, if a question called for information *outside* the witness's personal knowledge, he or she would let the examiner know.<sup>10</sup> And, when each witness was asked a question that was outside his or her personal knowledge, the witness said as much.<sup>11</sup>

More specifically, Mr. Griswold testified as to his personal knowledge of PacifiCorp's activities and how PacifiCorp is organized, including its Rocky Mountain Power business unit.<sup>12</sup> Mr. Griswold also testified as to his personal knowledge of the process of obtaining a power purchase agreement from PacifiCorp, and that no Defendant in this case has a power purchase agreement with PacifiCorp.<sup>13</sup> Mr. Bremer testified as to his personal knowledge of the process of obtaining a generation interconnection agreement with PacifiCorp, which would allow an

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<sup>7</sup> Pl. Ex. 193; Pl. Ex. 794, United States' Notice of Witness Deposition (Sept. 20, 2016).

<sup>8</sup> PacifiCorp Dep. 7:3-21, 68:1-20, 138:1-3, 142:3-8.

<sup>9</sup> PacifiCorp Dep. 7:25-8:13, 12:3-15:11, 68:21-69:8, 71:10-72:22, 138:15-139:7, 141:22-146:9.

<sup>10</sup> E.g., PacifiCorp Dep. 15:12-18; 76:14-22; 146:2-9.

<sup>11</sup> E.g., PacifiCorp Dep. 119:16-120:11, 186:2-16.

<sup>12</sup> PacifiCorp. Dep. 15:19-23:25.

<sup>13</sup> PacifiCorp. Dep. 24:1-48:14. To the extent that Mr. Griswold reported information from PacifiCorp records to testify as to this matter: 1) he testified as to his personal knowledge about how to figure out whether any agreement existed, and 2) the PacifiCorp records about the agreements it has is excepted from the rule against hearsay by Fed. R. Evid. 803(6). See Pl. Ex. 795, Declaration of PacifiCorp; [Fed. R. Evid. 902\(11\)](#).

electricity-producing facility to physically interconnect to PacifiCorp's electric system.<sup>14</sup> Mr. Bremer also testified as to his personal knowledge that no Defendant in this case has a generation interconnection agreement with PacifiCorp.<sup>15</sup> Ms. Whitesmith testified as to her personal knowledge of the process for transmission service agreement requests to PacifiCorp, and that no Defendant in this case has a transmission service agreement with PacifiCorp.<sup>16</sup>

## **II. The PacifiCorp employees testified to matters within their personal knowledge.**

[Federal Rule of Civil Procedure 30\(b\)\(6\)](#) allows a party to name a company as a deponent when the party “describes with reasonable particularity the matters for examination.”<sup>17</sup> The noticed company must then designate someone “to testify on its behalf” and may “set out the matters on which each person designated will testify.”<sup>18</sup> “The persons designated must testify about information known or reasonably available to the organization.”<sup>19</sup> This last provision means that, if a designated person does not have personal knowledge of the topics on which he or

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<sup>14</sup> PacifiCorp. Dep. 72:23-115:2.

<sup>15</sup> PacifiCorp. Dep. 115:4-117:15; To the extent that Mr. Bremer reported information from PacifiCorp records to testify as to this matter: 1) he testified as to his personal knowledge about how to figure out whether any agreement existed, and 2) the PacifiCorp records about the agreements it has is excepted from the rule against hearsay by [Fed. R. Evid. 803\(6\)](#). See Pl. Ex. 795; [Fed. R. Evid. 902\(11\)](#).

<sup>16</sup> PacifiCorp Dep. 138:1-184:2; To the extent that Ms. Whitesmith reported information from PacifiCorp records to testify as to this matter: 1) she testified as to her personal knowledge about how to figure out whether any agreement existed, and 2) the PacifiCorp records about the agreements it has is excepted from the rule against hearsay by [Fed. R. Evid. 803\(6\)](#). See Pl. Ex. 795; [Fed. R. Evid. 902\(11\)](#).

<sup>17</sup> [Fed. R. Civ. P. 30\(b\)\(6\)](#).

<sup>18</sup> [Fed. R. Civ. P. 30\(b\)\(6\)](#).

<sup>19</sup> [Fed. R. Civ. P. 30\(b\)\(6\)](#).

she is to testify, the noticed company must fill the witness – an “empty vessel” – with information that the company has.<sup>20</sup>

Here, the United States issued a [Fed. R. Civ. P. 30\(b\)\(6\)](#) notice to PacifiCorp, noting the specific topics on which we sought testimony. PacifiCorp designated Mr. Griswold, Mr. Bremer, and Ms. Whitesmith to testify on those topics. But PacifiCorp did not fill “empty vessels” in this case. As the witnesses’ testimony demonstrates, PacifiCorp designated witnesses who had *personal knowledge* of all of the topics on which the United States sought information. Each witness described his or her extensive personal experience working for PacifiCorp in the fields about which they testified. Each witness agreed that they would tell examining counsel if an answer they gave was from a source other than their own personal knowledge. And each witness was very clear when a question called for an answer outside his or her personal knowledge. Because the witnesses testified as to matters within their personal knowledge, they may provide trial testimony.<sup>21</sup> To the extent that any witness discussed PacifiCorp records to testify, the

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<sup>20</sup> *E.g.*, [Coryn Grp. II, LLC v. O.C. Seacrets, Inc.](#), 265 F.R.D. 235, 243 (D. Md. 2010) (“[I]n the context of a 30(b)(6) deposition, where a corporate designee testifies on topics of which he denies any personal knowledge, he is an ‘empty vessel’ and documents reviewed on those topics in preparation for the deposition necessarily informed his testimony.”).

<sup>21</sup> [Fed. R. Evid. 602](#) (“A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony.”). *C.f.* [Sara Lee Corp. v. Kraft Foods Inc.](#), 276 F.R.D. 500, 503–04 (N.D. Ill. 2011) (A [Rule 30\(b\)\(6\)](#) designee’s deposition testimony *not* about matters within his personal knowledge was “admitted for purposes of explaining ChefsBest’s licensing policies and establishing whether ChefsBest ever believed that one of the parties had violated those policies. If at trial Plaintiff seeks to admit portions of Thompson’s deposition for some other purpose, the Court will consider whether the underlying corporate knowledge is sufficiently reliable to substitute for personal knowledge.”).

witnesses testified about their personal knowledge of those records, and the records themselves are excepted from the rule against hearsay as business records of PacifiCorp.<sup>22</sup>

### **III. The PacifiCorp employees are unavailable for trial.**

Defendants suggest that PacifiCorp is not “unavailable” under [Fed. R. Civ. P. 32](#) because it “resides” within 100 miles of the place of trial.<sup>23</sup> But the foregoing facts show that it is the individual witnesses who will provide relevant testimony in this case. And those witnesses’ deposition testimony may be used in lieu of live testimony at trial under [Fed. R. Civ. P. 32\(a\)](#) because: 1) all parties had reasonable notice of the deposition; 2) as described above, the testimony would be admissible under the Federal Rules of Evidence if the witnesses were present and testifying live; and 3) the witnesses are far more than 100 miles from the place of trial in Salt Lake City, Utah.<sup>24</sup>

### **IV. Conclusion**

For all of these reasons, the deposition testimony from the PacifiCorp witnesses, Bruce Griswold, Kristopher Bremer, and Veronica Whitesmith is admissible under the Federal Rules of Evidence. This Court should admit that testimony as evidence in this case.

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<sup>22</sup> [Fed. R. Evid. 803\(6\)](#); [Fed. R. Evid. 902\(11\)](#); Pl. Ex. 795.

<sup>23</sup> *See* [ECF No. 347](#) at 3.

<sup>24</sup> [Fed. R. Civ. P. 32\(a\)\(1\)](#) & (4).

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Respectfully submitted,

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***ATTORNEYS FOR THE  
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 29, 2018, the foregoing document, along with its exhibits, was electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record.

*/s/ Erin Healy Gallagher* \_\_\_\_\_  
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