

Mark C. Moench (2284)  
Yvonne R. Hogle (7550)  
Rocky Mountain Power  
201 South Main Street, Suite 2300  
Salt Lake City, UT 84111  
Tel. 801-220-4050  
Fax 801-220-3299  
[mark.moench@pacificorp.com](mailto:mark.moench@pacificorp.com)  
[yvonne.hogle@pacificorp.com](mailto:yvonne.hogle@pacificorp.com)

Gregory B. Monson (2294)  
Stoel Rives LLP  
201 South Main Street, Suite 1100  
Salt Lake City, UT 84111  
Tel. 801-578-6946  
Fax 801-578-6999  
[gbmonson@stoel.com](mailto:gbmonson@stoel.com)

*Attorneys for Rocky Mountain Power*

**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 <b>RESPONSE OF ROCKY MOUNTAIN POWER IN OPPOSITION TO UIEC'S MOTION TO COMPEL</b>
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Rocky Mountain Power, a division of PacifiCorp (“Rocky Mountain Power” or “Company”), hereby responds in opposition to UIEC’s Motion to Compel Data Responses; Request for Extension of filing Deadline; and Request for Expedited Treatment (“Motion”) dated May 11, 2011.

The Motion seeks an order of the Commission compelling the Company to respond to UIEC Data Requests (“DR”) 10.3, 19.2, 19.9, 19.11, 20.5, 20.9 - 20.27, 20.30, and 20.31 regarding hedging policies, strategies and practices and natural gas acquisition practices of affiliates of the Company (“Hedging Requests”) and DR 12.9 regarding Gateway South and the

TransWest Express Transmission Project (“Transmission Request”) (collectively “Requests”), an extension to file direct testimony and expedited treatment. The Company opposes the Motion because (1) the Motion is moot—the Company has already provided all information within its possession, custody or control responsive to the data requests for which the Motion seeks to compel further responses (“Requests”) (2) the Requests seek information that is irrelevant to this proceeding, and (3) UIEC is not entitled to any other relief as a result of this discovery dispute because it chose to delay bringing the Motion.

### **I. BACKGROUND**

UIEC served its tenth set of data requests on the Company on March 10, 2011, seeking information about the Company’s affiliates’ hedging policies, strategies and practices. The Company objected to the requests on March 31, 2011 on the ground that the requests did not seek discovery of information that is relevant to the case or reasonably calculated to lead to discovery of admissible evidence.<sup>1</sup> On April 1, 2011, UIEC informed the Company that it disagreed with the objection and asked the Company to reconsider. That same day, the Company responded that it would not change its position.<sup>2</sup> Following further communications between the parties, the Company supplemented its response to Data Request (“DR”) 10.3 on April 12, 2011 to explain that (1) the Company and its affiliates are independently managed and operated, (2) they have different resource portfolios, market structures and risks and regulatory

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<sup>1</sup> The Motion states that the Company “waited the full twenty-one days allowed by the Commission to respond,” Motion ¶ 7, suggesting that the Company purposefully and improperly delayed providing its objections to UIEC. This suggestion ignores the fact that, as of May 20, 2011, the Company had been served with 1,812 data requests including 2,772 separate subparts in this docket. Between March 10 and April 8, 2011, UIEC alone served ten sets of data requests. It is all the Company can do to process and respond to this volume of discovery within the time allowed. It is not reasonable to suggest that the Company should have singled out these requests for earlier objection.

<sup>2</sup> See Exhibit F to Motion.

structures, (3) the Company's approach to hedging is informed by its specific resource portfolio, markets and regulatory structures, (4) the Company does not review or consider the hedging policies of the affiliates in determining its hedging policy, and (5) the Company does not have documents responsive to the request. UIEC, however, did not file the Motion until May 11, 2011. Instead, UIEC served its nineteenth and twentieth sets of data requests on April 6 and 8, 2011 and awaited responses to these requests, which were similar in nature to the tenth set, but asked more pointed questions about affiliates' hedging strategies and programs and natural gas acquisition. The Company responded to these requests reiterating its objections and referring to the 1st Supplemental Response to DR 10.3.

UIEC served a data request on March 23, 2011, DR 12.9, seeking detailed information regarding the Gateway South and TransWest Express transmission projects. These projects have not been built and are not at issue in this case. Therefore, the Company objected on the grounds of relevance on April 13, 2011. The parties had communications regarding this objection during which it became clear that UIEC contended that the information was relevant because it believed the costs of the Populus to Terminal line were in question. The Company refused to waive its objection because the costs of the Populus to Terminal line had already been approved by the Commission in major plant addition dockets. Again, UIEC did not file the Motion until May 11, 2011 even though it knew by mid-April that the Company objected to providing information responsive to DR 12.9 on the basis of relevancy.

After UIEC filed the Motion, Rocky Mountain Power promptly communicated with UIEC and, on May 16, 2011, met with UIEC and provided, without waiving its objections, supplemental responses ("Supplemental Responses") to the Requests, including one attachment in response to the Hedging Requests and several voluminous attachments in response to the

Transmission Request. At the meeting, the Company discussed and explained the Supplemental Responses and explained that it had decided it was more efficient to provide all information in its possession, custody or control responsive to the Requests, subject to its continuing objections, rather than litigate the Motion. UIEC reiterated its belief that despite the Supplemental Responses the Company must produce information regarding the hedging policies, strategies and practices of its affiliates because of shared officers and directors. Although the Company had previously reviewed the same issue, the Company agreed to review this issue again and get back to UIEC. UIEC, in turn, stated that it would review the Supplemental Responses and get back to the Company.

The Company promptly reviewed the shared officer and director issue raised by UIEC again and, on the morning of May 17, 2011, explained to UIEC that the risk management policies of affiliates are approved at the president level of the applicable division or affiliate, that the hedging policies, strategies and practices of the Company (which are subordinate to its risk management policy) are approved by the Senior Vice President for Commercial and Trading (Stefan Bird) and that the four persons who are officers or directors of both the Company and of its parent MidAmerican Energy Holdings Company (“MEHC”)<sup>3</sup> do not review and approve the hedging or risk management policies of the Company or its operating affiliates, let alone the specific strategies and practices of the Company and its affiliates. Therefore, the Company explained that it had no further information to provide in response to the Hedging Requests.

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<sup>3</sup> Greg Abel is Chairman of the Board and Chief Executive Officer of both PacifiCorp and MEHC. Doug Anderson is Senior Vice President and General Counsel of MEHC and a Director of PacifiCorp. Pat Goodman is Senior Vice President of MEHC and a Director of PacifiCorp. Brent Gale is Senior Vice President of MEHC and a Director of PacifiCorp. None of these individuals is an officer or director of MidAmerican Energy Company (“MEC”), CalEnergy Generation (“Cal Energy”), Northern Natural Gas (“NNG”) or Kern River Gas Transmission Company (“KRG”).

During that same conversation, UIEC stated that it was still reviewing the Supplemental Responses and would let the Company know if it had further questions.

On May 24, 2011, the Commission issued its Interim Order on Motion to Compel Discovery (“Interim Order”). The Interim Order noted that the Company had not filed a response to the Motion and that the Commission would not be able to address the Motion by the date UIEC’s testimony was due. Therefore, the Order said that UIEC should file its testimony on the due date and that the Commission would deal with the Motion and possibly consider a different remedy after the Company responded to the Motion and UIEC replied.

UIEC had not contacted the Company regarding its review of the Supplemental Responses at the time the Company reviewed the Interim Order. Therefore, the Company attempted to contact UIEC after reviewing the Interim Order the morning of May 24, 2011. UIEC responded the afternoon of May 24, 2011. During the discussion, UIEC for the first time told the Company that it was satisfied with the Supplemental Response to the Transmission Request, but that it still was not fully satisfied with the Supplemental Responses to the Hedging Requests. The Company again told UIEC that it had provided all of the information in its possession, custody or control responsive to the Hedging Requests in the Supplemental Responses. Accordingly, the Company believes it necessary to file this response to the Motion.

Based on the foregoing, even ignoring the irrelevance of the Hedging Requests, the Motion is moot. Furthermore, even assuming for the sake of argument that the Commission somehow determines that the Company should supply additional information to UIEC, UIEC is not entitled to any other remedy because of its delay in prosecuting the Motion.

## II. ARGUMENT

### A. The Motion Is Moot.

In responding to discovery, a party is only required to produce information within its possession, custody or control. Utah Rules of Civil Procedure (“URCP”) 34(a)(1). UIEC has the burden to establish that the Company has control of the documents of its affiliates. *See Honda Lease Trust v. Middlesex Mut. Assur. Co.*, No. 3:05cv1426, 2008 U.S. Dist. LEXIS 607066, at \*6 (D. Conn. Aug. 7, 2008). UIEC’s only attempt to meet that burden is a general statement, on information and belief, that the Company shares officers and directors with some, if not all, of its affiliates. Motion ¶ 6. This does not come close to meeting the burden.

To the contrary, as established by the Supplemental Responses, the Company does not have possession, custody or control of the hedging policies, strategies or practices of its affiliates and the affiliates are independently operated businesses. For example, the 1st Supplemental Response to DR 10.3 states:

MEHC’s business platforms are independently managed and operated businesses with different resource portfolios, different market structures and risks and different regulatory structures. . . . Rocky Mountain Power has no documents responsive to this request.

The 2nd Supplemental Response to DR 10.3 further states:

PacifiCorp and these [other MEHC public utilities] are independently operated businesses. For this reason, PacifiCorp does not have custody, possession or control of the information sought.

Similarly, the Supplemental Response to DR 19.2 states:

PacifiCorp is an independently operated company. For this reason, it does not have custody, possession or control of detailed monthly summaries of the hedging policy and practices and market purchases concerning natural gas for each of every electric utility and natural gas subsidiary and affiliate of MEHC.

The Supplemental Responses to all of the other Hedging Requests contain similar language.

Because the Company does not have possession, custody or control of the information of these affiliates and is operated independently of them, it is not required to provide such information in response to discovery requests. *See, e.g., Gerling International Insurance Co. v. Commissioner of Internal Revenue*, 839 F.2d 131, 141 (3d Cir. 1988) (“The requisite control has been found only where the sister corporation was found to be the alter ego of the litigating entity.”). The Hedging Requests do not seek information regarding transactions between the Company and its affiliates or matters that otherwise affect the revenues, expenses or investments of the Company. Thus, the Company is under no obligation to request that its affiliates provide the information sought in the Hedging Requests.<sup>4</sup>

The point is that the Company has already provided all of the information within its possession, custody or control that is responsive to the Hedging Requests. If the Commission orders the Company to respond to the Hedging Requests, the Company cannot provide further information. Therefore, the Motion is moot.

**B. The Hedging Requests Are Irrelevant.**

The Company does not contest the statement in the Motion that parties are entitled to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter of the pending case. Motion ¶ 18 (citing URCP 26(b)(1)). The Company also acknowledges that whether or not material is relevant is broadly construed in favor of discovery. However, this does not mean that any information sought is deemed relevant. A party may only discover information that is reasonably calculated to lead to the discovery of admissible evidence. *See, e.g., URCP 26(b)(1); Sabic v. Franklin Covey Prods., LLC*, No. 2:10cv343, 2010 U.S. Dist.

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<sup>4</sup> In the sole instance where the Company was able to locate a copy of a document responsive to one of the Hedging Requests, the Company provided the document in the Supplemental Responses.

LEXIS 112983, at \*5-\*6 (D. Utah Oct. 22, 2010).<sup>5</sup> In *Sabic*, the court noted that Rule 26(b)(1) should be liberally construed, but stated that the United States Supreme Court “has underscored” the requirement of the relevancy of the discovery sought and the “district courts should not neglect their power to restrict discovery.” *Id.*, \*5-\*6 (quoting *Herbert v. Lando*, 441 U.S. 153, 177 (1979)).

Here, the Hedging Requests seek discovery of information regarding the specific risk management and hedging policies, strategies and programs of affiliates of the Company and natural gas transactions in which the affiliates engage. This information is not reasonably calculated to lead to the discovery of admissible evidence because the Company’s hedging strategy, practices and costs are not affected in any way by the policies, strategies or practices of its affiliates. As stated by the Company in 1st Supplemental Response to DR 10.3:

MEHC’s business platforms are independently managed and operated businesses with different resource portfolios, different market structures and risks and different regulatory structures. PacifiCorp’s approach to hedging is informed by its specific resource portfolio, markets and regulatory structures. For this reason, Rocky Mountain Power does not review or consider the hedging policies of other MEHC affiliates in determining its hedging policy.

The differences were further explained in the Supplemental Responses. For example, in the 2nd Supplemental Response to DR 10.3, the Company stated:

PacifiCorp and these [other MEHC public utilities] are independently operated businesses. . . . Nevertheless, PacifiCorp understands that MEC has very limited natural gas-fired generation requirements for electric generation with one CCCT in a portfolio that is dominated by coal and wind and is generally long power. . . . MEC also operates a regulated natural gas distribution company with a dollar-for-dollar pass through tariff mechanism. PacifiCorp’s understanding is MEC hedges a good portion of its near term regulated distribution company natural gas

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<sup>5</sup> See *Lund v. Brown*, 2000 UT 75, ¶ 26, 11 P.3d 277 (interpretations of the Federal Rules of Civil Procedure are persuasive where the Utah Rules of Civil Procedure are “substantially similar”).



requirements and meets periodically with regulators to discuss past hedge performance and current hedge positions similar to how the Company has heard other natural gas distribution companies manage natural gas in the Northwest.

With respect to CalEnergy, the Company stated in the Supplemental Response to DR 20.9:

PacifiCorp understands that CalEnergy does not directly engage in buying or selling natural gas or power in daily markets, the bulk of CalEnergy's generation assets are contracted with third parties under long-term power purchase agreements ("PPAs") or tolling agreements in the case of certain of its natural gas fired facilities, and when those PPA's expire, CalEnergy renegotiates new contracts with third parties who are marketers or utilities.

With respect to NNG and KRGT, the Requests asked from what basins these companies transport natural gas, whether these basins produce shale gas energy and when the companies began transporting shale gas. In response to DRs 20.30 and 20.31, the Company provided its understanding based on publicly-available information.

The Company is not required to produce publicly-available information to UIEC in response to the Requests. *See* URCP 33(d); *see also Overstock.com, Inc. v. SmartBargains, Inc.*, 2008 UT 55, ¶¶ 22-24, 192 P.3d 858 (denying plaintiff further discovery because plaintiff "was capable of accessing public records and compiling survey evidence to present to the court"). Nonetheless, it did so in an effort to help UIEC understand why the information it sought in the Requests would not assist in determining the prudence of the Company's hedging practices or costs. Given that the affiliates of MEHC are independently operated business with different markets, sources of supply, generation resource mixes and regulatory contexts and that they do not compare hedging strategies, no useful or admissible information can be gained about the prudence of the Company's hedging policies, strategies and practices from the hedging policies, strategies and practices of these affiliates.

Furthermore, if the Company had this information and were able to supply it, the case would turn into a trial of the prudence of the policies and actions of each of these affiliates in the

context of their individual circumstances, the extent to which their circumstances and actions have any relevance to the circumstances and actions of the Company and the extent to which the actions of the Company either conform or do not conform to the strategies of these companies given their different circumstances. And if the hedging practices of affiliates are relevant, perhaps UIEC will next argue that their practices with respect to planning and construction of transmission lines or generation plants, integrated resource planning or any number of other issues are also relevant. Accepting UIEC's position would start down a slippery slope in which the scope of every issue in any Company case would be multiplied many times by an examination of each of its affiliates' conduct with respect to that issue. The Commission should not start down that slope and should deny the Motion because the Requests seek information that is not relevant or reasonably calculated to lead to discovery of admissible evidence.

**C. UIEC Is Not Entitled to Any Remedy.**

In the Motion, UIEC requested that it be granted a day-for-day extension of its testimony filing date based on the delay incurred in getting information it claimed it needed to prepare its testimony. Motion ¶ 22. The Interim Order has already denied UIEC that remedy based on the fact that UIEC filed the Motion with insufficient time for the Commission to decide it prior to the testimony filing date. However, the Interim Order leaves open the possibility that depending on the outcome of the Motion, the Commission may consider some other remedy for UIEC. Given that the Motion is moot, there is no reason UIEC should be granted any additional remedy. Even if the Motion is granted, however, UIEC is not entitled to any other remedy because the delay is largely attributable to UIEC's own decisions regarding how to deal with the Company's objections to the Requests.

As discussed above, UIEC knew by the end of March that the Company objected to its questions regarding hedging practices of affiliates. After unsuccessfully attempting to persuade

the Company to change its position on April 1, 2011, UIEC chose to file further data requests on the same subject. However, it was apparent after the Company provided the 1st Supplement Response to DR 10.3 on April 12, 2011, not only that the Company was not changing its position on relevance, but that the Company did not have information on its affiliates' hedging policies, strategies or practices. Instead of filing a motion to compel at that time to get information which it now claims is essential to its direct testimony in this case, UIEC delayed another month, apparently hoping that the Company would change its position in responding to subsequent Requests.<sup>6</sup> UIEC cannot reasonably claim that this process justified its delay in filing the Motion until two weeks before UIEC's direct testimony was due.

In addition, the Company did not file its response to the Motion on an expedited basis as it did in the case of the UAE motion to compel filed some weeks earlier because the Company determined that the most efficient way to deal with the Motion was to provide the information sought to the extent it was within the Company's possession, custody or control while preserving its objections to use of the information.<sup>7</sup> Thus, rather than filing this response within a few days after the Motion was filed, the Company proposed to provide the Supplemental Responses to

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<sup>6</sup> UIEC has provided repetitive and overlapping email chains as Exhibit F to its Motion. These communications involved several different data requests, many of which are not the subject of the Motion and which address different issues. While the Company was always hopeful that the discovery disputes could be resolved, it never suggested that it would change its basic position that affiliate hedging information was irrelevant or that it had such information in its possession, custody or control. To the contrary, the Company regularly reaffirmed that position.

<sup>7</sup> In connection with UAE's motion to compel, the Company and UAE recognized that the parties were deadlocked based on a few discussions and communications over the course of a few days and that further efforts to resolve the issue without Commission assistance would be futile. Therefore, the Company responded to the UAE motion within three business days and did not oppose expedited treatment of the motion.

UIEC within two days after the Motion was filed.<sup>8</sup> By promptly providing the Supplemental Responses disclosing all of the information available to the Company, the Company expedited resolution of the Motion. Accordingly, UIEC is not entitled to any additional relief even if the Motion is granted.

### **III. CONCLUSION**

UIEC's Motion should be denied because it is moot. Rocky Mountain Power has already provided all information responsive to the Hedging Requests to UIEC that is within its possession, custody or control and granting the Motion would not result in the production of any additional information. The Motion should also be denied because the information sought is not relevant or reasonably calculated to lead to discovery of admissible evidence. UIEC's request for further relief should be denied even if the Motion is granted because UIEC is responsible for the bulk of any delay based on its choices in how to deal with the Company's consistent position on the Requests.

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<sup>8</sup> The Company proposed to meet on Friday, May 13, 2011 to provide at least some of the Supplemental Responses and to discuss the issues and responses with UIEC, but UIEC could not meet until Monday, May 16, 2011.

DATED: May 26, 2011.

RESPECTFULLY SUBMITTED,

ROCKY MOUNTAIN POWER

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Gregory B. Monson  
Stoel Rives LLP

Mark C. Moench  
Yvonne R. Hogle  
Rocky Mountain Power

*Attorneys for Rocky Mountain Power*

## CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2011, a true copy of the foregoing **RESPONSE OF ROCKY MOUNTAIN POWER IN OPPOSITION TO UIEC'S MOTION TO COMPEL** was served by email on the following:

Patricia Schmid  
Assistant Attorney General  
Heber M. Wells Bldg., 5th Floor  
160 East 300 South  
Salt Lake City, UT 84111  
[pschmid@utah.gov](mailto:pschmid@utah.gov)

Paul Proctor  
Assistant Attorney General  
Heber M. Wells Bldg., 5th Floor  
160 East 300 South  
Salt Lake City, UT 84111  
[pproctor@utah.gov](mailto:pproctor@utah.gov)

Chris Parker  
William Powell  
Dennis Miller  
Division of Public Utilities  
Heber M. Wells Building  
160 East 300 South, 4th Floor  
Salt Lake City, UT 84111  
[ChrisParker@utah.gov](mailto:ChrisParker@utah.gov)  
[wpowell@utah.gov](mailto:wpowell@utah.gov)  
[dennismiller@utah.gov](mailto:dennismiller@utah.gov)

Cheryl Murray  
Michele Beck  
Utah Office of Consumer Services  
160 East 300 South, 2nd Floor  
Salt Lake City, UT 84111  
[cmurray@utah.gov](mailto:cmurray@utah.gov)  
[mbeck@utah.gov](mailto:mbeck@utah.gov)

Gary A. Dodge  
Hatch James & Dodge  
10 West Broadway, Suite 400  
Salt Lake City, UT 84101  
[gdodge@hjdllaw.com](mailto:gdodge@hjdllaw.com)

Kevin Higgins  
Neal Townsend  
Energy Strategies  
39 Market Street, Suite 200  
Salt Lake City, UT 84101  
[khiggins@energystrat.com](mailto:khiggins@energystrat.com)  
[ntownsend@energystrat.com](mailto:ntownsend@energystrat.com)

F. Robert Reeder  
William J. Evans  
Vicki M. Baldwin  
Parsons Behle &, Latimer  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111  
[bobreeder@parsonsbehle.com](mailto:bobreeder@parsonsbehle.com)  
[vbaldwin@parsonsbehle.com](mailto:vbaldwin@parsonsbehle.com)  
[bevans@parsonsbehle.com](mailto:bevans@parsonsbehle.com)

Peter J. Mattheis  
Eric J. Lacey  
Brickfield, Burchette, Ritts & Stone,  
P.C.  
1025 Thomas Jefferson Street, N.W.  
800 West Tower  
Washington, D.C. 2007  
[pjm@bbrslaw.com](mailto:pjm@bbrslaw.com)  
[elacey@bbrslaw.com](mailto:elacey@bbrslaw.com)

Gerald H. Kinghorn  
Jeremy R. Cook  
Parsons Kinghorn Harris, P.C.  
111 East Broadway, 11th Floor  
Salt Lake City, Utah 84111  
[ghk@pkhlawyers.com](mailto:ghk@pkhlawyers.com)  
[jrc@pkhlawyers.com](mailto:jrc@pkhlawyers.com)

Steven Michel  
Western Resource Advocates  
2025 Senda de Andres  
Santa Fe, NM 87501  
[smichel@westernresources.org](mailto:smichel@westernresources.org)

Nancy Kelly  
Western Resource Advocates  
9463 N. Swallow Rd.  
Pocatello, ID 83201  
[nkelly@ida.net](mailto:nkelly@ida.net)

Holly Rachel Smith, PLLC  
Hitt Business Center  
3803 Rectortown Road  
Marshall, VA 20115  
[holly@raysmithlaw.com](mailto:holly@raysmithlaw.com)

Steve W. Chriss  
Wal-Mart Stores, Inc.  
2001 SE 10th Street  
Bentonville, AR 72716-0550  
[stephen.chriss@wal-mart.com](mailto:stephen.chriss@wal-mart.com)

Kurt J. Boehm, Esq.  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, OH 45202  
[kboehm@BKLawfirm.com](mailto:kboehm@BKLawfirm.com)

Captain Shayla L. McNeill  
Ms. Karen S. White  
AFLOA/JACL-ULFSC  
139 Barnes Ave, Suite 1  
Tyndall AFB, FL 32403  
[Shayla.mcneill@tyndall.af.mil](mailto:Shayla.mcneill@tyndall.af.mil)  
[Karen.white@tyndall.af.mil](mailto:Karen.white@tyndall.af.mil)

Rob Dubuc  
Western Resource Advocates  
150 South 600 East, Suite 2A  
Salt Lake City, UT 84102  
[rdubuc@westernresources.org](mailto:rdubuc@westernresources.org)

Sonya L. Martinez  
Betsy Wolf  
Salt Lake Community Action Program  
764 South 200 West  
Salt Lake City, UT 84101  
[smartinez@slcap.org](mailto:smartinez@slcap.org)  
[bwolf@slcap.org](mailto:bwolf@slcap.org)

Ryan L. Kelly  
Kelly & Bramwell, P.C.  
11576 South State St. Bldg. 1002  
Draper, UT 84020  
[ryan@kellybramwell.com](mailto:ryan@kellybramwell.com)

Arthur F. Sandack  
8 East Broadway, Ste 510  
Salt Lake City, UT 84111  
[asandack@msn.com](mailto:asandack@msn.com)

Brian W. Burnett, Esq.  
CALLISTER NEBEKER &  
McCULLOUGH  
Zions Bank Building  
10 East South Temple, Suite 900  
Salt Lake City, UT 84133  
[brianburnett@cnmlaw.com](mailto:brianburnett@cnmlaw.com)

Randy N. Parker, CEO  
Leland Hogan, President  
Utah Farm Bureau Federation  
9865 South State Street  
Sandy, UT 84070  
[rparker@fbfs.com](mailto:rparker@fbfs.com)  
[leland.hogan@fbfs.com](mailto:leland.hogan@fbfs.com)

Bruce Plenk  
Law Office of Bruce Plenk  
2958 N St Augustine Pl  
Tucson, AZ 85712  
[bplenk@igc.org](mailto:bplenk@igc.org)

Mike Legge  
US Magnesium LLC  
238 North 2200 West  
Salt Lake City, UT 84106  
[mlegge@usmagnesium.com](mailto:mlegge@usmagnesium.com)

Torry R. Somers  
CenturyLink  
6700 Via Austi Parkway  
Las Vegas, NV 89119  
[Torry.R.Somers@CenturyLink.com](mailto:Torry.R.Somers@CenturyLink.com)

Stephen F. Mecham  
Callister Nebeker & McCullough  
10 East South Temple Suite 900  
Salt Lake City, UT 84133  
[sfmecham@cnmlaw.com](mailto:sfmecham@cnmlaw.com)

Gloria D. Smith  
Sierra Club  
85 Second Street, Second floor  
San Francisco, CA 94105  
[gloria.smith@sierraclub.org](mailto:gloria.smith@sierraclub.org)

Janee Briesemeister  
AARP  
98 San Jacinto Blvd. Ste. 750  
Austin, TX 78701  
[jbriesemeister@aarp.org](mailto:jbriesemeister@aarp.org)

Roger Swenson  
US Magnesium LLC  
238 North 2200 West  
Salt Lake City, UT 84114-6751  
[roger.swenson@prodigy.net](mailto:roger.swenson@prodigy.net)

Sharon M. Bertelsen  
Ballard Spahr LLP  
One Utah Center, Suite 800  
201 South Main Street  
Salt Lake City, UT 84111  
[bertelsens@ballardspahr.com](mailto:bertelsens@ballardspahr.com)