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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 **UIEC'S MOTION TO STRIKE THE TESTIMONY AND EXHIBITS ASSOCIATED WITH THE ASSETS NOT USED AND USEFUL AS OF THE RATE EFFECTIVE DATE**

Pursuant to R746-100-3.H of the Utah Administrative Code, the UIEC submits to the Utah Public Service Commission ("Commission") this Motion to Strike the Testimony and Exhibits Associated with the Assets Not Used and Useful as of the Rate Effective Date ("Motion") of the above-captioned general rate case.[1] In support thereof, UIEC states as follows.

1 The specific testimony and exhibits are set forth in Exhibit A.

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INTRODUCTION

On January 24, 2011, Rocky Mountain Power ("RMP" or the "Company") filed with the Commission its application in the above-captioned general rate case. The Company's application was based on a test period of July 1, 2011, through June 30, 2012, the most far-reaching future test period so far. The Office of Consumer Services ("OCS"), Utah Association of Energy users ("UAE"), and UIEC opposed the Company's proposed test period. The Commission allowed three rounds of briefing and an evidentiary hearing on the issue. While the Division of Public Utilities ("DPU" or "Division") started by not opposing the Company's proposed test period throughout the three rounds of testimony, during the hearing, the Division moved its position to full support with no clear explanation as to why. The Commission issued its Order on Test Period March 30, 2011, authorizing the Company's proposed test period.

On May 26, 2011, UIEC's witness James T. Selecky filed testimony explaining that based on the evidence in this case certain capital additions will not become commercial[2] until after the rate increase in this case becomes effective, and therefore, those capital additions must be excluded from the development of revenue requirement. The basis for this exclusion is legal, thus, Mr. Selecky did not testify as to the legal basis for the exclusion. Instead he provided the factual and policy bases for the required $21.858 million reduction in revenue requirement.

A fundamental principle of utility regulation is the concept that assets must be physically used and useful to current ratepayers before those ratepayers can be asked to pay the costs associated with them. This means the assets must be commercially in-service, title of ownership

2 Being commercial refers to the "in-service" date, which is the date the asset is no longer eligible for accrual of an allowance for funds used during construction ("AFUDC").

has to have passed to the utility, and the assets have to have become a productive source of value. This is what triggers capital recovery of the engineered, furnished and installed cost of the asset. Failure to adhere to the principle of "used and useful" in the physical sense leads to a mismatch between the timing of capital cost recognition and the income effect that occurs when an asset is put into service. It also leads to a mismatch between the ratepayers who are paying for the service versus the ratepayers who are receiving the service.

There is no guarantee that these assets will ever become physically used and useful to Utah ratepayers. What happens then? What happens if they are significantly delayed? Why should the current ratepayers be carrying this enormous risk? It is the investor who is supposed to bear the risk of loss as a developer of a public utility.

Based on the Company's testimony in its application, Mr. Selecky conducted his analysis, which shows the significant capital additions the Company admits will not be physically used and useful to Utah ratepayers when the rates become effective. For example, the Company has projected $216.5 million in transmission and pollution control additions that will not be physically used and useful to Utah ratepayers until at least nine (9) months after the rate effective date, if even then; $200.7 million in transmission and pollution control additions will not be physically used and useful to Utah ratepayers until at least eight (8) months after the rate effective date, and maybe never. That means that RMP intends to impose on Utah ratepayers $417.2 million—nearly half a billion dollars—in highly speculative costs at least eight (8) months prior to the time they ***may*** become physically used and useful,[3] in violation of the well-established principles of regulatory law in Utah and the nation as a whole.

3 Often title of ownership does not pass to the utility until the asset becomes commercially in-service. In these

The Commission cannot allow this unlawful exaction, which is tantamount to a taking, to occur. Accordingly, UIEC requests that the Commission strike from the Company's application all testimony and exhibits related to the capital additions as set forth in Exhibit A.

ARGUMENT

I. THE PRINCIPLE OF "USED AND USEFUL" IS THE BEDROCK OF UTILITY REGULATION.

In determining whether the state of Illinois had taken the property of grain warehousemen by legislating a maximum rate for grain storage, the United States Supreme Court in *Munn v. Illinois*, set forth the historic theory underlying public regulation of private property. 94 U.S. 113 (1876).

> [W]hen private property is affected with a public interest, it ceases to be juris private only. . . . Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

Id. at 126 (internal citations omitted).

Several years later, in *Smyth v. Ames*, the Court formulated for the first time a coherent test of the extent to which regulated companies were protected from legislative expropriation on behalf of the public. 169 U.S. 466 (1898). In doing so, the Court, in weighing the considerations of equity between the interests of the providers and the consumers of a service, tied together what is or is not physically used and useful to the public service being provided.

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situations, ratepayers would be paying RMP for assets it actually does not even yet own.

> We hold, however, that the ***basis of all calculations*** as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair ***value of the property being used by it for the convenience of the public***. . . . What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.

Id. at 546-47 (emphasis added). The *Smyth* Court set forth the idea that the only property eligible to earn a rate of return is the property used to serve the public. The public can demand physical use of such property so the regulated entity is entitled to earn a rate of return on that property.

Thereafter, the principle of "used and useful" became widely used not only to identify those assets that were "taken for public use" and for which private companies were entitled to a fair return from the public, but also to serve the role of placing definite limitations on the cost responsibilities of the persons receiving utility services.[4] Justice Cardozo explained this approach in *Columbus Gas & Fuel Company v. Public Utilities Commission*:

> There will be no need in the computation of the rate base to include the market or the book value of fields not presently in use, unless the time for using them is so near that they may be said, at least by analogy, to have the quality of working capital. The arrival of that time cannot be known in advance through the application of a formula, but within the margin of a fair discretion must be determined for every producer by the triers of the facts in the light of all the circumstances. The burden is on the gas company to supply whatever testimony may be necessary to enable court or board to make the requisite division. Leases bought with income, the proceeds of the sale of gas, and thus paid for in last analysis through the contributions of consumers, ***ought not in***

4 The "used and useful" principle is thus a balancing between the public service provider and the public. The public has certain rights to what is otherwise private property and the public must pay for those rights, but only to the extent that the public actually physically enjoys those rights.

> ***fairness to be capitalized until present or imminent need for use as sources of supply shall have brought them into the base upon which profits must be earned. To capitalize them sooner is to build the rate structure of the business upon assets held in idleness to abide the uses of the future***.

292 U.S. 398, (1934) (emphasis added).

Another good example is *Denver Union Stock Yard Company v. United States*, 304 U.S. 470 (1938). In this case, the Denver Union Stock Yard Company challenged the rates set for its services by the Secretary of Agriculture as being confiscatory. The Court affirmed after reviewing the evidence, which demonstrated that the Secretary had only excluded property not physically used and useful for performance of stockyard services covered by the rates.

The Court's decision in *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591 (1944), shifted rate base formulation from fair value to prudent investment, but the physical used and useful test prevailed. For example, in *Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commission*, the Court of Appeals for the District of Columbia held:

> In *Smyth v. Ames*, the Supreme Court articulated the guiding principle that "the basis of all calculations as to the reasonableness of rates to be charged by a (public utility) must be the fair value of the property Being used by it for the convenience of the public." ***Although methods for determining values of rate base items have evolved since Smyth v. Ames, the precept endures that an item may be included in a rate base only when it is 'used and useful' in providing service. In other words, current rate payers should bear only legitimate costs of providing service to them***. The FPC [forerunner to FERC] early adopted the 'used and useful' standard and has not departed from it without careful consideration of the wisdom of requiring current rate payers to bear costs of providing future service.

606 F.2d 1094, 1109 (D.C. Cir. 1979) (emphasis added) (internal citations omitted); *see also Natural Gas Pipeline Co. of Am. v. FERC*, 765 F.2d 1155, 1157 (D.C. Cir. 1985) ("In calculating

the utility's cost of service the Commission includes its operating expenses, depreciation expenses, taxes, and a reasonable return on the net valuation of the property devoted to the public service. . . . The Commission decides what property is devoted to the public service by asking whether the property is 'used and useful' in serving the public." (internal citations omitted)); *In re Southern Nat'l Gas Co.*, 130 FERC ¶ 61, 193, ¶ 30, 2010 WL 987184 (March 18, 2010) (noting that in establishing rates, FERC has traditionally included only costs relating to utility plant that is physically "used and useful" in providing utility service).

Later, many nuclear power plants that were planned for the 1960s and 1970s, were either cancelled or abandoned while only partially built. The regulatory and legal decisions regarding these assets established the ***economic*** "used and useful" concept.[5] *See* Jonathan A. Lesser, *The Used and Useful Test: Implications for a Restructured Electric Industry*, 23 Energy L.J. 349 (2002). We do not discuss that here. The subject of this motion and the subject of Mr. Selecky's adjustments pertain only to the physical "used and useful" principle for regulatory recovery, which still prevails in Utah.

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5 For example, in *Jersey Central Power & Light Company. v. Federal Energy Regulatory Commission*, 810 F.2d 1168 (D.C. Cir. 1987), evidence had been presented that the utility "was wholly dependent for short-term credit on a Revolving Credit Agreement," subject to termination at any time. *Id.* at 1171. As a result, the only long-time credit it had was its long-term securities, which were subject to mandatory repurchase should its short-term credit be terminated. *Id.* FERC had denied the utility a hearing, so, due to the utility's acute financial distress, the court remanded with instruction that FERC hold a hearing and make findings regarding whether its rate order constituted a reasonable balancing of interests. *Id*. at 1182. Then, in *Mid-Tex Electric Cooperative, Inc. v. FERC*, FERC's rules adopting construction work in progress ("CWIP") cost recovery was upheld to "further the maintenance of an adequate and efficient electric utility industry." 773 F.2d 327, 332 (D.C. Cir. 1985). There was evidence that under the existing allowance for funds used during construction ("AFUDC"), financing difficulties had arisen between cash flow and sales of debt and equity for utility construction programs. *Id.* "FERC stopped short, however, of concluding that the importance of achieving these objectives would permit it entirely to disregard the used and useful principle," arguing that "its decision was largely though not completely consistent with that principle." *Id.* at 334. Finally, the court in *Town of Norwood v. FERC*, 80 F.3d 526, 532 (D.C. Cir. 1996), upheld FERC's decision to allow the utility to recover from ratepayers 100% of its remaining unamortized investment, CWIP, decommissioning costs, and operating expenses for a nuclear plant. *Id*. 528. The evidence showed that the plant had benefitted ratepayers for 31 years and that shutting it down would save ratepayers more than $100 million. *Id.* at 531-33.

II. THE PRINCIPLE OF "USED AND USEFUL" HAS LONG BEEN A CORE PRECEPT OF UTAH LAW AND NOTHING HAS CHANGED THAT FACT.

A. The "Used and Useful" Principle Is Still the Law in Utah.

Contrary to the inference in the Commission's Order on Test Period in this case, Utah public utility law continues to adhere to the concept of "used and useful." As the Utah Supreme Court has ruled:

> [U]nder the general concepts of public utility law, ***risk capital is provided by the investor; it is this group which bears the risk of loss as developer of a public utility. It is only to the extent the facilities developed are used and useful to the consumer that they are included in the rate base.***

Committee of Consumer Servs. v. Public Serv. Comm'n, 595 P.2d 871, 874 (Utah 1979) ("*Wexpro Case*")[6] (emphasis added). Therefore, "a utility is usually precluded from including in the rate base any capital asset, until it is developed, and then only to the extent the asset is used and useful in rendering the consumer service." *Wexpro Case*, at 875. The *Wexpro* court relied on long established Utah law for its decision.

In 1944, the Utah Supreme Court affirmed the Commission's ruling directing a reduction in rates charged by the electric utility because the "just and proper rate base for the Company is the amount actually and 'prudently invested' in the property used and useful in rendering Utah service." *Utah Power & Light Co. v. Public Serv. Comm'n*, 152 P.2d 542, 546 (Utah 1944). In

6 In the *Wexpro Case*, the Utah Supreme Court noted that the Commission had modified the traditional principles of utility law in this particular case based on the broad statutory definition of gas plant, which allowed undeveloped acreage to be deemed an asset because it was used and useful to the rate payers in the production of gas. *Wexpro Case*, 595 P.2d at 875. Therefore, the used and useful principle was still followed, but the broad statutory definition of gas plant expanded the asset to which it could be applied. Such is not the case in the current general rate case. The plant not completed in this case after the rate effective date is not used and useful to the Utah rate payers under the definition of electric plant.

that case, the Utah Supreme Court took considerable effort to explain the long development of the physical "used and useful" principle. In doing so the court noted:

> The *Denver Stock Yard* case is of interest because of the fact that it was decided during a period when it appeared that important limitations were being placed on the "fair value'" doctrine of *Smyth v. Ames,* yet it emphatically laid down the rule that "as of right safeguarded by the due process clause of the Fifth Amendment, appellant is entitled to rates not per se excessive and extortionate, sufficient to yield a reasonable rate of return ***upon the value of property used, at the time it is being used, to render the services***."

Id. at 551 (emphasis added).[7]

In *Terra Utilities, Inc. v. Public Service Commission*, 575 P.2d 1029, 1033 (Utah 1978), the Utah Supreme Court affirmed the Commission's decision to reject a proposed rate increase for water and sewer services in a development project. The *Terra* court upheld the Commission's decision that because at the time only 20.76% of the water system was physically used and useful and only 19.83% of the sewer system was physically used and useful, the proposed rates that intended to include 100% of the costs of each were not just and reasonable. *Id.* at 1031-32.

The Commission has consistently relied on the physical "used and useful" principle.

> [R]atepayers should not bear the overall authorized return until such time as an asset becomes a productive source of service revenue or expense savings. At that time, full cost recovery occurs as the entire investment is included in rate base and then depreciated. . . . ***We continue to uphold the efficacy of the used and useful ratemaking principle because it demarcates an asset's in-service and productive status which in turn triggers capital***

7 In a separate part of the case, wherein the court discusses the calculation of net income, it states: "[T]he public should not in any event be forced to pay rates based on the amount paid in by stockholders ***unless the amount paid is represented in properties used and useful in serving the public***." *Utah Power & Light Co.*, 152 P.2d at 570 (emphasis added).

> ***recovery of the engineered, furnished and installed cost of the asset, including capitalized interest***.

In re U.S. West Commc'ns, Inc., Docket No. 97-049-08 (Dec. 4, 1997) (emphasis added); *see also In re SCSC, Inc.*, Docket No. 94-2196-01, 1994 WL 570658 (Utah P.S.C. Sept. 15, 1994) (ordering that "it must be absolutely clear that the rate-payer is not being asked to cover the cost of a system which is larger than needed (and thus not used and useful)").

Under Utah law, therefore, the Commission has no choice but to continue to adhere to this principle. Accordingly, the plant assets that will not be physically used and useful as of the rate effective date cannot be included in rate base in this case.

B. The Amendment to 54-4-4(3) Did Not Eliminate the "Used and Useful" Principle.

A plain reading of Utah Code Annotated § 54-4-4(3) demonstrates it cannot be read to imply a legal basis for the Commission to assume that it negated the physical "used and useful" principle. The subsection provides:

> (3)(a) If in the commission's determination of just and reasonable rates the commission uses a test period, the commission shall select a test period that, on the basis of evidence, the commission finds best reflects the conditions that a public utility will encounter during the period when the rates determined by the commission will be in effect.
>
> (b) In establishing the test period determined in Subsection (3)(a), the commission may use:
>
> (i) a future test period that is determined on the basis of projected data not exceeding 20 months from the date a proposed rate increase or decrease is filed with the commission under Section 54-70-12;
>
> (ii) a test period that is:
>
> (A) determined on the basis of historic data; and

(B) adjusted for known and measurable changes; ***or***

(iii) a test period that is determined on the basis of a combination of:

(A) future projections; and

(B) historic data.

(c) If pursuant to this Subsection (3), the commission establishes a test period that is not determined exclusively on the basis of future projections, in determining just and reasonable rates the commission shall consider changes outside the test period that:

(i) occur during a time period that is close in time to the test period;

(ii) are known in nature; and

(iii) are measurable in amount.

Utah Code Ann. § 54-4-4(3).

Under Utah law, when interpreting a statute, the Commission should "look first to the statute's plain language to determine its meaning." *Utah v. Gallegos*, 171 P.3d 426, 429 (Utah 2007). When examining the plain language, it must be assumed that each term included in the statute was used advisedly. *Carrier v. Salt Lake County*, 104 P.3d 1208, 1216 (Utah 2004). "'[S]tatutory construction presumes that the expression of one should be interpreted as the exclusion of another,'" and ***effect should be given to any omission in the "language by presuming that the omission is purposeful***." *Id.* (quoting *Biddle v. Washington Terrace City*, 993 P.2d 875 (Utah 1999)) (emphasis added). Furthermore,

> It is well established that the Commission has no inherent regulatory powers other than those expressly granted or clearly implied by statute. . . . When a specific power is conferred by statute upon a . . . commission with limited powers, the powers are limited to such as are specifically mentioned. . . . Accordingly, to ensure that the administrative powers of the [Commission] are not

> overextended, any reasonable doubt of the existence of any power must be resolved against the exercise thereof.

Heber Light & Power Co. v. Utah Pub. Serv. Comm'n, 231 P.3d 1203, 1208 (Utah 2010) (internal citations omitted) (ruling that Utah Public Service Commission acted beyond its limited grant of statutory authority).

Finally, "[s]tatutes are not to be construed as effecting any change in the common law beyond that which is clearly indicated." *Horne v. Horne*, 797 P.2d 244, 248 (Utah Ct. App. 1987).

Prior to the current formulation of subsection (3), the statute permitted use of future test periods. *See* Utah Code Ann. § 54-4-4, amendment notes. The statute as amended in 2003 merely changed the Commission's focus on the evidence for ordering a future test period. Nevertheless, a plain reading of the statute shows there is nothing in the language that clearly indicates the physical "used and useful" principle has been repealed or overruled. Effect should be given to the omission of a reference to "used and useful" by presuming the omission is purposeful.

The statute cannot be construed as effecting any change in the "used and useful" principle beyond that clearly indicated. None is indicated. Furthermore, because the use of a future test year was not a new, previously prohibited practice, it is even less likely that the introduction of the language existing today made any changes to the validity of the "used and useful" principle.

When a specific power is conferred by statute upon the Commission, such as subsection (3) of § 54-4-4, the Commission's powers are limited to such as are specifically mentioned. While the statute does make some reference to what can be considered in making rates, it makes no mention of abandoning the "used and useful" principle. Effect should be given to the

omission of a reference to "used and useful" by presuming the omission is purposeful. Therefore, under Utah law, the Commission cannot properly construe the future test period statute as eradicating the long held principle of "used and useful."

C. The Utah Legislature Has Already Provided Relief from the Harsh Results of the "Used and Useful" Principle and the Commission is Limited to that Relief.

The very existence of the Major Plant Addition ("MPA") statute belies any suggestion that § 54-4-4(3) eliminated the physical "used and useful" principle and provides the only relief to the "used and useful" principle available to the Commission.

On March 7, 2006, RMP filed a general rate case for $197.2 million that was designated Docket No. 06-035-21. The Company requested a test year ending September 30, 2007, for rates that would be effective December 11, 2006. *See* Report & Order, Docket No. 06-035-21 (Dec. 11, 2006).

Included in the application was a portion of the Lakeside project $347 million investment. D. Test. Tallman 7:158-160, Docket No. 06-035-21 (March 7, 2006). The Company projected that Lakeside would be operational by the summer of 2007, and therefore included net power costs and revenue requirement based on the number of months the Company believed Lakeside would be operational during the proposed test period. *Id.* 7:160-8:168.

Given that rates would have been in effect on December 11, 2006, and Lakeside was not projected to be operational until summer 2007, this would have meant that Lakeside would be included in rates before it was physically used and useful. Conversely, the Company believed it needed to begin recovering for the significant investment of the Lakeside project and felt it could not wait for a subsequent rate case. This resulted in a settlement of the case whereby the rate

increase was staged so that the Lakeside project would not impact Utah rate payers until it was supposed to be physically used and useful, but the Company could begin recovering about the time Lakeside was projected to become used and useful without going through another general rate case.[8]

Specifically, the parties agreed that customer rates would increase by $85 million on December 11, 2006, and by an additional $30 million on June 1, 2007. To accomplish this, the parties agreed that the Company could increase its annual Utah jurisdictional revenue requirement by $115 million effective on December 11, 2006, subject to an annualized rate credit of $30 million, beginning on December 11, 2006, and terminating on June 1, 2007. *See* Stipulation Regarding Revenue Requirement & Rate Spread at 2, Docket No. 06-035-21 (July 26, 2006).

Thereafter, the MPA statute was enacted, which allows the Company to apply for cost recovery of any single material capital investment project—one that in total exceeds 1% of the Company's rate base. Utah Code Ann. § 54-7-13.4(1)(c). Pursuant to that statute, an electrical corporation can request cost recovery of the major plant addition "if the commission has . . . entered a final order in a general rate case proceeding . . . within 18 months of the projected in-service date of the major plant addition." *Id.* at § 54-7-13.4(2). However, "an electrical corporation may not file for cost recovery of a major plant addition more than 150 days before the projected in-service date of the major plant addition." *Id.* § 54-7-13.4(3)(a). The in-service date is defined as the first day "an electrical corporation is no longer allowed to accrue an

8 In fact, the stipulation provided that RMP would not file another general rate case in Utah before December 11, 2007. Stipulation Regarding Revenue Requirement & Rate Spread at 3, Docket No. 06-035-21 (July 26, 2006).

allowance for funds used during construction[9] for a major plant addition." *Id.* § 54-7-13.4(1)(b).

Thus, the MPA statute provides an alternative to the Company, allowing it to recover costs for material capital investments up to 18 months[10] after its last general rate case even though they may not be physically "used and useful" for up to five (5) months after the application is filed.[11]

Once again, when a specific power is conferred by statute upon the Commission, such as the MPA case exception to the "used and useful" principle, the Commission's powers are limited to such as are specifically mentioned. *Heber Light & Power Co.*, 231 P.3d at 1208. Furthermore, "when two statutory provisions conflict, the more specific provision will prevail over the more general provision." *Williams v. Public Serv. Comm'n*, 754 P.2d 41, 48 (Utah 1988). Therefore, the general terms of § 54-4-4(3) and the general authority of § 54-4-1 must give way to the specifics of the MPA statute. The Utah Legislature has spoken. Only when the requirements of the MPA statute are met, can the Company recover costs that are not physically "used and useful."

D. A Certificate of Convenience and Necessity Does Not Confer Used and Useful Status to the Plant Assets Not in Service as of the Rate Effective Date.

A Utah Certificate of Convenience and Necessity ("CCN") does not provide a finding of used and useful. The statute provides, in relevant part:

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9 This is the AFUDC.

10 This is a policy decision made by the Utah legislature. Other states have different policies. For example, in Nevada, single-item rate cases like the MPA are not allowed, but the general rate case can include a certification for plant that is not expected to become physically used and useful until up to seven (7) months from when the application is filed. *See* NRS 704.110.4.

11 The Company is completely in charge of this timing. The Company is in charge of when AFUDC stops accruing, when a MPA case is filed, and when a general rate case is filed.

> (1) Except as provided in Section 11-13-304 [Interlocal Cooperation Act], a gas corporation, electric corporation, . . . may ***not establish, or begin construction or operation*** of a line, route, plant, or system or of any extension of a line, route, plants, or system, ***without having first obtained from the commission a certificate*** that present or future public convenience and necessity does or will require the construction.
>
> . . . .
>
> (4) (a) (i) Each applicant for a certificate shall file in the office of the commission evidence as required by the commission to show that the applicant has received or is in the process of obtaining the required consent, franchise, or permit of the proper county, city, municipal, or other public authority.
>
> (ii) If the applicant is in the process of obtaining the required consent, franchise, or permit, a certificate shall be conditioned upon:
>
> (A) receipt of the consent, franchise, or permit within the time period the commission may direct; and
>
> (B) the filing of such evidence of the receipt of the consent, franchise, or permit as the commission may require.
>
> (5) (a) Any supplier of electricity which is brought under the jurisdiction and regulation of the Public Service Commission by this title may file with the commission an application for a certificate of convenience and necessity, ***giving the applicant the exclusive right to serve the customers it is serving in the area in which it is serving at the time of this filing***, subject to the existing right of any other electrical corporation to likewise serve its customers in existence in the area at the time.
>
> (b) The application shall be prima facie evidence of the applicant's rights to a certificate.
>
> . . . .

Utah Code Ann. § 54-4-25 (emphasis added). Thus, a CCN bestows upon an electric utility, such as RMP, permission to establish, construct, or operate plant assets and the exclusive right to serve the customers in the area in which it has been certificated—nothing more.

The Commission confirmed this with its CCN for the addition of new generation at the Gadsby plant site in 2002. *See In re Matter of the Application of PacifiCorp for a CCN Authorizing Construction of a Resource Addition*, Docket No. 01-035-37, Slip Copy (Jan. 31, 2002). In that case, the Committee of Consumer Services ("CCS" nka Office of Consumer Services ("OCS" or "Office")) recommended approval of the Company's application subject to certain conditions, including that the approval implied nothing about cost allocation or rate treatment and that the parties must be able to examine the resource addition throughout its life in order to determine whether it is used and useful. *Id.* In evaluating the CCS's request the Commission stated:

> The proposed conditions, it is clear, are intended to preserve the rights of parties to conduct further analyses of the project, to audit its costs, and to present the case, if one is indicated, that the project is not prudent, not used and useful, or that the costs incurred are to some measure not legitimate and reasonable. . . . ***We further state that all other regulatory ratemaking questions, including those touching on the issue of whether plant is used and useful***, how costs should be allocated, and what costs are legitimate and reasonable for recovery in rates, ***are open for examination in the appropriate docke***t. We therefore find no compelling reason to condition the certificate as the Committee recommends and will not do so.

Id. (emphasis added). The Commission found no reason to condition RMP's certificate because those questions remain open for review in a regulatory ratemaking docket as a matter of course. The issuance of the CCN did not confer any finding of used and useful.

The plant assets at issue in the instant motion may or may not have been subject to a CCN, though they likely are additions to or modifications of plant that has been subject to a CCN. Nevertheless, any CCN that may have been granted in relationship to the plant assets at issue here are not physically used and useful merely as a result of that CCN.

CONCLUSION

Based on the foregoing, it is unlawful for the Commission to allow the Company to recover the costs associated with plant assets that will not be physically used and useful as of the rate effective date in this case. The amount of those costs and the specific items for those costs are set forth in the testimony of UIEC witness James T. Selecky. The specific testimony and exhibits of the Company claiming recovery for those costs are set forth in Exhibit A. UIEC requests that the Commission strike the testimony and exhibits related to these costs from consideration for recovery by the Company in this general rate case.

DATED this 21st day of June, 2011.

/s/ Vicki M. Baldwin

F. Robert Reeder
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CERTIFICATE OF SERVICE
(Docket No. 10-035-124)

I hereby certify that on this 21st day of June 2011, I caused to be emailed, a true and correct copy of the foregoing **UIEC'S MOTION TO STRIKE THE TESTIMONYAND EXHIBITS ASSOCIATED WITH THE ASSETS NOT USED AND USEFUL AS OF THE RATE EFFECTIVE DATE** to:

Patricia Schmid
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