

PATRICIA E. SCHMID (#4908)
DAHNELLE BURTON-LEE (#6528)
Assistant Attorneys General
Counsel for the DIVISION OF PUBLIC UTILITIES
MARK L. SHURTLEFF (#4666)
Attorney General of Utah
160 E 300 S, 5th Floor
P.O. Box 140857
Salt Lake City, UT 84114-0857
Telephone (801) 366-0380

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 RESPONSE OF THE DIVISION OF PUBLIC UTILITIES IN OPPOSITION TO UIEC'S MOTION TO STRIKE THE TESTIMONY AND EXHIBITS ASSOCIATED WITH THE ASSETS NOT USED AND USEFUL AS OF THE RATE EFFECTIVE DATE
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Pursuant to R746-100-3I, the Division of Public Utilities (Division) files its response opposing UIEC's Motion to Strike the Testimony and Exhibits Associated with the Assets Not Used and Useful as of the Rate Effective Date (UIEC motion). In effect, UIEC's motion seeks to preclude the Commission from exercising its authority to hear and review all the evidence prior to making its ruling in this case. The Division urges the Public Service Commission (Commission) to reject UIEC's motion, and to not strike the subject testimony and exhibits at this time, allowing the Commission after additional prefiled testimony, hearing, cross examination and questions from the Commission, to assign the appropriate weight to the subject testimony and exhibits.

UIEC, in effect, attempts to present both factual and policy bases and legal argument to support its motion. UIEC asserts that the testimony of its witness James T. Selecky provides the

“factual and policy bases for the required \$21.858 million reduction in revenue requirement”¹ while asserting that “well established principles of regulatory law in Utah and the nation as a whole”² provide the “legal basis for the exclusion,”³ claiming that certain assets will not be used and useful when, if Rocky Mountain Power (Company) prevails, the rate effective period begins. UIEC’s claim that allowing the subject assets to be included in the development of the revenue requirement for this case would be “tantamount to a taking”⁴ mischaracterizes the issue before the Commission.

However, Mr. Selecky’s testimony is not the only prefiled testimony looking at the assets in question and the issue of used and useful. The Company and the Division also have provided prefiled testimony regarding these assets. Additionally, in its rebuttal testimony, the Company challenges the calculations contained in Mr. Selecky’s direct testimony. Finally, the parties have not completed all rounds of prefiled testimony, and there has been no cross examination of the witnesses by the parties or questions asked of the witnesses by the Commission. The Commission has the responsibility to weigh the testimony presented by all witnesses in the case, and, at this stage, it is premature for the Commission to rely only upon the testimony of Mr. Selecky. The decision of whether utility property is used and useful has been characterized as a factual, not legal, decision.⁵

The regulatory concept of used and useful has been discussed in many court decisions, including decisions by the U.S. Supreme Court and the Utah Supreme Court. Although UIEC’s motion provides summaries and discussion of many of those cases, a closer look at the Utah cases, in particular, and other cases not discussed in UIEC’s motion is warranted. However, whether an asset is used and useful requires application of the law to the particular facts before

¹ UIEC Motion at p. 1.

² UIEC Motion at p. 1.

³ UIEC Motion at p. 1.

⁴ UIEC Motion at p. 3.

⁵ South New England Telephone Co. v. Public Utilities Commission, 282 A.2d 915, 919 (Conn. Super. 1970).

the Commission, and the Commission should not cut short that analysis by granting UIEC's motion to strike. It is instructive that the Utah decisions discussed below regarding the issue of used and useful involved all the facts presented by the parties, and weighed by the Commission.

For example, although in *Terra Utilities v. Public Service Commission*,⁶ the Commission, and then the Utah Supreme Court, disallowed certain costs from being included in the rate base because the water and sewer system at issue were found to be overbuilt, it is instructive that the decisions regarding the used and useful issue involved all the facts of the case as presented by the parties, and weighed by the Commission. Other Utah cases should be examined closely too.

Other Utah cases, while informative, cannot be said to provide binding precedent related to determining whether an asset should be categorized as being used and useful in the current Utah regulatory context. In *CP National Corporation v. Public Service Commission*,⁷ the issue before the court concerned the authority of municipalities to exercise eminent domain and condemn the assets of an existing public utility, not what constituted used and useful assets. In *Utah Power & Light Company v. Public Service Commission*,⁸ the critical issue involved "fair value" of the regulatory assets, again, not the issue of used and useful.

Also, the Federal Energy Regulatory Commission and other state jurisdictions, in case law and sometimes by statute, have allowed assets into rate base that were not fully physically used and useful at that time.⁹ The necessity that a public utility plan for the future has been one justification for this categorization.¹⁰

⁶ 575 P.2d 1029 (Utah 1978).

⁷ 638 P.2d 519 (Utah 1981).

⁸ 152 P.2d 542 (Utah 1944).

⁹ See, *Latourneax v. Citizens Utilities*, 209 A.2d 307. 313 (Vt. 1965) and 116 FERC ¶ 61,058. 61,260-61 (2006).

¹⁰ See *Id.* See also, "The Pig in the Python: Is Lumpy Capacity Investment Used and Useful?," 23 *Energy Law Journal* 383 (2002) and "'Used and Useful: Autopsy of a Ratemaking Policy,'" 8 *Energy Law Journal*, 303 (1987). A forward looking approach is not without criticism, however. See "The Used and Useful Test: Implications for a Restructured Electric Industry," 23 *Energy Law Journal* 349 (2002).

UIEC's contends that Utah Code Ann. § 54-4-4(3), often referred to as the test year statute, does not eliminate the used and useful requirement. It is true that the statute itself does not mention the phrase "used and useful," but it is also true that the Utah cases discussed previously were decided before the test year statute was amended to allow such a long future period. Thus, the amended statute's effect upon those cases should be examined. This longer allowed future test period calls for a thorough examination of all the testimony, as well as cross examination and Commission questions at the hearing, so that the Commission can make an informed ruling on the issue. This process should not be eliminated prematurely by granting UIEC's motion.

The discussion of the Major Plant Addition statute and related issues by UIEC is informative, but not determinative. In particular, the decision in Docket No. 06-035-21 addressing, among other things, the Lakeside project and its inclusion in rates, was arrived at via settlement. Furthermore, it is apparent that not all parties apply the Major Plant Addition statute similarly, and it is likely that additional information could aid the Commission in reaching its decision in this case.

A certificate of public convenience and necessity does, as UIEC states, grant the utility permission to construct the requested project. Division witness Dr. Zenger addresses this issue in her testimony.

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For the reasons set forth above, the Division urges the Commission to exercise its authority to review and hear all of the evidence prior to making its decision in this case, and urges the Commission to reject UIEC's motion.

Respectfully submitted this _____ day of _____, 2011.

Patricia E. Schmid
Attorney for the Division of Public Utilities

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of July 2011, I caused to be e-mailed, a true and correct copy of the RESPONSE OF THE DIVISION OF PUBLIC UTILITIES IN OPPOSITION TO UIEC'S MOTION TO STRIKE THE TESTIMONY AND EXHIBITS ASSOCIATED WITH THE ASSETS NOT USED AND USEFUL AS OF THE RATE EFFECTIVE DATE to:

Patricia Schmid
Assistant Attorney General
Heber M. Wells Bldg., 5th Floor
160 East 300 South
Salt Lake City, UT 84111
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

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
wpowell@utah.gov
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
mbeck@utah.gov

Gary A. Dodge
Hatch James & Dodge
10 West Broadway, Suite 400
Salt Lake City, UT 84101
gdodge@hjdllaw.com

Kevin Higgins
Neal Townsend
Energy Strategies
39 Market Street, Suite 200
Salt Lake City, UT 84101
khiggins@energystrat.com
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
vbaldwin@parsonsbehle.com
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
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
jrc@pkhlawyers.com

Steven Michel
Western Resource Advocates
2025 Senda de Andres
Santa Fe, NM 87501
smichel@westernresources.org

Nancy Kelly
Western Resource Advocates
9463 N. Swallow Rd.
Pocatello, ID 83201
nkelly@ida.net

Holly Rachel Smith, PLLC
Hitt Business Center
3803 Rectortown Road
Marshall, VA 20115
holly@raysmithlaw.com

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

Kurt J. Boehm, Esq.
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
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
Karen.white@tyndall.af.mil

Rob Dubuc
Western Resource Advocates
150 South 600 East, Suite 2A
Salt Lake City, UT 84102
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
bwolf@slcap.org

Ryan L. Kelly
Kelly & Bramwell, P.C.
11576 South State St. Bldg. 1002
Draper, UT 84020
ryan@kellybramwell.com

Arthur F. Sandack
8 East Broadway, Ste 510
Salt Lake City, UT 84111
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

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

Bruce Plenk
Law Office of Bruce Plenk
2958 N St Augustine Pl
Tucson, AZ 85712
bplenk@igc.org

Mike Legge
US Magnesium LLC
238 North 2200 West
Salt Lake City, UT 84106
mlegge@usmagnesium.com

Torry R. Somers
CenturyLink
6700 Via Austi Parkway
Las Vegas, NV 89119
Torry.R.Somers@CenturyLink.com

Sophie Hayes
Sarah Wright
Utah Clean Energy
1014 Second Avenue
Salt Lake City, UT 84103
sophie@utahcleanenergy.org
sarah@utahcleanenergy.org

Gloria D. Smith
Sierra Club
85 Second Street, Second floor
San Francisco, CA 94105
gloria.smith@sierraclub.org

Janee Briesemeister
AARP
98 San Jacinto Blvd. Ste. 750
Austin, TX 78701
jbriesemeister@aarp.org

Roger Swenson
US Magnesium LLC
238 North 2200 West
Salt Lake City, UT 84114-6751
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

David L. Taylor
Yvonne R. Hogle
Mark C. Moench
Rocky Mountain Power
201 South Main Street
Suite 2300
Salt Lake City, UT 84111
Dave.Taylor@pacificorp.com
Yvonne.hogle@pacificorp.com
Mark.moench@pacificorp.com
datarequestcenter@pacificorp.com
