F. ROBERT REEDER (2710)
WILLIAM J. EVANS (5276)
VICKI M. BALDWIN (8532)
CORY D. SINCLAIR (11158)
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, UT 84145-0898
Telephone: (801) 532-1234
Facsimile: (801) 536-6111
Attorneys for UIEC, an Intervention Group

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

UIEC submits to the Utah Public Service Commission ("Commission") this Reply in Support of Its 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. In support thereof, UIEC states as follows.

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INTRODUCTION

The "used and useful" principle "has stood as a ***bedrock*** principle of utility rate regulation." *Kentucky Utils. Co. v. Federal Energy Regulatory Comm'n*, 760 F.2d 1321, 1324 n.4 (D.C. Cir. 1985) (emphasis added). Despite this, the Division of Public Utilities ("DPU" or the "Division") urges the Commission to commit error by disregarding Utah law and Rocky Mountain Power ("RMP" or the "Company") has resorted to fabrication.

A future test year provides a sharing of risks that have a price and volume risk profile, such as fuel, purchased power, labor, benefits, administration, etc. However, construction has a completely different risk profile. The price risk is solved by the bidding process so that it is transferred to the contractor. That leaves the completion risk—whether it is operational on time, or completed at all. Used and useful has always provided the "bright-line" demarcation for the risk of completion of construction. That does not mean the utility is without recovery during that time. The utility is collecting allowance of funds used during construction ("AFUDC"). It also has the option of filing for recovery of major plant additions. There is no basis for using the future test year as an excuse to extend the sharing of risks from the price and volume risk profile to the completion risk profile. There is no indication that this was meant to occur.

Furthermore, while the term "used and useful" was admittedly used loosely during the course of the test period proceedings in this case, no argument was fully developed or made on the direct application of the "used and useful" principle to the plant facilities that would become commercial during the June 2012 test period. Nor did the Commission make any ruling in the Test Period Order regarding this issue. Furthermore, even if it had been decided, which it has not, the test period order is not a final order or judgment, and therefore, UIEC is not barred from

fully developing and making this specific argument in this case. *See, e.g., Moss v. Parr Waddoups Brown Gee & Loveless*, 237 P.3d 899, 901 (Utah Ct. App. 2010) (clarifying what does or does not constitute collateral attack).

Now, based on UIEC's fully supported explanation of the law of the "used and useful" principle in the United States and Utah, UIEC requests that the Commission adhere to Utah law and prevent the Company from attempting 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.

ARGUMENT

I. RMP'S ARGUMENTS ARE IN DIRECT CONTRADICTION TO UTAH LAW.

A. The Company's Arguments Are Without Legal Basis.

The Company's arguments have no legal basis and appear to be complete fabrications. For example, on page 10 of RMP's brief, it makes the statement: "However, unless the court concludes that the principle is a constitutional requirement it cannot ignore legislative direction ***that may appear*** contrary to strict adherence to that principle." (Emphasis added.)

This statement ignores Utah law, which provides: "Statutes 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) (emphasis added). Legislative directives to overturn common law such as the "used and useful" principle, therefore, must be clearly indicated.

As UIEC demonstrated in its opening brief, a plain reading of Utah Code Annotated § 54-4-4(3) demonstrates it cannot be read to merely ***imply*** a legal basis for the Commission to ***assume*** that it negated the physical "used and useful" principle. There is no ***clear indication*** in

this statute that the "used and useful" principle has been overruled. Therefore, contrary to the Company's suggestion, a principle of common law cannot be overruled based on an argument that it "***may appear*** [to be] contrary" to a statute. RMP Br. at 10 (emphasis added). There is no such legal principle. The Company has provided no support for its theory regarding constitutionally based common law and the interpretation of statutes. Therefore, its arguments are pure fabrication and should be disregarded. Relying on them could lead to error.

UIEC also disagrees with RMP's conclusion that the statute "may appear" to be contrary. The statute does not contradict the "used and useful" principle. It provides for sharing price and volume risks through future forecasts. It does not adopt the risk profile of completion.

Neither does RMP provide any support for its statement that the Utah Legislature directed that the Commission "may use a test period in which all plant additions during the test period will occur after rates are in effect." RMP Br. at 11. 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).[1] There is nothing in the plain language of § 54-4-4(3) that supports the Company's statement that the Commission "may use a test period in which all plant additions during the test period will occur after rates are in effect." RMP Br. at 11. Nor does the Commission have the authority to assume such an interpretation. This is a complete fabrication and should be disregarded. Otherwise, the Commission could be led to legal error.

Furthermore, in contrast to the long-established history of acceptance of the "used and useful" principle set forth in UIEC's motion, the Company provides no support and no citations to any authority, for its new, unique theory that the "used and useful" principle means an investment should be "included in rates after it is ***projected*** to be in service or used and useful." RMP Br. at 11 (emphasis added). This also appears to be a complete fabrication.

B. The Company Fails to Understand the Very Case Law Upon Which It Relies.

The very case law cited by the Company proves that rates cannot be considered just and reasonable unless they are based on property that is used and useful. *See* RMP Br. at 8 n.6. From *Bluefield Water Works & Improvement Company v. Public Service Commission*, the Company quotes, in part: "A public utility is entitled to such rates as will permit it to earn a return on the value of the property ***which it employs for the convenience of the public***." 262

1 Contrary to the Company's suggestion, the Commission is not authorized to rule "the MPA statute is not a sufficient substitute for inclusion of forecast investment in the test period." RMP Br. at 7. The Company has provided no support for such a ruling.

U.S. 679, 692 (1923) (emphasis added). That means the property must be used and useful to earn a return.

From the *Wage Case*, the Company quotes: "A just and reasonable rate is one that is sufficient to permit the utility to recover its cost of service and a reasonable return on the value of ***property devoted to public use***." *Utah Dep't of Bus. Regulation v. Public Serv. Comm'n*, 614 P.2d 1242, 1248 (Utah 1980) (emphasis added). Once again, this means that the cost of service and rate of return must be directly tied to property that is used and useful for the rate to be just and reasonable.

Finally, while the decision of the United States Supreme Court in *West Ohio Gas Company v. Public Utilities Commission* could be said, as the Company claims, to provide that recovery of expenses must be allowed where there is no showing of inefficiency or improvidence, it must also be noted that the *West Ohio* Court based its decision in part on the "final order of valuation, made in January, 1932, whereby the value of the property in Lima, [Ohio,] ***used and useful for the business***, was fixed." 294 U.S. 63, 66 (1935).

To be just and reasonable, rates must be based on property that is physically used and useful to the rate payers at the time they are being charged the rates. That is the law regardless of the Company's baseless arguments.

C. Abandoning the Demarcation of Used and Useful Will Lead to Unfortunate and Unintended Consequences.

The Company proposes to eliminate the long-held "used and useful" principle with no proposed substitute. If that demarcation line is eliminated, it will lead to a plethora of unforeseen consequences.

Currently, the company receives AFUDC during the period in which an asset is being constructed. The bright line between when the Company receives AFUDC and when it can start receiving a return on investment ("ROE") has always been, and continues to be, when the plant asset becomes used and useful. This bright line has always provided that prior to plant becoming used and useful, shareholders take the risk. Utah law has always been, after all, that the shareholders, not the ratepayers, fund utility development. *Committee of Consumer Servs. v. Public Serv. Comm'n*, 595 P.2d 871, 874 (Utah 1979) ("[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.").

For instance, it is likely in this case that if the Company continues to receive AFUDC until the facilities are actually used and useful sometime after the date that rates go into effect, the Company will be earning twice for a period of time on the same assets.

The Company keeps pushing further and further out to collect return on physical assets that are not yet used and useful. In this case, the guesses extended 18 months from the filing date. A true-up is never done and no showing of used and usefulness is ever required. Who and what is protecting the rate payers?

Unless the demarcation is maintained, the situation appears to be approaching a rate base addition balancing account. Such an account must be specifically provided by statute. No such statute exists. The major plant addition statute, § 54-7-13.4, is the only legal provision for making an addition to rate base.

The Commission needs to maintain the distinction between sharing the risks when there is a price and volume risk profile and the completion risk profile of construction, which there is

no proof the legislature intended to change. Otherwise, the rate payers bear all the risk with no protection. UIEC respectfully requests that the Commission continue to adhere to the "used and useful" principle.

II. IN ENCOURAGING THE COMMISSION TO DISREGARD UTAH CASE LAW, THE DIVISION IS LEADING THE COMMISSION TO ERROR.

The Division argues that the Commission should wait and weigh the evidence before making a decision on the plant additions that will not be used and useful at the time rates become effective, disregarding Utah law. This is nothing but an invitation to the Commission to commit error.

UIEC is not trying to hide anything. Testimony about the forecasted completion dates has been filed. This is a legal issue, not factual, and waiting would be a waste of time. The facts tell the amount that should be disallowed, but not whether the disallowance should occur.

The Division has provided no analysis and provided no support for its position that the Commission need not follow Utah law. If the Commission follows the Division's lead and disregards Utah case law, the Commission will be committing error.

The Division's characterization of cited case law is also mistaken. First, the DPU has cited *CP National Corporation v. Public Service Commission.*[2] UIEC did not rely on that case, did not cite the case in its motion, and agrees that it is irrelevant to the "used and useful" principle.

2 DPU Br. at 3.

Also, the FERC case cited by the Division,[3] 116 FERC ¶ 61,058 (2006), is inapplicable because it deals with CWIP, which UIEC distinguished. *See* UIEC Br. at 6 n.5.

The *Latourneax v. Citizens Utilities* case cited by the Division[4] reviewed a public service commission's acceptance of facilities that had actually been constructed and were in use. 209 A.2d 307, 313 (Vt. 1965). That is directly opposite to the situation we have here. UIEC has only addressed those facilities for which RMP has provided evidence that they will not be physically used and useful to ratepayers at the time they are put into rates.

Finally, while it is true the Utah Supreme Court was evaluating the use of fair value of regulatory assets in setting rates in *Utah Power & Light v. Public Service Commission*,[5] it did so in the context of implementing the "used and useful" principle and explaining the continuing importance of that principle to rate making. 152 P.2d 542 (Utah 1944). For instance, the court noted that despite the United States Supreme Court's decision in *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591 (1944), to abandon the fair value rule, the utility insisted the Commission was required to fix utility rates on a fair value basis. 152 P.2d at 546. The court then noted that the commission had instead adopted a directly contrary position based on used and useful assets. *Id.* The commission had "held that the just and proper rate base for the Company [wa]s the amount actually and 'prudently invested' in ***the property used and useful in rendering Utah service***." *Id.* (emphasis added).

The court further noted that when the United States Supreme Court developed the "fair value" rule as the test of reasonableness of rates in *Smyth v. Ames*, that it specifically "announced

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3 DPU Br. at 3 n.9.

4 DPU Br. at 3 n.9.

5 *See* DPU Br. at 3.

the rule that the owner of private property devoted to a public use is entitled to a 'fair return' on the 'fair value' of his ***property devoted to public use***." *Id.* at 548 (emphasis added). Note, that it is not that the return was provided on property ***to be*** devoted to public use, but to property devoted to public use.

The Utah Supreme Court also noted that the *Denver Union Stock Yard Company v. United States*, case "is worthy of note in the development of the law in this regard." *Id.* at 550. In fact, the Utah court specifically mentioned this case

> [B]ecause 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) (internal citations omitted).[6] The used and useful principle was critical to the Utah Supreme Court's holding to affirm the Commission's decision to abandon the fair value analysis and rule that the "just and proper rate base for the Company [wa]s the amount actually and 'prudently invested' in ***the property used and useful in rendering Utah service***." 152 P.2d at 546, 558.

Furthermore, Mr. Jim Selecky based his testimony completely and exclusively on the testimony and exhibits and discovery provided by the Company. Thus, the motion was based on the Company's testimony and evidence. In addition, rebuttal testimony has been filed and the Company filed only one correction to Mr. Jim Selecky's calculations. No one else rebutted Mr. Selecky.

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6 This is also support for UIEC's reference to a taking.

The only correction from the Company came from Mr. McDougal and addressed Mr. Selecky's calculation of property taxes. McDougal R.Test. 60:1310-61:1324. The Company made no further corrections to Mr. Selecky's calculations. Thus, there is no reason to wait.

This is a legal issue that should be decided on these briefs. The Commission should not disregard Utah law. The Company and other parties have had their opportunity to rebut the factual evidence upon which UIEC's recommended disallowance is based. The Company found only one element that needed correcting. No other factual evidence was presented. Waiting only wastes time. The Commission should make its decision of exclusion based on the briefs.

Alternatively, the Commission should rule in its final order that the "used and useful" principle is valid in Utah and disallow the costs associated with those facilities that will not be used and useful to Utah rate payers on the rate effective date.

CONCLUSION

Based on the foregoing, UIEC requests that the Commission strike the testimony and exhibits related to the costs as set forth in the direct testimony of UIEC witness James T. Selecky and Exhibit A to UIEC's opening brief. They are not associated with plant that will be physically used and useful as of the rate effective date in this case and RMP is barred from recovery based on Utah law. There is no indication that a forecasted test year changes the allocation of the completion of construction risk from the Company to the rate payers. The Commission should not assume that such has occurred.

Alternatively, if the Commission chooses not to strike the testimony and exhibits at this time, UIEC requests that the Commission, in its final order, recognize the validity of the "used

and useful" principle in Utah and disallow the costs associated with those facilities that will not be used and useful to Utah rate payers on the rate effective date.

DATED this 18th day of July, 2011.

/s/ Vicki M. Baldwin

F. Robert Reeder
William J. Evans
Vicki M. Baldwin
Cory D. Sinclair
PARSONS BEHLE & LATIMER
Attorneys for UIEC, an Intervention Group

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

I hereby certify that on this 18th day of July 2011, I caused to be emailed, a true and correct copy of the foregoing **REPLY IN SUPPORT OF 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
Dahnelle Burton-Lee
ASSISTANT ATTORNEYS GENERAL
500 Heber Wells Building
160 East 300 South
Salt Lake City, UT 84111
pschmid@utah.gov
dburton-lee@utah.gov

Michele Beck
Executive Director
COMMITTEE OF CONSUMER SERVICES
Heber Wells Building
160 East 300 South, 2nd Floor
SLC, UT 84111
mbeck@utah.gov

David L. Taylor
Yvonne R. Hogle
Mark C. Moench
ROCKY MOUNTAIN POWER
201 South Main Street, Suite 2300
SLC,UT 84111
Dave.Taylor@pacificorp.com
yvonne.hogle@pacificorp.com
mark.moench@pacificorp.com
datarequest@pacificorp.com

Chris Parker
William Powell
Dennis Miller
DIVISION OF PUBLIC UTILITIES
500 Heber Wells Building
160 East 300 South, 4th Floor
Salt Lake City, UT 84111
chrisparker@utah.gov
wpowell@utah.gov
dennismiller@utah.gov

Paul Proctor
ASSISTANT ATTORNEYS GENERAL
500 Heber Wells Building
160 East 300 South
Salt Lake City, UT 84111
pproctor@utah.gov

Cheryl Murray
Dan Gimble
Danny Martinez
UTAH COMMITTEE OF CONSUMER SERVICES
160 East 300 South, 2nd Floor
Salt Lake City, UT 84111
cmurray@utah.gov
dgimble@utah.gov
dannymartinez@utah.gov

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

Kevin Higgins
Neal Townsend
ENERGY STRATEGIES
39 Market Street, Suite 200
Salt Lake City, UT 84101
khiggins@energystrat.com
ntownsend@energystrat.com

Peter J. Mattheis
Eric J. Lacey
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson St., N.W.
800 West Tower
Washington, D.C. 20007
pjm@bbrslaw.com
elacey@bbrslaw.com

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

Sophie Hayes
Sarah Wright
Utah Clean Energy
1014 2nd Avenue
Salt Lake City, UT 84111
sophie@utahcleanenergy.org
sarah@utahcleanenergy.org

Stephen F. Mecham
Callister Nebeker & McCullough
10 East South Temple Suite 900
Salt Lake City, Utah 84133
sfmecham@cnmlaw.com

Kurt J. Boehm, Esq.
BOEHM, KURTZ & LOWRY
36 E. Seventh St., Ste1510
Cincinnati, Ohio 45202
Kboehme@BKLLawfirm.com

Sharon M. Bertelsen
Ballard Spahr LLP
201 So. Main Street, Ste 800
Salt Lake City, Utah 84111
bertelsens@ballardspahr.com

Charles (Rob) Dubuc
Western Resource Advocates
& Local Counsel for Sierra Club
150 South 600 East, Suite 2A
Salt Lake City, UT 84102
rdubuc@westernresources.org

Steven S. Michel
Western Resource Advocate
409 E. Palace Ave. Unit 2
Santa Fe, NM 87501
smichel@westernresources.org

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

Randy N. Parker, CEO
Utah Farm Bureau Federation
9865 South State Street
Sandy, Utah 84070
rparker@fbfs.com

Leland Hogan, President
Utah Farm Bureau Federation
9865 South State Street
Sandy, Utah 84070
leland.hogan@fbfs.com

Ryan L. Kelly, #9455
Kelly & Bramwell, P.C.
11576 South State St. Bldg. 1002
Draper, UT 84020
ryan@kellybramwell.com

Captain Shayla L. McNeill
Ms. Karen S. White
Staff Attorneys
AFLOA/JACL-ULFSC
139 Barnes Ave, Suite 1
Tyndall AFB, FL 32403
Shayla.mcneill@tyndall.af.mil
Karen.white@tyndall.af.mil

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

Roger Swenson
US Magnesium LLC
238 North 2200 West
Salt Lake City, UT 84114
roger.swenson@prodigy.net

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

ARTHUR F. SANDACK, Esq
8 East Broadway, Ste 411
Salt Lake City, Utah 84111
asandack@msn.com

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

Stephen J. Baron
J. Kennedy & Associates
570 Colonial Park Drive, Ste 305
Roswell, GA 30075
sbaron@jkenn.com

Gerald H.Kinghorn
Jeremy R. Cook
Parsons Kinghorn Harris, P.C.
111 East Broadway, 11th Floor
Salt Lake City, UT 84111
ghk@pkhlawyers.com
jrc@pkhlawyers.com

Gloria D. Smith
Senior Attorney
Sierra Club
85 Second Street, 2nd Fl.
San Francisco, CA
gloria.smith@sierraclub.org

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

Sonya L. Martinez, CSW
Policy Advocate
Betsy Wolf
Salt Lake Community Action
Program
764 South 200 West
Salt Lake City, UT 84101
Smartinez@slcap.org
bwolf@slcap.org

/s/ Colette V. Dubois