EXHIBIT A

F. ROBERT REEDER (2710)
WILLIAM J. EVANS (5276)
VICKI BALDWIN (8532)
ELIZABETH L. SILVESTRINI (13864)
PARSONS BEHLE & LATIMER
Attorneys for UIEC, an Intervention Group
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

BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Application of Rocky Mountain Power for Approval of Its Proposed Energy Cost Adjustment Mechanism.	Docket No. 12-035-67 **LEGAL BRIEF OF UIEC**

The Utah Industrial Energy Users ("UIEC") intervention group, respectfully submits this Legal Brief pursuant to the Utah Public Service Commission's ("Commission") request for briefing at the May 14, 2012 hearing in the above-referenced proceeding.

INTRODUCTION

On May 14, 2012, the Commission held a hearing to consider Rocky Mountain Power's ("RMP") request to increase rates through an Energy Balancing Account ("EBA"). The Division of Public Utilities ("Division") recommended that the Commission approve a rate increase to recover $9,028,831 in power costs accrued during the period from October 1, 2011, through December 31, 2011, along with 6% carrying charges, through a surcharge to go into effect on June 1, 2012. The surcharge would be subject to further review, hearing, and possible refund. *See* EBA Amortization, Review Report— The Division's Initial Comments on Rocky Mountain

Power's Request to Increase Rates through the Energy Balancing Account, Docket No. 12-035-67 at 2 (April 27, 2012) ("DPU Comments"). The UIEC responded to the DPU Comments, contending that there was insufficient evidence to show that the rate increase was for only prudently incurred, actual costs or that a surcharge to collect the approximately $9 million requested would result in just and reasonable rates. It further argued that an evidentiary hearing is required prior to Commission approval of any rate increase. *See* UIEC's Comments on the Division of Public Utilities' Initial EBA Comments and Recommendations, Docket No. 12-035-67 at 2-3, 10 (May 10, 2010) ("UIEC Comments"). During the hearing, the UIEC reiterated its concern that the "interim" procedure advocated by RMP and the Division left the Commission without any assurance that the $9 million included only prudently incurred, actual costs such that the resulting rate could be found to be just and reasonable. It further argued that approval without a hearing at which all parties could submit evidence would deprive ratepayers of due process. *See* Tr. at 18-19, 26; s*ee also* UIEC Comments at 4, 9.

At the hearing, the Commission asked for briefing on two issues. First, the "application of an interim rates process relative to the energy balancing account… as it's administered year by year." Tr. at 83. Second, the "standards that should apply relative to [RMP's] burden of proof to obtain the interim rate relief." *Id.* As discussed below, the UIEC's response with regard to the first issue is that there is no statutory basis for applying an "interim" rate process to EBA rate cases as that process is applied in a general rate case. EBA rates are subject to the same process as regular, non-interim rates. Because the EBA Statute does not provide for "interim" relief, the second issue is moot. Before the Commission can approve a rate increase to recover EBA costs, RMP must show, by substantial evidence, that the costs were actual and prudently

incurred and that the proposed rate increase is just and reasonable in accordance with the Commission's statutes and the Utah Administrative Procedures Act.

I. THE "INTERIM" RATE PROCESS AUTHORIZED IN A GENERAL RATE CASE DOES NOT APPLY TO EBA COST RECOVERY.

All rates must be found to be just and reasonable before approval and implementation. *See* Utah Code Ann. § 54-4-4(1); *Utah Dep't of Bus. Regulation v. Pub. Serv. Comm'n*, 614 P.2d 1242, 1245 (Utah 1980). Commission proceedings to set rates are subject to the Commission's statutes and regulations and to the provisions of the Utah Administrative Procedures Act.

The interim rate process described in Utah Code Section 54-7-12(4) ("GRC Statute") is a specific statutory mechanism which authorizes the Commission, in the context of a general rate case, to approve an "interim" rate based on an "adequate prima facie showing that the interim rate increase or decrease is justified." Utah Code Ann. § 54-7-12(4). This mechanism is limited to general rate cases. In fact, the "interim" rate process described in the GRC statute specifically excludes the type of costs that may be recovered through an EBA, and thus precludes the use of the interim rate procedure in an EBA cost recovery case. *See* Section I.B *infra*.

Utah Code Section 54-7-13.5 ("EBA Statute") authorizes certain enumerated costs to be recovered outside of a general rate case. It does not authorize an "interim" rate or an "interim" approval process similar to the one authorized by the GRC statute. Furthermore, there is no authority anywhere in the Commission's statutes that would allow EBA cost recovery through such a process, and no other legal precedent for doing so.

A. An EBA Rate Is Not an "Interim" Rate as that Term is Used in the GRC Statute.

An "interim" rate, as that term is used in the GRC Statute, is a rate that may go into effect after an application for a general rate increase is filed, after a limited hearing, and before the final rate is set. The purpose is to provide an "advance" against the collection of the anticipated increase during the 240-day period within which period the Commission must consider and issue an order on a utility's application for a rate increase. *See* Report and Order on Interim Rates and Notice of Further Hearings, Docket No. 85-049-02, 9, 11 (June 26, 1985). The practice of advancing the utility a portion of its requested rate increase before approving the final rate was introduced during a period of unusually steep inflation as a stop-gap measure to mitigate serious financial harm to the utility during the 240-day period of adjudication. *Id.* at 9. After a hearing and upon a *prima facie* showing "that the interim rate increase or decrease is justified," the Commission may allow an interim rate to go into effect, subject to adjustment until the general rate case is concluded and the Commission issues its final order, at which point the interim rate is subsumed into the general rate. *See* Utah Code Ann. § 54-7-12(4)(a)(iii), (c). The adjusted rate becomes a "final" rate and endures until changed in accordance with statutory procedure. *See* Utah Code Ann. § 54-7-12(3), (4) (referring to "final" orders; "final" allocation of the increase or decrease; increases "finally" ordered); *see Union Tel. Co. v. Qwest Corp.*, 495 F.3d 1187, 1193 (10th Cir. 2007) (explaining that, under the filed rate doctrine, a duly filed rate "is the only lawful charge and deviation from it is not permitted") (internal citation omitted). The "interim rate" is wholly a creature of the GRC Statute, enacted to solve a perceived problem of financial harm during the 240-day period.

An EBA rate, in contrast, is a rate set to allow recovery of certain costs without the necessity of holding a general rate case. With the enactment of the EBA Statute, the EBA cost recovery process was removed from the purview of the GRC Statute. The EBA Statute authorized instead a "single-issue rate case," just as the enactment of Section 54-7-13.4 created a separate process for cost recovery for major plant additions. *See* Utah Code Ann. § 54-7-13.5(4)(c) ("[An EBA] does not constitute impermissible retroactive ratemaking or single-issue ratemaking."). Once enacted, the EBA Statute became the only authority by which the Commission may authorize changes in rates to recover fuel and purchased power costs outside of a general rate case. The EBA Statute specifies that the Commission may, if it determines that such costs are actual and prudently incurred, set a fixed amount of fuel and purchased power costs to be recovered. *See* § 54-7-13.5(2)(c), (h). The rate set to recover these costs is subject to adjustment pursuant to annual reconciliations to ensure no over- or under-collection of the fixed amount. *See* § 54-7-13.5(2)(c). Once the fixed amount is paid off, the EBA rate terminates. *See* § 54-7-13.5(2)(h). There is no mention of "final" rates anywhere in the EBA statute, and thus no statutory basis by which an EBA rate can ever become final. Instead, EBA rates are temporary. Their prospective application is subject to annual review and may be altered depending on how quickly the fixed amount is amortized.

Likewise, there is no mention of "interim" procedures or "interim" rates in the EBA Statute. The term "interim," unfortunately, has been used in a generic sense outside of the GRC context and has created confusion as to the proper procedure to be used under the EBA Statute. The term "interim" in the EBA context describes nothing more than a temporary rate which is subject to later adjustment. Nothing in the EBA Statute suggests that an electric utility is

permitted to receive an advance rate increase while the Commission adjudicates its application for EBA cost recovery, or that adjudication of EBA cost recovery may be conducted via the abbreviated process described in the GRC Statute. Thus, to the extent the word "interim" is used to suggest an abbreviated procedure is appropriate for approving cost recovery in an EBA case, its use in the EBA context must be abandoned.

B. The "Interim" Rate Approval Process Cannot be Imported from the GRC Statute to the EBA Statute.

The provision in the GRC Statute providing for "interim" rates excludes EBA cost recovery from its scope. Utah Code Section 54-7-12(4)(a)(i) provides:

> "A request for interim rates shall be made within 90 days after the day on which a public utility files a complete filing for a *general rate increase* or a general rate decrease."

(emphasis added). A "general rate increase" means "any direct increase to a public utility's *base rates*" or "any modification of a classification, contract, practice, or rule that increases a public utility's *base rates*." § 54-7-12(1)(d) (emphasis added). Unless the Commission orders otherwise, "base rates" specifically exclude amounts in a "deferred account" or a "balancing account." § 54-7-12(a)(ii). Because an EBA is both a deferred account and a balancing account, and because it represents the difference between actual prudently incurred fuel and purchased power costs and the projected fuel and purchased power costs that are recovered through base rates, an EBA rate is by definition not a "base rate." Accordingly, EBA rates cannot be part of a general rate increase, and cannot be subject to the general rate case procedure. The GRC interim procedure cannot be superimposed on the EBA cost recovery procedure because the two procedures are, by statute, mutually exclusive.

C. The 191 Account Does Not Provide Precedent for an Electric Utility's EBA Procedures.

In technical conferences and discussions about the EBA, some parties have compared the EBA process to Questar's 191 Tariff authorizing a gas balancing account ("191 Account"). The 191 Account, however, does not provide authority for an "interim" rate or "interim" approval process in an electric utility's EBA proceedings. The Utah Legislature specifically passed the EBA Statute to accommodate RMP's request for a power cost adjustment mechanism. It could have specified a procedure similar to the 191 Account procedure, but it did not. RMP, having elected to establish an energy balancing account under the EBA Statute is now bound by the procedural requirements that the statute contemplates. Likewise, the Commission may not defer to the 191 Account for procedural guidance when the EBA Statute does not specify such procedures and when Title 54 otherwise provides a supporting procedural scheme for EBA ratemaking procedures in the electrical utility context.

The Questar 191 Account procedure has been in effect for many years. Its statutory basis has never been challenged and the UIEC does not contest it now as applied to gas balancing accounts.[1] But a traditional, unchallenged method for passing through a gas utility's fuel costs cannot supersede statutory law enacted to permit cost recovery of an electric utility's fuel and purchased power costs.[2] Nor would that kind of procedure be adequate to determine EBA issues, which are far more complex than those arising under the 191 Account. In addition to fuel and

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[1] The Utah Supreme Court considered issues relating to the 191 Account in *Questar Gas Company v. Utah Public Service Commission*, 2001 UT 93, 34 P.3d 218. Commenting on the statutory basis for the 191 Account, the Court explained, "[w]e presume . . . that the Commission implemented this rate-changing mechanism under its 'ample general power to fix rates and establish accounting procedures.'" *Id.* at ¶ 12.

[2] RMP's predecessor, Utah Power & Light, previously had a tariff providing for an EBA and asked to be relieved of it. Docket No. 90-035-06. Having rejected this arrangement, its only energy balancing account mechanism now is the EBA Statute that was enacted specifically for RMP's benefit.

purchased power, EBA accounts include revenue and expenses from the purchase and sale of transmission rights, natural gas, financial products, and multiple accounts and sub-accounts. All of these elements require separate reconciliation and prudence review. The enhanced opportunity for cost recovery makes the costs recovered under the EBA Statute more susceptible to review and challenge, requiring procedural mechanisms appropriate for addressing such challenges. The 191 Account does not provide either precedent or a suitable model for an electric utility's EBA procedures.

In summary, the "interim" rate process described in the GRC Statute does not apply to EBA cost recovery and there is no statutory authority or legal precedent to support the notion that the Commission may approve RMP's $9 million EBA rate increase by using a similar, abbreviated process to adjudicate the Application.

II. RMP MUST SHOW BY SUBSTANTIAL EVIDENCE THAT THE COSTS AND EXPENSES UNDERLYING ITS EBA RATE WERE ACTUAL AND PRUDENTLY INCURRED SUCH THAT THE RESULTING RATE INCREASE IS JUST AND REASONABLE.

A utility has the burden of proof to show, by substantial evidence, that its proposed rate increase is just and reasonable. *Utah Dep't of Bus. Regulation v. Public Serv. Comm'n*, 614 P.2d 1242 (Utah 1980); *see also* Utah Code Ann. § 54-4-4(1). Section 54-7-13.5(2)(h) of the EBA Statute provides:

> *Prudently incurred actual costs* in excess of revenues collected shall (i) be recovered as a bill surcharge over a period to be specified by the commission; and (ii) include a carrying charge.

(emphasis added). *See also* Utah Code Ann. § 54-7-13.5(2)(b) ("An [EBA] shall become effective upon a commission finding that the [EBA] is . . . for prudently incurred costs."). Therefore, to recover its costs and expenses under the EBA, RMP must demonstrate that these

costs and expenses were both actual costs and prudently incurred costs and that the resulting rate is just and reasonable. Moreover, the EBA Statute states that an EBA "may not alter: (i) the standard for cost recovery; or (ii) the electrical corporation's burden of proof." Utah Code Ann. § 54-7-13.5(2)(d). The starting point from which these standards cannot be "altered" is not articulated, but in the absence of a specific pronouncement, the applicable standard may be found in Title 54's general grant of Commission authority to set rates. Utah Code Ann. § 54-4-4. The standards for determining prudence are set forth in detail in Utah Code Section 54-4-4(4)(a). That section provides:

> If, in the commission's determination of just, reasonable, or sufficient rates, the commission considers the prudence of an action taken by a public utility or an expense incurred by a public utility, the commission shall apply the following standards in making its prudence determination: (i) ensure just and reasonable rates for the retail ratepayers of the public utility in this state; (ii) focus on the reasonableness of the expense resulting from the action of the public utility judged as of the time the action was taken; (iii) determine whether a reasonable utility, knowing what the utility knew or reasonably should have known at the time of the action, would reasonably have incurred all or some portion of the expense, in taking the same or some other prudent action; and (iv) apply other factors determined by the commission to be relevant, consistent with the standards specified in this section.

The utility has the burden of proof to establish prudence by substantial evidence. *See Committee of Consumer Servs. v. Pub. Serv. Comm'n*, 2003 UT 29, ¶ 12, 75 P.3d 481. The "prima facie" burden of proof standard for approving interim rates under the GRC Statute is inapplicable for the reasons discussed above.

The Commission may not bypass these statutory requirements by resorting to an abbreviated "interim" proceeding that does not consider the prudence of the EBA costs and expenses incurred. Were it not for the enactment of the EBA Statute, recovery of a utility's

previously incurred costs would be prohibited by the rule against retroactive rulemaking. *See Utah Dep't of Bus. Regulation v. Pub. Serv. Comm'n*, 720 P.2d 420, 423 (Utah 1986) ("[N]either the pass-through legislation nor the Commission's general grant of regulatory authority permits a utility to have retroactive revenue adjustments in order to guarantee shareholders the rate of return initially anticipated."). The EBA Statute provides an exception to the rule: "[An EBA] that is formed and maintained in accordance with this section does not constitute an impermissible retroactive rulemaking or single-issue ratemaking." Utah Code Ann. § 54-7-13.5(4)(c). Thus, any EBA procedure must strictly comply with the EBA Statute to avoid becoming impermissible retroactive rulemaking.

UIEC's objection to the use of an abbreviated procedure in EBA rate cases is not a mere academic exercise. Given the complexity of an EBA and its potential to be used as a vehicle for large-scale financial trading, an abbreviated procedure is insufficient to ensure that the Commission arrives at a just and reasonable rate. An EBA includes transactions not only for the purchase and sale of fuel and electricity, but also for the purchase and sale of natural gas, transmission rights and financial products. In fact, it appears that the losses from financial swaps alone made during the relevant period would likely be sufficient to offset RMP's $9 million EBA request for cost recovery if the Commission were to find them to be imprudent under the statute. Therefore, a prudence review for EBA cost recovery is not only explicitly required by statute, it is essential to determining a just and reasonable rate. Any prudence review under an abbreviated procedure adopted to meet the June 1 deadline advocated by RMP and the Division would be inadequate.

III. DUE PROCESS AND THE EBA STATUTE REQUIRE A HEARING IN CONFORMITY WITH THE UTAH ADMINISTRATIVE PROCEDURES ACT TO DETERMINE WHETHER EBA COSTS AND EXPENSES WERE ACTUALLY AND PRUDENTLY INCURRED.

Due process requires the Commission to provide parties affected by a rate change a reasonable opportunity to obtain and present evidence on whether the proposed rate meets the standards required for the Commission to find that it is just and reasonable. *See Util. Consumer Action Group v. Pub. Serv. Comm'n*, 583 P.2d 605, 608 (Utah 1978). This procedure is necessary to ensure that the Commission's rate setting order does not amount to an unconstitutional taking. "If the rates are so low as to be confiscatory of the utility's property, they are condemned by the Fourteenth Amendment. If they are so high as to yield a greater return on the value of the property used and useful in the service than other investments made with equal risk, they are unfair to the customer and should be reduced." *Telluride Power Co. v. Pub. Serv. Comm'n of Utah*, 8 F. Supp. 341 (D. Utah 1934); *see also Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759, 767 (Utah 1994) ("Two polar constitutional principles fix the parameters of rate regulation for natural monopolies: the protection of utility investors from confiscatory rates and, of equal importance, the protection of ratepayers from exploitive rates."); *Jersey Cent. Power & Light Co. v. Fed. Energy Regulatory Comm'n*, 810 F.2d 1168, 1180 (D.C. Cir. 1987) ("[T]he holding of *Hope Natural Gas* makes clear that exploitative rates are illegal."). Due process requires the Commission to hold a hearing at which all interested parties may participate before any rate increase is approved.

Utah Code Section 54-4-4(1), reflecting the requirements of due process, provides that the Commission must hold a hearing before approving any rate increase.[3] Title 54 is silent, however, as to the type of hearing required to satisfy due process. In the absence of a specific procedural statute in Title 54, the Utah Administrative Procedures Act ("APA") governs the administrative procedure to be used in adjudicative proceedings before the Commission.[4]

Section 63G-4-201 of the APA provides:

> (2) Subject to the provisions of Subsection (3), all agency adjudicative proceedings not specifically designated as informal proceedings by the agency's rules shall be conducted formally in accordance with the requirements of this chapter.
>
> (3) Any time before a final order is issued in any adjudicative proceeding, the presiding officer may convert a formal adjudicative proceeding to an informal adjudicative proceeding, or an informal adjudicative proceeding to a formal adjudicative proceeding if: (a) conversion of the proceeding is in the public interest; and (b) conversion of the proceeding does not unfairly prejudice the rights of any party.

Therefore, unless an adjudicative proceeding is designated as an informal proceeding by agency rule, or unless the conversion to an informal proceeding is both in the public interest and will not unfairly prejudice the rights of any party, all adjudications are to be conducted formally as provided by the APA.

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[3] The EBA Statute provides that the Commission may set forth procedures for a gas corporation's gas balancing account in its Commission-approved tariff. Utah Code Ann. § 54-7-13.5(3)(a)(ii). The EBA Statute provides no parallel provision for electrical utilities, which demonstrates that the Legislature intended for electric utilities to follow the procedures set forth elsewhere by statute. *See Carrier v. Salt Lake County*, 2004 UT 98, ¶ 30, 104 P.3d 1208 ("[S]tatutory construction presumes that the expression of one should be interpreted as the exclusion of another."). Section 54-4-4 applies here because it grants the Commission general authority to set rates authorized by statute.

[4] "Except as specifically provided to the contrary in Chapter 7, the commission shall comply with the procedures and requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its adjudicative proceedings." Utah Code Ann. § 54-1-2.5.

The Commission's rules provide for informal adjudication only where the party filing a request for agency action represents, or the Commission reasonably expects that the matter will be unopposed and uncontested. *See* Utah Admin. Code R.746-110.1. RMP has not requested informal adjudication, and the UIEC has contested the recovery of the $9 million in power costs through an EBA. *See* UIEC Comments at 10. An informal hearing is thus inappropriate under the Commission's rules.

Furthermore, an informal hearing on this proposed EBA rate increase would not serve the public interest and would unfairly prejudice the rights of the intervening parties. As explained above, EBA accounts are complex, involving multiple FERC-mandated sub-accounts and even sub-sub-accounts, some of which may include non-recoverable costs that must be extracted before calculating actual EBA costs. In addition to fuel and purchased power, EBA accounts include revenue and expenses from transmission wheeling, which require separate balancing. Finally, EBA accounts include financial products that have resulted in hundreds of millions of dollars in swap losses, which were the subject of a prudence challenge in the last general rate case. *See* UIEC Comments at 6. Under the circumstances, informal adjudication is not in the public interest, and would circumvent customers' legitimate interest in participating in the proceedings to ensure effective determination of whether EBA costs are actual and have been prudently incurred.

For the foregoing reasons, the APA requires a formal hearing in an EBA rate case. A formal hearing under the APA requires, among other things, the following procedures:

> In formal adjudicative proceedings, the agency may, by rule, prescribe means of *discovery adequate to permit the parties to obtain all relevant information necessary to support their claims or defenses*. If the agency does not enact rules under this section,

> the parties may conduct discovery according to the Utah Rules of Civil Procedure.

Utah Code Ann. § 63G-4-205(1) (emphasis added).

> The presiding officer shall afford to all parties the opportunity to *present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence.*

Utah Code Ann. § 63G-4-206(1)(d) (emphasis added). The Commission's rules implement the requirements of the APA as applied to cases coming before the Commission:

> Parties to a proceeding before the Commission, as defined in Section 63G-4-103, may participate in a proceeding including the right to *present evidence, cross-examine witnesses, make argument, written and oral, submit motions*, and otherwise participate as determined by the Commission.

Utah Admin. Code R.746-100-5. The Commission should hold a hearing in conformity with these procedures to determine whether RMP's EBA costs were actually and prudently incurred before approving RMP's proposed $9 million EBA rate increase.

CONCLUSION

In conclusion, with respect to the first question posed by the Commission, the interim rate process does not apply to EBA cost recovery as administered from year to year. An "interim" rate is only authorized in general rate case proceedings and Questar's 191 Account proceedings. Given that there are no statutory grounds for approving an EBA rate through the "interim" approval process, the Commission must adhere to the hearing process prescribed by the APA for determining whether RMP's costs and expenses are actual and prudently incurred so that rates are just and reasonable rate. Accordingly, there is no process for "interim" rate relief for EBA cost recovery. The Commission and the parties must follow the procedure set forth in the

Commissions statutes and the Company has the burden of proof to demonstrate by substantial evidence that the costs it desires to recover were actual costs that were prudently incurred.

DATED this 29th day of May, 2012.

/s/ Vicki M. Baldwin
F. ROBERT REEDER
WILLIAM J. EVANS
VICKI M. BALDWIN
ELIZABETH L. SILVESTRINI
PARSONS BEHLE & LATIMER
Attorneys for UIEC, an Intervention Group

CERTIFICATE OF SERVICE

Docket No. 12-035-67

I hereby certify that on this 29th day of May 2012, I caused to be emailed, a true and correct copy of the foregoing **LEGAL BRIEF OF UIEC** to:

Patricia Schmid
Wesley D. Felix
ASSISTANT ATTORNEYS GENERAL
500 Heber Wells Building
160 East 300 South
Salt Lake City, UT 84111
pschmid@utah.gov
wfelix@utah.gov

Michele Beck
Cheryl Murray
Dan Gimble
Executive Director
COMMITTEE OF CONSUMER SERVICES
500 Heber Wells Building
160 East 300 South, 2nd Floor
Salt Lake City, UT 84111
mbeck@utah.gov
cmurray@utah.gov
dgimble@utah.gov

David L. Taylor
Mark Moench
Yvonne R. Hogle
Daniel Solander
ROCKY MOUNTAIN POWER
201 South Main Street, Suite 2300
Salt Lake City, UT 84111
Dave.Taylor@PacifiCorp.com
Mark.moench@pacificorp.com
yvonne.hogle@pacificorp.com
Daniel.solander@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

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

Peter J. Mattheis
Eric J. Lacey
Brickfield, Bruchette, Ritts & Stone, P.C.
1025 Thomas Jefferson St., N.W.
800 West Tower
Washington, D.C. 2007
pjm@bbrslaw.com
elacey@bbrslaw.com

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

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

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

Arthur F. Sandack
8 East Broadway, Ste 411
Salt Lake City, Utah 84111
asandack@msn.com

Steven S. Michel
Western Resource Advocates
227 East Palace Ave., Suite M
Santa Fe, NM 87501
smichel@westernresources.org

Sarah Wright
Kevin Emerson
Brandy Smith
Utah Clean Energy
1014 2nd Avenue
Salt Lake City, UT 84103
sarah@utahcleanenergy.org
Kevin@utahcleanenergy.org
brandy@utahcleanenergy.org

Betsy Wolf
Salt Lake Community Action Program
764 South 200 West
Salt Lake City, Utah 84101
bwolf@slcap.org

Michael L. Kurtz
Kurt J. Boehm
BOEHM, KURTZ & LOWRY
36 East Seventh Street,
Ste 1510
Cincinnati, Ohio 45202
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com

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

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

Ryan L. Kelly
Kelly & Bramwell, P.C.
11576 South State St., Bldg. 203
Draper, UT 84020
ryan@kellybramwell.com

Gregory B. Monson
Stoel Rives LLP
201 South Main Street, Suite 110
Salt Lake City, UT 84111
gbmonson@stoel.com

/s Colette V. Dubois