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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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<b>In the Matter of the Petition of Mid-Utah Gas Pipeline Co., LLC Requesting a Declaratory Ruling by the Public Service Commission of Utah</b>	)	<b>DOCKET NO. 15-2577-01</b>
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	)	<b>COMMENTS AND RESPONSE OF THE UTAH DIVISION OF PUBLIC UTILITIES IN SUPPORT OF MID-UTAH’S PETITION FOR A DECLARATORY RULING</b>
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On January 23, 2015, Mid-Utah Gas Pipeline Co., LLC (Mid-Utah) filed a Petition Requesting a Declaratory Ruling (Petition) by February 6, 2015<sup>1</sup> from the Public Service Commission of Utah (Commission) “establishing jurisdiction over the natural gas pipeline Mid-Utah will build beginning west of Scipio, Utah in Millard County and ending in Sigurd, Utah in Sevier County.”<sup>2</sup> Pursuant to the Commission’s January 26, 2015, notice requesting comments by February 2, 2015, the Utah Division of Public Utilities (Division) hereby files its comments and response (Comments) in support of Mid-Utah’s Petition.

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<sup>1</sup> Due to permitting and construction issues, Mid-Utah requested the Commission issue its declaratory ruling by that date. See Petition at p. 5.  
<sup>2</sup> Petition at p. 1.

## BACKGROUND

Pursuant to Utah Code Ann. § 54-4-1 et seq., the Commission has jurisdiction over public utilities in Utah, including certain of their natural gas pipelines. The Utah Administrative Procedures Act and the Commission’s rules explicitly permit petitions for declaratory rulings,<sup>3</sup> with the Commission’s rule stating declaratory rulings shall be “prepare[d] without unnecessary delay.”<sup>4</sup>

The Petition states that Utah Code Ann. § 54-2-1(11), (12), and (19), and Utah Code Ann. § 54-4-25 must be reviewed.<sup>5</sup> The Petition identifies the so called “Hinshaw Exemption”<sup>6</sup> set forth in the Natural Gas Act at 15 U.S.C. 717(c)<sup>7</sup> as also requiring review.<sup>8</sup>

In addition, the Petition sets forth certain facts upon which the Division has relied in filing these Comments.<sup>9</sup> A material change in facts could affect the Division’s analysis and conclusions.

The Division’s comments are limited to the Petition, and are independent of any comments the Division may make if Mid-Utah later seeks a certificate of public convenience and necessity (CPCN) from the Commission under Utah Code Ann. § 54-4-25.

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<sup>3</sup> R746-101 et seq.

<sup>4</sup> R746-101-4C. See also Utah Code Ann. § 63G-4-503, in which the Utah Administrative Procedures Act empowers an agency to issue a declaratory order.

<sup>5</sup> See Petition at p. 1.

<sup>6</sup> Apparently it is called the Hinshaw Exemption “after the Congressman who introduced the bill amending the NGA to include it.” See, e.g., 29 No. 9 GASINFOMAN-NWL 5, Natural Gas Transportation Service Newsletter (September 2013).

<sup>7</sup> 15 U.S.C. § 717(c).

<sup>8</sup> See Petition at p. 1.

<sup>9</sup> See Petition at pp. 1-2.

## DISCUSSION

Certain Utah and federal statutes must be examined to determine if Mid-Utah and its proposed natural gas pipeline will be subject to Commission jurisdiction. The Utah statutes will be analyzed first and the Natural Gas Act second.

### Under Utah Law, Mid-Utah and Its Proposed Natural Gas Pipeline Will Be Subject to Commission Jurisdiction.

Interrelated Utah statutes define terms and establish when a company and its natural gas pipeline will be subject to Commission jurisdiction. First, the nature and facilities of the proposed project and Mid-Utah's characteristics must be examined under Utah law. Second, an analysis must be conducted to determine if Mid-Utah will be a public utility under Utah law. And finally, an analysis must be undertaken to determine if Mid-Utah and its proposed pipeline will be subject to Commission jurisdiction.

An entity can qualify as a "gas corporation," by "owning, controlling, operating, or managing" "gas plant" in Utah for "industrial use."<sup>10</sup> Therefore, the definition of "gas plant" must be looked at first. "Gas plant" is defined, in pertinent part, as including "all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with . . . the transmission, delivery, or furnishing of gas . . . for . . . power."<sup>11</sup> Mid-Utah's proposed "38 mile intrastate natural gas pipeline . . . to provide the natural gas required to operate a 580 MW electricity generating plant"<sup>12</sup> and related real estate, fixtures, and personal property under its

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<sup>10</sup> See Utah Code Ann. § 54-2-1(11).

<sup>11</sup> Utah Code Ann. § 54-2-1(12).

<sup>12</sup> Petition at pp. 1-2.

ownership, control, operation, or management will qualify as “gas plant” under Utah statute. Therefore, Mid-Utah will qualify as a “gas corporation” under Utah law because it will be “owning, controlling, operating or managing any gas plant . . . for the selling or furnishing of natural gas to any consumer or consumers within the state for . . . industrial use.”<sup>13</sup>

Utah law also must be examined to determine if Mid-Utah will qualify as a “public utility.” Utah Code Ann. § 54-2-1(19)(a) states that a “[p]ublic utility” includes . . . in the case of a gas corporation . . . where the gas . . . is sold or furnished to any . . . consumer within the state for . . . industrial use.” In addition, Utah Code Ann. § 54-2-1(19)(b)(ii) states:

If a gas corporation . . . not described in Subsection (19(d) [which addresses independent energy producers] sells or furnishes gas . . . to any consumers within the state, for . . . industrial use, for which any compensation or payments is received, it is considered to be a public utility, subject to the jurisdiction and regulation of the commission and this title.

The Division, relying upon the facts set forth in the Petition, concludes that Mid-Utah will be a public utility as defined by Utah Code Ann. § 54-2-1(19)(a) because it proposes to be a gas corporation with gas plant that will furnish gas for industrial use within the state of Utah. If Mid-Utah is compensated for such service, it will also meet the definition of a public utility as defined by Utah Code Ann. § 54-2-1(19)(b)(ii).

The Petition also specifies that Utah Code Ann. § 54-4-25 must be reviewed.<sup>14</sup> However, because that statute addresses a CPCN and related procedures, and there is no pending CPCN application from Mid-Utah, the Division believes further analysis of Utah Code Ann. § 54-4-25 is unnecessary at this time.

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<sup>13</sup> See Utah Code Ann. § 54-2-1(11).

<sup>14</sup> See Petition at p. 1.

Therefore, the Division concludes that the proposed pipeline will be “gas plant,” Mid-Utah will be a “gas corporation” with proposed “gas plant” furnishing gas for “industrial use” within the state of Utah, and, as such, Mid-Utah will qualify as a “public utility.” As a result, Mid-Utah and its proposed pipeline will be subject to Commission jurisdiction.

Mid-Utah Will Qualify for the Hinshaw Exemption and Will Not Be Subject to Federal Regulation under the Natural Gas Act.

The next issue is whether Mid-Utah will be subject to regulation by the federal government, through the Federal Energy Regulatory Commission (FERC), under the Natural Gas Act (NGA).<sup>15</sup> The Natural Gas Act (NGA) regulates natural gas companies and was “enacted in 1938 ‘to provide the Federal Power Commission, now the FERC, with authority to regulate the wholesale pricing of natural gas in the flow of interstate commerce from wellhead to delivery to consumers.’”<sup>16</sup> However, FERC’s jurisdiction over natural gas companies under the NGA is not absolute. For example, a company is exempt from regulation under the NGA if it satisfies the criteria for the Hinshaw Exemption. The Hinshaw Exemption is found at Section 1(c) of the NGA, and states:

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction

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<sup>15</sup> See 15 U.S.C. § 717 et seq.

<sup>16</sup> Exxon Corp v. Eagerton, 461 U.S. 176, 184 (1983) (internal citations omitted).

over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.<sup>17</sup>

Applying the facts presented in the Petition to the required three part analysis, the Division concludes that Mid-Utah will qualify for the Hinshaw Exemption. First, the Hinshaw Exemption's requirement that the gas be received in Utah or at its border will be satisfied because Kern River will deliver the gas to Mid-Utah near Scipio, Utah, and the "person to person test" is satisfied because Kern River is an entity distinct from Mid-Utah. Second, the requirement that "all the natural gas so received is ultimately consumed within such State" will be satisfied because the gas will be completely consumed by the Sevier power plant located in Utah.<sup>18</sup> And third, if the Petition is granted, the rates of and service by Mid-Utah will be subject to regulation by the state of Utah as discussed above.

The conclusion that Mid-Utah will qualify for the Hinshaw Exemption is consistent with a 1996 FERC case involving Mountain Fuel (Questar Gas' predecessor) and the Intermountain Municipal Gas Association (IMGA) (IMGA case).<sup>19</sup> In the IMGA case, certain municipalities in Utah and Arizona requested a declaratory order mandating gas transportation service by Mountain Fuel where such gas would be used by the municipalities in their own retail gas utilities. Mountain Fuel previously had refused IMGA's requests for transportation service.

FERC stated that:

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<sup>17</sup> 15 U.S.C. § 717(c).

<sup>18</sup>The Petition represents that if "excess capacity" is available for sale to others, gas transported using that excess capacity will be consumed entirely in Utah. See Petition at p. 2, stating, "All of the gas transported over Mid-Utah's pipeline will be consumed in Utah."

<sup>19</sup>74 FERC ¶ 61,254 (1996). Also, the Commission approved a stipulation involving the Hinshaw Exemption in a 2000 order, Re Hildale City and Intermountain Municipal Gas Association, Docket No. 98-057-01. The stipulation provided remedies, including notice and termination of MT Service, to address Questar Gas' concern that if a customer who was provided service under the MT tariff proposed "to extend service beyond the state of Utah or into a service area designated by the Federal Energy Regulatory Commission (FERC) pursuant to 7(f) of the Natural Gas Act," Questar Gas could be subject to federal jurisdiction and the "loss of any Hinshaw status it may have."<sup>19</sup>

Mountain Fuel may rely on the Hinshaw exemption in NGA section 1(c) to provide services requested by the Utah cities. To qualify for the Hinshaw exemption, a pipeline must satisfy section 1(c)'s three-part test: (1) the pipeline must receive gas within or at the boundary of the state from another person; (2) all of the gas so received must be consumed within such state; and (3) the pipeline's rates, services, and facilities must be subject to regulation by the state commission. Mountain Fuel's transportation services for any cities in Utah qualify for the Hinshaw exemption, since (1) Mountain Fuel would receive all of those transportation volumes in Utah from "another person" (i.e., an interstate pipeline); (2) all of the gas transported by Mountain Fuel to cities in Utah would be consumed in Utah by the cities' retail customers; and (3) Mountain Fuel's transportation services to the cities in Utah would be regulated by the Utah PSC. Whether to authorize any needed construction and subsequent transportation is a matter for the Utah Public Service Commission to decide.<sup>20</sup>

The above analysis supports the conclusion that Mid-Utah will be exempt from federal regulation under the NGA because it will satisfy the criteria for the Hinshaw Exemption.

## CONCLUSION

The Division supports Mid-Utah's request for a declaratory ruling "establishing jurisdiction over the natural gas pipeline Mid-Utah will build beginning west of Scipio, Utah in Millard County and ending in Sigurd, Utah in Sevier County."<sup>21</sup> As explained in detail above, the Commission will have jurisdiction over Mid-Utah because it will be a public utility and over the proposed pipeline because it will be gas plant. Furthermore, because Mid-Utah will qualify for the Hinshaw Exemption, there will be no federal jurisdiction under the NGA. The Division respectfully requests that the Commission issue the requested ruling.

Dated this 30<sup>th</sup> day of January, 2015.

Respectfully submitted,

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<sup>20</sup> Intermountain Municipal Gas Association, 74 FERC ¶ 61,254 at pp. 61,837 – 61,838 (1996) (internal citations omitted).

<sup>21</sup> Petition at p. 1.

/s/ Patricia E. Schmid  
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## CERTIFICATE OF SERVICE

I CERTIFY that on the 30<sup>th</sup> day of January, 2015, a true and correct copy of the foregoing **COMMENTS AND RESPONSE OF THE UTAH DIVISION OF PUBLIC UTILITIES IN SUPPORT OF MID-UTAH'S PETITION FOR A DECLARATORY RULING** was delivered upon the following as indicated below:

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