

Mark C. Moench (2284)  
Yvonne R. Hogle (7550)  
Rocky Mountain Power  
201 South Main Street, Suite 2300  
Salt Lake City, Utah 84111  
Tel. 801.220.4459  
Fax 801.220.4058  
[mark.moench@pacificorp.com](mailto:mark.moench@pacificorp.com)  
[yvonne.hogle@pacificorp.com](mailto:yvonne.hogle@pacificorp.com)

Gregory B. Monson  
D. Matthew Moscon  
Stoel Rives LLP  
201 South Main Street, Suite 1100  
Salt Lake City, Utah 84111  
Tel. 801.578.6946  
Fax 801.578-6999  
[gbmonson@stoel.com](mailto:gbmonson@stoel.com)  
[dmmoscon@stoel.com](mailto:dmmoscon@stoel.com)

*Attorneys for Rocky Mountain Power*

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

<p>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</p>	<p>Docket No. 10-035-124</p> <p><b>ROCKY MOUNTAIN POWER'S RESPONSE TO DPU'S MOTION TO COMPEL</b></p>
--	--

Rocky Mountain Power, a division of PacifiCorp (“Rocky Mountain Power” or “Company”), hereby responds to the Division of Public Utilities’ Motion to Compel Responses to DPU’s Data Requests 46.7 and 46.8 (the “Motion”). Rocky Mountain Power opposes the Motion.

**I. INTRODUCTION**

In seeking to compel responses to its Data Requests, the Division of Public Utilities (“DPU”) misconstrues the Company’s discovery obligations in this case. It is firmly established

that a party's obligation in responding to discovery requests is to *produce* information, not create it. As the United States Supreme Court explained in *Hickman v. Taylor*, 329 U.S. 495, 507 (1947), in propounding discovery requests, "either party may compel the other to disgorge whatever *facts he has in his possession*." (Emphasis added.) Contrary to this well-settled and most basic principle, the DPU seeks to compel the Company to undertake a costly analysis and to create information that does not currently exist. The DPU's Motion should be denied.

Not only do the DPU's Data Requests exceed the permissible scope of discovery by seeking information that is not within the Company's possession, the discovery requests impose an undue burden on the Company. The burden imposed by the Data Requests is great and will require the Company's employees to spend a week's worth of time and effort to perform the requested analysis. The results of that analysis, however, would be of little to no utility in this rate case. The study parameters requested by the DPU are unrealistic and do not comport with the Commission's Approved Evaluation Methodology. Therefore, the results would not be probative to the Commission's determination as to the reasonableness of the Company's rates. Moreover, the DPU's Data Requests were not served in a timely manner, and the DPU offers no valid reason as to why it should be allowed to use the Company's responses in its testimony. Accordingly, the Commission should not compel the Company to respond to the DPU's Data Requests.

## **II. FACTUAL BACKGROUND**

1. In the Commission's order in Docket No. 10-035-126, the Commission adopted what is referred to as the "Approved Evaluation Methodology" for the economic evaluation of Apex.

2. Shortly thereafter, the DPU served its data requests 38.4 and 38.5 on the Company.

3. In response to those requests, the parties met and conferred and the Company identified concerns with the design of the study requested in DPU data requests 38.4 and 38.5, particularly with respect to the front office transaction (“FOT”) limits.

4. The Company agreed to provide an interim response by reporting the estimated level of FOT increase that would be required in 2016 to ensure load obligations could be satisfied. The Company did in fact provide this information to the DPU on June 2, 2011.

5. On June 8, 2011, the DPU served its Data Requests 46.7 and 46.8 on the Company (hereafter, the “Data Requests”).

6. The Company objected to the Data Requests on the following grounds:

(1) the Data Requests would require a special study that has not been previously performed and therefore is beyond the scope of proper discovery and unduly burdensome;

(2) the study requested in the Data Requests is not realistic because it requires the Company to make an assumption that exceeds firm transmission import limits and market depth assumptions for those markets that can be used to satisfy load;

(3) the study requested in the Data Requests does not comply with the Commission’s Approved Evaluation Methodology; and

(4) the Data Requests were untimely because any response from the Company would not come due until *after* the DPU’s deadline to file its direct testimony.

7. In the rebuttal testimony submitted by Gregory N. Duvall, Mr. Duvall explained why the Data Requests were flawed. He testified as follows:

The DPU requested that the Company provide a study in which Apex was excluded from the resource portfolio, that also excluded the Currant Creek 2 resource until *after* 2016, and that further would allow the System Optimizer model to select the amount and timing of resources to be procured *beyond* 2016. These study parameters would necessarily create a capacity shortfall in 2016 and would result in unserved load. That is, the study was set up to compare one scenario with Apex to another scenario that

not only excluded Apex, but also excluded any replacement resource to Apex, and instead assumes all of that future energy will be filled by spot-market purchases, or front office transactions (“FOTs”).

\* \* \*

It is unreasonable to design a study that artificially adds resources or market access that do not exist (such as Apex’s non-existent transmission) or knowingly fails to meet load (that is, does not allow Current Creek II or other resources to meet the resource need). Recognizing that there would be a capacity shortfall in 2016, the DPU requested that the study be completed by artificially relaxing FOT limits in 2016, and in the alternative, by allowing capacity shortfalls to be met with high cost unmet energy and unmet capacity.

The first alternative is not reasonable because it increases FOT limits beyond what is possible, given the Company’s firm transmission rights to trading hubs, and requires the model to assume market purchases at volumes in excess of the market depth at a given trading hub. As such, the relaxed FOT assumption does not reflect what the Company could or would reasonably do to meet its load obligations in 2016.

The second alternative that would allow capacity shortfalls to be met with unmet energy and unmet capacity is equally non-representative of what would actually occur in absence of Apex. When the Company anticipates a capacity shortfall, the Company issues an RFP to fill that shortfall with the most cost effective resource, adjusted for risk, that is in the public interest. The Company cannot plan to have unmet energy and unmet capacity as a cost effective alternative that is in the public interest due, in part, to its obligation to serve. Consequently, the unmet energy and unmet capacity assumption in the DPU study does not reflect reasonable resource alternatives and inappropriately assumes that Apex, and Apex alone, would offset unmet energy and unmet capacity costs in 2016. That is, the DPU assumes Apex is the Company’s only alternative to meeting future energy demand. That assumption is unreasonable and far from the truth.

(Redacted Rebuttal Testimony of Gregory N. Duvall, Docket No. 10-035-124 (Utah PSC June 30, 2011) (“Duvall Testimony”) at ll. 2576-2614.)

8. The Company estimates that it would take its employees a week to run the analysis requested in the Data Requests.

9. In this rate case to date, the Company has responded to 3,113 other data requests, including discrete subparts.

### III. ARGUMENT

#### A. THE DPU'S MOTION TO COMPEL SHOULD BE DENIED.

Rule 746-100-8(B) of the Utah Administrative Code states that discovery in proceedings before this Commission “shall be made in accordance with Rules 26 through 37, Utah Rules of Civil Procedure.” Rule 26 of the Utah Rules of Civil Procedure sets forth the appropriate parameters for discovery. Rule 26 provides that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Utah R. Civ. P. 26(b)(1). *See also Major v. Hills*, 980 P.2d 683, 684 n. 2 (Utah 1999) (refusing discovery of material which is irrelevant to determination of dispute). Rule 26 further provides that discovery should be limited when it is “unduly burdensome or expensive.” Utah R. Civ. P. 26(b)(3)(C). Here, the DPU Data Requests should not be allowed because they are overbroad, unduly burdensome and do not seek relevant information.<sup>1</sup>

##### 1. The DPU Data Requests Exceed the Scope of Permissible Discovery.

In responding to discovery requests, the responding party's obligation is straightforward and well settled: the party responding to discovery has an obligation to provide any nonprivileged responsive information that is within its possession. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947); *Trane Co. v. Klutznick*, 87 F.R.D. 473, 476 (W.D. Wis. 1980); Utah R. Civ. P. 33. Equally well settled is the tenet that the rules of civil procedure do *not* create an obligation for the responding party to create new information that does not already exist. *Trane Co.*, 87 F.R.D. at 476; *Hicks v. Arthur*, 159 F.R.D. 468, 470 (E.D. Pa. 1995); *Smallwood v. Collins*,

---

<sup>1</sup> Citing to Utah Code Ann. § 54-4a-1, the DPU argues that it has “independent statutory authority” to require the Company to provide data and other information. Section 54-4a-1 simply authorizes the DPU to engage in discovery and to require entities subject to the jurisdiction of the PSC to provide information relevant to the matters before the PSC. It does not provide a basis for the DPU to require the Company to undertake costly analyses, as the DPU seeks to do with its Data Requests.

2010 U.S. Dist. LEXIS 58294, \*7-8 (S.D. Ohio May 20, 2010); *La Chemise Lacoste v. Alligator Co.*, 60 F.R.D. 164, 171 (D. Del. 1973). Indeed, a party responding to discovery requests has no obligation to create documents, reports, or information, or to produce documents, reports, or information that are not within the responding party's possession, custody, or control. *Hicks*, 159 F.R.D. at 470; *Smallwood*, 2010 U.S. Dist. LEXIS 58294 at \*7-8; *La Chemise Lacoste*, 60 F.R.D. at 171.

Here, the information requested by the DPU does not exist and is not within the Company's possession, custody, or control. Therefore, under well-settled law, the Company is under no obligation to create the requested information. *Cf. Hicks*, 159 F.R.D. at 470 (holding that responding party was under no obligation to survey its employees in order to create information needed to respond to interrogatories); *Kolar v. Chamness Tech., Inc.*, 2009 U.S. Dist. LEXIS 74688, \*4-5 (D. Neb. Aug. 24, 2009) (holding that defendant was not obligated to interview its employees "or otherwise perform research" to respond to an interrogatory that sought information not readily available to the defendant).

In propounding the Data Requests, the DPU essentially seeks to have the Company's employees perform work for the DPU. This exceeds the permissible scope of discovery. *See Poulos v. Summit Hotel Props., LLC*, 2010 U.S. Dist. LEXIS 67080, \*5-6 (D.S.D. July 1, 2010) ("A litigant may not compel his adversary to go to work for him."); *Ransom v. Gray*, 2009 U.S. Dist. LEXIS 118793, \*8-9 (S.D. Cal. Dec. 21, 2009) (affirming objection to interrogatory that purported to require defendant's expert "do Plaintiff's work"); *L.H. v. Schwarzenegger*, 2007 U.S. Dist. LEXIS 73752 (E.D. Cal. Sept. 21, 2007) ("Discovery does not mean that a party should have to prepare the other party's case."); *Halder v. Int'l Tel. & Tel. Co.*, 75 F.R.D. 657, 658 (E.D.N.Y. 1977) (denying motion to compel answers to interrogatories where "even though the requested information is in defendant's control, he should not be forced to engage in

extensive research and compilation, particularly when the purpose of the effort is to assist plaintiff in the preparation of his case.”) (internal cites omitted). The DPU is free to use its employees or retained experts to perform the analysis that it desires, using the raw data that the Company has already provided. The DPU may not, however, force the Company’s employees to prepare the DPU’s case for it. *See* Utah R. Civ. P. 26(b)(3)(A) (noting that discovery may be limited where the information sought is obtainable from some other, less burdensome, source).

**2. The DPU’s Data Requests Do Not Seek Relevant Information.**

The DPU’s Motion should also be denied because the information sought is not relevant. As the Company explained in its response to the DPU’s Data Requests, the requested analysis contains unrealistic assumptions regarding transmission import limits and the markets that can be used by the Company to satisfy load. As Greg Duvall testified,

It is unreasonable to design a study that artificially adds resources or market access that do not exist (such as Apex’s non-existent transmission) or knowingly fails to meet load (that is, does not allow Current Creek II or other resources to meet the resource need). . . . The first alternative is not reasonable because it increases FOT limits beyond what is possible, given the Company’s firm transmission rights to trading hubs, and requires the model to assume market purchases at volumes in excess of the market depth at a given trading hub. As such, the relaxed FOT assumption does not reflect what the Company could or would reasonably do to meet its load obligations in 2016. The second alternative that would allow capacity shortfalls to be met with unmet energy and unmet capacity is equally non-representative of what would actually occur in absence of Apex. . . . Consequently, the unmet energy and unmet capacity assumption in the DPU study does not reflect reasonable resource alternatives and inappropriately assumes that Apex, and Apex alone, would offset unmet energy and unmet capacity costs in 2016.

(Duvall Test. II. 2589-2601.) Moreover, the DPU Data Requests do not comply with the Commission’s Approved Evaluation Methodology and the Commission has already stated that it will “give no weight” to the DPU’s requested analysis. (Report and Order, Docket No. 10-035-126 (Utah PSC April 20, 2011 at 22. *See also* Duvall Test. II. 2615-2617 (testifying that the DUP’s requested analyses are not consistent with the Commission’s Approved Evaluation Methodology).)

Tellingly, the DPU fails to identify any admissible evidence that the Company's responses to the Data Requests are likely to lead to. Although the DPU argues that the Company's responses will be relevant to "evaluating the Company's decision-making process," (Mot. 6.) this is false. Because the study requested by the DPU does not and has never existed, it sheds no light on the "Company's decision-making process." In short, the Company's responses will not lead to the discovery of admissible evidence.

The likely benefit of the Company's responses is further diminished by the fact that the Requests were not served in time for any response to be available for use in the DPU's direct testimony. The DPU's direct testimony was due by May 26, 2011, but the Data Requests were not served until May 9, 2011. The DPU attempts to pin the blame for this on the Company by arguing that the Company's failure to provide adequate responses to data requests 38.4 and 38.5 necessitated the later-served Data Requests 46.7 and 46.8. However, data requests 38.4 and 38.5 were served too late for their responses to be used in direct testimony. Furthermore, they were flawed and the Company could not respond to them. The Company promptly met and conferred with the DPU regarding this issue. The fact that the initial data requests were flawed does not mean that the DPU should now get a second bite at the apple. Simply put, the DPU offers no valid reason as to why it did not timely serve its Requests. Because the Data Requests do not seek relevant information and are untimely, the DPU is not entitled to responses.

### **3. The Burden of Responding Outweighs Any Likely Benefit.**

In light of the irrelevance of the DPU's Data Requests, the Commission should not impose the burden of responding to the Requests on the Company, as the burden greatly outweighs any probative value that the Company's responses could have. *See Unishippers Global Logistics, LLC v. DHL Express*, 2009 U.S. Dist. LEXIS 94844 (D. Utah Oct. 12, 2009) (noting that a court must limit discovery if it determines that the burden and expense of the



proposed discovery outweighs its likely benefit) (citing Fed. R. Civ. P. 26). To be sure, the burden imposed by the DPU's Data Requests is great. The Company will be required to devote nearly a week's worth of its employees time to perform the requested analysis. Meanwhile, the Company's employees are already occupied preparing for this case, and the Company has responded to 3,113 other discrete subparts to data requests. Because the DPU's Data Requests impose an undue burden on the Company, the Commission should not compel the Company to respond.

#### **IV. CONCLUSION**

For the foregoing reasons, Rocky Mountain Power respectfully requests that the Commission deny the DPU's Motion except for the portion of the Motion seeking expedited treatment.

DATED: July 20, 2011.

Respectfully submitted,

ROCKY MOUNTAIN POWER

---

Mark C. Moench  
Yvonne Hogle  
Rocky Mountain Power

Gregory B. Monson  
D. Matthew Moscon  
Stoel Rives LLP

*Attorneys for Rocky Mountain Power*

## CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2011, a true copy of the foregoing **REPLY OF ROCKY MOUNTAIN POWER TO UIEC'S UNAUTHORIZED RESPONSE** was served by email on the following:

Patricia Schmid  
Assistant Attorney General  
Heber M. Wells Bldg., 5th Floor  
160 East 300 South  
Salt Lake City, UT 84111  
[pschmid@utah.gov](mailto: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](mailto: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](mailto:ChrisParker@utah.gov)  
[wpowell@utah.gov](mailto:wpowell@utah.gov)  
[dennismiller@utah.gov](mailto: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](mailto:cmurray@utah.gov)  
[mbeck@utah.gov](mailto:mbeck@utah.gov)

Gary A. Dodge  
Hatch James & Dodge  
10 West Broadway, Suite 400  
Salt Lake City, UT 84101  
[gdodge@hjdllaw.com](mailto:gdodge@hjdllaw.com)

Kevin Higgins  
Neal Townsend  
Energy Strategies  
39 Market Street, Suite 200  
Salt Lake City, UT 84101  
[khiggins@energystrat.com](mailto:khiggins@energystrat.com)  
[ntownsend@energystrat.com](mailto: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](mailto:bobreeder@parsonsbehle.com)  
[vbaldwin@parsonsbehle.com](mailto:vbaldwin@parsonsbehle.com)  
[bevans@parsonsbehle.com](mailto: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](mailto:pjm@bbrslaw.com)  
[elacey@bbrslaw.com](mailto: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](mailto:ghk@pkhlawyers.com)  
[jrc@pkhlawyers.com](mailto:jrc@pkhlawyers.com)

Steven Michel  
Western Resource Advocates  
2025 Senda de Andres  
Santa Fe, NM 87501  
[smichel@westernresources.org](mailto:smichel@westernresources.org)

Nancy Kelly  
Western Resource Advocates  
9463 N. Swallow Rd.  
Pocatello, ID 83201  
[nkelly@ida.net](mailto:nkelly@ida.net)

Holly Rachel Smith, PLLC  
Hitt Business Center  
3803 Rectortown Road  
Marshall, VA 20115  
[holly@raysmithlaw.com](mailto:holly@raysmithlaw.com)

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

Kurt J. Boehm, Esq.  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, OH 45202  
[kboehm@BKLawfirm.com](mailto: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](mailto:Shayla.mcneill@tyndall.af.mil)  
[Karen.white@tyndall.af.mil](mailto:Karen.white@tyndall.af.mil)

Rob Dubuc  
Western Resource Advocates  
150 South 600 East, Suite 2A  
Salt Lake City, UT 84102  
[rdubuc@westernresources.org](mailto: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](mailto:smartinez@slcap.org)  
[bwolf@slcap.org](mailto:bwolf@slcap.org)

Ryan L. Kelly  
Kelly & Bramwell, P.C.  
11576 South State St. Bldg. 1002  
Draper, UT 84020  
[ryan@kellybramwell.com](mailto:ryan@kellybramwell.com)

Arthur F. Sandack  
8 East Broadway, Ste 510  
Salt Lake City, UT 84111  
[asandack@msn.com](mailto: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](mailto:brianburnett@cnmlaw.com)

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

Bruce Plenk  
Law Office of Bruce Plenk  
2958 N St Augustine Pl  
Tucson, AZ 85712  
[bplenk@igc.org](mailto:bplenk@igc.org)

Mike Legge  
US Magnesium LLC  
238 North 2200 West  
Salt Lake City, UT 84106  
[mlegge@usmagnesium.com](mailto:mlegge@usmagnesium.com)

Torry R. Somers  
CenturyLink  
6700 Via Austi Parkway  
Las Vegas, NV 89119  
[Torry.R.Somers@CenturyLink.com](mailto:Torry.R.Somers@CenturyLink.com)

Sarah Wright  
Executive Director  
Utah Clean Energy  
1014 2nd Avenue  
Salt Lake City, UT 84103  
[sarah@utahcleanenergy.org](mailto:sarah@utahcleanenergy.org)  
[kevin@utahcleanenergy.org](mailto:kevin@utahcleanenergy.org)  
[brandy@utahcleanenergy.org](mailto:brandy@utahcleanenergy.org)

Stanley K. Stoll  
Blackburn & Stoll, LC  
257 E. 200 South, Suite 800  
Salt Lake City, UT 84111  
[sstoll@blackburn-stoll.com](mailto:sstoll@blackburn-stoll.com)

Gloria D. Smith  
Sierra Club  
85 Second Street, Second floor  
San Francisco, CA 94105  
[gloria.smith@sierraclub.org](mailto:gloria.smith@sierraclub.org)

Janee Briesemeister  
AARP  
98 San Jacinto Blvd. Ste. 750  
Austin, TX 78701  
[jbriesemeister@aarp.org](mailto:jbriesemeister@aarp.org)

Roger Swenson  
US Magnesium LLC  
238 North 2200 West  
Salt Lake City, UT 84114-6751  
[roger.swenson@prodigy.net](mailto: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](mailto:bertelsens@ballardspahr.com)

Sophie Hayes  
Utah Clean Energy  
1014 Second Avenue  
Salt Lake City, UT 84103  
[sophie@utahcleanenergy.org](mailto:sophie@utahcleanenergy.org)