- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Investigation of the Costs and Benefits of PacifiCorp's Net Metering Program	DOCKET NO. 14-035-114 CONSOLIDATED ORDER DENYING DISPOSITIVE MOTIONS

ISSUED: February 23, 2017

The Division of Public Utilities, Office of Consumer Services and multiple intervenors filed eight dispositive motions, seeking summary disposition of the relief PacifiCorp dba Rocky Mountain Power ("PacifiCorp") seeks in its Compliance Filing and Request to Complete All Analyses Required under the Net Metering Statute for the Evaluation of the Net Metering Program ("Request"). For the following reasons, we deny the motions.

1. PROCEDURAL HISTORY AND BACKGROUND

The procedural history of this docket is long, complex and need not be fully summarized here.[1] For instant purposes, the following suffices.

On November 10, 2015, the Public Service Commission ("PSC") issued an Order in this docket ("2015 Order"), adopting a general framework for assessing the costs and benefits of net metering pursuant to Utah Code Ann. § 54-15-105.1. The 2015 Order required PacifiCorp to file "[n]o later than the date PacifiCorp files its next general rate case" two separate cost of service studies for the purpose of evaluating the costs and benefits of net metering. (2015 Order at 15-16.) One study was to constitute a counterfactual, capturing what PacifiCorp's cost of service would be if net metering customers produced no electricity and had their entire load served from

[1] Parties seeking additional context and procedural history are referred to the Public Service Commission's Order dated November 10, 2015 in this docket.

PacifiCorp's system. The other study was to reflect PacifiCorp's actual cost of service with net metering customers' participation in the system. Here, we collectively refer to the two cost of service studies as the "COS Studies."[2] The 2015 Order provided: "The period of time covered by each of the [COS Studies] shall be commensurate with the test period in PacifiCorp's next general rate case." (2015 Order at 16.)

On November 9, 2016, PacifiCorp filed its Request, which asks the PSC to (i) find the COS Studies submitted with the Request fulfill the requirements in the 2015 Order; (ii) find, based on the COS Studies, that the costs of the net metering program exceed the benefits under the extant rate structure; (iii) find that the unique characteristics of net metering customers warrant segregating them into a distinct class; (iv) find the current rate structure for net metering customers is unjust and unreasonable because it does not reflect the costs to serve these customers and unfairly shifts costs from net metering customers to other customers or to PacifiCorp; (v) approve new rates and schedules for net metering customers that PacifiCorp asserts are just and reasonable; and (vi) approve a waiver of Utah Admin. R. 746-312-13 to allow PacifiCorp to charge its proposed interconnection application fee for net metering customers. (Request at 2.)

On November 18, 2016, the PSC issued a Scheduling Order and Notices of Hearing and Public Witness Hearing, which established a December 20, 2016 deadline for filing dispositive motions as regards PacifiCorp's Request.

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[2] The 2015 Order contains additional instructions for PacifiCorp with respect to the preparation of the COS Studies, including directions concerning the illustration of costs at the system, state and customer class levels. *See* 2015 Order at 16.

The following parties filed dispositive motions, styled as described:

- The Office of Consumer Services ("Office") filed a Motion to Dismiss or in the Alternative Motion for Order to Show Cause ("Office's Motion");
- The Division of Public Utilities ("Division") filed a Motion for Partial Summary Judgment ("Division's Motion");
- Sunrun, Inc. and the Energy Freedom Coalition of America (collectively, "EFCA") filed a Motion to Dismiss ("EFCA's Motion");
- Vivint Solar, Inc. ("Vivint") filed a Motion to Dismiss ("Vivint's Motion");
- Western Resource Advocates ("WRA") filed a Motion to Dismiss ("WRA's Motion");
- The Utah Solar Energy Association ("USEA") filed a Motion to Dismiss, or in the Alternative, Summary Judgment ("USEA's Motion");
- Utah Clean Energy ("UCE") filed a Motion to Dismiss ("UCE's Motion"); and
- Sierra Club filed a Motion to Dismiss Rocky Mountain Power's Request for Single-Issue Rate Increase ("Sierra Club's Motion").[3]

We collectively refer to the foregoing parties as the "Moving Parties" and collectively to their motions as the "Motions."

The Motions raise substantially similar arguments and are generally predicated on the following premises: (i) the PSC may not, as a matter of law, set rates under Utah Code Ann.

[3] HEAL Utah submitted a Joinder to the Motions to Dismiss filed by UCE, WRA, Vivint, USEA and Sierra Club; Summit County filed a Joinder to the Motions to Dismiss filed by Vivint and UCE.

§ 54-15-105.1(2) outside of a general rate case;[4] (ii) the Request is deficient because it fails to comply with requirements in the 2015 Order;[5] (iii) the Request asks the PSC to engage in illegal "single-issue" and/or "retroactive" ratemaking;[6] (iv) PacifiCorp has not shown cause for a waiver of Rule 746-312-13 to impose a new application fee;[7] (v) PacifiCorp's proposal conflates subsections (1) and (2) of Utah Code Ann. § 54-15-105.1;[8] and (vi) the Request is substantively deficient.[9]

2. STANDARD OF REVIEW

The PSC has no administrative rule governing the standard applicable to motions to dismiss or motions for summary judgment. "In situations for which there is no provision in [the PSC's] rules, the Utah Rules of Civil Procedure … govern, unless the [PSC] considers them to be unworkable or inappropriate." Utah Admin. R. 746-100-1(c).

Except for the Division, which styled its motion as one for partial summary judgment, the Moving Parties all styled their motions as motions to dismiss.[10] None of them, save WRA and EFCA, addressed the standard to be applied in assessing the motions. For their part, WRA and

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[4] *See, e.g.*, Sierra Club's Motion at 3-6; Office's Motion at 4-12; USEA's Motion at 3-4; WRA's Motion at 7-12; UCE's Motion at 12-14; Division's Motion at 4-9.

[5] *See, e.g.*, Sierra Club's Motion at 2-3; Office's Motion at 3-4; USEA's Motion at 6-8; UCE's Motion at 6-8; Vivint's Motion at 3-5; EFCA's Motion at 5-7.

[6] *See, e.g.*, Sierra Club's Motion at 3-6; Office's Motion at 12-14; UCE's Motion at 8-12; Vivint's Motion at 5-9; EFCA's Motion at 7-14.

[7] USEA's Motion at 9-11.

[8] USEA's Motion at 4-6.

[9] USEA's Motion at 11-12.

[10] USEA styled its motion as a Motion to Dismiss, or in the Alternative, [for] Summary Judgment.

EFCA made their motions pursuant to Utah R. Civ. P. 12(b)(6), asserting the Request fails to state a claim upon which relief may be granted. WRA and EFCA agree with PacifiCorp the PSC must construe the Request in the light most favorable to PacifiCorp and indulge all reasonable inferences in its favor. (WRA Motion at 7 (citing *Mounteer v. Utah Power & Light Co.*, 823 P.2d 1055, 1058 (Utah 1991)); EFCA's Motion at 5; PacifiCorp's Opposition at 8.) PacifiCorp asserts the Division's motion for summary judgment should be granted only on a showing "that there is no genuine issue as to any material fact and the [Division] is entitled to a judgment as a matter of law." (PacifiCorp's Opposition at 8 (quoting *Kearns v. Salt Lake County Comm'n*, 2001 UT 55, ¶ 7, 28 P.3d 686).)

We conclude that we must evaluate the Motions to determine whether any demonstrates the movant is entitled to relief as a matter of law with all questions of fact being construed in PacifiCorp's favor. The reasonableness of PacifiCorp's proposal is a matter for hearing, currently scheduled for the week of August 14, 2017. At this juncture, we need only evaluate the Motions to determine whether any of them demonstrates PacifiCorp's Request should be disposed of as a matter of law.

3. FINDINGS AND CONCLUSIONS

a. We Conclude that Nothing in the Statute Suggests the Legislature Intended for the PSC to Abstain from Fulfilling Its Obligations Thereunder Until PacifiCorp Files a General Rate Case.

"Our primary objective when interpreting statutes is to give effect to the legislature's intent." *State v. Harker*, 2010 UT 56, ¶ 12, 240 P.3d 780 (quotations omitted). "To discern legislative intent, we look first to the statute's plain language." *Id.* "We read the plain language of

a statute as a whole and interpret its provisions in harmony with other statutes in the same chapter and related chapters." *Id.*

The Statute provides the PSC shall:

(1) determine, after appropriate notice and opportunity for public comment, whether costs that [PacifiCorp] or other customers will incur from a net metering program will exceed the benefits of the net metering program, or whether the benefits of the net metering program will exceed the costs; and

(2) determine a just and reasonable charge, credit, or ratemaking structure, including new or existing tariffs, in light of the costs and benefits.

Utah Code Ann. § 54-15-105.1 (hereafter we refer to § 54-15-105.1(1) as "Subsection One" and § 54-15-105.1(2) as "Subsection Two" and continue to refer to them collectively as "the Statute").

The Moving Parties argue that, notwithstanding this statutory language, net metered customers' rates may only be altered in the context of a general rate case pursuant to Utah Code Ann. § 54-7-12. (*See, e.g.*, Sierra Club's Motion at 3-6; Office's Motion at 4-12; USEA's Motion at 3-4; WRA's Motion at 7-12; UCE's Motion at 12-14; Division's Motion at 4-9.) PacifiCorp responds that "any statutory authorization allowing the [PSC] to review and determine rates or rate structures in a context other than a general rate case exempts them from the general rate case requirement." (PacifiCorp's Opposition at 18.) We conclude this proposition is self-evident and undisputed. No party asserts the legislature lacks the power to direct the PSC to make findings and adjust rates outside the context of a general rate case if it sees fit.

The issue then, is whether the legislature intended for the PSC to refrain from fulfilling its obligations under the Statute until and unless a general rate case is initiated. We conclude the answer is no.

First, while we have been careful to distinguish between the tasks set for us under Subsection One and Subsection Two, the legislature's reference to "appropriate notice and opportunity for public comment" in Subsection One suggests it contemplated the PSC might fulfill its duties under the Statute outside the context of a general rate case. Indeed, elsewhere, where the legislature has directed us to adjust rates in connection with a particular program, it has specified to do so in connection with a general rate case. *See* Utah Code Ann. § 54-7-13.6(6)(c) (requiring, with respect to the low-income assistance program, that "the monthly surcharge shall be adjusted concurrently with the final order in a general rate increase or decrease case under Section 54-7-12….") And, of course, the requirement to conduct a general rate case before adjusting rates is not universal: Title 54 expressly authorizes rate changes arising out of energy balancing accounts. *See* Utah Code Ann. § 54-7-13.5(4)(c). Because the only process the legislature wrote into the Statute involves "notice and opportunity for public comment" and because the legislature makes no reference to a "general rate case," the plain language strongly suggests it did not intend that we could only fulfill our duties under the Statute in a general rate case.

Additionally, we find the context of the Statute's passing supports our conclusion. The Statute passed during the 2014 General Session shortly after PacifiCorp filed its Application for General Rate Increase (*i.e.*, its last general rate increase), which among other things sought to

implement a facilities charge on net metering customers.[11] As they are now, the issues of the cost to serve net metering customers and the appropriate pricing for their services were matters of substantial controversy. In our view, the Statute constitutes the instructions and authority the legislature elected to give the PSC for the purpose of addressing these issues. As numerous parties have pointed out, as long as these issues remain unresolved, the rooftop solar market is operating under uncertainty and consumers are without accurate price signaling in deciding whether to invest in rooftop solar. These issues are better resolved sooner rather than later. If the legislature had intended for us to act only in the context of the then pending or a later filed general rate case, it could have made its intentions plain. Instead, we believe the legislature was responding to the specific circumstances and controversy surrounding net metering and empowered the PSC to act to resolve it.

Because we conclude the Statute does not require a general rate case for rate adjustments under Subsection Two to occur, we need not reach the parties' arguments relating to whether PacifiCorp's proposal constitutes a "program offering" and/or "deferred account" excepted from "base rates" under § 54-7-12.

[11] *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. 13-035-184, Application for General Rate Increase at 8.

b. We Conclude that the 2015 Order Does Not Render Action under Subsection Two Contingent on the Filing of a General Rate Case, and Whether PacifiCorp's Request Satisfies the 2015 Order is a Matter for Hearing.

As an initial matter, we read the Statute to impose an affirmative duty on the PSC to evaluate the costs and benefits of net metering and to adjust rates as those findings dictate. As the above discussion should make clear, we do not believe the legislature intended for us to wait for a general rate case to fulfill our obligations under the Statute. Evaluating the costs and benefits associated with net metering has proved to be a challenging and complex task. The parties and the PSC have been working toward a resolution in this docket since August 2014. While the process is necessarily arduous and time-consuming, much constructive progress has been made. PacifiCorp's Request moves the process forward.

Nevertheless, the Moving Parties argue we should dismiss or otherwise dispose of PacifiCorp's Request because it fails to comply with our 2015 Order. More specifically, they point to language in our 2015 Order assertedly directing PacifiCorp to use the test period for its next general rate case for purposes of preparing the COS Studies. The Moving Parties argue PacifiCorp failed to use such a test period, and therefore we should summarily deny the Request. (*See, e.g.,* Vivint's Motion at 3-5.) PacifiCorp responds by asserting that "[w]hen the [2015 Order] was issued, the [PSC] believed that a general rate case would be filed on or around January 2016, pursuant to [PacifiCorp's] stay out agreement in the settlement of the 2014 [General Rate Case]." (PacifiCorp's Opposition at 12.) PacifiCorp further argues that the PSC's primary purpose in issuing our directive to use the test period for the next general rate case was

to resolve the parties' disagreement about whether costs and benefits should be evaluated over the long or short term. (*Id.*)

In drafting the 2015 Order, the PSC expected — as the parties appear to have expected — that PacifiCorp could file a general rate case in early 2016.[12] Our determination to use a study period commensurate with the test period for the next general rate case was corollary to our conclusion that a short-term time horizon like that used to establish rates was the appropriate period for assessing costs and benefits, as opposed to a long, multi-decade period.

While we drafted the 2015 Order with the expectation PacifiCorp could file a general rate case in January 2016, our ordering paragraphs were careful not to take the issue for granted. Ordering Paragraph 4 states: "The period of time covered by each of the cost of service studies shall be *commensurate* with the test period in PacifiCorp's next general rate case." (2015 Order at 16 (emphasis added).) If we had intended to only consider COS Studies that exactly matched the period of those used in the next general rate case, we would have simply written "the period of time … *shall be* the test period in PacifiCorp's next general rate case." "Commensurate" is an adjective meaning "corresponding in size, extent, amount, or degree."[13] Our use of it was

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[12] *See* October 6, 2015 Hr'g Tr. at 8:6-16; 191:7-14; 278:5-12; *see also id.* at 100:15-21 (M. Beck testifying she believed the evidence for rate design would be determined in the next general rate case but qualifying belief because "the [PSC] has a lot of discretion, so if they want to define the proceeding in a different way or some interim proceeding, I think that would be within their ability"); *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. 13-035-184, Report and Order dated August 29, 2014 (approving stipulation for PacifiCorp to refrain from filing a general rate case until January 1, 2016).

[13] Merriam-Webster Online, *available at* https://www.merriam-webster.com/dictionary/commensurate.

deliberate. We understood that we have an independent duty to act under the Statute and that PacifiCorp's decision not to file a general rate case does not, on its face, suspend that duty. Therefore, we ordered PacifiCorp to use a "commensurate" time period to allow it some flexibility in the event a general rate case was not filed. Additionally, we directed PacifiCorp to file its COS Studies "[n]o later than the date [it] files its next general rate case" because we acknowledged the possibility PacifiCorp might seek to do so sooner. (2015 Order at 15-16.) Finally, we have repeatedly left open the possibility for addressing the mandates imposed by the Statute in a general rate case "or other appropriate proceeding."(2015 Order at 1.)

We understand the Moving Parties' argument that COS Studies that exactly match the test year of PacifiCorp's next general rate case would provide some analytical advantages. However, we conclude that our 2015 Order did not inexorably "tie" any action under the Statute to the next general rate case. To have done so would not have been consistent with the Statute. Although we do not believe our 2015 Order suggests otherwise, to the extent that it does, we expressly modify it.

We are not prejudging the adequacy of PacifiCorp's Request and its supporting materials. In their arguments, the Moving Parties allege numerous substantive deficiencies in PacifiCorp's proposal and underlying COS Studies, including but not limited to (i) temporal mismatch between data sets used for various elements of the COS Studies (*see, e.g.,* Sierra Club's Reply at 3-4; Vivint's Reply at 3-4); (ii) reliance on information that is not used in a general rate case (*see, e.g.*, USEA's Reply at 8); (iii) reliance on speculative assumptions (*id.*); and (iv) reliance on stale data (Office's Reply at 4). Whether these criticisms and others have merit and whether, if so, they are fatal to PacifiCorp's Request are fact-intensive matters to be determined at hearing. The tools

of discovery, adversarial testimony, and a thorough and developed record will assist with that determination. If parties perceive deficiencies in PacifiCorp's filing, they should use these tools, to the extent possible, to remedy them. At this juncture, however, we cannot hold without evidence and as a matter of law that PacifiCorp's Request contains substantive deficiencies that warrant summary disposition.

c. We Conclude that Neither the Single-Issue Ratemaking nor Retroactive Ratemaking Doctrines Entitle the Moving Parties to Summary Disposition.

Several of the Moving Parties argue PacifiCorp's Request violates common law ratemaking principles prohibiting "single-issue" and/or "retroactive" ratemaking, warranting dismissal. (*See, e.g.*, Sierra Club's Motion at 3-6; Office's Motion at 12-14; UCE's Motion at 8-12; Vivint's Motion at 5-9; EFCA's Motion at 7-14.)

We conclude that the argument pertaining to single-issue ratemaking largely amounts to a reassertion that Subsection Two rates may not be adjusted outside of a general rate case. (*See, e.g.*, Office's Motion at 12 (arguing that "every [aspect other than the proposal to defer excess revenue] violates the prohibition against single issue ratemaking").) We understand and acknowledge the general prohibition against single-issue ratemaking. Under circumstances where the legislature has not directed otherwise, a utility may not seek to adjust rates based on isolated issues without considering all relevant costs and revenues. However, as we have already explained (*supra* at 6-8) we understand the Statute to direct us to take specific action (*i.e.*, assess costs and benefits of net metering and determine a fair ratemaking structure) with respect to one specific issue (*i.e.*, net metering). We conclude that to apply the single-item ratemaking doctrine on a *prima facie* basis and deny the Request would subvert the Statute.

With respect to concerns about "retroactive" ratemaking, the Utah Supreme Court has articulated the rule: "To provide utilities with some incentive to operate efficiently, they are generally not permitted to adjust their rates retroactively to compensate for unanticipated costs or unrealized revenues." *Utah Dep't of Bus. Regulation v. Public Serv. Comm'n*, 720 P.2d 420, 420 (Utah 1986). Here, the Moving Parties argue that PacifiCorp's proposed deferred accounting of net metered customers' revenues violates the doctrine. (*See, e.g.*, Vivint's Motion at 7.) PacifiCorp argues its Request does no such thing because it "does not seek to make up for any lost revenue in the past" rather "[i]t seeks a prospective rate structure that will recover costs currently incurred." (PacifiCorp's Opposition at 27.)

While we reserve judgment on the application of deferred accounting treatment to new net metered customer revenues until after a full factual record is developed, we conclude that PacifiCorp's proposed prospective rate structure is distinguishable from circumstances where the retroactive ratemaking doctrine is generally applicable. We understand PacifiCorp's proposal, ultimately, to be revenue neutral to PacifiCorp. Therefore, it does not, on its face, seek to compensate PacifiCorp for "unanticipated costs or unrealized revenues." Further, the circumstances are distinguishable from the typical rate setting context because we have a specific legislative directive to act with respect to net metering.

For the foregoing reasons, we conclude that no Moving Party has demonstrated PacifiCorp's Request fails as a matter of law.

d. We Conclude that Although the PSC Must Complete Different Tasks under Subsection One and Subsection Two, Nothing in the Statute or Prior PSC Order Precludes the PSC from Undertaking Both in the Same Docket.

USEA cites our July 1, 2015 order in this docket to highlight our prior emphasis on the distinction between the tasks we must complete under Subsection One and Subsection Two of the Statute. (USEA's Motion at 4-6.) USEA is correct that we have distinguished the task of assessing the costs and benefits of net metering (Subsection One) from the task of imposing a just and reasonable charge, credit or ratemaking structure in light of those costs and benefits (Subsection Two). Specifically, we have concluded that whatever discretion we have in setting "just and reasonable" rates under Subsection Two does not apply to the objective, quantitative analysis the legislature tasked us to perform under Subsection One. (July 1, 2015 Order at 11.)

However, nothing in the Statute nor our prior orders precludes us from endeavoring to complete both tasks under the umbrella of a single docket or a single request within that docket. We must make separate findings under both subsections, but we are confident we can objectively make our Subsection One findings before moving on to make any conclusions under Subsection Two. We conclude that PacifiCorp's inclusion of a request for findings under both subsections of the Statute is not grounds for dismissing the Request.

e. We Find that Material Questions of Fact Exist as to the Propriety of PacifiCorp's Request for a Waiver of Rule 746-312-13 that Preclude Summary Disposition.

Rule 746-312-3(2) permits us to waive any provision of the interconnection rules contained in Rule 746-312 upon a showing of "good cause." PacifiCorp seeks a waiver of Rule 746-312-13 that otherwise precludes Level 1 interconnection application fees in order to

implement its proposed interconnection application fee for net metering customers. USEA argues PacifiCorp has failed to show good cause in its Request and requests summary denial. (USEA's Motion at 10-11.) PacifiCorp responds that its request is supported by ample evidence, including testimony that an application fee for net metering interconnection removes a significant amount of the cost of net metering from the cost included in its proposed rates for new net metering customers. (PacifiCorp's Opposition at 33.)

We find a material question of fact continues to exist with respect to whether good cause exists to grant PacifiCorp's request for waiver. Accordingly, we deny USEA's request for summary disposition of this issue.

f. We Conclude that Dispositive Motion Briefing in this Docket is Not an Appropriate Procedural Mechanism to Request the PSC Order PacifiCorp to File a General Rate Case.

The Office styled its motion as a "Motion to Dismiss or in the Alternative Motion for Order to Show Cause" and included two paragraphs near the end of its motion seeking the alternate relief that we order PacifiCorp to file a general rate case. (Office's Motion at 1, 16-17.)[14]

We deny the Office's motion for an order to show cause. This docket is already encumbered with significant complexity, and dispositive motion practice in this docket is not an appropriate procedural mechanism for the Office to seek the opening of a general rate case. A general rate case is a logistically massive undertaking with potentially significant outcomes for consumers and PacifiCorp. If the Office believes a general rate case is appropriate and should be

[14] Other parties, such as WRA, suggest a general rate case would be appropriate but have not requested the PSC initiate one. (*See, e.g.*, WRA's Motion at 18.)

initiated, it may file a request for agency action that properly outlines the legal and factual basis for the request.

4. Conclusion and Order

For the foregoing reasons, we deny the Motions. Additionally, we deny the Office's Motion for Order to Show Cause.

We conclude that this Order does not constitute final agency action pursuant to Utah Code Ann. § 63G-4-301, *et seq*.

DATED at Salt Lake City, Utah, February 23, 2017.

/s/ Michael J. Hammer
Presiding Officer

Approved and Confirmed February 23, 2017, as the Order of the Public Service Commission of Utah.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
DW#291848

CERTIFICATE OF SERVICE

I CERTIFY that on February 23, 2017, a true and correct copy of the foregoing was delivered upon the following as indicated below:

By Electronic-Mail:

Robert C. Lively (bob.lively@pacificorp.com)
Yvonne R. Hogle (yvonne.hogle@pacificorp.com)
Daniel E. Solander (daniel.solander@pacificorp.com)
Rocky Mountain Power

D. Matthew Moscon (dmmoscon@stoel.com)
Attorney for Rocky Mountain Power

Data Request Response Center (datarequest@pacificorp.com)
PacifiCorp

Bruce M. Plenk (solarlawyeraz@gmail.com)
Thadeus B. Culley (tculley@kfwlaw.com)
Counsel for The Alliance for Solar Choice

Michael D. Rossetti (mike_rossetti@ucare.us.org)

Stanley T. Holmes (stholmes3@xmission.com)

Casey Roberts (casey.roberts@sierraclub.org)
Travis Ritchie (travis.ritchie@sierraclub.org)
Derek Nelson (derek.nelson@sierraclub.org)
Sierra Club

Sophie Hayes (sophie@utahcleanenergy.org)
Sarah Wright (sarah@utahcleanenergy.org)
Kate Bowman (kate@utahcleanenergy.org)
Utah Clean Energy

Tyler Poulson (tyler.poulson@slcgov.com)
Salt Lake City Corporation

Gary A. Dodge (gdodge@hjdlaw.com)
Hatch, James & Dodge

Kevin Higgins (khiggins@energystrat.com)
Neal Townsend (ntownsend@energystrat.com)
Energy Strategies

Elias Bishop (ebishop@utsolar.org)
Chad Hofheins (chad@synergypowerpv.com)
Utah Solar Energy Association

David L. Thomas (dthomas@summitcounty.org)
Summit County Attorney

Stephen F. Mecham (sfmecham@gmail.com)

Jerold G. Oldroyd (oldroydj@ballardspahr.com)
Theresa A. Foxley (foxleyt@ballardspahr.com)
Ballard Spahr LLP

Peter J. Mattheis (pjm@bbrslaw.com)
Eric J. Lacey (elacey@bbrslaw.com)
Brickfield, Burchette, Ritts & Stone, P.C.

Jeremy R. Cook (jrc@pkhlawyers.com)
Parsons Kinghorn Harris, P.C.

William J. Evans (bevans@parsonsbehle.com)
Vicki M. Baldwin (vbaldwin@parsonsbehle.com)
Parsons Behle & Latimer

Roger Swenson (roger.swenson@prodigy.net)
E-Quant Consulting LLC

David Wooley (dwooley@kfwlaw.com)
Keyes, Fox & Wiedman LLP

Arthur F. Sandack, Esq (asandack@msn.com)
IBEW Local 57

Kurt J. Boehm, Esq. (kboehm@BKLlawfirm.com)
Jody Kyler Cohn, Esq. (Jkylercohn@BKLlawfirm.com)
Boehm, Kurtz & Lowry

Brian W. Burnett, Esq. (bburnett@kmclaw.com)
Kirton McConkie

Stephen J. Baron (sbaron@jkenn.com)
J. Kennedy & Associates

Sophie Hayes (sophie@utahcleanenergy.org)
Utah Clean Energy

Capt Thomas A. Jernigan (Thomas.Jernigan@us.af.mil)
Mrs. Karen White (Karen.White.13@us.af.mil)
USAF Utility Law Field Support Center

Meshach Y. Rhoades, Esq. (rhoadesm@gtlaw.com)
Greenberg Traurig

Steve W. Chriss (Stephen.Chriss@wal-mart.com)
Wal-Mart Stores, Inc.

Anne Smart (anne@allianceforsolarchoice.com)
The Alliance for Solar Choice

Meshach Y. Rhoades, Esq. (rhoadesm@gtlaw.com)
Greenberg Traurig

Christine Brinker (cbrinker@swenergy.org)
Southwest Energy Efficiency Project

Michael Shea (michael@healutah.org)
Heal Utah

Jennifer Gardner (jennifer.gardner@westernresources.org)
Nancy Kelly (nkelly@westernresources.org)
Western Resource Advocates

Bruce M. Plenk (solarlawyeraz@gmail.com)
The Energy Freedom Coalition of America

Thadeus B. Culley (tculley@kfwlaw.com)
James M. Van Nostrand (jvannostrand@kfwlaw.com)
Keyes & Fox, LLP

Elias Bishop (elias.bishop@auricsolar.com)
Auric Solar, LLC

Donald H. Hansen (dhansen@slco.org)
Jennifer Bailey (jenbailey@slco.org)
Salt Lake County

Rick Gilliam (rick@votesolar.org)
Vote Solar

Thadeus B. Culley (tculley@kfwlaw.com)
James M. Van Nostrand (jvannostrand@kfwlaw.com)
Keyes & Fox, LLP

Bruce M. Plenk (solarlawyeraz@gmail.com)

Thomas A. Daley (tdaley@parkcity.org)
Luke Cartin (luke.cartin@parkcity.org)
Park City Municipal Corporation

Nathan K. Fisher (nathanf@fisherhunterlaw.com)
Fisher & Hunter, LLC

Dale Crawford (dale@imwindandsolar.com)
Doug Shipley (doug@imwindandsolar.com)
Mark Allred (mark@imwindandsolar.com)
Mark Richards (markrichards@imwindandsolar.com)
Doug Vause (dougvause@imwindandsolar.com)
Intermountain Wind and Solar, LLC

Patricia Schmid (pschmid@utah.gov)
Justin Jetter (jjetter@utah.gov)
Robert Moore (rmoore@utah.gov)
Steven Snarr (ssnarr@utah.gov)
Assistant Utah Attorneys General

Erika Tedder (etedder@utah.gov)
Division of Public Utilities

By Hand-Delivery:

Office of Consumer Services
160 East 300 South, 2nd Floor
Salt Lake City, UT 84111

_____
Administrative Assistant