

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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In the Matter of the Investigation of the  
Costs and Benefits of PacifiCorp's Net  
Metering Program

DOCKET NO. 14-035-114

NOTICE OF CLARIFICATION RE:  
UTAH ASSOCIATION OF ENERGY  
USERS' INITIAL COMMENTS

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ISSUED: July 31, 2017

On June 8, 2017, the deadline for the filing of written direct testimony in this docket, the Utah Association of Energy Users ("UAE") filed a document styled Initial Comments on Rocky Mountain Power's Compliance Filing ("Initial Comments"). UAE represented it "is filing unsworn comments rather than testimony given that its comments are legal in nature and do not lend themselves as well to factual or expert testimony." UAE further represented it filed the Initial Comments "on the direct testimony [due] date to give parties an opportunity to respond." UAE asks the Public Service Commission ("PSC") to consider the Initial Comments "as it would unsworn public testimony or a legal brief." UAE has been granted intervention and is a party to this docket.

On July 25, 2017, PacifiCorp dba Rocky Mountain Power ("PacifiCorp") filed a Request for Clarification re UAE's Filing ("Request"). In the Request, PacifiCorp argues the following: (i) as a party, UAE is not permitted to file "unsworn public testimony" under R746-1-704; (ii) UAE's Initial Comments constitute an untimely and impermissible legal brief in contravention of the PSC's Scheduling Order<sup>1</sup> and R746-1-401(1); and (iii) UAE's Initial Comments are not sponsored by any witness and cannot constitute testimony even though the document was filed

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<sup>1</sup> For convenience, this order refers to the adjudication schedule established in the PSC's November 18, 2016 Scheduling Order and Notices of Hearing and Public Witness Hearing as amended on July 14 and July 21, 2017, collectively as the "Scheduling Order."

on the due date for written direct testimony. Nevertheless, PacifiCorp does not ask the PSC to strike or disregard the Initial Comments but rather asks the PSC to clarify how it intends to treat the Initial Comments and "how, if at all, it would like [PacifiCorp] to respond." Additionally, PacifiCorp requests the PSC amend the Scheduling Order to allow an opportunity for post-hearing legal briefs and set due dates for such briefing.

No party requested the opportunity to file a pre-hearing brief (aside from briefing on dispositive motions) at the November 9, 2016 scheduling conference in this docket. Consequently, the Scheduling Order does not include any provisions for pre-hearing briefs. UAE could have either participated in the dispositive briefing schedule earlier in the docket or sought leave to file a pre-hearing brief. UAE did neither.

UAE asks us to consider its Initial Comments to be either "a legal brief" or "unsworn public testimony." UAE's Initial Comments address both a legal issue (related to the interpretation of statutory definitions) and a factual issue (related to Schedule 6 and Schedule 8 customers). We decline to consider the Initial Comments as a legal brief. Under R746-1-401, legal briefs are allowed "as required" in a scheduling order. The current scheduling order in this docket does not contemplate legal briefing at this stage of the docket, but allowed for extensive motion practice on legal issues earlier in the docket. UAE has not requested that the Scheduling Order be modified to allow for legal briefing in addition to those motion practice deadlines.

With respect to considering the Initial Comments as unsworn comments or testimony, R746-1-704 provides "[a] person *not a party to a docket* may ... file comments prior to hearing." (Emphasis added.) Although the rule does not state "only" a party may do so, PacifiCorp argues

the rule effectively precludes a party from filing such comments (as characterized here, "unsworn public testimony").

PacifiCorp has not moved to strike UAE's filing. We conclude that the language of R746-1-704 that permits unsworn public comments or testimony by a nonparty does not also act to prohibit unsworn public comments or testimony by a party who has been granted intervention.<sup>2</sup> We additionally conclude that parties are not likely to be prejudiced at hearing by the Initial Comments because under R746-1-704 and Utah Code Ann. §§ 63G-4-206 and -208, unsworn comments or testimony function as admissible hearsay evidence, upon which a contested finding of fact may NOT be solely based. Therefore, we accept the Initial Comments as unsworn public comments or testimony.

If any party believes post-hearing briefing is necessary to address arguments raised in UAE's Initial Comments or otherwise, we will take up the matter at the conclusion of the hearing.<sup>3</sup> In the meantime, we do not expect any party to file a response to UAE's Initial Comments.

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<sup>2</sup> We recognize that this interpretation of R746-1-704 potentially allows intervening parties to manipulate our processes. We also conclude that the rights accompanying intervention also should carry obligations with respect to our scheduling orders. Therefore, we intend to publish in short order a proposed rule change that, if enacted, will prohibit a party who has been granted intervention from filing any public comment or legal briefing outside the parameters of the scheduling order.

<sup>3</sup> We are mindful of PacifiCorp's request to amend the Scheduling Order with deadlines for such briefing. The parties will better understand at the conclusion of hearing what, if any, issues require post-hearing briefs, and we would prefer to receive input from the parties with respect to such a schedule. Therefore, we decline to unilaterally impose one now.

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DATED at Salt Lake City, Utah, July 31, 2017.

/s/ Michael J. Hammer  
Presiding Officer

Approved and Confirmed as the Order of the Commission, July 31, 2017.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg  
Commission Secretary  
DW#295622

CERTIFICATE OF SERVICE

I CERTIFY that on July 31, 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](mailto:bob.lively@pacificorp.com))  
Yvonne R. Hogle ([yvonne.hogle@pacificorp.com](mailto:yvonne.hogle@pacificorp.com))  
Daniel E. Solander ([daniel.solander@pacificorp.com](mailto:daniel.solander@pacificorp.com))  
Rocky Mountain Power

D. Matthew Moscon ([dmmoscon@stoel.com](mailto:dmmoscon@stoel.com))  
Attorney for Rocky Mountain Power

Data Request Response Center ([datarequest@pacificorp.com](mailto:datarequest@pacificorp.com))  
PacifiCorp

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

Michael D. Rossetti ([mike\\_rossetti@ucare.us.org](mailto:mike_rossetti@ucare.us.org))

Stanley T. Holmes ([stholmes3@xmission.com](mailto:stholmes3@xmission.com))

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

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

Tyler Poulson ([tyler.poulson@slcgov.com](mailto:tyler.poulson@slcgov.com))  
Salt Lake City Corporation

Gary A. Dodge ([gdodge@hjdllaw.com](mailto:gdodge@hjdllaw.com))  
Hatch, James & Dodge

Kevin Higgins ([khiggins@energystrat.com](mailto:khiggins@energystrat.com))  
Neal Townsend ([ntownsend@energystrat.com](mailto:ntownsend@energystrat.com))  
Energy Strategies

Chad Hofheins ([chad@synergypowerpv.com](mailto:chad@synergypowerpv.com))  
Utah Solar Energy Association

David L. Thomas ([dthomas@summitcounty.org](mailto:dthomas@summitcounty.org))  
Summit County Attorney

Stephen F. Mecham ([sfmecham@gmail.com](mailto:sfmecham@gmail.com))

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

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

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

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

Roger Swenson ([roger.swenson@prodigy.net](mailto:roger.swenson@prodigy.net))  
E-Quant Consulting LLC

David Wooley ([dwooley@kfwlaw.com](mailto:dwooley@kfwlaw.com))  
Keyes, Fox & Wiedman LLP

Arthur F. Sandack, Esq. ([asandack@msn.com](mailto:asandack@msn.com))  
IBEW Local 57

Kurt J. Boehm, Esq. ([kboehm@BKLawfirm.com](mailto:kboehm@BKLawfirm.com))  
Jody Kyler Cohn, Esq. ([Jkylercohn@BKLawfirm.com](mailto:Jkylercohn@BKLawfirm.com))  
Boehm, Kurtz & Lowry

Brian W. Burnett, Esq. ([bburnett@kmclaw.com](mailto:bburnett@kmclaw.com))  
Kirton McConkie

Stephen J. Baron ([sbaron@jkenn.com](mailto:sbaron@jkenn.com))  
J. Kennedy & Associates

Sophie Hayes ([sophie@utahcleanenergy.org](mailto:sophie@utahcleanenergy.org))  
Utah Clean Energy

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

Meshach Y. Rhoades, Esq. ([rhoadesm@gtlaw.com](mailto:rhoadesm@gtlaw.com))  
Greenberg Traurig

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

Anne Smart ([anne@allianceforsolarchoice.com](mailto:anne@allianceforsolarchoice.com))  
The Alliance for Solar Choice

Meshach Y. Rhoades, Esq. ([rhoadesm@gtlaw.com](mailto:rhoadesm@gtlaw.com))  
Greenberg Traurig

Christine Brinker ([cbrinker@swenergy.org](mailto:cbrinker@swenergy.org))  
Southwest Energy Efficiency Project

Michael Shea ([michael@healutah.org](mailto:michael@healutah.org))  
Heal Utah

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

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

Thadeus B. Culley ([tculley@kfvlaw.com](mailto:tculley@kfvlaw.com))  
James M. Van Nostrand ([jvannostrand@kfvlaw.com](mailto:jvannostrand@kfvlaw.com))  
Keyes & Fox, LLP

Elias Bishop ([elias.bishop@auricsolar.com](mailto:elias.bishop@auricsolar.com))  
Auric Solar, LLC

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

Rick Gilliam ([rick@votesolar.org](mailto:rick@votesolar.org))  
Vote Solar

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

Nathan K. Fisher ([nathanf@fisherhunterlaw.com](mailto:nathanf@fisherhunterlaw.com))  
Fisher & Hunter, LLC

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

Daniel Mach ([danielmach@quinnemanuel.com](mailto:danielmach@quinnemanuel.com))  
Jennifer Selendy ([jenniferselendy@quinnemanuel.com](mailto:jenniferselendy@quinnemanuel.com))  
Quinn Emanuel Urquhart & Sullivan, LLP

Patricia Schmid ([pschmid@agutah.gov](mailto:pschmid@agutah.gov))  
Justin Jetter ([jjetter@agutah.gov](mailto:jjetter@agutah.gov))  
Robert Moore ([rmoore@agutah.gov](mailto:rmoore@agutah.gov))  
Steven Snarr ([stevensnarr@agutah.gov](mailto:stevensnarr@agutah.gov))  
Assistant Utah Attorneys General

Erika Tedder ([etedder@utah.gov](mailto:etedder@utah.gov))  
Division of Public Utilities

By Hand-Delivery:

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

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Administrative Assistant