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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power for Approval of a Significant Energy Resource Decision and Voluntary Request for Approval of a Resource Decision	Docket No. 17-035-40 Utah Industrial Energy Consumers’ Reply in Support of Its Motion to Stay Proceedings
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The “Utah Industrial Energy Consumers”¹ (“UIEC”) hereby reply to Rocky Mountain Power’s (“RMP”) Response to the UIEC Motion to Stay Proceedings (“UIEC Motion”) in Docket No. 17-035-40 (“Docket”) filed on 10 October 2017 (“RMP Response”). UIEC timely files this reply under Utah Administrative Code R746-1-301(2).

UIEC, now joined by the Utah Association of Energy Users (“UAE”)² and the Office of Consumers Services (“OCS”),³ requested the Utah Public Service Commission (“Commission”) to stay all activity and timelines in the Docket and extend the review period because RMP’s

¹ For purposes of this Reply in Support of Its Motion to Stay, the UIEC is a reference, for convenience only, of Kennecott Utah Copper LLC, Tesoro Refining & Marketing Company LLC, LafargeHolcim Ltd., and Post Consumer Brands, LLC, as Petitioners for Intervention in Utah P.S.C. Docket No. 17-035-40.

² Utah Association of Energy Users’ Joinder in UIEC’s Motion to Stay Proceedings and OCS’s Response In Support, In the Matter of the Application of Rocky Mountain Power For Approval of a Significant Energy Resource Decision and Voluntary Request for Approval of Resource Decision, Utah P.S.C. Docket No. 17-035-40 (“UAE’s Joinder”).

³ Response to the Utah Industrial Energy Consumers’ Motion to Stay Proceedings, In the Matter of the Application of Rocky Mountain Power For Approval of a Significant Energy Resource Decision and Voluntary Request for Approval of Resource Decision, Utah P.S.C. Docket No. 17-035-40 (“OCS Response”).

application failed to comply with the requirements of the Energy Resource Procurement Act (“Act”);⁴ because the concurrent review of a hypothetical resource decision precludes a full and fair review of the ultimate resource decision, if any; and because RMP, rather than customers, should absorb the risk associated with “time-critical” related pressures pertinent to RMP’s planning and procedure decisions.

RMP’s Response claims that the scheduling order implicitly incorporates a Commission decision on the sufficiency of the application and that UIEC and other parties are barred from requesting that the Commission provide relief from RMP’s infirm and legally deficient application for approval. RMP’s claims are neither supported by the Docket’s record nor the law. Accordingly, and for the reasons presented below, UIEC requests that the Commission grant UIEC’s Motion.

I. RMP’S REQUEST FOR APPROVAL THAT PORTENDS TO SUBMIT AT SOME FUTURE TIME INFORMATION LEGALLY REQUIRED TO BE SUBMITTED WITH THE APPLICATION DOES NOT COMPLY WITH THE LEGAL AND REGULATORY REQUIREMENTS OF THE ENERGY RESOURCE PROCUREMENT ACT AND THE COMMISSION’S RULES.

The Company’s Application fails to satisfy the requirements of the Act and rules. As noted by UIEC and UAE, and undisputed by RMP, the legislature provides a procedure for a utility to make “time-critical” resource decisions.⁵ RMP admits it elected not to avail itself of this process.⁶ RMP’s Response fails to demonstrate how ignoring this mechanism in favor of a compressed and inappropriate process driven by its incomplete application promotes the public interest and avoids

⁴ Utah Code Ann. §§ 54-17-101 – 806.

⁵ See UIEC Motion at 10; UAE Joinder at 2; see also Utah Code Ann. §§ 54-17-501 – 17-502.

⁶ See UIEC Motion at 10; UAE Joinder at 2; RMP Response at 10.

prejudicing the rights of parties. RMP's efforts in this Docket frustrate the transparent process mandated by law.⁷

Without a waiver of the solicitation process, the Act requires RMP to file a request for approval with the Commission.⁸ And that request "shall include any information required by the commission by rule[.]"⁹ The Commission's rule, promulgated in 2007, provides:

(1) Filing Requirements: *When an Affected Utility files a request to approve a Significant Energy Resource pursuant to Section 54-17-302, the utility shall include with its request the following:*

(a) Information to demonstrate the utility *has complied* with the requirements of the Energy Resource Procurement Act and Commission Rules;

* * *

(c) Information regarding the solicitation process, if the Significant Energy Resource *was solicited* through a solicitation process, including but not limited to:

(i) Summaries of all bids *received*:

* * *

(iv) a copy of the complete Commission *approved* Solicitation . . . ;

(v) A signed acknowledgment from a utility officer involved in the solicitation that to the best of his or her knowledge, the utility *has fully observed and complied* with the requirements of the

⁷ Because the Act provides for a mechanism to facilitate "time-critical" resource decisions, the Commission need not, and should not, attempt to revise the legislature's process for a Significant Energy Resource Approval to accommodate a purported "time-critical" decision. This is especially true when, as in this Docket, the time pressures are a direct result of RMP's planning and actions. See UIEC Motion to Stay at 9-11; see also Division of Public Utilities ("DPU") Reply to Responses to UIEC's Motion to Stay, 2-3 In the Matter of the Application of Rocky Mountain Power For Approval of a Significant Energy Resource Decision and Voluntary Request for Approval of Resource Decision, Utah P.S.C. Docket No. 17-035-40 (describing how RMP's actions that began long before this Docket "could be said to be inconsistent with the transparent, robust process which is a hallmark of the regulatory paradigm[.]")

⁸ Utah Code Ann. § 54-17-302(1).

⁹ *Id.* § 54-17-302(2)(b) (emphasis added).

Commission’s rules or statutes applicable to the solicitation process[.]¹⁰

The word “shall” in both the statute and the rule imposes an affirmative obligation on RMP to submit the information required by the rule.¹¹ “When construing a statute or a rule, “the best evidence of . . . intent is the plain language[.]”¹² The Rule’s use of the present tense: “*when ... files*” combined with the rule’s use of past tense: “*has complied,*” “*was solicited,*” “*received,*” “*has fully observed and complied*” requires that the solicitation process be completed by the time the request is filed.¹³ There is nothing in the rule, incorporated by reference into the statute, to suggest that the utility *may* re-write the law by supplementing its incomplete application sometime in the future if and when the required information becomes available.¹⁴

By RMP’s own admission, its application did not comply with the law: “[t]he Company’s supplemental filing *following the conclusion* of the 2017R RFP process *will demonstrate compliance with the Commission’s solicitation process.*”¹⁵ *Will demonstrate compliance* is far from *has fully observed and complied*. RMP’s failure to comply with the legal requirements of

¹⁰ Utah Admin. Code R746-430-2(1) (emphasis added). The initially proposed rule merely required “Copies of all solicitation documents” and the current language requiring submission of information available only after the solicitation process is complete was inserted after the Commission received public comments. *See Utah State Bulletin*, 146, April 1, 2007, Vol. 2007, No.7. This change further demonstrates the solicitation process must be complete before the filing of the application for approval.

¹¹ *See Board of Education of the Granite School District v. Salt Lake County*, 659 P.2d 1030, 1035 (Utah 1983) (“[S]hall” ... is usually presumed mandatory and has been interpreted as such previously in this and other jurisdictions” (citing *Herr v. Salt Lake Cty., Utah*, 525 P.2d 728 (Utah 1974); *State v. Zeimer*, 347 P.2d 1111 (Utah 1960); *Swift v. Smith*, 119 Colo. 126, 201 P.2d 609 (Colo. 1948)).

¹² *Scott v. Scott*, 2017 UT 66, ¶ 22 (internal citations omitted); *see also Nebeker v. Summit Cty.*, 2014 UT App 244, ¶ 37, 338 P.3d 203, 216 (“When construing a statute or a rule, we assume that the legislature used each term in the statute advisedly[.]”).

¹³ *See e.g., Scott*, 2017 UT 66, ¶¶ 23-24 (looking at the “typical understanding” of “is” as a present tense verb to conclude that “is” necessarily means a present or ongoing condition); *Prows v. Labor Commission*, 2014 UT App 196, 2014 UT App 196, ¶ 11, 333 P.3d 1261 (“Accordingly, we assume that the legislature used ‘is’ here as a present-tense verb.”).

¹⁴ As OCS stated, “[o]f course, summaries, rankings and evaluations of bids will not be available until the end of the solicitation proceedings.” OCS Response at 2.

¹⁵ RMP Application at 13.

the Act directly contradicts RMP's assertion that "the Company's testimony and this Application demonstrate compliance with the Commission's administrative rules[.]"¹⁶ At best, parties and interested stakeholders were misled by RMP's incomplete and non-compliant application.¹⁷

The Commission should enforce the Act and regulations. RMP's application abuses the statutory process. Late filing of the information required in the initial application does not satisfy the legal requirements for an application for approval of a resource decision. Until the solicitation process concludes, a resource decision has been made, and all of the information required by law has been filed, the Commission should stay this Docket.

II. THE SCHEDULING ORDER DOES NOT AMOUNT TO A DEVIATION FROM THE LEGAL REQUIREMENTS OF THE ACT.

The Commission should not allow a routine scheduling order to preclude parties from asserting a challenge to a request for agency action. Instead of complying with the requirements of the Act, RMP attempts, for the first time in its Response, to justify its incomplete filing by arguing that the Commission "implicitly" waived these legal requirements in its scheduling order.¹⁸ However, as OCS emphasized in its response, the Commission cannot "waive" the

¹⁶ Rocky Mountain Power Application for Approval of a Significant Resources Decision and Voluntary Request for Approval of a Resource Decision, 13, In the Matter of the Application of Rocky Mountain Power For Approval of a Significant Energy Resource Decision and Voluntary Request for Approval of Resource Decision, Utah P.S.C. Docket No. 17-035-40 ("RMP Application"). RMP's Application refers to the proposed transmission upgrades and four new Wyoming wind resources as the "Combined Projects." *Id.* at 2.

¹⁷ RMP's efforts to substitute "proxies" for the "selected projects" are not convincing. Proxies by definition are substitutes for the real thing. RMP admits that the Combined Projects in this Docket, see RMP's Application at 2, are not the selected projects. RMP Response at 8 (noting that only "if the Wind projects are ultimately selected," will parties have had meaningful review). And RMP has previously challenged project developers' use and reliance on RMP provided "proxies" because RMP claimed that as a result of new information and reevaluation, the proxy did not adequately reflect true costs. *See Ellis-Hall Consultants, LLC v. Pub. Serv. Comm'n of UT, 2016 UT 34, ¶ 41* (resolving the case on administrative law grounds).

¹⁸ It is unclear whether RMP is asserting that the Commission approved an implied request for deviation, or if RMP is arguing that the Commission, parties, and interested stakeholders waived their right to seek relief for the prejudice inflicted on them by RMP's incomplete application. Both arguments fail. Because waiver is an intentional relinquishment of a known right that must be distinctly made; because RMP's application presented an illusion of compliance with the law and rule; and because no-one was on notice that the scheduling conference would be interpreted to be a hearing on the adequacy of RMP's application, UIEC understands that RMP is not claiming that

statutory requirements of Section 54-17-302 because R746-430-2 has become a substantive requirement mandated by the legislature's incorporation of the rule into the Act.¹⁹ RMP's reply did not recognize the substantive nature of the information mandated or the harm to parties arising from RMP's non-compliance. Instead RMP argues that "general principles" of federal administrative law permit agencies to modify "procedural rules."²⁰ The information required by rule, which is incorporated into the information required by the Act, is substantive, not procedural. The failure to submit the information required by the statute deprives the parties of the process contemplated by the legislature for allowing them to protect their rights, which are recognized by their intervention.

The Commission, however, need not, and should not, wade into esoteric principles of administrative law, because, in this case, RMP never requested a waiver, no notice was given that a request for waiver was under consideration by the Commission, and no request for waiver was adjudicated. The very idea of an implied deviation approval is a post-hoc invention by RMP to circumvent statutory requirements, rush the hypothetical resource selection to hearing, avoid the

the Commission, participants or non-participants waived their rights to be protected against an unlawful application. See *Meadow Valley Contractors, Inc. v. State Dep't of Transp.*, 2011 UT 35, ¶ 44, 266 P.3d 671, 682. Accordingly, UIEC interprets RMP's argument to be that the Commission implicitly granted a deviation.

¹⁹ See *Atlas Steel, Inc. v. Utah State Tax Comm'n*, 2002 UT 112, ¶ 21, 61 P.3d 1053, 1058 (concluding that the statutory "definition of manufacturing facility incorporates by reference the language of SIC Codes 2000 to 3999 as it is used in the SIC Manual and classification system.").

²⁰ Rocky Mountain Power's Reply to OCS Response to the UIEC's Motion to Stay Proceedings, 4, In the Matter of the Application of Rocky Mountain Power For Approval of a Significant Energy Resource Decision and Voluntary Request for Approval of Resource Decision, Utah P.S.C. Docket No. 17-035-40. . RMP cited a string of cases, most notably *American Farm Lines v. Back Ball Freight Serv.*, 397 U.S. 532 (1970), which held that the Interstate Commerce Commission was free to amend its own procedural rules for deciding, without hearings or other proceedings, an applicant's application for temporary operating authority when no other service is capable of meeting the need. In contrast here, the Act provides an alternative to meet the need for a "time-critical" decision. RMP just chose to ignore this option because it does not provide pre-approval nor guarantee full recovery of RMP's costs. Because the legislature has provided an alternative procedure for time-critical decisions, but this Docket is not that process, deference to agency discretion in time-critical procedures is not applicable. Thus, RMP's reliance is misplaced.

scrutiny that the law requires for resource decisions, and thus impose undue risk inherent in this truncated and unlawful process on ratepayers.

After having feigned compliance with the requirements of the statute and rules with its – at best confusing – “acknowledgment of compliance,” RMP now asserts that aggrieved parties are precluded from challenging RMP’s abuse of the process. While the Commission’s rules may permit a party to “move the Commission to deviate from a specified rule,” the rules also impose a burden on the party making *the motion* to demonstrate that hardships imposed by the rule outweigh the rule’s benefits,²¹ RMP never made such a motion. Instead, it now argues, with no factual or legal support, that the Commission, merely by issuing a scheduling order, can and did order a deviation from these requirements, which RMP contends amounts to a waiver of the statutory requirements, against interested parties who had no notice of a proposed waiver.²² The Commission should not let RMP lead it so far astray from its legal authority.

RMP’s Application requested the following relief:

- (1) That the Commission hold a scheduling conference *to set a schedule . . . to file comments and reply comments . . . for any technical conference . . . for a hearing on this request . . . and for other processes and procedures . . . to approve these requests.*
- (2) That the Commission issue an order pursuant Utah Code Ann. §§ 54-17-302 and 54-17-402 approving the Company’s significant energy resource decision . . .
- (3) That the Commission approve a new deferral and cost recovery RTM[.]²³

²¹Utah Admin. Code R746-1-109.

²² RMP Response at 11.

²³ RMP Application at 14.

None of these requests seek a deviation from the requirements of the Act and Commission Rule R746-430-2.²⁴ The application's silence on deviation from the legal requirements of the statute (and rule) stands in stark contrast with RMP's past practice of explicitly requesting Commission approval to deviate from Commission rules, and the Commission's past practice of explicitly documenting its decision when a waiver is granted.²⁵

The scheduling order does not demonstrate the Commission considered and granted a waiver of the requirements of the Act and R746-430-2.²⁶ The scheduling order merely presented a schedule in this Docket (just as it does in every other docket), defined discovery response efforts, noticed a technical conference, and noticed a hearing.²⁷ The scheduling order's setting of dates relating to when information can be submitted does not mean that the Commission granted, or could grant, a deviation from the Act's requirements, especially when no waiver was requested or

²⁴ A search of RMP's Application reveals no mention of deviation and only two references to "waiver," both pertaining to environmental requirements. *Id.*

²⁵ For example, in Docket No. 17-035-23, RMP explicitly identified how its proposed solicitation process deviated from the Commission's rules and explicitly requested that the Commission allow the deviation by waiving the requirement:

The Commission's RFP rules require that the IE "blind" all bids for the evaluation process. Utah Admin. Code R746-420-3(10)(a). The Company requests a waiver of this requirement . . . Blinding bids imposes additional burdens on the IE and the Company that will have no impact on the overall fairness of the solicitation process.

Rocky Mountain Power Application for Approval of Solicitation Process, 11, In the Matter of the Application for Approval of Solicitation Process for Wind Resources. Utah, P.S.C. Docket No. 17-035-23. Following the *hearing* on the proposed solicitation process, the Commission issued an Order that explicitly granted RMP's request for a waiver: "We approve [RMP's] request for a waiver of Utah Admin. Code R746-420-3(10)(a) requiring the IE blind all bids for the evaluation process." Order Approving RFP with Suggested Modification, 12, In the Matter of the Application for Approval of Solicitation Process for Wind Resources. Utah, P.S.C. Docket No. 17-035-23. RMP's efforts to rely on the Commission's prior explicit grant of a waiver of the blinding requirements as evidence of the Commission's implicit granting of a waiver in this Docket is unpersuasive.

²⁶ *See generally*, Scheduling Order, In the Matter of the Application of Rocky Mountain Power for Approval of a Significant Resource Decision and Voluntary Request for Approval of Resource Decision, Utah, P.S.C. Docket No. 17-035-40 (Scheduling Order).

²⁷ *Id.* at 1.

noticed. Precluding a challenge to the sufficiency of the initial filing cannot be predicated on a scheduling order based on an incomplete record.

The notice of the scheduling conference stated only that “[i]nterested parties should come *prepared to discuss a schedule* for [the repower and the Combined Projects] dockets.”²⁸ There is nothing in this language to suggest to any participants or non-participants that RMP moved for a deviation from the statute and rules or that the combined scheduling conference was a hearing in this Docket to address the merits of such a motion or the sufficiency of the initial filing. There is simply no support in the record, and RMP has marshalled none, to support the after-the-fact excuse that the Commission permitted a deviation from the legal requirements of the initial application contents.

The application does not comply with the requirements of the Act, RMP did not request or receive an order allowing it to deviate from these requirements, and RMP’s application, therefore, was and remains improper and deficient. Accordingly, the Commission should not entertain RMP’s after-the-fact assertions and should stay this Docket until the legal infirmities of the application have been cured.

III. A SCHEDULING ORDER CAN BE REVISED.

A scheduling order does not have preclusive effect on the consideration of the merits of an application. If the Commission meant to order a deviation from the statute in the scheduling order (which would be unimaginable), it can and should immediately correct the error. RMP does not dispute that the Commission has a statutory right to extend the time to review a significant resource decision and the discretion to revisit preliminary, preparatory, procedural, and intermediate

²⁸ Notice of Scheduling Conference, 1, In the Matter of the Voluntary Request of Rocky Mountain Power for Approval of Resource Decision to Repower Wind Facilities and In the Matter of the Application of Rocky Mountain Power for Approval of a Significant Resource Decision and Voluntary Request for Approval of Resource Decision, Utah, P.S.C. Docket No. 17-035-39 and Docket No. 17-035-40 (July 3, 2017) (emphasis added).

orders.²⁹ Nor does RMP identify anything in the scheduling order that would prohibit a party from challenging the incomplete and unlawful nature of RMP's request, harm to parties resulting from such a deficient filing, and requesting a stay to remedy those flaws. RMP, however, would like the Commission to believe otherwise by arguing that the scheduling order is preclusive on parties because they participated in the scheduling conference and on UIEC because it did not.³⁰

Imposing a preclusive or binding effect on the scheduling order disregards the Commission's authority to extend the review period and amend the scheduling order. It contradicts RMP's and the Commission's practice in this Docket: RMP twice requested the Commission delay the scheduled technical conference—requests the Commission granted.³¹ It also ignores that imposing a preclusive effective with insufficient notice would violate the parties' and UIEC's due process rights.

Finally, recent events further demonstrate the inappropriateness of advancing this Docket. As stated in RMP's Response, the Commission approved a 2017R RFP.³² RMP fails to mention,

²⁹ “The commission may, at any time after providing . . . notice and an opportunity to be heard, rescind, alter, or amend any order or decision made by the commission.” Utah Code Ann. § 54-7-14.5. Commission orders, even if final – and this one is not – are not res judicata during the term of the Docket in which they are issued. *See Bowen Trucking, Inc. v. Public Service Comm'n*, 559 P.2d 954, 955-957 (Utah 1977) (upholding a Commission's decision to reopen an order to correct an erroneous assumption of the Commission and the Parties concerning the law even though the time for seeking rehearing had expired). Moreover, a scheduling order is not final agency action. *See Heber Light & Power Co. v. Utah Pub. Serv. Comm'n*, 2010 UT 27, ¶ 1, 231 P.3d 1203, 1205. As such, RMP's reliance on Commission decisions denying motions for reconsideration of final agency action approving settlements after the Commission conducted a noticed hearing of the settlement is misplaced. So too is RMP's reliance on Utah Code Ann. § 63G-4-204. UIEC was not the target of an adjudication and therefore not the respondent. *See*, Utah Code Ann. § 63G-4-103 (Respondent” means a person against whom an adjudicative proceeding is initiated, whether by an agency or any other person).

³⁰ RMP's argument that UIEC waited too long to intervene overlooks that UIEC requested intervention, noting its intention to move the Commission to stay the proceedings, 102 days before the intervention deadline. It filed its Motion to Stay on 22 September, the day the Commission granted UIEC's petition to intervene.

³¹ Originally scheduled for 30 August 2017, the technical conference finally occurred forty two days later on 11 October 2017. *See* RMP's Motion for Amended Procedural Schedule, Docket No. 17-035-39 & Docket No. 17-035-40 (Aug. 11, 2017); RMP's Motion for Amended Procedural Schedule, Docket No. 17-035-39 & Docket No. 17-035-40 (Aug. 11, 2017); Notice of Technical Conference, Docket No. 17-035-40 (Sept. 14, 2017).

³² RMP Response at 5.

however, that the RFP expands the potential wind resources to include wind resources outside of Wyoming, which are not necessarily dependent on the transmission component of the Combined Projects.³³ This change further erodes whatever confidence existed in RMP’s provision of “proxy” resources.³⁴ RMP also notes that the Oregon commission issued a “final order” in the Oregon solicitation docket, but fails to note that approval of the RFP is conditioned upon the Oregon commission’s acknowledgment of the IRP.³⁵ Furthermore, RMP admits that the impacts of the 2017S RFP on the Significant Energy Resource Decision in this Docket will not be known until conclusion of both RFP processes, and RMP supplements the record.³⁶ These delays and the moving targets of the resources, their economics, and their alleged public benefits deprives the Commission, parties, and the public at large from a full evaluation of the information mandated by law.

To provide relief from the prejudice that the application and the concurrent advancement of this Docket with other dockets and the RFPs impose, the Commission should stay this docket suspending all activity and time, and extend the period for review.

IV. CONCLUSION

RMP’s failure to submit the information required by law, request a waiver of this requirement, provide notice of the requested waiver, and obtain explicit approval of such a request after notice and an opportunity for the parties to be heard, violates the Act and the due process of

³³ PacifiCorp, Renewal Request for Proposals (Sept 27, 2017) (2017R RFP), *available at*, http://www.pacificorp.com/sup/rfps/2017-rfp/2017R_RFP_Doc_and_Appendices.html (last visited Oct. 20, 2017).

³⁴ See discussion footnote 12, *supra*.

³⁵ Ruling, In the Matter of PacifiCorp, dba Pacific Power 2017 Integrated Resource Plan (Sept. 21, 2017), *available at* <http://edocs.puc.state.or.us/efdocs/HDA/lc67hda161259.pdf> (last visited Oct. 19, 2017).

³⁶ RMP Response, at 5. UIEC questions how the 2017S RFP, which is not being conducted with the same rigor or timelines as the wind solicitation process, and which is being limited to resources less than 300 MW to avoid the Commission solicitation approval process, can produce a true market valuation of the cost of solar generation as a substitute resource for the Combined Projects. UIEC notes, without waiving any objection to the “intended” solar solicitation process, that this issue is not being presented for resolution in this Reply.

the parties. A rushed decision that disregards the requirements of the Act and uses substitutes instead of real, market tested projects is contrary to the Act. It imposes undue risk on ratepayers and prejudices the rights and interests of intervenors and other interested parties. UIEC respectfully requests that the Commission stay all activity in this docket until all information required by law has been made available and presented in this Docket.

DATED this 20th day of October 2017

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CERTIFICATE OF SERVICE

(Docket No. 17-035-40)

I hereby certify that on this 20th day of October 2017, I caused to be e-mailed, a true and correct copy of the foregoing UTAH INDUSTRIAL ENERGY CONSUMERS' REPLY IN SUPPORT OF ITS MOTION TO STAY to:

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