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## State of Utah

### Department of Commerce Division of Public Utilities

FRANCINE GIANI    CHRIS PARKER  
*Executive Director    Director, Division of Public Utilities*

## Action Request Response

**To:** Public Service Commission of Utah

**From:** Utah Division of Public Utilities

Chris Parker, Director

Doug Wheelwright, Utility Technical Consultant Supervisor

Casey J. Coleman, Utility Technical Consultant

David Williams, Utility Analyst

**Date:** November 7, 2019

**Re:** **Docket No. 19-034-01**, Strawberry Water Users Association's Petition for  
Declaratory Ruling: Action Request Response

### Recommendation (Approve)

The Utah Division of Public Utilities (Division) recommends that the Public Service Commission determine that the Strawberry Water Users Association (Association) is not subject to Commission jurisdiction or regulation with respect to the Association's operation of Strawberry Valley Project power plants and the sale of power from those plants.

### Issue

On October 16, 2019, the Association petitioned the Public Service Commission (Commission) for a determination that the Association is not subject to PSC jurisdiction or regulation with respect to its operation of Strawberry Valley Project (SVP) power plants and the sale of power

from those SVP power plants.<sup>1</sup> On October 16, 2019, the Commission issued an Action request to the Division regarding the petition.

## **Background**

The Association is a Utah nonprofit corporation created to operate and maintain portions of the Strawberry Valley Project (SVP). The SVP was constructed by the Bureau of Reclamation (Reclamation), which is under the United States Department of the Interior. The SVP comprises around 45,000 irrigable acres around Spanish Fork, Utah; project features include dams, reservoirs, and three hydroelectric power plants.<sup>2</sup>

The Association has a contract with the federal government whereby the Association receives proceeds from the sale of electricity from the three SVP power plants. The Association does not “own, operate, maintain, control, manage, lease, or sell power from any other power plants” aside from the three SVP power plants.<sup>3</sup> Since 1986, the Association has sold all electricity from the three SVP plants to the Strawberry Electric Service District (SESD), which buys the electricity wholesale and distributes to its customers. The Association sells SVD electricity exclusively to SESD.<sup>4</sup>

Since 1986, the Association has submitted the Annual Report required of Utah public utilities, and paid its Public Utility Regulatory Fee. It claims to have paid this fees under the view that “it was simpler and less costly to continue making the annual payments and reporting that it would be to pursue deregulation (or confirmation the Association is not subject to PSC jurisdiction and regulation).”<sup>5</sup> However, the Association now believes it is not subject to Commission regulation

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<sup>1</sup> *Strawberry Water Users Association’s Petition for Declaratory Ruling*, filed October 16, 2019, Docket No. 19-034-01 (Petition). The Association filed an amended petition (Amended Petition) on November 4, 2019; the Amended Petition contained one minor change. This Division Recommendation references page numbers of the Amended Petition.

<sup>2</sup> See the Reclamation website at <https://www.usbr.gov/projects/index.php?id=419>

<sup>3</sup> See Amended Petition ¶ 2, p.4.

<sup>4</sup> *Id.* ¶¶ 4-7, p. 4. SESD was officially renamed South Utah Valley Electric Service District, but kept the acronym “SESD.”

<sup>5</sup> *Id.* ¶ 8, pp 4-5.

as a “public utility” as defined in the statutes, for two independent reasons. The Division addresses these two arguments in the next section.

## **Discussion**

The Association now claims that it is not subject to Commission jurisdiction and regulation, and it advances two arguments for its conclusion, either one of which is meant by the Association to be dispositive on its own. First, the Association believes it is an “independent energy producer” under Utah Code section 54-2-201(2)(c), and therefore exempt from the definition of “public utility” under Utah Code section 54-2-1(22)(a). Second, the Association argues that even if it assumed that it is not an independent energy producer, it does not qualify as a public utility subject to regulation, because it sells the SVP electricity to SESD, which is a wholesale purchaser, not a consumer.

### **Is the Association an Independent Energy Producer?**

The Association’s first argument is that it is an “independent energy producer” under Utah Code section 54-2-201(2)(c), and therefore exempt from the definition of “public utility” under Utah Code section 54-2-1(22). Section 54-2-201(2) provides that:

An independent energy producer is exempt from regulation by the commission as a public utility for an independent power production facility if the independent energy producer produces a commodity or delivers a service: [...] (c) for sale solely to an electrical corporation or other wholesale purchaser [...].<sup>6</sup>

“Independent energy producer” under Utah Code section 54-2-1(16) means “every electrical corporation, person, corporation [...] that own[s], operate[s], control[s], or manage[s] an independent power production or cogeneration facility.”

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<sup>6</sup> The Association correctly notes in its Amended Petition that section 54-2-201(2) lists four scenarios conjoined with an “or,” any one of which qualifies as an exemption. The Association is proceeding under the third exemption, in section 54-2-201(2)(c).

An “independent power production facility” is defined in Utah Code section 54-2-1(17) and means a facility that:

(a) produces electric energy solely by the use, as a primary energy source, of biomass, waste, a renewable resource, a geothermal resource, or any combination of the preceding sources; or

(b) is a qualifying power production facility.

The Association claims that hydropower should be considered a renewable resource.

### **Is Hydropower Considered “Renewable” Under Section 54-2-1(17)?**

The Association claims that the SVP hydroelectric facilities are independent power production facilities because it produces electricity solely by the use of a “renewable resource” as required under section 54-2-1(17)(a). In other words, the Association claims that hydropower counts as a “renewable resource” for purposes of section 54-2-1(17): “Although ‘renewable resource’ is not defined in the Public Utilities Code, it is commonly understood to include water and hydropower.”<sup>7</sup>

The Association is correct that “renewable resource” is not defined in Chapter 2 of the Utah Public Utilities Code (PUC).<sup>8</sup> In support of its position that hydropower is a renewable resource, the Association cites the U.S. Code of Federal Regulations sections dealing with when a facility qualifies as a “small power production facility.” The Association also cites Colorado, Michigan, and Montana statutes that include hydropower in the definition of “renewable energy resources” in various contexts.<sup>9</sup> For example, the Colorado statute cited by the Association (Colo. Rev. Stat. Ann. § 36-1-147.5) deals with “Leasing arrangements for renewable energy resources development.”

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<sup>7</sup> Amended Petition, p. 6.

<sup>8</sup> However, as the Division shows below, “renewable energy” is defined in other contexts in the PUC.

<sup>9</sup> Amended Petition, pp. 6-7.

However, the Division believes that a comprehensive survey of state or federal definitions of “renewable resource” in various contexts is not needed, as the term is defined elsewhere in the PUC to include hydropower. Part 6 of Chapter 17 of the PUC is titled “Carbon Emission Reductions for Electrical Corporations.” In that part of the Utah Code, “renewable energy” includes “hydroelectric energy if located within the state, without regard to the date upon which the facility becomes operational.”<sup>10</sup> Similarly, in Part 9 of Chapter 17 of the PUC (“Community Renewable Energy Act”), “renewable energy resource” also includes a hydroelectric plant.<sup>11</sup>

Other sections of the PUC refer to the two definitions above. For example, Part 8 of Chapter 17 provides that “‘Renewable energy facility’ means a renewable energy source as defined in Section 54-17-601” that meets certain conditions. The Division did not find a definition of “renewable” in the PUC that does not include hydropower. Therefore, the Division believes that there is sufficient reason to conclude that “renewable resources” in section 54-2-1(17)(a) includes hydropower.

### **The Association Is Exempt from Commission Regulation**

Once hydropower is determined to be a renewable resource, the rest of the Association’s claims follow:

- If the power from the SVP plants is renewable, then the SVP plants are “independent power production facilities” under Section 54-2-1(17)(a).
- If the SVP plants are independent power production facilities, then the Association is an “independent energy producer” under Section 54-2-1(16).
- An independent energy producer that produces electricity for sale “solely to an electrical corporation or other wholesale purchaser” is exempt from Commission regulation (for that independent power production facility). SESD is “an electrical corporation or other

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<sup>10</sup> Utah Code section 54-17-601(10)(b)(iii).

<sup>11</sup> Utah Code section 54-17-902(14)(a)(iv).

wholesale purchaser,” so the Association is exempt from commission regulation with respect to the SVP plants.

### **The Association’s Second Argument**

The Association presented a second argument regarding why it should not be regulated by the Commission. The second argument is intended to be independent of the first, so that even if the first argument fails, the second can succeed. The Association argues that even if it assumed that it is not an independent energy producer, it does not qualify as a public utility subject to regulation, because it sells the SVP electricity to SESD, which is a wholesaler, not a consumer as required under Section 54-2-1(22)(a). The Division recommends that the Commission not address this argument. The Association’s first argument succeeds, and so a discussion of the second is unnecessary.

### **Conclusion**

The Division agrees with the Association’s argument that hydropower counts as a renewable resource under Section 54-2-1(17)(a). Therefore, the Division recommends that the Commission find that the Association is an “independent energy producer” under Section 54-2-1(16) and is not subject to Commission jurisdiction or regulation for the sale of SVP plant power to SESD, as long as SESD remains the sole purchaser of that power.

Cc: Michele Beck, Office of Consumer Services