

Phillip J. Russell (10445)
JAMES DODGE RUSSELL & STEPHENS, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone: (801) 363-6363
Email: prussell@jdrsllaw.com

Attorneys for TransWest Express LLC

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Application of TransWest Express LLC for Order Granting Exemption from Regulation	Docket No. 22-2636-01
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TRANSWEST EXPRESS LLC'S APPLICATION FOR EXEMPTION FROM REGULATION

I. INTRODUCTION

Pursuant to Utah Code § 63G-4-201(1)(b) and Utah Admin. Code R746-1-101 et seq., TransWest Express LLC (“TransWest”) respectfully applies to the Public Service Commission of Utah (“Commission”) for an order granting TransWest exemption from regulation. As set forth more fully below, the facts of this docket demonstrate that TransWest is neither a “public utility” nor an “electric corporation” and, as a result, is not subject to the jurisdiction of the Commission or required to obtain a Certificate of Public Convenience and Necessity (“CPCN”) before constructing or operating a proposed new merchant transmission project.

II. FACTUAL BACKGROUND

TransWest Express LLC

1. TransWest is a Delaware limited liability corporation with its principal place of business in Denver, Colorado. TransWest is developing a new merchant transmission project, the TransWest Express Transmission Project (“TWE Project”).

2. TransWest is a wholly owned subsidiary of The Anschutz Corporation (“TAC”), a privately-held company located in Denver, Colorado.

3. Through its affiliates, TAC has been actively involved in energy development in the western United States for more than 75 years.

TWE Project Purpose

4. The TWE Project is a new overhead high-voltage interregional transmission system that will extend 732 miles from Wyoming to Nevada and will interconnect to existing bulk power systems in Wyoming, Utah, and Nevada.

5. The TWE Project will provide interstate merchant transmission service to deliver renewable wind energy generated in Wyoming to load-serving entities in other western states.

6. The TWE Project will provide multiple benefits, including but not limited to enhancing the stability of the transmission system as a whole, expanding access to Wyoming’s valuable wind energy resources, and assisting western states in meeting their renewable portfolio standards.¹

¹ See e.g., *Report on Barriers to and Opportunities for High Voltage Transmission, a Report to the Committees on Appropriations of Both Houses of Congress Pursuant to the 2020 Further Consolidated Appropriations Act*, prepared by the Staff of the Federal Energy Regulatory Commission at 3-4 and 11 (June 2020) (“June 2020 FERC Staff Report”). This report can be found at: <https://docs.house.gov/meetings/II/II06/20200922/111020/HHRG-116-II06-20200922-SD003.pdf>.

Transmission Facilities and Interconnections

7. The TWE Project will consist of three linked segments: (1) a 405-mile, 3,000 MW, 500 kV high-voltage direct current (“HVDC”) system between Wyoming and Utah; (2) a 278-mile, 1,500 MW, 500 kV high-voltage alternating current (“HVAC”) transmission line between Utah and Nevada; and (3) a 49-mile, 1,680 MW, 500 kV HVAC transmission line in Nevada. A map of the proposed route for the TWE Project is attached hereto as Exhibit 1.

8. The TWE Project will have interconnection points at the ends of each of the three linked segments where the TWE Project will interconnect with existing bulk power system facilities.

9. The TWE Project’s 405-mile HVDC segment will include terminals located near Sinclair, Wyoming (“Wyoming Terminal”) and Delta, Utah (“Utah Terminal”). At the Wyoming Terminal, the TWE Project will connect with the 3,000+ MW Chokecherry and Sierra Madre Wind Energy Project (“CCSM Project”) and will interconnect with PacifiCorp’s transmission system. TransWest has submitted a transmission interconnection request to PacifiCorp, and PacifiCorp’s System Impact Study (“SIS”) is underway.

10. At the Utah Terminal, the TWE Project will interconnect to the Intermountain Power Agency’s Intermountain Power Project (“IPP”) at its 345 kV Switchyard. TransWest has submitted a transmission interconnection request to the Los Angeles Department of Water & Power (“LADWP”), acting in its capacity as the IPP Operating Agent, and LADWP is conducting a SIS.

11. The TWE Project’s 278-mile HVAC segment will extend from the Utah Terminal to an interconnection with NV Energy’s Crystal North 500 kV Switchyard as well as Desert Link

LLC's Harry Allen-Eldorado 500 kV line facilities near the Crystal Switchyard. TransWest has submitted transmission interconnection requests to both NV Energy and Desert Link LLC, and each is conducting an SIS.

12. From there, the 49-mile HVAC segment will interconnect with one or more of the 500 kV transmission facilities in the Eldorado Valley southwest of Boulder City, Nevada owned by Southern California Edison Company ("SCE"), the Western Area Power Administration ("WAPA"), Arizona Public Service, LADWP, NV Energy and others. These facilities include the Eldorado Substation, the McCullough Substation, and the Mead-Marketplace transmission line. Currently, TransWest has an interconnection request pending with SCE for the Eldorado Substation and SCE is conducting a SIS.

FERC Oversight

13. As an interstate merchant transmission project, the TWE Project is subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission ("FERC").

14. On January 17, 2013, FERC issued a Final Policy Statement entitled "Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects." 142 FERC ¶ 61,038 ("FERC Policy"). This FERC Policy allows merchant transmission providers like TransWest to allocate transmission capacity on new transmission lines through an open solicitation process. FERC must approve the open solicitation design and selection criteria and also grant negotiated rate authority which allows the merchant transmission provider to negotiate customer agreements and transmission rates with entities meeting the selection criteria. Excess capacity not allocated in an open solicitation, and the

transmission rates that will apply, will be governed by the terms of an Open Access Transmission Tariff (“OATT”).

15. In compliance with this FERC Policy, on December 12, 2020, TransWest filed an “Application for Authority to Sell Transmission Service Rights at Negotiated Rates, Request for Approval of Capacity Allocation Process and Request for Waivers.” FERC Docket No. ER21-645-000.

16. In the application, TransWest requested FERC authorization to allocate up to 100% of the capacity of the TWE Project through an open solicitation process that would offer point-to-point transmission service for two products: (1) from Wyoming to Utah (1,500 MW), and (2) from Wyoming to Nevada (1,500 MW). (Because both products depend on the Wyoming-to-Utah segment, the two products together accounted for the full 3,000 MW capacity of the HVDC segment.)

17. In the application, TransWest also requested FERC authorization to charge negotiated rates for transmission service allocated through the open solicitation, and committed to file an OATT based on FERC’s *pro forma* OATT. The OATT will govern the allocation of any transmission capacity that may become available in the future, as well as the transmission rates that will apply thereto.

18. On February 26, 2021, FERC granted TransWest’s application in an order captioned “Order Granting Application for Authorization to Charge Negotiated Rates, Subject to condition, and Granting Waivers” (“FERC Order”). A copy of the FERC Order that addresses TransWest as a merchant transmission developer and the TWE Project as merchant transmission is attached as Exhibit 2.

19. In compliance with the terms of the FERC Order, TransWest, with assistance from an Independent Solicitation Manager (ISM”), completed an open solicitation process (“Open Solicitation”) to allocate transmission capacity on the TWE Project.

20. The Open Solicitation process commenced on June 7, 2021. Potential customers had to submit statements of interest (i.e., applications for capacity) to the ISM no later than August 6, 2021. The ISM applied the FERC-approved eligibility criteria and determined that only one potential customer, Power Company of Wyoming LLC (“PCW”), was eligible under the criteria. PCW is an affiliate of TransWest, and it owns and is developing the 3,000+ MW CCSM Wind Energy Project in Wyoming.

21. TransWest and PCW then entered into negotiations resulting in a Customer Agreement for each of the two transmission products offered in the Open Solicitation. The Customer Agreements allocate 100% of the two transmission products offered in the Open Solicitation to PCW, the only eligible customer that participated in the Open Solicitation.

22. On December 3, 2021, after conclusion of the Open Solicitation, selection, and negotiation of the Customer Agreements, TransWest filed a compliance filing at FERC demonstrating compliance with the approved Open Solicitation process and selection criteria. TransWest’s compliance filing included a detailed report from the ISM that described all steps completed as part of the Open Solicitation process, including providing broad public notice of the Open Solicitation opportunity. The compliance filing, including the non-confidential portion of the ISM’s report, is attached as Exhibit 3.

23. On February 16, 2022, FERC issued an unpublished letter order accepting TransWest’s compliance filing as demonstrating compliance with the approved Open Solicitation

process and selection criteria. This order concluded the Open Solicitation process, and TransWest and PCW have executed the Customer Agreements. Under the Customer Agreements, PCW secured all of the transmission capacity from Wyoming to Utah (3,000 MW) and Utah to Nevada (1,500 MW).

24. PCW intends to sell all of the energy it transmits on the TWE Project on a wholesale basis to load-serving entities in other western states.

Utah Law Recognizes Merchant Transmission

25. Utah law recognizes that interstate merchant transmission like the TWE Project is subject to the capacity allocation process set out in FERC's Policy. *See* Utah Code § 79-6-402(1)(a) (“‘Capacity allocation process’ means the process outlined by the Federal Energy Regulatory Commission in its final policy statement dated January 17, 2013, ‘Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects, Priority Rights to New Participant-Funded Transmission,’ 142 F.E.R.C. P61,038 (2013)’”).

26. Further, Utah Code § 79-6-402(2) (formerly codified as § 63M-4-402(2)) requires “merchant electric transmission lines” to notify the Utah Office of Energy Development (“OED”) of any open solicitation being conducted to allocate transmission capacity on a merchant transmission line pursuant to FERC Policy.

27. Under Utah Code § 79-6-402(1)(e) (formerly codified as § 63M-4-402(2)), a merchant electric transmission line “means a transmission line that does not provide electricity to retail customers within the boundaries of Utah.” As an interstate merchant transmission line subject to FERC's jurisdiction and FERC's Policy on allocating capacity on the TWE Project,

TransWest provided the required open solicitation notice to OED on June 7, 2021 (the commencement date of TransWest’s FERC-approved Open Solicitation). This open solicitation notice is attached hereto as Exhibit 4.

28. As required by Utah Code § 79-6-402(1)(e) (formerly codified as § 63M-4-402(1)(e)), OED published a notice to inform Utah merchant generators of the open solicitation and invite them to submit an expression of need to OED. A copy of that notice is attached as Exhibit 5.

29. No Utah generator submitting an expression of need in response to OED’s notice.

The TWE Project will not serve retail customers

30. As a result of the Open Solicitation, TransWest has entered into Customer Agreements to provide transmission services to PCW. In turn, PCW will sell its power on a wholesale basis to load-serving entities who will accept delivery at the TWE Project’s Utah Terminal (1,500 MW) and/or at the TWE Project’s Nevada substation(s) (1,500 MW). As a result, the TWE Project will not provide electricity to retail customers within the boundaries of Utah.

Development Status

31. TransWest has completed most of the development work required to commence construction of the TWE Project in 2023. In addition to completing the FERC Open Solicitation process described above, TransWest’s other completed milestones include:

- All major land use permitting is complete.
- Right-of-Way Grant secured from the Bureau of Land Management (“BLM”).
The BLM Right-of-Way Grant conveys the necessary land rights on BLM land in all four states and accounts for more than two-thirds of the Project’s route.

- Electric Transmission Line Easement obtained from the U.S. Forest Service.
- License for the Electric Transmission Line obtained from the U.S. Bureau of Reclamation in Nevada.
- Both of the two necessary state permits (a Nevada Utilities Environmental Protection Act Permit and a Wyoming Industrial Siting Permit) have been secured.
- County conditional use permits (or equivalent authorizations) obtained from the 14 counties traversed by the TWE Project.² Within Utah, the TWE Project will traverse Uintah, Duchesne, Wasatch, Utah, Sanpete, Juab, Millard, Beaver, and Iron Counties, resulting in substantial property tax and sales tax revenues for these counties. TransWest estimates that, in Utah, it will pay more than \$46 million in sales and use taxes over the Project's life, and more than \$18 million in property taxes in the first year alone.
- Easements secured from 369 of 370 affected private landowners in all four states, with a condemnation action and immediate possession motion currently pending against the final outstanding private landowner.
- Easements across state lands in Wyoming, Utah, and Colorado largely secured; no state easements required in Nevada.

32. Remaining pre-construction work includes completing the remaining environmental surveys and mitigation plans required by BLM as pre-requisites to issuance of its

² Due to a minor re-route in Wasatch County, TransWest will be seeking an amended conditional use permit in that county.

Notice to Proceed; acquiring the last remaining easements; completing the negotiation, execution, and regulatory approval of interconnection agreements; and contracting with engineering, procurement, and construction contractors.

33. Additional information about the TWE Project is available at <http://www.transwestexpress.net/index.shtml>.

III. REQUEST FOR ORDER OF EXEMPTION FROM REGULATION

TransWest respectfully requests that this Commission issue an order that TransWest is exempt from Commission regulation and is not required to obtain a CPCN before it commences construction or operation of the TWE Project.

TransWest is a Merchant Transmission Provider

Under Utah law (and FERC Policy), the TWE Project is a “merchant electric transmission line.” *See* Utah Code § 79-6-402(1)(e) (“Merchant electric transmission line’ means a transmission line that does not provide electricity to retail customers within the boundaries of Utah.”). The TWE Project will not be owned by a utility using the TWE Project to serve its retail customers. Instead, TransWest’s customer, PCW, will use the transmission capacity from Wyoming to Utah and Wyoming to Nevada on the TWE Project to deliver 3,000 MW of electricity to load-serving entities (i.e., selling wholesale energy), not delivering it to retail consumers within the boundaries of Utah. Therefore, the TWE Project is a “merchant electric transmission line” under both Utah law and FERC Policy, and TransWest as the owner of the TWE Project is a merchant transmission provider.

TransWest is Neither a Public Utility Nor an Electrical Corporation

As a merchant transmission provider, TransWest respectfully asserts that TransWest is not subject to regulation by the Commission because it is neither a “public utility” nor an “electrical corporation” as those terms are defined in Title 54 of the Utah Code.

Utah Code Section 54-4-1 defines and limits the powers of the Commission. *See Bear Hollow Restoration, LLC v. Public Service Commission*, 2012 UT 18, ¶ 18, 274 P.3d 956 (“The Public Service Commission has no inherent regulatory powers other than those expressly granted or clearly implied by statute” (cleaned up)); *Hi-Country Estates Homeowners Ass’n v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995) (Commission’s jurisdiction extends only to “the purposes outlined in” Utah Code Title 54, Chapter 4).

Utah Code Section 54-4-1 grants the Commission “power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state.” Thus, the Commission only has jurisdiction over “public utilities,” and can only regulate TransWest if it determines that TransWest is a “public utility.”

The Utah Code defines “public utility” as follows:

“Public utility” includes every railroad corporation, gas corporation, electrical corporation, distribution electrical cooperative, wholesale electrical cooperative, telephone corporation, telegraph corporation, water corporation, sewerage corporation, heat corporation, and independent energy producer not described in Section 54-2-201 *where the service is performed for, or the commodity delivered to, the public generally*, or in the case of a gas corporation or electrical corporation *where the gas or electricity is sold or furnished to any member or consumers within the state for domestic, commercial, or industrial use.*

Utah Code § 54-2-1(22)(a) (emphasis added)

In *Bear Hollow Restoration, LLC*, 2012 UT 18, ¶ 18, the Court found that a water corporation that served only shareholders and not the “public generally” was not a “public utility,”

and therefore that the Commission lacked jurisdiction to regulate it. The court explained that “[w]hen a ‘specific power is conferred by statute upon a . . . commission with limited powers, the powers are limited to such as are specifically mentioned’ and, accordingly, ‘to ensure that the administrative powers of the Commission are not overextended, any reasonable doubt of the existence of any power must be resolved against the exercise thereof.’” *Id.* (cleaned up, quotation marks omitted).

Like the water corporation in *Bear Hollow*, TransWest, a merchant transmission provider, falls outside the statutory definition of “public utility” because the TWE Project will not serve “the public generally” and will not provide service to retail customers within the boundaries of Utah.

This Commission lacks jurisdiction over TransWest not only because TransWest is not a “public utility,” but also because TransWest is not an “electrical corporation.” Utah Code § 54-2-1(8)(a) defines “electrical corporation” to include “every corporation . . . owning, controlling, operating, or managing any electric plant, or in any way furnishing electric power *for public service or to its consumers or members for domestic, commercial, or industrial use, within this state.*” (emphasis added). A corporation does not become an “electrical corporation” simply by owning “electric plant.” It must also furnish electric power “for public service, or to its consumers or members for domestic, commercial, or industrial use, within this state.” *Id.*

In *Garkane Power Co. v. Public Service Commission*, 100 P.2d 571 (Utah 1940), the Utah Supreme Court interpreted the term “electrical corporation” in the context of an electric cooperative. The Court acknowledged that Garkane Power owned “electric plant,” but held that Garkane was not an “electrical corporation,” and therefore not a “public utility,” because it did not *also* provide a “public service.” Articulating this point, the *Garkane* Court noted as follows:

It is clear and undisputed that Garkane will “own, control, operate, and manage an electric plant.” Assuming that the phrases “public service” and “for service to the public generally” have the same meaning, the sole question is whether Garkane will furnish electric power “for public service,” or “to the public generally.”

Id. at 572.³

Like Garkane Power, TransWest will own, control, operate, and manage “electric plant,”⁴ but it will not “furnish[] electric power for public service or to its consumers or members for domestic, commercial, or industrial use, within this state.” Utah Code § 54-2-1(8)(a). TransWest will not own the electric power that will be transmitted on the TWE Project, and TransWest will not furnish that power to anyone. PCW plans to sell its power transmitted via the TWE Project on a wholesale basis to load-serving entities in Utah, Nevada, California, and/or Arizona; those load-serving entities will, in turn, furnish that power to the public. Accordingly, TransWest is not an “electric corporation” or any other type of “public utility” that is subject to the jurisdiction of this Commission.

Applications for a CPCN, and the Commission’s review of such applications, are governed by Utah Code § 54-4-25 (“CPCN Statute”). The CPCN Statute states as follows:

Except as provided in Section 11-13-304, a gas corporation, electric corporation, telephone corporation, telegraph corporation, heat corporation, water corporation, or sewerage corporation may not establish, or begin construction or

³ The specific holding of *Garkane*—that Garkane Power is not a “public utility” subject to Commission jurisdiction—has been superseded by a statutory amendment that modified the definition of “electric corporation” to include electric cooperatives like Garkane Power. That amendment does not affect the Court’s analysis in *Garkane* that owning electric plant is, by itself, insufficient to make a corporation an “electric corporation.” See *Bear Hollow Restoration, LLC v. Public Service Commission*, 2012 UT 18, ¶ 19 n.9, 274 P.3d 956 (noting the statutory amendment post-*Garkane* but citing as support the statutory analysis in *Garkane*, stating that “the statutory language at issue in that case is identical to the current statute.”).

⁴ See Utah Code § 54-2-1(9) (“‘Electric plant’ includes all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of electricity for light, heat, power, and all conduits, ducts, or other devices, materials, apparatus, or property for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat, or power.”).

operation of a line, route, plant, or system or of any extension of a line, route, plant, or system, without having first obtained from the commission a certificate that present or future public convenience and necessity does or will require the construction.

The CPCN statute applies to certain types of “public utilities,” including “electric corporations,” but because TransWest is neither an “electrical corporation” nor any other type of “public utility” listed in the CPCN Statute, it is not required to obtain a CPCN from this Commission before constructing or operating the TWE Project.

This Commission’s determination in this docket is not governed by its conclusion in Docket No. 08-2490-01, *In the matter of the application of Milford Wind Corridor Phase I, LLC and Milford Wind Corridor Phase II, LLC for Certificates of Convenience and Necessity for the Milford Phase II and Phase II Wind Power Project* (“*Milford Wind*”). That docket addressed a wind project to be constructed in Millard County, Utah, and associated interconnection and transmission facilities that would transmit the wind-generated power to the IPP switchyard where it would be sold at wholesale to the Southern California Public Power Authority (“SCPPA”). The wind project owner filed an application for a CPCN and a simultaneous Motion to Dismiss, asserting that the wind project was an “independent power producer” and thus was excluded from Commission jurisdiction.⁵ This Commission initially granted the motion to dismiss,⁶ but reversed that ruling in response to a Petition for Review and Rehearing, ultimately ruling that the generation plant qualified as an “independent power producer” exempted from Commission jurisdiction but that the transmission lines did not fit within the definition of “independent power producer” and

⁵ See *Milford Wind*, Order Granting Motion to Dismiss the Application of Milford I and Milford II for Certificates of Convenience and Necessity (May 16, 2008) (“Order Granting MTD”).

⁶ See *id.*, Order Granting MTD at 9.

thus were not exempt from Commission jurisdiction.⁷ The Commission subsequently granted the requested CPCN, though it exempted the project from many regulatory requirements that apply to public utilities.⁸

The Commission did not subsequently adopt the *Milford Wind* ruling in an agency rulemaking and, thus, the order in that docket does not have a rule's force of law that would require the Commission to exercise jurisdiction to require TransWest to obtain a CPCN in this matter. *See* Utah Code § 63G-3-201(6) ("Each agency shall enact rules incorporating the principles of law not already in its rules that are established by final adjudicative decisions within 120 days after the decision is announced in its cases.").

Even if the Commission had adopted the *Milford Wind* ruling in agency rulemaking, the TWE Project is factually distinguishable from the project at issue in *Milford Wind*. Unlike in *Milford Wind*, TransWest will not generate any power from a generating station in Utah (or in any other state) and will not own the power that travels on the TWE Project's transmission lines. In short, for both legal and factual reasons, the *Milford Wind* ruling does not require a similar outcome in this docket.

For the reasons set forth above, TransWest is not an "electrical corporation" or a "public utility" and is not required to obtain a CPCN before constructing or operating the TWE Project. TransWest respectfully requests that this Commission issue an order confirming that TransWest

⁷ *See id.*, Order on Petition for Rehearing (July 2, 2008).

⁸ *See id.*, Report and Order (Oct. 8, 2008), Exhibit A (Stipulation) at 9-10 ("With the exception of the Conditions, the parties agree that Milford I should be exempt with respect to the certificated facility from all presently existing regulatory obligations imposed on public utilities or independent power producers by Utah statute or rule.").

is exempt from Commission jurisdiction and therefore that TransWest does not need to obtain a CPCN before constructing or operating the TWE Project.

IV. CONTACT INFORMATION

Communications concerning this Application should be directed to:

By Email (preferred)

Lisa Christian, General Counsel
Phillip Russell, Outside Counsel

Lisa.Christian@tac-denver.com
prussell@jdrslaw.com

By U.S. Mail

Lisa A. Christian
General Counsel
TransWest Express LLC
555 Seventeenth St., Ste. 2400
Denver, CO 80202

V. CONCLUSION

For the reasons set forth above, TransWest respectfully requests that the Commission take the following actions:

- (1) provide notice of this filing and set a comment period;
- (2) TransWest reasonably believes that this Application will not be opposed and, therefore, requests that the Commission treat this Application on an informal basis consistent with Utah Code § 63G-4-203 if no party opposes the relief sought herein; and
- (3) enter the findings and orders requested herein.

DATED this 23rd day of March 2022.

Respectfully submitted,



By:

Phillip J. Russell

JAMES DODGE RUSSELL & STEPHENS, P.C.

Attorneys for TransWest Express LLC

Certificate of Service
Docket No. 22-2636-01

I hereby certify that a true and correct copy of the foregoing was served by email this 23rd day of March 2022 on the following:

DIVISION OF PUBLIC UTILITIES

Chris Parker	chrisparker@utah.gov
William Powell	wpowell@utah.gov
Patricia Schmid	pschmid@agutah.gov
Justin Jetter	jjetter@agutah.gov
	dpudatarequest@utah.gov

OFFICE OF CONSUMER SERVICES

Michele Beck	mbeck@utah.gov
Bela Vastag	bvastag@utah.gov
Alyson Anderson	akanderson@utah.gov
Alex Ware	aware@utah.gov
Robert Moore	rmoore@agutah.gov
	ocs@utah.gov

TRANSWEST EXPRESS LLC

Lisa Christian	Lisa.Christian@tac-denver.com
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ROCKY MOUNTAIN POWER

Emily Wegener	emily.wegener@pacificorp.com
Stephanie Barber-Renteria	stephanie.barber-renteria@pacificorp.com

/s/ Phillip J. Russell
