

F. ROBERT REEDER (2710)  
VICKI M. BALDWIN (8532)  
PARSONS BEHLE & LATIMER  
Attorneys for Kennecott Utah Copper LLC  
One Utah Center  
201 South Main Street, Suite 1800  
Post Office Box 45898  
Salt Lake City, UT 84145-0898  
Telephone: (801) 532-1234  
Facsimile: (801) 536-6111

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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of an Investigation Regarding  
Third-Party Arrangements for Renewable  
Energy Generation.

**MEMORANDUM OF POINTS AND  
AUTHORITIES OF KENNECOTT UTAH  
COPPER LLC**

Docket No. 09-999-12

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On October 12, 2009, the Utah Public Service Commission (“Commission”) issued its Notice of Investigation and Procedural Order (“Notice”), requesting that interested parties submit comments or legal briefs regarding a series of legal questions. Kennecott Utah Copper LLC (Kennecott) respectfully submits its Memorandum of Points and Authorities to assist the Commission in its investigation.

**INTRODUCTION**

In its Notice, the Commission stated its intent is to investigate whether, and the extent to which, certain third-party arrangements for renewable energy generation<sup>1</sup> are subject to the Commission’s jurisdiction. The Commission asked interested parties to address the following questions:

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<sup>1</sup> The analysis may be different in each situation if the generation is not renewable.

(a) Whether the third party is a public utility under Utah law;

(b) Whether the third party is a public utility under Utah law when arrangements are entered into primarily as a financing mechanism for distributed renewable energy generation systems whereby a third party owns the renewable generation equipment, which is installed on a utility customer's premises, there is a long-term contract with the customer to supply a portion of that customer's electricity use, and payments are based on kilowatt-hours;

(c) Whether the third party is a public utility under Utah law when (i) there is a single relationship between the third-party owner of the generation and a customer or (ii) there are multiple customers taking power from the same third party; and

(d) Whether the third party is a public utility under Utah law when arrangements involve the leasing of distributed generation equipment from non-utility lessors to lessees that are also retail customers of utilities.

Based on our review and analysis, certain provisions of the Utah Code are applicable to answer these questions. For convenience, those provisions<sup>2</sup> are set forth in Appendix A to this document.

## **I. WHETHER THE THIRD PARTY IS A PUBLIC UTILITY UNDER UTAH LAW**

Under Utah law, “the Commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state.” *Id.* § 54-4-1. Therefore, whether a third party is a public utility under Utah law will determine whether the Commission has power and jurisdiction to supervise and regulate that third party. The answer to this question is really

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<sup>2</sup> This includes: Utah Code Annotated §§ 54-2-1(7), (8), (13), (14), (16)(a), (16)(d), (16)(f), (16)(g), (19), 54-4-1.

dependent on the nature of the transaction and the status of the participants. Therefore, a careful analysis of these criteria as they occur in the relevant statutes is conducted below.

**A. Electrical Corporation**

Electric plant, which is defined in Section 54-2-1(8) of the Utah Code,<sup>3</sup> includes renewable energy generation. Because we have renewable energy generation, we know we are dealing with electric plant in each of the Commission's scenarios.

Next we consider the definition of an electrical corporation. Pursuant to Utah law, an electrical corporation:

[I]ncludes every corporation, cooperative association, and person, 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, except independent energy producers, and except where electricity is generated on or distributed by the producer solely for the producer's own use, or the use of the producer's tenants, or for the use of members of an association of unit owners formed under Title 57, Chapter 8, Condominium Ownership Act, and not for sale to the public generally.

Utah Code Ann. § 54-2-1(7). Therefore, except for certain narrow exceptions, if the third party owns, controls, operates, or manages the electric plant, it is an electrical corporation. In addition, except for the exceptions, the third party is an electrical corporation if it in any way furnishes<sup>4</sup> electric power from the electric plant to the public within Utah.

The exceptions set forth above are: (1) when the third party qualifies as an independent energy producer ("IEP"); and (2) when the electricity that is generated by the electric plant is

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<sup>3</sup> See Appendix A.

<sup>4</sup> This does not require a sales transaction, but includes any type of furnishing. Cottonwood Mall Shopping Ctr. v. Utah Power & Light Co., 400 F.2d 36 (10th Cir. 1971).

produced for (a) the third party’s own use, (b) the use of the third party’s tenants, or (c) the use of members of a condominium association.

**B. Independent Energy Producer (“IEP”)**

The first exemption from electrical corporation is for an IEP, therefore, we first consider the definition of an IEP. An IEP includes: “every electrical corporation, person, corporation or government entity, their lessees, trustees, or receivers, that own, operate, control, or manage an independent power production or cogeneration facility.” *Id.* § 54-2-1(13). Therefore, we have an IEP if we are talking about owning, operating, controlling, or managing an independent power production or cogeneration facility.<sup>5</sup> We next look to the definition of an independent power production facility. That is defined as:

[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.

Utah Code Ann. § 54-2-1(14) (emphasis added). An IEP includes, therefore, an entity that owns, operates, controls, or manages a facility that produces electric energy from a renewable energy generation resource,<sup>6</sup> or a facility that meets the requirements for a qualifying facility (“QF”) under federal law.

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<sup>5</sup> While the Commission’s questions are directed specifically at a renewable energy generation source, the analysis herein would be the same for a third party that owns, operates, controls, or manages a cogeneration facility.

<sup>6</sup> If the fuel source in the Commission’s scenarios was natural gas rather than renewable energy, we would not have an IEP, and a different analysis would take place. That analysis would concentrate on the other exceptions to § 54-2-1(7)—namely, whether the electricity that is generated is produced for (a) the third party’s own use, (b) the use of the third party’s tenants, or (c) the use of members of a condominium association. Those uses would exempt the third party from the definition of electrical corporation, which would exempt the third party from the definition of a public utility.

In the situations set forth by the Commission, we have a renewable energy generation resource rather than a QF.<sup>7</sup> Therefore, if the third party owns, operates, controls, or manages a facility that produces electricity from a renewable energy *generation* resource,<sup>8</sup> it owns, operates, controls, or manages an independent power production facility (“IPPF”)<sup>9</sup> and is an IEP. Thus, it is excluded from the definition of an electrical corporation. However, it still may be considered a public utility.

**C. Independent Energy Producer as a Public Utility**

A public utility includes:<sup>10</sup>

[E]very . . . electrical corporation, . . ., and independent energy producer not described in Subsection (16)(d), 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 of consumers within the state for domestic, commercial, or industrial use.

Id. § 54.2.1(16)(a). We have previously determined that in the scenarios set forth by the Commission, we have an IEP. Hence, we have a public utility under Commission jurisdiction unless we meet the exemptions of (16)(d).<sup>11</sup>

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<sup>7</sup> While the Commission’s questions are directed specifically at a renewable energy generation source, the analysis herein would be the same for a generation facility that is a QF.

<sup>8</sup> Based on the word “produces,” the Commission recently ruled that only the generation facilities are included in the definition of an independent power production facility. Order on Pet. for Reh’g, In re: Application of Milford Wind Corridor for Cert. of Convenience & Necessity, July 2, 2008. The Commission ruled that for the interconnection facilities, the entity that owns, operates, or manages the facilities that interconnect a renewable energy generation resource to the grid is an electrical corporation and is not exempt under the IEP exemption.

<sup>9</sup> The IPPF is also electric plant.

<sup>10</sup> If the fuel source was natural gas rather than renewable energy and the transaction met one of the exemptions of § 54-2-1(7), we would not have an IEP or an electrical corporation, which would exempt the third party from the definition of a public utility and Commission jurisdiction.

<sup>11</sup> If the resource were natural gas and the third party did not meet an exemption of § 54-2-1(7) so that it was not exempt but instead considered an electrical corporation, it would not be eligible for this exemption.

**1. (16)(d) Exemption:**

That section provides:

An independent energy producer is exempt from the jurisdiction and regulations of the commission with respect to an independent power production facility if it meets the requirements of Subsection (16)(d)(i), (ii), or (iii), or any combination of these:

(i) the commodity or service is *produced or delivered*, or both, by an independent energy producer solely for the uses exempted in Subsection (7) or for the use of state-owned facilities;

(ii) the commodity or service is *sold* by an independent energy producer solely to an electrical corporation or other wholesale purchaser; or

(iii) (A) the commodity or service *delivered* by the independent energy producer is delivered to an entity which controls, is controlled by, or affiliated with the independent energy producer *or* to a user located on real property managed by the independent energy producer; and

(B) the real property on which the service or commodity is used is contiguous to real property which is owned or controlled by the independent energy producer. Parcels of real property separated solely by public roads or easements for public roads shall be considered as contiguous for purposes of this Subsection (16).

Id. § 54-2-1(16)(d) (emphasis added). By breaking this down, it appears that our IEP is exempt

with respect to its IPPF and is not under Commission jurisdiction if it:

(1) *produces or delivers* electricity or electrical service for

(a) its own use,

(b) the use of its tenants,

(c) the use of members of a condominium association,<sup>12</sup> or

(d) the use of a state-owned facility; or

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<sup>12</sup> Subsections (a) through (c) are the uses exempted in Subsection (7).

(2) *sells* electricity or electrical service solely to an electrical corporation or other wholesale purchaser (*i.e.* Rocky Mountain Power); or

(3) *delivers* the electricity or electrical service to

(a) an affiliate and the real property on which the electricity or electrical service is used is contiguous to real property owned or controlled by the IEP; or

(b) a user located on real property the IEP manages and the real property on which the electricity or electrical service is used is contiguous to real property owned or controlled by the IEP.

## **2. (16)(f) Exemption**

There are a few additional exemptions that are relevant. A public utility also does not include:<sup>13</sup>

[A]ny person that is otherwise considered a public utility under this Subsection (16) solely because of that person's ownership of an interest in an electric plant, cogeneration facility, or small power production facility in this state if *all* of the following conditions are met:

(A) the ownership interest in the electric plant, cogeneration facility, or small power production facility is leased to:

(I) a public utility, and that lease has been approved by the commission;

(II) a person or government entity that is exempt from commission regulation as a public utility; or

(III) a combination of Subsections (16)(f)(i)(A)(I) and (II);

(B) the lessor of the ownership interest identified in Subsection (16)(f)(i)(A) is:

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<sup>13</sup> If the fuel source were natural gas and the third party did not meet an exemption of § 54-2-1(7) so that it was considered an electrical corporation, it could also be eligible for this exemption.

(I) primarily engaged in a business other than the business of a public utility; or

(II) a person whose total equity or beneficial ownership is held directly or indirectly by another person engaged in a business other than the business of a public utility; and

(C) the rent reserved under the lease does not include any amount based on or determined by revenues or income of the lessee.

Id. § 54-2-1(16)(f) (emphasis added). Therefore, if our third party, who is an IEP, does not meet an exemption under (16)(d) explained above, the IEP can still be exempt if it leases its ownership interest in its renewable energy generation,<sup>14</sup> which is electric plant, to a public utility (*i.e.* Rocky Mountain Power) or exempt-governmental entity (*i.e.* Salt Lake City, Bountiful, *etc.*, but not Salt Lake County), *and* the IEP or the holder of the total equity of the IEP's ownership interest is not engaged in the business of a public utility (*i.e.* a bank), *and* the lease payments are not in any way determined by the income or revenues of that public utility or governmental entity that is the lessee (*i.e.* cannot be a percentage lease or any type of lease where any part of the payments are tied to income or revenue generating activity).

### **3. (16)(g) Exemption**

The final exemption provides:

[A]ny person that provides financing for, but has no ownership interest in an electric plant, small power production facility, or cogeneration facility. In the event of a foreclosure in which an ownership interest in an electric plant, small power production facility, or cogeneration facility is transferred to a third-party financier of an electric plant, small power production facility, or cogeneration facility, then that third-party financier is exempt from classification as a public utility for 90 days following the

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<sup>14</sup> This also applies if the generation facility is a QF or cogeneration facility, but the Commission's scenarios ask specifically about renewable energy generation.



foreclosure, or for a longer period that is ordered by the commission. This period may not exceed one year.

Id. § 54-2-1-(16)(g). Accordingly, if our third party who is an IEP cannot qualify for an exemption under (16)(d) or (16)(f), it would still be exempt if it had no ownership interest (except for the 90 day foreclosure exception) in the IPPF but only served as a financing entity.<sup>15</sup>

**II. WHETHER THE THIRD PARTY IS A PUBLIC UTILITY UNDER UTAH LAW WHEN ARRANGEMENTS ARE ENTERED INTO PRIMARILY AS A FINANCING MECHANISM FOR DISTRIBUTED RENEWABLE ENERGY GENERATION SYSTEMS WHEREBY A THIRD PARTY OWNS THE RENEWABLE GENERATION EQUIPMENT, WHICH IS INSTALLED ON A UTILITY CUSTOMER'S PREMISES, THERE IS A LONG-TERM CONTRACT WITH THE CUSTOMER TO SUPPLY A PORTION OF THAT CUSTOMER'S ELECTRICITY USE, AND PAYMENTS ARE BASED ON KILOWATT-HOURS**

The analysis of Section I also applies here. In this situation, we have a third party that owns renewable energy generation equipment (IPPF), which is also electric plant. Therefore, based on the previous analyses above, we have an IEP that is not an electrical corporation.<sup>16</sup>

In this scenario, the IPPF is installed on a utility customer's premises and supplies a portion of that customer's electricity, and the payments from the customer to the third party are based on kilowatt hours.

Under Section 54-2-1(16)(d), the IEP is exempt if it: (1) *produces or delivers* electricity or service for: (a) its own use, (b) the use of its tenants, (c) the use of members of a condominium association, or (d) the use of a state-owned facility; or (2) *sells* the electricity or service to an electrical corporation or other wholesale purchaser (*i.e.* Rocky Mountain Power); or (3) *delivers* the electricity or service to: (a) an affiliate and the real property on which the

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<sup>15</sup> If the fuel source were natural gas and the third party did not meet an exemption of § 54-2-1(7) so that it was considered an electrical corporation, it could also be eligible for this exemption.

<sup>16</sup> This applies to the generation portion of the resource; the IEP is not an electrical corporation. As to the interconnection facilities it is an electrical corporation.

electricity or electric service is used is contiguous to real property owned or controlled by the IEP, or (b) a user on real property the IEP manages and that real property is contiguous to real property the IEP owns or controls.

In this hypothetical, the electric power is not being produced for the IEP's own use. Because the IPPF is located on the utility customer's premises, and is being sold to the utility customer, it is not being produced for the use of the IEP's tenants. The power is not being sold to an electrical corporation or other wholesale purchaser. It also does not appear from the hypothetical that the electricity is being delivered to a user on real property that the IEP manages, which property is contiguous to real property the IEP owns. In each of these situations, the IEP would remain a public utility.

However, under this hypothetical, the customer could be a state-owned facility. Also, if the IPPF is installed on the utility customer's property, and the utility customer is a condominium association (*i.e.*, installed on the common areas), then the electricity could be produced or delivered for the use of the members of the condominium association. The customer could also be an affiliate if the affiliate is using the electricity or electrical service on real property contiguous to real property owned or controlled by the IEP. In these limited situations, the third party is not a public utility and is not under the power and jurisdiction of the Commission. These are the only exemptions that apply to this hypothetical.

The leasing arrangement of Section 54-2-1(16)(f) does not appear to be the situation described in the hypothetical. Therefore, this exemption likely does not apply here.<sup>17</sup> Also,

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<sup>17</sup> If we assume the hypothetical but include the leasing arrangement of (16)(f), because the lease payments do not appear to be in any way determined by the income or revenues of the customer under this hypothetical, the IEP

because the IEP owns the IPPF, it cannot qualify for the public utility exemption under Section 54-2-1(16)(g), which, except for the 90 day foreclosure situation, only applies if the third party has no ownership interest.

**III. WHETHER THE THIRD PARTY IS A PUBLIC UTILITY UNDER UTAH LAW WHEN (I) THERE IS A SINGLE RELATIONSHIP BETWEEN THE THIRD-PARTY OWNER OF THE GENERATION AND A CUSTOMER OR (II) THERE ARE MULTIPLE CUSTOMERS TAKING POWER FROM THE SAME THIRD PARTY**

The analysis and the answers here are the same as that of Section I above. It does not matter whether there is one customer or a multiple of customers. The deciding factors are not dependent on the number of customers, but rather, the nature of the transaction and the status of the participants.

**IV. WHETHER THE THIRD PARTY IS A PUBLIC UTILITY UNDER UTAH LAW WHEN ARRANGEMENTS INVOLVE THE LEASING OF DISTRIBUTED GENERATION EQUIPMENT FROM NON-UTILITY LESSORS TO LESSEES THAT ARE ALSO RETAIL CUSTOMERS OF UTILITIES**

The analysis of Section I above also applies here. This case involves the leasing of generation equipment (IPPF) from a non-utility lessor to a utility's retail customer. Based on the previous analyses above, as to the *generation* facilities only, we have an IEP that is not an electrical corporation.

None of the exemptions of 54-2-1(16)(d) appears to apply because all those involve the business of a public utility (selling or furnishing electricity), and in this case, we have a non-utility lessor.

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should also be exempt if it leases its ownership interest to a public utility or governmental entity, and the total equity of its ownership interest is held by another entity not engaged in the business of a public utility.

Because the hypothetical states that the third party is a non-utility lessor, it appears that it or the holder of the total equity of its ownership interest is not engaged in the business of a public utility. Under 54-2-1(16)(f), therefore, if the IEP leases its ownership interest to a public utility (*i.e.* Rocky Mountain Power) or exempt-governmental entity (*i.e.* Salt Lake City), *and* the lease payments are not in any way determined by the income or revenues of that public utility or governmental entity (*i.e.* cannot be a percentage lease or any type of lease where any part of the payments are tied to income or revenue generating activity), the IEP is not a public utility.<sup>18</sup>

Applying 54-2-1(16)(g) to this hypothetical, if the IEP has no ownership interest (except the 90 day foreclosure situation), but only serves as a financing entity, it is exempt from being a public utility.<sup>19</sup>

### CONCLUSION

Kennecott appreciates the Commission giving parties the opportunity to respond to this issue.

DATED this 16th day of November, 2009.

/s/ Vicki M. Baldwin  
F. ROBERT REEDER  
VICKI M. BALDWIN  
PARSONS BEHLE & LATIMER  
Attorneys for Kennecott Utah Copper LLC

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<sup>18</sup> This is also true if the generation resource is not renewable energy and the third party does not meet one of the exemptions of § 54-2-1(7).

<sup>19</sup> This is also true if the generation resource is not renewable energy and the third party does not meet one of the exemptions of § 54-2-1(7).

**APPENDIX A**  
**APPLICABLE STATUTES**

**54-2-1** Definitions.

As used in this title

...

(7) “Electrical corporation” includes every corporation, cooperative association, and person, their lessees, trustees, and receivers, 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, except independent energy producers, and except where electricity is generation on or distributed by the producer solely for the producer’s own use, or the use of the producer’s tenants, or for the use of members of an association of unit owners formed under Title 57, Chapter 8, Condominium Ownership Act, and not for sale to the public generally.

(8) “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, or 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.

...

(13) “Independent energy producer” means every electrical corporation, person, corporation, or government entity, their lessees, trustees, or receivers, that own, operate, control, or manage an independent power production or cogeneration facility.

**(14)** “Independent power production facility” 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.

...

**(16) (a)** “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 Subsection (16)(d), 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.

...

**(d)** An independent energy producer is exempt from the jurisdiction and regulations of the commission with respect to an independent power production facility if it meets the requirements of Subsection (16)(d)(i), (ii), or (iii), or any combination of these:

(i) the commodity or service is produced or delivered, or both, by an independent energy producer solely for the uses exempted in Subsection (7) or for the use of state-owned facilities;

(ii) the commodity or service is sold by an independent energy producer solely to an electrical corporation or other wholesale purchaser; or

(iii) (A) the commodity or service delivered by the independent energy producer is delivered to an entity which controls, is controlled by, or affiliated with the independent energy producer or to a user located on real property managed by the independent energy producer; and

(B) the real property on which the service or commodity is used is contiguous to real property which is owned or controlled by the independent energy producer. Parcels of real property separated solely by public roads or easements for public roads shall be considered as contiguous for purposes of this Subsection (16).

...

(f) (i) “Public utility” does not include any person that is otherwise considered a public utility under this Subsection (16) solely because of that person’s ownership of an interest in an electric plant, cogeneration facility, or small power production facility in this state if all of the following conditions are met:

(A) the ownership interest in the electric plant, cogeneration facility, or small power production facility is leased to:

(I) a public utility, and that lease has been approved by the commission;

(II) a person or government entity that is exempt from commission regulation as a public utility; or

(III) a combination of Subsections (16)(f)(i)(A)(I) and (II);

(B) the lessor of the ownership interest identified in Subsection (16)(f)(i)(A) is:

(I) primarily engaged in a business other than the business of a public utility; or

(II) a person whose total equity or beneficial ownership is held directly or indirectly by another person engaged in a business other than the business of a public utility; and

(C) the rent reserved under the lease does not include any amount based on or determined by revenues or income of the lessee.

(ii) Any person that is exempt from classification as a public utility under Subsection (16)(f)(i) shall continue to be so exempt from classification following termination of the lessee's right to possession or use of the electric plant for so long as the former lessor does not operate the electric plant or sell electricity from the electric plant. If the former lessor operates the electric plant or sells electricity, the former lessor shall continue to be so exempt for a period of 90 days following termination, or for a longer period that is ordered by the commission. This period may not exceed one year. A change in rates that would otherwise require commission approval may not be effective during the 90-day or extended period without commission approval.

(g) "Public utility" does not include any person that provides financing for, but has no ownership interest in an electric plant, small power production facility, or cogeneration facility. In the event of a foreclosure in which an ownership interest in an electric plant, small power production facility, or cogeneration facility is transferred to a third-party financier of an electric plant, small power production facility, or cogeneration facility, then that third-party financier is exempt from classification as a public utility for 90 days following the foreclosure, or for a longer period that is ordered by the commission. This period may not exceed one year.

...

(19) "Qualifying power production facility" means a facility that:



(a) produces electrical 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;

(b) has a power production capacity that, together with any other facilities located at the same site, is no greater than 80 megawatts, and

(c) is a qualifying small power production facility under federal law.<sup>20</sup>

...

**54-4-1.** The Commission is hereby vested with 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, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction. . . .

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<sup>20</sup> See 18 C.F.R. § 292.203 for the criteria of a qualifying small power production facility.

## CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November 2009, I caused to be e-mailed, a true and correct copy of the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES** to:

Michael Ginsberg  
Patricia Schmidt  
ASSISTANT ATTORNEYS GENERAL  
500 Heber Wells Building  
160 East 300 South  
Salt Lake City, UT 84111  
mginsberg@utah.gov  
pschmid@utah.gov

William Powell  
Phil Powlick  
Dennis Miller  
DIVISION OF PUBLIC UTILITIES  
500 Heber Wells Building  
160 East 300 South, 4<sup>th</sup> Floor  
Salt Lake City, UT 84111  
wpowell@utah.gov  
dennismiller@utah.gov  
Philippowlick@utah.gov

Michele Beck  
Executive Director  
COMMITTEE OF CONSUMER SERVICES  
500 Heber Wells Building  
160 East 300 South, 2<sup>nd</sup> Floor  
Salt Lake City, UT 84111  
mbeck@utah.gov

Paul Proctor  
ASSISTANT ATTORNEYS GENERAL  
500 Heber Wells Building  
160 East 300 South  
Salt Lake City, UT 84111  
pproctor@utah.gov

Cheryl Murray  
Dan Gimble  
UTAH COMMITTEE OF CONSUMER SERVICES  
160 East 300 South, 2<sup>nd</sup> Floor  
Salt Lake City, UT 84111  
cmurray@utah.gov  
dgimble@utah.gov

Yvonne R. Hogle  
Daniel Solander  
Jeff Larsen  
Mark Moench  
David L. Taylor  
ROCKY MOUNTAIN POWER  
201 South Main Street, Suite 2300  
Salt Lake City, UT 84111  
yvonne.hogle@pacificorp.com  
Daniel.solander@pacificorp.com  
jeff.larsen@pacificorp.com  
Mark.moench@pacificorp.com  
datarequest@pacificorp.com  
Dave.Taylor@PacifiCorp.com

/s/ Colette V. Dubois

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