Justin Lee Brown
Senior Counsel
Rocky Mountain Power
201 South Main Street, Suite 2300
Salt Lake City, UT 84111
(801) 220-4050
(810) 220-3299 (fax)
Justin.Brown@pacificorp.com

Gregory B. Monson (2294)
Stoel Rives LLP
201 South Main Street, Suite 1100
Salt Lake City, UT 84111
(801) 578-6946
(801) 578-6999
gbmonson@stoel.com

Attorneys for Rocky Mountain Power

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power, a Division of PacifiCorp, for a Deferred Accounting Order to Defer the Costs of Loans Made to Grid West, the Regional Transmission Organization	Docket No. 06-035-163
In the Matter of the Application of Rocky Mountain Power, for an Accounting Order to Defer the Costs Related to the MidAmerican Energy Holdings Company Transaction	Docket No. 07-035-04 **OPPOSITION OF ROCKY MOUNTAIN POWER TO MOTIONS FOR SUMMARY JUDGMENT**

Rocky Mountain Power, a Division of PacifiCorp (sometimes, "Company"), pursuant to Utah Administrative Code R746-100-1.C and R746-100-4.D and Utah Rules of Civil Procedure 7 and 56, hereby responds in opposition to the Motion of the Utah Division of Public Utilities for Summary Judgment ("Division Motion") and the Utah Committee of Consumer Services'

Motion for Summary Judgment ("Committee Motion") (collectively, "Motions") filed October 12, 2007 in the above referenced dockets. The Motions should be denied because there are genuine issues of material fact and because, even if there were no genuine issues of material fact, there is no law requiring denial of Rocky Mountain Power's requests for deferred accounting. Granting deferred accounting would not violate any ratemaking principle and is not in violation of the Stipulation Regarding Revenue Requirement and Rate Spread ("Stipulation") in the 2006 Rate Case. The Motions fail to comply with requirements for summary judgment motions and should be denied.

I. INTRODUCTION

Rocky Mountain Power initiated Docket No. 06-035-163, on December 20, 2006, by filing an application for a deferred accounting order with respect to Utah's portion ($1.1 million) of its loan to Grid West, the Regional Transmission Organization ("RTO"). In the application, Rocky Mountain Power requested that the Commission enter an order allowing it to transfer the loan from Account 124, Other Investments, to Account 182.3, Other Regulatory Assets, and to amortize the balance by crediting Account 182.3 and debiting Account 560, Transmission Operation Supervision and Engineering.

Rocky Mountain Power initiated Docket No. 07-035-04, on January 24, 2007, by filing an application for a deferred accounting order with respect to costs arising from the reduction in workforce associated with the acquisition of Rocky Mountain Power by MidAmerican Energy Holdings Company ("MEHC") ("Transition Costs"). Acknowledging that the Utah portion ($2.7 million) of Transition Costs then known were included in its filings in its general rate case, Docket No. 06-035-21 ("2006 Rate Case"), Rocky Mountain Power requested authorization to continue to amortize those costs commencing October 1, 2006 through September 30, 2009. The

application proposed to capitalize the Utah portion ($18 million)[1] of all Transition Costs in Account 182.3 and amortize them through Account 930.2, Miscellaneous General Expenses.

On February 2, 2007, the Division of Public Utilities ("Division") filed a memorandum in each docket stating that "the Division may oppose" the application on the ground that the Division was "of the opinion that the costs … may not meet the Division's criteria for deferred accounting" and that the "costs may be covered by the [S]tipulation in the last RMP rate case." The Division further stated that "even if the costs were not specifically included in the [S]tipulation, deferral of these types of costs may violate the spirit of the … [S]tipulation, especially the stay out provision."

Rocky Mountain Power initiated Docket No. 07-035-14, on March 21, 2007, by filing an application for a deferred accounting order with respect to costs associated with the retirement and decommissioning of its Powerdale Plant as the result of a flood. This application has been consolidated with the two prior applications for hearing, but is not the subject of the Motions.

On May 3, 2007, following discovery and technical conferences on April 13, 2007 and May 8, 2007, Rocky Mountain Power filed a statement of position on all three applications pursuant to a scheduling order issued on April 27, 2007. Rocky Mountain Power reemphasized that it was not seeking a determination of ratemaking treatment for the costs, but only their deferral. Therefore, it did not propose an amortization period for the costs. However, if the Commission wished to determine the amortization period, the Company stated that a three-year period would be reasonable and that the amortization period for the Grid West loan costs could reasonably commence on January 1, 2007 and for the Transition Costs on October 1, 2006.

[1] This amount was not provided in the application, but was subsequently provided in the Direct Testimony of Jeffrey K. Larsen ("Larsen Direct") filed August 8, 2007. It includes the $2.7 million known at the time of the 2006 Rate Case. Larsen Direct, lines 355-358.

The Commission issued a further scheduling order on July 16, 2007. Pursuant to that order, on August 8, 2007, Rocky Mountain Power filed the Larsen Direct; on September 10, 2007, the Division filed Direct Testimony of David T. Thomson ("Thomson Direct"), the Committee of Consumer Services ("Committee") filed Testimony of Cheryl Murray and Donna DeRonne and the Utah Association of Energy Users ("UAE") filed the Direct Testimony of Kevin C. Higgins; on October 1, 2007, Rocky Mountain Power filed Rebuttal Testimony of Jeffrey K. Larsen ("Larsen Rebuttal") and the Committee filed Rebuttal Testimony of Donna DeRonne; and on October 22, 2007, the Division filed Surrebuttal Testimony of David T. Thomson, the Committee filed Surrebuttal Testimony of Donna DeRonne and UAE filed Surrebuttal Testimony of Kevin C. Higgins.

The Motions were filed on October 12, 2007, prior to the filing of surrebuttal testimony. Both Motions cite testimony filed by MEHC and the Commission's order in the 2006 Rate Case in support of their argument that there is no genuine issue of material fact. *See* Division Motion at 2-3; Committee Motion at 4-5. The Division Motion further cites the Thomson Direct in support of dates Rocky Mountain Power filed deferred accounting applications on the Grid West loan costs in other states and the application in Docket No. 07-035-04 in support of the fact that a portion of the Transition Costs were included in the Company's application in the 2006 Rate Case. Division Motion at 3-4. The Committee Motion cites a Federal Energy Regulatory Commission ("FERC") order and the Larsen Rebuttal in support of the fact that PacifiCorp participated in the formation, management and activities of Grid West and in the decisions to create, reorganize and dissolve predecessors and successors to Grid West. Committee Motion at 4. Otherwise, the Motions do not cite the testimony filed in these dockets. Contrary to the premise of the Motions, the testimony filed in these dockets establishes that there are genuine

issues of material fact. Furthermore, the Division's and Committee's filing of surrebuttal testimony presumably was necessary because there were genuine issues of material fact in the evidence previously filed.

II. DISPUTED FACTS

Rule 56(c) of the Utah Rules of Civil Procedure provides that the motion, memorandum and affidavits filed in connection with a motion for summary judgment "shall be in accordance with Rule 7." Rule 7(c)(3)(A) provides in part that

> A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials.

The Motions do not comply with this requirement, making it difficult for Rocky Mountain Power to comply with Rule 7(c)(3)(B), requiring that

> A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

In an effort to comply with these requirements, applicable to Commission proceedings pursuant to Utah Administrative Code R746-100-1.C, Rocky Mountain Power will quote portions of the Motions that are controverted and will then set forth additional facts with appropriate citations to the testimony that preclude summary judgment.

A. Controverted Facts in Division Motion

Rocky Mountain Power does not controvert any of the statements in the Statement of Undisputed Material Facts section of the Division Motion except the concluding sentence: "There are no material disputed facts." As will be demonstrated below, there are genuine issues of material fact. Rocky Mountain Power also controverts other statements of fact in the Division Motion.

1. Claim that the Grid West loan costs and Transition Costs were not unforeseeable and extraordinary.

> The Company … should have included Grid West costs and Transition Costs because they were not unforeseeable and extraordinary. …
>
> Grid West costs were foreseeable and should have been included in the Company's 2006 rate case filing. … The filing of the deferred accounting treatment requests for the Grid West costs in Oregon, Wyoming and Idaho in such close proximity to the Utah rate case filing demonstrates that the Grid West issue was foreseen. … As set forth above, the events giving rise to the Grid West Filing were not unforeseen and extraordinary.
>
> … Reducing employee numbers is a common occurrence after acquisitions, and large layoffs should not have been unforeseen here, particularly when about 250 jobs were eliminated when the Iowa-Illinois Gas and Electric Company and Midwest Resources Inc. merged to become MidAmerican Energy Company, an affiliate of RMP. Therefore, events giving rise to the Transition Cost Filing were not unforeseen and extraordinary.
>
> ….
>
> The costs associated with the Grid West Filing and the Transition Cost filing were not unforeseen and extraordinary.

Division Motion at 5-7 (footnotes omitted).

The Division did not cite evidence in support of certain of these statements.[2] In addition, there are factual issues associated with these statements. First, is the unforeseeable and

[2] In support of the statement regarding the jobs eliminated in the merger that created MidAmerican Energy Company, the Division cites a newspaper article. *Id.* at 6, n.18. While Rocky

extraordinary standard the appropriate accounting standard for deferred accounting? Evidence in this case demonstrates that to qualify for deferred accounting an event must be extraordinary to the extent that extraordinary refers to items that are nonrecurring, unusual or in some cases unforeseen, but that events do not always have to be unforeseen to qualify for deferred accounting treatment. *See* Larsen Rebuttal, lines 23-26. Second, there is a dispute in the evidence regarding whether a materiality threshold should be applied in determining whether an event is extraordinary and, if so, what it should be. *See, e.g.*, Thompson Direct, lines 106-173; Larsen Direct, lines 91-100; Larsen Rebuttal, lines 56-103. Third, even assuming for the sake of argument that the Division's position that costs must be unforeseeable and extraordinary to be deferred is found to be correct by the Commission, the issue of whether the costs were unforeseeable and extraordinary is a factual issue. Mr. Larsen's testimony is that the notification of default of the Grid West loan was not received until April 2006, after the March 7, 2006 filing date for the 2006 Rate Case and well beyond the lockdown of results to complete the case filing. *See* Larsen Direct, lines 291-295; Larsen Rebuttal, lines 255-259. With respect to the Transition Costs, Mr. Larsen's testimony is that the only Transition Costs included in the rate relief sought in the 2006 Rate Case were those known at the time MEHC filed testimony on April 5, 2006. The Company did not include any projection of Transition Costs because no projection existed. *See* Larsen Direct, lines 343-345; Larsen Rebuttal, lines 363-374. Mr. Larsen also testifies that both events are unusual and unlikely to recur in the foreseeable future. *See* Larsen Direct, lines 30-31, 95-100, 309-311; Larsen Rebuttal, lines 66-67, 127-129, 230-231, 410-411.

Mountain Power assumes there may have been job reductions associated with that merger, it has no facts and there are no facts on the record in this case to support the statement. The Division is required to cite evidence in support of a motion for summary judgment, not newspaper articles.

2. Claim that the Company made a mistake in estimating its future costs in the 2006 Rate Case.

> The Company's mistakes in estimating its future costs do not warrant the deferral treatment requested by the Company.

Division Motion at 6.

The Division does not cite any evidence in support of this supposed statement of fact. The evidence cited in the prior section controverts this claimed fact. *See* Section II.A.1, above. The Company did not make a mistake in its estimation of future costs in the 2006 Rate Case.

3. Claim that the applications provide an opportunity for the Company to recover costs incurred during the "stay out" period.

> The requests for the deferral accounting orders in effect eviscerated [the stay-out] provision because they provide the Company an opportunity to request to recover costs incurred during the "stay out" period that the Company argues were not included, or were not included accurately, in the Company's future test year projections.

Division Motion at 7-8.

The Division does not cite any evidence in support of this statement of claimed fact. In fact, the testimony controverts this statement. The testimony establishes that by proposing amortization of the Grid West loan costs and the Transition Costs commencing during the stay-out period, the Company is not seeking to recover costs incurred during the stay-out period. *See, e.g.*, Larsen Direct, lines 314-317; Larsen Rebuttal, lines 224-229, 234-242, 432-442.

B. Controverted Facts in Committee Motion

The Committee Motion includes statements in its Statement of Facts section that are not supported by any citation to evidence and are controverted.

1. Claim that the Grid West loan costs and the Transition Costs are included in current rates.

> To state it again, Rocky Mountain is seeking an opportunity to include in the next general rate case, expenses actually incurred prior to December 11, 2006, for which rates had already been determined, or expenses the

> utility included or that are presumed included in the test year selected by the utility for the general rate case Docket No. 06-035-21. Therefore, the expenses are included in rates in effect after December 11, 2006.

Committee Motion at 3.

Much of this statement is not a statement of fact at all, but is rather legal argument. However, to the extent it is a factual statement, it is controverted. Proper accounting for the expenses is to defer them. *See, e.g.*, Larsen Direct, lines 51-62, 149-156, 309-317, 340-353. The expenses for which Rocky Mountain Power seeks deferred accounting (with the exception of the $2.7 million of Transitions Costs known in April 2006) are not included (or presumed included) in the rates currently in effect. *See, e.g.*, Larsen Rebuttal, lines 299-301, 380-393.

2. Claim that the Grid West loan costs and the Transition Costs are routine and usual.

> All parties' [sic] have offered evidence that the costs of participating in and loans made to Grid West, and management's employees severance benefits policies originated from the usual and planned course of utility operations.

Committee Motion at 3.

There is no citation to the testimony supposedly offered by all parties to support this statement. There is a citation following the next sentence referring to Grid West and its predecessors and successors. That citation is to a FERC order and the Larsen Rebuttal. The FERC order simply notes in passing that PacifiCorp was an active participant in the development of Grid West and also supported previous efforts to establish an RTO in the region. It also provides a brief description of these previous efforts.[3] The portion of the Larsen Rebuttal cited notes that although the employees that had worked on Grid West may no longer be working on it, they may be working on behalf of customers in other transmission planning forums. *See*

[3] Declaratory Order Providing Guidance Concerning Grid West Proposal, 112 FERC ¶ 61012, ¶¶ 61,091-61,092 (Jul. 1, 2005).

Larsen Rebuttal, lines 302-305. Neither of these references indicates in any way that failure of Grid West to repay a loan is not an unusual and nonrecurring event that should be accounted for on a deferred basis.[4] There is also a citation to the testimony filed by MEHC in the 2006 general rate case in the next sentence. Again, that testimony does not indicate in any way that incurrence of Transition Costs in connection with acquisition of the utility is not an unusual and non-recurring event that should be accounted for on a deferred basis.[5] Mr. Larsen's testimony establishes that it should be. *See* Section II.A.1, above, and Section II.C, below.

3. Claim that the Grid West loan costs and the Transition Costs are routine and normal expenses and were known or should have been known in the 2006 Rate Case.

> Employee benefits, and investments in regional transmission studies and coordination planning, are common programs within the control of management, result in expenses commonly recovered in general rate cases, are capable of being calculated and forecast with reasonable accuracy, and are known with certainty or readily foreseen. Rocky Mountain included some Grid West and some severance benefit expenses in its revenue requirement forecast for the 06-035-21 general rate case test

[4] The Committee Motion also includes a footnote, asserting, without citation, that "[t]he loans made to Grid West date back to 2000. PacifiCorp knew with certainty the commercial terms of the loan agreements, and when and how the loans were to be paid. PacifiCorp or its counsel may very well have participated in negotiating and drafting the terms of payment." *Id.* at 4. Although Rocky Mountain Power acknowledges that PacifiCorp started loaning funds to Grid West in 2000 and assumes that the terms of the loans were known to it, there is no evidence that the terms of the loans were known to it or that its predecessor or its counsel participated in negotiating or drafting the terms of the loans. The statement is irrelevant, but it illustrates that the Committee's Motion does not come close to complying with Utah Rule of Civil Procedure 7(c)(3)(A).

[5] The Committee Motion assumes that the Transition Costs were incurred in "what was most certainly a deliberate, considered and planned workforce reduction intended to occur in the test year." *Id.* The testimony cited does not say those things. *See* Testimony of Thomas B. Specketer, Docket No. 06-035-21 (Utah PSC Apr. 5, 2006) lines 51-56. The Committee Motion proceeds in a footnote to assume that "there can be no question but that the scope of the workforce reduction was known or precisely estimated. That the utility did not fully adjust its test year revenue requirement to account for the full extent of its knowledge proves that the request for deferred accounting in Docket No. 07-035-04 is due to the utility's error or omission, and deferred accounting of the costs is not allowed." These are clearly not statements of undisputed fact or of fact at all, and they are contrary to evidence in this docket that the only amount of Transition Costs known when the MEHC testimony was filed in the 2006 Rate Case was the amount stated in that testimony and that no projection of Transition Costs had been made. *See, e.g.*, Larsen Rebuttal, lines 367-372.

> year. The utility's stated revenue requirement included amounts and categories that included Grid West and employee benefit costs. There was no third party or external event that in any manner affected the timing, purpose or amount of these expenses. No third party or external event prevented their inclusion in the general rate case filed on March 7, 2006. Rocky Mountain and PacifiCorp's management planned for and acted upon one-time, nonreoccuring, but usual events. The events were known or evident to the utility prior to or shortly after filing its general rate case, Docket No. 06-035-21, on March 7, 2006.

Committee Motion at 4-5.

Again, the Committee makes these statements without citation. While Rocky Mountain Power is willing to concede that it commonly deals with employee benefits and transmission studies and coordination planning, the evidence in this case is that the Grid West loan costs and the Transition Costs are both unusual and nonrecurring costs. *See* Section II.A.1, above.

4. Claim that there were multiple opportunities to include the Grid West loan costs and Transition Costs in the 2006 Rate Case.

> From the filing date, March 7, 2006, until the Commission's December 1, 2006 Report and Order, there were multiple opportunities to describe these events and their cost. *See Report and Order, December 1, 2006, Part I – Procedural History, Page 1 to 5.*

Committee Motion at 5.

The Commission's order in the 2006 Rate Case does not state that Rocky Mountain Power had multiple opportunities to change its rate request. This is apparently an assumption of the Committee without evidentiary support. The evidence in this case is that there was no opportunity to introduce the Grid West loan costs in the rate case. *See, e.g.*, Larsen Direct, lines 291-295; Larsen Rebuttal, lines 254-255. The notification of default was not received until April of 2006, after the March 7, 2006 filing date and well after the lockdown of results to complete the case filing. *See, e.g.*, Larsen Direct, lines 291-292; Larsen Rebuttal, lines 255-259. Likewise, the evidence is that when the case was filed on March 6, 2006, the Company was still owned by ScottishPower. The only opportunity to present additional evidence on the record was

the supplemental testimony filed by MEHC on April 5, 2006. In that testimony, the Company presented the known Transition Costs. No projection of Transition Costs was ever presented because none existed. *See, e.g.*, Larsen Rebuttal, lines 363-372.

5. Claim that use of a forecasted test year by PacifiCorp in the 2006 Rate Case precludes deferred accounting for the Grid West loan costs and the Transition Costs.

> The utility's revenue requirement was based upon a future test year, October 1, 2006 to September 30, 2007. PacifiCorp intended that the parties and the Commission rely upon its stated revenue requirement as an accurate forecast of the total cost of providing electric service during the rate effective period.

Committee Motion at 5.

Rocky Mountain Power does not contest that PacifiCorp's requested revenue requirement was based upon a future test year from October 1, 2006 to September 30, 2007 and that it presented the most accurate information regarding its forecast of normal operating costs, investments and revenue and any known unusual costs for the test period that it had at the time it filed the case. To that extent this statement is not controverted. However, the clear implication of the statement is that because PacifiCorp proposed a future test period, Rocky Mountain Power cannot seek deferred accounting of expenses actually incurred during the future test period. This is a legal issue, not a factual one. To the extent the Committee wishes to portray it as a factual issue, it is controverted. The evidence in this case is that rates were set based upon a black box stipulation in which parties had different positions on both the level of investments, revenues and expenses considered and the appropriate test period. The costs were not included in PacifiCorp's rate request. Therefore, there is no factual foundation for any claim that the expenses PacifiCorp forecast or could have forecast for the future test period were included in the rates set. *See, e.g.*, Larsen Rebuttal, lines 380-388. Furthermore, the evidence is that use of a historical or future test

period has no impact on the appropriateness of deferred accounting treatment of actual expenses incurred. *See, e.g., id.*, lines 137-148.

C. Additional Facts that Prevent Summary Judgment

The essential issue presented by the applications is whether deferred accounting is the appropriate accounting treatment for the Grid West loan costs and Transition Costs. The parties have presented testimony on that factual issue. Much of that testimony is expert testimony. Based on the competent, expert testimony filed in these dockets by Mr. Larsen, the Commission should find that the appropriate accounting for the Grid West loan costs and the Transition Costs is deferred accounting. The Commission should also find that the costs (except for $2.7 million of the Transition Costs) were reasonably not included in the Company's rate request in the 2006 Rate Case and that failure to grant deferred accounting treatment for them would deny Rocky Mountain Power a reasonable opportunity to recover costs prudently incurred in providing service to customers.

For example, the Larsen testimony establishes the following facts:

1. Deferred accounting is a recognized regulatory accounting mechanism that provides a proper matching of costs and benefits and properly addresses cost recovery issues. Larsen Direct, lines 51-56.

2. Deferred accounting allows costs or revenues that would normally be booked as a current period cost or revenue by an unregulated enterprise to be deferred and amortized over several periods. *Id.*, lines 56-59.

3. Deferred accounting is simply a financial accounting adjustment made by a utility that has no impact on customer rates until the costs associated with the deferral are included in a general rate case or other cost recovery mechanism. *Id.*, lines 59-62.

4. The deferral process is a mechanism used to maintain stable utility rates and to allow the utility an opportunity to recover its prudently incurred costs in providing utility service. *Id.*, lines 152-154.

5. Extraordinary costs, meaning costs that are unusual and not likely to recur in the foreseeable future, should be deferred and amortized over a period of time so that when rates are set, they are set on the basis of the Company's normalized cost and revenue streams. *Id.*, lines 154-156; Larsen Rebuttal, lines 23-25.

6. The criteria for deferring an expense or revenue and establishing a regulatory asset or liability are the same whether the extraordinary expense is incurred during a rate case test period or outside a rate case test period. Larsen Direct, lines 149-151.

7. With respect to the Grid West loan costs, the Company is requesting to defer and amortize costs that are normally and properly amortized over a period of time as opposed to being expensed in a single period. This accounting better reflects the ongoing operations of the utility and preserves the opportunity to request recovery of these costs in a subsequent rate case. *Id.*, lines 309-314.

8. By beginning the amortization of the Grid West loan costs in January of 2007, amortization will occur while current rates are in effect so no current period expenses that are being incurred by the Company are being carried forward for future recovery. *Id.*, lines 314-317.

9. As a result of the severance program, 270 employees have been terminated resulting in $40 million in annual labor cost savings. Severance costs for these employees is approximately $46 million, of which only $6.4 was known by the Company and included in the revenue requirement filing as part of the 2006 Rate Case. The remaining severance costs of $39

million have been incurred subsequent to that date, and were not considered as part of the revenue requirement in the 2006 Rate Case. *Id.*, lines 340-347.

10. Deferred accounting of the Transition Costs better reflects the ongoing operations of the utility, and preserves an opportunity to request recovery of these costs in a subsequent rate case. *Id.*, lines 348-353.

11. The current revenue requirement was established through a black box settlement so any reference as to what costs are or are not included in rates, or even whether a historical or forecast test year was used, is without any foundation. As the Stipulation in the 2006 Rate Case states, parties relied on different test periods and different adjustments in supporting the Stipulation. Larsen Rebuttal, lines 299-301, 380-388.

12. The final revenue requirement to which the parties stipulated in the 2006 Rate Case was more that $80 million less than the Company requested in its original filing. Therefore, current rates are not recovering all of the expenses that were included in the Company's filing. *Id.*, 390-393.

13. The Company's applications are not a ploy to recover an otherwise non-recoverable expense by capturing it in the present period and carrying the entire amount of the expense into the future in an attempt to recover the full amount in a subsequent rate case. To the contrary, the Company is simply requesting to defer and amortize an expense that would normally be properly amortized over a period of time, as opposed to being absorbed in a single period. *Id.*, lines 224-229.

14. The Company's requests for deferred accounting are in harmony with the stay-out provision of the Stipulation because amortization of the deferrals will begin during the stay-out period rather than being delayed until new rates are set. The proposed beginning date for

amortization of the Grid West loan and the severance costs ensures that the amortization of the costs will commence while current rates are in effect. Current rates will not be impacted by the deferral and amortization. Future rates will only be impacted to the extent any remaining deferred balance and associated amortization expense continues through the test period of the next general rate case. *Id.*, lines 234-242. *See also id.*, lines 432-442.

15. The proposed deferral and amortization of the Grid West loan costs and the Transition Costs is the same as if they had been included in the 2006 Rate Case except that they are not being recovered in current rates. When new rates are set, the amount of remaining unamortized costs to be considered for recovery will be the same as if the costs had been deferred in the 2006 Rate Case. *Id.*, lines 243-248.

III. ARGUMENT

The Motions must be denied for several reasons. First, as demonstrated above, there are genuine issues of material fact that preclude summary judgment. Second, there is no controlling law that requires denial of deferred accounting treatment for the Grid West loan costs or the Transition Costs. If anything, Commission precedent on deferred accounting indicates that the costs are appropriate for deferred accounting. Third, granting of deferred accounting treatment would not violate any ratemaking principle, including the rule against retroactive ratemaking. Fourth, the applications do not violate the Stipulation in the 2006 Rate Case.

A. Summary Judgment Is Inappropriate Where There Are Genuine Issues of Material Fact.

Rule 56 of the Utah Rules of Civil Procedure provides that summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Utah appellate courts have consistently held that summary judgment is improper where there is a genuine issue of material fact. *See, e.g., SME Industries,*

Inc. v. Thompson, Ventulett, Stainback & Assocs. Inc., 2001 UT 54, ¶ 9, 28 P.3d 669; *Billings v. Union Bankers Ins. Co.*, 819 P.2d 803, 805 (Utah 1991). Furthermore, in considering whether to grant summary judgment, the court or agency must consider the evidence in a light favorable to the nonmoving party. *See, e.g.*, *Harris v. Albrecht*, 2004 UT 13, ¶ 2, 86 P.3d 728; *Jackson v. Dabney*, 645 P.2d 613, 615 (Utah 1982). Based on these principles, summary judgment is inappropriate in this case.

The fundamental premise of the Motions is that the Grid West loan costs and the Transition Costs were or should have been included in the rates set in the 2006 Rate Case. As amply demonstrated above, that premise is contrary to well-founded testimony filed in this case. Not only were the costs not included in the Company's rate request, they could not reasonably have been included given the timing of the request and the lockdown of results used to formulate the request.

In addition, there is competent testimony in the record that deferred accounting is the appropriate accounting treatment for the Grid West loan costs and Transition Costs. In light of this testimony, summary judgment is not proper.

B. There Is No Controlling Precedent Requiring Denial of Deferred Accounting.

As noted above, Rule 56 provides that summary judgment may only be granted if, based on undisputed facts, the moving party is entitled to judgment as a matter of law. The Committee Motion fails to cite any authority from any jurisdiction for the principle that deferred accounting is not appropriate for unusual and nonrecurring costs. The Division cites only one case, *Northern Indiana Public Service Company v. Indiana Office of Utility Consumer Counselor*, 826 N.E.2d 112 (Ind. App. Ct. 2005). Even if the Indiana case were on point, it is not controlling precedent for the Commission. Only decisions of courts of competent jurisdiction interpreting

Utah law are controlling on the Commission. Furthermore, even if *Northern Indiana* were a Utah case, it is distinguishable for several reasons discussed in Section III.D, below.

There are a number of cases holding that deferred accounting is appropriate in the case of unusual and non-recurring costs and that approval of deferred accounting does not result in any rate change. *See, e.g., Office of Consumer Counsel v. Department of Public Utility Control*, 905 A.2d 1, 14-15 (Conn. 2006); *Re Missouri-American Water Company*, 237 P.U.R.4th 353, 2004 WL 2579639 (Mo. PSC Nov. 10, 2004); *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 563 N.E.2d 877, 881 (Ill. App. 1990).

The only law in Utah on deferred accounting is the Commission's prior orders in a number of cases in which utilities have requested deferred accounting. Those orders do not establish any generally applicable standards on which deferred accounting is granted or not granted, but rather address the issue of deferred accounting on an issue-by-issue basis. The cases discuss a variety of factors in the context of various expenses. The primary consideration appears to be avoiding rate spikes by spreading costs over reasonable periods of time.[6] Those orders demonstrate that deferred accounting has been granted in the past for expenses similar to those for which deferred accounting is sought in this case. For example, in Docket No. 00-2035-01, the Commission approved deferred accounting for employee severance costs paid following

[6] *See, e.g.*, Report and Order, Docket No. 00-035-10 (Utah PSC May 10, 2000) at 60 ("Although Y2K costs are one-time expenses and could be excluded from the test year, the Company in fact incurred them in each of four successive years beginning in 1997. In addition, given the importance of the effort to avoid short- and long-term power outages and the pressure imposed on PacifiCorp from the Commission and others to solve the Y2K problem, it would be unreasonable to exclude them. Including Utah's allocated share of the entire $10.3 million in this test year as the Company proposes, however, would cause a spike in customer rates that amortization avoids. We accept amortization as a fair way for the Company to recover these costs, but believe five years is too long a period under the circumstances presented in this case. Instead, we adopt a three-year amortization to reflect the unique nature and importance of these particular expenses to the public generally.")

the merger between ScottishPower and PacifiCorp.[7] These costs are similar in nature to the Transition Costs. In Docket No. 99-035-10, the Commission approved deferral and amortization of costs associated with Y2K expenditures, the Noell Kempf Climate Action Project, reengineering costs, and the Glenrock Mine Closure costs, all of which were not unforeseen as that term is used in the Motions.[8] Therefore, if the authority in Utah argues for any result in this case, it is that the applications be approved. However, the fact is that there is no controlling standard in Utah on when applications for deferred accounting should be approved and when they should not be. Accordingly, summary judgment would not be appropriate in this case even if there were no genuine issue of material fact.

C. Granting Deferred Accounting Would Not Violate Any Ratemaking Principle, Including the Rule Against Retroactive Ratemaking.

The Motions argue that granting deferred accounting for the Grid West loan costs and the Transition Costs would violate ratemaking principles. The Division Motion argues that the costs were not unforeseen and extraordinary and that granting deferred accounting for them would violate the rule against retroactive ratemaking. The Committee Motion reaches the same conclusion based on an argument that a decision in a case is deemed to cover all matters whether raised or not. The Motions both argue that because PacifiCorp proposed that rates be set based on a future test year, it is inconsistent with ratemaking principles to seek deferred accounting for costs incurred during the period of the future test year. These arguments appear to be based on a misunderstanding of the rule against retroactive ratemaking and the purpose for using test periods in rate cases.

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[7] Report and Order, Docket No. 00-2035-01 (Utah PSC Jul. 12, 2000).

[8] Report and Order, Docket No. 99-035-10 (Utah PSC May 24, 2000) at 60-64, 68-70.

To the extent the Division Motion relies on its position that the costs were not unforeseen and extraordinary, summary judgment is not appropriate as discussed in Section III.A, above. There is a genuine issue of material fact whether this is the appropriate accounting standard and whether the costs were unforeseen and extraordinary.

The rule against retroactive ratemaking prohibits refunds or surcharges for rates previously paid pursuant to final Commission orders and the setting of rates higher or lower in the future based on past under- or over-earnings. *See MCI Telecommunications Corp. v. Public Service Comm'n*, 840 P.2d 765, 770 (Utah 1992); *Utah Dept. of Business Regulation v. Public Service Comm'n*, 720 P.2d 420, 421 (Utah 1986) ("*EBA Case*") The applications for deferred accounting do not even propose prospective rate changes, let alone retroactive rate changes. They simply request deferred accounting for unusual and nonrecurring expenses with the opportunity to seek a prospective change in rates in a future rate case. This is not retroactive ratemaking. *See, e.g., Business and Professional People,* 563 N.E.2d at 881 ("Nor does the order [for deferred accounting] constitute a backdoor approach to single-issue or retroactive ratemaking.").

The Committee also argues that because a rate case is deemed to cover all matters at issue in determining rates, expenses incurred during a test year in the case cannot be included in a future rate case. Committee Motion at 6. In support of the argument, the Committee cites rules 15(b) and 54(c)(1) of the Utah Rules of Civil Procedure, a case applying those rules and *Utah Dept. of Business Regulation v. Public Service Comm'n*, 614 P.2d 1242 (1980) ("*Wage Case*"). None of these rules or cases has anything to do with a request for deferred accounting and none supports the argument of the Committee.

Rule 15(b) simply states that if issues not in the pleadings are tried, the pleadings may be amended to conform to the evidence. This has nothing to do with a rate case. In addition, there is no evidence that the Grid West loan costs and the Transition Costs were "tried" in the 2006 Rate Case. Rule 54(c)(1) states that a judgment may grant relief to which the prevailing party is entitled even if the relief was not sought in the pleadings. Like Rule 15(b), this rule has nothing to do with rate cases before the Commission. Furthermore, there is no indication in the Commission's order in the 2006 Rate Case that any relief to which Rocky Mountain Power was entitled with respect to the Grid West loan costs and the Transition Costs was dealt with in that order, let alone evidence suggesting that the costs were included in the Company's rate request.

The *Wage Case* simply describes the process for setting rates and holds that it is improper to change rates prospectively based on a change in a single item of expense or revenue without considering any other changes that any party wishes to raise and without finding the new rates just and reasonable. 614 P.2d at 1249-50. Requests for deferred accounting do not seek to adjust rates based on a change in a single item of expense without considering any other changes that any party wishes to raise. Rather they seek approval for deferred accounting for unusual and nonrecurring costs with the opportunity to seek recovery of some portion of the costs in the future in a general rate case where they are considered in the full spectrum of expenses, revenues and investments and any party is free to bring up any issue with regard to the request for recovery, including whether the costs were prudent or were offset by other changes since the prior rate case.

If the Committee's argument were correct, deferred accounting would never be permitted. Not only is deferred accounting recognized by the Uniform System of Accounts, 18 CFR Part 101, Definition 31 and Account 182.3.B, and Financial Accounting Standard No. 71

("FAS 71") as appropriate accounting, the Commission and other commissions regularly approve deferred accounting, even for expenses incurred in prior periods, let alone during a rate-effective period after a rate case. *See, e.g.*, Report and Order, Docket No. 99-035-10 (Utah PSC May 10, 2000) at 68-69 (approving deferred accounting for Glenrock Mine closure costs incurred prior to the test period in the case); Report and Order, Docket No. 00-2035-01 (Utah PSC Jul. 12, 2000) (approving deferred accounting for employee severance costs associated with ScottishPower acquisition of PacifiCorp). That is the point of deferred accounting.

The fallacy of the Committee argument is further illustrated by normal treatment of plant additions that will take place during the test period, but will be in service only for part of the test period. Through the use of average rate base, rates are set assuming only a portion of the costs of the plant. Because the existence of the plant and its in-service date is known during the rate case, the Committee's argument would require that rates set in the case be deemed to include the plant and that rates in a subsequent case could not be changed to reflect the full costs of the plant. Obviously, this result is inappropriate and inconsistent with sound regulatory principles and consistent practice.

The Committee also argues in passing in a similar vein that the applications are a collateral attack on the Commission's order in the 2006 Rate Case. This argument is incorrect for the same reasons as the prior arguments. Rocky Mountain Power is not seeking to change the rates established in the 2006 Rate Case or to reopen the order. Rather, Rocky Mountain Power is seeking appropriate accounting for unusual and non-recurring costs that arose since it filed its petition in the 2006 Rate Case.

The fact that PacifiCorp sought rate relief based on a future test period is irrelevant for two reasons. First, as noted in the Stipulation, rates were not set based on a future test period.

Rather, the parties reached "no overall agreement as to the test period … which led to the stipulated revenue requirement increases because different parties relied upon different test periods … in supporting the agreed upon $115 million increase." Stipulation ¶ 7. Second, in a rate case, the Commission attempts to set rates that will allow the utility to recover its just and reasonable costs, including cost of capital, of providing service to customers during the rate-effective period. The Commission attempts to utilize a test period in this process that will best reflect the normal conditions that will be in effect during the rate-effective period. Whether the test period is historical, historical with updates or fully forecast, the point of the exercise is to predict as accurately as possible what reasonable and normal costs will be incurred in providing service during the rate-effective period. Once the rates are set, it does not matter whether the test period used in setting them was historical, historical with updates or fully forecast.

The purpose of deferred accounting is to defer and amortize unusual and nonrecurring costs or revenues incurred by a utility. If the costs were known and incurred during the test period used in setting rates, which by definition would only be the case if the test period were historical or historical with updates, the deferred accounting order is typically made concurrent with the determination of just and reasonable rates in the rate case. If they were not known and incurred during the test period used in setting rates, they must be dealt with either through applications such as those that have been filed in these dockets or in a subsequent rate case. All of these uses of deferred accounting have been recognized and employed by the Commission in Utah and none of them violates any ratemaking principle. To the contrary, as discussed above,

they are in complete harmony with the Uniform System of Accounts, FAS 71 and numerous Commission orders.[9]

D. The Revenue Requirement Stipulation Did Not Foreclose Appropriate Requests for Deferred Accounting.

The Division Motion argues that the applications for deferred accounting for Grid West loan costs and Transition Costs violate the Stipulation in the 2006 Rate Case. The Division cites *Northern Indiana*, mentioned above, in support of this argument. The Division also argues that interpreting the Stipulation as urged by Rocky Mountain Power would modify the Stipulation. These arguments are without merit.

In the Stipulation, the Company agreed "that it will not file another Utah general rate case before December 11, 2007, which would result in an anticipated rate effective date no earlier than August 7, 2008." Stipulation ¶ 12. The Stipulation did not address requests for deferred accounting.

As discussed above, *Northern Indiana* is not controlling precedent, and, even if it were, it is distinguishable for several reasons. First, the utility in *Northern Indiana* ("NIPSCO") was attempting to take costs incurred during a rate freeze period and defer them for recovery in their entirety in the future after the freeze period expired. 826 N.E.2d at 115. Here, Rocky Mountain Power is asking for deferred accounting treatment for costs and amortization of those costs starting during the rate-effective or stay-out period. It is not attempting to defer all of the costs to the period after which it is allowed to file a new rate case.

Second, the costs NIPSCO was attempting to defer were not unusual and nonrecurring costs, they were normal, ongoing costs of membership and participation in the Midwest

[9] *See, e.g.*, Report and Order, Docket No. 99-035-10 (deferred accounting approved in a rate case both for current period costs and prior period costs); Report and Order, Docket No. 00-2035-01 (deferred accounting approved outside a rate case for costs incurred between rate cases).

Independent Transmission System Operator ("MISO"). *Id.* MISO did not cease functioning and default on repayment of a loan made by NIPSCO as Grid West did on the loan made by the Company here.

Third, the context of the settlement agreement in the NIPSCO case is entirely different than the context here. NIPSCO's base rates had been set in 1987, fourteen years before the commencement of the investigation of its rates that led to the settlement. Hearings had been held that apparently established that NIPSCO was earning approximately $23 million annually in excess of its authorized rate of return. The settlement provided that rather than reducing its rates, NIPSCO would freeze its rates for 49 months and would provide credits of $55 million annually and totaling $225 million to customers by the end of the freeze. *Id.* Here, PacifiCorp filed regular rate cases over the past several years and filed a rate case on March 7, 2006 seeking a $197 million rate increase based on a future test period ending September 30, 2007. The parties agreed to an $85 million rate increase on December 11, 2006 and an additional $30 million rate increase on June 1, 2007. In consideration of this settlement, the Company agreed that it would not file its next rate case before December 11, 2007, which would result in an anticipated rate-effective date no earlier than August 7, 2008. *See* Stipulation ¶¶ 3, 7, 8, 12.

Fourth, the NIPSCO settlement provided that NIPSCO's rates, tariffs and terms and conditions would not be changed without the agreement of all parties. 826 N.E.2d at 115. The Stipulation filed and approved in the 2006 Rate Case provided simply that the Company would not file another Utah general rate case before December 11, 2007. Stipulation ¶ 12.

Based on the foregoing distinctions, *Northern Indiana* is not helpful.

In anticipation of the fourth distinction, the Division Motion argues that "the principle that a 'stay out' provision prohibits recovery during a certain period of time agreed to by the

Company and approved by the Commission, remains valid." Division Motion at 10. It is not clear what the Division means by this argument. The Company is not seeking recovery in rates of the costs for which it seeks deferral during the stay-out period. Apparently, therefore, the Division is arguing that the Stipulation must be interpreted to preclude deferred accounting applications during the stay-out period. If that is the Division's argument, summary judgment is clearly inappropriate because there is a genuine issue of material fact about whether the applications violate the stay-out provision of the Stipulation.

Furthermore, the Stipulation is to be interpreted under the same principles as would be applicable to interpretation of any other agreement. *Yeargin, Inc. v. Auditing Division of Utah State Tax Comm'n*, 2001 UT 11, ¶ 39, 20 P.3d 287. It is fundamental that agreements should be interpreted using their plain language according to its ordinary usage. *See, e.g., Berman v. Berman*, 749 P.2d 1271, 1273 (Ut. Ct. App. 1988) ("In interpreting contracts, the principal concern is to determine what the parties intended by what they said. 'We do not add, ignore, or discard words in this process; but attempt to render certain the meaning of the provision, in dispute, by an objective and reasonable construction of the whole contract.' *Mark Steel Corp. v. Eimco Corp*., 548 P.2d 892, 894 (Utah 1976). The ordinary and usual meaning of the words used is given effect, *Pugh v. Stockdale and Co*., 570 P.2d 1027, 1029 (Utah 1977), and '[e]ffect is to be given the entire agreement without ignoring any part thereof.' *Minshew v. Chevron Oil Co*., 575 P.2d 192, 194 (Utah 1978). *See also Larrabee v. Royal Dairy Prod. Co*., 614 P.2d 160, 163 (Utah 1980)."). Extrinsic evidence is considered only if the language of the agreement is ambiguous. *Yeargin*, 2001 UT 11, ¶ 39.

No party has offered evidence or argument in this case that the language in the Stipulation is ambiguous. To the contrary, each of the parties argues that the language of the

Stipulation is clear. Therefore, the Commission must read the plain language of the Stipulation, not adding or removing words, and giving the words chosen by the parties their plain meanings. Based on these rules, it is clear that the Stipulation does not prohibit the filing of an application for deferred accounting during the period Rocky Mountain Power agreed not to file a general rate case. It does not even address the subject.[10]

The Division also argues on the basis of *Utah Dept. of Administrative Services v. Public Service Comm'n*, 658 P.2d 601, 616-617 (Utah 1983) ("*Wexpro II*"), that the Commission's "conclusion on the overall fairness of a negotiated settlement containing many provisions should not be open to after-the-fact selective sniping at the fairness of individual provisions considered in isolation." Division Motion at 10 (quoting *Wexpro II*"). The purpose of this argument is unclear. Rocky Mountain Power is not contesting any provision of the Stipulation. If anyone is doing that, it is the Division and Committee who want the Commission now to put words into the Stipulation that simply are not there.

Likewise, the Division's final argument that approval of the Stipulation would be compromised by after-the-fact modifications inconsistent with the Stipulation misses the mark. Rocky Mountain Power is not requesting a modification of the Stipulation; the Division and Committee are if they want the Commission to read it as prohibiting applications for deferred accounting for unusual and nonrecurring events. The plain language of the Stipulation does not prohibit such applications.

[10] Paragraph 14 of the Stipulation addresses regulatory assets previously deferred in orders by the Commission and makes clear that the Stipulation does not affect the recovery of these assets. The fact that the parties explicitly addressed this issue, but failed to state that future deferrals were barred supports Rocky Mountain Power's interpretation of the plain language of the Stipulation. *See Ball v. Public Service Comm'n*, 2007 UT 79, ¶ 55.

IV. CONCLUSION

The Motions should be denied because there are genuine issues of material fact, there is no controlling law that would require denial of the applications even if there were no genuine issue of material fact, granting deferred accounting would not violate any ratemaking principle, but would rather be consistent with prior Commission decisions and other persuasive authority, including the Uniform System of Accounts and FAS 71, and the applications are not in violation of the Stipulation.

RESPECTFULLY SUBMITTED: October 29, 2007.

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Justin Lee Brown
Senior Counsel
Rocky Mountain Power

Gregory B. Monson
Stoel Rives LLP

Attorneys for Rocky Mountain Power

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **OPPOSITION OF ROCKY MOUNTAIN POWER TO MOTIONS FOR SUMMARY JUDGMENT** was served upon the following by electronic mail on October 29, 2007:

Michael Ginsberg
Patricia E. Schmid
Assistant Attorney Generals
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111
mginsberg@utah.gov
pschmid@utah.gov

Paul H. Proctor
Assistant Attorney General
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111
pproctor@utah.gov

Gary Dodge
Hatch James & Dodge
10 West Broadway
Salt Lake City, UT 84101
gdodge@hjdlaw.com

Kevin Higgins
Energy Strategies
215 South State Street, Suite 200
Salt Lake City, UT 84111
khiggins@energystrat.com

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