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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power for Authority to Increase its Retail Electric Utility Service Rates in Utah and for Approval of its Proposed Electric Service Schedules and Electric Service Regulations, Consisting of a General Rate Increase of Approximately $161.2 Million per Year, and for Approval of a New Large Load Surcharge	Docket No 07-035-93 TEST YEAR CLOSING ARGUMENT AND MOTION TO DISMISS

During the 7 February 2008 Test Year Hearing in this matter, the Commission invited the parties to submit their closing arguments in writing no later than Wednesday, 13 February.

1 EXISTING RATES ARE NOT INADEQUATE, SO THE COMMISSION MAY NOT CONSIDER INCREASING THE COMPANY'S RATES

UCA §54-4-4(1)(a) describes the first threshold the Commission must cross before determining new rates and charges. It must first hold a hearing and find that a utility's rates and charges *are* unjust, unreasonable, discriminatory, preferential, in violation of law, or insufficient. Rocky Mountain Power's (RMP, or PacifiCorp, or Company, or utility) Application is based upon the claim that its rates are insufficient, but the Company cannot prove that to be the case. Since that threshold has not been traversed, the Commission may not proceed to determine new rates. Instead, it must find that RMP's Application fails, and dismiss it.

1.1 BEFORE THE COMMISSION MAY CONSIDER INCREASING RATES, IT MUST FIND THAT EXISTING RATES ARE INADEQUATE

The Commission has not entered a finding that Rocky Mountain Power's rates are inadequate. Until it does, it may not proceed to determine new rates or fix them by order.

In the Company's own words in this very Docket:

> The Commission's guidance for the use and selection of a test period is embodied in the statute pertaining to the Commission's rate setting process. Section 54-4-4 carefully lays out a three step procedural process the Commission shall take when determining just and reasonable rates. First, §54-4-4(1)(a) provides that the Commission "shall take an action described in Subsection (1)(b), if the commission finds after a hearing that" either the rates and charges of a public utility are unjust, unreasonable, discriminatory preferential or otherwise in violation of any provision of law or the rates and charges are insufficient. Second, §54-4-4(1)(b) provides that if the Commission makes a finding that rates and charges are either unjust, unreasonable, discriminatory or otherwise insufficient as described in §54-4-4(1)(a), then the Commission shall: "determine the just, reasonable, or sufficient rates and charges. . . ."[1]

According to RMP itself, then, only after the Commission has, first, held a hearing and, second and as a direct result of the hearing, found that "either the rates and charges of a public utility are unjust, unreasonable, discriminatory preferential or otherwise in violation of any provision of law or the rates and charges are insufficient", may the Commission proceed to "determine the just, reasonable, or sufficient rates and charges" and fix the determination by order.

Since it cannot be determined that the Company's rates are inadequate, the Commission must find that the application fails.

1.2 ROCKY MOUNTAIN POWER'S RATES CANNOT BE INADEQUATE

Not only did PacifiCorp, under oath, testify to this Commission that the rates it agreed to accept in the stipulations in Docket 06-035-21 would be just and reasonable, and in the public interest (effectively, adequate) through at least 7 August 2007, but the Division and Committee testified likewise. The Commission then determined that they would be so, and fixed that determination by order.

Rocky Mountain Power cannot now claim that those same rates over much of that same period have been inadequate or that they currently are inadequate. Neither the Division nor the

[1] *Opposition to Request for Hearing on Test Year* (hereinafter, *Opposition*), 22 January 2008, in this Docket, 07-035-93: paragraph 13.

Committee can represent that they are, and the Commission cannot find that they are. The Company argues that they may become inadequate in the future, but the language of the statute is plain. It requires the inadequacy to be in the present, not the future, and that requires them to be demonstrated on the basis of actual, realised, data, not projected, forecast numbers. The Commission must dismiss the Application.

1.3 THE COMPANY, DIVISION, & COMMITTEE TESTIFIED, AND THE COMMISSION ORDERED, THAT RATES NOW CURRENT WOULD BE JUST & REASONABLE FROM 11 DECEMBER 2006 UNTIL AT LEAST 7 AUGUST 2008

Considering the testimony offered leading up to and during the 7 February 2008 Test Year Hearing in this proceeding, the Company cannot show that its rates are insufficient.

On 26 July 2006, PacifiCorp moved the Commission to approve a Stipulation Regarding Revenue Requirement and Rate Spread, stating that:

> As specified in the Stipulation, the Parties agree that the Stipulation is in the public interest and that all of its terms and conditions, considered together as a whole, will produce fair, just and reasonable results.
>
> Wherefore, PacifiCorp requests that the Commission grant this motion and approve the Stipulation.[2]

The Stipulation filed with the Motion included:

> PacifiCorp agrees 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[3]

and:

> The Parties agree that this Stipulation is in the public interest and that all of its terms and

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[2] *Motion for Approval of Stipulation*, 26 July 2006, in Docket 06-035-21 *In the Matter of the Application of PacifiCorp for Approval of its Proposed Electric Rate Schedules & Electric Service Regulations*: paragraph 5 et seq.

[3] *Stipulation Regarding Revenue Requirement and Rate Spread*, 26 July 2006, in Docket 06-035-21 *In the Matter of the Application of PacifiCorp for Approval of its Proposed Electric Rate Schedules & Electric Service Regulations*: paragraph 12.

conditions, considered together as a whole, will produce fair, just and reasonable results.[4]

On 1 August 2006, the Commission issued a Notice of Hearing on Stipulation Regarding Revenue Requirement and Rate Spread for 28 August 2006. Testimony was pre-filed on behalf of the Division and Committee that:

> The Division finds that the final terms and conditions of the Stipulation, taken as a whole, serve the public interest and are just and reasonable as required by Utah Code Ann. § 54-3-1. The Division also finds that the terms of the Stipulation will allow the Company to have sufficient revenue to recover the reasonable costs of providing electric service in the state of Utah.[5]

and:

> We believe that the terms of the Stipulation pending before the Commission will result in just and reasonable rates and is in the public interest.[6]

During the 28 August 2006 Hearing, Company witness David L Taylor said:

> The purpose of my testimony is to … walk through the terms of the Stipulation and explain why, in our view, they're just and reasonable and in the public interest.[7]

On 25 August 2006, the Company filed, and moved for its approval, a Stipulation Regarding Rate Design which again included the words:

> The Parties agree that this Stipulation is in the public interest and that all of its terms and conditions, considered together as a whole, will produce fair, just and reasonable results.[8]

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4 Id: paragraph 21.

5 DPU's *Stipulation Testimony of Thomas C Brill PhD*, 17 August 2006, in Docket 06-035-21, lines 860-864.

6 CCS's *Pre-filed Direct Revenue Requirement Stipulation Testimony of Reed Warnick*, 17 August 2006, in Docket 06-035-21, lines 173-175.

7 *Transcript of Proceedings*, 28 August 2006, in Docket 06-035-21, *In the Matter of the Application of PacifiCorp for Approval of its Proposed Electric Rate Schedules and Electric Service Regulations*: page 10, line 25, through page 11, line 5.

8 *Stipulation Regarding Rate Design*, 25 August 2006, in Docket 06-035-21 *In the Matter of the Application of PacifiCorp for Approval of its Proposed Electric Rate Schedules & Electric Service Regulations*: paragraph 15.

On 15 September 2006, the Commission issued a Revised Scheduling Order, calendaring hearings on rate design and cost of service for 27 and 30 October 2006. Testimony was pre-filed on behalf of the Division that:

> The Division recommends as just and reasonable the adoption of the stipulated rate designs for Schedules 6, 8, 9, and 31.[9]

On 1 December 2006, the Commission issued a Report and Order concluding that the terms of the Stipulation Regarding Revenue Requirement and Rate Spread "are just and reasonable and it is just and reasonable in result" and that the terms of the Stipulation Regarding Rate Design "are just and reasonable and in the public interest and it is just and reasonable in result." The Commission approved both stipulations.

The preceding testimony and order pose an insurmountable obstacle to any finding that the utility's rates *are* inadequate, and thus to the Commission proceeding with determining new rates. The Application must be dismissed.

2 SELECTION OF TEST PERIOD

Should the Commission find that PacifiCorp's rates are inadequate, the Company has outlined the next step thus:

> The third step provides that "If in the commission's determination of just and reasonable rates the commission uses a test period, the commission shall select a test period that, on the basis of evidence, the commission finds best reflects the conditions that a public utility will encounter during the period when the rates determined by the commission will be in effect" (emphasis added). *See* Utah Code Ann. §54-4-4(3)(a). [10]

The testimony in this record contains several bald assertions about which test period would best reflect the rate effective period, but no substantive evidence. Those assertions are not founded either upon data for an adequate range of possible test periods, or adequate analysis of which

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[9] DPU's *Pre-filed (Rate Design Stipulation for Schedules 6, 8, 9, & 31) Testimony of George R Compton PhD*, 3 October 2006, in Docket 06-035-21, lines 151-152.

[10] *Opposition*: paragraph 13.

would be best. The Utah Supreme Court has found that bald assertions are insufficient, that statutory words are to be given their ordinary meaning, and that language in statute trumps legislative intent.

Accordingly, the Commission does not have a sufficient basis upon which to select a test period in this proceeding.

2.1 THE PARTIES' POSITIONS

Rocky Mountain Power has asked the Commission to select the twelve-month period starting on 1 July 2008 and ending on 30 June 2009 as the test period for this general rate case. It has stated that to be the period which best reflects the rate effective period. But the utility has provided data for only two other periods, 1 July 2006 to 1 June 2007 and 1 July 2007 to June 2008, and has failed to provide a comparative analysis to explain why its preferred period is better than either of the others, or to provide data or a comparative analysis to show why it is better than any other possible period. The Company has focused its justification of its requested test period on the fact that it "extends no more than 20 months from the filing date of (its) proposed rate increase."[11]

The Utah Division of Public Utilities (DPU or Division) has said that it "has no objections to the use of the test period recommended by the Company",[12] but has failed to offer data for any alternatives or any comparative analysis to demonstrate why the commission should find that it best reflects the rate effective period. The Division has also testified that selection of the test period is up to the utility.[13]

The Utah Committee of Consumer Services (CCS or Committee) says that "the twelve month period requested by RMP can be reasonably reflective of the rate effective period if reasonable

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11 RMP's *Application*, 17 December 2007, in this Docket, 07-035-93 (hereinafter *Application*): paragraph 12, first sentence.

12 DPU's *Direct Testimony of Joni S Zenger PhD*, 25 January 2008, in this Docket, 07-035-93, line 40.

13 Id, line 155.

projections, forecasting methodologies, and assumptions are utilized in deriving the forecasted amounts."[14]

The UAE Intervention Group (UAE or Energy Users) recommends Calendar Year 2008 as the test period, but notes that data has not yet been filed for it, and observes that "(o)f the test periods for which data has already been filed in this case, the one that best replaces Calendar Year 2008 is the 'Mid Period,' consisting of July 1, 2007 through June 30, 2008."[15]

2.2 The Commission must Select a Test Period, on the Basis of Evidence, that Best Reflects the Rate Effective Period

The Commission does not presently know when new rates will go into effect, it does not have before it data for a comprehensive range of test periods, it has not been presented with substantial evidence that any one test period is superior to another, and so it cannot select, on the basis of evidence, the one that will best reflect the rate effective period.

The governing statute is UCA §54-4-4. It is referenced by Rocky Mountain Power,[16] and Sub-section (3) is quoted in full by Dr Zenger, Ms DeRonne, and Mr Higgins, on behalf of the DPU, CCS, and UAE, respectively, so all four parties are well acquainted with its plain language.

The pertinent part is paragraph (a), which states:

> If in the commission's determination of just and reasonable rates the commission uses a test period, the commission shall select a test period that, on the basis of *evidence*, the commission finds *best* reflects the conditions that a public utility will encounter during the period when the rates determined by the commission will be in effect. (Emphases added.)

Clearly, selection of a test period rests with the Commission, not the Company.

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[14] CCS's *Pre-filed Direct Test Year Testimony of Donna DeRonne CPA*, 25 January 2008, in this Docket, 07-035-93, lines 135-138.

[15] UAE's *Direct Testimony of Kevin C Higgins*, 25 January 2008, in this Docket, 07-035-93, lines 8-10.

[16] *Application*: paragraph 12, first & second sentences.

Certainly the test period must not extend beyond 20 months after RMP filed. Clearly, however, the Commission is required to select a test period that it finds "*best* reflects the conditions that a public utility will encounter during the period when the rates determined by the commission will be in effect."

And clearly, the Commission is required to make that finding "on the basis of *evidence*".

The Commission does not actually know what the rate effective period will be. In response to Commissioner Campbell, some witnesses speculated that it might begin on or about 13 August 2008, 240 days after the Application was filed, but there is no certainty of that. Assuming that the Commission proceeds to investigate and concludes that Rocky Mountain Power's rates are inadequate, it could give effect to new rates on or about 13 August 2008, or much sooner, or much later.

2.2.1 EVIDENCE IS MORE THAN BALD ASSERTION

It is noteworthy that both Mr Higgins and Ms DeRonne misquote that last clause as "on the basis of *the* evidence". But that is not what the statutory language says. It is not a question of the Commission choosing between different recommendations on the basis of "the evidence" offered to it by the parties, but selecting "on the basis of evidence". Where there is insufficient evidence in the record, the Commission must decline to select.

Also noteworthy is that Mr Higgins quoted associated legislative intent language which does say "based on the best evidence presented" to the Commission. However, intent language is intended to explain and amplify, and cannot contradict, the plain language of statute.

In interpreting statutory language a court's "primary objective" is "to give effect to the legislature's intent," which is "manifested by the language it employed" in the statute.[17] "Only if we find the

[17] *Smith v Price Dev Co*, 2005 UT 87, ¶ 16, 125 P.3d 945 (internal quotation marks omitted).

statutory language to be ambiguous may we turn to secondary principles of statutory construction or look to the statute's legislative history."[18]

Moreover, the intent language goes on to say "without any presumption for or against either a historical or a future test period." The statute in paragraph (b) permits three kinds of test year, but a purely historical one is not among them. To argue that the intent language trumps the statutory language with regard to the issue of evidence would also be to argue that it permits a purely historic test period.

Evidence requires more than assurances from the utility, a lack of objections by the Division, and the Committee's view that everything can be tweaked to produce a reasonable result. "Some deference to management judgment is, of course, proper. The commission may not, however, defer to bald assertions by management."[19]

2.2.2 BEST IS MORE THAN EITHER GOOD OR BETTER

As to which test period will "best" reflect the rate effective period conditions, "best" is a superlative, than which there is none better or even equally good. If another is better, the object cannot be the best; if another is equally good, neither is best, although both may be better than any others. To establish the best, it is insufficient to consider one, two or several, where several is three or more; it is necessary to consider the entire field of possible candidates. Best is the Olympic gold standard.

None of the parties – not Rocky Mountain Power, not the Division, not the Committee, and not Utah Energy Users – has presented a sufficient range of data, or comparative analysis of the data that has been presented, much less comparative analysis of that sufficient range of data, which

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[18] *State v Ireland*, 2006 UT 17, ¶ 11, 133 P3d.396 (quoting *Smith v Price Dev Co*, 2005 UT 87, 125 P.3d 945).

[19] *Utah Department of Business Regulation, Division of Public Utilities, v Public Service Commission of Utah*, No 16241, 19 June 1980, 614 P.2d 1247, quoting *State v Jager*, Alaska, 537 P.2d 1100, 1113-1114 (1975).

constitutes “evidence” that will enable the Commission to select a test period which will “best” reflect the conditions this utility will encounter during the rate effective period.

3 MOTION TO DISMISS

In light of the foregoing, I respectfully move the Commission to dismiss Rocky Mountain Power’s Application and close Docket 07-035-93.

Respectfully submitted on 13 February 2008,

/s/

Roger J Ball

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Test Year Closing Argument of Roger J Ball in Docket 07-035-93 was served upon the following by electronic mail on 13 February 2008:

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