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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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| 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. | Docket No. 08-035-38<br><br>**UTAH COMMITTEE OF CONSUMER SERVICES' FIRST RESPONSE TO APPLICATION** |

The Utah Committee of Consumer Services' response to Rocky Mountain Power's July 17, 2008 Application is permitted by Utah Administrative Rule R746-100-4 and by the Commission's August 1, 2008 scheduling Order. The Committee asserts that the Application should be dismissed, or no action taken upon it, due to its multiple deficiencies and manifest legal error. The pertinent sections of the Utah Public Utility Statutes upon which the Committee primarily relies are reproduced in Appendix 1.

## SUMMARY

The mere fact that two general rate cases are pending before the Commission at the same time is not a compelling argument for dismissing Rocky Mountain Power's

2008 Application. The Commission has in the past managed such cases, although with trepidation. *See In the Matter of the Application of Utah Power & Light Co.*, Docket 83-035-06 and *In the Matter of the Application of Utah Power & Light Co.*, Docket 84-035-01. However, as in this docket, successive rate proceedings involve substantially the same facts, an overlapping rate effective period based upon superimposed test periods, for which all rate elements have been litigated and determined, the second filed case cannot be prosecuted without harming the public interest.

Rocky Mountain Power's 2008 Application is not merely a rate filing made before an earlier case has been decided. Not only does Rocky Mountain Power propose using superimposed test periods, the utility includes previously claimed and litigated expenses within the test period, including expenses the Commission has now determined were not sufficiently supported or were unsupportable. The 2008 Application is designed to evade the outcome of the first rate case. Consequently, the 2008 Application violates fundamental principles of Utah public utility jurisprudence.

**RELIEF REQUESTED**

The Committee requests that Rocky Mountain Power's 2008 Application be dismissed without prejudice. While a dismissal is within the Commission's discretion and the Committee is convinced that it is proper, as an administrative proceeding under Utah Public Utility Statutes and the Administrative Procedures Act, the Commission may choose to construct an order offering the utility an opportunity to amend its application to

conform to Utah law. Accordingly, the Committee requests that, in the alternative, the Commission take the following actions:

1. Order that all action upon the 2008 Application be stayed and that the 240-day time period within which the Commission may enter an order upon an application shall not begin until such time as Rocky Mountain Power complies with the Commission's orders. In particular, the Commission should order that the 240 day time period shall not begin until the Commission selects a test period under Utah Code §54-4-4(3), and the utility files the schedules based upon the selected test period as provided by Utah Code §54-7-12(3).
2. Order that the utility file an Amended Application and Supplemental Direct Testimony based upon a test period that begins no sooner than January 1, 2009, if the utility proposes a future test period as defined in Utah Code §54-4-4(3)(b)(i). In addition, any proposed test period should be based upon the rates and charges that have been determined in the Commission's August 11, 2008 Report and Order in Docket No. 07-035-93.
3. Order that the Amended Application and Supplemental Direct Testimony expressly and separately address how the Amended Application and all proposed schedules and tariffs are consistent with and comply with the Commission's August 11, 2008 Report and Order in Docket No. 07-035-93.

4. Order that the Amended Application and Supplemental Direct Testimony expressly and separately address those parts of the August 11, 2008 Report and Order that require certain information or action "in the next general rate case."
5. Order Rocky Mountain Power to calculate and separately report to the Commission and parties, all costs, including all internal and external professional and legal fees, incurred to prepare and file the original 2008 Application and testimony, so that the Commission and parties may consider whether these costs may be recovered in rates.

## ARGUMENT

### I. PROCEDURAL AND SUBSTANTIVE LEGAL REASONS COMPEL THE PROHIBITION OR RESTRICTION OF RATE CASES AND TEST PERIODS SUCH AS ROCKY MOUNTAIN POWER HAS FILED IN THE 2008 APPLICATION.

A single rate case requires the regulatory commission to scrutinize and comprehend an enormous volume of fact-intensive and complex information, often the product of dueling computer models. In almost all cases, the commission works with limited resources and time, and may be constrained by the agency's structure and artificial time limits. Ratepayers ultimately pay the sometime staggering costs of the proceeding. Adding another concurrent rate case exacerbates the difficulties regulatory commissions face. Gifford, R.L., Regulatory Impressionism: What Regulators Can and

Cannot Do, *Review of Network Economics*, Vol. 2, Issue 4, Page 466-479, December 2003.

A second general rate change application filed while an earlier case is pending either before the regulatory commission or on appeal, will implicate the factual matters presented and to be decided in both, and may give rise to legal challenges. *See* Nolan, Paul V., "Judicial Review of Pancaked Rate Filings," *Public Utilities Fortnightly*, March 18, 1982. Consequently, Utah and other jurisdictions prohibit or restrict utilities from filing multiple rate cases or using overlapping test periods; doing so on a case by case basis, by policy, rule or statute.

The Utah Commission expressed its concern for the harm to the regulatory process posed by a policy that allows multiple cases or overlapping test periods. *See In the Matter of the Application of Utah Power & Light Co.*, Docket 83-035-06 and *In the Matter of the Application of Utah Power & Light Co.*, Docket 84-035-01. The Commission's reservations about the rate impact and procedural obstacles inherent in the practice were great enough that the Commission refused interim rate relief in an overlap period. Docket 84-035-01, Report and Order on Interim Rates, May 31, 1984, Finding of Fact 9., page 16-17. In the September 13, 1984 Report and Order in Docket 84-035-01, the Commission recognized the regulatory difficulties in using overlapping test periods and stated its intent to "take steps to protect the regulatory process whenever overlapping test periods are proposed." September 13, 1984 Report and Order, Findings of Fact and Conclusions of Law 2., page 6.

The Commission's recognition of the need to protect the regulatory process from general rate cases such as Rocky Mountain has filed in this case, is based not only upon the adverse impact such filings have upon a commission's ability to manage the case, but also the adverse impact upon ratepayers; for example, twice increasing rate base for the same asset. September 2, 1983, Report and Order on Interim Rates, Docket No. 83-035-06, page 4. Other jurisdictions have prohibited or restricted pancaked rate cases for similar reasons.

The Michigan Public Service Commission recognizes that while a public utility may file a general rate case when it believes appropriate to do so, the Commission's policy is that a utility may not file a second rate case while an earlier rate case is still pending. *In the Matter of Detroit Edison Company*, Case No. 14838, Order, June 15, 2006, Michigan Public Service Commission. The Michigan Court of Appeals explained the reasons underlying the policy in *Pennwalt Corporation v. Public Service Commission #2*, 136 Mich.App. 580, 585-586, 357 N.W.2d 715, 717 (1984). Quoting with approval the opinion from the circuit court that first reviewed the Michigan Commission's order, the Court of Appeals held:

> The MPSC has based its anti-pancaking rule on MCL 460.6a(2); MSA 22.13(6a)(2), which empowers the commission to adopt rules to enable it to reach a final decision on an application within nine months after it is filed. The commission has held that since the Legislature expressed a policy in that statute favoring timely action in rate cases, and since the practice of pancaking rate applications prolongs the final decisions in earlier applications, the practice is inconsistent with the timely disposition of rate cases. The commission also based the rule on logic. The reasoning behind the rule is as follows: Since each MPSC decision determines rates to be applied in the future, why should the commission decide the same issue in

> separate proceedings? The commission then has developed the anti-pancaking rule in order to avoid dealing with more than one application at a time. MPSC, Opinion and Order, Case No. U-5110, pp 3, 4 (June 28, 1976).

The Federal Energy Regulatory Commission adopted a rule under the Natural Gas Act of 1938 to prevent rate increase filings from becoming "pancaked", such that new cases are filed before older ones have established rates. See *Associated Gas Distributors v. FERC*, 706 F.2d 344, 345 (D.C. Cir. 1983). There are some reasons for the FERC rule found in the scope and character of FERC's jurisdiction that are lesser factors for the Utah PSC. However, prohibitions of or limitations upon overlapping rate cases is a reasonable means to conserve the Commission's resources and prevent a utility from overwhelming the regulatory process; particularly by filing unjustifiable and unsound applications such as Rocky Mountain Power has done in this case.

Pennsylvania statutorily prohibits pancaked rate cases.[1] 66 Pa.C.S. 1308 (d.1).[2] The Pennsylvania Commonwealth Court enforced this prohibition in a case that bears some similarity to the application at hand. *Masthope Rapids Property Owners Council v.*

[1] *Northwestern Bell Telephone Co. v. Iowa State Commerce Commission*, 359 N.W.2d 491, 493-496 (Iowa 1984), describes how Iowa statutes were changed to deal with "pancaking" new rate changes resulting in continued collection of unapproved rates. What differences exist between Utah's and Iowa's rate regulatory procedure do not diminish the relevance of the Iowa Supreme Court's discussion of the same practical and policy objections to permitting overlapping rate cases that are presented by Rocky Mountain Power's 2008 Application.

[2] (d.1) Multiple filings prohibited**.** Except as required to implement an order granting extraordinary rate relief, no public utility which has filed a general rate increase request pursuant to this section shall file an additional general rate increase request pursuant to this section for the same type of service until the commission has made a final decision and order on the prior general rate increase request or until the expiration of the maximum period of suspension of the prior general rate increase request pursuant to this section, whichever is earlier.

*Pennsylvania Public Utility Commission*, 135 Pa.Cmwlth. 437, 581 A.2d 994 (1990). In May 1988, the utility filed as a general rate case, Tariff Supplement No. 2, to be effective October 1, 1988, for the revenue necessary to repay a Water Facilities Restoration Act loan principal and interest. The Commission's investigation order suspended Supplement No. 2 for seven months from October 1. On November 2, 1988, the utility petitioned for Supplement No. 3, a customer charge, to become effective December 1, 1988, for the purpose of recovering on an expedited basis, the principal and interest due on the Water Act loan. The utility stated that if the commission granted the customer charge tariff that the utility would withdraw its general rate increase request contained in Supplement No. 2. 135 Pa.Cmwlth. 441-442, 581 A.2d 996-997. The utility then withdrew the May 1988 request and asserted first, that the Water Act required the Commission to provide expedited rate recovery, and second, that no rate filing was pending by virtue of withdrawing its Supplement No. 2 proposal. Like Rocky Mountain Power, the utility filed two applications for the same or related expenses. Like Rocky Mountain Power has done with the test period in this docket, the utility manipulated the filing's character and timing.

The Pennsylvania Commission allowed withdrawal of Supplement No. 2 and granted Supplement No. 3 as a temporary rate and ordered an investigation into the justness and reasonableness of the utility's existing rates. 135 Pa.Cmwlth. 443, 581 A.2d 997. The Court held that both filings were general rate cases as defined by statute and as such, the utility's second filing violated the anti-pancaking provision. The Commission's

decisions permitting a withdrawal of the first case and granting a rate increase upon the second case also violated the due process rights of parties opposing the rate increase. 135 Pa.Cmwlth. 446-447, 581 A.2d 999.

The procedural policy, administrative rule or statute employed to prevent improper ratepayer impacts from pancaked rate cases and overlapping test periods, reflect the differences between each commission's authority and jurisdiction and each jurisdiction's unique regulatory framework and statutorily established public policy. However, within each jurisdiction's laws and policies, including Utah, there are common reasons for regulating the scope, timing and procedure for general utility rate cases. All of such policies, rules and statutes are intended to fairly balance the need for protection of ratepayers through meaningful commission review of their concerns against the needs of utilities. A utility's stratagems must not be allowed to avoid these substantive and procedural due process protections.

## II. UTAH LAW AUTHORIZES THE UTAH PUBLIC SERVICE COMMISSION TO DISMISS OR OTHERWISE REQUIRE THAT ROCKY MOUNTAIN POWER'S 2008 APPLICATION CONFORM TO UTAH LAW.

Utah law authorizes the Commission to take such action as the Commission deems necessary to exercise its jurisdiction over Rocky Mountain Power's 2008 Application. If an application for a general rate increase has no analytical or empirical beginning from which the Commission can determine if current rates are not just and reasonable and what

adjustments must be made to make them so, then the Commission may refuse or condition consideration of or hearings upon the application.

**a. The Commission is not obligated to take action on a general rate increase application that is uncertain, unspecified, incomplete or does not conform to the law.**

The Commission stated in its February 14, 2008 Order on Test Period in Docket No. 07-035-93, page 4: "Furthermore, UCA 54-7-12(2) unambiguously permits "any public utility or other party" to propose a change in rates. UCA 54-7-12(2) mandates the Commission to proceed with a hearing to consider the proposed rate change and specifies what the Commission must determine relative to the proposed rate change." However, this does not mean that the Commission must consider any general rate application as one that meets the requirements of statutes, administrative rules, commission decisions or judicial opinions.[3] Rocky Mountain Power's application does not even pretend to establish that the rates determined in Docket No. 07-035-93 are insufficient. Rocky Mountain Power's application does not even pretend to establish that the July 1, 2008 to June 30, 2009 test period best reflects the conditions it will encounter during the period

[3] A condition precedent to the Commission's determination of the just, reasonable, or sufficient rates "to be thereafter observed and in force", is a finding that the rates in effect are unjust; unreasonable; discriminatory; preferential; or otherwise in violation of any provisions of law; or are insufficient. *Utah Code §54-4-4 (1) (a), (b).* As the Commission recently observed, the Commission must construe §57-7-12 (2) and §57-4-4 (1) "through their plain language, to render all parts relevant and meaningful and to avoid interpretations that render portions superfluous or inoperative." *In the Matter of the Request of Rocky Mountain Power*, Docket No. 08-035-35, Report and Order, August 1, 2008, page 10.

when the rates determined by the commission will be in effect. *Utah Code §54-4-4 (3)(a).*

Rocky Mountain Power's application is calculated to discount and disregard the proceedings, evidence and outcome of Docket No. 07-035-93. The forecast revenue requirement for the proposed test period "will not change after the Commission issues its order in the revenue requirement phase of Docket No. 07-035-93." *Docket No. 08-035-38 Application, paragraph 5.* Mr. Walje goes further when he states that Rocky Mountain Power's analysis and evidence will not change to take into consideration the Commission's Report and Order in Docket 07-035-93. *Docket No. 08-035-38, Direct Testimony of A. Richard Walje, line 94 – 101.*[4]

Rocky Mountain Power deliberately disregards the August 11, 2008 Report and Order by its apparent unwillingness to adjust the forecast revenue requirement for the Commission's ordered adjustments.[5] Without making these adjustments, it is not possible to determine just and reasonable rates from the testimony and evidence offered by Rocky Mountain Power with its application. Among the Commission's findings and

[4] That the utility takes this position should not be surprising since it claims that the Commission's test period order caused the utility to file this rate case. *Docket No. 08-035-38, Direct Testimony of A. Richard Walje, line 69 – 78.*

[5] The essence of Rocky Mountain Power's strategy is to contest the February 14, 2008 Order on Test Period, and preemptively contest the August 11, 2008 Report and Order, by filing what is in large measure a duplicate of the application in 07-035-93. Absent a request for reconsideration or judicial review under Utah Code §54-7-15, which is the exclusive means to contest the Report and Order, it is final in all collateral actions or proceedings. *Utah Code §54-7-14.*

conclusions in the Report and Order for 07-035-93 that command adjustment in this docket are the following:

> Incorrect normalization modeling and erroneous calculation of imputed revenues for the SMUD contract (page 23, 28); uneconomic generation produced by faulty GRID logic (page 30); use of an accurate planned outage schedule that reflects actual historic practice and planned outages (page 33); requiring the use of historical data to compute average annual forced outage rates (page 35); review for correctness and accuracy, Rocky Mountain Power's minimum loading deration and heat rate modeling may be erroneous (page 36-38); overstated energy loss due to the utility's thermal ramping adjustment and inaccurate modeling (page 40); incorrectly calculated losses for transmitting Hermiston power over the BPA transmission system (page 41 - 42); include non-firm transmission in the GRID model and use an average of a 48 month history as is used to compute avoided costs (page 87). [6]

Despite these and other express orders for the next general rate case, and these and other adjustments to on-going contracts and costs, Rocky Mountain Power has plainly stated that it does not need to make adjustments to its claims in this docket. A response by Rocky Mountain Power that they have made or will make such adjustments does not change the fact that the 2008 Application so violates fundamental filing requirements, the Commission cannot determine just and reasonable rates based upon it. Rocky

[6] These adjustments are in most if not all instances, applicable to any subsequent general rate case and materially impact the revenue requirement by many millions of dollars.

Mountain Power's position seems to be that the Commission, Division, Committee and other intervenors must themselves find and analyze the differences between the 2007 and 2008 rate cases, particularly the forecasts for July 1 to December 31, 2008. The utility's position seems to be that the Commission, Division, Committee and other intervenors must themselves recalculate the current rate schedules and the proposed rate schedules based upon the outcome of the 2007 case.

Without a commitment to adjust its 2008 general rate case to comply with the Commission's August 11, 2008 Report and Order, the Application is so deficient that the Commission cannot determine if it meets the requirements of Utah Code 54-4-4 (1) and (3). In response to Rocky Mountain Power's attempt to update its case in 07-035-93, the Commission stated, "All projections must be evaluated for general reasonableness and also to ensure consistency with other inputs and assumptions and the appropriate matching of costs and revenues throughout the test period." Report and Order, Docket No. 07-035-93, August 11, 2008, page 51. Unless the Commission stays all proceedings in this Docket and orders Rocky Mountain Power to conform its application to the Report and Order in 07-035-93, dismissal of this Docket is the only other means to put a stop to surprise updates and untimely adjustments.[7]

[7] Rocky Mountain Power's claim for a 10.75% rate of return is particularly problematic. The Commission held that the cost of long-term debt for example must be based upon what is expected in 2008. Having made the determination, it appears to the Committee that the utility's claim is more in the nature of an update intended to provide "another bite at the apple" for the last six months of 2008.

Indeed, *Mountain Fuel Supply Co. v. Public Service Commission of Utah*, 861 P.2d 414 (Utah 1993), stands for the proposition that the Commission need not consider a general rate case that is based upon whatever facts and circumstances might be determined from exploring different test years and out-of-period adjustments as the case goes forward. The Court held that the Commission is not required to invest its time permitting the utility "to prepare its case at the same time it presented it." *Id*. at 424. The utility does not meet its burden of establishing "just and reasonable" rates by submitting indefinite evidence and open-ended analysis. *See Id*. at 423.

**b. The Commission is not obligated to take action on a general rate increase application that is based in whole or in part upon expenses or revenues that have been or should have been included in a prior rate case.**

The Commission's January 3, 2008 Report and Order denying Rocky Mountain Power's accounting order applications in Docket No. 06-035-163 and Docket No. 07-035-04, established a rule of ratemaking derived from the rule against retroactive ratemaking. The Commission need not and will not allow a utility to account for or keep track of expenses past their incurrence for the purpose of a future ratemaking proceeding if future recovery is not likely. Whether recovery is likely is determined by ratemaking rules and principles. Under the rule as applied in Docket 06-035-163 and Docket No. 07-035-04, failure to include costs of which the utility was aware, or inclusion of costs at a level different from the level in a past rate case, and which are not unforeseen and

extraordinary, are not likely to be recovered and therefore no deferred accounting order will be allowed.

Listed on page 11 of this response are but a few examples of the Commission's decision on expenses the utility claimed should be included in rates to be set in Docket No. 07-035-93. The Commission's August 11, 2008 Report and Order comprehensively considered and either allowed, adjusted, or rejected these and all other expenses that Rocky Mountain Power forecast it would incur in the calendar 2008 test period. Expenses incurred or forecasted to incur in 2008 are deemed to be included in the rates effective as of August 13, 2008. Consequently, to the extent that the July 1, 2008 to June 30, 2009 test period includes any expense incurred or forecast to be incurred from July 1, 2008 to December 31, 2008, or of which Rocky Mountain Power was aware and that is not unforeseen and extraordinary, may not be considered by the Commission in Docket 08-035-38. Accordingly, the 2008 Application should be dismissed.

An example of why the deferred accounting order is meaningful to this docket is found in the Commission's treatment of Rocky Mountain Power's request in rebuttal to include electric swaps and indexed gas transactions in net power costs. The Commission denied the request as not timely and for lack of evidence describing and demonstrating that they "should be included in the test period." Report and Order, Docket No. 07-035-93, August 11, 2008, page 47 – 48. Given Rocky Mountain Power chose to file its next general rate case when it did, before knowing the outcome of the 2007 case, and given its stated view that it is not necessary to reflect the outcome of the 2007 case, the question

must be asked whether the new rate case has included electric swaps and indexed gas transactions in net power costs for the last six months of 2008? The answer to this question may lie in the hundreds of pages of testimony, concealed in plain sight or obscurely disclosed. Unless the Commission stays all proceedings in this Docket and orders Rocky Mountain Power to conform its application to the Report and Order in 07-035-93, this Docket must be dismissed.

## II. THE DOCTRINE OF RES JUDICATA AS IT HAS BEEN APPLIED BY THE UTAH PUBLIC SERVICE COMMISSION, MANDATES THE DISMISSAL OF ROCKY MOUNTAIN POWER'S JULY 2008 APPLICATION.

As recently as 1985, Utah typified jurisdictions that were reluctant to apply res judicata in public utility ratemaking proceedings.[8] Since then the Commission defined and plainly adopted principals of res judicata/collateral estoppel and stare decisis as applied to utility ratemaking proceedings. Order on Various Procedural Motions and Petitions, August 1, 2005, *In the Matter of the Divisions Annual Review and Evaluation*, Docket No. 03-035-01, and *In the Matter of HELP*, Docket No. 04-035-21. The Commission stated:

> Res judicata consists of two prongs: claim preclusion and issue preclusion. Claim preclusion "precludes the relitigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action." *Schaer v. State*, 657 P.2d 1337, 1340 (Utah 1983)(quotations omitted). Issue preclusion (often referred to as collateral estoppel) "arises

[8] Ballam, D. A., The Applicability of Res Judicata/Collateral Estoppel to Utility Rate-Making Proceedings, *American Business Law Journal*, Vol. 24, Issue 2, Page 293, June 1986.

> from a different cause of action and prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit." *Id.* The principles of res judicata (both claim and issue preclusion) are applicable to administrative agencies and their decisions, *Salt Lake Citizens Congress v. Mountain States Telephone and Telegraph Co.*, 846 P.2d 1245 (Utah 1992), and "bars a second adjudication of the same facts under the same rule of law." *Id.*, at 1252. . . . "To hold otherwise would give a petitioner a way to revive claims he had originally lost due to his own lack of diligence in failing to exhaust his administrative remedies." *Nebeker v. Utah State Tax Commission*, 34 P3d 180, XXX (Utah 2001)." *Id.* at 6.

For the purpose of the Committee's response to the 2008 Application, the important holding from the HELP cases is the prohibition of re-litigating facts and to prevent a petitioner from repeatedly filing the same claims. The ratepayer impact from the 2008 Application is to reclaim and litigate for a second time, expenses that were in Docket No. 07-035-93, forecast to be incurred July 1, 2008 to December 31, 2008, or that Rocky Mountain Power did not disclose in the first case, or that Rocky Mountain Power now forecasts will be incurred in the same period. The principles of res judicata and the prohibition against retroactive ratemaking apply to the 2008 Application and mandate that it be dismissed.[9]

[9] The Committee agrees with and adopts the arguments presented by the Utah Industrial Energy Consumers' August 18, 2008 Motion to Dismiss.

## CONCLUSION

The purpose of the Commission's investigation and assessment of an application for a general rate case is to establish, after hearing, rates, charges and classifications that are just and reasonable. *Utah Code 54-3-1, 54-4-4(1), (2).* The focus of the inquiry is the rate impact upon the consumer, and the result reached must be just and reasonable. The Commission must follow procedures that ensure rates will be just and reasonable, and whatever the procedure by which rates are changed, the utility has the burden of establishing that the rates will be just and reasonable. *See In re Questar Gas Co*., Docket No. 98-057-12, December 3, 1999 Report and Order, page 5-6. If the utility does not present sufficient facts from which the Commission can determine if rates are insufficient or if the proposed rates are just and reasonable, the Commission must refuse the request for a rate increase. *Committee of Consumer Services v. Public Service Commission of Utah*, 2003 UT 29, ¶12, ¶13. If the evidence in an application is not reasonably calculated to resolve the issues that must be determined in a general rate case, then from the outset, the utility has failed to meet its burden. *See Id.* ¶14, citing *Utah Dep't of Bus. Regulation v. Pub. Serv. Comm'n*, 614 P.2d 1242, 1245 (Utah 1980). Because this is the utility's burden at all stages of the proceeding, an application for general rate relief that

requires the Commission or any interested party to disprove the necessity for rate relief is fundamentally flawed and must be dismissed.[10] *Id.*

Rocky Mountain Power's 2008 Application as filed is so deficient that it does not and cannot meet the utility's heavy burden of convincingly showing that the rates proposed will be just and reasonable. *See East Tennessee Natural Gas Co. v. Federal energy Regulatory Commission,* 686 F.2d 430 (6th Cir. 1982), citing *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). The more appropriate relief for ratepayers is to dismiss the Application. If not dismissed, the Application must be amended to conformed to Utah law.

RESPECTFULLY SUBMITTED this 18th day of August 2008.

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[10] At the least, it is certainly improper to permit such a deficient filing to trigger the running of the 240 day time period in which the Commission may act on the application.

## APPENDIX 1.

### §54-4-4. Classification and fixing of rates after hearing.

(1) (a) The commission shall take an action described in Subsection (1)(b), if the commission finds after a hearing that:

(i) the rates, fares, tolls, rentals, charges, or classifications demanded, observed, charged, or collected by any public utility for, or in connection with, any service, product, or commodity, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, practices, or contracts affecting the rates, fares, tolls, rentals, charges, or classifications are:

(A) unjust;

(B) unreasonable;

(C) discriminatory;

(D) preferential; or

(E) otherwise in violation of any provisions of law; or

(ii) the rates, fares, tolls, rentals, charges, or classifications described in Subsection (1)(a)(i) are insufficient.

(b) If the commission makes a finding described in Subsection (1)(a), the commission shall:

(i) determine the just, reasonable, or sufficient rates, fares, tolls, rentals, charges, classifications, rules, regulations, practices, or contracts to be thereafter observed and in force; and

(ii) fix the determination described in Subsection (1)(b)(i) by order as provided in this section.

(2) The commission may:

(a) investigate:

(i) one or more rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, or practices of any public utility; or

(ii) one or more schedules of rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, or practices of any public utility; and

(b) establish, after hearing, new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, practices, or schedules in lieu of them.

(3) (a) 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.

(b) In establishing the test period determined in Subsection (3)(a), the commission may use:

(i) a future test period that is determined on the basis of projected data not exceeding 20 months from the date a proposed rate increase or decrease is filed with the commission under Section 54-7-12;

(ii) a test period that is:

(A) determined on the basis of historic data; and

(B) adjusted for known and measurable changes; or

(iii) a test period that is determined on the basis of a combination of:

(A) future projections; and

(B) historic data.

(c) If pursuant to this Subsection (3), the commission establishes a test period that is not determined exclusively on the basis of future projections, in determining just and reasonable rates the commission shall consider changes outside the test period that:

(i) occur during a time period that is close in time to the test period;

(ii) are known in nature; and

(iii) are measurable in amount.

(4) (a) If, in the commission's determination of just, reasonable, or sufficient rates, the commission considers the prudence of an action taken by a public utility or an expense incurred by a public utility, the commission shall apply the following standards in making its prudence determination:

(i) ensure just and reasonable rates for the retail ratepayers of the public utility in this state;

(ii) focus on the reasonableness of the expense resulting from the action of the public utility judged as of the time the action was taken;

(iii) determine whether a reasonable utility, knowing what the utility knew or reasonably should have known at the time of the action, would reasonably have incurred all or some portion of the expense, in taking the same or some other prudent action; and

(iv) apply other factors determined by the commission to be relevant, consistent with the standards specified in this section.

(b) The commission may find an expense fully or partially prudent, up to the level that a reasonable utility would reasonably have incurred.

**§54-7-12. Rate increase or decrease -- Procedure -- Effective dates -- Electrical or telephone cooperative.**

(1) As used in this section:

(a) "Rate decrease" means:

(i) any direct decrease in a rate, fare, toll, rental, or other charge of a public utility; or

(ii) any modification of a classification, contract, practice, or rule that decreases a rate, fare, toll, rental, or other charge of a public utility.

(b) "Rate increase":

(i) means:

(A) any direct increase in a rate, fare, toll, rental, or other charge of a public utility; or

(B) any modification of a classification, contract, practice, or rule that increases a rate, fare, toll, rental, or other charge of a public utility; and

(ii) does not include a tariff under Section 54-7-12.8.

(2) (a) Any public utility or other party that proposes to increase or decrease rates shall file appropriate schedules with the commission setting forth the proposed rate increase or decrease.

(b) The commission shall, after reasonable notice, hold a hearing to determine whether the proposed rate increase or decrease, or some other rate increase or decrease, is just and reasonable. If a rate decrease is proposed by a public utility, the commission may waive a hearing unless it seeks to suspend, alter, or modify the rate decrease.

(c) Except as otherwise provided in Subsections (3) and (4), a proposed rate increase or decrease is not effective until after completion of the hearing and issuance of a final order by the commission concerning the proposed increase or decrease.

(3) The following rules apply to the implementation of any proposed rate increase or decrease filed by a utility or proposed by any other party and to the implementation of any other increase or decrease in lieu of that proposed by a utility or other party that is determined to be just and reasonable by the commission.

(a) On its own initiative or in response to an application by a public utility or other party, the commission, after a hearing, may allow any proposed rate increase or decrease, or a reasonable part of the rate increase or decrease, to take effect, subject to the commission's right to order a refund or surcharge, upon the filing of the utility's schedules or at any time during the pendency of the commission's hearing proceedings. The evidence presented in the hearing held pursuant to this subsection need not encompass all issues that may be considered in a rate case hearing held pursuant to Subsection (2)(b), but shall establish an adequate prima facie showing that the interim rate increase or decrease is justified.

(b) (i) If the commission completes a hearing concerning a utility's revenue requirement before the expiration of 240 days from the date the rate increase or decrease proposal is filed, the commission may issue a final order within that period establishing the utility's revenue requirement and fixing the utility's interim allowable rates before the commission determines the allocation of the increase or decrease among categories of customers and classes of service.

(ii) If the commission in the commission's final order on a utility's revenue requirement finds that the interim increase order under Subsection (3)(a) exceeds the increase finally ordered, the commission shall order the utility to refund the excess to customers. If the commission in the commission's final order on a utility's revenue requirement finds that the interim decrease order under Subsection (3)(a) exceeds the

decrease finally ordered, the commission shall order a surcharge to customers to recover the excess decrease.

(c) If the commission fails to enter the commission's order granting or revising a revenue increase within 240 days after the utility's schedules are filed, the rate increase proposed by the utility is final and the commission may not order a refund of any amount already collected by the utility under its filed rate increase.

(d) (i) When a public utility files a proposed rate increase based upon an increased cost to the utility for fuel or energy purchased or obtained from independent contractors, other independent suppliers, or any supplier whose prices are regulated by a governmental agency, the commission shall issue a tentative order with respect to the proposed increase within ten days after the proposal is filed, unless it issues a final order with respect to the rate increase within 20 days after the proposal is filed.

(ii) The commission shall hold a public hearing within 30 days after it issues the tentative order to determine if the proposed rate increase is just and reasonable.

(4) (a) Notwithstanding any other provisions of this title, any schedule, classification, practice, or rule filed by a public utility with the commission that does not result in any rate increase shall take effect 30 days after the date of filing or within any lesser time the commission may grant, subject to its authority after a hearing to suspend, alter, or modify that schedule, classification, practice, or rule.

(b) When the commission suspends a schedule, classification, practice, or rule, the commission shall hold a hearing on the schedule, classification, practice, or rule before issuing its final order.

(c) For purposes of this Subsection (4), any schedule, classification, practice, or rule that introduces a service or product not previously offered may not result in a rate increase.

(5) (a) Notwithstanding any other provision of this title, whenever a public utility files with the commission any schedule, classification, practice, or rule that does not result in an increase in any rate, fare, toll, rental, or charge, the schedule, classification, practice, or rule shall take effect 30 days after the date of filing or at any earlier time the commission may grant, subject to the authority of the commission, after a hearing, to suspend, alter, or modify the schedule, classification, practice, or rule.

(b) (i) Notwithstanding any other provision of this title, whenever a public utility files with the commission a request for an increase in rates, fares, tolls, rentals, or charges based solely upon cost increases to the public utility of fuel supplied by an independent contractor or independent source of supply, the requested increase shall take effect ten days after the filing of the request with the commission or at any earlier time after the filing of the request as the commission may by order permit.

(ii) The commission shall order the increase to take effect only after a showing has been made by the public utility to the commission that the increase is justified.

(iii) The commission may, after a hearing, suspend, alter, or modify the increase.

**CERTIFICATE OF SERVICE**

I certify that on August 18, 2008 the foregoing Utah Committee of Consumer Services' First Response to Application was served by electronic mail upon the parties listed below.

DATED this 18th day of August 2008.

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