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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.	Docket No. 08-035-38 **UIEC'S MOTION TO DISMISS THE APPLICATION OF ROCKY MOUNTAIN POWER**

Pursuant to the Utah Public Service Commission's ("Commission") Scheduling Order issued August 1, 2008, the "Utah Industrial Energy Consumers" ("UIEC"), by and through their counsel, hereby request that the Commission dismiss the current Application of Rocky Mountain Power ("RMP" or the "Company"). Moreover, because the earliest appropriate rate case test period for again adjusting RMP's rates is calendar year 2009, based on the reasoning of the test period decision in Docket No. 07-035-93, RMP cannot properly re-file a rate case application until near the end of 2008, when it will have sufficient current information to make a filing on a calendar 2009 test year in a manner consistent with the Docket No. 07-035-93 test period order.

As set forth below, RMP's Application violates the principles of res judicata, retroactive ratemaking, and stare decisis; it is a collateral attack of the Commission's decisions in Docket No. 07-035-93; violates the filing requirements of Utah Code Annotated § 54-7-12; denies Utah ratepayers their right to procedural due process; and is an unreasonable burden on regulatory resources.

INTRODUCTION

In December 2007, RMP filed an application to increase its rates and charges for electric service in Utah by $161,229,086. The application had a June 2009 Rolled-In Revenue Requirement of $1,566,425,726; Capped Revised Protocol Revenue Requirement of $1,585,027,032; and Normalized June 2009 General Business Revenues of $1,423,797,946. It was designated Docket No. 07-035-93. The test year in that application was a future period extending from July 1, 2008, through June 30, 2009.

Upon motion and after hearing, the Commission determined that the appropriate test year for Docket No. 07-035-93 would be the calendar year 2008. The Commission concurred with the recommendation that "forecasting a period nearer in time [would] render greater confidence in the matching of costs and revenues." Order on Test Period at 3, Docket No. 07-035-93 (Feb. 14, 2008). The Commission ruled that such a test year would "strike an appropriate balance between Company and ratepayer interests and best reflects the conditions the Company will encounter during the rate effective period." *Id.* Therefore, in its February 14 decision, the Commission ordered that the costs to be recovered by the Company in Docket No. 07-035-93 should be the estimated just and reasonable costs for the calendar year 2008.

Unhappy with the test year decision, on April 7, 2008, RMP filed its Notice of Intent to File General Rate Case, threatening to file another rate case as early as June 6, 2008. On July 17, RMP filed that second application to increase its rates and charges in Utah. Interestingly, this second application requests an increase in rates and charges for electric service in Utah by $160,557,621. It has a June 2009 Rolled-In Revenue Requirement of $1,573,633,600; Capped Revised Protocol Revenue Requirement of $1,592,320,499; and Normalized June 2009 General Business Revenues of $1,431,762,877. This second application also has the test year of a future

period extending from July 1, 2008, through June 30, 2009. This is the Application in the instant docket, 08-035-38.

Notice the distinct similarities between these two filings. The test year is identical. The requested rate increase is nearly identical. The revenue requirement figures are nearly identical. Many of the claims for the recovery of estimated costs asserted in this 08-035-38 case include claims for the recovery of estimated costs that were already advanced by RMP and then challenged by the interveners in the 07-035-93 case (*i.e.*, costs), and since denied by the Commission's order in Docket No. 07-035-93 issued August 11, 2008.

At the time the instant 08-035-38 case was filed, the challenged claims in the 07-035-93 case still remained under consideration by the Commission. Without awaiting the Commission's decision and taking proper actions to appeal it, or more appropriately, without timely appealing the test year decision, RMP has chosen to launch an attack on the Commission's decision by filing a near duplicate application for the recovery of the same estimated costs challenged in Docket No. 07-035-93.

The Commission has now issued its revenue requirement decision for Docket No. 07-035-93. That decision orders several adjustments to RMP's rate increase request, which are not reflected in the subsequent rate increase request of Docket No. 08-035-38. That decision also accepts several adjustments to the Company's GRID model that have not been reflected in RMP's Docket No. 08-035-38 filing. That decision orders RMP to take several actions in the filing of its next rate increase request, which is Docket No. 08-035-38, and those actions have not been taken with its filing.

RMP's attempt to recover additional monies in Docket No. 08-035-38 for the same estimated costs as those addressed by the parties and the Commission in Docket No. 07-035-93 is barred by the doctrines of res judicata and stare decisis, the rule against retroactive ratemaking,

and the statutory bar to collateral attacks to Commission orders under Utah Code Annotated § 54-7-14. Moreover, the excessive burden in time and money involved in litigating and re-litigating the same costs should not be tolerated.

In addition, pursuant to Utah Code Annotated § 54-7-12, a proceeding to increase rates by the Company is commenced by the filing of "appropriate schedules." Utah Code Ann. § 54-7-12(2)(a). Those schedules contain the rates that, if the Commission fails to timely act, will by default become effective. Those schedules also provide notice to interested parties of the impact of the Company's application.

The schedules filed in this case fail to provide reasonable notice to affected persons of the rates and charges that may become effective because they are entirely contingent on events outside this case (the Commission's order in 07-035-93). This is thus a violation of the procedural due process rights of Utah ratepayers. The Commission's determination in Docket No. 07-035-93 of the amount of revenue to be recovered and the allocation of that revenue among the various rate schedules and classes of customers has an impact on the determination of the prices to be ultimately charged. It is RMP's responsibility to file a case compliant with the Commission's order in Docket No. 07-035-93, which is the effective law, the provisions of § 54-7-12, and procedural due process. It should not be the burden of the ratepayers to waste precious time out of the 240-day running clock to discover where RMP's Application is in violation of the Commission's order so those appropriate adjustments can be requested. Due to the contingency on the Commission's decision in Docket No. 07-035-93, until an updated filing with complete schedules has been made incorporating the results of that decision, schedules in this Docket No. 08-035-38 purporting to increase rates above a level that is no longer in effect do not provide meaningful notice to customers of the impact of RMP's requested increase, and thus violate the due process rights of Utah ratepayers.

STATEMENT OF FACTS

1. On December 17, 2007, PacifiCorp, doing business in Utah as RMP, filed for a rate increase effective August 14, 2008. The filing was designated Docket No. 07-035-93.

2. The application was based on a twelve-month future test period extending from July 1, 2008, through June 30, 2009.

3. The application requested an increase to RMP's rates and charges for electric service in Utah by $161,229,086. (SRM-1, Normalized Results of Operations – REVISED PROTOCOL, Twelve Months Ending June 30, 2009, Docket No. 07-035-93, attached hereto as Ex. A.)

4. The application had a June 2009 Rolled-In Revenue Requirement of $1,566,425,726; Capped Revised Protocol Revenue Requirement of $1,585,027,032; and Normalized June 2009 General Business Revenues of $1,423,797,946. *Id.*

5. After a hearing on the test period issue, on February 14, 2008, the Commission issued its Order on Test Period for Docket No. 07-035-93.

6. Pursuant to the Order on Test Period, the Commission ruled that the 2008 calendar-year (January 1, 2008 through December 31, 2008) "best reflect[ed] the conditions the Company will encounter during the period when the rates determined in [that] docket will be in effect." Order on Test Period at 2, Docket No. 07-035-93 (Feb. 14, 2008), attached hereto as Ex. B. The Commission relied for its decision on an evaluation and balancing of factors relevant to selection of a test period as identified in its October 20, 2004, Order in Docket No. 04-035-42. *Id.*

7. The Commission then directed RMP to update its filing in Docket No. 07-035-93 "with the calendar-year 2008 test period, based on an average-of-year rate base." *Id.* at 4.

8. RMP complied with the Commission's order, filing its updated schedules on March 6, 2008.

9. On April 7, 2008, RMP filed a Notice of Intent to File General Rate Case.

10. On July 17, 2008, PacifiCorp, doing business in Utah as RMP, filed for another rate increase effective March 14, 2009. Application at 11, Docket No. 08-035-38 (July 17, 2008). This filing has been designated Docket No. 08-035-38.

11. This Application requests an increase in rates and charges for electric service in Utah by $160,557,621. SRM-2, Normalized Results of Operations – REVISED PROTOCOL, Twleve Months Ending June 30, 2009, Docket No. 08-035-38, attached hereto as Ex. C.

12. This Application has a June 2009 Rolled-In Revenue Requirement of $1,573,633,600; Capped Revised Protocol Revenue Requirement of $1,592,320,499; and Normalized June 2009 General Business Revenues of $1,431,762,877. *Id.*

13. This Application also has the test year of a future period extending from July 1, 2008, through June 30, 2009.

14. The test period requested in RMP's 08-035-38 Application is the identical test period requested in RMP's 07-035-93, which was subsequently changed by the Commission's 07-035-93 test year decision.

15. The test period requested in RMP's 08-035-38 Application overlaps the test period[1] ordered by the Commission in Docket No. 07-035-93 by six months. In other words, RMP's request for a rate increase in Docket No. 08-035-38 includes the same six-months' of the test period data and information that is the test period for Docket No. 07-035-93.

[1] In considering whether to allow interim rate increases for overlapping periods in the past, the Commission "expressed concern over the regulatory difficulties caused by overlapping test years" and noted that it "will take steps to protect the regulatory process whenever overlapping test periods are proposed." Report and Order at 6, Case No. 84-035-01 (Sept. 13, 1984).

16. With respect to labor expense, many of the components used to annualize payroll expense were at issue in Docket No. 07-035-93 (incentive compensation, employee levels, overtime, employee benefits, etc.). These same labor assumptions are included in the new case Docket No. 08-035-38. This means that millions of dollars in labor expenses for the new docket will likely be at issue again for the same reasons as before.

17. With respect to net power costs, a number of the items challenged related to the details in the modeling of net power costs. Without waiting for resolution of these modeling details in Docket No. 07-035-93, RMP instead filed its Application in Docket No. 08-035-38 using the same erroneous model. Thus, these same costs are likely to be placed at issue once again. This means that millions of dollars of net power costs could be at issue again for the same reasons as before.

18. The net power costs in Docket No. 07-035-93 were evaluated and adjustments were presented on a month-by-month basis. This means that for Docket No. 08-035-93, RMP expects a ***reevaluation*** of the net power costs for the months July through December 2008.

19. In Docket No. 07-035-93, RMP witness Widmer testified: "The normalized net power costs for the twelve months ended June 2009 are approximately $456.4 million on a Utah allocated basis, or $1.091 billion system-wide." Widmer Test. at 2, Docket No. 07-035-93, attached hereto as Ex. D.

20. In Docket No. 07-035-93, RMP witness Duvall[2] testified in his revised testimony: "The normalized net power costs for the twelve months ending December 2008 are approximately $435.3 million on a Utah allocated basis or $1.051 billion system-wide." Duvall Rev. Test. at 2, Docket No. 07-035-93, attached hereto as Ex. E.

[2] Duvall adopted Widmer's testimony in 07-035-93.

21. In this docket, RMP witness Duvall testified: "The normalized net power costs for the 12 months ending June 2009 are approximately $469.6 million on a Utah basis, or $1.129 billion system-wide." Duvall Test. at 2, Docket No. 08-035-38.

22. In this docket, RMP witness Duvall further testified that the "Company's forward price curve for the 12-month test period in the current proceeding is more than 20 percent higher than the one for the 12-month period in docket 07-035-93. The Company has not experienced rising net power costs of this magnitude since the Western energy crisis." *Id.* at 3

23. RMP witness Duvall further testified in this docket that the Company's actual system power costs for the 12 months ending May 31, 2008 are approximately $1.055 billion. *Id.*

24. In Docket No. 08-035-35, RMP witness Oliver testified regarding the Chehalis acquisition: "Evidence in the case illustrates that PacifiCorp had conducted an economic analysis of the basis for its offer for the Plant in December 2007. In January 2008, it appeared that discussions regarding the acquisition of the Plant were renewed and PacifiCorp submitted a non-binding proposal on February 13, 2008." Oliver Test. at 7, Docket No. 08-035-35, attached hereto as Ex. F.

25. The Company knew of the Chahalis plant and the economic consequences of the plant by February 14, the date the Commission issued its test period order in Docket No. 07-035-93, and well before March 6, the date the Company updated its filing in Docket No. 07-035-93.

26. A detailed audit will be required to verify that any agreed upon changes to Docket No. 07-035-93 have been incorporated into the new rate case, Docket No. 08-035-38. This will consume a good portion of the 240-day time limitation.

27. An additional detailed audit will now be required to verify that any ordered changes from Docket No. 07-035-93 are in fact properly incorporated into any updated filing of Docket No. 08-035-38. This will consume a good portion of the 240-day time limitation.

28. As of July 17, 2008, when RMP filed its application for an additional rate increase, the Commission had not yet decided or issued its order resolving the rate of return, revenue requirement, cost of service, or rate design issues of the prior rate case, Docket No. 07-035-93.

29. RMP filed schedules in its Application for a rate increase in this docket, Docket No. 08-035-38, that cannot stand alone without incorporation of the results of the Commission's order in 07-035-93. In other words, the schedules filed in support of the 08-035-38 Application are incomplete in that they are dependant on events outside this docket, including the outcome in the Commission's order in 07-035-93, and they require an updated filing based on the Commission's order.

30. Nevertheless, RMP has insisted in its 08-035-38 Application that the 240-day statutory deadline for decision began on July 17, 2008, the date it filed its Application with incomplete schedules. Application at 2.

31. The Commission's revenue requirement order in Docket No. 07-035-93, which was issued August 11, 2008, requires that the Company include in its general rate case filings, non-firm transmission in the GRID model and use of an average of the 48-month history as is done in the calculation of avoided costs. Report & Order on Revenue Requirement at 106–07, Docket No. 07-035-93 (Aug. 11, 2008) (hereinafter "Revenue Requirement Order"), attached hereto as Ex. G. RMP's filing in Docket No. 08-035-38 fails to comply with this order.

32. The Commission's Revenue Requirement Order takes the Company's revised requested revenue for the test year January 1, 2008 through December 31, 2008, from $74.456

million and makes $41.078 million in adjustments resulting in a revenue increase of $33.378 million. *Id.* at 7, 18, 96, 108, 110, 111. None of these adjustments, which include several changes to GRID inputs and assumptions, are reflected in RMP's filing of Docket No. 08-035-38, which includes in its test year, the overlapping period of July 1, 2008 through December 31, 2008.

33. The Commission's Revenue Requirement Order directs the Company to apply the use of historical data to compute average annual forced outage rates rather than using an average of four years of monthly data to derive monthly forced outage rates for GRID. *Id.* at 35. Contrary to the Commission's order, RMP failed to implement this method in its net power cost study for its filing in Docket No. 08-035-38.

ARGUMENT

I. THE PRINCIPLES OF RES JUDICATA AND ADMINISTRATIVE FINALITY BAR THE COMPANY'S APPLICATION BASED ON A TEST YEAR THAT OVERLAPS THE 07-035-93 TEST YEAR BY SIX MONTHS.

Based on the principles of res judicata and administrative finality, the Commission should dismiss RMP's Application. Res judicata is based on the principles of providing finality to decisions and prevents the relitigation of issues previously decided. *Astoria Fed. Savs. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107–08 (1991); *see also Culbertson v. Bd. of County Comm'rs*, 44 P.3d 642, 648 (Utah 2001); *Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245, 1251 (Utah 1992). "Res judicata has two branches: claim preclusion and issue preclusion[3]." *Murdock v. Springville Mun. Corp. (In re Gen. Determination of the Rights to the Use of All the Water)*, 982 P.2d 65, 70 (Utah 1999). "[C]laim preclusion bars a party from prosecuting in a subsequent action a claim that has been fully litigated previously." *Culbertson*, 44 P.3d at 642. It also "precludes the relitigation of all issues that could have been

[3] Issue preclusion, also referred to as collateral estoppel, bars "parties or their privies from re-litigating issues which were once adjudicated on the merits and have resulted in a final judgment." *Murdock*, 989 P.2d at 65.

litigated." *Schaer v. State*, 657 P.2d 1337, 1340 (Utah 1983) (ruling that for claim preclusion to apply, both suits must involve the same parties or their privies and also the same cause of action; and this precludes the re-litigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action).

In the administrative law context, the United States Supreme Court declared in *United States v. Utah Construction & Mining Company*, that the principles of res judicata should be applied when an administrative agency, acting in a judicial capacity, resolves disputed issues of fact that the parties have had an adequate opportunity to litigate. 384 U.S. 394, 422 (1966). The principles of res judicata (both claim and issue preclusion) are applicable to Utah administrative agencies and their decisions as well. *Salt Lake Citizens*, 846 P.2d at 1251; *In the Matter of the Division's Annual Review and Evaluation of the Electric Lifeline Program, HELP*, Utah Publ. Serv. Comm'n, Docket Nos. 03-035-01, 04-035-21, Order on Various Procedural Motions and Petitions at 6 (Aug. 1, 2005).[4]

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[4] Several states apply the principles of res judicata in utility rate cases. *See, e.g., In re Tariff Filing of Cent. Vermont Pub. Serv. Corp.*, 769 A.2d 668 (Vt. 2001) (holding that issue preclusion may apply in a utility rate case if all elements are met, and then applying issue preclusion to question of prudence as well as use and usefulness); *Florida Power Corp. v. Garcia*, 780 So. 2d 34 (Fla. 2001) (in upholding Commission's denial of petition based on res judicata, Florida Supreme Court held that the doctrine of administrative finality precluded re-adjudication of a pricing issue); *West Texas Util. Co. v. Office of Pub. Util. Counsel*, 896 S.W.2d 261 (Tex. Ct. App. 1995) (holding that appellants failed to produce sufficient evidence that circumstances were changed enough to justify reexamination of depreciation expense figure for plant that was approved by the commission in a previous docket and presented by plaintiff in current docket); *Consumers Power Co. v. Public Serv. Comm'n*, 493 N.W.2d 902 (Mich. Ct. App. 1993) (holding that while claim and issue preclusion would not be strictly applied, where the precise issues have already been litigated, it would be a waste of resources to re-litigate, and therefore, plaintiff should only be allowed to raise previous issues if new evidence or change of circumstances proved that prior findings were no longer applicable) (citing *Pennwalt Corp. v. Public Serf. Comm'n*, 420 N.W.2d 156 (1988) which held that issue of reasonableness of costs in setting rates would be precluded unless plaintiff could establish new evidence or change of circumstances); *Office of Pub. Util. Counsel v. Public Util. Comm'n of Texas*, 843 S.W.2d 718 (Tex. Ct. App. 1993) (holding that doctrines of res judicata and collateral estoppel preclude re-litigation of prudence issues for inclusion in rate base) (citing *Coalition of Cities for Affordable Util. Rates v. Public Util. Comm'n of Tex.*, 798 S.W.2d 560 (Tex. 1990)); *Lehigh Valley Power Comm. v. Pennsylvania Pub. Util. Comm'n*, 563 A.2d 548 (Pa. Commw. Ct. 1989) (applying the elements of issue preclusion to hold that even though couched in different terms, the issue raised by plaintiff regarding cost recovery of rates paid to qualifying facilities was precluded because it was essentially the same as that determined in a prior proceeding); *Allied Chem. v. Niagara Mohawk Power Corp.*, 517 N.Y.S.2d 635 (N.Y. App. Div. 1987) (finding that due to the adjudicatory nature of a rate proceeding, issue preclusion should apply, and parties were precluded from re-litigating issue of whether tariff approved by Public Service Commission applied to their contract).

For the period of July 1 through December 31, 2008, RMP's Application in this case includes the same claims as it did for that same period of time in Docket No. 07-035-93. These claims include capital investments, maintenance expenses, cost of debt, preferred stock and capital structure, return on equity, loads and revenues in Utah, net power costs, compensation and benefit plans, class cost of service, rate spread and rate design. The Company, regulators, and many of the interveners are the same in both dockets. When the Commission issued its decision for Docket No. 07-035-93, it decided what the results of those claims should be for 2008, including the period of July 1 through December 31, 2008. Unless RMP goes through the process for judicial review (which is the course that should be taken if RMP is not satisfied with the results of the decision),[5] the decision for Docket No. 07-035-93 as it relates to the period of July 1 through December 31, 2008, is final.

The net power costs have already been analyzed and evaluated for each of the months of July through December 2008. Adjustments have already been presented and ruled upon. When RMP's witness Duvall claims in this case that the "Company has not experienced rising power costs of this magnitude since the Western energy crisis," one can reasonably infer that the costs to which he is referring are the costs incurred in 2008, because no costs have yet been "experienced" for 2009. So he has to be referring to costs that have already been litigated. Any recovery by RMP for net power costs for the months July through December 2008 is res judicata. RMP cannot re-litigate those same claims again in this case.

The same is true for capital investments, maintenance expenses, cost of debt, preferred stock and capital structure, return on equity, loads and revenues in Utah, and compensation and benefit plans. RMP cannot re-litigate those same claims for July through December 2008 in this case.

[5] And is the course that RMP should have taken when it was dissatisfied with the test period decision.

Furthermore, RMP knew the price of the Chehalis plant and its economic consequences a month before filing its updated filing on March 6, 2008. RMP could have included those costs in that updated filing. However, for whatever reason, it chose not to.[6] Claim preclusion also precludes the re-litigation of all issues that ***could have been litigated*** in the 07-035-93 case, but which were not, for whatever reason. Having elected, for whatever reason, not to advance during the 07-035-93 case the costs of the Chehalis plant that were known or knowable, the Company cannot be allowed to reopen the issue through another rate case to claim those costs, which it strategically failed to present in the 07-035-93 case.

The costs and revenues for the period of July 1 through December 31, 2008, are res judicata. The costs of the Chehalis plant included in the 08-035-38 filing are res judicata. RMP cannot in this case re-litigate those same claims or raise the claims it should have litigated but chose not to. Thus, its Application should be dismissed. RMP cannot properly re-file a rate case application until near the end of 2008, when it will have sufficient current information to make a filing on a calendar 2009 test year in a manner consistent with the 2007 test period order.

II. THE RULE AGAINST RETROACTIVE RATEMAKING BARS THE COMPANY'S APPLICATION BASED ON A TEST YEAR THAT OVERLAPS THE 07-035-93 TEST YEAR BY SIX MONTHS.

Similarly, the Commission should dismiss the Company's Application based on the rule against retroactive ratemaking.[7] Utah law prohibits the Commission from permitting a utility to recover past costs or unrealized revenues. The Utah Supreme Court stated: "[As a] general rule [] … ***all ratemaking must be prospective in effect*** and rates may be fixed only in general rate proceedings." *Utah Dep't of Bus. Regulation v. Pub. Serv. Comm'n*, 720 P.2d 420, 423 (Utah

[6] Recognizing that there were potential confidentiality concerns with respect to the matter, those claims could nevertheless have been presented under the provisions of the protective order in place.

[7] The rule against retroactive ratemaking is similar to the principles of res judicata and claim preclusion. Just as with claim preclusion, the rule against retroactive ratemaking bars a party from making up for mistakes in forecasting in one rate case by prosecuting in a subsequent action the costs and revenues that have already been litigated previously, as well as those that could have been litigated but were not.

1986) (citations omitted) (emphasis added) (hereinafter referred to as the "*EBA Case*"). A "retroactive" rate adjustment is one that allows a utility to recoup from future rates "costs that were greater than projected." *MCI Telecomms. Corp. v. Pub. Serv. Comm'n*, 840 P.2d 765, 770 (Utah 1992). The rule against retroactive ratemaking is not constitutionally mandated, but it is a well-settled Utah rule based on "sound ratemaking policies."[8] *Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759, 777 (Utah 1994).

The essence of the rule is that utilities are generally not permitted to adjust their rates retroactively to compensate for unanticipated costs or unrealized revenues. *Id.* at 778.

> "If the utility underestimates its costs or overestimates revenues, the utility makes less money. By the same token, if a utility's revenues exceed expectations or if costs are below predictions, the utility keeps the excess." . . . Accordingly, "[t]he bar on retroactive rate-making has no exception for missteps made in the rate-making process," even though the projections of expenses and revenues for the test year vary from actual experience. . . . [A]djustments made in future rates to compensate for ***errors*** in prior rate-making proceedings are deemed retroactive in nature, and such adjustments are generally not consistent with a statutory regulatory scheme based on prospective rate-making.

Id. (quoting the *EBA Case*, 720 P.2d at 420) (emphasis in original).

The rule against retroactive ratemaking makes ***no*** exception for "overestimates" or "underestimates" of a utility's costs, or for mistakes in the ratemaking process based on the utility's inability to accurately forecast its revenues and expenses. *Id*. Thus, adjustments to future rates to offset missteps in the rate-making process based on the inability to predict revenues and expenses accurately are not permitted. *Id.*; *see also In re Application for Rocky Mountain Power, a Div. of PacifiCorp., for a Deferred Accounting Order to Defer the Costs of Loans Made to Grid West, the Reg'l Transmission Org., et al.*, Docket Nos. 06-035-163, 07-035-04, 07-035-14, Report and Order at 15 (Jan. 3, 2008).

[8] It is not only well recognized and well established in Utah, but is also well established throughout the United States. *See, e.g., In re Cent. Vt. Pub. Serv. Corp.*, 473 A.2d 1155 (Vt. 1984); *State ex rel. Util. Consumers Council of Mo., Inc.*, 585 S.W.2d 41 (en banc) (Mo. 1979).

Except for fraud, the only other recognized "exception" to this rule is when "an unforeseeable event results in an extraordinary increase or decrease in expenses or revenues." *MCI*, 840 P.2d at 771. An "unforeseeable" event is one which is "inherently unpredictable," and which is not a result of "company mismanagement ***or imperfect forecasts***." *Id*. (emphasis added). With respect to this issue, the Utah Supreme Court stated:

> [t]he extraordinary ***and*** unforeseeable nature of the expenses recognized under the exception differentiates them from ***expenses inaccurately estimated because of a misstep in the ratemaking process, such as the inability to predict precisely***, or from mismanagement. An increase or decrease in expenses that is unforeseeable at the time of a ratemaking proceeding, cannot, by hypothesis be taken into account in fixing just and reasonable rates."

Id. (emphasis added).

Thus, the "exception" is appropriate ***only*** when an event is sufficiently unpredictable that it would be ***impossible*** to account for its effect in a rate case, ***and*** only when the effects of the unforeseen event are ***so beyond expectation*** that it would be unjust and inequitable not to adjust rates accordingly. However, costs, once litigated and decided and disallowed, cannot be clawed back simply by filing a separate application covering the same costs.

By way of example only, and not meaning to preclude any other expenses and revenues for July 1 through December 31, 2008, the net power costs and labor expenses proposed by RMP in Docket No. 07-035-93 were based on its own forecasting methods and information. The parties analyzed and evaluated these on a month-by-month basis. Adjustments were proposed based on the month-by-month evaluation. A decision has been issued by the Commission based on the evidence presented in that case. There have been several adjustments ordered. RMP cannot be allowed to now try to "update" the results for the last six months of 2008 because actual costs or revenues or increased information show the mistakes made in RMP's forecasting

ability. No one is forcing RMP to file forecasted test years.[9] If its forecasting ability is so faulty, RMP should stick to an historical test year.

Furthermore, the Chehalis expenses were known ahead of the time RMP updated its filing on March 6. Thus, these expenses were not "impossible" to account for in Docket No. 07-035-93. Nor were they so "beyond expectation" that it would be unjust and inequitable not to adjust rates accordingly. These expenses cannot be considered an exception to the rule against retroactive ratemaking and should be precluded from recovery in a general rate case.

In its Application in this case, RMP has provided no evidence that any unforeseeable event has resulted in an extraordinary increase in expenses or revenues. Nevertheless, its Application includes estimates of costs and revenues that deviate from the estimates of these same costs and revenues in the 07-035-93 case. It includes estimates of costs and revenues that were known but were by its own choosing not included in the 07-035-93 case.

RMP is trying to make-up for its "missteps made in the ratemaking process" of Docket No. 07-035-93. This is retroactive ratemaking and should be prohibited. Thus, RMP's Application should be dismissed. RMP cannot properly re-file a rate case application until near the end of 2008, when it will have sufficient current information to make a filing on a calendar 2009 test year in a manner consistent with the Docket No. 07-035-93 test period order.

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[9] As the Commission has noted in the past, it is

> Concerned that when future test years are used so much hearing time is spent in arguing the validity and accuracy of test-year forecasts of revenues, expenses, and rate base. We are forced to consider whether forecasting methods have merit and whether forecast amounts are acceptable and whether forecast numbers should be modified as actual data becomes available during each rate case. The more time that is spent altering forecasts in this manner, the less time remains during the proceeding to ascertain the reasonableness of each revenue, expense, and rate base item.

Report and Order at 6–7, Case No. 84-035-01.

III. THE COMMISSION'S DECISION OF 07-035-93 HAS A BINDING LEGAL EFFECT UNDER THE DOCTRINE OF STARE DECISIS, WHICH RMP'S APPLICATION IN THIS CASE VIOLATES.

> [W]hen the Commission rules in a rate proceeding that, as a matter of law, certain categories of expenses cannot be charged to ratepayers, that ruling establishes law that controls future cases, subject to the Commission's power to reverse itself ***in an appropriate manner***.

Salt Lake Citizens, 846 P.2d at 1251 (emphasis added). This binding legal effect is known as the doctrine of stare decisis. *Id.* at 1252. Furthermore,

> A rule of law, whether pre-existing or newly established, that serves as the major premise of an adjudicatory syllogism, necessarily governs all subsequent cases properly falling within the scope of the rule. This is so even when the particular facts in subsequent cases are different and res judicata does not apply.

Id. As the Utah Supreme Court noted in *Salt Lake Citizens*: "Rate-making proceedings are ***not*** to be conducted on the basis of gamesmanship." *Id.* at 1254 (emphasis in original).

In the instant case, the Commission's rulings of Docket No. 07-035-93 are the established law that controls the case of Docket No. 08-35-38. RMP's filing in Docket No. 08-35-38 does not comply with this established law.

Several adjustments were ordered with respect to net power costs, labor costs, and other expenses for the year 2008. RMP's filing in Docket No. 08-35-38 does not reflect these adjustments for the months July through December 2008.

Many of the ordered adjustments included modifications to the assumptions and inputs of the GRID model as it applied to the year 2008. RMP's filing in Docket No. 08-35-38 does not reflect these ordered adjustments for the months July through December 2008.

The Commission's order of August 11, 2008, included several rulings as to how all filings should be made on a going-forward basis. RMP's filing in docket No. 08-35-38 does not comply with these rulings.

RMP knew full well that orders were forthcoming that would materially affect any filing it made. RMP is obligated by law to comply with the Commission's rulings of Docket No. 07-035-93. RMP's filing of the Application in this case without full consideration of the Commission's decisions of Docket No. 07-035-38 is nothing more than a flaunting of the Commission's authority and the law. Using gamesmanship, RMP is attempting to circumvent the law. This cannot be permitted.

RMP's Application should be dismissed. RMP cannot properly re-file a rate case application until near the end of 2008, when it will have sufficient current information to make a filing on a calendar 2009 test year in a manner consistent with the 2007 test period order.

IV. THE COMPANY'S APPLICATION IS NOTHING MORE THAN AN IMPERMISSIBLE COLLATERAL ATTACK ON THE COMMISSION'S ORDERS IN DOCKET NO. 07-035-93 AND SHOULD BE DISMISSED.

The findings of the Commission in Docket No. 07-035-93 for recovery of costs for the period of July 1, 2008 through December 31, 2008, cannot be collaterally attacked by the Company filing a subsequent application to recover costs for that same period. Neither can the Commission's test year decision in Docket No. 07-035-93 be collaterally attacked in this way.

The Utah Code provides: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." Utah Code Ann. § 54-7-14; *see also North Salt Lake v. St. Joseph Water & Irrigation Co.*, 223 P.2d 577 (1950) (ruling that if property owner or others claimed an impairment of their rights by the rulings made by the Commission and were not satisfied with the order as entered, then their relief was to request a further hearing before the Public Service Commission or appeal to the Utah Supreme Court, not to try to have the order modified or changed in a separate proceeding, because the Commission's order had the effect of a judgment and its legality cannot be attacked in collateral proceedings).

In the instant case, the Commission's decisions in Docket No. 07-035-93 are conclusive. This not only includes the cost and revenue issues for July 1, 2008, through December 31, 2008, it also includes the test year decision. RMP's Application is cloaked in the guise of a new rate increase, but it is in fact an impermissible collateral attack on the underlying Commission orders in Docket No. 07-035-93, through which the Commission ruled that the proper test year was calendar year 2008, and that the revenue requirement issues for the period July 1, 2008 through December 31, 2008, have been decided.

If the Company disagrees with those decisions, its recourse is timely appeal. Filing this Application for the same period is a collateral attack to the Commission's decisions in Docket No. 07-035-93, which is a violation of § 54-7-14 and should not be allowed. The Application should be dismissed. RMP cannot properly re-file a rate case application until near the end of 2008, when it will have sufficient current information to make a filing on a calendar 2009 test year in a manner consistent with the 07-035-93 test period order.

V. THE COMPANY'S APPLICATION FAILS TO MEET THE FILING REQUIREMENTS OF § 54-7-12, AND THUS, FAILS TO PROVIDE ADEQUATE NOTICE UNDER THE LAW.

The schedules filed with RMP's Application do not meet the minimum requirements of Utah Code Annotated § 54-7-12, thus failing to give adequate notice and violating the due process rights of Utah's ratepayers. The Application should therefore be dismissed.

Section 54-7-12 provides: "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." Utah Code Ann. § 54-7-12(2)(a). The statute continues by providing: "The commission shall, after reasonable notice, hold a hearing to determine whether the proposed rate increase . . . is just and reasonable." *Id.* § 54-7-12(2)(a). Furthermore, "[i]f 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." *Id.* § 54-7-12(3)(c).

Under Utah law:

> Utah's Due Process Clause provides that "[n]o person shall be deprived of life, liberty[,] or property, without due process of law," Utah Const. art. I, § 7, and is "substantially the same as the due process guarantees contained in the Fifth and Fourteenth amendments to the United States Constitution." *In re Worthen*, 926 P.2d 853, 876 (Utah 1996). . . . When an administrative agency engages in adversarial, adjudicative decision-making, as in this case, attention must be paid to due process. *V-1 Oil Co. v. Department of Envtl. Quality*, 939 P.2d 1192, 1196–97 (Utah 1997). "[T]imely and adequate notice and an opportunity to be heard in a meaningful way are at the very heart of procedural fairness." *In re Worthen*, 926 P.2d at 876 (quotations, citations, and footnote omitted).

Brent Brown Dealerships v. Tax Comm'n, Motor Vehicle Enforcement Div., 139 P.3d 296, 304 (Utah Ct. App. 2006).

The schedules filed in the Company's Application do not set forth the proposed rate increase, thus they are not "appropriate." They are entirely dependent on factors outside the scope of the case, including the Commission's orders in 07-035-93. There is no way that Utah ratepayers can determine whether the proposed rate increase in this case is just and reasonable as proposed. In fact, because the filing does not include the adjustments or comply with the rulings of the Commission's Revenue Requirement Order, it cannot be just and reasonable.

Furthermore, the tariffs filed by the Company in its Application include direct violations of the Commission's Revenue Requirement Order. If the Commission were to fail to enter an order within 240 days, these tariffs would be made effective by default. Because the tariffs violate the Commission's Revenue Requirement Order, they would be unlawful upon effectiveness. Therefore, they are not appropriate to serve as adequate notice under the law of what just and reasonable rates should be.

Timely and adequate notice and an opportunity to be heard in a meaningful way are at the very heart of procedural due process. Without complete schedules filed at the time the 240-day statutory clock began, Utah ratepayers have not been given timely and adequate notice of what the Company's proposed rate increase is. Utah ratepayers will thus be denied the opportunity to be heard in any meaningful way because their ability to properly investigate and prepare their case will be adversely impacted by RMP's failure to file compliant and completed schedules at the time the Application was filed.

The 240-day statutory time clock is meant to give parties a fair opportunity to investigate, challenge, and adjudicate this rate increase. Nevertheless, it is a very short period of time for such significant decisions. In contrast, civil matters allow at least 240 days just for the discovery period alone. Utah R. Civ. P. 26(d).

As the Commission has stated "on numerous occasions, the Company is the gatekeeper of information concerning its operations." Revenue Requirement Order at 97. RMP has already signaled that it does not plan to re-file its adjusting schedules to comply with the Commission's Revenue Requirement Order until it files its rebuttal testimony on January 5, 2009. This ignores the Commission's comments that presenting information for the first time in rebuttal testimony is too late for reasonable evaluation by regulators and other parties. *Id.* at 47.

Utah ratepayers deserve a compliant application be filed on the first day of the 240 days, not on the 150th day, or whenever RMP thinks it is "reasonable" to do so. *See, e.g.*, RMP's responses to UIEC Data Requests 2.1, 2.2, 2.3, 2.4, 2.6 and 2.9, Docket No. 08-035-38, attached hereto as Ex. H (responding that updated information will be supplied within a "reasonable" time after the Commission issues its order in Docket No. 07-035-93). Otherwise, valuable portions of the 240-day time period that are critical to the regulators and interveners are wasted waiting for RMP to provide the necessary information to proceed.

It is not the duty of the Utah ratepayers to discover the discrepancies between the law as set forth in the Commission's Revenue Requirement Order and RMP's Application as filed.[10] RMP, however, is obligated to file a compliant Application, giving sufficient notice of updated information. *See, e.g.*, Revenue Requirement Order at 47. It has failed to do so.

There is no statutory timing requirement for the filing of RMP's rate increase requests. RMP could just as easily have waited until after it had the Commission's decisions in Docket No. 07-035-93 before it finalized and filed its rate increase Application. RMP's failure to do so should not be allowed to result in the denial of the due process rights of Utah's ratepayers.

Therefore, RMP's Application should be dismissed. RMP cannot properly re-file a rate case application until near the end of 2008, when it will have sufficient current information to make a filing on a calendar 2009 test year in a manner consistent with the 2007 test period order.

VI. THE COMPANY'S FAILURE TO WAIT AND FILE A COMPLETE APPLICATION MEETING THE REQUIREMENTS OF § 54-7-12, WILL RESULT IN A WASTE OF REGULATORY RESOURCES.

The requirements of § 54-7-12 ensure that upon the filing of an application for a rate increase, the Commission, the Division of Public Utilities ("DPU"), and the Committee of Consumer Services ("CCS") have sufficient information to conduct a thorough investigation within the statutory timeframe of 240 days that will result in a decision for just and reasonable rates. RMP has failed to adhere to the statutory requirements to provide the requisite level of information in its Application to meet its initial burden of proof and to provide sufficient information that a result could be imposed by default. The DPU and CCS (as well as the other interveners) have now been put into the position of wasting valuable time gathering, through discovery efforts, information that should have been provided in the Application. This is a waste

[10] It is not a question as to whether it is a possible task. Of course, given sufficient time, the calculations could be done by the parties. But, it is outrageous to expect the parties to perform this task within the 240-day time clock when the Company should have done it before filing the Application. Furthermore, this would also introduce into the case a significant number of new issues and even more time would be wasted evaluating these new issues.

of regulatory resources. RMP had the obligation to present a complete Application. Filing an incomplete Application places an unnecessary prejudicial burden on regulatory resources. Thus, failing to dismiss would be contrary to the public interest. RMP cannot properly re-file a rate case application until near the end of 2008, when it will have sufficient current information to make a filing on a calendar 2009 test year in a manner consistent with the 2007 test period order.

CONCLUSION

Based on the foregoing, the UIEC respectfully request that the Commission dismiss RMP's Application in this case. RMP cannot properly re-file a rate case application until near the end of 2008, when it will have sufficient current information to make a filing on a calendar 2009 test year in a manner consistent with the 07-35-93 test period order. While RMP may believe it has specific individual claims that for good and sufficient reasons it did not include in the case for Docket No. 07-035-93, it is RMP's obligation to bring those specific claims forward and RMP bears the burden to prove such claims are not precluded as set forth above.

DATED this 18th day of August, 2008.

/s/ Vicki M. Baldwin
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CERTIFICATE OF SERVICE
(Docket No. 08-035-38)

I hereby certify that on this 18th day of August 2008, I caused to be e-mailed, a true and correct copy of the foregoing **UIEC'S MOTION TO DISMISS THE APPLICATION OF ROCKY MOUNTAIN POWER** to:

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