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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Complaint 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	**Division of Public Utilities' Motion on the 240-day Statutory Time Period and Other Issues** **Docket No. 08-035-38**

The following is a Motion by the Division of Public Utilities (DPU or Division) (1) urging the Commission to find that the 240-day statutory time period for a rate case decision does not begin to run until Rocky Mountain Power (RMP or Company) files revised schedules as a result of the Commission's decision in Docket No. 07-035-93 and (2) asking that Rocky Mountain Power be bound by decisions made by the Commission in the August 11, 2008 Order in Docket No. 07-035-93, the last rate case which includes a portion of the test year in the current rate case.

1. This general rate case was filed by the Company before the Commission issued its Order in the Company's prior general rate case. In addition, the test year the Company has filed in this rate case overlaps the test year in the Company's last general rate case, Docket No. 07-035-93. When the Company filed its requested rate relief in this case, it asked that its increase be $160.6 million above currently effective rates. Because of the timing, this rate increase request was made without incorporating to the rate increase or decisions that the Commission made in its

Order in Docket No. 07-035-93. Obviously, the rate increase actually requested by the Company will not be the $160.6 million in the filing, but will be $160.6 million reduced by some unknown amount that will not be known until the Company files new schedules that will let all know what the rate increase the Company is seeking in this case. As it currently stands, the scheduling Order issued in this Docket has no requirement for the Company to make a supplemental filing after the Order is issued in Docket No. 07-035-93 that would provide a new revenue requirement based on that Commission Order. It is the DPU's position that such a supplemental filing is absolutely mandatory for this case to be conducted in an orderly manner. The Company indicated at a scheduling conference that it might not make such a filing until its responsive testimony is filed in early January 2009. It is also the DPU's position that statutorily the current filing is incomplete and as a matter of law cannot constitute a filing that will begin the 240-day statutory time period for a decision found in Utah Code Ann. § 54-7-12. Finally, the DPU believes that the Company must make these supplemental filings consistent with the Commission's Order in Docket No. 07-035-93 and that several decisions made in that Order affect the Company's filing in Docket No. 08-035-38. The parties cannot wait until some unknown future date for the Company to file a complete rate case in this Docket in compliance with the Order issued in Docket 07-035-93 while having the 240-day clock begin ticking in this case.

2. In the testimony of Company witness Mr. Steven R. McDougal page 4, line 85, the Company tries to portray the effect of the Order in Docket No. 07-035-93 as simply adding additional revenues that would effectively reduce the revenue requirement in this current rate case by the amount of the decision in the past case. For example, because the Commission awarded a rate increase of $33.4 million in Docket No. 07-035-93, the Company asserts that the requested increase in Docket No. 08-035-38 would be $127.2 million, not the $160.6 million

requested in the 2008 filing. ($160.6 million requested in Docket No. 08-035-38 less the $33.4 million awarded in Docket No. 07-035-93; numbers have been rounded) The Division asserts that this is a gross oversimplification of what is required for the Company to refile its exhibits and schedules in compliance with the Order issued by the Commission on August 11, 2008. The affidavit of Mr. David T. Thomson addresses the practical problems the Division faces without having a filing from the Company reflecting the revenue requirement and adjustments it is actually asking the Commission to hear in this case. It is not just a simple process of reducing the revenue requirement in the current case to reflect the rate increase in the last case. The auditor must take what was filed in Docket No. 08-035-38 and break down the work into contested and noncontested information; however the auditor will not be sure until the compliance filing is made that the audited component has not been affected by the prior rate case Order. (See Affidavit of David T. Thomson, attached hereto as Exhibit A) The Company is required to file the current rate case in compliance with the Commission's decision in Docket No. 07-035-93. Those decisions are binding on the Company in this case and without those decisions being incorporated into a new filing the Company has not presented a complete filing.

Mr. Gregory N. Duval, the Company's net power costs witness, does not even appear to address how the Commission's Order in Docket No. 07-035-93 will be incorporated into the net power study he performed for this rate case. He does indicate which adjustments have been made to the current net power costs study from the prior docket. (Duval Direct testimony p. 7.) The DPU believes that the net power costs study will need significant revisions. It will need to be rerun with adjustments ruled on by the Commission it its August 11, 2008 Order incorporated into the current study. The DPU is submitting the affidavit of Mr. James B. Dalton, the DPU net power costs witness, that addresses (1) the Division's review of the net power costs study in this Docket absent a revised net power costs study reflecting the adjustments of the Commission's

Order, and, (2) the effect of over-lapping test years on the DPU's review of net power cost study. For example, Mr. Dalton states that, for example, there are at least a ($ [confidential]) million increase in total Special Sales for Resale in the overlapping period. (See Affidavit of James B. Dalton, attached hereto as Exhibit B [confidential])

The Affidavits of Mr. Thomson and Mr. Dalton are being presented to demonstrate the practical problems caused by the Company's filing this rate case prior to the decision in the last rate case and the effect of the over-lapping test year.

3. For a variety of reasons, the Company's filing is insufficient to begin the statutory time period for a decision contained in Utah Code Ann. § 54-7-12. The Company has filed this rate case with schedules that will produce a rate increase to customers that does not reflect the rate increase the Company is actually seeking to be implemented. Mr. Griffith's Exhibit WRG-2 is the Company's proposed tariffs that describe the rate changes proposed by the Company in this case. Those schedules reflect a 23.86% increase for irrigation customers, a 15% increase for schedule 9 customers, and an 11.47% increase for residential and commercial customers. (Direct Testimony of William Griffith. p. 3.) The Company tries to address the effect of the decision in Docket No. 07-035-93 by describing what the rate increase would be for each rate schedule if the requested rate relief the Company sought in Docket No. 07-035-93 is awarded by the Commission, i.e. the entire $74.5 million increase. That proposed rate increase for each schedule is described on p. 3 of Mr. Griffith's direct testimony. Mr. Griffith's information and the information provided by other Company witnesses is insufficient to meet notice requirements and to constitute a filing of schedules sufficient to begin the 240-day clock. Besides the parties not knowing what relief the Company is actually asking for in this case, ratepayers and parties to the case are significantly disadvantaged by the Company's premature filing -- the ratepayers and parties do not know what rate increase the Company is proposing to apply to each individual

customer group; that number may be a maximum of $160.6 million or a minimum of $160.6 million minus $74.5 million. In actuality, the proposed rate increase for each customer will not be known until the Company makes a filing after the rate Order is issued in Docket No. 07-035-93 that will at that point inform the public of the actual proposed rate increase sought by the Company after applying not only the rate increase granted by the Commission in the last rate case, but also re-running its revenue requirement with adjustments made by the Commission in the last rate case. It is this failure to file schedules that inform the public of the proposed rate increase that legally makes the Company's filing in Docket No. 08-035-38 incomplete and not in compliance with Utah Code Ann. § 54-7-12.

4. Utah Code Ann. § 54-4-3 describes the notice that a utility must give the public in Order to seek a change in its rates. The statute requires the utility to file its new schedules with the Commission and to keep those proposed schedules open for public inspection. The schedules are to plainly state the changes to be made in the schedules and the time the new schedules will go into effect. Section 54-3-3 provides:

> **54-3-3. Changes by utilities in schedules - Notice.**
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> Unless the commission otherwise orders, no change shall be made by any public utility in any rate, fare, toll, rental, charge or classification, or in any rule, regulation or contract relating to or affecting any rate, toll, fare, rental, charge, classification or service, or in any privilege or facility, except after 30 days' notice to the commission and to the public as herein provided. Such notice shall be given by filing with the commission, and keeping open for public inspection, new schedules stating plainly the change or changes to be made in the schedule or schedules then in force, and the time when the change or changes will go into effect. The commission for good cause shown may allow changes, without requiring the 30 days' notice herein provided for, by an order specifying the changes so to be made, the time when they shall take effect and the manner in which they shall be filed and published. When any change is proposed in any rate, fare, toll, rental, charge or classification, or in any form of contract or agreement, or in any rule, regulation or contract relating to or affecting any rate, toll, fare, rental, charge, classification or service, or in any privilege or facility, attention shall be directed to such change on the schedule filed with the commission by some character to be designated by the commission immediately preceding or following the item.

Utah Code Ann. § 54-7-12(2)(a) provides that a utility that wishes to file a rate increase shall file its schedules with the Commission in order to begin the process. The 240-day time period begins to run from the time the utilities schedules are filed. Section 54-7-12(3)(c) provides: "If the Commission fails to enter the Commission's Order granting or revising a revenue increase within 240 days after the utilities 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."

Both sections refer to a rate case being initiated by the utility filing schedules of the proposed rate increase. Failure by the Commission to render a decision within 240 days has severe consequences: the rate increase filed by the utility in its schedules will go into effect and will not be subject to refund. In this case, a $160.6 million rate increase is significantly higher than what the Company will propose when the Commission's Order in the last rate case is reflected in the filing in this case. The schedules filed by the Company only reflect the rate increase off of currently effective tariffs, and do not reflect changes due to the Commission's Order in Docket No. 07-035-93. The case, as currently filed, does not reflect the rate increase that the Company proposes once the Order in the last rate case is issued.

Second, the accounting schedules, testimony, net power costs, and the Company's MDR do not reflect the information needed by the parties to proceed with a rate case. All of those filings do not reflect the Order issued August 11, 2008 and the numerous adjustments ordered by the Commission to the Company's revenue requirement. The recent Commission Order

addressed the need for a complete filing by the Company in order for the Commission to consider the rate case filed. The Commission stated:

> a. General Requirements
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> The Division and the Committee recommend the Commission order the Company to provide certain information when filing a general rate case. The Division proposes the requirements identified in the January 30, 2006, Discovery Task Force Report filed in Docket No. 04-035-42 and as presented in the Stipulation on Filing Requirements, Discovery, and Timing of Test Period Hearing in Docket No. 06-035-21 be made a permanent part of future general rate case filings. Alternatively, the Division recommends the Commission initiate a rule making proceeding to determine the filing requirements for both Questar Gas Company and PacifiCorp.
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> The Committee contends that in order for parties to effectively analyze and investigate the Company's filings, adequate information must be provided in a timely manner. As the Company is in control of the information upon which it bases it case, it is the Committee's view that having adequate information, such as that contained in responses to Master Data Requests ("MDR"), at an early stage of the case is essential. While the Company, through stipulation, provided responses to MDRs in this and the previous rate case, there is no agreement to provide responses to MDRs beyond this docket. The Committee believes this information is essential as support for the Company's case and should be required with every application for a general rate case.
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> The Company argues the proposed modification to the amount of required filing information for a general rate case and the associated time period in which a general rate case must be completed would further delay recovery of costs, create even less opportunity for the Company to achieve its authorized rate of return and provide poor price signals to customers. Additionally, these modifications are inconsistent with the Utah State Legislature's direction that the Commission uses a forward looking test period when appropriate.
>
> The Division counters that its proposed scheduling and filing requirements do not preclude a forward-looking test period because the information sought is known up front and should be able to be prepared with the rate case filing. Rather, the Division contends its general recommendation should be interpreted as a recommendation to expedite the assessment of critical data.
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> The issue presented before us deals with the information to be filed with or provided to parties at the time of filing a general rate case. We disagree with the Company that the previously agreed to filing requirements would further delay recovery of costs. We find the Division's and the Committee's testimony on the filing requirement issue persuasive and direct the Company to provide the requested information on an ongoing basis or until such time that rules may be adopted.

In the past, filing up front information, such as MDR A, was done voluntarily. Now it is a requirement of the Commission in order for the rate case to be considered filed. That information being provided in a complete fashion representing the utilities best information and incorporating Commission decisions is absolutely necessary to be present in the MDRs, in the revenue requirement testimony and exhibits, and in the net power costs studies. Even though that information is absent, the Company is urging that the clock ticks against the parties, even though the Company has not filed a complete rate case. Absent a complete filing including the effect of the most recent rate case Order, the Company has not meet its burden of proof and is effectively shifting the burden of proof to parties to determine the rate relief sought.

The deficiency of the filing in Docket No. 08-035-38 may warrant dismissal of the case. The obvious defects, and impacts upon the public and parties, are numerable and prohibit proper, timely evaluation of the filing. Dismissing the filing would allow PacifiCorp to refile, completely, and seek a rate increase in a timely manner.

5. Concepts of res judicata, collateral estoppel, and stare decisis apply.

It is well established that the utility has the burden of proof in a general rate case. The mere filing of incomplete schedules and testimony, as the Company has done here, is insufficient to meet that burden. Utah Department of Business Regulation v. Public Service Commission, 614 P. 2d 1242 (Utah 1980). Ratemaking is not an adversarial proceeding in which the utility only needs to submit a prima facia case. Before the Commission can act it must be advised of all relevant facts. Otherwise, its hands and the hands of all parties are tied and just and reasonable rates cannot be set. Utah Department of Business Regulation v. Public Service Commission, 614 P.2d 1242 (Utah 1980). Here the utility is forcing the parties and the Commission to evaluate two different rate making models and sets of facts. The first model and set of facts are the ones that the Company used in the last rate case, which ignores the August 11, 2008 Order. The

second model and set of facts will incorporate the effects of the August 11, 2008 Order into Docket No. 08-035-38. The Company has indicated that it may not provide the Commission with that revised model and second sets of facts until rebuttal testimony is submitted in January 2009. In Mountain Fuel Supply Company v. Public Service Commission, 861 P 2d 414 (Utah 1993), the Utah Supreme Court affirmed the Commission's decision not to allow Mountain Fuel to present evidence to support an alternative test year. The court said it is inconsistent with the utility's burden of proof "to allow the utility to force the Commission to engage in an analysis of two rate-making models when the utility itself does not have any idea of what the analysis will actually produce." (561 P.2d at 423. In affirming the Commission's order to reject the Company's attempt to present evidence, the court noted that what Mountain Fuel wants to do is "prepare its case at the same time it presented it." (861 P.2d at 424) Here Rocky Mountain Power is preparing its case at the same time it wishes to present it. Parties are placed in the position of awaiting the Company to file the change in revenue requirement caused by the issuance of the Order in Docket No. 07-035-93. The 240-day statutory time period for a decision in Docket No. 08-035-38 is reduced while the Company finishes preparing its case. That preparation time should go against the Company and not other parties.

6. The statute, Commission decisions, and court decisions apply principals of collateral estoppel, res judicata, and stare decisis to decisions of the Commission. In a Commission decision, In the Matter of the Division's annual review and evaluation of HELP 03-035-01 and 04-035-21 August 1, 2005, the Commission applied the principals of rest judicator and stare devises. In that decision, the Commission stated that res judicata consists of two prongs: issues preclusion and claims preclusion. Claims preclusion prevents the relitigation of all issues that could have been litigated or those that were in fact litigated in a prior proceeding. Issues preclusion or collateral estoppel comes into play when there is a different cause of action, and

prevents parties from re-litigating issues and facts in the second cause of action that were completely heard in the first cause of action. Generally, these rules bar a second adjudication under the same facts under the same rule of law. (Help Order p. 3.) Stare decisis is also discussed in the HELP Order applying principals established in one proceeding to another and requiring the utility to follow those principals in subsequent filings. (HELP Order p. 4.)

One Utah Supreme Court decision that provides significant guidance on these principals and their application to public utility regulation is Salt Lake Citizen Congress v. Mountain States Telephone and Telegraph, 846 P.2d 1245 (Utah 1992) (often called the Charitable Case). In that decision, the court indicated that concepts of res judicata have been applied to administrative proceedings since the 1950's. The court indicated "when an agency is acting in a judicial fashion and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, courts have not hesitated to apply res judicata to enforce repose." (Charitable Case applying principals to administrative proceedings at 1250.) Res judicata "applies when there has been a prior adjudication of a factual issue and an application of a rule of law to those facts. In other words, res judicata bars a second adjudication of the same facts under the same rule of law." (Charitable Case at 1251-52.) In the Charitable Case, the court found that the rule of res judicata did not technically apply since the amount of charitable contributions included in a variety of rate cases varied year by year since the Commission's initial decision in 1969. Instead, the court found that the principal of stare decisis applied. The results were similar under either legal concept since the utility was required to file its future rate cases in accordance with the rules established by the Commission in its earlier decision. In order to meet the utility's burden of proof and the rule of stare decisis, the filing had to be made by the utility in such a way that does not make it difficult for the Commission to regulate the utility and establish just and reasonable rates. (Charitable Case at 1254.) Absent a filing by the Company

following the principals established in Docket No. 07-035-93, a complete rate case does not exist for the Commission to act on and set new rates. Cleary, the way the utility has filed this rate case is making it extremely difficult for the parties to investigate the reasonableness of their filing.

In applying stare decisis rather than res judicata to the prior rulings of the Commission on charitable contributions, the Utah Supreme Court recognized the limited applicability of res judicata to rate making. The court stated:

> Of course, res judicata has only limited applicability to some agency proceedings, such as rate cases where the predominant issue is what constitutes a just and reasonable rate for a future period. What constitutes a just and reasonable rate of return, the cost of capital, and the various expenses and revenue amounts cannot be decided on the bases of a prior rate proceeding, but must be determined anew in each rate case. Nevertheless, when 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.

Charitable Case at 1251.

Although not generally applied in rate cases, in this case principals of both res judicata and stare decisis may apply. It seems clear that many of the decisions made by the Commission in Docket No. 07-035-93 will and should apply to the filing in the new general rate case, and that the Company should be required to refile its most recent rate case reflecting those decisions. The 240 days should not start until that filing has occurred. Also, because of the overlapping test year, principals of res judicata may also apply since this case is reestablishing rates using the same 6-month period used in the prior rate case; the period June 2008 to December 2008 is in both rate cases. Adjudication in the prior case on certain specific facts may have occurred in such a manner that concepts of res judicata may apply. However, due to the significant additions of costs in the June 2008 to December 2008 time period in the current case that were not present in the past case, i.e. mainly Chehalis, the Division proposes to address res judicata on an issue by issue basis.

These significant differences in the June 2008 to December 2008 time period in the two cases include some of the following: short term firm sales are ($[confidential]) higher in the new rate case June 2008 to December 2008 time period then the last rate case. Purchased power increases ($ [confidential]) over the prior docket, which contained a ($ [confidential]) increase in short term firm purchases. Other material differences also exist. (See Affidavit of James B. Dalton, Exhibit B [confidential]) Similar changes in rate base between the two periods can also be isolated. Some major plant additions that were not included in the 2007 rate case are included now in the new rate case in the overlapping time period: Chehalis ($ [confidential]), Rolling Hills ($206 million), and Glen Rock III ($67 million). Because of these differences, the DPU is not applying res judicata on a wholesale basis but on an issue-by-issue basis to the rate case just because an overlapping test year is taking place. Factual differences do exist between the two rate cases based at least in part on the Chehalis plant purchase recently approved by the Commission and some new wind plants not included in the last rate case. However, concepts of res judicata may very well apply to individual issues that were fully litigated in the prior rate case addressing the same facts in both cases due to the overlapping test year. Faced with these circumstances, the DPU sees a variety of alternatives for the Commission to consider in resolving both the overlapping test year issue and issue that this rate case was filed before the Order was issued in the last general rate case.

The DPU recommends the following: (1) The Company be required to refile its general rate case with the effect of the Commission's Order reflected in that filing not only for its results of operations, but also for its cost of service and tariffs; (2) This refilling would include a detailed list of which adjustments are included in its filing and which are not and why not; (3) The Company would file schedules that would explain in detail the differences between the June 2008 to December 2008 results of operation between the two rate cases; (4) Only when these

filings are made would the 240 day time period would begin to run in this Docket; (5) At that point, parties could object to the filing on an issue-by-issue basis or generally object if after reviewing the Company's filing they continue to believe that the Company is precluded from filing a rate case with an overlapping test year. (6) If the Commission does not believe it has the authority to restart the 240 day time period when the Company refiles its rate case then the Commission should dismiss the rate case until the new filing is made with the impact of the Commission's August 11, 2008 Order included.

The above recommendations of the DPU suggests that the burden be shifted back to Rocky Mountain Power to refile its rate case taking into effect the Order in the last rate case and that each party can choose to take what action it thinks necessary at that time. Those actions could include objecting to the test year, arguing that res judicata applies even with the new filing and the case should be dismissed, or arguing that stare decisis applies to certain issues that have not been incorporated by the Company in its new filing. Once a complete filing is available parties can evaluate that filing in light of their view of the effect of the last rate case Order and the overlapping test year.

Respectfully submitted this _____ day of August, 2008.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **Motion on the 240 day Statutory Time Period and Other Issues** was sent by electronic mail and mailed by U.S. Mail, postage prepaid, to the following on August 18, 2008:

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