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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 **REPLY MEMORANDUM IN SUPPORT OF 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, respectfully submit this reply memorandum in support of their motion to dismiss without prejudice Rocky Mountain Power's ("RMP") application in this case for failure to state a claim upon which relief can be granted.

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ARGUMENT

I. ROCKY MOUNTAIN POWER'S ARGUMENTS MISCHARACTERIZE THE STATE OF REGULATORY LAW IN UTAH AND SHOULD BE DISREGARDED.

A. Commission Policy Has Not Allowed Overlapping Rate Cases Since at Least 1988 and Overlapping Rate Cases Should Continue to Be Prohibited.

Contrary to RMP's assertions, using overlapping or "pancacked" rate cases is not the "long-established practice before the Commission" in Utah. Response of Rocky Mountain Power to Motions to Dismiss or to Restart the 240-Day Statutory Time Period ("RMP's Br.") at 10. Interestingly, the most recent case cited by RMP for their allegation is from 1985. We are currently in the year 2008, twenty-three years later. A review of the regulatory landscape between the cases cited by RMP and the law today demonstrates that RMP's version of history has some holes.

In 1993, ***eight years after*** the latest case cited by RMP as the Commission's "long-established practice," the Commission set forth its accepted policy on test years and adjustments in the U.S. West Communications general rate case. *In re Request of U.S. West Commc'ns, Inc. for Approval of an Increase in Its Rates & Charges*, Docket No. 92-049-05, Report & Order (April 15, 1993) (hereinafter *U.S. West Order*) (attached hereto as Exhibit A). In that case, the Commission noted that "***[d]uring the past five years or more***" its practice had been to rely on historical test years. *Id.* at 12 (emphasis added). Therefore, since at least 1988,[1] the Commission's policy had been to use fully historical test years.

As the Commission explained, a "'test year' is the information base for constructing the 'test period,' which is intended to represent the period new rates will be in effect." *Id.* at 10.

[1] The Commission stated in 1993 that "during the past five years or more" its practice had been to rely on historical test years, which would mean since at least 1988.

Ideally, each element of a test-year's revenues, expenses, and investment should be examined during a general rate case for correctness of accounting and for reasonableness of amount. *Id.*; *accord In re Application of Mountain Fuel Supply Co. to Increase Rates & Charges*, Docket No. 93-057-01, Order on Rehearing at 10 (Dec. 1, 1994) ("A 12-month set of revenues, expenses, and investments, matched in time, is a principal aspect of a properly constructed test year and a standard of regulatory practice.") (attached hereto as Exhibit B). The Commission further explained that during this period of at least five years, it had come to understand the "undesirable effects of post-test-year adjustments" and sought to exclude them.

In summarizing its argument against post-test-year adjustments and future test years, the Commission explained:

> It diminishes economic examination and accountability, replaces actual results of operations data with difficult-to-analyze projections, and plays to the Company's [regulated utility] strength, which is the control of critical information. The efficiency incentive conferred by regulatory lag is dampened, and the risks of the future are transferred to ratepayers. This is too high a price to pay simply to accept post-test-year adjustments. . . . We conclude that absent compelling reasons which mitigate the concerns just expressed, we will not permit post-test-year adjustments absent rate case examination of revenues, expenses, and investment for the same post-test-year period. It is simply unreasonable to consider post-test-year adjustments in isolation. Post-test-year adjustments thus may transform an historical test year into a projected test year. Given the important regulatory benefits of using the historical test year, this is an unacceptable outcome where the better alternative is available and appropriate.

Id. at 15–16. This policy was reaffirmed in subsequent rate cases. *See, e.g.*, *In re Application of Mountain Fuel Supply Co. to Increase Rates & Charges*, Docket No. 93-057-01, Report & Order at 10–15 (Jan. 10, 1994) (reaffirming policy while accepting a compromise of a rolling test year to accommodate the impacts of a FERC order) (attached hereto as Exhibit C); *In re Application*

of Mountain Fuel Supply Co. for an Increase in Rates & Charges, Docket No. 95-057-02, Report and Order at 2–3 (Oct. 17, 1995) (reaffirming policy while ruling that utility had not met burden of showing the need for post-test-year adjustments and offsetting revenues, and denying the utility's request for a future test year) (attached hereto as Exhibit D); *In re Application of Questar*[2] *Gas Co. for a General Increase in Rates & Charges*, Docket No. 02-057-02, Report & Order at 22 (Dec. 30, 2002) (noting utility's argument against Commission's long-standing policy of using fully historical test years to determine revenue requirement) (attached hereto as Exhibit E).[3]

Unhappy with the Commission's long-standing policy of using fully historical test years without post-test-year adjustments, in 2003, the utilities successfully lobbied for a change in the law to allow future test years and consideration of post-test-year adjustments in certain limited situations. Utah Code Ann. § 54-4-4, Amendment Notes, 2003 amendment. Nevertheless, contrary to the assertion of RMP, the Commission has not had a policy of allowing overlapping test periods since at least 1988, so this cannot be considered Commission precedent in this case. The policy allowing overlapping test periods was obviously replaced and should not be reinstated without sound reason. RMP has provided no such evidence so its application should be dismissed.

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[2] Mountain Fuel Supply Company was reorganized and renamed as Questar Corporation.

[3] The Commission reiterated in 2004 that its policy had been to rely on historical test periods without out-of-period adjustments due to the possible bias and lack of complete information such adjustments presented, and its concern that the use of future test periods lead to diminished economic examination and accountability, replacement of actual results of operations data with difficult-to-analyze projections, reduction in the ability of parties to effectively analyze the utility's forecasts, dampening of the efficiency incentive of regulatory lag, playing to the utility's strength from control of critical information and shifting of the risks of the future to ratepayers. *In re PacifiCorp*, Docket No. 04-035-42, Order Approving Test Period Stipulation at 3 (Oct. 20, 2004) (attached hereto as Exhibit F) (hereinafter "2004 Test Period Order").

B. RMP's Argument to Allow Significant Updates During a Rate Proceeding Is Misplaced and Relies on a Misstatement of Its Evidence.

RMP argues at length that every type of minor adjustment that is made in a rate case provides evidence that the significant adjustments proposed by RMP in this case (making its application conform to the 07-035-93 Revenue Requirement Order) are just a matter of conducting an ordinary rate case. RMP's Br. at 7–9, 11–14. RMP's exaggeration and oversimplification of the facts makes one wonder if RMP understands the process for setting revenue requirement in Utah.[4]

First of all, RMP claims that UIEC argued that if re-filing of the revenue requirement exhibit is required, the 240-day period should be restarted. This is not what UIEC argued, and in fact, UIEC will demonstrate below why restarting the 240-day period is legally not an option for the Commission. The UIEC stated clearly throughout its opening brief that RMP's application in this case must be dismissed. UIEC's Br. at 1, 13, 16, 18, 19, 22, 23. RMP should not be permitted to file a new application for a rate increase until it is able to file one that incorporates all the changes that resulted from the Commission's revenue requirement order issued August 11, 2008, in Docket No. 07-035-93 ("Revenue Requirement Order").

Next, RMP seems to have forgotten basic principles of ratemaking:

> A fundamental principle is: the burden rests heavily upon a utility to prove it is entitled to rate relief and . . . [the] utility has the burden of proof to demonstrate its proposed increase in rates and charges is just and reasonable. The company must support its application by way of substantial evidence, and the mere filing of schedules and testimony in support of a rate increase is insufficient to sustain the burden. . . . A state regulatory commission, whose powers have been invoked to fix a reasonable rate, is entitled to

[4] We understand that the owners are new to Utah and their counsel may be new to Utah regulatory law, but "newness" should not be an excuse for the absence of diligence.

> know and before it can act advisedly must be informed of all relevant facts.

Utah Dep't of Bus. Regulation v. Public Serv. Comm'n, 614 P.2d 1242, 1245–46 (Utah 1980) (attached hereto as Ex. G).[5] Thus, it is RMP's burden to present an application with substantial evidence of all relevant facts, not just some schedules and testimony. RMP's argument that the form of the schedule is all that must conform to the rules (RMP's Br. at 23–30), demonstrates a clear misunderstanding of its responsibilities and burdens in the ratemaking process.

The Commission's *U.S. West Order* explained the process for determining revenue requirements in Utah. As the Commission noted in that case, a test year is more than just a general guide, it "is the information base for constructing the 'test period,' which is intended to represent the period new rates will be in effect." *U.S. West Order* at 10. The examination conducted during a rate case proceeding should lead to the accounting and reasonableness adjustments that will convert the test year to a ratemaking test period. *Id.*

This process begins by first adjusting the Utah intrastate revenues, expenses, and investments of the test year to accord with standing Utah regulatory policies. *Id.* This "may require imputation of revenues or disallowances of expenses and/or investments." *Id.* Then, because "the test year looks forward to the period when new rates will be in effect, the second kind of adjustment must annualize specific revenue, expense and investment changes that occurred during the test year. *Id.* at 11. A third category of adjustments are those that normalize

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[5] In its ruling, the Supreme Court also confirmed the comments of the dissenting commissioner in the underlying case who had noted that the Commission cannot abdicate its day to day regulatory responsibilities "***simply because the Division of Public Utilities or interested parties intervening in rate proceedings do not challenge or question that which is improper, illegal, unfair, unjust, discriminatory or which is in any other fashion contrary to the rules and regulations or orders***" of the Commission. *Utah Dep't of Bus.*, 614 P.2d at 1245 (emphasis added). Similarly, contrary to the repeated arguments of RMP (RMP's Br. at 5, 7, 9, 12, 13, 16 n.4, 22), just because a practice was not challenged in the past, this does not mean it is lawful.

the test year by removing the effects of accounting adjustments. *Id.* Weather normalizing adjustments are another type of adjustment. *Id.* Finally, adjustments that go to the reasonableness of the revenues, expenses, and investments can be made. *Id.* All these types of adjustments are routinely examined and made during a rate case. *Id.*

Pursuant to the provisions of the Utah's Public Utility Statutes, if a test period established is not determined exclusively on the basis of future projections, the Commission should also consider changes outside the test period that are close in time to the test period, known, and measureable. Utah Code Ann. § 54-4-4(3)(c). In Docket No. 07-035-93, the test period established was determined exclusively on the basis of future projections. Therefore, known and measureable updates were prohibited by statute. Utah Code Ann. § 54-4-4(3). RMP should not be allowed to file another rate case with an overlapping period, including what it claims are known and measureable updates to its future forecast of Docket No. 07-035-93, in an attempt to circumvent the statutory prohibitions.

On its face, RMP's filing fails to meet the requirements of § 54-7-12 of the Utah Code, as explained in UIEC's opening brief. A complete re-filing of the revenue requirement portion of the case, which is what would be necessary to correct the deficiencies, is not in accordance with the types of adjustments that are allowed and accepted in the normal course of rate making procedures. The application, as filed, makes it impossible for the Commission to grant the relief requested without significant material changes. Thus, the application in this case must be dismissed without prejudice and re-filed at a future date with the appropriate information.

Moreover, RMP's examples of permissible updating to an application are misleading. For instance, RMP points out that it filed updated information to reflect the MEHC acquisition

one month after it filed its 2006 rate case. This is a blatant, misleading representation of the facts of that case and should be disregarded. In Docket No. 05-035-54, MEHC and PacifiCorp jointly filed for Commission approval of MEHC's proposed acquisition of PacifiCorp. Pursuant to that proceeding, the parties agreed to many commitments. One of those commitments, U23, provided:

> PacifiCorp intends to file its next Utah general rate case, including its direct revenue requirement testimony, by March 1, 2006. . . . In addition, within fifteen days after closing, PacifiCorp will file supplemental testimony by an MEHC witness to discuss and update PacifiCorp's revenue requirement in that case and to incorporate any additional adjustments that are appropriate as a result of the transaction. ***In order to provide parties with time to address any additional information provided in the MEHC testimony, PacifiCorp will extend the Rate Effective Date to December 11, 2006. If the transaction closes after April 30, 2006, or PacifiCorp fails to file supplemental testimony within fifteen days of closing, PacifiCorp acknowledges that the Rate Effective Date may be further extended by a reasonable period of time, as determined by agreement of the parties or by the Commission. PacifiCorp hereby waives any claim or argument that an additional extension of the Rate Effective Date would violate the provisions of Utah Code section 54-7-12(3)(b)(i).***

In re Application of MidAmerican Energy Holdings Company & PacifiCorp dba Utah Power & Light Company for an Order Authorizing Proposed Transaction, Docket No. 05-035-54, Report & Order at 39, U23 (Jan. 27, 2006) (emphasis added) (attached hereto as Ex. H). In the Commission's decision in that case, the Commission noted:

> PacifiCorp intends to file its next rate case March 1, 2006. ***The applicants agree to delay the rate effective date, to allow MEHC to file supplemental testimony to update the revenue requirement and allow other parties to respond to that testimony, until December 11 of 2006*** (Commitment U23).

Id. at 6 (emphasis added). The Commission further noted: "The Division believes ***the commitment to postpone the implementation of new rates by 45 days*** to at least December 11, 2006 (Commitment U23) . . . may represent positive benefits." *Id.* at 9 (emphasis added). The Commission granted the application subject to these commitments.[6] *Id.* at 16 ¶ 3. Note, this means that for a material amendment that was not even the magnitude of the amendment contemplated in this case, an update was provided by a date certain and the 240-day time limitation was extended by 45 days.[7] This prevented prejudice to the regulators and intervening parties.

To now claim that permitting this substantial update during the course of a rate case was just a matter of ordinary business, with no effect on the rate-effective date is either disingenuous or an example of extremely lax research,[8] and makes one wonder at the veracity of the rest of RMP's arguments. There is no precedent for an update of this significance without a waiver of the 240-day time limitation, and, in fact, this example is precedent that such an update would be acceptable only if RMP were to waive the time limitation. Accordingly, in this case, RMP's application should be dismissed without prejudice.

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[6] In light of its press release of September 2, 2008, RMP may want to revisit these commitments.

[7] In this case, the Commission's Revenue Requirement Order was issued nearly 30 days from the filing of this reply brief and RMP has not yet provided an updated filing. It is unknown when RMP may do so, but it has threatened to wait until January, 2009.

[8] RMP claims that it made this assertion "[b]ased on the best information available to the Company." RMP's Br. at 9. If that is truly the case, RMP should consider updating its records.

II. RMP'S REQUEST THAT THE COMMISSION RECONSIDER ITS TEST YEAR DECISION IN DOCKET NO. 07-035-93 IS PROOF THAT ITS APPLICATION IN THIS CASE IS NOTHING MORE THAN A COLLATERAL ATTACK OF THE DECISIONS OF THAT CASE.

As set forth in UIEC's opening brief, the Commission's decisions in Docket No. 07-035-93 are conclusive. If RMP is dissatisfied with any of the decisions in that case, its relief is to request rehearing by the Commission, not to try to have the orders or decisions modified or changed in a separate proceeding, such as this case. Doing so is nothing more than a collateral attack on the Commission's decisions and authority. *See North Salt Lake v. St. Joseph Water & Irrigation Co.*, 223 P.2d 577 (1950) (attached hereto as Ex. I).

On September 2, 2008, RMP filed its petition for reconsideration in Docket No. 07-035-93 ("Petition for Reconsideration"). A copy of the petition is attached hereto as Exhibit J. In that petition, RMP asked for, *inter alia*, reconsideration of the test year decision, arguing that the test year it proposed in Docket No. 07-035-93, which is the same test year proposed in this case, should have been the ordered test period. Petition at 29–30.

That filing is proof that RMP's application in the instant case is nothing more than a collateral attack on the decisions of Docket No. 07-035-93. RMP has filed a separate proceeding, this case, to try to have the Commission's orders and decisions in the 07-035-93 case modified. RMP is attacking the authority of the Commission and its decisions from every possible angle: by collateral attack, accepted review procedures, and in the press.[9] The Commission cannot succumb to these attacks.

[9] A copy of the press release issued by RMP threatening the ratepayers and regulators of Utah is attached hereto as Exhibit L.

Stewart v. Utah Public Service Commission, is instructive here. 885 P.2d 759 (Utah 1994) (attached hereto as Ex. K). In that case, the utility, which operated in a number of states, threatened to refrain from making the appropriate investments in Utah unless the Commission increased the utility's rate of return. The *Stewart* court not only overruled the Commission for yielding to the utility's threats, but it sanctioned the utility for making those threats by ordering the utility to pay attorneys' fees to the group of citizens who brought the case against the utility.[10]

Moreover, RMP even admits in its opposition that it has used its filing in this case to ask the Commission to change its position in the 07-035-93 case. RMP's Br. at 30 (claiming that "the doctrine of stare decisis . . . does not in any way prohibit the Company from asking the Commission to change its position based on the facts presented in this case"). This is prohibited and the application should be dismissed.

III. RMP'S ARGUMENTS THAT *STARE DECISIS* DOES NOT PREVENT IT FROM SEEKING A CHANGE IN POSITION ARE WITHOUT MERIT.

RMP has argued that *stare decisis* does not apply to the types of decisions made in the Commission's Revenue Requirement Order, and that it does not prevent RMP from seeking a change in position by merely filing another application nearly identical to that filed in Docket No. 07-035-93. RMP's Br. at 30–31. These arguments are without merit.[11]

[10] Pursuant to §§ 54-7-21 and 54-7-23, the Commission is authorized to prosecute a utility in violation of the Constitution or the statutes of Utah and impose penalties, including criminal penalties.

[11] Not only are they without merit, but RMP's argument that it could not incorporate the adjustments of the Revenue Requirement Order because the order had not yet been issued is facetious and demonstrative of the type of logic RMP has relied upon in its opposition. RMP was fully aware that order was forthcoming, and it knew the latest date upon which the Commission could issue that order.

Interestingly, even though RMP argues the limited applicability of *stare decisis* in administrative agency cases, especially as it relates to adjustments to costs in rate cases (RMP's Br. at 31), it relies on this very same doctrine in support of its position for rehearing on the net power costs related to the Sacramento Municipal Utility District Contract (Petition for Rehearing at 9).

Nevertheless, many of the adjustments of the Revenue Requirement Order were not strictly related to cost. They include modifications to the assumptions and inputs that are to be made to the GRID when modeling costs on a going forward basis. They include rulings as to how all filings should be made on a going forward basis. These are rules of law that are "as binding on a utility as a rule formally promulgated in a rule-making proceeding." *Salt Lake Citizens Cong. v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245, 1253 (Utah 1992) (attached hereto as Ex. M). They must be followed until overruled by the Commission or a court. RMP's application fails to conform to these rules of law and should be dismissed.

Furthermore, contrary to RMP's argument, it cannot ask the Commission to change its position based merely on the facts in a re-filed case. *Salt Lake Citizens* is also instructive in this instance. In *Salt Lake Citizens*, the utility tried to argue that its applications for rate increases in 1976 and in 1980 through 1985, which disregarded a prior Commission ruling, "constituted petitions to approve a change in the law." *Id.* at 1254. The court ruled that such an argument was without merit. *Id.* The utility had not filed a petition asking the Commission to rule on the issue or for reconsideration, and the utility had failed to ever direct the Commission's attention to the issue within the application filings. *Id.* at 1250 n.2, 1254.

Similarly in this case, the filing of a new application cannot constitute a request for the Commission to change its position on the rulings of the prior case. The only way to request a revision of the Commission's order is through RMP's Petition for Reconsideration. As explained above, doing so by way of filing the application in this case is nothing more than a collateral attack on the Commission's decision in Docket No. 07-035-93 and must be prohibited. *See* RMP's Br. at 30 (claiming that "the doctrine of stare decisis . . . does not in any way prohibit the Company from asking the Commission to change its position based on the facts presented in this case"). Therefore, the application must be dismissed.

IV. A PROPER INTERPRETATION OF THE RULE AGAINST RETROACTIVE RATEMAKING PROHIBITS USE OF RMP'S APPLICATION IN THIS CASE.

RMP fails to understand the rule against retroactive ratemaking and its application in this case. RMP makes a selective citation to *Stewart* in its brief[12] and indicates that because rates are set on a prospective basis, "the rule against retroactive ratemaking is not implicated in this situation." RMP's Br. at 18. This demonstrates a significant misunderstanding of the ratemaking process as well as the rule against retroactive ratemaking.

A "'test year' is the information base for constructing the 'test period,' which is intended to represent the period new rates will be in effect." *U.S. West Order* at 10. "Utah statutes, after amendment in 2003, allow, with conditions, the test period to be constructed from historic data with known and measurable adjustment, part historic and part forecasted data, or forecasted data not to exceed twenty months from the date of filing of the utility's case." 2004 Test Period Order at 3. The 2003 amendment did nothing to repeal the doctrine of retroactive ratemaking.

[12] RMP has cited to dicta in the *Stewart* court's note of the misnomer for retroactive ratemaking as applied to prospective rates and then, despite years of case law throughout the country to the contrary, claims retroactive ratemaking does not apply with a future test year.

Regardless of the test year selected, utility rates are always fixed prospectively. *Utah Dep't of Bus. Regulation v. Public Serv. Comm'n*, 720 P.2d 420, 420, 423 (Utah 1986) (attached hereto as Ex. N); *Stewart*, 885 P.2d at 778. Thus, whether the ***test year*** is an historic year or a purely forecasted year, the ***test period*** is always prospective.

Nevertheless, as explained in *Stewart*,

> [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. . . . 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.

Stewart, 885 P.2d at 778 (emphasis in original). This is precisely the situation before us in this case.

Adjustments made in future rates to be effective March 14, 2009, to compensate for errors that were made in Docket No. 07-035-93, especially those due to the inability of RMP to predict revenues and expenses accurately, are deemed retroactive in nature and are not permitted. *See, e.g.*, Ex. O (RMP's response to UIEC Data Request No. 2.7 in Docket No. 08-035-38, showing that application filing in Docket No. 08-035-38 corrects RMP's forecasting errors in Docket No. 07-035-93 for each month of July through December 2008). This case is a perfect example of retroactive ratemaking and should not be permitted. RMP's current application attempting to fix its errors from the prior case should be dismissed.

V. RMP'S ARGUMENTS THAT *RES JUDICATA* DOES NOT PREVENT IT FROM SEEKING A CHANGE IN POSITION ARE WITHOUT MERIT.

Just as with *stare decisis*, the doctrine of *res judicata* prevents relitigation of the issues already decided as well as the issues that could have been litigated.[13] *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 No.s 03-035-01, 04-035-21, Order on Various Procedural Motions and Petitions at 6 (Aug. 1, 2005) (Attached hereto as Ex. P).

Many of the adjustments of the Revenue Requirement Order were not strictly related to cost. They were made in an adversary proceeding, and resolved controversies over legal rights. Thus, pursuant to *Salt Lake* Citizens, those adjustments are *res judicata*, and RMP's application should be dismissed.

Furthermore, RMP's arguments regarding Chehalis are without merit. RMP argues that it did not know whether the Chehalis plant was approved until August 1, 2008, and thus it could not include it in the 07-035-93 filing. RMP's Br. at 19. Based on this logic, RMP should not have been able to include it in the application for this case, which was filed on July 17, before the approval of Chehalis. RMP knew the price and its economic consequences a month before filing its updated filing in Docket No. 07-035-93. These were known and should have been included in that filing.

RMP argues that had it attempted to include the costs of Chehalis in Docket No. 07-035-93, the parties would have objected. This is pure speculation and a direct contradiction to the manner in which the Lakeside plant was treated. In that case, the revenue increase was phased-in

[13] Interestingly, just as with *stare decisis*, RMP argues here that *res judicata* does not apply to this type of situation. Yet, in its Petition for Reconsideration, RMP argues that *res judicata* does apply to the costs and revenues of the 07-035-93 case. Petitions for Reconsideration at 9.

based on the anticipated commercial operation of the Lakeside plant so that the increase was $85 million beginning December 11, 2006, and then raised to $115 million on June 1, 2007. *In re Application of PacifiCorp for Approval of Its Proposed Elec. Serv. Scheds. & Elect. Serv. Regulations*, Docket No. 06-035-21, Report & Order at 11, Stipulation Regarding Revenue Reqmt. & Rate Spread ¶ 7 (Dec. 1, 2006) (attached hereto as Ex. Q). A similar arrangement could have been requested and accommodated for the Chehalis plant.

RMP could have included the Chehalis costs in the Docket No. 07-035-93 filing. It failed to do so, and pursuant to the doctrine of *res judicata*, it is forbidden from doing so in the present case.

VI. IT IS UNLIKELY THAT THE COMMISSION HAS THE AUTHORITY TO WAIVE RMP'S RIGHT TO EFFECTIVE RATES WITHIN 240 DAYS OF FILING THE APPLICATION.

Though the UIEC understand and appreciate the simplicity of the solution were the Commission to just order a stay in the proceedings until RMP has filed updated schedules and testimony, based on the wording of the statutory time limitation, it appears the Commission probably does not have the authority to do so. The statute provides:

> 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.

Utah Code Ann. § 54-7-12(3)(c). This appears to grant a right to RMP to have its revenue increase effective within 240 days of filing absent a contrary decision by the Commission. Because it is RMP's right, RMP is likely the only party entitled to waive that right. The UIEC can find no provision according the Commission the authority to abrogate RMP's right. Thus,

UIEC believes that unless the application is dismissed, which it legally should be, the 240 day clock started on July 17, 2008, and cannot be changed unless RMP agrees to waive this right.

Nevertheless, for the reasons discussed above, the application is legally insufficient to state a claim upon which relief can be granted. Therefore, it should be dismissed without prejudice and re-filed once RMP is able to incorporate the appropriate information.

CONCLUSION

Based on the foregoing and the evidence set forth in the UIEC's opening brief, the UIEC respectfully request that the Commission dismiss without prejudice RMP's Application in this case.

DATED this 8th day of September, 2008.

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CERTIFICATE OF SERVICE
(Docket No. 08-035-38)

I hereby certify that on this 8th day of September 2008, I caused to be e-mailed, a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF UIEC'S MOTION TO DISMISS THE APPLICATION OF ROCKY MOUNTAIN POWER** to:

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