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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 **ROCKY MOUNTAIN POWER'S PETITION FOR RECONSIDERATION OF ORDER ON MOTIONS TO DISMISS OR ADDRESS 240-DAY TIME PERIOD**

Pursuant to Utah Code Annotated §§ 63G-4-3-1 and 54-7-15 and Utah Administrative Code R746-100-11.F, Rocky Mountain Power (the "Company") hereby submits to the Public Service Commission of Utah (the "Commission") its petition for reconsideration of the

Commission's Order on Motions to Dismiss or Address 240-Day Time Period (the "Order") issued September 23, 2008 in this matter.

In this Petition, the Company respectfully requests that the Commission review and reconsider the Order and, thereafter, issue a new order (1) denying the motions of the Division of Public Utilities ("DPU"), Committee of Consumer Services ("CCS"), UAE Intervention Group ("UAE"), and the Utah Industrial Energy Consumers ("UIEC") to dismiss the Application of the Company for a rate increase filed July 17, 2008 or alternatively to restart the 240-day period for the Commission to act on the Application; (2) vacating the portions of the Order establishing September 10, 2008 as the effective date of the Company's Application in this matter; and (3) affirmatively ruling that the effective filing date of the Application in this matter was July 17, 2008, the date it was actually filed, and that the 240-day statutory period runs from that date.

I. ARGUMENT

A. The Commission's Unprecedented Decision Ignores Decades of Commission Practice and Misinterprets the *Charitable Contributions* Case

The Application was filed on July 17, 2008. On August 18 and 19, 2008, various parties ("Moving Parties") filed motions or responses to the Application urging the Commission to either dismiss it or restart the 240-day time limit within which the Commission may act on an application for a rate increase under Utah Code Ann. § 54-7-12(3)(c) when the Company made an amended or supplemental filing incorporating the Commission's Revenue Requirement Order ("2007 Revenue Order") issued in Docket No. 07-035-93 ("2007 Docket") on August 11, 2008. The Company filed an update to the Application on September 10, 2008, incorporating the 2007 Revenue Order and specifically identifying instances where the Application, as updated, differed from the 2007 Revenue Order.

Although the Moving Parties asserted a variety of grounds in support of their motions, the Commission identified its fundamental problem as "RMP knew that within a matter of a few weeks [after filing the Application], the Commission would issue its order in the 2007 Docket and RMP would need to account for the decisions therein in any subsequent general rate proceedings." (Order at 22). The Commission concluded, *ipso facto*, that the Application was defective for failing to comply with *Salt Lake Citizens Congress v. Mountain States Telephone*, 846 P.2d 1245 (1992) ("*Charitable Contributions*"). The Commission posited that "the Application suffers from the same defects as the subsequent rate case applications and supporting materials filed by US West and found fatally flawed by the Utah Supreme Court in the Charitable Contributions case." (*Id.*)

This portion of the Order is in error for two reasons. First, the Commission has misread and extended the application of the *Charitable Contributions* case far beyond its terms. The *Charitable Contributions* holding does not support the conclusion that the Application is defective or that the Commission is required, or even authorized, to restart the 240-day limit. Second, based on decades of Commission practice and the policy which underlies the language of the governing statutes, the fact that the Company and other parties knew that the Commission would ultimately issue an order in the 2007 Docket is not a valid basis to find the Application insufficient. Moreover, the Company's September update was made in a timely manner, is comparable to other updates commonly made during the course of rate cases and is not prejudicial to any party.

1. The Commission Erred by Misapplying and Broadly Expanding the Holding of the *Charitable Contributions* Case.

In the Order, the Commission found the Moving Parties were prejudiced because, among other grounds, they "have not had access to [the update to the Application] until" the September filing. (Order at 24.) There are two problems with the Commission's finding of prejudice.

First, eight of the issues addressed in the update to the Application are simply issues from the 2007 Revenue Order preserved for relitigation in the 2008 rate case. Those issues were already in the Application because, when the Application was filed, the Company did not know the Commission would rule against it in the 2007 Revenue Order. Given that those issues were already an inherent part of the original filing, the Company's decision to retain them as issues in the update has not prejudiced any party—the only thing different is that they have now been specifically identified as issues the Company is asking the Commission to revisit. Although it concluded that not identifying these issues until the September update is detrimental and prejudicial to the other parties, the Commission has not stated how the simple retention of those issues in the 2008 case could possibly prejudice anyone. On these issues, there is no conceivable prejudice to any party.

Second, the implication of the Commission's finding is that the Company must either (1) update any pending application after a Commission order in a previous rate case and face a restart of the 240-day time limit or (2) not update the application and face a dismissal combined with a restart of the 240-day time limit. The only way to avoid a restart of the time limit under the Commission's approach is to be perfectly clairvoyant and predict the issues the Company will lose in a yet-to-be-issued order.

The *Charitable Contributions* case does not require, or even support, the procedural "catch 22" that the Commission has created for the Company. A clear understanding of the factual background of that case demonstrates the Commission's error. In a 1969 Mountain Bell rate case order, the Commission ruled that Mountain Bell's charitable contributions would be disallowed for ratemaking purposes (thus, the shareholder, not the ratepayers, bore those expenses). 846 P.2d. at 1249. Nearly twenty years later, in a 1988 rate case, the 1969 ruling surfaced and, in that 1988 rate case, charitable contributions were disallowed. *Id.* Thereafter, a group known as the Salt Lake Citizen's Congress filed a complaint seeking a refund of charitable contributions included in Mountain Bell rate cases from 1976 through the mid-1980s. The facts demonstrated that, with some limited exceptions, in those rate cases, Mountain Bell included charitable contributions in the accounting schedules filed with its testimony.

The Commission dismissed the complaint because, among other things, reopening the cases would constitute unlawful retroactive ratemaking and the 1969 order was not sufficiently explicit to require Mountain Bell to affirmatively ask the Commission to reauthorize the inclusion of charitable contributions. The Supreme Court reversed, ruling that the Commission's 1969 order was sufficiently clear to have a "binding legal effect" and that the 1969 order established "a general rule of law" that would apply until formally overruled by Commission action or by statute. *Id.* at 1252, 1253. Despite the fact that the schedules filed with Mountain Bell's accounting testimony showed that charitable contributions were included in the rate request, the Court found that Mountain Bell had erred in not "fil[ing] a petition asking the Commission" to overrule the 1969 decision, nor had Mountain Bell "directed the Commission's attention to the issue." *Id.* at 1254. The matter was remanded to the Commission for further proceedings to determine if an exception to the rule against retroactive ratemaking applied. The

case was ultimately resolved by a settlement resulting in a one-time refund to customers of Mountain Bell.

The holding of the *Charitable Contributions* case is straightforward: certain types of Commission decisions, depending on how clearly they are announced by the Commission to have general application, may rise to the level of a "general rule of law." If so, if the utility wishes to relitigate that issue before the Commission, it must "petition" for a change in position, or otherwise "direct[]the Commission's attention to the issue" in such a manner that it is clear that the Company is specifically requesting that the Commission revisit a previously-decided issue. But that is all the case stands for, and no other holding may be attributed to it.

The *Charitable Contributions* case does not suggest, for example, that a utility in its application must anticipate the Commission's decision on contested issues in orders yet to be issued. Moreover, the *Charitable Contributions* opinion makes it clear that the Court is not even prescribing the method by which the utility notifies the Commission that it intends to relitigate an issue. The opinion simply provides that the notice be sufficiently clear that it directs "the Commission's attention to the issue." That is precisely what the Company did in its September update: it "directed the Commission's attention" to issues that the Company lost in the 2007 Revenue Order that it intended to relitigate in the current case. In other words, the Company has done precisely what is required by the *Charitable Contributions* case.

It is also important to note that, while the court in the *Charitable Contributions* case remanded the case for the Commission to consider the impact of Mountain Bell's failure to affirmatively notify the Commission in several rate cases that it intended to relitigate the charitable contributions issue, the Court did not suggest that the applications in those intervening rate cases were otherwise defective or voidable. All the Court did was order the Commission to

consider whether an exception to the rule against retroactive ratemaking allowed a refund of charitable contributions included in rates set in those cases and, if so, to create an appropriate remedy consistent with the decision. The Court did not suggest in any manner that the Commission relitigate the entire rate cases, which would be the logical result if Mountain Bell's failure to properly identify the charitable contributions issue had the effect of rendering its applications defective or void.

Thus, the Commission cannot rely upon the *Charitable Contributions* opinion to support its finding that the Application is defective or void. The *Charitable Contributions* decision was a rifle shot focused on a single issue—the Commission's order erroneously interprets that decision as though it were a shotgun blast that wipes out the entirety of the Application.

2. The Company's Update to Its Application Less Than Two Months After It Was Filed Is Consistent with Commission Practice and with the *Charitable Contributions* Case. It Is, Therefore, Not a Valid Basis for Restarting the 240-Day Clock.

Less than two months after the Application was filed and only one month after the 2007 Revenue Order was issued, the Company on September 10 updated its Application. The update noted that as a result of the $36 million revenue increase granted in the 2007 Revenue Order, the rates requested in the Application represented an increase in rates that was $36 million less than the increase from the rates in effect when the Application was filed. (As a result of the Commission's recent order on reconsideration, the amount of the revenue increase granted by the Commission has increased to approximately $40 million. Surely, no one could credibly claim that this further change makes the Application defective or restarts the 240-day clock again). The September 10 update also reduced the rates requested by approximately $9 million consistent with rulings in the 2007 Revenue Order. In addition, the September 10 update

identified eight issues in the 2007 Revenue Order on which the Commission had ruled against the Company's position, but which the Company was asking the Commission to revisit and decide in the Company's favor on the basis of evidence presented in this docket, the 2008 case.

In the Company's Response to the Moving Parties' motions in this case, it filed an appendix that establishes beyond doubt that so-called "pancaked" rate cases have been commonly filed in Utah and that in some cases the applications were filed prior to receiving a final revenue requirement order in a prior case.[1] None of the moving parties challenged the factual assertions of the information presented in the appendix. None suggested that the Commission had ever changed the lawful filing date for a rate case on the ground that a utility had filed a case with the foreknowledge that it would need to update its filing in the future to account for an anticipated revenue requirement order in a pending case. Yet that is exactly what occurs whenever pancaked rate cases are filed.

The Order erroneously states that the Company took *two months* from the date of the 2007 Revenue Order to analyze its decisions and incorporate them into the September update. (Order at 24). In fact, the Company received the 2007 Revenue Order on August 11, 2008 and filed its update on September 10, 2008, *thirty days later*, *not two months later*. Thus, less than one month after receiving the 2007 Revenue Order, the Company updated its Application and its testimony in the 2008 case to address the issues decided in the 2007 Revenue Order. Indeed, this was less time than the parties had to evaluate the changes and updates the Company made arising

[1] The chart filed by the Company addressed rate cases that were filed during a period in which utilities typically used future test periods for ratemaking purposes and, because of continual inflationary pressure, sought rate increases almost continuously.

from the Commission's test year order in the 2007 Docket. Any inference in the Order that the Company delayed its update to disadvantage other parties is simply not supported by the facts.

The key question is whether the facts and law justify the Commission's conclusion that the Application is so defective as to allow the Commission to restart the 240-day time limit prescribed by law. The answer to that question is clearly no. By their nature, rate cases and the ratemaking process are unlike a typical civil dispute before a court. In court cases, the facts, while perhaps vague and subject to dispute, usually have already occurred and the primary task is to decide what they are, then apply the law to them to determine if one party should prevail over another. Rate cases are dramatically different; particularly when, as in Utah, future test periods are encouraged. Rate cases necessarily involve changing facts during the course of the proceeding, with the corresponding need to update those facts in a timely manner. As demonstrated in the Company's response to the motions and attachment dated August 28, 2008, the practice of this Commission and parties to Utah rate cases for decades has been to accommodate updates that reflect, among many other things: the resolution of specific issues; new, more accurate information; and actual data to replace forecasted data. The universal Utah practice has been to accommodate these changes without restarting the 240-day statutory time limit. Until the Order in this case, never in the many cases filed by utilities over the past several decades has the fact that a utility updated its position ever resulted in a Commission ruling that the commencement of the 240-day period be reset at a later date—it is, as far as the Company can determine, the first ruling of its kind in Utah.

There is no small irony in the fact that the Company's September 10 update was made at a much earlier point in this docket than the much more extensive update to reflect the

Commission's test period decision in the 2007 Docket.[2] In this case, the September filing is benign in comparison to the test year update in the 2007 Docket. Yet, despite the fundamental changes wrought by the need to present information for a different test year, the parties in the 2007 case were able, albeit with work and effort, to ask the right questions, review the right information, perform the necessary analyses, prepare the written testimony, and hold the necessary hearings in a timely manner so the Commission was able to issue its order within the statutory 240-day period. Instead of claiming prejudice in the 2007 Docket, the parties moved forward and completed the work in a timely manner. The September 10 filing reduces the requested revenue increase, resolves numerous issues (including conforming the filing to reflect numerous decisions made in the 2007 Revenue Order), and specifically identifies issues that the Company lost in the 2007 Docket that the Company wishes to re-address in this docket. In other words, the September filing creates far fewer issues for the parties to resolve than the test period update in the 2007 Docket. Yet, inexplicably, the Commission concluded that to fail to restart the clock here would be prejudicial to the other parties when an even more substantial update with much less time for the parties to consider the changes in the 2007 docket was not prejudicial.

3. The Company's September 10 Update Is Clear and Straightforward and Is Not Prejudicial to the Other Parties.

In the Order, the Commission noted the September 10 filing changed the requested revenue increase (though not mentioned by the Commission, the increase in revenue requirement was reduced by $46.1 million from a requested increase of $160.6 million to $114.5 million) and that the changes in revenue requirement required the modification of tariff sheets. (Order at 24-

[2] Rocky Mountain Power Response at 7-9.

25.) The Commission concluded that "the effects of these changes are to the detriment and with prejudice to the Moving Parties" unless the 240-day clock is restarted. (*Id*. at 25.)

It is certainly true that the Company changed, *by significantly reducing*, the revenue increase requested in this case. It is also true that any change in revenue requirement – whether initiated by the Company or ordered by the Commission – necessitates a change in tariffs. It is also true that the Company identified, in conformance with the *Charitable Contributions* case, issues that it had lost in the 2007 Docket that it desires the Commission to revisit based on testimony and other evidence in this docket. But the real question is whether the changes represented by the September 10 filing are substantially prejudicial to the other parties, particularly given their uncomplicated nature and the fact that we are in the early stages of this case. A straightforward analysis of the changes demonstrates that there is no substantial prejudice to any party and that the Commission, in addition to misapplying the *Charitable Contributions* case, is applying a dramatically different standard to this docket than it has applied in prior cases.

There is nothing unusual or difficult about what the Company has done in its September 10 update. One change simply subtracted the revenue allowed in the 2007 Revenue Order from the revenue requirement increase sought in this case, hardly a matter that will cause any party a problem any more serious than subtracting one number from another.[3] The other changes simply reduce the revenue requirement by an additional $9 million, and the Company's September 10 update clearly explains each of the elements of these reductions. In other words, these changes

[3] Given the Commission's decision in its October 13 order on reconsideration, the Company will need to make another update to reduce the revenue requirement in the 2008 docket by an additional $3.21 million. This is simply done by subtracting an additional $3.21 million from the requested rate increase in the September 10 filing and creates no prejudice to any party.

are no different than typical updates that have taken place in numerous past cases. Yet here, where the update is far less significant than in other cases, the Commission has created a new and previously unarticulated standard for determining whether an update is sufficiently prejudicial to necessitate that a statutory time limit be repudiated. In so doing, the Commission has, in violation of clear direction from the Supreme Court, departed from past practice without enunciating a reasonable basis for doing so and without following proper procedures. *See Williams v. Pub. Serv. Comm'n*, 720 P.2d 773, 777 (Utah 1986) ("[T]he Commission cannot reverse its long-settled position . . . and announce a fundamental policy change without following the requirements of the Utah Administrative Rulemaking Act."). The Commission has not articulated a good reason to depart from prior practice here. As will be discussed *infra*, the Order has the effect of deviating directly from the policy underlying the 2000 and 2003 amendments to section 54-4-4, which is the policy of setting rates on the basis of the best information available about the rate-effective period.

B. The Order Is Beyond the Commission's Authority and Directly Contrary to Binding Legislative Policy

The Commission was created by the Legislature to perform a legislative function, and the Commission's powers and policies are thus defined by the Legislature and delegated to the Commission to implement. The Commission has no inherent power; its authority is limited to those powers expressly delegated by statute or clearly implied. *Hi-Country Estates Homeowners Assoc. v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995). Moreover, these statutory grants are strictly construed and "any reasonable doubt of the existence of any power [of the Commission] must be resolved against the exercise thereof." *Id.* As such, the Commission's authority is both

defined and circumscribed by its governing statutes. Section 54-7-12 is one of those governing statutes.

With respect to the timing and purpose of rate cases, the Legislature has provided that if the Commission fails to act on a rate increase request within 240-days, the request is final and not subject to refund. Utah Code Ann. § 54-7-12(3)(c). The clear intent of this statute is to protect public utilities from delays in implementation of rate increases. It is not, as argued by some of the Moving Parties, to assure that they have at least 240 days to examine and provide positions on a rate increase request. To the contrary, rates may be, and often are, set in far less than 240 days. All parties to a rate proceeding are entitled to due process, but due process requires only notice and a hearing,[4] not some lengthy prescribed length of time, and certainly not 240 days, to review and respond to a requested increase. If the statute were to be interpreted as argued by the Moving Parties, it would require that no rate increase can take effect until 240 days have passed following an application. That is not what the statute says.

The Commission decision to restart the 240-day period prescribed by section 54-7-12(3)(c) is inconsistent with the clear intent of the statute and exceeded the Commission's statutory authority and is therefore unlawful.[5] The validity of this decision is further undermined

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[4] *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.")

[5] The Commission stated that it has received "a broad delegation of authority regarding utility regulation." (Order at 15). That is undoubtedly true. Section 54-4-1 presumably relied on by the Commission for this statement, grants the Commission the power to "supervise and regulate every public utility in the state, . . . and to do all things, whether herein specifically designated or in addition thereto, which are necessary and convenient." But the courts have limited those words. The clearest articulation of these limitations is set forth in *Williams v. Public Serv. Comm'n*, 754 P.2d 41, 50 (Utah 1988) ("The PSC has no inherent regulatory powers and can only assert those which are expressly granted or clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it. . . . To ensure

by the Commission's decision to ignore decades of past practice that allowed the filing of precisely the type of case filed by the Company and involved many cases that have resulted in numerous updates during the course of the case, all of which were handled within the 240-day time limit established in Utah statutes.

The Order completely ignores the purpose of the 240-day time limit and the Legislature's most recent statement of its policy on utility ratemaking. Under long-standing rules of statutory construction, individual sections (such as section 54-7-12) of a more comprehensive statutory compilation must be read in harmony with each other.[6] Thus, the meaning and intent of one statute should be read in the light of other statutes. Consistent with these principles, statutes should also be interpreted and applied in the context of the most recent articulations by the Legislature of its policy goals.[7]

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that the administrative powers of the PSC are not overextended, '*any reasonable doubt of the existence of any power must be resolved against the exercise thereof.*'") (citations omitted, emphasis added). In *Hi-Country Estates.*, 901 P.2d at 1021, the Court was clear that section 54-4-1 does not give the Commission unfettered discretion to do things inconsistent with its statutory authority. The Court said: "Despite its broad language, *section 54-4-1 does not confer upon the Commission a limitless right to act as it sees fit,* and this court has never interpreted it as doing so." (Emphasis added.)

[6] *Board of Educ. v. Sandy City Corp.*, 2004 UT 37, ¶ 9, 94 P.3d 234 ("Pursuant to our rules of statutory construction, we look first to the statute's plain language to determine its meaning. We read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters") (citations and internal quotation marks omitted). *Jerz v. Salt Lake County*, 822 P.2d 770, 773 (Utah 1991) ("It is [the appellate court's] duty to construe each act of the legislature so as to give it full force and effect. When a construction of an act will bring it into serious conflict with another act, our duty is to construe the acts to be in harmony and avoid conflicts.").

[7] *Phillips v. Union Pacific Railroad*, 614 P.2d 153, 154 (Utah 1980) (rejecting a reading of a statute as "a blatant violation of expressed legislative policy"). *See also Utah Publ. Employees Ass'n v. State*, 2006 UT 9, ¶ 27, 131 P.3d 208, 216 (2006) (noting that public employment is governed by statute and "legislative policy," which means that it is subject to "change as thought best by the people, acting through their legislative representative"). In its 2003 amendments to section 54-4-4, the Legislature changed both the substantive law related to rate recovery by utilities but also articulated a clear policy in favor of allowing utilities to recover rates that are more reflective of conditions in the rate effective period.

As discussed above, the clear purpose of section 54-7-12(3)(c) is to protect public utilities from delay in implementing rate increase requests. In addition, the most recent articulation of Utah legislative policy is set forth in the 2003 amendments to section 54-4-4(3), specifically the provision that, in selecting a test period and in setting forward-looking rates, the Commission make its decision so the test period (and therefore the rates) in a rate case "best reflects the conditions that a public utility will encounter during the period when the rates established by the commission will be in effect." Utah Code Ann. § 54-4-4(3)(a). Yet, despite the Company's arguments on that point, the Commission's analysis never once discusses section 54-4-4(3) and its underlying policy. By requiring a restart of the 240-day statutory period, instead of allowing the Company's update to be treated as other updates in the past (*i.e.,* that the update does not result in restarting the statutory clock), the Order is contrary to the legislative policy that underlies section 54-4-4(3) and is therefore unlawful.

In the Order, and in the face of other facts to the contrary (*e.g.,* the parties' ability to accommodate the changes resulting from the test period update in the 2007 Docket), the Commission simply accepted the Moving Parties' claims of prejudice.[8] Yet there were still more than six months from the September 10 filing date (and more than five months from the date of this petition) before an order would be required under section 54-7-12. There is simply no reason, other than the fact that compliance will require hard work by all the parties, that the revenue portion of this docket cannot be resolved in that time period, especially in light of the fact that the Company's operations and books have just been thoroughly reviewed in the 2007

[8] The affidavits filed by the DPU demonstrate only that updates create more work than would otherwise need to be done (in other words, updates are inconvenient). But they do not demonstrate insuperable obstacles in this case that have not applied in countless other cases, and that, through concerted effort, have been overcome.

Docket. Clear legislative policy in Utah is to set reasonable rates that are reflective of the time period that rates will be in effect. The Order, however, never mentions that policy and seems to be based on a claim of prejudice by the parties (though none of them showed how updates in this case differ from those in numerous other cases that preceded it). The Company believes the Legislature articulated a clear policy that the Order ignores, instead giving undue weight to a policy not articulated in any statute: that administrative convenience and the avoidance of any major demands on the other parties trumps the setting of just and reasonable rates within 240-days that are reflective of the time period that rates will be in effect. Administrative convenience and demands on parties are not insignificant concerns, but they are subordinate to the policies articulated in sections 54-7-12(3)(c) and 54-4-4(3).

C. The Order Fails to Articulate a Standard for "Prejudice," and, In Any Event, the Correct Standard Is "Substantial Prejudice," Which None of the Parties Demonstrated.

In the end, the only basis articulated by the Commission for its decision to restart the 240-day clock is its conclusion that the effects of the updated filing "are to the detriment and with prejudice to the Moving Parties." (Order at 25). The standard relied upon by the Commission—prejudice to the Moving Parties—is not the legal standard in Utah. In *Swan Creek Village Homeowners v. Warne*, 2006 UT 22 ¶ 21, 134 P.3d 1122, the Utah Supreme Court ruled that some prejudice to a party because of an amendment to a pleading is insufficient to justify refusing to allow the amendment:

> The general rule regarding prejudice is that an amendment should be denied when "the opposing side would be put to unavoidable prejudice by having an issue adjudicated for which he [or she] had *no time to prepare.*" We have been careful to limit the scope of "prejudice" within this rule, requiring that there be "'undue or *substantial prejudice*,' because almost every amendment of a pleading will result in some 'practical prejudice' to the opposing party.' (Citations omitted; emphasis in original).

Thus, the fact that an update to an application may cause some inconvenience to a party is not sufficient grounds to disallow the update, nor should it, in light of the long history of parties in this state dealing with rate cases in which updates and other changes are made throughout the course of the proceeding, be a proper ground for restarting the 240-day statutory time limit to act on the Application. The Company recognizes that hard work is necessary by all parties to a rate case (including the employees of the Company). But setting rates in a timely and reasonable manner as defined in sections 54-7-12(3)(c) and 54-4-4(3)(a) is a legislative mandate that should not be ignored merely because complying with it would result in inconvenience or additional work.

No party suggested that the work cannot be completed so that the 240-day clock is met, and history demonstrates that, while change creates inconvenience and work in a rate case, that is the nature of the process. It is noteworthy that the 2007 Revenue Order was entered within the 240-day period despite the fact that a major update caused by the change in test period occurred. Inconvenience is not the same as "substantial prejudice." The Moving Parties have failed to present any meaningful evidence or argument that they would be substantially prejudiced by requiring the revenue requirement to be determined within 240 days of July 17, 2008, and nothing in the historical conduct of parties to rate cases could support such a claim.

D. It Is Critical That the Company's Rate Cases Not Be Delayed in Such a Manner that the 240-Day Clock Is Effectively Rendered a Nullity.

In reality, it is the Company that is prejudiced by the Order because the effect of the Order will preclude the Company from receiving millions of dollars in revenues for costs incurred in a timely manner that are needed to keep up with the current operating conditions. Depending on the ultimate outcome of the case, this will amount to several million dollars to

which the Company is entitled in order to continue to serve its customers and meet their growing demands for electricity.

For purposes of illustration, assuming the Commission grants a revenue requirement increase in the amount that the Company is seeking ($114,000,000), delaying the case 55 days as the Commission has done will deprive the Company of recovery of approximately $17,000,000 in costs that it will prudently incur in providing service to its customers. Compare this impact to unsupported claim of prejudice of the Moving Parties. The Commission's order completely fails to explain how the prejudice it believes the Moving Parties may suffer outweighs the prejudice the Company will unavoidably suffer.

Moreover, in addition to the problems already discussed, the Commission is proceeding down the proverbial slippery slope. The Order raises the specter of a never-ending series of Commission-ordered changes to the filing date that would have the effect of (1) effectively reading out of the statutes section 54-7-12(3)(c), the provision establishing the 240-day clock and (2) undermining the policy of setting rates to reflect the conditions when rates are in effect in section 54-4-4(3)(a). For example, what if the hearing on the test year in this docket results in the Commission deciding on a different test period? Would that mean that the effective date of filing this case would be set even further into the future?[9] What if, as will undoubtedly take place, updates are made to information presented by the Company? Will that mean that yet-again the effective date of filing this case would be set even further into the future? If that were

[9] This concern is more than a theoretical possibility. In a news story dated September 24, 2008 in the Deseret News, Commission Secretary Julie Orchard is quoted as stating that the September 10, 2008 date (which commenced the 240-day period) could be amended once again pending the outcome of an October 28, 2008 hearing on what test year should be used to determine future rates in the case.

to be the result, the 240-day clock would effectively be gutted and no longer have any effective relevance in Utah's utility statutes.

If that were to be the result, the Commission's actions would be a direct violation of its duty to administer and follow its governing statutes. In *LKL Associates, Inc. v. Farley*, 94 P.3d 279, 281, 2004 UT 51 ¶ 7 (2004), the Utah Supreme Court reaffirmed a long-established rule of statutory construction: "This court also interprets statutes to give meaning to all parts, *and avoids rendering portions of the statute superfluous. . . .* Applying these rules to the statutory language quoted above, it is apparent that no reasonable reading of the language in question supports the trial court's holding." (Emphasis added).

E. The Schedules Filed with Company's Application Are, As a Matter of Law, Legally Sufficient

The Commission acknowledges that the Application, including the schedules were legally sufficient as filed, but only so long as "we stopped at the Application and went no further." (Order at 22) Thus, the Commission's ruling adopts a position that an otherwise sufficient application becomes insufficient because the Company knew that updates to the Application would need to be filed based on the anticipated 2007 Revenue Order. Given that, the Commission appears to find that the entire Application, as opposed to solely the "schedules," was inadequate. (*Id.*).

Given the central nature of that argument in the Moving Parties' briefs, it is worth briefly addressing the issue of the adequacy of the filed schedules.[10] Section 54-7-12(2)(a) is the primary section describing the type of "schedules" that a utility must file with its rate

[10] *See* the Company's Response dated August 28, 2008 at 23-30 for the Company's detailed argument on this issue.

application: "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." The Moving Parties argued that, to make the schedules adequate, setting forth the proposed rate increase or decrease requires schedules showing a comparison between the rates in effect after the 2007 Revenue Order and the rates proposed in this case. This argument is incorrect. The statute does not require that the increase or decrease in rates be expressed as a comparison with existing rates. It simply states that the schedules will set forth the proposed increase or decrease. Thus, the Moving Parties' argument adds words to an already clear statute. The Commission's rules do not require revised tariff pages to be filed in a manner that shows the difference between existing and proposed rates. Rather, proposed tariff pages simply contain the new rates with an "I" in the margin indicating that the rates are increased from the rates in the current tariff. Utah Admin. Code R746-405-2.A.3.c. Nevertheless, even if it is assumed for the sake of argument that the statute contemplates that the schedules will provide a comparison with current rates, the statute does not specify that the comparison must be from rates that will be in effect at some time in the future. The Application showed the percentage increases in rates proposed for all classes of customers. Those increases were with respect to the rates that were in effect (those rates that were established by the Commission in Docket No. 06-035-21) when the Application was filed, i.e., the rates the Company was charging when the Application was filed. *Id.* § 54-3-7. The fact that those rates were changed by a subsequent order in the 2007 Docket is the subject of the 2007 case, not this one. The table included in the Application filed by Rocky Mountain Power fulfilled all statutory requirements. Application at ¶ 17. The schedules filed with the Application complied with the requirements of section 54-7-12. Therefore, the

Application was sufficient and the 240-day time limit began to run when the Application was filed.

II. CONCLUSION

Energy is currently an extremely high priority in the United States. Issues as to affordability, bringing more renewable energy into the mix, population growth, increasing demand, the cost of buying power in the open market, and a host of other issues make the Company's business highly risky and demanding. At the same, the Company is investing large amounts in generation and transmission. The Company has invested billions of dollars in its system and the need to continue to make such investments will not diminish anytime soon (e.g., the Populus-to-Terminal transmission line, which is just one element of a broader plan to create more transmission capacity, is a $700 million project alone). In light of these and other demands, it is critical, as the Utah Legislature has recognized, that the Company be able to receive rate recovery in a timely manner. Yet the Order is inconsistent with the critical current demands on the Company and the policy set by the Legislature. That is why the Commission should reconsider its decision.

Thus, for the reasons set forth above, the Company hereby requests that the Commission review and reconsider the Order and issue a new order (1) denying the motions of the DPU, CCS, UAE, and the UIEC, (2) vacating the portions of the Order establishing September 10, 2008 as the effective date of the Company's filing in this matter, and (3) affirmatively ruling in its new order that the lawful filing date for this matter under Utah Code Ann. § 54-7-12 is July 17, 2008 and that the 240-day statutory time limit runs from that date.

RESPECTFULLY SUBMITTED: October 23, 2008.

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Mark Moench
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this 23rd day of October, 2008, to the following:

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