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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.

UIEC’S SUR-REPLY TO ROCKY MOUNTAIN POWER’S MOTION FOR APPROVAL OF TEST-PERIOD

Docket No. 08-035-38

The “Utah Industrial Energy Consumers” (“UIEC”), by and through their counsel, hereby reply to Rocky Mountain Power’s (“RMP” or the “Company”) reply to the parties’ objections to its motion for approval of test-period.

ARGUMENT

I. RMP’S END-OF-YEAR ARGUMENTS ARE MISPLACED.

In its brief, RMP argues:

Many commissions employ the end-of-period method for measuring rate base, especially when a utility, like Rocky Mountain Power, is in a build cycle and faces increasing costs. This is true whether commissions use historic test years, future years or some combination of the two.

RMP's Br. at 3–4. RMP then cites to a large number of cases, giving the impression that they are all on point and allow use of an end-of-year base method. A closer examination of the cases demonstrates that this is not the case.

RMP has cited *In re Golden Heart Utilities, Inc. & College Utility Corp.*, Alaska P.U.R., Docket No. 7-07-76, Order No. 8 (June 30, 2008) and *Alaska Gas and Service Co.*, Order No. 4, Granting Partial Interim Rate Increase, AK P.U.C., Docket No. 7-65-30 (July 12, 1975), for its position. In both cases, the commission denied the utility's request for year-end rate base.

In *Golden Heart*, which involved a historic test year, a 5.5% growth rate did not rise to the level of abnormal. The Alaska PUC referenced a 1982 case where it allowed the utility to use the year-end rate base because the utility demonstrated a 14% growth in sales and only a 10% growth in revenue in the test year. The PUC noted that the year-end rate base is applied in two circumstances: (1) "in an atmosphere where the utility is experiencing extraordinary growth in plant and customers" *id.* at 37, and (2) the utility is experiencing "declining revenues and a depressed economy" *id.* But, "the first step of the analysis has always been an evaluation and conclusion that the change in net plant is abnormal. Only after this threshold test is met do the other operational factors, such as customer loss, lack of customer growth, or sales versus revenues, weigh in the equation to determine if the use of the year-end rate base is appropriate." *Id.* at 39. The Alaska PUC found that Golden Heart utility had grown by 5.5%, but that such growth "does not rise to the unusual or abnormal or extraordinary first hurdle." *Id.* at 39-40. The PUC further stated, that "Most regulated utilities do not meet the requirements of the use of a year-end rate base. . . . In this case, we find with the AG that the use of the 13-month average rate base is appropriate." *Id.* at 40.

In *Alaska Gas and Service Co.*, the Alaska PUC stated:

There are various methods of establishing rate base including the 13-month average as defined in the Commission's emergency regulations, 3 AAC 48.275, and the year end rate base approach used by the Companies. . . . The 13-month average concept more reasonably allows consideration of revenues derived from the rate base in calculating an overall revenue requirement. The year end rate base takes into consideration the picture at the end of the year and it is argued it should be used because rates are set for the future. ***The year-end rate base concept, however, does not generally allow proper treatment of the revenues derived from any portion of the rate base of the test year that became used and useful during the latter part of the test year.*** . . . The year-end rate base concept is best applied in an atmosphere where the utility is experiencing extraordinary high growth in plant and customers and the utility has made a clear showing that it is endeavoring to cope with needs for their services due to abnormal population and economic growth conditions within its service area.

Id. at 6. The Alaska PUC adopted the 13-month averaging approach because the Company failed to show that it was experiencing abnormal growth. *See id.* at 5-11.

RMP cites *Washington Utility and Transportation. Commission v. Olympic Pipeline Co.*, 2002 WL 32892587 (Sept. 27, 2002), for the proposition that commissions use a year-end rate base together with a future test year or a mixed year. In this case, the utility faced serious hurdles: (i) inadequate financing; (ii) devastating accident; (iii) litigation from accident victims; and (iv) FERC proposed refund of interstate rate for failure to comply with procedures. *Id.* at 11-12. The commission staff proposed the end-of-period rate base, “recognizing that it is not the best match between revenues and costs, as a means to mitigate the effect of regulatory lag . . . on the company’s capital needs.” *Id.* at 44. The Commission accepted the staff’s proposal, stating that “treatment of rate base is appropriate in exceptional circumstances such as those Olympic has experienced since 1999 when regulatory lag may affect the Company’s opportunities to seek

timely rate relief. . . . This adjustment to the traditional rate base calculation is warranted and appropriate.” *Id.* at 44. The opposing parties accepted the end-of-period rate based on the condition that the test period ended on or before December 31, 2001. *Id.* at 44. This case was a unique situation with facts distinguishable from those before us with RMP’s situation. Furthermore, it was apparently only accepted by the opposing parties as a compromised agreement on test year.

Contrary to the Company’s suggestion, the Idaho P.U.C. has a strong preference against the year-end test. In *In Re United Water Idaho, Inc.*, 243 P.U.R.4th 113 (Id. PUC 2005), the utility used a historical test year and year-end rate base. In this case, the commission stated:

As in recent cases for other utilities, the Commission finds *use of the average rate base test year is more appropriate in this case than year-end.* . . . It is true that United Water, or its predecessor Boise Water filed four rate cases since 1993 and that the Commission approved its year-end rate base calculation in those cases. In the first such case, however, the Commission expressed disapproval that the Company had not included an average rate base methodology, at least as an option for the Commission to consider. *The Commission approved the Company's year-end calculation only because no party objected, and no other option was presented to the Commission.* The Commission also instructed the Company “to present, as an option, a 13-month average calculation of rate base in its next general rate case.” *In the Company's rate cases since 1993, the year-end methodology was approved only because no party objected or proposed a different methodology.* That history, along with United Water review of the Commission's final Orders in the recent Idaho Power and Avista cases, provided the Company with *adequate notice of the Commission's preference for the average rate base methodology.*

Id. at 121 (omitting citations) (emphasis added). The commission allowed post test year and end of test year improvements in this case, only as long as the utility also included associated

revenue and expense adjustments with such improvements. *See also In Re Washington Gas Light Co., D.C. Div.*, 146 P.U.R.4th 429, 474 (D.C. PUC 1993) (PUC rejected utility's request for a year-end rate base because it determined that the utility "has not met its burden of proof in demonstrating that the Company has experienced an extraordinary erosion of its ability to earn its return on investment. . . . Based upon the evidence in this proceeding, the Commission finds that the Company was substantially able to realize its return on investment and on equity in a large percentage of the years reflected in the Company's schedules."); *In Re Atlanta Gas Light Co.*, 119 P.U.R.4th 404, 407 (Sept. 18, 1990) (Georgia PUC stated, "There is a strong presumption against mismatching the rate base and income, and . . . only in the face of clear and convincing evidence to justify departure from that presumption shall the commission do so. . . . The Commission emphasizes that the appropriateness of continued use of end-of-period rate base must be re-examined at the time of the Company's next rate case filing."); *In Re Mich. Bell Tel. Co.*, 3 P.U.R.4th 1, 6 (Mich. P.S.C. 1973) (PUC rejected the year-end rate base method used in the 1970 case, noting that while its benefit is the use of current information, "Due to the fact that operating revenues and consequently earning adjusted to a year-end level are as unreliable as the evidence in the present case indicates, the commission cannot accept the year-end approach to rate base. The commission is of the opinion that, in addition to being current, the year-end approach must produce reasonable reliable results.").

A year-end rate base should only be permitted in certain very narrow circumstances. RMP has not met its burden of proof in demonstrating that it meets these unusual circumstances and its request should be denied.

II. RMP’S ARGUMENTS CONCERNING SECTION 54-4-4 MISCHARACTERIZE THE FACTS, ARE CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE AND ALL THE RULES OF STATUTORY CONSTRUCTION, AND LACK ANY LEGAL SUPPORT.

On pages 12–14 of its brief, RMP argues that the Commission should ignore the plain language of Section 54-4-4 of the Utah Code Annotated and the established rules of statutory construction. RMP has failed to cite to any law for its position and has mischaracterized the Commission’s decision on the parties’ motions to dismiss. This appears to be a consistent problem with most of RMP’s brief. Therefore, RMP’s arguments should be disregarded.

RMP states that “the Commission *rejected* UIEC’s argument that the Company’s rate filing should be dismissed” and that this is an “*implicit[] reject[ion]*” of UIEC’s “res judicata and administrative finality causes” of action. RMP’s Br. at 13 (emphasis added). This is a mischaracterization of the facts.

In its order on the parties’ motions to dismiss, the Commission stated: “We conclude we will issue our order resolving the major dispute common to all of the Moving Parties and RMP *without addressing each of the alternative or complementary arguments raised* in an individual pleading regarding the July Application.” Order on Motion to Dismiss or Address 240-day Time Period, at 27 (Sept. 23, 2008) (emphasis added). Clearly, if the Commission states that it has not addressed a particular argument, this is not a rejection of the argument. It is what it says—the arguments were not addressed. Cases are decided by courts and commissions all the time wherein arguments are left unaddressed. That is not a rejection of an argument, but instead, an exercise of judicial discretion to resolve the issue on other grounds. RMP’s attempt to color it otherwise should be disregarded.

Except for this futile attempt to dismiss UIEC's legal arguments out-of-hand, with no legal support, RMP has failed to address the fact that its proposed test year violates the principles of res judicata, retroactive ratemaking, and stare decisis. Thus its motion should be denied, and the calendar-year 2009 should be used as a basis for the test period.

Furthermore, with no supporting analysis or support, RMP states: "If the Legislature had intended to prohibit the Commission from considering changes outside the test period in all cases except when the test period is not based on future projections, it would have said so." RMP's Br. at 12. Looking at the plain language of Section 54-4-4, and applying the well-established rules of statutory construction under Utah law, demonstrates that the Legislature has done just that.

Section 54-4-4 provides, in relevant part:

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

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

(ii) a test period that is:

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

(B) adjusted for known and measurable changes;

or

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

(A) future projections; and

(B) historic data.

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

rates the commission shall consider changes outside the test period that:

- (i) occur during a time period that is close in time to the test period;
- (ii) are known in nature; and
- (iii) are measurable in amount.

Utah Code Ann. § 54-4-4(3) (emphasis added).

Under Utah law, when interpreting a statute, the Commission should “look first to the statute’s plain language to determine its meaning.” *Utah v. Gallegos*, 171 P.3d 426, 429 (Utah 2007). When examining the plain language, it must be assumed that *each term included* in the statute was used advisedly. *Carrier v. Salt Lake County*, 104 P.3d 1208, 1216 (Utah 2004). “[S]tatutory construction presumes that *the expression of one should be interpreted as the exclusion of another,*” and effect should be given to any omission in the “language by presuming that the *omission is purposeful.*” *Id.* (quoting *Biddle v. Washington Terrace City*, 993 P.2d 875 (Utah 1999)) (emphasis added).

Based on these basic laws of statutory construction, therefore, when determining which test period to use, the Commission is limited to either (a) an exclusively future test period, (b) an historic test period adjusted for known and measurable changes, or (c) a combination of future updated with changes that will occur close in time to the test period and historic updated with known and measurable changes. These are the only test periods allowed by statute. If a test period *is* determined exclusively on the basis of future projections, which has been proposed by RMP in this case and the last case, the Commission *cannot* consider any changes outside the test period, including changes that are known in nature or measurable in amount. RMP is not

permitted to use an exclusively projected test period updated with any changes outside that test period.

In an attempt to avoid this prohibition, RMP has filed the current proposed test year using six months that have already been analyzed and evaluated. In doing so, RMP has updated its projections for those six months and included previously omitted items.

III. AN AVERAGE ANNUALIZATION OF RATE BASE SHOULD BE USED.

In its Test Period Motion, in addition to requesting that the Commission accept the test period as filed, RMP also requested that it be permitted to use the end-of-period rate base. The UIEC will respond to RMP's arguments through cross-examination.

CONCLUSION

The UIEC respectfully request that the Commission (a) deny RMP's Test Period Motion in its entirety; (b) set the test period for calendar-year 2009; (c) defer decision on the average versus end-of-year basis, or alternatively order an average-year basis; (d) order RMP to refile an updated filing in conformance with the Commission's order; and (e) restart the 240-day time clock from the date upon which the updated filing is filed.

DATED this 27th day of October, 2008.

/s/ Vicki M. Baldwin

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CERTIFICATE OF SERVICE

(Docket No. 08-035-38)

I hereby certify that on this 27th day of October 2008, I caused to be e-mailed, a true and correct copy of the foregoing **UIEC'S SUR-REPLY TO ROCKY MOUNTAIN POWER'S MOTION FOR APPROVAL OF TEST-PERIOD** to:

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