F. ROBERT REEDER (2710)
VICKI BALDWIN (8532)
PARSONS BEHLE & LATIMER
Attorneys for UIEC, an Intervention Group
One Utah Center
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, UT 84145-0898
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

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 RESPONSE TO ROCKY MOUNTAIN POWER'S PETITION FOR RECONSIDERATION OF ORDER ON MOTIONS TO DISMISS OR ADDRESS 240-DAY TIME PERIOD** Docket No. 08-035-38

The "Utah Industrial Energy Consumers" ("UIEC"), by and through their counsel, hereby respond to Rocky Mountain Power's ("RMP" or the "Company") Petition for Reconsideration of Order on Motions to Dismiss or Address 240-Day Time Period ("Petition").

INTRODUCTION

Even though RMP had full knowledge that the decision of the Utah Public Service Commission ("Commission") in Docket No. 07-035-93 was imminent, it nevertheless filed another general rate case in July nearly identical to the one it originally filed in Docket No. 07-035-93. Because this new rate-increase application did not account for the 2007 docket decision, and could not be altered to account for the decision without extreme difficulty, several parties moved to dismiss RMP's application under various legal theories, and/or asked the Commission to restart the 240-day decision period. The Commission allowed for full briefing on the matters

and held hearings on September 10, 2008. On September 23, the Commission issued its thorough written decision ("240-Day Order").

As the Commission explained in the 240-Day Order, it has the discretion to deny the Company permission to amend its application. 240-Day Order at 20, 22. Without the amendment, the Commission ruled that the application does not conform with the rules of law[1] issued in the 2007 docket, and must be dismissed. *Id.* at 22. To save the Company from this result, the Commission compromised and offered to accept the amendments as long as the Company agreed that the clock would be restarted from the time of amendment. *Id.* at 27–28.

As noted by the Commission, when RMP filed its July Application, it knew amendments would be necessary, because RMP knew that before August 13, the Commission would issue its order in the 2007 Docket and RMP would need to account for those decisions. *Id.* at 23. Yet, RMP acts as though its hands were tied and it had no other option but to file an inadequate filing on July 17 and update it on September 10, while the days[2] ticked away. Interestingly, RMP has never explained why it rushed to file before the 2007 decision was issued.

Under Utah law, to meet its heavy burden to prove it was entitled to additional rate relief on top of that which was to be granted in the pending decision of the Commission, which RMP would have known if it had just waited, RMP needed to file an adequate application with substantial evidence. Instead, RMP chose to act as though there was no 2007 docket and re-file its application in a manner that, if allowed, would likely have acted to deprive the parties and the

[1] As explained below, the Utah Supreme Court has ruled that a general rate case order typically is comprised of an "order," setting the new rates, and a "decision," establishing general rules of law that are to be followed going forward unless specifically overruled.

[2] Fifty-five days to be precise, which, as explained by the Commission and contrary to RMP's assertion (RMP's Br. at 7–8), is essentially two months wasted out of the eight-month decision period.

public a fair opportunity to evaluate all the issues.[3] As a result, the Commission was left with two options: dismiss the entire application and allow RMP to file an adequate application, which action was supported by the UIEC, or restart the clock. In trying to consider and balance the fairness to all parties, including the Company, the Commission chose to make an offer to the Company. Instead of denying the Company permission to make its September 10 amendments and imposing the more draconian measure of dismissal, the Commission ruled that it would accept the amendments, but only if the Company accepted the restart of the clock. Even though RMP appears to have accepted the Commission's offer, it has filed this Petition reiterating many of its previous arguments and asks once again for the 240-day decision period to begin from its initial filing on July 17, 2008.

The Commission has since ruled that the test year period in this case is to be the calendar year of 2009 using an average rate base, and the Company is to provide a new updated filing, that complies with the 2007 decision, on or before December 8, 2008.[4] Based on this, RMP surely cannot contend that the 240-day decision period should still be set to coincide with its initial filing of July 17. In fact, an argument could be made that it should now be reset to the date of the new update. In its test year order, the Commission noted that the period begins on September 11, as previously allowed. Nevertheless, RMP has refused the UIEC's request that the Company withdraw its Petition, indicating that it still must advocate the earlier start of the

[3] The effort may have been, as previously argued by the UIEC, to collaterally attack the Commission's test year decision.

[4] The Commission initially ordered the update be provided on December 1, but on November 4, the Company requested that the Commission move this date to December 8, which request the Commission granted on November 6.

clock. Therefore, the UIEC are obliged to address the Company's outstanding Petition and request that the Commission deny it.

The Commission should not, however, simply let the Petition be denied by failure to act under Utah Code Annotated § 54-7-15(d)(i). This will result in a trap or Catch-22 situation.[5]

Currently, operating under the assumption that RMP has accepted the Commission's offer and the 240-day period has been reset to begin in September, the revenue requirement hearings on this matter are scheduled to start March 30, 2009. However, this assumption is likely to lead to undesirable (at least for everyone except the Company) results.

RMP has filed this Petition, arguing that the Commission has erred and does not have the authority to restart the clock. It is the Company's position that its rates will become effective March 14, 2009, before hearings in this matter even begin. If the Commission allows the Petition to merely be deemed denied without resolving this issue with certainty, there is a cloud over this proceeding regarding when the clock actually begins, which is certain to result in an appeal.

It appears that the only way to resolve this is for the Commission to make an affirmative order regarding the Petition, doing one of the following: a) affirmatively find that RMP has waived the effective date of March 14, 2009, and accepted that the 240-day period began September 11, and ask for an acknowledgement of such from RMP; or (b) enforce its order not to accept the amendments of September 10 without RMP's agreement, and dismiss the application as being inadequate, declaring that the December filing will be the commencement of a new case.

[5] The UIEC do not mean to suggest that any trap is intentional or premeditated, but rather a result of the circumstances.

ARGUMENT

I. THE COMPANY HAS WAIVED THE REQUIREMENT THAT THE 240-DAY DECISION PERIOD BEGIN WITH THE JULY FILING.

By relying on its amendments in continuing this case through the test period proceedings and further scheduling requests, RMP has impliedly accepted the Commission's condition that it was "permitted to amend its July 17, 2008, Application (as it has done through the September 10, 2008, filed amendments) ***only if*** Utah Code § 54-7-12(3)'s 240-day time period is applied and commences with the filing date of the latter amendments, September 10, 2008." 240-Day Order at 27–28 (emphasis added). Thus, RMP has waived its right to have the 240-day time period begin with its July filing.[6]

For waiver, there must be: "(1) an existing right, (2) knowledge of its existence, and (3) an intent to relinquish the right." *IHC Health Servs., Inc. v. D&K Mgmt., Inc.*, -- P.3d --, 2008 WL 4682287 (Utah), 2008 UT 73 ¶ 16. Waiver may be implied if "the totality of the circumstances warrants the inference of relinquishment." *Id.* (internal citations omitted).

Section 54-7-12 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 statute 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. As evidenced by RMP's Petition, it is fully knowledgeable of the existence of this right.

[6] In the absence of such a waiver, the trap is created, though we do not suggest that the creation of the trap is intentional.

The Commission noted in the 240-Day Order, that it ***may*** allow amendment to pleadings, but that the guiding principle in doing so is that there be no prejudice or disadvantage to other participants. 240-Day Order at 20. In this case, the Company did not seek leave to amend its initiatory July Application and the period for amendment without leave had passed by mid-August. *Id.* at 22. The Commission found that the effects of the September amendments, if allowed, would result in significant prejudice to the parties. *Id.* at 26.

The Commission was faced with motions to either dismiss RMP's application or restart the clock. The amendments could not be permitted under the circumstances posed by the Company due to the significant prejudice that would result to the other parties. Therefore, rather than impose the harshest measure against RMP, to dismiss the application in its entirety, the Commission made an offer:

> Rocky Mountain Power is ***permitted to amend*** its July 17, 2008, Application . . . ***only if*** Utah Code § 54-7-12(3)'s ***240-day time period is applied and commences*** with the filing date of the latter amendments, ***September 10, 2008***.

Id. at 27–28 (emphasis added). Left unsaid is the alternative that if RMP refuses the Commission's offer, its application is inadequate and therefore must be dismissed.

Since the 240-Day Order has been issued, RMP has proceeded with this case based on the filing ***with*** the amendments, not without. RMP did not argue in its Petition that its application could not be dismissed. RMP relied on the filing with amendments in its position on the test year issue. RMP relied on the filing with amendments in its position in its November 4 request to modify the schedule to update its filing to comply with the test year order. RMP's actions of accepting the Commission's offer and going forward with its case with the amendments, warrants inference of the relinquishment of its right to have its revenue increase effective within

240 days of the July filing.[7] Therefore, RMP is barred from arguing that the 240-day period begins with the July filing. The Commission should affirmatively find that RMP has made this waiver and ask for explicit acknowledgement from RMP or else dismiss the application in its entirety.

II. THE COMPANY MISCHARACTERIZES THE *CHARITABLE CONTRIBUTION CASE*.

The Commission is not obligated to accept the Company's amendments, but without them, the July filing is inadequate under *Salt Lake Citizens Congress v. Mountain Sates Tel. & Tel. Co.*, 846 P.2d 1245 (Utah 1992) (hereinafter *Charitable Contribution Case*). Therefore, in an attempt to find error, RMP has oversimplified and mischaracterized the Utah Supreme Court's decision in the *Charitable Contribution Case*. RMP claims that the case stands merely for the idea that certain types of Commission decisions may rise to the level of a general rule of law, and if so, the utility must petition for a change in position or otherwise direct the Commission's attention to the issue if the utility wishes to re-litigate the issue. RMP's Br. at 6. This is only a small portion of that ruling.

In the *Charitable Contribution Case*, the Utah Supreme Court ruled that the 1969 general rate case had produced both an "order" and a "decision." "The order established Mountain Bell's rates for that case, and the decision established a general rule of law that charitable contributions could not be charged to ratepayers." *Id.* at 1253. The decision was binding under the doctrine of *stare decisis* "until either the Commission specifically overruled the decision or the decision was changed or set aside by formal rule, statue, or court decision." *Id.* The court ruled that the Commission had erred in holding otherwise. *Id.* at 1254.

[7] Without this inference, a trap is created, which the UIEC do not suggest is intentional.

The court continued by ruling that Mountain Bell's submissions to the Commission in 1976 and subsequent cases did not constitute petitions to approve a change in the law with respect to charitable contributions because Mountain Bell had never filed a petition asking the Commission to rule and in fact never directed the Commission's attention to the issue so that the Commission could address it.[8] *Id.*

However, even more importantly, the court ruled:

> The fundamental policy embodied in that rule [the rule against retroactive ratemaking], however, does not permit a utility to subvert the integrity of rate-making proceedings by misconduct that affects rates in a manner favorable to the utility. . . . 'A utility that misleads or fails to disclose information pertinent to whether a rate-making proceeding should be initiated or to the proper resolution of such a proceeding cannot invoke the rule against retroactive rate making to avoid refunding rates improperly collected.' ***Here, the allegations clearly fit within the scope of the exception to the rule against retroactive rate making announced in MCI.***

Id. (emphasis added). The court continued by holding:

> For Mountain Bell to assert that its treatment of charitable deductions was in 'plain sight' ***is simply a play on words***. It was in plain sight only to those who might suspect that Mountain Bell might not comply with the law and who knew where and what to look for in a highly technical 74-page exhibit. It was not in plain sight to those who had a right to expect Mountain Bell to abide by the law and petition the Commission to change its ruling if it believed that such a change was appropriate. ***That kind of semantic gamesmanship on the part of utilities is intolerable and clearly in violation of Mountain Bell's duty to abide by the law***. The Commission's ruling to the contrary is erroneous.

Id. at 1255 (emphasis added). The court then held that the Commission's failure to hold a factual hearing on the issue of utility misconduct was arbitrary and capricious. *Id.* It was within these

[8] This is comparable to the Company's July filing, ignoring the rules of law of the 2007 docket.

guidelines that the Utah Supreme Court remanded the decision to the Commission. Thus, the *Charitable Contribution Case* stands for much more than RMP would like to imply, and is much more analogous to this situation than RMP would like to admit.

In the case at hand, the Commission considered RMP's heavy burden to prove it is entitled to rate relief, that must be supported by substantial evidence, which is more than a mere filing of schedules and testimony. 240-Day Order at 14 (quoting *Utah Dep't of Bus. Regulation v. Utah Pub. Serv. Comm'n*, 614 P.2d 1242, 1245, 1246 (Utah 1980)). The Commission also considered its broad, general delegation of authority and its duty to weigh not only the positions and interests of the parties but also those of the public. *Id.* at 15, 20–21.

The Company, nevertheless, wants to ignore the fact that:

> At the time of filing the July Application, RMP knew amendments to an application, filed at that time, would be necessary. RMP knew that within a matter of a few weeks, the Commission would issue its order in the 2007 Docket and RMP would need to account for the decisions made therein in any subsequent general rate proceeding.

Id. at 23. To argue that it could not have filed an application in July that incorporated the Commission's decision in the 2007 Docket (RMP's Br. at 4) is more than just a parsing of words; it is gamesmanship and should not be tolerated. Filing an application despite the fact that the Company knew it would not incorporate the general rules of law that were forthcoming in the 2007 Docket is analogous to Mountain Bell's behavior in the *Charitable Contribution Case*. RMP knew there would be rules of law issued; that its application would fail to include those rules of law; that those rules of law were binding on the Company in this case; and that it would have to update its application to incorporate those rules of law. Rather than being open and

transparent, RMP is using gamesmanship in the way it is proceeding with this case. RMP's arguments to the contrary should be disregarded.

CONCLUSION

Based on the foregoing, the UIEC respectfully request that the Commission affirmatively deny RMP's Petition, and that in doing so, the Commission rule either a) that it affirmatively finds that RMP has waived[9] the effective date of March 14, 2009, and accepted that the 240-day period begins September 11, 2008, and request an acknowledgement or some other type of action from the Company to make the waiver explicit; or (b) to enforce its order not to accept the amendments of September 10 without RMP's agreement, and dismiss the application as being inadequate, declaring that the December filing, which must include the 2007 decision and all required updates, will be the commencement of a new case.

DATED this 7th day of November, 2008.

/s/ Vicki M. Baldwin

F. ROBERT REEDER
VICKI M. BALDWIN
PARSONS BEHLE & LATIMER
Attorneys for UIEC, an Intervention Group

[9] To prevent the unintentional creation of the trap discussed above, waiver is necessary

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

I hereby certify that on this 7th day of November 2008, I caused to be e-mailed, a true and correct copy of the foregoing **UIEC'S RESPONSE TO ROCKY MOUNTAIN POWER'S PETITION FOR RECONSIDERATION OF ORDER ON MOTIONS TO DISMISS OR ADDRESS 240-DAY TIME PERIOD** to:

Roger J. Ball
Utah Ratepayers Association
1375 Vintry Lane
Salt Lake City, Utah 84121
Ball.roger@gmail.com

Mark C. Moench
David L. Taylor
Yvonne R. Hogle
Daniel E. Solander
Rocky Mountain Power
201 South Main Street, Suite 2300
Salt Lake City, Utah 84111
mark.moench@pacificorp.com
david.taylor@pacificorp.com
yvonne.hogle@pacificorp.com
daniel.solander@pacificorp.com
datarequest@pacificorp.com

Peter J. Mattheis
Eric J. Lacey
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, N.W.
800 West Tower
Washington, D.C. 20007
pjm@bbrslaw.com
elacey@bbrslaw.com

Gerald H. Kinghorn
Jeremy R. Cook
Parsons Kinghorn Harris, P.C.
111 East Broadway, 11th Floor
Salt Lake City, Utah 84111
ghk@pkhlawyers.com
jrc@pkhlawyers.com

Gary A. Dodge
HATCH, JAMES & DODGE
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
gdodge@hjdlaw.com

Kevin Higgins
Neal Townsend
ENERGY STRATEGIES
39 Market Street, Suite 200
Salt Lake City, UT 84101
khiggins@energystrat.com
ntownsend@energystrat.com

Arthur F. Sandack(#2854)
Attorney for Intervenor IBEW Local 57
8 East Broadway, Ste 411
Salt Lake City, Utah 84111
Telephone: (801) 595-1300
Fax 801- 355-6955
asandack@msn.com

Katherine A. McDowell
Lisa F. Rackner
McDowell & Rackner P.C.
520 SW 6th Avenue, Suite 830
Portland, OR 97204
Katherine@mcd-law.com
lisa@mcd-law.com

Steven S. Michel
Western Resource Advocates
2025 Senda de Andres
Santa Fe, NM 87501
smichel@westernresources.org

Victoria R. Mandell
Western Resource Advocates
2260 Baseline Rd., Suite 200
Boulder, CO 80302
vmandell@westernresources.org

Betsy Wolf
Salt Lake Community Action Program
764 South 200 West
Salt Lake City, UT 84101
bwolf@slcap.org

Charles Johnson
1086-7B Pleasant Blvd.
Toronto, Ontario M4T1K2
cjohnson@ieee.org

Sarah Wright
Executive Director
Utah Clean Energy
1014 2nd Avenue
Salt Lake City, UT 84103
sarah@utahcleanenergy.org

Rich Collin
Associate Professor, Finance & Economics
Bill and Vieve Gore School of Business
Westminster College
1840 South 1300 East
Salt Lake City, UT 84105
rcollins@westminstercollege.edu

Howard Geller
Executive Director
Southwest Energy Efficiency Project
2260 Baseline Rd., Suite 212
Boulder, CO 80302
hgeller@swenergy.org

Roger Swenson
U. S. Magnesium LLC
238 North 2200 West
Salt Lake City, UT 84116
Roger.swenson@prodigy.net

Holly Rachel Smith, Esq.
Russell W. Ray, PLLC
6212-A Old Franconia Road
Alexandria, VA 22310
holly@raysmithlaw.com

Mr. Ryan L. Kelly
Kelly & Bramwell, PC
Attorneys at Law
11576 South State Street, Bldg. 203
Draper, UT 84020
ryan@kellybramwell.com

Steve W. Chriss
Wal-Mart Stores, Inc.
2001 SE 10th Street
Bentonville, AR 72716-0550
Stephen.chriss@wal-mart.com

Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Boehm, Kurtz & Lowry
36 East Seventh Street, Ste 1510
Cincinnati, Ohio 45202
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com

Stephen J. Baron
J. Kennedy & Associates
570 Colonial Park Dr, Ste 305
Roswell, GA 30075
sbaron@jkenn.com

Michael Ginsberg
Patricia Schmidt
ASSISTANT ATTORNEYS GENERAL
500 Heber Wells Building
160 East 300 South
Salt Lake City, UT 84111
mginsberg@utah.gov
pschmid@utah.gov

William Powell
Phil Powlick
Dennis Miller
DIVISION OF PUBLIC UTILITIES
500 Heber Wells Building
160 East 300 South, 4th Floor
Salt Lake City, UT 84111
wpowell@utah.gov
dennismiller@utah.gov
Philippowlick@utah.gov

Michele Beck
Executive Director
COMMITTEE OF CONSUMER SERVICES
500 Heber Wells Building
160 East 300 South, 2nd Floor
Salt Lake City, UT 84111
mbeck@utah.gov

Barrie L. McKay, Director
State Regulatory Affairs
Questar Gas Company
180 East 100 South
P. O. Box 45360
Salt Lake City, UT 84145-0360
Barrie.mckay@questar.com

Colleen Larkin Bell
Jenniffer Byde
Questar Gas Company
180 East 100 South
P. O. Box 45360
Salt Lake City, UT 84145-3604
Colleen.bell@questar.com
Jenniffer.byde@questar.com

Paul Proctor
ASSISTANT ATTORNEYS GENERAL
500 Heber Wells Building
160 East 300 South
Salt Lake City, UT 84111
pproctor@utah.gov

Cheryl Murray
Dan Gimble
UTAH COMMITTEE OF CONSUMER SERVICES
160 East 300 South, 2nd Floor
Salt Lake City, UT 84111
cmurray@utah.gov
dgimble@utah.gov

/s/ Colette V. Dubois