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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 CLARIFICATION OR
RECONSIDERATION OF ORDER ON
MOTION FOR APPROVAL
OF TEST PERIOD**

Pursuant to Utah Code Annotated §§ 63G-4-301 and 54-7-15 and Utah Administrative Code R746-100-11.F, Rocky Mountain Power, a division of PacifiCorp (“Rocky Mountain Power” or “Company”), hereby petitions the Public Service Commission of Utah (“Commission”) to clarify or, alternatively, to reconsider the Order on Motion for Approval of Test Period (“Test Period Order”) issued October 30, 2008 in this matter.

This Petition addresses only the portion of the Test Period Order requiring the Company to follow a procedural process prior to filing other material in future general rate cases, as follows:

We conclude we will order a procedural process for all future RMP general rate cases by which identification and selection of the test period to be used in the case will be the first item for resolution prior to the submission of other material (e.g., revenue requirement information, rate proposals and rate schedules and tariffs) and our resolution of other disputes. Once the test year is approved by the Commission, the company

will then file the remaining aspects of the case: the change in revenue requirement the company deems appropriate, in light of the designated test year; the rate design which the company proposes to use for rates, charges, fees, etc.; and the proposed rate schedules and tariff provisions to effectuate the company's rate design.

Test Period Order at 5-6. (This portion of the Test Period Order will be referred to hereinafter as the "Order.")

Rocky Mountain Power respectfully requests that the Commission clarify that the Order: (1) applies only to the next Rocky Mountain Power general rate case and does not set any precedent for future rate cases; (2) does not contemplate that the determination of test period prior to submission of other material will be done outside the 240-day period during which the Commission may act on a rate change application under Utah Code Ann. § 54-7-12(3); or (3) has been rendered moot by the passage of Senate Bill 75 ("SB 75") in the 2009 General Session of the Utah Legislature and the Commission's rulemaking pursuant to SB 75 to determine what constitutes a "complete filing" in a general rate case.

Alternatively, if the Commission is not willing to clarify the Order in any of the foregoing ways, the Company respectfully requests the Commission to reconsider and vacate the Order on the grounds that the Commission (1) does not have authority to require the pre-filing procedure because the procedure (a) is not authorized by and is inconsistent with governing statutes and (b) has the effect of extending or nullifying the 240-day period during which the Commission may act on an application for a rate change and (2) did not follow proper procedures for this departure from long-standing and accepted practice.

The Commission issued its final order on the revenue requirement portion of this case, the Report and Order on Revenue Requirement ("Revenue Requirement Order"), on April 21, 2009. The Revenue Requirement Order specified that parties aggrieved by the order may seek reconsideration of the order and, if not satisfied, may seek review of the order before the

Supreme Court. The Test Period Order was an interim order and did not contain provisions regarding reconsideration or review. The Company believes issuance of the Revenue Requirement Order is a trigger for seeking clarification or reconsideration of the Order. By seeking clarification or reconsideration of the Order, however, the Company is expressly not seeking clarification or reconsideration of the Revenue Requirement Order. The Revenue Requirement Order approved a Stipulation Regarding Revenue Requirement to which the Company was a party. Therefore, the Company accepts and supports the Revenue Requirement Order, and this Petition does not seek clarification or reconsideration of the Revenue Requirement Order in any way.

I. INTRODUCTION

The Test Period Order addressed the test period to be used in Docket No. 08-035-38. In the course of discussing that issue, the Test Period Order addressed whether the 240-day period during which the Commission may act on a request for a rate increase under Utah Code Ann. § 54-7-12(3) should restart with a filing by the Company of the revenue requirement based on the test period adopted in the Test Period Order. Although the Commission concluded that the 240-day period should not restart, it stated:

We conclude we will order a procedural process for all future RMP general rate cases by which identification and selection of the test period to be used in the case will be the first item for resolution prior to the submission of other material (e.g., revenue requirement information, rate proposals and rate schedules and tariffs) and our resolution of other disputes. Once the test year is approved by the Commission, the company will then file the remaining aspects of the case: the change in revenue requirement the company deems appropriate, in light of the designated test year; the rate design which the company proposes to use for rates, charges, fees, etc.; and the proposed rate schedules and tariff provisions to effectuate the company's rate design.

Test Period Order at 5-6.

Rocky Mountain Power has complied with this requirement in connection with its currently pending general rate case, Docket No. 09-035-23, and has now entered into a Test Period Stipulation in that case, which, if approved by the Commission, will resolve the issue. In doing so, the Company has not addressed potential problems with the Order, but has rather resolved the issue in a manner acceptable to the parties.

Following issuance of the Commission's Order on Motions to Dismiss or Address 240-day Time Period and the Order, the parties to the case discussed the possibility of legislation to clarify what constitutes a "complete filing" for purposes of commencing the 240-day time period during which the Commission may consider a request for a rate increase. SB 75 was the result of those discussions.

Among other things, SB 75 amended section 54-7-12(3) to provide that the 240-day period during which the Commission may act on the revenue requirement portion of a rate change application commences when a "complete filing" is made. SB 75, lines 132-141. The bill directed the Commission to "create and finalize rules concerning the minimum requirements to be met for an application to be considered a complete filing" for general rate case applications "within 180 days after the effective date of" the bill. *Id.*, lines 87-89.

The Commission initiated Docket No. 09-999-08 to provide an opportunity for the Commission to receive comments and suggestions of interested parties on the rules to be adopted under SB 75. Pursuant to the Pre-Rulemaking Schedule issued by the Commission in that docket, parties submitted preliminary comments and suggestions to the Commission on May 18, 2009; the Commission will issue a preliminary draft of rules by May 28, 2009; parties will submit comments and suggestions on the preliminary draft rules by June 11, 2009; a public meeting will be held on June 23, 2009 to review the comments and suggestions submitted and to

determine which areas of the draft rules need further consideration by the Commission; the Commission will issue a revised draft of the rules by July 2, 2009; and interested parties will be allowed to submit further comments and suggestions and to participate in a second public meeting on July 9, 2009. The Commission then intends to formally initiate the rulemaking required by SB 75 by submitting proposed rules for publication.

II. ARGUMENT

A. The Commission Should Clarify the Order.

1. The Commission May Clarify that the Order Applies Only to Docket No. 09-035-23.

During the period since the test period statute, Utah Code Ann. § 54-4-4(3), was amended in 2003, public utilities have stipulated to make, or have voluntarily made, pre-filing notifications to assist parties to transition to the use of future test periods. In each stipulation and order approving the stipulation until the Order, the parties agreed or the Commission ordered that the pre-filing requirements would apply only to the next general rate case. Although the Order does not contain that language, it is possible that the Commission intended the Order only to apply to Rocky Mountain Power's next general rate case. Rocky Mountain Power has now initiated that case in compliance with the Order and has entered into a Test Period Stipulation that, if approved, will resolve the issue raised by the Order with respect to that case. Therefore, if the Commission will clarify that the Order was intended to apply only to the next general rate case and not set precedent for the future, the concerns the Company otherwise has with the Order will be resolved. Accordingly, the Company respectfully requests that the Commission clarify that the Order applies only to Docket No. 99-035-23 and will have no application to any future docket.

2. The Commission May Clarify that the Pre-filing Procedure in the Order May Be Part of the 240-day Period.

The Order does not state whether the 240-day period specified in section 54-7-12(3) starts when the Company makes the pre-filing notification of test period required by the Order or when the Company files the other material following determination of the test period. The Company does not object to the Order if the pre-filing procedure begins after commencement of the 240-day period. Accordingly, the Company respectfully requests that the Commission clarify that the pre-filing procedure required by the Order shall commence the 240-day period.

3. The Commission May Clarify that SB 75 and the Rulemaking Required by SB 75 Have Rendered the Order Moot.

The Commission is now engaged in a rulemaking process required by SB 75 to state the minimum requirements for what constitutes a “complete filing” for purposes of determining when the 240-day time period specified in section 54-7-12(3) commences. The Commission is required to create and finalize these rules within 180 days of the effective date of SB 75 or by September 21, 2009. Given that the Company has agreed in the Test Period Stipulation in Docket No. 09-035-23 not to file another general rate case until January 1, 2011 and that the application of the Order is expressly limited to the Company, the rules adopted by the Commission will be in effect for the Company’s next rate case filing. These rules will address whether some pre-filing procedure for test period determination will be required for a general rate case application to be regarded as a complete filing and, consistent with the statutes, will presumably determine that it is not. Accordingly, the Order has been rendered moot by SB 75 and its required rulemaking. The rules adopted by the Commission should govern on this issue, and the Order should not be precedent or binding on the Company in any future rate case.

Based on the foregoing, the Company respectfully requests that the Commission clarify that the Order has been rendered moot by SB 75 and the Commission's rulemaking pursuant to SB 75 and will not be binding on the Company in the future.

4. Conclusion on Clarification.

This Petition proposes that the Commission clarify the Order in three ways. If the Order is clarified in any one of the three ways, the Company's concern with the precedential effect of the Order for future rate cases will be resolved. Therefore, the Company respectfully requests that the Commission clarify the Order in at least one of the three ways specified in this Petition. The Commission may also wish to clarify it in more than one of the ways.

B. Alternatively, the Commission Should Reconsider and Vacate the Order.

It is well established that the Commission, as a creation of the Legislature, has only those powers specifically granted or clearly implied by statute. *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995); *Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n*, 754 P.2d 928, 930 (Utah 1988); *Williams v. Public Serv. Comm'n*, 754 P.2d 41, 50 (Utah 1988); *Kearns-Tribune Corp. v. Public Serv. Comm'n*, 682 P.2d 858, 859 (Utah 1984); *Basin Flying Service v. Public Serv. Comm'n*, 531 P.2d 1303, 1305 (Utah 1975). "Any reasonable doubt of the existence of any power must be resolved against the exercise thereof." *Hi-Country Estates*, 901 P.2d at 1021 (quoting *Williams*, 754 P.2d at 50). Furthermore, "[w]ithout clear statutory authority, the commission cannot pursue even worthy objectives for the public good." *Mountain States*, 754 P.2d at 933. Therefore, the Commission cannot impose a pre-filing process for determination of test period that is not authorized by or inconsistent with governing statutes or that has the effect of extending or nullifying the 240-day period. In addition, the Commission may not depart from long-established practice without following proper procedures.

1. The Pre-filing Process Is Not Authorized by and Is Inconsistent With Governing Statutes.

SB 75 was not intended to expand the Commission's authority. Rather, it was designed to clear up confusion created by the Order on Motions to Dismiss or Address 240-day Time Period and the Test Period Order in Docket No. 08-035-38. Prior to the passage of SB 75, the Commission had no authority to require pre-filing procedures in general rate cases. Rather, with regard to determination of test period, Utah Code Ann. § 54-4-4(3) specified that:

If in the commission's determination of just and reasonable rates the commission uses a test period, the commission shall select a test period that, on the basis of evidence, the commission finds best reflects the conditions that a public utility will encounter during the period when the rates determined by the commission will be in effect.

Thus, the Legislature clearly contemplated that the test period determination would be made in the course of determination of just and reasonable rates. In other words, the test period determination would be part of the rate case proceeding.

Utah Code Ann. § 54-7-12(3) required the Commission to act on a rate increase application by a public utility within 240 days or the rate increase requested went into effect. SB 75 did not change this requirement. Utah Code Ann. § 54-7-12(3) now provides:

(a) Within 240 days after a public utility submits a complete filing, the commission shall issue a final order to:

- (i) grant the proposed general rate increase or decrease;
- (ii) grant a different general rate increase or decrease; or
- (iii) deny the proposed general rate increase or decrease.

(b) If the commission does not issue a final written order within 240 days after the public utility submits a complete filing in accordance with Subsection (3)(a):

- (i) the public utility's proposed rate increase or decrease is final;
- and

(ii) the commission may not order a refund of any amount already collected or returned by the public utility under Subsection (4)(a).

Because we know it was not the Legislature's intent to broaden the authority of the Commission through SB 75, it would be inappropriate to read the delegation of rulemaking authority in SB 75 as giving the Commission authority to require pre-filing procedures not specified elsewhere in the statutes. Had the Legislature intended to confer that authority on the Commission, it would have done so in SB 75. *See 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").

A rate case application is an application of a public utility. It contains the public utility's positions on a variety of issues, including the test period that best reflects the conditions the utility will encounter during the rate-effective period. Parties are free to challenge the utility's positions and to make their own recommendations. However, challenges to a utility's position do not make an application incomplete and suggesting that they do so would be absurd. Interpreting section 54-7-12(3) to require a pre-filing procedure to resolve test period prior to the filing of a general rate case would violate the requirement that statutes cannot be interpreted in a manner that would produce an absurd result. *See, e.g. State v. GAF Corp.*, 760 P.2d 310, 313 (Utah 1988).

For all of these reasons, the Order is beyond the Commission's authority and must be vacated.

2. The Pre-filing Procedure Is an Impermissible Attempt to Extend or Nullify the 240-day Period.

Prior to SB 75, the 240-day period applied only to rate increase applications by public utilities. The obvious purpose of the 240-day period was to avoid the possibility of a rate increase being unreasonably delayed or possibly being effectively denied through delay in

resolution of the case. At the same time, the 240-day period allowed adequate time for the Commission to consider proposed rate increases and for interested parties to present their positions to the Commission. Rather than providing authority to extend the 240-day period, SB 75 confirmed the requirement that the Commission issue an order within 240-days or the rate change requested becomes effective. SB 75, lines 132-141 (“If the commission does not issue a final written order within 240 days after the public utility submits a complete filing in accordance with Subsection (3)(a): (i) the public utility’s proposed rate increase or decrease *is final*; and (ii) the commission *may not* order a refund of any amount already collected or returned by the public utility under Subsection (4)(a).”) (emphasis added).

The Commission attempted to justify the pre-filing procedure as follows:

Participants engaged in utility regulation, especially in regards to general rate cases, face a number of daunting realities. These include: the increasing complexity of electricity markets; the increasing complexity of electric utility operations; the increasing complexity to harmonize and the potential for conflicts arising from multi-state utility operations and varying statutory provisions and policy goals of different states; the increased number of factors which are to be considered and interrelated in arriving at decisions in regulating utilities, in setting a revenue requirement, and in designing rates which are all required to be just and reasonable; the increasing complexity and sophistication of tools and analysis applied to evaluate past expense, revenues and rate design and to arrive at or project future ones; and the absolute magnitude and the relative magnitude of the sums arising from differences in the evaluation of existing and future electric utility operations.

The difficulty in dealing with these aspects of today’s utility regulation, in the context of acknowledging and accommodating the different interests of the utility, customers and society, is heightened through the use of a means, itself, intended to address some of these aspects – a projected test year (irrespective of whether it is partially or fully forecast). Early resolution of the appropriate test year to be used benefits all involved in a general rate proceeding.

Test Period Order at 4-5. Thus, the intent of the pre-filing procedure was to provide more time for the Commission and parties to deal with the complex issues in a general rate case. But this

intent is contrary to the 240-period in section 54-7-12(3) and is therefore not authorized.

Furthermore, the Commission may not assume authority to do things not authorized by statute just because it thinks it would be a good thing to do so. *Mountain States*, 754 P.2d at 933.

If the Commission may utilize the definition of a “complete filing” to require pre-filing procedures, the 240-day period is without any meaning. For example, in addition to requiring prior approval of the test period, the Commission might require prior approval of the cost of capital, the projection of certain revenues or expenses or any other factor that affects the revenue requirement and is part of the determination of just and reasonable rates. The Commission does not have authority to reduce the complexity of acting on a rate case within the 240-day period by requiring some issues to be determined prior to the 240-day period. Interpreting the statutes in a way that permits the Commission to effectively extend or nullify the 240-day period is not permissible because it nullifies the effect of the statute. A fundamental rule of statutory construction is that statutes must be read in a manner that gives effect to all of their parts. *See, e.g. 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.”).

3. The Commission Has Not Complied with the Procedures Required to Depart From Long-standing Practice.

In the late-1970s and early-1980s, the Commission consistently permitted public utilities to file general rate case applications, including applications using future test periods, without requiring any pre-filing procedures. Thereafter, the Commission consistently allowed public utilities to file general rate case applications without any pre-filing determination of test period. In fact, the Company is unaware of any case prior to the Order in which the Commission has required a public utility to request a determination of test period prior to filing a general rate case

application. The Order departs from this long-standing practice without following proper procedures.

In *Williams v. Public Serv. Comm'n*, 720 P.2d 773 (Utah 1986), the Court considered whether the Commission could change a long-standing practice of requiring one-way paging companies to obtain certificates of public convenience and necessity without complying with the Utah Administrative Rule Making Act. The Court concluded that the Commission could not. 720 P.2d at 777 (“[W]e conclude that the Commission cannot reverse its long-settled position . . . without following the requirements of the Utah Administrative Rule Making Act.”) The Commission’s decision to require the pre-filing procedure was a departure from long-standing practice without following the requirements of the Utah Administrative Rule Making Act and was, thus, improper.

III. CONCLUSION

For the foregoing reasons, Rocky Mountain Power respectfully submits that that the Commission should clarify that the Order: (1) applies only to the next Rocky Mountain Power general rate case and does not set any precedent for future rate cases; (2) does not contemplate that the determination of test period prior to submission of other material will be done outside the 240-day period during which the Commission may act on a rate change application under Utah Code Ann. § 54-7-12(3); or (3) has been rendered moot by the passage of SB 75 and the Commission’s rulemaking pursuant to SB 75 to determine what constitutes a “complete filing” in a general rate case.

Alternatively, if the Commission is not willing to clarify the Order as requested, the Company respectfully submits that the Commission should reconsider and vacate the Order because it is beyond the Commission’s authority and was not adopted following proper procedures.

DATED: May 21, 2009.

Respectfully submitted,

ROCKY MOUNTAIN POWER

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of **ROCKY MOUNTAIN POWER'S PETITION FOR CLARIFICATION OR RECONSIDERATION OF ORDER ON MOTION FOR APPROVAL OF TEST PERIOD** on the following by electronic mail on May 21, 2009:

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