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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power for Approval of its Proposed Energy Cost Adjustment Mechanism.	**UIEC's RESPONSE TO ROCKY MOUNTAIN POWER'S MOTION TO STRIKE** Docket No. 09-035-15

Pursuant to the Utah Public Service Commission's ("Commission" or "PSC") rule R746-100-4, the Utah Industrial Energy Consumers intervention group ("UIEC")[1] hereby submits this Response to Rocky Mountain Power's ("RMP" or the "Company") Motion to Strike ("Motion" or "Motion to Strike"), which was filed December 13, 2016, and to the Division of Public Utilities' Response in Support of RMP's Motion to Strike ("Division's Response"), filed December 23, 2016.

RMP's Motion to Strike is a procedural vehicle that is improperly used in this case to advance a legal argument that will lead the Commission into error. The UIEC respond to RMP's legal argument in Section I of this Response. In Section II, the UIEC explain why, as a matter of

[1] The UIEC was granted intervention in this docket on May 4, 2009, at which time the intervening parties were identified as Holcim, Inc., Kennecott Utah Copper Corp., Kimberly-Clark Corp., Malt-O-Meal, Praxair, Inc., Proctor & Gamble, Inc., Tesoro Refining and Marketing Co., and Western Zirconium. This Reply and UIEC's original Comments are submitted on behalf of only Tesoro Refining and Marketing Co., Malt-O-Meal, and Holcim, Inc. The remaining intervening parties do not participate in the Comments or this Reply.

administrative procedure, the Motion is unwarranted under the applicable rules and should be denied.

I. RMP'S INTERPRETATION OF SB 115 IS IN ERROR; THE COMMISSION MAY DISALLOW EBA COST RECOVERY IF IT CANNOT BE FOUND TO BE IN THE PUBLIC INTEREST.

The legal argument in the UIEC Comments was submitted for the purpose of identifying, summarizing and discussing the law applicable to this phase of the EBA docket. The Comments point out that, under the EBA statute as well as other provisions of Title 54, the Commission may not approve an EBA, or allow it to continue, unless it is found to be in the public interest. *See, e.g.*, Comments at 7 (*citing* Utah Code Ann. § 54-13-5-2(2)(b); 54-7-13.5(4)(c); 54-3-1). Relying on the findings expressed in the Division of Public Utilities' Final Evaluation Report on the EBA Pilot Program ("DPU Report"), the Comments explain why the EBA in its current form, as modified by SB 115, can no longer be found to be in the public interest and should therefore be eliminated or substantially restructured.

In its Motion to Strike, RMP asserts a legal argument in rebuttal to the Comments that is based on an incorrect theory of statutory interpretation, an inaccurate account of the Legislature's intent in enacting SB 115, and a misunderstanding of how SB 115 interfaces with the existing law. According any credence to RMP's argument will lead the Commission into error.

RMP focuses on a perceived conflict between the Section 2(b) of the EBA statute (requiring the EBA to be "in the public interest"), and the new provisions of SB 115 – Subsection (2)(d) (allowing 100 percent recovery),[2] Subsection (6) (requiring annual reports from the

[2] Section (2)(d) provides:

> Beginning June 1, 2016, for an electrical corporation with an energy balancing account established before January 1, 2016, the commission shall allow an electrical corporation to recover 100% of the

Commission on the public interest),[3] and Section 63I-1-254(2) (sunsetting Subsection 2(d) on December 31, 2019).[4] RMP asks the Commission to interpret these sections of SB 115 as expressing a legislative intent that would require the Commission to allow RMP to recover 100 percent of its power costs through 2019, apparently whether or not continuing to recover EBA costs is reasonable and in the public interest, as long as the Commission provides annual reports to the Legislature. Motion at 6. Any other interpretation, says RMP, fails to conform to the canon of statutory interpretation which provides that the plain language of a statute should be interpreted in a way that "gives meaning to [the entire statute] and does not render any portion of the statute superfluous." *Id.*

RMP's interpretation of SB 115 is simply wrong. It would, in fact, render superfluous Sections 54-7-13.5(2)(d) and 54-7-13.5(4)(c), and every other provision in Title 54 that requires the Commission to ensure that a utility's rates and charges are just, reasonable, and in the public interest. When the Utah Legislature amends a portion of a statute and leaves the other portions untouched, the unchanged portions must be interpreted to be re-adopted by the legislature with no implicit repeal or change in meaning. *Christensen v. Indus. Comm'n*, 642 P.2d 755, 756 (Utah

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> electrical corporation's prudently incurred costs as determined and approved by the commission under this section.

Utah Code Ann. § 54-7-13.5(2)(d).

[3] Subsection (6) states:

> The commission shall report to the Public Utilities and Technology Interim Committee before December 1 in 2017 and 2018 regarding whether allowing an electrical corporation to continue to recover costs under Subsection (2)(d) is reasonable and in the public interest.

Utah Code Ann. § 54-7-13.5(6) (emphasis added).

[4] SB 115 added a new Subsection (2) to Section 63I-1-254 which states, "Subsection 54-7-13.5(2)(d) is repealed on December 31, 2019." Utah Code Ann. § 63I-1-254(2).

1982). The EBA statute, when read consistently with itself and with other provisions of Title 54,[5] unambiguously requires that any EBA must be found to be in the public interest, and that EBA rates and charges must be found to be just and reasonable.[6] If the Legislature had intended that SB115 repeal or modify the standards so clearly expressed in these previously existing statutes, it could have said so. It did not.[7]

Nor can SB 115 be interpreted to implicitly repeal any prior section of the applicable statutes. *Christensen*, 642 P.2d at 756. Thus, RMP's view that the Commission must allow 100 percent EBA recovery *whether or not* such recovery is in the public interest is an invitation to error. Instead, SB 115 must be read consistent with the existing statutes to mean that RMP may be allowed 100 percent recovery, *as long as* such recovery is in the public interest.

RMP argues that, "the Legislature has mandated[8] that the Commission allow recovery of 100 percent of *prudent* EBA costs through December 31, 2019," and that it would "be difficult to

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[5] SB115 must be read to be consistent with other provisions of Section 54-7-13.5 and of Title 54. *Mountain States Tel. & Tel. Co. v. Payne*, 782 P.2d 464, 467 (Utah 1989); *see also Olsen v. Eagle Mountain*, 2011 UT 10, ¶ 12, 248 P.3d 465; *Sullivan v. Scoular Grain Co. of Utah*, 853 P.2d 877, 880-81 (Utah 1993); *Clover v. Snowbird*, 808 P.2d 1037, 1045 (Utah 1991).

[6] *See* UIEC Comments at 7; *see also* Utah Code Ann. § 54-13-5-2(2)(b) (Commission must find EBA is in the public interest for it to become effective); *id*. at § 54-7-13.5(4)(c) (EBA must be "formed and maintained" in accordance with the requirements of Section 54-13.5 (which includes the "public interest" requirement) to avoid constituting impermissible retroactive ratemaking); *id*. at § 54-3-1 (rates charged to utility customers must be just and reasonable); *id.* (every unjust or unreasonable charge of a public utility is prohibited).

[7] As RMP was the author of SB 115, it has only itself to blame that SB 115 did not adequately address the apparent conflict between 100 percent recovery and the requirement that rates be just, reasonable and in the public interest. Its Motion to Strike is an attempt to avoid the consequence of this oversight, to foreclose legal argument on the point, and to thereby advance RMP's policy of shifting risks to ratepayers.

[8] It is a stretch to say that SB 115 was a "mandate" that the Commission must allow 100 percent EBA recovery. SB 115 was primarily about a sustainable energy and transportation plan – not about the EBA. Moreover, the bill was voted down in the House on the last day of the session. It was only after returning from a dinner break that the bill was brought up for reconsideration and passed without any explanation for the reversal. The passage of SB 115 was thus a testament only to RMP's dinner-time lobbying prowess, not to any legislative intent to supersede a century-long policy authorizing the Commission to order a utility to discontinue a rate or practice that is against the public interest.

contemplate a situation where the recovery of such "prudent" costs are not also in the "public interest." Motion at 7.[9] Again, this argument, while it reveals the crux of the problem facing the Commission, is leading the Commission into error. In amending the statute to allow 100 percent recovery of prudently incurred EBA costs, the Legislature assumed that the Commission would determine the prudence of EBA costs. In a speech to the Public Utilities & Technology Standing Committee, the sponsor of SB 115 stated:

> So, the question is, what is the effect [on rates] of going from a 70/30 reimbursement of the EBA to 100 percent? I guess we don't know. So … the compromise was that we put a sunset on the 70/30 to 100 percent. That sunset, actually, goes … is enacted in 2019.
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> In the meantime, again, the Public Service Commission *has total oversight over this*. They … when there's a prudency hearing to find out if these dollars are actually acceptable, the Public Service Commission has the hearing to evaluate the prudency.

Audio Recording of the Public Utilities & Technology Standing Committee Meeting, March 8, 2016, (Adams, S.) (emphasis added).[10] An essential assumption underlying the amendment, therefore, was that in exercising oversight over EBA cost recovery, the Commission would be able to ensure that the costs recovered through the EBA were prudently incurred.

That assumption turns out to be unfounded. The DPU has since reported to the Commission that, despite having devoted substantial effort over the past five years to auditing the Company's power costs, the Division has no confidence that it can meaningfully assess the prudence of the Company's transactions, nor would it be able to do so even with improved

[9] Whether or not it would be difficult to imagine such a situation, the fact remains that the Legislature did not declare that allowing 100 percent recovery of prudently incurred costs would be "in the public interest." It thus left intact the statutory charge that the Commission must make a determination of whether EBA rates and charges are just, reasonable and in the public interest.

[10] Found at http://utahlegislature.granicus.com/MediaPlayer.php?view_id=2&clip_id=20192, at 8:11 – 8:46

documentation. DPU Report at 8, 43. The Division reports that its audit "will *not* include specific prudence reviews of *most of* the NPC items." *Id.* at 8 (emphasis added). It states that it cannot attest to the correctness of the Company's net power costs, and that it may be "virtually impossible" to reasonably ascertain RMP's prudently incurred actual power costs. *Id.* at 8, 43, 50. RMP's argument that the "public interest" is served because only "prudently incurred" costs will be recovered, therefore, is a dangerous illusion. Allowing the recovery of costs that cannot reasonably be ascertained as "prudently incurred" can never be in the public interest. If the Commission accepts RMP's view, it will find itself in the position of rubber-stamping the recovery of any and all EBA costs that RMP might claim during the next three years, without any means of knowing whether those costs were prudently incurred. This not only directly contravenes the legislative assumption behind the bill, but it abrogates other sections of the code and, at the same time, does violence to the public interest.

The Commission must interpret and apply SB 115 in a way that is consistent with the Commission's responsibility to ensure that rates and charges are just, reasonable and in the public interest. The Division has reported to the Commission that (apart from the impossibility of ascertaining prudence), the EBA benefits the Company but provides no significant benefit to ratepayers (DPU Report at 6, 50); "ratepayers are worse off [with the EBA in place] both in higher rates, but also in terms of risk that the Company was able to shift to them" (*id*. at 6, 50); the Company is earning its authorized rate of return with the 70/30 bands in place and will over-earn without the sharing bands (*id*. at 31, 45-46); the EBA has not resulted in any reduction in energy rates, rate volatility, or the need for annual rate increases; (*id.* at 28-29, 43); and with the elimination of the sharing bands, any incentive for the Company to act with prudence has also been

eliminated. (*Id.* at 18, 44-45). Under the circumstances, the public interest clearly is not served by continuing the EBA in its present form.

SB 115 must not be applied in a way that allows RMP to draft a self-serving bill, jam it through the legislature based on false assumptions, and then claim that the Commission can ignore its obligation to protect the public against unjust and unreasonable rates. SB 115 does not operate to repeal or modify the Commission's authority (or its obligation) to ensure that EBA recovery is only for prudently incurred costs and that the resulting rates are just, reasonable and in the public interest. The UIEC encourages the Commission to review the risks and benefits of the EBA in light of SB 115 and to carefully consider the parties' proposals, including the UIEC's suggestions, for restructuring the EBA. If, despite efforts at restructuring, the Commission is unable to find that all of RMP's EBA costs are prudently incurred, or unable to conclude that allowing 100 percent recovery would result in rates that are just, reasonable and in the public interest, the Commission must disallow the recovery of EBA costs.

II. RMP'S MOTION TO STRIKE SHOULD BE DENIED

From a procedural standpoint, RMP's Motion to Strike should be denied for several reasons. First, it is untimely. Pursuant to the Commission's rules, motions must be filed within ten (10) days of the service of the pleading to which they are directed. Utah Admin. Code ("UAC") R746-100-4.D. The UIEC filed and served its Comments on the DPU Report on November 16, 2016. Any motion to be made regarding UIEC's Comments, therefore, should have been filed no later than November 28, 2016. Because RMP did not file its Motion to Strike until December 14, 2016, the Motion itself is untimely and should be disregarded.

Second, both RMP and the Division are incorrect in alleging that the UIEC did not timely submit the Comments. The UIEC's Comments, submitted in lieu of testimony in response to the DPU Report, were filed on the day scheduled for filing Responses to the DPU Report. The Comments consist of legal argument supporting UIEC's position that the Commission has authority to discontinue the EBA if it cannot be found to be in the public interest, and commentary on the DPU Report, suggesting modifications that should be considered if the EBA is retained. Because the UIEC will not be sponsoring testimony in this phase of the proceeding, the Comments are both timely submitted and properly designated as "comments."

Third, a motion to strike is not available under these circumstances. The Commission's rules of practice and procedure ("Rules") do not include any provision for motions to strike, but instead defer to the Utah Rules of Civil Procedure ("URCP") in a situation like this one, where there is no specific provision in the Commission's Rules. Utah Admin. Code R746-100-1(C). Under the URCP, a motion to strike is not available when a party objects to evidence in another party's memorandum.[11] RMP has not alleged any other ground for a motion to strike that is recognized under the URCP.[12]

Fourth, the Commission's Rules provide that while the Commission may exclude "non-probative, irrelevant, or unduly repetitious evidence," it may receive and consider legal briefs as

[11] URCP 7(n) (**"**A party who objects to evidence in another party's motion or memorandum may not move to strike that evidence. Instead, the party must include in the subsequent memorandum an objection to the evidence").

[12] *See, e.g.*, URCP 10(h) ("The court may strike and disregard all or any part of a pleading or other paper that contains redundant, immaterial, impertinent or scandalous matter"); URCP 12(e) (in the context of a motion for a more definite statement, a pleading may be stricken when it is found to be "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading"); URCP 12(f) ("the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter"); URCP 37(e)(2)(c) (as sanctions for failure to comply with a discovery order, the court may order pleadings stricken).

well as oral and documentary evidence, including unsworn statements or comments from public witnesses.[13] UAC R746-100-10(F)(1); 746-100-1(C). The Scheduling Order does not address the timing for submitting comments, but certainly does not prohibit them.

Fifth, it has long been the practice of the Commission to accept informal, unsworn statements or comments from parties in lieu of testimony, just as the Commission accepts such statements from public witnesses. Both RMP and the Division claim that during the scheduling conference in this docket on June 15, 2016, it was "determined" that a party could only propose changes to the EBA in sponsored testimony, not in comments. Motion at 3; Division Response at 2. No such restriction, however, appears in the Scheduling Order, and the Commission should decline to interpret the Scheduling Order as imposing one. *See Ellis-Hall Consultants, LLC v. Pub. Serv. Comm'n*, 2016 UT 34, slip op. at 8 (July 28, 2016) (Commission has no right to revise its orders by later interpretation). For reasons related to changes in the individual intervenors comprising the UIEC, the UIEC has elected not to fully participate in this phase of the docket for the purpose of proposing changes to the EBA.[14] Thus, its suggestions for modifications to the EBA are properly offered as public statements on the DPU Report in lieu of testimony. *See* Comments at 10.

The UIEC acknowledges that the Commission may accord weight to unsworn comments as appropriate in accordance with the Rules.[15] But, there is no ground for striking them. And

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[13] UAC R746-100-2(Q) defines a "public witness" as "a person expressing an interest in an issue before the Commission but not entitled or not wishing to participate as a party."

[14] *See supra*, n.1. Recent changes in the make-up of the group have made it impracticable for the group to sponsor testimony or otherwise fully participate.

[15] None of the recommended changes to the EBA are new. The UIEC's witnesses have raised them repeatedly in EBA proceedings since 2011, as clearly specified in the citations in the Comments.

contrary to the Division's assertion, due process is not offended by considering the statements of public witnesses as provided under the Commission's Rules. To the contrary, denying the submission of UIEC's Comments may offend due process to the extent it forecloses public comment on matters before the Commission. In fact, both RMP and the Division concede that the Commission may treat the Comments as public comments. Motion to Strike at 5; Division Response at 3.

Finally, to the extent the UIEC's Comments are legal argument, they are not subject to a motion to strike. Legal issues are properly raised whenever they arise in the course of a Commission proceeding. By its very nature, legal argument cannot be presented by lay witnesses, and the weight to be accorded to a legal position cannot be dependent on the credibility of any witness or on the form of the pleading in which they are presented. The legal issues raised by the UIEC are both timely and properly presented in the form in which the UIEC submitted them.

Most importantly, the UIEC believe that the legal issues it has raised are essential to the public interest. As no other party has seen fit to raise them despite the obvious tension in the applicable law created by the enactment of SB 115, the UIEC, as a matter of public concern,[16] has brought them to the attention of the Commission so that the Commission may consider its alternatives in ruling on the continuation of the EBA Pilot Program.

[16] Utah recognizes that it may be appropriate for a private litigant to protect important constitutional rights or societal interests and that, under extraordinary circumstances, the private litigant may receive an award of attorney fees for doing so. *See Stewart v. Utah Public Serv. Comm'n*, 885 P.2d 759, 783 n.19 (Utah 1994) (adopting the "private attorney general doctrine" where rate payers challenged the constitutionality of Section § 54-4-4.1(2) (1990) for delegating legislative powers to a private party).

For the foregoing reasons, the UIEC respectfully requests that the Commission deny RMP's Motion to Strike and give due consideration to the unsworn statements and legal argument contained in the UIEC's Comments.

CONCLUSION

Although the Commission may no longer require risk sharing through the 70/30 sharing bands, the Commission retains the statutory authority and responsibility to disallow cost recovery whenever necessary to ensure that a utility's rates and charges are just, reasonable, and in the public interest. Despite RMP's flawed arguments to the contrary, the Commission may not continue an EBA that does not meet this fundamental standard. For the reasons discussed above and in UIEC's Comments, the Commission should carefully consider whether, in light of the DPU Report and SB 115, the EBA can be restructured in a way that is in the public interest and that produces just and reasonable rates. If not, the EBA should be discontinued.

As a matter of procedure, the Company's Motion to Strike is untimely and without any basis in either the Commission's Rules or the Utah Rules of Civil Procedure, and should be denied.

Dated this 28th day of December, 2016.

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