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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 OPPOSITION TO MOTION FOR A DEFERRED ACCOUNTING ORDER** Docket No. 09-035-15

The electrical power customers referred to in this docket as the "Utah Industrial Energy Consumers" or "UIEC," with the exception of Kennecott Utah Copper, LLC., which respectfully declines to participate in this particular filing,[1] through their counsel and pursuant to the provision at Utah Admin. Code R746-100-3(H), hereby submit this Opposition to Rocky Mountain Power's Motion for a Deferred Accounting Order ("Opposition") which motion was filed in this docket on February 9, 2010, and in support of this Opposition state as follows:

INTRODUCTION

On February 8, 2010, the Public Service Commission ("Commission") issued its Report and Order in Phase I of this docket. ("Phase I Order"). The Commission determined that "a final conclusion on [whether an ECAM is in] the public interest is dependent upon a number of

[1] The electrical power customers participating in this filing are: Holcim, Inc., Kimberly-Clark Corp., Malt-O-Meal, Praxair, Inc., Proctor & Gamble, Inc., Tesoro Refining and Marketing Co., and Western Zirconium.

matters and evidence which were not sufficiently developed at the conclusion of Phase I." Phase I Order at 2. To further develop the evidence and to explore some of the specific questions raised by the parties, the Commission decided it would "continue this docket into Phase II to make this exploration together with all other relevant areas of inquiry." Id. The Commission declined to determine whether an ECAM would be in the public interest.

It its Motion for a Deferred Accounting Order ("Motion"), Rocky Mountain Power ("RMP"), notes that the Commission has concluded that it will move to Phase II of this docket. Motion at ¶6. RMP requests, "based on the conclusion in the Commission's [Phase I Order]," that it be allowed to begin deferring "the difference between NPC [net power costs] ordered in its 2009 General Rate Case and actual NPC incurred on a monthly basis until the Commission approves an ECAM." Motion at 4 (Request for Relief).

RMP's Motion should be denied because (1) deferred recovery of NPC would violate the rule against retroactive ratemaking; (2) there is no a statutory authorization for the requested deferral since an ECAM has not yet been approved; and (3) even if an ECAM had been approved, RMP's formulation of NPC is not among the categories of costs that the statute specifies may be recovered under an ECAM.

ARGUMENT

A. The Proposed Deferred Accounting Order Violates the Rule Against Retroactive Ratemaking.

RMP evidently contends that the Commission has authority to grant the relief requested under its general grant of jurisdiction (§54-4-1) and under its authority to establish a system of accounts for public utilities (§54-4-23). Motion at 1. The Commission, however, has recognized that sound ratemaking principles presume that rates should be set prospectively, and that the rule

against retroactive ratemaking, and its exceptions and rationale, should apply when determining whether a deferred accounting order is appropriate. In the Matter of the Application of Rocky Mountain Power for a Deferred Accounting Order to Defer the Costs of Loans Made to Grid West, the Regional Transmission Organization, Docket Nos. 06-035-163, 07-035-04, 07-035-14 (Jan. 3, 2008) at 13.

Ordinarily, the Commission is prohibited from permitting a utility to recover past costs or unrealized revenues. The Utah Supreme Court stated: "[As a] general rule [] . . . *all ratemaking must be prospective in effect* and rates may be fixed only in general rate proceedings. Utah Dep't of Bus. Regulation v. Pub. Serv. Comm'n, 720 P.2d 420, 423 (Utah 1986) (citations omitted) (emphasis added) (hereinafter referred to as the "EBA Case"). A "retroactive" rate adjustment is one that allows a utility to recoup from future rates "costs that were greater than projected." MCI Telecomms. Corp. v. Pub. Serv. Comm'n, 840 P.2d 765, 770 (Utah 1992). The rule against retroactive ratemaking is not constitutionally mandated, but it is a well-settled Utah rule based on "sound ratemaking policies."[2] Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 777 (Utah 1994). The purpose of the rule is "to provide utilities with some incentive to operate efficiently." Id. at 778 (quoting the EBA Case, 720 P.2d at 420). The rule makes no exception for "overestimates" or "underestimates" of a utility's costs, or for mistakes in the ratemaking process based on the utility's inability to accurately forecast its revenues and expenses. Id.

[2] It is not only well established in Utah, but also throughout the United States. See, e.g., In re Cent. Vt. Pub. Serv. Corp., 473 A.2d 1155 (Vt. 1984); State ex rel. Util. Consumers Council of Mo., Inc., 585 S. W.2d 41 (en banc) (Mo. 1979).

Except for circumstances where "a utility's conduct undermines the integrity of the ratemaking process,"[3] the only generally recognized "exception" to this rule is when "an unforeseeable event results in an extraordinary increase or decrease in expenses or revenues." MCI, 840 P.2d at 771. An "unforeseeable" event is one which is "inherently unpredictable," and which is not a result of "company mismanagement or imperfect forecasts." Id. The Utah Supreme Court stated:

> [t]he extraordinary *and* unforeseeable nature of the expenses recognized under the exception differentiates them from expenses inaccurately estimated because of a misstep in the ratemaking process, *such as the inability to predict precisely*, or from mismanagement. An increase or decrease in expenses that is unforeseeable at the time of a ratemaking proceeding, cannot, by hypothesis be taken into account in fixing just and reasonable rates."

Id. (Emphasis added). Thus, the "exception" is appropriate only when an event is sufficiently unpredictable that its effect cannot be accounted for in a rate case, *and* only when the effect is so beyond expectation that it would be unjust and inequitable not to adjust rates accordingly. See also Stewart, 885 P.2d at 778 ("Because earnings or expenses caused by an unforeseeable event cannot be reasonably anticipated in the ratemaking process, justice and equity may require appropriate adjustments in future rates to offset extraordinary financial consequences.").

In the General Rate Case, RMP proposed a future test year and projected costs that it claimed were a reasonable approximation of costs it would face during the rate-effective period. RMP's Motion now requests that the Commission allow it to defer accounting of NPC to relieve

[3] Stewart, 885 P.2d at 779; see, e.g., Industrial Customers of Northwest Utilities' Application for Deferred Accounting, Docket No. UM 1465 (Oregon PUC, filed Dec. 31, 2009), in which the Applicants seek deferred accounting relief for PacifiCorp's alleged failure to account for revenue from its contracts with Kennecott Utah Copper, U.S. Magnesium and San Diego Gas and Electric, which Applicants contend should have been included in setting rates.

it of any misstep in its projection of costs.[4] There has been no demonstration (or even allegation) that those costs are, or were during the GRC, "unforeseeable or extraordinary." The requested deferred accounting is simply a mechanism to allow RMP to recover NPC greater than those it projected in the General Rate Case. Unlike a retroactive adjustment to preserve the integrity of the ratemaking process, RMP's Motion is a text-book example of a request for retroactive recovery of costs to relieve the utility of the risk of its own imperfect forecasting.

B. The Proposed Deferred Accounting Order is Not Authorized by Statute.

The Energy Balancing Account ("EBA") statute (found at Utah Code Ann. § 54-7-13.5) authorizes the Commission to allow an electrical corporation to establish an energy balancing account, and provides that "an account maintained in accordance with [the statute] does not constitute impermissible retroactive ratemaking or single-issue ratemaking." Utah Code Ann. §54-7-13.5(4)(c). Thus, to the extent an ECAM would operate to defer costs that are recoverable through an approved energy balancing account, the EBA statute represents an exception to the general rule that rates must be set prospectively. But, the EBA statute provides that an energy balancing account may be authorized only upon the Commission finding that it is: "(i) in the public interest; (ii) for prudently incurred costs; and (iii) implemented at the conclusion of a general rate case." Id. at 54-7-13.5(2)(b). The Commission has not made the required findings. While Order in the General Rate Case has recently issued, the requirement of public interest remains unfulfilled.

RMP's Motion apparently presumes that the Commission's Phase I Order moving this docket into Phase II means that the Commission will approve an ECAM for the NPC that RMP

[4] Deferred accounting in these circumstances would represent a "true-up" to future test-year costs ordered in the GRC, giving RMP yet another way to avoid the consequences of regulatory lag and, consequently, avoid the incentive to minimize expenses.

seeks to defer. See Motion at 4 (seeking deferral "until the Commission approves an ECAM"). But the Phase I Order did not conclude that RMP's proposed ECAM, or any ECAM for that matter, is in the public interest. It stated clearly the contrary: that there are "a number of matters and evidence which were not sufficiently developed" in Phase I upon which a finding of "public interest" depends. RMP's request for deferral is premature; it cannot be authorized under the EBA statue because the Commission has not found that it is in the public interest.

C. The Type of Costs RMP Seeks to Defer are is Not Authorized by the Energy Balancing Account Statute.

Assuming for the sake of argument that the EBA statute could be a foundation for authorizing the deferral of costs later to be recovered through an ECAM, RMP's Motion should still be denied because the kinds of costs that it seeks to defer are not the kind of costs contemplated by the statute. By definition, an energy balancing account is

> for some or all components of the electrical corporation's *incurred actual power costs*, including: (i)(A) fuel; (B) purchased power; and (C) wheeling expenses; and (ii) the sum of the power costs described in Subsection (1)(B)(i) less wholesale revenues.

Utah Code Ann. §54-7-13.5(1)(b)(emphasis added). RMP's Motion asks for deferral of costs that are different from the statutory formulation of "actual power costs." Instead of seeking to defer the difference between wholesale revenues and the sum of fuel, purchased power and wheeling, RMP is seeking to defer the difference between NPC ordered in the General Rate Case and NPC incurred on a monthly basis. The UIEC commend RMP for its decision to account for power costs on a monthly basis (if and when an ECAM is approved). But, on its face, this formulation does not square with the statutory requirement that only actual costs may be recovered through an energy balancing account.

In Phase I of this docket, UAE's witness pointed out that RMP's calculation of NPC does not account for adjustments made to Utah jurisdictional costs by the Multi-State Process Revised Protocol. See Direct Testimony of Kevin C. Higgins, Docket 09-035-15 (filed Nov. 16, 2009) at Ll. 364-386. Even though the Revised Protocol may include a rate mitigation cap for Utah, RMP's NPC calculation is based on system-wide power costs that likely do not reflect "actual power costs" for the Utah jurisdiction. See Surrebuttal Testimony of Kevin Higgins, Docket 09-035-15 (filed Jan. 5, 2010) at pp. 2-5.

In short, there has been no showing that the NPC RMP seeks to defer correspond to the kind of costs that may be recovered through an energy balancing account. The Commission implicitly recognized that deficiency when it invited the exploration of alternative ECAM mechanisms as part of Phase II of this Docket. See Phase I Order at 2. It would be premature, therefore, to grant deferred accounting for RMP's formulation of NPC before the Commission has the opportunity to review the nature of those NPC and to hear the alternative views and proposals of the parties.

D. In the Alternative, if the Commission Approves Deferred Accounting, RMP Should Be Required to Account Monthly for Power Costs and for Customer Usage.

For the reasons stated above, the Commission should deny RMP's Motion for Derferred Accounting. If the Commission is inclined to grant it, however, it should require RMP to account for costs in sufficient detail that they be recovered through a mechanism different than the ECAM that RMP has proposed. RMP should be required to account monthly for all claimed elements of actual power costs, so that the Commission can order, if appropriate, that only a subset of those costs may be recovered through an EBA. RMP should also be required to collect and preserve all available data on customers' monthly usage, including time of use. That is

because any cost adjustment mechanism ultimately authorized by the Commission should operate to assign, on a month-by-month basis, actual power costs to the customers responsible for causing those costs. By correlating RMP's monthly actual power costs with customer usage, the Commission will be able to more accurately assign the costs that it ultimately concludes are recoverable through an EBA.

CONCLUSION

The UIEC commend the Commission for its practice of considering requests for deferred accounting in the context of the prohibition against retroactive ratemaking, and encourages the Commission to continue that practice. In this case, there is nothing that would justify departure from the general rule that rates should be set prospectively. Although it is conceivable that some energy cost adjustment mechanism could qualify for treatment as an EBA (and thus avoid the prohibition against retroactive ratemaking), the Commission has ruled that it cannot presently make the findings required to authorize an energy balancing account for Rocky Mountain Power. RMP's Motion, therefore, should be denied. In the alternative, if the Commission decides to grant the Motion, it should order that RMP keep sufficiently detailed accounts of monthly costs and customer usage so that the Commission has the greatest flexibility in fashioning an appropriate ECAM in Phase II of this docket.

DATED this ___23rd_ day of February, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February 2010, I caused to be e-mailed, a true and correct copy of the foregoing **UIEC'S OPPOSITION TO MOTION FOR A DEFERRED ACCOUNTING ORDER** to:

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