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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	**Docket No. 09-035-15**

UAE'S MEMORANDUM IN OPPOSITION TO ROCKY MOUNTAIN POWER'S MOTION FOR A DEFERRED ACCOUNTING ORDER

The Utah Association of Energy Users ("UAE") submits this Memorandum in response and opposition to the Motion for a Deferred Accounting Order ("Motion") filed by Rocky Mountain Power ("RMP") in this docket on February 9, 2010. RMP's Motion does not allege and makes no attempt to satisfy the legal requirements for issuance of a deferred accounting order in Utah. Accordingly, RMP's Motion should be denied.

RMP's Motion Requests Improper Retroactive Ratemaking

RMP's Motion asks this commission to enter an order now that will permit it to collect from rate payers at a later point in time any amount by which RMP's "actual" net power costs exceed the level of net power costs assumed in current rates. The Motion thus asks the Commission to authorize RMP to engage in retroactive ratemaking.

Ratemaking in Utah must be done on a prospective basis; retroactive ratemaking is generally prohibited. This prohibition is made clear in Utah statutes: *Utah Code* §§ 54-3-3 (utility may make "no change" to "any rate" without first making a Commission filing); 54-3-7 ("no public utility shall … receive a greater … compensation … than the rates … specified in its schedules on file and in effect at the time"); 54-4-4 (rate changes permitted only "after a hearing"); 54-7-12(2) (increase in rates must be preceded by the filing of schedules, notice, a hearing and issuance of a final commission order).

The prohibition against retroactive ratemaking is also made clear in Utah case law: *MCI Telecommunications Corp. v. Public Service Commission*, 840 P.2d 765, 773 (Utah 1992) ("the first prerequisite of a rate order is that it be preceded by a hearing and findings"); *Utah Department of Business Regulation v. Public Service Commission*, 720 P.2d 420, 420, 423, 424 (Utah 1986) ("Following lengthy hearings, utility rates are fixed *prospectively* by the PSC"; "[A]ll rate making must be *prospective* in effect"; "The bar on retroactive rate making has no exception for missteps made in the rate-making process. Corrective action can be taken, but it must be *prospective* only") (emphasis added).

Utah law recognizes a few limited exceptions to the general rule against retroactive ratemaking. For example, exceptions are recognized for "unforeseeable and extraordinary increases or decreases" in expenses or revenues, *MCI Telecommunications Corp. vs. Public Service Commission*, 840 P.2d 765, 772 (Utah 1992), and for utility misconduct. *Id*. at 774-75. Also, interim rate adjustments are permitted by Utah law in certain other circumstances, such as for "unexpected increases in certain specific types of costs," *Utah Department of Business Regulation v. Public Service Commission*, 720 P.2d 420, 423 (Utah 1986), in an "abbreviated rate case," or a "191 balancing account mechanism," *Questar Gas Co. vs. Utah Public Service*

Commission, 34 P.3d 218, 223 (Utah 2001), or through an energy balancing account that has been approved by the Commission pursuant to *Utah Code* §§ 54-7-13.5.

The Commission has also recognized an exception to the general rule against retroactive ratemaking for circumstances that may be known but not measurable, such as an event that may have been foreseeable but whose impact upon costs or revenues of the utility were unforeseeable and extraordinary, or whose actual manifestations vary from their projections in an unforeseeable and extraordinary way. Report and Order, Utah PSC Dockets 06-035-163, 07-035-04, 07-035-14, at 19 (January 3, 2008).

RMP has made no effort whatsoever to claim or demonstrate that its request for retroactive ratemaking through a deferred accounting order satisfies any of the recognized exceptions to the bar against retroactive ratemaking. Rather, RMP merely cites its "original request" in its application in this docket that an ECAM mechanism be established concurrently with the final revenue requirement in Docket 09-035-23. RMP's "original request" hardly qualifies as a recognized exception to the bar against retroactive ratemaking.

RMP was in control of the timing of its request for an ECAM and its general rate case. Moreover, RMP's original ECAM application was deficient; it failed to establish a prima facie case for its proposed ECAM. Rather than dismissing the application, however, the Commission allowed RMP to supplement its filing with testimony and exhibits. RMP cannot now avoid the bar against retroactive ratemaking by relying on its own untimely filing or on its own failure to support its filing in a manner that might have permitted an approved ECAM to take effect at the same time as the Commission's ruling in Docket 09-035-23.

An ECAM cannot lawfully take effect until after the Commission has approved an ECAM as in the public interest based on sufficient evidence following a hearing. The timing of

the ECAM in comparison to the current general rate case is irrelevant. An ECAM can take effect only prospectively after the Commission has determined that it is in the public interest.

Because RMP has neither pleaded nor established any lawful basis for retroactive ratemaking with respect to RMP's net power costs, RMP's motion in this docket should be denied.

RMP's Motion Ignores Revenues and Expenses that might be included in an ECAM

In its Motion, RMP proposes to begin deferring amounts "as described in the Company's application and testimony in this docket." (Motion at ¶ 7). Even if deferral were lawful, the proposed scope of deferral is inadequate. Other parties will almost certainly request that other or different elements of revenue and expense be included if an ECAM is adopted. Thus, a deferral order is impracticable because a complete list of all possible revenue and expense elements that may be included in an ECAM cannot be determined in advance.

RMP's motion is seriously deficient in that it fails to include deferral of revenue from the sale of renewable energy certificates ("RECs"). UAE recently filed an Application with the Commission seeking deferral of revenue received by RMP from the sale of RECs in excess of the REC value utilized in setting current rates. UAE's Application is completely independent of RMP's Motion, and alleges a proper legal basis for an exception to the general rule against retroactive ratemaking. Independent of UAE's Application for a deferred accounting order, which should be approved under all circumstances, UAE will propose, if any type of ECAM is ultimately adopted by this Commission, that REC revenues be included within the scope of the ECAM. Similarly, UAE and other parties are also likely to propose that other revenue and costs items be included in an ECAM. Because it is impossible at this point in time to know which cost

and revenue items will be included in an ECAM, a deferred accounting order that attempts to identify all such items is impracticable.

For the foregoing reasons, UAE respectfully submits that RMP's Motion for a deferred accounting order should be denied.

DATED this 23rd day of February, 2010.

/s/ _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this 23rd day of February, 2010, on the following:

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