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
Telephone: (202) 342-0800
Facsimile: (202) 342-0807

Gerald H. Kinghorn
Jeremy R. Cook
PARSONS KINGHORN HARRIS, P.C.
111 East Broadway, 11th Floor
Salt Lake City, UT 84111
Telephone: (801) 363-4300
Facsimile: (801) 363-4378

Attorneys for Nucor Steel-Utah, A Division of Nucor Corporation

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 **Nucor Post-Hearing Brief**

In response to the Utah Public Service Commission's (Commission's) request for post-hearing briefs, Nucor submits this brief to detail its position on the proposed Energy Cost Adjustment Mechanism (ECAM). Rocky Mountain Power (RMP or the Company) has not met its burden under Utah Code Ann. § 54-7-13.5 to demonstrate that this ECAM is "in the public interest," and Nucor urges the Commission to reject the ECAM as proposed. While Nucor agrees with many of the general criticisms of the ECAM lodged by other parties in this proceeding, this brief highlights a few specific problems created by the ECAM of particular concern.

I. Statement of Facts

On March 16, 2009, the Company filed an application for approval of an ECAM. On August 4, 2009, the Commission issued an Order that divided the docket into two phases: Phase I would address "whether an energy cost adjustment mechanism, or ECAM, and its use in

regulating RMP is in the public interest;" and Phase II would "address the specific items to be included, the terms, operations and implementation of an ECAM for RMP, if an ECAM is found to be in the public interest."

On February 8, 2010, although the Commission reached no conclusion as to whether the ECAM was in the public interest, the Commission determined that it was necessary to progress to Phase II of the proceeding to consider the impact of including or not including a variety of elements in a potential ECAM, before it could gauge whether an ECAM is in the public interest. The Commission received testimony and held hearings on November 1-2, 2010. At the conclusion of these hearings, the Commission requested that parties file post-hearing briefs on all phases of the ECAM proceeding.

II. Argument

A. The ECAM Proposed by Rocky Mountain Power Is Not in the Public Interest and Should Be Rejected by the Commission.

The Company has not satisfied its statutory obligation to demonstrate to the Commission that an energy balancing account is just and reasonable and in the public interest. Utah Code Ann. § 54-7-13.5(2)(b) allows the creation of an energy balancing account only where the Commission finds the account to be "(i) in the public interest; (ii) for prudently-incurred costs; and (iii) implemented at the conclusion of a general rate case." Similarly, the Utah Supreme Court has consistently found that Utah Code Ann. § 54-3-1 places the burden on the utility to show that any alterations to its rates are just and reasonable:

> In the regulation of public utilities by governmental authority, a fundamental principle is: the burden rests heavily upon a utility to prove it is entitled to rate relief and not upon the commission, the commission staff, or any interested party or protestant; to prove the contrary. A utility has the burden of proof to demonstrate its proposed increase in rates and charges is just and reasonable. … A state regulatory commission, whose powers have

> been invoked to fix a reasonable rate, is entitled to know and before it can act advisedly must be informed of all relevant facts.

Utah Dep't of Bus. Regulation, Div. of Pub. Util. v. Pub. Serv. Comm'n, 614 P.2d 1242, 1245-46 (Utah 1980).[1] Whether the ECAM is "just and reasonable" and "in the public interest" are fundamental thresholds that must be demonstrated by Rocky Mountain Power in its filings or in testimony offered by its witnesses. In addition to the dozens of potential problems parties have raised regarding the proposed ECAM, there are two significant shifts in risk responsibility that will jeopardize the Commission's ability to maintain just and reasonable rates for the state of Utah. First, the ECAM would pass all price risks for fuel costs and purchased power transactions to customers, eliminating the Company's natural incentives to keep costs low and replacing this incentive with an after-the-fact audit process that has little likelihood of providing similar results for ratepayers. Second, the shift in price risk responsibility would shift price risk away from a utility that directly purchases and manages the utilization of the fuel and purchased power to customers who would be powerless to manage the risk. The Company has not shown in any of its testimony or exhibits that such a shift in risk responsibility of this magnitude would be in the public interest as required by statute. [2]

[1] See also Committee of Consumer Services v. Public Service Com'n of Utah, 75 P.3d 481, 486 (Utah 2003) ("The utility must therefore put forth substantial evidence to establish that its proposed increase is ' just and reasonable.' ... The Commission, in turn, bears responsibility for holding the utility to its burden.")

[2] See Supplemental Direct Testimony of Karl McDermott at 15 (Aug. 17, 2009). Mr. McDermott argues that consumers would be "better off" under the ECAM because the Company may obtain capital "on more favorable terms," customers will receive better price signals, and overall consumption will decrease. None of these contentions are supported by the Company's testimony or exhibits in this proceeding.

1. An After-the-Fact, Audit-Based Prudence Review of Thousands of Transactions Cannot Replicate the Company's Current Incentive to Maximize Efficiency for Shareholders.

The Utah Supreme Court has found that a utility's "monopoly position" imposes a duty on the utility "to operate in such manner as to give to the customers the most favorable rate reasonably possible." Utah Dep't of Admin. Servs. v. Pub. Serv. Comm'n, 658 P.2d 601, 618 (Utah 1983). This duty is an outgrowth of the utility's legal responsibility under Utah Code Ann. § 54-3-1 to render services that are "in all respects adequate, efficient, just and reasonable." Utah Dep't of Admin. Servs., 658 P.2d at 618. The lack of a pass-through mechanism for fuel and purchased power costs (which are among RMP's largest expenses) means that in order to provide favorable rates while simultaneously operating efficiently and profitably RMP has to aggressively attempt to control these costs. The Company controls its fuel and purchased power costs through its purchasing and dispatch practices and the efficient operation of its facilities. Failing to control these costs means lower profits for shareholders, and ultimately less favorable rates.

The current incentive for management to operate efficiently and control costs would be significantly reduced or eliminated if the Company's bottom line were no longer directly tied to its ability to control fuel and purchased power costs. Audit-based prudence reviews by third parties – no matter how complete or diligent – are not comparable to the company's internal profit-maximizing incentive. The volume of transactions involved is simply staggering. As UIEC Witness Maurice Brubaker highlighted in his Surrebuttal Testimony, the Company engaged in 25,000 electrical financial and physical purchase and sales transactions and nearly 700 gas physical and financial transactions between January 1 and September 23, 2010, and the Company expects to complete approximately 350,000 third-party wheeling reservations in

2010.[3] When a company's overall success and individual job performance are at stake, every transaction will receive some level of scrutiny. An audit can offer no such guarantees. Company Witness McDermott acknowledged at the November hearings that it is not possible for external auditors to monitor or analyze the thousands of yearly transactions. According to Witness McDermott, because of the high number of individual transactions, external auditors typically rely on "statistical samples" and "judgment calls." Tr. at 282.

The high number of individual transactions, coupled with the practical limitations of outside monitoring, would make prudence challenges difficult, if not impossible. Even if auditors were to discover one or more imprudent transactions, it is not clear what number of transactions would create a material case for "imprudence" under Utah Code Ann. 54-7-13.5(2)(b). Nor is it clear how such imprudence would be translated into a disallowance. For example, if imprudence is found to have occurred in 2% of the sample transactions, what costs are ultimately disallowed?

The costs of discovering and prosecuting single transactions, or even multiple transactions, for imprudence would be high relative to the ultimate benefit for ratepayers. Currently, the Company may quickly identify inefficiencies and establish "course corrections" on a real-time basis; however, under the proposed ECAM, auditors would be forced to depend on the quality of reporting, statistical samples, and judgment calls to monitor the Company's inefficiencies, then bring retroactive challenges well after the transactions have been executed. The Company cited a handful of examples of "Investigations and Decisions Regarding

[3] Surrebuttal Testimony and Exhibits of Maurice Brubaker, at 10 (Oct. 13, 2010).

Prudence" from the 2004-05 timeframe[4] as evidence that prudence reviews "are being effective in identifying and disallowing certain costs," Tr. at 270. However, the Company has not explained what threshold must be met by auditors to bring challenges, nor has it demonstrated that the risk of a potential prudence audit is an effective replacement for the Company's real-time incentive to operate efficiently.

Even if audit-based prudence reviews were deemed to be an adequate means of monitoring and evaluating the tens of thousands of transactions, such reviews would require substantial resources and an ongoing commitment from the Utah Legislature to fund the Division of Public Utilities or another external auditor to conduct the audit and report the findings. The Company has not been able to articulate the magnitude of additional staffing or monitoring that would likely accompany the shift to outside auditing by the Division of Public Utilities. At the November hearings, Commissioner Allen questioned Company Witness McDermott about the scope and size of actual prudence reviews in other states, and asked whether audits had "blown up" on any states in recent history. Tr. at 282. Mr. McDermott did not give specific numbers, but noted that in similar situations 20 years ago in Illinois, audits required "quite a few staffers." Tr. at 283. Although a detailed assessment of the staffing required to perform audit-based prudence reviews has not been presented in this case, it is clear that the Division or another entity would be required to take on additional significant responsibilities that they do not currently have. It is unlikely that the representatives of ratepayer classes that typically intervene in general rate cases could afford to be involved on a consistent basis in monthly audits or prudence challenges brought as a result of these audits. Indeed, implementation of an ECAM will likely

[4] Rebuttal Testimony of Karl A. McDermott at 32 (December 10, 2009).

result in Utah ratepayers being significantly less able to meaningfully participate in the evaluation of power costs than they are presently.

2. The Proposed ECAM Shifts Net Power Cost Risk to Customers Who Are Less Able to Manage Exposure to Risks.

Wherever possible, risks should be allocated to those parties most capable of managing those risks and at the lowest cost. The price risks associated with the cost of fuel and purchased power are currently managed entirely by the Company through the negotiation of short- and long-term fuel and purchased power contracts, unit operational decisions, unit efficiency efforts, management of maintenance outages, utilization of demand response resources, and a variety of other decisions that only the Company is in a position to make. The proposed ECAM directly passes through all net power cost risks to customers, who are unable to manage these risks. Even if customers had access to actionable and sufficiently granular price signals (which for the most part they do not), such signals would provide only a limited ability to manage price risk. Customers who currently limit exposure to price risks through efficiency or peak load curtailment would not have any more ability than they currently have to affect the Company's hourly decisions that impact the price of power. Reducing the amount of power consumed appears to be the only option for customers, and even that option is tempered by the collection mechanism proposed by the Company, which is blind to seasonal cost causation by customer class (see Section B below). Under the Company's proposed ECAM methodology, fuel and purchased power costs would be considered in isolation of many other factors, including load growth, and would be applied at least a year after-the-fact without regard to which customers caused the incremental energy costs. Although it is clear that RMP would benefit from limiting

their exposure to higher marginal costs, it has not been proven that the public interest would be served by customers taking on 100% of the fuel and purchased power price risks.

The consideration of fuel and purchased power costs outside of a general rate case also ignores the negotiated level of risk compensation that the Company currently receives through its authorized return on equity (ROE) for fuel and purchased power price risk, weather-related risks, or outage-related risks. While it is obvious that the ECAM would shift a tremendous amount of risk directly to customers, the Company has not explained in testimony exactly how that risk reduction may be reflected in its authorized ROE, if at all. In fact, when pressed about a potential reduction in ROE during the November hearings, Company Witness Hadaway argued that "the effect of ECAM risk reduction is already taken into account in our ROE estimation process," and that reducing the ROE would "double count any risk effect that might result from the ECAM." Tr. at 153-54. It is hard to imagine how this could be the case, given that the Company does not currently have an ECAM. But regardless of the process the Company uses to formulate its position on an appropriate ROE level, the ECAM removes a significant amount of price risk from the Company and reassigns it to Utah customers. It is reasonable to assume that the Company's risk compensation through its ROE would decrease if an ECAM is adopted. Because the Company has not provided any evidence that the shift in risk allocation would benefit customers, including any changes to the current ROE, the proposed ECAM has not met the fundamental "public interest" threshold.

B. The Proposed ECAM Allocates Net Power Costs in a Manner that Does Not Reflect Actual Usage and Unfairly Penalizes Users of Off-Peak Energy.

Utah Code Ann. §54-7-13.5(2)(g-h) outlines the standard for tracking costs and revenues in an energy balancing account. Revenues collected in excess of "prudently incurred actual

costs" shall be refunded as a surcredit (with carrying charge). Where "prudently incurred actual costs" exceed revenues, these costs shall be recovered as a bill surcharge (with carrying charge). Both scenarios clearly require careful tracking of "prudently incurred *actual* costs." The Company's proposed ECAM, by contrast, does not have a collection mechanism that accounts for the wide variance in monthly or seasonal energy cost margins. As proposed, the ECAM would defer recovery of any monthly deviation from established projected net power cost baseline for each month, combine all amounts into a 12-month average, then would recover any accumulated deviations over the following year in a rider mechanism (proposed Schedule 94) on an equal cents per kilowatt-hour basis. [5] Although the Company's proposed recovery mechanism appears to permit separate on-peak and off-peak rates for time-of-use schedules (it is unclear if such rates will be utilized), it does not recognize the seasonal differences in energy costs and the associated cost causation differences, and simply assigns the responsibility to all customers on a straight energy usage basis.

This is a significant omission, particularly considering that customer classes do not equally cause the higher energy usage during summer and winter months when marginal generation and purchased power costs are high. Industrial and manufacturing classes that maintain more consistent load factors regardless of season do not drive summer and winter peaks and the associated higher energy costs. The relative share of the total system energy usage by these customers is typically lower in the summer and winter months, when energy costs are greater, and higher in the shoulder months when energy costs are lower.[6] The Company's

---

[5] See Direct Testimony of William R. Griffith at 3 (March 16, 2009).

[6] See Exhibit Accompanying Rebuttal Testimony of C. Craig Paice, Cost of Service – Summary by Function at 16 (Nov. 2009).

proposed Schedule 94 would collect any fuel and purchased power costs in excess of the baseline from all customers without regard to cost causation. To meet the statute's requirement that an energy balancing account reflect "prudently incurred actual costs," the ECAM must assign costs in a way that corresponds with *actual* usage and cost causation.

C. The Combination of the Company's Ability to Recover Capital Costs Through Major Plant Additions and the Proposed ECAM Would Reduce the Effectiveness of General Rate Cases and the Ability of the Public Service Commission to Protect Customers.

In the short time since the Utah Legislature established a mechanism for alternative cost recovery for major plant additions, the Company has brought two Major Plant Addition (MPA) applications.[7] If RMP is permitted to recover the full amount of these two requests, the resulting rate increase will be almost as large as the last two general rate cases combined.[8] This substantial increase will have been accomplished without the comprehensive review of the Company's expenses, operations and rates historically provided by a general rate case. The Company has signaled its intent to actively pursue expansion of its transmission capabilities as part of the $6 billion Energy Gateway project,[9] which could mean additional major plant addition dockets in the coming years.

The proposed ECAM would allow the approval and recovery of net power costs in isolation as well, limiting the Commission's ability to balance energy costs with ROE, load

---

[7] See Utah PSC Docket Nos. 10-035-13 and 10-035-89.

[8] The Company has proposed a total increase in revenue requirement of $69.8 million for MPA I and MPA II to be collected starting January 1, 2011. The combined revenue requirement increases for the two previous rate cases is $77.4 million, which includes the $32.4 million increase in 09-035-23 and the $45 million increase in 08-035-38.

[9] See, e.g., http://www.pacificpower.net/ed/tp/eg.html.

growth, and other elements typically resolved in a general rate case. The potential for a significant rate increase associated solely with net power costs is high. At the November hearings, Company Witness Griffith noted that the deferred account balance for net power costs not in rates had already reached $38.8 million for a 7-month period. Tr. at 171. Taking up net power costs in isolation almost certainly creates an immediate increase in customer rates. The creation of an ECAM presents another separate, independent means of single-item ratemaking that would be imposed without adequate consideration of all factors. It is an unnecessary limitation on the Commission's ability to counterbalance cost increases and decreases in all relevant areas, and it would challenge the Commission's ability to maintain the public interest through the setting of just and reasonable rates.

III. Conclusion

The Company has not met its burden to demonstrate that an ECAM is in the public interest. In fact, the Company has not been able to articulate any direct benefit to customers from the creation of the proposed ECAM. The fundamental shift in risk-allocation, the potential for subsidization of energy costs, and the addition of another single-item ratemaking process create a multitude of new problems with no apparent benefit for Utah ratepayers. The proposed ECAM leaves too many questions unanswered and represents too serious a threat to the well-being of energy consumers in Utah. It should be rejected by the Commission.

Respectfully Submitted,

____

Gerald H. Kinghorn
Jeremy R. Cook

Peter J. Mattheis
Eric J. Lacey

Attorneys for Nucor Steel-Utah, A Division of Nucor Corporation

December 16, 2010.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this 16th day of December, 2010, to the following:

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	Gregory B. Monson Stoel Rives LLP 201 South Main Street, Suite Salt Lake City, UT 84111 gbmonson@stoel.com	Mark Moench Yvonne R. Hogle 110 Daniel Solander ROCKY MOUNTAIN POWER 201 South Main Street, Suite 2300 Salt Lake City, UT 84111 Mark.moench@pacificorp.com vvonne.hogle@pacificorp.com Daniel.solander@pacifIcorp.co mdatarequest@pacificorp.com
Sarah Wright Kevin Emerson Brandy Smith Utah Clean Energy 1014 2nd Avenue Salt Lake City, UT 84103 sarah@utahcleanenergy.org kevin@utahcleanenergy.org brandy@utahcleanenergy.org	Paul Proctor Assistant Attorney General 500 Heber Wells Building 160 East 300 South Salt Lake City, UT 84111 pproctor@utah. gov	Holly Rachel Smith Russell W. Ray, PLLC 6212-A Old Franconia Rd. Alexandria, VA 22310 holly@raysmithlaw.com
Gary Dodge Hatch James & Dodge 10 West Broadway, Suite 400 Salt Lake City, UT 84101 gdodgeahjdlaw.com	Arthur F. Sandack 8 East Broadway, Ste 411 Salt Lake City, Utah 84111 asandack@msn.com	Steven S. Michel Nancy Kelly Western Resource Advocates 227 East Palace Ave., Suite M Santa Fe, NM 87501 smichel@westernresources.org nkelly@westernresources.org
Steve W. Chriss Wal-Mart Stores, Inc. 2001 SE 10th Street Bentonville, AR 72716-0550 (479)204-1594 Stephen.chriss@wal-mart.com	Ryan L. Kelly Kelly & Bramwell, P.C. 11576 South State St., Bldg. 203 Draper, UT 84020 ryan@kellybramwell.com	Peter J. Mattheis Eric J. Lacey Brickfield, Bruchette, Ritts & Stone, P.C. 1025 Thomas Jefferson St., N.W. 800 West Tower Washington, D.C. 2007 Dim@bbrslaw.com

		elacey@bbrslaw.com

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

/s/_Kim Waters__ ____________________