F. ROBERT REEDER (2710)
WILLIAM J. EVANS (5276)
VICKI BALDWIN (8532)
PARSONS BEHLE & LATIMER
Attorneys for UIEC, an Intervention Group
One Utah Center
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, UT 84145-0898
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

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 ROCKY MOUNTAIN POWER'S PETITION FOR CLARIFICATION AND RECONSIDERATION OR REHEARING** Docket No. 09-035-15

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Pursuant to Rule R746-100-11.F of the Utah Administrative Code, the Utah Industrial Energy Consumers ("UIEC"), an intervention group, submits this Opposition to Rocky Mountain Power's Petition for Clarification and Reconsideration or Rehearing.

INTRODUCTION

UIEC commends the Utah Public Service Commission ("Commission") on the well-reasoned decision issued in this matter on March 3, 2011, granting Rocky Mountain Power ("RMP" or the "Company") an energy balancing account ("EBA") that meets the statutory requirements and public interest standard set forth by the Utah Legislature in Utah Code Annotated 54-7-13.5. The issues were extremely complex and contentious. Corrected Report and Order, Docket No. 09-035-15 (March 3, 2011) ("Order").

The most critical aspects of the EBA statute, as recognized by the Commission in its Order, are the limitations on what can be included in an EBA and the fact that any EBA authorized must be "in the public interest." Utah Code Ann. § 54-7-13.5(2)(b)(i); *see also id.* § 54-7-13.5(1)(b). Granting the Company's Petition would violate both of those critical aspects.

The Company's suggestions regarding industry standards of accounting and practices in other states are inapposite. The Utah legislature determined the specifics of what can be considered in a Utah EBA and to what risks Utah ratepayers should be subject. What is permitted under the statutes of other states or through the micromanaging performed by other commissions is irrelevant.

Finally, the Company's threat of dire unintended consequences is nothing but a red herring. A close look at the Company's logic exposes the examples for what they are—a fallacy of irrelevant conclusion.

As to the Company's Petition for Clarification and Reconsideration or Rehearing ("Petition"), the rules and regulations of the Commission provide only for petitions for "review or rehearing." Utah Admin. Code R746-100-11.F. While the Utah Administrative Procedures Act ("APA") provides for petitions for reconsideration, the time limit for such petitions is twenty (20) days. Utah Code Ann. § 63G-4-302(1)(a). The Company did not meet the filing deadline for a petition for reconsideration under the Utah APA. Thus, its Petition cannot be given the same treatment as a petition for reconsideration. Instead, the Company's Petition must be considered only as a petition for review or rehearing, and the Company has not met its burden for a rehearing.

Though the Company attempts to impermissibly supplement the record throughout its brief,[1] nothing presented therein is evidence that could not have been introduced at the hearing. Nor has the Company provided any support that it has new evidence that could not have been introduced at the hearing. Thus, its Petition should be denied on this basis alone.

If the Commission were to grant the Company's Petition, it is very likely that the EBA that would result would fail to be in the public interest, and would thus be a violation of Utah law. UIEC encourages the Commission to hold to the decision it made and to deny RMP's Petition as it applies to matters for rehearing. *See* RMP Br. at 2. UIEC takes no position with respect to the Company's requests for clarification

[1] The Company's Petition is replete with supposed evidence that is not a part of the record in this case. *See, e.g.*, footnote 11 citing testimony of an Alan J. Walker from a Utah Commission proceeding of April 15, 2005; footnote 13 citing a Standard & Poor's report from January 28, 2011; footnotes 14, 15, and 16 citing Florida commission decisions on hedging; footnote 17 citing a North Carolina commission decision on hedging; footnote 18 and 19 citing Illinois commission decisions on hedging; examples set forth on pages 13-18; and reasons for using fixed for floating price financial swaps at page 15. The Commission cannot consider this material. The Commission's decision must be "based exclusively on the evidence of record in the adjudicative proceedings or on facts officially noted." Utah Code Ann. § 63G-4-208(1)(a).

ARGUMENT

I. THE COMMISSION WAS CORRECT IN EXCLUDING FINANCIAL SWAPS FROM THE EBA IT FOUND TO BE IN THE PUBLIC INTEREST.

A. The Statutory Definition of an EBA Excludes Financial Hedging Instruments.

The EBA statute provides in part:

> (b) "Energy balancing account" means an electrical corporation account 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).

Under the applicable rules of statutory construction, we first look "to the statute's plain language to determine its meaning." *Heber Light & Power v. Public Serv. Comm'n*, 231 P.3d 1203, 1208 (Utah 2010) (internal citations omitted). "We presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning." *C.T. v. Johnson*, 1999 UT 35, ¶ 9, 977 P.2d 479 (citation and internal quotations omitted). Furthermore, "'statutory construction presumes that the expression of one should be interpreted as the exclusion of another[,]' . . . ***we should give effect to any 'omission in the [statute's] language by presuming that the omission is purposefu1***.'" *State v. Jacobs*, 2006 UT App 356, ¶ 7, 144 P.3d 226 (quoting *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 30, 104 P.3d 1208) (internal quotations omitted) (emphasis added). "***Where a general statutory term is followed by***

the word 'include,' the primary import of words following that word indicates 'restricted meaning' to the general term, which came before it." *Edmondson v. Pearce*, 91 P.3d 605, 640 (Okla. 2004) (emphasis added). In addition,

> The doctrine of *ejusdem generis* applies in instances where an inexhaustive enumeration of particular or specific terms is followed by a general term or terms that suggest a class. The doctrine declares that in order to give meaning to the general term, the general term is understood as restricted to include ***things of the same kind, class, character, or nature*** as those specifically enumerated, unless there is something to show a contrary intent.

Utah ex rel. A.T. v. A.T., 34 P.3d 228, 232 (Utah 2001) (emphasis added).

In this case, the Company has cited many of the appropriate rules of statutory construction, but then completely ignored them in its arguments and analyses. The statute is unambiguous in stating that an EBA must be for "incurred ***actual power costs***." Utah Code Ann. § 13.5(1)(b) (emphasis added). As explained above, the term "including" that follows "actual power costs" indicates that the kind, class, character, or nature of the components that the Legislature meant to include in an EBA are only the costs related to actual physical power—fuel and purchased power—and for the wheeling expenses related to delivery of actual physical power. Any other components that might be included must be restricted to the same type, kind, class, character, or nature as these. *See Utah ex rel. A.T.*, 34 P.3d at 232.

The Company suggests that any associated items related to actual power costs should be included. RMP Br. at 6. If that were the case, then power plant related labor and health care costs would be included. The statute clearly sets the limitation to actual power costs.

The Company's natural gas purchasing strategy is to fix the total cost of its natural gas supply for some substantial period of time by using financial products ("derivatives") and then to

buy physical products periodically at index prices. TR (Bird) 240:7-10.[2] The Company's use of derivatives is limited exclusively to fixed-for-floating swap transactions ("swaps").[3]

As noted in the Company's brief, "swaps are simply a financial vehicle." RMP Br. at 6. Swaps are ***not*** of the same kind, class, character, or nature as actual physical power. Even though RMP may record the settlement cost of derivatives in a fuel or purchased power account, it does not acquire any fuel or power for those costs, or even any security of supply for fuel or power. TR (Duvall) 51:9-19; 52:9-17 (Aug. 17, 2010). Its use of these derivatives does not ensure that it obtains its fuel and power supply at the least cost, but instead, allegedly only "reduces volatility" in the price of fuel and power. *Id.* at 53:21-24, 58:18-23. The derivative the Company uses is simply a bet on the direction of a price. And, as the data show,[4] the Company has been betting wrong over the past several years.[5] Confidential DPU Ex. 2.1SR (Wheelwright, Phase I, Part I) (Aug. 10, 2010).

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[2] References to the Transcript of Hearing are cited as TR (Witness) [page #]:[line #]. Unless otherwise noted, citations to the hearing transcript refer to the Phase II, Part 2 hearing, that took place on Nov. 1-2, 2010.

[3] "A fixed-for-floating financial swap transaction is a transaction in which one party pays a fixed price in exchange for a floating index price. With respect to natural gas, the floating index price could refer to beginning of the month index prices, or daily index prices. With respect to power, the floating index price normally refers to daily index prices." Duvall Reb. (Phase I) 459-462, n.2 (July 20, 2010).

[4] UIEC intends to show in the current general rate case that the Company's betting losses, especially for natural gas, have continued to increase significantly despite falling prices.

[5] The abuse in the market for swaps and other derivatives has recently prompted federal legislation that is likely to subject utility hedging practices using swaps to additional regulation including possible margin obligations. In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Pub.L. 111-203, H.R. 4173 (2010). Dodd-Frank implements a profound increase in regulation of the financial services industry, giving, among other things, the Securities Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC") authority to regulate over-the-counter derivatives. It requires central clearing and exchange trading for derivatives that can be cleared and provides a role for both regulators and clearing houses to determine which contracts should be cleared. Data collection and publication through clearing houses or swap repositories will be required as well as capital and margin requirements on swap dealers and major swap participants.
http://banking.senate.gov/public/_files/070110_Dodd_Frank_Wall_Street_Reform_comprehensive_summary_Final.pdf. It is expected to produce market dislocations, increase the cost of certain swap transactions, and adversely

The EBA statute permits the cost of the physical contracts for gas or purchased power to be included in an EBA because those contracts are for the actual delivery of fuel and power. While the effect of the EBA is to shift certain risks from the Company to ratepayers, the statute allows that shift only with respect to the delivery of physical products (fuel and purchased power). The risks surrounding financial products remain a shareholder risk, as they should.

RMP's arguments regarding the Uniform System of Accounts ignore the laws of statutory construction. The Utah Legislature made no mention of the Uniform System of Accounts in defining what could be included in the EBA. "[W]e should give effect to any 'omission in the [statute's] language by presuming that the omission is purposefu1.'" *Jacobs*, 2006 UT App 356 ¶ 7. If the Utah Legislature meant to include all costs that are found in the Uniform System of Accounts for fuel and purchased power it could have simply stated so in the statute—it did not.

Furthermore, the Company's comparison to the definition of a gas balancing account only supports the fact that financial hedging was not meant to be included in an EBA. Contrary to the Company's proposition, the fact that an EBA is defined differently than a gas balancing account indicates that they should not contain the same types of costs. If the costs to be included in an EBA were meant to be the same as those of a gas balancing account, there would be no purpose in defining the two separately and differently.

Absurdly, the Company cites as support the fact that there is no legislative history indicating that financial hedges were meant to be excluded. RMP Br. at 7-8. Well, it is equally true that there is no legislative history indicating that financial hedges were meant to be included. Even though "it is elementary that we do not seek guidance from legislative history and relevant

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affect certain types of investment funds and structured finance transactions. http://blogs.law.harvard.edu/corpgov/2010/07/21/dodd-frank-act-becomes-law/.

policy considerations when the statute is clear and unambiguous," *C.T. v. Johnson*, 977 P.2d at 482, there is a simple reason why there is no legislative history supporting the Company's position. The statute was a consensus statute brought to the legislature by the interested parties proposing it with prior agreement on the wording. Thus, there was no debate over meaning and what should or should not be included. As a contributor to the language of the statute, UIEC can unequivocally state that the words "incurred actual power costs" were not accidental.

The Company attempts to rely on information not contained in the record in this matter by citing and including a Standard & Poor's report. However, the Company should have paid closer attention to the substance of that report. As noted by the analysts at Standard & Poor's, "Sample companies that have mostly regulated operations [which includes RMP] have limited derivative use." Standard & Poor's, *RatingsDirect on the Global Credit Portal*, at 6 (Jan. 28, 2011) ("Standard & Poor's Report"). This would suggest that RMP is anomalous in its practices, not the standard. Thus, the Standard & Poor's Report is not only inadmissible because it is outside the record in this case, it does not stand for the proposition RMP suggests.

Finally, the Company is schizophrenic in its approach to statutory interpretation. "[I]t is elementary that we do not seek guidance from legislative history and relevant policy considerations when the statute is clear and unambiguous," as it is in this case. *C.T. v. Johnson*, 977 P.2d at 482. On the one hand the Company argues the statute is clear and unambiguous, but then on the other it attempts to "provide[] persuasive policy analysis" through the introduction of additional inadmissible evidence of practices in other states. This should be disregarded.

Moreover, such a suggestion ignores the specific language of the specific statute in Utah that enabled authorization of any EBA and how that may compare to the specific enabling

statutes in the cited states. For example, the enabling statute in North Carolina permits inclusion of "fuel-related costs." N.C. Gen. Stat. § 62-133.2(a). Contrary to the Company's assertion otherwise, the plain language of the statutory definition of EBA is not this broad and prohibits inclusion of the Company's purely financial hedging costs.

Furthermore, the Company's suggestion also ignores the fact that in many other states, the public service commissions play a very hands-on role in the risk management plans of the utilities, requiring an annual filing for up-front approval of the regulated utilities' annual risk management plans. *See, e.g., In re Fuel & Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor*, 2011 WL 729238 (Feb. 25, 2011) (listing as issues to be determined whether the commission should approve the annual risk management plans of five separate electric utilities). As can be seen by this example, in some cases, especially where a utility operates in only one state, the state commission micromanages the utility's hedging strategy so that it is subject to regular regulatory and intervenor scrutiny so that costs may be comfortably passed through to ratepayers. However, RMP operates in several jurisdictions and this Commission has indicated that it has no desire to micromanage the Company's business.

The statute is clear and the Commission's decision regarding swaps adheres to the statutory language. RMP's Petition should be denied.

B. Including Financial Swaps or Other Financial Instruments in the EBA Would Not Meet the Public Interest Standard.

The EBA statute provides that "[a]n energy balancing account shall become effective upon a commission finding that the energy balancing account is: (i) ***in the public interest***; (ii) for prudently-incurred costs; and (iii) implemented at the conclusion of a general rate case." Utah Code Ann. § 54-7-13.5 (2) (emphasis added).

In Phase I of this docket the Commission found that some kind of energy cost adjustment mechanism ***could*** be in the public interest. Report & Order at 1 (Feb. 8, 2010). The Commission continued to Phase II for the purpose of considering whether the cost adjustment mechanism proposed by RMP met the requirements of the EBA statute. *Id.* at 2. RMP's proposal to include financial swaps does not meet the public interest standard. In fact, it is likely to harm the public interest.

The public interest standard requires the Commission to ensure that "the ***applicants show*** that the transaction provides a ***net positive benefit*** to the public." *In the Matter of the Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp. and US West Communications, Inc.* ("*Qwest Merger*"), Report and Order at 14, Docket No. 99-049-41, 2000 Utah PUC LEXIS 228, (Utah PSC, June 9, 2000) (emphasis added). The Commission "is to consider [all positive benefits and negative impacts], giving each its proper weight, and determine whether on balance the [proposal] is beneficial or detrimental to the public." *In the Matter of the Application of PacifiCorp and Scottish Power plc for an Order Approving the Issuance of PacifiCorp Common Stock*, Docket No. 98-2035-04, Report and Order at 26-27 (Utah PSC Nov. 23, 1999).

Therefore, to include the Company's financial hedging instruments in the EBA, the Commission must consider its positive and negative impacts on the public. The Commission may find it to be in the public interest only if it concludes there is a "definable net benefit" to the public. *See Qwest Merger*, Docket No. 99-049-41, 2000 WL 873341 (June 2000) (citing Utah Code Ann. §§ 54-4-28, 54-4-29 and 54-4-30). Furthermore, the EBA statute requires that RMP bear the burden of proof as to whether inclusion of financial hedging costs in the EBA provides a

definable net benefit and it has failed to do so in this instance. Utah Code Ann. § 54-7-13.5(2)(d); *see also Utah Dep't of Bus. Regulation v. Pub. Comm'n*, 614 P.2d 1242 (Utah 1980).

The record is closed. RMP did not provide any evidence of a definable net benefit to ratepayers for including the ramifications from its use of swaps in an EBA during the hearing and cannot be permitted to do so now. As explained below in Section D the Company's claim that exclusion of swaps will have adverse and unintended consequences is nothing more than an *ignoratio elenchi* meant to scare and obfuscate the truth. Instead, including them would mean that the EBA no longer meets the public interest standard.

C. Including Financial Swaps or Other Financial Instruments in the EBA Would Not Result in Just and Reasonable Rates.

The Commission must also always consider whether the Company's proposal to include financial derivatives in the EBA would result in just and reasonable rates. Before any rates or charges for any commodity or service furnished by a public utility can be approved, the Commission must find that they are "just and reasonable." Utah Code Ann. §§ 54-3-1; 54-4-4. The Commission has stated:

> Two polar constitutional principles fix the parameters for rate regulation for natural monopolies: the protection of utility investors from confiscatory rates and, ***of equal importance, the protection of ratepayers from exploitive rates***. . . . To avoid confiscatory rates on the one hand and exploitive rates on the other, ***the Commission must determine what a just and reasonable rate is*** under Utah Code Ann. § 54-4-4 by applying a standard that is based on a utility's cost of service. . . . In both rate-of-return and rate-base cases, the issue is what economic factors the Commission may consider in determining what rates should be charged ratepayers for the benefit of shareholders. . . . Just and reasonable rates are necessarily based on cost of service and cost of capital, whatever the particular formula used.

Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 767, 770-71 (Utah 1994) (internal citations omitted) (emphasis added); *see also U.S. Magnesium, LLC v. Utah Pub. Serv. Comm'n*, 110 P.3d 165, 168 (Utah Ct. App. 2005).

For the last several years, the Company has used ratepayers as its safety net for the gambling losses resulting from its hedging practices. This would continue if such costs were allowed to flow through to ratepayers and rates would not be just and reasonable. Instead, the incentive structure needs to be changed so that RMP is taking the risk with shareholder money. That would be more likely to result in RMP only taking risks on that in which it is fairly confident. It is also more likely that RMP would finally come close to earning its authorized rate of return.

D. RMP Mischaracterizes the Evidence Regarding Inclusion of Hedging Instruments.

RMP's statement that "all witnesses who addressed the issue ultimately recommended that all components of NPC should be included in the EBA" is a mischaracterization of the evidence. RMP Br. at 11. Several parties had serious concerns regarding the Company's hedging strategy and addressed this by encouraging the Commission to review the Company's hedging strategy and issue guidelines before authorizing an EBA. *See, e.g.*, Brubaker (Phase II) SR 11:18-21 (Oct. 13, 2010); Gimble (Phase II) D. 9:262-10:282 (Aug. 4, 2010). These concerns and recommendations cannot be ignored and boiled down to the simplistic statement that all witnesses "recommended that all components of NPC should be included in the EBA."

Furthermore, the Company should not be surprised at the concerns over its hedging practices. Parties have been raising these concerns at least since the 2007 general rate case. *See e.g.*, Report & Order on Rev. Reqmt., Cost of Serv. and Design of Rates at 114, Docket No. 09-

035-23 (Feb. 18, 2010); Report & Order on Rev. Reqmt. at 11, Docket No. 08-035-38 (April 21, 2009); Report & Order on Rev. Reqmt. at 50-51, Docket No. 07-035-93 (Aug. 11, 2008).

In fact, no one, not even the Company recommended that all components of net power costs ("NPC") should be included in the EBA, because in Utah, RMP includes all kinds of costs and expenses in its NPC, including power plant wages and healthcare benefits. Thus, RMP's statement misrepresents the evidence.

Also, following Mr. Peterson's logic, allowing RMP to include swaps in the EBA would incent RMP to rely solely on swaps for hedging, and hedging with those swaps at nearly 100%. In contrast, RMP should be incented to hedge using the most prudent tools and mix of tools available. The evidence does not support RMP's position.

E. The Company's Claim that Swaps Are Necessary to Properly Hedge Price Risks is Blatantly False.

The Company argues that fixed for floating price financial swaps are necessary as though swaps are the only tool available to a utility to manage energy price risks and inferring that the physical market is completely corrupted. Not only are swaps NOT the only tool available to manage price risk, but using swaps the way the Company does is NOT the only way to use them when they are used. *See, e.g.*, Andrew S. Hyman, et al., *Energy Risk Management: a Primer for the Utility Industry*, chap. 7, Publ. Utils. Reports, Inc. (2006).

As UIEC will demonstrate in the current general rate case of Docket No. 10-035-124, the Company completely disregards the abundance of available tools such as exchange traded futures and options, including puts, calls, caps, and collars, as well as the various combinations in which they can be used to effectively reduce price risk. Also, rather than diversifying its risks through a combination of, for example, swaps, options, and market purchases, the Company is

nearly 100% hedged with swaps. This is contrary to prudent investment management. The Commission correctly ruled that these transactions must be reviewed and approved in each general rate case.

F. The Company's Claim of Adverse and Unintended Consequences Is an *Ignoratio Elenchi* Fallacy Meant to Scare and Obfuscate the Truth.

Finally, RMP claims that the exclusion of swaps from the EBA will have adverse and unintended consequences. This argument, while facially appealing, is merely *ignoratio elenchi* (a fallacy of irrelevant conclusion). RMP argues that failing to include swaps in the EBA could cause ratepayers or RMP to lose several million dollars if the predicted future price of natural gas *(i.e.*, the swap price) does not match the actual future price of natural gas (*i.e.*, the spot price). To illustrate this possibility, RMP offers two hypotheticals—the first where customers lose $140 million, and a second where RMP loses $140 million—allegedly and solely because swaps were not included in the EBA. In both hypotheticals, the assumed swap expenses move in the opposite direction of spot natural gas prices. In the first hypothetical—where customers lose $140 million—spot natural gas prices increase while the swap expenses decline by the same amount. In the second hypothetical—where RMP loses $140 million—spot natural gas prices decline while the swap expenses increase by the same amount.[6]

These examples, upon first reading, appear to indicate that ratepayers could be drastically harmed by failing to include swaps in the EBA. However, a closer examination of the examples yields the undeniable conclusion that the examples are merely a mathematical tautology and offer no support for the specific conclusion that ***swaps*** must be included in the EBA.

[6] To the extent that UAE accepts the Company's fallacy, UIEC disagrees that something must be done. UIEC does agree, however, that this can be worked out in the EBA workgroup already established.

To illustrate this, suppose if one were to replace swap expenses in RMP's hypotheticals with labor costs, or any other cost that could move in the opposite direction of spot natural gas prices. Under this revised hypothetical, when spot natural gas prices decline, and thus labor costs increase, failure to include labor costs in the EBA results in the exact same windfall to ratepayers and added cost to RMP. Similarly, if spot natural gas prices increase, and thus labor costs decline, failure to include the new, higher labor costs in the EBA would result in the same windfall to RMP and added cost to ratepayers. Indeed, failure to include ***any cost*** which could move in the opposite direction of spot natural gas prices results in the adverse and unintended consequences RMP describes. This is because, any variable that is not part of the EBA that moves in the opposite direction of power prices results in ratepayers or RMP having to pay that difference. Thus, swaps themselves do not cause the adverse and unintended consequences that RMP raises. Rather, it is simply the directional change of any variable that leads to the claimed windfall or extra expense, which is no justification at all.

Take an analogous example. It is undisputed that as more people play the lottery, the total available prize increases. Thus, as fewer people choose to play the lottery, the total available prize declines. Now suppose that lottery ticket prices increase, which leads to fewer people playing the lottery. If the loss in lottery players (due to the price increase) is not completely offset by the increase in funds received from higher prices, the winners would be worse off because fewer people play the lottery. Under RMP's adverse and unintended consequences theory, all people should be forced to play the lottery to avoid the unintended consequence of having the winners worse off as a result of the decline in available prize money. However, the decline in prize money is not a justification for mandatory participation. It is

simply a recognition that, as one variable increases but is not offset by another declining variable, the total net effect will be positive.

Returning to RMP's alleged adverse and unintended consequences, RMP further argues that the customer and RMP will have divergent interests if swap costs are not included in the EBA. This is incomplete and thus misleading. In essence, RMP is asking ratepayers to insure it against poor performance in the natural gas swap market. If RMP poorly speculates future natural gas prices, which it has been doing significantly as of late, RMP is asking the ratepayers to pay the costs associated with guessing incorrectly. Alternatively, if RMP accurately speculates, the ratepayers receive the "winnings." This insurance policy being sought by RMP effectively permits it to speculate on future natural gas prices with impunity. Just like a person gambling with someone else's money, if swap costs are included in the EBA, RMP would know that its losses would be borne by ratepayers, so it has the incentive to continue to speculate even if its past performance indicates it should stop. If swap costs are not included in the EBA, the risk of speculation is properly placed with the party that is speculating on future natural gas prices. Therefore, the interests are not divergent; instead, the incentives are properly with the party taking the risky action.

II. A 70/30 SHARING MECHANISM IS PERMISSIBLE UNDER THE STATUTE.

As the Commission noted in its Order, and as the Company seems to have forgotten, "ratemaking is not simply cost reimbursement." Order at 70. Furthermore, as explained above, any EBA approved must be in the public interest. As things stand now, if the EBA ordered by the Commission does not have a sharing band, it will not be in the public interest.

Mr. Higgins noted in this proceeding, a "100 percent cost pass-through seriously reduces RMP's incentive to manage its fuel and purchased power costs as well as it would manage them if the Company remained fully responsible for the energy cost risk." Higgins (Phase II) D. 4:83-87, 11:226-29 (Aug. 4, 2010). "It is axiomatic that when a firm stands to gain or lose from its cost management decisions, . . . the pursuit of its economic self-interest gives it a powerful incentive to perform well in managing its costs." *Id*. 11:229-33.

With the 70/30 sharing band, the risks are shared. RMP ignores the fact that the sharing band is reciprocal so that customers share in the risks and benefits. To do as RMP suggests would eliminate any risk sharing and simply pass 100% of that risk to customers. RMP has not provided any definable net benefit to ratepayers for accepting this risk. Nor can it. If the Commission eliminates the 70/30 sharing band in its entirety, without implementing something in its place, the resulting EBA would not be in the public interest and would be unlawful.

CONCLUSION

Based on the foregoing, UIEC requests that the Commission deny the Company's Petition with respect to the Commission's decision as to swaps and the 70/30 sharing band. UIEC takes no position with respect to the Company's request for clarification.

DATED this 2d day of May, 2011.

/s/ Vicki M. Baldwin

F. ROBERT REEDER
WILLIAM J. EVANS
VICKI M. BALDWIN
PARSONS BEHLE & LATIMER
Attorneys for UIEC, an Intervention Group

CERTIFICATE OF SERVICE

I hereby certify that on this 2d day of May, 2011, I caused to be e-mailed, a true and correct copy of the **UIEC'S OPPOSITION TO ROCKY MOUNTAIN POWER'S PETITION FOR CLARIFICATION AND RECONSIDERATION OR REHEARING** of Docket No. 09-035-15 to:

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 110
Salt Lake City, UT 84111
gbmonson@stoel.com

Mark Moench
Yvonne R. Hogle
Daniel Solander
ROCKY MOUNTAIN POWER
201 South Main Street, Suite 2300
Salt Lake City, UT 84111
Mark.moench@pacificorp.com
yvonne.hogle@pacificorp.com
Daniel.solander@pacificorp.com
datarequest@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 ATTORNEYS 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
gdodge@hjdlaw.com

Arthur F. Sandack
8 East Broadway, Ste 411
Salt Lake City, Utah 84111
asandack@msn.com

Gerald H. Kinghorn
Jeremy R. Cook
Parsons Kinghorn Harris, P.C.
111 East Broadway, 11th Floor
ghk@pkhlawyers.com
jrc@pkhlawyers.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

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

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
pjm@bbrslaw.com
elacey@bbrslaw.com

Michael L. Kurtz
Kurt J. Boehm
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Ste 1510
Cincinnati, Ohio 45202
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com

Steve W. Chriss
Wal-Mart Stores, Inc.
2001 SE l0th Street
Bentonville, AR 72716-0550
(479)204-1594
Stephen.chriss@wal-mart.com

/s/ Colette V. Dubois