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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 **MOTION OF ROCKY MOUNTAIN POWER FOR RULING ON IMPLEMENTATION OF ECAM**

Rocky Mountain Power, a division of PacifiCorp ("Rocky Mountain Power" or "Company"), pursuant to Utah Administrative Code R746-100-3.H, moves the Commission to enter an order concluding that any Energy Cost Adjustment Mechanism ("ECAM") approved in this proceeding may be implemented within a reasonable period following the final order in the Company's pending general rate case, Docket No. 09-035-23. Alternatively, if the Commission concludes that any ECAM approved in this proceeding must be implemented simultaneously with either the revenue requirement order or the final order in the Company's pending general rate case, Rocky Mountain Power requests that the Commission expedite the schedule in this

docket to allow conclusion of this docket concurrently with the applicable order in the general rate case. Because of the relationship between this motion and the motion to bifurcate the general rate case, Rocky Mountain Power requests that they be decided together.

I. BACKGROUND

Rocky Mountain Power filed its application in this case on March 16, 2009. It did so consistent with its understanding of Commitment U 23 approved in the Commission's Report and Order issued June 5, 2006 in Docket No. 05-035-54 that an application for an ECAM would be filed at least three months in advance of a general rate case filing and that intervenor testimony deadlines on the application would be the same as those established in the general rate case. The application stated the basis for approval of the ECAM and included supporting testimony of two witnesses.

The Commission noticed a scheduling conference for April 14, 2009. At the scheduling conference, the Division of Public Utilities ("Division") stated that it had contacted David Boonin of National Regulatory Research Institute and that he was willing to make a presentation on the different types of energy and fuel cost adjustment mechanisms used by utilities across the country. Accordingly, the Commission scheduled a technical conference for May 5, 2009 at which Mr. Boonin would make his presentation, the filing of proposed scope of issues and recommendations by parties for May 26, 2009 and a further technical conference and scheduling conference for June 2, 2009.

During his presentation on May 5, 2009, Mr. Boonin discussed the basis for energy cost adjustment mechanisms, the various types of mechanisms being used throughout the country and the pros and cons of each. He noted that Utah was the only non-restructured state in the country that had not adopted some type of energy or fuel cost adjustment mechanism.

The filings of parties other than the Company on May 26, 2009, recommended that as a threshold issue, the Commission determine whether the Company had demonstrated the need for the ECAM before addressing the design of the ECAM. Each of the filings recommended issues that should be considered by the Commission in determining whether the ECAM is in the public interest and needed. Some of them also recommended issues to be considered in the design of the ECAM and in implementation and auditing of the ECAM. Although none of the filings was in the form of a motion to dismiss, some of them argued that the application was inadequate and recommended that it should be dismissed or supplemented before the matter proceeded. The Utah Industrial Energy Consumers ("UIEC") recommended that the Commission consider possible dismissal after discovery and the filing of testimony by other parties or conclude that it did not have sufficient information currently and deny the application. UIEC also recommended that the Commission establish minimum filing requirements for requesting an ECAM and that it conduct a rulemaking proceeding, possibly in conjunction with the rule making on the complete filing requirements for general and major plant addition rate cases, for the minimum filing requirements for ECAM rate adjustment filings. In addition, the Office of Consumer Services ("OCS") recommended that the scheduling conference set for June 2, 2009 be postponed until the Commission issued an order on the May 26, 2009 filings.

In accordance with the OCS's recommendation, the Commission vacated both the technical conference and scheduling conference previously set for June 2, 2009. On June 18, 2009, the Commission issued its Notice of Scheduling Conference and Procedural Order ("Order"). In the Order, the Commission provided procedural guidance on the scope of issues and recommendations of the parties and set a scheduling conference for June 25, 2009. The Commission divided the case into two phases, with Phase I to address the necessity of an ECAM

and identification of an appropriate regulatory treatment for recovery of net power costs that appropriately balances standard regulatory objectives. The Commission identified seven issues that should be addressed at a minimum in Phase I. The Commission also declined to dismiss the Company's application. However, the Commission stated that the schedule should permit the Company an opportunity to augment its filed testimony if it wished to do so.

Rocky Mountain Power filed its general rate case application on June 23, 2009. Given Commitment U 23, the Company contacted other parties and suggested that the scheduling conference in this docket be delayed until a schedule is established in the general rate case. No party objected. Accordingly, the Commission vacated the June 25, 2009 scheduling conference, and set a new scheduling conference on July 14, 2009, immediately following the scheduling conference in the general rate case.

During the scheduling conference, Rocky Mountain Power requested input from the parties on any possible constraints on scheduling imposed by Commitment U 23 and Utah Code Ann. § 54-7-13.5(2)(b)(iii), which provides that "[a]n energy balancing account shall become effective upon a commission finding that the energy balancing account is: . . . implemented at the conclusion of a general rate case." Two parties, Western Resource Advocates ("WRA") and Utah Association of Energy Users ("UAE"), expressed the view that the testimony deadlines in Commitment U 23 were intended to apply only to the first rate case filed following its approval, Docket No. 06-035-21, and that, therefore, intervenors did not need to file testimony on the ECAM on the same deadlines established in the general rate case. With regard to section 54-7-13.5(2)(b)(iii), Rocky Mountain Power expressed the view that the intent of the statute was that an energy balancing account such as the ECAM would be implemented based upon determination of net power costs included in base rates in a general rate case. UAE and UIEC

expressed agreement with this statement. UIEC expressed the view that the statute did not require implementation of the ECAM simultaneously with the effective date of rates based on the revenue requirement order in Docket No. 09-035-23, but that implementation of the ECAM needed to be in close proximity following the revenue requirement order. No other party took a position on these issues.

Rocky Mountain Power initially proposed a schedule under which the hearings on Phase II in this docket would be held in early February 2010 so that the Commission could issue an order prior to or concurrently with its order on revenue requirement, and possibly its final order, in the general rate case due by February 18, 2010. Other parties objected to this proposed schedule as not allowing enough time for them to prepare testimony. Rocky Mountain Power stated that based on the views expressed regarding Commitment U 23 and section 54-7-13.5(2)(b)(iii), the schedule set by the Commission might allow more time. In further discussions about the interval for other parties to file testimony, the OCS and WRA stated that if the result of setting a schedule that might conclude after the rate case was that Rocky Mountain Power could not implement its ECAM until the next general rate case, Rocky Mountain Power was to blame for filing a deficient application and the need to complete the ECAM concurrently with the general rate case should not dictate a more expedited schedule. The OCS stated that a more expedited schedule might have the effect of denying it due process. Rocky Mountain Power responded that its filing was not insufficient, but that it was supplementing the filing simply to provide information requested by other parties. Rocky Mountain Power also stated that it was unacceptable to it to schedule proceedings in this docket which would allow conclusion of this docket after conclusion of the general rate case if that required that the ECAM could not be implemented until the next general rate case.

Based on the foregoing discussion, a schedule was established in this docket in which hearings on Phase I would take place on December 16-17, 2009 and a scheduling conference would be held for Phase II on January 19, 2010. In addition, tentative hearings on Phase II were set for March 30-31, 2010. In drafting and submitting a proposed scheduling order at the Commission's request, Rocky Mountain Power proposed to include some of the context under which the schedule was established. The Division and OCS objected to inclusion of this proposed language in the scheduling order. In submitting the proposed order to the Commission, Rocky Mountain Power requested that if the Commission concluded that the ECAM must be implemented simultaneously with the revenue requirement order or the final order in the general rate case, it expedite the schedule in this docket to assure that could take place. The Division objected and suggested that the issue should not be resolved in the context of a proposed scheduling order, but should be formally presented to the Commission.

In addition, UIEC has filed a motion to bifurcate the revenue requirement and cost of service phases of the general rate case and has supported its motion in part on the ground that such a bifurcation would resolve the concurrent scheduling issue in this case. Rocky Mountain Power and the Division have agreed that bifurcation of the general rate case might resolve the issue of concurrent scheduling in this case and have stated that they do not oppose the motion to bifurcate so long as Phase II in the general rate case is resolved prior to implementation of summer season rates. In fact, Rocky Mountain Power has stated that it supports the motion to bifurcate if the Commission deems that necessary to resolve the scheduling and implementation issue in this docket. In response to the proposed scheduling order in this case, UIEC has confirmed its position that the ECAM may be implemented in close proximity to the revenue

requirement order in the general rate case and has recommended that the Commission defer scheduling this docket until it resolves the motion to bifurcate in the general rate case.

Because of the relationship between the motion to bifurcate in the general rate case and the issue presented by this motion, Rocky Mountain Power believes the issues should be decided together. Rocky Mountain Power, therefore, presents this motion requesting the Commission to address the interpretation of section 54-7-13.5(2)(b)(iii) now. If the Commission determines that the statute requires that the ECAM must be implemented by the conclusion of the general rate case, Rocky Mountain Power additionally requests that the Commission schedule this docket essentially concurrently with the general rate case.

II. ARGUMENT

A. The Statute Does Not Require that the ECAM Be Implemented Simultaneously with the Conclusion of the Rate Case.

The Commission's decision on this motion turns on its interpretation of section 54-7-13.5(2)(b)(iii). Under well established and accepted rules of statutory construction, the Commission is to base its interpretation on the plain language of the statute, reading all portions of the statute together, in a way that provides meaning to each of its terms and that does not render any of them meaningless. *In re T.R.E.*, 2009 UT App 168, ¶ 6 (courts "interpret a statute by looking at its plain language" and "read the plain language of a statute as a whole, with due consideration of the other provisions and in an effort to interpret them in harmony with each other and with other statutes under the same and related chapters"); *Nelson v. Salt Lake County,* 905 P.2d 872, 876 (Utah 1995) (courts "will not construe a statute in such a way as to render certain viable parts meaningless and void"). The Commission is to look to legislative intent or beyond the plain meaning of the words in the statute only if they are reasonably capable of more than one possible interpretation. *In re Estate of Flake,* 2003 UT 17, ¶ 25 (explaining that a court

will only "seek guidance from the legislative history and relevant policy considerations" if it "find[s] some ambiguity in the statute's plain language").

Section 54-7-13.5(2) provides:

> (a) The commission may authorize an electrical corporation to establish an energy balancing account.
>
> (b) An 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.

The words "implemented at the conclusion of a general rate case" either are unambiguous based on the definition of the word "at" or are capable of more than one possible interpretation based on the definition of the word "at." The applicable definition of "at" in the dictionary is "used as a function word to indicate presence or occurrence in, on or near." Merriam Webster's Collegiate Dictionary, Tenth Edition (Merriam-Webster, Inc., Springfield, Mass. 1993). "In, on or near" indicates that "at" does not require simultaneous occurrence. Various courts have agreed with this interpretation. *See, e.g., Texas Co. v. Blackman-Scarbrough, Inc.,* 38 S.E.2d 890, 891 (Ga. App. 1946) ([T]he "word 'at' is a term of considerable elasticity of meaning, and is somewhat indefinite. It is not a word of precise and accurate meaning, and it has been said that the connection furnishes the best definition. As used to fix a time, it does not necessarily mean eo instanti, or the identical time named, or even a fixed, definite moment."); *Central Guarantee Co. v. Fourth & Central Trust Co.,* 244 Ill.App. 61, 65 (1927) ("The phrase 'at the end of' or 'at the expiration of' does not always necessarily imply that action must take place on the day of expiration in order to be a literal compliance. . . . The word 'at' is not invariably used to denote a fixed or definite time. It sometimes may be used to mean 'about' or 'after.'").

the phrase "implemented at the conclusion of a general rate case" means implemented based on and near to conclusion of a general rate case.

On the other hand, if the word "at" is deemed to mean either "on" or "near," the word itself is capable of more than one meaning, so it would be appropriate to look to intent. No party has urged the Commission that section 54-7-13.5(2)(b)(iii) means that an ECAM must be implemented simultaneously with conclusion of a general rate case. This is presumably because all interested parties are aware of the reason for including this provision in the statute, having participated in its drafting. The purpose for including this provision in the statute was that all interested parties agreed that the ECAM should be implemented based upon net power costs included in base rates found just and reasonable by the Commission. As acknowledged by UIEC, this does not mean that the ECAM must be implemented simultaneously with the revenue requirement order in which the just and reasonable level of net power costs is determined, but it means that it must be implemented within reasonably close proximity to the revenue requirement order so that it is based on a level of net power costs included in base rates found just and reasonable by the Commission.

Although Rocky Mountain Power does not concede that the phrase "conclusion of a general rate case" means the revenue requirement order in a bifurcated general rate case, it believes resolution of this secondary issue is unnecessary in the context of this case. No party has claimed that even if bifurcation is ordered in the general rate case, the bifurcation should result in a substantial delay in resolution of the cost of service, rate spread and rate design issues in the general rate case. To the contrary, the only parties to specifically address this issue in Docket No. 09-035-23, Rocky Mountain Power, the Division, and UAE, have all urged that if the Commission bifurcates the general rate case, that it conclude the second phase of the case prior

to the summer season of 2010. Given that the revenue requirement order must be issued by February 18, 2010 and that summer season rates will be effective on May 1, 2010, conclusion of the cost of service, rate spread and rate design portion of the case will be in reasonably close proximity to or near the revenue requirement order.[1]

Under any reasonable interpretation of section 54-7-13.5(2)(b)(iii) based either on the plain meaning of the words used or legislative intent, an energy balancing account may be implemented within reasonably close proximity to the conclusion of the general rate case. Accordingly, the Commission should rule that Rocky Mountain Power may implement the ECAM approved in this docket following issuance of the final order in the general rate case, Docket No. 09-035-23, so long as it is implemented in reasonably close proximity to the order.

B. If the Commission Concludes that the ECAM Must Be Implemented Simultaneously with the Revenue Requirement Order or Final Order in the General Rate Case, It Should Expedite the Schedule in this Docket to Make that Possible.

If the Commission concludes, contrary to the foregoing argument, that the ECAM must be implemented simultaneously with the revenue requirement order or the final order in the general rate case, the Commission should expedite the schedule in this docket to be essentially concurrent with the schedule in the general rate case.

Commitment U 23 and section 54-7-13.5(2)(b)(iii) were both clearly intended to tie adoption of a fuel or energy cost adjustment clause to a general rate case for reasons already discussed above. The applicable portion of Commitment U 23 states:

> PacifiCorp also commits that any request for Commission approval of a PCAM mechanism (or any net power cost adjustment mechanism) will be filed at least three months in advance of a general rate case filing

[1] If the meaning of the phrase "conclusion of a general rate case" with reference to the revenue requirement order or final order does become an issue for some unanticipated reason, Rocky Mountain Power believes it is apparent that a general rate case is not concluded until the Commission issues its final order in the case.

and that intervener testimony deadlines will be the same as those established in the general rate case.

It is apparent that both the three-month advance filing requirement and the intervenor testimony deadlines referenced in the commitment refer to "any request for Commission approval of a PCAM mechanism (or any net power cost adjustment mechanism)." Thus, it would be inappropriate for parties, on the one hand, to take the position that intervenor testimony deadlines in the companion general rate case do not apply to them in this case, but, on the other hand, take the position that the ECAM docket needs to be filed three months in advance of the general rate case and tied to the general rate case. As Rocky Mountain Power made clear in the scheduling conference, it was willing to accept that the intervenor testimony filing deadlines in the general rate case did not apply to this case only if the ECAM could be implemented after conclusion of the general rate case.

The argument of other parties that Rocky Mountain Power is responsible for this circumstance because it did not file a sufficient application is bankrupt for several reasons. First, the Commission has already determined that Rocky Mountain Power's application was sufficient in determining not to dismiss the application. The Commission's decision is obviously sound. Rocky Mountain Power filed essentially the same application in Idaho. Not only did no party claim in Idaho that the application was deficient and should, therefore, be dismissed, the parties have already submitted their stipulation for implementation of the ECAM to the Idaho commission for approval.

Second, a careful reading of the statements of the parties that claimed the application is deficient demonstrates that the deficiencies they claim were the result of the application not anticipating and addressing issues they may wish to raise in opposition to the application. For example, the OCS's memorandum states:

> The Office contends that the Commission may only approve a cost adjustment mechanism if existing ratemaking practices that are available to or used by the utility, for example financial energy hedging, forecast test periods, weather normalization, and major capital additions and resource procurement rate inclusion mechanisms, are proven to be inadequate and incapable of adjusting rates to varying loads, costs, revenues and market conditions.

Memorandum from The Office of Consumer Services, May 26, 2009, at 2. By way of further example, parties have claimed that because the Company failed to address the regulatory resources necessary if an ECAM is approved, the Commission must dismiss the application. *Id.* at 3; Preliminary Recommendation and Scope of Issues of Utah Association of Energy Users at 3. These issues and others raised are clearly issues that other parties may wish to present in opposition to the application. It is not the Company's obligation to make other parties' cases for them or to anticipate and rebut in its application potential objections of other parties.[2] At most, the Company is required to identify the relief it seeks and to provide sufficient support for that relief that if no party filed anything in opposition to it, the Company would be entitled to the relief it seeks.

Third, parties have been free since March 16, 2009 to file a motion to dismiss the application or to conduct discovery on the application to obtain additional information they claim they need to analyze the application or to develop their positions on it. Yet no party has filed a formal motion to dismiss to date and no party recommended dismissal or identified supposed deficiencies until May 26, 2009, more than two months after the application was filed. Thus, the delay in getting this docket in a position that some opposing parties believe is necessary for them

[2] There are other reasons the Company should not have addressed these issues in its application. On the first example, hedging is clearly not a rate making practice as characterized by the OCS. On the second example, it is not even within the Company's knowledge to address whether the state has sufficient resources to monitor an ECAM or to anticipate what the state may determine it may need to monitor an ECAM.

to file responsive testimony is as much or more attributable to their actions or inactions as it is attributable to any actions or inactions by Rocky Mountain Power.

It is not sufficient to defeat this argument by the claim that Rocky Mountain Power has the burden of proof. Rocky Mountain Power admits that it has the burden of proof, but the fact that a party has the burden of proof does not mean that an application must contain its entire case. The plaintiff typically has the burden of proof on issues in civil litigation as well. However, under notice pleading standards, an initiatory pleading must simply provide notice of the claims of the plaintiff and identification of the relief sought. *See Canfield v. Layton City,* 2005 UT 60, ¶ 14 (explaining that under the liberal standard of notice pleading, "[t]he plaintiff must only give the defendant fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved"). The burden of proof refers to the evidence presented at a hearing, not the evidence presented in an application. Rocky Mountain Power recognizes that these legal doctrines have somewhat different application in the regulatory context. However, there is no requirement in the regulatory context that an applicant is required to offer all evidence in support of its case in its application. Therefore, the only basis to dismiss an application is that it fails to make a prima facie case. Although UAE argued that the application did not make a prima facie case, that argument assumes that a public utility must not only support its own position in its application, but that it must demonstrate why every alternative position is incorrect. As noted above, that is not the correct test of a prima facie case.

Fourth, the recent claims by parties in this and other cases that applications are not complete may have some application in the context of general rate cases or major plant addition cases where the Commission has a strict timeline to act, but it has little if any application to other proceedings. While the application in this case is tied to a rate case by virtue of Commitment

U 23 and section 54-7-13.5(2)(b)(iii), the fact that the Company filed its application three months in advance of the rate case application largely moots the "complete filing" issue that arises in the context of the general rate case itself.

The OCS also claimed during the scheduling conference that any expedition of the schedule in this matter would deprive it of due process.[3] This statement represents a gross misunderstanding of the requirements of due process. Due process simply requires notice and an opportunity to be heard. *See Utah County v. Ivie*, 2006 UT 33, ¶ 22 ("[t]he hallmarks of due process are notice and an opportunity to be heard"). While it is possible that a schedule might conceivably be established that was so unreasonably short that a party could legitimately claim that it did not have a reasonable opportunity to be heard, giving parties two months to respond to supplemental testimony, one month to file rebuttal testimony and setting a hearing some weeks thereafter does not even come close to a due process issue. The fact that the OCS believes its resources may be strained by its participation in multiple proceedings at the same time is an issue to be raised with the Legislature and has nothing to do with due process.

III. CONCLUSION

Based on the foregoing, the Commission should conclude that section 54-7-13.5(2)(b)(iii) permits implementation of the ECAM approved in this docket following but in reasonably close proximity to the final order in the currently pending general rate case. If the Commission concludes otherwise, it should expedite the schedule in this docket consistent with the initial recommendation of Rocky Mountain Power so that the docket may conclude and the ECAM may be implemented by conclusion of the general rate case as defined by the Commission. Because

[3] In fact, the OCS's statement during the scheduling conference was to the effect that even the current schedule would deprive it of due process.

of the relationship between this motion and the motion to bifurcate the general rate case, Rocky Mountain Power requests that they be decided together.

DATED: July 30, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **MOTION OF ROCKY MOUNTAIN POWER FOR RULING ON IMPLEMENTATION OF ECAM** to be served upon the following by electronic mail to the addresses shown below on July 30, 2009:

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