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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power for Authority to Increase its Retail Electric Utility Service Rates in Utah and for Approval of Its Proposed Electric Service Schedules and Electric Service Regulations	Docket No. 09-035-23 **ROCKY MOUNTAIN POWER'S PETITION FOR IMMEDIATE STAY AND FOR RECONSIDERATION OF MSP ORDER**

Rocky Mountain Power, a division of PacifiCorp ("Rocky Mountain Power" or "Company"), pursuant to Utah Code Ann. § 63G-4-405(2), hereby respectfully requests that the Commission immediately stay its Order issued October 19, 2009 in this docket ("Order"). In requesting the stay of the Order, the Company is expressly not requesting a stay of the schedule

in this case nor is it waiving its statutory right to receive rate relief within 240 days of the date the application in this matter was filed.

In addition, pursuant to Utah Code Ann. §§ 54-7-15, 63G-4-302, and Utah Administrative Code R746-100-11.F, the Company requests that the Commission reconsider the Order and following reconsideration vacate the Order.

I. INTRODUCTION

A. Docket No. 00-035-15

In part because of inconsistencies in inter-jurisdictional allocation of resources among the Company's jurisdictions that prevented the Company from being able to confidently invest in its integrated six-state system, the Company filed an application with the Commission on December 1, 2000 in Docket No. 00-035-15. The application requested approval of a structural realignment proposal ("SRP") under which the Company would be reorganized into six distribution companies, one for each state in which the Company provides utility service, a generation company and a service company. Under the SRP, each state commission would have retained jurisdiction over the distribution company in its respective state, and there would have been contractual relationships between the distribution company and the generation and service companies. Under the contract with the generation company, each distribution company would have received a fixed share of each of the Company's generation assets with the ability for each state to independently plan for and acquire additional generation on a state-specific basis. The Company filed similar applications in each of its other states. Numerous parties intervened in the case and several technical conferences were held. Although the SRP was viewed favorably by some commissions, it was not acceptable to other jurisdictions, including Utah, because of concerns regarding the potential loss of jurisdiction over generation and transmission assets and the potential loss of the efficiencies of six-state system planning and operations. Ultimately, the

parties agreed to vacate the schedule in the proceeding and to enter into a multi-state process ("MSP") to consider inter-jurisdictional issues.

B. Docket No. 02-035-04

The Company filed its application to initiate investigation of inter-jurisdictional issues in Docket No. 02-035-04 on March 5, 2002. The application proposed that an MSP be undertaken under the auspices of a facilitator to attempt to reach consensus among the states. On April 4, 2002, the Commission initiated the investigation and the MSP. Other state commissions also approved the MSP. During the next two years, monthly multi-day meetings and numerous teleconferences were held in which commission staffs and other interested parties from five of the Company's jurisdictions participated. (California monitored the MSP, but did not actively participate.) Utah parties included the Commission staff, the Division of Public Utilities ("Division"), Committee of Consumer Services (now Office of Consumer Services, "Office"), Utah Association of Energy Users Intervention Group ("UAE") and Salt Lake Community Action Program ("SLCAP").

On September 30, 2003, the Company filed a motion and supporting testimony requesting that the Commission ratify an inter-jurisdictional cost allocation protocol ("Protocol"). Numerous technical conferences were held on the motion and Protocol. In addition, further MSP meetings were held on the Protocol. On May 21, 2004, the Company filed supplemental testimony and a revised MSP protocol ("Revised Protocol"). On July 28, 2004, the Company, Division, Office, UAE, SLCAP, Crossroads Urban Center, AARP and the Federal Executive Agencies filed a stipulation ("2004 Stipulation") supporting adoption of the Revised Protocol in conjunction with rate mitigation measures. Following the filing of additional testimony and a hearing, the Commission issued a Report and Order on December 14, 2004, approving the 2004 Stipulation. The commissions in Idaho, Oregon and Wyoming likewise

approved the Revised Protocol and, although not formally approved, the Revised Protocol is used in California as well.

The 2004 Stipulation contained specific provisions on how the Utah revenue requirement beginning April 1, 2009 through March 31, 2014 would be calculated in rate cases going forward. It stated that Utah's revenue requirement would be the lesser of that calculated using the Rolled-In method multiplied by a rate mitigation cap (currently 101.00 percent) and that calculated using the Revised Protocol plus a rate mitigation premium, if applicable. Furthermore, the Commission and Utah parties found that implementation of the Revised Protocol would preserve the benefits of the integrated system planning and operations to the benefit of Utah customers. Absent the Revised Protocol, it was clear that some states would have preferred a split of the Company's resources and operations among the jurisdictions.

The 2004 Stipulation provided that the Company could propose a new inter-jurisdictional allocation method if its Utah revenue requirement calculated using the Revised Protocol for the period from April 1, 2009 through March 31, 2014, exceeds or is projected to exceed 101.00 percent of the amount that would result from the Rolled-In method. Although parties reserved the right to challenge the application of the 2004 Stipulation in future rate cases, the Commission noted that the Office anticipated that such challenges would not be made prior to 2014.

The Revised Protocol established a MSP Standing Committee to review issues arising under the Revised Protocol. The Revised Protocol provided that:

> Prior to departing from the terms of the Protocol, consistent with their legal obligations, Commissions and parties will endeavor to cause their concerns to be presented at meetings of the MSP Standing Committee and interested parties from all States in an attempt to achieve consensus on a proposed resolution of those concerns.

Revised Protocol at 14.

C. Current MSP Issue

On November 6, 2008, at the MSP Commissioners Forum, the Commission expressed concern regarding continued use of the Revised Protocol based on the results of a 2005 update to the original 2004 forecast that indicated that Utah revenue requirement would remain higher using the Revised Protocol than the Rolled-In method. It was agreed that the Company would undertake to update this analysis with the commissioners expressing "their desire to have such a review completed in the next year" with the results presented at the next Commissioners Forum. Pursuant to that request, the Company provided an updated preliminary forecast ("2009 Preliminary Forecast") to the MSP Standing Committee work group on August 17, 2009. One of the things that makes the forecast preliminary is that it does not include the affect of the Klamath Final Agreement. The Company informed the MSP Standing Committee that the Klamath Final Agreement cannot be incorporated into the study until it is executed, which is expected by the end of this year.

On September 10, 2009, in response to the 2009 Preliminary Forecast, the Commission, Division and Office ("Utah Parties") submitted a proposal to the MSP Standing Committee to consider whether it remained in the interests of Utah customers to continue to use the Revised Protocol. The Utah Parties provided a more detailed proposal during the September 29, 2009 MSP Standing Committee conference call. This included a "Strawman Solution" to move to Rolled-In allocation. The Utah Parties also proposed a schedule for developing possible solutions to its concern to be completed by November 30, 2009.

The MSP Standing Committee held a conference call on the issue on October 13, 2009. During this call, Oregon expressed its intent to propose an alternative to the Utah proposal, which is expected to include a split of generation and transmission assets, with separate planning and operations. In addition, the Company agreed to develop a concept paper that identifies the

various elements of the Revised Protocol that drive the differences between Rolled-In and Revised Protocol allocations. This would allow states to consider possible modifications to the Revised Protocol. The Standing Committee agreed that Oregon's proposal and the Company concept paper would be circulated by October 26, 2009 and would be discussed on a conference call on October 29, 2009. Additional conferences have been tentatively set for November 19 and December 9, 2009, and the next Commissioners Forum is scheduled for March 9, 2010.

D. Docket No. 09-035-23

The Company filed notice that it intended to file the application in this docket on April 16, 2009. After the test period to be used in the docket was determined, the Company filed the application on June 23, 2009, accompanied by extensive direct testimony. The Company's direct testimony did not raise any issue with the 2004 Stipulation or Revised Protocol. On August 4, 2009, the Commission issued a scheduling order establishing dates for the filing of direct testimony by other parties, rebuttal testimony, surrebuttal testimony and hearings. Pursuant to that schedule, three and one-half months after the application was filed, on October 8, 2009, all other parties filed their direct testimony on revenue requirement issues, responding to the Company's direct testimony and providing their recommendations. No party raised any issue with the 2004 Stipulation or Revised Protocol in that testimony despite the fact that the Division and Office had joined the Commission staff in expressing concern about this issue nearly a month prior to filing the testimony. Rebuttal testimony on revenue requirement issues is due on November 12, 2009, surrebuttal testimony is due November 30, 2009, and hearings on revenue requirement issues commence on December 7, 2009.

In the Order, the Commission requires the Company to file on October 26, 2009 its 2009 Preliminary Forecast provided to the MSP work group, and all applicable work papers. The Order also directs the Division and invites other parties to file rebuttal testimony on two

questions: (1) whether use of the inter-jurisdictional allocation method agreed upon in the 2004 Stipulation is in the "public interest" in this docket for "development of the revenue requirement," and (2) whether other alternatives, such as "use of the Rolled-In method without the revenue requirement adjustments contained in the 2004 Stipulation terms . . . would be just and reasonable in this case." Order at 3.

E. Summary of Problem

The MSP is a multi-state effort by the utility commissions of the states in which the Company operates to develop a consensus approach to the problem of assuring that the billions of dollars of investment in generation and transmission facilities that benefit all customers are allocated fairly among the states. The process is critical to the Company and its customers for several reasons. First, if the entire investment of the Company in facilities required to provide safe, reliable and adequate service to its customers is not allocated among the states, the Company will be financially damaged. As the Commission is well aware, customers are the ultimate losers when credit ratings decline or consistent underearnings occur. Second, the Company's ability to invest in resources necessary to provide reliable service to customers, and particularly the growing customer base in Utah, will be severely damaged if the Company is not allowed a reasonable opportunity to earn a return on those investments. Third, the likely alternative to a consensus approach to allocation is some sort of division of the Company. The Commission has consistently opposed this result because it would eliminate the benefit of systemwide planning and operations.

Although the Order states that "[o]ur intent today is not to hinder the development of a long term solution to the issue in MSP" (Order at 2), the introduction of the identical issue in this adjudicative docket and the application of ex parte communication prohibitions will clearly block, if not nullify, the ability of the MSP Standing Committee to address the issue as requested

by the Utah Parties. Moreover, introduction of this complex issue in this rate case at this late stage of the proceedings will not allow the parties sufficient time to properly address the issue. In fact, although the issue could potentially have a profound multi-million dollar impact on revenue requirement, parties will be given only 17 days from the filing of the 2009 Preliminary Forecast to provide testimony on the issue. Thereafter, the Company, and other parties, will have only 18 days to provide rebuttal testimony on the issue. Any decision of the Commission on the issue will be based on a preliminary and incomplete forecast. The parties are already aware that the forecast will change when the Klamath Final Agreement is executed, but the forecast cannot be modified based on an agreement that is still in negotiation.

Finally, proceeding with the Order could easily disrupt the delicate balance that has allowed the MSP to work providing benefits to all concerned parties. Accordingly, the Company respectfully requests the Commission to immediately issue a stay of the order. In addition, the Company requests that the Commission reconsider the Order and, upon reconsideration, vacate the Order.

II. PETITION FOR IMMEDIATE STAY

The Commission should immediately stay the Order because it will completely undercut the MSP and will render impossible the MSP Standing Committee's consideration of the issue. For the reasons set forth hereafter, it will preclude any further involvement of the Commission and its staff in the MSP, a situation may destroy the entire MSP.

A. Application of Ex Parte Law Will Bar the Utah Commission and its Staff from Participating in MSP

In the Order, the Commission noted that it has had concerns about the results of the Revised Protocol that was previously agreed to in the MSP. The Commission also reaffirmed its ongoing commitment to the MSP through the Utah Commission's staff's raising these concerns

with the MSP Standing Committee in September 2009 and its presentation to the Standing Committee of a schedule for addressing these issues. The Commission noted its "intent not to hinder the development of a long term solution to the issue in the MSP." Order at 2.

Nonetheless, the Order, if allowed to stand, will effectively eviscerate the MSP, a process that the Commission has clearly stated that it wants to succeed. By placing the 2004 Stipulation and Revised Protocol at issue in this docket, the Order will preclude the ability of the Commission staff, the Company, and other parties to the Utah rate case to participate in the MSP because doing so will violate the Utah ex parte contact statute and the Commission's ex parte communications rule.

Utah Code Ann. § 54-7-1.5 states:

> No member of the Public Service Commission, administrative law judge, or commission employee who is or may reasonably be expected to be involved in the decision making process, shall make or knowingly cause to be made to any party any communication relevant to the merits of any matter under adjudication unless notice and an opportunity to be heard are afforded to all parties. No party shall make or knowingly cause to be made to any member of the commission, administrative law judge, or commission employee who is or may reasonably be expected to be involved in the decision making process, an ex parte communication relevant to the merits of any matter under adjudication. . . .

Based on this statute, the Commission has adopted a rule governing ex parte contacts, and the procedures that govern how they are dealt with. Utah Admin. Code R746-100-13. For example, an ex parte contact is defined as a substantive (*i.e.,* non-procedural) contact by a party in a currently-contested proceeding with a commissioner or other commission staff member who "is, or may reasonably be expected to be, involved in the decision-making process *regarding a matter pending before the Commission.*" *Id.* R746-100-13.B (emphasis added). Further, the rule specifically precludes commissioners or staff members who may be involved in the decision-

making process of an issue before the Commission "to request or entertain ex parte communications." *Id.*

In light of the statute and rule, the Order, which now makes the issue the Utah Parties have requested the MSP Standing Committee to review a contested issue in this docket, will have the effect of turning all communications by the Commission staff, the Company or other parties participating in the MSP into illegal ex parte communications. Indeed, because of the prohibition on Commissioners and staff members from requesting or entertaining such contacts, the result is that, so long as issues related to inter-jurisdictional allocation are being litigated in a contested rate case, either the Commission staff or the Company and other parties to the rate case must withdraw from further participation in the MSP. Thus, the Order has the consequence of turning the consideration by the MSP Standing Committee of the issue raised by the Utah Parties into a process that all Utah parties may not participate in. Given that Utah is the largest service area of the Company, the negative impacts to the MSP will be irreparable because it is impossible to see how that process can succeed if the Commission staff is unable to participate or if the Company and other parties may not be part of the process. That is why an immediate stay of the Order is necessary.

The MSP was designed to allow the Company, state commissions and other interested stakeholders to collaboratively and openly address issues related to inter-jurisdictional allocations in a forward-looking process that does not affect any existing docket. The results of that process are designed to be applied only to future cases and thus avoid the ex parte problems described above. The Order upends the process. By injecting these issues into a current docket, the Order, unless immediately stayed, will undermine, and may destroy, the MSP—yet the Commission has stated its commitment to working these issues out in the MSP. The solution is

to immediately vacate or stay the Order, allow the MSP to proceed as designed, and deal with changes in allocations in future rate cases.

III. PETITION FOR RECONSIDERATION

In addition to the reasons for an immediate stay, the Order should be reconsidered and vacated for three other reasons. First, the Order violates the due process rights of the Company and other parties in this case. Second, the Commission should not make a decision based on an incomplete and preliminary forecast. Third, consideration of the Revised Protocol in this case is inconsistent with the 2004 Stipulation and the spirit of the Commission's order approving the 2004 Stipulation and may jeopardize the future of the MSP.

A. The Order Violates the Fundamental Due Process Rights of the Company and Other Parties.

Utah law is clear that in proceedings before the Commission, parties are entitled to fundamental due process rights, including timely and adequate notice of issues that will be addressed in a proceeding, an opportunity through discovery to determine the factual and policy basis for the proposals of other parties, and, among other things, an adequate opportunity to respond to those proposals. *Sorge v. Office of the Attorney General*, 2006 UT App. 2, ¶18, 128 P.3d 566, *cert. denied,* 138 P.3d 589 (Utah 2006) ("Despite the flexibility of administrative hearings, there remains the necessity of preserving fundamental fairness in administrative hearings"); *Court of Appeals v. Sunset City*, 2009 UT App. 197, 216 P.3d 367 ("Due process, at a minimum, requires *timely* "notice and an opportunity for hearing appropriate to the nature of the case.") *quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis in original); *accord In re Worthen*, 926 P.2d 853, 877 (Utah 1996) ("[T]o satisfy due process, a hearing must be prefaced by timely notice.")

The Order violates these principles by injecting into this docket a major issue raised neither by the Company in its direct testimony filed in June nor by the direct testimony of other parties filed earlier this month. Assuming for the sake of argument that it is appropriate to raise this issue without first attempting to address and resolve the issue through the MSP, this issue could have been raised months ago, even prior to the Company's filing of its application in June, given that extensive pre-filing proceedings took place in this docket.

The Company filed notice that it would be filing its application in this case over six months ago. At that time, the Commission could have raised the issues included in the Order and could even have ordered the Company to address the issues in its direct testimony filed over two months later. Barring that, the Commission could have raised the issues shortly after the Company filed its application and ordered the Company to supplement its testimony to address the questions now raised in the Order. At a minimum, the Commission could have ordered the Division to consider these issues and include its recommendations on them (as well as inviting other parties to do the same) when it issued its scheduling order in this case on August 4, 2009, that set October 8, 2009 as the date for other parties to file direct testimony on revenue requirement issues. None of these actions was taken despite the fact that inter-jurisdictional allocations and the 2004 Stipulation have been fundamental building blocks in all of the annual rate cases filed by Rocky Mountain Power for several years and that the Commission itself raised concerns about the Revised Protocol nearly a year ago before in the MSP. This is hardly a new issue that just came to light.

Instead of taking any of the foregoing actions, which would have given all parties the time to properly address this complex issue, the Order now introduces this issue into the docket immediately before submission of final testimony and a hearing on cost of capital and at a time

when parties are devoting their attention to a myriad of other revenue requirement issues. Indeed, the discovery turnaround in the case is currently 14 days. Thus, the parties will not have time to submit and receive responses to one set of discovery requests and incorporate them in testimony between the time the 2009 Preliminary Forecast is filed and testimony on the issues is due. It is clear that the Company and other parties will be denied the opportunity to fully explore this issue with all of the required trappings of due process.

The bare facts relating to the remainder of the schedule in this case demonstrate that requirements of due process cannot be met. The testimony of the Division, Office and a variety of other parties on revenue requirement was filed on October 8, 2009. None of this testimony raised issues related to the 2004 Stipulation. The Order requires the Company to file the 2009 Preliminary Forecast on October 26, 2009, only seventeen days prior to the date rebuttal testimony is due. Under the Order, the first point at which the Division and other parties will address the two questions raised in the Order will be the filing of rebuttal testimony on November 12, 2009, a date that is only 18 days prior to the filing of surrebuttal testimony and only 25 days prior to commencement of hearings on December 7, 2009. Because no MSP issue was raised in the revenue requirement testimony of any party and because the filing of the November 12 testimony will provide the Company with the first description of and rationale for any proposals on this issue by the Division and other parties, the Company's first opportunity to respond to these potentially significant proposals will be in the surrebuttal round of testimony on November 30, 2009, only 18 days after the filing of rebuttal testimony and only seven days prior to the start of hearings. Although the discovery turnaround is shortened to seven days after November 12, the Company (and other parties wishing to rebut testimony filed November 12 on

these issues) will not have sufficient time between November 12 and November 30 to engage in any meaningful discovery and to incorporate responses into surrebuttal testimony.

This injection of a major new issue into the case at the last moment violates the due process rights of the Company (and other parties) to adequate notice, opportunity for discovery, and in all meaningful respects, an opportunity to be heard on an issue that could have an enormous impact on revenue requirement. While the Company could seek an extension of the schedule to have adequate time to address the issue, doing so would jeopardize the Company's statutory entitlement to rate relief within 240 days from the date the application is filed. Utah Code Ann. § 54-7-12(3). The Commission cannot properly give the Company a choice to either waive its right to due process or waive its right for rate relief within 240 days. Thus, the Commission should immediately stay and vacate the Order.

B. The Commission Cannot Reasonably Make a Finding Based on an Incomplete and Preliminary Forecast.

The analysis that the Commission has ordered the Company to file on October 26, 2009 and which will be the basis for any testimony and recommendations on the issues raised in the Order is an incomplete and preliminary forecast. It is subject to modification based on further review and the occurrence of pending matters, such as the Klamath Final Agreement. In addition, other changes could result as the analysis is finalized. Surely, it would be inappropriate for the Commission to make the far-reaching decision to depart from the 2004 Stipulation that was more than two years in the making when it knows the evidence before it is incomplete, preliminary and likely to change based on further review.

Furthermore, if the Commission makes findings based on the 2009 Preliminary Forecast, it will be doing so without any party supporting the analysis. The Company prepared the forecast and has done its best to provide an accurate forecast based on information that is

currently available and given the time available to prepare the analysis. However, the Company cannot be expected to testify that the analysis meets the standards required for evidentiary admissibility, because it does not at this point. No other party has information on which it could make any better forecast. The Commission must rely on credible and supported evidence as the basis for findings of fact.

Thus, the Commission should stay, reconsider and vacate the Order until such time as sound evidence is available on which to base a conclusion.

C. Hearing MSP Issues in Isolation in this Case Is Contrary to the 2004 Stipulation and the Spirit of the Commission's Order Approving the Stipulation.

The MSP was initially undertaken, with the Commission's approval, to address a significant and difficult issue. Because of differing approaches to inter-jurisdictional cost allocation among the Company's state regulators, the Company was unable to confidently invest in generation and transmission resources in Utah and other states without fear that its financial health would be jeopardized. The Revised Protocol was the result of a two-year process in which parties were educated, exchanged views on these difficult issues and ultimately agreed to compromise their firmly held positions in the public interest. As the Commission is aware, the Revised Protocol and the 2004 Stipulation are based on a delicate balancing of the competing interests of the various states the Company serves.

Recognizing the significance and difficulty of the issue, the parties agreed that, although they would be free to advocate different inter-jurisdictional allocations in future rate cases based on changed circumstances, they would not do so without first raising issues and attempting to reach consensus in the MSP Standing Committee. In addition, there was an implicit agreement that barring substantial disruptions caused by unforeseen circumstances, the Revised Protocol would be left in place for ten years until 2014.

The Division, Office and other parties to the 2004 Stipulation have correctly concluded that they would not challenge the Revised Protocol or 2004 Stipulation in this case. Indeed, the Revised Protocol adopted by the 2004 Stipulation which was approved by the Commission provides:

> Prior to departing from the terms of the Protocol, consistent with their legal obligations, Commissions and parties will endeavor to cause their concerns to be presented at meetings of the MSP Standing Committee and interested parties from all States in an attempt to achieve consensus on a proposed resolution of those concerns.

Revised Protocol at 14.

By requesting that the MSP Commissioners Forum address the issues of concern, the Commission followed proper procedures for consideration of them in MSP—it is the Commission's simultaneous injection of these issues into this docket that raises serious issues in this case and threatens the MSP. Although the Commission is not a party to the 2004 Stipulation, it approved the Stipulation. Surely, it is inconsistent with the spirit of the Commission's approval of the 2004 Stipulation and its actions in raising the issues under the Revised Protocol, to simultaneously address the same issues in this case without awaiting the outcome of the MSP review.

If the Commission does not stay, reconsider and vacate the Order, there is a significant possibility that other state commissions may conclude that they should likewise depart from the Revised Protocol. Cooperation between the various states, each of whom has a reasonable basis for its unique position on inter-jurisdictional allocations, is dependent on the good faith participation of the other states in the MSP. The Commission should not undermine that process by proceeding with the Order. Given the customer growth and anticipated shortfalls in Utah, Utah cannot afford to walk away from the MSP at this time and certainly should not be the catalyst for undoing this valuable process.

IV. CONCLUSION

Based on the foregoing, Rocky Mountain Power respectfully requests that the Commission immediately stay the Order. In addition, the Commission should reconsider and vacate the Order. Once the MSP Standing Committee has completed its process, there will be opportunity for the Commission to consider raising this issue in the Company's next general rate case should the issue still be relevant in light of the results of the MSP review.

DATED: October 22, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **ROCKY MOUNTAIN POWER'S PETITION FOR IMMEDIATE STAY AND FOR RECONSIDERATION OF MSP ORDER** to be served upon the following by electronic mail to the addresses shown below on October 22, 2009:

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