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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 POST-HEARING BRIEF FOR THE UTAH OFFICE OF CONSUMER SERVICES

The Utah Office of Consumer Services presents this brief to explain why the Office's recommended adjustments must be made if Rocky Mountain Power's rates are to be just and reasonable. The Office has been and will be mindful of the Commission's admonitions concerning its familiarity with the evidence and of the request for brevity in written argument.

BURDEN OF PROOF

The evidence upon which the Commission must base its decision is contained in voluminous pre-filed written testimony and exhibits, and the explanations and clarifications that may have come about in the course of seven

days of hearings. But this evidence must be considered in the context of the well-defined burden of proof that rests with Rocky Mountain.

In *Utah Department of Business Regulation v. Public Service Commission*, 614 P.2d 1242 (Utah 1980), the Court plainly defined the burden that a public utility must bear in any case for rate relief:

> In the regulation of public utilities by governmental authority, a fundamental principle is: the burden rests heavily upon a utility to prove it is entitled to rate relief and not upon the commission, the commission staff, or any interested party or protestant; to prove the contrary. A utility has the burden of proof to demonstrate its proposed increase in rates and charges is just and reasonable. The company must support its application by way of substantial evidence, and the mere filing of schedules and testimony in support of a rate increase is insufficient to sustain the burden. Ratemaking is not an adversary proceeding in which the applicant needs only to present a prima facie case to be entitled to relief. A state regulatory commission, whose powers have been invoked to fix a reasonable rate, is entitled to know and before it can act advisedly must be informed of all relevant facts. Otherwise, the hands of the regulatory body could be tied in such fashion it could not effectively determine whether a proposed rate was justified. In accordance with the mandate of Section 54-7-12(2) (". . . . On such hearing the commission shall establish the rates . . . . which it shall find to be just and reasonable.") there must be substantial evidence to support the essential findings in a rate order. ". . . . Whether there is any substantial evidence to support a finding of fact made by the Commission is a judicial question and may be determined by this court . . . ." *Id*. at 1246 [footnotes omitted].

TEST PERIOD ENLARGEMENT

In rebuttal, Mr. Duvall repeated a stratagem from Docket No. 07-035-93 by enlarging the test period well beyond that approved by the Commission. He introduces net power cost projections through 2011 to evidence the reasonableness of the net power costs requested in this case. *Duvall Rebuttal, line 35 – 43, Table*

1. In his summary, Mr. Duvall complained of under-collecting net power costs unless consideration is given to the costs through 2011.

Mr. Walje and Mr. Wilson assert that the Commission should reject Office and Division adjustments, and authorize an 11% return on common equity, because the rates will be effective until Fall 2011 due to the Company tying the test period to its choice not to file another rate case until January 2011. *Walje Rebuttal, lines 22 – 29, lines 48 – 50; Wilson Rebuttal, lines 29 – 33, lines 136 – 142*.[1] This testimony is an outright claim that the Commission should project costs beyond the approved test period. Such testimony should be disregarded in its entirety, as it is not probative in any sense.

In Docket No. 07-035-93, Mr. Duvall testified "[T]he test year decision has increased the regulatory lag the Company faces in a time of steadily increasing power costs." *Duvall Rebuttal, Line 208 – 210.* In that case as in this one, Rocky Mountain Power does not acknowledge that projections must include matching revenues as well as expenses, either greater or lesser, when modifying a test period. As the Court stated in *Utah Department of Business Regulation v. Public Service Commission,* 614 P.2d at 1248:

> The test period results are adjusted to allow for reasonably anticipated changes in revenues, expenses, or other conditions in order that the test-period results of operations will be as nearly representative of future conditions as possible. The commission may

[1] Mr. McDougal, however, states: "The Company believes the Test Period is conservative and balances the need for adequate cost recovery with the need for transparency and risk sharing between the Company and its customers." *McDougal Direct*, lines 102- 106.

> adjust all figures, revenue, expense, and investment for anticipated changes, but it may not adjust one side or part of the equation without adjusting the other; unless there is a finding the particular expense is extraordinary. In other words, there is no basis for adjusting a test year figure in the absence of a finding the increased revenues expected in the future (adjusted to reflect new customers) will not be sufficient to offset the investment and other increased investment and expenses.

THE OFFICE'S RECOMMENDED RETURN ON COMMON EQUITY MORE ACCURATELY REFLECTS A FAIR RETURN AND JUST AND REASONABLE RATES.

As the Commission recognizes, this is the fourth general rate case filed by Rocky Mountain between March 6, 2006 and June 23, 2009. The most recent three were filed within 18 months. The Commission's Report and Order in Docket No. 08-035-38 increased rates effective May 8, 2009. At that time Rocky Mountain stipulated that, considered as a whole, the tariff changes would produce *fair, just and reasonable Utah retail electric utility rates that provide Rocky Mountain Power a reasonable opportunity to earn its authorized return.* Yet, two months later, Rocky Mountain filed this case insisting that the utility was in jeopardy without increased rates due to the same reasons as were advanced before.

All of the admitted evidence acknowledges the economic instability faced by Rocky Mountain and its customers. Rocky Mountain however, appears to isolate the rate of return from the final impact of the rates to be paid, which is the controlling principle. Rocky Mountain also isolates the Utah jurisdiction from the whole of its service territory and from risk-comparable proxy utilities in order to inaccurately represent its financial condition. The reasonable and persuasive

evidence is focused upon what rate of return assures confidence in the financial integrity of PacifiCorp as a whole, while establishing a just and reasonable rate to be paid by Utah customers. Mr. Lawton's recommended rate of return, confirmed by the rate of return concurrently authorized in Oregon, Washington, Idaho and Wyoming, is presumptively just and reasonable.[2]

Reservations about the consistency and attention to detail exhibited by Rocky Mountain's evidence are certainly justified when examining the request for an 11% return on common equity. Rocky Mountain subtly insists that an 11% return on equity is necessary to induce continued investment to serve its Utah customers.[3] In rebuttal testimony, Mr. Walje states:

> In spite of the negative signals from interveners, our owners (MEHC) presently remain committed to making the capital investments required by PacifiCorp required [sic] necessary to provide its customers with the level of service quality they require. However, their commitment to invest requires, in turn, a supportive regulatory environment that provides the Company with a reasonable opportunity to earn a fair return on that investment. Even if capital investments are allowed into rates without a disallowance, not providing the company adequate revenues through rates to provide its investors with a reasonable return is indistinguishable from a capital addition disallowance. *Walje Rebuttal, line 87 – 95.*[4]

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[2] Whether the result of a litigated or settled general rate case, the authorized rate of return is in each instance supported by evidence found by the commission to substantially demonstrate that the rates established are consistent with the law and public interest, accompanied by descriptions of the evidence and issues examined and of the efforts expended to test Rocky Mountain Power's direct case.

[3] Rocky Mountain's response to the August 11, 2008 Report and Order in Docket No. 07-035-93 authorizing a 10.25% return was not subtle. See September 2, 2008 Press Release, "Rocky Mountain Power announces changes in its Utah business" filed in Docket No. 07-035-93.

[4] Mr. Walje is also critical of the Division for not being balanced and not monitoring the financial health of the utility. *Walje Rebuttal, lines 82 – 86.* Mr. Walje's description of

The Commission's August 11, 2008 Report and Order in Docket No. 07-035-93 allowed a 10.25% return on common equity based upon evidence explained and compared in multiple rounds of testimony. The Commission concluded:

> As we sift through the evidence presented by the financial expert witnesses, we give less weight to the testimony presented by Mr. Walje. We conclude the points Mr. Walje raises are incorporated in the application and consideration of the financial evidence. The circumstances Mr. Walje references are not unique to the Company and are factored into the data and inputs used in the financial modeling. As we stated in our June 27, 2008, Docket No. 07-057-13 rate case order for Questar Gas Company, we "recognize our determination of a specific rate of return will be analyzed and factored in the recommendations and ratings of credit rating agencies, stock analysts, and current and future shareholders. What we do will have an effect on the Company's ability to obtain capital in the future. It will also affect Company customers through the rates they will pay. Although equity and debt capital markets are always in flux, the current capital market has distinguishing characteristics. Many of the witnesses have given us their views and opinions on the current capital market and we as well make our determination weighing the long term interests of the Company, investors and ratepayers.
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> [. . .]
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> Through our consideration of the financial models as we deem appropriate, with the inputs or components and weighting we believe reasonable, and weighing all of the expert financial testimony and other witness testimony received, we find and conclude that a rate of return on common equity of 10.25 percent is reasonable." *Report and Order page 17 – 18.*

The process to determine the rate of return on common equity described by the Commission is outlined in *Stewart v. Utah Public Service Commission*, 885 P.2d 759 (Utah 1994). The factors to be considered are many, but several stand out. Rates may not be confiscatory of utility investors, nor exploit ratepayers. Consumer interests are to be protected, as is the financial health of the utility; both

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the Division's duty cannot be found in the statute defining the Division's responsibilities or objectives.

to be considered in light of prevailing economic conditions. *See Stewart,* 885 P.2d 767.

Stewart also cautions against considering factors with marginal or no value to the just and reasonable equation. A fair rate of return based upon the market cost of capital necessarily ensures the availability of capital for investment. *Id*. at 770. Allowing additional return as an incentive to invest for the public convenience and necessity is "flatly irreconcilable with a utility's legal duties" under Utah law. *Id.* at 771. *See also Utah Power & Light Co. v. Public Serv. Comm'n,* 152 P.2d 542, 568 (1944) (citing *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n,* 262 U.S. 679, 692 (1923)).[5]

The return on common equity authorized in the general rate cases preceding this one demonstrate that no single formula or combination of formula are definitive, for it is the total effect of the rate order that must be just and reasonable.[6] Just as would a reviewing court, the Commission must pragmatically view evidence in its entirety, recognizing that economic and financial facts and

[5] "A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."

[6] In this case, Rocky Mountain Power insists that the return in Utah must exceed by a large margin, the return found to be just and reasonable in every other jurisdiction in which Rocky Mountain operates.

circumstances change affecting opportunities for investment, the cost of capital and business conditions generally. What was a reasonable rate of return at one time may be too low or too high at another time.

REBUTTAL COST OF SERVICE AND ITS EFFECT ON RATE SPREAD

From June 23, 2009 to November 12, 2009, Rocky Mountain was silent as the Office, Division, and others examined and evaluated the Company's proposed rate spread, class return calculations, and underlying cost of service study. Two weeks before testimony closed with sur-rebuttal, Rocky Mountain indifferently announced that misaligned historical and forecast hourly load research "did not properly characterize the class peak relationships among the classes."[7] *Paice Rebuttal, line 29 – 55*. The consequence to the cost of service study results in this case is to shift $22 million in cost responsibility from commercial and industrial schedules to the residential consumer. *Gimble Surrebuttal, line 55 – 65*.

The Commission recognized in Docket No. 99-035-10 that "a change in the time of peak, measured at a single hour in a month, can cause large shifts in cost responsibility among classes" and that unpredictable swings in jurisdiction and class cost responsibility violates ratemaking principles. *Report and Order*, page 75. While the Commission considered the cost-of service study results, it

[7] The Commission's staff may wish to review Mr. Paice's reply testimony filed August 31, 2009 in Oregon Public Utility Commission Docket No. UE-210 to determine if the changed methodology described is the same or similar to the problem not disclosed in Utah until November 12, 2009.

tempered that consideration to avoid "an abrupt shift in revenue requirement responsibility among schedules." *Id.* at 76.

Various aspects of the cost of service study offered by Rocky Mountain Power in direct testimony were critiqued by parties and modifications were offered in a number of areas such as classification of generation plant, shared services and load data. However, the parties were able to apply a cost-causation analysis in developing specific rate-spread recommendations rationally linked to Rocky Mountain's original study.[8]

Rocky Mountain's new cost of service study introduced 12 new monthly coincident peaks, 11 of which differed from the application by one hour (May 2010), several days, and as many as 29 days, 8 hours (October 2009). *Chernick Surrebuttal, Table 1, page 3.* And while the April 2010 peak date and hour are the same for the test year in the application and for 2008 in the rebuttal study, the class contribution to the April coincident peak changes without any logical explanation. *Id. line 92 – 97.*[9]

Mr. Chernick determined that the new class 12 CPs are based on 2008 actual dates and times of the peaks, rather than test year forecasted peak dates and times, unsupported by any analysis to confirm that 2008 was a particularly

[8] Schedule 15 Outdoor Lighting is an anecdotal but revealing example of the impact of single peak allocation.

[9] Mr. Brubaker demonstrates the absurdity of the study presented in rebuttal testimony in UIEC Exhibit 1.1 SR, "Difference between "Top-Down" Jurisdictional Peak for Utah and "Bottom-Up" Loads from Class Cost of Service Study 12 Months Ending June 2010." Mr. Brubaker described the result for October as "impossible".

representative year in terms of the timing of peak loads or of the coincidence of Utah and system peaks. *Id., line 48 – 51, line 66 – 69.* Mr. Chernick further points out: "The most troublesome issue is that *all* the demand allocators, not just those derived from the class contribution to system peak demand, changed from the original filing to RMP's rebuttal." The cost of service study presented in rebuttal testimony was untimely, unsupported with proper evidence, and produces large, unexplained swings in class cost of service results. The new study is a sweeping and material revision and not simply the correction of an error. It should be rejected. [10]

THE OFFICE'S RECOMMENDED RATE SPREAD IS THE MOST REASONABLE, SUPPORTED BY EVIDENCE

Similar to other parties, the Office identifies problems with, and proposes modification to Rocky Mountain's original cost of service study. However, the Office does not believe it is appropriate to excuse the utility from its burden of proof by recommending that any change in the revenue requirement be equally spread across the rate classes. If, as UIEC contends, "any cost of service study that relies upon [RMP's Class Load Data] is subject to significant error" Brubaker Surrebuttal, page 8, line 6 – 16, then Rocky Mountain has failed to meet its heavy burden of proof by substantial evidence and therefore, rates may not change for

[10] The Office renews its Motion in Limine, which is attached as Appendix 1, requesting that the Commission decline to consider evidence offered by any party in pre-filed written testimony, in oral summaries, or in oral reply or responsive testimony, consisting of or relying upon the following: Revised cost of service analysis and new class cost of service studies offered in the rebuttal testimony of C. Craig Paice and Scott D. Thornton.

any class. But, this result is no more fair than an across the board equal percentage rate change.

The solution lies in the continued rebalancing of rates between residential and large industrial classes that began in Docket 08-035-38, together with a strict requirement to correct the flaws in cost of service studies. The Office's rate spread recommendation found in Mr. Gimble's testimony is based upon the cost of service study that Rocky Mountain submitted in the original filing and upon which the utility expected the Commission and others to rely. This study conforms to the Commission's procedures and practices to permit a fair and thorough examination of Rocky Mountain's case.

The Office rate spread recommendation and proposed general principles for the classes it represents (Schedules 1,2,3,10,23 and 25), is based upon an analysis of the cost of service study that identified or extrapolated the evidence that is reasonably reliable, can be duplicated, bears a rational and causal relationship to class cost of service, and that does not artificially or for convenience, allocate costs. The Office recommendation also heeds the Commission's guidance to avoid abrupt shifts in cost responsibility among classes, to consider the amount of change in revenue requirement, and examine trends in class earned returns. In other words, the Office has taken from the first filed cost of service study that which is reliable, or by adjustment made reliable, rather than be complacent with rates set by default.

EVIDENCE PERTAINING TO NET POWER COST and REVENUE REQUIREMENT ADJUSTMENTS

The substance and merits of the Office position on specific components to the revenue requirement, including net power costs, need not be restated. The Office will however, briefly examine certain evidence and responsive documents offered by Rocky Mountain. The Office contends that Rocky Mountain's evidence on these issues omits material facts or is presented in such a manner that it is unreliable or misleading. As the Office states in its Motion in Limine, citing *Ferguson v. Williams and Hunt*, 2009 UT 49 ¶ 47, "[w]hile almost all evidence is prejudicial, when viewed in context and under the circumstances in which it is offered, including when it is offered, the probative value must be weighed against its unfair prejudice and likelihood to confuse or mislead." The Office believes that as to the issues discussed below, Rocky Mountain's evidence falls far short of meeting its burden of proof.

Net Power Cost Updates

The Court held in *Utah Department of Business Regulation v. Public Service Commission* that the utility did not meet its burden of proof because of the unreliability of both methods employed and results obtained by the utility to support its request for rate relief. Rocky Mountain Power's net power cost updates in this case, as in Docket No. 07-035-93, are similarly unreliable.[11]

[11] In the August 11, 2008 Report and Order, the Commission held: "We find the Company's proposed change to its forward price curve is untimely and not well supported. Changes by the Company to its own uncontested forecasts fairly late in the

The opinion in *Utah Department of Business Regulation v. Public Service Commission* recognizes that in adjusting rates there must be "substantial evidence concerning every significant element in the rate making components (expense or investment) which is claimed by the applicant as the basis to justify a rate adjustment." *Id.* at 1250. Adjusting both the expense and revenue sides of the rate equation is a condition precedent to just and reasonable rates. *Id.* at 1248. Herein lies the flaws in Rocky Mountain's update proposal; it is incomplete and asymmetrical. Neither Rocky Mountain's nor other parties' updates conform to Mr. Duvall's position that unless updates are complete and symmetrical, they are to be excluded. Duvall Rebuttal, line 85 – 89.

Mr. Falkenberg describes several omissions from Rocky Mountain's contract updates in Utah, and the deficiencies in its proposed updates. *Falkenberg Surrebuttal, line 85 – 110; Exhibit OCS 4.1S.* In addition, he points out that as to the Cal ISO service and wheeling fees, Rocky Mountain omitted any update of those fees, which reduced net power costs by $6 to 8 million. Id. line 113 – 118. Other evidence demonstrates that Rocky Mountain omitted contract updates in

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process are subject to a high standard of review. The regulatory "known and measurable" standard of review cannot be readily applied to projections and forecasts. All projections must be evaluated for general reasonableness and also to ensure consistency with other inputs and assumptions and the appropriate matching of costs and revenues throughout the test period. We do not see such support in this record." *Report and Order*, page 51.

both Utah and Oregon that represented revenues reducing test period net power costs. *UIEC Cross Exhibit 1* (PacifiCorp and Nevada Power Co.)[12]

GRID Market Caps

The issue of including or excluding market caps in graveyard hours for purposes of GRID calculations is plainly described by Mr. Falkenberg. Mr. Falkenberg was examined about a witness's, Andrea Coon, conclusions in Docket No. 03-035-14 addressing the application of market caps to the avoided cost calculation. *RMP Cross-Exhibit 16.* The implication was that this evidence demonstrated ample basis for continuing the market cap adjustment. Rocky Mountain omitted the exhibit upon which Ms. Coon's conclusions were based. Ms. Coon's complete testimony, with its only exhibit, 2.1 R, was offered and admitted as OCS Re-Direct 2. Mr. Falkenberg demonstrated during his re-direct examination that Ms. Coon's exhibit was premised on very little actual data and did not even include all of the plants on the system.

Ms. Coon's Exhibit 2.1 R may or may not be helpful to understanding the differences between the avoided cost calculation and low load hour coal generation and wholesale sales on a four year rolling average or recent single year, under circumstances in 2003 compared to 2009. The Office believes that

[12]The Office renews its Motion in Limine, which is attached as Appendix 1, requesting that the Commission decline to consider evidence offered by any party in pre-filed written testimony, in oral summaries, or in oral reply or responsive testimony, consisting of or relying upon the following: Net power cost updates offered by Rocky Mountain Power, Utah Association of Energy Users, or the Division of Public Utilities. The Office has withdrawn the only net power cost update offered. *See Surrebuttal Testimony of Philip Hayet, Page 3 to 4.*

complete information and data should be available to the witness, but more importantly available to the Commission. In the end, as was pointed out during Mr. Falkenberg's questioning by the Chairman, the basis for the market cap adjustment is to bring night time sales in the GRID model to a level more close to actual system operation. The focus of Rocky Mountain's case is entirely on coal generation, which is not even an input into the determination of market caps. Rocky Mountain simply failed to demonstrate anywhere in the record that the current market cap adjustment is consistent with the actual level of off-system sales currently taking place.

Generation Overhaul Expenses

The Commission's August 11, 2008 Report and Order in Docket No. 07-035-93 determined how actual generation overhaul expenses are to be escalated for the purpose of forecasting the expense in a test period:

> We accept the Committee's adjustment, in part. First, in our recollection, this is the first time escalation within averaging has been proposed. We are not persuaded this is an appropriate approach and are concerned, if accepted here, such a practice would be extended to other cost items, by both PacifiCorp and Questar Gas Company. The basis for using averages of actual costs is because booked amounts vary from year to year, and the costs in any one year are not considered normal. In the next case, following the precedent established here, the Company will assert this year's actual expense, considered in this case to be abnormal, can be escalated to obtain a reasonable level of expense for the next year. This seems to defeat the purpose of constructing an average, which is to smooth out the year-to-year abnormalities. Escalation in the Company's approach serves merely to inflate the average, and the average is already higher than the budget. *Report and Order*, page 81 – 82.

The Division and Office adjusted Rocky Mountain's direct case to conform to the Commission's order and to revise projected overhaul costs at plants because

Rocky Mountain's overstated the 2009 estimates by as much as 3.5 million for one plant. *Salter Direct, line 94 - 114.* The parties are in agreement on the revision to the projected 2009 overhaul costs for the new plants, but still differ in the escalation methodology for the prior period costs. However, without any prompt by new evidence or explanation from Rocky Mountain, in surrebuttal filed on November 30, 2009, the Division did an about-face.

In direct testimony, Mr. McDougal presented a hypothetical comparison of averaging without escalating for inflation as compared to averaging historic amounts that had been escalated to current period dollars. For the "averaging without escalating" he assumes that the hypothetical costs increase each year consistent with inflation, thus each year is escalated off of the prior year, but not to current period dollars. *McDougal Direct, line 417 – 427.*

Dr. Powell's surrebuttal modifies the comparisons by Rocky Mountain by adding volatility to historical values. In this case, Dr. Powell contends that the escalate to current year dollars then average methodology is more accurate than the other method. *Powell Surrebuttal, line 158 – 183.* Insisting that this one "experiment" is not enough, Dr. Powell conducts 10,000 additional experiments by introducing a random variant to represent volatility of historical values. In other words, Dr. Powell tests the accuracy of a forecast in this rate case by using various hypothetical numbers, none of which were based on the actual overhaul costs incurred by Rocky Mountain. From these 10,000 experiments Dr. Powell concludes that Rocky Mountain's methodology is "not exactly" the best method,

but "other methods may provide better estimates of the test year values." *Powell Surrebuttal, line 211 – 213*.

At best, Dr. Powell's analysis, filed at a time when no party had any opportunity to consider and respond, only minimally favors Rocky Mountain's position by repeating the experiment 10,000 times in order to draw a "general conclusion". *Powell Surrebuttal, line 184 – 190*. His analysis is presented after the Division in direct testimony, unequivocally rejected Rocky Mountain's position. Finally, Dr. Powell does not address at all, the rationale behind the Commission's rejection of this methodology in Docket No. 07-035-93. The Division has presented no substantial evidence for reversing that decision.

Idaho Power Transmission Rates

In its proposed update, Rocky Mountain increased net power costs by $11.1 million classified as "BPA and IPC Wheeling". *See MDR 1.8.* The Office learned that $3.7 million was due to a transmission rate case pending at FERC, Docket ER-09-1335-000. In December 2009, the Office asked Rocky Mountain to provide any orders issued by the FERC ALJ. Rocky Mountain opined about possible outcomes of the case and disclosed "FERC has permitted Idaho Power to charge the filed rates, effective August 19, 2009, albeit subject to refund." The August 18, 2009 Order also states: "Our preliminary analysis indicates that Idaho Power's proposed rates have not been shown to be just and reasonable and may be unjust, unreasonable and unduly discriminatory or preferential, or otherwise unlawful." *Order Accepting and Suspending Proposed Rate Schedule and*

Establishing Hearing and Settlement Judge Procedures, August 18, 2009, ¶19, *Idaho Power Company*, Docket ER09-1335-000. Allowing this uncertain and contingent net power cost into rates is not just and reasonable.

OATT Wind Integration Charges

Philip Hayet testified as follows in direct testimony:

Q. WHAT IS YOUR CONCERN REGARDING THE LONG HOLLOW AND STATELINE WIND RESOURCES?

A. Long Hollow and Stateline are wind resources located within PacifiCorp's service territory, and are PacifiCorp Transmission Customers that supply wind energy to other utility companies. Since they are located within PacifiCorp's service territory, PacifiCorp provides transmission services to them under its FERC approved OATT. Currently, PacifiCorp's OATT allows for the recovery of the cost of providing operating reserves, but not for the cost of providing wind integration services. Despite providing wind integration services to those wholesale customers, PacifiCorp receives no revenues from them for the provision of those services. Instead, PacifiCorp is seeking to recover the cost of providing those services from its retail customers in this proceeding, even though the retail customers won't receive any energy or any other benefits from the wholesale Transmission Customers. *Hayet Direct, line 147 – 197*.

Mr. Hayet went on to explain that as merchant or municipally owned wind resources located within PacifiCorp's control area, retail customers receive no benefit from the resources but pay the wind integration costs because these

charges are not included in PacifiCorp's OATT. *Duvall Direct, line 198 – 220*. To correct this improper subsidization, Mr. Hayet recommends that these charges be disallowed in net power costs. *Id. line 221 – 233*.

Rocky Mountain's response is found in Mr. Duvall's rebuttal. In summary, Rocky Mountain charges retail ratepayers rather than the wholesale transmission customer because its OATT does not provide for such charges; FERC approval is required to assess those charges; and, charging for wind integration may be discriminatory. *Duvall Rebuttal, line 943 – 969*. What is important under Utah law is that the utility attempt to correct this acknowledged subsidization by applying to FERC.

In *Committee of Consumer Services v. Public Service Commission*, 2003 UT 29, the Utah Supreme Court addressed a similar circumstance in which the Commission approved recovery of gas processing costs from retail customers in part based upon "the Commission's assessment of the probable result if the allocation issue had been brought before the Federal Energy Regulatory Commission (FERC) in the first place." *Id*. at ¶ 5. The Court framed the issue as a dissenting Commissioner did: [S]ince "[t]he CO2 gas processing plant issue turns on what [FERC] would have done had Questar Gas First taken the case there," the Commission should have required Questar Gas to obtain a ruling from FERC before making its decision." *Id*. at ¶ 6.

The Court held: "Questar Gas's decision not to seek a cost allocation determination from FERC, given the possibility that FERC might have imposed

the entire cost on producers rather than on ratepayers, raises further questions regarding the utility's fidelity to its obligations to its customers." *Id.* at ¶ 15. Unless and until Rocky Mountain requests FERC to include wind integration charges in its OATT, these charges must be removed from net power costs paid by retail customers.

Distribution Preventative and Corrective Maintenance Expense

Utah Department of Business Regulation v. Public Service Commission, *supra* at 1246, recognizes that in adjusting rates there must be "substantial evidence concerning every significant element in the rate making components (expense or investment) which is claimed by the applicant as the basis to justify a rate adjustment." Rocky Mountain failed to provide factual evidence in support of its proposed $3.45 million adjustment to increase Utah distribution preventative and corrective maintenance expense. In making its adjustment, Rocky Mountain merely compared budgeted to actual costs in a subset of accounts. As indicated by Ms. Ramas, Rocky Mountain did not identify what specific maintenance items were foregone, did not identify specific costs that otherwise would have been incurred, and was unable to provide any written documentation provided to employees giving direction or instructions pertaining to the purported reduction in Utah distribution corrective and preventative maintenance expenditures. *Ramas Surrebuttal line 251 – 260; Ramas Direct line 924 – 936.* Rocky Mountain apparently took no steps to document or track for future identification, the specific cost reductions and modifications in procedures it contends it undertook, thereby

making it impossible to verify the necessity or justification for the proposed $3.45 million adjustment to preventative and corrective maintenance expense for the test period.

Merely comparing budgeted amounts in certain sub-accounts to actual amounts recorded in those accounts does not support the adjustment. Likewise, Mr. McDougal's comparison of historic external contractor costs is misleading in that it includes not only external contractor costs specific to the Utah corrective and preventative maintenance expenses, but incorporates all Utah situs contract labor costs, the majority of which were capital costs and not expenses. *Ramas Surrebuttal, line 382 – 396.*

While the Office agrees a reasonable level of distribution corrective and preventative maintenance is necessary to maintain reliable service, this does not excuse the Company from providing substantial evidence in support of its proposed adjustments. *Ramas Surrebuttal, line 400 – 418*.

Senior Executive Retirement Plan (SERP)

In its May 24, 2000 Report and Order in Docket No. 99-035-10, the Commission addressed a proposed adjustment disallowing all SERP expense for the test year: "Although it has been argued that the SERP plan is extra compensation to executives who did not perform well during the test year, it is our opinion that a SERP plan is an essential part of executive compensation in recruiting and retaining qualified executives." *Report and Order*, page 57. In this rate case, Rocky Mountain asserts that even though there is only one person

eligible for SERP who is currently employed and that the plan is closed to new participants, Rocky Mountain must be known as a company that performs its contractual obligations to employees.

The question is not whether Rocky Mountain will pay the SERP benefits; it is contractually bound to pay whether or not it recovers the costs in rates. The question is whether Utah ratepayers should in perpetuity pay the plan's cost when no evidence demonstrates that SERP provides a present or future ratepayer advantage. Evidence that supported the Commission's conclusion in May 2000, appears nowhere in the record of this case.

Whatever principle of ratemaking was relied upon by the Commission in May 2000, or is relied upon by Rocky Mountain today, all costs of SERP are allocated to ratepayers no matter whether a participant resigned, was fired, or laid-off; no matter under what circumstances they became a participant; no matter for whom they worked or how long they stayed; no matter whether they receive duplicate benefits as both senior executives and as directors; no matter whether receipt of SERP benefits were in fact contingent or were unqualified vested benefits; and, no matter whether participation in SERP was awarded by the entity obtaining control as a result of a merger or acquisition.

The Commission's comments in Docket No. 99-035-10, which Rocky Mountain insists binds both the Commission and ratepayers, must bow to the wisdom of time when a prior decision is in need of change. *See Union Oil Company v. Utah State Tax Commission,* 2009 Utah 78 ¶12. Whatever essential

part of executive compensation SERP may have served in the past, it is no longer a fair or just and reasonable component of Rocky Mountain's revenue requirement.

Pension Expense Adjustment

Rocky Mountain witness Erich Wilson in Rebuttal referred to updated actuarial information prepared October 1, 2009 by its actuary Hewitt Associates. Mr. Wilson was critical of Donna Ramas' using 2009 actuarial information to project forward to 2010. Ms. Ramas was examined about Hewitt's October 1, 2009 update marked as RMP Cross-Exhibit 9.

The exhibit about which Ms. Ramas was examined omitted a section titled "Key Assumptions" and omitted one and one-half pages describing pension contributions, payments and balance sheet items. The omitted information described the assumptions upon which the actuarial projection is based, and are necessary to an informed decision concerning the inclusion of pension costs in utility rates. In particular, the assumptions Rocky Mountain deleted from its exhibit evidence that October 31, 2009 year to date return on plan assets, 16.7%, was double the return assumed in Rocky Mountain's application, 7.75%. The Office offered the complete document as a substitute Cross-Exhibit 9.

The Office's adjustment to pension expenses more accurately reflects forecast expenses in the test period and rate effective period. The Office's adjustments were based upon the assumptions and outcomes described by the actuary. The Office's adjustment has not been rebutted by Rocky Mountain's

analysis that excludes the complete information and data that should be available to the witness, and more importantly available to the Commission.

Settlement Fees – United States of America v. PacifiCorp dba Rocky Mountain Power No. 09-CR 174-B

Until November 30, 2009 sur-rebuttal testimony, Rocky Mountain requested that its ratepayers pay a portion of the restitution ordered as a result of July 16, 2009 guilty pleas to each of thirty-four counts for violating the Migratory Bird Treaty Act, 16 U.S.C. §703. *Ramas Direct, line 1900 – 1917*. Mr. McDougal removed these expenses from its revenue requirement request. *McDougal Surrebuttal, line 111 – 125*. Though it removed these expenses, Rocky Mountain continued to assert as it had from the beginning "the settlement fees in question by Ms. Ramas were in the best interest of the Company's ratepayers because they facilitated a favorable resolution of disputed litigation, reducing the Company's potential exposure for excessive compensatory and punitive damages. Id. line 113 – 118. Earlier, Rocky Mountain justified charging ratepayers for "an avian settlement" because: "A certain level of legal risk is inherent in the nature of the electric utility industry. Although the Company makes significant efforts to mitigate these risks, settlement and legal expenses are unavoidable and necessary in order to provide adequate electric power to its customers." *McDougal Rebuttal, line 1113 – 1116.*

Rocky Mountain exercised reasoned judgment by recording "below-the-line" the assessment and fine resulting from the pleas, and in the end when the

restitution order was removed. What is troubling however is that the fact of and circumstances surrounding this matter were not initially disclosed and no effort was made to explain the restitution as advancing consumer interests.[13] [14] Had this been done, there may have been much less, perhaps very little, concern over the issue. While rate cases are complex and involve considerable resources to prepare, the Office's view is that a judicious, perhaps overly cautious, approach providing more background and support is preferable to creating an appearance that the application lacks candor. The next adjustment is another example.

Settlement Fees – Colstrip

Rocky Mountain increased the revenue requirement by $1.2 million as PacifiCorp's share of a May 2008 settlement payment to 50 plaintiffs who sued the Colstrip owners in May 2003. A complete description of the lawsuit and settlement is found on pages 10 and 11 and in Exhibit MLJ-4 to the May 8, 2009 Direct Testimony of Michael L. Jones on behalf of Puget Sound Energy, Docket No. UE-090704, Washington Utilities and Transportation Commission. Rocky Mountain did not disclose the details of the lawsuit and settlement, nor the fact

[13] The restitution order first appears as an entry in Account 925 Injuries & Damages.

[14] The Information was filed June 24, 2009 and the Misdemeanor Judgment on the pleas was filed July 16, 2009. The Judgment distributes the restitution in specific amounts to specific parties for specific purposes.

that potential insurance proceeds would reduce PacifiCorp's net payment to approximately $691,857. *Jones Direct, Id., Exhibit MLJ-4.*[15]

As a non-recurring expense incurred before the test period, that is partially insured and for which no supporting information was provided, the entire amount should be removed.[16]

CONCLUSION

The few specific revenue requirement components addressed in this brief are not the only areas in which the Office recommends adjustments. The Office regards the specific adjustments discussed in this post-hearing brief as a measure of the substance and quality of the whole of Rocky Mountain's evidence. Its evidence is insubstantial, incomplete and based upon inaccurate or inadequately supported projections. Under long-standing ratemaking rules and principles in light of the burden of proof, it is apparent that Rocky Mountain's application for a rate increase is excessive in its individual parts and unwarranted as a whole.

Rocky Mountain's monopoly position imposes upon it a "consequent duty to operate in such manner as to give to the customers the most favorable rate reasonably possible," a duty reflected in the statutory "just and reasonable" requirement. *Utah Department of Administrative Services v. Public Service*

[15] Puget Sound Energy requested the Commission to defer recovery until insurance recovery is exhausted and then amortize the amount over five years. Rocky Mountain Power's witness for this issue appeared to be unaware of the origin of the claim and the actual terms of PacifiCorp's obligation.

[16] While Rocky Mountain Power offered to amortize the Colstrip settlement over three years, no evidence or explanation was provided to justify such treatment. *McDougal Surrebuttal, line 119 – 125.*

Commission, 658 P.2d 601, 618 (Utah 1983); *accord*, *Committee of Consumer Services v. Public Service Commission*, 2003 UT 29 ¶15. Within this context, the Commission should view the utility's evidence in this case with some skepticism. "The utility is truly the gatekeeper to information concerning what has happened, what is happening and what the utility anticipates can happen as its management continues pursuit of its business plans." *Order, January 3, 2008, In the Matter of Rocky Mountain Power Application for Accounting Orders, Docket Nos. 06-035-163, 07-035-04, 07-035-14, Page 19.*

Rocky Mountain Power has not provided the Commission with the quality or scope of evidence that is substantial and upon which the Commission may rely to set just and reasonable rates. Only by accepting the Office's adjustments does the evidence accurately reflect the costs of service that reasonably may be expected in the rate effective period. Only with the Office's adjustments will the significant elements in the ratemaking components be supported by substantial evidence.

RESPECTFULLY SUBMITTED this 11th day of January 2010.

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CERTIFICATE OF SERVICE

On January 11, 2010, a copy of the Utah Office of Consumer Services' Post Hearing Brief was served upon the following by electronic mail.

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