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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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| 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. 10-035-124<br><br>**ROCKY MOUNTAIN POWER'S RESPONSE OPPOSING URTA'S MOTION TO DISMISS, TO STRIKE TESTIMONY OR, ALTERNATIVELY, TO OPEN A RULEMAKING DOCKET** |

Rocky Mountain Power, a division of PacifiCorp ("Rocky Mountain Power"), hereby responds in opposition to the Motion to Dismiss, Motion to Strike, or Alternatively, Motion to Open a Separate Rulemaking Docket Filed by the Utah Rural Telecom Association ("Motion")

on May 3, 2011.[1] In the Motion, the Utah Rural Telecom Association ("URTA") requests that the Commission dismiss the Company's request to amend Electric Service Schedule No. 4 – Pole Attachments ("Schedule 4") and strike testimony filed in support of that request.[2] Alternatively, URTA requests that the Commission transfer the Schedule 4 issue from this docket to a rulemaking docket. The Company opposes the Motion because (1) URTA has failed to demonstrate that the Company is not entitled to relief under the facts set forth in the Application, (2) the relief the Company seeks is an appropriate rate case issue and is not rulemaking, and (3) the Motion is untimely.

## I. INTRODUCTION

Rocky Mountain Power filed its Application in this case on January 24, 2011. The Application included the testimony of Steven R. McDougal and Jeffrey M. Kent requesting that Schedule 4 be amended to include a schedule of non-recurring fees and that various rates in the schedule be modified, including increasing the annual charge per pole attachment from $7.02 to $8.10.[3] Mr. McDougal's testimony demonstrated that the amendment to Schedule 4 would increase Company pole attachment revenues, which are reflected as a revenue credit in the case,

[1] This response is filed pursuant to Utah Admin. Code R746-100-1.C and 4.D and Rule 12(b) Utah Rules of Civil Procedure ("URCivP") and on an expedited basis pursuant to the Commission's Order Shortening Time for Response to Motion and Notice of Oral Argument ("Order and Notice") issued May 4, 2011.

[2] The portion of the Motion requesting that Mr. McDougal's and Mr. Kent's testimony be stricken is unsupported in the Motion and Memorandum in Support of the Motion ("Memorandum") and is apparently simply an extension of URTA's request that the Company's request to amend Schedule 4 be dismissed. Accordingly, the Company will not further address that portion of the Motion in this response.

[3] Direct Testimony of Jeffrey M. Kent ("Kent"), lines 23-103 and Exhibits RMP ___ (JMK-1 and -2); Direct Testimony of Steven R. McDougal ("McDougal"), lines 875-879 and Exhibit RMP ___ (SRM-3), pages 3.5 and 3.5.1.

by $198,778,[4] thus offsetting revenue increases otherwise required in other rates and schedules by the same amount.

The Commission held a duly noticed scheduling conference on February 9, 2011. URTA and other parties that attach facilities to the Company's poles were given notice of and the opportunity to participate in the scheduling conference. As noted in the Order and Notice, the schedule developed in that conference is complex and was the product of extensive discussion, taking into account availability of numerous expert witnesses and counsel. On May 3, 2011, fourteen weeks following the filing of the Application, twelve weeks following the scheduling conference, and less than two weeks before its testimony on the Schedule 4 issue is due, URTA filed the Motion and requested expedited proceedings on the Motion. URTA admitted that it requested expedited treatment "so that URTA can avoid filing testimony on May 16, 2011." Motion at 1. URTA further requested that if there is insufficient time for the Commission to resolve the Motion before the testimony is due, the Commission postpone the date for URTA and others to file testimony on the Schedule 4 issue. *Id.* at 1-2. Thus, it is apparent that the Motion was motivated, at least in part, by the looming deadline for URTA to file testimony.

The Motion seeks dismissal of the Company's request to amend Schedule 4. Such motions are governed by Utah Admin. Code R746-100-1.C, R746-100-4.D and Rule 12(b)(6) of the Utah Rules of Civil Procedure. A motion under Rule 12(b)(6) must establish that the applicant is not entitled to the relief sought as a matter of law assuming that the facts plead in the application or reasonable inferences from those facts are true. URTA has failed to even address this issue, much less demonstrate that the Company is not entitled to amend Schedule 4 based on the facts in the Application. Furthermore, the premise for the Motion, that the request should be

[4] McDougal, Exhibit RMP ___ (SRM-3), pages 3.5 and 3.5.1.

dealt with in rulemaking, is obviously incorrect. An amendment to a schedule that results in increased rates is an appropriate issue in a rate case. Utah Code Ann. §§ 54-3-3, 54-4-4, 54-7-12. The relief the Company seeks does not require an amendment to Rule R746-345 or any other Commission rule and is not rulemaking. Finally, URTA fails to offer any excuse for its failure to either claim that the Application was incomplete within 14 days of the filing of the Application as required by Utah Code Ann. § 54-7-12(2)(b)(ii) or to move to dismiss the request within 30 days of the filing of the Application or its receipt of notice of the Application as required by Utah Admin. Code R746-100-1.C and -4.D and Rule 12(b)(6) of the Utah Rules of Civil Procedure. Based on the foregoing, the Motion should be denied.

## II. STATEMENT OF FACTS

URTA fails to explain why the facts alleged in the Application do not justify an amendment to Schedule 4 as a matter of law. This alone is a reason the Motion should be denied. Nonetheless, the Company will briefly summarize the facts in support of its request for Schedule 4 to be amended to illustrate why the relief the Company seeks is clearly appropriate for consideration in a general rate case.

The Company has been charging the same non-recurring fees for pole attachments since 2002 pursuant to contracts approved by the Commission. Kent, lines 31-34. These charges have not been included in Schedule 4. *Id.*, lines 81-82. In adopting Rule R746-345 in 2006, the Commission indicated that the fee schedule for non-recurring rates should be included in Schedule 4. *Id.*, lines 77-78. *See also* Utah Admin. Code R746-345-3.A.2. The Application amends Schedule 4 to include the fee schedule. Kent, lines 26-27.

The Company's current annual charge for pole attachments has been in effect since 2006. *Id.*, line 99. The administrative support costs the Company incurs to manage joint use of the Company's poles are not being recovered through this charge because these costs settle to a

different Federal Energy Regulatory Commission ("FERC") account than the account used for administrative and general expenses included in the carrying charge component of the annual charge. *Id.*, lines 44-47. It is necessary to increase the annual charge to ensure that pole occupants who are causing the costs are responsible for paying the costs. *Id.*, lines 52-53. To the extent the annual charge is less than the costs the Company incurs in managing joint use attachments, which it currently is, other customers unfairly subsidize parties that attach to the Company's poles. *Id.*, lines 55-57. The increase in rates proposed by the Company will offset $198,778 of the Company's revenue requirement which would otherwise be paid by other customers. McDougal, Exhibit RMP ___ (SRM-3), pages 3.5 and 3.5.1.

Until now, the Company has attempted to recover the administrative support costs through application and per pole fees. This practice has not recovered the costs. Kent, lines 63-66. By including these costs in the annual charge, proper cost recovery occurs and there is no longer a need for the application and per pole fees. *Id.*, lines 71-73. The fee schedule in executed contracts will be amended by amending Schedule 4. *Id.*, lines 73-75.[5]

The inclusion of an unauthorized attachment fee of $100 plus back rent is not a change to the Company's current practice. *Id.*, lines 86-88. Making this charge is a deterrent to attaching to the Company's poles without permission. *Id.* Attaching without permission results in improper cost avoidance under a lesser fee if and when the unauthorized attachment is discovered. *Id.*, lines 89-90.

[5] Mr. Kent's testimony inadvertently referred to this proceeding as "rulemaking" on line 74. This is an obvious clerical error as is plain from the context and will be corrected when Mr. Kent files rebuttal testimony or when his testimony is offered for admission in accordance with normal practice.

## III. ARGUMENT

URTA cites Rule R746-100-3.H as the basis for its Motion. That rule simply provides general guidance about filing motions with the Commission. Utah Admin. Code R746-100-3.H. It does not specify the standards any particular motion must meet. URTA has not specified the Commission rule or rule of civil procedure that supports dismissal of the Company's request. Thus, the Company has been forced to make assumptions about the legal basis for the Motion. The only legal bases that appear applicable are Utah Code Ann. § 54-7-12(2)(b)(ii) allowing a challenge the completeness of the Application or Rule 12(b)(6) allowing dismissal for failure to state a claim.[6]

### A. URTA's Motion Does Not Even Attempt to Establish that the Company's Request Is Legally Insufficient.

In considering a motion to dismiss under Rule 12(b)(6), the Commission should accept the factual allegations in the Application as true and consider all reasonable inferences to be drawn from those facts in a light most favorable to the Company's claims.[7] The Commission may also review documents referenced in the Application and take notice of facts of record that have bearing on the claim.[8]

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[6] As previously noted, the Company is not addressing the portion of the Motion related to striking testimony because it is not supported in the Motion or Memorandum.

[7] *Barker v. Qwest Corp.*, Docket No. 02-049-46, 2002 Utah P.U.C. LEXIS 148, *3-*4 (Oct. 4, 2002). *See also In re McMillian*, Docket No. 09-019-01, 2011 Utah P.U.C. LEXIS 84, *2 & n.1 (Feb. 28, 2011) (quoting *Ho v. Jim's Enters.*, 2001 UT 63, ¶ 6, 29 P.3d 633); *Prows v. State*, 822 P.2d 764, 766 (Utah 1991) ("appears that the [applicant] . . . would not be entitled to relief under the facts alleged or under any state of facts [it] could prove to support [its] claim"); *Hudgens v. Prosper, Inc.*, 2010 UT 68, ¶ 14, 243 P.3d 1275.

[8] *Lee v. Gaufin*, 867 P.2d 572, 585 n.19 (Utah 1993) ("Judicial notice may be taken of facts pursuant to Rule 201(b) of the Utah Rules of Evidence when the facts are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.") (internal quotations and citations omitted). *See also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 n.1 (10th Cir. 2004).

URTA has not even attempted to establish that the Company would not be entitled to an amendment to Schedule 4 if the allegations in the Application, including the testimony filed with the Application, are accepted as true. Therefore, the Motion must be denied.

Nonetheless, the Company has provided a summary of the facts in the Application that demonstrate quite clearly that the annual charge currently in effect is insufficient to cover the costs the Company incurs in providing pole attachments to parties such as URTA. Thus, if the annual charge is not increased, other customers of the Company will be required to make up the revenue shortfall associated with these costs. Accepting these facts as true, it is clear that the Company is entitled to the relief it seeks and that such relief is in the public interest. Far from making pole attachments a profit center as claimed by URTA (Memorandum at 1), the Company's request simply seeks a change in revenue from pole attachments to match their cost which will result in a decrease in revenue requirement to be covered by other services. The amendment sought by the Company will not increase its profits at all.

Instead of challenging the sufficiency of the evidence or the legal basis for the request, URTA argues that the Company should be barred from attempting to amend Schedule 4 because it took two years for the Commission to establish the current version of Rule R746-345-5 and the safe harbor contract issued in that docket. Memorandum at 2-3. URTA also argues that the Company made the same claims it is making in this case in that docket and in Docket No. 10-035-97. *Id.* at 3. Even assuming for the sake of argument that URTA's claims are correct, there is no reason the Company cannot seek an increase in rates in this case. Ratemaking involves a continual process of reviewing costs and determining rates to recover those costs fairly.[9] The

[9] *See Questar Gas Co. v. Utah Public Service Comm'n*, 2001 UT 93, ¶ 5, n. 6, 34 P.3d 218 ("A general rate proceeding is the Commission's primary mechanism for setting utility rates prospectively. In lengthy hearings, the Commission considers various factors, including the utility's historical income, cost

Company or any other party is free to seek a change in a rate established in a prior case in any subsequent case. *Id.*

The methodology for calculating the pole attachment annual rental rate was effectively established in Docket No. 04-999-03. That proceeding resulted in the adoption of the current version of Rule R746-345-5. Although the rule establishes a rate formula for calculating a pole attachment annual rental rate, each pole owner must calculate its own rate based on the consideration of factors in the formula. In addition, there is nothing in the rule to suggest that the rate is forever set in stone absent an amendment to the rule. As costs associated with factors in the formula change over time, it is entirely appropriate for the Company to seek a new annual charge through a rate case. Certainly, a review of costs once every five years is not "wasteful of the Commission's and the parties' limited resources" as claimed by URTA. Memorandum at 1. In addition, the rule specifically provides that the Company or any other party may deviate from the formula with Commission approval. Utah Admin. Code R746-345-5.B. That is precisely what the Company is seeking in this case.

The balance of URTA's argument claims that the Company's request to amend Schedule 4 is inconsistent with Federal Communications Commission ("FCC") precedent and direction. Memorandum at 3-4. This argument goes to the merits of the Company's request. Such an argument may be presented in testimony or legal argument, but is not a basis to dismiss the request.[10]

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and revenue data, and predictions of future costs and revenues, to arrive at a just and reasonable rate."); *Utah Dep't of Bus. Regulation v. Utah Public Service Comm'n*, 614 P.2d 1242, 1248 (Utah 1980) ("In a general rate proceeding the commission determines for a test period the expenses, the rate base, and the rate of return to be allowed. Based on those figures the commission determines the revenue requirements, then fixes a rate to produce sufficient income to meet the revenue requirements.")

[10] Furthermore, if the Commission reviews the FCC precedent cited by URTA, it will note that the FCC has effectively found the Company's unauthorized attachment fee of five times annual rent plus

**B. The Company's Request Is Not Rulemaking and Is Appropriate for a Rate Case.**

URTA's alternative relief, that the Commission open a new rulemaking docket to consider the Company's proposed amendments to Schedule 4, would clearly be inappropriate. Rulemaking is for adoption or amendment of rules which have general applicability; it is not to consider changes in the rates of a single utility. *See* Utah Code Ann. § 63G-3-102(16). The Company is not seeking any amendment to Rule R746-345 or any other rule. It is seeking a change in its rates. Furthermore, to the extent it is seeking a deviation from the annual charge formula in Rule R746-345-5(1), deviations are already contemplated and permitted by the rule as it now stands. Utah Admin. Code R746-345-5.B.

Utah Code Ann. § 54-3-3 prohibits a public utility from changing its rates, regulations or schedules without filing new schedules with the Commission. Utah Code Ann. § 54-4-4(1) requires the Commission to hold a hearing to determine if any change in rates, regulations or schedules proposed by a public utility is just and reasonable. Utah Code Ann. § 54-7-12 addresses the process for a utility to propose a change in its rates or schedules. Section 54-7-12(1)(a)(i) defines a base rate as:

> Those charges included in a public utility's generally applicable rate tariffs, including: (A) a fare; (B) a rate; (C) a rental; (D) a toll; or (E) any other charge generally applicable to a public utility's rate tariffs.

The annual charge, the unauthorized attachment fee and the non-recurring charges in Schedule 4 are base rates. Section 54-7-12(1)(d) defines a rate increase as:

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$100 is reasonable. The FCC said that unauthorized attachment fees are "presumptively reasonable if they do not exceed those implemented by the Oregon PUC." Report and Order and Order on Reconsideration, FCC 11-50 (Apr. 7, 2011) at ¶ 115. As noted by the FCC, the Oregon commission has approved unauthorized attachment fees in certain circumstances of $500 per pole or five times annual rent plus $100. *Id.*

> (i) any direct increase to a public utility's base rates; or (ii) any modification to a classification, contract, practice, or rule that increases a public utility's base rates.

The Company's proposed increase in the annual charge is a rate increase. Section 54-7-12(5) allows a rate *decrease* to go into effect without a hearing. Thus, a rate *increase* would normally only take effect after a hearing.

It is apparent that an amendment to Schedule 4 that increases rates falls within the provisions of the foregoing ratemaking sections of the Utah Code and that it is appropriately addressed in a rate case. Accordingly, the relief the Company seeks regarding Schedule 4 is available in a rate case and is *not* available in a rulemaking proceeding.

**C. URTA's Motion Is Untimely.**

Section 54-7-12(2)(b)(ii) requires that a motion challenging the completeness of a general rate case application must be filed within 14 days after the application is filed with the Commission. With regard to a motion to dismiss under Rule 12(b)(6), the Commission's procedural rules provide that

> responsive pleadings to requests for agency action shall be filed with the Commission and served upon opposing parties within 30 days after service of the request for agency action or notice of request for agency action, whichever was first received. Motions directed toward initiatory pleadings shall be filed before a responsive pleading is due; otherwise objections shall be raised in responsive pleadings.

Utah Admin. Code R746-100-4.D. Thus, a motion to dismiss must be filed within 30 days after service of an application or notice of the application or objections to the request sought in an application must be made in a responsive pleading filed within 30 days after service of the application or notice of the application.[11]

[11] The Company does not mean to suggest that parties are required to object to any aspect of a rate case application within 30 days or forever hold their peace. Parties are clearly entitled to thoroughly

The Commission's procedural rules further provide that "[i]n situations for which there is no provision in these rules, the Utah Rules of Civil Procedure shall govern, unless the Commission considers them to be unworkable or inappropriate." *Id.* R746-100-1.C. Thus, further guidance is provided by the body of law established under Rule 12(b)(6) of the Utah Rules of Civil Procedure, which is the rule governing motions to dismiss. Rule 12(b)(6), like Rule R746-100-4.D, requires that motions to dismiss pleadings or portions of pleadings be made within the time provided for responding to the pleading. Rule 12(b) URCivP.

Responsive pleadings are not required in many Commission proceedings, including general rate cases. However, if a party wishes to challenge the completeness of a rate case application, it must file the challenge within 14 days of the filing of the application with the Commission. Utah Code Ann. § 54-7-12(2)(b)(ii). URTA did not seek to intervene or file such a challenge within the 14-day period. Therefore, to the extent its claim that the Company's request to amend Schedule 4 is "without any supporting data or evidence" (Motion at 2) is a claim that the Application was incomplete, the claim is untimely and should be disregarded. URTA is certainly free through discovery and testimony to challenge the evidentiary basis for the Company's request; however, it is too late to urge that the request be dismissed because it is incomplete.

Likewise, if a party wishes to challenge the legal sufficiency of a claim, the party must file a motion to dismiss within the time allowed for a responsive pleading or within 30 days of service of the pleading or notice of agency action. Utah Admin. Code R746-100-4.D; Rule

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review the application, to conduct discovery and to file testimony opposing particular aspects of the application in accordance with the procedural schedule established by the Commission. However, if a party wishes to claim that a component of the relief sought by the application, in this case an amendment to Schedule 4, is not appropriate in a general rate case, the party should be required to make that objection known in a motion filed before responsive pleadings are due or in a responsive pleading in accordance with the Commission's rules and the Utah Rules of Civil Procedure.

12(b)(6) URCivP. URTA's Motion is barred because it was not brought within 30 days of the date URTA was served with notice of the Application.

## IV. CONCLUSION

For the foregoing reasons, Rocky Mountain Power respectfully requests that the Commission deny URTA's Motion.

DATED: May 10, 2011.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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