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. 10-035-124**

Rebuttal Testimony and Exhibits of

J. Robert Malko

On behalf of

Utah Industrial Energy Consumers

June 30, 2011

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REBUTTAL TESTIMONY OF J. ROBERT MALKO

Q PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A J. Robert Malko. My business consulting address is 245 North Alta Street, Salt Lake City, Utah 84103.

Q ARE YOU THE SAME J. ROBERT MALKO WHO FILED DIRECT TESTIMONY ON BEHALF OF UTAH INDUSTRIAL ENERGY CONSUMERS ("UIEC") IN THIS PROCEEDING?

A Yes.

Q WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY IN THIS PROCEEDING?

A My rebuttal testimony responds to witness Dr. William Powell of the Division of Public Utilities ("Division") concerning the role of regulation and the financial health and integrity of an energy utility.

Q PLEASE SUMMARIZE YOUR REBUTTAL TESTIMONY.

A I address Dr. Powell's position that concern for the financial health of Rocky Mountain Power ("RMP" or the "Company") to meet its service obligations in a growth environment along with cumulative impacts of proposed reasonable and supportable reductions to RMP's revenue requirement should justify the Public Service Commission of Utah ("Commission") to allow and approve imprudent or unreasonable costs to be included in RMP's revenue requirement and rates. I conclude that Dr. Powell's proposal <u>violates</u> fundamental regulatory principles.

Q WHAT IS THE BASIS FOR YOUR CONCLUSION?

A Dr. Powell places excessive emphasis on RMP's financial integrity and under-emphasizes the importance of the traditional principle of "just and reasonable" prices, efficient behavior by utility managers, and interests of utility ratepayers.

<u>RESPONSE TO DR. POWELL</u>

Q HAVE YOU REVIEWED DR. POWELL'S TESTIMONY REGARDING THE ROLE OF REGULATION AND RMP'S FINANCIAL HEALTH IN THIS CASE?

A Yes, I have.

Q WHAT DOES DR. POWELL PROPOSE IN HIS DIRECT TESTIMONY CONCERNING THE ROLE OF REGULATION AND THE FINANCIAL HEALTH OF RMP?

A The following are key points in Dr. Powell's position:

> 1. Individual adjustments concerning reductions to proposed revenue and rate increases are supportable and reasonable.
>
> 2. However, cumulative effects of these same reasonable reductions and adjustments could be:
>
>   a. Harmful to the financial health of the Company; and
>
>   b. Harmful to RMP in its obligation and effort to serve Utah ratepayers, in a growth environment, with safe, adequate and reliable services.

Q WHAT IS THE BASIS OF DR. POWELL'S CONCLUSION?

A Dr. Powell on pages 2-3, lines 30-46 of his direct testimony presents the following discussion of the basis for the Division's position on the role of regulation and the financial health of RMP.

> Finally, as the manager of the energy section, I will act as the Division's policy witness. The Division believes that each of the adjustments to the Company's revenue requirement recommended in testimony filed by Division witnesses, including consultants, is supportable and represents a reasonable adjustment to the revenue requirement to reflect prudent utility practice. However, the Division is concerned that the cumulative effect of the Division's and others' adjustments in this case could leave the Company with insufficient resources to meet its mandate of providing safe, adequate, and reliable service.
>
> The Division believes the Commission may, and in fact should, consider the cumulative effect of all of the adjustments on the Company's overall financial health as it establishes the Company's revenue requirement in this case. A myopic focus on each item in a general rate case may lead to many reasonable adjustments, often small in amount, the combined effect of which ultimately leaves the Company insufficient resources to make needed investments. Failing to consider the cumulative weight of otherwise reasonable adjustments, particularly when Utah's load is growing relative to the Company's other jurisdictions, is unwise and could lead to the Company's future inability to meet its service obligations and would not be in the public interest.

What Dr. Powell essentially does is state that costs demonstrated by professional analysts to be unreasonable on an individual basis should be viewed as reasonable based on a cumulative assessment if there may be a harmful and negative impact on the financial health and integrity of the Company.[1] However, under a traditional regulatory and corporate finance framework, unreasonable costs attributable to inefficient decision-making by utility managers should be borne by utility shareholders, not ratepayers. The corporate governance framework provides the means and directions for utility

[1] This type of thinking is analogous to the position that business firms in the automobile industry are too important and too big to fail.

shareholders to address issues, activities, and decisions associated with their financial agents, the utility managers. Corporate governance is responsible for addressing imprudence and inefficiencies associated with utility managers based on decisions and guidance provided by regulators. Regulators should not excuse or shelter the imprudence and inefficiencies associated with decisions made by utility managers, and investors need to know this information.

Q WHAT DO YOU BELIEVE DR. POWELL FAILED TO CONSIDER?

A Dr. Powell's testimony violates well-established and fundamental precepts of public utility regulation as recognized by various regulators and experts in this field. These fundamental precepts, including the role of economic regulation, the importance of the principle of "just and reasonable" prices, drawbacks of rate of return regulation, and the obligations and rights of a regulated public utility, are all ignored by Dr. Powell. These fundamental precepts are reflected in relevant sections of the Utah Code, including Sections 54-4-4 and 54-4a-6.

Q SHOULD THE COMMISSION ACCEPT AND FOLLOW THE ADVICE OF DR. POWELL CONCERNING THE FOCUS ON THE CUMULATIVE EFFECT OF DISALLOWING UNREASONABLE COSTS ON THE FINANCIAL HEALTH OF RMP?

A No. Dr. Powell is recommending a form of "top-down," as opposed to "bottom-up," determination of a revenue requirement for a regulated utility, RMP. The traditional regulatory approach is to construct a revenue requirement from the "bottom-up" by examining the reasonableness of individual cost items and excluding unreasonable costs from the revenue requirement that is to be approved as adequate. Dr. Powell is recommending an arbitrary "floor" for RMP's revenue requirement and arbitrary "cap" on unreasonable costs for RMP in the name of some unknown measures or definitions of financial integrity and health of RMP. Under Dr. Powell's approach to regulation, the following occurs: costs determined to be unreasonable on an individual basis magically become reasonable on a cumulative basis because of considerations of the financial health of the utility. A regulatory commission should not assess the unreasonable costs associated with imprudent and inefficient decisions made by utility managers to be paid by ratepayers in the name of the financial integrity of the utility business. These unreasonable costs need to be borne by shareholders. There clearly needs to be a reasonable risk balancing and sharing between ratepayers and shareholders in the regulatory framework.

Q DOES WITNESS POWELL APPROPRIATELY CONSIDER THE ROLE OF ECONOMIC REGULATION IN HIS ANALYSIS?

A No. The role of economic regulation of a monopoly is to produce the results, in a reasonable manner, of a competitive market. My position is also supported by Professor James Bonbright, who states the following concerning this issue on page 93 of his book, Principles of Public Utility Rates (1961):

> Regulation, it is said, is a substitute for competition. Hence its objective should be to compel a regulated enterprise, despite its possession of complete or partial monopoly, to charge rates approximating those which it would charge if free from regulation but subject to the market forces of competition. In short, regulation should be not only a substitute for competition, but a closely imitative substitute.

According to Myron B. Katz, former chairman of the Oregon Public Utility Commission, "The principal objective of utility regulation is to protect consumers from the lack of competition. It cannot be repeated often enough." Public Utilities Reports: Guide, page 3-10, (1999). I fully agree with this statement.

The inclusion of unreasonable costs associated with the behavior of inefficient managers in the price of a service is clearly inconsistent with the principles of competitive markets and economic regulation. Important principles and tools associated with economic regulation includes prudence review and used and useful. Specifically, an economic asset needs to be "used and useful" to be included in the utility's rate base and revenue requirement for determining rates to be charged to utility ratepayers. The evaluation criteria to be applied is to determine if assets are used in providing utility services and useful to ratepayers.

If a business in a competitive market invests significant amounts of financial capital in improvements or transactions that the market deems unreasonable or unnecessary, then these wasteful costs would not be paid for by customers that have choices, and investors would sell securities and invest in more "prudent" companies. The financial integrity of a company is a function of its performance, including prudent decision-making and innovations in the capital budget process and related activities.

Q HOW HAS DR. POWELL FAILED TO CONSIDER THE IMPORTANCE OF THE PRINCIPLE OF "JUST AND REASONABLE" PRICES IN HIS ANALYSIS?

A I think my position on this is ably described by Dr. Jonathan Lesser and Dr. Leonardo Giacchino who provide the following insightful comments concerning the regulatory compact and the just and reasonable principle on pages 43-44 of their book, Fundamentals of Energy Regulation (2007):

> There is also a long-standing, but unwritten, rule that governs cost recovery and lies at the heart of establishing *regulated* prices. This

> rule is known as the *regulatory compact*. Under the regulatory compact, the regulator grants the company a protected monopoly, essentially a franchise, for the sale and distribution of electricity or natural gas to consumers in its defined service territory. In return, the company commits to supply the full quantities demanded by those customers at a price calculated to cover all operating costs plus a "reasonable" return on the capital invested in the enterprise. The first half of this "compact" protects the company from would-be competition and secures for the public the substantial economies of scale available in the large-scale production of electricity. The second half of the "compact" counteracts the injurious tendency of monopolists to raise prices above the level that would prevail in a competitive market.
>
> Because the regulatory compact is nowhere written down, you may get different answers as to whether it, in fact, exists, depending on whom you ask. Not so with the *just and reasonable* standard, which can trace its origins to the *just price* doctrine of medieval times and to the Takings Clause of the Fifth Amendment of the U.S. Constitution. Where the just and reasonable standard comes into play arises from the concerns raised by Alfred Kahn. The regulatory compact is a tacit agreement between regulators and the regulated, but it does not give regulated firms *carte blanche* to recover any and all costs. Regulated firms are not guaranteed recovery for the costs associated with lavish offices, "gold-plated" plants, and multimillion-dollar salaries for all. The costs must be just and reasonable.
>
> Together, the regulatory compact and the just and reasonable standard provide the crucial foundation for rate regulation. Both underlie the estimation of a regulated firm's costs, the allocation of those costs among different customers, the allowed return on the firm's capital investments, and the prices that regulators set for different classes of customers.

By essentially recommending the inclusion of unreasonable costs in rates to allegedly protect the financial health of RMP, Dr. Powell is violating the principle of "just and reasonable" costs.

Q WHAT ARE THE OBLIGATIONS AND RIGHTS OF A REGULATED PUBLIC UTILITY?

A Professor Charles F. Phillips, Jr. discusses four obligations and four rights of regulated public utilities on pages 106-107 of his book, The Regulation of Public Utilities: Theory and Practice (1984). Specifically, Professor Phillips states the following concerning the fourth obligation:

> Finally, public utilities are obligated to charge only a "just and reasonable" price for the services rendered. It is up to the various commissions and the courts to interpret this duty. Nonregulated businesses are under no such restraint, as competition is assumed to regulate prices in the public interest.

It appears to me that by recommending the inclusion of unreasonable costs in rates because of considerations of the financial health of RMP and cumulative impacts of disallowances that are nevertheless supportable, Dr. Powell fails to address an important obligation of RMP—that of providing service at just and reasonable prices.

Q **HAS WITNESS POWELL APPROPRIATELY CONSIDERED THE MAJOR DRAWBACKS OF RATE OF RETURN REGULATION IN HIS POSITION?**

A No. Professor Roger Morin states and I agree with the following concerning the drawbacks of rate of return regulation ("RORR") on pages 533-534 of his book, New Regulatory Finance (2006):

> Traditional rate base regulation has both direct and indirect, or opportunity, costs. The direct costs involve the frequency and breadth of hearings, multiple expert testimonies, legal fees, and administrative costs borne by the regulator and the regulated utility. ***The indirect costs, which are considerably more important than the direct costs in magnitude, involve the lack of incentives to minimize production costs and to innovate***.
>
> Generally, there are two aspects to these indirect opportunity costs: (1) the potential for overcapitalization and (2) the potential for inflated operating expenses, wages, and overhead. With regard to overcapitalization, while there is no conclusive academic evidence of over- or undercapitalization, there is nevertheless some effect on managerial behavior. Additions to rate base are not necessarily guided by the discipline of the free marketplace under orthodox

> RORR. With respect to the distortion of operating costs, management is clearly disinclined to minimize operating costs under traditional "pass-through" ("cost plus") regulation.

(Emphasis added.) With this in mind, it appears that rather than recommending action that would attempt to avoid these drawbacks of traditional rate base regulation. Dr. Powell is instead clearly supporting and promulgating the drawbacks of traditional rate base regulation by recommending that unreasonable costs be included in prices just to protect the financial health of RMP.

Q WHY DO YOU BELIEVE SECTION 54-4A-6 RELEVANT?

A Section 54-4a-6(4) appears to give guidance to the Division. It provides:

> 4) For purposes of guiding the activities of the Division of Public Utilities, the phrase "just, reasonable, and adequate" encompasses, but is not limited to the following criteria:
>
> (a) maintain the financial integrity of public utilities by assuring a sufficient and fair rate of return;
>
> (b) promote efficient management and operation of public utilities;
>
> (c) protect the long-range interest of consumers in obtaining continued quality and adequate levels of service at the lowest cost consistent with the other provisions of Subsection (4).
>
> (d) provide for fair apportionment of the total cost of service among customer categories and individual customers and prevent undue discrimination in rate relationships;
>
> (e) promote stability in rate levels for customers and revenue requirements for utilities from year to year; and
>
> (f) protect again wasteful use of public utility services.

It appears to me that the Division's attempt to balance the criteria of Section 54-4a-6(4) cannot be achieved by ignoring the underlying principle of "just and reasonable" rates. Dr. Powell seems to over-emphasize the importance of "maintain[ing] the financial integrity of public utilities" and he seems to under-emphasizes the importance of "promot[ing] efficient management and operations of public utilities." Thus, the following anomalous and unreasonable result and conclusion has resulted: An unreasonable cost on an individual basis becomes a reasonable cost on a cumulative basis.

Q WHY DO YOU BELIEVE SECTION 54-4-4 OF THE UTAH CODE IS IMPORTANT?

A This section of the Utah Code appears to set forth the Commission's obligations with respect to setting rates. Under this section, the Commission is obligated to take action if the Commission finds that:

> (i) the rates, fares, tolls, rentals, charges, or classifications demanded, observed, charged, or collected by any public utility for, or in connection with, any service, produce, or commodity, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, practices, or contracts affecting the rates, fares, tolls, rentals, charges, or classifications are:
> (A) unjust;
> (B) unreasonable;
> (C) discriminatory;
> (D) preferential; or
> (E) otherwise in violation of any provisions of law.

If certain individual costs are unreasonable on an individual basis, the Commission is obligated to disallow them. This position is consistent with well-established and fundamental principles of public utility regulation.

Q **HAS DR. POWELL PROVIDED ANY LISTING OF SPECIFIC MATERIALS THAT HE BELIEVES SUPPORTS HIS PROPOSED POSITION FOR THE REGULATIONS OF A MONOPOLY ENERGY UTILITY?**

A Yes. In response to a UIEC data request to the Division concerning specific materials for support of Dr. Powell's proposed regulatory approach, the following documents are identified:

> See Title 54 of the Utah code. See Attachment 2-2a. See also Bonbright in particular chapters 5, 10, and 15. For a more detailed explanation of the underlying economic principles consult any microeconomics text on the theory of production and costs.

A copy of this data request and response is attached to my rebuttal testimony as Exhibit UIEC- __ (JRM-R1).

Q DO THE UNDERLYING PRINCIPLES PRESENTED IN MICROECONOMIC TEXTS SUPPORT DR. POWELL'S POSITION CONCERNING THE FOCUS ON THE CUMULATIVE EFFECT OF DISALLOWING UNREASONABLE COSTS ON THE FINANCIAL HEALTH OF AN ENERGY UTILITY?

A No. Based on my extensive experience in reviewing textbooks, publishing research, and teaching courses on this exact subject, traditional microeconomic texts support the following principles instead. First, costs are a function of production, and efficiency considerations are significant in these relationships. Second, Professor Mark Hirschey states the following concerning the issue of production on page 221 of his book, Fundamentals of Managerial Economics (2003). "A production function specifies the maximum output that can be produced for a given amount of input. Alternatively, a production function shows the minimum quantity of input necessary to produce a given level of output." Third, Professor Hirschey states the following concerning the issue of costs on page 298 of the same text: "A **short-run cost curve** shows the minimum cost impact of output changes for a specific plant size and in a given operating environment. A **long-run cost curve** shows the minimum cost impact of output changes for the optimal plant size using current technology in the present operating environment." (Emphasis added.)

Thus, microeconomics is concerned with efficiency and optimality, especially in competitive markets. Principles of microeconomics do not support focusing on and adjusting for unreasonable and inefficient costs in prices to be charged to customers in order to meet revenue targets. This is contrary to Dr. Powell's position which is compatible with the behavior of an unregulated monopoly facing inelastic demand.

Q DO CHAPTERS 5, 10 AND 15 IN <u>PRINCIPLES OF PUBLIC UTILITY RATES</u> (1961) WRITTEN BY PROFESSOR JAMES BONBRIGHT SUPPORT DR. POWELL'S POSITION CONCERNING THE FOCUS ON THE CUMULATIVE EFFECT OF DISALLOWING UNREASONABLE COSTS ON THE FINANCIAL HEALTH OF AN ENERGY UTILITY?

A I have reviewed Chapter 5 (Value of Service), Chapter 10 (Criteria of a Fair Return) and Chapter 15 (The Fair Rate of Return) in Professor Bonbright's classic book, and I have found no clear support for Dr. Powell's position. In a summary paragraph to Chapter 5 on pp. 91-92, Professor Bonbright articulates the following position that is in fact opposed to Dr. Powell's position concerning unreasonable and imprudent costs:

> Thirdly and finally, in actual rate cases the cost principle is always given modified interpretations which, while not converting it into a value principle, take indirect account of the effectiveness of the cost incurrence in contributing to the benefit of the consumers. Thus, in principle at least, costs are subject to compensation only if prudently incurred; and thus, with some exceptions, a "fair rate of return" is allowed only on those capital outlays still embodied in properties "used and useful in the public service." The refusal of public utility law to guarantee against losses, combined with the allowance of an opportunity to earn a reasonable profit for successful risk taking, are also related, though in a very crude way, to the principle of payment for benefit received and not merely for costs sustained. Finally, the tendency of commissions to base the allowance for these capital outlays on the original construction costs of the plant and equipment, even if the properties have later been sold to the present accounting company at higher or lower

> prices, rest on the principle that the only capital entitled to compensation is the capital usefully devoted to the service of the public.

Q DOES TITLE 54 OF THE UTAH CODE SUPPORT DR. POWELL'S PROPOSED POSITION FOR THE REGULATION FO A MONOPOLY ENERGY UTILITY?

A As discussed earlier in my rebuttal testimony, Dr. Powell appears to over emphasize the importance of "maintain the financial integrity of public utilities" and under-emphasizes the importance of "promote efficient management and operations of public utilities." By creating this imbalance among the criteria, Dr. Powell reaches the following unreasonable conclusion: An unreasonable cost on an individual basis becomes a reasonable cost on a cumulative basis. My understanding is that the Commission is guided by the dictates of Section 54-4-4, which appears to me to mean that if certain individual costs are unreasonable on an individual basis, the Commission is obligated to disallow them. This position is consistent with well-established and fundamental principles of public utility regulation.

Q SHOULD THE COMMISSION ADOPT DR. POWELL'S RECOMMENDATION CONCERNING THE TREATMENT OF UNREASONABLE COSTS AND THE FINANCIAL HEALTH OF RMP?

A No. Based on my extensive experience and review of available literature, I believe Dr. Powell's arbitrary and subjective recommendation should be rejected by the Commission due to the basic principles and tenets of regulation of public utilities and what I believe are its statutory obligations under Section 54-4-4.

Q PLEASE SUMMARIZE YOUR REBUTTAL TESTIMONY.

A Dr. Powell recommends that despite the fact that the Division's and others' proposed adjustments are supportable and reasonable, the Commission should include at least some of these unreasonable costs in RMP rates in order to address concerns of RMP's financial health and growth in the Utah service area. His position violates fundamental regulatory principles, including those of economic regulation and just and reasonable prices. Dr. Powell over-emphasizes the importance of RMP's financial health and under-emphasizes the need for efficient behavior by RMP's management. Regulatory ratemaking is not a cost reimbursement scheme. Unreasonable costs attributable to inefficient decision-making by utility managers should be borne by utility shareholders, not ratepayers. The corporate governance framework provides the means for utility shareholders to address issues, activities, and decisions associated with their financial agents, the utility managers. In summary, the utility ratepayers did not cause the unreasonable costs associated with inefficient decision-making by utility managers, therefore, the utility ratepayers should not pay for those costs.

Q DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A Yes.

CERTIFICATE OF SERVICE

(Docket No. 10-035-124)

I hereby certify that on this 30th day of June 2011, I caused to be emailed, a true and correct copy of the foregoing **REBUTTAL TESTIMONY AND EXHIBITS OF J. ROBERT MALKO ON BEHALF OF UIEC** to:

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