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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. 10-035-124 **ROCKY MOUNTAIN POWER'S RESPONSE OPPOSING UIEC'S MOTION TO STRIKE TESTIMONY AND EXHIBITS**

Rocky Mountain Power, a division of PacifiCorp ("Rocky Mountain Power" or "Company"), hereby responds in opposition to UIEC's Motion to Strike the Testimony and Exhibits Associated with the Assets Not Used and Useful as of the Rate Effective Date ("Motion") dated June 21, 2011. The Motion should be denied because it is an improper attempt to reargue the Commission's Order on Test Period ("Order") issued March 30, 2011 in this docket and is based on an erroneous and unsupported interpretation and application of the used and useful principle.

I. INTRODUCTION

The Company filed its Application for General Rate Increase ("Application") in this docket on January 24, 2011. The Commission has until September 21, 2011 to issue an order approving the proposed rate increase or some other rate increase found just and reasonable. Utah Code Ann. § 54-7-12(3). The Application proposed that rates be set based on a test period from July 1, 2011 through June 30, 2012. The test period included a 13-month average-period rate base and, therefore, included, for an appropriate portion of the test period, investments in assets planned to be placed in service after the effective date of the rate increase.

The Utah Industrial Energy Consumers or UIEC, Utah Association of Energy Users Intervention Group ("UAE") and Office of Consumer Services ("OCS") opposed the proposed test period. One of the bases for their opposition was that the rate base included assets that would not be in service at the commencement of the rate-effective period and might not be placed into service during the rate-effective period. They argued that selection of the Company's proposed test period including such assets in rate base would violate the used and useful principle of ratemaking.

The Division of Public Utilities ("DPU") supported approval of the test period arguing that parties could recommend adjustments to the test period to account for, among other things, projected investments that they believed were speculative or excessive in amount. The Company responded that selection of an earlier test period would deny the Company recovery of costs that would be incurred in providing service to customers during the rate-effective period.

Based on the foregoing, the Commission issued the Order, approving the test period proposed by the Company. In making that decision, the Commission addressed and rejected the arguments made in the Motion.

Now, UIEC's Motion seeks to strike any Company testimony or exhibits referring to plant additions that will go into service after September 21, 2011. Thus, the Motion is an improper attempt by UIEC for a second bite at the test-period apple. UIEC already presented its evidence and argument on the issue it raises in the Motion, and the Commission, after carefully considering the issue, ruled against it. In addition, the premise of the Motion—that inclusion of assets that will be placed in service after the effective date of the rates set in this case violates the used and useful ratemaking principle—is based on an unsupported and erroneous interpretation and application of that principle. Accordingly, the Motion should be denied.

II. ARGUMENT

The Motion presents a lengthy argument tracing the history of public utility regulation from *Munn v. Illinois*, 94 U.S. 113 (1876) to *In re U.S. West Commun., Inc.*, Docket No. 97-049-08 (Utah PSC Dec. 4, 1997) in an attempt to show that the used and useful principle is the "bedrock of utility regulation." Motion at 3-9. The Motion then proceeds to argue that the Utah Legislature's authorization of use of a fully forecast test year in section 54-4-4(3) cannot be read as allowing the Commission to consider plant investments that will placed into service after the effective date of a rate increase. *Id.* at 9-12. Finally, the Motion argues that "the very existence of the Major Plant Addition ("MPA") statute belies any suggestion that § 54-4-4(3) eliminated the physical 'used and useful' principle" and provides the only relief to the 'used and useful' principle available to the Commission." *Id.* at 12-14.

The Commission has already rejected these arguments in the Order. In addition, the argument on the used and useful principle is based on an erroneous interpretation and application of that principle.

A. The Motion Is an Improper Attempt to Reargue the Issue Already Decided in the Order.

UIEC, UAE and the OCS opposed the Company's proposed test period in part because the test period rate base included assets that would not be in service at the commencement of the rate-effective period and might not be placed into service during the rate-effective period.[1] Acknowledging in passing the fact that this argument applied equally to the calendar-year 2011 ("CY 2011") test period proposed by UIEC and UAE because that test period also included plant additions that would be placed in service between September 21 and December 31, 2011, they argued that selection of the test period including such assets in rate base would violate the used and useful principle of ratemaking[2] and that the MPA statute, Utah Code Ann. § 54-7-13.4, obviated the need for inclusion of such assets in rate base.[3]

The DPU supported approval of the Company's proposed June 2012 test period arguing that parties could recommend adjustments to the test period to account for, among other things,

[1] Direct Testimony of Maurice Brubaker on Test Period Selection, Docket No. 10-035-124 (Utah PSC Mar. 9, 2011) ("Brubaker Direct") at p. 14 ll. 11-19; Rebuttal Testimony and Exhibits of Maurice Brubaker on Test Period Selection, Docket No. 10-035-124 (Utah PSC Mar. 17, 2011) ("Brubaker Rebuttal") at p. 4 ll. 3-9, p. 8 ll. 13-16; Surrebuttal Testimony of Maurice Brubaker on Test Period Selection, Docket No. 10-035-124 (Utah PSC Mar. 21, 2011) ("Brubaker Surrebuttal") at p. 3 ll. 2-5, p. 6 ll. 10-13; Test Period Phase Rebuttal Testimony of Daniel E. Gimble for the Office of Consumer Services, Docket No. 10-035-124 (Utah PSC Mar. 17, 2011) ("Gimble Rebuttal") at ll. 106-110.

[2] UIEC's Motion Challenging Completeness of Filing and Proposed Test Year, Docket No. 10-035-124 (Utah PSC Feb. 7, 2011) ("UIEC's Initial Motion") at 7; Brubaker Rebuttal at p. 4 ll. 3-9; Brubaker Surrebuttal at p. 6 l. 17-p. 7 l. 21; Surrebuttal Testimony of J. Robert Malko on Test Period Selection, Docket No. 10-035-124 (Utah PSC Mar. 21, 2011) at ll. 78-80; Direct Testimony of Kevin C. Higgins on Behalf of UAE [Test Period], Docket No. 10-035-124 (Utah PSC Mar. 9, 2011) ("Higgins Direct") at ll. 495-509.

[3] UIEC's Initial Motion at 9; Brubaker Direct at p. 7 ll. 5-7, p. 9 ll. 20-25, p. 10 ll. 9-14; Brubaker Rebuttal at p. 9 l. 22-p. 10 l. 3; Brubaker Surrebuttal at p. 8 ll. 15-17; Higgins Direct at ll. 292-300; Higgins Rebuttal at ll. 142-144, Test Period Phase Direct Testimony of Daniel E. Gimble for the Office of Consumer Services, Docket No. 10-035-124 (Utah PSC Mar. 9, 2011) at ll. 25-28, 47-53, 163-167; Gimble Rebuttal at ll. 58-63, 131-135; Test Period Phase Surrebuttal Testimony of Daniel E. Gimble for the Office of Consumer Services, Docket No. 10-035-124 (Utah PSC Mar. 21, 2011) at ll. 29-47, 77-78.

projected investments that they believed were speculative or excessive in amount.[4] The Company responded to the arguments of UIEC, UAE and the OCS that its plans to place assets into service during the test period were reliable, with many of the projected plant additions already under construction and that not including them would deny the Company recovery of costs that would be incurred in providing service to customers during the rate-effective period.[5]

Following submission of argument, testimony and evidentiary hearings, the Commission issued the Order approving the test period proposed by the Company. The Order addressed the same issues raised by the Motion, stating:

> Company forecasts show it expects to encounter unusually high levels of plant investment . . . in the first half of 2012. Under such circumstances if the selected test period does not include forecast data from the first half of 2012, the rates in effect for the majority of the Rate Effective Period will not be synchronized properly with the Company's costs of service. This could deprive the Company of a fair opportunity to recover its costs.
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> . . . .
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> The Company forecasts it will invest $864 million in utility plant during the first six months of 2012, a rate of plant investment not adequately represented by forecast 2011 data. The Company testifies its 13-month average electric plant in service will be over $500 million higher during the June 2012 Test Period compared to the CY 2011 Test Period. If this is the case, rates in effect during 2012, if based on CY 2011 Test Period forecasts, would unreasonably under-recover plant investment costs. The vast majority of these forecasted costs are for projects that do not meet the MPA threshold. In fact only two potentially qualify, and the timing of their in-service dates in relation to the last general rate case decision is such that MPA applications would likely not be filed until after this case is decided. Hence, in this particular case the MPA process may not provide an adequate alternative means of recovering the forecasted plant additions.

[4] *See, e.g.*, Pre-filed Direct Testimony of Joni S. Zenger, PhD on Behalf of Utah Division of Public Utilities Test Period, Docket No. 10-035-124 (Utah PSC Mar. 9, 2011) at ll. 46-53, 199-205.

[5] *See, e.g.*, Test Period Rebuttal Testimony of David L. Taylor, Docket No. 10-035-124 (Utah PSC Mar. 17, 2011) at ll. 235-244; Test Period Surrebuttal Testimony of David L. Taylor, Docket No. 10-035-124 (Utah PSC Mar. 21, 2011) at ll. 95-99; Test Period Rebuttal Testimony of Steven R. McDougal, Docket No. 10-035-124 (Utah PSC Mar. 17, 2011) at ll. 188-196.

. . . .

We acknowledge extending the forecast period six months may affect forecast reliability. In this instance, however, we must also consider the predicted substantial increases in plant investment the Company forecasts to be necessary in early 2012, particularly the significantly increased investment projected as necessary for compliance with air quality requirements. The substantial mismatch of costs and revenues that could exist if we do not examine these forecasts in this proceeding weighs in favor of the June 2012 Test Period. Additionally, the Division's testimony, based on analytical examination of these forecasts, provides a measure of assurance any diminution in forecast reliability can be managed through specific adjustments identified and tested in the revenue requirement phase of this case.

In contrast to UIEC and UAE, the Division supports the Company's June 2012 Test Period, relying in part on its evaluation of the Company's plant investment . . . -- forecasts it intends to test more thoroughly during the revenue requirement phase. The Division's testimony analyzes the Company's higher forecasts of gross plant in service during the June 2012 Test Period. The Division testifies it understands much of this projected new investment is related to transmission plant or environmental protection equipment. If the Company has little or no discretion in the timing of these investments, to meet system reliability or other standards, and the CY 2011 Test Period is used as the basis for the rates set in this proceeding, the Company could incur these costs without a reasonable chance of cost recovery. If, on the other hand, use of the CY 2011 Test Period induced the Company to postpone certain plant investments to the detriment of reliability or the environment, customers may not be well served. The Division concludes in either scenario the public interest weighs against the more near-term test period. We agree. In this case, selection of the CY 2011 Test Period could create incentives for management to withhold plant investment necessary to reliable service and environmental safety or risk incomplete cost recovery.

The Division buttresses its support of the June 2012 Test Period with analysis comparing the Company's forecasts of plant additions . . . with actual data. The Division also identifies major causes of the cost increases present in the June 2012 Test Period forecasts. The Division's over-arching conclusion from this analysis is the June 2012 Test Period forecasts reasonably reflect the conditions the Company will face during the Rate Effective Period, provided the forecasts are subject to necessary adjustments. In the Division's view, any necessary forecast adjustments can be identified during the revenue requirements phase of this case. This conclusion by the Division is a key element of our reasoning in selecting the June 2012 Test Period.

> In light of the disproportionately higher costs in the first half of 2012 identified in the Company's forecasts, the ability to synchronize the Company's investment and expenses with the revenues it derives through rates is an integral factor in our decision. Indeed, this factor bears directly on our statutory charge to select a test period that best reflects the conditions the public utility will encounter while the rates are in effect. We note, however, the validity of the Company's forecasts remains to be established on this record. We trust and expect the reservations and even skepticism expressed by some parties will result in thorough evaluation of the Company's cost and revenue forecasts and, where appropriate, the proposal of substantiated adjustments and alternatives. We ask parties to include in their analysis of the Company's June 2012 Test Year revenue requirement rigorous examination of all forecast components, inputs and assumptions. In particular, parties should examine the following:
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> 1. The forecast of plant additions . . . .

Order at 4-5, 6, 7-8.

In their direct testimony on revenue requirement submitted on May 26, 2011, UIEC, the DPU and the OCS challenged the Company's forecast of plant additions as anticipated by the Commission. Instead of relying on those challenges, which the Commission will decide on the basis of the evidence submitted, however, UIEC attempts in the Motion to exclude from consideration all plant investments that will not go into service prior to September 21, 2011, whether accurately forecast or not. The Commission has already ruled in the Order that this would be improper, deny the Company the opportunity to recover costs incurred in providing service, provide disincentives for needed investments contrary to the public interest and be inconsistent with the Commission's obligation to select a test period that best reflects conditions the Company will experience during the rate-effective period.

In addition, the Commission has also already ruled that the MPA statute is not a sufficient substitute for inclusion of forecast investments in the test period. Contrary to UIEC's argument in the Motion, the Commission has implicitly ruled that the Legislature's adoption of the MPA

statute was not intended to limit section 54-4-4(3) to a test period that ended by the start of the rate-effective period.

The Motion is improper because it is an attempt to reargue the issues UIEC, UAE and the OCS already argued and lost when presenting their position on test period. The Commission has already considered their arguments and rejected them in the Order. It is administratively inefficient for a party to reargue an issue that has already been decided. Accordingly, the Motion should be denied.

B. The Used and Useful Principle Does Not Bar Use of a Test Period that Includes Plant Additions that Will Go Into Service After the Date Rates Become Effective.

The Motion argues that the bedrock principle of utility regulation is the used and useful principle and that inclusion of plant additions after the date rates will be placed into effect violates that principle. Motion at 3. Although the Company acknowledges that the used and useful principle is an important consideration in ratemaking, it is not the bedrock principle in ratemaking. The bedrock principle is that rates must be just and reasonable and that to be just and reasonable they must be designed to cover the utility's prudent costs incurred in providing service to customers during the period rates will be in effect, including the opportunity to earn a reasonable return on its investment in property used in rendering that service.[6] And whether the

[6] *West Ohio Gas Co. v. Public Utilities Comm'n*, 294 U.S. 63, 72-73 (1935) (recovery of expenses must be allowed where there is no showing of inefficiency or improvidence); *Bluefield Water Works & Improvement Co. v. Public Service Comm'n*, 262 U.S. 679, 692 (1923) ("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 . . . ."); *Stewart v. Utah Public Service Comm'n*, 885 P.2d 759, 767 (Utah 1994) ("To avoid confiscatory rates on the one hand and exploitive rates on the other, the Commission must determine what a just and reasonable rate is . . . based on a utility's cost of service. A cost-of-service standard mandates that rates produce enough revenue to pay a utility's operating expenses plus a reasonable return on capital invested."); *Utah Dep't of Business Regulation v. Public Service Comm'n*, 614 P.2d 1242, 1248 (Utah 1980) ("*Wage Case*") ("A just and reasonable rate is one that is sufficient to permit the utility to recover its cost of service and a reasonable return on the value of property devoted to public use.").

principle is bedrock or not, the Motion misinterprets and misapplies the used and useful principle in arguing that the Commission cannot in setting rates consider plant investments that will not be in service on the date rates go into effect.

Rate regulation is a legislative function.[7] As such, it is governed by rules and procedures established by the legislature. The role of courts in this process is simply to assure that regulatory agencies who are delegated authority by the legislature to set rates properly interpret legislative direction, that the legislative direction is not unconstitutional and that the regulatory agency does not act in an arbitrary or capricious manner. While appellate courts may review decisions of administrative agencies for lawfulness, they may not assume the duties of the agency.[8]

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[7] *Munn v. Illinois*, 94 U.S. 113, 133 (1876) ("In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable."); *Wage Case*, 614 P.2d at 1250 ("To [order a refund of rates collected under a Commission order reversed on appeal] would be tantamount to this Court engaging in rate-making, which is strictly a legislative power, for the P.S.C. in fixing and promulgating rates acts merely as an arm of the Legislature. The review by this Court of the orders of the P.S.C. is confined to the legal issues of whether there is substantial evidence to sustain the findings of the P.S.C.; whether the P.S.C. has exercised its authority according to law; and whether any constitutional rights of a complaining party have been invaded or disregarded. Any interference by this Court beyond the aforementioned limits would constitute an interference with the law-making power of this state."); *Combined Metals Reduction Co. v. Indus. Comm'n*, 117 P.2d 298 (Utah 1941) (holding that the Public Service Commission is "vested . . . by the law of its creation and existence" the broad discretion to make decisions within its delegated statutory authority).

[8] *See, e.g.,Beaver County v. Qwest, Inc.*, 2001 UT 81, ¶ 12, 31 P.3d 1147, 1150 (upholding dismissal for lack of subject-matter jurisdiction of a complaint in court, noting"[w]e have consistently adhered to the legislature's intent in delegating adjudication of the rate making function to the PSC"); *Utah Dept. of Admin. Services v. Public Service Comm'n ("Wexpro II")*, 658 P.2d 601, 615 (Utah 1983) ("[T]he public authority empowered to regulate and 'supervise all of the business' of a public utility, U.C.A., 1953, § 54-4-1, is the Commission, not this Court."); *Mountain States Tel. & Tel. Co. v. Public Service Comm'n*, 155 P.2d 184, 188 (Utah 1945) (in setting aside a previous Commission decision "[w]e did not [determine that the rates charged by the utility were unjust, unreasonable or confiscatory] simply because that is not our function. Indeed, it is not a judicial function. It is legislative and is to be exercised by the arm of legislature—the Public Service Commission."); *Mulcahy v. Public Serv. Comm'n*, 117 P.2d 298, 299-300 (Utah 1941) ("[E]ver since *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60, it has been recognized that one department of the government cannot control the judgment or official acts of another department, acting within its proper sphere of governmental power, within the scope of its authority.") *See also Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 21 (1952) ("The Court, it is true, has

Thus, in the absence of specific legislative direction, a court may rely on principles such as the used and useful principle to determine if a regulatory agency has fulfilled its duty to set just and reasonable rates. However, unless the court concludes that the principle is a constitutional requirement, it cannot ignore legislative direction that may appear contrary to strict adherence to that principle.[9] The Motion has not cited any case that purports to hold that the used and useful principle is a constitutional requirement that overrides legislation.

The Commission performs its delegated ratemaking function by setting rates that are designed to cover the costs that the Company will reasonably incur during the period rates will be in effect.[10] The Commission typically uses a test period in that process. Whatever test period is used, it must "best reflect[] the conditions that a public utility will encounter during the period when the rates determined by the [C]ommission will be in effect." Utah Code Ann. § 54-4-4(3)(a). Thus, whatever test period is used, even if an historic test period, it is used to project or forecast the costs the public utility is expected to incur during the period rates will be in effect. In this context, every aspect of the test period, even if historic, is a forecast or projection of the future, and it does not matter whether the forecast is based on "steel currently in the ground" or "steel reasonably projected to be in the ground" during the rate-effective period.

This is confirmed by the fact that the Legislature has specifically authorized the Commission to use a test period that extends up to 20 months beyond the date a rate application is filed. *Id.* § 54-4-4(3)(a)(i). Given that rates will normally be effective within 240 days or

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power 'to affirm, modify, or set aside' the order of the Commission 'in whole or in part.' But that authority is not power to exercise an essentially administrative function.") (citation omitted); *San Carlos Irr. and Drainage Dist. v. United States*, 111 F.3d 1557, 1564 (Fed. Cir. 1997) ("[R]ate making is generally inherently a policy decision better left to an agency, and . . . the doctrine of primary jurisdiction requires that the agency redetermine rates in cases where a court determines the agency has abused its discretion . . . .") (citations omitted).

[9] *Munn*, 94 U.S. at 134 ("[B]ut the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations.").

eight months after an application is filed, *id.* § 54-7-12(3), it is clear that the Legislature has authorized use of a test period in which plant additions during the test period will entirely occur beyond the date the rates set in the case will go into effect. Thus, UIEC's strained statutory interpretation argument is obviously incorrect.

In addition, UIEC's argument is based on a misunderstanding of the used and useful principle. By using a 13-month average-period rate base, the Company has only included investments in rate base for the period that they are projected to be in service. Thus, only 1/13th of the annual cost associated with plant forecast to go into service in June of 2012 is included in the rates set in the case. In other words, the investment is only included in rates after it is projected to be in service or used and useful. Thus, inclusion of plant additions that are forecast to be placed in service after September 21, 2011 (and for that matter those placed in service from July 1 through September 21 ,2001) is limited to the time they are forecast to be used and useful during the test period.

In summary, the used and useful principle does not override the Legislature's direction that the Commission is to use a test period that best reflects conditions during the rate-effective period and may use a test period in which all plant additions during the test period will occur after rates are in effect. In addition, use of such a test period does not violate the used and useful principle as properly interpreted and applied.

III. CONCLUSION

The Commission should reject UIEC's attempt to reargue the test period issue through the Motion. The Commission should also reject UIEC's attempt, based on misinterpretation and misapplication of the used and useful principle, to have it ignore the Legislature's clear direction regarding use of an appropriate test period. The Motion is deficient and should be denied.

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[10] *Stewart*, 885 P.2d at 767; *Wage Case*, 614 P.2d at 1248.

DATED: July 6, 2011.

RESPECTFULLY SUBMITTED,

ROCKY MOUNTAIN POWER

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2011, a true copy of the foregoing **ROCKY MOUNTAIN POWER'S RESPONSE OPPOSING UIEC'S MOTION TO STRIKE TESTIMONY AND EXHIBITS** was served by email on the following:

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