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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of the
Utah Industrial Energy Consumers for a
Deferred Accounting Order Directing
Rocky Mountain Power to Defer
Incremental REC Revenue for Later
Ratemaking Treatment

Docket No. 11-035-46

**ROCKY MOUNTAIN POWER'S
MOTION TO DISMISS AND
RESPONSE OPPOSING UIEC'S
APPLICATION**

Rocky Mountain Power, a division of PacifiCorp (“Rocky Mountain Power” or the “Company”), pursuant to Utah Code Ann. § 63G-4-204 and Utah Admin. Code R746-100-1.C.3 and 4 and Rule 12(b)(6) of the Utah Rules of Civil Procedure,¹ hereby moves the Commission to dismiss the Application for Deferred Accounting Order for REC Revenue (“Application”) of Holcim, Inc., Kennecott Utah Copper LLC, Kimberly-Clark Corp., and Western Zirconium

¹ See Utah Admin. Code R746-100-1.C (stating when “there is no provision in these rules, the Utah Rules of Civil Procedure shall govern”).

(collectively the “Utah Industrial Energy Consumers” or “UIEC”) filed March 21, 2011 and responds in opposition to the Application. The Application fails to state a claim on which relief may be granted. It is wholly inappropriate for UIEC to seek deferred accounting at this time for revenues realized by the Company on the sale of renewable energy credits (“REC”) during 2009 and prior to February 22, 2010.

I. INTRODUCTION

UIEC’s Application seeks “a deferred accounting order . . . directing [the Company] to defer as a regulatory liability all REC revenue during 2009 and prior to February 22, 2010, that is in excess of the REC value utilized in Utah rates until they can be recovered in a future ratemaking proceeding.” Application at 6. The essential premise for the request is an allegation, on information and belief, that the Company was able to sell RECs during 2009 for an amount significantly greater than the amount anticipated in the Company’s rates and that the amount was “dramatic, unprecedented, unforeseeable, and extraordinary” and “greater than [the Company] disclosed in previous general rate cases.” *Id.* ¶ 4.

The Application fails to mention the specific rate cases with rates that were in effect during 2009, and prior to February 22, 2010. Although it mentions the deferred accounting order for incremental REC revenues starting February 22, 2010, it fails to discuss the implications of that order for the Application. A brief review of the background of those cases and the prior petition for deferred accounting of REC revenues demonstrates that the relief sought by UIEC is untimely and otherwise inappropriate. If the Commission were to grant the Application, there would be nothing to prevent any party, including the Company, from seeking deferred accounting for any component of revenue requirement for any period in the past that turned out to be significantly different than the amount of that component anticipated in setting rates.

Rocky Mountain Power requests that the Application be dismissed or denied because it seeks retroactively to establish a deferred account for REC revenues realized for periods substantially in the past when the Company was earning less than the rate of return on equity (“ROE”) authorized by the Commission. The purpose of deferred accounts is to defer recognition of expenses or revenues in a current period for possible ratemaking treatment in a subsequent period. This purpose is not applicable in these circumstances. Furthermore, because retroactive ratemaking would only be considered for a past extraordinary and unforeseen increased revenue or decreased expense during a period when the Company was over-earning, deferred accounting for the increased revenue or decreased expense during a period of under-earning is also inappropriate.

II. STATEMENT OF FACTS

A. 2007 General Rate Case

The Company’s rates in effect from January 1, 2009 through May 7, 2009 were determined in a general rate case (“GRC”), Docket No. 07-035-93 (“2007 GRC”), that was filed by the Company on December 17, 2007. The rates were set in the Commission’s Report and Order on Revenue Requirement issued August 11, 2008 (“2007 GRC Revenue Requirement Order”), as modified by the Erratum Report and Order on Revenue Requirement issued August 21, 2008 and the Order on Reconsideration issued October 13, 2008. Thus, the Application seeks deferred accounting for revenues related to rate orders issued from 29 to 31 months prior to its filing.

REC revenues were a relatively new phenomenon at that time. The Company had realized REC revenues allocated to Utah of \$1,409,724 during the July 1, 2006 to June 30, 2007 historical base period used in the 2007 GRC, and estimated REC revenues allocated to Utah of \$2,414,589 during the calendar-year 2008 test period. UIEC challenged the Company’s estimate

claiming that the REC revenues projected for the Goodnoe Hills wind project were too low. The Commission rejected UIEC's proposed adjustment and accepted the Company's proposed level of REC revenue. The Commission stated:

We recognize the REC market is only emerging and this is the first litigated case in which the subject of REC forecasting and allocation to states has been raised. We do not accept the UIEC proposal at this point because it addresses the issue in isolation of a comprehensive solution for the forecasting and allocation of REC revenue. While the MSP workgroup addressing RPS issues has resolved REC allocation issues for reporting purposes, we understand the issues of forecasting REC revenue is left to state rate case determinations. We do not find the current record sufficient to comprehensively resolve issues regarding REC forecasting and inclusion in rates. Therefore, we accept the Company's proposal for the test period in this case and await further discussion in a future rate proceeding.

2007 GRC Revenue Requirement Order at 99.

The Company realized actual Utah-allocated REC revenues during the calendar-year 2008 test period of \$2,993,920. The Commission did not consider any estimate of REC revenues for the period covered by the Application, January 1, 2009 through May 7, 2009, because that period was beyond the test period selected by the Commission.

B. 2008 General Rate Case

The Company's rates in effect from May 8, 2009 through February 17, 2010, were determined in Docket No. 08-035-38 ("2008 GRC") filed by the Company on July 17, 2008. The rates were set in the Commission's Report and Order on Revenue Requirement issued April 21, 2009 ("2008 GRC Revenue Requirement Order"), approving a Stipulation Regarding Revenue Requirement among all or almost all of the parties in the 2008 GRC, including UIEC. Thus, the Application seeks deferred accounting for revenues related to a rate order issued 23 months prior to its filing, based on a revenue requirement stipulation in which UIEC joined.

The stipulated revenue requirement in the 2008 GRC included estimated Utah-allocated REC revenues to be realized during the test period, calendar year 2009, of \$4,243,000. The Company had realized Utah-allocated REC revenues of \$2,571,476 during the twelve months ended June 2008 historical base period. The stipulated revenue requirement included a reduction from the Company's filed level of REC revenue to account for delayed in-service dates of the Rolling Hills and Glenrock III wind projects. In entering into the overall revenue requirement stipulation, no party noted any reservation about the overall level of REC revenue included in rates or suggested that REC revenues should be held out of the revenue requirement stipulation for later treatment.

The Company realized actual Utah-allocated REC revenues during the calendar-year 2009 test period of \$29,010,207. The Commission did not consider any estimate of REC revenues for a portion of the period covered by the Application, January 1, 2010 through February 17, 2010, because that period was beyond the test period selected by the Commission.

C. 2009 General Rate Case

The Company's rates from February 18, 2010 through February 21, 2010, were determined in Docket No. 09-035-23 ("2009 GRC") filed by the Company on April 16, 2009. The rates were set in the Commission's Report and Order on Revenue Requirement, Cost of Service and Spread of Rates issued February 18, 2010 ("2009 GRC Revenue Requirement Order"). Thus, the Application seeks deferred accounting for revenues related to a rate order issued 13 months prior to its filing.

The revenue requirement in the 2009 GRC was determined based on a test period commencing July 1, 2009 and ending June 30, 2010. When the Company filed its application in the 2009 GRC, it estimated Utah-allocated REC revenues of \$4,109,081 based on information available at that time. As noted above, the Company had realized Utah-allocated REC revenues

of \$2,982,376 during the calendar-year 2008 historical base period in the case.² In direct testimony filed October 8, 2009, the Office of Consumer Services (“Office”) recommended an adjustment to projected Utah-allocated REC revenues based on a variety of factors, including information on increased sales and prices available at that time. This adjustment resulted in total estimated Utah-allocated REC revenues during the test period of \$9,896,404. The Company accepted this proposed adjustment, and the amount of REC revenue considered in determining the revenue requirement for the test period was undisputed. *See* 2009 GRC Revenue Requirement Order at 17 (referring to REC revenues as “green tag revenue”).

The Company realized actual Utah-allocated REC revenues during the test period ending June 2010 of \$53,901,571. The Application only covers four days of this period related to the 2009 GRC, and approximately \$18 million of the incremental REC revenue for this period is already being deferred pursuant to the deferred accounting order in Docket No. 10-035-14, discussed below.

D. Company Earnings

The Commission is well aware that the Company has not come close to earning the ROE authorized by the Commission for several years. The Commission set rates in the 2007 GRC based on an authorized ROE of 10.25 percent. The Commission set rates in the 2008 GRC based on an authorized ROE of 10.61 percent. The Commission set rates in the 2009 GRC based on an authorized ROE of 10.60 percent. During the relevant periods the Company actually earned 8.00 percent, 9.53 percent and 9.58 percent, respectively.³

² The actual Utah-allocated REC revenues for calendar-year 2008 provided above is slightly different than the Utah-allocated REC revenues for the historical base period provided here because the former is allocated based on actual allocation factors and the latter is allocated to Utah based on test period allocation factors in the 2009 GRC.

³ These are the Type 1 Normalized Earned ROEs from the Company’s Semi-annual Results of Operations for the relevant periods.

The following table summarizes the foregoing information regarding REC revenues and earnings relative to the three GRCs. Even including the REC revenues for which UIEC's Application seeks deferred accounting, the Company earned substantially less than its authorized ROE during the relevant periods.

Docket No.	Year Ended	Total Company REC Revenues	Utah Allocated REC Revenues	Authorized ROE	Earned ROE
07-035-93					
Base Period	Jun-07	\$2,818,613	\$1,409,724		
Test Period	Dec-08	\$4,659,716	\$2,414,589	10.25%	
Actual	Dec-08	\$6,151,676	\$2,993,920		8.00%
08-035-38					
Base Period	Jun-08	\$5,347,544	\$2,571,476		
Test Period	Dec-09	\$8,074,601	\$4,243,000	10.61%	
Actual	Dec-09	\$50,793,765	\$29,010,207		9.53%
09-035-23					
Base Period	Dec-08	\$6,151,676	\$2,982,376		
Test Period	Jun-10	\$18,574,170	\$9,896,404	10.60%	
Actual	Jun-10	\$98,525,363	\$53,901,571		9.58%

E. Existing Deferred Accounting Order

On February 22, 2010, the Utah Association of Energy Users ("UAE") filed an application in Docket No. 10-035-14 seeking an order establishing a deferred account for incremental REC revenues from February 22, 2010 going forward. That application was granted in a Report and Order on Deferred Accounting Stipulation issued July 14, 2010. The order was based on a stipulation of parties, including UIEC, in Docket No. 10-035-14 and Docket No. 09-035-15 ("ECAM Docket"), relating to deferred accounting orders for incremental net power costs ("NPC") and incremental REC revenues. Pursuant to a further stipulation in Docket Nos. 10-035-14, 10-035-13 and 10-035-89, the latter two dockets dealing with alternative rate

recovery for major plant additions, the Company is currently conditionally crediting a portion of incremental REC revenues from the deferred account established in Docket No. 10-035-14 to its customers.

As alleged by UAE in its application, prices for RECs increased from the levels known and projected at the time the Company filed its application in the 2009 GRC and when other parties filed their direct testimony in the 2009 GRC. The Company believes this was largely the result of regulatory decisions in California affecting demand for RECs and the supply and availability of registered RECs. However, the Company's agreements to sell RECs at these higher prices were not approved during the 2009 GRC and were still pending approval at the time UAE filed its application.⁴

F. Updates of Forecasts During Rate Cases

Parties have debated the propriety of updating forecasts of components of revenue requirement during rate cases for several years. For example, in the 2007 GRC, the Company attempted to update its forward price curve used in estimating NPC for the test period in its rebuttal testimony. Other parties protested, and the Commission ruled that it was too late for the Company to update its estimate of NPC. 2007 GRC Revenue Requirement Order at 50-51. In the 2009 GRC, UAE sought to update the forecast of NPC using a forward price curve that became available after the Company filed its application because it decreased forecasted NPC.⁵ The Company sought to increase its forecast of NPC for the test period based on the updated

⁴ The Company filed a general rate case in Wyoming on October 2, 2009. In that application, which used a test period six months beyond the Utah test period, the Company estimated total-Company REC revenues for 2010 of \$36 million. This amount is approximately \$21 million on a Utah-allocated basis.

⁵ Direct Testimony of Kevin Higgins, Docket No. 09-035-23 (Oct. 8, 2009) at lines 240-258.

forward price curve and on changes in a number of other factors since the application was filed.⁶ The Commission generally rejected both positions. *See* 2009 GRC Revenue Requirement Order at 58-61, 65-67. *But see id.* at 62-64, 66-67.

III. ARGUMENT

UIEC argues that the Application should be granted because a “dramatic, unprecedented, unforeseeable and extraordinary” increase in REC revenues satisfies one or both of the exceptions to the rule against retroactive ratemaking recognized in Utah. Application ¶¶ 4, 16. It also argues that deferral of REC revenues for future ratemaking is necessary to ensure just and reasonable rates. *Id.* ¶ 18. Noticeably absent from UIEC’s argument is discussion of the additional factors identified by the Commission for consideration in deciding whether to grant deferred accounting⁷ and any valid explanation why it is appropriate to treat REC revenues any differently than many other components of revenue requirement that varied from the amounts included in setting rates during the same period. The Application does not demonstrate why deferred accounting should be considered for REC revenues many months after the fact during a period when the Company was substantially under-earning. Therefore, the Application should be dismissed or denied.

A. Standard for Motion to Dismiss

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 UIEC’s claims.⁸ The Commission should

⁶ Rebuttal Testimony of Gregory N. Duvall, Docket No. 09-035-23 (Nov. 8, 2009) at lines 25-27.

⁷ *See* Report and Order, Docket No. 06-035-163 (Jan. 3, 2008) (“*Deferred Accounting Order*”).

⁸ *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

also review documents referenced in the Application and take notice of facts of record that have bearing on the claim.⁹ Under the Rule 12(b)(6) standard, the Commission may also “look for plausibility in [the Application].”¹⁰ More specifically, the Commission may “look to the specific allegations in the [Application] to determine whether they plausibly support a legal claim for relief.”¹¹ Thus, in determining whether to dismiss the Application, the Commission is not required to accept allegations that are implausible or speculative or obviously inaccurate based on facts of which the Commission may take notice.

B. Standards for Deferred Accounting

The purpose of deferred accounting—the establishment of a regulatory asset or liability—is to defer recognition of expenses or revenues in a current period for possible ratemaking treatment in a subsequent period. It is apparent that this purpose is not applicable to the Application based on the foregoing statement of facts. A decision to grant deferred accounting is simply a decision to allow a utility to capitalize expenses that would otherwise be required to be expensed in a current period or to defer recognition of revenues that would otherwise be required to be recognized in a current period. Therefore, although the Commission is not bound to follow financial accounting rules and guidelines regarding whether it is appropriate to defer an expense or revenue, the rules and guidelines have some relevance in

(Utah 1991) (“appears that the [petitioner] . . . 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.

⁹ *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).

¹⁰ *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007) (quotations and citations omitted).

¹¹ *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)) (other quotations and citation omitted).

considering a request for deferred accounting. *See, e.g., Deferred Accounting Order* at 13. On the other hand, as the Commission concluded in its *Deferred Accounting Order*, allowing deferred accounting “is an indication, if but an early tentative one, that there is a likelihood that the particular expense can be included in a future revenue requirement determination.” *Deferred Accounting Order* at 16-17. The Commission stated that this conclusion meant that “ratemaking rules and principles . . . may be given greater weight than accounting rules and principles in considering whether to issue an accounting order.” *Id.* at 17.¹²

1. Accounting Standards

The accounting standards applicable to deferred accounting are found in the Uniform System of Accounts (“USOA”) promulgated by the Federal Energy Regulatory Commission (“FERC”), 18 CFR Part 101, Definition 31 and Account 182.3, and adopted by the Commission, Utah Admin. Code R746-310-7.A, and in Statement of Financial Accounting Standards (“FAS”) No. 71 (“FAS 71”).¹³

USOA allows the creation of regulatory assets and liabilities.

31. *Regulatory Assets and Liabilities* are assets and liabilities that result from rate actions of regulatory agencies. Regulatory assets and liabilities arise from specific revenues, expenses, gains, or losses that would have been included in net income determination in one period under the general requirements of the Uniform System of Accounts but for it being probable:

¹² Contrary to this guidance, the Division of Public Utilities (“Division”) focused almost entirely on an incorrect understanding of the application of accounting standards in its initial opposition to the Company’s motion for deferred accounting for NPC in the ECAM Docket. *See* Opposition of Division of Public Utilities to Rocky Mountain Power’s Motion for a Deferred Accounting Order, Docket No. 09-035-15 (Feb. 24, 2010). On the other hand, UIEC focuses solely on selected ratemaking principles in the Application and its opposition to the Company’s motion in the ECAM docket. *See* Application at ¶¶ 12-16; UIEC’s Opposition to Motion for a Deferred Accounting Order, Docket No. 09-035-15 (Feb. 23, 2010).

¹³ FAS 71 is now known as Accounting Standards Codification Topic 980 Regulated Operations.

A. that such items will be included in a different period(s) for purposes of developing the rates the utility is authorized to charge for its utility services; or

B. in the case of regulatory liabilities, that refunds to customers, not provided for in other accounts, will be required.

18 C.F.R. Part 101, Definition 31. The USOA further provides that other regulatory assets should be recorded in Account 182.3:

182.3 Other regulatory assets.

A. This account shall include the amounts of regulatory-created assets, not includible in other accounts, resulting from the ratemaking actions of regulatory agencies. (*See* Definition No. 30 [sic].)

B. The amounts included in this account are to be established by those charges which would have been included in net income, or accumulated other comprehensive income, determinations in the current period under the general requirements of the Uniform System of Accounts but for it being probable that such items will be included in a different period(s) for purposes of developing rates that the utility is authorized to charge for its utility services. . . .

C. If rate recovery of all or part of an amount included in this account is disallowed, the disallowed amount shall be charged to Account 426.5, Other Deductions, or Account 435, Extraordinary Deductions, in the year of the disallowance.

18 C.F.R. Part 1, Account 182.3.

FAS 71 provides in part:

This Statement provides guidance in preparing general purpose financial statements for most public utilities. . . .

In general, the type of regulation covered by this Statement permits rates (prices) to be set at levels intended to recover the estimated costs of providing regulated services or products, including the cost of capital (interest costs and a provision for earnings on shareholders' investments).

For a number of reasons, revenues intended to cover some costs are provided either before or after the costs are incurred. If regulation provides assurance that incurred costs will be recovered in the future, this Statement requires companies to capitalize those costs. If current recovery is provided for costs that are expected to be incurred in the future, this

Statement requires companies to recognize those current receipts as liabilities.

....

9. Rate actions of a regulator can provide reasonable assurance of the existence of an asset. An enterprise shall capitalize all or part of an incurred cost that would otherwise be charged to expense if both of the following criteria are met:

a. It is probable that future revenue in an amount at least equal to the capitalized cost will result from inclusion of that cost in allowable costs for rate-making purposes.

b. Based on available evidence, the future revenue will be provided to permit recovery of the previously incurred cost rather than to provide for expected levels of similar future costs. If the revenue will be provided through an automatic rate-adjustment clause, this criterion requires that the regulator's intent clearly be to permit recovery of the previously incurred cost.

FAS 71 (footnotes omitted). A footnote on the word "probable" in the foregoing states:

The term *probable* is used in this Statement with its usual general meaning, rather than in a specific technical sense, and refers to that which can reasonably be expected or believed on the basis of available evidence or logic but is neither certain nor proved (*Webster's New World Dictionary of the American Language*, 2d college ed. [New York and Cleveland: World Publishing Company, 1972], p. 1132).

Id. Finally, FAS 71 provides, "The provisions of this Statement need not be applied to *immaterial* items." (emphasis in original.) FAS 71 does not define material.

In applying these accounting standards, the purpose of the standards must be recognized. FAS 71 applies to general-purpose external financial statements of an enterprise that has regulated operations. FAS 71 provides guidance in the proper reporting and valuation of the enterprise for the economic impacts of regulated operations. It does not preclude the issuance of accounting orders by the Commission, but instead sets the standard for the proper valuation related to the impact of such accounting orders and reporting to external investors and financial audiences. Once a company has received an order allowing the deferral of costs under FAS 71,

it must make a determination of the probability of future recovery of those costs through a future revenue stream and a determination of materiality. To the extent a company does not believe a portion of the costs are probable of recovery, it will either need to not book those costs as an asset or will need to establish a provision against the deferred regulatory asset. Likewise, if a regulatory asset is not material, a company would not need to establish it. The probability and materiality determinations referenced in FAS 71 are management tests that are carried out based on facts and circumstances that would support the fair valuation of assets and fair reporting of financial condition on the financial statements of the company.

The granting of a deferred accounting order by the Commission is separate and apart from these management determinations. Thus, the Commission need not consider whether it is probable that it will ultimately consider the amounts deferred in setting rates in the future or whether an amount is material in the financial accounting sense of the term in deciding whether to grant an accounting order. Rather, as alluded to in the *Deferred Accounting Order*, the Commission must simply consider whether there is any reasonable chance that it might allow rate recovery of the amounts deferred and whether the amount is significant enough to receive consideration in setting rates. *See Deferred Accounting Order* at 16-17.

Based on the foregoing accounting standards and principles that are applicable to a Commission decision on whether to grant deferred accounting, a regulatory asset may be created if an expense is incurred in the current period that may appropriately be included in determining rates in a future period. Likewise, a regulatory liability may be created if revenue is received in the current period that may appropriately be included in determining rates in a future period. The critical issue for purposes of this case is that expenses or revenues are deferred in a current period, not many months or years after they have already been expensed or recognized in

accounting statements. Otherwise, the purpose of the accounting standards would be frustrated. If deferred accounting is sought years after the fact, as in this case, the ability of investors and the financial community to rely on information provided to them will be compromised. In addition, the ability of the utility and other stakeholders to make decisions regarding whether a rate case is needed will be compromised.

2. Ratemaking Standards

As a general rule, rates are set following a general rate case in which all aspects of expenses, revenues and investments are considered to determine the level of rates that is designed to produce revenue sufficient to cover the costs incurred by a public utility in providing service to its customers during the period rates will be in effect. *Utah Dept. of Business Regulation v. Public Service Comm'n*, 720 P.2d 420 (Utah 1986) (“*EBA Case*”); *Utah Dept. of Business Regulation v. Public Service Comm'n*, 614 P.2d 1242, 1248 (Utah 1980) (“*Wage Case*”). Changes in one aspect of revenues, expenses or investments normally have not been a basis for a change in rates, and rates normally have not been allowed to be adjusted with retroactive application. *EBA Case* at 420. In addition, because rates are set for a future period, unusual costs or revenues are typically normalized to assure that rates are set to recover reasonably anticipated costs and not based on extreme events. R. Hahne and G. Aliff, *Accounting for Public Utilities* (LexisNexis 2008) at § 7.05.

As with all rules, there are exceptions. In an effort to assure that rates really do provide anticipated revenue sufficient to cover prudent cost of service, regulatory commissions have approved various types of trackers, balancing accounts or cost adjustment mechanisms over the

years.¹⁴ These are typically approved where a material cost is quite volatile or difficult to predict and is largely outside the control of the utility.¹⁵ They may also be approved in circumstances such as when there is a pattern of increased investment in replacement facilities that is beyond the normal course of operations.¹⁶ In addition, rates have been allowed to be adjusted based on changes in a single item of expense, revenue or investment when doing so is more administratively efficient or fair, such as when a utility is making major plant additions. *See, e.g.,* Utah Code Ann. § 54-7-13.4. Deferred accounting is allowed for certain circumstances, such as the costs associated with an extraordinary storm, that would typically not be considered in setting rates as a result of normalization.¹⁷ Finally, exceptions have been recognized for implementation of rate changes retroactively in limited circumstances.

The rule against retroactive ratemaking prohibits refunds or surcharges for rates previously paid pursuant to final Commission orders and the setting of rates higher or lower in the future based on past under- or over-earnings. *See MCI Telecommunications Corp. v. Public Service Comm'n*, 840 P.2d 765, 770 (Utah 1992); *EBA Case*, 720 P.2d at 421. Courts have held that applications for deferred accounting do not amount to retroactive ratemaking.¹⁸ The

¹⁴ *See, e.g.,* Hahne at § 8.10; M. Schmidt, *Automatic Adjustment Clauses: Theory and Application*, (MSU Press, East Lansing, MI. 1980). *See also* P. Joskow and R. Schmalensee, “Incentive Regulation for Electric Utilities,” *4 Yale Journal on Regulation 1* (1986) at 1-50.

¹⁵ *See* Corrected Report and Order, Docket No. 09-035-15 (Utah PSC Mar. 3, 2011) (“*EBA Order*”) at 65-66; R. Burns, M. Eifert, and P. Nagler, “Current PGA and FAC Practices: Implications for Ratemaking in Competitive Markets,” (National Regulatory Research Institute, 1991).

¹⁶ Direct Testimony of Barrie L. McKay, Docket No. 09-057-16 (Dec. 3, 2009), Exhibit QGC 1.8 (listing states allowing infrastructure rate adjustment mechanisms for natural gas utilities).

¹⁷ *See, e.g., Office of Consumer Counsel v. Department of Public Utility Control*, 905 A.2d 1, 14-15 (Conn. 2006); *Re Missouri-American Water Company*, 237 P.U.R.4th 353, 2004 WL 2579639 (Mo. PSC Nov. 10, 2004); *Bus. and Prof'l People for the Pub. Interest v. Illinois Commerce Comm'n*, 563 N.E.2d 877, 881 (Ill. App. 1990); *Deferred Accounting Order* at 17.

¹⁸ *See, e.g., Bus. and Prof'l People*, 563 N.E.2d at 881 (“Nor does the order [for deferred accounting] constitute a backdoor approach to single-issue or retroactive ratemaking.”).

Commission, however, concluded in the *Deferred Accounting Order* that “[t]he rule against retroactive ratemaking, exceptions to the rule and their underlying rationales have application in considering whether an accounting order should be issued.” *Deferred Accounting Order* at 16. Therefore, the Company will address retroactive ratemaking principles in this response.

In the *Deferred Accounting Order*, the Commission first noted that “utilities . . . are generally not permitted to adjust their rates retroactively to compensate for unanticipated costs or unrealized revenues. This process places both the utility and the consumers at risk that the rate-making procedures have not accurately predicted costs and revenues.” *Deferred Accounting Order* at 14-15 (quoting *EBA Case*, 720 P.2d at 420). The Commission then discussed the unforeseeable and extraordinary exception to the rule against retroactive ratemaking.

An increase or decrease in expenses that is unforeseeable at the time of a rate-making proceeding cannot, by hypothesis, be taken into account in fixing just and reasonable rates. Furthermore, because the increase or decrease must have an extraordinary effect on the utility’s earnings, the increase or decrease will necessarily be outside the normal ranges of variance that occurs in projecting future expenses.

Deferred Accounting Order at 15-16 (quoting *MCI*, 840 P.2d at 771). In further explaining this exception, the Commission concluded that

The ratemaking principle that recognizes possible exceptions for unforeseen and extraordinary events also includes exception for events which may be known or foreseeable, but whose impact upon the revenues or expenses of the utility are unforeseeable and extraordinary or whose actual manifestations vary from their projections in an unforeseeable and extraordinary way.

Deferred Accounting Order at 19.

The Commission then discussed issues related to timing of raising issues for deferred accounting related to a GRC. Where the subject of an expense was known at the time of a prior GRC, the Commission concluded that “[f]ailure to include costs or the inclusion of costs at different levels in a past rate case appears to draw closer to . . . missteps in the ratemaking

process rather than unforeseen and extraordinary occurrences.” *Id.* at 20. Noting that the revenue requirement in the prior GRC was resolved by stipulation, the Commission concluded:

[I]t is reasonable to require any party who wishes to segregate a known expense or revenue from a pending ratemaking case and from the evaluations of a compromised revenue requirement, to specifically identify those expenses or revenues which have been or are intended to be taken off the table and are not part of the compromises in the current ratemaking proceeding, but intended to be reserved for future ratemaking consideration.

Id. at 21.

In addition to the foregoing principles enunciated by the Commission in the *Deferred Accounting Order*, the exceptions to the rule against retroactive ratemaking approved in *MCI*, that the Commission said should be considered in applications for deferred accounting orders, were approved in the context of a situation in which the utility was earning in excess of its authorized ROE. *MCI*, 840 P.2d at 768. In fact, the court repeatedly focused on over-earnings in its discussion of the exceptions, *see, e.g., id.* at 772-73, and the remedy ordered was for a refund of earnings “to the extent they exceeded [the utility’s] authorized rate of return.” *Id.* at 776. Thus, under the Commission’s view that principles and rationales for exceptions to the rule against retroactive ratemaking have application in considering whether deferred accounting orders should be issued, a deferred accounting order for increased revenues or decreased expenses in the past would only be justified if the utility were over-earning.

Based on the foregoing, the Commission may approve a request for deferred accounting if an expense or revenue is unforeseen and has an extraordinary impact on earnings or if it is foreseen, but the amount of the variance from that predicted in the prior rate case is unforeseeable and has an extraordinary impact on earnings. In addition, if the request is for deferred accounting for revenue, the utility must be over-earning for deferred accounting to be granted. Finally, if the expense or revenue was treated in a GRC resolved by stipulation, the

party advocating for deferred accounting must have given notice during the rate case that the expense or revenue will be the subject of a request for possible true up to the actual amount after the rate case.

C. Application of Standards to the Application

The Application contains few factual allegations that the Commission must accept for purposes of the Company's motion to dismiss. Most allegations are based on information and belief or based on assumptions. Interestingly, most of the bases for these conclusory allegations or assumptions are matters of public record. The Commission may take notice of the amount of REC revenues received by the Company in the historical base periods, the amount included in rates and the amount realized for the test period in each of the GRCs at issue. These amounts are set forth in the statement of facts section of this response. Even giving UIEC the benefit of all reasonable inferences from these facts, the claim is deficient as a matter of law and must be dismissed.

The Application seeks deferred accounting for revenues realized from 13 to 27 months before the Application was filed and related to rate orders issued from 13 to over 31 months before the Application was filed. In fact, ignoring the four days rates from the 2009 GRC were in effect, the Application seeks deferred accounting for revenues related to rate orders issued from 23 to 31 months before the Application was filed. This is clearly inconsistent with the accounting standard that deferred accounting is granted to allow the deferral of current revenues or expenses for ratemaking treatment in a subsequent period. The REC revenues for which UIEC seeks deferred accounting are far from current revenues. Moreover, there is no excuse for UIEC's failure to file the Application in a timely manner. UIEC was a participant in each of the GRCs and in Docket No. 10-035-14. It cannot claim that it only recently became aware that

REC revenues realized in prior periods were in excess of amounts included in rates during those same periods.

The implications of granting the Application demonstrate its complete impropriety. If UIEC is entitled to seek deferred accounting for REC revenues received and already recognized in income in 2009 in this case, any party may seek deferred accounting for any item of revenue or expense which was incurred at any time in the past so long as the amount of that revenue or expense included in rates is significantly different than the actual amount realized. For example, the Company could seek deferred accounting of NPC in excess of the amount included in rates from 1998 to February 17, 2010. As shown in the ECAM Docket, this amounts to over \$356 million on a Utah-allocated basis just for a portion of this period from January 1, 2002 through February 17, 2010.¹⁹ If the Company were to file an application for deferred accounting for NPC for these periods, there is little doubt that UIEC would claim that the application was totally inappropriate.

By way of further example, assume the Company experienced a sharp spike in expenses as a result of an explosion and fire at a generating plant or damage to transmission and distribution lines because of severe storm but then waited two or three years to seek deferred accounting for the expenses. In the meantime, the Company and the parties would make determinations about whether rate cases were warranted based on the assumption that the Company was not seeking to recover those expenses in rates. In fact, as applied to the circumstances in this case, the Company might even have intervening rate cases in which the extraordinary expenses were ignored, but then the Company comes in after-the-fact and seeks additional rate relief based on creation of a deferred account for expenses that were incurred

¹⁹ Rebuttal Testimony of Gregory N. Duvall – Docket No. 09-035-15 - Phase I (Dec. 10, 2009), Exhibit RMP __ (GND-1R).

prior to the intervening rate cases. UIEC would certainly claim that such an application was inappropriate, but that is exactly what UIEC's Application seeks.

REC revenues associated with the 2008 GRC do not meet the standard for deferred accounting enunciated by the Commission in the *Deferred Accounting Order* for another reason—they were part of a revenue requirement settlement and were not reserved for possible true up in the future. These REC revenues account for 69 percent of the time period and 97 percent of the total REC revenues for which UIEC seeks deferred accounting.²⁰

Perhaps most importantly, the Commission is well aware and can take notice of the fact that the Company has not earned in excess of its authorized ROE during the periods in question. In fact, the Company has earned substantially less than its authorized ROE during these periods even including the incremental REC revenues. Thus, any increase in REC revenues over the amount estimated in setting rates has simply partially offset changes in other factors estimated in setting rates. This is, of course, exactly what is expected when rates are set. Rates are set for a future period based on best current estimates of normalized costs to be incurred and revenues to be received during the rate-effective period. Once rates are set most items of revenue and expense diverge from the forecast amounts. It is only when the divergence is sufficient to result in ROE that falls above or below the authorized level that a new GRC is justified and rates are reset prospectively. *See EBA Case, 720 P.2d at 420-21.*

This point is further illustrated by another example. Assume that the Company did not have a rate case for five years because new revenue from new customers or increased load from

²⁰ May 8, 2009 through February 17, 2010 is 286 days. January 1, 2009 through February 17, 2010 is 413 days. $286 / 413 = 69\%$. Total REC revenues less the amount included in rates from May 8, 2009 through February 17, 2010 is approximately \$31 million. Total REC revenues less the amount included in rates from January 1, 2009 through February 17, 2010 is \$32 million. $\$31 \text{ million} / \$32 \text{ million} = 97\%$.

existing customers, increased REC revenues or other increased sales during that period at least partially offset increased expenses during the same period, but that a party at the end of the five-year period successfully sought deferred accounting for the revenues that allowed the Company to avoid a rate case. Not only would the regulatory process be frustrated by such a scenario, the ability of investors and the financial community to rely on timely and accurate communications would be compromised if revenues earned during prior periods could be clawed back through retroactive deferred accounting.

Applying the standards for deferred accounting, and particularly considering their underlying rationale, it is apparent that UIEC's Application must be dismissed because UIEC has not stated and cannot state a claim upon which relief may be granted.

IV. CONCLUSION

UIEC's Application is improper because it seeks deferred accounting for REC revenues that were received by the Company in periods extending from 13 to 27 months prior to the date of the Application. During those periods, the Company did not earn the authorized ROE even including the REC revenues. 97 percent of the REC revenues for which deferred accounting is sought are covered by a rate case in which revenue requirement was settled without any reservation of the issue for subsequent true up. If the Commission were to grant the Application, there would be nothing to prevent any party, including the Company, from seeking deferred accounting for any component of revenue requirement for any period in the past that turned out to be significantly different than the amount of the component included in rates during that period.

V. RELIEF SOUGHT

Based on the foregoing, Rocky Mountain Power respectfully requests that the Commission dismiss or deny the Application.

VI. NOTICES, FILINGS, COMMUNICATIONS AND DISCOVERY

Notices, filings and communications regarding the Application should be sent to the following:

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In addition, Rocky Mountain Power requests that all data requests regarding this application be sent in Microsoft Word or plain text format to the following:

By email (preferred): datarequest@pacificorp.com

By regular mail: Data Request Response Center
PacifiCorp
825 NE Multnomah, Suite 2000
Portland, Oregon 97232

Informal questions may be directed to David L. Taylor, Utah Regulatory Affairs Manager, at (801) 220-2923.

DATED: April 20, 2011.

Respectfully submitted,

ROCKY MOUNTAIN POWER

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2011, I caused to be emailed a true and correct copy of the foregoing **ROCKY MOUNTAIN POWER'S MOTION TO DISMISS AND RESPONSE OPPOSING UIEC'S APPLICATION** to the following:

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