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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 UAE'S RESPONSE IN OPPOSITION TO RMP'S MOTION TO DISMISS UIEC'S APPLICATION FOR DEFERRED ACCOUNTING
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The Utah Association of Energy Users (“UAE”) hereby files this response in opposition to the Motion (“Motion”) filed by Rocky Mountain Power (“RMP”) to dismiss the Application of the Utah Industrial Energy Consumers (“UIEC”) for a Deferred Accounting Order for incremental REC revenues prior to February 22, 2010 (“UIEC Application”). RMP’s Motion should be denied because numerous factual and policy issues must first be resolved before a proper determination can be made as to the appropriate ratemaking impacts, if any, of the dramatic increase in REC values prior to February 22, 2010.

A motion to dismiss for failure to state a claim upon which relief can be granted is meritorious only based upon a clear showing that no relief could be appropriate, even assuming the truth of all allegations made, together with reasonable inferences. *E.g., Capital Assets Fin. Servs. v. Jordanelle Dev., LLC*, 247 P.3d 411, 413 (Utah Ct. App. 2010). Under this standard, RMP's Motion must be denied.

I. Many Important Factual and Policy Issues Must be Resolved Before the Nature and Extent of any Appropriate Relief can be Determined.

RMP's Motion to Dismiss relies upon six pages of factual allegations. That reliance alone dooms its Motion. A motion to dismiss for failure to state a claim must be resolved solely on the basis of pleadings. Rule 12(b), *Utah Rules of Civil Procedure*. When matters outside the pleadings are considered, the motion is treated as one for summary judgment under Rule 56, *Utah Rules of Civil Procedure*. *Id.* A motion for summary judgment can be granted only if the moving party demonstrates that no genuine issue exists as to any material fact and that it is entitled to judgment as a matter of law. Rule 56(c), *Utah Rules of Civil Procedure*. RMP's six-page "Statement of Facts" does not establish the material facts upon which it relies, or the lack of genuine dispute regarding those material facts. To the contrary, it demonstrates the existence of material factual issues that must be explored before the propriety and extent of any appropriate relief can be determined.

Facts relied upon in RMP's Motion, but not properly established for purposes of a Rule 56 motion for summary judgment, include: alleged amounts of actual REC revenue received by

the company from 2007 – 2010 (Motion, pages 3-7); alleged actual company earnings for those same periods (Motion, pages 6-7) ; alleged timing and causes of the dramatic jump in REC values (Motion, page 8); and the timing of RMP agreements to sell RECs (Motion, page 8). RMP provided no affidavits or other demonstration that these facts are accurate or undisputed. RMP's reliance on these alleged, but unproven, facts, as well as plausible disputes over some or all of these facts, dooms RMP's Motion.

RMP's Motion also fails to resolve factual issues that are critical to any Commission determination of the propriety of the requested retroactive rate relief. Under Utah law, the Commission must determine whether the dramatic upswing in REC values constituted an unforeseeable and extraordinary change in revenue, *MCI Telecommunications Corp. v. Utah Public Serv. Comm'n*, 840 P.2d 765, 771-772 (Utah 1992); Report and Order, Utah PSC Dockets 06-035-163, 07-035-04, 07-035-14, at 15 (January 3, 2008). Similarly, the Commission must determine whether the dramatic increase in REC values was based on events or circumstances that were known but not measurable at the time of a rate case, or events which may have been known or foreseeable, but whose impact upon the revenues of the utility were unforeseeable and extraordinary, or whose actual manifestations varied from projections in an unforeseeable and extraordinary way. Report and Order, Utah PSC Dockets 06-035-163, 07-035-04, 07-035-14, at 19 (January 3, 2008). Finally, the Commission must explore allegations of utility misconduct and failure to timely disclose pertinent information. *Stewart v. Utah Public Serv. Comm'n*, 885 P.2d 759, 779 (Utah 1994). The Motion to Dismiss must be denied because the Commission

must first resolve these critical factual contentions raised by the UIEC Application, which are presumed to be true for purposes of the Motion.

In addition to the numerous disputed factual issues identified above, RMP's Motion also raises several important policy issues, each of which is dependent upon underlying factual issues and potential disputes that must be explored and resolved based on an appropriate record.

Among such policy issues are those identified in the Division's April 10, 2011 response to the Commission's Action Request and, potentially, some of those raised in RMP's Motion. These critical policy issues can only be properly resolved following thorough investigations by the Division, Office and other parties, and the creation of a proper record upon which the Commission can rely. These policy and factual issues cannot properly be resolved on the pleadings or on the unsupported and incomplete allegations contained in RMP's Motion.

II. RMP's Heavy Focus on Accounting Standards is Misplaced.

RMP's Motion relies heavily on its interpretation of and allegations concerning applicable accounting standards, essentially disregarding rulings that the Commission should concern itself primarily with ratemaking issues rather than accounting issues. *E.g.*, Report and Order, Utah PSC Dockets 06-035-163, 07-035-04, 07-035-14, at 17 (January 3, 2008).

Moreover, whether or not an accounting order is the technically appropriate method for addressing the allegations raised in the UIEC Application, those allegations must be investigated and resolved. The UIEC Application should thus be considered as including a request for retroactive rate relief, regardless of the accounting treatment that may be appropriate. The

Commission must investigate and adjudicate the weighty allegations and issues raised in the UIEC Application, which can only be done by allowing the case to proceed and a record to be made.

III. Retroactive Rate Relief Does Not Require Overearnings.

RMP asserts a novel interpretation of Utah law, by arguing that retroactive rate relief is only appropriate in a period when a utility is over-earning. RMP cites no support for this claim, other an unwarranted assumption as to the Utah's Supreme Court's supposed, but unexpressed, reason for citing over-earnings in the *MCI* case, *MCI Telecommunications Corp. v. Public Serv. Comm'n*, 840 P.2d 765, 770 (Utah 1992). The holding in that case does not purport in any manner to require over-earnings as a condition to retroactive rate relief, and other cases demonstrate the fallacy of the argument. *E.g.*, *Utah Dep't of Bus. Regulation v. Public Serv. Comm'n*, 720 P.2d 420, 422 (Utah 1986). Moreover, any such determination would constitute major policy and legal determinations, the implications of which must first be carefully considered and analyzed based on testimony and a complete record.

IV. Consideration of the UIEC Application will not open up a Pandora's Box of Deferred Accounting Orders.

RMP posits a parade of horrors if UIEC's Application were to be granted, including utility applications based on swings in net power costs. RMP's circular argument provides no support for its Motion. If the increase in REC values identified in the UIEC Application meets the factual and legal requirements for retroactive relief – issues still to be decided – then it may well qualify for retroactive rate adjustments. The same is true of net power costs. Indeed, RMP

has sought retroactive relief for unforeseeable and extraordinary increases in net power costs, and may well do so in the future. That relief is and should remain available, but only when the legal and factual prerequisites are established. RMP's Motion to Dismiss should be denied so that the parties can proceed to address, and the Commission can properly make, those determinations.

DATED this 5th day of May, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this 5th day of May, 2011, on the following:

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