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

Pursuant to Rule R746-100-4.D of the Utah Administrative Code, and the Order issued in this matter by the Utah Public Service Commission ("Commission") on April 28, 2011, the Utah Industrial Energy Consumers ("UIEC"), an intervention group, submits this Opposition to Rocky Mountain Power's Motion to Dismiss and Response to Application.

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INTRODUCTION

If UIEC's allegations are assumed to be true and all reasonable inferences are drawn in the light most favorable to UIEC, as must be done under the standard for a motion to dismiss, then the Commission should grant UIEC's Application for Deferred Accounting Order for REC Revenue ("Application") and deny Rocky Mountain Power's ("RMP" or the "Company") Motion to Dismiss and Response Opposing UIEC's Application ("Motion").

Contrary to RMP's suggestion otherwise, the Commission should give greater weight to ratemaking rules and principles than to accounting rules and principles. The Commission has already previously ruled that the rule against retroactive ratemaking and its exceptions are directly relevant in deciding whether to issue accounting orders. Given the extraordinary differences between what RMP disclosed as expected revenues ($14 million) and what it actually received ($83 million has now been confessed), at least one, if not all, of the exceptions apply in this case. Also, contrary to the Company's assertion otherwise, its ability to earn its authorized return on equity (even after taking into account its losses on swaps) has no bearing whatsoever to whether the exceptions to the rule against retroactive ratemaking should apply. It is the extraordinary and unforeseeable nature of the circumstances and expenses as well as whether RMP has misled or failed to disclose pertinent information that is determinative.

The Company has been less than forthcoming in providing relevant information regarding its windfall in REC revenues. This, along with the critical questions asked in the Division of Public Utilities' ("DPU" or the "Division") recommendation that the matter be investigated, demonstrate that the Commission would be in error to grant the Company's Motion.

Finally, the Company cannot use a black box settlement with a "no precedent" clause as reason for putting undisclosed REC revenues out of the reach of ratepayers. It is unfair and disingenuous.

While granting an accounting order for any of the revenues addressed in UIEC's Application is not a dispositive determination of final treatment in future ratemaking proceedings, the situation presented here provides a significant basis for investigation into the matter nonetheless.

ARGUMENT

The Commission "'should grant a motion to dismiss only when, assuming the truth of the allegations in the [Application] and drawing all reasonable inferences therefrom in the light most favorable to the [Applicant], it is clear that the [Applicant] is not entitled to relief.'" *Capital Assets Fin. Servs. v. Jordanelle Dev., LLC*, 247 P.3d 411, 413 (Utah Ct. App. 2010) (reversing motion to dismiss granted by trial court) (quoting *Brown v. Division of Water Rights*, 228 P.3d 747 (Utah 2004)).

Contrary to RMP's assertions, and as clearly demonstrated by the list of issues in the recommendation of the Division (Action Request Response at 2, April 20, 2011), in assuming the truth of the allegations in UIEC's Application and drawing all reasonable inferences in the light most favorable to UIEC, it is clear that UIEC ***is*** entitled to relief and RMP's motion must fail.

I. THE EXCEPTIONS TO THE RULE AGAINST RETROACTIVE RATEMAKING ARE APPLICABLE IN THIS CASE.

As previously noted by the Commission,

> Accounting for regulatory purposes may be different from

> accounting for financial reporting purposes; cross-distinctions are recognized on either side in recognition of the different purposes and goals each pursues. ***Regulatory accounting is a tool to arrive at the regulatory objective of just and reasonable rates***.

Report & Order at 13, Docket Nos. 06-035-163, 07-035-04, and 07-035-14 (Jan. 3, 2008) ("*Deferred Accounting Order*") (emphasis added). In fact, "***ratemaking rules and principles*** have application and ***may be given greater weight*** than accounting rules and principles in considering whether to issue an accounting order." *Id*. at 17 (emphasis added). Accordingly, the Company's four-page explanation regarding accounting standards adds little, if anything, to this case.

In the *Deferred Accounting Order*, the Commission held that exceptions to the rule against retroactive ratemaking and their underlying rationales have application in considering whether an accounting order should be issued. *Id*. at 16. In addition, "[i]n deciding whether to issue accounting orders, [the Commission] will also take into consideration the time when the utility becomes aware of events or circumstances and when related expenses occur in relation to the timing of past and future ratemak[]ing proceedings." *Id*. at 18. This recognizes the fact that "[t]he utility is truly the gatekeeper to information concerning what has happened, what is happening and what the utility anticipates can happen as its management continues pursuit of its business plans." *Id*. at 19.

Pursuant to the rule against retroactive ratemaking, "[t]o provide utilities with some incentive to operate efficiently, they are generally not permitted to adjust their rates retroactively to compensate for unanticipated costs or unrealized revenues." *Utah Dep't of Bus. Regulation v. Public Serv. Comm'n*, 720 P.2d 420, 420 (Utah 1986) ("*EBA Case*"). However, Utah courts and the Commission recognize exceptions to this rule.

One of those exceptions is "for unforeseeable and extraordinary increases in a utility's expenses," as well as decreases in expenses. *MCI Telecomm. Corp. v. Public Serv. Comm'n*, 840 P.2d 765, 771-72, (Utah 1992); *see also Southern Cal. Edison Co. v. California Pub. Utils. Comm'n*, 576 P.2d 945, 945-46 (Cal. 1978) (noting that rule against retroactive ratemaking is also applicable to order refunds of amounts collected by a public utility pursuant to approved rates). As the *MCI* court explained, the "extraordinary and unforeseeable nature of the expenses recognized under the exception differentiates them from expenses inaccurately estimated because of a misstep in the rate-making process, such as the inability to predict precisely, or from mismanagement."[1] *Id*.

There is also another exception available, and that is for utility misconduct. *Id*. at 774-75.

> A utility that ***misleads or fails to disclose information pertinent*** to whether a rate-making proceeding should be initiated or to the proper resolution of such a proceeding cannot invoke the rule against retroactive rate making to avoid refunding rates improperly collected. The rule against retroactive rate making was not intended to permit a utility to subvert the integrity of rate-making proceedings. . . . If a utility misleads the Commission or the Division by withholding relevant rate-making information, the rates fixed by the Commission cannot be based on reasonable projections of the utility's revenues and expenses. The rule against retroactive rate making was designed to ensure the integrity of the rate-making process, not to shelter a utility's improperly obtained revenues.
>
> Moreover, ***the Commission has the inherent power to reopen a rate order if the utility engages in misconduct***.

1 The Commission has also recognized an exception for events or circumstances that may be known but not measurable at the time of a rate case, *e.g.*, an event which may have been known or foreseeable, but whose impact upon the revenues of the utility were unforeseeable and extraordinary, or whose actual manifestations vary from the projections in an unforeseeable and extraordinary way. *Deferred Accounting Order* at 19.

Id. at 775 (internal citations omitted) (emphasis added). Thus, exceptions are available for extraordinary and unforeseeable events, circumstances, expenses, and revenues as well as for utility misconduct.

Contrary to the Company's preposterous suggestion, however, there has never been any recognition in Utah courts or at the Commission (nor, to our knowledge, any other courts or commissions) that these exceptions are in any way impacted by the utility's ability to earn its return on equity ("ROE"). RMP Br. at 18, 19, 21. In fact, contrary to RMP's suggestion, the *EBA Case*, which has been recognized as the "leading case in this jurisdiction prohibiting retroactive rate making," *MCI*, 840 P.2d at 770, dealt specifically with action the Commission had taken to make up for the utility's failure to meet its authorized ROE, *EBA Case*, 720 P.2d at 422. The Company's suggestion that the exceptions to the rule against retroactive ratemaking should not apply in this case because the Company is for some reason[2] not making its authorized ROE should be totally disregarded. In *MCI* the utility was over earning and in the *EBA Case* the utility was under earning. This fact is irrelevant.

In this case, the Company failed to provide timely, accurate, and specific information as to its actual REC sales and REC revenues during the period of 2009 and up and until the Utah Association of Energy Users ("UAE") filed its application for a deferred accounting order on February 22, 2010. However, the Company has now confessed that it collected $29 million as opposed to the $4 million disclosed in the 2008 general rate case and $54 million as opposed to the $10 million disclosed in the 2009 general rate case. Twenty-nine million dollars is

2 It is more likely than not, as UIEC plans to demonstrate in the currently pending general rate case, that the reason the Company has not been making its ROE has more to do with its irrational and imprudent natural gas hedging practices.

significantly larger than $4 million. Fifty-four million dollars is significantly larger than $10 million. Furthermore, there is a question of whether the Company had this information during the relevant rate making cases. If RMP failed to disclose this information, which was definitely pertinent to the proper resolution of the rate cases, RMP cannot now invoke the rule against retroactive ratemaking to avoid refunding rates improperly collected. This is precisely the type of circumstances under which information in past rate making cases must be examined to determine whether an exception to the rule against retroactive ratemaking applies.

II. THE COMPANY HAS BEEN LESS THAN FORTHCOMING IN DISCLOSING RELEVANT REC INFORMATION.

On December 14, 2009, during cross examination of RMP's witness Mr. Duvall in the 2009 general rate case, Docket No. 09-035-23, UIEC offered into the record UIEC Confidential Exhibit Cross No. 1, which included a contract between the Company and Nevada Energy. Docket No. 09-35-23, Hr'g Tr., vol. III, 499:9-14, Dec. 14, 2009. It was established during the hearing that the contract was executed on October 21, 2009, and included sales of renewable energy and renewable energy certificates ("REC") to be made to Nevada Energy for 60,000 MWh in December of 2009 and 727,000 MWh in 2010. *Id*. at 500:12-17, 501:17-506:10. However, the revenue from these REC sales were not included in the Company's updates to net power costs even though the contract was executed prior to other updates proposed by the Company.[3]

Based on information and belief, UAE had difficulty obtaining information regarding REC revenues from the Company in the energy balancing account matter, Docket No. 09-035-15. Based on information and belief, UAE finally was able to obtain the requested information

3 Ultimately, it appears there are at least three (3) undisclosed contracts.

in the UAE REC deferral case, Docket No. 10-035-14. Thereafter, in the second Major Plant Addition case ("MPA II"), UAE attempted to raise the issue of RMP's significant understating of REC revenues in its Prefiled Direct Testimony of Kevin Higgins filed October 26, 2010. RMP tried to hide this information by filing a motion to strike the testimony on November 8, 2010. The matter was settled, with the inclusion of an offset for REC revenues, but without any disclosure as to how that amount was derived.

UIEC had not yet executed a confidentiality agreement in the UAE REC deferral case, Docket No. 10-035-14. Nevertheless, after understanding that UAE had finally been successful in obtaining REC revenue information, UIEC also attempted to discover the relevant REC sales and revenue information, but in Docket No. 10-035-89 (MPA II). The Company fought and delayed UIEC's attempts. On November 12, 2010, UIEC issued a set of data requests to the Company in the MPA II and UAE REC deferral cases, Docket Nos. 10-035-89 and 10-035-14, requesting the quantities of RECs sold in 2009 and 2010 and the 2009 and 2010 REC revenue received. A true and correct copy is attached as Exhibit A. It was UIEC's understanding that such information had been disclosed to UAE. RMP first asked for a delay in providing the information and then refused to provide it at all, claiming it was irrelevant, even though REC revenues were a part of the MPA II settlement. *See* the true and correct copies of relevant meet and confer correspondence and the Company's data responses refusing to comply in Exhibits B, C, D, E, and F; *see also* RMP Br. at 7-8; Order Approving Settlement Stipulation at i, 4, 6, 8-10, Docket No. 10-035-89 (Dec. 21, 2010).

Thereafter, on January 6, 2011, the Company notified UIEC that it was ready to provide the responses, but that they could only be used in the UAE REC deferral case, Docket No. 10-

035-14. RMP also claimed the information was confidential so UIEC would first have to execute a confidentiality agreement. *See* the true and correct copy of correspondence at Exhibit G. Because UIEC wanted to also use the information in the not-yet-then-filed general rate case, UIEC indicated it would be willing to execute the confidentiality agreement for Docket No. 10-035-14 and the general rate case. *See* the true and correct copy of correspondence at Exhibit H. The Company responded that UIEC would have to wait until after the general rate case was filed, but that it would get the responses to UIEC as soon as the confidentiality agreement was signed. *Id*.

On February 8, 2011, once the general rate case was filed and after UIEC filed its Petition to Intervene and executed the confidentiality agreement, UIEC served its first set of data requests to the Company, which included the questions regarding the quantities of RECs sold in 2009 and 2010 and the 2009 and 2010 REC revenues received. A true and correct copy is attached as Exhibit I. However, the Company did not provide the responses to UIEC as soon as the confidentiality agreements were signed as promised. Instead, RMP made UIEC wait until March 1 for its responses to the first set of data request, but then, the responses to UIEC's requests about REC sales and REC revenues were omitted. *See* the true and correct copies of relevant meet and confer correspondence and the Company's data responses in Exhibits J and K. UIEC finally got the responses to its REC sales and REC revenue data requests on March 10, 2011. *See* the true and correct copy in Exhibit L. However, because the REC sales and REC revenue information was marked as confidential, UIEC received it on a Confidential CD on March 11. *Id*. After taking the time to try to understand and evaluate the Company's responses, UIEC filed its Application on March 21, 2011. Specific detailed information was not included in the

Application because the Company had claimed that it was confidential. *See* Company's responses to UIEC 1.46 and 1.50 in Exhibit L.

Yet now, despite the fact that the Company has been claiming the REC revenues are confidential, and despite the fact that the Company fought UIEC's attempts to access this information for about five months, the Company has published these $69 million in undisclosed REC revenues in its public response and motion to dismiss, and claims that they were available in the public record all along! RMP Br. at 7, 19. This is absurd.

Moreover, the Company continues its quest to hide the REC revenues it receives. In the currently pending general rate case, the Division requested a copy of the recently executed contract for energy and renewable energy attributes between PacifiCorp and NV Energy. *See* the true and correct copy of the data request and 2d Supplemental Response attached hereto as Exhibit M. The Company claims the contract is confidential. The Company supplied a copy of the contract to those who have executed the confidentiality agreement in this docket. However, even though the contract is marked as confidential and only supplied to parties who have executed a confidentiality agreement, the Company still redacted the pricing information. Even under the terms of the confidentiality agreement and its obligation to provide the pricing information, the Company has refused to provide that information.[4] The Company continues to try to hide REC revenue information.

4 This is especially ironic given the fact that in Nevada, the Public Utilities Commission of Nevada ("PUCN") recently ruled that renewable energy and renewable attribute pricing in utility contracts is not confidential and must be disclosed. *See* PUCN Order, Docket No. 10-02009 (July 2, 2010).

III. THE LACK OF ANSWERS TO THE DIVISION'S RECOMMENDATION IN THIS MATTER INDICATES THAT INVESTIGATION IN THIS DOCKET IS REQUIRED.

In response to an action request from the Commission in this docket, the Division has listed the following questions, which list is not exhaustive, with respect to UIEC's Application: (a) whether the revenue available to RMP in selling renewable attributes of renewable energy resources in 2009 was significantly greater, in a manner that was dramatic, unprecedented, unforeseeable, and extraordinary, than disclosed by RMP in previous general rate cases, and if so, what caused this to happen; (b) whether RMP entered into contracts for the sale of RECs at prices significantly higher than prices projected or disclosed by RMP in previous rate cases; (c) whether the Company incorporated into the test years for its rate cases or disclosed to the Commission in prior rate cases the extraordinary revenue it received for RECs in 2009; (d) whether the discovery in Docket No. 10-035-124 demonstrate that for at least some period during 2009, RMP total company REC revenue prior to February 22, 2010 was in excess of $50 million, and if not, then just what was the amount and was it extraordinary; (e) whether RMP has millions of RECs banked but not sold; and (f) whether the Company's REC revenue that predates the Commission's order approving a REC-revenue deferral account in Docket No. 10-035-14 qualify for "retroactive" rate adjustment.

With respect to question (f), whether the Company's REC revenue that predates the Commission's order approving a REC-revenue deferral account in Docket No. 10-035-14 qualify for "retroactive" rate adjustment, the answer is yes. The approved stipulation in that matter provides:

> [T]he deferred accounting orders contemplated herein do not create any presumption regarding future ratemaking treatment of the

> deferred amount. Accordingly, by agreeing to issuance of the deferred accounting orders contemplated herein, the Parties are not stipulating or agreeing to any facts or legal arguments offered in support of or in opposition to either the Company Motion or the UAE Application.

Report & Order on Deferred Accounting Stipulation ¶ 14, Docket Nos. 09-035-15, 10-035-14 (July 14, 2010). Thus, the stipulation does not serve as precedent to exclude the retroactive treatment of previously earned revenues.

With respect to question (e), whether RMP has millions of RECs banked but not sold, if the Company's confidential response to UIEC Request No. 1.46 is to be believed, the answer is yes. However, further investigation, testimony, and cross examination are probably necessary to answer definitively.

As to the other questions, the answers are only known by RMP at this time, though UIEC has issued data requests for that information. *See* a true and correct copy in Exhibit N. Responses, unless dates are changed under the upcoming scheduling conference, are currently not due until June 1, 2011. Thus, an investigation as recommended by the Division is required. *See also MCI*, 840 P.2d at 775 (ruling that given the facts appearing on the record and the allegations made to the Commission, the Commission's failure to hold a factual hearing on the issue of utility misconduct was arbitrary and capricious). We can start with the difference of the confessed $69 million in undisclosed REC revenues and investigate whether that number should be higher.

IV. THE STIPULATION OF DOCKET NO. 08-035-38 DOES NOT PREVENT INVESTIGATION INTO THE REC REVENUES AND SALES DURING THE RELEVANT PERIOD OF THAT CASE.

The Company has suggested, without citation to any law, that parties are estopped from attempting to apply an exception to the rule against retroactive ratemaking to the final order in Docket No. 08-035-38 because such an issue was not reserved in the settlement for later treatment. Such a suggestion ignores the essence of the exceptions to the rule against retroactive ratemaking as well as the terms of the settlement itself.

The stipulation in Docket No. 08-035-38 was a "black box" compromise. *See* Report & Order on Rev. Reqmt. ¶ 10, Docket No. 08-035-38 (April 21, 2009) ("While the Parties agreed on the general categories of costs to be adjusted in arriving at the agreed revenue requirement increase, there is no overall agreement as to the specific revenue requirement adjustments which led to the stipulated revenue requirement increases because different parties relied upon different adjustments in supporting the agreed upon $45.0 million increase."). In addition, the stipulation contained terms providing that it could not serve to prohibit any arguments on issues not specifically resolved in the stipulation. *Id*. ¶ 20 ("Neither the execution of this Stipulation nor the order adopting this Stipulation shall be deemed to constitute an admission or acknowledgment by any Party of any liability, the validity or invalidity of any claim or defense, the validity or invalidity of any principle or practice, or the basis of an estoppel or waiver by any Party other than with respect to issues resolved by this Stipulation; nor shall they be introduced or used as evidence for any other purpose in a future proceeding by any Party except a proceeding to enforce the approval or terms of this Stipulation.").

The Commission has ruled:

> A black box compromise resolution, however, by definition, precludes a party from referring to revenue requirement expense evidence and a Commission expense dispute resolution to claim that a particular expense was or was not included and, if claimed to be included, the precise amount of the expense which is said to have been included. . . .[W]e do not believe it a fair ratemaking process consistent with ratemaking principles to allow a participant in a ratemaking case to support and advocate approval of a non-detailed revenue requirement compromise, but later appear before the Commission and essentially claim that a specific expense or revenue, of which it was aware, was not included in the compromises leading to the revenue requirement stipulation.

Deferred Accounting Order at 20-21.

In this case, not only did the specific terms of the stipulation provide that the parties were not prohibited from making future arguments regarding any issues not specifically called out and resolved in the stipulation, but it was a black box compromise. REC sales and revenues are not called out in the stipulation; nor are they addressed as an issue that was resolved. Therefore, the Company cannot now claim that all REC sales and revenue issues were resolved by the stipulation. Furthermore, because the Company had not shared the relevant information, there is no possible way a party could have reserved such an issue for future treatment. This is the reason for the exceptions to the rule against retroactive ratemaking and the Company's argument must fail.

CONCLUSION

Based on the foregoing, UIEC respectfully requests that the Commission deny the Company's motion and response.

DATED this 5th day of May, 2011.

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CERTIFICATE OF SERVICE
(Docket No. Docket No. 11-035-46)

I hereby certify that on this 5th day of May 2011, I caused to be emailed, a true and correct copy of the foregoing **UIEC'S OPPOSITION TO ROCKY MOUNTAIN POWER'S MOTION TO DISMISS AND RESPONSE TO APPLICATION** to:

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