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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
REPLY TO UIEC'S AND UAE'S
RESPONSES IN OPPOSITION TO
MOTION TO DISMISS**

Rocky Mountain Power, a division of PacifiCorp (“Rocky Mountain Power” or the “Company”), pursuant to Utah Admin. Code R746-100-1.C.3 and 4 and Rule 12(b)(6) of the Utah Rules of Civil Procedure, hereby replies to UIEC’s Opposition to Rocky Mountain Power’s Motion to Dismiss and Response to Application (“UIEC Response”) and UAE’s Response in Opposition to RMP’s Motion to Dismiss UIEC’s Application for Deferred Accounting (“UAE Response”) (collectively, the “Responses”) both dated May 5, 2011.

I. INTRODUCTION

Boiled down to its essence, UIEC's Response is that Rocky Mountain Power's Motion to Dismiss ("Motion") should be denied because, regardless of the fact that UIEC's Application for Deferred Accounting Order for REC Revenue ("Application") violates accounting standards for deferred accounting, the rule against retroactive ratemaking does not bar deferred accounting where the renewable energy credit ("REC") revenues received by the Company from January 1, 2009 through February 21, 2010 were significantly greater than those estimated in setting rates for that period. UIEC Response at 1-2. On the other hand, UAE's Response essentially acknowledges that the Application seeks improper relief and suggests that the Commission should consider it instead to be an application for retroactive ratemaking. (UAE Response at 4-5) Although the Responses claim there is a need for an investigation of numerous factual and policy issues, it is apparent that the Commission may appropriately dismiss the Application now based on its resolution of two legal issues: (1) Is deferred accounting only available for current revenues or costs? (2) Is retroactive ratemaking only available for increased revenues or decreased costs if the Company is over earning?

The answers to these questions do not depend on disputed facts that need to be investigated or developed, but rather are pure legal issues. If the Commission appropriately answers the first question affirmatively, there is no reason for this matter to proceed based on the relief sought in the Application. If the Commission appropriately answers both questions affirmatively, there is no reason for this matter to proceed either as a claim for deferred accounting or retroactive ratemaking. If on the other hand, the Commission answers both questions negatively, the Company concedes that the Commission needs to make factual determinations and that the Motion should be denied.

II. ARGUMENT

A. The Motion Does Not Depend on Improper Factual Allegations.

The Responses argue that the Commission, in ruling on the Motion, must assume the facts alleged in the Application to be true. The Company agrees. Motion at 9. However, UAE then argues that because the Motion “relies upon six pages of factual allegations,” the Motion must be denied or must at least be converted to a motion for summary judgment and denied if there is any genuine issue of material fact. UAE Response at 2-4. This argument is incorrect.

As mentioned in the Motion, the Commission may take notice of facts of record in ruling on the Motion. Motion at 10. It is well established that doing so does not convert the Motion into a motion for summary judgment. *See, e.g., Tal v. Hogan*, 453 F.3d 1244, 1265 n.24 (10th Cir. 2006) (“[F]acts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment.”); *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1206 n.5 (D. Utah 2004) (“Furthermore, ‘a court may take judicial notice of matters of public record outside the pleadings without converting a motion to dismiss’ into a motion for summary judgment.”) (citing James Wm. Moore et al., *Moore’s Federal Practice* ¶56.30 (3d ed. 1997)).

The “six pages” of factual allegations in the Motion are all facts of record of which the Commission may take notice. Most of them are simply a review of the REC issue in the rate cases that determined the rates in effect from January 1, 2009 through February 21, 2010. The essential facts come from undisputed testimony or Commission orders in the dockets cited and are not matters about which there could be any legitimate dispute.

UAE mentions only four “allegations” that are not of this nature: actual REC revenues received by the Company; actual Company earnings; timing and causes of the dramatic jump in REC revenues; and timing of agreements to sell RECs. UAE Response at 2-3. If the

Commission decides that deferred accounting is not available for revenues realized from January 1, 2009 through February 21, 2010, none of these issues has any relevance.¹ If the Commission decides that retroactive ratemaking is not available because the Company was not over earning during the period in question, only one of the four allegations has potential relevance—the Company’s earnings during the period at issue. As stated in the Motion, the earnings figures provided in the Motion are from the Company’s semi-annual Results of Operations filed with the Commission, the Division of Public Utilities (“Division”) and the Office of Consumer Services (“Office”) and available to the public. Motion at 6, n. 3. The Commission may take notice of those reports. Neither UIEC or UAE has claimed that there is any error in these reports nor could they reasonably do so.²

Finally, UAE argues that the Motion does not resolve or address other factual issues such as whether the upswing in REC revenues was an unforeseeable and extraordinary change in revenue or whether rates were set too high in the rate cases as a result of utility misconduct. UAE Response at 3-4. The Company did not address these issues in the Motion because they do not matter if the Company’s legal position is correct. If the Commission decides that the Company’s legal position is not correct, the issues identified by UAE may have some relevance.

B. Deferred Accounting Is an Accounting Issue

The Responses argue that the Motion’s focus on accounting standards is improper or too heavy. UIEC Response at 3; UAE Response at 4. In support of this position, they rely on the

¹ The Company notes, however, that actual REC revenues for 2009 and projected REC revenues for 2010 were reported in the Company’s December 31, 2009 Results of Operations. Actual REC revenues for 2009 were also reported in the Company’s FERC Form 1 and the Company’s 10-K. These are all sources of which the Commission could take notice if the issue were relevant.

² The Company and the Commission, Division and Office rely upon these reports to monitor the Company’s earnings and to determine when and if rate relief may be necessary. Therefore, while the reports are not formally audited, they are reviewed and are relied upon as a reasonable and dependable source of information by the Company, regulators and state agencies.

Commission's Report and Order in Docket Nos. 06-035-163, 07-035-04 and 07-035-14 ("Deferred Accounting Order"). In its Motion, the Company cited and quoted extensively from that order and acknowledged and quoted the Commission's statement on which their argument is based. Motion at 11. But contrary to the implication of the Responses, the Commission did not say that accounting rules should be given no or almost no consideration in deciding whether to grant deferred accounting. The Commission said "ratemaking rules and principles . . . may be given greater weight than accounting rules and principles in considering whether to issue an accounting order." *Deferred Accounting Order* at 17. Given that a deferred accounting order is an order regarding accounting, it is clear that accounting rules and principles must be given significant weight, even if less weight than ratemaking principles.³

Giving any weight to accounting rules and principles, it is clear that the relief sought by the Application is not appropriate deferred accounting for the reasons stated in the Motion. The Responses have not even addressed, let alone rebutted these reasons. In summary, the purpose of deferred accounting 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.

C. Exceptions to the Rule Against Retroactive Ratemaking Do Depend on Company Earnings.

The Responses attempt to diminish the Company's argument that retroactive ratemaking depends on Company earnings by calling it names. UIEC calls the argument "preposterous" (UIEC Response at 5), and UAE calls it "novel" and "fallacy." UAE Response at 5. Beyond name calling, they both cite *Utah Dep't of Business Regulations v. Public Service Comm'n*, 720

³ UIEC clearly recognized that its Application is based on the Commission's authority to regulate utility accounts under Utah Code Ann. § 54-4-23. Application at 1.

P.2d 420 (Utah 1986) (“*EBA Case*”), without any discussion of the facts or holding of the case, as the basis for their view that utility earnings are irrelevant in determining whether retroactive ratemaking may be considered. Responses at 5. UAE goes one step further claiming that the Utah Supreme Court case in which the exceptions to the rule against retroactive ratemaking were first recognized in Utah, *MCI Telecomm. Corp. v. Utah Public Service Comm’n*, 840 P.2d 756 (Utah 1992), did not express that the rationale for the exceptions was dependent on utility earnings and that the Company has cited no support for its argument. UAE Response at 5. A brief review of these cases and the exceptions demonstrates the deficiency of these arguments.

In the *EBA Case*, Utah Power & Light sought to make up for under earnings by shifting a surplus in its Energy Balancing Account (“EBA”) to its general revenues for the benefit of shareholders. *EBA Case*, 720 P.2d at 420. The Court concluded that the Commission did not have authority to “permit[] a utility to have retroactive revenue adjustments in order to guarantee shareholders the rate of return initially anticipated.” *Id.* at 423. The Court held “[t]he utility cannot use the energy cost pass-through procedure to shift to ratepayers the risk of misprojecting nonenergy components of the general rate.” *Id.* at 424. Thus, the case did not recognize any exception to the rule against retroactive ratemaking and, therefore, did not consider whether application of exceptions to the rule depended on utility earnings. In short, the *EBA Case* has no bearing on the issue presented here.

MCI, on the other hand, specifically addressed when exceptions to the rule against retroactive ratemaking could be applied. After discussing U.S. West’s significant over earnings in some detail (*MCI*, 840 P.2d at 768), the Court reviewed cases recognizing an exception to the rule against retroactive ratemaking when an unforeseeable and extraordinary increase in utility expenses resulted from a natural disaster. *Id.* at 771. The justification for this exception, noted

by the Court, was that absent such an exception, a utility would not be afforded a reasonable opportunity to earn a reasonable rate of return. *Id.* Thus, it is clear the exception for an unforeseeable and extraordinary event that caused a decrease in earnings would only be justified if the utility was earning less than its authorized return as a result.

This rationale for the rule is demonstrated by a hypothetical example. Assume the Company were earning in excess of its authorized rate of return, but that an unforeseeable and extraordinary event caused a decrease in its earnings to the authorized level. Would the utility be justified in claiming that its rates should be retroactively increased to recover the lost earnings based on the unforeseeable and extraordinary exception to the rule against retroactive ratemaking? Of course not. Likewise, customers are not entitled to a refund resulting from an unforeseeable and extraordinary event that caused an increase in earnings, unless the increase resulted in the utility earning in excess of its authorized return.

This rationale is confirmed by the Court's holding and direction on remand in *MCI*. After holding that an exception to the rule against retroactive ratemaking for unforeseeable and extraordinary increases or decreases in expenses is recognized in Utah (*id.* at 772), the Court directed the Commission on remand to make factual findings that, "at a minimum, include (1) U.S. West's earnings and rate of return for the years 1986, 1987, 1988, and 1989 . . . ; (2) the extent to which U.S. West's earnings exceeded the authorized rate of return in 1987, 1988, and 1989" *Id.* at 774. The Court went on to state:

[I]f a utility earns profits in excess of its authorized rate of return because of an exception to the rule against retroactive ratemaking, the authorized return is the best available measure of a fair return and earnings in excess of that rate are subject to refund. Accordingly, if on remand the Tax Reform Act of 1986 is found to have resulted in an unforeseeable and extraordinary decrease in expenses or if U.S. West is found to have engaged in utility misconduct, we hold that U.S. West's earnings, to the

extent they exceeded its authorized rate of return established in the 1985 general rate case, should be refunded to U.S. West ratepayers.

Id. at 776. The Court clearly and explicitly recognized that application of exceptions to the rule against retroactive ratemaking are contingent on the level of utility earnings.

UAE's argument ignores this straightforward direction from the Court. It is beyond dispute that the Company earned substantially less than its authorized rate of return on equity during the period for which UIEC seeks deferred accounting or, as suggested by UAE, retroactive ratemaking. Therefore, the Application should be dismissed.

D. The Black Box Revenue Requirement Stipulation in Docket No. 08-035-38 Bars a Significant Portion of the Application.

UIEC argues that the Company's argument in the Motion that the settlement in Docket No. 08-035-38 ("2008 GRC") bars deferred accounting for REC revenues from May 8, 2009 through February 17, 2010 (Motion at 21) is incorrect and without citation to legal authority. UIEC Response at 12-13. The Company plainly cited the *Deferred Accounting Order* in support of the argument and earlier in the Motion referred to the same portion of that order cited in the UIEC Response on this issue. *See* Motion at 18; UIEC Response at 13. Thus, the issue here is not whether the Company's argument is unsupported; it is the interpretation of the *Deferred Accounting Order* cited by both parties.

The *Deferred Accounting Order* states that deferred accounting cannot be granted for a revenue or expense that was included in a black box settlement in a general rate case unless the party seeking the deferred accounting "specifically identif[ied] 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." *Deferred Accounting Order* at 21. This was the reason given by the Commission for rejecting the Company's request for deferred accounting for severance costs in one of the applications

decided in that docket. Furthermore, the settlement in the 2006 general rate case referenced by the Commission in the *Deferred Accounting Order* contained reservation of rights language similar in nature to that cited by UIEC in its Response.⁴

UIEC was a party to the settlement in the 2008 GRC and did not in any way comply with the conditions required by the *Deferred Accounting Order* to later seeking deferred accounting for REC revenues included in the black box revenue requirement settlement in the 2008 GRC. Thus, the relief sought in the Application for 97 percent of the total REC revenues for which deferral is sought is barred.

E. UIEC's and UAE's Other Arguments Are Irrelevant and Unpersuasive.

1. Claimed Problems with Disclosure of REC Revenues.

UIEC argues that the Motion should be denied because it claims the Company has been less than forthcoming in disclosing relevant REC information. UIEC Response at 6-9. The basis for this argument is an incident in cross examination during Docket No. 09-035-23 ("2009 GRC") and a litany of discovery issues in other dockets. Far from proving that the Company has been less than forthcoming, these examples illustrate why there is no excuse for UIEC's belated effort to obtain deferred accounting for revenues received from January 1, 2009 through February 21, 2010. Moreover, the entire argument is a tempest in a teapot. If UIEC wanted to know the level of actual REC revenues received by the Company during 2009, that information was publicly available in the Company's Results of Operations, FERC Form-1 and 10-K, all of which were filed during the first few months of 2010. In any event, this argument is irrelevant to the legal issues presented by the Company's Motion.⁵

⁴ See Stipulation Regarding Revenue Requirement and Rate Spread, Docket No. 06-035-21 (July 21, 2006) at ¶ 22.

⁵ Although the issue is irrelevant, the Company believes a response to UIEC's argument that the Company's disclosure of actual REC revenues in the Motion is inconsistent with its prior claims that REC

2. Division Issues List

UIEC cites the issues raised in the Division's response to the Commission's action request as a basis for denying the Motion. UIEC Response at 10-11. The Company acknowledges that some or all of the issues noted by the Division may need to be addressed if the Motion is denied. However, raising the issues is not a reason that the Motion should be denied. As discussed above, the Motion turns on the answers to two legal questions. Those questions can and should be answered regardless of the answers to the questions raised by the Division.⁶

3. UAE Argument on Parade of Horribles

UAE concludes its Response by arguing that the Company's argument that granting the Application would open the door to other applications for deferred accounting for unforeseeable and extraordinary changes in expenses or revenues that occurred in the past should be ignored. UAE Response at 5-6. UAE essentially accepts the validity of the argument, but says that relief should be available if legal and factual prerequisites are established. *Id.* at 6. However, UAE incorrectly claims that the Company has sought retroactive relief for unforeseeable and extraordinary increases in net power costs ("NPC"). *Id.* This argument illustrates a problem in

revenue information is confidential (UIEC Response at 9) may be helpful. What UIEC apparently fails to realize is that current information regarding particular REC sales contracts and volumes of RECs available for and being traded is very sensitive commercial information. Public disclosure of that information could affect the market for RECs. On the other hand, the total REC revenues realized during past periods is not confidential and, as has been explained in this Reply, is provided in publicly-available reports filed by the Company.

⁶ Although UIEC acknowledges that the answers to most of the Division's issues are unknown at this time, it claims that the answer to one of the Division's issues regarding whether the REC revenues for which the Application seeks deferred accounting qualify for retroactive rate adjustment is yes based on the stipulation of the parties in the UAE Deferral Docket. *Id.* The language from the stipulation cited by UIEC simply provides that the stipulation does not create any presumption about ratemaking treatment of the deferred amounts and that by entering into the stipulation the parties are not stipulating or agreeing to any facts or legal arguments offered in support of the requests for deferred accounting. *See* Report and Order on Deferred Accounting Stipulation, Docket Nos. 09-035-15 and 10-035-14 (July 14, 2010) at ¶ 14. It says nothing about UIEC's Application and has no relevance to the Motion.

UIEC's and UAE's understanding of the fundamental flaw in the Application. The Company sought deferred accounting for incremental NPC when the incremental NPC was a current expense; it did not seek retroactive relief for increases in NPC. Deferred accounting is not the same as retroactive ratemaking.

III. CONCLUSION

The Responses do not rebut the bases for the Motion that the Application should be dismissed because deferred accounting is not appropriate for revenues received many months in the past and that retroactive ratemaking is not justified when the Company was earning far below its authorized rate of return during the period in question. In addition, the Responses do not demonstrate that the relief UIEC seeks for 97 percent of the revenues at issue is not barred by the *Deferred Accounting Order*. The Motion is well taken and the Application should be dismissed.

DATED: May 16, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2011, I caused to be emailed a true and correct copy of the foregoing **ROCKY MOUNTAIN POWER'S REPLY TO UIEC'S AND UAE'S RESPONSES IN OPPOSITION TO MOTION TO DISMISS** to the following:

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