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BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Rocky Mountain Power Proposed Schedule 94, Energy Balancing Account (EBA) Pilot Program Tariff.	Docket No. 11-035-T10 **UIEC'S REQUEST FOR CLARIFICATION OF ORDER AND TARIFF** **OR** **PETITION FOR REVIEW, REHEARING AND LIMITED CONSOLIDATION**

The Utah Industrial Energy Consumers ("UIEC") group, formed for the purpose of intervention in this matter, pursuant to the provisions at Utah Code Ann. § 54-7-15 and § 63G-4-301, and at Utah Administrative Code R-746-100-11(F) hereby submits to the Public Service Commission ("Commission") its Request for Clarification of Order and Tariff or Petition for Review, Rehearing and Limited Consolidation ("Request for Clarification") of the Commission's Order issued in this docket on May 1, 2012 ("T10 Order"). The grounds for this Request for Clarification are set forth as follows:

1. This docket was established to consider Rocky Mountain Power's ("RMP" or "Company") proposed tariff Schedule 94, filed on October 12, 2011. The Commission directed

the Company to make the tariff filing as a result of the Commission's Order Approving the Settlement Stipulation ("Stipulation") in Docket Nos. 10-035-124, 09-035-15, 10-035-14, 11-035-46, and 11-035-47 ("Combined Dockets"); *see also* Pre-hearing Order, Docket No. 11-035-T10 (January 20, 2012) at 1. The tariff filing was necessary to implement the Commission's Order approving the parties' Stipulation that the Company may recover $20 million in excess of fuel and power costs through the energy balancing account ("EBA") beginning June 1, 2012. Stipulation at 17-18; Report and Order (Combined Dockets, September 13, 2011) at 53.

2. On December 16, 2011, the Commission issued a Notice of Scheduling Conference, Notice of Intervention and Notice of Hearing, requesting that the parties submit "issues lists" in the present docket. On December 16, 2011, the UIEC submitted an Issues List which included the following comment with respect to the "finality" of EBA rates:

> Rocky Mountain Power ("RMP" or "Company") insistently proposes that the Energy Balancing Account ("EBA") tariff include a provision specifying a date by which rates set under the EBA process will become final. *This is contrary to the statute, Utah case law, and good public policy*.
>
> The EBA statute does not provide a time by which rates must become final and appealable. Thus, *all EBA rates are interim*. Regardless of what language may be in the Commission's order, the Commission *cannot by tariff or order declare rates to be final by a date certain when the statute does not grant such authority*.
>
> The precedent in this state has always been that balancing account rates are interim. The setting of EBA rates involves a very limited time for adequate discovery, a quick approval and implementation time frame, and it is always uncertain whether rates will over- or under-recover actual fuel and purchased power costs. Thus, they should not be determined final. It should be clear that the EBA rates are interim and there can be no tariff provision for a date by which they become final.

UIEC Issues List (Docket No. 11-035-T10, December 16, 2011) at 2-3 (emphasis added) (citations omitted).

3. The Division of Public Utilities ("Division") also submitted an Issues Statement stating that the "singular" issue in this docket is "whether the proposed tariff, including the formula calculating the monthly EBA Accrual as set out in the proposed Schedule 94, is consistent and complies with the Order [approving the Settlement Stipulation in the Combined Dockets]." Division of Public Utilities' Issues Statement, Docket No. 11-035-T10 (Dec. 16, 2012) at 1. The Division further stated that the Order and the Commission's March EBA Order "provide sufficient clarity and direction for review and approval" of the proposed tariff and that "any other issues were or should have been addressed by the parties and resolved by the Commission in other dockets." *Id.* at 2. The Division did not comment on the "finality of rates" or on the procedure to be used in adjudicating an EBA cost recovery filing.[1]

4. On January 20, 2012, the Commission issued a Pre-Hearing Order, which stated in part:

> This proceeding is also not the best forum in which to promulgate EBA administration details. Rather we have already provided for such details to be addressed to some extent in the Division's report of the working group established pursuant to the EBA Order. Moreover, we expect to further examine such details after the Commission and interested parties gain some experience with the EBA mechanism.

[1] Although the Division left other issues to be resolved in other dockets, its Initial EBA Comments and Recommendations in Docket No. 12-035-67 are completely silent on the procedural requirements for conducting the EBA cost recovery proceeding.

Pre-Hearing Order, Docket No. 11-035-T10 (Jan. 20, 2012) at 2. The Commission thus apparently deferred consideration of the procedural aspects of administering the EBA, finding that this is "not the best forum" for that purpose. *Id*.

5. The Pre-Hearing Order also requested that the parties submit comments on (1) whether the proposed EBA tariff adequately details the types of costs that will be recorded in the EBA; (2) whether the proposed tariff is consistent with the Commission's EBA order issued March 3, 2011 in Docket No. 09-035-15; and (3) whether the proposed tariff's treatment of carrying charges is consistent with the EBA order. Pre-Hearing Order at 5.[2]

6. In response to the Pre-Hearing Order, on March 22, 2012, most of the parties filed comments on Original Sheet 94-5 of the proposed tariff, specifically addressing those issues on which the Commission requested comment. Although some parties addressed the question of whether rates should be "interim" or "final," no party addressed the procedural requirements, substantive standards or the burden of proof imposed by Section 54-7-13.5 ("EBA Statute") in connection with EBA cost recovery.

7. Between the time the Commission issued its Pre-Hearing Order (January 20, 2012), and the final T10 Order (May 1, 2012), RMP filed an Application to Increase Rates through the Energy Balancing Account. Application, Docket No. 12-035-67 (filed March 15, 2012) ("Application"). The Application seeks approximately $29.3 million, representing $20 million from the Stipulation approved in the Combined Dockets, and an additional approximately $9.3 million (later reduced to approximately $9 million) in alleged deferred EBA costs accrued between October 1, 2011 and December 31, 2011. Application at 1.

[2] At the time the Commission issued the Pre-Hearing Order, the Company had not filed its request for cost recovery of the $9.3 million that it requested in its filing on March 15, 2012 in Docket No. 12-035-67.

8. On March 19, 2012, the Commission issued an Action Request to the Division requesting an explanation and statement of issues to be addressed in Docket No. 12-035-67. The Division's Comments were submitted to the Commission on April 2, 2012.

9. On March 30, 2012, the Commission issued a scheduling order in Docket No. 12-035-67 providing for comments (not testimony) to be filed in response to the Division's Comments. It also scheduled a hearing in that docket for Monday, May 14, 2012 on the Company's Application.

10. On May 10, 2012, the UIEC filed Comments on the Division's Initial Comments in Docket No. 12-035-67. While the UIEC did not oppose a surcharge to recover the stipulated $20 million, it opposed the implementation of a surcharge to go into effect on June 1, 2012 to recover the $9 million that the Company sought in its Application. Its opposition was based on the grounds that there had been no evidentiary hearing, and there was insufficient evidence on the record, therefore, to demonstrate whether recovery of the $9 million through the EBA would be for prudently incurred, actual costs or that a surcharge to recover such costs, therefore, would be just and reasonable. UIEC comments at 10. Thus, the statutory and procedural requirements for approving EBA cost recovery were, for the first time, placed in controversy in Docket No. 12-035-67.

11. The Commission considered the UIEC Comments at hearing on the Company's Application in Docket No. 12-035-67, which took place on May 14, 2010. The Commission declined to order that a surcharge to recover the approximately $9 million go into effect on June 1, 2012, and instead requested that the parties submit legal briefs on "the application of the interim rate process" relative to EBA cost recovery, on the standards that should apply, and on

the burden of proof necessary for the Company to obtain interim rate relief. Bench Order, May 14, 2012. Transcript of Hearing Proceedings, Docket No. 12-035-67 (May 14, 2012) ("Tr.") at 83.

12. Simultaneous with filing this Request for Clarification or for Review and Rehearing, the UIEC submits its Legal Brief in Docket No. 12-035-67, setting forth the procedural requirements, substantive standards and burden of proof necessary to allow cost recovery of the $9 million through the EBA. A copy of the UIEC's Legal Brief is attached hereto and incorporated herein by this reference as further support for this Request for Clarification.

13. On May 1, 2012, in the present docket, the Commission issued the T10 Order on Proposed Schedule 94. The T10 Order determined, among other things, certain inter-jurisdictional allocation and spread issues, the detail of accounts to be included in the EBA, the allocation of EBA deferrals to special contract customers, the application of carrying charges, and certain "implementation issues," including "finality of rates." With respect to "implementation issues," the Commission's T10 Order states:

> The Company proposes on Original Sheet 94-95: "the EBA rate shall be implemented on an interim basis and shall remain in effect for the EBA rate effective period. The interim rate shall become permanent upon a final order by the Commission." The Division testifies this language is consistent with the EBA order which states, "We adopt a process with hearing to set interim rates. We direct the Company to file annually, on March 15, to collect or refund the calendar deferred balance. Following the Division's audit and a prudence review, we will set final rates."
>
> The Division supports the Office's recommendation that rates are only final after the Division issues its audit report, comments on the report are filed by the parties, and parties have a minimum of 45 days to comment on the Division's audit report before the

> Commission holds a hearing to consider final rates. UIEC testifies parties should have at least 30 days to comment and that the Division should have at least 180 days to files its audit report. Further UIEC recommends any adjustments made to interim rates should include the appropriate adjustments to carrying charges.
>
> We find the process outlined by the Office and the Division is reasonable and will require a period of at least 45 days for the parties to comment on the Division's audit report prior to any hearing to consider final rates. We find this process is consistent with the language contained in the Company's proposed Original Sheet No. 94-95. We decline to set a limit on the time period within which the Division must file its audit report. As this is a pilot program, we expect the amount of time necessary for the Division to complete its report will become more apparent.

T10 Order at 15-16.

14. In light of the foregoing, and in light of the issues now before the Commission in Docket No. 12-035-67, the UIEC requests that the Commission clarify that the T10 Order (including the above-quoted passage) is not intended as a ruling on the procedure that must be followed to satisfy due process in adjudicating the amount of prudently incurred, actual fuel and purchased power costs that may be recovered under the EBA. Although the procedural question is more directly before the Commission in Docket No. 12-035-67 in connection with the Company's Application for EBA cost recovery, a clarifying order in the present docket would avoid any perceived inconsistency in the Commission's rulings.

15. The Commission did not request in this docket (and the parties did not submit) comments on the appropriate procedures to be used to ensure that due process will be met in adjudicating an EBA cost recovery case. Although some of the parties addressed the question of "rate finality," they did not address the question of what procedure is required for approval of the rate in the first place. The Commission always must make findings and conclusions that a

proposed rate increase is just and reasonable before allowing it to go into effect. Utah Code Ann. § 54-4-4. In an EBA cost recovery case, that process entails receiving and weighing evidence, among other things, on whether the proposed increase is solely for the "prudently incurred," "actual" costs of the items enumerated in the statute. Utah Code Ann. § 54-7-13.5(2). The standard for determining prudence is specified by statute, as is the requirement that the Company has the burden of proof to demonstrate that the costs it seeks to recover are prudently incurred, actual costs and that the resulting increase would be just and reasonable. *Id*. at § 54-4-4(4); *id*. at § 54-7-13.5(2)(d). The process for adjudicating an application for EBA cost recovery, therefore, must be adequate for the Commission to receive and weigh the evidence, and to make an informed determination of whether the Company has met its burden to show that the statutory requirements for cost recovery have been met. Those issues have not been addressed in this docket, but are currently before the Commission in Docket No. 12-035-67.[3]

16. The Commission's T10 Order apparently adopts the language in the Schedule 94 tariff stating the EBA rate "shall be implemented on an interim basis and shall remain in effect for the EBA rate effective period. The interim rate shall become permanent upon a final order by the Commission." The Commission noted that this language "is consistent with the EBA order which states, '*[w]e adopt a process with hearing to set interim rates.*'" T10 Order at 16 (emphasis added). But this cannot mean anything more than it is a temporary rate.

[3] The UIEC contends in its Legal Brief that the Company's Application requires, among other things, a formal evidentiary hearing in compliance with the Administrative Procedures Act before the Commission can allow a rate increase to go into effect as a surcharge under the EBA. *See* Utah Code Ann. § 54-4-4. That means the parties must be allowed discovery adequate to permit them to obtain information necessary to support their positions (Utah Code Ann. § 63G-4-205), and that a properly noticed hearing must take place in which "all parties [are afforded] the opportunity to present evidence, argue, respond, conduct cross-examination and submit rebuttal evidence." *Id*. at 63G-4-206(1)(d).

17. The use of the word "interim" in the T10 Order and in the EBA proceeding requires clarification. The UIEC contends that "interim" cannot be interpreted to mean that the Commission may employ an abbreviated procedure for hearing an EBA cost recovery case similar to that employed for hearing an application for interim relief in a general rate case. The interim rate process described in Section 54-7-12(4) is a creature of the general rate case statute (Section 54-7-12), applicable only to setting "base rates." Utah Code Ann. § 54-7-12(4); 54-7-12(1)(a),(c),(d); (4). As discussed in the attached Legal Brief, rates set to recover an EBA deferral are not (and cannot plausibly be construed as) "base rates." *Id*. at § 54-7-12(1)(a). Thus, the general rate case statute and the EBA statute, because of the very nature of balancing account deferred accounting and cost recovery, preclude using the interim rate proceeding described in the general rate case statute to determine costs that are recoverable through an EBA. *See* Legal Brief at 3-8.

18. The use of the word "interim" in the context of an EBA proceeding, therefore, cannot mean anything more than "temporary." The UIEC continues to contend, as it did in its Issues List, and as it does in Docket No. 12-035-67, that all rates resulting from the recovery of EBA costs are "interim" in the sense that they are temporary and subject to adjustment until the amount of costs approved for recovery are fully collected (or the amount of over collected costs have been fully refunded) at which time the surcharge or credit is terminated. There is no authority for the Commission ever to set "permanent" or "final" rates in an EBA proceeding. *See* Legal Brief at 8.

19. The Company has filed for EBA cost recovery of approximately $9 million in Docket No. 12-035-67, and the Commission has asked the parties to file briefs on the legal issues

raised by the UIEC's Comments in that docket, including the applicability of an "interim" process to that case. Thus, the procedural requirements necessary to satisfy due process in an EBA cost recovery case will be directly addressed in that docket. For that reason, and because they were not addressed in the present docket, the UIEC request that the Commission clarify that its T10 Order was not intended to establish an abbreviated procedure or to determine the procedural requirements necessary to satisfy due process in EBA cost recovery cases.

20. To the extent the Commission did, in fact, intend the T10 Order to be a ruling on the procedure that must be followed in EBA cases, the UIEC requests that the Commission review that portion of the T10 Order and the Schedule 94 tariff, and set for rehearing in this docket the same issues that the Commission has asked the parties to address in their legal briefs in Docket No. 12-035-67. For the sake of consistency, administrative economy and convenience of the parties, the UIEC respectfully suggest that, if the Commission intends the T10 Order to be a ruling on the procedure that must be followed in EBA cases, the Commission grant rehearing, accept in this docket the legal briefs filed in Docket No. 12-035-67, and consolidate any hearings to be held in the respective dockets to determine the common issues.

WHEREFORE, UIEC respectfully REQUESTS: that the Commission clarify that the T10 Order and Schedule 94 tariff are not intended to address the procedures to be employed in an EBA cost recovery case.

ALTERNATIVELY, if the Commission did intend that the T10 Order and Schedule 94 tariff as currently written are meant to address EBA procedure, UIEC respectfully REQUESTS: that the Commission grant a rehearing in this docket, accept in this docket the legal briefs filed in

Docket No. 12-035-67, and consolidate any hearings to be held in the respective dockets to determine the common issues.

DATED this 29th day of May, 2012.

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CERTIFICATE OF SERVICE
Docket No. 11-035-T10

I hereby certify that on this 29th day of May 2012, I caused to be e-mailed, a true and correct copy of the foregoing **UIEC'S REQUEST FOR CLARIFICATION OF ORDER AND TARIFF OR PETITION FOR REVIEW, REHEARING AND LIMITED CONSOLIDATION** to:

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