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BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Application of Rocky Mountain Power for Approval of Its Proposed Energy Cost Adjustment Mechanism.	Docket No. 11-035-67 **UIEC'S COMMENTS ON THE DIVISION OF PUBLIC UTILITIES' INITIAL EBA COMMENTS AND RECOMMENDATIONS**

Pursuant to the Scheduling Order issued in this docket by the Utah Public Service Commission ("Commission") on March 30, 2012, the Utah Industrial Energy Users, an intervention group ("UIEC"), hereby submits its comments on the Division of Public Utilities' ("DPU" or "Division") Initial EBA Comments and Recommendations ("DPU Comments").

COMMENTS

1. On July 28, 2011, the parties in several dockets entered into a Settlement Stipulation resolving issues in those dockets. Settlement Stipulation, Docket Nos. 10-035-124, 09-035-15, 10-035-14, 11-035-46 11-035-47 (Jul. 28, 2011) ("Stipulation"). Among other things, the Parties to the Stipulation agreed that the Company could commence recovering $60 million in deferred net power costs accrued as of September 20, 2011, without a carrying charge, through an annual $20 million surcharge over three years, commencing June 1, 2012. Stipulation at 17, ¶ 59. In a Report and Order issued on September 13, 2011, the Commission

approved the parties' Stipulation as to the recovery of $20 million, and also approved the stipulated date of June 1, 2012 as the date on which the surcharge would go into effect. Report and Order, Docket Nos. 10-035-124, 09-035-15, 10-035-14, 11-035-46 11-035-47 (Sept. 13, 2011) at 53.

2. On March 15, 2012, Rocky Mountain Power ("RMP" or "Company") filed its Application to recover the $20 million of deferred EBA costs pursuant to the Stipulation. *See* Application of Rocky Mountain Power to Increase Rates by $29.3 Million or 1.7 percent through the Energy Balancing Account, Docket No. 12-035-17 (March 15, 2012) ("Application"). The Application also requests that the Commission approve an surcharge on base rates to recover an additional $9.3 million in power costs accrued during the period from October 1, 2011 through December 31, 2011, along with 6% carrying charges, and that "this increase in Utah rates become effective, on an interim basis, June 1, 2012, subject to further review, hearing and possible refund." Application at 2. For the $9.3 million and carrying charges, there has been no stipulation or order approving the amount, or setting June 1, 2012 as the date on which the requested rate increase should go into effect. Thus, there is no reason that the Commission cannot implement the $20 million surcharge on June 1, and delay a decision on the $9.3 million until a future date.

3. On April 27, 2012, the Division submitted its Comments to the Commission recommending, among other things, approval of a rate increase to recover $9,028,831 of the requested $9.3 million, along with carrying charges, through a surcharge to go into effect on June 1, 2012. The UIEC commends the Division for checking the mathematical accuracy of the Company's EBA calculations, and for recommending removal of $257,175 associated with buy-through curtailments that were not properly removed from the Company's calculations. *See* DPU Comments at 5, 10. For the reasons set out below, however, the UIEC contend there is

insufficient evidence to show that an increase of $9.3 million (or even $9.0 million as the Division recommends) would result in just and reasonable rates.

4. The EBA statute provides that the Company must file a reconciliation of the balancing account at least annually, and that "prudently incurred actual costs in excess of revenues collected shall be recovered as a bill surcharge over a period to be specified by the Commission." Utah Code Ann. § 54-13.5-2(c), (h). The statute does not repeal by implication the law requiring the Commission to ensure that all rates, temporary or permanent, are just and reasonable. Utah Code Ann. §54-4-4(1). In fact, the Utah Supreme Court has held that "any rate established by the Commission in [balancing account] proceedings must be just, reasonable, and sufficient." *Questar Gas Company v. Utah Pub. Serv. Comm'n*, 34 P.3d 218, 223 (Utah 2001) (citing Utah Code Ann. § 54-4-4 (2000)).

5. The rate established in a balancing account proceeding is "interim" because it is a rate adjustment that occurs between general rate cases. *See Utah Dept. of Bus. Reg. v. Public Serv. Comm'n*, 720 P.2d 420, 423 (Utah 1986) ("EBA Case"). An energy balancing account, even if it is subject to true-up, is not license to increase rates on speculative or unreliable data. Section 54-7-12, which pertains to interim rates for a general rate case, for example, provides:

> The commission … may, *after a hearing*, allow any rate increase or decrease proposed by a public utility, *or a reasonable part* of the rate increase or decrease, to take effect on an interim basis …
>
> The *evidence presented* in the hearing held … *shall establish an adequate prima facie showing* that the interim rate increase is justified.

Utah Code Ann. § 54-7-12 (4)(a) (emphasis added). Even for setting temporary rates that are subject to refund, there must be due process and a sufficient quantum of reliable evidence sufficient to demonstrate that the rate is just and reasonable. *See id*. at 54-4-4(1).

6. The Commission has been asked in this docket to implement a rate increase based on unaudited information provided by the Company. Although there is a "hearing" scheduled, parties other than the Company are permitted only to submit comments – not to present evidence – on whether the proposed rate increase is just and reasonable. The Commission will not consider evidence from parties opposing the rate increase until after the increase has been in effect for an indeterminate period of time while the Division undertakes an audit. Thus, at present, any rate increase would be not only temporary, but tentative – that is, an "interim" interim rate. And, any order of the Commission issued before June 1, 2012 would have to rely solely on the Company's filing and the Division's Comments which are admittedly "preliminary." DPU Comments at 2. Although the mathematical calculations in the Application (as corrected by the Division) may be accurate, the Division has raised sufficient doubt about the Application to cause serious concern about whether the evidence currently available can support a finding that the alleged $9.3 million (or even $9.0 million as the Division recommends) is only for prudently incurred actual costs. The procedure, which has been rushed to accommodate a June 1 implementation date, leaves the Commission without any assurance of the reliability or veracity of the information on which the proposed increase is based. Under the circumstances, and for the additional reasons discussed below, the Commission should decline to implement any rate increase to recover the $9.3 million[1] until after the Division has completed its audit and an evidentiary hearing has been held in which there is sufficient, reliable evidence presented for the Commission to determine whether the proposed increase is just and reasonable.

7. The unreliability of the information available to the Commission is evident in the use of estimated costs to calculate net power costs. The Division's Comments rightly expressed

[1] The UIEC have no objection to implementing a surcharge on June 1, 2012, to recover the $20 million agreed to in the Stipulation.

concern that estimated costs had not been removed from the Company's proposed $9.3 million. DPU Comments at 17. Yet, the Division, inexplicably, made no recommendation for reducing the amount on account of those estimates.

8. Estimated costs are not recoverable through the EBA.[2] The statute specifies that only "*prudently incurred actual costs* in excess of revenues collected" may be recovered through the EBA. Utah Code Ann. § 54-7-13.5(2) (h) (emphasis added). The Division found that the Company removed "most, but not all accounting estimates from FERC accounts 447, 555 and 565," and appears to have *not* "exclude[d] accounting estimates from the other EBA FERC accounts." DPU Comments at 17 (emphasis added). Moreover, after receiving the Company's response to its data requests, the Division was "still not clear … what the base conceptual differences are between the estimates included by the Company and those excluded by the Company." *Id*. The UIEC served similar data requests and received similar responses. It would appear that accounts 447, 555 and 565, as well as "other" accounts, include estimated costs, which may be significant. The magnitude of the estimated amounts is unstated.[3]

9. The uncertainty about "actual" costs is magnified by the fact that the power costs in base rates are forecasted costs determined using a future test year. To allow recovery through the EBA of an estimated deviation from the costs in forecasted base rates is to allow the Company to simply "re-forecast" its power costs and collect through the EBA the forecasted deviation from the forecasted base costs – and to collect carrying charges on the re-forecasted

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[2] The statute provides:

> (b) "Energy balancing account" means an electrical corporation account for some or all components of the electrical corporation's incurred *actual* power costs …

Utah Code Ann. § 54-7-13.5(1) (b) (emphasis added).

[3] The Company's proposed adjustments to "Actual NPC" for out-of-period events is also uncertain. *See* DPU Comments at 18-20 (the Division has issued a data request and will "explore this issue during its audit."). Because the EBA statute only allows a surcharge for *actual* costs, there should be some amount disallowed to compensate for out-of-period costs that may still be in the proposed EBA amount.

deviation. The statute does not contemplate balancing account treatment for such uncertain costs, and it is not just and reasonable to impose a rate increase on customers for them. The Commission should find at this time that the Company has failed to make an adequate showing that the requested $9.3 million rate increase is for actual power costs and that the proposed increase, therefore, is not just and reasonable. Utah Code Ann. § 54-7-12(4)(a).[4]

10. The same uncertainty exists as to whether all of the costs the Company seeks to recover through the EBA were prudently incurred. Because the EBA statute specifically allows only for the recovery of "*prudently incurred* actual costs in excess of revenues collected," a showing that the proposed increase is just and reasonable must include a showing that the costs for which recovery is sought were prudently incurred. Utah Code Ann. § 54-7-13.5(2)(h) (emphasis added); *see also Committee of Consumer Services v. Public Serv. Comm'n*, 75 P.3d 481 (Utah 2003) (Commission must determine prudence; and must refuse to grant rate increase if record is insufficient to make a prudence determination). A utility seeking a rate increase has the burden of proof to demonstrate that the increase is for prudently incurred costs. *Utah Dep't of Bus. Regulation v. Public Serv. Comm'n*, 614 P.2d 1242 (Utah 1980).

11. Over the past several years, the Company has passed on to ratepayers many hundreds of millions of dollars in swap losses. In the last general rate case (Docket No. 10-035-124) the parties challenged the prudence of the Company's hedging strategy. The parties reached a Stipulation in that docket with respect losses attributable to the Company entering into natural gas swaps prior to July 28, 2011 (which are represented by the $20 million in stipulated

[4] It should be noted that the EBA 70/30 sharing mechanism does not ameliorate the impropriety of allowing EBA recovery of estimated power costs. The 70/30 split was intended only to reflect a sharing of the risk of recovering actual prudently incurred fuel and purchased power costs in excess of the costs in base rates. Allowing recovery of estimated costs places the risk on ratepayers that the Company's estimates will deviate from actual costs, as well as the risk that the estimated costs are a result of imprudent conduct. Both the question of "actual" costs and "prudence" must be determined before the 70/30 split is effectuated. Utah Code Ann. §54-7-13.5.

EBA surcharges). As a consequence, the Commission did not make a prudence determination in that rate case. The Company's currently pending rate case (Docket No. 11-035-200) uses a base period ending on June 30, 2011, and a test period beginning on June 30, 2012. Thus, the Company's prudence in incurring fuel and purchased power costs during the period at issue in this EBA docket (October 1, 2011 through December 31, 2011), will never be the subject of review by the Commission in any other proceeding.[5] It is especially important, then, that an effective prudence review occur in this EBA reconciliation case. Initially, it appears that the Company decreased the percentage of its gas requirements that are covered by swaps during the fourth quarter of 2011. But, prudence in the acquisition of swaps is only part of demonstrating that swap costs were prudently incurred. Even though a swap may be prudently acquired, it may be imprudent to fail to liquidate the swap when market conditions begin to change.[6]

12. For several months, the market price for natural gas has sharply declined, putting the Company's swaps out of the money. Yet, it appears that it the Company never sold or liquidated its position in a single swap, or ever attempted to do so. Unlike one sister Berkshire Hathaway entity which began to sell off fixed for variable swaps during the last quarter of 2011,[7] the Company tenaciously held onto its swaps while the market plunged to its lowest level in many years. Perhaps it neglected to liquidate swaps because its purpose in acquiring them was solely to stabilize its earnings without regard to whether its hedging practices minimized costs to

[5] Undoubtedly, there will be questions in the current general rate case about the Company's prudence, which could raise inferences about its conduct during the EBA period. The Commission would be well advised to allow the parties to develop and present the evidence in the GRC before jumping to a preliminary ruling that the currently proposed $9.3 million should be recovered through an EBA surcharge beginning on June 1, 2012.

[6] While the Stipulation prohibits parties from asserting that natural gas swaps entered into before July 21, 2011 were prudently entered into, it does not foreclose an assertion that the Company failed to prudently manage those swaps. Stipulation at 15-16.

[7] Noah Buhayar, *Buffett Says Energy Future Bet at Risk of Bring Wiped Out*, Businessweek, Feb. 28, 2012, http://mobile.bloomberg.com/news/2012-02-27/buffett-says-energy-future-bond-bet-at-risk-of-being-wiped-out

the ratepayers.[8] There is nothing in the record to suggest the reason – just as there is nothing in the record to demonstrate that the Company has met is burden of proof to show that its decision to hold them was prudent.

13. The Division's Comments failed to consider whether some of the swap losses included in the $9.3 million may have been a consequence of imprudent conduct.[9] Likewise, it did not question of the prudence of the Company's decisions to dispatch or idle plant, or to purchase or sell wholesale power. Given recent history of challenges to the Company's prudence in its fuel purchasing practices, and based on the information currently available to the Commission, there should be serious concern about whether all of the requested increase is for prudently incurred actual costs. If it is determined that an rate increase is just and reasonable for any part of the $9.3 million, the Commission should disallow some portion of that amount to reflect the likely event that, after an audit of the Company's transactions, its conduct will be found, to some extent, imprudent.[10]

14. Over the next indefinite period of time, the Division will perform an audit of the EBA costs that the Company seeks to collect in a surcharge now. That will include a prudence review, and the Division of has stated it will include a review of whether estimated costs should be included in the EBA surcharge. DPU Comments at 17. In the meantime, if the surcharge is allowed to go into effect on June 1, 2012, ratepayers will start paying out real dollars to cover the

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[8] *See* UIEC's Comments on the Division of Public Utilities' Report to the Utah Public Service Commission on the Collaborative Process to Discuss Appropriate Changes to PacifiCorp's Hedging Practices, Docket No. 10-035-124, ("UIEC Hedging Comments") at 7-8 (Apr. 13, 2012) (prudent hedging strategy must have dual purpose of rate stability and cost minimization) .

[9] *See* UIEC Hedging Comments at 7, 10-12 (arguing it may be imprudent to fail to liquidate swaps and discussing standards for determining prudence of hedging strategy).

[10] It would not be unreasonable to disallow between 30% and 50% of the claimed swap losses. *See* Pre-Filed Direct Testimony of Denise Kay Parish, filed on behalf of the Wyoming Office of Consumer Advocate, Docket No. 20000-405-ER-11, Record No. 13034 (Wyo. PSC), at 37-38 (Apr. 30, 2012) (recommending in the current Wyoming general rate case that the shareholders bear 30% to 50% of net swap losses).

Company's estimated costs and possibly imprudently incurred hedging losses – in effect, becoming the financiers of the Company's mistaken estimates and failed fuel purchasing strategy.[11] For Schedule 8 and Schedule 9 the proposed EBA surcharge is 1.8% and 2% respectively. This is in addition to a proposed increase of 9.5% and 12.5% respectively, in the general rate case, and an effective increase 2.8% and 3.4% respectively, for a reduction in REC credits. Thus, if the Company's requests are granted, Schedule 8 and 9 customers will suffer three increases in their electric rates totaling to 14.3% and 17.9% respectively.

15. The UIEC understand if EBA rates are implemented on June 1, they will be temporary and subject to refund after the Division completes its audit in a year or so. But, that is cold comfort to a customer who must pay the surcharge now. For some commercial and industrial customers, an EBA surcharge to recover just the $9.3 million could amount to as much as the cost of hiring a new employee for a year. For other customers operating an energy intensive business, the increase in power costs could result in competitive losses attributable to higher cost of production. The likely over-collection of net power costs is not just an amount to be refunded next year if the regulators get it wrong. It represents the economic cost of unemployed workers who may not be hired and companies that may not recoup business losses even if a refund is ordered. Rates that are not just and reasonable cannot be made so by calling them temporary and truing them up later. The Commission should be vigilant, therefore, in applying the protections afforded by the EBA statute that restrict recovery to costs that the Company has demonstrated are "prudently incurred actual costs," and that the Commission finds, after the due process of an evidentiary hearing, produce just and reasonable rates.

[11] It would not be unreasonable for the Commission, if it permits a surcharge to go into effect on June 1, 2012, for the $9.3 million, to deny carrying charges on that amount until the Division completes its audit. Ratepayers should not have to pay carrying charges while the Division and parties ferret out mistakes and imprudent costs in the Company's filing.

16. The UIEC recommend that the Commission (1) segregate into separate schedules the $20 million in stipulated net power costs from the $9.3 million claimed for the fourth quarter of 2011; (2) allow recovery of the $20 million as an EBA surcharge to go into effect on June 1, 2012; (3) delay implementing a surcharge to recover the $9.3 million until the Division has completed its audit and there has been an evidentiary hearing on whether recovery of that sum through the EBA will be only for prudently incurred actual costs and will produce just and reasonable rates. As an alternative to (3), if the Commission allows a rate increase on the $9.3 million to become effective on June 1, 2012, it should disallow a portion of the requested amount to reflect the fact that it includes estimated costs and may also include imprudently incurred costs.

DATED this 10th day of May, 2012.

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CERTIFICATE OF SERVICE
Docket No. 12-035-67

I hereby certify that on this 10th day of May 2012, I caused to be e-mailed, a true and correct copy of the foregoing UIEC'S COMMENTS ON THE DIVISION OF PUBLIC UTILITIES' INITIAL EBA COMMENTS AND RECOMMENDATIONS to:

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