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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power to Increase Rates by \$29.3 Million or 1.7 Percent Through the Energy Balancing Account.

In the Matter of the Rocky Mountain Power Proposed Schedule 94, Energy Balancing Account (EBA) Pilot Program Tariff

Docket No. 12-035-67

**ROCKY MOUNTAIN POWER'S
RESPONSE BRIEF REGARDING
APPLICATION OF INTERIM RATE
PROCESS TO EBA DEFERRAL AND
APPLICABLE LEGAL STANDARD**

Docket No. 11-035-T10

**ROCKY MOUNTAIN POWER'S
RESPONSE TO UIEC'S REQUEST
FOR CLARIFICATION OF ORDER
AND TARIFF OR PETITION FOR
REVIEW, REHEARING AND
LIMITED CONSOLIDATION**

Rocky Mountain Power, a division of PacifiCorp (“Rocky Mountain Power” or the “Company”), hereby responds to the Initial Brief of the Utah Division of Public Utilities (“Division Brief”); the Legal Brief of UIEC (“UIEC Brief”) and the Brief of the Utah Association of Energy Users (“UAE Brief”), (collectively, the “Opening Briefs”) all filed on May 29, 2012 in Docket No. 12-035-67 (“EBA Docket”), and to UIEC’s Request for Clarification of Order and Tariff or Petition for Review, Rehearing and Limited Consolidation in Docket 11-035-T-10 (Tariff Compliance Docket”) filed on May 29, 2012.

I. INTRODUCTION

After lengthy, multi-phase proceedings in Docket No. 09-035-15, the Commission approved an Energy Balancing Account (“EBA”) for the Company over the strenuous

objections of the Utah Industrial Energy Users Intervention Group (“UIEC”) and the Utah Association of Energy Users (“UAE”). In its Corrected Report and Order (“EBA Order”) issued March 3, 2011 in that docket, the Commission specifically approved an EBA with a process involving interim rates, followed by an audit, and adjustments resulting from the audit in final rates. EBA Order at 77. UIEC then attempted to block or delay implementation of the EBA through protracted arguments about the EBA tariff (“EBA Tariff”) in the Tariff Compliance Docket. Despite these objections and efforts to reargue issues already lost in the earlier docket, the Commission approved the EBA Tariff, reserving the interim rate process issues, in its Order issued May 31, 2012, in that docket.

Pursuant to the EBA Order and pending EBA Tariff, the Company filed its first application for rate change pursuant to the EBA in this docket on March 15, 2012. Now, in a third attempt to frustrate the purposes of a statute which UIEC and UAE agreed to support in a package of legislation designed to resolve long-standing issues before the Commission,¹ UIEC and UAE are making the argument that much of the benefit of this three-year history has been for naught, because the EBA statute does not expressly state that the procedures it authorizes the Commission to adopt to implement the EBA include interim ratemaking. In making this argument, UIEC and UAE are attempting to hamstring the Commission’s ability to carry out its core function: to efficiently regulate the rates charged by public utilities in this state. They are also ignoring the fact that Questar Gas Company’s (“Questar”) similar Gas Balancing Account has been successfully operated, and specifically upheld by the Utah Supreme Court,² using a

¹ In making this statement, the Company does not suggest that UIEC and UAE were barred in Docket No. 09-035-15 from arguing against adoption of the Company’s proposed EBA or from making suggestions regarding the EBA Tariff, only that it is disingenuous to “support” a statute authorizing an EBA as part of a settlement compromise, but to then attempt to eviscerate the EBA adopted by the Commission pursuant to that statute though repeatedly contesting every attempt to implement the EBA.

² See *Questar Gas Co. v. Utah Public Service Commission*, 2001 UT 93, ¶ 12, 34 P.3d 218.

similar interim rate process for over 30 years without violating anyone's due process rights or exceeding the Commission's authority and without any express statutory authorization.

UIEC essentially claims that any interim rate process is only appropriate in the context of a general rate case and the Commission has no authority to act otherwise. UIEC also argues that use of the interim rate process for an EBA amounts to retroactive ratemaking.³ *Id.* at 9-10. Moreover, UIEC asserts the Commission would violate due process concerns by declining to hold a formal hearing as defined under the Utah Administrative Procedures Act ("UAPA") on any matter affecting an interim rate outside the context of a general rate case. UIEC Brief at 11-14.

UAE basically claims that since the Commission is examining the use of an interim rate process with respect to the Company's EBA for the first time, use of an interim rate process would amount to retroactive ratemaking. *See* UAE Brief at 2. According to UAE, the Commission may not apply the interim rate process except in a general rate case or in a case where the judicial branch affirms the Commission's use of the process, citing *Questar Gas*. *Id.*

Contrary to UIEC's and UAE's arguments, the Commission may employ an interim rate process with respect to the EBA, and the Commission may evaluate whether the Company presented prima facie evidence that the interim rates the Company is seeking are just and reasonable without holding a full-blown hearing. The point of interim rates, as opposed to final rates, as suggested by section 54-7-12(4), is that interim rates are subject to refund or surcharge after a full evidentiary hearing, and, therefore, may be implemented based on prima facie evidence without a full evidentiary hearing. Because the rates are interim, no issue of retroactive ratemaking or due process is raised. The Utah Division of Public Utilities ("Division") concurs

³ In the same breath UIEC argues interim EBA rates would never become "final," and are only "temporary" rates subject to later adjustment. UIEC at 5. This argument lacks merit. The definition of "interim" is "temporary or provisional," *see* Black's Law Dictionary 889 (9th ed. 2009), and EBA rates for a prior period would be final after audit and any necessary changes.

with the Company that the Commission may adopt an interim rate process to set interim EBA rates, and that due process concerns are satisfied since the Company has met its burden of proof that the rates are just and reasonable. Division Brief at 8.

The Commission should grant the Company's Application to Increase Rates by approximately \$8.9 Million through the Energy Balancing Account ("Application") on an interim basis now based on its resolution of two legal issues: (1) the Commission may adopt an interim rate process with respect to the EBA; and (2) due process concerns are satisfied where the Company has made a prima facie showing that the interim rates it seeks are just and reasonable. The answers to these questions do not depend on disputed facts that need to be investigated or developed or resolved as complex policy issues, but rather are pure legal issues for the Commission to decide under its ample authority to establish accounting procedures. *See Questar Gas*, 2001 UT 93, ¶ 12; Utah Code Ann. §§ 54-4-1, -4.1. Thus, the Company's Application should be granted.

As part of its attempt to thwart the implementation of the EBA, on May 29, 2012, UIEC also filed a Request for Clarification of Order and Tariff or Petition for Review, Rehearing and Limited Consolidation ("Request") in the Tariff Compliance Docket requesting that the Commission clarify that its May 1, 2012 Order in that docket 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. From the very beginning, the Commission has been clear about the purpose of the Tariff Compliance Docket - to determine whether the Company's proposed Schedule 94 properly implements the relevant Utah statutes and Commission orders defining and approving the EBA. Thus any "procedures" set forth in proposed Schedule 94 merely reflect the procedures and processes that the Commission set forth in earlier orders related to the EBA in Dockets 09-035-15 and 10-035-

124. To the extent that UIEC had an issue with the abbreviated process, i.e., interim rate process, or other procedural requirements necessary to satisfy due process in the recovery of costs related to EBA applications, it should have petitioned the Commission for such clarification or reconsideration in Dockets 09-035-15 and 10-035-124. The Tariff Compliance Docket is not the appropriate docket to seek such clarification because the issue was decided, and the Commission approved the interim rate process, in Docket 09-035-15 in the EBA Order.

Further, it is the Company's position that the order in the Tariff Compliance Docket issued by the Commission on May 31, 2012 properly addresses the Request from UIEC. As noted by the Commission in that order, certain parties challenged the interim rate process in the EBA Docket and the Commission does not express a decision in the Tariff Compliance Docket on the questions raised regarding the propriety and content of an EBA interim rates process. Further, the Commission noted that it approved Schedule 94, as modified therein, subject to its future order in the EBA Docket. Any final decision that would require a change to the Company's proposed Schedule 94 would necessarily need to be incorporated in proposed Schedule 94 before it could become effective. The Commission need not take any further action in the Tariff Compliance Docket and should, therefore, deny UIEC's Request.

II. ARGUMENT

A. The Commission Has the Authority to Adopt Interim Rate Mechanisms Outside the Context of General Rate Cases.

Interim rates mechanisms are just one of the many methods of rate regulation that the Commission may employ when exercising its broad authority to regulate utility rates.

1. Interim Rates Are Not Exclusive to General Rate Cases.

UIEC argues that interim rates are unique to general rate case proceedings and the Commission may not adopt an interim rate process for any other type of proceeding. UIEC Brief at 4- 6. An interim rate mechanism, however, is not explicitly defined or prescribed by statute.

See Utah Code Ann. § 54-2-1 (“Definitions”). Though *an* interim rate procedure is described in section 54-7-12(4), nothing in that section prohibits the use of an interim rate mechanism in a proceeding different than a general rate case proceeding. See Utah Code Ann. § 54-7-12.

Indeed, in *Questar Gas*, the Utah Supreme Court set aside an order of the Commission that denied the use of an interim ratemaking mechanism to recover costs under a Gas Balancing Account similar to the Company’s EBA, holding the interim rate mechanism was not “tied” to the same statutory section. 2001 UT 93, ¶¶ 19-20. (holding the “191 balancing account” had no “nexus” with the “pass-through” subsection of Utah Code Ann. § 54-7-12(d)). The Court held that since “the Commission did not intend the balancing account to be ‘merely’ an accounting tool, but created it as a more efficient interim rate-changing mechanism for recovering certain gas costs” that there was no “nexus” between Questar’s “191 Account” and the “pass-through statute.”⁴ *Id.* ¶¶ 9, 16, 19. Instead, the Court held the 191 balancing account was a separate mechanism that could be modeled upon, but not tied to, the pass-through statute. *Id.*

Similarly, the Company’s EBA is modeled on, but not tied to, the interim rate mechanism for general rate proceedings. Instead, it is a separate rate-changing mechanism described under section 54-7-13.5 (“EBA Statute”) for recovering certain costs. See Utah Code Ann. § 54-7-13.5(2)(c). While the EBA Statute does not explicitly state the Company’s EBA should operate in the same manner as the interim rate process in general rate cases, the EBA statute does not prohibit the recovery of costs in a manner similar to the interim process in a general rate proceeding. In fact, the EBA statute permits the Commission to employ “the collection method . . . in an appropriate proceeding.” *Id.* § 54-7-13.5(2)(e) (emphasis added). This grants the Commission discretion to employ an interim ratemaking mechanism in an EBA proceeding.

⁴ Utah Code Ann. § 54-7-12(3)(d) (2001), previously located in the same chapter and section as the description of the interim rate process for general rate cases, was referred to as the “pass-through” statute because it allowed a utility to propose a “tentative rate increase based upon an increased cost to the utility for fuel” to pass on the increase in fuel costs directly to customers. This subsection of section 54-7-12 was deleted in 2009 when the EBA Statute was enacted.

UIEC's claim that interim rate mechanisms are limited exclusively to general rate case proceeding, therefore, is contrary to Utah law. *See Questar Gas*, 2001 UT 93.

2. The Commission Has Ample Authority to Adopt Ratemaking Procedures.

Contrary to UIEC's assertion that the Commission is limited "by the procedural requirements that the [EBA] statute contemplates," UIEC Brief at 7, the Commission has statutory authority to adopt any manner of rate regulation consistent with Title 54. Utah Code Ann. § 54-4-4.1(1). Indeed, the legislature delegated explicit authority to the Commission to establish methods of rate regulation, so long as the Commission acts within its mandate. *See Questar Gas*, 2001 UT 93, ¶ 12 (holding the Commission "implemented [a] . . . rate-changing mechanism under its 'ample power to fix rates and establish accounting procedures'" (citing *Utah Dep't of Bus. Reg. v. Pub. Serv. Comm'n*, 720 P.2d 420 (Utah 1986)). These powers are not unlimited, but under section 54-4-4.1, the Commission may "by rule or order, adopt any method of rate regulation," that is "consistent with this title," "in the public interest"; and, "just and reasonable." Utah Code Ann. § 54-4-4.1(1)(a)-(c).

The Commission must work within the framework of the EBA Statute, but this framework does not prohibit an interim ratemaking mechanism. The EBA Statute states:

- (c) An electrical corporation:
 - (i) may, with approval from the commission, recover costs under this section through:
 - (A) base rates;
 - (B) contract rates;
 - (C) surcredits; or
 - (D) surcharges; and
 - (ii) shall file a reconciliation of the energy balancing account with the commission at least annually with actual costs and revenues incurred by the electrical corporation.
- (d) An energy balancing account may not alter:
 - (i) the standard for cost recovery; or
 - (ii) the electrical corporation's burden of proof.
- (e) The collection method described in Subsection (2)(c)(i) shall:
 - (i) apply to the appropriate billing components in base rates; and

(ii) be incorporated into base rates in an appropriate commission proceeding.

Id. § 54-7-13.5(2)(c)-(e). To the contrary, the terms “surcredits,” “surcharges,” “reconciliation” and “balancing account” are suggestive of and consistent with an interim rate process.

Furthermore, the EBA Statute was adopted in the context of Questar’s already existing Gas Balancing Account in which an interim rate process has been employed for over 30 years.

Because the EBA statute describes the procedure for some, but not all, of the cost recovery methods, the Commission may use its ratemaking authority to fill in the gaps by adopting a

specific mechanism to implement the cost recovery methods. The statute’s statement that EBA adjustments shall “be incorporated into base rates *in an appropriate commission proceeding*,”

Utah Code Ann. § 54-7-13.5(2)(e) (emphasis added), gives the Commission broad discretion to determine what sort of proceeding may be appropriate, so long as the Commission complies with the proscribed collection methods listed in section 57-7-13.5(2)(c).

The Commission appropriately exercised its explicitly delegated power and jurisdiction to “adopt a method of rate regulation consistent with” Title 54 when it established an interim rate process for the Company’s EBA in its EBA Order. The Order states:

We concur with the recommendation of the Company and the Division to establish an interim rate process. *We adopt a review process with hearing to set “interim rates.”* We direct the Company to file annually, on March 15, to collect or refund the calendar-year deferred balance. Following the Division’s audit and prudence review, we will set final rates.

EBA Order at 77 (emphasis added). Since an “interim rate” is not a defined term under Title 54, it is reasonable for the Commission to look within the very same chapter of Title 54 to the section governing the procedure to establish interim rates in general rate cases as a model for an interim rate process for the EBA. Neither the section governing the interim rate process for general rate cases nor the EBA Statute proscribes application of the interim rate method outside

of a general rate case. Indeed, the EBA Statute expressly grants the Commission discretion to determine the “appropriate commission proceeding” for an electrical company to recover costs.

Further, the interim rate procedure described for general rate cases also prescribes a standard for cost recovery and the Company’s burden of proof. Utah Code Ann. § 54-7-12(4)(a)(iii) (“The evidence presented in the hearing . . . need not encompass all issues that must be considered in a rate case . . .but [the Company] shall establish a prima facie showing that the interim rate increase or decrease is justified.”). This interim process does not change the standard for cost recovery or burden of proof in the context of a general rate case, and the Commission’s adoption of this same procedure does not alter the standard for cost recovery or the Company’s burden of proof in an EBA case. Utah Code Ann. § 54-7-13.5(2)(d) (“An energy balancing account may not alter . . . the standard for cost recovery; or . . . the electrical corporation’s burden of proof.”). And, like the interim ratemaking mechanism for general rate cases, the Division must perform an audit and prudence review at least annually on the deferred EBA amount. *See* Order at 77. Thus, the Commission may properly look to the interim ratemaking mechanism described for general rate cases as a model to fill in the gaps for an EBA interim ratemaking mechanism.

In the context of a general rate case, the Company could seek interim relief for increased net power costs or others could seek an interim decrease for reduced net power costs under the procedures set forth in section 54-7-12(4)(c). In doing so, the party seeking interim relief would be required to establish on a prima facie basis that the interim rate change is justified. Thereafter, the parties would have an opportunity to examine the change in costs more thoroughly and to challenge the interim rates if further review demonstrates that they are not justified. If there is a challenge, the Commission would then determine the final rates and order refunds or surcharges based on its final ruling. The same process is followed under the EBA, so

there is no change in the standard of cost recovery or in the burden of proof through the use of an interim process under the EBA statute.

B. An EBA Interim Rate Mechanism Protects Due Process, Complies with the UAPA, Does Not Violate the Rule Against Retroactive Ratemaking and Ensures Any Rate Increase or Decrease Is Justified.

The Commission fashioned an interim rate mechanism in the EBA Order that ensures just and reasonable rates and protects due process by: (1) directing the Division to audit and perform a prudence review annually; and, (2) adopting the hearing procedures as described for interim rates in general rate cases. This process is consistent with due process and UAPA, does not violate the rule against retroactive ratemaking, and ensures that rates are just and reasonable.

1. A Mandatory Annual Prudence Review Ensures the Company's EBA Interim Rates Are Justified.

When the Commission adopted an interim rate mechanism in its EBA Order, it explicitly directed the Company to file its deferred balance annually, and for the Division to promptly thereafter perform an audit and a prudence review on the deferred balance. EBA Order at 77. The Commission then could adjust the “final rates” for the year if the Division’s audit and any subsequent proceeding reveals that corrections are necessary. *Id.* UIEC argues that the “complexity of an EBA” mandates a prudence review before an interim rate may be set. UIEC Brief at 10. UIEC, however, fails to support its proposition by anything other than bare assertions that an EBA is any more complicated than a general rate case. *Id.* Indeed, one of the benefits of the EBA is that the prudence of net power costs may be the singular focus of the Division’s audit of the EBA, where in a general rate case, net power costs are just one of many issues. Further, both the Commission through its EBA Order and the EBA Statute direct the Division to perform a prudence review on an annual basis. *See* Order at 77; Utah Code Ann. § 54-7-13.5(2)(c)(ii). Although recently the Company has had rate cases almost every year, one of the potential benefits of the EBA is that it may reduce the necessity for annual rate cases. In any

event, even recently the Company's net power costs have not been audited every year because rate cases have been filed on a somewhat longer schedule. Therefore, UIEC's suggestion that audits of net power costs in EBA proceedings is somehow less thorough or complete than in general rate cases is incorrect.

2. A Hearing as Described for Interim Ratemaking in General Rate Cases Does Not Violate UAPA.

The Commission adopted a "review process with hearing to set 'interim rates.'" EBA Order at 77. UIEC argues that the Commission must have a full-blown hearing to set interim EBA rates or the Commission will violate the UAPA and due process. UIEC at 11-14. UIEC's argument is incorrect.

First, ordinarily, UAPA applies to every agency action, with exceptions, unless "otherwise provided by a statute superseding" UAPA "by explicit reference" to UAPA. Utah Code Ann. § 63G-4-102(1). That is the case here. Section 54-1-2.5 provides:

Except as specifically provided to the contrary in Chapter 7, the commission shall comply with the procedures and requirements of Title 63G, Chapter 4, Administrative Procedures Act in its adjudicative proceedings.

Chapter 7 outlines "Hearings, Practice and Procedure." Specifically, the hearing procedure for the interim rate mechanism described for general rate cases states: "The evidence presented in the hearing held pursuant to this Subsection (4) need not encompass all of the issues that may be considered in a rate case hearing. . . ." Utah Code Ann. § 54-7-12(4)(a)(iii).

Second, the EBA Statute, also in Chapter 7, does not expressly describe the type of hearing necessary when an electrical corporation seeks the Commission's approval to recover costs. Again, the Commission may fill in the gaps given its broad authority to adopt procedures consistent with Title 54. The Commission may properly look to the interim rate mechanism described under Chapter 7 for general rate cases to determine the hearing procedures for an EBA

interim rate mechanism. *Questar Gas*, 2001 UT 93, ¶ 12. Accordingly, the Commission may comply with UAPA and adopt the hearing procedures described for interim rates in general rate cases.

3. The Interim EBA Process Satisfies Due Process Requirements.

UIEC's claim that the interim process violates due process if the Commission does not have a full-blown hearing when the Company seeks approval for cost recovery under the EBA misconstrues due process requirements in the regulatory context and ignores the entire process.

The "hallmarks of due process are notice and an opportunity to be heard." *Utah County v. Ivie*, 2006 UT 33, ¶ 22, 137 P.3d 797, 803 ("The hallmarks of due process are notice and an opportunity to be heard, but not all proceedings demand the same level of process.") (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)). Further, due process standards are situational. *V-1 Oil Co. v. Dep't of Env'tl. Quality*, 939 P.2d 1192, 1196 (Utah 1997) ("[T]he Court of Appeals' analysis fails to account for relevant distinctions between administrative and judicial proceedings. The requirements of due process depend upon the specific context in which they are applied because unlike some legal rules due process is not a technical conception with a fixed content unrelated to time, place, and circumstances.") (internal quotations omitted). Administrative proceedings generally are not required to follow the most stringent due process standards. *Id.*

Regardless of the fact that this is an administrative proceeding, the interim EBA ratemaking mechanism adopted by the Commission and modeled on the interim procedures in general rate cases clearly provides both notice and hearing, thus satisfying general due process requirements. Utah Code Ann. § 54-7-12. The requirement for the Company to make a "prima facie showing that the interim rate increase or decrease is justified," and then requiring a Division audit followed by further proceedings, if needed, to determine if any adjustments to the

interim rates are warranted, specifically protects due process in the ratemaking context.

Accordingly, the Commission's adoption of an interim ratemaking mechanism based on the EBA Statute and filling in the gaps with procedures for interim rates in general rate cases comports with UAPA, general due process concerns, and specifically due process concerns in ratemaking settings.

4. The Interim Mechanism Does Not Violate the Rule Against Retroactive Ratemaking.

UIEC and UAE claim in passing that implementation of the EBA without a complete hearing on the prudence of net power costs would violate the rule against retroactive ratemaking. UIEC Brief and 9-10; UAE Brief at 2. Although they do not flesh out this argument, the Company will provide a brief response.

As the Commission is well aware, the primary purpose of the EBA Statute was to resolve claims in prior dockets that a net power cost balancing account was beyond the Commission's authority and would result in retroactive ratemaking or single-issue ratemaking. Thus, the EBA statute expressly allows refund or surcharge of the difference between actual net power costs and those included in base rates. Utah Code Ann. § 54-7-13.5(2)(g) and (h). Further, EBA balances may not be used to offset other inaccuracies in the ratemaking process in express recognition of the retroactive ratemaking issue decided in *Utah Dep't of Bus. Reg.*, 720 P.2d 420, a case addressing these issues in the context of a prior EBA. *Id.* § 54-7-13.5(4)(b). Finally, the Statute provides that:

An energy balancing account . . . that is formed and maintained in accordance with this section does not constitute impermissible retroactive ratemaking or single-issue ratemaking.

Id. 54-7-13.5(4)(c).

The point of making rates interim is to allow them to go into effect subject to refund or surcharge when they are finally determined. Thus, the rule against retroactive ratemaking is not

implicated by interim rates because the rates have not been finally established. Surely, if operation of the EBA does not violate the rule against retroactive ratemaking, its implementation through an interim mechanism that likewise is not retroactive ratemaking does not violate the rule.

III. CONCLUSION

For the foregoing reasons, the Company respectfully requests that the Commission (1) conclude that the interim rate mechanism approved in the EBA Order is appropriate and that the Company need only provide, and has provided, adequate prima facie evidence that the interim rate adjustment the Company seeks is just and reasonable, and may be implemented subject to audit and to any retroactive adjustment that may be required if it is determined following audit that the rate adjustment was not just and reasonable, and (2) deny UIEC's Request for Clarification of Order and Tariff. Accordingly, the Company is entitled to the interim rate relief sought in its Application.

DATED: June 13, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2012, a true and correct copy of the foregoing **ROCKY MOUNTAIN POWER'S RESPONSE AND OPPOSITION BRIEF REGARDING APPLICATION OF INTERIM RATE PROCESS TO EBA DEFERRAL AND APPLICABLE LEGAL STANDARD** and **ROCKY MOUNTAIN POWER'S RESPONSE TO UIEC'S REQUEST FOR CLARIFICATION OR ORDER AND TARIFF OR PETITION FOR REVIEW, REHEARING AND LIMITED CONSOLIDATION** was served by email to the following:

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