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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. 12-035-67 **UIEC'S REPONSE TO LEGAL BRIEFS OF ROCKY MOUNTAIN POWER AND THE DIVISION OF PUBLIC UTILITIES**

The Utah Industrial Energy Users ("UIEC") intervention group, pursuant to the Utah Public Service Commission's ("Commission") request for briefing at the May 14, 2012 hearing in the above-referenced proceeding, hereby submits this Response to the legal briefs of Rocky Mountain Power ("Company" or "RMP") and the Division of Public Utilities ("Division" or "DPU").

INTRODUCTION

The Commission has asked the parties to submit legal briefs on two issues: First, the "application of an interim rates process relative to the energy balancing account… as it's administered year by year;" and, second, the "standards that should apply relative to [RMP's]

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

The UIEC filed its Legal Brief on May 29, 2012. With respect to the first issue, an "interim rate process" does not apply to EBA cost recovery as administered from year to year. Neither the EBA Statute nor any other provision in the law authorizes a process by which a rate increase can be allowed to go into effect to recover EBA costs before the Commission has heard the evidence and made findings and conclusions that the costs are actual costs, that they were prudently incurred, and that the resulting rate is just and reasonable. An "interim" rate, like the one described in the general rate case statute, Utah Code Ann. § 54-7-12(4)(a)(i)-(iii), is only authorized in general rate cases or, by virtue of unchallenged, longstanding case law involving Questar's 191 Account proceedings. Because neither is applicable here, and because the Commission's authority to set rates is limited by the legislative grant of authority expressed in the statutes, the Commission is not authorized to approve such an "interim" rate proceeding in EBA cost recovery cases.

With respect to the second issue, there are no standards of proof that would apply in an "interim" EBA proceeding because that kind of proceeding is not authorized in the first place. An electric utility seeking a rate increase to recover EBA costs must prove by a preponderance of the evidence that the increase is solely for actual fuel and purchased power costs, that those costs were prudently incurred, and that the proposal for recovery of those costs would yield just and reasonable rates. *See* Utah Code Ann. § 43-7-13.5(1)(b), (2)(b), (2)(h); § 54-4-4(1)(b).

The Utah Association of Energy Users ("UAE") filed a brief supporting UIEC's position. Brief of UAE, Docket No. 12-035-67 (filed May 29, 2012) ("UAE Brief") at 2. The Division

and RMP filed briefs advocating that an interim process is permissible to recover EBA costs. Initial Brief of the DPU, Docket No. 12-035-67 (filed May 29, 2012) ("DPU Brief"); RMP's Opening Brief Regarding Application of Interim Rate Process to EBA Deferral and Applicable Legal Standard, Docket No. 12-035-67 (filed May 29, 2012) ("RMP Brief"). The UIEC responds to the DPU Brief and RMP's Brief as follows.

A. Response to DPU Brief

The DPU's Brief contends (1) that the general grant of jurisdiction found at Utah Code Ann § 54-4-1 empowers the Commission to "set interim rates for an EBA;" and (2) the Commission should "look to analogous statutory provisions regarding interim rates for the appropriate process for interim rate approval." DPU Brief at 5-6. Neither theory is sound for the reasons set out below.

1. The Commission's General Grant of Authority does not Authorize an Interim Procedure

The Division's Brief acknowledges that "[t]he EBA statute itself does not identify an interim rate process," and further acknowledges that, pursuant to a previous Commission order, the "approved [EBA] rates are not final, and will 'continue to be examined in general rates cases and other appropriate rate-setting proceedings.'" DPU Brief at 4 (*quoting* Corrected EBA Report and Order, Docket No. 09-035-15 (March 16, 2011) at 80). It contends, however, that the Commission is "empowered to set interim rates for an EBA" by virtue of "its delegated general powers and language in the EBA statute." DPU Brief at 5. Yet, at the same time, it states the "language of the EBA statute is silent about the method of [its] implementation." *Id.* at 5. Thus, the Division apparently relies solely on the language of the general grant of power and jurisdiction expressed in Section 54-1-1. That section provides:

> The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction …

Utah Code Ann. § 54-1-1. Despite its broad language, the Utah Supreme Court has held Section 54-4-1, in fact, "does not confer upon the Commission a limitless right to act as it sees fit, and [the Court] has never interpreted it as doing so." *Hi-Country Estates Homeowners v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995) (citing *Mountain States Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 754 P.2d 928, 930 (Utah 1988)). The Utah Court has stated:

> It is well established that the Commission has *no inherent regulatory powers* other than those expressly granted or clearly implied by statute. . . . When a specific power is conferred by statute upon a . . . commission with limited powers, *the powers are limited to such as are specifically mentioned*. . . . Accordingly, to ensure that the administrative powers of the [commission] are not overextended, *any reasonable doubt of the existence of any power must be resolved against the exercise thereof.*

Heber Light & Power Co. v. Utah Pub. Serv. Comm'n, 231 P.3d 1203, 1208 (Utah 2010) (internal citations omitted) (emphasis added) (ruling that Utah Public Service Commission acted beyond its limited grant of statutory authority). The Court's interpretation of Section 54-4-1 is consistent with the generally recognized statutory canon which holds that a specific statute takes precedent over a general statute addressing the same issue. *See Lyon v. Burton*, 2000 UT 19, ¶ 17, 5 P.3d 616 ("[A] statute dealing specifically with a particular issue prevails over a more general statute that arguably also deals with the same issue.").[1] Because EBA cost recovery has

[1] *See also Madsen v. Brown*, 701 P.2d 1086, 1090 (Utah 1985) ("It is a long-standing rule of statutory construction that a provision treating a matter specifically prevails over an incidental reference made thereto in a provision treating another issue, not because one provision has more force than another, but because *the legislative mind is*

been authorized by a specific statute, the Commission's powers are limited to those mentioned in the statute. If there is uncertainty about whether the EBA Statute authorizes an "interim" or abbreviated procedure, the issue must be resolved against the exercise of such authority, despite the apparently broad language of Section 54-4-1. Therefore, the EBA Statute, as a specific expression of the legislature, cannot be interpreted to authorize an "interim" process for setting rates.

In the absence of any mention in the EBA Statute about the procedure to be used in EBA cost recovery cases, the Commission should look not to Section 54-4-1 (the broad grant of powers and jurisdiction), but to Section 54-4-4(1), which specifically addresses the Commission's authority to fix rates, and to Section 54-1-2.5, which specifically denotes the kind of procedures required:

> 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.

Utah Code Ann. § 54-4-4(1); *see also* Utah Code Ann. § 63G-4-201 (providing that all hearings are formal unless designated informal by agency rule or an informal proceeding is in the public interest); *see also* UIEC Brief at 12. Unless otherwise specified by statute or Commission rule, hearings must be conducted in accordance with the formal hearing requirements set out in the Utah Administrative Procedures Act ("APA").

The DPU is leading the Commission to error. The Commission should refuse to ignore the requirement of a hearing imposed by Sections 54-4-4(1) and 54-1-2.5. *See Heber Light &*

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presumed to have stated its intent when it focused on that particular issue.") (emphasis added) (internal citation omitted).

Power Co., 231 P.3d at 1208 ("any reasonable doubt of the existence of any power must be resolved against the exercise thereof"). The Commission should not, without legislative authorization, approve a rate increase after an "abbreviated" hearing where no discovery is conducted and no evidence is taken from parties opposing the rate increase. *See* Utah Code Ann. §§ 63G-4-205(1), 206 (requiring that parties to a formal hearing be afforded the opportunity to conduct discovery, present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence).

The Division is simply incorrect to suggest that Section 54-4-1 permits the Commission to approve an EBA rate increase without providing for discovery, evidence, testimony, and cross examination, or otherwise complying with the statutory protections of due process.

2. The Commission May Not Look to the General Rate Case Statute for Guidance on the Procedure for Setting EBA Rates.

The Division recommends that, in the absence of "specific instruction in the EBA statute," the Commission should "look to analogous statutory provisions regarding interim rate implementation for guidance." DPU Brief at 5. In light of the discussion above, this recommendation is misguided because it wrongly assumes that an interim rate procedure is authorized under the EBA Statute in the first place, which it clearly is not. *See* Utah Code Ann. § 54-4-13.5. Nevertheless, the DPU contends that the interim rate procedure as applied in general rate cases provides an adequate "level of inquiry," and that a more rigorous procedure than to require a *prima facie* showing that a rate is just and reasonable "would render superfluous an interim rate proceeding." *Id*. at 6.

The Division's argument begs the question of whether an "interim" rate proceeding of any kind is permissible for setting EBA rates. While the rate set in an EBA cost recovery

proceeding may be "interim" in the sense that it is temporary, an abbreviated procedure requiring anything less than a full evidentiary hearing violates Section 54-4-4(1), Section 54-1-2.5, the APA, and the EBA Statute itself. *See* UIEC Brief at 8-9, 12-14. The EBA Statute prohibits any alteration of the "standard for cost recovery" or "the electrical corporation's burden of proof." Utah Code Ann. § 54-7-13.5(2)(d). By its plain language, therefore, the EBA Statute precludes the implementation of a *prima facie* standard in EBA cost recovery cases. The Division, somehow rationalizing that the "level of inquiry" is different from the "burden of proof," urges the Commission into error by advocating that it employ an interim rate proceeding "analogous" to the general rate case interim procedure.

As discussed in UIEC's opening brief, the interim rate process and the *prima facie* standard of proof described in the general rate case statute, Utah Code Section 54-7-12(4) ("GRC Statute") cannot be made applicable, even by analogy, to an EBA cost recovery case. The interim procedure described in the GRC Statute is confined to a "*general rate increase or a general rate decrease*." Utah Code Section 54-7-12(4)(a)(i) (emphasis added). A "general rate increase" means "any direct increase to a public utility's *base rates*" or "any modification of a classification, contract, practice, or rule that increases a public utility's *base rates*." § 54-7-12(1)(d) (emphasis added). And, the term "base rates" specifically excludes amounts in a "deferred account" or a "balancing account." § 54-7-12(a)(ii). An EBA is both a deferred account and a balancing account, and cannot, by definition, be part of a "base rate." Thus, the

use of an interim procedure to recover EBA costs is not supported by, and in fact is contrary to the GRC Statute.[2]

Because the EBA Statute requires the same standard for cost recovery and the same burden of proof that is otherwise required for setting rates, because it does not provide for any "advance" to the electrical corporation pending an order fixing rates after a hearing, and because balancing accounts and deferred accounts are specifically excluded from the interim process described in the GRC Statute, the Commission should not, even by analogy, apply the GRC Statute's interim process to EBA cost recovery proceedings. There is simply no authority anywhere in the Commission's statutes that would permit it to grant an EBA rate increase upon an abbreviated proceeding and a *prima facie* evidentiary standard.

B. Response to RMP Brief

Rocky Mountain Power's Brief contends (1) the Commission's prior orders already set out "a process that relies on interim rates" for EBA cost recovery; (2) the EBA should be treated the same as the Company's Renewable Energy Credit Balancing Account ("RBA"); (3) Questar's 191 Account procedures provide a precedent for an abbreviated procedure in EBA cases; and (4) under the relaxed burden of proof used in 191 Account proceedings, RMP has made a *prima facie* showing that the EBA increase would result in just and reasonable rates. As discussed below, none of RMP's arguments should be found persuasive, primarily because they ignore the plain language of the EBA statute, the requirements of Title 54 and the APA.

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[2] The Division's argument might have been more plausible under the version of the general rate case statute that was in effect prior to 2009. *See* Utah Code Ann. § 54-7-12(3) (2008). In 2009, Section 54-7-12 was amended to define "rate increase" as a change in the utility's *base rates*. *See* 2009 Utah Laws 1520; Utah Code Ann. § 54-7-12(1)(d) (2012). Thus, by its own terms, Section 54-7-12 does not apply to deferred accounts or balancing accounts. *See* Utah Code Ann. § 54-7-12(4)(a)(i) (2012) (interim rate requests must be made after utility files application for *general rate increase*, i.e., an increase to *base rates*); *see also* UIEC Brief at 6.

1. The Commission has Ruled that it Will Consider UIEC's Objections to the Interim Process.

RMP contends that the Commission's Corrected Report and Order, issued March 3, 2011 in Docket No. 09-035-15 ("EBA Order") "approved the process for implementation of the EBA." RMP Brief at 3. It argues that, having done so, it is now "too late for parties to petition the Commission for reconsideration of this process … or to ask the Commission to change a process that is now well underway." Id.

On June 12, 2012, the Commission issued a Report and Order in this docket, approving a rate increase of $20 million for deferred net power costs to which the parties stipulated in Docket Nos. 10-035-124, 09-035-15, 10-035-14, 11-035-46 and 11-035-47. Report and Order, Docket No. 12-035-67 (June 12, 2012) at 1. In the Report and Order, the Commission noted that both RMP and the DPU contended during the hearing conducted on May 14, 2012, that the UIEC had "failed to avail itself of earlier opportunities to oppose the interim rate procedure." Id. at 7. The Commission recognized that the UIEC could have raised its objections earlier, but stated:

> We conclude, nevertheless, under the current circumstances the best course is to evaluate fully UIEC's objections before ruling on the Company's request to recover EBAC through interim rates. As the parties well know, the EBA is a pilot program, and this Application is the first instance of its operation. Since inception of the EBA pilot, we have noted on several occasions that various associated administrative procedures would be developed during the course of the pilot, as the Commission and parties gain experience with this ratemaking process. We therefore take this opportunity to examine and further refine the process leading to EBA-related adjustments.

Id. at 9. The Commission, thus, wisely determined that, following its review of the briefs, it would "provide additional guidance regarding the Company's request to recover fourth quarter

2011 EBAC." Id. In light of this recent ruling, the Commission's prior orders do not preclude the determination in this docket of the proper procedure to be used in an EBA cost recovery case.

2. The RBA and EBA Should Not be Treated Similarly.

RMP claims that there is "virtually no difference between the EBA and the RBA;" that it would be "inappropriate" for the Commission to approve the RBA sur-credit, without approving the EBA surcharge;" and that the RBA and EBA should be treated "symmetrically." RMP Brief at 6. RMP's position ignores significant differences between the RBA and the EBA. The EBA is a creation of the legislature and its establishment and operation are a matter of statute. The RBA is a Commission-created balancing account, established upon the request and stipulation of the parties. *See* Settlement Stipulation, Docket Nos. 10-035-124, 09-035-15, 10-035-14, 11-035-46, 11-035-47, ¶ 61 (July 28, 2011). Thus, unlike the EBA, there is no statutory mandate for the RBA. Moreover, the RBA is for a single item of revenue that may be adequately accounted for without the complexities that are inherent in investigating and determining EBA costs. By its nature, the RBA process is, and should be simpler than the EBA process. Moreover, the Commission has already ruled that renewable energy credits are sufficiently different from fuel and purchased power costs that RECs shall not be included in the EBA. EBA Order at 72. The Commission does not, and should not treat the RBA and the EBA "symmetrically" as the Company suggests.

3. The 191 Account Procedures Provide No Precedent for Using Similar Procedures in EBA Cost Recovery Cases.

Questar's 191 Account cost recovery mechanism, unlike the EBA, is not specified by statute. It is a practice implemented in response to a Commission order from 1979 which, over the past thirty-three years, has become ensconced in Questar Gas Company's tariff. *See* Report

and Order, Docket No. 78-057-13 (Apr. 3, 1979); Report and Order, Docket No. 12-057-05 (May 8, 2012) (citing Section 2.06 of Questar's tariff as the source of "procedures for recovering gas costs shown in the 191 Account by means of periodic and special adjustments to rates, and an annual amortization of that account"). Even though the 191 Account procedures did not precisely follow the statutory pass-through mechanism that was in effect in 1979, the 191 Account procedure has acquired the force of precedent through its longstanding, unchallenged use as a Questar fuel "pass through" mechanism. No party has ever challenged the procedure, the Utah Supreme Court has not overturned its use *sua sponte*, and the UIEC does not now challenge it.

But, the 191 Account is unique to Questar. There is nothing about it that would justify a similar procedure for an electric utility recently authorized by statute to recover fuel and purchased power costs outside of a general rate case. The fact that the Commission might have approved Questar's use of the 191 Account for Questar (despite a lack of explicit statutory authority) does not mean that the same procedures can or should be implemented for the newly, statutorily created energy balancing account – especially when those procedures are contested as inadequate, unlikely to yield just and reasonable rates, and in violation of the Commission's statutes, the APA and concepts of due process. The rationale behind the precedent of Questar's use of the 191 Account cannot be transposed into the current case.

RMP's Brief overstates the case for the Commission's authority to implement a similar mechanism here in disregard of statutory constraints and due process requirements of RMP's EBA. RMP claims that "the [Utah Supreme Court] expressly held that the Commission had authority to approve interim rates for the 191 Balancing Account." RMP Brief at 4 (citing

Questar Gas Company v. Utah Public Service Commission, 34 P.3d 218, ¶ 12 (Utah 2000)). Even if that were an accurate statement of the Court's ruling (which the UIEC disputes), it would mean only that the Commission could approve the 191 Account procedures for Questar's fuel pass-through. Even in the case of Questar, the Court's statement was dictum. The issue of whether fuel costs could be recovered through 191 Account procedures was not raised before the Commission, was not appealed to the Court, was not essential to the Court's decision, and was therefore not before the Court for a decision. Instead, the issue on appeal was whether the Commission was required to consider Questar's request to use 191 Account procedures to recover the cost of operating its CO_2 plant. The Court held that the Commission was required to consider the request, but only because the Commission's prior practice was to allow Questar to use 191 Account procedures for its fuel cost recovery. The Court stated:

> As we have just stated, *the Commission created a procedure to enable utilities to recover increased fuel costs in the gas balancing account*. Also, as we just noted, *it has been the custom of the Commission to allow utilities, including Questar, to recover those costs through that procedure*. In fact, according to Questar's tariff, Questar is *required* to record specified gas costs in its balancing account, account 191, which by definition is a rate-changing mechanism. Thus, *we conclude it has been the Commission's "prior practice" to enable Questar to recover specified costs through the balancing account procedure* (as discussed above) as those costs are outlined in Questar's tariff. *Because it has been the Commission's prior practice* to enable Questar to recover gas costs through this procedure, the Commission's refusal to do so must be "justifie[d] by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency." *Id.*

34 P.3d 218, ¶ 18 (emphasis added). The Commission was required to consider using the 191 Account to recover CO_2 costs only because "it ha[d] been the Commission's prior practice to enable Questar to recover gas costs through this procedure." *Id*. at ¶ 18.[3]

If RMP had been using a similar "Commission-created procedure" to enable it to recover fuel costs through a mechanism similar to the 191 Account, it could plausibly argue that it should be allowed to continue to use the same mechanism. However, RMP had such a mechanism in place and requested that the Commission release RMP from it. See Report & Order, Docket No. 90-035-06. In 1990, PacifCorp, petitioned the Commission for elimination of its energy balancing account, arguing that it was "inappropriate in the Company's [then] current operating environment," and that it restricted the Company's ability to "manage its resources" and "make decisions for the benefit of its customers and shareholders." Id. at 2. In support of the petition Verl Topham, executive vice president of PacifiCorp Electric Operations Group, testified that if the EBA were eliminated, the Company could invest in generation and then "make off system sales … and use the margin from those sales to support the Company's investment." Pre-filed Direct Testimony of Verl R. Topham, Docket No. 90-035-06 (May, 1990) at 15. Elimination of the EBA would act as an incentive for efficiency "because the Company could be rewarded with some of the benefits of power cost efficiencies between general rate cases." Id. at 17. In other words, in the then-current environment, PacifiCorp perceived it could do better in the competitive market by abandoning its energy balancing account. PacifiCorp, having ultimately

[3] Paragraph 17 of the Order states:

> Section 63-46b-16 of the Utah Code authorizes this court to grant a petitioning party relief from an agency decision when the agency action is "contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency." Utah Code Ann. § 63-46b-16(4)(h)(iii) (1997).

34 P.3d 218, at ¶ 17.

succeeded in convincing the Commission that it was in the interest of ratepayers to eliminate its Commission-created balancing account, may not now invoke "the agency's prior practice" as authority for increasing rates without an evidentiary hearing. The Commission-created balancing account that once carried the force of "prior practice" has been replaced by the legislatively-created balancing account in the EBA Statute. RMP's procedural options are now confined to the statute.

The EBA Statute itself argues against using 191 Account procedures for an electrical corporation's balancing account. It provides that the Commission may set forth procedures for a gas corporation's gas balancing account in its Commission-approved tariff. Utah Code Ann. § 54-7-13.5(3)(a)(ii). But, it omits any comparable provision for electrical utilities. It must be concluded, therefore, that the Legislature did not intend for the Commission to use procedures similar to gas balancing account procedures to determine an electric corporation's balancing account. *See Carrier v. Salt Lake County*, 2004 UT 98, ¶ 30, 104 P.3d 1208 ("[S]tatutory construction presumes that the expression of one should be interpreted as the exclusion of another.").

Even if there were a sound statutory basis for using 191 Account procedures in EBA cases, which there is not, those procedures would be inadequate as a model for EBA cases. RMP's Commission-created energy balancing account was for fuel and power costs only, not for wheeling revenues and gains or losses from financial instruments. It was never the Commission's "prior practice" to allow a rate increase to go into effect for these kinds of costs based only on a perfunctory hearing, before evidence from interested parties is considered. Nor would it seem appropriate to allow RMP to begin to recover a surcharge from ratepayers for the

swap losses that the parties have been complaining were imprudently incurred without first requiring proof of RMP's prudence in incurring them.[4] The prudence inquiry is mandatory and explicit under the EBA Statute.

RMP claims "there is no distinction between the EBA and the 191 Balancing Account with respect to their creation and purpose." RMP Brief at 5. The UIEC identified some important differences in its opening Legal Brief. UIEC Brief at 7-8, 13.[5] EBA cost recovery proceedings are far more complex. Unlike the 191 Account, RMP's EBA includes multiple FERC accounts and sub-accounts, some of which contain items that are not recoverable through the EBA. Unlike the 191 Account, the EBA includes power purchases and sales, transmission revenues, and transactions in unregulated as well as regulated products, including speculative financial products, which transactions may or may not be necessary to provide utility services to its customers. The nature and magnitude of these costs far exceeds the costs ordinarily recovered through the 191 Account. There is also a difference in the nature of the risks that are being shifted to ratepayers in RMP's EBA. For the first time, ratepayers will pay for a utility's losses from the speculative financial trades of its managers who for far too long have been operating

[4] The UIEC continue to assert that swap losses were imprudently incurred. On June 11, 2012, the UIEC filed the Prefiled Direct Testimony of J. Robert Malko in the currently pending rate case, Docket No. 11-035-200 ("Malko Direct"). Dr. Malko concluded that "The Company was imprudent in failing to actively manage the natural gas fixed for variable swaps so as to balance the goals of cost minimization and price stability and to respond effectively to significant changes in business risks." Malko Direct at 2, ln.25-28. He testified that "some of the Company's biggest losses appear to have occurred in the fourth quarter of 2011, which is the period at issue in the current EBA recovery period." *Id.* at 20, ln.445-449.

[5] UIEC's Legal Brief stated:

> In addition to fuel and purchased power, EBA accounts include revenue and expenses from the purchase and sale of transmission rights, natural gas, financial products, and multiple accounts and sub-accounts. All of these elements require separate reconciliation and prudence review. The enhanced opportunity for cost recovery makes the costs recovered under the EBA Statute more susceptible to review and challenge, requiring procedural mechanisms appropriate for addressing such challenges.

UIEC Brief at 7-8.

with minimal regulatory oversight. This shifting the risk to ratepayers requires vigilance from regulators beyond what might be required for the 191 Account. RMP is only permitted to recover EBA costs pursuant to the EBA Statute, which states that recovery is limited to prudently incurred costs. Anything like 191 Account procedures would simply not be adequate to the task.

As discussed in UIEC's opening Legal Brief, formal hearings must be conducted in accordance with the APA and the Commission's rules, which provide, among other things, for (1) "discovery adequate to permit the parties to obtain all relevant information necessary to support their claims or defenses," (Utah Code Ann. § 63G-4-205(1)); (2) "the opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence," (*id*. at § 63G-4-206(1)(d)); and (3) the opportunity to "make argument, written and oral, [and to] submit motions." Utah Admin. Code R746-100-5; *see also* UIEC Brief at 13-14.

This is not a gas balancing account. And for the reasons stated above, it should not be treated like one.

4. Rocky Mountain Power's Argument that it has Made a *Prima Facie* Showing Should be Rejected

RMP, arguing the 191 Account truncated procedure should apply, also contends that RMP should only be required to make a *prima facie* showing that the rates set to recover EBA costs are "just, reasonable and sufficient." RMP Brief at 6. RMP claims that the Commission need only consider Schedule 94, "which describes the costs and revenues (including the accounts to which they are assigned) that are to be included in the formula that determines the monthly accrual rate for the EBA." RMP Brief at 7. Apart from "the Company's application," the "Division's report and recommendation," and the "parties' comments," RMP contends, "no additional evidence is required at this stage." Id.

RMP's argument asks the Commission to disregard the requirement that a formal hearing must be held before a rate increase is put into effect. *See* Utah Code Ann. § 54-4-4(1). It also runs directly counter to the maxim that a utility has the burden of proof to show, by substantial evidence, that its proposed rate increase is just and reasonable,[6] and to the EBA Statute itself, which provides that an EBA may not alter that burden of proof. *See* Utah Code Ann. § 54-7-13.5(2)(d). RMP is inviting error by advocating that the Commission should order a rate increase on a *prima facie* showing that the rates would be just and reasonable.

Even assuming for the sake of argument that a *prima facie* showing were sufficient, RMP has still not met its burden. Schedule 94 identifies the FERC accounts to be included in the EBA deferral, but it says nothing about whether the $8.9 million in costs that RMP seeks to recover are actual costs, or whether they were prudently incurred. The filing of a rate schedule is not (nor can it ever be) a *prima facie* evidentiary showing of anything. It is not evidence.

RMP has not demonstrated that the costs it seeks to recover are actual costs. Quite the opposite. The Division found, and RMP does not deny, that a significant portion of the costs are estimated – not actual costs. RMP's Brief tries to minimize the import of including estimated costs in its EBA, arguing that estimates are an essential part of accrual accounting, and noting that the Division recommended implementation of a surcharge even though some of the costs were estimated. While it may be accounting practice to include estimates in accrual accounting,

[6] *See Utah Dep't of Bus. Regulation v. Public Serv. Comm'n*, 614 P.2d 1242 (Utah 1980); Utah Code Ann. § 54-4-4(1).

the EBA Statute permits recovery of only actual costs.[7] RMP has failed on this element of its *prima facie* showing.

More conspicuous is its failure to make any kind of showing that the costs it seeks to recover were prudently incurred. Section 54-4-4(4) requires that if the commission considers prudence in determining just and reasonable rates (as the EBA Statute requires), it "shall apply" certain standards, which include "focus[ing] on the reasonableness of the expense resulting from the action of the public utility judged as of the time the action was taken" and "determin[ing] whether a reasonable utility, knowing what the utility knew or reasonably should have known at the time of the action, would reasonably have incurred all or some portion of the expense." Utah Code Ann. § 54-4-4(4). RMP's Brief completely fails to explain how it has made even a *prima facie* showing that these standards have been met. Indeed, RMP does not even allege in its Application or argue in its brief that the costs were prudent. RMP evidently is asking the Commission to presume, without an evidentiary hearing, and without so much as an allegation of prudence, that RMP has made the necessary evidentiary showing for the Commission to order a rate increase; this, in the context of staggering swap losses, possibly due to mismanagement,[8] and an unprecedented shift of risk to ratepayers.

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[7] RMP argues that because the EBA Statute at Section 54-7-13.5(2)(c) (i) omits the word "actual" before the word costs, it can be implied that the Legislature "contemplated a category of recoverable costs that is broader" than "actual" costs. RMP Brief at 8-9. To the extent RMP is arguing that the omission of the word "actual" in subsection (c)(i) allows it to recover estimated costs without a formal evidentiary hearing, its interpretation is inconsistent not only with all of the other references to "actual costs" in the EBA Statute, but with Sections 54-1-2.5, 54-4-1, 63G-4-201, 205, 206, and R746-110-1. The Commission should decline to adopt RMP's interpretation of 54-7-13.5(2)(c). *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991) (a statute should not be construed in a piecemeal fashion but as a comprehensive whole); *Osuala v. Aetna Life & Casualty*, 608 P.2d 242, 243 (Utah 1980) ("[i]f there is doubt or uncertainty as to the meaning or application of the provisions of an act, it is appropriate to analyze the act in its entirety, in light of its objective, and to harmonize its provisions in accordance with its intent and purpose.").

[8] *See supra*, at 15, n.4.

The Commission should hold a hearing in conformity with APA procedures to determine whether RMP's EBA costs are limited to prudently incurred actual costs before approving a surcharge to recover RMP's proposed $8.9 million EBA rate increase.

CONCLUSION

Neither the EBA statute nor any other provision in the law authorizes a process by which a rate increase can be allowed to go into effect to recover EBA costs before the Commission has heard the evidence and made findings and conclusions that the costs are actual costs, that they were prudently incurred, and that the resulting rate is just and reasonable. Because there is no such "interim" process available, and because the EBA statute specifies that the EBA shall not alter the standards for recovery and the burden of proof, the Commission should conclude that it is not authorized to grant a rate increase without an evidentiary hearing or merely on a *prima facie* showing by the Company. The Commission should require an electric utility seeking a rate increase to recover EBA costs to prove by a preponderance of the evidence, after a hearing conducted in accordance with APA procedure, that the increase is solely for actual fuel and purchased power costs, that those costs were prudently incurred, and that the rates set to recover those costs would be just and reasonable.

DATED this 13th day of June, 2012.

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CERTIFICATE OF SERVICE

Docket No. 12-035-67

I hereby certify that on this 13th day of June 2012, I caused to be emailed, a true and correct copy of the foregoing **UIEC'S RESPONSE TO LEGAL BRIEFS OF ROCKY MOUNTAIN POWER AND THE DIVISION OF PUBLIC UTILTIIES** to:

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