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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 MOTION TO STRIKE THE TESTIMONY OF WITNESS STEFAN A. BIRD, OR IN THE ALTERNATIVE, MOTION TO ALLOW POST-HEARING BRIEFS TO ADDRESS LEGAL ISSUES

The Utah Industrial Energy Users (“UIEC”) intervention group, pursuant to Utah Administrative Code R746-100-3(J), hereby moves the Utah Public Service Commission (“Commission”) for an order striking portions of the rebuttal testimony of Mr. Stefan A. Bird in this matter. In the alternative, the UIEC requests that the Commission allow the parties to address in post-hearing briefs the issues Mr. Bird has raised in that part of his rebuttal testimony. In support of this Motion to Strike the Testimony of Witness Stefan A. Bird, or in the Alternative, Motion to Allow Post-Hearing Briefs to Address Legal Issues (“Motion”), the UIEC states as follows:

1. On or about March 3, 2011, the Commission issued a Corrected Report and Order setting forth the basis for what it characterized as an Energy Balancing Account (“EBA”) that could, if properly implemented, be in the public interest and used for the determination of just and reasonable rates.¹ The Commission ordered that this EBA be implemented on a four-year trial basis.² The instant filing is the first reconciliation filing of that four-year trial.

2. The EBA statute allows the Company to recover through the EBA its prudently incurred, actual costs of fuel, purchased power and wheeling expenses.³

3. On or about September 13, 2011, the Commission issued a Report and Order approving a stipulation in the general rate case Docket No. 10-035-124 (“2011 Stipulation”), which included an amount of forecasted net power costs (“NPC”) to be included in base rates. There is no language in the 2011 Stipulation by which the parties stipulate that the forecasted NPC are or should be deemed to be prudently incurred actual costs.

4. On or about September 19, 2012, the Commission issued a Report and Order approving a stipulation that addressed the revenue increase in the general rate case Docket No. 11-035-200 (“2012 Stipulation”), including an amount of forecasted NPC to be included in base rates. There is no language in the 2012 Stipulation that provides agreement that the forecasted NPC are or should be deemed to be prudently incurred actual costs.

5. In the present docket, on January 8, 2013, Rocky Mountain Power (“RMP” or the “Company”) filed with the Commission and served on the parties in this matter a redacted version and a confidential version of the rebuttal testimony of its witness Mr. Stefan A. Bird.

¹ Docket No. 09-035-15, Corrected Report & Order at 80 (March 3, 2011).

² *Id.* at 78.

³ Utah Code Ann. § 54-7-13.5.

6. In his testimony, Mr. Bird states that he holds a B.S. in mechanical engineering.⁴ He testifies that he has held various business positions with various companies during his career and currently oversees the Company's Commercial and Trading organization.⁵ Mr. Bird does not recite any credentials or qualifications to indicate that he is competent to testify regarding the legal issues he raises.⁶

7. Nevertheless, despite his declaration that he is not a lawyer,⁷ Mr. Bird opines on at least the five following legal issues:

(a) Whether stipulated, forecasted NPC, when ordered by the Commission to be included in base rates, are considered to have the imprimatur of "prudence" for the purposes of an EBA proceeding;⁸

(b) Whether the EBA statute requires review of all costs incurred during the deferral period, or only a review of the variance between forecasted costs in base rates and actual costs incurred during the deferral period;⁹

(c) Whether the UIEC testimony of Dr. J. Robert Malko in this case violates the terms of the 2011 Stipulation;¹⁰

(d) Whether the UIEC testimony of Dr. J. Robert Malko in this case violates the terms of the 2012 Stipulation;¹¹

⁴ Docket No. 12-035-67, Bird Test. 1:7 (Jan. 8, 2013).

⁵ *Id.* 1:7-18.

⁶ *See generally* Bird Test.

⁷ *Id.* 27:568-69.

⁸ *Id.* 26:557-61; 28:583-84; 28:592-94; 31:656-57; 33:695-704; 33:707-15; 34:721-23; 34:737-35:746.

⁹ *Id.* 27:563-67; 28:587-90; 28:595-600; 33:709-12; 34:721-29.

¹⁰ *Id.* 27:567-68; 27:575-28:584; 28:594-95; 28:601-29:615; 29:619-30:632; 30:641-42; 31:649-50.

(e) Whether the UIEC testimony of Dr. J. Robert Malko in this case is contrary to the EBA Statute, the Commission's EBA Order, and Tariff Schedule 94.¹²

8. Each of these is a legal issue, requiring the interpretation of legal concepts as well as the language of statutes, orders, tariffs, and contracts. In fact, nearly one-third of Mr. Bird's testimony is devoted to discussion of these purely legal issues.

9. Mr. Bird is not qualified to opine on these issues. And, the UIEC cannot properly respond in testimony because the UIEC's witness is not qualified to do so. Presumably, none of the other parties' witnesses in this matter are qualified to respond either.

10. For those reasons, Mr. Bird's testimony on these matters should be stricken. The specific pages and lines that should be stricken are set forth below in the Conclusion of this Motion.

11. As an alternative to striking Mr. Bird's testimony, the UIEC requests that the Commission set the legal issues raised in his testimony for briefing by the parties at the conclusion of the hearing. At least some, if not all, of these legal issues are important to the resolution of this case, and some are important to EBA proceedings in the future.

12. Implementation of the EBA has made the ratepayers responsible for recovery of the Company's prudently incurred actual fuel and purchased power costs. This re-allocation of risk, and the fact that the Commission cannot reach a decision in this EBA proceeding without resolving some or all of the legal issues raised, justify the Commission taking the time to become

¹¹ *Id.* 30:637-43; 31:649-52; 31:656-57.

¹² *Id.* 27:569-571; 31:658-33:704.

fully advised of the parties' positions. For that reason the UIEC requests that the Commission set the issues identified above for briefing.

CONCLUSION

For the foregoing reasons, the UIEC respectfully requests that the Commission grant this motion and strike the following lines of Mr. Bird's surrebuttal testimony in this case: 26:557-61; 27:563-71; 27:575-28:584; 28:586-29:615; 29:619-30:632; 30:637-46; 31:649-53; 31:656-33:715; 34:717-18; 34:721-29; 34:737-35:746.

In the alternative, the UIEC requests that the Commission allow the parties to address the legal issues identified in paragraph 7 of this Motion in post-hearing briefs.

DATED this 17th day of January, 2013.

/s/ William J. Evans
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CERTIFICATE OF SERVICE

Docket No. 12-035-67

I hereby certify that on this 17th day of January 2013, I caused to be emailed, a true and correct copy of the foregoing **UIEC's MOTION TO STRIKE THE TESTIMONY OF WITNESS STEFAN A. BIRD, OR IN THE ALTERNATIVE, TO ALLOW POST-HEARING BRIEFS TO ADDRESS LEGAL ISSUES:**

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