STEVEN W. SNARR (#3022)
Special Assistant Attorney General
ROBERT J. MOORE (#5764)
Assistant Attorney General
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone: (801) 366-0353
ssnarr@utah.gov
rmoore@utah.gov
Attorney for Utah Office of Consumer Services

Before the Utah Public Service Commission

In the Matter of Investigation of the Costs and Benefits of PacifiCorp's Net Metering Program	Docket No. 14-035-114 The Office of Consumer Services' Reply Memorandum to Opposition of Rocky Mountain Power to Motions to Dismiss and for Summary Judgment.

Pursuant to Utah Code Ann. § 54-10a-303 and Utah Admin. Code r. 746-100-3, the Office of Consumer Services ("Office") submits this Reply Memorandum to the January 12, 2017, Opposition of Rocky Mountain Power Motions to Dismiss and Motions for Summary Judgment ("Opposition Memorandum.") In order to somewhat ease the burden on this Public Service Commission ("Commission") in reviewing the numerous and sometimes unavoidably repetitious filings, the Office will only address the major issues the Opposition Memorandum directs at the arguments put forward in the Office's initial December 20, 2016, Motion to Dismiss or in the Alternative Motion for Order to Show Cause ("Initial Motion.") The Office reserves the right to embrace the positions of other parties on the issues not specifically addressed herein.

ARGUMENT

In this Reply Memorandum, the Office addresses the following issues raised in Rocky Mountain Power's ("Company") Opposition Memorandum.

A. The Office's Position in the 2014 General Rate Case.

On pages 4, 5 and footnote 19 of its Opposition Memorandum, Rocky Mountain Power chastises the Office for taking a position in the 2014 General Rate Case that Rocky Mountain Power claims to be contrary to the position the Office is taking in the instant filings, i.e., that the determinations required to be made under the Net Metering Statute, Utah Code Ann § 54-15-105.1, should not be undertaken in the 2014 General Rate Case. However, Rocky Mountain Power's attempt to raise this as an issue makes no sense.

Section 54-15-105.1 was passed during the pendency of the 2014 General Rate Case, after Rocky Mountain Power had filed its cost of service studies. (Opp. Memo. at 2-3.) There was simply no time to adequately conduct a section 54-15-105.1 analysis. Rocky Mountain Power cites extensively from the Office's witness Daniel Gimble but fails to cite the most relevant portion of his testimony, that the "Office and other parties will only have the surrebuttal phase of the case (three weeks with very little time for discovery) to respond to any NM cost-benefit analysis filed by the Company in rebuttal testimony." (Rebuttal COS/RD Test. of Daniel E. Gimble, Docket No. 13-035-184 (June 26, 2014) at 3:81-84.)

It was in the face of these unreasonable time constraints that the Office took its position in the 2014 general rate case – a circumstance that cannot reasonably be compared to those surrounding the present filing. Moreover, over two years have

passed since the record in the 2014 rate case was developed and the positions of all parties have evolved. The Office now concludes that the features of the rate design proposed by Rocky Mountain Power can only be considered within a general rate case.

B. The Compliance Filing is Inconsistent with the November 2015 Order.

The Office contends that Rocky Mountain Power's three cost-of-service studies all based on 2015 data, with one study "reconciled" to the revenue requirement data from the Company's 2014 general rate case, are inconsistent with paragraph four of this Commission's November 10, 2015 Order. That order provides: "The period of time covered by each of the cost-of-service studies shall be commensurate with the test period in PacifiCorp's next general rate case." (Order, Docket No. 14-035-114, at 16 (Utah P.S.C. November 10, 2015)("November 2015 Order"); Offices Initial Motion, at 3.) Rocky Mountain Power disputes this requirement. (Opp. Memo. at 10-13.)

In essence, Rocky Mountain Power argues that because its 2015 data is "reconciled" with 2014 data from its last general rate case, the data is commensurate with the test period in its "next general rate case." (November 2015 Order at 7-8, 16; Opp. Memo. at 11.) Not only is this contention semantically dubious, it is based on a mistaken view of the substance of the November 2015 Order. Rocky Mountain Power argues that the "parties litigated whether the period over which costs and benefits of the Program would be considered should be one year or many years . . . . The parties did not litigate the particular test period to be used." (Opp. Memo. at

11.) However, a fair reading of the November 2015 Order itself reveals that the test period to be used was an important aspect of this Commission's ruling.

> The Division, the Office and PacifiCorp agree that we should adopt a framework that analyzes the net metering program over a one-year period that is commensurate with the test period PacifiCorp relies on in its next general rate case. (See, e.g., P. Clements Rebuttal Test. at 4:75-77 ("I agree with the OCS' conclusion that a short-term study period that coincides with the period used for ratemaking [commonly known as the 'test period'] is appropriate for the NEM cost-benefit analysis."); Hr,g r. at 193:17-194:8)
>
> We concur . . . . It is, therefore, eminently sensible to rely on the same test period data employed to establish all customers rates.

(November 2015 Order at 7-8.)

Moreover, this Commission's ruling that the studies should be commensurate with the test period in the Company's next general rate case is substantive as well as procedural. In this filing, Rocky Mountain Power asks this Commission to set rates based on data almost three years stale. This would be unprecedented. In ratemaking, two test periods separated by three years cannot be considered "commensurate." Accordingly, it is clear that this Commission used its words advisably and Rocky Mountain Power's filing is fatally inconsistent with the November 2015 Order.

C. The Net Metering Statute does Not Authorize Ratemaking Outside a General Rate Case.

Rocky Mountain Power argues that the Net Metering Statute, Utah Code Ann. § 54-15-105.1, itself constitutes a separate ratemaking mechanism, complete with its own procedural safeguards, authorizing this Commission to set rates outside a general rate case. (Opp. Memo. at 18.) In this way the Company claims the Net

Metering Statute is analogous to the Energy Balancing Account Statute, Utah Code Ann. § 54-7-13.5. (*Id.*) The Office disagrees. Rather than creating a separate ratemaking mechanism, the Net Metering Statute merely grants this Commission wide discretion to address the costs and benefits of the net metering program through its existing statutory authority.

The Net Metering Statute provides in total:

> The [Commission] shall:
>
> (1) determine, after appropriate notice and opportunity for public comment, whether costs that the electrical corporation or other customers will incur from a net metering program will exceed the benefits of the net metering program, or whether the benefits of the net metering program will exceed the cost; and
>
> (2) determine a just and reasonable charge, credit, or ratemaking structure, including new or existing tariffs in light of the costs and benefits.

Section 54-15-105.1.

In determining whether the Net Metering Statute constitutes a separate ratemaking mechanism this Commission must "read the plain language of a statute as a whole and interpret its provisions in harmony with other statutes in the same chapter and related chapters." *State v. Harker*, 2010 UT 56, ¶ 12, 240 P.3d 780. Rocky Mountain Power asserts that the most helpful comparison is the Energy Balancing Account Statute, which is undisputedly a separate ratemaking mechanism. (Opp. Memo. at 18.) *In the Matter of the Application of Rocky Mountain Power for Approval of its Proposed Energy Cost Adjustment Mechanism*, Docket No. 09-035-15, 2011 WL 836438 (Utah P.S.C. March 2, 2011.)

The Energy Balancing Account Statute sets forth a number of procedural and substantive safeguards that must apply when utilizing a balancing account and lists the findings this Commission must make before authorizing a balancing account, section 54-7-13.5(2)(b), lists the methods available for recovering costs through a balancing account, section 54-7-13.5(2)(c)(i), requires the filing with this Commission of "a reconciliation of the energy balancing account . . . at least annually with actual costs and revenues incurred," section 54-7-13.5(2)(c)(ii), requires that the balancing account "may not alter: (i) the standard for cost recovery; or (ii) the electric corporation's burden of proof," section 54-7-13.5(2)(e), describes the appropriate billing components, section 54-7-13.5(2)(f), describes the manner in which excess revenues and excess prudently incurred costs are recovered together with the manner carrying costs are handled, section 54-7-13.5(2)(h)-(j), requires that all available costs and revenues remain in the balancing account until charged or refunded to customers, section 54-7-13.5(4)(a), and prohibits the balance of the account from being transferred or used to impute earnings or losses, section 54-7-13.5(4)(b). In contrast, the Net Metering Statute merely references "charges, credits or ratemaking structures."

It is only "by acting within the bounds of the Energy Balancing Account statute that the Commission can be assured it is not violating the Court's general proscription of retroactive ratemaking and single-issue ratemaking." *In the Matter of the Application of Rocky Mountain Power for Approval of its Proposed Energy Cost Adjustment Mechanism,* Docket No. 09-035-15, 2011 WL 836438, at 6 (Utah P.S.C. March 2, 2011.) Without procedural safeguards comparable to the Energy

Balancing Account statute the Net Metering Statute cannot be used to support the ratemaking adjustments underlying Rocky Mountain Power's proposed net metering rate design. Rocky Mountain Power recognizes the importance of the existence of procedural safeguards to its contention that the Net Metering Statute constitutes a separate ratemaking mechanism and argues, the "Net Metering Statute provides for its own separate safeguards for consideration: it directs the Commission to provide `appropriate notice and opportunity for public comment,' and grants express discretion to the Commission about how such public participation would occur." (Opp. Memo. at 18, *quoting* section 54-7-105.1.)

However, this is a rather scant procedural safeguard as compared to those in the Energy Balancing Account Statute. This Commission cannot conduct its business in the dark. Most dockets provide some opportunity for public comments. Clearly, a comparison of the two statutes leads to the conclusion that merely mentioning credits and ratemaking structures, coupled with the opportunity for public comment, is insufficient to create a separate ratemaking mechanism apart from the general rate case statute. *See, Harker*, 2010 UT at ¶ 12. Rather, to create a separate ratemaking mechanism a statute must create some form of a mechanism, a mechanism with sufficient procedural safeguards to insure that the resulting rates are just and reasonable and in the public interest. Merely mentioning rates is insufficient. Accordingly, the proper interpretation of section 54-15-105.1 is that it

is a wide grant of discretion to this Commission to address the cost benefit analysis under its existing statutory authority.[1]

Rocky Mountain Power's approach ignores the "plain meaning" of the terms "charge, credit, or ratemaking structure" in the regulatory context, it does not logically follow that the absence of a reference to General Rate Case statute means that the Net Metering Statute creates a separate ratemaking mechanism that at the whim of the Company can be employed outside a general rate case regardless of the nature of the Company's proposal. *See*, (Opp. Memo. at 19-21, arguing the Company has a variety of options to pursue ratemaking under the statute.)[2] The

---

[1] The Company attempts to ascribe legislative intent to the lack of a reference to a general rate case proceeding in the Net Metering Statute. This argument falls short of compelling. The utility statute must be read as an integrated whole and construed together in light of the various statutory provisions. With this in mind it is more compelling to suggest that the Legislature was fully aware that a general rate case proceeding would be utilized to establish the "charge, credit or ratemaking structure" called for in the Net Metering Statute when it was enacted.

[2] On page 20 of the Opposition Memorandum, Rocky Mountain Power points out that this Commission "has previously modified the Company's net metering tariff without reference to a need for a general rate case, including determining the appropriate credit to be given to customers for excess generation." A change in the credits given for excess generation is relevant to ratemaking issues and is addressed by the Office below. However, the Company went on to argue:

> In a follow-up investigatory docket concerning the Program, the Commission set the value for net excess generation and set levels of use for purposes of classifying net metering customers. In the Commission's Report and Order modifying Schedule 135 as a result of the investigatory docket, the Commission noted:
>
> > Regarding financial concerns, to the extent the Company determines it is being adversely affected by net metering . . . . under [the previous version of the Net Metering Statute] the Company has the ability to approach the Commission with information on both costs and benefits to address this issue. **In addition,** the financial aspect of the net metering can be addressed in a general rate case.

(Opp. Memo. 20 (brackets, ellipsis and bold in original memorandum, footnotes omitted.))

statute grants this Commission, not the Company, discretion on how to resolve the results of the required cost benefits analysis and this discretion must be exercised within the confines of this Commission's existing statutory authority.

D. Rocky Mountain Power's Rate Structure Proposal is Not Exempt From the General Ratemaking Statute Under the Public Utility Program Offering Exemption.

Rocky Mountain Power argues that "the 'net metering program' is a 'public utility program offering" and therefore its rate design proposal is exempt from the General Rate Case Statute, Utah Code Ann. § 54-7-12, pursuant to the public utility program offering exemption contained in section 54-7-12(1)(a)(ii)(F). (Opp. Memo. at 22.) This contention misconstrues the statute and therefore must be rejected.

As set out in the Office's initial Motion, Rocky Mountain Power's rate structure proposal constitutes an increase in "base rates," section 54-7-12(a)(1), any increase in "base rates" results in a "general rate increase," section 54-7-12(1)(d), and a "general rate increase" can only take place pursuant to the procedures of a general rate case, sections 54-7-12(2)(a), 54-7-12(b)(i) and (ii), and 54-7-12(3)(a). (Initial Motion at 5.) A caveat to this analysis is contained in section 54-7-12(1)(a)(ii), which provides exemptions for charges that would otherwise be

---

However, the above quote did not deal with the portion of the Order addressing credits for excess energy but rather the portion of the Order dealing with the 20% cap on customer generation. (Report and Order, Docket No. 08-035-78, pg. 13 (Utah P.S.C. February 12, 2009.)) As such this portion of the Order has limited relevance to ratemaking. At issue in the docket was a change from crediting excess generation on a Schedule 37 avoided cost methodology to kilowatt-hour basis. (Report and Order, Docket No. 08-035-78, pg. 15 (Utah P.S.C. February 12, 2009.)) Both the Company and the Division of Public Utilities expressly supported the change and no party opposed the change. (*Id.* at 15-19.) Given this, the issue of whether the change should have been address in a general rate case or if it qualified for a utility program exemption was never litigated.

included in the "base rates." The exemption at issue here, of course, is the exemption for program offerings. The relevant statutory language reads: "Unless included by a commission order, "base rates" does not include **charges included in**: . . . (F) a public utility program offering." Section 54-7-12(1)(a)(ii)(F)(bold added.) Rather than being excluded from base rates, this Commission, by its November 2015 Order, has clearly required that the net metering rates must be addressed in a general rate case proceeding after specific cost-of-service study evidence has been presented and analyzed with the opportunity for the public and other parties to provide comment and input on how the net metering rates and related impacts should best be implemented.

Rocky Mountain Power ignores the "charges included in" language and, as noted above, argues that because the net metering is statutorily referred to as the "net metering program," the net metering program itself constitutes "a public utility program offering" and all the wide ranging aspects of its proposal are exempt from base rates and therefore exempt from the general rate case statute. (Opp. Memo. at 22.) However, the terms "charges included in" cannot be so readily discarded.

Again, this Commission must "read the plain language of a statute as a whole and interpret its provisions in harmony with other statutes in the same chapter and related chapters." *Harker*, 2010 UT at ¶ 12. Of course, it is not possible to read the language of a statute as a whole and at the same time ignore selective operative terms. No plain reading of the term "charges included in a public utility program offering" can be understood to refer to the creation of a new class of ratepayers. Nor

can these words be read to refer to the attempted creation of a deferred account for the benefit of ratepayers who are not participants of the net metering program.

Furthermore, when read in harmony with related statutes, it is clear that the subject term cannot refer to rate increases that result in a general increase in revenue to the Company, regardless of whether the increased revenue is placed in a deferred account. Read in light of other statutes creating various utility programs, the term "charges included in a public utility program offering" refers to charges that fund the utility programs or are so closely intertwined with the purposes of the program that it is appropriate to segregate them from general rates[3].

Moreover, the public utility program exemption may provide an explanation as to how the Commission was able to change the credit for excess energy outside of a general rate case in Docket 08-035-78, a case heavily relied on by the Company. However, because of the nature of the docket, it is difficult to determine if a change in the manner net metering excess generation is credited qualifies as a utility program exemption. At issue in the docket was a change from crediting excess generation based on a Schedule 37 avoided cost methodology to a simple kilowatt-hour credit. (Report and Order, Docket No. 08-035-78, pg. 15 (Utah P.S.C. February 12, 2009.)) Both the Company and the Division of Public Utilities expressly supported the change and no party opposed the change. (*Id.* at 15-19.)

---

[3] For example, the electric vehicle incentive program, Utah Code Ann. § 54-20-103, the clean coal technology program, Utah Code Ann. § 54-20-104, and the innovative utility programs, Utah Code Ann. § 54-20-105, are all funded by a separate charge authorized by this Commission pursuant to Utah Code Ann. 54-7-12.8(3), a separate charge that also funds demand side management, which is also defined as a program. Section 54-7-12.8(a). It is these types of charges which are self-contained within the program themselves that the exemption to base rates contained in section 54-7-12(1)(a)(ii)(F) refers to, not common rate increases.

Given this, the issue of whether the change should have been addressed in a general rate case or if it qualified for a utility program exemption was never litigated. Nevertheless, it is certainly arguable that the charge for excess energy is the type of charge that is self-contained within the program and qualifies for an exemption under section 54-7-12(1)(a)(ii)(F). Even if not, the fact that the issue was never litigated undercuts the Company's argument that because this Commission allowed a change in the credit for excess generation outside a rate case, the Commission can now approve their wide-ranging proposal in an abbreviated proceeding.

In sum, because the Company ignores operative language in section 54-7-12(1)(a)(ii)(F), their argument that this section exempts the entire net metering program from the general rate case statute must be rejected. In addition, section 54-7-12(1)(a)(ii)(F) demonstrates how this Commission can change the credit for excess generation outside a rate case but require a rate case for the wide-ranging rate structuring proposal in the Company's present filing.

E. Rocky Mountain Power's Rate Structure Proposal is Not Exempt From the General Ratemaking Statute Under the Deferred Account Exemption.

Rocky Mountain Power also argues that its proposal is exempt from base rates under the deferred account exemption contained in section 54-7-12(a)(ii)(A). The Office believes that its Initial Motion sufficiently addresses the arguments presented in the Company's Opposition Memorandum. There is no need to restate these arguments here.[4]

[4] One small point. To the extent the Company attempts to factually minimize the issue concerning retroactive ratemaking by asserting that "the overall magnitude of the cost shifting is relatively small now" (Steward Direct at pg. 16, ln. 309-10; pg. 37, ln. 719-20),

F. The Office Does Not Argue that The Company's Proposal as a Whole Violates the Prohibition Against Retroactive Ratemaking.

Rocky Mountain Power criticizes the Office for arguing that the Company's entire proposal violates the prohibition against retroactive ratemaking. (Opp. Memo. at 28.) However, the Office has never made this argument. Rather, the Office argues "RMP's proposal to defer excess revenue until its next general rate case violates the prohibition against *retroactive ratemaking*. . . . [E]very other aspect of RMP's proposal violates the prohibition against *single-issue ratemaking*." (Initial Motion at pg. 12.) In fact, the Office's reading of all parties' filings reveals that no party has made the argument that the entire proposal violates the prohibition against retroactive ratemaking. Accordingly, this Commission can disregard the Company's arguments on this point.

G. Rocky Mountain Power's Proposal Constitutes Single-Issue Ratemaking.

All but one of the Motions challenging Rocky Mountain Power's filing raise almost identical arguments concerning single-issue ratemaking. Accordingly, in order to ease the burden caused by repetitive filing in this round of briefing, the Office will only briefly address this issue and relies on the other parties to more fully respond to the Company's arguments. The Office does note, however, that the Company only raises three rather unique legal arguments in favor of its position, none having any legal support.

---

the admission concerning cost shifting must be accepted in considering whether this docket or a new general rate case docket should be used to address the legal question of what type of docket proceeding is required to resolve the rate design and cost shifting issues.

First, the Company argues that the prohibition against single-issue ratemaking only is implicated when the rate increase applies across all customer classes and the Company is free to employ single-issue ratemaking to individual classes or, presumably, multiple but not all classes. (Opp. Memo. at pg. 30.) The Office is unaware of any legal authority addressing this position, let alone supporting it, and the Company offers no authority for this position. Second, the Company argues that because the rate increase is implemented in conjunction with a new tariff, the prohibition against single-issue rate making does not apply. Again, the Office is unaware of any legal authority addressing this issue and the Company only references several tariffs without citing any Commission proceeding or other legal authority to support its contention. (*Id.* at 30 & n. 104 and 59.)

Third, the Company argues that because "the NEM Studies necessarily took into account all of the costs and benefits associated with the Program and were then adjusted to the currently-approved revenue requirement" the Company's proposal is exempt from the prohibition against single-issue ratemaking. (*Id.* at 32.) However, the Company again fails to cite to any authority to support the contention that cost of service studies reconciled with three years stale revenue requirement cures any problems associated with single-issue ratemaking. Although the Company does cite to authority in its argument, it only seeks to distinguish case law contrary to its position. Utah case law on point clearly does not support such a position. *Mountain Fuel Supply Co. v. Pub. Serv. Comm'n of Utah*, 861 P.2d 414, 422 (Utah 1993)("one of the fundamental goals of rate making is to select a test year that reasonably approximates the rate-effective period.")

As opposed to these unsupported assertions, the Office and other parties rely on the firmly established prohibition of single-issue ratemaking. *Utah Dep't of Bus. Regulation v Public Service Comm'n,* 614 P.2d 1242, 1243 (Utah 1980); *A. Finkl & Sons Co. v. Illinois Commerce Comm'n,* 620 N.E.2d 1141, 1147 (Ill. App. 1993.)

H. The Commission Should Grant the Office's Motion for an Order to Show Cause.

Again the Office's initial Motion and the other parties' filings adequately address the Company's arguments against the Motion to Show Cause. The Office only briefly notes the incongruity of the Company's arguments, i.e., the contention that an arduous general rate case should not be required when the only issue presented is whether rates should be reset for net metering customers and the contrary argument that it is irrelevant to these proceedings that the Company is over earning and likely has an inflated return on equity. (Opp. Memo. at 34-35.) Of course, the fact that the Company is over earning and the likelihood that it currently is earning an inflated return on equity are reasons for issuing an Order to Show Cause and therefore not irrelevant to these proceedings. Moreover, an Order to Show Cause would allow the Company and the other parties the procedural opportunity to explore whether a general rate case should be promptly implemented.

CONCLUSION

For the reasons set out in this Reply Memorandum and the Initial Motion to Dismiss, this Commission should Dismiss the Company's filing or in the alternative Issue an Order to Show Cause why the Company should not promptly institute a general rate case in which the issue presented in the instant docket would be incorporated.

January 26, 2017

_____
Robert J. Moore
Attorney for the Office of Consumer Services