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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE INVESTIGATION OF THE COSTS AND BENEFITS OF PACIFICORP'S NET METERING PROGRAM	**Docket No. 14-035-114** **UTAH SOLAR ENERGY ASSOCIATION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS, OR IN THE ALTERNATIVE, SUMMARY JUDGMENT ON ROCKY MOUNTAIN POWER'S COMPLIANCE FILING DATED NOVEMBER 9, 2016**

Intervenor Utah Solar Energy Association ("**USEA**")[1] respectfully submits to the Public Service Commission of Utah (the "**Commission**") the following Reply in support of its *Motion to Dismiss, or in the Alternative, Summary Judgment on Rocky Mountain Power's Compliance*

[1] USEA is a Utah nonprofit corporation whose mission is to champion the growth of Utah's solar industry through policy advancement, education, advocacy and business services for industry members, as well as commercial and residential solar customers. Members include companies that design, build, integrate, install, and/or service rooftop solar systems, or provide other important services in the rooftop solar industry in Utah. The views expressed in this Motion represent the position of USEA as an organization, but not necessarily those of its individual members.

Filing (the "**Motion**"), and in response to the *Opposition of Rocky Mountain Power to Motions to Dismiss and for Summary Judgment* (the "**Opposition**").

REPLY

The Commission should grant the Motion and overrule the Opposition because the Company[2] fails to (I) articulate any basis justifying a departure from framework prescribed by the November 2015 Order, which is required by the Net Metering Statute and Utah Law; (II) provide "good cause" for waiver of Rule 746-312-13; and (III) overcome the substantive deficiencies of the Compliance Filing.

I. UTAH LAW PROHIBITS THE RELIEF REQUESTED IN THE COMPLIANCE FILING OUTSIDE A GENERAL RATE CASE

In the Opposition, the Company does not dispute the basic tenet that as a general matter, compliance filings are limited in scope to effectuating the specific terms of a Commission order. *See e.g., New Hampshire Elec. Coop, Inc.*, 83 N.H. P.U.C. 465 (1998) ("as a compliance filing, the scope of this case was narrow, and limited to whether the filing was consistent with the orders of the Commission and applicable statutes"). Instead, the Company spends considerable ink arguing that the Commission should ignore this basic rule and not only consider whether its Compliance Filing complies with the November 2015 Order, but also authorize multiple forms of relief that are only available in a general rate case, including segregating net-metering customers into a new class, applying a new rate structure to the new class, and increasing their rates and fees. The Company anchors this request mainly on three equally untenable arguments.

First, the Company argues that the Commission should conduct the Subsections One and Two analysis in one proceeding for the sake of efficiency. *See* Opposition at 14-16.

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[2] Unless otherwise defined, Capitalized terms have the same meaning as in the Motion.

Specifically, the Company argues that "[i]f the two proceedings are split or the ruling on both analyses is delayed, the studies may have to be redone for the Commission to Conduct its Subsection Two analysis . . ." *Id.* at 15. The Company does not explain why "the studies may have to be redone" if the Commission were to abide by the framework it has laid out as required by the Net Metering Statute. But the Company's argument betrays a flaw in the design of the Studies. If a few months' delay would render the Studies unreliable, then perhaps the Commission should not rely on them at all in determining the costs and benefits of net metering, let alone in setting a whole new rate scheme for a whole new class of customers for years to come. This is particularly so because any correction could only be made at a future rate case, and the Company admits that there are no rate cases planned "on the immediate horizon." *See id.* at 13. Thus, the Company's argument actually supports rejecting the Studies in their entirety, not rushing the process outlined by the Statute.

Second, the Company argues that the Net Metering Statute authorizes the Commission to set rates for Net Metering customers outside of a general rate case. *See* Opposition at 17-21. But the Net Metering Statute's plain language does not contain such an exemption. *See* Utah Code Ann. § 54-15-105.1(1). Instead, the Net Metering Statute simply outlines the two step process that the Company is trying to abrogate. Moreover, the very authorities that the Company cites in the Opposition narrowly construe exceptions to the general rate case statute. *See e.g. Utah Dept. of Business Regulation Div. of Public Utilities v. Public Service Comn.*, 720 P.2d 420 (Utah 1986). In that case, the Court held that the Commission exceeded its authority in allowing the power company to use funds from its EBA account to make an "accounting adjustment" to address a revenue shortfall due to "unusual circumstances." *See id.* at 423. The Court reasoned that while the Commission "has broad authority to regulate a utility's business[,]" that authority

"must be construed to harmonize with the general rules for rate making set by the legislature, to wit: all rate making must be prospective in effect and rates may be fixed only in general rate proceedings." *Id.* (emphasis added). And although pass-through legislation allowed an expedited proceeding for rate increases due to changes in fuel costs, neither that exception to the general rule "nor the Commission's general grant of regulatory authority" permitted the adjustment that the utility sought. *See id*. In other words, the Court read the fuel pass-through exception to the general rate case statute narrowly, and consistent with that ruling, where, as here, the Net Metering Statute is silent on whether the general rate case statute applies, the presumption is that it does.

Notably, even if the Commission has discretion to set rates outside a general rate case under the Net Metering Statute, nothing prohibits the Commission from using that discretion to require a general rate case here where the proposed structure creates a new class of customers, significantly increases their rates, and requires them to pay new fees. The purported justification for these wholesale changes is not a change in a discrete variable, such as an increase in fuel costs, but alleged structural deficiencies in the whole net-metering program. In a general rate case, the Commission could consider issues like the cost-shifting allegedly occasioned by net metering, or purported costs arising out of the program's popularity, and weigh them against other benefits of net metering. In other words, a general rate case is particularly appropriate here because the putative basis for the proposed rate increases is not an unforeseen event or circumstance. Thus, the Company's second argument fails because the Commission should exercise any discretion it may have in favor of considering rate increases for net metering programs within a general rate case. In fact, the Commission has repeatedly noted that the Subsection Two analysis may be conducted at a future proceeding, such as a "general rate case."

See e.g., In re Rocky Mountain Power, 2009 WL 2497389, at *6 (P.S.C. February 12, 2009) ("the financial aspects of net metering can be addressed in a general rate case"). Nothing in the Opposition changes that outcome.

Third, the Company argues that the Compliance Filing is not subject to the General Rate Case Statute because it is not seeking to change "base rates" and the new charges will be deposited in a deferred account or are assessed as part of a utility program offering. These arguments fail because they seek to turn narrow exceptions under the General Rate Case Statute into the general rule. Under the General Rate Case Statute, "'[b]ase rates' means those charges included in a public utility's generally applicable rate tariffs, including . . . a fare; a rate; . . . or any other charge generally applicable to a public utility's rate tariffs." Utah Code Ann. § 54-7-12(1)(a)(i). The Company may only request increases of "base rates" in a general rate case. *See id*. at §54-7-12(2)(a). The Statute does provides that "base rates" does not include "charges included in . . . a deferred account . . . or a public utility program offering." *Id.* at § 54-7-12(1)(a)(ii)(A), (F). These are narrow exceptions and interpreting them as the Company proposes would turn them into the rule. That is, were the Commission to accept the Company's position, then all the Company would have to do any time it wishes to increase rates outside of a general rate case is propose to place "excess revenue" in a deferred account. This would, in essence, turn deferred accounts into an insurance fund from which the Company could cover shortfalls at the expense of consumers, who would have to fund them in the interim. Utah law prohibits such a result. *See e.g., Utah Dept. of Business Regulation*., 720 P.2d at 420-23.

In sum, none of the Company's main objections warrant a departure from the process that the Commission has already adopted, i.e., conducting the Step One in this proceeding and Step Two in a separate general rate case.

II. THE COMPANY HAS NOT SHOWN GOOD CAUSE FOR A WAIVER OF RULE 746-312-13

In the Opposition, the Company concedes that it must show "good cause" for a waiver of Rule 746-312-13, but then fails to meet this standard. *See* Opposition at 32-34. Instead, the Company argues that the Commission should waive the rule because "[i]f the application fee were not allowed, the proposed basic charge for Level 1 customers would be higher by $8.41 per month." *Id.* at 33. The argument fails on its face because even if accepted as true, it does not justify an application fee of $60, which is what the Company is seeking. More fundamentally, nothing in the Compliance Filing nor the Opposition supports a finding of good cause for waiver of Rule 746-312-1. Even if the Company's data justifies the new fee, the proper procedure is for the Company to propose a new rule. The Company simply has not pointed to any extraordinary circumstances requiring a waiver of the rule, and thus, the Compliance Filing should be rejected on this issue.

III. THE COMPLIANCE FILING IS SUBSTANTIVELY DEFICIENT AS A MATTER OF LAW

Contrary to the Company's argument, the Commission may and should dismiss the Compliance Filing because it is substantively deficient as a matter of law under Utah Rules of Civil Procedure 12(b) and 56. Courts routinely dismiss claims and cases under these rules where, as here, it is not genuinely disputed that the operative pleading contains a substantive deficiency. For example, it is blackletter law that under Rule 56, "[a] plaintiff's failure to present evidence that, if believed by the trier of fact, would establish any one of the elements of the prima facie case justifies a grant of summary judgment to the defendant." *Nimela v. Imperial Mfg.*, 2011 UT App. 333, ¶ 7, 263 P.3d 1191. And under Rule 12, judgment must be granted where the plaintiff fails to state a claim upon which relief can be granted. *See* Utah R. Civ. P. 12(b)(6). Here, the

Company's failure to submit studies that comply with the November 2015 Order is analogous to a plaintiff's failure to plead an essential element of her case.

Specifically, as USEA and other movants pointed out in their dispositive motions, the Compliance Filing is substantively deficient because, among other things, it relies on the Studies as the sole basis for determining costs and benefits of net metering;[3] the Studies rely on information that is not used in a general rate case;[4] the Studies rely on speculative assumptions, including that solar installations would continue to "increase exponentially" in part because of government subsidies;[5] and the Studies rely on data gathered over a random12-month period rather than a period that is "commensurate with the test period in [the Company's] next general rate case," as ordered by the Commission.[6] These facts are not genuinely disputed as they are evident from a cursory review of the Compliance Filing and its supporting documents. Consequently, the Commission can and should find that the Compliance Filing is deficient as a matter of law.

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[3] *See* USEA's Motion at 11.
[4] UCE Motion at 6-8.
[5] *See e.g.,* Testimony of Mr. Gary W. Hoogeveen at 144-185; Ms. Steward's Testimony at 126-13.
[6] *See* UCE Motion at 6-8.

CONCLUSION

For the foregoing reasons, the Commission should grant the Motion, overrule the Opposition, and either dismiss the Compliance Filing or limit all proceedings under the Scheduling Order to an evidentiary hearing on the soundness of the Studies.

Dated this 26th Day of January, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I will cause a true and correct copy of the foregoing **REPLY COMMENTS OF UTAH SOLAR ENERGY ASSOCIATION** to be delivered to the Utah Public Service Commission on January 26, 2017 via hand delivery and to be served via email on that day on the following persons:

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