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BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Application of Rocky Mountain Power for Approval of the 2017 Protocol.	Docket No. 15-035-86 **COMMENTS OF KENNECOTT UTAH COPPER LLC**

Kennecott Utah Copper LLC ("Kennecott") submits comments on the Application for Approval of the 2017 Protocol filed by PacifiCorp d/b/a Rocky Mountain Power ("PacifiCorp" or "RMP") and respectfully requests that the Commission consider these comments. Kennecott (1) supports Section X.B to the extent it is construed to mean that the 2017 Protocol does not impose costs on Utah in the event an eligible customer transfers service from RMP to a non-utility supplier; and (2) opposes the $4.4 million "Equalization Adjustment" allocation to Utah. Kennecott submits these comments pursuant to Utah Administrative Rule R746-100-10.F.1, in lieu of testimony, but in response to the testimony filed with the Application in this matter.

COMMENTS

Kennecott's comments pertain to only two aspects of the 2017 Protocol. First, Kennecott supports Section X.B of the 2017 Protocol to the extent it is construed to mean that the 2017

Protocol does not require or recommend the allocation of costs to Utah as a consequence of Kennecott transferring service to a nonutility energy supplier pursuant to Utah Code Ann. § 54-3-32. Second, Kennecott recommends that the Commission decline to accept the $4.4 million "Equalization Adjustment" to Utah that the 2017 Protocol recommends as a measure to avoid any shortfall in PacifiCorp's system revenue requirement.

I. Kennecott Supports Section X.B of the 2017 Protocol to the Extent It Is Interpreted to Mean that No Costs are Allocated to Utah upon Kennecott's Transfer of Service to a Nonutility Energy Supplier.

On April 1, 2014, Senate Bill ("SB") 67 of the 2014 Utah legislative session was signed into law. Later codified (in part) at Utah Code Ann. § 54-3-32, SB67 sets out a process by which eligible customers, such as Kennecott, may transfer their electric service from RMP to a nonutility energy supplier. As part of that process, section 54-3-32(6) requires the Commission to make a determination of whether an eligible customer's transfer of service will result in any "costs or credits allocated to Utah under any interjurisdictional cost allocation methodology the commission reasonably expects to be in effect as of the intended date of transfer of service." Utah Code Ann. § 54-3-32(6)(b)(i). At the time of SB67's enactment, the interjurisdictional cost allocation methodology in effect was the 2010 Protocol. As of January 1, 2017, it will be the 2017 Protocol if approved by the Commission. Kennecott believes that the 2017 Protocol assists the Commission in making the determination required under section 54-3-32(6) by clearly stating whether there will be "costs or credits allocated to Utah."

Section X of the 2017 Protocol consists of three subsections addressing the treatment of state programs that allow customers access to alternative electricity suppliers. Section X.A deals with the treatment of loads that are lost to PacifiCorp due to Oregon's "Direct Access Programs," specifying the circumstances under which such loads will be included in the allocation factors that impose costs on Oregon. 2017 Protocol at 8-9. Section X.B of the Protocol specifically addresses SB67:

> If, pursuant to Utah Code Annotated Section 54-3-32, an eligible customer in Utah transfers service to a non-utility energy supplier, the Public Service Commission of Utah will make determinations under Utah law as contemplated therein. The Company will inform the State Commissions and the Parties of the Public Service Commission of Utah's determinations.

2017 Protocol at 9:17-21. Unlike Section X.A, there is no provision in X.B for allocating costs to Utah upon an eligible customer transferring service.[1]

Section X.B represents a significant departure from the analogous provision in the 2010 Protocol, which, similar to Section X.A, provides for the allocation of costs to jurisdictions whose state law allows full-requirements customers to have direct access to a competitive electricity supplier. While the 2010 Protocol covers direct access by full requirements customers, it is silent on a situation where a customer may cease to take service from PacifiCorp to exercise a right under state law to fully optimize its own self-generation capabilities through a nonutility energy supplier.

The 2010 Protocol dealt with direct access by full requirements customers,[2] but it was not clear whether its "direct access" provisions were applicable to customers like Kennecott who transfer service under Section 54-3-32 to fully optimize their own self generation capabilities. When Kennecott does transfer service (sometime after the end of 2016), the 2010 Protocol will

[1] Section X.C is a "catch-all" in the event other states adopt laws or regulations governing customer access to alternative electricity suppliers. 2017 Protocol at 9:22 – 10:2.

[2] The direct access provisions were included in the 2010 Protocol specifically to address Oregon's direct access program.

have expired, and the 2017 Protocol apparently will be in place.[3] Kennecott has long held that it is not a full requirements customer and therefore it is not a "direct access" customer within the meaning of the 2010 Protocol. Accordingly, when the Multistate Protocol ("MSP") Broad Workgroup convened to negotiate the 2017 Protocol, Kennecott participated in limited discussions to encourage a meaningful distinction between "direct access" full requirements customers and customers who transfer service to fully optimize their own self generation.[4]

Kennecott has not been a load that RMP must plan to serve. It has the ability to generate 195 MW of electricity.[5] Aside from intermittent backup and supplemental power, Kennecott's service from RMP arises from mutually beneficial opportunities. RMP has provided pricing to Kennecott on terms structured to take advantage of Kennecott's generation by incentivizing Kennecott to run its generators at certain times, and to forbear running its generation at other times, in order to benefit RMP in maximizing its revenues, ultimately to the benefit of RMP and all of its ratepayers. Sales to Kennecott have been primarily opportunistic, transactions of convenience rather than necessity, made only when a sale was beneficial to both parties. RMP's sales to Kennecott are purportedly based on RMP's back-up and supplemental power pricing, prudently

[3] The 2017 Protocol, if approved, would be effective in PacifiCorp rate proceedings filed after December 31, 2016, through December 31, 2018, unless extended by a determination of all State Commissions that approve it. 2017 Protocol at 4:1-10.

[4] Kennecott's participation was limited to Section X negotiations. As the Commission is aware, the MSP working groups engage in protracted negotiations, taking place over several years, among some regulators from some of PacifiCorp's jurisdictions, as well as some customers and customer groups who have the budget to participate. This multi-party, multi-issue forum is not conducive to encouraging comprehensive public participation and is not conducted with parity among participants. This setting promotes Protocol methodologies arising from compromises reflecting such dissymmetry and reduced stakeholder participation rather than a straightforward application of cost causation principles.

[5] Kennecott's net generation includes 31 MW of cogeneration at its Smelter, 6 MW of combined heat and power at its Refinery, and 158 MW from its Utah Power Plant ("UPP"), totaling 195 MW. UPP can be operated 12 months of the year, using coal from March through October, and natural gas during the remaining months.

covering Kennecott's planned and unplanned outages through RMP's front office purchases, Thus, while Kennecott has long been a customer of RMP, there has been no need for RMP to plan to serve Kennecott's load.[6]

Likewise, there is no "cost of service" for providing service to Kennecott, in part because it is difficult to price opportunistic sales. Revenue from sales to Kennecott is treated as a revenue credit, allocated to cover RMP's costs to serve other customers while at the same time enhancing RMP's earnings. While there may be some loss of revenue to RMP from Kennecott transferring service, RMP has never had any entitlement or reasonable expectation that those revenues will continue to be realized. Because of Kennecott's self-generation, and because Kennecott purchases power out of convenience or when RMP offers Kennecott economically attractive pricing, there is no need to plan for Kennecott's load and no justification, therefore, for attributing costs to Utah upon Kennecott's transferring service to another provider.

Unlike the 2010 Protocol, that does not directly address how to treat a transfer of service under Section 54-3-32 by an eligible customer that leaves RMP's service to fully optimize its own self-generation, the language in Section X.B plainly states that "the Public Service Commission of Utah will make determinations under Utah law as contemplated therein." 2017 Protocol at 9. Utah law, in turn, requires the Commission to determine whether an eligible customer's transfer of service "will result in costs or credits allocated to Utah under any interjurisdictional cost allocation methodology the commission reasonable expects to be in effect as of the intended date of transfer of service." Utah Code Ann. § 54-3-32(6)(b)(i). Section X.B of the 2017 Protocol thus leaves it to the Utah Commission to find simply that Section X.B says nothing about costs being

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[6] Kennecott's load was not included in RMP's 2013 Integrated Resource Plan.

allocated to Utah. In short, there is no requirement, recommendation or even suggestion in the 2017 Protocol that any costs should be imposed on Utah resulting from Kennecott's transfer of service. The requirements of Section X.B are informational only, providing that "the Company will inform the State Commissions and the Parties of the Public Service Commission of Utah's determinations." 2017 Protocol at 9.

Kennecott supports Section X.B to the extent it means that the interjurisdictional allocation methodology described in the 2017 Protocol would impose no costs on Utah as a result of Kennecott's transferring service during the period of time that the 2017 Protocol is effective. Unless the Commission or any party contends that Section X.B means something else, *i.e.*, somehow requires or allows an allocation of costs to Utah as a result of Kennecott's transferring service, Kennecott does not oppose the adoption of the 2017 Protocol. In considering the Application in this docket, therefore, Kennecott respectfully requests that the Commission acknowledge that the 2017 Protocol does not require or allow costs to be allocated to Utah as a result of Kennecott's transferring service under Section 54-3-32.

II. The 2017 Protocol's $4.4 Million "Equalization Adjustment" is a Gratuitous Allocation that the Commission Should Decline to Approve.

The 2017 Protocol states that the Utah Parties "agree to an annual Utah Equalization Adjustment of $4.4 million and a 2017 Protocol Adjustment of the same amount." The Protocol does not state or otherwise indicate that this "adjustment" has any basis in RMP's cost to serve Utah customers. As explained by the Utah Supreme Court:

> To prevent a utility from using its monopoly power to charge exploitive rates, the Legislature has provided that a utility may charge only those rates found to be just and reasonable by the Public Service Commission. Just and reasonable rates are necessarily

> based on cost of service and cost of capital, whatever the particular formula used.

Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 767, 770-71 (Utah 1994) (citing UCA § 54-4-4).

For Utah rates to be just and reasonable and in the public interest, they must be based on the utility's Utah Commission approved cost of capital, and on its cost of providing service to Utah customers. The Commission must independently make that determination, free of any pronouncement by a multistate workgroup that Utah ratepayers should bear some arbitrary additional burden to fill a gap in RMP's system revenue requirement.

In addition to the costs to serve customers, the 2017 Protocol recommends an allocation (in varying amounts of costs or credits) to each of PacifiCorp's jurisdictions as a gratuitous tribute to ensure that there is no shortfall in PacifiCorp's system revenue requirement. Kennecott understands that the negotiators of the MSP Broad Workgroup may have felt compelled to make concessions simply to "close the deal," and ensure a multijurisdictional allocation protocol was in place when the 2010 Protocol expires. At the same time, the negotiators recognized that the Commission may ultimately decide whether this $4.4 million gratuity should be allocated to Utah ratepayers. 2017 Protocol at 2:11-20.

Finally, it should not go unnoticed that, as a condition to PacifiCorp's early mergers, the Utah Commission imposed, and PacifiCorp accepted the risk that it might not fully recover its costs while operating a multijurisdictional utility. In a 2002 docket filed by PacifiCorp to initiate an investigation into certain interjurisdictional issues, the Commission reminded PacifiCorp that, although a multi-state process was required as a condition of the original merger between Utah

Power & Light and PacifiCorp, PacifiCorp's shareholders remained responsible for of any shortfall in its total system cost recovery:

> The Commission's September 28, 1988 Order approving the Merger required the Applicants to convene multi-jurisdictional meetings to discuss allocation issues and to file a proposed interjurisdictional allocation method for the merged company. The proposed allocation method was to avoid total reliance on stand-alone modeling, to be verifiable against actual data, and to equitably allocate the benefits of the Utah Power transmission system and the Pacific Power hydro resources. **PacifiCorp shareholders were to assume all risks that may result from less than full system cost recovery due to the adoption of different allocation methods by its regulatory jurisdictions**.

Report and Order, Docket No. 02-035-04 (Dec, 14, 2004) at 21-22 (emphasis added). The $4.4 million gratuity included in the 2017 Protocol is unrelated to Utah's cost of service or the utility's cost of capital. It is, in fact, the utility's attempt to counteract the risk of disparate rate treatment among its various jurisdictions—the very risk that its shareholders assumed as a condition of the merger. For that reason, under the rule in *Stewart*, accepting the $4.4 million allocation is not in the public interest and will not yield just and reasonable rates in Utah.

While Kennecott applauds the negotiators for closing the deal, Kennecott recommends the Commission decline to approve the allocation of the $4.4 million "Equalization Adjustment" to Utah.

CONCLUSION

By its plain language, Section X.B of the 2017 Protocol does not require, authorize, recommend or even raise the possibility that costs can be allocated to Utah upon a customer transferring service to a nonutility energy supplier pursuant to section 54-3-32. To the extent

Section X.B is construed consistent with Kennecott's understanding, Kennecott supports its approval.

Kennecott understands that the 2017 Protocol leaves it to the Commission's discretion to accept or reject the $4.4 million gratuitous allocation. Because the gratuity is unrelated to costs that the Utah Supreme Court has said are the basis for just and reasonable rates, and because the claimed shortfall in PacifiCorp's system revenue is precisely the kind of risk that PacifiCorp's shareholders have agreed to accept, Kennecott recommends that the Commission reject the $4.4 million allocation to Utah.

DATED this 16th day of March, 2016.

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CERTIFICATE OF SERVICE

Docket No. 15-035-86

I hereby certify that on this 16th day of March 2016, I caused to be emailed, a true and correct copy of the foregoing comments on **COMMENTS OF RIO TINTO KENNECOTT COPPER LLC ON ROCKY MOUNTAIN POWER'S APPLICATION FOR APPROVAL OF 2017 PROTOCOL** to:

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