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BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Application of Rocky Mountain Power, a Division of PacifiCorp, for a Deferred Accounting Order to Defer the Costs of Loans Made to Grid West, the Regional Transmission Organization	DOCKET NO. 06-035-163
In the Matter of the Application of Rocky Mountain Power for an Accounting Order to Defer the Costs Related to the MidAmerican Energy Holdings Company Transaction	DOCKET NO. 07-035-04 **PETITION OF THE UTAH INDUSTRIAL ENERGY CONSUMERS' FOR PERMISSION TO FILE BRIEF AND BRIEF IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT**

The electrical power customers[1] referred to hereinafter for convenience only as the "Utah Industrial Energy Consumers" or "UIEC," by and through their counsel, hereby petition the Public Service Commission ("Commission") for leave to file the accompanying Brief in Support of Motions for Summary Judgment as support of the motions filed by the Division of Public Utilities ("Division") and the Committee of Consumer Services ("Committee"). As set forth in

[1] The customers referred to include: Fairchild Semiconductor, Holnam, Inc., Kennecott Utah Copper Corp., Kimberly-Clark Corp., Praxair, Inc., Western Zirconium, and Malt-o-Meal.

the Division's and Committee's motions and further explained below, the Applications of Rocky Mountain Power Company ("RMP") asking for deferral of certain costs should be denied.

INTRODUCTION

On January 27, 2006, the Commission approved the acquisition of PacifiCorp by MidAmercan Holding Company ("MEHC") pursuant to the accompanying stipulation, which the Commission also approved. Thereafter, in March 2006, using a future test period of October 1, 2006 through September 30, 2007, PacifiCorp, the predecessor of RMP, filed a general rate case, which was designated as Docket No. 06-035-21.

On April 5, 2006, PacifiCorp filed supplemental testimony in Docket No. 06-035-21 in compliance with Commitment U23 of the merger commitments that MEHC had agreed to in conjunction with its acquisition of PacifiCorp. This supplemental testimony updated PacifiCorp's requested revenue requirement to account for costs and expenses associated with the MEHC acquisition of PacifiCorp. See Supplemental Direct Testimony & Exhibits of Thomas B. Specketer, at 2. This update included adjustments for workforce reduction expenses and severance costs. Id. at 3.

The parties to Docket No. 06-035-21 filed a Stipulation Regarding Revenue Requirement and Rate Spread ("Revenue Stipulation") on July 26, 2006. Pursuant to the Revenue Stipulation,[2] the parties to that docket, including RMP, agreed to a specific revenue requirement. See Revenue Stipulation, Rate Case Order, Docket No. 06-035-21 (Dec. 1, 2006). This Stipulation was approved on December 1, 2006. In approving the Revenue Stipulation, the

[2] RMP's comments about the Revenue Stipulation being the result of a black box settlement are irrelevant. Whether a settlement is a line-by-line agreement or a "black box" agreement, all items of dispute are settled unless specifically excepted in the settlement agreement. In this case, all items in dispute regarding revenue requirements, including the amounts requested for workforce reduction expenses and severance costs, were settled.

Commission concluded that it "provides revenues sufficient to recover *all costs of service* including those associated with new generation, transmission and distribution facilities required to provide safe, reliable and reasonably-priced service to Utah customers." Rate Case Order, at 15 (emphasis added).

On December 19, 2006, RMP filed an application requesting that the Commission issue an order to defer the costs of loans RMP had made to Grid West, a regional transmission organization ("RTO"), which RMP claims will unlikely be repaid to it. Concurrent with its request for the Commission to establish a reserve for these loans as non-recoverable, RMP also requested deferred accounting treatment for these costs for later amortization in rates. See Application for Deferred Accounting Order, at 1–2 (Dec. 19, 2006).

On January 24, 2007, RMP filed its application requesting that the Commission issue an order authorizing the Company to defer and amortize certain costs pertaining to severance payments associated with the reduction in workforce. RMP also asked for authorization to continue amortizing these severance costs that were included in the Company's general rate case, in Docket No. 06-035-21. RMP stated that it was requesting this accounting treatment so that it could preserve the opportunity to seek the recovery of these prudently incurred costs in rates in the Company's next general rate case. See Application for Accounting Order, at 1 (Jan. 24, 2007).

All testimony has been filed in this case. The costs that RMP is requesting be deferred for recovery in future rates were actually incurred or evident to RMP prior to or shortly after it filed its general rate case on March 7, 2006. There is no genuine issue as to any material facts. Utah law prohibits the Commission from permitting a utility to recover past costs. The costs at

issue are not associated with any unforeseen and extraordinary circumstances. Their recovery is prohibited by the well-recognized rule against retroactive ratemaking and should be prohibited.

Accordingly, the UIEC request that the Commission grant the summary judgment motions of the Division and the Committee and deny RMP's requests for deferral of the costs of loans made to Grid West and the costs related to the MEHC transaction.

BRIEF

I. THE RULE AGAINST RETROACTIVE RATEMAKING PREVENTS THE COMMISSION FROM GRANTING RMP'S APPLICATIONS FOR DEFERRAL OF COSTS.

Utah law prohibits the Commission from permitting a utility to recover past costs or unrealized revenues. The Utah Supreme Court stated: "[As a] general rule [] … *all ratemaking must be prospective in effect* and rates may be fixed only in general rate proceedings. Utah Dep't of Bus. Regulation v. Pub. Serv. Comm'n, 720 P.2d 420, 423 (Utah 1986) (citations omitted) (emphasis added) (hereinafter referred to as the "EBA Case"). A "retroactive" rate adjustment is one that allows a utility to recoup from future rates "costs that were greater than projected." MCI Telecomms. Corp. v. Pub. Serv. Comm'n, 840 P.2d 765, 770 (Utah 1992). The rule against retroactive ratemaking is not constitutionally mandated, but it is a well-settled Utah rule based on "sound ratemaking policies."[3] Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 777 (Utah 1994). The purpose of the rule is "to provide utilities with some incentive to operate efficiently." Id. at 778 (quoting the EBA Case, 720 P.2d at 420).

The rule against retroactive ratemaking makes *no* exception for "overestimates" or

[3] It is not only well recognized and well established in Utah, but is also well established throughout the United States. See, e.g., In re Cent. Vt. Pub. Serv. Corp., 473 A.2d 1155 (Vt. 1984); State ex rel. Util. Consumers Council of Mo., Inc., 585 S.W.2d 41 (en banc) (Mo. 1979).

"underestimates" of a utility's costs, or for mistakes in the ratemaking process based on the utility's inability to accurately forecast its revenues and expenses. Id. Except for fraud, the only other recognized "exception" to this rule is when "an unforeseeable event results in an extraordinary increase or decrease in expenses or revenues." MCI, 840 P.2d at 771. An "unforeseeable" event is one which is "inherently unpredictable," and which is not a result of "company mismanagement or imperfect forecasts." Id. The Utah Supreme Court stated:

> [t]he extraordinary *and* unforeseeable nature of the expenses recognized under the exception differentiates them from expenses inaccurately estimated because of a misstep in the ratemaking process, *such as the inability to predict precisely*, or from mismanagement. An increase or decrease in expenses that is unforeseeable at the time of a ratemaking proceeding, cannot, by hypothesis be taken into account in fixing just and reasonable rates."

Id. (Emphasis added). Thus, the "exception" is appropriate *only* when an event is sufficiently unpredictable that it would be *impossible* to account for its effect in a rate case, *and* only when the effects of the unforeseen event are *so beyond expectation* that it would be unjust and inequitable not to adjust rates accordingly. See also Stewart, 885 P.2d at 778 ("Because earnings or expenses caused by an unforeseeable event cannot be reasonably anticipated in the ratemaking process, justice and equity may require appropriate adjustments in future rates to offset extraordinary financial consequences.").

RMP requests that the Commission allow it to defer excess costs so that it can recover those past costs from the ratepayers sometime in the future. The costs at issue here, the costs pertaining to severance payments associated with the reduction in workforce, and the costs associated with loans made to Grid West, are merely costs that were greater than the utility originally projected. RMP's Applications are, thus, text-book examples of requests for

retroactive recovery of costs. These costs do not come anywhere near fitting into the recognized exception to the rule against retroactive recovery of costs.

With respect to the severance payment costs associated with the reduction in workforce, RMP filed an update to its last rate case, Docket No. 06-035-21, specifically to cover its estimated projections for workforce reduction expenses and severance costs. To now ask for deferred treatment of the costs resulting from RMP's obvious underestimating ignores well-established and well-accepted ratemaking principles.

Furthermore, RMP, as PacifiCorp, has been engaged in transactions with Grid West, in its many permutations, since at least 2000. RMP (as well as it predecessor entities) is a sophisticated corporate entity with the full ability to negotiate and execute commercial contracts. It was fully aware of what it was doing when it agreed to the obligations and risks associated with those contracts. It cannot now ask the ratepayers to bail it out of obligations it knowingly incurred as a result of commercial contract negotiations.[4]

RMP's Applications, at their core, are nothing more than a complaint that it was unable to predict the future. This is ironic coming from a utility that argues the public should trust its forecasting ability in rate cases based on future test years rather than the traditional historic test year.

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[4] A number of courts have held that cost increases alone do not allow the disadvantaged party to avoid obligations under a contract. See, e.g., United States v. SW. Elec. Coop., Inc., 869 F.2d 310, 315 (7th Cir. 1989) (If "the buyer forecasts the market incorrectly and therefore finds himself locked into a disadvantageous contract, he has only himself to blame and so cannot shift the risk back to the seller by invoking impossibility or related doctrines" (citations omitted)); Holmgren v. Utah-Idaho Sugar Co., 582 P.2d 856, 861 (1978) (rise in cost of operating and maintaining canals does not render contract void or voidable); Bernina Distribs. v. Bernina Sewing Mach. Co., Inc., 646 F.2d 434, 439 (10th Cir. 1981) ("cost increases alone, though great in extent, do not render a contract impracticable.").

In the absence of some unique, unforeseeable and extraordinary event, unpredictable forecasting has never been grounds for finding an exception to the rule against retroactive ratemaking. See In re Cent. Vt. Pub. Serv. Corp., 473 A.2d 1155 (Vt. 1984).[5] RMP does not allege any unforeseeable and extraordinary events and should be prohibited from recovering these costs.

CONCLUSION

Based on the foregoing, the UIEC request that the Commission dismiss RMP's Applications for deferral of the costs of loans made to Grid West and the costs related to the MEHC transaction.

DATED this 29th day of October, 2007.

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[5] In the cited case, the issue was whether a tariff that permitted recovery of past power costs fell under an exception to the prohibition against retroactive ratemaking. The court found that the petitioning utility's fuel costs constituted over 50% of the utility's operating costs, were fluctuating over time and were uncontrollable by the utility. Nonetheless, the court held that "[e]conomic risks are part of the utility business, and even the risk of economic catastrophe may properly be assigned to the owners of a utility company rather than to its consumers." 473 A.2d at 1161. Accordingly, the court denied implementation of the tariff and disallowed recovery of past fuel costs.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2007, I caused to be e-mailed and/or mailed, first class, postage prepaid, a true and correct copy of the foregoing, to:

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