



UAE seeks a determination from the Commission that RMP's July Application is inadequate and incomplete and, therefore, could not lawfully and properly take effect 240 days from filing pursuant to the provisions of Utah Code §54-7-12(3)(c). UAE first contends that it is

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incomplete because it does not specify, either totally or by schedule, the specific rate increases proposed by RMP, as required by Utah Code §54-7-12. Secondly, it is inadequate under Utah Code §54-7-12 because it does not reflect binding Commission orders from Docket 07-035-93 (the 2007 Docket) and relies upon assumptions in those orders that are inaccurate or uncertain. Lastly, it does not identify the agency actions RMP requests by identifying the specific changes in its tariff language, projections, amortizations, allocations, or methodologies as compared to the results of the 2007 Docket.

In reply to RMP's Response, UAE argues that simply because parties in the past have not challenged an incomplete application, this does not, of itself, establish any long-settled position or fundamental policy by the Commission that requires a change through rule-making. The Commission, UAE argues, has inherent authority to determine whether an application and its attendant schedules are adequate. UAE states that RMP admits it will need to file updates and supplements to reflect the recent rate case Order in the 2007 Docket, and that this amounts to tacit "evidence that the Application and Schedules as filed are inadequate and incomplete."

**Committee's Response and Reply**

The Committee's Response raises some issues similar to those raised by UAE. CCS also argues that RMP's July Application is deficient. It states that RMP must, in its July

Application, first establish that rates determined in the 2007 Docket are insufficient. CCS states that the August 11, 2008 Report and Order (August R&O) in the 2007 Docket mandated adjustments for the next general rate case, that the July Application does not include those adjustments, and that the adjustments must be made before the July Application can proceed.

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Because it did not incorporate the 2007 Docket adjustments, RMP has left its July Application with “indefinite evidence and open-ended analysis”, which makes it practically impossible for the Commission and others to determine just and reasonable rates from RMP’s July Application. Therefore, RMP’s July Application must either be dismissed or stayed, in order for RMP to conform its July Application to the August R&O.

The Committee also argues that the July Application potentially violates “fundamental principles of Utah public utility jurisprudence.” While it notes that the filing of concurrent applications does not *per se* compel the dismissal of the July Application, the Committee argues that such concurrent applications exacerbate difficulties already faced by the Commission. CCS points out that analysis of fact-intensive and complex information contained in the overlapping applications drains the Commission’s limited resources and time. The work involved in the review of overlapping applications limits the Commission’s ability to effectively manage the dockets, increases workload which in turn increases costs to taxpayers, and ultimately limits the Commission’s ability to adequately balance protection of ratepayers with the needs of the utility.

The Committee further states that the Commission need not act on a general rate increase application that is based in whole or in part upon expenses or revenues that were or should have been included in the 2007 Docket. To the extent the July Application contains expenses RMP claimed should be included in rates to be set in the 2007 Docket (i.e. any expense incurred or forecasted from July 1, 2008 to December 31, 2008), and which are not unforeseen or extraordinary, may not be considered in this July Application. Therefore, it should be dismissed.

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Further, CCS contends that principles of *res judicata*, and *stare decisis* prevent a utility from re-litigating facts and re-filing the same claims. Here, the Committee specifically argues RMP is prohibited from re-litigating any expenses contained, forecasted, or undisclosed, in the 2007 Docket, or that RMP now forecasts to be incurred in the same period.

**UIEC's Motion to Dismiss and Reply**

UIEC first argues that the doctrine of *res judicata* and administrative finality require the Commission dismiss the July Application. UIEC states that the application in the 2007 Docket contained a test year for a future period from July 1, 2008 to June 30, 2009. In the 2007 Docket, the Commission ordered that the test year would be the calendar year 2008. In the 2007 Docket, RMP made claims for certain expenses and revenues that would be incurred in the 2008 test year for that docket. UIEC claims, however, that RMP has included many of the same expenses and revenues in the new July Application, as were made for the period of time between July 1 to December 31, 2008, in the 2007 Docket. Additionally, the July Application provides for expenses incurred for the Chehalis plant, some of which RMP was aware during the 2007 Docket, and some of which it failed to include in the current July Application. To the extent the

July Application attempts to claim any expenses or revenue dealt with in the 2007 Docket, or to the extent RMP failed to include any expenses it knew or should have known about, it is prohibited from attempting to “relitigate” such items in this July Application under the doctrine of *res judicata*.

Second, UIEC argues that through its July Application, RMP seeks to recover past costs for a test period that partly overlaps the one ordered for the 2007 Docket. For

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example, RMP claimed certain net power costs and labor expenses in the 2007 Docket for July 1 to December 31, 2008, that were based on its own forecasts. RMP now seeks to “‘update’ the results for the last six months of 2008 because actual costs or revenue or increased information show [RMP’s forecasting mistakes]” in the 2007 Docket. Such an action by RMP, UIEC argues, is retroactive rate-making, is clearly barred by well-established case law, and requires the Commission dismiss the July Application.

Third, UIEC contends that the July Application violates principles of *stare decisis* and must be dismissed. UIEC points out that the Commission’s August R&O contained certain mandated adjustments for the next general rate case, which “are the established law that controls the case of Docket 08-35-38.” RMP’s refusal to incorporate the ordered adjustments of that Order before filing the July Application, violates the principles of *stare decisis* and requires dismissal.

Fourth, UIEC contends RMP merely seeks to avoid the Commission’s previous orders on cost, revenue, and test year issues, for the period of July 1 through December 31, 2008, by filing the July Application. Such an action by RMP is nothing more than a collateral attack on

the Commission's orders in the 2007 Docket, and requires the Commission dismiss the July Application.

Fifth, UIEC also claims that RMP's July Application is not adequate under the provisions of Utah Code §54-7-12. The July Application fails to file "appropriate schedules . . . setting forth the proposed rate increase or decrease." Utah Code §54-7-12(2)(a). It does not set forth the proposed rate increase, which prohibits the Commission from determining whether the

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current rates are just and reasonable, and therefore, could not lawfully take effect in 240 days. In short, the July Application's inadequacy prevents ratepayers from having a fair opportunity to investigate and challenge the rate increase application and must be dismissed.

Finally, UIEC states that because RMP did not meet the requirements of Utah Code §54-7-12, it forces the Commission, DPU, CCS and other intervenors like itself, into the position of wasting time and resources, gathering and analyzing information that should have been provided with the July Application. This improperly shifts RMP's burden onto regulatory bodies and other interested parties and prevents the regulatory process from working efficiently to protect the public interest.

Summarizing UIEC's Reply to RMP's Response, UIEC basically contends the Commission disfavors overlapping or "pancaked" rate cases, and that allowing such pancaked cases is not the long-established rule of practice before the Commission. It argues that any such practice has long been discontinued, should not be reinstated, and the July Application should be dismissed as just such a pancaked rate case. Also, UIEC states that making the kind of

adjustments made by RMP in the July Application are not the types of minor updates commonly made in the regular course of a rate proceeding. Rather the Amendments made by RMP are of such significance that it amounts to a new filing, which requires the July Application be dismissed.

**DPU's Motion and Reply**

DPU filed its Motion asking the Commission to find, as a matter of law, that RMP has filed a flawed application. DPU states that RMP has failed to incorporate rate increases or

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adjustments mandated by the Commission in the August R&O. Absent those incorporations, the July Application is incomplete. Additionally, RMP's failure to reflect the adjustments from the 2007 Docket is problematic in that it does not allow its experts to analyze contested and non-contested information in the July Application, and also apparently reflects expenses and costs for an overlapping period of time between the 2007 Docket and July Application. As such, Utah Code §54-7-12(3)(c)'s 240-day time period does not commence until RMP files a complete application.

DPU also contends the July Application fails to specifically identify the rate increases proposed by RMP, failing to include the appropriate rate schedules, and other information as required by Utah Code §54-7-12. Given the lack of required schedules, and other information, the Commission, ratepayers and other interested parties cannot know if the rate increase RMP proposes is in fact just and reasonable.

DPU makes similar arguments as other parties concerning the bars to the July

Application imposed by principles of *res judicata*, *stare decisis*, and collateral estoppel. DPU contends RMP cannot relitigate facts and refile the same claims. Here, DPU specifically argues RMP is prohibited from relitigating any expenses contained, forecasted, or undisclosed, in the 2007 Docket, or that RMP now forecasts for the same period.

DPU asks the Commission to stay the 240-day time period while RMP files a complete Application. Otherwise, if the Commission feels it cannot properly stay the 240-day time period, DPU asks the Commission to dismiss the July Application until RMP can comply

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with the requirements of Utah Code §54-7-12 and incorporate the adjustments ordered in the August R&O.

**RMP's Response**

RMP raises seven points in its Response to the Moving Parties' pleadings. First, RMP criticizes the movants' arguments that contend RMP may not file overlapping rate cases. RMP argues that the movants ignore long-standing practice before the Commission, since the late 1970s, for the Commission to bifurcate rate cases between revenue requirement and cost of service issues. This permitted the Commission to either grant the request or order another increase within 240 days, while still being able to resolve the cost of service issues until well past the 240-day mark. RMP supports its contention with a list of dockets where it states the Commission clearly permitted overlapping applications. This historic pattern has established a "long-settled position" and a "fundamental policy" for practice before the Commission, and, absent a rule change per the Utah Administrative Procedures Act, Utah Code §§63G-4-101 *et seq*



(UAPA), a change from such a practice is unreasonable and improper.

Second, RMP contends that, taken to their logical end, the movants' positions would necessitate starting the 240-day clock each time any party to a rate case updated or supplemented the revenue requirement, rendering the 240-day clock pointless. A public utility or other party changes position regularly based on information provided through discovery, expert testimony, negotiations, forecasted events that may actually occur, etc. Additionally, Commission orders, orders of other regulatory bodies, reviewing courts, etc. may also force a change in the utility's or other party's position. Parties may, and often do, update information

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submitted to the Commission, which is clearly proper. Not only is updating information a common practice, it is something contemplated by Utah Code §54-7-1(1), which encourages informal resolution. Updating information would be a natural result of the parties' negotiations. Given the common practice of updating information during a rate proceeding, RMP contends that the movants' positions that the 240-day clock restarts each time this information is updated cannot be correct.

RMP further responds that its use of a test period in the July Application overlapping that in the 2007 Docket is completely proper according to the test year statute and case law. The Commission may use a test period based on historic data, future projections, or a mix of the two. *See*, Utah Code §54-4-4(3)(b)(i)-(iii). In any application, the test year period and rate effective period are not necessarily identical, and the use of the same or overlapping test periods does not necessarily result in duplicative rate recovery or retroactive ratemaking. The

point, RMP contends, is to select a period that most accurately reflect conditions during the rate-effective period, even if part of the test year overlaps. Because the rate-effective periods will be different for the 2007 Docket and the 2008 Docket, RMP can still use test periods that overlap in part. RMP also points out that some of the movants' reliance on orders from Docket Nos. 83-035-06 and 84-035-01 is misplaced. The Committee uses those orders to argue that using overlapping test periods is disallowed. RMP points out, however, that the orders are actually limited to the context of interim relief—an interim rate increase, and the Commission's concerns with a lower evidentiary burden a company has in interim rate cases versus those where a "full evidentiary" standard applies. RMP affirms that in this matter, the parties will be afforded full

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due process, including the right to fully and adequately analyze and challenge any issues arising out of an overlapping test period. RMP also contends that it is not including expenses that were known or reasonably foreseeable at the time it commenced its 2007 rate application, i.e. for the Chehalis plant. The plant, RMP states, was not acquired until after the 2007 Docket commenced and its expenses would not have been included in the 2007 Docket. In short, RMP contends it has not engaged in retroactive ratemaking.

Fourth, RMP argues the movants' arguments run contrary to legislative intent manifest in the public utility statutes, the Commission's order and the movants' own evidence. RMP argues that the legislature's allowance of future test periods was a response to concerns that utilities did not have adequate opportunity to earn the authorized rate of return due to regulatory lag. The movants' arguments, if accepted, would obviate the possible benefit of a future test year

by allowing the time for issuing a revenue requirement to extend beyond the 240 days from the filing of an application. Additionally, RMP contends the Commission, in addressing RMP's concerns about limiting the test period to a time less than 20 months after the 2007 Docket was filed, recognized that one way for the company to deal with such concerns was to file more frequent rate cases. This, arguably, could mean the filing of a new rate case before the revenue requirement in a prior case was determined. Finally, RMP argues UIEC's own expert witness acknowledged that RMP should deal with regulatory lag by filing rate cases more frequently, precisely what RMP has done here. The movants, especially UIEC, cannot now complain.

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Fifth, RMP claims its schedules filed with the July Application comply with the provisions of Utah Code §54-7-12 and other appurtenant statutes. The plain language of the relevant statutes shows that RMP has complied with the required provisos by attaching the tariff pages listing the rates in effect if the rate decrease or increase is approved. The exhibits include the proposed changes in the tariff pages, showing the rate and charges proposed for each class of customers to reach the revenue requirement. RMP submits that no comparison between rates proposed in the July Application and those ordered in the 2007 Docket is necessary. The statute does not explicitly require that rate increases or decreases be expressed in comparison with existing rates, but merely mandates that schedules set forth the proposed increase or decrease. The exhibits already do that, RMP argues, by complying with the Commission rules by placing an "I" in the margin indicating an increase. Nowhere does the rule require that schedules show a

comparison between current and proposed rates. Also, even if the rule did provide that, the schedules do list increases in the proposed rates as compared to rates in effect when the 2007 Docket commenced. Further, RMP contends that exhibits give sufficient information to the Commission and all interested parties to determine the effect of the increase or decrease in rates and allows them sufficient time to determine if they wish to participate in the proceeding. Additionally, the schedules attached establish the rates that will be in effect if the Commission fails to act on the July Application within 240 days. Namely, the effect will not be \$160.6 million rate increase over the rates then in effect, but will be the \$160.6 million over those effective July 17, 2008. The July Application complies with applicable statutory requirements and the 240-day time period commenced as of July 17, 2008.

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Sixth, RMP argues *stare decisis* does not prevent it from petitioning the Commission to change its position on costs disallowed in the 2007 Docket. RMP argues it could not have violated principles of *stare decisis* as it filed its July Application before the August R&O was issued—there was simply no order to contravene at the time the July Application was filed. Additionally, nothing prohibits RMP from asking the Commission to change its position based on the facts presented in the July Application. Further, case law explaining the role of *stare decisis* in administrative proceedings differentiates between decisions made on issues limited to the instant case—for example, levels of costs, versus rulings meant to apply prospectively, as a general rule of law, e.g. the recovery of charitable contributions, etc. RMP claims it remains to be seen what portions of the August R&O are meant to be limited and which are meant to apply prospectively.

Finally, RMP denies its July Application is barred by *res judicata*. *Res judicata* cannot bar the issues in the July Application because determining “[w]hat constitutes a just and reasonable rate for . . . a future period” “cannot be decided on the basis of a prior rate proceeding, but must be determined anew in each rate case”. Additionally, the movants’ arguments that it could have raised expenses that would be incurred, i.e., expenses for the Chehalis plant, are wrong as they assume that RMP knew what those expenses would be even when it purchased the plant after it began the 2007 Docket.

### **Hearing**

On September 10, 2008, the Commission held a hearing on the parties’ moving and responding papers relevant to the 2008 Application. Yvonne Hogel of RMP and Gregory B.

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Monson of Stoel Rives, LLP, appeared on behalf of RMP. Paul H. Proctor, Assistant Attorney General, appeared on behalf of the Committee. Gary A. Dodge, of Hatch, James, & Dodge appeared on behalf of intervenor UAE. Vicki Baldwin of Parsons, Behle, & Latimer, appeared on behalf of UIEC. Michael Ginsberg, Assistant Attorney General, appeared for the DPU.

### **Discussion**

We begin our examination of the parties’ arguments and positions with a few observations obtained from our agency’s expertise and familiarity with ratemaking proceedings and from Utah case law. As we have stated on numerous occasions, a utility has “unequaled access to the financial and accounting information” relating to its operations. It also is the sole source for access to or knowledge concerning its business plans, past, present and future. *E.g.*,

Order Approving Test Year Stipulation, issued October 20, 2004, Docket No. 04-035-42, page 5. With the utility as the information gatekeeper, the Commission and all others participating in any regulatory activities and proceedings involved with utility regulation know only what the utility tells us concerning its plans, activities and operational information. *E.g.*, Report and Order, issued January 3, 2008, 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. There is concern about informational parity arising from the utility's control of access to, the flow of, the type of and the adequacy of the information made available to those outside of the utility. These include concerns about informational access affecting the balancing of inherent conflicts of interests between the utility and others, as the utility pursues what it believes is in its best interests and

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duties to its owners and other parties' need for information as they pursue what they believe is in their best interests and fulfil their responsibilities and duties. In this vein, the Utah Supreme Court has stated:

In the regulation of public utilities by governmental authority, a fundamental principle is: the burden rests heavily upon a utility to prove it is entitled to rate relief and not upon the commission, the commission staff, or any interested party or protestant to prove the contrary. A utility has the burden of proof to demonstrate its proposed increase in rates and charges is just and reasonable. The company must support its application by way of substantial evidence, and the mere filing of schedules and testimony in support of a rate increase is insufficient to sustain the burden. Rate making is not an adversary proceeding in which the applicant needs only to present a prima facie case to be entitled to relief. A state regulatory commission, whose powers have been invoked to fix a reasonable rate, is entitled to know and before it can act advisedly must be informed of all relevant

facts. Otherwise, the hands of the regulatory body could be tied in such fashion it could not effectively determine whether a proposed rate was justified. *Utah Department of Business Regulation v. Utah Public Service Commission*, 614 P.2d 1242, 1245, 1246 (Utah 1980)(Wage Case).

Although phrased in various ways, the Moving Parties have a common thread in their objections: the July Application for a general rate increase is flawed. A concomitant objection of the Moving Parties is that a Company effort to ameliorate the deficiencies in the July Application prejudices their participation in our proceedings on the July Application, in light of the 240 day limitation contained in Utah Code §54-7-12(3)(c). That code section provides:

If the Commission fails to enter the commission's order granting or revising a revenue increase within 240 days after the utility's schedules are filed, the rate increase proposed by the utility is final and the commission may not order a refund of any amount already collected by the utility under its filed rate increase.

The Moving Parties' objections broach a fundamental concern underlying any adjudicative process: fairness to the parties participating in the proceedings. In considering this point with

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respect to our proceedings on general rate cases and this particular docket, we are guided by statutory provisions, administrative rules and Utah case law dealing with fairness or due process aspects of adjudicatory proceedings.

Utah's statutory provisions regarding administrative adjudications are found in UAPA and provide relatively general guidance. *E.g.*, provision for how adjudicative proceedings are started, *id.*, §63G-4-201; provision for possible responsive pleadings, *id.*, §63G-4-204; provision for discovery and subpoenas, *id.*, §63G-4-205; and the conduct of hearings, *id.*, §63G-4-206. Although general in its tenor, UAPA incorporates concepts of fairness or procedural due

process. *E.g.*, hearings are to provide opportunity for “full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions,” *id.*, §63G-4-206(1)(a), and judicial relief is available if the agency’s adjudicatory proceedings have violated procedural requirements, *id.*, §63G-4-403(4)(e), or entrenched indicia associated with due process, *id.*, §63G-4-403(4)(h).

The Commission has a broad, general delegation of authority regarding utility regulation. Statutes having specificity to the Commission’s procedural process or to our regulatory process for a general rate proceeding are also general in their approach and quite limited in their procedural scope. A proponent of a rate change is directed to “file appropriate schedules with the commission setting forth the proposed rate increase or decrease,” Utah Code §54-7-12(2)(a). The Commission is required to provide reasonable notice and hold a hearing to determine whether the proposed rate change is “just and reasonable,” Utah Code §54-7-12(2)(b). If the Commission completes the proceedings, its deliberations and issues an order on a utility’s

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revenue requirement within 240 days after the initiatory filing, it may set interim rates and proceed with proceedings on final rate design, with ability to afford surcharges or refunds if final rates differ from the interim rates, Utah Code §54-7-12(3)(b)(i). If the Commission fails to fully complete the adjudicatory process and issue an order setting a revenue requirement within 240 days, whatever was proposed in the initiatory filing made under §54-7-12(2)(a) becomes final, and may be collected by the utility without possibility of refunds to customers even if the Commission should determine that they are too high (not ‘just and reasonable’), Utah Code §54-



7-12(3)(c).<sup>1</sup> Cognizant of these specific provisions, we exercise our delegated authority and the inherent ability of an adjudicative entity to set and control the process of its adjudicatory proceedings, mindful of due process concepts and the availability of judicial relief on appeal if we should err.

We have exercised our discretionary authority and set some procedural rules, Utah Administrative Code Rule 746-100, to provide additional substantive direction for our proceedings. As in this general rate proceeding, applicants are directed to submit a pleading which, in addition to other items, is to include the specific relief sought, relevant tariff or rate sheets, positions taken, and the basis in fact and law for the positions. Rule 746-100-3(G).<sup>2</sup> Following these rules and our usual practice, an applicant proposing a rate change will submit an

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initiatory pleading which is equivalent to a plaintiff's case-in-chief given in civil practice in Utah courts. As exemplified in this case, the Company's July Application has hundreds of pages of written testimony and exhibits provided to support the rate increases proposed by the Company.

Soon after the Company's filing of the July Application, the Moving Parties filed their motions, claiming particularized failings of the Company's actions and the July Application. The Company responds to all of the Moving Parties' motions in a single Response. The Moving Parties' have provided their individual replies. We address the arguments and

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<sup>1</sup>There are other procedural requirements given in §54-7-12 for "passthrough" proceedings and how rates may be set by electric and telephone cooperatives. These are not relevant to the issues raised in this docket nor to our discussion and decision.

<sup>2</sup>We also provide guidance on filing and service, Rule 746-100-4; appearance and representation, Rule 746-100-6; intervention, Rule 746-100-7; discovery, Rule 746-100-8; prehearing conferences and briefing, Rule 746-100-9; and hearing procedures, Rule 746-100-10.

positions taken on a combined basis as well.

**Adequacy of the July Application and Recognition of the  
Revenue Requirement Order from Docket 07-035-93**

The Moving Parties argue the July Application does not make recognition of the rate relief granted in the August R&O, nor the numerous rulings or decisions the Commission made on disputed issues in that order. They argue a rate case application must be ‘complete’ or ‘adequate.’ To comply with this position, an application must be consistent with Commission determinations/decisions or must explicitly identify the difference and explain why the prevailing Commission resolution should not be applied in the current case. The identify-and-explain-the-contrary requirement arises from the Utah Supreme Court case of *Salt Lake Citizen’s Congress v. Utah Public Service Commission*, 846 P.2d 1245 (Utah 1992)(Charitable Contributions Case).

There, the Court stated,

The adjudication of every case requires the application of one or more rules of law. A rule of law, whether pre-existing or newly established that serves as the major premise of an adjudicatory syllogism, necessarily governs all subsequent cases properly falling within the scope of the rule. This is so even when the particular facts in subsequent cases are different and res judicata does not apply. *Id.*, at 1252.

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In the Charitable Contributions Case, the Court ruled a years earlier decision of the Commission, that denied inclusion of charitable contributions in the calculation of a utility’s revenue requirement, was such a “rule of law” and had application in all subsequent rate cases, precluding inclusion of any charitable contributions in a revenue requirement, until such time as the Commission overruled the prior decision. The utility, Mountain Bell, argued that the inclusion of charitable contribution expenses in proposed revenue requirements contained in

subsequent rate case applications, with their accompanying evidentiary exhibits, constituted requests that the Commission change the controlling rule of law. The Court found this argument without merit. It stated,

Mountain Bell never filed a petition asking the Commission to rule on the issue or to reconsider its 1969 ruling [establishing the charitable contribution rule of law]. In fact, Mountain Bell never directed the Commission's attention to the issue, and the Commission never addressed it. Under these circumstances, it cannot be said that the Commission intended to change the rule of law by silence. . . . Rate-making proceedings are *not* to be conducted on the basis of gamesmanship. The disclosure of charitable contribution expenses near the end of a multi-page exhibit attached to financial statements and under the general heading of "Miscellaneous" expenses does not comply with Mountain Bell's duty to petition the Commission to change its ruling on charitable contributions. *Id.*, at 1254, 1255 (emphasis in original).

Here, the Moving Parties argue that the July Application does not include the rules of law the Commission established in resolving numerous disputed issues in the Company's last general rate case, Docket 07-035-93. Neither does the July Application draw the Commission's attention to these non-conformities and explain why the Commission should overrule them in this case.

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The Company acknowledges that the July Application does not conform to the decisions made in its last rate case. It argues that at the time it filed the July Application, the August R&O had not been issued and the Company expected to later update the July Application to incorporate the Commission's decisions. The Company argues that updating or amending pleadings, as a general rate case proceeds before us, has occurred in past dockets and is an established practice. At the September 10<sup>th</sup> hearing on the motions, the Company represented

that it had recently completed amendments to the July Application, to reflect the August R&O, and had sent what we will call an Amended Application to the parties the prior day by over-night delivery. Copies of the Amended Application were received at the Commission's office while we were conducting the September 10<sup>th</sup> hearing.

We agree with the Company that amendments to pleadings are allowed in our adjudicative process. Our procedural rule specifically provides "the Commission may allow pleadings to be amended or corrected at any time." Utah Administrative Code R746-100-3.D. *C.f.*, Utah Rules of Civil Procedure, Rule 15 (" . . . a party may amend his pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires.") Amendment is allowed, but on the condition that there is no prejudice or disadvantage to other participants. Considerations of fairness in our adjudicative proceedings are guided by considerations similar to those made in judicial proceedings. A primary consideration in whether amendment may be allowed is whether the opposing side would be prejudiced in not having adequate time to deal with the matters brought through the amendments. *Bekins Bar V Ranch v. Huth*, 664 P.2d 455 (Utah 1983). *See, also, Ringwood v. Foreign Auto*

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*Works, Inc.*, 786 P.2d 1350 (Utah Ct. App.)(cert denied, 795 P.2d 1138 (Utah 1990)) (In considering motions to amend pleadings, primary considerations are whether parties have adequate notice to meet new issues and whether any party receives an unfair advantage or disadvantage.).

Considerations of fairness and disadvantage take on greater weight and greater

sensitivity in our adjudication of general rate cases. Unlike a court's civil practice, where there is no time constraint on the parties' efforts to prepare for their day in court, Utah Code §54-7-12(3)(c) places upon us what the parties refer to as a 240-day clock. If we do not issue an order determining a utility's revenue requirement within that 240-day clock, parties opposing the rate increases sought by the utility suffer an adverse result. We must also note that the 240-day clock not only encompasses the parties' preparation for hearing, but requires also the completion of the hearing(s), completion of our deliberative process and composition or writing of our order setting forth our review and approval or disapproval of jointly supported matters, resolution of disputed issues, and the bases for our decisions which culminate in the utility's revenue requirement set by the order. A further distinction between the Commission and a court is that a court is faced with resolving disputes between the parties appearing before it, the interests involved and the impact of the resulting decision are limited to the parties appearing in the court. In our proceedings, we are required to weigh not only the positions and interests of the parties appearing in our proceedings but of those beyond, including the public interest. *See, MCI Telecommunications v. Utah Public Service Commission*, 840 P.2d 765 (Utah 1992) (Commission's approval of successive, unopposed stipulated rate reductions was inadequate.

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Commission is to give consideration/protection for the interests of a wide range of interests, including those not appearing.) In this light, the fairness considerations for our general rate case adjudications take in a greater swath than that of a civil court. Fairness and advantage/disadvantage are considered for an amendment's impact on the parties' participation

in our adjudicative proceedings, and also upon the activities or acts which the Commission itself must accomplish (our interests) and the public interest.

In this case, the Moving Parties do claim prejudice and disadvantage. That is the distinction with a difference to the Company's argument that amendment has routinely been allowed in previous rate cases. Where there has been no opposition to the amendments made, it is axiomatic to state that amendments are routine. Amendment is not routine where opposed. In a technical aspect, the Company's Amended Application is procedurally in error as the Company did not seek leave to amend its initiatory July Application and more than 30 days had passed since filing the July Application. *See*, Utah Administrative Rule 746-100-3.D (amendment may be made without leave if no response has been filed or time for a response has not run). We agree with the Moving Parties that the July Application is flawed and the Amended Application, submitted September 10, 2008, cannot relate back in time, for purposes of the 240-day clock, to the July 17, 2008, filing date of the July Application.

Utah Code §54-17-12(2) requires the filing of "appropriate schedules." As we have noted, practice before the Commission effectively causes a rate change proponent to file its case-in-chief as the initiatory pleading. And the Company has done so in its July Application. In the hundreds of pages comprising the July Application, the Company has provided testimony

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and exhibits of numerous witnesses and has also included tariff or rate sheets whose implementation would allow recovery of what the Company then believed was an appropriate revenue requirement based upon all of the assumptions, estimates, modeling and calculations

made in or supporting the July Application. In the course of the arguments made at the September 10<sup>th</sup> hearing, the Company conceded that filing tariff or rate sheets, although meeting a limited, literal reading of the wording of §54-7-12(2), likely would be insufficient to meet its intent or purpose. We agree with the view expressed by all parties participating in the September 10<sup>th</sup> hearing, that an initiatory pleading or a rate case application will fall somewhere on a continuum of what is clearly inadequate/incomplete to what is clearly adequate/complete.

The Company argues that the July Application is sufficiently adequate to comply with §54-7-12(2) and also to start §54-7-12(3)(c)'s 240-day clock. We likely would agree with this contention if we stopped at the July Application and went no further. However, we and the Company must go further. At the time of filing the July Application, RMP knew amendments to an application, filed at that time, would be necessary. RMP knew that within a matter of a few weeks, the Commission would issue its order in the 2007 Docket and RMP would need to account for the decisions made therein in any subsequent general rate proceeding. Without amendment, the July Application suffers the same defects as the subsequent rate case applications and supporting materials filed by US West and found fatally flawed by the Utah Supreme Court in the Charitable Contributions Case, *supra*. The July Application fails to comply with what the Charitable Contributions Case opinion states is required from a rate change application and in a general rate case. The Company has attempted to comply with the

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Charitable Contributions Case requirements through the amendments made in the Amended Application.

We disagree with the Company's position that the amendments to the July Application have no effect on the application of §54-7-12(3)(c)'s 240-day clock, §54-7-12(2)'s appropriate schedules requirement or the due process interests of the complaining parties. The amendments needed to move from the July Application to the Amended Application, in order to comply with the Charitable Contributions Case and recognize the August R&O, are material. In addition to the changes necessitated to comply with the Charitable Contributions Case requirements, the Company has also included additional amendments in the Amended Application. *See, e.g.*, Supplemental Testimony of Gregory Duval, page 2, filed with the Amended Application. Amendments to incorporate our August R&O decisions regarding GRID modeling and application to revenue requirement determinations, alone, are important changes or amendments. The use of GRID is not akin to punching numbers into a handheld calculator. GRID is a sophisticated and complex computer model. Use of the model requires expertise and knowledge of how it operates, how it models operations, and how it performs its internal calculations, and skill and judgment are needed in the interpretation of its iterations and their application in setting a revenue requirement. All of this is subject to differing views or positions on whether it is done correctly. The use of GRID affects the estimation or calculation of over \$1 billion, on a system wide basis, and hundreds of millions of dollars, on a Utah allocated basis, of the Company's operating expenses. As shown in our August R&O, alterations involving only one item in GRID can result in differences of millions of dollars.

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The Company represents it took two months for it to take our decisions on disputed issues from the August R&O, analyze them and incorporate them into its amendments



made in the Amended Application. Although the Company unilaterally took two months of what it maintains is an applicable 240-day clock, that started with the July Application, it fails to recognize the other parties in this docket not only have also had to undertake an analysis of the decisions from the August R&O, but also have the additional chore of reviewing how the Company has incorporated the decisions into the amendments made in the Amended Application and also conclude whether they agree or disagree that the Company has properly made conforming amendments. The Company's arguments and position that this has no impact on fairness or due process considerations, particularly with awareness of the effect of the 240-day clock, is unpersuasive. The Company knew it would have to comply with the Charitable Contributions Case standard and incorporate or distinguish decisions made in Docket No. 07-035-93's order in any subsequent rate case application. The Moving Parties have not had access to a Charitable-Contributions-Case-conforming rate case application until September 10, 2008.<sup>3</sup> The amendments made in the Amended Application changed the overall revenue requirement calculation which the Company believes is justified. The changes have also required modification of the tariff or rates sheets through which the Company's revised revenue

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requirement could be collected. Importantly, the changes in the overall revenue requirement and

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<sup>3</sup>We do not conclude the Amended Application is a conforming application. The Company represents that the amendments made therein deal with the August R&O, but it is only that, a representation and the other parties have yet had opportunity to review the Amended Application. We also note the Company is required to provide us and the parties with an updated GRID Model itself and explanation of the modifications it has made, not just the reports or output from the model. This has not occurred.

changes in necessary tariff provisions arise from changes in the Company's arguments, reasoning and calculations from the July Application to the Amended Application. We conclude the effects of these changes are to the detriment and with prejudice to the Moving Parties, *Ringwood, supra*, and *Bekins Bar V Ranch, supra*, if we make no accommodation to the 240-day clock which the Company argues began to run from July 17, 2008.

We recognize the simplicity of the argument made by the Moving Parties that a clear way to avoid the prejudice, caused by allowing the Company to take up 25 percent of a 240-day clock until an arguably appropriate rate case application was made, is to dismiss the application. Dismissal is an alternative to allowing amendment as an available tool or step in the procedural process. Dismissal of the July Application would remove any argument or ambiguity that a 240-day clock, which started with a July 17, 2008, filing date, is applicable. We conclude, however, that we need not dismiss this case to cure the disadvantage and prejudice arising from the Company's amendments. The hundreds of pages made in the additional pleading comprising the Amended Application were not to totally supplant the filing made in the July Application. There are many unmodified or unaltered matters, information and calculations contained in the July Application upon which the Company would continue to rely and advance as justification or support for a rate change request. If the July Application were dismissed and we were left only with the Amended Application, these would no longer be available. This would necessitate that the Company would need to, yet again, provide additional amendments to replicate what would be lost through dismissal of the July Application. In lieu of dismissal and causing recycling of

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what was dismissed, we believe we can prevent the prejudice and disadvantage arising from amendment by starting §54-7-12(2)'s 240-day clock from the submission date of the Amended Application, September 10, 2008. As we have discussed, this is the date on which the Company provided, to us and the other parties to this case, a rate change application with all of the data, testimony and exhibits which arguably meet the requirements of the Charitable Contributions Case and through which it begins to meet its Wage Case burden of proof to support the actual rate changes proposed by the Company (at least its latest position on them).<sup>4</sup>

At our August 20, 2008, Scheduling Conference on Test Year Matters, the parties noted the importance of the Commission's ruling on the Moving Parties' pleadings and their desire that the Commission issue its ruling as soon as possible to assist the parties in preparing for the rest of these proceedings. We conclude we will issue our order resolving the major dispute common to all of the Moving Parties and RMP without addressing each of the alternative or complementary arguments raised in an individual pleading regarding the July Application. Through our resolution of the major issue and this order, we effectively achieve the same remedial end sought through the alternative arguments.

Wherefore, based on our discussion herein, we enter the following

ORDER

Rocky Mountain Power is permitted to amend its July 17, 2008, Application (as it has done through the September 10, 2008, filed amendments) only if Utah Code §54-7-12(3)'s

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<sup>4</sup>However, we make no decision on the actual conformity or sufficiency of the Amended Application, *see*, footnote 4.

240-day time period is applied and commences with the filing date of the latter amendments, September 10, 2008.

DATED at Salt Lake City, Utah, this 23<sup>rd</sup> day of September, 2008.

/s/ Ted Boyer, Chairman

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/s/ Ric Campbell, Commissioner

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/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard  
Commission Secretary  
G#59137