

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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In the Matter of the) TRANSCRIPT OF

Application of Rocky) PROCEEDINGS

Mountain Power for)

Authority to Increase its) Docket No.:

Retail Electric Utility) 08-035-38

Service Rates in Utah and)

for Approval of its)

Proposed Electric Service)

Schedules and Electric)

Service Regulations)

)

September 10, 2008 * 8:30 a.m.

Location: Public Service Commission

160 East 300 South

Salt Lake City, Utah 84114

Before: Ted Boyer - Chair

Ric Campbell - Commissioner

Ron Allen - Commissioner

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1 P R O C E E D I N G S

2 CHAIRMAN BOYER: Let's go on the record.

3 This is the time and place we've duly
4 noticed for the hearing of various motions in Docket
5 number 08-035-38, which is styled in the matter of
6 the Application of Rocky Mountain Power for Authority
7 to Increase its Retail Electric Utility Service Rates
8 in Utah and for approval of its Proposed Electric
9 Service Schedules and Electronic Service Regulations,
10 sometimes known as the 2008 Rate Case.

11 I believe Ms. Orchard of our office has
12 given courtesy calls to each of the lawyers involved
13 in this case, letting you know how we wish to
14 proceed. And basically we have allocated two hours
15 this morning, till 10:30. We thought we'd begin with
16 the moving parties, giving each moving party ten
17 minutes to make their best arguments. As always,
18 we've read the pleadings, all of the memoranda. And
19 then we'll give Rocky Mountain Power, who is
20 responding to multiple motions, some of them overlap
21 and some of them don't, we'll give them 20 minutes.
22 And then the moving parties will have the last say,
23 say five minutes or so. See how that goes. And the
24 Commissioners may have questions as well.

25 Any questions about how we intend to

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1 proceed?

2 Okay. Well, let's make appearances for
3 the record then, please. Beginning to my right, your
4 left.

5 MR. PROCTOR: Paul Proctor, on behalf of
6 the Utah Committee of Consumer Services.

7 MR. GINSBERG: Michael Ginsberg, for the
8 Division of Public Utilities.

9 MR. MONSON: Gregory Monson, for Rocky
10 Mountain Power.

11 And I should note that I've also entered
12 an appearance in this case for Questar Gas. But
13 Questar Gas has consented to my representing Rocky
14 Mountain Power on these motions in this hearing today
15 and I am representing Rocky Mountain Power today.

16 CHAIRMAN BOYER: Very well, Mr. Monson.

17 MS. HOGLE: Yvonne Hogle, for Rocky
18 Mountain Power.

19 MS. BALDWIN: Vicki Baldwin, on behalf of
20 UIEC.

21 MR. DODGE: Gary Dodge, on behalf of UAE.

22 CHAIRMAN BOYER: I think what we'll do is
23 begin with the Division, because of the partition,
24 then we'll move then to Mr. Proctor, for the
25 Committee. We'll go then to Ms. Baldwin and then Mr.

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1 Dodge, just because of the way you're seated.

2 And with that, Mr. Proctor, you have the
3 floor.

4 MR. PROCTOR: I think Mr. Ginsberg has the
5 floor.

6 CHAIRMAN BOYER: I mean Mr. Ginsberg.
7 Yeah. Hold on, Mr. Proctor.

8 MR. GINSBERG: Thank you.

9 Good morning, Commissioners.

10 I'd first like to start and make it clear
11 exactly what the Division is requesting the
12 Commission to do. And it's on page 2 of our
13 response. And I believe it somewhat differs from
14 what the other parties who have filed motions have
15 requested. Probably closest to what UAE has
16 requested.

17 And the main issue that the Division is
18 requesting the Commission to do is order the Company
19 to make a supplemental filing, bringing its 2008 rate
20 case into compliance with the order issued in the
21 2007 rate case. Once those filings are made, we
22 believe the Commission should restart the 240-day
23 clock. And then after that takes place, then the
24 parties can file motions on test year, if that's
25 still relevant, or on whether or not an overlapping

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1 test year is appropriate or inappropriate, whether
2 res judicata applies to individual issues or the
3 whole case or whether retroactive rate making somehow
4 has an applicability here. But the number one issue
5 is getting that supplemental filing filed.

6 You know, it's now one month after the
7 Commission issued its order and two months after the
8 Company filed its rate case. I assumed that the
9 Company would have made their supplemental filing
10 before today. But here we are, sitting here at this
11 hearing and the Company has made no filing to bring
12 its 2008 rate case into conformance with the
13 Commission's order that was issued in August. It
14 seems to us and it's just fundamentally unfair that
15 the party who has the burden of proof, being the
16 Company, can file an incomplete and inadequate
17 application that does not represent the rates that
18 could possibly go into effect at the end of 240 days
19 and eat up the time clock against all other parties
20 who are forced to respond to the rate case that Rocky
21 Mountain has filed. It seems clear to us that the
22 Commission should have the authority to be able to
23 deal with inadequate and incomplete initial filings
24 by telling the Company that their filing is
25 incomplete and requiring a supplemental filing.

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1 The Company raises a number of prior cases
2 where orders were issued -- rate cases were filed
3 before the orders were issued. And talks about how
4 it's a standard practice to have updated filings
5 during the rate case. It seems fundamentally
6 different that an initial filing by the Company is
7 inadequate and cannot be implemented then, whether or
8 not updates can take place.

9 I think I like the way UAE put it, and
10 there is a level where you can go from -- in the
11 absence of rules, whereas the Commission can have
12 rules clearly stating what has to be filed in rate
13 cases, what constitutes appropriate schedules, as the
14 statute uses the term, but in the absence of that,
15 there is a continuum between complete inadequate
16 filings that require the restart of the 240-day clock
17 to those that don't. The Commission would base their
18 decisions on appropriate motions that are made by
19 parties and can judge each application on its own to
20 determine whether that filing is adequate enough to
21 constitute appropriate schedules that can allow a
22 rate case to go forward. Or even during a rate case
23 where fundamental changes are made in the rate case
24 filing that would put all parties at an unfair
25 advantage to allow the 240-day clock to tick on by

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1 the Company's control or when they file their
2 information.

3 The DPU is so, I think, concerned about
4 the practical problems associated with having an
5 inadequate filing, not having the new updated
6 schedules reflecting the last rate case, that it
7 submitted two affidavits to try and explain to the
8 Commission the position that is being -- the parties
9 are being placed in by not having the filing,
10 updating the information from the last rate case.
11 And this is particularly a problem for net power
12 costs. And those affidavits, I think, make it clear
13 that it's an unfair advantage that the Company is
14 taking and now eating up a quarter of the 240 days
15 without having a complete application.

16 I think the Commission is faced with a
17 decision of whether at least some differences between
18 some of the filings of whether to -- it's required to
19 dismiss the application or it can order a
20 supplemental filing and restart the 240 days. I
21 think we view that if the Commission is so concerned
22 about their authority to take control of proceedings
23 and tell the Company that their filing is inadequate
24 and is incomplete and cannot go forward, that a
25 dismissal may be warranted. And we think you have

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1 the authority, under the statute, to determine up
2 front in rate cases what are appropriate schedules to
3 be filed in a general rate case. And can find in
4 this case that the schedules and information the
5 Company has filed is inadequate until the
6 supplemental filing is made that incorporates the
7 last general rate case. When that filing is made, we
8 think you have the authority to say that that's when
9 the statutory 240-day clock begins to run.

10 I think there are sufficient legal bases
11 that have been outlined in our filing and in the
12 others that provide you, I think, the legal
13 justification for considering the filing made by the
14 Company inadequate and incomplete, granting you the
15 authority to tell the Company that it is incomplete
16 and ordering a supplemental filing. I think they
17 were well outlined in the filings and I don't intend
18 to go into it any more this morning, unless you have
19 questions. I think the main issue I wanted to raise
20 with you this morning was the practical problems that
21 are being caused by the time clock ticking away
22 without this supplemental filing having taken place.

23 Thank you.

24 CHAIRMAN BOYER: Thank you, Mr. Ginsberg.

25 Mr. Proctor.

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1 MR. PROCTOR: Thank you, Mr. Chairman,
2 Commissioners.

3 What -- what strikes me as particularly
4 important and persuasive in this particular matter
5 and on these motions is that you have the entire
6 spectrum of consumers and regulators who have said in
7 essence the same thing. And that is, that Utah law
8 has established a certain scope and character for
9 regulating a monopoly utility. I think you will see
10 a great deal of uniformity amongst all the arguments.
11 You have already seen that, in the original motions
12 and in the replies. You've also seen that while they
13 may have different perspectives on a particular
14 issue, the theories and the ultimate result are all
15 the same. And that is, as Mr. Ginsberg has said,
16 this application, filed in July of 2008, because it
17 is so deficient is fundamentally unfair to that broad
18 spectrum of consumers and regulators.

19 For example, the Company's approach to the
20 240 day time period that is framed in the statute
21 seems to assume that it is purely procedural, that it
22 has no meaning to the merits of their particular
23 case, no meaning to the significant and substantive
24 process that the statute requires. It's as if they
25 issued a summons and didn't serve it in time, so they
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1 have to issue another summons. But the time still
2 keeps running.

3 As we have -- the Committee described in
4 its reply, there are certain reasons why the 240 day
5 limit is there. These are matters that affect every
6 citizen within the State of Utah. These are matters
7 that affect the financial integrity of the utility
8 upon which every citizen depends. And they are also
9 matters that are absolutely critical for the
10 Commission if it is to perform its statutory duties
11 to scrutinize those applications because you must
12 bear in mind that this is a regulated monopoly. And
13 the operative word there is "monopoly." Without
14 these types of proceedings, the monopoly is
15 threatened and it is not regulated.

16 They suggest in their -- in their response
17 that there is a disconnect between the financial
18 information that is contained within their -- the
19 initial filing and the pending 2007 case. There is a
20 disconnect between the initial filing and any
21 forecasts or projections that it may be based upon,
22 suggesting that they can, if they wish, if they
23 choose, make updates to it. But those updates can
24 come at any time within the 240 day process. And no
25 matter when they are filed, they don't interrupt the
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1 passing of the 240 days because, according to the
2 Company, it's an insignificant, perhaps even
3 arbitrary, amount of time within which you must act.
4 As I said, it's much more than that.

5 The Utah scheme of regulation is not a
6 loose compilation of unrelated provisions. It is a
7 whole. Utah law has said always you have to read
8 these statutes as a whole. The 240 day period makes
9 a difference. The requirements for initial filing
10 make a difference. What a schedule is, the notice
11 provided by that -- those schedules, makes a
12 difference. Not only to your regulatory authority
13 and the ability to perform that, but also to the
14 consumers, the customers who have rights to notice,
15 plain information. And it also ignores the fact that
16 the Company has in all respects for all purposes a
17 heavy burden to prove its case if it wishes to
18 increase the rates or make changes to classifications
19 or charges.

20 You can also see within all of the
21 parties' motions that there is a recognition that
22 this Commission must consider properly-filed rate
23 increases. Now on page 2 and 3 of the Committee's
24 initial response there is a lengthy discussion of
25 what the Committee believes you should do and the
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1 practical realities of the regulatory process that
2 suggests what perhaps you must do. No party has
3 suggested that they cannot file another prospective
4 rate case. No party has suggested that if they are
5 to make a proper filing, that this Commission
6 shouldn't go forward and make the decision that it
7 needs to make and hold the hearings and permit the
8 parties to make their case. And there is a reality
9 that you have certain obligations to the Company and
10 you have certain obligations to the consumers. And
11 so that's why the Committee took the position very
12 similar, if not a mirror image, of the Division's
13 saying, "Make them refile this case, stop the 240
14 days" -- because that's critical to the regulatory
15 process -- "and give them an opportunity to make the
16 proper filings." And we've outlined what those
17 filings are. So the Committee, the Division, UAE,
18 UIEC, none of them have suggested anything other than
19 let this process work as it is designed and as it has
20 been working now for decades. And the cases that
21 this Commission has -- has addressed are all
22 supportive of that. The manner in which this
23 Commission has permitted the use of overlapping test
24 periods or restricted its use. Managed pancaked rate
25 cases, placed restrictions or limits on them. And
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1 also the way in which this Commission has addressed
2 the responsibilities of the utility to provide the
3 information necessary to permit the regulatory
4 process to go forward.

5 That's the Committee's position. It's
6 well stated. As are the other motions. And I
7 certainly have some things I suspect to say in
8 response to the Company. I would certainly like to
9 do that. But this would conclude my initial remarks.

10 CHAIRMAN BOYER: Thank you, Mr. Proctor.

11 Let' turn now to Ms. Baldwin. Welcome.

12 MS. BALDWIN: Thank you.

13 The only reason we are here today in this
14 difficult situation is because the Company did not
15 like the Commission's decision in the '07 case.
16 Instead of relying on their proper recourse under the
17 law and filing their petitions for reconsideration,
18 which they did do, they chose to also take an
19 improper measure of attacking the regulators and the
20 Commission in the press, with the Legislature and by
21 collaterally by filing this case.

22 The application in this case needs to be
23 dismissed because there are claims during the
24 overlapping period that are barred legally. And this
25 cannot be simply changed and amended by an updated

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1 schedule filing. There are claims that are barred by
2 the rule against retroactive rate making. In our
3 reply brief, we included as Exhibit O a response to a
4 data request in this matter where we had asked the
5 Company to show us their projections for net power
6 costs for their filing in the '07 case. Then we
7 asked them to also compare that to the filing in this
8 case. And that shows that they have taken the July
9 through December, their projections for those
10 periods, and now they have corrected those
11 projections and made new projections for July through
12 December, which is a book -- a textbook example of
13 retroactive rate making and it should not be allowed.

14 There are also claims in this case that
15 are barred by the doctrine of stare decisis. For
16 instance, the Commission, in issuing its '07
17 decision, issued a rule that going forward modeling
18 was supposed to be done based on certain inputs and
19 assumptions. Those rules of law were ignored by this
20 application. The Commission also made a ruling that
21 filings going forward were supposed to include
22 certain things. This application has ignored those
23 rules of law.

24 This application also has claims that are
25 in opposition to the doctrine of res judicata. The
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1 doctrine of res judicata does not just apply to those
2 claims that have been litigated already. It also
3 applies to claims that should have been raised, but
4 were not. And in this case, the Chehalis (ph) claims
5 there was adequate information at the time of the '07
6 filing. They were not made. They should have been
7 made. They cannot be made now. That's in violation
8 of the doctrine of res judicata.

9 Because there are claims that are legally
10 barred, this cannot be resolved by a simple update to
11 the schedules. There is the question of what
12 escalators they used in this case. Based on the '07
13 decision, what escalator should they have used? When
14 did those escalators begin? And how should we decide
15 that? What period should the ROE be applicable to?

16 And contrary to the Company's assertions,
17 history shows that overlapping test periods were
18 abandoned 23 years ago. Since that time, the
19 Commission has clearly and consistently stated its
20 policy for determining test periods, even since the
21 2003 amendments to the rules -- or to the statute.
22 Overlapping cases have not been used since the EBA
23 account was abandoned, and they have not been used
24 since the Charitable Contribution case by the Utah
25 Supreme Court set forth how stare decisis applies to

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1 administrative agencies, such as this Commission.
2 The Commission has no reason to return to using
3 overlapping test periods and the Company certainly
4 has not provided any sufficient evidence in this case
5 as to why we should return to such periods.

6 The plain reading of Section 54-4-4(3)
7 prohibits updates to purely forecasted test years.
8 The '07 case was a purely forecasted test year. The
9 Company is trying to circumvent that prohibition by
10 refiling the same case here again. And they should
11 be prohibited from doing that.

12 The utility is in control of all of the
13 information. The utility has the burden of proof to
14 support, with substantial evidence, why this
15 application is just and reasonable. The utility has
16 the obligation to inform the Commission of all of the
17 relevant facts. Because the application is not based
18 on current rates and has ignored the Commission's '07
19 decision, the Company has not met its burden of proof
20 and the application is legally insufficient.

21 We see this to be a similar situation to a
22 Rule 12(b)(6) case -- a Rule 12(b)(6) motion in a
23 court. A motion to dismiss for failure to state a
24 claim upon which relief can be granted. There are
25 claims that have not been stated with sufficient

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1 particularity. There are legal bars to certain of
2 the Company's claims. Therefore, we ask that the
3 application be dismissed without prejudice and then
4 it be later refiled as an amended pleading, as an
5 amended application in a way that overcomes the legal
6 deficiencies of the current application.

7 Given the short time, we don't plan to
8 address all of the arguments in our brief, but we
9 will be free to take questions on anything at a later
10 time.

11 Thank you.

12 CHAIRMAN BOYER: Thank you, Ms. Baldwin.

13 Mr. Dodge, please.

14 MR. DODGE: Thank you, Mr. Chairman.

15 You've got some pretty fascinating legal
16 issues presented before you. And this to lawyers is
17 like models to condiments, I suspect. We chose, as
18 UAE, not to get into those interesting issues. You
19 get to resolve them. We addressed a very simple
20 issue and made a simple request. And that is, we've
21 asked this Commission to determine whether this
22 application and these schedules are complete and
23 adequate under your rules, under Utah law and under
24 your expectations. We submit the Commission has the
25 inherent power, as has any administrative or

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1 adjudicative body, to determine when an application
2 before it is complete for purposes of the statutes
3 and rules for which they are submitted -- or in
4 connection to which they are submitted. Our and
5 other briefs go through a variety of Utah Code
6 sections and Commission rules, prior Commission
7 rulings that give you, I believe, ample grounds to
8 determine when an application is complete.

9 But I would like to -- and I will be
10 brief, but I'd like to just test Rocky Mountain's
11 theories by taking them to their logical extremes,
12 which of course is a known and true method for
13 testing whether or not a position can hold up and at
14 what point it crosses a line. And I'd start with the
15 notion what in Rocky Mountain Power's position would
16 prevent them from filing a one-page application for a
17 \$200 million rate increase and attaching schedules
18 that simply raise somebody's rates by that amount? I
19 don't believe there is anything in their position
20 that would prevent it. Now that would take that to
21 the logical extreme. But the point is, does the
22 Commission not have the inherent authority to say
23 that's not enough? And if it does, then at one point
24 does it draw that line? And I submit that's the roll
25 of adjudication that this Commission is tasked with:
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1 Has this application and these schedules crossed the
2 line of whether they're adequate under the intended
3 rules, the expectations of the parties, due process
4 and all other applicable concerns.

5 The second way that I'd test their
6 position, Rocky Mountain Power's position, to the
7 logical extreme is, what would stop it from filing a
8 rate case every month? So at any given time, when
9 you're in a rate case, you have 11 previous ones
10 still under consideration. And simply at the end of
11 each case updating the 10 -- the 11 cases in front of
12 it with those results. Again, logical -- I mean
13 absurd in terms of reality, but possibly. But my
14 point is, what's the legal position that would stop
15 them from doing that?

16 I submit that the legal line that this
17 Commission has to draw is, at what point is an
18 application and schedule sufficiently complete and
19 adequate that it's fair to the parties, to the
20 participants, that it provides all the notice and
21 information that both parties and the general public
22 deserve and need in order to know whether their
23 rights are sufficiently impacted to get involved?
24 And in this context, I submit that completeness and
25 adequacy under the Utah statutes is not met unless

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1 and until they can, at a minimum, incorporate the
2 results of a -- the most recent or impending rate
3 case order from this Commission. Because it's only
4 the delta between rates in effect at the time we're
5 analyzing the new rate increase and the requested
6 increase that is of any significance. The delta
7 between the request and an old set of rates,
8 policies, procedures and tariffs is not relevant and
9 not meaningful. The only thing that is meaningful is
10 the delta from the last Commission order going
11 forward.

12 My position is not that you should stop
13 the 240-day clock or that you should reset it. My
14 position is that if you determine this application
15 and these schedules are incomplete or inadequate,
16 that clock has not started. Once they've made a
17 filing that is adequate and complete, then it begins.

18 Thank you.

19 CHAIRMAN BOYER: Thank you, Mr. Dodge.

20 Mr. Monson, will you be arguing for the
21 Company?

22 MR. MONSON: I will.

23 CHAIRMAN BOYER: Very well.

24 MR. MONSON: Well, first of all, I wanted
25 to make a joke about Mr. Reeder, but he's not here so

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1 maybe that's inappropriate. There were some
2 questions raised about regulatory history in the
3 State of Utah and how things have been done. And I'm
4 not quite as old as Mr. Reeder, but I'm almost. And
5 I think I've been doing this almost as long as him.
6 So maybe that's why I was asked to come into the
7 argument.

8 Before addressing the arguments that have
9 been made by the parties, I want to make three
10 general comments.

11 First, I think we need to step back and
12 talk about what we're doing here. The purpose of
13 this case is to set rates for Rocky Mountain Power
14 and its customer that are just and reasonable. Just
15 and reasonable rates are rates that provide the
16 utility coverage for its reasonable costs incurred in
17 providing the service and include a return on capital
18 invested in providing that service. So -- and as Mr.
19 -- as the Committee recognized in argument today,
20 setting just and reasonable rates isn't just a
21 benefit for the Company, it's a benefit for the
22 customers. And if the rates aren't just and
23 reasonable and if they don't allow the Company to
24 recover its costs of providing the service, then
25 that's a detriment to the customers. It may provide

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1 a short-term benefit in lower rates, but it
2 ultimately provides a long-term detriment because, as
3 Mr. Proctor mentioned, it damages the financial
4 integrity of the Company. So resolving the Company's
5 application in this case in a manner that results in
6 just and reasonable rates satisfies the Commission's
7 mandate and ultimately benefits the Company, its
8 customers and the public interest in the State of
9 Utah. All the various arguments that are being made
10 by the parties about procedure and process need to be
11 reviewed through the prism of whether they seek to
12 promote or to thwart that objective of setting just
13 and reasonable rates.

14 The second comment. Some of the parties
15 have suggested that this is an exercise in
16 gamesmanship by the Company. Rocky Mountain Power is
17 not playing a game. Rocky Mountain Power's owners
18 have invested \$1.5 billion in this Company since the
19 acquisition took place and they have yet to take one
20 dime out of that -- out of the company. This is not
21 a game.

22 Third, the question's been raised and the
23 Division's main request for relief is that we be
24 ordered to provide updated schedules. And they
25 wondered why we didn't do it before the hearing.

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1 Well, I don't know why we didn't do it before the
2 hearing, but I do know that last night updated
3 schedules were sent by overnight courier to the
4 parties and to the Commission. And you'll receive
5 them, I assume, by 10:30 or 11:00 today. The Company
6 needed some time to review the order and to make
7 modifications to its application based on the order.
8 It hasn't ignored the order. I can tell the parties
9 that those schedules, the updated schedules, reduce
10 the revenue requirement request by approximately \$9
11 million. That, added to the \$36 million which the
12 Company granted in the revenue requirement order in
13 the 2007 case, means that the request to the Company
14 is now, instead \$160.6 million, approximately \$114.5
15 million. That filing moots or demonstrates the
16 fallacy of many of the procedural issues raised in
17 the motions. The Company didn't delay that filing to
18 try to play a game. The Company needed time to
19 review the order and to incorporate it into the
20 application.

21 I wonder what the parties think happened
22 when there was pancaked rate cases in the '70s and
23 the '80s. Do they think that the Company filed an
24 application that anticipated the new order? Of
25 course not. The Company filed an application based

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1 upon the then known facts and circumstances. And
2 then when the order came out, there was an update.
3 That's exactly what's happened here. And it didn't
4 start the 240-day clock over then and it shouldn't
5 start it now.

6 The parties have nearly three months
7 before they are required to file their responsive
8 testimony and they are already deeply engaged in the
9 discovery process. Dismissing the case or delaying
10 the schedule adds further confusion and complexity to
11 resolving the Company's need for new rates to reflect
12 new costs and does nothing to promote the goal of
13 setting just and reasonable rates.

14 So with that background, let me turn to
15 the arguments that have been raised.

16 The central theme of the Division's
17 argument, as Mr. Ginsberg has stated it, is that the
18 Company ought to be required to file amended
19 schedules. The Division's argument is essentially
20 that it needs the Commission to restart the 240-day
21 clock now because the Division could not perform its
22 audit and do its work without those schedules. Now
23 that the Company has made this filing, it's clear
24 that the updates should not restart the clock. The
25 filing did not impact the basic revenue requirement

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1 components of the case. It didn't in any way affect
2 the base period, which is what the Division's audits.
3 It didn't affect the test period. It didn't affect
4 capital additions and allocation methodology. It
5 simply narrowed and simplified the case. It did not
6 expand the scope of the case or increase the revenue
7 requirement. And so there is no need for any
8 additional time for review and processing.

9 Now the Division's argument that it needs
10 more time is inconsistent with what it did in the
11 last case. After the Commission issued its test
12 period order in that case, Rocky Mountain Power filed
13 updated exhibits essentially affecting every expense
14 component in that case. Those exhibits reflected a
15 much larger change in revenue requirement than the
16 exhibits that are being filed today.

17 In addition, the updating in this case has
18 occurred nearly a month earlier in the process than
19 it did in the 2007 case. The updated exhibits in the
20 2007 case resulted in a reduction of 60 to \$61
21 million and were filed 80 days after the application
22 was filed, or one-third of the way through the
23 240-day period. And by the way, we take the 240-day
24 period very seriously. We don't consider it
25 arbitrary. It's there to protect the Company.

26

1 That's why we think it's very important.

2 The updated exhibits in this case result
3 in a revenue reduction of 45 million, and 36 million
4 of which, by the way, the parties knew about when the
5 Commission issued its order. And they are filed
6 55 days after the application was filed. 25 days
7 earlier than in the last case.

8 So a critical question is, what's
9 different about this case that makes the Division
10 unable to do its job here when it was able to do it
11 in the 2007 case? The Division and other parties
12 argue that the difference is that the application in
13 this case was incomplete or that it was deficient.
14 And that's an important aspect of the argument of the
15 parties. Well, if you compare the application in
16 this case with the application in the 2007 case, they
17 are very similar. There is nothing less compelling
18 about this application than the application in the
19 2007 case. They both contain extensive testimony,
20 extensive exhibits, extensive work papers and
21 extensive schedules showing the rate changes that
22 we've proposed.

23 Mr. Dodge raises the question of the only
24 thing that's important about a rate change is the
25 delta. And I think the delta is important. But the
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1 schedules that are required to be filed with an
2 application are the schedules showing the new rates.
3 And the Commission's rules prescribe what those
4 schedules should have in them. And they don't
5 prescribe that you should have the delta; they
6 prescribe that you should have the new rate and you
7 should have in the margin of the exhibit the letter
8 "I" or the letter "D" to show that it's an increase
9 or a decrease from the existing rate. Following the
10 Commission's rules, that's what the schedules
11 require, that's what was filed in this case.

12 The application in this case consisted of
13 1,200 pages of material, including the testimony of
14 11 witnesses and 33 exhibits. It included two books
15 of work papers containing the results of operations
16 and the costs of service. In addition, the Company
17 voluntarily provided 90 responses to master data
18 requests. Those aren't required. That's voluntary.
19 Since the Company was -- since the case was filed,
20 the Division has sent 58 data requests. And the
21 Company has been required by the Commission to answer
22 them on a schedule 30 percent faster than in the 2007
23 case.

24 So what's different about this case? The
25 difference is that this case was filed before the
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1 revenue requirement order was issued in the last
2 case. Well, that's been done many times before this
3 Commission, particularly when using forecasted test
4 periods. People have dealt with. They can deal with
5 it. And as I say, doing it and updating those
6 exhibits results in a much less drastic change than
7 changing the test period in the prior case.

8 This case is no different than any other
9 rate case. Changes in circumstances occur after the
10 case is filed, requiring adjustments in the revenue
11 requirement. Parties have never been reticent about
12 proposing updates when they result in reductions in
13 the revenue requirement. And that's the case here.
14 And if the Commission -- if the Company believes
15 those reductions are justified, it accepts them. In
16 fact, in the last case, between the 2007 updated
17 filing on March 6th and the submission of the case to
18 the Commission in June, Rocky Mountain Power
19 decreased its requested rate increase by 25 percent
20 as a result of such changes. No one had a problem
21 dealing with those changes in that case, during the
22 course of that case. And no one should have a
23 problem dealing with them here.

24 Everyone acknowledges, and they can't not
25 acknowledge the fact, that the Commission and the

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1 parties used to deal with this situation all the time
2 back in the late '70s and early '80s. The Division
3 attempts to distinguish those circumstances on the
4 basis that the Energy Balancing Account was in place
5 then. This is correct. It was in place. But that's
6 a highly ironic argument for the Division to make and
7 it's also irrelevant. The fact is that the lack of
8 an EBA now illustrates why it's more important for
9 the Commission to proceed with this case and set just
10 and reasonable rates as quickly as possible, not the
11 opposite.

12 The Division also attempts to distinguish
13 the prior cases, and other parties do, on the basis
14 that they occurred before the Charitable
15 Contributions case. The Division claims that that
16 case imposed obligations on the utility to file
17 complete schedules. Or I guess the assumption is
18 they didn't have that obligation before. Well,
19 that's not correct. The utilities have always had
20 the obligation to file complete schedules and
21 complete applications when they file for a rate
22 increase.

23 Mr. Dodge says could we file one page and
24 attach schedules? Probably not. And we didn't do
25 that. We filed 1,200 pages, the testimony of 11
26

1 witnesses.

2 Yeah. I agree. There is some spectrum
3 here. We're not even close to the deficient end of
4 the spectrum. We filed the same kind of application
5 we file in every rate case. The only difference is
6 it was filed before the revenue requirement came out.

7 UIEC argues that we didn't take into
8 account in our application -- it's insufficient
9 because we ignored the rules of law established by
10 the revenue requirement order. Well, those rules of
11 law didn't exist when he filed the application, so
12 how could we have taken them into account? We've now
13 filed an update that takes them into account, to the
14 extent there are rules of law in the order.

15 You know, I think that -- as I think Mr.
16 Dodge said, there is a lot of -- I don't know if I'd
17 call them interesting legal arguments. I might call
18 them boring legal arguments. I don't think this case
19 is going to turn on those arguments. If I'm wrong, I
20 don't know if you can let me know some way because
21 I'd love to address them. I think we've addressed
22 them in our memorandum. I think it's pretty obvious
23 the res judicata, retroactive rate making and stare
24 decisis have no application to the issue before you.
25 The issue before you comes down to one simple thing,

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1 and that is, was the application the Company filed
2 adequate? And I believe that under any fair view, it
3 was totally adequate. The only thing it didn't
4 contain was updates to reflect this case. But the
5 Commission has consistently recognized in the 1979
6 through 1985 period that that's okay and that updates
7 can occur after a case is filed.

8 When I was representing Qwest in the '80s
9 on rate cases, the common practice was to have a test
10 period what was -- the case might be filed in
11 February of 1980 and the test period would be
12 calendar year 1980. And so at that point in time,
13 the test period was projected. But as the test
14 period went on, as the rate case went on, all the
15 parties, not just the Company, wanted updates to that
16 test period to make sure that the actual numbers
17 coming in how they compared with the forecast
18 numbers. Updates occurred right up to the time of
19 the order. No one has ever had a problem dealing
20 with that before. In fact, people have welcomed it
21 because it provides the Commission with the best
22 information available to make a sound decision on
23 what are just and reasonable rates for the benefit of
24 the Company, its customers and the State of Utah.

25 I little bit more on stare decisis.

26

1 The Charitable Contributions case said
2 that when the Commission issues an order saying
3 something like thou shall not include charitable
4 contributions in your revenue requirement request,
5 that that establishes a rule of law. And it's not
6 only applicable under that case, to the parties to
7 that case, it's applicable to everybody. It's like a
8 rule, like adopting a rule. Now we're being told
9 that if the Company -- if the Commission in its case
10 says, "You asked for 40 million in a certain expense,
11 but we're only going to give you 35 million," that
12 that's a rule of law. That's not a rule of law.
13 That's a judgement made based on the facts in a
14 particular case that was used in that case to set
15 just and reasonable rates for the future period, the
16 rate-affected period. And so I don't know whether or
17 not some of the Commission's decisions in the 2007
18 revenue requirement order are rules of law. And
19 that's -- that's an issue that can be discussed and
20 will be discussed during the course of this case as
21 it moves forward. But I don't think that very many
22 of them were. I think that -- and the fact is even
23 if they were, the Company can still, under the
24 Charitable Contributions case, can still request the
25 Commission to change its mind on those rules of law.
26

1 And in fact, the Charitable Contributions case
2 acknowledges Regely (ph), in which the Court said,
3 "The Commission can improve its mind, can change it's
4 mind based on new facts and circumstances. And can
5 change its view of what is in the public's interest."

6 So it's totally appropriate for the
7 Company to say we're going to accept these
8 adjustments, we're not going to accept these
9 adjustments, identify which ones the Company does
10 accept and argue them again in this case. That does
11 not ignore the prior case. It is not a collateral
12 attack on the prior case. Because what we're doing
13 is we're setting rates for the future. The rates
14 that were set in the prior case will be in effect
15 from August 13th to whenever the rates set in this
16 case go into effect. They won't overlap. They won't
17 be recovering losses from the prior period or lower
18 because of over earnings in the prior period.
19 They'll be the rates that are supposed to represent
20 the costs the Company's going to incur in the future.

21 I haven't -- let me see if I've addressed
22 UAE's arguments.

23 Oh, UAE said that the Company -- that the
24 Commission never specifically decided that pancake
25 rate cases were legitimate in prior periods, so

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1 that's really not a decision by the Commission.
2 Well, I think UAE understates what the Commission
3 did. Because the Commission carefully considered
4 whether it would allow pancaked rate cases and
5 whether or not overlapping test periods would be a
6 problem. It did so in the context of interim rates.
7 And it found, generally, that in the context of
8 setting interim rates that was a problem. But it had
9 no problem allowing them to be used in -- when the --
10 in the full evidentiary hearing that went before the
11 final rate order. And that's exactly what will
12 happen here. The Company hasn't sought interim
13 relief here. The Company is going to present its
14 evidence in the full evidentiary hearing. So that
15 protects against the concern.

16 And the Williams case, which was cited by
17 Rocky Mountain Power, but which was then also cited
18 by UAE is very interesting on this point because the
19 rule of law that was established in the Williams case
20 was not established by an order. It was established
21 by practice. The issue there was whether one-way
22 paging companies were public utilities and needed a
23 certificate of convenience and necessity. The
24 Commission had always just -- the companies had
25 applied for them. The Commission had always granted
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1 them. No one had ever asked whether they were a
2 public utility. The Commission never issued an order
3 on that. And then finally, a company came in and
4 said, "I don't think we're a public utility. I don't
5 think we need a certificate." And the Commission
6 said, "You know, now that we look at, I don't think
7 you do." And so the issue -- there was no prior
8 order on the subject. And yet the rule of law or the
9 long-standing position of the Commission was
10 established by practice. Just as it has been
11 established by practice here.

12 Now UIEC says, "No. That was abandoned
13 23 years ago." Well, the thing that happened 23
14 years ago was the Commission said, "We're going to
15 use historic test periods." They didn't say anything
16 about pancaked rate cases or overlapping test
17 periods. And by the way, there is nothing
18 inconsistent between having historic test periods and
19 having overlapping -- having a pancaked rate case or
20 in overlapping test periods. There is nothing
21 inconsistent about that. And so the Commission
22 didn't need to decide that. Didn't decide it. And
23 now we're coming into a time that's more like the
24 time period in the '70s and '80s where there is high
25 inflation, there is need to grow the system

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1 substantially to add new resources and there is
2 tremendous investment required. And so the
3 Legislature has now decreed that we will at least
4 consider using future test periods, just as the
5 Commission used to use back in the late '70s and
6 early '80s. And so looking back to that period is
7 very helpful to determine what's appropriate. It's
8 not a practice that was disavowed. The Commission
9 never disavowed it.

10 Some of the parties have cited Section
11 54(3)(3) as evidence that the schedules and the
12 filing here are inadequate. But as I've already
13 mentioned, the schedules that are required to be
14 filed under Section 54(3)(3) are exactly the
15 schedules that the Company has filed and the
16 schedules that are mandated by the Commission's rule.

17 Let me see if there is anything else I
18 need to cover.

19 Oh, there has been an argument about the
20 legislative intent and what the Commission's test
21 period order means. The Commission knows what its
22 order means, but I think -- I think that it's clear
23 that the legislature and the Commission and even Mr.
24 Lemon testifying for the UIEC in the last case
25 recognized that one way to deal with regulatory lag

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1 is to file rate cases more often. And that's what
2 the Company has done here.

3 We aren't rejecting -- we can't be -- UIEC
4 said that we filed this rate case because we were
5 dissatisfied with the results of the prior case. How
6 can that be? We filed this rate case before the
7 results of the prior case came out. We didn't know
8 what the results of the prior case were when we filed
9 this case. What we did know was that we had
10 increasing investments, increasing costs that were
11 not covered by the application in that case.

12 The moving parties have advanced a variety
13 of arguments in this case urging the Commission to
14 delay the setting of just and reasonable rates for
15 the future. Rocky Mountain Power has demonstrated
16 the flaws in these arguments. The filing of an
17 application for an increase in rates while another
18 cases is still pending has been a common and accepted
19 practice before the Commission in periods of time
20 similar to those we're now facing. It's common for
21 parties to change positions during the course of a
22 rate case in response to changed circumstances or the
23 positions of other parties. Allowing such changes is
24 the appropriate process for a rate case. It promotes
25 settlement. It allows the Commission to make

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1 decisions based on the best evidence available. And
2 it should not be discouraged by restarting the
3 240-day period.

4 The use of a test period in one case and
5 an overlapping test period in other case has been
6 done before. It's appropriate. It doesn't involve
7 retroactive rate making. The Commission doesn't
8 determine what the costs that are being -- that are
9 going to be recovered during the test period. The
10 Commission determines what the rates are that are
11 just and reasonable for the future period when rates
12 will be affected. And there is no overlap between
13 those periods.

14 The filing of a rate case before the
15 conclusion of a prior case is consistent with the
16 policy to reduce the deleterious affects in
17 regulatory lag. And the schedules filed with the
18 application in this case are complete and comply with
19 all legal requirements.

20 The Commission -- the Company is free to
21 seek modifications of decisions and doing so does not
22 violate the rule against -- doesn't violate the
23 principle of stare decisis and is not a collateral
24 attack on the Commission's order.

25 So based on the foregoing, the Company
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1 urges the Commission to deny the motions. Denying
2 the motions will promote the Commission's overriding
3 objective to set just and reasonable rates in the
4 best interests of the Company, its customers and the
5 State of Utah. In addition, it will avoid
6 unnecessary additional work by all parties.

7 Rocky Mountain Power also requests that
8 this Commission issue its decision on the motions as
9 expeditiously as possible.

10 Thank you.

11 CHAIRMAN BOYER: Thank you, Mr. Monson.

12 Let's give the moving parties another five
13 or ten minutes, if you need, to respond to what Mr.
14 Monson's said. And then we'll see if the
15 Commissioners have questions.

16 Mr. Ginsberg.

17 MR. GINSBERG: Thank you. I do have a few
18 comments.

19 I think I did hear Mr. Monson agree that
20 there is a spectrum upon which the Commission has the
21 ability to determine the adequacy of filings. I
22 think he would acknowledge that there are some
23 instances where the Commission could determine that a
24 filing made is so inadequate that -- or the
25 supplemental filing that is made is so significant

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1 that the 240-day clock should start to run again. I
2 think the Division and everybody should be thrilled
3 that the supplemental filing has now been made, or is
4 in the mail. And will allow all to now review it and
5 determine, you know, the bases upon which the
6 supplemental filing is made.

7 But I can't sit here like Mr. Monson and
8 say that as a result of this supplemental filing, as
9 a result of the two-month delay since the rate case
10 was originally filed or the one-month delay since the
11 order was issued that regulators and the personnel
12 within the Division and the consultants hired should
13 be able to just bone up and be able to complete this
14 within the time period left. I can't sit there like
15 Mr. Monson and say that. And that's why we filed
16 those affidavits to try and really focus this on the
17 practical problems that are being caused by the
18 filing being delayed.

19 Mr. Monson brought up that last case the
20 test year order came out and a supplemental filing
21 occurred with no restart of the 240 days. And that's
22 correct. And the Division thought it could deal with
23 that delay within the 240 days that was permitted.
24 But you'll note that when the Division filed its
25 testimony in the rate case, it tried to emphasize the
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1 significant problems caused by the way the test year
2 hearings are being handled where a month or so after
3 the filings occur, a whole new test year is filed.
4 And the problems that that caused, that's why we made
5 recommendations that could ultimately lead to test
6 year hearings being held before the Company has to
7 file or that the 240 days doesn't start until the
8 test year decision is made.

9 Nobody wants to delay these proceedings or
10 avoid -- delay rates being set that are found to be
11 just and reasonable. But everybody has to live
12 within a 240-day time period. That limited time
13 period needs to be viewed in light of the filings
14 that are being made and determine on a case-by-case
15 basis whether or not as a result of the supplemental
16 filings or -- that are made, whether 240 days needs
17 to restart. And in this case, we believe it should.

18 Thank you.

19 CHAIRMAN BOYER: Thank you, Mr. Ginsberg.

20 Mr. Proctor.

21 MR. PROCTOR: The first two pages of the
22 Committee's reply, filed on Monday, we pointed out
23 two instances in which the Company, we believe,
24 misrepresented the filings that the Commission -- the
25 committee had made, altering, quote, so that they

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1 supported the Company's position, omitting any
2 reference to the accurate Commission position with
3 respect to the schedule and the 240-day limit. And
4 we referred to that as setting the tone of the
5 Committee -- of the Company's response. That tone
6 has become louder and more troubling today.

7 The Company suggests that it's not
8 engaging in gamesmanship. Then why would this
9 company, two months after filing its rate case, and
10 in that rate case making the suggestion that indeed
11 they are not going to update anything at the time of
12 the hearing on these motions, say that updates are
13 coming coordinating with the '07 order and they'll be
14 here after this hearing is over with? Is that not
15 gamesmanship? Is that not another example of not
16 being candid, not being forthright? Because their
17 intention to incorporate the '07 order could have
18 been stated in July. At that point it was pending.

19 It's not gamesmanship to send out the
20 public statements that they have made and the
21 implications of those statements directed to
22 customers, to regulators? Is it not gamesmanship to
23 after these parties' replies were filed on Monday
24 withdraw portions of their request for
25 reconsideration, but insist that this Commission give
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1 it guidelines and tell it how it is that it should go
2 forward with this '08 case in connection with rate of
3 return? Is that not gamesmanship?

4 The tone is aggravated. The tone is
5 troubling.

6 The statutes the Committee cited in its
7 initial response set forth the boundaries of the
8 regulatory process. This particular application, the
9 2008 General Rate Increase, destroys those boundaries
10 from within and without by the way they apply those
11 statutes and by their conduct, the filings and the
12 omissions made outside of those boundaries.

13 These motions should be granted.

14 Mr. Reeder, UIEC, insists that indeed you
15 have no choice but to dismiss it without prejudice.
16 They must refile in its entirety. Other parties
17 disagree. The application should conform to Utah
18 law. When it does, only if it does, then would those
19 particular time periods within which the regulatory
20 process can work should begin. But until such time
21 as this is an adequate, complete filing, no action
22 should take place whatsoever.

23 The Committee's preference is to dismiss
24 it because we believe the Company's conduct and its
25 preparation would justify that.

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1 The realities of the regulatory process,
2 they are important issues, they do need to be
3 resolved, there must be certainty. But unless you
4 have the information upon which you can make a
5 certain decision, you should not permit those
6 boundaries to disappear and what was supposed to be
7 and must be a regulated monopoly becomes just another
8 monopoly.

9 Thank you.

10 CHAIRMAN BOYER: Thank you, Mr. Proctor.

11 Ms. Baldwin.

12 MS. BALDWIN: Thank you.

13 I first want to start by clarifying that
14 our position is not that all overlapping periods are
15 a problem. Each case needs to be looked at based on
16 the facts of that particular case. The facts of this
17 particular case, it is our position that the claim --
18 there are several claims that are legally barred in
19 this application due to the overlapping periods. And
20 we've explained those both in our argument here today
21 as well as our brief.

22 The reason the updates in the 2007 case
23 did not involve a big concern for us at that time was
24 because it did not have an overlap in periods. So it
25 did not include this trying to undue and untwine

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1 these legally barred claims from all of the other
2 issues.

3 The updates in the '07 and '08 case are
4 not known and measurable. The updates that were made
5 in the '07 case were not based on known and
6 measurable. The updates in this case are not known
7 and measurable. This is a future test year, just as
8 last year's -- the last case was a future test year.

9 Several times the Company has made the
10 argument that back in the '70s and '80s the
11 overlapping periods were accepted and that no one had
12 ever questioned them and therefore they should be
13 lawful, we should consider them lawful. Just because
14 an issue was never challenged, does not mean that
15 it's ipso facto lawful. It's the standard of Utah
16 law that unless an issue is placed directly before an
17 adjudicatory body, it's rarely addressed.

18 It is obvious that overlapping periods
19 have not been allowed. They have not been done.
20 They were frowned upon at least for 23 years. And I
21 put forth again, there is no reason to go back to
22 something that was abandoned 23 years ago in this
23 entirely different situation.

24 The Company claims that the EBA account
25 had nothing to do with why they were abandoned. Yet

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1 it provides no evidence of that. It's just a
2 statement they're making here today. And it has
3 provided no evidence as to why those cases were
4 abandoned.

5 I am putting forth to you that just
6 because no one challenged them at that time, but that
7 the Commission decided it was an improper way to
8 conduct rate making proceedings. And the Commission
9 knew that there was a better way and the Commission
10 proceeded in that way. And until we have substantial
11 information, substantial evidence, that we should go
12 back to that, we put forth today that we should not
13 go back to those days.

14 Let me make sure I have everything.

15 And I'm not sure -- I am old enough to
16 remember the '70s and '80s, and I don't think the
17 inflation today is as high as the inflation back
18 then. I recall 15 percent, 16 percent. I do not
19 think that today's situation is nearly as dire as the
20 Company makes it out to be.

21 I think that the last case was done in a
22 very well thought out -- the decision was very, very
23 well done. The Petition for Reconsideration will
24 look at the changes that the Company would like to
25 make to that decision. The Company's filing in this

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1 case has not indicated which things it has a problem
2 with. It just refiled the case that it had filed
3 before with some updates. And as the Utah Supreme
4 Court said, just filing another application without
5 making an issue of what it is you want updated is not
6 adequate. And the application in this case did not
7 do that.

8 And I think that that -- I covered all the
9 issues that I wanted to cover.

10 Thank you.

11 CHAIRMAN BOYER: Thank you, Ms. Baldwin.

12 Mr. Dodge.

13 MR. DODGE: Thank you, Mr. Chair.

14 Without being unduly repetitive, I'd like
15 to make four brief points.

16 The first one is the issue raised by UAE
17 is an issue of first impression by UAE and some of
18 the other interveners. There has been no ruling
19 cited from the '70s or otherwise in which the issue
20 of -- raised by UAE in this docket was resolved; that
21 is, is an application and the accompanying schedules
22 adequate and complete under Utah law if they do not
23 include the effects of a pending general rate case
24 decision and do not include the schedules that can
25 lawfully go into effect in 240 days or disclose the

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1 changes reflected by the utility in the new schedules
2 from those that will be in effect at the time the new
3 rate case is considered? The fact that no one
4 challenged the 2007 update is irrelevant. Not
5 challenging it does not mean the Commission made a
6 determination that it was appropriate. And I'll tell
7 you some of us considered a challenge in that case
8 because it did put people into a real bind time wise
9 and frankly led to probably some of the problems
10 we've had with the utility to want to file hundreds
11 and hundreds of pages of surrebuttal at the hearing
12 because things were so compressed as a result of that
13 update. Maybe it should have been challenged. It
14 wasn't. It is in this case. And it's an issue of
15 first impression.

16 Second, there is a fundamental difference
17 in any event between updating a case based upon later
18 discovered events, based upon mistakes that may be
19 pointed out or agreeing to accept other parties'
20 positions on the one hand, and that initial filing
21 that doesn't include schedules that could lawfully or
22 properly go into effect in 240 days. It's the
23 deficiencies in the initial filing that makes this
24 case different.

25 Third point, in response to the two
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1 logical extreme hypotheses that I hypothesized, Mr.
2 Monson admitted that there is a continuum and that
3 this Commission has the authority to determine where
4 on that continuum an application falls. I submit,
5 unlike Mr. Monson, that this falls on the deficient
6 end because of the points that I've made, their
7 schedules can lawfully go into effect and the
8 application does not point out changes being
9 requested from the current status quo.

10 The second one is, what would stop them
11 from filing one per month? He didn't address that.
12 I submit that the line the Commission ought to draw
13 that would stop them from filing one every month is
14 that if there is a general rate case pending with a
15 general rate case expected in the 240-day timeline,
16 that an application has to incorporate the results of
17 that ruling before it can be deemed complete and
18 adequate.

19 The last point, I believe nobody here, and
20 certainly UAE, is not here trying to gang up on the
21 utility. In fact, we admitted some time ago that the
22 test period we supported and still believe is the
23 correct test period may require more frequent rate
24 cases. We're prepared for that. That does not
25 excuse a filing that's incomplete upon filing and it

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1 fails to adequately notify the regulators or the
2 parties of the differences being sought in the new
3 case.

4 I'm pleased to hear that a new filing was
5 apparently sent out yesterday and presumably will be
6 filed today. The 240-day clock presumptively started
7 when they filed their first application, although now
8 it's been challenged. If this Commission determines
9 it's inappropriate and incomplete, then it doesn't
10 start until today presumptively if they've now -- if
11 they've now cured those deficiencies. And assuming
12 nobody else challenges it successfully, then that
13 240-day clock would begin immediately. We submit
14 that's the fair and right thing to do in balancing
15 the interests of all customers, regulators and the
16 utility.

17 Thank you.

18 CHAIRMAN BOYER: Thank you, Mr. Dodge.

19 Let's turn now to the Commissioners.

20 Commissioner Allen.

21 COMMISSIONER ALLEN: Thank you, Mr.

22 Chairman.

23 Quick question for Mr. Monson.

24 Did I hear you correctly, Mr. Monson,
25 assert that the 2008 initial filing was very similar

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1 in content into the 2007 initial filing, in terms of
2 the substance?

3 MR. MONSON: Yes. And I want to make sure
4 I didn't misspeak. It didn't contain the same
5 numbers. But in terms of the scope of the filing and
6 the projections and the bases for the test period and
7 all the requested rate relief, it's very similar.

8 COMMISSIONER ALLEN: Okay. Thanks.

9 And then I heard the Division address that
10 assertion a bit. But I haven't heard the other
11 parties, particularly the Committee, if you have any
12 observations about whether or not those filings --
13 because this is talking about whether or not the
14 filings are substantially similar in some case, in
15 some way. I want to know if you have any
16 observations about that?

17 MR. PROCTOR: In our initial response we
18 addressed the fact that the last -- the first six
19 months of their now proposed test period has already
20 been resolved. And all of the -- by the August 11th
21 order. And the legal implications of that with
22 respect to whether or not the 2008 rate case is
23 complete or whether or not it can go on at all,
24 whether parts of that have in fact been -- are
25 subject to the findings and conclusions and the order

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1 that this Commission has issued. UIEC also addresses
2 that probably more thoroughly and more articulately
3 that I do. But that is the Committee's position.
4 It's clearly stated. It is inappropriate by these --
5 this Commission's orders in the Deferred Accounting
6 case, for example.

7 Chehalis, I don't know that that's the
8 best example. There are others that are perhaps
9 better. But they knew before they filed the 2008 or
10 certainly within a few weeks of the July 17th date,
11 they knew they were going to have an order. There
12 was going to be a definitive conclusion as to a
13 number of issues, factual and legal. For example,
14 the validity of the grid model, whether or not it
15 should incorporate other items. They knew that was
16 going to happen. They ignored that and went forward,
17 really relitigating the exact same issue. Because if
18 you read carefully the parts of their application
19 that the Committee cites, they are quite candid in
20 saying we're not going to make any changes regardless
21 of what happens out of the 2007 order.

22 So I hope that responds.

23 COMMISSIONER ALLEN: That's helpful. And
24 then I was able to find some references in the
25 testimony to my question.

26

1 For the other parties, unless you have
2 something to add? Okay. Thank you very much.

3 CHAIRMAN BOYER: Commissioner Campbell.

4 COMMISSIONER CAMPBELL: Is it the moving
5 parties' position that overlapping cases are no
6 longer practically possible because of the Charitable
7 Contributions case?

8 MS. BALDWIN: Commissioner, I'll speak
9 first, if that's okay with the other parties.

10 It's not our position that they're
11 impossible. It depends on the specific facts of that
12 case.

13 And in this case, we've looked at the
14 issues, the decision when it was made, at the '07
15 case, and what the decisions were, what the issues
16 were, such as the grid modeling, that type of thing.
17 Those were decisions that had been made that have to
18 be on an ongoing basis. And so to have an
19 overlapping period and just ignoring those decisions
20 opens up a whole host of problems.

21 And with the 240 day, we do think it's
22 impractical, if not impossible, to take care of
23 those, at least in this case. We can't speak to
24 whether or not it would always be that way.

25 COMMISSIONER CAMPBELL: Well, let me put
26

1 it another way.

2 If -- if we had a number of rate cases and
3 the rule of law got established, so to speak, is
4 there anything that would prohibit the Company from
5 filing an overlapping case if the prior case didn't
6 change anything from what their new application
7 purported -- or contained?

8 MR. PROCTOR: May I speak to that?

9 Commissioner Campbell, no, there would not
10 be anything, provided that you know that nothing has
11 changed. And so the Company takes into account
12 either the order that has been issued or commits,
13 clearly commits, to take that into account when it is
14 an issue. And of course the 240-day clock is running
15 and it tells the Commission, it tells everyone, by
16 that date it will be issued.

17 So the Committee's position, as we stated
18 at the beginning of our initial response, is the mere
19 fact, the mere fact that two rate cases are
20 overlapping alone is -- doesn't -- it's not
21 prohibited. The Utah law permits that. The problem
22 arises when you file a case, such as this particular
23 2008 case, where you completely ignore all of the
24 consequences, the findings, conclusions in the order
25 of this Commission and simply refile part or all of

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1 it and make no commitment whatsoever to update it.
2 That's where the problem arose when the Company just
3 excised the mere fact that out of the quote and then
4 suggested that the Committee supported its position.
5 It doesn't.

6 The other thing is this, the updates have
7 to be accurate and timely. And the Commission, in
8 the Committee's judgement, needs to, when they see
9 overlapping cases, make certain that there is a
10 procedure to deal with and address that particular
11 fact, the accurate and timely filings. And if you --
12 if you permit the 240 days to begin and just run
13 uninterrupted regardless of what happens
14 subsequently, then you end up in the exact same
15 position that we're in now. And that is, the Company
16 comes in and says, "Well, as soon as this hearing is
17 over with, we're going to file something that moots
18 the arguments." And that's the type of overlapping
19 rate cases, pancaking rate cases, that just
20 eliminates, impedes, interferes with your ability to
21 accurately determine rates from both.

22 MR. GINSBERG: May I make a comment?

23 COMMISSIONER CAMPBELL: Please.

24 MR. GINSBERG: The Charitable case dealt
25 with two different legal issues. It dealt with

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1 whether or not the concept of res judicata applied to
2 the old charitable -- the old, past Rocky Mountain,
3 Mountain Bell rate cases in determining whether the
4 charitable contributions could be -- had to be
5 excluded on the new case. And the Court actually
6 found that generally the concept of res judicata
7 doesn't apply to rate cases because you're resetting
8 a factual basis. And instead, made its decision on
9 stare decisis, that rulings that were established in
10 the past have -- are sort of like rules of law that
11 are applicable in future filings that are made. And
12 I think the rule of stare decisis is what creates the
13 problem here between -- not the overlapping test
14 year, but the rate case being filed before the
15 decision in the last rate case, failing to reflect
16 the rules of law that are established in that rate
17 case. If res judicata applies, it would be, I think,
18 more an individual issue-by-issue basis that may
19 result as a result of the overlapping test years.

20 COMMISSIONER CAMPBELL: My question was
21 premised on the concept of stare decisis and rule of
22 law. And that was the question.

23 Does that prevent the Company from
24 overlapping cases?

25 MR. GINSBERG: I don't see where the rule
26

1 of stare decisis prevents overlapping test years.

2 COMMISSIONER CAMPBELL: Well, let me ask
3 this, and it deals with the comment that -- I mean,
4 if the Commission were to take a bright line and say,
5 "Okay. We've got new schedules, so the clock starts
6 over again." I'd like the parties to comment on
7 this -- on the statement that Mr. Monson made that
8 updates and those sort of things would frustrate the
9 process as it relates to stipulations. So that if we
10 were to take a bright line, they filed again, that's
11 it. Well, why wouldn't the Company -- or can't cases
12 continue to go forward in the normal if the Company
13 is afraid to change its positions because every time
14 they would change their position, then a new clock
15 begins?

16 MR. GINSBERG: I don't think the new clock
17 begins automatically. It would take someone filing a
18 motion and bringing it to you and saying that this is
19 so significant that -- and changes the filing so
20 significantly and -- that due process and the ability
21 of parties to deal with it is impossible, that it
22 requires your action. I don't see where new filings
23 would in any way necessarily automatically restart
24 the 240 day clock. It might be actions like what we
25 have here today. Or like when the Company was

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1 acquired by Mid-America, the 240-day clock was
2 actually extended to take into account the fact that
3 that event was taking place and it so fundamentally
4 changed the rate case that was pending that the
5 240-day clock was extended.

6 So I don't see where just there is a
7 standard update or new information is filed, that
8 parties in good faith would automatically come to the
9 Commission and say that the 240-day clock starts
10 over.

11 MR. PROCTOR: And I would agree with Mr.
12 Ginsberg. And Ms. Baldwin perhaps puts it best when
13 she analogizes this particular proceeding to a motion
14 in civil court that there is no claim stated, that
15 the initial pleading is insufficient to state any
16 claim that either the Court or the defendant or the
17 other parties can deal with and manage. That's the
18 situation we have here. And Mr. Dodge states it very
19 well as to the deficiencies that exist in this
20 particular case.

21 But lawsuits and maybe more so, this
22 Commission's proceedings, are dynamic. Things do
23 change as evidence is exchanged, as data requests are
24 answered, as positions are changed in the ongoing
25 process. It's the updates that -- that change

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1 everything from the initial pleading forward, as Mr.
2 Ginsberg has pointed out with the MEHC acquisition.
3 Those are the problematic ones. Those are the ones
4 that you have to struggle with and deal with and
5 manage in regard to the 240 days.

6 COMMISSIONER CAMPBELL: Couldn't a party
7 claim that a company changing its forward price curve
8 would constitute a change significant enough to
9 change the application and start the clock again? I
10 mean, is it just decreases that the parties aren't
11 worried about? Or is it -- well, obviously this is a
12 decrease as well the parties have raised questions
13 about.

14 MR. PROCTOR: Well -- I'm sorry, Mike.

15 MR. GINSBERG: No. Go ahead. You were
16 talking.

17 MR. PROCTOR: The Company did that in this
18 particular case. As you recall, there was a dispute
19 over the forward price curves that the Company was
20 using in last few weeks of the case and up to the
21 hearing date. I think that updates were supplied
22 within a couple of weeks of the hearing itself.

23 Did that restart the 240 days? I don't
24 believe that anybody would argue that's the case.
25 Because they are manageable within the context of the

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1 initial pleading, the information and evidence that
2 has taken place throughout and the test period.

3 But if the Company were to come back and
4 say, "We want to change the test period in this rate
5 case," or "Six months ago we decided to purchase a
6 power plant and we'd like to add that now," or "We've
7 been acquired," those are the types of things that
8 may have an impact upon the Commission's time to
9 resolve the rates. And so that's when there has to
10 be an adjustment of the running of the 240 days.

11 COMMISSIONER CAMPBELL: Let me put it
12 another way.

13 If the Company changes its schedules, is
14 the determination of when the 240-day clock stops and
15 starts dependent upon the challenges of parties as to
16 whether they think that -- whether they think they
17 need more or less time?

18 MR. PROCTOR: The Committee's answer would
19 be no, it doesn't, provided that the initial
20 schedules filed with the application meet the
21 requirements that the statute has enforced upon it.
22 Mr. Dodge's explanation is the best in my judgement.

23 COMMISSIONER CAMPBELL: Please.

24 MR. MONSON: Can I comment on this?

25 COMMISSIONER CAMPBELL: Please.

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1 MR. MONSON: I think the problem -- I
2 think you're identifying a potential serious issue
3 because in -- in the old days, we used to file
4 different test years. I mean, sometimes you'd go
5 right down the path and the Division had one test
6 year and the Company had a different test year. And
7 the Commission would decide in its final order which
8 test year it was going to use. Now we've got this
9 new procedure that started in the last year's cases
10 where we have this test year hearing. And some
11 parties have suggested today that if you change the
12 test year, that starts the 240-day clock over again.
13 Well, that can't be right because -- because the
14 Commission can decide the test year issue in the
15 final order. I mean -- or it can wait four months to
16 decide the test year issue.

17 And last case, there was a significant
18 change in the case when the test years were decided.
19 The Company had to go back and redo all of its
20 filing. I mean, it refiled everything.

21 The filing you're going to get today isn't
22 a refiling of everything. It's a filing of certain
23 amendments to certain exhibits that reflect the
24 order. It's not as big a deal as the change in test
25 year was in the last case. Everybody dealt with it

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1 in the last case. I think everybody can deal with it
2 here.

3 Now as a matter of principle in your
4 question, let's remember what the 240 days is. The
5 240 days is a protection to a company that asks for a
6 rate increase. It doesn't apply to rate decreases.
7 It only applies to rate increases. And as the UIEC
8 pointed out, this is the Company's benefit. They are
9 the only ones who can waive it. And they do waive it
10 occasionally. They waive it when they have a merger.
11 They agree by stipulation, you know, we'll give you
12 some extra time if you approve the merger or the
13 acquisition. They used to waive it sometimes in the
14 '80s, they'd say, "Yeah. We'll give you one more
15 month. Go ahead. Take one more month." It's a
16 benefit for the Company.

17 So to say that any little change in a case
18 can restart the clock kind of nullifies that benefit
19 because parties can always claim there is some change
20 in the case that ought to change the clock. And my
21 point is that practice over the years has shown that
22 updates occur during a case, that updates should
23 occur during a case to make the information more
24 accurate, to settle issues. And that shouldn't
25 restart the 240-day clock.

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1 Is there some -- can we imagine some
2 circumstance where maybe it would happen? Yes.
3 Probably. I mean, everything in life is a spectrum.
4 And yeah, there is probably something that could
5 happen that would restart it. But in general, it
6 doesn't restart. And the presumption should be it
7 doesn't restart.

8 COMMISSIONER CAMPBELL: Even if the
9 Company updates schedules 30 or \$40 million, that
10 doesn't restart the clock?

11 MR. MONSON: Okay. Now you're giving an
12 example where the Company asks for a huge increase in
13 its rate request late in the case. Maybe that
14 should. But that's not what we're dealing with.
15 We're dealing here with a rate decrease. We're
16 dealing with an update that's decreasing rates.

17 And by the way, in the last -- in the
18 Questar Gas rate case, there was an update that
19 increased rates. And it was not only supported by
20 Questar Gas, it was supported by other parties. And
21 it was the fact they had projected in their forecast
22 test period a debt issuance. And on the issue of the
23 debt, they issued more debt than they had planned and
24 they issued at a higher cost than they had planned.
25 And everybody agreed, let's update the cost capital

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1 to reflect that. And that's appropriate because
2 that's better information.

3 So it's not only decreases. It's
4 increases.

5 But yeah, at some point, if the Company
6 came in and in its rebuttal evidence filed a whole
7 new application effectively, should that restart the
8 clock? Yeah. Probably. But this isn't that case.

9 CHAIRMAN BOYER: Okay. I have a few
10 questions. And I always caution the parties not to
11 read too much into my questions. I think Mr. Monson
12 had a comment on that from another case that happened
13 several years ago in which all parties thought they
14 had won and we ruled in favor of one and not the
15 other one, but it was still based on my questioning.

16 With that caveat, several of you -- Mr.
17 Ginsberg, I think, started off using the term
18 "fairness." Mr. Proctor had mentioned "due process."

19 How do those terms -- what's the
20 interplay?

21 And then Ms. Baldwin used the analogy of
22 the 12(b) motion for failure to state a claim.

23 How do those relate to the appropriateness
24 of the schedules filed?

25 MR. GINSBERG: I think it relates back to
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1 the way the Supreme Court has tried to define what
2 the utility's burden of proof is, that the mere
3 filing of schedules is not sufficient to meet your
4 burden of proof, that the utility is obligated to
5 provide the Commission all the necessary information
6 in order for it to evaluate and make decisions. In
7 later cases, the Court has tried to define that
8 burden of proof in terms of that the Commission
9 doesn't have to just waste its time on incomplete and
10 inadequate filings, that it does have the flexibility
11 to determine whether filings are complete.

12 And the reason for that was -- is that the
13 burden rests on the utility, not on anyone else to
14 provide the information. They have complete control
15 of the information provided to the parties. And
16 absent it all being provided up front when there is a
17 clock ticking, it is I think a question of
18 fundamental fairness and due process when the clock
19 is being eaten away by the way the utility make its
20 filing.

21 CHAIRMAN BOYER: Mr. Proctor.

22 MR. PROCTOR: If I may.

23 In Mountain Fuel Supply, the case decided
24 in 1993 by the Utah Supreme Court, essentially said
25 that a utility can't make up its case as it goes

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1 along. And if you look at the 240-day period within
2 which this Commission is to, from beginning to end,
3 wrestle with one of the most complex issues and
4 subject matter of any litigation I'm familiar with,
5 compared to the years that is permitted in the civil
6 context, for really any case, it gives you some idea
7 of the fact that from beginning to end, the
8 information has to be readily available, accurate,
9 transparent. And the parties need to be able to
10 manage it, address it and make a case out of it.

11 And I think that -- and this is my own
12 perception -- when the test period in the '07 case
13 was determined, I believe, in February, it took
14 everybody a little bit aback, including the
15 Commission, Commission staff, because now suddenly we
16 realized, you know, we have now taken a compressed
17 period and compressed it even more.

18 So that -- that's the Committee's view of
19 how there is a relationship between the civil ideas
20 of due process and fairness, fundamental fairness in
21 a procedural sense. It relates so much to a
22 substantive sense in the utility context.

23 CHAIRMAN BOYER: Mr. Monson.

24 MR. MONSON: I have a comment. Yeah.

25 I'm glad you brought that 12(b)(6) motion
26

1 up again because remember what the standard is for a
2 12(b)(6) motion. It is that the complaint read with
3 every presumption in favor of the complainant and
4 assuming everything in it is true, could not state a
5 claim, could not -- there could not be a possibility
6 of any recovery on the basis of the complaint. And
7 the application filed in this case, under that
8 standard, there is no question that it should not be
9 dismissed. If you apply that standard, we win.

10 Okay. Because we've clearly stated a claim. We've
11 provided tons of evidence. And we clearly are
12 entitled to some relief.

13 Now on the due process issue. The 240
14 days is not a due process protection for other
15 parties. There was some earlier argument in some of
16 the pleadings that suggested if we don't get the full
17 240 days, we haven't had due process. That's not
18 what due process is. Due process is a fair
19 opportunity to be heard by an impartial tribunal and
20 notice of what's being heard. We've given notice.
21 We filed an application for a rate increase. We're
22 now going to reduce it a little bit -- not a little
23 bit, quite a bit -- because of the order in the 2007
24 case. Which, by the way, how could we have taken it
25 into account when we filed the thing? It wasn't

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1 issued yet. I'll say that again. But -- so people
2 have had notice. They are going to have three
3 months. Is three months due process? Under
4 anybody's measure, that's due process. It may not be
5 quite as much as they'd like, but it's certainly due
6 process. It certainly satisfies due process. And
7 they're going to have a hearing before a fair and
8 impartial tribunal. They will have due process in
9 this case. No issue about that, I don't think.

10 CHAIRMAN BOYER: Okay. So that raises
11 another sort of interesting question to me.

12 What is it -- and this is probably for the
13 moving parties. So what is it that was inappropriate
14 in the schedules filed in the '08 case? Was it the
15 fact that those schedules did not reflect the
16 decisions made in the 2007 revenue requirement order?
17 Is that the gravamen of the complaint?

18 And then a related question is, test
19 period. In cases in which the test period is
20 disputed and it takes some time to resolve that
21 issue -- I mean, we saw the impact on the amount of
22 the revenue requirement in the '07 when it went from
23 161 down to approximately \$100 million. How does
24 that play out? What is it that's deficient?

25 MR. GINSBERG: I think you can look at the
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1 -- well, I think there is two parts to the way to
2 look at that.

3 First, the term appropriate schedules
4 allows, I think, the Commission to determine whether
5 or not the filings are sufficient or insufficient.

6 But on another grounds that's been talked
7 about today a little bit is that the rates that were
8 filed were not capable of being implemented in 240
9 days because of the intervening order that the
10 Commission issued. So just as a matter of --

11 CHAIRMAN BOYER: Let me stop you right
12 there.

13 Not capable of being implemented or should
14 not be implemented?

15 MR. GINSBERG: No. That -- well,
16 shouldn't 00 not capable of being implemented because
17 they -- a supplemental order changed the amount that
18 was going to be implemented. So it doesn't even --
19 arguably under the notice requirements, although we
20 all knew this, under the notice requirements, it was
21 not a filing that was, in my mind, capable of being
22 put into effect in 240 days without the Company doing
23 some type of supplemental filing.

24 CHAIRMAN BOYER: Okay. Thank you.

25 MR. DODGE: May I also address that?

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1 I'm sorry. If Mr. Proctor wanted to, I'll
2 wait.

3 MR. PROCTOR: Please.

4 CHAIRMAN BOYER: Go ahead, Mr. Dodge.

5 MR. DODGE: I believe what you put it at
6 is exactly right, and that is the schedules -- the
7 application and schedules in combination are
8 insufficient under Utah statutes to allow them to go
9 lawfully into effect 240 days later. And that's
10 because the statutes require an explanation of
11 anything that's changing from the status quo. Mr.
12 Monson keeps saying, "Well, we didn't know about it
13 so of course we couldn't incorporate it." That's
14 exactly the point. He knew it was coming. He knew
15 there dozens, literally, of disputed issues on
16 amortization, on the power cost calculation, on
17 projections, on virtually every significant aspect of
18 a rate case in general that was coming very soon.
19 And so their application could not, because it was
20 filed before the order came out, properly show the
21 delta, the differences, the changes they're asking
22 the Commission to make and schedules that reflect
23 those changes.

24 Unlike the last case, in the last case
25 when they filed, had the Commission done nothing, it
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1 would have properly gone into effect the way they
2 requested it. The test period was within the realm
3 of what the statute allowed. They explained the
4 changes they were making from prior Commission order
5 to the status quo at the time. And had nobody done
6 anything, those could lawfully have gone into effect.

7 These could not. They required updates
8 based on the Commission's order to show what it is
9 they are presupposing to change, what they are
10 proposing to do different. And the delta, that is
11 the rate increase requested, from the status quo.

12 CHAIRMAN BOYER: Thank you, Mr. Dodge.

13 Did you want to add something, Mr. Monson?

14 MR. MONSON: Yes. I do. Thank you.

15 CHAIRMAN BOYER: Commissioner Campbell
16 then has some related questions.

17 Okay. Go ahead.

18 MR. MONSON: Could the schedules have gone
19 into effect 240 days after? Yes. They could have.

20 But should they have? No. Because the
21 Commission issued an order.

22 But did the fact that the Commission
23 granted a \$36 million rate increase affect those
24 schedules? No. It didn't. I think that's probably
25 the kind of comment that Mr. Proctor is referring to.

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1 Because those schedules reflected the revenue
2 requirement, the end result of that revenue
3 requirement. And that didn't change by the fact that
4 the Commission granted -- I mean, the total revenue
5 requirement, if you understand what I'm saying. The
6 amount of the increase sought did change. But the
7 rates that would be in effect didn't change. What
8 changed the rates was the decision. The decision
9 said, "We're going to disallow some things." And so
10 that changed the rates by 9 million. And that's
11 what's reflected in the new information that's filed
12 with you.

13 I think the point here is, that happened
14 also when you changed the test year in the 2007 case.
15 The rates went down \$60 million. The rates changed.
16 The rates requested. Everybody dealt with it. It
17 was hard. This time we have filed these new -- this
18 new information, which is less significant, much
19 smaller in scope, one month earlier than it was filed
20 in the last case.

21 So let's get on with it. We can deal with
22 it.

23 MR. PROCTOR: Mr. Chairman, if I might
24 respond just quickly?

25 It's not just the rates, too, that they
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1 have not taken into account. It's the underpinnings
2 of those rates. How they calculated net power costs,
3 for example. The '07 order requires that the grid
4 model be updated to match that order. But it wasn't.
5 And there's been no evidence to this point, no
6 update, no schedule, no respect given to those types
7 of orders that were made in August. And there were
8 numerous similar orders. So it's the underpinnings
9 as well that have to be addressed in the '08 case in
10 order to reach the just and reasonable rate. And if
11 that information is missing or inaccurate, then the
12 application in itself -- on its face simply cannot be
13 addressed by this Commission according to the
14 statutes.

15 COMMISSIONER CAMPBELL: I think we're
16 still beating the same issue, but I'm going to ask it
17 again in a different way. And it really was for Mr.
18 Monson. I think you were preceding to answer it.
19 But let me ask it this way.

20 Under the law, can an application be
21 deemed adequate if -- if it lawfully and properly
22 cannot go into effect in the 240 days?

23 MR. MONSON: Well, my answer is yes.

24 But I don't know what you mean by
25 "lawfully." Why it cannot lawfully go into effect.

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1 COMMISSIONER CAMPBELL: Well, I'm quoting
2 Mr. Dodge as it relates to taking into account prior
3 Commission orders and rules of law.

4 If there is a rule of law change in the
5 middle of an -- let's say you file an application.
6 Let's say it's not us. Let's say it's federal law
7 that changes the outcome. Do you or do you not have
8 to take that into account, refile and then does the
9 clock start again?

10 MR. MONSON: Okay. I appreciate that
11 clarification.

12 You have to refile, the clock does not
13 start again. Because that happens in every case. In
14 every single rate case, changes occur after the
15 application is filed and the parties update their
16 positions based on those changes. It doesn't restart
17 the 240-day clock.

18 CHAIRMAN BOYER: I have a couple more
19 questions.

20 I find your use of the language in the
21 statute sort of interesting. We've talked about
22 adequacy and completeness of schedules. And the
23 statute uses the word "appropriate." And Mr. Dodge
24 was talking about inherent power.

25 Does appropriate -- does the use of the
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1 word "appropriate" imply broader discretion on our
2 part than if it were something like "accurate" or
3 "completeness" or not?

4 MR. DODGE: My view, Mr. Chairman, is that
5 "appropriate" is a very broad term. And that's why
6 what we looked at was other statutes and rules that
7 ought to give clues as to what the Commission should
8 deem appropriate or inappropriate, including the
9 requirement that the specific delta in the rate
10 increase be reflected. That a specific agency action
11 request be specified; that is, changes from the
12 status quo, et cetera. We think adequacy encompasses
13 all those things. And frankly, we think there is a
14 big heap of discretion in there in any event. And I
15 think Mr. Monson agreed on this continuum in the
16 absence of very, very specific rules which you could
17 issue, but don't have to because you're also allowed
18 the discretion to determine things like that on a
19 case-by-case basis. It gives you tremendous
20 discretion to describe, yes, under our expectations
21 and the statute, this is adequate or no, it's not.

22 CHAIRMAN BOYER: Mr. Monson.

23 MR. MONSON: I haven't done an analysis of
24 the word "appropriate" in terms of Black's Law
25 Dictionary or cases that have interpreted that word,

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1 but I think "appropriate" has probably the same scope
2 as "adequate."

3 But I think Mr. Dodge made an important
4 point. And that is, so we look at other statutes.
5 And the other statute that they looked at was
6 54(3)(3), which says a utility can't change its rates
7 without filing new schedules with the Commission.
8 The schedules its talking about, there are tariffs,
9 tariff pages. And the Commission -- and Mr. Dodge
10 said, "Yes. The Commission could adopt a rule, but
11 it hasn't." No, the Commission has adopted a rule.
12 The Commission specifically adopted a rule in what
13 you have to include in your tariff pages when you
14 make changes in your tariffs, what do you have to
15 file.

16 And so I submit the Commission's already
17 decided what's appropriate and it's what's in that
18 rule. And our schedules comply with that rule.

19 MR. GINSBERG: Under that rational that
20 Mr. Monson is giving you, then the Company could
21 merely file its tariff sheets with the necessary
22 delta that shows the change between the old rates and
23 the new rates and not file any accounting schedules
24 or additional information that I think appropriately
25 allows the Commission to define what that means. Not
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1 only does the term "appropriate" I think needs to be
2 viewed in light of the court decisions that places
3 what the burden is on the company in order to meet
4 it's obligations to file a general rate case. And
5 when you look at that burden in light of the term
6 "appropriate," I think it gives the Commission broad
7 discretion to determine whether the filings are
8 adequate or not when they are initially filed. And
9 not just whether the tariff page is there.

10 MR. MONSON: Can I beg your indulgence for
11 one more comment?

12 CHAIRMAN BOYER: Sure.

13 MR. MONSON: I urge the Commission just to
14 decide the issue before it. When courts do that,
15 they tend to make good decisions. When they try to
16 go farther and say, what if, what if, what if, then
17 they start making mistakes.

18 If the Commission will simply decide the
19 issue before it; which is, are these schedules
20 appropriate? Was this filing appropriate? I think
21 you've got an easy decision to make.

22 If you say what if we had just filed a
23 tariff page with nothing else? We didn't. We filed
24 testimony of 11 witnesses, 1,200 pages of
25 information. We answered 90 data requests that we

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1 didn't have to answer.

2 So that's what we have facing you and I
3 think you should make your decision based on what we
4 did file, not what we didn't file.

5 CHAIRMAN BOYER: Well, if there is, in
6 fact, this spectrum or continuum of appropriateness
7 from inappropriate to perfectly appropriate, I mean,
8 how do we determine that? Is it the number of pages?
9 Is it a percentage if it increases -- if it changes
10 and increases the revenue requirement by one,
11 percent, five percent, ten percent? I mean, what
12 kinds of things would we look at?

13 MR. MONSON: Well, I think that that's a
14 valid question. I think that's what you have to
15 decide here. Were these schedules -- was this filing
16 appropriate? And I think in making that decision,
17 you can look at what you previously accepted, whether
18 or not the Company has sufficiently explained the
19 basis for its rate increase and questions like that.
20 And I think we clearly meet those tests. And I don't
21 think you need to worry about what if we had filed
22 something that was way less than that because we
23 didn't. We filed something more than that.

24 And I think to suggest the schedules filed
25 in this case were inappropriate and those filed in
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1 the 2007 case were appropriate, I mean, they are
2 almost the same, almost identical. So how can one be
3 appropriate and the other one inappropriate?

4 MR. PROCTOR: Chairman Boyer, if I may
5 very quickly.

6 But the purpose of reviewing this
7 particular initial filing that we've requested, the
8 moving parties have requested that you do, is not a
9 little, mini rate hearing that takes place only
10 amongst the Commission. Say, well, you're only
11 asking for one percent, so that's okay. That's not
12 the test. The test is, as outlined by all the moving
13 parties in their briefs, in their motions, it is a
14 body of law developed by the Commission through
15 rules, the Commission through decisions, through
16 statutes, administrative rules and Supreme Court
17 rules that define what it is a general rate case must
18 do to even be considered, in order for regulation to
19 occur as demanded by the statute, the just and
20 reasonable rate.

21 And if that initial application does not
22 provide that, does not allow you to regulate this
23 utility, according to the standards that have been
24 set forth -- that have been cited, then you dismiss
25 it, you stay action on it and you require that it

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1 comply. Then you can go forward as has been the
2 practice of the Commission to do.

3 Up to this point, nothing so deficient has
4 ever been presented to this Commission. It has in
5 other cases. The Committee has cited other states
6 where they've dealt with these sorts of problems and
7 they've said, "No. You cannot do this for these
8 reasons, the overlapping rate case, the prohibition
9 by statute. Because you are trying to put so much on
10 the regulatory authority that it cannot properly
11 regulate, for example." So it's not a financial
12 test, a quantity test. It's one that as an
13 adjudicatory body you are making the decision, can
14 you perform your duties with respect to this
15 particular rate case? And if you find that the
16 schedules are inappropriate, the underpinnings are
17 not adequate, omit or are in error or inaccurate or
18 do not take into account your rate cases issued, not
19 last month or two years ago, then you have the
20 discretion, the inherent authority to exercise your
21 jurisdiction to say, "Refile it. Amend this one.
22 And until you do it correctly, we are not going to
23 just simply robotic apply a 240-day limit." Because
24 the 240 days is fundamental to the Commission's
25 ability to regulate. That's the basis the Committee
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1 believes you should make the decision on with these
2 motions.

3 CHAIRMAN BOYER: What would -- this would
4 be for Mr. Monson. And we're running out of time.

5 What would be the down side, what would be
6 the parade of horrors if the Commission adopted a
7 rule, a fairly narrow rule, that said basically you
8 can't file a pancaked rate case in circumstances
9 where all or a portion of the test period is forecast
10 until the pending case revenue requirement is
11 decided? Make it very, very narrow in those kind of
12 circumstances.

13 MR. MONSON: Well, I mean, you're
14 basically adopting a rule that says you can't file
15 pancaked rate case. So you are asking me -- with a
16 forecast test period. Because if you can't do it
17 until the prior case is decided, then it's not a
18 pancaked rate case anymore.

19 So you're asking me, can the Commission do
20 that? Can the Commission adopt such a rule?
21 Probably. But it hasn't. And its past practice was
22 that it allowed them in these kinds of circumstances.
23 And so I don't think it should adopt that rule.

24 CHAIRMAN BOYER: No one wants to say
25 anything on that point?

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1 Well, let me ask one last question and
2 then we'll wrap this up.

3 Is the fact that these two cases are
4 either entirely or partially forecast test period
5 cases presenting a particular problem in this case?

6 I mean, we have -- I was going to ask this
7 hypothetical, I am not going to do it now, but I'll
8 say what it was. Hypothetically, if a utility comes
9 in, files a rate case for \$161 million increase.
10 While that's pending, they file another case for \$160
11 million increase. I mean, is it because of
12 unforeseen changes that have happened or because of
13 errors made in the forecasting? I mean, that was the
14 hypothetical I was going to ask.

15 But is there a problem using this
16 forecasting technique because of the potential for
17 overlooking something or for miscalculating or
18 projecting? Is that presenting a particular problem
19 in this instance?

20 MR. MONSON: Doesn't present a problem for
21 us. I guess the other parties need to answer that.

22 I think the point is -- now the Commission
23 went through a period of time where it wouldn't allow
24 forecast test periods. And the Legislature has now
25 said, "No. You need to allow whatever test period

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1 best reflects the rate affecting period." So I think
2 the Legislature has made the decision that forecast
3 test periods are okay if they best reflect the rate
4 affected period. They still left it up to you to
5 determine what period does. And I guess you could
6 say, "Well, we always think historic test periods
7 best reflect the rate affected period." But I think
8 we all know that wouldn't be very honest because --
9 because they just wouldn't. Things change.

10 MR. PROCTOR: Chairman Boyer?

11 CHAIRMAN BOYER: Yes. Mr. Proctor.

12 MR. PROCTOR: The Supreme Court has
13 decided that issue and has said that errors in
14 forecasting -- they -- their -- you can't continually
15 file a rate case to make up for the errors in
16 forecasting your last time except under very certain
17 circumstances. And the UIEC has very well explained
18 that particular principle that the Utah Supreme Court
19 has determined. And so to permit the Company to just
20 file rate cases that update forecasts because of
21 errors in the past, that would violate that
22 particular rule.

23 CHAIRMAN BOYER: Mr. Ginsberg.

24 MR. GINSBERG: I actually don't see it
25 quite so simply. Maybe if the Company was filing

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1 rate cases on a monthly cases, updating information.
2 But I think the rule on retroactive rate making that
3 these cases referred to -- the rates are still not
4 being -- there is still no retroactive correction of
5 the missteps that were made in the 2007 rate case.
6 So I saw the difficulty in this concept of whether
7 retroactive rate making applied to it just because
8 new information has come in that changes the
9 forecast. The rates are still not going to be set
10 until March or whenever that will happen. And there
11 will be no attempt to go back and collect for the
12 errors that were made in the forecast in the past.

13 So I didn't see it as a real simple
14 question of whether these applied to it just because
15 there was a test year that had correcting information
16 for whatever reason, like Chehalis, for a similar
17 period that occurred in the last rate case.

18 MS. BALDWIN: And if I may?

19 We disagree. We do believe that making
20 corrections -- it's very clear in the Supreme Court
21 decisions that making corrections to your forecast,
22 whether you're going up or down, is not allowed.
23 That is what retroactive rate making is. You're
24 still projecting, but you're going to project again
25 to make up for the mistakes you made the last time.

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1 And that's retroactive rate making.

2 CHAIRMAN BOYER: Mr. Monson.

3 MR. MONSON: Retroactive rate making is
4 when you say we made mistake in the last case. We
5 set rates too high or too low for the period they
6 were in affect. So we're now going to set rates
7 higher or lower in the next case to make up for that
8 mistake. That's not what's happening here. Mr.
9 Ginsberg is absolutely right.

10 What's happening here is we are saying
11 based on the information available to us now, the
12 rates that should be in affect during the period from
13 March 14th, or whatever day it is, going forward
14 should be these rates. That's not retroactive rate
15 making.

16 And under -- to talk about extreme
17 examples, I guess under the UIEC position, we can
18 never include Chehalis and rate base. We just can't
19 recover on it because we didn't put it in the 2007
20 rate case. Well, that's silly. That's not
21 retroactive rate making.

22 CHAIRMAN BOYER: Okay. I think we've
23 probably heard enough.

24 Thank you all for your participation.

25 We'll take this matter under advisement

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1 and try to get an order out as expeditiously as
2 possible.

3 Thank you so much.

4 (Hearing concluded at 10:30 a.m.)

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REPORTER'S HEARING CERTIFICATE

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STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, Kelly Fine-Jensen, Registered Professional Reporter and Notary Public in and for the State of Utah, do hereby certify:

That said proceeding was taken down by me in stenotype on September 10th, 2008, at the place therein named, and was thereafter transcribed, and that a true and correct transcription of said testimony is set forth in the preceding pages;

I further certify that I am not kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the outcome thereof.

WITNESS MY HAND AND OFFICIAL SEAL this 23rd day of September, 2008.

Kelly Fine-Jensen, RPR
Notary Public
Residing in Salt Lake County