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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power for Authority to Increase its Retail Electric Utility Service Rates in Utah and for Approval of its Proposed Electric Service Schedules and Electric Service Regulations.	Docket No. 08-035-38 UIEC'S RESPONSE TO ROCKY MOUNTAIN POWER'S MOTION FOR APPROVAL OF TEST-PERIOD
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Pursuant to the Utah Public Service Commission's ("Commission") Amended Scheduling Order issued September 29, 2008, the "Utah Industrial Energy Consumers" ("UIEC"), by and through their counsel, hereby respond to Rocky Mountain Power's ("RMP" or the "Company") Motion for Approval of Test-Period. The UIEC also file testimony in this matter concurrently herewith on RMP's proposal to use an end-of-test-period rate base instead of an average, as is the custom.

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INTRODUCTION

On August 18, 2008, RMP filed its Motion for Approval of Test-Period (“Test Period Motion”), requesting that the Commission approve the test period used by RMP in its filing for this case. That test period is the twelve-month period ending June 30, 2009. Six months of this proposed test period, July 2008 through December 2008, has already been analyzed and decided in Docket No. 07-035-93. Therefore, the decisions regarding the information in this period are *stare decisis*. See *Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245 (Utah 1992). Based on the current economic situation, an historic test year is probably the wisest path to take given the uncertainty and likely inaccuracy of any projections. However, RMP has already filed its application based on a purely future test year. When the problems that result from an overlapping test year, both legal and logistical, and the factors for determining test period are considered, the Commission should order a calendar-year 2009 test year be used as the test period in this case.

The Test Period Motion also argued that the Commission should make an early decision that the annualization of rate base should be made on an end-of-test-period level instead of an average year basis. Not only is there no reason to make that decision at this early date, but an end-of-test-period annualization will result in a host of additional problems, including the opportunity for gaming, difficulty in matching, and problems evaluating used and useful. The Commission should either defer the decision or order an average year.

STATEMENT OF FACTS

1. On December 17, 2007, PacifiCorp, doing business in Utah as RMP, filed for a rate increase effective August 14, 2008. The filing was designated Docket No. 07-035-93.

2. The application was based on a twelve-month future test period extending from July 1, 2008, through June 30, 2009.

3. The application requested an increase to RMP's rates and charges for electric service in Utah by \$161,229,086. (SRM-1, Normalized Results of Operations – REVISED PROTOCOL, Twelve Months Ending June 30, 2009, Docket No. 07-035-93, attached hereto as Ex. A.)

4. The application had a June 2009 Rolled-In Revenue Requirement of \$1,566,425,726; Capped Revised Protocol Revenue Requirement of \$1,585,027,032; and Normalized June 2009 General Business Revenues of \$1,423,797,946. *Id.*

5. After a hearing on the test period issue, on February 14, 2008, the Commission issued its Order on Test Period for Docket No. 07-035-93.

6. Pursuant to the Order on Test Period, the Commission ruled that the 2008 calendar-year (January 1, 2008 through December 31, 2008) “best reflect[ed] the conditions the Company will encounter during the period when the rates determined in [that] docket will be in effect.” Order on Test Period at 2, Docket No. 07-035-93 (Feb. 14, 2008). The Commission relied for its decision on an evaluation and balancing of factors relevant to selection of a test period as identified in its October 20, 2004, Order in Docket No. 04-035-42. *Id.*

7. The Commission then directed RMP to update its filing in Docket No. 07-035-93 “with the calendar-year 2008 test period, based on an average-of-year rate base.” *Id.* at 4.

8. RMP complied with the Commission's order, filing its updated schedules on March 6, 2008.

9. On April 7, 2008, RMP filed a Notice of Intent to File General Rate Case.

10. On July 17, 2008, PacifiCorp, doing business in Utah as RMP, filed for another rate increase. This filing has been designated Docket No. 08-035-38.

11. This Application requested an increase in rates and charges for electric service in Utah by \$160,557,621. SRM-2, Normalized Results of Operations – REVISED PROTOCOL, Twelve Months Ending June 30, 2009, Docket No. 08-035-38, attached hereto as Ex. B.

12. This Application had a June 2009 Rolled-In Revenue Requirement of \$1,573,633,600; Capped Revised Protocol Revenue Requirement of \$1,592,320,499; and Normalized June 2009 General Business Revenues of \$1,431,762,877. *Id.*

13. This Application also has the test year of a future period extending from July 1, 2008, through June 30, 2009.

14. The test period requested in RMP's 08-035-38 Application is the identical test period requested in RMP's 07-035-93, which was subsequently changed by the Commission's 07-035-93 test year decision.

15. The test period requested in RMP's 08-035-38 Application overlaps the test period¹ ordered by the Commission in Docket No. 07-035-93 by six months. In other words, RMP's request for a rate increase in Docket No. 08-035-38 includes the same six-months' of the test period data and information that is the test period for Docket No. 07-035-93.

16. The net power costs in Docket No. 07-035-93 were evaluated and adjustments were presented on a month-by-month basis. This means that for Docket No. 08-035-93, RMP expects a *reevaluation* of the net power costs for the months July through December 2008.

¹ In considering whether to allow interim rate increases for overlapping periods in the past, the Commission "expressed concern over the regulatory difficulties caused by overlapping test years" and noted that it "will take steps to protect the regulatory process whenever overlapping test periods are proposed." Report and Order at 6, Case No. 84-035-01 (Sept. 13, 1984).

17. In Docket No. 07-035-93, RMP witness Widmer testified: “The normalized net power costs for the *twelve months ended June 2009 are approximately \$456.4 million on a Utah allocated basis, or \$1.091 billion system-wide.*” Widmer Test. at 2, Docket No. 07-035-93 (emphasis added).

18. In Docket No. 07-035-93, RMP witness Duvall² testified in his revised testimony: “The normalized net power costs for the twelve months ending December 2008 are approximately \$435.3 million on a Utah allocated basis or \$1.051 billion system-wide.” Duvall Rev. Test. at 2, Docket No. 07-035-93.

19. RMP witness Duvall testified in this docket that the Company’s actual system power costs for the 12 months ending May 31, 2008 are approximately \$1.055 billion. Duvall Test. at 3, Docket No. 08-035-38.

20. In this docket, RMP witness Duvall testified: “The normalized net power costs for the *12 months ending June 2009 are approximately \$469.6 million on a Utah basis, or \$1.129 billion system-wide.*” Duvall Test. at 2, Docket No. 08-035-38 (emphasis added).

21. In this docket, RMP witness Duvall updated his testimony on September 10, claiming: “The normalized net power costs for the *twelve months ending June 2009 are approximately \$461 million on a Utah allocated basis, or \$1.109 billion system-wide.*” Duvall at Supp. Test. at 1, Docket No. 08-035-38 (emphasis added).³

22. A detailed audit will be required to verify that any agreed upon changes to Docket No. 07-035-93 have been incorporated into the new rate case, Docket No. 08-035-38.

² Duvall adopted Widmer’s testimony in 07-035-93.

³ RMP’s first projection in this case differs from the second projection by \$20 million—\$8.6 million on a Utah basis. They both differ from the projection made for the same time period in Docket No. 07-035-93 when first filed. Why should any one projection be believed over the other?

23. As of July 17, 2008, when RMP filed its application for an additional rate increase, the Commission had not yet decided or issued its order resolving the rate of return and revenue requirement in Docket No. 07-035-93. This order was issued August 11, 2008.

24. On September 10, 2008, the Company filed a supplement to its initial filing in this case, allegedly incorporating most of the Commission's revenue requirement order from Docket No. 07-035-93. The Company claims it made all adjustments except those related to: transmission imbalance, biomass non-generator, SMUD contract, return on equity, property taxes, and generation over-haul.

25. An additional detailed audit will now be required to verify that any ordered changes from Docket No. 07-035-93 are in fact properly incorporated into the updated filing of September 10.

26. The Commission ordered that the 240-day time period should begin to run from the September 10 filing. Docket No. 08-035-38, Order on Motions to Dismiss or Address 240-Day Time Period (Sept. 23, 2008).

27. Washington Mutual was seized by federal regulators on September 25, 2008 in what was the largest bank failure in American history. Virtually all of it was sold to J.P. Morgan Chase, with the remainder to be operated by the government. Salt Lake Tribune, "Washington Mutual is seized to avert failure," Sept. 25, 2008, attached hereto as Ex. C.

28. The Utah Department of Workforce Services reported that jobs in the financial sector were down 1100 jobs in August and Utah is expected to lose about 3000 jobs over the next couple of years. KSL.com, September 20, 2008, attached hereto as Ex. D.

29. Berkshire Hathaway has agreed to invest \$5 billion in Goldman Sachs Group, and between \$3 billion and \$6 billion in General Electric. It also recently purchased Constellation Energy Group for \$4.7 billion. Greenwire, E&E Publishing, LLC, www.eneews.net, Oct. 2, 2008, attached hereto as Ex. E.

30. The Dow suffered the worst weekly performance for the week ending October 3, 2008, since the week after September 11, 2001. CNNMoney.com, "Market Report," Oct. 3, 2008, attached hereto as Ex. F.

31. On September 7, 2008, the federal government seized control of Fannie Mae and Freddie Mac. Washingtonpost.com, "U.S. Seizes Control of Mortgage Giants," Sept. 8, 2008, attached hereto as Ex. G.

32. On October 2, 2008, Questar Gas Company filed for a rate reduction due to unexpectedly low gas prices. *In re Pass-Through Application of Questar Gas Company for and Adjustment in Rates and Charges for Natural Gas Service In Utah*, Docket No. 08-057-22 (Oct. 2, 2008).

ARGUMENT

I. THE TEST YEAR SHOULD BE CALENDAR-YEAR 2009 AND UNLESS THE ANNUALIZATION OF RATE BASE DECISION IS DEFERRED, AN AVERAGE YEAR BASIS SHOULD BE ORDERED.

A. Due to the Filing Already Made, the Calendar-Year 2009 is the Appropriate Test Year Upon which to Base the Test Period Decision.

Based on the current economic situation, the filing already made by RMP, the problems that result from an overlapping test year, and the factors to be considered, the Commission should order a calendar-year 2009 test year be used as the test period in this case.

Section 54-4-4 provides:

If in the commission's determination of just and reasonable rates the commission uses a test period, the commission shall select a test period that, on the basis of evidence, the commission finds best reflects the conditions that a public utility will encounter during the period when the rates determined by the commission will be in effect.

Utah Code Ann. § 54-4-4(3)(a). The Commission has outlined its goals in making this test period decision:

Ideally, the test period should balance the utility's investment, revenues and expenses so that all elements of the rate case are matched on the same level of operations. Each case needs to be considered on its own merits and the test period selected should be the most appropriate for that case. The test period selected for a utility in a particular case may not be appropriate for another utility or even the same utility in a different case. Some of the factors that need to be considered in selecting a test period include the general level of inflation, changes in the utility's investment, revenues or expenses, changes in utility services, availability and accuracy of data to the parties, ability to synchronize the utility's investment, revenues and expenses, whether the utility is in a cost increasing or cost declining status, incentives to efficient management and operation and the length of time the new rates are expected to be in effect.

In re Application of PacifiCorp for Approval of Its Proposed Elec. Serv. Scheds. & Elec. Serv. Regulations, Docket No. 04-035-42, Order Approving Test Period Stipulation at 4 (Oct. 20, 2004) (attached hereto as Ex. H). This philosophy was reaffirmed in the Commission's decision in Docket No. 07-035-93. *See* Docket No. 07-035-93, Erratum Report and Order on Rev. Req'mt at 102-03 (Aug. 21, 2008); Docket No. 07-035-93, Order on Test Period at 2-4 (Feb. 14, 2008). In addition, in its test period decision in Docket No. 07-035-93, the Commission acknowledged the uncertainty presented with future test years, especially given the evidence of financial reversals at that time, and ruled that if a forecasted test year were used, it should be a

“period nearer in time to render greater confidence in the matching of costs and revenues.”
Docket No. 07-035-93, Order on Test Period at 3.

The test year in Docket No. 04-035-42 was the first purely projected test year used as a basis for the test period since the Utah Code was amended to specifically allow such a test year, and this was determined by stipulation between the parties. Docket No. 04-035-42, Order Approving Test Period Stipulation. Since that case, RMP has consistently filed its increase applications using a purely forecasted test year. Nevertheless, RMP has consistently failed to provide accurate forecasts in its increase applications. As an example, RMP has made three very distinct forecasts in less than one year for the normalized net power costs for the twelve month period ending June 2009, none of them agreeing and with a range of \$13.2 million on a Utah allocated basis, or \$38 million system-wide.

The U.S. economy is in extreme turmoil at the present time—much more so than in February when the financial reversals at that time dictated the test period decision that was made in Docket No. 07-035-93. The government has seized control of Fannie Mae and Freddie Mac. Lehman Brothers has declared bankruptcy and has requested permission to sell its energy assets. Berkshire Hathaway has recently acquired Constellation Energy Group, and agreed to invest \$5 billion in Goldman Sachs Group and between \$3 billion and \$6 billion into General Electric. Washington Mutual failed, which is the largest bank failure in American history. Congress just approved a \$700 billion financial system bailout, and the Dow suffered the worst weekly performance since the week after 9/11. Locally, job losses are expected to reach over 4000, and credit is extremely tight.

Given the current condition of the economy and the uncertainty of the future, an historic test year with known and measureables would probably be the wisest choice for the test period in this case. However, the Company has already filed a case using a purely projected test year. Therefore, an historic test year may not be practicable because the Company would have to start from scratch in preparing a new rate case application and supporting testimony.

As explained below, the 2008 portion of the proposed test year presents legal and logistical problems. Using at least part of what has already been filed, while keeping in mind the desire to have a period nearer in time to render greater confidence in the matching of costs and revenues, and the factors to be considered in selecting a test year, the calendar-year 2009 is the most reasonable result.

The UIEC therefore request that the Commission order that (a) RMP use a 2009 test year; (b) RMP update its filing accordingly; and (c) the 240-day time period should restart upon submission of the updated re-filing.

B. The Test Year Proposed by RMP Presents Legal and Logistical Problems.

1. RMP's Proposed Test Year Is an Attempt to Circumvent the Statutory Prohibition Against Updating Future Test Years and Should Be Denied.

The statute governing the data upon which a test period may be decided prohibits updates if a purely future test year is used. RMP persists in using a purely future test year despite the other options available that provide for the incorporation of updates. RMP's proposed test year in this case is merely an attempt to circumvent the statutory prohibition against updates and should be denied.

Section 54-4-4 provides, in relevant part:

(b) In establishing the test period determined in Subsection (3)(a), the commission may use:

(i) a future test period that is determined on the basis of projected data not exceeding 20 months from the data a proposed rate increase or decrease is filed with the commission under Section 54-7-12;

(ii) a test period that is:

(A) determined on the basis of historic data; and

(B) adjusted for known and measurable changes;

or

(iii) a test period that is determined on the basis of a combination of:

(A) future projections; and

(B) historic data.

(c) If pursuant to this Subsection (3), the commission establishes a test period that is *not determined exclusively on the basis of future projections*, in determining just and reasonable rates the commission shall consider changes outside the test period that:

(i) occur during a time period that is close in time to the test period;

(ii) are known in nature; and

(iii) are measurable in amount.

Utah Code Ann. § 54-4-4(3) (emphasis added).

Under Utah law, when interpreting a statute, the Commission should “look first to the statute’s plain language to determine its meaning.” *Utah v. Gallegos*, 171 P.3d 426, 429 (Utah 2007). When examining the plain language, it must be assumed that *each term included* in the

statute was used advisedly. *Carrier v. Salt Lake County*, 104 P.3d 1208, 1216 (Utah 2004). “[S]tatutory construction presumes that *the expression of one should be interpreted as the exclusion of another,*” and effect should be given to any omission in the “language by presuming that the *omission is purposeful.*” *Id.* (quoting *Biddle v. Washington Terrace City*, 993 P.2d 875 (Utah 1999)) (emphasis added).

Based on these basic laws of statutory construction, therefore, if a test period *is* determined exclusively on the basis of future projections, which has been proposed by RMP in this case and the last case, the Commission *cannot* consider any changes outside the test period, including changes that are known in nature or measurable in amount. When determining which test period to use, the Commission is limited to either (a) an exclusively future test period, (b) an historic test period adjusted for known and measurable changes, or (c) a combination of future updated with changes that will occur close in time to the test period and historic updated with known and measurable changes. These are the only test periods allowed by statute. RMP is not permitted to use an exclusively projected test period updated with any changes outside that test period.

In an attempt to avoid this prohibition, RMP has filed the current proposed test year using six months that have already been analyzed and evaluated. In doing so, RMP has updated its projections for those six months and included previously omitted items such as the Chehalis plant.

Despite all indications that a purely projected test year is not the best route, RMP continues time after time to file its applications requesting one. RMP should therefore live with the inherent results of using a purely projected test year, and not be allowed to get around the law

to make up for its projection failures. Its proposed test year is such an attempt and should be denied.

2. RMP's Proposed Test Year Presents Legal Problems and Should Be Denied.

As set forth in the UIEC's Motion to Dismiss the Application of Rocky Mountain Power and Reply in support, which are incorporated in full herein by reference, and attached hereto as Exhibits I and J, RMP's proposed test year violates the principles of res judicata, retroactive ratemaking, and stare decisis. It should be denied. Instead, the calendar-year 2009 should be used as a basis for the test period.

3. RMP's Proposed Test Year Causes an Unnecessary Burden and Should Be Denied.

Trying to sort out the issues related to an overlapping test year pose an unnecessary burden to the parties and the regulators. The Commission has already determined the various issues with respect to the time period of July 2008 through December 2008. We can refer to that as Period 1. The issues have not been decided with respect to Period 2, January 2009 through June 2009. The question arises as to how Period 1 and Period 2 costs should be integrated. We already know the net power costs of Period 1. Should Period 1 be adjusted with known and measureables to determine Period 2? Or, should Period 2 be purely forecasted? This same scenario arises with labor costs.

For rate base, since we know rate base for Period 1, should we apply the escalators to Period 1? We cannot apply the escalators to 2007, because then we would be recalculating Period 1, which is prohibited by the rule against retroactive ratemaking. What time period

should be considered to determine the return on equity? The return on equity has already been determined for 2008. Should we have a return on equity that changes over time?

In addition, it is unclear whether the filing made in September has properly integrated the changes required by the Commission's decision in Docket No. 07-035-93. This will have to be done by the parties first. Then, there is the issue of the Company's request for reconsideration. The reconsideration issues are therefore outstanding, and whatever is decided by the Commission will require more updates and more efforts to integrate this case into one whole. These case management problems would not exist if the case used a 2009 test year.

These decisions must be made and direction given before testimony can be filed, or the parties will have to file testimony with a number of various scenarios for each separate adjustment. This is likely to become unmanageable. Therefore, the overlapping period should not be used.

C. Whether to Use an Average or End-of-Year Annualization of Rate Base Should be Decided as Part of the Whole Case, Not as a Separate Issue. But, if Decided Now, an Average Should Be Used.

In its Test Period Motion, in addition to requesting that the Commission accept the test period as filed, RMP also requested that it be permitted to use the end-of-period rate base. The Company confirmed at the test year scheduling conference held August 20 that it is requesting that this decision, which is contrary to common practice, especially in light of a future test year, be made as an initial matter along with the decision of what test year to use for the basis of a test period. The UIEC disagree with this proposal.

First, “[w]hat annual rate will constitute just compensation [for RMP] depends upon many circumstances, and must be determined by the exercise of a fair and enlightened judgment,

having regard to *all relevant facts.*” *Bluefield Waterworks & I. Co. v. Public Serv. Co.*, 262 U.S. 679, 692 (1923) (emphasis added). To make a piecemeal determination of issues in isolation, without determining whether that factor itself needs evaluation or adjustment, or without concurrently assessing other related factors, is contrary to the over-arching requirement that rates set by the Commission must be just and reasonable. The Utah Supreme Court has echoed this sentiment in the *Wage Case*. *Utah Dep’t of Bus. Regulation v. Pub. Serv. Comm’n*, 614 P.2d 1242, 1250 (Utah 1980).

There has not been sufficient justification for why this one issue should be decided early and in isolation. The Company has the obligation and bears the burden of demonstrating its position should be accepted. *Utah Dep’t of Bus. Regulation v. Public Serv. Comm’n*, 614 P.2d 1242, 1245–46 (Utah 1980). Making this one decision in a vacuum, without the context of all the other revenue requirement adjustments, is likely to result in rates that are not just and reasonable.

The Company argues that instead of projecting twenty months forward it is compromising by including an end-of-period rate base, rather than the average as it has done in previous cases, and that it is doing this to compensate for perceived regulatory lag. McDougal Test. at 11. This ignores the importance of regulatory lag; that being the inducement to management efficiency. The Company wants to eliminate the balance of risk between shareholders and ratepayers, and arrive at a position in which ratepayers bear all the risk. A purely forecasted test year already shifts more risk toward the ratepayers and now an end-of-period rate base just shifts even more onto the ratepayers. The Company provides no

justification for why the ratepayers should bear this much larger portion of risk and fails to explain how it will ensure management efficiency if regulatory lag is eliminated.

In addition, the company relies on testimony from Mr. Walje that the Company has projected its case based on a belief that Utah's load will continue to grow at the same rate as in the past and its net power costs will continue to grow. Walje Test. at 10–11. This, despite the fact that Questar has filed for a rate reduction due to lower-than-expected natural gas prices and the extreme turmoil in the United States economy, both of which suggest otherwise.

Furthermore, as explained in the testimony of Maurice Brubaker, filed concurrently herewith, by requesting to update the rate base to end-of-period balances, RMP has failed to synchronize its projected investments with sales and revenues. This synchronization is critical to the determination of just and reasonable rates. Without it, this distortion of relationships within the test period is extremely adverse to ratepayers. This also places the ratepayers at an extremely high risk of being drastically overcharged if a capital project is canceled or delayed.

Due to the timing during a test period that capital costs become used and useful, due to the manner in which depreciation is accounted for, and due to the inherent uncertainty of a future test year, the practice has been to use an average rather than an end-of-period method. The Company's proposal to use an end-of-period method in this filing is just another way in which RMP is trying to shift the majority of risk to the ratepayers.

If the Company wishes to change the current practice, it should be required to fully explain the affect of such a change on revenue requirement.⁴ It should also be required to

⁴ A similar requirement was ordered by the Commission in Docket No. 07-035-93 with respect to any proposed substantive accounting changes. Report & Order at 101.

include full information for both methods: averaging and end-of-period so that the parties can make a full analysis of the effects of each method.

This issue should then be heard as a part of the case in whole, not separately. Otherwise, the parties are unable to make a fair evaluation of the impacts of such a change, and the Commission is unable to make a fair assessment so as to set just and reasonable rates.

The Commission need not make the decision on average versus end-of-year now, and in fact, without sufficient supporting information provided in the application, the Commission should not make the decision now. The Commission should order the Company to update its filing with (a) full information for both averaging and end-of-period; and (b) testimony justifying the shift in risk to ratepayers and explaining the affect of the change on revenue requirement. Then the Commission should consider this issue along with the other issues of the revenue requirement portion of the case. Alternatively, the Commission should find that RMP has failed to meet its heavy burden of establishing why the current practice of using average year should be abandoned and order that the average should be used.

CONCLUSION

Based on the foregoing and the testimony filed concurrently herewith, the UIEC respectfully request that the Commission (a) deny RMP's Test Period Motion in its entirety; (b) set the test period for calendar-year 2009; (c) defer decision on the average versus end-of-year basis, or alternatively order an average-year basis; (d) order RMP to refile an updated filing in conformance with the Commission's order; and (e) restart the 240-day time clock from the date upon which the updated filing is filed.

DATED this 7th day of October, 2008.

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CERTIFICATE OF SERVICE

(Docket No. 08-035-38)

I hereby certify that on this 7th day of October 2008, I caused to be e-mailed, a true and correct copy of the foregoing **UIEC'S RESPONSE TO ROCKY MOUNTAIN**

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