

Mark C. Moench (2284)  
Yvonne R. Hogle (7550)  
Daniel E. Solander (11467)  
Rocky Mountain Power  
201 South Main St., Suite 2300  
Salt Lake City, UT. 84111  
(801) 220-4014 (Solander)  
mark.moench@pacificorp.com  
yvonne.hogle@pacificorp.com  
daniel.solander@pacificorp.com

Katherine A. McDowell  
*Admitted Pro Hac Vice*  
McDowell & Rackner P.C.  
520 SW 6th Avenue, Suite 830  
Portland, OR 97204  
503-595-3924 - telephone  
katherine@mcd-law.com

Paul J. Hickey  
*Admitted Pro Hac Vice*  
Hickey & Evans, LLP  
1800 Carey Avenue, Suite 700  
P.O. Box 467  
Cheyenne, WY 82003-0467  
Ph. 307-634-1525  
[phickey@hickeyevans.com](mailto:phickey@hickeyevans.com)

*Attorneys for Rocky Mountain Power*

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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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. 09-035-23

**MOTION OF ROCKY MOUNTAIN POWER TO STRIKE PRE-FILED SUPPLEMENTAL DIRECT TESTIMONY OF MICHAEL J. McGARRY, SR., MATTHEW CROFT, AND THOMAS C. BRILL AND FOR AN EXTENSION OF TIME TO FILE REBUTTAL TESTIMONY AND REQUEST FOR EXPEDITED SCHEDULE ON MOTION**

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Rocky Mountain Power, a division of PacifiCorp (“Rocky Mountain Power” or “Company”), pursuant to Utah Code Ann. § 63G-4-206(d), Utah Admin. Code R.-746-100-3.H and R.-746-100-10.E.3, hereby moves the Public Service Commission of Utah (the “Commission”) to strike the Pre-Filed Supplemental Direct Testimony of Michael J. McGarry, Sr., Matthew Croft, and Thomas C. Brill (“Supplemental Testimony”) filed on behalf of the Utah Division of Public Utilities (“DPU” or “Division”) on October 29, 2009.<sup>1</sup> The Company moves to strike the Supplemental Testimony because the DPU filed the testimony after the October 8, 2009, deadline set out in the Scheduling Order dated August 4, 2009, (“Scheduling Order”) without good cause to do so and therefore prejudiced the Company’s ability to respond to the testimony in the timeframe set out in the Scheduling Order. The Company is not moving to strike the Supplemental Direct Testimony of George W. Evans, which was filed concurrently with the Supplemental Testimony, because of difficulties Mr. Evans had in obtaining spreadsheets and other information related to the coal cost adjustments he proposed.

Regardless of whether the Commission denies this motion to strike, the Company also moves for an extension of time to file its rebuttal testimony relating to the issues raised by all of the Supplemental Testimony, including the Supplemental Testimony filed by Mr. Evans. The delay of three weeks in the filing of the DPU’s Supplemental Testimony does not allow the Company adequate time to respond before the deadline for filing its rebuttal testimony on November 12, 2009. In addition, the adjustments proposed in the DPU’s Supplemental Testimony have an impact on other adjustments the DPU previously proposed and on the DPU’s

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<sup>1</sup> In addition to new material, the Supplemental Testimony also includes corrections and updates to the Division’s Direct Testimony based both on correction of errors in the direct testimony and on settlement of issues since the direct testimony was filed. Although this Motion moves to strike those corrections and updates, the Division should make the same corrections in its rebuttal testimony in accordance with normal practice.

proposed revenue requirement. The Company respectfully requests that the Commission extend the deadline for the Company to file rebuttal testimony responding to the DPU's Supplemental Testimony from November 12, 2009 to November 25, 2009. In addition, the Supplemental Testimony indicates that the DPU intends to file further rebuttal testimony at an unspecified time in the future. If the Division is allowed to file this further Supplemental Testimony, the Company respectfully requests that the Commission grant it 14 days after the DPU files this further Supplemental Testimony to respond — 14 days being less than the 21 days after the DPU's testimony was due that it filed the Supplemental Testimony.

Given the current schedule in this matter, the Company further requests that the Commission set an expedited schedule for consideration of this Motion. Rebuttal testimony is due November 12, 2009, only three days from the filing of this Motion, surrebuttal testimony is due November 30, 2009, and hearings on revenue requirement issues commence on December 7, 2009. If parties are given 15 days to respond to this Motion, responses will not be due until November 24, 2009. Accordingly, Rocky Mountain Power requests that the Commission require responses to this Motion to be filed by November 16, 2009, and rule on the Motion not later than November 19, 2009. In the event the Commission determines to deny the Motion in its entirety, the Company nonetheless requests that the Commission allow it to file testimony responsive to the Supplemental Testimony five business days after ruling on the Motion consistent with normal practice. Otherwise, the Motion will have been rendered moot simply by the schedule in this matter.

## **I. BACKGROUND**

The Company filed its application and direct testimony in this docket on June 23, 2009.

The Commission's Scheduling Order required all non-company witnesses to file their direct testimony by October 8, 2009. This permitted the non-Company parties three and one-half months to analyze and conduct discovery on the Company's direct testimony and to prepare their direct testimony. Even though the Company filed complete responses to Master Data Requests providing extensive information to the other parties at the outset of the case, the Division took full advantage of the time available for discovery, serving over 45 sets of discovery requests on the Company between June 23 and September 16, 2009.<sup>2</sup> The Scheduling Order requires the Company to file its rebuttal testimony by November 12, 2009, only 35 days after the direct testimony of other parties was filed.

Messrs. McGarry, Evans, Croft and Brill filed direct testimony on October 8, 2009. In that direct testimony each of them attempted to reserve the right to file supplemental testimony, or stated that he might propose adjustments in the future (based in part on pending discovery served after September 16, 2009).<sup>3</sup> On October 29, 2009, three weeks after the deadline for rebuttal testimony contained in the Scheduling Order, the DPU filed Supplemental Direct Testimony from each of the five witnesses. The Scheduling Order has no provision allowing non-company parties to file supplemental direct testimony. The Division filed its Supplemental Direct Testimony without seeking leave from the Commission to make such a filing.

In each of their Supplemental Testimony filings, the Division witnesses imply that they are reserving the right to file updates to testimony because they were waiting for a response to a

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<sup>2</sup> September 16, 2009 was 22 days before October 8, 2009. The discovery turnaround provided in the Scheduling Order through October 8, 2009, was 21 days. Therefore, in order to receive responses to discovery requests prior to the date testimony was due, the Division should have filed the discovery requests by September 16, 2009.

<sup>3</sup> Mr. McGarry stated he might propose adjustments in his rebuttal testimony. McGarry Direct/8-9, ll. 162-165. Mr. Evans stated he might address coal costs in rebuttal testimony. Evans Direct/5, ll. 312-317. Mr. Croft stated his adjustment to Electric Plant in Service "may change." Croft Direct/8, ll. 140-141. Mr. Brill stated the Division might withdraw adjustments in the future. Brill Direct/10, ll. 171-173. Mr. Brill also stated the Division reserves the right to address tax related issues in rebuttal testimony or at another time during the case.

data request from the Company. As shown in the table below, with one exception the Company filed its responses to the relevant data requests on time.<sup>4</sup> Indeed, in several cases the Company filed responses before the due date. The sole reason that the relevant data responses referenced in the DPU’s Supplemental Testimony had not been received was because they were not due until after the filing deadline for the DPU’s direct testimony.

Intervenor	Set	Received	Due	Sent
DPU	45	14-Sep	5-Oct	2-Oct
DPU	46	15-Sep	6-Oct	6-Oct
DPU	47	16-Sep	7-Oct	7-Oct
DPU	48	21-Sep	12-Oct	12-Oct
DPU	49	24-Sep	15-Oct	15-Oct
DPU	50.1	28-Sep	19-Oct	16-Oct
DPU	50.2-50.10	28-Sep	19-Oct	<b>21-Oct</b>
DPU	51	29-Sep	20-Oct	20-Oct
DPU	52	30-Sep	21-Oct	20-Oct
DPU	53	5-Oct	26-Oct	26-Oct
DPU	54	6-Oct	27-Oct	27-Oct
DPU	55	8-Oct	29-Oct	27-Oct

In the Company’s 2008 rate case, Docket 08-035-38, the Division similarly filed out-of-time supplemental direct testimony for one witness, Mr. Dalton, proposing one new adjustment. The Company considered, but did not file a motion to strike in that case, assuming that the Division’s filing was an isolated violation of the Commission’s procedural rules. Additionally, while the supplemental direct testimony was prejudicial in that case, the limited nature of the Division’s filing allowed the Company to respond. The Division’s approach in this case, repeating and greatly expanding the practice of filing out-of-time Supplemental Testimony without leave from the Commission to do so, leaves the Company no choice but to move to

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<sup>4</sup> The response to DPU set 50 was sent two days late. However, even if it had been sent on time, the due date was October 19, 2009, 11 days after the DPU’s direct testimony was due.

strike this testimony as improper and prejudicial.

## II. ARGUMENT

Pursuant to its authority to ensure a just, expeditious, and orderly hearing procedure,<sup>5</sup> the Commission should strike the Supplemental Testimony from the record. The testimony was filed contrary to the Commission's Scheduling Order and three weeks after the filing deadline.

The DPU's failure to adhere to the Commission's schedule prejudices the Company because it will not have adequate time to respond to the Supplemental Testimony under the current schedule. In accordance with the requirements of the Utah Administrative Procedures Act, the Scheduling Order allows the Company thirty-five days to draft and file its rebuttal testimony.<sup>6</sup> Here, because the DPU violated the Scheduling Order, the Company has only fourteen days. This time is insufficient for the Company to respond to the new issues raised by the Division witnesses. Indeed, the Company does not have time to submit and receive responses to even one set of discovery requests on the Supplemental Testimony—the discovery turnaround from October 8 through November 12, 2009, is fourteen days.

Although the Supplemental Testimony filed by the Division witnesses suggests that it was filed late because they were waiting for a response to a data request from the Company, the majority of the Company's responses to the data requests were not due until after the October 8, 2009, filing deadline. The Division had approximately four months to conduct discovery in this case and served almost sixty sets of data requests. There is no reason why the information underlying the Supplemental Testimony could not have been gathered during this extensive

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<sup>5</sup> See Utah Admin. Code R. 746-100-10.E.3.

<sup>6</sup> See Utah Code Ann. § 63G-4-206(d) (requiring presiding officers of administrative proceedings to afford parties the opportunity to submit rebuttal evidence).

discovery period. The DPU simply sought the information too late for it to be included in its direct testimony.

As noted above, the Supplemental Testimony includes corrections and updates to positions taken in the DPU's Direct Testimony filed October 8, 2009, in addition to improperly asserting new positions. In some cases, these updates are made based upon settlement of issues since the Direct Testimony was filed. Absent the Supplemental Testimony, these corrections and updates would have been made in rebuttal testimony. The Company believes the DPU should make these corrections and updates in the rebuttal testimony to be filed on November 12, 2009, and encourages the DPU to do so.

### **III. CONCLUSION**

By striking the Supplemental Testimony, the Commission will confine this proceeding to those issues appropriately raised before the Commission in accordance with the Scheduling Order. If the Commission decides that the Supplemental Testimony should remain in the record, due process requires it to allow the Company sufficient time to respond. Without an extension of time to file responsive testimony, the Company will be allowed only 14 days to respond when the Commission's Scheduling Order granted the Company 35 days. In addition, the Supplemental Testimony has effects on other aspects of the DPU's case that the DPU has not addressed in testimony. Therefore, in addition to striking the Supplemental Testimony, to avoid prejudice, the Company requests that the Commission extend the deadline for the Company to file rebuttal testimony on the Supplemental Testimony from November 12, 2009, to November 25, 2009.

The Company also respectfully requests that the Commission expedite the schedule for dealing with this Motion, by requiring parties wishing to respond to the Motion to do so by November 16, 2009 and by ruling on the Motion by not later than November 19, 2009. In the event the Commission determines to deny the Motion in its entirety, the Company respectfully requests that the Commission allow it to file testimony responsive to the Supplemental Testimony five business days after ruling on the Motion consistent with normal practice.

RESPECTFULLY SUBMITTED: November 9, 2009.

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Mark C. Moench  
Daniel E. Solander  
Yvonne R. Hogle  
Attorneys for Rocky Mountain Power



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this 9th day of November, 2009, to the following:

Gary A. Dodge, #0897  
HATCH, JAMES & DODGE  
10 West Broadway, Suite 400  
Salt Lake City, UT 84101  
Telephone: 801-363-6363  
Facsimile: 801-363-6666  
Email: gdodge@hjdllaw.com

Michael Ginsberg  
Patricia Schmid  
Assistant Attorney General  
500 Heber M. Wells Building  
160 East 300 South  
Salt Lake City, UT 84111  
mginsberg@utah.gov  
pschmid@utah.gov

Paul Proctor  
Assistant Attorney General  
160 East 300 South, 5th Floor  
Salt Lake City, UT 84111  
pproctor@utah.gov

F. Robert Reeder  
William J. Evans  
Vicki M. Baldwin  
Parsons Behle & Latimer  
One Utah Center, Suite 1800  
201 S Main St.  
Salt Lake City, UT 84111  
BobReeder@pblutah.com  
BEvans@pblutah.com  
VBaldwin@pblutah.com

ARTHUR F. SANDACK  
8 East Broadway, Ste 510  
Salt Lake City, Utah 84111  
asandack@msn.com

Peter J. Mattheis  
Eric J. Lacey  
Brickfield, Burchette, Ritts & Stone, P.C.  
1025 Thomas Jefferson Street, N.W.  
800 West Tower  
Washington, D.C. 20007  
pjm@bbrslaw.com  
elacey@bbrslaw.com

Gerald H. Kinghorn  
Jeremy R. Cook  
Parsons Kinghorn Harris, P.C.  
111 East Broadway, 11th Floor  
Salt Lake City, UT 84111  
ghk@pkhlawyers.com

Steven S. Michel  
Western Resource Advocates  
227 East Palace Avenue, Suite M  
Santa Fe, NM 87501  
smichel@westernresources.org

Michael L. Kurtz  
Kurt J. Boehm  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, Ohio 45202  
mkurtz@bkllawfirm.com  
kboehm@bkllawfirm.com

Betsy Wolf  
Utah Ratepayers Alliance  
Salt Lake Community Action Program  
764 South 200 West  
Salt Lake City, Utah 84101  
bwolf@slcap.org

Stephen R. Randle  
Utah Farm Bureau Federation  
664 N Liston Cir.  
Kaysville, UT 84037  
s.randle@yahoo.com  
Sarah Wright  
Utah Clean Energy  
1014 2nd Avenue  
Salt Lake City, UT 84103  
sarah@utahcleanenergy.org

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