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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

In the Matter of the Application of Rocky Mountain Power for Approval of an Electric Service Agreement between Rocky Mountain Power and Praxair, Inc.	Docket No. 10-035-115 <b>UTAH OFFICE OF CONSUMER SERVICES' REQUEST FOR RECONSIDERATION</b>
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I. INTRODUCTION AND RELIEF REQUESTED.

The Office requests that the Commission reconsider the December 16, 2010 Report and Order approving the electric service agreement (ESA) between Rocky Mountain Power and Praxair, Inc.<sup>1</sup> In particular, the Commission's decision is based upon a procedure and evidence that violates the Commission's administrative rules and practices pertaining to expedited, orderly and efficient

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<sup>1</sup> The Request for Reconsideration is timely as 30 days from December 16, 2011 was Saturday January 15, 2011 and Monday January 17, 2011 was a federal and State holiday.

hearings. Furthermore, the Report and Order is based upon unwarranted weight given to irregular evidence.

The Office requests that the Commission rescind the Report and Order and reissue a Report and Order that excludes the November 17, 2010 Memorandum submitted by Praxair.

## II. PRAXAIR'S NOVEMBER 17, 2010 MEMORANDUM IS IRREGULAR EVIDENCE.

In its October 27, 2010 Scheduling Order the Commission required Rocky Mountain Power to file by October 29, 2010, memoranda supporting approval of the ESA. Interveners were to file comments on the ESA by November 15, 2010.<sup>2</sup> Any party was permitted to file a reply to intervener comments by November 17, 2010, the day before the November 18 hearing. Praxair's first filing was a reply on November 17, 2010.

By a severe application of the Scheduling Order, Praxair's memorandum was timely. In this circumstance, "timely" also means the effective preclusion of any scrutiny or response to the memorandum. It also effectively precluded any possibility that the Office could respond at the hearing either by testimony or

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<sup>2</sup> On November 2, 2010, Praxair petitioned the Commission to intervene. Even though the petition was not granted until November 22, 2010, after the hearing, the Office will consider Praxair to be an intervener for the purpose of this Request for Reconsideration.

through cross-examination. The Office did not have access to Praxair's memorandum within a reasonable time before it was presented to the Commission.

Praxair's memorandum is irregular for three other reasons. First, it addresses subject matter that far exceeds the scope of the November 15, 2010 comments. Essentially, it is a plea for the Commission to approve the ESA in order to protect Praxair from competitors whose energy costs may be lower.

Second, the memorandum cites to materials gathered from the Division of Public Utilities, internal criteria and guidelines for approving special term contracts, which the Division does not reference in its November 15, 2010 comments and which Praxair admits it cannot authenticate, does not know who prepared it and is addressed to the Arizona Public Service Commission or Public Service Company. Transcript November 18, 2010, page 8. The criteria and guidelines document was not provided together with the memorandum. In fact, these criteria and guidelines are purportedly from a 1988 task force about which there is no evidence. The criteria originated with an attorney for what was then Utah Power & Light. There is no foundation for the evidence offered at the hearing. Rocky Mountain Power waived objection to the document given the limited time to review it, only if it was understood "that this does not reflect what the current criteria and guidelines for special contracts with large customers is."

Transcript November 18, 2010, page 9, lines 7 to 11. And, of course, the timing of its filing effectively precluded any scrutiny or response.

Third, generally a lawyer in a firm may be a necessary witness if another lawyer from the same firm is the advocate because the tribunal is not likely to be misled. *Utah Rules Prof'l Conduct 3.7(b) and Comment 5*. However, prejudice to opposing parties must also be considered. *Id. Comment 1*. In this case, where the attorney/witness connection with Praxair was obvious, the Commission has not considered whether evidence from a lawyer in the firm representing Praxair is necessary, i.e. can only be acquired from the attorney. The Commission has not considered that the timing and circumstances in which the evidence was offered may be prejudicial, nor has the Commission addressed it in the Report and Order.

### III. THE REPORT AND ORDER GIVES UNWARRANTED WEIGHT TO PRAXAIR'S MEMORANDUM.

The Report and Order relies upon an incorrect evidentiary standard stated at page 9:

Regarding the applicability of a special contract in this case, the Office contends that no justification has been provided for Praxair to be considered a special-contract customer. Although the OCS has listed important considerations that should be raised as we review the proposed ESA, it did not rebut Praxair's testimony besides the statements in its Memo. The Commission cannot ignore unchallenged testimony: "the law does not invest the Commission with any such arbitrary power to disbelieve or disregard uncontradicted, competent, credible evidence." *US West v. Public Serv. Comm'n*, 901 P.2d 270 (Utah 1995).

Classifying Praxair's memorandum as un-rebutted and unchallenged signals to every party in every docket that they should not under any circumstance stipulate to the authenticity or admission of any evidence. Classifying such evidence as conclusive signals to every party in every docket that scheduling orders must allow for multiple rounds of testimony and that the testimony must conform to strictly applied rules of evidence.

Commission rules provide means for parties to conduct necessary discovery and to prepare and file testimony in an efficient manner that does not require the Commission's procedural oversight. Commission rules encourage simplifying issues, avoiding unnecessary proof, exchanging proposed exhibits and expert testimony, and cooperatively determining procedures to be followed at hearings. In particular, Commission rules encourage the parties to resolve evidentiary disputes.

Unfortunately, the effect of the Report and Order is to render unpredictable and unreliable, the Commission's procedural rules and evidentiary standards. For example, in the Commission's September 13, 2010 Report and Order in Docket No. 09-2511-01 cost evidence was excluded because the Commission found that it had not been disclosed to a party in a specific way or at a specific time, even though the subject matter to which the evidence was directed has been a focus of the year long litigation. In this case, evidence available for less than 24 hours was

admitted. The Report and Order acknowledges the relevance of the Office's evidence, yet dismisses it in the face of evidence for which there is no foundation that is in part deemed by Rocky Mountain Power to be incorrect and irrelevant.

#### IV. CONCLUSION.

The irregularity and the improper weight given to the evidence contained in Praxair's memorandum have resulted in a decision that is arbitrary and not supported by substantial evidence. The Commission should rescind the Report and Order and reissue a Report and Order that excludes the November 17, 2010 Memorandum submitted by Praxair.

Dated this 18<sup>th</sup> day of January 2011.

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## CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing Request for Reconsideration were served upon the following by electronic mail on January 18, 2011.

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Dated this 18<sup>th</sup> day of January, 2011.

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