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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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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>RESPONSE OF PRAXAIR TO THE OFFICE OF CONSUMER SERVICES' PETITION FOR RECONSIDERATION</b>
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Pursuant to Rule R746-100-11.F of the Utah Administrative Code, Praxair, Inc. (“Praxair”), by and through its counsel, respectfully submits this response to the Office of Consumer Services’ Petition for Reconsideration<sup>1</sup> (“Petition”).

**INTRODUCTION**

Contrary to the belated claims of the Office of Consumer Services’ (“OCS” or the “Office”), the proceedings in this docket were conducted in full accordance with the law. Furthermore, the Office has waived any objections it may have had.<sup>2</sup>

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<sup>1</sup> The rules and regulations of the Utah Public Service Commission (“Commission”) provide only for petitions for “review or rehearing.” Utah Admin. Code R746-100-11.F. While the Utah Administrative Procedures Act (“APA”) provides for petitions for reconsideration, the time limit for such petitions is twenty (20) days. Utah Code Ann. § 63G-4-302(1)(a). The Office did not meet the filing deadline for a petition for reconsideration under the Utah APA. Thus, its Petition should not be given the same consideration as a petition for reconsideration. Instead, the Office’s Petition must be considered only as a petition for review.

<sup>2</sup> Having fully examined the Utah Rules of Civil Procedure, Utah Rules of Evidence, as well as the Commission’s Rules of Practice and Procedure, Praxair can find no such evidentiary objection as “irregular evidence” and the Office cites no support for its position. Yet this appears to be the primary basis of the Office’s Petition.

Nevertheless, it appears that what is really of concern to the Office, given its specific request for relief, is not that the contract be unwound or re-evaluated, but is instead some language in the Order. The Praxair contract has been approved and the parties have been operating under that contract for more than one month. Therefore, Praxair emphasizes that the contract should not be disturbed.

In light of this and the requested relief, Praxair requests that the Commission take no further action in this matter and let its Order in this docket stand, with the passing of twenty (20) days pursuant to Utah Code Annotated § 54-7-15(2) essentially denying the Office's Petition.

## **ARGUMENT**

### **I. THE OFFICE'S UNTIMELY OBJECTIONS HAVE NO BASIS UNDER UTAH LAW.**

The proceedings and admission of evidence relevant to approval of Praxair's Electric Service Agreement ("ESA") with RMP was in full compliance with the Commission's rules and regulations and other Utah law. The Office was given ample opportunity to object to the schedule, the proceedings, and the admission of evidence, but did not. The Office appears to be trying to create an issue where none exists.

The Commission's regulations provide that sections 1 through 14 of R746-100 govern the formal hearing procedures before the Commission, and for situations in which there is no provision in these sections, the Utah Rules of Civil Procedure govern. Utah Admin. Code R746-100-1.A., -1.C.

In the conduct of hearings, "[w]hen a hearing is conducted before less than the full Commission, before an administrative law judge or presiding officer, the presiding officer shall ensure that the taking of evidence and subsequent matters proceed as expeditiously as

practicable.” *Id.* R746-100-10.E.2. Furthermore, the “Commission is not bound by the technical rules of evidence and may receive any oral or documentary evidence.” *Id.* R746-100-10.F.1. The Praxair ESA proceeding was conducted in full compliance with these regulations.

**A. The Office’s Objections to the Schedule and the Substance of Praxair’s Reply Filing Are Waived and Irrelevant to Its Request for Relief.**

Regardless of its narrow request for relief, the Office complains about the schedule, the fact that Praxair filed only a reply to the Office’s comments and no comments on its ESA as filed, and the scope of Praxair’s comments. The Office has waived any such objections and such are irrelevant to a request that the language of the order merely be modified.

If the Office felt it had inadequate time to review Praxair’s comments, or if it had concerns regarding the scope or substance of Praxair’s comments, the time to raise those issues was at the hearing. *State v. Winward*, 941 P.2d 627, 633 (Utah Ct. App. 1997) (“The tactical decision not to object, thereby foregoing a ruling or instruction that may cure an error, constitutes knowing waiver.”)

Based on the timing of the filing by RMP and the desired effective date of the ESA, the schedule in this matter was compacted. Nevertheless, the Scheduling Order indicated that comments on approval of the ESA should be filed on November 15. Scheduling Order at 2, Docket No. 10-035-115, et al. (Oct. 27, 2010). Praxair had no comments on the ESA as filed and thus filed no comments.

The Scheduling Order indicated that replies to other parties’ comments were to be filed on November 17. *Id.* Praxair filed its reply to the Office’s comments in accordance with the Scheduling Order.

The Office never made any objections to the structure of the schedule nor to Praxair's filing. No objections were lodged before the hearing and no objections were made at the hearing. If the Office truly felt it did not have enough time to review Praxair's filing or that the filing was in any way defective, as it has set forth in its Petition, the time to object was at the hearing where a ruling or instruction could have cured any error if such were found to exist.

However, the Office did not make its objections known at the hearing, and thus, under Utah law, the Office has knowingly waived any objection it may have had to the schedule or the scope or substance of Praxair's filing. In addition, in light of the Office's narrow request for relief, such objections are irrelevant and should be disregarded.

**B. The Office's Objections to the Exhibit Submitted in Support of Praxair's Filing Are Waived and Irrelevant to Its Request for Relief.**

Similarly, despite its narrow request for relief, the Office now objects to the introduction of the exhibit, Praxair 1, during the hearing. Exhibit Praxair 1 was properly admitted and is sufficient under the Commission's rules for admission as evidence. Furthermore, such an objection is irrelevant if the Office's goal is to merely change one sentence of the Order.

"The Commission is not bound by the technical rules of evidence and may receive any oral or documentary evidence." Utah Admin. Code R746-100-10.F.1. As the transcript shows, Exhibit Praxair 1 was properly explained and properly admitted under the Commission's rules. Hr'g Tr. 7:10-8:19. The Office expressed no concern whatsoever as to its admission under the Commission's rules and regulations. The policy introduced was explained to be the Division's policy obtained from the Division and was not represented to be anything else.

When the Presiding Officer asked: "So with that caveat, no objections?" the Office remained silent. Thus, the Office knowingly and expressly waived any objection to the

admission of the Exhibit Praxair 1, and is estopped from raising any now. Furthermore, the objections set forth in the Petition are irrelevant if the Office's goal is merely to change the language of the Order, and therefore, they should be disregarded.

C. **The Office's Claim that the Commission's Order Gives Unwarranted Weight to Praxair's Reply Is Unfounded.**

The Commission has broad discretion in the exercise of its obligations to supervise and regulate Rocky Mountain Power, *Mountain Fuel Supply Co. v. Pub. Serv. Comm'n*, 861 P.2d 414, 427 (Utah 1993), and the Office provides no definitive support for its claim otherwise. Praxair's Reply not only set forth the positive economic reasons for approving its ESA with RMP as a special contract, but it also explained the legal and economic deficiencies in the Office's arguments and why those arguments must fail. As the Commission explained in its Order: "the OCS . . . did not rebut Praxair's testimony *besides the statements in its Memo.*" Report & Order at 9, Docket No. 10-035-115 (Dec. 16, 2010) (emphasis added). The matter was resolved on all the opinions filed with the Commission. The Office's comments on the ESA were given evidentiary status as a result of the stipulated agreement to enter all the memoranda as evidence.

The Commission's Order does not render unpredictable and unreliable its procedural rules and evidentiary standards as the Office claims. Those rules and standards are clear and predictable and they worked consistently in this matter as they have in all other Commission formal hearings.

**II. THE OFFICE’S CITATION TO THE RULES OF PROFESSIONAL CONDUCT ARE MISAPPLIED AND MISLEADING AND SHOULD BE DISREGARDED.**

The Office has alluded to the Utah Rules of Professional Conduct and implied misconduct in this case. The Office’s argument has been misapplied and should be disregarded. The Office relies on Comment 1 of Rule 3.7 for its argument. Office Br. at 4. However, Comment 1 is specifically directed to subsection (a) of Rule 3.7. That subsection prohibits in most cases a lawyer serving as *both* an advocate and a witness in the same proceeding. *See Utah Rules of Prof’l Conduct R. 3.7 cmt 1* (“The tribunal has proper objection when the trier of fact may be confused or misled by *a lawyer serving as both advocate and witness.*” (emphasis added)). That would only have been the case if Mr. Reeder had attempted to serve as Praxair’s advocate and witness. However, that is not what happened here.

In fact, the Utah Rules of Professional Conduct specifically allow the proceedings as they occurred in this case. The Rules provide:

A lawyer may act as advocate [Mr. Reeder] in a trial in which another lawyer in the lawyer’s firm [Dr. Sinclair] is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rules 1.7 and 1.9 concern conflicts of interest between current and former clients. They are inapplicable here. The Office’s attempt to disparage and imply misconduct in this case should be disregarded in its entirety.

**CONCLUSION**

In its Petition, the Office has complained of simple procedural and evidentiary processes that occurred prior to and during the hearing for this matter on November 18, 2010. As demonstrated above, the Office has knowingly and expressly waived any such complaints and its

Petition should be denied. The ESA has been approved and Praxair and RMP have been operating pursuant to that contract for more than one month. The Office appears to have no complaint with the ESA or its approval, but instead is only concerned with some language in the Order. The objections raised in the Petition are irrelevant to such a narrow request. Therefore, Praxair requests that the Commission let the twenty (20) day limit for ruling expire pursuant to Utah Code Ann. § 54-7-15(2), resulting in denial of the Office's Petition.

DATED this 2d day of February, 2011.

/s/ Vicki M. Baldwin

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**CERTIFICATE OF SERVICE**

(Docket No. 10-035-115)

I hereby certify that on this 2d day of February 2011, I caused to be e-mailed, a true and correct copy of the foregoing **RESPONSE OF PRAXAIR TO THE OFFICE OF CONSUMER SERVICES' REQUEST FOR RECONSIDERATION** to:

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/s/ Colette V. Dubois

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