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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power for Approval of its Proposed Energy Cost Adjustment Mechanism

Docket No. 09-035-15

In the Matter of the Application of the Utah Association of Energy Users for a Deferred Accounting Order Directing Rocky Mountain Power to Defer Incremental REC Revenue for Later Ratemaking Treatment

Docket No. 10-035-14

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. 10-035-124

**RESPONSE OF UAE INTERVENTION GROUP
TO MOTION OF ROCKY MOUNTAIN POWER FOR DETERMINATION OF
RATEMAKING TREATMENT OF DEFERRED ACCOUNTS**

The UAE Intervention Group (UAE) hereby responds to the Motion (RMP Motion) of Rocky Mountain Power (RMP) for a determination of the ratemaking treatment of deferred

incremental net power costs (NPC Deviation) and deferred incremental REC revenue (REC

Deviation). UAE's response to the RMP Motion is summarized as follows:

1. RMP's request for a determination of the ratemaking treatment of the REC Deviation is moot, as UAE has already requested the same in the pending general rate case (GRC), and has timely filed supporting testimony;
2. The Commission should determine the ratemaking treatment of the NPC Deviation at this time in light of the RMP Motion, but not in the 2011 GRC;
3. The ratemaking treatment of the NPC Deviation can be determined as a matter of law;
4. The NPC Deviation cannot lawfully be collected from Utah Ratepayers under the EBA Statute;
5. The NPC Deviation cannot otherwise be lawfully collected from Utah Ratepayers because it would constitute prohibited retroactive ratemaking;
6. The NPC Deviation is not and should not be tied in any manner to a determination of the ratemaking treatment of the REC Deviation.

I. A Determination of the Ratemaking Treatment of the NPC Deviation has already been requested.

The RMP Motion requests a determination of the ratemaking treatment of the REC Deviation in the context of the 2011 GRC. RMP's request is moot, as UAE has already made such a request, and has timely supported its request with testimony.

II. The Commission should determine the ratemaking treatment of the NPC Deviation in light of the RMP Motion.

Both the Deferral Order (Report and Order on Deferred Accounting Stipulation, July 14, 2010, Docket No. 09-035-15) and the EBA Order (Corrected Report and Order, March 3, 2011, Docket 09-035-15) contemplate that the ratemaking treatment (if any) of the NPC Deviation would be determined at an appropriate future time. As RMP has now requested that such

determination be made, it is appropriate for the Commission to do so. As explained below, however, this determination should not be made in the context of the 2011 GRC. As also explained below, this determination can be made as a matter of law.

III. The NPC Deviation Cannot be Collected from Utah Ratepayers under the EBA Statute.

The Commission's findings in the EBA Order, when applied to the legal restrictions of the EBA Statute, Utah Code §§ 54-7-13.5, *et seq.*, compel the conclusion that RMP cannot collect the NPC Deviation from Utah Ratepayers under that statute. An EBA can only become effective *after* the Commission has determined that it is "in the public interest" (*id.*, at § 13.5(2)(b)(i)), and an EBA can only be implemented "at the conclusion of a general rate case" (*id.*, at § 13.5(2)(b)(iii)). In the EBA Order, the Commission found that the Company's proposed EBA was *not* in the public interest (EBA Order at 63). Therefore, the requisite public interest finding was not and could not have been made prior to the conclusion of the 2009 GRC in February 2010. The first general rate case after the Commission's public interest finding is the pending 2011 GRC, Docket 10-035-124. Accordingly, as a matter of law, the EBA cannot lawfully be implemented until the pending GRC is concluded, as was properly recognized in the EBA Order (at 77).

RMP's *intention* that the EBA would be instituted at the end of the 2009 GRC is immaterial. RMP's proposed EBA was found not to be in the public interest, and it thus was not -- indeed could not have been -- implemented at the conclusion of the 2009 GRC in February 2010. The Commission properly determined that the EBA will not be implemented until the conclusion of the 2011 GRC. Given the express restrictions of the EBA Statute and the timing

and findings of the EBA Order, the EBA statute does not and cannot support a retroactive implementation date as now requested by RMP.

IV. Recovery of the NPC Deviation from Utah Ratepayers Would Constitute Prohibited Retroactive Ratemaking.

Because the timing and findings of the EBA Order and the EBA Statute preclude a retroactive EBA implementation date, RMP cannot collect the NPC Deviation under that statute, and cannot otherwise collect it from Utah ratepayers unless the NPC Deviation qualifies for one of the limited exceptions recognized by Utah law to the general bar against retroactive ratemaking. It does not so qualify. RMP has not claimed or offered facts or circumstances sufficient to warrant application of any recognized exception to the bar against retroactive ratemaking.

Utah law requires that ratemaking be done prospectively and forbids retroactive rate adjustments except under limited and extraordinary circumstances. Utah statutes are clear in this mandate: A utility may make “no change” to “any rate” without first making a Commission filing. Utah Code §§ 54-3-3. “[N]o public utility shall ... receive a greater ... compensation ... than the rates ... specified in its schedules on file and in effect *at the time*”) *Id.* at 54-3-7 (emphasis added); A rate increase must be preceded by the filing of schedules, notice, a hearing and issuance of a final commission order *Id.* at 54-7-12(2).

Utah case law is even clearer: “Following lengthy hearings, utility rates are fixed *prospectively* by the PSC”; “[A]ll rate making must be *prospective* in effect”; “The bar on retroactive rate making has no exception for missteps made in the rate-making process. Corrective action can be taken, but it must be *prospective* only.” *Utah Department of Business Regulation v. Public Service Commission*, 720 P.2d 420, 420, 423, 424 (Utah 1986) (emphasis added).

A few limited exceptions have been recognized by Utah courts to the general bar against retroactive ratemaking. One such exception is for *unforeseeable* and *extraordinary* events that, by their nature, could not have been taken into account in the ratemaking process. *E.g.*, *MCI Telecommunications Corporation v. Utah Public Service Commission*, 840 P.2d 765, 771-772 (Utah 1992); Report and Order, Utah PSC Dockets 06-035-163, 07-035-04, 07-035-14, at 15 (January 3, 2008). In addition, retroactive rate adjustments may be appropriate in the case of utility misconduct that undermines the integrity of the ratemaking process. *Stewart v. Utah Public Service Commission*, 885 P.2d 759, 779 (Utah 1994).¹

Utah's prospective ratemaking policy is intended to effect a balancing of risks between a utility's shareholders and its ratepayers. The prohibition against retroactive ratemaking is designed to provide the utility with an "incentive to operate efficiently." *Utah Department of Business Regulation v. Public Service Commission*, 720 P.2d 420, 420 (Utah 1986). "If the utility underestimates its costs or overestimates its revenues, the utility makes less money. By the same token, if a utility's revenues exceed expectations or if costs are below predictions, the utility keeps the excess." *Id.* at 420. Permitting PacifiCorp to collect retroactively the amount by which actual NPC exceeded rate case NPC projections would clearly violate these policies.

The Commission has allowed retroactive NPC rate adjustments in the past in the wake of legitimately unforeseeable and extraordinary events, such as a major plant outage during the California energy crisis (Order on Stipulation; Dockets 01-035-23, 01-035-29, 01-035-36, May 2,

¹Utah law has also recognized limited exceptions to the general bar against retroactive ratemaking for interim rate adjustments, *Utah Dept. of Business Reg. v. Public Service Comm.*, 720 P.2d 420, 423 (Utah 1986), under a "fuel cost pass-through" statute, in an "abbreviated rate case," or through a "191 balancing account mechanism." *Questar Gas Co. vs. Public Service Comm.*, 34 P.3d 218, 223 (Utah 2001). None of these

2002). No such extraordinary and unforeseeable events have even been claimed, much less supported, by RMP for the NPC Deviation. Thus, RMP cannot recover it from Utah ratepayers.

RMP's attempt to rely upon findings of the EBA Order to support a retroactive rate adjustment is unavailing. The standard for *prospective* adoption of an EBA is very different than the standard for a *retroactive* rate adjustment. RMP claims that NPC is "volatile" and "difficult to forecast" and that NPC Deviations are "substantial" and outside its control (Supplemental Direct Testimony of Steven R. McDougal, Deferred Accounts, June 2011, lines 140-144). Such evidence may have been sufficient to support prospective implementation of an EBA under the EBA Statute, but they clearly do not satisfy the "extraordinary and unforeseeable" requirement of Utah law for retroactive rate relief.

Neither the RMP Motion nor Mr. McDougal's Supplemental Testimony even purports to claim, let alone demonstrate, that the NPC Deviation was caused by extraordinary or unforeseeable events.² As a matter of Utah law, RMP may not recover the NPC Deviation from its Utah ratepayers.

V. The NPC Deviation is not and should not be tied to the REC Deviation.

The Commission's Deferral Orders in both the EBA Docket (09-035-15) and the REC Docket (10-035-14) contemplated that the final ratemaking treatment of each deferral (if any, and without any prejudgment or presumption as to any appropriate ratemaking treatment) would be

circumstances applies here.

² This admission is similar to RMP admissions in the EBA Docket hearings. Both RMP's counsel and RMP's only witness on recovery of the NPC Deviation in that docket refused to characterize, or accept characterizations of, the NPC Deviation as extraordinary *or* unforeseeable (*See* Transcript of Hearing Proceedings, UPSC Docket 09-035-15, November 1, 2010, page 92, line 11 – page 98, line 5), prompting Chairman Boyer to accurately predict that RMP "may have a problem downstream" in light of such admissions (*id.*, page 96, lines 21 – page 97, line 2).

determined at some point in the future in ratemaking dockets. Consistent with this direction, UAE timely requested that the ratemaking treatment of the REC Deviation be determined in the 2011 GRC. UAE conducted discovery on the REC Deviation in the context of the 2011 GRC and requested a ratemaking determination with the filing of its direct case. Moreover, the appropriate ratemaking treatment of the REC Deviation can easily be determined within the schedule of the 2011 GRC, given that limited factual and legal issues are presented. Indeed, the RMP Motion does not assert that RMP will not have adequate time to analyze or respond to UAE's request within the context of the 2011 GRC.

In contrast, RMP did not seek a ratemaking determination of the NPC Deviation with its direct case. Moreover, if the RMP Motion is not disposed of on legal grounds (as UAE believes it should be), the factual and policy issues presented by the RMP Motion are extensive and highly contested, will require significant discovery, and will involve much more time and effort than is possible within the remaining 2011 GRC schedule. In essence, the parties would need to investigate the equivalent of a brand new rate case for an expansive period stretching from February 2010 to September 2011 to evaluate the prudence, amount and appropriate treatment of all aspects of the NPC Deviation.

The myriad of factual and policy issues that would need to be addressed to determine the appropriate ratemaking treatment of the NPC Deviation include, among others: prudence (e.g., prudence of all transactions affecting NPC, including sales, purchases, outages, etc.); appropriate adjustments (including evaluation of NPC adjustments adopted in the 2009 GRC and proposed in the 2011 GRC); design (e.g., which cost and expense items should properly be included, and how they should be recovered); treatment of swaps/hedges (e.g., what level of hedging was utilized,

what was the cost, what hedges were prudent under then-existing circumstances, etc.); interstate allocations (i.e., proper implementation of a rolled-in methodology or treatment of the 1% rate mitigation cap for this period, as contemplated in the EBA Order (at 77-78)); risk sharing (e.g., 70/30 risk-sharing as adopted in the EBA); etc. There is simply not enough time left in the 2011 GRC to investigate all of these issues. The parties have already spent months investigating the 2011 GRC, and simply do not have the time or resources to explore all of the issues relevant to NPC for the expansive deferral period.

The RMP Motion requests, in the alternative, that the REC Deviation not be resolved in the context of the 2011 GRC if the NPC Deviation is not. This request will be moot based on a determination that the NPC Deviation cannot be recovered from Utah ratepayers as a matter of law, but it is otherwise inappropriate. There is no reasonable basis for denying UAE's timely request for a determination of the ratemaking treatment of the REC Deviation. RMP's failure to timely request a similar determination of the NPC Deviation in the 2011 GRC is not a proper basis for denying UAE's timely request. The two deferrals are not tied together in any manner, legally, logically, factually or otherwise. RMP's alternative request should be denied.

Respectfully submitted this 17th day of June, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this 17th day of June, 2011, on the following:

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