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**BEFORE THE UTAH PUBLIC SERVICE COMMISSION**

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In the Matter of the Notice of Rocky Mountain Power of Intent to File a General Rate Case.

Docket No. 11-035-200

**UIEC’S MOTION TO DISQUALIFY**

**OR, IN THE ALTERNATIVE,**

**TO REQUIRE THE DEVELOPMENT OF MODELS TO ASSIST THE COMMISSION IN EVALUATING THE PROPOSALS OF ALL OF THE PARTIES**

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Utah Industrial Energy Users, an intervention group (“UIEC”), pursuant to Utah Rule of Administrative Procedure R746-100-3(H), hereby submits this Motion to Disqualify or, in the alternative, to Require the Development of Models to Assist the Commission in Evaluating the Proposals of All of the Parties. The grounds for this Motion are set forth as follows:

**INTRODUCTION**

The method for class cost allocation is a contested issue in this case. Rocky Mountain Power (“RMP” or “Company”) has proposed a model that incorporates the inter-jurisdictional allocation methodology into the class cost allocation, which the UIEC has challenged in previous dockets and plans to challenge again in this docket. *See* UIEC’s Comments on Agreement

Pertaining to PacifiCorp's September 15, 2010 Application for Approval of Amendments to Revised Protocol Allocation Methodology, Docket No. 02-035-04 (August 18, 2011) ("UIEC Comments") at 10.<sup>1</sup>

The Commission has enlisted Dr. Jim Logan to reformat RMP's model to make it more convenient for the Commission to use in evaluating the Company's proposal. *See* Memorandum, Docket No. 11-035-200 (April 30, 2012) ("Commission Memorandum"). Like the RMP model, Dr. Logan's model applies inter-jurisdictional allocation methods to the class cost allocation. The Commission has stated that it plans to use Dr. Logan's model "as it considers parties' direct, rebuttal, and surrebuttal adjustments to the requested revenue increase stated in the [Company's] direct case." Commission Memorandum.

The Commission has scheduled a workshop as an "[i]ntroduction to and discussion of the Commission's April 30, 2012, memorandum and integrated model replicating RMP's jurisdictional and class cost of service results." Notice of Technical Conference and Agenda, Docket No. 11-035-200 (May 18, 2012) ("Notice") at 3. It has also issued an Action Request to the Division of Public Utilities for investigation into the inconsistencies between RMP's jurisdictional and class cost of service studies. Action Request, Docket No. 11-035-200 (May 10, 2012).

The Commission's sponsorship and proposed use of Dr. Logan's model, and its Action Request to the Division, creates the appearance (and the risk) of prejudgment and bias in favor of the Company's method for class cost allocation. The remedy for apparent prejudgment and bias

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<sup>1</sup> UIEC has argued that "Utah rates should be based on functionalization, classification, and allocation factors that are just and reasonable for Utah ratepayers based on Utah law and Utah policies, regardless of any inter-jurisdictional allocation agreement."

requires that the Commission disqualify from participation in this case those individuals who participated in procuring, reviewing, approving or using Dr. Logan's model to ensure impartiality in the adjudication of the class cost allocation issue. In the alternative, the Commission should request Dr. Logan to reformat the models to be submitted by other parties so that the Commission would find it equally convenient to evaluate their proposed class cost allocation methods.

**I. COMMISSION SPONSORSHIP OF DR. LOGAN'S MODEL CREATES AN APPARENT BIAS THAT COULD LEAD TO UNINTENTIONAL PREJUDGMENT OF THE ISSUE OF CLASS COST ALLOCATION METHODOLOGY.**

“One of the fundamental principles of due process is that all parties to a case are entitled to an unbiased, impartial judge.” *Anderson v. Indus. Comm'n of Utah*, 696 P.2d 1219, 1221 (Utah 1985). This principle is equally applicable to administrative proceedings. *Id.* In *Pan Am World Airways, Inc. v. Boyd*, for example, the Civil Aeronautics Board considered whether it should terminate a certificate authorizing Pan Am World Airways to fly a certain Northwest route. 207 F. Supp. 152, 153 (D.D.C. 1962). It conducted its own study and concluded that the best route structure for the four airlines in the region required termination of Pan Am's authorization to fly that route. *Id.* at 153. The Board scheduled hearings to allow the affected parties to explain why their decision should not go into effect. *Id.* The federal court rejected the Board's approach, explaining that, while administrative proceedings are different from judicial proceedings, nevertheless “a case may not be prejudged by the tribunal that is going to hear and decide it.” *Id.* at 154-55.

The Commission sponsored Dr. Logan's model in an effort to make the Company's cost of service model easier to use. Commission Memorandum. The Commission is allowed to

develop and use analytical tools to assist its decision-making. However, Dr. Logan's model hardwires RMP's method of tying the inter-jurisdictional allocation to the class cost allocation. As such, his model could make it more difficult for the Commission to evaluate competing class cost allocation proposals.

Because the Commission (or its staff) has procured Dr. Logan's model, invested time and perhaps money in developing it, it would be natural for the Commission to prefer to use Dr. Logan's model as a reference point from which to consider all other proposals. Thus, the mere sponsorship of Dr. Logan's model is likely to create a conceptual reliance on it, and a bias in favor of it, to the detriment of the Commission's perceived ability to consider other parties' proposals. Like the Board pre-determining the route structure in *Pan Am World Airways*, the Commission's decision to create a model only for evaluating RMP's proposal encourages the Commission to treat the other parties' proposals as "alternatives" to the Company's method, thus unintentionally prejudging the class cost allocation issue. If Dr. Logan's model is the only one used to evaluate the parties' proposals, or if it is used as the reference point for evaluating all other class cost allocation proposals, there is a significant risk that the Commission will be unable to fairly evaluate the others.

Dr. Logan cannot be made to testify about his cost of service model. *See* Utah Code Ann. § 54-1-6(3)(a) ("[t]he staff or other employees of the commission may not appear as parties or witnesses in any proceeding before the commission, any commissioner, or any administrative law judge"). Without an opportunity to cross examine Dr. Logan, the parties are denied traditional procedural safeguards to challenge his assumptions, test the validity of his theories and reasoning, or otherwise rebut his opinion. *See* Utah Code Ann. § 63G-4-206(1)(d) ("The

presiding officer shall afford to all parties the opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence [in a formal adjudicative procedure.]”). The lack of these procedural safeguards makes it all the more important that the Commission avoid the appearance of partiality toward RMP’s class cost allocation method.

A decision-maker who has already decided the case before hearing evidence from all the parties cannot be said to be impartial and must be disqualified from the proceeding. *V-1 Oil Co. v. Dep’t of Environ. Quality*, 939 P.2d 1192, 1197-98 (Utah 1997). The Commission’s sponsorship of Dr. Logan’s model creates the appearance that the Commission has prejudged the issue and will thereby deny the parties a fair hearing on the proper method for class cost allocation. Regardless of the Commission’s intentions, when partiality is “apparent on the face of the record,” the Commission and members of its staff who were involved in sponsoring Dr. Logan’s model must be disqualified. *See Id.* (“A clear demonstration of partiality apparent on the face of the record . . . automatically requires disqualification of the decision-maker.”) (internal citation omitted).

Because the Commission has created the appearance and the risk of impartiality in adjudicating the class cost of service issue, all of those among the Commission and its staff who have participated in procuring, reviewing, approving or using Dr. Logan’s model should be disqualified from participating in adjudicating or advising the Commission on that issue.

**II. IN THE ALTERNATIVE, THE COMMISSION SHOULD REQUIRE DR. LOGAN TO DEVELOP A MODEL FOR THE COMMISSION TO EVALUATE COMPETING PROPOSALS**

Instead of hiring Dr. Logan to create a model to evaluate RMP’s class cost allocation proposal, the Commission could have issued an action request to the Division of Public Utilities

("DPU") to advise it on the Company's model. Under Utah Code Section 54-4-1.5, the Commission may order the director of the DPU to conduct research, studies and investigations and provide information, documents or records to assist the Commission in investigating and adjudicating issues before it. Enlisting the DPU to procure and sponsor Dr. Logan's model would have eliminated any question as to the Commission's objectivity. In addition, the parties would have been able to conduct discovery concerning the model and to cross examine Dr. Logan. By enlisting Dr. Logan directly, and by requesting that he create a model only to evaluate RMP's proposal, the Commission has exposed itself to the appearance of partiality and bias which it must now take action to mitigate.

The UIEC respectfully suggest that, as the other parties file their alternative proposals to the Company's class cost allocation method, the Commission enlist Dr. Logan to reformat their models, as it has done with RMP's model, to make it equally convenient for the Commission to evaluate all proposed class cost allocation methods. This would assist the Commission in fairly and fully evaluating the alternative class cost of service proposals while, at the same time, mitigating the appearance and risk of prejudging the issue.

### **CONCLUSION**

For the reasons stated above, the Commission must disqualify those individuals who were involved in procuring, reviewing, approving or using Dr. Logan's model from participating in deciding or advising the Commission on the cost of service issues in this case. In the alternative, the Commission should direct Dr. Logan to develop reformatted models, similar to the model he has developed to evaluate RMP's proposed class cost allocation method, for the Commission to use in evaluating the competing proposals of the other parties.

DATED this 1<sup>st</sup> day of June, 2012.

/s/ William J. Evans

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**CERTIFICATE OF SERVICE**

Docket No. 12-035-200

I hereby certify that on this 1st day of June 2012, I caused to be emailed, a true and correct copy of the foregoing UIEC'S MOTION TO DISQUALIFY OR, IN THE ALTERNATIVE, TO REQUIRE THE DEVELOPMENT OF MODELS TO ASSIST THE COMMISSION IN EVALUATING THE PROPOSALS OF ALL THE PARTIES to:

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/s Colette V. Dubois

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