

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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In the Matter of the Application of the Utah )  
Industrial Energy Consumers for a Deferred ) DOCKET NO. 11-035-46  
Accounting Order Directing Rocky Mountain )  
Power to Defer Incremental REC Revenue for ) ORDER DENYING  
Later Ratemaking Treatment ) MOTION TO DISMISS  
)  
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ISSUED: June 20, 2011

By The Commission:

This matter is before us on Rocky Mountain Power's Motion to Dismiss and Response Opposing Utah Industrial Energy Consumers'<sup>1</sup> ("UIEC") Application, filed April 20, 2011. In this motion, PacifiCorp ("Company"), doing business in Utah as Rocky Mountain Power, argues UIEC's application for a deferred accounting order fails to state a claim upon which relief may be granted.

UIEC's application requests an order from the Commission requiring the Company to defer for later ratemaking treatment all revenues from 2009 recovered by the Company prior to February 22, 2010,<sup>2</sup> in connection with sales of Renewable Energy Credits/Certificates ("RECs"), in any form, that are in excess of the REC value utilized in Utah rates. UIEC asserts the rule against retroactive ratemaking is not a bar to its application because the REC revenues in question likely are the results of: 1) unforeseen events producing

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<sup>1</sup> UIEC is a group of electrical customers comprised of Holcim, Inc., Kennecott Utah Copper LLC, Kimberly-Clark Corp., Malt-O-Meal, Praxair, Inc., Proctor & Gamble, Inc., Tesoro Refining and Marketing Co., and Western Zirconium.

<sup>2</sup> In an order issued February 22, 2010, in Docket No. 10-035-14, the Commission authorized deferred accounting for REC revenues from that date going forward.

extraordinary effects, and 2) the Company's knowing failure to disclose pertinent REC revenue information during rate setting proceedings.<sup>3</sup>

The Company brings its motion to dismiss pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure.<sup>4</sup> This Rule describes as a basis for dismissal of a civil complaint, the failure of the complaint to state a claim on which relief can be granted. The Company notes that when deciding a Rule 12(b)(6) motion, the Commission should accept the non-movant's factual allegations as true and consider all reasonable inferences to be drawn from those facts in the light most favorable to the non-movant, in this case UIEC. This approach is consistent with past Commission practice.<sup>5</sup> The Company also urges the Commission to take notice of facts capable of ready determination and to evaluate the plausibility of the legal claims for relief in the application.<sup>6</sup>

The Company argues UIEC's application must be dismissed because it seeks an inappropriate use of deferred accounting and improper retroactive ratemaking. In defending its motion, the Company asks: "1) Is deferred accounting only available for current revenues or costs? 2) Is retroactive ratemaking only available for increased revenues or decreased costs if the Company is over earning?"<sup>7</sup> The Company argues these questions are purely legal and their

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<sup>3</sup> See UIEC's Application for Deferred Accounting Order for REC Revenue, March 21, 2011, pp. 4-5.

<sup>4</sup> The Commission's procedural rules do not provide specifically for a motion to dismiss. Utah Admin. Code R746-100-1.C. states in situations not provided for in the Commission's rules, the Utah Rules of Civil Procedure govern, unless the Commission considers them to be unworkable or inappropriate.

<sup>5</sup> See, e.g., *Barker v. Qwest*, Docket No. 02-049-46, October 4, 2002; *In re Bear Hollow*, Docket No. 09-015-01, Order on Motions to Dismiss, February 4, 2010.

<sup>6</sup> See Rocky Mountain Power's Motion to Dismiss, April 20, 2011, p. 10.

<sup>7</sup> Rocky Mountain Power's Reply to UIEC's and UAE's Responses in Opposition to Motion to Dismiss, May 16, 2011, p.2.

answers require no resolution of disputed facts. The Company also argues the appropriate answers to these questions are in the affirmative and mandate dismissal of the UIEC application.

In supporting its motion the Company quotes and construes various accounting standards from the Federal Energy Regulatory Commission Uniform System of Accounts and Statement of Financial Accounting Standards No. 71. The Company concludes the deferred accounting UIEC desires would frustrate the purposes of these standards and compromise the ability of the financial community to rely on accounting information. In the Company's view, deferred accounting must be limited to revenues and expenses incurred in the current period.

The Company also presents a detailed account of the REC revenue forecasts it has presented to the Commission since 2006 and the actual revenues realized. It offers data showing it earned below its authorized return during the periods for which UIEC seeks the accounting order, even though actual REC revenues in 2009 and 2010 were higher than the Company predicted for those years. Citing *MCI Telecommunications Corp. v. Public Service Comm'n*,<sup>8</sup> the Company argues the exceptions to the rule against retroactive ratemaking on which UIEC relies (in requesting now a deferred accounting order applicable to 2009 revenues) are only available and justified if the Company earned more than its authorized rate of return during the relevant period. Since, in the Company's view, it was not over earning, UIEC's application must be dismissed.

UIEC opposes the motion to dismiss. It notes the Commission, in considering requests for deferred accounting, has previously found that regulatory accounting has somewhat different purposes and objectives than financial accounting. "Regulatory accounting is a tool to

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<sup>8</sup> 840 P2d 765 (Utah 1992).

arrive at the regulatory objective of just and reasonable rates.”<sup>9</sup> Accordingly, “ratemaking rules and principles have application and may be given greater weight than [financial] accounting rules and principles in considering whether to issue an accounting order.”<sup>10</sup> UIEC believes the pertinent ratemaking principles, as distinct from financial accounting standards, support the imposition of the requested accounting order.

UIEC also argues exceptions to the rule against retroactive ratemaking justify the requested deferred accounting. These exceptions apply when unforeseen and extraordinary circumstances, or the utility’s withholding of relevant information, render rates unjust and unreasonable. UIEC notes, in considering whether to apply such exceptions in other cases, the Commission has assessed when the utility became aware of key events and circumstances, and when it incurred the expenses or received the revenues resulting from the unforeseen and extraordinary circumstances.<sup>11</sup>

UIEC provides detailed documentation of its efforts to learn from the Company about the extent of its REC transactions, alleging the Company failed to provide timely, accurate and specific information as to its 2009 REC sales and revenues. UIEC asserts the Company has recently disclosed it collected \$29 million as opposed to the \$4 million it projected in the 2008 general rate case and \$54 million as opposed to the \$10 million it projected in the 2009 general rate case.<sup>12</sup> UIEC argues a utility that fails to disclose information pertinent to the proper resolution of a ratemaking proceeding may not invoke the rule against retroactive ratemaking to

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<sup>9</sup> Report and Order, Docket Nos. 06-035-163, 07-035-04, and 07-035-14, January 3, 2008, pp. 13-14.

<sup>10</sup> Id. at 17. See also Rocky Mountain Power’s Motion to Dismiss, pp. 9-10.

<sup>11</sup> Id. at 18.

<sup>12</sup> See UIEC’s Opposition to Rocky Mountain Power’s Motion to Dismiss, May 5, 2011, p. 5.

avoid refunding rates improperly gained. Thus, in UIEC's view, questions of fact regarding the higher levels of REC revenues received in relation to rate case projections, the reasons for those higher levels, and when the Company became aware of these changed conditions are at the heart of UIEC's request and must be resolved in the Commission's action on the application.

The Utah Association of Energy Users ("UAE") also opposes the Company's motion, citing numerous factual and policy issues it believes the Commission must consider in determining whether the exceptions to the rule against retroactive ratemaking apply in this matter. UAE argues the Company's motion itself relies on numerous factual allegations that have not been properly established, including: "alleged amounts of actual REC revenue received by the company from 2007 – 2010 (Motion, pages 3-7); alleged actual company earnings for those same periods (Motion, pages 6-7); alleged timing and causes of the dramatic jump in REC values (Motion, page 8); and the timing of RMP [i.e., Company] agreements to sell RECs (Motion, page 8)."<sup>13</sup> UAE maintains disputes over these assertions are at least plausible and their resolution requires a hearing.

The Division of Public Utilities did not respond to the Company's motion. It did, however, respond to the Commission's action request on the UIEC application, noting numerous factual issues raised by the application, as follows:

...whether the revenue available to RMP in selling renewable attributes of renewable energy resources in 2009 was significantly greater, in a manner that was dramatic, unprecedented, unforeseeable, and extraordinary, than disclosed by RMP in previous general rate cases and if so what caused the above to happen. Second, did RMP enter into contracts for the sale of RECs at prices significantly higher than prices projected or disclosed by RMP in previous rate cases? Third, is

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<sup>13</sup> UAE's Response in Opposition to RMP's Motion to Dismiss, May 5, 2011, pp. 2-3.

it true or not that the Company did not incorporate into the test years for its rate cases or disclose to the Commission in prior rate cases the extraordinary revenue it received for RECs in 2009? Fourth, does the discovery in Utah Docket No. 10-035-124 demonstrate that for at least some period during 2009, RMP total company REC revenue prior to February 22, 2010, was in excess of \$50 million, and if not \$50 million, then just what was the amount and was it an extraordinary amount? Fifth, does RMP have millions of RECs banked but not sold? And sixth, does or does not the Company's REC revenue that predates the Commission's order approving a REC-revenue deferral account in Docket No. 10-035-14 qualify for "retroactive" rate adjustment?<sup>14</sup>

The Division presents these questions as justifying a scheduling conference for the purpose of establishing filing deadlines and, if necessary, hearings. We note the similarity of these factual questions to those UIEC and UAE assert in response to the Company's motion to dismiss.

We conclude dismissal of UIEC's application for a deferred accounting order at this stage is not justified. Accepting, for the purposes of this order, UIEC's factual allegations as true and considering all reasonable inferences from those facts in the light most favorable to UIEC, we cannot grant the Company's motion. UIEC's application raises a number of factual and policy issues we must examine, in order to determine whether the requested relief should be granted.<sup>15</sup>

Analyzing the two "legal" questions the Company presents as the basis for its motion (quoted above) makes clear a hearing is warranted. First, the Company asserts its motion is meritorious because deferred accounting is not proper for previously-incurred revenues and

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<sup>14</sup> Action Request Response of the Division of Public Utilities, April 20, 2011, p 2.

<sup>15</sup> We note the Company's motion itself rests on numerous allegations relevant to whether the requested relief is merited. Given the assertions in UIEC's application, we find it is plausible, if not likely, UIEC will dispute many of the facts alleged in the Company's motion and the inferences that may be drawn from them. It is also apparent much of the Company's argument interprets and applies various accounting and ratemaking standards in ways UIEC disputes. These differing perspectives raise questions of fact relevant to our decision on the application.

expenses. The Company's own interpretations of the various accounting standards and policies, however, raise issues of fact. Even more significant is UIEC's argument that the accounting standards are not dispositive and that ratemaking rules and principles in this instance should be accorded greater weight. Consistent with past Commission practice, the balancing of these various accounting and regulatory standards and policies can require, as it does in this instance, a highly fact-dependent analysis. The resulting mix of questions of fact and law necessitates hearings.

One of our fundamental objectives is the establishment of just and reasonable rates. In pursuit of that objective we must not be thwarted by rigid adherence to particular interpretations of financial accounting standards, especially where those standards may have been designed to achieve somewhat different purposes. This case presents allegations of unforeseen and extraordinary events producing an extraordinary windfall for the Company. We further have allegations the windfall, or at least the timing of UIEC's ability to challenge it, may be at least partially the result of the Company's alleged knowing failure to disclose to the Commission relevant information in prior rate cases. Under these circumstances, we have a duty to investigate UIEC's allegations.

Our consideration of the second "legal" question presented in the Company's motion leads us to a similar conclusion. UIEC's claims potentially raise exceptions to the rule against retroactive ratemaking the Utah Supreme Court defined in the *MCI Telecommunications Corp.* case. The Company, however, argues the exceptions are only available to address increased revenues or decreased costs when, and to the extent, the utility is over earning. In *MCI*

the record showed a utility had consistently earned more than its authorized rate of return and that a possible cause was the reduced corporate tax rate imposed by the Tax Reform Act of 1986 (“TRA”). The Court found the Commission erred in failing to hold hearings to determine whether the reduced tax rate resulted in an unforeseeable and extraordinary decrease in utility expenses, and whether the utility engaged in misconduct by obfuscating the effects of the tax rate change.

In remanding the case, the Court held if the TRA was found to have resulted in an unforeseeable and extraordinary decrease in expenses or if the utility was found to have engaged in misconduct, the utility’s earnings, to the extent they exceeded its authorized rate of return established in a prior rate case, should be refunded to ratepayers. In providing these instructions the Court stated “...if a utility earns profits in excess of its authorized rate of return because of an exception to the rule against retroactive rate making, the authorized rate is the best available measure of a fair return and earnings in excess of that rate are subject to refund.”<sup>16</sup>

In the instant case, the Company maintains it earned less than its authorized rate of return during the relevant time period. As proof, it refers to results of operations reports it routinely files with the Commission. While these reports are relevant, they are not conclusive evidence of the rate of return achieved in 2009 for purposes of this application. Additionally, we are not yet persuaded the Court’s direction in *MCI* necessarily means there is no remedy in this case if the Company was not over earning. UIEC alleges the Company’s failure to disclose relevant information in previous ratemaking proceedings may have led to improperly collected rates. In *MCI* the Court stated: “A utility that misleads or fails to disclose information pertinent

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<sup>16</sup> *MCI Telecommunications Corp. v. Public Service Comm’n*, 840 P. 2d 765, 776.

to whether a rate-making proceeding should be initiated or to the proper resolution of such a proceeding cannot invoke the rule against retroactive rate making to avoid refunding rates improperly collected.”<sup>17</sup> While in *MCI* the utility had been over earning, is the Court’s reasoning any less compelling where demonstrated utility wrongdoing fails to produce returns greater than those authorized? In answering this question, we are guided by an additional statement in the *MCI* opinion: “...the commission has the inherent power to reopen a rate order if a utility engages in misconduct.”<sup>18</sup> We conclude the Court’s reasoning in *MCI* supports our duty to hold a hearing in this matter.

ORDER

The motion to dismiss is denied. The schedule for processing UIEC’s application, provisionally established in our order of May 16, 2011, is in effect.

DATED at Salt Lake City, Utah this 20<sup>th</sup> day of June, 2011.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard  
Commission Secretary  
D#207372

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<sup>17</sup> Id. at 775.

<sup>18</sup> Id.