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**BEFORE THE UTAH PUBLIC SERVICE COMMISSION**

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| In the Matter of the Application of Rocky Mountain Power for Approval of the 2017 Protocol. | Docket No. 15-035-86<br><br>**REPLY COMMENTS OF KENNECOTT UTAH COPPER LLC** |

Kennecott Utah Copper LLC ("Kennecott") submits these Reply Comments on the Application for Approval of the 2017 Protocol filed by PacifiCorp d/b/a Rocky Mountain Power ("RMP" or "Company") in response to the Rebuttal Testimony of Artie Powell, Ph.D., filed on behalf of the Division of Public Utilities ("Division" or "DPU"), and the Direct Testimony of Steven R. McDougal filed on behalf of RMP, and respectfully requests that the Commission consider these Reply Comments.

## INTRODUCTION

The initial Comments filed by Kennecott in this docket stated that Kennecott (1) supports Section X.B to the extent it is construed to mean that the 2017 Protocol (or "Protocol") does not impose costs on Utah in the event an eligible customer transfers service from RMP to a non-utility supplier; and (2) opposes the $4.4 million "Equalization Adjustment" allocation to Utah. On April

20, 2016, the Division filed its Rebuttal Testimony, which was devoted to responding to Kennecott's first point that the Protocol does not impose costs on Utah in the event an eligible customer transfers service from RMP to a non-utility supplier. On the same day, RMP filed its Rebuttal Testimony,[1] commenting in part on Kennecott's Comments. Kennecott submits these Reply Comments to reply to some portions of the Division and RMP's testimony.

## REPLY COMMENTS

### I. KENNECOTT AGREES WITH THE DIVISION THAT SECTION X.B DOES NOT ALLOCATE COSTS TO UTAH, BUT DISAGREES WITH THE DIVISION'S FAULTY LOGIC THAT THE ABSENCE OF "NO" MEANS "YES."

Responding to Kennecott's comments, the Division acknowledges that Section X.B does not impose costs on Utah. The Division states in its Rebuttal Testimony:

> Q. In its comments, Kennecott states, "the 2017 Protocol does not impose costs on Utah in the event an eligible customer transfers service from RMP to a non-utility energy supplier." Do you agree?
>
> A. Yes, *the 2017 Protocol does not impose costs on Utah.*

DPU Rebuttal at 2:38-41. Kennecott agrees with the Division that "the 2017 Protocol does not impose costs on Utah."

Having correctly noted that the 2017 Protocol does not impose costs on Utah, the DPU then incorrectly adds, "it also does not prohibit costs from being imposed on Utah as a result of Kennecott or another customer leaving the system" because Section X.B is intended to be "neutral." *Id.* at 2:41-44. Likewise, RMP's Rebuttal states that Section X.B was drafted to avoid

[1] Mr. McDougal's testimony is captioned "Direct Testimony." But since it is responsive to earlier filed comments and testimony, and to avoid confusion, Kennecott will refer to it herein as "RMP Rebuttal."

any "predeterminations" of the question of whether costs are allocable to Utah under Section 54-3-32. RMP Rebuttal at 11:232-36.

Both the Division and RMP assert that neutrality (the absence of a prohibition against allocating costs to Utah) means that costs may be allocated to Utah. Kennecott disagrees. The inquiry under Section 54-3-32 is whether Section X.B *allocates* costs to Utah, not whether it is neutral or whether it does not *prohibit* costs to be allocated to Utah.[2] The Division correctly answered the relevant question: "the 2017 Protocol does not impose costs on Utah." The fact that Section X.B does not say costs may *not* be imposed, does not mean they *may* be imposed, just as the absence of "no" does not mean "yes."[3]

Kennecott supports the plain meaning of Section X.B, *i.e.*, that no costs are allocated to Utah upon Kennecott's transferring service to a non-utility energy supplier.

## II. KENNECOTT'S FILING COMMENTS INSTEAD OF TESTIMONY DOES NOT PRECLUDE THE COMMISSION FROM FULLY CONSIDERING KENNECOTT'S COMMENTS

The rebuttal testimony of both Division and RMP note that Kennecott is submitting comments rather than testimony in this docket. The Division assumed that the Commission should treat Kennecott's Comments as public comments. DPU Rebuttal at 1:17-19. The Company

[2] There is no need for the Commission to decide anything with respect to 54-3-32 now. Kennecott simply points out that it does not agree with the DPU and RMP's interpretation of 54-3-32 and Section X.B in their respective Rebuttal Testimony.

[3] In insisting that the absence of "no" means "yes," the Division uses a logical fallacy and offers a scenario where it imagines that instead of applying Section X.B (which applies to "eligible customers in Utah" who are transferring service "pursuant to Utah Code Annotated Section 54-3-32."), the Commission could apply X.A (which "specifies the treatment of *Oregon* loads that opt for retail access") to the treatment of Kennecott's load under Section 54-3-32. DPU Rebuttal at 3:67-74. Then, through the application of Appendices A and B, the Division says the Commission "may find under a 54-3-32 determination that the treatment of loads specified in Section X.A (or a similar treatment) is reasonable to apply to the loads of a Utah eligible customer." *Id.* at 3:70-72. The very positing of this hypothetical demonstrates its incoherence: *i.e.*, the Commission can avoid a conclusion that "the 2017 Protocol does not impose costs on Utah" only by misapplying the Protocol itself.

apparently contends that because Kennecott is not proffering a witness to support its Comments, "the Commission should not give any weight to the KUC comments." RMP Rebuttal at 11;238-243; 12:254.

The Commission "is not bound by the technical rules of evidence and may receive any oral or documentary evidence," and parties may elect to intervene and file testimony, or "[p]ublic witnesses may elect to provide unsworn statements." Utah Admin. Code R746-100-10.F.1. Accordingly, Kennecott submitted its initial Comments, as it does these Reply Comments, as unsworn statements of a public witness. That does not prevent the Commission from giving full consideration to Kennecott's comments about the interplay between Section X.B of the 2017 Protocol and Section 54-3-32, which address matters of law independent of any factual assertions. Likewise, the nature of this proceeding is such that the Commission need not make findings of fact relating to any of the issues addressed in Kennecott's Comments.

Kennecott acknowledges that its initial Comments contained background factual information about the nature of Kennecott's load and the lack of RMP's need to plan for Kennecott's load. Because there is no opportunity for parties to cross examine their proponent, Kennecott does not ask the Commission to credit those statements, or to base any finding of fact or conclusion of law on them.[4] They are offered only as general context for the legal argument made in Kennecott's initial Comments and in these Reply Comments.

[4] Kennecott has found that one statement in the initial Comments is not entirely accurate. The Comments (at page 4) allude to Kennecott taking "backup and supplemental power" from RMP, which is an incorrect characterization of Kennecott's present and past service agreements with RMP.

## CONCLUSION

Section 54-3-32(6)(b) requires a determination of whether the 2017 Protocol allocates costs to Utah as a result of an eligible customer's transfer of service. Section X.B obviously does not allocate costs to Utah. Statements from the DPU that Section X.B does not *preclude* costs, or that it is "neutral," or from RMP that Section X.B does not even determine the question, only demonstrate the confusion that can arise when the plain words are not given effect. Kennecott supports approval of Section X.B, but only to the extent it is given its plain meaning – that no costs are allocated to Utah upon an eligible customer transferring service.

DATED this 25th day of May, 2016.

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## CERTIFICATE OF SERVICE

**Docket No. 15-035-86**

I hereby certify that on this 25th day of May 2016, I caused to be emailed, a true and correct copy of the foregoing comments on **REPLY COMMENTS OF RIO TINTO KENNECOTT COPPER LLC ON ROCKY MOUNTAIN POWER'S APPLICATION FOR APPROVAL OF 2017 PROTOCOL** to:

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