

Stephen F. Mecham (4089)
Stephen F. Mecham Law, PLLC
10 West 100 South, Suite 323
Salt Lake City, Utah 84101
Telephone: (385) 222-1618
E-mail: sfmecham@gmail.com
Attorney for Praxair, Inc.

NON- CONFIDENTIAL VERSION

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power for Approval of an Energy Service Contract between Rocky Mountain Power and Kennecott Utah Copper, LLC

Docket No. 16-035-33

**REPLY IN SUPPORT OF PETITION
TO INTERVENE**

Praxair, Inc. (“Praxair”), through the undersigned counsel, hereby files its Reply in Support of Petition to Intervene in accordance with the Notice issued October 6, 2016 by the Public Service Commission (“Commission”) in this docket. As demonstrated herein, Praxair meets the standard for intervention under Utah Code Ann. § 63G-4-207. Praxair’s legal rights and interests will be substantially and directly affected by the outcome of this proceeding and its participation in this docket will not materially impair the prompt and just adjudication of this matter.

On September 20, 2016, more than three weeks in advance of the deadline to do so, Praxair filed a routine petition to intervene in the above-captioned proceeding. Since that date, Rocky Mountain Power (“RMP”) and the Utah Office of Consumer Services (the “Office”) filed oppositions to the petition and Kennecott Utah Copper LLC (“KUC”) filed comments¹

¹ KUC filed its comments five days after parties were to file responses and they should be stricken. Praxair replies to them because they are included in this docket on the Commission's website. In addition, on October 11, 2016 RMP filed an erratum to its original opposition.

(collectively, the “Submissions”). The Submissions (i) argue that Praxair does not have an interest in this proceeding and cannot meet the statutory requirements for intervention and (ii) express concern that Praxair’s petition, if granted, will delay the Commission’s action on the approval of KUC’s new electric service agreement (“ESA”). KUC and RMP both take the view that the provisions of the ESA are confidential and their disclosure, even to Praxair, would harm KUC and RMP’s competitive interests. For the reasons set forth below, Praxair respectfully disagrees with the Submissions which unfortunately have only heightened Praxair’s concern regarding the contents of the ESA, its potential effects on Praxair and how an order approving the ESA could affect Praxair’s rights and interests.

I. THE STANDARD FOR INTERVENTION UNDER UTAH CODE ANN. §63G-4-207(2) REQUIRES THAT PRAXAIR FIRST DEMONSTRATE ITS LEGAL RIGHTS AND INTERESTS MAY BE SUBSTANTIALLY AFFECTED BY THE COMMISSION’S APPROVAL OF THE ESA. SECOND, PRAXAIR MUST SHOW THAT THE INTERESTS OF JUSTICE AND ORDERLY AND PROMPT CONDUCT OF THE ADJUDICATIVE PROCEEDINGS WILL NOT BE MATERIALLY IMPAIRED BY PRAXAIR’S INTERVENTION

A. Praxair’s legal rights and interests would be substantially affected by the Commission’s approval of the ESA

1. Praxair produces, sells, and distributes gases essential to a variety of industries including mining, aerospace, chemicals, and metals manufacturing. Praxair’s Magna facility is located on KUC’s site in Magna, Utah and primarily supplies KUC with industrial gases essential to its operations. Praxair’s Magna facility currently carries a MW load, which will increase to a MW load in 2017. Historically, Praxair received service from RMP under a special contract.² RMP and the Commission determined that service to Praxair under Schedule 9

² See Docket No. 10-035-115, *In the Matter of the Application of Rocky Mountain Power for Approval of an Electric Service Agreement between Rocky Mountain Power and Praxair*, RMP Application, Exhibit 1 “Explanation of Certain Contract Issues Related to the Master Electric Service Agreement,” page 1:17-19 (November 10, 2010).

was inappropriate and that “due to Praxair’s unique relationship to Kennecott, Praxair, like Kennecott, has been considered a special contract customer of the Company.”³

In 2011 Kennecott offered to provide direct electric service to Praxair beginning in 2012. On October 13, 2011, RMP submitted its petition for approval of the electric service agreement with Kennecott for 2012,⁴ which treated “Praxair as a tenant and subsumed Praxair’s energy needs within the Kennecott Agreement.”⁵ In its application, RMP stated that Praxair’s load was consolidated with Kennecott’s load behind Kennecott’s meter.⁶ Consistent with this agreement, Praxair has taken electric service from Kennecott since January 1, 2012.

On August 2, 2016, RMP contacted Rick Noger, Praxair’s Energy Manager for the Magna facility, by email. RMP informed Praxair that it signed the ESA with Kennecott.⁷ RMP stated that “the terms of this new Agreement will impact service to Praxair.”⁸ RMP requested a conference call with Praxair and Kennecott “to speak with you [Praxair] about the terms of this agreement and implications for Praxair.”⁹ In the call that followed, RMP informed Praxair that as of December 1, 2016, Kennecott will no longer provide electric service to Praxair’s Magna facility. RMP also informed Praxair that as of that date Praxair’s electric service would be provided by RMP under Schedule . On August 5, 2016, RMP initiated this proceeding by filing its Application for Approval of Energy Services Agreement with Kennecott.

³ *Id.* at 2:5-6.

⁴ Docket No. 11-035-181, *In the Matter of the Application of Rocky Mountain Power for Approval of an Electric Service Agreement between Rocky Mountain Power and Kennecott Utah Copper, LLC*, RMP Petition for Approval (October 13, 2011).

⁵ Report and Order, at page 2 Docket No. 11-035-181 .

⁶ *Id.* at ¶5.

⁷ Email correspondence from Lucky Morse, RMP Director Regional Business Management to Rick Noger, Praxair Energy Manager dated August 2, 2016. Attached as Exhibit 1.

⁸ *Id.*

⁹ *Id.*

According to RMP's original opposition, the ESA requires that Kennecott terminate its service to the Praxair facility and that RMP provide service to Praxair under Schedule 9.¹⁰

Praxair, as a special contract customer and then as Kennecott's tenant, has never received service from RMP under Schedule . A move to Schedule represents an immediate % increase in electricity costs.¹¹

KUC's comments reflect a different view of the ESA provisions and their impact on Praxair. KUC states that "the *only* reference in the entire ESA to Praxair [is] as follows:

Section 4.05 Resale of Power.

Electric power purchased by Customer hereunder shall not be re-sold but shall be used solely by Customer, Customer's onsite contractors and its tenants located adjacent to Customer's facilities and within the Company's service territory that are involved in Customer's mining and associated activities, but excluding Praxair's Garfield plant."

Praxair appreciates the disclosure of this provision despite the confidentiality concerns RMP and KUC have expressed. But even this limited provision raises concerns for Praxair.

With electric power comprising a substantial portion of industrial gas production costs,

¹⁰ On October 11, 2016 filed an erratum attempting to clarify that the ESA only refers to Praxair in Section 4.05. Whether or not that is correct, according to the erratum, Praxair will still be served under Schedule. Further, RMP's email stated that the ESA would impact the terms of Praxair's service.

A % increase in electricity costs (if Praxair must be served under Schedule) and Section 4.05 of the ESA have a direct and substantial impact on Praxair and are potential outcomes of this ESA approval proceeding. From the Submissions, it appears that the Commission's approval of the ESA would impact Praxair in ways that the other parties in this proceeding may not appreciate and therefore have not included in the petitions seeking approval. Praxair cannot simply ignore this proceeding and file a request for a separate proceeding as RMP suggests in its Opposition.¹² If Praxair did not first intervene in this proceeding, RMP could argue in a later proceeding that Praxair was untimely, had waived its rights and should have sought intervention in this docket. Accordingly, intervention is appropriate and is the only manner for Praxair to discover what the provisions of the ESA say about Praxair and to advocate for its interest.

2. In its Opposition the Office incorrectly concluded that Praxair has not demonstrated a current legal interest affected by the outcome of this docket.¹³ It applied the traditional test for standing the Utah Supreme Court used in *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, 148 P.3d 960 to determine Praxair's legal interest. The Court referred to a three-step inquiry requiring a party to identify personal adverse effects of an action, sufficient causation between the action and the injury, and redressability of the injury claimed if the requested relief is granted in order to intervene. *Id.* at ¶¶ 19-21.

In this Reply Praxair has shown that the only paragraph of the ESA disclosed thus far

¹² RMP Opposition at page 3.

¹³ Office Opposition, p. 2.

In addition, it is undisputed that Praxair has been part of and received its electric service under Kennecott's current contract. If the Commission approves the ESA, Praxair's rates will escalate significantly. The Office compared Praxair to a renewable energy supplier that was denied intervention in the Facebook case, Docket No. 16-035-27. There is no comparison. That supplier had no connection to Facebook or the proposed contract. By contrast, in this docket Praxair under the ESA and its rates will escalate. That is more than enough showing of a particularized legal interest that may be adversely affected by the actions proposed in this docket. There is a direct causal relationship between the impending injury and the action proposed. The Commission can redress the injury by granting Praxair's Petition to Intervene, conditioning approval on minor changes to the ESA before it is approved and clarifying that neither the ESA nor the approval of the ESA affect Praxair. That is the relief Praxair seeks.

- B. Praxair's Intervention is in the interest of justice and will not materially impair the orderly and prompt conduct of the proceeding.

The Submissions express concern that Praxair's intervention could delay the approval of the ESA. In fact, RMP seems to argue that intervention of another party, whatever its interest, would "facilitate the service of discovery and the filings of motions and objections...that would interfere with the prompt and orderly process of this docket."¹⁴ But the orderly and prompt conduct of any proceeding includes timely intervention. The Commission's Scheduling Order (prior to its suspension) in this matter established October 13, 2016 as the deadline for submitting petitions to intervene, and Praxair met that deadline with over three weeks to spare.¹⁵ That RMP would be "forced to respond" to discovery requests and motions, or that RMP would

¹⁴ RMP Opposition at page 3.

¹⁵ See Scheduling Order and Notice of Hearing, Docket No. 16-035-33 issued August 18, 2016.

be forced to file a protective order is irrelevant as a consideration under Utah Code 63G-4-207. Furthermore, the Commission may control the timing of the proceedings through appropriate scheduling orders. In addition, it should be noted that RMP has known that it would need to seek Commission approval of its ESA since the last one was approved. Nonetheless RMP did not seek such approval until late August. The resulting shortness of time to obtain approval should not come at the expense of Praxair's intervention status and due process rights. Finally, at the request of the Division of Public Utilities with the consent of RMP and the Office, the scheduling order setting forth deadlines for the filing of testimony was suspended, effectively extending indefinitely the deadline for filing testimony, an odd way to expedite a proceeding. Justice and the orderly and prompt conduct of these proceedings will not be impacted by Praxair's intervention. More than three weeks in advance of the intervention cutoff, Praxair timely submitted its Petition to Intervene. Nonetheless, Praxair has already prepared Direct Written Testimony in this matter, which can be submitted promptly upon the Commission's setting a deadline. Praxair's intervention need not represent any delay.

II. CONFIDENTIALITY

RMP's opposition and KUC's comments also express confidentiality concerns in a conclusory manner without specifying why Praxair's review of the ESA would be detrimental. Utah Admin. Code R746-100-16 provides for the review and use of confidential information, and these protections are already in place in this docket. As it appears that the ESA affects Praxair in ways that the parties themselves may not appreciate, Praxair respectfully suggests that RMP and KUC, working together, could come up with a redacted version of the ESA that would allow Praxair to satisfy itself that its interests are not impacted beyond what has already been disclosed.

III. CONCLUSION

Praxair requests that the Commission grant its Petition to Intervene, that any order of the Commission approving the ESA expressly state that Praxair is not affected by the ESA, that there is no bar on Praxair and RMP agreeing on an electric service agreement other than Schedule provided it is subject to Commission approval,

and such other relief as the Commission may find just and proper. In the interests of fairness and justice, Praxair's Petition to Intervene must be granted. The Submissions ignore the reality that Praxair's interests are directly and substantially impacted by this proceeding. Any procedural concerns regarding discovery or requiring that parties follow a schedule similar to the one the Commission established initially in this docket are not grounds to deny Praxair's intervention. Simply stated, the other parties have failed to demonstrate why Praxair should not be allowed to participate in this proceeding and protect its rights as an electric customer.

FOR THE FOREGOING REASONS, Praxair respectfully requests that the Commission issue an order granting Praxair intervention in this proceeding.

RESPECTFULLY SUBMITTED this 14th day of October, 2016.

Stephen F. Mecham Law, PLLC

/s/Stephen F. Mecham

Stephen F. Mecham
Attorney for Praxair, Inc.

EXHIBIT 1

August 2, 2016 Email from RMP to Praxair

Certificate of Service

I hereby certify that on October 14, 2016, I caused a true and correct copy of the foregoing **REPLY IN SUPPORT OF PETITION TO INTERVENE** to be emailed to the following:

Chris Parker (ChrisParker@utah.gov)
William Powell (wpowell@utah.gov)
Erika Tedder (etedder@utah.gov)
Division of Public Utilities

Patricia Schmid (pschmid@utah.gov)
Justin Jetter (Jjetter@utah.gov)
Rex Olsen (rolsen@utah.gov)
Robert Moore (rmoore@utah.gov)
Assistant Attorneys General

Michele Beck (mbeck@utah.gov)
Cheryl Murray (cmurray@utah.gov)
Utah Office of Consumer Services

Gary A. Dodge (gdodge@hjdllaw.com)
Hatch James & Dodge

R. Jeff Richards (robert.richards@pacificorp.com)
Yvonne R. Hogle (yvonne.hogle@pacificorp.com)
Daniel Solander (daniel.solander@pacificorp.com)
Bob Lively (bob.lively@pacificorp.com)
Rocky Mountain Power

/s/ Stephen F. Mecham