Mark C. Moench (2284)
Yvonne R. Hogle (7550)
Rocky Mountain Power
201 South Main Street, Suite 2300
Salt Lake City, UT 84111
(801) 220-4050
(801) 220-3299 (fax)
mark.moench@pacificorp.com
yvonne.hogle@pacificorp.com

Gregory B. Monson (2294)
Stoel Rives LLP
201 South Main Street, Suite 1100
Salt Lake City, UT 84111
(801) 578-6946
(801) 578-6999 (fax)
gbmonson@stoel.com

Attorneys for Rocky Mountain Power

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of Rule-Making for Rule Provisions Delineating "Complete" Application Requirements for Rate Case and Major Plant Addition Applications Pursuant to Utah Code Sections 54-7-12 and 54-7-13.4	Docket No. 09-999-08 **PRELIMINARY COMMENTS AND SUGGESTIONS OF ROCKY MOUNTAIN POWER ON SB 75 RULES**

Rocky Mountain Power, a division of PacifiCorp ("Rocky Mountain Power"), respectfully provides these preliminary comments and suggestions on rules to be adopted by the Commission under Senate Bill 75 ("SB 75") enacted by the Utah Legislature during the 2009 General Session. These preliminary comments and suggestions are provided pursuant to the Pre-Rulemaking Schedule issued by the Commission in this docket on May 4, 2009.

I. INTRODUCTION

Following the filing of Rocky Mountain Power's application for an increase in rates and charges ("Application") in Docket No. 08-035-38 on July 17, 2008, several parties filed motions

or requests for the Commission to dismiss the Application or to suspend or restart the 240-day period within which the Commission may act on a rate increase application under Utah Code Ann. § 54-7-12(3)(c) (2008). Among the reasons asserted for the motions, the parties claimed that the Application was not complete or adequate because it did not reflect Commission decisions yet to be made and did not specify the level of rate increases for various rate schedules from the rates that would thereafter be ordered by the Commission in Docket No. 07-035-93. The Commission issued its Report and Order on Revenue Requirement ("Revenue Requirement Order") on August 11, 2008 in Docket No. 07-035-93. Rocky Mountain Power responded, arguing that the Application was just like applications filed in other recent general rate cases, that the Commission had previously allowed applications to be filed prior to issuance of revenue requirement orders in pending cases and that the Application would be updated to reflect the Revenue Requirement Order as soon as possible. Rocky Mountain Power noted that this update would be no more significant than updates routinely filed in general rate cases based on ordered changes in test period or other matters. Rocky Mountain Power filed an update to the Application on September 10, 2008 to incorporate the Revenue Requirement Order.

The Commission issued its Order on Motions to Dismiss or Address the 240-day Time Period ("240-day Order") on September 23, 2008. In the 240-day Order, the Commission concluded that the Application did not comply with *Salt Lake Citizens Congress v. Utah Public Service Comm'n*, 846 P.2d 1245 (Utah 1992) and *Utah Dept. of Business Regulation v. Utah Public Service Comm'n*, 614 P.2d 1242 (Utah 1980). The Commission characterized the update filed on September 10, 2009 as an amended pleading that Rocky Mountain Power should have sought permission to file under Utah Administrative Code R746-100-3.D. The Commission

ordered that it would permit the amendment on condition that the 240-day period would commence with the filing of the update on September 10, 2008.

Rocky Mountain Power filed a timely petition for reconsideration of the 240-day Order which was denied by operation of law when the Commission did not grant it within 20 days. Because the 240-day Order was interlocutory in nature, Rocky Mountain Power did not petition the Supreme Court for review of the order at that time, but rather sought legislation, supported by Questar Gas Company ("Questar Gas") and unopposed by any party, to clarify the law. Subsequently, Rocky Mountain Power and most of the other parties to Docket No. 08-035-38, entered into a Stipulation Regarding Revenue Requirement that was approved by the Commission in its Report and Order on Revenue Requirement issued April 21, 2009.

SB 75 was passed in the 2009 General Session of the Utah Legislature. Among other things, SB 75 amended section 54-7-12 to provide that the 240-day period during which the Commission may act on the revenue requirement portion of a rate change application commences when a "complete filing" is made. SB 75 also enacted section 54-7-13.4 allowing electrical and gas corporations to file applications for cost recovery of major plant additions if the Commission has entered a final order in a general rate case of the corporation within 18 months of the projected in-service date of the major plant addition. *Id.*, lines 268-272. The section provides a 90-day or 150-day time period for the Commission to issue an order on a "complete filing." The shorter period is applicable if the major plant addition has been the subject of a proceeding for approval of a significant energy resource decision under the Energy Resource Procurement Act ("ERPA"), Utah Code Ann. §§ 54-17-101, *et seq*. SB 75, lines 294-299.

Under section 54-7-12, as amended, and section 54-7-13.4, a procedure is established to address whether an application is a complete filing. Under section 54-7-12, an application for a general rate increase is considered a complete filing unless the Commission issues an order within 30 days of the filing of the application describing information that the public utility must provide to make the application a complete filing. Parties have 14 days from filing of the application to challenge whether it is a complete filing. In the case of both sections, if the Commission determines that the application is not a complete filing, it is required to identify the information the public utility needs to provide and determine whether the deficiencies in the application are material. If the deficiencies are not material, the Commission may either determine that the relevant time period within which the Commission may act is not affected or may suspend the time period to resume when the public utility files the required information. If the deficiencies are material, the relevant time period starts over when the public utility files the required information.

The bill directed the Commission to "create and finalize rules concerning the minimum requirements to be met for an application to be considered a complete filing" for both general rate case applications and major plant addition applications "within 180 days after the effective date of" the bill. *Id.*, lines 87-89, 256-258. The bill was signed by the Governor and became effective on March 25, 2009. http://le.utah.gov/~2009/status/sbillsta/sb0075.htm. Therefore, the Commission has until September 21, 2009 to create and finalize these rules.

The Commission has established a schedule for pre-rulemaking proceedings that will allow interested parties to submit comments and suggestions on proposed rules, the Commission to provide a preliminary draft of proposed rules, interested parties to submit comments on the preliminary draft, the Commission to provide a revised draft and interested parties to submit

comments on the revised draft before the Commission commences the formal rulemaking by publishing proposed rules in the Utah State Bulletin by August 15, 2009. Rocky Mountain Power appreciates the opportunity to participate in this process and provide these comments and suggestions.

II. COMMENTS AND SUGGESTIONS ON RULES

A. General Rate Cases

1. 240-day Period

One of the major purposes of SB 75 was to address the potential ambiguity in the statutes that led to the motions and 240-day Order in Docket No. 08-035-38. In addition, SB 75 reemphasized the obligation of the Commission to act on general rate case applications within 240-days subject to the caveat, accepted by Rocky Mountain Power during argument on the motions, that an application would need to meet some reasonable minimum standard in order for the 240-day period to start to run. On the other hand, SB 75 was not intended to provide authority for the Commission to extend the 240-day period by imposing pre-filing procedures on public utilities. Therefore, Rocky Mountain Power respectfully suggests that the Commission adopt a rule that preserves the 240-day period and does not extend it by imposing pre-filing procedures beyond the notifications identified below.

It is well established that the Commission, as a creation of the Legislature, has only those powers specifically granted or clearly implied by statute. *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995); *Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n*, 754 P.2d 928, 930 (Utah 1988); *Williams v. Public Service Comm'n*, 754 P.2d 41, 50 (Utah 1988); *Kearns-Tribune Corp. v. Public Serv. Comm'n*, 682 P.2d 858, 859 (Utah 1984); *Basin Flying Service v. Public Serv. Comm'n*, 531 P.2d 1303, 1305 (Utah 1975). "Any reasonable doubt of the existence of any power must be resolved against the exercise thereof."

Hi-Country Estates, 901 P.2d at 1021 (quoting *Williams*, 754 P.2d at 50). Therefore, the Commission cannot adopt rules that have the effect of extending the 240-day period.

Prior to SB 75, the 240-day period applied only to rate increase applications by public utilities. The obvious purpose of the 240-day period was to avoid the possibility of a rate increase being effectively denied through delay in resolution of the case. At the same time, the 240-day period allowed adequate time for the Commission to consider proposed rate increases and for interested parties to present their positions to the Commission. Rather than providing authority to extend the 240-day period, SB 75 confirmed the requirement that the Commission issue an order within 240-days or the rate change requested becomes effective. SB 75, lines 132-141 ("If the commission does not issue a final written order within 240 days after the public utility submits a complete filing in accordance with Subsection (3)(a): (i) the public utility's proposed rate increase or decrease *is final*; and (ii) the commission *may not* order a refund of any amount already collected or returned by the public utility under Subsection (4)(a).") (emphasis added).[1]

Rocky Mountain Power filed a Motion for Approval of Test Period on August 18, 2008 in Docket No. 08-035-38. On October 30, 2008, the Commission issued its Order on Motion for Approval of Test Period. In that order, the Commission stated:

> We conclude we will order a procedural process for all future RMP general rate cases by which identification and selection of the test period to be used in the case will be the first item for resolution prior to the submission of other material (e.g., revenue requirement information, rate proposals and rate schedules and tariffs) and our resolution of other disputes. Once the test year is approved by the Commission, the company

[1] In addition to clarifying that the 240-day period commences when a "complete filing" is made, the procedures for determining if a filing is complete and the effect of an incomplete filing on the 240-day period, SB 75 also made the 240-day period applicable to rate decrease applications of public utilities as well as rate increase applications. *Id.*, lines 132-141.

> will then file the remaining aspects of the case: the change in revenue requirement the company deems appropriate, in light of the designated test year; the rate design which the company proposes to use for rates, charges, fees, etc.; and the proposed rate schedules and tariff provisions to effectuate the company's rate design.

To the extent that the effect of this ruling is to extend the 240-day period during which the Commission may consider and rule on a rate change application of a public utility, it is contrary to section 54-7-12, both before and after passage of SB 75. Consistent with the law, Rocky Mountain Power has no objection to the Commission conducting a process to determine a test period during the early stages of the 240-day period.[2] However, to the extent the effect of the Order on Motion for Approval of Test Period is to delay the filing of the revenue requirement, schedules and other material that the Commission would likely determine are required for a complete filing until after the test-period determination, thus extending the 240-day period, the ruling is beyond the authority of the Commission. A public utility is free to propose whatever test period it believes best reflects the rate-effective period. Disagreement with the proposed test period does not render a filing incomplete anymore than disagreement with any other aspect of a public utility's proposed rate changes. Therefore, Rocky Mountain Power respectfully suggests that the Commission not include this requirement in the rules adopted pursuant to SB 75.[3]

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[2] Rocky Mountain Power proposes a procedure for determination of test period in Attachment 1 to these preliminary comments and suggestions because of the relationship between a complete filing and determination of test period in the Order on Motion for Approval of Test Period.

[3] Rocky Mountain Power has recently provided notice to the Commission and interested parties that it intends to file a general rate case on or about June 15, 2009. This rate case has been assigned Docket No. 09-035-23. Rocky Mountain Power has also filed a motion for entry of a protective order. Consistent with the Order on Motion for Approval of Test Period in Docket No. 08-035-38, Rocky Mountain Power notified the Commission and interested parties that it proposes to use a test period consisting of the twelve months ending December 31, 2010 in

(continued . . .)

2. Recent Practice in General Rate Case Filings

As a result of the amendment of Utah Code Ann. § 54-4-4(3) in 2003 to make clear that the use of a future test period[4] was contemplated when it best reflected conditions a public utility will encounter during the rate-effective period, Rocky Mountain Power and Questar Gas have, pursuant to stipulation or voluntarily, provided additional information with general rate case filings to assist the Commission and the parties in dealing with a transition to use of future test periods.[5] In each Rocky Mountain Power case in which the additional information was filed pursuant to stipulation, the stipulation provided that it was only applicable to the next general rate case and did not set precedent for the future. In the case in which the information was provided voluntarily, Questar Gas made clear that it was providing the information without setting any precedent for future cases. Therefore, the fact that Rocky Mountain Power and Questar Gas have made such filings should not be presumed in the Commission's rulemaking to create a baseline for filing requirements for a complete filing.

As the Commission is well aware, the Division of Public Utilities ("Division"), the Committee of Consumer Services (now the Office of Consumer Services "OCS"), Rocky Mountain Power, Questar Gas and UAE Intervention Group ("UAE") participated in an extended

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(. . . continued)
this new rate case. During a scheduling conference on April 23, 2009, Rocky Mountain Power agreed to a schedule under which testimony would be filed and a hearing on test period would be held in advance of the anticipated June 15, 2009 filing. This was done in compliance with the Commission's Order on Motion for Approval of Test Period, but without prejudice to Rocky Mountain Power's position that the Commission may not extend the 240-day period through requiring such a procedure. The parties have now submitted a Test Period Stipulation for the Commission's consideration that should resolve the issue in that case.

[4] A future test period may extend up to 20 months from the date the application for a proposed rate increase or decrease is filed.

[5] *See* Test Period Stipulation, Docket No. 04-035-42 (Utah PSC Oct. 8, 2004).

effort to agree upon filing requirements for general rate cases and were unable to reach consensus.[6] Therefore, the stipulated and voluntary filings represented compromises in exchange for resolution of other issues or to avoid or resolve issues and did not represent the minimum information necessary for a complete filing.

3. Overlapping Rate Cases and Test Periods

In Docket No. 08-035-38, filed July 17, 2008, Rocky Mountain Power filed an application for a rate increase before the Revenue Requirement Order had been issued in Docket No. 07-035-93. The Commission's ruling in the 240-day Order that the application was insufficient to start the 240-day period because it did not reflect the Revenue Requirement Order, which at that time had not been issued, may be viewed as effectively foreclosing the opportunity for public utilities to file overlapping general rate cases. Rocky Mountain Power respectfully suggests that the Commission not incorporate this ruling in the rules adopted pursuant to SB 75 to allow for the possibility that such filings may be appropriate in some circumstances. The Commission allowed overlapping rate cases using future test periods to be filed for several years during the 1970s and 1980s. There is no need for the Commission to foreclose in the rules the possibility of such cases being allowed in the future.

The OCS and Utah Industrial Energy Consumers ("UIEC") have taken the position in recent general rate cases that use of a test period in one general rate case prevents use of any portion of that same period in the test period in a subsequent general rate case. This position is based on a misunderstanding of the purpose of using test periods in rate cases and legal doctrines such as retroactive ratemaking and res judicata. As section 54-4-4(3) makes clear, a test period

[6] *See* Report of Filing Requirements Subgroup of the Test Period Task Force, Docket No. 04-999-05 (Utah PSC Dec. 14, 2005).

is simply a tool to assure that rates set in a general rate case reflect the conditions that the public utility is likely to encounter during the rate-effective period. Accordingly, Rocky Mountain Power respectfully suggests that the rules adopted by the Commission allow test periods in different general rate cases to overlap so long as they comply with section 54-4-4(3).

4. Standard for a Complete Filing

The appropriate standard for the filing requirements is that a general rate case application is complete if it establishes a prima facie case. "A prima facie case has been made when evidence has been received at trial that, in the absence of contrary evidence, would entitle the party having the burden of proof to judgment as a matter of law." *Bair v. Axiom Design*, 2001 UT 20, ¶ 14, 20 P.3d 388. Requiring a public utility to file more than a prima facie case imposes an inappropriate burden on the public utility to make other parties' cases for them. Parties have the opportunity after an application is filed to make timely requests for additional relevant information they desire to develop their own positions. The voluntary or stipulated filing of additional information in conjunction with recent rate case applications has not diminished the volume of discovery in any way. If anything, it has increased the volume of discovery.

5. Proposed Filing Requirements

Consistent with the foregoing standard, Rocky Mountain Power has prepared Proposed Filing Requirements for General Rate Cases which are included in Attachment 1 to these preliminary comments and suggestions. These filing requirements are more than ample to provide a prima facie case, including a case in which a public utility proposes to use a future test period. In addition, the Proposed Filing Requirements include a proposed procedure for determination of test period early in the 240-day period and provide for reasonable prefiling of notification of intent to file a general rate case, of the proposed test period and of a motion for

entry of protective order so that any confidential information may be provided promptly to interested parties that have agreed to comply with the protective order.

B. Major Plant Addition Cases

Unlike general rate cases, the parties have little experience with cases establishing what information would be necessary to support cost recovery for a major plant addition. Nonetheless, Rocky Mountain Power respectfully suggests that the information required for a complete filing is governed by the same standard as that for a general rate case, *viz.* to be complete an application must establish a prima facie case.

SB 75 identifies some of the information required for a major plant addition case. For example, the electrical or gas corporation making an application under section 54-7-13.4 needs to provide information that demonstrates that the capital investment qualifies as a major plant addition. In addition, an application in a major plant addition case should specify how the electrical or gas corporation proposes to recover the costs of the major plant addition, including whether deferred accounting or an immediate rate change is sought. If the major plant addition is one for which approval of a significant energy resource decision has been obtained under the ERPA, the additional information required should be relatively minimal. In fact, the application should primarily focus on any differences between the information provided in the ERPA proceeding and the more current information included in the application for cost recovery. If the major plant addition is one for which approval has not been obtained under ERPA, the application should provide additional information.

Rocky Mountain Power has prepared Proposed Filing Requirements for Major Plant Addition Cases which are provided as part of Attachment 1 to these preliminary comments and suggestions. The information identified in Attachment 1 is more than sufficient to establish a prima facie case that the public utility is entitled to cost recovery for the major plant addition.

C. Relationship Between General Rate Cases and Major Plant Addition Rate Cases

SB 75 provides that applications for cost recovery for major plant additions may be filed for a major plant addition if the projected in-service date for the major plant addition is within 18 months of a final order in a general rate case of the public utility filing the application. SB 75, lines 268-272. Beyond that, the statute does not specifically address any relationship between general rate cases and major plant addition rate cases.

The title of section 54-7-13.4 is "*Alternative* cost recovery for major plant addition." *Id.*, line 251 (emphasis added). Subsection (2) states that "[a] gas corporation or an electrical corporation *may* file with the commission a complete filing for cost recovery of a major plant addition . . . ." *Id.*, lines 268-269 (emphasis added). In other words, a gas or electrical corporation has the option of seeking cost recovery for a major plant addition in a major plant addition rate case or in a general rate case. Accordingly, Rocky Mountain Power respectfully suggests that the Commission's rules adopted pursuant to SB 75 recognize that public utilities may elect either to include cost recovery for a major plant addition in a general rate case if the projected in-service date of the major plant is during the test period used in the general rate case or, alternatively, to file a separate major plant addition rate case even if the in-service date is projected during the test period in a general rate case. The rules should also recognize that a major plant addition case may occur concurrently with a general rate case.

III. CONCLUSION

An important purpose of SB 75 was to clarify the filing requirements for general rate cases of public utilities to avoid confusion about when the 240-day time period commences within which the Commission may act on an application for a rate change before it goes into effect and whether the 240-day period is subject to suspension. SB 75 affirmed the significance of the 240-day period and was not intended to authorize the Commission to extend it. In

adopting rules under SB 75, Rocky Mountain Power respectfully suggests that the Commission not impose pre-filing procedures that have the effect of extending the 240-day period.

Rocky Mountain Power's proposed filing requirements for general rate cases and major plant addition rate cases provide information that is more than ample to establish a prima facie case for the relief requested. It is inappropriate to require public utilities to provide more than a prima facie case or to make other parties' cases for them. Therefore, Rocky Mountain Power respectfully suggests that the Commission incorporate the proposed filing requirements provided in Attachment 1 in the rules proposed pursuant to SB 75.

DATED: May 18, 2009.

Respectfully submitted,

ROCKY MOUNTAIN POWER

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Mark C. Moench
Yvonne Rodriguez Hogle
Rocky Mountain Power

Gregory B. Monson
Stoel Rives LLP

Attorneys for Rocky Mountain Power

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **PRELIMINARY COMMENTS AND SUGGESTIONS OF ROCKY MOUNTAIN POWER ON SB 75 RULES** to be served upon the following by electronic mail to the addresses shown below on May 18, 2009:

Sandy J. Mooy
Legal Counsel
Public Service Commission of Utah
400 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111
smooy@utah.gov

Rebecca L. Wilson
Carol Revelt
Public Service Commission of Utah
400 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111
rlwilson@utah.gov
crevelt@utah.gov

Michael Ginsberg
Patricia E. Schmid
Assistant Attorney Generals
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111
mginsberg@utah.gov
pschmid@utah.gov

Philip J. Powlick
William A. Powell
Marlin Barrow
David T. Thomson
Division of Public Utilities
400 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111
philippowlick@utah.gov
wpowell@utah.gov
mbarrow@utah.gov
dthomson@utah.gov

Paul H. Proctor
Assistant Attorney General
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111
pproctor@utah.gov

Michele Beck
Cheryl Murray
Office of Consumer Services
200 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111
mbeck@utah.gov
cmurray@utah.gov

Colleen Larkin Bell
Questar Gas Company
180 East First South
P.O. Box 45360
Salt Lake City, UT 84145-0360
colleen.bell@questar.com

Barrie L. McKay
Questar Gas Company
180 East First South
P.O. Box 45360
Salt Lake City, UT 84145-0360
barrie.mckay@questar.com

Stephen F. Mecham
Callister, Nebeker & McCullough
10 East South Temple, Suite 900
Salt Lake City, UT 84133
sfm@cnmlaw.com

Brett Anderson
Blackburn & Stoll
257 East 200 South, Suite 800
Salt Lake City, UT 84111
banderson@blackburn-stoll.com

Gary A. Dodge
Hatch, James & Dodge
10 West Broadway, Suite 400
Salt Lake City, UT 84101
gdodge@hjdlaw.com

F. Robert Reeder
William J. Evans
Vicki M. Baldwin
Patrice Lemasney
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
bob.reeder@parsonsbehle.com
bevans@parsonsbehle.com
vbaldwin@parsonsbehle.com
plemasney@parsonsbehle.com

SaltLake-448467.4 0085000-01002