

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of Rocky Mountain Power for Approval of an Electric Service Agreement between Rocky Mountain Power and Praxair, Inc.))))))	<u>DOCKET NO. 10-035-115</u> <u>REPORT AND ORDER</u>
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ISSUED: December 16, 2010

By The Commission:

This matter is before the Commission on the Application of Rocky Mountain Power (Company) for Approval of an Electric Service Agreement (ESA) between Rocky Mountain Power and Praxair, Inc (Praxair). The Commission held a hearing on November 18, 2010. Yvonne Hogle represented the Company. Paul Clements was witness for the Company. Patricia Schmid, assistant attorney general, was counsel for the Division of Public Utilities (Division). Charles Peterson was witness for the Division. Paul Proctor, assistant attorney general, represented the Office of Consumer Services (OCS). Cheryl Murray was witness for the OCS. Robert Reeder represented Praxair. Cory Sinclair was witness for Praxair.¹ The parties stipulated to the Commission receiving into evidence the Applications, recommendations, and other documents filed in the docket, together with the additional document submitted by Praxair at the hearing, and issuing an Order based on that record. *See Hearing Transcript*, p.5.,ll.12-25, p.6., ll.1-25. Counselors for all parties proffered their witnesses would testify to the matters submitted if called to testify. *Id.* The parties waived their right to cross-examine witnesses. *Id.*

¹ Mr. Sinclair's testimony was admitted at the hearing, and also filed with the Commission.

The Company filed its application on October 18, 2010, seeking to implement the proposed ESA to run from January 1, 2011, through December 31, 2011.² Generally, the proposed ESA is modification of the current ESA which expires on December 31, 2010.³ The Company alleged the proposed ESA established “just and reasonable rates, terms and conditions for continued firm electric service to be supplied by RMP to Praxair on or after January 1, 2011, through December 31, 2011.” *Petition for Approval*, ¶6.

The Company also filed an explanation of certain ESA issues on November 1, 2010. *See Explanation of Certain Contract issues related to the Master Electric Service Agreement between Rocky Mountain Power and Praxair, inc. Dated October 18, 2010 (Explanation)*. The Company, in part, explained its rationale for entering into the special contract with Praxair. The explanation given is as follows:

The Company has historically entered into a special contract with Praxair under which it provides retail electric service . . . These Praxair special contracts have been approved by the Utah Public Service Commission (“Commission”) as just and reasonable in past proceedings. To the Company’s knowledge, the Commission has not provided definitive rules establishing which customers qualify for retail special contracts. The Company typically does not seek or allow retail special contracts unless the customer has specific characteristics that require unique treatment in a negotiated contract. Praxair is a supplier of gas products that is located adjacent to Kennecott Utah Copper, LLC (“Kennecott”). Kennecott is the largest off-taker of product from Praxair’s facility. Furthermore, Kennecott could physically supply Praxair’s electrical needs from Kennecott generation facilities with relative ease. Due to Praxair’s unique relationship to Kennecott, Praxair, like Kennecott, has been considered a special contract customer of the Company. . .

Explanation, p.1, ll.17-23, p.2. ll.1-8.

² The Application contained confidential materials which were redacted from some of the parties’ filings. In order to avoid disclosure of those confidential materials, the Commission refers to some provisions of the proposed ESA generally.

³ The current ESA was approved in Docket No. 09-035-101.

The Company also explained the provision providing for lag time for price adjustments. *See Id.* p.2, ll.17-24.

The Division submitted its recommendation, suggesting approval with conditions. It noted additional details of the proposed ESA. In addition to providing firm, fixed pricing, the Division noted the ESA allows for specific Commission-ordered price adjustments, including those associated with [REDACTED]

[REDACTED] within a certain timeframe. *Division Recommendation*, p.3. The Division accepted the new lag period for changing ESA pricing, but recommended the Commission approve this proposed ESA on the condition that the proposed ESA's lag time serve as a cap for future ESAs. The Division concluded that approval of the proposed ESA was just, reasonable, and in the public interest.

The OCS also submitted comments. Its primary recommendation was that the Commission deny the ESA due to the lack of evidence supporting the need for a special contract *OCS Comments*, p.4. In addition, the Office maintains the sole purpose of having the special contract is to grant Praxair a lag period before any Commission-ordered rate increase is implemented. *OCS Comments*, p.2. Alternatively, if the Commission does approve the proposed ESA, the OCS recommended:

1. the Commission require any future request for a special contract between Rocky Mountain Power and Praxair include justification for the contract with the application;
2. the Commission's approval order in this docket specifically state that prior special contract treatment will not be considered justification for any future agreements; and

3. the Commission should require the Company to utilize predictable criteria for determining when customers should be subject to regular tariffed rates and when circumstances warrant special contract provisions and/or rate provisions.

Id.

The OCS detailed what it claimed were the Company's "four . . . justification[s] for special contract treatment:" 1) the Company and Praxair have historically held a special contract; 2) Praxair's proximity to Kennecott and its provision of gas products to Kennecott; 3) Kennecott could supply Praxair's electrical needs from its generation facilities with relative ease; 4) given Praxair's unique commercial relationship to Kennecott, Praxair has been considered a special contract customer. *Id.*, p.2.

The OCS criticized each of the justifications. First, it stated that just because Praxair has been treated as a special contract customer in the past is insufficient justification to continue doing so, without providing the original or continuing reasoning or justification for making Praxair a special contract customer. The OCS contends that the Commission, before approving this special contract, should consider weighing the original justification for the implementation of the special contract against the current context (e.g. electricity markets, current public policy, etc.) in which this proposed ESA is approved. The OCS further asked the Commission to require that future ESA approval would require more than "prior special contract treatment" for approval.

Second, the OCS stated that mere proximity between Kennecott and Praxair cannot justify non-tariff rate treatment.

Third, the OCS conceded that “Kennecott’s ability to physically supply Praxair’s electrical needs from its generation may have some merit as a reason to allow Praxair to operate under a special contract.” *Id.* at p.2, ¶ 3. However, it contended that the Company should be required to provide evidence of how losing Praxair as a customer would impact other ratepayers, assuming Praxair was able to take power directly from Kennecott instead of from the Company. It further argued:

In times past, special contracts were found to be in the public interest as long as the contract covered the incremental costs associated with serving the customer and made some contribution to fixed costs. Other customers were found to be better off by the partial contribution to fixed costs in comparison to having that customer leave the system. However, in today’s circumstances of continued growth and new resource needs, such an evaluation would not be appropriate. The PacifiCorp system is facing significant deficits. If one customer leaves the system, other customers may end up better off if it frees up existing resources without imposing other types of costs. This fundamental change in the operating circumstances of the Company particularly requires that special contracts be scrutinized and required to provide justification for any special price benefits.

Id. at p.2, ¶3- p.4.

In sum, the OCS objected to the approval of the proposed ESA because no justification had been provided for the special contract. It recommended the Commission require the Company to “utilize predictable criteria for determining when customers should be subject regular tariff rates [and when they should receive special contracts or rate provisions].” *Id.* at p.4.

The Office contends there is no evidence or analysis justifying the lag based upon utility ratemaking principles. While recognizing it is an improvement over prior agreements, this improvement does not negate the fundamental problem with the ESA, i.e., whether or not a special contract is appropriate in this case.

The Company replied to the Division's and OCS's comments. The Company pointed to its reasons stated in the *Explanation* as a basis for approval of the proposed ESA, reiterating that Praxair's unique characteristics require a special contract. It argued the Commission should not condition the proposed ESAs approval on the OCS' three conditions for future ESAs.

To the OCS' comments, Praxair submitted the written testimony on November 17, 2010, and an oral reply of Dr. Corey Sinclair at the hearing. Sinclair contended that the OCS presented no evidence that the historical treatment of Praxair as a special contract customer should be discontinued. He also contended the special contract was economically efficient and in the best interest of the Company's ratepayers.

Sinclair first replied that the special contract is proper for the following reasons: Praxair is a "bypass risk [and] would be placed at a significant competitive disadvantage if its competitors obtained its input prices, and it has a unique load profile." *Memorandum of Dr. Corey D. Sinclair (Sinclair Memo)*, p.1. Because these qualities have existed for many years, the special contract became a standard. Sinclair asserts that the OCS' assertion that Praxair's historical treatment as a special contract customer is insufficient to support future special contract treatment, is incorrect and in contravention of Utah law. *See e.g. Husky Oil Co. of Delaware v. State Tax Comm'n of Utah*, 556 P.2d 1268, 1271 (Utah 1976) (holding that administrative agencies' prior determinations are given great weight and departures from past practice should not be deviated absent "cogent" reasons).

Second, Sinclair states the proposed ESA satisfies the criteria given to him by the Division (Criteria and Guidelines)⁴ to analyze special contracts: “1) Praxair is a bypass risk; 2) Praxair faces potential competitive disadvantages without the contract; and 3) Praxair has a unique load profile.” *Sinclair Memo*, p.3.

Sinclair also discussed the issue of Praxair being a by-pass risk and stated that Praxair faces a competitive disadvantage without the proposed ESA. He testifies that it operates in a highly competitive market, where energy prices are a significant percentage of total input costs. It has a competitor in Bountiful, Utah. The competitor takes energy from Bountiful City, which has no obligation to publish prices and may offer deviating prices to different customers. If Bountiful City offers its competitor prices below those of the Company’s tariffs, but the Company cannot offer similar concessions to Praxair, then Praxair is left at a “significant competitive disadvantage.” Additionally, if Praxair’s competitors learn its input prices for energy, it places Praxair at a “considerable competitive disadvantage.”

Finally, Sinclair states that Praxair has a unique load profile like Kennecott. Praxair’s power needs are directly related to Kennecott’s, which no one disputes has a unique load profile. This unique load profile supports the continued use of the special contract.

Sinclair contends although the OCS submits generalized comments in opposition to the proposed ESA, it submits no “independent evidence or economic theory” in support of its opposition. *Id.* at p.7. Sinclair then responds to the OCS’ contentions with arguments similar to those raised above.

⁴ Sinclair refers to the guidelines provided by the Division, and submitted in this matter as *Praxair Exhibit 1: February 5, 1988, Letter to Special Contract Guidelines Task Force, from Thomas Forsgren*. See *Hearing Transcript*, p.6, ll.3-7, p.7, ll.2-25, p.8, 1-25.

ANALYSIS

Utah Code Ann. § 54-3-8 states: “[A] public utility may not: (a) as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any person, or subject any person to any prejudice or disadvantage; and (b) establish or maintain any unreasonable difference as to rates, charges, service or facilities, or in any other respect, either as between localities or as between classes as service.” Even special contracts are subject to this statutory provision. *See generally Utah Copper Co. v. Public Util. Comm’n*, 203 P.627 (Utah 1921). However, although Utah law prohibits “public utilities from engaging in disparate treatment of similarly situated customers . . . and requires that a utility's charges be ‘just and reasonable’, [it also] recognizes . . . that not all customers are similarly situated. ‘The scope [of the] definition of “just and reasonable” may include, but shall not be limited to, the cost of providing service to each category of customer, economic impact of charges on each category of customer, and on the well-being of the state of Utah’” *Bradshaw v. Wilkinson Water Co.*, 2004 UT 38, ¶ 14 (internal citations omitted).

No party disagrees the firm fixed-price rates proposed in the ESA are unjust or unreasonable, and the Commission has no basis to conclude otherwise. Based upon the information provided, the Commission finds the rates in the proposed ESA just and reasonable as the rates cover the cost of providing service to Praxair.

Parties, however, disagree on whether the lag period applicable to changes [REDACTED]

[REDACTED]
[REDACTED] is just and reasonable. The Office recognizes the new lag period is an improvement over prior agreements,

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however also indicates no evidence or analysis has been provided justifying the lag based upon utility ratemaking principles. The Company and Praxair agree that the proposed lag period is just and reasonable for this one year agreement in that it allows Praxair some gradualism in this change yet is still compliant with the Commission-ordered interval in Docket No. 09-035-101.

The Division points out the lag period is a significant improvement over previous years' contracts when delays could reach up to one year. The lag period is also within the 90-day maximum ordered by the Commission in Docket No. 09-035-101. Further, the Division recommends, since the lag period is acceptable to the Company and Praxair and there has been no argument proffered supporting the lag except that it falls within the Commission's order, the new lag period should be set as the maximum delay for future contracts.

Based upon the concept of gradualism, *see e.g. In the Matter of the Investigation into the Reasonableness of Rates and Charges of PacifiCorp, dba Utah Power & Light Company, Docket No.97-035-01* (stating "We have consistently embraced the principle of gradualism.") the Commission determines the new lag period is reasonable in this case. Absent further justification, however, the Commission expects there will be no lag in rate adjustments for any reason in future contracts between the Company and Praxair.

Regarding the applicability of a special contract in this case, the Office contends that no justification has been provided for Praxair to be considered a special-contract customer. Although the OCS has listed important considerations that should be raised as we review the proposed ESA, it did not rebut Praxair's testimony besides the statements in its Memo. The Commission cannot ignore unchallenged testimony: "the law does not invest the Commission

with any such arbitrary power to disbelieve or disregard uncontradicted, competent, credible evidence.” *US West v. Public Serv. Comm’n*, 901 P.2d 270 (Utah 1995).

Besides the other reasons raised by Praxair, it maintains that allowing its input prices to be disclosed, if not protected by a confidential ESA, could have negative economic impact on Praxair. Because it competes in a highly competitive industry, and where input prices comprise a significant part of input costs, disclosure of those costs could put Praxair at a significant competitive disadvantage. This is especially magnified where one of its competitors receives service from a municipality that may deviate from list prices for any customer, including the Praxair competitor, and where the municipality is not required to disclose those rates. Approving the ESA, based on the evidence currently before the Commission, would allow Praxair to maintain competitive equities as Dr. Sinclair contends.

Additionally, there is no dispute that the Commission has historically allowed the Company to treat Praxair as a special contract customer, for reasons stated above (i.e. the bypass risk posed by the Company, the competitive disadvantages posed by Praxair if no ESA, and Praxair’s unique load profile). Given such past practice, it would be error for the Commission to act “contrary to the agency’s prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency” *Utah Code Ann. § 63G-4-403(4)(h)(iii)*. See also *Comm. of Consumer Services v. Public Serv. Comm’n*, 2003 UT 29, ¶ 13. Therefore, given the Commission’s prior practice and the importance of confidentiality, the Commission in this case finds the proposed ESA should be approved.

We note the OCS' concerns pertaining to the utilization of predictable criteria in determining when circumstances warrant special contract provisions and/or rate treatment. At minimum, in future special contracts, the Company should be prepared to address whether the special contract covers its costs of the Company providing service to the special contract customer, whether the special contract criteria should be applied to similarly situated customers, and whether the special contract will continue to be in the public interest. Additionally the Company should provide a discussion of all considerations which factor into the basis for establishing the specific special contract.

ORDER

1. The proposed ESA is approved;
2. For future filings seeking approval of ESAs with Praxair, the Company shall be prepared to provide substantial evidence that the proposed ESA with Praxair continues to be just and reasonable, in the public interest, and not violative of Utah Code Ann. §54-3-8. If the ESA does give preferential treatment to Praxair through a special contract, the Company shall ensure that it presents to the Commission a reasonable basis for such treatment. At a minimum, in future special contracts Company shall be prepared to address whether the special contract covers its costs of the Company providing service to the special contract customer, whether the special contract criteria should be applied to similarly situated customers, and whether the special contract is in the public interest. Additionally the Company shall provide a discussion of all considerations which factor into the basis for establishing the specific special contract;

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3. Prior practice alone shall not be sufficient basis to approve the ESA absent other fair and rational bases.
4. Pursuant to Sections 63G-4-301 and 54-7-15 of the Utah Code, an aggrieved party may request agency review or rehearing of this Order by filing a written request with the Commission within 30 days after the issuance of this Order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission does not grant a request for review or rehearing within 20 days after the filing of the request, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a petition for review with the Utah Supreme Court within 30 days after final agency action. Any petition for review must comply with the requirements of Sections 63G-4-401 and 63G-4-403 of the Utah Code and Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 16th day of December, 2010.

/s/ Ruben H. Arredondo
Administrative Law Judge

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Approved and confirmed this 16th day of December, 2010, as the Report and
Order of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#70146