PATRICIA E. SCHMID (#4908)
WESLEY D. FELIX (#6539)
Assistant Attorney Generals
MARK L. SHURTLEFF (#4666)
Attorney General of Utah
160 E 300 S, 5th Floor
P.O. Box 140857
Salt Lake City, UT 84114-0857
Telephone (801) 366-0353
pschmid@utah.gov
wfelix@utah.gov
Counsel for the DIVISION OF PUBLIC UTILITIES

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power to Increase Rates by $29.3 Million or 1.7 Percent through the Energy Balancing Account	)	DOCKET NO. 12-035-67 INITIAL BRIEF OF THE UTAH DIVISION OF PUBLIC UTILITIES

Pursuant to the briefing schedule established during the May 14, 2012 hearing for this matter, the Utah Division of Public Utilities ("Division") hereby files its initial brief regarding an interim rate process applicable to energy balancing accounts ("EBAs") and the appropriate standard of proof for the applicant.

INTRODUCTION

The Utah Legislature ("Legislature") approved mechanisms for EBAs or energy cost adjustment mechanisms ("ECAMs") in Section 54-7-13.5 of the Utah Code (the "EBA statute") which became effective March 25, 2009. On March 16, 2009, Rocky Mountain Power ("RMP") filed an application for approval of a proposed EBA.[1] On

[1] See Docket No. 09-035-15.

March 3, 2011, the Commission approved a four-year pilot EBA, on a provisional basis, consistent with the authority granted and the limitations imposed by Utah Code Ann. § 54-7-13.5 ("Corrected EBA Report and Order" or "CRO").[2]

The Commission directed that implementation of the pilot EBA was to occur on the first day of the month following resolution of RMP's then current general rate case.[3] The general rate case order was entered September 13, 2011.[4] Thus, EBA implementation and initial accrual of amounts for the EBA deferred account balance began on October 1, 2011.

The Corrected EBA Report and Order further directed that RMP was to file annually, on March 15, an application to "collect or refund the calendar-year deferred balance."[5] Accordingly, in what was designated as Docket No. 12-035-67, RMP filed its Application to Increase Rates through the Energy Balancing Account ("EBA Rate Increase"), on March 15, 2012. RMP's application sought, in relevant part, to impose an interim rate increase of $9.3 million beginning June 1, 2012.[6] The $9.3 million, RMP represented, was equal to 70% of the difference between base net power costs ("NPC")

[2] An erratum to the Corrected EBA Order was issued on March 16, 2011, adding inadvertently omitted language concerning agency and judicial review. In March of this year, the Division filed its "Draft Division Report on EBA Pilot Program Evaluation Plan" in Docket No. 09-035-15. RMP and the Utah Industrial Energy Consumers, an intervention group ("UIEC") both filed comments on the Division's draft report.
[3] See Docket No. 10-035-124.
[4] On September 13, 2011, the Commission issued an omnibus order approving stipulations resolving five pending RMP dockets: the general rate case (Docket No. 10-035-124), the EBA pilot implementation (Docket No. 09-035-15); the deferred accounting treatment of renewable energy credits (Docket Nos. 10-035-14 and 11-035-46); and, deferred bonus depreciation (Docket No. 11-035-47) ("Omnibus Order").
[5] CRO at p. 77.
[6] Per RMP's stipulation at the May 21, 2012 hearing in this docket, the amount RMP now seeks to recover for the Stub Period is $8.9 million. The EBA Rate Increase also sought recovery of $20 million for net power costs from Docket No. 10-035-124 consistent with the Omnibus Order.

and actual NPC costs for the three month period from October 1, 2011 to December 31 2011 (the "Stub Period").[7]

RMP filed testimony from three witnesses supporting its calculation of the deferred account balance.[8] The Division filed its comments on April 27, 2012, generally supporting recovery of the deferred account balance, as corrected. Consistent with the applicable scheduling order, comments from the Office of Consumer Services ("OCS") and the Utah Industrial Energy Consumers ("UIEC") were filed on May 10, 2012. In general, in their reply comments, RMP and the OCS supported recovery of the deferred account balance and UIEC opposed recovery.[9]

On May 14, 2012, a hearing was held on Rocky Mountain Power's EBA interim rate increase application pursuant to the EBA. Testimony was taken from the three RMP witnesses and from the Division's witness. The UIEC objected, in its comments and at the hearing that the truncated period for assessment of the interim rate request, and the limited input envisioned by the Commission's process did not allow for presentation of opposing direct testimony. UIEC noted the process, as a consequence, did not allow for substantive or effective cross examination.[10] The result, according to the UIEC, is inadequate process.[11] In consideration of the UIEC's objections, and at the

[7] The Stub Period is an artifact of the implementation of the EBA in September. Normally, the application for recovery or refund of the deferred account balance would encompass a calendar year.
[8] See Direct Testimony of Dickman, McDougal and Griffith filed March 15, 2012.
[9] Parallel tariff proceedings occurred in Docket No. 11-035-T10, and, inter alia, on May 1, 2012, the Commission issued an order directing RMP to file a modified Schedule 94, ordered the use of a static scalar for certain allocations for EBA deferrals for the Stub Period, and ordered that certain Net Power Cost compliance studies to be filed.
[10] Both the UIEC and the Division declined to cross examine RMP witnesses, but reserved their right to do so, if the Commission were to determine that a more robust process was required before an interim rate could be imposed.
[11] See, UIEC Comments at p. 3, ¶ 5, "Even for setting temporary rates that are subject to refund, there must be due process and a sufficient quantum of reliable evidence sufficient to demonstrate that the rate is just and reasonable."

request of the Division, the Hearing Officer deferred decision on RMP's application for an interim rate recovering the EBA account balance, and requested that the parties brief two issues: the process for assessing an application for EBA recovery or refund, and the burden of proof required to approve such an application. [12] This brief responds to the Hearing Officer's request.

ARGUMENT

The Commission has authority to set interim rates for an EBA and can look to existing statutes for guidance. In determining interim rates, it is appropriate for the Commission to use an abbreviated process to determine just and reasonable rates and to require the applicant to meet a prima facie standard.

1. EBA Rate Adjustment Process

The EBA statute itself does not identify an interim rate process. The Commission's CRO notes only that "[a]t the end of the twelve month period, and following a hearing on the prudence of the actual costs, the ending balance [of the EBA deferred account] will yield 'prudently incurred actual costs in excess of the revenues collected' to be recovered in rates through a surcharge to customers pursuant to Utah Code § 54-7-13.5(g), or 'revenues collected in excess of prudently incurred actual costs' to be surcredited to customers pursuant to Utah Code § 54-7-13.5(2)(h)."[13] To be sure, the Corrected Report and Order notes that the approved rates are not final, and will "continue to be examined in general rate cases and other appropriate rate-setting proceedings."[14]

[12] Transcript, May 14, 2012, Docket No. 12-035-67, at pp. 82-84.
[13] CRO at p. 76.
[14] Id. at p. 80.

2. The Commission Has the Power to Set Interim Rates for Energy Balancing Accounts

Through a combination of its delegated general powers and language in the EBA Statute, the Commission is empowered to set interim rates for an EBA. The Utah State Legislature delegated authority over public utilities and rate regulation to the Utah Public Service Commission. In pertinent part, Utah Code Ann. § 54-4-1 states, "The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction." The Commission is empowered to adopt any method of rate regulation that is "consistent with this title," "in the public interest" and "just and reasonable."[15] The general delegation expressed in Section 54-4-1 is especially important when the Commission is faced with implementation of a statute such as the EBA Statute that is silent about the method for that implementation. Thus, even though the authority to set interim rates is not explicitly mentioned in the EBA Statute, the Commission has such power under its general delegation of authority.

3. The Interim Rate Statute Can Provide Guidance for Setting Interim EBA Rates

The Division believes that, in the absence of specific instruction in the EBA statute, the Commission should look to analogous statutory provisions regarding interim rate implementation for guidance as to the appropriate process for interim rate

[15] Utah Code Ann. § 54-4-4.1(1).

approval.[16] Utah Code §54-7-12(4) describes the general process for interim rate-making. In relevant part, the statue provides:

> (4)(a)(i) A request for interim rates shall be made within 90 days after the day on which a public utility files a complete filing for a general rate increase or a general rate decrease.
>
> . . .
>
> (iii) The evidence presented in the hearing held pursuant to this Subsection (4) need not encompass all issues that may be considered in a rate case hearing held pursuant to Subsection (2)(d), but shall establish an adequate prima facie showing that the interim rate increase or decrease is justified.

The abbreviated process envisioned is adequate, because any initial determinations will be fully reviewed in the Commission's final order. In that final order, the Commission may order a refund or surcharge as appropriate.

What differs between interim and final rates appears not to be the burden of proof or standard of cost recovery, but the level of inquiry that must be made to determine whether the requested interim rates are just and reasonable. It seems appropriate that language from the Interim Rate Statute addressing these issues provide guidance to interim rate recovery under the EBA.

Commission orders provide insight into this distinction. The Commission has stated repeatedly that interim rate proceedings "are not to be treated as mini-rate cases."[17] Furthermore, such treatment would render superfluous an interim rate proceeding. It seems appropriate that this distinction be applied to interim rate proceedings under the EBA Statute.

[16] A similar process has been used for Questar Gas' balancing accounts.
[17] See, e.g., Mountain State Telephone and Telegraph Company, Case No. 85-049-02 (June 26, 1985).

The Utah Supreme Court has provided some guidance on what constitutes a prima facie showing. The Utah Supreme Court has looked to Black's Law Dictionary and precedent for a definition of prima facie, "defining prima facie evidence as "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced" and that "prima facie evidence is 'that quantum of evidence that suffices for proof of a particular fact until the fact is contradicted by other evidence....'"[18] It seems that this guidance appropriately could be applied to a proceeding for an interim rate increase under the EBA Statute.

The requirement that the full process afforded in a general rate case is provided before an interim rate becomes final, provides more than adequate due process protections. This proposition is supported by the overwhelming majority of cases to address the issue.[19] Moreover, an interim rate of limited duration should mitigate any concerns about intergenerational inequities. Failure to allow recovery of interim rates that meet a prima facie standard creates intergenerational problems as interest continues to accrue, customers change, and the EBA period becomes increasingly distant from the time when recovery begins. The interim rate process should allow recovery in relative proximity to costs incurred, and provide a timely future offset if adjustment is needed.

---

[18] Stevenson v. State Tax Commission, Taxpayer Services Division, 112 P.3d 1232 (Utah Ct. App. 2005), cert. granted, Tax Commission. v. Stevenson, 124 P.3d 634 (Utah 2005), and aff'd in part, rev'd in part, Utah State Tax Commission v. Stevenson, 150 P.3d 521, 567 (Utah 2006).

[19] See Re Washington Water Power Company, 22 P.U.R. 4th 485, 487 (Idaho PUC October 13, 1977) ("Most courts which have considered the contention that interim relief violates a consumer's due process rights have rejected the argument that the due process clause requires full and complete litigation of every issue before any relief may be granted."); and Connecticut Natural Gas Corporation v. Department of Public Utility Control, 981 A.2d 1084, 1094 (Conn. Super 2009) (During [the] full rate case proceeding, the department will consider adjustments for the pro forma period . . . This will permit the department to correct any erroneous adjustments to the plaintiffs rates ordered following the interim rate decrease process. The plaintiff provides no evidence to show that this additional process is insufficient to counterbalance any risks associated with the interim rate decrease procedures.").

CONCLUSION

Modeling an interim rate procedure for RMP's EBA based upon existing statutory language is consistent with the Commission's power and authority over public utilities, and its obligation to set rates in a just and reasonable manner. A process where interim rates, based upon a prima facie showing by the applicant, are subsequently examined more thoroughly before final rates are set satisfies due process concerns and balances cost incurrence and intergenerational equities.

Dated this 29th day of May 2012.

Respectfully submitted,

_____
Patricia E. Schmid
Attorney for the Division of Public Utilities

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of May 2012, I caused to be mailed, e-mailed, or hand delivered a true and correct copy of the foregoing **INITITAL BRIEF OF THE UTAH DIVISION OF PUBLIC UTILITIES** to the following:

Chris Parker
William Powell
Dennis Miller
Division of Public Utilities
160 East 300 South, 4th Floor
Salt Lake City, UT 84111
ChrisParker@utah.gov
wpowell@utah.gov
dennismiller@utah.gov

Michele Beck
Cheryl Murray
Dan Gimble
Utah Office of Consumer Services
160 East 300 South, 2nd Floor
Salt Lake City, UT 84111
mbeck@utah.gov
cmurray@utah.gov
dgimble@utah.gov

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

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

Arthur F. Sandack
8 East Broadway, Ste 510
Salt Lake City, UT 84111
asandack@msn.com

F. Robert Reeder
William J. Evans
Vicki M. Baldwin
Parsons Behle &, Latimer
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
bobreeder@parsonsbehle.com
vbaldwin@parsonsbehle.com
bevans@parsonsbehle.com

Ms. Karen S. White
AFLOA/JACL-ULFSC
139 Barnes Ave, Suite 1
Tyndall AFB, FL 32403
Karen.white@tyndall.af.mil

Holly Rachel Smith, Esq.
Russell W. Ray, PLLC
6212-A Old Franconia Road
Alexandria, VA 22310
holly@raysmithlaw.com

Mark C. Moench
Yvonne R. Hogle
Rocky Mountain Power
201 South Main Street, Suite 2300
Salt Lake City, UT 84111
mark.moench@pacificorp.com
yvonne.hogle@pacificorp.com

Kurt J. Boehm, Esq.
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
kboehm@BKLlawfirm.com

_____