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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 REPLY BRIEF OF THE UTAH DIVISION OF PUBLIC UTILITIES

The Utah Division of Public Utilities ("Division") hereby files its reply brief responding to the May 29, 2012 opening briefs of the Utah Industrial Energy Consumers ("UIEC") and the Utah Association of Energy Users ("UAE") regarding an interim rate process applicable to energy balancing accounts ("EBAs") and the appropriate standard of proof for the utility-applicant.[1]

I. INTRODUCTION

UIEC and UAE fail to support their proposition that applicable law precludes an interim rate process as ordered by the Utah Public Service Commission ("Commission")

[1] Rocky Mountain Power also filed an opening brief.

in its March 3, 2011 order ("Corrected EBA Order")[2] approving a provisional, four year pilot EBA pursuant to Utah Code Ann. §§ 54-7-13.5 (the "EBA Statute").[3] The Commission's order establishing an interim rate process complies with the EBA Statute and other applicable statutes. It is appropriate to look to the interim rate process set forth in Utah Code Ann. § 54-7-12(4) ("GRC Statute") and the process used by Questar Gas Company for guidance in developing an interim rate process. An interim rate process such as the two phase approach proposed by the Division offers due process protection, with the utility-applicant having the burden of proof to make its case through a prima facie standard of proof for the first phase and a substantial evidence standard of proof for the second phase, and is consistent with the Commission's authority to determine the method and process for hearings.

II. ARGUMENT

A. The Commission Has Ample Authority to Order an Interim Rate Process and Explicit Language in the EBA Statute is Not Required.

UIEC argues unpersuasively that the Commission's authority to order an interim rate is established by, and limited to, the GRC Statute.[4] By stating that "The 'interim rate' is wholly a creature of the GRC Statute,"[5] UIEC ignores the broad authority delegated to Commission and specific statutes which can be construed to give the Commission the authority to order an interim rate process.[6] UAE's statement that it

[2] On March 16, 2011, the Commission issues an erratum to the Corrected EBA Order, adding inadvertently omitted language concerning agency and judicial review.
[3] The general issues raised by UAE's brief are addressed in connection with UIEC's more specific arguments.
[4] See Legal Brief of UIEC ("UIEC Brief") at p. 4 ("The 'interim rate' is wholly a creature of the GRC Statute, enacted to solve a perceived problem of financial harm during the 240-day period."). Some of the same ratemaking concerns such as regulatory lag arise in both the GRC and EBA processes.
[5] UIEC Brief at p. 4.
[6] An interim rate process developed under the intertwined statutes discussed in this section, contrary to UIEC's claim, does not constitute "impermissible retroactive ratemaking." UIEC Brief at p. 10.

"could not identify any Utah legal authority for an exception to Utah's general ban on retroactive ratemaking to permit the use of an interim or adjustable rate mechanism in the context of an EBA true up docket"[7] also fails in light of applicable statutes.

Rules of statutory construction support an interim rate process. The Utah Supreme Court has stated, "[statutes] are considered to be in pari materia and thus must be construed together when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object."[8] The Court continued, stating, "If it is natural or reasonable to think that the understanding of the legislature or of persons affected by the statute would be influenced by another statute, then those statutes should be construed to be in pari materia, construed with reference to one another and harmonized if possible."[9] Therefore UIEC's argument that an interim rate process is prohibited by the EBA Statute is without merit because the provisions discussed herein should be construed together.[10]

In addition to the comments in the Division's initial brief pertaining to the Commission's delegation of authority, it is important to note that the Commission has the "power and jurisdiction . . . 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."[11] The Commission's power and jurisdiction "to do all things . . . which are necessary . . . in the exercise of such power and jurisdiction"[12] extends to

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[7] UAE Brief at pp. 1-2.
[8] Utah County v. Orem City, 699 p.2d 707, 709 (Utah 2003) ("Orem City") (construing seven statutes relating to use of county jail) (internal citations omitted).
[9] Orem City at p. 709.
[10] UIEC Brief at p. 3.
[11] Utah Code Ann. § 54-4-1. The Commission's power and jurisdiction are not unlimited. See, e.g., Williams v. Mountain States Telephone and Telegraph Company, 763 P.2d 796 (Utah 1988).
[12] Utah Code Ann. § 54-4-1.

accomplishing what has been set out in the EBA Statute by implementing an interim rate process. Through the EBA Statute, the Legislature identified a particular set of costs, including but not limited to the sum of "power costs," less "wholesale revenues"[13] that are to affect rates. It is within both the Commission's authority and within the scope of its duty pertaining to ordering just and reasonable rates to establish a means of implementing the EBA Statute.

The Commission has both the authority and the duty to "fix" rates that are not just, reasonable and sufficient. If the Commission "finds after hearing" that rates are unjust or unreasonable the Commission "shall: (i) determine the just, reasonable or sufficient rates" and "fix the determination described … [above] by order as provided in this section."[14] In Questar Gas Company v. Utah Public Service Commission ("Questar Gas"),[15] the Court said, "We presume, as we did in *Utah Department of Business Regulation v. Public Service Commission,* 720 P.2d 420 (Utah 1986), a case involving a similar type of account used by Utah Power and Light, that the Commission implemented this rate-changing mechanism under its 'ample general power to fix rates and establish accounting procedures.'"[16]

Further support for an interim rate process comes from Utah Code Ann. §54-4-4.1, authorizing the Commission to adopt methods and mechanisms of rate regulation, by stating, that "the commission may, by rule or order, adopt any method of rate regulation that is (a) consistent with this title; (b) in the public interest; and (c) just and

[13] Utah Code Ann. § 54-7-13.5(1)(b).
[14] Utah Code Ann. § 54-4-4(1) (emphasis added).
[15] 34 P.3d 218 (Utah 2001).
[16] Id. at p. 223 (internal citations omitted) (emphasis added)...

reasonable."[17] That statute further states that in addition to such things as volumetric and demand rate components, "a method of rate regulation may include . . . other components, methods, or mechanism approved by the commission."[18]

Interim ratemaking has been specifically identified as a "mechanism" by the Utah Supreme Court. In Questar Gas, the Court stated, "A straightforward reading of the April 3 order reveals that the Commission did not intend for the balancing account to be 'merely' an accounting tool, but created it as a more efficient interim rate-changing mechanism for recovering certain gas costs."[19] The Court recognized the value of an interim process when it stated, "The operation of the account was intended to replace more frequent rate relief requests by allowing the utility to record in *and recover through* the account certain costs on a dollar-for-dollar basis without having to go through a lengthy rate-making process."[20]

Additionally, the EBA Statute itself contains provisions that indicate an interim rate process was intended by the Legislature even if the word "interim" was not specifically mentioned in the statute. The EBA Statute begins by establishing what an EBA is and providing the Commission authority to authorize EBAs.

Then, the EBA Statute discusses reconciliation and true-up. The EBA Statue requires that, "an electrical corporation . . . shall file a reconciliation of the energy balancing account with the commission at least annually with actual costs and revenues included by the electrical corporation."[21] The Commission must find costs are "actual"[22]

[17] Utah Code Ann. § 54-4-4.1(emphasis added).
[18] Utah Code Ann. § 54-4-4.1 (emphasis added).
[19] Questar Gas at p. 222 (emphasis added).
[20] Id. (emphasis in the original).
[21] Utah Code Ann. § 54-7-13.5(2)(c)(ii).

and "prudently-incurred."[23] The EBA Statute states that "revenues collected in excess of prudent incurred costs shall: (i) be refunded as a bill surcredit to an electrical corporation's customers over a period specified by the commission and (ii) include a carrying charge."[24] A symmetrical provision addresses "prudently incurred actual costs in excess of revenues collected."[25] "All allowed costs and revenues associated with an energy balancing account …shall remain in the respective balancing account until charged or refunded to customers."[26] These steps indicate that EBA rates are established through a process of estimation and true up.

An interim rate process as ordered by the Commission in its Corrected Order combined with the Division's proposed two-phase process is an appropriate mechanism for implementing this estimation and true up.

B. The GRC Statute and Questar Gas' 191 Account Are Appropriate Models for an Interim Rate Process.

UIEC asserts that the Questar Gas' 191 Account "does not provide authority for an 'interim' rate or 'interim' approval process in an electric utility's EBA proceedings. "[27] While there are differences in how the gas EBA and the energy EBA came about, it is shortsighted to ignore a pass through procedure that has been utilized for many years just because it applies to a gas, and not an electric, utility. It is equally shortsighted to ignore a pass through procedure because it was adopted prior to enactment of the EBA statute.[28] There often is much to learn from prior ratemaking mechanisms.[29] Indeed, it

[22] Id. at Utah Code Ann. § 54-7-13.5(2).
[23] Id.
[24] Id. at Utah Code Ann. § 54-7-13.5(2)(g).
[25] Id. at Utah Code Ann. § 54-7-13.5(2)(h).
[26] Id.at Utah Code Ann. § 54-7-13.5(4).
[27] UIEC Brief at p. 7
[28] Questar Gas was decided prior to the 2009 enactment of the EBA Statute.

is possible that the language pertaining to a gas tariff merely formalizes Questar Gas' longstanding practice. As established above, the Commission has authority to implement an interim rate process and the fact that the "electric" EBA did not contain language referring to adopting a procedure through a Commission approved tariff should not be read as foreclosing the Commission from implementing an interim rate process, as UIEC contends.

C. An Interim Rate Process Does Not Violate Due Process.

UIEC's concerns about due process are satisfied by the two-phase interim rate process proposed by the Division. The Commission has the authority to conduct abbreviated proceedings.[30] Here, the Division recommends an abbreviated process and prima facie standard only for the first hearing to set interim rates. Before interim rates would be made final, there would be a formal hearing as contemplated by the Administrative Procedure Act and Commission rules, with opportunity for discovery, cross examination, and other elements, and the applicable standard of proof would be the substantial evidence standard. Thus, final rates would be established under the traditional "substantial evidence" standard.[31] As this discussion shows, UIEC will be provided due process and its complaints on this point are without merit.

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[29] The Commission approved an EBA pilot program in recognition that procedures may need to be altered as customers, the Company, and regulators gain more experience. Corrected Order, pp. 79-80.
[30] Utah Department of Business Regulation v. Public Service Commission, 614 P.2d 1242 (Utah 1980).
[31] Id. at 1245-46.

D. A Utility Applicant Requesting an Interim Rate Process Bears the Burden of Proof.

UIEC similarly puts forth an unpersuasive argument that an interim rate process would change the burden of proof. This argument fails because the EBA Statute itself explicitly states, "An energy balancing account may not alter . . . the electrical corporation's burden of proof."[32] It is long established Commission practice that a public utility seeking a rate increase bears the burden of proof. The Company would bear the burden of proof for both the first hearing for interim rates and the second hearing for final rates. While the standard of proof would differ between the two hearings, the burden would not shift from the Company.

CONCLUSION

Establishing an interim rate process based upon existing statutory language is within the Commission's authority, duties, and responsibilities. A two-phase hearing process, where interim rates are based upon a prima facie showing by the applicant, and final rates based upon a showing of substantial evidence by the applicant, satisfies due process concerns.

Dated this ___ day of _____ 2012.

Respectfully submitted,

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[32] Utah Code Ann. § 54-7-(2)(d).

CERTIFICATE OF SERVICE

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

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