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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE INVESTIGATION OF THE COSTS AND BENEFITS OF PACIFICORP'S NET METERING PROGRAM	Docket No. 14-035-114 **REPLY TO ROCKY MOUNTAIN POWER'S OPPOSITION TO MOTIONS TO DISMISS AND FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Utah Admin. Code r.746-100 and Rules 7 and 56 of the Utah R. Civ. P., the Utah Division of Public Utilities ("Division") files this Reply to Rocky Mountain Power's Opposition to Motions to dismiss and for Partial Summary. The Public Service Commission of Utah ("Commission") should grant the Division's Motion for Partial Summary Judgment that the Commission cannot implement the proposed rates recommended by Rocky Mountain Power ("RMP") in its November 9, 2016 compliance filing in this docket.

INTRODUCTION

On November 9, 2016, RMP filed a Compliance Filing in this Docket requesting new rates for new net electric metering ("NEM") customers. On November 18, 2016 the Commission issued a Scheduling Order setting December 20, 2016 as the date for dispositive motions. The Division

and other parties filed motions. On January 12, 2017, RMP filed its Opposition. The Division hereby files its response to RMP's January 12, 2017 Opposition.

REPLY TO ROCKY MOUNTAIN POWER'S DISPUTED FACTS

RMP disputes in part the Division's fact number 1: *Rocky Mountain Power has requested new rates be implemented in this docket for NEM customers*. RMP disputes this fact on the basis that its request was only for new rates for NEM customers who applied for after December 10, 2016. The disagreement between RMP and the Division on this fact is not ultimately a question of fact as to what has been requested. The Division recognizes that RMP's November 6th Compliance Filing sought a determination that "the current rate structure for net metering customers us unjust and unreasonable…" but only requested the Commission approve a proposed schedule that applies to new customers.[1] The partial dispute is over the matter of whether new rates for NEM customers who differ from existing NEM customers solely by date of application are legal under Utah law.

Utah law has never permitted such a distinction between classes by date of application among like customers. To do so would be a plain violation of Utah Code Ann. § 54-3-8; "a public utility may not… establish or maintain any unreasonable difference as to rates, charges, services or facilities, or in any other respect, …between classes of service." For this reason although RMP may ostensibly have requested application of rates only to new NEM applicants, the fact that Utah law prohibits such unreasonable differences in rates results in the necessary conclusion that if the current rates are unjust and unreasonable the proposed rates, which must apply to all NEM customers, must be implemented through a general rate case.

[1] RMP Net Metering Compliance Filing at p.2.

RMP also disputes the Division's fact number 2: *The new rates requested by Rocky Mountain Power are intended to increase revenue*. RMP disputes this fact stating that the goal is to minimize the cost shift among customers. RMP further cites its intent to defer the additional revenue as disputing that the new rate will increase revenue. Finally RMP asserts that this fact is not material. The Division disagrees that this fact is actually disputed. If RMP believes (a) that there is a current cost shift from NEM customers to others - NEM customers are not paying enough - , and (b) that the proposed rate will solve the issue of NEM customers not paying enough, the only reasonable conclusion is that the new rates will increase revenue.

This fact is directly relevant to the prohibition on "single item" or "single issue" ratemaking. Increased revenue outside of a general rate case, regardless of how RMP treats the accounting of it, raises the risk of current customers being overcharged. The purpose of prohibiting single issue ratemaking is precisely to avoid this. It is immaterial whether the additional revenue is deferred. It is immaterial whether the additional revenue is used to reduce or eliminate a cross class subsidy. Identification of a cross class subsidy is not a justification for single issue rate making. A change in rates with the purpose or effect of increasing revenue without evaluation of the entire company's operations is directly material to the legal question of whether the proposal is an impermissible single issue ratemaking.

ARGUMENT

RMP relies on two primary arguments to oppose the Division's Motion for Partial Summary Judgment: 1) that the Net Metering Statute authorizes base rate changes outside of a general rate case; and 2) that RMP is not requesting a change in "base rates". The Division disagrees. Silence as to the method of implementation in the Net Metering Statute does not create

an exception to the range of other statutory requirements for rate setting and the term "program" as used in the statute does not except the new rates from the definition of base rates. To the extent that the traditional canons of interpretation would suggest otherwise the absurd results doctrine is applicable. Demand and energy rates that apply to a class of customers are base rates. A request for a deferral does not except a change in base rates from the requirements of a general rate case, nor does it justify an otherwise impermissible single issue ratemaking.

THE NET METERING STATUTE DOES NOT AUTHORIZE THE COMMISSION TO SET RATES OUTSIDE OF A GENERAL RATE CASE

In support of its argument that the Commission may set new rates outside of a general rate case RMP argues that silence as to the requirement that changes to base rates be made in a general rate case infers an exception to the statute. RMP asserts that that silence "makes clear the legislative intent to provide the Commission with an entirely separate mechanism to adjust the rate and rate structure for the [NEM] Program."[2] The language makes no such exception.

Just as the Commission remains bound by every other statute that is not in conflict with its duties under § 54-15-105.1, it remains bound by §54-7-12. The statute is silent as to many obligations and restrictions on Commission action. The silence on discriminatory effect does not, for example, suggest for example that Commission might permissibly set discriminatory rates. The only reasonable conclusion from the silence as to the rest of the utility code is that, unless conflicting, it continues to apply to setting net metering rates just as it would apply to setting any other rates.

[2] RMP Opposition at 18.

RMP also claims that the Net Metering Statute uses the term "program" to describe net metering and as a result provides an exception to the requirement to increase base rates in a general rate case because utility program offerings are not base rates. While the statute admittedly does use the term "program" and calls net metering a "program administered by the electrical corporation"[3] it does not change the nature of the base rates that are being proposed. The result would be absurd. "Normally, where the language of a statute is clear and unambiguous, our analysis ends; our duty is to give effect to that plain meaning. However, '[a]n equally well-settled caveat to the plain meaning rule states that a court should not follow the literal language of a statute if its plain meaning works an absurd result.'"[4]

The structure of §54-7-12 makes this clear. It defines "base rates" then states that they do not include charges including "a public utility program offering." Program offerings do not have base rates for energy or demand that are set outside of a general rate case. If RMP was successful in implementing the proposed rates as part of a "program" not subject to the general rate case requirements, it would create a new division among net metering customers, those with base rates subject to general rate case requirements and those with "program" charges subject to change at any time. In comparison, the alternative conclusion that the ratemaking provided for under the Net Metering Statute may involve base rates that must be implemented through a general rate case is both a viable reading of the plain language and avoid such an absurd result. The exclusion of an entire class of customer and that class's rates from the definition of base rates stretches the "program" exception beyond recognition.

[3] Utah Code Ann. §54-15-102(12).
[4] *State ex rel. Z.C.*, 2007 UT 54, ¶ 11, 165 P.3d 1206, 1209 (citing to *Savage v. Utah Youth Vil*l., 2004 UT 102, ¶ 18, 104 P.3d 1242).

To provide a further example of how RMP's reading of the statue would result in absurd outcomes; NEM customers would be excluded from participation in the Energy Balancing Account. Section 54-7-12.5(2) authorizes the Commission to have an energy balancing account that may recover costs, but the "collection method… shall… apply to the *appropriate billing components in base rates*; and be incorporated into *base rates* in an appropriate commission proceeding."(emphasis added). To the extent that the proposed NEM rates are not "base rates" the EBA may not recover costs because the only authorized collection method applies to billing components in *base rates*. The plain absurdity of such an outcome mandates the use of the absurd outcome doctrine. The Legislature did not intend to create one unique class of customer who is subject to billed energy and demand rate changes outside of general rate cases despite their character as traditional elements of base rates. Inference is too weak a device to accomplish such a redefinition.

Adding further support to the proper interpretation as base rates, the other public utility program offerings are funded through charges that are incremental to the base rates of customers such as the solar incentive program, cool keeper, and other similar programs. Generally the "programs" rely on credits or charges on customer that are expressly included in the statute creating them. For example the Sustainable Transportation and Energy Plan has a variety of "programs." They have express statutory directive to "include[] a line item charge on the electrical corporation's customers' bills to recover costs" or similar.[5]

[5] Utah Code Ann. § 54-7-12.8 (2)(a) ("the commission may approve … a line item charge on the electrical corporation's customers' bills to recover costs incurred by the electrical corporation for demand side management", (3) "commission shall, before January 1, 2017, authorize … a line item charge on the large-scale electric utility's customers' bills to recover the cost … ". *See also* §54-8b-10(4)(a) ("the commission shall impose a surcharge on each residential and business access line … to cover the costs of…"); §54-8b-15(10) ("the commission shall have the authority to require … explicit charges … shall be in the form of end-user surcharges applied to intrastate retail rates.")

The Net Metering Statute does not provide an express statutory directive to add an incremental charge. Rather it provides a variety of alternative options to address the cost shift. They include "charge, credit, or ratemaking structure." To the extent that the Commission opts for a new ratemaking structure and resulting new base rates as requested by RMP, the language does not direct the Commission to make those new rates outside of a general rate case. It is silent as to the method of implementation and the timing. Had the Legislature intended the Commission to set rates outside of a rate case it would have provided express authority to do so as it has with other programs. Reading into the silence an authority to implement new base rates outside of a general rate case in contravention of §54-7-12's requirements is a bridge too far. It results in absurd outcomes and should be rejected.

RMP'S PROPOSED INCREASE IN BASE RATES IS LIKELY TO APPLY TO ALL NEM CUSTOMERS.

RMP claims that its proposal is to create only new rates for new NEM customers and it has requested to grandfather existing customers. "[A] public utility may not… establish or maintain any unreasonable difference as to rates, charges… or as between classes of service."[6] "It is axiomatic in rate making that utilities are barred from treating persons similarly situated in a dissimilar fashion. Reasonable classifications between consumers may be made, but there must be adequate findings of fact, supported by evidence, which demonstrate a rational basis for the classification."[7]

[6] Utah Code Ann. § 54-3-8(1)

[7] *Mountain States Legal Foundation v. Utah Public Service Comm'n*, 636 P.2d 1047, 1052 (Utah 1981) (citing to *State ex rel. Utilities Commission v. The Mead Corp*., 238 N.C. 451, 78 S.E.2d 290 (NC 1953); *Postal Telegraph-Cable Co. v. Associated Press*, 228 N.Y. 370, 127 N.E. 256 (NY 1920)).

RMP provides no rational basis for distinguishing between existing net metering customers and future net metering customers. In fact the Company's entire basis for the new rates it proposes for net metering customers is based upon a study of *existing* net metering customers' load data. Just as it is axiomatic that utilities are barred from treating similar customers differently, it is also axiomatic that if customer data from existing customers is valid to represent the class of new customers, existing customers who's load data are representative must be similar to the new customers. The distinction the Company has proposed by date of application is simply not a reasonable classification, however popular it might be.

While the Division does not believe the discrimination issue is ripe for determination on a motion for summary judgment because the facts must be interpreted in the light most favorable to RMP, the facts as presented do not provide a reasonable basis for distinguishing between existing NEM customers and new NEM customers. Without more, the NEM rates must apply to all NEM customers, which would require a change in existing NEM customers' base rates. Thus, even without resolving the discrimination question, it is evident that there is at least a reasonable likelihood that all NEM customers' rate would be affected by RMP's proposal.

RMP'S FILING REMAINS AN IMPERMISSIBLE SINGLE ITEM RATE CASE.

In response to the issue of single item ratemaking RMP asserts that the purpose of the prohibition on single item ratemaking is only to ensure that rates are set based on matched time period of "revenues, expense, and investments."[8] The rule is broader than this narrow definition. "The commission may adjust all figures, revenue, expense, and investment for anticipated changes, but it may not adjust one side or part of the equation without adjusting the other; unless

[8] RMP Opposition at 27.

there is a finding the particular expense is extraordinary." While RMP claims that it "simply seeks to adjust the rates for net metering customers so that they cover their cost of using the system" doing so must as a result increase the rates. Increasing rates for one class of customer without adjusting the remaining classes to correct other inaccuracies is precisely the type of rate increase single item rate making prohibits.

Moreover RMP's effort to adjust the data to match the test year used during the prior rate case is an insufficient solution. RMP is using actual data from NEM customers from a period that does not accurately match the time period the data was collected to set current rates. Knowing the outcome of the operations during a future test year is significantly different from a projection. During the rate effective period the forecasts will inherently be found to have errors. The balance of the errors in both directions are relied upon to maintain just and reasonable rates until the next general rate case. The request to implement rates that are set based on actual data from the future period creates a mismatch because actual results of operations during the test period do not match the projections. For this reason the use of actual NEM customer data collected multiple years after the data set that was relied on to predict the future test year is insufficient to satisfy the requirement for a matched time period. Increasing the rates for one customer group to adjust for a cost shift three years after the most recent rate case without an overall review of RMP's operations is an impermissible single item rate making.

CONCLUSION

The proposal by RMP to implement new tariffs for net metering customers cannot be accomplished outside of a general rate case. They are base rates. The statutory requirement to file a general rate case to increase base rates remains applicable to net metering customers and

the fixed, demand, and energy charges that apply to them. Additionally raising base rates outside of a general rate case is an impermissible single issue ratemaking. The Commission should clarify that the rates cannot be implemented in this docket.

Submitted this 26th day of January, 2016.

/s/ Justin C. Jetter

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