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Before the Public Service Commission of Utah

In the Matter of Rocky Mountain Power's Solar Photovoltaic Incentive Program (Schedule 107) 2016 Annual Report	Docket No. 16-035-21 Comments of The Office of Consumer Services

Pursuant to Utah Code Ann. § 54-10a-301 and Administrative Code r476-100, the Office of Consumer Services (Office) submits these Reply Comments arguing that this Public Service Commission (Commission) should find that Rocky Mountain Power's (Company) actions of violating Tariff Schedule 107 by allowing unqualified customers to participate in its Solar Photovoltaic Incentive Program imprudent and rule that incentive payments made to unqualified customers not be recovered in rates. In addition, this Commission must assess monetary penalties against the Company for each separate violation of Schedule 107, pursuant to Utah Code Ann. § 54-7-25.

BACKGROUND

On June 1, 2016, the Company filed its Solar Photovoltaic Incentive Program 2016 Annual Report. On June 29, 2016, the Office filed its initial comments on the

Annual Report recommending that this Commission acknowledge the 2016 Report as meeting this Commission's reporting requirements but raising several issues with management of the Program. Among the issues raised was the concern that Schedule 107's eligibility requirements for the solar incentive program were not being enforced, specifically Schedule's 107 requirement that participation for the solar incentive program be conditioned on a customer's participation in the Company's Cool Keeper Program. (Electric Service Schedule No. 107, Special Conditions 8.)

The Office first raised this issue in the comments to the Company's 2015 Annual Report on the Program. Specifically, the Office noted that the application for the program simply asked if the customer was eligible for the Cool Keeper program and therefore the programs eligibility requirements were "self policing." (Office's June 29, 2016 Comments, at pg. 2) The Company replied that it "was researching the issue to determine if the requirement is being met or if additional steps need to be taken to ensure participation where appropriate." (*Id.*, at pg. 2-3.) However, at the time of the 2016 Annual Report evidence still suggested customers participating in the solar incentive program are not participating in the Cool Keeper Program. Accordingly, in conjunction with its initial comments to the 2016 Report, the Office propounded discovery requests regarding this issue.

On July 15, 2016, after the Company responded to the discovery request, the Office filed comments providing:

> The following table incorporates information obtain in the above referenced responses

Program Year	Program Sector	Potentially Eligible	Not Eligible	Enrolled in Cool Keeper	Requested & Received Removal from Cool Keeper
2013	Large Non-Residential	3	4		
	Residential	98	32	5	2
	Small Non-Residential	85	13		1
2014	Large Non-Residential	7	3		
	Residential	107	33	7	3
	Small Non-Residential	70	18	1	
2015	Large Non-Residential	4	3		
	Residential	103	29	10	7
	Small Non-Residential	116	39		2
2016	Residential	9	0	3	3
Total all Years		**602**	174	**26**	**18**

> Looking only at the residential customers who received solar incentive payments during Program years 2013 to 2016 (to date) the Company indicates that a total of 317 were potentially eligible to participate in the Cool Keeper Program whereas only 25 were actually enrolled. During that same time period 18 requested to be removed from Cool Keeper.
>
> The Company did not explain what "potentially eligible" means, however . . . it is fair to assume, without counter information from the Company, that a large portion of the potentially eligible customers should have been enrolled in the Cool Keeper Program in keeping with the tariff requirements for the Solar Incentive Program. In contrast, it appears that less than five percent of potentially eligible customers are actually following this requirement of the tariff.

(Office's July 15, 2016 Comments, at pg. 3-4.)

Based on this information, the Office recommended that this Commission open a new docket or schedule an additional round of comments to address the issues of imprudence and appropriate remedies stemming from the Company's failure to enforce

Schedule 107 eligibility requirements. (*Id.* at pg. 4-5.) On July 19, 2016, this Commission issued an Order scheduling a new round of comments to address the issues raised by the Office. These comments follow.

ARGUMENT

The Company's failure to enforce the eligibility requirements for participating in the solar incentive program was imprudent. Accordingly, the costs of incentives paid to ineligible participants should not be recovered in rates. In addition, the Company must be assessed monetary penalties for each separate violation of Schedule 107, in accordance with Utah Code Ann. § 54-7-25.

A. IMPRUDENCE

The costs of the incentives paid to ineligible customers under the solar incentive plan should not be recouped through rates. In order for an expense to be properly recoverable in rates it must be prudently incurred. *Committee of Consumer Services v. Public Service Com'n of Utah*, 2033 UT 29, ¶¶ 13-14, 75 P.3d 481. Generally, once the issue is raised, the utility bears the burden of demonstrating that an expense is prudent. *Id.* In making a prudence ruling, this Commission must "determine whether a reasonable utility, knowing what the utility knew or reasonably should have known at the time of the action, would reasonably have incurred all or some portion of the expense, in taking the same or some other prudent action." Utah Code Ann. § 54-4-4(a)(iii). Under this standard, it is clear that the Company's payments to ineligible customers were imprudent.

Initially, it was not reasonable to not undertake any measures to insure participants' eligibility for the solar incentive program beyond simply relying on a question on an application. At the initiation of the program a reasonable utility should have known the Company's actions were insufficient to properly enforce the program's eligibility requirements. Moreover, the Company was expressly put on notice of the problem by the Office's 2015 comments but apparently took no action. Under these circumstances, the Company's actions and inactions, viewed at the time the actions were taken or not taken, were unreasonable and the payments made to ineligible participants were imprudent.

Indeed, participation in the Cool Keeper Program was central to the solar incentive program. As the Office stated in its comments to the Company's August 10, 2012 Application for Approval of a Solar Incentive Program: "Program participants should be required to implement cost effective DSM measures prior to qualifying for a solar incentive. . . . Requiring such measures ensures that ratepayers' dollars are better spent as it minimizes the extent to which the resources receiving incentives are serving inefficient loads." (Office's August 29, 2012, Comments, pg. 4, Docket No. 11-035-104.) Due to the general lack of availability for customer energy audits the Office recognized that requiring implementation of cost effective DSM measures may be problematic but customer participation in the Cool Keeper Program was an essential component to our support of the solar incentive program. However, this important aspect of the program has been lost with less than five percent of potentially eligible customers complying with the tariff and participating in the Cool Keeper program. (*See* Office's July 15, 2016 Comments at pg. 4.)

Accordingly, given the Company's unreasonable actions of failing to take cost effective measures in enforcing the eligibility requirement of the solar incentive program, incentive payments to ineligible customers must be found to be imprudent and should not be recoverable in rates.[1]

Since the funds for the majority of these incentive payments have already been collected from customers through rates, the Commission must determine a method for returning to customers the associated costs that should not be recoverable. The Office notes that SB115 terminates the Solar Incentive Program and mandates that remaining associated costs be collected through the newly established STEP program. The Office recommends that the uncollected costs be offset with a credit equal to the total incentive payments given to customers who were eligible to participate in the Cool Keeper Program, but for whom the Cool Keeper requirement was not enforced by the Company. While the record as it presently exists does not contain sufficient information to make this calculation, the Office suggest that this Commission require the Company to submit this information as part of a compliance filing or in the final phase of this docket.

B. UTAH CODE ANN. § 54-7-25

In addition to a finding of imprudence and a ruling that the incentives paid to unqualified customers cannot be recouped in rates, this Commission must impose a

[1] While Schedule 107 clearly provides that to receive an incentive a customer must be a participant of the Cool Keeper Program, it does not address the issue of whether a customer who receives an incentive under the solar incentive program must remain a participant in the Cool Keeper Program. Therefore, the Office is not arguing that the incentives paid to customers who were in the Cool Keeper Program but left the program after receiving the incentives should not be recouped in rates. However, the Office notes that this somewhat counterintuitive result could have been avoided with more careful drafting of the tariff.

statutory penalty on the Company for its repeated violations of its tariff, pursuant to Utah Code Ann. § 54-7-25. The Utah Supreme Court has held "section 54-7-21 of the Utah Code clearly states that a fine is **mandatory** if such violations occur." *Beehive Telephone Co. v. Public Service Com'n of Utah*, 2004 UT 18, ¶ 33, 89 P.3d 131 (bold added.)

Section 54-7-25 provides:

> (1) Any public utility that violates or fails to comply with this title or any rule or order issued under this title, in a case which a penalty is not otherwise provided for that public utility, is subject to a penalty of not less than $500 nor more than $2000 for each offense.
> (2) Any violation of this title or any rule or order of this commission by any corporation or person is a separate and distinct offense.

In *Beehive*, the Utah Supreme Court upheld penalties assessed against Beehive Telephone for repeatedly violating its tariff by charging long distance rates for calls made to local area cellular prefixes, despite Beehive's contention that it was allowed to do so. *Beehive*, 2004 UT at ¶¶ 1, 5. This Commission ruled that by repeatedly violating its tariff in charging erroneous rates, Beehive violated Utah Code Ann. § 54-3-7, requiring that rates not vary from the schedules, and therefore is liable for statutory penalties set forth in section 54-7-25. *Id.* at ¶¶ 8-11.

Here, the Company repeatedly violated its tariff by paying incentives to ineligible customers thereby violating Utah Code Ann. § 54-3-23, requiring that utilities must "obey and comply with each and every requirement of every order, decision, direction, rule or regulation made or prescribed by the commission," and is therefore

liable for statutory penalties under section 54-7-25. While a section 54-7-25 violation must be proven by clear and convincing evidence, in this case the evidence of the violations of the tariff all come from the Company's own records so, therefore, is undisputed. *See Beehive*, 2004 UT at ¶ 43. Moreover, the Company's discovery responses admit that the Company paid incentives to ineligible customers in violation of Schedule 107. Indeed, the Office informed the Company of the possibility of ineligible participants in its solar incentive program in its 2015 Annual Report.

Accordingly, in addition to ruling that the incentive payments made to ineligible customers will not be recouped in rates, this Commission must impose fines of $500 to $2000 for each violation of Schedule 107. The Office asserts that the Commission should measure a violation as each customer that was eligible to participate in the Cool Keeper program, but was given an incentive without being required to enroll in Cool Keeper. From the data provided by the Company, that would appear to be 558 violations.

CONCLUSION

The Company's actions in paying incentives to ineligible customers under the solar incentive program was both imprudent and in violation the provisions of Schedule 107. Therefore, this Commission must issue an order ruling that the costs of these erroneous incentive payments may not be recoverable in rates and must be returned to customers to the extent that the funds have already been collected from customers. The Commission must also issue an order imposing a statutory penalty of $500 to $2000 for each of the apparent 558 violations.

Dated September 2, 2016.

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