- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Formal Complaint of Joseph McLean Durfey against Garkane Energy	DOCKET NO. 09-028-02 ORDER ON REQUEST FOR REVIEW AND REHEARING

ISSUED: July 2, 2009

By The Commission:

This matter is before the Commission on Garkane Energy's (Company) petition for review and rehearing of the April 30, 2009 Report and Order in this matter. We will consider the petitioner's request for review and rehearing pursuant to Utah Code Ann. § 54-7-15, § 63G-4-301, and R746-100-11(F).

In its April 30, 2009 order (April Order), the Commission's ALJ ordered the Company to only back-bill Mr. Durfey for the six-month period prior to the discovery of the error. The ALJ based his order on our holding in Docket No. 08-057-11, *In the Matter of the Investigation and the Consolidation of Dockets of the Formal Complaint against Questar Gas Company Relating to Back-billing (Questar Order)*. The ALJ held as follows:

> In that Docket, Questar had installed transponders that also failed to correctly transmit the correct usage, even where the usage was being correctly measured by the meter. The problem was not with the reading, as the usage was being measured correctly, but with the transmission of that usage. In that docket, the error resulted in Questar under-billing affected customers for one-half of their actual consumption (pre-divide error). Also, the Commission found that customers that had been under-billed due to pre-divide errors could be back-billed for no more than six months prior to the date the error was discovered. A similar situation exists in this case. Although the usage was correctly recorded, it was not transmitted correctly, resulting in under-billing.
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> *April 30, 2009 Order*, p.2.

It is important to note, however, one of our underlying reasons for our order allowing Questar to back-bill no more than six months prior to the date the error was discovered. In that order, we stated:

> We approve the Settlement Stipulation's terms relating to the period of time for which an affected customer may be back-billed for past consumption that was under-reported due to transponder pre-divide errors. . . . We conclude a six-month backbill period limit, applied to affected customers who were underbilled, is reasonable.

Questar Order, p.4.

We later explained why the six month back-billing period was not only "reasonable" but the only period consistent with existing Commission Rules:

> We have previously had to weigh the interests of an individual customer in regards to circumstances where the payments made by the customer do not account for the actual service provided. . . . Utah Administrative Rule R746-320-3.H already provides that where a gas meter incorrectly indicates the volume of natural gas used by a customer by more than three percent, the customers is to be given a refund (if the meter over-reported) or backbilled (if the meter under-reported). This rule reflects a regulatory decision previously made, in balancing the interests of customers and the utility, that incorrect measurement of customer consumption may be rectified after the close of a billing period. There is however, a time period limitation once an error is recognized. As incorporated into the existing rule, the time period that may be addressed is no more than the six prior months for under-reported consumption and the six prior months (or longer if the error can be shown to originate to a specific date more than six months prior) for over-reported consumption. *Even without the Stipulating Parties' agreement on a six month time limitation for pre-divide error backbilling*, Rule 746-320-3.H's six month limitation would apply to the individual customers.

Questar Order, p.5 (emphasis added).

To clarify, the reason why the agreement on a six month time limitation for pre-divide error backbilling would apply to individual customers "even without the []

agreement", is because we determined *the transponder was part of the meter*, and therefore the error was a meter error. Under R-746-320-3.H.2, the applicable rule governing gas utilities' ability to adjust billing for slow meters, it states: "If a meter tested pursuant to Subsections R746-320-3(E) and (F) is more than three percent slow, the utility may bill the customers in an amount equal to the unbilled error for one-half the period since the last test, that one-half period shall not exceed six months." Because the transponder was part of the meter, we considered it a meter error, and subject to R746-320-3(E)'s restriction.

Electric utilities have similar Rules governing their ability to backbill customers in the event of a slow meter. R746-310-3(C)(2) states: "If a meter tested pursuant to this section is more than two percent slow, the utility may bill the customer for the estimated energy consumed but not covered by the bill for a period not exceeding six months . . . ." The language of R746-310-3(C)(2) does provide an exception. In the case where "it can be shown that the error was due to some cause, *the date of which can be fixed*" then the "the bill shall be computed back to, but not beyond that time." *See id*. A "meter" as defined in the Rules "means the device used to measure the electricity transmitted from an electric utility to a customer." R746-310-1(B)(7).

In this case, the Company stated that the meter stopped working, i.e. "had not been sending the correct reading to Garkane's office since June 2007. . . . The meter which stopped, was a state of the art 'turtle meter.' Turtle meters are typically installed in remote locations to reduce meter reading costs. However . . . computerized equipment

occasionally fails." *Garkane Response to customer complaint, March 17, 2009,* p.1. In its Petition for Review and Rehearing of Report and Order, the Company confirmed that

> the underbilling was the result of a failure in a communication device attached to a remotely-read electrical meter known as a "turtle meter." The failure was not in the meter or its measurement, but only in the communication of the correct meter reading via remote telecommunications link with Garkane's office.

The ALJ reasoned that "the problem was not with the reading, as the usage was being measured correctly, but with the transmission of that usage." *See April Order,* p.2. Nonetheless, in our interpretation, it was all, ultimately, part of an overall error with the meter. Therefore, where the error caused by the underbilling was the result of a failure in a meter, the Company may only backbill Mr. Durfey for a period not exceeding six months, unless it can be shown that the error was due to some cause, *the date of which can be fixed*.

From the record below, it appears the utility can only determine that the meter stopped working *sometime* in June 2007, see *Garkane Response to customer complaint, March 17, 2009,* p.1, but cannot determine a fixed date in June 2007 when the error occurred. Therefore, the Company could not backbill to June 2007, absent a fixed date.

The Company argues that the April Order improperly and incorrectly failed to apply existing commission policy on electric utility backbilling, runs afoul of existing commission rules and Utah law, violates the Utah Administrative Rulemaking Procedure Act. Ultimately, however, the April order correctly concludes that the Company may not bill Mr. Durfey for a period exceeding six months. In our

interpretation, whether the device is a "transponder" as used by Questar, or a "communication device attached to a remotely-read electrical meter" used by the Company, they are both part of the meter as defined in R746-310-1(B)(7), much like a manually read gauge on earlier generations of meters are part of the meters. Although it might play a different function from other parts of the meter, the communication device attached to a remotely-read electrical meter is still part of the meter and is "used to measure the electricity transmitted from an electric utility to a customer." As such, the provisions of R746-310-3(C)(2) would apply and the Company would not be able to backbill Mr. Durfey for a period exceeding six months. Given that R746-310-3(C)(2) is an existing Rule, and since we find that the Company's communication device attached to a remotely-read electrical meter is part of the "meter" as defined in R746-310-1(B)(7), we conclude that prohibiting the Company from backbilling Mr. Durfey for a period not to exceed six months does not improperly and incorrectly fail to apply existing commission policy on electric utility backbilling, does not run afoul of existing commission rules and Utah law, and does not violate the Utah Administrative Rulemaking Procedure Act.

We cannot agree that our determination that the communication device is part of the meter, which would in turn prohibit the Company from billing a customer beyond a six month period as stated in R746-310-3(C)(2) is a confiscatory taking. Rule 746-310-3(C)(2) is an existing rule regarding meter errors, which has governed the Company's back-billing practices. The Rule only limits the Company's ability to back-bill in the event of a slow meter reading under 746-310-3(C)(2). In does not restrict the

Company's ability to back-bill a customer for other reasons for a period of 24 months as stated in R746-310-8. Additionally, as stated above, R746-310-3(C) was partly implemented to "reflect[] a regulatory decision previously made, in balancing the interests of customers and the utility" to allow a utility to charge for service rendered and the "interests of an electric ratepayer for finality in billings." In addition to limiting a utility's ability to back-bill a customer for a slow meter, R746-310-3(C), subpart (1) also prohibits a customer from receiving a refund for a period beyond a six-month period, unless she can establish a fixed date of error. *See* R746-310-3(C)(1). In each case involving meter errors, the utility may have provided service beyond the six month period, or the customer may have paid for service not rendered. However, we have determined that the six-month period is a reasonable time period that balances the competing demands of the utility and ratepayers. With respect to a utility, like the Company, we recognize that a utility will make technological improvements, like installing remote communication devices, in order to improve and simplify its provision of service. However, whatever improvements the utility makes, it ultimately controls whether such improvements provide ratepayers with service that minimizes billing errors. The Company stated that a six month rule limiting back-billing in the case of meter errors would "depriv[e] it of the value of its remote-meter reading devices" for some business or homes where these devices are installed. It argues that it would have to send out human meter readers at least every six months. *See Garkane Petition for Review and Rehearing of Report and Order*, p.5-6. However, the Company already had procedures in place that

allow it to "routinely tests its meters to alleviate billing errors," *see Garkane Response to customer complaint, March 17, 2009,* p.1 and it is unclear why these methods could not continue to be used. Also, the Company can control, to a large extent, whether equipment implementing technological advances will function properly. Customers, on the other hand, cannot adjust or repair faulty meters. Rule R746-310-3(C)(2) has imposed a restriction on the Company for years now, and the Company has been able to deal with the restriction while still able to maintain a reasonable return on its investments, despite "circumstances such as weather, schedule difficulties, access issues, etc." *See id.* at p.5. Also, even though our interpretation that the communication device attached to a remotely-read electrical meter is part of the "meter" as defined in R746-310-1(B)(7) might prove it unprofitable for the utility to provide service to some customers, (e.g. those with meter errors resulting from improperly functioning communication devices, and who received services beyond a six month back-billing period), the utility still has not shown that our interpretation would deprive it of all the value of every single communication device attached to meters. *C.f. U.S. West Communications v. Public Serv. Comm'n*, 882 P.2d 141, 147 (Utah 1994) (holding that "[i]t is a fundamental principle of public utility regulation that all customers are entitled to adequate and convenient service, even if it is unprofitable for the utility to provide the service to some of the customers. The Commission can require a utility to provide unprofitable services to some customers as long as the utility is allowed a reasonable opportunity to earn its authorized rate of return on its overall investment.")

ORDER

For the previous reasons, we deny the Company's request for review and reconsideration and rehearing.

Pursuant to Sections 63G-4-301 and 54-7-15 of the Utah Code, an aggrieved party may request agency review or rehearing within 30 days after issuance of this Order by filing a written request with the Commission. 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 requirement of Sections 63G-4-401 and 63G-4-403 of the Utah Code and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 2nd day of July, 2009.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#62728