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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Pass-Through Application of Dominion Energy Utah for an Adjustment in Rates and Charges for Nature Gas Services in Utah	Docket No. 19-057-18
Application of Dominion Energy Utah for and Adjustment to the Daily Transportation Imbalance Charge	Docket No. 19-057-19
Application of Dominion Energy Utah to Change the Infrastructure Rate Adjustment	Docket No. 19-057-20
Application of Dominion Energy Utah to Amortize the Conservation Enabling Tariff Balancing Account	Docket No. 19-057-21
Application of Dominion Energy Utah for an Adjustment to the Low-Income Assistance/Energy Rate	Docket No. 19-057-22 Legal Comments Addressing Public Service Commission of Utah's Question Concerning Its Authority to Impose Interim Rates in Dominion Energy Utah's 191 Account

Pursuant to Utah Code § 54-10a-301, Utah Admin. Code r. 746-1, and the Public Service Commission of Utah's ("Commission") September 10, 2019 Scheduling Order, Notice of Hearing, and Direction to Comment ("Scheduling Order"), the Office of Consumer Services ("Office") submits these Comments addressing the Commission's question posed in its

September 10th Scheduling Order: how do the parties distinguish the interim rates sought in the above captioned dockets from the interim rates the Utah Supreme Court held the Commission did not have the authority to approve in the Court's recent opinion in *Utah Office of Consumer Services v. Pub. Serv. Comm'n,* 2019 UT 26, ¶ 48, 445 P.3d 464?

A. *Office of Consumer Services* Does Not Impact the 191 Account.

The Court's reasoning in *Office of Consumer Services* and *Questar Gas Co. v. Utah Pub. Serv. Comm'n*, 2001 UT 93, 34 P.2d 218 answers the Commission's question. The Supreme Court has twice held that the Commission established Dominion's 191 balancing account pursuant to its authority under its general jurisdiction statutes. *Office of Consumer Services*, 2019 UT 26, ¶¶ 36, 38; *Questar Gas*, 2001 UT 93, ¶ 12, 34 P.2d 218; Utah Code § 54-4-1. Conversely, the balancing account at issue in *Office of Consumer Services* was established, not under the Commission's general jurisdiction statutes, but under the procedures and requirement of the Energy Balancing Account ("EBA") statute, Utah Code § 54-7-13.5. *Office of Consumer Services*, 2019 UT 26, ¶ 36.

The Courts holding in *Office of Consumer Services* is based on the EBA statute's requirement that an energy balancing account may not alter an electrical corporation's burden of proof and that the fact that "the Commission concedes that it did not require PacifiCorp to carry a 'substantial evidence' burden of proof when it approved the requests to impose interim rates." *Id.* at ¶ 46; section 54-7013.5(e)(ii). However, the validity of the 191 account's procedures does not depend on the requirements of the EBA statute. *Questar Gas*, in upholding the validity of the 191 account, "does not speak to whether section 54-7-13.5 authorizes the imposition of interim rates in the EBA proceeding. That is because the 191 balancing account was in no way

tied to section 54-7-13.5 – that provision didn't even exist yet." *Office of Consumer Services*, 2019 UT 26, ¶ 36.

It is true that the EBA statute does contain provisions relating to gas corporation's balancing accounts. Specifically, section 54-7-13.5(3)(a) provides: "The commission may: (i) establish a gas balancing account for a gas corporation; and (ii) set forth procedures for a gas corporation's balancing account in the gas corporation's commission approved tariff." In addition, section 54-7-13.5(3)(b) provides that a gas balancing account may not alter "(i) the standard of cost recovery; or (ii) the gas corporation's burden of proof." Nevertheless, these requirements do not apply to the 191 account. The EBA statue does not operate retroactively to potentially invalidate procedures in a balancing account established decades before the enactment of the statute under a different statutory regime.

B. The EBA Statute Does Not Operate Retroactively To Invalidate Balancing Accounts Previously Established.

The starting point in any analysis into whether a statute operates retroactively is Utah Code § 68-3-3, which provides: "A provision of the Utah Code is not retroactive, unless the provision is expressly declared to be retroactive." Accordingly, the Utah Supreme Court has held that "absent clear legislative intent to the contrary, we generally presume that a statute applies only prospectively. The intent to have a statute operate retroactively may be indicated by explicit [statutory] statement to that effect, or by clear and unavoidable implication that the statute operates on events already past." *Waddoups v. Noorda*, 2013 UT 64, ¶ 6, 321 P.3d 1108 (quotations and citations omitted, brackets in original). The Court went on to state: "Like all matters of statutory interpretation, we evaluate retroactivity by first examining the text of the statute, because it is axiomatic that the best evidence of legislative intent is the plain language of

the statute itself." (quotations and citations omitted); *see also, State v. Perez*, 2015 UT 13, ¶ 10, 345 P.3d 1150.[1]

Moreover, in determining whether the plain meaning of the words "[t]he commission may . . . establish a gas balancing account . . ." apply to balancing accounts established prior to the enactment of the statute, it is important to note that in enacting the EBA statute the legislature was not painting on a blank canvas. Rather, the ""'legislature is presumed to know the common law which existed before the enactment of a statute.'"" *Siebach v. Brigham Young University,* 2015 UT App 253, ¶ 22, 361 P.3d 130 (quoting *Gottling v. P.R. Inc.*, 2002 UT 95, ¶ 22, 361 P.3d 130 (Durham C.J. dissenting)(quoting Norman J. Singer, *Sutherland Stat. Constr.* § 50.01, at 422 (4th ed. 1984.)) Accordingly, in enacting the EBA statute, the legislature is presumed to know of the existence and import of *Questar Gas.*

Thus, the question is whether the plain language of the EBA statute expressly declares or clearly and unavoidably implies that the statute operates retroactively to apply the requirements of the statute to gas balancing accounts established prior to the EBA's enactment. Moreover, this question must be answered given the presumption that the legislature knew of the preexisting 191 account and the reasoning in *Questar Gas.* Viewed in this light, it is clear that the EBA's requirements do not apply to preexisting balancing accounts.

Rather than expressly declaring that the statute applies retroactively to gas balancing accounts already in existence, the language expressly applies only to gas balancing accounts that may be established in the future. First, the wording "may . . . establish" and "may . . . set forth"

[1] In *Perez*, the Supreme Court held that Utah does not recognize an exception to the presumption against retroactivity for amendments that clarify existing law or an exception for amendments that are considered procedural. Rather, Utah law has abrogated the substantive procedural distinction in favor of a rule of applying "the law as it exist at the time the event regulated by the law in question." *Id.* at ¶¶ 9-10.

is in the present tense. In *Waddoups*, in the Court, noting the statutory presumption against retroactivity and the fact that the statute in question used the words "is" and "is not recognized," observed: "It simply cannot be said that the use of the present tense communicates a clear and unavoidable implication that the statue operates on events already past. If anything, use of the present tense implies an intent that the statute apply to the present, as of its effective date, and continuing forward." *Waddoups,* 2013 UT 64, ¶ 7. As in *Waddoups*, the EBA statute does not contain any express language that it operates retrospectively and because the terms "may . . . establish" and "may . . . set forth" are in the present tense, there is no clear and unavoidable implication that the statute applies to balancing accounts established in the past.

Second, the plain language of the EBA statute does not contemplate that a gas balancing account subject to the EBA's requirements will necessarily be established. The language of the statute obviously provides that the "commission **may** . . . establish a gas balancing account" and the "commission **may** . . . establish procedures." Section 54-7-13.5(3)(a). The statute does not require the establishment of a gas balancing account or refer to a gas balancing account previously established. Again, the legislature is presumed to know of *Questar Gas* and therefore the existence of the 191 account. It is nonsensical to suggest that the term "**may** . . . establish a gas balancing account" is meant to refer to a gas balancing account already in existence at the time the statute was enacted. Accordingly, even without the statutory presumption against retroactivity, the plain wording of the EBA statute precludes a reading that the statute applies to the 191 account.

In addition, the plain meaning of the term "establish" clearly refers to the initial Commission action of promulgating the initial procedures of the balancing account when the balancing account came into effect and not to the ongoing administration of the account.

"Establish" means to "originate on a firm lasting basis . . . promulgate . . . ," AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (New College Ed. 1980), not to administer. Moreover, the statute ties the establishment of a gas balancing account to the promulgation of the procedures of the balancing account in a gas company's tariff. "The commission may: (i) establish a gas balancing account . . . and (ii) set forth procedures for a gas corporation's balancing account in the . . . approved tariff." Section 54-7-13.5(3)(a). This further demonstrates that the term "establish" refers to the initiation of the balancing account through the initial promulgation of the procedures in the gas company's tariff. *Office of Consumer Services*, 2019 UT 26, ¶ 30 (statutory terms must be read "in context, taking into consideration surrounding terms and associated provisions.")

Furthermore, the reasoning in *Office of Consumer Services*, assumes the 191 account was established or implemented at the time the Commission approved the initial procedures in the company's tariff and the balancing account first began to operate. *Id.* at ¶ 36 ("the 191 balancing account was in no way tied to section 54-7-13.5 – that provision did not even exist yet. So the 191 balancing account was not implemented under 54-7-13.5 it was implemented under the Commission's ample general power to fix rates and establish accounting procedures.") (quotations omitted). Accordingly, a ruling that the Commission establishes a balancing account continuously through its administration of the account would not only violate the statutory presumption against retroactivity and the plain meaning of the statutory terms but also the reasoning of a Supreme Court case decided just months ago.

It should also be noted that the legislature could have drafted the statute to apply to preexisting balancing accounts if that is what they intended. Ture, under section 68-3-3 and *Waddoups* the legislature would have to do so explicitly or by clear unavoidable implication but

that would not have been difficult. The legislature could have drafted the statute to provide "any gas balancing account the commission has established or may establish shall meet the following requirements . . ." The fact that the legislature did not do so is evidence of an intent not to have the statute implicate the 191 accounts. Indeed, at the time of the enactment of the EBA statute, *Questar Gas*, recognizing the validity of the 191 account, had already been issued and therefore there was no need to pass a statute authorizing the 191 account. *Siebach,* 2015 UT App 253, ¶ 22 (legislature presumed to know state of the law).

Finally, reading the gas corporation provisions in the EBA statute as only applying prospectively, as the Commission must, does not render the provisions ineffectual. The future is uncertain. These provisions could come into effect under several possible scenarios. They could conceivably apply to a future gas balancing account parallel to the 191 account. The 191 account could be discontinued and a new gas balancing account could replace it or a new gas company could fall under the Commission's jurisdiction. In any one of these scenarios the gas balancing account provisions of the EBA statute would presumably apply.

CONCULSION

Given the statutory presumption against retroactivity and the plain meaning of the words of the statute, the gas balancing account language in the EBA statute does not apply to the 191 account, which was established decades before the enactment of the EBA statute and under a different statutory regime. Therefore, the requirements of the EBA statute do not apply to the procedures of the 191 account, procedures upheld as authorized under the Commission's general jurisdiction statutes in *Questar Gas.* Because the holding in *Office of Consumer Services* is predicated on the requirements of the EBA statute, *Office of Consumer Services* does not require any changes to the procedures of the 191 account.

Respectfully Submitted, September 20, 2019.

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