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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Dominion Energy	
191 Pass- Through Application	Docket No. 19-057-18
Adjustment to the Daily Transportation Imbalance Charge	Docket No. 19-057-19
Infrastructure Rate Adjustment	Docket No. 19-057-20
Conservation Enabling Tariff	Docket No. 19-057-21
Low Income Assistance	Docket No. 19-057-22
	Legal Comments from the Utah Division of Public Utilities

In its September 13, 2019 Scheduling Order[1] the Public Service Commission of Utah ("Commission") asked parties to provide comments regarding "how they distinguish the interim rates sought in these dockets from those the Supreme Court held the PSC lacks the authority to approve" in the recent opinion in *Utah Office of Consumer Servs. v. Pub. Serv. Comm'n of Utah*,

[1] Amended September 16, 2019.

2019 UT 26, 445 P.3d 464 ("*Office of Consumer Servs.*"). The Division submits these comments in response to the Commission's request and recommends that the Commission implement the rates requested in the Application as set forth below until regular procedures and base rates for these accounts are set in an appropriate proceeding.

I. The Conservation Enabling Tariff and Low Income Assistance Rates May be Made Final.

The Division recommends that the Commission approve the requested rate change in Docket Nos. 19-057-21 (Conservation Enabling Tariff) and 19-057-22 (Low Income Assistance). These Dockets do not require an audit and the proposed rates can be made final. Therefore, these comments will not address these two dockets with respect to the application of *Office of Consumer Servs.*

II. The Infrastructure Rate Adjustment is Not a Statutory Gas Balancing Account.

The Division further recommends that the requested rates in Docket No. 19-057-20 (Infrastructure Rate Adjustment) be approved and made effective October 1, 2019 as interim rates because the infrastructure tracker account is not, by definition, a gas balancing account under Utah Code § 54-7-13.5(c). "Gas balancing account" means a "gas corporation account to recover on a dollar-for-dollar basis, purchased gas costs, and gas cost-related expenses." *Id*. The infrastructure tracker, while collected through a balancing account type process, is not a recovery of purchased gas costs or gas-cost related expenses. The infrastructure tracker collects costs related to certain plant upgrades. Therefore, the infrastructure tracker is not a gas balancing account as contemplated by Utah Code § 54-7-13.5(c). The Commission's broad authority to implement interim rates as recognized in *Questar Gas Co. v. Utah Public Service Commission*, 2001 UT 93, 34 P.3rd 218, is applicable to the infrastructure tracker and the Commission may authorize the current mechanism for collection of those costs.

III. *Office of Consumer Servs.* Likely Does Apply to the 191 Account and the Daily Transportation Imbalance Charge Account but Given the Uncertainty it Does Not Demand Immediate Action that Will Injure the Public Interest.

Although the Utah Supreme Court's opinion in *Office of Consumer Servs.* addressed an electric balancing account rather than gas balancing accounts, the opinion likely does apply to Docket Nos. 19-057-18 (191 Account) and 19-057-19 (Daily Transportation Imbalance Charge Account ("Transportation Imbalance Account"). Both accounts seemingly fit within § 54-7-13.5(c)'s definition of a gas balancing account. They are accounts for the collection of purchased gas costs and gas-cost related expenses, and both accounts are seeking recovery on a dollar for dollar basis. And the operative language regarding the burden of evidence in §54-7-13.5(2)(e), that the Court addressed, is identical to the language found (3)(b).

The Court held in *Office of Consumer Servs.* that the use of interim rates in the EBA mechanism used by PacifiCorp had effectively altered the burden of proof required to implement the rates. 2019 UT at ¶46. Respondents in *Office of Consumer Servs.* relied on the Court's prior decision in *Questar Gas Co. v. Utah Public Service Commission*, 2001 UT 93, 34 P.3rd 218 (the 191 Account was permissible under the Commission's broad powers), for the premise that interim rates did not alter the burden of proof if the burden was ultimately satisfied at the conclusion of the relevant docket. *Office of Consumer Servs.* rejected this line of argument. *Id* at ¶47. The Court held that the Commission had failed to require the utility to "carry a 'substantial evidence' burden of proof when it approved the request to impose interim rates" even if the burden was ultimately met as part of the rate adjustment procedure. *Id* at ¶46. A rate change in a balancing account under § 54-7-13.5 must be based on substantial evidence that the rate is prudent. Because the operative language is similar in the instant case to that in the *Office of Consumer Servs*. case, it follows that the same reasoning would apply to the 191 Account and the

Transportation Imbalance Account. Thus, whether the request is for "interim rates," and amortization of past amounts, or something else, a rate change in a balancing account must comply with § 54-7-13.5(3)(b).

There are alternative legal interpretations of § 54-7-13.5 and the facts 191 Account that might provide relief from this proposition. First, it may be argued that the language in § 54-7-13.5(3)(a) is prospective only. It states that the "commission may: establish a gas balancing account for a gas corporation." Arguably the language might be interpreted to mean that this operates on a prospective basis only and does not apply to already established balancing accounts. In effect, the limitations apply only to new gas balancing accounts and not the 191 Account that precedes the statute.

This reading strains the limits of interpretation because of the common use of various forms of the phrase "may establish" in Utah law where statutes provide legislative authority to agencies. Title 54 is replete with examples of the use of "establish" within grants of legislative authority. The Division is not aware of case law interpreting the tense of the verb "establish" with respect to the question of whether restrictions on an agency's authority granted under similar statutes would apply to already existing application of newly codified authority. To demonstrate this, if the statute had said "may not establish" it would be difficult to argue that existing balancing accounts would continue to be authorized. The 191 Account and the Transportation Imbalance Account are otherwise plainly gas balancing accounts under the statute.

Recent identification and treatment of the 191 Account has been consistent with the understanding that the statute applies. For example, the application for the 191 Account adjustments typically reference the gas balancing account statute for authority to make the rate

adjustments. This docket is no exception. Paragraph 2 of the Application lists §54-7-13.5 as an applicable statute.

Nonetheless, the argument that the 191 Account and the Transportation Imbalance Account are not accounts established pursuant to § 54-7-13.5 but instead are independently established accounts is not without some merit. Strict textual interpretation is not uncommon in Utah. For example, the Utah Supreme Court has recently held that the use of "is" means only the present perfect tense in a context that seemingly defies the legislative intent. *Scott v. Scott*, 2017 UT 66, ¶26 (*Scott*) ("if we start from the premise that we should discern what the legislature intended from the plain language of the text unencumbered by notions of what we think the legislature must have wanted the language to accomplish, the difference in the language assumes greater importance."). Under a more strict textualist approach taken by the Utah Supreme Court in *Scott*, the 191 Account and Transportation Imbalance Account might not be considered "established" under §54-7-13.5 because of their existence before passage. In short, if the legislature had intended the limitations to apply to existing accounts it could have written the law more carefully to do so.

This view of the 191 Account is consistent with *Questar Gas* 2001 UT 93, ¶ 16 ("We have concluded that the balancing account was created as a rate-changing mechanism with attendant procedures designed to ensure just and reasonable rates; we have also determined that it is not tied to the pass-through statute."). If the 191 Account was established prior to the current gas balancing account statute, it might be determined that it is not tied to the current gas balancing account statute.

A second alternative option that might provide the necessary relief from the impact of *Office of Consumer Servs.* in the short term would be for the Commission now to establish an

account for recovery of the pass-through costs that is on a basis other than dollar for dollar. Section 54-7-13.5(3) applies only to dollar for dollar recovery accounts. Any difference from that narrow definition would presumably not be subject to the limitations placed on gas balancing accounts. This is an unsatisfactory condition in the long run but may offer a legal method to proceed with limited harm to customers and the utility until a more durable replacement process is implemented. Nevertheless, it seems out of character with the spirit of the statute.

IV. Conclusion

The Commission should approve the rates requested in Dominion's Application and make them effective on October 1, 2019. *Office of Consumer Servs.* likely applies to the 191 Account and the Daily Transportation Imbalance Account. The requests are for non-final rates and the burden of proof that would apply to final rates has not yet been met. However, there are arguments for alternative interpretations of the statute and the application of *Office of Consumer Servs.* The public interest will not be served by the Commission denying approval of the requested rates. As the Division pointed out in earlier comments, denying approval will deprive the utility of needed cash flow. That denial would likely cost ratepayers more than any difference that the Commission is likely to find between the requests and final approved costs.

The current 191 Account is ill-suited to immediate compliance as a gas balancing account established under § 54-7-13.5. For instance, there is no clear base rate, as the statute calls for. Thus, it is not even clear what denial of the request would entail. What base commodity cost would be appropriate? Was it set in Dominion's last general rate case as § 54-7-13.5 seems to require? Or is it possibly the last final rate approved for the various accounts?

The Commission may rely in good faith on the distinguishable facts and uncertainty in application of the opinion and proceed in the short term with the current practice while simultaneously exercising caution by immediately beginning a process to comply with *Office of Consumer Servs.'* restrictions. As the Division detailed in earlier comments, the denial of the requested rate change would present significant cash flow problems for the utility. The Commission should not damage the public interest by denying approval of the cash flow necessary to operate the utility in the public interest. Accordingly, the Commission should open a docket to address conforming the 191 Account and the Daily Transportation Imbalance Charge to § 54-7-13.5. In the dockets currently before the Commission it should approve of the requested rates and make them effective October 1, 2019.

Submitted this 20th day of September 2019.

/s/ Justin C. Jetter
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