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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 Reply 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, the Office of Consumer Services

("Office") submits these Reply Legal Comments to the Legal Comments filed by Questar Gas Company d/b/a Dominion Energy Utah ("Dominion" and "Dominion Comments") and Utah Division of Public Utilities ("Division" and "Division Comments").

A. *Questar Gas*

All parties agree that absent a retroactive application of Utah Code § 54-7-13.5(3), *Questar Gas Co. v. Utah Pub. Serv. Comm'n*, 2001 UT 93, ¶¶ 36, 38, 34 P.2d 218 governs and therefore the 191 Account's procedures are authorized by the Commission's general jurisdiction statute, Utah Code § 54-4-1. Dominion Comments at. pg. 4-5; Division Comments at pg. 4; Office's Comments at pg. 2-3. As stated in the Office's initial Legal Comments, *Utah Office of Consumer Services v. Pub. Serv. Comm'n,* 2019 UT 26, 445 P.3d 464, expressly distinguish its holding that interim rates were not authorized under section 54-7-13.5 from the holding in *Questar Gas*. *Id.* at ¶¶ 36, 38, 48.

Therefore, the central conflict among the parties is whether section 54-7-13.5(3) applies retroactively to the 191 Account, which was promulgated under a different statutory regime decades before the enactment of section 54-7-13.5(3).[1]

B. Section 54-7-13.5(3) Does Not Apply Retroactively to Preexisting Balancing Accounts

Both the Office and Dominion agree that section 54-7-13.5(3) does not apply retroactively to the procedures of the 191 Account. Office Comments at pg. 3-7; Dominion Comments at pg. 3-5. The Division recognizes that under a strict textual analysis, section 54-7-13.5(3) may apply only prospectively but nevertheless argues that it is "likely" the statute applies retrospectively. Division Comments at 3-6. However,

[1] Dominion also argues that if section 54-7-13.5(3) applies, the procedures of the 191 Account meet the statutory standard regarding the burden of proof. Dominion at pg. 2-3. The Office believes that this is essentially a factual argument and takes no position on this issue at this time.

given recent Supreme Court decisions, a strict textual analysis is the correct approach in analyzing section 54-7-13.5(3).

First, in arguing that a strict textual analysis would not be followed and the statute is likely to apply retrospectively, the Division does not acknowledge 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 Supreme Court "presume[s] that a statute applies only prospectively." *Waddoups v. Noorda,* 2013 UT 64, ¶ 6, 321 P.3d 1108 (quotations omitted). While the legislature can express an intent for a statute to operate retroactive, it must be "indicated by explicit [statutory] statement to that effect, or by clear and unavoidable implication that the statute operates on events already past." *Id.* (quotation omitted, brackets in original). Moreover, in determining whether there is a "clear and unavoidable implication" of retroactivity, the words of the statute, pursuant to a strict textual analysis, are given their plain and ordinary meaning. *Id.* Any contention that section 54-7-13.5(3) meets this high standard is unsupportable.

The Division asserts that it is unlikely that the Supreme Court would apply a strict statutory analysis grounded on the "tense" of the terms in the statute. Division Comments at pg. 4. However, in *Waddoups*, the Supreme Court does just that. "It simply cannot be said that the use of the present tense communicates a clear and unavoidable implication that the statute 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. Therefore, the fact that section 54-7-13.5(3) uses the present tense of the terms "may . . . establish" and "may . . . set forth procedure" conclusively establishes that the plain language of section 54-7-13.5(3)

does not clearly and unavoidably imply that the statute operates retrospectively. *Id.* Thus, the statute only applies prospectively. *Id.*; section 68-3-3.

The Division cites to *Scott v. Scott*, 2017 UT 66, ¶ 6, 432 P.3d 1275, for the contention that the Supreme Court might apply a strict textual approach to the wording of the statute. Division Comments at pg. 5. In *Scott,* the Supreme Court held that Utah Code § 30-3-5(10), which requires the termination of alimony upon a showing that the receiving former spouse is cohabitating with another person, does not apply in a situation where the former spouse ceases to cohabitate prior to the filing of the petition to terminate alimony.[2] *Scott*, 2017 UT 66, ¶ 23. Accordingly, pursuant to section 30-3-5(10), spouses who cease to cohabitate prior to the filing of a petition to terminate cannot have their alimony terminated based on the assertion that they have cohabitated in the past.

In reaching this holding the Supreme Court notes "the meaning of section 30-3-5(10) depends on the meaning of what is is. We conclude that the legislature intended *is* should mean *is* and not *was* or *has been*." *Id.* at , ¶ 1 (emphasis added). Accordingly, the Supreme Court has twice recently interpreted statutes based on the tense of the statutes' terms, both with respect to the question of retroactivity and generally. *Id.; Waddoups,* 2013 UT 64, ¶ 7. Given these Supreme Court cases, it is not only likely that this Commission should base its decision on the ordinary meaning of the tense of the terms in section 54-7-13.5(3), such a strict textual approach is mandatory. Indeed, the Court

[2] Section 30-3-5(10) provides "alimony to a former spouse terminates upon the establishment by the party that the former spouse is cohabitating with another person."

based its holding in *Office of Consumer Services* on a strict statutory construction of Utah Code § 54-7-13.5(2)(e)(ii). *Utah Office of Consumer Services,* 2019 UT 26, at ¶ 15.

The Division also argues that because the Utility Code is "replete with examples of the use of 'establish' within grants of legislative authority" it is likely the legislature does not attach any import to the tense of the term. Division Comments at pg. 4. However, it is not possible to address such a broad claim without analyzing the individual statutes. The Division does not cite to any specific statute where the appropriate analysis leads to the conclusion that the term "establish" applies retroactively. ,

Finally, the Division asserts "if the statute said 'may not establish' it would be difficult to argue that existing balancing accounts would continue to be authorized." Division Comments at pg. 4. Not so. The Division does not apply the correct standard. Assuming the Division's hypothetical does not include an explicated statement that the statute applies retroactively, the standard is whether the term "may not establish" clearly and unavoidably implies that the statute operates retroactively. *Waddoups,* 2013 UT 64, ¶ 7. One possible interpretation of the term "may not establish" is that the term means exactly what it says, from the enactment of the statute continuing to the future the Commission "may not establish" a balancing account. *See Scott*, 2017 UT 66, ¶ 23*; Waddoups,* 2013 UT 64, ¶ 7. Because this is one possible interpretation of the hypothetical statute, the statute's language would not **unavoidably** imply that such a statute operates retroactively.

Moreover, no party has cited a Supreme Court case, or any case for that matter, that stands for the proposition that the tense of the terms of the statute do not impact the determination of whether the statute operates retrospectively, or to authority that any way

undermines *Waddoups.* Again, given section 38-3-3, *Waddoups* and *Scott,* a strict statutory construction of the ordinary meaning if the tense of the wording of section 54-7-13.5(3) is mandatory. Accordingly, section 54-7-13.5(3) does not apply retroactively to the preexisting 191 Account.

CONCLUSION

Section 54-7-13.5(3) does not apply retroactively to Dominion's 191 Account. Both the Office and Dominion advance this proposition. The Division's equivocal statement that the statute is not likely to apply retroactively is unsupported and conflicts with the controlling authority of section 38-3-3 and *Waddoups,* where the Supreme Court reached a holding that states the precise opposite conclusion to the Division's qualified contention. Pursuant to recent Supreme Court authority, the tense of the terms of section 54-7-13.5(3) must be given their plain and ordinary meaning. Thus, section 54-7-13.5(3) does not operate retroactively to the procedures of the preexisting 191 balancing account.

Respectfully submitted, September 23, 2019.

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