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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power for Approval of its Proposed Energy Cost Adjustment Mechanism	Docket No. 09-035-15
	ROCKY MOUNTAIN POWER MOTION TO STRIKE COMMENTS OF UTAH INDUSTRIAL ENERGY CONSUMERS ON THE DIVISION OF PUBLIC UTILITIES’ FINAL EVALUATION REPORT ON THE EBA PILOT PROGRAM

Rocky Mountain Power, a division of PacifiCorp (“Rocky Mountain Power” or “Company”), pursuant to Utah Code Ann. § 63G-4-206(d), Utah Admin. Code R.-746-100-3.H and R.-746-100-10.E.3, hereby moves the Public Service Commission of Utah (the “Commission”) to strike the Comments of Utah Industrial Energy Consumers (“UIEC”) on the Division of Public Utilities’ Final Evaluation Report on the EBA Pilot Program (“Final EBA Report”) filed with the Commission November 16, 2016 (the “Comments”). The Commission’s June 22, 2016 Scheduling Order, Notice of Hearing and Notice of Public Witness Hearing (the “Scheduling Order”) in this docket set forth the process and schedule on which parties may participate in this phase of this long-standing docket. Specifically, it set forth the following deadlines: (i) September 21, 2016 for direct testimony by all parties intending to propose

changes to the EBA, (ii) November 16, 2016 for rebuttal testimony to respond both to direct testimony and the Final EBA Report; (iii) December 15, 2016 for sur-rebuttal testimony and (iv) January 17, 2017 for the hearing.

The Comments should be stricken based on several grounds. First, they are inconsistent with the Commission's Scheduling Order to file *testimony* in the docket, as was contemplated by parties who participated in the scheduling conference held June 15, 2016. Consequently, the Company and others will not have the opportunity to thoroughly examine the recommendations in the Comments through cross-examination of a sponsoring witness. Second, while the UIEC indicates the Comments respond to the Final EBA Report (which would have been appropriate had the Comments been filed as testimony), they also include proposals to change the EBA, approximately two months after they were due, i.e., September 21, 2016, without explanation or good cause to do so.

In the alternative, if the Comments are not stricken, the Company respectfully requests that the Commission either (i) consider the Comments "public," and give them the weight they are due and allow the Company to respond to them during the hearing, if necessary; or (ii) allow the Company to file supplemental testimony to respond to each of the recommendations in the Comments on or before January 13, 2017 and require UIEC to file a witness list disclosing the name(s) of the witness(es) who will be sponsoring the Comments at hearing. January 13, 2017 is a reasonable due date for supplemental testimony because the two month period from November 16, 2016 (the date the Comments were filed) to January 13, 2017 is consistent with the two-month period the Company had to respond to other parties' recommendations (from September 21, 2016 to November 16, 2016).

I. BACKGROUND

On May 20, 2016, the Division of Public Utilities (the “Division”) filed its “Final Evaluation Report of PacifiCorp’s EBA Pilot Program” making several recommendations regarding whether the EBA Pilot Program should continue as is, or whether it should be modified or discontinued. On May 25, 2016, the Commission issued a Notice of Scheduling Conference in which the Commission asked parties to be prepared to discuss a schedule to address the Final EBA Report at a June 15, 2016 scheduling conference. At the scheduling conference, the parties in attendance considered (i) whether it would be more appropriate to propose changes to the EBA and address the Final EBA Report in comments or testimony, and (ii) the timing of the filings proposing changes to the EBA and responding to the Final EBA Report. The parties ultimately determined that, given the complexity of the issues and the history of the EBA, it would not be appropriate to address the EBA and the Final EBA Report in comments, nor would it be appropriate to do so without a hearing. Rather, it was determined the issues in the case would necessitate setting a schedule for testimony and a full evidentiary hearing. The parties also determined that it would be reasonable to allow new interested parties to intervene after direct testimony was filed, who were not interested in proposing changes to the EBA but who, nevertheless, desired to file testimony to respond to the Final EBA Report.

II. ARGUMENT

A. The Comments Were Filed Contrary to the Commission’s Order and Should Be Stricken

Pursuant to its authority to ensure a just, expeditious, and orderly hearing procedure,¹ the Commission should strike the Comments from the record. The Comments were filed contrary to the Commission’s Scheduling Order and approximately two months from the filing deadline for

¹ See Utah Admin. Code R. 746-100-10.E.3.

proposals to change the EBA.

To the best of the Company's recollection, UIEC was not present at the scheduling conference and perhaps was not aware of the recommended process in the current phase of this long-standing docket, in which UIEC has otherwise been consistently participating. However, given the dates set for "testimony" and "hearing" and the lack of dates for "comments" in the Scheduling Order, it is logical to infer that parties are required to state their positions regarding the EBA and the Final EBA Report in testimony, not in comments. Corroborating this understanding is the fact that the Commission set a date for an evidentiary hearing, and these require witnesses to present and defend their testimony. It makes no sense for the Scheduling Order to contemplate the filing of both "testimony" and "comments" in a docket where an evidentiary hearing is also set. And while the Scheduling Order set a date for "public witness" day, it is unclear whether UIEC intended its comments to be considered "public comments."

UIEC's failure to adhere to the Scheduling Order is inexcusable. First, UIEC was granted intervention in 2009, has been an active participant in the docket and received notice of the scheduling conference set for June 2016. Thus it had the opportunity to attend the scheduling conference in June 2016. It is not a new party who may have been unfamiliar with the Commission's process. Second, UIEC did not seek leave from the Commission to excuse it from filing direct testimony on September 21, 2016 to make recommendations regarding modifications to the EBA. UIEC is also not a new party who desired to file testimony solely to respond to the Final EBA Report. UIEC apparently interpreted the Scheduling Order as allowing it to file comments to recommend the termination of the EBA or, in the alternative, to propose changes to the EBA. Given UIEC's background in the case and its sophistication with the regulatory process, its erroneous interpretation is no excuse for disregarding the process.

UIEC is well aware that, for an evidentiary hearing, it must designate witnesses who will be supporting its positions at trial. UIEC is well aware that the Commission discourages and generally prohibits parties from making their case at hearing through cross examination. UIEC had nearly three months from the time the Commission issued the Scheduling Order to the date direct testimony was due to find and prepare a witness to support its proposed modifications to the EBA and it failed to do so. Consequently, its Comments should be stricken or, at the very least, be deemed “public” and given the weight they are due. Allowing the Comments on the record will undermine the process in this and in future cases. In any event, while the Company will not comment on each and every recommendation in the Comments, UIEC’s overall recommendation for the termination of the EBA must be rejected because it is inconsistent with Utah law, as the Company explained in its reply comments in Docket No. 16-035-T05.²

B. The Commission Must Reject UIEC’s Recommendation to Terminate the EBA

In 2016, the Utah Legislature amended Section 54-7-13.5 in several ways through Senate Bill No. 115 (“SB 115”). Most relevant for purposes of this docket, a new Subsection (6) was added as follows:

The commission shall report to the Public Utilities and Technology Interim Committee before December 1 in 2017 and 2018 regarding whether allowing an electrical corporation *to continue to recover costs under Subsection (2)(d)* is reasonable and in the public interest.

Id. § 54-7-13.5(6) (emphasis added).

In addition, SB 115 added a new Subsection (2) to Section 63I-1-254 as follows:

Subsection 54-7-13.5(2)(d) is repealed on December 31, 2019.

Id. § 63I-1-254(2).

² The Company requests the Commission take administrative notice of the full text of the Company’s Reply Comments in Docket No. 16-035-T05, and incorporate them herein.

The intent of these legislative amendments is clear. First, the Legislature mandated that the Commission allow the Company to recover 100 percent of its prudent EBA costs. *See id.* § 54-7-13.5(2)(d). Second, the Legislature, directed that the Commission provide it with reports in December 2017 and 2018 “regarding whether allowing the Company *to continue to recover 100 percent of its prudent costs* is reasonable and in the public interest.” *See id.* § 54-7-13.5(6) (emphasis added). Third, the Legislature provided that its mandated 100 percent recovery of prudently incurred costs would terminate on December 31, 2019. *See id.* § 63I-1-254(2).³

The new law is clear that the EBA was to continue at least until December 31, 2019, absent any further action by the Legislature. If the argument of the UIEC that the program could be terminated by the Commission (presumably by December 31, 2016) were accepted, the requirement that the Commission “shall allow” the Company to recover 100 percent of its prudent costs through December 31, 2019 would be rendered meaningless. *Id.* §§ 54-7-13.5(2)(d) and 63I-1-254(2). Likewise, the requirement that the Commission provide reports to the Legislature “regarding whether allowing an electrical corporation *to continue to recover costs under Subsection (2)(d)* is reasonable and in the public interest” would be superfluous. *Id.* § 54-7-13.5(6) (emphasis added).

The argument of the UIEC conflicts with fundamental principles of statutory interpretation which require that statutes be interpreted in a way that effectuates the intent of the Legislature by reading the plain language of the statute and by interpreting all provisions of the statute together in a manner that gives meaning to each and does not render any portion of the statute superfluous.⁴ The UIEC’s arguments ignore the plain meaning of the words “shall allow”

³ Of course, the Commission retains the right under Section 54-7-13.5 to continue 100 percent recovery in the public interest after December 31, 2019, but is no longer not mandated to do so.

⁴ *State v. Kay*, 2015 UT 43, ¶ 15, 349 P.3d 690, 693 (“As with any question of statutory interpretation, our primary goal is to effectuate the intent of the Legislature. *State v. Watkins*, 2013 UT

and “to continue to recover” and read legislatively imposed requirements out of the statute. Thus, their arguments must be rejected.

Furthermore, UIEC’s arguments that SB 115 did not affect the Commission’s prior orders establishing the EBA as a pilot program that would terminate unless renewed by the Commission by December 31, 2016 and that the EBA is not in the public interest without a sharing band are wrong. The Commission derives its authority from the Legislature.⁵ Thus, a statutory mandate takes precedence. Here the Legislature has mandated that the Commission allow recovery of 100 percent of *prudent* EBA costs through December 31, 2019. SB 115 did not hinder the DPU’s and others’ ability to review the prudence of these costs. In addition, it would be very difficult, if not impossible, to contemplate a situation where “prudent” costs are not also in the “public interest.” In other words, consistent with SB 115, if the Company can demonstrate that the costs incurred are “prudent,” they are inherently in the “public interest.” Thus, the UIEC’s arguments are wrong. In any event, SB115 clearly takes precedence over the Commission’s prior decisions that would have potentially allowed termination of the EBA on December 31, 2016 and that found the sharing mechanism to be the best method at that point in time to ensure that the public interest was maintained.⁶

28, ¶ 18, 309 P.3d 209. The best evidence of the Legislature’s intent is the statute’s plain language. *Marion Energy, Inc. v. KFJ Ranch P’ship*, 2011 UT 50, ¶ 14, 267 P.3d 863. Further, ‘we interpret [] statutes to give meaning to all parts, and avoid [] rendering portions of the statute superfluous.’ *Watkins*, 2013 UT 28, ¶ 23, 309 P.3d 209 (alterations in original) (internal quotation marks omitted”).

⁵ *Heber Light & Power Company v. Utah Pub. Serv. Comm’n*, 2010 UT 27, ¶ 17, 231 P.3d 1203 (“It is well established that the Commission has no inherent regulatory powers other than those expressly granted or clearly implied by statute.”) (quoting *Hi-Country Estates Homeowners Ass’n v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995) (quoting *Mountain States Tel. & Tel. Co. v. Pub. Serv. Comm’n*, 754 P.2d 928, 930 (Utah 1988)). See also *Interwest Corp. v. Pub. Serv. Comm’n*, 510 P.2d 919, 920 (Utah 1973) (“The Public Service Commission was created by the legislature and . . . can only exercise those powers granted by the legislature.”)

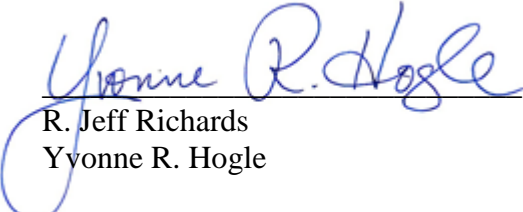
⁶ See Report and Order, Docket No. 09-035-15 at 70.

III. CONCLUSION

By striking the Comments, the Commission will preserve the process and schedule that was appropriately set forth in its Scheduling Order. There is no reason or excuse for filing the Comments two months after all the other parties filed their recommendations for proposed modifications to the EBA. There is also no excuse for filing Comments as opposed to testimony in the docket. UIEC did not even seek leave from these requirements. To the extent the Commission denies the Company's Motion, the Company respectfully requests that it either (i) consider the Comments "public," and give them the weight they are due and allow the Company to respond to them during the hearing, if necessary; or (ii) allow the Company to file supplemental testimony to respond to each of the recommendations in the Comments on or before January 13, 2017 and require UIEC to file a witness list disclosing the name(s) of the witness(es) who will be sponsoring the Comments at hearing.

The Company also respectfully requests that the Commission expedite the schedule for dealing with this Motion, by requiring parties wishing to respond to the Motion to do so by no later than December 23, 2016, and by ruling on the Motion by no later than December 30, 2016.

RESPECTFULLY SUBMITTED: December 13, 2016


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this December 13, 2016, to the following:

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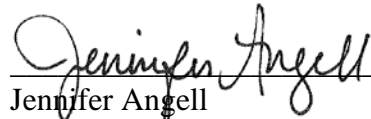
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