

- 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
ORDER ON PACIFICORP'S MOTION TO STRIKE

ISSUED: January 12, 2017

I. BACKGROUND

On June 15, 2016, the Public Service Commission of Utah (PSC) held a scheduling conference and thereafter issued a scheduling order and related notices on June 22, 2016.¹ The scheduling order establishes deadlines for direct testimony by all parties intending to propose changes to the EBA (September 21, 2016), rebuttal testimony, petitions for intervention, and a hearing date.² Importantly, the scheduling order also provides a November 16, 2016 deadline for "[r]eponses of all parties intending to address the Division's Final EBA Report."³

On November 16, 2016, the Utah Industrial Energy Consumers (UIEC) filed comments in this docket.⁴ Thereafter, PacifiCorp, doing business in Utah as Rocky Mountain Power (PacifiCorp), filed a motion to strike UIEC's comments,⁵ and the Division of Public Utilities

¹ See *In the Matter of the Application of Rocky Mountain Power for Approval of its Proposed Energy Cost Adjustment Mechanism* (Scheduling Order, Notice of Hearing, and Notice of Public Witness Hearing at 1, issued June 22, 2016), Docket No. 09-035-15.

² See *id.*

³ See *id.*

⁴ See *id.* (Comments of UIEC on the Division of Public Utilities' Final Evaluation Report on the EBA Pilot Program, filed Nov. 16, 2016).

⁵ See *id.* (Rocky Mountain Power Motion to Strike Comments of UIEC on the Division of Public Utilities' Final Evaluation Report on the EBA Pilot Program, filed Dec. 14, 2016).

(DPU) filed a response supporting PacifiCorp's motion.⁶ UIEC responded to PacifiCorp's motion on December 28, 2016.⁷

II. PARTIES' POSITIONS

PacifiCorp's motion is based on two main objections: (1) UIEC's comments are not specifically allowed under the June 22, 2016 scheduling order, which mentions testimony but not comments, and (2) they were untimely filed. Accordingly, PacifiCorp asks that UIEC's comments be stricken or, in the alternative, that the PSC treat UIEC's filing as "public comments" and give them the weight appropriate to their nature as unsworn public statements not subject to cross-examination.

UIEC responds with five counterarguments. First, UIEC argues that PacifiCorp's motion is untimely and, therefore, should be disregarded because it was filed more than ten days after UIEC filed its comments in violation of Utah Admin. Code R746-100-4(D). Second, UIEC contends its comments, which were filed on November 16, 2016, comport with the scheduling order's deadline for "[r]esponses of all parties intending to address the Division's Final EBA Report."⁸ Third, UIEC maintains that a motion to strike is not available under these circumstances. Fourth, UIEC emphasizes that Utah Admin. Code R746-100-10(F)(1), particularly when read together with other rule provisions,⁹ allows the PSC to consider legal briefs, unsworn statements or public comments. Fifth, UIEC points out that PSC practice is to

⁶ *See id.* (DPU's Response in Support of Rocky Mountain Power's Motion to Strike UIEC's Comments, filed Dec. 23, 2016).

⁷ *See id.* (UIEC's Response to Rocky Mountain Power's Motion to Strike, filed Dec. 28, 2016).

⁸ *See supra* n.1.

⁹ *See, e.g.*, Utah Admin. Code R746-100-1(C) and R746-100-2(Q).

accept unsworn statements or comments as it accepts such statements from public witnesses. UIEC acknowledges the PSC may exercise its judgment in determining the weight to accord UIEC's comments, but stresses there is no basis for striking them. As for the legal arguments contained in UIEC's filed comments, UIEC contends they are not subject to a motion to strike. Thus, for these reasons, UIEC asks the PSC to deny PacifiCorp's motion.

III. DISCUSSION, FINDINGS, AND CONCLUSIONS

Our administrative rules do not specifically provide for a motion to strike pleadings.¹⁰ Thus, pursuant to our rules, "the Utah Rules of Civil Procedure shall govern, unless the Commission considers them to be unworkable or inappropriate."¹¹ Accordingly, we begin our analysis under the Utah Rules of Civil Procedure. But our analysis does not necessarily end there.

Under Rule 12(f) of the Utah Rules of Civil Procedure, "*the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.*"¹² If the order is granted, the offending language is deleted and the case still proceeds.¹³ PacifiCorp does not assert nor do we conclude that any of the stated bases for striking UIEC's comments apply.

The scheduling order in this docket specifically states, in part: "...[r]esponses of all parties intending to address the Division's Final EBA Report" shall do so no later than November

¹⁰ See generally Utah Admin. Code R746.

¹¹ See *id.* R746-100-1(C).

¹² U.R.C.P. 12(f) (emphasis added). This is similar to Utah Admin. Code R746-100-10(F)(1), which provides: "the Commission may exclude non-probative, irrelevant, or unduly repetitious evidence."

¹³ See Utah Courts, Motions (discussing Rule 12(f) Motion), available at: <https://www.utcourts.gov/howto/filing/motions/>.

16, 2016.¹⁴ UIEC filed its comments addressing the Division's Final EBA Report on November 16, 2016. Thus, we conclude that UIEC's comments were timely filed. We also conclude by inference that UIEC does not intend its comments to be treated as sworn testimony proposing changes to the EBA, since it does not characterize them as such and did not file them by September 21, 2016, the deadline for filing such testimony.

UIEC claims PacifiCorp's motion was untimely. PacifiCorp's motion was due no later than November 28, 2016 (i.e., 10 business days from November 16, 2016, the date on which UIEC served its comments), but it was not filed until December 14, 2016. Thus, we conclude that PacifiCorp's motion to strike was untimely.¹⁵

For the foregoing reasons, we deny PacifiCorp's motion to strike UIEC's comments, but grant both PacifiCorp's and UIEC's common request that we treat UIEC's pleading as unsworn public comments. We note that this decision is consistent with our longstanding practice of distinguishing between sworn testimony, which is subject to cross-examination, and public comment, which is not subject to cross-examination and may be unsworn.¹⁶

IV. ORDER

Accordingly, we deny PacifiCorp's motion to strike UIEC's comments, but grant PacifiCorp's and UIEC's request to treat UIEC's comments as unsworn public comments.

¹⁴ See *supra* n.1.

¹⁵ See Utah Admin. Code R746-100-4(D) (requiring that "Motions directed toward responsive pleadings shall be filed within ten days of the service of the responsive pleading.").

¹⁶ See *generally* Utah Admin. Code R746-100-10(F)(1) ("The Commission is not bound by the technical rules of evidence and may receive any oral or documentary evidence; except that no finding may be predicated solely on hearsay or otherwise incompetent evidence. Further, the Commission may exclude non-probative, irrelevant, or unduly repetitious evidence. Testimony shall be under oath and subject to cross-examination. Public witnesses may elect to provide unsworn statements.").

DOCKET NO. 09-035-15

- 5 -

DATED at Salt Lake City, Utah, January 12, 2017.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
DW#291214

Notice of Opportunity for Agency Review or Rehearing

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

CERTIFICATE OF SERVICE

I CERTIFY that on January 2, 2017, a true and correct copy of the foregoing was served upon the following as indicated below:

By Electronic-Mail:

Data Request Response Center (datarequest@pacificorp.com)
PacifiCorp

Robert C. Lively (bob.lively@pacificorp.com)
Yvonne Hogle (yvonne.hogle@pacificorp.com)
Daniel Solander (daniel.solander@pacificorp.com)
Rocky Mountain Power

F. Robert Reeder (frreeder@parsonsbehle.com)
William J. Evans (bevans@parsonsbehle.com)
Vicki M. Baldwin (vbaldwin@parsonsbehle.com)
Parsons Behle & Latimer

Chris Shears (cshears@everpower.com)
EverPower Wind Holding Company

Peter J. Richardson (peter@richardsonandoleary.com)
Richardson & O'Leary, PLLC

Jeffrey Barrett (jhbarrett@utah.gov)
Utah Office of Energy Development

Gary A. Dodge (gdodge@hjdllaw.com)
Hatch, James & Dodge

Kevin Higgins (khiggins@energystrat.com)
Neal Townsend (ntownsend@energystrat.com)
Energy Strategies

Holly Rachel Smith (holly@raysmithlaw.com)
Excelon Business Services Company

Ryan L. Kelly (ryan@kellybramwell.com)
Kelly & Bramwell, P.C.

Steve W. Chriss (stephen.chriss@wal-mart.com)
Wal-Mart Stores, Inc.

Steven S. Michel (smichel@westernresources.org)
Nancy Kelly (nkelly@westernresources.org)
Western Resource Advocates

Peter J. Mathis (pjm@bbrslaw.com)
Eric J. Lacy (elacey@bbrslaw.com)
Brickfield, Burchette, Ritts & Stone, P.C.

Gerald H. Kinghorn (ghk@pkhlawyers.com)
Jeremy R. Cook (jrc@pkhlawyers.com)
Parsons Kinghorn Harris, P.C.

Gregory B. Monson (gbmonson@stoel.com)
Stoel Rives LLP

Sophie Hayes (sophie@utahcleanenergy.com)
Sarah Wright (sarah@utahcleanenergy.com)
Utah Clean Energy

Patricia Schmid (pschmid@utah.gov)
Justin Jetter (jjetter@utah.gov)
Robert Moore (rmoore@utah.gov)
Assistant City Attorneys General

Erika Tedder (etedder@utah.gov)
Division of Public Utilities

By Hand Delivery:

Office of Consumer Services
160 East 300 South, 2nd Floor
Salt Lake City, Utah 84111

Administrative Assistant