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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 **PETITION OF UIEC, OFFICE OF CONSUMER SERVICES AND UAE FOR RECONSIDERATION AND REHEARING OF COMMISSION ORDER ISSUED FEBRUARY 16, 2017**

Pursuant to Utah Code sections 54-7-15 and 63G-4-302, the Utah Industrial Energy Users ("UIEC") intervention group,[1] the Utah Association of Energy Users ("UAE"), and the Office of Consumer Services ("OCS" of "Office") (collectively "Petitioners") hereby jointly submit this Petition for Reconsideration and Rehearing of the Public Service Commission of Utah ("Commission Order dated 16 February 2017, that approved Rocky Mountain Power's ("Company" or "RMP") request for interim rates in its Energy Balancing Account ("EBA") ("Order" or "Commission Order")). Petitioners respectfully request that the Commission reconsider, and grant a rehearing of, its Order to remedy several legal errors: (1) the EBA statute does not authorize interim rates, and the Commission's limited authority for interim rate setting does not extend to the EBA mechanism; (2) Utah Code Section 54-7-12 (the "GRC statute"), which deals with filings for general rate increases or decreases to base rates, does not grant to the Commission interim rate authority under the EBA mechanism; (3) the Commission's Order failed to establish the standard for cost recovery and RMP's burden of proof; and (4) the Commission's Order failed to require a hearing to set interim rates. The Commission Order is also arbitrary and capricious to the extent it departs from prior orders and practices without providing a rational explanation for the departure, or is otherwise without a rational basis supported by substantial evidence. Finally, Petitioners seek clarification on that portion of the Commission Order addressing the "true-up" of interim EBA rates.

[1] The parties to the UIEC intervention to this docket, which was granted on 4 May 2009, were Holcim, Inc., Kennecott Utah Copper Corp., Kimberly-Clark Corp., Malt-O-Meal, Praxair, Inc., Proctor & Gamble, Inc., Tesoro Refining and Marketing Co. and Western Zirconium. The only UIEC parties affiliated with this petition are Holcim, Inc., Kennecott Utah Copper LLC (as successor in interest to Kennecott Utah Copper Corp.), Malt-O-Meal, and Tesoro Refining and Marketing Co.

I. The Commission's Order Pertaining to Interim Rates in EBA Proceedings is in Error and Should Be Vacated.

A. Procedural History and Background

Petitioners UIEC and UAE are intervenors in RMP's Application for Energy Cost Adjustment Mechanism[2] that became Docket number 09-035-15.[3] Numerous times throughout this multi-year docket and in related EBA dockets, UIEC and others have objected to interim rates. These objections include the filing of legal briefs by UIEC in Docket No. 12-035-67[4] that precipitated the Commission's decision that "the interim rate process is not well suited for the EBA[.]"[5] In denying interim rates, the Commission then reasoned that

> we do not decide in this order how an EBA interim rate process could satisfy [the standard for cost recovery or RMP's burden of proof], it is apparent any reasonable process applied to the EBA, in its present form, likely would result in two rounds of litigation of the same controversial issues: first at the hearing to set interim rates and again after the D[PU]'s audit report is completed."[6]

At that time, RMP conceded that an interim rate process "should include the opportunity for parties to contest RMP's interim rate showing, through adverse testimony and cross examination."[7]

Most recently, UIEC reasserted that interim rates are not permitted in the EBA as a matter of law in its comments filed with the Commission in this phase of the docket, and at the hearing

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[2] Appl. for Energy Cost Adjustment Mechanism of RMP, Docket No. 09-035-15, 16 March 2009.

[3] Order Granting Intervention, Docket No. 09-035-15, 4 May 2009.

[4] *See, e.g.*, UEIC's Comments on the DPU's Initial EBA Comments and Recommendations, Docket No. 12-035-67, 10 May 2012; Legal Br. of UIEC, Docket No. 12-035-67, 29 May 2012; UIEC's Resp. to Legal Brs. of RMP and the Div. of Pub. Util., Docket No. 12-035-67, 13 June 2012.

[5] Order on EBA Interim Rate Process, Docket Nos. 12-035-67, 09-035-15, 11-035-T10, 30 Aug. 2012 ("Interim Rate Order").

[6] Interim Rate Order, at 12–13.

[7] *Id.*, at 13.

held before the Commission on 16 January 2017.[8] The OCS presented testimony opposing the Division of Public Utility's ("DPU") proposal for interim rates and proposing instead that the time should be extended for the DPU to review RMP's EBA filing. UAE concurred with OCS's proposal that the time for review could be extended, and argued that interim rates should not be implemented and that the Commission's prior decision not to use interim rates should not be disturbed.[9] RMP testified it was willing to grant more time for DPU to complete its review in exchange for interim rates,[10] and also acknowledged that RMP "bears the burden to show that [its] costs are prudent."[11]

Despite the Petitioners' objections, the Commission issued its Order authorizing interim rates on 16 February 2017. This Order purportedly supersedes the final rate component of the Interim Rate Order in which the Commission declined to implement an interim rate process, and instead establishes the following schedule:

> 1. [RMP] will continue to file its EBA application on or about March 15.
> 2. The DPU will conduct a preliminary review of [RMP's] application and provide a preliminary conclusion if the EBA filing appears to not depart from prior years' filings.
> 3. Within 45 days after the EBA application is filed, the PSC will act on the DPU's preliminary conclusion. If the interim rates are approved they will have an amortization period through April of the following year, effective May 1.

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[8] *See* Comments of UIEC on the DPU's Final Evaluation Report on the EBA Pilot Program, Docket No. 09-035-15, 16 Nov. 2016; Hr'g Proceedings Tr., Docket No. 09-035-15, 17 Jan. 2017. The Commission acknowledged that the UIEC continued to assert that "no process exists for authorizing interim rates for EBA cost recovery." Commission Order 18, Docket No. 09-035-15, 16 Feb. 2017.

[9] See Commission Order 18, Docket No. 09-035-15, 16 Feb. 2017.

[10] Hr'g Proceedings Tr. 86:16–24, Docket No. 09-035-15, 17 Jan. 2017.

[11] *Id.*, 87:5–12.

4. The DPU will then file its audit report by November 15, following which the PSC will set a schedule in the docket.
5. The PSC will hold a hearing on or about February 1 of the year following the year in which the EBA application is filed, after which a true-up of rates could be ordered.
6. The PSC will issue an order by March 1 of the year following the year in which the EBA application is filed.
7. Any true-up [mechanism] will go into effect May 1, and be amortized through April 30 of the following year.[12]

The Petitioners recognize the burden placed on the DPU to audit RMP's EBA filings each year, and appreciate the considerable effort and resources that the DPU has expended in stepping up to the task. While Petitioners do not dispute that the DPU should not be allowed more time to complete its work, an interim rate is not a lawful or a rational or necessary solution to the problem. The Commission's Order on interim rates suffers from errors of law and is inconsistent with prior practice, not rational, and otherwise arbitrary and capricious. Petitioners respectfully request, therefore, that the Commission reconsider its Order allowing interim rates in EBA proceedings.

B. Utah Code Section 54-7-13.5 Does Not Confer on the Commission the Authority to Allow Interim EBA Rate Changes.

The Commission has no inherent regulatory powers,[13] and its "general power to fix rates . . . is not unlimited."[14] The limitation on the Commission's authority is most acute when powers are expressly granted to the Commission. "When a specific power is conferred by statute upon a . . . commission with limited powers, *the powers are limited to such as are specifically*

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[12] Commission Order 28.

[13] *See Heber Light & Power Co. v. Utah Pub. Serv. Comm'n*, 2010 UT 27, ¶¶ 16-20, 231 P.3d 1203 (Utah 2010) (ruling that the Commission acted beyond its limited grant of statutory authority).

[14] *Questar Gas Co. v. Utah Pub. Serv. Comm'n*, 2001 UT 93, ¶ 12, 34 P.3d 218.

mentioned."[15] A generally recognized statutory canon holds that a specific statute takes precedent over a general statute addressing the same issue: "a statute dealing specifically with a particular issue prevails over a more general statute [addressing] the same issue."[16] If any reasonable doubt as to the existence of power exists, the uncertainty "must be resolved against the exercise [of that power]."[17]

Utah Code section 54-7-13.5 confers specific power to the Commission to administer the EBA. Because EBA cost recovery has been authorized by a specific statute, the Commission's powers are limited to those granted in the EBA Statute. The granted authority includes authorizing RMP to establish an EBA; allowing the Commission to permit RMP to recover *prudently incurred costs*; allowing the Commission to establish a gas balancing account; and requiring the Commission to report to the Public Utilities and Technology Interim Committee whether an electrical EBA is reasonable and in the public interest.[18] Missing from the delegation of authority is any ability of the Commission to establish interim rates. The EBA Statute, as a specific expression of the legislature, does not confer interim rate setting authority, and cannot be interpreted to authorize an "interim" process for setting rates. If there is any uncertainty about whether the EBA Statute authorizes an "interim" or abbreviated procedure, the issue must be

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[15] *Heber Light & Power Co.*, 2010 UT, ¶17 (omission in original) (emphasis added) (internal quotation marks omitted).

[16] *Lyon v. Burton*, 2000 UT 19, ¶ 17, 5 P.3d 616 (citing *Madsen v. Brown*, 701 P.2d 1086, 1090 (Utah 1985) ("It is a long-standing rule of statutory construction that a provision treating a matter specifically prevails over an incidental reference made thereto in a provision treating another issue, not because one provision has more force than another, but because *the legislative mind is presumed to have stated its intent when it focused on that particular issue.*") (emphasis added) (internal citation omitted)).

[17] *Heber Light & Power Co.*, 2010 UT, ¶17 (internal quotation marks and citation omitted).

[18] *See* Utah Code Ann. § 54-7-13.5.

resolved against the exercise of such authority.[19]

Purported similarities between the natural gas "191" balancing account and the electric EBA mechanism cannot alter this conclusion. To the contrary, significant differences between the 191 account and the EBA mechanism highlight the error in relying on an historical natural gas balancing account mechanism to infer interim rate making authority within the statutory EBA mechanism. The 191 account has been in effect for many years and its statutory basis was never challenged.[20] A longstanding but unchallenged method for passing through a gas utility's fuel costs cannot supersede express statutory provisions enacted to permit recovery of an electric utility's fuel and purchased power costs.

Unlike the gas balancing account, interim rates under the EBA have been repeatedly challenged. More importantly, unlike the gas balancing account, the EBA mechanism is a specific creature of a recent statute, so the Commission's authority with respect to that mechanism is limited to those powers enumerated in the enabling EBA Statute. Because the EBA Statute does not authorize interim rates, the limited general rate authority presumed to underlie the 191 account cannot apply. The Supreme Court has confirmed that interim rates result from limited powers not included in the EBA mechanism.[21]

C. The Commission Erred When It Adopted Interim Rates from Utah Code Section 54-7-12(4)(a)(ii).

The Commission erred by relying on the GRC statute, Utah Code section 54-7-12, as a

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[19] *Heber Light & Power Co.*, 2010 UT, ¶17

[20] *Questar Gas Co.*, 2001 UT, ¶¶ 8, 16. Commenting on the statutory basis for the 191 account, the Court explained, "[w]e presume . . . that the Commission implemented this rate-changing mechanism under its 'ample general power to fix rates and establish accounting procedures.'" *Id.*, ¶ 12 (quoting *Utah Dep't of Bus. Regulation v. Pub. Serv. Comm'n*, 720 P.2d 420, 424 n.4, (Utah 1986)).

[21] *See Heber Light & Power Co.*, 2010 UT, ¶17; *Questar Gas Co.*, 2001 UT, ¶ 12.

source of authority to allow interim rates within the EBA mechanism.[22] Statutory interpretation must consider the entire context and subject matter for the statute and avoid producing "an absurd, unreasonable, or inoperable result."[23]

The Commission's reading of Utah Code section 54-7-12(4)(a)(ii) in isolation ignores the context of the broader statutory provisions, and creates an absurd result: interim rates are permitted at any time and without any safeguards in the EBA or any other non-GRC context, but are permitted only subject to due process protections when they are in a general rate case ("GRC") context.

The Commission Order correctly notes that sub-paragraph 4(a)(ii) does not specifically reference a GRC.[24] However, applying that subsection outside of a GRC wholly ignores the context and limiting language of all of the other subsections of Section (4) as well as the general structure and purpose of Utah Code Section 54-7-12.

The first Subsection of 54-7-12(4) explicitly applies only to a general rate increase or decrease, and therefore does not apply to an EBA cost recovery filing: "A request for interim rates shall be made within 90 days after the day on which a public utility files a complete filing for a *general rate increase* or a general rate decrease."[25] Similarly, Subsection 4(a)(iii), 4(b) and 4(c),

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[22] *See* Commission Order 25–26.

[23] *State v. Jeffries*, 2009 UT 57, ¶ 8, 271 P.3d 265; *see also In re Marriage of Gonzalez*, 2000 UT 28, ¶ 23, 1 P.3d 1074 (noting, again, this is the duty of the Court).

[24] *See* Commission Order 26.

[25] Utah Code Ann. § 54-7-12(4)(a)(i) (emphasis added). A "general rate increase is defined as "any direct increase" or modification that results in an increase to a "public utility's *base rates.*" Utah Code Ann. § 54-7-12(1)(d) (emphasis added). "Unless included by a commission order, 'base rates' does not include charges included in (A) a deferred account; [or] (B) a balancing account." *Id.* at § 54-7-12(1)(a)(ii).

as well as Sections (1), (2) and (3), all apply only in a GRC context.[26]

Sections (1), (2), (3) and (4) of Utah Code 54-7-12 all specifically refer and apply only to changes in general or base rates. The other Sections of 54-7-12 ((5), (6), (7) and (8)) expressly signal application outside this GRC context through the use of introductory language such as "notwithstanding" any other provision of Title 54, or through specific references to cooperatives or telephone corporations. Nothing in the language of any portion of Sections (1) – (4) suggests in any manner that it applies outside the context of general or base rates. Rather, the pervasive references to "general rates" conveys the legislature's clear intent that subsections (1) – (4) pertain only to *general rate cases*. It is error to conclude that the lack of the modifier "general" in subsection (4)(a)(ii) confers on the Commission a broad, general grant of interim rate setting authority under any and every circumstance other than a GRC. To the contrary, when viewed in proper context, the shorthand reference to a "rate increase or decrease" in Subsection (4)(a)(ii) can reasonably be read only to reference a general or base rate increase or decrease as addressed without exception in the surrounding statutory provisions.

In addition, policies potentially justifying interim rate changes in a GRC do not exist in an EBA context. An "interim" rate, as that term is used in the GRC Statute, is a rate that may go into effect after an application for a general rate increase is filed, after a limited hearing, and before the final rate is set. The purpose is to provide a utility with an "advance" against the collection of the anticipated increase during the statutory 240-day period for resolving a GRC,[27] and as a potential

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[26] *See* Utah Code Ann. §§ 54-7-12(1)(b)(1), 12(3), 12(4)(b).

[27] *See* Report and Order on Interim Rates and Notice of Further Hearings, Docket No. 85-049-02, 9, 11 (June 26, 1985).

protection against regulatory lag and during a period in which the utility will not earn interest on amounts later determined to be appropriate for inclusion in rates. Moreover, the concept of advancing the utility a portion of its requested rate increase before approving final rates was introduced during a period of unusually steep inflation as a stop-gap measure to mitigate serious financial harm to the utility during the 240-day period of adjudication.[28] "Interim rate" is wholly a creature of the GRC Statute that was enacted to solve a perceived problem of financial harm during the 240-day period.

The EBA, in contrast, is a mechanism designed to allow a retroactive true-up of certain costs without the necessity of holding a GRC. The EBA Statute specifies that the Commission may, if it determines that costs were actually and prudently incurred, authorize changes in rates to allow the recovery of a fixed amount of fuel, purchased power, and wheeling costs to be recovered in accordance with the terms of customers' contracts.[29] The rate set to recover these costs is subject to adjustment pursuant to annual reconciliations to ensure no over or under collection of the fixed amount.[30] Once the fixed amount is paid off, the EBA rate terminates.[31] There is no mention of "final" rates anywhere in the EBA statute, and thus no statutory basis by which an EBA rate can ever become final. Instead, EBA rates are always temporary. Their prospective application is subject to annual review and may be altered depending on how quickly the fixed amount is amortized. Moreover, the EBA balance is subject to a carrying charge, leaving no prospect of significant financial harm to the utility.

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[28] *Id.* at 9.

[29] *See* Utah Code Ann. § 54-7-13.5(2)(c) – 54-7-13.5(2)(g).

[30] *See* § 54-7-13.5(2)(h).

[31] *Id.*

Given the limited scope and duration of EBA review and rates, as well as the carrying charge, RMP does not face the same perceived harm that gave rise to a statutory interim rate option in a GRC. In addition, even assuming the interim process for a GRC could properly be imported into the EBA (which it cannot), the Commission erred by failing to require RMP to demonstrate harm before putting an interim rate in place.[32] The Commission must remain consistent with established practice unless the Commission presents "facts and reasons that demonstrate a fair and rational basis for the inconsistency."[33] The Order did not follow the Commission's practice of requiring a showing of financial harm or a hearing before approving interim rates, and offered no explanation for departing from this prior practice. This inconsistent application of the interim rate requirements without any rational reason for the departure is arbitrary and capricious.

D. The Commission Should Clarify its Proposal to "True-Up" Interim Rates.

Having borrowed from the GRC statute to claim authority for interim rates, the Commission appears to have introduced an ambiguity in the way any overcharges are to be returned to customers. The GRC statute provides:

> If the commission in the commission's final order on a public utility's revenue requirement finds that the interim increase ordered under Subsection (4)(a)(ii) exceeds the increase finally ordered, the commission shall order the public utility to refund the excess to customers.

Utah Code Ann. § 54-7-12(4)(c)(i). The EBA statute, by contrast, states:

> Revenues collected in excess of prudently incurred actual costs shall: (i) be refunded as a bill surcredit to an electrical corporation's

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[32] *See* Report and Order on Interim Rates and Notice of Further Hearings, Docket No. 85-049-02, at 9.

[33] Utah Code Ann. § 63G-4-40(4)(h)(iii); *see also Committee of Consumer Servs. v. Public Service Comm'n of Utah*, 2003 UT 29 ¶ 13, 75 P.3d 481, 485-486 (holding that the safety concerns that may have necessitated the construction of a CO2 plant do not establish who should pay these costs, and therefore, were insufficient reasons to depart from the established practice of a prudence review).

> customers over a period specified by the commission; and (ii) include a carrying charge.

Utah Code Ann. § 54-7-13.5(2)(h).

The DPU proposed that interim EBA rates should go into effect on May 1 to be amortized through April 30 of the following year, with a possible "true-up" of rates to be ordered after the hearing takes place.[34] The DPU proposed that "[a]ny true-up to the interim rates will go into effect March 1, and be amortized through April 30."[35] In its Order, the Commission, finding a two-month amortization might be too short, ordered that any "true-up to the interim rates will go into effect May 1, and be amortized through April 30 of the following year."[36]

The Commission's Order is not clear whether, in the case of an over-collection of EBA costs during the interim rate period, a "true-up" is intended to be something different than the "refund" contemplated by the EBA Statute. It is also unclear why, if the Commission is borrowing from the GRC statute to justify interim rates, the GRC's refund provision should not apply to cause the utility to remit refunds to ratepayers immediately. The Commission cites "stability and gradualism" as reasons to prolong the amortization of a true-up at the end of an interim rate period.[37] But, when the true-up results in a refund, ratepayers should be fully refunded as quickly as possible to ensure that the customers who paid the overcharges receive the refund. While delaying a refund by amortizing it over one year may promote gradualism (which few ratepayers

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[34] See Commission Order at 17.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 27.

want when a refund is due), it also exacerbates the "intergenerational" problem of issuing refunds to customers who did not pay overcharges, and denying refunds to those who did.

The ambiguity created by the Order's "true-up" procedure should be moot because any interim rate procedure applied to the EBA is unlawful for the reasons stated above. Nevertheless, to the extent the Commission Order addresses a "true-up" procedure, Petitioners respectfully request that Commission explain what is meant by "true-up" and clarify how the procedure adopted by the Commission's Order will affect the issuance of refunds due on account of EBA over-charges.

E. The Commission Erred When It Ordered Interim Rates without Establishing Procedures for a Hearing or Specifying the Standard for the Rates and RMP's Burden of Proof.

A utility has the burden of proof to show, by substantial evidence, that any proposed rate increase is just and reasonable.[38] Potential recovery for RMP under the EBA Statute exists only for *prudently* incurred actual costs.[39] "An [EBA] shall become effective upon a commission finding that the [EBA] is . . . for *prudently-incurred costs*."[40] Utah Code section 54-4-4(4)(a) prescribes the requirements for determining prudence:

> If, in the commission's determination of just, reasonable, or sufficient rates, the commission considers the prudence of an action taken by a public utility or an expense incurred by a public utility, the commission shall apply the following standards in making its prudence determination: (i) ensure just and reasonable rates for the retail ratepayers of the public utility in this state; (ii) focus on the reasonableness of the expense resulting from the action of the public

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[38] *Utah Dep't of Bus. Regulation v. Pub. Serv. Comm'n*, 614 P.2d 1242 (Utah 1980); *see also* Utah Code Ann. § 54-4-4(1).

[39] Utah Code Ann § 54-7-13.5(2)(i) ("*Prudently incurred actual costs* in excess of revenues collected shall (i) be recovered as a bill surcharge over a period to be specified by the commission; and (ii) include a carrying charge.") (emphasis added).

[40] Utah Code Ann. § 54-7-13.5(2)(b)(ii). (emphasis added).

> utility judged as of the time the action was taken; (iii) determine whether a reasonable utility, knowing what the utility knew or reasonably should have known at the time of the action, would reasonably have incurred all or some portion of the expense, in taking the same or some other prudent action; and (iv) apply other factors determined by the commission to be relevant, consistent with the standards specified in this section.

The utility has the burden of proof to establish prudence by substantial evidence.[41] To become entitled to recover costs and expenses under the EBA, RMP must demonstrate that these costs and expenses were both actual costs and prudently incurred costs, and that the resulting rate is just and reasonable. Moreover, an EBA "may not alter: (i) the standard for cost recovery; or (ii) the electrical corporation's burden of proof."[42]

The Commission Order's reliance on the DPU's preliminary review and preliminary conclusion as to whether the EBA filing "appears to not depart from prior years' filings" fails to meet the statutory requirement for cost recovery because it fails to adequately ensure that costs to be recovered were either actual or prudently incurred.[43] The Commission Order does not provide sufficient opportunity for review of RMP's EBA filling prior to imposing an interim rate increase. The DPU testified that, even under the schedule in effect before this Order, it did not have sufficient time to confirm "that [its] sample is a statistically accurate representation of the Company's financial statements."[44] The Order's truncated 45-day period from the EBA filing in which the Commission must set interim rates further reduces any possible confidence in the DPU's review, and precludes any meaningful opportunity for meaningful analysis, presentation of

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[41] See *Committee of Consumer Servs. v. Pub. Serv. Comm'n*, 2003 UT 29, ¶ 12, 75 P.3d 481.

[42] Utah Code Ann. § 54-7-13.5(2)(e).

[43] *See* Commission Order 28.

[44] Hr'g Proceedings Tr. 49:14–19, Docket No. 09-035-15, 17 Jan. 2017. *See also id.*, 48:22–25; 49:1–19.

evidence or cross examination of witnesses that might enable the Commission to evaluate whether the purported costs were actually incurred, or prudently incurred. Allowing RMP to begin to recover its claimed excess costs simply because its filing appears "not to depart" from prior years' filings, ignores the statutory requirement that RMP may only recover prudently incurred costs in excess of revenues.[45] Consistency with a prior years' filings does not demonstrate that the costs in the current year's filing were either *actually* incurred or *prudently* incurred.

The Commission Order is also arbitrary and capricious to the extent the Commission failed to address all the issues presented. The Commission is required to render a decision on all issues requiring resolution.[46] The Commission's Interim Rate Order noted that it has not decided how an EBA interim rate process could satisfy the standard for cost recovery and RMP's burden of proof.[47] The Commission Order, while approving interim rates, still fails to address these threshold issues, which under the statute are essential to EBA cost recovery. By establishing interim rates without specifying or even discussing the standard for cost recovery and the burden of proof, the Order is arbitrary and inconsistent with the requirements of the EBA Statute.

F. The Commission Order Erred By Denying Rate Payers Due Process By Not Requiring a Hearing.

Due process requires that the Commission provide parties affected by an increase in rates a reasonable opportunity to obtain and present evidence on whether the proposed rate meets the

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[45] Utah Code Ann. § 54-7-13.5(2)(i); *see also* Utah Code Ann. § 54-7-13.5(2)(d) ("[The commission shall allow an electrical corporation to recover 100% of the electrical corporation's prudently incurred costs as determined and approved by the commission under this section.").

[46] *See* Utah Code Ann. § 63G-4-403(4)(c).

[47] Interim Rate Order, at 12–13.

standards required for the Commission to find that it is just and reasonable.[48] Utah Code section 54-4-4(1), reflecting this due process requirement, provides that the Commission may determine and set rates only if the Commission finds, *after a hearing*, that existing rates are unjust, unreasonable, discriminatory, preferential, in violation of the law or are otherwise insufficient.[49] Title 54 is silent, however, as to the specific type of hearing required to satisfy due process. In the absence of a specific procedural statute in Title 54, the Utah Administrative Procedures Act ("APA") governs the administrative procedure to be used in adjudicative proceedings before the Commission.[50]

Section 63G-4-202 of the APA provides:

> (2) Subject to the provisions of Subsection (3), all agency adjudicative proceedings not specifically designated as informal proceedings by the agency's rules shall be conducted formally in accordance with the requirements of this chapter.
>
> (3) Any time before a final order is issued in any adjudicative proceeding, the presiding officer may convert a formal adjudicative proceeding to an informal adjudicative proceeding, or an informal adjudicative proceeding to a formal adjudicative proceeding if: (a) conversion of the proceeding is in the public interest; and (b) conversion of the proceeding does not unfairly prejudice the rights of any party.

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[48] *See Util. Consumer Action Grp. v. Pub. Serv. Comm'n*, 583 P.2d 605, 608 (Utah 1978).

[49] The EBA Statute provides that the Commission may set forth procedures for a gas corporation's gas balancing account in its Commission-approved tariff. Utah Code Ann. § 54-7-13.5(3)(a)(ii). The EBA Statute provides no parallel provision for electrical utilities, which demonstrates that the Legislature intended for electric utilities to follow the procedures set forth elsewhere by statute. *See Carrier v. Salt Lake Cnty.*, 2004 UT 98, ¶ 30, 104 P.3d 1208 ("[S]tatutory construction presumes that the expression of one should be interpreted as the exclusion of another." (internal quotations omitted). Utah Code section 54-4-4 applies here because it grants the Commission general authority to set rates authorized by statute.

[50] "Except as specifically provided to the contrary in Chapter 7, the commission shall comply with the procedures and requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its adjudicative proceedings." Utah Code Ann. § 54-1-2.5.

Therefore, unless an adjudicative proceeding is designated as an informal proceeding by agency rule, or unless the conversion to an informal proceeding is both in the public interest and will not unfairly prejudice the rights of any party, all adjudications are to be conducted formally as provided by the APA. The Commission's rules provide for informal adjudication only where the party filing a request for agency action represents, or the Commission reasonably expects, that the matter will be unopposed and uncontested.[51]

In its Interim Rate Order, the Commission stated, and noted that RMP has conceded, that an interim rate process "should include the opportunity for parties to contest RMP's interim rate showing, through adverse testimony and cross examination."[52] The Commission Order, however, fails to include a hearing before an interim rate would take effect. Allowing an interim rate to occur without a hearing violates Utah Code section 54-4-4(1) as well as section 63G-4-201.

Allowing an interim rate to occur without a hearing also departs from the Commission's prior practice. Even assuming the Commission could borrow from the GRC statute to allow interim rates in an EBA case (which it cannot), and even assuming an interim rate could become effective in a GRC case without a hearing (which it cannot), the Commission's practice has been to hold a hearing to determine whether an interim rate is necessary to avoid financial harm to the utility.[53] The Commission cannot depart from this practice, which is ensconced in its prior decisions, without articulating a fair and rational basis for departing from its prior practice.[54] The

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[51] *See* Utah Admin. Code R.746-110.1.

[52] *Interim Rate Order* 12–13; Commission Order 22.

[53] *See, e.g.,* Report and Order on Interim Rates and Notice of Further Hearings, Docket No. 85-049-02, 9, 11 (June 26, 1985).

[54] *See Committee of Consumer Servs.*, 75 P.3d 481, 485-486.

Commission Order's failure to present any rational basis for its decision not to require a hearing is, therefore, not only contrary to law, but also arbitrary and capricious.

G. The Commission Order Erred by Focusing on a Perceived Agreement on Swap Principles and Guidelines as a Sufficient Change in Circumstances to Depart from its Prior Decision that Interim Rates Were Not Suited for the EBA.

The Commission Order relies on a perceived lack of disagreement over swap transactions and the burden on the DPU to review the "voluminous number of EBA-related transactions" to revisit its prior decision that "an interim rate process is not well suited for the EBA[.]"[55] These "changed circumstances," however, cannot create authority for the Commission to order interim rates where none exists under the applicable statutes, or to order a rate increase without a hearing. As discussed above, the Commission Order on interim rates is in error and should be vacated.

Even assuming the Commission had statutory authority to order interim EBA rates, which it does not, the "changed circumstances" cited by the Commission would still not provide a rational basis for departing from the Commission's prior decision in the Interim Order that interim rates are not suited to an EBA proceeding.

The Interim Order followed briefing and oral argument on two issues: "1) the commission's authority to apply an interim rate process as a component of EBA administration, and 2) assuming such authority exists, RMP's burden of proof in obtaining interim rate relief."[56] The Interim Order did not ultimately decide either question because the Commission determined that interim rates were not well suited for the EBA.[57] In reaching this decision, the Commission reasoned that the

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[55] Commission Order 23-24.

[56] Interim Order 2-3.

[57] *Id* 3; Commission Order 23.

controversy surrounding swaps would likely lead to litigation of the same issues at the "interim" and "final" rate setting stages.[58] Whether or not controversy about swap transactions has subsided, the fact that interim rates would require multiple rounds of litigation on the same issue remains just as true today as before.

As discussed above, interim rate proceedings, even if they were permissible in the EBA, would require the Commission to hold a hearing, resulting in the same unnecessary inefficiencies of "two rounds of litigation of the same controversial issues: first at a hearing to set interim rates and again after the D[PU]'s audit report is completed."[59] Moreover, a party's ability to review and comment on semi-annual hedging reports and RMP's agreement to comply with hedging guidelines does not mean that the costs being sought through interim rates were actually and prudently incurred. As such, the purported reduction in controversy surrounding RMP's hedging does not provide a rational basis for departing from the prior reasoning that litigating the same issues twice would be inefficient in the EBA context.

The Commission Order also fails to decide the questions that it raised (and then found unnecessary to decide) in the Interim Order. It framed the questions as follows:

> The EBA statute states, *[a]n energy balancing account may not alter: (i) the standard for cost recovery; or (ii) the electrical corporation's burden of proof.* While we do not decide in this order how an EBA interim rate process could satisfy these requirements, it is apparent any reasonable process applied to the EBA, in its present form, likely would result in two rounds of litigation of the same controversial issues: first at the hearing to set

[58] Commission Order 22 (quoting Interim Order at 13).

[59] *Id.* (alteration in original).

> the interim rates and again after the D[PU]'s audit report is completed.[60]

The Commission is required to render a decision on all issues requiring resolution.[61] Yet, the Commission has now approved an interim rate process and ignored the essential inquiry that was left undecided in the Interim Order. At the same time, it has not avoided two rounds of litigation, or explained why the EBA was not then suited to an interim process but is now, other than to omit entirely the requirement for a hearing, which is required by statute and due process before an interim rate is put in place.

In rejecting interim rates, the Interim Order properly took into consideration the financial and logistical burdens that would be placed on intervenors. Those same considerations continue to exist; EBA Intervenors should not be forced to incur the expense of two rounds of litigation on the same issues, particularly given that the utility is made whole through carrying charges and a relatively short increased period of time is necessary to allow the DPU to complete a full audit.

The Commission's reversal of its Interim Order to approve an interim rate process is therefore contrary to the applicable statutes, violates due process, and is arbitrary and capricious. For the foregoing reasons, Petitioners respectfully request that the Commission reconsider its Order and vacate those portions of the Order that allows interim rates in an EBA cost recovery proceeding.

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[60] Interim Order at 13 (emphasis added).

[61] *See* Utah Code Ann. § 63G-4-403(4)(c).

II. Conclusion

The EBA Statute does not confer on the Commission interim rate making authority. Without such an express grant of power, the Commission's limited interim rate making authority does not extend to the EBA mechanism. The Commission improperly relied upon limited interim ratemaking authority granted in the GRC Statute but only in the context of an increase in general or base rates. Moreover, even if the Commission possessed the authority to set interim EBA rates, Utah law requires that such interim rates can be implemented only after RMP demonstrates at a hearing by substantial evidence that the costs were actually and prudently incurred and that the resulting rates are just and reasonable. Because the Commission's Order relies upon inapplicable authority to set interim rates and would permit a rate change without a hearing or requiring RMP to satisfy threshold rate setting requirements, Petitioners respectfully request that the Commission reconsider its Order.

DATED this 20th day of March, 2017.

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