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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 UIEC PETITION FOR RECONSIDERATION OF COMMISSION ORDER ISSUED FEBRUARY 16, 2017, OR IN THE ALTERNATIVE, REQUEST FOR CLARIFICATION
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Pursuant to Utah Code sections 54-7-15 and 63G-4-302, the Utah Industrial Energy Users (“UIEC”) intervention group,¹ submit this Petition for Reconsideration of the Public Service Commission of Utah (“Commission”) Order dated 16 February 2017, that extended the Energy Balancing Account (“EBA”) pilot period through December 31, 2019, and approved Rocky Mountain Power’s (“Company” or “RMP”) request for interim EBA rates (“Order” or “Commission Order”). The UIEC joined with the Office of Consumer Services (“OCS”) and the

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 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.

Utah Association of Energy Users (“UAE”) in seeking reconsideration and rehearing on the portion of the Commission Order approving interim rates. The UIEC hereby submits this additional, separate Petition, and requests reconsideration of that portion of the Commission Order extending the EBA through December 1, 2019, and of the omission from the Commission Order of any findings and conclusions on whether the EBA, as amended by SB 115, is in the public interest and will produce just and reasonable rates during the extended pilot period. In the alternative, the UIEC request that the Commission clarify those portions of the Commission Order as set forth below in this Petition.

I. Background

With the enactment of Senate Bill 115 in 2016 (“SB 115”),² the legislature eliminated the 70/30 sharing bands that had, until that time, been an important mechanism requiring RMP and the ratepayers to share the risk that RMP’s actual and prudently incurred fuel and purchased power costs would be different from those costs as contained in base rates. The change from a 70/30 sharing mechanism to a non-sharing 100/0 mechanism potentially affects both the fair allocation of risk, and the incentives for the Company to operate efficiently in incurring fuel and purchased power expenses.

The UIEC filed Comments in this Docket on November 16, 2016 (“Comments”), containing legal argument that the EBA, due to the changes made by SB 115, can no longer be in the public interest according to the criteria the Commission has adopted in this docket.³ The UIEC

² The Sections of SB 115 relevant to the EBA are codified at Utah Code Ann. § 54-7-13.5(2)(d) and -13.5(6).

³ The Commission’s Corrected Report and Order in this docket specified three criteria necessary for the EBA program to serve the public interest and ensure just and reasonable rates:

To serve the public interest and to ensure just and reasonable rates, most importantly this new mechanism must [1] fairly allocate risk between customers and shareholders, [2] maintain incentives to operate efficiently, both in the long-run and short-run, and [3] satisfy the requirements of the Energy Balancing Account statute.

argued that absence of a risk sharing mechanism, and the corresponding absence of any incentive for the Company to operate efficiently, compels a conclusion that the EBA, as amended by SB 115, is no longer in the public interest and that it should therefore be substantially revised or discontinued.⁴ The UIEC's Comments are attached hereto as Appendix 1. Section II thereof at pages 3 through 10, are incorporated herein by this reference.

The Commission Order does not make any findings and conclusions on whether the EBA, in its current form, remains in the public interest. Instead, (in addition to approving an interim EBA rate), the Commission Order focuses on the continuity of the EBA, observes that SB 115 requires the Commission to submit reports to the legislature by December 1 of 2017 and 2018, and concludes that "the most appropriate way to fulfill the mandates and responsibilities of S.B. 115 is to extend the EBA pilot period through December 31, 2019."⁵ The Commission Order adopted the recommendation of the Office of Consumer Services that "the PSC implement a process allowing stakeholders to provide input for these reports."⁶ Accordingly, the Commission Order states:

We intend to allow input and comment with respect to the 2017 and 2018 reports required by S.B. 115 during the EBA dockets for those two years. We anticipate that the scheduling conferences and scheduling orders will provide a process to accommodate that input and that the review we conduct following the December, 2018 report will examine whether, and in what form, an EBA should be continued.⁷

Corr. Rep. and Order, at 67-68.

⁴ Legal argument contending the EBA is no longer in the public interest was submitted in the UIEC's Comments, which were timely filed and received by the Commission. Although they were filed as "comments," the UIEC interveners have been parties to this proceeding from the outset. Thus, the Commission's consideration of their legal argument would not create a precedent that the Commission must decide all issues presented by all non-party public witnesses. In any case, the Commission is constrained to act in accordance with the applicable law.

⁵ Commission Order at 6.

⁶ *Id.*

⁷ *Id.*

II. Request for Reconsideration and Clarification

UIEC respectfully requests that the Commission reconsider or clarify its decision not to address UIEC's argument that the 100% allocation under SB 115 removes the risk sharing mechanism and corresponding incentives that the Commission previously determined was indispensable to ensure EBA is in the public interest.⁸ UIEC also requests that the Commission reconsider or clarify its Order on the stakeholder input process associated with the Public Utilities and Technology Interim Committee (PUTIC) reports due before December 1, 2017 and 2018.

A. The Commission Should Enter Findings and Conclusions on Whether the EBA, as Amended by SB 115, is in the Public Interest or, in the Alternative, Clarify its Order to Explain the Reason for Omitting Such Findings and Conclusions.

SB 115 provides that the utility may recover 100 percent of its actually and prudently incurred EBA costs beginning on June 1, 2016. The Commission must also report to the legislature whether the 100 percent recovery mechanism is reasonable and in the public interest by December 1, 2017.⁹ There is nothing in the Order, however, that explains how, during the 17-month intervening period, the EBA, with a 100/0 mechanism in place, will be in the public interest or will produce just and reasonable rates. The UIEC's Comments were raised against a backdrop of a currently effective EBA surcharge, and with RMP in a position to potentially exceed its authorized

⁸ See, *supra*, n.3.

⁹ Utah Code Ann. § 54-7-13.5(6). The legislation is silent on what the Commission may or must do if it concludes the EBA is not reasonable or in the public interest.

rate of return.¹⁰ While the recent EBA filing by RMP that proposes an EBA refund¹¹ somewhat reduces the immediate concern raised by UIEC, the threshold question remains: how, with the removal of the risk sharing mechanism, can the Commission ensure the EBA and its associated rates are just, reasonable and in the public interest?

The Commission is required to render a decision on all issues requiring resolution.¹² It must also adhere to its established practices unless the Commission presents “facts and reasons that demonstrate a fair and rational basis for the inconsistency.”¹³ The absence in the Commission’s Order of any findings and conclusions on whether the EBA, as amended by SB 115, is in the public interest, the lack of any explanation of the reasons for declining to address the public interest issue, as well as the absence of any explanation for departing from Commission’s prior decision requiring a sharing of risk between RMP and rate payers, is contrary to the Utah Administrative Procedures Act. The UIEC request that the Commission reconsider its Order and enter findings and conclusions on whether the EBA, as amended by SB 115, remains in the public

¹⁰ See Comments at 6 (*citing* DPU Final Evaluation Report of PacifiCorp’s EBA Pilot Program, Docket 09-035-15 (May 20, 2016) at 31 (“DPU Report”). In a year where RMP claims a deficit in recovering its actual, prudently incurred fuel and purchased power costs, it will recover 100 percent of the deficit through the EBA mechanism. That could represent a shift of a considerable sum of money flowing from ratepayers into the Company’s coffers. If that were to occur in an environment where RMP is or will be over-earning (as the Division has reported is likely, everything else held constant), EBA rates could become unjust and unreasonable as EBA revenues further increase RMP’s overearnings. See DPU Report, at 31. On March 15, 2017, RMP filed its EBA case covering calendar year 2016, seeking approval of a refund to ratepayers. Application to Decrease the Deferred EBA Rate through the Energy Balancing Account Mechanism, Docket 17-035-01 (March 15, 2017). While the harm to ratepayers from the 100/0 mechanism may be less in a year when a refund is due, the harm to the utility is greater. In addition, in a year where an over-collection is refunded at 100/0, the utility has no incentive to continue any efficiencies that may have contributed to the over-collection. Thus, even in a year when an EBA refund is due, at 100/0, the allocation of risk is still not fair and the incentives to operate efficiently are still absent.

¹¹ See Application to Decrease the Deferred EBA Rate through the Energy Balancing Account Mechanism, Docket No. 17-035-01 (filed March 15, 2017).

¹² Utah Code Ann. § 63G-4-403(4)(c).

¹³ Utah Code Ann. § 63G-4-40(4)(h)(iii); see *Committee of Consumer Services v. Public Service Com’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, we insufficient reasons to depart for the established practice of a prudence review).

interest. In the alternative, the UIEC request that the Commission clarify the Order and articulate rational reasons for omitting such findings and conclusions.

B. The Commission Should Clarify the Portion of its Order Stating that it Intends to Invite Input and Comment on the 2017 and 2018 Reports to the Legislature and on the 2019 Pilot Review in EBA Dockets Scheduled for those Years.

The UIEC request that the Commission clarify its ruling that it intends “to allow input and comment with respect to the 2017 and 2018 reports required by S.B. 115 during the EBA dockets for those two years.”¹⁴

The Commission’s Order acknowledges that SB 115 requires “further review of the EBA,” specifically, that the Commission report to the legislature before December 1 in 2017 and 2018, and “continue to review the EBA through 2019.”¹⁵ Responding to recommendations of the OCS and DPU, the Order states:

We intend to allow input and comment with respect to the 20-17 and 2018 reports required by S.B. 115 during the EBA dockets for those two years. We anticipate that the scheduling conferences and scheduling orders will provide a process to accommodate that input and that the review we conduct following the December 1, 2018 report will examine whether, and in what form, an EBA should be continued.¹⁶

Since its inception, the review of the EBA pilot program has taken place in this Docket No. 09-035-15. Parties interested in the pilot program generally, and in the impact of SB 115 specifically, may choose not to intervene in a particular EBA reconciliation docket.¹⁷ In order to fairly accommodate all interested parties, the UIEC request that the Commission clarify that,

¹⁴ Commission Order at 6.

¹⁵ Commission Order at 6 (*citing* Utah Code Ann. § 54-7-13.5(6)).

¹⁶ Commission Order at 6.

¹⁷ In the recently filed 2017 EBA case, for example, RMP seeks approval of a refund to compensate for over collection of EBA costs, instead of a surcharge to cover a deficit. Application, Docket No. 17-035-01 (Mar. 15, 2017). Since a refund is proposed, parties who are interested in the pilot program may choose not to intervene in the current EBA reconciliation docket.

whether or not it also uses the then-current EBA reconciliation docket, the Commission will continue primarily to use the current docket to accept input and comment with respect to the 2017 and 2018 reports and well as the 2019 review.

C. The Commission Should Clarify that Input and Comments on the Commission’s 2017 and 2018 Reports and on the 2019 Pilot Review May Include Legal Briefing in Connection with Determining whether the EBA is in the Public Interest, and on Such Other Matters that are Pertinent to the 2017 and 2018 Reports and Pilot Review.

The UIEC also seek clarification on the process for and the nature of the “input and comments” the Commission will receive in connection with the 2017 and 2018 reports. For the reasons stated in the UIEC Comments, the questions of whether a post-SB 115 EBA remains in the public interest, what standard should be applied to make that determination, and what the consequences of such a determination should be, are primarily matters of law. These legal issues are so fundamental to the Commission’s responsibility in adjudicating EBA cases, that it would be arbitrary and capricious to fail to address them.¹⁸ The UIEC presume that, because SB 115 specifies that the Commission’s report must address “whether allowing an electrical corporation to continue to recover costs under Subsection (2)(d) is reasonable and in the public interest,” the input and comments the Commission intends to invite from the parties would include legal briefing on that topic. The UIEC request that the Commission clarify that any such input and comments may include legal briefing on whether the EBA is in the public interest.

Similarly, the UIEC request that, in connection with inviting input and comment on the 2017 and 2018 reports, the Commission clarify whether the criteria it proposes to apply to determine whether the EBA is in “public interest” are the same as those set out in the Corrected

¹⁸ An order of the Commission is arbitrary and capricious if it fails to render a decision on all issues requiring resolution. See Utah Code Ann. § 63G-4-403(4)(c).

Report and Order. If the criteria the Commission proposes to apply are different, (and assuming for present purposes only that the Commission can lawfully depart from the criteria set out in its prior decision in the Corrected Report and Order), the UIEC request that the Commission advise potentially interested parties of any such revised criteria and articulate rational reasons for departing from its prior order.

D. The Commission Should Clarify whether the Commission Order Requires the EBA to Continue until December 31, 2019 regardless of whether the Commission Concludes in its 2017 or 2018 Reports that the EBA, as Amended by SB 115, is in the Public Interest.

The Commission Order states that the best way for the Commission “to fulfill the mandates and responsibilities of S.B. 115 is to extend the EBA pilot period through December 31, 2109.¹⁹” It is presumed that the Commission has not prejudged the primary issue that is to be the subject of the 2017 and 2018 reports, *i.e.*, whether the EBA with the 100/0 mechanism is reasonable and in the public interest. Yet, at the same time, the Commission Order contemplates that “the [pilot] review we conduct *following the December 1, 2018* report will examine whether, and in what form, an EBA should be continued.”²⁰ This statement could be read to mean that, whether or not the Commission finds in its 2017 or 2018 reports that the EBA is in the public interest, the EBA will continue through December 31, 2019.

The UIEC hereby reassert that portion of the argument stated more fully in its Comments, that if the Commission ever finds that the EBA is not “reasonable and in the public interest,” it cannot allow the EBA to continue.²¹ To the extent the Commission Order extending the EBA

¹⁹ Commission Order, at 6.

²⁰ *Id.* (emphasis added).

²¹ SB 115 is silent on what the Commission may or must do if it concludes in its 2017 or 2018 reports that the EBA is not reasonable and in the public interest. See Utah Code Ann. § 54-7-13.5(6). In that event, the Commission’s options are governed by the more general provision at Utah Code Ann. § 54-4-4(1).

through 2019 would permit the EBA to continue without finding in both the 2017 and 2018 reports that the EBA is in the public interest, the Order is in error. The UIEC respectfully request that the Commission reconsider that portion of its Order extending the EBA through December 31, 2019, without any qualification that it be found to be in the public interest in the Commission's 2017 and 2018 reports to the legislature. In the alternative, in light of the Commission's overarching responsibility to ensure that all rates are just, reasonable and in the public interest,²² the UIEC request that the Commission explain how the Commission intends to ensure that, under the EBA as amended by SB 115, rates remain just and reasonable and that the EBA continues to be in the public interest throughout the extended pilot period.

III. Conclusion

For the reasons set out above and in the UIEC Comments, the UIEC request that the Commission reconsider its decision to omit from the Commission Order any findings or conclusions on whether the EBA, as amended by SB 155, is in the public interest, and request that the Commission either make such findings or conclusions, or explain a rational basis for omitting them.

The UIEC also request that the Commission clarify the Commission Order to provide greater certainty about (1) whether the dockets in which it will invite input and comment from interested parties with respect to the 2017 and 2018 reports to the legislature will include the current docket (Docket No. 09-035-15); (2) whether the input and comments from interested parties in connection with the 2017 and 2018 reports may include legal argument on whether the EBA is in the public interest and, if so, what is the appropriate criteria for determining with the EBA is in the public interest; and (3) whether the Commission Order requires the EBA to continue

²² See Utah Code Ann. § 54-4-4(1).

the public interest and, if so, how the Commission intends to ensure that rates remain just and reasonable and that the EBA continues to be in the public interest throughout the extended pilot period.

DATED this 20th day of March, 2017.

A handwritten signature in black ink, appearing to read 'W. J. Evans', is written over a horizontal line.

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