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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
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**THE DIVISION OF PUBLIC UTILITIES'
RESPONSE TO PETITION OF UIEC,
OFFICE OF CONSUMER SERVICES AND
UAE FOR RECONSIDERATION AND
REHEARING OF COMMISSION ORDER
ISSUED FEBRUARY 16, 2017**

Pursuant to Utah Code Ann. §§ 54-7-15 and 63G-4-301 and administrative rule R746-100-4, the Utah Division of Public Utilities (Division) files this response to the “Petition of UIEC, Office of Consumer Services and UAE for Reconsideration and Rehearing of Commission Order Issued February 16, 2017 (Petition).” The Petition seeks “reconsideration and rehearing”¹ of what it classifies as four “legal errors,” a determination that the Order is

¹ Petition at p. 1.

“arbitrary and capricious,” and clarification pertaining to the “true-up.”² The Petition then seeks to have the Public Service Commission of Utah’s (Commission) February 16, 2017 order in this docket (Order) “vacated.”³

The Order withstands the Petition’s challenge because as demonstrated below, the Commission has the authority and power to order interim rates in the energy balancing account (EBA) process, with or without reliance on Utah Code Ann. § 54-7-12, and the Order is not arbitrary and capricious.⁴ Notwithstanding the Petition’s deficiencies, the Commission may wish to clarify certain portions of its Order.

I. Background

Somewhat understandably because of the length and complexity of this and related proceedings, the Petition does not provide a complete procedural history. However, the Division must draw attention to one edited quotation and certain omitted procedural and substantive matters. Otherwise, the Petition will not be evaluated in the proper context.

² See Petition at p. 2. The Petition lists these “legal errors” as:

(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 the 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 rates.

Petition at p. 2.

Then the Petition claims that “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” and states further “Petitioners seek clarification on that portion of the Commission Order addressing the “true-up” of interim EBA rates.” Petition at 2.

³ Petition at p. 2.

⁴ The phrase “interim rates” is perhaps used crudely in this docket. As a charge added to the customer’s normally billed use, the interim provision contemplated in the Commission’s Order in some ways more closely resembles a charge, method, or mechanism of the type mentioned in Utah Code Ann. §§ 54-4-4 and 54-4-4.1 than a rate, though it is imposed with reference to the customer’s usage.

The Petition quotes the Commission's interim rate order in Docket Nos. 12-035-67, 09-035-15, and 11-035-T10 (Interim Rate Order)⁵, but quotes it only in part, omitting words that are integral to both the Interim Rate Order and this Order.⁶ Whereas the Petition states only that, "the Commission's decision that 'the interim rate process is not well suited for the EBA [.],'"⁷ the Interim Rate Order actually states instead, "We have concluded, however, an interim rate process is not well suited for the EBA, as presently formulated."⁸ The use of the grammatical convention "[.]" refracts, rather than represents, the Commission's earlier order.

Detailed history is provided in the Order, so the Division is highlighting only particularly pertinent matters.⁹ The Commission's first order excluded swaps from the EBA.¹⁰ Later, a stipulation addressing five dockets, including the docket addressing the EBA pilot program, was filed and approved. That stipulation provided that financial swaps would be included in an EBA and that a hedging collaborative process would take place.¹¹ Subsequently, the Company filed an EBA request seeking "an EBA rate adjustment, requesting the change on an interim basis, subject to further review, hearings and possible refund,"¹² Various reports pertaining to the EBA were filed. The Commission's second order (the Interim Rate Order) concluded that interim rates were no longer appropriate, anticipating two rounds of litigation and a contentious process.¹³ The Interim Rate Order stated:

We approved the Stipulation and in so doing changed the EBA mechanism as the parties requested. It is now apparent this change has substantially increased the

⁵ See Order issued August 30, 2012 (Interim Rate Order).

⁶ See Interim Rate Order at p. 11.

⁷ Petition at p. 3 (footnote omitted).

⁸ Interim Rate Order at p. 8 (emphasis added).

⁹ See Order at pp. 19-21. Docket Nos. 09-035-15, 12-035-67, and Senate Bill 115 are intertwined.

¹⁰ See Order at pp. 19-20.

¹¹ See Order at pp. 19-20.

¹² See Order at p. 21.

¹³ See Order at pp. 21-23.

levels of complexity and controversy pertaining to an examination of EBAC, and an interim rate process is no longer practical or appropriate.¹⁴

The Commission concluded in the Interim Rate Order that: “[i]n light of the foregoing factors, we conclude the interim rate process we initially ordered is no longer warranted.”¹⁵

More recently, Senate Bill 115 (SB 115) was enacted which, among other things, mandated that the Commission submit reports to the legislature in 2017 and 2018, eliminated the sharing band, and then repealed that change to the sharing band in 2019.¹⁶

Omitting these important details results in an incomplete backdrop for examining the Order, particularly given the subsequent years of EBA history and at least one petitioner’s inconsistent concern with intergenerational inequities.¹⁷

I. Argument

A. The Commission Has the Power and Authority to Order Interim EBA Rates and the EBA Statute Lacks the Specificity to Preclude the Commission from Exercising Its Other Powers

The EBA statute is found at Utah Code Ann. § 54-7-13.5, but must not be read in isolation. One must also look to other statutes and case law. The directives laid out in the EBA statute do not preclude the Commission from exercising its other powers that do not conflict with the EBA statute.

¹⁴ See Order at p. 23 citing the Interim Rate Order at pp. 12-13 (emphasis added).

¹⁵ Order at p. 23 citing the Interim Rate Order at pp. 12-13 (emphasis added).

¹⁶ See Utah Code Ann. § 54-7-13.5.

¹⁷ Earlier, UAE dismissed the Division’s concerns that a timing issue required attention and resolution because it believed that later balancing was adequate despite the possibility of a less accurate initial estimate. Now, the Petition to which UAE is a signatory raises similar intergenerational concerns to those it glossed over in its treatment of the mismatch issue. See the direct testimony of Division witness Charles Peterson at lines 100-140, his rebuttal testimony at lines 132-176, and his surrebuttal testimony at lines 131-141. See also the rebuttal testimony of UAE witness, Kevin Higgins at lines 227-273 and his surrebuttal testimony at lines 39-166. These testimonies were filed between September 21, 2016 and December 5, 2016 in this docket.

1. The EBA Statute Lacks the Specificity to Extinguish the Commission’s Power to Set Interim Rates and Otherwise Establish a Public Utility’s Fees, Charges, and the Like.

The EBA statute largely leaves the mechanism to implement the statute’s objectives to the Commission. For example, the EBA statute states that “the collection method described in Subsection (2)(C)(i)¹⁸ shall: (i) apply to the appropriate billing components in base rates and (ii) be incorporated into base rates in an appropriate commission proceeding”¹⁹ but the statute does not describe what constitutes such an appropriate proceeding. Indeed, the statute’s language clearly contemplates that the Commission has powers found elsewhere in code, which is perfectly appropriate given the Legislature is the grantor of all the Commission’s statutory powers. Similarly, the EBA statute states that a “surcredit” or a “surcharge” be refunded or collected, respectively, “over a period specified by the commission,”²⁰ leaving the determination of that period solely to the Commission. Additionally, the EBA statute does not use the term “final base rates” or “interim base rates.” The statute just uses the term “base rates.”²¹ Accordingly, as illustrated by the examples above, there are no “specific” provisions to override the Commission’s otherwise-existing power to establish interim EBA rates.

Because of this lack of specific contradiction, the Commission’s powers found elsewhere permit the Commission to order interim rates in the EBA context. In short, nothing in a specific statute extinguishes an agency’s general powers that do not contradict the specific statute.²²

¹⁸ Described as “base rates,” “contract rates,” “surcredits,” or “surcharges.” See Utah Code Ann. 54-7-13.5(2)(C)(i).

¹⁹ Utah Code Ann. § 54-7-13.5(f).

²⁰ Utah Code Ann. § 54-7-13.5(h).

²¹ See Utah Code Ann. § 54-7-13.5(2)(c)(i). In that same subsection, the statute also uses the terms “contract rates,” “surcredits,” and “surcharges.”

²² See, e.g., *Williams v. Public Service Commission*, 754 P.2d 41 (Utah 1988).

2. The Commission's Powers

a. Introduction

The Commission's powers are established through statute and have been addressed by case law. While of course not unlimited,²³ Utah Code Ann. § 54-4-1 states the Commission has “the power and jurisdiction . . . to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction.”²⁴ This general grant of jurisdiction is augmented by specific powers and operative provisions discussed below, which give the Commission the power to order interim EBA rates.

In addition to Utah Code Ann. § 54-4-1, support for an interim EBA rate or charge comes from Utah Code Ann. §§ 54-4-4 and 54-4-4.1. Section 54-4-4 authorizes the Commission after a hearing to determine if rates are “unjust; unreasonable; discriminatory; preferential, or otherwise in violation of any provisions of law . . . or are insufficient.”²⁵ If the Commission so finds, then the Commission “shall . . . determine the just, reasonable, or sufficient rates” and implement them through an order.²⁶ Subsection 54-4-4(2) also authorizes the Commission to “establish, after hearing, new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, practices, or schedules in lieu of them” even without the predicate finding required by Subsection (1).²⁷ Section 54-4-4.1 gives the Commission the power and discretion to choose “any method of rate regulation.” Section 54-4-4.1 states that “the commission may, by rule or order, adopt any method of rate regulation that is (a) consistent with this title; (b) in the public interest; and (c) just and reasonable.”²⁸ That statute further states that in addition to such things

²³ See, e.g., Utah Department of Business Regulation v. Public Service Commission, 614 P.2d 1242 (Utah 1980).

²⁴ Utah Code Ann. § 54-4-1.

²⁵ Utah Code Ann. § 54-4-4(1)(a). The Petition's claim that the Order is required to specify that a hearing will be held is addressed below.

²⁶ Utah Code Ann. § 54-4-4(1)(b).

²⁷ Utah Code Ann. § 54-4-4(2).

²⁸ Utah Code Ann. § 54-4-4.1(emphasis added).

as volumetric and demand rate components, “a method of rate regulation may include . . . other components, methods, or mechanism approved by the commission,” “Any method” includes interim rates.

Interim ratemaking has been specifically identified as a “mechanism” by the Utah Supreme Court.²⁹ Indeed, the Commission has a long history of employing interim rate processes, particularly in Questar Gas’ accounts. While there are differences in how the gas accounts and the energy EBA came about, it is shortsighted to ignore a pass through procedure that has been utilized for many years just because it applies to a gas, and not an electric utility. It is equally shortsighted to ignore a gas pass-through procedure because it was adopted prior to enactment of the EBA statute, which did nothing to extinguish the Commission’s other ratemaking powers. The Petition’s arguments to the contrary are unpersuasive.³⁰

In Questar Gas Company v. Utah Public Service Commission (“Questar Gas”), the Court said, “We presume, as we did in Utah Department of Business Regulation v. Public Service Commission, 720 P.2d 420 (Utah 1986), a case involving a similar type of account used by Utah Power and Light, that the Commission implemented this rate-changing mechanism under its ‘ample general power to fix rates and establish accounting procedures.’”³¹ The Questar Gas Court continued, stating, “A straightforward reading of the April 3 order reveals that the Commission did not intend for the balancing account to be ‘merely’ an accounting tool, but created it as a more efficient interim rate-changing mechanism for recovering certain gas costs.”³² The Court then recognized the value of an interim process by stating:

The operation of the account was intended to replace more frequent rate relief requests by allowing the utility to record in and recover through the account

²⁹ See Questar Gas Company v. Public Service Commission, 34 P.3d 218 (Utah 2001) (Questar Gas).

³⁰ See Petition at pp. 7-8.

³¹ Questar Gas at p. 222.

³² Questar Gas at p. 222 (emphasis added).

certain costs on a dollar-for-dollar basis without having to go through a lengthy rate-making process.³³

Interim rates are a permitted Commission-ordered mechanism and are appropriate for the EBA process. It is reasonable to look to gas pass-through cases for guidance.

b. In addition, Utah Code Section 54-7-12(4)(a)(ii) May Provide the Commission with the Authority to Establish Interim EBA Rates.

Utah Code Section 54-7-12(4)(a)(ii) states:

(ii) The commission, on its own initiative or in response to an application by a public utility or other party, may, after a hearing,³⁴ allow any rate increase or decrease proposed by a public utility, or a reasonable part of the rate increase or decrease, to take effect on an interim basis within 45 days after the day on which the request is filed, subject to the commission's right to order a refund or surcharge (emphasis added).

Although other provisions in Section 54-7-12 refer to “a complete filing for a general rate increase or a general rate decrease,” Subsection 4(a)(ii) does not.³⁵ Subsection 4(a)(ii) allows the Commission to allow “any rate increase or decrease . . . to take effect on an interim basis”³⁶ and lacks the restrictive language of other subsections. The Petition argues that despite the absence of the restrictive language, the application of this subsection must be limited to general rate increases or decreases.³⁷ However, the statutory canon that a legislature chooses its words carefully supports the conclusion that Utah Code Ann. § 54-7-12(4)(a)(ii) supports interim rates in the EBA context.³⁸ Indeed, Utah Code Ann. § 54-7-12(4)(a)(ii) does not prohibit interim rates in the context of a general rate case increase or decrease – it allows interim rates in any appropriate proceeding.

According to the plain language of this statute, interim rates are not limited to a general rate case increase or decrease but instead are allowed in any proceeding and should be allowed

³³ Questar Gas at p. 222 (emphasis added).

³⁴ See discussion supra at pp. 9-10 regarding the necessity of the Commission including a hearing in the Order.

³⁵ See, e.g., Utah Code Ann. § 54-7-12(2).

³⁶ Utah Code Ann. § 54-7-12(4)(a)(ii) (emphasis added).

³⁷ See Petition at pp. 7-11.

³⁸ See, e.g., *Marion Energy, Inc. v. KFJ Ranch Partnership*, 267 P.3d 863 (Utah 2011).

here.

II. The Order Did Not Need to Provide Additional Details of the Future Interim Rate EBA Process, Although the Commission May Choose to Clarify the Order to Do So, Particularly with Regard to Holding a Hearing.

The Petition claims, in essence, that the Order is defective because it does not spell out every step that will be taken in the interim EBA rate process. The Commission need not, at this stage, provide the choreography for every step of the process. The case proceedings themselves, as set through a scheduling order or other Commission order or administrative rules, often provide that level of detail. The Commission may choose to provide further details through scheduling or other orders or to implement a rulemaking process pertaining to the EBA, including the implementation of interim rates.

However, if it chooses to do so now, the Commission could provide more details clarifying the EBA interim rate process. If the Commission chooses to elaborate, it should take care to not limit its flexibility to adapt its contemplated processes to future conditions. The following are only examples of procedures the Commission may choose to implement.

For example, the Commission could choose to clarify: that interim EBA rates would be set only after a hearing, ameliorating due process concerns raised by the Petition;³⁹ that the interim rate hearing would be an allowable abbreviated proceeding; that because of the abbreviated nature of an interim proceeding, all issues need not be considered at that point; that the standard of proof for an interim rate would be a prima facie case while the standard of proof for final rates would be that set forth in the EBA statute; that the burden of proof would be upon the utility or other party requesting the rate increase or decrease; that a full and robust hearing, with time for more detailed discovery and exploration of all issues, would be held before a final

³⁹ See Petition at pp. 15-18.

rate decision would be made; that existing EBA rates must be shown to be unjust and unreasonable; that final rates must be shown to be just and reasonable and in the public interest; and that after such a decision, the interim rate and the final rate would be trued-up. These things may be implicit in the Order but the Commission may decide that further detail may be more helpful than harmful.

In addition, the Commission may wish to clarify its statements that “The DPU will conduct a preliminary review of PacifiCorp’s application and provide a preliminary conclusion if the EBA filing appears to not depart from prior years’ filings” and “Within 45 days after the EBA application is filed, the PSC will act on the DPU’s preliminary conclusion.”⁴⁰

III. The Commission May Choose to Clarify its Procedures Regarding the True-Up of Interim Rates, Although the Commission Is Not Required to Do So Now

The Commission might choose to outline what happens (with respect to the current EBA process) between the March 1, 2018 (final order) and the start of any true-ups on May 1, 2018. For example, the Commission could decide that on April 10, 2018, Rocky Mountain Power (Company) will file with the Commission its best *estimate* of the final balance difference between the final EBA rates as ordered by the Commission and what was collected/paid out under interim rates. The Division could opine by April 20, 2018 regarding the reasonableness of the Company's estimate. It would be understood that the Company would use its best efforts to respond to any data requests by the Division in order to facilitate the Division's April 20th filing. Assuming the Division finds the Company's estimates reasonable, then those true-up rates automatically would go into effect on May 1st. Other parties, of course, could petition the Commission to do something else at any time. In subsequent years, the true-ups could be

⁴⁰ Order at p. 28.

balanced as a regular part of the schedule, if necessary, for example if there were material carry-over balances.

IV. The Order Is Not Arbitrary and Capricious and Withstands This and Related Claims

For the reasons below, the Division submits that the Petition incorrectly characterizes the Order as “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.”⁴¹

To begin, however, the Division must state that it does not believe that there were “prior orders and practices” from which the Commission departed, obligating the Commission to explain its rationale and to provide substantial evidence in support thereof. The more than thirty-year-old case upon which the Petition relies, is far too stale to constitute a prior order and practice from which a departure must be explained.⁴² It is unreasonable to conclude that one more than thirty year old case established a pattern or practice from which the Commission could depart only with an exhaustive showing. Finally, if there is any applicable long-standing Commission practice, it is the practice of holding a hearing on gas balancing account matters.⁴³

However, since the Commission did voluntarily offer its rationale, the Division will demonstrate that the Order withstands a challenge that it is arbitrary and capricious, and without a rational basis or substantial evidence. The Order establishes that circumstances have changed from the time that the Interim Rate Order was issued and that those changes now support permitting interim EBA rates. The Petition’s arguments to the contrary are unpersuasive.

⁴¹ Petition at p. 2.

⁴² See Petition at p. 17, footnote 53 in which it states, “See, e.g., Report and Order on Interim Rates and Notice of Further Hearings, Docket No. 85-409-02 (June 26, 1985).”

⁴³ See Questar Gas, *infra*, and multiple semi-annual gas pass-through filings and orders.

Now it is unlikely that an interim rate process would result in two rounds of identical litigation. First, much of the confusion surrounding swaps has been alleviated by, as the Commission noted in its Order, the hedging collaborative and experience.⁴⁴ Contentious litigation has been infrequent as parties have gained facility with EBA filings, and EBA dockets have been resolved through settlement. Second, the scope of inquiry is likely to be different for an interim proceeding as compared to a final rate proceeding which should reduce the intensity of contested litigation, if there is any. This has been the case with Questar Gas' hearing on dockets imposing interim rates pending Division audit.

V. Conclusion

The Order withstands the Petition's challenge. The history of the EBA is complex, but an understanding is vital to create the proper backdrop. As the analysis demonstrates, the Commission has the power and authority to order interim EBA rates and the existence of the EBA statute does not preclude the Commission from exercising its other powers. The Commission however may choose to clarify portions of its Order, and, in particular, address the hearing issue raised by the Petition.

Respectfully submitted this 4th day of April, 2017.

Patricia E. Schmid
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of Public Utilities

⁴⁴ See Order at pp. 23-24.

CERTIFICATE OF SERVICE

Docket No. 09-035-15

I hereby certify that on this 4th day of April, 2017, I caused to be emailed, a true and correct copy of the foregoing **THE DIVISION OF PUBLIC UTILITIES' RESPONSE TO THE PETITION OF UIEC, OFFICE OF CONSUMER SERVICES AND UAE FOR RECONSIDERATION AND REHEARING OF COMMISSION ORDER ISSUED FEBRUARY 16, 2017:**

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