

- 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 PETITIONS FOR
AGENCY REVIEW OR REHEARING

ISSUED: April 7, 2017

PROCEDURAL HISTORY

On February 16, 2017, the Public Service Commission of Utah (PSC) issued an order (Order) in this docket addressing the Division of Public Utilities' (DPU) Final Evaluation Report of PacifiCorp's Energy Balancing Account (EBA) Pilot Program, including the impacts of statutory changes affecting the EBA mechanism that became effective May 10, 2016. Among other things, the Order adopts the DPU's proposed changes to the procedural schedule for processing EBA applications.¹ Those changes include the potential for the PSC to order interim rates pending completion of the DPU's examination of a large volume of EBA account data, when the PSC finds interim rates to be in the public interest.

On March 20, 2017, several parties petitioned for agency review or rehearing (Joint Petition).² The petitioning parties include the Utah Industrial Energy Users (UIEC), the Utah Association of Energy Users (UAE), and the Office of Consumer Services (OCS), (collectively, Petitioners). Also on March 20, 2017, UIEC filed a separate petition seeking reconsideration or, in the alternative, clarification (UIEC Petition).³ On April 4, 2017, the DPU and PacifiCorp,

¹ See *In the Matter of the Application of Rocky Mountain Power for Approval of its Proposed Energy Cost Adjustment Mechanism* (Order, issued February 16, 2017), Docket No. 09-035-15.

² See *id.* Petition of UIEC, Office of Consumer Services and UAE for Reconsideration and Rehearing of Commission Order Issued February 16, 2017, filed March 20, 2017.

³ See UIEC Petition for Reconsideration of Commission Order Issued February 16, 2017, or in the Alternative, Request for Clarification, filed March 20, 2017.

doing business in Utah as Rocky Mountain Power (PacifiCorp), filed responses opposing both petitions.⁴ We address both petitions below, clarifying certain aspects of the Order and modifying one provision of the Order. Any element of Petitioners' requests not addressed below is denied.

TIMELINESS OF THE PETITIONS

PacifiCorp argues that both petitions were untimely because they seek reconsideration under Utah Code Ann. § 63G-4-302, which requires such requests to be filed within 20 days of the challenged order's issuance. The petitions were filed within 30 days after the Order was issued, but we treat both petitions as timely filed under Utah Code Ann. § 54-7-15 and Utah Code Ann. § 63G-4-301.⁵

Both petitions refer to reconsideration under Utah Code Ann. § 63G-4-302.⁶ We conclude, however, that reconsideration under that statute is inapplicable to PSC proceedings.

⁴ See *id.* Opposition to Joint Petition and UIEC Petition, filed April 4, 2017; 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, filed April 4, 2017; and The Division of Public Utilities' Response to UIEC's Petition for Reconsideration of Commission Order Issued February 16, 2017, or in the Alternative, Request for Clarification, filed April 4, 2017.

⁵ We note that a previous PSC Administrative Rule, Utah Admin. Code R746-100-11.F, also addressed review or rehearing. All of Utah Admin. Code R746-100 was repealed in Docket No. 16-R100-01. In Docket No. 16-R001-01, the PSC enacted a new rule, Utah Admin. Code R746-1. Within that rule, R746-1-801 addresses post-hearing proceedings, and is copied here for convenience:

"R746-1-801. Post-hearing Proceedings.

- (1) Proceedings on review shall be in accordance with Utah Code § 54-7-15.
- (2) A person that challenges a finding of fact in a proceeding brought under Subsection R746-1-801(1) shall marshal the record evidence that supports the challenged finding, as set forth in *State v. Nielsen*, 2014 UT 10, ¶¶ 33-44, 326 P.3d 645.
- (3) Following the filing of a petition pursuant to Subsection R746-1-801(1), opposing parties may file responsive memoranda or pleadings within 15 days.
- (4) A petition for rehearing pursuant to Utah Code § 54-7-15 is required in order for a party to exhaust its administrative remedies prior to appeal."

⁶ See Petition of UIEC, Office of Consumer Services and UAE for Reconsideration and Rehearing of Commission Order Issued February 16, 2017 at 2, filed March 20, 2017, and UIEC Petition for Reconsideration of Commission Order Issued February 16, 2017, or in the Alternative, Request for Clarification at 1, filed March 20, 2017.

Utah Code Ann. § 63G-4-302 provides for reconsideration of an agency order if two conditions are both met:

1. The order is one "for which review by the agency or by a superior agency under Section 63G-4-301 is unavailable;" and
2. The order would otherwise constitute final agency action.⁷

We conclude that the first condition listed in Utah Code Ann. § 63G-4-302(1)(a) is inapplicable to PSC orders because agency review is available for those orders under both Utah Code Ann. § 54-7-15 and Utah Code Ann. § 63G-4-301.

Utah Code Ann. § 63G-4-301 governs any request for reconsideration where "a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order by the agency or by a superior agency."⁸ This section specifies such requests must be filed within 30 days of the issuance of the order in question. We conclude this section is applicable here because a statute specific to the PSC, Utah Code Ann. § 54-7-15, permits any party to a PSC proceeding to seek review or rehearing of a PSC order. In other words, we conclude that review or rehearing provided by Utah Code Ann. § 54-7-15 is a subset of the types of agency review described in Utah Code Ann. § 63G-4-301(1)(a).

While both petitions request reconsideration under Utah Code Ann. § 63G-4-302, they each additionally seek review under Utah Code Ann. § 54-7-15.⁹ Although the caption of the

⁷ Utah Code Ann. § 63G-4-302(1)(a).

⁸ Utah Code Ann. § 63G-4-301(1).

⁹ See Petition of UIEC, Office of Consumer Services and UAE for Reconsideration and Rehearing of Commission Order Issued February 16, 2017 at 2, filed March 20, 2017, and UIEC Petition for Reconsideration of Commission Order Issued February 16, 2017, or in the Alternative, Request for Clarification at 1, filed March 20, 2017.

UIEC Petition does not refer to rehearing, we decline to disregard it for that sole reason. Because both petitions purport to be filed pursuant to Utah Code Ann. § 54-7-15, we treat them as seeking review or rehearing and apply both Utah Code Ann. § 54-7-15 and Utah Code Ann. § 63G-4-301.

RESPONSE TO THE JOINT PETITION

The Joint Petition challenges the PSC's authority to order interim rates in the context of the EBA mechanism. The Order elucidates the PSC's interim rates authority, and we decline to engage in further discussion here except to clarify certain details of how EBA interim rates may be implemented, and to modify one aspect of the Order.

1. The Standard of Cost Recovery and PacifiCorp's Burden of Proof.

Joint Petitioners claim the Order fails to establish a standard for cost recovery and PacifiCorp's burden of proof.¹⁰ Similarly, they allege the "Order's reliance [in implementing interim rates] 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."¹¹ These claims inexplicably disregard the inherent tentative nature of interim rates and the standards for EBA cost recovery we have routinely applied that remain unchanged by the Order. They also ignore the detailed EBA data requirements we have prescribed in prior orders that must be at least facially satisfied before interim rates are

¹⁰ Petition of UIEC, Office of Consumer Services and UAE for Reconsideration and Rehearing of Commission Order Issued February 16, 2017 at 2, filed March 20, 2017.

¹¹ *Id.* at 14.

authorized. To be clear, that is what we meant in referring to an EBA filing that "appears to not to depart from prior years' filings."

The EBA statute does not allow alteration in the standard for cost recovery we apply in ratemaking.¹² Rather, the EBA statute only allows for recovery of "[p]rudently incurred actual costs[.]"¹³ Our prior orders specifically recognize this standard, and this Order does not alter it. In our March 3, 2011 Corrected Report and Order in this docket, we concluded that the EBA mechanism (as well as other proceedings that would remain in place) affords the PSC adequate opportunities to assess the prudence of PacifiCorp's actions respecting EBA costs. The potential interjection of an interim rate change while the DPU completes its full examination of the EBA account does not alter this standard. Thus, we can state again as we did then that the EBA:

... does not alter the standard of cost recovery we are bound to apply or the Company's burden to prove the reasonableness of the costs it seeks to recover in rates. The mechanism only pertains to actual net power cost and will be implemented, as the Energy Balancing Account statute requires, at the conclusion of a general rate case. That case will provide the forecast of net power cost that will serve as the initial baseline for the mechanism.¹⁴

In short, the standard for cost recovery has not changed from previous orders.

The EBA statute also states that "[a]n [EBA] may not alter . . . the electrical corporation's burden of proof."¹⁵ Our March 3, 2011 Corrected Report and Order recognizes that "the EBA we approve does not alter . . . the Company's burden to prove the reasonableness of the costs it seeks

¹² See Utah Code Ann. § 54-7-13.5(e)(i) ("An [EBA] may not alter . . . the standard for cost recovery[.]").

¹³ *Id.* at § 54-7-13.5(i).

¹⁴ *In the Matter of the Application of Rocky Mountain Power for Approval of its Proposed Energy Cost Adjustment Mechanism* (Corrected Report and Order at 80, issued March 3, 2011), Docket No. 09-035-15.

¹⁵ Utah Code Ann. § 54-7-13.5(2)(e).

to recover in rates."¹⁶ In an order issued June 15, 2012 we established the types of information PacifiCorp would need to provide to meet this burden.¹⁷ The exhibit attached to that order includes several pages of detailed filing requirements.¹⁸ Subsequently, in an order issued the following year, we added twenty additional categories of information to the filing requirements.¹⁹

In short, PacifiCorp's burden of proof has not changed from previous orders, and we expressly maintained that burden of proof in our Order when we stated that before we consider whether to approve interim rates, the DPU will "provide a preliminary conclusion if the EBA filing appears to not depart from prior years' filings."

2. A Hearing Will Be Held as Required by Statute.

Petitioners claim our Order is deficient because it fails to require a hearing to set interim rates.²⁰ Before interim rates can be implemented, a hearing is required. *See* Utah Code Ann. § 54-4-4(1)(a). This statutory requirement exists independent of our Order. Thus, we saw no purpose in restating it. Moreover, as the DPU notes, we need not choreograph every step of the process at this juncture.²¹

¹⁶ *Supra* n.14.

¹⁷ *See In the Matter of the Application of Rocky Mountain Power for Approval of its Proposed Energy Cost Adjustment Mechanism (Report and Order on EBA Filing Requirements and Pilot Program Evaluation Plan* at 17, Attachment (discussing annual EBA filing requirements), Docket No. 09-035-15.

¹⁸ *See id.*

¹⁹ *In the Matter of the Application of Rocky Mountain Power to Increase Rates by \$29.3 Million or 1.7 Percent through the Energy Balancing Account* (Report and Order, Attachment 1 at 2-3 (footnotes omitted), issued February 27, 2013), Docket No. 12-035-67.

²⁰ Petition of UIEC, Office of Consumer Services and UAE for Reconsideration and Rehearing of Commission Order Issued February 16, 2017 at 2, filed March 20, 2017.

²¹ *See 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* at 9 ("The [PSC] need not . . . provide the choreography for every step of the process."), filed April 4, 2017.

3. What "True-Up" Means.

Petitioners also ask us to clarify the term "true-up" as that term is used in our Order.²² As used in our Order "true-up" means an adjustment to the EBA balance and the associated rates, resulting in either a credit (balance owed to customers) or a surcharge (balance owed to PacifiCorp) on customers' bills. We recognize that under some circumstances it may be desirable to apply a true-up rate adjustment for a period different than the 12-month amortization provided for in the Order.

In our Order we state: "Any true-up to interim rates will go into effect May 1, and be amortized through April 30 of the following year."²³ Based on the clarification provided above, we modify the foregoing paragraph of our Order to read: "Any true-up to interim rates for surcharges or credits will go into effect May 1, and be amortized through April 30 of the following year, unless otherwise determined by PSC order."

RESPONSE TO THE UIEC PETITION

UIEC claims the PSC should enter findings and conclusions on whether the EBA, as altered by S.B. 115, is in the public interest or clarify why the Order omits such findings.²⁴ In passing S.B. 115, the Legislature eliminated the 70/30 sharing band in favor of 100% recovery of prudently incurred costs. S.B. 115 does not require the PSC to make a "just and reasonable, and in the public interest" finding pertaining to the existence of that cost recovery mechanism.

²² See Petition of UIEC, Office of Consumer Services and UAE for Reconsideration and Rehearing of Commission Order Issued February 16, 2017 at 11, filed March 20, 2017.

²³ Order at 28, ¶ 7, issued February 16, 2017.

²⁴ See UIEC Petition for Reconsideration of Commission Order Issued February 16, 2017, or in the Alternative, Request for Clarification at 8-9, filed March 20, 2017.

Rather, as of June 1, 2016, for a pre-existing EBA established before January 1, 2016, which includes PacifiCorp's EBA, the PSC "shall allow [PacifiCorp] to recover 100% of [its] prudently incurred costs . . ." ²⁵ Additionally, S.B. 115 requires the PSC to report to the legislature in 2017 and 2018 regarding the operation of the mechanism in its revised form. To that end, we have established in Docket No. 17-035-01 a schedule for interested parties to provide comments on the current mechanism, with a notice of that comment period also being issued in Docket No. 09-035-15. ²⁶ This comment period affords interested parties an opportunity to express their views on the mechanism in its current form. We will consider and reference these comments when we prepare and submit our 2017 report to the Legislature. We anticipate using a similar process for the 2018 report. ²⁷

We conclude that this order is a final agency action.

ORDER

Based on the foregoing discussion, we:

1. Deny PacifiCorp's timeliness argument;
2. Grant Petitioners' requests for clarification to the extent provided above;
3. Modify Paragraph 7 on page 18 of our Order to read: "Any true-up to interim rates for surcharges or credits will go into effect May 1, and be

²⁵ See Utah Code Ann. § 54-7-13.5(2)(d).

²⁶ See In the Matter of the Application of Rocky Mountain Power to Decrease the Deferred EBA Rate through the Energy Balancing Account Mechanism, *and* In the Matter of the Application of Rocky Mountain Power for Approval of its Proposed Energy Cost Adjustment Mechanism (Courtesy Notice, issued March 23, 2017), Docket Nos. 17-035-01 and 09-035-15.

²⁷ See Utah Code Ann. § 54-7-13.5(6).

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amortized through April 30 of the following year, unless otherwise determined by PSC order."; and

4. Deny all other bases for review, rehearing, or clarification not otherwise addressed above.

DATED at Salt Lake City, Utah, April 7, 2017.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
DW#293029

Notice of Opportunity for Agency Review or Rehearing

Judicial review of the PSC'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 with the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I CERTIFY that on April 7, 2017, a true and correct copy of the foregoing was delivered upon the following as indicated below:

By Electronic-Mail:

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

Robert C. Lively (bob.lively@pacificorp.com)
R. Jeff Richards (robert.richards@kpacificorp.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@richardsonanddoleary.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)
Steven Snarr (ssnarr@utah.gov)
Robert Moore (rmoore@utah.gov)
Assistant Utah 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