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Before the Public Service Commission of Utah

In the Matter of the Application of Rocky Mountain Power for Approval of an Energy Services Agreement between Rocky Mountain Power and Kennecott Utah Copper, LLC	Docket No. 16-035-33 Opposition to Petition to Intervene
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Pursuant to Utah Code Ann. § 54-10a-301 and Utah Administrative Code r476-100, the Office of Consumer Services (“Office”) submits this Opposition to Praxair, Inc.’s Petition to Intervene on the grounds that Praxair lacks a sufficient legal interest in this docket to allow intervention under Utah Code Ann. § 63G-4-207 or to obtain standing under Utah law.

FACTS

In this docket, Rocky Mountain Power seeks approval of a newly negotiated special energy service contract between Rocky Mountain Power and Kennecott Utah Copper, LLC (“Kennecott.”) Kennecott is not a party to these proceedings. On September 20, 2016, Praxair petitioned to intervene pursuant to Utah Code Ann. § 63G-4-207 alleging the

following facts.¹ (1) Praxair is in the business of the production and sale of gas products such as nitrogen, oxygen and argon. (2) Praxair's Utah plant is located on property owned by Kennecott and provides a significant portion of its product to Kennecott. (3) For approximately five years, Praxair has received its electricity requirements under Kennecott's expiring special energy service contract with Rocky Mountain Power. (4) The newly proposed special energy service contract between Kennecott and Rocky Mountain Power does not provide for Praxair to receive its electricity requirements under the contract. (5) Praxair is concerned that its exclusion from the newly negotiated contract will impact the costs and reliability of its energy supply.² (Praxair's Petition at pg. 1-2)

ARGUMENT

This docket's sole concern is the approval or disapproval of the newly negotiated contract between Rocky Mountain Power and Kennecott ("Kennecott contract.") Praxair does not allege that it is a party to this contract nor does it allege facts demonstrating that it has any legally cognizable right for its interest to be taken into account in the approval or disapproval of the new contract. As such, Praxair has failed to demonstrate that it has any current legal interest that could be impacted by the outcome of this docket or that its claims are redressable in this docket. Therefore, Praxair fails to establish that it has a right to intervene under section 63G-4-207 or that it has standing in this proceeding under Utah law.

¹ Section 63G-4-207(1)(c) provides that a petition to intervene must include "a statement of facts demonstrating that the petitioner's legal rights or interest are substantially affected by the formal adjudicative proceeding."

² Praxair also makes the conclusionary allegations that "Praxair's intervention and participation in this matter will not materially impair the prompt and orderly conduct of these proceedings" and "Praxair's interest are not adequately represented by another party." (Praxair's Petition at pg. 2) Because this Opposition focuses on Praxair's lack of a sufficient legal interest to intervene, these allegations are not relevant to the instant filing.

Praxair petitions to intervene under section 63G-4-207, which provide:

(2) The presiding officer shall grant a petition for intervention if the presiding officer determines that:

(a) the petitioner's legal interests may be substantially affected by the formal adjudicative proceeding; and

(b) the interest of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention.

In addressing whether a petitioner has alleged a significant "legal interests" to intervene under the first part of this test, Utah appellate courts and this Commission analyze the issue through the related doctrine of standing.³ See *Utah Chapter of Sierra Club v. Air Quality Bd.*, 2006 UT 74, ¶¶ 9-10, 148 P.3d 960; *In the Matter of the Application of Emery Telephone for an Increase in Utah Universal Service Fund Support*, Docket No. 15-042-01, WL 5450996, pg. 2 (Utah P.S.C. 2015.) Utah law provides two tests for standing, the traditional test and the alternative tests. *Utah Chapter of Sierra Club*, 2006 UT at ¶ 18. Here, Praxair does not allege any facts implicating the alternative test for standing and therefore the Office will only address the traditional test.⁴

Under the traditional test, to establish a "legal interest" that is

³ The standing doctrine has application beyond issues of intervention. All litigants must have a sufficient legal interest in the matter before a court or formal administrative proceeding to prosecute a claim. See *BV Lending LLC v. Jordanelle Special Service Dist.*, 2013 UT App. 9, ¶¶ 2-7, 294 P.3d 656. Moreover, having a sufficient legal interest in a dispute does not guarantee the right to intervention if the second part of section 64G-4-207 test dealing with "the orderly and prompt conduct of the adjudicative proceeding" is not satisfied. See *Ball v. Public Serv. Comm'n*, 2007 UT 79, ¶ 37, 175 P.3d 545.

⁴ "A party may qualify for alternative standing if the party is (1) an appropriate party to bring suit and (2) the issue being presented is one of sufficient public importance to balance the absence of the traditional standing criteria." *BV Lending*, 2013 UT at ¶ 12. To establish an issue "of sufficient public importance" the issue presented must be one impacting the community as a whole. *Id.* at ¶¶ 14-15. Here, the issue is one of a contract between at most three parties and therefore does not impact the community as a whole.

substantially affected by the formal adjudicative proceeding, a petitioner must demonstrate that it suffered a distinct and palpable injury pursuant to a three-step inquiry.

First, the party must assert that it has been or will be adversely affected by the challenged action. Second, the party must allege a causal relationship between the injury to the party, the challenged action and the relief requested. Third, relief requested must be substantially likely to redress the injury claimed.

Utah Chapter of Sierra Club, 2006 UT at ¶ 19 (quotations, cites and brackets omitted.)

Here, Praxair's petition fails because it does not allege **any** injury to a "legal interest." While Praxair may desire that the proposed Kennecott contract provide them with a beneficial energy supply, it has not alleged any facts that demonstrate that it has a legal right to this beneficial treatment. Praxair is in the same position as any third party that may want some ancillary benefit from the Kennecott contract. Merely desiring a potential economic benefit stemming from a proposed contract between third parties is insufficient to establish a "legal interest" under section 63G-4-207(2)(a) or confer standing under Utah law.

In a similar case, this Commission denied a petition from a renewable energy supplier to intervene in a docket to approve a Schedule 34 contract between Rocky Mountain Power and a third party, Facebook, Inc. *In the Matter of the Application of Rocky Mountain Power for Approval of a Renewable Energy Services Contract Between Rocky Mountain Power and Facebook, Inc. Pursuant to Tariff Electronic Service Schedule 34*, Docket No. 16-035-27, WL 4259392, pg.

3(Utah P.S.C. 2016.)("Facebook docket") In the Facebook docket, the petitioner argued that it desired to enter into a contract to supply alternative energy to Facebook if the Schedule 34 contract was approved and therefore it had a sufficient "legal interest" to intervene. *Id.* at 2. This Commission disagreed, ruling "[petitioner] has no current legal interest that could be harmed or impaired by the outcome of this docket." *Id.* While disapproval of the Facebook contract would prevent petitioner from possibly contracting with Facebook in the future, without a current interest in the contract under consideration for approval, the petitioner lacks a sufficient "legal interest" to intervene. *Id.*

Here, it is difficult to analyze Praxair's argument because Praxair failed to adequately comply with Section 63G-4-207(1)(c), which provides that the "petition shall include: . . . (c) a statement of the relief that the petitioner seeks from the agency." This in and of itself is sufficient grounds to deny Praxair's petition to intervene. Nevertheless, read extremely liberally, Praxair's petition could be understood as seeking a ruling from this Commission compelling Rocky Mountain Power and Kennecott to renegotiate the proposed contract to take into account Praxair's future economic interests.

However, as was true in the Facebook docket, Praxair does not allege any facts demonstrating that it has a current legal right for its interests to be taken into account in the negotiation of the proposed Kennecott contract. It only alleges that it desires a future economic benefit from the new Kennecott contract. Praxair therefore is in a similar position as the petitioner in Facebook and the same position as any third party seeking some potential future economic benefit from

any proposed contract before this Commission for approval. Accordingly, as was true in the Facebook contract, Praxair has not alleged a significant legal interest that would justify intervention under section 63G-4-207(2)(a) nor to grant it standing under Utah law.

Moreover, Praxair's petition fails the third part of the traditional tests for standing, i.e., redressability. *Utah Chapter of Sierra Club*, 2006 UT at ¶ 19. The sole issue in this docket is whether the proposed contract between Rocky Mountain Power and Kennecott is in the public interest. Praxair does not allege that its exclusion from the proposed Kennecott contract violates the public interest. How the contract impacts various third parties is outside the scope of this docket and therefore any contested issues between Kennecott and a third party is not redressable in this docket. Indeed, Kennecott is not even a party to these proceedings. Accordingly, Praxair's petition also fails to demonstrate that its concerns are redressable in this docket and therefore Praxair lacks standing to intervene and its petition must be denied.

CONCLUSION

Praxair fails to allege facts demonstrating that it suffered an injury to a cognizable legal interest impacted by this docket or that its claims are redressable in this docket. Therefore, Praxair fails to establish that it has a right to intervene under section 63G-4-207 or that it has standing to pursue its claims in this proceeding. Accordingly, Praxair's petition must be denied.

DATED October 4, 2016

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