

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of Rocky Mountain Power for Approval of an Energy Service Contract between Rocky Mountain Power and Kennecott Utah Copper, LLC

DOCKET NO. 16-035-33
ORDER DENYING PETITION TO INTERVENE

ISSUED: October 24, 2016

1. Background

This docket concerns PacifiCorp, dba Rocky Mountain Power's ("PacifiCorp") application ("Application") for approval of an energy services agreement ("ESA") with Kennecott Utah Copper, LLC ("Kennecott"). PacifiCorp filed the Application on August 5, 2016, seeking the Commission's approval before Kennecott's existing energy services agreement expires on November 30, 2016.

Utah Code Ann. § 54-3-32 allows defined "eligible customers" to take service from third party, nonutility energy suppliers. In simplified terms, eligible customers must own significant generation capacity of their own to qualify under the statute. *See* Utah Code Ann. § 54-2-1(10). Before transferring service to a nonutility energy supplier, an eligible customer must fulfill enumerated statutory requisites, including providing written notice to its public utility no later than 18 months before the eligible customer intends to transfer service. Utah Code Ann. § 54-3-32(3). In the event they elect not to transfer service, eligible customers may also negotiate energy supply contracts with public utilities on terms that may differ from those in the otherwise applicable published tariff schedule, subject to the Commission's approval. Utah Code Ann. § 54-3-33.

Kennecott has an existing, Commission-approved energy supply contract set to expire on November 30, 2016. Prior to the parties executing the new ESA, Kennecott provided notice to PacifiCorp pursuant to § 54-3-32 that it intended to transfer service to a nonutility energy supplier on June 15, 2017. (Direct Test. of P. Clements at 13:211-212.)

On August 5, 2016, PacifiCorp filed its Application for approval of the new ESA, explaining that “[f]ollowing extensive negotiations, [PacifiCorp] and Kennecott have reached a new Agreement with rates, terms, and conditions for [PacifiCorp to provide] electric service [to Kennecott] through” the date specified in the ESA. (Application at 3.) After PacifiCorp filed its Application for approval of the new ESA, PacifiCorp received notice from Kennecott postponing its intended transfer date. (*See* PacifiCorp Notice of Kennecott Intended Transfer Date dated September 13, 2016.) In other words, after negotiations, Kennecott and PacifiCorp reached an agreement whereby Kennecott will remain PacifiCorp’s customer for the term specified in the ESA and will not, in the near term, transfer its service to a nonutility energy supplier (so long as the Commission approves the ESA).

On September 20, 2016, Praxair filed its Petition to Intervene (“Petition”). Since January 2012, Praxair has purchased electricity directly from Kennecott as its tenant.¹ (Praxair’s Reply in Support of Petition to Intervene at 3 [hereafter “Reply”].) Under the new ESA, Kennecott and PacifiCorp have agreed that Kennecott will no longer resell electricity to Praxair. (*See, e.g., id.* at

¹ Title 54 contemplates eligible customers may provide electricity to a “tenant or affiliate” that is related to its core business, located within a 25-mile radius of the eligible customers’ electric generating plant and located on real property owned or at least “commonly controlled” by the eligible customer. *See, e.g.,* Utah Code Ann. § 54-2-1(10)-(11). However, nothing in Title 54 appears to *require* eligible customers to do so.

4.) Praxair has sought intervention because it believes its electricity costs will increase in the event Kennecott stops selling it electricity and it is forced to purchase electricity from PacifiCorp under the otherwise standard applicable terms and conditions. (*See Reply at 5.*) Praxair is not a party to the ESA, and no provision in it relates to Praxair save for a reference in Section 4.05 wherein Kennecott agrees that it shall not resell any electric power it purchases from PacifiCorp and that the power “shall be used solely by [Kennecott, its] onsite contractors and its tenants ... excluding Praxair’s Garfield plant.” (*Id.* at 4.)

PacifiCorp filed an Opposition to Praxair’s Petition on September 27, 2016, and the Office of Consumer Services filed an Opposition to Praxair’s Petition on October 5, 2016. Praxair filed a consolidated Reply on October 14, 2016. Pursuant to the Scheduling Order and Notice of Hearing the Commission issued on August 18, 2016, the hearing on PacifiCorp’s Application is set for October 27, 2016.

2. Discussion

Intervention is appropriate where the following two criteria are met: (i) the party seeking intervention’s “legal interests may be substantially affected by the formal adjudicative proceeding”; and (ii) “the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention.” Utah Code Ann. § 63G-4-207.

Both prongs of the statutory analysis weigh in favor of denying intervention here. With respect to the first prong, Praxair appears to be concerned the Commission could conceivably issue an order in this docket that a party might later rely on in a future proceeding to assert the Commission has already made a determination with respect to Praxair’s interests. (*See Reply at 5*

(arguing that if Praxair does not “intervene in this proceeding, [PacifiCorp] could argue in a later proceeding that Praxair was untimely, had waived its rights and should have sought intervention in this docket”).) The Commission expressly precludes this possibility by (1) concluding that no order in this docket affects, or later may be interpreted as affecting, any of Praxair’s legal interests, rights, claims or remedies over which the Commission has jurisdiction and (2) expressly limiting this docket to the sole issue the Commission must decide to fulfill its statutory responsibility under Utah Code Ann. § 54-3-33, namely assessing whether to approve the agreement between PacifiCorp and Kennecott, a contract to which Praxair is not a party.

As an eligible customer, Kennecott has a statutory right to negotiate an electric service agreement with PacifiCorp. The Commission’s role is to evaluate the proposed agreement to ensure it is just, reasonable and in the public interest. While the proposed ESA reflects Kennecott’s election not to provide electricity to Praxair as a tenant, this is not an issue that falls within the Commission’s jurisdiction. The Commission simply cannot compel Kennecott, a nonutility, to enter or extend a contract with another nonutility to provide any good or service, including electric service. Further, attempting to compel a nonutility to do so by refusing to approve its contract with a public utility that is otherwise just, reasonable and in the public interest would not be a legitimate or prudent exercise of the Commission’s jurisdiction. The Commission does have the power to compel PacifiCorp to provide electric service and to dictate the terms for such service, and the Commission concludes that no order issued in this docket will affect any decision it is asked to make on this point with respect to Praxair in the future. For example, perhaps Praxair believes meritorious arguments exist that entitle it to receive electricity from PacifiCorp on terms and conditions similar to those under which it has received service

from Kennecott in the past. If so, Praxair may file a request for agency action or customer complaint seeking such relief, and no order the Commission issues in this docket will affect the Commission's evaluation of any such request or claim.

The second prong strongly underscores the necessity of the conclusion the Commission makes under the first. Because Kennecott's existing electric service agreement is set to expire at the end of November 2016, time is of the essence in adjudicating this dispute. The hearing is set for October 27, 2016 (less than two weeks from the date Praxair filed its Reply), and the Commission expects to issue an order before the end of November that either approves or declines to approve the new ESA. If Praxair intervened in this docket, Praxair would be entitled to some opportunity to fully participate in the adjudication, *i.e.*, to conduct reasonable discovery and to allow the other parties to seek discovery and disclosures from Praxair in order to ascertain what evidence might be presented at hearing. Doing so would necessitate continuing the hearing, rendering it very difficult for the Commission to hear the parties on the merits of PacifiCorp's Application and to issue an order prior to the expiration of Kennecott's extant agreement. In the statute's language, allowing intervention at this late stage would "materially impair" the orderly and prompt conduct of the proceeding.

Kennecott is a very large industrial customer that owns the capacity to generate much of its own electricity and, as an "eligible customer," has a statutory right to leave PacifiCorp's system. Should it elect to do so, Kennecott's historical contribution to PacifiCorp's fixed costs, which all customers share the burden of paying, will be diminished or, potentially, eliminated. (*See, e.g.*, Direct Test. of P. Clements at 2:34-40.) The ramifications for all customers may be significant. The fact that PacifiCorp has presented a renewed electric service agreement to the

Commission suggests that a mutually advantageous bargain may have been struck that will facilitate Kennecott's continued participation in PacifiCorp's system.

Of course, any electric service agreement between Kennecott and PacifiCorp must, on the whole, provide net benefit to PacifiCorp's ratepayers, and this is precisely the question the Commission will resolve at hearing. The interests of a single business, Praxair, in continuing to receive preferential rates from Kennecott, a nonutility, under a private contract the Commission has no authority to regulate are not relevant to the inquiry. Again, Praxair retains all interests, rights and remedies and may pursue its interests before the Commission, or other appropriate forum, without fear of being prejudiced by any order arising out of this docket. However, it would not serve the interests of justice to allow Praxair to intervene, delay the proceedings and potentially jeopardize an agreement that may benefit all ratepayers given that Praxair is not a party to the ESA and has offered no legal basis supporting its right to interfere with Kennecott's statutory right to negotiate and enter an electric service agreement with PacifiCorp.

3. Order

For the foregoing reasons, Praxair's Petition is denied. All arguments, claims and interests Praxair may wish to assert in a later proceeding are expressly preserved. No order in this docket shall be construed as an adjudication of Praxair's interests.

DATED at Salt Lake City, Utah, October 24, 2016.

/s/ Michael J. Hammer
Presiding Officer

DOCKET NO. 16-035-33

- 7 -

Approved and confirmed October 24, 2016 as the Order of the Public Service
Commission of Utah.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
DW#289699

CERTIFICATE OF SERVICE

I CERTIFY that on October 24, 2016, a true and correct copy of the foregoing was served upon the following as indicated below:

By Electronic-Mail:

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

Robert C. Lively (bob.lively@pacificorp.com)
Yvonne Hogle (yvonne.hogle@pacificorp.com)
Daniel Solander (daniel.solander@pacificorp.com)
Rocky Mountain Power

Stephen F. Mecham (sfmecham@gmail.com)
Stephen F. Mecham Law, PLLC

Patricia Schmid (pschmid@utah.gov)
Justin Jetter (jjetter@utah.gov)
Rex Olsen (rolsen@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