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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power to Increase the Deferred Rate through the Energy Balancing Account Mechanism	)))))	Docket No. 18-035-01 Post-hearing Brief of the Utah Office of Consumer Services

On February 5, 2019, the Public Service Commission ("Commission') held a hearing on the Application of Rocky Mountain Power ("RMP or Company") to increase the deferred rate through its Energy Balancing Account ("EBA").[1] Participants in the hearing included RMP, the Division of Public Utilities ("DPU") and the Utah Association of Energy Users ("UAE"). While the Office of Consumer Services ("OCS") is a party to these proceedings,[2] it did not participate directly in the February 5, 2019 hearing. Notwithstanding, the OCS has monitored events associated with the hearing and this proceeding and has a continuing interest in the outcome.

[1] RMP's initial Application was filed on March 15, 2018.
[2] The OCS previously submitted comments in this docket on April 19, 2018 and October 16, 2018. The OCS also participated in the hearing held on April 26, 2018, regarding interim rates.

At the conclusion of the hearing, the Commission, pursuant to a stipulation submitted by the hearing participants, agreed to have parties address legal standards that should apply in dealing with the evidence presented at hearing. The Commission issued an order providing that post-hearing legal briefs with a maximum length of 15 pages may be filed by any party to this docket by Friday, March 1, 2019.

The OCS hereby submits its post-hearing brief addressing the legal standards that the Commission should consider in reviewing the evidence presented at hearing and in determining how the issues raised in this docket should be resolved. Because the OCS did not actively participate in the February 2019 hearing, its post-hearing brief will focus primarily on the applicable legal standards rather than delving directly into the facts (or lack thereof) that were discussed during the course of the hearing.

Legal Standard for Recovery of Costs in Rates

The Utah Code Section 54-3-1 requires that "[a]ll charges made, demanded or received by any public utility . . . for any product . . . or for any service rendered . . . shall be just and reasonable."

Burden of Proof

The Utah Supreme Court has addressed issues related to who carries the burden of proof in utility regulatory proceedings and how the burden of proof requirements should apply. In *Utah Dep't of Bus. Regulations v. Pub. Serv. Comm'n*, 614 P.2d 1242 (Utah 1980), the Court observed:

> In the regulation of public utilities by governmental authority, a fundamental principle is: *the burden rests*

> *heavily upon a utility to prove it is entitled to rate relief and not upon the commission, the commission staff, or any interested party or protestant; to prove the contrary.* The utility has the burden of proof to demonstrate its proposed increase in rates and charges is just and reasonable. The company must support its application by way of substantial evidence, and the mere filing of schedules and testimony in support of a rate increase is insufficient to sustain the burden. Rate making is not an adversary proceeding in which the applicant needs only to present a prima facie case to be entitled to relief. A state regulatory commission, whose powers have been invoked to fix a reasonable rate, is entitled to know and before it can act advisedly must be informed of all relevant facts.

Id. at 1245-46 (emphasis added).

The court specifically found that the lack of evidence to support proposed rates would require the rejection of the utility's recommended rates, saying: "If there be no substantial evidence to support an essential finding, that finding cannot stand; and a rate order predicated upon it must fail." *Id*. at 1245; Re: *Southern Cal. Gas Co.*, 35 P.U.R.3d 300, 309 (Cal. 1960)); s*ee also, Mountain States Tel. & Tel. Co. v. Pub. Serv. Comm'n,* 145 P.2d 790, 792 (Utah 1944) ("If there is no substantial evidence to support an essential finding, that finding cannot stand and a rate order predicated upon it must fail.")

These burden of proof legal standards were reiterated and reaffirmed by the Utah Supreme Court in *Comm. of Consumer Serv. v. Pub. Serv. Comm'n,* 2003 UT 29, 75 P.3d 481. In addition, the court observed: "The utility bears the burden of presenting the evidence necessary to support the Commission's 'essential finding[s]' . . . The Commission, in turn bears responsibility for holding the utility to its burden." *Id.* at ¶ 13.

Specific consideration of prudency issues

During the course of the hearing in this proceeding, questions related to prudency were raised in considering a number of different issues and factual circumstances. Utah Code § 54-4-4(4) provides:

> (a) If, in the commission's determination of just, reasonable, or sufficient rates, the commission considers the prudence of an action taken by a public utility or an expense incurred by a public utility, the commission shall apply the following standards in making its prudence determination:
>
> (i) ensure just and reasonable rates for the retail ratepayers of the public utility in this state;
>
> (ii) focus on the reasonableness of the expense resulting from the action of the public utility judged as of the time of the action was taken;
>
> (iii) determine whether a reasonable utility, knowing what the utility knew or reasonably should have known at the time of the action, would reasonably have incurred all or some portion of the expense, in taking the same or some other prudent action; and
>
> (iv) apply other factors determined by the commission to be relevant consistent with the standards specified in this section.
>
> (b) The commission may find an expense fully or partially prudent, up to the level that a reasonable utility would reasonably have incurred.

Case examples requiring proof of prudency

During the hearing, several specific circumstances were called into question as it relates to whether RMP or its contractors acted prudently. While the Utah Code clearly requires a utility to demonstrate that it acted prudently in incurring costs that are sought to be recovered under the standard of "just and reasonable rates," the following cases provide more specific guidance when dealing with circumstances where the utility relies in part on contractors or third parties in securing the services required to meet utility customer needs.

In 1999, the Supreme Court of the Louisiana dealt with a situation very similar to the issues presented in this proceeding. There the utility, Entergy Gulf States, Inc., was challenged as it attempted to recover costs associated with replacement power costs related to outages the utility had experienced. Consistent with the prudence requirements established in the Utah Code, the Louisiana court found: "[T]he burden of proof is on the utility, which must "demonstrate that it went through a reasonable decision making process to arrive at a course of action and, given the facts as they were or should have been known at the time, responded in reasonable manner." *Entergy Gulf States, Inc. v. La Pub. Serv. Comm'n*, 726 So.2d 870, 873 (La. 1999).

The case involved both planned outages (where the time to accomplish the planned outage was extended to include unscheduled time and unanticipated replacement power costs) and unforeseen forced outages. In reviewing replacement costs associated with both types of unforeseen and unscheduled outages, the Louisiana court described its scope of inquiry:

> [T]he Company must demonstrate that it acted prudently incurring fuel costs, including replacement power costs. In order to carry this burden with regard to outage related replacement power costs, the Company must demonstrate that its decisions and actions that lead to the outage were prudent. To this end, the utility must show that it went through a reasonable decision making process to arrive at a course of action and, given the facts as they were or should have been known at the time, responded in a reasonable manner.

Id. at 876 (internal quotation marks omitted).

In a 1987 decision out of the Supreme Court of South Carolina, higher fuel costs associated with an unscheduled outage at a nuclear plant were addressed. In *Hamm v. S.C. Pub. Serv. Comm'n*, 291 S.C. 119, 352 S.E.2d 476 (1987), the court addressed questions concerning attempts made by Carolina Power and Light to recover higher

fuel costs which had been incurred as a result of a mandatory shutdown of a nuclear reactor. Carolina Power and Light argued that because it had contracted with an engineering firm to do technical specifications associated with Nuclear Regulatory Commission (NRC) standards related to seismic pipe support modifications, the utility should be allowed to recover higher fuel costs associated with an unforeseen outage. The Court found:

> The evidence shows only that (the utility) hired (an engineering firm) to do the technical specifications for the seismic pipe supports. There is no evidence of any effort by (the utility) to insure that (the engineering firm's) work complied with the NRC standards.
>
> A utility cannot insulate itself from its responsibility . . . by delegating decision-making authority to a third party. Responsibility for fuel costs which are incurred because of irresponsible decision-making must be on the decision-makers. If a utility was permitted to pass these costs along to its customers, it would have no incentive to minimize fuel costs.

Id. at 478.

In a decision from the Supreme Court of Pennsylvania, an order from the Pennsylvania Public Utility Commission disallowing energy replacement costs was affirmed in two instances associated with nuclear power plants outages. In one instance, the Commission had found that the utility acted imprudently for failing to have procedures in place to deal with anticipated shellfish infestations which would have minimized plant outages. *Pa Pub. Util. Comm'n v. Philadelphia Elec. Co.,* 522 PA 338, 561 A.2d 1224, 1227 (1989). In another plant outage, the Commission had found that the utility, and not its ratepayers, should bear the financial responsibility associated with faulty resins that had been supplied by a manufacturer. With respect to the faulty resin issue supplied by a third party, the Court stated:

> [W]e believe a utility company is in a better position to prevent an occurrence or provide for protection against any such occurrence. After all, it was the utility which chose the contractor, negotiated the contract and is in a position to seek damages for any losses sustained under the contract. While the utility may have to bear the initial losses incurred as the result of its contractor's negligence, it is in a far better position to aggressively pursue the tortfeasor for reimbursement. If we were to hold otherwise, the utility would have no incentive to pursue the tortfeasor, having already received full compensation for its losses. On the other hand, ratepayers would not be in a position either legally or financially to pursue the allege tortfeasor. Balancing, as we must, the equities involved to determine whether a requested increase is just and reasonable, . . . we must agree with the commission that all energy replacement costs incurred by (the utility) as a result of faulty resins must be borne by the utility and not the ratepayers.

Id. at 1228;, *see also, Pa Power Co. v. Pa Util. Com'n.* 625 A.2d 719, 723-24 (Pa Comwlth 1993) (denying cost recovery where utility had failed to provide required high degree of care to avoid plant shutdown which resulted in the incurrence of higher-cost replacement power and finding that utility is responsible for acts or omissions of its contractors.)

In a 1986 decision involving the denial of an increase in the cost of purchasing wholesale electricity following a power outage associated with a utility's wholesale supplier of electricity, the Supreme Judicial Court of Massachusetts affirmed the Department of Public Utilities' determination that the retail utility shared responsibility for the wholesaler's imprudence in causing the power outage. In *Commonwealth Elec. Co. v. Dep't of Pub. Util.,* 397 Mass. 361, 491 N.E.2d 1035 (1986), the court found that statutory responsibilities to ensure that utility service would be provided at the lowest possible cost included a requirement that the utility be responsible for the costs it incurred in securing electric energy from other suppliers. In this case, the Court

found that it was appropriate to impute the imprudence of an energy supplier to the utility to ensure that cost recovery was in synch with statutory responsibilities.

Summary

In seeking recovery of its energy costs, the Company bears the evidentiary burden to demonstrate that its rates and charge will be just and reasonable. Where prudency has become an issue, the Company bears the burden of demonstrating that its actions have been prudent. None of the non-company parties to this proceeding bear any burden, neither does the Commission. Any inquiry into "imprudence" or proving the negative of "prudence" would constitute a misdirection in the application of the appropriate legal standard and an impermissible shifting of the burden of proof upon other parties.

Issues of prudency must clearly be addressed by the Company. RMP must provide evidence of its prudency. Where contractors or third-parties are involved, the Company must still demonstrate that its actions in dealing with contractors or third-parties insured that customers would be protected from the imprudent actions of others. As shown in Utah legal requirements as well as legal precedent found addressing similar issues from other jurisdictions, the Commission's inquiry should be guided by the following legal principles:

- any rate to be approved must be just and reasonable;
- in considering the prudence of actions taken by the utility, the Commission must (1) ensure just and reasonable rates for the retail ratepayers, (2) focus on the reasonableness of the utility's actions judged as of the time of the action, and (3) determine if expenses were reasonably incurred;

- the burden of proof rest heavily on the utility to prove it is entitled to rate relief;

- no burden rests upon the Commission, the Commission staff or any interested party or protestant to prove anything to the contrary;

- the Company's mere filing of schedules and testimony in support of a rate increase is insufficient to sustain the Company's burden of proof;

- the Commission bears responsibility for holding the utility to is burden;

- in order to recover replacement power costs associated with an unscheduled or unforeseen outage, the utility must show that its decisions and actions that lead to the outage were prudent and that its decisions and actions in securing replacement power were prudent;

- a utility cannot insulate itself from its responsibility to act prudently by delegating decision-making authority to a third party;

- the utility, and not its ratepayers, should bear responsibility associated with faulty parts or services supplied by manufacturers or third parties;

- the utility is responsible for acts or omissions of its contractors;

- the Commission is entitled to know and before it can act advisedly must be informed of all relevant facts; and

- if there is not substantial evidence to support an essential finding, that finding cannot stand and a rate order predicated upon it must fail.

Where factual issues remain related to legitimate questions of prudency, the Commission cannot approve cost recovery based upon a vacuum of evidence which cannot support a finding of prudency.

Respectfully submitted this 1st day of March 2019, by

__s/s__*Steven W. Snarr*_____
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