JUSTIN C. JETTER (#13257)
PATRICIA E. SCHMID (#4908)
Assistant Attorney Generals
Counsel for the DIVISION OF PUBLIC UTILITIES
SEAN D. REYES (#7969)
Attorney General of Utah
160 E 300 S, 5th Floor
P.O. Box 140857
Salt Lake City, UT 84114-0857
Telephone (801) 366-0335
jjetter@agutah.gov

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Application of Rocky Mountain Power to Increase the Deferred EBA Rate through the Energy Balancing Account Mechanism	Docket No. 18-035-01 **POST HEARING BRIEF OF THE DIVISION OF PUBLIC UTILITIES**

Pursuant to Utah Admin. Code r.746-1, the Division of Public Utilities ("Division") files this Post Hearing Brief. The Public Service Commission ("Commission") should find that Rocky Mountain Power ("RMP") has failed to meet its burden of proof that it is entitled to recover costs associated with the outages identified in Division testimony. The Commission should further hold that RMP is responsible for the acts of its contractors in connection with the contracts. The Division continues to recommend the Energy Balancing Account ("EBA") net power cost adjustment of $1,954,826 for the seven outages identified as imprudent.

INTRODUCTION

On January 2, 2018, RMP filed its Notice of Intent to file its Application for the 2018 EBA. RMP filed its Application on March 15, 2018. Parties submitted prewritten testimony and a hearing was held on February 5, 2019. At the February 5, 2019, hearing the Commission

sought further input by the parties regarding the legal standard that should be applied in the "evaluation of prudence where there is a plant operator or co-owner involved or a contractor relationship and – what the legal standards are."[1] The Commission issued a Scheduling Order on February 7, 2019, for briefing.

The Division's brief will address two key issues regarding the legal standard of review for the outages at issue. The first is the burden of proof. The Utah Supreme Court has directly rejected the position that a utility may show a prima facia case and then shift the burden to other parties to rebut a presumption of prudence. This burden on the utility extends to the EBA process.

Second, with respect to the question of imputation of third-party imprudence the Commission should find that such imputation is necessary to give effect to the requirement of just and reasonable rates. The statute does not limit reasonableness to the actions of the utility, it limits what costs may be included in rates. It should not be read to shield a utility from consequences of its agent's failures. Moreover, it is in the public interest to assign the risk to RMP because it is in the best position to manage those risks. Other jurisdictions, including Montana where one of RMP's units is under shared ownership, impute contractor and co-owner imprudence. This Commission should apply the same standard to RMP.

ARGUMENT

Rocky Mountain Power Has Failed to Meet Its Burden of Proof

Utah law places the burden of proof for recovery of EBA expenses on the utility, RMP. "In the regulation of public utilities by governmental authority, a fundamental principle is: the

[1] Transcript at p.7 lines 12-15.

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."[2] Some jurisdictions have adopted a position that expenses of utilities made in good faith are entitle to a rebuttable presumption of prudence.[3] Utah has rejected such a presumption. The court in *Utah Dep't of Bus. Regulation, Div. of Pub. Utilities v. Pub. Serv. Comm'n* quoted favorably the dissent of Commissioner Kenneth Rigtrup,

> While the strict application of technical rules of evidence in a court of law may well dictate that a moving party meets its initial burden of proof by establishing a prima facie case, thereby shifting the burden of proof to the opposing party or parties, such a rule or practice should not apply before this administrative body.[4]

The court agreed and held that, "Rate making is not an adversary proceeding in which the applicant needs only to present a prima facie case to be entitled to relief."[5]

The express rejection of the prima facia standard for rate setting requires a higher burden than a mere showing that RMP incurred costs and that those costs may have been incurred in good faith. RMP seems to rely on such a rebuttable presumption that those costs are prudent unless proven otherwise by the Division. However, the burden remains on RMP to show that its actions and the actions of its contractors or partners have been prudent in incurring those costs.

The EBA mechanism does not alter this burden. The EBA statute plainly states that RMP is entitled to only "prudently incurred costs."[6] And it explicitly states that the EBA mechanism

---

2 *Utah Dep't of Bus. Regulation, Div. of Pub. Utilities v. Pub. Serv. Comm'n*, 614 P.2d 1242, 1245 (Utah 1980).
3 *See ex. Kiawah Prop. Owners Grp. v. The Pub. Serv. Comm'n of S.C.*, 357 S.C. 232, 237, 593 S.E.2d 148, 151 (2004) ("Normally, the expenses of a Utility are presumed to be reasonable when incurred in good faith").
4 *Utah Dep't of Bus. Regulation, Div. of Pub. Utilities v. Pub. Serv. Comm'n*, 614 P.2d 1242, 1245 (Utah 1980)("the comments of the dissent as to the burden of proof were correct").
5 *Id*. At 1246.
6 Utah Code § 54-7-13.5(2)(b)(ii).

may not alter RMP's standard for cost recovery or its burden of proof.[7] Therefore, RMP must meet the same burden of proof to recover EBA expenses as it would to recover the same expenses in a rate case. While parties in proceedings before the Commission sometimes speak in terms of "disallowance," the true standard is whether expenses ought to be allowed for recovery because they were prudently incurred. The utility must prove they were.

RMP has failed to meet its burden. RMP has not proven that its actions or the actions of contractors or partners of RMP were prudent in incurring the expenses identified by the Division in a small subset of the outages reviewed by the Division. Without belaboring the facts again in this brief, the Craig Unit 2 missing plug demonstrates that RMP has failed its burden. RMP's witness testified in response to the question of whether it vibrated out because it was not tightened properly "I – they're not sure why it vibrated out. It may not have been tightened enough. It may have had a flaw, don't really know..." [8]

The simple fact is that RMP doesn't know what happened. Nor does the Division. However, it not the Division's burden to know or prove that it was the result of imprudence. It is RMP's burden to demonstrate prudence. Unknown facts are surely insufficient to meet the burden of proof required to recover costs when an outage is caused by a missing piece of equipment if no one knows why it was missing.

Moreover, contrary to what was suggested at the hearing, this is not a question of strict liability for RMP. Division consultants reviewed the 27 unplanned or forced outages longer than 72 hours and recommended disallowance of only seven. The Division is not seeking to hold RMP to a perfection standard, merely a reasonable standard. However, it remains RMP's burden

7 Utah Code § 54-7-13.5(2)(e).
8 Transcript p. 36 lines 21-23.

to prove that it acted prudently. If RMP cannot show that its costs were prudently incurred, it is not entitled to recover them.

The same standard must apply to the other outages as well. It is not the Division's burden to prove that improper tubing or dissimilar metal welds were imprudent when they were involved in the Dave Johnston and Huntington outages respectively. Nor is it the Division's burden to prove that the wiring damage at Jim Bridger unit 3 was imprudent. The burden rests on RMP. With respect to the Dave Johnston unit 4 oil pump and the Jim Bridger unit 2 heat trace failures, imprudence is more plainly obvious by the record. Delivery of the wrong part for the Dave Johnston oil pump due to under staffing is not prudent. At Jim Bridger unit 2, RMP witness Mr. Ralston testified that the heat trace test had failed inspection, yet no action was taken to remedy the known non-functional device that caused the outage.[9] RMP has failed to meet that burden with respect to each of the outages. RMP is not entitled to recovery through the EBA of the costs identified in the Division's testimony.

The Actions of Third-Party Contractors and Partners Must be Treated Similarly to RMP's Own Actions.

RMP is responsible for the actions of its contractors, affiliates, and partners in ownership for multiple reasons. Holding RMP responsible is necessary for just and reasonable rates to be charged to customers consistent with Utah Code § 54-3-1. It is consistent with the language and intent of the EBA statute, which requires only prudent expenses be included. It is consistent with prior Commission orders. And it is consistent with other jurisdictions. It is the best policy because RMP is in the best position to select, supervise the work of, and seek damages from the third parties it contracts with for these tasks. Furthermore, failure to hold RMP responsible

[9] Transcript at p. 46.

would allow RMP to rely on third parties to shift the risk of any imprudent actions to customers and would require regulators to become involved in the negotiation and supervisory aspects of these transactions in order to protect rate payers.

RMP must be held responsible for the prudence of its contractors and partners in order to ensure that rates are just and reasonable. Utah Code § 54-3-1 requires that RMP's rates "shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful." A necessary extension of requiring that rates are just and reasonable is the requirement that those parties responsible for providing the service must do so in a reasonable and prudent manner. The law does not distinguish RMP from its contractors or partners or limit the reasonableness requirement to only RMP's own employees. Properly, the law's focus is on the rates customers pay and their reasonableness, which is obtained by prudence. If an imprudent action causes costs to go up, regardless of whether the imprudence was RMP or a third party it contracted with, including the costs of imprudence in rates would not be just and reasonable. The resulting rates would be unlawful.

Utah Code § 54-4-4(4) permits the Commission to hold the utility accountable for imprudence of its partners or contractors. The argument to the contrary is unpersuasive because in many instances it would require imprudent expenses to be in rates, which would render those rates unlawful. Section 54-4-4(4) states:

> (4)(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 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.

In directing the Commission's review of prudence, the statute is clear that it applies to both actions of the utility and expenses incurred by the utility. Section 54-4-4(a)(i) requires that the prudence review ensure just and reasonable rates. It does not require that the utility be compensated for costs due to imprudence by others. Next, Section 54-4-4(a)(ii) directs the Commission to focus on the reasonableness of the expense that results from the action of the public utility, but again does not prevent the Commission from imputing imprudence of contractors, partners, or other parties performing the functions of a utility. The definition of an electric utility in Utah Code § 54-2-1(8)(a) includes "every corporation, cooperative association, and person, their lessees, trustees, and receivers … controlling, operating, or managing any electric plant, or in any way furnishing electric power…"

Even § 54-4-4(a)(iii), which requires a review of whether a reasonable utility would have acted similarly knowing what it knew or should have known, does not prevent the Commission from imputing the losses from third party imprudence. The "utility" in title 54 is broader than RMP and its employees. Section 54-2-1(8)(a) definition of public utility is broad enough to encompass any "person… controlling, operating, or managing" an electric plant. Moreover, the broad list of possible persons or entities who are considered part of the broader "utility" is not limited to only those specified therein. Utah Code § 68-3-12(1)(f) tells us that when a statute includes "Include," "includes," or "including" the list is "not an exclusive list, unless the word

'only' or similar language is used to expressly indicate that the list is an exclusive list." Rather such a list should properly be considered only a partial list.[10] Section 68-3-12(1)(a) further requires the application of this standard unless "inconsistent with the manifest intent of the Legislature" or "repugnant to the context of the statute." Under the plain language of Section 68-3-12 as applied to the definition of public utility in Section 54-2-1(8)(a) as used in Section 54-4-4, prudence applies to the broader category of utility. That includes contractors, partners, or other third party actors who are performing functions of the public utility.

When outsourcing functions of operation, the question becomes one of whether the contractor, now acting in place of RMP, acted reasonably knowing what it knew or should have known. By stepping into the shoes of the utility through a contract or partnership to perform utility functions such as maintenance, repairs, or operation of utility equipment, the third party is acting as the effective utility and performing utility functions. From the position of customers, a third party of this nature is effectively a substitute for RMP. Customers are not involved in these decisions and are entitled by law to rates based on prudent behavior.

This reasoning is consistent with a recent Montana Public Service Commission order holding the electric utility responsible for imprudent costs of a third party contract operator of the Colstrip powerplant. "When Talen, as an operator of the Colstrip facilities, fails to reasonably operate and maintain the plant, any failures that may result can then rest on the regulated utility owner of that plant. Costs caused by a failure of a plant operator are not reasonable and just costs that may be automatically passed on to ratepayers of the regulated utility."[11] The Montana

[10] *Boyle v. Christensen*, 2011 UT 20, ¶ 27, 251 P.3d 810 ("When 'including' precedes a list, its common usage is to indicate a partial list.").
[11] *In the Matter of Nw. Energy's 2012-2013 Elec. Supply Tracker in the Matter of Nw. Energys 2013-2014 Elec. Supply Tracker*, No. 2013.5.33, 2016 WL 2871455, at *20 (May 10, 2016).

Commission held that the replacement power costs were the result of imprudent operations and as a result disallowed recovery of those costs.

In reaching the conclusion that the utility was responsible for imprudence of a third party operator, the Montana Commission cited a Texas Court of Appeals decision where the utility had purchased defective generators from a third party vendor. Like the tubing failures at Dave Johnston 3, the utility was required to shut down the generators only 12 years after operation and replace them as a result of deteriorating tubes that should have lasted significantly longer. The Texas Public Utility Commission denied recovery of the replacement power costs finding that while the utility did not act imprudently, its vendor did, and the imprudence was imputed to the utility. The court upheld the decision. "Under Commission precedent, costs incurred due to the imprudence of a third-party vendor are not reasonable and necessary. The imprudence of a third-party vendor may be imputed to the utility, even if the utility has not acted imprudently."[12]

This direct question may be a matter of first impression for this Commission, however imputation of the imprudence of a contractor or vendor is consistent with this Commission's past orders. The Commission has stated:

> We conclude that forced outages should be evaluated based on the facts and circumstances of each outage, including the actions of PacifiCorp, its agents or its contractors. We also conclude that PacifiCorp's responsibility for ensuring prudently incurred costs does not end once a contract is executed; it also includes management of the contract, among other things. We find that management of a contract includes administration, monitoring, and any necessary oversight.[13]

[12] *AEP Texas Cent. Co. v. Pub. Util. Comm'n*, 286 S.W.3d 450, 468–69 (Tex. App. 2008).
[13] *In the Matter of the Application of Rocky Mountain Power for Approval of Its Proposed Energy Cost Adjustment Mechanism*, No. 09-035-15, 2017 WL 661346, at *10 (Feb. 16, 2017).

While not directly deciding the matter of imputing agent or contractor imprudence, the Commission's language is consistent with the determination that should be made in this docket: that a utility's contractor or agent's imprudence should be imputed to the utility.

Imputation of imprudence is consistent with a variety of other jurisdictions. In *Entergy Gulf States, Inc. v. Louisiana Pub. Serv. Comm'n* the utility argued that "when equipment fails due to some design defect, it is the fault of the vendor and not the Company; thus, the Company should not have to bear the replacement power costs."[14] The court rejected that position and held that "as between the ratepayer and the Company, it is the Company who is in a position to choose vendors carefully and pursue the vendor for any damage caused by defective parts."[15]

Similar to RMP's claim of lack of control over the operating partner of the Craig powerplant, in *Commonwealth Elec. Co. v. Dep't of Pub. Utilities,* the Massachusetts utility was a minor partner in a generation facility and claimed that it therefore was not responsible for the imprudence of the operating partner.[16] The court rejected that position and held that "The shareholders cannot automatically shift those risks to the ratepayers. The ratepayers are not the guarantors of the company's success."[17] And the court said that "[i]mputation of imprudence encourages vigilant oversight by those who have delegated their responsibilities."[18]

In *Pennsylvania Pub. Util. Comm'n v. Philadelphia Elec. Co.*, it was undisputed that the utility had no part in the manufacturing of resins that failed resulting in replacement costs.[19] However, the court held that the utility was in the best position to pursue the vendor for damages

[14] 98-0881 (La. 1/20/99), 726 So. 2d 870, 883.
[15] *Id.*
[16] 491 N.E.2d 1035 (Mass. 1986).
[17] *Id*. At 1040.
[18] *Id.*
[19] 522 Pa. 338, 346, 561 A.2d 1224, 1228 (1989).

and "Balancing, as we must, the equities involved to determine whether a requested rate increase is just and reasonable… we must agree with the Commission that all energy replacement costs incurred … as a result of faulty resins must be borne by the utility and not the ratepayers."[20]

The consistent ruling of these various jurisdictions when presented with similar questions of imputation of prudence by partners, contract operators of generation facilities, or vendors of services is that the utility is in the best position to contract for, supervise, and seek compensation for imprudence on behalf of the third parties. As between the rate payers and the utility, the utility must bear the risk of loss due to imprudence of these third parties, even if the utility acted prudently in its interactions with them. Those risks are part of what the utility shareholders are compensated for through just and reasonable rates. Just and reasonable rates include compensating utility shareholders for risk, not expenses imprudently incurred.

This position is further consistent with the statutory requirement that EBA retain the utility's burden of proof and standard for cost recovery. While not directly addressing the matter at issue here, the prohibition on altering the burden of proof is consistent with the fundamental premise that the EBA is a mechanism for adjusting rates for changes in fuel costs as a more efficient method than frequent rate cases. While the EBA offers significant risk reduction to RMP – particularly so after elimination of the sharing band – it should not be expanded to function as a risk shift to customers of imprudent contractors or partners. Without an EBA, the replacement power costs for these types of forced outages would not typically be recoverable between rate cases, nor would they be recoverable in future rates unless they were part of a

[20] *Pennsylvania Pub. Util. Comm'n v. Philadelphia Elec. Co.*, 522 Pa. 338, 347, 561 A.2d 1224, 1228 (1989).

period submitted as part of the rate case. RMP would bear the risk of these losses as part of its operational risk. The Commission should not shift this category of risk to ratepayers.

Finally, the regulatory process would be turned on its head if RMP were able to use contracts with third parties to shift risk of loss to customers. Customers have no participation in these contracts but would be forced to bear the risk of imprudence. At the same time RMP would benefit by reducing risk, and third party contractors and vendors would have limited incentive to operate prudently knowing that RMP would not be directly responsible for losses, particularly consequential damages. The only protection for customers would be through close regulatory oversight of the contracts and relationships with the third parties. It would not be in the public interest to introduce this level of oversight and inefficiency into the operations of the utility. Moreover, it is unlikely to result in rates that are just and reasonable to customers.

CONCLUSION

RMP has failed to meet its burden of proof that it is entitled to recover the costs for the seven outages the Division identified as imprudent. The imprudence of RMPs vendors, contractors, and partners must be imputed to RMP. RMP is in the best position to manage these contracts and as between the customers and the utility, the utility should remain responsible. This is the majority position and is consistent with other Commission precedent and Utah law. It is a keystone of agency law that is further bolstered by the statutory requirement for just and reasonable rates. Imprudence by the utility or a third party is not just and reasonable and may not be included in rates. The Commission should reject the position that RMP's duty extends only so far as its contract and deny recovery of the imprudent costs the DPU has identified.

Respectfully submitted this 1st day of March 2019,

/s/ Justin C Jetter
Justin C. Jetter
Assistant Attorney General
Utah Attorney General's Office
Counsel for Utah Division of Public Utilities

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Post-Hearing Legal Brief filed by the Utah Division of Public Utilities was emailed on the 1st day of March 2019 to the following in Utah Docket 18-035-01:

BY Electronic-Mail:

Yvonne Hogle	Yvonne.hogle@pacificorp.com
Data Request Response Center	datarequest@pacificorp.com
Jana Saba	Jana.saba@pacificorp.com
D. Matthew Moscon	Matt.moscon@stoel.com
Rocky Mountain Power	utahdockets@pacificorp.com
Patricia Schmid	pschmid@agutah.gov
Justin Jetter	jjetter@agutah.gov
Chris Parker	chrisparker@utah.gov
Artie Powell	wpowell@utah.gov
Erika Tedder	dpudatarequest@utah.gov
Division of Public Utilities	
Michele Beck	mbeck@utah.gov
Robert Moore	rmoore@agutah.gov
Steven Snarr	stevensnarr@agutah.gov
Office of Consumer Services	
Gary A. Dodge	gdodge@hjdlaw.com
Phillip J. Russell	prussell@hjdlaw.com
Utah Association of Energy Users	
William J. Evans	bevans@parsonsbehle.com
Vicki M. Baldwin	vbaldwin@parsonsbehle.com
Chad C. Baker	cbaker@parsonsbehle.com
Utah Industrial Energy Consumers	

/S/
Erika Tedder, Paralegal
Utah Division of Public Utilities