GARY A. DODGE (0897)
PHILLIP J. RUSSELL (10445)
HATCH, JAMES & DODGE
10 West Broadway, Suite 400
Salt Lake City, UT 84101
Telephone: (801) 363-6363
gdodge@hjdlaw.com
prussell@hjdlaw.com
Attorneys for Utah Association of Energy Users

STEVEN W. SNARR (3022)
Special Assistant Attorney General
ROBERT J. MOORE (5764)
Assistant Attorney General
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone: (801) 366-0158
stevensnarr@agutah.gov
rmoore@agutah.gov
Attorneys for Utah Office of Consumer Services

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. 19-035-01 Joint Petition for Review or Rehearing

Pursuant to Utah Code §§ 63G-4-301, 54-7-15 and Utah Admin. Code r. 746-1-801, Petitioners Office of Consumers Services ("Office") and Utah Association of Energy Users ("UAE") submit this Joint Petition for Review or Rehearing requesting the Utah Public Service Commission ("Commission") to review and reverse its April 26, 2019 Order imposing interim rates on Utah consumers through the Energy Balancing Account ("EBA") mechanism.

PROCEDURAL HISTORY

In *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 at 18-28 (February 16, 2017, Utah P.S.C.), this Commission reversed a prior order and imposed interim rates into the EBA's statutory procedures. The Office and the UAE, among others, filed a Petition for Reconsideration or Rehearing arguing that the Commission lacked the statutory authority to impose interim rates into the EBA. On April 7, 2017, this Commission denied the Petition. *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 Petition for Agency Review or Rehearing at 8-9, (April 7, 2017, Utah P.S.C.). Thereafter, the Office and the UAE appealed the February 16th and April 7th Orders and that Appeal is presently fully briefed and argued, however, a decision in the case has yet to be issued by the Utah Supreme Court. *Utah Office of Consumer Services and Utah Association of Energy Users v. Utah Public Service Commission*, Case No. 20170364-SC.

Although the February 16, 2017 and April 7, 2017 Orders provided this Commission's legal conclusion that it had the authority to impose interim rates in the EBA mechanism and established the procedures for the imposition of interim rates, these orders left for future dockets the actual imposition of interim rates under specific factual settings. On April 27, 2018, for the first time since its 2017 Orders, this Commission issued an Order imposing specific interim rates over a specific period.[1] *Application of Rocky Mountain Power to Increase the Deferred EBA Rate through the Energy Balancing Account Mechanism*, Docket No. 18-035-01, Order at 5-6

[1] No interim rates were issued in 2017 EBA period pursuant to an agreement of the parties offsetting amounts owed by both PacifiCorp and ratepayers. *In the Matter of the Application of Rocky Mountain Power to Decrease the Deferred EBA Rate through the Energy Balancing Account Mechanism*, Docket 17-035-01, Order at 3-4 (April 25, 2017, Utah P.S.C.).

(April 27, 2018, Utah P.S.C.). Specifically, this Order increases rates on Utah ratepayers by $2,800,000.00 to be collected on an interim basis subject to true-up. *Id.* The Office and the UAE have also appealed this order, which has been fully briefed, argued and is awaiting decision by the Utah Supreme Court. *Utah Office of Consumer Services and Utah Association of Energy Users v. Utah Public Service Commission*, Case No. 20180572-SC.

On April 26, 2019, for the second time since its 2017 Orders, this Commission issued an Order imposing specific interim rates over a specific period. *Application of Rocky Mountain Power to Increase the Deferred EBA Rate through the Energy Balancing Account Mechanism*, Docket No. 19-035-01, Order at 4 (April 26, 2019, Utah P.S.C.). Specifically, this Order increases rates on Utah ratepayers by $23,900,000.00 to be collected on an interim basis subject to true-up. *Id.* This Petition for Reconsideration challenges the April 26, 2019 Order.

ARGUMENT

This Petition seeks review of this Commission's April 26, 2019 Order on the same grounds that are the subject of the appeal in Docket 09-035-15 and Docket 18-035-01. The arguments presented in the instant Petition vary from the arguments presented in the two appeals only to the limited extent that the Commission's April 26, 2019 Order imposes an interim rate, i.e., the $23,900,000 interim rate Order during the 2019 interim rate period, under a fact situation where the difference between Actual EBAC and Base EBAC exceeds the amount in interim rates attributable to the Deer Creek Mine closure. This provides further evidence that the ratepayers have been prejudiced by the imposition of interim rates as provided for in this Commission's February 16, 2017 Order, April 7, 2017 Order, April 27, 2018 Order and now its April 26, 2019 Order. Specifically, ratepayers have been prejudiced by being deprived of the use of their money

before appropriate factual and legal determinations have been made and until after the true-up if money paid for unproven costs is to be refunded.

Accordingly, Petitioners seek reversal of the Commission's April 26, 2019 Order—and to the extent necessary reversal of the February 16, 2017 and April 7, 2017 Orders—requesting a ruling that interim rates are not authorized in the EBA mechanism for the arguments provided for in Petitioners' briefing in *Utah Office of Consumer Services and Utah Association of Energy Users v. Utah Public Service Commission*, Case No. 20170364-SC and *Utah Office of Consumer Services and Utah Association of Energy Users v. Utah Public Service Commission*, Case No. 20180572-SC, which are incorporated by reference.

Petitioners will briefly summarize here the arguments supporting this Petition. The Commission erred in its February 16, 2017 Order when it ruled that Utah Code Ann. § 54-7-12(4)(a)(ii) of the general rate case statute authorizes interim rates in the EBA because Subsection (4)(a)(ii), read in isolation, does not limit its application to general rate cases. However, statutory provisions are never read in isolation. Rather, statutes are read as a whole and the meaning of a statutory provision is determined in light of the relevant context of the statute. *Monarrez v. Utah Dep't of Transp.,* 2016 UT 10, ¶ 11, 368 P.3d 846. Here, all subsections Surrounding Subsection (4)(a)(ii) by their terms are applicable only in general rate cases. Subsection (4)(a)(ii) is included in cross references made to other subsections that are limited to general rate cases and the complete statute is limited to providing the requirements, procedures and exemptions for general rate cases.

The Commission's reliance on the general rate case statute impermissibly renders portions of Subsection (4)(a)(iii) superfluous. Specifically, applying subsection (4)(a)(ii) outside the context of a general rate statute would render superfluous the subsection (4)(a)(iii) exemption

of the hearing provided for in subsection (4)(a)(ii) from the general rate case proceedings provided for in subsection (2)(d). Finally, the Commission's construction leads to untenable results, by extracting a single subsection from one statute and employing it in another statutory regime, the Commission is essentially rewriting the statutes.

Even if Subsection (4)(a)(ii) could properly be applied outside a general rate case, it cannot be applied in the context of the EBA Statute, Utah Code § 54-7-13.5. When a statute confers powers on the Commission, the powers conferred are limited to those specifically mentioned or clearly implied. *Heber Light & Power Co. v. Utah Pub. Serv. Comm'n*, 2010 UT 27, ¶ 17, 231 P.3d 1203. Here the EBA Statute encompasses a long list of requirements and procedures that do not include the concept of interim rates. Nor can interim rates procedure be considered clearly implied from the language of the statute. To the contrary, subsection 54-7-13.5(4)(c) provides that an energy balancing account must be "formed and maintained in accordance with this section" to be legally valid. Thus, the statute itself limits its application to its own procedures.

Also, the procedures of Subsection (4)(a)(ii) conflict with the mandatory requirements for a balancing account under the EBA Statute. Section 54-7-13.5(2)(e) provides: "An energy balancing account may not alter: (i) the standard of cost recovery; or (ii) the electric corporations burden of proof." While the Commission applied the correct standard of cost recovery, i.e., that only prudently incurred actual costs may be recovered, the Commission did not, and could not apply the correct burden of proof, i.e., that PacifiCorp prove by "substantial evidence" that costs were actually and prudently incurred. *Comm. of Consumer Serv. v. Utah Pub. Serv. Comm'n*, 2003 UT 29, ¶¶ 12-14, 75 P.3d 481.

The procedures this Commission adopted for initial establishment of interim rates, including a determination that PacifiCorp's filing does not appear to depart significantly from the prior years' filings, do not satisfy PacifiCorp's burden of proof. Whether the filing is consistent with prior years does not prove by "substantial evidence" that the millions of dollars in costs that flow through the EBA were actually and prudently incurred. Moreover, given the breadth and complexity of the transactions in PacifiCorp's EBA, it is not possible to apply the correct burden of proof in Subsection (4)(a)(ii)'s short 45-day window before the hearing on interim rates.

The tension between the utilities' general burden of proof and the procedures for interim rates is not present under the general rate case statute because the general rate case statute expressly provides for a lower burden of proof in an interim rate hearing. In contrast, the EBA statute expressly provides that the standard of proof remains unchanged. Therefore, even if Subsection (4)(a)(ii) applies outside a general rate case—which it does not—it cannot apply in the EBA setting.

Moreover, the Commission's reliance on *Questar Gas v. Utah Pub. Serv. Comm'n,* 2001 UT 93, 34 P.3d 218 is misplaced. First, while the Commission found support in *Questar Gas,* it did not base it decision on the rationale of the case but on its contention that Subsection (4)(a)(ii) authorized the imposition of interim rates in the EBA setting. Second, the legality of the types of interim rates at issue in this instant Petition, rates that go into effect after PacifiCorp's initial filing but before the Division's audit or a public hearing, were never at issue in *Questar Gas.* Rather, *Questar Gas* dealt only with this Commission's authority to imposed interim rates between general rate cases. *Id.*at ¶ 12. Moreover, the rationale for imposing the type of rates at issue in *Questar Gas,* to mitigate unexpected increases in costs, is different from the rationale for imposing the type of interim rates at issue in this Petition, to mitigate issues of intergenerational

transfers. *Id.* Therefore, there is no basis for extending the *Questar Gas* ruling to the type of interim rates at issue here.

Nor does the Commission's general ratemaking authority under Utah Code § 54-4-1 authorize interim rates in the EBA setting. Here, a specific statute governs the procedures of the EBA, the EBA statute does not authorize interim rates and the imposition of interim rates conflicts with the requirements of the EBA statute. Moreover, under established rules of statutory construction, specific statutes—in this case the EBA statute—govern over general statutes—in this case section 54-4-1. The omission in the EBA statue of specific procedures for interim rates are presumed purposeful and the EBA's prohibition on additional procedures and altering the burden of proof must be given effect. Accordingly, section 54-4-1 does not authorize the imposition of interim rates in the EBA context.

Finally, the challenged Orders are inconsistent with prior Orders and the Commission has not adequately justified this inconsistency. Utah Code § 63G-4-403(4)(h)(iii). Specifically, the challenged Orders are inconsistent with the Commission's prior Orders limiting Subsection 54-7-12(4)(a)(iii) interim rate proceedings to cases where the utility demonstrates that the imposition of interim rates is necessary to prevent financial harm to the utility. Although the Commission imported the general rate case statutes' procedures for interim rate, it failed to include the requirement for a showing of need to prevent financial harm to justify interim rates or otherwise offer any reason for its departure from this prior practice.

CONCLUSION

For the above reasons, and all the reasons presented in the Petitioner's briefs in *Utah Office of Consumer Services and Utah Association of Energy Users v. Utah Public Service*

Commission, Case No. 20170364-SC, Petitioners request this Commission reconsider and reverse its April 27, 2018 Order imposing interim rate in the EBA mechanism.

Respectfully submitted, May 13, 2019.

__/s/ *Phillip J. Russell*_____
Phillip J. Russell
Attorney for Utah Association of Energy Users

___/s/ *Robert J. Moore*_____
Robert J. Moore
Attorney for Utah Office of Consumer Services