

ROBERT J. MOORE (5764)
Assistant Attorney General
STEVEN W. SNARR (3022)
Assistant Attorney General
Utah Attorney General
160 East 300 South, Fifth Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0312
Facsimile: (801) 366-0101
E-mail: rmoore@agutah.gov
stevensnarr@agutah.gov
Attorney for Utah Office of Consumer Services

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Application of Rocky Mountain Power for Authority to Increase its Retail Electric Utility Service Rates in Utah and for Approval of its Proposed Electronic Service Schedules and Electronic Service Regulations	Docket No. 20-035-04 PETITION FOR RECONSIDERATION AND REHEARING
--	--

Pursuant to Utah Code §§ 54-7-15, 54-10a-301, 63G-4-301 and UTAH ADMIN. CODE r. 746-1-801, the Utah Office of Consumer Services (“OCS”) petitions the Public Service Commission of Utah (“PSC”) for review and reconsideration of its December 30, 2020 Order concluding that Rocky Mountain Power (“RMP”) carried its burden of proof that RMP acted prudently in connection with the cause of the August 2019 catastrophic generator malfunction at the Lake Side 2 power plant, a power plant owned and operated by RMP. *Application of Rocky Mountain Power for Authority to Increase its Retail Electric Utility Service Rates in Utah and for Approval of its Proposed Electronic Service Schedules and Electronic Service Regulations*, Docket 20-035-04, Order at 35 (December 30, 2020, Utah P.S.C.) (“December 30th Order”).

The PSC based its conclusion that RMP acted prudently regarding the cause of the Lake Side 2 outage on three findings. One, “RMP followed prudent practices in performing a [Root

Cause Analysis ('RCA').” December 30th Order, at 35. Two, “[t]here is nothing in the completed RCA that identifies negligence or imprudence actions as the likely cause of the outage.” *Id.* at 35-36. And three, “RMP engaged qualified expert companies to develop, perform and/or recommend procedures to operate this plant.” *Id.* at 36. The OCS does not challenge these findings. Rather, the OCS argues that these findings are legally insufficient to conclude that RMP carried its unique and heavy burden of proving the prudence of an expense used in the determination of just and reasonable rates in a general rate case. *See Comm. of Consumer Serv. v. Pub. Serv. Comm’n of Utah*, 2003 UT 29, ¶ 14, 75 P.3d 481; *Utah Dep’t of Bus. Regulations, Div. of Pub. Utilities v. Pub. Serv. Comm’n*, 614 P.2d 1242, 1245-46 (Utah 1980).

The conclusion of whether a utility has carried its burden of proof that an expense was prudently incurred presents a legal question that must be addressed by the PSC consistent with established legal principles. *Comm. of Consumer Serv.*, 2003 UT 29, ¶ 14. In *Committee of Consumer Services*, the issue before the Court was whether the PSC erred in accepting a stipulation that included in rates the costs associated with the utility’s actions of contracting with an affiliate to construct a CO₂ plant needed to alleviate safety concerns with the utility’s gas supply. *Id.* The utility and the PSC argued that on appeal that the PSC’s ruling including the costs of the CO₂ plant in rates should be upheld because it is “supported by substantial evidence in the record [and opposing parties] fail[ed] to marshal the evidence in support of the Commission's findings and to demonstrate that the evidence was insufficient.” *Id.* at 11.

The Utah Supreme Court rejected this approach. The Court held that the Commission erred as a matter of law by failing to hold Questar Gas to its burden of showing that the increase was just and reasonable.” *Id.* at ¶14.¹

The legal nature of a utility’s burden of proving that an expense should be recoverable in rates stems from the heavy burden the law places on a utility to prove its rates are just and reasonable, a burden that is unique to utility law. “In the regulation of public utilities by governmental authority, a fundamental principle is: the burden rests heavily upon the utility to prove it is entitled to rate relief and not upon the Commission, the Commission staff, or an interested party or protestant, to prove the contrary.” *Id.* Indeed, 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.” *Utah Dep’t of Bus. Regulation*, 614 P.2d at 1245.² The PSC “may not, [simply], defer to

¹ Specifically, the Court held that it reached its decision that the utility did not sustain its burden of proof that it acted prudently “**under a correction of error standard** because the Commission’s decision to accept the CO₂ Stipulation’s proposed rate increase constitutes an erroneous **application of the law**. The Commission erred by failing to hold Questar Gas to its burden of showing that the increase was just and reasonable.” *Id.* (emphasis added).

In overturning the PSC decision, the Court also commented on the abuse of discretion standard. However, this analysis was limited to the utility’s argument that the decision whether to conduct a prudence review of a contract with an affiliate was within the PSC’s discretion. Without deciding the issue the Court held: “Even assuming that the requirement of a prudence review was initially within the Commission’s discretion rather than a mandatory legal obligation, it is now an established Commission practice to which the Commission must adhere unless it presents “facts and reasons that demonstrate a fair and rational basis for the inconsistency.” *Id.* at ¶ 11. Because the record contained no such showing and because no demonstration of the prudence of the contract was made, or could have been made, the Court decided to “overturn the Commission’s decision to accept the CO₂ Stipulation and to grant the rate increase proposed therein.” *Id.*

² The above quote was taken from the fact section of the opinion and is a quote from the dissenting Commissioner’s opinion. However, the Supreme Court adopted the dissent position on the issue of a utility’s burden of proof, holding: “The comments of the dissent as to the burden of proof were correct.” *Id.*

bald assertions by management.” *Id.* at 1247.³ Rather, the utility must come forward with proof sufficiently detailed and explicit for the PSC to make an independent judgment as to the prudence of any expense to be included in rates. *Id.* at 1246-1247. “The Commission is entitled to know and before it can act advisedly must be informed of all relevant facts, otherwise, it could not effectively determine whether a proposed rate was justified.” *Comm. of Consumer Serv.*, 2003 UT 23, ¶ 14. Finally, when the record as to the prudence of an expense is inconclusive demonstrating only that the utility may or may not have acted prudently, the utility fails in its burden of proof and the expense must be excluded from the revenue requirement. *Id.* ¶ 13.

As measured by this legal standard the PSC committed legal error in ruling that RMP proved it acted prudently in regard to the cause of the catastrophic malfunction of Lake Side 2 generator. This is easily demonstrated by examining the PSC’s rationale for its decision. First, the PSC places significant emphasis on the facts that RMP contracted for two RCAs. The PSC noted that RMP acted prudently in conducting the first RCA, and added:

we do not want to provide a disincentive to RMP to engage in comprehensive RCAs for these types of events, and we particularly do not want to provide a disincentive for the second RCA that is currently in process. We find that RMP acted prudently by engaging a disinterested third party to perform a second RCA, and we will not penalize RMP for doing so because the results of that second RCA are not complete . . .

December 30th Order at 36. However, though RMP may have acted prudently in contracting for the initial RCA and may have even acted laudably in contracting for a second RCA, these facts have no bearing on whether RMP acted prudently regarding the *cause* of the Lake Side 2 malfunction. RMP’s actions in contracting for the RCAs occurred *after* the catastrophic malfunction of the Lake Side 2 generator and therefore cannot provide any evidentiary basis for the question of whether RMP acted prudently in regard to the cause of the Lake Side 2 outage.

³ See *supra*, note 2.

In *Committee of Consumer Services*, the utility and the PSC argued that policy reasons surrounding the need of the CO₂ plant for customer safety justified including the cost of the plant in rates. *Id.* The Supreme Court forcefully rejected this contention as inconsistent with the law concerning a utility's burden of proof.

We hold that the Commission's safety rationale is neither an adequate nor a fair and rational basis for departing from its prudence review standard. While safety concerns may have necessitated the construction and operation of a CO₂ plant, they do not establish who should bear the cost of these measures. . . . Since the Commission found that no such record [of the prudence of the affiliate transaction] was or could be made available, it should have refused to grant a rate increase that included CO₂ plant costs.

Id.

While there may be legitimate reasons for RMP contracting for the RCAs after the outage occurred and the PSC may feel that, for policy reasons, there is cause to allow recovery to provide incentives to RMP to conduct RCAs, these conclusions are legally insufficient to support a Commission finding that the utility acted prudently as it relates to the cause of the outage. The fact that after the catastrophic failure of the generator, RMP conducted RCAs has no legal bearing on whether RMP carried its burden of proof that it acted prudently in connection with the unknown cause of the generator malfunction.

The PSC's second rationalization put forth to justify the inclusion of costs associated with the Lake Side 2 outage fares no better. The PSC notes that "[t]here is nothing in the completed RCA that identifies negligence or imprudence actions as the likely cause of the outage." December 30th Order, at 35-36. The OCS does not disagree with this statement. However, there is nothing in the completed RCA and no other evidence on the record that exonerates RMP from causing the outage. The completed RCA is inconclusive. It did not

establish the cause of the Lake Side 2 malfunction, nor did any other evidence on the record establish a cause.

If the record does not contain evidence establishing the cause of a catastrophic generator failure, the record does not contain proof as to what entity should be responsible for the unknown cause of the outage. When the record is inconclusive regarding the prudence of an expense, as a matter of law, the utility failed to carry its burden of proof and the expense cannot be included in the revenue requirement. *Comm. of Consumer Servs.*, 2003 UT 29, ¶ 13.

Finally, the PSC's third rationale for the allowance of the costs of the Lake Side 2 outage also fails as a matter of law. Specifically, the PSC ruled that the record contains "evidence that RMP engaged qualified expert companies to develop, perform and/or recommend procedures to operate this plant." December 30th Order at 36. First, it should be noted that the record also includes evidence that a massive generator failure occurred at the Lake Side 2 plant. Thus, these procedures were either insufficient to prevent the outages or they were not followed. Moreover, the evidence presented consists merely of the testimony of a RMP official that such expert procedures were in place. As such, this evidence only constitutes "bald assertions by management" that at most only establish a "prima facie case" of prudence and are legally insufficient to carry RMP's burden of proof that it acted prudently regarding the catastrophic malfunction of the Lake Side 2 generator. *Utah Dep't of Bus. Regulation*, 614 P.2d at 1245.

It is likely that RMP has procedures and policies in place governing all its technically complex generation plants. However, by relying only on testimony that such procedures and policies exist, the Commission has effectively shifted the burden of proof regarding prudence to other parties by using the impermissible standard that costs will be presumed to be prudent unless some other party demonstrates imprudence. Such a result is inconsistent with the law. In

rejecting similar arguments, the Supreme Court of Utah has made it clear that for a utility to recover any specific cost, it has the affirmative duty to provide the PSC with all relevant facts needed for the PSC to “effectively determine whether a proposed rate was justified” regardless of any evidence, or lack of evidence, submitted by opposing parties. *Comm. of Consumer Serv.*, 2003 UT 23, ¶ 14.; *Utah Department of Business Regulations*, 614 P.2d at 1245.

Here, RMP’s testimony does not meet the legal test of providing the PSC with “all relevant facts” which is a legal necessity for the PSC to “effectively determine whether a proposed rate was justified” because the most salient fact to the question of RMP’s prudence is missing from the record, i.e., the cause of the Lake Side 2 outage. Moreover, the fact that RMP acted reasonably in its efforts to uncover the cause of the Lake Side 2 outage after the generator malfunctioned does not change this analysis. These efforts failed to identify a cause and without a known cause of the malfunction RMP has not produced “all relevant facts” necessary for the PSC to make an informed determination as to RMP’s prudence. Because the record does not contain this essential information, RMP has failed to carry its unique and heavy burden of proof. Indeed, this is what the term “burden of proof” means.

In sum, the Utah Supreme Court has found that the question of whether a utility has carried its burden of proof that it acted prudently in incurring an expense presents a question of law. The legal confines of what is necessary to carry this burden are established in the seminal cases of *Committee of Consumer Services* and *Utah Department of Business Regulations*. All three of the rationales put forth by the PSC as justification for including the cost of the Lake Side 2 outage in rates conflict with or are specifically rejected by the legal principles set out in one or both of these cases.

Ultimately, RMP has the legal obligation to affirmatively present evidence of “all relevant facts” needed for the PSC to “determine whether a proposed rate was justified.” *Comm. of Consumer Serv.*, 2003 UT 23, ¶ 14. Here the record lacks the most relevant and central fact need to determine if RMP acted prudently with regards to the cause of the Lake Side 2 outage, i.e., the cause of the Lake Side outage itself. Because RMP was unable to produce evidence of this fact, the PSC should not conclude that the utility has carried its heavy and unique burden of proof that its actions were prudent and that the cost associated with the Lake Side 2 outage can be justly and reasonably included in rates.

CONCLUSION

The OCS petitions the PSC to reconsider its December 30th Order including in rates the cost associated with the Lake Side 2 malfunction. For the reasons set forth above, as a matter of law, RMP has failed to carry its burden of proof that it acted prudently in regard to the cause of the catastrophic Lake Side 2 outage.

Respectfully submitted, January 29, 2021.

/s/ Robert J. Moore
Robert J. Moore
Assistant Attorney General
Attorney for the Utah Office of Consumer