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UTAH DEPARTMENT OF COMMERCE

Division of Public Utilities

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Comments

To: Public Service Commission of Utah

From: Utah Division of Public Utilities

Chris Parker, Director
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Date: February 21, 2024

Re: **Docket No. 24-035-03**, Investigation of Rocky Mountain Power's Transfer of Assets and Customers to Hurricane City

Recommendation (Clarify Positions)

The Division of Public Utilities ("Division") investigated the transfer of assets and customers between Rocky Mountain Power ("RMP" or "Company") and Hurricane City ("Hurricane" or "City") and determined that RMP likely should have notified the Public Service Commission ("Commission") and requested approval of the transfer before it occurred. RMP should also have asked the Commission to alter RMP's relevant CPCN to reflect changes to its service area. The Division recommends the Commission clarify certain details to prevent any future misunderstandings.

Issue

On January 11, 2024, the Commission issued a Notice of Investigatory Docket and Request to the Division to Investigate and Advise¹ ("Commission Notice") for the Division to investigate the transfer of assets and customers between RMP and the City addressing: (1) if RMP violated any applicable provision of statute, administrative rule, or prior administrative order in relation to these events; and (2) advise as to any appropriate action

¹ Notice of Investigatory Docket and Request to the Division of Public Utilities to Investigate and Advise, Docket No. 24-035-03, January 11, 2024.

<https://pscdocs.utah.gov/electric/24docs/2403503/3317872403503noidarttdoputiaa1-11-2024.pdf>.

by the Commission to ensure future compliance in the event RMP committed a violation. The Commission has asked the Division to respond by February 21, 2024.

Background

As mentioned in the prior proceeding² leading up to this investigation, there were 180 customers situated in an unincorporated peninsula (“Peninsula”) in Washington County located outside of Hurricane City limits. The Peninsula has been served by RMP with 22 of the 180 customers served under RMP’s solar agreements, which are titled Interconnection and Customer Generation Service Agreements (“Interconnection Agreements”). On August 3, 2023, RMP entered into an agreement with Hurricane City to sell its distribution assets in the Peninsula for \$206,000 as described in the Asset Purchase Agreement (“Agreement”).³ RMP notified the customers of the purchase on August 24, 2023, but did not notify the Commission. RMP transferred all assets in the Peninsula to Hurricane on November 1, 2023, and Hurricane currently provides power to all 180 customers.⁴ As described in RMP’s Motion to Dismiss, Hurricane’s intent is to annex this area because “if Hurricane provides municipal services (including electricity service) for at least one year, the city can annex the unincorporated area without a formal annexation petition.”⁵

Discussion

Do the Transferred Assets Comply with Utah Administrative Code R746-401-3?

An electrical corporation must report the construction, purchase, or sale of certain assets to the Commission 30 days before any such transaction is consummated. For RMP, this rule applies to assets with a value of more than \$10,000,000 or 5% of the utility’s gross rate base, generators over 10 MW, or transmission lines of at least 138 kV.⁶ According to the assets listed in the Agreement between RMP and Hurricane, nothing in the Agreement

² See *RMP v House*, Docket No. 23-035-48, October 13, 2023.

<https://psc.utah.gov/2023/10/13/docket-no-23-035-48/>.

³ *CONFIDENTIAL Rocky Mountain Power’s Answer and Motion to Dismiss*, Docket No. 23-035-48, Exhibit 5: Asset Purchase Agreement Between Rocky Mountain Power and Hurricane City, November 15, 2023.

⁴ *Id.*, p. 5.

⁵ *CONFIDENTIAL Rocky Mountain Power’s Answer and Motion to Dismiss*, Docket 23-035-48, November 15, 2023, p. 4.

<https://pscdocs.utah.gov/electric/23docs/2303548/330793RdctdRMPAnswrMtnDsms11-15-2023.pdf>.

⁶ Utah Administrative Code R746-401-3(A).

meets these criteria, therefore there was no need to report to the Commission based on Utah Administrative Code R746-401-3.

The Legality of Hurricane's Annexation Plan.

RMP's adherence to Utah Code Ann. § 10-8-14 was a specific concern of the Commission's and mentioned in its Notice.⁷ RMP's Motion to Dismiss states that Section 10-8-14 does not apply "because the city is not seeking to serve customers outside of city limits."⁸ At the time of the transfer (November 1, 2023), the Peninsula had not been annexed by Hurricane. The Peninsula is, by definition, outside Hurricane City limits. RMP states, "Hurricane has not yet completed annexation of [the Peninsula] as this is a multi-year process."⁹ The customers in the Peninsula are beyond the municipality's boundaries.

Utah Code Ann. § 10-8-14(4)(a) states "Except as provided in Subsection (4)(b), (6), or (10), a municipality may not sell or deliver the electricity produced or distributed by the municipality's electric works constructed, maintained, or operated in accordance with Subsection (2) to a retail customer located beyond the municipality's municipal boundary." Therefore, Utah Code Ann. § 10-8-14(4)(a) prohibits a municipality from selling electricity to retail customers outside of the municipality's boundaries, with Subsection (b) providing three exceptions:

1. Utah Code Ann. § 10-8-14(4)(b) allows a municipality to serve a customer outside of its city limits if it was serving that customer before December 15, 2013. Hurricane was not providing electrical service to the Peninsula before November 1, 2023, so this exception does not apply. This section requires Commission approval when it applies.
2. Utah Code Ann. § 10-8-14(6) allows a municipality to serve a customer outside of its city limits if a legacy customer described above requests it. There is no indication in

⁷ Notice of Investigatory Docket and Request to the Division of Public Utilities to Investigate and Advise, Docket No. 24-035-03, January 11, 2024

⁸ CONFIDENTIAL Rocky Mountain Power's Answer and Motion to Dismiss, Docket No. 23-035-48, November 15, 2023, p. 7.

⁹ *Id.* p. 4.

the record that any customers in the Peninsula requested service from Hurricane or that they had received service from Hurricane prior to December 15, 2013, so this exception does not apply. This section also requires Commission approval when it applies.

3. Utah Code Ann. § 10-8-14(10) allows a municipality to serve its own facilities outside of its municipal boundaries. There is no indication in the record that there are any Hurricane facilities on the Peninsula. If there were, those would be the only customers in the Peninsula that Hurricane could legally provide power to under this exception, so this exception does not apply.

None of the three exceptions listed above apply, therefore, Utah Code Ann. § 10-8-14(4)(a) is the applicable provision. However, RMP and Hurricane believe that Utah Code Ann. § 10-2-421(2)(a) provides an exception to Utah Code Ann. § 10-8-14. Section 10-2-421(2)(a) states:

“If an electric customer in an area being annexed by a municipality receives electric service from an electrical corporation ...the municipality may not, without the agreement of the electrical corporation, furnish municipal electric service to any electric customer in the annexed area until the municipality has reimbursed the electrical corporation for the value of each facility used to serve any electric customer within the annexed area...” (emphasis added).

This allows a municipality to ask a utility to sell its distribution assets outside of the municipal boundaries if the area is being annexed. The municipality would then be providing utility service outside of its municipal boundaries to customers for an undetermined length of time. It is not evident whether “being annexed” means the municipality is free to serve customers outside its boundary or for how long. Customers in such an area are no longer served by a public utility and are thus outside of the Commission’s jurisdiction. They also cannot vote to influence their electrical service because they are outside of municipal boundaries.

Utah Code Ann. § 10-2-421(2)(a) provides a way for a municipality to provide electric service to customers in an area “being annexed.” Utah Code Ann. § 10-2-421(2)(a) could

provide an exception to Utah Code Ann. § 10-8-14(4)(a) for an area “being annexed.” It is not clear how broad the term “being annexed” can be read. Even within the same subsection it refers to “the annexed area,” which seems to contemplate a completed annexation. If Utah Code Ann. § 10-2-421(2)(a) applies here, this provision does not explicitly require filing with the Commission.

Hurricane seeks to annex the Peninsula without filing an annexation petition. To do this, it must meet criteria established by Utah Code Ann. § 10-2-418(2)(b)(ii)(B), which for an annexation of an unincorporated peninsula with fewer than 800 residents requires that “the municipality has provided one or more municipal-type services to the area for at least one year.” Hurricane was not providing municipal-type services to the Peninsula¹⁰ prior to the agreement based on RMP’s Motion to Dismiss, which states that the reason for the Agreement was to allow Hurricane to provide electrical power to the Peninsula so that it could annex it without an annexation petition.¹¹

The legality of City service to the Peninsula seems to depend on the definition of “being annexed” in Section 10-2-421(2)(a), particularly in the absence of an annexation petition. In this instance, Hurricane could not legally annex the Peninsula without an annexation petition unless it was providing electrical service (assuming that it was not providing any other municipal type services) and could not provide electrical service unless the Peninsula was “being annexed.” The code is unclear if Section 10-2-421(2)(a) should allow a municipality to do something that was otherwise prohibited by doing another thing that was also prohibited. Such an interpretation would leave customers in areas “being annexed” unprotected for an indefinite period. This statute could also be read as merely ensuring that an electrical corporation is paid for its assets when they are transferred to a municipality annexing an area.

Thus, while the Company may not have violated statute, it is likely relevant whether Hurricane had the authority to serve these customers. If Utah Code Ann. § 10-2-421(2)(a)

¹⁰ See Utah Office of Consumer Services, *Find My Utility Mapping Tool*, showing the area served by the Washington County Water Conservancy District, last visited on February 15, 2024.

<https://utah.maps.arcgis.com/apps/Viewer/index.html?appid=573dfdb6220d4fada6d833def633b866>.

¹¹ CONFIDENTIAL Rocky Mountain Power’s Answer and Motion to Dismiss, Docket No. 23-035-48, November 15, 2023, p. 4.

does not supersede Utah Code Ann. § 10-8-14(4)(a), then the Company should not have sold the assets and RMP acted imprudently by selling to a municipality that does not have the legal ability to serve those customers. The code is somewhat unclear in this limited instance.

RMP’s Motion to Dismiss acknowledges Commission approval of the Agreement.

In its Motion to Dismiss, RMP states in paragraph 8, point (2),¹² that the Asset Purchase Agreement “automatically updates or is terminated if the Commission determines that any provision of the Asset Purchase Agreement is unlawful.” It is not clear whether this language is present because RMP and Hurricane were uncertain about the legality of the Agreement when they signed it. The Agreement contemplated the possibility that some Commission process was necessary. RMP did not submit the Agreement for approval or for notification, so the Commission could not determine if the agreement was unlawful beforehand. Therefore, if the Commission now determines that the agreement is unlawful or not in the public interest, the Commission will need to consider the cost and service implications for all Peninsula customers.

RMP’s history regarding changes to service area.

In similar situations, RMP proactively notified the Commission and received approval when altering its service area or exchanging customers.

In 2013, RMP transferred 35 customers and the distribution assets that served them to the City of Blanding (Blanding).¹³ The stated net book value of the distribution assets was \$50,000,¹⁴ thus not requiring approval under Utah Administrative Code R746-401. RMP notified the Commission and sought and received Commission approval for this transaction. The Commission’s Order did not mention modifying RMP’s service area or CPCN.¹⁵

¹² Rocky Mountain Power’s Answer and Motion to Dismiss, Docket No. 23-035-48, November 15, 2023, p.4.

¹³ Approval of Asset Transfer Agreement with Blanding Utah, Docket No. 13-035-58, April 19, 2013. <https://psc.utah.gov/2016/06/20/docket-no-13-035-58/>.

¹⁴ *Application for Approval of Asset Transfer Agreement*, Docket No. 13-035-58, April 19, 2013, p. 3. <https://pscdocs.utah.gov/electric/13docs/1303558/243552AppApprovAssetTransAgmnt4-19-2013.pdf>.

¹⁵ *Commission Order Approving Asset Transfer Agreement*, Docket No. 13-035-58, June 12, 2013. <https://pscdocs.utah.gov/electric/13docs/1303558/2447541303558oaata.pdf>.

In 2013, RMP asked the Commission to approve an Agreement for Electrical Service, allowing the City of Hurricane to serve customers in the Company's "certificated service area."¹⁶ In this instance, RMP did not ask to change its service area or its CPCN because it was not relinquishing the territory to Hurricane, but only allowing the Hurricane to serve customers within RMP's service area. RMP's filing stated that "The Parties have entered into the Agreement, subject to the Commission's approval, in compliance with Utah Code Ann. §§ 10-8-14 and 54-4-40 for the Municipality to provide electric service to Additional Customer(s) ..."¹⁷ The Commission approved this arrangement as filed.¹⁸

In 2015, RMP transferred transmission and distribution assets to the Navajo Tribal Utility Authority.¹⁹ In this instance, the Company asked the Commission to approve both the agreement transferring the assets and to amend the CPCN to reflect the changed service area.²⁰ The Commission issued its Order²¹ approving the transaction and changing RMP's relevant CPCN.

In 2021, RMP asked for Commission approval of its Agreement to Adjust Service Territory Boundaries and to change its CPCN when it made small adjustments to its service area, exchanging service territory with Beaver City ("Beaver").²² RMP described this transfer and resulting adjustments as "minor" and "proportionately minimal" with RMP adding service to two new meters and receiving approximately \$2,000 worth of distribution assets from Beaver.²³ RMP recognized the requirement for Commission approval of both the agreement

¹⁶ *Request for Approval of Agreement for Electric Service*, Docket No. 13-035-186, November 8, 2013. <https://pscdocs.utah.gov/electric/13docs/13035186/248658ReqApprovAgrmnt11-8-13.pdf>.

¹⁷ *Id.* para 6.

¹⁸ *Commission Order Approving Customer Service Agreement*, Docket No. 13-035-186, January 23, 2014. <https://pscdocs.utah.gov/electric/13docs/13035186/25025413035186oacsa.pdf>.

¹⁹ Application for Approval of Purchase and Transfer Agreement and Power Supply Agreement with Navajo Tribal Utility Authority and Amendment of Certificate of Public Convenience and Necessity, Docket No. 15-035-84, December 21, 2015.

<https://pscdocs.utah.gov/electric/15docs/1503584/271098RMPNTUAAApp12-21-2015.pdf>.

²⁰ *Id.* p. 2.

²¹ *Commission Order Memorializing Bench Rulings Approving Settlement, Amending CPCN No. 1118 and Denying Petition to Intervene*, Docket No. 15-035-84, June 10, 2016, p. 9.

<https://pscdocs.utah.gov/electric/15docs/1503584/2772891503584ombrasacnadpti.pdf>.

²² *Application of Rocky Mountain Power for Approval of Agreement with Beaver City and Amendment of Certificate of Public Convenience and Necessity*, Docket No. 21-035-03, January 22, 2021.

<https://pscdocs.utah.gov/electric/21docs/2103503/317065Application1-22-2021.pdf>.

²³ *Id.* p. 3.

and the changes to its CPCN when the service area changed. In previous situations, the Commission acknowledged this procedure when it approved RMP's request.²⁴

The above instances may be instructive in evaluating RMP's actions in this docket. In somewhat analogous situations in the past, RMP has sought approval from the Commission.

RMP and the 22 Interconnection Agreements.

The Division analyzed the Interconnection Agreement signed by Kevin House on December 16, 2019.²⁵ RMP pointed to Article 9.1 of the Interconnection Agreement, which states, "if any provision of this Agreement conflicts with any applicable... [statute, rule or tariff], then the applicable provision of the Code, Rules, or Tariff controls." The Interconnection Agreement can be preempted by a conflicting statute or rule. However, in this case, Hurricane has not annexed the Peninsula yet. It appears that the Interconnection Agreement cannot be preempted until the Peninsula has been annexed.

The ability to change, alter, or terminate an Interconnection Agreement lies with the Commission as outlined in the agreement.²⁶ Therefore, RMP should have notified the Commission and received approval before transferring customers. The Interconnection Agreement details that the Commission can change the terms of the agreement at any time. Pre-approval of the sale could have avoided some of the issues RMP is currently experiencing. If the Commission concludes customers should not have been transferred, the Commission might order that this subset of customers be compensated according to the terms of the Interconnection Agreement for the period they were improperly transferred.

²⁴ *Commission Order Approving Agreement and Amending Certificate of Public Convenience and Necessity No. 1686*, Docket No. 21-035-03, March 25, 2021.

<https://pscdocs.utah.gov/electric/21docs/2103503/3179552103503oaaaacopcann1686-3-25-2021.pdf>.

²⁵ It is assumed that the Interconnection Agreements for the other 21 customers are similar in form and substance.

²⁶ See CONFIDENTIAL Rocky Mountain Power's Answer and Motion to Dismiss, Docket No. 23-035-48, attached as Confidential Exhibit 1, INTERCONNECTION AND CUSTOMER GENERATION SERVICE AGREEMENT FOR CUSTOMER GENERATION FACILITY LEVEL 1 INTERCONNECTION 25 Kw NAMEPLATE CAPACITY OR SMALLER, November 15, 2023, Section 9.1.

Recommendations

The Division recommends the Commission:

1. Require RMP to file a request to change its CPCN to reflect the Company's actual service area affected by the sale to Hurricane.
2. Clarify that a public utility must, at a minimum, notify the Commission of any changes in the public utility's service area prior to the change taking effect.
3. Clarify that a utility's CPCN must reflect the utility's actual service area.
4. Clarify that RMP is required to notify the Commission before it transfers its customers with an Interconnection Agreement to a different service provider.

Conclusion

RMP does not appear to have violated any statute in this instance. However, any change to an electrical corporation's service area should require the electrical corporation to notify the Commission of the change and obtain Commission approval of the change to the relevant CPCNs, as RMP and the Commission have done in the past incidences mentioned above.

cc: Jana Saba, PacifiCorp
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