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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE APPLICATION OF QUESTAR GAS COMPANY TO MAKE TARIFF MODIFICATIONS TO CHARGE TRANSPORTATION CUSTOMERS FOR PEAK HOUR SERVICES	**Docket No. 17-057-09**

POST-HEARING BRIEF OF THE UTAH DIVISION OF PUBLIC UTILITIES

November 17, 2017

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Pursuant to direction from the Public Service Commission of Utah (Commission),[1] the Utah Division of Public Utilities (Division) respectfully submits its brief responding to the Initial Brief (Brief) of Dominion Energy Utah (DEU[2] or the Company). The Division recommends that the Commission find the Company's decision to enter into the Contract imprudent. DEU has not shown that the Kern River Gas Transmission Company peak hour contract (Kern River and Contract, respectively) is "necessary and in the public interest."[3] If the Commission wishes, it could withhold a prudence determination in this docket.

I. INTRODUCTION

If the Commission makes a decision on prudence in this docket, the Commission should find the Contract imprudent. The Commission should not find prudence or order transportation customers to pay a portion of peak hour contract costs on the record now before it.[4] The evidence presented in this docket is insufficient to support making a decision that the Company's action was prudent.[5] The Commission may order further evaluation, either in this docket or a 191 Docket.[6] Consequently, there is no need for the Commission to address the related allocation issue or to reach a decision when, where, and how to implement the results of a determination finding prudence.

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[1] Hearing Transcript, September 26, 2017 (Transcript) at 151:16-25 and 152:1-14.

[2] This brief will refer to the utility as DEU, reflecting the name change made earlier this year.

[3] Douglas D. Wheelwright Surrebuttal Testimony at 2:31-36.

[4] Transcript at 82:9-14.

[5] Division witness Mr. Howard E. Lubow testified that further scrutiny was warranted. Lubow Surrebuttal at 8:199-211 wherein he calls for a "more rigorous showing by the Company and an independent review. . . a process that has not occurred in this proceeding." Further, Mr. Wheelwright testified, "The Division would recommend that a more complete study of all transportation contracts be included as part of future filings in which the Company seeks recovery of the contracts' costs." Wheelwright Surrebuttal at 13:333-35.

[6] Transcript at 88:6-20.

DEU's arguments and prejudicially late-presented facts are unpersuasive. In addition, the Company's argument that the Division should be effectively estopped from raising any concerns about prudence in this docket is both legally and rationally unsupportable.

II. ARGUMENT

A. The Contract is Imprudent, the Company Failed to Meet Its Burden of Proof, and the Commission Need Not Determine Prudence at this Time

1. The Company Bears the Burden of Proof

Generally, the proponent of a proposition bears the burden of proof before the Commission. The "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."[7] Accordingly, here it is DEU's duty to prove that entering into the Contract was prudent.

2. There is Insufficient Evidence to Determine Prudence

If it makes a decision on prudence, the Division urges the Commission to find that the Contract is imprudent. DEU has failed to present substantial evidence supporting a determination that the Contract is necessary to provide safe, adequate, and reliable service. Instead, the Contract, if approved in this docket and incorporated into the proposed tariff and other rates and charges, will result in unnecessary costs to both transportation and sales customers.

The Contract is not necessary to provide safe, adequate, and reliable service.[8] The Company has developed a Design Day model including assumptions about "heating degree days,

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[7] Committee of Consumer Services v. Public Service Commission of Utah, 75 P.3d 481, 486 (Utah 2003).

[8] Lubow Surrebuttal Testimony at 2:30-34.

mean wind speed, maximum sustained wind gust, day of the week, [and] holidays"[9] During the hearing, Company witness Mr. David C. Landward was questioned about the likelihood of a Design Day event.[10] He testified that "it would be rare" if "all those things would come together as one in twenty years."[11] Indeed, he admitted at hearing that in the last 50 years of data, he had not seen all those things occur simultaneously.[12] Actually, the last Design Day event occurred over 50 years ago, in 1963.[13]

Additionally, although DEU witness Mr. Kelly B. Mendenhall testified that firm sales have increased 53% while transportation capacity has increased only 27% over the last 20 years, his testimony ignores that during that same time period actual firm sales demand has been at least 15% below DEU's Design Day requirement and has averaged over 20% below the Design Peak Demand levels.[14] Further, like other LDCs, the Company has planned its system requirements on a Design Day basis for many years.[15]

Notably, even without the Contract, the Company has not had to curtail firm customers,[16] or residential customers, in approximately 30 years.[17] Actual peak demand has been well below

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[9] Landward Rebuttal at 2:29-30. He also included "prior day demand" as a "statistically significant variable []." Id.

[10] It is important to note that Mr. Landward mischaracterized Mr. Lubow's direct testimony. Mr. Lubow did not "in either of [his] testimonies equated historic peak usage with the use of a design day peak." Transcript at 111:9-19.

[11] Transcript at 39:2-9

[12] Transcript at 39:10-12.

[13] Transcript at 110: 12-14.

[14] Lubow Direct at 8:196-200.

[15] Transcript at 115:12-25 and 116:1-7.

[16] Lubow Surrebuttal at Exhibit 2.3SR.

[17] Transcript at 110:14-16.

the amount of pipeline capacity held by the Company.[18] The need for the peak hour contract is questionable at best.

Even if the need for a peak hour contract was considered legitimate for *planning* purposes, the *operational* need has not been demonstrated in the record.[19] Mr. Lubow stated, "[a review of DEU's rebuttal evidence] further supports my conclusion that resource planning based on a peak hour is improper, unfounded, unneeded, and if approved, will only lead to unreasonable and unnecessary costs being borne by QGC customers."[20] He also testified that, "the Company planning process continues to be based on a design peak day in its modeling approach to estimate firm sales under peak design day conditions. It has remained essentially unchanged over the last 10 years."[21] Also telling, the Company did not prove that there was anything unique about its customer load characteristics. Additionally, the Company is the only shipper that has chosen to sign up for peak hour service on Kern River.[22]

DEU's approach of using of peak hour contracts is also unprecedented. Mr. Lubow testified that "the idea of an LDC basing its upstream pipeline requirements on a peak hour, to my knowledge is unique within the industry" and he has "not seen any industry literature . . . supporting LDC planning for peak hour requirements in making peak pipeline capacity commitments."[23] When asked, DEU failed to produce industry literature supporting LDC planning for peak hour requirements in making pipeline capacity commitments.[24]

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[18] Transcript at 110:14-18.

[19] See pages 2-3, supra and see Transcript at 115:12-25 and 116:1-7.

[20] Lubow Surrebuttal Testimony at 2:30-38.

[21] Transcript at 110:2-4.

[22] Lubow Direct at 9:240-242.

[23] Transcript at 110:4-10.

[24] Transcript at 110:7-10. See also Lubow Surrebuttal at 2:47-53 and Exhibit 2.1SR.

Finally, the Company has failed to show in this docket that it meaningfully explored more economical alternatives to the Contract.[25] DEU's customer Rocky Mountain Power's Lake Side Power Plant currently has a Company controlled flow meter.[26] The Company has not fully explored adding additional customer flow meters. For example, although the Company stated it had an idea of the cost of flow meters for its largest 12 customers,[27] it neither offered financial incentives to those customers,[28] nor does it seem it presented a comparison between the onetime costs of installing flow meters and ongoing peak hour contracts. The Division calculated that with an estimated cost of $50,000 per meter[29] for 12 meters, $1.2 million of Contract costs would be offset over just more than two years, and even sooner if the costs of a peak hour service contract with DEU-Questar Pipeline, were included,[30] and/or the discussed Liquified Natural Gas Plant (LNG) was pursued. [31]

3. Even if the Commission Decided that the Company Had Presented Evidence Proving Prudence, Because Much Evidence Was Only Revealed in Rebuttal Testimony, the Parties Were Prejudiced

The Commission should find the Contract imprudent. The initial application was accompanied by a mere seven pages of direct testimony and "four brief exhibits which lacked a significant amount of the necessary and substantial detail."[32] In its brief, DEU relied heavily upon evidence that was not presented until rebuttal testimony, and that testimony was

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[25] Transcript at 116:13-25, 117:1-20, 118:2-8. See also Transcript at 119:16-25, 120:1-25, and 121:1-6.

[26] Transcript at 22:1-3 and 44:19-23.

[27] Transcript at 69:6-20.

[28] Transcript at 59:1-8.

[29] Transcript at 69:11-15.

[30] On October 2, 2017, in Docket No. 17-057-20, DEU filed seeking, inter alia, to include the Questar Pipeline peak hour contract its 191 Account. That filing also contained a request to include the Contract in the 191 Account.

[31] See Lubow Surrebuttal at 8:205-213.

[32] Transcript at 81:20-23.

accompanied by 20 additional exhibits.[33] Three of the four Company witnesses filing rebuttal were new witnesses. Division witness Mr. Douglas D. Wheelwright stated:

> The information filed as rebuttal testimony is much more extensive and more detailed than the original filing. Rebuttal testimony includes information from previous IRP dockets, regulator station pressure assumptions and hourly flow rate information. This level of detail was not included in the original filing, nor was it provided in response to Division data requests asking for such information.[34]

Mr. Wheelwright also testified at hearing, that "the late filing of this additional and more detailed information made it challenging for the Division and its consultant to have sufficient time to analyze and evaluate the new information or allow for additional discovery."[35] By presenting such evidence as testimony only by new witnesses in rebuttal, the Company effectively prevented the Division from hiring an engineering expert.[36]

The Division used its best effort to respond to this new evidence in the limited time available. DEU alleges in its brief that "[n]o party has provided evidence contesting any of the foregoing."[37] This claim in disingenuous given the fact that the parties had no time to review and address much of the evidence filed just a month before hearings. To put this into clear perspective, the Company filed nearly all of its evidence 116 days into a 148-day docket schedule. The Division had 25 days to respond in surrebuttal and seven more days to prepare for the hearing.[38] The inability of the Division to respond to the new evidence presented in rebuttal testimony should not be taken as agreement with or acknowledgment of DEU's assertions.

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[33] Transcript at 81:23-25.

[34] Wheelwright Surrebuttal at 1:19-23.

[35] Transcript at 82:105. See also Transcript at 86:15-25 and 87:1-9.

[36] Transcript at 97:7-12.

[37] DEU Brief at p. 18.

[38] See Docket No. 17-057, Scheduling Order, issued November 6, 2017 (Scheduling Order).

4. The Commission Does Not Need to Make a Prudence Determination in this Docket

The Commission is not required to make a prudence determination in this docket. This is not a docket implementing requested changes to DEU's 191 Account or a general rate case. While the Commission may have made decisions in other tariff dockets, it is not required to do so, and is certainly not required to do so here. This issue was addressed at hearing., resulting, in part, in briefing.[39]

At least once per year, DEU is required to make what is commonly referred to as a 191 Account filing to adjust the balance in that account. In 2017, the Company filed two 191 Account proceedings before the Commission: Docket No. 17-057-07, which was filed simultaneously with this docket and Docket No. 17-057-20, which included a second peak hour contract with DEU-Questar Pipeline as well as the Contract. To the extent necessary, prudence issues pertaining to peak hour contracts issues have been assigned their own track in Docket No. 17-057-20.[40] The Division's argument for an imprudence finding in this docket should not be seen as precluding Division support for a prudence decision on one or more related questions in another docket.

5. There is No Need for the Commission to Determine Allocation Issues or Collection Mechanism

The Commission should not determine allocation or collection methods for the Contract because entering into the Contract was imprudent. A Commission decision on prudence is a condition precedent to including the cost in rates. Docket No. 17-057-20 includes a request to include both the Contract and the significantly more costly DEU-Questar Pipeline peak hour contract in rates. Therefore, while it is clear that allocation issues and implementation issues

[39] See Transcript at 146:12-19.

[40] See Scheduling Order.

cannot not be determined now if the Commission issues a decision finding the Company's action imprudent; even if Commission finds the Contract prudent, issues will remain to be decided with regard to the other peak hour contract.

Should the Commission determine that entering into the Contract was prudent, "The allocation of the cost should be determined based on how the peak hour contract is to be used."[41] Accordingly, the Division urges the Commission to use the allocation method set forth in Mr. Lubow's and Mr. Wheelwright's testimonies.

DEU and Utah Association of Energy users questioned allocating costs to interruptible customers. Interruptible customers should be allocated a portion of the costs because they have benefitted from the Contract.[42] Arguments to the contrary do not recognize that benefit. Company witness Mr. William Schwarzenbach, III stated that during the 2016-2017 heating season, the Contract was used "to adjust supply to 'better match demand on the system with flows from Kern River."[43] Mr. Wheelwright testified that the Contract was used:

> 6 days in December 2016, 21 days in January 2017, and 3 days in February 2017 for a total of 30 days. It is doubtful that all of these days were peak weather event days, which indicated that this Contract was being used under normal operating conditions.[44]

Similarly, the Lake Side contract should be included.[45]

DEU's reliance on Docket No. 14-057-31 (Transportation Imbalance Charge)[46] as an example of when SNG costs have been allocated outside of a general rate case may be called into

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[41] Wheelwright Surrebuttal Testimony at 2:37-38.

[42] Transcript at 84:3-5. Wheelwright Surrebuttal at 8-9:196-217.

[43] Wheelwright Surrebuttal at 3:51-54.

[44] Wheelwright Surrebuttal 3:65-70.

[45] Wheelwright Surrebuttal at 6:134-152.

[46] Docket No. 14-057-31, Report and Order, page 31, E. The Flat Fee as an Alternative to Questar's Proposed Imbalance Charge.

question.[47] While the Commission approved the Company's proposal in this Docket, this was not an allocation of SNG cost to all transportation customers. In the Transportation Imbalance Charge docket, the Commission approved the allocation of SNG services for those transportation customers whose nominations are outside the ±5% tolerance window. Transportation customers whose nominations stay within the tolerance limit are not subject to this charge and are not allocated a portion of the SNG cost. The Commission specifically rejected a proposed flat fee to all transportation customers since the intent of the proposed change was to improve the gas nomination practices of transportation customers.[48] The Commission also specifically recognized that this issue would be addressed in the 191 pass-through filing and in the anticipated 2016 general rate case to see if the stated objectives (improved gas nominations) are being achieved.[49] This Docket did not allocate a portion of SNG costs to all transportation customers as the Company has indicated and transportation customers can avoid this charge through accurate nominations.

B. The Division's Prior Participation in Other Dockets or Meetings Does Not Estop the Division from Challenging Prudence in This Docket, Nor Is Equitable Estoppel a Remedy the Commission Has Jurisdiction to Grant

1. The Division is Not Estopped from Challenging Prudence in this Docket

The Company in essence claims that the Division is estopped from challenging prudence in this docket. This argument is presented without legal support and is unpersuasive. It appears that the Company is attempting to make an argument that because the Division allegedly failed to express concern about entering into a peak hour service contract in other dockets or meetings,

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[47] DEU Brief at p.27.

[48] Docket No. 14-057-31, Report and Order, page 31, E. The Flat Fee as an Alternative to Questar's Proposed Imbalance Charge.

[49] Docket No. 14-057-31, Report and Order, page 37, J. Semi-Annual Updates.

and allegedly did not express concerns until it filed its direct testimony, the Division is now estopped from challenging the prudence of the Kern River Contract in *this* docket.

DEU often bases its claim upon the Division's participation in other dockets, such as the 2016/2017 and 2017/2018 IRP dockets. However, an IRP docket is a "one party presentation," and is very different than this docket or dockets addressing 191 Account issues.[50] Information in these other dockets completely lacks the specificity needed to address prudence concerning the need for any peak hour contract, or more particularly the need or prudence for this *specific* Contract. The Company ignores the fact that on multiple occasions, including small meetings involving only the Company and the Division, the Division not only expressed skepticism that there is a need for any peak hour contract, but also specifically asked the Company for more information or additional explanation concerning the Contract. The Division has been perplexed throughout this docket as to why its questioning in many different settings of the justification for the Contract was not met with a stronger filing by the Company.

The Division is not, and cannot be, estopped from questioning the quantity and quality of the Company's evidence and the prudence of its decision. The Commission should find DEU's entering into the Contract imprudent.

First, the Division has no affirmative duty to object in other dockets or in meetings to a contract not yet before it. It is only in a case-specific docket where pertinent facts and applicable law are presented. It is in testimony or comments where, based upon those specific facts and applicable law, the Division sets forth its position. To assume otherwise, binding the Division to a position based on off-the-record or informal meetings would render the regulatory process, including this docket, and its companion pass through docket, meaningless, and would do harm

[50] Wheelwright Surrebuttal at 4:99.

to the concept of due process. In essence, it would allow the Division to nullify its duty to the public interest and the Commission on the strength of insufficiently expressed skepticism. Even had the Division acquiesced—and it has not—it lacks the authority to cast off its obligation to participate appropriately in Commission proceedings to represent the public interest.

Second, estoppel is not legally supportable under these circumstances. In 2011, in *McLeod v. Retirement Board*,[51] the Court of Appeals reiterated that generally estoppel cannot be asserted against state agencies. *McLeod* pointed to prior Utah Supreme Court cases addressing estoppel, noting that, "Generally, 'the doctrine of estoppel is not assertable against the state and its agencies."[52] *McLeod* recognized that the Court has allowed exceptions to this general rule "where it is plain that the interests of justice so require."[53] The required level of unusual circumstances is only met if "the facts may be found with such certainty, and the injustice suffered is of sufficient gravity, to invoke the exception."[54] In the few cases where estoppel was applied, the cases turned on "very specific written representations by authorized government entities."[55]

Here, the facts are not certain but instead are disputed. The injustice, if any, is not grave. There is no specific written representation upon which reliance could reasonably be placed. Indeed, no such verbal representation was ever given. Applying estoppel against the Division here is not supported by Utah law, and is contrary to reason.

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[51] 257 P.3d 1090, 1095 (Utah Ct. App. 2011) (*McLeod*).

[52] See *McLeod* at 1095 citing *Eldredge v. Utah State Retirement Board*, 795 P.2d 671, 675 (Utah Ct. App. 1990) (Eldredge).

[53] *McLeod* at 1095 (internal citations omitted).

[54] *Id.*

[55] *Id.*

2. Even If Estoppel Applied, the Commission Cannot Order Such a Remedy

The Commission lacks jurisdiction to order a remedy based upon equitable estoppel. The The Commission itself has stated:

> There are legal concepts under which sufficient factual proof might sustain relief to Complainants-equitable estoppel and negligence come to mind. Unfortunately for Complainants, our jurisdiction simply does not extend to affording relief under such theories...[56]

Thus, even if the facts and the law somehow supported equitable estoppel, that remedy could not be granted by the Commission. The Commission should find entering into the Contract was imprudent.

III. CONCLUSION

The Commission should find DEU's action entering into the Contract imprudent. The Division requests that the Commission make a finding of imprudence, or order further investigation. The Commission should deny the relief sought by DEU because the Company failed to present substantial evidence on the record supporting a Commission decision finding prudence or ordering transportation customers to pay the costs of the Contract.

RESPECTFULLY SUBMITTED this 17th day of November 2017.

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[56] *Complaint of Robert and Anne Baker v. Mountain States Telephone and Telegraph Company*, Docket No. 99-049-52 (Utah Public Service Commission 1999).