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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

IN THE MATTER OF THE  
APPLICATION OF DOMINION ENERGY  
UTAH FOR APPROVAL OF A THIRD-  
PARTY BILLING RATE

Docket No. 17-057-T04

**DOMINION ENERGY UTAH'S  
COMBINED OPPOSITION TO  
MOTION TO RECONSIDER AND  
MOTION TO DISMISS PETITION FOR  
DECLARATORY RULING**

Pursuant to R746-1-301 and R746-1-801(3) of the Utah Administrative Code, Utah Code Annotated §§ 63G-4-301 and 63G-4-503, and Rule 12(b)(6) of the Utah Rules of Civil Procedure, Questar Gas Company dba Dominion Energy Utah ("Dominion Energy" or the "Company") hereby submits its opposition to the Rocky Mountain Gas Association's ("RMGA") Motion to Reconsider, filed on August 28, 2017 ("RMGA Motion"), and its motion to dismiss the Petition for Declaratory Ruling, filed on September 1, 2017 ("Petition") by RMGA, Utah Home Builders Association ("UHBA"), the Utah Plumbing & Heating Contractors Association ("UPHCA"), and the Independent Electrical Contractors Association of Utah ("IECU")

(collectively Petitioners). The RMGA Motion and the Petition are collectively referred to as the “Filings.”

On September 28, 2017, the Utah Home Builders Association withdrew the Motion to Reconsider that it had filed on August 28, 2017 (“UHBA’s Motion”), and it withdrew from the Petition. The arguments set forth below apply equally UHBA’s Motion and, to the extent the Commission declines to accept the UHBA’s withdrawal, the Company asserts the same arguments it offers in opposition to the Filings.

## **I. INTRODUCTION**

Through its Application in this docket, Dominion Energy sought approval to modify its Natural Gas Tariff No. 500 (“Tariff”) to include Section 8.08. The Company proposed this change to clarify the circumstances and charges for third parties billing for services on the utility bill. In response to the Application, the Division of Public Utilities (“DPU”) and the Office of Consumer Services (“OCS”), filed comments recommending approval of the proposed Tariff change provided that it incorporate the parties’ stipulated method for calculating the charges to be paid by third parties. (*See* Jul. 28, 2017 Order (“Order”) at 2.) No other parties sought to intervene, nor did any other party submit comments regarding the Application or seek to participate in the June 29, 2017, hearing on the Application.

Following the hearing, and based on the comments received, the uncontested evidence showing that the third-party billing services would “serve to reduce costs” for ratepayers, the lack of any evidence suggesting any negative impact to the Company’s customers’ rates, and Utah Code Ann. § 54-4-7, which “expressly contemplates the inclusion of third-party charges on utility bills and enumerates protections [for customers],” the Commission approved the revised Tariff. (*Id.* at 2-3.) The Commission ordered Dominion Energy, in implementing the Tariff

changes, to “comply with all applicable statutes and regulations . . . including, but not limited to, Utah Code Ann. § 54-4-37.” (*Id.* at 3.)

On August 29, 2017, the day after the last day to submit motions for reconsideration or rehearing, RMGA filed its motion. In its motion, RMGA states that it attempted to file its motion on August 28th, but “inadvertently left off the PSC email address” when it emailed its motion and, as such, “the PSC did not receive the RMGA Motion until the morning of August 29.” (Petition at 1.) The RMGA Motion did not cite to any rule or statute that grant RMGA the right to seek reconsideration of the Order or to otherwise participate in this docket.

The RMGA Motion asks the Commission to reconsider its Order because, according to RMGA, the approved Tariff changes provide “Dominion Energy Solutions, a for-profit subsidiary of Dominion Energy with an unfair advantage over all other for-profit HVAC and Plumbing contractors who offer home warranty programs, and natural gas furnace and water heater repair work in Utah.” (RMGA Motion at 1.)<sup>1</sup> Specifically, RMGA claims that customers may be confused and believe they are contracting with Dominion Energy instead of with Dominion Energy Solutions. (RMGA Motion at 1.) It further contends, without support, that Dominion Energy Solutions “has plans to further blur the line between the ratepayer based entity and the for-profit subsidiary, by advertising the warranty programs in Dominion Energy newsletters that are sent out regularly along with ratepayer gas bills, a prospect that small HVAC and Plumbing contractors may not be able to accomplish because of the cost and ability to provide mechanical services in Dominion Energy’s entire service area.” (RMGA Motion at 2.) Finally, it purports to challenge, without any support, “the discussion and findings in the docket,

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<sup>1</sup> The Filings repeatedly refer to Dominion Energy Solutions as a for-profit subsidiary of Dominion Energy and as a third-party that would allegedly receive an unfair advantage under the Tariff. However, the unregulated entity discussed in this proceeding was Dominion Products and Services, Inc., which is an affiliate of Dominion Energy, but is not a subsidiary of the Company.

that there is not a readily discernable market for warranty programs in Utah.” (RMGA Motion at 2.)

Out of concern for its “day-late motions,” RMGA, together with UPHCA and IECU (which did not file any post-hearing motions), filed the Petition on September 1, 2017. (Petition at 1.) The stated reason for the Petition is the concern that RMGA’s late-filed motion may not be considered. (*Id.*) The Petition asserts, in nearly verbatim fashion, the arguments asserted in the motion to reconsider. (*Id.* at 1-3.) The Petition also seeks the same relief. It asks the Commission to “reconsider the public interest of third party billing services offered by Dominion Energy that would allow their for-profit subsidiary: Dominion Energy Solutions, an unfair competitive advantage over all other private warranty service providers . . . ,” it seeks rescission of the Order, and it asks the Commission to stop implementation of Dominion Energy Solutions “plans to advertise and offer HVAC, Plumbing and Electrical warranty programs on Dominion Energy ratepayer gas bills until [the] Petition is considered by the Public Service Commission.” (*Id.* at 3-4.) The Petition, like the motions to reconsider, fails to cite to any rule or statute authorizing the filing of the Petition.

Each of the Filings should be rejected. They are procedurally improper, are based on clear misunderstandings of the Company’s Application and incorrect assumptions, and lack any substantive basis for the relief being sought.

## **II. ARGUMENT**

### **A. The Filings Are Procedurally Defective.**

While the Filings are each substantively deficient (as discussed below), the motion to reconsider is untimely, and each of the Filings is otherwise procedurally improper. For that reason alone, they can and should be summarily dismissed.

Utah Code Ann. § 63G-4-301 provides the basis for a request for reconsideration of a Commission order where “a statute or the agency’s rules permit parties to any adjudicative proceeding to seek review of an order by the agency or by a superior agency.” § 63G-4-301(1). Under that statute, a request for reconsideration must be filed within 30 days of “the issuance of the order with the person or entity designated for that purpose by the statute or rule.” (*Id.*) Utah Code Ann. § 54-7-15(2) provides for Commission review or rehearing of an order. It states that, “[a]fter any order or decision has been made by the commission, any party, stockholder, bondholder, or other person peculiarly interested in the public utility who is dissatisfied with an order of the commission may apply for rehearing of any matters determined in the action or proceeding.”

While review or reconsideration is available under these provisions, it is available only where a timely motion has been filed with the Commission. As RMGA acknowledges in the Petition, because the Order was issued July 28, 2017, its motion filed on August 29, 2017 was untimely.

Further, review, rehearing or reconsideration is only available to *parties* to a proceeding. As this Commission recently held:

Under both Sections 63G-4-301 and 54-7-15 of the Utah Code Ann. referenced above, *a person making a request for review or rehearing of a commission action must be a “party” to the proceeding. As each of these statutes apply here, a “party” is narrowly defined to include intervenors (e.g., the two parties who filed and were granted intervention in this docket) or other persons authorized by statute (i.e, the Division) to participate in the proceeding. Mr. Uhlig neither filed for nor was granted intervention in this docket. Therefore, he lacks standing to challenge the Commission's May 5, 2014 order in this docket. Accordingly, we dismiss his appeal.*

June 19, 2014, Report and Order Denying Request for Review or Rehearing, *In the Matter of the Application of Hicountry Estates Homeowners Ass'n for Approval of Its Proposed Water Rate Schedules & Water Serv. Regulations*, 13-2195-02, 2014 WL 2915911, at \*2 (emphasis added) (citations omitted). Because RMGA is not a party to this docket, it has no standing to seek reconsideration of the Order.

As to the Petition, it is also procedurally improper and should be dismissed. Under Rule 12(b)(6) of the Utah Rules of Civil Procedure, a motion to dismiss is properly granted when, even assuming the factual allegations are true, they provide no legal basis for recovery. *Hess v. Johnston*, 2007 UT App 213, ¶ 7, 163 P.3d 747; *Mackey v. Cannon*, 2000 UT App 36, ¶ 13, 996 P.2d 1081.<sup>2</sup> In the Petition, Petitioners cite to no rule or statute that allows them to seek reconsideration and rescission of the Order through a petition filed in a docket to which they are not a party. In fact, the Petition is an admitted and improper attempt to side-step the limitations period imposed by Utah Code Ann. § 63G-4-301. The Petition itself states that the Petition was filed only because the RMGA Motion is untimely. Allowing non-parties (or parties for that matter) to avoid the reconsideration timeframe by simply re-characterizing the motion as a petition for declaratory relief would entirely undermine the purposes and limitations imposed by § 63G-4-301 and § 54-7-15. Moreover, filing a petition does not render Petitioners parties to this docket. They never moved to intervene, as required by Utah law, and, as such, were never admitted as parties by the Commission. *See* Utah Code Ann. § 63G-4-207. Therefore, they lack standing to challenge the Order.

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<sup>2</sup> There is no specific provision for motions to dismiss or for summary judgment under the administrative rules governing the Commission. When no administrative rule governs, “the Utah Rules of Civil Procedure and case law interpreting these rules are persuasive authority in Commission adjudications” unless otherwise specified by statute, rule or Commission order. Utah Admin. Code. R746-1-105.

Similarly, to the extent Petitioners intended their Petition to be filed under the procedures set forth in R746-101-104 of the Utah Administrative Code, it is also improper. A petition under R746-101 *et seq.* is only proper to obtain a declaratory ruling, which is narrowly defined as “an administrative interpretation or explanation of *rights, interest or other legal relationships* under a statute, rule or order.” R746-101-1(B)(2) (emphasis added); *see also* R746-101-2(A). This makes clear that a declaratory ruling is only available to determine the applicability of a statute, rule or order, not to contest and seek reconsideration of an order. Utah Code Ann. 63G-4-503(a)—which governs declaratory orders and authorizes the process set forth in R746-101 *et seq.*—further demonstrates the scope of the relief available through a declaratory order. It states that “[a]ny person may file a request for agency action, requesting that the agency issue a declaratory order *determining the applicability of a statute, rule, or order* within the primary jurisdiction of the agency to specified circumstances.” *Id.* (emphasis added). It is the applicability of a statute, rule or order that can be sought through a declaratory order, not a substantive rehash of the evidence giving rise to an order.

The Petition does not seek a determination of the applicability of the Order, to explain any rights under the Order, or to seek an administrative interpretation of the Order. It seeks to have the Commission reconsider and set aside the Order. *See* Petition at 3 (seeking to have the Commission “[r]escind the approval of Docket No. 17-057-T04,” and “[h]ave the Public Service Commission reconsider the public impact of third party billing services . . .”).<sup>3</sup> As a result, the relief being sought in the Petition is not legally available under the procedure set forth in R746-101 *et seq.*, and the Petition should therefore be dismissed under Rule 12(b)(6) of the Utah Rules of Civil Procedure.

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<sup>3</sup> In addition to these defects, the Petition is not signed as is required for reconsideration. *See* Utah Code Ann. § 63G-4-301(1)(b)(i).

**B. The Filings Are Substantively Unsupported.**

1. The Filings Are Based Misunderstandings of the Tariff and Incorrect Assumptions.

In addition to being procedurally improper, the Filings lack any substantive merit. In their haste to prepare the Filings, Petitioners appear to have misunderstood the relief Dominion Energy sought through its Application or how the approved Tariff changes will function. As is clear from the Application, Dominion Energy opened this docket to seek to define the circumstances under which third parties could seek to have line items listed on a utility bill for third-party services provided to customers, and to establish the charges the Company would collect from third parties for that listing to protect customers from paying that cost. (Application at 1-2.) It is indisputable that § 54-4-37 allows third parties to include charges on utility bills if the requirements of that statute are satisfied. But the statute does not clarify the amount that should be charged by the Company for those services. The Tariff approved by the Order fills that void.

Further, under the Tariff, third parties can only include charges on a customer utility bill if it does so in compliance with the protections afforded by § 54-4-37 and Section 8.08 of the Tariff. That statute and section of the Tariff make clear that, among other things, the following protections must be afforded to customers:

- the third-party provider must be a qualified provider that is clearly identified to the customer;
- the services or merchandise must be explicitly identified to the customer;
- the customer must have expressly consented to the services and the inclusion of charges for those services in the bill;

- the third-party provider must maintain a toll-free number to contact to resolve disputes; and
- the third-party provider must clearly identify the payment amount required for the services or merchandise.

*See* § 54-4-37(4); Tariff Section 8.08.

Petitioners' claim that the Tariff will create confusion because customers may not clearly understand when they are receiving services from a Dominion Energy affiliate as opposed to the Company. (*See* Petition at 1-3; RMGA Motion at 1-2.) They also assert, incorrectly, that Dominion Energy Solutions has plans to use Company newsletters to market products and services to Dominion Energy customers. (*Id.*) Both assertions are unfounded and overlook the foregoing protections and the Company's filings.

Section 54-4-37 requires that each customer be clearly informed of any third-party service provider and that the provider receive explicit consent from the customer before including any services on a utility bill. Moreover, in its filings, and to avoid precisely the concern raised by Petitioners, the Company clarified that it will comply with the provisions of Utah Code Ann. § 54-3-8 by not granting any preference or advantage to any third-party service provider, will ensure that third-party services are separately delineated on a bill, will distinguish any third-party provider from the utility, and require third parties to market their services independent of the Company. (*See* Direct Testimony of Judd Cook at 2:34-35, 3:52-57.) Thus, the Order does not create "an unfair advantage" for any entity. All third parties that satisfy the requirements of the Tariff will have equal access to the billing option provided in the Tariff, any Dominion Energy affiliate will have to clearly disclose to the customer that it, not Dominion

Energy, is the service provider, and no third party will be using the Company's mailers for advertising purposes. Each third-party will be responsible for its own marketing. (*Id.* at 3:55-56.)

Finally, to the extent Petitioners are claiming that Dominion Products and Services, Inc. (DPS) directly competes with them by providing HVAC, plumbing or electrical services, there is no merit to that claim. DPS provides "utility service line and energy related home protection service *contract* programs." (*Id.* at 6:138-38) (emphasis added). It does not provide HVAC, plumbing, electrical or similar services. In fact, Petitioners and their participants would likely benefit from DPS's services, as it would need to contract with service providers to provide warranty services its customers request.

2. The Filings Are Substantively Unsupported.

Finally, the Filings should be dismissed because they lack any substantive support. As the entities bringing the motions and the Petition, the Filers bear the burden of "marshal[ing] the record evidence that *supports* the challenged finding" and "establishing facts sufficient" to support their alternative position. *See* Utah Admin. Code R746-1-801(2) (emphasis added). The Filings are devoid of any evidence to support their claims:

- There are no declarations or affidavits to support any representations presented in the Filings;
- The Filings claim that the Commission's Order fails to address "customer confusion," but offer no evidence (such as expert testimony) that could support any finding that customers would in fact be confused by the Tariff; and
- The Filings claim that other contractors "offer warranty programs" and "*may* provide services that are less expensive or a better option for the gas customer," but offer no

support for these claims. (See RMGA Motion at 1-2; *see also* Petition. at 2 (emphasis added).)

The Filings also attempt to challenge findings from the Order without providing any reasonable support for their challenges. For instance, the Filings claim that the Commission erred by finding that there is “not a readily discernible market for warranty programs in Utah.” (RMGA Motion at 2; *see also* Petition at 2.) But this statement misunderstands the finding of the Commission. The Order states that “no readily discernible market exists” from which to determine the market price for the service of “includ[ing] the third parties’ line item charges on Dominion customer bills.” (Order at 1-2) Petitioners are confused regarding the distinction between the market for warranty services and the market prices for including line item charges in utility bills. As such, their objection is not a justification to revisit the Order, as not party claimed (and the Commission did not determine) that there is no market for warranty services in Utah.

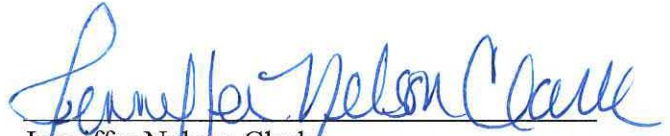
Similarly, there is no support offered for Petitioners’ claimed dispute regarding the finding that the Tariff would not “negatively impact customers in a manner unrelated to their rates.” (RMGA Motion at 2; *see also* Petition at 2.) The Filings offer no evidence to refute this finding. Nor do they address the fact that a statute *specifically allows* for the type of billing services approved by the Order. (See Order at 3 (citing Utah Code Ann. § 54-4-37).)

A party seeking reconsideration of a Commission finding must do more than simply object—a party must provide *evidence or a legal basis* that justifies a change to the order. Petitioners have failed to provide either. Instead, they have rushed to get something lodged with the Commission, without having considered the actual evidence or the Order. There is no justification for reconsidering or readdressing the Order.

### III. CONCLUSION

For the foregoing reasons, Dominion Energy respectfully requests that the Commission deny the RMGA Motion, and dismiss the Petition.

DATED: September 28, 2017.



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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DOMINION ENERGY UTAH'S COMBINED OPPOSITION TO MOTION TO RECONSIDER AND MOTION TO DISMISS PETITION FOR DECLARATORY RULING** was served upon the following by as set forth below on September 28, 2017:

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