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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Pass-Through Application of Dominion Energy Utah for an Adjustment in Rates and Charges for Nature Gas Services in Utah	Docket No. 19-057-18
Application of Dominion Energy Utah for and Adjustment to the Daily Transportation Imbalance Charge	Docket No. 19-057-19
Application of Dominion Energy Utah to Change the Infrastructure Rate Adjustment	Docket No. 19-057-20
Application of Dominion Energy Utah to Amortize the Conservation Enabling Tariff Balancing Account	Docket No. 19-057-21
Application of Dominion Energy Utah for an Adjustment to the Low-Income Assistance/Energy Rate	Docket No. 19-057-22
	QUESTAR GAS COMPANY DBA DOMINION ENERGY UTAH'S LEGAL COMMENTS IN RESPONSE TO COMMISSION ORDER

Pursuant to the Scheduling Order, Notice of Hearing, and Direction to Comment ("Order"), issued by the Public Service Commission of Utah ("Commission") on September 10, 2019, and the Amended Scheduling Order and Notice of Hearing ("Amended Order"), issued by the Commission on September 16, 2019, DEU provides the following legal comments in response to Commission's request for the parties to "explain how they distinguish the interim rates sought in these dockets from those the Supreme Court held the PSC lacks authority to approve" in the Utah Supreme Court's ruling in *Utah Office of Consumer Services and Utah Association of Energy Users v. Public Service Commission et al.*, 2019 UT 26, 445 P.3d 464 ("Opinion").

LEGAL COMMENTS

A. The Opinion Is Not Applicable to the Dockets Before the Commission.

The Commission's question regarding the applicability of the Opinion is a useful and necessary inquiry, particularly given the Opinion's recency and its focus on the implementation of interim rates in the context of PacifiCorp's EBA statute. That said, a careful review of the Opinion demonstrates that it is not applicable to the interim rates sought in the present dockets for at least two reasons.

First, in the *Office of Consumer Services* case, the Utah Supreme Court based its conclusion that the interim rates approved by the Commission were improper on the assumed concession that, in seeking those interim rates, PacifiCorp had failed to prove "by substantial evidence" that the costs giving rise to those rates were "prudently incurred" or "just and reasonable." 2019 UT 26, ¶ 46. Specifically, the Court held:

> The interim rates at issue were imposed without a requirement that the public utility prove by "substantial evidence" that the costs incorporated in the rates were "prudently incurred" or "just and reasonable." We hold that this runs afoul of the controlling standard set forth in Utah Code section 54-7-13.5(2)(e)(ii). And we set aside the Commission's orders on this basis.

Id. ¶ 2 (emphasis added). It was that concession which led the Court to conclude that the Commission's order approving PacifiCorp's requested interim rates had altered the required burden of proof, in violation of Utah Code § 54-7-13.5(2)(e)(ii):

> We reverse on this basis. We conclude that the Commission's orders unlawfully altered the burden of proof that PacifiCorp must satisfy before recovering its claimed EBA costs. And we accordingly set aside the Commission's orders interjecting an interim rate procedure into the EBA process and authorizing PacifiCorp to recover $2.8 million on an interim basis.

Id. ¶ 48. No such concession has been made in these dockets, and DEU can demonstrate by substantial evidence that its proposed costs and associated rates are prudent, just and reasonable.

DEU does not concede that its applications and supporting materials in these dockets do not establish, by substantial evidence, that the costs incorporated into its proposed rates were prudently incurred and that its proposed rates are just and reasonable. On the contrary, as discussed in more detail below, DEU maintains that the information and materials it has already provided, together with other information that may be requested, will establish, by substantial evidence, that the costs incorporated into the proposed rates were prudently incurred and that the proposed rates are just and reasonable. No party has argued that the Company's pass-through costs were not prudently incurred or that the proposed rates are not just and reasonable, and a hearing on DEU's proposed rates has not yet occurred. Accordingly, the Opinion does not bar DEU's ability to seek, or the Commission's authority to approve, the interim rates requested in these dockets.

Second, in addition to being factually distinguishable from the *Office of Consumer Services* case, these dockets are legally distinguishable from that case. DEU's applications present issues the Utah Supreme Court did not address in the Opinion. The Opinion *does not address* the burden of proof DEU is required to satisfy to obtain Commission approval of interim rates under DEU's 191 Account. The Opinion also does not address Utah Code 54-7-13.5(3) or

the relationship between DEU's 191 Account and the Legislature's passage of that statute. This much we *do* know. DEU's 191 Account, and the Commission's authority to implement interim rates in connection with that account, has now been reaffirmed twice by the Utah Supreme Court. *See Questar Gas Co. v. Utah Public Service Comm'n*, 2001 UT 93, ¶ 12, 34 P.2d 218; *Utah Office of Consumer Services*, 2019 UT 26, ¶¶ 36, 38. The interim rate procedure established in connection with DEU's 191 Account has been in place for decades, without objection or complaint by any party or court, and notably, and without ever requiring DEU to satisfy the burden of proof referenced in the Opinion.

When Utah Code § 54-7-13.5(3) was passed during the 2009 Legislative session, the Legislature gave no indication that it intended to override, replace, or eliminate the interim rate procedure that had been in effect for many years preceding the passage of that statute, or that it intended to change the burden of proof that had been applied to interim rate proceedings associated with DEU's 191 Account whether in the past or on a going-forward basis. If anything, the lack of a specific mention of an intent to replace the 191 Account procedure or to change the burden of proof indicates that the Legislature did not intend to (i) eliminate the Commission's authority to approve interim rates in connection with DEU's 191 Account, (ii) overrule prior Commission decisions approving interim rates in connection with that account, or (iii) change the showing that must be made to obtain approval of interim rates in connection with the 191 Account. *See Siebach v. Brigham Young University*, 2015 UT App 253, ¶ 22, 361 P.3d 130 (rejecting the argument that the Legislature intended to preempt certain existing common law rules when it passed a statute, and quoting *Gottling v. P.R. Inc.*, 61 P.3d 989, 998-99 (Utah 2002) (Durham C.J. dissenting) and Norman J. Singer, *Sutherland Stat. Constr.* § 50.01, at 422 (4th ed. 1984), for the proposition that "[t]he legislature is presumed to know the common law which existed before the enactment of a statute, and 'absent an indication that the legislature

intends a statute to supplant common law, the courts should not give it that effect.'").

This is important because, as the Opinion does not address the burden of proof applicable to interim rates authorized by the Commission in connection with DEU's 191 Account, the Utah Supreme Court has never held that the "burden of proof" language contained § 54-7-13.5(3) was intended to change the burden of proof that has been applied to interim rates approved as part of DEU's 191 Account pass-through filings. In other words, while the Utah Supreme Court has previously upheld the Commission's authority to implement interim rates through the 191 Account, it has never stated that the burden of proof required to approve those rates is the same burden of proof it applied in the Opinion, or that the Legislature intended § 54-7-13.5(3) to only refer to a single burden of proof for all proceedings and all circumstances. The statute itself does not specify the burden of proof, nor does it rule out that "the burden of proof" language in § 54-7-13.5(3) was intended to refer to the burden of proof that has historically applied to 191 Account interim rate proceedings, as well as the burden of proof that has been applied to requests for approval of final rates.[1]

In short, there are enough factual and legal differences between DEU's interim rate request and the proceedings giving rise to the *Office of Consumer Services* case to make the Opinion inapplicable to DEU's request for approval of interim rates in these dockets.

B. DEU's Request More Than Satisfies the Standards for Approval of Final Rates.

Even setting aside the factual and legal differences between DEU's request for interim rates and the proceedings giving rise to the *Office of Consumer Services* case, there is more than

[1] DEU is cognizant of the fact that, because filings under Utah Code § 54-7-13.5(3) have become synonymous with DEU's 191 Account, interim rate requests have most often simply referred to § 54-7-13.5(3). DEU could amend its applications to seek interim rates, exclusively citing to only its 191 Account and *Questar Gas*, 2001 UT 93, ¶ 12. DEU is willing to pursue that course if it were necessary to obtain the rate changes it is proposing in its filings.

sufficient evidence to demonstrate, by substantial evidence, that DEU's proposed rates are just and reasonable and can be made final.

First, there is no basis to question the prudence of the costs included in DEU's filings, and the Division has not historically questioned the prudence of those costs as part of its audits. This is not surprising as virtually all of the contracts at issue have been reviewed and deemed prudent by the Commission in past proceedings. For example, the Wexpro family of agreements have all expressly been reviewed and approved by the Commission in a series of formal dockets. In addition, DEU's upstream storage and transportation is provided under contracts with FERC-regulated interstate pipeline companies. Moreover, while the purchased-gas supply contracts are subject to Division review during the Company's pass-through proceedings, those contracts are standard contracts that are rarely questioned, and are not being objected to by any party in these dockets. In the rare event that the prudency of a contract were to become an issue, the Commission has the authority to open a separate docket to address that issue.

Second, the costs included in the Company's 191 account are very straight-forward, and the Division's past audits have produced very few adjustments. During the past 10 years, the Division has only identified *a total* of $15,000 in adjustments in DEU's costs. To put this number in perspective, those adjustments apply to pass-through applications seeking more than $5,000,000,000 in cost recovery. There is no basis on which to believe the current filings are any less accurate or to question the prudence of the costs contained in the Company's pass-through filings.

Third, the combination of an account that adjusts for over- or under-collection, prompt prudency reviews (in the rare instances where they would become necessary), and audits of historical information show not only that the costs included in DEU's filings have been prudent, but also that the corresponding rates sought in DEU's pass-through filings have been just and

reasonable. No party to this proceeding has challenged the rates proposed by DEU, and they are clearly just and reasonable, particularly when one considers the alternative. Denying the Company its requested $11,532,000 increase will reduce cash flows and put pressure on the credit metrics for the Company, potentially resulting in additional costs for customers. Additionally, denial of the proposed rates would result in the Company continuing to carry the $11,532,000 under-collection in the 191 account. This will cost customers an additional $503,948 in annual carrying charges ($11,532,000 multiplied by the current Commission approved 4.37% carrying charge). This negative impact on customers dwarfs the magnitude of any adjustments the Division has identified over *the past ten years*, and would certainly dwarf any possible adjustments (if any) identified in the present filings. As the Division of Public Utilities noted in its initial comments in response to DEU's applications:

> Given the Division's historical experience auditing the 191 account, the Division can confidently say the risk of the requested rates being imprudent is far outweighed by the risk of negative effects from stifling commodity-related cash flow before procedures can be adapted . . . ."

(DPU Action Request Response at 2.) For the reasons discussed above, The Company agrees with the Division's assessment. Therefore, not only should the Commission approve the proposed rates as just and reasonable because the Company has met its burden of proof, but also because the denial of the Company's requested relief would result in unjust and unreasonable rates for both the Company and the customers.

As a final point, DEU notes that the very existence of a balancing account provides an opportunity for the Division to identify de-minimus adjustments, even if the rates are "final." A balancing account, by its very nature, assumes that the account will be out of balance for some period and to some extent due to externalities that are out of the Company's control. This imbalance is "trued-up" with each filing. For example, weather and prices of market purchases can fluctuate from what was forecast, but the fluctuation is always adjusted for in the following

filing. The elimination of the balancing account would, in many cases, result in customers paying more in rates than they would if rates based on reasonable forecast that is later adjusted.[2] This is particularly true since each and every pass through application seeks to amortize any over- or under-collected balances, and the Division can propose adjustments found in one pass-through during the immediate subsequent pass-through.[3]

Therefore, DEU maintains that the Commission can approve and should approve the rates contained in DEU's applications as final rates.

DATED this 20th day of September, 2019.

Respectfully submitted,

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[2] While perhaps an obvious point, the Company notes that there is nothing inherently unjust or unreasonable about setting rates based on forecasts determined using reasonable forecasting methodologies. Rates are sent in many utility contexts based on forecasting.

[3] This audit period is not indefinite. The Company's Utah Natural Gas Tariff No. 500 (Tariff) requires that any adjustments be identified and proposed within one year. (Tariff at Section 2.06.)

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **QUESTAR GAS COMPANY DBA DOMINION ENERGY UTAH'S LEGAL COMMENTS IN RESPONSE TO COMMISSION ORDER** was served upon the following persons by email on September 20, 2019:

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