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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Investigation into Potential Statutory Changes to Utah Code § 54-7-15.)	Docket No. 19-999-11
)	
)	Comments of the Office of Consumer Services
)	

Pursuant to Utah Code § 54-10a-301 and Utah Admin. Code r. 746-1, the Office of Consumers Services (“Office”) submits these Comments in response to the Utah Public Service Commission’s (Commission) May 6, 2019 Request for Comments into the investigation of the Potential Statutory Change to Utah Code § 54-7-15, to change the date by which the Commission must issue an Order on a section 54-7-15 Petition for Reconsideration from twenty days to thirty days. The Office strongly supports this proposed change. A section 54-7-15 Request for Reconsideration is a pivotal requirement in an appeal of a Commission decision and all parties benefit if the Commission has adequate time to craft an order. Conversely, the additional ten days to issue an order on reconsideration will not meaningfully impact the long and arduous process of appealing a Commission decision.

BACKGROUND

On May 6, 2019, this Commission issued a Request for Comments in docket 19-999-11 concerning whether the Commission should “pursue a statutory change to Utah Code Ann. § 54-7-15 during the 2020 General Session of the Utah Legislature” changing the time by which the Commission must issue an order on a section 54-7-15 Petition for Reconsideration from twenty days to thirty days. This Commission explained that section 54-7-15 must be read in concert with Utah Code § 63Gk-4-301(2)(a), which provides a respondent fifteen days to respond to a Petition for Review leaving the Commission only five days to issue an order. Moreover, when the date for response falls on a weekend, which occurs regularly, the time to issue an order drops to three days and when the next Monday is a holiday the time to issue an order drops to two days. Request for Comments at 1 n1. The Request for Comments suggests that all parties would benefit from allowing the Commission an additional ten days to ensure that the order on reconsideration receives “adequate attention to deliberation, drafting, and approval.” *Id.*

RECOMMENDATION

The Office strongly supports pursuing the proposed change to section 54-7-15. The ruling on a 54-7-15 Petition to Reconsider is a pivotal component of the process of appealing an order from this Commission and adequate time to craft the order is of significant importance. On the other hand, the extra ten days will have, at most, a de minimis effect on the time it takes to appeal an order from the Commission.

A. A Ruling on a Petition for Reconsideration is a Pivotal Component of an Appeal.

As this Commission is aware, an order on a Petition for Reconsideration is of central importance in an appeal from this Commission because section 54-7-15(2)(b) provides a party “may not urge or rely on any ground not set forth in the [Petition for Reconsideration] in any

appeal to any court.” See *Utah Ass’n of Mun. Power Sys. v. Pub. Serv. Comm’n*, 789 P.2d 298, 300 & n. 1 (Utah 1990) (“issue is not preserved for consideration on appeal unless it has been specifically raised in a petition for rehearing”); *Utah Dep’t of Bus. Regulations v. Pub. Serv. Comm’n*, 602 P.2d 696, 699 (Utah 1979) (appellate courts do not have subject matter jurisdiction over issues not raised in Petition for Reconsideration). Accordingly, parties have a significant incentive to raise as many issues as possible in order not to waive an issue on appeal. Indeed, in the last appeal filed from a Commission order, *Monticello Wind Farm v. Pub. Serv. Comm’n*, Case No. 20180572-SC, the Petitioner filed a forty-two-page Petition for Reconsideration.¹ The Petition raised several substantive, complex and novel issues, some of which were only obliquely addressed in the Petitioner’s pleadings leading to the Order that is the subject of the Petition, some of which were not raised at all.² In cases of new or only obliquely raised issues, the order from the Petition for Reconsideration will become the primary order reviewed on appeal.

Moreover, Utah appellate courts require Commission orders to adequately delineate the reasons for the Commission’s conclusions. Specifically, the Commission must “make subsidiary findings in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions.” *Milne Truck Lines, Inc. v. Pub. Serv. Comm’n*, 720 P.2d 1373, 1378 (Utah 1986). Moreover, “findings should be sufficiently detailed to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached.” *Id.* Fashioning an order that sufficiently supports conclusions for numerous, at times new, issues raised in a Petition for

¹ Petition for Reconsideration found at:

<https://pscdohcs.utah.gov/electric/17docs/1703568/302632MWFPetReconsidRehear6-6-2018.pdf>

² See Offices’ Response to Petition of Monticello wind Farm LLC for Reconsideration and Rehearing (identifying newly raised issues), found at

<https://pscdocs.utah.gov/electric/17docs/1703568/303018OCSRespPetMWFReconRehear6-22-2018.pdf>.

Reconsideration in three days is a formidable task that this Commission should not be required to undertake regularly.

In addition to the need to address substantive issues, the manner in which this Commission writes its orders significantly impacts the manner in which the decision is reviewed. In *Murray v. Utah Labor Comm'n*, 2013 UT 38, ¶¶ 8-40, 308 P.3d 461, the Utah Supreme Court reexamined the standards of review for appeals from agency decisions. The Court observed that there are several standards of review, abuse of discretion, issues of law and issues of fact etc., that have significant impact on the amount of deference the appellate court gives to an agency's decision. And the amount of deference given a decision can easily determine the outcome on appeal.

For example, for mixed questions of fact and law if the factual nature of the decisions dominates, the Courts use the deferential standard of whether the agency's decision is clearly erroneous. *Id.* at ¶ 14 (citing *Salt Lake City Corp. v. Labor Comm'n*, 2007 UT 4, ¶ 13, 153 P.3d 179). Conversely, in a mixed question of fact and law where the legal nature of the decision dominates, the Courts use the least deferential standard and review the decision de novo. *Murray*, 2013 UT 38, at 40. Because the question of whether in a mixed question of fact and law the legal or factual nature of the decision dominates may be a close issue, the manner in which this Commission writes its decision may determine this issue, which in turn could determine the outcome of the appeal.

In sum, three days, or even five days, for the Commission to write an order from a section 54-7-15 Petition for Reconsideration is grossly insufficient given the likelihood that numerous issues—some which might be raised for the first time—will be presented in the Petition, the requirements for the written orders, and the importance of a well-reasoned order both to the

newly raised substantive issues and to the standard of review and thus the ultimate outcome of the appeal. Indeed, a well-reasoned order may convince an aggrieved party that an appeal would be futile thus avoiding any appeal at all.

B. An Extra Ten Days for the Commission to Issue an Order from a Section 54-7-15 Petition for Reconsideration is De Minimis Given the Long Process of an Appeal.

Appealing an Order from this Commission is a long and painstaking process. Several months, sometimes over a year, can pass between the Order on the Petition for Reconsideration and oral argument. Given this expansive time frame, ten additional days for this Commission to issue an order is insignificant. Moreover, if a Petitioner wishes to, it could easily make up the additional ten days by making perfunctory filings earlier than required by the Rules of Appellant Procedure. For example, the Petition for Review is a simple document to prepare and Rule 14, Utah R. App. P., allows for thirty days after the issuance of the Order on Reconsideration for the filing of a Petition of Review. The Docketing statement, again not a complex document, is filed twenty-one days after the Petition for Review. Rule 9, Utah R. App. P. In the fifty-one days to file these perfunctory documents, a Petitioner can easily make up the additional ten days being proposed to issue an order on a Petition for Reconsideration. Therefore, an additional ten days to issue an Order on Reconsideration is an insignificant countervailing factor as compared to the importance of a well-constructed Order on a Petition for Review.

CONCLUSION

For the forgoing reasons, the Office strongly supports the Commission's proposal to pursue a statutory change to Utah Code Ann. § 54-7-15 during the 2020 General Session of the Utah Legislature, changing the time the Commission must issue an order on a section 54-7-15 Petition for Reconsideration from twenty days to thirty days.

Respectfully Submitted, June 19, 2019.

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