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Application of Rocky Mountain Power for an Accounting Order for Settlement Charges Related to its Pension Plan	)	Docket No. 18-035-48
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	)	Legal Brief filed on behalf of the Utah Office of Consumer Services
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Pursuant to the Scheduling Order and Notice of Oral Argument issued by the Utah Public Service Commission (“Commission”) on March 5, 2019, the Utah Office of Consumer Services (“Office”) hereby submits its legal brief in the above proceeding.

**BACKGROUND**

On December 31, 2018, Rocky Mountain Power (“Company”) filed with the Commission an application seeking a deferred accounting order for settlement charges related to its pension plans. In support of its application the Company asserted that it has incurred settlement charges in 2018 because certain eligible pension participants took permissible lump sum cash distributions in 2018. The settlement charges were incurred because the 2018 lump sum cash distributions in aggregate exceeded a defined accounting threshold derived using actuarial information. The Company requests that a deferred regulatory account be established to allow amortization of these 2018 pension settlement charges as well as possible future settlement charges to be recovered in future rates.

On February 1, 2019, the Division of Public Utilities (“Division”), the Office, and the Utah Association of Energy Users (“UAE”), each filed comments opposing the Company’s request.

The Office reaffirms the position taken in its February 1<sup>st</sup> comments (1) that the Company has failed to show that costs associated with 2018 cash lump sum retirements demonstrate unusual volatility, (2) that the Company has failed to meet its burden of proof in showing why a different accounting treatment of pension costs from how they were treated in the Company's last rate case is warranted or necessary to satisfy the public interest, and (3) that there is no support for carving out pension costs for specialized, or single-issue rate treatment, outside the context of a general rate case proceeding where all costs and expenses can be examined using the lens of a consistent time period to ensure that overall rates will be just and reasonable.

In further support of this position, the Office submits this legal brief.

### **NECESSARY FACTUAL CLARIFICATIONS**

#### **THE COMPANY HAS FAILED TO SHOW THAT THE 2018 COSTS ASSOCIATED WITH CASH LUMP SUM RETIREMENTS DEMONSTRATE UNUSUAL VOLATILITY**

Facts associated with the retirements and related costs of pensions that occurred during 2018 do not show unusual or extraordinary circumstances. Pension expense was included as a component of the revenue requirement in the Company's last rate case.<sup>1</sup> The pension expense in the last rate case was based on actuarial calculations consistent with Generally Accepted Accounting Principles (GAAP). Based upon the numbers that were submitted in the Company's rebuttal testimony in the rate case and confirmed in a response to a data request submitted by the Office,<sup>2</sup> a representative annual pension expense of \$21 million was allowed in connection with the rates that went into effect as a result of a settlement.

The Company's response to data requests submitted by the Office indicates the following:

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<sup>1</sup> Docket No. 13-035-184.

<sup>2</sup> See response to the Office's Data Request No. OCS 1.2 (attached).

- The number of employees that retired and received lump sum cash distributions pursuant to provisions of the Company's pension plan during 2018 is near the average of the five most representative years from 2013 through 2018.<sup>3</sup>
- The total amount of lump sum cash distributions paid to plan participants pursuant to the Company's pension plan in 2018 was \$52,249,575.45, an amount that is substantially similar to the \$52,183,189.75 that the Company paid in lump sum cash distributions to plan participants in 2013.<sup>4</sup>
- The Company currently projects that for each of the years 2019 through 2021, the number of retirees that will elect to take a lump sum cash distribution pursuant to the Company's pension plan will be 200.<sup>5</sup>
- The Company's current projections of the aggregate dollar amounts the Company might pay for lump sum cash distributions for each of the years 2019 through 2021 will not exceed \$40,000,000.<sup>6</sup>

While the Office acknowledges that the actual amounts associated with lump sum cash distributions as well as retiree decisions associated with taking lump sum cash distributions can vary, depending on interest rates and other economic factors, such variances were contemplated when the plans were established providing for the option for retirees to elect to take their pensions via a lump sum cash distribution. The fact that the retirees may take lump sum cash distributions and that such cash distributions impact the determination of pension expense under GAAP was a known fact at the time of the last general rate case and was, or should have been, taken into account when the Company entered into a settlement resolving all issues of that case.

The inclusion of pension expense based on the Company's existing pension plans and the resulting actuarially determined pension expense, calculated based on GAAP as a component of the Company's rates that were found to be just and reasonable in the Company's last general rate case was appropriate. Nothing has factually occurred that would suggest that current rates are no longer just and

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<sup>3</sup> As shown in the Company's response to the Office's Data Request No. 1.10 a., in 2014, only 150 retirees took lump sum cash distributions. 2014 appears to be an outlier. The other five years appear to be more representative. For those years, the number of retirees taking lump sum cash distributions ranged from 204 to 224. The average number of retirees taking lump sum cash distributions for these five years is 212. For 2018, the number of retirees taking a lump sum cash distribution was 211, a number just below the average of the five most representative years.

<sup>4</sup> See the Company's response to the Office's Data Request No. 1.10 b.

<sup>5</sup> See the Company's response to the Office's Data Request No. 1.10 c.

<sup>6</sup> See the Company's response to the Office's Data Request No. 1.10 d.

reasonable as it relates to the rate treatment of pension plans and related expenses.<sup>7</sup> No changes in accounting policies have occurred that would suggest the need for a change in the Commission's approved ratemaking policies as it relates to the treatment of pension plan expenses. The Company has failed to show a significant variance in the facts associated with its year-to-year experience.<sup>8</sup>

**THE COMPANY HAS FAILED TO SHOW THAT IT WILL BE FINANCIALLY HARMED AS A RESULT OF THE 2018 SETTLEMENT CHARGES**

As indicated above, annual pension expense of \$21 million was allowed in rates that went into effect as a result of a settlement in the most recent prior general rate case. For the twelve months ended December 31, 2018, the Company's pension expense will actually be a pension income amount of \$16.9 million (negative pension expense) if its proposed accounting treatment is accepted<sup>9</sup> and pension expense will only be \$3.5 million if its proposed accounting treatment is rejected.<sup>10</sup> Clearly, the actual 2018 pension expense that results if the Company's request is rejected of \$3.5 million is substantially less than the \$21 million considered in the Company's last general rate case.

As demonstrated in the table below, the annual pension expense has been substantially lower than the \$21 million that was presented in the last general rate case. The Company has benefited from the lower actual pension expense each year since the establishment of rates in the last general rate case.

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<sup>7</sup> There is no factual showing that would allow the Commission to exercise its authority under Utah Code Section 54-4-4(1)(a) or support a finding that current rates are unjust or unreasonable.

<sup>8</sup> The fact that the Company can demonstrate that its lump sum cash distributions for 2018 may have exceeded its actuarially planned threshold by approximately \$11.2 million, does not warrant changing the accounting policies that have supported the Company's just and reasonable rate for the past several years. Nor do the 2018 numbers warrant a change in accounting policies as we review the Company's projections over the next three years.

<sup>9</sup> See the Company's response to the Office's Data Request No. 1.6, Attachments OCS 1.6-1 and OCS 1.6-2.

<sup>10</sup> Even if the Application is rejected, the Company would record pension expense of only \$3.5 million, which is shown on Attachment OCS 1.6-2 as "Benefit Cost or (Income)" and "Total Benefit Cost or (Income) for Fiscal Year."

ACTUAL PENSION EXPENSE<sup>11</sup>

2014	\$11.6 M	
2015	\$18.5 M	
2016	\$13.2 M	
2017	(\$12.4 M)	
2018	\$3.5 M	Without requested special accounting treatment
2018	(\$16.9 M)	With special requested accounting treatment

If the Company's requested special accounting treatment is rejected, RMP's currently projected annual pension expense for 2019 through 2021 would continue to be substantially lower than the \$21 million amount considered in the last general rate case, and in fact, is projected to be annual pension income (negative expense) for each year, 2019 through 2021.<sup>12</sup> Under the Company's proposal, the actual recorded pension expense will be considerably lower than the amount considered in the last rate case and it would still be permitted to defer pension costs for future recovery from ratepayers that would not occur absent its request being granted. These facts were presented in the Office's Comments filed in this docket on February 1, 2019. It is compelling that the Company did not dispute these basic facts in its Reply Comments filed on February 19, 2019. The Company is unable to demonstrate that it is financially harmed if its request is rejected as the resulting pension expense will still be substantially less than the amount contemplated in the base rates currently being recovered from ratepayers. Even if financial harm could be demonstrated, the Company's appropriate remedy would be to file a general rate case where all changes in costs and revenues could be examined at the same time.

**THE PENSION SETTLEMENT CONTEMPLATED IN THIS DOCKET  
IS NOT COMPARABLE TO THE 2008 PENSION CURTAILMENT EVENTS**

In its February 19, 2019 Reply Comments, the Company discusses the Division's and the Office's positions regarding the establishment of deferral accounting for certain pension costs contemplated in Docket No. 08-035-93. In Docket No. 08-035-93, the Company sought permission to allow deferral accounting associated with both pension curtailment gains and the impact of a required change in the

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<sup>11</sup> See the attachments to the Company's responses to the Office's Data Request OCS 1.4 and OCS 1.6.

<sup>12</sup> See the Company's response to the Office's Data Request OCS 1.6, Attachment OCS 1.6-2.

pension plan asset and liability measurement date.<sup>13</sup> The pension curtailment gains addressed in the 2008 docket were caused by significant changes to the retirement plans offered to employees. Specifically, the retirement plan for the IBEW Local 659 union employees changed from the defined benefit pension plan to a 401(k) program.<sup>14</sup> Additionally, the non-union employees were given the option of either a 401(k) only retirement plan or a cash balance retirement plan.<sup>15</sup> The employees switching to 401(k) programs triggered a curtailment gain, the treatment of which was addressed in the 2008 docket.<sup>16</sup> Additionally, the change in the pension plan asset and liability measurement date arose from a change in GAAP with which the Company was required to comply.<sup>17</sup>

Thus, the Company acknowledged in its Reply Comments that the events that impacted pension costs that were contemplated in Docket No. 08-035-93 were caused by: 1) substantial changes to the retirement plan offerings provided by the Company to its union and non-union employees; and 2) a required change in the pension measurement date used for determining the actuarially determined pension expense for which the Company had no control. The pension settlement for which the Company is seeking special regulatory accounting treatment in this case was caused by the normal operation of the existing retirement plans and not a substantial change to the retirement plans being provided to the Company's employees. As indicated previously in this brief, the number of employees retiring and receiving lump sum cash distributions pursuant to the provisions of the Company's existing retirement plans in 2018 is consistent with recent historic years and consistent with projected future years. The Company's attempt to compare the 2018 pension settlement costs that arose through the normal operation of the pension plan to the substantial changes made by the Company to the pension plan offerings to its employees in the 2008 docket is disingenuous. It is not an apples-to-apples comparison. While the Company attempts to use statements made by the Division and the Office in Docket No. 08-035-93 in

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<sup>13</sup> Reply Comments of Rocky Mountain Power, filed February 19, 2019, at 3 – 4.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> Reply Comments of Rocky Mountain Power, filed February 19, 2019, at 5-6.

support of its position in this case, the pension costs at issue in this case are part of the normal operation of the existing pension plans and are not comparable to the facts and circumstances at issue in the 2008 docket.

**APPLICABLE LEGAL PRINCIPLES**

**THE COMPANY HAS FAILED TO MEET ITS BURDEN OF PROOF  
IN SHOWING HOW THE PUBLIC INTEREST WOULD BE SERVED  
BY POSTPONING THE RECOGNITION OF PENSION COSTS  
THROUGH ITS PROPOSED DEFERRED ACCOUNTING.**

The Utah Code Section 54-3-1 requires that “[a]ll charges made, demanded or received by any utility . . . for any product . . . or for any service rendered . . . shall be just and reasonable.” This Commission has determined that the current rates established for the Company to collect pension plan related costs meets this just and reasonable standard.<sup>18</sup> There has been no showing that current rates are inadequate or unjust and unreasonable. A careful review of the Company’s rates in a general rate case proceeding, in which all costs and revenues can be analyzed, is necessary to determine whether a change in current rates and the current related accounting treatment of pension costs in rates is necessary.

As to any proposed change to the policies and principles underlying current rates, the burden of proof clearly falls upon the utility. As the applicant in this proceeding, it is the party suggesting a change. As the utility involved in this case, the burden of proof clearly rests upon it. As the Utah Supreme Court observed in *Utah Dep’t of Bus. Regulations v. Pub. Serv. Comm’n*, 614 P.2d 1242 (Utah 1980):

In the regulation of public utilities by governmental authority, a 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. The utility has the burden of proof to demonstrate its proposed increase in rates and charges is just and reasonable. The company must support its application by way of substantial evidence, and the mere filing of schedules and testimony in support of a rate increase is insufficient to sustain the burden. Rate making is not an adversary proceeding in which the applicant needs only to present a prima facie case to be entitled to relief. A state regulatory commission, whose powers have been invoked to fix a reasonable rate,

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<sup>18</sup> Current rates were deemed just and reasonable as part of the Settlement approved by this Commission in Docket No. 13-035-184.

is entitled to know and before it can act advisedly must be informed of all relevant facts.

*Id.* at 1245-46. *See also, Comm. of Consumer Serv. v. Pub. Serv. Comm'n*, 2003 UT 29, 75 P.3d 481 (the utility bears the burden of presenting the evidence necessary to support the Commission's essential findings); *Mountain States Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 145 P.2d 790, 792 (Utah 1944) (if there is no substantial evidence to support an essential finding, that finding cannot stand and a rate order predicated upon it must fail).

While the Company's application does not seek an immediate increase in customer rates, it does seek to preserve through the establishment of a regulatory deferral of its 2018 settlement charges a cost that would otherwise be recorded as a component of pensions expense in 2018, which would give the Company the opportunity to recoup such 2018 pension costs over time. The Company has failed to meet its burden of proof in demonstrating that the proposed accounting change is factually warranted, necessary to ensure the utility's financial stability, or that it would satisfy the just and reasonable standard. There has been no showing of a significant cost variance. Nor has there been a showing of a resulting pension expense if its request is rejected that would significantly exceed the level contemplated in current base rates. While the application alludes to rate variability or instability, a continuation of current just and reasonable rates -- without approving the Company's proposed change -- would be the best course to ensure continued rate stability. The Company has failed to show that its proposal is in the public interest.

**THERE HAS BEEN NO SHOWING OF UNFORESEEN OR EXTRAORDINARY  
CIRCUMSTANCES THAT WOULD WARRANT CARVING OUT  
PENSION COSTS FOR SPECIALIZED OR SINGLE-ISSUE RATE TREATMENT**

In an attempt to preserve an opportunity to recover the 2018 settlement charges that would otherwise have to be recognized as an offsetting expense to current income, the Company has proposed to establish a deferral account that would allow it to recover part of these pension costs in the future. This proposal contravenes established legal standards that prohibit single-issue ratemaking and violates legal principles associated with retroactive ratemaking.



In *Utah Dep't. of Bus. Regulations v. Pub. Serv. Comm'n*, 720 P.2d 420 (Utah 1986) the Utah Supreme Court addressed the Commission's authority and process in establishing just and reasonable rates. There the Court found:

The PSC has broad authority to regulate a utility's business. . . . That authority, however, must be construed to harmonize with the general rules for rate making set by the legislature, to wit: all rate making must be prospective in effect and rates may be fixed only in general rate proceedings.

*Id.* at 423.

The Court further elaborated on utility attempts to make rate changes to effectuate corrective actions for past events, or retroactive ratemaking, stating: "The bar on retroactive rate making has no exception for missteps made in the rate making process. Corrective action can be taken, but it must be prospective only." *Id.* at 424. *See also, Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759 (Utah 1994) (finding that "the bar on retroactive ratemaking has no exception for missteps made in the ratemaking process even though the projections of expenses and revenues for the test year vary from actual experience).<sup>19</sup>

In this application, the Company directly suggests that because its actual experience in the incurrence of pension costs for 2018 was different than what it had contemplated that the resulting settlement charges should be isolated and preserved via the establishment of a deferral account for the Company's recovery in future rates. This proposal violates the Utah Supreme Court's legal prohibition on retroactive ratemaking.

While the Company suggests that it has not sought any change in current rates, its proposal nevertheless seeks specialized treatment of 2018 expense in a way that would provide for future rate recovery without regard to what other future costs and revenues might be or whether rate relief might be warranted after a careful review of all the factors that would necessarily come into play or need to be

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<sup>19</sup> While courts have recognized some exceptions that may warrant equitable adjustments to rates outside the context of a general rate case proceeding, such adjustments have been limited to situations of extraordinary events or unforeseen circumstances. *See generally, MCI Telecommunication Corp. v. Utah Pub. Serve. Comm'n*, 840 P.2d 765, 771-72 (Utah 1992). The Company's application in this proceeding fails to show such extraordinary or unforeseen events or circumstances.

examined in determining whether prospective rate changes would be warranted in a future general rate case proceeding. For these reasons, the Company's request for specialized accounting treatment of a single issue to afford future recovery of 2018 related expenses should be rejected.

**SUMMARY**

The Office submits that the Company's request for specialized rate treatment of the pension-related settlement charges incurred in 2018 should be denied. The Company has failed to show that the facts related to employees retiring and electing to take lump sum cash distributions fall outside the parameters contemplated at the time the currently-approved just and reasonable rates were established. It has also failed to demonstrate that the pension settlement charges would result in its overall recorded pension expense exceeding the amount of pension expense contemplated at the time the currently-approved just and reasonable rates were established.

The Company has failed to demonstrate that its currently-approved rates are no longer just and reasonable. The Company has failed to meet its burden of proof in supporting the need for a change in rate treatment. The Company's suggestion to carve out the 2018 settlement charges for separate recovery in future rates is unreasonable. The Company's request should be denied.

Respectfully submitted this 28<sup>th</sup> day of March, 2018.

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Steven W. Snarr  
Attorney for the Utah Office of Consumer Services

Attachments:

Company's response to the Office's Data Request No. 1.2  
Company's response to the Office's Data Request No. 1.4  
Company's response to the Office's Data Request No. 1.6  
(including Attachments 1.6-1 and 1.6-2)  
Company's response to the Office's Data Request No. 1.10