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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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Application of Rocky Mountain Power to Establish	)	Docket No. 21-035-14
a Balancing Account for Pension Settlement	)	
Adjustments	)	<b>CONFIDENTIAL</b>
	)	Post-Hearing Brief
	)	
	)	Subject to Rules 746-1-602 and
	)	746-1-603
	)	

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Pursuant to Utah Code § 54-10a-301, UTAH ADMIN. CODE r. 746-1 and the Public Service Commission’s (PSC) September 10, 2021 Order Granting Motion, the Utah Office of Consumer Services (OCS) submits this Post-Hearing Brief arguing that the doctrine of judicial estoppel prevents Rocky Mountain Power (RMP) from changing the position that it took in the 2020 general rate case (GRC) that the amount of settlement loss incorporated into base rates is \$11.9 to a contrary position in the balancing account docket (PBA).

**FACTS**

Having held a hearing on this case, the PSC is fully aware of the underlying facts in this docket. Accordingly, the OCS only briefly restates the most salient facts to the OCS’s argument. In the GRC, RMP sought to include in rates the amount of the pension settlement loss projected to accrue in the test year.<sup>1</sup> The pension settlement loss is anticipated to occur as a result of

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<sup>1</sup> GRC Docketed 20-035-04, Kobliha Direct ln. 598-683.

anticipated aggregate lump sum cash distributions from the pension plan exceeding a defined threshold, triggering an immediate recognition of a portion of the unrecognized losses.<sup>2</sup> Absent the triggering of immediate recognition of a portion of the unrecognized losses, such losses would be expensed over the projected life of the plan’s participants.<sup>3</sup> The OCS did not argue that settlement losses should not be recoverable. Rather, the OCS proposed that the settlement loss should be amortized over 21 years.<sup>4</sup>

RMP’s direct testimony provided that its “filing reflects . . . a projected settlement loss of approximately \$11.9 million during the 2001 test year.”<sup>5</sup> Under RMP revenue requirement calculations RMP assumed that \$4 million of the \$11.9 million would be capitalized with \$7.9 million expensed.<sup>6</sup> OCS’s recommendation amortizing the settlement loss was based on the \$7.9 million of expense.<sup>7</sup> Nevertheless, RMP’s rebuttal testimony tracked the language in its direct testimony providing that RMP recommended “the Company be allowed to recover . . . pension settlement losses based on the level of expense projected in the test period.”<sup>8</sup>

On December 30, 2020, after several days of hearings, the PSC issued its order in the GRC denying the OCS’s proposal for amortization and ruling “RMP may recover the \$11.9 in settlement losses it anticipates incurring during the Test year in rates effective January 1, 2021.”<sup>9</sup> The PSC also established a balancing account to track settlement

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<sup>2</sup> *Id.* at ln. 597-612.

<sup>3</sup> *Id.*

<sup>4</sup> GRC Docket 20-035-04 Ramas Direct ln. 505-515.

<sup>5</sup> GRC Docket 20-035-04 Kobilha Direct ln. 594-596.

<sup>6</sup> PBA Docket 21-035-14 Highsmith Direct ln. 63-69.

<sup>7</sup> GRC Docket 20-035-04 Ramas Direct OCS Exhibit 3.8D.

<sup>8</sup> GRC Docket 20-035-04 Kobilha Rebuttal ln. 206-208.

<sup>9</sup> *Application of Rocky Mountain Power for Authority to Increase its Retail Electric Utility Service Rates in Utah and for Approval of the Proposed Electric Service Schedules and Electric Service Regulations*, Docket 20-035-04, Order at 32 (Utah P.S.C., December 26, 2020). (GRC Order)

losses.<sup>10</sup> The Utah Association of Energy Users (UAE) filed a Petition for Clarification or Reconsideration, which the OCS joined, arguing (1) that the PSC should reconsider its ruling rejecting the amortization approach and including the full \$11.9 million for recovery in the test year, (2) the PSC should clarify whether \$4 million of the settlement loss should be capitalized and the remainder should be the initial base amount in the balancing docket.<sup>11</sup> In response, RMP argued that the \$11.9 million should not be amortized and that the company testified—and PCS ruled—that \$11.9 million is the amount of settlement loss included in the test year. RMP concluded: “It could not be more clear that the initial amount in the balancing account is \$11.9 million.”<sup>12</sup> The PSC rejected the first argument but did not resolve the issue on capitalization, instead ruling that it will address the issue in the pension docket after developing a full record.<sup>13</sup>

However, through discovery in the instant pension balancing account docket, the OCS discovered that between RMP’s direct and rebuttal testimony in the GRC, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>10</sup> *Id.*

<sup>11</sup> GRC Docket 20-035-04 Petition of the Utah Association of Energy Users and The University of Utah For Review or Rehearing of Commission Order Issued December 30, 2020, at 3-9 (UAE Petition)

<sup>12</sup> GRC Docket 20-035-04 Rocky Mountain Power’s Response in Opposition to Petitions for Reconsideration, Review, or Rehearing, 13 (RMP Petition Opp.).

<sup>13</sup> GRC Order at

<sup>14</sup> PBA Docket 21-035-14 Ramas Direct In. 375-380.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] For example, in its direct GRC testimony RMP asserted that its “filing reflects . . . a projected settlement loss of approximately \$11.9 million during the 2021 test period.”<sup>18</sup> [REDACTED], RMP made affirmative statements indicating that its position regarding the amount of settlement loss remains the same between its direct and rebuttal testimony in the GRC. That is, RMP recommended “the Company be allowed to recover . . . pension settlement losses based on the level of expense projected in the test period.”<sup>19</sup>

In the instant docket, where a lower number for the initial base amount in the balancing account equates to a larger recovery in the operation of the balancing account,

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<sup>15</sup> PBA Docket 21-035-14 Ramas Confidential Direct In. 464-465.

<sup>16</sup> *Id.* In. 468-470.

<sup>17</sup> *Id.* In. 475.

<sup>18</sup> GRC Docket 20-035-04 Kobilha Direct In. 594-596.

<sup>19</sup> GRC Docket 20-035-04 Kobilha Rebuttal In. 206-208.

RMP for the first time reversed course and disclosed the change in accounting.<sup>20</sup> RMP now argues that the initial amount in the balancing account is not the \$11.9 million it stated in its testimony in the GRC and, most prominently, in its Response to the Petition for Reconsideration in the GRC but rather argues the initial base amount in the balancing account should be \$7.9 million.<sup>21</sup>

## ARGUMENT

The doctrine of judicial estoppel prevents RMP from changing the position it took in the GRC on the amount of settlement loss included in rates during the test year to a contrary position in this docket.

The elements of judicial estoppel are: (1) the prior and subsequent litigation involve the same parties or their privities; (2) the prior and subsequent litigation involve the same subject matter; (3) the prior position was “successfully maintained”; and (4) the party seeking judicial estoppel has relied upon the prior testimony “and changed his position by reason of it.”

*Orvis v. Johnson*, 2008 UT 2, ¶ 177 P.3d 600, *see also*, *New Hampshire v. Main*, 532 U.S. 743, 748 (2001). The Utah Court of Appeals have employed a fifth element of bad faith, as opposed to the accidental or mistaken misrepresentations, and while not clearly adopting this element, the Supreme Court has favorably noted this element in its cases. *Orvis*, 2008 UT 2, at n.1.

The purpose of judicial estoppel is “to protect the integrity of the judicial process by prohibiting parties from deliberately changing position according to the exigencies of the moment. . . [avoiding] the perception that either the first or the second court was misled.” *New Hampshire*, 532 U.S. at 550 (quotations and citations omitted). Although developed in

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<sup>20</sup> PBA Docket 21-035-14 Highsmith Direct In. 63-69; Highsmith Rebuttal In. 113-126

<sup>21</sup> *Id.* In. 74.

the courts, the doctrine has been recognized in administrative decisions and applied by the PSC. *Nebeker v. Utah State Tax Comm'n*, 2001 UT 74, ¶¶ 25-26, 34 P.2d 180; *Re All-American Telephone Co.*, Docket 08-2469-01, WL 4823682, Order on Application for Review and Rehearing and Request for Reconsideration, at \*5 (Utah P.S.C., July 6, 2010).

Here, no party can contest that the first two elements have been met as the GRC and this docket involved the same parties, RMP and the OCS, and the same subject matter, RMP's pension settlement loss. Similarly, RMP prevailed on the settlement loss issue in the GRC as the PSC allowed the settlement loss to be included into the base rates without amortization over 21 years as proposed by the OCS. The remaining elements, bad faith and detrimental reliance have also been met.

(1) *Bad Faith*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. *See Salt Lake City v. Sliver Fork Pipeline Corp.*, 913 P.2d 731, 734 (Utah 1995) (purpose of judicial estoppel not met when there is no evidence that a party “knowingly misrepresented any facts in the prior proceeding.”)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

While correctly apply controlling accounting rules would have resulted in an increase in the requested revenue requirement, this does not excuse RMP's actions. [REDACTED]

[REDACTED]

[REDACTED]

Moreover, RMP's [REDACTED]

[REDACTED]

[REDACTED] The PSC's initial decision to allow the projected settlement loss to be included in rates, as opposed to amortizing them over 21 years, was based largely on the notion that the financial and regulatory accounting should be consistent. Specifically, the PSC ruled:

We recognize that financial accounting, income tax accounting, and regulatory accounting have different purposes. . . . We conclude that the same facts that required a change to accounting in RMP's financial accounting also justify inclusion of those expenses in the test year. We find that requiring the settlement losses to be amortized as the OCS and UAE recommend would be ignoring the fact that the settlement losses occurred. We find no reason to remove those actual costs from the Test Year.<sup>22</sup>

In response to the portion of the UAE's and OCS's Petition for Reconsideration arguing that the settlement loss be amortized RMP relied on this rationale. RMP asserted in their response:

The Commission expressly observed that it is not required to adopt financial accounting standards for regulatory accounting or ratemaking. *However, it concluded in the case of pension settlement it was appropriate for regulatory accounting to be consistent with financial accounting.* Thus, the Commission concluded that recovery in rates of the full amount of pension settlement losses or gains, which are required to be financial accounting standards to be expensed or recognized in income in a single year, is appropriate.<sup>23</sup> (emphasis added).

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<sup>22</sup> GRC Order at 31.

<sup>23</sup> RMP Petition Opp. at 9.

Given RMP's argument that "it is appropriate for regulatory accounting to be consistent with financial accounting," it would be difficult for RMP to, at the same time, reveal that their revenue requirement calculations were in fact *inconsistent* with the actual financial accounting standards applicable to pension settlement losses as well as other pension plan costs.

Accordingly, in addressing the portion of the UAE and OCS's Petition for Clarification and Reconsideration dealing with the issue of whether RMP capitalized a portion of the settlement loss, RMP provided arguments in line with its prior arguments that regulatory and financial accounting be consistent, arguing:<sup>24</sup>

The Company presented undisputed evidence that the \$11.9 million in actuarially-projected pension settlement losses are forecasted in the test period, and its rate request included that amount. . . . The Commission clearly stated that the test year included \$11.9 in pension settlement losses. . . It could not be more clear that the initial amount in the balancing account is \$11.9 million.<sup>25</sup>

Again,

[REDACTED] and given the PSC's ruling that the settlement loss be included in rates because, in this case, regulatory and financial accounting should be consistent— [REDACTED]

Rather, they took the position that the regulatory accounting in their revenue requirement calculations was consistent with financial accounting and this position led to an initial amount in the balancing account of \$11.9 million.

[REDACTED] and its

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<sup>25</sup> RMP Petition Opp. at 12-13.



Response to the Petitions for Reconsideration, i.e., not disclosing that the finance accounting is inconsistent with regulatory accounting. [REDACTED]

[REDACTED] It was not until the GRC was completed and it was established that the settlement loss should be included in rates—i.e., in the instant docket addressing the pension balancing account—that RMP finally disclosed the change in accounting rules in an effort to increase its recovery through the operation of the pension balancing account. [REDACTED]

(2) *Detrimental Reliance*

The element of detrimental reliance is also met. [REDACTED]

[REDACTED] This is sufficient to establish detrimental reliance. Indeed, [REDACTED]

[REDACTED] Moreover, forgoing taking an action in litigation in reliance on a position taken by the opposing party has been recognized as sufficient reliance to support a claim of judicial estoppel. *Davis v. Wakelee*, 156 U.S. 680, 689 (1895) (forgoing an appeal sufficient to establish detrimental reliance) (cited on this point as authoritative by *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)).

[REDACTED]

However, the OCS was deprived of the opportunity to make this argument because of the manner that RMP presented its position. Indeed, the way RMP presented its case confused the record, as is evidenced by the OCS's amortization calculations as compared to the PSC's ruling that \$11.9 million was included in the test year. However, any confusion was resolved by the unambiguous declarations in RMP's Response to the Petitions for Reconsideration that RMP seeks to recover the \$11.9 million in the test year and that this amount is the initial base amount in the balancing account. Because of the OCS's reliance on RMP's litigation tactic, RMP is estopped from asserting a position in the instant docket that conflicts with this litigation position.

**CONCLUSION**

For the reasons outlined above, RMP is judicially estopped from changing the position it took in its testimony and pleading in the GRC to a contrary position in a subsequent docket to establish a balancing account for pensions losses.

Respectfully submitted September 27, 2001.

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CERTIFICATE OF SERVICE  
Docket No. 21-035-14

I CERTIFY that on September 27, 2021 a true and correct copy of the foregoing **Redacted Post Hearing Brief on behalf of the Office of Consumer Services** was served upon the following:

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