

JUSTIN C. JETTER (#13257)
PATRICIA E. SCHMID (#4908)
Assistant Attorney Generals
Counsel for the DIVISION OF PUBLIC UTILITIES
SEAN D. REYES (#7969)
Attorney General of Utah
160 E 300 S, 5th Floor
P.O. Box 140857
Salt Lake City, UT 84114-0857
Telephone (385) 341-3412
jjetter@agutah.gov
pschmid@agutah.gov
Attorneys for the Utah Division of Public Utilities

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Application of Rocky Mountain Power to Establish a Balancing Account for Pension Settlement Adjustments	Docket No. 21-035-14 Post Hearing Brief
--	--

Pursuant to Utah Code § 54-4a and Utah Admin. Code R.746-1, the Division of Public Utilities (Division) files Post Hearing Brief. The Public Service Commission of Utah (Commission) should deny Rocky Mountain Power’s (RMP or the Company) request to increase customer rates approximately \$4 million by setting the base rate for the pension settlement adjustment balancing account (Pension Base) at \$7.9 million instead of \$11.9 million as set in the December 30, 2020 Order in Docket No 20-035-04 (GRC Order).¹ Using a lower Pension

¹*Application of Rocky Mountain Power for Authorization to Increase its Retail Electric Utility Service Rates in Utah and for Approval of its Proposed Electric Service Schedules and Electric Service Regulations* (2020 GRC), Docket No. 20-035-04, Order at 32 (December 30, 2020) (“GRC Order”).

Base than was set in the GRC Order is both an impermissible single-issue ratemaking and retroactive ratemaking.

INTRODUCTION

This case presents a remarkable scenario where RMP represented to the Commission the value of a cost to be include in rates at a value lower than it knew that value was.² RMP made a strategic decision to represent that the value was the lower number for the purpose of winning an issue of the disputed timing of the recovery.³ When directly called into question the Company vehemently defended its position despite internal knowledge that the value was wrong.⁴ It knowingly misled the Commission. RMP has the audacity to now request that its strategic choice not to disclose or correct the error be treated as merely an “incorrect accounting assumption” that can be corrected through the balancing account despite the Pension Base having been set in the GRC Order.

In support of its argument in favor of changing the Pension Base RMP argues that it is entitled to collect the pension settlement loses through rates and that it did not ask for a balancing account. Rather, RMP sought to include the pension costs in base rates without a true up mechanism.⁵ While RMP maintains that the correct value of \$7.9 million was tucked away in its work papers, it simultaneously recognizes that if it had updated the calculation for pension settlement losses during the general rate case it “would have resulted in a higher requested rate change for customers.”⁶ During the live hearing RMP witness Steven McDougal agreed that if

² Direct Testimony of Donna Ramas, Office of Consumer Services (OCS) Exhibit 1.1D.

³ *Id.*

⁴ 2020 GRC, Docket No. 20-035-04, Rocky Mountain Power’s Response in Opposition to Petitions for Reconsideration, Review, or Rehearing at p. 12 (“It could not be more clear that the initial amount in the balancing account is \$11.9 million.”)

⁵ Rebuttal Testimony of Nicholas L. Highsmith at Lines 82-84.

⁶ *Id.* at lines 85-86.

RMP had gotten exactly as it requested in its general rate case request – the base rates set without a true up – RMP would continue to collect only the amount authorized by the GRC Order until the next rate case.⁷

Changing the Pension Base now would have the same effect on customer rates as changing any other fixed value included in the final rates set in the GRC Order. The mere existence of a balancing account does not license alterations to specifically adjudicated items recently set in a general rate case. Just like changing rates to correct the error would plainly violate both the prohibitions on single-issue ratemaking and retroactive ratemaking if there were no balancing account, changing the Pension Base now also violates those same prohibitions. The Commission should reject the request to change the Pension Base.

ARGUMENT

The Commission should reject the request to set the Pension Base lower than \$11.9 million. The Commission's GRC Order set the Pension Base amount included in current base rates at \$11.9 million. Under Utah law it cannot interpret the GRC Order to mean some other value in this docket. Given that the GRC Order's plain language cannot be reinterpreted, a deviation from the \$11.9 million in the context of the balancing account tied to the rates set in the GRC Order is both impermissible single-issue and retroactive ratemaking.

- I. The Commission's GRC Order Set the Pension Settlement Adjustment Collection in Base Rates at \$11.9 Million.

The Commission in its GRC Order set the Pension Base at \$11.9 million. The GRC Order directly addressed this specific issue and stated in relevant part:

⁷ Hearing transcript at p.41 Lines 1-10.

RMP may recover the \$11.9 million in settlement losses it anticipates incurring during the Test Year in rates effective January 1, 2021. However, RMP will establish a balancing account and true-up, on an annual basis, the Pension Settlement Adjustments that it actually recognizes with the amount it recovered in rates. Our conclusions here are sufficient to resolve the issue as regards rates to be effective January 1, 2021.⁸

The plain reading of the GRC Order is that, as requested by the Company, \$11.9 million in settlement losses is included in the base rates effective January 1, 2021. And the balancing account established as a result of the GRC Order will true up against the \$11.9 million recovered in base rates.

Parties must be able to read and rely on the language of the GRC Order including the Pension Base value. The Commission lacks authority to revise the GRC Order here. Controlling Utah administrative agency case law holds that:

Because the words in the Commission's orders have the force of law, the Commission has no right to *revise* them by a later “interpretation.” It is the Commission's orders and tariffs that have the force of law, not its privately held intentions. So an agency has no authority to override the terms of an issued order by vindicating the agency's “true” intent.⁹

Therefore, an unexpressed or unclear intent to adopt the Company’s workpapers that might be used to derive another value in contradiction to the stated amount in base rates cannot stand.

Some of the testimony in this case regarding what is actually in rates seems to be a semantic argument between the specifically adjudicated question the Commission decided (\$11.9M or \$7.9M in settlement losses) and what numbers flowed through various spreadsheets and up to a total request number from which the Commission made adjustments. It cannot be the

⁸ GRC Order at 32.

⁹ *Ellis-Hall Consultants v. Pub. Serv. Comm'n*, 2016 UT 34, ¶ 31, 379 P.3d 1270, 1275.

case that the complicated network of spreadsheet values and data requests that lead to a \$7.9M pension settlement loss the Commission explicitly and repeatedly rejected are a reasonable interpretation of the Commission's order when the ordering language itself was so clear. RMP's choice to not inform the Commission of the problems with its supporting spreadsheets does not now license retroactive changes. RMP's choice in the general rate case was to not amend its request to reflect what it purported to be asking for. Thus, any amount it might view as actually uncollectible because of the Commission's orders is a product of its own choices, not regulators' decisions.

This is the case regardless of whether it was a mistake. The *Ellis-Hall* opinion explained in footnote 3 that agencies may have authority to repeal prior orders and issue new ones. However, that power is distinctly separate from the authority to interpret an existing order in another proceeding to mean something other than the plain language.¹⁰ In the instant case the Commission has authority to repeal or replace the GRC Order through an appropriate proceeding. This narrow proceeding is not appropriate to consider that question. Much has changed since January 1, 2021 and the Commission should reject the request to consider only one element of its orders. The Commission may not interpret the GRC Order in this docket in a way that conflicts with the GRC Order.

II. Changing the Pension Settlement Loss Base Rate Outside of a General Rate Case is Prohibited Single Issue Ratemaking and Retroactive Ratemaking.

The GRC Order set the Pension Base. Using a different base value for true up requires a change in the assumptions of allocations of the aggregate rates currently collected. It therefore represents a change in customer rates generally. In this case it would result in an increase in

¹⁰ *Id.* at FN3.

rates. A change in rates for a correction of error known to the utility at the time it was represented to be accurate is a prohibited “single-issue” or “single-item” ratemaking. In effect this is the inverse of *MCI Telecommunications Corp. v. Pub. Serv. Comm'n of Utah* where the court held that “[a] utility that misleads or fails to disclose information pertinent [in a ratemaking proceeding] cannot invoke the rule against retroactive rate making to avoid refunding rates improperly collected.”¹¹ Although that case involved a proceeding by the Commission concerning an after-the-fact adjustment to rates, it was an allowable adjustment because of the utility’s failure to correct a known error. Here, we again have a known utility error, but one that went in ratepayers’ benefit after the utility made a strategic decision to not correct its error. Where RMP failed to disclose material information to its detriment in the current matter, it cannot now avoid the prohibition on single-issue ratemaking through a semantic argument about what might have been found in workpapers or whether *MCI* allows subsequent error correction. The Commission should deny the request to raise the rates set in the GRC Order through a change in the pension settlement loss balancing account base.

Ratemaking is an imprecise process. Setting rates for major energy utilities is complex and relies heavily on forecasts. “[I]t is impossible to fix rates that are mathematically correct or exactly applicable to all the new conditions that may arise even in the immediate future.”¹² The Commission ultimately sets aggregate rates that allow the Company to collect enough aggregate revenue to cover costs and have an opportunity to earn a fair rate of return.¹³ The aggregate

¹¹ *MCI Telecommunications Corp. v. Pub. Serv. Comm'n of Utah*, 840 P.2d 765, 775 (Utah 1992).

¹² 73B C.J.S. Public Utilities § 21.

¹³ *Utah Department of Business Regulation v. Public Service Commission*, Utah, 614 P.2d 1242, 1248 (1980).

revenue is then assumed to be adequate until a showing is made that it is insufficient or excessive.

Adjusting rates based on a single factor is generally prohibited because it is likely to lead to distorted rates. This Commission recently succinctly stated the rule. “Under circumstances where the legislature has not directed otherwise, a utility may not seek to adjust rates based on isolated issues without considering all relevant costs and revenues.”¹⁴ Doing so is likely to lead to distorted rates because the utility has a significant advantage in information as compared to ratepayers and regulators. Therefore, it is reasonable to assume that the issues brought to the Commission for correction will be those that favor the utility.

Even in the case of errors made during the ratemaking process, raising rates to correct one error might be done without recognizing that there are counterbalancing savings from other errors. The Pension Base value was plainly set in the GRC Order. Changing the base rate now to correct an error in the underlying calculation would fall squarely within the prohibition on single-item ratemaking. It would adjust rates for one isolated issue and not consider any relevant costs or revenue changes that might offset the difference. Changing the Pension Base is functionally equivalent to increasing the base rates for customers after the fact to correct RMP’s requested revenue requirement if no balancing account existed, despite RMP itself choosing not to correct the request. In that hypothetical there would be little question that such an increase in rates is an impermissible single-issue ratemaking. Even if all parties agree that the \$11.9 million

¹⁴ *In the Matter of the Investigation of the Costs & Benefits of PacifiCorp’s Net Metering Program*, Docket No. 14-035-114, Consolidated Order Denying Dispositive Motions at 7, 2017 (Feb. 23, 2017).

was not fully reflected in the spreadsheets that built the rate request, the parties do not have complete knowledge of other errors that may offset the error in the pension settlement loss.

Like the rule against single-issue ratemaking, the rule against retroactive ratemaking flows from the assumption that the aggregate revenue is sufficient during the rate effective period. It places the risk on the utility and provides financial incentive to operate efficiently. The rule against retroactive ratemaking goes beyond simple forecasting errors. “The bar on retroactive rate making has no exception for missteps made in the rate-making process.”¹⁵ Even if RMP had not known and failed to disclose the error in its testimony regarding the \$11.9 million it claimed to be in rates, the rule would still prohibit a correction.

Setting the Pension Base to a value other than the \$11.9 million set in the GRC Order will impermissibly increase rates retroactively. Doing so results in aggregate revenue from current base rates being deemed to cover less of the pension settlement losses than current rates. It assumes that base rates that have already been paid effectively contributed less to the pension costs. Therefore, the higher balancing account surcharge would recover costs that were already included in past rates. If RMP’s original proposal in the general rate case were adopted and no balancing account existed, recovering retroactively for the difference between set rates and the adjusted calculation would plainly be impermissible retroactive ratemaking. The same principles apply here. The GRC Order set the Pension Base. The creation of a balancing account does not open the door to retroactively change that value to increase revenue for RMP.

¹⁵ *Utah Dep't of Business Regulation v. Public Serv. Comm'n*, 720 P.2d 420, 424 (Utah 1986).

CONCLUSION

The Commission should reject the request to reset the Pension Base in this docket. The Pension Base was plainly set at \$11.9 million in the GRC Order. The GRC Order is law and cannot be reinterpreted here. Changing the Pension Base in the context of the balancing account is both impermissible single-issue and retroactive ratemaking.

Submitted this 27th day of September 2021.

/s/ Justin C. Jetter
Justin C. Jetter
Assistant Attorney General
Utah Division of Public Utilities

CERTIFICATE OF SERVICE

I certify that on September 27, 2021, I caused a true and correct copy of the foregoing to be filed with the Public Service Commission and served by the Utah Division of Public Utilities to the following in Utah Docket 21-035-14 as indicated below:

BY Electronic-Mail:

Rocky Mountain Power

Jana Saba

jana.saba@pacificorp.com

Emily Wegener

emily.wegener@pacificorp.com

Joelle Steward

joelle.steward@pacificorp.com

Utah Association of Energy Users

Phillip Russell

prussell@jdrsllaw.com

Kevin Higgins

khiggins@energystrat.com

Courtney Higgins

chiggins@energystrat.com

Office of Consumer Services

Michelle Beck

mbeck@utah.gov

Alyson Anderson

akanderson@utah.gov

Alex Ware

aware@utah.gov

Utah Attorney General's Office

Assistant Attorney Generals

Justin Jetter

jjetter@agutah.gov

Patricia Schmid

pschmid@agutah.gov

Robert Moore

rmoore@agutah.gov

/S/ Madison Galt

Madison Galt, Legal Assistant
Utah Division of Public Utilities