

Phillip J. Russell (10445)
JAMES DODGE RUSSELL & STEPHENS, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone: (801) 363-6363
Email: prussell@jdrsllaw.com

Counsel for Utah Association of Energy Users

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
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**POST-HEARING BRIEF OF THE
UTAH ASSOCIATION OF ENERGY USERS**

The Utah Association of Energy Users (“UAE”) files this Post-Hearing Brief to address certain legal issues that arose during the August 23, 2021 hearing in this matter.

INTRODUCTION

Rocky Mountain Power (“RMP” or “Company”) seeks to relitigate the question of the amount of pension settlement loss included in current rates. That question was fully and fairly litigated in the recent general rate case, Docket 20-035-04 (“GRC”), and the doctrine of *res judicata* bars relitigation of that question. This Commission should disregard all evidence and testimony asserting that the amount of pension settlement loss currently included in rates is anything other than \$11.9 million and/or that the portion of anticipated test year settlement expense that was assumed in the GRC to be capitalized was not actually included in rates.

ARGUMENT

I. The Doctrine of Issue Preclusion Bars the Company from Relitigating the Amount of Pension Settlement Loss Included in Customer Rates

This Commission ruled in the GRC that RMP's customer rates effective January 1, 2021 include \$11.9 million in pension settlement losses,¹ and RMP may not in this docket relitigate that issue. "Res judicata, often referred to as claim and issue preclusion, prevents the readjudication of issues previously decided." *Salt Lake Citizens Cong. v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245, 1251 (Utah 1992). "The doctrine is premised on the principle that a controversy should be adjudicated only once. Although initially developed with respect to the judgments of courts, the same basic policies, including the need for finality in administrative decisions, support application of the doctrine of res judicata to administrative agency determinations." *Id.* See also Utah Code § 54-7-14 ("In all collateral actions or proceedings the orders and decisions of the commission which have become final **shall be conclusive.**" (emphasis added)).

Utah courts and this Commission have applied *res judicata* to bar parties from relitigating matters that have previously been adjudicated. See, e.g., *Ostler v. Retirement Bd.*, 2017 UT App 96, ¶¶ 20-29, 400 P.3d 1099 (ruling that petition for judicial review from agency adjudication "is barred by the issue-preclusion branch of res judicata" because petitioner had raised issue in prior court proceeding); *Utah Dept. of Admin. Services v. Public Service Commission*, 658 P.2d 601, 621 (Utah 1983) ("[T]he principle of *res judicata* assures finality to those provisions of the Commission's order that allocate benefits and establish the parties' rights."); *In the Matter of the Division's Annual Review*

¹ See Docket No. 20-035-04, Order (Dec. 30, 2020) ("GRC Order") at 30 ("Here, RMP forecasts Test Year pension settlement losses of \$11.9 million, and RMP's preference is to include this full amount as a component of pension expense."); *Id.* at 32 ("RMP may recover the \$11.9 million in settlement losses it anticipates incurring during the Test Year in rates effective January 1.").

and Evaluation of the Electric Lifeline Program, HELP, Docket No. 03-035-01, Order on Various Procedural Motions and Petitions dated August 1, 2005, 2005 WL 5163728 (dismissing claims challenging Commission’s implementation of HELP program because those claims sought to relitigate issues resolved in prior proceeding).

Issue preclusion applies when the following four elements are satisfied:

- (i) the party against whom issue preclusion is asserted was a party to or in privity with a party to the prior adjudication;
- (ii) the issue decided in the prior adjudication was identical to the one presented in the instant action;
- (iii) the issue in the first action was completely, fully, and fairly litigated; and
- (iv) the first suit resulted in a final judgment on the merits.

Ostler, 2017 UT App 16, ¶ 23 (internal quotation marks omitted).

RMP was a party to the GRC and the GRC resulted in a final judgment on the merits. Moreover, the question RMP seeks to raise in this docket—the amount of pension settlement loss included in rates as a result of the GRC order—is identical to the issue presented in the GRC. As such, elements (i), (ii), and (iv) are clearly satisfied. At the August 23 hearing in this docket, however, RMP argued that element (iii) is not satisfied. As set forth below, the question of the amount of pension settlement loss included in rates was completely, fully, and fairly litigated in the GRC and RMP is barred from relitigating that question in this docket.

(iii) *The issue in the first action was completely, fully, and fairly litigated*

The question of the amount of pension settlement loss to be included in RMP’s rates was raised and answered in the GRC and was “completely, fully and fairly litigated” in that docket. “[O]ur case law does not require either a motion or a hearing for full and fair litigation,” to satisfy this element of issue preclusion. *Career Dev. Review Bd. v. Utah Dep’t of Corrections*, 942 P.2d 933, 939 (Utah 1997). Rather, this element is met if the party against whom issue preclusion is sought “receive[d]

notice, reasonably calculated, under all the circumstances, to apprise them of the pendency of the action and afford them an opportunity to present their objections.” *Id.* (quotation marks omitted).

RMP certainly had notice of the issue of the amount of pension settlement loss included in rates. RMP first raised the issue in its filing through the direct testimony of Nikki Kobliha, who testified that “[b]ased on actuarial projections, settlement losses of \$18.5 million and \$11.9 million are forecast during 2020 and 2021, respectively, *justifying the inclusion of these costs in base rates.*”² UAE and OCS provided lengthy pre-filed testimony objecting to the Company’s proposal to include in rates the \$11.9 million of projected test year pension settlement loss in its entirety in annual pension cost.³ UAE’s witness, Mr. Higgins, noted in his direct testimony that “RMP is proposing an adjustment to pension cost to include a projected 2021 settlement loss of \$11.9 million (Total Company) in the test period. RMP is proposing to include \$7.9 million of this forecasted settlement loss in pension expense in this case *and capitalize the remaining balance.*”⁴

In response to the testimony offered by UAE and OCS, Ms. Kobliha asserted in rebuttal testimony that “[t]he Company’s primary recommendation is that *base rates reflect pension settlement losses using the information reflected in the test period.*”⁵ Ms. Kobliha further responded by stating her recommendation that “the Company be allowed to recover its . . . pension settlement losses *based on the level of expense projected in the test period.*”⁶ UAE and OCS responded in surrebuttal testimony, again objecting to RMP’s proposal to include the full amount

² Docket No. 20-035-04, Direct Testimony of Nikki Kobliha at lines 638-641 (emphasis added).

³ *See, e.g.*, Docket No. 20-035-04 Direct Testimony of Kevin C. Higgins at lines 704-746; Direct Revenue Requirement Testimony of Donna Ramas at lines 442-541.

⁴ Docket No. 20-035-04, Direct Testimony of Kevin C. Higgins at lines 707-710 (emphasis added).

⁵ Docket No. 20-035-04, Rebuttal Testimony of Nikki Kobliha at lines 206-208 (emphasis added).

⁶ *Id.* at lines 44-45 (emphasis added).

of the expensed portion of the projected \$11.9 million pension settlement loss in the annual revenue requirement, rather than recovering it over the expected life of the pension plan participants.⁷

Considering all of this testimony, the Commission issued a ruling on December 30, 2020 indicating that it clearly understood RMP's request was to include \$11.9 million of pension settlement loss in rates: "Here, RMP forecasts Test Year pension settlement losses of \$11.9 million, and RMP's preference is to include this *full amount as a component of pension expense*."⁸ The Commission then granted RMP that request, ruling that "RMP may recover the \$11.9 million in settlement losses it anticipates incurring during the Test Year in rates effective January 1."⁹

The issue was then the subject of post-hearing briefing, including UAE's Petition for Rehearing, which sought, among other things, "clarity regarding the base revenue requirement associated with pension settlement losses included in rates as well as the intended operation of the true-up."¹⁰ RMP opposed UAE's Petition, stating that its proposal was "that the amount it projected would be required to be expensed in the test period, *\$11.9 million, be included in full in rates*,"¹¹ and that the Commission had "concluded that recovery in rates of the *full amount* of pension settlement losses or gains, which are required by financial accounting standards to be expensed or recognized in income in a single year, is appropriate."¹²

In *this* docket, RMP asserts that it knew during the GRC that its proposed rate increase did not include the full amount of pension settlement loss required to be recognized in income in a single year,

⁷ See, e.g., Docket No. 20-035-04, Surrebuttal Testimony of Kevin C. Higgins at lines 633-659 & UAE Exhibit RR 5.10; Surrebuttal Revenue Requirement Testimony of Donna Ramas at lines 884-948.

⁸ GRC Order at 30 (emphasis added).

⁹ *Id.* at 32.

¹⁰ Docket No. 20-035-04, Petition of UAE for Review or Rehearing at 8.

¹¹ Docket No. 20-035-04, RMP's Response in Opposition to UAE Petition at 8 (emphasis added).

¹² *Id.* at 9 (emphasis added).

but opted not to notify the Commission. Instead, RMP emphatically argued in the GRC that its rate request gave it an opportunity to collect the projected \$11.9 million in test year pension settlement loss and that the initial amount in the balancing account should be \$11.9 million:

First, UAE's argument that the initial amount to be included in the balancing account is unclear is disingenuous. ***The Company presented undisputed evidence that \$11.9 million in actuarially-projected pension settlement losses are forecast in the test period, and its rate request included that amount.*** The OCS acknowledged in its testimony that the proposed balancing account included the full amount of the pension settlement loss for which the Company sought cost recovery. ***The Commission clearly stated that the test year included \$11.9 million in pension settlement losses.*** . . . However, to assure that only actual losses or gains are included in rates, the Commission ordered the establishment of a balancing account. ***It could not be more clear that the initial amount in the balancing account is \$11.9 million.***¹³

The question of the amount of pension settlement loss to be included in rates was completely, fully, and fairly litigated. Each of the four elements of issue preclusion are satisfied and this Commission should disregard any evidence presented in this docket that seeks to relitigate the question of the amount of pension settlement loss included in customer rates.

II. *Res Judicata* Bars a Finding that Something Other Than \$11.9 Million in Pension Settlement Loss was Included in Customer Rates

The Commission's GRC orders are final, cannot properly be modified, and have *res judicata* effect. At the August 23 hearing when RMP moved to admit its pre-filed testimony, UAE objected to that motion on the grounds cited herein.¹⁴ The Commission initially declined to rule on that objection or on RMP's motion to admit the testimony,¹⁵ but ultimately granted that motion, relying on its authority to modify the GRC Order pursuant to Utah Code § 54-7-14.5.¹⁶ UAE's objection

¹³ *Id.* at 12-13 (emphasis added).

¹⁴ *See* Tr. of Hr'g (8/23/2021) at 9:4-12:10.

¹⁵ *See id.* at 23:10-20; 24:15-20.

¹⁶ *See id.* at 23:10-20.

regarding the admissibility of this testimony was preserved for purposes of the hearing,¹⁷ but as a result of the Commission's decision to admit RMP's pre-filed testimony in full, witnesses for RMP and others gave live testimony regarding the amount of pension settlement loss that is actually included in rates. *Res judicata* requires that this Commission disregard that evidence.

Utah Code § 54-7-14.5 allows this Commission to “rescind, alter, or amend any order or decision made by the commission.” Utah courts have considered *res judicata* and Utah Code § 54-7-14.5 and have ruled that *res judicata* does not bar the Commission from finding that current utility rates are no longer just and reasonable. *See Utah State Bd. of Regents v. Public Service Commission*, 583 P.2d 609, 611-12 (Utah 1978) (ruling that *res judicata* did not bar Commission from setting new rate of return one year after setting rate of return in general rate case). *Res judicata* does not apply to the question of what constitutes “just and reasonable rates” because the factors underlying such a determination change over time and, therefore, an issue presented in one rate case is not identical to the issues presented in the next rate case and element (ii) identified above is not met. But the issue in this docket is identical to the issue determined in the GRC. Indeed, the issue in this docket is what the Commission ruled in the GRC, not what the Commission might have ruled had it been given a different set of facts than those that were presented in the GRC. The Commission's ruling in the GRC is clear, and the Commission should not alter the GRC Orders based on facts not presented to it in the GRC. RMP declined to disclose certain facts in the GRC, and obtained one result from that decision, and now seeks to disclose those facts in an effort to obtain a different outcome.

This Commission retains jurisdiction to amend its prior orders after providing notice and an opportunity to be heard. *See* Utah Code § 54-7-14.5. “Administrative agencies must, and do, have

¹⁷ *See id.* at 25:14-18.

the power to overrule a prior decision when there is a reasonable basis for doing so,” *Salt Lake Citizens Congress*, 846 P.2d at 1253, but unless and until the Commission amends a prior decision its adjudicative decisions—including those entered in a rate case—have the force of law to which doctrines of finality such as *res judicata* and *stare decisis* apply. *Id.* at 1251-53. As the Utah Supreme Court has noted, “[b]ecause the words in the Commission’s orders have the force of law, the Commission has no right to *revise* them by a later ‘interpretation.’” *Ellis-Hall Consultants v. Public Service Commission*, 2016 UT 34, ¶ 31, 379 P.3d 1270 (“[A]n agency has no authority to override the terms of an issued order by vindicating the agency’s ‘true’ intent.”). This Commission has not revised its GRC orders and, as such, those orders have *res judicata* effect.

No party has either requested that this Commission amend the GRC orders or otherwise presented a “reasonable basis” for this Commission to do so. *See Salt Lake Citizens Congress*, 846 P.2d at 1253 (requiring “reasonable basis” to modify prior orders). The GRC record cannot verify RMP’s assertion that something other than \$11.9 million was included in rates.¹⁸ As noted in Section I, above, RMP argued in the GRC that \$11.9 million was included in its rate request. Revising the GRC orders based on the evidence presented in this docket would prejudice other parties who have had no opportunity to determine the appropriate change in rates based on the evidence presented in this docket. RMP is not prejudiced from a factual finding that \$11.9 million is included in rates, both because pension settlement losses are merely numbers reflected on earnings statements and do not result in RMP making payments out of pocket,¹⁹ and because RMP decided not to raise this issue during the GRC because it decided it was “willing to live with” the result.²⁰

¹⁸ *See* Tr. of Hr’g (8/23/2021) at 45:17-47:17 (Mr. McDougall); 98:22-99:16 (Mr. Higgins).

¹⁹ *See* Tr. of Hr’g (8/23/2021) at 88:1-89:9 (Ms. Ramas); Pre-filed Direct Testimony of Kevin Higgins at lines 137-141.

²⁰ Tr. of Hr’g (8/23/2021) at 56:8-13 (Mr. McDougall)

Moreover, parties would be prejudiced if the Commission were to limit modification of the GRC orders to the issue presented in this docket, while refusing to consider other issues that have been and could be raised. For example, in denying UAE's Petition for Rehearing in the GRC, the Commission declined to modify its Schedule 32 rate design order that included certain non-RMP revenues in the rate spread, asserting that "Intervenors had ample opportunity to comment on this issue throughout the case but did not do so."²¹ The same principle should apply here to prevent the prejudice of disparate treatment to non-RMP parties. Otherwise, this Commission should grant to UAE an additional opportunity to address the rate increases imposed on Schedule 32 customers and to present other issues, such as UAE's proposal in the GRC for rate treatment of pension settlement losses. RMP's capitalization error was not isolated to pension settlement losses and amending the GRC orders to unwind that error would require a more inclusive review than is possible in this docket.

Finally, Utah Code § 54-7-14.5 cannot be invoked to amend the GRC orders to address RMP's capitalization error because doing so would violate the rule against retroactive rate making. *See Salt Lake Citizens Cong.*, 846 P.2d at 1254 ("The rule against retroactive rate making precludes adjustments of approved rates to correct errors or missteps in the rate-making process."). In *Utah Dept. of Bus. Reg., Div. of Pub. Utilities v. Public Service Commission*, 720 P.2d 420 (Utah 1986), the Utah Supreme Court ruled that the "the PSC exceeded its statutory authority" when it allowed a utility to utilize a balancing account "to make up for a general revenue shortfall, thus violating the proscription against retroactive ratemaking." *Id.* at 423. The Court found that "neither the pass-through legislation" authorizing the EBA, "nor the Commission's general grant of regulatory authority permits a utility to have retroactive revenue adjustments in order to guarantee shareholders

²¹ Order on Petitions for Review, Reconsideration, and Rehearing (Feb. 26, 2021) at 13.

the rate of return initially anticipated.” *Id.* The Court further found that the Commission erred when it allowed the utility to use the balancing account to correct errors in ratemaking. *Id.* at 424 (ruling that Commission is prohibited from “us[ing] the pass-through statute to enable a utility to recover revenue shortfalls resulting from errors in forecasting or calculating an appropriate general rate.”).

There is no “reasonable basis” for this Commission to alter its GRC orders on the solitary issue of the amount of pension settlement loss included in rates. Absent modification, the GRC orders have the force of law and *res judicata* applies to bar RMP from relitigating in this docket the facts that were fully and fairly litigated in the GRC.

CONCLUSION

For the foregoing reasons, RMP is barred from relitigating the question of the amount of pension settlement loss included in rates and this Commission should disregard any evidence presented by RMP asserting that rates set in the GRC include anything other than \$11.9 million for pension settlement loss.

DATED this 27th day of September 2021.

Respectfully submitted,



By:

Phillip J. Russell
JAMES DODGE RUSSELL & STEPHENS, P.C.
Attorneys for UAE

Certificate of Service
Docket No. 21-035-14

I hereby certify that a true and correct copy of the foregoing was served by email this 27th day of September 2021 on the following:

ROCKY MOUNTAIN POWER

Emily Wegener	emily.wegener@pacificorp.com
Stephanie Barber-Renteria	stephanie.barber-renteria@pacificorp.com
Jana Saba	jana.saba@pacificorp.com
	Datarequest@pacificorp.com

DIVISION OF PUBLIC UTILITIES

Chris Parker	chrisparker@utah.gov
William Powell	wpowell@utah.gov
Patricia Schmid	pschmid@agutah.gov
Justin Jetter	jjetter@agutah.gov
	dpudatarequest@utah.gov

OFFICE OF CONSUMER SERVICES

Michele Beck	mbeck@utah.gov
Bela Vastag	bvastag@utah.gov
Alyson Anderson	akanderson@utah.gov
Robert Moore	rmoore@agutah.gov

/s/ Phillip J. Russell