

September 27, 2021

VIA ELECTRONIC FILING

Utah Public Service Commission
Heber M. Wells Building, 4th Floor
160 East 300 South
Salt Lake City, UT 84114

Attention: Gary Widerburg
Commission Administrator

RE: **Docket No. 21-035-14 – In the Matter of the Application of Rocky Mountain Power to Establish a Balancing Account for Pension Settlement Adjustments**
Rocky Mountain Power Post Hearing Legal Brief

Pursuant to the Order Granting Motion issued September 10, 2021 in the above referenced docket, Rocky Mountain Power (the “Company”) hereby submits for filing its post hearing legal brief.

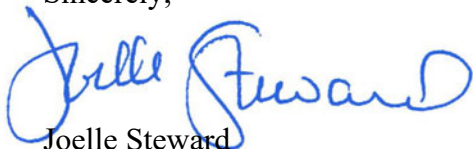
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Sincerely,



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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

POSTHEARING LEGAL BRIEF

PacifiCorp dba Rocky Mountain Power (“RMP” or the “Company”) hereby submits its post-hearing brief in the above-captioned docket on the legal effect of res judicata and judicial estoppel on this proceeding.

INTRODUCTION

The Company’s proposed starting balance for the Pension Settlement Adjustment Balancing Account (“PSABA”) is consistent with its position in the Company’s 2020 general rate case, Docket No. 20-035-04 (“2020 GRC”). At the hearing on the establishment of the PSABA, the Office of Consumer Services (“OCS”) and Utah Association of Energy Users (“UAE”) raised objections to RMP testimony that the starting balance of the PSABA should be \$7.9 million, claiming that the legal principles of res judicata and judicial estoppel prevent the Company from establishing the starting balance as anything other than \$11.9 million due to representations made in the 2020 GRC. However, there is no dispute that the amount of pension settlement costs used on the 2020 GRC included an erroneous capitalization assumption, which resulted in only \$7.9

million of the \$11.9 million pension settlement loss being included in the revenue requirement. The Commission’s purpose in establishing the balancing account is clear: to allow the Company to recover these “plainly recoverable” costs through a true up to the amount it was allowed to recover in rates in the 2020 GRC. Statements the Company made confusing the amount of projected pension settlement loss with the amount included in the Company’s revenue requirement request do not affect the appropriate starting balance of the PSABA, which should be set at \$7.9 million.

BACKGROUND

1. In the 2020 GRC, the Company projected an \$11.9 million dollar pension settlement loss. No party disputed that the Company incurred the pension settlement loss, but parties disagreed about how the Company should recover the loss.¹ The Company proposed including the loss in rates or, alternatively, in a balancing account that would true-up annually the difference between the actual and expected level of net periodic benefit cost of the Company’s pension and other post retirement plans, including settlement losses and any other potential curtailment gains and losses. UAE and OCS opposed both of the Company’s proposals, and instead proposed that the Company recover the loss over 20 years.

2. During the time the 2020 GRC was pending, the Company became aware of an incorrect capitalization assumption in the revenue requirement relating to the pension settlement loss. Specifically, the team tasked with determining the revenue requirement assumed based on earlier accounting guidance that a third of the loss would be included as a capitalized cost. However, the

¹ *Application of Rocky Mountain Power for Authority to Increase its Retail Electric Utility Service Rates in Utah and for Approval of its Proposed Electric Service Schedules and Electric Service Regulations*, Docket No. 20-035-04, Order at 30 (Dec. 30, 2020) (“No party in the 2018 Docket or here has argued the Pension Settlement Adjustments are not recoverable in the context of a general rate case. To the extent controversy exists, it concerns the manner in which RMP should recover any such losses.”).

accounting department had correctly stopped capitalizing such expenses per relevant accounting guidance, and no pension settlement loss was included in capitalized costs.

3. At the conclusion of the 2020 GRC, the Commission ruled: “We conclude that RMP’s Test Year pension settlement losses are plainly recoverable. Additionally, we find it reasonable to recognize recovery of those pension losses consistent with the required financial accounting standard.”² However, due to the “contingent and binary nature of Pension Settlement Adjustments,” the Commission determined that these “uniquely unpredictable and volatile” expenses should be recovered through “a balancing account with an annual true-up.” Concerning the balancing account, the Commission stated: “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.”³ This balancing account was narrower than the one proposed by the Company as an alternative.

4. On petition for rehearing, UAE challenged the Commission’s 2020 GRC Order as it related to pension settlement costs. Relevant to this proceeding, UAE requested clarification of the starting balance, stating “The only portion that should be included in the balancing account is Utah’s share of the Total Company pension settlement losses that are being expensed.”⁴ OCS joined in UAE’s petition. Neither party requested a revenue requirement adjustment related to this clarification.

5. In response to UAE’s petition, the Company argued that there was no need to reconsider or clarify the initial amount in the balancing account or how the account will operate because there was evidence in the record about the amount of the balancing account and this docket would

² *Id.* at 31.

³ *Id.* at 32.

⁴ 2020 GRC, 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 8 (January 29, 2021).

establish how the mechanism would work.⁵ The Company included citations to the 2020 GRC testimony of Nikki L. Koblaha, where she testified that the projected settlement loss for the 2021 test period was \$11.9 million⁶ and to the surrebuttal testimony of Donna Ramas, who testified that it was her understanding that the Company proposed to include the full amount of projected 2021 settlement loss as part of pension expense.⁷

6. While the evidence the Company cited from rate case testimony does not contradict the evidence presented in this docket, the Company's 2020 GRC post-hearing brief did not take into account the capitalization error, and therefore misstated its position on the starting balance of the PSABA, stating "that the initial amount in the balancing account is \$11.9 million."

7. The Commission denied UAE's petition for clarification or rehearing concerning the starting balance and mechanics of the balancing account.⁸ In the February 26 GRC Order, the Commission stated, "The points Intervenors raise with respect to RMP's plan to capitalize, rather than expense, a portion of the \$11.9 million raises a genuine and significant question as to whether any capitalized portion will constitute a realized expense in the Test Year. . . . We look forward to developing a full record on [this] issue[] in the forthcoming docket to address the balancing account."⁹ The Commission noted that discrepancies in the amount of pension settlement losses actually realized could be considered in this docket.¹⁰

8. In this application, the Company submitted undisputed testimony from Mr. Nicholas L. Highsmith that \$7.9 million was the amount of pension expense included in the revenue

⁵ 2020 GRC, Rocky Mountain Power's Response in Opposition to Petitions for Reconsideration, Review, or Rehearing ("Opposition"), at 11-14 (February 16, 2021).

⁶ 2020 GRC, Opposition, at 12 n.50, citing Direct Testimony of Nikki L. Koblaha at lines 594-96, 638-40.

⁷ *Id.* at 13, footnote 51.

⁸ 2020 GRC, Order on Petitions for Review, Reconsideration, or Rehearing ("February 26 GRC Order"), at 6-7 (February 26, 2021).

⁹ *Id.* at 7.

¹⁰ *Id.* at 7-8.

requirement in the 2020 GRC.¹¹ UAE and OCS objected to the introduction of testimony that the starting balance of the PSABA should be \$7.9 million. Specifically, UAE objected to the “portions of the testimony that assert that the amount of pension settlement loss . . . included in rates is something other than \$11.9 million” based on the principle of res judicata.¹² OCA joined UAE’s objection, added an objection to more testimony, and argued that the testimony should also be excluded on the grounds of judicial estoppel.¹³ The Commission denied the objection but noted that the legal objection was preserved.¹⁴

9. At the hearing, no witness contended that the Company actually included the full \$11.9 million in its 2020 GRC revenue requirement. Division of Public Utilities witness Jeffrey Einfeldt testified that only \$7.9 million of pension settlement loss expense was included in the 2020 GRC revenue requirement.¹⁵ UAE witness Kevin Higgins similarly testified, “[t]he company maintains that for accounting purposes, it did not include this \$4 million in its rate base, and I don’t have a reason to dispute that.”¹⁶

ARGUMENT

The legal doctrines of issue preclusion and res judicata do not constrain this Commission from setting a starting balance in the PSABA at \$7.9 million, consistent with what was undisputedly included in rates. Issue preclusion does not apply because the starting balance of the PSABA was not fully and fairly litigated, and did not result in a final judgment on the issue in the 2020 GRC. Moreover, the purposes of issue preclusion would not be served by applying it here. To the extent the Company maintained a position on the starting balance of the PSABA in the

¹¹ Direct Testimony of Nicholas L. Highsmith, at 3:55-4:80 (April 20, 2021); Rebuttal Testimony of Nicholas L. Highsmith (“Highsmith Rebuttal”), at 2:32-4:72 (July 13, 2021).

¹² Hearing Tr. at 12:1-6.

¹³ Hearing Tr. at 15:5-9.

¹⁴ Hearing Tr. at 23:5-24:10.

¹⁵ Hearing Tr. at 78:17-25.

¹⁶ Hearing Tr. at 99:12-14.

2020 GRC, judicial estoppel does not bar a change in position in this proceeding because no parties relied on any statement by the Company to their detriment. For these reasons, the Commission can and should set the starting balance of the PSABA at \$7.9 million, the undisputed amount of pension settlement loss included in the 2020 GRC revenue requirement.

I. ISSUE PRECLUSION DOES NOT APPLY BECAUSE THE STARTING BALANCE OF THE PSABA WAS NOT DETERMINED IN THE 2020 GRC.

Issue preclusion, also called collateral estoppel, may apply to bar the relitigation of issues that are “fully litigated”¹⁷ in administrative agency decisions when the agency acts in a judicial capacity.¹⁸

A party seeking to invoke collateral estoppel must establish that: (1) the issue decided in the prior adjudication is identical to the one presented in the instant action; (2) the party against whom issue preclusion is asserted was a party, or in privity with a party, to the prior adjudication; (3) the issue in the first action was completely, fully, and fairly litigated; and (4) the first suit resulted in a final judgment on the merits.¹⁹

Issue preclusion has only “limited applicability” to agency decisions, and applies “when there has been a prior adjudication of a factual issue and the application of a rule of law to those facts.”²⁰ In other words, *res judicata* bars a second adjudication of the same facts under the same rule of law.²¹ For instance, in *Salt Lake Citizens Cong.*, the Utah Supreme Court held that Commission was bound by its ruling that charitable contributions could not be charged to customers “until either the Commission specifically overruled the decision or the decision was changed or set aside by formal rule, statute, or court decision.”²² Here, the Commission did not apply the same “rule of

¹⁷ *Buckner v. Kennard*, 2004 UT 78, ¶ 12, 99 P.3d 842.

¹⁸ *Salt Lake Citizens Cong. v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245, 1251 (Utah 1992).

¹⁹ *Buckner*, 2004 UT 78, ¶ 13.

²⁰ *Salt Lake Citizens Cong.*, 846 P.2d at 1251-52.

²¹ *Id.*

²² *Id.* at 1253.

law” in the 2020 GRC as it is asked to apply here, so the application of issue preclusion is not mandatory.

Issue preclusion does not apply in this case because the 2020 GRC decision to set up a balancing account did not automatically decide the starting balance of the PSABA, and in fact expressly left that determination to this proceeding.²³ The Commission’s February 26 GRC Order specifically states that one of the purposes of the current proceeding is to flesh out the questions about capitalization and allocation that pertain the starting balance of the PSABA.²⁴ To the extent the questions addressed in the 2020 GRC and this proceeding overlap, the 2020 GRC outcome supports the Company’s position that the starting balance should be \$7.9 million because all parties agree that this was the amount included in the revenue requirement for pension settlement loss.²⁵ It is important to note that when the Commission discussed the specific amount of the projected pension settlement loss, the Commission’s stated intent was to provide the Company with full recovery of its “plainly recoverable” costs, which can only be accomplished with a starting balance of \$7.9 million. Further, even if the \$4 million discrepancy had been included in rates as a capitalized amount, which no party contends, the capitalized portion would amount to only \$.2 million during the test year.²⁶

The Company’s position is also not barred by the doctrine of issue preclusion because the starting balance was never fully or fairly litigated, nor was it subject to a final judgment on the merits. Intervenors argued at the hearing that the issue presented in this docket was previously fully and fairly litigated resulting in a judgment on the merits because the amount of pension settlement loss was the subject of pre-filed testimony and the post-hearing brief in the 2020 GRC.

²³ Background ¶ 7.

²⁴ Background ¶ 7.

²⁵ Background ¶ 9.

²⁶ Highsmith Rebuttal at 8:141-145.

This argument ignores that the 2020 GRC Order ordered the creation of a balancing account that was not contemplated by any of the parties, and so its starting balance could not have been fully or fairly litigated.²⁷ It also ignores the purpose of this docket as expressed in the February 26 GRC Order. Because the amount of the starting balance of the PSABA was not fully and fairly litigated in the 2020 GRC, the Commission should set the PSABA balancing account at \$7.9 million, consistent with the amount actually included in rates.

Even if issue preclusion were applicable here, the Commission would have the discretion to not apply the doctrine in circumstances where its purposes would not be served or where the result would not be just.²⁸ Some of the purposes of issue preclusion include: (1) preserving the integrity of the judicial system by preventing inconsistent judicial outcomes; (2) promoting judicial economy by preventing previously litigated issues from being relitigated; and (3) protecting litigants from harassment by vexatious litigation. A PSABA balance of \$7.9 million is consistent with the outcome of the 2020 GRC because the February 26 GRC Order explicitly leaves the beginning balance of the PSABA to this proceeding. Accordingly, applying the doctrine of issue preclusion would not promote judicial economy nor would it prevent vexatious litigation. Under these circumstances, it would not be just to start the PSABA with an erroneous balance based on confusion in a previous proceeding.

II. JUDICIAL ESTOPPEL DOES NOT APPLY BECAUSE NO PARTIES RELIED ON ANY STATEMENT BY THE COMPANY TO THEIR DETRIMENT.

OCS argues that the Company's previous statements that \$11.9 million of pension settlement loss should be included in rates precludes it from now stating that only \$7.9 million was actually included in rates. The Commission should reject this argument because the Company did

²⁷ See Background ¶ 3.

²⁸ See *Estate of Covington v. Josephson*, 888 P.2d 675, 678 (Utah Ct.App.1994).

not successfully maintain its position with respect to the \$11.9 million number and no party relied on the Company's statements to its detriment.

The elements of judicial estoppel are: (1) the prior and subsequent litigation involve the same parties or their privies; (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."²⁹

Additionally, judicial estoppel should not be applied unless the party against whom judicial estoppel is sought acted in bad faith.³⁰

As an initial matter, as discussed above, the Commission never ruled on the starting balance of the PSABA in the earlier proceeding, so the Company's alleged "prior position" was not "successfully maintained." The Company prevailed on its position that it should get full recovery of its pension settlement losses. To the extent the Company's prior position was that a specific amount of pension settlement cost, \$11.9 million, should be included in rates, it did not prevail on that position because only \$7.9 million was included in rates.

More importantly, no parties relied on the Company's statements about the amount in rates to their detriment. UAE witness Kevin Higgins was aware of the capitalization error throughout the 2020 GRC, but UAE never contended that the Company should increase its revenue requirement request by \$4 million as a result of the error even though there is no dispute that the pension costs were prudently incurred. Indeed, there is no evidence that any party would have behaved any differently in the 2020 GRC or in this docket had the Company adjusted its revenue requirement request to include the full \$11.9 million expense or stated explicitly that the actual amount included in rates in the 2020 GRC was \$7.9 million. Therefore, judicial estoppel does not

²⁹ *Orvis v. Johnson*, 2008 UT 2, ¶ 11, 177 P.3d 600 (citing *Tracy Loan & Trust Co. v. Openshaw Inv. Co.*, 102 Utah 509, 132 P.2d 388, 390 (1942)).

³⁰ *Id.* ¶ 11 at n.1.

bar the Company's position in this docket that \$7.9 million is the appropriate starting balance for the PSABA.

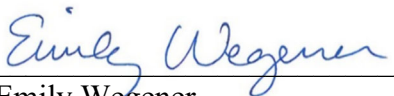
Finally, there is no evidence that the Company acted in bad faith in its statements about the amount of pension settlement loss in the 2020 GRC. The Company at all times included \$7.9 million of the pension settlement loss as a revenue requirement expense. Its filing was transparent enough that Mr. Higgins included information about the capitalization error in his testimony and UAE discussed it in its post-hearing brief, making this information fully available to other parties including the OCS. The Company's primary position in the 2020 GRC is that the pension settlement loss should be included in rates with no balancing account, a result that would have benefited customers as a result of the capitalization error. If a hypothetical capitalization assumption were included in the PSABA base, the difference would only be approximately \$0.2 million. There is no evidence that the Company acted in bad faith in its statements about the amount of pension settlement loss in rates made in the 2020 GRC.

CONCLUSION

For the foregoing reasons, the Commission should accept the Company's application as filed and establish the PSABA balance at \$7.9 million, consistent with the pension settlement costs included in the 2020 GRC.

DATED this 27th day of September, 2021.

Respectfully submitted,



Emily Wegener
Attorney for Rocky Mountain Power

CERTIFICATE OF SERVICE

Docket No. 21-035-14

I hereby certify that on September 27, 2021, a true and correct copy of the foregoing was served by electronic mail to the following:

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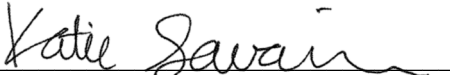
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