

Michelle Brandt King
Austin W. Jensen
Thorvald A. Nelson
Nikolas S. Stoffel
Holland & Hart LLP
555 Seventeenth Street, Suite 3200
Denver, CO 80202
Phone: (303) 295-8000
Email: mbking@hollandhart.com
awjensen@hollandhart.com
tnelson@hollandhart.com
nsstoffel@hollandhart.com

Attorneys for the Utah Large Customer Group

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

<p>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</p>	<p>Docket No. 24-035-04</p> <p>THE UTAH LARGE CUSTOMER GROUP'S RESPONSE TO ROCKY MOUNTAIN POWER'S REQUEST FOR REVIEW OR, IN THE ALTERNATIVE, REHEARING OF COMMISSION FINAL ORDER</p>
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I. INTRODUCTION AND SUMMARY

Pursuant to Utah Code § 63G-4-301(2) and Utah Administrative Code § R746-1-801(3),¹ the Utah Large Customer Group (“UTLCG”) files this Response to Rocky Mountain Power’s (“RMP” or the “Company”) Request for Review or, in the Alternative, Rehearing of Commission Final Order (“Request”) with the Utah Public Service Commission (“Commission”) in RMP’s 2024 general rate case.

The UTLCG specifically addresses four primary issues within RMP’s Request as a part of this Response: (1) wildfire excess liability insurance (“ELI”) premium costs, (2) return on equity (“ROE”), (3) capital structure, and (4) the Washington Climate Commitment Act (“CCA”) compliance costs. Based on Utah law and the substantial evidence presented in this proceeding, the Commission’s Order was proper. RMP’s attacks on the Order are frequently baseless, inaccurate, represent logical inconsistencies, and simply reflect RMP’s general disagreement with the outcome of its rate case. As the Commission has done in the past, the Commission should apply Utah Rule of Civil Procedure 59’s standard for review or rehearing.² As evidenced throughout this response, RMP fails to meet the standard because its Request does not offer the necessary persuasive evidence or reasoning to identify a flaw in the original Order warranting review or rehearing. The Commission’s Order appropriately relied on the substantial evidence found in the record. RMP’s Request does nothing to change that. The Commission’s decisions in the Order were just, reasonable, and in the public interest. Therefore, the UTLCG respectfully requests that the Commission reject RMP’s Request.

¹ Both Utah Code Ann. § 63G-4-301 (2) and Utah Admin. Code § R746-1-801 (3) allow any party to a proceeding in which a request for review or rehearing has been filed to submit a response to such a request within 15 days of the request.

² *See generally* Utah R. Civ. P. 59.

II. STANDARD OF REVIEW

It is well-established Utah law that the Commission must set rates that are just, reasonable, and in the public interest based on the substantial evidence adduced at hearing.³ In setting just and reasonable rates, the Commission “has considerable latitude of discretion”⁴ so long as it “balances the need for ensuring safe, reliable, adequate, and reasonably priced utility service for customers, with the need to ensure utility companies have the opportunity to earn a reasonable rate of return.”⁵ “[T]he 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.”⁶

Furthermore, with specific regard to the determination of whether expenses incurred by a utility were prudent, and therefore recoverable, the Commission must: (1) “ensure just and reasonable rates for the retail ratepayers . . . in this state,” (2) “focus on the reasonableness of the expense resulting from the action of the public utility judged as of the time the action was taken,” (3) “determine whether a reasonable utility, knowing what the utility knew or should have known at the time of the action, would reasonably have incurred . . . the expense,” and (4) “apply other factors determined by the [C]ommission to be relevant.”⁷

Upon receiving a request for review or rehearing that challenges the decisions made by the Commission in establishing rates, the Commission looks to the standard in the Utah Rules of Civil

³ *Utah Dep’t of Bus. Regul., Div. of Pub. Utils. v. Pub. Serv. Comm’n*, 614 P.2d 1242, 1245 (Utah 1980) (citing Utah Code Ann. § 54-7-12); *see also* Utah Code Ann. § 54-4-4.1 (1).

⁴ *White River Shale Oil Corp. v. Pub. Serv. Comm’n*, 700 P.2d 1088, 1093 (Utah 1985); *see also* Utah Code Ann. § 54-4-1.

⁵ *In the Matter of the Request for a Rate Increase of Hidden Creek Water Company*, Docket No. 09-2440-01, Report and Order, p. 10 (Aug. 3, 2010).

⁶ *Utah Dep’t of Bus. Regul.*, 614 P.2d at 1245.

⁷ Utah Code Ann. § 54-4-4 (4)(a).

Procedure, Rule 59.⁸ The Commission has previously used the Rule 59 standard, governing requests for new trials, including in the Deferred Accounting Order (“DAO”) Docket that became a part of this proceeding.⁹ As relevant here, Rule 59 provides that a new hearing may be granted based upon (1) “accident or surprise that ordinary prudence could not have guarded against,” (2) “newly discovered material evidence that could not, with reasonable diligence, have been discovered and produced at trial,” (3) “insufficiency of evidence to justify the verdict or other decision,” and (4) “that the verdict or decision is contrary to law or based on an error in law.”¹⁰ Failure to establish the presence of one or more of these circumstances warrants denial of the request.

III. ARGUMENT

A. The Commission’s Order to disallow certain ELI premium increases was proper and should be affirmed.

RMP attempts to rebut the Commission’s decision disallowing certain of the Company’s ELI premium increases by criticizing the Order on multiple fronts. First, the Request claims the Commission improperly determined that RMP was responsible for most of its ELI premium increases by way of its tortious conduct underlying the *James*¹¹ wildfires. Second, RMP argues that the amount of ELI premium costs the Commission allowed the Company to recover is insufficient and based on incorrect information. Last, RMP contends that it was prudent for the Company to not obtain lower premiums or pursue self-insurance, and that it should not be denied a portion of its cost recovery as a result. However, all of these arguments fail to persuade and do

⁸ See generally Utah R. Civ. P. 59; see *Application of Rocky Mountain Power for a Deferred Accounting Order Regarding Insurance Costs*, Docket No. 23-035-40, Order on Review, pp. 15–16 (May 29, 2024) (In the DAO Docket preceding the present proceeding, the Commission applied Rule 59 to RMP’s request for rehearing and determined that RMP did not meet the Rule 59 standards.).

⁹ See *Application of Rocky Mountain Power for a Deferred Accounting Order Regarding Insurance Costs*, Docket No. 23-035-40, Order on Review, pp. 15–16 (May 29, 2024).

¹⁰ Utah R. Civ. P. 59 (a).

¹¹ See UTLCG Cross Ex. 11 (*James v. PacifiCorp*, No. 20-CV-33885 (Or. Cir. Ct., Multnomah Cnty, Jun. 12, 2023)).

not satisfy the Rule 59 standards for review or rehearing. The Commission should affirm its Order regarding RMP's ELI premium cost recovery and deny the Request.

1. Substantial evidence supports the fact that RMP is responsible for the vast majority of ELI premium increases.

RMP argues it satisfies Rule 59 by claiming that the Commission applied inconsistent standards to the review of ELI premium costs and that the Commission lacked evidence to support its conclusions.¹² Yet, the Commission maintained consistent standards throughout the proceeding and properly applied Utah's prudence analysis to the ELI premium costs. The Commission's determination that RMP is responsible for, and therefore cannot recover, most of its own ELI premium increases was proper and does not warrant review or rehearing.

- a. *The Order does not deviate from the Commission's reasoning in the DAO Docket.*

RMP asserts that the Commission applied inconsistent standards between its review of the same issue in the related DAO Docket and the present rate case.¹³ RMP contends that the Order constitutes a "'surprise' shift in legal and evidentiary standards regarding the prudence of ELI premium expenditures."¹⁴ This claim is unfounded; the Commission was consistent across the DAO Docket and this rate case in evaluating the prudence of RMP's ELI premium costs.

RMP's issue with the Commission's evaluation of its costs stems from the Company's overreliance on certain Commission language in the DAO Docket's Order on Review. In that proceeding, the Commission correctly articulated that, when evaluating ELI premium costs in the rate case, "[t]he pertinent question is whether RMP's tortious conduct in relation to the events underlying *James*, its conduct for which a jury assessed punitive damages and found RMP culpable

¹² See Request, pp. 40–46, 61–64.

¹³ *Id.*, p. 41.

¹⁴ *Id.*, p. 46 (referencing the prudence standard detailed in Utah Code Ann. § 54-4-4 (4)(a)).

for causing the 2020 Oregon wildfires, impact RMP’s [ELI Premiums] and to what degree.”¹⁵ The Commission also noted that “[n]one of the evidence RMP points to . . . meaningfully speaks to that question.”¹⁶ RMP states that the Commission did not reach this “pertinent question” in its Order and instead focused on “‘discrepancies’ between the Company’s ELI premiums and those of other utilities,” constituting a new standard.¹⁷

RMP’s contention that the Commission applies a “surprise” new standard in its Order fails on multiple fronts. First, just because the Commission highlighted the “pertinent question,” it does not follow that RMP’s tortious conduct related to *James* is the *only* analysis relevant to cost recovery. In the DAO Docket, the Commission did not say that RMP’s tortious conduct underlying *James* is the sole issue; it left open the possibility that it may consider other factors,¹⁸ which is consistent with the Commission’s discretion under Utah law.¹⁹

Second, it is inaccurate for RMP to say that the Commission “did not . . . reach . . . the ‘pertinent question.’”²⁰ The Commission’s Order very clearly relies, in part, on the substantial evidence highlighting RMP’s highly culpable conduct in relation to *James*. The Order states that “the historic, adverse verdict in *James* is, in conjunction perhaps with other wildfire-related liabilities . . . , the most likely cause of the discrepancy for RMP,” where “discrepancy” refers to the explosion of RMP’s ELI premium costs as compared to peer utilities with similar risk profiles.²¹ Thus, the Commission clearly reaches the DAO Docket question by finding that

¹⁵ *Application of Rocky Mountain Power for a Deferred Accounting Order Regarding Insurance Costs*, Docket No. 23-035-40, Order on Review, p. 14 (May 29, 2024).

¹⁶ *Id.*

¹⁷ Request, p. 42.

¹⁸ *See Application of Rocky Mountain Power for a Deferred Accounting Order Regarding Insurance Costs*, Docket No. 23-035-40, Order on Review, p. 14 (May 29, 2024).

¹⁹ *White River Shale Oil Corp. v. Pub. Serv. Comm'n*, 700 P.2d 1088, 1093 (Utah 1985) (noting the Commission’s “considerable latitude of discretion”); Utah Code Ann. § 54-4-4 (4)(a) (specifically noting that the Commission can apply other factors the Commission deems relevant).

²⁰ Request, p. 42.

²¹ Order, p. 161.

substantial evidence supported the conclusion that the *James* verdict, and thus RMP's conduct underlying the verdict, directly led to an increase in ELI premiums. RMP even appears to admit that the Commission addressed the Company's conduct underlying *James*, by acknowledging that "[e]lsewhere in the Order, the Commission returns to its claim that ELI premiums 'were driven far beyond industry norms for Utah, by PacifiCorp's management of the wildfires in September 2020.'"²²

Third, Utah's prudence standard for cost recovery does not pigeon-hole the Commission. The statutory prudence standard explicitly states that the Commission has the ability to "apply other factors determined by the [C]ommission to be relevant, consistent with the standards specified in this section."²³ The issues the Commission addressed in the Order go directly toward considering the "reasonableness of the expense resulting from the action of the public utility judged as of the time the action was taken."²⁴ Here, the Commission's decision to consider additional evidence presented on ELI premium costs was entirely within the scope of its discretion and is valid under the prudence standard. Because RMP's tortious conduct in *James* was a significant contributing factor to ELI premium increases, the ELI premium increases are hardly a reasonable cost RMP should be allowed to recover. In assessing the host of issues related to the ELI premium increases, the Commission properly reviewed the evidence presented by intervenors, which spoke to all of the bases on which the Commission's decision rests. RMP had many opportunities to rebut the evidence the intervenors presented, either through pre-filed testimony or cross-examination at hearing. In fact, one of the reasons the Commission granted rehearing in the DAO Docket was so that more evidence could be evaluated. Thus, there is no basis for RMP to

²² Request, p. 43 (quoting Order, p. iii).

²³ Utah Code Ann. § 54-4-4 (4)(a).

²⁴ *Id.*

claim “surprise” on the issues assessed in the Order related to ELI premium costs—the substantial evidence weighing against recovery was made known to RMP throughout the proceeding.

Last, RMP offers incorrect standards for evaluating review and rehearing on ELI premium costs. In its Request, RMP attempts to state that the Utah Administrative Procedure Act (“APA”) governing *judicial* review applies to this proceeding in addition to the Utah Rules of Civil Procedure standards for review or rehearing.²⁵ This is plainly incorrect. RMP states the Commission applied the APA standard before, but its reference to such applications is weak.²⁶ RMP cites only to an initial Commission order, not an order for review, where the Commission simply referred to the APA to note that Commission aims for consistent adjudications absent the necessary justification.²⁷ The statement that the Commission should apply this standard without strong precedence lacks coherence as the APA statute is clearly reserved for *judicial* review. Thus, the Commission need not directly consider the APA standard in considering review or rehearing. Rule 59 of the Utah Rules of Civil Procedure is the proper standard.

The Commission’s evaluation of ELI premium costs as a part of this proceeding was consistent with the DAO Docket and Utah law. As a result, there is no “surprise” legal standard or evidence as RMP claims. The Request should be denied because it does not satisfy the standard for review or rehearing.

- b. *The Commission properly accounted for RMP’s tortious conduct underlying James.*

Next, RMP argues that, under its preferred prudence standard, ELI premium costs are fully recoverable. Specifically, the Company argues that “[t]he evidence presented by the Company

²⁵ Request, p. 44.

²⁶ *See id.*

²⁷ *See In the Matter of the Application of Rocky Mountain Power for Approval of an Electric Service Agreement between Rocky Mountain Power and Praxair, Inc.*, Docket No. 10-035-115, Report and Order, p. 10 (Dec. 16, 2010) (The Order merely quotes a portion of the APA standard for judicial review to state the Commission should not act contrary to its prior practices without justification.).

established that insurers did not consider the tortious conduct alleged in *James* when setting the Company’s ELI premiums.”²⁸ This is patently false. Thus, RMP’s argument fails even using its singular metric for recoverability.

First and foremost, it is inaccurate for RMP to claim that its tortious conduct underlying *James* is “alleged.”²⁹ It is a fact that RMP engaged in “grossly negligent, reckless[,] and willful” conduct in the events surrounding *James*.³⁰ The jury verdict in *James* is the valid product of a court-sanctioned process to investigate RMP’s conduct regarding the wildfires. For RMP to claim otherwise flouts the rule of law. Just because the *James* verdict is currently on appeal, that does not mean the verdict is any less legitimate. RMP’s insurers and the Commission knew—as fact—that the Company engaged in highly culpable conduct in igniting wildfires in 2020. Simply because RMP disagrees with the jury’s verdict and hopes that its appeal will find a sympathetic appellate panel, does not change the facts known today. The same is true with regard to the existence of the Oregon Department of Forestry (“ODF”) report; it does nothing to change the legitimacy of the verdict, and it certainly does not change the fact that all other evidence presented in this proceeding points to RMP’s conduct underlying *James* greatly impacting ELI premium increases. Critically, the ODF report and RMP’s pending appeal fail to support the conclusion that RMP’s conduct and the *James* verdict did not cause RMP’s ELI premiums to increase beyond industry norms.

Second, intervening parties persuasively rebutted RMP’s purported evidence and demonstrated that RMP is responsible for ELI premium increases. RMP doubles down on its argument at hearing that because *James* is not in the Company’s loss history, its actions related to

²⁸ Request, p. 41 (emphasis added); *see id.* at 43 (“As noted above, the record shows the ‘tortious conduct’ alleged in *James* did not impact the premiums.”).

²⁹ *See id.* at p. 41.

³⁰ Order, p. 39 (referencing the jury verdict in *James*).

James could not have possibly been the cause of the rise in premiums.³¹ To that end, RMP submitted evidence from a single insurer stating that RMP did not have a loss history associated with these events.³² As it did at hearing, RMP ignores the role that risk exposure plays in ELI premium increases and its Request glosses over risk, focusing solely on loss history.³³ But even RMP’s witness recognized the flaw in this argument, acknowledging that insurers “consider all factors related to risk exposure, including mass jury verdicts that are very large in size”³⁴ and review Form 10-K disclosures filed by utilities with the United States Securities and Exchange Commission (“SEC”), including RMP’s 10-K that addressed risk stemming from the *James* verdict.³⁵ Thus, it is myopic for RMP to claim that it is not responsible for premium increases because it never filed a claim in *James*.³⁶ Insurers took notice of the significant increase in risk facing RMP in the fallout of the *James* events. Other intervenors agree, including the Utah Association of Energy Users (“UAE”) and Western Resource Advocates (“WRA”).³⁷ Accordingly, substantial evidence supports the conclusion that the risk RMP created through its culpable conduct underlying *James* directly impacted its ELI premiums.

Even if the standard for prudence on RMP’s ELI premium costs was solely whether RMP reasonably incurred costs stemming from *James*, as RMP argues (and as refuted above), the Company has clearly failed to meet that standard with substantial evidence. RMP is unable to provide any substantive, non-speculative evidence that the Company is not responsible for its own ELI premium increases. Rather, RMP’s arguments are conclusory, ignore reality, and lie in direct conflict with the record evidence. The substantial evidence showed that RMP was responsible for

³¹ See Request, p. 63.

³² Order, p. 147.

³³ See UTLCG Phase III Post-Hr’g Br., p. 5; Request, p. 63.

³⁴ Trial Tr. Vol. I (3/20/2025), 200:21–23 (Coleman).

³⁵ UTLCG Phase III Post-Hr’g Br., p. 6.

³⁶ Phase III Direct Test. of Karl G. Boothman, 12:168.

³⁷ Order, pp. 149–50.

ELI premium increases. “To the extent the increased expenses are attributable to the Company’s gross negligence, recklessness, and willful conduct in Oregon, they are not just and reasonable costs and therefore should be ineligible for recovery.”³⁸ The Commission correctly reached this conclusion. The Request should be denied.

2. The Order’s comparison of ELI premiums among utilities and its 400 percent multiplier are supported by substantial evidence.

In addition to taking issue with the Commission’s disallowance of most ELI premium costs, RMP also argues that the evidence does not support the Commission’s 400 percent multiplier.³⁹ However this assertion is lacking and highlights RMP’s logical inconsistency in this proceeding. Throughout its Request, RMP claims that it deserves more cost recovery for its ELI premium increases but vacillates on the Commission’s evaluation methodology in whatever way is most convenient to the Company. Moreover, RMP attempts to inject “new” evidence to the proceeding that was available to the Company at hearing. For these reasons, RMP’s Request regarding its authorized ELI premium costs is without merit. The Commission relied on substantial evidence in determining the extent to which these costs are just and reasonable; further review, or rehearing, is unwarranted. The Commission should deny the Request.

a. *RMP fails to recognize its own evidence supporting ELI premium comparisons and the 400 percent multiplier.*

In determining what ELI premium costs RMP is actually entitled to recover in this case, the Commission ultimately undertook an analysis of comparable utilities to determine the level of increase that was appropriate, excluding the costs the Commission already deemed imprudent as a result of RMP’s actions underlying *James*.⁴⁰ Through that analysis, the Commission decided to

³⁸ UTLCG Phase III Post-Hr’g Br., p. 1.

³⁹ Request, pp. 46–61.

⁴⁰ See Order, p. 166.

raise the recoverable Utah-allocated ELI premium cost by 400 percent compared to the 2020 general rate case.⁴¹ RMP criticizes the Commission’s comparison to other utilities and the ultimate 400 percent increase at length.⁴² However, RMP primarily faults the Commission in ways that are contradictory to the Company’s own, prior evidence presented to the Commission.

First, RMP contests that the Commission’s reliance on comparing it to other utilities was inappropriate and it should have instead “rel[ie]d] on data specific to the Company and current ELI risks and costs.”⁴³ This stance is in direct conflict with RMP’s arguments throughout the proceeding which stated that the Commission should be evaluating the market as a whole in determining the prudence of ELI premium increases. In Direct Testimony, RMP witness Frank Graves provided lengthy evidence describing comparisons of other utilities facing rising insurance premiums and other issues relevant to acquiring commercial liability insurance.⁴⁴ Mr. Graves cited to the ELI circumstances of multiple utilities RMP considers peers, including Pacific Gas & Electric Company (“PG&E”), Southern California Edison (“SCE”), San Diego Gas & Electric (“SDG&E”), Avista Corporation, and Idaho Power Company.⁴⁵ Furthermore, in Phase III Direct Testimony, RMP witness Mariya V. Coleman details Public Service Company of Colorado’s (“PSCo”) efforts to establish deferred accounting for ELI premium increases to offer support for RMP’s position stating that PSCo “further corroborated the Company’s position.”⁴⁶ Ms. Coleman also finds support in PSCo’s statement that “Western utilities seeking liability insurance are expected to face the impacts of significantly increasing rates.”⁴⁷ Thus, RMP has consistently and repeatedly emphasized the need to look at the broader market, until now. Now that the

⁴¹ *Id.*

⁴² *See* Request, pp. 46–61.

⁴³ *Id.* at p. 46.

⁴⁴ *See generally* Direct Test. of Frank Graves, 7:151–18:344.

⁴⁵ *Id.* at 12:242–16:315.

⁴⁶ Phase III Direct Test. of Mariya V. Coleman, 19:416–20:430.

⁴⁷ *Id.* at 20:429–30.

Commission followed RMP's lead to look at the whole market for evaluating ELI insurance premiums, and reached a conclusion RMP deems not sufficiently favorable, RMP cries foul. RMP cannot have it both ways.

Second, RMP takes issue with the 400 percent multiplier the Commission applied to RMP's 2020 prudent and recoverable ELI premiums to determine the amount RMP may now recover. RMP claims "[t]he 400 percent increase approved by the Commission is not commensurate with the identified peer utilities" and "the data . . . does not support the conclusion that PSCO and NV Energy only experienced a 400 percent increase in ELI premiums."⁴⁸ Again, this claim is in direct conflict with RMP's presented evidence. As an initial note, RMP states that comparing its ELI premiums to PSCO and NV Energy as "'peer utilities' . . . that 'have not experienced catastrophic wildfire events' is not supported by the record evidence, contradicts key information in the record, and arbitrarily limits the Company's recovery of ELI premiums."⁴⁹ This is a tacit admission from the Company that its involvement in the 2020 Oregon wildfires, including its conduct underlying *James*, did have a significant impact on its ELI premiums, contrary to its arguments otherwise. Furthermore, in RMP's Request, it initially only attacks the proposed 400 percent step-up of ELI premiums with respect to WRA's analysis on the issue.⁵⁰ But the Commission also relied on the Division of Public Utilities' ("DPU") analysis that reached the same conclusion.⁵¹ DPU's analysis compared "the increases other utilities have experienced" to "limit RMP's increase to between 100 and 400 percent of the amount currently in base rates from the 2020 GRC."⁵² Notably, in contrast to WRA's analysis which analyzed PSCO and NV Energy,

⁴⁸ Request, pp. 47–48.

⁴⁹ *Id.* at p. 60.

⁵⁰ *See id.* at pp. 48–50.

⁵¹ Order, p. 159.

⁵² *Id.*

DPU’s analysis “used the same utilities that RMP regards as reference points, including three large California utilities: PG&E, SDG&E, and SCE.”⁵³ DPU witness Jeffrey S. Einfeldt notes that applying a “400% growth rate to the prior GRC ELI cost” is “a growth rate greater than all the entities referenced by RMP witness Graves except for PG&E.”⁵⁴

Later in its Request, RMP also criticizes DPU’s analysis, but this too contradicts RMP’s own evidence. RMP states “the Company’s testimony never suggested that the Commission . . . should set rates solely based on comparisons with rates charged by other utilities.”⁵⁵ First, it is a stretch to say that the Commission is setting its rates “based solely on comparisons” to other utilities. The Commission only compared to these other utilities to determine the appropriate increase in ELI premium cost recovery and does not apply these utilities’ other costs to RMP in this rate case. Additionally, through witnesses Mr. Graves’ and Ms. Coleman’s testimony RMP explicitly *asked* the Commission to compare RMP to the utilities DPU analyzes to support RMP’s contention that ELI increases are an industry-wide issue.⁵⁶ To now say the Commission can only compare RMP to other utilities in the manner the Company prefers is nonsensical. It was reasonable for the Commission to use the same utilities RMP advertised as helpful reference points.

Furthermore, RMP is logically inconsistent in its criticisms of the temporal comparisons in DPU’s analysis. RMP produces a table comparing ELI premiums among the California utilities DPU analyzed from 2020 to 2023. RMP argues that “[t]his comparison highlights the distortions caused by comparing data from varying time periods . . . California utilities saw their major

⁵³ *Id.* at n. 365 (citing Phase III Direct Test. of Jeffrey S. Einfeldt, 11:179–92).

⁵⁴ Phase III Direct Test. of Jeffrey S. Einfeldt, 12:209–11.

⁵⁵ Request, p. 55.

⁵⁶ *See generally* Direct Test. of Frank Graves, 7:151–18:344.

increases in premium levels earlier in time.”⁵⁷ In a footnote, RMP goes on to say that PG&E saw a large increase in premiums between 2016 and 2019.⁵⁸ Notably, however, DPU’s analysis clearly evaluated these utilities’ ELI premiums beginning earlier than 2020; DPU’s data on PG&E goes back to the 2015/2016 year and its data on the other evaluated utilities goes back as far as the 2016/2017 year.⁵⁹ For RMP to only show a comparison from 2020 to 2023 undermines its argument that the DPU comparison does not account for additional years of ELI premium increases. In fact, RMP itself is guilty of “distortions caused by comparing data from varying time periods.”⁶⁰ Here, RMP states that a comparison of ELI premiums from 2020 to 2023 distorts the data, but earlier in its Request RMP offers a comparison of the ELI premiums for PSCo and NV Energy on a similar timescale (2020 to 2024) as support for its conclusions.⁶¹ RMP’s logical inconsistencies regarding the Commission’s application of comparisons among other utilities erode the bases of its arguments and do not support its proffered conclusion that a 400 percent increase in cost recovery for ELI premiums is inadequate. It is illogical for RMP to simultaneously point to other, specific utilities to attempt to prove that it deserves more ELI premium cost recovery and reject those same comparisons when the conclusion cuts the other way. Once again, RMP tries to have it both ways.

The significant logical inconsistencies within RMP’s Request regarding the amount of costs it should be able to recover on ELI premiums leave its argument deficient. It is not possible to consider RMP’s argument that the Commission’s Order suffers from “insufficiency of evidence to justify the . . . decision” (as is necessary in order to find in favor of review or rehearing) when

⁵⁷ Request, pp. 56–57.

⁵⁸ *Id.* at p. 57 n. 222.

⁵⁹ Phase III Direct Test. of Jeffrey S. Einfeldt, 11:182–92.

⁶⁰ Request, p. 56

⁶¹ *See id.*, pp. 49–50.

much of the Order on this issue is actually aligned with RMP’s previously presented evidence. The Request fails to persuade and should be denied.

b. *RMP improperly attempts to introduce new evidence in its Request.*

Despite claiming that the Commission used improper evidence in its determination of recoverable ELI premium costs, RMP makes multiple, impermissible attempts in its Request to introduce new evidence not found in the record. Rule 59 of the Utah Rules of Civil Procedure, only permits the consideration of “newly discovered material evidence that could not, with reasonable diligence have been discovered and produced at trial” to inform a decision for review or rehearing.⁶² Evidence that was readily discoverable or available prior to, or at trial, does not constitute “newly discovered material” under the Rule.⁶³ None of RMP’s newly proffered evidence falls under the Rule 59 definition.

For example, RMP offers new evidence not previously included in the record regarding Xcel Energy’s annual 10-K SEC filing,⁶⁴ NV Energy’s testimony in front of the Public Utilities Commission of Nevada regarding its wildfire liability risk,⁶⁵ RMP’s “revised” version of the “‘WRA Annualized Premium’ chart including California utilities,”⁶⁶ and Xcel Energy’s statements regarding the 2021 Marshall Fire.⁶⁷ All of this new evidence in RMP’s Request is improperly offered as it certainly could have been requested or produced prior to the close of evidence in this proceeding. Additionally, certain new evidence, such as the “revised” version of the “WRA Annualized Premium” chart is misleading.⁶⁸ The chart only shows the change in premium cost over time for other utilities, but neglects to provide any relevant context regarding utility size,

⁶² Utah R. Civ. P. 59 (a).

⁶³ See *Clarke v. Clarke*, 542 P.3d 935, 946 (Utah Ct. App. 2023).

⁶⁴ Request, p. 51.

⁶⁵ *Id.* at p. 54.

⁶⁶ *Id.* at p. 58.

⁶⁷ *Id.* at pp. 60–61.

⁶⁸ See *id.* at p. 58.

coverage amounts, or other information that could distinguish these premium figures among the utilities.⁶⁹ With no opportunity to propound discovery, offer testimony to rebut, or cross-examine, RMP on this evidence, its late introduction in the Company's Request improperly prejudices the UTLCG and other intervenors. Given the unfairness against the intervening parties that RMP's attempt to introduce new evidence presents, the Commission should not consider any evidence within RMP's Request that was not established in the record prior to or during the hearing. Furthermore, this evidence cannot be used as the basis for review or rehearing per the Rule 59 standard.

3. RMP's failure to procure lower ELI premiums was established in the record evidence and was properly considered in the Order.

RMP argues that the Order errs in relying on RMP's failure to procure lower cost premiums or to use self-insurance.⁷⁰ On the contrary, there is substantial evidence supporting the Order's disallowance.

Regarding RMP's failure to acquire lower ELI premiums to mitigate the substantial increases it has faced, the Commission noted that "a reasonable utility . . . would reasonably and responsibly evaluate its insurance procurement decisions."⁷¹ RMP claims "the overwhelming weight of the record evidence demonstrates" it did in fact "evaluate its insurance procurement decisions."⁷² However, it is not at all clear where the record evidence actually supports such a contention. RMP lists several actions it took to procure ELI renewals,⁷³ but none of these actions were clearly taken to obtain lower ELI premiums in light of the wildfire liability weighing on the Company. RMP simply states, it met with its potential insurers, and that "the Company strives for

⁶⁹ *See id.*

⁷⁰ *See id.* at p. 69.

⁷¹ Order, p. 162.

⁷² Request, p. 69 (quoting Order, p. 152).

⁷³ *See id.*, pp. 69–70.

the lowest premiums” without offering a modicum of support for what exactly it has done beyond the ordinary course of business to ensure it receives lower premiums.⁷⁴ Furthermore, RMP contends its August 2025 ELI renewal “provides more certainty than the annual policies insurers traditionally offer,”⁷⁵ but includes no explanation of what that “certainty” entails, let alone any support that the Company “reasonably or responsibly”⁷⁶ reviewed that policy. As far as “evidence of the Company’s diligent efforts in its insurance procurement process”⁷⁷ goes, that is it. RMP offers no other evidence that it acted reasonably to procure lower ELI premiums. This light lift hardly meets the proper standard of substantial evidence to justify RMP’s position.

Furthermore, the Order relies, in part, on RMP’s response to a discovery request from WRA in concluding disallowance of a portion of the ELI premium increases was proper.⁷⁸ In that response, RMP “could not identify the claims it reviewed in determining an appropriate level of coverage, has no ‘methodology . . . to determine reasonable liability coverage,’ and conducted no study to assess statistically expected losses.”⁷⁹ Yet RMP inexplicably attempts to discredit its own response on this issue by stating WRA was unqualified to ask the question in the first place.⁸⁰ WRA is a sophisticated, credible, and respected organization. It is unfortunate (and usually inappropriate) when the best argument is personal attack.⁸¹ RMP’s attack on WRA doesn’t cure the lack of diligence it exercised in procuring lower ELI premiums.

⁷⁴ *Id.* (quoting Trial Tr. Vol. 1 (3/20/2025), 79:15–19 (Coleman)).

⁷⁵ *Id.* at 70.

⁷⁶ Order, p. 162.

⁷⁷ Request, p. 70.

⁷⁸ Order, p. 162.

⁷⁹ *Id.* (quoting Phase III Direct Test. of Karl G. Boothman, 18:301–02).

⁸⁰ Request, p. 71.

⁸¹ *Peters v. Pine Meadow Ranch Home Ass’n*, 2007 UT 2, ¶ 21 (2007) (“There is a misconception among some lawyers and clients that advocacy can be enhanced by personal attacks, overly aggressive conduct, or confrontational tactics. Although it is true that this type of advocacy may occasionally lead to some short-term tactical advantages, our collective experience as a court at various levels of the judicial process has convinced us that it is usually highly counterproductive. It distracts the decision-maker from the merits of the case and erodes the credibility of the advocate. Credibility is often directly tied to civility and professionalism. Judges, jurors, and other lawyers are more likely to believe a lawyer who is courteous and treats others with dignity and respect.”).

On the issue of self-insurance, RMP again fails to demonstrate it acted reasonably to reduce ELI premium costs. While RMP disputes the Commission’s claims about its actions, and what is available to it in the regulatory environment, regarding self-insurance, RMP neglects to acknowledge the other available options that could alleviate some of the insurance burdens the Company is facing. Specifically, the Commission noted that RMP is eligible to establish a “Utah fire fund” that would make surcharge funds “available to RMP to resolve claims arising out of fire events in Utah with a \$10 million deductible.”⁸² But RMP has failed to file an application to establish the fund.⁸³ Thus, RMP has at least one alternative insurance option readily available, but the Company has neglected to pursue it. RMP’s decision to solely incur commercial insurance costs simply cannot be considered reasonable or prudent with such an alternative available.

The Commission properly applied the statutory prudence standard by “focus[ing] on the reasonableness of the expense resulting from the action of the public utility judged as of the time the action was taken.”⁸⁴ On this standard, RMP fails to demonstrate that its actions to acquire lower ELI premiums were anything but sub-par. Meanwhile, various intervenors, including the UTLCG, WRA, and UAE presented substantial evidence to establish that RMP acted unreasonably. Accordingly, RMP cannot claim there is an “insufficiency of evidence to justify the . . . decision”⁸⁵ to support its Request; review or rehearing is unwarranted on this issue. The Commission should deny the Request.

⁸² Order, p. 163.

⁸³ *Id.*

⁸⁴ Utah Code Ann. § 54-4-4 (4)(a).

⁸⁵ Utah R. Civ. P. 59 (a).

B. The Commission should affirm its ROE determination as a valid, well-informed application of its discretion.

In its Request, RMP attempts to discredit the Commission's ROE determinations by (1) comparing the Order's ROE to the ROE established in RMP's 2020 general rate case, (2) arguing the Commission deviated from past practice in setting the ROE, and (3) reiterating that RMP witness record evidence is better suited to evaluate market and regulatory conditions.⁸⁶ These attempts to obtain a higher ROE than the Commission ordered should be summarily rejected. The Commission properly set the ROE in this case at 9.375% on the basis of substantial evidence presented by intervenors.⁸⁷ While this Response does not attempt to re-litigate the substantive issues underpinning the ROE calculation that were extensively discussed during the Phase I hearing, the UTLCG addresses RMP's arguments for review or rehearing on the ROE issue.⁸⁸

1. RMP misunderstands the standard for ROE determination.

As a general matter, RMP's Request argues for a higher ROE determination by making repeated comparisons to the ROE approved in its 2020 general rate case, stating that it is inappropriate for the Commission to set a lower ROE than it did in 2020.⁸⁹ RMP misunderstands the relevance of its 2020 ROE in the present proceeding. In short, there is none.

RMP attempts to use its 2020 ROE as the starting point of comparison, but such an approach is inappropriate. As UTLCG witness Mr. Garrett notes in his Phase I direct testimony, the Commission should not "simply accept the Company's proposal to continue with the prior authorized 9.65% ROE"; rather, the Commission is meant to "look at the evidence presented in this proceeding and current market conditions to calculate a reasonable ROE going forward."⁹⁰ As

⁸⁶ See Request, pp. 74–91.

⁸⁷ See Order, p. 21.

⁸⁸ UTLCG's Phase I Post-Hr'g Br. contains its complete arguments on the ROE issue.

⁸⁹ See Request, pp. 75–82.

⁹⁰ Phase I Direct Test. of David Garrett, 3:46–50.

set forth in *Federal Power Commission v. Hope Natural Gas Company*, the appropriate comparative analysis is described as follows: “the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks.”⁹¹ In other words, the proper determination of ROE must be based on the Commission’s evaluation of the *current* market and regulatory *risk*; the 2020 authorized ROE does not carry any weight in the 2024 rate case. In its Order, the Commission correctly set an ROE that takes these factors into account, recognizes that current conditions warrant a lower ROE than it authorized in 2020, and evaluates the substantial evidence presented by intervenors to reach its determination.⁹² RMP’s reliance on its 2020 ROE to support arguments for review or rehearing are misguided and should not be considered in ruling on the Request.

2. The Commission has significant discretion to set the ROE.

Similarly, in its Request, RMP frequently argues that the Commission did not provide a basis for its decision to reduce the Company’s ROE compared to the 2020 general rate case. For example, RMP states that “the Commission’s Order does not account for . . . cost of equity increase[ing] since 2020” and the “Order [does not] explain how that substantial increase is accounted for in a significant reduction in the Company’s ROE.”⁹³ However, RMP ignores the discretionary authority afforded to the Commission in setting just and reasonable rates.

As previously noted, the Commission “has considerable latitude of discretion” in setting rates.⁹⁴ The Commission is permitted, and expected, to set rates using its judgment, as informed by the record evidence. Furthermore, specific to ROE determinations, the Utah Supreme Court

⁹¹ *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944).

⁹² See Order, pp. 22, 26.

⁹³ Request, p. 78.

⁹⁴ *White River Shale Oil Corp. v. Pub. Serv. Comm’n*, 700 P.2d 1088, 1093 (Utah 1985); see also Utah Code Ann. § 54-4-1.

has held that the Commission has “broad discretion in setting the rate of return on equity.”⁹⁵ In that same case, the Utah Supreme Court found that the reduction in a gas utility’s ROE from 12.2% to 12.1% was appropriate and within the Commission’s discretion despite the Commission not providing a rationale for its decision in that instance.⁹⁶ Here, the Commission’s decision to set an ROE for RMP at 9.375%, which is 0.275% lower than its 2020 authorized ROE, was a similarly valid exercise of its discretion to set rates. In this instance, the Commission supported its decision with substantial evidence and reasoning, as detailed below in Section III.B.3, and thus, RMP’s argument for review or rehearing is without merit.

3. The Order relies on credible record evidence evaluating the applicable market and regulatory conditions.

a. *RMP’s evidence in support of its proposed ROE remains unreliable.*

Despite the Order explicitly outlining why RMP’s expert evidence in support of its proposed ROE was unreliable, RMP argues its ROE evidence was overlooked.⁹⁷ RMP’s ROE evidence remains unreliable and the Commission should maintain its position discrediting such evidence given the Commission’s appropriate reliance on substantial evidence from intervenors and its judgment.⁹⁸ RMP claims the Commission’s skepticism of its proposed ROE was unfounded because it cites to Utah Office of Consumer Services (“OCS”) witness Dr. Woolridge, who uses some of the same projections as RMP’s witness and, therefore, does not support the Order’s finding that RMP’s ROE analysis skewed the outcome unreasonably high.⁹⁹ However, RMP ignores the fact that the Commission did not solely rely on Dr. Woolridge’s testimony in determining RMP’s analysis was not credible; in its Order, the Commission notes that it finds support for such a

⁹⁵ *Mountain Fuel Supply Co. v. Pub. Serv. Comm’n*, 861 P.2d 414, 427 (Utah 1993).

⁹⁶ *Id.* at 429.

⁹⁷ See Request, pp. 82–86.

⁹⁸ See Order, pp. 25–26 (finding RMP’s analyses informing its ROE proposal “are not reliable” and “cannot provide a valid basis for the [Commission’s] ROE decision”).

⁹⁹ Request, p. 82.

determination in the testimony of both the UTLCG and DPU regarding the discounted cash flow (“DCF”), capital asset pricing model (“CAPM”), and empirical CAPM (“ECAPM”) analyses.¹⁰⁰ Furthermore, while the Commission only cited to OCS in its Order regarding the finding that RMP’s bond yield plus risk premium (“BYRP”) was not credible,¹⁰¹ the UTLCG argued for the same outcome on similar grounds. Mr. Garrett reached the same conclusion, noting that RMP’s analysis uses ROE data dating back to 1980 and that “[r]elying on data from the Carter administration contradicts Ms. Bulkley’s acknowledgement that cost of equity analysis is a forward-looking process.”¹⁰² Although the UTLCG finds the Order appropriate regarding the ROE determination, if the Commission finds OCS’s position on ROE unreliable, the Commission should lower the ROE to the UTLCG’s recommended value of 8.8%.¹⁰³ After all, the Commission noted that setting the ROE at 9.375% was “the highest credible recommended ROE”; without OCS’s recommendation, the UTLCG’s recommendation is the next “highest credible recommended ROE.”¹⁰⁴

RMP only attacks the OCS analysis to claim its own ROE analysis was credible, but RMP fails to recognize that other intervenors offered substantial evidence supporting the same conclusion. “[T]he burden rests heavily upon a utility to prove it is entitled to rate relief,” and in light of the substantial evidence provided during this proceeding discrediting RMP’s ROE analysis, the Commission was correct to conclude RMP simply did not overcome this burden.¹⁰⁵ The Commission has more than enough support from intervenor evidence to maintain the

¹⁰⁰ Order, pp. 25–26.

¹⁰¹ *Id.*

¹⁰² Phase I Direct Test. of David Garrett, 45:829–32.

¹⁰³ UTLCG Phase I Post-Hr’g Br., p. 10.

¹⁰⁴ Order, p. 31.

¹⁰⁵ *Utah Dep’t of Bus. Regul., Div. of Pub. Utils. v. Pub. Serv. Comm’n*, 614 P.2d 1242, 1245 (Utah 1980).

conclusion that RMP’s ROE analysis was unreliable and should be afforded due weight in the ROE decision making process.

In addition to noting RMP’s failed effort to resurrect its own ROE analysis, it is important to bear in mind that the Commission correctly evaluated the market conditions that are relevant to setting a reasonable ROE. RMP attempts to rebut the Commission’s analysis of economic and regulatory conditions to say a higher ROE is warranted.¹⁰⁶ RMP generally states that economic and regulatory conditions have worsened since 2020.¹⁰⁷ As noted above, comparisons to RMP’s ROE in 2020 are irrelevant; however, RMP’s economic and regulatory conditions argument fails for multiple other reasons. First, RMP repeatedly states that economic conditions have worsened when considering inflation and treasury rates.¹⁰⁸ But this misses the mark for ROE analyses. As Mr. Garrett notes in his Phase I Direct Testimony, the appropriate measure to determine ROE is not these generalized market metrics; rather, the relevant, and “most important” market metric for ROE is the “amount of risk in the business.”¹⁰⁹ The U.S. Supreme Court held that “the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks.”¹¹⁰ Thus, RMP focuses on the wrong economic metrics. Comparing risk is what matters for a ROE determination, and, as noted above, RMP’s risk analysis was not credible.

Next, regarding regulatory conditions, RMP offers the conclusion that its relative risk as a utility is high, warranting a higher ROE.¹¹¹ This argument is both incorrect and illogical. RMP asserts there is no evidence that “utility stocks are generally less risky than many other types of stocks.”¹¹² This is false. Mr. Garrett notes “public utility companies. . . [are] ‘comparatively

¹⁰⁶ Request, p. 75.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 76.

¹⁰⁹ Phase I Direct Test. of David Garrett, 7:117–18 (quoting *Wilcox v. Consol. Gas Co. of N.Y.*, 212 U.S. 19 (1909)).

¹¹⁰ *Id.* at 8:136–38 (quoting *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944)).

¹¹¹ *See* Request, p. 79.

¹¹² *Id.* (quoting Order, p. 29).

unaffected by overall market conditions” and utilities are “prime examples of low-risk, defensive firms.”¹¹³ Furthermore, RMP itself later admits that utility stocks have a beta value of less than 1, which directly indicates the low-risk nature of utility stocks.¹¹⁴ RMP’s contradictory statements regarding the risk of utility stocks nullifies its arguments that the Order’s ROE analysis was somehow lacking. However, RMP’s additional arguments for a finding of riskier regulatory conditions also fail. The Commission found that the regulatory environment in Utah creates circumstances that make utilities less risky firms.¹¹⁵ Specifically, state statutes that provide wildfire mitigation opportunities and wildfire liability protection serve to make the utilities operating in Utah less risky.¹¹⁶ RMP states that these statutes do not mitigate risk,¹¹⁷ but that is simply because RMP has failed to properly utilize the statutes. For example, RMP has opted not to file an application with the Commission to implement the statutorily authorized wildfire fund. It would be unreasonable for RMP’s Utah customers to pay for a higher ROE because RMP has not taken prudent action to mitigate its risks within a regulatory environment that encourages such mitigation. Utah’s regulatory conditions cannot reasonably lead to the determination that RMP deserves a higher ROE. Thus, as with the Commission’s evaluation of risk in the market, the Commission’s ROE determination properly relied on substantial evidence and should be affirmed.

¹¹³ Phase I Direct Test. of David Garrett, 18:348–351 (quoting Zvi Bodie, Alex Kane & Alan J. Marcus, *Essentials of Investments*, 9th ed., McGraw-Hill/Irwin, p. 382 (2013)).

¹¹⁴ Request, p. 88.

¹¹⁵ Order, p. 29 (noting that “Utah is deemed to be a supportive regulatory environment by Moody’s and S&P”).

¹¹⁶ *Id.*

¹¹⁷ Request, pp. 80–81.

- b. *The evidence offered by the UTLCG remains the best information to inform the ROE determination.*

Although RMP does not offer any evidence in its Request to rebut the UTLCG's determination that RMP's ROE analysis was not credible, RMP attempts to argue that the UTLCG's ROE conclusions are incorrect.¹¹⁸ These arguments do not carry weight and are simply representative of RMP's disagreement with the Order. Specifically, RMP considers the UTLCG's recommended ROE range to be unreasonable because it is on par with ranges considered unreasonable in its 2020 rate case.¹¹⁹ First, this is of no importance. This is the 2024 rate case. Circumstances that inform ROE calculations change over time, and the Commission's judgment regarding ROE can (and must) change over time as well. The UTLCG's ROE range, which informed the Commission's determination, is unique to this case and should not be viewed through a lens of the past. Second, RMP questions how the UTLCG's ROE range was considered "credible and persuasive."¹²⁰ But what is apparent and not contested in RMP's Request: the ROE range produced by Mr. Garrett used appropriate inputs that accurately capture the necessary measure of risk.¹²¹ In contrast, the Commission found RMP's range to be unreliable and defective because of the inputs it used.¹²² Last, RMP implies that the UTLCG over-relied on the CAPM analysis as opposed to the DCF analysis that the Company used.¹²³ This is correct, and for good reason. As Mr. Garrett notes, the Nobel Prize-winning CAPM model "is arguably the strongest of the models usually presented in rate cases because, unlike the DCF Model, the CAPM directly measures the most important component of a fair rate of return analysis: *risk*."¹²⁴

Ultimately, the UTLCG's ROE analysis is reasonable, appropriate, and better suited to inform the Commission's ROE determination. Thus, the Commission was correct to exercise its discretion and rely, in part, on the UTLCG's analysis.

¹¹⁸ See *id.* at pp. 86–88.

C. The Commission’s capital structure determination was appropriate and should be affirmed.

RMP contests the Commission’s decision to approve an actual capital structure of 44.43% equity and 55.57% debt rather than its proposed, hypothetical capital structure of 50% equity, 50% debt.¹²⁵ RMP bases its argument on the notion that the Commission should not consider the Company’s culpable conduct underlying the *James* events, that it should not hold RMP accountable for its issuance of dividends in light of the *James* events, and that the Commission has the general ability to authorize a hypothetical capital structure.¹²⁶ These arguments are supported by neither Utah’s statutory ratemaking standards nor common sense. Accordingly, RMP’s Request should be denied. Similar to the ROE issue, the UTLCG does not attempt to reiterate the substantive arguments from this proceeding regarding capital structure; instead, this Response addresses RMP’s primary challenges of the Order on capital structure.¹²⁷

1. The Commission applied the proper ratemaking standards in rejecting RMP’s proposed capital structure.

RMP argues that the Commission should not have considered the Company’s culpable conduct underlying the *James* events in relation to the Company’s current financial situation.¹²⁸ RMP says it was “error to reject the Company’s proposed capital structure on the basis of *assumed* negligence by the Company concerning the Oregon 2020 Labor Day wildfires.”¹²⁹ Presumably, RMP considers its culpable conduct related to *James* to be “assumed” because of the pending

¹¹⁹ *Id.* at p. 86.

¹²⁰ *Id.* at p. 87.

¹²¹ *See* Order, p. 26

¹²² *Id.*

¹²³ *See* Request, p. 87

¹²⁴ Phase I Direct Test. of David Garrett, 31:588–90 (emphasis in original).

¹²⁵ *See* Request, pp. 92–96; Order, p. 31, 41.

¹²⁶ *See* Request, pp. 92–96.

¹²⁷ UTLCG’s Phase I Post-Hr’g Br. contains its complete arguments on the capital structure issue.

¹²⁸ Request, p. 93.

¹²⁹ *Id.* (emphasis added).

appeal of the *James* verdict, which it also cites as reason for the “error” in assessing the Company’s wildfire conduct when considering the proposed capital structure.¹³⁰ RMP goes on to predict that the *James* verdict is “likely to be reversed” on appeal on the basis of the recently issued ODF report that addresses the *spread* of the Santiam Canyon Fire.¹³¹

RMP’s contention that it is not liable for its conduct in *James*, simply because the matter is on appeal, is an affront to the jury’s determination in *James*. RMP’s culpability is not “assumed,” it has been established; RMP acted willfully, recklessly, and with gross negligence. Furthermore, its assertion that the *James* verdict will likely be reversed on appeal is pure speculation; RMP cannot simultaneously claim it was unable to foresee the outcome of *James* but somehow able to know its appeal is likely to succeed.¹³² Regardless, the Commission need not consider what has yet to come for the *James* verdict—it need only consider the information available to it at the time of the hearing. That information clearly and irrefutably stated that RMP’s actions underlying *James* were “grossly negligent, reckless, and willful,” which contributed to an adverse financial position for the Company as it began accruing liability for judgments and settlements.¹³³ The Commission cannot, nor should it, base its findings on something that may occur at some indeterminate point in the future. The ODF report does not undo the fact that a jury found RMP responsible for the wildfires. The Commission properly noted the financial fallout for RMP associated with the jury finding. Moreover, even were the pending appeal of *James* relevant, RMP has still received “additional jury verdicts totaling several hundred million dollars” and PacifiCorp has paid, through September 30, 2024, “a total of \$1.213 billion in settlements

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *See id.* at 94 (claiming that “[t]he *James* verdict and associated damages award were not known or foreseeable”).

¹³³ Order, p. 23 n.38 (citing UTLCG Phase I Cross Ex. 11).

associated with the wildfires.” This has had a significantly adverse effect on the Company’s financial position, and the Commission has correctly taken note.¹³⁴

The Commission has a duty to authorize only rates that are just and reasonable.¹³⁵ It would be highly *unjust* and *unreasonable* for the Commission to saddle customers with costs that reward RMP’s culpable conduct. The Commission appropriately recognized as much in its rationale rejecting RMP’s proposed capital structure. To now review or rehear that rejection, it would have to be established that the Commission committed an “error of law” as RMP’s arguments assert.¹³⁶ No such error occurred; the Commission upheld Utah law by considering the substantial evidence in favor of a reasonable capital structure, accounting for RMP’s misconduct that continues to adversely impact its financial position.

Next, the Request contends that the Commission does not properly apply the prudence standard in considering the dividends RMP issued during the *James* case.¹³⁷ This is not the case. Rather, RMP simply disagrees with the outcome of the Order. To “ensure just and reasonable rates for the retail ratepayers . . . in this state,” the Commission must assess prudence by “determin[ing] whether a reasonable utility, knowing what the utility knew or should have known at the time of the action, would reasonably have incurred . . . the expense.”¹³⁸ RMP claims that the *James* verdict and associated damages “were not known or foreseeable at the time the dividends were issued” and the “mere existence of lawsuits did not render the issuance of those dividends imprudent.”¹³⁹ RMP goes on to say that because it followed Generally Accepted Accounting Principles when issuing the dividends, the dividends are inherently prudent.¹⁴⁰

¹³⁴ Order, pp. 39–40.

¹³⁵ Utah Code Ann. § 54-7-12.

¹³⁶ Utah R. Civ. P. 59 (a).

¹³⁷ Request, p. 94.

¹³⁸ Utah Code Ann. § 54-4-4 (4)(a).

¹³⁹ Request, pp. 94, 95.

¹⁴⁰ *Id.* at p. 94.

RMP’s position on issuing dividends defies common sense and stretches credulity. The fact that RMP had clear “notice as of October 20, 2020,” that it could be on the hook for “over \$600 million” in claimed damages stemming from the wildfires in *James*¹⁴¹ is enough to find the issuance of dividends imprudent. At base, the Commission rightly found RMP accountable for matters within its managerial and financial discretion. The Commission appropriately found the issuance of dividends to be imprudent and considered that finding in determining a reasonable capital structure. Incorporating the imprudent dividends in the capital structure determination “would place an unreasonable and unjustifiable burden” on customers.¹⁴² RMP’s disagreement with the Commission’s conclusion on its application of the prudence standard does not constitute an “error of law” that would necessitate review or rehearing.¹⁴³

2. The Order was consistent with past Commission capital structure determinations.

To RMP’s final point, RMP fails to recognize the Commission’s consistency in its capital structure determinations. In its Request, RMP argues that the Commission should have approved the Company’s proposed hypothetical capital structure because the Commission approved similar structures in the past.¹⁴⁴ Thus, RMP faults the Commission for applying a “different” standard to the Company in this case. This assertion ignores the fact that, excepting this case, RMP has advocated that the Commission apply its actual capital structure in all of its rate cases for at least the past 15 years.¹⁴⁵ RMP even notes in this proceeding that “actual capital structure is most

¹⁴¹ *Id.* at 95.

¹⁴² Order, p. 36.

¹⁴³ *See* Utah R. Civ. P. 59 (a).

¹⁴⁴ Request, p. 96.

¹⁴⁵ UTLCG Phase I Cross Ex. 5, 18:329–407 (RMP 2020 rate case); UTLCG Phase I Cross Ex. 6, 11:237–48 (RMP 2014 rate case); UTLCG Phase I Cross Ex. 7, 13:284–91 (RMP 2011 rate case); UTLCG Phase I Cross Ex. 8, 12:259–66 (RMP 2010 rate case); UTLCG Phase I Cross Ex. 9, 5:95–6:119 (RMP 2009 rate case); Trial Tr. Vol. II (12/10/2024), 241:16–242:9, 242:25–243:4, 243:25–244:4, 245:5–8, 246:3–24 (Kobliha).

appropriate . . . to rely on in the normal course of business.”¹⁴⁶ The Commission’s approval of RMP’s actual capital structure in this case maintained consistency with past decisions, which is something RMP continuously advocated for throughout its Request, despite many of those calls for consistency being misplaced.¹⁴⁷ Once again, RMP cannot have it both ways. The Request should be denied.

D. The Commission should affirm its Order denying CCA compliance cost recovery.

RMP makes four arguments as to why the Commission should overturn its decision denying CCA compliance cost recovery: (1) CCA costs are costs associated with a “System Resource,” not a “State Resource”; (2) the Commission’s Order disconnects Chehalis’s costs and benefits; (3) denial of recovery violates the Dormant Commerce Clause; and (4) the Commission’s Order prevents the Company from recovering its *2020 rate case* revenue requirement and return.¹⁴⁸ As explained below, none of these arguments are persuasive, and the Request should be denied.

1. That Chehalis is a “System Resource” does not mandate CCA cost recovery.

For RMP to recover CCA costs, it must do two things: (1) establish that some portion of the costs are allocable to Utah and (2) establish that the allocated costs are just, reasonable, and in the public interest such that they can be recovered in rates.¹⁴⁹ RMP’s argument surrounding the 2020 Protocol relies on specific definitions of “System Resource” and “State Resource” to bypass both criteria. However, this reductive stance disregards the Commission’s discretionary powers under both the 2020 Protocol and Utah law, introduces a new and inconsistent argument not previously made, and flouts the fundamental purpose of interstate cost allocation.

¹⁴⁶ Order, p. 32 (citing Phase I Direct Test. of Nikki L. Kobliha, 13:257–59).

¹⁴⁷ See, e.g., Request, pp. 32, 39, 45, 61, 103.

¹⁴⁸ *Id.* at p. 108.

¹⁴⁹ See Trial Tr. Vol. I (12/9/2024), 91:19–92:4 (Steward).

- a. *The 2020 Protocol and Utah law specifically empower the Commission to act as it has.*

The Commission should not entertain RMP’s strained reading of the 2020 Protocol. All the Commission needs to do is reference the authority and discretion the 2020 Protocol and Utah law provide. Notably, the 2020 Protocol specifically reserves for the Commission the authority to “determine fair, just, and reasonable rates based upon applicable laws and the record established in rate proceedings conducted by [the] Commission” and to “consider the effect of changes in laws, regulations, or circumstances on inter-jurisdictional allocation policies and procedures when determining fair, just, and reasonable rates.”¹⁵⁰

Because the CCA was a “change[] in law, regulation[], or circumstance[],” the 2020 Protocol specifically allows the Commission to “consider the effect” of the CCA “on inter-jurisdictional allocation policies and procedures when determining fair, just, and reasonable rates.”¹⁵¹ Thus, the 2020 Protocol specifically reserves all allocation decisions to the sound discretion of the Commission especially in instances where, as here, new and previously unanticipated costs are proposed to be allocated to Utah and considered for recovery in rates. RMP conceded as much at hearing.¹⁵²

The Commission’s discretion in this regard is supported by and is consistent with Utah law.¹⁵³ RMP’s principal argument is that the 2020 Protocol *requires* that CCA costs be allocated to, and recovered from, RMP’s Utah customers. While this contention fails under the plain

¹⁵⁰ UAE Cross Ex. 4, 3:48–52.

¹⁵¹ *Id.* at 3:48–52.

¹⁵² Trial Tr. Vol. I (12/9/2024), 94:23–95:5 (Steward) (admitting that “the Commission has the discretion to determine whether the CCA fits into the 2020 protocol[] [a]nd if so, how”).

¹⁵³ *White River Shale Oil Corp. v. Public Serv. Comm’n*, 700 P.2d 1088, 1093 (Utah 1985) (providing that the Commission “has considerable latitude of discretion” in establishing rates); *see also* Utah Code Ann. § 54-4-1.

language of the 2020 Protocol, Utah law would also preclude such an outcome.¹⁵⁴ There is no rate or cost recovery the Commission can simply accept without determining, after notice and hearing, that it is just, reasonable, and in the public interest.¹⁵⁵

Therefore, the Commission should not entertain RMP’s definition-based arguments, and the Order should be affirmed.

- b. *RMP’s definition-based interpretation of the 2020 Protocol is new, irrelevant, and incorrect.*

While the Commission need not wade through the 2020 Protocol’s definitions to resolve the allocability of CCA compliance costs, RMP’s “System Resource” argument does not carry the day. Particularly, RMP’s Request treats CCA compliance costs as indistinguishable from costs associated with Chehalis itself. According to RMP, because Chehalis is a “System Resource,” CCA compliance costs must fall into the “System Resource” category of costs.¹⁵⁶ RMP claims that the only way the Commission can reject the assignment of costs to Utah is when the costs are associated with *resource acquisition*. Because the CCA does not require RMP to acquire resources, CCA compliance costs must be borne by Utah residents and businesses.¹⁵⁷

RMP’s argument is new and should be ignored. In pre-filed testimony and in Phase I post-hearing briefing, RMP consistently maintained that CCA compliance costs were allocated as generation taxes under Section 3.1.7 of the 2020 Protocol.¹⁵⁸ Notably absent from RMP’s Request,

¹⁵⁴ See, e.g., *Empire Dist. Elec. Co. v. Pub. Serv. Comm’n.*, 630 S.W.3d 887, 894 (Mo. Ct. App. 2021) (“The Commission requires flexibility in exercising its ratemaking function to deal with changing and unforeseen circumstances. As a result, contracts between public utilities and their customers cannot limit the ratemaking authority of the Commission.”).

¹⁵⁵ *Comm. of Consumer Servs. v. Pub. Serv. Comm’n of Utah*, 2003 UT 29, ¶ 14 (2003); Utah Code Ann. § 54-3-1; see also Utah Code Ann. § 54-4-4(1)(a)(i).

¹⁵⁶ Request, pp. 96–100.

¹⁵⁷ *Id.* at 100–02.

¹⁵⁸ RMP Ex. 2 (Phase I Rebuttal Test. of Joelle R. Steward), 42:940–41 (“Section 3.1.7 of the 2020 Protocol applies to the generally applicable compliance costs 940 associated with purchasing GHG allowances for the Chehalis plant.”); RMP Phase I Post-Hr’g Br., p. 60 (“As a generation-related tax, or a dispatch cost, the Cap and Invest Program should be treated as other state-imposed generation taxes are treated, and allowed in the test period.”).

however, is explanation as to how the CCA is a tax. Now, RMP relies on Section 3.1.2 with passing reference to Section 3.1.7.¹⁵⁹ To be sure, Section 3.1.2 and Section 3.1.7 are different cost allocation provisions.

Perhaps RMP has backed off of its generation tax argument because of its positions in its Ninth Circuit appeal challenging the CCA. If the Commission is inclined to consider new argument (and UTLCG submits it should not), it should do so comprehensively. Notably, on May 5, 2025, PacifiCorp submitted a notice of supplemental authority. In that notice, PacifiCorp argued that CCA compliance costs are not a state tax because the “allowance charge is imposed by an agency, not the legislature; the charge is paid by a narrow group, not the wider population; and the money is earmarked for special purposes, not the general treasury.”¹⁶⁰ The UTLCG agrees,¹⁶¹ as has RMP witness Ms. Steward.¹⁶² Regardless of the motivation behind this new approach, the Commission should reject RMP’s inconsistent and new arguments.

Nevertheless, RMP’s “System Resource” interpretation ignores the changed circumstances, attempting to shove the future into yesterday’s constraints. The 2020 Protocol does not mention the CCA or emission allowance regimes.¹⁶³ It is a novel law that the Commission must judge anew. While CCA compliance costs are levied on emissions from Chehalis, they are new and distinct costs from the “System Resource” costs the 2020 Protocol contemplated when it was negotiated and approved. Although nothing in the 2020 Protocol fits perfectly, the intent of interstate cost allocation has always been to mitigate “impacts on other jurisdictions of a single state’s energy policy.”¹⁶⁴ Consistent with this intent, and as explained at length in the UTLCG’s

¹⁵⁹ Request, pp. 96–100; *id.* at 102.

¹⁶⁰ *PacifiCorp v. Sixkiller*, No. 24-4803, ECF No. 48.1, p. 2 (9th Cir.) (attached as **Exhibit A**).

¹⁶¹ See UTLCG Phase I Post-Hr’g Br., pp. 24–25.

¹⁶² Trial Tr. Vol. I (12/9/2024), 98:3–13 (Steward).

¹⁶³ Trial Tr. Vol. I (12/9/2024), 92:18–93:7 (Steward).

¹⁶⁴ *In the Matter of the Application of PacifiCorp for an Investigation of Inter-jurisdictional Issues*, Docket No. 02-035-04, Report and Order, p. 11 (Dec 14, 2004).

Phase I Post-Hearing Brief, the closest fit for CCA compliance costs is to liken them to state portfolio standards or state-specific initiatives.¹⁶⁵

Therefore, the Request should be denied.

2. The Order does not impermissibly disconnect costs and benefits.

RMP next argues that the Commission’s Order impermissibly disconnects costs and benefits from Chehalis.¹⁶⁶ Not so. RMP improperly conflates the true costs and benefits of operating Chehalis, on the one hand, with the costs and benefits of the CCA, on the other. To be sure, the *benefits* of the CCA are manifested as revenue for Washington for use by its own citizens, such as for reducing Washington customer electricity bills.¹⁶⁷ These benefits, however, are not extended to Utahns. Regarding the *costs* of the CCA, Washington incurs none, while RMP insists that Utah bears 100 percent of its System Generation allocated share. It is confounding that RMP criticizes the Commission for not acknowledging the equilibrium of costs and benefits when its Order carefully safeguards Utah residents and businesses from undue costs imposed solely on out-of-state consumers for Washington’s sole benefit. Reaching a different conclusion would likely trigger a “race to the bottom,” with each state offloading the expenses of its policies, thereby artificially inflating costs for everyone. The Commission rightly avoided this path.

Utah customers have paid, and continue to pay, for Chehalis and receive the benefit of the electricity produced.¹⁶⁸ Then the State of Washington mismatched costs and benefits by adding incremental costs for which Utah customers receive no benefit.

The Request should be denied.

¹⁶⁵ UTLCG Phase I Post-Hr’g Br., pp. 25–28.

¹⁶⁶ Request, pp. 102–04.

¹⁶⁷ UTLCG Cross Ex. 12.

¹⁶⁸ For this reason, it would be unjust and unreasonable to deny Utah customers the benefits of Chehalis generation. *See* Request, pp. 108–09.

3. The Order does not violate the Dormant Commerce Clause.

RMP argues that the Commission’s Order violates the Dormant Commerce Clause by discriminating against interstate commerce.¹⁶⁹ However, it strains credulity for RMP to argue in federal court that the CCA violates the Dormant Commerce Clause¹⁷⁰ and argue in its Request that the Commission erred for the same reason. Put differently, in its federal lawsuit, RMP asserts that the CCA discriminates against interstate commerce such that no state, including Utah, should have to pay its costs. RMP cannot then credibly claim that this Commission discriminates against interstate commerce by not requiring Utah customers to pay CCA costs. It cannot be that the appropriate fix is to require the Utah Commission to comply with an unconstitutional law. Such an outcome is absurd, unjust, and unreasonable.

Notwithstanding, RMP’s application of the Dormant Commerce Clause is incorrect. The Dormant Commerce Clause “invalidate[s] local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State.”¹⁷¹ The rationale of the Dormant Commerce Clause is to prohibit economic protectionism or state “regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”¹⁷² The Dormant Commerce Clause analysis includes two tiers: (1) discrimination and (2) undue burden. Under the first tier, “when a state statute clearly discriminates against interstate commerce, it will be struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. Indeed, when the state statute amounts to simple economic protectionism, a virtually per se rule of invalidity has applied.”¹⁷³ A law can be

¹⁶⁹ Request, p. 104.

¹⁷⁰ *Id.*

¹⁷¹ *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

¹⁷² *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 647 (1994).

¹⁷³ *Wyoming v. Oklahoma*, 502 U.S. 437, 454–55 (1992) (internal quotation marks and citations omitted).

discriminatory on its face, in practical effect, or in its purpose.¹⁷⁴ Under the undue burden tier, “where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”¹⁷⁵

An important distinction here is the difference between an article of interstate commerce specifically and the general impact of a state action on a regulated entity. True, RMP does business in more than one state and is impacted by the Commission’s Order. However, the Commission’s Order does not unconstitutionally impede an article of interstate commerce. In a somewhat ironic example out of Washington, in *PacifiCorp v. Wash. Utils. & Transp. Comm’n*, PacifiCorp argued that the Washington Utilities and Transportation Commission’s (“UTC”) refusal to allow PacifiCorp to recover out-of-state power purchase agreement (“PPA”) costs violated the Dormant Commerce Clause.¹⁷⁶ The Washington Court of Appeals disagreed noting that the Washington UTC’s decision did not “direct the purchase or sale of energy, or affect the flow of energy to and from [Washington],” the principle example in which the Dormant Commerce Clause has invalidated regulator actions.¹⁷⁷ Similarly here, the Commission did nothing to require RMP to purchase or sell energy (*i.e.*, the article of interstate commerce) based on state of origin. While the UTLCG recognizes that RMP is incurring a cost not recoverable from Utah or Washington, as the Washington Court of Appeals held, “inconsistent determinations may burden [the utility], we believe this burden is a necessary consequence of doing business in more than one state.”¹⁷⁸ The risk of doing business in multiple states is incurring inconsistent and potentially conflicting

¹⁷⁴ *Id.*

¹⁷⁵ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁷⁶ 376 P.3d 389, ¶ 18 (Wash. Ct. App. 2016).

¹⁷⁷ *Id.* at ¶¶ 71–73.

¹⁷⁸ *Id.* at ¶ 74 (quoting *State ex rel. Utilities Comm’n v. North Carolina Power*, 450 S.E.2d 896, 902 (N.C. 1994)).

impacts. This Commission said as much 40 years ago in approving Utah Power and Light's and Pacific Power's merger:

The Merged Company shall agree that PacifiCorp shareholders shall assume all risks that may result from less than full system cost recovery if inter-divisional allocations methods differ among the Merged Company's various jurisdictions.¹⁷⁹

The Request should be denied.

4. RMP has an opportunity to achieve its awarded return.

Finally, RMP argues that because the Commission denied CCA cost recovery, the Company would be unable to recover “all costs approved in the 2020 general rate case, which includes CCA costs” and that “the Company will be harmed in its ability to reach its authorized rate of return” approved in the 2020.¹⁸⁰ This argument lacks coherence and clarity. This is the 2024 rate case, not the 2020 rate case. And the CCA did not exist at the time of the 2020 rate case, so CCA costs are not included in the 2020 rate case revenue requirement.

Presuming RMP meant to argue that the Commission's Order fails to provide a reasonable opportunity to earn its awarded return from this case, that too misses the mark. It is circuitous logic to argue that recovery should be allowed because disallowing recovery would not allow the utility to recover all of its costs. The entire point of a disallowed cost is that the utility cannot recover the cost from customers and, as such, its shareholders must pick up the tab. This is a perfectly appropriate and lawful result, even for prudently incurred costs.¹⁸¹ RMP's argument is identical to the “prudent investment rule,” which requires customers to “compensate[]” utilities

¹⁷⁹ *In the Matter of the Application of Utah Power & Light Company, PC/UP&L Merging Corp. (To be renamed PacifiCorp) for an Order Authorizing the Merger of Utah Power & Light Company and PacifiCorp into PC/UP&L Merging Corporation*, Docket No. 87-035-27, Order, p. 97 (Sep. 28, 1988).

¹⁸⁰ Request, p. 108.

¹⁸¹ *See e.g., Nat. Gas Pipeline Co. v. Fed. Energy Regul. Comm'n*, 765 F.2d 1155, 1163–64 (D.C. Cir. 1985) (“Natural's claim is that because it acted prudently, it cannot fairly be punished by nonrecovery of its expenses. But the problem of risk allocation in this case is not a problem of fault The Natural Gas Act simply does not guarantee the shareholders of even a prudently managed utility that ratepayers can always be stuck with the bill . . . , however praiseworthy the utility's motives for undertaking those projects may have been.”).

“for all prudent investments at their actual cost when made . . . , irrespective of whether individual investments are deemed necessary or beneficial.”¹⁸² The Supreme Court rejected such a rule, stating that “the adoption of any such rule would signal a retreat from 45 years of decisional law in this area which would be as unwarranted as it would be unsettling.”¹⁸³ The Commission’s authority is constrained by the broad just and reasonable standard that the Commission applied appropriately in this case.

E. The UTLCG acknowledges RMP’s arguments regarding Utah Code § 54-7-12 compliance and reserves the right to present arguments in the pending appeal.

The UTLCG is aware of the arguments RMP puts forth in its Request regarding the Order’s compliance with Utah Code § 54-7-12.¹⁸⁴ Given that this element of the case has already been appealed, the UTLCG does not address RMP’s arguments in this Response. The UTLCG reserves the right to fully respond in the appeal proceeding and the submission of this Response does not waive its ability to address the issue in the appeal.

IV. CONCLUSION

The UTLCG appreciates the Commission’s attention to and diligence in this matter. RMP’s Request should be denied. The Commission’s Order was reasoned, appropriate, and relies on substantial evidence to ensure RMP’s Utah customers will pay just and reasonable rates that support the public interest. Review or rehearing on the issues is unwarranted.

¹⁸² *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309 (1989).

¹⁸³ *Id.* at 315.

¹⁸⁴ Request, p. 125.

Respectfully submitted on June 11, 2025.

HOLLAND & HART LLP



Michelle Brandt King

Austin W. Jensen

Thorvald A. Nelson

Nikolas S. Stoffel

Holland & Hart LLP

555 Seventeenth Street, Suite 3200

Denver, CO 80202

Phone: (303) 295-8000

Email: mbking@hollandhart.com

awjensen@hollandhart.com

tnelson@hollandhart.com

nsstoffel@hollandhart.com

*Attorneys for the
Utah Large Customer Group*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Utah Large Customer Group's Response to Rocky Mountain Power's Request for Review or, in the Alternative, Rehearing of Commission Final Order*, was served this 11th day of June, 2025, to the following:

Via Email:

ROCKY MOUNTAIN POWER

Ajay Kumar (ajay.kumar@pacificorp.com)

Jana Saba (jana.saba@pacificorp.com)

Carla Scarsella (carla.scarsella@pacificorp.com)

Data Request Response Center (datareq@pacificorp.com), (utahdockets@pacificorp.com)

*D. Matthew Moscon (mmoscon@mayerbrown.com)

*Cameron L. Sabin (csabin@mayerbrown.com)

*Kaitie Wilson (kwilson@mayerbrown.com)

Bill Magness (bill@mrg-law.com)

DIVISION OF PUBLIC UTILITIES

Patricia Schmid (pschmid@agutah.gov)

Patrick Grecu (pgrecu@agutah.gov)

Madison Galt (mgalt@utah.gov)

OFFICE OF CONSUMER SERVICES

Alyson Anderson (akanderson@utah.gov)

Bela Vastag (bvastag@utah.gov)

Alex Ware (aware@utah.gov)

Jacob Zachary (jzachary@utah.gov)

Robert Moore (rmoore@agutah.gov)

(ocs@utah.gov)

UTAH ASSOCIATION OF ENERGY USERS

*Phillip J. Russell (prussell@jdrslaw.com)

*Shantell Garrett (sgarrett@energystrat.com)

*Kevin Higgins (khiggins@energystrat.com)

*Neal Townsend (ntownsend@energystrat.com)

WESTERN RESOURCE ADVOCATES

*Sophie Hayes (sohpie.hayes@westernresources.org)

*Karl Boothman (karl.boothman@westernresources.org)

*Nancy Kelly (nancy.kelly@westernresources.org)

*Jessica Loeloff (jessica.loeloff@westernresources.org)

UTAH CLEAN ENERGY

*Logan Mitchell (logan@utahcleanenergy.org)

*Sarah Wright (sarah@utahcleanenergy.org)

Lauren R. Barros (lrb@laurenbarroslaw.com)

STADION LLC

*Irion Sanger (irion@sanger-law.com)
Geoff Moore (goeffmoore@meta.com)
*Kyra Coyle (kcoyle@newgenstrategies.net)
F. Diego Rivas (diego@sanger-law.com)

WALMART STORES, INC.

*Justina A. Caviglia (jcaviglia@parsonsbehle.com)
*Jamie McGovern (jamie.mcgovern@walmart.com)
Roni Shaffer (rshaffer@parsonsbehle.com)

NUCOR STEEL-UTAH

*Peter J. Mattheis (pjm@smxblaw.com)
*Eric J. Lacey (ejl@smxblaw.com)
*Jeremy R. Cook (jcook@cohnekinghorn.com)

FEDERAL EXECUTIVE AGENCIES

*Maj Leslie R. Newton (leslie.newton.1@us.af.mil)
*Capt Ashley N. George (ashley.george.4@us.af.mil)
*Capt Michael A. Rivera (michael.rivera.51@us.af.mil)
*Thomas A. Jernigan (thomas.jernigan.3@us.af.mil)
*Ebony M. Payton (ebony.payton.ctr@us.af.mil)
*TSgt James B. Ely (james.ely@us.af.mil)
(ULFSC.Tyndall@us.af.mil)

UTAH LARGE CUSTOMER GROUP

*Michelle Brandt King (mbking@hollandhart.com)
*Austin W. Jensen (awjensen@hollandhart.com)
*Adele Lee (aclee@hollandhart.com)
*Thorvald A. Nelson (tnelson@hollandhart.com)
*Nikolas S. Stoffel (nsstoffel@hollandhart.com)
*Jeff Pollock (JCP@jpollockinc.com)
*David Garrett (dgarrett@resolveuc.com)
*Jim Dauphinais (jdauphinais@consultbai.com)

THE KROGER CO.

Kurt J. Boehm (kboehm@bkllawfirm.com)
Jody Kyler Cohn (jkylercohn@bkllawfirm.com)

/s/ Adele Lee
Adele Lee

**Indicates those with Confidentiality Agreements on file*



Dallas DeLuca | Lawyer
DallasDeLuca@MarkowitzHerbold.com

May 5, 2025

FILED ELECTRONICALLY AND VIA U.S. MAIL

Molly Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

**Re: FRAP 28(j) notice of supplemental authorities
PacifiCorp v. Casey Sixkiller, in his official capacity as Director of the
Washington State Department of Ecology
Ninth Circuit Court of Appeals No. 24-4803
U.S. District Court, Western District of Washington, Case No. 3:23-
cv-06155-TMC**

Dear Clerk for the Ninth Circuit Court of Appeals,

Pursuant to Washington Code of Professional Conduct 3.3(a)(3),
PacifiCorp's counsel discloses potential adverse authority – 28 U.S.C. §1341,
the Tax Injunction Act ("TIA"). The TIA relates to the district court's
jurisdiction over plaintiff's claim to enjoin defendant's enforcement of
greenhouse gas emissions allowances if the allowances are a tax. Under the
TIA, "[t]he district courts shall not enjoin, suspend or restrain the

Molly Dwyer, Clerk of Court

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assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.” “The dispositive question . . . is whether the plaintiff’s action, if successful, would reduce the flow of state tax revenue.” *Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1184 (9th Cir. 2006); *Armstrong v. Walborn*, 743 Fed. Appx. 83 (9th Cir. 2018) (unpublished) (finding no jurisdiction where plaintiffs sought a tax credit).

There is contrary authority. First, under *Bidart Brothers v. California Apple Commission*, 73 F.3d 925, 931-32 (9th Cir. 1996), the TIA should not apply. Defendant’s allowance charge is imposed by an agency, not the legislature; the charge is paid by a narrow group, not the wider population; and the money is earmarked for special purposes, not the general treasury.

Second, because the purpose of allowances is to modify behavior (reduce emissions), not to raise revenue, the TIA should not apply. See *Chamber of Comm. of U.S. v. Edmondson*, 594 F.3d 742, 762 (10th Cir. 2010) (“primary goal . . . is to regulate behavior,” hence TIA does not apply); *Clean Truck*

Molly Dwyer, Clerk of Court

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Coalition, LLC v. Su, 2013 WL 12125767 (C.D. Cal. July 30, 2013) (under *Edmondson*, TIA would not apply to penalties).

Third, the TIA was not raised where other plaintiffs sought nearly identical relief against the same defendant concerning the same law. *See, e.g., Invenergy Thermal LLC v. Watson*, No. 23-3857, 2024 WL 5205745 (9th Cir. Dec. 24, 2024), *petition for cert. filed*, 2025 WL 944543 (U.S. Mar. 26, 2025).

PacifiCorp would like to brief its position that the TIA does not apply.

Opposing counsel, during conferral, stated the allowances are not a tax.

Very truly yours,



Dallas DeLuca

Enclosure

cc: Andrew Arthur Fitz
Christopher Huriaux Reitz
Kelly Thomas Wood
Zachary Stephen Packer

Molly Dwyer, Clerk of Court

May 5, 2025

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CERTIFICATE OF COMPLIANCE – WORD COUNT

I certify that this letter complies with the word-count limitation in Circuit Court Rule 28-6, that the body of this letter does not exceed 350 words. The body of this letter contains 345 words.

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