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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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Application of Rocky Mountain Power for a Deferred Accounting Order Regarding Cost Incurred Due to the Covid-19 Public Health Emergency	Docket No. 20-035-17 Office of Consumer Services Reply Comments
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Pursuant to Utah Code § 54-10a-301, UTAH ADMIN. CODE r. 746-1-101 through 801 and the Public Service Commission of Utah’s (“PSC”) April 11, 2020 Scheduling Order and Notice of Hearing the Utah Office of Consumer Services (“OCS”) submits these Reply Comments further expounding on the proper tests for the exceptions to the rules against single-issue and retroactive rate making set out in *MCI Telecommunication Corp. v. Pub. Serv. Comm’n*, 840 P.2d 765, 771 (Utah 1992) and specifically addressing the Utah Division of Public Utilities’ (“DPU”) June 1, 2020 Comments that recommend Rocky Mountain Power’s (“RMP”) application should be granted. Therefore, these Reply Comments are limited in scope. They are not meant to supplant or modify in anyway the arguments presented in the OCS’ June 1, 2020 Comments

In sum, Rocky Mountain Power’s (“RMP”) application seeks an “an accounting order authorizing the Company to record a regulatory asset associated with costs incurred as part of the Company’s response to the COVID-19 public health emergency.” RMP’s April 3, 2020, Application for Accounting Order, at pg. 1 (“Application”). However, PSC precedent provides that the type of deferred accounting order requested here violated the rule against single-issue and retroactive ratemaking and can only be allowed if RMP carries its burden of establishing that the circumstances qualify for an exception to the general rule under the test set out by the Utah Supreme Court in *MCI. Application of Rocky Mountain Power for an Accounting Order for Settlement Charges related to Pensions*, Order, Docket 18-035-48, at 4-5 (Utah P.S.C., May 22, 2019) (“Pension Order”). The applicable exception in this case would allow the deferred accounting if RMP establishes “(1) the event giving rise to the increase or decrease [in revenue] was unforeseeable; and (2) the increase or decrease [in revenue] is extraordinary.” *Id.* at 4, citing, *MCI*, 840 P.2d at 771.

RMP’s application seems to suggest, and the DPU’s Comments seem to accept, the notion that since the Covid-19 health crises is unprecedented it meets the extraordinary element for an exception recognize in *MCI* and the Pension Order. This is incorrect. The extraordinary element of the exception does not relate to whether the event triggering the request for a deferred accounting is unprecedented, being unprecedented only relates to whether the triggering event is unforeseeable. Rather, the second element of the exception requires that the event ““must have an *extraordinary effect on the utility’s earnings, . . .*”” *Id.* at 4, quoting, *MCI*, 840 P.2d at 771-72 (emphasis added). Here, both RMP and the DPU acknowledge that the impact of the Covid-19 crises has on RPM’s earnings is presently unknown. Application at ¶¶ 5-6; DPU Comments at 2. Accordingly, it is axiomatic that RPM has not yet met its burden of establishing the elements for

the exception to single-issue and retroactive ratemaking. Thus, any recovery from ratepayers must be conditioned on a future demonstration that the costs associated with the Covid-19 pandemic have an extraordinary impact on RMP's earnings.

## BACKGROUND

Here, where RMP's Applications seeks "deferral accounting to facilitate potential recovery of prior year [Covid-19 related] expense in a future general rate case, the principles of both retroactive ratemaking and single-issue ratemaking require [the PSC] to apply the legal standard articulated in *MCI*." Pension Order at 5; *see also* Application at ¶¶ 4, 10. As noted above, *MCI* provides an exception to the rule against single-issue and retroactive ratemaking where (1) an unforeseeable event (2) "results in and extraordinary increase or decrease in expenses or revenue" of the utility. *MCI*, 840 P.2d at 771; *see also* *Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759, 778 (Utah 1994) (exception to the rule to "offset extraordinary financial consequences."); Pension Order at 4-5 ("the increase or decrease must have an extraordinary effect on the utility's earnings") (quotations omitted); *In the Matter of the Formal Complaint of Beaver County, et al, v. Qwest Corp.*, 2005 WL 1566660, Order, Docket 01-035-75, at 19 (Utah P.S.C., June 17, 2005) ("there must be a significant impact on earnings before an event becomes extraordinary") ("County Order").<sup>1</sup>

The exception's requirement that an event must have an extraordinary impact on a utility's finances stems from the reasoning underlying the rule against retroactive ratemaking. The "prohibition against retroactive ratemaking is designed to provide utilities with an incentive

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<sup>1</sup> *MCI* also recognized a second exception to the prohibition on retroactive ratemaking based on the utilities misconduct in the ratemaking process. *MCI*, 840 P.2d at 475-75. This exception is not applicable in this docket.

to operate efficiently. For that reason, utilities are not allowed to recoup unanticipated costs or unrealized revenues.” *MCI*, 840 P.2d at 770. “This process places both the utility and the consumers at risk that the rate-making procedures have not accurately predicted costs and revenues.” *Id.*, quoting, *Utah Department of Business Regulation v. Pub. Serv. Comm’n*, 720 P.2d 420, 420-21 (Utah 1968). Consistent with this reasoning, the Utah Supreme Court “emphasize[s] that the exception for unforeseeable and extraordinary events cannot be invoked simply because a utility experiences expenses that are greater or revenues that are less than those projected in the general rate proceeding.” *MCI*, 840 P.2d at 772. Rather, the increase or decrease in revenue must have an extraordinary effect on the Utility’s finances. Because “the increase or decrease [in revenue] must have an extraordinary effect on the utility’s earnings, the increase or decrease [in revenue] will necessarily be outside the normal range of variance that occurs in projecting future expense.” *Id.*

An example of how the PSC deals with the extraordinary prong of the *MCI* exception can be seen in the County Order. In addressing the Counties claims that a tax refund constituted an extraordinary increase in revenue, the PSC relied solely on a comparison of the amount of the refund and the overall financial condition of the utility. The PSC rejected the Counties’ claim because the amount of the refund compared to the financial status of the utility did not indicate that the impact of the utility was extraordinary, noting that “on a Utah-only basis, the revenues [from the tax refund were only] 0.03% of operating expenses or 0.12% of income from operations before taxes.” County Order at 19. The PSC emphasis that “there must be a significant impact on earnings before an event becomes extraordinary.” *Id.*

Similarly, in the Pension Order, the PSC addresses the burden on RMP to establish that the circumstances satisfy the extraordinary prong of the *MCI* test. There, RMP claimed “that economic conditions have caused a significant amount of pension plan participants to take lump sum distributions in 2018, triggering a requirement for [RMP] to expense approximately \$21 million in pension-related losses [the “Settlements”] for the year.” Pension Order at 2 (brackets in original, quotations omitted). RMP sought to have the PSC allow the recovery of this 21 million through a deferred accounting order. *Id.* at 1-2.

In the Pension Order, the PSC rejected RMP’s request, in part, because RMP did not meet its burden of demonstrating that the \$21 million in pension expense had an extraordinary impact on RMP’s finances, where “RMP offers no reference point against which to compare the costs it will realize as a result of the Settlements to demonstrate the costs are extraordinary.” *Id.* at 7. RMP failed to establish a reference point because the “last general rate case was settled without a specific finding as to approved pension costs, . . .” *Id.* at 8. While this fact was not attributable to RMP lack of diligence, RMP carried the burden of establishing the fact that the expense was extraordinary, therefore the failure to establish a reference point was fatal to RMP’s claim. “In sum, RMP did not quantitatively demonstrate that the Settlements would cause its pension expense to be, in the language of *MCI*, ‘outside the normal range of variance that occurs in projecting future [pension] expenses.’” *Id.* at 8, quoting, *MCI*, 840 P.2d at 772.

In the present case, RMP’s burden to “quantitatively demonstrate” that the Covid-19 related expenses have an extraordinary effect on its earnings requires a significantly higher showing than merely that the expenses were prudently incurred, as suggested in RMP’s Application. *See* Application at ¶ 10. As explained below, both RMP and DPU acknowledge

the financial impact of the Covid-19 health emergency is presently unknown. Application at 3; DPU Comments at 2. It follows that RMP has not yet carried its burden of quantitatively demonstrating that the cost associated with Covid-19 have an extraordinary effect on its earnings and therefore qualify for *MCI's* exception to the prohibition on single issue and retroactive ratemaking.

### **APPLICATION TO PARTIES' POSITIONS**

In its Application, RMP asserts that the “Company is unable to fully estimate the total costs that will be incurred due to its COVID-19 responses at this time, given the many unknowns, including how long the emergency situation is likely to continue.” Application, at ¶ 6. And “though it is not currently possible to fully anticipate the scope of the cost impacts related to the COVID-19 emergency, the Company seeks authorization for deferred accounting now because of the potential magnitude of the costs.” Application, at ¶ 5. These contentions demonstrate that RMP has yet to meet its burden to “quantitatively demonstrate” that Covid-19 expenses have an extraordinary effect on RMP’s earnings. Pension Order at 8. Accordingly, RMP’s own application provides ample evidence that RMP has not carried its burden of establishing the elements *MCI's* exception to the prohibition against single-issue and retroactive ratemaking at this time.

The DPU’s comments, for their part, asserts that the DPU “believes RMP’s application for a Deferred Accounting Order for bad debt related costs identified above due to the COVID-19 public health emergency meets the burden of an unforeseen, and extraordinary event. The materiality of the costs is unknown at this time. The Division recommends the application be approved . . . .” DPU Comments at 2. By asserting that the materiality of the impact is

unknown, the DPU is aligned lined with the factual underpinning of the OCS's argument, i.e., that recovery from ratepayers should be contingent on RMP's future demonstration that the "materiality" of the impact of the Covid-19 pandemic. However, by asserting both that RMP meets the burden of establishing an "extraordinary event" and at the same time that the "materiality of the costs is unknown," the DPU seems to be concluding that because the Covid-19 pandemic is unprecedented it meets the exceptional element of the *MCI* test. Again, while the unprecedented nature of the pandemic is relevant to whether the emergency is unforeseeable, it is not relevant to the issue of whether the emergency has an extraordinary effect on RMP's earning.

Finally, the fact that the economic impact of Covid-19 pandemic is presently unknown does mean that RMP can never satisfy its burden that costs associated with Covid-19 have an extraordinary impact on RMP's earnings. As the OCS stated in its initial comments while "the impact on expenses incurred by RMP could ultimately reach an extraordinary level, whether or not that will occur is yet unknown." OCS' Initial Comments at 2. Accordingly, the OCS does not object to RMP tracking costs it incurs in its response to the Covid-19 pandemic. However, the PSC should rule that tracking of costs does not equate to the authorization to recovery a regulatory asset from ratepayers. Before the PSC can grant the relief sought in the application, RMP must be able to quantitatively demonstrate that the costs associated with the Covid-19 pandemic have an extraordinary effect on RMP's revenues.

## **CONCLUSION**

Because RMP and the DPU acknowledge that the economic impact of the Covid-19 pandemic on RMP's earnings is unknown, RMP has yet to carry its burden of quantitatively demonstrating that the costs associated with the pandemic have an extraordinary impact on

RMP's revenue. Thus, the Application fails to meet both elements of the *MCI* tests for exception to the prohibition on single-issue and retroactive ratemaking. The PSC can approve the deferred accounting request so long as rate recovery is not guaranteed or allowed until such time when RMP carries its burden of establishing that the subject costs are extraordinary. If the PSC concludes that such a conditional order would be inappropriate, the Application must be denied.

Respectfully submitted, July 21, 2020.

/s/ Robert J. Moore  
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Services*