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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH	
Application of Rocky Mountain Power for a Deferred Accounting Order Regarding Insurance Costs	Docket No. 23-035-40 Prehearing Brief

Pursuant to Utah Code § 54-10a-303, UTAH ADMIN. CODE r. 746-1, and the Public Service Commission of Utah's (PSC) September 13, 2023, Scheduling Order and Notice of Hearing, the Office of Consumer Services (OCS) submits this Prehearing Brief arguing that Rocky Mountain Power's (RMP) Application for a Deferred Accounting Order be denied. RMP has not even attempted to carry its initial burden of establishing that the expense sought to be deferred is likely to be recoverable in rates and was not caused by its own mismanagement. This failure is fatal to RMP's Application. The OCS limits this brief to addressing this specific issue.

ARGUMENT

RMP seeks a Deferred Accounting Order authorizing RMP to record a regulatory asset of $49.2 million, Utah's share of approximately $112.1 million (total Company), resulting from an increase in the cost of premiums for excess liability insurance. 23-035-40, Rebuttal Testimony Shelly E. McCoy, ln. 68-69, 71-74 (December 21, 2023). However, RMP does not attempt to quantify the amount of the increase in premiums that is the result of climate change and the increase in frequency and intensity of wildfires and the amount of the increase in premiums that is the result of the *James* verdict—a verdict finding RMP liable for compensatory and punitive damages for acting with negligence, gross negligence, recklessness, and willfulness in starting wide ranging wildfires in Oregan occurring over Labor Day weekend 2020. Docket No., 23-035-30, Application at ¶¶ 3, 6 (June 21, 2023); Final Verdict, James v. PacifiCorp, No. 20-CV-33885 (Cir. Ct. Multnomah County, Jun. 12, 2023). Because the jury's verdict of negligence is essentially a finding of imprudence, as negligence is fundamentally a synonym of imprudence, it is highly unlikely that RMP could recover in a rate proceeding the amount of increase in excess insurance premiums attributable to its own negligence and mismanagement in causing the Labor Day fires.

Indeed, the law on the authorization of deferred accounting orders is clear. No accounting order should be issued if the amount sought to be deferred is not likely to be recoverable in rates nor should an authorization be granted for expenses caused by the utilities' own mismanagement. Grid West Order at 16-17[1] (recovery at a future rate proceeding must be

[1] The PSC issued the "Grid West Order" from three dockets consolidated for the purpose of decision and can be found at *In the Matter of the Application of Rocky Mountain Power, a Division of PacifiCorp, for a Deferred Accounting Order To Defer the Costs of Loans Made to Grid West, the Reginal Transmission Organization; In the Matter of the Application of Rocky Mountain Power for an Accounting Order To Defer the Cost Related to the MidAmerican Energy Holdings Company; In the Matter of the Application of Rocky Mountain Power for an Accounting Order for Costs related to the*

likely); *MCI Telecomm. Corp. v. Pub. Serv. Comm'n,* 840 P.2d 765, 772 (Utah 1992) (must not appear that the expense sought to be recovered resulted from mismanagement). Because RMP fails to quantify how much of the increase in premiums is due to general wildfire conditions in the western states and how much is attributable to its own imprudence and mismanagement, RMP has failed to carry its burden of proof regarding its entitlement to a deferred accounting order. *Application of Rocky Mountain Power for an Accounting Order for Settlement Charges Related to its Pension Plans*, Docket No. 18-035-48, Order at 5-6 (Utah P.S.C., May 22, 2019) ("Pension Order") (Utility has burden of proof to establish entitlement to an accounting order); *see also, Comm. of Consumer Serv. v. Pub. Serv. Comm'n of Utah*, 2003 UT 29, ¶ 13, 75 P.3d 481 (when evidence concerning prudence has not, and cannot, be identified, the utility fails to carry its burden of proof). Thus, RMP's application for a deferred accounting order must be denied.

I. Requirements for a Deferred Accounting Order

The seminal case for the requirements for a deferred accounting order is *MCI Telecomm Corp.,* 840 P.2d 765. However, *MCI* itself is not a deferred accounting case; rather, it is the first case where the Utah Supreme Court recognized exceptions to the prohibition on retroactive ratemaking. *Id.* at 770-72. The prominence of *MCI* in deferred accounting cases stems from the fact that deferred accounting impacts the rules against both retroactive and single-issue ratemaking. Pension Order at 4-6. This is because a deferred accounting order facilitates potential recovery of a specific category of prior year expenses, in this case excess costs of insurance premiums, for recovery in a future rate proceeding. *Id.* at 5. Therefore, to obtain a deferred accounting order, a utility must establish the requirements for an exception to the

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Flooding of the Powerdale Hydro Facility, Docket No's 06-035-163, 07-035-04, 07-035-14, Report and Order (Utah P.S.C., January 3, 2008) ("Grid West Order").

prohibitions on retroactive and single-issue ratemaking. *Id.* (applying the *MCI* test to both retroactive and signal-issue ratemaking).

In its testimony, RMP focuses exclusively on the two most cited factors for the *MCI* tests for the exception from rule against retroactive and single-issue ratemaking: (1) the expense must have been unforeseeable at the time of the last general rate case, (2) the expense must have an extraordinary impact on the utility's earnings. *MCI*, 840 P.2d at 771-72. However, *MCI* also notes that for the exception to apply, the unforeseen extraordinary expense must not be caused by the utility's mismanagement. *Id.* at 771 (exception applies to "unforeseen windfalls or disasters not caused by the utility"). A corollary of this general rule for the exception to retroactive and single-issue ratemaking is the rule specifically related to deferred accounting orders, i.e., that a deferral will not be authorized unless "there is a probability of future recovery." Grid West Order at 16.

Concerning the specific rule for deferred accounting orders, the granting of a deferred accounting order does not equate to a determination that the amount deferred will ultimately be recoverable in rates. *Id.* Under applicable accounting rules, a deferred accounting order only authorizes the utility to track its costs occurring between rate cases for the possible future recovery, after a full prudence review, in the next ratemaking proceeding. *Id.*

However, generally accepted accounting practices require that a deferred accounting order only be issued irecovery in rates is likely. Specifically, "accounting standards do indicate that a utility may account for or keep track of expenses past their incurrence if there is a probability of future recovery. If future recovery is not likely, no accounting order need issue as generally accepted accounting practices would not have the utility account for them for treatment in some future period, but would effectively require them to be expensed in the periods in which

they are incurred." *Id.* In this way, the generally accepted accounting principles for a deferral order interact with regulatory principles related to the general recoverability of a utility's costs. As the PSC stated in the Grid West Order, "ratemaking rules and principles have application and may be given greater weight than accounting rules and principles in considering whether to issue an accounting order." *Id.* at 16-17.

Thus, to be granted the relief requested in its application, RMP must make an initial showing that the increase in its excess insurance costs is likely to be recoverable in rates. This showing must take place at the time of the application for a deferred accounting order is requested, not at the time of a full prudence review. *Id.* As discussed below, RMP has failed to make this showing.

With respect to the *MCI* test for the general exemption to the rules against retroactive and single-issue ratemaking, the utility must show that the unforeseen and extraordinary expense did not result from the utility's mismanagement. *MCI,* 840 P.2d at 771 (A deferred accounting order should be issued once "it is clear that a particular cost is 'extraordinary' and that it does not result from company mismanagement.") *Stewart v Utah Pub. Serv. Comm'n*, 885 P.2d 759, 778 (Utah 1994) ("[t]he extraordinary and unforeseeable nature of the expenses recognized under the exception differentiates them from expenses inaccurately estimated because of a misstep in the rate-making process . . . or from mismanagement.") Therefore, both under the general rule for an exception to the rules against single-issue and retroactive ratemaking and the specific rule for deferred accounting orders, a utility must initially demonstrate at the time of the deferral request that the unforeseeable and extraordinary expense sought to be deferred must not have resulted from the utility's own misconduct.

Here, RMP fails to quantify the amount of increase insurance premiums attributable to its own misconduct in causing the fires that resulted in the *James* verdict from the amount of increase insurance premiums attributable to the general wildfire conditions facing electrical utilities operating in the western states. As discussed below, RMP bears the burden of proof to establish its entitlement to a deferred accounting order. Its failure to quantify the amount of the increase in premiums due to general wildfire conditions, as opposed to the *James* verdict, precludes the possibility that RMP carried its burden to demonstrate the amount of excess costs to be deferred and therefore whether this amount is "extraordinary."

II. Burden of Proof

The PSC has determined that in deferred accounting cases the utility bears the burden of proof in establishing that the *MCI* test for exceptions to the rules against retroactive and single-issue ratemaking apply. *See* Pension Order at 4-6. This is consistent with the general law concerning the burden of proof for utilities seeking to include costs in rates. Indeed, the Utah Supreme Court has held "'the 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.'" *Comm. of Consumer Serv.*, 2003 UT 29, at ¶ 14, *quoting, Utah Dep't of Bus. Regulation v. Pub. Serv. Comm'n,* 614 P.2d 1242, 1245 (Utah 1980). Thus, the utility must produce substantial evidence on all elements required to support the utility's request for a rate increase. The PSC "'is entitled to know and before it can act advisedly must be informed of all relevant facts," otherwise, "it could not effectively determine whether a proposed rate was justified.'" *Comm. of Consumer Serv.*, 2003 UT 29, at ¶ 14, *quoting, Utah Dep't of Bus. Regulation* 614 P.2d at 1246. Logically, it follows that if evidence concerning prudence has not, or cannot, be identified—the utility fails to carry its burden of proof. *Comm. of Consumer Serv.*,

2003 UT 29, at ¶ 13 ("Since the Commission found that no such record was or could be made available, it should have refused to grant a rate increase that included CO_2 plant costs").

In this case, RMP has failed to produce any evidence quantifying the amount of the $49.2 million requested to be deferred that resulted from the general wildfire conditions as opposed to premium increases resulting from the *James* verdict, which found RMP culpable in starting the fires. Therefore, there is no evidence that the amount of excess insurance costs RMP claims it is entitled to defer is appropriate for recovery, or whether this amount has an "extraordinary" impact on earnings.

In fact, in response to a question on the impact of the *James* verdict on the excess liability insurance, RMP simply replied: "[RMP's] insurers did not communicate to [RMP] the impact, specific or general, of the James verdict, the timing of which was coincidental to the renewal of the Company's excess liability insurance. . . . As a general matter, insurance companies base their policies on the total risk being insured and do not compartmentalize certain percentages of that risk to specific events." 23-035-40, Rebuttal Testimony Mariya V. Coleman, at ln. 96-100, 103-105, (Dec. 21, 2023). This testimony does not indicate that RMP made any great effort to uncover evidence quantifying the amount of excess liability insurance that is attributable to the *James* verdict other than simply "communicating" with its insurers. In any event, whether RMP simply failed to uncover this evidence, or whether the amount of additional insurance premiums cannot be determined, this lack of evidence means that RMP has failed to carry its burden of proof that it is entitled to a deferred accounting order. *Comm. of Consumer Serv.*, 2003 UT 29, at ¶ 13.

Moreover, there is the question as to whether it is "likely" that RMP will recover the increase in costs of excess liability premiums caused by the *James* verdict. Pension Order at 4-6;

Rocky Mountain Power's Application for Approval of the 2020 Energy Balancing Account, Docket 20-035-01, Order at 6 (Utah P.S.C., February 26, 2021) (Lake Side Order) (prudently incurred expenses for replacement power do not flow through to consumers if underlying power outage was the result of impudent actions). The *James* verdict was issued from a bifurcated class action, with the first phase adjudicating RMP's liability for starting the Labor Day fires and the damages awarded for seventeen representative plaintiffs. Again, the jury found RMP acted with negligence, gross negligence, recklessness, and willfulness in starting the Labor Day fires. Final Verdict, James v. PacifiCorp, No. 20-CV-33885 (Cir. Ct. Multnomah County, Jun. 12, 2023). The jury awarded damages to the seventeen representative plaintiffs of $70 million in compensable damages and $18 million in punitive damages. *Id.;* Docket No., 23-035-30, Application at ¶¶ 6, 9 (June 21, 2023). In the second phase of the class action, damages will be awarded to the remaining plaintiffs in the class. Docket No., 23-035-30, Application at ¶¶ 6, 9 (June 21, 2023). While the damages for the remaining plaintiffs in the class remains uncertain, a rough extrapolation from the damages awarded to the representative plaintiffs to the remaining class yields damages in the billions of dollars.

Moreover, RMP cannot dispute that by finding the company liable for conduct establishing willfulness, recklessness, gross negligence, and negligence, the jury implicitly found that RMP acted impudently in starting and responding to the Oregon fires. Blacks Legal Dictionary defines prudence as:

> **PRUDENCE.** Carefulness, precaution, attentiveness, and good judgment, as applied to action or conduct. The degree of care required by the exigencies or circumstances under which it is to be exercised. This term, in the language of the law, is commonly associated with "care" and "diligence" *and contrasted with "negligence.*"

BACK'S LAW DICTIONARY 1104 (5TH ed. 1979) (emphasis added); *see also, Prudence Defined,* WEX LAW DICTIONARY, https://www.law.cornell.edu/wex/prudence (last visited January 3, 2024) ("The prudent person rule is a hypothetical person used as a legal standard to determine whether someone *acted with negligence*") (emphasis added). Accordingly, the concept of prudence is contrasted with the opposite concept of negligence. Therefore, imprudence and negligence are essentially synonyms in the context of the *James* verdict. Thus, the finding of willfulness, recklessness, gross negligence, and negligence in the *James* verdict precludes the PSC from issuing an order in the instant docket that the increase in premiums caused by the *James* verdict "likely" resulted from prudent actions taken by RMP.[2]

Nor can RMP argue that the *James* verdict did not "likely" impact the amount charged for premiums for excess liability insurance. RMP's testimony provides that their insurers base their premium on "the total risk being insured" which includes analysis of "claims against multiple utilities in the western US" arising from wildfires. 23-035-40, Rebuttal Testimony Mariya V. Coleman, at ln. 101-104 (Dec. 21, 2023). It is axiomatic that if "claims against multiple utilities" factored into the amount of premium increases, that a claim against RMP, the precise utility that seeks to purchase insurance, impacted the premium increase—particularly a claim based on a jury verdict that found RMP acted with willful indifference and recklessness in regard to the dangers of wildfires, and which resulted in liability of potentially billions of dollars.

[2] Not only does the jury verdict, as a practical matter, preclude the finding of prudence, the same result can also be reached by applying the doctrine of collateral estoppel, also known as issue preclusion. Collateral estoppel prevents the relitigation of an issue already decided in a prior case and applies when four elements are met. Buckner v. Kennard, 2004 UT 78, ¶ 13, 99 P.3d 842. One, identity of issues—as noted above negligence and prudence are identical issues. *Id*. Two, the party estopped must have been a party to the prior suit—PacifiCorp is a party in James v. PacifiCorp. *Id*. Three, the issue must have been fully and fairly litigated—the issue of negligence/prudence was the central issue of a full jury trial. *Id.* And four, the issue must be finally resolved on the merits—the issue of negligence/prudence was finally resolved on the merits in a jury trial establishing PacifiCorp's liability. *Id.* Accordingly, pursuant to the doctrine of collateral estoppel, PacifiCorp is estopped from arguing in front of the PSC that they acted with prudence in regard to the Oregon wildfires.

Lastly, the fact that RMP failed to quantify the amount of the claimed deferral attributed to its conduct resulting in the Labor Day fires clearly shows that RMP failed to carry its burden of proof in establishing that its actions did not impact the amount charged for premiums. It is true that the PSC has ruled when the cause of a power outage could not be determined, RMP was nevertheless entitled to flow through the cost of replacement power to consumers. Lake Side Order at 20. However, the PSC based its decision on the facts unique to the Lake Side case, i.e., that the cause of a power outage was inexplicable, no party identified any imprudent action that RMP took in relations to the outage, and RMP acted with prudence in investigating the cause of the outage. *Id.* at 17-19. Thus, the Lake Side Order is easily distinguished from the instant case and is not controlling.

In Lake Side, no party could identify any action by RMP impacting the outage that constituted imprudence and the cause of the outage was inexplicable. *Id.* Here, as discussed above, the cause of the excess cost of premiums is not inexplicable but rather can be attributable in part to RMP's actions resulting in the *James* verdict, actions that were imprudence. Moreover, in Lake Side, RMP went to extreme efforts in trying to uncover the cause of the power outage, including participating in two root cause reports, which both proved to be inconclusive. *Id.* at 19. Here, RMP has done little to quantify the amount of increase in premiums due to general conditions in the western states, as opposed to their own negligence in starting the Labor Day fires, other than "communicating with its insurers." Given these facts, RMP cannot rely on the Lake Side Order to counter the Utah Supreme Court holding that when the issue of prudence cannot be established, or here where the cost of excess liability premiums attributable to the *James* verdict have not been quantified, the utility fails to carry its burden of proof. *Comm. of Consumer Serv.*, 2003 UT 29, at ¶ 13.

In sum, RMP does not even attempt to quantify the amount of the increase in insurance premiums that is attributable to the *James* verdict and therefore attributable to RMP's negligence/imprudence. Thus, RMP failed to carry its initial burden of proof of its entitlement to a deferred accounting order by failing to quantify the amount to be deferred.

CONCLUSION

As part of its initial application for a deferred accounting order, RMP has the burden of proof to establish that the expense that is sought to be deferred is "likely" to be recoverable in rates and did not result from RMP's mismanagement. Because RMP has not even attempted to quantify the amount of the increase in premiums attributable to the *James* verdict, and therefore attributable to RMP's imprudence, RMP fails to carry its burden and the Application for Deferred Accounting must be denied.

Respectfully submitted, January 9, 2024.

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CERTIFICATE OF SERVICE
Docket No. 23-035-40

I CERTIFY that on January 9, 2024, a true and correct copy of the foregoing the **Office of Consumer Services Prehearing Brief** was served upon the following:

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