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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 Utah Division of Public Utilities' Prehearing Brief Opposing Approval of the Deferred Accounting Application
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The Division of Public Utilities (Division or DPU) urges the Public Service Commission of Utah (Commission) to deny Rocky Mountain Power's (RMP) August 21, 2023, "Application of Rocky Mountain Power for a Deferred Accounting Order Regarding Insurance Costs" (Application).¹

The Application must fail for at least four reasons: 1) RMP has failed to prove that the Commission should approve the request for a deferred account; 2) because retroactive ratemaking is an exception applying only when traditional ratemaking tools provide no alternative, RMP's correct route to relief is filing a general rate case (GRC),

¹ The Division files its prehearing brief pursuant to Utah Code Ann. § 54-4a-1, Utah Admin. Code R746-1, and the Public Service Commission of Utah's (Commission) scheduling orders in this docket.

not this deferral request; 3) the insurance costs RMP seeks to defer, record, and later recover may relate to events resulting from the Company's imprudent, negligent, grossly negligent, or reckless conduct and would not result in just and reasonable rates; and 4) the insurance costs RMP seeks to defer do not meet the well-established criteria required for Commission approval of a deferral account. Ratemaking should not be turned into a cost recovery accounting exercise.

I. Background

PacifiCorp, and derivatively RMP and Pacific Power as business units of PacifiCorp, obtain excess liability insurance and other insurance through their relationship with Berkshire Hathaway Energy Company (BHE).²

On August 21, 2023, RMP filed its Application seeking "a deferred accounting order authorizing the Company [RMP] to record a regulatory asset associated with the costs associated with increased insurance premiums."³ RMP claims "Wildfire liability risk is impacting the commercial insurance markets with an increase in the premiums for available insurance coverage."⁴ The Application also claims that "Liability insurance, including wildfire liability insurance, is a prudent business expense that protects the Company and customers against financial losses from third-party claims."⁵

² PacifiCorp's parent company is BHE. See RMP's Direct Test. of Mariya V. Coleman (Coleman Direct), lines 6-7.

³ Application at 1.

⁴ *Id.*

⁵ *Id.* at 2.

In its Application, RMP stated that it seeks to defer “the incremental cost of acquiring coverage for the policy periods commencing August 15, 2023 or later.”⁶ The insurance coverage at issue in this docket is excess liability insurance. RMP defines excess liability insurance as “A claims-made policy form that provides coverage for legal liability to third parties arising out of bodily injury and property damage losses suffered by those third parties. This includes excess wildfire liability insurance.”⁷ In rebuttal testimony, RMP updated the commercial insurance cost estimate provided in its direct testimony and now seeks to defer \$122.6 million (total Company)⁸ with Utah’s allocation being \$49.2 million,⁹ and RMP does not seem to state when the period ends or cap the amount to be deferred.¹⁰ Rates established in RMP’s last GRC in 2020 included \$10.5 million (total Company) in premiums for excess liability insurance.¹¹

RMP’s prefiled testimony explains how it obtains insurance and how costs are allocated by BHE. In her direct testimony, RMP witness Ms. Coleman states:

PacifiCorp obtains its commercial insurance, including its excess liability insurance, as part of BHE’s aggregated insurance program. This allows PacifiCorp to reduce its insurance costs by sharing a single placement, when

⁶ *Id.* at 3.

⁷ Coleman Direct, lines 52-55.

⁸ RMP’s Rebuttal Test. of Mariya V. Coleman (Coleman Rebuttal), line 28.

⁹ RMP’s Rebuttal Test. of Shelley E. McCoy (McCoy Rebuttal), lines 71-74.

¹⁰ It seems likely that a deferral account, unless expressly limited by the Commission, has no cap and could continue to accrue until a prudence review is sought. That prudence review could be years in the future. This is inconsistent with the well-recognized and accepted complementary theories of cost causation and cost responsibility. Here, it seems that if a deferral account is approved, those increased insurance costs, possibly accruing for years, could be put into a future test year that could then be used during a GRC. In addition, if RMP’s estimates prove true, the deferred amount could grow to be quite large before a prudence examination is undertaken.

¹¹ See RMP’s Direct Test. of Shelley E. McCoy (McCoy Direct), lines 44-50; Coleman Direct, lines 125-26.

possible, instead of purchasing its own. BHE allocates the cost of insurance to PacifiCorp and other BHE companies using corporate cost allocation methodologies and principles.¹²

In turn, BHE allocates PacifiCorp's premiums,

through BHE's corporate allocation, which is calculated based on an average percentage of property, plant and equipment; employee count; loss history; overhead electric transmission and distribution lines; and transmission and distribution pipeline miles.¹³

II. Abbreviated Procedural Background

RMP filed this Application on August 21, 2023. A scheduling order and notice of hearing, then an erratum, were issued September 13, 2023. The Utah Association of Energy Users (UAE) sought and was granted intervention.¹⁴

On October 13, 2023, RMP witnesses Mariya V. Coleman and Shelley E. McCoy filed their direct testimonies. DPU witness Jeffery S. Einfeldt, Office of Consumer Services (OCS) witness Alyson Anderson, and UAE witness Kevin C. Higgins filed their direct testimonies on November 29, 2023. Ms. Coleman and Ms. McCoy filed their rebuttal testimonies on December 21, 2023, and Mr. Einfeldt and Ms. Anderson filed surrebuttal testimonies on January 9, 2023.¹⁵

¹² Coleman Direct, lines 44-48.

¹³ *Id.* at lines 99-102.

¹⁴ See the Commission's docket sheet for Docket No. 23-035-40 available at <https://psc.utah.gov/2023/08/21/docket-no-23-035-40/>.

¹⁵ *Id.*

III. Argument

A. RMP Has Failed to Meet Its Burden of Proof to Prove that the Commission Should Approve the Application

RMP, as the applicant seeking the change, bears the burden of proof to demonstrate to the Commission that approval is supported by the facts and is consistent with Utah law. In Utah Department of Business Regulation v. Public Service Company, the Utah Supreme Court stated,

In regulation of public utilities by governmental authority, a fundamental principle is: 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.¹⁶

Only RMP has access to all its data, and it alone decides if and when to seek a change.¹⁷ The Division and others, including the Commission, can only review what information RMP provides. If, for example, the Division determines that the information RMP provides is insufficient, unclear, or otherwise unsatisfactory, it must deduce what additional information or clarification is needed and persuade the RMP to produce it. Unless the requestor seeks and gets an order to compel from the Commission, the utility controls the release of information.

¹⁶ See Utah Dep't of Bus. Regul. v. Pub. Serv. Comm'n, 614 P.2d 1242, 1245 (Utah 1980) (internal citation omitted) (emphasis added). This case involved a rate case but applying it to a request for a deferral account is appropriate.

¹⁷ Unless required to do so by statute, court decision, or Commission order.

RMP must provide more than just prima facie evidence to carry its burden.¹⁸ Instead,

The company must support its application by way of substantial evidence, and the mere filing of schedules and testimony in support of a rate increase is insufficient to sustain the burden. Rate making is not an adversary proceeding in which the applicant needs only to present a prima facie case to be entitled to relief.¹⁹

RMP has failed to meet its burden, and the Commission should deny the Application.

B. RMP's Correct Route for Relief Is Filing a General Rate Case, Not Through This Application

A GRC is the correct route for RMP's relief for the increased insurance costs.²⁰

There is no cause or need for the Commission to grant RMP a very rare exception to the rule against retroactive ratemaking when the Company can file a GRC.²¹ In addition,

¹⁸ See Utah Dep't of Bus. Regul., 614 P.2d at 1246.

¹⁹ *Id.*

²⁰ The Division does not concede that the Company is entitled to the relief it seeks here, whether it proceeds through the Application, a GRC, or other means.

²¹ RMP's claims that it cannot file a GRC are unpersuasive. See McCoy Rebuttal, lines 141-159. The Division acknowledges that it may take some time to prepare a case, but as discussed elsewhere in this brief that is no reason to not file one in light of all the other considerations. Utah allows the use of a forward test year. RMP's own testimony indicates that it had notice that insurance costs would increase markedly. Filing a GRC would have offered RMP the possibility of an interim rate increase allowing expedited rate relief. A GRC would not only consider the increased insurance costs but also changes in other costs and revenues, and result in complete updated rates if warranted after a comprehensive review. RMP's complains that "The preparation of a general rate case and the presentation of such a request would still take months to complete" and "This would leave the Company with, at best, only partial recovery of these extraordinary and necessary expenses." McCoy Rebuttal, lines 162-64. The possibility of only a partial recovery weighed against the risk of a truncated deferral accounting process still goes in favor of the ratepayer, and a GRC is the correct route. Regulatory lag is a normal part of ratemaking. RMP also claims that "The Company works hard to manage costs between rate cases to minimize the frequency and size of customer rate increases." McCoy Rebuttal, lines 170-71. This is indeed a laudable goal, but matching cost responsibility with costs is also a concern and sometimes, like here, a GRC is warranted. Also, RMP's last GRC was filed in 2020. There is a high likelihood that costs, revenues, an appropriate rate of return, system usage, and other things have changed since then. The Division also

a GRC offers the possibility of interim rates providing expedited relief, unlike this request for a deferral account.

1. A GRC Is Required for a Holistic Examination of Costs and Revenues

A GRC ensures that all revenues and costs for a certain period are scrutinized simultaneously, an exercise consistent with the theory of cost causation and cost responsibility.²² Even the Application concedes the importance of a holistic and comprehensive proceeding: “Based on the best available information known in its last rate case, the Company’s rates were approved to reflect a reasonable level of self-insurance and commercial insurance related to third-party claims, as an expense of providing electric service to customers.”²³

In contrast to the comprehensive review done in a GRC, a request for approval of a deferral account and its possible subsequent proceeding to determine if deferred costs are recoverable is a truncated proceeding and will scrutinize only costs for the requested deferred accounts. Changes in revenues, other costs, or system usage

notes that RMP has filed GRCs recently in other states, just not Utah. The Division recognizes that operating a multi-state utility and carrying on GRCs in multiple states simultaneously can be challenging. However, Utah’s rates are designed to compensate the Company so that it can be adequately staffed on regulatory matters pertaining to Utah. Finally, the Company’s protests that it cannot quickly prepare a GRC may suggest that it may be inadequately staffed. A Utah GRC would provide information about current and needed employee counts, allow a comparison to those counts to those in RMP’s 2020 GRC, and provide a comprehensive resetting of rates.

²² Additionally, many more non-Company parties representing a wide range of interest routinely participate in a GRC. For example, in RMP’s 2020 GRC, at least 12 non-Company parties participated, and the public participated too. Contrast that with the three non-Company parties participating in this deferral docket. Compare <https://pscdocs.utah.gov/electric/20docs/2003504/316613PstHrngBrfUAE11-30-2020.pdf> with <https://psc.utah.gov/2023/08/21/docket-no-23-035-40/>.

²³ Application at 3 (emphasis added).

changes are not and cannot be examined in a deferral proceeding. A deferral proceeding is a narrow asymmetric process.

In fact, while one of Utah's leading cases on retroactive ratemaking, MCI Telecommunications Company v. Public Service Commission of Utah focuses attention on the issue of when retroactive ratemaking is permissible, its overall lesson is the importance of robust and comprehensive review.²⁴ In that case, the phone company made representations about the effects of federal tax law changes,²⁵ which the Commission and Division largely accepted without fuller exposition.²⁶ Ultimately those representations were wrong, earnings were also boosted by other factors, and the rates the Commission ordered were wildly inaccurate in the telephone company's favor.²⁷ Retroactivity was invoked only to repair the damage done by the Commission's failure to require a fuller proceeding, like a GRC.²⁸

Without a future GRC, the Company could continue deferring insurance costs for the foreseeable future with no inquiry into whether other aspects of the business offset those costs. While numerous factors suggest the Company will need to file a GRC in the near future, it is not guaranteed, and conditions can change.

²⁴ MCI Telecomm. Co. v. Pub. Serv. Comm'n of Utah, 840 P.2d 765 (Utah 1992).

²⁵ *Id.*

²⁶ *See, e.g., id.* at 767, 769-770.

²⁷ *Id.* at 769.

²⁸ *Id.* at 775. The court was quite critical of the actions of the Commission and the parties.

2. *Only A GRC Provides Access to Immediate Relief Through Interim Rates*

If RMP had filed a Utah GRC along with an interim rate request, it is possible that RMP could have already received an order authorizing an interim rate increase.²⁹ Only a prima facie case must be made to show an interim rate is justified. The Commission must issue a decision on an interim rate request within 45 days of that request.³⁰

C. The Application Should Be Dismissed Because It Is Likely Some Increases in Insurance Costs Were Caused by Imprudent, Negligent, Grossly Negligent, or Reckless Conduct and Are Not Just and Reasonable

Increased insurance premiums resulting from imprudent, negligent, grossly negligent, or reckless actions³¹ are not recoverable in RMP rates because Utah law requires that:

All charges made, demanded or received by any public utility, . . . for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful.³²

²⁹ The Division notes that RMP first sought relief in June 2023 for “incremental costs associated with third-party liability due to wildfires in Oregon” through an application for a deferral account. See Application filed June 21, 2023, at 1 in Docket No. 23-035-30. RMP filed to withdraw that application without prejudice on August 22, 2023. The Commission issued a notice recognizing the withdrawal on September 15, 2023. <https://psc.utah.gov/2023/06/21/docket-no-23-035-30/>. On August 21, 2023, RMP filed this Application. If RMP had spent its time preparing and filing a GRC instead of seeking approval for a deferral account, it is possible that RMP could have already received an interim rate increase.

³⁰ See Utah Code Ann. § 54-7-12(4).

³¹ The Division is not arguing that Pacific Power’s and PacifiCorp’s actions and inactions are the only factors influencing increasing insurance rates, but it would strain credibility to say that it is likely they have no effect on insurance rates.

³² Utah Code Ann. § 54-3-1.

Axiomatically, costs due to imprudent, negligent, grossly negligent, or willful and reckless actions are not just and reasonable.

The Commission has denied recovery when RMP has failed to prove that its actions were prudent. For example, the Commission disallowed RMP's request to recover increased net power costs related to an outage at Craig Unit 1. The Commission concluded that "according to its own analysis, RMP was responsible for installing an incorrectly designed component that failed and caused the outage" and "RMP offer[ed] no evidence to suggest its actions were prudent."³³ An incorrectly designed component seems akin to simple negligence if the design flaw was not glaringly obvious.

Moving on to an example involving 2007 wildfires in California, in a 2018 decision the California Public Service Commission (California Commission) denied rehearing of its decision denying San Diego Gas & Electric (SDG&E) cost recovery where the utility failed to prove prudence.³⁴ In its earlier decision, the California Commission found allowing recovery under those circumstances would not result in just and reasonable rates. Quoting its earlier decision, the California Commission said SDG&E

failed to meet its burden to show that its operation and management of its system leading up to the 2007 Wildfires, and its immediate response at the time of the fires, was reasonable and prudent. By definition then, rate recovery would be unjust, unreasonable, and unlawful under Section 451. For that reason, we denied SDG&E's request to pass the \$379 million in WEMA costs on to its ratepayers.

³³ RMP's Application for Approval of the 2022 Energy Balancing Account, Docket No. 22-035-01, Order issued Jan. 9, 2023, at 16.

³⁴ See Application of San Diego Gas & Electric Company (U902E) for Authorization to Recover Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense Memorandum Account (WEMA), Application 15-09-010, Decision 18-07-025 (Cal. Pub. Util. Comm'n, July 12, 2018) (order denying rehearing).

In denying rehearing, the California Commission discussed the relationship between proving prudence and cost recovery in great detail. Except for the portion addressing California's unique inverse condemnation statute, the California Commission's rationale is applicable here, particularly because both states have statutes requiring rates to be just and reasonable.

The actions and inactions of PacifiCorp and Pacific Power concerning wildfires in Oregon and Washington during the fall of 2020 form a critical backdrop to the Application. In James v. PacifiCorp, a jury has gone far beyond finding simple negligence, instead finding gross negligence and reckless and willful conduct.³⁵

In James, the plaintiffs alleged that the Company's facilities, actions, and inactions caused certain fires in Oregon in 2020 and that the Company should have shut off service to customers to prevent igniting fires. The Final Verdict in James awarded approximately \$90 million in damages to certain plaintiffs,³⁶ finding that the Company's actions and inactions were negligent, grossly negligent, and willful and reckless.³⁷

³⁵ See *generally* Final Verdict, James v. PacifiCorp, No. 20-CV-33885 (Cir. Ct. Multnomah County, Jun. 12, 2023). The Division requests that the Commission take administrative notice of James. The court has issued a limited decision and the Company is appealing the verdict and has neither paid damages nor filed James-related insurance claims. See Coleman Rebuttal, lines 107-109. The James court entered a limited verdict on January 4, 2024, and PacifiCorp has filed an appeal with the court of appeals. Also, the Oregon wildfires, James, and the Company's conduct were addressed RMP's June 21, 2023, application in Docket No. 23-035-30. The Division requests that the Commission take administrative notice of the application, later withdrawn, in that docket.

³⁶ See *generally* James.

³⁷ *Id.*

It seems that the James verdict and other wildfire litigation probably must have had an effect on the increased insurance costs.³⁸ It seems unlikely that these verdicts would have had no effect on insurance rates that were not yet final at the time of the verdicts.³⁹

The Commission should not authorize a deferral account when at least part of the insurance increase is likely related to the Company's own actions found by a jury to be negligent, grossly negligent, and willful and reckless.⁴⁰ While prudence questions could theoretically be put off until the Company seeks later ratemaking treatment, and RMP states it is not seeking a prudence review now,⁴¹ establishment of a deferred accounts suggests some preliminary indication that the costs are recoverable.⁴² The Commission should not give that preliminary indication here with such a large question about the effects of the Company's past conduct on insurance costs. Again, a GRC is the appropriate forum for resolution of questions such as these.

³⁸ Coleman Direct at lines 208-210. Perhaps it is an over semantic analysis and interpretation, but Ms. Coleman's choice of words when addressing the effect of James on the cost increase seems particularly carefully worded. She states, "PacifiCorp's insurers did not communicate to PacifiCorp 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." Coleman Rebuttal, lines 98-100(emphasis added). Later, however, she does acknowledge that "[c]laims against multiple utilities in the western US was influencing their [insurers'] decisions to withdraw from selling wildfire insurance or to charge more to insure wildfire risk." *Id.*, lines 100-103.

³⁹ See DPU's Direct Test. of Jeffrey S. Einfeldt (Einfeldt Direct), lines 118-120.

⁴⁰ See generally James. See also Einfeldt Direct, lines 7-8.

⁴¹ See, e.g., McCoy Rebuttal, lines 178-180.

⁴² *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 Regional Transmission Organization*, Docket No. 06-035-163, Report and Order issued Jan. 3, 2008, at 16-17.

D. The Increased Insurance Costs Are Not Eligible for Deferral Under the Commission's Well-Established Criteria for a Deferral Account

There is no need for the Commission to reach the issue of foreseeability and extraordinary or extraordinary effect because “better tools exist” than a deferral account. Nonetheless, in case the Commission reaches this issue, the Division asserts that RMP fails to provide the facts necessary to demonstrate that it is entitled to a deferral account under relevant case law and Commission orders.⁴³

Under the Utah public utility regulatory paradigm, rates are to be set on a going forward basis and utility missteps or missed forecasts do not justify retroactively changing rates.⁴⁴ Only in very rare instances should retroactive ratemaking be allowed.⁴⁵ No such rare instance exists here because despite RMP's assertions to the contrary, the increased insurance costs were foreseeable. Because RMP failed to prove unforeseeability, it is not necessary for the Commission to reach the second prong of the test addressing the extraordinary issue.

1. The Increased Insurance Costs Were Foreseeable and a Missed Forecast Does Not Make an Event Unforeseeable

RMP has been experiencing increases in insurance rates since its last GRC in 2020. Additionally, even a casual observer would have been aware of such things as

⁴³ See generally Utah Dep't of Bus. Regul. v. Utah Pub. Serv. Comm'n, 720 P.2d 420 (Utah 1986) (EBA case) and MCI Telecomm. Co. v. Pub. Serv. Comm'n of Utah, 840 P.2d 765 (Utah 1992).

⁴⁴ See *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 Regional Transmission Organization*, Docket No. 06-035-163, Report and Order issued Jan. 3, 2008, at 16-17. See also MCI, 840 P.2d at 770-71.

⁴⁵ See generally Utah Dep't of Bus. Regul., 720 P.2d 420, and MCI, 840 P.2d 765. See also the discussion concerning retroactive ratemaking in Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 777-779 (Utah 1994) (reh'g denied).

the associated deaths, property damage, and liability issues resulting from the 2017 and later California wildfires. Someone even tangentially related to regulated utilities would have been aware of those things and the associated increasing liability of regulated electric companies, insurance coverage issues, and Pacific Gas and Electric Company's 2019 wildfire related bankruptcy filing.⁴⁶

Despite their efforts, RMP's witnesses' claim that the increased insurance costs were not foreseeable are not persuasive.⁴⁷ The Company's excess liability policies expire every August, and it cannot ignore such things as the California wildfires, particularly those occurring in 2017-2019, and their results when contemplating annual insurance renewals or new policies.⁴⁸ In 2020, it also knew it was facing litigation concerning the 2020 Labor Day fires in Oregon.⁴⁹ Indeed, as Mr. Einfeldt testifies, "As for whether the insurance increase was unforeseen or unforeseeable, a series of notable wildfires in California since 2019 caused significant disruption to California

⁴⁶ The Division recognizes that California has a unique inverse condemnation legal regime affecting wildfire damages and recovery. Nonetheless, the California events and their effect on regulatory scrutiny, insurability, and insurance costs cannot be ignored.

⁴⁷ Cf. 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 Regional Transmission Organization, Docket No. 06-035-163; Application of Rocky Mountain Power for an Accounting Order To Defer the Costs Related to the MidAmerican Energy Holdings Company Transaction, Docket No. 07-035-04; and Application of Rocky Mountain Power for an Accounting Order for Costs related to the Flooding of the Powerdale Hydro Facility, Docket No. 07-035-14, Order issued Jan. 3, 2008 (January 2008 Order).

⁴⁸ See Coleman Direct, line 112.

⁴⁹ See, e.g., Berkshire Hathaway Energy Company, 10-K for fiscal year ending December 31, 2022 at 81-84. https://www.sec.gov/Archives/edgar/data/75594/000108131623000005/bhe-20221231.htm#ie573076a10d74efb84db79ba1b920a35_61.

utilities and their ratepayers,” and Oregon had wildfires in 2020 “leading to lawsuits filed against PacifiCorp in September 2020.”⁵⁰

Particularly curious is RMP’s claims that the increase was not foreseeable when Ms. Coleman provides the following testimony. Although numerous, her words merit presentation in full here:

Against the backdrop of prolonged drought conditions and increased development in wildland areas, wildfires across the western United States (“U.S.”) have proliferated in the last several years, and these fires have become larger and more destructive. This has resulted in significantly increasing wildfire costs for utilities and an inability to acquire insurance at rates and coverage levels consistent with past premiums. Insurers have increased the price at which they will consider selling insurance covering claims from wildfire liability. Additionally, insurers who historically would consider selling wildfire liability will no longer do so. For these reasons, the increase the Company experienced is not a one-time anomaly but is indicative of the high cost of obtaining excess liability coverage due to ongoing challenges with wildfire issues.⁵¹

She claims that a critical fact when examining foreseeability is the magnitude of the increase in costs from data presented in its 2020 GRC, with its 2021 test year, compared to the premium rates available in 2023.⁵² That comparison is fine as far as it goes, but the Company has operated with additional knowledge since 2020. The fact that the increase was bigger than the Company’s expected costs in the 2020 GRC because the Company failed to project the higher insurance costs do not make the

⁵⁰ Einfeldt Direct, lines 114-117.

⁵¹ Coleman Direct, lines 131-140.

⁵² See *id.* at lines 186-190.

increase unforeseeable.⁵³ The 2022 renewal period was considerably higher than the 2020 GRC numbers. A trend was beginning to form. The question of foreseeability is not what could have been foreseen at the last GRC, but whether the Company could have foreseen the increase in enough time to use normal ratemaking mechanisms to protect itself from coming cost increases and regulatory lag. Inflation and regulatory lag are normal parts of ratemaking. A deferral account is not warranted simply because costs increase by more than anticipated. The question is not whether inflation was large, but whether inflation could be foreseen in time to take action in normal ratemaking processes to account for it in rates.⁵⁴

The Utah Supreme Court made an insightful observation that now can be used to evaluate the foreseeability of the increased insurance costs. In MCI Telecomm. Co., Utah's Supreme Court said:

Here, however, the federal corporate income tax rate was cut by more than one-fourth. As the United States Court of Appeals for the District of Columbia Circuit commented in connection with the Act, "The change in [Carolina Power & Light Company's] tax costs at issue here was caused by an act of Congress (one only marginally more foreseeable than an act of God)." *Carolina Power & Light Co. v. FERC*, 860 F.2d 1097, 1102 (D.C.Cir.1988).⁵⁵

⁵³ As an aside, Ms. McCoy quotes Mr. Einfeldt's direct testimony where he says that RMP "should explore 'alternative strategies to mitigate wildfire risk rather than acquiring traditional insurance.'" She states that "To the extent Mr. Einfeldt is asserting the Company relies on insurance instead of mitigating wildfire risk, this assertion is completely wrong." McCoy Direct, lines 187-190. Mr. Einfeldt's testimony was not meant to imply that fire mitigation measures, which are part of prudent utility operation, are a substitute for insurance.

⁵⁴ Only if the Commission makes a finding that the increase was not foreseeable does it reach the extraordinary issue. See discussion *infra*.

⁵⁵ MCI, 840 P.2d at 772 (emphasis added).

No act of Congress is involved here, merely market forces, and the market made the insurance cost increases foreseeable enough for the Company to include the increases in just and reasonable rates set in a GRC. RMP does not prove that an exception to the rule against retroactive ratemaking is justified.⁵⁶

2. Because RMP Failed to Prove Unforeseeability, the Commission Has No Need to Consider the Extraordinary Issue

Because RMP fails the first prong of the test by not proving that the increased costs were unforeseeable, it is unnecessary for the Commission to reach the second prong of the test dealing with the extraordinary aspect.

IV. Conclusion

RMP has failed to prove that it is entitled to a deferral account. RMP has the burden of proof, not the Division, other parties, or the Commission. If RMP does not satisfy its burden of proof and evidentiary standard, its requested relief must be denied.

A GRC is the correct process for the Commission to address whether RMP should be allowed to recover the increased insurance costs. In a GRC, a future test year can be used and all costs and revenues, usage changes, an appropriate rate of return, and the like can be scrutinized symmetrically and virtually simultaneously. Interim rates can also be requested in a GRC filing, allowing expected recovery of costs until the Commission approves final rates. While the increased insurance costs represent a

⁵⁶ See, e.g., 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 Regional Transmission Organization, Docket No. 06-035-163; Application of Rocky Mountain Power for an Accounting Order To Defer the Costs Related to the MidAmerican Energy Holdings Company Transaction, Docket No. 07-035-04; and Application of Rocky Mountain Power for an Accounting Order for Costs related to the Flooding of the Powerdale Hydro Facility, Docket No. 07-035-14, January 3, 2008 (January 2008 Order).

relatively high increase in costs, retroactive ratemaking is not meant to address mere inflation of costs.

A deferred accounting order is a rarely granted exception to the prohibition against retroactive ratemaking. Forecasting error is not an extraordinary circumstance justifying a deferred accounting order.⁵⁷ A GRC could have been filed at or near the time the increases took effect to address the difference between insurance costs in the previous rate case's forecast and rates and the actual conditions three years after that case.

RMP has also failed to prove that it is entitled to a deferred accounting order when the increased insurance costs are likely partially related to unjust charges and the imprudent and bad acts of the Company. Rates based upon unjust charges and bad acts cannot be just and reasonable.

RMP has failed to prove that its request for a deferred accounting order satisfies the Commission's well-established criteria for such an order. Increased insurance costs were not unforeseeable.

Approving the Application would do injury to the Commission's well-established regulatory framework and criteria for a deferral account. A deferral account is not meant to move a public utility towards more asymmetrical mere cost recovery ratemaking.

Respectfully submitted this 10th day of January, 2024.

/s/ Patricia E. Schmid
Patricia E. Schmid
Attorney for Utah Division of Public Utilities

⁵⁷ MCI, 840 P.2d at 770-71.

CERTIFICATE OF SERVICE

I certify that on January 10, 2024, I caused a true and correct copy of the foregoing to be filed with the Public Service Commission and served by the Utah Division of Public Utilities to the following in Utah Docket No. 23-035-40 as indicated below:

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