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

Pursuant to Utah Code § 54-10a-303, UTAH ADMIN. CODE r. 746-1, and the Public Service Commission of Utah’s (PSC) January 26, 2024, Notice of Opportunity to Submit Post-Hearing Briefs, the Office of Consumer Services (OCS) submits this limited Post-Hearing Brief to address two issues: (1) Rocky Mountain Power’s (RMP) contention, made in its Prehearing Brief and through testimony at the hearing, that the Grid West/Powerdale Order<sup>1</sup> does not provide that to obtain a deferred accounting order the applicant must make an initial showing that the amount

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<sup>1</sup> The PSC issued the “Grid West/Powerdale 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 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/Powerdale Order”).

In the OCS’s Prehearing Brief, the OCS referred to the Order as the Grid West Order. OCS Prehearing Brief at 2 & n.1. However, in its Prehearing Brief, RMP cites to the order as the Powerdale Order. RMP Prehearing Brief at 5 & n. 33. For the sake of clarity, the OCS will cite to the Order in the instant brief as the Grid West/Powerdale Order.

to be deferred is likely to be recoverable in rates, and (2) that the increase in insurance premiums was caused, in part, by the *James* verdict—a verdict which found RMP acted with negligence, gross negligence, recklessness and willfulness in starting and responding to wide ranging wildfires in Oregon over the Labor Day weekend 2020 and finding RMP liable for compensatory and punitive damages in an amount yet to be determined but that could be in the billions of dollars. *James v PacifiCorp*, No.-CV-33885 (Cir. Ct. Multnomah County, Jun. 12, 2023).

A. The Portions of the Grid West/Powerdale Order that the OCS Quotes from in its Prehearing Brief Provides that for a Deferred Accounting Order to be Issued, the Amount Sought to be Deferred Must Likely be Recoverable in Rates.

The OCS files this Post-Hearing Brief, in part, to rebut the contention made in RMP’s Prehearing Brief and throughout its hearing testimony, that the only analysis of the likelihood of the recovery of the amounts deferred comes in the eventual prudence review not at the time of PSC’s decision to grant or deny the accounting order. RMP Prehearing Br. at 10-12. Inherent in RMP’s argument is the contention that in explaining the procedures for the issuance of an accounting order, Grid West/Powerdale **does not** provide that if “future recovery is not likely, no accounting order need [be] issue[d].” However, contrary to this assertion, the relevant portions of Grid West/Powerdale expressly provide that before a deferred accounting order can be issued, the applicant must make an initial showing that the amount sought to be deferred is likely to be recoverable in rates. Moreover, this showing takes place at the time of the application for a deferred accounting order, not at the time of a full prudence review. Grid West/Powerdale Order at 16-17.

As for the requirement that for an accounting order to be issued there must be a likelihood of future recovery, Grid West/Powerdale provides:

Although the Commission has the ability to completely disallow expenses in a future ratemaking proceeding, 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 expended in the periods in which they are incurred.

Grid West/Powerdale Order at 16 (emphasis added); *see* OCS Prehearing Br. at 4 (quoting the above language from Grid West/Powerdale). This principal was echoed by Utah Association of Energy Users' (UAE) witness Kevin Higgins' hearing testimony: "But with respect to your question about likelihood of recovery, you know, I am -- I am aware that, in an accounting sense, there is an expectation that if -- if deferred accounting is granted, there must be -- that it would be done with some likelihood of recovery, . . ." H.T. pg. 116 ln. 6-11.

Nevertheless, in its Prehearing Brief and its testimony at the hearing, RMP contends that Grid West/Powerdale **does not** require that an applicant make an initial showing of a likelihood that the amounts deferred will be recovered in rates to obtain a deferred accounting order. RMP Prehearing Br. at 12; (issue of recoverability of amounts deferred solely limited to the eventual prudence review in future ratemaking proceeding); *see also* Mariya Coleman hearing testimony page 44 ln. 23 to page 45 ln. 5. (same); Shelly McCoy hearing testimony page 28 ln. 4-7 ("Q. Okay. And it's PacifiCorp's position that the Commission can [issue an accounting order], even if it makes no judgment at all about whether there's any likelihood of recovery? A. Yes. I'm not a legal expert, but yes.")

While Ms. McCoy's testimony simply and directly conflicts with the quoted language in Grid West/Powerdale, RMP's Prehearing Brief, and Ms. Coleman's testimony take a somewhat

more nuanced approach. RMP's brief and Ms. Coleman's testimony suggest that in relying on language in Grid West/Powerdale, OCS incorrectly conflates the requirement of showing a likelihood of recovery to obtain a deferred accounting order with the requirement that the amount deferred will be subject to a full prudence review in a future ratemaking proceeding. RMP Prehearing Br. at 10-12. However, neither the OCS brief nor Grid West/Powerdale confuse these very different showings. OCS Prehearing Br. at 5; Grid West/Powerdale Order at pg. 16. Indeed, Grid West/Powerdale is very clear that with regards to an application for an accounting order two showings must be made: (1), at the time the application for a deferred accounting order is made, i.e., an initial showing that recovery is likely, and (2), at the time the amounts deferred are to be included in the revenue requirement in a future ratemaking proceeding. i.e., that the utility acted prudently in incurring the expenses. *See* Grid West/Powerdale Order at 16-17.

Specifically, Grid West/Powerdale provides:

Authorizing certain expenses to be accounted for through an accounting order does not "preapprove" them for inclusion in the determination of a utility's revenue requirement in some future ratemaking proceedings. They are still subject to analysis and adjustment at the time a revenue requirement determination is to be made. In a future ratemaking proceeding, the Commission could ultimately conclude that they will not be included at all in making a revenue requirement determination upon which rates would be set. **Although the Commission has the ability to completely disallow expenses in a future ratemaking proceeding, 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.**

We agree with the parties' positions that granting an accounting order for any of the expenses addressed in the applications filed in these dockets is not a dispositive determination of final treatment in future ratemaking proceedings.

**We conclude, however, that authorization of an accounting order for a particular expense is an indication, if but an early tentative one, that there is a likelihood that the particular expense can be included in a future revenue requirement determination.**

Grid West/Powerdale Order at pg. 16-17 (emphasis added).

RMP's contention that the OCS argues that a full prudence review is needed at the initial stage of obtaining the accounting order is simply incorrect. RMP Prehearing Br. at 12; *contra* OCS Prehearing Br. at 5. Again, the OCS has never made the argument that a full prudence review is needed at this stage in the proceedings, only that for a deferred accounting order to be issued the utility must make the lesser and initial showing that the amounts sought to be deferred will likely be recoverable in rates. OCS Prehearing Br. at 5. The OCS's position is completely consistent with an accurate interpretation of the above quote from Grid West/Powerdale establishing the two-part showing for recovery of deferred expenses.<sup>2</sup>

RMP also argues, in discussing *MCI Telecomm's Corp. v. Pub. Serv. Comm'n*, 840 P.2d 765 (Utah 1992), that the "OCS interpretation of *MCI* incorrectly conflates two separate proceedings, deferral and the subsequent recovery of deferred expense." RMP Prehearing Br. at 10-11. However, the OCS correctly interpreted *MCI*, which is not a deferred accounting case, rather it is a case concerning the general law for the exceptions to retroactive and single-issue ratemaking in the context of ordering a refund of excessive rates. *MCI*, 840 P.2d at 770-73; *see also*, OCS Prehearing Br. 3-4. Moreover, as discussed in the OCS's Prehearing Brief, there is a correlation between the specific rule in deferred accounting cases, i.e., that an accounting order

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<sup>2</sup> Moreover, it cannot be seriously argued on the face of the record presented in this deferral proceeding, that there is a likelihood of recovery of any portion of the increase in premiums attributable to the *James* verdict. The OCS establishes this fact on page 8-9 of its Prehearing Brief and these arguments need not be repeated here. However, regardless of the exact standard needed to show a likelihood of recovery in the abstract, here the existing record establishes that there is no likelihood of recovery of the amounts of increase in insurance premiums caused by the *James* verdict. OCS Prehearing Br. at 8-9.

should only be granted if ultimate recovery is likely, and the general rule for exceptions to the rules against retroactive and single issue ratemaking, i.e., that the “extraordinary” expense must not be attributable to the utility’s mismanagement—mismanagement such as the conduct that led to the *James* verdict. *MCI*, 840 P.2d at 771 (recovery allowed 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.”) Accordingly, RMP’s arguments based on the *MCI* case are misplaced. A correct interpretation of *MCI* supports the contention that RMP is not entitled to an exception to the rules against retroactive and single-issue ratemaking for excess liability expense caused by the *James* verdict.

In sum, RMP essentially argues that Grid West/Powerdale **does not** provide that in a deferred accounting application, “if future recovery is not likely, no accounting order need [be] issue[d]. . . .” Grid West/Powerdale Order at 16; *supra* quote page 3; *contra* RMP Prehearing Brief at 10-12. Apparently, RMP also argues that all language in Grid West/Powerdale relating to the likelihood of recovery concerns the prudence review in a future ratemaking proceeding, not to any determination made at the time of the application for a deferred accounting order. RMP Prehearing Br. at 10-12; *contra* Grid West/Powerdale Order at 16-17; *supra* quote pg. 4-5. However, these contentions do not survive a simple reading of the relevant portions of Grid West/Powerdale.

B. Admissions Bolster the OCS’s Argument that the Increase in Premiums Resulted, in Part, from the *James* Verdict.

In its Prehearing Brief, the OCS noted that RMP’s pre-filed testimony established that the increase in insurance premiums resulted, in part, from claims against multiple utilities in the western US arising from wildfires. OCS Prehearing Br. at 9. Accordingly, the OCS argues:

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.

OCS Prehearing Br. at 9. However, RMP has not attempted to quantify the amount of the \$49.2 million that is attributable to the *James* verdict and what amount is attributable to general wildfire conditions. Therefore, RMP has not carried its burden of establishing the amount of excess insurance costs to be deferred, or whether this amount has an “extraordinary” impact on earnings.

In fact, RMP’s prehearing brief contains assertions which bolster this commonsense conclusion that the *James* verdict impacted the amount of premium increase. Specifically, RMP’s brief provides:

Therefore, while overall experience of worsening industry claims, *including underlying events associated with the Company’s assets*, have contributed to commercial insurance carriers concluding the overall risk is higher, thus leading to higher premiums costs, there is no direct correlation between insurance claims resulting from *James* and the increase in insurance premiums for which the Company seeks deferral accounting.

RMP’s Prehearing Br. at 13-14 (emphasis added).

While this passage asserts that there is no direct correlation between the *James* verdict and the precise amount of increase in insurance coverage, it nevertheless admits that the increased wildfire claims, including claims against RMP which of course include the *James* verdict, have resulted in higher premiums. Specifically, although this passage is somewhat

cryptic, RMP admits that worsening industry claims contribute to the increase in premiums and those claims include “underlying events associated with the Company’s assets.” Underlying claims associated with the Company’s assets clearly include the *James* verdict.

RMP’s claim that there is no direct correlation between the *James* verdict and the precise increase in insurance premiums, as well as the impact of this argument on RMP’s burden of proof has been previously briefed on pages 6-7; 9-11 of the OCS prehearing brief and will not be repeated here. The OCS only mentions RMP’s prehearing brief here to demonstrate the admission that the *James* verdict impacted the increase in insurance premiums.

### CONCLUSION

A simple reading of the relevant passage, establishes that Grid West/Powerdale provides that “no accounting order need [be] issue[d]” if “future recovery is not likely” and that the language concerning likely recovery in Grid West/Powerdale relates to the initial application for a deferred accounting order and not the final prudence review. Also, RMP’s prehearing brief contains an admission that the *James* verdict impacted the increase in premiums. Because RMP has not even attempted to quantify the amount of excess premiums are attributable to the *James* verdict, an amount that it is not likely to be recoverable in rates, RMP has not carried it burden of proof of what amount of increase insurance premiums is likely recoverable in rates and whether that amount is “extraordinary.”

Respectfully submitted, February 26, 2024.

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