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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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| APPLICATION OF ROCKY MOUNTAIN<br>POWER FOR A DEFERRED ACCOUNTING<br>ORDER REGARDING INSURANCE COSTS | Docket No. 23-035-40<br><br>Division of Public Utilities' Post-Hearing<br>Brief Opposing Approval of the Deferred<br>Accounting Application |
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Pursuant to the Public Service Commission of Utah’s (Commission) January 29, 2024, Notice of Opportunity to Submit Post-Hearing Briefs, the Division of Public Utilities (Division) files this brief requesting that the Commission deny Rocky Mountain Power’s (RMP or the Company) August 21, 2023, application for “deferral accounting for the increase in its excess liability insurance premium expenses since the Commission last set the company’s rates in its 2020 general rate case”<sup>1</sup> (Application). The Company calculates that as of August 2023, these excess insurance premiums increased by \$112.1 million total Company wide, with \$49.2 million being allocated to Utah instead of the \$10.5 million in RMP’s 2020 general rate case.

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<sup>1</sup> Test. of Shelley McCoy, Hr’g Tr., 9, lines 13-17 (McCoy Test.). *See also* Docket No. 20-035-04, 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, (Utah P.S.C. 2020) (2020 GRC).

## I. INTRODUCTION

The Commission should deny RMP's Application because normal ratemaking tools were adequate to do the job of minimizing or eliminating regulatory lag caused by a large increase in insurance costs. "Justice and equity"<sup>2</sup> do not require deviating from normal rules against retroactive and single-issue ratemaking in this case. Regulatory lag occurring when normal expenses change is a "usual delay" intended to be part of the "incentive-encouragement features of orthodox rate regulation."<sup>3</sup>

Because RMP has failed to prove that a departure from the prohibition against retroactive ratemaking is required, the Commission does not need to examine whether the unforeseeability test from *MCI* applies. However, if the Commission decides to move on to that inquiry, the testimony in this docket shows that the increases were foreseeable. Further, RMP's 2020 GRC is not the proper starting point for a comparison; RMP had actual knowledge of the increasing insurance rates, and it could have taken steps through the regular ratemaking process to minimize any impact of the increase.

## II. DISCUSSION

### A. EVIDENCE PRESENTED AT THE HEARING REBUTS RMP'S CLAIMS THAT A DEFERRED ACCOUNTING ORDER IS JUSTIFIED

The *MCI* case permits an exception to the prohibition against retroactive ratemaking "where justice and equity require that adjustments be made for unforeseen windfalls or disasters not caused by the utility."<sup>4</sup> Missed forecasts or costs increasing more rapidly than anticipated do not warrant an exception to the rule against retroactive ratemaking.<sup>5</sup>

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<sup>2</sup> *MCI Telecomms. Corp. v. Pub. Serv. Comm'n of Utah*, 840 P.2d 765, 722 (Utah 1972), *reh'g denied* (*MCI*).

<sup>3</sup> James C. Bonbright, *Principles of Public Utility Rates*, 96 (1960).

<sup>4</sup> *See generally MCI*, 840 P.2d 765 at 771-72.

<sup>5</sup> *MCI*, 840 P.2d 765 at 767-768.

RMP's witnesses failed to prove at the hearing that "justice and equity"<sup>6</sup> require the Commission to approve the Company's Application seeking a departure from the Commission's regular ratemaking process—a general rate case (GRC). Justice and equity do not require retroactive ratemaking be allowed here because filing a GRC with a request for interim rates could have minimized the effect of rising costs on earnings.

Although the record does not reveal exactly when RMP knew it would face significantly higher insurance costs beginning in August 2023, the Company did have months of advance warning that higher expenses and decreasing availability of coverage were imminent. Had RMP spent those months preparing a Utah GRC, which RMP assured the Commission it had adequate staff to do,<sup>7</sup> it could have avoided or minimized the regulatory lag of which it complains.<sup>8</sup> RMP could have filed a GRC without a separate test year phase and with a request for interim rates. Doing so would have likely resulted in new insurance rates being reflected in rates sometime in the fall of 2023.<sup>9</sup>

RMP protests that without deferred accounting treatment it will have a gap where expenses are unrecoverable, but "regulatory lag is a common occurrence in Commission proceedings involving regulated public utilities,"<sup>10</sup> including the setting of rates,<sup>11</sup> and is "basically the cost of doing business" as a regulated utility.<sup>12</sup> As noted above, the leading treatise on utility regulation,

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<sup>6</sup> *Id.*

<sup>7</sup> Ms. McCoy testified that she believes RMP's current rates include "enough revenue for personnel to file needed regulatory filings in each state in which it operates." See Hr'g Tr., 20, lines 20-24.

<sup>8</sup> See, e.g., McCoy Test., Hr'g Tr., 12, lines 17-24, and 13, lines 1-2.

<sup>9</sup> Also, RMP could have minimized regulatory lag by filing its 2024 rate case including both its preferred test period and the default test period instead of exercising the option to have the Commission determine the test period first, delaying the effective date of the rate case. R746-700-10(B).

<sup>10</sup> Testimony of Jeffery S. Einfeldt, Hr'g Tr., 99, lines 12-21 (Einfeldt Test.).

<sup>11</sup> See, e.g., McCoy Test., Hr'g Tr., 12, lines 17-24, and 13, lines 1-2.

<sup>12</sup> Einfeldt Test., Hr'g Tr., 105, lines 6-7.

Principles of Public Utility Rates, by James Bonbright, indicates that regulatory lag is a feature of normal monopoly utility ratemaking.<sup>13</sup>

Furthermore, the increase in unrecovered insurance expense was not the result of a “misstep in the ratemaking process” or an unforeseen disaster<sup>14</sup> but rather the consequence of insurance rates foreseeably rising over several years due to the response of insurance companies to increased wildfires and associated litigation, and RMP choosing not to file a rate case until now to update the rates set in its 2020 GRC.<sup>15</sup>

**B. IF EXAMINED AT ALL, FORESEEABILITY SHOULD BE DETERMINED BY WHETHER RMP HAD ENOUGH NOTICE OF THE INCREASE TO PREVENT NEGATIVE CONSEQUENCES**

The Commission need not consider whether the insurance expense increases at issue were foreseeable because, as demonstrated above, RMP has failed to satisfy *MCI*'s predicate, which mandates that justice and equity must call for an exception to the prohibition against retroactive ratemaking. However, if the Commission nonetheless chooses to examine foreseeability under *MCI*, the issue of foreseeability should be examined at the time RMP learned there could be a significant increase, not at the time of the 2020 GRC as RMP contends. As shown below, RMP's request for a deferral account should be denied because the increase was foreseeable and RMP had sufficient time to mitigate or avoid adverse consequences of the increase.

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<sup>13</sup> See Bonbright, *supra*.

<sup>14</sup> *MCI*, 840 P.2d at 771-72.

<sup>15</sup> See RMP's January 24, 2024 “Notice of Intent to File General Rate Case and Request for Approval of a Test Period” in Docket No. 24-035-04, <https://psc.utah.gov/2024/01/24/docket-no-24-035-04/>. Filing a GRC in 2024 was not mentioned in RMP's prefiled testimony. Ms. McCoy first announced that RMP would be filing a GRC in 2024 in her summary at the January 17, 2024 hearing. See McCoy Test., Hr'g Tr., 13, lines 22-25, and 14, line 1. Ms. McCoy was the supporting witness for RMP's Request for Approval of a Test Period.

1. Despite RMP's arguments, 2020 is not the correct starting point

Despite RMP's claims, its 2020 GRC is not the appropriate baseline for determining if an increase in the insurance costs was foreseeable. RMP suggests the appropriate inquiry is whether the utility could have foreseen in 2020 that insurance rates would rise so high.<sup>16</sup> But that should not be the test for foreseeability. The question is whether an event<sup>17</sup> was foreseeable enough to materially avoid the negative consequences the event brings.

If the insurance expenses allowed in RMP's 2020 GRC are chosen as the starting point for a comparison, the foreseeability test would become meaningless because ordinary expenses invariably change over time. Also, if using a distant starting point, regulated utilities could have an incentive to delay filing rate cases when allowed returns on equity are trending downward or expenses have significantly decreased, such as with the completion of large projects or significant employee layoffs, while knowing that certain increasing expenses would be captured until the next GRC. These incentives are inconsistent with just and reasonable rates. Regulatory lag can be considered a normal part of ratemaking for monopoly utilities in part because it creates incentives for efficient management for ratepayer benefit, not merely shareholder benefit, between cases.

There could be a significant gap in time between the complete and comprehensive assessment of a utility's revenues, expenses, and cost of capital return in a GRC and an order authorizing a deferral account. Ms. McCoy agreed with Commissioner Harvey that until a deferral account is part of a rate case, "it is not being offset by anything, and part of the rate case would be [sic] give us the rates going forward, but also let us recover this big chunk of money."<sup>18</sup> She also

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<sup>16</sup> McCoy Test., Hr'g Tr., 10, lines 2-25.

<sup>17</sup> Note that there has been no event here, merely a change. Below, DPU discusses the precedents and their forcing events, which are absent in this case.

<sup>18</sup> McCoy Test., Hr'g Tr., 30, lines 12-19.

even agreed that “the longer PacifiCorp takes to file a rate case, the bigger the gap is between what’s being asked to be recovered in that deferred accounting and not knowing all of these other changes that are going on in the Company.”<sup>19</sup> Note that even if the gap in time is small, the recovery of one set of expenses remains isolated from any potential offsetting revenues or other items. Conceptually, many deferrals could lead to rates being higher when expenses and ROE are falling, leading to the possibility of some overearning. It could also allow a utility to postpone filing for a general rate change while deferring some expenses as it waits for new capital investment to enter service and be available for inclusion in rates. Deferral also could lead to rate recovery turning into a mere cost recovery exercise outside of the regular statutory ratemaking process, albeit one largely controlled by the utility and its interests.

Additionally, RMP relies upon earlier cases where typically GRCs were filed frequently, sometimes annually,<sup>20</sup> to support its claim that deferral should be allowed because “the increases were not foreseeable in the last general rate case.”<sup>21</sup> However, more recently, there have been large gaps between rate cases. There likely will be about a four to five year gap between the rate effective date in RMP’s 2024 rate case and the rate effective date from its 2020 GRC. A utility cannot create unforeseeability for purposes of a deferral merely by going a long time between rate cases. Instead, the test is whether RMP knew or should have known of the increasing insurance costs, as it did here, and had sufficient time to file a GRC and minimize earnings consequences.

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<sup>19</sup> McCoy Test., Hr’g Tr., 29, lines 21-25, and 30, line 1.

<sup>20</sup> Compare Docket Nos. 07-035-93 filed December 17, 2007; 08-035-38 filed July 17, 2008; 9-035-200 filed June 23, 2009; and 10-035-124 filed January 24, 2011 with Docket Nos. 13-035-184, filed on January 3, 2014; 20-035-04 filed on May 5, 2000; 24-035-04 with its Notice of Intent to file a General Rate Case and Request for Approval of Test Period filed January 24, 2024 an anticipated general rate case filing date of April 30, 2024.

<sup>21</sup> See, e.g., Test. of Mariya Coleman Test., Hr’g Tr., 42, lines 14-25 (Coleman Test.).



2. Foreseeability has generally depended on an external forcing event and the cases RMP relies upon are distinguishable

RMP relies upon the *MCI*, *Powerdale*, and the *Tax Cut and Jobs Act (TCJA)* cases in which deferred accounting was authorized to support its claim that it is entitled to an order approving a deferral account. However, there are critical differences between those cases and this docket. In those cases, there was a direct, external forcing event, not industry changes, trends, or ordinary expenses increasing more rapidly than anticipated.

As the Utah Supreme Court said in the *MCI* case,

The rule stated in the *EBA* case is a sound rate-making principle, but it only applies to “missteps in the rate-making process.” It does not apply where justice and equity require that adjustments be made for unforeseen windfalls or disasters not caused by the utility. We emphasize 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.<sup>22</sup>

The case arose from the results of certain Commission general rate case orders being affected by Congress later enacting the Tax Reform Act of 1986,<sup>23</sup> which reduced the amount of federal income tax the company had to pay—an amount that, to a large extent, the company had already collected in rates.<sup>24</sup> The act implemented a two-step process resulting in a “total reduction of approximately 26%<sup>25</sup> whereas MCI’s 1985 general rate case “assumed a federal tax rate of 46%.”<sup>26</sup> In the absence of retroactive ratemaking, the ratepayers would never be able to recoup the tax money paid and the company would retain a substantial windfall. Even if a GRC had been filed close in time to the tax change, it would not refund the overpayments of deferred taxes even though

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<sup>22</sup> *MCI*, 840 P.2d 765 at 767-768.

<sup>23</sup> PL 99-514, 100 STAT 2085 (October 22, 1986).

<sup>24</sup> *MCI*, 840 P.2d at 767-68.

<sup>25</sup> *MCI*, 840 P.2d at 767.

<sup>26</sup> *Id.*

the tax change eliminated the company's obligation to pay. In *MCI*, unlike here, the triggering action creating the company's windfall was an unforeseeable, independent event that materially affected the company's earnings, not a regular increase or decrease in expenses. Similarly, *TCJA* also involved a change in tax law affecting previously paid amounts.<sup>27</sup>

The Company makes much of the Commission approving a deferral account in *Powerdale* for a much smaller amount than is at issue here.<sup>28</sup> However, instead of the amount, what is important is that the event in *Powerdale* was an unforeseeable natural disaster—"a flood, and debris flow on the Hood River"—which resulted in severe damage to the Powerdale plant.<sup>29</sup> Indeed, a flood is the type of natural disaster often given as an example of an unforeseeable event.<sup>30</sup>

Instead of being similar to the *MCI* and *Powerdale* cases, this docket is similar to other cases where the Commission chose not to authorize deferral accounting. One recent case involving pension events is discussed below. There the Commission denied RMP's request to defer costs related to pension settlement events.<sup>31</sup> RMP argued that the pension settlements were not known and reasonably foreseeable during the last rate case but instead were an "unusual event caused by

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<sup>27</sup> See McCoy Test., Hr'g Tr., 11 lines 1-8.

<sup>28</sup> See McCoy Test., Hr'g Tr., 10 lines 17-25.

<sup>29</sup> 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) at 3. (*Powerdale*).

<sup>30</sup> *Powerdale* at 16. In addition, despite the Company's efforts, the guidelines used by the Division in that case, are irrelevant to the question of foreseeability in this case. At the hearing in this docket, RMP failed to prove that the guidelines were binding upon the Division and the Commission, or that they were determinative in this case. When on the stand being cross examined by the Company or asked questions by the Commissioners, DPU Witness Jeff Einfeldt unwaveringly testified that the Division is not bound by the guidelines. See Einfeldt Test, Hr'g Tr., 97 lines 14-21. He testified that the guidelines "are guides," "not rules," and are "not an exhaustive list of items that [the Division] consider[s]." Einfeldt Test., Hr'g Tr. 97-17-22. In response to Commissioner Harvey's questions, he testified that those guidelines are not binding upon the Commission. The Division lacks rulemaking authority; only the Commission has that authority here. Einfeldt Test., Hr'g Tr. 105, lines 18-25 and 106, line 1.

<sup>31</sup> Docket No. 18-035-48 – The Company's Application – 12-31-2018 (pg. 9),

economic conditions and decisions of retired employees that are outside of the control of the Company.”<sup>32</sup> In denying the request the Commission stated that “Expenses arising out of variable interest rates, retirees’ elections to take lump sum distributions in the ordinary course of RMP’s pension plan...are simply not the kind of expenses MCI contemplates are unforeseeable.”<sup>33</sup>

The EBA statute<sup>34</sup> is also a useful analog here. As noted later in a discussion about earnings reporting and lagging EBA revenues, there can be large swings in utility net power cost costs. Based on RMP’s third quarter EBA report, filed in November, 2023, the DPU expects that actual net power costs outpaced base net power costs by approximately \$400 million during 2023. These are large cost increases in ordinary expenses. The absence of matching revenues drives earnings significantly lower, despite the future recovery of revenues for this difference. However, in the absence of the EBA statute or some other previously established recovery mechanism, if lawful, such variances in ordinary expenses would not be deferrable. The *MCI* case contains no magnitude caveat to its rule 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.”<sup>35</sup> Net power costs are a far better analog to the current insurance expenses than any of the examples RMP relies on for purported support of its position.

### 3. The increased insurance expense was foreseeable

Though the burden is not on the DPU to prove foreseeability, the increases were foreseeable despite its witnesses’ claims otherwise.<sup>36</sup> An event must be “unforeseeable” to satisfy

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<sup>32</sup> Docket No. 18-035-48 – The Company’s Legal Brief – 3-28-2019 (pg. 9).

<sup>33</sup> Docket No. 18-035-48 – PSC Order – 5-22-2019 (pg. 6).

<sup>34</sup> Utah Code Ann. § 54-7-13.5.

<sup>35</sup> *MCI*, 840 P.2d at 772.

<sup>36</sup> *See, e.g.,* McCoy Test., Hr’g Tr., 9, lines 17-20, and 14, lines 11-16. *See also* Coleman Test., Hr’g Tr., 41, line 4, and 42, lines 12-25.

the first prong of *MCI*'s two prong test pertaining to the exception related to retroactive rate making.<sup>37</sup>

RMP concedes that if an event is foreseeable, it does not qualify for deferred accounting treatment<sup>38</sup> and acknowledges that to qualify for a deferral account, the precipitating event must be both unforeseeable and extraordinary.<sup>39</sup> When questioned if “an increase was foreseeable,” RMP witness Coleman carefully answered, “An increase of this magnitude was not foreseeable.”<sup>40</sup> However, the increased insurance expense was more than foreseeable—it was actually experienced in prior years and RMP knew or should have known it was likely to worsen.<sup>41</sup>

As noted, RMP asserts that the baseline for foreseeability is the amount included in 2020 GRC rates for insurance expenses.<sup>42</sup> If 2020 is the baseline, a significant increase was absolutely foreseen because it occurred multiple times. Even if 2020 is not the proper baseline, as DPU argues, RMP knew rates were rising and knew the August 2023 rates would increase significantly more. It knew this information in time to minimize the effect of the rising rates on earnings. Because the increases were foreseeable in time for RMP to eliminate or minimize regulatory lag in the recovery of an increase in ordinary expenses, the first prong of the *MCI* test cannot be met even if the Commission reaches the question.<sup>43</sup> Also, the amount of the increase is irrelevant under *MCI*'s first prong. If the amount of the increase is irrelevant to the *MCI* foreseeability test, it is difficult to see how the existence of prior years' increases can coexist with a finding of unforeseeability.

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<sup>37</sup> See, e.g., *MCI*, 840 P.2d at 772.

<sup>38</sup> See McCoy Test., Hr'g Tr., 16, lines 6-7.

<sup>39</sup> *Id.* (emphasis added).

<sup>40</sup> Coleman Test., Hr'g Tr., 48, lines 19-22 (emphasis added).

<sup>41</sup> *Id.* at 43, lines 9-10.

<sup>42</sup> See, e.g., McCoy Test., Hr'g Tr., 14, lines 14-16; Coleman Test., Hr'g Tr., 42, lines 4-11.

<sup>43</sup> McCoy Test., Hr'g Tr., 17 line 4.

Ms. Coleman is RMP’s “insurance witness.” She started in the insurance industry in 2010 and has about 13.5 years of insurance experience with Berkshire Hathaway Energy Company (BHEC).<sup>44</sup>

a. Ms. Coleman has knowledge and experience regarding increases in the Company’s insurance expenses

Ms. Coleman testified she has knowledge that the Company experienced rising insurance rates for multiple years in advance of 2023’s even higher rate.<sup>45</sup> She reported that the increase from 2019 to 2023 was approximately 1,764 percent.<sup>46</sup> She stated that the percent increase from 2022 to 2023 “is 234 percent, approximately.”<sup>47</sup>

Additionally, Ms. Coleman had knowledge of claims and litigation against PacifiCorp that, according to her, are the types of incidents that affect insurance premiums.<sup>48</sup> Ms. Coleman reviews and contributes to the liability and legal proceeding sections of BHEC’s 10-K and 10-Q routine and required filings with the Security and Exchange Commission (SEC).<sup>49</sup> In at least some of BHEC’s SEC filings, the 10-Ks and 10-Qs reported wildfire claims and litigation against PacifiCorp beginning in at least 2020.<sup>50</sup>

She specifically stated she knew of insurance expense increases in 2022 and 2023 when the policies came up for renewal or replacement. In BHEC’s regular relevant insurance cycle, new

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<sup>44</sup> See Coleman Test., Hr’g Tr., 45, lines 20-25, and 64, line 24.

<sup>45</sup> See, e.g., *id.* at 42, lines 12-25.

<sup>46</sup> *Id.* at 49, lines 9-11.

<sup>47</sup> *Id.* at lines 6-9.

<sup>48</sup> See, e.g., *id.* at 45-47.

<sup>49</sup> *Id.* at 46, lines 13-25. On the stand she specifically reviewed and answered questions about DPU Cross Exhibit 1, selected pages from BHEC’s 10-Q for the quarterly period ending March 31<sup>st</sup> of 2023. *Id.* at 47-48. She acknowledged that DPU Cross Exhibit 1 included mentions of numerous wildfire related legal actions against PacifiCorp: a 2020 class action complaint against PacifiCorp, one in 2021 captioned as Shylo Salter, and numerous complaints in 2022. *Id.* at 46, lines 3-12.

<sup>50</sup> *Id.* at 48, lines 22-25 and 48 lines 3-9.. See also DPU CROSS EXHIBIT 1, included as Attachment A.

rates begin in August of one year and continue until the end of July of the following year.<sup>51</sup> She also testified that the “speed and scale of the excess insurance liability insurance cost increases were unprecedented and did not reflect either the Company’s historical experience or normal cost escalation.”<sup>52</sup> But Ms. Coleman’s own testimony about industry experiences suggests a prudent utility would be on guard for price increases given these circumstances.

b. Ms. Coleman has general knowledge of insurance liability events and expenses in other states

Ms. Coleman also testified that she looks at what is happening in terms of wildfires in the states PacifiCorp serves.<sup>53</sup> In response to questions from Commissioner Clark regarding California’s 2004 wildfires, she stated although she was not in the insurance industry until 2010, when she started “the kind of knowledge base was that California—the big three California utilities are massive premium payers in terms of liability insurance.”<sup>54</sup> She said that “the more recent premium levels that California major utilities were reporting were in excess of 70 cents on the dollar prior to the California Commission choosing to create self-insurance mechanisms for those companies rather than continuing to pay the commercial market.”<sup>55</sup> She also testified that she didn’t have specifics, but it “was a common perception that those California utilities sure do pay a lot of money for liability insurance due to their wildfire risk.”<sup>56</sup> Finally, she discussed the impact of the catastrophic fund California relatively recently created, the “\$1 billion attachment point of that fund,” and how it “created a little bit of a cap in how much [the utilities] would have the—the

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<sup>51</sup> *Id.* at 42, lines 4-11.

<sup>52</sup> Coleman Test., Hr’g Tr., 42, lines 17-20.

<sup>53</sup> *Id.* at 43.

<sup>54</sup> *Id.* at 64, lines 24-25, and 65, lines 2-6.

<sup>55</sup> *Id.* at 64, lines 24-25, and 65, lines 2-6. The Division acknowledges that California has a unique sort of strict liability for wildfires that influence insurance rates.

<sup>56</sup> Coleman Test., Hr’g Tr., 65, lines 2-6.

appetite to purchase,” serving as a sort of cap with the subscribing California utilities “only purchas[ing] commercial insurance” up to that attachment point. She noted that the catastrophic fund did not cap the liabilities the utilities might face and those liabilities “could be significantly more than the \$1 billion insurance that they would purchase below the fund.”<sup>57</sup> Other state insurance programs have occurred in places like Florida following rises in disasters and claims.<sup>58</sup>

c. Ms. Coleman has knowledge of the insurance company communities’ responses to increased wildfire incidents, claims, and judgments

Ms. Coleman also testified regarding her personal knowledge of how the insurance communities react to increasing wildfire incidents, claims, and judgments adverse to their insured utilities. She testified about the effect of claims upon insurance rates.<sup>59</sup> She agreed that litigation outcomes across “the entire spectrum” affect how insurance companies perceive utility industry wildfire risk.<sup>60</sup> She agreed with Commissioner Clark that he was correct when he characterized her testimony as meaning, “generally, that the increase in insurance premiums is... being driven by the overall change in the risk profile for electric utilities in the west” because of “the incidents of wildfires” and “the levels of damage that are being experienced.”<sup>61</sup>

Further, she acknowledged that “the increase in costs is associated with larger and more destructive wildfires in the western U.S. due to prolonged drought conditions, extreme weather events, and increased development in wildfire areas.”<sup>62</sup> She further stated that “Utah, like most

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<sup>57</sup> *Id.* at 65, lines 11-23.

<sup>58</sup> *See, e.g.*, Leslie Scism, Arián Campo-Flores & Deborah Acosta, *Florida Lawmakers to Tackle Ballooning Property-Insurance Crisis*, Wall Street J., Dec. 11, 2022.

<sup>59</sup> *See, e.g.*, Coleman Test., Hr’g Tr., 44, lines 3-22.

<sup>60</sup> *Id.* at 46, lines 8-12.

<sup>61</sup> *Id.* at 63, lines 7-14. While acknowledging that Ms. Coleman could better answer insurance questions, Ms. McCoy also addressed how industry wide increased risk profiles and loss history goes into calculating insurance rates. McCoy Test., Hr’g Tr., 26, lines 3-25.

<sup>62</sup> Coleman Test., Hr’g Tr., 43, lines 1-8.

western states, is exposed to increasing wildfire risk”<sup>63</sup> and that as “wildfire risk increases, the need for the insurance and the costs associated with that insurance increased.”<sup>64</sup>

With its advance knowledge and foreseeability concerning the increasing insurance rates, RMP could have taken action to avoid or mitigate the impact of the increases. The Company had sufficient notice and time to use “normal ratemaking tools” to eliminate or minimize the effects of the increased insurance expenses. Instead, RMP first filed its request in Utah for a deferral account regarding wildfire claims on June 21, 2023, in Docket No. 23-035-30, and the application giving rise to this docket was filed on August 21, 2023. Mr. Einfeldt said he is “suggesting the Company had sufficient foresight and knowledge to start the [rate case] process several months prior to August,” when the instant application was filed.<sup>65</sup> He says that “when they first became aware of that this was going to be an issue, they could have started the [rate case] process.”<sup>66</sup> Even if precise numbers were not yet available, updates part way through a general rate case are common.

In sum, RMP completely ignores that its insurance expenses have been increasing every year since the 2020 GRC. These increases were a known event RMP could see and plan for. While the increase in 2023 insurance expenses is large, it was not unforeseen because increases had occurred in prior years and RMP’s knowledge of the large increase occurred early enough to take remedial action to protect its earnings.

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<sup>63</sup> *Id.* at lines 5-6.

<sup>64</sup> *Id.* at 44, lines 9-14. Almost incongruously, she also testified that during insurance renewal discussions with PacifiCorp, “none of the Company’s insurers indicated” that the \$78 million jury verdict in James “affected the premium expenses in the policies they offered.” *Id.*

<sup>65</sup> *See* Einfeldt Test., Hr’g Tr., 91, lines 22-24.

<sup>66</sup> *See id.* at 91, lines 22-24, and 92, line 1.



C. EVEN IF THE COMMISSION REACHES THE “EXTRAORDINARY EFFECT” PRONG, RMP’S TESTIMONY CONTAINS INACCURATE INFORMATION

In the unlikely event the Commission reaches the second prong of the test permitting retroactive single-issue ratemaking, the extraordinary effect prong,<sup>67</sup> the Commission should find that RMP has failed to meet its burden of proof because it relies upon inaccurate information.

The numbers and percentages RMP provides are suspect. RMP’s results of operations exclude additional EBA revenues.<sup>68</sup> Because EBA revenues do not temporally match net power cost expenses, any given year might have earnings that are higher or lower than would be the case if the recovery period matched the expenditures. In a high cost year, earnings could be reduced despite the fact that recovery of the high costs in a subsequent year, with carrying charges, will account for the difference. Unless RMP is prepared to accept rate reductions in years where a high recovery of past EBA expenses inflates earnings beyond allowed rates of return, it should not rely on gaps in earnings caused by the same delay to argue for the material effect of EBA recovery shortfalls on earnings. For example, RMP omitted the appropriate year’s EBA revenues from its calculations used to determine the percent increase in insurance expenses between 2019 and August 2023, meaning that the analysis of the effects of the 1,764 percent increase it claims was flawed.<sup>69</sup>

Due to the excluded additional EBA revenues, the claimed drop in RMP’s ROE is inaccurate. On the stand, Ms. McCoy asserted that the alleged effect of Utah’s share of the 2023 insurance cost increase helped drop RMP’s ROE “a little more than 500 basis points below RMP’s current authorized . . . ROE.”<sup>70</sup> But this was calculated using Utah’s results of operations which

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<sup>67</sup> See *MCI*, 840 P.2d at 771-72.

<sup>68</sup> Coleman Test., Hr’g Tr., 33, lines 15-22.

<sup>69</sup> McCoy Test., Hr’g Tr., 15, lines 5-18.

<sup>70</sup> See McCoy Test., Hr’g Tr., 32, lines 14-18.

lacked “additional EBA revenues.”<sup>71</sup> Ms. McCoy stated with regard to the 500 basis point gap that “the biggest driver is increased net power costs.”<sup>72</sup> As noted above, based on the EBA report for the third quarter of 2023, net power costs exceeded base net power costs by hundreds of millions of dollars, an amount far in excess of the roughly \$50 million in increased insurance premiums in place from August, 2023.

While it is relatively simple to calculate the effect of rising insurance expenses in isolation, depriving the discussion of the context of the roughly \$170 million in EBA revenues representing calendar year 2022, or likely near \$400 million to be sought for calendar year 2023, paints an incomplete picture of revenues and expenses.

Because RMP uses this information to determine the effect of the increase upon Utah’s ROE, percentage of expense increase from 2019-2023, and other calculations, RMP’s calculations insufficiently show the actual effect of the increase. Furthermore, the effect of increased insurance expenses cannot be calculated by simply comparing the current insurance expenses to the insurance expenses in rates set in the 2020 GRC because, as explained above, the rates set in the 2020 GRC are not the relevant starting point.

### **III. CONCLUSION**

Justice and equity do not demand a departure from the rule against retroactive and single-issue ratemaking here. RMP experienced significantly increasing insurance expenses in multiple years and, after learning the August 2023 insurance increases would be even larger, it had adequate opportunity to eliminate or mitigate the usual regulatory lag associated with normal ratemaking tools. Because RMP’s request for a deferred accounting order fails to meet the standard for the

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<sup>71</sup> *Id.* at 33, lines 15-21.

<sup>72</sup> *Id.* at 32 lines 23-24.

exception to the prohibition on retroactive ratemaking, the Commission should deny the Company's Application.

Respectfully submitted this 26<sup>th</sup> day of February, 2024.

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

## CERTIFICATE OF SERVICE

I certify that on February 26, 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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