- 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 ORDER DENYING APPLICATION

ISSUED: March 29, 2024

1. PROCEDURAL BACKGROUND

On August 21, 2023, Rocky Mountain Power (RMP) filed its Application for a Deferred Accounting Order ("Application"), requesting the Public Service Commission (PSC) issue an order authorizing RMP to record a regulatory asset to FERC Account 182.3 (Other Regulatory Assets) to facilitate its potential future recovery of costs associated with increased insurance premiums ("Deferred Accounting Order," or DAO). The PSC issued a Scheduling Order and Notice of Hearing on September 13, 2023 ("Scheduling Order"). RMP submitted written direct testimony on October 13, 2023. On November 29, 2023, the Division of Public Utilities (DPU) and the Office of Consumer Services (OCS) filed written direct testimony strongly in opposition to the Application, and the Utah Association of Energy Users (UAE) filed testimony stating it did not oppose the Application. RMP filed written rebuttal testimony on December 21, 2023. OCS and DPU filed written surrebuttal testimony on January 9, 2024. Pursuant to the Scheduling Order, OCS filed a pre-hearing brief on January 9, 2024, and DPU and RMP filed pre-hearing briefs on January 10, 2024.

On January 17, 2024, the PSC held a hearing to consider the Application. RMP, DPU, OCS, and UAE (the "Parties") appeared and provided testimony. At the conclusion

of the hearing, the PSC inquired as to whether the Parties desired an opportunity to file post-hearing briefs. The Parties answered affirmatively, and the PSC issued a Notice of Opportunity to Submit Post-Hearing Briefs on January 29, 2024. RMP, OCS, and DPU filed post-hearing briefs on February 26, 2024.

2. FACTUAL SUMMARY

a. RMP's Application seeks leave to defer a large increase in its excess liability insurance premiums for potential recovery in a future general rate case.

RMP maintains excess liability insurance (ELI) to manage risks associated with general civil liability, wildfire liability, auto liability, and employer's liability. While RMP self-insures third-party liability claims up to $10 million, RMP relies on its ELI to cover larger claims. RMP contends ELI premiums are a necessary part of its utility operations and are ordinarily and properly recoverable through rates. RMP's current rates, established in its last general rate case (GRC), include approximately "$10.5 million (total-Company) in [ELI premium] costs."[1]

RMP alleges it has experienced an unforeseeable and extraordinary increase in ELI premiums since its last GRC. Specifically, RMP contends "[t]he premiums for [ELI] available to [it] in 2023 are currently $125 million (total-Company)," which RMP characterizes as "a dramatic increase from the $10.5 million" it presently recovers in

[1] Direct Test. of M. Coleman at 10:226-28.

rates.[2] According to RMP, this represents an increase of 1,764 percent since 2019 with rates increasing 234 percent from 2022.

In its written direct testimony, RMP attributes the increase to the general proliferation of wildfires in the western United States over the last several years, which have become larger and more destructive. RMP contends these destructive wildfires have "resulted in significantly increasing wildfire costs for utilities and an inability to acquire insurance at rates and coverage levels consistent with past premiums" with insurers drastically raising premiums or declining to continue to offer coverage for wildfire liability.[3]

RMP argues the increase in premiums was unforeseeable and constitutes an extraordinary change that warrants deferred accounting treatment. It asks the PSC to issue a DAO approving deferral of the increase in premiums, which would result in a deferral of Utah's allocated share of the approximately $115 million increase.

b. An Oregon Court Issued an Unprecedently Large Adverse Verdict Holding PacifiCorp Liable for Consequential and Punitive Damages Prior to the Increase in ELI Premiums.

In a case captioned *James et al. v. PacifiCorp* in the Multnomah County Circuit Court of Oregon ("*James*"), an Oregon jury found PacifiCorp had caused certain wide ranging wildfires Oregon suffered in 2020, resulting in a significant adverse judgment

[2] *Id*. at 5:123-6:126.
[3] *Id.* at 6:134-35.

against PacifiCorp[4] in June 2023. No party introduced copies of any documents from *James* into evidence in this matter, and the PSC does not attempt to adequately summarize that complex proceeding here.

It should suffice to note the *James* verdict found PacifiCorp liable for causing the subject wildfires and to have acted with sufficient negligence, recklessness, and willfulness to warrant punitive damages under applicable Oregon law. The total sum of compensatory and punitive damages approaches $90 million, but the PSC understands *James* is a class action lawsuit and the jury verdict in June 2023 determined damages only for the named plaintiffs. Therefore, PacifiCorp faces significant additional exposure as regards damages recoverable by the remaining plaintiffs.[5]

RMP's written direct testimony avoids any mention of the *James* verdict. After other parties raised concerns about whether and to what degree the drastic increase in RMP's ELI premiums is attributable to *James*, RMP represented in written rebuttal testimony "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

[4] RMP is the name under which PacifiCorp does business in Utah.

[5] RMP previously filed an application (subsequently withdrawn) with the PSC in which RMP represented the *James* verdict found PacifiCorp "liable to the named plaintiffs for over $70 million in economic and non-economic damages[,]" "over $18 million in punitive damages[,]" and "additional claims are likely" because the matter had been certified as a class-action. *Application of RMP for a Deferred Accounting Order Regarding Wildfire Claims*, Docket No. 23-035-30, Application for Deferred Accounting Order filed June 21, 2023.

renewal" of its ELI.[6] RMP further testified "[a]s 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."[7]

Notably, however, RMP's Application quotes an insurance industry trade publication that suggests the *James* verdict has strongly impacted insurance premiums: "insurers have taken note of the fact that, '[l]iability on the scale imposed by the Oregon jury presents an existential threat to an industry that faces increasing wildfire risk from more extreme weather … .'"[8]

3. DISCUSSION, FINDINGS, AND CONCLUSIONS

The Parties disagree as to the criteria that should govern RMP's request for a DAO in this docket. RMP argues that so long as a recognized exception to the rule against retroactive ratemaking applies (discussed *infra* at 6-7), deferred accounting is warranted. Citing an order of the PSC from 2008 ("Grid West Order"),[9] OCS argues "[n]o 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."[10] For its part, RMP insists its likelihood

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[6] Rebuttal Test. of M. Coleman at 5:98-100.
[7] *Id*. at 5:103-05.
[8] Application at 2 (quoting Joel Rosenblatt, *Utility Investors Wary of Exposures After Buffet's PacifiCorp Held Liable for Wildfires*, Insurance Journal (July 19, 2023)).
[9] *In the Matter of the Application of RMP 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.
[10] OCS Pre-Hearing Br. at 2.

of recovery is irrelevant because the issue of recovery will be determined in a later proceeding.

a. The Prohibition on Retroactive Ratemaking and the *MCI* Exception.

"As a general proposition, a utility's recoupment of costs that were greater than projected or revenues that were less than projected from future rates constitutes retroactive rate making[,]" and is prohibited under Utah law.[11] This prohibition on retroactive ratemaking precludes utilities from "recoup[ing] unanticipated costs or unrealized revenues" and exists "to provide utilities with an incentive to operate efficiently."[12] "[T]he bar on retroactive rate making makes no exception for missteps in the rate-making process."[13]

However, Utah law recognizes an exception ("*MCI* Exception") to the general prohibition on retroactive ratemaking "for unforeseeable and extraordinary increases in a utility's expenses" and "decreases in expenses."[14] "The 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, such as the inability to predict precisely, or from mismanagement."[15] These expenses "cannot, by hypothesis, be taken into account" when fixing just and

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[11] *MCI Telecomm. Corp. v. PSC*, 840 P.2d 765, 770 (Utah 1992) [hereafter "*MCI*"].
[12] *Id*.
[13] *Id*. at 770-71.
[14] *Id*. at 771.
[15] *Id*.

reasonable rates in a GRC because the increase "will necessarily be outside the normal range of variance that occurs in projecting future expenses." *Id.* at 771-72. Making allowances for these kinds of unforeseeable, dramatic changes "by definition is impossible" in a GRC and any attempt to do so "would always [yield] unjust and unreasonable" rates "as to either ratepayers or stockholders."[16]

Here, RMP does not yet seek to recover any unanticipated costs, rather it seeks a deferred accounting order that would allow it to book the unanticipated ELI premiums as regulatory assets for future recovery. Owing to the prohibition on retroactive ratemaking, such deferral could only be lawful if RMP demonstrates the *MCI* Exception applies.

b. Qualifying for the *MCI* Exception May be Necessary, But It Is Not Sufficient to Authorize Deferred Accounting; If the Expenses to be Deferred are Not Likely to be Recovered, No Basis Exists to Issue a DAO in the First Place.

The PSC begins its analysis with the Grid West Order. As here, *Grid West* involved RMP seeking deferred accounting orders authorizing it to account for expenses "whereby [RMP] may have an opportunity to recover them in future rates."[17] Further, the "[t]he parties [were] unanimous, in concept" concerning the PSC's authority to authorize deferred accounting for, at least, some of the expenses involved.[18]

[16] *Id.* at 772.
[17] Grid West Order at 14.
[18] *Id*. at 17.

The PSC observed that a utility's application for deferred accounting "is driven by the [PSC's] authority to prescribe the accounts and accounting practices Utah utilities are to use and follow."[19] The PSC concluded that deferred accounting orders, in principle, may be appropriate in certain circumstances because "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."[20] Recognizing that such future recovery stood in potential conflict with the prohibition on retroactive ratemaking, the PSC also concluded exceptions to the rule, i.e. the *MCI* Exception, "have application in considering whether an accounting order should be issued."[21]

While the PSC recognized that authorizing expenses for deferred accounting "does not 'pre-approve' them for inclusion" in future rates, it does provide "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."[22] Therefore, "[i]f 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."[23]

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[19] *Id.* at 13.
[20] *Id*. at 16.
[21] *Id*.
[22] *Id*. at 16-17.
[23] *Id*. at 16.

That is, *Grid West* makes clear the PSC has long considered its authority to grant DAOs to stem from its statutory authority to prescribe a system of regulatory accounts, and the justification for allowing deferred accounting, from the start, has been tied to accounting principles that permit expenses to be booked beyond the current period so long as a likelihood of future recovery exists.

RMP is simply wrong in suggesting that its likelihood of future recovery is irrelevant and that requiring such a showing would add "a third criterion to the Utah Supreme Court's holding in *MCI* … ." [24] In *MCI*, the issue was whether an actual adjustment to rates was warranted because of a change in tax law. The discussion in *MCI* takes for granted that unforeseen and extraordinary expenses recoverable under the *MCI* Exception are expenses that would otherwise be deemed recoverable were it possible to take them into account at the time of a GRC. *MCI* simply does not speak to the issue of deferred accounting, and the PSC is aware of no judicial or statutory authority in Utah that does.

Here, RMP asks for deferred accounting treatment of Utah's allocated share of more than $100 million in ELI premiums. Although such premiums are expenses of the kind that are ordinarily recoverable, available facts suggest this unprecedented increase is to some significant degree tied to conduct on the part of PacifiCorp that an

[24] RMP's Pre-Hearing Br. at 10.

Oregon jury found so grossly negligent, reckless, and willful that it awarded approximately $18 million in punitive damages.

Nevertheless, RMP declined to present any meaningful evidence or argument to support the notion that it will ultimately be just and reasonable to require Utah ratepayers to incur this tremendous cost. Instead, RMP asks us to conclude these issues are irrelevant to its Application and that the only material questions are whether the increase was extraordinary and unforeseeable.

We reject RMP's argument and conclude that a likelihood of recovery is a requisite to a DAO. In fact, it's the first and foundational hurdle that any utility seeking a DAO must clear. As *Grid West* explains, the entire premise underlying PSC-approved DAOs is to align a utility's accounts with responsible accounting practices that allow it to book expenses it is likely to recover in a future period.

RMP offers no compelling alternative argument as to any other reason the PSC should grant a DAO. Instead, RMP relies wholly on *MCI*, which puts the cart entirely before the horse. If no basis exists to issue a DAO in the first instance, then no reason exists to examine whether doing so would be lawful under the *MCI* Exception to the rule against retroactive ratemaking.

The PSC recognizes it has considered whether to issue DAOs in the past without explicitly requiring a showing that a "likelihood of future recovery" exists, but this is unsurprising insofar as those orders entail either (1) stakeholder stipulations to

deferred accounting; or (2) expenses of a kind that are generally recoverable *and would have been included in rates* had it been possible to forecast them accurately at the time of the last GRC.[25]

For example, RMP points to a 2018 docket ("Pension Docket") to support its assertion that it need only satisfy the *MCI* Exception to show it is entitled to deferred accounting.[26] In that docket, we evaluated RMP's request to defer expenses associated with an unexpectedly large number of retirees taking lump sum distributions from their pension plans. No party disputed that the pension expenses would have been recoverable within the context of a GRC, rather the disputed issue concerned whether the *MCI* Exception applied, i.e. whether the expenses were extraordinary and unforeseeable such that deferred accounting would not run afoul of the prohibition on retroactive ratemaking. We applied the criteria under the *MCI* Exception and found RMP had failed to show the expenses were unforeseeable or extraordinary and denied its request for a DAO. No question existed that the pension costs would have been recoverable in a GRC, as the PSC observed: "RMP seeks to defer pension expenses that arise out of the ordinary operation of its pension plan, and pension expenses are a known and anticipated category of costs."[27]

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[25] *See, e.g.*, *Application of RMP for a Deferred Accounting Order regarding Costs Incurred Due to the COVID-19 Public Health Emergency*, Docket No. 20-035-17, Order Approving Accounting Order issued September 15, 2020.
[26] *Application of RMP for an Accounting Order for Settlement Charges Related to Its Pension Plans*, Docket No. 18-035-48, Order issued May 22, 2019 ("Pension Order").
[27] Pension Order at 7.

The same is true for the numerous stipulated DAOs we have approved since *Grid West*, including the recent order approving expenses related to the COVID-19 pandemic.

The instant docket is another matter altogether. A jury has found RMP acted in a manner sufficiently tortious as to impose punitive damages. RMP has declined to offer any meaningful evidence concerning its conduct underlying the *James* verdict or to otherwise make any serious attempt to demonstrate its tortious conduct is not a substantial or primary cause of its increased premiums. On the contrary, as noted above, RMP quotes an insurance industry trade publication in its Application that expressly suggests the *James* verdict is, in fact, a primary driver of its increased premiums.[28]

Under these circumstances, the PSC cannot responsibly find a likelihood exists that RMP will be entitled to recover these expenses in a future rate case. Though we appreciate deferred accounting does not guarantee recovery, it does provide an "indication, if [only] an early tentative one, that there is a likelihood" that these expenses are recoverable from ratepayers.[29] This deficiency does not reflect a mere technicality. Without a likelihood for recovery, no justification exists for authorizing RMP to book these expenses as a regulatory asset. By allowing deferral, the PSC would, effectively, facilitate unreliable accounting.

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[28] *See supra* at 5.
[29] Grid West Order at 16-17.

Allowing a utility to book any extraordinary, unexpected expenses for potential future recovery, no matter how unlikely recovery may be, has other negative implications. For example, GRCs are extremely complex proceedings during which stakeholders must adjudicate a litany of issues that concern the totality of a utility's expenses, capital structure, authorized rate of return, and rate design among customer classes. Absent a compelling reason, the adjudication of a highly contested, fact-extensive matter like the one presented here should not be postponed until a future GRC. Doing so needlessly disadvantages stakeholders seeking to challenge the expense as their resources are stretched thin among many competing issues, and it will almost certainly result in a less well-developed factual record than adjudicating the complex and contentious issue in advance of the GRC.

Finally, we acknowledge that "a likelihood of recovery" is susceptible to competing interpretations, and parties may disagree as to what precisely qualifies. Reasonable minds may disagree as to whether the standard should be, for example, "a substantial likelihood," "more likely than not," etc. A future docket may present a close question that will require us to further develop this standard, and we will look forward to benefiting from additional briefing from the parties on the matter.

The instant docket is not a close question. RMP has seen exorbitant increases in its ELI premiums immediately subsequent to an unprecedently large jury verdict finding PacifiCorp was grossly negligent, reckless, and willful in causing the Oregon

wildfires and awarding plaintiffs significant punitive damages. We do not prejudge whether RMP might ultimately demonstrate the increased ELI premiums are a prudent expense, but no reasonable person could conclude that such an outcome is likely, let alone sufficiently likely to authorize RMP to book the expense as a regulatory asset.

c. Because RMP Has Not Demonstrated a Likelihood Exists It May Recover Its Increased ELI Premiums, the PSC Need Not Reach the Question of Whether the *MCI* Exception Applies.

DPU urges the PSC to deny the Application because granting it would constitute retroactive ratemaking, contending the *MCI* Exception does not apply because the increase in ELI premiums was foreseeable. Because we have found RMP failed to make a threshold showing that it is likely to recover its increased ELI premiums, no justification exists, in the first instance, to authorize deferred accounting. Therefore, we do not reach the question of whether RMP has satisfied the *MCI* criteria such that authorizing deferral would not violate the prohibition on retroactive ratemaking.

4. ORDER

For the foregoing reasons, RMP's Application is denied.

DATED at Salt Lake City, Utah, March 29, 2024.

/s/ David R. Clark, Commissioner

/s/ John S. Harvey, Ph.D., Commissioner

Attest:

/s/ Gary L. Widerburg
PSC Secretary
DW#333096

Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this order by filing a request for review or rehearing with the PSC within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the PSC fails to grant a request for review or rehearing within 30 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the PSC's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I CERTIFY that on March 29, 2024, a true and correct copy of the foregoing was delivered upon the following as indicated below:

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