KATHERINE MCDOWELL
Direct (503) 595-3924
katherine@mrg-law.com

April 29, 2024

VIA E-MAIL TO
psc@utah.gov

Utah Public Service Commission
Heber M. Wells Building, 4th Floor
160 East 300 South
Salt Lake City, UT 84114

Re: Docket No. 23-035-40 – Application of Rocky Mountain Power for a Deferred Accounting Order Regarding Insurance Costs.

Attached for filing in the above-referenced matter, please find Rocky Mountain Power Company's Request for Review or Alternatively for Rehearing.

Please contact this office with any questions.

Sincerely,

Katherine McDowell
McDowell Rackner Gibson PC

Katherine McDowell
McDowell Rackner Gibson PC
419 SW 11th Ave., Suite 400
Portland, Oregon 97205
Telephone: 503-595-3922
Facsimile: 503-595-3928
Email: katherine@mrg-law.com

Carla Scarsella
Ajay Kumar
Rocky Mountain Power
1407 W North Temple, Suite 320
Salt Lake City, UT 84116
Telephone: (503) 813-6338
Facsimile: (801) 220-3299
Email: carla.scarsella@pacificorp.com
ajay.kumar@pacificorp.com

Attorneys for Rocky Mountain Power

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 **ROCKY MOUNTAIN POWER'S REQUEST FOR REVIEW OR ALTERNATIVELY FOR REHEARING**

TABLE OF CONTENTS

I. INTRODUCTION

Pursuant to Utah Code Ann. §§ 63G-4-301(1) and 54-7-15(2)(a), PacifiCorp d/b/a Rocky Mountain Power (the "Company") hereby submits this Request for Review or Alternatively for Rehearing concerning the Utah Public Service Commission's ("Commission") March 29, 2024, Order Denying Application ("Order") in the above-captioned docket.

In this case, the Company sought deferred accounting treatment due to an extraordinary increase in its excess liability insurance premiums. The Commission denied the Company's request for a deferred accounting order ("DAO"). The Commission concluded that an applicant must first demonstrate that the costs the applicant seeks to defer will likely be recovered in a future proceeding and held that the Company did not make that showing sufficiently to support a DAO. The Company requests review or rehearing on the following grounds.

First, the Company respectfully seeks review and reconsideration of the legal conclusions in the Order that are contrary to the Commission's prior practice, prejudicial to the Company, and unfair and unreasonable. Specifically, the Company requests that the Commission reconsider its conclusion that a party seeking deferred accounting must demonstrate likely recovery of the expenses the applicant seeks to defer. The Commission acknowledged that it has previously approved DAOs without requiring the applicant to demonstrate a likelihood of recovery,[1] and the Commission has never denied a DAO based on the still-evolving standard.[2] In this case, the Commission applied this newly articulated legal standard without providing the parties an opportunity to respond to this change in its prior practice.

---

[1] Order at 10 (Mar. 29, 2024).

[2] The Commission "acknowledge[s] 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." *Id.* at 13.

In past decisions, the Commission has recognized that "it would be error for the Commission to act 'contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency[.]'"[3] The Commission attempted to justify its departure from its past practice by distinguishing the expenses to be deferred in the Company's request from the expenses at issue in previous DAO dockets, which "would have been included in rates had it been possible to forecast them accurately at the time of the last [general rate case ("GRC")]."[4] The Commission's rationale, however, disregards the fact that historically it has allowed the excess liability insurance premium expenses the Company seeks to defer in utilities' rates, and permitted deferred accounting for costs in rates when actual costs vary from their projections in an unforeseeable and extraordinary way.[5]

Second, the Company seeks review of the Order because its factual findings are unsupported by substantial evidence in the record. The Commission denied deferral of the Company's excess liability insurance costs, finding that "[a]lthough 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 [the Company]."[6] The Commission

---

[3] *In the Matter of the Application of Rocky Mountain Power for Approval of an Electric Service Agreement between Rocky Mountain Power and Praxair, Inc.*, Docket No. 10-035-115, Report and Order at 10 (Dec. 16, 2010) (citing and applying Utah Code Ann. § 63G-4-403(4)(h)(iii)).

[4] Order at 10-11.

[5] *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 Regional Transmission Organization; In the Matter of the Application of Rocky Mountain Power for an Accounting Order to Defer the Costs Related to the MidAmerican Energy Holdings Company Transaction; 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 Nos. 06-035-163, 07-035-04, 07-035-14, Report and Order at 19 (Jan. 3, 2008).

[6] Order at 9 (emphasis supplied).

rested this finding entirely on the speculative contention that the increase in the Company's insurance premium expenses resulted from the jury verdict against the Company in *James v. PacifiCorp*.[7] In the Order, the Commission found that the Company failed to demonstrate that the *James* verdict was not a "substantial or primary cause of" the increase in the Company's liability insurance premium expenses and that "an insurance industry trade publication . . . suggests the *James* verdict is, in fact, a primary driver of its increased premiums."[8] The Commission correlates the timing of the verdict and the increased insurance premiums, but this correlation is not supported by the record evidence. The "available facts" do not support converting a suspected correlation to a determination of causation that would deny recovery of the Company's insurance premiums.

On the contrary, the Company provided substantial evidence demonstrating that its conduct did not cause the increase in excess liability insurance premium expenses, including testimony on the dramatic upward trend in wildfire insurance costs for other utilities in the West and the undisputed fact that the Company's insurers at no point indicated that *James* was the underlying cause of the increased premiums. In addition, the parties opposing the Company's request did not provide any evidence beyond conclusory statements in testimony to indicate that *James* affected the Company's excess liability insurance premium expenses.

The Company respectfully submits that, for these reasons, the Commission should review and reconsider its legal conclusion applying the "likelihood of future recovery" standard for the first time to deny a DAO, and its erroneous factual findings regarding the impact of the *James* verdict on the Company's insurance premiums, which are not supported by substantial evidence.

[7] No. 20-CV-33885 (Cir. Ct. Multnomah Cnty., June 12, 2023).

[8] Order at 12.

Alternatively, the Company requests rehearing on the basis that the evidence in the record does not justify the Commission's denial of a DAO.[9] The Commission has previously concluded that changes in policy should be applied on a prospective basis only.[10] Consistent with that conclusion, the Company requests rehearing to allow the submission of additional evidence to demonstrate "likelihood of future recovery." If the Commission chooses not to reopen the evidentiary record in this docket, the Commission could vacate the Order and consider the legal and factual arguments regarding recovery of the Company's increased 2023-2024 excess liability insurance premiums in the Company's upcoming GRC, where the parties will already be addressing the reasonableness of the Company's excess liability insurance premiums in the test period.

II. BACKGROUND

In the Company's last GRC in 2020, the Commission authorized inclusion of $10.5 million total-Company for excess liability insurance expense.[11] By August 2023, the Company's excess liability insurance premiums increased by $112.1 million total-Company compared to the amount in base rates.[12] The Company sought deferred accounting treatment for the extraordinary and unforeseeable increase in its excess liability insurance premium expenses.

Throughout this docket, all parties cited previous deferred accounting decisions in which the Commission relied on the criteria identified in *MCI Telecommunications Corporation v.*

[9] *See* Utah R. of Civ. P. 59(a)(6) ("[A] new trial may be granted to any party on any issue for any of the following reasons . . . insufficiency of the evidence to justify the verdict or other decision[.]").

[10] *See Re Utah Power & Light Co.*, Docket No. 88-035-08, Opinion at *14 (Sept. 20, 1989).

[11] *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*, Docket No. 20-035-04, Order (Dec. 30, 2020). The Commission also authorized recovery of $3.9 million for property insurance premiums. Direct Testimony of Shelley E. McCoy at 3 (Oct. 13, 2023).

[12] Rebuttal Testimony of Shelley E. McCoy at 4 (Dec. 21, 2023).

Public Service Commission ("*MCI*"). In that case, the Utah Supreme Court established an exception to the prohibition on retroactive ratemaking for "unforeseeable and extraordinary increases or decreases in expenses[.]"[13] The Company presented evidence that the insurance cost increases were unforeseeable and had an extraordinary impact on the Company's earnings.[14] The Utah Association of Energy Users ("UAE") did not dispute the Company's position that the increased excess liability insurance premium expense was "material, extraordinary, and unforeseen."[15] The Division of Public Utilities ("DPU") acknowledged that the costs were not foreseeable at the time of the Company's last general rate case but asserted that foreseeability should be considered at the time the costs are incurred.[16] Under cross-examination, DPU acknowledged that in prior deferral dockets the Commission and DPU had consistently applied the foreseeability criterion at the time of the utility's last rate case.[17]

Regarding the extraordinary impact on the Company's earnings, the Office of Consumer Services ("OCS") initially asserted that the Company had failed to show that the increased excess liability insurance expenses would have an extraordinary impact on earnings,[18] but in its surrebuttal testimony, OCS modified its position and acknowledged that the Company had met its burden of demonstrating that the impact from these expenses would be extraordinary.[19] DPU also initially asserted that the costs were not extraordinary because they were the "new

[13] 840 P.2d 765, 772 (Utah 1992); The Company's Post-Hearing Brief at 2 (Feb. 26, 2024) ("Since *MCI*, the Commission has relied on these two factors in determining whether to approve a deferral.").

[14] The Company's Prehearing Brief at 6-9 (Jan. 10, 2024).

[15] Direct Testimony of Kevin C. Higgins at 5 (Nov. 29, 2023).

[16] Direct Testimony of Jeffrey S. Einfeldt at 7 (Nov. 29, 2023).

[17] RMP Cross-Exhibit 1 at 3; Hr'g. Tr. at 77:22-80:17.

[18] Direct Testimony of Alyson Anderson at 3 (Nov. 29, 2023).

[19] Surrebuttal Testimony of Alyson Anderson at 2 (Jan. 9, 2024).

normal,"[20] but in its Prehearing Brief argued that the Commission need not address whether the expenses were extraordinary.[21]

In addition to the arguments applying the *MCI* criteria, OCS challenged whether these costs could be recovered in a future rate case. OCS testified, "[i]deally the [Commission] should be able to determine the cause of the increase in the excess liability insurance premium costs" and that any "costs related to [*James* are] most likely not prudent and should not be recovered from ratepayers."[22] While DPU testified that the Commission should not grant the Company's application because a DAO "is an early indication of recoverability,"[23] DPU agreed that prudence issues "are more appropriately addressed in a [GRC.]"[24] Relatedly, UAE testified that it did not oppose the Company's request for deferred accounting but, consistent with the Company's position, asserted that a DAO "does not guarantee recovery of the deferred amount" and the "amount that is ultimately recoverable should be determined in [the Company's] next [GRC.]"[25]

In response to OCS's and DPU's unsupported allegation that the *James* verdict caused the increase in the Company's excess liability insurance premiums, the Company submitted testimony rebutting that purported correlation. The Company's rebuttal testimony demonstrated that the Company's insurers did not communicate any impact, specific or general, of the *James*

[20] Direct Testimony of Jeffrey S. Einfeldt at 6.

[21] Utah Division of Public Utilities' Prehearing Brief Opposing Approval of the Deferred Accounting Application at 17 (Jan. 10, 2024) [hereinafter "DPU Prehearing Brief"].

[22] Direct Testimony of Alyson Anderson at 5.

[23] Direct Testimony of Jeffrey S. Einfeldt at 7-8.

[24] *Id.* at 8.

[25] Direct Testimony of Kevin C. Higgins at 5.

verdict.[26] It is unsurprising that the insurance carriers did not factor in *James* as part of the Company's August 2023 renewal because the Company had not, and will not, file any *James*-related claims with its excess liability insurance providers.[27] Any claims arising from the *James* litigation recoverable from excess liability insurance would have to be paid from the Company's excess liability policies in effect during the 2020 policy year.[28] The 2020 policy year included several extraordinary wildfires, and the Company's 2020 insurance benefits were already fully reserved for claims related to other wildfires before the *James* verdict in 2023. For that reason, none of the *James* damages (whatever amount they may total after appeals are complete) will be paid for by excess liability insurance.

When excess liability insurers determine future premiums, they base those decisions on loss history, that is, the liability exposure faced by the insurers based on past claims or forthcoming claims for which the insurer has created a coverage reserve. When the Company's insurers determined the premiums for 2023-2024 excess liability insurance policies, there were no claims or reserves in the Company's policy history related to the wildfires underlying the *James* litigation. Moreover, the Company's testimony showed that insurers based their policy premiums on the total risk being insured in consideration of the industry and geographic regions covered and did not assign certain percentages of that risk to specific events involving their insureds.[29] The Company showed that insurers have an industry-wide concern about increasing wildfire risk and its impact on claims against utilities in western U.S. states.[30]

---

[26] Rebuttal Testimony of Mariya V. Coleman at 5 (Dec. 21, 2023).

[27] *Id.* at 5-6.

[28] Hr'g. Tr. at 68:4-9.

[29] Rebuttal Testimony of Mariya V. Coleman at 5.

[30] Rebuttal Testimony of Mariya V. Coleman at 5; Direct Testimony of Mariya V. Coleman at 6 (Oct. 13, 2023).

In addition, a driver of the increased excess liability premium costs associated with 2023-2024 policies was that the Company procured more insurance coverage from the prior year as a prudent operating expense. The Company initially reduced coverage levels in 2021-2022 and 2022-2023 periods to mitigate rising insurance rates, but in 2023-2024, restored coverage to approximately the same level as the 2020-2021 policies included in the 2020 GRC to prudently address increased wildfire liability risk.[31] As a result, the Company's total excess liability limits for Idaho, Utah, and Wyoming increased from $232,500,000 to $458,250,000 in relation to the 2021-2022 and 2022-2023 policies.[32] This increase in coverage resulted in an increase in the Company's premiums.[33]

In the Order, the Commission did not address the parties' arguments applying the *MCI* criteria. Instead, the Commission concluded that it "need not reach" whether the *MCI* criteria had been satisfied in this case because, before applying those criteria, the "first and foundational hurdle that any utility seeking a DAO must clear" is to show that the expenses the utility seeks to defer are likely to be recovered in a future rate case.[34] The Commission did not specify how this standard will be applied in future cases but concluded that the "instant docket is not a close question."[35]

[31] Direct Testimony of Mariya V. Coleman at 7 (discussing increased coverage levels purchased in August 2023 compared to the policies purchased in 2022); Hr'g. Tr. at 42:12-13 ("The total coverage levels in 2020 and 2023 are generally comparable[.]").

[32] Direct Testimony of Mariya V. Coleman at 7.

[33] Hr'g. Tr. at 67:18-19.

[34] Order at 10, 14.

[35] *Id.* at 13.

III. REQUEST FOR REVIEW OR REHEARING

A. Legal Standard

Under the Utah Administrative Procedures Act ("APA"), a party requesting review of an agency order must request that review within 30 days after issuance of the order and must, among other things, "state the grounds for review and the relief requested[.]"[36]

In considering requests for review, the Commission has previously applied the Utah APA standard for judicial review, which states that an agency conclusion may be reversed for several reasons, including if the agency's action is "contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency"[37] or is "otherwise arbitrary or capricious."[38] When considering a claim that an agency's order is arbitrary or capricious, the Utah APA applies a reasonableness standard,[39] which Utah courts have described as "essentially a test for logic and completeness rather than the correctness of the decision."[40] Additionally, a party challenging an agency's conclusion on the basis that the agency's action is inconsistent with past practices must demonstrate that they were "substantially prejudiced" by the inconsistent action,[41] meaning there is a "reasonable likelihood that the error affected the outcome of the proceedings."[42]

---

[36] Utah Code Ann. § 63G-4-301(1)(a), (b)(ii).

[37] Utah Code Ann. § 63G-4-403(4)(h)(iii); *see also* Docket No. 10-035-115, Report and Order at 10 (citing and applying Utah Code Ann. § 63G-4-40(4)(h)(iii)).

[38] Utah Code Ann. § 63G-4-403(4)(h)(iv).

[39] *Bourgeous v. State Dep't of Commerce*, 41 P.3d 461, 463 (Utah Ct. App. 2002).

[40] *Murray v. Utah Labor Comm'n*, 308 P.3d 461, 472 (Utah 2013).

[41] Utah Code Ann. 63G-4-403(4); *Petersen v. Utah Labor Comm'n*, 416 P.3d 583, 586 (Utah 2017).

[42] *Smith v. Dep't of Workforce Servs.*, 245 P.3d 758, 762 (Utah Ct. App. 2010).

Similar to requests for review of legal conclusions, the Commission has applied the Utah APA's substantial evidence standard when considering an application for review of factual findings.[43] The Utah APA authorizes reversal of an agency order when an agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record.[44] Under Utah law, substantial evidence "is a quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion."[45]

A party to an order may also seek rehearing before the Commission of any matters determined in the proceeding.[46] When considering a party's request for rehearing or to otherwise accept new evidence into the record, the Commission has applied Utah R. of Civ. P. 59,[47] which governs civil motions for new trials. Utah R. of Civ. P. 59 identifies several bases for a new trial, including (1) accident or surprise that ordinary prudence could not have guarded against; (2) insufficiency of the evidence to justify the verdict or other decision; and (3) that the verdict or decision is contrary to law or based on an error in law.[48]

[43] *Application of Rocky Mountain Power to Establish Export Credits for Customer Generated Electricity*, Docket No. 17-035-61, Order on Agency Review or Rehearing and Notice of Virtual Scheduling Conference at 5 (Dec. 23, 2020).

[44] *Vote Solar v. Pub. Serv. Comm'n of Utah*, 532 P.3d 981, 987 (Utah 2023).

[45] *Becker v. Sunset City*, 309 P.3d 223, 227 (Utah 2013).

[46] Utah Code Ann. 54-7-15(2)(a)

[47] *See, e.g.*, *Pacific Energy & Mining Company*, Docket No. 18-2602-01, Order on Review (May 2, 2019).

[48] Utah R. of Civ. P. 59(a)(3),(6),(7).

B. The Commission's application of a new "likelihood of recovery" standard is contrary to the Commission's prior practices and the Order does not demonstrate a fair and rational basis for the inconsistency.

1. The Commission's prior practice when considering requests for deferred accounting was to apply the MCI criteria.

In the Order, the Commission denied the Company's request for a DAO because it found that the Company failed to meet the "first and foundational" requirement for deferred accounting, which is to demonstrate that the expenses the party seeks to defer are likely recoverable in a future proceeding.[49] However, as the Commission acknowledges,[50] the Commission has issued DAOs in the past without applying this criterion. In fact, from review of the Commission's prior deferred accounting dockets, the Commission has never required that an applicant demonstrate that the expenses it sought to defer would likely be recovered.

As an initial matter, the Commission states in the Order that "*MCI* simply does not speak to the issue of deferred accounting[.]"[51] However, in prior deferred accounting dockets the Commission has consistently applied the *MCI* criteria when determining whether to issue the requested DAO.[52] The Commission "must adhere" to its established prior practice unless it demonstrates a "fair and rational basis for the inconsistency."[53]

---

[49] Order at 10.

[50] *Id*.

[51] *Id.* at 9.

[52] *See, e.g.*, *Application of Rocky Mountain Power for an Accounting Order for Settlement Charges Related to its Pension Plans*, Docket No. 18-035-48, Order at 5-6 (May 22, 2019) ("[W]here RMP seeks deferred accounting to facilitate potential recovery of a specific category of prior year pension expenses in a future general rate case, the principles of both retroactive ratemaking and single-issue ratemaking require us to apply the legal standard articulated in *MCI*. To grant RMP's request for a deferred accounting order, we must find RMP has met its burden to demonstrate the Settlements were unforeseeable and are extraordinary.").

[53] *Comm. of Consumer Servs. v. Pub. Serv. Comm'n*, 75 P.3d 481, 485 (Utah 2003) ("Even assuming that the requirement of a prudence review was initially within the Commission's discretion rather than a mandatory legal obligation, it is now an established Commission practice to which the Commission must

In the Order, the Commission cites its order in Docket Nos. 06-035-163, 07-035-04, and 07-035-14 ("*Grid West*") to support the assertion that the justification for deferred accounting is "tied to accounting principles that permit expenses to be booked beyond the current period so long as a likelihood of future recovery exists."[54] However, even in *Grid West* the Commission did not require an affirmative demonstration that the specific costs the applicant sought to defer would likely be recovered in a future proceeding. Rather, consistent with the Commission's prior practice, the Commission rejected recovery of some of the costs at issue in that case because they were foreseeable and, therefore, did not satisfy the *MCI* criteria.[55] Unlike the current case, in *Grid West* the Commission did not refer to or treat the likelihood of recovery as part of its analysis, much less as foundational in its analysis.

The Order is also contrary to Docket No. 18-035-48 ("Pension Docket"), where the Commission expressly stated that the burden a utility must satisfy to obtain a DAO is "to demonstrate the [expenses] were unforeseeable and are extraordinary"—i.e., to satisfy the *MCI* criteria.[56] Given this clear statement of the burden an applicant must satisfy for issuance of a DAO, the Commission's decision not to apply the *MCI* criteria to the Company's request and to instead deny the application based on a newly articulated standard requiring a likelihood of recovery is plainly contrary to the Commission's prior practices.

---

adhere unless it presents 'facts and reasons that demonstrate a fair and rational basis for the inconsistency.'") (quoting Utah Code Ann. § 63-46b-16(4)(h)(iii)).

[54] Order at 9.

[55] Docket Nos. 06-035-163, 07-035-04, and 07-035-14, Report and Order at 19-20 (denying the Company's request to defer certain costs because "the Company was aware of [those costs] and their existence was known during the Company's last [GRC]").

[56] Docket No. 18-035-48, Order at 5-6.

The Commission's explanation for the inconsistency with its prior practice is that past cases allowed deferral of expenses that "would have been included in rates had it been possible to forecast them accurately at the time of the last GRC" and those costs were "a known and anticipated category of costs."[57] However, this explanation does not demonstrate a fair and rational basis for the inconsistency because utilities' insurance premium expenses have historically been included in utilities' rates.

Like the pension expenses at issue in the Pension Docket, insurance premiums have consistently been included in rates because they are a "known and anticipated" cost in the test year.[58] Moreover, the Commission recognized in *Grid West* that deferred accounting is appropriate when a forecasted cost is included in rates but actual costs "vary from their projections in an unforeseeable and extraordinary way."[59] That is precisely what occurred in this case. The excess liability insurance premium costs included in rates were based on the best available information at the time of the last rate case,[60] but the costs of those premiums increased extraordinarily in a manner that could not have been foreseen at the time of the last rate case. The Order is inconsistent with the Commission's prior practice in deferred accounting dockets and the Commission has not provided a fair and rational basis for the disparate treatment.

[57] Order at 11.

[58] *See* Direct Testimony of Shelley E. McCoy at 3 (discussing inclusion of excess liability insurance premium expenses in the Company's last GRC).

[59] Docket Nos. 06-035-163, 07-035-04, and 07-035-14, Report and Order at 19.

[60] Direct Testimony of Mariya V. Coleman at 8-9.

2. The Commission's decision not to apply the MCI criteria substantially prejudiced the Company because the evidence in the record demonstrates that the excess liability insurance premiums were unforeseeable and extraordinary.

The Commission's inconsistency with its past practice of applying the *MCI* criteria when considering a request for deferred accounting substantially prejudiced the Company because there is a reasonable likelihood that, had the Commission applied the *MCI* criteria to the Company's application, the Commission would have granted the request for a DAO.

By the time of the hearing there was little dispute that the Company had met the *MCI* criteria because the excess liability insurance premiums were unforeseeable and had an extraordinary impact on the Company's earnings.[61] All intervenors agreed that, at the time of the Company's last rate case, such an increase was not foreseeable. While DPU still contested whether the increased expenses were foreseeable at the time the costs were incurred,[62] DPU acknowledged under cross-examination that its testimony in past dockets had consistently considered foreseeability at the time of the last rate case.[63] Additionally, consistent with *MCI*,[64] the Commission has considered in past dockets whether the costs at issue were foreseeable at the time of the utility's last GRC.[65]

Regarding the extraordinary impact on the Company's earnings, the Company demonstrated that the magnitude of the impact to the Company from its excess liability insurance

---

[61] *See MCI*, 840 P.2d at 772.

[62] DPU Prehearing Brief at 15-16.

[63] Hr'g. Tr. at 77:22-80:17. DPU similarly acknowledged that its established guidelines for determining whether a requested deferral is in the public interest specifically state that prudence and other cost-recovery concerns will be addressed in a future rate case when the utility seeks to recover the deferred expenses. *Id*. at 84:18-85:7; RMP Cross-Exhibit 1 at 3.

[64] 840 P.2d at 771 ("An increase or decrease in expenses that is unforeseeable at the time of a rate-making proceeding cannot, by hypothesis, be taken into account in fixing just and reasonable rates.").

[65] Docket Nos. 06-035-163, 07-035-04, and 07-035-14, Report and Order at 19-20

premium expenses was greater than the impact resulting from DAOs that the Commission had approved in prior cases.[66] OCS initially asserted that the Company had failed to show that the increased excess liability insurance expenses would have an extraordinary impact on earnings,[67] but in its surrebuttal testimony, OCS modified its position and acknowledged that the Company had met its burden of demonstrating that the impact from these expenses would be extraordinary.[68] DPU also initially asserted that the costs were not extraordinary because they were the "new normal,"[69] but in its Prehearing Brief stated that the Commission need not consider this argument.[70]

There was substantial evidence in the record of this docket demonstrating that the Company's excess liability insurance premium expenses were unforeseeable and extraordinary, and for that reason the Commission's decision not to apply the *MCI* criteria to the Company's request for deferred accounting substantially prejudiced the Company.

C. The Commission's conclusion that the Company's excess liability insurance premium expenses are not likely recoverable rests on findings that are unsupported by substantial evidence in the record.

In the Order, the Commission concludes that the Company failed to demonstrate that the conduct at issue in *James* was not a "substantial or primary cause of [the Company's] increased premiums."[71] The Commission elsewhere asserts that "available facts suggest" the increase in the Company's excess liability insurance premium expenses "is to some significant degree tied

[66] The Company's Prehearing Brief at 8-9.

[67] Direct Testimony of Alyson Anderson at 3.

[68] Surrebuttal Testimony of Alyson Anderson at 2.

[69] Direct Testimony of Jeffrey S. Einfeldt at 6.

[70] DPU Prehearing Brief at 17.

[71] Order at 12.

to" the *James* verdict.[72] The Company requests review of both these factual findings. First, the Commission erred by applying the incorrect burden of proof in this case; the Company is not required to prove a negative when the opposing parties have provided no evidence to support their challenges to the Company's application. Second, the Commission's conclusion that *James* may have been a substantial or primary cause of the increase in excess liability insurance premiums is not supported by substantial evidence in the record.

1. The Commission applied the incorrect burden of proof by requiring the Company to prove a negative when the opposing parties did not provide adequate evidence of their challenges to the Company's application.

The Commission denied the Company's application after concluding that the Company failed to demonstrate that the expenses it sought to defer would likely be recovered in a future proceeding.[73] The Commission based this conclusion on its finding that the Company had failed to demonstrate that the *James* verdict was "not a substantial or primary cause of its increased premiums."[74] However, the Commission's conclusion misapplies the burden of proof in these proceedings.

As the applicant, the Company bears the ultimate burden of proof in this case.[75] But the Utah Supreme Court has clarified that a party opposing an application before the Commission

---

[72] *Id.* at 9-10.

[73] *Id.* at 12.

[74] *Id*.

[75] *See, e.g.*, *In the Matter of the Formal Complaint of Beaver County, Box Elder County, Cache County, Carbon County, Davis County, Duchesne County, Emery County, Garfield County, Grand County, Iron County, Juab County, Kane County, Morgan County, Piute County, Rich County, Salt Lake County, Millard County, San Pete County, Sevier County, Summit County, Tooele County, Uintah County, Utah County, Wasatch County, Washington County, Wayne County, Weber County, and all other Persons or Entities Similarly Situated vs. Qwest Corporation fka US West Communications, Inc., fka Mountain States Telephone & Telegraph Services Inc.,* Docket No. 01-049-75, Order Granting Motion for Summary Judgment at *20-21 (June 17, 2005) (explaining that the counties that had sought deferral bear the burden of ultimate persuasion).

bears the burden of proving the factual assertions supporting their opposition.[76] A party opposing an application before the Commission cannot rely on "conclusory statements in . . . testimony" to prove their assertions.[77] Based on that burden of proof for challenges to an application, the Commission has previously concluded that, notwithstanding a utility's burden of ultimate persuasion, a utility need not "prove a negative[.]"[78] Rather, if the Company provides substantial evidence supporting its case, any party opposing the Company's request must provide contradictory evidence rebutting the Company's position.[79]

In testimony, DPU and OCS raised concerns about the fact that the Company's increased insurance costs were incurred after the *James* verdict but did not provide any specific evidence that the *James* verdict had, in fact, caused the increased insurance premiums.[80] For example, DPU simply stated that the *James* verdict "is likely influencing the insurance cost rise that is the subject of this request for a [DAO.]"[81] OCS similarly testified that it was unclear "what portion [of the increase in excess liability insurance premium expenses] is due specifically to the June 2023 jury verdict in Oregon," relying on the assumption that some portion of the increase was, in fact, resulting from the verdict.[82] These conclusory statements in testimony are not sufficient to

[76] *Milne Truck Lines v. Pub. Serv. Comm'n*, 720 P.2d 1373, 1379 (Utah 1986).

[77] *Id.*

[78] *Rocky Mountain Power's Application for Approval of the 2020 Energy Balancing Account*, Docket No. 20-035-01, Order at 10 (Feb. 26, 2021).

[79] *Id.* ("Therefore, if RMP provides substantial evidence that its actions with respect to an outage were prudent, the party contending RMP failed to act prudently must at the very least rebut that substantial evidence by identifying some action RMP took or failed to take that was not prudent in relation to circumstances leading to the outage.").

[80] Direct Testimony of Jeffrey S. Einfeldt at 7-8; Direct Testimony of Alyson Anderson at 5-6.

[81] Direct Testimony of Jeffrey S. Einfeldt at 7.

[82] Direct Testimony of Alyson Anderson at 5.

satisfy the intervenors' burden to support their challenges to an application before the Commission.[83]

Moreover, even though DPU and OCS failed to meet their evidentiary burden, the Company submitted substantial evidence into the record to rebut DPU's and OCS's conclusory assertions that *James* caused the increase in the Company's excess liability insurance premiums. In rebuttal testimony, the Company explained that while the timing of the *James* verdict was coincidental to the renewal of the Company's excess liability insurance, the Company's insurers did not identify any impact, specific or general, of the *James* verdict.[84] Rather, the Company's insurers indicated that increased wildfire risk resulting from climate change, in addition to claims against multiple utilities in the western United States, was influencing their decisions to withdraw from selling wildfire insurance or to charge more to insure wildfire risk.[85] In addition, even though the *James* verdict was issued prior to the Company's most recent insurance renewal, to date, the Company has not paid any damages resulting from the *James* lawsuit. The Company has not filed any *James*-related claims with its insurers because the potential insurance coverage for the wildfires involved in *James* is fully reserved to cover other 2020 wildfire claims unrelated to *James*.[86] As a result, the Company's loss history with its insurers does not include any *James*-related claims, so the *James* verdict could not have caused the excess liability insurance premium increase.

Contrary to the established burden of proof in Commission proceedings, in the Order the Commission faults the Company for failing to prove a negative—i.e., that the *James* verdict did

[83] *Milne Truck Lines*, 720 P.2d at 1379.

[84] Rebuttal Testimony of Mariya V. Coleman at 5.

[85] *Id*.

[86] *Id*. at 5-6.

not cause the increase in the Company's excess liability insurance premiums. The Commission misapplied the burden of proof that an applicant has in proceedings before the Commission, and for that reason the Company requests review of the findings in the Order.

2. The Commission's conclusion that the "available facts suggest" the James verdict likely caused the Company's increased insurance premium expenses is not supported by substantial evidence.

Although the Commission asserted in the Order that it was not prejudging the prudence of the Company's increased insurance costs,[87] the Commission concluded that "available facts suggest" that *James* caused the increase in excess liability insurance premium expenses,[88] and therefore "no reasonable person could conclude that" these expenses will be determined to be prudent and recoverable.[89] There are multiple problems with the Commission's conclusion.

First, without the benefit of an evidentiary record, the Commission concluded that the increased excess liability insurance premium expenses are not likely prudent and recoverable. As discussed above, the Commission announced a new requirement that a party seeking a DAO must demonstrate that the costs at issue will likely be recovered—*i.e.,* those costs will be determined in a future rate recovery proceeding to have been prudently incurred. Because the Commission has not applied this criterion in prior deferral dockets, no party in this proceeding attempted to develop the full record needed to make a prudence determination.[90]

---

[87] Order at 14.

[88] *Id.* at 9-10.

[89] *Id.* at 13-14 ("[The Company] has seen exorbitant increases in its [excess liability insurance] 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.").

[90] *See Jesse H. Dansie Family Trust v. Pub. Serv. Comm'n*, 374 P.3d 1057, 1062 (Utah Ct. App. 2016). (Commission to exercise its own independent judgment based on its industry expertise, rather than defer to courts on issues within the Commission's jurisdiction).

Second, the Commission's conclusion that the evidence "suggests the *James* verdict has strongly impacted insurance premiums"[91] or that *James* was "a primary driver of" the increased premium expenses is not supported by substantial evidence in the record. The Commission does not rely on any party's testimony to support this conclusion, and instead cites only (1) the fact that *James* occurred prior to the increase in premiums; and (2) a quote from a publication the Company cited in its application.[92]

The coincident timing of *James* prior to the increased premiums is insufficient to demonstrate causation. In Utah, a "finding of causation cannot be predicated on mere speculation or conjecture" but instead must be based upon "evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act[.]"[93] Coincidental timing, standing alone, indicates only a possibility of causation and is not sufficient to demonstrate causation.[94] Courts are "not permitted" to "rely on the temporal relationship . . . by itself as evidence of causation."[95] This is especially true here when the Company provided undisputed evidence that its insurers never referenced the *James* verdict as a driver of the excess liability insurance premium increase and the Company's current loss history does not include any claims related to the *James* verdict.

---

[91] *Id.* at 5.

[92] *Id.* at 5 (citing Joel Rosenblatt, INSURANCE JOURNAL, *Utility Investors Wary of Exposures After Buffet's PacifiCorp Held Liable for Wildfires* (July 19, 2023) (available at https://www.insurancejournal.com/news/national/2023/07/19/731224.htm#:~:text=But%20a%20jury%20verdict%20last,about%20the%20scale%20of%20exposure) (last visited Apr. 25, 2024)).

[93] *Lindsay v. Gibbons & Reed*, 27 Utah 2d 419, 423 (1972).

[94] *See, e.g.*, *YESCO v. Labor Comm'n*, 497 P.3d 839, 846-47 (Utah Ct. App. 2021) (reversing an agency conclusion that an employee's shoulder injury resulted from their employment, even though the injury developed during that employment).

[95] *Etherton v. Owners Ins. Co.*, 829 F.3d 1209, 1220 (10th Cir. 2016) (quoting *Goebel v. Denver & Rio Grande W. R.R. Co.*, 346 F.3d 987, 999 (10th Cir. 2003)).

Additionally, the Commission's reliance on a single quote from a publication referenced in the Company's application does not provide substantial evidence for the conclusion that *James* caused the increased excess liability insurance premium expenses. As an initial matter, the article itself was not included in the record and the Commission relied exclusively on a single sentence quoted in the Company's application.[96] The article discussed *James* as an example of the hardships utilities now face when seeking wildfire insurance, and specifically stated that these difficulties exist for all utilities, not just the Company. With this context, the article supports the Company's position that its excess liability insurance premium increase resulted from its insurers' perception of increased industry-wide risk related to wildfires, not because of the impact of the *James* verdict on the Company.

For these reasons, the Commission's finding that the record suggests the *James* verdict caused the increase in the Company's excess liability insurance premium expenses is not supported by substantial evidence in the record.

D. The Company requests rehearing to submit additional evidence addressing the causes of the increase in excess liability insurance premium expenses.

For the reasons detailed above, the record in this case does not support the Commission's findings regarding the impact of the *James* verdict on the Company's excess liability insurance premium expenses. If the Commission declines to review the Order, the Company alternatively requests that the Commission grant rehearing in this case on this basis.[97] The Commission has previously concluded that "changes in methodology or policy should be analyzed and approved

[96] If the Commission reopens the record as requested below, the Company could provide a copy of that article in its entirety to give the Commission context for the quote on which it relies.

[97] *See* Utah R. of Civ. P. 59(a)(6) ("[A] new trial may be granted to any party on any issue for any of the following reasons . . . insufficiency of the evidence to justify the verdict or other decision[.]").

by the Commission on a prospective basis only."[98] Consistent with that conclusion, the Company requests rehearing to allow the submission of additional evidence to address the new standard for granting a DAO that the Commission identified in the Order, instead of denying the Company's application based on retroactive application of this new standard.

As outlined above, in prior deferred accounting dockets the Commission has not referred to or treated the likelihood of recovery as a "foundational" criterion for deferrals and has instead approved or rejected requests for deferrals by applying the *MCI* criteria.[99] Relying on that history, the Company developed an extensive record in this case demonstrating that the increased excess liability insurance premium expenses were unforeseeable and extraordinary. However, in the Order, the Commission did not apply the *MCI* criteria and instead denied the Company's application after concluding that the Company was required to demonstrate a "likelihood of future recovery,"[100] a standard that the Commission has never previously applied to reject a request for deferred accounting and did not apply with any specificity in the Order.

The novel nature of the "foundational" criterion identified in the Order is plain from incongruity between the record developed in this case and the Commission's ultimate Order. At the hearing, the parties focused their questioning on whether the Company had satisfied the *MCI* criteria. No party cross-examined any Company witnesses about the likelihood of recovering insurance premium expenses. The only questions to Company witnesses about recoverability were from Commissioner Harvey, who simply confirmed that the Company's position was that

[98] Docket No. 88-035-08, Opinion at *14.

[99] *See, e.g.*, Docket Nos. 06-035-163, 07-035-04, and 07-035-14, Report and Order at 19-20.

[100] Order at 9.

the Commission can grant a DAO "even if it makes no judgment at all about whether there's any likelihood of recovery[.]"[101]

If the Commission were to grant the Company's request for rehearing, the Company would supplement the record with additional evidence to further demonstrate that the *James* verdict did not cause the increase in the Company's excess liability insurance premium expenses. While the Company intended to demonstrate the prudence of these insurance premiums in its upcoming GRC, if granted rehearing the Company would submit additional evidence demonstrating the following facts:

- The fires that are the subject of the *James* jury verdict in 2023 occurred in 2020, the same year as several other massive fires in western states.
- All claims related to *James* that could be recovered from excess liability insurance policies could only be recovered from policies in effect in the 2020 policy year.
- Before the *James* verdict, all the coverage available from the Company's 2020 excess liability insurance policies had been reserved to pay claims arising from fires or other events that preceded the *James* verdict. No matter what the jury in *James* decided, none of the damages from that litigation would be paid by the Company's insurers because the Company had already reserved against its policy limit for 2020.
- When excess liability insurers determine future premiums, they base those decisions on loss history, that is, the liability exposure faced by the insurers based on past claims.

[101] Hr'g Tr. 28:4-7. The most detailed questioning about likelihood of recovery was directed to UAE, whose witness acknowledged that deferred accounting imbues "some likelihood of recovery" but "the extent . . . of that amount to be recovered and ultimately whether it will be recovered can still be determined in a [GRC]." *Id.* at 116:6-13.

- When the Company's insurers determined the premiums for 2023-2024 excess liability insurance policies, there were no *James* claims in the Company's policy history. In fact, there never will be because the Company has no remaining 2020 policy year insurance proceeds available to pay them.
- The Company's excess liability insurance premiums had been increasing prior to the *James* verdict, and other utilities exposed to wildfire risks are experiencing similar increases in the costs of their premiums. Insurers have escalated premiums (or discontinued offering wildfire coverage altogether) due to the aggregate increase in wildfire risk throughout the West, not in response to a single fire or jury verdict.

In sum, on rehearing, the Company's evidence will show that the correlation of increased excess liability insurance premiums with the timing of the *James* verdict is a factual error. It is this factual error that underlies the Commission's determination on the "likelihood of future recovery" used to justify denying the Company's DAO request. The rehearing will demonstrate why the Commission should review and reconsider the Order.

As an alternative to reopening the evidentiary record in this docket, the Commission could vacate the Order and rehear evidence on the Company's application for deferred accounting in the Company's upcoming GRC docket.[102] The Commission has previously considered pending deferred accounting dockets in the Company's 2011 GRC,[103] and doing so in this case would allow the Company to submit evidence supporting the prudence of the insurance

[102] *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*, Docket No. 24-035-04.

[103] *In the Matter of the 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, et al.*, Docket Nos.10-035-124, 09-035-15, 10-035-14, 11-035-46, and 11-035-47, Report and Order (Sept. 13, 2011).

policies purchased in August 2023 in the context of a GRC where parties will be reviewing the prudence of excess liability insurance premium costs in the test year.[104] This would not only address the Commission's new criterion requiring a demonstration that costs will likely be recovered but would also be consistent with DPU's request that the Commission consider the Company's insurance premium expenses in the context of a GRC.[105] Addressing the Company's request for deferral in the pending GRC would also be consistent with UAE's position that after a deferral is granted "[t]he specific amount that is ultimately recoverable should be determined in [the Company's] next" GRC and the Commission should "consider all relevant factors" relating to prudence in that GRC.[106] For the reasons discussed above, the Company's factual evidence will be the same whether offered on rehearing or in the GRC proceeding.

IV. CONCLUSION

For the reasons discussed above, the Company requests that the Commission review and reconsider the legal conclusions in the Order that are contrary to prior Commission practice and the factual findings that are not supported by substantial evidence in the record. Alternatively, the Company requests rehearing and an opportunity to introduce additional evidence, either in this docket or in the Company's upcoming GRC, further demonstrating that its 2023-2024 excess liability insurance premium increases are likely to be recovered in rates and the *James* verdict was not a "substantial or primary cause of" these increases.

---

[104] In the Order, the Commission indicated it was concerned that "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" and, for that reason, "the adjudication of a highly contested, fact-extensive matter like the one presented here should not be postponed until a future GRC." Order at 13. However, because the Company will seek recovery of its excess liability insurance premium expenses for the test period in the GRC, the prudency of those expenses will already be at issue in the GRC and will not unduly expand the scope of issues in that docket.

[105] Direct Testimony of Jeffrey S. Einfeldt at 3-4.

[106] Direct Testimony of Kevin C. Higgins at 3.

Dated: April 29, 2024.

MCDOWELL RACKNER GIBSON PC

Katherine McDowell
MCDOWELL RACKNER GIBSON PC
419 SW 11th Ave., Suite 400
Portland, Oregon 97205
Telephone: 503-595-3922
Facsimile: 503-595-3928
Email: katherine@mrg-law.com

Carla Scarsella
Ajay Kumar
ROCKY MOUNTAIN POWER
1407 W North Temple, Suite 320
Salt Lake City, UT 84116
Telephone: (503) 813-6338
Facsimile: (801) 220-3299
Email: carla.scarsella@pacificorp.com
ajay.kumar@pacificorp.com

Counsel for Rocky Mountain Power

CERTIFICATE OF SERVICE

Docket No. 23-035-40

I hereby certify that on April 29, 2024, a true and correct copy of the foregoing was served by electronic mail to the following:

Utah Office of Consumer Services

Michele Beck	mbeck@utah.gov
	ocs@utah.gov

Division of Public Utilities dpudatarequest@utah.gov

Utah Association of Energy Users

Phillip J. Russell	prussell@jdrslaw.com
Shantell Garrett	sgarrett@energystrat.com
Kevin Higgins	khiggins@energystrat.com
Neal Townsend	ntownsend@energystrat.com

Assistant Attorney General

Patricia Schmid	pschmid@agutah.gov
Robert Moore	rmoore@agutah.gov
Patrick Grecu	pgrecu@agutah.gov

Rocky Mountain Power

Data Request Response Center	datarequest@pacificorp.com
Jana Saba	jana.saba@pacificorp.com
	utahdockets@pacificorp.com
Ajay Kumar	Ajay.kumar@pacificorp.com
Carla Scarsella	Carla.scarsella@pacificorp.com

Cole Albee
Paralegal
McDowell Rackner Gibson PC