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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of the Utah Office of Consumer Services for a Deferred Accounting Order Directing Rocky Mountain Power to Defer All Bonus Depreciation Allowed for 2009 through 2011 by the Small Business Jobs Act as amended.	Docket No. 11-035-47 UTAH OFFICE OF CONSUMER SERVICES' RESPONSE TO MOTION TO DISMISS APPLICATION FOR DEFERRED ACCOUNTING ORDER FOR 2009 – 2011 BONUS DEPRECIATION
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Bonus depreciation about which this docket is concerned, arises from tax benefits available to Rocky Mountain Power under *The Small Business Jobs Act of 2010* signed September 27, 2010, which extended a Recovery Act provision for 50 percent “bonus depreciation” through 2010, and *The Reid-McConnell Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010*, signed December 17, 2010. These tax provisions were designed to stimulate investment and economic growth by reducing current tax burdens through accelerated depreciation and freeing up or increasing cash flow. Rocky Mountain Power

admits that “At the federal statutory tax rate of 35%, the temporary tax benefit of the bonus depreciation and related cash flow is expected to be approximately \$554.5 million for 2010, \$411.3 million for 2011 and \$137.6 million for 2012.” *Response to UIEC Data Request 1.69, March 1, 2011, Docket No. 10-035-124.*

The application for a deferred accounting order for 2009 to 2011 bonus depreciation due to September 2010 and December 2010 tax law changes (the Application) plainly identifies the factual and policy issues underlying the ratemaking treatment of tax benefits resulting from changes to tax laws. The Application addresses the changes in revenue requirement, the tax expense impact and the accounting, among other issues, pertaining to \$1,103.4 million increased cash flow, \$850 million of which Rocky Mountain Power will deliver to its shareholder. *Response to OCS Data Request 2.9, February 24, 2011, Docket No. 10-035-124.*

A motion to dismiss for failure to state a claim upon which relief may be granted, such as Rocky Mountain Power has filed, is not proper or permitted in this docket; a formal adjudicative proceeding pursuant to Utah Code Ann. Section 63G-4-204. *Utah Code Ann. § 54-1-2.5; Utah Admin. Code R 746-100-2 H.* As a formal adjudicative proceeding, a hearing upon the evidence must be held “to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions.” *Utah Code Ann. § 63G-4-206.* In

particular: “The presiding officer shall afford to all parties the opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence.” *Utah Code Ann. § 63G-4-206 (1) (d)*. The statute under which the Commission is to adjudicate the Application requires no less than discovery and an evidentiary hearing.¹

If a motion to dismiss is permitted, as set out by Utah R. Civ. P. 12(b)(6), Rocky Mountain Power’s argument falls far short of establishing the extraordinary and limited circumstances in which a court, let alone the Commission, may without evidence or even an examination, dismiss the Application. Administrative proceedings are usually conducted with greater flexibility and informality than judicial proceedings, even when apply the Utah Rules of Civil Procedure. “Rigid adherence to judicial procedures in administrative proceedings is generally inappropriate because it ignores basic differences between judicial and administrative procedures.” *Pilcher v. State, Dept. of Soc. Services*, 663 P.2d 450, 453 (Utah 1983). “Generally, administrative pleadings are to be liberally construed and easily amended.” *Id.*

¹ Rocky Mountain Power erroneously cites Utah Admin. Code R. 746-100-1 C. as authorizing the Commission to disregard procedures in a formal adjudication thereby avoiding scrutiny of the ratemaking implication of \$1.1 billion in excess cash flow. Even if 1 C. does permit a 12(b)(6) motion to dismiss, in this case, such a motion is unworkable and inappropriate. In addition, the meaning of dismissal for failure to state a claim is at best inconsistent and more likely outright contrary to the authority of the Commission to rescind, alter, or amend any order or decision even one that may no longer be appealed. *Utah Code Ann. § 54-7-14.5*.

Of particular significance to this docket is the rule that motions to dismiss are not ripe in an administrative adjudication presenting disputes of regulatory interpretation. See *In the Matter of Julie's Limousine & Coachworks, Inc.*, United States EPA Docket No. CAA-04-2002-1508, Order Denying Respondent's Motion to Dismiss, November 26, 2002, attached and at http://www.epa.gov/oalj/orders/julie_dismiss.pdf. To demonstrate that the Application presents such disputes one need only look to the proceedings before the Commission and the orders in Docket No. 10-035-38, In the Matter of Post-Retirement Prescription Drug Coverage Tax Benefits, and in Docket Nos. 06-035-163, 07-035-04, 07-035-14, wherein the revenue requirement and ratepayer borne expense impacts, and the accounting implications and policies are described as fact specific, regulatory disputes.

Of course, based upon long established precedent, motions to dismiss such as Rocky Mountain Power has filed, are undeniably governed by specific legal principles. The Commission may grant the motion only under very limited circumstances when it appears to a certainty that the claim is purely speculative or not plausible, based solely upon the allegations set forth on the face of the complaint as well as inferences reasonably deducible, all of which are accepted as true, even if doubtful in fact. *Ashcroft v. Iqbal*, 556 U.S. ____ (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (determining whether a complaint

states a plausible claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense); *Capital Assets Fin. Servs. v. Jordanelle Dev., LLC*, 2010 UT App 385, ¶ 4.

Rocky Mountain Power's motion to dismiss for failure to state a claim upon which relief may be granted is flawed and groundless. It must be denied.

Dated this 6th day of May 2011.

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CERTIFICATE OF SERVICE

(Docket No. 11-035-47)

I hereby certify that on this 6th day of May 2011, I served by electronic mail, a true and correct copy of the foregoing Response to Motion to Dismiss Application for Deferred Accounting Order for 2010 – 2011 Bonus Depreciation upon:

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