- 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 2010 through 2011 by the Small Business Jobs Act as Amended.	)	DOCKET NO. 11-035-47 ORDER DENYING MOTION TO DISMISS

ISSUED: June 2, 2011

By The Commission:

This matter is before us on Rocky Mountain Power's Motion to Dismiss and Response Opposing Office's Application, filed April 21, 2011. In this motion, PacifiCorp ("Company"), doing business in Utah as Rocky Mountain Power, argues the Utah Office of Consumer Services' ("Office") application for a deferred accounting order fails to state a claim upon which relief may be granted. The Office's application requests an order from the Commission requiring the Company to defer for later ratemaking treatment the impact on accumulated deferred income taxes (and the associated impact on rate base for plant additions that are currently being recovered in rates) which results from "bonus depreciation" available under recent tax law changes. The Company brings its motion to dismiss pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, noting the Commission's procedural rules do not specifically provide for such a motion.[1]

Rule 12(b)(6) describes as a basis for dismissal of a civil complaint, the failure of the complaint to state a claim on which relief can be granted. In this instance, the Company argues the Office's application must be dismissed because it seeks an inappropriate use of

[1] Utah Admin. Code R746-100-1.C. states in situations not provided for in the Commission's rules, the Utah Rules of Civil Procedure govern, unless the Commission considers them to be unworkable or inappropriate.

deferred accounting and improper retroactive ratemaking. The Company also asserts that to the extent the recently-authorized bonus depreciation warrants deferred accounting, the Company has already implemented it. The Company notes that when deciding a Rule 12(b)(6) motion, the Commission should accept the factual allegations in the application as true and consider all reasonable inferences to be drawn from those facts in the light most favorable to the applicant. This approach is consistent with past Commission practice.[2]

The Company bases its motion on three assertions:

> (1) the Application is an improper attempt to establish a deferred account for a retroactive change in revenue requirement to account for regulatory lag rather than for a current revenue or expense, (2) the changes in tax depreciation referenced in the Application only result in tax timing differences and have *no impact* on the Company's total periodic income tax expense or the amount of income taxes the Company will ultimately pay, and (3) the Company is already properly accounting for accumulated deferred income taxes consistent with the changes in bonus depreciation cited in the Application, and customers will receive the benefit of those changes in future rates over the life of the assets to which they apply.[3]

In effect, the Company argues there are no facts in controversy that call these assertions into question, and they require dismissal of the application as a matter of law.

The Office opposes the Company's motion. The Office argues this matter is a formal adjudicative proceeding; therefore, Utah Code Ann. § 63G-4-206(1) requires the Commission to hold an evidentiary hearing "to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions." In light of the Commission's statutory obligation to hold a hearing in this matter, the Office maintains applying

[2] See, e.g., Barker v. Qwest, Docket No. 02-049-46, October 4, 2002.
[3] Rocky Mountain Power's Motion to Dismiss…, April 21, 2011, p.2.

Rule 12(b)(6) is neither workable nor appropriate.[4] The Office also argues the Company's motion is contrary to "the rule that motions to dismiss are not ripe in an administrative adjudication presenting disputes of regulatory interpretation."[5] The Office, referring to various Commission proceedings, argues the revenue requirement and expense impacts of tax law changes, including the related accounting implications and policies, are fact specific regulatory disputes to which the rule applies.

In addition to the Office, two other parties filed pleadings opposing the Company's motion, the Division of Public Utilities ("Division") and the Utah Association of Energy Users ("UAE"). In general, each of these parties asserts the Office's application raises issues of fact that must be resolved through evidentiary hearings. As the Division notes in opposing the motion, the Utah Supreme Court has stated: "…a [Rule 12(b)(6)] motion to dismiss should be granted only when 'it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.'"[6]

Despite the Company's arguments, we do not find dismissal of the Office's application for a deferred accounting order is justified. The application raises a number of factual and policy issues we must examine, in order to determine whether the requested relief should be granted. It is revealing the Company requires six full pages in its motion to set the factual context in which to present its legal argument. Given the assertions in the Office's

[4] See Utah Admin. Code R.746-100-1.C.
[5] See Utah Office of Consumer Service's Response to Motion to Dismiss…, May 6, 2011, p. 4, citing *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. Noting the Respondent's motion raised "a serious dispute of regulatory interpretation," the EPA Administrator's Order finds: "At this stage of the proceeding, it is sufficient to note that the parties disagree over the applicability of the regulations cited… It would be premature to analyze the merits of each party's arguments at this juncture."
[6] Osguthorpe, 232 P. 3rd 999 (Utah 2010) at p. 1006, citing Mack. V. Utah Dep't of Commerce, 2009 UT 47, ¶ 17, 221 P. 3rd 194.

application, we find it is plausible, if not likely, some of the facts presented in the Company's motion and the inferences that may be drawn from them are not without controversy. Moreover, much of the Company's argument that follows its statement of facts, interprets and applies various accounting and ratemaking standards. Based on the Office's application, we expect it will dispute some of these interpretations or will assert the Company applies the standards incorrectly. These differing perspectives raise questions of fact we must resolve in reaching a decision on the application.

Examining the three assertions the Company presents as the basis for its motion (quoted above) illustrates this point. First, The Company alleges the deferred accounting order the Office seeks is an improper use of deferred accounting. The Office, on the other hand, argues that a deferred accounting order, under its view of the facts, "is both appropriate and necessary."[7] Second, the Company represents the tax law changes only result in tax timing differences and have no impact on the Company's total periodic income tax expense. The Office characterizes the same tax law changes as creating "an unforeseen and extraordinary change in tax expense that merits the accounting order the Office requests."[8] Third, the Company asserts it is properly accounting for accumulated deferred income taxes consistent with the changes in bonus depreciation cited in the application, and customers will receive the benefit of those changes in future rates over the life of the assets to which they apply. The Office, however, argues without the deferred accounting order it requests, ratepayers will permanently lose certain

[7] See Utah Office of Consumer Services' Application…, March 22, 2011, p.6
[8] Id.

rate impact benefits resulting from higher accumulated deferred income taxes and lower rate base.[9]

These contradictory assertions raise questions of fact we must resolve before we can determine whether to grant the requested relief. For example, which, if any, accounting standards and regulatory policies apply to the remedy the Office seeks? What are the correct interpretations and applications of these standards and policies? Are the tax law changes in question unforeseen and extraordinary, such that retroactive rate relief may be appropriate? What facts and circumstances support or undermine the answer to that question? What are the revenue requirement impacts of bonus depreciation? Are these impacts unforeseen and extraordinary? Is the Company properly accounting for the accumulated deferred income tax? What are the rate impacts of this accounting treatment on generations of customers? What are the impacts on Company earnings? Possible answers to these factual questions could justify the relief the Office seeks. Therefore, to resolve fairly these and other questions raised or implied in the application, we must offer the Office and all other parties the opportunity to present evidence and to challenge the evidence of parties with opposing views. We find it does not "appear to a certainty that the [Office] would be entitled to no relief under any state of facts which could be proved in support of [its] claim."[10] Accordingly, dismissal of the application is not justified.

The motion to dismiss is denied. The schedule for processing the Office's application, provisionally established in our order of May 16, 2011, is in effect.

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[9] Id. at 8.

[10] See Osguthorpe, 232 P. 3rd 999 (Utah 2010) at p. 1006, citing Mack. V. Utah Dep't of Commerce, 2009 UT 47, ¶ 17, 221 P. 3rd 194.

DATED at Salt Lake City, Utah this 2nd day of June, 2011.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#73107
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