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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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| 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<br><br><b>DIVISION OF PUBLIC UTILITIES'<br/>OPPOSITION TO ROCKY MOUNTAIN<br/>POWER'S MOTION TO DISMISS<br/>OFFICE'S APPLICATION</b> |
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Pursuant to Utah Administrative Code R746-100-4(D), the Utah Division of Public Utilities (Division) files its objection to Rocky Mountain Power's (Company) Motion to Dismiss Office's Application (Motion to Dismiss).<sup>1</sup> The Company asserts that the Office has failed to state a claim upon which relief may be granted. The Division urges the Commission to deny the Motion to Dismiss.

On March 22, 2011, the Office of Consumer Services (Office) filed an Application 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 (Application). In response, on April 21<sup>st</sup>, the Company filed the above-referenced Motion to Dismiss and Opposition to the Application. The Company stated:

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<sup>1</sup> The Division is not responding to the Company's Response Opposing Office's Application.

[it] requests that the Application be dismissed or denied because the relief the Office seeks is not an appropriate use of deferred accounting and is inappropriate retroactive ratemaking. Furthermore, to the extent the Office seeks appropriate relief – deferred accounting for the impact of the Acts – it has already taken place.<sup>2</sup>

Consistent with R746-100-1, which states, “In situations for which there is no provision in these rules, the Utah Rules of Civil Procedure shall govern, unless the Commission considers them to be unworkable or inappropriate,” the Division seeks guidance from Rule 12(b). Both the Commission and the Utah Supreme Court (Court) have considered the application of Rule 12(b)(6). The Commission has stated, “For purposes of deciding Respondent's motion to dismiss, we consider the factual allegations contained in the complaint and answer in the light most favorable to Complainant.”<sup>3</sup> The Commission's statement is consistent with statements made by the Court. The Court has stated that, that “. . . a 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.’”<sup>4</sup> Furthermore, “A rule 12(b)(6) motion to dismiss admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts.”<sup>5</sup> Finally, the Court has stated, “A dismissal is a severe measure.”<sup>6</sup>

When measured against the strict standards set forth above, the Company's Motion to Dismiss fails. Taking the Office's facts as true, consistent with instructions

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<sup>2</sup>Motion to Dismiss at p. 3, footnote omitted.

<sup>3</sup>Barker v. Qwest, 2002 WL 34131885, Docket No. 02-049-46, decided October 4, 2002 by the Utah Public Service Commission.

<sup>4</sup>Osguthorpe, 232 P.3d 999 (Utah 2010) at p. 1006, citing *Mack v. Utah Dep't of Commerce*, 2009 UT 47, ¶ 17, 221 P.3d 194 (internal quotation marks omitted).

<sup>5</sup>Osguthorpe at p.1006, citing *Helf v. Chevron U.S.A., Inc.*, 203 P.2d 962 (Utah 2009).

<sup>6</sup>Colman, 795 P.2d 622, 624 (Utah 1990), citing *Liquor Control Commission v. Athas*, 243 P.2d 441 (Utah 1952).

from the Commission and the Court, inquiry into the appropriateness of a deferred accounting order due to bonus depreciation legislation should not be precluded at this time by granting the Motion to Dismiss. It is arguable that the Application could result in an order in the Office's favor, and therefore the harsh action of dismissal now is unwarranted.<sup>7</sup> Issues associated with bonus depreciation are extremely complex. The extent to which facts set forth in the Application ultimately can be rebutted or disproved, the correct standards to be applied when issuing a deferred accounting order, the ultimate decision of whether a deferred accounting order is appropriate, overlaid by the appropriate application of complex bonus depreciation laws and regulations and determination of the effect thereof, requires undertaking discovery and engaging in thoughtful and thorough analysis. Thus, at this stage, further proceedings should not be precluded, and the Motion to Dismiss should be denied.

Respectfully submitted this \_\_\_\_\_ day of May, 2011.

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<sup>7</sup> The Division has not undertaken an analysis of the Office's position, and offers no opinion on whether or not the Division ultimately would support the Office's position.

## CERTIFICATE OF SERVICE

I hereby certify that on this \_\_\_\_ day of May 2011, I caused to be emailed, a true and correct copy of the foregoing DIVISION OF PUBLIC UTILITIES' OPPOSITION TO ROCKY MOUNTAIN POWER'S MOTION TO DISMISS OFFICE'S APPLICATION to the following:

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