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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**

**UAE'S RESPONSE IN  
OPPOSITION TO RMP'S MOTION  
TO DISMISS OCS' APPLICATION  
FOR DEFERRED ACCOUNTING**

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The Utah Association of Energy Users (“UAE”) hereby files this response in opposition to the Motion (“Motion”) filed by Rocky Mountain Power (“RMP”) to dismiss the Application of the Office of Consumer Services (“OCS”) for a Deferred Accounting Order relating to bonus depreciation. (“OCS Application”). RMP’s Motion should be denied because numerous factual and policy issues must first be resolved before a proper determination can be made as to the appropriate ratemaking impacts, if any, of the adoption of bonus depreciation legislation late in 2010.

A motion to dismiss for failure to state a claim upon which relief can be granted is meritorious only based upon a clear showing that no relief could be appropriate, even assuming the truth of all allegations made, together with reasonable inferences. *E.g., Capital Assets Fin. Servs. v. Jordanelle Dev., LLC*, 247 P.3d 411, 413 (Utah Ct. App. 2010). Under this standard, RMP's Motion must be denied.

**I. Many Important Factual and Policy Issues Must be Resolved Before the Nature and Extent of any Appropriate Relief can be Determined.**

RMP's Motion to Dismiss relies upon six pages of factual allegations. That reliance alone dooms its Motion. A motion to dismiss for failure to state a claim must be resolved solely on the basis of pleadings. Rule 12(b), *Utah Rules of Civil Procedure*. When matters outside the pleadings are considered, the motion is treated as one for summary judgment under Rule 56, *Utah Rules of Civil Procedure*. *Id.* A motion for summary judgment can be granted only if the moving party demonstrates that no genuine issue exists as to any material fact and that it is entitled to judgment as a matter of law. Rule 56(c), *Utah Rules of Civil Procedure*. RMP's six-page "Statement of Facts" does not establish the material facts upon which it relies, or the lack of genuine dispute regarding those material facts. To the contrary, it demonstrates the existence of material factual issues that must be explored before the propriety and extent of any appropriate relief can be determined.

Facts relied upon in RMP's Motion, but not properly established for purposes of a Rule 56 motion for summary judgment, include: accounting and revenue requirement impacts of

bonus depreciation (Motion, pages 4-8); alleged actual company earnings (Motion, page 9); and the impact on RMP's total income tax expense (Motion, page 20). RMP provided no affidavits or other demonstration that these facts are accurate or undisputed. RMP's reliance on these alleged, but unproven, facts, as well as plausible disputes over some or all of these facts, dooms RMP's Motion.

RMP's Motion also fails to resolve factual issues that are critical to any Commission determination of the propriety of the requested retroactive rate relief. Under Utah law, the Commission must determine whether the impact of bonus depreciation legislation created an unforeseeable and extraordinary change in revenue, *MCI Telecommunications Corp. v. Utah Public Serv. Comm'n*, 840 P.2d 765, 771-772 (Utah 1992); Report and Order, Utah PSC Dockets 06-035-163, 07-035-04, 07-035-14, at 15 (January 3, 2008). Similarly, the Commission must determine whether the bonus depreciation legislation was based on events or circumstances that were known but not measurable at the time of a rate case, or events which may have been known or foreseeable, but whose impact upon the revenues of the utility were unforeseeable and extraordinary, or whose actual manifestations varied from projections in an unforeseeable and extraordinary way. Report and Order, Utah PSC Dockets 06-035-163, 07-035-04, 07-035-14, at 19 (January 3, 2008). The Motion to Dismiss must be denied because the Commission must first resolve these critical factual contentions raised by the OCS Application, which are presumed to be true for purposes of the Motion.

In addition to the numerous disputed factual issues identified above, RMP's Motion also

raises several important policy issues, each of which is dependent upon underlying factual issues and potential disputes that must be explored and resolved based on an appropriate record.

Among such policy issues are those identified in the Division's April 14, 2011 response to the Commission's Action Request and, potentially, some of those raised in RMP's Motion. These critical policy issues can only be properly resolved following thorough investigations by the Division, Office and other parties, and the creation of a proper record upon which the Commission can rely. These policy and factual issues cannot properly be resolved on the pleadings or on the unsupported and incomplete allegations contained in RMP's Motion.

## **II. RMP's Heavy Focus on Accounting Standards is Misplaced.**

RMP's Motion relies heavily on its interpretation of and allegations concerning applicable accounting standards, essentially disregarding rulings that the Commission should concern itself primarily with ratemaking issues rather than accounting issues. *E.g.*, Report and Order, Utah PSC Dockets 06-035-163, 07-035-04, 07-035-14, at 17 (January 3, 2008). Moreover, whether or not an accounting order is the technically appropriate method for addressing the allegations raised in the OCS Application, those allegations must be investigated and resolved. The OCS Application should thus be considered as including a request for retroactive rate relief, regardless of the accounting treatment that may be appropriate. The Commission must investigate and adjudicate the weighty allegations and issues raised in the OCS Application, which can only be done by allowing the case to proceed and a record to be made.

**III. Retroactive Rate Relief Does Not Require Overearnings.**

RMP asserts a novel interpretation of Utah law, by arguing that retroactive rate relief is only appropriate in a period when a utility is over-earning. RMP cites no support for this claim, other an unwarranted assumption as to the Utah's Supreme Court's supposed, but unexpressed, reason for citing over-earnings in the *MCI* case, *MCI Telecommunications Corp. v. Public Serv. Comm'n*, 840 P.2d 765, 770 (Utah 1992). The holding in that case does not purport in any manner to require over-earnings as a condition to retroactive rate relief, and other cases demonstrate the fallacy of the argument. *E.g.*, *Utah Dep't of Bus. Regulation v. Public Serv. Comm'n*, 720 P.2d 420, 422 (Utah 1986). Moreover, any such determination would constitute major policy and legal determinations, the implications of which must first be carefully considered and analyzed based on testimony and a complete record.

DATED this 9<sup>th</sup> day of May, 2011.

HATCH, JAMES & DODGE

/s/ \_\_\_\_\_  
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this 9<sup>th</sup> day of May, 2011, on the following:

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