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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 Appreciation Allowed for 2010 through 2011 by the Small Business Jobs Act as amended	Docket No. 11-035-47 **ROCKY MOUNTAIN POWER'S REPLY TO THE OCS, DPU AND UAE RESPONSES IN OPPOSITION TO MOTION TO DISMISS**

Rocky Mountain Power, a division of PacifiCorp ("Rocky Mountain Power" or the "Company"), hereby replies to the Utah Office of Consumer Services' Response to Motion to Dismiss Application for Deferred Accounting Order for 2009 [sic] – 2011 Bonus Depreciation ("OCS Response"), Division of Public Utilities' Opposition to Rocky Mountain Power's Motion to Dismiss Office's Application ("DPU Response"), and UAE's Response in Opposition to RMP's Motion to Dismiss OCS's Application for Deferred Accounting ("UAE Response") (collectively, the "Responses"), all filed on May 9, 2011.

I. INTRODUCTION

The Responses do not directly respond to the basis for Rocky Mountain Power's Motion to Dismiss ("Motion")—the Utah Office of Consumer Services' Application for Deferred Accounting Order for 2010-2011 Bonus Depreciation ("Application"), even assuming all of its factual allegations and reasonable inferences from them are true, fails to justify deferred accounting or retroactive ratemaking. Rather, the Office of Consumer Services ("Office") claims that a motion to dismiss is not permitted in a formal adjudicative proceeding or that it is not ripe where regulatory policy issues are presented. OCS Response at 2-3, 4. These arguments are inconsistent with the Utah Administrative Procedures Act, Utah Code Ann. §§ 63G-4-101 *et seq.*, the Commission's rules and widely-accepted practice. The Division of Public Utilities ("Division") claims that the issues are too complex to be dismissed and that the facts in the Application cannot be rebutted or disproved at this stage of the proceeding. DPU Response at 3. The fact that legal issues may be complex does not justify discovery or evidentiary hearings when no relief is available even assuming the facts in the Application are true.

The Utah Association of Energy Users ("UAE") claims that dismissal is inappropriate because many factual and policy issues need to be explored and resolved. UAE Response at 2-4. Contrary to UAE's argument, the Commission may appropriately dismiss the Application now based on its resolution of three legal issues: (1) Is deferred accounting only available for current revenues or costs and not to avoid regulatory lag by capturing a retroactive change in revenue requirement? (2) Is retroactive ratemaking only available for permanent changes in tax expenses and not for tax timing differences that do not affect the total amount of tax expense the Company will ultimately pay or have an impact on the Company's total periodic income tax expense? (3) Is retroactive ratemaking only available for increased revenues or decreased costs if the Company is over earning? The answers to these questions do not depend on disputed facts that

need to be investigated or developed or resolution of complex policy issues, but rather are pure legal issues. If the Commission appropriately answers the first question affirmatively, there is no reason for this matter to proceed based on the relief sought in the Application. If the Commission appropriately answers the first question and either the second or third question affirmatively, there is no reason for this matter to proceed either as a claim for deferred accounting or retroactive ratemaking. If, on the other hand, the Commission answers all three questions negatively, the Company concedes that the Commission needs to make factual determinations and that the Company's Motion should be denied.

II. ARGUMENT

A. Motions to Dismiss May Be Granted in Formal Adjudicative Proceedings.

The OCS Response argues that a motion to dismiss may not be granted in a formal adjudicative proceeding because the Commission must hold an evidentiary hearing. OCS Response at 2-3 (citing Utah Code Ann. §§ 54-1-2.5, 63G-4-204, 63G-4-206; Utah Admin. Code R746-100-2.H).[1] This argument is incorrect because it ignores other provisions of UAPA, the Commission's rules and the fact that agencies in Utah operating under UAPA often grant motions to dismiss in formal adjudicative proceedings.

UAPA explicitly states that it does not prohibit a motion to dismiss (or summary judgment for that matter) prior to evidentiary hearings in a formal adjudicative proceeding. Utah Code Ann. § 63G-4-102(4)(b) ("This chapter does not preclude an agency . . . from . . . granting

[1] Utah Code Ann. § 54-1-2.5 ("[T]he commission shall comply with the procedures and requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its adjudicative proceedings."); Utah Code Ann. §§ 63G-4-204 (specifying the procedures for responsive pleadings in formal adjudicative proceedings under UAPA), -206(1)(d) (stating that "in all formal adjudicative proceedings, a hearing shall be conducted . . . afford[ing] to all parties the opportunity to present evidence, . . . conduct cross-examination, and submit rebuttal evidence"); Utah Admin. Code R746-100-2.H (defining a "formal proceeding" as any "proceeding before the Commission not designated informal by rule, pursuant to Section 63G-4-202").

a timely motion to dismiss or for summary judgment if the requirements of Rule 12(b) or Rule 56 of the Utah Rules of Civil Procedure are met by the moving party"). Reading section 63G-4-102(4)(b) together with section 63G-4-206(1)(d), as required by rules of statutory construction,[2] it is apparent that the Commission may grant a motion to dismiss without holding an evidentiary hearing if an application fails to state a claim upon which relief may be granted.

Likewise, UAPA explicitly allows the Commission to make rules regarding how the Commission conducts its proceedings. *See* Utah Code Ann. § 63G-4-102(6) ("This chapter does not preclude an agency from enacting a rule affecting or governing an adjudicative proceeding"); *see also* Utah Code Ann. § 54-1-1 ("The Public Service Commission is charged with discharging the duties and exercising the legislative, adjudicative, and rule-making powers committed to it by law"). The Commission has exercised its rulemaking power to incorporate the Utah Rules of Civil Procedure into its practices and procedures. *See* Utah Admin. Code R746-100-1.C ("in situations where there is no provision in these rules, the Utah Rules of Civil Procedure shall govern"). The Commission's rules also refer to motions directed at initiatory pleadings. *Id.* R746-100-4.D. Thus, it is apparent that motions to dismiss may be granted under the Commission's rules.[3]

[2] When confronted with an issue of statutory interpretation, the Commission must read all provisions together attempting to give meaning to each part of the statute. *See Anderson v. Bell*, 2010 UT 47, ¶ 9, 234 P.3d 1147 ("our interpretation of a statute requires that each part or section be 'construed in connection with every other part or section so as to produce a *harmonious whole*'") (quoting *State v. Maestas*, 2002 UT 123, ¶ 54, 63 P.3d 621) (citing *Sill v. Hart*, 2007 UT 45, ¶ 7, 162 P.3d 1099) (emphasis added). *See also State v. Schofield*, 2002 UT 132, ¶ 8, 63 P.3d 667; *Nixon v. Salt Lake City Corp.*, 898 P.2d 265, 268 (Utah 1995); *State v. Redd*, 954 P.2d 230, 235 (Utah App. 1998).

[3] Other agencies have reached the same conclusion. For example, the Utah Department of Commerce explicitly recognizes that UAPA does not prohibit the agency from granting a motion to dismiss. *See* Utah Admin. Code R151-4-301(3) (providing that a motion to dismiss for failure to state a claim or for other good cause may be granted); R151-4-302 (providing that a motion to dismiss under Rule 12(b) of the Utah Rules of Civil Procedure shall be filed prior to filing a responsive pleading).

The OCS Response also argues that even if Rule 12(b)(6) does apply, it should be applied with "greater flexibility and informality than judicial proceedings." OCS Response at 3 n.1. Though an administrative proceeding may be less formal and the rules may be applied less rigidly, there is no point in proceeding with a claim if the relief sought is not available even if the facts in the Application and reasonable inferences from them are accepted as true.

Finally, if the Office's argument were correct, the Commission and other Utah administrative agencies would not consider, let alone grant, motions to dismiss in formal adjudicative proceedings. However, motions to dismiss are commonly considered and granted by the Commission and other agencies that are subject to UAPA in Utah.[4]

Here, contrary to the Office's argument, the Commission may appropriately dismiss the Application now if it determines that deferred accounting is not available to capture a retroactive change in revenue requirement to avoid regulatory lag or that retroactive ratemaking is not available for a timing difference in an expense or for increased revenues or decreased costs if the Company is under earning. No matter how "flexibly" or "informally" the Commission may

[4] *See, e.g., Heber Light & Power v. Utah Public Service Comm'n*, 2010 UT 27, ¶ 27, 231 P.3d 1203 (reversing Commission order denying motion to dismiss for lack of jurisdiction); *In re McMillian*, Docket No. 09-019-01, 2011 Utah P.U.C. LEXIS 84, *2 & n.1 (Feb. 28, 2011) (dismissal under Rule 12(b)(1) for lack of jurisdiction); *Barker v. Qwest Corp.*, Docket No. 02-049-46, 2002 Utah P.U.C. LEXIS 148, *3-*4 (Oct. 4, 2002) ("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. However, even giving all of the allegations such consideration, the conclusion must be reached that . . . [w]e are unable to proceed further."); *Petitioner 1 & Petitioner 2 v. Utah State Tax Comm'n*, Appeal No. 09-2960, 2010 Utah Tax LEXIS 28 (Utah Tax Comm'n Mar. 18, 2010) (granting Auditing Division's motion to dismiss on the basis that petitioners did not file their petition within the 30-day statutory period); *Petitioner v. Taxpayer Servs.*, Appeal No. 09-2732, 2010 Utah Tax LEXIS 61 (Utah Tax Comm'n Aug. 26, 2010) (granting Taxpayer Services Division's motion to dismiss on the basis of failure to state a claim upon which relief may be granted); *Petitioner v. Auditing Div. of the Utah State Tax Comm'n*, Appeal No. 09-0569, 2009 Utah Tax LEXIS 72 (Utah Tax Comm'n, 2009) (granting the Auditing Division's motion to dismiss based on Petitioner's failure to state a claim upon which relief may be granted).

apply Rule 12(b)(6), the Application should be dismissed if these straightforward legal issues are decided in the Company's favor. That is the point of a motion to dismiss.

B. The Motion to Dismiss Is Ripe for Administrative Review.

The OCS Response argues that motions to dismiss involving regulatory policy issues are not ripe. OCS Response at 4. This argument is contrary to common practice.[5] Furthermore, the case the OCS Response cites in support of the argument, *In the Matter of Julie's Limousine & Coachworks, Inc.*, Docket No. CAA-04-2002-1508, (Environmental Protection Agency, Administrator's Order Denying Respondent's Motion to Dismiss, Nov. 26, 2002) ("*Julie's Limousine*"), has a different context than this case. In *Julie's Limousine*, there was a dispute regarding which regulation applied because there was a change in regulations during the timeframe at issue. *Julie's Limousine* at 4. Here, there is no dispute about regulations or their application. Thus, the Office's reliance on *Julie's Limousine* is misplaced, and the Application should be dismissed.

C. The Motion Does Not Depend on Improper Factual Allegations.

The Responses argue that the Commission, in ruling on the Motion, must assume the facts alleged in the Application to be true. The Company agrees. Motion at 11. However, UAE then argues that because the Motion "relies upon six pages of factual allegations," the Motion must be denied or must at least be converted to a motion for summary judgment and denied if there is any genuine issue of material fact. UAE Response at 2-4. The Division argues the Application should not be dismissed because the "extent to which facts set forth in the Application can be rebutted or disproved" is unknown at this stage of the proceeding. DPU Response at 3. These arguments are incorrect.

[5] *See, e.g.*, cases cited in footnote 4, *supra*.

First, as mentioned in the Motion, the Commission may take notice of facts of record in ruling on the Motion. Motion at 10. It is well established that doing so does not convert the Motion into a motion for summary judgment. *See, e.g., Tal v. Hogan*, 453 F.3d 1244, 1265 n.24 (10th Cir. 2006) ("[F]acts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment."); *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp.2d 1201, 1206 n.5 (D. Utah 2004) ("Furthermore, 'a court may take judicial notice of matters of public record outside the pleadings without converting a motion to dismiss' into a motion for summary judgment.") (citing James Wm. Moore et al., Moore's Federal Practice ¶ 56.30 (3d ed. 1997)).

The "six pages of factual allegations" in the Motion are facts in the Application or facts of which the Commission may take notice. Most of the "facts" are simply a recitation of the procedural history in the cases and acts of Congress mentioned in the Application. These are not subject to dispute, and the Commission may take notice of the record in other proceedings. Utah Code Ann. § 63G-4-206(1)(b)(iv). In addition, the Motion provides a summary explanation of how bonus depreciation affects utility accounts for ratemaking and tax purposes. This explanation is not controversial and is a technical fact within the Commission's expertise of which it may take notice. *Id.*

The Motion refers to two other matters as facts: the Company's earnings in 2009 and 2010 and how the Commission has previously treated amortization of deferred accounts. With regard to the Company's earnings, as stated in the Motion, the earnings figures provided in the Motion are from the Company's semi-annual Results of Operations filed with the Commission, the Division and the Office of Consumer Services ("Office") and available to the public. Motion at 9, n. 8. The Commission may take notice of those reports. No party has claimed that there is

any error in these reports nor could it reasonably do so.[6] With regard to how the Commission has previously treated amortizations of deferred accounts, the Motion simply cites a Commission order. Again this is something the Commission may take notice of. Utah Code Ann. § 63G-4-206(1)(b)(iv).

The Responses have not identified any facts in the Motion that are disputed. The Motion does not rely on any facts that are inconsistent with the facts in the Application or which are controversial.

Second, the Division's concern about the veracity of the facts in the Application is misplaced. As stated above, on a motion to dismiss all of the factual allegations in the Application are accepted as true. Thus, the issue of whether the facts in the Application may later be rebutted or disproved is irrelevant.

D. Exceptions to the Rule Against Retroactive Ratemaking Depend on Company Earnings.

The UAE Response claims that the Company's argument that retroactive ratemaking depends on Company earnings is contrary to *MCI Telecomm. Corp. v. Utah Public Service Comm'n*, 840 P.2d 756 (Utah 1992) and *Utah Dep't of Business Regulations v. Public Service Comm'n*, 720 P.2d 420 (Utah 1986) ("*EBA Case*"). UAE Response at 5. A brief review of these cases and the exceptions to the rule against retroactive ratemaking demonstrates the deficiency of these arguments.

In the *EBA Case*, Utah Power & Light sought to make up for under earnings by shifting a surplus in its Energy Balancing Account ("EBA") to its general revenues for the benefit of

[6] The Company and the Commission, Division and Office rely upon these reports to monitor the Company's earnings and to determine when and if rate relief may be necessary. Therefore, while the reports are not formally audited, they are reviewed and are relied upon as a reasonable and dependable source of information by the Company, regulators and state agencies.

shareholders. *EBA Case*, 720 P.2d at 420. The Court concluded that the Commission did not have authority to "permit[] a utility to have retroactive revenue adjustments in order to guarantee shareholders the rate of return initially anticipated." *Id.* at 423. The Court held "[t]he utility cannot use the energy cost pass-through procedure to shift to ratepayers the risk of misprojecting nonenergy components of the general rate." *Id.* at 424. Thus, the case did not recognize any exception to the rule against retroactive ratemaking and, therefore, did not consider whether exceptions to the rule depend on utility earnings. In short, the *EBA Case* has no bearing on the issue presented here.

MCI, on the other hand, specifically addressed when exceptions to the rule against retroactive ratemaking could be applied. After discussing U.S. West's significant over earnings in some detail (*MCI*, 840 P.2d at 768), the Court reviewed cases recognizing an exception to the rule against retroactive ratemaking when an unforeseeable and extraordinary increase in utility expenses resulted from a natural disaster. *Id.* at 771. The justification for this exception, noted by the Court, was that absent such an exception, a utility would not be afforded a reasonable opportunity to earn a reasonable rate of return. *Id.* Thus, it is clear the exception for an unforeseeable and extraordinary event that caused a decrease in earnings would only be justified if the utility was earning less than its authorized return as a result.

This rationale for the rule is demonstrated by a hypothetical example. Assume the Company were earning in excess of its authorized rate of return, but that an event caused an unforeseeable and extraordinary decrease in its earnings to the authorized level. Would the Company be justified in claiming that it should be able to surcharge customers to recover the lost earnings based on the unforeseeable and extraordinary exception to the rule against retroactive ratemaking? Of course not. Likewise, customers are not entitled to a refund resulting from an

unforeseeable and extraordinary increase in earnings, unless the increase results in the Company earning in excess of its authorized return.

This rationale is confirmed by the Court's holding and direction on remand in *MCI*. After holding that an exception to the rule against retroactive ratemaking for unforeseeable and extraordinary increases or decreases in expenses is recognized in Utah (*id.* at 772), the Court directed the Commission on remand to make factual findings that, "at a minimum, include (1) U.S. West's earnings and rate of return for the years 1986, 1987, 1988, and 1989 . . . ; (2) the extent to which U.S West's earnings exceeded the authorized rate of return in 1987, 1988, and 1989 . . . ." *Id.* at 774. The Court went on to state:

> *[I]f a utility earns profits in excess of its authorized rate of return because of an exception to the rule against retroactive ratemaking*, the authorized return is the best available measure of a fair return and *earnings in excess of that rate are subject to refund*. Accordingly, if on remand the Tax Reform Act of 1986 is found to have resulted in an unforeseeable and extraordinary decrease in expenses . . . , *we hold that U.S. West's earnings, to the extent they exceeded its authorized rate of return* established in the 1985 general rate case, *should be refunded* to U.S. West ratepayers.

Id. at 776 (emphasis added). The Court clearly and explicitly recognized that application of exceptions to the rule against retroactive ratemaking is contingent on the level of utility earnings.

UAE's argument ignores this straightforward direction from the Court. It is beyond dispute that the Company earned substantially less than its authorized rate of return on equity during the period for which the Office seeks deferred accounting or retroactive ratemaking. Therefore, the Application should be dismissed.

E. Deferred Accounting Is an Accounting Issue.

The UAE Response argues that the Motion's focus on accounting standards is too heavy. UAE Response at 4. In support of this position, it relies on the Commission's Report and Order in Docket Nos. 06-035-163, 07-035-04 and 07-035-14 ("*Deferred Accounting Order*"). In its

Motion, the Company cited and quoted extensively from that order and acknowledged and quoted the Commission's statement on which UAE's argument is based. Motion at 12. But contrary to the implication of UAE's Response, the Commission did not say that accounting rules should be given almost no consideration in deciding whether to grant deferred accounting. The Commission said "ratemaking rules and principles . . . may be given greater weight than accounting rules and principles in considering whether to issue an accounting order." *Deferred Accounting Order* at 17. Given that a deferred accounting order is an order regarding accounting, it is clear that accounting rules and principles must be given significant weight, even if less weight than ratemaking principles.

Giving *any* weight to accounting rules and principles, it is clear that the relief sought by the Application is not appropriate deferred accounting for the reasons stated in the Motion. UAE's Response has not even addressed, let alone rebutted these reasons. In summary, the purpose of deferred accounting is to defer recognition of expenses or revenues in a current period for possible ratemaking treatment in a subsequent period. This purpose is not applicable to the Application, which seeks deferral of a retroactive change in revenue requirement for the purpose of avoiding regulatory lag, not deferral of any revenue or cost.

III. CONCLUSION

The Responses do not directly address, let alone rebut the bases for the Motion. The Application should be dismissed because (1) deferred accounting is not appropriate for regulatory lag associated with a retroactive change in revenue requirement rather than for a current revenue or cost, (2) the changes in tax depreciation referenced in the Application only result in tax timing differences, do not affect the total amount of tax expense the Company will ultimately pay and have no impact on the Company's total periodic income tax expense for financial accounting or ratemaking purposes, (3) the Company is already properly accounting for

accumulated deferred income taxes consistent with the changes 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, and (4) retroactive ratemaking for an increased revenue or decreased expense is not appropriate when the Company is earning less than its authorized rate of return. The Motion is well taken and the Application should be dismissed.

DATED: May 19, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2011, I caused to be emailed, a true and correct copy of the foregoing **ROCKY MOUNTAIN POWER'S REPLY TO THE OCS, DPU AND UAE RESPONSES IN OPPOSITION TO MOTION TO DISMISS** to the following:

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