ARIZONA TAX COURT

TX 2005-050206 04/13/2006

HONORABLE MARK W. ARMSTRONG

CLERK OF THE COURT
L. Slaughter
Deputy

FILED:_____

DUKE ENERGY ARLINGTON VALLEY LLC, et al.

PAUL J MOONEY

v.

ARIZONA STATE DEPARTMENT OF REVENUE

FRANK BOUCEK III

JIM L WRIGHT

UNDER ADVISEMENT RULING

This matter was taken under advisement after oral argument on Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment held April 10, 2006. The Court has considered the papers and arguments of counsel.

I. ISSUE PRESENTED

Under A.R.S. § 42-14156(A)(3), is the valuation table adopted a guideline, and therefore exempt from the formal rulemaking requirements of the Arizona Administrative Procedures Act, when it is used to determine the value of all electric generation facilities in the State of Arizona?

II. STATEMENT OF FACTS

Duke Energy, Griffith Energy, Mesquite Power, and Harquahala Generating Company ("Plaintiffs") seek to have the Tax Court declare invalid a valuation table created and relied upon by the defendant, Arizona Department of Revenue ("Department"), to value certain electric generation facilities pursuant to A.R.S. § 42-14156. Plaintiffs own and operate individual electrical generation facilities in the State of Arizona. Section 42-14156 provides that:

> A. The valuation of electric generation facilities … shall be determined as follows:
> …

3. The valuation of personal property used in operating the facility is the cost multiplied by the valuation factors as prescribed by tables adopted by the department, adjusted as follows:
   a. For the first year of assessment, the department shall use thirty-five per cent of the scheduled depreciated value.
   b. For the second year of assessment, the department shall use fifty-one per cent of the scheduled depreciated value.
   c. For the third year of assessment, the department shall use sixty-seven per cent of the scheduled depreciated value.
   d. For the fourth year of assessment, the department shall use eighty-three per cent of the scheduled depreciated value.
   e. For the fifth and subsequent years of assessment, the department shall use the scheduled depreciated value as prescribed in the department's guidelines.

Pursuant to A.R.S. § 42-14156(A)(3), the Department created and adopted a valuation table ("Table"), which applies to the personal property of electric generation facilities a 25-year life, ten-percent minimum value or floor, and the phase-in factors required by the statute. The Table is a straight-line depreciation table based on cost factors provided by Marshall and Swift, an outside service. The Department updates the Table yearly to take into account annual inflation adjustments to the cost factors. The Table was adopted over a period of several years, during which the Department held meetings with electric generation industry representatives to develop the formula contained in A.R.S. § 42-14156.

III. PLAINTIFFS' ARGUMENTS

A. The Table is a "rule" as defined under the Arizona Administrative Procedures Act.

Plaintiffs argue that the Legislature did not expressly state whether the tables it directs the Department to adopt in A.R.S. § 42-14156(A)(3) are "rules" or "guidelines." Therefore, Plaintiffs claim they are entitled to summary judgment as a matter of law because the Table is a "rule" as defined by the Arizona Administrative Procedures Act ("APA"). According to the APA, "a 'Rule' means an agency statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency." A.R.S. § 41-1001(17). Plaintiffs claim that the Department is an "agency" as defined in A.R.S. § 41-1001(17), and the Table is a "statement of general applicability" because it is used by the Department to value ***all*** electric generation facilities in the State of Arizona under A.R.S. §§ 42-14151 and 42-14156(A)(3). Plaintiffs also claim that the Table "implements, interprets or prescribes" A.R.S. § 42-14156's directive that the valuation must be "prescribed by tables adopted by the department." According to Plaintiffs, the Department is unable to determine the valuation of electric generation facilities without resorting to the Table. Therefore, they claim that the Table meets the statutory definition of a "rule" under the APA.

In addition, Plaintiffs oppose the Department's application of the rule of statutory construction that specific statutes control over general statutes. *Mercy Healthcare Ariz., Inc. v. Ariz. Health Care Cost Containment Sys.*, 181 Ariz. 95, 100, 887 P.2d 625, 630 (App. 1994). According to Plaintiffs, the rule does not apply here because there is no general statute over which this specific statute prevails.

B. The Table is invalid because the Department did not comply with the APA's procedures and requirements.

Plaintiffs argue that because the Table is a "rule" within the meaning of the APA, in order to be valid it must have been adopted in compliance with the APA's rulemaking requirements. Pursuant to the APA's Article 3 on Rule Making, A.R.S. § 41-1030(A) provides that "a rule is invalid unless it is made and approved in substantial compliance with sections 41-1021 through 41-1029 and articles 4, 4.1 and 5 of this chapter, unless otherwise provided by law." Thus, Plaintiffs argue that the Table is invalid as a matter of law because the Department failed to comply with the APA's rulemaking procedures. They contend that although the Department may argue that it performed most of the requirements for rulemaking without going through the formal APA procedures, there is nothing in the APA that provides an exception from the formal rulemaking requirements if an agency performs some, but not all, of the requirements.

Plaintiffs claim that the APA's purpose for public participation in rulemaking is "to ensure that those affected by a rule have adequate notice of the agency's proposed procedures and the opportunity for input into the consideration of those procedures." *Carondelet Health Services, Inc. v. Ariz. Health Care Cost Containment Sys. Admin.*, 182 Ariz. 221, 227, 895 P.2d 133, 139 (App. 1995). According to Plaintiffs, the Department rebuffed their efforts to participate in the process by which the Table was adopted and unilaterally determined to use a 25-year economic life without conducting a single public hearing.

Plaintiffs also argue that courts have consistently upheld the requirement that statements of general applicability must be adopted pursuant to the formal rulemaking process. *Southwest Ambulance, Inc. v. Ariz. Dept. of Health Srvcs.*, 183 Ariz. 258, 902 P.2d 1362 (App. 1995) (superseded by statute as stated in *Phoenix Children's Hosp. v. Ariz. Health Care Cost Containment Sys. Admin.*, 195 Ariz. 277, 987 P.2d 763 (App. 1999)). In *Southwest Ambulance*, the court found that schedules established by the Department of Health Services, prescribing the amounts that ambulance companies could charge for their services on a statewide basis, should have been adopted in accordance with rulemaking procedures. *Id.* at 261.

C. Fact that the valuation can be adjusted does not render the Table immune from rulemaking requirements.

According to Plaintiffs, the fact that the obsolescence provisions in A.R.S. § 42-14156(a)(4) permit the Department to make further adjustments to values calculated in accordance with the Table does not mean that the Table is not a "rule." In other words, the fact

that a rule has an exception does not excuse compliance with the APA's rulemaking requirements. According to Plaintiffs, the Department concedes that it cannot determine the valuation of electric generation facilities without resorting to the Table itself. Therefore, even if the Department can make additional obsolescence adjustments, it does not negate use of the Table as a rule.

D. Impracticability is not an excuse for compliance with the APA.

Plaintiffs refute the Department's argument that the use of rulemaking for a valuation table that changes yearly is impracticable by arguing that the APA does not have any exceptions for impracticability. Plaintiffs state that this is not a case where the standards adopted by the Department are "so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule." *Ariz. Corp. Comm'n v. Palm Springs Util.*, 24 Ariz. 124, 129, 536 P.2d 245, 250 (App. 1975). According to Plaintiffs, the fact that the Department may have to adjust the Table once a year to account for changes in the Marshall and Swift factors does not legitimize avoiding the rulemaking process. In addition, Plaintiffs claim the Department could easily address any such year-to-year issues through obsolescence adjustments.

E. If the Table is a "guideline," it is not binding on Plaintiffs and is not entitled to any special weight.

Finally, Plaintiffs argue that if the Tax Court accepts the Department's claim that the Table is merely a guideline, it should issue a judicial declaration to that effect. Plaintiffs claim that the Department's characterization of the Table as a guideline is contrary to its position in defending against the valuation appeals involving Plaintiffs' properties. Therefore, according to Plaintiffs, if the Tax Court should declare the Table a guideline, the Table should not be entitled to any special weight and should not be binding in the valuation of Plaintiffs' electric generation facilities.

IV. DEFENDANT'S ARGUMENTS

A. The plain language of the statute supports the conclusion that the Table is a guideline.

The Department argues that the plain language of A.R.S. § 14-14156(A)(3) instructs the Department to adopt a depreciation "guideline" for personal property, thereby indicating that the Legislature contemplated the Table as a guideline, not as a rule, and did not intend the APA to apply. The Department claims that the Legislature, if it had intended to do so, knows how to tell the Department that it should adopt a rule. According to the Department, a search of the Arizona Revised Statutes results in approximately 350 statutes containing the phrase "shall adopt rules." The Department cites *State v. Heinze*, 196 Ariz. 126, 131, 993 P.3d 1090, 1095 (App. 1999) for the assertion that, under statutory rules of construction, it is improper to read into a statute a provision that the Legislature has specifically provided for in other statutes, but not in the statute

in question. The Department claims that the Legislature could have easily instructed the Department to adopt a rule if that is what the Legislature had intended, but that there is nothing in the language of the statute to support that the Table was intended to be adopted as a rule.

In addition, the Department argues that a basic rule of statutory construction is that if a specific statute conflicts with a general statute, the specific statute is treated as an exception to the general statute, and the specific statute controls. *Mercy Healthcare*, 181 Ariz. at 100, 887 P.2d at 630. The Department notes that, as the Tax Court previously held, the plain language of the specific valuation statute authorizing the Department to adopt depreciation guidelines exempts the Department from the general rulemaking requirements imposed under the APA. *Griffith Energy, LLC v. Ariz. Dept. of Revenue*, (TX 2003-000002, Minute Entry Decision, 11/23/2003).

B. The Table does not meet the definition of a rule.

The Department argues that in adopting A.R.S. § 42-14156, the Legislature not only did not instruct the Department to adopt a rule, but also created a means to adjust the Department's guideline by including an obsolescence provision. A.R.S. § 42-14156(A)(4) provides that "the taxpayer may submit documentation showing the need for, and the department shall consider, an additional adjustment to recognize obsolescence." Thus, the Department argues that the Table is merely a starting point and does not operate as a hard and fast rule from which the Department cannot deviate. Because it cannot be said that the Table alone "implements, interprets, or prescribes law or policy," the Department claims that the Table does not meet the definition of a rule.

C. The Legislature has adopted the Department's valuation table.

The Department points out that after it adopted the Table in 2002, the Legislature amended A.R.S. § 41-14156 in 2003 without changing the language authorizing the Department to adopt depreciation guidelines. When a statute is enacted and an administrative agency responsible for interpreting the statute has done so, and the Legislature reenacts the provisions at issue without change, it presumably adopts the administrative or legal interpretation with approval. *Hamilton v. State*, 186 Ariz. 590, 595, 925 P.2d 731, 736 (App. 1996). Therefore, the Department argues that the Legislature presumably knew in 2003 that the Table had been developed as a guideline, and by not amending the statute to require that the Table be adopted as a rule, the Legislature ratified the Department's adoption of the Table as a guideline.

D. The use of rulemaking for valuation tables that change yearly is impractical.

According to the Department, the typical time to develop and promulgate a rule is greater than 12 months. Thus, the Department claims it was necessary to issue the Table as a guideline because making it a rule is impractical given that the Marshall and Swift inflation cost factors upon which it is based change yearly. Pursuant to A.R.S. § 41-1028, when incorporating outside

information, only current year information may be incorporated by reference. Consequently, the Department argues that if it were compelled to adopt the Table as a rule, it would have to use the rulemaking process every year to change the Marshall and Swift components, which would make it impossible to meet the yearly statutory deadlines for issuing values.

In addition, the Department points out that Arizona courts have recognized an exception to the APA in situations where the standards adopted by an agency are "so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule." *Palm Springs Util.*, 24 Ariz. at 129, 536 P.2d at 250. The Department argues that the fact that the Table changes yearly makes it so varying and specialized as to be impossible to capture within the boundaries of a rule.

E. Plaintiffs' rulemaking arguments have no merit.

According to the Department, the cases relied upon by Plaintiffs in support of rulemaking are inapposite. In *Carondelet*, the Legislature provided direction in the original legislation requiring the billing charges to be adopted as a rule. 182 Ariz. at 224, 895 P.2d at 136. The Department argues that, here, not only is there no direction by the Legislature that the Table is a rule, but the statute specifically refers to depreciation guidelines. Moreover, unlike the hospitals in *Carondelet*, the Department claims that the electric generation industry participated in the process of drafting A.R.S. § 42-14156. The Department distinguishes *Southwest Ambulance* for the same reasons. In addition, the Department points out that the court in *Carondelet* discussed the *Palm Springs Util.* decision. The court acknowledged the exception to rulemaking when the problem is so specialized and varying in nature that it is impossible to capture within the boundaries of a general rule, but it concluded that *Carondelet* did not involve such a situation. 182 Ariz. at 229, 895 P.2d at 141. The Department claims that this refutes Plaintiffs' assertion that impracticality is not a consideration.

V. CONCLUSION

A.R.S. § 42-14156(A)(3) provides that "the valuation of personal property used in operating the facility is the cost multiplied by the valuation factors as prescribed by tables adopted by the department." Thus, the Table adopted by the Department is a schedule of depreciated values. A.R.S. §§ 42-14156(A)(3)(a)-(d) provide for adjustments during Years 1 through 4 of stated percentages "of the scheduled depreciated value." Therefore, it seems clear from the language in these subsections that the adjustments are to the value stated in the Table adopted by the Department. A.R.S. § 42-14156(A)(3)(e) provides that "for the fifth and subsequent years of assessment, the department shall use the scheduled depreciated value as prescribed in the department's guidelines." Once again, subsection (e) refers to "scheduled depreciated value," which is what is contained in the Table adopted by the Department. Therefore, when examining the plain language of A.R.S. § 42-14156(A)(3) in its entirety, it appears clear that the statute is alluding to "tables adopted by the department" when referring to "the department's guidelines."

On the other hand, there is some credence to Plaintiffs' argument that the Department's use of the Table meets the definition of a rule. All property is given an initial life of 25 years, and the only way to change it is to prove evidence of obsolescence under A.R.S. § 42-14156(A)(4). However, because the plain language of the statute refers to the Table as a guideline, the Court does not believe that we reach the issue of whether the Table is a "rule" under the APA. Following the reasoning of *Mercy Healthcare*, the plain language of A.R.S. § 42-14156(A)(3) exempts the Department from the general rulemaking requirements of the APA. 181 Ariz. at 100, 887 P.2d at 630 (When a general and a specific statute conflict, we treat the specific statute as an exception to the general, and the specific statute controls). In addition, the idea that the Legislature intended the Table to be a guideline is strengthened by the fact that the Legislature amended the statute in 2003 and did nothing to change the agency interpretation. Consequently, the Court finds that the Department is entitled to summary judgment as a matter of law.

IT IS THEREFORE ORDERED granting Defendant's Motion for Summary Judgment, the Court expressly finding that the subject Table is a guideline and not a rule.

IT IS FURTHER ORDERED denying Plaintiff's Motion for Summary Judgment.