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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Complaint of Rocky Mountain Power, a Division of PacifiCorp, Against Heber Light & Power Regarding Unauthorized Service by Heber Light & Power in Areas Certificated to Rocky Mountain Power	Docket No. 07-035-22 HEBER LIGHT & POWER COMPANY'S RESPONSE TO ROCKY MOUNTAIN POWER'S MOTION TO SET SCHEDULE
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Heber Light & Power Company ("HLP") hereby submits this response to Rocky Mountain Power's Motion to Set Schedule.

INTRODUCTION

On March 26, 2009, the Commission held a conference to determine the proper schedule in this matter. Acting through the administrative law judge, the Commission made clear that a

scheduling order setting discovery deadlines, prefiled testimony, and a hearing would serve no useful purpose, until the Commission determined whether HLP's appeal divested the Commission of jurisdiction. Others present stated their opposition to even allowing discovery to precede pending resolution of an appeal that may leave the Commission without subject matter jurisdiction. Following this hearing, the Commission set a briefing schedule on the issue of whether the appeal divested the Commission of jurisdiction, but chose not to set other deadlines.

Against this backdrop, RMP moves the Commission to enter a scheduling order setting the very deadlines that the Commission had previously refused to set. RMP provides no meaningful reason why the Commission should change its earlier determination not to set these deadlines.¹ For this reason and the reasons set forth below, the Commission should deny RMP's Motion to Set Schedule.

A. HLP's Appeal of the Commission's Jurisdictional Ruling Divests the Commission of Jurisdiction.

In a separate motion, HLP has requested that the Commission stay these proceedings because the appeal divests the Commission of jurisdiction pending appeal. For the reasons set forth in HLP's motion, the Commission lacks jurisdiction to enter the scheduling order and the Commission should deny the RMP's Motion to Set Schedule.

¹ RMP seeks to justify its approach as follows:

By filing this motion in advance of the deadline for HLP to file its motion to stay, Rocky Mountain Power does not seek to confuse or interfere with the schedule set for that motion. Rather, inasmuch as there is no schedule currently in place, Rocky Mountain Power believes this motion will provide a context for HLP's proposed motion.

RMP's Motion to Set Schedule at p. 6.

B. Assuming *Arguendo* that HLP's Appeal Does Not Divest the Commission of Jurisdiction, the Commission Should Still Deny RMP's Motion to Set Schedule.

Assuming that the Commission has jurisdiction notwithstanding HLP's appeal, which it does not, the Commission should still deny RMP's Motion to Set Schedule. First, no good reason exists to require the parties to incur the costs and inconvenience of discovery and litigation before a tribunal that may not have jurisdiction. Second, RMP has presented no good reason why the Commission should simply adopt RMP's proposed schedule without holding a scheduling conference to hear from the parties as is the Commission's normal practice. Each of these additional grounds for denying RMP's motion is discussed below.

1. The Commission Should Not Adopt a Schedule That Forces The Parties to Incur the Costs of Litigation Before the Supreme Court Determines Whether the Commission Has Jurisdiction.

Neither the Commission nor any party has an interest in incurring the cost and inconvenience of litigation which is rendered a nullity by a Supreme Court ruling leaving the Commission without jurisdiction. RMP implicitly acknowledges this possibility and that any scheduling order or other order could be vacated depending on the Supreme Court's decision. *RMP's Motion to Set Schedule* at p. 6. In other words, RMP requests that the Commission set a schedule which may or may not be consistent with the timing and substance of the Supreme Court's ruling and which would force the parties to incur the cost and expense of discovery in a proceeding where the Commission may have no jurisdiction. No good reason exists for forcing the parties to incur these expenses until the Supreme Court resolves the jurisdiction issue.

Little weight should be given to RMP's claims about delay.

First, RMP has agreed to stay these proceedings for many months without harm to itself or others. In fact, RMP agreed to stay these proceedings for approximately eighteen months following the filing of its complaint. *RMP Motion to Set Schedule* at p. 2. Moreover, during

these proceedings, RMP has issued will-serve letters to customers inside HLP's historic service area. *RMP Response HLP Data Request* 19. It is thus clear that this litigation has not affected developers seeking service. Second, if RMP were truly interested in an expeditious resolution of this dispute, it would have promptly provided complete responses to HLP's discovery or commenced this action in district court which unquestionably has jurisdiction to determine HLP's authority to serve. Finally, notwithstanding RMP's mischaracterization of HLP's argument, HLP's interests are not served by the Commission setting a discovery schedule and this matter proceeding in the Commission. As stated in its arguments before the Supreme Court, the Commission has completed determination on the legal question of whether HLP could be a public utility, and thus no further proceedings in the Commission are required on that issue. *Heber Light & Power's Response to Rocky Mountain Power's Motion to Dismiss for Lack of Jurisdiction*, p. 2, 4 (Utah Supreme Court). HLP's interests are served by resolution of this legal issue in the Supreme Court, not by factual discovery or proceedings before the Commission.

In sum, even if the appeal did not divest the Commission of jurisdiction, no good reason would exist for forcing the parties to proceed with discovery, until the Supreme Court determines whether the commission has jurisdiction.

2. RMP Has Offered No Reason for Abandoning its Ordinary Procedure for Setting Schedules.

RMP acknowledges that the Commission cannot set a schedule until after the Commission determines whether the appeal divests the Commission of jurisdiction. *RMP Motion to Set Schedule*, at p. 6. It however does not explain why the Commission should simply adopt RMP's schedule rather than following the Commission's ordinary practice of setting a scheduling conference to hear from all affected parties on the proper schedule. The Commission

would hold such a scheduling conference only after ruling on its own jurisdiction pending the appeal.

At such a scheduling conference, the following concerns with RMP's proposed scheduled would be explored:

1. Discovery Cutoff. RMP proposes a discovery cutoff of August 31, 2009. This discovery cutoff is unreasonably short for the following reasons:

(a) HLP has not been able to proceed with discovery because, at RMP's request, RMP and HLP have not exchanged supplemental discovery responses as originally planned in January, 2009. RMP has not provided a new date when these supplemental responses can be expected. Until these responses are provided, HLP cannot proceed effectively with written discovery or depositions.

(b) The parties currently anticipate in excess of twenty depositions, in addition to further written discovery. Many of the deponents are not current employees of any of the parties. It is unrealistic to expect that all of these depositions can be reasonably scheduled during the summer months.

Given these issues, a reasonable discovery cutoff would be October 31, 2009 and the other deadlines should be adjusted accordingly.

2. Filing of Prefiled Testimony. The prior scheduling order in this matter provided for staggered submission of prefiled testimony with RMP filing its direct testimony, followed by HLP's rebuttal testimony. Contrary to this usual practice of the Commission, RMP's proposed order would require HLP to file its first round of testimony simultaneously with RMP. As the party seeking relief, RMP should file its testimony first, thereby allowing HLP to respond in a meaningful way to RMP's case.

CONCLUSION

For these reasons, the Commission should deny Rocky Mountain Power's Motion to Set Schedule.

Dated this 15th day of April, 2009.

/s/ _____
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **HEBER LIGHT & POWER COMPANY'S RESPONSE TO ROCKY MOUNTAIN POWER'S MOTION TO SET SCHEDULE** to be served upon the following by email to the email addresses shown below on April 15, 2009:

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