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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 **ROCKY MOUNTAIN POWER'S REPLY ON MOTION TO SET SCHEDULE**

Rocky Mountain Power, a division of PacifiCorp ("Rocky Mountain Power"), pursuant to Utah Administrative Code R746-100-4.D, respectfully replies to "Heber Light & Power Company's Response to Rocky Mountain Power's Motion to Set Schedule" ("Response") dated April 15, 2009.

I. INTRODUCTION

Heber Light & Power Company's ("HLP") Response was filed in opposition to Rocky Mountain Power's Motion to Set Schedule ("Motion") dated March 31, 2009. The Motion requested the Commission to enter an Amended Scheduling Order in the form of Appendix 1 to the Motion. Appendix 1 proposed a schedule with a cutoff for discovery not directed to filed testimony on August 31, 2009, filing of testimony over the following two and one-half months, and hearings approximately three weeks later from December 8-10, 2009.

HLP's Response both objects to the Commission setting a schedule and objects to certain aspects of the schedule proposed by Rocky Mountain Power. As part of its Response, HLP suggests that it was improper for Rocky Mountain Power even to make the Motion. Response at 2. This Reply will demonstrate that it was not improper for Rocky Mountain Power to make the Motion and that the Response is unpersuasive. Accordingly, the Commission should grant the Motion and set a schedule as proposed in the Motion modified to accommodate the calendars of the Commission and parties.

II. ARGUMENT

A. The Motion Is Appropriate in This Unique Case.

Rocky Mountain Power understands, as noted in the Response, that proposing a schedule through a motion is not the ordinary practice before the Commission. Response at 4. Rocky Mountain Power anticipated that it was unlikely that the Commission would adopt the schedule proposed in the Motion without input from the parties and consideration of its own calendar. HLP has now provided its input, which the Commission can consider in setting a schedule. Rocky Mountain Power departed from ordinary practice for several reasons.

First, this case is unique. As far as Rocky Mountain Power is aware, this is the first time that a public utility has been forced to formally challenge a municipal power system's incursion

into its certificated service area to provide retail service in Utah. There certainly have been and are other incursions, but none is of the magnitude or involves the sort of direct competition for customers present in this case. Rocky Mountain Power has successfully worked out these other situations without the need to resort to litigation. Had HLP not recommended that the Wasatch County Council revoke Rocky Mountain Power's franchise in HLP's self-defined service territory, this action would not have been commenced when it was. In fact, even after filing this action, Rocky Mountain Power has twice agreed with HLP to lengthy stays in the hopes of negotiating a satisfactory resolution. However, such attempts and several attempts prior to April of 2007 have all ultimately proven fruitless, so it appears that litigation is the only avenue available to resolve a unique and unsatisfactory situation.

Second, as the Commission is well aware from the Status and Scheduling Conference, both parties recognize the need for this long-standing dispute to be resolved expeditiously. In fact, but for a disagreement about the context for discovery, both parties indicated a willingness during the Status and Scheduling Conference to participate in discovery even while HLP's interlocutory appeal is pending in order to expedite resolution regardless of any decision of the Supreme Court.[1] The Court's decision in the interlocutory appeal will not resolve the matter, it will simply determine whether it will be initially addressed by the Commission or by a district court.

Third, Rocky Mountain Power believes the dispute between the parties will only be resolved expeditiously if the parties are required to work toward resolution under a schedule. In that regard, Rocky Mountain Power believes its proposed schedule is realistic and reasonable and that subject to modification to accommodate the Commission's and the parties' calendars, it

[1] HLP has now apparently changed its mind about the need to move this matter along by continuing discovery while its interlocutory appeal is pending. Response at 4.

represents a reasonable goal to which the parties should work subject to a decision by the Utah Supreme Court on HLP's interlocutory appeal.[2]

Fourth, valuable time that could be used to further resolution of this dispute continues to pass as HLP's motion for stay and its interlocutory appeal are pending. Rocky Mountain Power does not anticipate a ruling by the Commission on the Motion prior to ruling on HLP's motion for stay. Contrary to the implication of the Response, in filing the Motion Rocky Mountain Power did not disregard the Commission's informal indication in the Status and Scheduling Conference that it wished to decide the motion for stay before taking further action. Rocky Mountain Power has simply teed up further scheduling in the Motion to expedite scheduling assuming the Commission denies the motion for stay.

In this context, it was entirely appropriate for Rocky Mountain Power to file the Motion. Certainly, there is no legal reason it should not have done so. HLP argues that its interlocutory appeal divested the Commission of jurisdiction. Response at 2. However, on the same day it filed its petition for review, HLP filed a motion requesting the Commission to strike the current scheduling order in this matter, not on the basis of the interlocutory appeal, but on the basis of discovery disputes between the parties.[3] If the Commission was divested of jurisdiction by HLP's interlocutory appeal, one can only wonder why it was necessary for HLP to seek vacation of the schedule because of a discovery dispute. Furthermore, given that the Commission granted HLP's motion to strike the schedule, there are no proceedings currently pending before the

[2] The reasonableness of the proposed schedule is addressed further in part II.C, below.

[3] *See* Heber Light & Power Company's (1) Motion to Strike Scheduling Order and (2) Response to Rocky Mountain Power's Motion to Continue Testimony Filing Date.

Commission to stay.[4] Rocky Mountain Power's Motion is manifestly appropriate in these circumstances.

B. HLP Has Not Contested the Facts That Demonstrate That This Dispute Must Be Resolved Expeditiously.

The Motion set forth facts showing that developments are pending in the area of Wasatch County outside the boundaries of members of HLP that wish to commence construction during the 2009 construction season and that need to know whether their power will be supplied by Rocky Mountain Power or HLP. The statement of facts further showed that lack of resolution of the dispute between the parties impairs the ability of Rocky Mountain Power to plan construction projects and power needs to provide service in an efficient and economical manner on a long-term basis in unincorporated Wasatch County. Motion at 4.[5] HLP does not contest these facts, but rather attempts to diminish their importance by arguing that this matter has previously been stayed for many months, that developers have been issued will-serve letters during the pendency of the litigation and that if Rocky Mountain Power were truly interested in expeditious resolution it would have provided complete responses to discovery requests and would have commenced the action in the district court. Response at 3-4.

While the fact that this matter has been twice delayed to allow the parties to attempt to settle their dispute may superficially support HLP's argument that further delays are acceptable, deeper analysis of the issue demonstrates that prior delays, mutually undertaken in good faith by the parties, have exacerbated the current problem. In fact, but for the onset of the current

[4] Rocky Mountain Power is responding separately to HLP's motion for stay.

[5] These facts are further supported by the Affidavit of Cindy Christoffersen ("Affidavit") filed in support of Rocky Mountain Power's Motion to Expedite Review in the Supreme Court. A copy of the Affidavit is provided as Appendix 1 to this Reply.

recession and credit crisis, delays in resolution of the dispute between the parties would have created substantial problems. *See* Affidavit ¶¶ 2-3.

The fact that Rocky Mountain Power has issued will-serve letters to developers in HLP's self-defined service territory has not resulted in service to these developers. Rather, HLP's insistence that it is to provide service to these developers has illustrated one aspect of the real-life problem caused by the dispute. Developers whose projects are clearly within Rocky Mountain Power's certificated area and who Rocky Mountain Power understands would prefer to receive service from Rocky Mountain Power, are forced either to take service from HLP or risk potential political consequences for failure to do so. They should not be put in this position. Furthermore, the more HLP extends its facilities beyond its members' municipal boundaries to provide service, the more it complicates ultimate resolution of the dispute and increases its business reasons for further expansion. On the other hand, Rocky Mountain Power's fulfillment of its obligation to serve may be rendered inefficient if HLP continues to encroach into its service territory whenever it finds it advantageous to do so. The public interest requires resolution of this dispute as soon as possible.

HLP's passing suggestion in the Response that if Rocky Mountain Power were truly interested in expeditious resolution of the dispute between the parties, it would have provided complete responses to data requests and filed its complaint in district court "which unquestionably has jurisdiction to determine HLP's authority to serve," Response at 4, ignores important points.

First, HLP's suggestion ignores the fact that both parties believed they had provided complete responses to discovery requests, but, after conferring, agreed to provide supplemental information. As noted below, Rocky Mountain Power is prepared to exchange that supplemental

information as soon as a schedule is set in this matter. In addition, until the parties find it necessary to bring discovery disputes to the Commission, it is improper to rely on them as HLP has done in the Response.

Second, the suggestion ignores the fact that Rocky Mountain Power's obligation to serve can only be determined by the Commission. Therefore, even assuming that the Supreme Court reverses the Commission's order finding that it has jurisdiction to hear Rocky Mountain Power's complaint and the parties thereafter proceed with litigation in the district court on the threshold issue of HLP's authority to serve outside it members' municipal boundaries, there will still be issues that must be addressed by the Commission, and HLP will be required to provide information on those issues. In fact, even assuming for the sake of argument that the matter must proceed in the district court and the district court finds that HLP has authority to serve outside its members' municipal boundaries from surplus, it is unlikely that the district court will determine the extent of the area HLP can reasonably serve from surplus or impose any obligation on HLP to serve any defined area. Thus, even if HLP prevails before the Supreme Court and district court, it is likely that the parties will have to come back to the Commission to determine the area in which Rocky Mountain Power should be obligated to serve in the public interest.

Third, HLP's suggestion ignores the fact that the Commission and district court may have concurrent jurisdiction of some of the issues presented by this dispute. *See, e.g. Cundiff v. GTE California Inc.*, 101 Cal.App.4th 1395, 1406 (Cal.App. 2002); *Consolidated Telephone Co. v. Western Wireless Corp.*, 637 N.W.2d 699, 709 (N.D. 2001). Assuming there is concurrent jurisdiction, the Commission is clearly in a better position than the district court to assess whether HLP is serving customers outside the municipal boundaries of its members from legitimate surplus power as contemplated by section 10-8-14 of the Utah Code and *County Water*

System v. Salt Lake County, 278 P.2d 285, 290 (Utah 1954). In fact, assuming HLP files an action in the district court, Rocky Mountain Power will likely request the district court to dismiss the action under the doctrine of primary jurisdiction to allow the Commission to first address issues within its jurisdiction and expertise.

HLP's arguments do not contest the facts that show that expedited resolution of this dispute is in the public interest or offer any sound reason for unnecessary delay.

C. The Schedule Proposed by Rocky Mountain Power Is Reasonable, But Rocky Mountain Power Has No Objection to Reasonable Accommodations.

The schedule proposed by Rocky Mountain Power in the Motion is reasonable. It allows more time for discovery than was contemplated by prior schedules set by the Commission in this case and allows roughly equal time for the filing of testimony and preparation for hearings. The first scheduling order issued March 11, 2008, allowed approximately six additional weeks for discovery, two months for filing testimony and four weeks for hearing preparation. The second scheduling order issued November 3, 2008, contemplated approximately nine additional weeks for discovery, three and one-half months for the filing of testimony and approximately three weeks for hearing preparation. The schedule proposed in the Motion allows four and one-half additional months for completion of discovery, two and one-half months for filing of testimony and three weeks for hearing preparation.

HLP argues that this is insufficient because supplemental discovery responses have not been provided and because in excess of 20 depositions are planned. Response at 5. The only reason supplemental discovery responses have not been provided by Rocky Mountain Power is that there is no schedule in this matter. As soon as the Commission establishes a schedule, Rocky Mountain Power will promptly exchange supplemental responses with HLP. As for the 20-plus depositions, almost all of these are planned by HLP. Rocky Mountain Power anticipates

that most of them will be brief and that they will be focused on issues either not relevant to the current dispute or only tangentially relevant. It is likely that they could all be completed within a period of a few weeks. Certainly, even with summer vacation scheduling issues, they can be completed within two months.

HLP also objects to the proposal in the Motion that Rocky Mountain Power and HLP file the first round of testimony simultaneously. Response at 5. Rocky Mountain Power acknowledges that simultaneous filing of testimony is not the practice in a majority of cases before the Commission. However, it is far less regular to take in excess of 20 depositions in a case prior to filing testimony. Given HLP's plan to take approximately 20 depositions and the plans of both parties for further written discovery, the parties will be well aware of each other's evidence and positions prior to either of them filing testimony. In cases such as this where the evidence is not principally in the hands of the public utility, it is common for parties to simultaneously file testimony. For example, in interconnection agreement arbitrations between telecommunications providers, testimony is often filed simultaneously. Furthermore, both parties will have the opportunity for filing rebuttal and surrebuttal testimony under the proposed schedule. Therefore, if either party says something unanticipated in direct testimony, the other will have opportunity to conduct further discovery and respond in written testimony prior to the hearing. In these circumstances, simultaneous filing of testimony by the principal adversaries is fair and reasonable.

Although the schedule proposed by Rocky Mountain Power is reasonable and sufficient, Rocky Mountain Power has no objection to reasonable adjustments to the proposed schedule to accommodate the calendars of the Commission and the parties or to make other adjustments deemed appropriate by the Commission. For example, Rocky Mountain Power has proposed a

cutoff of discovery not directed to filed testimony of August 31, 2009. HLP suggests a cutoff of October 31, 2009, if the Commission sets a schedule. Response at 5. Rocky Mountain Power urges the Commission to choose a date near the front end of this range, but recognizes that the range is relatively narrow. The overriding point is that the Commission should set a schedule that will allow the issues in the case to be resolved as soon as is reasonably possible.

III. CONCLUSION

HLP's Response fails to provide any valid reason for denying the Motion. Prompt resolution of the issues in this matter is in the public interest. Accordingly, the Commission should grant the Motion and set a schedule that leads to expeditious resolution of the dispute between the parties after considering the calendars of the Commission and all parties.

DATED: April 27, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **ROCKY MOUNTAIN POWER'S REPLY ON MOTION TO SET SCHEDULE** to be served upon the following by email to the email addresses shown below (except as indicated where service was by regular U.S. Mail, first class postage prepaid, to the address shown) on April 27, 2009:

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