

J. Craig Smith #4143
(jcsmith@smithlawonline.com)
Adam S. Long #14701
(along@smithlawonline.com)
SMITH HARTVIGSEN PLLC
175 South Main Street, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 413-1600
Facsimile: (801) 413-1620

Attorneys for Ticaboo Utility Improvement District

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

**In the Matter of the Formal Complaint of
Marian Seamons against Ticaboo Utility
Improvement District**

**TICABOO UTILITY IMPROVEMENT
DISTRICT’S MOTION TO DISMISS
AND RESPONSE TO AMENDED
FORMAL COMPLAINT**

Docket No. 15-2508-01

Ticaboo Utility Improvement District (“**TUID**” or the “**District**”), pursuant to Utah Code Ann. §§ 63G-4-204(1) and Utah Admin. Code R746-100-3 and 4, hereby files its Motion to Dismiss and Response to the Amended Formal Complaint (the “**Complaint**”) filed by Marian L. Seamons with the Public Service Commission of Utah (“**Commission**”) on March 10, 2014.

BACKGROUND

TUID provides culinary water, sanitary sewer, electricity and garbage collection (collectively, “**Municipal Services**”) in a remote and rural area in southeastern Utah. The Ticaboo area, which TUID serves, is south of Hanksville and north of Lake Powell’s Bullfrog Marina. TUID is the only entity that provides the above Municipal Services to Ticaboo. Ticaboo has never been incorporated into a municipality under the laws of Utah. Ticaboo was settled when two

uranium mines opened in the 1970's. Initially, various mining companies constructed and provided the Municipal Services now provided by TUID.

As the mines closed and mine employees relocated, the mining companies lost interest in providing these services. TUID was created by Garfield County to fill this void. While many local districts in Utah provide culinary water, sanitary sewer and garbage collection services, TUID is one of only two districts in Utah that provides electricity to retail customers. Additionally, TUID is likely the only retail electric provider in the lower 48 states that is "off the grid." Accordingly, TUID must self-generate all of the electricity it provides. Currently, diesel generators provide the electricity, although TUID is nearing completion of a project that will provide solar power to pumps for TUID's culinary water wells.

Ms. Seamons is one of TUID's customers. She owns ten platted lots in Ticaboo. An unoccupied mobile home is on two of the lots; the remainder are undeveloped. The mobile home is actively receiving power, water, and sewer service from TUID. The remaining properties pay standby fees as District infrastructure exists adjacent to those properties and service is readily available. Ms. Seamons, through this Complaint and her previous filings, is attempting to avoid paying for the utility services that she has enjoyed. By doing so, she is effectively seeking to compel the other District customers to pay for her utility services, which is clearly not fair, just, or reasonable. Indeed, if a number of District customers were to refuse to pay their bills, TUID would be faced with two undesirable options—either raise rates significantly for all other customers or eventually go bankrupt and cease operations altogether. TUID continues to attempt to collect the amounts owed from Ms. Seamons in order to avoid such a result. Obviously, the expenses incurred by TUID in responding to the numerous filings and requests from Ms. Seamons must likewise be borne by all customers.

MS. SEAMON'S COMPLAINT

Over the preceding months, TUID has received no fewer than five letters from Ms. Seamons requesting various information and documents. On October 14, 2015, Ms. Seamons submitted to TUID a long list of information she wished to obtain from TUID (“**Information Request**”), ostensibly under the Government Records Access and Management Act (“**GRAMA**”).¹ Although this request was supposedly made under GRAMA, the information requested went significantly beyond the document access provided for under GRAMA and included questions seeking legal analysis such as “requesting all statutes prohibiting property owners to put up [sic] their own solar power or personal generators,” overly-broad document requests such as “all minutes of every official meeting held by [the District] since the beginning of their [sic] being in control of utilities in Ticaboo,” and ambiguous requests such as “how and when all regulations of contracts were initiated.” Despite the deficiencies the Information Request, TUID expended significant time and effort compiling information and formulating responses for Ms. Seamons. She also complained to the Garfield County Commission (the “**County Commission**”), which oversees TUID and appoints the trustees who govern TUID (*see generally*, Utah Code § 17B-1-301 *et seq.*). During the October 26, 2015 County Commission meeting in Panguitch Ms. Seamons addressed the County Commission. Chip Shortreed, the District Manager, attended this meeting and presented Ms. Seamons with a 143-page response to her Information Request.

Apparently, Ms. Seamons was still dissatisfied. On October 29, 2015, she filed an informal complaint (the “**Informal Complaint**”) with the Division of Public Utilities (the “**Division**”) that was substantially similar to the Information Request. In response TUID submitted to the Division

¹ Utah Code § 63G-2-101 *et seq.*

and to Ms. Seamons approximately 164 pages of documentation and responses. As the Informal Complaint was very similar to the prior Information Request, much of the same documentation was submitted by TUID in response to the Informal Complaint.

On December 18, 2015, Ms. Seamons filed with the Commission a handwritten Formal Complaint in this docket (the “**Initial Formal Complaint**”) alleging many of the same points, attacking the District’s policy of requiring that standby fees be paid for utility services provided by TUID and claiming that various District policies violated Utah statutes. On December 29, 2015 the Division filed comments recommending that no action be taken on the Initial Formal Complaint because it was incomplete and failed to specify the relief sought. On January 13, 2016 TUID filed its response to the Initial Formal Complaint, agreeing with the recommendation of the Division.

Before the Commission acted on the Initial Formal Complaint, Ms. Seamons retained legal counsel, requested that her reply be stayed, and requested leave to amend her Initial Formal Complaint. TUID, welcoming to opportunity for clarification, did not object and the Commission issued its “Order on Motion for Leave to Amend Formal Complaint and the Stay Complainant’s Final Reply Deadline” on February 18, 2016 granting leave for Ms. Seamons to file an amended formal complaint with a deadline of March 10, 2016. She filed her Amended Formal Complaint on March 10 (the “**Complaint**”).

MOTION TO DISMISS

TUID moves under, Utah Rule of Civil Procedure, Rule 12(b)(6), for an Order dismissing the Complaint.² The Complaint is fatally defective. The relief sought is outside of the relief that

² See Utah R. Admin R746-100-1(C).

the Commission may provide ; therefore the Complaint fails to state any claim on which relief can be granted and must be dismissed pursuant to Rule 12(b)(6).

The Complaint makes eight claims against TUID: (1) the standby fees are illegal, (2) the requirement that a customer receiving at least one utility service provided pay, at a minimum, the standby fees for the other utility services violated anti-trust laws, (3) TUID has failed to comply with § 9.1 of its tariff, (4) TUID is noncompliant with the tariff requirements that certain documents be visible in TUID's offices, (5) TUID's policy of making property owners responsible for utility bills for tenant-occupied properties is unreasonable, over burdensome, and unjust, (6) the abandonment policy violates Utah R. Admin 746-200(7)(I), (7) Ms. Seamons' due process rights were violated by removing meters without notice, and (8) that TUID's tariff is unlawful.

With respect to Ms. Seamons' first claim, while TUID currently serves only 43 customers, its service area contains an additional 84 customers that TUID must be prepared to serve. Most of these potential customers consist of platted lots that either a trailer or conventional house could be located upon. Many of these lots formerly had mobile homes during periods when the mines were operating. The very minimal approval process of Garfield County, which governs land use within TUID, could be satisfied in a matter of days and a mobile home could be immediately located on the lot and require utility service.

The infrastructure owned and maintained by TUID was constructed with sufficient capacity to serve all of the lots that pay standby fees, and this infrastructure must be maintained. For example, Ms. Seamons has nine vacant lots to which TUID stands ready to provide service upon request. The value of these lots is significantly increased by the availability of utility service provided by TUID; without the availability of utility service from TUID, the vacant lots in

Ticaboo, including those owned by Ms. Seamons, would be effectively impossible to develop or to live on full-time.

Ms. Seamons misunderstands, misconstrues, and misapplies the Division's Action Request Response, in Commission Docket No. 15-2508-T01, attached as Exhibit D to the Complaint. Neither the Division nor the Commission determined that the Commission had authority over the rates charged by TUID. The issue in that docket was whether or not TUID's tariff had been properly filed with the Commission. Neither the Division nor the Commission attempted to claim that the Commission had any authority as to the rates themselves. The only question in the docket—which is not an issue here—was whether the tariff had been filed properly with the Commission according to the requirements of Utah Code § 17B-2a-406 and § 54-3-3.

Questioning the legality of standby fees is beyond the scope of the Commission's jurisdiction over TUID and thus no relief can be granted by the Commission. The Commission only oversees the provision of retail electric service by TUID. The other services provided by TUID are not regulated by the Commission. When determining the jurisdiction of the Commission over utility service in Utah, one must look to the Utah Constitution and the relevant Utah statutes. For example, all utility services provided by a municipality are outside of the realm of Commission jurisdiction.³ Similarly, the provision of water, sanitary sewer, and garbage collection services by a local district, such as TUID, are also outside of Commission jurisdiction. Even the Commission's jurisdiction over the provision of electrical service by a local district is limited.

The Commission's authority over TUID is granted by statute.⁴ The Commission has authority over an "electric improvement district" as defined in § 17B-2a-406(1)(c), which currently

³ See *Heber Light & Power Co. v. Utah PSC*, 2010 UT 27, 231 P.3d 1203 (Utah 2010)

⁴ Utah Code § 17B-2a-406(2) ("An electric improvement district is a public utility and subject to the jurisdiction of the [public service] commission.").

includes only two districts—TUID and South Utah Valley Electric Service District. That same code section, in § 17B-2a-406(6)(a), goes on to remove any Commission authority over rates, under Utah Code § 54-7-12, so long as TUID complies with certain basic requirements. The effect of this provision is to entirely remove the Commission’s authority to regulate the electric rates charged by TUID. The standby electricity service fee is one of the tariffed rates of the District (*see* TUID Electric Rate Schedules, as filed with the Commission in Docket 15-2508-T01), and as such is excluded from Commission regulation through the aforementioned statutes. Accordingly, Ms. Seamons’ claim that the standby fee is illegal cannot be determined by the Commission and should be dismissed.

Ms. Seamons’ second claim, speculating that the tariff likely violates an anti-trust law is irrelevant and is beyond the scope of Commission jurisdiction. Regulated utilities by their nature are monopolistic and the Commission’s very existence can be traced to this fact. Both Utah and the United States have anti-trust laws, but the Commission is not tasked with enforcement of those laws.⁵ The Commission’s authority over TUID is granted by Utah Code § 17B-2a-406(2).⁶ This statute gives the Commission authority over an “electric improvement district” as defined in § 17B-2a-406(1)(c). The Commission’s jurisdiction over TUID is based solely on the provision of electric service and does not extend beyond that; the Commission is not granted any authority over the other utility services provided by TUID. The Commission likewise has no authority or obligation to enforce state or federal anti-trust provisions, despite Ms. Seamons’ insistence that it do so. Indeed, as the Commission may only exercise the powers granted to it by statute, the

⁵ See Utah Code § 76-10-3101 *et seq.*, and the Sherman Antitrust Act, 15 U.S.C. §§ 1-7.

⁶ Utah Code § 17B-2a-406(2) (“An electric improvement district is a public utility and subject to the jurisdiction of the [public service] commission.”).

Commission is legally unable to address Ms. Seamons' claims of anti-trust violations. As such, Ms. Seamons' second claim should be dismissed.

With respect to Ms. Seamons' third claim, TUID has fully complied with Section 9.1 of its tariff as referenced by the Complaint and notes that the allegations set forth in Ms. Seamons' third claim are wholly unsupported by any evidence. TUID sent the pamphlets in question to Ms. Seamons and all other District customers. TUID additionally makes every effort to have all such materials publicly available on its website. TUID is willing to stipulate that it is required to comply with Section 9.1 of the tariff and no action from the Commission is necessary as this point is not in dispute. As such, Ms. Seamons' third claim should be dismissed.

With respect to Ms. Seamons' fourth claim, the required documents are indeed publicly available. Ms. Seamons provides no evidence for her fourth claim. This is also wholly immaterial issue to the Complaint as Ms. Seamons is not a resident of Ticaboo, as noted in her Complaint. TUID is willing to stipulate that it is required to comply with Section 1.3 of the tariff and no action from the Commission is necessary as this point is not in dispute. As such, Ms. Seamons' fourth claim should be dismissed.

With respect to Ms. Seamons' fifth claim, Ms. Seamons' has not stated a claim on which relief can be granted. Ms. Seamons claims, without citing any rule or statute, that TUID may not legally require property owners to be ultimately responsible for utility bills for tenant-occupied properties. This policy is clearly set forth in the tariff, as quoted by the Complaint. The tariff, including this provision, has been previously reviewed by the Division and acknowledged by the Commission. Ms. Seamons does not allege that TUID violated its tariff or any applicable rule or statute and the Commission thus cannot grant relief on this claim. As such, Ms. Seamons' fifth claim should be dismissed.

With respect to Ms. Seamons' sixth claim, the abandonment policy is not a violation of any applicable statute or rule and is clearly set forth in the tariff. Indeed, the Complaint fails to distinguish between a customer that is actively receiving service and a customer who is not actively receiving service, but nonetheless required to pay standby fees. The Complaint does not allege any violations of the tariff or any applicable rule or statute. The provisions of the tariff have previously been reviewed by the Division and acknowledged by the Commission and are not at issue here. As such, this is not a claim on which relief can be granted by the Commission and Ms. Seamons' sixth claim should be dismissed.

With respect to Ms. Seamons' seventh claim, TUID responds that any allegations of violation of constitutional rights, including due process violations, are beyond the scope of the Commission's jurisdiction. As such, Ms. Seamons' seventh claim should be dismissed.

With respect to Ms. Seamons' eighth claim, TUID responds that Ms. Seamons' claim that the tariff is unlawful is not supported by any evidence nor does Ms. Seamons claim any procedural problems with the adoption and acknowledgement of the tariff. The Complaint intentionally misrepresents the Commission's past statements as to the tariff. The Complaint states "[i]t is clear that the Division, which was supported by the Commission, determined that certain provisions of the tariff is [sic] unlawful." The Division has no adjudicative power as to the tariff or any other matter concerning TUID and thus cannot "determine" any matter with respect to TUID. Further, the statement that the Commission supported such a determination by the Division is incorrect as the Commission Secretary (not the Commission) did nothing more than acknowledge an opinion

stated by the Division in a letter to TUID.⁷ As such, Ms. Seamons' eighth claim should be dismissed.

The Complaint fails to state any claim on which the Commission can take meaningful action and should be dismissed as set forth above.

ANSWER

In the event the Commission does not grant TUID's motion to dismiss, TUID answers the Complaint as set forth below. As an initial matter, TUID wishes to correct multiple misstatements and misrepresentations contained in the Complaint.

The Complaint states that "Complainant has investigated using solar energy, although TUID has notified her that all utilities must be paid or none of the utilities would be provided."⁸ This statement misrepresents that policies of TUID. TUID does not prohibit the use of solar power and Ticaboo residents are free to generate their own solar power. If a customer wishes to generate their full electricity needs through solar power, that customer would obviously not need to pay electricity usage charges. That customer would, however, be required to pay the monthly standby fees representing the customer's share of the fixed costs inherent in maintaining the electrical system that stands ready to serve that customer upon request. Self-generating 100 percent of the electricity required for a residence—being completely "off the grid"—is extremely difficult and expensive. Even if a customer fully "off the grid" nonetheless benefits from the availability of TUID-provided power through increased property values and the provision of water service, which relies on power generated by TUID.

⁷ See Letter from Gary L. Widerburg dated April 24, 2015, Commission Docket No. 15-2508-T01.

⁸ Complaint at 2.

The Complainant states that Ms. Seamons “filed an informal complaint with the Commission” in March 2014.⁹ This is incorrect as informal complaints are filed with the Division.

The Complaint states that “[i]n [sic] October 2, 2015, TUID refused to provide any documentation to Complainant, through her daughter, regarding utility contracts and receipts.”¹⁰ TUID disputes this accusation and notes that TUID has provided, at no cost, hundreds of pages of documents to the Complainant, representing dozens of hours of work by the District Manager, in response to multiple letters and requests. TUID’s responses to Ms. Seamons’ requests have been thorough and far exceeded the standards required under GRAMA.

The Complaint states that “TUID has an open enrollment period that restricts signing up for utilities except in October.” While TUID does have a set period during which Ticaboo residents can sign up for one of the optional “block billing” electric service schedules,¹¹ a customer can sign up for electrical service on the normal per-kWh basis at any time.

I. The Commission Has Only Limited Jurisdiction Over TUID

As noted by the Division in its Memorandum filed with the Commission in this Docket on December 29, 2015, the Commission is “granted only limited authority over utilities regarding customer complaints” and “the Commission may order a utility to correct service problems and refund incorrect billings.” In the instant situation, Ms. Seamons does not allege that her bills were not in accordance with the tariff nor does she allege any problems with the utility service provided to her properties.

⁹ *Id.*

¹⁰ *Id.* at 3.

¹¹ The District’s optional electric service schedules (Electric Service Schedule Nos. 3-8) provide for a flat monthly payment throughout the year with a set maximum number of kilowatt hours to be used throughout the year. The District’s standard residential electric schedule (Electric Service Schedule No. 1) provide for an unlimited number of kWh at a set per-kWh rate.

This docket and the Amended Formal Complaint must be read with the understanding that the Commission has only limited authority over TUID. The Commission’s limited authority over TUID is granted by statute.¹² This statute gives the Commission authority over an “electric improvement district” as defined in § 17B-2a-406(1)(c). That same code section, in § 17B-2a-406(6)(a), goes on to exempt TUID from the ratemaking requirements of Utah Code § 54-7-12, so long as TUID complies with certain basic requirements. The effect of this provision is to entirely remove the Commission’s authority to regulate any of electric rates charged by TUID. TUID is not a privately-owned, for-profit, public utility (e.g., Rocky Mountain Power, or Questar) over which the Commission has full authority and from which the owners of the utility are seeking a return on investment. Instead, TUID is a local district organized and operating under Utah Code Title 17B. TUID is a political subdivision of the State of Utah and was created by action of the Garfield County Commission. The members of TUID Board of Trustees are appointed by the County.¹³ TUID is not seeking to make a profit or to generate a return on investment, nor is the salary of the District Manager, who is the sole full-time District employee, tied in any way to the financial performance of TUID.

TUID is indeed an “electric improvement district” and subject to limited Commission jurisdiction, while also serving as the sole provider of water, wastewater, and garbage service in Ticaboo. A local district providing just these services, but not electric service, would not be subject to any form of Commission regulation and TUID is thus not subject to Commission regulation as to the provision of water, wastewater and garbage service. The Commission only has jurisdiction over electric service provided by TUID and that jurisdiction is limited, as noted above.

¹² Utah Code § 17B-2a-406(2) (“An electric improvement district is a public utility and subject to the jurisdiction of the [public service] commission.”).

¹³ See Utah Code § 17B-1-103(1)(a).

TUID is a merger of Ticaboo Electric Improvement District (“**TEID**”), which began providing electric service in Ticaboo when the nearby uranium mines closed, and Ticaboo Special Service District (“**TSSD**”), which had been providing water, wastewater, and garbage service for a number of years.¹⁴ In order to more efficiently provide utility services to Ticaboo, the two districts were merged and renamed as Ticaboo Utility Improvement District. The Commission had no authority over any aspect of TSSD.

The Complaint and the utility services provided by TUID must also be seen through the lens of reality—Ticaboo is an off-the-grid “island” that must provide all of its own services. TUID is one of only two districts in Utah providing electrical service.¹⁵ TUID currently serves 43 customers and is one of the smallest regulated public utilities in Utah. The electric service by TUID is provided through a system that was, in large part, inherited from the uranium mining companies that had been selling electricity as illegal and uncertificated public utilities for years before the formation of TEID. As such, TEID inherited an electrical system designed to serve large industrial users and a customer base that was, for all practical purposes, too small to support the electrical system. TUID, including Mr. Shortreed as District manager and the members of the Board of Trustees, has worked tirelessly for years to literally “keep the lights on” in Ticaboo. TUID has used grants and loans from the Permanent Community Impact Fund to modernize the electrical system, replace aged and extremely inefficient generators with newer equipment better suited to the demands of Ticaboo, improved and maintained the water system, and made numerous other improvements to the utility infrastructure in Ticaboo in order to ensure reliable utility service

¹⁴ Note that the mining companies that had previously provided electrical service to Ticaboo had been operating as illegal uncertificated public utilities, without the requisite oversight from the Commission.

¹⁵ The other is South Utah Valley Electric Service District, which serves electricity to a portion of Utah County.

in Ticaboo. Without TUID, the residents of Ticaboo would effectively be primitive camping with no access to the utility services necessary for modern society, presumably causing property values to plummet and motivating many of the current residents to leave. Without TUID, the town of Ticaboo would effectively be abandoned and the Ticaboo Resort would not be viable.

II. TUID is Legally Allowed to Charge Standby Fees

TUID is legally allowed to charge standby fees. The Complaint correctly points out that TUID is authorized to charge fees for services provided, but ignores the remainder of that statute authorizing TUID to impose fees or other charges for facilities and for maintaining and operating the system. Further, the Complaint attempts to cite the Assessment Area Act, which is wholly inapplicable to TUID.¹⁶

Standby fees are the mechanism through which TUID fairly allocates the fixed costs (i.e., the costs that do not vary with customer usage) of maintaining the utility infrastructure among those who enjoy the benefits of that infrastructure, whether actively receiving utility service or not.¹⁷ These standby fees represent the expenses incurred by TUID to maintain the utility infrastructure and facilities. TUID is expressly authorized to charge fees for facilities. Utah Code § 17B-1-103(2)(j) allows TUID to:

- (i) impose fees or other charges for commodities, services, **or facilities** provided by the district, to pay some or all of the district's costs of providing the commodities, services, **and facilities**, including the costs of:
 - (A) maintaining and operating the district;
 - (B) acquiring, purchasing, constructing, improving, or enlarging district facilities;
 - (C) issuing bonds and paying debt service on district bonds; and

¹⁶ Utah Code Title 11 Chapter 42.

¹⁷ The District generally refers to property owners who are currently receiving service as “active customers” and to those property who are not actively receiving utility service, but to whom utility service is readily available and who are obligated to pay the District’s standby fees, as “inactive customers.”

- (D) providing a reserve established by the board of trustees; and
- (ii) take action the board of trustees considers appropriate and adopt regulations to assure the collection of all fees and charges that the district imposes;¹⁸

Indeed, the Amended Formal Complaint quotes the first portion of this very statute, but ignores the authority granted to TUID to impose fees for facilities provided by TUID.¹⁹ TUID is expressly granted the authority to impose fees for “facilities,” which is a term defined in Title 17B to mean

“ . . . structure, building, system, land, water right, water, or other real or personal property required to provide a service that a local district is authorized to provide, including any related or appurtenant easement or right-of-way, improvement, utility, landscaping, sidewalk, road, curb, gutter, equipment, or furnishing.”²⁰

Likewise, TUID is authorized to bill for and collect fees for “commodities, services, *and facilities*”.²¹ The Amended Formal Complaint again conveniently ignores the term “facilities” when discussing Utah Code § 17B-1-901. et seq.²² Ms. Seamons also states that the “terms ‘furnishing’ and ‘providing’ in both Utah Code Ann. § 17B-1-904(1)(g) & 903(1)(b) as used are not consistent with the mere existence of a tap [sic] on one’s property, particularly if the tap was [sic] never turned on.”²³ This is a clear misinterpretation of those statutes as Utah Code § 17B-1-903 addresses only the specific terms under which water and sewer service may be provided and service terminated and § 17B-1-904 sets forth certain procedures applicable to collection of service fees imposed by local districts—neither statute addresses the rates, fees, or charges that a district is authorized to impose and the attempt to characterize those statutes as doing so by Ms. Seamons can only serve to mislead the Commission.

¹⁸ Utah Code § 17B-1-103(2)(j) (emphasis added).

¹⁹ Complaint at 6.

²⁰ Utah Code § 17B-1-102(6).

²¹ Utah Code § 17B-1-901(1) (emphasis added).

²² Complaint at 6-7.

²³ *Id.*, pg. 7.

The Utah Office of the Property Rights Ombudsman has also weighed in on the standby fee issue as it relates to local governments. In Advisory Opinion 101, dated July 6, 2011 and attached hereto as **Exhibit A**, the Ombudsman was asked whether a municipality could charge standby fees on vacant lots.²⁴ The Ombudsman’s opinion provides an excellent and well-reasoned analysis of the justifications for standby fees from a disinterested third party. TUID believes this analysis is helpful in understanding the current situation. In discussing whether the existence of a water system benefits vacant lots, the Ombudsman stated that

Even if the [owners] do not connect to the water system or use any of the water, they nevertheless receive a service from the City, and may therefore be subject to a reasonable fee. The [owners] can readily access the system and receive water service if they choose, but they receive a benefit even if they don’t connect to the system. The City’s water system contributes to the value and marketability of the property, and provides water for fire suppression.

While both a local district and a municipality are political subdivisions of the State of Utah, obviously the legal powers granted to each differ and the Ombudsman’s analysis of Garden City’s legal ability to impose fees is not necessarily applicable to TUID. However, the Ombudsman’s determination that the existence utility infrastructure and the ability to receive service upon demand does indeed benefit property owners who are not actively receiving service—even owners of undeveloped lots—supports TUID’s standby fee structure.

The Commission has repeatedly and consistently approved standby fees for public utilities. Likewise, the Division has reviewed and recommended approval of proposed rate structures that include standby fees from many utilities. For example, in Docket No. 13-2195-02, the Commission approved standby fees and stated “that all landowners within the Company service area benefit from having a water system in place; therefore, we find that it is reasonable to require

²⁴ Advisory Opinion #101, The Office of the Property Rights Ombudsman (July 6, 2011) (<http://propertyrights.utah.gov/advisory-opinions/view-all-advisory-opinions/advisory-opinion-101>).

all landowners to pay a portion of the system's cost"²⁵ The Commission further confirmed the necessity and appropriateness of standby fees when responding to a request for review and rehearing in that docket that claimed, among other things, that standby fees were illegal.²⁶ In Docket No. 13-2506-01, the Commission likewise approved a rate structure that included monthly standby fees.²⁷ The Commission approved standby fees in Docket No. 05-071-T01,²⁸ in Docket No. 11-097-03,²⁹ and in many other dockets. The Commission has repeatedly approved standby fees for public utilities to address the same issues TUID is facing. Ms. Seamons has provided no justification as to why TUID's standby fees are not just and reasonable nor has she shown that the Commission has any jurisdiction to regulate the standby fees.

TUID charges monthly standby fees as follows: \$75.00 for electric service, \$39.00 for water service, \$29.00 for wastewater service, and \$12.00 for garbage service, for a total of \$154.00 per month. In order to provide utility service to properties within Ticaboo, TUID must have sufficient utility infrastructure in place. Owners of as-yet-undeveloped properties hold those properties with the expectation that utility service from TUID will be available on that future day when the owner desires to develop the property and requires utility service. Unfortunately for TUID, utility service is not scalable in such small increments. If a system was constructed only to serve those customers actively taking service at the time, the very next person to request service to a formerly undeveloped lot would either (1) be refused service in violation of TUID's

²⁵ Report and Order at 18, Docket No. 13-2195-02 (May 5, 2014).

²⁶ See Report And Order Denying Mr. Uhlig's Request For Review Or Rehearing at 5, Docket No. 13-2195-02 (June 19, 2014).

²⁷ See Report and Order, Docket No. 13-2506-01, the Application of Willow Creek Water Company for a General Rate Increase (October 4, 2013).

²⁸ See Report and Order, Docket 05-071-T01, In the Matter of Wolf Creek Water and Sewer Company Regarding Schedule of Rates, Rules and Regulations (December 2, 2005).

²⁹ See Report and Order, Docket No. 11-097-03, In the Matter of the Application of Mountain Sewer Corporation to Increase its Sewer Utility Service Rates (October 30, 2012).

obligations as a public utility, or (2) require the purchase of an incrementally larger generator, larger and longer power lines, and other upsized infrastructure—at insurmountably high costs to all involved. TUID has instead wisely sought to install and maintain infrastructure sufficient to meet the needs of all properties in Ticaboo expected to be developed in the near future; by doing so, TUID stands ready to provide utility service upon request. Simply having these facilities at the ready does, in fact, cause TUID to incur expenses: generators need maintained, pipes need replaced, power lines need repaired, and any number of other items must constantly be addressed simply by virtue of the infrastructure existing. This infrastructure, although not being actively used to its full capacity today, clearly benefits those properties not yet developed (or “inactive customers”); forcing active customers to pay for those benefits inuring to the inactive customers is very clearly unfair. TUID’s standby fees are designed to address precisely this issue.

The standby fees fairly allocate the fixed costs incurred by virtue of having the utility infrastructure in place among all those who benefit from it. The increased variable costs that TUID incurs to provide service to active customers (especially diesel fuel to produce electricity) are reflected in the usage rates that active customers pay. The fixed costs of the utility infrastructure are allocated among all customers. The rates for active customers and the standby fees combine to justly and reasonably allocate costs to those who enjoy the benefits. Attempting to operate TUID without charging standby fees would lead to unreasonably high rates for all active customers and would result in those active customers subsidizing the system for all those not actively receiving service.

TUID has created very specific guidelines to determine which property owners should justifiably be charged standby fees. In order to be charged standby fees, a property must have a “tap” on the property for electric, water, or wastewater service; i.e., TUID infrastructure must exist

at the property line or on the property to provide one of the aforementioned services. By doing so, TUID has attempted to limit the applicability of the standby fee requirements to only those properties that are ready to receive service upon demand.

The undeveloped lots, and the developed lots not actively receiving service, owned by Ms. Seamons indeed are obligated to pay standby fees under the tariff and, in accordance with its tariff TUID has been billing Ms. Seamons for those standby fees. Ms. Seamons' properties are undeniably more valuable due to the immediate availability of utilities and Ms. Seamons rightfully bears the costs of those burdens through her standby fees. Additionally, as noted previously, the Commission has no authority over these rates imposed by TUID.

TUID is authorized to charge standby fees for installing and maintaining its facilities. The standby fees represent a significant and measurable benefit to the inactive customers of TUID and the requirement that those inactive customers pay the costs of providing these benefits is just and reasonable.

III. District Policies are not Anti-Trust Violations

The Complaint attempts to characterize as an antitrust violation the requirement that a customer who is receiving one or more utility services from TUID pay standby fees for the other services. Ms. Seamons' antitrust argument is without merit. Even before addressing the merits of the claim, the Complaint fails to show the Commission has any jurisdiction over an antitrust claim. Nor does the Complaint provide any guidance as to how the Commission could exceed its limited statutory authority over TUID, which is based solely on the provision of electric service provided by TUID, and dictate the terms under which TUID may provide water, sewer or garbage service. The aforementioned policy requiring the minimum fees for other services is simply a different way of stating the standby fee requirement explained previously. The Complaint acknowledges that

the Commission does not have authority over all of the issue raised in the Complaint.³⁰ The Commission should dismiss this claim by Ms. Seamons and emphasize again that the Commission’s jurisdiction over public utilities is limited, and even further restricted as it relates to TUID.

Even disregarding the lack of Commission jurisdiction over anti-trust issues and over the other utility services provided by the District, and assuming that the legal situation of a local district is indeed comparable to that of a municipality as claimed by Ms. Seamons,³¹ TUID’s policies do not violate any anti-trust laws. In *Kay Elec. Co-op. v. City of Newkirk*, the 10th Circuit Court of Appeals determined that the question of whether anticompetitive conduct is authorized hangs on “the most specific direction issued by the state legislature on the subject.”³² The most specific direction as to the powers of local districts is found in Utah Code § 17B-1-103(2)(q), in which the legislature grants a local district power to “perform any act or exercise any power reasonably necessary for the efficient operation of the local district in carrying out its purposes.”³³ This broad grant of power by the Utah legislature ensures that local districts, which are often used in remote parts of the state to provide services that would otherwise be unavailable, have the power to carry out the purposes for which they were created at the lowest possible cost to the recipients of those services. The predecessors to the current District, TSSD and TEID, were merged to make the provision of utility services to Ticaboo residents and businesses more efficient and to reduce the rates charged to District customers. The provision of electrical, water, sewer, and garbage

³⁰ Complaint at 3 (“Complainant understands that the Commission does not have authority concerning all of the aforementioned issues . . .”).

³¹ *Id.* at 9 (“The Court stated that municipalities, which in this case local districts are comparable, are not the same and only share in the state’s anti-immunity ‘when it is implementing anticompetitive policies authorized by the state.’” (citations omitted)).

³² *Kay Elec. Co-op. v. City of Newkirk*, 647 F.3d 1039, 1044 (10th Cir. 2011).

³³ Utah Code § 17B-1-103(2)(q).

service by a single district reduces costs to the residents of Ticaboo, and is thus necessary for the efficient operation of TUID and clearly authorized by statute.

The Complaint acknowledges that TUID is authorized to provide electrical, water, sewer, and garbage service to Ticaboo. The predecessor districts, TSSD and TEID were likewise authorized to provide their respective services. Presumably each utility service could be provided by a separate local district, thus eliminating any real or imagined anti-trust concerns and thereby quadrupling the administrative costs that must be borne by the residents and property owners in Ticaboo, including Ms. Seamons.

The requirement that a customer pay, at a minimum, the standby fees for each service that is readily available to the property has the same real-world effect as TUID's regulation requiring payment of standby fees for all services that are readily available. Each lot in Ticaboo has water, sewer, and power infrastructure readily available to it, requiring at most the installation of a service lateral from the main line, and thus each lot is required to pay standby fees for the utility services offered by TUID.

IV. TUID has Complied with its Tariff

The Amended Formal Complaint alleges that Ms. Seamons has not received the annual information pamphlet mailed by TUID and further alleges that "TUID fails to give proper notice in all aspects of its business."³⁴

TUID has mailed the pamphlets as required by its tariff to all customers at the mailing addresses on file. General mailings are sent via First Class Mail and the District has not been notified about any other problems with the mailings. Further, all actions of TUID as they relate to electrical service are posted on the Commission's website, all District meeting agendas are made

³⁴ Complaint at 11.

public in accordance with the Utah Open and Public Meetings Act, and a great deal of information (including the pamphlets in question) is available on demand on TUID's website at www.ticaboouid.com.

TUID agrees that it is required to comply with its tariff and is willing to stipulate to that fact. TUID believes that such a stipulation resolves this issues and this claim should be dismissed.

As to the claim that "TUID fails to give proper notice in all aspects of its business," TUID responds that this statement—in addition to being false—is baseless, not supported by evidence, and not proper for a proceeding before the Commission. TUID respectfully requests that the Commission disregard this unsupported statement contained in the Complaint.

V. Required Documents are Available for Public Inspection

The Complaint alleges that TUID does not maintain a copy of the current tariff in its office and alleges that certain notices are not posted or publicly available. These allegations are false. This claim by Ms. Seamons seems to be used primarily as justification for filing the Complaint in its current amended form. TUID did not object to the filing of the current Complaint and fails to see the relevance of this claim now. Clearly Ms. Seamons has not been denied access to the tariff. The District is willing to stipulate that the it is required to comply with its own tariff, rendering this issue moot and requiring dismissal of this claim.

TUID maintains a copy of the current tariff that is available for public inspection upon request. TUID has also posted the notice required by Rule 746-405-2(F) as well as a copy of the annual information pamphlet in the District office. That said, as the Commission is aware, the District "office" is located in the District Manager's dining room as TUID does not own any sort of office space, nor is commercial office space available to rent in Ticaboo. As the District Manager is the single full-time employee of TUID and is responsible for not only the

administration of TUID but also the operation, maintenance, and upkeep, the office is not always open to the public during regular business hours. However, the District Manager is available via cell phone and TUID has made significant efforts to accommodate all requests from Ms. Seamons to meet and to inspect documents, including requests after normal business hours. Ms. Seamons has in no way been prejudiced or disadvantaged by the current office arrangements. Although TUID would prefer to operate with a larger budget, it seeks to keep operating costs, and therefore rates charged by TUID, as low as possible. Operating a full-time customer service counter is simply incompatible with her other criticisms of the rates and fees charged by TUID.

TUID is willing to stipulate that it is required to comply with its own tariff, which TUID believes will fully address Ms. Seamons' apparent concerns about the public availability of certain documents.

VI. TUID's Requirement that Property Owners Be Ultimately Responsible for Utility Bills For Tenant-Occupied Properties is Just and Reasonable.

TUID's policy of requiring property owners be ultimately responsible for the utility bills for tenant-occupied properties is just and reasonable and TUID has acted fully in accordance with its tariff.

TUID does indeed require property owners to be responsible for utility bills for their properties, whether owner-occupied or tenant-occupied. Ticaboo experiences significant seasonal population swings and many temporary residents during the summer months are seasonal workers at Bullfrog Marina or Ticaboo Resort. Obviously those residents require utility service. Temporary residents were previously set up and billed for Municipal Services as individual account holders. TUID has found collecting past-due amounts from those temporary residents is often difficult and the costs of doing can be larger than the original debt. When a customer has used services and caused TUID to incur expenses to provide those services, someone must

eventually pay for those expenses. Fairness dictates that it should be the person who received the benefits; however, when TUID cannot collect on amounts owed from a previous customer who has since moved away, the remaining customers inevitably must cover those expenses.

By making a property owner responsible for utility bills, TUID increases the likelihood that fees for services will be paid and that paying customers are not burdened with expenses for services they did not receive. The effect of this policy for Ms. Seamons and other would-be landlords in Ticaboo is to make the rentals inclusive of utilities. Alternately, TUID could require an extremely large security deposit prior to initiating service to any customer, which would indeed dissuade people from residing in Ticaboo.

Ms. Seamons indicates concerns about bad tenants and states “if the tenants leave, [Ms. Seamons] is ultimately responsible, despite whether or not the tenants comply with any rent duration agreement.”³⁵ This is the just and reasonable approach to tenant situations. Ms. Seamons asks that the other customers to bear the risk of her tenant decisions, which is not fair to the other customers. A landlord *should* bear the economic risks of the rental property; TUID’s policy regarding tenant-occupied properties accomplishes this. TUID has acted in compliance with its effective tariff.

To the extent that the current language in TUID’s tariff causes confusion regarding SITLA-owned properties in Ticaboo, TUID will review that language and make changes accordingly. However, that issue does not affect Ms. Seamons as she owns her properties in Ticaboo.

VII. TUID’s Abandonment Policy is not a Violation of Utah Law

At the risk of rehashing topics that have been covered before the Commission on previous occasions, a full response to the allegations in the Amended Formal Complaint necessitates a

³⁵ Complaint at 13.

discussion of TUID's abandonment policy.³⁶ Ticaboo has many out-of-town property owners who do not have intentions to develop their properties in the near future. To address this issue and for the benefit of these property owners, TUID has adopted a policy to abandon the utility services and taps to a particular property. This abandonment effectively returns the parcel, at least as far as TUID is concerned, to its completely undeveloped state.

When the taps are abandoned, the owner will no longer be obligated to pay standby fees to and TUID will not recognize an obligation to provide utility service on demand to that particular parcel nor account for future service to that parcel when making capital investment decisions. If, at some point in the future, the owner of a parcel with abandoned taps desires utility service to that parcel, the owner would have to pay any and all applicable fees in effect at that future time; essentially, the parcel in question would be treated as if it never had service from TUID. When considering abandonment of taps, a customer must determine in light of their development plans whether it makes sense to pay standby fees and keep utility services available on demand or whether it makes economic sense to abandon the taps and pay potentially much larger costs in the future when utility service is desired.

TUID implemented this policy after much discussion and after input from Ticaboo residents; the abandonment policy is intended to give customers such as Ms. Seamons an option to cease paying standby fees for lots to which utility service will not be required for a significant period of time. The abandonment policy is appropriate considering TUID's unique situation. In order to abandon the taps to a lot in Ticaboo, the lots must be undeveloped (meaning no residential or commercial structures on the lot) and the owner must be current on amounts owed.

³⁶ The District's abandonment policy is set forth in Section 03.12 of the District's Electric Service Regulations.

As far as TUID is aware, Ms. Seamons has only inquired about abandoning the taps to the two developed lots on which her mobile home is located. Obviously these lots are developed—and the mobile home located on the lots is actively receiving service—and therefore not eligible for abandonment of the utility taps. Ms. Seamons made this inquiry in late 2015, approximately two years after TUID implemented this policy. She has not inquired about abandoning the taps on any of her properties and thus has not been injured in any way by this policy. This claim is simply a statement of Ms. Seamons opinion as to how TUID should operate. A formal complaint with the Commission is not the proper vehicle for initiating policy changes.³⁷

VIII. Complainant’s Claims of Due Process Violations are Unfounded and Beyond the Jurisdiction of the Commission

All District interactions with Ms. Seamons, including any removal of meters, was handled strictly in compliance with TUID’s tariff. Ms. Seamons claims that TUID violated her constitutional rights by removing meters (owed by TUID) without notice; Ms. Seamons does not, however, provide any legal analysis supporting this claim nor does she explain how this issue falls under the jurisdiction of the Commission. Indeed, the Commission’s jurisdiction is granted, and limited, by statute and those statutes do not in any way confer any jurisdiction over alleged violations of constitutional rights. Ms. Seamons also asks that “since TUID disregarded Complainants [sic] due process, TUID should provide restitution to Complainant.”³⁸ The Commission simply does not have the authority or ability to assess penalties against TUID for alleged violations of constitutional rights or for any other reason. A penalty or fine assessed

³⁷ See Memorandum from Division of Public Utilities, Docket No. 12-057-03 (February 2, 2012) (“ . . . a complaint proceeding should not be the platform for changes that may affect and benefit many others not involved in this dispute.”).

³⁸ Complaint at 16.

against TUID would necessarily have to be paid by the other District customers, which is not a just and reasonable result and the request should be denied by the Commission.

IX. The Tariff is Lawful and Governs Utility Service by TUID

TUID has taken all actions required by statute in creating, adopting, and implementing its tariff. The tariff does not violate any applicable statute or administrative rule. The tariff is therefore lawful and governs the operations of TUID. Ms. Seamons' statement that the "Division, which was supported by the Commission, determined that certain provision of the tariff is [sic] unlawful" is simply false. The Division does not have the power to make decisions regarding the legality of TUID's tariff and at no point has the Commission reached such a determination. The Complaint further alleges that the fees owed by Ms. Seamons to TUID are an "injustice."³⁹ This is an allegation intended to be inflammatory and is not supported by any factual or legal analysis and should be dismissed by the Commission.

CONCLUSION

TUID respectfully requests that the Complaint be dismissed. As shown above, Ms. Seamons' complaint is meritless and the remedies she seeks are outside of the jurisdiction of the Commission. The Complaint appears to be nothing more than an attempt to avoid paying the legitimate expenses and fees, as set forth in TUID's tariff, for District services from which the Ms. Seamons has reaped the benefits. By doing so, Ms. Seamons is attempting to compel all other paying customers of TUID to pay for the utility services that she has enjoyed.

³⁹ *Id.* (Complainant simply seeks for the Commission to undo the injustice of the fees imposed upon her . . .”).

DATED this 22nd day of April, 2016.

RESPECTFULLY SUBMITTED,

**TICABOO UTILITY IMPROVEMENT
DISTRICT**

_____/s/ **Adam S. Long**_____

J. Craig Smith

Adam S. Long

*Attorneys for Ticaboo Utility Improvement
District*

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing TICABOO UTILITY IMPROVEMENT DISTRICT'S MOTION TO DISMISS AND RESPONSE TO AMENDED FORMAL COMPLAINT was served as indicated on the following on April 22, 2016:

By email and hand delivery:

UTAH PUBLIC SERVICE COMMISSION
c/o Gary Widerburg, Commission Secretary
160 East 300 South, Fourth Floor
Salt Lake City, Utah 84111
psc@utah.gov

By email:

Jon M. Hogelin, # 14981
Benjamin Lakey, #14699
LAKEY HOGELIN, PLLC
jon@lakeyhogelin.com;
ben@lakeyhogelin.com
Attorneys for Marian L. Seamons

Patricia Schmid (pschmid@utah.gov)
Justin Jetter (jjetter@utah.gov)
Rex Olsen (rolsen@utah.gov)
Utah Assistant Attorneys General

/s/ Adam S. Long

EXHIBIT A

Advisory Opinion #101