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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of Revisions to Tariff No. 1 of Ticaboo Utility Improvement District	**DISTRICT'S RESPONSE TO DIVISION OF PUBLIC UTILITIES ACTION REQUEST RESPONSE DATED APRIL 13, 2015 AS REQUESTED BY THE COMMISSION ON APRIL 24, 2015** Docket No. 15-2508-T01

Ticaboo Utility Improvement District (the "**District**") by and through its counsel, J. Craig Smith and Adam S. Long of Smith Hartvigsen, PLLC, as directed by the Utah Public Service Commission ("**Commission**") in a letter dated April 24, 2015 from Commission Secretary Gary L. Widerburg, responds to the Action Request Response of the Division of Public Utilities ("**Division**") recommending rejection of the recent Tariff filing, as follows.

1. Introduction & Background

The District is a Utah Improvement District created and operating under the authority of Title 17B, Chapter 2a of the Utah Code. The district is the sole provider of culinary water, sewer, trash disposal and electricity in the Ticaboo area. Ticaboo is a remote, unincorporated area of eastern Garfield County approximately 12 miles north of the Bullfrog Marina on Lake Powell. Ticaboo is "off the grid" meaning that no

regional transmission power lines connect to the District's system and the District must generate all of the electricity it serves. There are currently 48 active customers who receive electricity and other services.

The remote Ticaboo area was not settled until the late 1970's when nearby uranium mines were developed. Eventually two uranium mines were opened and a mill was constructed. Both mines have only operated sporadically and both are now closed. Nearby, Lake Powell provided tourism as a second, though limited, economy. The District, which began providing electrical service in 2010, took over electrical service from the mines that constructed and had operated the electrical infrastructure since the 1970's. Prior to the District taking over in 2010, there was no public utility authorized to provide service.[1] Over the years, The District and its predecessors have served as many as 150 customers and as few as 26. The sporadic operation of the mines and the seasonal nature of Lake Powell tourism causes wide fluctuation in the number of customers served by the District.

The District is one of only two districts authorized to serve electricity in Utah.[2] It is the smallest provider of electricity to the public in Utah. The District employs one full time employee, General Manager and CEO Chip Shortreed. District Board Members and other local residents regularly volunteer to keep the District functioning. A large portion of the area served by the District is State of Utah School Trust Lands administered by the School and Institutional Trust Land Administration ("**SITLA**"). A portion of those lands are leased to a private entity that operates the Ticaboo Resort.

Unlike investor owned utilities, under Utah law the District is not fully regulated by the Commission. Water, wastewater, and garbage services are not subject to Commission regulation. The only regulated service, electricity, is exempt from certain aspects of Commission regulation, as discussed in detail below.

2. Revised Tariff Filed By the District on March 20, 2015

[1] Garfield County created the Ticaboo Electrical Service District in 2009 and the Utah Legislature authorized its provision of electrical service through SB188 that same year. The Ticaboo Electrical Service District and the Ticaboo Special Service District later merged to create the District. No prior electrical service e provider had any legal right to operate as a public utility.

[2] The other is South Utah Valley Electric Service District which serves electricity in a portion of Utah County.

The District filed the revised Tariff sheets which are at issue with the Commission on March 20, 2015 (the "**Revised Tariff**", a redlined copy of the tariff sheets with substantive changes in the Revised Tariff is attached as **Exhibit A**.). The driving force in revising the District's Tariff was SITLA's dissatisfaction with the District's standby fees for developed residential lots not currently being served by the District and the abandonment application fee required to abandon utility service to a particular parcel and terminate the standby fees. SITLA, which is not a customer of the District, objected to these fees. SITLA's lessee refused to pay standby fees and SITLA vowed to bring legal action against the District to contest the fees. Negotiations fortunately resulted in a settlement with SITLA. (A copy of the settlement agreement is attached as **Exhibit B**.) In this settlement SITLA agreed to pay the standby fees its lessee owed to the District and the lessee abandoned a number of connections not currently being served, paying a lower abandonment application fee in the Revised Tariff. The Revised Tariff implements the settlement with SITLA and clarifies various definitions, establishes fees for unauthorized use of utility services provided by the District, clarifies responsibly for payment for District services in landlord/tenant situations, and makes various other changes. For the sake of simplicity and uniformity and to allow for formatting changes and minor corrections, the District submitted a completely new Revised Tariff, although substantive changes from the prior Tariff as first filed on October 14, 2013 were primarily made to Regulations 02.01 (Definitions), 03.12 (Abandonment of Utility Services) and 08.02 (Electric Service Billings) (See **Exhibit A**).

3. Division of Public Utilities Action Request Response

As requested by the Commission, the Division reviewed the District's Revised Tariff and issued an "Action Request Response" on April 13, 2015 (the "**Division Response**"). The Division expressed concern with the standby fees charged by the District to inactive customers even though standby fees were not changed by the Revised Tariff but were, in fact, implemented by the District in 2013 and reviewed by the Division in Docket 13-2508-T02. The Division did not recommend rejection or even question the standby fees in its Action Request Response filed in Docket 13-2508-T02. (A copy of this Action Request Response is attached as **Exhibit C**.) The Division also noted that the effective date of the Tariff preceded the date on which the revised Tariff was filed

with the Commission. The Division asserts that the Tariff should be rejected by the Commission based on its interpretation of Utah Code § 54-3-3, which states ". . . no change shall be made by any public utility in any rate, fare, toll, rental, charge or classification, . . . except after 30 days' notice to the commission and to the public as herein provided."[3] The Division also recommended that the Commission prohibit the District from charging standby fees to inactive utility customers.

As requested by the Commission, the District will address (1) compliance with Utah Code Ann. § 17B-2c-406 and § 54-3-3 and (2) appropriateness of standby and abandonment fees.

[3] The Division's recommendation of rejection for failure to comply with Utah Code Ann. § 54-3-3 is puzzling as only the effective date of the Revised Tariff is affected by this statute.

A. Compliance with U.C.A. § 17B-2a-406 and Notice to Commission Under U.C.A. § 54-3-3

The Division Response posits that the revised Tariff does not comply with Utah Code §§ 17B-2a-406 and 54-3-3 and therefore the Revised Tariff should be rejected by the Commission. The Division Response recommending rejection implies, without providing any real explanation or legal authority, that the Commission has jurisdiction and authority to approve or reject the Revised Tariff. The District respectfully disagrees. The Commission is a creature of Utah statute and thus only has jurisdiction and authority specifically delegated to it by the Legislature. As noted by the Utah Supreme Court in *Bear Hollow Restoration, LLC v. Public Service Comm'n of Utah*, 2012 UT 18, ¶18, "the [Public Service] Commission has no inherent regulatory powers other than those expressly granted or clearly implied by statute." The Commission's jurisdiction and authority over improvement districts providing electricity (as well as electrical distribution cooperatives) is limited by statute.[4] Electrical improvement districts, such as the District, are declared to be public utilities and subject to the jurisdiction of the Commission in Utah Code Ann. § 17B-2a-406(2). Thus the Commission's jurisdiction over the District is derived solely through Utah Code Ann. § 17B-2a-406(2).[5] However, in subsection (6)(a), it states that a critical jurisdictional provision in Title 54, Section 54-7-12, does not apply to rate changes of an electric improvement district if:

> (i) the district is organized for the purpose of distributing electricity to customers with the boundary of the district on a not-for-profit basis;
>
> (ii) the schedule of the new rates or other change that results in new rates has been approved by the board of trustees of the district;
>
> (iii) prior to the implementation of any rate increases, the district first holds a public meeting for all its customers to whom mailed notice of the meeting is sent at least 10 days prior to the meeting; and
>
> (iv) the district has filed the schedule of new rates or other change with the commission.

The District has complied with all requirements listed in Utah Code § 17B-2a-406(6)(a). The Commission, in Docket 09-2508-01, examined the District at the time the District was created by Garfield County. In that docket,

the Commission, in its Report and Order Granting Certificate Of Public Convenience And Necessity, issued November 30, 2009, stated in the Conclusions of Law section that the District "meets each of the statutory requirements under Utah Code Ann. § 17B-2a-406 and Utah Code Ann. § 54-4-25 for issuance of a Certificate of Convenience and Necessity to operate as a public utility rendering electrical power services within the District's boundaries" and that the District will "operate as a public utility subject to regulation by the Commission except that District's rates need not be initially approved by the Commission under Utah Code Ann. §54-7-12." (A copy of this Report and Order is attached as **Exhibit D**.) Clearly the requirements of subsection (i) have been met. The Division reviewed the meeting minutes and board resolutions regarding the tariff changes and concluded that each change was properly approved at a public meeting of the District's Board of Trustees (See Division Response, page 3). All Board of Trustees meetings are noticed according to the Utah Open and Public Meetings Act and District customers are provided at least 10 days' advance mailed notice of meetings at which the Board of Trustees is planning to vote on possible rate increases. (A copy of the relevant agendas is attached as **Exhibit E.** Due to the voluminous nature of the combined minutes, resolutions and supporting documentation for tariff changes those documents are not included here; however, the District will provide all such documents on request.) (A declaration from Chip Shortreed regarding mailed notice is attached as **Exhibit F**). Such notice and action by the District Board satisfies subsections (ii) and (iii). Finally, as the Commission is aware, the District filed the revised Tariff with the Commission on March 20, 2015, meeting the requirements of subsection (iv). In light of the undisputed facts, a rational argument that the District has not complied with Utah Code Ann. § 17B-2a-406 cannot be made. The District's Revised Tariff is thus entitled to the full exemption from Utah Code Ann. § 54-7-12.

[4] Distribution cooperatives are in essentially the same situation as electric districts regarding Commission authority over rates and regulations as Utah Code § 54-7-12(7) (applicable to co-ops) and Utah Code Ann. § 17B-2a-406 (applicable to districts) provide exemption from the ratemaking procedures of Utah Code Ann. § 54-7-12 upon compliance with certain very similar requirements—including filing of the changes with the Commission.

[5] As is well known, municipalities, the other governmental entity which provides electric service, are not public utilities as that phrase is defined and used in Title 54 of the Utah Code and are not subject to any Commission jurisdiction or regulation.

Utah Code Ann. § 54-7-12, which as shown above does not apply to the District, grants the Commission authority over and sets forth procedures for the setting of rates by other public utilities.[6] Thus the District is exempt from Commission jurisdiction and authority for setting rates which include the standby, abandonment and other fees in the Revised Tariff and the Commission can neither approve nor reject the rates including fees and other charges in the Revised Tariff established by the District through the procedure set forth in Utah Code Ann. § 17B-2a-406(6)(a).

Recognition of the exemption of electrical improvement district tariffs from Commission oversight and approval is further demonstrated by the practice of the Commission to simply acknowledge and file tariff filings by electrical improvement districts and electrical distribution cooperatives. A review of the Commission's public files on its website failed to reveal a single instance of a tariff filing by either an electrical district or electrical distribution cooperative being subjected to an approval process by the Commission. In each case, the Action Request Response by the Division only recommends the Commission acknowledge the filed tariff. There is no claim or suggestion that the tariff be approved by the Commission. (For an example, see **Exhibit G**, which is a copy of the Action Request Response filed by the Division in Docket No. 14-2167-T01 for South Valley Electric Service District.) In fact, the recommendation of rejection by the Division appears to be without precedent. The Commission is simply without jurisdiction and authority under Utah Code Ann. § 17B-2a-406 and § 54-7-12 to reject the Tariff as urged in the Division Response.

As this Commission well knows, the core rationale why public utilities are fully regulated by the Commission and why municipalities providing the exact same electric service are totally unregulated is the lack of consumer representation as to rates charged by investor owned public utilities such as Rocky Mountain Power, while in a municipality, such as Bountiful City, the utility customers have access through the ballot box to the governing board, i.e., the city council.

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[6] The term "rates" is not defined in Title 54. However, the phrase "base rates" is defined in Utah Code Ann. § 54-7-12(1)(a)(i) as "those charges included in a public utility's applicable rate tariffs, including: (A) a fare; (B) a rate; (C) a rental; (D) a toll; or (E) any other charge generally applicable to a public utility's rate tariff."

This same rationale applies to electrical districts and distribution cooperatives. The Utah Supreme Court has recognized this distinction in *Garkane Power Co. v. Public Service Comm'n*, 100 P.2d 571 (Utah 1940). This is one more reason why the Commission should not accept the Division's invitation to veer from a well-trod path allowing electric districts and distribution cooperatives to regulate their rates through voters and members, respectively.

The Division also cited Utah Code Ann. § 54-3-3 and on that basis recommends that the Commission reject the District's revised tariff as the Commission was not given notice of the proposed changes at least 30 days in advance. Also, at most, this statute alters the effective date of the Revised Tariff. It cannot be a basis for rejection, even if the Commission held such authority. The District is puzzled by the Division's sudden focus on Utah Code Ann. § 54-3-3, as neither the Division nor the Commission has applied that section to tariff filings by electric districts or distribution cooperatives in the past. Indeed, in the following completed dockets, the Division voiced no objections despite the effective date of the tariff being less than 30 days after filing of the tariff with the Commission (in dockets marked with an asterisk, the tariff was effective ***prior to filing*** with the Commission):

15-066-T01*
15-028-T01
14-2167-T01*
13-2508-T01
13-066-T02*
12-066-T01
12-031-T01*
12-022-T01
11-028-T01*
10-032-T01*
09-2167-T01*
09-028-T01*
08-028-T03

As the Commission is likely aware, the dockets listed above represent a significant portion of the tariff revisions filed with the Commission by electric districts and distribution cooperatives in recent history. As neither the Division nor the Commission have previously interpreted Utah Code § 54-3-3 to apply to electric districts and distribution cooperatives, the District seriously questions what is motivating the Division to not only ask the Commission the apply this statute, for what appears to be the very first time, but to urge rejection when this statute

would only at most alter the effective dates. If the Commission interprets § 54-3-3 to apply to tariff revisions by the District, it follows that the Commission should apply the 30 day requirement uniformly to all electric districts and distribution cooperatives.

B. Standby Fees

The District established its electric standby fees in 2013 and filed that tariff with the Commission in Docket 13-2508-T02. The Division reviewed that tariff as filed with the Commission and addressed the standby fees in its Action Request Response dated November 19, 2013; in that Action Request Response (**Exhibit C**), the Division recommended that the Commission acknowledge the revised tariff sheets. The District has not changed the standby fees since that time. Thus, there is no change in standby fees in the most recent Tariff filing and no basis for the Division to reopen the 2013 Tariff in this docket.

As noted in the Division Response, the District charges standby fees to inactive customers, which are those customers who do not currently receive any of the services offered by the District but to whom the District is ready, willing and able to provide such services upon request (generally defined as the existence of taps on the property, also known as connections or service laterals, for one or more of the District's services). These standby fees are based on four components: water, wastewater, garbage and electricity. Only electricity is under the authority of and regulated by the Commission.

The Standby Fees are the only way for inactive customers to pay their rightful share of the expenses incurred by the District to acquire and maintain the District's utility infrastructure—including the extra capacity needed to serve these standby customers—when service is requested.[7] Without standby fees, the Ticaboo residents who currently receive services from the District would be forced to subsidize this additional capacity of the District. As stated above, the population of the Ticaboo area, and thus the number of customers served by the District, fluctuates greatly. For example, during the winter the District serves approximately 28 customers while in the summer that number swells to more than 50. Over a longer period of time the opening and closing of the

[7] For Example in 2013 the District obtained a loan from the Community Impact Board to purchase two new diesel generators, which have the capacity to serve approximately 300 residential connections, even though currently there are only 48 connections.

uranium mines have created even greater fluctuations in the customer base for the District. Without the purchase and maintenance of additional capacity the District would not be able to handle these wide swings of customers and thus would not be able to provide "adequate and continuous service to . . . the public" a requirement of all utilities and a duty of the Commission to assure, see *McMullin v Public Service Comm'n,* 320 P.2d 1107, 1109 (Utah 1958) Without the Standby Fees, the District would not be able to charge fees that are "just and reasonable" as required by Utah Code Ann. § 54-3-1 as the residents who are receiving utility service from the District would be required to subsidize the additional capacity needed to address the seasonal and long term fluctuations described above.

Standby fees, both as approved by the Commission and by unregulated utilities, e.g. municipalities and water and sewer districts, are in widespread use throughout Utah as the mechanism to address the issue of inactive customers who will eventually request utility service when a particular parcel of property is developed. Few, if any of these utilities experience the magnitude of customer fluctuation of the District. Indeed, the District believes it is very clear that standby fees are necessary for it to set rates that are just and reasonable to all customers in a utility's service area—whether those customers are actively receiving service at present or not. (See Utah Code Ann. § 54-3-1.) As such, the District respectfully submits the Division's sudden objections to the standby fees that are unchanged from the previous tariff are ill conceived and if implemented would actually cause the District to violate its legal duty to provide just and reasonable service to all served by it.

C. Abandonment Application Fee

As part of the settlement with SITLA, and in order to lessen the burden on property owners who do not intend to occupy or develop their properties in the foreseeable future, the District implemented a policy allowing these property owners to "abandon" utility service to an undeveloped subdivision lot that is not receiving service. This abandonment essentially takes the particular lot or parcel back to its pre-development state—just as if the District had never prepared to serve that particular property. For properties where utility service has been abandoned, the owners are no longer required to pay Standby Fees and the District will not consider the abandoned lots for service. The District will not account for that property when planning for required capacity or making changes or upgrades to the District's utility infrastructure. If and when the owner of a particular abandoned lot desires to reconnect, that lot would be treated as if it had never been prepared to receive service from the District and the lot owner would pay all applicable fees to the district (impact fees, connection fees, etc.) just as if it were a new lot. While these future fees are likely to be significant, the District believes that offering the choice between continuously paying Standby Fees and abandoning utility service (and paying connection and impact fees in the future) is a benefit to the District's customers—particularly in light of the unique nature of Ticaboo.

The District's abandonment policy requires that a property be vacant (e.g., not occupied, no structures existing) for at least 24 months before abandonment will be allowed. The District believes that this policy protects both the District and Ticaboo residents. This policy, for example, prevents a property owner from removing a mobile home from his lot in November, applying for abandonment, and then moving the mobile home back on his lot in May. This policy also allows for some measure of revenue stability for the District. The District recognizes that this abandonment fee may be uncommon, but the District believes it is an appropriate policy given Ticaboo's unique situation.

4. Conclusion

As stated above, the District believes it has fully complied with the requirements imposed on it by Utah statutes and Commission rules in filing the Revised Tariff. The changes made in the revised tariff as filed with the Commission on March 20, 2015 have been carefully examined and discussed among the District's board

members and the public had opportunities to make any comments on the changes prior to board approval. Unlike most public utilities regulated by the Commission, the District and its board members are politically accountable to the District's customers and the District is further overseen by Garfield County.

While the changes made to the tariff are in the best interests of the District and its customers, to date the only change that has actually been implemented is the reduction in the abandonment application from $150.00 to $75.00. As part of the settlement with SITLA, which is not a customer of the District, SITLA requested that the abandonment application fee in the existing Tariff be reduced. After the fee was reduced, SITLA's Lessee abandoned the taps to a number of properties within Ticaboo so that standby fees would not continue to accrue. Any action by the Commission requiring reversal of that reduction in the abandonment application fee would necessarily dismantle the negotiated settlement with SITLA, which would quite possibly result in SITLA bringing a lawsuit against the District and cause the District and its customers to bear significant legal expenses. Aside from SITLA, no one has paid the $75 abandonment application fee. None of the rate changes in the recently filed Tariff have impacted any customers of the District.

The District respectfully requests that the Commission acknowledge the Revised Tariff as submitted to the Commission with an effective date of March 21, 2014.

Respectfully submitted this 14th day of May, 2015.

SMITH HARTVIGSEN, PLLC

/s/ J. Craig Smith

J. Craig Smith
Adam S. Long
Attorneys for Ticaboo Utility Improvement District

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May, 2015, I served a true and correct copy of the foregoing **DISTRICT'S RESPONSE TO DIVISION OF PUBLIC UTILITIES REPORT AND RECOMMENDATION DATED APRIL 13, 2015 AS REQUESTED BY THE COMMISSION ON April 24, 2015** by causing the same to be delivered to the following:

Via hand delivery and email to:

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

Via U.S. Mail to:

Utah Division of Public Utilities
160 East 300 South, Box 146751
Salt Lake City, UT 84114-6751

Via email to:

Justin Jetter
Utah Office of the Attorney General
jjetter@utah.gov

/s/ J. Craig Smith