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April 6, 2020

***VIA ELECTRONIC FILING***

Public Service Commission of Utah  
Heber M. Wells Building, 4<sup>th</sup> Floor  
160 East 300 South  
Salt Lake City, UT 84114

Attention: Gary Widerburg  
Commission Administrator

**RE: Docket No. 20-035-11 – In the Matter of the Formal Complaint of Glynn N. Donahue  
against Rocky Mountain Power**

Dear Mr. Widerburg:

Rocky Mountain Power (“Company”) hereby submits for filing its Motion to Dismiss in the above referenced matter. The Company respectfully requests that all formal correspondence and requests for additional information regarding this filing be addressed to the following:

By E-mail (preferred): [datareq@pacificorp.com](mailto:datareq@pacificorp.com)  
[jana.saba@pacificorp.com](mailto:jana.saba@pacificorp.com)

By regular mail: Data Request Response Center  
PacifiCorp  
825 NE Multnomah, Suite 2000  
Portland, OR 97232

Informal inquiries may be directed to Jana Saba at (801) 220-2823.

Sincerely,

Jacob A. McDermott  
Senior Attorney

Enclosures

Cc: Glynn Donahue – [gd09335@gmail.com](mailto:gd09335@gmail.com)

Jacob A. McDermott (16894)  
Rocky Mountain Power  
1407 W North Temple, Suite 320  
Salt Lake City, UT 84116  
Telephone: (801) 220-2233  
Facsimile: (801) 220-4615

*Attorney for Rocky Mountain Power*

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of the Formal Complaint of	)	Docket No. 20-035-11
Glynn N. Donahue against Rocky	)	
Mountain Power	)	
	)	<b>MOTION TO DISMISS</b>
	)	
	)	
	)	

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Rocky Mountain Power, a division of PacifiCorp (“RMP” or the “Company”), pursuant to Utah Code Ann. §§ 63G-4-204(1) and Utah Admin. Code R746-1-203, and R746-1-301, hereby moves to dismiss in its entirety, with prejudice, the formal complaint (“Complaint”) filed by Glynn Donahue with the Public Service Commission of Utah (the “Commission”), because Rocky Mountain Power has not violated any provision of law, Commission order or Rule, or Company tariff, and the subject matter of the complaint is not within the jurisdiction of the Commission.

**I. PRELIMINARY MATTERS**

Communications regarding this Application should be addressed to:

By e-mail (preferred): [datarequest@pacificorp.com](mailto:datarequest@pacificorp.com)  
[jana.saba@pacificorp.com](mailto:jana.saba@pacificorp.com)  
[utahdockets@pacificorp.com](mailto:utahdockets@pacificorp.com)  
[jacob.mcdermott@pacificorp.com](mailto:jacob.mcdermott@pacificorp.com)

By mail: Data Request Response Center  
Rocky Mountain Power  
825 NE Multnomah St., Suite 2000  
Portland, OR 97232

Jana Saba  
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1407 W. North Temple, Suite 330  
Salt Lake City, UT 84116  
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## **II. BACKGROUND**

1. On August 1, 2019, Glynn Donahue filed an informal complaint regarding Company Work Order No. 6665325. The Company sent a bill, separate from his utility bill, to Mr. Donahue for \$13,097.54 for damages associated with replacement of damaged company equipment, and related work to restore service in the area. The Company alleges that one of its poles was damaged by horses chewing on one of its poles (or “cribbing”) located on or very close to the property line of Mr. Donahue’s property located at 6130 South 2200 West, in Taylorsville, Utah, and that the damage caused the pole to weaken and collapse resulting in the need to replace it and another pole. Mr. Donahue alleges that 1) the poles were damaged by “cribbing” and termite damage prior to his purchase of the property; 2) the weight of heavy wet snow and ice from a storm cause the pole to collapse; and that 3) the Company had not inspected the pole for years prior to the incident. Mr. Donahue’s informal complaint requested that the Company waive the damage claim and sought his own damages of \$300 dollars for grading he claims was needed to repair his field after the Company came onto the property to repair its damaged equipment.

2. On August 7, 2019, Rocky Mountain Power provided a response to the informal complaint. The Company noted it had left several voicemail messages with Mr. Donahue, and sent a letter requesting a return call, but Mr. Donahue did not respond. The Company stated that it

attempts to recover the cost of repair for damage to Company property from the people responsible for that damage whenever possible. The Company stated that it billed Mr. Donahue for the costs related to repairing the damage related to the “cribbed” pole for that reason. The Company provided pictures showing the horse pasture on Mr. Donahue’s property and the damage to the pole that fell. The Company also contradicted Mr. Donahue’s claims that the poles had not been inspected for years and that the poles had been damaged prior to his ownership of the property. The Company’s records indicate that the poles were inspected on February 15, 2018, and that there were no notes in the inspection records regarding pre-existing damage to the pole at that time. The Company also noted that Google images from June 2018 show the poles in good condition. The Company further stated that on the day it responded to the pole down call in March 2019, the company found that the pole had been almost chewed through, and the damage was clearly not weather related. Finally, the Company noted that there had been light snow on that day, but that it was the damage to the pole that had weakened it and caused it to fall.

3. In its August 7, 2019 response, the Company also provided a Wikipedia entry describing lignophagia (wood-chewing) in horses. The Company then noted that it had followed its normal practices in attempting to recover the cost of the damages caused by Mr. Donahue’s horses, and requested that the Commission change the complaint to an inquiry. The Company also offered to work out a payment arrangement with Mr. Donahue.

4. On March 6, 2020 the Commission received a formal complaint from Mr. Donahue that included many of the same allegations contained in his informal complaint. The Company neither admits nor denies the allegations in the formal complaint, instead, as further described below, the Company moves to dismiss the complaint for failure to state a claim upon which relief

can be granted by this Commission, and because the Commission lacks subject matter jurisdiction to hear this complaint.

5. The Complaint does not allege that Rocky Mountain Power has violated any provision of law, Commission Order or Rule, or Company tariff under the jurisdiction of the Commission. Utah Code § 54-8-1, et seq. and to the extent the complaint is an action for damages the Commission lacks subject matter jurisdiction to determine and award such damages.

### **III. MOTION TO DISMISS**

6. The Company moves under Utah Rules of Civil Procedure, Rules 12(b)(1) & 12(b)(6) for an Order dismissing the Complaint. As noted above, the Complaint does not include any allegations that Rocky Mountain Power has violated any provision of law under the jurisdiction of the Commission, Commission Order or Rule, or Company tariff. The Company notes that should the Commission deny this Motion it will respond to the Complaint with an answer to the allegations within 14 days as provided under Utah Rules of Civil Procedure, Rules 12(a)(1).

7. Utah Code Ann. § 54-7-9(2) states a complaint against a public utility “shall specify the act committed or omitted by the public utility that is claimed to be a violation of the law or a rule or order of the commission.”

8. Although the Commission has broad jurisdiction, granted to it by Utah Code Ann. §54-4-1 “to supervise and regulate every public utility in this state and to supervise all of the business of every such public utility” the Utah Supreme Court has stated that “the primary purpose of the Commission is to fix the rates that a public utility may charge its customers.”<sup>1</sup> The test for whether a utility activity is Commission-jurisdictional is “whether the activity the Commission is attempting to regulate is closely connected to its supervision of the utility’s rates and whether the

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<sup>1</sup> *Bear Hollow Restoration, LLC v. Pub. Serv. Comm’n of Utah*, 2012 UT 18 (Utah 2012), citing *Kearns-Tribune Corp. v. Pub. Serv. Comm’n*, 682 P. 2d 858, 859 (Utah 1984).

manner of the regulation is reasonably related to the legitimate legislative purpose of rate control for the protection of the consumer.”<sup>2</sup>

9. In this case, the allegations in Mr. Donahue’s Complaint related to the Company seeking recovery for damage to its property caused by Mr. Donahue’s horses, and Mr. Donahue’s \$300 counterclaim for alleged damage to his field related to the Company’s repair of its equipment do not meet this standard. None of the concerns raised in the Complaint contain allegations of a violation of a law, rule, or Order under the jurisdiction of the Commission. Instead, Mr. Donahue’s complaint is an action related to a dispute over property damages, and is unrelated to the Company’s service to Mr. Donahue as an electric utility, and therefore properly lies in district court.<sup>3</sup>

10. While Mr. Donahue raises allegations related to the Company’s proper maintenance and inspections of its poles, he does not raise these claims to complain that the Company has failed to meet reliability obligations or any of its other obligations in its performance of its duties as a public utility. The Company does not deny that the Commission would have jurisdiction to examine such claims, but here Mr. Donahue raises the Company’s maintenance and inspection practices only as a defense to his liability for damage to Company property, which is not properly within this Commission’s authority to determine.<sup>4</sup>

11. Mr. Donahue further raises a counterclaim for property damage. Alleging that the Company caused \$300 in damages to his field when it performed the repair work on the damaged poles and other equipment. The Company notes it did provide Mr. Donahue the contact

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<sup>2</sup> *Id.* at ¶ 32.

<sup>3</sup> “It is the district court, not the Commission, that has jurisdiction to consider claims for damages for wrongful disconnection or other torts committed by a public utility. At most, the Commission may order the restoration of service and the removal of any improper charges.” *McCune & McCune v. Mountain Bell Tel.*, 758 P.2d 914 at 916 (Utah 1988), citing *Atkin, Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330 at 334 (Utah 1985), and Utah Code Ann. §§ 54–7–20, & 24.

<sup>4</sup> *Id.*

information necessary for him to put in a claim for the cost of the repairs to his field, as of the time of this Motion to Dismiss, Mr. Donahue has not contacted the Company. As with his allegations that go to defenses against liability for damage to Company equipment, Mr. Donahue's claim for damages does not implicate the Company's services or as a public utility, but rather involve the rights of the Company to access Mr. Donahue's land to repair the Company's fallen poles and damaged distribution equipment. These property rights related issues are not within the Commission's jurisdiction.<sup>5</sup> Just as with Mr. Donahue's dispute with and defenses to liability for the \$13,097.54 the Company claims in damages, Mr. Donahue's own claim for \$300 in damages to his field is not properly within this Commission's authority to determine or award.<sup>6</sup>

12. Rocky Mountain Power has a responsibility to its customers to seek recovery of damages caused to its property by others, and it routinely does so. Where disputes arise in such matters, the Company, and entities Company has damage claims against, have the ability to seek redress in district court, where property rights, and liability for damages can be determined and awarded. Mr. Donahue's complaint raises no issues beyond the determination of liability for damages to the Company's property, or to his own. Because this Commission has neither the authority, nor the jurisdiction to make such determinations or awards, and because the Complaint fails to include any allegations that Rocky Mountain Power has violated any provision of law under the jurisdiction of the Commission, Commission Order or Rule, or Company tariff, it must be dismissed in its entirety, with prejudice.

#### **IV. CONCLUSION**

WHEREFORE the Company respectfully requests the Commission dismiss the Complaint in its entirety, with prejudice.

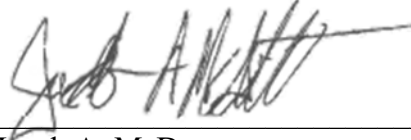
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<sup>5</sup> See e.g., *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 901 P2d 1017, 1022 (Utah 1995).

<sup>6</sup> *McCune & McCune v. Mountain Bell Tel.* at 916.

DATED this 6<sup>th</sup> day of April, 2020

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jacob A. McDermott", with a long horizontal flourish extending to the right.

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Jacob A. McDermott

*Attorney for Rocky Mountain Power*



**CERTIFICATE OF SERVICE**

Docket No. 20-035-11

I hereby certify that on April 6, 2020, a true and correct copy of the foregoing was served by electronic mail to the following:

Glynn Donahue [gd09335@gmail.com](mailto:gd09335@gmail.com)

**Utah Office of Consumer Services**

Cheryl Murray [cmurray@utah.gov](mailto:cmurray@utah.gov)

Michele Beck [mbeck@utah.gov](mailto:mbeck@utah.gov)

**Division of Public Utilities**

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**Rocky Mountain Power**

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Center

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Katie Savarin  
Coordinator, Regulatory Operations