

March 9, 2021

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

RE: Docket No 21-035-04 Formal Complaint of Tyler and Meredith Jensen against Rocky Mountain Power

Subject: Tyler and Meredith Jensen's Motion for a Hearing and Objection to Rocky Mountain Power's Motion to Dismiss and Answer

Having considered the information provided by Rocky Mountain Power (RMP) and contained in the Comments from the Division of Public Utilities, my wife and I hereby object to RMP's motion to dismiss this complaint and instead make a motion for a formal hearing to be conducted into the matter. In Rocky Mountain Power's Motion to Dismiss and Answer, they move to dismiss this complaint under Utah Rules of Civil Procedure, Rule 12 (b)(6) because they claim that we have failed to allege or establish their company violated applicable laws, rules, or tariffs.¹ Based upon all the information provided to us to date, it is our opinion that Rocky Mountain Power (RMP) violated multiple Utah Administrative Codes and Federal law in the communications, statements, and published materials they provided to us between August and December 2020. Additionally, as seen in *Haynes v. Department of Public Safety*, when reviewing a motion to dismiss, the adjudicator must accept all material allegations in the complaint as true and should only dismiss the complaint if the alleged set of facts cannot support a valid cause of action. In deciding a motion to dismiss, the focus is solely on the sufficiency of the allegations in the complaint and not the underlying merits of the case.² This response outlines and establishes these alleged violations demonstrating that RMP's motion to dismiss is not founded and therefore should be denied.

Overview

RMP provided erroneous information and failed to provide material information that was essential for the average consumer to make a well informed decision about their products and services during the timeframe in question which is in direct violation of the Utah Residential Utility Service Rules for Electric, Gas, Water, and Sewer Utilities (Utah Administrative Code R746-200-1), the Utah Consumer Sales Practices Act Rule (Administrative Code R152-11), and

¹ State of Utah, "Public Service Commission: Docket No: 21-035-04: Formal Complaint of Tyler and Meredith Jensen against Rocky Mountain Power," Rocky Mountain Power's Motion to Dismiss and Answer, 1 March, 2021. [Docket No: 21-035-04 | Public Service Commission \(utah.gov\)](#)

² *Haynes v. Department of Public Safety*, 2020 UT app 19, paragraph 5, 460 P.3d 565.

the Federal Trade Commission Act. Additionally, because RMP made promises that we relied upon in our subsequent actions and now RMP will no longer honor these promises which will ultimately result in our financial loss, this complaint falls under the precedent established for estoppel.³ In their reply, RMP makes no substantive arguments to counter our claims because they are “by and large, without information to confirm or deny [the] allegations.”⁴ RMP simply makes the unsubstantiated claim multiple times that their company provided the “best information available at the time to consumers, to include complainant.”⁵ Contrary to this argument, RMP failed to provide the “best information available at the time” as they claim because they didn't provide four critical pieces of material information, both from their customer service team and on their website, that were essential for the average customer to be able to make an informed decision immediately prior to and during the transition from Schedule 136 to 137: 1) that there were two criteria, and not just one, that could result in the conclusion of Schedule 136 to new customers; 2) that their company was actively seeking to change the net metering rate and had filed an application with the PSC to change the rates for net metering (Docket No. 17-035-61 – In the Matter of the Application of Rocky Mountain Power to Establish Export Credits for Customer Generated Electricity); 3) that hearings had recently concluded between 29 September to 6 October, 2020 and that a possible decision could be made very soon resulting in a change to export credits; and 4) that information regarding the PSC order concerning Schedule 136 was not disclosed to customers immediately upon receipt of the decision and remained falsely advertised to their customer for 26 days. All four of the aforementioned points of material information that were omitted by RMP's customer service are corroborated by identical omissions of this material information on RMP's website. Of particular importance was that RMP failed to disclose that there were two criteria, and not just one, that could result in the conclusion of Schedule 136 to new customers (an essential component of the terms for this product and service), leading to false promises of remaining time available within the Schedule 136 program by RMP's customer service representatives. Also of importance was that RMP's customer service failed to disclose that their company was actively in the process of seeking to change the net metering rate, having filed an application with the PSC and conducted hearings for this purpose, when directly asked by us if a rate change was planned in the near future and could impact our application for Schedule 136.

RMP's failure to be honest and act with sincere intent by providing erroneous information and failing to provide material information to us in good faith is a violation of the Utah Residential Utility Service Rules for Electric, Gas, Water, and Sewer Utilities (Utah Administrative Code R746-200-1(d)). Additionally, RMP conducted a deceptive act by making an oral and written

³ Koller v. Koller, 2018 UT App 27, paragraph 23, 424 P. 3d 926.

⁴ Rocky Mountain Power's Motion to Dismiss and Answer,

⁵ Ibid

offer without stating clearly and conspicuously all "material exclusions, reservations, limitations, modifications, or conditions" which is a clear violation of the Utah Consumer Sales Practices Act Rule (Administrative Code R152-11).⁶ RMP violated this code a second time when they conducted a deceptive act by offering to sell consumer commodities without a bona fide effort to sell the advertised commodities and later refusing to sell "the consumer commodities advertised in accordance with the terms of the advertisement."⁷ Finally, RMP violated the Federal Trade Commission Act because they deceived us with oral and written representation of their commodities that contained and omitted information that was "likely to mislead consumers acting reasonably under the circumstances" and was "'material' – that is, important to a consumer's decision to buy or use the product."⁸

In their reply, RMP asserts that all information concerning their products and services was publically available both through the media and the Public Service Commission (PSC) at the time.⁹ In doing so, they infer that this absolves them of their direct responsibility to make all material information regarding their products and services available to their customers. State and Federal rules and laws do not give RMP the ability to abdicate their responsibility to act in good faith and to provide full disclosure of material information concerning their products simply because information is available through alternate means such as the media or PSC. The onus for fully complying with these rules and laws falls directly on RMP, and they alone bear responsibility for their deceptive practices related to their customers. This is particularly the case where RMP's violation of State rules and Federal law directly result in RMP's financial gain while also causing financial injury to their customer, such as is found in this situation.

Material information

The FTC Policy Statement on Deception is very clear in defining critical information that must be shared by a vendor with consumers. "A "material" misrepresentation or practice is one which is likely to affect a consumer's choice of or conduct regarding a product. In other words, it is information that is important to consumers. If inaccurate or omitted information is material, injury is likely."¹⁰ The FTC continues that "a finding of materiality is also a finding that injury is likely to exist because of the representation, omission, sales practice, or marketing technique. Injury to consumers can take many forms. Injury exists if consumers would have chosen differently but for the deception. If different choices are likely, the claim is material, and injury

⁶ Ibid

⁷ State of Utah, "Utah Consumer Sales Practices Act Rule," Utah Administrative Code R152-11-1, Utah Office of Administrative Rules, [UT Admin Code R152-11. Utah Consumer Sales Practices Act Rule. January 1, 2020](#)

⁸ Federal Trade Commission, "Protecting America's Consumers: Advertising FAQ's: A Guide for Small Business," April 2001. [Advertising FAQ's: A Guide for Small Business | Federal Trade Commission \(ftc.gov\)](#)

⁹ Ibid

¹⁰ Federal Trade Commission, "FTC Policy Statement on Deception," October 14, 1983, upended to Cliffdale Associates, Inc 103 F.T.C. 110, 174 (1984). [831014deceptionstmt.pdf \(ftc.gov\)](#)

is likely as well. Thus, injury and materiality are different names for the same concept.” But for RMP’s omission of critical information that constitutes a deception, we would not have purchased our solar system. This makes the four critical pieces of information RMP failed to provide us “material” based upon this definition, as had this information been provided, it would have resulted in a different decision by us, the consumer. Certainly we had a decision to make, and RMP has a distinct obligation to provide all material information needed for us as customers to make this decision regarding their products and services. This is especially the case considering that the omission of this information will result in injury to us in the form of a decreased discount (export credits) on our overall power bill over what was originally represented to us by RMP under Schedule 136.

Failure to Provide the “Best Information Available at the Time”

Contrary to RMP’s assertion that they provided us “the best information available at the time,” the information provided by their customer service and website was incomplete, misleading, and erroneous. RMP failed to provide the following material information in good faith, both from their customer service team and on their website, which would have been required to have provided the “best information available at the time” as they claim: 1) that there were two criteria, and not just one, that could result in the conclusion of Schedule 136 to new customers; 2) that their company was actively seeking to change the net metering rate and had filed an application with the PSC to change the rates for net metering (Docket No. 17-035-61 – In the Matter of the Application of Rocky Mountain Power to Establish Export Credits for Customer Generated Electricity); 3) that hearings had recently concluded between 29 September to 6 October, 2020 and that a possible decision could be made very soon resulting in a change to export credits; and 4) information regarding the PSC order for Schedule 136 was not disclosed to customers immediately upon receipt of the decision and remained falsely advertised to the customer for 26 days.

1. RMP failed to provide “the best information available at the time” by not providing material information that there were two criteria, and not just one, that could result in the conclusion of Schedule 136 to new customers. As stated in the Division of Public Utilities response, “the stipulation between signatory parties approved by the Commission at the conclusion of Docket No. 14-035-114 was very specific regarding the timing and closure of Schedule No. 136. Either one or both of two criteria, when met, would conclude Schedule No. 136 and close that tariff to new customers. The stipulation required the Commission to close Docket No. 136 when it issued its Order in the matter, or when installed solar reached the pre-set megawatt (“MW”) caps.”¹¹ RMP only informed me about one of the two criteria, and completely omitted all material

¹¹ State of Utah, “Public Service Commission: Docket No: 21-035-04: Formal Complaint of Tyler and Meredith Jensen against Rocky Mountain Power,” Comments from the Division of Public Utilities, 1 March, 2021. [Docket No: 21-035-04 | Public Service Commission \(utah.gov\)](#)

information pertaining to the second criteria. RMP did an excellent job of informing me that when applications reached the pre-set megawatt ("MW") caps, Schedule 136 would be closed to new customers. This information was provided by multiple customer service representatives and remained consistent throughout our due diligence process. One customer service rep, even pointed me to RMP's Customer Generation Webpage, which contained a link to a webpage depicting how much capacity was remaining, to show me that there was still ample time to apply for Schedule 136 because there was significant capacity remaining in the program.¹² The Division of Public Utilities response also supports this assertion as they state that "during the period leading up to the Order, RMP provided a link on its website reporting the total and pending installed MWs under Schedule No. 136."¹³ However, RMP failed to inform us as a customer during my interactions with their customer service representatives that there was a second criteria that could result in the closure of this program. At no point was it mentioned that the program would end if the PSC issued an Order at the conclusion of Docket No 17- 035-61, regardless of the remaining MW capacity left in the program. As mentioned in the subsequent points that were omitted by RMP, because no information was ever provided concerning this Docket or the ongoing hearings, there was no reason for an average customer to request if or assume there was a second way that Schedule 136 could be closed to new customers. The RMP Customer Generation webpage at the time in question supported this assertion because it too failed to disclose that there were two ways in which Schedule 136 could be closed to new customers as it similarly only provides information pertaining to one of the two criteria.¹⁴ By only including information pertaining to the megawatt cap for Schedule 136, the reasonable customer looking at RMP's Customer Generation webpage is to understand that this is the only way in which the program will end. Contrary to RMP's assertions in their response to our complaint that "the Company's website contained accurate information about the schedule applicable to customer generators," a failure to disclose all of the material terms of a product and service to include possible criteria for program termination does not demonstrate "accurate information about the schedule applicable."¹⁵ Quite to the contrary, this omission of critical information was extremely misleading to the customer as it led us as average customers to believe that because there was capacity remaining, there was time remaining in the program. Additionally, given that the RMP customer service representatives misunderstood that there were two criteria based upon their comments and that this information is omitted from RMP's Customer Generation webpage, it is reasonable to believe that RMP failed to properly train their employees regarding this important matter which resulted in them providing erroneous information that there was still significant time remaining to apply for the program.

¹² Enclosure 1 contained within this letter

¹³ Comments from the Division of Public Utilities

¹⁴ Enclosure 1 contained within this letter

¹⁵ Rocky Mountain Power's Motion to Dismiss and Answer

Even without receiving the erroneous information provided by RMP's customer service team regarding the time remaining in the Schedule 136 program, the average customer would be lead to believe that time was not of the essence simply because there was significant capacity left in the Schedule 136 pre-set megawatt cap webpage that was provided on RMP's website.¹⁶ Given that our solar application was submitted quite timely given the requirements to undertake two weeks of engineering development prior to applying, there would have been no reason for my wife and I to suspect that Schedule 136 was subject to close during this relatively short period of time based upon the information provided by RMP on their website. Information identifying that there were two criteria that could independently result in the closure of Schedule 136 was material in nature because it outlined the possible ways in which this program may be terminated thereby making subsequent customers ineligible for this program. This information most certainly would be necessary for the consumer to make an educated decision concerning pursuing net metering prior to and during a transition. By omitting to provide information that there were two possible criteria that could result in the closer of Schedule 136, RMP did not provide us with "the best information." Additionally, since RMP had known about this agreement at the conclusion of Docket No. 14-035-114, this information was certainly available to them at the time of our inquiries. The omission of this critical information does not support RMP's assertion that they provided "the best information available at the time" and constitutes a violation of Utah Rules, federal law, and provides a key component showing that this case falls under the precedent established for estoppel.

2. RMP failed to provide "the best information available at the time" by not providing pertinent information that their company was actively seeking to change the net metering rate and had filed an application with the PSC to change the rates for net metering (Docket No. 17-035-61 – In the Matter of the Application of Rocky Mountain Power to Establish Export Credits for Customer Generated Electricity). As one of the primary parties involved in an Application to Establish Export Credits for Customer Generation Commission in Docket No. 17- 035-61, it is hard to believe that RMP did not have a good understanding of the process at the time information was provided to us. Furthermore, it is unreasonable to believe that RMP did not understand their own intentions as they were the ones that originally filed this application. During my multiple conversations with RMP customer service team, not a single representative informed me that RMP had filed an application to change the rate for export credits. Even when directly asked if the rates were soon subject to change because of information we had been told by a solar company, RMP told us that there was no active intention to change rates until after capacity limits were reach, and that once reached a grace period for transition would be granted similar to the grace period provided between Schedule 135 and 136. Additionally, information regarding Docket No 17-035-

¹⁶ Enclosure 1 contained within this letter

61 was not contained anywhere on their website at the time.¹⁷ Information pertaining to an active application to change the rate for export credits most certainly was critical to a consumer's ability to make an informed decision at the time of purchase, especially when combined with point one above, and therefore makes this information material. Since RMP filed this application on December 1, 2017, it is also unreasonable to believe that RMP provided me with the "best information available at the time" as this information was certainly available at the time (as demonstrated by their participation in the application) and disclosure of this information would be required to be categorized as the "best information" as it was material to the matter at hand. The omission of this critical information constitutes a violation of Utah Rules, Federal law, and provides a key component showing that this case falls under the precedent established for estoppel.

3. RMP failed to provide "the best information available at the time" by not providing material information that hearings had recently concluded between 29 September to 6 October, 2020 and that a possible decision could be made very soon by the PSC resulting in a change to export credits. In their response, RMP claims that they "did not possess the knowledge as to when the Commission would issue its decision nor what the decision would entail prior to receiving the Commission order."¹⁸ While RMP may not have known the exact day, it is common sense that the hearings would precede the order and that a decision was likely to be forthcoming once the hearings were complete. As stated in the Division of Public Utilities response, "the Commission held a hearing to establish the export credit rate for customer generated electricity from September 29, 2020 through October 6, 2020. At any point after that hearing, the Commission could have entered an order that would close Schedule 136. RMP and other interested parties should have been aware of this fact."¹⁹ RMP most certainly knew this information, as they were notified of the hearings on 12 August 2020, and actively participated in the proceedings.²⁰ After 12 August, RMP should have provided information concerning their part in hearings to their customers as this information, when combined with points one and two above concerning omitted information, would have indicated that the rates were soon subject to change. As the Division of Public Utilities continues "to those following the process it was clear that a decision from the Commission was imminent. Nevertheless, a member of the general public might not be fully aware of the proceedings without further study."²¹ RMP's argument that they did not possess the knowledge concerning when the Commission order would be issued is a kin to a bowler

¹⁷ Enclosure 2, Formal Complain of Tyler and Meredith Jensen

¹⁸ Ibid

¹⁹ Comments from the Division of Public Utilities

²⁰ State of Utah, "Public Service Commission: Docket No: 17-035-61: In the Matter of the Application of Rocky Mountain Power to Establish Export Credits for Customer Generated Electricity," Public Service Commission Notice, 12 August, 2020. <https://pscdocs.utah.gov/electric/17docs/1703561/3149651703561n8-12-2020.pdf>

²¹ Ibid

claiming that it was the bowling ball's fault that pins were knocked down, simply because the bowler didn't know when or how many pins would fall down. My wife and I were most certainly not aware of the ongoing hearings and it is reasonable to believe that the average RMP customer was also not following this process. RMP most certainly knew that hearings were being conducted and that a decision was forthcoming. Yet at no point did RMP's customer service team tell us that there were ongoing hearings and that a decision to change rates was soon forthcoming. Quite to the contrary, they told us we had plenty of time to submit our application to ensure that we were under Schedule 136 and that RMP had no active intent to change rates in the near future because of remaining MW capacity. Additionally, none of this information concerning hearings was provided on RMP's website on the Customer Generation webpage.²² Because none of this information was provided on the Customer Generation webpage, the average consumer is to understand that the program is still accepting applications with no near term changes eminent. Information regarding the completion of hearings that could result in an order changing rates for customers during their application process was beyond a doubt material to the consumers' ability to make an informed decision as it could determine whether they pursued solar or not. The omission of this critical information constitutes a violation of Utah Rules, Federal law, and provides a key component showing that this case falls under the precedent established for estoppel.

4. RMP failed to provide "the best information available at the time" by not providing material information to their customers regarding the PSC order immediately upon receipt of the decision and by falsely advertising to their customers the availability of Schedule 136 for 26 days. By their own admission in their response, RMP acknowledges that their website was not updated until November 25, 2020. This means that for 26 days, and more importantly during the time our application was submitted, RMP's website was not providing good faith information with "the best information available at the time" as they claimed in their response. There was no mention that a ruling had been made by the PSC on RMP's website at the time of our application nor that new tariffs under Schedule 137 were currently being developed and forthcoming, which RMP claims they were waiting on to let the public know of the change in programs. Additionally, RMP's website continued to show many misleading items including: 1) remaining Schedule 136 availability based upon remaining MW capacity; 2) the Schedule 136 contract did not show an end date for the program on the contract (which was later amended after 26 days of false advertising); and 3) no disclosure that Schedule 136 was no longer available to new customers (this was also later corrected after 26 days of false advertising). In her written response to my initial complaint, Risa Talo stated that information regarding the PSC order was made publically available on the Power Clerk website prior to the deadline for new customers. This indicates that RMP both knew about the change timely and had the ability to update all of their websites with the best

²² Enclosure 2, Formal Complain of Tyler and Meredith Jensen

information available and in a timely manner. If they can update one website timely, they can certainly update two. However, RMP failed to update any information on their main customer website. The average consumer would have no reason to search for information regarding Rocky Mountain Powers' current net metering program on the Power Clerk website as it is not their official consumer website, but instead an industry level website that requires a login. Additionally, the assertion that RMP was waiting for new tariffs to be approved in order to update their website does not demonstrate an intent to provide the best information available at the time to their customers as material information concerning the closure of Schedule 136 was available to RMP 26 days prior to their update and should have been shared with their customers when advertising their net metering programs. For the 26 days that this information was falsely advertised, material information that Schedule 136 was closed to new applicants because of a PSC order was critically important to ensure that customers pursuing solar were aware of the current situation. Furthermore, RMP sends their customers e-mails all the time, some for billing purposes, some indicating that there will be a disruption to service, and others for advertising purposes. RMP most certainly could have sent out an e-mail containing information regarding the new deadline for solar applications to their customers and a subsequent one once the program was closed. Finally, the updated version of RMP's website now includes "closed to new applicants" next to Schedule 136 and an updated version of the Schedule 136 contract (including a back dated end date) indicating that this information needed to be updated to accurately reflect the status of the program from what they were previously advertising. These important disclaimer were not present during the 26 days that RMP's website falsely advertising their net metering program. On all fronts, RMP failed to inform their customers about critical material information pertaining to a deadline for new applications to Schedule 136 and that the program was closed following the order. This information would have been essential for customers to know the timeline and criteria required to receive this program and therefore was material to the customer at the time. By not providing timely material information that Schedule 136 was closed to new applicants immediately following the PSC order, RMP did not provide my wife and me with "the best information available at the time" and constitutes a violation of Utah rules, Federal law, and provides a key component showing that this case falls under the precedent established for estoppel.

All four of the aforementioned points of material information that were omitted by RMP's customer service are corroborated by identical omissions of this material information on their website on the Customer Generation webpage.²³ These omissions on their website provide a strong indicator that this material information was also omitted in the training that was

²³ State of Utah, "Public Service Commission: Docket No: 21-035-04: Formal Complaint of Tyler and Meredith Jensen against Rocky Mountain Power," Enclosure 2, Formal Complaint of Tyler and Meredith Jensen, 28 January, 2021. [Docket No: 21-035-04 | Public Service Commission \(utah.gov\)](https://www.psc.utah.gov/docket/21-035-04)

provided to their customer service teams and gives significant credit to our claims regarding the conversations we represented in this response and our original complaint. Additionally, following our informal complaint and in addition to the aforementioned change to include "closed to new applicants," RMP has since added a section to their Customer Generation website titled "Keeping you informed" that outlines information regarding the transition process from Schedule 136 to 137.²⁴ This note now provides material information that should have been included well prior to the transition, not 26 days after. By changing their practices and now including this section, RMP provides strong evidence that they recognized their failure to inform the public prior to and during the change and that a change in practices was required to be more honest with their customers. By updating the Power Clerk website so quickly, RMP demonstrated that they could have easily included a section similar to their current section "keeping you informed" during this transitional timeframe to provide all of the material information that was required for their customers to make an informed decision.²⁵ While we welcome RMP's efforts to improve their disclosure of material information, such a change further indicates that RMP practices were not "keeping you informed" prior to the change and that material information was indeed withheld from customers. By providing erroneous information concerning program transition timelines and omitting four material pieces of information critical for the consumer to make an informed decision, RMP demonstrated that they did not provide "the best information available at the time" as they claim.

RMP Violated Utah Administrative Code R746-200-1

RMP violated Utah Administrative Code R746-200-1 by omitting material information and providing erroneous information that would have been critical to our ability to make an informed decision in regards to the net metering products and services offered by RMP at the time. Utah Administrative Code R746-200-1 (D) states that public utility companies must conduct all their dealings and agreements with their customers in "good faith," that is to say they have an "obligation of good faith, honesty, and fair dealings" in the performance of their duties. By definition, good faith is honesty and sincerity of intentions. RMP's dealings with us were not honest, fair, nor were they conducted with a sincerity of intentions which constitutes a violation of this rule.

Honesty requires full disclosure of the material information held by a company, especially when they have a monopoly over the goods and services - as a public utility does - and the company stands to financially benefit from the omission of the information in question. Anything short of full transparency of the relevant details by a company required to make an informed decision

²⁴ State of Utah, "Public Service Commission: Docket No: 21-035-04: Formal Complaint of Tyler and Meredith Jensen against Rocky Mountain Power," Enclosure 3, Formal Complaint of Tyler and Meredith Jensen, 28 January, 2021. [Docket No: 21-035-04 | Public Service Commission \(utah.gov\)](#)

²⁵ Enclosure 3, Formal Complaint of Tyler and Meredith Jensen

about their products and services does not meet the definition of honesty and therefore does not meet the requirements outlined in Code R746-200-1(d). RMP acted dishonestly by providing erroneous information and omitting to provide the aforementioned four critical pieces of material information that were essential for us to make an informed decision at the time. Because information regarding efforts to change export credit rates, ongoing hearings, and decisions by the PSC were critical for a consumer to make an informed decision, this information would be required to be shared by RMP for them to act honestly and in good faith. In particular, RMP demonstrated blatant dishonesty when their customer service team told us that there was plenty of time remaining within the Schedule 136 program and that a future transition would be triggered only when the remaining capacity within the program was reached. This dishonesty was also conducted on their website, as it omitted the aforementioned critical information and alluded that the termination of the program was solely based upon remaining capacity. Furthermore, RMP dishonestly advertised for 26 days that Schedule 136 was still available to their customers, to include an invalid Schedule 136 contract, with no intention to honor these faulty advertisements under Schedule 137 was finished. Because the information provided by RMP's customer service team and website were not honest, this omission of information and subsequent erroneous information provided by RMP's customer service constitutes a blatant violation of the good faith requirement in Utah Administrative Code R746-200-1(d).

RMP's actions were not conducted with sincerity of intentions. RMP was actively pursuing a change in the export credits and participating in hearings on the one hand while on the other omitting to inform their customers of this intent to change the terms, even after being directly asked by us if there was any merit to claims made by a solar company that the rates would soon change. One could easily argue that RMP's omissions were purposeful in order to avoid a "rush on solar" prior to the order, similar to what happened during the closure of Schedule 135. These actions demonstrate a lack of sincerity of intentions in RMP's dealings with their customer and therefore were not conducted in good faith. This is especially the case given that RMP stood to benefit financially from every customer that wasn't informed timely resulting in them falling under Schedule 137. Assuming that the increase to each customer's cost in electricity by way of reducing the export credit is \$10,000 over the course of the 11 years that Schedule 136 would have been in effect, RMP could stand to gain \$2.13 million from the 213 applicants that applied for solar between 31 October and 6 November.²⁶ If the period of time is expanded to include all applicants that filed during the timeframe that RMP provided false information on their website during the month of November, that number is increased to \$5.87 million (587 applicants between 31 OCT – 25 NOV).²⁷ There was certainly a financial benefit for RMP to not disclose this information to their customers, as many would likely have expedited

²⁶ Rocky Mountain Power's Motion to Dismiss and Answer

²⁷ Ibid

their application or not purchased solar in the first place had they known they may not fall under Schedule 136. Had RMP notified us of Docket 17- 035-61 and pointed us in the right direction, we would have certainly taken the time to research the matter further which would have provided some of the critical information we needed to make an informed decision, likely resulting in us not choosing to put solar on our house. Additionally, by only posting information on the Power Clerk website regarding the recent Order from the PSC, RMP indicates that their intentions were not sincere to inform all of their customers at large about the change. Given that they stood to profit multiple millions of dollars from those that did not apply timely by this omission, one is left to assume that RMP did not update their main website on purpose as a calculated move to increase the number of applicants that would fall under Schedule 137. It is hard to believe that they accidentally neglected updating their main site for 26 days when they quickly updated the Power Clerk website within hours of the change. By showing insincerity in their intentions by posting information regarding the change on only one website (the one least visited by the consumer) and failing to inform the consumer about their active endeavors to change rates, even when directly asked, RMP violated the good faith requirement outlined in Utah Administrative Code R746-200-1.

RMP Violated the Utah Consumer Sales Practices Act Rule and the Federal Trade Commission Act

Because RMP failed to provide material informational that was essential for the average consumer to make a well informed decision during the timeframe in question, RMP violated the Utah Consumer Sales Practices Act Rule (Administrative Code R152-11) and the Federal Trade Commission Act. As is to be expected, traditional private companies are held to a high standard in their advertising and dealings with customers to ensure that customers are treated fairly and ethically. There are many rules and laws at both the State and Federal level that are designed to ensure that consumers receive fair treatment from companies, especially in the manner in which these companies represent their products and discounts to the consumer. In particular, at the State level, the Utah Consumer Sales Practices Act Rule (Administrative Code R152-11) is designed to "supplement and compliment any other rules promulgated by the State of Utah or any agency or subdivision thereof or any other governmental entity" to encourage fair consumer sales practices.²⁸ Additionally, on the Federal level, the Federal Trade Commission Act, outlines unfair acts or practices that affect commerce.²⁹ Both of these laws have the intended purpose of ensuring that companies treat the consumer with fair representation of their products and services to ensure that the consumer is treated in a fair and ethical manner.

²⁸ State of Utah, "Utah Consumer Sales Practices Act Rule," Utah Administrative Code R152-11-1, Utah Office of Administrative Rules, [UT Admin Code R152-11. Utah Consumer Sales Practices Act Rule. January 1, 2020](#)

²⁹ Federal Trade Commission, "Protecting America's Consumers: Federal Trade Commission Act," [Federal Trade Commission Act | Federal Trade Commission \(ftc.gov\)](#)

In particular, these laws designate a high standard for the information that is provided or omitted orally by a company's customer service, on their website, and through digital communications such as e-mail.

RMP's failure to provide material informational essential for the average consumer to make a well informed decision during the timeframe in question is a violation of the Utah Consumer Sales Practices Act Rule (Administrative Code R152-11). Utah Administrative Code R152-11, states the intention of this act is to "protect consumers from suppliers who engage in referral sellings, commit deceptive acts or practices, or commit unconscionable acts or practices" and to "encourage the development of fair consumer sales practices."³⁰ Administrative Code R152-11 continues that "it is a deceptive act or practice for a supplier in connection with a consumer transaction, in the sale or offering for sale of a consumer commodity to make any offer in written or printed advertising or promotional literature without stating clearly and conspicuously in close proximity to the words stating the offer of any material exclusions, reservations, limitations, modifications, or conditions."³¹ These requirements extend to offers made orally, as they "must include a conspicuously clear and oral statement of any material exclusions, reservations, modifications, or conditions."³² As already mentioned, the information that RMP failed to provide to their customers constitutes oral statements and advertised literature on their website that did not include all of the material exclusions, reservations, modifications, and conditions. The inclusion of one, instead of two criteria for termination, the intent to modify the terms of service without disclosure, the participation in ongoing hearings showing an intent to modify the terms without disclosure, and failing to inform customers that Schedule 136 was no longer available after the PSC order are all subject to this rule and are violations of this clause. Furthermore, under section R152-11-3, the rule continues that "it shall be a deceptive act or practice in connection with a consumer transaction for a supplier to offer to sell consumer commodities when the offer is not a bona fide effort to sell the advertised consumer commodities."³³ As previously mentioned and as indicated by RMP, from 31 October to 25 November, RMP continued to advertise Schedule 136 with no intention of honoring this program or mention that any terms for this program had changed. This is a deceptive act according to this rule that constitutes bait advertising of unavailable commodities, even if it was not RMP's intention.³⁴ This continued false advertising on their website constitutes a violation of both the aforementioned clauses as RMP failed to disclose all of the relevant exclusions and modifications to their products and services while also having no intention to sell the products and services as advertised on their website or as outlined in the posted Schedule 136 contract.

³⁰ "Utah Consumer Sales Practices Act Rule"

³¹ Ibid

³² Ibid

³³ "Utah Consumer Sales Practices Act Rule"

³⁴ Ibid

My wife and I, along with 587 other customers, applied for Schedule 136 while it was falsely advertised during this timeframe. RMP's "refusal to show, demonstrate, or sell the consumer commodities advertised in accordance with the terms of the advertisement" demonstrates a clear violation of this Utah rule, even if this was the result of a PSC order.³⁵ Understanding that RMP was under a PSC order to change to Schedule 137 and therefore could not grant new customers entry under Schedule 136 does not abdicate RMP's responsibility to comply with this rule and ensure that their advertised literature on their website and contracts accurately reflected their available products. Furthermore, counter to RMP's assertions, this Administrative Code does not give RMP the ability to abdicate their responsibility to conduct their business in a manner that is free of deceptive and unfair practices for their customers simply because the media or PSC already provided information about the terms of their products. The responsibility for correctly representing their products online and through their customer service representatives falls on RMP alone.

RMP's failure to provide material information that was essential for the average consumer to make a well informed decision during the timeframe in question is also a violation of the Federal Trade Commission Act. Furthermore, the principles applied by the Federal Trade Commission under the Federal Trade Commission Act provide significant amplifying information that supports the validity of our claim. Section 5 of the Federal Trade Commission Act "declares unfair and deceptive acts or practices unlawful."³⁶ According to the definition provided by the FTC on their website, RMP's actions constitute deceptive advertising. The Federal Trade Commission "Protecting America's Consumers: Advertising FAQ's" webpage further states that "an ad is deceptive if it contains a statement – or omits information – that: 1) is likely to mislead consumers acting reasonably under the circumstances; and 2) is "material" – that is, important to a consumer's decision to buy or use the product."³⁷ The FTC Policy Statement on Deception further clarifies that "practices that have been found misleading or deceptive in specific case include false oral or written representation" and those where there is a "failure to perform promised services."³⁸ To determine if deception has occurred, the situation needs to be examined from the perspective "of a consumer acting reasonably in the circumstances."³⁹ It is reasonable that a consumer would turn to their utility company, as the subject matter expert on solar net metering, to inquire about the products and services offered by said utility company. It is also reasonable that the average customer would not question the responses received from said company, especially when they match those advertised on their website,

³⁵ Ibid

³⁶ "FTC Policy Statement on Deception"

³⁷ Federal Trade Commission, "Protection America's Consumers: Advertising FAQ's: A Guide for Small Business," April 2001. [Advertising FAQ's: A Guide for Small Business | Federal Trade Commission \(ftc.gov\)](https://www.ftc.gov/ftc/advertising-faq)

³⁸ "FTC Policy Statement on Deception"

³⁹ Ibid

and not seek additional information, even if that information is available in the media or from a government agency. According to the FTC, "the test is whether the consumer's interpretation or reaction is reasonable," even if "it is not shared by a majority of consumers in the relevant class."⁴⁰ The average consumer of Rocky Mountain Power is not an expert in the solar arena, and would not pay attention to news articles related to solar net metering until they were considering the purchase of a solar system. Additionally, the average consumer would not know anything about the Public Service Commission or its role, if they had no prior exposure to the PSC. Furthermore, the average consumer would not know at first to ask to speak with the net metering department when they called RMP, they would simply ask to speak to someone about solar. According to the FTC, "the commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." The omissions previously mentioned that were conducted by RMP certainly resulted in the consumers' detriment and could result in RMP profiting roughly \$5.87 million at the expense of their customers.

Furthermore, the FTC clarifies that there is no obligation for the consumer to have to seek out further information to clarify deceptive information received from a company. This would apply to many of the items already covered to include, but not limited to, both the oral statements provided to us from RMP's customer service team that there was still capacity remaining in the program and thus plenty of time and to the written material provided on RMP's website that omitted key information regarding criteria for closure of the program. This would equally apply to advertising for Schedule 136 for 26 days, when the information is later revealed that the program is no longer available. The deceptive information alone can be a violation of the Federal Trade Commission Act even if clarifying information is available to the average consumer later (such as through the media, a governmental website, updating a webpage, or after applying for net metering). Multiple FTC cases support this assertion, including *Giant Food* (61 F.T.C. 326, 348 (1962)) where a "fine print disclaimer was inadequate to correct a deceptive impressions" from printed material (comparable to stating that the material information is available through other public sources even though deceptively presented by RMP); *Peacock Buick* (86 F.T.C 1532, 1558-59 (1974)) where oral deception from employees resulted in customers choosing a product despite written literature that provided the material information needed to make a decision (comparable to RMP customer service providing deceptive oral statements when the material information is available through other means); and *Seekonk Freezer Meats, Inc* (82F.T.C. 1025 (1973)), where offers to sell products and services were not bona fide offers and the truth was made known just prior to purchase (similar to offering Schedule 136 for 26 days when there was no intention to honor the offer).⁴¹

⁴⁰ Ibid

⁴¹ "FTC Policy Statement on Deception"

Commission cases reveal specific guidelines. Depending on the circumstances, accurate information in the text may not remedy a false headline because reasonable consumers may glance only at the headline. Written disclosures or fine print may be insufficient to correct a misleading representation. Other practices of the company may direct consumers' attention away from the qualifying disclosures. Oral statements, label disclosures or point-of-sale material will not necessarily correct a deceptive representation or omission. Thus, when the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser. Pro forma statements or disclaimers may not cure otherwise deceptive messages or practices.⁴²

As such, it is completely understandable that a reasonable consumer looking to purchase solar would call RMP, take the deceptive statements received and literature on their website in good faith and determine that there was no need to continue to conduct any further due diligence. Additionally, it is unreasonable to assume that your average customer would scan through countless dockets on the PSC website and news articles in search of information regarding potential changes to RMP's products and services after receiving information from RMP, let alone even know what the Public Service Commission is. My wife and I had no understanding of the existence of the PSC prior to the order changing rates. It was only after seeking out how to file a complaint that we became aware of the PSC and its role in overseeing public utilities. If RMP's customers seek additional information from RMP concerning their products, good faith would require that RMP provide at least the same amount of information that is publically available concerning their products and services. RMP has a greater responsibility than the media and PSC to ensure that they fully disclose "material" information to their customers to ensure that they can make an informed decision, because they are the only ones required by law to ensure that they accurately and fully represent their own products and services to their customers. This responsibility does not fall on the consumer, the PSC, nor the media; it only falls on RMP. This is even of greater importance when RMP's failure to disclose the material information results in financial benefit for their company at the injury of their customers.

As a "public utility" company, having an exclusive monopoly over the power market in our area, RMP should be at least held to the same standards as traditional private companies, to which these laws undoubtable apply. Certainly public utility entities (albeit still technically private entities) should not enjoy less of an expectation for fair business practices than traditional private companies. Quite to the contrary, public utility companies should have the highest expectation of transparency and disclosure of information to their customers because there is no competition within the market to ensure market fairness. In a final statement provided by the FTC in their Statement on Deception, they state that it is their intentions "to enforce the FTC Act vigorously."⁴³ If this is the intention of the FTC to investigate deceitful practices of traditional private entities, how much greater should the need be to investigate companies that

⁴² "FTC Policy Statement on Deception"

⁴³ Ibid

have a monopoly by design. A "vigorous" investigation into this matter is most certainly called for by the PSC.

Estoppel

In *Koller v Koller*, three elements were outlined for estoppel: "(i) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (ii) reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act or failure to act; and (iii) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act."⁴⁴ Using this precedent as a benchmark, all three elements required for estoppel are met in this complaint. In regards to the first element, RMP provided erroneous information and failed to provide material information to us that was critical to fully understand the true nature of the requirements needed to receive net metering under Schedule 136. Oral and written representation indicated that we had sufficient time to apply and that RMP had no intention to change the terms of Schedule 136 during our solar application process. In regards to the second element, we made reasonable decisions to move forward with a solar purchase directly based upon the information provided and omitted to us by RMP. This included moving forward with a purchase we would not have pursued had we been fully informed of the eminent change. This also includes taking our time throughout the process not understanding that time was of the essence. In regards to the third element, RMP contradicted what was originally represented to us and told us that we did not qualify for Schedule 136 and instead would have to sign up under Schedule 137, which is financially worse for us than had we been under Schedule 136 as originally represented by RMP. As outlined here, we meet all three criteria required for estoppel and as such RMP should not be allowed to cause injury to us as a result of our reasonable actions taken based upon their false representations of their net metering program.

Additional Information in Response to RMP's Answer

In their answer to our complaint, RMP asserts that, "the Company's records confirm that Mr. Jensen called in to the Company's customer service center, but it does not appear that any of those calls were referred to the net metering department, which would indicate that customer generation was not the primary purpose of the call."⁴⁵ The average customer of Rocky Mountain Power exploring solar for their personal residence would have no knowledge of the many departments within RMP and therefore would not know to ask for the Net Metering Department when calling to discuss solar. This was certainly the case for my wife and me prior to learning of the order made by the PSC. On pages two and three of our original complaint, we did not claim to speak with the Net Metering department at this time because for most of our

⁴⁴ *Koller v. Koller*, 2018 UT App 27, paragraph 23, 424 P. 3d 926.

⁴⁵ Rocky Mountain Power's Motion to Dismiss and Answer

calls, we did not know what department we were speaking with.⁴⁶ We only knew that we were speaking with RMP customer service. Every single phone call we conducted with RMP between August and December 2020 was for the sole purpose of exploring and applying for programs regarding customer generation on our house. As a consumer trying to become smart on a subject prior to a purchase, we did not know to ask for the Net Metering department and cannot confirm that we spoke with a representative from that department until after the PSC order because this change in rates resulted in us becoming aware of this department's existence, a result of investigating the issue (as represented on page 4).⁴⁷ When asked, what the purpose of our call was, we simply said we wanted to learn more about solar and talk to someone that could assist us to better understand the process and benefits. Additionally, regardless of the department in which we spoke, every representative that we spoke with from RMP was still a paid representative for RMP, and equally responsible for either getting us in contact with the correct department or putting out factual information in good faith that was free of deception. Furthermore, it is not incumbent upon the customer to make sure they speak with the "right" department, but incumbent on RMP to make sure that they provide the best answer to the customer. The average customer only knows that they are speaking to their power company and should not have to differentiate if the representative they are speaking with is from the "right" department and therefore is providing answers that can be trusted. All answers from RMP's customer service should be trustworthy and comply with Utah rules and Federal law.

In their answer to our complaint, RMP continues by asserting that "complainants also claim they spoke with a Rocky Mountain Power energy audit representative, but the Company does not have any record of this taking place."⁴⁸ During one of our calls, the first representative that I spoke with when I mentioned that we wanted to consider different ways to save money on our bills to include exploring solar, stated that they were going to try and connect us to an energy audit representative. There would be no way for us to confirm if this was indeed true or not aside from what was represented to us on the phone, but based upon how it was represented to us throughout the full phone call, we were certainly left with the impression that we were speaking with someone from the energy audit department. Additionally, during this conversation in regards to us weighing the benefits of going solar with who we thought was an energy auditor, the representative explored with us all of the different ways we should consider saving money on our bills. This conversation, which was quite lengthy, included going through all of our energy usage for the last 5-8 years, looking for trends and ways to improve, ways to conduct energy assessments on our house, and exploring how much solar could save us on our utility costs. Based upon the statement of the first representative and the discussion that we had with the second representative, we were certainly left with the impression that we spoke with someone from the energy audit department, as the discussion was very much

⁴⁶ Formal Complain of Tyler and Meredith Jensen

⁴⁷ Formal Complain of Tyler and Meredith Jensen

⁴⁸ Rocky Mountain Power's Motion to Dismiss and Answer

focused on auditing and exploring ways for us to save money. Furthermore, the department to which we spoke has little to no relevance to the substance of what was provided by RMP. All departments within RMP should be equally responsible for ensuring that they provide good faith information to their customers that is free of deception and that complies with Utah and Federal rules and laws.

Additionally, RMP argues that the changes in export credit were out of their hands because they came as a result of an order from the PSC. As the entity that originally filed Docket No. 17-035-61 – In the Matter of the Application of Rocky Mountain Power to Establish Export Credits for Customer Generated Electricity, RMP was the initial catalyst that began the chain of events that resulted in a change to export credits. This makes RMP directly responsible for this change. RMP filed their initial motion fully with the intention of changing the export credits and the situation needs to be seen as such. RMP was not helpless throughout this process as they infer. They always had a full understanding of the situation from the beginning to include all of the material information needed for their customers to make an informed decision; information that their company failed to provide their customers. RMP's actions in this case should be considered with a full understanding that they alone bear responsibility in this situation for their actions and not allow them to seek to push responsibility to the PSC, the customer, or the media.

Finally, RMP's assertion that "permitting any customer to enroll in Schedule 136 after its closure would open the floodgates to other customers claiming that they too should be entitled to enroll" has no bearing to support that RMP did not violate Utah Administrative Codes and Federal Law in their interactions with us.⁴⁹ The matter at hand is if RMP violated State Administrative Code and Federal Law in the way they represented their products and services to us, their customers. If it is found that they did violate Utah rules and federal law, we should be grandfathered into Schedule 136. Furthermore, RMP should not be shying away from doing what is right by their customers simply because "it would be arduous work."⁵⁰ A public utility company should be willing and eager to undertake "arduous work" if it means they are taking care of their customers. Perhaps this aversion to arduous work is why good faith information was not provided to us as the consumer in the first place. Operating and maintaining a transparent public utility company should be arduous work.

Conclusion

As demonstrated above, RMP omitted material information and gave erroneous information that was critical for a customer to make an informed decision about purchasing solar between August and December 2020. Because this information was provided in a manner that was not

⁴⁹ Rocky Mountain Power's Motion to Dismiss and Answer

⁵⁰ Rocky Mountain Power's Motion to Dismiss and Answer

honest, fair, and sincere in intention, these actions constitute a violation of the good faith clause of Utah Administrative Code R746-200-1. Additionally, RMP violated multiple provisions within Utah Administrative Code R152-11 because the information they provided was deceptive in nature, misrepresented their products and services, and for most of the month of November constituted a bait and switch advertisement. Furthermore, RMP violated the Federal Trade Commission Act by conducting deceptive acts in their interactions with us, their customer. Finally, because RMP made promises that we relied upon in our subsequent actions and now RMP will no longer honor those promises resulting in our financial loss, this complaint falls under the precedent established for estoppel and as such RMP should be forced to honor their original promises as represented and admit us under Schedule 136. While neither my wife nor I are lawyers, and we do not have representation in this situation, we believe we have provided a creditable complaint that shows sufficiency of the allegations that RMP failed to comply with Utah Administrative Code and Federal law and therefore their motion to dismiss has no merit. We call upon the PSC to deny their motion to dismiss and instead investigate this matter through a hearing.

Sincerely,

Tyler and Meredith Jensen

Enclosures:

1 – "Utah Megawatt Capacity" under Schedule 136 - Screenshot from Rocky Mountain Power Website



MY ACCOUNT

OUTAGES & SAFETY

SAVINGS & ENERGY CHOICES



SIGN IN

Savings & Energy Choices

Home energy choices

Business energy choices

Renewable energy

Electric vehicles

Customer generation

Time of Day

Utah megawatt capacity

Under [Utah Rate Schedule 136](#), the transition program for customer generators, there is a maximum megawatt capacity available. This content is updated monthly to show capacity remaining.

Cumulative MW direct current (DC) applied for and interconnected

CUSTOMER CLASS	TRANSITION CAP	CUMULATIVE APPLIED FOR (PENDING)	CUMULATIVE INTERCONNECTED (COMPLETED)
Residential and small businesses	170 MW direct current (DC)	42.55 MW	98.37 MW
Large businesses	70 MW direct current (DC)	10.18 MW	11.48 MW

Data as of October 31, 2020