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Formal Complaint of Kevin House against Rocky Mountain Power	<u>DOCKET NO. 23-035-48</u> <u>ORDER GRANTING MOTION TO DISMISS</u>
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ISSUED: January 11, 2024

**1. Procedural History**

On October 13, 2023, Kevin House (“Complainant”) filed a formal complaint (“Complaint”) with the Public Service Commission (PSC) against Rocky Mountain Power (RMP). Complainant is aggrieved that Hurricane Power has replaced RMP as his electric service provider and will not honor the terms he formerly received under Schedule 136 of RMP’s tariff.

The PSC issued a Notice of Filing and Comment Period on October 16, 2023, and an Action Request to the Division of Public Utilities (DPU) on October 13, 2023. The DPU filed Comments on November 15, 2023, indicating it has no recommendation regarding this docket.

On November 15, 2023, RMP filed its Answer and Motion to Dismiss (“Motion”), asking the PSC dismiss the Complaint with prejudice. On November 30, 2023, Complainant filed his reply (“Complainant’s Reply”). In his reply, Complainant explicitly states the relief he seeks from the PSC, asking the PSC “either overturn the transfer [of his service] or force the involved parties to honor [their] binding contracts.” Complainant’s Reply at 9.

## **2. Factual Background**

The following facts appear undisputed: (1) Complainant resides in an area (the “Area”) presently part of Washington County (the “County”); (2) until recently, Complainant was a customer of RMP and received service under Schedule 136, a schedule for eligible customer-generators (typically rooftop solar owners) that credits customers a fixed amount for each kWh they export to the grid; (3) Hurricane City (the “City”) intends to annex the Area as reflected in its General Plan 2020;<sup>1</sup> (4) in March of 2022, the County adopted a resolution formally recommending the City annex the Area;<sup>2</sup> (5) the City provides electric service to City residents through its municipal utility, Hurricane Power; (6) RMP entered an Asset Purchase Agreement (APA) with the City on or about August 3, 2023, agreeing to sell its distribution assets in the Area to the City to facilitate the City replacing RMP as electric service provider to customers in the Area; (7) the transaction detailed in the APA closed on, or prior to, November 1, 2023; (8) the City subsequently replaced RMP as Complainant’s electric service provider; (9) the City had not annexed the Area when Complainant’s service was transferred;<sup>3</sup> (10) the City’s terms of service for customer-exported generation are less favorable to Complainant than the terms he enjoyed under RMP’s Schedule 136.

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<sup>1</sup> See Motion at Ex. 3 at 78-83.

<sup>2</sup> See Motion at Ex. 4.

<sup>3</sup> The filings suggest the annexation had not occurred during the pendency of this proceeding and may not occur for another year.

In more succinct terms, Complainant is aggrieved RMP transferred his service to the City because the City's terms of service render his investment in rooftop solar panels significantly less advantageous to him.

**3. Discussion, Findings, and Conclusion**

- a. A genuine question exists as to whether the law was violated when the City began providing service to Complainant outside its municipal boundary without entering a statutorily required agreement that had been approved by the PSC.

Generally, "a municipality may not sell or deliver the electricity [it] produce[s] ... to a retail customer located beyond the municipality's municipal boundary."<sup>4</sup> However, a municipality may do so provided the utility that serves the customer agrees, and the municipality and utility enter a written agreement to allow the municipality to provide such service.<sup>5</sup> Significantly, the municipality may only provide the service "if ... the [PSC] approves the agreement" between the utility and municipality.<sup>6</sup>

RMP does not allege such an agreement existed here, and the PSC has no record of approving one. Rather, RMP argues a PSC-approved agreement was not necessary "because the [City] is not seeking to serve customers outside city limits,"

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<sup>4</sup> Utah Code Ann. § 10-8-14(4)(a).

<sup>5</sup> Utah Code Ann. § 10-8-14(6)(c).

<sup>6</sup> *Id.*; *see also* Utah Code Ann. § 54-4-40 (requiring the PSC to review agreements between municipalities and utilities that § 10-8-14 requires and mandating certain procedures the PSC must follow).

stressing the County “has already annexed the territory to [the City], and [the City] is in the process of annexation.”<sup>7</sup>

RMP’s argument on this point is unpersuasive. The County’s resolution makes clear it is merely a recommendation, being titled “A Resolution Formally Recommending Annexation of a County Peninsula into Adjacent Hurricane City Pursuant to Utah Code Ann. § 10-2-418(8)(c).”<sup>8</sup> On its face, the resolution does not purport to change the existing municipal boundaries, and the subsection of the Utah Code the resolution cites does not effect an annexation.<sup>9</sup> As RMP concedes in the same sentence it argues otherwise, the City is only “in the process” of annexation. RMP cites no authority suggesting the City’s municipal boundaries will change until the City completes the annexation process.<sup>10</sup>

The PSC appreciates RMP was acting on the wishes of local and county governments, but no language in the statute proscribing a municipality from providing

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<sup>7</sup> RMP’s Motion at 7.

<sup>8</sup> *See* RMP’s Motion at Ex. 4.

<sup>9</sup> On the contrary, Subsection 8(c) allows a municipality to forego certain opportunities residents would otherwise have to object to the annexation provided the county relinquishing the territory provides a recommendation in the form the County did here.

<sup>10</sup> Interpreting the statutory strictures and requirements concerning municipal annexation is well outside the PSC’s purview. Nevertheless, even a cursory review of Section 10-2-418 demonstrates the municipality must undergo numerous other processes to complete the annexation, including holding a public hearing and providing “one or more municipal-type services to the area for at least one year.” Utah Code Ann. § 10-2-418(2)(b).

service outside its municipal boundaries contemplates an exception for circumstances where a municipality has an intention to annex the area. That is, the boundary appears to be the boundary until and unless a municipality changes it by completing one of the annexation processes outlined in Title 10.

Accordingly, the PSC can discern no reason, on this limited record, Utah Code Ann. § 10-8-14 did not require the City to obtain a PSC-approved agreement to replace RMP as Complainant's service provider. Notably, this would have afforded Complainant an opportunity to request a public hearing before the PSC to raise his objection and to be heard with respect to whether the PSC should approve the agreement.<sup>11</sup>

- b. The PSC has no lawful authority to grant Complainant the relief he seeks.

Complainant asks the PSC either "overturn" the transfer of his service to the City or compel the City to provide service consistent with the terms of RMP's Schedule 136. Regardless of whether Complainant is ultimately entitled to such relief, the most immediate question is whether the PSC has authority to grant it. We conclude the PSC does not have such authority.

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<sup>11</sup> Utah Code Ann. § 54-4-40(4)(b) (providing "a person that the agreement affects" may submit a request to the PSC for a public hearing).

While the PSC is vested with relatively broad authority to regulate public utilities in Utah,<sup>12</sup> municipal utilities are specifically exempt from the PSC's jurisdiction.<sup>13</sup> We are aware of no legal authority authorizing the PSC to compel the City to provide terms of service consistent with RMP's Schedule 136. Similarly, now that the City has purchased the distribution assets RMP used to serve Complainant and replaced RMP as his service provider, we have no authority to compel the City to unwind that transfer of service or assets. Complainant has understandably cited no such authority because we are reasonably confident it does not exist.

As discussed above, a serious question exists as to whether the City violated Title 10 by replacing RMP as Complainant's electric service provider without obtaining the PSC's approval of an agreement between RMP and the City. However, the PSC simply has no jurisdiction to adjudicate any violation on the City's part and no power to order the City to redress Complainant's grievance. If the Complainant wishes to

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<sup>12</sup> See Utah Code Ann. § 54-4-1 (providing the PSC is "vested with power and jurisdiction to supervise and regulate every public utility in this state").

<sup>13</sup> While the PSC has jurisdiction to regulate public utilities, municipal utilities are not "public utilities" as the term is defined in Title 54. Utah Code Ann. §§ 54-2-1(23) (defining "public utility" to include, among other kinds of corporations, every "electrical corporation" that provides electric service within the state); 54-2-1(6)(b) (specifying the term "corporation" does not include towns, cities, counties ... or other governmental units created or organized under any ... law of this state"); see also Utah Code Ann. § 54-4-40(2) (providing the PSC's authority to review and approve certain agreements between electric public utilities and municipalities does "not confer jurisdiction on the [PSC] to regulate any electric service provided by a municipality").

obtain a remedy against the City, it must be in a court of general jurisdiction with lawful authority to award it.

For these reasons, the PSC must grant RMP's Motion and dismiss the Complaint.

Nevertheless, the PSC is concerned that RMP may have facilitated the City's apparent disregard of the requirement to obtain a PSC-approved agreement prior to transferring Complainant's electric service to the City. Accordingly, the PSC is opening, contemporaneously with this order, a separate investigatory docket regarding RMP's compliance with applicable law, regulations, and PSC orders with respect to its sale of its assets to the City and transferring customers to the City prior to annexation and without obtaining a PSC-approved agreement.

If Complainant wishes to seek leave to intervene in that investigatory docket, he is welcome to do so. However, Complainant should understand the PSC does not have authority to award damages against RMP and it is unlikely he would receive any personal remedy regardless of the outcome. The purpose of the docket will be to explore the issue, obtain input and an investigation from the Division of Public Utilities concerning the events that transpired, and determine what, if any, measures are appropriate and necessary to incent RMP to ensure compliance in the future. Again, any personal remedy Complainant hopes to receive can only be awarded by an appropriate court.

**4. Order**

For the reasons discussed above, the Complaint is dismissed. The PSC will issue a notice on this date to initiate the investigatory docket referenced above.

DATED at Salt Lake City, Utah, January 11, 2024.

/s/ Michael J. Hammer  
Presiding Officer

Approved and confirmed January 11, 2024, as the Order of the Public Service Commission of Utah.

/s/ David R. Clark, Commissioner

/s/ John S. Harvey, Ph.D., Commissioner

Attest:

/s/ Gary L. Widerburg  
PSC Secretary  
DW#331784



Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this written order by filing a request for review or rehearing with the PSC within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the PSC fails to grant a request for review or rehearing within 30 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the PSC's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I CERTIFY that on January 11, 2024, a true and correct copy of the foregoing was delivered upon the following as indicated below:

By Email:

Kevin House ([khouse1961@verizon.net](mailto:khouse1961@verizon.net))  
Complainant

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Administrative Assistant