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October 28, 2009

Public Service Commission  
Heber Wells Building  
160 East 300 South, 4<sup>th</sup> Floor  
Salt Lake City, Utah 84111

**Re: DPU Request for Scheduling Conference**  
***Bear Hollow Restoration, LLC v. Saunders et al.***  
**Docket No. 09-015-01**

To the Public Service Commission:

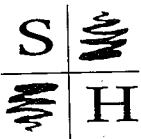
As the Commission is aware, this law firm represents Bear Hollow Restoration, LLC, which is the Complainant in the above-referenced action. This letter is sent in response to the October 13, 2009, letter from Flitton & Swensen and the October 20, 2009, letter from Hatch, James & Dodge, both of which request that (1) the Public Service Commission not grant the Division of Public Utility's request to hold a scheduling conference to plan discovery until the Respondents' pending motions to dismiss are resolved and (2) that Bear Hollow Restoration, LLC not be allowed to participate in any formal proceeding or investigation even if the motions to dismiss are denied.

First, the DPU's request for a scheduling conference was eminently reasonable. Rule 16(b) of the Utah Rules of Civil Procedure<sup>1</sup> provides that "[i]n any action, in addition to any other pretrial conferences that may be scheduled, the [Commission<sup>2</sup>] upon its own motion or upon the motion of a party, may conduct a scheduling and management conference." Utah R. Civ. P. 16(b). Given the gravity and complexity of the claims in this case, a scheduling and management conference at the earliest possible convenience—if even to discuss only whether any discovery is needed to resolve the pending motions as well as the timing and resolution of

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<sup>1</sup> Public Service Commission Rule R746-100-1.C. provides, "In situations for which there is no provision in these rules, the Utah Rules of Civil Procedure shall govern, unless the Commission considers them to be unworkable or inappropriate." Utah Admin. Code R746-100-1.C. There is no specific Commission rule with regard to scheduling and management conferences.

<sup>2</sup> "In the applicable Rules of Civil Procedure, reference to 'the court' shall be considered reference to the Commission." Utah Admin. Code. R746-100-8.C.5.



the pending motions—is in order and will not prejudice any party to the proceeding. It is difficult to see how anyone would be harmed by a simple scheduling conference.

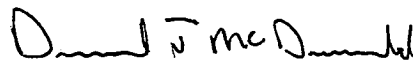
Second, the Respondents' suggestion that SWDC shareholder Bear Hollow should not be involved in this proceeding other than as a potential witness is simply inappropriate. Bear Hollow is a "person" within the meaning of Utah Code Ann. § 54-7-9(1)(b), which expressly authorized it to file the Complaint and Request for Agency Action. Bear Hollow is also a "party" within the meaning of Utah Code Ann. § 63G-4-103(1)(f), which defines a party as "the ... person commencing an adjudicative proceeding ..." *Id.* In turn, the Commission's participation rule, Rule R746-100-5, provides, "Parties to a proceeding before the Commission, as defined in Section 63G-4-103, may participate in a proceeding including the right to present evidence, cross-examine witnesses, make argument, written and oral, submit motions, and otherwise participate as determined by the Commission." Utah Admin. Code R746-100-5. By statute, Bear Hollow is authorized "to obtain all relevant information necessary to support their claims or defenses" through discovery. Utah Code Ann. § 63G-4-205(1). And Utah Code Ann. § 63G-4-206(1)(d), guarantees "all parties the opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence." Perhaps the reason the Respondents fail to back their request to unjustly exclude Bear Hollow from this proceeding with any legal support or justification is because there is no statutory, administrative or common law basis for their request, which should be summarily denied.

Finally, Mr. Flitton's request for what seems to be *ex parte* communication with the Commission—"As always, my office is happy to discuss this matter further with the Commission ...."—is inappropriate and should be declined. As the Commission is aware, such *ex parte* communications are strictly prohibited by Commission Rule R746-100-13.B. Indeed, the request for such communication must be declined pursuant to Rule R746-100-13.E. (Commission must "decline to hear the communication and explain that the matter is pending for determination") and any further attempt to have *ex parte* communications with the Commission that exclude Bear Hollow should be sanctioned pursuant to Rule 746-100-13.G. ("Upon receipt of a communication knowingly made in violation of R746-100-13(B), the presiding officer may require the communicator, to the extent consistent with the public interest, to show cause why the communicator's interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected because of the violation.").

Thank you for the opportunity to respond.

Very truly yours,

SMITH HARTVIGSEN, PLLC



Daniel J. McDonald

c: Division of Public Utilities  
Hatch, James & Dodge  
Flitton & Swensen