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ATTORNEYS FOR PETITIONER, SHOSHONE  
CONDOMINIUM HOTEL OWNERS ASSOCIATION

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA**

SHOSHONE CONDOMINIUM HOTEL	)	
OWNERS ASSOCIATION, a Montana	)	
Corporation,	)	<b>DOCKET NO: D2013.9.71</b>
	)	
Petitioner,	)	<b>PETITIONER'S BRIEF</b>
	)	<b>IN SUPPORT OF</b>
	)	<b>REGULATION</b>
ABACO ENERGY SERVICES,	)	
LLC, a North Dakota Limited Company,	)	
	)	
Respondent.	)	

The SHOSHONE CONDOMINIUM HOTEL OWNERS ASSOCIATION, (“SCHOA”) submits this initial Brief in Support of the Public Service Commission’s (“Commission”) Regulation of ABACO Energy Services, LLC (“ABACO”).

**PROCEDURAL HISTORY**

It is important to note the previous orders of the Commission regarding this matter. The Commission on November 24, 2014 by a vote of 5-0 ordered that ABACO’s Motion to Dismiss SCHOA’s complaint be denied and ABACO must preserve current rates for the

propane system for the next 12 months. It also invited, at that time Boyne to voluntarily become an intervening party to this proceeding.

Subsequently in denying ABACO's Motion for Reconsideration the Commission removed the portion of the order which states "ABACO must preserve current rates for the propane system for the next 12 months until a tariff rate is developed."

In its Order on Motion to Dismiss this Commission found at ¶11 that ABACO's ownership of the propane system constitutes; (1) a private corporation; (2) that owns, operates or controls; (3) any plant or equipment; (4) for the production, delivery or furnishing of heat, light or power in any form; (5) to other persons, firms, associations or corporations; (6) within the State of Montana and the propane system is therefore a public utility pursuant to MCA 69-3-101. These six requirements were then addressed, further, specifically and throughly in the Order.

After the Commission denied its Motion for Reconsideration, ABACO filed in the Montana First Judicial District, Lewis and Clark County a Petition for Judicial Review seeking to reverse two orders of the Commission. Attorneys for the Commission argued before the District Court in a written brief the Petition for Judicial Review should be dismissed and SCHOA's complaint be allowed to proceed past the Motion to Dismiss stage, through discovery to a final hearing. An argument made in the Commission's brief was that one of the options before the Commission could be that it reaffirm its preliminary findings in the Order to Deny the Motion to Dismiss.

It is clearly evident from the Data Request responses introduced into evidence, the pre-filed written testimony of SCHOA witnesses and testimony obtained from ABACO's witnesses at the hearing that ABACO is a public utility and that SCHOA has standing to bring the Complaint. SCHOA respectfully requests the Commission reaffirm its preliminary findings and find that ABACO is a public utility. That is, this Commission is entitled to regulate ABACO as a public utility and SCHOA has standing to file its Complaint.

#### **ISSUE I: ABACO is a Public Utility**

**(A) The Commission's enabling legislation defines the term "Public Utility" for purposes establishing the parameters of its jurisdiction. MCA §69-3-101, *et seq.***

A clear reading of this statute is that every company who owns, operates or controls equipment within the state of Montana for the delivery or furnishing to persons of heat and/or power in any form is a public utility. ABACO acknowledges and even admits that it has contracts with Boyne U.S.A. and other customers for the production of propane. ABACO admits that propane it furnishes is consumed for the purpose of furnishing heat and power in the state of Montana. Thus, ABACO is by its own admission governed by the provisions of the enabling legislation which authorizes governance by this Commission.

The Commission has on at least three separate occasions agreed that it may regulate propane service as a regulated utility. In Docket No. D2000.12.205, on January 16, 2001, the Commission regulated Five Valleys Gas Company regarding increased rates for propane service to consumers in the Seeley Lake service area. In Docket No. D2000.12.209, on March 21, 2001, the Commission exercised jurisdiction over propane service of Energy

West Montana in Cascade (EWM-C, a Division of Energy West, Inc.) More recently, in Docket No. D2011.6.50, on September 1, 2011, this Commission exercised jurisdiction over propane on the application of ONEOK Bakkin Pipeline.

Clearly, the enabling statute has been interpreted by this Commission to allow it to regulate propane

**(B) Judicial interpretation of MCA §69-3-101 confirms this Commission’s jurisdiction.**

Montana Supreme Court case of *Gallatin Natural Gas Company v. Public Service Commission*, 79 Mont. 269, 556 P.2d 373 (1927) allows this Court to regulate ABACO. That case supported and affirmed this Commission’s regulation of the Gallatin Natural Gas Company, even though the gas company contended it did not sell natural gas to customers. The Supreme Court’s analysis is illustrative of how this Commission should resolve the SCHOA’s Complaint in favor of regulating ABACO. The Montana Supreme Court analyzed the predecessor to MCA §69-3-101 which predecessor is extremely similar to the present legislation. The prior statute provided that every corporation who owns, operates, or controls equipment within the state of Montana for the production, delivery, or furnishing to other persons heat or power may be regulated by this Commission. The Montana Supreme Court held that this Commission is a creation of the state of Montana, an instrumentality of government “invested with the full power of supervision, regulation, and control of such utilities, subject to the provisions of this Act.” Gallatin Natural Gas Company acquired natural gas from Wyoming and conveyed the natural gas by pipeline into the state to the City limits

of Billings, in Yellowstone County. There, it delivered the gas to the Billings Gas Company who sold natural gas to its customers. Gallatin Natural Gas Company also transported natural gas in pipelines to Laurel, Bridger, and Fromberg, Montana. In each of these cities, Billings Gas Company sold the gas to its customers.

It is important that the Montana Supreme Court understood that natural gas was furnished for the ultimate consumption for heat, light, and power.

“Confessedly the gas furnished its customers by the Billings Gas Company is furnished for consumption, and it is a matter of common knowledge that natural gas is consumed for the purpose of furnishing heat, light, or power.”

*Gallatin Natural Gas Co. v. Public Service Commission*, 79 Mont. 269, 256 P. 373, 375 (1927)

Both the Public Service Commission in its decision that it could regulate Gallatin Natural Gas Company and the Montana Supreme Court in affirming the Yellowstone District Court’s decision that the Public Service Commission had authority to regulate the Gallatin Natural Gas Company concluded that natural gas was transported for heat, light, or power. Similarly, ABACO transports propane for heat and power. There was nothing in the enabling legislation in 1921 that discussed natural gas. The word “natural gas” did not exist in the enabling legislation. As with the present legislation, the earlier legislation provided that the ownership and use of any equipment, the purpose of which is used to produce, deliver, or furnish power or light results in the authority of this Commission to regulate that entity.

Procedurally, this Commission has significant evidence establishing ABACO is a public utility.

In *Gallatin Natural Gas* the Montana Supreme Court concluded:

“Having arrived at the conclusion that Plaintiff is a public utility: that it and the Billings Gas Company are in effect the same; that plaintiff owns, operator, and controls a plant and equipment within the state, for the delivery and furnishing, for and to other persons, of heat, light, and power, there is no doubt of the right of defendant to regulate the price, at burner tip, charged by the Billings Gas Company (plaintiff’s creature) for gas furnished consumers, as is being done. We have no doubt of the right of defendant to declare plaintiff a public utility.”

*Gallatin Natural Gas Co. v. Public Service Commission*, 79 Mont. 269, 256 P. 373, 379 (1927)

The Affidavit of ABACO clearly acknowledges that it owns and operates equipment that conveys propane to Boyne U.S.A. and to over 200 customers in Big Sky, MT through its propane distribution system. See Mr. Tschider’s letter of September 28, 2012 ABACO Exhibit 1-6 The Montana Supreme Court found this Commission had the right to regulate natural gas conveyed by Gallatin Natural Gas Company even though that term was not found in the enabling legislation. There is little doubt the Montana Supreme Court would uphold this Commission’s decision to similarly find this Commission has jurisdiction to regulate ABACO because it owns, operates, or controls equipment for the production, delivery, or furnishing of propane for heat or light purposes

**C. ABACO contemplated the Commission’s authority to regulate.**

ABACO negotiated a written contract with Boyne. SCHOA Exhibit 1-3 Paragraph 7 (d) of the contract provides ABACO and Boyne will negotiate annually the price for propane provided the system remains unregulated by the Montana Public Service Commission. Paragraph 7 (e) provides that Boyne understands rates may be subject to regulation by the

Montana Public Service Commission. If regulation occurs, Boyne understands the propane rate will be based on ABACO's cost of services to serve customer and other potential customers. (Emphasis Supplied) ABACO contemplated additional customers in its contract.

**D. ABACO contemplated additional customers.**

In ABACO's contract with Boyne Paragraph 1(b) provides that Boyne acknowledges that Boyne has or will grant to ABACO non exclusive perpetual easements... for the delivery of propane to Boyne and other customers of ABACO for the reasonable access... (Emphasis Supplied)

ABACO has added new services and propane distribution lines. ABACO's response to SCHOA's Data Request 007, Expansion of Customer and Infrastructure provided in sub paragraph (a) that Boyne advised ABACO that it has significant expansion plans for the Mountain Village area and property that it owns. Attached to that Data Request Response from ABACO is an email from Su-Lin Tschider to her employee dated July 15, 2015 regarding the expansion and getting the master plan for the 15 units for the current two year expansion. She writes that ABACO spoke with Boyne (Taylor Middleton) and made it quite clear that ABACO will be responsible for propane construction only and anything over and above that will be added to the cost. ABACO stressed that Joey and Brian Wheeler have established a great working rapport, she notes that ABACO needs to consult with Kevin Shuttlesworth of ABACO on the total viability of servicing the entire expansion plans that Brian sent two months ago. Several pages later in the data response is an ABACO energy services partial bill to Boyne for the 2015 expansion at Big Sky for \$12,000. Several pages later in the

documentation is Brian Wheeler's email of July 7, 2015 to Joey McMullen stating that there will be 11 more cabins and 4 single family lots. This is the expansion that Su-Lin Tschider refers to in her July 15, 2015 email. The following page in the document response is the list of equipment of ABACO s including 800 feet of 2" pipe and 1000 feet of ½" pipe together with numerous couplings and tees. Su-Lin Tschider was unable to explain that equipment list during her testimony.

ABACO in response to Data Request PSC 004, growth of the system, stated that a total of 20 new meters had been added to the system since ABACO purchased it from NorthWestern Energy in 2007. 19 meters were for Boyne, USA's expansion of the Powder Ridge Condominium development on Boyne, USA property. When Boyne sold these units to individual unit owners, the accounts were transferred to the new unit owners individual name. The 20<sup>th</sup> meter was added to the Stillwater Condominium on the existing riser and piping.

In Response to SCHOA Data Request 034, Boyne produced a copy on CD of the Big Sky Resort Mountain Village Overall Development Plan dated November 30, 2015. A copy of the plan was also introduced as SCHOA's Exhibit 1-4. Boyne in the response to Data Request admits that Boyne, just north of the present Huntley Lodge, has plans to develop 290 units in a mix of residential condominiums, town homes and commercial uses that will likely include a hotel, commercial, retail, food and beverage facilities and employee housing. Northwest of Huntley Lodge will be a similar mix of uses for an additional 450 residential uses. These will be part of a mix of residential and commercial uses. The Commission



already has evidence of ABACO's expansion built in 2015. As Boyne continues to grow ABACO's tank farm will continue to be utilized to heat that growth.

**E. ABACO's Financial Data.**

ABACO's financial data negates its argument that it does not serve the public. ABACO responded to SCHOA Data Request 001 regarding the amount of propane sold and revenue received and the cost per unit distributed to each of its customers. In 2011 hundreds of customers paid differing average annual amounts per gallon. In 2011 the lowest annual average price per gallon for propane paid by an ABACO customer was \$1.89 The highest annual average price per gallon paid by a customer was \$3.76. ABACO sold 945,294 gallons of propane generating \$1,898,702.72 of revenue.

In 2012 the lowest annual average price per gallon for propane paid by an ABACO customer was \$2.01 and the highest was \$4.40. ABACO sold 908,847 gallons of propane and earned revenue of \$1,902,248.43.

In 2013 the lowest annual average price per gallon for propane paid by an ABACO customer was \$1.68 and the highest was \$3.70 ABACO sold 862,373.37 gallons of propane and earned revenue of \$1,594,964.71.

In 2014 the lowest annual average price per gallon for propane paid by an ABACO customer was \$1.70 and the highest was \$3.00 ABACO sold 895,645 gallons of propane and earned revenue of \$1,572,721.57.

ABACO well understands its role in providing propane to the Mountain Village Community. Mr. Tschider's letter of September 28, 2012 addressed to the Board of Directors

and members of SCHOA (SCHOA Ex. 1-6) clearly reveals ABACO's understanding of its role in the Big Sky Mountain Village community. Mr. Tschider writes:

The purpose of this letter is to give you the list of ABACO Energy Services (ABACO) members and to provide you with an overview of the systems and services we provide as your propane distribution company. (Emphasis supplied.)

Pointedly, the letter omits ABACO's present contention that it only sells propane to Boyne and a small number of end users. The letter does not discuss any sales of propane to Boyne. However it claims:

ABACO services over 200 customers in Big Sky, MT through our propane distribution system.

ABACO then makes a promise to the 90 plus owners and SCHOA to provide to each of them and all of them reliable, uninterrupted service.

ABACO Energy Services is committed to provide a safe and uninterrupted reliable service.

Mr. Tschider writes that ABACO knows the importance of having uninterrupted service, not just from the economic standpoint but from a personal safety standpoint as well.

He concludes his letter by asking any of the unit owners or the SCHOA to contact him directly if they have any questions.

From the foregoing it is readily apparent ABACO solicits customers and sells propane used by the ultimate end users to heat their homes and businesses and to warm the fireplaces of each of the SCHOA's 94 units. The evidence is compelling demonstrating that ABACO is a public utility.

**F. ABACO does not qualify for any exemption under the *Lockwood Water Users Association* analysis.**

The Commission in its order denying ABACO's Motion for Reconsideration thoroughly analyzed the *Lockwood* decision. It appears the *Lockwood* decision stands for the proposition that a service rendered only to members who share the costs of operation and thus are non profit services are excluded from the definition of a public utility. In *Lockwood Water Users Association v. Anderson*, 168 Mont. 303 542 P.2d 1217 (1975), the Montana Supreme

Court affirmed the District Court's decision the Lockwood Water Users Association was not a public utility, in part, because:

It is clearly apparent from the testimony of the witnesses and the exhibits introduced that to get water from the \*308 Association one must be a member. Only members, as such, are allowed to use the system and they use it on a non profit cost sharing basis, as required by the FHA. By joining the Association, members agree to be bound by its rules and regulations.

The evidence in the record in this proceeding does not provide the legal or factual basis for this Commission to find that ABACO is not a public utility. Repeatedly Mr. Tschider testified ABACO is a privately held for profit limited liability company. It's over two hundred customers are not its members. It is not a non profit association. ABACO's responses to Data Request PSC003 and the attached documentation is that there is no documentation that service is rendered only to stockholders or members who share the cost of operation. There is no documentation that service to stockholders or members is contractual. As seen in the

expansion plans recited earlier in this brief, ABACO has taken steps to add end users of its propane system through Boyne's growth and development.

The Commission in denying ABACO's motion for reconsideration analyzed the Montana Supreme Court's language in *Lockwood* regarding the two conjunctive requirements for the public utility status exception. i.e., the service confines its service to its own stockholders or members and does not serve or hold itself out as willing to serve the public. ABACO has provided no evidence to support the public utility status exception. It does not confine its service to its own stockholders or members therefore the first predicate of the conjunctive requirements is missing. Secondly as seen from Mr. Tschider's letter to the Shoshone unit owners and Board of September 28, 2012, ABACO proudly explains it has 200 customers receiving propane from ABACO. It is not only willing but is actively serving these public customers. Thus the second conjunctive requirement is likewise missing. It is clear that ABACO has not sustained its burden in proving it's exception to the public utility status.

**G. The Commission should consider that ABACO provides heat to persons, firms, associations or corporations within the State of Montana from its propane system.**

This factor which is considered a plurality of customers is satisfied first because ABACO admits that it provides "service to individual end users in Cedar Creek, Powder Ridge and Stillwater" See Second Affidavit of Tschider ¶12. Also ABACO's response to PSC Data Request 001 states ABACO serves 72 users in Cedar Creek, 89 users at Powder Ridge and 41 users at Stillwater. ABACO has a total of 231 meters only 18 of which fall within the contract between Boyne and ABACO. The remaining 213 meters are held by individual unit owners.

In addition to the Cedar Creek, Powder Ridge and Stillwater Condominiums, 10 meters service Elk Horn Creek and one meter services the lodge.

The record also confirms that the 94 units within the Shoshone Condominium Hotel have fireplaces all of which are heated by ABACO's propane. This propane is in addition to the propane at the Shoshone meter used to heat the building, individual units and the pool. Thus there are 94 separate customers using propane for their individual fireplaces. These should be added to the individual users in Cedar Creek, Powder Ridge, Stillwater and Elk Horn Creek. Together they along with Boyne comprise the 5<sup>th</sup> element under MCA 69-3-101 i.e., furnishing heat to other persons, firms, associations or corporations.

**ISSUE II. The individual hotel guests and unit owners of the Shoshone Condominium Hotel should be considered end users of the service.**

SCHOA, itself and for its members as unit owners have standing to bring its Complaint against ABACO before this Commission.

MCA 69-3-321(1) requires a complainant to be directly affected by ABACO's actions. The SCHOA is directly affected by ABACO's actions and pricing. It pays for the propane used to heat the hotel, the swimming pool, the hotel rooms and the fireplaces.

The Montana Supreme Court case of *Williamson v Montana Public Service Commission*, 212 MT 32 364 Mont.128 272 P.3d 71 illustrates how the Court grants standing in "passthrough" systems where the downstream user is expected to pay for costs incurred through an upstream entity. In that case city residents filed a complaint with this Commission asking it require an electric utility to replace existing high pressure sodium street lights with

light emitting diod street lights. This Commission dismissed the complaint believing the complainants lacked standing. The District Court affirmed this Commission’s decision and complainants appealed to the Montana Supreme Court.

The Supreme Court concluding several of the petitioners satisfied the “directly affected” standard of MCA 69-3-321(1) because of the passthrough system. The District Court interpreted “directly affected” to mean that only the customers in the street and area lighting class i.e., have standing to challenge the energy company’s rates. In other words, only the parties that write the check directly to the utility for the street lighting bill are directly affected by the rates, charges and service. The Montana Supreme Court rejected that interpretation and adopted the “passthrough” system.

We cannot agree that this restrictive construction is consistent with the intent of §69-3-321(1), MCA. The statute grants standing to “persons,” not just “customers,” and the critical language is “directly affected,” not “directly pays.” Under the PSC’s approach, large categories of persons could be precluded from pursuing legitimate complaints in the PSC through the mere expedient of structuring customer classes, rate classifications, and billing practices such that consumers pay energy fees to an intermediary which in turn pays NorthWestern directly.

See *Williamson v Montana Public Service Commission*, ¶48.

...Where that occurs - i.e., where the costs of street lighting are assessed and collected by the city or county from the property owners in the street lighting district - we conclude that there is a sufficiently close logical, causal, or consequential relationship between (a) NorthWestern’s rates and charges and (b) the taxes paid by the property owners specifically for street lighting in the street lighting district, to satisfy § 69-3-321 (1) MCA.  
See ¶37, Supra.

Supra ¶48.

The Supreme Court's interpretation of "directly affected" utilizing the "passthrough system" closely describes the existing situation SCHOA and its members face with ABACO.

The Pre-filed Testimony of Murray Morgan and member of the Board of Directors of SCHOA explains how SCHOA and its unit owners/members receive, use and pay for ABACO's propane.

- The Shoshone Condominium Hotel is a 94 unit condominium operated at the base of lone mountain in Meadow Village at Big Sky, Montana.
- It was Boyne's idea the Condominium Hotel be operated as a hotel. It has a switchboard, hotel check-in facility, main floor and elevators to take guests to individual units.
- SCHOA uses propane (1) to heat the Shoshone pool, (2) heat its domestic water to each unit, (3) preheat outside air in the heating months to replace circulation loss and (4) provide a base heat source to the heat pump located in each unit during the heating months. A small quantity of propane is used to light the fireplaces in each unit.
- Strings of emails between Barb Rooney Starz, Murray Morgan, and Stacy Tschider (SCHOA Exhibit 1-1) clearly established that ABACO is charging not only for the price of propane but for distribution, operation and maintenance to the Shoshone boiler that heats the Shoshone.

- SCHOA Exhibit 1-2 is a copy of an invoice billed by ABACO for services at the “Shoshone Lodge propane meter” that invoice is dated July 1, 2009 shows a usage of 13,710.1983 gallons at a unit price of \$1.41 per gallon.
- In SCHOA Exhibit 1.1 Barb Rooney Starz writes distribution and O&M are charges from ABACO not Boyne, that are in addition to the per gallon propane charge.
- The propane for the Shoshone Hotel comes from a tank farm located in the Mountain Village. The tank farm is owned and operated by ABACO.
- SCHOA and each unit owner is an end user, a person and a customer. Each is directly effected by ABACO and pays a significant portion of ABACO’s propane bill. SCHOA obtains its propane from ABACO. ABACO owns the propane when it is located in the tank farm and delivered to the Shoshone boiler in ABACO’s piping system. If there was a leak or a defect in any part of ABACO’s piping structure, ABACO would be responsible for repairing the defect as it is charging for operation and maintenance. It is ABACO’s propane until it is delivered to the Shoshone Boiler. ABACO’s contract acknowledges it owns the piping system.
- SCHOA understands it is a customer of ABACO that is it is a buyer/patron of ABACO’s services and products. SCHOA makes a monthly payment for propane delivered to the Shoshone boiler. That makes it a customer. It is



directly affected by the pricing of ABACO and SCHOA pays a significant portion of ABACO's propane bill.

- The individual units within the Hotel are heated with ABACO's propane. The propane is stored in a tank farm in the Mountain Village. The propane is then delivered through piping owned by ABACO to the Shoshone boiler. The Boiler converts the propane to heat and the heating system owned by SCHOA delivers the heat to the individual units. A small amount of propane is delivered to each unit to activate the fireplace to each unit.
- The SCHOA is the end user of ABACO's propane as is each unit owner/member.
- There is no contract between SCHOA and Boyne for Boyne to sell propane to the Hotel. The SCHOA has a management agreement with Boyne requiring, in part, that Boyne as agents shall enter into contracts... for gas... and other necessary services. All such contracts and orders shall be made in the name of the Association. The intent of the agreement was for SCHOA as the ultimate end user to contract directly with ABACO.
- Per the Contract between ABACO and Boyne, ABACO sets the rate charged for propane to SCHOA. The SCHOA computes as part of the condominium assessment the past annual expenses incurred by SCHOA in assess each member his percentage of the obligation based on the percent of ownership

bears to the entirety the condominium real property interest. No rates are established or set by SCHOA.

- ABACO sets and calculates the rate for propane to be used by the ultimate user, SCHOA and each unit owner. SCHOA Exhibit 12-1 are quarterly billings from Boyne after it terminated its Management Agreement for propane to SCHOA. SCHOA does not determine these rates. These rates are set out per the contract between ABACO and Boyne which is SCHOA Exhibit 1-3.

Boyne admits that it does not sell propane to SCHOA. Boyne's response to ABACO Data Request 025 requesting that Boyne admit it provides propane to Shoshone Condominium Hotel is denied. Further Boyne denies it provides any propane. Boyne affirmatively alleged that ABACO operates the propane storage and distribution system which provides propane to the shared meter serving the Shoshone Condominium Hotel, Yellowstone Conference Center and part of the Huntley Lodge. Boyne affirmatively alleges ABACO is aware that propane delivered to the meter is used in the Shoshone Condominium Hotel. Boyne affirmatively alleges ABACO provides price quotes from propane suppliers in order to give users of propane the option of "locking in" a price per gallon or floating with the market. Boyne affirmatively alleges ABACO was aware that the "lock" and "float" options were presented to the SCHOA Board for discussion and decision and that ABACO was aware that multiple condominium units were present in the Shoshone Condominium Hotel.

In Boyne's response to ABACO Data Request 27 requesting that Boyne admit it provides propane to other condominiums, unit owners, buildings and entities, Boyne denies

it provides any propane to anyone. Boyne affirmatively alleges that Boyne provides to end users of ABACO's propane ABACO's bills and pricing, but Boyne does not provide propane to any user or entity. In all situations in which Boyne conveys information and bills to end users, ABACO invoices Boyne the contracted product and distribution charge for the volume of propane delivered to the applicable meter. Boyne then either passes those invoices on in their entirety for direct payment by the end user or allocates the propane charges among users behind a particular meter in accordance with the relevant cost sharing agreement in place. Affirmatively, Boyne does not provide propane to any other user or entity and only passes through the propane costs without markup or service charge.

It is important for the Commission to understand the end user has little say in the method of determining costs charged by ABACO. Su- Lin Tschider testified that in 2007 the O&M charge was 8¢. They chose 8¢ because that was the O&M charged by NorthWestern Energy at the time. Today the O&M charge is 34.2¢.

The price per gallon of propane consists of three components; supply, O&M and the distribution rate. See Stacy Tschider's testimony p. 232. The distribution rate originated at 30¢ per gallon in 2007 because that was the rate NorthWestern used. See Stacy Tschider's testimony p. 232. There is a cost of living escalator at the rate of 2.5% per year. That 30¢ distribution generates approximately \$180,000 a year. See Stacy Tschider's testimony p. 234. That is used for salaries of owners of ABACO and their return on original capital investment See Stacy Tschider's testimony p. 234.

As the volume of propane increases the pot also increases. See Stacy Tschider's testimony p. 235.

These end users are paying for ABACO's propane because these end users utilize ABACO's propane. This is quite similar to the "pass through" system approved by the Montana Supreme Court in *Williamson*. Supra. The Commission should find that SCHOA has standing to bring this complaint.

**ISSUE III: SCHOA is a captive end user of ABACO which is why regulation by this Commission is necessary.**

Boyne has taken the position that no propane tanks will be allowed in the Mountain Village Subdivision and has recorded Amended Protective Covenants to that effect. See SCHOA Exhibit 14-1. SCHOA in response to PSC Data Request 015 stated that it believes Boyne maintains that Boyne recorded amended covenants that prohibit property owners from keeping and storing propane tanks on property within Big Sky Mountain Village subdivision. Barb Rooney Starz has testified that Boyne rejected any request by SCHOA to have its own tank. Barb Rooney Starz testified that the Mountain Village Subdivision does not allow for propane tanks in the area around the Shoshone as part of the Mountain Village Subdivision which does not allow that. See Rooney Starz testimony p. 170:

Q. The data response you said in sum and substance that on behalf of Boyne you cannot put propane tanks on the property that is covered by the CC&R's, correct?

A. Well, the Mountain Village subdivision does not allow for that and the area around the Shoshone is part of the Mountain

Village subdivision which does not allow for that, which probably would have been my response, yes.

In Boyne's response to Data Request PSC 010 Boyne references the protective covenants which prohibits fuel storage tanks within the Mountain Village subdivision.

### CONCLUSION

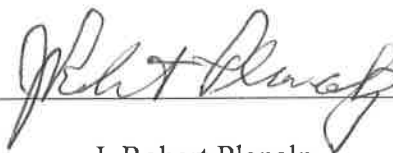
The propane furnished to its over 200 customers by ABACO is furnished for consumption, and it is a matter of common knowledge that propane is consumed for the purpose of furnishing heat. Therefore ABACO in furnishing its customers with propane, furnishes them with heat. The foregoing was taken from the Montana Supreme Court's language in *Gallatin Natural Gas Co.*, supra p. 375 substituting ABACO for Billings Gas Company and propane for natural gas.

Utilizing Montana Supreme Court's analysis in *Williamson*, supra, SCHOA and its members are directly affected by the delivery of propane by ABACO from its tank farms and the concomitant charges for that propane. Charges that the SCHOA and others have little if any control over. It is respectfully requested the PSC find that ABACO is a public utility and that the PSC regulate the same.

DATED this 11 day of August, 2016

LANDOE, BROWN, PLANALP & REIDA, P.C.

By: \_\_\_\_\_



J. Robert Planalp

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_ day of August, 2016, a true and correct copy of the foregoing was this day served as follows:

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