

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Complaint of)	REGULATORY DIVISION
SHOSHONE CONDOMINIUM HOTEL)	
OWNERS ASSOCIATION, a Montana Facility)	DOCKET NO. D2013.9.71
)	
Complainant,)	ORDER NO. 7393b
)	
v.)	
)	
ABACO ENERGY SERVICES, LLC)	
a North Dakota Limited Company,)	
)	
Defendant.)	
)	

PROCEDURAL ORDER

1. On September 30, 2013, Shoshone Condominium Hotel Owner’s Association (“Shoshone”) filed a Complaint asking the Montana Public Service Commission (“Commission”) to take jurisdiction over the propane delivery system at the Big Sky Ski Resort (“the propane system”) owned by ABACO Energy Services, L.L.C. (“ABACO”).

2. On November 12, 2013, ABACO filed a Motion and Brief in Support of Motion to Dismiss Shoshone’s Complaint. On January 10, 2014, ABACO filed a Reply Brief on the Motion to Dismiss and requested an oral argument. An oral argument was held before the Commission on April 22, 2014.

3. The Commission issued Order 7393 denying ABACO’s Motion to Dismiss on February 18, 2015. Based on the allegations in Shoshone’s Complaint, the Commission found that ABACO qualified as a public utility under Mont. Code Ann. § 69-3-101 (2015) and the Complaint should not be dismissed for lack of subject matter jurisdiction. Additionally, the Commission ordered that “Abaco must preserve current rates for the propane system for the next 12 months until a tariff rate is developed. These rates are not to be considered just and reasonable under Commission rate making authority and apply only on an interim basis.” Or.

DOCKET NO. D2013.9.71, ORDER NO. 7393b

7393 pp. 8-9 (Feb. 18, 2015).

4. On February 13, 2015, a Bill was introduced in the Montana Legislature that would have specially exempted ABACO from the Commission's jurisdiction. *See* S.B. 321, 2015 Leg., 64th Reg. Sess. (Mont. 2015). On February 25, 2015, ABACO filed a Motion for Extension of Time to File Motion for Reconsideration of Order No. 7393, which was granted in a Notice of Staff Action. The Commission temporarily suspended this proceeding while this Bill was pending in the Montana Legislature. The Bill was passed by the Montana Senate and House but was ultimately vetoed by the Governor. *See* Veto Message of Governor Steve Bullock of Senate Bill 321 (Apr. 8, 2015).

5. On March 13, 2015, ABACO filed a Motion to Reconsider and Brief in Support. The Commission held a work session on April 24, 2015 and voted to reconsider and modify the Commission's Order 7393 in Order 7393a. Order 7393a removed the requirement that Abaco must preserve current rates for the propane system for 12 months. *See* Order 7393a at ¶ 20.

6. On May 20, 2015, the Commission issued a Notice of Opportunity to Intervene in Complaint Proceeding. The Montana Consumer Counsel and Boyne USA were granted intervention on June 11, 2015.

7. On June 12, 2015, ABACO filed a Petition for Judicial Review with the Montana First Judicial District Court seeking to reverse two orders of the Commission. On July 15, 2015, the Commission filed a Motion to Dismiss concerning ABACO's Petition for Judicial Review. The Commission's Motion to Dismiss was granted on October 28, 2015 allowing the Commission to proceed with Shoshone's Complaint.

8. The Commission, through delegation to staff, hereby establishes the Procedural Order ("Order") to be followed in this proceeding. This Order is effective immediately and remains effective unless modified by the Commission or staff. A party may seek reconsideration of this Order within ten (10) days of its service date. Mont. Admin. R. 38.2.4806 (2015).

Schedule

9. This Order sets the following procedural schedule for this Docket:
- (a) December 9, 2015: Final day for ABACO's Answer to Shoshone's Complaint.
 - (b) January 8, 2016: Final day for data requests to all parties.
 - (c) February 1, 2016: Final day for all parties to respond to data requests. *See also infra* ¶ 13.
 - (d) February 16, 2016: Final day for Shoshone testimony.
 - (e) March 1, 2016: Final day for data requests on Shoshone testimony.
 - (f) March 11, 2016: Final day for the Commission to identify additional issues.*
 - (g) March 15, 2016: Final day for Shoshone to respond to data requests. *See also infra* ¶ 13.
 - (h) March 29, 2016: Final day for ABACO's testimony.
 - (i) April 12, 2016: Final day for data requests on ABACO's testimony.
 - (j) April 26, 2016: Final day for ABACO to respond to data requests. *See also infra* ¶ 13.
 - (k) May 10, 2016: Final day for Shoshone rebuttal testimony and for parties to file cross-party response testimony.
 - (l) May 24, 2016: Final day for data requests on Shoshone rebuttal testimony and data requests on cross-party response testimony.
 - (m) June 1, 2016: Final day for responses to data requests on Shoshone rebuttal testimony and data requests on cross-party response testimony. *See also infra* ¶ 13.
 - (n) June 15, 2016: Deadline for stipulations.
 - (o) June 22, 2016: Deadline for prehearing memoranda.
 - (p) July 11, 2016: Hearing commences and continues from day-to-day as necessary.

* If the PSC identifies additional issues it will issue a modified procedural order and schedule, likely changing some of deadlines f through p.

Service and Filing

10. A party must serve a copy of every pleading, motion, brief, objection, data request or response, and other document it files in this proceeding on every other party. Upon e-filing a

DOCKET NO. D2013.9.71, ORDER NO. 7393b

document with the Commission, the filing party must email a copy of the document to counsel of record. In order to file a document with the Commission, a party must: (1) Submit the document electronically (e-file) on the Commission's website at <http://psc.mt.gov> ("Account Login/Registration" under "Electronic Documents" tab); and (2) physically deliver or mail the original document to the Commission at 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601. The Commission will not post an e-filed document to its website until it receives the original from the filing party. Service or filing by means of facsimile is prohibited. Service by mail does not extend a deadline.

Intervention

11. The deadline for intervention in this proceeding was June 9, 2015. An entity seeking late intervention must file a petition to intervene setting forth: (1) The general position that it intends to take; (2) a legally protectable interest directly affected by this proceeding; (3) whether late intervention would delay the proceeding or prejudice another party; and (4) good cause for not having filed a timely petition. Late intervention will become effective only upon action of the Commission.

Discovery

12. “The exchange of information among parties pursuant to data requests is the primary method of discovery in proceedings before the [C]ommission.” Mont. Admin. R. 38.2.3301(2). The Commission directs parties to use the following guidelines for data requests:

- (a) Assign a unique, consecutive number to each data request (e.g., MCC-001), regardless of the party to whom the request is directed (e.g., the Commission may direct PSC-001 through 008 to Abaco, PSC-009 through 016 to the MCC, and PSC-017 through 019 again to Abaco).
- (b) At the beginning of each data request, consistently describe its subject in five words or less. In addition, a party may direct the request to a particular witness or include citations to exhibits or testimony.
- (c) For multi-part requests, use lower case letters (a-e) to denote up to five parts.
- (d) The following is an example of an acceptable data request:

PSC-006 RE: Purchased Gas Contracts
Witness Doe, JBD-4:13-15.

- a. What risks of bypass would be avoided by the shareholders as a result of the company's proposed treatment?

- b. What risks of bypass would be avoided by the ratepayers as a result of the company's proposed treatment?

13. Parties must respond to data requests within fourteen (14) calendar days of the service date of the data request or by the deadline to respond, whichever is earlier.

14. A party may file an objection to a data request by the deadline to respond. Objections must be sufficiently specific for the Commission to adequately rule on whether to sustain or object. The responding party need not object if an answer has been provided to a discovery request. If the requesting party finds the response inadequate, they may file a motion to compel. *See infra* ¶ 17. Only objections based on discoverability will be considered; objections on admissibility will be overruled. The failure to object to a data request does not waive the right to subsequently object to the admissibility of the information provided in response. If a party objects based on privilege, it must file a privilege log by the deadline to respond with enough information for the Commission to determine whether the privilege applies. The Commission may schedule oral argument before ruling on an objection.

15. If a data request asks for protected information, the responding party must file a motion for a protective order as soon as practicable, but no later than the deadline to respond to the data request.

16. A party may submit a data request after a deadline established in this Order either by agreement of the parties or with approval of the Commission upon a showing of good cause that addresses why the discovering party missed the deadline.

17. If a response to a data request fails to answer the request, the discovering party may move within fourteen (14) calendar days after service of the response for an order compelling an answer. The motion, which the party must file with the Commission and serve on all parties, must identify the relief requested. The responding party may file a brief in opposition within fourteen (14) days of service of the motion to compel. The Commission may schedule oral argument before ruling on a motion to compel, and will set a new response deadline if it grants the motion.

18. In response to a party's failure to answer a data request, the Commission may: (1) refuse to allow it to support or oppose related claims; (2) prohibit it from introducing related evidence; (3) strike pleadings, testimony, or parts thereof; (4) stay the proceeding until the request is satisfied; or (5) dismiss the proceeding, or parts thereof.

19. In order to promote the efficiency of the administrative process, staff attorneys Jeremiah Langston and Laura Farkas will act as examiners for the limited purpose of disposing of discovery disputes (including objections to data requests and motions to compel) and motions for protective order in this proceeding. Mont. Code Ann. §§ 69-2-101, 69-3-103; *see also* Admin. Mont. R. Mont. 38.2.306, 38.2.1501. “Any party may apply for reconsideration in respect to any matter determined” in a Commission order or decision, including the examiner’s final written decision. Mont. Admin. R. 38.2.4806.

Pre-hearing Motions, Conferences and Memoranda

20. A party must make a pre-hearing motion, including a motion to strike pre-filed testimony, at the earliest possible time. A responding party must file and serve its response brief within seven (7) calendar days of service of the motion. If the movant wishes to reply, it must file and serve its reply brief within five (5) calendar days of service of the response brief. Upon the request of a party, the Commission may allow oral argument on a pre-hearing motion.

21. The Commission may schedule a pre-hearing conference at any time prior to the hearing to discuss the feasibility of settlement in whole or in part, simplification of the remaining issues through admissions of fact, and any other matters that may expedite the hearing.

22. Unless the parties agree to file jointly, each party must file and serve a pre-hearing memorandum listing the following information regarding the hearing: (1) Contested issues; (2) uncontested issues; (3) witnesses that it intends to call; (4) exhibits and responses to data requests that it intends to introduce (other than responses to data requests related to additional issues response testimony); (5) any special accommodations sought regarding witness sequence or scheduling. Each party’s pre-hearing memorandum must also list any responses to data requests that the parties have collectively agreed to introduce. Whenever a party moves for the admission of a response to a data request, it must identify the number of the request.

Hearing

23. The Montana Rules of Evidence in effect at the time of the hearing will govern the hearing. *See* Mont. Code Ann. § 2-4-612(2). Because each party is entitled to reasonable notice of what issues will be addressed at the hearing, the Commission may not allow a party to raise an issue at a hearing unless it is reasonably related to an issue previously identified in the

DOCKET NO. D2013.9.71, ORDER NO. 7393b

proceeding.

24. Prior to the hearing, the parties must arrange with the court reporter and Commission staff to consistently mark all proposed exhibits, responses to data requests, and pre-filed testimony for reference.

25. A party must make each person that authored a data request response available for cross-examination at the hearing unless the Commission approves an agreement among the parties to waive cross-examination. A witness need not recite pre-filed testimony before counsel moves to admit the testimony into the record.

26. When a party seeks to examine a witness based on a document not previously filed in this proceeding, it must make copies of the document available to each Commissioner, party, and staff member, unless it shows good cause why copies are not available. A party seeking to introduce a document not previously filed in this proceeding must also provide a copy of the document to the court reporter.

27. At the discretion of the Commission, members of the public may comment on the proceeding at the hearing.

DONE AND DATED this 17th day of November, 2015, by delegation to Commission staff as an Order of the Commission.

BY THE MONTANA PUBLIC SERVICE COMMISSION

BRAD JOHNSON, Chairman
TRAVIS KAVULLA, Vice Chairman
KIRK BUSHMAN, Commissioner
ROGER KOOPMAN, Commissioner
BOB LAKE, Commissioner