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MONTANA FIFTH JUDICIAL DISTRICT COURT, MADISON COUNTY

**The Montana Department of Public
Service Regulation, Montana Public
Service Commission,**

Plaintiff,

v.

ABACO Energy Services, L.L.C.,

Defendant.

Cause No. _____

**Complaint for Recovery
of Civil Penalties for Violation of
Commission Orders**

The State of Montana, by and through the Montana Department of Public Service Regulation, Montana Public Service Commission (“Commission” or “PSC”), files this Complaint for Recovery of Civil Penalties (“Complaint”) in response to ABACO Energy Services, L.L.C.’s (“ABACO”) failure to adhere to Commission Orders 7392c and 7393d.

JURISDICTION AND VENUE

1. This Court has jurisdiction to enforce any violation of public utility laws and orders. Mont. Code Ann. §§ 69-3-206, 69-3-209 (2017).

2. Venue is proper because ABACO’s operations and rate payers are located in Madison County. Mont. Code Ann. § 25-2-124; *Mont. Consumer Counsel v. Mont. Pub. Serv.*

Comm'n, 181 Mont. 225, 593 P.2d 34 (1979); *Mont.-Dakota Utils. Co. v. Pub. Serv. Comm'n*, 111 Mont. 78, 80, 107 P.2d 533, 534 (1940).

PARTIES

3. The Commission is a Montana state agency with statutory authority to supervise, regulate, and control public utilities in Montana. Mont. Code Ann. § 69-3-102.

4. Defendant ABACO is a limited liability company organized in North Dakota. Elizabeth Severn Eriksson is listed as the registered agent of the company located at 201 Silver Run Rd., Big Sky, Montana 59719. ABACO is a public utility by virtue of its operation of the propane delivery system at the Big Sky Ski Resort in Big Sky, Montana.

FACTUAL ALLEGATIONS

5. The Montana Public Service Commission supervises, regulates, and controls public utilities in Montana.

6. Defendant ABACO is a limited liability company organized in North Dakota.

7. ABACO owns the tank farm and associated equipment, distribution main and service pipes, and meters for the propane distribution system located in the Village Center in Big Sky.

8. The distribution system consists of 18,400 feet of plastic mains through 83 services supplying 228 meters. Liquid propane is received via tank truck from a contracted supplier. The tank farm has two 30,000 gallon storage tanks.

9. The propane distribution system was originally constructed in 1996 by the Montana Power Company. NorthWestern Energy acquired the system from the Montana Power Company around 2002. ABACO purchased the system from NorthWestern Energy in 2007.

10. ABACO serves a total of 231 meters on its propane system. Eighteen of these meters are associated with Boyne USA, Inc.

11. Boyne USA, Inc. ("Boyne") is the owner of Big Sky Resort and manages the Summit Hotel, the Village Center Condominiums, and the Snowcrest Lodge.

12. The remaining 213 meters are held by individual unit owners. These customers are located in the following developments:

Cedar Creek	72
Powder Ridge	89
Stillwater Condominiums	41
Elkhorn Creek	10

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

14. Shoshone Condominium Hotel Owner’s Association is a homeowners’ association made up of the unit owners of the Shoshone Condominium Hotel. The hotel is a 94-unit condominium operated at the base of Lone Mountain in the Mountain Village at Big Sky. It was built in approximately 1989 by Boyne, and the individual units were marketed and sold as condominiums. Initially, Boyne acted as the Shoshone Condominium’s property manager and also its leasing agent.

15. On November 12, 2013, ABACO filed a Motion and Brief in Support of Motion to Dismiss Shoshone’s Complaint. Shoshone’s Response Brief was filed on December 12, 2013. 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. The Commission issued Order 7393 denying ABACO’s Motion to Dismiss on February 18, 2015.

16. Based on the allegations in Shoshone’s Complaint, the Commission subsequently found that ABACO qualified as a public utility under Mont. Code Ann. § 69-3-101, and that 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.” Order 7393 pp. 8–9 (Feb. 18, 2015) (Ex. A).

17. On February 13, 2015, Senate Bill 321 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 ultimately was vetoed by the Governor. *See* Veto Message of Governor Steve Bullock of Senate Bill 321 (Apr. 8, 2015) (Ex. B).

18. 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 (Ex. C).

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

20. 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 by Judge Menahan on October 28, 2015, allowing the Commission to proceed with Shoshone's Complaint. *Abaco Energy Services, LLC v. Mont. Pub. Serv. Comm'n*, ADV-2015-424, Order on Respondent's Mot. to Dismiss, 7 (Mont. 1st Jud. Dist. Ct. Oct. 28, 2015) (Ex. D).

21. On November 18, 2015, the Commission issued Procedural Order 7393b setting deadlines for discovery, testimony, prehearing memorandum, and a hearing date. A hearing was held on July 11, 2016. ABACO and Shoshone filed post-hearing briefs.

22. On December 22, 2016, the Commission issued Final Order 7393c. *See* Final Order 7383c (Mont. Pub. Serv. Comm'n Dec. 22, 2016) (Ex. E). The Commission found that Shoshone had standing to bring its Complaint against ABACO. *Id.* ¶ 74. The Commission also found ABACO is a public utility under both Mont. Code Ann. § 69-3-101 and *Lockwood Water Users Ass'n v. Anderson*, 168 Mont. 303, 542 P.2d 1217 (1975). *Id.* ¶ 75.

23. Importantly, to effectuate these findings, the Commission required ABACO to "file with the Commission information sufficient to meet the minimum rate case filing standards by April 28, 2017." *Id.* ¶ 76.

24. ABACO did not file a Motion for Reconsideration of Final Order 7383c despite the availability to do so. *See* Mont. Admin. R. 38.2.4806 (2017).

25. On January 17, 2017, ABACO's Counsel informed Commission staff and the relevant parties that ABACO would seek judicial review of Final Order 7393c. *See* Email from Kim Beatty (Jan. 19, 2017) (Ex. F). Despite announcing ABACO's intent to seek judicial review, ABACO's Counsel also stated that it would work with the parties to find some means of appropriate regulation of ABACO:

[M]y clients are also willing to work with all of you in an effort to try to resolve the litigation and set appropriate rates and terms and conditions of tariffs and service obligations. In other words, if we are able to reach some agreements as to what the regulated environment might look like, then my clients would be willing to dismiss the appeal and submit to regulation by the Commission. At this time, however, there are just too many open questions for ABACO to forego their right to appeal now. In addition to rates and terms of service, there are also questions about scope of service territory, obligations to infuse additional capital for system expansion, whether customers will be allowed to come and go from the system or whether they will be captive customers, etc.

Id. Counsel for ABACO indicated that it would stay the petition for judicial review “for 60 days to allow the parties some time to talk and work through some of the issues. To that end, ABACO would like to re-extend the invitation we made a month ago to sit down and talk in detail with the parties.” *Id.*

26. On January 20, 2017, ABACO filed a Petition for Judicial Review of Final Order 7393c with the Montana First Judicial District Court, Lewis and Clark County. *See ABACO Energy Services, LLC v. Mont. Pub. Serv. Comm'n*, Cause No. DDV-2017-57 (Mont. 1st Jud. Dist. Ct. Jan. 20, 2017) (Ex. G). The case was assigned to Judge Reynolds.

27. On February 21, 2017, the Commission filed the Notice of Transmittal of Administrative Record related to ABACO's Petition for Judicial Review to the District Court.

28. On February 22, 2017, ABACO filed a Motion for Substitution of Judge Reynolds. On February 23, Judge Reynolds issued an assumption inviting Judge McMahon to assume jurisdiction of ABACO's Petition for Judicial Review. On March 22, 2017, despite the invitation to Judge McMahon to assume jurisdiction, Judge Menahan assumed jurisdiction over ABACO's Petition for Judicial Review assigning it Cause No. ADV 2017-57. Since Judge Menahan's assumption of jurisdiction, no further progress has been made in this cause number. ABACO never filed a formal request to stay the proceedings in Cause No. ADV 2017-57.

29. On April 26, 2017, two days before the deadline, ABACO filed a Motion for Extension of Time to “file with the Commission information sufficient to meet the minimum rate case filing standards by April 28, 2017” as required by ¶ 76 of Final Order 7393c. ABACO Complaint for Recovery of Civil Penalties

requested an extension to September 30, 2017 to allow it to use a 12-month test period from 2016 for its rate case filing. ABACO's Motion for Extension of Time (Mont. Pub. Serv. Comm'n April 26, 2017) (Ex. H). On May 9, 2017, the Commission granted ABACO's Motion in a Notice of Commission Action. *See* Notice of Commission Action (Mont. Pub. Serv. Comm'n May 9, 2017) (Ex. I).

30. On October 2, 2017, two days after the deadline, ABACO filed an additional Motion for Time to "file with the Commission information sufficient to meet the minimum rate case filing standards" by September 30, 2017. *See* ABACO's Motion for Extension of Time (Mont. Pub. Serv. Comm'n Oct. 2, 2017) (Ex. J). ABACO requested additional time until December 31, 2017 to file the information required by ¶ 76 of Final Order 7393c. ABACO explained that it had hired experts, provided financial and expense information to the relevant parties, and "had several discussions among the lawyers as well as in person with the parties in the past several months." *Id.* at 2. ABACO explained that this extension would allow it "to continue its discussion with the parties; and if those discussions are not successful, to elect to either pursue the appeal it has previously filed, or to file the information necessary to meet the minimum rate case filing requirements as requested by this Commission." *Id.*

31. On October 17, 2017, the Commission held a work session to grant ABACO's Second Motion for Extension. On November 16, 2017, the Commission issued Order 7393d memorializing this authorization, but expressing frustration with ABACO's delays in providing this information:

The Commission GRANTS ABACO's request for extension to provide the information required in ¶ 76 of Final Order 7393c by December 31, 2017. The Commission notes, however, that December 31, 2017 is a Sunday and Monday, January 1, 2018, is a state holiday. Therefore, the Commission grants the extension to January 2, 2018.

The Commission notes that this is the second request for extension that it has granted for the benefit of ABACO. This is in addition to the accommodations made in Final Order 7393c to allow ABACO to file a rate case in a reasonable amount of time. *See* Final Order 7393c ¶¶ 60–61 (permitting ABACO to retain its existing contracts as allowed under Mont. Code Ann. § 69-3-305(6)). By the time ABACO files the information sufficient to meet the minimum rate case filing standards on December 31, 2017, the Commission's decision finding subject matter jurisdiction over ABACO will already be over a year old.

In order to prevent further undue delay, ABACO is on notice that failure to adhere to this December 31, 2017, deadline will result in an immediate application of fines under Mont. Code Ann. §§ 69-3-209 and -206. The Commission may fine

any public utility up to \$1,000 for failure to follow any order made by the Commission. *Id.* The Commission will seek enforcement in district court of any violation of this Order without further notice to the parties in this docket.

Order 7392d ¶¶ 5–7 (Mont. Pub. Serv. Comm’n Nov. 16, 2017) (Ex. K).

32. ABACO has failed to adhere to the January 2, 2018 deadline. As of the filing of this Complaint, ABACO has not filed the information as required by ¶ 76 of Final Order 7393c.

33. To the Commission’s knowledge, no meaningful conversations have occurred since October 2, 2017 between ABACO, Shoshone, Boyne, and the MCC to discuss the rate case filings that should have been provided on January 2, 2018.

34. The Commission has not received additional requests for extension from ABACO or an explanation of why this information, as required by ¶ 76 of Final Order 7393c, has not been provided to the Commission.

35. ABACO has failed to prosecute its Petition for Judicial Review contained in Cause No. ADV 2017-57 in a timely manner. *See Shackleton v. Neil*, 207 Mont. 96, 100, 672 P.2d 1112, 1114 (1983) (“[Failure to prosecute] means that a plaintiff has failed to exercise due diligence in bringing his case to a conclusion.”). “All orders of the commission shall become operative within 20 days after the filing of the order by the commission, subject to the right of stay and injunction as provided in this part.” *Id.* § 69-3-401. ABACO has not sought injunctive relief to prevent the effective date of the Commission’s orders. *See* Mont. Code Ann. § 69-3-403 (permitting injunctive relief of Commission decisions subject to ongoing judicial review).

COUNT ONE: ONGOING VIOLATION OF COMMISSION ORDER 7392d.

36. Plaintiff repeats and realleges all previous paragraphs as fully set forth herein.

37. Order 7392d requires ABACO to file to provide the information required in in ¶ 76 of Final Order 7393c by January 2, 2018.

38. ABACO has not provided this information and, thus, is in violation of Order 7392d.

COUNT TWO: ONGOING VIOLATION OF COMMISSION JURISDICTION

39. Plaintiff repeats and realleges all previous paragraphs as fully set forth herein.

40. ABACO is an investor-owned public utility subject the Commission’s jurisdiction pursuant to Mont. Code Ann. § 69-3-101.

41. The Commission is invested with the full power of supervision, regulation, and control of public utilities. Mont. Code. Ann. § 69-3-102. In addition to normally implied powers, the Commission is expressly granted the power to do all things necessary and convenient in the exercise of the powers conferred by Title 69, Chapter 3, excluding judicial powers. Mont. Code Ann. § 69-3-103(1).

42. ABACO's failure to appraise the Commission of the reasons for not filing the information required in ¶ 76 of Final Order 7393c is in violation of the Commission's full power of supervision, regulation, and control of public utilities. Mont. Code. Ann. § 69-3-102.

43. Due to ABACO's failure to provide the information required in ¶ 76 of Final Order 7393c, the Commission cannot exercise its general rate making authority to ensure that ABACO's rates as a public utility are just and reasonable. *See* Mont. Code Ann. §§ 69-3-301 to -310; *see also* Final Order 7392c ¶¶ 58–59 (Ex. E) (expressing concern that ABACO's rates may be discriminatory).

44. Due to ABACO's failure to provide the information required in ¶ 76 of Final Order 7393c, the Commission cannot exercise its jurisdiction over the Complaint filed by Shoshone. *See* Mont. Code Ann. §§ 69-3-321.

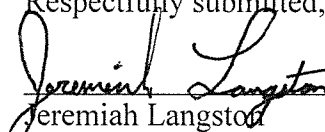
DEMAND FOR RELIEF

45. Pursuant to Mont. Code Ann. §§ 69-3-206 and -209, the Commission requests the Court impose on ABACO a civil penalty of \$1,000 per day per violation, for both Counts I & II, from January 3, 2018 until ABACO provides the information required in ¶ 76 of Final Order 7393c with the Commission, in order to complete the rate making procedure contemplated in Order 7393c and in fulfillment of the Commission's full power of supervision, regulation, and control of public utilities.

46. The Commission also requests that the Court order these fines—\$2,000 a day—to be collected and deposited into the state general fund on a monthly basis until ABACO complies with these authorities.

DATED this 16th day of January, 2018.

Respectfully submitted,



Jeremiah Langston
Special Assistant Attorney General
Attorney for Plaintiff