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July 16, 2013

Board of Directors
Heber Light & Power
31 South 100 West
Heber City, Utah 84032

Re: Complaint regarding Board Compensation schedule changes, compliance with the Utah Open Public Meetings Act, Municipal Officer's & Employees' Ethics Act and Utah Public Officers & Employee's Ethics Act.

Dear Board of Directors:

The Civil Review Committee of the Utah Attorney General's Office ("CRC") received a complaint forwarded from the Utah Auditors Office and concerned citizens regarding Heber Light and Power ("H L&P") and its Board of Directors ("Board").

Several concerns arise from the complaint and subsequent CRC review including:

1. Did H L&P and its Board comply with Utah law and its own Bylaws with regard to notice of, and procedure for, open meetings in general and specifically when it changed the Board's compensation schedule in November, 2011?

2. Did H L&P and its Board comply with Utah law and its own Bylaws regarding proper procedure concerning its Board Members planning, preparation, institution and acceptance of compensation in lieu of a "health insurance benefit"?

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3. Did the Board's actions regarding its planning, preparation, institution and acceptance of compensation in lieu of a "health insurance benefit" violate either the Municipal Officers' & Employees' Ethics Act, Utah Code § 10-3-1304 and/or the Utah Public Officers' & Employees' Ethics Act Utah Code §§ 67-16 (4) &(5)?

4. Did H L&P Board Members violate Utah law and its own Bylaws in its acceptance of compensation in lieu of a health insurance benefit and stipends for attendance at meetings?

The CRC has reviewed the complaint, information sent us, met with in-house counsel and researched applicable law regarding the above. Having completed its review of the matter, the CRC has determined Heber Light & Power failed to comply with Utah law and its Bylaws as outlined below:

FACTS

On November 16, 2011, the Human Resource Committee of H L&P presented amendments to the H L&P employee manual. The Board by motion acted on and approved the proposed amendments. *Heber Light & Power Minutes-November 16, 2011, at 3.* Included was an amendment that provided Board members total compensation would be increased from $466.00 per month to direct compensation of $1,687.00 per month, an increase of some 262% per month. As justification, the Board and HR Committee indicated the increase was compensation for the amount which would be paid to an insurance provider for health, dental and vision coverage waived by the Board. *Heber Light & Power letter- September 20, 2012.*

There is no evidence that a public hearing was held prior to the H L& P Board's action on November 16, 2011. Further, there is no evidence of any notice of a public hearing as required by Utah law and H L&P's Bylaws. The H L&P agenda, in general and specifically relating to this matter, lack any semblance of specificity.

A budget hearing was held December 13, 2011 one month after the November 16, 2011 action. The hearing was opened and closed with nothing put on the record other than the hearing was opened and closed. At some point in December, the general public became aware of the Board's actions and H L&P began receiving complaints and comments regarding the November 16, 2011 action.

In response to the complaints, H L&P held a meeting on January 25, 2012. The agenda listed "Public Comment." *Heber Light & Power Agenda- January 20, 2012* and *Heber Light & Power minutes-January 25, 2012.* The Notice and Agenda both lack the required reasonable specificity they should have. The Minutes indicate the Board would take comment, but would offer no response.

On February 22, 2012, the Board rescinded the monetary compensation for "health benefits" previously approved for the board members.

ANALYSIS

I. H L&P and Board did not comply with Utah law and its own Bylaws regarding notice and procedure for open meetings ("OPMA") in general practice or when it changed the Board's compensation schedule.

Utah Code § 52-4-103(8)(a) defines a public body subject to the Open Public Meetings act as:

> (a) A public body means any administrative, advisory, executive, or legislative body of the state or its political subdivisions that:
> (I) is created by Utah constitution, statute, rule, ordinance, or resolution;
> (ii) consists of two or more persons;
> (iii) expends, disburses, or is supported in whole or in part by tax revenue;
> (iv) is vested with the authority to make decisions regarding the public's business.

While Section (8)(b) exempts certain governmental/public bodies from the Open Public Meetings Act, noticeably absent from the short list of exempted entities are "Special Service Districts." Also, nothing in the Interlocal Cooperation Act, Utah Code § 11-13-101 et seq. specifically exempts such districts from compliance with OPMA. In fact, the Interlocal Cooperation Act contemplates that interlocal entities may be subject to OPMA pursuant to Utah Code § 11-13-223.

H L& P has argued that it is exempt from OPMA because it does not expend nor is it supported by tax revenue. The CRC disagrees with H L&P's position. In order for H L&P to be subject to OPMA, it must meet the elements listed above in Section 103(8)(a). The CRC believes H L&P is subject to OPMA as it does meet the four criteria.

First, H L&P is a creature of statute, thus meeting the first element. Second, H L& P's Board consists of two or more persons, thus meeting the second element. Third, H L&P is owned by public entities and its Board consists of the Mayors of Heber, Midway and Charlston Town, two council members from Heber and a county official. It is by virtue of their elected positions that the individual's are Board members and every action taken by a Board member is done so through the prism of their elected/paid position. While attending Board meetings or acting as Directors, these individuals do not cease to be Mayors and Council Members as reflected in Utah Code § 11-13-222(1) which states in relevant part; "an officer performing services under an agreement under this chapter shall be considered to be an officer of the public

agency employing the officer." Also, Utah Code § 11-13-222(2) states in relevant part; "unless provided in an agreement that creates an interlocal entity, members continue to be an employee of the public agency and continue to be governed by the rules, rights, entitlements and status that apply to employees of the public agency." Utah Code § 11-13-211 allows public agencies, in this case municipalities, to provide support to the interlocal entity in the form of personnel and services. The Board is constituted of individuals who are paid by their respective municipalities, town or county while in attendance and while acting on behalf of the interlocal entity. Based on the above the CRC believes H L& P is "supported in part" by tax revenue and meets the third element. Lastly, H L & P is vested with authority to, and does make decisions regarding the public's business within the boundaries of the contracting public agencies, meeting the last element.

Even if it were determined that H L&P was not subject to OPMA, H L&P's Bylaws, Articles XIII through XIX restate nearly verbatim all the requirements and the statutory language of OPMA, Utah Code § 52-4-101 et seq. After reviewing numerous sets of meeting notices, agendas, and open meeting minutes, it is clear that H L&P has neither complied with the Open Public Meetings Act, nor its own Bylaws in general practice, or in the specific documents associated with the Board's actions to alter and/or change its compensation schedule. Notices reviewed by the CRC do cite time and place of meetings but are cryptic at best as to what, if any, business will be conducted at the meetings. The same lack of reasonable specificity is the general practice regarding topics on H L&P's agendas. In the documents reviewed by the CRC, discussion items such as "General Manager's Remarks" were listed as action items. Other "action items" were described as general business with no detail what soever that would provide notice to an interested party as to what subject matter the Board would be acting. Specifically, in reviewing the documents regarding the Board's actions to alter and/or change its compensation schedule, the topic was listed on the notices and agendas as "employee & exempt employee manual amendments" or "personnel committee report." Sufficient information was never provided by H L&P to notify the public as to the topics to be considered at its meetings. Each topic should have been listed under an agenda item on the notice and meeting agenda notifying the public of the Board's intended discussion and/or action with regard to increasing the Board's compensation as required by Utah Code § 52-4-202(6)(a) & (c) and Article XIII, *Bylaws of Heber Light and Power Company.*

Regarding the minutes kept of open meetings held by H L&P, in the ordinary course of business as its general practice and specifically documents related to the present issue, the minutes do nothing to memorialize and document the actual discussion and/or actions taken by the governing body. Utah Code § 52-4-203 states:

> 52-4-203. Written minutes of open meetings -- Public records -- Recording of meetings.
>
> (1) Except as provided under Subsection (7), written minutes and a recording shall be kept of all open meetings.
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> (2) Written minutes of an open meeting shall include:
>
> (a) the date, time, and place of the meeting;
>
> (b) the names of members present and absent;
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> (c) the substance of all matters proposed, discussed, or decided by the public body which may include a summary of comments made by members of the public body;
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> (d) a record, by individual member, of each vote taken by the public body;
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> (e) the name of each person who:
>
> (i) is not a member of the public body; and
>
> (ii) after being recognized by the presiding member of the public body, provided testimony or comments to the public body;
>
> (f) the substance, in brief, of the testimony or comments provided by the public under Subsection (2)(e); and
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> (g) any other information that is a record of the proceedings of the meeting that any member requests be entered in the minutes or recording.
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> (3) A recording of an open meeting shall:
>
> (a) be a complete and unedited record of all open portions of the meeting from the commencement of the meeting through adjournment of the meeting; and
>
> (b) be properly labeled or identified with the date, time, and place of the meeting.
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> (4) The written minutes and recording of an open meeting are public records under Title 63G, Chapter 2, Government Records Access and Management Act, as follows:

> (a) Written minutes that have been prepared in a form awaiting only formal approval by the public body are a public record.
>
> (b) Written minutes shall be available to the public within a reasonable time after the end of the meeting.
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> (c) Written minutes that are made available to the public before approval by the public body under Subsection (4)(d) shall be clearly identified as "awaiting formal approval" or "unapproved" or with some other appropriate notice that the written minutes are subject to change until formally approved.
>
> (d) A public body shall establish and implement procedures for the public body's approval of the written minutes of each meeting.
>
> (e) Written minutes are the official record of action taken at the meeting.
>
> (f) A recording of an open meeting shall be available to the public for listening within three business days after the end of the meeting.
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> (5) All or any part of an open meeting may be independently recorded by any person in attendance if the recording does not interfere with the conduct of the meeting.
>
> (6) The written minutes or recording of an open meeting that are required to be retained permanently shall be maintained in or converted to a format that meets long-term records storage requirements.
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> (7) Notwithstanding Subsection (1), a recording is not required to be kept of:
>
> (a) an open meeting that is a site visit or a traveling tour, if no vote or action is taken by the public body; or
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> (b) an open meeting of a local district under Title 17B, Limited Purpose Local Government Entities - Local Districts, or special service district under Title 17D, Chapter 1, Special Service District Act, if the district's annual budgeted expenditures for all funds, excluding capital expenditures and debt service, are $50,000 or less.

Article XVIII, *Bylaws of Heber Light and Power Company* also restates Section 203 nearly verbatim. As a general practice, the H L&P minutes lack among other things: the substance of all matters proposed, discussed, or decided by the Board including any summary of comments made by members of the Board; a record, by individual member, of each vote taken by

the public body; the identity of and the substance, in brief, of the testimony or comments provided by the public. This is particularly true with regard to the documents associated with the immediate issue. The actions of the H L&P Board were far from transparent.

II: H L&P and Board did not comply with Utah law and H L&P Bylaws regarding proper procedure by Board Members in planning, preparing, instituting and accepting compensation in lieu of a paid "health insurance benefit."

As justification for its actions, counsel for H L&P has argued that "as an energy services interlocal entity, the Company is a political subdivision separate from the municipalities that created it" (Counsel cites Utah Code § 11-13-203, -204 & -206) and not subject to other statues including Utah Code § 10-3-818 and that H L&P was compliant with its Bylaws in taking its actions. In many instances this argument might be sound, however as applied to the immediate issue it is fundamentally flawed.

Noticeably absent from the statutes cited by H L&P in its justification is Utah Code § 11-13-222. As discussed above, Utah Code § 11-13-222(2), states in relevant part, unless provided in an agreement that creates an interlocal entity, members continue to be an employee of the public agency and continue to be governed by the rules, rights, entitlements and status that apply to employees of the public agency. Further, the courts have long held that the intent of the "Interlocal Cooperation Act" is to allow municipalities to collectively exercise powers which they already possess individually, *CP National Corporation v. Public Service Commission*, 638 P.2d 519. What is also clear, is that the courts have long held that an interlocal entity is bound by the limits of the founding municipalities powers and authority.

The H L&P Board of Directors is comprised of elected officials from the founding municipalities and a member from the county. It is only by virtue of their elected positions that the individuals sit on the Board of H L&P. Each individual is a paid by his/her municipality while acting as a Director and is further significantly compensated, in addition, by H L&P in the form of a stipend. As elected officials, each Board member lives and dies by his/her representation of their constituency. Every decision made by the individual Directors is done so through the prism of their elected positions as evidenced by Article XVII, § 5 (a) through (c) which provides for "owner only" votes and "Weighted Voting", *Bylaws of Heber Light & Power*, Article XVII, Section 5. The link between the Board of Directors of H L&P is inextricably intertwined with their elected official municipal positions and duties.

As to the "subcommittee" process by which a recommendation was made to alter the compensation schedule, the CRC has not been able to obtain and is not aware of any detailed record kept by the subcommittee as to how they came to their conclusions/recommendation. In contacting PEHP and attempting to retrace the steps alleged to have been taken by the subcommittee, the CRC was unable to substantiate information provided by H L&P.

In contacting in-house counsel for PEHP and PEHP's new accounts manager to inquire about eligibility requirements for insurance, it appears H L&P's Board members may never have been eligible for insurance through PEHP. While it is true that there is a municipal pool which includes both elected and appointed officials, being an elected and/or appointed official is not the only base criteria for eligibility. An individual must also be employed to work a minimum of twenty (20) hours per week and be eligible to participate in a retirement program. While the Board of Directors/appointed officials meet the first prong, they each fail on the next two. No evidence has been provided by H L&P documenting a minimum of 20 hours per week worked by the Board. In fact, the CRC was lead to believe no such tracking of time is done as a general practice for the Board. Finally, H L&P has indicated that none of the Board participate in, or are eligible for, a retirement plan through the Company. Given that the Board does not meet all the hard requirements of eligibility, it is possible that if the Boardmembers had elected to receive insurance rather than the monetary equivalent, they would have been denied coverage.

PEHP also indicated while not adverse to law and/or PEHP policy, it appears extremely rare for appointed officials in general practice to have such dual primary coverage policies through PEHP and even more rare for an individual to receive direct compensation equivalent to the cost of premiums in lieu of coverage. PEHP indicated while it does not have enforcement authority and/or oversight over reimbursement of employees under such a scheme, it could not cite any other governmental entity, state or local with such a policy as H L&P's.

Because of the lack of transparency in the planning, preparation, institution and acceptance of compensation in lieu of a health benefit, it is difficult to determine how and why the subcommittee and the Board approved a six (6) month retroactive disbursement as part of the change to the compensation schedule. It is apparent though that pursuant to Utah Code § 10-3-818, which the CRC believes is applicable and Article XII §§ 1 & 2 of its Bylaws, the Board may only adjust its compensation schedule from a fixed point forward. In fact, Section 2 states, "the Company's Annual Budget **shall include a line item for Director compensation for the coming year.**", (Emphasis added.) No evidence has been found which would authorize the Board to act six months retroactively, only to move forward with a new policy from a fixed point after the action.

The municipalities (Heber, Midway, Charleston) do not have the legal authority or ability to alter the compensation of its elected officials and/or employees in the manner H L&P chose to undertake in its change to the Board's compensation, which action exceeds the authority of the founding municipalities. At its base, a municipality, including those listed above, may not alter its compensation schedule without public notice and a public hearing prior to the action and without authority to act retroactively. In the immediate case, H L&P did neither, or at the very least, substantially failed in its attempt to comply. Any notice provided prior to the Board's action was so fundamentally vague, no member of the public could have deciphered the Board's intent. There is no evidence found or proffered by H L&P that a public hearing ever took place

prior to, or after, the Board's actions. A meeting wherein the Board took "public comment" occurred sometime well after the Board's actions took place in November, 2011.

The Company's Annual Budget shall include a line item for Director compensation for the coming year. Notice of the public hearing on the Annual Budget shall be given as provided in Article IX, and Article XII § 2, *Bylaws of Heber Light & Power Company*. Also, the Board must be able to show it considered factors including: the nature and complexity of the Company's business; time spent in and outside of Board Meetings on Board business; cost of living adjustments; and compensation of comparable boards. *Bylaws of Heber Light & Power Company, Article XII § 1.* There is no evidence the CRC is aware of that such a change in compensation was shown to be comparable to any other similarly situated board. When asked about tracking of time for the Board members of H L&P the CRC was lead to believe no such tracking was maintained by H L&P. Similarly, there is no evidence that H L& P followed the requirements of Article IX §§ 1 & 2, Article XIII, §§ 1 through 3, Article XIV, § 2 (a) & (b) of their own Bylaws.. In fact, the CRC is not aware of any other similarly placed governmental entities who have changed their compensation schedule in such a manner, providing direct compensation in lieu of a health benefit and especially, with a six month retroactive eligibility/disbursement.

It appears H L&P failed to follow Utah law and its Bylaws in its planning, preparation, institution and acceptance of compensation in lieu of a "health insurance benefit."

III: H L& P Board actions regarding its planning, preparation, institution and acceptance of compensation in lieu of a "health insurance benefit" brings into question compliance with the *Municipal Officers' & Employees' Ethics Act, Utah Code § 10-3-1304 and/or the Utah Public Officers' & Employees' Ethics Act Utah Code §§ 67-16 (4) &(5).*

There is no doubt that the Board of Directors for H L&P are subject to the provisions of the Municipal and State Ethics Acts. Article XI, *Bylaws of Heber Light and Power Company* specifically compels the Board to comply with the Acts. However, the Board of Directors would be subject to the provisions of the Acts regardless of the language in its Bylaws.

Utah Code § 67-16-5 states; it is an offense for a public officer.....under circumstances not amounting to a violation of Section 63G-8-105 or 76-8-105, to use or attempt to use his official position to further substantially the officer's personal economic interest or secure special privileges or exemptions for himself or others. Utah Code § 10-3-1304(2)(b) reiterates this prohibition verbatim.

When the circumstances and actions of the H L&P Board are viewed in totality, it appears H L& P Board members may have violated the above statutes. There is at least the appearance that compensation in lieu of insurance coverage was a thinly vailed attempt by the Board to

increase its overall compensation without full disclosure to the public and in excess of the compensation typical to such interlocal and other governmental boards. The Board's actions may have substantially furthered each member's personal economic interests, especially in view of the six month retroactive provision equaling more than $10,000.00 to each Board member. This action also equates to monthly compensation in excess of $1,800.00 per month for a part time board with only broad oversight duties. By its own admission, the day to day operations, technical and other specific duties are handled by full time staff in management positions. The H L& P Board members were already receiving close to $500.00 per month in total compensation for such oversight.

The Board's actions could also be viewed as a special privilege or exemption secured by the Board for itself. It does not appear, and H L& P has not provided evidence that rank and file employees have the option to waive insurance coverage in lieu of increased compensation and certainly not to receive compensation retroactively for six months. No justification, such as un-reimbursed medical expenses incurred during the six month retroactive period has been given that would support a sound public purpose for such an action either. In fact, had a medical expense been incurred, the Board members already had primary coverage through the municipalities/county they represent to which any medical expense could/would have been billed. Additionally, had the Board members elected to receive coverage, such coverage would commence from the date the application for insurance was accepted and a policy issued and coverage would not have been applied retroactively. Payment for such coverage would also have commenced from the date of issuance and not applied retroactively. Pursuant to information obtained from PEHP, there is sound public policy behind preventing individuals from receiving compensation in lieu of insurance. Primarily, because if such an option were offered, the pool would be drastically reduced and insurance coverage would become cost prohibitive for governmental entities. It appears it is very unique among governmental entities to offer compensation in lieu of insurance. However, The CRC is aware of a few small municipalities and/or special service districts, who because of size have offered a re-rout of sorts of pay to a quasi cafeteria plan, because medical insurance could not be offered. In these instances, typically this is not additional compensation, but a re-allocation of existing compensation. The CRC is not aware of/could not find any other governmental entity who has increased its governing body's compensation in such a manner and to this extent.

IV: H L&P Board Members acceptance of compensation/stipends for attendance at meetings.

The complaint received by the CRC also included concerns regarding the Board receiving compensation from the municipalities and from H L&P in the form of a stipend. While many governmental entities in Utah have policies which would prohibit the acceptance of such compensation/stipend when already being compensated by the governmental entity, it does not appear that such a compensation scheme is in violation of any Utah statute, nor a local ordinance. Inasmuch, as there does not appear to be a violation of law the CRC will not address this issue further.

CONCLUSION

The CRC recommends that the H L& P Board address its general practice with regard to public notice, and the lack of any reasonable specificity in its notice/agendas. Such notice/agendas should conform to the minimum standards of it own Bylaws and also the Open & Public Meetings Act. Similarly, all minutes should also meet the OPMA standards. As to the actions of the Board to increase its compensation, the CRC understands the Board rescinded its change in compensation and some members of the Board have either returned the money they received or made payment arrangements to do so. However, the fact that certain Board members have refused to reimburse H L& P, given the significant dollar amount of their increase , the utter lack of transparency, the violations of Utah law and its own Bylaws is extremely troublesome. The CRC strongly recommends that all Board members reimburse H L& P the monies received as a result of the flawed action taken by the Board to increase their own compensation 262%. The Civil Review Committee's primary goal in this matter is compliance with Utah law, public ethics and transparency in government. Reimbursement of the funds in question to H L&P would be sufficient to close this matter. However, should any Board member fail to remit the funds received, or should H L&P continue to violate its own Bylaws and State law with regard to notice, agenda and/or minutes, the CRC will contemplate formal enforcement action, including enforcement of possible ethical violations of Utah law.

Thank your for your immediate attention to these issues.

Sincerely,

Sheila Page

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cc: Joseph Dunbeck