- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Complaint of Rocky Mountain Power, a division of PacifiCorp, against Heber Light & Power Regarding Unauthorized Service by Heber Light & Power in Areas Certificated to Rocky Mountain Power	)	DOCKET NO. 07-035-22 REPORT AND ORDER

ISSUED: November 3, 2008

By The Commission:

THIS MATTER is before the Public Service Commission (Commission) on Heber Light and Power's (HL&P) Motion to Dismiss. HL&P moved to dismiss Rocky Mountain Power's (RMP) Complaint, arguing the Commission lacked subject-matter jurisdiction over RMP's Complaint. On October 2, 2008, the Commission held a hearing on the Motion. Messrs. Joseph Dunbeck of Dunbeck & Moss and Gary Dodge of Hatch James & Dodge represented HL&P. Mr. Dunbeck argued on behalf of HL&P. Mr. Gregory Monson of Stoel Rives, LLP represented RMP. Mr. Michael Ginsberg appeared for the Division of Public Utilities (Division). The Commission, having reviewed the moving and responding papers, having heard oral arguments from the parties, and being otherwise fully appraised in the matter, hereby DENIES HL&P's Motion.

PROCEDURAL SUMMARY

RMP's Original Complaint

On April 18, 2007, RMP filed its original Complaint against HL&P raising five causes of action. Generally, RMP alleged that HL&P violated RMP's certificate, usurpation of

Commission jurisdiction, violation of U.C.A. § 10-8-14 (Municipal Code), violation of U.C.A. § 11-3-304 (Interlocal Act), and violation of Article I, Section 22 of the Utah Constitution. RMP sought declaratory relief in relation to the alleged violations. Namely, RMP asked the Commission to 1) order HL&P cease providing electric service to customers outside its Member Cities' boundaries and within RMP's certificated areas; 2) find that the actions of HL&P in concert with Wasatch County in attempting to determine Rocky Mountain's service area are unlawful; 3) find that the electric service provided by HL&P to retail customers outside of its Member Cities' boundaries is in violation of the Municipal Code; 4) find that HL&P failed to obtain one or more certificates of public convenience and necessity in violation of the Interlocal Cooperation Act; and 5) declare that the electric service provided by HL&P to retail customers within the Rocky Mountain service area is a taking of RMP's property.

The Stays

There were two stays granted in this action. The Commission granted the first on June 5, 2007 and the second on August 8, 2007. During the stays, the parties attempted to resolve their disputes but were not successful.

RMP's Original Complaint

On February 5, 2008, RMP filed its Amended Complaint. In its jurisdictional allegations, RMP alleged as follows:

> The Commission has jurisdiction over this Amended Complaint because HL&P is providing retail electrical service to customers outside the municipal boundaries of its Member Cities [] in violation of Rocky Mountain Power's Certificate and Utah law. The electrical service provided by HL&P is not the temporary wholesale of surplus product or service capacity, but is rather part of a

> pattern of providing permanent, continuous, and expanding retail service in the normal course of business to customers outside the Municipal Boundaries.
>
> Although the Commission does not have jurisdiction over municipalities providing utility service within their municipal boundaries or making legitimate temporary wholesale sales of surplus product or service capacity outside of their municipal boundaries, the Commission is authorized to prohibit continuous retail service by municipalities outside of their municipal boundaries because in so doing the municipalities are not engaged in a municipal function authorized by Utah Code Ann. § 10-8-14 and because customers of the municipalities located outside of their municipal boundaries have no control over the policies and actions of the municipalities because they are not able to vote for the elected public officials who set such policies and authorize such actions.
>
> The Commission also has jurisdiction over this Amended Complaint because, on information and belief, HL&P has constructed generating plants and transmission lines without obtaining a certificate of public convenience and necessity from the Commission in accordance with Utah Code Ann. § 11-13-304.

RMP Amended Complaint, ¶¶ 3-5.

RMP's Amended Complaint

RMP filed an Amended Complaint. In it, RMP requested the Commission make findings to determine: 1) whether HL&P has "surplus product or service capacity" and, if so, the amount of HL&P's "surplus product or service capacity"; 2) whether the sale of "surplus product or service capacity" must be restricted to temporary wholesale sales or may be to retail customers on a continuing basis; 3) the geographic area in which RMP is obligated to serve if the Commission determines HL&P has authority to provide retail electric service to customers outside boundaries of the Member Cities' boundaries; and 4) if the Commission determines HL&P has authority to provide retail electric service to customers outside its Member Cities' boundaries, that the Commission amend RMP's Certificate to exclude those areas from RMP's certificated areas.

HL&P'S Answer to Amended Complaint

On April 7, 2008, HL&P answered RMP's Amended Complaint. Besides the general denials, admissions, and affirmative allegations to RMP's Amended Complaint listed in its First Defense, HL&P also raised five other defenses. Its Second Defense alleges the Commission lacks subject-matter jurisdiction to adjudicate the issues contained in RMP's Complaint or grant the relief requested by RMP. In its Third Defense, HL&P raised defenses of abandonment, forfeiture, waiver, estoppel, and laches, arguing that RMP has been aware of and encouraged HL&P's development of electric service to the Heber Valley. In its Fourth Defense, HL&P argues RMP abandoned or forfeited its rights and obligation to provide service to the Heber Valley and unincorporated areas of Heber Valley. The Fifth Defense claims RMP has failed to state a claim for which relief can be granted. In its Sixth Defense, HL&P makes an equitable argument, stating that it should be allowed to continue serving its customers within its historical service area.

Key Factual Allegations and Admissions

RMP has made certain factual allegations, and HL&P has admitted some facts that are relevant to this Order. HL&P is an energy services interlocal entity formed under the Interlocal Act by Heber City, Midway, and the Town of Charleston (Member Cities). *RMP Amended Complaint,* ¶ 2*, HL&P Answer,* ¶ 2. It provides electric service to individuals living within the Member Cities' boundaries and also to individuals outside of those boundaries—in unincorporated areas of Wasatch County. *HL&P Answer,* ¶ 3. HL&P admits that it "does not provide temporary wholesale service to the unincorporated areas of Wasatch County and that as

part of its normal course of business it provides services to customers in the unincorporated areas of Wasatch County." *HL&P Answer*, ¶ 3. HL&P also admits that it "intends to continue to serve customers within its historic service territory," i.e. customers outside its Member Cities' boundaries. *Id. at ¶ 11.* RMP has franchises from Wasatch County as early as 1917 authorizing it to provide electric service to residents of Wasatch County, *RMP Amended Complaint*, ¶ 7, *HL&P Answer*, ¶ 7; its current franchise expires in 2010, *RMP Amended Complaint*, ¶ 7, *HL&P Answer*, ¶ 7. RMP also has a certificate from the Commission authorizing it to provide electric service to customers in Wasatch County. *RMP Amended Complaint*, ¶ 8. Both RMP and HL&P provide electric service to customers in the unincorporated areas of Wasatch County. *RMP Amended Complaint*, ¶ 6, *HL&P Answer*, ¶6.

HL&P's Motion to Dismiss and Reply

Concurrently with the filing of its Answer, HL&P filed its Motion to Dismiss and supporting Memorandum. HL&P generally argued that because it was an interlocal entity and political subdivision of Utah, the Commission lacked jurisdiction to determine the extent of its authority to serve its customers and define its service territory boundaries. HL&P notes that U.C.A. 54-4-1 explicitly gives the Commission authority over public utilities— including electrical corporations, but that HL&P is not an electrical corporation. Under U.C.A. 54-2-1(5)(b), governmental entities are excluded from the definition of "corporation." Additionally, neither is HL&P a "person" under U.C.A. 54-2-2, nor is it an "association" or "company" subject to Commission jurisdiction, something not contemplated by applicable statutes. HL&P contends that RMP's arguments to classify HL&P as a "company" or "association" simply

because HL&P is a "business organized by its members to provide electric service" would make each municipal electric utility subject to Commission jurisdiction. HL&P further reasons that the 1989 amendment to U.C.A. 54-2-2, removing the term "governmental entity" from the definition of "person", clearly shows the Legislature's intent to remove entities such as HL&P from Commission jurisdiction.

HL&P further contends that RMP and the Division's reliance on the Commission's 1992 *White City Water Company* decision, Docket No. 91-018-02 (*White City)*[1] is mistaken. HL&P contends *White City* water is either distinguishable, or in the alternative, was wrongly decided. HL&P contends *White City* is distinguishable, first, because the Commission merely decided to retain jurisdiction over a company over which it already had jurisdiction. Part of the Commission's rationale for retaining jurisdiction was that when Sandy acquired the company, it also took on "all its regulatory baggage." HL&P contends that, here, it is not acquiring a public utility, so the Commission cannot "retain jurisdiction" over an entity which it has never regulated. Secondly, the Commission plainly stated that it was only asserting jurisdiction to nullify rate discrimination, not to assert jurisdiction over Sandy or to determine its service area. Therefore, it is inapplicable in this case where RMP does want the Commission to assert jurisdiction over HL&P and determine its service area.

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[1] In *White City*, Sandy City contracted with White City Water Company to purchase the company's water system and intended to operate the company as a municipal utility. Some of the water company's customers, however, were non-residents of Sandy and would be charged higher rates than Sandy residents. White City Water applied to the Commission for an order approving the transfer of all its stock to Sandy. It also sought a declaratory judgment that the system, under Sandy control, would constitute a municipal water system. As such, it would be free of Commission jurisdiction—both with regards to customers within and without Sandy city boundaries. In *White City*, the Commission ultimately determined that Sandy was not performing a municipal function—insofar as its service to non-residents was concerned, and thereby was subject to Commission jurisdiction in that aspect.

HL&P also contends, in the alternative, that the *White City* decision should be overruled. HL&P contends the Commission decided the matter upon public policy considerations, and nowhere listed a statute explicitly authorizing the Commission to assume jurisdiction. The Commission merely reasoned that the possibility that Sandy might discriminate against extra-territorial customers, required Commission jurisdiction to regulate Sandy's rates and protect disenfranchised customers. But because no statute explicitly gives the Commission jurisdiction over HL&P, it argues the Commission must dismiss the Complaint and allow a civil court to resolve the disputes between RMP & HL&P.

RMP's Response to the Motion

RMP responded to HL&P's Motion. RMP first argued that HL&P is subject to the Commission's jurisdiction because it qualifies as a "person" under § 54-2-1(7) (a)'s definition of "electrical corporation." A "person" under § 54-2-2 means "individuals, corporations, partnerships, associations, trusts, and companies." Even if it is a "political subdivision", HL&P qualifies as a "company", RMP argues, because it is an "association, partnership, or union—that carries on a commercial or industrial enterprise," or an association or union of three cities organized for the commercial purpose of providing electric service to customers within and without Member Cities' boundaries. Additionally, the legislature's deletion of the term "governmental entity" from the definition of "person" in § 54-2-2 did not exempt HL&P from all Commission regulation, but merely served to bolster the notion that the Commission did not generally have jurisdiction over municipal power providers, or entities like HL&P. Additionally, RMP contends HL&P's arguments regarding its exemption from

provisions of the Interlocal Act are not relevant because the issue is not just whether HL&P is subject to Commission oversight for *construction* of generation plants and transmission lines under § 11-13-204(2)(a)(I), but also whether HL&P is exempt from Commission oversight for its *provision* of product and service into areas outside its Member Cities' boundaries.

RMP cites the *White City* water case as a basis for jurisdiction. Based on *White City's* precedent, the Commission clearly has jurisdiction in this case, RMP contends. In *White City* the Commission decided to regulate Sandy's provision of water to non-Sandy residents for the following reasons: 1) disenfranchised non-residents would not be able to prevent Sandy from charging them excessively; 2) because Sandy was also an entity of limited jurisdiction like the Commission, Sandy might possibly have to assume the Commission's role in regulating rates of non-residents, which would be inappropriate; and 3) Sandy was not performing a municipal function by proving water to customers outside its boundaries and therefore subjected itself to regulation. RMP suggest the same reasons supporting Commission jurisdiction in *White City* are present here.

RMP also argued that its Complaint goes to another key issue—the nature and extent of RMP'S obligation to serve in Wasatch County. The Commission was the authority that issued RMP'S certificate and determined the certificated area. RMP claims the Commission is the only body with the authority and expertise to regulate RMP's service obligation, including determining whether RMP has abandoned or forfeited part of its certificate, or whether HL&P has obtained a right to serve the disputed areas by passage of time.

Finally, RMP argues that, taken to its logical end, HL&P's argument would mean that HL&P and "any other interlocal entity or municipal power system has the power to serve electric customers anywhere in Utah . . . . and that no limitations on that power can be placed upon it by the Commission." This is not what the legislature intended and therefore, the Motion must be denied.

The Division's Response to the Motion

The Division also responded to HL&P's Motion. The Division first argued that under *White City*'s rationale, the Commission should deny the Motion and allow the matter to proceed. The Division stated that *White City* held that under certain circumstances the Commission might have jurisdiction over a city's provision of service outside of its municipal boundaries. Like Sandy City in *White City*, HL&P is selling services outside of its municipalities' boundaries. The sale of the services was not the sale of surplus services. Additionally, the non-resident customers outside of Sandy City had no say in Sandy governance. The Division contends similar circumstances exist here. It argues the Commission must assume jurisdiction to protect disenfranchised customers. The Division stated that given the precedent already established by *White City*, the facts alleged by RMP and answers and defenses put forth by HL&P, and the lack of controlling opinion from the Supreme Court on the issue, the Commission should retain jurisdiction to determine if the *White City* case controls.

The Division also argues that the Commission must assume jurisdiction to clarify the uncertainties that exist with regards to the obligations of RMP to serve residents in unincorporated areas of Wasatch County, especially in newer developments where there is

confusion as to whether HL&P or RMP has the obligation to serve. The Division contends that had HL&P not been an interlocal, the Commission would certainly have jurisdiction to regulate it in the unincorporated areas of Wasatch County. Because non-residents served by HL&P have no other authority to turn to, the Commission should assume jurisdiction.

Finally, the Division reasons that because HL&P is prohibited from serving non-residents with services that are not surplus, the Commission can be the only proper authority with jurisdiction to determine who has the obligation to serve residents in unincorporated areas of Wasatch County. The Division notes that Article XI, Section 5 of the Utah Constitution authorizes cities to provide public utilities which are "local in extent and use." Section 10-8-14 of the Utah Code allows municipalities to sell and deliver product or services to non-residents that are surplus. Article VI, Section 28, states only that the Commission cannot interfere with a municipalities municipal functions, but does not expressly prohibit the Commission from regulating municipalities when they are not performing municipal functions. Also, the Division cites to *County Water System v. Salt Lake City*, 278 P.2d 285 (Utah 1954), *Salt Lake County v. Salt Lake City*, 570 P.2d 119 (Utah 1977), and *CP National Corp. v. Public Service Comm'n,* 638 P.2d 519, 521 (Utah 1981) to support its proposition that HL&P's Member Cities cannot sell or deliver non-surplus product or services to non-residents. It recognizes that although no case is squarely on point, those three cited cases, together with the constitutional and statutory provisions cited, make it clear that HL&P cannot provide the service it is providing. This being the case, only the Commission has the jurisdiction to clarify any uncertainties, regulate HL&P outside is Member Cities' boundaries, and protect disenfranchised customers.

ANALYSIS

Standard for Motion to Dismiss

HL&P has made a motion to dismiss for lack of subject matter jurisdiction. Commission Rules do not squarely address how the Commission should treat such a motion. In light of this, R746-100-1.C provides that "[i]n situations for which there is no provision in these rules, the Utah Rules of Civil Procedure shall govern . . . ." Rule 12(b)(1) of the Utah Rules of Civil Procedure is the vehicle for HL&P's Motion. It states HL&P may make its motion to dismiss for "lack of jurisdiction over the subject matter." There is little, if any, Utah case law on how to address a 12(b)(1) Motion. Federal case law, however, is instructive.[2] Motions to Dismiss for lack of subject matter jurisdiction take two forms. One form is where the defendant attacks the "sufficiency of the complaint's allegations as to the subject matter jurisdiction", *City of Albuquerque v. United States DOI,* 379 F.3d 901 (10th Cir. 2004), as HL&P has done here. In such a case, the adjudicator must presume all the allegations in the complaint are true. *See id.* at 906. Therefore, the Commission will presume RMP's factual allegations are true.

Assumed Factual Allegations

RMP makes two central factual allegations that it states, argue for Commission jurisdiction and against dismissal. First, RMP alleges HL&P is providing non-temporary, non-surplus product or service capacity to areas outside of the Member Cities' boundaries.

[2] Interpretations of the Federal Rules of Civil Procedure are persuasive where the Utah Rules of Civil Procedure are "substantially similar" to the federal rules. *Lund v. Brown*, 2000 UT 75, ¶ 26. Utah Rule 12 and federal Rule 12 are substantially similar.

Complaint, ¶ ¶ *3-4.* HL&P admits it "does not provide temporary wholesale service to the unincorporated areas of Wasatch County and that as part of its normal course of business it provides services to customers in the unincorporated areas of Wasatch County," *HL&P Answer*, ¶ 3. Additionally, HL&P admits it "intends to continue to serve customers within its historic service territory," i.e. customers outside its Member Cities' boundaries. In essence, RMP argues, HL&P is acting just like a private commercial enterprise—a public utility, in providing such service outside its Member Cities' boundaries.[3] Second, RMP states that because some HL&P customers live outside Member City boundaries and cannot vote, they will have no means of preventing HL&P from charging excessive rates or providing inadequate srvice, if HL&P is not subject to Commission jurisdiction.

In sum, because applicable law only allows HL&P to provide service and capacity to customers within its Member Cities' boundaries, any service outside those boundaries subjects HL&P to Commission jurisdiction, RMP argues. RMP also argues the Commission must have jurisdiction for protection of extra-territorial customers, as the Commission has the expertise and was created to protect just such customers.

HL&P Argues it is Exempt from Jurisdiction

HL&P counters that even assuming, *arguendo*, the facts alleged above are true, and even while recognizing RMP's legal and public policy arguments for what HL&P cannot or should not do, factual allegations mixed with public policy considerations provide no statutory

[3]At the hearing, HL&P presented a map showing its "service area.' The boundaries of HL&P's service area lie within Wasatch County and have been demarcated by the County. HL&P admits its service area overlaps areas for which RMP has a certificate from the Commission.

basis for Commission jurisdiction. Because the Commission is a creature of statute, it can "only assert those [powers] which are expressly granted or clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it." *Hi-Country Estates HOA v. Bagley &Co.*, 901 P.2d 1017, 1021 (Utah 1995). Even where there might be important public policy considerations, HL&P argues, if there is reasonable doubt that the Commission has jurisdiction, then "any reasonable doubt of the existence of any power must be resolved against exercise thereof." *Hi-Country Estates*, 901 P.2d at 1021. HL&P claims that RMP has cited no statute which explicitly gives the Commission jurisdiction over an interlocal providing non-temporary services to extra-territorial customers.

In fact, HL&P argues that it is explicitly exempt from Commission jurisdiction. U.C.A. 54-4-1 states the Commission is "vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction . . . ." U.C.A. 54-2-1(16)(a) states that a "'public utility'" includes every . . .electrical corporation . . . ." An electrical corporation includes "every corporation, cooperative association, and person . . .owning, controlling, operating, or managing any electric plant, or in any way furnishing electric power for public service or to its consumers or members for domestic, commercial, or industrial use, within this state . . . ." *U.C.A. 54-2-1(7)*. Section 54-2-1 states that an electrical corporation is *not defined* as "towns, cities, counties . . . or other governmental units created or organized under any general or special law of this state." One governmental unit that may be created

"under any general or special law of this state" is an interlocal entity. Two or more Utah public agencies, such as the Member Cities, may enter into an agreement with one another to create an energy service interlocal entity under U.C.A. 11-13-203(4)(a). Therefore, under § 54-2-1, HL&P is an energy service interlocal entity explicitly exempt from jurisdiction. HL&P additionally argues that U.C.A. § 11-13-204(2)(a) explicitly exempts it from the Project Entity Provisions, U.C.A. § 11-13-304. In this instance, given that it is an interlocal entity, HL&P contends the statutes are plain on their face. There is no commission jurisdiction over it. The Commission must grant the Motion, dismiss the Complaint, and let a district court resolve the dispute.

Interpretation of Applicable Statutes

If the Commission reads the plain language of sections 54-2-1 and 11-13-204(2)(a) in isolation, as HL&P urges, then it would require HL&P exemption from Commission jurisdiction. However, in attempting to interpret the statutes governing HL&P, the Commission must read "the plain language of a statute *as a whole*, and interpret its provisions in harmony with other statutes in the same chapter *and related chapters*." *Hansen v. Eyre*, 2003 UT App 274, ¶ 7 (emphasis added).

> Statutes are considered to be in pari materia and thus must be construed together when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object. If . . . the understanding of the legislature or of persons affected by the statute would be influenced by another statute, then those statutes should be construed with reference to one another and harmonized if possible.

Id. The Commission must look at the statute "in its entirety and in accordance with the purpose which was sought to be accomplished." *State v. Farrow*, 919 P.2d 50, 54 (Utah Ct. App. 1996). Therefore, it is appropriate for the Commission to read those sections upon which HL&P bases it argument for exemption in relation to the other statutes in the same chapter and related chapters, and harmonize those sections with other statutes that affect interlocals generally.

Interlocal Act and Municipal Powers

The intent of the Interlocal Act was to allow municipalities to collectively exercise the powers its municipal members already possess. *See CP National*, 638 P.2d at 521 (holding the "intent of the act appears to be to allow municipalities collectively to exercise powers which they *already possess* individually.") Section 10-8-14(1) lists some of the powers municipalities "already possess": "A city may: (a) construct, maintain, and operate . . . electric light works . . . . (b) authorize the construction, maintenance and operation of the works or systems listed in Subsection (1)(a) by others; . . . .(d) sell and deliver the surplus product or service capacity of any works or system listed in Subsection (1)(a), not required by the city or the city's inhabitants, to others beyond the limits of the city . . . ." If, from the plain language of U.C.A. § 10-8-14, it seems evident that municipalities may sell and deliver surplus product or service capacity of its electric light works not required by their inhabitants to those beyond their limits, then the other side of the coin logically follows: municipalities *may not* sell and deliver product or service that is *not surplus* to those outside their boundaries. This conclusion is

supported by two relevant opinions, that—while not exactly on point, are instructive. *See e.g. CP Nat'l*, 638 P.2d 519; *County Water*, 278 P.2d 285.

The first is *CP National*. In *CP National*, eighteen municipalities, under the Interlocal Act, formed the Southwest Power Agency (SPA) in order to finance and purchase electric light and power works for their municipalities. SPA commenced negotiations with CP National for purchase of the entire system. CP National soon informed SPA that it had decided to sell its system to Utah Power and Light. SPA then informed CP National that unless it negotiated a purchase with it, it would commence condemnation proceedings. SPA later commenced condemnation proceedings. In the proceedings, SPA stated that it intended to purchase CP National and continue service using CP nationals's to-be-condemned electrical system, not only to customers living within the municipalities' boundaries, but to other customers living outside the municipalities. While the question answered in *CP National*—whether municipalities had the power to condemn and continue service of entire public utility systems, is not the question in this matter, the Supreme Court's statement about a municipalities' powers is applicable here. The Supreme Court cited Section 10-8-14 noting that it authorized cities to maintain and operate electric light works and authorized them to sell surplus to those outside of their boundaries. The Supreme Court, in explaining the section, also went on to explain how it limits municipalities as well:

> We believe that this language imposes a limitation on a city operating outside its borders. *It negates the proposition that a city could purposely engage in the distribution of power to localities or persons outside its limits except to dispose of surplus* . . . . Section 10-8-14 *does not contemplate nor authorize a city to so operate its electric light and power works.*

CP National, 638 P.2d at 524 (emphasis added).

The second case is the *County Water* matter. *See* 278 P.2d 285. *County Water* deals with water works—not with electric service, but is analogous. In *County Water*, the County Water System, a public water works utility, was providing water in the same area as Salt lake City. County Water asked the Supreme Court to decide whether Salty Lake City's sale of surplus water beyond its city limits was subject to Commission regulation. The Court found the sale of surplus water was not. In reaching its conclusion, the Court addressed the fears of County Water, i.e. that Salt Lake City's selling and delivering of services outside its boundaries and on a broad scale, would compete with and possibly destroy the privately owned utility's own provision of service. The Court declared County Water's fears unfounded because "[s]uch activities are neither contemplated nor authorized by law; [the cities] have no authority to sell water outside the city limits except as expressly permitted by statute, *U.C.A. §10-8-14*, which is to sell the "surplus product . . .not required by the city or its inhabitants." The Court's statements help identify the limits of a municipalities' powers in providing public services and are analogous. Just as U.C.A. §10-8-14 does not authorize a city to sell non-surplus water outside its city limits, neither does it authorize a city to sell non-surplus electricity.

The powers of the interlocal simply mirror those of the individual municipalities and are no greater. U.C.A. 11-13-213 states "Any two or more public agencies may make agreements between or among themselves: (1) for the joint ownership of any one or more facilities or improvements *which they have authority by law to own individually*; (2) for the joint operation of any one or more facilities or improvements *which they have authority by law to*

operate individually; . . .” In accordance with the powers enumerated in section 10-8-14, an Interlocal Entity, like HL&P, may be formed “to accomplish the purposes of [the public agencies’] joint and cooperative action with respect to facilities, services, and improvements necessary or desirable with respect to the acquisition, generation, transmission, management, and distribution of electric energy *for the use and benefit of the public agencies that enter into the agreement.*” U.C.A. § 11-13-203. Taking the principles garnered from *CP National* and *County Water*, if the municipalities may “construct, maintain, and operate . . . electric light works” and “sell and deliver the surplus product or service capacity of [those] works or system . . . not required by the city or the city's inhabitants, to others beyond the limits of the city”, then so may the interlocal organized by those municipalities. *U.C.A. § 10-8-14.* But it also stands to reason that if municipalities may not sell and deliver product or service that is not surplus to those outside their boundaries, then neither may interlocals organized by those municipalities.

HL&P’s argument is that because there is no statute explicitly giving the Commission jurisdiction over an energy services interlocal entity like itself, then the appropriate forum for resolving RMP’s dispute is the district court, not the Commission. HL&P’s isolated reading of the statutes, however, is inappropriate.

Whatever conduct those statutes or cases may authorize for HL&P (and which would not fall within the Commission’s jurisdiction), they still do not preclude the Commission’s jurisdiction over an entity like HL&P when its operations or activities exceed those delineated by statute.

The Legislative Intent

The reason for the mandate to read "the plain language of a statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters" is to interpret the intent of the legislature.

> "The fundamental consideration which transcends all others in regard to the interpretation and application of a statute is: What was the intent of the legislature? All other rules of statutory construction are subordinate to it and are helpful only insofar as they assist in attaining that objective. In determining that intent the statute should be considered in the light of the purpose it was designed to serve and so applied as to carry out that purpose if that can be done consistent with its language."

CP National, 638 P.2d at 522 (quoting *Johnson v. State Tax Comm'n*, 411 P.2d 831 (Utah 1966)). HL&P's assertion, taken to its logical end, would impliedly leave one with the conclusion that an entity like HL&P could categorize anything to do with its sale and delivery of non-surplus product or service capacity as exempt from Commission jurisdiction. Because the legislature explicitly failed to speak on the subject, then any interlocal or municipality could bypass the regulatory mechanism by forming an energy service interlocal entity, then use that interlocal to compete with or substitute itself for a public utility's service in areas outside the municipalities' boundaries. The question is whether the legislature intended for this apparent "gap" to allow an interlocal to compete in such a manner. When viewing all the statutes governing interlocals and related statutes, those governing Commission jurisdiction, and case law interpreting these statutes, the answer is no.

It seems the legislature intended that when an interlocal like HL&P is acting within the limits of its powers, it is not subject to Commission jurisdiction. When it is acting just like a public utility in selling, delivering non-surplus services to customers outside member city boundaries, it is, for all intents and purposes, acting like a public utility insofar as its service to extra-territorial customers. To the extent it serves those extra-territorial customers, and to the extent it is acting just like any other public utility, it seems the legislature intended it would be considered a corporation, association, etc. and would be subject to commission jurisdiction as would any other public utility. This seems to be the legislative intent. The legislature did not intend to leave a gap for governmental agencies, like interlocals, to form what are essentially unregulated public utilities in an effort to target and serve non-resident customers in an effort to compete with certificated utilities. To conclude otherwise would undermine the purpose of the regulatory scheme the legislature implemented.

The Supreme Court has already concluded the same.

> There is good justification for this limitation since municipally owned utilities are not subject to the jurisdiction and supervision of the Public Service Commission, but are controlled solely by the administration of the city or town wherein they are located. Customers who are non-residents of the municipalities would be left at the mercy of officials over whom they have no control at the ballot box, and they could not turn to the Public Service Commission for relief.
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> *CP National*, 638 P.2d at 524.

For these reasons, HL&P's Motion is denied.

Any person aggrieved by this Order may petition the Commission for review pursuant to the Utah Administrative Procedures Act, U.C.A. §§ 63-46b-1 *et seq*. Failure to do so will bar judicial review of the grounds not identified for review. U.C.A. § 54-7-15.

DATED at Salt Lake City, Utah, this 3rd day of November, 2008.

/s/ Ruben H. Arredondo
Administrative Law Judge

Approved and confirmed this 3rd day of November, 2008, as the Report and Order of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#59673