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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	Response to Motion to Dismiss **Docket No. 07-035-22**

Pursuant to the procedural schedule in this docket, the Division of Public Utilities (DPU) files its response in opposition to the Motion to Dismiss filed by Heber Light and Power (Heber):

INTRODUCTION

On April 4, 2008, Heber filed a Motion to Dismiss the Amended Complaint filed by Rocky Mountain Power (RMP). The basis of its Motion to Dismiss was that the Utah Public Service Commission (Commission or PCS) lacked subject matter jurisdiction (Utah R. of Civ. P. 12(b)(1)), rather than that RMP failed to state a claim upon which relief can be granted, (Utah R. Civ. P. 12(b)(6)). Heber claimed that the Commission did not have statutory authority to regulate Heber in any way. Heber also filed an Answer to the Amended Complaint and included a variety of defenses to the Amended Complaint. Finally, Heber filed a Memorandum in Support of its Motion to Dismiss.

Unfortunately, Heber in its Memorandum in Support of its Motion to Dismiss failed to address or even mention the Commission's decision in White City Water Company, Docket No. 91-018-02, dated February 20, 1992 (White City or Order). That decision clearly holds that under certain circumstances the Commission has subject matter jurisdiction over a city's utility service outside of its municipal boundary. That decision deserved discussion by Heber, and it is unfortunate that the parties will not see that discussion until the reply brief is filed. It is the Division's position that on the basis of the White City decision and the apparent lack of any controlling Utah Supreme Court decision on this exact issue, that the Motion to Dismiss for lack of subject matter jurisdiction should be denied and that this matter should proceed to adjudication.

THE COMMISSION SHOULD BE RELUCTANT TO GRANT A MOTION TO DISMISS

The Commission, rightfully, has been reluctant to grant a Motion to Dismiss. In fact in two prior proceedings the Commission was reversed by the Utah Supreme Court for not allowing a hearing to take place. The issue in those proceedings was if the rule on retroactive rate making applied.[1] Although this is a Motion to Dismiss for lack of subject matter jurisdiction, the Commission has clearly issued an Order stating that under certain circumstances it has subject matter jurisdiction on the extra territorial utility service of a municipality. That Order seems to require a denial of the Motion. The Commission has stated that it has subject matter jurisdiction and, until the Utah Supreme Court rules otherwise, the Commission should follow its prior Order.

Possibly at some future time, a 12(b)(6) Motion for failure to state a cause of action upon which relief can be granted or a Motion for Summary Judgment may be

[1] See MCI v. Public Service Commission, 840 P.2d 765 (Utah 1992) and Salt Lake Citizens Congress v. Mountain States Telephone and Telegraph Company, 846 P.2d 1245 (Utah 1992).

appropriate. In any event, either of those two routes requires in this case a determination whether evidence exists to create a cause of action. Under the 12(b)(6) rule, the courts have recognized that a Motion to Dismiss is a severe remedy and should be granted only if the Applicant could present no set of facts that could support a claim.[2] It seems clear that the facts alleged in the complaint filed by RMP and the answer and defenses of Heber create enough facts to support the PSC decision to allow this case to go forward to determine if under the circumstances of this case the PSC has some jurisdiction.

THE FACTS SUPPORT THE PSC HOLDING FURTHER PROCEEDINGS TO DETERMINE THE APPLICABILITY OF THE WHITE CITY DECISION

Heber has been providing electric service to its member cities and to those who request electric service outside of the cities on the Heber valley floor. Currently, Heber acknowledges that it serves 8,600 customers, 1,700 of which are located outside of the member cities. (Answer ¶ 10). Heber claims that it has been providing this service to not only its member cites but also to those outside the cities since 1909 and that RMP knew of and encouraged Heber to provide service including service to the unincorporated areas of Wasatch County. As a result, Heber claims that abandonment, forfeiture, waiver, estoppel, and laches bar RMP from challenging Heber from serving outside of its municipal boundaries. (Answer Third Defense). As a result of its long standing service in Wasatch County, Heber claims (Answer Forth Defense) that RMP has abandoned or forfeited its Certificate of Convenience and Necessity issued by this Commission. In other words, Heber acknowledges that it has taken over the obligation

[2] Mackey v. Cannon, 996 P.2d 1081 at 1084 (Utah 2000).

to serve in what was part of RMP's Certificate in the unincorporated areas of Wasatch County.

RMP in its Amended Complaint argues that Heber is providing expanding permanent service in the unincorporated areas of Wasatch County. RMP argues that this service is not wholesale, not surplus, and is not temporary service and therefore is not the type of service authorized by the statute (Utah Code § 10-8-14) and by the courts. RMP claims that Heber and it are in direct competition with each other and that Heber is trying to serve major new land developments outside of its municipal boundaries such as a major new development of 4,000 homes outside of Heber's municipal boundary. (Amended Complaint ¶¶ 11 and 12). RMP claims that Heber has told certain developers that they must take service from it and not RMP even though the service was in the unincorporated areas of Wasatch County. (Amended Complaint ¶ 13). RMP claims that under its Certificate, it has the exclusive legal right to provide service in the unincorporated areas of Wasatch County and that RMP is ready, willing, and able to provide service.

The reason for outlining all of these facts is to focus the issue on the uncertainties that currently exist in Wasatch County as to who can serve where and what is the status of customers who are being served by Heber, who are outside of the cities, and who are being served with non-surplus permanent electric service. Clearly, if Heber were not an Inter Local Cooperative Agency made up of three cities, the PSC could resolve this territorial dispute and would be setting the rates and service standards for the residents outside of the three cities. The facts alleged by RMP and the apparent boundary dispute is crying out for remedy. The citizens of unincorporated

Wasatch County who are not enfranchised in the three cities deserve to know who will provide electric service, at what costs, and under what terms and conditions. Is it a court or the Public Service Commission that they can turn to for those answers? The DPU believes that the facts outlined above justify the PSC denying the Motion to Dismiss based on the White City decision and the limitation placed on cities by the courts concerning their extraterritorial electric service.

THE COURTS HAVE DEFINED NARROWLY THE AUTHORITY OF CITIES TO PROVIDE EXTRATERRITORIAL UTILITY SERVICE

Article XI, Section 5 of the Utah Constitution authorizes cities "to furnish public utilities local in extent and use." The municipal code authorizes cities to provide utility service but limits the authority for municipalities to sell utility service to their non residents unless sold and delivered as surplus product or capacity not required by its residents. (Utah Code § 10-8-14). The so-called Ripper Clause, Article VI, Section 28, limits the Commission from interfering with Heber's municipal functions. Is Heber's service in unincorporated Wasatch County in competition with RMP a municipal function? A variety of court decisions have limited the applicability of Article VI, Section 28.[3] These courts determined that there is no automatic application of the Utah Constitutional provision. Instead, the court would look at a variety of factors including how the municipal service affects the interests of those beyond the municipal boundary and the extent to which the state activity will intrude upon the ability of those within the cities to control their own destiny.

Courts have also provided some definition as to the limits on a municipality to provide service beyond their borders. It does not appear that courts have answered the

[3] Utah Association of Municipal Power System v. Public Service Commission, 789 P.2d 298 (Utah 1990) and City of West Jordan v. Utah Retirement Board, 767 P.2d 530 (Utah 1987).

question as to PSC jurisdiction when the electric service being provided is not surplus and is not protected from state regulation under Article VI, Section 28.

The Utah Supreme Court's decision in County Water Systems v. Salt Lake City, 278 P.2d 285 (Utah 1954) is somewhat analogous to the current case. Salt Lake City was providing water service outside of its municipal boundaries in competition with County Water Systems, a public utility. The court held that Salt Lake City could sell surplus water beyond its borders and that such sale is a municipal function, and, therefore, not subject to PSC jurisdiction. However, the court provided some guidance as to the limits of this authority. The court noted:

> Furthermore, the fears expressed by plaintiffs that cities will engage in the utility business on a broad scale in competition with and destructive of regularly authorized privately owned utilities does not seem to be justified. Such activities are neither contemplated nor authorized by law; they have no authority to sell water outside the city limits except as expressly permitted by statute which is sell the "surplus product not required by its inhabitants."
>
> But such permissive sale of surplus water is clearly not calculated to permit the city to purchase water solely for resale, nor to construct, own or manage facilities and equipment for the distribution of water outside of its city limits as a general business; the intent is obviously to permit it to do those only to the extent incidental to the development and use of water for present requirements and those reasonably to be anticipated in connection with the expected growth of the city.[4]

In a later Utah Supreme Court decision, Salt Lake County v. Salt Lake City, 570 P.2d 119 (Utah 1977), the court, after affirming no PSC jurisdiction when the utility service is reasonably incidental to the city service, left open the question of jurisdiction when a city is engaging in utility service outside of its city limits. After determining there was no PSC jurisdiction when the utility service is incidental, the court noted: "But to just

[4] 278 P.2d 285 at 289-290. The court also talked about the temporary nature of surplus water service which would prevent cities from competition with public utilities.

however great a extent a city may engage in rendering a utility service outside its city limits without being subject to some public regulation is not so clearly determined."[5]

In 1981 the Utah Supreme Court decided CP National v. Public Service Commission, 638 P. 2d 519 (Utah 1981) which further defined the limits on municipalities serving outside of their boundaries. In CP National, a group of Southern Utah cities created an Inter Local Cooperative Agency and attempted to acquire CP National facilities both in the member cities and outside of them. UP&L objected and filed with the PSC a contract for approval of the purchase of the CP National system. In interpreting Utah Code § 10-8-14, the court ruled that the Utah Code imposed limitations on the cities' authority to provide service outside of their boundaries. The section negates the proposition that a city could purposely engage in the distribution of power to localities or persons outside the city limits except to dispose of surplus. The reason the court gave for these limitations is that cities are not subject to PSC jurisdiction and that customers who are outside of the city "would be left to 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."

The DPU believes that the White City decision addresses the issue of PSC jurisdiction when a city is serving outside of its boundaries and that service is not surplus. The White City decision provides insight into the PSC jurisdiction when the City has assumed, for whatever reason, the certificated service obligations of a public utility.

[5] The court also noted that it should be with great caution that one treats a Motion to Dismiss like a Motion for Summary Judgment. Here in this case facts have not been developed to determine if a Motion for Summary Judgment is appropriate.

THE WHITE CITY DECISION APPEARS TO GIVE THE PSC SUBJECT MATTER JURISDICTION OVER THIS DISPUTE

Heber's Motion to Dismiss rests entirely on the question of whether the PSC has statutory authority to regulate Heber in this matter. Heber relies upon the facts that entities such as Heber have not been subject to PSC jurisdiction, and that Heber is not covered as a Person under Utah Code § 54-2-2 and thus is not an electrical corporation subject to PSC jurisdiction. No discussion of the White City decision occurs in Heber's memorandum even though the PSC found Sandy subject to PSC jurisdiction, noting that the amendment to Utah Code § 54-2-2 removing "government" as a "person" did not show an intent to foreclose PSC regulation for extra-territorial service. The Commission found it had jurisdiction over Sandy particularly when the service to be provided was not surplus, and when Sandy was taking over the utility obligations of an existing public utility. In this case, the allegations are that Heber is competing with a public utility and that the service it is providing to its non-residents is not surplus and therefore the PSC has jurisdiction over Heber's extra territorial non-surplus service.

In White City a public utility was selling its system to the city of Sandy. Many of the residents were outside the city of Sandy. Sandy, by acquiring all of the extra territorial residents, was, according to the Commission, assuming the obligations of the existing public utility. That same rationale may apply in the instant case. Heber claims that RMP has abandoned its Certificate and that it has served in RMP's stead. The Commission noted in White City that providing non-surplus service by a municipality is either ultra vires or subject to PSC or court jurisdiction. The White City decision holds that this type of service can be subject to PSC subject matter jurisdiction and therefore a Motion to Dismiss for lack of subject matter jurisdiction is inappropriate.

What has happened in the Heber valley appears unique in Utah. It is the DPU's understanding that most municipal electric systems do not directly compete with RMP and only serve incidentally outside of their municipal boundaries. However, when, as in the Heber case, disputes arise as to who can serve and where each group can serve, either a court or the PSC should be able to resolve these disputes. The White City decision appears to give the PSC the ability to resolve this dispute and, if needed, to provide a forum for Heber's customers who are disenfranchised and being provided electrify on a permanent non-surplus bases.

CONCLUSION

The DPU recommends that the Motion to Dismiss be denied.

Respectfully submitted this _____ day of April, 2008.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **Response to Motion to Dismiss** was sent by electronic mail and mailed by U.S. Mail, postage prepaid, to the following on April ____, 2008:

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