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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	Docket No. 07-035-22 **RESPONSE OF ROCKY MOUNTAIN POWER TO HEBER LIGHT & POWER COMPANY'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

Rocky Mountain Power ("Rocky Mountain Power"), pursuant to the agreement of the parties regarding scheduling,[1] hereby responds to Heber Light & Power Company's ("HLP") Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Motion") and "Heber Light &

[1] The parties have agreed that Rocky Mountain Power will file this response on September 17, 2008, Heber Light & Power ("HLP") will file its reply by September 26, 2008 and a hearing on HLP's Motion to Dismiss for Lack of Subject Matter Jurisdiction will be held on October 2, 2008.

Power Company's Memorandum in Support of its Motion to Dismiss for Lack of Subject Matter Jurisdiction" ("Memorandum").

I. INTRODUCTION

HLP's Memorandum misapprehends Rocky Mountain Power's position. Rocky Mountain Power makes no claim that HLP is subject to regulation by the Commission in the performance of municipal functions, and the Amended Complaint ("Complaint") seeks to impose no such pervasive regulation. There is no question that HLP's service to customers located within the municipal boundaries of Heber City, Midway and the Town of Charleston ("Municipal Boundaries") and legitimate temporary sales of surplus power outside the Municipal Boundaries are not subject to the jurisdiction of the Commission.[2] But that is not the question here.

The issues in this case relate to continuous and long-term provision of electric service (not from surplus power) by HLP to customers who are not within the Municipal Boundaries. Moreover, all of the customers at issue fall within a service territory that the Commission, through a certificate of convenience and necessity, has authorized and obligated Rocky Mountain Power to serve.

The essence of HLP's argument is that the Commission lacks jurisdiction to determine the boundaries of its service territory or to regulate its service beyond the Municipal Boundaries. It reaches this conclusion through erroneous interpretations of Utah statutes and by ignoring a

[2] The Commission, in *Re White City Water Company*, 1992 WL 486434, at *64 (Utah PSC, 1992) ("*White City Water*"), stated: "We concede at the outset that we have no authority to regulate a municipality *within its boundaries*." (Emphasis added.)

critical Commission decision, *White City Water*, that makes it clear that, by serving extra-territorial customers, HLP is subject to Commission jurisdiction.

HLP also ignores a fundamental question raised in the Complaint—the extent of Rocky Mountain Power's duty to serve in Wasatch County. Rocky Mountain Power *is a public utility* subject to the regulation of the Commission. The scope of that regulation includes the definition of the area in which Rocky Mountain Power bears an obligation to serve. HLP does not suggest that that question is outside the jurisdiction of the Commission. Yet that question is fundamental to the Complaint, it is essential to the resolution of the issues in this case, and it is a question that only the Commission has the jurisdiction to answer. Therefore, HLP's intimation that any issue of its authority to serve outside the Municipal Boundaries can only be resolved by a court is simply incorrect. It is the Commission, and not a court, that has the jurisdictional power and the expertise to deal with the issues in this docket.

II. FACTUAL ISSUES

HLP makes several factual assertions in its Memorandum. Because the allegations are not supported by evidence, they are not legitimately before the Commission in deciding the Motion. Nonetheless, Rocky Mountain Power will briefly comment on some of them because they illustrate why the issues raised by the Complaint are within the jurisdiction of the Commission and why they must be resolved in the public interest.

HLP claims that it has been required to provide service outside the Municipal Boundaries on the "valley floor" because "no other electric utility had the interest or the facilities to provide service to these customers." (Memorandum at 2.) HLP also claims that Wasatch County has only recently become "attractive" to Rocky Mountain Power because of "dramatic growth and development in recent years" and that the Jordanelle Substation has given Rocky Mountain Power "for the first time, some capacity to provide service to the north end of the Heber Valley."

(*Id.*) In fact, Rocky Mountain Power currently serves approximately 1,000 customers in Heber Valley, many of them in the north end of the valley. Rocky Mountain Power has been providing service for many years to customers in the Heber Valley from a line extension from the Park City area. Rocky Mountain Power has always been willing to serve customers outside the Municipal Boundaries in the Heber Valley in accordance with the terms of its tariff. However, given HLP's practices, Rocky Mountain Power has rarely been approached to provide service except in areas that HLP does not wish to serve. In at least some of the few instances where Rocky Mountain Power was approached for service to customers located farther south, the customers have been told by HLP or other local governments that they were required to obtain service from HLP.

HLP also asserts that Rocky Mountain Power "has chosen not to make the capital investments in local infrastructure necessary to serve the Heber Valley floor," and that Rocky Mountain Power "now is challenging HLP's authority to continue to serve the entire Heber Valley in an effort to opportunistically, cherry-pick customers from HLP's historical service area." (*Id.* at 3) Rocky Mountain Power has prudently installed facilities necessary to provide service to customers who have requested service from it. It has not overbuilt facilities installed by HLP in an effort to compete for customers. Utah is not an open-access state. The Jordanelle Substation was installed to serve the growth in demand for service in the portions of Wasatch County that Rocky Mountain Power has traditionally served and in other areas adjacent to the areas served by Rocky Mountain Power. It was HLP's desire to further expand its service into these areas in an effort to "cherry pick" that brought this longstanding dispute to a head last year.

In any event, HLP's allegations illustrate why the Commission is the appropriate body to deal with this situation. Given Rocky Mountain Power's obligation to serve, it invests in facilities necessary to serve customers that request its service. It then finds that HLP has

approached these customers and instructed them that their developments will not be permitted unless they take service from HLP. And when Rocky Mountain Power is not requested to provide service and, therefore, does not construct facilities, HLP alleges that it is required to provide service outside the Municipal Boundaries because Rocky Mountain Power has "abandoned or forfeited" its certificate of convenience and necessity and franchise. (Answer at 5.) In making these allegations, HLP affirms that this dispute is clearly within the exclusive jurisdiction of the Commission and that it must be resolved in the public interest based on the Commission's unique expertise.

III. ARGUMENT

HLP argues that the Commission lacks jurisdiction over the Complaint because HLP is not a public utility and because, as an energy services interlocal entity, it is not required to obtain a certificate from the Commission for generating plants and transmission lines. Neither argument is correct.

A. HLP Is a "Person" under the Definition of "Electrical Corporation."

HLP's primary argument turns on a hyper-technical reading of Utah's utility statutes. HLP claims that the Commission lacks subject matter jurisdiction over the Complaint based on a narrow reading of the definition of "public utility" in Title 54. HLP correctly states that one of the categories of "public utility" under Utah Code Ann. § 54-2-1(15)(a) is an "electrical corporation" and that an "electrical corporation" under section 54-2-1(7) includes "every corporation, cooperative association, and person" that provides electrical service. (Memorandum at 5) HLP then argues that HLP cannot, under any circumstance, fall within the definition of a "public utility" in Utah, basing its argument on a strained statutory interpretation by which it concludes that it is not a "person" within the meaning of the Utah utility code.

Although HLP correctly states that the term "person" in section 54-2-2 means

"individuals, corporations, partnerships, associations, trusts, and companies," HLP simply assumes that it falls into none of these categories: HLP states that it is a "political subdivision" and thus "not any of these entities." (Memorandum at 5.) HLP cites no authority for the extraordinary proposition that a "political subdivision" is an exclusionary category that cannot also fit into one or more of the categories in section 54-2-2. HLP does not explain why a political subdivision cannot be an "association" or a "company."

Indeed, at the same time it claims that it cannot be a "company," in its pleadings and on its website HLP refers to itself as Heber Light and Power *Company*. (Emphasis added.) HLP's own name acknowledges that it is a company. And the name is appropriate; the term "company" is a broad, general term that does not connote any particular type of business entity. For example, sole proprietorships often adopt a trade name that includes the word "company." *Black's Law Dictionary* defines "company" as:

> 1. A corporation—or, less commonly, *an association, partnership, or union—that carries on a commercial or industrial enterprise*. 2. A corporation, partnership, association, joint-stock company, trust, fund, or organized group of persons, *whether incorporated or not*, and (in an official capacity) any receiver, trustee in bankruptcy, or similar official, or liquidating agent, *for any of the foregoing*.[3]

It is undisputed that HLP is an association or union of three cities organized for the "commercial purpose" of providing electric service to customers within and without the Municipal Boundaries. The definition is clear that while many companies are incorporated, the term "company" designates a much broader group of business entities than form corporations. HLP is clearly a "company" under section 54-2-2.

Moreover, by its own description, HLP is an "entity" created *by three municipalities* to provide electrical power. As such, it clearly falls within the broad term "association." There is

[3] *Black's Law Dictionary* (8th ed. 2004) at 298 (emphasis added).

no statutory definition of the term "association" as used in section 54-2-2, but the term, in its ordinary usage, is very broad. For example, in *Cleveland Asphalt v. Coalition for a Fair and Safe Workplace*, 886 A.2d 271, 279 (Pa. Super. 2005), the issue was what constituted an "association" of employees. In the absence of a specific statutory definition, the court afforded "the term its plain, ordinary meaning." The court then turned to *Black's Law Dictionary*, which defined "association" as a "gathering of people for a common purpose; the persons so joined," and to *Webster's Encyclopedic Dictionary*, which defined an association as an "organization of people with a common purpose and having a formal structure." The emphasis of both definitions is the grouping of two or more persons (or other entities) for a common purpose. Here, HLP is an entity that was created by three municipalities associating themselves for the common purpose of providing electric service, and creating a formal structure to accomplish that purpose. By any reasonable definition of the term "association," HLP is one.

HLP is both a "company" and an "association" and is therefore a "person" under the Utah utility code. By using broad terms like "company" and "association" in its definition of "person" in section 54-2-2, the Legislature clearly intended to brush broadly so that an entity that would otherwise be classified as a public utility could not avoid Commission jurisdiction by adopting an unusual form of organization.

HLP states that a 1989 amendment to the Utah statutes eliminated the term "governmental entity" from the definition of "person," and thus suggests that HLP cannot fall within the term "person." That precise argument was made to the Commission by Sandy City in *White City Water*. After reviewing the legislative history of the amendment, the Commission concluded: "Our perusal of the Legislative history of this change, however, does not indicate that the Legislature intended to foreclose our regulation of a city's extra-territorial retail water

customers." *White City Water*, 1992 WL 486434 at *65. The legislative history to which the Commission referred was a summary and transcript of a floor debate in the House on the bill that removed the words "government entity" from the definition of "person."[4] As the floor debate demonstrates, the issue addressed by that bill related to the concern that a 1985 amendment gave the Commission "general jurisdiction over all electrical utility systems." It was to correct that limited problem, and not to suggest that municipal power providers are under all circumstances exempt from being a "person" under the utility code, that the bill was passed. Thus, the Commission's conclusion that the legislative history of that change does not "foreclose our regulation of a city's extra-territorial retail water customers" is clearly correct.

HLP's reliance on *Thompson v. Salt Lake City Corp.*, 724 P.2d 958, 959 (Utah 1986), is misplaced. HLP cites *Thompson* for its holding that a municipality may operate a waterworks without becoming a public utility subject to Commission jurisdiction. That is true, but *Thompson* has nothing whatsoever to do with the provision of service to customers outside of municipal boundaries. Indeed, that was not an issue in the case. In *Thompson*, the lessees of property sought water service and tendered the required deposit. However, their application was denied because a city ordinance required that the owner of the property, the landlord, agree to be ultimately responsible for payment for water, and the landlord had "refused to sign the application and agreement." It was in the context of the lessees' argument that the city had a duty to provide service to "all members of the public" that the court noted that Salt Lake City was not operating as a public utility subject to the provisions of Title 54. But there is nothing in *Thompson* that suggests that the complainants lived outside the city limits and nothing in the

[4] The summary and transcript were attached to the reply brief of a party to that docket. A copy of the same legislative history, obtained from the Commission's files, is attached to this Response for the convenience of the Commission and the parties.

court's opinion addresses the legal implications of extra-territorial service by a municipality in any manner. Rocky Mountain Power agrees that when HLP provides electric service to residents of Heber, Midway, or Charleston, it is not acting as a public utility subject to Commission regulation under Title 54 of the Utah Code, but that is not the issue in this docket.

B. HLP's Arguments Related to Its Exemption from Provisions of the Interlocal Cooperation Act Are Irrelevant.

HLP conflates an exemption an "energy services interlocal entity" possesses under the Interlocal Cooperation Act (Utah Code Ann. §§ 11-13-1 *et seq*) into a claim that the Commission lacks the jurisdiction to address the provision by such an "energy services interlocal entity" of electric service outside of the Municipal Boundaries. For this proposition, HLP refers first to Utah Code Ann. § 11-13-304, which requires "each interlocal entity" to obtain a certificate of public convenience before constructing an "electrical generating plant or transmission line." Then HLP cites section 11-13-204(2)(a)(i), which exempts an "energy services interlocal entity" from Part 3 of the Interlocal Cooperation Act; thus, the requirement of section 11-13-304 that an interlocal entity obtain a certificate from the Commission does not apply to an entity that meets the qualifications to be an "energy services interlocal entity." All of that is true, but HLP then makes the quantum leap to the position that because "the Commission lacks jurisdiction over HLP's construction of *electrical generating plant or transmission line*, … RMP's complaint must thus be dismissed." (Memorandum at 6; emphasis added.)

HLP's argument studiously ignores the critical fact that the exemption to section 11-13-304 is limited to the requirement to obtain a certificate for a "generating plant or transmission line." While Rocky Mountain Power's Complaint alleges that HLP has failed to obtain certificates for its generation plants and transmission lines, that is because Rocky Mountain Power believes HLP constructed generation plants and transmission lines without Commission

certificates before "energy services interlocal entities" (and the exemption in section 11-13-204(2)(a)(i)) existed.[5] Furthermore, Rocky Mountain Power has been unable to verify that HLP has ever taken the steps necessary to qualify as an "energy services interlocal entity" or that it is not a "project entity" and thus unable to be an "energy services interlocal entity."

But in reality the issue whether HLP was required to obtain certificates for its generating plants and transmission lines is not the core issue in this case—the core issue is HLP's extension of "distribution plant" beyond its members' Municipal Boundaries to serve extraterritorial customers. In other words, the exemption upon which HLP relies, even if it applies, is irrelevant to the core issue in this docket. In effect, HLP is attempting to broaden the exemption for generation and transmission certification in section 11-13-204(2)(a)(i) to cover all activities of an "energy services interlocal entity;" that is, HLP believes that section 11-13-204(2)(a)(i)'s exemption to the certificate requirement in section 11-13-304 compels the conclusion that an "energy services interlocal entity" may never be subject to any kind of jurisdictional oversight by the Commission. That conclusion violates the most fundamental rule of statutory construction: that statutes be read according to their plain language.[6] The plain language of section 11-13-204(2)(a)(i) is simply that if an entity meets the qualifications to be an "energy services interlocal entity" it need not obtain a certificate for a generating plant or a transmission line. That is all the statute says, and HLP's effort to broaden it into a blanket exemption from Commission regulation of a municipal power company's service to extraterritorial customers constitutes a blatant effort to go beyond the specific words of the statute.

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[5] Energy services interlocal entities were first made possible in 2002. *See* L. Utah 2002, ch. 286 §§ 5, 8-9.

[6] *Li v. Enterprise Rent-a-Car*, 2006 UT 50, ¶ 9, 150 P.3d 471. In *Li*, the Utah Supreme Court noted that its primary purpose in statutory construction was to determine the intent of the Legislature, a process that begins first by examining the "plain language" of the statute and giving effect to it.

C. The Commission Has Already Decided that It Has Jurisdiction over Extra-Territorial Sales of Utility Services by Municipal Utilities.

HLP ignores *White City Water*, the Commission decision on the issue of Commission jurisdiction over provision of utility service by a municipality to extraterritorial customers. In that case, a private water company, White City Water, entered into a contract to sell its system to Sandy City, which intended to thereafter operate it as a municipal utility. However, some of the customers of the system did not live in Sandy, and Sandy intended to charge them higher rates than the residents of Sandy. Thus, the question of Commission authority over the extra-territorial provision of utility service by a municipal utility was squarely presented. The Commission straightforwardly concluded that it had jurisdiction to regulate Sandy's provision of water service to non-Sandy residents.

The Commission relied on several grounds for its conclusion. First, without Commission regulation, the non-Sandy customers would be disenfranchised and "have no means of preventing Sandy from charging excessive rates." 1992 WL 486434 at *64. Second, while acknowledging its own limited statutory powers, the Commission noted that a city likewise is a legal entity of limited powers; the Commission thus concluded that "one of the obligations Sandy may be required to assume is that of state regulation of rates charged to customers residing outside the city." *Id.* at *65. Third, the Commission concluded that in providing service to customers outside its boundaries, the city was not performing a municipal function. Relying on cases like *Utah Associated Municipal Power Systems v. Public Service Comm'n*, 789 P.2d 298 (Utah 1990), the Commission rejected the claim that Sandy was providing a municipal function, even to extraterritorial customers: "Sandy is stepping outside the exercise of its municipal function and subjecting itself to state regulation of rates for those extra-territorial customers." *Id.* at *66.

The Commission acknowledged that Utah Code Ann. § 10-8-14(1) allows a city to "sell surplus product or service capacity" beyond its city limits, but noted that the Supreme Court, in *County Water System v. Salt Lake City*, 278 P.2d 285, 290 (Utah 1954), ruled that surplus water is a "temporary glut occasioned by the provision for prudent future expansion." 1992 WL 486434 at *67. The Commission thus denied the city's request for a declaratory judgment that it could operate free of Commission regulation.

The only thing that distinguishes the current situation from *White City Water* is that HLP has consciously expanded its service territory beyond the boundaries of the three cities that own HLP. It is certainly telling that HLP makes no attempt to claim that its expansion into unincorporated areas of Wasatch County was in order to sell surplus power. In some cases, that expansion may be entirely explicable, but that does not obviate the reasons why such service continues to fall within the jurisdiction of the Commission.

D. The Heart of the Complaint Goes to the Nature and Extent of Rocky Mountain Power's Obligations to Serve in Wasatch County and Is Therefore Within the Jurisdiction of the Commission

HLP's Motion ignores other critical facts. Even assuming *arguendo* the validity of HLP's claim that it is not answerable to the Commission for its extraterritorial service (a proposition that the foregoing analysis has demonstrated to be false), the fact is that the Commission has granted Rocky Mountain Power a certificate to serve the unincorporated portions of Wasatch County—the very same areas in which HLP is providing extraterritorial service to customers. That fact alone brings this matter well within the limits of the Commission's jurisdiction. If HLP has unfettered discretion to serve (or, for that matter, to not serve) extraterritorial customers in Wasatch County, the implications of that discretion on Rocky Mountain Power is profound. HLP would, of course, serve only those customers that it finds desirable and would leave the rest to Rocky Mountain Power, or it could, without any

Commission oversight, impose line extension charges that are unreasonable. That is why in *White City Water* so much emphasis was placed on the need for some level of regulatory oversight from the Commission for customers who, because they are not citizens of the cities that own a municipal utility that provides them with service, have no political recourse to protect themselves when they encounter unreasonable business activities or poor service.

HLP's motion ignores three other key factors. First, Rocky Mountain Power has an obligation through its certificate to serve customers in Wasatch County. The nature and extent of that service obligation can only be determined by the Commission in the context of a proceeding like this one that takes into account the extraterritorial service of an interlocal entity attempting to serve all, or perhaps just some, of the same customers. It is the Commission, and not a court, that issued Rocky Mountain Power's certificate, and it is the Commission that has the expertise and authority to interpret that certificate in light of current factual circumstances.

Second, in its Motion, HLP claims that Rocky Mountain Power has abandoned or forfeited its certificate. (*See* Answer at 5). Rocky Mountain Powers denies that claim and is prepared to demonstrate its falsity. But it is clear that the only agency with the power and expertise to adjudicate the factual and legal issues related to an abandonment or forfeiture claim with regard to a certificate is the Commission.

Third, the public policy implications of the positions taken by HLP, in particular its claim that it has essentially unfettered power to serve customers throughout unincorporated Wasatch County without any oversight or other authority by the Commission is an issue that the Commission should deal with in the first instance. The statutory authorization for a municipal utility to sell surplus outside of the municipal limits raises factual questions that fall within the jurisdiction and expertise of the Commission.

In short, the issues raised by Rocky Mountain Power's Complaint go to the heart of the Commission's expertise and authority and, therefore, should be considered by the Commission.

E. Taken to Its Logical Extreme, HLP's Position Is That It Has Unfettered Discretion, Without Regulatory Oversight, to Provide Electric Service Anywhere It Chooses to Do So.

One of the strongest arguments against HLP's strained construction of its powers is a simple common sense argument. The argument that HLP makes in its Memorandum, if taken to its logical conclusion, is that HLP (and any other interlocal entity or municipal power system) has the right to serve electric customers anywhere in Utah, irrespective of the Commission's grant of certificates to public utilities like Rocky Mountain Power, and that no limitations on that power can be placed upon it by the Commission. As the prior analysis demonstrates, that is not the law of Utah. Once a municipality or group of municipalities decides to broaden their service beyond their boundaries, the powers and jurisdiction of the Commission come into play. Not only is that conclusion consistent with the law of Utah, it is mandated by common sense. If the world were as HLP claims it to be, then the power of the Commission to bring rational oversight to the provision of a critical service to the public would be eliminated and the result would be chaos. That is not what the Legislature intended nor is it what the statutes, Commission orders, or court decisions conclude.

F. HLP's Claim That It Obtained a Right to Serve by the Passage of Time Is Erroneous on Its Face

Another of HLP's factual/legal assertions bears a brief response. HLP states that it has served extra-territorial customers in the Heber Valley for many years: "as part of its normal course of business [HLP] provides services to unincorporated areas of Wasatch County." (Answer ¶ 3; see also Memorandum at 2). In so stating, HLP implies that its provision of service to extra-territorial customers for many years, and the fact that Rocky Mountain Power and its

predecessors did not file a complaint, somehow transforms unlawful acts into lawful ones. Municipalities and interlocal entities are limited by the powers granted to them by the Legislature, and to the extent that a municipality or interlocal entity chooses to engage in a course of conduct that is inconsistent with the powers granted by statute, it cannot transform the unlawful acts into lawful ones by the mere passage of time. HLP made the conscious, calculated decision to serve customers outside the Municipal Boundaries. The fact that the decision was made many years ago, does not transform continued violation of the law into a lawful act.

IV. CONCLUSION

HLP's underlying argument that this matter can only be heard by a court should be rejected for the reasons set forth above. The Commission granted the certificate under which Rocky Mountain Power, a Utah public utility, operates, and the Commission should interpret that certificate (including deciding the claim now made by HLP that Rocky Mountain Power has abandoned or forfeited its certificate). In *White City Water*, the Commission determined that it has jurisdiction over a municipality's provision of extra-territorial service. The Commission has the expertise to address the factual and legal issues in this case. Indeed, many of these issues fall within the exclusive jurisdiction of the Commission. Thus, the Commission should hear this matter.

For the reasons set forth herein, Rocky Mountain Power respectfully submits that HLP's Motion should be denied and this matter should proceed expeditiously to a hearing on the merits.

RESPECTFULLY SUBMITTED: September 17, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **RESPONSE OF ROCKY MOUNTAIN POWER TO HEBER LIGHT & POWER COMPANY'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION** to be served upon the following by email to the email addresses shown below on September 17, 2008:

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