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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 Heber Light & Power Company's Reply Memorandum in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction

Heber Light & Power Company submits this reply memorandum in support of its motion to dismiss the Amended Compliant and Request for Expedited Treatment of Rocky Mountain Power Company.

INTRODUCTION

The issue here is whether the Commission has subject matter jurisdiction to determine the authority of Heber Light & Power Company ("HLP") to provide retail electric service. The utility code does not grant the Commission jurisdiction over governmental entities, such as HLP, and excludes governmental entities from the definition of "electrical corporation"

subject to Commission jurisdiction. The Commission therefore lacks subject matter jurisdiction and should dismiss the Amended Complaint.

It is axiomatic that the Commission has "only the rights and powers granted to it by statute." *Hi-Country Estates Homeowners Assoc. v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995). Any statutory grant of authority is narrowly construed and "any reasonable doubt of the existence of any power [of the Commission] must be resolved against the exercise thereof." *Id*. at 1021. "Without clear statutory authority, the commission cannot pursue even worthy objectives for the public good." *Mountain States Tel. and Tel. Co. v. Public Service Com'n*, 754 P.2d 928, 932-33 (Utah 1988).

No Utah statute grants the Commission jurisdiction over a governmental entity such as HLP to determine its authority to serve its customers. It is immaterial that a statute does not preclude the Commission from asserting jurisdiction or is silent on the question. In order for the Commission to have subject matter jurisdiction, the statute must affirmatively grant the Commission jurisdiction. Since no statute grants the Commission jurisdiction over HLP, the Commission lacks jurisdiction to determine HLP's authority to serve its customers.

Although the Commission lacks jurisdiction, HLP does not have, nor does it claim, "the unfettered discretion" to serve customers "anywhere it chooses to do so." *RMP's Memorandum* at p. 14. The only issue here is whether the Commission, as opposed to a Utah court, has jurisdiction to determine the extent of HLP's authority. *Cf. In re White City Water Company*, Docket No. 91-018-02, 133 P.U.R. 4th 62, 68 n.4 (Utah P.S.C. 1992)(acknowledging jurisdiction of court over these issues). As discussed below, this jurisdiction lies with the court, and not the Commission.

Notwithstanding the requirement of a statutory grant of jurisdiction, RMP's Amended Complaint did not cite any statute affirmatively granting the Commission subject matter jurisdiction to determine a governmental entity's authority to serve electrical customers.[1] RMP however now belatedly seeks to establish jurisdiction by a tortured interpretation of the terms "association" and "company." *RMP's Memorandum* at p. 9. RMP's interpretation must be rejected because it is inconsistent with the legislative intent and other provisions of the Utility Code and because it would make any governmental entity providing electric service a public utility and subject to all aspects of Commission regulation.

Alternatively, RMP claims, because the Commission has jurisdiction to determine RMP's obligation to serve, the Commission must also have jurisdiction to determine the extent HLP's authority to serve. RMP cites no statute that grants the Commission jurisdiction over a governmental entity in this situation. Moreover, Utah law is clear that the Commission's broad authority over public utilities does not give it unrestricted authority over such public utilities, much less authority over a governmental entity. *Mountain States Tel. & Tel. Co. v. Public Service* Commission, 754 P.2d 928, 930 (Utah 1988)(The Commission's general grant of jurisdiction over public utilities does not grant "the Commission a limitless right to act as is sees fit.") In any event, the Commission may resolve RMP's service territory issues without determining HLP's authority to serve.[2]

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[1] The Amended Complaint cited Section 11-3-304 of the Utah Interlocal Cooperation Act as requiring HLP to obtain a certificate of convenience and necessity for the construction of "electric generating plants or transmission lines." This provision does not apply to HLP because it is not a "project entity." *HLP Memorandum in Support of its Motion to Dismiss for Lack of Subject Matter Jurisdiction*, at p. 6. RMP has now apparently abandoned this basis for Commission jurisdiction. *Response of Rocky Mountain Power to Heber Light & Power Company's Motion to Dismiss for Lack of Subject Matter Jurisdiction* ("RMP Memorandum") at p. 9.

[2] RMP claims that it serves 1,000 customers in Wasatch County. While this may be true, it serves less than 50 customers in the area served by HLP.

Both the Division and RMP rely heavily on the Commission's decision in *In re White City Water Company*, Docket No. 91-018-02, 133 P.U.R. 4th 62 (Utah P.S.C. 1992) and its policy arguments for Commission jurisdiction. However, the *White City Water* case is distinguishable because the Commission, in that case, did not assume jurisdiction to determine or limit a governmental entity's authority to serve customers. More importantly, the *White City Water* case has never been cited by the Commission or a court and is contrary to established Utah case law and the Commission's own decisions. It therefore does not provide the basis for the Commission assuming jurisdiction to determine HLP's authority to serve.

Finally, both the Division and RMP burden the Commission with extensive discussion on the extent of a municipality's authority to serve customers. *RMP's Memorandum* at 14-15; *Division's Memorandum* at 5-7. This discussion however is irrelevant. The only issue raised by the motion to dismiss is whether the Commission has jurisdiction to determine this issue. Stated simply, the Commission must first determine whether it has subject matter jurisdiction before it can consider merits of any of the parties' claims. *In re Questar*, 175 P.3d 545, 556 ¶45 (Utah 2007)("Prior to deciding substantive questions presented by the parties, this Court must ascertain whether it has subject matter jurisdiction. . . . "). The Commission should therefore disregard all arguments going to the merits.

ARGUMENT

A. HLP, As A Governmental Entity, Is Not An Electrical Corporation Subject to Commission Jurisdiction.

The utility code gives the Commission jurisdiction over public utilities including electrical corporations. *Utah Code Ann*. § 54-4-1. The question here is whether HLP, a

governmental entity, is an "electrical corporation" subject to the Commission jurisdiction.

As discussed below, the Utah Legislature intended to exclude government entities from Commission jurisdiction. The Legislature's intent is first shown by the plain language of the utility code which excludes governmental entities from the definition of "electrical corporation." This intent is further shown by the Legislature's 1989 amendment to the utility code removing the term "governmental entity" from the code's definition of "person." For these reasons, the Commission lacks jurisdiction over HLP.

1. The Plain Language of the Utility Code Excludes a Governmental Entity From the Definition of an "Electrical Corporation" Subject to Commission Jurisdiction.

The Commission lacks jurisdiction over HLP because the utility code's definition of "electrical corporation" excludes governmental entities. The code defines "electrical corporation" as a "corporation" or a "person" that provides electrical service. *Utah Code Ann.* § 54-2-1(7). As shown below, a governmental entity is not a "corporation" or a "person," and therefore is not an "electrical corporation" subject to Commission jurisdiction.

A governmental entity is not a "corporation" under the utility code. "Corporation" is defined by the utility code, in pertinent part, as an "association." *Utah Code Ann.* § 54-2-1(5)(a). This definition however **expressly excludes** governmental entities from the meaning of "corporation."[3] *Utah Code Ann.* § 54-2-1(5)(b). Thus, a governmental entity can not be a "corporation." This would be true even if the governmental entity was an "association."

A governmental entity is also not a "person" under the utility code. The utility code defines "person," in pertinent part, as "corporations," "associations," and "companies." *Utah*

[3] " 'Corporation' does not include towns, cities, counties, conservancy districts, improvement districts, or other governmental units created or organized under any general or special law of this state." *Utah Code Ann.* § 54-2-1(5)(b).

Code Ann. § 54-2-2. Terms in a list such as this are interpreted to refer to entities of the same character. *Salt Lake City v. Salt Lake County*, 568 P.2d 738, 741 (Utah 1977).[4]

As shown above, the definition of "corporation" expressly excludes governmental entities. Thus to the extent that a "person" is a "corporation," it cannot be a governmental entity.

By including "association," in the definition of "corporation" the Code treats these two terms as coterminous. Thus, while the utility code does not define the term "association," this term should be interpreted consistently as excluding governmental entities. Stated in different words, the Legislature clearly did not intend that the term "person" exclude governmental entities if a corporation is involved but include governmental entities if an association or company is involved. This is particularly true since corporations, associations and companies are treated alike in these definitions.

RMP's argument on the interpretation of "electrical corporation" ignores the fact that the definition of "corporation" expressly excludes governmental entities. By interpreting the terms "associations" and "companies" in isolation, RMP does not explain how "association" and "companies" can include governmental entities whereas "corporation" in the same statutory provision expressly excludes governmental entities.

RMP urges the Commission to use dictionary definitions to define the terms "company"[5] and "association."[6] Using these definitions, RMP argues that HLP is a

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[4] The doctrine of noscitur a sociis (known from its associates) provides "that the phrase, "or subdivision thereof" following the words "the state, or any county" should be taken to mean public entities of similar character; and thus a subdivision of either the state or any county." *Id.* at 741.

[5] Quoting *Black's Law Dictionary* (8th ed. 2004) at 298, RMP claims the term "company" means:

> 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" and an "association" because HLP is a business organized by its members to provide electric service.

RMP's interpretation paints much too broadly. Every municipal electric utility is "organized for 'the commercial purpose' of providing electric service to customers." *RMP's Memorandum* at p. 6. As a result, RMP's interpretation would make every municipal electric utility a public utility subject to plenary Commission jurisdiction, regardless of where they provide service. This is an absurd and illogical result. *Cf. RMP's Memorandum* at p. 2 ("There is no question that HLP's service to customers located within the municipal boundaries . . . are not subject to the jurisdiction of the Commission.").

2. The Legislature's Intent To Exclude Governmental Entities From the Definition of "Person" Is Evidenced By The 1989 Amendment Removing "Governmental Entity" From the Definition.

The Legislature's 1989 amendment to the definition of "person" provides direct, incontrovertible evidence of the Legislature's intent to exclude governmental entities from the definition of "person" in the utility code and therefore from the definition of "electrical corporation." Prior to the amendment, the utility code expressly defined "person" to **include** governmental entities.[7] The Legislature in 1989 removed the term "governmental entity" from the definition of person and the definition now reads:

> 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.*

RMP's Memorandum at p. 6 (emphasis provided by RMP)

[6] To define the term "association," RMP selectively quotes *Black's Law Dictionary* as defining association as a "gathering of people for a common purpose; the persons so joined." RMP fails to include the more applicable definition of the term "association" in *Black's Law Dictionary* which states: "An unincorporated organization that is not a legal entity separate from the persons who compose it." This later definition would not include HLP which is a legal entity separate from its members.

[7] Prior to the amendment, the utility code defined person as follows:

> As used in this chapter, "person" includes all individuals, corporations, partnerships, associations, trusts, and companies and their lessees, trustees, and receivers.

Utah Code Ann. § 54-2-2. It is hard to imagine a clearer statement of the Legislature's intent to exclude governmental entities from the definition of "person," than an amendment that removes the term "governmental entity" from the definition. Stated in different words, before the amendment, the term "person" included governmental entities and after it did not.

In response, RMP cites to *White City Water* and the amendment's legislative history.[8] The *White City* decision however contains no analysis of the plain language of the statute, nor does it explain what ambiguity in the statutory language justifies using the legislative history as an aid to statutory interpretation.[9] Since the statutory definition of "person" is unambiguous, *White City Water* erroneously relied on the legislative history to justify its conclusion on jurisdiction.

It is noteworthy that the legislative history in *White City Water* does not evidence a legislative intent to grant the Commission jurisdiction over governmental entities. To the contrary, the legislative history evidences an intent to deny the Commission jurisdiction over governmental entities. This is not surprising since the amendment eliminates governmental entities from the definition of persons subject to Commission jurisdiction.

> "Person" includes all individuals, **government entities**, corporations, partnerships, associations, trusts, and companies and their lessees, trustees, and receivers.

Utah Code Ann. Section 54-2-1(18)(1988)(emphasis supplied).

[8] As shown above, the plain language of the utility code excludes governmental entities from the definition of "electrical corporation." It was thus not appropriate for the Commission to rely on the legislative history. *In re Estate of Flake*, 71 P.3d 589, 598 ¶ 25 (Utah 2003).

[9] *White City*'s entire analysis of this issue is three sentences, one of which is a reference to an attachment containing the legislative history. *White City*, 133 P.U.R. 4th at 65.

Finally, nothing in the legislative history can be interpreted as an affirmative grant of jurisdiction for the Commission to do anything. In fact, the *White City Water* case does not even attempt to claim that the legislative history evidences an affirmative grant of jurisdiction, but rather that the legislative history does not expressly prohibit jurisdiction over governmental entities. The absence of a prohibition however cannot be equated with an affirmative grant of jurisdiction. Since an affirmative grant of jurisdiction is legally required and neither the statute nor its legislative history evidences such a grant, *White City Water's* reliance on the legislative history is erroneous.

B. The Utah Interlocal Cooperation Act Does Not Give the Commission Jurisdiction Over HLP.

RMP's argument on the application of the Utah Interlocal Cooperation Act ("Act") contradicts the Amended Complaint which alleges both that HLP is an energy services interlocal entity[10] (*Amended Complaint* at ¶ 2) and that the Commission has jurisdiction over HLP under Section 11-3-304 of the Act.[11] As RMP concedes (*RMP's Memorandum* at p. 9), Section 11-3-304 does not apply to an energy service interlocal entity. Faced with a statute

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[10] Although the Amended Complaint alleges that HLP is an energy services interlocal entity, RMP now complains that it has been unable to verify whether HLP is an energy services interlocal entity and not a project entity. *RMP Memorandum* at p. 10. Section 11-13-203(4) provides that an interlocal may become an energy services interlocal, if it is not a project entity, by action of its governing board. The Act further provides that a project entity is an interlocal entity that owns an electric generation and transmission facility or resources and infrastructure supporting such a facility. *Utah Code Ann.* § 11-13-103(12)(defining "project entity") and -103(11)(a)(defining "project"). The Declaration of Blaine Stewart attached establishes: (1) that HLP has been properly constituted as an energy services interlocal entity, and (2) that HLP is not a project entity because it does not own an electric generating and transmission facility or resources and infrastructure supporting such a facility. *Declaration of Blaine Stewart* at ¶ 6.

[11] The Amended Complaint states:

> 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.

Amended Complaint at ¶ 5.

that admittedly has no application, RMP declares the statute irrelevant to jurisdiction over "the core issue," HLP's use of distribution facilities to serve extraterritorial customers. *RMP's Memorandum* at p. 10.

Although RMP concedes that Section 11-13-304 is irrelevant, it cannot leave well enough alone. Instead, RMP creates a strawman by misrepresenting HLP's arguments. Contrary to RMP's suggestion, HLP did **not** contend that the Act's exemptions from Commission jurisdiction under Section 11-13-304 provided a blanket exemption to Commission jurisdiction under other statutory provisions.[12] Since RMP characterization of HLP's argument is false, the Commission may disregard RMP's irrelevant arguments refuting its own mischaracterization.

C. The Commission's Jurisdiction to Determine the Nature and Extent of RMP's Obligation to Serve Does Not Give the Commission Jurisdiction Over HLP's Business.

RMP claims that the Commission has jurisdiction over HLP's business because it has jurisdiction over RMP's business. *RMP's Memorandum* at p. 12. RMP's rationale for this *non sequitur* is that HLP's business has "implications" for RMP's business. *Id.* While this may or may not be true, RMP has cited no statute giving the Commission jurisdiction over the business of a non-public utility because of its "implications" on a regulated utilities business. Absent a statutory grant, the Commission cannot assert jurisdiction based on these facts.

The fallacy of RMP's position is further demonstrated by the fact that the Commission can determine the full nature and extent of RMP's obligation to serve in

[12] *Compare HLP's Opening Memorandum* at p. 6 ("HLP, as an "energy services interlocal entity," is exempted from this section (11-13-304) of the Interlocal Act.") *with RMP's Memorandum* at p. 9 ("HLP conflates an exemption an "energy services interlocal entity" possesses under the Interlocal Cooperation Act . . . 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." (citation omitted)).

Wasatch County ***without asserting jurisdiction over HLP's business*.** In fact, when the Commission granted RMP its current certificate, it did so without assuming jurisdiction over HLP's business or determining the extent of its authority. If, in the current proceeding, the Commission determines to change RMP's service area or obligation to serve, it can do so without assuming jurisdiction over HLP's business or determining the extent of HLP's authority.

D. The Commission's Decision In *White City Water* Does Not Justify The Commission's Assertion of Jurisdiction Over HLP In This Case.

In *White City Water*, a prior Commission elected to "retain" limited jurisdiction over a municipality that acquired a regulated public utility providing water service to "extraterritorial customers" (customers outside the municipality's boundaries). *White City Water* is easily distinguishable from the facts of this case and in any event does not justify the Commission's assertion of jurisdiction over HLP. More importantly, the prior Commission erred in asserting subject matter jurisdiction in *White City Water* in the absence of a statutory grant and based solely on public policy grounds in contradiction of Utah Supreme Court cases and the Commission's own decisions.[13] For these reasons, the

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[13] The Division suggests that the *White City Water* decision binds the Commission until the Utah Supreme Court reverses the decision. *Division's Memorandum* at p. 2. However, unlike a court, the Commission is not bound by doctrine of *stare decisis* and may freely correct errors in its prior decisions.

> Although the PSC may not arbitrarily or capriciously reverse a prior decision, administrative agencies, as a general matter, are free of the limitations of stare decisis as they apply in a judicial setting. . . . Additionally, Williams' position would require the PSC to be bound in future circumstances by past mistakes. As this Court has previously recognized, this analysis is unacceptable. . . . Thus, the PSC acted rationally and reasonably in formulating rule 8304 and is not prevented from reversing its previous practice of exercising jurisdiction over one-way paging services.

Williams v. Public Service Commission, 754 P.2d 41, 52 (Utah 1988).

Commission should decline RMP's invitation for it to follow the reasoning of *White City Water* in asserting jurisdiction over HLP.

1. Facts and Holding of *White City Water*.

In *White City Water*, White City Water Company ("Company") provided water service to customers in the area of Sandy City ("Sandy") but outside Sandy's municipal boundaries. The Company was a public utility subject to Commission regulation. *White City Water*, 133 P.U.R. 4th at 63.

The Company, Sandy, and the Municipal Building Authority of Sandy ("Authority") entered an agreement under which the Authority would obtain all of the Company's stock and the Company would continue in existence owned by the Authority. Upon completion of the stock sale, the Authority would lease the Company's system to Sandy which would integrate its existing system into the Company's system. Sandy would thereafter provide service to customers both inside and outside of its municipal boundaries. *White City Water*, 133 P.U.R. 4th at 63.

Before the proposed sale could close, the Company was required to obtain a Commission determination that the Commission did not have jurisdiction over Sandy's proposed provision of water service outside of its municipal boundaries.[14] *White City Water*, 133 P.U.R. 4th at 63. The Commission resolved the jurisdiction issue by holding that it retained jurisdiction over rates, "at least to the extent of nullifying invidious discrimination" against extraterritorial customers. *Id.* at 68.

[14] The Commission severed this jurisdiction question from the issue of whether the stock sale should be approved. *White City Water*, 133 P.U.R. 4th at 63.

2. *White City Water* Does Not Support the Commission's Assertion of Jurisdiction Over a Municipality to Determine the Extent of Municipality's Authority to Serve.

In *White City Water*, Sandy proposed to purchase an "existing, regulated water system" and thereby to strip away the Commission's jurisdiction. *White City Water*, 133 P.U.R. 4th at 63-64, 67-68. The Commission's holding was that, notwithstanding the transfer to a municipality, "the Commission would retain jurisdiction to regulate rates charged the extra-territorial retail customers, at least to the extent of nullifying invidious discrimination." *Id.* at 68. (emphasis supplied) The Commission based this holding, in part, on the belief that when a municipality acquires a public utility the municipality also takes "all [its] regulatory baggage." *Id.* at 65.[15]

Unlike Sandy City in *White City Water*, HLP is not purchasing a public utility with its "regulatory baggage." The Commission therefore has no jurisdiction to "retain" since HLP business has never been regulated. For this reason, *White City Water* does not support the Commission's assertion of jurisdiction over HLP.

In addition, the Commission in *White City Water* narrowly limited the scope of its holding. The Commission limited its jurisdiction to "nullifying invidious [rate] discrimination" against the extra-territorial customers. It did not state that the Commission had full regulatory jurisdiction over Sandy, or that it had the jurisdiction to determine the extent of Sandy's authority to serve. On these issues, the Commission suggested that the proper forum, as in *CP National Corporation v. Public Service Commission*, 638 P.2d 519 (Utah 1981), was a judicial proceeding. *White City Water*, 133 P.U.R. 4th at 68 n. 4. For this

[15] To support this proposition, the Commission cited *North Salt Lake v. St. Joseph Water & Irrigation Company*, 223 P.2d 577 (Utah 1950). That case however does not suggest that the Commission retains jurisdiction after a public utility is sold to a municipality. It merely held that a prior, unappealed judgment of the Commission remained binding, as would a judgment of a court.

reason, *White City Water* does not support Commission jurisdiction over HLP to resolve the claims asserted in the Amended Complaint.

3. The Commission Should Overrule *White City Water*.

In *White City Water*, the Commission erred by assuming subject matter jurisdiction based on public policy considerations rather than based on a statutory grant of jurisdiction. Nowhere in the decision does the Commission cite to any statute expressly or impliedly granting it jurisdiction of any kind over a municipality. In fact, the Commission acknowledged that "gaps" existed in its statutory authority over a municipality providing extra-territorial service, *White City Water*, 133 P.U.R. 4th at 65, and that "there may be no explicit statutory authority for us to assume jurisdiction" over such extra-territorial service. *Id.* at 67-68.

Notwithstanding the absence of any statutory authority, the Commission relied on public policy concerns to justify retaining jurisdiction. Specifically, the Commission assumed jurisdiction because "the obvious remedy for the abuse of extra-territorial customers is for us to continue to regulate their rates," *White City Water*, 133 P.U.R. 4th at 67-68, and because of the need to protect "powerless extra-territorial utility customers." *Id.* at 68. According to the Commission, these public policy concerns justified "the Commission . . . retain[ing] jurisdiction to regulate rates charged the extra-territorial retail customers, at least to the extent of nullifying invidious discrimination." *Id.* at 68. By retaining jurisdiction without a statutory grant, the *White City Water* decision contradicts well-established Utah law as well as the Commission's own precedent. For this reason and as discussed below, the

Commission should not adopt the rationale of *White City Water* in asserting jurisdiction over HLP.[16]

The Commission has no inherent power or jurisdiction. *Hi-Country Estates Homeowners Assoc. v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995). Its power comes solely from the Utah Legislature through statutory grants of jurisdiction. Moreover, these statutory grants are strictly construed and "any reasonable doubt of the existence of any power [of the Commission] must be resolved against the exercise thereof." *Id.* Because the Commission is a creature of statute, public policy concerns, not addressed in statute, are not grounds for extending the Commission's authority.

This is illustrated by Utah Supreme Court's decision in *Mountain States Tel. and Tel. Co. v. Public Service Com'n*, 754 P.2d 928 (Utah 1988). There, the Commission had required regulated telephone companies to charge their customers a surcharge to fund the Lifeline program, a program to provide discounted telephone service to needy individuals. The Commission required telephone companies to pool this surcharge which the Commission then distributed under the Lifeline program. Mountain States objected that the Commission lacked authority to require pooling.[17]

On appeal, the Commission claimed that the public policy favoring universal telephone service justified its assertion of jurisdiction to impose the pooling requirement.

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[16] Basing jurisdiction based on good policy would give rise to an unlimited expansion of Commission jurisdiction. For example, the policy of protecting the disenfranchised could give the Commission jurisdiction over nonresident customers who receive municipal electric service for property owned in the city.

[17] Mountain States objected because "the pooling mechanism compels its non-Lifeline customers to subsidize other companies' Lifeline customers. Because there are more non-Lifeline Mountain Bell customers to support its Lifeline customers, Mountain Bell claims that the surcharge its non-Lifeline customers pay is greater than it would be if funding were accomplished on a company-specific basis." *Id.* at 929.

The Utah Supreme Court however rejected this assertion of jurisdiction, no matter how good the policy reasons purportedly served:

> We agree that universal service is a desirable end. Increasing the number of households in Utah with telephone service decreases public costs and conserves public resources.
>
> However, although desirable, public policy goals standing alone cannot support the Commission's pooling order. Without clear statutory authority, the Commission cannot pursue even worthy objectives for the public good. If the Lifeline program is in fact not feasible in the absence of pooling, the appeal to save the program must be made to the state legislature. The legislature can act to preserve Lifeline by statutorily granting the Commission the power to order multicompany pooling.

Id. at 932-33.

The Court's ruling in *Mountain States* is echoed in the Commission's decision in *Re: Qwest Corporation*, Docket No. 03-049-63 2005 WL 4052372 (Ut. PSC 2005). There, Qwest complained to the Commission that SBS Telecommunications, Inc. ("SBS") had entered contracts with developers to install telecommunication equipment in new developments. Qwest asserted that SBS actions violated a Commission order and mislead developers and lot purchasers who reasonably believed that Qwest would accept the telecommunications equipment.[18] The Commission however refused to assert jurisdiction

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[18] The Division, Qwest, and the Committee of Consumer Services argued:

> [P]ermitting developers (or their contractors) to install telecommunications facilities in these new subdivisions exposes homeowners to the potential that there may be no public telecommunications services available when homeowners desire to have them. Qwest has clearly indicated that it will not purchase facilities from SBS. Although SBS is willing to offer the installed facilities to other telecommunications corporations beyond Qwest, there is no certainty that the facilities will be purchased and used to provide service by any telecommunications company. They argue that the equipment may not be engineered or installed to a standard acceptable for use by a telecommunications corporation or that prospective purchasers and SBS may not reach mutual agreement on terms for transfer and use of the facilities.

Qwest, 2005 WL 4052372.

over SBS because SBS was not a "telephone corporation" subject to Commission jurisdiction.

In refusing to assert jurisdiction, the Commission made clear that jurisdiction must be based on a statutory grant not simply public policy concerns:

> Although sympathetic to the concerns expressed, the Commission cannot exercise jurisdiction it does not have, even if it is expected to produce a worthy result furthering the public interest. *See, Mountain States Telephone Company v Public Service Commission of Utah*, 754 P.2d 298 (Utah 1988). The result of the limitations of Commission authority over SBS may portend homeowners being greatly disappointed and delayed in receiving public telecommunications service they expect to have when moving into a subdivision. These future customers and their telecommunications companies may be required to resort to alternative line extension policies and procedures because there is no telecommunications company willing to stand behind SBS's installed facilities and use them to provide service. This could be an inefficient and costly outcome for telecommunications customers and telecommunications companies, but one which inevitably can arise due to the limitation of our authority over the developers, SBS and their conduct. While SBS is willing to take this gamble, the Commission is not certain that the affected developers are knowingly accepting such risk. The Commission believes that potential purchasers of lots in the subdivisions will be ignorant of the risk potential and that local governmental entities, approving these subdivisions, are unaware of the risk arising from the subdivision developer's and SBS's agreements and arrangements for the placement and use of telecommunications facilities. At best, the Commission can only provide notice and information concerning this potential. We are not able to grant the relief requested by Qwest. To do so would be an attempt to assert authority over conduct which we believe is beyond our jurisdiction.[19]

In sum, *White City Water* was wrongly decided and should be overruled. It bases an assertion of subject matter jurisdiction on public policy arguments, without a statutory grant of jurisdiction. In so doing, it directly violates Utah law as established by the Utah Supreme

[19] The Commission has reached similar results in other contexts. *See generally Beaver County v. Qwest Corp.*, 2005 WL 1566660 (Ut. P.S.C. 2005)(Commission not free to fashion remedies not authorized by statute); *Olympus Clinic Inc. v. Qwest Corp*., 2004 WL 1091115 (Utah P.S.C. 2004)("While we recognize that Olympus' complaint follows an approach cognizable in courts with broad law and equity powers, we are not a court. Our powers are those conferred by statute enacted by the legislature.")

Court decisions as well as by the Commission's own decisions. *White City Water* thus is not sound authority for the recognition of subject matter jurisdiction over HLP.

CONCLUSION

Utah law requires that the Commission's subject matter jurisdiction be based on a statutory grant of authority. The utility code however excludes governmental entities from Commission jurisdiction and does not affirmatively grant jurisdiction over such entities. In fact, the Commission in *White City Water* acknowledged the absence of a statutory grant of jurisdiction over municipalities. The Commission therefore lacks subject matter jurisdiction and HLP's motion to dismiss should be granted.

Dated this ___ day of September, 2008.

/s/ _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this 26th day of September, 2008, on the following

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