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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Complaint of Rocky Mountain Power, a Division of PacificCorp, 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 Application for Agency Review

Heber Light & Power Company ("HLP") hereby applies to the Commission for agency review of the Commission's Report and Order issued November 3, 2008, denying HLP's motion to dismiss for lack of subject matter jurisdiction. This ruling is directly contrary to established Utah law because the Commission asserts jurisdiction over HLP absent a specific statutory grant. For this reason, the Commission should grant agency review, reverse its prior ruling and dismiss this action for lack of subject matter jurisdiction.

The grounds for this application are set forth in this petition and in Heber Light & Power Company's Memorandum in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction, incorporated herein and attached here to as Exhibit A, and Heber Light & Power Company's Reply Memorandum in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction, incorporated herein and attached here to as Exhibit B.

INTRODUCTION

Heber Light & Power Company, or its predecessor Heber City, has provided retail electric service to residents and businesses in the Heber Valley for nearly 100 years. These operations, which have evolved over the years, began in 1909 when a hydroelectric power plant was built on the Provo River north of Heber City. In the 1930's, Heber City, Midway City, and Charleston Town joined together to form what is now known as the Heber Light & Power Company. Later, these member municipalities reorganized HLP under the Utah Interlocal Cooperation Act, *Utah Code Ann*. §§ 11-13-101, et seq., and HLP continues to operate under this Act to the present. As an energy services interlocal entity, HLP is a political subdivision of the State of Utah.

From 1909 to the present, HLP has provided electric service to customers on the floor of the Heber Valley who have requested service. This service has been provided both within the member's municipal boundaries and also in the unincorporated areas of Wasatch County located on the valley floor. HLP has provided this service in part because no other electric utility had the interest or facilities to provide service to these customers scattered across the Heber Valley.

Until recently, Rocky Mountain Power had recognized that HLP's service area included the unincorporated areas of Wasatch County and had, in some cases, encouraged HLP's service to these areas, including distribution services to RMP's customers in the Timberlakes Subdivision. However, in 2007, Rocky Mountain Power ("RMP") started the instant proceeding asking the Commission to determine, *inter alia*, whether HLP has authority to provide service to customers in the unincorporated areas of its service area.

HLP moved to dismiss the Amended Complaint, because no statute granted the Commission jurisdiction over HLP.[1] The Commission denied HLP's motion and found that jurisdiction existed, notwithstanding a "gap" in the Commission's jurisdiction under statutes. *Report and Order* at p. 20. HLP has filed the instant petition for review because the Commission's ruling finding jurisdiction absent a statutory grant is contrary to the rule of law established by the Utah Supreme Court and the Commission itself.

The Commission is a creature of statute and has only the authority or jurisdiction granted by the Utah Legislature. *Hi-Country Estates Homeowners Assoc. v. Bagley & Co.*, 901 P. 2d 1017, 1021 (Utah 1995). The Commission apparently[2] bases its jurisdiction on Section 54-4-1, which gives the Commission jurisdiction over public utilities, including electrical corporations. *See also Utah Code Ann*. § 54-2-1(16)(a)(defining "public utility" as including "electrical corporations"). The Legislature however has not granted the Commission jurisdiction over governmental entities, such as HLP, and has expressly excluded governmental entitles from the definition of

[1] For the purposes of this motion only, HLP has assumed that the factual allegations of the Amended Complaint are true. However, HLP reserves the right to dispute RMP's legal and factual allegations in the appropriate forum and to establish the lawfulness of its actions.

[2] The Commission does not expressly identify the statute giving it jurisdiction, because it fills a "gap" in the statutes.

"corporations," subject to Commission jurisdiction. *Utah Code Ann.* § 54-2-1(5)(b). There is thus no statutory grant of jurisdiction to Commission over HLP, for any purpose.

The Commission's Report and Order forthrightly concedes the absence of a statutory grant of jurisdiction over HLP.[3] The Commission endeavors to fill the supposed "gap" in its jurisdiction by rewriting the utility code to give the Commission jurisdiction over a governmental entity, such as HLP. The Commission justifies its actions through unsupported speculation on the Legislature's intent and a misapplication of the doctrine of *in pari materia*, all in derogation of well-established rules of law. Stated simply, the Commission asserts jurisdiction, without statutory authority, in violation of the rule of law found in Utah Supreme Court cases and the Commission's own decisions. For these reasons and as discussed more fully below, the Commission should grant agency review, reverse its prior ruling and dismiss this action for lack of subject matter jurisdiction.

ARGUMENT

A. The Utah Code Does Not Give the Commission Jurisdiction to Determine HLP's Authority to Serve.

The Commission has no jurisdiction, except for jurisdiction affirmatively granted by statute. *Hi-Country Estates Homeowners Assoc.*, 901 P.2d at 1021. Any statutory grant of authority is narrowly construed and "any reasonable doubt of the existence of

[3] In its Report and Order, the Commission acknowledges that a "gap" exists in the statutory grant of jurisdiction and that "the legislature [has] explicitly failed to speak on subject" of whether the Commission had subject matter jurisdiction over a municipality's service outside its municipal boundaries. *Report and Order* at p. 19-20. It also states that "the plain language of sections 54-2-1 [sic] and 11-13-204(2)(a) [read] in isolation, as HL&P urges . . . would require HL&P exemption from Commission jurisdiction." *Report and Order* at 14. Similarly, in *In re White City Water Company*, Docket No. 91-018-02, 133 P.U.R. 4th 62 (Utah P.S.C. 1992), the Commission acknowledged that "gaps" existed in its statutory authority and that that "there may be no explicit statutory authority for us to assume jurisdiction" over extra-territorial service. *Id.* at 65, 67.

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, 933 (Utah 1988).

In the instant case, no statute grants the Commission jurisdiction to determine a governmental entity's authority to serve. Thus, the Commission simply lacks jurisdiction over this issue.

This was the Utah Supreme Court's ruling in *Mountain States*. There, the Utah Supreme Court rejected the Commission's effort to assert jurisdiction based on Section 54-4-1's general grant of jurisdiction, but absent a specific statutory grant. Although Section 54-4-1 broadly grants the Commission jurisdiction over public utilities, the Court held that it did not provide the Commission "a limitless right to act as it sees fit" and required a specific grant of jurisdiction before the Commission could act. Finding no such grant, the Court overruled the Commission's finding that it had jurisdiction.

Following *Mountain States*, the Commission itself has carefully avoided exercising jurisdiction, not granted by statute. *See generally Re: Qwest Corporation*, Docket No. 03-049-63 2005 WL 4052372 (Ut. PSC 2005)("[T]he Commission cannot exercise jurisdiction it does not have, even if it is expected to produce a worthy result furthering the public interest"); *Beaver County v. Qwest Corp.*, 2005 WL 1566660 (Ut. P.S.C. 2005)(The 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.")

Under these precedents, the Commission's determination that a "gap" exists in its statutory jurisdiction means that the Commission has no jurisdiction. The Commission ruling that it has jurisdiction, notwithstanding this jurisdictional "gap," violates the rule of law established by the Utah Supreme Court and the Commission itself. For this reason alone, the Commission lacks jurisdiction and should dismiss the Amended Complaint.

B. The Commission Cannot Create Jurisdiction By Rewriting the Jurisdictional Statute to Fill a Perceived Jurisdictional "Gap."

Having acknowledeged a "gap" in its statutory jurisdiction, the Commission purports to rewrite the jurisdictional statute to fill the precived "gap." The Commission's analysis fails for three reasons. First, the analysis violates the rules of construction governing statutes granting the Commission jurisdiction. Second, it is based on speculation concerning legislative intent and contradicts the statute's language, "the best evidence of legislative intent." *Provo v. Ivie*, 191 P.2d 841, 843 ¶ 4 (Ut. App. 2008). Finally, the analysis misapplies the doctrine of *in pari materia*. Each of these errors is addressed in turn below.

1. The Commission Must Narrowly Interpret its Jurisdictional Statute and Resolve any Doubt Against Exercising Jurisdiction.

As stated above, the Commission has "no inherent regulatory powers other than those expressly granted or clearly implied by statute." *Mountain States*, 754 P.2d at 930. A collary of this rule is the rule of construction that jurisdictional statutes are narrowly construed and "any reasonable doubt of the existence of any power [of the Commission] must be resolved against the exercise thereof." *Hi-Country Estates*, 901 P.2d at 1021. The application of these rules to a statute which admittedly has a "gap" would require a finding that the Commission has no jurisdiction.

In the instant case, the Commission has not narrowly interpreted the jurisdictional statute nor resolved any doubts against the existence of jurisdiction. Instead of following this rule of law, the Commission's analysis seeks to find jurisdiction regardless of any reasonable doubts and in spite of the statutory language. The Commission should reject this approach which is contrary to the established rule of law, requiring a statutory basis for jurisdiction and narrow construction of statutory grants.

2. The Commission's Unsupported Speculation on Legislative Intent Does Not Justify Rewriting the Statute to Fill a Perceived Jurisdictional "Gap."

The Commission seeks to avoid the lack of a statutory grant of jurisdiction by speculating on what the Legislature intended, but failed to express in the statutory language. *Report and Order* at p. 20. The Commission conclusions about the Legislature's supposedly true, but unexpressed intent, has no support in statutory language or other sources. In fact, the Commission betrays a lack of certainty in its conclusion by stating that the Legislature "seems" to have intended to grant jurisdiction, notwithstanding the "gap" in the statutory language. *Id.*

The Commission's analysis of legislative intent ignores "the best evidence of legislative intent," the language of the pertinent statutes. *Provo*, 191 P.2d at 843 ¶ 4. Instead, it purports to divine legislative intent from undisclosed sources. The result is ruling that creates jurisdiction contrary to the statute's language.

Creating jurisdiction "out of whole cloth"[4] in this way violates the established rule of law on determining legislative intent.

[4] "It is one thing for this court to interpret an ambiguous statute and attempt to harmonize the various provisions of an act, but it is another for this court to fashion a statutory rule out of whole cloth without having any idea of the legislature's intentions." *Mariemont Corporation v. White City Water Improvement District*, 958 P.2d 222 (Utah 1998).

> When faced with a question of statutory construction, we look first to the plain language of the statute. In so doing, we presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning. **We will not infer substantive terms into the text that are not already there**. Rather, the interpretation must be based on the language used, and **[we have] no power to rewrite the statute to conform to an intention not expressed**.

J.J.W. v. Division of Child and Family Services, 33 P.3d 59, 64 ¶ 17 (Ut. App. 2001)(emphasis supplied). *See also Salt Lake Child and Family Therapy Clinic, Inc. v. Frederick*, 890 P.2d 1017, 1021 (Utah 1995)("While we agree with the concerns expressed by the dissent, it is not our prerogative to rewrite that section or to question the wisdom, social desirability, or public policy underlying it.") This rule against rewriting statutes applies with particular force to statutes governing Commission jurisdiction which are narrowly construed. *Hi-Country Estates*, 901 P.2d at 1021 "[I]f a statute is infirm, 'amendments to correct the inequities should be made by the legislature and not by judicial interpretation.'" *Salt Lake Child and Family Therapy*, 890 P.2d at 1021.

The Commission's reliance on legislative intent violates these rules of law.

First, the Commission disregards the statute's plain language which the Commission concedes does not grant jurisdiction. *Report and Order* at p. 14. The Commission, in fact, ignores the statute's express exclusion of governmental entities from the definition of "corporations" subject to Commission jurisdiction. *See Utah Code Ann.* § 54-1-2(5)(b). By ignoring the statute's plain language the Commission has ignored the "best" and only evidence of the Legislature's intent.

Second, the Commission, in interpreting a statute, must presume that "the legislature used each word advisedly and [must] give effect to each term according to its ordinary and accepted meaning." *J.J.W.*, 33 P.3d at 64 ¶ 17. The Commission violates

this rule of law by assuming, without any support in the statutory language or otherwise, that the Legislature inadvertently created a "gap" in the statutory grant of jurisdiction, even though the statute, in part, creates the "gap" by excluding governmental entities from the definition of "corporations" subject to Commission jurisdiction. *See Utah Code Ann.* § 54-1-2(5)(b). Thus, the Commission, in filling this supposed "gap," has not presumed, as it must, "that legislature used each word [in the statute] advisedly." *Id.* at 64 ¶¶ 17 & 18.

It is worth noting that when the Legislature has intended for the Commission to have jurisdiction over governmental entities it has had no trouble clearly stating that intent. *See generally Utah Code Ann*. § 10-18-303(2)(d)(municipal cable television service provider shall comply with Commission rules); § 11-13-304(1)(project entity required to obtain certificate from Commission); § 17B-2a-406(1)(improvement district providing electric service is a public utility subject to Commission jurisdiction).

Finally, the Commission usurps the Legislature's function by straightforwardly rewriting its statutory grant of jurisdiction by inserting a grant of jurisdiction over a governmental entity. The Commission has no power to "infer substantive terms into the text that are not already there," nor "to rewrite the statute to conform to an intention not expressed." *J.J.W.*, 33 P.3d at 64 ¶ 17. It is the Legislature's function, not the Commission's, to fill any "gap" in the Commission's statutory grant of jurisdiction.

In part, these errors in the Commission's analysis arise out of the Commission's confusion of the issue of whether the Commission has jurisdiction over HLP with the issue of whether HLP has exceeded its authority to serve. The Commission mistakenly assumes that it has jurisdiction if a governmental entity, such as HLP, has exceeded its

authority to serve. However, no statute gives the Commission jurisdiction over a governmental entity to determine whether the governmental entity has exceeded its authority. *Report and Order* at p. 20. Absent such a statute, the Commission lacks jurisdiction even if the governmental entity has exceeded its authority. *CP National Corp. v. Public Service Commission*, 638 P.2d 519, 524 (Utah 1981).

This is illustrated by the Utah Supreme Court's decision in *CP National Corp.* There, the Utah Supreme Court discussed, in the context of a condemnation proceeding, the Commission's jurisdiction over an interlocal entity created by municipalities providing extraterritorial service. The Court concluded that the Commission did not have jurisdiction over the interlocal providing such extraterritorial service, even though the interlocal may have exceeded its authority. *CP National*, 638 P.2d at 524. Thus, the Commission's extensive reliance on *CP National* is misplaced because that decision would deny the Commission jurisdiction over HLP's extraterritorial service.

3. The Commission's Application of the Doctrine of *In Pari Materia* is Erroneous and Does Not Support Jurisdiction.

The Commission also seeks to fill the "gap" in the statutes granting it jurisdiction by relying on the doctrine of *in pari materia*, a rule of statutory construction. *Report and Order* at p. 14-18. Rules of statutory construction, however, have no application where, as here, the plain language of the statute is clear and unambiguous. *Salt Lake Child and Family Therapy*, 890 P.2d at 1020. In addition, as discussed below, the Commission analysis does not support a finding of jurisdiction and misapplies the rules of statutory construction.

Under the doctrine of *in pari materia* ("in the same matter"), statutes which "relate to the same person or thing, to the same class of persons or things, or have the

same purpose or object" are construed together. *J.J.W.*, 33 P.3d at 65 ¶ 22. This rule of construction however only applies where the statutes are related to the same matter and is not applied to create substantive terms that are not found in the statutory language. *Id*. at 65 ¶ 23.

Under the doctrine of *in pari materia*, the Commission relies on provisions of the Utah Municipal Code[5] and the Utah Interlocal Cooperation Act to aid in its construction of its jurisdiction under the Utah utility code. These statutes however concern only the authority of municipalities and interlocal entities. They have nothing to do with the Commission's jurisdiction. These statutes are thus not *in pari materia* and provide no guidance on the proper construction of the Commission's jurisdiction under Section 54-4-1 of the Utah utility code.

Even if the statutes were *in pari materia*, which they are not, the doctrine could not be used to create substantive terms that have no support in the statute's language. Stated differently, under the doctrine of *in pari materia*, an unclear statute may be construed in the light of other similar statutes, but new terms cannot be created from whole cloth. Thus, under this doctrine, the Commission cannot construe Section 54-4-1 to give it jurisdiction over a governmental entity, because the plain language of Section 54-4-1 does not support such a grant.

Finally, the Commission concludes its discussion of *in pari materia* by stating that these other statutes "do not preclude the Commission's jurisdiction over an entity like HL&P when its operations or activities exceed those delineated by statute." *Report*

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[5] The Commission asserts that Section 10-8-14(1) of the Utah Municipal Code and Sections 11-13-213 and 11-13-203 of the Utah Interlocal Cooperation Act are *in pari materia* for the purposes of construing the Commissions jurisdictional statute. *Report and Order* at p. 15, 17-18. These statutes concern the power of a municipality and interlocal entities and do not refer or relate in any way to the Commission or its jurisdiction.

and Order at p. 18. The Commission's conclusion is factually accurate but irrelevant. It is factually accurate because the statutes do not deal with Commission jurisdiction at all and thus do not preclude jurisdiction. It is irrelevant because Commission jurisdiction must be based on an affirmative statutory grant of authority which the statutes do not provide. The Commission's reliance on the doctrine of *in pari material* thus does not support its finding of jurisdiction.

CONCLUSION

The Commission has no authority or jurisdiction unless provided by statute. The Commission concedes that no statute gives it jurisdiction over a governmental entity, such as HLP. This "gap" was, in part, created by the Legislature's decision to exclude governmental entities from the definition of corporations subject to Commission jurisdiction. Rather, than simply accepting this "gap" as the will of the Legislature, as it must under established legal principles, the Commission erroneously rewrites the statute to include jurisdiction over governmental entities. For the reasons expressed above, the Commission ruling violates these rules of law and should be reversed.

Dated this __ day of December, 2008.

Heber Light & Power company

By:/s/_____
Blaine Stewart, Its Manager

Dated this __ day of December, 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 and U.S. Mail this 3rd day of December, 2008, on the following:

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