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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 **OPPOSITION OF ROCKY MOUNTAIN POWER TO HEBER LIGHT & POWER COMPANY'S APPLICATION FOR AGENCY REVIEW**

Rocky Mountain Power, pursuant to Rule R746-100-11.F of the Rules of Practice and Procedure of the Public Service Commission of Utah ("Commission"), opposes the Application for Agency Review ("Application") filed by Heber Light & Power Company ("HLP") on December 3, 2008.[1]

[1] By calling its pleading an Application for *Agency Review* (emphasis added), there is an inference that HLP may believe that the Report and Order issued by the Commission on

I. INTRODUCTION

For the most part, HLP's Application is a reiteration of the arguments in its opening and reply memoranda on its motion to dismiss for lack of jurisdiction. In fact, HLP has attached and incorporated the opening and reply memoranda in the Application. (Application at 2). Rocky Mountain Power generally will not reiterate its arguments and those of the Division of Public Utilities in response to HLP's motion. The Order generally accepted those arguments in denying HLP's motion, and, to the extent necessary, they are incorporated in this Opposition.

The primary thrust of the Application is a claim that the Commission agrees that a jurisdictional gap exists in the relevant Utah statutes because it acknowledges that there is no statute explicitly addressing the issue of the Commission's jurisdiction over a municipality's service outside its municipal boundaries. (*See, e.g., id.* at 4). HLP's Application attempts to transform the Commission's reference to an "apparent 'gap'" into some sort of admission by the Commission that an actual gap exists. In reality, however, the Commission correctly concluded that, in light of clear legislative intent, the apparent gap is non-existent. Based on a consistent and harmonious reading of the relevant statutes, the Commission correctly ruled that the legislature "did not intend to leave a gap for government agencies, like interlocals, to form what are essentially unregulated public utilities in an effort to target and serve non-resident customers in an effort to compete with regulated utilities." (Order at 20). The Commission correctly applied appropriate rules of statutory construction and relevant decisions of the Utah Supreme

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November 3, 2008 was not reviewed and adopted by the three members of the Commission. That, of course, is not correct. All three members of the Commission "[a]pproved and confirmed" the Report and Order ("Order"). (Order at 21). In light of that, this Opposition treats the Application as a petition for reconsideration.

Court and the Commission in support this conclusion. The Commission's Order should, therefore, not be disturbed.

The second major contention of HLP that is somewhat different than its prior arguments is that there is no necessary relationship between the municipal and interlocal entity statutes and Title 54 and that it is inappropriate to consider them together in determining legislative intent. (Application at 10-12). This argument is also incorrect.

II. ARGUMENT

HLP's Application reiterates the cases that state that the Commission lacks unlimited authority and that its regulatory powers are those that are "expressly granted or clearly implied" by statute. No one disputes the holding of these cases. The real question here is whether, reading the statutes consistently and harmoniously in order to discern the Legislature's intent, the Commission was correct to deny HLP's motion to dismiss for lack of jurisdiction. The answer to that question is clearly yes.

A. HLP's Argument that a Gap Exists in the Statutes Misinterprets the Order and Is Erroneous.

HLP begins its argument by misinterpreting the Commission's Order. HLP says that, *"[h]aving acknowledged a 'gap' in its statutory jurisdiction*, the Commission purports to rewrite the jurisdictional statutes to fill the perceived 'gap.'" (Application at 6; emphasis added). Thus, HLP claims that the Commission acknowledged the existence of statutory gap that the Commission needed to fill in the public interest.

In fact, the Order does not acknowledge a gap. The Order refers to a gap twice. The first reference asks whether—given that the Legislature did not explicitly speak on the subject of what happens if a municipality or interlocal agency exceeds its authority by providing service outside of municipal boundaries—"the legislature intended for this *apparent 'gap'* to allow an

interlocal to compete in such a manner." (Order at 19; emphasis added). The second reference clarifies the first; "[t]he legislature did not intend to leave a gap for governmental agencies, like interlocals, to form what are essentially unregulated public utilities in an effort to target and serve non-resident customers in an effort to compete with certificated utilities." (*Id.* at 20). Thus, the Commission never agreed that there was a gap in its "statutory jurisdiction." There is a fundamental difference between agreeing that a "gap" exists and suggesting that there is an "apparent gap" and then explaining why the "apparent gap" does not, in reality, exist. To that point, HLP ignores the sentence immediately following the reference to the "apparent gap" in the Order: "When viewing all the statutes governing interlocals and related statutes, those governing Commission jurisdiction, and case law interpreting these statutes, the answer [to the question whether the Legislature intended to leave a gap] is no." (*Id.* at 19). In other words, the Commission's ruling was that, after reading all related statutes consistently and harmoniously, no jurisdictional gap exists.[2]

B. The Commission's Statutory Analysis Is Consistent with Applicable Rules of Construction Used to Discern the Legislature's Intent.

HLP's argues that the Commission has, based on unsupported speculation as to the intent of the Legislature, unlawfully filled a gap in the statute. (Application at 7-10). HLP supports this conclusion by arguing that it was error for the Commission to consider the meaning of statutes in the Public Utility Code in conjunction with statutes in the Utah Municipal Code and the Utah Interlocal Cooperation Act. (*Id.* at 10-11). A brief review of the Commission's

[2] In another example of its skewed interpretation the Order, HLP states that "the Commission disregards the statute's plain language which the Commission concedes does not grant jurisdiction." (Application at 8). That is not what the Commission said. Indeed, the Commission was clear that, once the plain language of the relevant statutes were read harmoniously, the Commission clearly has jurisdiction.

analysis in the Order, however, demonstrates that the Commission has read all of the relevant statutes in the only reasonable way they can be read and that the relevant statutes include those dealing with provision of electric service by municipalities and interlocal entities.

The Commission first noted that if section 54-2-1 and 11-13-201(2)(a) are read in complete isolation, HLP would not be subject to Commission jurisdiction. (Order at 14). But the Commission, quite correctly and in reliance on *Hansen v. Eyre*, 2003 UT App 274 ¶ 7, noted that statutes must be read together ("as a whole"), and that this process includes statutes from "related chapters." "If . . . the understanding of the legislature or the persons affected by the statute would be influenced by another statute, then those statutes should be construed with reference to one another *and harmonized if possible*." (Order at 14-15; emphasis added). Therefore, the Commission properly rejected HLP's argument that the Commission is required to, in effect, treat the relevant statutes as isolated islands in the code that neither affect nor are affected by other parts of the code.

The Commission first analyzed the statutes that apply to individual municipalities. Reading these statutes and *CP National Corp. v. Public Service Comm'n*, 638 P.2d 519 (Utah 1981), and *County Water System v. Salt Lake City*, 278 P.2d 285 (Utah 1954), the Commission concluded that municipalities may not sell or deliver a product or service that is not surplus outside their boundaries (Order at 15-18), a legal proposition that HLP apparently does not dispute. The next step in the Commission's statutory analysis was to examine the statutes that define the powers of interlocal agencies (which are merely combinations of government agencies, including municipalities). There, the Commission, relying on specific language from sections 11-13-213(1) & (2) and 11-13-203, correctly concluded that an interlocal agency

comprised of municipalities has no greater powers than its individual members. (*Id.* at 17-18).[3] The Commission reasonably concluded that "if municipalities may not sell and deliver product or service that is not surplus to those outside their boundaries, then neither may interlocals organized by those municipalities." (*Id.* at 18).

The final element of the Commission's analysis was its discussion of legislative intent through the application of statutory rules of construction. On this issue, the Commission quoted *CP National* for the proposition that rules of statutory construction are helpful if they assist in discerning the intent of the Legislature: "In determining that intent the statute should be considered in the light of the purpose it was designed to serve and so applied as to carry out that purpose if that can be done consistent with its language." (*Id.* at 19, quoting *CP National*). With that in mind, the Commission concluded: "The legislature did not intend to leave a gap for governmental agencies, like interlocals, to form what are essentially unregulated utilities in an effort to target and serve non-resident customers in an effort to compete with certificated utilities." (*Id.* at 20). Relying on *CP National* for the proposition that allowing municipalities the unfettered power to serve outside their boundaries would place non-residents "at the mercy of officials over whom they have no control at the ballot box," the Commission denied HLP's motion.

HLP claims that the Commission has not, as required, used each word of the statute "advisedly." (Application at 9). But that is not true. In fact, the Commission's analysis fully

[3] The Commission's conclusion is buttressed further by Utah Code Ann. § 11-13-102, the section that defines the *purposes* of the Interlocal Cooperation Act. Among those purposes are to allow government entities to "make the most efficient use of their powers," to enable "cooperation" in the provision of services, and to "provide the benefit of economy of scale." Noticeably absent from the purpose of the statute is any reference to allowing governmental entities to form interlocal entities for the purpose of doing things they cannot do individually.

interrelates the relevant statutes, reads them harmoniously, and concludes, with the assistance of pointed language from the courts and earlier Commission decisions, that the only reasonable conclusion is that the Legislature did not intend to allow municipalities or interlocal entities unfettered power to provide completely unregulated services wherever and to whomever they chose. Any other conclusion would violate another rule of statutory construction: that a statute should not be read to produce an absurd result and thus defeat the Legislature's intent.[4]

HLP claims that the *in para materia* rule of construction was erroneously used by the Commission because section 54-4-1 is clear and unambiguous and because the Utah Municipal Code and Utah Interlocal Cooperation Act are not related to Commission jurisdiction under the Public Utility Code. (*Id.* at 10-11). Neither part of this claim is correct.

Contrary to HLP's assumption (Application at 3), the Commission did not rely solely or even primarily on section 54-4-1 in support of its conclusion that it has jurisdiction over HLP's extraterritorial service. Rather, the Commission discussed the parties' positions on the statutes defining public utilities subject to its jurisdiction (*see, e.g.* Order at 7, 13-14) and, as noted above, reviewed those definitions in the context of the limitations in Titles 10 and 11 of the code on the power of municipalities and interlocal entities to provide extraterritorial electric service. (*Id.* at 14-20). In doing so, the Commission followed the direction of *CP National* to apply rules of statutory construction that focus on the *purpose of the statute*. Thus, understanding the purpose of the Legislature's exclusion of governmental entities from the definition of

[4] *Johanson v. Cudahy Packing Co.*, 107 Utah 114, 135, (1944). ("[W]e are cognizant of the fact that we are not following the literal wording of the statute, but such is not required when to do so would defeat legislative intent and make the statute absurd."); *State v. GAF Corp.*, 760 P.2d 310, 313 (Utah 1988) ("It is axiomatic that a statute should be given a reasonable and sensible construction and that the legislature did not intend an absurd or unreasonable result.") (citation omitted).

"corporations" in section 54-2-1(5)—relied on by HLP as the primary reason that the statute is clear (Application at 8)—is assisted by understanding the purpose for limiting the authorized role of governmental entities in Titles 10 and 11 of the code.[5]

Finally, HLP's argument that it is not a corporation and therefore not a public utility ignores the clear conclusion of *White City Water*. There 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. 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. The issue here is the status of HLP when it serves extraterritorial customers as a part of its ongoing business and not on a temporary basis from surplus. On that issue, the Commission has reasonably interpreted all of the relevant Utah statutes and has demonstrated that nothing in them gives HLP the right to do so without regulation by the Commission. To the contrary, when HLP acts beyond its governmental authority, it is no longer performing a municipal function exempt from Commission regulation.

[5] HLP also conveniently ignores the fact that the term "corporation" is only one of several terms under section 54-2-2 that can bring a person or entity within the definition of a "public utility." "Person" in section 54-2-2 means "individuals, corporations, partnerships, associations, trusts, and companies." While HLP is a "political subdivision," there is nothing to suggest that that term is an exclusionary term that, by definition, means it cannot also fit into one or more of the categories in section 54-2-2. In saying that it cannot be a "corporation," HLP does not explain why it cannot fall within either the term "association" or "company." As Rocky Mountain Power noted in its response to HLP's motion to dismiss, HLP is clearly both an association and a company.

III. CONCLUSION

For the reasons set forth herein, Rocky Mountain Power respectfully submits that HLP's Application for Agency Review should be denied.

RESPECTFULLY SUBMITTED: February 21, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **OPPOSITION OF ROCKY MOUNTAIN POWER TO HEBER LIGHT & POWER COMPANY'S APPLICATION FOR AGENCY REVIEW** to be served upon the following by email to the email addresses shown below on February 21, 2018:

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