Mark C. Moench (2284)
R. Jeff Richards (7294)
Rocky Mountain Power
201 South Main Street, Suite 2300
Salt Lake City, UT 84111
(801) 220-4734
(801) 220-3299 (fax)
Mark.Moench@pacificorp.com
Jeff.Richards@pacificorp.com

Gregory B. Monson (2294)
Scott S. Newman (11305)
Stoel Rives LLP
201 South Main Street, Suite 1100
Salt Lake City, UT 84111
(801) 328-3131
(801) 578-6999 (fax)
gbmonson@stoel.com
ssnewman@stoel.com

Attorneys for Rocky Mountain Power

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 **ROCKY MOUNTAIN POWER'S RESPONSE IN OPPOSITION TO MOTION FOR STAY PENDING JUDICIAL REVIEW**

Rocky Mountain Power, a division of PacifiCorp ("Rocky Mountain Power"), pursuant to Utah Administrative Code R746-100-3.H, respectfully responds to "Heber Light & Power Company's Motion for Stay Pending Judicial Review" ("Motion") filed April 8, 2009. Heber Light & Power Company's ("HLP") Motion requests a stay of proceedings pending a decision by the Utah Supreme Court on HLP's petition for review of the Commission's Report and Order ("Order") issued November 3, 2008, denying HLP's motion to dismiss Rocky Mountain Power's

amended complaint for lack of jurisdiction. Motion at 3. Rocky Mountain Power opposes the Motion.

I. INTRODUCTION

This matter was commenced by Rocky Mountain Power filing a complaint on April 17, 2007. After unsuccessful settlement discussions, Rocky Mountain Power filed its Amended Complaint and Request for Expedited Treatment ("Complaint") on February 5, 2008. The basis for the request for expedited relief was that "[p]otential customers, including major developments, are being delayed pending a resolution of the disputes." Complaint at ¶ 33. The Commission entered a scheduling order on March 11, 2008, and, in accordance with that order, HLP filed an answer and motion to dismiss for lack of jurisdiction on April 4, 2008. On April 18, 2008, Rocky Mountain Power filed a motion to stay the procedural schedule to allow the parties to engage in further settlement discussions, which was granted by the Commission. Settlement was again unsuccessful, so following briefing and oral argument, the Commission issued the Order denying the motion to dismiss on November 3, 2008. On the same day, the Commission issued a scheduling order, setting a schedule for proceedings in accordance with discussions with the parties. The scheduling order set dates for filing testimony and a hearing in May 2009.

The parties engaged in discovery and became involved in discovery disputes that resulted in both parties seeking changes to the schedule. On February 25, 2009, the Commission granted HLP's motion to strike the schedule, except for a Status and Scheduling Conference ("Conference") set for March 26, 2009, pending resolution of the discovery disputes.

While the foregoing was taking place, on December 3, 2008, HLP requested the Commission to reconsider the Order. The Commission took no action on HLP's request, so it was deemed denied by operation of law. *See* Utah Code Ann. § 54-7-15(2)(c). On January 21,

2009, HLP filed a petition for review of the Order with the Utah Supreme Court that is pending as *Heber Light & Power Company v. Utah Public Service Commission and Rocky Mountain Power,* Case No. 20090053-SC. On February 2, 2009, Rocky Mountain Power filed a motion to dismiss the petition on the ground that the Commission's order was interlocutory. On March 2, 2009, the Court issued an order deferring consideration of Rocky Mountain Power's motion to dismiss until plenary presentation on the merits of HLP's petition for review. The Court also set a briefing schedule under which HLP's brief is due May 5, 2009, response briefs are due approximately June 4, 2009, and HLP's reply brief, if any, is due the earlier of approximately July 6, 2009 or five days prior to oral argument.[1] Rocky Mountain Power filed a motion requesting that the Court expedite the briefing and hearing schedule on April 8, 2009. The motion to expedite was supported by the Affidavit of Cindy Christoffersen ("Affidavit"). A copy of the Affidavit is provided as Appendix 1 to this Response.

At the Conference on March 26, 2009, HLP stated that it intended to file the Motion. It was agreed that HLP would file the Motion by April 8, 2009, that other parties would respond by April 27, 2009, and that HLP would reply by May 11, 2009. Beyond that, no schedule was set for further proceedings in the matter. On March 31, 2009, Rocky Mountain Power filed a motion requesting that the Commission set a schedule for further proceedings.

II. STATEMENT OF FACTS

Several developments in unincorporated Wasatch County were pending in early 2008 and needed resolution of whether their electric service would be provided by Rocky Mountain Power or HLP to proceed. Affidavit at ¶ 2. Those developments were delayed as a result of the

[1] Only approximate dates can be given because the due date for subsequent briefs will depend on how the briefs are served. In addition, the Utah Rules of Appellate Procedure provide for extensions of the briefing schedule. Utah Rules App. Proc. 22, 26(a).

significant credit crisis and economic recession that developed in 2008. *Id.* at ¶ 3. In October 2008 and February 2009, developers contacted Rocky Mountain Power regarding provision of power to them for work that they contemplate commencing during the 2009 construction season. One of these developments, Wasatch Commons, is outside the municipal boundaries of the members of HLP but within the area that HLP claims is within its service territory. The other, the Ken Duncan property, is adjacent to an area currently served by HLP, but apparently outside the boundary of its claimed service territory. As the economy begins to recover, Rocky Mountain Power believes these types of circumstances will increase in number and frequency. Furthermore, lack of resolution of the issue whether Rocky Mountain Power or HLP will provide service in portions of Wasatch County outside the boundaries of Heber City, Midway City and the Town of Charleston impairs Rocky Mountain Power's ability to plan construction projects and power needs to meet its obligation to provide service in unincorporated Wasatch County in an efficient and economical manner on a long-term basis. *Id.* at ¶¶ 4-7. Finally, HLP has argued that the Commission's order denying its motion to dismiss for lack of jurisdiction has placed it in a position in which it may be required to "discontinu[e] service to existing customers or [] refus[e] to provide service to new customers in unincorporated areas even though no other service provider is presently able to provide service to most of these customers." Heber Light & Power's Response to Rocky Mountain Power's Motion to Dismiss for Lack of Jurisdiction, Case No. 20090053-SC (Feb. 20, 2009) at 8. HLP asserts that "[s]uch a result would have dramatic and far-reaching implications not only for HLP but also for thousands of residents of the Heber Valley." *Id.* This is apparently because HLP may be operating illegally outside the boundaries of its members as a public utility subject to Commission jurisdiction because it is not in compliance with the statutes and rules applicable to public utility service.

III. ARGUMENT

A. HLP's Appeal of an Interlocutory Order Does Not Divest the Commission of Jurisdiction.

In the Motion, HLP superficially argues that its petition for review of the Order "divests the Commission of jurisdiction pending final resolution of the appeal." Motion at 3. HLP cites *Career Services Review Board v. Utah Dept. of Corrections*, 942 P.2d 933 (Utah 1997), in support of this argument. HLP's argument is incorrect because it oversimplifies the issue and ignores the fact that *Career Services* addressed a different issue and its non-controlling dicta contained a qualification applicable to this case.

Career Services involved a complex procedural history and a number of issues. The central issue was whether the Career Services Board ("Board") could enforce a decision it made regarding discipline by the Department of Corrections ("Department") against an employee of the Department. The Board issued an initial decision that the Department appealed, but that appeal was voluntarily dismissed. After the appeal was dismissed, the Board issued a second decision that the Department believed was beyond the Board's jurisdiction. The Department chose to ignore the second decision rather than appeal it. The Board filed an action in district court to enforce its second decision. The district court granted summary judgment to the Department, and the Board appealed. One of the bases for the grant of summary judgment was that the earlier appeal of the earlier decision of the Board had been voluntarily dismissed by the Board and Department. Therefore, the district court concluded that the Board lacked jurisdiction to issue the second decision after that dismissal. Thus, the issue before the Court was whether an agency may take further action in a matter following dismissal of an appeal. That is not the issue presented in this case. The issue here is whether an agency may take further action in a matter while appellate review of an interlocutory order is pending.

As a prelude to discussing the issue of whether the Board could act following dismissal of the appeal, *Career Services* noted that "[w]hen a party institutes proceedings to review a decision or an order of an administrative agency, the agency is deprived of its jurisdiction over the matter during the pendency of the appeal." 942 P.2d at 943. This statement is the basis for HLP's argument that its petition for review divested the Commission of jurisdiction in this matter. Motion at 2-3.

The Court's statement is obviously dicta. In *Beaver County v. Home Indemnity Co.*, 52 P.2d 435, 444-45 (Utah 1935), the Court said:

> [D]icta is that part of an opinion which does not express any final conclusion on any legal question presented by the case for determination or any conclusion on any principle of law which it is necessary to determine as a basis for a final conclusion on one or more questions to be decided by the court.

The Court's statement regarding an agency being deprived of jurisdiction pending an appeal did not address an issue presented for determination or a principle of law necessary to determine whether the agency could act after the appeal was dismissed.

Dicta is not binding. *State v. Gardiner*, 814 P.2d 568, 572 (Utah 1991); *State v. Salt Lake County*, 85 P.2d 851, 858 (Utah 1938) (court decisions are authoritative only upon questions actually presented, discussed and decided). *See also* 20 Am.Jur.2d(Rev.) Courts § 39 at 361. Therefore, the statement HLP relies on is not binding on the Commission.

In addition, HLP fails to note that *Career Services* went on to state, "The Board was therefore *without authority to modify its 1993 Order* while the court of appeals was considering [the Department's] petition for review of that order." 942 P.2d at 943 (emphasis added). Here, no one is asking the Commission to modify the Order finding that it had jurisdiction to hear the Complaint during the pendency of HLP's petition for review. The Court also noted in *Career Services* that "[o]peration of the rule [divesting agencies of jurisdiction while an appeal is

pending] is *limited* to situations where the exercise of administrative jurisdiction would *conflict* with the proper exercise of the court's jurisdiction. '*If there would be no conflict, then there would be no obstacle to the administrative agency exercising a continuing jurisdiction* that may be conferred upon it by law.'" *Id.* (quoting *Westside Charter Serv., Inc. v. Gray Line Tours of Southern Nevada*, 664 P.2d 351, 353 (Nev. 1983) (brackets in original; emphasis added).

HLP argues that the Court cannot effectively determine whether HLP is subject to Commission jurisdiction if proceedings continue before the Commission. Motion at 3. In an attempt to explain this questionable argument, HLP states that continuation of proceedings before the Commission would essentially render meaningless a Court ruling that the Commission lacked jurisdiction. *Id.* This argument is not persuasive. The Court's consideration of the Commission's jurisdiction over HLP is not affected in any way by continued proceedings before the Commission. If the Court determines that the Commission lacks jurisdiction over HLP, the most that would happen is that any Commission order requiring HPL to comply with statutes or regulations applicable to public utilities would be vacated or unenforceable. However, in light of Rocky Mountain Power's acknowledgement in its Motion to Set Schedule that the proceeding before the Commission would not continue to a decision prior to issuance by the Court of its decision on the petition for review, Motion to Set Schedule at 6, and the acknowledgement by both parties that their dispute must be resolved either before the Commission, if the Commission has jurisdiction, or before the district court, if the Court holds that the Commission does not have jurisdiction, there is no likelihood that a Court ruling would be rendered meaningless by continued proceeding before the Commission pending that ruling.

Consistent with its prior argument before the Commission, HLP ignores the fact that regardless of the Court's ruling, there are significant issues for the Commission to address that

are clearly within its jurisdiction. Whether the Commission has jurisdiction over HLP or not, the Commission does have jurisdiction over Rocky Mountain Power. For example, while the Court considers the preliminary and interlocutory Order, the Commission can supervise discovery and require provision of evidence regarding the impact of HLP's extraterritorial service on Rocky Mountain Power's obligation to serve. Even if the Commission does not have jurisdiction to regulate HLP, it has jurisdiction to issue process and subpoenas to HLP requiring HLP to respond to discovery and provide evidence. *See* Utah Code Ann. §§ 54-7-2, 54-7-3. The Commission can also order Rocky Mountain Power to comply with discovery initiated by HLP and to provide evidence whether it has jurisdiction over HLP or not. The Commission can also address HLP's claims that Rocky Mountain Power has abandoned or forfeited its certificate of convenience and necessity (*see* Answer at 5) without regulating HLP or asserting jurisdiction over it. Commission action addressing these issues while HLP's petition is pending before the Court would not interfere with the Court in any way even accepting HLP's illogical premise that Commission action would conflict with the Court's authority by "essentially rendering meaningless a [C]ourt ruling that the Commission lacked jurisdiction." Motion at 3. Therefore, the Motion should be denied, and Rocky Mountain Power's motion to set schedule should be granted.

B. The Order Does Not Impose New Regulatory Obligations on HLP or Any Other Municipal Utility.

HLP supports its Motion by arguing that the

> Order adopts a new and expansive interpretation of the Commission's jurisdiction which could have far-reaching implications for all Utah governmental entities, and could have immediate and detrimental impacts on HLP's business. Stated simply, the Commission Order could bring within the Commission's broad jurisdiction any governmental entity that the Commission concludes has been "acting like a public utility," subjecting the governmental entity to the full breadth of Commission jurisdiction under *Utah Code Ann.* § 54-4-1.

Motion, 2. Thus, HLP attempts to justify a stay of the Order on the ground that it changes the status quo and imposes significant new regulatory obligations on HLP and other municipal utilities. This argument is incorrect because the Order does not impose new obligations on HLP or any other municipal utility.

The Order simply denied HLP's motion to dismiss the Complaint for lack of jurisdiction and allowed the matter to proceed. As part of the analysis supporting that decision, the Commission noted that if HLP is operating beyond its authority as an interlocal entity, as alleged in the Complaint, it is not performing a municipal function and is not exempt from Commission regulation. Order, 18-20. This is neither a "new" or an "expansive" interpretation of the Commission's jurisdiction. In the only other case of which Rocky Mountain Power is aware in which the Commission has addressed this issue, *Re White City Water Company*, 1992 WL 486434 (Utah PSC 1992), the Commission reached the same conclusion.

More importantly, the Order has done nothing but set the stage for adjudication of the parties' dispute. The Commission will now determine whether HLP is performing a legitimate municipal function in making authorized sales of surplus power outside its members' boundaries or if it is acting as a public utility in providing permanent and expanding retail sales, not from legitimate surplus, outside its members' boundaries. *See* Utah Code Ann. § 10-8-14 (authorizing sales of surplus); *County Water System v. Salt Lake City*, 278 P.2d 285, 290 (Utah 1954) (defining surplus as a "temporary glut occasioned by the provision for prudent future expansion"). If the Commission determines that HLP is performing a legitimate municipal function, it will presumably determine that it has no jurisdiction over HLP, and HLP will not be required to change its operations in any way. In that case, the only issue left to the Commission will be to determine Rocky Mountain Power's obligation to serve in light of HLP's legitimate

operations. If, on the other hand, the Commission agrees with Rocky Mountain Power that HLP is not performing a legitimate municipal function in providing service on a permanent and expanding basis outside its members' boundaries, the Commission will address HLP's unauthorized encroachment into the service territory allotted by the Commission to Rocky Mountain Power.

Certainly, the Order has no application to other municipal utilities. As far as Rocky Mountain Power is aware, none of them has engaged in the sort of blatant competition for new customers outside their municipal boundaries that has characterized HLP's actions during recent years. It is HLP's "new and expansive" view of its business plan and authority, not the Commission's consistent view of its jurisdiction, that has changed the landscape and prompted this action. No other municipal utility is a party to this proceeding, so even if the Order had the draconian effect argued by HLP, it would have no application to them. *See* Utah Code Ann. § 54-7-15(4).[2]

Therefore, the Order does not impose obligations on HLP to comply with statutes and regulations applicable to public utilities and has no application to any other municipal utility. HLP's argument provides no justification for a stay.

C. There Are Good Reasons for the Commission to Proceed During the Pendency of the Supreme Court's Review of the Order.

As demonstrated by the Affidavit, potential customers need to know *now* who will provide them power in unincorporated Wasatch County. As the economy begins to recover, it is

[2] *See also North Carolina Joint Underwriting Ass'n v. Long*, 2008 WL 320150, *12 (E.D.N.C. 2008) (explaining that because entity was not a party to state court judgment, it is not bound by that decision); *St. Pierre v. Norton*, 498 F.Supp.2d 214, 221 (D. D.C. 2007) (stating that a non-party to the lawsuit would not be bound by the court's order); *Hatfield v. Price Management Co.*, 2005 WL 375665, *2 (D.Kan. 2005) (reminding the parties "that orders of a court are binding on parties to the pending cause and cannot bind non-parties").

likely that the current uncertainty will affect many more customers on a much more frequent basis. Of equal importance, neither Rocky Mountain Power nor HLP can reasonably extend service to new customers or plan for future service in unincorporated areas of Wasatch County without resolution of their dispute. Thus, Rocky Mountain Power's ability to fulfill its obligation to provide safe, adequate and reliable service to customers in unincorporated Wasatch County at reasonable cost is impaired until this dispute is resolved.

During the Conference on March 26, 2009, some of the parties anticipated that the Supreme Court's review of the Order will not be completed before the end of 2009 or early 2010. Assuming they are correct, if the Commission stays its proceeding during that review, there will be no progress in resolution of the dispute between the parties for approximately eight months.[3] And it is entirely possible that the Court's resolution of the petition will be to dismiss it because the Court does not have jurisdiction to hear an appeal of an interlocutory order.[4] Thus, after an approximately eight-month hiatus, the case could come back to the Commission in its current posture without any guidance on the jurisdictional question raised by HLP in its petition.

Whatever the Court decides, following the Court's decision the parties would then start the discovery process, which under the original scheduling order was estimated to take approximately three months, and which in practice consumed a good share of that time just in the first round of written discovery.[5] This would be followed by a period of approximately two and

[3] Rocky Mountain Power has filed a motion with the Supreme Court requesting it to expedite the briefing and hearing schedule. If the motion is granted, the Supreme Court review might take only approximately four months. It would be premature to assume the outcome of that motion at this time.

[4] The Court has deferred ruling on Rocky Mountain Power's motion to dismiss HLP's petition for review, which is jurisdictional, until it considers HLP's petition for review.

[5] Rocky Mountain Power has proposed a four and one-half month discovery period in its Motion to Set Schedule based on the delays associated with discovery to date and in

one-half months to file written testimony if the matter is heard by the Commission.[6] Thus, if this matter is stayed and the Supreme Court does not issue its decision until the end of 2009, it is likely that the Commission (or a district court) could not conclude proceedings until after the 2010 construction season.

Finally, as acknowledged by the parties during the Conference, any discovery that takes place while the petition for review is pending before the Supreme Court would have application whether the matter proceeds before the Commission or a district court. Therefore, the Commission should deny HLP's Motion and should set a schedule for the proceeding, including a schedule for discovery, for filing testimony and for hearings, subject to adjustment or vacation depending on the status of proceedings before the Supreme Court.

Rocky Mountain Power is aware of the issue raised by the Division of Public Utilities ("Division") at the Status and Scheduling Conference regarding its participation in discovery being potentially rendered unnecessary should the Court conclude that the Commission does not have jurisdiction. As discussed during the Conference, the Division had not yet determined whether it would participate in a proceeding before the district court. If the Division chooses to participate, which Rocky Mountain Power believes is likely, its participation in discovery would not be rendered unnecessary by a decision of the Court reversing the Order. In addition, Division uncertainty should not prevent Rocky Mountain Power and HLP from proceeding with discovery that will be necessary and useful regardless of the forum in which their dispute is

---

consideration of the current briefing schedule before the Supreme Court.

[6] If the matter is heard by the district court, Rocky Mountain Power assumes the schedule would be longer even though written testimony would not be filed. In addition to preliminary pleading and motion practice before the district court, which has already been concluded before the Commission, normal court scheduling would not permit a trial for several months following completion of discovery.

resolved. Rocky Mountain Power will cooperate, and believes HLP will cooperate, with the Division in scheduling depositions and other discovery at times that accommodate the Division's schedule. Therefore, the Division's uncertainty should not be a basis for granting HLP's motion to stay.

IV. CONCLUSION

For the foregoing reasons, Rocky Mountain Power respectfully requests that the Commission deny the Motion and instead grant Rocky Mountain Power's Motion to Set Schedule. HLP's petition for review has not divested the Commission of jurisdiction because continued proceedings before the Commission will not conflict or interfere with the Court's review of the Order and the Commission retains jurisdiction over pending issues in this dispute regardless of the Court's ruling. Prompt resolution of the issues in this matter is necessary to enable the parties to fulfill their service obligations in a reasonable and efficient manner. It is also necessary to allow developments in Wasatch County located outside the municipal boundaries of members of HLP to proceed knowing the entity that is responsible to provide their electric service. The dispute needs to be resolved promptly regardless of the Court's decision, so it makes no sense for the matter to sit idle for several months, particularly where the Court may simply dismiss the petition without providing any guidance on the underlying jurisdictional issue.

DATED: April 27, 2009.

Respectfully submitted,

_____

Mark C. Moench
R. Jeff Richards
Rocky Mountain Power

Gregory B. Monson
Scott S. Newman
Stoel Rives LLP

Attorneys for Rocky Mountain Power

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **ROCKY MOUNTAIN POWER'S RESPONSE TO MOTION FOR STAY PENDING JUDICIAL REVIEW** to be served upon the following by email to the email addresses shown below (except as indicated where service was by regular U.S. Mail, first class postage prepaid, to the address shown) on April 27, 2009:

Joseph T. Dunbeck
Joseph A. Skinner
Dunbeck & Gordon
175 N. Main Street, Suite 102
Heber City, UT 84032
jtd@dunbeckgordonlaw.com
jas@dunbeckgordonlaw.com

Gary A. Dodge
Hatch, James & Dodge
10 West Broadway, Suite 400
Salt Lake City, UT 84101
gdodge@hjdlaw.com

Michael Ginsberg
Patricia E. Schmid
Assistant Attorney Generals
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111
mginsberg@utah.gov
pschmid@utah.gov

Paul H. Proctor
Assistant Attorney General
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111
pproctor@utah.gov

Thomas Low
Wasatch County Attorney
805 West 100 South
Heber City, UT 84032
tlow@co.wasatch.ut.us

Jodi S. Hoffman
Hoffman Law
P.O. Box 681333
Park City, UT 84068
jhoffman@xmission.com

Michael R. Christensen
Project Manager
JT Wasatch Commons, LC
1165 E. Wilmington Ave., Suite 275
Salt Lake City, UT 84106
mikec@jtcompany.com

Gerald E. Nielson
3737 Honeycut Road
Salt Lake City, UT 84106
(Service by Regular Mail)