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*Attorney for Dixie Escalante Rural Electric Association*

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of the Formal Complaint of	)	Docket No. 15-066-01
InSite Towers Development, LLC against	)	
Dixie-Escalante Rural Electric Association	)	
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**DIXIE ESCALANTE RURAL ELECTRIC ASSOCIATION’S  
ANSWER, MOTION TO DISMISS, AND FOR DECLARATORY RELIEF**

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Dixie Escalante Rural Electric Association (the “Cooperative”), pursuant to Utah Code Ann. §§ 63G-4-204(1) and Utah Admin. Code R746-100-3 and -4, provides its Answer to the formal complaint filed by InSite Towers Development, LLC (“InSite” or “Complaint”).

The Cooperative further Moves the Commission for Declaratory Relief that: (i) the Cooperative’s obligation to serve is satisfied by municipal electric service offered by the City of St. George to customers at the proposed location; or, in the alternative, that (ii) InSite is required to comply with the provisions of Dixie’s filed tariffs and electric service regulation in order to request and receive service to the desired location.

In addition, the Cooperative moves that the Complaint be dismissed in its entirety, with prejudice, because:

1. The Commission has no jurisdiction to review the contractual arrangement between Dixie and the City of St. George, for electric service to be provided by the City to customers outside the City's municipal boundary in accordance with Utah Code Section 10-8-14(5).

2. The transfer of electric utility assets from Dixie to St. George in 1981 is authorized by Utah law and does not violate any provision of Commission rules or regulations.

3. The Complaint seeks agency action concerning the reasonableness of rates or charges of Dixie but is not signed "by not less than 25 consumers or purchasers, or prospective consumers or purchasers" of Dixie as required pursuant to Utah Code Section 54-7-9(3).

4. The Complaint seeks advisory opinion and rulemaking as to the justness and/or reasonableness of future rates and charges that have not been calculated, determined nor assessed by Dixie.

5. The Complaint seeks relief that the Commission cannot grant, in that the Complaint (a) seeks to ignore or otherwise displace a Municipal Service Arrangement over which the Commission has no authority; (b) seeks to unlawfully force St. George to convey municipal utility assets from St. George City to Dixie; (c) seeks to force Dixie to make use of idle service facilities which were long ago removed and are no longer in existence; and/or (d) seeks in the alternative to force Dixie to install "stand alone" power and energy generation facilities in violation of Dixie's exclusive electric supply requirements contract with its wholesale electric supplier.

## I. PRELIMINARY MATTERS

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## II. BACKGROUND/FACTS

1. Dixie is an electric distribution cooperative, an organization that exists solely for the benefit of the member consumers who rely on the Cooperative to provide electric service in primarily rural, agricultural areas in the State of Utah and, to a limited extent, rural communities in Arizona.

2. As a rural electric cooperative, Dixie has no shareholders or investors. It is entirely governed by democratically selected directors elected from among its electric consumers.

3. Because Dixie has no shareholder/investor, it has no source of funds for constructing or extending utility facilities for new service requests except to collect the costs of line extension/construction from the new consumer requesting additional service(s), or else to charge the costs of such construction to its existing rural ratepayers.

4. Dixie has for many years had a contractual arrangement with the City of St. George whereby St. George City provides municipal electric service to customers on an unincorporated parcel of land adjacent to and surrounded by city-served property that was annexed many years ago into the City boundaries.

5. Under Utah law, the City of St. George is expressly authorized to enter into contractual arrangement with Dixie to provide for municipal electric service in unincorporated areas certificated to the Cooperative.

6. Unlike other public utilities, which must obtain Commission consent for such arrangements, Dixie is authorized to fashion and rely on such an arrangement with the City of St. George without Commission review. *Utah Code Section 10-8-14(5)(c)(iii)(B)*.

**A. Municipal Systems Are Authorized Providers of Electric Service in Unincorporated Areas Under Utah Law.**

7. Since at least 2014, with enactment of the provisions of Utah Code Section 10-8-14(5), cities which operate municipal electric systems are authorized to provide municipal electric service to customers located in certain areas outside municipal boundaries.

8. The provision of Section 10-8-14(5) does not envision duplicative, or “overlapping” obligation to provide electric service to new customers in targeted areas of unincorporated property.

9. The public utility “obligation to serve” as developed originally under common law has as its origin the concept that the utility’s *exclusive franchise* conveys monopolistic rights and powers which warrant a concomitant public obligation to exercise reasonable diligence to serve within an area where the exclusive franchise exists.

10. Where, as now provided by Utah law, the public utility’s *monopolistic franchise* is removed or materially altered by virtue of a City’s authorization and undertaking to provide electric service through municipal electric service in unincorporated areas, the traditional obligation to provide public utility service no longer

applies, but is modified and subject to the municipal service arrangement as expressly authorized pursuant to Section 10-8-14(5).

11. St. George City operates a municipal electric system to the property in question, as well as areas adjacent to the unincorporated property, and is specifically authorized to provide such service in lieu of Dixie.<sup>1</sup>

12. Utah Code Section 10-8-14(6) expressly provides that Dixie, although it is certificated to serve the area, does not assume or have an obligation to serve customers within that area once a municipal service arrangement exists, unless and until the municipality and the public utility instigate and complete a transfer of municipal electric facilities as provided in Section 10-2-421. Dixie has not instigated, and St. George City has not completed any such transfer of facilities serving the unincorporated property where InSite proposes to locate.

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1. The statutory regime enacted in 2014 clearly contemplates that municipal service arrangements are not intended to create overlapping duplication of the obligation to provide electric service. New consumers in those locations are not placed in a position to “pick and choose” their provider; rather, it is left for the utility and the municipality to agree, as between themselves, which electric service will apply in a given area – either public utility service or municipal electric service. For example, once a public utility notifies the city providing service in an unincorporated area that it has installed facilities to serve and wishes to resume public utility service to the area, the city must transfer service to the public utility, and the traditional public utility monopoly is once again reinstated. *Utah Code Section 10-8-14(5)(c)(ii)*. Importantly, Utah Code Section 10-8-14(5)(c)(ii) does not mandate nor require a public utility to install facilities to serve customers in an area of its certificated territory where a municipal system has undertaken to provide service outside the City’s boundary. Indeed, it is up to the public utility, if it so chooses, to refrain from notifying the City and triggering an obligation to transfer service from municipal service to public utility service (even if public utility facilities are eventually installed and could be used to provide public utility service in the area). *Id.*

13. Nothing in Section 10-8-14(6) requires the public utility and/or the city to commence or consummate such a transfer at the insistence of either a customer or the Commission.

**B. St. George City Provides Municipal Electric Service to the Unincorporated Property.**

14. Dixie has a longstanding agreement with St. George City pursuant to which the City serves customers on the isolated parcel of unincorporated property where InSite intends to locate (the “Municipal Service Arrangement”).

15. InSite is considering installing a cellular data tower at some time in the future on a portion of land in Washington County owned by members of a Gubler Family (the “Vacant Gubler Property” or “Vacant Property”). The Vacant Gubler Property is part of a parcel of property owned by the same or related persons known as the “Gubler Ranch.”

16. The Vacant Gubler Property consists of a narrow parcel of land extending as a peninsula into the municipal boundaries of the City of St. George. It extends from open BLM land on its western boundary, which BLM land is not within Dixie’s certificated service area, and is surrounded on the remaining sides by property that has been annexed into the City.

17. A map depicting the Vacant Property, relative to St. George City municipal service area and the Dixie franchise area within the City is attached as Exhibit “A”.

18. Dixie has never furnished electric service to any part of the Vacant Gubler Property.

19. Dixie once provided service to a single residential meter on the opposite side of the Santa Clara river, at the Gubler Ranch Property.

20. The City of St. George has provided all electric service to the Gubler Property since about 1981.

21. St. George City remains willing and will continue to provide the Gubler Ranch service, and it is willing to add additional service connections on the Vacant Gubler Property, provided the property owner complies with the City's conditions for multiple municipal service connections, apparently including a requirement to apply for annexation of the Vacant Property.

22. InSite, as lessee of the property owner(s), objects to the conditions and/or restrictions which St. George has placed on adding more service connections at the location.

23. InSite has commenced legal action against St. George as well as Dixie seeking, among other things, injunctive relief to mandate the City to provide municipal electric service to additional service connection(s) for the use of InSite and its tenant(s).

24. Dixie does not take a position whether the City may lawfully require or restrict addition(s) to the municipal services provided to the property in the manner that InSite alleges.

**C. Dixie Cannot Serve the Property Without Constructing New Facilities.**

25. As of 1981, Dixie provided service to at most a small number of retail member loads remaining on yet-to-be annexed unincorporated property along the northwest quadrant of the current City boundaries, located near the Gubler Property.

26. In 1981, in order to furnish service to the handful of Cooperative meters that remained in that area, Dixie operated a single radial distribution feeder line which extended a long distance to a substation located at Dixie's facilities over 5 miles away, on the opposite (eastern) side of I-15 and south of Brigham Road (which is in the southern portion of St. George City).

27. As of 1981 this single feeder line served approximately two (2) residential services (one of which is the Gubler Ranch home) and perhaps three (3) water pumps along an area several miles end-to-end, which at that time was mostly devoid of developed residential, commercial, or other electric load.

28. About 40 or 50 years ago, the City of St. George began annexing virtually all parcels of land in the vicinity which fell within Dixie certificated territory, including all properties surrounding what is now the Vacant Gubler Property and the Gubler Ranch.

29. As the City did so, it aggressively dismantled Dixie service equipment without notice to or approval from Dixie, interrupted electric service to existing Dixie members, and began service to all customers both within and outside City boundaries that had been served up to that time by Dixie.

30. In approximately 1980, Dixie commenced legal action against the City to prevent further incursion into Dixie's service territory, seek reparation and equitable relief on account of the City's actions.

31. At that time, the scope and limit of municipalities to provide electric service to customers outside the boundaries of the municipality were not well defined under Utah law.



32. In 1981 St. George City and Dixie agreed to settle the litigation over competing efforts to provide electric service to all areas that fell within the City's future annexation plan(s).

33. As agreed between the two parties to the litigation, the City indicated it intended to completely annex and thereby would displace all of Dixie's current and future electric service to any customers in areas located generally north of the Virgin River (which essentially bisects the City approximately 5 miles to the south of the Gubler Property) (the "Municipal Service Area").

34. The few remaining Cooperative members in the Municipal Service Area (comprising perhaps 2 families, and 4 or 6 meters in total) agreed or otherwise accepted municipal electric service from the City; thereafter, all property owned by Cooperative Members in the Municipal Service Area had long ago been annexed by the City, with the sole remaining exception of the Gubler Property.<sup>2</sup>

35. For over 35 years, the property owners located on the Gubler Ranch residence have accepted and received electric service from the City.

36. Only a portion of the 1981 arrangement between the City and Dixie was formally reduced to a written agreement. That portion, which effected the transfer of Dixie's physical distribution facilities in the City (which generally were distribution equipment designed and operated at distribution voltage, and referred to as the

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2. Since 1981, Dixie's service, and all of its utility facilities, have been restricted to areas (the "Franchised Area") located generally to the south of the Virgin River or in the Bloomington area at the southern portion of St. George City, a distance of some 5 or six miles away from the Vacant Property.

“Transferred Assets”) is memorialized in a single-page agreement (the “1981 Agreement”).<sup>3</sup>

37. The City disconnected the Transferred Assets from Dixie’s feeder line, constructed its own municipal distribution feeder system into the area, and the Dixie feeder line fell completely idle.

38. The Dixie feeder line and associated transformers and other equipment once located to serve the northern areas of the City no longer served any Cooperative load and all those facilities were dismantled and removed shortly after 1981.

39. The distribution facilities once used to serve the unincorporated property to the north of the Virgin River have all been removed; no such facilities remain.

40. St. George City has constructed a “loop fed” system of municipal electric distribution facilities to serve the area; the system is fed from different location(s) in different direction(s) and different line voltage than Dixie’s feeder line, and none of the City’s municipal systems rely on or make use of any distribution assets which were once owned by Dixie.

41. The Complaint includes as an Exhibit 1, aerial views of the Gubler Property depicting electric utility facilities in and around the proposed location of InSite’s project. All electric utility facilities depicted in Exhibit 1 to the Complaint are municipal

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3. The 1981 Agreement was only a part of the contractual arrangement between Dixie and St George. For example, pursuant to the terms of the Municipal Service Arrangement, the City has agreed to and does provide electric service into the Gubler Property which lies east of the Santa Clara river occupied by the Gubler Ranch – this despite the fact that the single-page 1981 Agreement is completely silent as to that aspect of the contractual Service Arrangement.

electric system assets owned by St. George City. Those facilities are not nor ever were interconnected to any of Dixie's utility assets.

42. At the time of the 1981 Agreement, all of Dixie's remaining agricultural member services located in the area north of the Virgin River were either annexed, in the process of being annexed, or clearly going to be annexed into the City; indeed, those areas are virtually all now part of the municipal boundary of St. George.

43. St. George has by separate agreement and ordinance, granted Dixie the right to serve those members of the Cooperative living within the portions of the City located well away from the properties in question, in the southernmost portions of the City lying south of the Virgin River and in the Bloomington area (the "Franchised Area").

44. The nearest point of the Dixie Franchised Area is approximately 5 miles away from the Gubler Vacant Property or the Gubler Ranch. It is separated from serving the Gubler Property by both State (SITLA) lands, and by BLM Property.

45. Dixie does not own, and on information and belief, could not acquire permission from the City to duplicate municipal utility rights-of-way or permits to construct distribution feeder systems within the municipal rights-of-way in the north part of the City where the City has taken over all electric services.

46. Based on Dixie's experience in constructing facilities located in other parts of the surrounding area, obtaining necessary permits and rights-of-ways to enter onto SITLA and/or BLM property in order to interconnect the Gubler Property with Dixie's closest utility facilities would take years to accomplish.

47. Under the terms of Dixie's tariff and electric service regulations as filed with the Commission, InSite must furnish Dixie with the necessary permits and rights of way to construct facilities to serve the requested location.

48. Undertaking to construct facilities to interconnect the Gubler Properties with Dixie's closest existing utility facilities, even assuming InSite furnishes the necessary permits/rights to cross the public lands necessary to do so, would involve an additional acquisition/construction expense that could easily exceed \$375,000.00, an amount that would constitute a sizeable portion of the total annual margin (or "net income") of Dixie in a typical year.

49. The City of St. George maintains and operates municipal electric services directly on and adjacent to customers on the Gubler Ranch, as well as extensive, well developed municipal electric system on properties immediately adjacent to the Gubler Vacant Property on both sides of the Santa Clara river.

50. InSite asserts that Dixie could have reserved or kept its facilities that were dedicated to provide service to the area of the Gubler Property notwithstanding the settlement with St. George City in 1981.

51. InSite fails to allege, and Dixie asserts it would be unable to demonstrate in any event, that the City of St. George would have agreed to allow Dixie to retain any ownership or similar interest in the Transferred Assets in 1981.

52. The effect of Utah law, Section 10-8-14(5)(d), is such that the Commission may not alter or impose any condition to the Municipal Service Arrangement unless the City is willing to approve and accept such condition(s).

53. InSite fails to allege that, in absence of the 1981 settlement and the Municipal Service Arrangement, Dixie would have the ability to force the City to refrain from taking the cooperative electric loads away from Dixie, as the City in fact has done for the past 35 years.

54. Prior to 1981, the line Dixie used to feed the area north of the Virgin River extended over 5 miles partly underground, traversed I-15 and crossed the Virgin River to tie into a substation on the southeast quadrant of what has now been incorporated into St. George City (the “Idle Feeder Line”).

55. Dixie would, in all events, not have been able to retain any material portion of the Transferred Assets or other facilities located outside the Dixie Franchise Area for a continuous period of over 35 years in a de-energized and idle condition without seriously violating a reasonable duty of diligence and care.

56. Idle facilities extended through and across such an extended distance and over such an extended number of decades would pose serious fire risks, risks of public safety and environmental concerns, among other things.

57. Dixie has filed with the Commission its electric service regulations, including Service Regulation No. 10 which specifically provides that the Cooperative retains discretion to remove idle service facilities:

Idle Services: For services determined to be idle, Association may exercise its option to remove said service and use the materials elsewhere. Should the consumer require service at that location at some future date, he will be given service according to the provisions of this policy under the applicable classification as determined by the Association.

A copy of the *Electric Service Regulations* is attached as *Exhibit “B”*.

58. The policy referenced in Dixie's filed Service Regulation No. 10 applies to all Cooperative member service, and further requires, among other things, that new members requesting service to a location not currently served must furnish all rights-of-way necessary for construction, and pay the costs of construction to locate (or in the case of idle services removed under the Regulation, to once again locate) service to the requested location.

59. As of 1981 and for over 35 years since, there remained no Cooperative member loads whatsoever which receive any energy from any portion of what was once the Idle Feeder Line.

60. In the years subsequent to 1981, the Idle Feeder Line was removed pursuant to the Idle Services provision of Dixie's Commission-filed Electric Service Regulation No. 10 and/or demolished by the City as it does not use the former Cooperative facilities to distribute electricity to municipal service customers on the unincorporated Gubler Property.

61. No portion of the Idle Feeder Line remains.

62. If Dixie were to effectuate a transfer of service from the City pursuant to the provision of Section 10-8-14(5)(d) (and assuming the City effectuated such a transfer to Dixie), Dixie would have to install utility facilities that interconnect with Dixie's system at an entirely different location within Dixie's electric distribution system than the former point of interconnection that once existed to supply the non-existent Idle Feeder Line.

63. The line which Dixie would have to construct (the "New Feeder Line") to reach this single parcel of isolated unincorporated property within the northern part of the

City would duplicate and, in places compete with existing municipal electric distribution lines and equipment.

64. The New Feeder Line, if constructed, would burden public rights-of-way and create unsightly, undesirable and unwanted duplicative structures and equipment in and around portions of the City and across public lands.

65. The New Feeder Line, if constructed, would be constructed to Dixie's system design criteria, which is different from and not easily compatible with the municipal electric distribution system constructed and operated by St. George City.

66. None of the City's service to the City-served unincorporated parcel is or ever were supplied or served by the Idle Feeder Line facilities; the City serves the loads using an entirely different, completely City owned distribution system.

67. Even had any portions of the Idle Feeder Line survived for 35 years, the already-aged materials and condition of those facilities would in any event render those facilities unsafe and/or incapable of re-energizing and providing service to any portion of the Vacant Property when or if InSite were to request such service in the future.

68. The Idle Feeder Line was located on property that has, over the past 35 years, been developed and is now occupied by residential, commercial, municipal buildings, shopping structures, etc. Much of the Idle Feeder Line (even if Dixie had attempted to preserve it in idle state) would have been required to have been dismantled and removed as this development (all within the City of St. George) occurred over the years. All such property has been annexed and is now incorporated in the City of St. George.

69. The only way for Dixie to provide future service to the Vacant Property would be by construction of new facilities; there could be no way to utilize the Idle Feeder Line in order to avoid new construction of a line to interconnect with Dixie's nearest operable facilities even if Dixie had attempted to retain ownership of such facilities over the years.

**D. The 1981 Transfer of Dixie Utility Assets.**

70. The total book value of Transferred Assets at the time of the 1981 transfer from Dixie to St. George City did not exceed \$65,000. This amount is well below \$10 million and also much less than 5% of Dixie's total utility plant and equipment book value at the time the transfer took place.

71. As a result, no notice was required nor approval necessary from the Commission in order to complete the 1981 Agreement. *Commission Rule R746-401.*

**III. MOTION FOR DECLARATORY RELIEF**

72. Dixie is entitled to rely on the Municipal Service Arrangement as authorized by Utah law, Section 10-8-14(5).

73. Dixie is not required to duplicate public utility service to customers in areas covered by the Municipal Service Arrangement with St. George City under Utah law, Section 10-8-14(5).

74. Pursuant to Utah law, and in accordance with the Municipal Service Arrangement, the City of St. George may impose any conditions, restrictions, and/or rules for municipal electric service(s) in the unincorporated area as are consistent with its general municipal powers and/or which do not otherwise contravene the provisions of Utah Code Section 10-8-14(7).



75. InSite has asserted in the Complaint as well as in its state court complaint and proceedings that InSite may choose at its option to force *either* St. George to provide municipal electric service to its tower project *or* demand public utility service from Dixie. (a copy of InSite’s state court complaint is attached as Exhibit “C”).

76. Dixie is entitled to declaratory relief that InSite may not demand public utility electric service from Dixie where St. George City furnishes municipal electric service to the unincorporated property on which its proposed tower will be situated.

77. In the alternative, and in the event that a court of competent jurisdiction determines that the City of St. George is not authorized under Utah law to provide municipal service to the unincorporated property on which the InSite tower is proposed, Dixie is entitled to declaratory relief that InSite must satisfy the provisions of Dixie’s filed tariff, including electric service regulation No. 10 as a condition of requesting extension of facilities from Dixie’s electric utility facilities to serve the desired location.

78. In the event that a court of competent jurisdiction determines that the City of St. George is not authorized under Utah law to provide municipal service to the unincorporated property on which the InSite tower is proposed, Dixie is entitled to declaratory relief that InSite has failed to satisfy the requirement of Dixie’s filed electric service regulation until InSite has, among other things: (i) furnished to Dixie suitable permits and rights-of-way to construct extension of utility facilities from the nearest compatible location designated by Dixie for interconnection to Dixie’s existing electric facilities; and (ii) paid the reasonable construction deposit to Dixie for costs necessary to complete the construction of line extension facilities to the proposed InSite tower location.

#### IV. MOTION TO DISMISS

79. The Cooperative moves under Utah Rules of Civil Procedure, Rule 12(b) for an Order dismissing the Complaint. In support of this motion, the Cooperative provides a number of bases, each addressed below.

##### A. SUBJECT MATTER JURISDICTION.

###### a. **The Commission Has No Authority to Regulate or Review the Municipal Service Arrangement between Dixie and St. George.**

80. The Complaint alleges that Dixie violated a duty owed as a public utility by entering into the larger set of contractual arrangements and agreements making up the Municipal Service Arrangement with St. George City to provide for municipal electric service to customers north of the Virgin River.

81. The Commission only has the power specifically granted to it by the legislature. *Williams v. Public Service Comm'n*, 754 P.2d 41, 50 (Utah 1988) (internal citations omitted).

82. With respect to an agreement between Dixie and St. George City to serve prospective, or “new” customers on property located outside the municipal boundaries, such as InSite, Utah law has developed substantially since 1981; Utah statute expressly now provides that no Commission review of such agreements is authorized or required if the public utility involved is an electric distribution cooperative like Dixie. Utah Code Section 10-8-14(5)(C)(iii)(B).

83. InSite acknowledges, and indeed in its state court action filed simultaneous with this Complaint, it affirmatively asserts that there exists a Municipal Service Arrangement between Dixie and St. George City.

84. InSite alleges in State Court that the City has undertaken to, and it must provide service to the unincorporated Gubler property.

85. InSite has made formal application to the City for municipal electric service as contemplated pursuant to Utah Code Section 10-8-14(5).

86. The existence of agreements between Dixie and St. George, which constitute a Municipal Service Arrangement, is undeniable. InSite does not allege otherwise.

87. It is equally undeniable that the Municipal Service Agreement includes contractual arrangements with the City, which extend beyond the written terms of the single-page 1981 Agreement. The uncontested record of over 35 years during which Insight's lessor(s) have received and accepted, and the City of St. George has continuously furnished, municipal electric service on the unincorporated Gubler property, provides ample evidence, given the written agreement's silence on that subject.

88. Dixie agrees that Dixie and St. George have a contractual arrangement, part of which is memorialized as the 1981 Agreement, but which, in its totality, comprises the Municipal Service Arrangement requiring St. George City to offer to provide electric service to the Gubler properties.

89. The conditions and terms which the City may lawfully place as precondition to extensions or expansions of service on the Gubler property under the Municipal Arrangement are largely left to the appropriate exercise of the City's

municipal powers under applicable Utah law, and are not subject to review by the Commission.<sup>4</sup>

90. If InSite disagrees or feels it is injured unjustly by conditions being placed on the availability of extended or additional service connections to the municipal electric service by the City of St. George, the appropriate legal remedy is in State court, which InSite is indeed pursuing. The Commission cannot undo, overturn, ignore, or alter the Municipal Arrangement because InSite disagrees with terms of service being offered by St. George City. The Commission lacks authority over the subject matter of the Municipal Service Arrangement.

91. Although not all aspects of the Municipal Arrangement have been committed to written agreement, the 1981 Agreement nevertheless satisfies the requirement of Utah law that, in order for the City to proceed under such a Municipal Arrangement, the electric corporation and the City must simply “enter into a written agreement.” *Utah Code Section 10-8-14(5)*.

92. Under the statute, there exists no requirement that the written agreement contain all the terms and conditions of the Municipal Arrangement, and there is no restriction on such terms or conditions that might be included. *Id.* In all events, Utah law does not grant the Commission jurisdiction to regulate, review, or adjudicate the provisions of the Municipal Arrangement with Dixie. *Utah Code Section 10-8-14(5)(c)(iii)(B)*, *see also subsection (d)*.

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<sup>4</sup> The provisions of Section 10-8-14(7) set forth standards by which the City must abide in providing service to consumers in unincorporated areas. Whether or not the City has over-reached in attempting to mandate its City Service Conditions is an issue for the courts, not the Commission to decide.

93. Because Dixie is an electric cooperative that meets the requirements of Subsection 54-7-12(7), Utah Code Section 10-8-14(5)(c)(iii)(B) expressly authorizes a Municipal Arrangement with the City of St. George to be reviewed and authorized by Dixie's governing board, and not by the Commission. Likewise, Section 54-4-40, only authorizes the Commission to review such agreements "if the electrical corporation is required to obtain commission approval in accordance with Section 10-8-14..." which Dixie is not required to do. *Id.*

94. A finding by the Commission to the effect that the Municipal Service Arrangement is invalid, that it does not exist or is unenforceable either in part or in whole, would constitute, unavoidably, a determination that the City has no legal authority to provide service to any portion of the un-incorporated area because, at least since 2014, absent an effective agreement, the Municipality may not serve outside its boundaries under Utah law. Utah Code Section 10-8-14(d).

95. An attempt by the Commission to adjudicate, limit, or regulate the municipal services provided by the City of St. George would be extra-jurisdictional. *Heber Light & Power v. Utah Public Service Comm'n*, 231 P.3d 1203 (Utah 2010).

96. The reasonableness, legality, and/or enforceability of the terms and conditions of the Municipal Arrangement, *and even the determination of its existence and adjudication of its scope and meaning*, are all beyond the jurisdiction of the Commission. Utah Code Section 10-8-14(5)(c)(iii)(B), and *Heber Light & Power v. Utah Public Service Comm'n*, 231 P.3d 1203 (Utah 2010).

97. Insight's complaint must be dismissed because it is entirely premised on an erroneous assertion of Utah law, namely, that the Commission has authority to review,

adjudicate, or regulate the Municipal Arrangement between Dixie and St. George City. The Commission has no such authority.

**b. The 1981 Asset Transfer Was Lawful.**

98. The Complaint alleges that the Cooperative should not have conveyed the Transferred Assets to the City of St. George without first seeking Commission approval for the 1981 Agreement.

99. InSite fails to allege facts that state any claim against Dixie for violation of any law, regulation, or requirement of the Commission.

100. InSite does not allege in its factual allegations that: (i) the Transferred Facilities conveyed to St. George were used or useful in serving any Cooperative load after the City commenced municipal service to all such loads; or (ii) that the utility assets conveyed as part of the Transferred Assets meet the necessary threshold to require Commission review/approval.

101. With respect to InSite's claim, the Cooperative responds that the very limited transfer of utility assets involved in the transfer from Dixie to St. George pursuant to the 1981 Agreement is authorized by Utah law.

102. Commission Rules expressly contemplate utility asset transfers of the size involved in the 1981 Agreement without notifying the Commission or obtaining Commission consent.

103. Rule 746-401-3 provides that no report or other filing is required with the Commission for the sale, transfer or other disposition of utility assets "having a book cost allocated in Utah in excess of the lesser of ten million dollars or five percent of gross investment in utility plant devoted to Utah service".... Utah Admin. R. 746-401-3(B).

104. At the time of the 1981 transfer to St. George, the Transferred Assets had a book cost of no greater than \$65,000 and Dixie's gross investment in utility plant at the time (virtually all devoted to Utah service) exceeded \$20 million. The conveyance of Transferred Assets involved only about ten percent of the minimum threshold value required to trigger Commission reporting, review, or approval.

105. Under the provisions of Utah Code Section 10-2-421, the City of St. George had not only the authority, but the obligation to acquire facilities used by Dixie for, and to obtain Dixie's consent to serve, the annexed areas in the northern portion of the City. The Utah Supreme Court in *Strawberry Elec. Serv. Dist. v. Spanish Fork* further held that such transfer of those facilities to the City, as a precondition to the City's furnishing electric service to the annexed areas, is already inherently approved and implicitly *part of* Dixie's Certificate of Convenience and Necessity:

[Utah Code Section] 10-2-401(4) provides: Areas annexed to municipalities ... should receive the services provided by the annexing municipality, subject to Section [10-2-421], as soon as possible following the annexation....This section, and section [10-2-421] by reference, must be construed *as a term of Strawberry Electric's certificate of public convenience and necessity.*

918 P.2d 870, 878 (Utah 1996)(emphasis added, code references updated to reflect current code sections).

106. Utah Code Section 10-2-421, cited by the Court in the *Strawberry* decision and incorporated by implication into Dixie's Certificate of Convenience and Necessity, is

the mechanism whereby the City obtains the transfer and pays the value for those facilities used to serve the areas being taken over from the utility.<sup>5</sup>

107. InSite does not reference, and there does not appear to exist, any express authority granted to the Commission under Section 10-2-421 to review the agreement reached between a public utility and a municipality for fixing and conveying the transfer of facilities used to furnish service to areas when the service is taken over by the City. No such provision exists under Utah law.

108. As the Court has repeated on numerous occasions:

“ ‘It is well established that the Commission has no inherent regulatory powers other than those expressly granted or clearly implied by statute.’ ” *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995) (quoting *Mountain States Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 754 P.2d 928, 930 (Utah 1988)). “When a ‘specific power is conferred by statute upon a ... commission with limited powers, the powers are limited to such as are specifically mentioned.’ ” *Id.* (quoting *Union Pac. R.R. v. Pub. Serv. Comm'n*, 103 Utah 186, 134 P.2d 469, 474 (1943)). “Accordingly, to ensure that the administrative powers of the [Commission] are not overextended, any reasonable doubt of the existence of any power must be resolved against the exercise thereof.” *Id.* (internal quotation marks omitted).

*Heber Power & Light v. Utah Public Serv. Comm'n*, 231 P.3d 1203 (Utah 2010).

109. The 1981 transfer of the Transferred Assets involved a transfer of substantial portions of the Idle Feeder Line facilities that had once been used by Dixie to distribute electricity to the Cooperative loads it served in the northwest quadrant of the St. George City area and/or to serve the Gubler Ranch home before that service was taken over by St. George City.

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<sup>5</sup> There may, in specific circumstances, be factual questions as to the scope of facilities dedicated to serve annexed and/or city served unincorporated loads; however, those factual questions did not arise in the context of the 1981 Agreement since the City took over and displaced all of Dixie’s member loads in that portion of the City and unincorporated properties north of the Virgin River.



110. The Idle Feeder Line was dismantled and is not used to serve any load in the area.

111. Service to the area of the Vacant Property is furnished by St. George over the City's wholly owned facilities fed from an entirely different direction, using different system configuration, voltages, and facilities than Dixie ever used.

112. Any objection to the transfer of Dixie facilities under the 1981 Agreement has long since been barred by the applicable Utah statute of limitation and the transfer of those facilities under the agreement is now in repose. Utah Code Section 78B-2-307(3).

**B. FAILURE TO STATE A CLAIM WITH RESPECT TO REFUSAL TO SERVE.**

113. The Complaint fails to establish that Dixie has denied service to InSite. InSite has not made application for service from Dixie.

114. Although the Complaint states that in March 2014 "InSite contacted Dixie Power, *seeking electric service from Dixie Power* for the Tower Site," the foregoing allegation is mostly a product of careful pleading; it does not allege that InSite ever formally executed the required application for cooperative membership, obligating itself to post the required construction deposit for Dixie to conduct engineering and other efforts necessary to undertake to extend facilities to provide such service.

115. InSite alleges on one hand "Dixie Power declined to provide such service,..." but also acknowledges that, on the contrary, "Dixie Power has indicated that, if it were to provide service to InSite Tower, it would need to install connecting facilities from its existing facilities and that InSite would be required to pay for all such new ... facilities."

116. The Complaint evidences on its face that Dixie indicated it would provide service subject to: (i) the terms and conditions of the Municipal Arrangement with St. George City which allow the City, and not Dixie, to act as the service provider at that location; and (ii) InSite must satisfy all conditions to service set forth in Dixie's tariff provisions including filed electric service regulations for line extension requests.

117. The Complaint fails to allege the satisfaction of either foregoing condition.

118. InSite does not allege, and indeed it could not maintain, that Utah law in any way prohibits an agreement between Dixie, and the City of St. George to allow the City to provide electric service at that location in lieu of Dixie. As previously noted, Utah law expressly authorizes such an arrangement. *Utah Code Section 10-8-14(5)*.

119. InSite does not allege, and the law does not require, that the City, in serving outside its municipal boundaries pursuant to Utah Code Section 10-8-14(5) must: accept the same regulatory limitations as would apply to a public utility; limit the rates, terms, or conditions of service only to those which the displaced public utility could have required; or conform to any traditional public utility standards.

120. Utah law contemplates that the City will continue to provide the service to the area until the public utility chooses to once again provide service by extending facilities to serve the location, and even then, only *after* the City consummates a transfer of municipal facilities to the public utility pursuant to Utah law. *Utah Code Section 10-8-14(5)(c)(ii) and 10-8-14(6)*.<sup>6</sup>

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<sup>6</sup> It is conceivable that InSite may theorize that the City's service under Municipal Code Section 10-8-14 may *co-exist* with a duty of the public utility to extend or maintain Cooperative facilities at a customer's request, and thereby displace the City service. Apart from raising disturbing public policy and public interest concerns, that question is not presented and cannot be addressed on the facts set forth in the Complaint; InSite has

121. InSite attempts to avoid the Commission's lack of jurisdiction over the terms and conditions of the Municipal Arrangement by characterizing Dixie's decision to enter into the Municipal Arrangement as abandonment of its service territory. Utah law clearly does not prohibit Dixie from making such an agreement; and Utah statute expressly provides no Commission approval or review is authorized or required to convey and transfer the relatively small amount of utility assets involved in the 1981 transfer. *Utah Code Section 10-8-14(5)(c)(iii)(B)*.

**C. THE COMMISSION LACKS AUTHORITY TO GRANT THE RELIEF REQUESTED BY THE COMPLAINT.**

**a. The Complaint is Facially Deficient Under Utah Law; the Commission Cannot rule on the reasonableness of future construction charges that have never been quantified, calculated or assessed.**

122. Dixie is not free to disregard or deviate from its filed tariff charges and the conditions which must be satisfied by InSite in order to process a request for service line extension.

123. Under Dixie's filed electric service regulation, and by extension, Dixie's tariff, InSite must furnish all rights of way necessary to provide and furnish service to its location. InSite has not offered or undertaken to do so.

124. InSite asks the Commission to declare Dixie's charges for constructing new facilities to reach the Vacant Property to be unjust and/or unreasonable.

125. InSite's Complaint must be dismissed because it requests agency action concerning the reasonableness of rates and charges set forth in Dixie's tariff/electric service regulations, but the request is not signed by "not less than 25 consumers or

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*not* requested Dixie to extend its facilities and thus displace the City's existing service on the adjacent portions of unincorporated property. Indeed, InSite has formally requested service from St. George City and *not* from Dixie.

purchasers, or prospective consumers or purchasers” of electric service from Dixie. *Utah Code Section 54-7-9(3)*.

126. In any event, Dixie has not determined or undertaken to assess any such charge to InSite. The Commission has nothing before it on which to evaluate the amount or reasonableness of any such potential future charge(s), nor does Dixie have any basis to defend the amount(s) of such charges unless and until it is requested by formal application and request to provide service and, thereafter, makes a determination of the appropriate charge(s) under its tariff.

127. As noted above, both the City of St. George and Dixie are entitled first to apply and enforce the provisions of the Municipal Service Arrangement, subject only to the limitations that a court of competent jurisdiction may find to exist, on the City’s ability to place conditions and/or restrictions on the quantity of service connections, or other requests for service extensions on the unincorporated Gubler property.

128. The Commission has no authority to exempt or exclude a particular prospective consumer from provisions of a filed tariff and/or electric service regulation.

129. The Commission may review rates and charges that are asserted to be unjust or unreasonable, but InSite’s Complaint does not establish facts on which any such review could take place.

130. Dixie has not determined, assessed, nor collected any charge of any type against InSite.

**b. The Commission Cannot Order Dixie to Retain, Maintain, or Reconstruct Idle Facilities for 35 or More Years.**

131. InSite asks the Commission declare and enjoin Dixie as follows:

- a. That it be “placed in the same position of receiving electric service at just and reasonable rates” as it would be in if Dixie Power had not transferred the limited facilities pursuant to the 1981 Agreement;
- b. That Dixie be required “to obtain... access to ... facilities near the Tower Site” that would be suitable to provide service; or
- c. That Dixie install facilities “at or near the Tower Site” to provide service to the Site; and in all events,
- d. That Dixie be enjoined from imposing any charge for installation of facilities as a condition of receiving service to the Tower Site.

132. The Commission cannot order or grant the requested relief to InSite because doing so will result in unjust and unreasonable rates and charges to Dixie’s other members contrary to law. *Utah Code Section 54-3-1.*

133. Dixie is a member-owned electric distribution cooperative; costs incurred in constructing new facilities to the Vacant Property cannot be avoided since all existing facilities of Dixie pre-dating 1981 and located anywhere in the vicinity were long ago removed as Idle Service pursuant to Dixie’s filed tariff/electric service regulation.

134. Enjoining Dixie from collecting costs for new construction from InSite necessarily and unavoidable results in collecting those costs from Dixie’s remaining cooperative members – there is no shareholder, financial owner or investor to provide any alternative source of these funds.

135. InSite posits that Dixie could, indeed should have been required to, keep, preserve, and maintain the Idle Feeder Line for 35 years so that should InSite or another

unknown and unforeseen future customer desire, Dixie would be in a more economical position to provide service once again to the Gubler Property.

136. The 35 year cost and effort of maintaining and preserving an entirely Idle Service and the extensive facilities of the Idle Feeder Line would have been borne by the remaining rural member consumers of Dixie.

137. The cost of relocating virtually every segment of the Idle Feeder Line as the City permitted and developers constructed new commercial shopping centers, urban residential development, county municipal office complex, and other urban development that now stands on substantially all of the former path occupied for the Idle Feeder Line would have been borne by the remaining member consumers of Dixie.

138. The cost of replacing the conduit, poles, and transformer equipment of the Idle Feeder Line, already dated and worn at the time all Cooperative services formerly on that line came idle in or prior to 1981, and the cost to construct new conforming equipment, materials, and structures in the place thereof would have been borne entirely by the remaining member consumers of Dixie over 35 years of continuous idleness on all portions of that Idle Feeder Line.

139. Subsidizing InSite's cellular tower project by adding the costs of new construction to serve the Vacant Property and collecting those costs from existing members who neither benefit from nor request any such new construction results in rates and charges to Dixie's remaining customers which are neither just nor reasonable as required by Utah law. The Commission cannot order such relief for the unfair and inequitable benefit of one single prospective customer – InSite.

140. The Commission cannot “place InSite in the same position” of receiving service in 1981 since InSite did not receive any such service at that time.

141. The Commission cannot “place InSite in the same position” of receiving service by re-energizing the Idle Feeder Line because it was long ago removed and decommissioned in compliance with Dixie’s filed Idle Services provision of the Electric Service Regulation, and could not in any event be used even had it never been removed.

142. The Commission cannot mandate that Dixie “acquire” facilities located near the Vacant Property. Such “nearby” facilities undoubtedly can only refer to those municipal electric facilities owned by St. George City; it is beyond the authority of the Commission to mandate the City or Dixie to enter into an agreement to convey interest in municipal owned facilities.

**c. The Commission Cannot Order Dixie to Violate the Terms of its All Requirements Contract for Electric Power**

143. InSite alternatively asserts that Dixie should install “stand alone generation” somewhere on its system (perhaps on the Gubler Property) to reduce the cost of potential line extension to serve the InSite facility.

144. Dixie is a rural electric cooperative served under the terms of an exclusive all-requirements contract for electric power and energy from Deseret Generation & Transmission Co-operative (“Deseret”). The exclusive all-requirements contract between Dixie and Deseret was filed with, and the Commission approved the transaction by Report and Order dated July 3, 1996, in Docket No. 96-506-01.

145. Under the terms of Dixie’s All Requirements Contract, Dixie is prohibited from acquiring any source of electric generating power or energy except from Deseret or from specified sources set forth in the All Requirements Contract. The Commission

lacks authority to order Dixie to disregard or violate the terms of its approved All Requirements Contract with Deseret.

146. As explained above, the Commission has no authority to grant the relief which InSite now requests, and for that reason the Complaint must be dismissed.

**CONCLUSION and PRAYER FOR DECLARATORY RELIEF**

WHEREFORE having fully answered Complainant's complaint and finding no violation of law, Commission rules, or Cooperative tariffs to base an award of the relief requested, the Cooperative prays for the dismissal of the Complaint with prejudice.

IN ADDITION, AND PURSUANT to the facts and reasons stated above, the Cooperative respectfully requests that the Utah Public Service Commission enter an order providing the declaratory relief set forth in ¶¶ 72-78 above.

Dated this 7th day of May 2015.

Respectfully submitted,

/s/ David F. Crabtree  
David F. Crabtree  
*Attorney for Dixie Escalante Rural  
Electric Association*

*Exhibit "A" – Map of Service Areas*  
*Exhibit "B" – Dixie Electric Service Regulations*  
*Exhibit "C" – InSite's State Court Complaint*



## CERTIFICATE OF SERVICE

I CERTIFY that on the 7th day of May, 2015, a true and correct copy of the foregoing was served upon the following as indicated below:

By Electronic-Mail:

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