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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,)	RESPONSE OF THE UTAH DIVISION
Inc.)	OF PUBLIC UTILITIES TO DIXIE
)	ESCALANTE’S MOTION TO DISMISS
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Pursuant to Utah Admin. Code R746-100-4 promulgated by the Public Service Commission of Utah (Commission), the Utah Division of Public Utilities (Division) files its Response to Dixie Escalante Rural Electric Association, Inc.’s (Dixie) Motion to Dismiss (Motion) filed May 7, 2015. The Motion was combined with Dixie’s Answer and Motion for Declaratory Relief¹ filed in response to InSite Towers Development, LLC’s (InSite) April 7th, 2015 Request for Declaratory and Injunctive Relief and Request for Agency Action.

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¹ The Division is not filing a response to Dixie’s Motion for Declaratory Relief.

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This Division files this response for the limited purpose of addressing the Commission’s jurisdiction over this matter as it pertains to Dixie. The Commission’s jurisdiction over Dixie is limited in scope because Dixie is an “electric distribution cooperative.”²

BACKGROUND

The Division was established pursuant to Utah Code Ann. § 54-4a-1 et seq., and its functions and objectives are addressed at length there. In part, the Division may:

commence original proceedings, file complaints, appear as a party, present factual information and evidence, examine witnesses, advocate policy recommendations, commence appeals, otherwise participate in proceedings before the Public Service Commission, and engage in all other activities consistent with its statutory responsibilities . . . ³

Additionally, “[i]n the performance of the duties, powers, and responsibilities committed to it by law, the Division of Public Utilities shall act in the public interest in order to provide the Public Service Commission with objective and comprehensive information, evidence, and recommendations consistent with the following objectives” which concern the “safe, healthy, economic, efficient, and reliable operation of all public utilities;” “just, reasonable, and adequate rates, charges, . . . practices and services of public utilities;” making “the regulatory process as simple and understandable as possible;” and other related goals.⁴

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² See Utah Code Ann. §§ 54-2-1(6) (defining “distributive electrical cooperative”) and 54-4-1.1 (addressing the Commission’s jurisdiction over a “wholesale electrical corporation” which the Division construes as including a distributive electrical corporation such as Dixie).

³ Utah Code Ann. § 54-4a-1(1)(a),

⁴ Utah Code Ann. § 54-4a-6.

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The Legislature further guided the Division’s activities by committing to statute that,

. . . the phrase “just, reasonable, and adequate” encompasses, but is not limited to the following criteria:

- (a) maintain the financial integrity of public utilities by assuring a sufficient and fair rate of return;
- (b) promote efficient management and operation of public utilities;
- (c) protect the long-range interest of consumers in obtaining continued quality and adequate levels of service at the lowest cost consistent with the other provisions of Subsection (4).
- (d) provide for fair apportionment of the total cost of service among customer categories and individual customers and prevent undue discrimination in rate relationships;
- (e) promote stability in rate levels for customers and revenue requirements for utilities from year to year; and
- (f) protect against wasteful use of public utility services.⁵

It is pursuant to its statutory directives and objectives that the Division responds to Dixie’s motion.

FACTS

Selected Facts

The Division makes no attempt to identify and discuss all the facts raised by InSite and Dixie in their respective pleadings, but, instead, is highlighting a few critical facts.

⁵ Utah Code Ann. § 54-4a-6.

The pleadings identify the parties as InSite, whose parent “owns and manages more than 1,200 wireless communications tower sites in the United States” and several other countries,⁶ and Dixie, an electrical cooperative holding a Commission issued certificate of convenience and necessity (CPCN) to provide electrical service to customers within a specific area of Washington County.⁷

InSite leased certain property arguably within Dixie’s service area from the Gublers (Subject Property), intending to construct and operate a “monopole telecommunications tower” thereon and obtained certain permits relating to such operation and construction.⁸

There is an agreement (the 1981 Agreement) between Dixie and the City of St. George (City) which purportedly affects property located within Dixie’s CPCN designated service area and may affect its duty and obligation to serve the Subject Property.⁹

Arguably, InSite has been unable to obtain electrical service for the Subject Property from the City or Dixie.¹⁰

JURISDICTION

The Commission has jurisdiction over Dixie, but does not have jurisdiction over the City

The scope of the Commission’s jurisdiction over entities and issues, established by statute, has been addressed by the Utah Supreme Court many times. Somewhat recently, the Court addressed the Commission’s jurisdiction and stated,

“It is well established that the Commission has no inherent regulatory powers other than those expressly granted or clearly

⁶ See Complaint at p. 2, para. 2.

⁷ See Complaint at p. 2, para. 4. See also, “In the Matter of the Application of Dixie Rural Electric Association for a Certificate of Convenience and Necessity to operate as a Public Utility rendering electrical service,” Case No. 5663, issued by the Public Service Commission on June 30, 1966, granting Dixie Certificate of Convenience and Necessity No. 1556 (Dixie Certificate Case).

⁸ Complaint at pp. 2-3, paras. 5-11.

⁹ See, generally, Complaint and Answer.

¹⁰ See, generally, Complaint and Answer. Note that Dixie has raised issues pertaining to whether or not InSite has, or has properly, requested service from Dixie. See Answer at p. 25.

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)).¹¹

To that end, the Court continued, stating,

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).¹²

Given Dixie’s status as a public utility, the Commission is correctly exercising, and has correctly exercised in the past, jurisdiction over Dixie.¹³ However, because Dixie is an “electric distribution cooperative,”¹⁴ the Commission’s jurisdiction over Dixie is more limited. Indeed, pursuant to statute, “the commission does not have the authority under the provisions of this title to regulate, fix, or otherwise approve or establish the rates, fares, tolls, or charges of a wholesale electrical cooperative.”¹⁵ However, the provision addressing cooperatives “does not exempt wholesale electrical cooperatives from other areas of regulation under this title including, but not limited to, regulation having an indirect effect on rates, fares, tolls, or charges but which does not constitute an approval or establishment of them.”¹⁶ How or whether InSite’s request in this docket would constitute the regulation or fixing of rates, charges, and the like is not the subject of this response. To the extent InSite’s request for a service extension without charge from Dixie

¹¹ *Heber Light & Power Company v. Utah Public Service Commission*, 231 P.3d 1203, 1208 (Utah 2010) (Heber Light).

¹² *Heber Light & Power* at p. 1208.

¹³ See, Utah Code Ann. §§ 54-2-1(6), 54-2-1(7), 54-2-1(19), 54-4-1, and 54-4-1.1.

¹⁴ See Answer at p. 3, para. 1.

¹⁵ Utah Code Ann. § 54-4-1.1.

¹⁶ Utah Code Ann. § 54-4-1.1.

is viewed as the fixing of a rate or charge at zero, it may be outside the Commission's jurisdictional authority.

Accordingly, InSite has chosen this forum, albeit not exclusively, to bring forth its disputes with Dixie for resolution.¹⁷ On the same day as it filed with the Commission, InSite filed a verified complaint in the Fifth Judicial District Court for Washington County seeking declaratory and injunctive relief against the City and Dixie "regarding the furnishing of power to a parcel of real property located in Washington County, State of Utah . . ." ¹⁸

Importantly, the City, an entity frequently mentioned in the pleadings but not a party to this docket, is not subject to Commission jurisdiction. The Utah Constitution states, "The Legislature shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, to levy taxes, to select a capitol site, or to perform any municipal functions."¹⁹ The Court has ruled that the Commission "lacks authority to hear a dispute" between Rocky Mountain Power and Heber Light, "an electrical services interlocal entity comprised of several municipalities organized under the Utah Interlocal Cooperation Act" where Rocky Mountain Power had filed a complaint with the Commission that "alleged Heber Light & Power . . . was providing electrical service in the Heber Valley in violation of the Certificate of Convenience and Necessity that the Commission issued to Rocky Mountain, which granted Rocky Mountain the exclusive right to provide electricity in the area" and it was claimed that the municipalities were acting outside their municipal statutory authority.²⁰

¹⁷ Additionally, it has been said that a "general consumer," not a municipality or wholesale power purchaser, "is subject to regulation by the PSC in the sense that the PSC may determine which utility may sell it power." *White River Shale Oil Corporation v. Public Service Commission*, 700 P.2d 1088, 1092 (Utah 1985) (White River).

¹⁸ See Exhibit C to the Answer, p. 2 para. 6.

¹⁹ Utah Constitution, Article VI, Section 28.

²⁰ See Heber Light generally and at p. 1210.

ARGUMENT

The Commission has subject matter jurisdiction to determine Dixie's service area and its, if any, obligations to serve

As discussed above, the Commission's jurisdiction is limited and specific. Utah Code Ann. § 54-4-25 provides the Commission with explicit jurisdiction to issue an electrical corporation (a category which includes Dixie) "a certificate that present or future public convenience and necessity does or will require the construction."²¹ Indeed, a Commission granted CPCN is by law a prerequisite that an electric corporation must satisfy before "establish[ing], begin[ning] construction, or begin[ning] operation of a line, route, plant, or system,"²² and, under certain circumstances, an extension thereof.²³

In 1966, the Commission granted Dixie a CPCN for a service area which arguably included the Subject Property.²⁴ Issues before the Commission include those pertaining to Dixie's Commission approved service area and conditions of service; the effect, if any, of the 1981 Agreement on Dixie; and whether Commission approval was necessary, or sought, of that 1981 Agreement.

Determining if Dixie has an obligation to serve, and if so how to serve, the Subject Property is within the Commission's explicitly granted jurisdiction connected to its issuance of Dixie's CPCN. Several cases have addressed the Commission's authority to determine the scope of a public utility's service area.²⁵ The necessity of a Commission decision concerning which public utility had authority to serve was recognized in *White River Shale Oil Corporation v.*

²¹ Utah Code Ann. § 54-5-25(1).

²² *Id.*

²³ *Id.*

²⁴ See *Dixie Certificate Case*, *supra*.

²⁵ But see, *Heber Light* in which the Court stated that contentions between a public utility and an energy services interlocal entity regarding area served and other matters are subject to District Court jurisdiction. *Heber Light* p. 1210. Here the dispute is between a potential customer and the public utility, not between the utility and the municipal entity.

Public Service Commission, wherein the Court stated, “The PSC, however, has made no ruling on the question of which utility should serve White River. Without specific findings of fact and conclusions on the merits of the case, this Court cannot and will not address those issues.”²⁶ The Commission’s jurisdiction to determine which public utility should provide service was also recognized in *Empire Electric Association, Inc. v. Public Service Commission*.²⁷

Whether or not Dixie has satisfied its obligation, if any, to serve the Subject Property by virtue of the 1981 Agreement is also an issue properly before the Commission. The issue before the Commission concerns Dixie’s duties, if any, toward InSite. The City’s obligations, if any, may not properly be the subject of InSite’s pleading.²⁸ By adjudicating this issue as to Dixie, the Commission is acting within its statutory powers.²⁹

Similarly, the issue of whether Commission approval of the 1981 Agreement was necessary or sought is properly within the Commission’s jurisdiction. The Commission has the jurisdiction to require that certain contracts must be submitted to and approved by the Commission.³⁰

²⁶ *White River* at p. 1093 (Utah 1985).

²⁷ 604 P.2d 930 (Utah 1979). See also *Utah Gas Services Company v. Mountain Fuel Supply Co.*, 422 P.2d 530 (Utah 1967).

²⁸ The Commission’s jurisdiction is over InSite, not over the City. While the Commission’s determination of Dixie’s obligations may be instructive as a district court adjudicates the City’s responsibilities, the district court retains its jurisdiction to resolve that question as to the City. See, e.g., *Heber Light*, supra, at p. 1210 (stating that “until the Utah State Legislature confers authority on the Commission to regulate municipalities acting beyond their statutory authority, the Commission may not regulate Heber Light and the proper forum for Rocky Mountain’s complaint is in the district court.”).

²⁹ This case before the Commission is reminiscent of, but different from (because there the City was a party), the *City of St. George v. Public Service Commission*, 565 P.2d 72 (Utah 1977) (*St. George*) wherein the Court was asked to review and reverse the Commission’s refusal to limit Dixie’s service territory or enjoin Dixie from providing service to property within Dixie’s certificated service area which was later annexed by the City. In its order in that case, the Commission specifically noted, “[It] is aware of the basic conflicts between the parties evident in the Washington County litigation [in District Court], but concludes that it has no jurisdiction or authority to resolve those many and complex issues.” In upholding the Commission’s decision, the Court recognized the pending District Court litigation and its effect, and stated that the Court “was not persuaded that the Commission acted capriciously or arbitrarily or exceeded its jurisdiction in the action.” *St. George* at p. 73.

³⁰ See, e.g., Utah Code Ann. §§ 54-4-26 (contracts calling for expenditures).

As noted above, the Division is not addressing here whether a Commission decision concerning InSite's request for a line extension (or generator) at no cost would constitute a decision outside of the Commission's jurisdiction because of Dixie's status as a wholesale electrical cooperative.³¹

CONCLUSION

The Commission has the power to determine whether Dixie is obligated to serve InSite's property, though it may not require the City to serve the property. The Division is taking no position concerning the effect of the District Court case filed by InSite.

Dated this _____ day of May, 2015.

Respectfully submitted,

/s/
Patricia E. Schmid
Attorney for the Division of Public Utilities

³¹ See Utah Code Ann. § 54-4-1.1.

CERTIFICATE OF SERVICE

I CERTIFY that on the ____ day of May, 2015, a true and correct copy of the foregoing **RESPONSE OF THE UTAH DIVISION OF PUBLIC UTILITIES TO DIXIE ESCALANTE'S MOTION TO DISMISS** was delivered to the following as indicated below:

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