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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Formal Complaint of InSite Towers Development, LLC against Dixie-Escalante Rural Electric Association	))))))	Docket No. 15-066-01

REPLY OF DIXIE-ESCALANTE RURAL ELECTRIC ASSOCIATION TO RESPONSE OF UTAH DIVISION OF PUBLIC UTILITIES TO DIXIE'S MOTION TO DISMISS

Pursuant to Utah Admin. Code R. 746-100-4, Dixie Escalante Rural Electric Association (the "Cooperative"), files its Reply to the Response of Utah Division of Public Utilities ("DPU") to Dixie's Motion to Dismiss (the "DPU Response").

SUMMARY OF ARGUMENT

The DPU Response concedes the Commission cannot exercise jurisdiction over St. George City or resolve contentions between a public utility and a municipal service provider regarding the duty to serve in an area adjoining municipal service area(s), and other matters relating thereto. *DPU Response at p.4-6, and 7, note 25.* InSite's Formal Complaint seeks relief that would require the Commission to attempt to do precisely that – exercise authority to determine, as between Dixie and the City of St. George, which entity retains the obligation to serve the area where InSite's proposed tower is to be located.

I. There Is No Such Thing as Subject Matter Jurisdiction Over Just One Side of a Bilateral Contract.

The agreement (the "Municipal Service Area Agreement") between Dixie and St. George City is authorized by Utah law. U.C.A. § 10-8-14(5). Dixie is entitled by that same statutory scheme to *rely* on the contractual rights conferred to Dixie and to *enforce* the provisions and undertakings to which St. George has agreed.

The DPU Response argues that, because the Commission may exercise jurisdiction over Dixie *in some, perhaps many* instances, the Commission therefore may assert jurisdiction over Dixie's "side" of the Municipal Service Area Agreement, even though the Supreme Court has barred the Commission from exercising *any* jurisdiction to determine the scope of service obligations involving areas in contention between a public utility and a municipal service provider. *Heber Light & Power Company v. Utah Public Service Commission*, 231 P.3d 1203, 1208 (Utah 2010) ("Heber Light").

There is no such thing as controlling a single side of a contract, determining only one party's rights, or enforcing contractual provisions against one party only. The Commission has no authority to address *either* party's obligations under the agreement.

II. The Formal Complaint Cannot Be Adjudicated Without Addressing the Municipal Service Area Agreement.

InSite seeks various forms of relief against Dixie that is all premised on the resolution to one fundamental and unavoidable central question – as between Dixie and St. George City, which has the obligation to provide electric service to the property? The *Heber Light* decision, and DPU's own Response provide uncontroverted direction that the resolution of that question *must* be left to the courts, not to the Commission.

The DPU Response attempts to find a way around the Court's holding in the *Heber Light* decision, reasoning that whereas *Heber Light* did involve the same issue, *i.e.*, determination of service area and service obligation between a public utility and a municipal entity, that case was initiated by a public utility which attempted to join the municipal agency as a party in Commission proceedings. This case, the DPU observes, was initiated not by Dixie against St. George, but rather by InSite, as a consumer. This "difference without a distinction" drives the DPU to disregard *Heber Light*. The future interests of electric consumers were equally at play in *Heber Light* as in the present matter – the Supreme Court nevertheless extended extraordinary relief against *ultra vires* Commission proceedings notwithstanding the potential effect that resolution of the issues would have on electric consumers.

That St. George City is not, and could not be made a party to this proceeding does not add to the Commission's jurisdiction over the issues presented here. Indeed, the absence of the City further *frustrates and highlights* the futility of any attempt to ignore the Commission's lack of jurisdiction to decide the fundamental question presented. The procedural history how an issue comes to be presented before the Commission is irrelevant to the threshold inquiry of jurisdiction over the *subject matter* at issue.

The subject matter of this dispute is substantively indistinguishable from the disputed issue attempted to be posed to the Commission in *Heber Light*. In that case, the Utah Supreme Court took extraordinary, emergency measures to immediately vacate the Commission's improper attempt to assert jurisdiction over the subject matter involved.[1]

[1] InSite claims that St. George has an obligation and duty to provide electric service at the location it prefers. Dixie agrees with InSite. The Commission may reach a similar conclusion – but such a finding by the Commission would clearly be viewed by St. George to be irrelevant as a matter of law; the City could, and very likely will, simply disregard it.

III. THE DPU RESPONSE DOES NOT ADDRESS THE EFFECT OF RECENT UTAH STATUTORY ENACTMENTS

As explained in Dixie's Motion to Dismiss, the Commission has no authority to adjudicate any issues or subject matter unless and except as expressly and specifically granted.[2] The DPU Response provides ample agreement on that point:

> 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 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)).[3] 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).[4]

The statutory language of Utah Code, Section 10-8-14(5)(c)(iii)(B) *expressly* and *specifically* exempts the Municipal Service Area Agreement between Dixie and St. George City from Commission approval, and it necessarily follows that the Commission has no retained jurisdiction to adjucate its terms.

Likewise, the DPU Response does not refute nor attempt to address the effect of Utah Code Section 54-4-40 which extends the Commission's approval authority to only

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[2] The DPU Response cites statutes granting the Commission various forms of regulatory authority over specific *entities* that qualify as public utilities, see DPU Response at n. 13, *citing* Utah Code Ann. §§ 54-2-1(6) (defining electric distribution cooperative), 54-2-1(7)(defining electric corporation), 54-2-1(19),(defining public utility) 54-4-1(general jurisdiction), and 54-4-1.1(exemption of wholesale electric cooperatives from Commission's rate jurisdiction). The Response does not cite any grant of jurisdiction over the specific activity or subject matter in question – a municipal service area agreement entered pursuant to Utah Code Section 10-8-14(5)(c)(b)(iii).

[3] DPU Response at p. 4-5, citing Heber Light & Power Company v. Utah Public Service Commission, 231 P.3d 1203, 1208 (Utah 2010).

[4] Id., citing *Heber Light & Power* at p. 1208.

those municipal service arrangements in which the electric corporation is required by statute to obtain Commission approval – which Dixie is not required to do by the express statute language in Section 10-8-14(5)(c)(iii)(B).

It would be both illogical and improper, where the statute expressly *withholds* any jurisdictional authority to allow the Commission to review a municipal service area agreement at its inception, for the Commission nevertheless to attempt to assert authority to make crucial determinations and exercise regulatory oversight with respect to fundamental terms of the agreement thereafter.

CONCLUSION

The Commission cannot exercise jurisdiction over the central threshold issue presented by InSite's Complaint, namely, whether in light of the municipal service area agreement with St. George City, Dixie has the obligation to provide service to the area in question as opposed to the City.

Dated this 4th day of June 2015

Respectfully submitted,

__/s/_____
David F. Crabtree
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CERTIFICATE OF SERVICE

I CERTIFY that on the 4th day of June, 2015, a true and correct copy of the foregoing was served upon the following as indicated below:

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