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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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|---------------------------------------|---|----------------------------------|
| In the Matter of Formal Compliant of: | : |                                  |
|                                       | : | <b>Docket No. 15-066-01</b>      |
| INSITE TOWERS DEVELOPMENT, LLC,       | : |                                  |
|                                       | : | <b>RESPONSE OF INSITE TOWERS</b> |
| v.                                    | : | <b>DEVELOPMENT, LLC, TO</b>      |
|                                       | : | <b>MOTION TO DISMISS AND FOR</b> |
| DIXIE ESCALANTE RURAL ELECTRIC        | : | <b>DECLARATORY RELIEF OF</b>     |
| ASSOCIATION, INC.                     | : | <b>DIXIE ESCALANTE R.E.A.</b>    |
|                                       | : |                                  |

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InSite Tower Development, LLC (“InSite”) submits this response to the Motion to Dismiss and for Declaratory Relief (“Motion”) of Dixie Escalante Rural Electric Association, Inc. (“Dixie Power”).

The core issues before the Commission are (a) whether InSite is entitled to relief from the burdens imposed on it as a direct result of Dixie Power’s abandonment of a portion of its Certificate of Public Convenience and Necessity granted to it by the Utah Public Service Commission, and (b) if so, relief that is reasonable and in the public interest under the circumstances.

InSite has alleged in its Complaint that a 1981 Agreement between Dixie Power and the City of St. George (“City”) has resulted in an unlawful abandonment of Dixie Power’s public utility obligation to serve customers in the territory covered by its Certifi-

cate of Public Convenience and Necessity issued by the Public Service Commission. There is no record of any communication to the Commission by Dixie Power that it sought Commission approval or even informed the Commission of its agreement to abandon certain public service obligations.<sup>1</sup>

Notwithstanding Dixie Power's extensive treatment of assertions and claims in InSite's Complaint, it has not established that there are no factual or legal issues to be decided by the Commission in this case. Accordingly Dixie Power's Motion to Dismiss InSite's Complaint must be dismissed, as must its request for declaratory relief.

### **ARGUMENT**

*Preliminary.* InSite does not have serious disagreement with Dixie Power's statement of Background Facts in ¶¶ 1-70 of its Motion, and it is not productive to parse them here for purposes of establishing that the Motion should be denied.<sup>2</sup> As to ¶ 71, InSite agrees that the sale of certain facilities in 1981 would not require reporting to the Commission under the current version of Utah Administrative Code § R746-701. However, as will be apparent below, InSite does not agree that Commission approval was not

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<sup>1</sup>InSite's Request for Admissions No. 3 sought the following: "Admit that Dixie Power neither sought the approval of the Commission nor informed the Commission of any aspect of Dixie Power's grant to the City of a 'non-exclusive franchise to provide energy in certain areas of the City,' provided in ¶ 1 of the 1981 Agreement." Dixie Power refused to admit the assertion by giving a non-responsive, irrelevant and factually inaccurate response: "Denied. Dixie did not grant any 'non-exclusive franchise to provide energy in certain areas of the City' to the City of St. George," followed by an irrelevant argument about St. George City's alleged statutory and constitutional authority. As Dixie Power gave no independent response to the follow-up query concerning when any such notification took place or produced any evidence of such notification, the conclusion is that Dixie Power did not file with or inform the Commission about the Agreement.

<sup>2</sup>Paragraphs 7-10 of Dixie Power's Background Facts suggest that the 2014 amendment to Utah Code Ann. § 10-8-14 created a new mechanism for cities to service customers outside their boundaries, thereby disrupting a longstanding, common-law exclusive franchise assumption which drove a regulated utility's obligation to provide service. The version of § 10-8-14 in place in 1981 (and at least as long ago as 1969) was far more expansive than the 2014 revisions in its provision of rights by municipalities to service non-municipal customers by agreement.

required for the 1981 Agreement.

As will unfold, a major thrust of Dixie Power's factual discussion goes to its belief that an "arrangement" it has with the City enables InSite to obtain the desired electric service from the City. In that sense, InSite and Dixie Power agree that, in denying service to InSite except under conditions beyond InSite's control, the City is playing the role of Bad Actor in this drama. However, the parties disagree on how InSite's "powerless" situation can be remedied in the face of the City's intransigence on the issue.

*Jurisdiction.* As a preliminary matter, InSite notes that Dixie Power is dead wrong in its attempt to (re)cast InSite's entire Complaint as being outside the Commission's jurisdiction. Dixie Power is a Utah public utility subject to the general jurisdiction of the Commission, and the issues raised by InSite are appropriate subjects for Commission oversight. The Division of Public Utilities has weighed in on the jurisdiction issue in its Response to the Motion, and InSite concurs with the Division's general conclusion that the Commission *does* have jurisdiction to hear and decide on InSite's Complaint. InSite will, therefore, not cover the same ground addressed by the Division's pleading. Suffice it to say that InSite and the Division are fully aware that the Commission has no jurisdiction over any aspect of utility services provided by the City of St. George (the "City"), but that, as a public utility, the Commission does have broad statutory authority over Dixie Power:

The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction . . . .<sup>3</sup>

The matters brought before the Commission by InSite involve the business of a

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<sup>3</sup>Utah Code Ann. § 54-4-1.

public utility, and the remedy that InSite seeks is not only convenient, but necessary, in protecting the public interest.<sup>4</sup>

*The 1981 Agreement.* Because InSite’s Complaint is driven in the first instance by the 1981 Agreement between Dixie Power and the City (Complaint, Ex. 2), it is useful to start with the basic provisions of that agreement as they relate to the issues before the Commission.<sup>5</sup> In that regard, there are just two basic elements:

- Dixie Power’s agreement not to object to the City’s construction and operation of facilities in Dixie Power’s certificated territory for certain customers of the City.
- Dixie Power’s sale of its utility plant facilities in the area to the City for \$65,000.<sup>6</sup>

Under the stated terms of the Agreement, the City is not obligated to serve any customer in Dixie Power’s certificated territory, including such customers as were being served by Dixie Power’s facilities that were sold to the City for \$65,000. However, Dixie Power claims that there is a broader “Municipal Service Arrangement” (e.g., Motion ¶¶ 10, 14, 80, 87) of which the 1981 Agreement is only a part. Under this broader agreement, Dixie Power concludes that the City does have an obligation to serve such customers.<sup>7</sup> That is, Dixie Power bargained away its public service obligation in the area where InSite’s Tower Site is located, assuming—wrongly, as it turns out—that the City

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<sup>4</sup>InSite recognizes that the phrase “all of the business” is constrained by Utah Code Ann. § 54-4-1.1, which involves the rates of a wholesale electric cooperative. InSite has raised no rate issues in this proceeding.

<sup>5</sup>For convenience, the 1981 Agreement, which is attached to various previous pleadings in this case, is also attached here as Exhibit A, along with the more readable, transcribed version of the Agreement.

<sup>6</sup>In addition, the City granted to Dixie Power authority to serve certain customers within the City’s municipal limits, and Dixie Power agreed to dismiss two civil lawsuits it had previously filed against the City. Neither of these provisions is relevant to the present case.

<sup>7</sup>See note 10, *infra*.

would step into the shoes of Dixie Power and provide such service in the future.

As it comes to light some 34 years later, the City did *not* step into Dixie Power's shoes and now refuses to provide service to InSite. The City, which has facilities that could easily provide service to the InSite Tower Site, has flatly refused to do so unless certain annexation conditions are satisfied (Ex. 2.3 to Todd Fuson Testimony)—conditions that are wholly unrelated to providing electric service and which InSite is powerless to comply with.<sup>8</sup> Importantly, no such condition could have arisen if InSite were applying for service from a Utah public utility.

Dixie Power insists that it has no responsibility to supply such service because it contracted the responsibility to the City of St. George in 1981, and that St. George should provide the service. St. George apparently has a different view of its obligations under the 1981 Agreement. It obviously believes it has no obligation to serve the area that Dixie Power abandoned—the Tower Site, in particular. St. George's future recalcitrance was a risk for Dixie Power—admittedly a small one—that the utility undertook when it sold its right and obligation to serve the area in which the Tower Site is located. InSite should not have to suffer for Dixie Power's unmet expectations of performance by St. George.

Dixie Power's attempt to place its public service obligations in the hands of a municipality failed. It, therefore, continues to have a public service obligation to serve InSite. Further, it cannot sidestep the real issue by simply asserting it will be happy to provide service if the customer will just pay for a five-mile service extension from Dixie

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<sup>8</sup>"The City's position has been, and the Property Owners [Owen H. & Veld L. Gubler] have understood, that any development on their property requiring additional municipal services would require the property to be annexed to the City." Ex. 2.3 to Todd Fuson Testimony.

Power's now-extant utility plant facilities. This would conveniently overlook the fact that Dixie Power's none-too-careful attempt to sew up the details of abandoning part of its certificated service territory to the City in 1981 left that territory's existing and future customers at risk and subject to the extortionate position of the City.

For one thing, Dixie Power did not include in the 1981 Agreement a provision that committed the City to service such customers in Dixie Power's certificated service territory as would be eligible to obtain service from the transferred facilities. Further, had Dixie Power properly brought the matter to the Commission in 1981, it is not beyond reasonable conjecture that the Commission or the Division of Public Utilities or another party would have asked: "Who is going to guarantee that present or future electric service customers in the general area of the facilities will be served by St. George? There seems nothing in this agreement to address the issue." Indeed, there is not.

*The Municipal Service Arrangement.* Dixie Power claims in its Motion that the 1981 Agreement is only a part of a more comprehensive "Municipal Service Arrangement," not all of which was committed to writing.<sup>9</sup> Dixie Power may well have intended (and believed) that the City would have a public-service obligation to serve the area containing the Tower Site under the "Municipal Service Arrangement." For example, "Dixie and St. George have a contractual arrangement . . . which, in its totality, comprises the Municipal Service Agreement requiring St. George City to offer to provide electric ser-

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<sup>9</sup>"[N]ot all aspects of the Municipal [Service] Arrangement have been committed to written agreement." Motion ¶ 91. Dixie Power doesn't elaborate on the nature of the rest of the "arrangement." InSite, however, has petitioned the Fifth District Court for an order enforcing the terms of the "arrangement, seeking to compel the City to furnish power to the Tower Site under the same terms offered to its other similarly situated customers. The Court has not yet acted on the petition.

vice to the Gubler properties.” (Motion ¶ 88.<sup>10</sup>) However, the City clearly thinks otherwise, as it has refused service unless an external condition over which InSite has no control is complied with. Further, Dixie Power has produced no other documents to establish the terms of that agreement that were not memorialized in the 1981 Agreement.

In a civil suit involving the relative contractual obligations between Dixie Power and the City, there may well be an issue over whether an expanded, partly oral agreement exists.<sup>11</sup> However, the fact that the 1981 Agreement itself does not address the public service issue for customers in a portion of Dixie Power’s certificated area leaves an issue squarely before the Commission.

On the one hand, Dixie Power claims that the City, through the Municipal Service Arrangement, agreed to provide electric service to the property on which the Tower Site is located—presumably with straightforward extensions from its nearby distribution sys-

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<sup>10</sup>Also notable is Dixie Power’s statement in the companion case *InSite Towers Development, LLC, v. City of St. George*, where it has stated its concurrence with InSite’s assertions of the effect of the 1981 Agreement:

Dixie agrees with the Plaintiff [InSite] that a longstanding contractual Agreement exists between Dixie and St. George (the “Municipal Service Agreement”) pursuant to which the City has undertaken and agreed to furnish electric service to customers located on the Subject Property.

Dixie does not contest nor oppose Plaintiff’s assertions to the extent that Dixie agrees . . . St George City, by virtue of long-standing contractual Agreement to furnish municipal electric service to areas including the Subject Property, is obligated to provide similar service to new customers located on the Subject Property on terms and conditions the City may lawfully impose as operator of its municipal electric system, subject only to provisions of Utah law, including Utah Code Ann. § 10-8-14(5) and § 10-8-14(7) . . . .

Dixie Power Memo. in Support of Motion to Dismiss and in Opposition to Plaintiff’s Motion for Preliminary Injunction, Utah 5<sup>th</sup> Dist. Case No. 150500188, at 8.

<sup>11</sup>The companion civil suit in Washington County, *InSite Towers Development v. City of St. George* (Utah 5<sup>th</sup> Dist. Case No. 150500188) may turn out be such a forum, as both are parties to that case. However, there has as yet been no cross-claim as between Dixie Power and the City; they are simply co-defendants.

tem. (Motion ¶ 88.) On the other hand, when the City balks, Dixie Power implies that it is InSite's problem, essentially washing its hands of its inadequate procurement of commitment from the City pursuant to the Municipal Service Arrangement. Dixie Power can't have it both ways: Having previously served the general area where the Tower Site is located, it, in effect, assigned without regulatory approval its public service obligation to the City. When the City later repudiates the Dixie Power-assigned responsibility to act in the public interest in Dixie Power's service territory, Dixie Power cannot then shrug its shoulders and claim it's someone else's problem.

Therefore, the issue is: Does Dixie Power have a current obligation to InSite as a customer in Dixie Power's Commission-certificated area to provide InSite with adequate service at reasonable terms and rates? The answer is "yes." To comply with this public service obligation, Dixie Power has at least two options:

- ▶ Persuade the City of St. George that it is contractually obligated under the not-entirely-written Municipal Service Arrangement to provide InSite with the requested service; or
- ▶ Provide the service using its own utility plant.

*The remedy.* Because the Commission has no jurisdiction over the City, the first option is solely in the hands of Dixie Power.<sup>12</sup> As to the second option, it is not an answer for Dixie Power to feign innocence and claim it is ready to provide service so long as InSite stands for the full cost, inconvenience and time lag involved with a five-mile service extension.<sup>13</sup>

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<sup>12</sup>Indeed, there is undoubted concurrence among the participants here that the entire difficulty would disappear if St. George would simply honor InSite's request for service without imposing an unrelated property-annexation condition that InSite can't satisfy.

<sup>13</sup>Dixie Power essentially lays out a complete argument about why this is not a real option. Motion ¶¶ 44-48.



Concerning the second option, as this case has unfolded from the filing of InSite's Complaint, it has become clear to InSite that it is not practical to resolve InSite's request for relief by the construction of an extension of Dixie Power's existing facilities to InSite's Tower Site.<sup>14</sup> It is still true that, but for Dixie Power's actions in 1981, it could very likely have remained active in the area near the Tower Site with expanded utility plane that would now easily be able to serve InSite's needs. Nevertheless, InSite agrees generally with Dixie Power that a conjecture about such development over the 34 years since the 1981 Agreement is too much to stretch an extrapolation exercise.

However, that does not eliminate InSite's need for relief—relief that has been necessitated by Dixie Power's 1981 actions that were not brought to the attention of the Commission. Had it sought Commission approval of the 1981 Agreement—or even had it informed the Commission, the Commission might well have required certain safeguards for Dixie Power's concession of certificated territory to St. George that would have rendered the current situation more tractable. But Dixie Power did not seek Commission approval at the time, and we are left to wonder. If there is uncertainty about what should have happened had Dixie Power alerted the Commission to its intent to contract with the City, any conclusion should inure to the benefit of the customer rather than letting the utility company off the hook for its omission back in the day.

There is, in fact, a practical remedy available that was addressed in InSite's Complaint—installation of stand-alone generation facilities that would, at least initially, be

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<sup>14</sup>Through Dixie Power's responses to InSite's discovery requests, Dixie Power's Motion, the Division's responsive pleading and various filings of direct prepared testimony late last week by the participants.

dedicated to providing the necessary electric service to InSite's Tower Site project.<sup>15</sup>

Although not as desirable as connection to a poles-and-wires electric distribution system, such facilities would be an acceptable and economically viable method for solving the problem created by Dixie Power's 1981 actions. More specifically, this remedy would have a logical connection to the 1981 Agreement by identifying the \$65,000 in funds paid to Dixie Power as the "source" of assets to obtain the necessary generation equipment for the Tower Site. InSite does not propose that funds from 34 years ago should be "tracked." Rather, the notion is that Dixie Power received certain cash proceeds for facilities that provided service in area near the Tower Site but are no longer available to provide the service InSite needs. One can reasonably assert a connection between the receipt of those funds and the lack of facilities to provide the service today. In 2015 dollars, 1981's \$65,000 is equivalent to \$169,182 today.<sup>16</sup> This amount would be more than adequate for Dixie Power to install and maintain the necessary generation equipment at the Tower Site. InSite believes that, in the absence of Dixie Power's being able to persuade the City to remove the impossible-to-comply-with condition for service, it should be required by the Commission to install such a facility as a part of its electric plant and to provide electric service under its Utah Small Commercial Service (50 kW maximum) rates. Such a requirement is well within the Commission's authority under Utah Code Ann. § 54-4-1 and well clear of its rate limitations under § 54-4-1.1.

Dixie Power dismisses this solution, not by claiming it is infeasible, but by claiming that providing such service from a stand-alone generator installation would violate

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<sup>15</sup>Complaint ¶¶ 31, 38.

<sup>16</sup><http://www.usinflationcalculator.com> (last visited June 5, 2015).

terms of an “all-requirements contract” it has with Deseret Generation & Transmission Co-operative (“Deseret”). Dixie Power alleges, without providing a copy of the contract, that all its electric generating power or energy must be provided by Deseret. It argues that this contract forecloses the possibility of implementing such a generator-based remedy. According to Dixie Power, the all-requirements contract was approved by the Commission in a July 3, 1996, order in PSCU Docket No. 96-506-01, and that the Commission now “lacks authority to order Dixie Power to disregard or violate” the terms of that agreement.

It seems unlikely that the Commission “lacks authority” to reopen a matter over which it had exercised original jurisdiction. To the extent InSite’s current predicament was not contemplated when the Commission approved the Deseret-Dixie Power contract, the Commission would be well within its authority—either *sua sponte* or upon motion by a party—to revisit the Deseret-Dixie Power contract.<sup>17</sup>

Dixie Power’s Motion correctly notes that the Commission has only the powers granted to it by the Legislature. But, it neglects to cite the overarching authority that the Legislature has given to the Commission in Utah Code Ann. § 54-4-1: “The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility . . . and *to do all things . . . which are necessary or convenient in the exercise of such power and jurisdiction.*”<sup>18</sup>

It is not only convenient but necessary that the Commission exercise its supervi-

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<sup>17</sup>Dixie Power did not attach the Deseret-Dixie Power contract as an exhibit to its Motion to Dismiss. InSite has not yet been able to review that contract to determine the applications of its terms and conditions to the case now before the Commission. It has served a discovery request on Dixie Power to produce the contract and limited documents related to its Commission approval.

<sup>18</sup>Utah Code Ann. § 54-4-1 (emphasis added).

sory and regulatory powers to set right a matter that is within the ambit of this jurisdiction—namely, to require a public utility to resume the role that it unlawfully relinquished without authorization in 1981 to serve an area of Washington County in its certificated area with electrical service.

If that means that the Deseret-Dixie Power contract needs to be reviewed to see if it still satisfies the requirement that it be in the public interest as applied in the current circumstances, then the Commission has the authority to undertake such a review. If that agreement is what stands between InSite's obtaining adequate service or not, then InSite contends that provisions in the agreement that restrict Dixie Power from providing a remedy to the current problem are not reasonable or in the public interest. Indeed, it is difficult to see that the *sui generis* event of requiring Dixie Power to provide adequate generation facilities for the Tower Site in an area currently disjoint from its Deseret-supplied facilities would affect any aspect of the intent, operational or financial aspects of the Deseret-Dixie Power contract.

### **CONCLUSION**

Dixie Power's Motion provides a helpful statement of the background facts in this case; a well-stated account of why it thinks the City of St. George should step up and provide electric service to InSite; and a set of arguments about why it believes it should ultimately prevail against the claims made in InSite's Complaint. But, it has not made out a case that the Commission should dismiss the Complaint on its face as a matter of law. Notably, the Dixie Power motion provides no affidavit or declaration evidence in support of its Motion. Accordingly, the factual assertions in the Complaint have not been refuted and must, for the purposes of Dixie Power's Motion, be taken as true.

There *are* issues before the Commission that cannot be disposed of as a matter of

law on the assertions Dixie Power's Motion:

- To the extent Dixie Power bases its motion on the assertion that the Commission has no jurisdiction over various matters involving Dixie Power and Deseret, the Motion fails.
- There are facts yet to be developed concerning what constitutes the Municipal Service Arrangement invoked by Dixie Power and which is, by Dixie Power's admission, only partially captured by evidence currently before the Commission.
- There are facts yet to be developed concerning a remedy base on Dixie Power's providing service through stand-alone generation facilities that would provide adequate electric service to InSite's Tower Site project.

Accordingly, InSite respectfully requests the Commission to enter an order dismissing Dixie Power's Motion to Dismiss InSite's Complaint, with the parties to proceed according to the procedural schedule set by the Scheduling Order and Notice of Hearing of April 22, 2015.

Perforce, InSite also respectfully requests the Commission to enter an order denying Dixie Power's Motion for Declaratory Relief as being unwarranted for the reasons set forth above and being, at best, premature.

Respectfully submitted this 8<sup>th</sup> day of June 2015.

JONES, WALDO, HOLBROOK & MCDONOUGH, P.C.

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**CERTIFICATE OF SERVICE**

I certify that I have served on the following persons a true and correct copy of the foregoing RESPONSE OF INSITE TOWERS DEVELOPMENT, LLC, TO MOTION TO DISMISS AND FOR DECLARATORY RELIEF OF DIXIE ESCALANTE R.E.A. by U.S. Mail and e-mail this 8th day of June 2015.

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Tawnya Mundell, Legal Assistant

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