

BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of the)
 Complaint of Rocky)
 Mountain Power, a Division) MOTION TO DISMISS
 of PacifiCorp, Against)
 Heber Light & Power) Judge Ruben Arredondo
 Regarding Unauthorized)
 Service by Heber Light &) Docket Number
 Power in Areas Certificated) 07-035-22
 to Rocky Mountain Power.)
 _____)

October 2, 2008 * 9:30 a.m.

Location: Heber M. Wells Building
 160 East 300 South, Room 451
 Salt Lake City, Utah 84114

Reporter: Kathy Morgan, CSR, RPR
 Notary Public in and for the State of Utah

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1 OCTOBER 2, 2008 - 9:30 A.M. - SALT LAKE CITY, UTAH

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P R O C E E D I N G S

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4 THE COURT: We're on the record. This is
5 the Public Service Commission hearing in the matter
6 of the complaint of Rocky Mountain Power against
7 Heber Light & Power Regarding Unauthorized Service by
8 Heber Light & Power in Areas Certificated to Rocky
9 Mountain Power, docket number 07-035-22. I'm Ruben
10 Arredondo. I'm the ALJ assigned by the Commission to
11 hear this matter. Let's go ahead and take
12 appearances. Let's start with Rocky Mountain Power.

13 MR. MONSON: Gregory Monson of Stoel Rives
14 appearing for Rocky Mountain Power.

15 THE COURT: Let's go to you, Mr. Ginsberg.

16 MR. GINSBERG: Michael Ginsberg appearing
17 for the Division of Public Utilities.

18 THE COURT: Thank you.

19 MR. DUNBECK: Your Honor, Joe Dunbeck
20 representing Heber Light & Power.

21 MR. DODGE: Gary Dodge, also with Heber
22 Light & Power.

23 THE COURT: Thank you. All right. We're
24 here on the motion to dismiss, hearing on the motion
25 to dismiss brought by Heber Light & Power. How do

1 you want to do this? Mr. Dodge, Mr. Dunbeck, are you
2 both going to argue or just one of you?

3 MR. DUNBECK: I'll argue.

4 THE COURT: Okay. All right, then, we'll
5 start with you, then, Mr. Dunbeck.

6 MR. DUNBECK: Thank you.

7 Just to open this up here to begin with,
8 as I indicated, my name is Joe Dunbeck. Were here on
9 a motion to dismiss for lack of subject matter
10 jurisdiction with respect to the petition of Rocky
11 Mountain Power. Before we talk about the specifics,
12 I think it would just be helpful to look at a map
13 quickly.

14 Heber Light & Power began about 100 years
15 ago when Heber City obtained a power facility, a
16 hydro plant right about here (pointing) and began
17 providing electricity. In about the 1930s or so,
18 Heber City, with Charleston and Midway, formed what
19 amounted to a partnership. I'm not sure they knew
20 that, but in any event, they formed a partnership in
21 connection with bringing on a new facility, the Snake
22 Creek Plant. And they operated as a partnership
23 until approximately the 1960s, when they reconfigured
24 and the Interlocal Act came into play, and then they
25 reconfigured the partnership under the Interlocal

1 Act. Finally, in about 2002, again reconfigured as
2 energy services and a local entity.

3 What this yellow line represents is during
4 the course of the last year or so, we have obtained a
5 franchise from Wasatch County to provide electric
6 service within the yellow boundaries. Now, these
7 yellow boundaries also include areas in which Rocky
8 Mountain Power has a franchise and also has their
9 certificate. As you can see here, here's Heber City,
10 Charleston and Midway. We provide service within the
11 entire area. A lot of it, as you can see on this,
12 even today is still green. A lot of development to
13 the east of Heber City.

14 The thing you need to be aware of is that
15 this map suggests that our service territory is very
16 large. In fact, in context of Wasatch County, it's
17 really not. Jordanelle is up here, which is also
18 within Wasatch County, and the area up and around
19 Jordanelle is serviced by Rocky Mountain Power, as
20 are the areas around here. We have a subdivision
21 here called Timberlakes, which is serviced by Rocky
22 Mountain Power.

23 As you come up the canyon this way, which
24 is up towards Daniel's Summit, actually we have Moon
25 Lake Electric, which provides service with respect to

1 that part of Wasatch County. Wasatch County goes
2 further to the south here to Wallsburg, which is
3 serviced by Rocky Mountain Power, and actually keeps
4 going further south all the way to Spanish Fork
5 Canyon, where there's a little bit of Wasatch County
6 which, I'd assume, is serviced by Rocky Mountain
7 Power.

8 So within that yellow line is what we've
9 been calling our historic service area, the area in
10 which we've provided services. And as you can see,
11 we've provided service in both the incorporated and
12 unincorporated areas of the County.

13 The issues here are really quite simple.
14 Rocky Mountain has filed a complaint seeking a
15 Commission determination that we're not allowed to
16 provide the service that we've provided in the
17 unincorporated areas. The question on our motion is:
18 Does the Commission have jurisdiction to actually
19 resolve the issue concerning our authority to provide
20 service?

21 An important fact that kind of gets lost
22 in all of our briefing is that this is not a question
23 of whether the Public Service Commission has
24 jurisdiction or no one else. In this case, it's very
25 clear that you don't have jurisdiction to determine

1 this; that the authority -- that the courts clearly
2 have authority to determine our ability to serve.

3 So it's important to recognize that Heber
4 Light & Power is not taking the position that it may
5 do whatever it wants. There's a suggestion that we
6 have unfettered discretion to serve anywhere and
7 everywhere, or not serve, and that's not what we're
8 really claiming. What we're claiming is we do have
9 authority to serve within that yellow boundary. And
10 we're not here saying that we're without regulation,
11 because we recognize that the courts would have
12 authority with respect to both our service and our
13 authority to service. The question here is whether
14 the Utility Code gives the Commission subject matter
15 jurisdiction to determine the authority of Heber
16 Light & Power to serve.

17 There's two issues with respect to that.
18 One is the statute itself. The rule is very clear
19 that if the statute does not provide authority to the
20 Commission, it doesn't have authority or
21 jurisdiction. Here, the statute does not give
22 jurisdiction.

23 We have an additional wrinkle in this
24 case, which is the White City Water case. There, the
25 Commission asserted some limited jurisdiction over

1 rate discrimination over municipalities serving in
2 the unincorporated areas. As we pointed out, the
3 White City case is distinguishable, because -- and
4 this is important -- the Commission did not assert
5 jurisdiction, as is requested here, to determine the
6 authority to serve. What it did is assert
7 jurisdiction, or suggest it had jurisdiction, as to
8 rates and invidious discrimination. The other point
9 about White City Water is it's just simply wrong to
10 cite. It's not been cited by the Commission or
11 anyone that we're aware of with respect to the issue
12 concerning jurisdiction.

13 So with respect to those two issues, let
14 me just talk about the statute for a minute. As
15 everybody -- as we've put in our brief several times,
16 I guess is the easiest way to say it, when you're
17 looking in the jurisdictional statute of the
18 Commission, or of any agency, the statute itself is
19 strictly construed, and all reasonable facts are
20 against asserting jurisdiction.

21 The Mountain States case, which is cited
22 in our brief, shows how the proper approach with
23 respect to that is. In that case, there was a
24 pooling -- a requirement that surcharges be pooled to
25 fund an account for discount telephone service for

1 needy people. The Court, if you go through and watch
2 what the Court did with respect to that, the
3 Commission had asserted jurisdiction, but the Court
4 strictly reviewed each of the statutory provisions
5 phrased and found that they didn't give them the
6 authority to do this, even though it was a pretty
7 good idea.

8 What's interesting about the case is
9 unlike Heber Light & Power, which is not a public
10 utility, in that case Mountain States was a public
11 utility, and the Commission -- or excuse me -- the
12 Court strictly construed the jurisdiction.

13 Applying the strict construction here, the
14 first question is: Is Heber Light & Power a public
15 utility under the Utility Code? And we start with
16 the definition of an "electrical corporation."
17 There's two elements to an electrical corporation.
18 One is corporation; one is person. As to the
19 corporation element, the statute specifically
20 provides that a governmental entity, such as Heber
21 Light & Power, cannot be a corporation. So as to
22 that element, electrical corporation, are we a
23 corporation? No.

24 The next question is: Are we a person?
25 The "person" is defined in the Code as a corporation,

1 which excludes governmental entities. It also
2 includes associations or companies. The Code defines
3 corporations and associations similarly, and so
4 therefore associations are not governmental entities.
5 More importantly, all three of these terms should be
6 interpreted together, as to show a similar type of
7 entity rather than treating one as a governmental
8 entity, one excludes governmental entity and one
9 we're not so sure about.

10 More importantly, treating a person as
11 potentially being a governmental entity reaches an
12 absurd result. If a person can be a governmental
13 entity, then every municipal utility is subject to
14 Commission jurisdiction. But there's no restriction,
15 and that's clearly an absurd result. In fact, I
16 think we all agree that with respect to the -- with
17 respect to the issue of whether there's jurisdiction
18 over service within the incorporated areas, there is
19 none.

20 Finally, with respect to the statute, the
21 statute was modified in 1989 to eliminate the
22 reference to governmental entities. Previously, a
23 "person" included governmental entities, but that
24 provision was taken out. That step right there
25 confirms that there's no intent for "person" to

1 include governmental entities.

2 Ordinarily, as I said earlier, the
3 determination of whether the statute gives
4 jurisdiction is the end of the discussion. We have,
5 however, the White City Water case that we sort of do
6 need to discuss. With respect to White City Water,
7 the critical thing is in that case the Commission
8 admits that it didn't have statutory jurisdiction.
9 In two different places, at one point says there's
10 gaps in our jurisdiction, and secondly it says that
11 even absent jurisdiction, they would assert
12 jurisdiction in that situation. The law that we've
13 cited to is really clear that the policy arguments
14 that White City Water made with respect to why they
15 were going to assert jurisdiction to protect people
16 in the unincorporated areas is not the kind of
17 arguments that are accepted by the Court in
18 connection with assertions of jurisdiction by the
19 Public Service Commission.

20 White City Water is also simply
21 distinguishable. White City Water does not stand for
22 the proposition that the Commission has authority to
23 determine -- doesn't have jurisdiction to determine
24 the authority of a municipality to serve outside its
25 boundaries. It's very limited. It's limited to the

1 issue of rates and invidious discrimination, and on
2 that point, there's no complaint about our rates.
3 And what's clear in the complaint and what's being
4 fought about is the issue with respect to our
5 authority to serve in those areas.

6 So based upon those positions, both the
7 statute doesn't provide it and White City was wrongly
8 decided or distinguishable, you should grant our
9 motion to dismiss.

10 THE COURT: Thank you, Mr. Dunbeck.

11 Mr. Monson?

12 MR. MONSON: I assume we're not being live
13 broadcast or whatever?

14 MR. DUNBECK: I don't think so.

15 MR. MONSON: So would you like me to come
16 up here, then?

17 THE COURT: You can sit there if you want.

18 MR. MONSON: Whichever you want. All
19 right, I'll stay here. There's a couple of things in
20 this argument about which all the parties agree, and
21 one of them is that the Commission's decision on this
22 issue is very important. Heber and Rocky Mountain
23 Power both agree that the Commission's decision could
24 have far-reaching effects on public utility
25 regulation in Utah, but we agree for different

1 reasons. Heber claims that if Rocky Mountain Power's
2 argument is correct, that compels the conclusion that
3 the Commission has jurisdiction over all municipal
4 electric utilities.

5 That's not the case. Rocky Mountain
6 Power's argument is limited to Heber's actions beyond
7 its governmental authority in providing public
8 utility service to extraterritorial customers.
9 Everyone concedes that the Commission does not have
10 authority to regulate Heber in providing municipal
11 service. Thus, denying the motion will not have the
12 widespread repercussions claimed by Heber.

13 On the other hand, if Heber's argument is
14 correct, any municipality in this state can provide
15 service outside its boundaries, in areas the
16 Commission has certificated to regulated public
17 utilities without any obligation to annex the
18 territory served, and therefore without any
19 obligation to compensate the public utility for
20 facilities installed or render service in the area.
21 And in the absence of annexation, the customers, the
22 extraterritorial customers, will also not have a
23 franchise to vote for the elected officials in the
24 communities that are providing them with the service.

25 The municipality, according to Heber, can

1 do this without any obligation to provide service to
2 customers in the area outside the municipal
3 boundaries. It can refuse service to any new
4 customer in the area and discontinue service to any
5 existing customer at any time. So the question is:
6 How can a public utility prudently invest in
7 facilities to meet its obligation to serve in its
8 certificated area if Heber's argument is correct?

9 While the Commission's decision on this
10 motion could have far-reaching implications, it's
11 also important to note that the situation with Heber
12 is unique. Other municipal power systems recognize
13 the legal limitation on their authority to provide
14 service outside their boundaries. While they
15 occasionally extend incidental service to customers
16 outside their boundaries, they eventually annex the
17 territory served. Thus, there's no long-term
18 festering problem between them and Rocky Mountain
19 Power like there is with Heber.

20 However, that could all change if the
21 Commission grants Heber's motion to dismiss for lack
22 of jurisdiction. The statute that authorizes Heber
23 to provide municipal service is Section 10-814, and
24 it specifically says that they can provide service to
25 their own inhabitants and sell surplus product or

1 capacity to others outside their boundaries. Heber
2 has not claimed in this case that its sales to
3 customers outside of the boundaries of its three
4 member cities are sales of surplus product or
5 capacity.

6 This is not surprising, because it could
7 not reasonably do so while at the same time admitting
8 that it is not making temporary wholesale sales to
9 extraterritorial customers; that as part of its
10 normal course of business it provides a retail
11 service to extraterritorial customers and has been
12 doing so for almost 100 years, and that it intends to
13 continue to provide that service in the future.
14 Therefore, I won't bother to add the caveat about
15 sales of surplus power each time I talk about the
16 illegitimate municipal authority during the balance
17 of this argument, because that's not an issue in this
18 case.

19 Heber knew about White City Water before
20 it filed its motion, but it didn't mention it, and
21 only brought it up in its reply. This is surprising,
22 because the case is not only directly on point on the
23 issue presented in this case, but it's the only
24 authority that squarely addresses that issue under
25 Utah law.

1 Heber makes the claim that the case
2 supports its position. It does this based on a
3 couple of statements in which the Commission
4 acknowledged that there was no express statutory
5 authority for it to regulate municipal utilities in
6 providing service outside their boundaries, and it
7 also does it on the basis of a footnote in which the
8 Commission notes that the Court had authority to
9 address issues about extraterritorial services, and
10 that was referring to the CP National case.

11 If you look at the footnote and if you
12 look at CP National, you'll see that the issue, the
13 main issue addressed by the Court in that case was
14 condemnation. No one claims that the Commission has
15 jurisdiction over condemnation actions. Furthermore,
16 just because a court may have jurisdiction doesn't
17 mean the Commission doesn't have jurisdiction, and
18 there may be issues on which both the Court and the
19 Commission have jurisdiction.

20 At the end of the footnote, the Commission
21 questions whether the Court would have reached the
22 same result regarding Commission jurisdiction if it
23 had applied the analysis in the West Jordan case
24 under the "ripper" clause in the Constitution. Heber
25 then makes an attempt to distinguish the case. Part

1 of the attempt is an argument that the case has a
2 very limited holding. Heber cites a reference to the
3 Commission's conclusion at the end of the case in
4 support of that.

5 First of all, I don't know that it matters
6 whether it's limited, or whether it's a broad or a
7 limited holding, because the Commission found it had
8 jurisdiction, and that's the issue that's before you
9 today. But if you review the entire decision, I
10 think it's clear that the Commission based its
11 conclusion on a much broader holding.

12 In fact, right at the start of the
13 decision, the Commission was asked to issue a
14 declaratory ruling. The Commission states it was
15 asked to issue a declaratory ruling that Sandy's
16 provision of service, outside its municipal
17 boundaries, would not be subject to Commission
18 jurisdiction. The Commission denied that request,
19 declaring instead, and I quote: "The Commission has
20 jurisdiction over a municipality to the extent it
21 provides retail service" -- water service in that
22 case -- "outside its boundaries as a general
23 business."

24 Heber also attempts to distinguish the
25 case on the ground that the Commission was simply

1 concluding that when service to customers of a
2 regulated utility is taken over by a municipality,
3 the Commission retains the jurisdiction it previously
4 had. This argument is also incorrect because it
5 ignores the bulk of the Commission's analysis, which
6 was not based on the fact that this was an
7 acquisition. In fact, the Commission observed in the
8 case, quote: "The situation is not one whit different
9 when a municipal purposely acquires an existing
10 regulated water system." So its prior discussion
11 wasn't addressing that issue and it's not different
12 when they're acquiring one.

13 In any event, the interesting thing is
14 Heber then concedes, really, that the case is on
15 point because it asked the Commission to overrule it.
16 You don't have to overrule the case if it's
17 distinguishable. So the very fact they're asking you
18 to overrule it means it isn't distinguishable.

19 Heber says the case is wrong because the
20 Commission justified its holding purely on public
21 policy concerns rather than statutory grounds.
22 That's not an accurate portrayal of the case. Again,
23 I quote the Commission: "We concede at the outset
24 that we have no authority to regulate a municipality
25 within its boundaries. However, we conclude that

1 case law, statutory law and public policy support our
2 authority to regulate Sandy's water service outside
3 its boundaries." The Commission clearly considered
4 statutory or legal grounds in its analysis and did
5 not rely solely on public policy to support its
6 holding.

7 The Commission carefully analyzed
8 constitutional and statutory limitations on its
9 authority to regulate municipal utilities based on
10 both the language of the Constitution and statutes,
11 and the Supreme Court cases is addressing those. The
12 Commission also carefully analyzed the authority of
13 municipal utilities to provide service outside their
14 boundaries. In doing so, the Commission recognized
15 what is the key issue in this case, and which is
16 something that Heber keeps ignoring. The Commission
17 stated in White City Water, quote: "Should Sandy
18 provide water service to White City's
19 extraterritorial customers, it would, to that extent,
20 not be exercising a municipal function. Sandy would
21 be acting as a traditional utility, exercising a
22 business function, and therefore it would be subject
23 to regulation."

24 And that's the key. We're not claiming
25 that Heber is a public utility subject to the

1 Commission's regulation when it provides a municipal
2 function. What we're saying is when it goes beyond
3 providing a municipal function, that's when it comes
4 under the statutes that authorize the Commission to
5 regulate public utilities.

6 The Commission has -- there can be no
7 dispute that the Commission has authority to regulate
8 public utilities. There's an exception to that for
9 municipalities that are providing municipal service
10 within their boundaries. However, when a
11 municipality goes beyond its legitimate function,
12 it's acting just like anyone else who provides a
13 utility service and it's not exempt from regulation
14 by the Commission.

15 And that's why -- Heber argues that all
16 the discussions in the Division's memo and Rocky
17 Mountain Power's memo about the authority of Heber to
18 provide public utility service is just an unnecessary
19 burden on the Commission. But just as in the White
20 City Water case, the issue of whether Heber's acting
21 as a governmental entity in providing public utility
22 service is crucial to deciding whether it is exempt
23 from Commission regulation. When Heber goes beyond
24 its governmental authority, as it has admittedly done
25 here, it is no longer performing a governmental

1 function, and to that extent it is not exempt from
2 Commission regulation.

3 It occurred to me that we're all talking a
4 lot about White City Water. I assume you have a copy
5 of that. Okay, I didn't know. The copy I have is
6 kind of a funny one, and so I wanted to get a nice,
7 clean one. But anyway, if you've got one, that's
8 great.

9 I think if you study the case, you'll
10 realize that it answers the question before you, and
11 the Commission carefully considered the issue, all
12 the claims that are raised, and has addressed them.
13 Heber claims that the case is wrong because it's
14 contrary to the Lifeline case, which Mr. Dunbeck just
15 referred to as the Mountain States Telephone case,
16 and other cases that recognize that the Commission's
17 authority is limited to that expressly granted or
18 clearly applied by statute, and that the Commission
19 can't assume jurisdiction for policy reasons. Rocky
20 Mountain Power doesn't have any argument with those
21 cases.

22 However, given the fact that Heber is not
23 acting in its municipal function when it provides
24 service outside its boundaries, there's no conflict
25 between White City Water and the Lifeline case or the

1 other cases cited by Heber. As already discussed,
2 the Commission clearly has authority to regulate
3 public utilities, except municipalities, providing
4 public utility services to their citizens. Thus, the
5 Commission has the statutory authority to regulate
6 Heber in performing an non-municipal or private
7 function that Lifeline and other cases say that it
8 needs. It's not necessary for statutes to otherwise
9 grant authority for the Commission to regulate
10 municipalities when they provide service beyond their
11 government role. The Commission already has that
12 authority.

13 Heber also makes another argument in its
14 reply that's new, and that is the argument that
15 Mr. Dunbeck made about the fact that the definition
16 of "corporation" excludes local government entities.
17 That's true. However, if Heber is not acting as a
18 government entity when it provides service outside
19 its boundaries, it is not excluded from that
20 definition.

21 In addition, even if Heber is not a
22 corporation, that doesn't mean it's not a public
23 utility. An electrical corporation, as defined in
24 the Code, includes more than just corporations. It
25 includes cooperative associations and persons. As

1 Rocky Mountain Power argued in its response, Heber is
2 a person because a "person" includes associations and
3 companies. Heber calls itself a company and does not
4 really challenge that portion of Rocky Mountain
5 Power's response.

6 Since Heber's admittedly a company, it
7 doesn't really matter whether it's an association.
8 But then we get into all the discussion about whether
9 it's an association. Well, the fact is it's an
10 association of three local government entities that
11 associate to provide electrical service to their
12 citizens, so that's not really a serious issue,
13 either.

14 Heber's argument that if a government
15 entity cannot be a corporation, it also cannot be an
16 association or person doesn't make sense to me.
17 While it's true that the terms used serially in a
18 statute are interpreted together, it is not true that
19 they all must be regarded as meaning the same thing
20 or having the same characteristics. If that were the
21 case, there would be no need for the Legislature to
22 list the series of terms. Obviously, when the
23 Legislature listed the series of terms in the
24 statute, it was attempting to include all types of
25 entities that provide public utility service within

1 the definition of a public utility so they could be
2 regulated by the Commission.

3 The other thing I want to note is that
4 Rocky Mountain Power's interpretation of the statutes
5 is consistent with the Commission's sound reasoning
6 in White City Water. Mr. Dunbeck also mentioned the
7 1989 amendment that removed -- I think it was
8 governmental entities from municipal entities from
9 the definition of electric -- from the definition in
10 the Code.

11 The 1989 amendment is interesting, because
12 it was, in fact, an amendment to correct an error
13 that had been made previously. In 1985, the
14 Legislature added that term to that section because
15 parties that were providing cogeneration,
16 governmental entities that were providing
17 cogeneration, were concerned that they wouldn't
18 qualify under some federal law unless they were
19 considered to be public utilities.

20 But in doing that, the Legislature
21 recognized later that it painted too broadly and had
22 opened the door for the argument that municipal power
23 systems were subject to Commission regulations. So
24 the amendment was to correct that error. It did not
25 in any way indicate that the Commission -- that the

1 Legislature was saying to the Commission that you
2 don't have authority to regulate a municipal power
3 company when it provides service beyond its
4 authority, outside its boundaries.

5 Rocky Mountain Power also noted in its
6 response that many of the arguments and factual
7 arguments raised by Heber in fact compel the
8 conclusion that the Commission does have jurisdiction
9 because it's the only entity that has authority to
10 resolve the issues. These are issues such as that
11 Rocky Mountain Power's abandoned its certificate or
12 has forfeited its certificate or has refused to
13 provide service it's obligated to provide under its
14 certificate. In response, we pointed out that those
15 are clearly issues that can only be addressed by the
16 Commission.

17 In its reply now, Heber argues that these
18 issues don't matter because the Commission must have
19 statutory authority to regulate Heber's
20 extraterritorial business, and because the Commission
21 can regulate Rocky Mountain Power without regulating
22 Heber. If these issues don't matter, one can only
23 wonder why Heber brought them up.

24 But more importantly, they do matter, and
25 they go to the heart of the issue in this case. The

1 problem here is that Rocky Mountain Power has an
2 obligation to provide service in its certificated
3 area, but cannot reasonably make the investments
4 necessary to provide that service because the
5 investments will be wasted in areas Heber chooses to
6 serve. Heber believes it can serve wherever it
7 wants, but fails to recognize that its unilateral
8 choices affect Rocky Mountain Power's regulated
9 service in its certificated area.

10 In addition, Heber fails to recognize that
11 it has no obligation to serve extraterritorial
12 customers on terms found just and reasonable by the
13 Commission or to continue to serve them, but Rocky
14 Mountain does have those obligations. If Heber
15 refuses to provide service, to continue to provide
16 service or to provide service on just and reasonable
17 terms, its extraterritorial customers have no
18 franchise to address that issue.

19 Now, these problems that I've just
20 discussed can be satisfactorily eliminated in only
21 one of two ways. First, they're eliminated if Heber
22 is restricted to serving within its members'
23 boundaries. Second, they're eliminated if Heber's
24 service outside its members' boundaries is subject to
25 regulation by the Commission. The issue of which

1 entity has the obligation to serve in which part of
2 Wasatch County outside Heber's municipal boundaries
3 is clearly an issue within Commission jurisdiction
4 that can only be resolved by the Commission. The
5 Court has neither the jurisdiction nor the expertise
6 to decide that issue. Only the Commission can issue
7 certificates of public convenience and necessity and
8 determine the boundaries of a utility for these
9 areas. That's the issue that's at the heart of this
10 case.

11 So the Commission has authority to
12 regulate public utilities except municipalities
13 providing service within their jurisdictions. White
14 City Water is a sound and well-reasoned decision.
15 Although it is consistent with several Supreme Court
16 decisions, it is the only authority that directly
17 addresses the issues in this case. Why hasn't it
18 been cited subsequently? Probably because no one
19 else is doing this.

20 White City Water correctly holds that when
21 a municipality provides service to customers outside
22 its municipal boundaries, it is not acting as a
23 governmental entity, and loses the exemption from
24 Commission regulation to the extent of that
25 extraterritorial service. The Commission is the only

1 tribunal with the authority to determine which entity
2 has the obligation to serve customers outside the
3 municipal boundaries of Heber. Therefore, the
4 Commission has jurisdiction over the issues in Rocky
5 Mountain Power's amended complaint and Heber's motion
6 should be denied. Thank you.

7 THE COURT: Thank you.

8 Mr. Ginsberg?

9 MR. GINSBERG: Thank you. The Division is
10 opposing the motion to dismiss made by Heber on the
11 basis of the White City Water decision, and that
12 there is no controlling Utah Supreme Court decision
13 that specifically has determined what jurisdiction
14 the Public Service Commission has when a municipality
15 is providing service in a non-surplus manner in an
16 area that, as Heber has indicated, is almost a
17 franchised area where they have a service territory,
18 and said to the Commission it doesn't have
19 jurisdiction to address that issue.

20 An area that I think neither of the two
21 parties has addressed, if I could quote a little
22 section from the White City decision, it says: "Sandy
23 does not have specific delegated authority to serve
24 water outside its boundaries without state
25 regulation. Where there are gaps in the coverage of

1 applicable statutes, as in the instant case, we
2 believe that legislative extent should be interpreted
3 as to protect the constitutional rights of citizens,
4 which in this case are the extraterritorial retail
5 customers."

6 We're not here just in, I think, an
7 academic/legal exercise to sort of define who has
8 authority to serve where, but instead, we are here to
9 determine the effect that is occurring on thousands
10 of customers outside of Heber who are being served in
11 a way that is questionable under the authority of the
12 statutes. These customers have no place to go for
13 their complaints. They have no real recourse on
14 potential discriminatory rates, who is going to serve
15 them, whether Rocky Mountain Power is going to serve
16 them or whether Heber is going to serve them. There
17 is no forum for them to make those decisions.

18 So it's really the customers who are
19 outside of Heber who are the ones that we're here to
20 determine whether or not there's a forum to resolve
21 this dispute, whether it be appropriate for the
22 Public Service Commission to resolve that dispute
23 under the White City decision or whether a court is
24 going to resolve that dispute if the Commission
25 dismisses that as appropriate.

1 It seems to the Division that there is
2 little difference between what occurred in the White
3 City Water case where Sandy City acquired an existing
4 public utility serving outside of the City of Sandy
5 and within the City of Sandy. The acquisition of the
6 area outside the City of Sandy was clearly beyond the
7 authority of Sandy to acquire. It was non-surplus
8 water. Here, for whatever reason, historical or
9 whatever, Heber has basically taken over. They've
10 called it -- they said that Utah Power & Light, Rocky
11 Mountain Power has forfeited or abandoned its
12 certificate, but has basically taken over the
13 obligations to provide service in the area outside of
14 these three cities. Rocky Mountain Power may have
15 abandoned their certificate. They may have forfeited
16 certain rights that they had under their certificate
17 by acquiescence, or laches or other things may have
18 taken place between Rocky Mountain Power and Heber
19 where they consented to what has taken place.

20 But it seems to the Division that all of
21 that is irrelevant, because what we're faced with
22 today is that Heber is serving in an area that was
23 certificated to Rocky Mountain Power, and it's how we
24 got there, and what the relationship is between Rocky
25 Mountain Power and Heber does not go to the authority

1 of Heber to serve in that area or what the effect
2 will be on the customers who are now being served by
3 Heber Light & Power. Heber's answer, basically, to
4 the White City decision is to either distinguish it
5 or to overrule it.

6 The second area, I think, that I'd like to
7 talk about for a minute is what forum really best can
8 address the issue that is being presented here. If
9 the Commission dismisses this, it will probably end
10 up in court, and a court clearly doesn't have the
11 jurisdiction over the certificated area of Rocky
12 Mountain Power. It can't alter the certificate. It
13 can't divide up the territory. It can't determine
14 what relationship exists between Rocky Mountain Power
15 and Heber. It might be able to tell Heber that it
16 doesn't have the authority to provide service in the
17 way it has, but once it does that, then the issue
18 would probably have to come back here to address the
19 results.

20 So in interpreting the White City
21 decision, we think the Commission should keep in mind
22 that the similarities between these two are quite
23 remarkable, because in the White City decision, Sandy
24 took over the certificated service territory by
25 acquisition of an existing public utility, and the

1 Commission basically said going along with that
2 extraterritorial service that you are acquiring,
3 there's going to be some form of Public Service
4 Commission regulation to protect those citizens who
5 are disenfranchised and are left without recourse
6 because of this acquisition. Here, Heber Light &
7 Power has apparently, as the facts appear to say, has
8 taken over the certificated obligations of Utah Power
9 & Light, at least in the area of Wasatch County that
10 they outlined on that. Those citizens are in the
11 same position as the extraterritorial citizens of
12 Sandy. And based on the analysis of the White City
13 decision to serve deserving the types of protection
14 that the Commission was willing to offer the Sandy
15 citizens, they should similarly offer to the Heber
16 Light & Power extraterritorial citizens. Thank you.

17 THE COURT: Thank you, Mr. Ginsberg.

18 Mr. Dunbeck?

19 MR. DUNBECK: Thank you. I won't stand up
20 this time.

21 THE COURT: That's fine.

22 MR. DUNBECK: I didn't know the rules.

23 The issue here is not what is best. It
24 really is not. The issue here is not what is the
25 best forum to resolve this issue. The issue here is,

1 as we've quoted in our brief, the issue here is: Does
2 the Commission have jurisdiction over Heber Light &
3 Power with respect to these issues? All of the
4 policy arguments that have been made may be
5 wonderful, may be accurate. However, it begs the
6 question of what is the statutory authority for this
7 Commission to assert jurisdiction over Heber Light &
8 Power?

9 Mr. Monson quotes from White City Water in
10 an effort to resurrect what I believe to be a dead
11 body. It is true that as he read from the decision,
12 that White City does refer to a statute. But if you
13 read the case, the statute they refer to is the
14 statute dealing with the municipality's jurisdiction,
15 not the Commission's jurisdiction.

16 There is no reference, no citation in
17 White City Water to any statutory provision that gave
18 the Commission jurisdiction over Sandy and the
19 circumstances discussed there. That's why the
20 Commission said that there were gaps. That's why
21 they said we are acting without statutory authority.
22 And as Mr. Ginsberg suggested, the reason they did it
23 was because they felt a compelling need to protect
24 the constitutional rights of the people in the
25 extraterritorial areas.

1 They did not have the authority to do
2 that. The statute does not give them that power.
3 And that's why White City is wrongly decided. No
4 meaningful reading of that case can come to the
5 conclusion that there's a statutory authority on
6 which White City is based.

7 White City is also distinguishable for the
8 reasons that I previously indicated. After
9 struggling for four pages without citing to any
10 statute, the Commission finally says, well, I guess
11 we have rate jurisdiction, and at least covering
12 invidious discrimination. You cannot ignore that
13 language. It's in the case. It's what the
14 Commission decided.

15 That's not what we have here. What we
16 have here is a request that they take over our
17 operations and treat us like any other public
18 utility. Mr. Monson asked the question: What are we
19 to do? How are we to protect ourselves? Well, it's
20 very clear what they're to do. They're to go to
21 district court, like they did in UAMPS 1, and
22 challenge the right and the authority of a
23 municipality to do business where they claim we ought
24 not to be doing business. They're fully protected.
25 If they want to go there, they can go there. We will

1 litigate the issue.

2 The Commission simply does not have
3 jurisdiction to decide the issue. And there may be
4 sundry, good reasons why they should, but as the
5 current statutes indicate, you don't have
6 jurisdiction. So the real answer is if you have a
7 problem with Heber Light & Power, don't sue them in
8 the wrong forum. Sue them in the correct forum.
9 We'd be happy to defend with respect to the issues
10 that are being raised.

11 On the question of whether or not -- the
12 question of arguments with respect to whether it's
13 performing the municipal function in the
14 unincorporated areas or not, the UAMPS 2 case, which
15 is what White City relies on, actually supports our
16 position. In UAMPS 2, there was an express grant of
17 authority to the Commission to grant a certificate in
18 the situation that was at issue in that case. The
19 only question was whether the "ripper" clause
20 prevented enforcement of that statutory grant of
21 authority.

22 In our case, the "ripper" clause doesn't
23 apply because the Commission simply has not been
24 given authority. We don't have to reach the "ripper"
25 issues because you haven't gotten the statutory

1 authority in the initial instance.

2 There's been some mention in connection
3 with the affirmative defenses that we've raised in
4 our answer, and I do want to touch on those briefly.
5 We're in a catch-22 at this point. A complaint's
6 been filed against us. We claim you don't have
7 jurisdiction, but we're required to file an answer
8 that raises our affirmative defenses. The
9 affirmative defenses are raised not because we want
10 to litigate those issues in the PSC, but we raised
11 those issues because we were required to because of
12 the pleading practices.

13 I just want to end with the public policy
14 concerns, which is all, really, that's been argued
15 here today, and it's all that's in the briefs, and
16 it's all in White City, are simply insufficient to
17 give the Commission jurisdiction. The one case that
18 I thought was pretty compelling was actually a
19 Commission decision cited in our brief at page 16.

20 It's Qwest Corporation. In that case,
21 everybody agreed that the utility, the Committee for
22 Consumer Services and the Division of Public
23 Utilities all agreed that in that situation, that the
24 defendant was putting customers and developers in a
25 potential position where they could be defrauded.

1 And we've quoted that extensively, and
2 notwithstanding that there was fraud going on in that
3 case, the Commission declined jurisdiction because it
4 wasn't given jurisdiction over that entity pursuant
5 to the statute. And the result in the Mountain
6 States case is the same. If you don't have it
7 written in the statutes, you don't have jurisdiction.

8 One last thing. Mr. Monson suggests that
9 "governmental entity" doesn't include Heber Light &
10 Power. Well, we are a governmental entity, and
11 there's nothing in the statute that says governmental
12 entities should somehow be defined any differently
13 than the plain language, which is: Are you a
14 governmental entity? It doesn't talk about
15 functions. It doesn't talk about any of those
16 things. And there is no authority for treating Heber
17 Light & Power as anything other than a governmental
18 entity.

19 Because of the lack of statutory basis, we
20 urge the Commission to grant our motion to dismiss
21 and find that you do not have subject matter
22 jurisdiction.

23 THE COURT: Thank you, Mr. Dunbeck.

24 Anything else from anybody?

25 MR. MONSON: If I might comment just

1 briefly on that Qwest case, that was a situation
2 where a company that was not providing public utility
3 service to anyone was utilizing a mechanism
4 essentially telling developers that if they let them
5 put in their telephone facilities, that they would
6 then sell those facilities to either Qwest or some
7 other telecommunications provider. It was not an
8 issue of whether that entity in that function was a
9 public utility. The question was whether, by putting
10 in telecommunications facilities, they were a public
11 utility, not in providing service to customers. So
12 it's a different situation. Here, Heber is clearly
13 providing public utility service to customers. As
14 Mr. Ginsberg pointed out, it's those customers whose
15 rights need to be looked after.

16 THE COURT: Mr. Ginsberg, anything?

17 MR. GINSBERG: No.

18 THE COURT: Mr. Dunbeck, would you like to
19 reply?

20 MR. DUNBECK: No, Your Honor. Thanks.

21 THE COURT: All right. Thank you very
22 much. I'll take this matter under advisement and
23 issue a decision. Thank you.

24 (The proceedings were concluded at 10:26 a.m.)

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REPORTER'S HEARING CERTIFICATE

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STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, Kathy H. Morgan, Registered Professional Reporter and Notary Public in and for the State of Utah, do hereby certify:

That prior to being examined, the witnesses were duly sworn to tell the truth, the whole truth, and nothing but the truth;

That said proceeding was taken down by me in stenotype on October 2, 2008, at the place therein named, and was thereafter transcribed, and that a true and correct transcription of said testimony is set forth in the preceding pages;

I further certify that I am not kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the outcome thereof.

WITNESS MY HAND AND OFFICIAL SEAL this 5th day of October, 2008.

Kathy H. Morgan, RPR, CSR
Notary Public