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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Complaint of Rocky Mountain Power, a Division of PacificCorp, Against Heber Light & Power Regarding Unauthorized Service by Heber Light & Power in Areas Certificated to Rocky Mountain Power.	Docket No. 07-035-22 Heber Light & Power Company's Memorandum in Support of its Motion to Dismiss for Lack of Subject Matter Jurisdiction
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Heber Light & Power Company (“HLP”) hereby submits this memorandum in support of its motion to dismiss for lack of subject matter jurisdiction the Amended Complaint filed in this docket by Rocky Mountain Power (“RMP”). The Amended Complaint asks the Commission to determine the extent of HLP’s authority to serve its customers and to define the boundaries of its service territory. RMP, however, cites no statute which gives the Commission subject matter jurisdiction to make either of these determinations. The reason for this lacuna is that there is no statute giving the Commission jurisdiction over HLP, a Utah interlocal entity and political

subdivision of the State of Utah. For this reason, the Commission must dismiss RMP's complaint for lack of subject matter jurisdiction.

INTRODUCTION

Heber Light & Power Company or its predecessor Heber City has provided retail electric service to residents and businesses in the Heber Valley for nearly 100 years. These operations, which have evolved over the years, began in 1909 when a hydroelectric power plant was built on the Provo River north and HLP began providing service within the Heber Valley. In the 1930's, Heber City, Midway City, and Charleston joined together to form what is now known as HLP. Later, these member municipalities reorganized HLP under the Utah Interlocal Cooperation Act, *Utah Code Ann.* §§ 11-13-101, et seq., and it continues to operate under this Act to the present.

From 1909 to the present, HLP has provided electric service to customers on the floor of the Heber Valley who have requested service. This service has been provided both within the member's municipal boundaries and also in the unincorporated areas of Wasatch County located on the valley floor. HLP has provided this service in part because no other electric utility had the interest or facilities to provide service to these customers scattered across the Heber Valley.

Dramatic growth and development in recent years has apparently now made the Wasatch County, including the Heber Valley, attractive to RMP. This is illustrated by the 2005 RMP extension of its 138kv transmission line and construction of a new substation to serve the developing areas primarily around the Jordanelle Reservoir. The 138kv-12.5kv substation was originally to be located above the dam, but because of citing difficulties was ultimately located below base of the dam. This location gives RMP, for the first time, some capacity to provide service to the north end of the Heber Valley.

However, even with these new facilities, RMP lacks the necessary facilities to provide services generally throughout the Heber Valley. This is best illustrated by the fact that RMP's

customers in the Timber Lakes subdivision located in the foothills east of the Heber Valley are serviced by electricity provided by HLP and over HLP's power lines.

Unlike HLP, RMP has chosen not to make the capital investment in local infrastructure necessary to serve the Heber Valley floor. Indeed, it cannot even serve its own customers in the foothills above the Heber Valley without HLP's assistance. It has made no attempt for decades to provide service and stood by without protest while HLP went about its business of purchasing resources and constructing significant infrastructure in order to provide electrical services never offered by RMP. After years of ignoring the Heber Valley, RMP now is challenging HLP's authority to continue to serve the entire Heber Valley in an effort to opportunistically, cherry-pick customers from HLP's historical service area. Given these facts, HLP will fully defend these claims in the appropriate forum.

However, this Commission is not the appropriate forum to resolve the issues between HLP and RMP. The Commission has only that jurisdiction delegated by the Utah legislature. It has never been given general jurisdiction over electrical services provided by Utah governmental entities such as HLP. For this reason, and as discussed below, the Commission should dismiss the complaint for lack of jurisdiction.

FACTUAL STATEMENT

The only facts relevant to the issue of whether this Commission has jurisdiction over HLP's provision of electrical services or its service territory are undisputed and are the following:

1. Heber Light & Power Company is an energy services interlocal entity formed under the Interlocal Cooperation Act.
2. HLP was formed by Heber City, Midway City and Charleston.

3. As an energy service interlocal entity, HLP is separate from its members and is a political subdivision of the State of Utah. *Utah Code Ann.* § 11-13-203(1).

ARGUMENT

The Public Service Commission is a creature of statute. It has only the authority or jurisdiction granted by the Utah Legislature. *Hi-Country Estates Homeowners Assoc. v. Bagley & Co.*, 901 P. 2d 1017, 1021 (Utah 1995) (“The PSC has only the rights and powers granted to it by statute.”) (quotation omitted). Moreover, “any reasonable doubt of the existence of any power [of the Commission] must be resolved against the exercise thereof.” *Id.* at 1021. The Utah Legislature has clearly not granted to the Commission any authority or jurisdiction to determine HLP’s authority to provide service within the Heber Valley or the extent of its service territory.

RMP claims jurisdiction on two grounds. First, it claims that the Commission has jurisdiction because HLP allegedly lacks authority under the Utah Municipal Code to serve in the unincorporated areas of the Wasatch County and because the customers in the unincorporated areas cannot vote for the Member’s councils. *Amended Complaint* at ¶¶ 3-4. This non-sequitur provides no support for RMP’s claim of Commission jurisdiction. Even if these disputed assertions were accurate, they do not in any manner address the question of which court or commission has the authority to adjudicate the implications of the same. More importantly, this argument fails because the Commission has been given no statutory authority whatsoever to address or resolve RMP’s claims.

Second, RMP suggests that Commission jurisdiction can be found in Section 11-13-304 of the Utah Interlocal Cooperation Act (the “Interlocal Act”). This argument also fails. The Interlocal Act expressly exempts HLP from the requirements of Section 11-13-304.

For these reasons, and as discussed more fully below, the Commission must dismiss RMP's action for lack of subject matter jurisdiction.

A. The Public Utility Act Does Not Delegate To The Commission Any Form of Jurisdiction Over Electric Services Provided by HLP.

The Commission's grant of jurisdiction is limited to public utilities. *Utah Code Ann.* § 54-4-1. HLP is not a public utility. The Commission therefore lacks subject matter jurisdiction.

The authority of the Commission under *Utah Code Ann.* § 54-4-1 is expressly limited to public service by public utilities. A "public utility" is defined in Section § 54-2-1(15) to mean, in pertinent part, an "electrical corporation." An "electrical corporation" is defined in Section 54-4-1(7) to mean, in pertinent part, a "corporation, cooperative association, and person." Since HLP is not a "corporation" or a "cooperative association, the Commission only has jurisdiction if HLP is a "person" within the meaning of the Public Utility Act.

A "person" is defined in Section 54-2-2 to mean "individuals, corporations, partnerships, associations, trusts, and companies." HLP, as a political subdivision, is not any of these entities. Under the plain language of the Code, HLP is not a "person" and is thus not a "public utility" subject to the Commission's jurisdiction. *See Thompson v. Salt Lake City Corp.*, 724 P.2d 958, 959 (Utah 1986) ("As a municipal corporation, [Salt Lake City] is authorized to operate a waterworks. However, it does not engage in the activity as a public utility, but is specifically excluded from that status" (citations omitted)).

Governmental entities such as HLP have never been public utilities under Title 54 of the Utah Code. Moreover, the intent of the legislature to exclude governmental entities from the scope of the Public Utilities Act was bolstered by the legislature's 1989 amendment to delete "governmental entity" from the definition of "person" in Section 54-2-2. In addition, the legislature has no problems in expressing its intent to subject certain governmental entities to the

Commission's jurisdiction when that is in fact its intent. See, for example, *Utah Code Ann.* § 11-13-304.

B. The Utah Interlocal Cooperation Act Does Not Give the Commission Jurisdiction Over HLP.

The Utah Interlocal Cooperation Act gives the Commission limited jurisdiction to issue certificates of convenience and necessity under certain circumstances for certain interlocal entities. RMP relies upon this limited grant of authority for its argument that the Commission has jurisdiction to adjudicate the claims in its Amended Complaint. This argument fails because HLP is not subject to the requirements of Section 11-13-304. HLP, as an “energy services interlocal entity,” is exempted from this section of the Interlocal Act.

Utah Code Ann. § 11-13-204(2)(a)(i) expressly exempts an “energy services interlocal entity” from the application of “Part 3” of the Interlocal Act. HLP is an “energy services interlocal entity.” *Utah Code Ann.* §§ 11-13-103(7); 11-13-203(4). Section 11-13-304, upon which RMP relies in support of its claim of Commission jurisdiction, is found in “Part 3” of the Interlocal Act, and thus has no applicability to HLP. Under the plain language of the Interlocal Act, the Commission lacks jurisdiction over HLP's construction of electrical generating plant or transmission line, and RMP's complaint must thus be dismissed.

CONCLUSION

RMP has not asserted any cognizable grounds for this Commission to address or resolve the claims raised by it against HLP. Whether or not HLP lacks authority under the Utah Municipal Code to continue to serve its customers in unincorporated areas of the Heber Valley as claimed by RMP, RMP has cited no statutory authority, and indeed there is none, that authorizes this Commission to resolve these claims. Moreover, HLP is expressly exempted from the

portion of the Interlocal Act relied upon by RMP. Because the Commission lacks subject matter jurisdiction to resolve RMP's complaints against HLP, this action must be dismissed.

Dated this 4th day of April, 2008.

/s/ _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this 4th day of April, 2008, on the following

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