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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Complaint of Rocky Mountain Power, a Division of PacifiCorp, 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 REPLY MEMORANDUM IN SUPPORT OF HEBER LIGHT & POWER'S MOTION FOR STAY PENDING JUDICIAL REVIEW
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Heber Light & Power Company ("HLP") hereby submits this Reply Memorandum in Support of Heber Light & Power Company's Motion for Stay Pending Judicial Review.

INTRODUCTION

In this proceeding, Rocky Mountain Power ("RMP") challenges Heber Light & Power Company's ("HLP") authority to provide service in the unincorporated areas of Wasatch County

and seeks an order prohibiting HLP from continuing to provide such service, as it has for more than 100 years. During this time, HLP provided this service without challenge from RMP and without any claim of jurisdiction or oversight by the Commission.

Although RMP seeks to prohibit HLP from serving the unincorporated areas of Wasatch County, RMP lacks the present ability to serve almost all of these areas. Indeed, RMP's discovery responses acknowledge that RMP does not currently have distribution facilities to serve the unincorporated areas within HLP's historic service area. *RMP Response to HLP Data Request* No. 14, attached as Exhibit A. Moreover, RMP's memorandum acknowledges RMP's need to plan construction projects and power supply needed to serve within HLP's historic area. *Rocky Mountain Power's Response in Opposition to Motion for Stay Pending Judicial Review* ("RMP Response") at p. 4. In other words, RMP claims the authority and obligation to serve these areas, but acknowledges its present inability to fulfill this obligation.

HLP has filed a motion to stay these proceedings pending resolution of HLP's appeal of the Commission Order to the Utah Supreme Court. Through this motion, HLP has sought to avoid the wasted cost of litigation in a forum which the Court may determine does not have jurisdiction.

After having agreed to many months of delay, RMP opposes a stay because of the supposed untoward effect of delay on development in Wasatch County and on RMP's planning to serve the unincorporated of Wasatch County. *RMP Response* at 3-4. The Commission may properly look with a jaundice eye on RMP's new-found concern with delay. RMP has not shown how, after many months of delay, a stay of a few months will harm anyone. Faced with these same arguments, the Supreme Court refused to shorten the briefing schedule or to expedite oral argument.

While HLP shares RMP's desire for a prompt resolution of the service territory issue, the Commission would do more harm than good by proceeding with discovery before the Court determines whether the Commission has jurisdiction. First, the Commission lacks jurisdiction because continuing with the litigation would conflict with the Utah Supreme Court's jurisdiction. Second, the Commission's failure to stay will have a substantial adverse affect on HLP and the other parties which are not offset by any equities served by granting the stay. For these reasons and as discussed below, the Commission should stay these proceedings and the affect of its order.

ARGUMENT

I. The Appeal Divests The Commission of Jurisdiction.

The Utah Supreme Court's ruling on divesture in *Career Service Review Board v. Utah Dept. of Corrections*, 942 P.2d 933, 943 (Utah 1997) is not *dicta*. At issue were two agency orders of the Career Service Review Board ("Board"), the 1993 Order and the 1994 Order. The 1993 Order essentially ordered the Department of Corrections ("Department") to pay restitution to an employee. The Department appealed the 1993 Order but later voluntarily dismissed the appeal by stipulation. Later, the Board issued the 1994 Order which directed that the Department make further payments under the 1993 Order to the employee. The Department ignored the 1994 Order, and the Board filed suit against the Department seeking to enforce its 1994 Order.

On appeal to the Supreme Court, the Department argued that the appeal of the 1993 Order and voluntary dismissal divested the Board of jurisdiction to issue the 1994 Order. The court however rejected this argument because, under the divesture rule, an appeal only deprived the Board of jurisdiction when there was a conflict between the Board's jurisdiction and the

court's appellate jurisdiction. Thus, in the *Career Service* case, the court relied on the divestiture rule to conclude that an agency has jurisdiction after an appeal has been dismissed because there was no conflicting jurisdiction under the divestiture rule. *Id.* At 944. This ruling is not dicta because the divestiture rule was necessary to the determination of the issue on appeal.

Applying *Career Services* to the instant case, it is clear that the Commission's jurisdiction conflicts with the appellate Court's jurisdiction. HLP, on appeal, seeks a court reversal of the Commission's claim to jurisdiction. If the Commission proceeding continues, HLP will have been subject to Commission jurisdiction regardless of how the Court rules. Since the Court and Commission jurisdiction conflict, the Commission is divested of jurisdiction.

To avoid a stay, RMP would like to transform this proceeding into an investigation of a public utility. *RMP Response* at 7-8. The Commission has authority to investigate a public utility, like RMP. In making such an investigation the Commission has the authority to, among other actions, issue subpoenas to witnesses, require a public utility to answer discovery questions, and determine the status of a certificate of convenience and necessity. Such an investigation, however, does not require HLP to be a party to a proceeding. It is one thing for HLP to be subject to Commission jurisdiction with all of the attendant duties and responsibilities that come with it. It is quite another to merely be subject to a subpoena and involved as a third-party in an investigation of a regulated public utility. If RMP would like to proceed in this manner, it should open a new matter for its investigation of itself without naming HLP as a party, and it should dismiss the current proceeding.

II. The Commission's Failure to Grant A Stay Will Cause Irreparable Harm to HLP and the Other Parties.

RMP argues extensively that a stay would cause injury to RMP and development in Wasatch County. As shown in Part III below, RMP has not and cannot show that such injures

would follow from a stay. Moreover, as discussed in this Part II, these supposed injuries are outweighed by the injuries to HLP and the other parties if a stay is denied.

A. No Party Has An Interest In Proceeding With Discovery Before An Agency That Does Not Have Jurisdiction.

Neither the Commission nor any party has an interest in incurring the cost and inconvenience of litigation which is rendered a nullity by a Supreme Court ruling leaving the Commission without jurisdiction. RMP implicitly acknowledges this possibility and that any scheduling order or other order could be vacated depending on the Supreme Court's decision. In other words, RMP requests that the Commission not stay this proceeding and force the parties to incur the cost and expense of discovery in a proceeding where the Commission may have no jurisdiction. No good reason exists for forcing the parties to incur these expenses until the Supreme Court resolves the jurisdiction issue.

This injury is not eliminated by a district court action. If Court reverses the Commission's jurisdictional ruling, the Division and Commission would have expended the resources on discovery which can only be used in district court. The Commission would not be a party to such a proceeding and the Division has not determined whether it would participate in such a proceeding. Stated simply, they would have incurred the expense of discovery but received no benefit. A stay would avoid this possibility at little cost.

B. HLP's Forced Participation in This Adjudicatory Proceeding Would Preclude HLP From Obtaining Meaningful Judicial Review of the Commission Order.

Unless the Commission grants a stay, the Commission's Order would subject HLP to immediate Commission jurisdiction. HLP would be required to participate in the Commission proceedings as if the Commission has jurisdiction. However, the very purpose of HLP's appeal is to obtain a judicial determination of whether HLP can properly be forced to participate in this

proceeding. Plainly, if HLP is forced to participate in these proceedings, any later ruling by the Court rejecting Commission jurisdiction would amount to closing the barn door after the horse had gotten away. In other words, without a stay, HLP will not be able to obtain meaningful judicial review of the Commission's assertion of jurisdiction.

The instant case is similar to *Southwestern Bell Tel. Co. v. Public Utility Comm'n*, 72 S.W.3d 23 (Tx. App. 2001). There, AT&T filed an action in the Texas Public Utility Commission ("PUC") against Southwestern Bell Telephone Company ("SWBT") challenging SWBT's charges to AT&T. *Id.* at 27. The PUC issued a preliminary order evidencing its intent to proceed with an adjudicatory hearing. SWBT filed a court action challenging PUC jurisdiction to modify SWBT rates or to conduct a hearing on those rates. *Id.* at 28-29. SWBT also requested "a temporary injunction restraining the PUC pendente lite from reducing the charges and from holding an adjudicative hearing for that purpose." *Id.* The court denied the temporary order and SWBT filed an interlocutory appeal.

On appeal, the Texas Appellate court found that continuation of the PUC proceeding pending judicial review would cause SWBT irreparable injury that justified the temporary order staying the PUC proceedings. It held:

*If SWBT's contentions are ultimately sustained by the district court, after a trial on the merits, it will be a meaningless and hollow victory if the agency has in the period before trial conducted a hearing and reduced the current amount of SWBT's switched-access charges, thereby extinguishing SWBT's claimed rights by actions the district court will have held ultra vires and unlawful. It appears to us then that a temporary injunction is the only practical and effective remedy to prevent such an eventuality. The statutory rights claimed by SWBT, if they exist, are larger than and different in character from a moral right to be free from the mere expense associated with a hearing before the PUC. **The substance of SWBT's claimed rights is a right to be free of agency regulation in particulars the legislature has reserved for itself as the sovereign's immediate representatives. It seems to us then that the rights claimed by SWBT cannot be measured by a pecuniary standard or compensated by money if destroyed by unlawful agency action.***

Id. at 30 (italics in original, additional emphasis added).

In the instant proceeding, HLP faces the very same type of irreparable injury that SWBT faced in the Southwestern Bell case. As in that case, HLP claims “a right to be free of agency regulation in particulars the legislature has reserved,” i.e., a right to be free from the Commission proceedings. If HLP is forced to participate in the Commission’s proceedings, HLP will have effectively lost the right to be free of Commission jurisdiction, even if, later, the Court were ultimately to determine that the Commission erred in asserting jurisdiction. Thus, the Commission should stay the extent of these proceedings to allow for meaningful review of the Commission Order.

C. The Commission Should Stay the Effect of Its Order to Avoid Adverse Consequences to HLP’s Business.

The Commission Order adopts a new and expansive interpretation of the Commission’s jurisdiction which could have far-reaching implications for all Utah governmental entities, and could have immediate and detrimental impacts on HLP’s business. Stated simply, the Commission Order could bring within the Commission’s broad jurisdiction any governmental entity that the Commission concludes has been “acting like a public utility,” subjecting the governmental entity to the full breadth of Commission jurisdiction under Utah Code Ann. § 54-4-1. *Commission Order* at p. 20.

The Commission’s newly-asserted and dramatic expansion of its jurisdiction over governmental entities has broad legal implications for HLP (and other municipal utilities) beyond the pending proceeding before the Commission. The Commission Order asserts general jurisdiction over HLP, not only to resolve the specific issues raised in the Amended Complaint, but also presumably to supervise and regulate HLP’s business as if it were any other public

utility. Stated simply, to the extent the Commission believes that HLP is acting “like a public utility,” it could presumably impose on HLP the full breadth of Commission regulation over regulated public utilities. *Commission Order* at p. 20.

It cannot be gainsaid that exposure to such regulation has immediate legal implications for HLP and will dramatically affect its day-to-day business.¹ *Utah Code Ann.* §54-7-10(1) (Commission orders are effective and operative on the date issued). The Commission Order drastically alters the legal regime under which HLP has operated for a century because HLP is no longer excluded, as a matter of law, from Commission jurisdiction. Even though it has always acted free of any Commission regulation, HLP’s operations could now become subject to scrutiny and control as if it were or could be a “public utility.” Additionally, HLP could now be required: to obtain Commission approval before increasing its rates or terms of service to existing customers (U.C.A. §§ 54-3-2, 54-4-4 (rates), U.C.A. §§ 54-3-2, 54-4-7, 54-4-18 (service)); to adopt the Commission’s system of accounts (U.C.A. §§ 54-4-21, 54-4-23); to obtain Commission consent before issuing securities, or entering construction or purchase contracts (U.C.A. § 54-4-31 (securities), U.C.A. § 54-4-26 (contracts)); and to conform to all Commission orders and regulations applicable to public utilities (U.C.A. § 54-3-23). See also Title R746 regulations promulgated by the PSC. These same costs would befall other municipalities as well.

HLP can presumably avoid the Commission’s newly-asserted jurisdiction only by discontinuing service to existing customers or by refusing to provide service to new customers in the unincorporated areas, even though no other service provider is presently able to provide service to most of these customers. Such a result would have dramatic and far-reaching implications not only for HLP but also for thousands of residents of the Heber Valley. To avoid these impacts, HLP requests a stay of the Commission’s Order pending appeal.

¹ Attached as Exhibit B is the Second Declaration of Blaine Stewart which details the impact on HLP.

RMP seeks to minimize these impacts by suggesting that the Commission Order merely “set[s] the stage” for further litigation. *RMP’s Response* at p. 9. This argument however ignores the fact that the Commission Order includes a governmental entity within the definition of “public utility” and thus could subject the governmental entity to the Commission’s general jurisdiction. This ruling does not simply “set the stage” for further litigation.

RMP argues that the Commission Order asserting jurisdiction over a governmental entity is not “new” because the Commission asserted jurisdiction over a governmental entity in *In re White City Water Company*, Docket No. 91-018-02, 133 P.U.R. 4th 62 (Utah P.S.C. 1992). The Commission in *White City* however did not assume general jurisdiction over a governmental entity, but limited its jurisdiction to “nullifying invidious [rate] discrimination” against the extra-territorial customers. *Id.* at 68. It did not state that the Commission had full regulatory jurisdiction over Sandy, or that it had the jurisdiction to determine the extent of Sandy’s authority to serve. On these issues, the Commission suggested that the proper forum, as in *CP National Corporation v. Public Service Commission*, 638 P.2d 519 (Utah 1981), was a judicial proceeding. *Id.* at 68 n. 4. Thus, the Commission Order asserting general jurisdiction over HLP goes beyond *White City* and is a new and expansive assertion of Commission jurisdiction. With regard to *White City*, it is noteworthy that the Commission did not rely on *White City* in its analysis of its jurisdiction over HLP.

RMP further argues that the Commission’s assertion of jurisdiction over HLP will not be binding on other municipalities, who are not parties. This argument is curious given RMP’s repeated citation of *White City* as supporting jurisdiction over HLP. Obviously, the Commission decision finding jurisdiction over HLP will be cited as authority for jurisdiction over other

governmental entities, just as RMP has cited *White City* here, even though HLP was not a party in *White City*.

III. Development In Wasatch County and RMP's Planning Will Not Be Adversely Affected by a Stay of These Proceeding or The Effect of Its Order.

RMP claims that a stay of these proceedings would hinder development in Wasatch County and planning by RMP. Little weight should be given to RMP's claims about delay. RMP has agreed to stay these proceedings for many months without harm to itself or others. In fact, RMP agreed to stay these proceedings for approximately eighteen months following the filing of its complaint. *RMP Motion to Set Schedule* at p. 2. Moreover, during these proceedings, RMP has issued will-serve letters to customers inside HLP's historic service area. *RMP Response HLP Data Request 19*. It is thus clear that this litigation has not affected developers seeking service. In addition, if RMP were truly interested in an expeditious resolution of this dispute, it would have promptly provided complete responses to HLP's discovery or commenced this action in district court which unquestionably has jurisdiction to determine HLP's authority to serve.

A. The Commission's Stay of These Proceedings Will Not Adversely Affect Development in Wasatch County.

The primary thrust of RMP's argument is that "potential customers need to know *now* who will provide them power in unincorporated Wasatch County." *RMP Memorandum* at p. 10 (emphasis in original). However, current economic conditions have essentially stopped new development in Wasatch County. *Affidavit of Cindy Christoffersen* at ¶3. The effect of these economic conditions is best illustrated by the fact that RMP can identify only two active new developments in Wasatch County. *Affidavit of Cindy Christoffersen* at ¶¶ 4-5. It is thus clear that the timing of this proceeding will have no affect on development in Wasatch County.

Faced with this obvious economic reality, RMP professes a belief that new development will increase “as the economy begins to improve.” *RMP Memorandum* at p. 10. RMP however has not offered any admissible evidence to support its belief in an economic recovery or to predict when such a recovery can be expected.² It has thus wholly failed to show how the timing of this litigation will have any affect on new development in Wasatch County.

In addition, the current appeal has not affected the two active developments referenced in the RMP affidavit. Johansen-Thackeray & Company, the owner of one of the developments, has not obtained master plan or preliminary approval of its project and thus will not be delayed by the timing of this appeal. *Affidavit of Doug Smith* at ¶¶ 4, 5 attached as Exhibit C. Moreover, Johansen-Thackeray has already received a “will-serve letter” from RMP for its development – pursuant to which RMP has agreed to provide service to this development (*Affidavit of Cindy Christoffersen* at ¶ 2) – and thus is free to proceed with development approval, notwithstanding the continuing dispute over service area.

Moreover, while RMP stresses the impact on Johansen-Thackeray, RMP provides no evidence explaining how the expedited resolution of this proceeding would benefit the development. RMP’s affidavit simply describes a conversation with the developer in February, 2009, in which the developer stated an intent to proceed with construction in 2009. Clearly this

² The only discussion in the RMP affidavit of an economic recovery is:

Based on the experience of the Park City Office working with developers in Wasatch County in the recent past, she believes that as the economy begins to recover, the types of circumstances described in the two foregoing paragraphs will increase in number and frequency.

Affidavit of Cindy Christoffersen at ¶ 6.

statement is inadmissible hearsay. More importantly, it provides no information on what the developer's current plans are or whether the developer has the financing or government approval to implement this plan. Until these questions are addressed, RMP cannot show that the timing of this proceeding will have an adverse impact on this developer. In any event, the developer has still not received the necessary approvals to proceed with construction, whatever the developer's plans were in February, 2009. *Affidavit of Doug Smith* at ¶¶ 4, 5.

RMP refers to a second developer who seeks service outside HLP's service area. Since the customer is outside HLP's historic service area, the current litigation, which concerns HLP's right to serve within its historic service area, will have no affect on this customer. Because this customer is in RMP's service area, HLP informed the referenced customer that HLP would not provide service to this customer unless RMP consented. *Affidavit of Blaine Stewart* at ¶ 8 attached as Exhibit D. RMP has apparently not consented to HLP providing this customer service. In any event, the timing of this litigation will have no affect on this customer who is not within HLP's service area.

B. The Commission's Stay of these Proceedings Will Not Affect RMP's Ability to Plan.

RMP claims that a stay will somehow affect its ability to plan for serving within HLP's historic service area. It, however, has not and cannot explain how a stay will adversely affect its ability to "plan construction projects and power needs to meet its obligation to provide service in unincorporated Wasatch County in an efficient and economical manner on a long-term basis." *RMP Memorandum* at p. 4. The RMP affidavit, without foundation and in a conclusory manner simply states that RMP's planning will be affected.³ RMP has made no showing that a stay will affect RMP's ability to plan.

³ The affidavit's entire discussion of RMP's planning needs is:

With respect to RMP's lack of planning, it is worth noting that RMP has asked the Commission to declare that HLP does not have authority to serve in the unincorporated areas of Wasatch County. Given this challenge to HLP's authority, HLP assumes that RMP must be able to serve these customers and must have engaged in planning to undertake service in those areas that RMP seeks to remove from HLP's service area.

In sum, even if the appeal did not divest the Commission of jurisdiction, no good reason would exist for forcing the parties to proceed with discovery, until the Supreme Court determines whether the commission has jurisdiction.

CONCLUSION

As shown above, the appeal to the Utah Supreme Court divests the Commission of jurisdiction because the Commission's continuing jurisdiction conflicts with the Court's appellate jurisdiction. The conflict arises because the Court cannot give HLP complete relief, if HLP is forced to participate in this litigation. The Commission should thus stay these proceedings until the Court rules on jurisdiction.

In addition, the equities favor a stay. Without a stay, both HLP and the other parties will be put to unnecessary expense of discovery in a forum that may not have jurisdiction. Moreover, continuing this litigation limits the ability of the Court to grant HLP relief on appeal. Against these equities, RMP cannot show any offsetting harm from a stay. For this alternative ground,

Lack of resolution of the issue whether Rocky Mountain Power or HLP will provide service in portions of Wasatch County outside the boundaries of Heber City, Midway City and the Town of Charleston impairs the ability of Rocky Mountain Power to extend service to new customers in the unincorporated area of Wasatch County and to plan construction projects and power needs to provide service in a reasonable and efficient manner on a long-term basis in this area.

Affidavit of Cindy Christoffersen at ¶ 7.

the Commission should stay these proceedings pending review to avoid the harm to HLP and the other parties.

Dated this ____ day of May, 2009.

/s/ _____
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **HEBER LIGHT & POWER COMPANY'S MEMORANDUM IN SUPPORT OF MOTION FOR STAY PENDING JUDICIAL REVIEW** to be served upon the following by email to the email addresses shown below on May ____, 2009:

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