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Heber Light v. Public Service Commission : Brief of Respondent

Utah Court of Appeals

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- BEFORE THE SUPREME COURT OF UTAH -

Heber Light & Power Company)	
Petitioner/Respondent)	Supreme Court Docket
)	No. 200900053
vs.)	
)	(PSC Docket No. 07-035-22)
Utah Public Service Commission and)	
Rocky Mountain Power, a Division of)	
PacifiCorp)	
Respondent/Petitioner)	

Response Brief of the Public Service Commission of Utah

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Heber Power and Light Company; Rocky Mountain Power, a Division of PacifiCorp; the Division of Public Utilities, Department of Commerce, State of Utah; the Committee of Consumer Service (now, renamed Office of Consumer Services), Department of Commerce, State of Utah, Wasatch County, State of Utah; Town of Independence, State of Utah, JT Wasatch Commons, LC. After the Petition for Review was filed with this Court, Dale and Kenneth P. Olson petitioned to intervene in the Commission proceedings, but no intervention order has been issued at this time.

Table of Contents

Table of Authorities	0
Jurisdiction of the Court	1
Statement of issues presented on appeal and standard of review	1
Constitutional provisions, statutes, etc. whose interpretation are determinative of the appeal	2
Statement of the Case	8
Summary of Argument	10
Argument	10
A. The Statutory Language	10
B. Determining Legislative Intent	13
C. Non-municipal Functions	19
D. Public policies support PSC jurisdiction	23
Conclusion	26
Relief Sought on Appeal	29

Table of Authorities

Barnes vs. Lehi City, 279 P 878 (1929)	20
County Water System vs. Salt Lake City, 278 P.2d 285 (Utah 1954)	16, 28
CP National Corp. vs. Public Service Commission of Utah, 638 P.2d 519 (Utah 1981)	13-16, 24
Johnson vs. State Tax Commission, 411 P.2d 831 (Utah 1966)	13
Logan City vs. Public Service Commission of Utah, 271 P. 961 (Utah 1928) ..	9, 13, 14, 23, 28
Salt Lake County vs. Salt Lake City, 570 P.2d 119 (Utah 1977)	17, 18, 24
Strawberry Electric Service District vs. Spanish Fork city, 918 P.2d 870 (Utah 1996)	25
Utah Associated Municipal Power Systems vs. Public Service Commission, 789 P2d 298 (Utah 1990)	19, 28
Statutes	
Utah Code §10-8-14.	14, 15
Utah Code §11-13-101	15, 18
Utah Code §11-13-204(6)	18
Utah Code §54-2-1(16)(c)	22
Utah Code §78A-3-102(3)(e)(i)	1

Jurisdiction of the Court

This is an appeal of an order of the Utah Public Service Commission (PSC), which denied Heber Power and Light Company's (HPL) Motion to Dismiss, issued in a formal administrative proceeding before the PSC, PSC Docket No. 07-035-22. This Court has jurisdiction pursuant to Utah Code §78A-3-102(3)(e)(i).

Statement of issues presented on appeal and standard of review

Does the provision of electric utility service, which is not the disposal of temporary surplus power, by a municipal electric utility (or in this case, by an association of three municipalities who have formed an interlocal government entity) outside municipal boundaries, subject the service rendered outside the municipal boundaries to the jurisdiction or supervision of the PSC? This is a question of law to which the Court applies a correction-of-error standard. *Associated General Contractors vs Board of Oil, Gas and Mining* 38 P.3d 291 (Utah 2001). This issue was raised by HPL in its Answer, Record 18 and its Motion to Dismiss, Record 20, and in its Application for Agency Review, Record 38.

Constitutional provisions, statutes, etc. whose interpretation are determinative of the appeal

Utah Constitution article VI, section 28:

The Legislature shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, to levy taxes, to select a capitol site, or to perform any municipal functions.

Utah Code §54-2-1(5),(7), (8) and (16):

(5) (a) "Corporation" includes an association, and a joint stock company having any powers or privileges not possessed by individuals or partnerships.

(b) "Corporation" does not include towns, cities, counties, conservancy districts, improvement districts, or other governmental units created or organized under any general or special law of this state.

...

(7) "Electrical corporation" includes every corporation, cooperative association, and person, their lessees, trustees, and receivers, owning, controlling, operating, or managing any electric plant, or in any way furnishing electric power for public service or to its consumers or members for domestic, commercial, or industrial use, within this state, except independent energy producers, and except where electricity is generated on or distributed by the producer solely for the producer's own use, or the use of the producer's

tenants, or for the use of members of an association of unit owners formed under Title 57, Chapter 8, Condominium Ownership Act, and not for sale to the public generally.

(8) "Electric plant" includes all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power, and all conduits, ducts, or other devices, materials, apparatus, or property for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat, or power.

...

(16) (a) "Public utility" includes every railroad corporation, gas corporation, electrical corporation, distribution electrical cooperative, wholesale electrical cooperative, telephone corporation, telegraph corporation, water corporation, sewerage corporation, heat corporation, and independent energy producer not described in Subsection (16)(d), where the service is performed for, or the commodity delivered to, the public generally, or in the case of a gas corporation or electrical corporation where the gas or electricity is sold or furnished to any member or consumers within the state for domestic, commercial, or industrial use.

(b) (i) If any railroad corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewerage corporation, heat corporation, or independent energy producer not described in Subsection (16)(d), performs a service for or delivers a commodity to the public, it is considered to be a

public utility, subject to the jurisdiction and regulation of the commission and this title.

(ii) If a gas corporation, independent energy producer not described in Subsection (16)(d), or electrical corporation sells or furnishes gas or electricity to any member or consumers within the state, for domestic, commercial, or industrial use, for which any compensation or payment is received, it is considered to be a public utility, subject to the jurisdiction and regulation of the commission and this title.

(c) Any corporation or person not engaged in business exclusively as a public utility as defined in this section is governed by this title in respect only to the public utility owned, controlled, operated, or managed by the corporation or person, and not in respect to any other business or pursuit.

(d) An independent energy producer is exempt from the jurisdiction and regulations of the commission with respect to an independent power production facility if it meets the requirements of Subsection (16)(d)(i), (ii), or (iii), or any combination of these:

(i) the commodity or service is produced or delivered, or both, by an independent energy producer solely for the uses exempted in Subsection (7) or for the use of state-owned facilities;

(ii) the commodity or service is sold by an independent energy producer solely to an electrical corporation or other wholesale purchaser; or

(iii) (A) the commodity or service delivered by the independent energy producer is delivered to an entity which controls, is controlled by, or affiliated with the independent energy producer or to a user located on real property managed by the independent energy producer; and

(B) the real property on which the service or commodity is used is contiguous to real property which is owned or controlled by the independent energy producer. Parcels of real property separated solely by public roads or easements for public roads shall be considered as contiguous for purposes of this Subsection (16).

(e) Any person or corporation defined as an electrical corporation or public utility under this section may continue to serve its existing customers subject to any order or future determination of the commission in reference to the right to serve those customers.

(f) (i) "Public utility" does not include any person that is otherwise considered a public utility under this Subsection (16) solely because of that person's ownership of an interest in an electric plant, cogeneration facility, or small power production facility in this state if all of the following conditions are met:

(A) the ownership interest in the electric plant, cogeneration facility, or small power production facility is leased to:

(I) a public utility, and that lease has been approved by the commission;

(II) a person or government entity that is exempt from commission regulation as a public utility; or

(III) a combination of Subsections (16)(f)(i)(A)(I) and (II);

(B) the lessor of the ownership interest identified in Subsection (16)(f)(i)(A) is:

(I) primarily engaged in a business other than the business of a public utility; or

(II) a person whose total equity or beneficial ownership is held directly or indirectly by another person engaged in a business other than the business of a public utility; and

(C) the rent reserved under the lease does not include any amount based on or determined by revenues or income of the lessee.

(ii) Any person that is exempt from classification as a public utility under Subsection (16)(f)(i) shall continue to be so exempt from classification following termination of the lessee's right to possession or use of the electric plant for so long as the former lessor does not operate the electric plant or sell electricity from the electric plant. If the former lessor operates the electric plant or sells electricity, the former lessor shall continue to be so exempt for a period of 90 days following termination, or for a longer period that is ordered by the commission. This period may not exceed one year. A change in rates that would otherwise require commission approval may not be effective during the 90-day or extended period without commission approval.

(g) "Public utility" does not include any person that provides financing for, but has no ownership interest in an electric plant, small power production facility, or cogeneration facility. In the event of a foreclosure in which an ownership interest in an electric plant, small power production facility, or cogeneration facility is transferred to a third-party financier of an electric plant, small power production facility, or cogeneration facility, then that third-party financier is exempt from classification as a public utility for 90 days following the foreclosure, or for a longer period that is ordered by the commission. This period may not exceed one year.

(h) (1) The distribution or transportation of natural gas for use as a motor vehicle fuel does not cause the distributor or transporter to be a "public utility," unless the commission,

after notice and a public hearing, determines by rule that it is in the public interest to regulate the distributors or transporters, but the retail sale alone of compressed natural gas as a motor vehicle fuel may not cause the seller to be a "public utility."

(ii) In determining whether it is in the public interest to regulate the distributors or transporters, the commission shall consider, among other things, the impact of the regulation on the availability and price of natural gas for use as a motor fuel.

Utah Code 54-2-2:

As used in this chapter, "person" includes all individuals, corporations, partnerships, associations, trusts, and companies and their lessees, trustees, and receivers.

Utah Code 54-4-1:

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; provided, however, that the Department of Transportation shall have jurisdiction over those safety functions transferred to it by the Department of Transportation Act.

Statement of the Case

The proceeding below was commenced to address Rocky Mountain Power's (RMP) original and amended Requests for Agency Action, dealing with the operations of HPL and their affect on RMP operations in Wasatch County, Utah. Record 1, Complaint of Rocky Mountain Power; Record 9, Amended Complaint and Request for Expedited Treatment. This appeal arises from the PSC's denial of a Motion to Dismiss for Lack of Subject Matter Jurisdiction submitted by HPL below. Record 34, Report and Order. Each party has made allegations intending to portray their position and circumstances in their most sympathetic light. HPL represents it is continuing a long tradition of supplying electricity to customers where no other provider of electric service is seemingly willing or able to provide service in Wasatch County. *E.g.*, Record 20, HPL's Memorandum in Support of Motion to Dismiss. RMP portrays itself as ready and willing to serve customers in its service territory, including those in Wasatch County, but alleges it is constrained in providing service within the subject territory by HPL's aggressive competing provision of service outside municipal boundaries, fostered by local government entities steering or forcing potential customers to the interlocal entity. *E.g.*, Record 30, Response of RMP to HPL Motion to Dismiss. Because of the stage of the proceedings below, no evidentiary record exists upon which some of the disputes between

the parties could be resolved. However, there is no dispute on the circumstances which underlie the legal issue presented on appeal. This factual basis arises from the uncontested claims and admissions made in the pleadings submitted by RMP and HPL.

HPL is an energy services interlocal entity formed by the associated municipalities of Heber, Midway and Charleston. Record 20, HPL Memorandum in Support of Motion to Dismiss. Currently, the three cities provide electric service through an intergovernmental electric distribution cooperative formed pursuant to Utah Code §11-13-203(4). *Id.* These three cities provide electric utility service to customers in Wasatch County, both within their municipal boundaries and to an extensive area outside their municipal boundaries. *Id.* This appeal deals only with the utility service provided outside the municipal boundaries. The PSC makes no claim of jurisdiction regarding electric service provided within the municipal boundaries. *See, Logan City v. Public Service Commission of Utah*, 271 P. 961 (Utah 1928). HPL makes no claim that the service provided outside municipal boundaries is the disposal of surplus electricity, provided under authority of Utah Code §10-8-14(1)(d). Record 20, HPL Memorandum in Support of Motion to Dismiss. The area outside the municipal boundaries served by HPL is also within RMP's service territory, served pursuant to a certificate of public convenience and necessity granted by the PSC. Record 30, Response of RMP to HPL's Motion to Dismiss. RMP has facilities in Wasatch County and has been and is willing to serve customers in the subject area. *Id.*

Summary of Argument

This Court has concluded a municipality was never authorized or intended to be able to engage in the purposeful business of providing electric utility service to customers outside municipal boundaries. A rationale supporting a city's provision of utility like service within its boundaries, as a municipal function, outside the jurisdiction of the PSC, is the control the customers/citizens have over the operators of the municipal electric entity. This does not hold for customers outside the municipal boundaries, hence, a city is only authorized to make a limited disposal of surplus water or excess electricity, on a temporary basis, outside municipal boundaries. Where a municipality or group of municipalities engage in operations that extend beyond municipal boundaries, engage in operations which no longer affect uniquely the city's residents who, ultimately, control the service provider, or engage in operations which affect the interests of those outside municipal boundaries such operations pass beyond the exclusive local government interest purpose of Utah Constitution Article VI Section 29 and pass into the realm of state interests which are subject to a state created regulatory commission.

Argument

The Extent of PSC Jurisdiction Over Electrical Corporations Which May be Operated by a Municipality

A. The Statutory Language

Utah Code §54-4-1 provides, in part, "The commission is hereby vested with

power and jurisdiction to supervise and regulate every public utility in this state,”

“Public utility” is defined in Utah Code §54-2-1(16)(a) as “includ[ing] every . . .

electrical corporation, . . . where the service is performed for, or the commodity delivered

to, the public generally, or in the case of a gas corporation or electrical corporation where

the gas or electricity is sold or furnished to any member or consumers within the state for

domestic, commercial, or industrial use.” Utah Code §54-2-1(8) defines “Electrical

corporation” as “every corporation, cooperative, association, and person, their lessees,

trustee, and receivers, owning, controlling, operating, or managing any electric plant, or

in any way furnishing electric power for public service or to its consumers or members

for domestic, commercial or industrial use, within this state, except [for self production of

a generator’s own or the generator’s tenants’ use or for a condominium owners

association, which circumstances are not applicable in this appeal].” Utah Code §54-2-

1(5) defines “Corporation” as “(a) includ[ing] an association, and a joint stock company

having any powers or privileges not possessed by individuals or partnerships. (b)

‘Corporation’ does not include towns, cities, counties, conservancy districts,

improvement districts, or other governmental units created or organized under any

general or special law of this state.” And, finally, Utah Code §54-2-2 defines “person” as

follows “As used in this chapter, ‘person’ includes all individuals, corporations,

partnerships, associations, trusts, and companies and their lessees, trustees and receivers.”

Stringing these definitions together, one is apprised that the PSC has jurisdiction over all electrical corporations, which includes every corporation (which includes an

association, and a joint stock company having any powers or privileges not possessed by individuals or partnerships, but which does not include towns, cities, counties, conservancy districts, improvement districts, or other governmental units created or organized under any general or special law of this state), cooperative, association, and person (which includes all individuals, corporations [which includes an association, and a joint stock company having any powers or privileges not possessed by individuals or partnerships, but which does not include towns, cities, counties, conservancy districts, improvement districts, or other governmental units created or organized under any general or special law of this state]), partnerships, associations, trusts, and companies and their lessees, trustees, and receivers, who provide electricity to the public generally or for domestic, commercial or industrial use. HPL argues that since governmental entities are expressly excluded, by §54-2-1(5)(b), from the definition of corporation, HPL can not be a public utility subject to PSC jurisdiction. HPL extends the specific statutory exception given for governmental entities in regards to the definition of corporations to the other statutory terms that could include governmental entities, viz persons, partnerships, associations and companies. HPL phrases its argument in the terms of legislative intent. The PSC agrees that discerning legislative intent is paramount in construing statutory provisions and resolving the issue presented on appeal. The PSC reaches a different conclusion from that of HPL.

B. Determining Legislative Intent

In *CP National Corp. vs Public Service Commission of Utah*, 638 P.2d 519, 522, (Utah 1981)(*CP National*) this Court stated, ““The fundamental consideration which transcends all others in regard to the interpretation and application of a statute is: What was the intent of the legislature? All other rules of statutory construction are subordinate to it and are helpful only insofar as they assist in attaining that objective. In determining that intent the statute should be considered in the light of the purpose it was designed to serve and so applied as to carry out that purpose if that can be done consistent with its language.”” (Quoting *Johnson vs State Tax Commission*, 411 P.2d 831 (Utah 1966)). An important precedent in divining legislative intent (which actually subsumes the issue in its Utah-Constitutional rational) is *Logan City vs Public Utilities Commission of Utah*, 271 P. 961 (Utah 1928)(*Logan City*). In *Logan City*, this Court addressed whether the Utah Utilities Commission (the predecessor to the PSC) had authority to modify rates set by Logan City for electric service rendered by Logan City’s municipal electric utility to the citizens/customers located within the city. The opinion discusses a number of statutory references and arguments made there from for the proposition that the legislature intended municipal electrical utilities to be subject to the state regulatory commission and the rate adjustment was properly done. The opinion notes a number of problems which make it difficult for the Court to agree with that position. *Id.*, 271 P., at 965-970. The Court then moves to the dispositive ruling of the case, assuming that Logan City’s municipal utility is subject to the state regulatory commission’s jurisdiction and the rate modification was

properly done. Given the assumption, the Court rules, if “so construed and considered,” the actions of the state regulatory commission violate Article VI, Section 28 of the Utah Constitution. *Id.*, 271 P., at 970. In conceding the legislature may delegate to a regulatory commission authority to regulate a private public utility, “that does not answer the question now before us of whether the Legislature by the Utilities Act has taken from municipalities the power to fix their own rates and charges in operating and in controlling their own plants or systems of waterworks or electrical or other utilities for their own use and for the use of their inhabitants and conferred the power on the Utilities Commission and, if so, whether it was competent for the Legislature to do so.” *Id.*, 271 P., at 971. The ruling unambiguously holds the state regulatory commission has no authority to intrude upon the city’s electric utility’s service to the city’s inhabitants. Such service is a municipal function. The Utah Constitution precludes a state created commission from regulating the performance of a municipal function.

But the issue resolved by the *Logan City* opinion is not the issue before this Court in this appeal. *Logan City* dealt with the city utility providing electric service to the city and the city’s inhabitants. At issue here is a city’s (or three combined cities) provision of electric service to customers who are not inhabitants/citizens of the municipality. A municipality is authorized by the legislature to operate a municipal electric utility. Utah Code §10-8-14. This Court has held that this authorization, to undertake electric utility operations to serve the city’s inhabitants, does not authorize a city to attempt to operate an electric utility to provide services outside the city boundaries. *CP National, supra*. Utah

Code §10-8-14(1)(d) also authorizes a municipality to dispose of surplus product or service capacity not required by the city or the city's inhabitants to others beyond the limits of the city. Again, this is not the issue presented in this appeal. HPL is not disposing of surplus electricity to those customers located outside the municipalities' boundaries in the unincorporated areas of Wasatch County.

Indeed, circumstances parallel to or similar to the case on appeal have previously been broached by this Court, disapprovingly in each instance. In *CP National, supra*, a number of municipalities formed an intergovernmental cooperative, pursuant to Utah Code §§11-13-1 *et seq.*, to pursue the purchase of an existing private electric utility, CP National, which had decided to cease operations. When CP National decided to sell its assets to another private electric utility, the cities commenced condemnation proceedings to obtain the assets, intending to continue the utility operations through the intergovernmental cooperative they had formed. In agreeing that the municipalities were not authorized to accomplish their design, this Court stated, "Section 10-8-14 set out above authorizes cities to construct, maintain and operate electric light works and authorizes them to sell and deliver the surplus product or service capacity of such works not required by the city or the inhabitants to others beyond the limits of the city. We believe that this language imposes a limitation on a city operating outside its borders. *It negates the proposition that a city could purposely engage in the distribution of power to localities or persons outside its limits except to dispose of surplus.*" 638 P.2d, at 524 (emphasis added) The opinion drew a further distinction in the authorization for a city to

operate a water system as a municipal function, compared to the more restricted authorization to operate an electrical system. “The reason for the legislature giving broad powers to municipalities in the case of waterworks systems may have been because water is a scarce and finite resource, which is not capable of manmade generation or replacement as electricity may be.” *Id.*, 638 P.2d, at 523. Water essentially exists in its utility delivered form before any volitional activities of any utility. Its relative scarcity, particularly in Utah, has engendered a complete body of law to put it to use and promote its beneficial use. Electricity, however, exists only insofar as the operator of the utility system decides to cause its generation. For a municipal electric utility, electric supply sufficiency to meet the electricity demand of the city and the city’s inhabitants (and any concomitant excess supply or surplus) arises solely from the operational decisions of the municipal utility’s operators. The amount of electrical supply is calculated, planned for and generated to meet a specific amount of demand.

CP National cited to *County Water System vs Salt Lake City*, 278 P.2d 285 (Utah 1954)(*County Water*). In *County Water*, a private water utility objected to the provision of water service by the city to individuals residing in the private utility’s service area outside the city boundaries. Although this Court sustained the city utility’s limited provision of service, concluding it was the disposal of surplus commodity, this Court noted,

the fears expressed by plaintiffs that cities will engage in the utility business on a broad scale in competition with and destructive of regularly authorized privately owned utilities does not seem to be justified. *Such activities are*

neither contemplated nor authorized by law; they have no authority to sell water outside the city limits except as expressly permitted by statute, which is to sell the ‘surplus product’ not required by the city or its inhabitants. . . . But such permissive sale of surplus water is *clearly not calculated to permit the city to purchase water solely for resale, nor to construct, own or manage facilities and equipment for the distribution of water outside of its city limits as a general business*; the intent is obviously to permit it to do those things only to the extent incidental to the development and use of water for present requirements and those reasonably to be anticipated in connection with the expected growth of the city. *Id.*, 278 P.2d, at 289, 290 (emphasis added).

In a later case, this Court reiterated the Utah Constitution based rationale permitting a municipality to provide utility service, as a municipal function, to the inhabitants within its borders (and the disposal of excess water outside its boundaries) outside the purview of the PSC. However, this Court also stated, “[b]ut to just however great an extent a city may engage in rendering a utility service outside its city limits without being subject to some public regulation is not so clearly determined.” *Salt Lake County vs Salt Lake City*, 570 P.2d 119, 122 (Utah 1977) (*Salt Lake County*)..

It is in this context, an early legal precedent that a state regulatory commission has no jurisdiction to supervise a city’s utility service when undertaken only for itself and those within city limits (a municipal function), the limited authorization for a city to provide incidental, temporary service outside its city limits to dispose of surplus, and no greater utility service outside city limits is intended or authorized, that one confronts the question of legislative intent respective to statutory application to HPL’s intentional, persistent, competing utility service outside the city boundaries of HPL’s associated municipalities and within RMP’s certificated territory. HPL may bristle at the wording,

but from an unincorporated-Wasatch-County-area customer's perspective (and the PSC's view), HPL is operating just like a public utility providing electric utility service. From this Court's phrasing, it is 'purposely engaged in the distribution of power to localities or persons outside its limits,' 'calculated to permit HPL to purchase and generate electricity solely for resale, to construct, own, or manage facilities and equipment for the distribution of electricity outside of its city limits as a general business,' and 'rendering such utility service outside its city limits without being subject to some public regulation is not so clearly determined .' As noted above, from the statutory authorizations for municipal utility operations and this Court's precedents, the individual cities which formed HPL are only authorized to perform the municipal function of providing electric service within their city limits. Service outside their city limits may only be undertaken for the limited purpose of disposing of surplus, a condition with HPL does not claim is applicable to the service provided in the service area outside the cities' boundaries. That the cities have entered into a joint association through their interlocal cooperative entity, pursuant to Utah Code §§11-13-101 *et seq.*, does not change their authority nor the application of statutory provisions to their non-municipal function operations. "Nothing in this section may be construed as expanding the rights of any municipality or interlocal entity to sell or provide retail service." Utah Code §11-13-204(6). Non-municipal functions are not contemplated within the Utah-Constitution reasoning articulated by this Court in *Logan City*.

HPL claims a distinction in determining legislative intent concerning PSC

jurisdiction and legislative intent concerning authorized municipal utility operations. HPL Brief at 26. They are not disparate considerations. As noted in HPL's Brief and in the discussion contained in this Court's precedents cited herein, Utah's utility laws' statutory provisions have included wording placing municipals within the jurisdiction of the state utility regulatory commission. As a consequence, one must ask whether any given, post-*Logan City*, legislative enactment (which is said to indicate intent to withdraw municipalities from PSC jurisdiction) evidences a legislative intent to completely remove all utility activities undertaken by a municipality outside of the PSC's jurisdiction, or whether it is the legislature's recognition of this Court's constitutional based ruling in *Logan City*. Are the statutory provisions a recognition that for the municipality's rendering of electricity as a municipal function, authorized to occur only within the city limits (and for the limited exception of disposing of surplus outside the limits, which does not apply in this case), a city is outside the PSC's jurisdiction, but where the utility activity is outside the city limits and not an authorized municipal function, the city has chosen to venture beyond the jurisdictional exemption and become a public utility subject to PSC jurisdiction?

C. Non-municipal Functions

In this regard, this Court's ruling in *Utah Associated Municipal Power Systems vs Public Service Commission*, 789 P2d 298 (Utah 1990)(*UAMPS*) is instructive. In *UAMPS*, a group of cities planned to construct a powerline to facilitate the cities' existing

and future electric service operations through an interlocal entity which they had formed. The cities' appeal to this Court raised the Utah Constitution Article VI, Section 28 based exclusion, recognized in *Logan City*, as ostensibly negating the cities' need to submit to PSC jurisdiction relative to the construction and planned use of the electric utility line they proposed to build. This Court stated, "[th]e effect of UAMPS' petition would be to read article VI, section 28 and *Logan City and Barnes* [vs *Lehi City*, 279 P 878 (1929)] as defining anything having to do with the operation of a municipal utility as a 'municipal function,' the performance of which is beyond the reach of state regulation. Neither the constitutional provision nor the holdings of *Logan City and Barnes* can properly be so read.", *id.*, 789 P.2d, at 301. Referencing prior precedents, the Court noted "many functions traditionally performed by municipalities may be sufficiently infused with a state, as opposed to an exclusively local, interest to escape characterization as 'municipal functions' for purposes of article VI, section 28." *Id.*, 789 P.2d, at 302. This Court presented a number of factors to consider, and which it did consider, that are particularly relevant to this appeal before the Court, to determine whether the activity is a municipal function beyond PSC reach or one sufficiently infused with state interest to fall within PSC jurisdiction. It noted the activity was performed not by a single municipality, but a combination. The interlocal entity's utility plant was outside the municipalities' boundaries and would intrude into the service area of an existing public utility regulated by the PSC. The interlocal's utility plant and operations were intended to supplant the services provided and offered by the existing public utility. The Court held, "[w]e have little

difficulty finding that the construction of this line by UAMPS is ‘sufficiently infused with a state, as opposed to an exclusively local, interest to escape characterization as (a) ‘municipal function.’ *Id* , 789 P.2d, at 303. The Court emphasized its reasoning was influenced by the function/activity affecting the interests of those beyond the boundaries of the municipalities, the function/activity was not performed by a single municipality but a combination (evidencing the difficulty of a local government to perform it effectively and particularly the difficulty for the local government to consider the interests of all those outside the city’s boundaries as compared to the PSC), and the function/activity being subject to the ability of citizens within the local government’s boundaries to control their elected officials so as to control the substantive policies that “affect them uniquely.” *Id* , 789 P2d, at 303 Using these same factors, and applying them in the same fashion and with the same emphasis as the Court, to the activities of HPL at issue in this appeal inexorably leads to the conclusion that HPL’s service in the unincorporated areas of Wasatch County are not the performance of a municipal function. It has not been undertaken by a single municipality, but a combination. They have intruded into the service territory of another public utility outside municipal boundaries. The activity has operational and financial effects upon RMP. The activity affects not only RMP’s interests, but the interests of customers served outside the municipals’ boundaries. In contrast to the citizens of the municipalities, these outside persons have no control, through elected officials, of the substantive policies and activities of HPL that affect them uniquely. HPL’s activities outside municipal boundaries are ‘sufficiently infused with a

state, as opposed to an exclusively local, interest' to be within the PSC's jurisdiction. It must be emphasized that this PSC jurisdictional activity is undertaken at the complete discretion of the municipalities involved. Should they desire to retain the Article 6, Section 28 based exclusion, they may simply confine their activities to that which is truly local, and justified for the exclusion, and limit their service to municipal functions within their borders.

Given that HP&L is not performing a municipal function within the *Logan City*/Article VI Section 28 based exclusion, one must ask whether HPL is an entity, performing an unquestionable utility function, subject to PSC regulation. Reviewing the language used in the statutory definitions, the legislature has used a litany of words (individuals, corporation, partnerships, association, trusts, and companies) which indicates an intent to cover all conceivable organizations whose actions can make them public utilities. And, the legislature has recognized that some of the activities of an organization can be subject to PSC jurisdiction while other activities are outside the PSC's jurisdiction. Utah Code §54-2-1(16)(c). An entity can be exempt from PSC supervision while at the same time subject to PSC supervision, the distinction being which activities are being scrutinized. The PSC has a long history of having to separate or allocate an organization's operations, costs and revenues into PSC-jurisdictional and non-jurisdictional buckets. It has done so for decades relative to the operations of utility telephone service entities whose operations are interstate and intrastate in nature, forcing allocation considerations for federal and state jurisdictional areas and also further

allocations among multiple states for the operations of one company. Relative to electric utility operations, the PSC also has a long history and ongoing familiarity in having to deal with entities whose operations span multiple states, again requiring the PSC to allocate parts of utility operations which are and those which are not within the PSC's jurisdiction.

D. Public policies support PSC jurisdiction

HPL critiques, as speculation, the PSC's public policy discussion as to why the legislature would not have intended municipal utility operations that are beyond those authorized within city boundaries or that exceed the (not applicable) limited exception for surplus disposal to be non-jurisdictional. These public policy reasons and rationales did not originate with the PSC, they come from this Court. In *Logan City*, *supra*, this Court stated,

Because patrons, customers or consumers of a product of a privately owned public utility, as a rule have no voice in the handling and management of the business, nor in fixing and establishing rates and charges, and no adequate remedy or redress against unreasonable or excessive or unjust rates or charges fixed by a public utility company, there are good legal reasons for the state, under its police power for public good and protection, to fix a reasonable and just rate or charge for such a utility, or to delegate the power so to do to a commission or board of its creation. But no such ground exists to so safeguard and protect taxpayers and citizens of a town or city owning and operating its own utility for its own use and for the use and benefit of its inhabitants, for the consumers of the product and the citizens and taxpayers of the town or city have a voice in the management and handling of the plant and as to the rate or charge to be fixed. The plant is their own plant. It is their property. It is for them through their chosen officers and boards, to determine, not only the character of the plant to be

owned and operated, but also the rates and charges to be made and whether the interest on and principal of bonds shall be met by taxation or by charges from operation or partly from the one and partly from the other. If officers, boards, or agents chosen and selected by them do not comply with their demands or requests, or fix an unfair or an unreasonably low or high or a discriminatory rate or charge, others can be chosen or selected to establish a proper and fair rate or charge or consumers may appeal to the courts to correct any such abuses. 271 P., at 971.

In *CP National*, this Court noted, “[c]ustomers who are non-residents of the municipalities would be left at the mercy of officials over whom they have no control at the ballot box, and they could not turn to the Public Service Commission for relief.” 638 P.2d, at 524. Are those Wasatch County customers outside the city limits of the municipalities which have formed HPL not affected by the same considerations? Even with respect to the authorized disposal of surplus water, this Court noted those outside the city limits should have a determination of what their rights are and are not, a clear understanding of mutual rights and obligations vis a vis themselves and the city utility, and opportunity to have a venue for determining whether the rates charged were reasonable and nondiscriminatory. *Salt Lake County*, *supra*. Could not the legislature intend for PSC jurisdiction to address these matters where a city operates its utility beyond the activities authorized and outside its geographic boundaries? To go beyond the performance of municipal functions and to engage in a pure business venture to provide utility service outside its boundaries (which is not the disposal of surplus) is a voluntary choice of the city. The city no longer performs a municipal function, but has chosen to engage in a retail operation. HPL’s position just does not make sense. Under HPL’s position, could not any city then, as well, decide to

engage in the retail sale of electronic devices and appliances to customers throughout the State of Utah, in competition to Best Buy and RC Willey like retailers, and claim no need to deal with a state sales tax obligation imposed upon retailers by the State and subject to the Tax Commission of Utah?

HPL's position on appeal places a municipality inapposite of this Court's ruling in *Strawberry Electric Service District v Spanish Fork city*, 918 P.2d 870 (Utah 1996)(*Strawberry Electric*). Adoption of HPL's position permits a municipality to do, in connection with a non-municipal function, outside its municipal boundaries precisely what this Court said a municipality can not do when rendering the electric service municipal function within its boundaries. In *Strawberry Electric*, Spanish Fork City annexed additional areas in which the Strawberry Electric Service District, a public utility, was providing electric utility service. Spanish Fork City then commenced to serve some customers (selected at the city's discretion) within the annexed area through extensions of the city's municipal electric utility, leaving other customers to be served by the existing public utility. The city undertook this service activity without obtaining the public utility's consent for the municipality to serve some customers within the newly annexed area nor compensating the utility for the municipality's invasion of the service territory. This Court's opinion is very clear. Although a city has the power to annex and invade a public utility's service area, it may not choose which customers it serves and may only serve in an annexed area if it has obtained the utility's consent or compensated the utility for what the Court recognized was a protectible property interest held by the utility. Here, HPL

position enables a municipality to invade RMP's territory without even going through any annexation, to perform a non-municipal function by serving customers outside municipal boundaries, to select which customers it will and will not serve and to do so without obtaining the utility's consent or compensating the utility for damages or loss. HPL may protest that it is not selecting which customers it will serve, it is willing to serve any and all within its so called service territory. But that is precisely the point. It is HPL's discretionary exercise to select what is and what is not (and correspondingly who is and who is not) within its discretionary 'service territory' located outside municipal boundaries. *Strawberry Electric* holds that even in providing electric service to inhabitants within city limits as a municipal function, a city must first obtain the public utility's consent to so serve. Here, HPL advocates a position that a city may provide non-municipal service outside city limits not only without the consent of the existing public utility, but in spite of that utility's protests.

Conclusion

HPL argues that all of these seeming conundrums (providing non-municipal utility service never authorized outside city boundaries; municipalities purposely engaging in the never authorized or intended retail business of extra-territorial utility service in competition with an existing utility; non-municipal function utility service over the objection of the existing public utility or without compensation for damages or loss; policy arguments for how city inhabitants/customers can protect their interests vis a vis the

municipal utility's operators' decisions, but no such capability for customers outside city limits; the municipal utility's discretion to choose who to serve outside city limits, but not so within the city limits) are precisely the lacunas the legislature intended. The legislature really meant to place these circumstances outside the PSC's jurisdiction. It is difficult to agree with HPL's position when this Court's opinions state that this was *not* the legislature's intent. As the legislature never authorized 'purposely engaging in the distribution of power to localities or persons outside city limits,' nor did the legislature 'calculate permitting HPL to purchase and generate electricity solely for resale, to construct, own, or manage facilities and equipment for the distribution of electricity outside of city limits as a general business,' the legislature can not be portrayed as intending the 'rendering of such utility service outside city limits without being subject to some public regulation.' HPL argues the legislature had an intent for things which the legislature never intended.

The PSC comes to a different conclusion. The legislature was very clear in authorizing what a city utility may and may not do. It may perform the municipal function of providing electric service within, and only within, city boundaries. A city may provide utility like service outside of a municipal boundary only to dispose of surplus if such surplus arises in providing utility service for the city and its inhabitants; surplus does not exist to intentionally serve outside the city's limits.

Nor does holding for PSC jurisdiction trench the Utah Constitution rationale given in *Logan City*. *Logan City* recognizes the city's performance of a municipal function in

providing utility service within city boundaries. The PSC may not intrude on the exercise of a municipal function. However, *Logan City* and *UAMPS* do not recognize the provision of service outside city limits as a municipal function, the municipal function is viewed as confined within the city's boundaries. *Logan City* does not recognize extra-territorial service as a municipal function exempted through Article VI, Section 28 of the Utah Constitution. *UAMPS* similarly holds. *County Water* notes the only municipal function which the legislature has added and authorized to occur outside a municipality's boundaries is the disposal of surplus capacity. HPL acknowledges disposal of surplus is not at issue in this appeal.

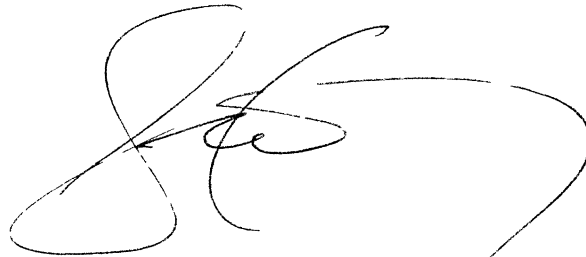
This Court has identified why customers served outside municipal boundaries suffer disadvantage which citizens within the municipality do not. This Court has stated the public policy reasons why this disparity between customers should not be. The Court has also stated the reasons why the legislature would seek to protect customers from utility operators' decisions; why the state would choose to regulate the operations of an electric service entity over which customers have no control. It is then not remarkable that the legislature addressed all conceivable entities which may operate an electric utility and made their public utility activities subject to the PSC's supervision and regulation. Where a municipality decides to engage in a non-municipality function and operate an electric utility just like any other electric utility, serving customers who have no influence on the utility operators' management and decisions, the city has decided to place its extra-territorial service outside the cloister of the *Logan-City*-recognized exclusion and placed

the providing entity and the service within the bailiwick of PSC jurisdiction.

Relief Sought on Appeal

The Court should sustain the PSC's conclusion regarding state commission reach to the non-municipal function utility operations outside city boundaries and affirm the November 3, 2008, Order.

Dated this __ day of June, 2009.

A handwritten signature in black ink, appearing to be 'Sandy Mooy', with a large, stylized loop at the end.

Sandy Mooy
Attorney for the Utah Public Service Commission

Certificate of Service

I hereby certify I served a copy of the foregoing Brief of the Utah Public Service Commission upon the parties below, June __, 2009, by mailing a copy, First Class Mail, US Postal Service, with sufficient postage prepaid to the following:

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