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Heber Light and Power Company v. Public Service Commission : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

HEBER LIGHT & POWER COMPANY,

Petitioner/Respondent,

v.

PUBLIC SERVICE COMMISSION;
ROCKY MOUNTAIN POWER,

Respondents/Petitioners.

Supreme Court No. 20090053

PSC Docket No. 07-035-22

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
ARGUMENT	1
I. The Utah Public Utility Code Does Not Give the Public Service Commission Jurisdiction Over Governmental Entities, Such As Heber Light & Power Company.	1
A. The Commission’s Orders In The Instant Case and In <i>White City</i> Acknowledge That No Statute Gives The Commission Jurisdiction Over Governmental Entities.	2
B. HLP is not a Person subject to Commission Jurisdiction.	4
1. The Term “Person” Does Not Include Governmental Entities Because the Legislature Removed Governmental Entities From the Definition of “Person” in its 1989 Amendment to the Utility Code.	4
2. The Plain Language of the Utility Code Excludes Governmental Entities, Such as HLP, From the Definition of “Person,” Subject to Commission Jurisdiction	7
(i) HLP is Not a Corporation Subject to Commission Jurisdiction.	9
(ii) HLP is Not an “Association.”	9
(iii) HLP is Not a “Company.”	11
II. The Commission Erroneously Asserts Jurisdiction Based on Public Policy, Without a Statutory Grant of Jurisdiction	12
III. The Commission’s and RMP’s Factual Claims, Not Supported By The Record, Must Be Disregarded.	15
IV. The Commission Order Is Final Agency Action Subject to Judicial Review. ...	18
V. Assuming <i>Arguendo</i> That the Commission Order Is Not Final Agency Action, the Court Has Jurisdiction to Review the Order in Connection with the Issuance of an Extraordinary Writ.	21
CONCLUSION	23

TABLE OF AUTHORITIES

CASES

<i>Barker v. Public Service Commission</i> , 970 P.2d 702 (Utah 1998)	18
<i>Bethlehem Steel Corp. v. Environmental Protection Agency</i> , 699 F. 2d 903 (3 rd Cir. 1982)	18, 19
<i>CEC Energy Co., Inc. v. Public Service Commission</i> , 891 F.2d 1077 (3 rd Cir. 1989)	19, 20
<i>CP National Corp. v. Public Service Commission</i> , 638 P.2d 519, 524 (Utah 1981)	2
<i>Hi-Country Estates Homeowners Assoc. v. Bagley & Co.</i> , 901 P.2d 1017, 1021 (Utah 1995)	1, 3
<i>In re Estate of Flake</i> , 71 P.3d 589, 598 ¶ 25 (Utah 2003)	6
<i>In re: White City Water</i> , 133 P.U.R. 4 th 62 (Utah PSC 1992).	4, 7, 8
<i>Mountain States Tel. and Tel. Co. v. Public Service</i>	3, 14
754 P.2d 928, 933 (Utah 1988)	
<i>Oregon Natural Desert Ass’n v. United States Forest Service</i> , 465 F.3d 977, 982 (9 th Cir. 2006)	17
<i>Renn v. Utah State Board of Pardons</i> , 904 P.2d 677, 682 (Utah 1995)	21
<i>Salt Lake City v. Salt Lake County</i> , 568 P.2d 738, 741 (Utah 1977)	9
<i>Union Pacific R.R. v. Utah State Tax Comm’n</i> , 2000 UT 40 ¶13, 999 P.2d 17	17, 18

STATUTES

<i>Utah Code Ann.</i> § 54-2-1(5)	5, 10, 14
<i>Utah Code Ann.</i> § 54-2-2.	8, 9
<i>Utah Code Ann.</i> § 54-7-10(1)	, 20
<i>Utah Code Ann.</i> § 10-18-303(2)(d)	5
<i>Utah Code Ann.</i> § 11-13-203(1)(b)	9
<i>Utah Code Ann.</i> § 11-13-304(1)	5
<i>Utah Code Ann.</i> § 17B-2a-406(1)	5

OTHER

<i>Black’s Law Dictionary</i> (8 th ed. 2004)	12
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ARGUMENT

I. The Utah Public Utility Code Does Not Give the Public Service Commission Jurisdiction Over Governmental Entities, Such As Heber Light & Power Company.

In this appeal, the issue is whether the Commission erred by asserting jurisdiction over a governmental entity, such as HLP. It is axiomatic that the Commission has only the jurisdiction granted by statute and such grants are narrowly construed. *Hi-Country Estates Homeowners Assoc. v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995). The utility code does not grant the Commission jurisdiction over governmental entities and excludes governmental entities from Commission jurisdiction. Thus, the Commission lacks jurisdiction.

Faced with the absence of a statutory grant of jurisdiction, the Commission and RMP ask the Court to rewrite the utility code to give the Commission jurisdiction over governmental entities. Such a ruling would make governmental entities public utilities, subject not only to the Commission's adjudicatory jurisdiction but to the full range of Commission regulation. Nothing in the utility code remotely suggests that the Legislature intended such a fundamental and far-reaching extension of Commission's general jurisdiction. To the contrary, when the Legislature has acted on jurisdiction, it has excluded governmental entities from Commission jurisdiction.

The Commission and RMP discuss at length the law on a municipality's authority to serve. *Commission Brief* at 15-26, *RMP Brief* at 20-22, 36. This discussion however is

irrelevant because it confuses the issue of whether the Commission has jurisdiction over HLP with the issue of whether HLP has exceeded its authority to serve. The Commission and RMP mistakenly assume that the Commission has jurisdiction if a governmental entity, such as HLP, has exceeded its authority to serve. *Commission Order* at 20. (R.34). However, no statute gives the Commission jurisdiction over a governmental entity, even if the governmental entity has allegedly exceeded its authority to serve. Absent such a statute, the Commission lacks jurisdiction even if the governmental entity has exceeded its authority.

To distract the Court from the lack of statutory authority, the Commission and RMP seek to characterize HLP as a scofflaw which admits to selling non-surplus power in violation its authority. They further raise the specter of a municipality claiming the “right to serve customers anywhere in Utah,” *RMP Brief* at 36, or the right “to engage in the retail sale of electronic devices and appliances to customers throughout the Sate of Utah.” *Commission Brief* at 24-25. This hyperbole is misleading because HLP has never admitted to selling non-surplus power nor claimed an unrestricted right to serve throughout the State of Utah. Moreover, it is prepared, **in the proper forum**, to present the law and the facts to support its continued operations.

The real issue is whether the Commission or district court has jurisdiction to determine the extent of a governmental entity’s authority to provide service. No one questions that the district court has the jurisdiction to decide these issues and to prevent

the parade of horrors suggested by the Commission and RMP. The Commission, however, has not been granted this jurisdiction and its decision must be reversed.

A. The Commission's Orders In The Instant Case and In *White City* Acknowledge That No Statute Gives The Commission Jurisdiction Over Governmental Entities.

The Commission has no jurisdiction, except for jurisdiction affirmatively granted by statute. *Hi-Country Estates Homeowners Assoc.*, 901 P.2d at 1021. Any statutory grant of authority is narrowly construed and “any reasonable doubt of the existence of any power [of the Commission] must be resolved against the exercise thereof.” *Id.* at 1021. “Without clear statutory authority, the commission cannot pursue even worthy objectives for the public good.” *Mountain States Tel. and Tel. Co. v. Public Service Com’n*, 754 P.2d 928, 933 (Utah 1988).

Even though the Commission's jurisdiction depends on a statutory grant of authority, the Commission Order does not identify the section of the utility code purportedly giving it jurisdiction over a governmental entity. The Commission Order does obliquely state, without reference to a statute, that “it seems the legislature intended [HLP] would be considered a corporation, association etc.” *Commission Order* at 20 (R. 34). It however does not justify this conclusion in light of the code's exclusion of governmental entities from the definition of corporation.

The Commission Order acknowledges that “the Legislature [has] explicitly failed to speak on subject” of whether the Commission has subject matter jurisdiction over a

municipality's service outside its municipal boundaries. *Commission Order* at 19-20. (R.34). This finding is consistent with the Commission's earlier ruling, in *In re White City Water Company*, 133 P.U.R. 4th 62 (Utah P.S.C. 1992), where the Commission acknowledged that "there may be no explicit statutory authority for us to assume jurisdiction" over extra-territorial service. *Id.* at 65, 67.

RMP takes significant umbrage at the characterization of this lack of explicit statutory authority as a "gap" in the Commission's statutory jurisdiction. *RMP Brief* at 32-33. RMP however does not dispute that the Commission acknowledged that the Commission lacked an explicit statutory grant of authority over governmental entities providing extraterritorial service. Whether this lack of authority is called a "gap" or something else does not change the substance of the Commission's acknowledgment that no statute explicitly grants it jurisdiction over governmental entities providing extraterritorial service and does not change the fact that the Commission rewrote the statute to fill this lack of an explicit statutory grant of jurisdiction.

B. HLP is not a Person subject to Commission Jurisdiction.

Although not the basis of the Commission Order, RMP defends the Commission Order by claiming that HLP is a "person" subject to Commission jurisdiction. The term "person," however, was amended in 1989 to remove governmental entities from the meaning of person subject to Commission jurisdiction. In addition, including governmental entities in the definition of person conflicts with other statutory sections of

the utility code and creates absurd results. For these reasons, HLP is not a person subject to Commission jurisdiction.

1. The Term “Person” Does Not Include Governmental Entities Because the Legislature Removed Governmental Entities From the Definition of “Person” in its 1989 Amendment to the Utility Code.

When the Legislature has dealt with governmental entities, *per se*, the Legislature has excluded governmental entities from Commission’s general jurisdiction. First, it expressly excluded governmental entities from the definition of a “corporation” subject to the Commission’s general jurisdiction. *Utah Code Ann.* § 54-2-1(5). Second, it removed governmental entities from the definition of “person” subject to the Commission’s general jurisdiction. Each of these Legislative actions establishes an unambiguous intent to exclude governmental entities from the Commission’s general jurisdiction.¹

Of controlling significance is the 1989 Amendment removing governmental entities from the definition of “person.” Simply stated, before the amendment the term “person” included governmental entities and made them subject to Commission jurisdiction, and after it did not. Thus, the 1989 Amendment precludes a finding that HLP, a governmental entity, is a “person,” subject to Commission jurisdiction.

¹ Conversely, when the Legislature has intended for the Commission to have specific jurisdiction over governmental entities, it has had no trouble clearly stating that intent. *See generally Utah Code Ann.* § 10-18-303(2)(d)(municipal cable television service provider shall comply with Commission rules); § 11-13-304(1)(project entity required to obtain certificate from Commission); § 17B-2a-406(1)(improvement district providing electric service is a public utility subject to Commission jurisdiction).

RMP argues that the Court should rely on Legislative history to modify the unambiguous language of the 1989 Amendment. Legislative history, however, cannot be used to vary the 1989 Amendment's unambiguous expression of Legislative intent. *In re Estate of Flake*, 71 P.3d 589, 598 ¶ 25 (Utah 2003). The Legislative history is thus irrelevant and must be disregarded.

Assuming *arguendo* that the Legislative history should be considered, the Legislative history merely confirms the Legislature's intent to exclude governmental entities from the Commission's jurisdiction. The Legislative history explains that, in 1985, the Legislature put governmental entities into the definition of "person" and thus potentially subject to all provisions of the utility code including the Commission's general jurisdiction. The Legislative intent in 1985 was only "to make sure governmental entities . . . could become electrical co-generators under the Federal PURPA Act." The Legislature had not intended to make governmental entities a "person" with respect to the other provisions of the utility code.

According to this Legislative history, the 1989 Amendment corrected this mistake by removing governmental entities from the definition of "person" subject to the Commission general jurisdiction, and making a governmental entity a "person" only in "the special definition of person for co-generation purposes." Thus, the Legislature intended, as the 1989 Amendment states, that a governmental entity would not be a "person," subject to the Commission's general jurisdiction.

Notwithstanding this clear statement of Legislative intent, RMP asserts that the 1989 Amendment and Legislative history show that “the Legislature did not intend the 1989 Amendment to foreclose the Commission’s regulation of a governmental entity” that provided extraterritorial service. *RMP Brief* at 26-27. It is however immaterial that the 1989 Amendment does not preclude the Commission from asserting jurisdiction over governmental entities or is silent on the question. In order for the Commission to have subject matter jurisdiction, the statute must affirmatively grant the Commission jurisdiction over governmental entities. The 1989 Amendment contains no such grant since it was intended to preclude Commission jurisdiction over governmental entities.

In addition, RMP’s argument is contradicted by the plain language of 1989 Amendment or Legislative history. Both unambiguously preclude Commission general jurisdiction over governmental entities, as persons, without restriction and regardless of what the governmental entity is doing. In essence, RMP would re-write the 1989 Amendment to provide that governmental entities are persons, subject to Commission jurisdiction, if they are allegedly acting beyond their authority. Neither the 1989 Amendment nor its Legislative history contain any language giving the Commission jurisdiction over governmental entities that exceed their authority.

In support of its argument on legislative history, RMP cites the Commission’s decision in *In re: White City Water*, 133 P.U.R. 4th 62 (Utah PSC 1992). *RMP Brief* at 26. *White City*’s entire discussion of this issue is three sentences, one of which is a reference

to an attachment containing the legislative history. *Id.* at 65. The decision does not, as it must, identify a statutory ambiguity that justifies using the legislative history as an aid to statutory interpretation.

RMP's reliance on *White City* is also misplaced because the Commission did not rely on the Legislative history or *White City* in its Order in the instant case or in its brief in this appeal. The Commission, thus, has apparently abandoned the *White City* analysis and its holding on Commission jurisdiction over governmental entities.

2. The Plain Language of the Utility Code Excludes Governmental Entities, Such as HLP, From the Definition of "Person," Subject to Commission Jurisdiction.

The 1989 Amendment, standing alone, establishes the Legislature's intent to exclude governmental entities from the definition of "person," and thus from the Commission's jurisdiction. This conclusion is also supported by the plain language of the statutory definition of "person."

The utility code defines "person" as including "corporation," "association," and "company." *Utah Code Ann.* § 54-2-2. The definitions of these terms overlap and contain common elements. For example, the term "corporation" is defined to include "association." Because of this interrelationship, these terms must be interpreted together and cannot be considered in isolation. This interrelationship also shows the Legislative intent that these terms refer to entities of the same character. *Salt Lake City v. Salt Lake*

County, 568 P.2d 738, 741 (Utah 1977).²

RMP disparages HLP's arguments on these interrelated terms as circular, but provides no justification for this label. *RMP Brief* at 24, 25. HLP's analysis is not circular and simply traces the definitional path created by the Legislature. HLP applies the plain meaning of the statutory language in light of the other statutory provisions using identical terms. By considering these related provisions together, this approach obtains a meaning consistent with the language of each provision and avoids the absurd result of identical terms having different means in different sections of the same statute.

RMP ignores this interrelationship and attempts to define the terms "association" and "company," in isolation from each other and from the definition of "corporation." This results in definitions which conflict with the statute's plain meaning and which cannot be consistently applied throughout the statute.

(i) HLP is Not a Corporation Subject to Commission Jurisdiction.

HLP is an energy services interlocal entity and as such a body corporate. *Utah Code Ann.* § 11-13-203(1)(b). As a body corporate, it has the attributes of a corporation. 56 Am.Jur. 2d Municipal Corporations, Etc. § 1. The code however expressly excludes governmental entities from the definition of corporations subject to Commission

² The doctrine of *noscitur a sociis* (known from its associates) provides "that the phrase, "or subdivision thereof" following the words "the state, or any county" should be taken to mean public entities of similar character; and thus a subdivision of either the state or any county." *Id.* at 741.

jurisdiction. *Utah Code Ann.* § 54-2-1(5)(b). Thus, even though HLP is a body corporate and a corporation, the utility code excludes HLP, a governmental entity from jurisdiction.

Because the utility code expressly excludes governmental entities from corporations subject to Commission jurisdiction, RMP seeks to force HLP into the definition of person by characterizing HLP as an “association” or a “company.”

(ii) HLP is Not an “Association.”

RMP urges the Court to adopt a dictionary definition for the term “association,” subject to Commission jurisdiction. Under RMP’s definition, an “association” means a “gathering of people for a common purpose; the persons so joined.” *RMP Brief* at 25. Based on this definition, RMP concludes that HLP is an association because it “was created by three municipalities, associating themselves for a common purpose of providing electrical power.” *RMP Brief* at 25. RMP thus concludes that the Commission has jurisdiction over HLP, even though it is a governmental entity.

Defining association as including a governmental entity creates an absurd result when that definition is applied to the code’s definition of corporation. The code defines corporation as including association, *Utah Code Ann.* § 54-2-1(5)(a), but excludes governmental entities from the corporation subject to Commission jurisdiction. *Utah Code Ann.* § 54-2-1(5)(b). Thus, under RMP’s analysis, the word “association” includes governmental entities when used in the definition of person but excludes governmental entities when used in the definition of corporation. This is an absurd result.

The proper construction is to exclude governmental entities from “association” where ever it is used. This is supported by the statutory exclusion of governmental entities from the definition of corporation and by the 1989 Amendment excluding governmental entities from the definition of person.

RMP’s argument conflicts with the code’s definition of corporation in another way. Under RMP’s argument, HLP is an association because three municipal corporations came together to create HLP. *RMP Brief* at 25. These municipal corporations are however excluded from the Commission’s jurisdiction by the code’s definition of corporation. It is absurd to suggest that these municipal corporations are excluded from Commission jurisdiction if they act individually, but are subject to the Commission jurisdiction if they merely come together for a common purpose.

Finally, RMP’s argument that HLP is an association conflicts with its proffered dictionary definition. To define the term “association,” RMP selectively quotes *Black’s Law Dictionary* as defining association as a “gathering of people for a common purpose; the persons so joined.” RMP fails to include the more applicable definition of the term “association” in *Black’s Law Dictionary* which states: “An unincorporated organization that is not a legal entity separate from the persons who compose it.” This later definition would not include HLP which is a legal entity separate from its members. Thus, HLP is not an association.

(iii) HLP is Not a “Company.”

RMP offers a dictionary definition to define a “company,” subject to Commission jurisdiction. Under RMP’s definition, a “company” means “a corporation” or “less commonly, an association” that “carries on a commercial or industrial enterprise.”³ Based on this definition, RMP concludes that HLP is a company because “HLP is an association or union of three municipalities organized for the ‘commercial purpose’ of providing electric service.” *RMP Brief* at 24. RMP thus concludes that the Commission has jurisdiction over HLP.

RMP’s definition makes a “company” synonymous with both corporation and association. Thus, if HLP is a company, it is also a corporation and an association. As a corporation, the code excludes HLP, as a governmental entity, from Commission jurisdiction. It is absurd to suggest that HLP is subject to Commission jurisdiction if called a “company” and is excluded from Commission jurisdiction if called a “corporation.”

³ Black’s Law Dictionary (8th Edition, 2004) defines “company” as:

1. A corporation — or, less commonly, an association, partnership, or union — that carries on a commercial or industrial enterprise. 2. A corporation, partnership, association, joint-stock company, trust, fund, or organized group of persons, whether incorporated or not, and (in an official capacity) any receiver, trustee in bankruptcy, or similar official, or liquidating agent, for any of the foregoing. Investment Company Act § 2(a)(8) (15 USCA § 80a-2(a)(8)).

RMP's interpretation of "association" and "company" to include governmental entities paints much too broadly. Every municipal electric utility is "organized for 'the commercial purpose' of providing electric service to customers." *RMP's Memorandum* at 6. As a result, RMP's interpretation would make every municipal electric utility a public utility subject to plenary Commission jurisdiction, regardless of where they provide service. This is an absurd and illogical result. *Cf. RMP's Memorandum* at 2 ("There is no question that HLP's service to customers located within the municipal boundaries . . . are not subject to the jurisdiction of the Commission.") The only way to avoid such an absurd and illogical result is to further rewrite the statute to limit the jurisdiction to governmental entities providing extraterritorial service. Nothing in the statutory language however supports this additional language.

II. The Commission Erroneously Asserts Jurisdiction Based on Public Policy, Without a Statutory Grant of Jurisdiction.

As discussed in HLP's opening brief, the Commission Order contains a number of errors. It is not necessary for HLP to repeat its earlier argument detailing how the Commission's Order violates the rulings of this Court as well as the Commission's own decisions.

The Commission falls prey to these errors in its effort to justify its assertion of jurisdiction over governmental entities, absent a statute grant. Because there is no statutory grant of jurisdiction, the Commission is forced to find jurisdiction based on an

amalgam of “all the statutes governing interlocals and related statutes, those [statutes] governing Commission jurisdiction, and case law interpreting these statutes.”

Commission Order at 19 (R.34). Essentially, the Commission rewrites the utility code to give the Commission jurisdiction over a governmental entity, because the Commission **believes** that it is good public policy.

The Commission cannot properly assert jurisdiction simply because it believes that it is a good idea. “Without clear statutory authority, the commission cannot pursue even worthy objectives for the public good.” *Mountain States Tel. and Tel. Co. v. Public Service Com’n*, 754 P.2d 928, 933 (Utah 1988). It is however clear that the Commission Order is fueled by public policy considerations, without statutory authority. This is shown by its brief in this Court which discusses public policy concerns without reference to the statutory language. *See, e.g., Commission Brief* at 23-25. Similarly, RMP describes “simple common sense” devoid of statutory support as “[o]ne of the strongest arguments” against HLP’s arguments based on the statute’s language. *RMP Brief* at 35-36. The Commission’s jurisdiction however cannot be properly based on such policy arguments absent statutory support.

III. The Commission’s and RMP’s Factual Claims, Not Supported By The Record, Must Be Disregarded.

With respect to the issues raised by the Petition for Review, the parties are limited to the facts, supported by the record on appeal. The record on an appeal of a motion to dismiss

consists of the Complaint and Answer. In its motion to dismiss, HLP accepted as true the allegations of the Complaint, for the purposes of the motion only. Stated in different words, the Commission lacked jurisdiction over HLP, even if contrary to fact, the allegations of the Complaint were true. HLP retains the ability to prove the Complaint's factual allegations, false in the appropriate forum.

Notwithstanding these limitations, the Commission and RMP seek to present the false impression that HLP has admitted to selling non-surplus power in violation of Utah law. *Commission Brief* at 6, 15, 18, and 28, *RMP Brief* at 7. HLP's Answer unambiguously states:

HLP has for decades offered and continues to offer electrical services to customers located within its historical service areas who request such service, in full conformity with the Utah Municipal Code and all other applicable laws and principles of law and equity.

Answer at 6. This allegation and others in the Answer make clear that HLP denies RMP's claim that it has violated the law by selling non-surplus electricity in violation of Utah law.

In connection with the Petition for Review, the Commission's and RMP's briefs contain factual allegations, which are beyond the pleadings and thus not relevant to the issues here. *Commission Brief* at 8-9, *RMP Brief* at 5-6. These factual allegations, however, if left unchallenged, could be viewed as being accepted by HLP. The following briefly responds to these allegations.

RMP's Brief characterizes as "unfounded" HLP's claim that HLP has provided service to customers outside the municipal boundaries "because no other electric utility had the interest or facilities to provide service to customers scatter across the Heber Valley. *RMP Brief* at 5.⁴ While it is true RMP has provided service to a few customers in the Heber Valley, it does not have the facilities to serve many of the customers located in or around HLP's service area. The vast majority of the customers served by RMP in the Heber area are located in the Timber Lakes subdivision and served over lines and using electricity provided by HLP. In fact, recently, a customer outside of HLP's service area requested service from HLP because RMP could not economically provide that service. HLP referred the customer to RMP to obtain service.

As suggested by RMP's Brief, RMP had no capacity to provide service in the Heber Valley until construction of RMP's substation at Jordanelle, in 2005, which gave it some capacity to serve the north end of the Heber Valley. *RMP Brief* at 6, *Answer* at 2 (R. 9). Prior to that time, "customers received service from the entity of their choice." *RMP*

⁴ In its Answer, HLP states:

RMP has for many decades known of and encouraged HLP to provide electric service in the Heber Valley, including unincorporated areas of Wasatch County, and to make substantial expenditures for resources and facilities to provide this service. RMP is barred by abandonment, forfeiture, waiver, estoppel and laches from challenging HLP's authority to serve the Heber Valley, including unincorporated areas.

Answer at 5 (R. 9).

Brief at 6. However, given RMP's lack of facilities, the customer's choice was service from HLP or no service at all. This choice continues today because of RMP's lack of facilities.

The history of RMP's service to the Heber Valley illustrates the dilemma facing customers and HLP. *RMP Brief* at 6 From its creation in 1909, HLP was essentially "the only game in town," and RMP did not object to HLP's service area. RMP, however, sought to change the rules when, in 2005, the Jordanelle substation gave it some capacity to serve the north end of the Heber Valley. It was only then that RMP made any effort to serve within HLP's historic service area and then only to customers at the north end of the Heber Valley. It continues to lack the capacity to serve in the remainder of the Heber Valley.

IV. The Commission Order Is Final Agency Action Subject to Judicial Review.

"Final agency action" is an agency order that has "fully decided" an issue. *Union Pacific R.R. v. Utah State Tax Comm'n*, 2000 UT 40 ¶13, 999 P.2d 17. Courts adopt a "pragmatic and flexible" approach in applying the term "final agency action" to a particular agency decision. *Oregon Natural Desert Ass'n v. United States Forest Service*, 465 F.3d 977, 982 (9th Cir. 2006). The court thus focuses on "the practical and legal effects" of the agency decision, and on the "effect of the action . . . not its label." *Id.* at 982 and 985.

Applying this standard in the instant case has been simplified by the Commission's

acknowledgment of this Court's jurisdiction to review the Commission Order as final agency action. *Commission Brief* at 1. The Commission thus acknowledges that it has "fully decided" the jurisdictional issue, that judicial review will not disrupt the orderly process of adjudication, and that the Commission Order is not a preliminary decision. Moreover, it confirms, as HLP argued, that the Commission Order has an immediate impact on HLP and its operations.

While the Commission's acknowledgment does not create jurisdiction, the Court should carefully consider the acknowledgment in weighting the *Union Pacific* standard. *Cf. Barker v. Public Service Commission*, 970 P.2d 702 (Utah 1998)(Commission's treatment of own order as final agency action). This is particularly true, in the instant case, where the harm to HLP comes, in part, from the Commission's immediate application of its own order. Stated simply, the Commission apparently views its Order as having immediate impact, notwithstanding RMP's arguments to the contrary.

It is not necessary to review in detail each of the *Union Pacific* elements which are discussed in detail in HLP's opening brief. These arguments are not repeated here. Instead, the discussion that follows addresses specific errors in RMP's analysis or supporting authorities.

RMP cites *Bethlehem Steel Corp. v. Environmental Protection Agency*, 699 F. 2d 903 (3rd Cir. 1982) for the proposition that deferring judicial review fosters judicial economy. *RMP Brief* at 14. In *Bethlehem*, the agency action involved both legal and

factual issues. *Id.* at 909. With respect to the factual issues, the court deferred ruling to allow resolution of potentially dispositive factual issues. *Id.* However, with respect to purely legal questions, the court suggested a different approach:

Despite the frequently reiterated benefits of exhaustion, courts have declined to require it when no purpose would be served by deferring review. For example, where a dispute centers on legal questions such as constitutional or statutory interpretation, and the facts are uncontested, then the interest in “full administrative fact gathering and utilization of agency expertise” is not harmed by earlier judicial scrutiny. . . . In those circumstances, a rigid exhaustion requirement would entail “a commitment of administrative resources unsupported by any administrative or judicial interest.”

Id. at 907. The *Bethlehem* court did ultimately reach the issue of whether it should review the purely legal issue because another court had exclusive jurisdiction over that legal issue. *Id.* at 909.

In the instant case, the Commission Order resolves a purely legal issue. It does not depend on the underlying facts. In other words, the Court deferring ruling would serve no useful purpose.

RMP cites *CEC Energy Co., Inc. v. Public Service Commission*, 891 F.2d 1077 (3rd Cir. 1989) for the proposition that the Commission Order is preliminary. In *CEC Energy*, the PSC determined that it had jurisdiction to investigate a contract between WAPA and CEC to determine its impact on WAPA ratepayers. *Id.* at 110. CEC claimed that the agency action injured it because the pending investigation made it difficult to obtain financing for the project contemplated by the contract. *Id.* at 1111. The court found that

this injury was not the type that justified immediate judicial review, because it was CEC's choice to move ahead with the project while the case was pending. *Id.*

In *CEC Energy*, the agency jurisdictional ruling was limited to opening an investigative proceeding that had no independent legal effect other than that ordinarily associated with litigation. The Commission Order in the instant case does more than simply start litigation with its usual costs. It affects the very legal environment in which HLP operates. Before the Commission Order, the Commission had not claimed a right to regulate HLP under any circumstances. After the Commission Order, the Commission claimed the right to treat HLP as a public utility, and the Order was effective immediately. *Utah Code Ann.* § 54-7-10(1).

The Commission Order is a determination having immediate impact, justifying immediate review. When such agency action is involved, the affected party “need not wait until a threatened hardship becomes a reality” to obtain judicial review. *CEC Energy* at 1111. Instead, the affected party may obtain pre-enforcement judicial review. *Id.* Applying these principles, HLP may obtain immediate review of the Commission Order.

V. Assuming *Arguendo* That the Commission Order Is Not Final Agency Action, the Court Has Jurisdiction to Review the Order in Connection with the Issuance of an Extraordinary Writ.

If the Court determines that the Commission Order is not final agency action, the Court should retain jurisdiction to review the Order in connection with the issuance of an

extraordinary writ. An extraordinary writ is the appropriate remedy where an agency exceeds its authority:

The common law writ of certiorari was used when there was no adequate remedy at law, such as a direct statutory appeal, to bring the record of the proceedings of an inferior tribunal before a superior court to determine from the record whether the inferior tribunal exceeded its jurisdiction or failed to proceed in accordance with law. . . . The scope of the common law writ has been broadened not only to encompass questions of jurisdiction and regularity of proceedings, but also to correct “ ‘errors in law affecting the substantial rights of the parties.’ ”

Renn v. Utah State Board of Pardons, 904 P.2d 677, 682 (Utah 1995). A writ is appropriate here because the Commission has exceeded its statutory jurisdiction.

While the Commission does not oppose HLP’s application for a writ, RMP opposes the application for many of the same reason it raises in its arguments on final agency action. Essentially, RMP claims the Order has no immediate affect and thus HLP suffers no irreparable harm. The Commission Order however is immediately binding on HLP. In making this ruling, however, the Commission exceeded its authority by claiming a right to asset jurisdiction over HLP, as a “public utility,” notwithstanding the absence of any statutory authority. The Commission does not deny that its Order has this immediate impact on HLP.

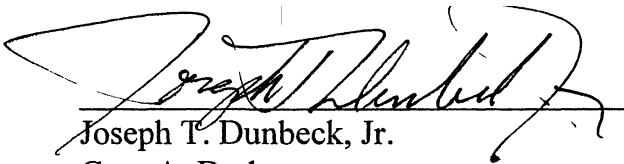
Contrary to RMP’s argument, this impact is not the same as a party simply being required to participate in ligation. The Commission Order gives the Commission jurisdiction to not only determine the extent of HLP’s authority to serve, but to subject

HLP to the full range of public utility regulation. It is this later aspect of the Commission Order that makes this case unlike the ordinary challenge to jurisdiction. Unlike those cases, HLP injury is not limited to the specific issues in the litigation. HLP injury reaches beyond the immediate litigation to include regulation of all its extraterritorial operations. This latter risk is irreparable and not the typical risk of litigation.

CONCLUSION

For these reasons, the Court should reverse the Commission Order, because it asserts jurisdiction over a governmental entity, absent a statutory grant of jurisdiction and contrary to the Court's and the Commission's own precedent.

Dated this 24 day of July, 2009.


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CERTIFICATE OF SERVICE

I hereby certify on the 7th day of July, 2009, I served a copy of the foregoing
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