1992

Sandy City v. Public Service Commission of Utah : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

SANDY CITY, Appellant-Petitioner, vs. PUBLIC SERVICE COMMISSION OF UTAH, Appellee-Respondent.	)	BRIEF OF APPELLANTS WHITE CITY WATER COMPANY and SANDY CITY Case No. 920220 Priority No. 10

APPEAL FROM AN ORDER ENTERED BY THE
PUBLIC SERVICE COMMISSION OF THE STATE OF UTAH

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CONSTITUTIONAL PROVISIONS

[Special privileges forbidden.]

> 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.

RULES

STATUTES

TEXT OF CONTROLLING STATUTES

> "Water corporation" includes every corporation and person, their lessees, trustees, and receivers, owning, controlling, operating, or managing any water system for public service within this state. It does not include private irrigation companies engaged in distributing water only to their stockholders, or towns, cities, counties, water conservancy districts, improvement districts, or other governmental units created or organized under any general or special law of this state.

Utah Code Ann. § 54-2-1(34)

> Water, sewer, gas, electricity, telephone and public transportation -- Service beyond city limits -- Retainage escrow.
>
> (1) They may construct, maintain and operate waterworks, sewer collection, sewer treatment systems, gas works, electric light works, telephone lines or public transportation systems, or authorize the construction, maintenance and operation of the same by others, or purchase or lease such works or systems from any person or corporation, and they may sell and deliver the surplus product or service capacity of any such works, not required by the city or its inhabitants, to others beyond the limits of the city.

Utah Code Ann. § 10-8-14 (1992)

JURISDICTION

This Court has jurisdiction over final orders issued by the Public Service Commission ("Commission") pursuant to Utah Code Ann. § 78-2-2(3)(e)(i). Appellant/Petitioner contests jurisdiction, however, on the grounds that the order from which it appeals, which the Commission has declared is a final order, is not final.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. DOES THE COMMISSION HAVE CONSTITUTIONAL OR STATUTORY AUTHORITY TO EXERCISE JURISDICTION OVER SANDY'S SALE OF WATER TO NON-RESIDENTS?

II. DID THE COMMISSION'S ORDER DEPRIVE SANDY CITY OF CONSTITUTIONAL DUE PROCESS BY DENYING SANDY CITY THE OPPORTUNITY TO PRESENT EVIDENCE RELEVANT TO THE DETERMINATION MADE BY THE COMMISSION?

III. IS THE COMMISSION'S ORDER A FINAL ORDER DISPOSING OF ALL THE ISSUES BEFORE THE COMMISSION?

This issue includes the following sub-issues.

a. IS THE COMMISSION'S ORDER ARBITRARY AND CAPRICIOUS IN PURPORTING TO MAKE FINDINGS OF FACT WHEN NO EVIDENCE WAS PRESENTED TO IT?

b. IS THE COMMISSION'S ORDER ARBITRARY AND CAPRICIOUS BECAUSE IT IS CONTRARY TO THE UNDISPUTED FACTS THAT WOULD BE PRESENTED TO IT IN AN EVIDENTIARY HEARING?

c. DID THE COMMISSION ERR IN BIFURCATING THE ISSUE OF APPROVAL OF THE CONTRACT FROM ITS DECLARATION OF JURISDICTION?

STANDARD OF APPELLATE REVIEW

The Public Service Commission issued an Order which is attached hereto as Addendum 1 declaring it had jurisdiction to regulate the rates charged by Sandy City for the sale of water to non-residents. The Order was issued without any evidentiary hearing and is based on the Commission's interpretation of constitutional and statutory law. The appropriate standard of review for questions of law is de novo review without deference to the Commission's decision. MCI v. Public Serv. Comm'n, 186 Utah Adv. Rep. 8 (1992); Savage Indus., Inc. v. Utah State Tax Comm'n, 811 P.2d 664 (Utah 1991); Morton Intern. Inc. v. Auditing Div., 814 P.2d 581 (Utah 1991).

NATURE OF THE CASE

Petitioners White City Water Company and Sandy City appeal from an Order issued by the Commission declaring that the Commission has jurisdiction over a municipality to regulate the rates charged by the municipality for providing water to residents living outside its boundaries. In issuing this Order, the Commission severed the jurisdictional issue addressed by the Order from the original petition filed by White City Water Company ("White City") for approval by the Commission of a Contract of Sale of the stock of White City to the Municipal Building Authority of Sandy City (the "Building Authority").

COURSE OF PROCEEDINGS BELOW

White City, a water utility, applied for approval by the Commission of an agreement by which all of its stock would be sold to the Building Authority. The application requested determination by the Commission that upon consummation of the proposed transaction, subsequent ownership by the Building Authority and operation of the water system by Sandy City would no longer be subject to the Commission's jurisdiction.

White City Water Users, Salt Lake County and Sandy City filed petitions to intervene in this matter. The Commission allowed the intervention of these parties and directed the parties to submit legal memoranda concerning the Commission's jurisdiction subsequent to the sale if the sale were approved. Without allowing the parties to present evidence and without conducting any formal proceedings, and over the objections of Sandy City and White City, the Commission issued the Order purporting to find that it would have jurisdiction over Sandy's sale of water to non-Sandy residents. More specifically, the Commission's Order first purported to sever the issue of approval of the sale from what it characterized as the jurisdictional issue and then ruled that it would have jurisdiction if the sale were found to be in the public interest. Sandy City and White City seek review of that Order.

STATEMENT OF FACTS

1. On November 4, 1991, White City filed an application advising the Commission that it had entered into an agreement with Sandy City and the Building Authority to sell all of its stock to the Building Authority. Sandy City would then lease and operate the water system. The application which is attached hereto as Addendum 2, informed the Commission that the geographic area served by White City was contiguous to and partly within Sandy City and within an unincorporated area of Salt Lake County. The application stated that Sandy City's water system had facilities that were fully sufficient to provide storage and pressure to Sandy City's existing customers as well as to the customers of White City. R. 0081.

2. The application noted that White City had water rights that were ordinarily sufficient to give adequate and continuous water service to its customers. White City, however, lacks adequate facilities to store water at sufficient elevation to provide pressure to serve its customers. Additionally, White City lacks sufficient storage and delivery capacity to meet prolonged emergency in the case of an emergency draw down. Currently, although these deficiencies are being mitigated by purchasing water from the Salt Lake County Water Conservancy District, there is no guarantee that needed emergency capacity will be available. White City has been unable to construct additional storage and distribution facilities to provide adequate pressure

for anticipated emergency situations. The application notes that even if White City does obtain permission to build such facilities, it will need to expend money beyond its present resources. Consequently, White City would have to borrow funds for such a construction which would result in substantially higher rates for its customers. R. 0081-83.

3. The application stated that the water systems of White City and Sandy City are well matched for efficiencies to result from the proposed integration. The application noted that approval of the agreement is in the public interest in that it would result in better service to all customers of White City and Sandy City in the foreseeable future. R. 0084.

4. On November 7, 1991, Sandy City sought permission to intervene and in late November, 1991, White City water users petitioned to intervene. On December 9, 1991, the Commission held a prehearing and granted the proposed intervention of Sandy City and White City water users. R. 0003. At the December 9th prehearing, the Commission also scheduled briefing on the issue of the scope of the Commission's jurisdiction in approving or disapproving White City water. A hearing was scheduled for February 18, 1992. R. 0171.

5. Subsequently, on January 10, 1992, the Commission issued a pre-hearing order. The Commission set out the dates for the scheduled briefing and discovery, stating that "although this docket is obstensibly about the sale of the outstanding shares of

Applicant to Sandy City, an issue of broader concern surfaced having to do with the authority of Commission once the sale is consummated to regulate the rates charged and service provided to certain Applicants customers who reside outside the municipal boundaries of Sandy City." R. 0164-165.

6. The January 10, 1992 Order did not suggest the Commission's intent to separate the issue of jurisdiction from the issue of approval of the agreement. R. 0164-166.

7. Prior to the hearing set for February 18, 1992, and without giving the parties an opportunity to present evidence, the Commission determined that it would describe the case as having two issues; (1) whether the sale was in the public interest, and (2) whether the Commission would have jurisdiction if the sale were approved. Additionally, the Commission unilaterally determined that it would issue an Order declaring it would retain jurisdiction over the sale of water to former White City customers who were not Sandy residents. At the hearing before the Commission on February 18, 1992, Chairman Stewart stated:

> If I may first give a little history of why we are here today. Following the hearing in this matter, or prehearing in this matter several months ago, the Commission in that hearing ordered that briefs would be filed on the question of the legal authority of the Commission.
>
> Following submission of those briefs, the Commission reached a preliminary conclusion that it would exercise jurisdiction over rate payers affected by this purchase if the purchase was to go forth.

> A week ago Friday, on February 7th, at the request of the attorneys in this case, an informal meeting was held in the Chairman's office in which the original question of what should be intended for today's hearing. [sic] At that time, we communicated to the attorneys that we had made that preliminary decision and indicated to them that they then had the option of appearing here today for oral argument, recognizing the Commission initial decision.
>
> They could appear today to have a prehearing to schedule this matter further and several other options were discussed. We did not hear anything from the attorneys and about the middle of last week, the Commission approved an order prepared by our Administrative Judge Thurman which order states that we intend to exercise the jurisdiction that we had indicated to the attorneys in the previous meeting would be the case. . . .
>
> So the purpose of today's hearing is simply to hear oral argument on the legal issues that were presented in the briefs and following this hearing, the Commission will determine whether or not we have been swayed to alter the preliminary order which was signed last week. If not, it will then be up to the parties to determine where we go from here.

R. 0023-25.

8. At the February 18, 1992 hearing, White City objected to the Commission's issuing of an order prior to a consideration of the facts at issue, by stating:

> [E]ven in the case of a declaratory judgment, there must be a case in controversy and the opinion laid against the background of the factual situation in the case.
>
> You haven't done that here yet. You have seen some pleading and that's all. It is our feeling that if you do this in a vacuum, not against the back drop of any particular set of facts, you will be departing from the

> entire tradition, the common law so far as decision making is concerned.

R. 0027.

9. Additionally, White City pointed out to the Commission that there was currently before the Legislature a bill that would grant jurisdiction to the Commission where a city served non-residents, belying the Commission's conclusion that the government statutory framework gave the Commission jurisdiction. R. 0028.

10. White City also told the Commission that although White City water users currently had one of the lowest rates for water in the entire state, partially due to the age of the system, White City Water Company was constructed at a time when costs were lower. Consequently, much of the White City system is fully depreciated on the books and although the rate base is just over $1 million, the system could not be reproduced today for less than $15 million. White City noted that within the next five years, White City would have to invest over $3.5 million to replace old pipes and to solve storage and pressure problems. The costs of these improvements would result in an increase in rates to a level above any rate which Sandy would charge non-residents. R. 0030.

11. White City represented to the Commission that although it could handle one or two home fires, it could not handle more complex fire emergencies, such as a shopping center, with its current facilities. White City urged the Commission to

approve the contract for safety reasons and to allow for continued good water service to the Community. R. 0031.

12. White City also noted that it would be in the public interest for White City to consolidate with another system and that Sandy City's system was the most appropriate for consolidation. R. 0032.

13. Sandy City argued that the Commission could not determine whether it had jurisdiction unless the Commission first heard the factual background concerning the the sale of White City stock to Sandy City. Specifically, Sandy City argued that the evidentiary hearings on the public interest question would address the same evidence necessary to determine if the Commission could constitutionally assert jurisdiction. Sandy City, therefore, urged the Commission not to issue an order on jurisdiction without facts to support its legal conclusions, stating:

> [I]f you issue [the order] without a factual framework against which to judge the extent of jurisdiction, [it will] place all cities at risk with respect to the extent to which they are submitting themselves to jurisdiction of the Commission. That is simply something that needs to be explained against the factual framework.

R. 0037, 0039. Sandy City noted that if the Commission was going to consider jurisdiction, "it need[ed] to do so with a full factual hearing in order to decide whether the ground to be broken [was] appropriate." R. 0040. Sandy City reiterated that the question of jurisdiction "should be addressed in a full factual hearing." R. 0041.

14. The Commission refused to hold an evidentiary hearing on the issue of jurisdiction. Instead, the Commission assigned a separate docket number to the jurisdiction issue and severed that issue from White City's application for approval of its agreement with Sandy City. R. 0355.

15. Although the Commission purported to sever the jurisdictional question from the original application, the Commission has not established a separate file for the two proceedings or otherwise dealt with the "severed" cases as separate matters. See Record as a whole.

SUMMARY OF ARGUMENT

White City sought approval from the Commission for the sale of all its stock to the Building Authority and for a determination by the commission that if the sale was completed, the Commission would no longer have jurisdiction over the water system. Before any evidence was presented, and over the objections of the parties, the Commission issued an order which: (1) severed the issue of jurisdiction from the issue of approval of the sale; (2) gave the jurisdiction issue a new docket number; and (3) declared that the Commission would have subsequent jurisdiction. For the reasons set forth below, the Commission's Order should be vacated and the case should be remanded to the Commission for an evidentiary hearing.

First, under existing constitutional law, statutory law and controlling case law, the Commission does not have

jurisdiction over cities which sell water to non-residents. To the contrary, cities have statutory authority to sell surplus water to non-residents. In fact, Utah's Constitution prohibits state agencies such as the Commission from regulating cities performing a municipal function. Under controlling case law, service of water to non-residents constitutes a municipal function. Furthermore, even if the analysis set forth in West Jordan v. Utah State Retirement Bd., 767 P.2d 530 (Utah 1988) applies to the sale of water, the Commission utterly failed to perform the factual analysis set out in West Jordan. Instead, the Commission relied on its beliefs, surmise, suspicions and unsupported conclusions, without any basis in fact to make its decision.

Second, the Commission's order denies the parties their constitutional right to due process. The order, which was written before any evidence was presented, is not based on factual findings. The Commission decided this issue in a factual vacuum without reference to the actual facts concerning the application. Furthermore, the Commission's order which severed the issues without adequate notice to the parties, and which was issued without any evidence, denies White City and Sandy City of their constitutional due process rights to notice and a fair hearing.

Third, the Commission's order, which does not address the question of whether it will approve the sale, is not a final appealable order. The Commission currently has before it White City's application for approval of the sale of its stock.

Presumably, the Commission will go forward and schedule hearings on whether the sale is in the public interest. Many of the facts at these hearings will be relevant to the jurisdiction issue. Indeed, absent approval of the application, jurisdiction is not an issue. Under the terms of the agreement, the sale is conditional on the jurisdictional issue. Clearly, these issues arise out of the same operational facts. Under the standards set out by this Court relating to finality, this appeal should be dismissed because the order in question, though specifically reciting that it was final, did not resolve the present application.

ARGUMENT

I. THE PUBLIC SERVICE COMMISSION DOES NOT HAVE JURISDICTION OVER MUNICIPAL WATER SYSTEMS THAT SERVE NON-CITY RESIDENTS.

White City appropriately sought approval of its agreement to sell all its stock to the Building Authority and requested determination by the Commission that upon consummation of the proposed transaction, subsequent ownership by the Building Authority and operation of the water system by Sandy City would not be subject to the Commission's jurisdiction.

The Commission's Order, after purporting to sever the issue of approval of the transfer of stock of White City to the Building Authority, determined that the Commission would have jurisdiction over whatever entity served White City customers residing outside the boundaries of Sandy City. More specifically, the Commission's Order states that if White City's

application for approval of its proposed agreement with Sandy City is approved, the Commission would have jurisdiction to regulate rates charged by Sandy City to non-city customers.

As demonstrated by this Brief, it is difficult to separate the substantive argument over whether the Commission can assert jurisdiction over municipalities which serve non-residents from the due process and finality arguments made later in this Brief. This difficulty stems from the fact that the Commission purports to make findings of fact without ever having taken any evidence in this matter. In fact, a review of the enumerated findings of fact indicates that they bear no relation to the ultimate conclusions made by the Commission. Indeed, the Commission's own language demonstrates that these conclusions are supported only by the Commission's speculation with respect to the parties' merit and not by the stated findings of fact.

Under the current law, the Commission either clearly does not have statutory or constitutional ability to exercise jurisdiction over a municipality or, if it does, it may do so only under the detailed "weighing" of stated criteria as enunciated in the West Jordan and UAMPS cases. In fact, the various factors enunciated in the West Jordan case would be implicit to a determination of whether the sale is in the public interest, a matter which the Commission has kept before it. Consequently, either the Commission clearly exceeded its statutory and constitutional authority or the Commission committed procedural error

by attempting to separate the jurisdiction from the public interest determination when both involve the same set of evidentiary facts.

A. STATUTORY LAW AND CONTROLLING CASE LAW PROHIBIT THE COMMISSION FROM EXERCISING JURISDICTION OVER SANDY CITY'S SALE OF SURPLUS WATER TO NON-RESIDENT CUSTOMERS.

The Commission is a creature of the legislature and has only those powers specifically delegated to it by statute. As stated in Williams v. Public Serv. Comm'n, 754 P.2d 41 (Utah 1988), any doubt about the existence of power by the Commission must be resolved against the Commission. Id. at 50. As stated by this Court:

> Where a "'specific power is conferred by statute upon a tribunal, board or commission with limited powers, the powers are limited to such as are specifically mentioned.'" Union Pac. R.R. Co. v. Public Serv. Comm'n, 103 Utah 186, 197, 134 P.2d 469, 474 (1943) (quoting Bamberger Elec. R.R. Co. v. Public Util. Comm'n, 59 Utah 351, 364, 204 P. 314, 320 (1922)). All powers retained by the PSC are derived from and created by statute. The PSC has no inherent regulatory powers and can only assert those which are expressly granted or clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it. Basin Flying Serv. v. Public Serv. Comm'n, 531 P.2d 1303, 1305 (Utah 1975). To ensure that the administrative powers of the PSC are not overextended, "any reasonable doubt of the existence of any power must be resolved against the exercise thereof." Public Serv. Comm'n v. Formal Complaint of WWZ Co., 641 P.2d 183, 186 (Wyo. 1982).

Id. (emphasis added).

In this instance, the Commission's jurisdiction is limited to regulation of "public utilities." By definition a public utility includes a "water corporation" . . . "where the service is performed for, or the commodity delivered to, the public generally." § 54-2-1(19)(a). A city, by statutory definition, is not a water corporation and, therefore, not a public utility.[1] See Utah Code Ann. §54-2-1(34) ("'water corporation' includes every corporation and person . . . and it does not include . . . towns, cities, . . . or other governmental units created or organized under any general or special law of this state.") Thompson v. Salt Lake Corp., 724 P.2d 958, 595 (Utah 1986) ("a municipal corporation . . . is authorized to operate water works. However, it does not engage in the activity as a public utility, but is specifically excluded from that

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1 The Building Authority is not subject to the Commission's jurisdiction either. The terms "water corporation" and "corporation" as defined in Utah Code Ann. § 54-2-1 exclude not only cities and towns but any "governmental unit created under [a] general or special law of this state." As a creature of the Utah Municipal Building Authority Act, Utah Code Ann. § 17A-3-901 et seq., the Building Authority falls outside definition of a water corporation. Furthermore, the Act specifically exempts the Building Authority and the projects it acquires (such as the White City water system), from Commission jurisdiction. Specifically, Utah Code Ann. § 17A-3-914(3) provides:

> (3) No board, commission, or agency of the state, including the Utah Public Service Commission, shall have any jurisdiction over building authorities or projects.

In sum, both by the limited nature of its own authority and by express legislative exclusion, the Commission has no authority over the Building Authority.

status.") Clearly, the Commission's statutory authority does not extend to regulation of water service provided by a municipality. Sandy City is not a "water company" and, therefore, is not a "public utility" or a "corporation" subject to the Commission's jurisdiction.

Indeed, the Commission concedes it has no statutory authority to assert jurisdiction over Sandy City in the order itself. The order states:

> While there may be no explicit statutory authority for us to assume jurisdiction, the obvious remedy for the abuse of extra territorial customers is for us to continue to regulate their rates; otherwise, to meet the Court's concern, the instant proposal would have to be found ultra vires.

Order at p. 14.

The Commission ignores its own concession that it has no statutory authority and tries to bootstrap itself into authority by claiming that Sandy City's authority is also limited. Sandy City's authority, however, has no relevance to the issue of the Commission's authority. Even if Sandy City were to engage in ultra vires activity, the result would not be an expansion of the Commission's jurisdiction. Rather, Sandy city would be subject to appropriate court order enjoining such activity. In sum, the district courts, not the Commission, possess general jurisdiction to resolve disputes under Utah law.

The Commission cannot expand its jurisdiction to fill what it perceives to be a gap in its statutory authorization.

Indeed, the absence of continuing jurisdiction could presumably be one of the issues the Commission considers in determining whether the sale is in the public interest, along with other evidence concerning whether the sale is in the public interest. It is inappropriate and unnecessary, however, for the Commission to assert jurisdiction where the statutes provide none, in order to prevent this sale from proceeding. Instead, the Commission should fully evaluate the application's long term impact on the public interest and rule accordingly.

The Commission's order relies on North Salt Lake v. St. Joseph Water & Irr. Co., 118 Utah 600, 223 P.2d 577 (Utah 1950) to extend its jurisdiction over rate regulation of Sandy's service to non-residents. In this regard, however, the Commission misreads the facts and the holding of North Salt Lake. In North Salt Lake, the newly-formed town of North Salt Lake had condemned what was previously a privately-owned water system. Owners of certain residential lots outside the town who had intended to hook onto the water system when it was private sought a determination that the newly-formed town was obligated to provide water to them. The court rejected those claims stating, that there was no binding obligation upon the owner of the water system that encumbered the system itself. The court based its ruling, in part, on a determination made by the Commission prior to the condemnation that the water company was neither obligated nor permitted to provide water service to additional customers.

This determination, which was made when the Commission did have jurisdiction, was based on the fact that the lack of available water might prevent the water company from serving its existing customers. The Commission, however, did not rule that the town was prohibited from serving additional customers, merely that the additional customers could not claim a binding obligation that encumbered the water system. Contrary to the Commission's reading of the case, the court did not suggest that the Public Service Commission or its orders had, or would have, an ongoing jurisdiction on the operation of the water system by the Commission.

Similarly, the Commission cites Orangeberg v. Moss, 262 S.C. 299, 204 S.E.2d 377 (S.C. 1974) for the proposition that the Commission has jurisdiction to regulate a municipality operating outside its boundaries. Like its reliance on North Salt Lake, the Commission's reliance on Orangeberg is misplaced. As the Commission admits, South Carolina has legislation specifically empowering their public service commission to regulate extra-territorial service. In contrast, Utah has legislation that excludes such regulation and, therefore, the holding in Orangeburg simply does not apply.

B. THE COMMISSION IS PROHIBITED BY UTAH'S CONSTITUTION FROM EXERCISING JURISDICTION OVER SANDY CITY'S MUNICIPAL FUNCTIONS.

The Commission is constitutionally prohibited from interfering with Sandy City's activities as a municipality.

Article VI, Section 28 of the Utah Constitution provides, in pertinent part, that "the Legislature will not delegate to any special commission . . . any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise . . . or to perform any municipal functions." Utah Const. Article VI, § 28.

The provision of water services to residents and non-residents constitutes a municipal function. Additionally, cities are statutorily authorized to provide surplus water outside of their boundaries. Indeed, the legislature has stated that cites "may construct, maintain and operate water works . . . or lease such works . . . from any person or corporation, and they may sell and deliver the surplus product or service capacity of any such works, not required by the city or its inhabitants, to others beyond the limits of the city." Utah Code Ann. § 10-8-14 (1992).

The provision from the Utah Code quoted above was interpreted in County Water System v. Salt Lake City, 3 Utah 2d 46, 278 P.2d 285 (1954) where the Utah Supreme Court specifically held that Salt Lake City had authority to sell its surplus water beyond the city limits, that such sales were a municipal function, and that such sales were not subject to Commission jurisdiction. On the basis of Section 10-8-14, the Court held:

> Such sale of surplus water, being authorized by law [Section 10-8-14] as a municipal function, is as much a municipal function as the supplying of water within the city limits, and disposing of the surplus outside its

> limits as permitted by statute does not change its character as a municipality; nor does the ownership and management of the necessary facilities beyond the city boundaries change such property to anything other than municipal property.

County Water Systems, 278 P.2d at 290. Thus, the Court held that Salt Lake City was not subject to the Commission's jurisdiction in selling surplus water outside its corporate boundaries and that the constitutional provision which is now Article VI, Section 28, precluded any grant of authority to the Commission over Salt Lake City's operation of its water system. See also Salt Lake County v. Salt Lake City, 570 P.2d 119, 121-22 (Utah 1977), (Salt Lake City's "business in furnishing water to its residents and activities reasonably incidental thereto is not subject to regulation by the Public Service Commission").

Sandy City asserts, and because no facts have been raised to refute it, it must be assumed, that acquisition and operation of the White City system is incidental to its overall provision of general water service delivery to its own residents. Because White City is located in the middle of Sandy City's service area, integration of the two systems will enhance Sandy City's ability to serve its own customers by eliminating a "hole" in its delivery network. Integration of the two systems also will minimize the duplication of pipes and other facilities in some areas, resulting in more reliable service to all of White City's customers both inside and outside of Sandy City's limits. Almost half of White City's customers reside within Sandy City

and White City's non-resident customers are located in an unincorporated island which is within Sandy City's existing service area. It is economically and operationally rational for Sandy City to provide water service to those customers after its acquisition of the system and incident to its overall resident customer water delivery. Furthermore, Sandy City has ample capacity to serve the non-Sandy White City customers and will, therefore, be selling "surplus" water to them upon acquisition of the White City system.

C. THE COMMISSION'S ORDER DOES NOT APPLY THE APPROPRIATE STANDARD TO DETERMINE IF SANDY CITY'S SALE OF WATER TO NON-RESIDENT USERS IS A MUNICIPAL FUNCTION.

The Commission attempts to rewrite Utah law by relying on Utah Assoc. Mun. Power Sys. v. Public Serv. Comm'n, 789 P.2d 298 (Utah 1990) ("UAMPS") and West Jordan v. Utah State Retirement Bd., 767 P.2d 530 (Utah 1988) for its assertion that "service to the extra-territorial customers is not a municipal function." Order at 9. The Commission's reliance is misplaced because the instant transaction does not fit within the UAMPS analysis and the Commission did not properly apply the analysis.

The Commission cites West Jordan to assert that "no particular activity conducted by a municipality is ipso facto a municipal function for purposes of Article VI, Section 28." Order at 10. The West Jordan case does not hold that there are no activities which are necessarily municipal functions. Rather,

the case holds that where the character of a particular activity under Utah law is not clear, the court will determine whether the activity constitutes a municipal function by considering a number of factors. The Utah Supreme Court has, however, already determined that the sale of surplus water to non-residents is a proper municipal function. In County Water Sys., 278 P.2d at 285, the court held that the "sale of surplus water, being authorized by law as a municipal function, is as much a municipal function as the supplying of water within the city limits." Id. at 290. This ruling has never been questioned, much less overturned, by the Utah Supreme Court; it is and remains controlling law in the State of Utah and the Commission may not ignore its clear holding.

Even, if the Commission is correct in its assumption that the West Jordan case invalidates the County Water System case as controlling law, the Commission would be required to make detailed factual findings based upon evidence on a number of issues, including:

> the relative abilities of the state and municipal governments to perform the function, the degree to which the performance of the function affects the interest of those beyond the boundaries of the municipality, and the extent to which the legislation under attack would intrude upon the ability of the people within the municipality to control through their elected officials are subject to policy that affect them uniquely.

West Jordan, 767 P.2d at 534.

The Commission has not made such specific findings nor could it have made such findings because it refused to proceed with an evidentiary basis. In fact, the Commission's Findings of Fact are very limited and do not address any of the conclusions at which the Commission later arrived. Rather, the Findings of Fact are innocuous and incomplete recitations of either the Application or briefs.

The Commission's complete Findings of Fact are as follows:

FINDINGS OF FACT

1. Applicant is a water corporation certificated by this Commission. In its Application, Applicant seeks approval of a transfer of all its outstanding stock to an instrumentality of Sandy City Corporation (hereafter "Sandy"), a Utah municipal corporation. Applicant further seeks declaratory relief in the form of a Commission declaration that "the integrated system constitutes a municipal water system under the laws of the State of Utah."

2. Under the proposed contract terms, the stock would be transferred to the Municipal Building Authority of Sandy City (hereafter "the Authority"). Applicant would retain its corporate existence for the lifetime of the bonds issued by the Authority to finance the purchase.

3. Applicant would cease operating the system and, for a nominal rental, would lease the system to the Authority, which in turn would sublease to Sandy. Sandy would actually operate the system and, to the extent feasible, would integrate Applicant's present system with Sandy's municipal system. Payment to the bondholders would be made by the Authority out of rentals realized from the sublease to Sandy, which in turn proposes to pay the rental fees out of water charges to customers.

4. In its brief, Sandy states explicitly that customers residing outside the city limits will be charged more than those residing within. The stated rationale is

that the customers outside the city limits should bear a greater proportion of the costs of the acquisition.

5. In the contract, the stock transfer is specifically conditioned upon this Commission's final Order declaring that the Commission does not have and will not assert any jurisdiction over Sandy, whether in regard to customers residing inside or outside the city limits.

From these limited findings, and without the benefit of evidence, the Commission's Conclusions of Law "predict with considerable confidence, that in case of conflict between the interests of franchised and disenfranchised customers, the interests of the former will receive priority -- no matter how vociferous the protest raised in meetings." Order at 5.

This "prediction" is without support in the findings and is without any evidence with respect to the process by which Sandy City sets its rates. Despite this lack of supporting evidence, however, the Commission's Conclusions of Law continue by stating:

> Obviously, Sandy could issue and service its own bonds. We strongly <u>suspect</u> the Authority is involved in the transaction only in a "belt and suspenders" attempt to insulate the real principals, applicant and Sandy, from our jurisdiction. We believe we are entitled to assess the substance, not the mere form, of a transaction. So assessing the transaction, it is obvious the Authority has no real role or participation in the management, and its presence should be disregarded.

Order at 7-8 (emphasis added). Based on suspicion, certainly not the Findings of Fact nor any evidence, the Commission chooses to disregard the structure of the transaction and the good faith of

the parties, stating that "in this case . . . Sandy will not be disposing of surplus water it now possesses -- it will be surplus only by virtue of Sandy's calculated acquisition of a class of captive, disenfranchised customers -- precisely the situation Justice Crocket inveighed against." Order at 12-13.

Once again, the Findings of Fact contains no support for this critical conclusion by the Commission. Lacking evidence to make such a finding, the Commission simply makes an expedient conclusion of law, ignoring the inherently factual nature of a determination of "surplus." This is a particularly important jump for the Commission to make in its analysis because its later conclusion that the transaction is not an appropriate exercise of municipal power depends on its conclusion that the sale is not of surplus water. The Commission, through constructing this "neat" syllogism, sought to avoid the full analysis of whether the transaction was a constitutionally protected municipal function under the West Jordan and UAMPS cases.

The Commission misapplies the ruling set out in UAMPS. Both West Jordan and UAMPS determined that a statute granting jurisdiction to a Commission is constitutional. In contrast, in this case the Commission is excluded by statute from regulating Sandy City's water system. In UAMPS a coalition of cities asked the Commission for a certificate of convenience to construct electric transmission lines in southern Utah. The cities acted under the auspices of the Interlocal Cooperation Act, Utah Code

Ann. § 11-13-1 to -36 (1986) which requires such coalitions to obtain a certificate of convenience and necessity from the Commission before constructing a transmission line. See Utah Code Ann. § 11-13-27 (1986). The Commission, after extensive evidence was presented in over fifty hearings, denied the petition. The coalition sought to overturn the statute as unconstitutional on the grounds it contravenes Article VI, Section 28 of the Utah Constitution.

Although the Court in UAMPS rejected "pat characterizations" of specific functions or categories of functions as being invariably "municipal," it did not question or reject the long-standing holding of County Water Sys. Rather, the Court analyzed whether under the factual scenario of UAMPS, the building of electric transmission lines over broad stretches of land was a "municipal function" excluding Commission jurisdiction where the state legislature had so provided. Unlike the coalition of cities in UAMPS which was required by statute to seek approval from the Commission for transmission lines, the Commission is specifically excluded by statute from exercising jurisdiction over the sale of surplus water by municipalities.

Furthermore, even if the analytical framework set out in UAMPS applies, the Commission failed to apply the balancing approach to the facts in this case. The Commission's analysis is limited to the bold assertion, without any basis in fact, that "the only 'substantial interest' our assuming jurisdiction would

affect would be that of Sandy in 'milking' the extra-territorial customers to the maximum extent possible." Order at 10, note 3. The Commission does not refer to or put into the balance the following facts: (1) Unlike the proposed transmission line in UAMPS which had "far-reaching impacts beyond the boundaries of UAMPS members," forty-two percent of White City customers are Sandy City residents and the remaining White City customers are surrounded by Sandy City and form a "hole" in Sandy City's water supply grid; and (2) Unlike the situation in UAMPS where the coalition proposed to duplicate existing and proposed lines, White City needs extensive and costly updating to keep White City customers adequately provided with water for emergency situations such as fires. The Commission does not refer to the economies of scale or increased public safety that will be effected by the sale of White City Water to Sandy City and the integration of the White City system into Sandy City's more reliable water system. The Commission utterly failed to apply any of the elements of the balancing test to White City's petition and, indeed, could not because it failed to undertake any factual investigation into the matter.

D. THE COMMISSION HAS ERRONEOUSLY ASSUMED THAT SALE OF WHITE CITY WATER TO NON-SANDY RESIDENTS WOULD NOT BE "SURPLUS" WATER.

As noted above, the Commission states, without any findings of fact, that "in this case . . . Sandy will not be disposing of surplus water it now possesses -- it will be surplus

only by virtue of Sandy's acquisition of a class of captive, disenfranchised customers." Order at 13. The Commission gives no criteria for how it determined that the White City water would not be surplus water other than to cite to Judge Crockett's admonition that cities are not to engage in the sale of water outside its limits as a general business. County Water Sys., 278 P.2d at 290. The Commission fails to note Judge Crockett's recognition that such sale of surplus water is allowed by law and that the Commission does not have jurisdiction to regulate it. In this regard, Judge Crockett stated:

> Nevertheless, whatever the considerations as to the wisdom of the city's being subject to regulation by the Public Service Commission may be, it is, perhaps fortunately, not our responsibility to here evaluate these factors and determine what is more desirable as a matter of policy. It is rather our duty to interpret what was intended by the framers of the constitution and the legislative enactments thereunder.

Id. at 290.

Similarly, the Commission's citation of C.P. Natl. Corp. v. Public Serv. Comm'n, 638 P.2d 519 (Utah 1981) reverses the meaning of the case. In C.P. National the court distinguished law that applied to the Commission's jurisdiction over cities providing extra-territorial water systems and those providing extra-territorial electricity. The Utah legislature has specifically granted cities more power over water systems than over electric power systems because water is a scarce and finite resource that must be conserved. In fact, the C.P. National

Court recognized this distinction by stating that "[t]he 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 man-made generation or replacement as electricity may be." Id. at 523. Because C.P. National dealt with the issue of the Commission's jurisdiction over an electrical power system, the court distinguished its prior ruling in County Water System. Consequently, the holding in C.P. National strengthens Sandy City's position that the sale of water to non-residents is not subject to the Commission's regulations under the current laws of the State of Utah.

II. THE COMMISSION'S REFUSAL TO ALLOW AN EVIDENTIARY HEARING CONSTITUTES A DENIAL OF THE PARTIES' RIGHTS TO DUE PROCESS.

This Court has stated that "[e]very person who brings a claim in a court or at a hearing held before an administrative agency has a due process right to receive a fair trial in front of a fair tribunal." Bunnell v. Industrial Comm'n, 740 P.2d 1331, 1333 (Utah 1987)); see also Tolman v. Salt Lake County Attorney, 818 P.2d 23, 28 (Utah Ct. App. 1991) (same). In R.W. Jones Trucking, Inc. v. Public Serv. Comm'n, 649 P.2d 628 (Utah 1982), this Court made it clear that the rule announced in Bunnell and reiterated in Tolman applies to hearings before the Public Service Commission by stating that "a party before the Commission is entitled to 'the essential elements of due process

of law . . . notice, an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case, before a tribunal having jurisdiction of the case.'" Id. at 629 (quoting Fuller-Toponce Truck Co. v. Public Serv. Comm'n, 99 Utah 28, 96 P.2d 722 (1939)); see also Armored Motor Serv. v. Public Serv. Comm'n, 23 Utah 2d 418, 464 P.2d 582, 584 (Utah 1970) (holding that a party appearing before the Commission "is entitled to . . . a full and fair opportunity to present his [or her] evidence and contentions on the issues; and to have an adequate consideration and a correct determination of them.").

Although administrative hearings need not possess the formality of judicial proceedings, "there remains the 'necessity of preserving fundamental requirements of procedural fairness in administrative hearings.'" Id. (quoting Nelson v. Dept. of Employment, 801 P.2d 158, 163 (Utah Ct. App. 1990). Indeed, as noted by the Tolman Court "[i]t is a clear abuse of discretion for an administrative body to exercise its discretion over the manner in which it conducts its proceedings such that it denies due process to a party appearing before it." Id.

When a decision by the Commission is judicial in nature as it is here, more formality is required. Id. When resolving such matters, the Commission must make findings of fact. Mountain States Legal Found. v. Public Serv. Comm'n, 636 P.2d 1047, 1051 (Utah 1981). In this regard, this Court recently stated that the Commission must make sufficient findings of fact on

ultimate and subordinate issues of fact, citing Milne Truck Lines, Inc. v. Public Serv. Comm'n, 720 P.2d 1373, 1378 (Utah 1986) as authority. MCI v. Public Serv. Comm'n, 186 Utah Adv. Rep. 8, 13 (Utah 1992). In Milne, this Court summarized the responsibilities of the Commission and the rationale for imposing these responsibilities by stating:

> The Commission cannot discharge its statutory responsibilities without making findings of fact on all necessary ultimate issues under the governing statutory standards. It is also essential that the Commission make subsidiary findings in sufficient detail that the critical subordinate factual issues are highlighted and resolved in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions. The importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency. To that end, findings should be sufficiently detailed to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached.

Milne Truck Lines, Inc., 720 P.2d at 1378. The Court then explained the importance of adequate findings of fact to an appellate court by stating that "[w]ithout such findings, this Court cannot perform its duty of reviewing the Commissioner's order in accordance with established legal principles and of protecting the parties and the public from arbitrary and capricious administrative action." Id. With these standards in mind, the MCI Court reminded the Commission of its obligation to make sufficient findings of fact by stating that "the fixing of utility rates by private negotiation with no findings of fact raises

serious questions about the legality and integrity of the procedures the Commission employed." MCI, 186 Utah Adv. Rep. at 13.

The Commission's Order that is the subject of this action was issued without holding an evidentiary hearing despite objections by Sandy City. Indeed, before a hearing on the approval of the agreement and the jurisdictional question was held, the Commission had already drafted the Order at issue and informed the parties that it would retain jurisdiction if the agreement between White City and Sandy City were approved. The Commission told the parties they could argue before it to see if the Commission would change its mind. R. 0025. White City objected to deciding the issue of jurisdiction in a vacuum and Sandy City argued that, under the terms most favorable to the Commission's position, jurisdiction required a balancing test based on a factual context. Nonetheless, the Commission was adamant that it would decide the jurisdictional issue, standing alone, before it heard any facts about whether the Agreement between White City and Sandy City was in the public interest. The Commission refused to consider facts about whether the public interest would be served and by a simple fiat stated that the two issues would be severed and that it would issue an Order declaring that it had jurisdiction. No evidence was received by the Commission prior to the entry of its Order. In this regard, the Commission deprived the parties of their right to due process by refusing to provide the parties with a chance to present evidence

relevant to their positions. Indeed, an evidentiary hearing would have allowed White City Water Company and Sandy City to present facts to the Commission demonstrating that approval of the proposed transaction would be in the public interest. In addition, an evidentiary hearing would give the Commission and this Court the factual basis on which to determine the constitutionality of exercising jurisdiction if that determination is governed, as the Commission contends, by the West Jordan case.

Consequently, the matter must be remanded to the Commission for an evidentiary hearing because "'due process demands a new trial when the appearance of unfairness is so plain that [the court] is left with the abiding impression that a reasonable person would find the hearing unfair.'" Tolman, 818 P.2d at 28. In light of the fact that the Commission refused to hold any hearing whatsoever, and gave no notice of its intent to bifurcate the issues, a reasonable person would have no choice but to conclude the proceedings before the Commission were unfair. The unfairness of the proceeding below is most clearly illustrated by comparing the Commission's "plain vanilla" Findings of Fact, supra which merely recite portions of the application, with the unsupported hyperbole in the Commission's Conclusions of Law.

Additionally, although the Commission's order purports to make findings of fact on issues material to this case, there is no evidence in the record to support these findings. In fact, the Commission expressly states that its decision is based upon

its "doubts that service outside the city boundaries would constitute exercise of a municipal function and [their] skepticism that Sandy would indeed be selling surplus water as contemplated by the Utah statutes." Order at 4 (emphasis added). As noted by the Kansas Supreme Court, "[f]indings not based on evidence, but on suspicion and conjecture are arbitrary and baseless." Cities Servs. Gas. Co. v. State Corp. Comm'n., 440 P.2d 660, 668 (Kan. 1968). An order based on arbitrary and baseless findings cannot be sustained because, as noted by this Court, "to sustain an order, the findings must be sufficiently detailed to demonstrate that the Commission has properly arrived at the ultimate factual findings and has properly applied the governing rules of law to those findings." Mountain States Legal Found., 636 P.2d at 1052. Accordingly, the Commission's order at issue in this case cannot be sustained by this Court.

III. THE COMMISSION'S ORDER IS NOT FINAL.

A. THE COMMISSION'S ORDER IS NOT FINAL BECAUSE THE REQUIREMENTS OF RULE 54(b) OF THE UTAH RULES OF CIVIL PROCEDURE HAVE NOT BEEN SATISFIED.

In its order severing the proceedings, notwithstanding the fact it has never held a hearing concerning whether approving White City's application is in the public interest, the Commission issued what it has called a "final order" on the issue of jurisdiction. Before an order can be final for appellate

purposes, however, the requirements of Rule 54(b) of the Utah Rules of Civil Procedure must be satisfied.[2] This rule states:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Utah R. Civ. P. 54(b).

In light of the express language of Rule 54(b), courts have held that an appellate court lacks jurisdiction when issues and/or parties remain before the trial court. For example, in First Sec. Bank v. Conlin, 817 P.2d 298 (Utah Ct. App. 1991), the Utah Court of Appeals held that it did not have jurisdiction over one claim that had been tried separately because other related claims remained below.

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2 Rule 750-100-11 of the Utah Administrative Code states that "[a]ppeals from final orders of the Commission shall be to the Supreme Court of Utah and shall be pursued in accordance with the applicable statutes and court rules." Utah Admin. R. 750-100-11 (1992).

Even if the forum issuing an order certifies the order as final for appeal, the analysis does not end. Indeed, this Court has stated that a district court or other forum "cannot. . . make a non-final order appealable. An order is either final or it is not. The terminology used in describing it cannot change its fundamental character." Olsen v. Salt Lake City Sch. Dist., 724 P.2d 960, 964 (Utah 1986). In this regard, this Court has stated that Rule 54(b) certifications are rather freely granted, "often without examining closely the certifiability of the underlying order." Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099, 1104 (Utah 1991). The Court continued by offering the following standard to determine if an issue should be certified under Rule 54(b): "When [the] factual overlap [of issues] is such that separate claims appear to be based on the same operative facts with minor variations, they are held not to constitute separate claims for Rule 54(b) purposes." Kennecott, 814 P.2d at 1103. In other words, "a 'separate claim' must arise from different facts than those underlying the remaining causes of action." Webb v. Vantage Income Properties, 818 P.2d 1, 2 (Utah 1991). Similarly, this court has also stated that

> "Finality," for purposes of the application of Rule 54(b), is generally understood as that degree of finality required to meet the appealability requirements of 28 U.S.C. § 1291. . . . This, in turn, is usually defined as a judgment "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."

Olsen, 724 P.2d at 964-65 (citations omitted). In sum, disposing of one significant issue in a case does not make certification appropriate. Webb, 818 P.2d at 2.

In light of the standards of Rule 54(b) discussed above, the Commission's characterization of its order as final is improper. Indeed, as demonstrated by the language from Kennecott quoted above, the Commission could not properly have certified this order as final because the operative facts underlying this order not only overlap but are identical to those involved in the contract issue pending before the Commission. The only way the Commission could resolve its "doubts" and "conjecture" would be to complete its review of the public interest issues still pending. Additionally, the Commission's order regarding jurisdiction did not end litigation on the merits of White City's action as required by Olsen. Consequently, this Court lacks jurisdiction to hear this appeal and, therefore, the Commission's order regarding the appeal should be dismissed and the matter remanded to the Commission for resolution of all the pending issues. Manila v. Broadbent Land Co., 818 P.2d 2 (Utah 1991) (holding that the remedy for improperly accepting an appeal is dismissal of the appeal).

B. THE COMMISSION'S ORDER IS NOT A FINAL ORDER BECAUSE RELEVANT ISSUES STILL REMAIN UNRESOLVED.

This action began when White City Water Company filed an Application with the Commission to approve a contract that White City had entered into with Sandy City and the Building

Authority. The Commission did not determine whether it would approve the contract and that issue is still pending. In fact, the Commission is in the process of scheduling hearings to determine whether the transaction should be approved. Without making a determination about the public interest, and without gathering any evidence, the Commission issued an order stating that it would retain jurisdiction over White City water users residing outside of Sandy if the transaction was completed. In support of its decision, the Commission stated:

> We deem the jurisdictional question of such importance that it should be resolved before inquiring whether the transfer is in the public interest. Accordingly, we sever the prayer for declaratory relief from the balance of the proceeding and declare the Commission has jurisdiction over a municipality to the extent it provides retail water service outside its boundaries as a general business.

Commission's Order Severing Proceeding at 1.

This Court has appellate jurisdiction to review final orders and decrees resulting from formal adjudicative proceedings before the Commission. See Utah Code Ann. § 78-2-2(3)(e)(i) 1992) ("The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over . . . final orders and decrees in formal adjudicative proceedings originating with . . . the Public Service Commission."); Utah Code Ann. § 63-46b-16 (1992) ("As provided by statute, the Supreme Court . . . has jurisdiction to review all final agency action resulting from formal adjudicative proceedings."). As noted by the

express language of the statutes quoted above, this Court's jurisdiction is limited to the review of final orders of the Commission. Additionally, applicable case law holds that courts do not have jurisdiction to review an administrative decision until all issues have been resolved and the proceeding before the administrative agency is final. See Keystone, a Division of Ralston Purina Co. v. Flynn, 769 P.2d 484, 489 (Colo. 1989). The following discussion demonstrates that the order at issue in this case is not a final order. Consequently, this Court does not have jurisdiction to hear this matter.

Where an applicant raises issues to be decided, an order of the Commission is not final until those issues are resolved. Id. Thus, "an order of [an] agency is not final so long as it reserves something for the agency for further decision." Sloan v. Board of Review, 781 P.2d 463, 464 (Utah Ct. App. 1989) (per curiam) (holding that an order remanding the case to Administrative Law Judge for further proceedings was not a final order for purposes of judicial review). Simply assigning a separate docketing number to one phase of a proceeding does not make an interlocutory decision final. Public Util. Comm'n v. Paudre Valley Rural Elec. Ass'n, 173 Colo. 364, 366, 480 P.2d 106, 108 (Colo. 1970). Applying this rule to a case involving the Colorado Public Utilities Commission, the Colorado Supreme Court held that "[t]he assignment of separate numbers by the Commission to its decisions dealing with different phases of the

same proceeding did not create two separate proceedings." Id. The court continued by stating that reducing an administrative matter to final judgment required "settling all the issues between the parties." Id.

The principles discussed by the Colorado Supreme Court in Paudre Valley are directly applicable in this case. Accordingly, the Commission may not create a separate proceeding simply by purporting to carve out one issue in a proceeding and assigning it a separate docket number. Additionally, even assuming that the Commission could create a separate proceeding, it has not done so. Although the Commission stated that the proceeding had been bifurcated, no actual separation was, or could have been done. Had the proceeding been bifurcated, thereby creating two separate and distinct cases, two separate and distinct case files would have been created, each containing only the documents relevant to its respective case. Instead, the Commission has maintained only one file containing all documents relevant to both supposed separate and distinct cases. Indeed, the record on review as designated by the Commission is not limited to those documents relevant to the issue of jurisdiction. Rather, the record sent up to this Court contains all documents in the file relating to White City's initial application. In fact, the file before the Commission in regards to its continued consideration of White City's application is identical to the file considered by the Commission before it ruled on the issue of jurisdiction.

In sum, the Commission cannot and has not created two separate matters in this case. The initial issue of White City's application, therefore, remains before the Commission. In fact, the Commission implicitly admits that its order regarding jurisdiction does not resolve all the issues before it by stating in the order that "[i]n light of our action in this proceeding, Applicant may choose to proceed or not in the approval action." Order at 4. Clearly until the issue of approval is resolved, the Commission's order regarding jurisdiction is not a final order.

CONCLUSION

This case is prematurely before the Utah Supreme Court. In fact, this matter is before this Court only because White City and Sandy City were required to appeal the Commission's Order regarding jurisdiction because the Commission purported to parse out a jurisdictional question through the simple expedient of assigning a new case number and then characterized that decision as final. That approach was unfair to the parties, to the Commission itself and ultimately to this Court.

The central question pending before the Commission is whether the subject transaction is in the public interest. The evidence relating to that determination is the same evidence which, under the Commission's reading of the UAMPS and West Jordan cases, is necessary for the Commission to constitutionally assert jurisdiction. Even that analysis, however, will not resolve the absence of statutory authorization for the Commission

to assert jurisdiction over the provision of water to extra-territorial customers of Sandy City. Furthermore, the jurisdictional stretch attempted by the Commission may not be necessary because the Commission ultimately may decide that the sale is not in the public interest, that the sale will not be in the public interest if the Commission does not have jurisdiction on an ongoing basis, or that the sale will not be in the public interest if conditions that are a reasonable substitute for the exercise of jurisdiction cannot be imposed subsequent to the sale. Again, the Commission's rush to judgment has deprived itself, and ultimately this Court, of the record against which that determination can be judged.

The manner in which the Commission conducted the proceedings below is equally troublesome. Although the Commission purported to make findings of fact, those findings of fact have nothing to do with the ultimate conclusions. Indeed, the Commission's Conclusions of Law are largely factual recitations couched in terms of surmise or speculation. This Court, and other courts reviewing administrative decisions, have consistently and repeatedly underscored the importance of due process to those appearing before an administrative body. The quintessential violation of due process in an administrative context occurs when, as in this case, findings of fact are made without any supporting evidence even being presented let alone considered and subsequently, conclusions of law are reached that have no relationship to the

unsupported findings. This is particularly true when the ultimate conclusions characterize the parties before it in perjorative terms without any evidence to support these characterizations. Quite simply, this matter must be remanded to the Commission for further proceedings consistent with the constitutional mandate for due process and basic fairness.

DATED this 15th day of December, 1992.

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ESC/112592B

CERTIFICATE OF HAND DELIVERY

I hereby certify that I caused to be hand delivered, a true and correct copy of the foregoing **BRIEF OF APPELLANTS WHITE CITY WATER COMPANY and SANDY CITY** to the following on this 15th day of December, 1992:

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Tab 1

-- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH --

In the Matter of the Application of WHITE CITY WATER COMPANY for Commission Approval of a Contract Entered into on the 8th Day of October, 1991, Under Which Contract Sandy City and the Municipal Building Authority of Sandy City, Utah, Will Purchase All of the Outstanding Stock of WHITE CITY WATER COMPANY.	DOCKET NO. 91-018-02 ORDER SEVERING PROCEEDING AND REPORT AND ORDER

ISSUED: February 20, 1992

SYNOPSIS

Applicant, a certificated water corporation, seeks approval of the sale of all its stock to a local governmental entity and the assumption of service to its present customers by a municipal corporation. Applicant further asks the Commission to declare it has no jurisdiction over the municipality's subsequent water service operations insofar as they relate to Applicant's customers residing outside the municipal boundaries. We deem the jurisdictional question of such importance that it should be resolved before inquiring whether the transfer is in the public interest. Accordingly, we sever the prayer for declaratory relief from the balance of the proceeding and declare the Commission has jurisdiction over a municipality to the extent it provides retail water service outside its boundaries as a general business.

Appearances:

Calvin L. Rampton James Burch	For	White City Water Company, Applicant
Val R. Antczak, Lee Kapoloski and T. Patrick Casey	"	Sandy City Corporation, Intervenor
Jeffrey W. Appel Michele Mattsson	"	White City Water Users, et al, Intervenor
Gerald E. Nielson, Deputy County Attorney, Salt Lake	"	Salt Lake County, Intervenor
Michael Ginsberg Laurie Noda Assistant Attorneys General	"	Division of Public Utilities, Utah Department of Commerce, Intervenor

y the Commission:

PROCEDURAL HISTORY

The application in this matter was filed November 4, 1991. The Commission conducted a prehearing conference December 9, 1991, and asked the parties to brief the issues of the Commission's jurisdiction to approve the contract which is the subject of these proceedings and, should the contract be approved, the Commission's jurisdiction over Sandy City in connection with water customers residing outside the city. Oral arguments were heard by the Commission on February 18, 1992. Having been fully advised in the premises, the Commission enters the following Report and Order.

FINDINGS OF FACT

1. Applicant is a water corporation certificated by this Commission. In its Application, Applicant seeks approval of a transfer of all its outstanding stock to an instrumentality of Sandy City Corporation, (hereafter "Sandy") a Utah municipal corporation. Applicant further seeks declaratory relief in the form of a Commission declaration that "the integrated system constitutes a municipal water system under the laws of the State of Utah."
2. Under the proposed contract terms, the stock would be transferred to the Municipal Building Authority of Sandy City (hereafter "the Authority"). Applicant would retain its corporate existence for the lifetime of the bonds issued by the Authority to finance the purchase.
3. Applicant would cease operating the system and, for a nominal rental, would lease the system to the Authority, which in turn

would sublease to Sandy. Sandy would actually operate the system and, to the extent feasible, would integrate Applicant's present system with Sandy's municipal system. Payment to the bondholders would be made by the Authority out of rentals realized from the sublease to Sandy, which in turn proposes to pay the rental fees out of water charges to customers.

4. In its brief, Sandy states explicitly that customers residing outside the city limits will be charged more than those residing within. The stated rationale is that the customers outside the city limits should bear a greater proportion of the costs of the acquisition.

5. In the contract, the stock transfer is specifically conditioned upon this Commission's final Order declaring that the Commission does not have and will not assert any jurisdiction over Sandy, whether in regard to customers residing inside or outside the city limits.

CONCLUSIONS OF LAW

As we view it, Applicant seeks two separate and distinct forms of relief--approval, per se, of the contract, and declaratory relief in regard to the Commission's jurisdiction. We deem the declaratory branch of the proceeding so important that it should be severed from the approval branch.

The subject transaction differs from other transfers hitherto considered by the Commission in that the transfer is to an entity arguably outside Commission jurisdiction. It would leave a number of customers, who have had recourse to the Commission for grievances, effectively without recourse to any entity, public or private. Given

ıat stark fact, we refuse to take the "all or nothing" choice resented by Applicant. Instead, we propose to resolve the ırisdictional issue in this proceeding, with the docket number in he caption above, as a matter separate from the contract approval. n light of our action in this proceeding, Applicant may choose to roceed or not in the approval action.

We turn now to the merits of the jurisdictional issue.

We concede at the outset that we have no authority to regulate ı municipality within its boundaries. However, we conclude that case .aw, statutory law, and public policy support our authority to :egulate Sandy's water service outside its boundaries. In reaching :his conclusion, we believe the salient considerations include disenfranchisement of the extra-territorial customers, Sandy's limited statutory powers, the structure of the transaction, our doubts that service outside the city boundaries would constitute exercise of a municipal function, and our skepticism that Sandy would indeed be selling surplus water as contemplated by the Utah statutes.

Disenfranchisement of the Customers

At present, all of Applicant's customers, inside and outside the city limits, have recourse to the Commission to ensure just and reasonable rates. Absent our involvement in Sandy's ratemaking outside its boundaries, the customers would have no means to prevent Sandy from charging excessive rates. In its initial brief, Sandy states that the customers are not "entirely" disenfranchised, since they can attend Sandy City public meetings. (Sandy, Initial Brief, at 9).

We deem the assertion less than ingenuous. One cannot be partially disenfranchised; either one can vote or not. Clearly the customers located outside Sandy's boundaries do not have a right to vote in Sandy City. The opportunity to attend meetings is a poor substitute for the right to reward or punish via the ballot.

The fact that Sandy proposes to charge a differential rate immediately upon approval of the transaction is a strong indication of how the "outside" customers would fare under the proposal. Indeed, we can predict with considerable confidence, that in case of conflict between the interests of franchised and disenfranchised customers, the interests of the former will receive priority--no matter how vociferous the protests raised in meetings.

Limitation of Sandy's Statutory Powers

Unquestionably, as Sandy asserts, the Commission is a creature of statute with all the limitations on power and jurisdiction that implies. However, Sandy itself stands in much the same position; its powers are circumscribed also. See State v. Hutchinson, 624 P.2d 1116, 1121 (Utah 1980).[1]

We proceed first on the premise that if Sandy takes over the utility service of White City Water Company, the city must also take on the utility's obligations. According to our Supreme Court in North Salt Lake v. St. Joseph Water & Irrigation Co, 223 P.2d 577

[1]The Hutchinson Court actually broadened a municipality's authority by holding that the powers delegated by the Legislature should be liberally construed. The Court's rationale was that local democratic institutions should be strengthened, thus empowering citizens in regard to the local affairs most immediately affecting them. Were we to adopt the Applicant's position, we would, of course, actually disempower the extra-territorial customers, running counter to the Hutchinson rationale.

Utah 1950), when North Salt Lake condemned a water company, it took pon itself the obligations imposed upon the water company, including he effect of an Order issued by this Commission before the :ondemnation.[2]

Other jurisdictions have extended the principle explicitly to include rate regulation. For example, in City of Orangeburg v. Moss, 204 S.E.2d 377 (S.C. 1974), the court held that the South Carolina PSC had jurisdiction to regulate a municipality operating electrical facilities outside its boundaries. The court held that the constitutional grant of Power to municipalities by the State to operate electrical facilities was not a limitation on the power of the State to regulate those activities through the PSC or otherwise.

> It is the position of the plaintiff in the current action that this constitutional grant of power to the municipalities of the State to operate electrical facilities is a limitation on the power of the State of South Carolina to regulate those activities through the Public Service Commission or otherwise. The writer does not agree. He feels that the section in question was no more than a constitutional provision to permit certain municipal activities previously held ultra vires and that

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[2]At the time of that hearing the water company was a utility subject to the rules and regulations of the Public Service Commission and its findings and orders were binding on the company, its successors, those claiming through or under it, and those later dealing with it.

* * *

If limitations were imposed on the water company in the hearing before the Public Service Commission, then condemnation of the property by the town would not unblock the controls. The . . . town takes the franchise and property subject to all burdens of furnishing water that were imposed at the time of transfer.

Id. at 223 P.2d 577. If a previous Commission Order is binding on a town clearly exercising a municipal function, a fortiori the town is subject to Commission regulation when exercising a non-municipal function.

> it is not to be construed as limiting the powers of the State to regulate such activities. (emphasis added.)

Id. at 378. It is true that South Carolina had in place legislation specifically empowering their PSC to regulate extra-territorial service. The issue, nevertheless, was the constitutionality of that legislation, and we believe there is scant difference in principle between that case and this.

It is not unreasonable to suppose that one of the obligations Sandy may be required to assume is that of state regulation of rates charged to customers residing outside the city limits.

As derogating from the foregoing analysis, we have been cited Article XI, Section 5, of the Utah Constitution which provides a municipality the authority to furnish public utility services "local in extent and use"; Utah Code Ann. § 17A-3-914(3); the Municipal Building Authority Act; the 1988 amended definition of "person" under Utah Code Ann. § 4-2-2; and Utah Code Ann. § 10-7-4 which gives a municipality authority to condemn a water system. We do not perceive any of these provisions as denying us authority to regulate rates charged by Sandy for water service outside its boundaries.

Article XI, Section 5, gives Sandy the power to furnish public utility services, but not necessarily the power to set extra-territorial rates, particularly in light of the "local in extent and use" provision, which has no obvious meaning other than as a reference to the City's boundaries.

Any prohibition by the Municipal Building Authority Act is irrelevant in this proceeding. As noted in the Findings of Fact above, the sole role of the Authority is to be a conduit. Obviously, Sandy could issue and service its own bonds. We strongly

uspect the Authority is involved in the transaction only in a "belt nd suspenders" attempt to insulate the real principals, Applicant nd Sandy, from our jurisdiction. We believe we are entitled to ssess the substance, not the mere form, of the transaction. So ssessing the transaction, it is obvious the Authority has no real ole or participation in the arrangement, and its presence should be isregarded.

It is true that in 1988 the Legislature deleted "governmental entity" from the definition of "person." Utah Code Ann. § 54-2-2 (1988). Our perusal of the Legislative history of this change, however, does not indicate that the Legislature intended to foreclose our regulation of a city's extra-territorial retail water customers. (See transcript of the Legislative history on this amendment, Exhibit "A" to Reply Brief, White City Water Users).

Finally, Utah Code Ann. § 10-7-4 does give a municipality power to condemn a water system, but it does not necessarily give a municipality power to set utility rates for extra-territorial retail customers. In a condemnation proceeding, a city is limited by strict laws to protect the new owners of those systems and the citizens served thereby. Indeed, as noted earlier, the St. Joseph Water case, supra, suggests that water systems acquired by condemnation carry with them all their regulatory baggage.

Sandy does not have specific delegated authority to serve water outside its boundaries without state regulation. Where there are gaps in the coverage of applicable statutes, as in the instant case, we believe that legislative intent should be interpreted so as to

protect constitutional rights of citizens, which in this case are the extra-territorial retail customers.

The Nature of the Arrangement

As noted above, Sandy has made great efforts to avoid our jurisdiction in the way it has set up the proposed transfer. The elaborate nature of the arrangement between White City, the Authority, and Sandy, renders the arrangement suspect.

Sandy's initial brief claims that neither White City, the Authority, nor Sandy are subject to our regulation. (Sandy, Initial Brief, at 6-14). As noted above, the role of the Authority is explicable only as an attempt to avoid our jurisdiction. Given the expressed intent to charge extra-territorial customers differential rates, Sandy's good faith, in structuring the transaction as it has, must be questioned.

Sandy is Not Performing a Municipal Function

Should Sandy provide water service to White City's extra-territorial customers, it would, to that extent, not be exercising a municipal function. Sandy would be acting as a traditional utility (exercising a business function) and therefore would be subject to regulation.

Sandy claims that Utah Constitution Art. VI, Section 28, prohibits us from interfering with Sandy's municipal functions. (Sandy, Initial Brief, at 7). Obviously, we agree that we cannot interfere with Sandy's municipal functions, but we maintain that Sandy's proposed service to the extra-territorial customers is not a municipal function.

Recent Utah cases support our position. In Utah Associated Municipal Power Systems v. Public Service Commission, 789 P.2d 298 (Utah 1990), in which Art. VI, Section 28, was at issue, the Court discussed the alleged "municipal function" performed by Utah Associated Municipal Power Systems ("UAMPS") in attempting to construct a utility line and to provide utility service. UAMPS resisted the jurisdiction of the Commission on constitutional grounds, arguing that they were political subdivisions exercising municipal functions, even though part of their service area was located outside, or would have a substantial impact outside, the boundaries of the political subdivisions.

The UAMPS Court applied a balancing test first enunciated in City of West Jordan v. Utah State Retirement Board, 767 P.2d, 530 (Utah 1988). Under that test, no particular activity conducted by a municipality is ipso facto a municipal function for purposes of Art. VI, Section 28. Instead, a functional analysis is to be conducted, considering such factors as

> the relative abilities of the state and municipal governments to perform the function, the degree to which the performance of the function affects the interests of those beyond the boundaries of the municipality, and the extent to which the legislation under attack will intrude upon the ability of the people within the municipality to control through their elected officials the substantive policies that affect them uniquely.[3]

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[3]Id. at 534. The Court went on to say the balancing test would best serve the Constitutional purpose without "erecting mechanical conceptual categories that, without serving any substantial interest, may hobble the effective government which the state constitution as a whole was designed to permit." Ibid. In the instant case, of course, the only "substantial interest" our assuming jurisdiction would affect would be that of Sandy in "milking" the extra-territorial customers to the maximum extent possible.

Applying that test, the UAMPS Court had little difficulty in finding that the construction of the utility transmission line for the purpose of generating, buying and selling electricity across the state was outside the ambit of Art. VI, Section 28. Utah Associated Municipal Power Systems v. Public Service Commission, supra, 789 P. 2d at 302.

The present proposal is closely analogous to the UAMPS case. In particular, those residing outside Sandy stand to be severely impacted, while our assuming jurisdiction in regard to them would have minimal impact on Sandy's legitimate interests. By purposefully acquiring an existing public utility, and thereby taking over the obligation to serve 58% of the customers of an existing certificated public utility, Sandy is stepping outside the exercise of its municipal function and subjecting itself to state regulation of rates for those extra-territorial customers surplus.

Sandy attempts to bolster its position by referring to Utah Code Ann. § 10-8-14(1) concerning sale of surplus water by a municipality. A careful reading of this statute, however, weighs against Sandy's proposal and in favor of the extra-territorial customers.

According to the statute, a city "may sell and deliver the surplus product or service capacity of any such works, not required by the city or its inhabitants, to others beyond the limits of the city. . . ." In attempting to show that it would be serving "surplus" water in accordance with this statute, Sandy states that it "has more than ample capacity to serve the non-Sandy White City customers and will therefore in fact be selling 'surplus' water to

hem upon acquisition of the White City system." (Sandy, Initial rief, at 8). This interpretation is contrary to Utah case law on he subject and contrary to a common sense definition of "surplus."

In support of Sandy's interpretation of surplus, it cites County Water System v. Salt Lake City, 278 P 2d 285 (Utah 1954) and Salt Lake County v. Salt Lake City, 570 P 2d 119 (Utah 1977)

In County Water System, supra, the Utah Supreme Court stated that the authority of municipalities to sell utility services beyond its corporate boundaries was limited to the disposal of surplus water. Id. at 289.

In fact, after first delineating a municipality's powers of surplus water disposal in sweeping terms, Justice Crockett, writing for the Court, appears to have had immediate second thoughts. In his next paragraph, he hedged the municipality's authority:

> 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.

Id. at 290.

The Court also made clear its concept of surplus water--a temporary glut occasioned by provision for prudent future expansion. This would, according to the court, foreclose a municipality's commitment to purchasers of surplus water for any long-term supply. Ibid. Under this concept, if Sandy is indeed to sell surplus water, the extra-territorial customers stand to be left literally high and dry in the near to medium term.

In this case, however, Sandy will not be disposing of surplus water it now possesses--it will be surplus only by virtue of Sandy's

calculated acquisition of a class of captive, disenfranchised customers--precisely the situation Justice Crockett inveighed against.

Sandy cites Salt Lake County, supra, for the proposition that "[A municipality's] business in furnishing water to its residents and activities reasonably incidental thereto is not subject to regulation by the Public Service Commission." Id. at 570 P.2d 121-122. Sandy, however, fails to quote the complete paragraph. The next, and more relevant sentence is: "But 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." (emphasis added.) The second sentence is not mere dictum. The case involved the propriety of a summary judgment rendered by the district court, and the Supreme Court remanded for determination of precisely the issue of a municipality's amenability to regulation of extra-territorial service. We do not know the subsequent course of the litigation.

The Salt Lake County case evidences to us the Court's concern with precisely the potential for abuse presented by the instant proposal. We think it would be difficult to find a clearer instance of a city's stepping over the boundary of legitimate surplus water sales under the statute.

Our conclusion is strengthened by C.P. National Corporation v. Public Service Commission, 638 P.2d 519 (Utah 1981), According to the Court,

> " . . . We believe that [Utah Code Ann. § 10-8-14] 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." [Citing County Water System, supra]. In the instant case, the municipalities intend to continue to serve a large area outside any of their limits. . . .
>
> Section 10-8-14 does not contemplate nor authorize a city to so operate its electric light and power works. There is good justification for this limitation since municipally owned utilities are not subject to the jurisdiction and supervision of the Public Service Commission but are controlled solely by the administration of the city or town wherein they are located . . . customers 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. (emphasis added.) (citations omitted.)

Id. at 524.

We can only add that the situation is not one whit different when a municipality purposefully acquires an existing, regulated water system. While there may be no explicit statutory authority for us to assume jurisdiction, the obvious remedy for the abuse of extra-territorial customers is for us to continue to regulate their rates; otherwise, to meet the Court's concern, the instant proposal would have to be found ultra vires.[4]

If there is a common thread running through the history of economic regulation in the United States, it is the abhorrence of unchecked monopoly. We see no reason to suppose that a monopoly held by a municipality over powerless extra-territorial utility customers would be any more benevolent than a monopoly held privately. Sandy's expressed intent to impose higher rates immediately upon the extra-

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[4]That is the course the Court took in the CP National case. The main issue was the constitutionality of the municipalities' acquiring an existing electrical utility by condemnation. The Court assumed without discussion that we would have no jurisdiction over rates charged the extra-territorial customers. One wonders if the same result would have been reached had the Court considered the jurisdictional issue and applied the City of West Jordan test.

territorial customers is ample demonstration of the reason we are unwilling to cede jurisdiction in these circumstances.

We conclude that in the event the proposal presented by Applicant were to be approved by the Commission, the Commission would retain jurisdiction to regulate rates charged the extra-territorial retail customers, at least to the extent of nullifying invidious discrimination. Accordingly, Applicant's prayer for a declaratory judgment to the contrary should be denied.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that:

>> On the Commission's own motion, the prayer of WHITE CITY WATER COMPANY, for a declaration that, should the Commission approve a transfer of the stock of said company to the Sandy City Building Board, pursuant to the contract delineated in said Company's application, the Commission would have no jurisdiction thereafter to set rates for customers residing outside the boundaries of Sandy City, be, and the same hereby is, severed from the balance of the proceeding and given the Docket Number 91-018-02;

>> Said prayer is denied;

>> Any party aggrieved by this Order may, within 30 days of the issuance hereof, petition for review; failure so to do will forfeit the right to such review, as well as the right to appeal to the Utah Supreme Court.

DATED at Salt Lake City, Utah, this 20th day of February, 992.

/s/ Brian T. Stewart, Chairman

(SEAL)

/s/ James M. Byrne, Commissioner

/s/ Stephen C. Hewlett, Commissioner
Pro Tempore

ATTEST:

/s/ Julie Orchard
Commission Secretary

Tab 2

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF UTAH

IN THE MATTER OF THE APPLICATION OF WHITE CITY WATER COMPANY FOR COMMISSION APPROVAL OF A CONTRACT ENTERED INTO ON THE 8TH DAY OF OCTOBER, 1991, UNDER WHICH CONTRACT SANDY CITY AND THE MUNICIPAL BUILDING AUTHORITY OF SANDY CITY, UTAH, WILL PURCHASE ALL OF THE OUTSTANDING STOCK OF WHITE CITY WATER COMPANY	)	APPLICATION Docket No. 91-018-01

White City Water Company hereby petitions and represents to the Commission as follows:

1. White City Water Company is a corporation organized under and pursuant to the laws of the State of Utah and having its principal place of business in Salt Lake County, State of Utah.

2. Sandy City is a municipal corporation organized and existing under and by virtue of the laws of the State of Utah and is located within the boundaries of Salt Lake County, Utah.

3. The Municipal Building Authority of Sandy City, Utah, is established and created pursuant to Title 17A, Chapter 3, Part 9, Utah Code Annotated 1953, as amended.

4. On the 8th day of October, 1991, Sandy City and the Muncipal Building Authority of Sandy City entered

into a contract with White City Water Company whereby Sandy City, through its municipal building authority, will acquire the stock of White City Water Company, pursuant to certain terms and conditions set forth in the contract, a copy of which contract is marked Exhibit A and attached hereto.

5. White City Water Company holds Certificate of Convenience and Necessity No. 1121 issued by the Public Service Commission of Utah on the 11th day of May, 1955, authorizing the Company to:

(a) Construct, maintain and operate a water system consisting of a water well located in Section 8, Township 3 South, Range 1 East, Salt Lake Meridian in Salt Lake County, Utah having a capacity of approximately 1,200 gallons of water per minute with a pipe line leading from said well to a 500,000 gallon reservoir located in Section 9, Township 3 South, Range 1 East, Salt Lake Base & Meridian with a pipe line leading from said storage tank to the area to be served with the necessary distribution lines, service lines and other facilities to serve water for domestic, culinary and other purposes within the area bounded on the West by the East line of 7th East Street, on the East by 20th East Street, on the North by 94th South Street and on the South by 120th South Street in Salt Lake County, Utah.

(b) To construct, maintain and operate such additional wells, pipe lines and extended water system facilities as may be necessary from time to time to adequately serve water for domestic, culinary and other purposes within the area above specified.

6. The above described geographical area is contiguous and lies partly within Sandy City and partly within the unincorporated area of Salt Lake County. White City Water Company has approximately 3650 customers plus 83 lines to residential lots, not yet connected. 42% of the connections are within the city limits of Sandy City and 58% are in contiguous Salt Lake County.

7. Sandy City has constructed and maintained a municipal culinary water system rendering service to approximately 21,050 residential, commercial, and industrial customers within the limits of Sandy City. The Sandy City water system is an efficient and well-maintained system having facilities to deliver water to its customers. The water system at present has facilities which are fully sufficient to provide storage and pressure to its existing customers as well as to the customers of White City Water Company if this contract is approved.

8. White City Water Company has a distributing system sufficient to serve its current customers. White City Water Company also has water rights which during ordinary years are fully sufficient to give adequate and continuous water service to its customers. However, White City Water Company lacks adequate facilities for the

storage of water at a sufficient elevation to provide sufficient pressure to adequately serve its customers and, in case of an emergency draw down, a lack of sufficient storage capacity to meet a prolonged emergency. In order to adjust for this situation, White City Water Company has arrangements whereby it will sell certain water at its wellheads to the Salt Lake County Water Conservancy District and purchase back at a very much higher price from the Salt Lake County Water Conservancy District water delivered at a sufficient elevation and in sufficient quantities to provide both pressure and adequate flow in emergency situations. This arrangement is an expensive one for White City Water Company as it receives for its water at the wellhead under this contract $20.00 per acre foot while it pays for the water delivered at the higher elevations the sum of $125.22 per acre foot. This contract with the Salt Lake County Water Conservancy District is subject to cancellation by the parties. Furthermore, the price to be charged for the water that is delivered is almost exclusively at the discretion of the Salt Lake County Water Conservancy District. Thus White City Water Company is under constant threat of either discontinuance of this service or the pricing of the service at a level

which is unacceptable to White City Water Company and its customers who would bear the ultimate responsibility of paying for these services through higher rates.

9. White City Water Company has attempted to get permission to construct additional storage facilities on property which it owns in Sandy City and which is of sufficient elevation to provide adequate pressure. Sandy City, however, has been unwilling to grant a variance from zoning ordinances to permit the construction of such storage facilities and this Commission has declined to use its authority, if such authority it has, to compel Sandy City to grant such variance. White City Water Company has explored other sites outside Sandy City as a possible location for constructing new storage facilities; however, all such available sites are expensive to purchase, remote from the White City Water Company's distribution system and its wells and would entail the expenditure of money beyond the present resources of White City Water Company. If it were possible to borrow funds for such construction, it would require substantially higher rates from the customers of White City Water Company in order to service the debt and amortize the investment of such additional storage facilities.

10. Sandy City already has in existence or under construction sufficient storage facilities to provide adequate volume and pressure for White City Water Ccmpany customers if operation of the two systems were integrated.

11. While White City Water Company customers now pay generally lower rates than Sandy City charges to its customers for similar service, this situation will not prevail for long if White City must continue to render the service to its customers on its own. The cost of maintaining an aging system and the cost of required new facilities as above described will in the near future require White City Water Company to raise its rates substantially for it to continue as a viable corporation.

12. The water systems cf White City Water Company and Sandy City are well matched for integration. The approval of this application is in the public interest and will result in better service to all customers of White City Water Company and Sandy City in the foreseeable future.

13. As part of the terms of the agreement, the White City Water Company wll remain intact as a corporation over the life of the bonds which the municipal building authority of Sandy City proposes to issue to raise capital

for the acquisition of the stock of White City Water Company. Sandy City, however, will operate the two systems on an integrated basis and requests an order from this Commission to the effect that such an integrated system will be considered a municipal system in its entirety under the laws of the State of Utah and thus be exempt pursuant to Utah Code Ann. § 174A-13-914(3) from the jurisdiction of the Public Service Commission of Utah.

WHEREFORE, applicant prays that this matter be set down for hearing and that upon such hearing the Commission approve the contract described above and find that the integrated system constitutes a municipal water system under the laws of the State of Utah.

DATED this 31st day of October, 1991.

Calvin L. Rampton
Attorney for White City Water Company

VERIFICATION

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

John E. Papanikolas, being first duly sworn, deposes and says that I am the President of White City Water Company, that I have read the foregoing Application and that the same is true and complete to the best of my knowledge and belief.

John E. Papanikolas

SUBSCRIBED AND SWORN to before me this 31 day of October, 1991.

Notary Public
Residing at Salt Lake County 84109

My Commission Expires:
September 11, 1994